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**Court :** Delhi

**Decided On :** Jul-19-2010

**Judge :** Mr. Indermeet Kaur, J.

**Appeal No. :** RSA No.79/1981

**Appellant :** Mst. Akhtari Khatoon (Since ... )

**Respondent :** Smt. Rajeshwari Devi Through Lrs....

**Advocate for Def. :** Mr.D.K.Rustagi ; Mr.B.S.Bagga Advs.

**Advocate for Pet/Ap. :** Mr.R.M.Bagai, Adv.

**Judgement :**

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

## **ORDER**

1. This appeal has been preferred against the impugned judgment and decree dated 19.8.1980 passed by the court of the Additional District Judge confirming the order of the Sub-Judge 1st Class dated 4.4.1978 whereby the suit of the plaintiff/respondent stood decreed.

2. The plaintiff/respondent had filed suit no.456/1973 against the defendant/appellant for possession of an area measuring 11'. 6"x 4'.9" forming part of a room and another area measuring 11'.0"x 2'.3" of the open space in house no.8135 (part) situated in Mohalla Chimney Mill, Bara Hindu Rao, Delhi. It was alleged that the aforementioned area situated on the first floor and the passage to which is from the stairs of the adjoining house i.e. house no.8136 had illegally and wrongfully been usurped by the defendant by encroaching upon the aforesaid land after removing the intervening partition wall.

3. The adjoining house i.e. house no.8136 was owned by Sh.Suraj Prakash and Sh.Kasturi Lal who had sold the same to Smt.Shanti Devi; after the death of Smt.Shanti Devi her legal heirs i.e. defendant nos.7 to 10 had sold the same to defendant no.1 vide sale deed dated 17.1.1972.

4. The first fact finding court i.e. the court of the Sub-Judge had framed five issues. Four witnesses were examined by the plaintiff; PW-1 was an attesting witness to the sale deed Ex.P-1. As per Ex.P-1 the suit premises i.e. property no.8131 (part) (new) 9670 (old) and 8135 (part) (new) 9676 (old) had been sold to the plaintiff by Lekhraj. PW-3 had also deposed that this disputed room and the open space in the verandah had been sold by Lekh Raj to the plaintiff vide Ex.P-1. Trial court had relied upon text of Ex.P-1 where it was depicted that the property bearing municipal no.8135 (part) 9676 (old) is partly tenanted out to Smt.Shanti Devi and is attached with house no.8136 (new) 9677 (old); further this portion which was in tenancy of Smt.Shanti Devi had been sold to the plaintiff; PW-4 had corroborated this version of PW-3. The portion marked red in the site plan Ex.P2 i.e. the disputed portion had also been proved by the afore noted witnesses. The oral testimony of PW-4 was also considered to the effect that this portion marked in red in Ex.P-2 was in occupation of Smt.Shanti Devi in her capacity as a tenant. In these circumstances, the trial court had held that Shanti Devi herself being a tenant having no legal title of ownership in the afore noted disputed portion; she/her legal heirs (defendant nos.7 to 10) had no corresponding right to transfer the same to defendant no.1. Version of PW-4 had also been relied upon by the Court wherein he had stated that he himself was present at the time when the wall in the disputed portion had been broken; further, the defendants had nowhere

stated that the disputed property i.e. the portion on the first floor of 8135 (new) 9670 (old) was owned by Smt. Shanti Devi who in turn could have sold it to defendant no.1. For all the afore stated reasons, the issues were decided in favour of the plaintiff and the suit of the plaintiff for possession was decreed. It is relevant to state that the plaintiff had filed an application for appointment of a local commissioner on 25.3.1977 but no efforts were made to pursue the said application thereafter.

5. In appeal the Appellate Court confirmed the finding of the Trial Court. The appeal was disposed of on 19.8.1980. Para 9 of the judgment is relevant and is reproduced below: "9. The only question that requires consideration is as to whether the area forming part of a room measuring 11'.6"x 4'.9" and open space measuring 11'.0"x 2'.3" feet of house no.8135 formed part of the sale deed Ex.P1 which was executed by Shri Lekh Raj in favour of the plaintiff-Smt. Rajeshwari Devi or it was a part of the property sold by defendants no. 7 to 10 in favour of Smt. Akhtri Khatoon vide sale deed Ex.DW6/1. The sale deed Ex. P1 has been proved on record from the evidence of PW1 Ram Chander Goel, an attesting witness of the sale. Ex.P2 is the site plan attached with the said sale deed. PW3 Kasturi Lal is the previous owner of this very property and had sold the same to Sh. Lekh Raj vide sale deed Ex.PW3/1. PW4 Kanwar Sain is the General Attorney of the plaintiff and corroborated the facts stated in the plaint. The cumulative effect of the plaintiff's evidence is that premises bearing no. 8131(part) and 8135(part) were sold to the plaintiff by Shri Lekh Raj in which the portion now sought to be vacated from defendant no.1 form part of the sale deed Ex.P1. It was specifically mentioned that the portion bearing municipal no.8135(part) which was under the tenancy of Mohd. Khalil and Shanti Rani, a portion in which she is tenant, is attached with house no.8136 (part) on the first floor and the vendor Lekh Raj had delivered the ownership of the possession of the abovesaid portion to the plaintiff. This averments made in Ex. P1 find corroboration from the sale deed Ex.PW3/1 which was executed by Kasturi Lal-PW3 in favour of Lekh Raj who in turn had sold the same to the plaintiff. Kasturi Lal while in the witness box has specifically stated that the room and the open space, which is the disputed portion in the present suit, was not sold to Shanti Rani, the defendant. I would have agreed with the submission of the learned counsel for the appellant but his sale deed Ex. DW6/1

on which a reliance has been place do no, in fact, support his contention. At no place in the said deed, defendants no.7 to 10 had mentioned this very portion forming part of their property which was sold to Smt. Akhtri Khatoon. Furthermore, defendants' witnesses while under cross- examination, admitted the case of the plaintiff. They were frank enough to admit that the portion shown red in the plan Ex.P2, was in occupation of Shanti Rani as tenant of Lekh Raj. If this possession is admitted to be correct, then vide Ex.P1, Lekh Raj had transferred all rights and interest over the property in dispute to the plaintiff as the tenants were duly informed of this. Admittedly defendants no.7 to 10 are the legal heirs of Shanti Rani and they could not claim a better title than Shanti Rani who had actually no right to make the transfer of the same in favour of defendant no.1. It is true that the plaintiff did not come in the witness box in support of her case but that fact would not make any difference as her husband, who held a power of attorney on behalf of the plaintiff, appeared in the witness box and supported the allegations made in the plaint. In spite of lengthy cross-examination, nothing could be brought on record from him which may help the defendants no.1 to 6. PW 4 not only proved the Power of Attorney Ex. PW 4/1 authorizing him by the plaintiff to act and plead on her behalf in the suit, he also identified the plaintiff's signatures on the plaint and verification. Regarding the allegations of encroachment in the suit premises by the defendants, the statement of PW 4- Kanwar Sain is enough to hold the same in favour of the plaintiff, as for reasons best known to the defendants, no question was put to him in the cross-examination. All these facts taken together leads to the only conclusion that the plaintiff has been successful in establishing her case of possession of the portions mentioned in the plaint against defendants no.1 to 6." It is this judgment which is in appeal before this court. Further before the first Appellate Court also the appellant had made an application on 7.8.1980 to get a local commissioner appointed; he thereafter chose to abandon the application; no order was accordingly passed on the said application.

6. The counsel for the appellant has drawn the attention of this court to the order dated 17.2.1982 passed by this court on an application under Order 26 Rule 9 of the Code wherein repelling the contention of the respondent a local commissioner had been appointed to visit the property no.8135 (part) and 8136 (part), first floor, Gali Chimney Mill, Bara Hindu Rao, Delhi to report the age of the wall between the

two houses. While recording the order this court had held that the entire controversy raised by the parties could be resolved by the local inspection of the premises. Accordingly Mr.R.N.Kapoor, Advocate had been appointed. Local commissioner had filed his report dated 5.4.1982. The relevant extract of the said report reads as follows:- "5. That in the presence of the above named, it was found that House No.8136 (1st Floor), Gali Chimney Mills, Bara Hindu Rao Delhi, had an old wall adjoining to House No.8135, Mohalla Chimney Mills, Bara Hindu Rao, Delhi-6.

The wall adjoining to House No.8135 was similar in structure to the other 3 walls of the House. The said wall appeared made of bricks, mortar plaster and design etc skin and similar to the other 3 walls of the house. It contained in itself two old designed "Jallas" and also there was a "Patchati" made of old wooden logs. There were also electricity fittings quite old and depleted on the said wall."

7. Objections and counter objections to the said report were filed by the respective parties.

8. On 12.10.1982 after the receipt of this report the following order was passed which inter alia reads as follows"I have gone through the report of the local commissioner and heard the parties' counsel. I admit the appeal to consider the following question of law, "whether on the facts of this case the cause of action accrued to the plaintiffs?"

9. A co-joint reading of the order dated 17.2.1982 and the order dated 12.10.1982 show that this additional evidence had been collected by the Court where after the question of law had been framed by it. It is relevant to point out that it had not been defined as a substantial question of law, it merely states it to be a question of law.

10. Counsel for the appellant has submitted that this report has set the controversy between the parties at rest. The local commissioner has categorically reported that there was an old wall adjoining the house no.8135 new (9676 old), and 8136 new (9677 old), Mohalla Chimney, Bara Hindu Rao and this wall is similar in structure to the other three walls of the house made of brick, mortar and plaster and the

design is also similar to the other three walls; further the local commissioner had also noted the electricity fittings affixed on the said wall which were also dilapidated and old. It is submitted that in these circumstances when the wall was still standing between aforementioned two properties nos.8135 new (9676 old), and 8136 new (9677 old) of the disputed portion, the question of encroachment by the defendant into the property of the plaintiff by breaking this wall could not and did not arise. It is submitted that the findings of the Courts below are clearly perverse. Reliance has been placed upon the following judgments to support his arguments:

- i. (1999) 9 SCC 237 Neelu Narayani (dead) Through LRs and Ors. v. Lakshmanan (D) Through LRs and Ors.
- ii. AIR 1997 SC 1906 Major Singh v. Rattan Singh (Dead) by LRs and Ors.
- iii. AIR 1975 Raj 153 Miss Bedlani v. A. Hoogewerfe and Ors.
- iv. AIR 2001 SC 1273 Kulwant Kaur and Ors. v. Gurdian Singh Mann (dead) by LRs and Ors.
- v. AIR 1985 SC 111 Lakshmi Narayan Guin and Ors. v. Niranjana Modak
- vi. AIR 1976 P & H 107 J.G. Kohli v. The Financial Commissioner, Haryana, Chandigarh and Anr.
- vii. AIR 1973 SC 171 Laxmi & Co. v. Dr. Anant R. Deshpande & Anr.
- viii. AIR 1986 SC 687 Prakash Chandra Mehta v. Commissioner and Secretary, Government of Kerala and Ors. ix. AIR 1993 Cal 144 Ratanlal Bansilal and Ors. v. Kishorilall Goenka and Ors.
- x. JT 2001 (5) SC 250 Swarn Kaur and Ors. v. Jal Kaur and Ors.

It is submitted that subsequent events (in this case the subsequent event being the report of local commissioner) can be taken into account by a Court hearing a second appeal; further the evidence which has been rejected by the Trial court is on flimsy ground and can be re-appreciated; further if the interpretation of even a proved document raises a dispute about a question of title, such a question is a

question of law which can be examined by the second Appellate Court.

11. These arguments have been countered by learned counsel for the respondent. It is submitted that both the Courts below have given their finding on facts which cannot now be re-agitated in second appeal. It is submitted that the report of the local commissioner if read in evidence would make this Court a third fact finding court which it is not permitted to go into in view of the strict parameters as contained in section 100 of the Code of Civil Procedure (hereinafter referred to as "the Code"). Further the conditions of Order 41 Rule 27 of the Code which is the only provision of law under which additional evidence can be permitted at the appellate stage, have not been fulfilled. The parameters of this controversy i.e. of the disputed intervening wall between the two adjoining properties was well within the knowledge of the appellant; he had on two earlier occasions, both before the Trial Court as also before the Appellate Court moved an application for appointment of a local commissioner but thereafter for reasons best known to him he chose not to pursue the said application. In such a scenario it cannot be said that the evidence which he now seeks to bring on record by way of appointment of a local commissioner was after exercise of "due diligence" not within his knowledge. This court is seized of jurisdiction only when there is a substantial question of law involved.

12. Counsel for the respondent has placed reliance upon a judgment of the Apex Court reported in (1996) 9 SCC 392 Motilal Daultram Bora & Ors. v. Murlidhar Ramchandra Bhutabe & Ors. to support his submission that where in a second appeal the High Court had appointed a local commissioner and on the basis of his report had reversed the concurrent finding of the two Courts below, the Supreme Court had held that such an approach of appointing a local commissioner to go into the width and demarcation of the road was an erroneous approach and the High Court had erred in interfering with the concurrent findings of the fact by two Courts below.

13. Section 100 of the Code as amended in 1976 has prescribed the peripherals limit of the Courts jurisdiction while hearing a second appeal. In a judgment of the Supreme Court reported in 1978 SC 1062 Balai Chandra Hazra v. Shewdhari

Jadav on the question of the approach of the second Appellate Court in dealing with the second appeal the following findings of the Supreme Court are relevant:

"Now, if in second appeal the finding of fact recorded by the first appellate court are taken as binding unless fresh additional evidence is permitted to be led when again appreciation of evidence to record a finding of fact would become necessary, that position is not altered. Even if amendment of pleadings is granted which puts into controversy some new facts alleged in amended pleadings and therefore the Court hearing the second appeal after granting amendment could not take over the function of the trial court or the first appellate court and undertake appreciation of evidence and record findings of facts. That is not the function envisaged by the Code of the Court hearing second appeal Under Section 100. This becomes crystal clear from the provision contained in Section 103 which defines the power of the High Court to determine a question of fact while hearing second appeal. But this power of the Court is limited to evidence on record which again is sufficient to determine an issue of fact necessary for disposal of the appeal and which has not been determined by the lower appellate Court or which has been wrongly determined by such court."

14. The observations of the Judicial Committee of the Privy Council in *Indraj Pratap Sahi v. Amar Singh and Ors.* Law Reports 50 T.A. 183 were considered as also the ambit of the jurisdiction of the Appellate Court to admit evidence under Order 41 Rule 27 of the Code. It was held that the second Appellate Court has unrestricted power to admit documents where sufficient grounds have been shown for their having not been produced at the initial stage of the litigation. It was held that clear distinction between admitting evidence which is entirely different from appreciating it and acting upon it must be kept in mind.

15. The Supreme Court in *Balai Chandra* case (supra) had further reaffirmed the principle laid down in *Meenakshi Naidoo v. Subramaniya Sastri* Law Reports 14 L.A. 160 following the decision of the *Ledgard v. Bull* Law Reports 131 A 134 wherein it had been held that when the Judge has no inherent power over the subject matter of a suit, the parties cannot by their mutual consent convert it into a proper judicial process; they could not clothe the Bench with jurisdiction to record

fresh oral evidence and proceed to appreciate the same and record the findings of facts. In AIR 1969 Mad 144 T.R.Rajagopala Iyer v. T.R.Ramachndra Iyer while dealing with an application under Order 41 Rule 27 of the Code seeking appointment of a local commissioner at the appellate stage, the High Court of Madras had observed as follows:-

"I may observe that appointment of a Commissioner in the appeal is a rarity and is seldom resorted to in my view, such an appointment is not authorized by Rule 27 of Order XLI. That rule relates to additional evidence and the language of Rule 27(1)(b) does not lend itself to a construction that the report of a commissioner to be appointed and submitted in the appellate stage is regarded as additional evidence for purposes of that rule."

The provisions of Section 107(2) of the Code had also been considered; Court had reiterated that this power should be very sparingly used.

16. On an appreciation of the facts and the legal position what emerges thus is as follows:-

A. Factual Position:

i. Both the fact finding Courts i.e. the Trial Court as also the first Appellate Court had in detail after the examination of the oral and documentary evidence held that the plaintiff had a clear cause of action in his favour. This finding was given by the first Trial Court while deciding issue no.3. ii. Trial Court had relied upon the explicit details as contained in the sale deed Ex.P-1 and the site plan Ex.P-2 annexed with the sale deed evidencing the ownership of the disputed portion of the property in favour of the plaintiff. This had been reinforced by the oral version of the witnesses of the plaintiff. The defence of the defendant that he was in possession of the property in his own right had been disbelieved; the sale deed Ex. DW-6/1 relied upon by the defendant nowhere spoke of the disputed property; it was a sale deed executed between the defendant Akhtari Khatoon and defendant nos. 7 to 10 (legal representatives of the deceased Shanti Devi) and related to property no. 8136. Apart from the oral and documentary evidence proved by the plaintiff the Trial Court had also rejected the defence as set up by the defendant in view of the

version of the witnesses of the defendant and rightly so. There were six DWs examined by the defendant. Ex.DW-6/1 already stood discarded as noted supra. DW-1 in her cross-examination had admitted that the erstwhile owner Lekh Raj had purchased the first floor of 8135 including a room which he had sold to plaintiff. DW-4 has also corroborated the version of DW-1 and in his cross-examination had stated that the plaintiff had purchased the property in question from Lekh Raj. DW-5 had stated that the plaintiff is the owner of portion 8135 whereas 8136 had been purchased by Shanti Rani from Lekh Raj.

iii. This evidence adduced had led both the Courts below to given findings in favour of the plaintiff. The witnesses of the defendant had also admitted that the disputed portion which falls in portion no.8135 was owned by the plaintiff. Defendant nos. 7 to 10 (legal representatives of deceased Shanti Rani) had sold portion 8136 to defendant no.1; they not being the owners of 8135 could not have sold any such portion to defendant no.1. Defendant no.1 was rightly held to be an encroacher on the said portion.

iv. The question of law was framed by this Court only after receipt of the report of the local commissioner under Order 26 Rule 9 of the Code under which the order appointing the local commissioner was passed, such a report is only a evidence and if need be the commissioner may also be examined in court . As such a third fact finding inquiry could not be embarked upon by this Court by reading the report of the local commissioner to which objections had also been filed by the non-applicant and would at best again become a questionable piece of evidence before this Court. The question of law framed by this Court relating to the cause of action accruing to the plaintiff already stood considered by the Trial Court while deciding issue no.3 wherein findings of facts qua the disputed wall had been recorded. B. Legal propositions which accordingly emerges are as follows: i. The second Appellate Court has powers to admit additional evidence. This power is, however, circumscribed under Order 41 Rule 27 of the Code.

ii. Oral evidence is permitted where evidence by the two fact findings Courts has either been rejected or the Courts below have failed to go into any such evidence or that such a judgment is based on conjectures or surmises or on no evidence

and from which no reasonable man can draw any reasonable inference.

iii. The ambit of the jurisdiction of the second Appellate Court being that it has unrestricted power to admit documents where sufficient grounds have been shown for their not having been produced at the initial stage of litigation. iv. This necessarily follows from a harmonious construction of the principle of law as contained in Section 100 to be read with Section 103 of the Code; the latter provision which clearly postulates that evidence only on record before the Court can be re-appreciated and re-assessed.

v. Distinction between admitting evidence, appreciating it and acting upon it has thus to be clearly understood and acted upon.

vi. Section 100 of the Code (as amended in 1976) imposes an almost blanket restriction against the re-appreciation of evidence even when the findings of fact by the first Appellate Court are perverse, inadequate and violative of the principles of natural justice.

vii. Where a Court has no inherent jurisdiction over the subject matter, the parties cannot by mutual consent convert it into a proper judicial process. Second Appellate Court cannot be clothed with the jurisdiction to record fresh oral evidence and proceed to appreciate the same to record findings on facts.

viii. In exceptional case where additional evidence has been permitted by the second Appellate Court it could not nevertheless take over the function of the Trial Court or the first Appellate Court and undertake an appreciation of this new evidence and record new findings of fact. This is not a function envisaged in Section 100 of the Code. In such exceptional circumstances it would be appropriate that the case be remanded back to the Trial Court.

17. The judgments relied upon by the learned counsel for the respondents show that none of them can apply to the facts of the instant case which are all distinct. The subsequent events as noted in the judgment of Miss Bedlani (supra) related to the sale of property during the pendency of the appeal which was an admitted factual position between the parties. In the other judgment relied upon by the

learned counsel for the appellant reported as J.G. Kohli (supra) the subsequent event in a suit for eviction was the event of the retirement of the landlord which was again an admitted fact between the parties. The judgment reported in Laxmi & Co.case (supra) detailing in para 27 as to what could be "subsequent events" lists out examples which are only illustrative. Perusal of para 27 shows that such subsequent events are again those in which the court finds that the judgment of the Court cannot be carried into effect because of the subsequent change of circumstances and as such the Court can take notice of the same. None of these propositions apply to the facts of the instant case. Report of the local commissioner dated 5.4.1982 against which objections are pending is only one piece of questionable evidence. It does not fall in the category of Legal Proposition No.(ii) under which category alone oral evidence can be permitted at the second appellate stage. Submission of the counsel for the appellant that the judgment of the fact finding Courts is perverse is not substantiated by any of his afore noted submissions. This Court had also framed a question of law and not a substantial question of law which is the mandate under Section 100 of the Code. The Courts below had on a comprehensible conspectus of the case after considering the entire gamut of the evidence both oral and documentary adduced before it, given its concurrent findings.

18. The concurrent finding of both the Courts below calls for no interference.

19. The question of law is answered against the appellant. Appeal is dismissed.

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