

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision:10th September, 2018**

+ **RSA No.323/2015 & CMs No.18444/2015 (for stay) & 18096/2015**
(u/O XLI R-27 CPC)

MANJULA & ORS

..... Appellants

Through: Mr. S.N. Sharma and Mr. Sharvan
Dev, Advs.

versus

KISHORE KUMAR & ANR

..... Respondents

Through: Mr. R.S. Kela, Mr. Bharat Gupta and
Mr.Sanjeev Bindal, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree [dated 15th April, 2015 in RCA No.32/08 of the Court of the Additional District Judge-01 (North-East)] allowing the First Appeal under Section 96 of the CPC preferred by the respondents/plaintiffs against the judgment and decree [dated 22nd March, 2007 in Suit No.414/2006 of the Court of Civil Judge, Karkardooma] of dismissal of the suit filed by the two respondents/plaintiffs. Vide the same judgment dated 15th April, 2015, the learned Additional District Judge also dismissed the First Appeal under Section 96 of the CPC preferred by the appellants/defendants impugning the findings of the Suit Court to the extent against the appellants though the suit was dismissed. Consequently, the learned Additional District Judge has passed a decree, in favour of the respondents/plaintiffs and against the appellants/defendants, of recovery of possession of immovable property.

2. This appeal came up first before this Court on 4th September, 2015,

when albeit without expressing any satisfaction that the appeal raises any substantial question of law and without framing any substantial question of law, notice thereof was ordered to be issued and the operation of the impugned judgment and decree stayed. The respondent no.1/plaintiff appeared in pursuance to the notice issued of the appeal. Though the respondent no.1/plaintiff had also instituted the suit as attorney of the respondent/plaintiff no.2 Moti Lal, but since in the memo of parties in this appeal the respondent/plaintiff no.2 Moti Lal was not shown as to be served through respondent no.1, the respondent no.1/plaintiff did not enter appearance on behalf of the respondent/plaintiff no.2 Moti Lal. The parties were vide order dated 23rd August, 2016 referred to mediation but which remained unsuccessful. The appeal has thereafter been adjourned from time to time. The appellants have also filed an application under Order XLI Rule 27 of the CPC. In none of the subsequent orders also, no satisfaction with respect to the appeal entailing any substantial question of law has been expressed and no substantial question of law has been framed till now. Supreme Court in *Vijay Arjun Bhagat Vs. Nana Laxman Tapkire* 2018 SCC OnLine SC 518 and *Surat Singh Vs. Siri Bhagwan* (2018) 4 SCC 562 held that the procedure in respect of Second Appeal is that the Court, before issuing notice thereof is required to frame substantial question of law and without that the appeal cannot be entertained.

3. As such though the appeal is pending for the last three years, but today the counsels have been heard to determine whether any substantial question of law arises and in the course of the hearing, the Suit Court record and the First Appellate Court record requisitioned in this Court have been

examined.

4. The two respondents/plaintiffs instituted the suit, from which this appeal arises, pleading (i) that the respondent/plaintiff no.1 Kishore Kumar, on 17th July, 1984, has purchased property no.B-2/391, Nand Nagari, Delhi – 110 093 from the respondent/plaintiff no.2 Moti Lal by way of irrevocable General Power of Attorney (GPA), Agreement to Sell, Affidavit, Receipt etc. and the respondent/plaintiff no.2 Moti Lal put the respondent/plaintiff no.1 into vacant peaceful physical possession of the property; (ii) that at the time of purchase the property comprised of two room with store on the ground floor and a room, kitchen and bath and open terrace on the first floor; (iii) that Shri Natha Lal, brother of the respondent/plaintiff no.1, in or about December, 1985 came to Delhi from Gujarat and expressed desire to settle down in Delhi and requested the respondent/plaintiff no.1 to allow him to temporarily take shelter in the aforesaid property; (iv) that since the respondent/plaintiff no.1 at that time was residing in a rented accommodation, the respondent/plaintiff no.1 allowed his brother Natha Lal to temporarily occupy the property; (v) that Natha Lal thereafter got his wife and children i.e. the appellants/defendants also to Delhi and along with them started residing in the property; (vi) that the respondent/plaintiff no.1, in or around March, 1987, shifted along with his family to the subject property and Natha Lal and his family were still permitted to continue residing on the ground floor of the property; (vii) the appellants/defendants continued to reside in the ground floor of the property even after the demise of Natha Lal; (viii) that the appellants/defendants, inspite of repeated requests, failed to vacate the property; and, (ix) that the

appellants/defendants, on 5th November, 1993 filed complaint under Section 145 of the Code of Criminal Procedure, 1973 (Cr.PC). Hence, the suit for recovery of possession of the portion of the property in occupation of appellants/defendants and for recovery of arrears of/and future *mesne* profits/damages for use and occupation of the property.

5. The appellants/defendants contested the suit by filing a written statement *inter alia* controverting the valuation of the suit for the purposes of court fees and jurisdiction and pleading (i) that Natha Lal had purchased the “flat” for consideration of Rs.22,000/- from the respondent/plaintiff no.2 Moti Lal vide Sale Certificate/Agreement and Receipt dated 3rd January, 1980 and since 3rd January, 1980 Natha Lal with his family members i.e. the appellants/defendants remained in possession of the said flat; (ii) on demise of Natha Lal, the appellants/defendants as his heirs became the owners of the property; (iii) that the respondent/plaintiff no.1 took possession of one room illegally and forcibly on 8th July, 1993; (iv) that the respondent/plaintiff no.1 is a bad element of the locality; (v) denying that the respondent/plaintiff no.2 Moti Lal on 17th July, 1984 had sold the property to the respondent/plaintiff no.1; and, (vi) that all constructions in the property had been carried out by Natha Lal.

6. Thought the respondents/plaintiffs are found to have filed a replication, but need to refer thereto is not felt.

7. On the pleadings aforesaid of the parties, the following issues were framed in the suit on 2nd June, 1999 and 27th September, 2005:-

“1. *Whether the suit is valued properly for the purpose of Court Fees and jurisdiction as the*

market value of the suit property? OPD

2. *Whether the defendant had purchased the flat in question from Sh. Moti Lal for a valuable consideration? OPD*
3. *Whether the plaintiff is entitled for the decree of injunction as prayed for? OPP*
4. *Whether the plaintiff is entitled for the relief of possession as prayed for? OPP*
5. *Relief.”*

8. The Suit Court, on the basis of evidence led, found/observed/reasoned/held (i) that no evidence was adduced on issue no.1 and no error was found in the valuation of the suit for the purpose of court fees and jurisdiction; (ii) that the appellants/defendants had failed to prove the documents of purchase of property by their predecessor Natha Lal and it thus could not be held that Natha Lal had purchased the property; accordingly issue no.2 was decided in favour of the respondents/plaintiffs and against the appellants/defendants; (iii) that it was within the knowledge of the respondents/plaintiffs prior to the institution of the suit that the appellants/defendants were also having some documents through which they were claiming ownership right over the property; however the respondents/plaintiffs did not take any steps to seek declaration of their ownership right over the property or for cancellation of the documents claimed by the appellants/defendants; (iv) that neither party had examined the respondent/plaintiff no.2 Moti Lal; and, (v) because the respondents/plaintiffs had not asked for declaration of their ownership over the property inspite of a shadow being cast over the title of the respondents/plaintiffs, the respondents/plaintiffs were not entitled to any

relief.

9. As aforesaid, both preferred First Appeals against the judgment of the Suit Court.

10. The First Appellate Court has allowed the appeal of the respondents/plaintiffs and dismissed the appeal of the appellants/defendants, finding/reasoning (i) that during the pendency of the First Appeals, the application of the respondents/plaintiffs under Order XLI Rule 27 of the CPC to examine the respondent/plaintiff no.2 Moti Lal was allowed vide order dated 12th March, 2013 and in pursuance thereto, the respondent/plaintiff no.2 Moti Lal was examined by the First Appellate Court on 19th December, 2014; (ii) that the respondent/plaintiff no.2 Moti Lal deposed that he had sold the property to the respondent/plaintiff no.1 by way of GPA, Agreement to Sell etc. on 17th July, 1984 and denied having sold the property to Natha Lal on 3rd January, 1980 through Sale Certificate and Receipt; (iii) that specimen thumb impressions of Moti Lal were obtained and the same along with the documents claimed by the respective parties were sent to the Finger Print Bureau; (iv) inconsistencies pointed out by the appellants/defendants in the deposition of the respondent/plaintiff no.2 Moti Lal were minor in nature and it could not be lost sight of that he was appearing as a witness after more than thirty years of execution of the documents in favour of the respondent/plaintiff no.1; (v) that the respondent/plaintiff no.2 Moti Lal denied his thumb impressions on the documents in favour of Natha Lal; (vi) that notice to show cause dated 1st January, 1993 of Municipal Corporation of Delhi (MCD) claiming licence fee from Natha Lal was of no avail; (vii) that the certificate dated 19th

January, 1993 giving no objection to Natha Lal to obtain electricity connection in the property was also of no avail; neither of the said documents indicated any ownership or intent to sell but only confirmed occupation of Natha Lal of the property; (viii) similarly, deposit by Natha Lal of licence fee with respect to the property also did not confer any rights in Natha Lal in the property; (ix) that the appellants/defendants, in cross-examination of the respondent/plaintiff no.2 Moti Lal also did not suggest that possession was delivered by the respondent/plaintiff no.2 Moti Lal to Natha Lal on 3rd January, 1980; (x) once the respondent/plaintiff no.2 Moti Lal had himself appeared in witness box and denied execution of any documents in favour of Natha Lal, the statements of witnesses of the appellants/defendants could not be relied upon; (xi) that the purported Sale Certificate in favour of Natha Lal was prepared on a stamp paper purchased for GPA; (xii) that the antecedents of the respondent/plaintiff no.1 as a bad element were irrelevant for the purposes of the Civil Court; (xiii) finding of the Suit Court that the respondents/plaintiffs were required to sue for declaration of their title and/or for declaration of the document in favour of the appellants/defendants/their predecessors as null and void, was not correct; and, (xiv) in the absence of the same, the suit for recovery of possession was maintainable and there was no need for the respondents/plaintiffs to sue for declaration. Accordingly, though a decree for possession was passed in favour of the respondents/plaintiffs but the claim of the respondents/plaintiffs for *mesne* profits was declined.

11. As aforesaid, the appellant/defendants are enjoying stay of execution granted, without imposing any condition on the appellants/defendants for

the last three years.

12. Though the challenge in this appeal is to the judgment allowing the First Appeal of the respondents/plaintiffs as well as to the judgment of dismissal of First Appeal of the appellants/defendants, but composite appeal has been filed. The counsel for the appellants/defendants however explains that he had filed separate appeal but which was ordered to be dismissed as withdrawn observing that the appellants/defendants can in this appeal challenge the judgements in both the First Appeals.

13. The counsel for the appellants/defendants has contended, that while Agreement to Sell/GPA etc. set up by the respondent/plaintiff no.2 Moti Lal in favour of the respondent/plaintiff no.1 is of 1984, the Agreement to Sell/Sale Certificate set up by the appellants/defendants in favour of their predecessor, also executed by respondent/plaintiff no.2 Moti Lal, is of a date prior thereto i.e. of the year 1980. On the basis thereof it is sought to be contended that even if the documents in favour of the respondents/plaintiffs no.1 are to be accepted, the documents in favour of the predecessor of the appellants/defendants are of a date prior to the documents in favour of respondent/plaintiff no.1. It is also contended that the finger print expert has reported inconsistency in the thumb impressions of the respondent/plaintiff no.2 Motil Lal and the thumb impression purportedly of the respondent/plaintiff no.2 Moti Lal on the Agreement to Sell/GPA etc. in favour of the respondent/plaintiff no.1.

14. I have however enquired from the counsel for the appellants/defendants, that once the appellants/defendants admit the title of

the respondent/plaintiff no.2 Moti Lal, and the respondent/plaintiff no.2 Moti Lal himself having sued for recovery of possession albeit through his attorney respondent/plaintiff no.1 and the respondent/plaintiff no.2 Moti Lal while deposing before the First Appellate Court having admitted appointment of the respondent/plaintiff no.1 as his attorney and having further admitted executing Agreement to Sell/GPA etc. in favour of the respondent/plaintiff no.1, whether not the admitted title is better than the claim of the appellants/defendants on the basis of Agreement to Sell etc. and which in *Suraj Lamp & Industries P. Ltd. Vs. State of Haryana* (2009) 7 SCC 363 and (2012) 1 SCC 656 has been held to be not constituting documents of title to immovable property.

15. The counsel for the appellants/defendants, while not disputing that the appellants/defendants are not challenging the title of respondent/plaintiff no.2 Moti Lal, contends that the documents claimed by the respondent/plaintiff no.1 to have been executed by the respondent/plaintiff no.2 Moti Lal are not lawful owing to variance in the thumb impressions.

16. However I reiterate, that when the admitted owner was suing for possession even if through attorney, the appellants/defendants who are claiming to be mere agreement purchaser from the respondent/plaintiff no.2 Moti Lal, cannot contend otherwise.

17. Though the counsel for the appellants/defendants has not argued, but since the Agreement to Sell in favour of the predecessor of the appellants/defendants is of a date prior to the Agreement to Sell in favour of

the respondent/plaintiff no.1 and in pursuance to the Agreement to Sell in favour of the predecessor of the appellants/defendants, possession of the property is claimed to have been delivered and which possession would be protected by Section 53A of the Transfer of Property Act, 1882, I have enquired from the counsel for the appellants/defendants, whether there is any document to show possession of the appellants/defendants of the property since 3rd January, 1980 or any time prior to 17th July, 1984.

18. The counsel for the appellants/defendants states that delivery of possession is either recorded in the Agreement to Sell, Receipt etc. dated 3rd January, 1980 in favour of predecessor of the appellants/defendants or there are documents to the effect that the appellants/defendants have paid licence fee to the MCD with respect to the subject property since the year 1976.

19. As far as the first of the aforesaid set of documents are concerned, once the respondent/plaintiff no.2 Moti Lal has denied execution of the documents dated 3rd January, 1980, no credence thereto can be given for determining the possession of the predecessor of the appellants/defendants with effect from the said date. The remedy if any of the appellants/defendants, on denial by the respondent/plaintiff no.2 Moti Lal of the transaction with the predecessor of the appellants/defendants, was to sue for specific performance or for such other relief to which the appellants/defendants may have been entitled to.

20. As far as the second set of documents aforesaid are concerned, what transpires is that the payment w.e.f. 1976 have been made only in the year 1993 and the same also thus does not prove possession since 3rd January,

1980 or of any time prior to the Agreement to Sell in favour of the respondent/plaintiff no.1, affirmed by the respondent/plaintiff no.2 Moti Lal.

21. In my opinion, the aforesaid is enough to sustain the order of the First Appellate Court and no substantial question of law is found to arise in this appeal.

22. The counsel for the appellants/defendants at this stage requires the following to be recorded:-

- (a) that the appellants/defendants, in the memorandum of appeal, have proposed the substantial questions of law;
- (b) that the Agreement to Sell dated 17th July, 1984 set up by the respondent/plaintiff no.1 was only of *malba* and not of land;
- (c) that the respondent/plaintiff no.2 Moti Lal cannot be permitted to resile from the transaction with the predecessor of the appellants/defendants and that is why the report of the finger print expert becomes important; and,
- (d) that the appellants/defendants in this appeal also have applied under Order XLI Rule 27 of the CPC for fresh examination of the respondent/plaintiff no.2 Moti Lal.

23. The substantial questions of law proposed in the memorandum of appeal were perused before hearing the counsels and not finding the same to be substantial questions of law and not finding the same to be arising from this appeal, the hearing had proceeded. Merely because the

appellants/defendants in the memorandum of Second Appeal has proposed substantial questions of law, does not fulfil the requirement of law and it is the Court which has to frame the substantial questions of law after hearing the appellant.

24. The Agreement to Sell executed by the respondent/plaintiff no.2 Moti Lal in favour of the respondent/plaintiff no.1 has to be interpreted in the light of the evidence recorded by the First Appellate Court of the respondent/plaintiff no.2 Moti Lal and the First Appellate Court has correctly concluded that the cross-examination by the appellants/defendants of the respondent/plaintiff no.2 Moti Lal could not contradict his testimony of sale in favour of the respondent/plaintiff no.1. It also cannot be lost sight of, that in vernacular, a property with old construction or *kachcha* construction was often referred to as *malba*. I may also mention that the appellants/defendants did not cross-examine the respondent/plaintiff no.2 Moti Lal in this respect.

25. The need to again summon the respondent/plaintiff no.2 Moti Lal is not felt as the appellants/defendants have had full opportunity to cross-examine him.

26. No merit thus found in this Second Appeal. It is not found to entail any substantial question of law.

27. Dismissed.

28. The appellants/defendants have enjoyed stay of execution for three years and while finally deciding this appeal, it is required to balance the equities.

29. The respondents/plaintiffs had claimed *mesne* profits @ Rs.500/- per month and which is found to be bare minimum which an immovable property can fetch.

30. It is thus further ordered that the appellants/defendants shall compensate the respondent/plaintiff no.1 for the interim stay enjoyed, @ Rs.500/- per month for the period for which the execution of the impugned judgment and decree remained stayed i.e. from 4th September, 2015 till this date and which amount shall also be recoverable as a decree.

31. However no costs.

Decree sheet be prepared.

SEPTEMBER 10, 2018
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RAJIV SAHAI ENDLAW, J.

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