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IN THE HIGH COURT OF DELHI

Judgment reserved on : October 03, 2008

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Judgment delivered on : October 20, 2008

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CM(M) 633/2004

PREMA DEVI RASTOGI

..... Petitioner

Through: Mr. Davinder Singh, Sr. Adv. with
Mr. Saurabh Tiwari, Advocate

VERSUS

BIMLA DEVI RASTOGI

..... Respondent

Through: Mr. Bharat Sangal, Advocate
Mr. R.R.Kumar, Advocate and
Ms. Ipsita Borthakur, Advocate

RFA 416/2002

BIMLA DEVI RASTOGI

..... Appellant

Through: Mr. Bharat Sangal, Advocate
Mr. R.R.Kumar, Advocate and
Ms. Ipsita Borthakur, Advocate

VERSUS

PREMA DEVI RASTOGI

..... Respondent

Through: Mr. Davinder Singh, Sr. Adv. with
Mr. Saurabh Tiwari, Advocate

CORAM:

Hon'ble Mr.Justice Pradeep Nandrajog

Hon'ble Mr.Justice J.R. Midha

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

: **PRADEEP NANDRAJOG, J.**

1. The original suit bearing Suit No.359/95 was filed by the Appellant in RFA No.416/2002, Smt.Prema Devi Rastogi, seeking a decree of partition, declaration and permanent injunction in respect of the property bearing Municipal No.54-A, East Azad Nagar, Krishna Nagar, Delhi (hereinafter referred to as the "Suit Property") against the Respondent in RFA No.416/2002, Bimla Devi Rastogi.

2. For the sake of convenience, we shall be referring to the parties by their nomenclature in the suit.

3. Case set up by the plaintiff was that she and the defendant, who is the wife of the real brother of her husband, had purchased the suit property which was a 'single storeyed building' from one Sh.Devi Chand Khanna on 04.08.1971 vide registered sale deed dated 12.08.1971 for a consideration of Rs.22,000/-. That the parties contributed Rs.11,000/- each for the purchase of the suit property. That since the date of its purchase the entire suit property except one room remained in the possession of the defendant and her family. That the said room remained under the lock and key of the plaintiff and was occupied by the plaintiff and her family for short intervals of time. That on 28.10.1995 the intention of the defendant to raise constructions on the first floor/roof of the suit property came to the knowledge of the plaintiff therefore she was constrained to file the suit seeking partition of the suit property as also to

restrain the defendant and her family from raising any construction on the first floor/roof of the suit property.

4. The suit was contested by the defendant who in the written statement took a defence that the plaintiff had no right, title or interest in the suit property as she was a mere benamidar inasmuch as the defendant was the real owner of the suit property having paid the entire sale consideration in respect of the suit property. As regards the factum of execution of the sale deed pertaining to the suit property in name of the plaintiff it was averred in the written statement that '*the execution of the sale deed is however, not denied*'. It was further pleaded that after purchasing the suit property the defendant demolished the building and reconstructed the same with her own funds and contributions made by her family. It was pleaded that the claim of the plaintiff that the defendant is attempting to raise construction on the roof of the suit property is false inasmuch as defendant had raised said construction much prior to the filing of the present suit. It was pleaded that the claim of the plaintiff of having possession of the one room in the suit property is false. It was pleaded that the defendant is enjoying continuous, uninterrupted and peaceful possession of the suit property since last 12 years and therefore has perfected her title in the suit property by way of adverse possession.

5. Since a dispute was raised by defendant regarding the date of raising of construction on the roof/first floor of the suit property, the plaintiff filed an application under Order XXVI Rule 9 of the Code of Civil Procedure before the learned Trial Court seeking appointment of a Local Commissioner for inspection of the suit property.

6. Vide order dated 21.11.1995 the learned Trial Court appointed a Local Commissioner who was directed to inspect the suit property and prepare a report particularly on the aspect of existence of any construction on the roof/first floor of the suit property. The report filed was to the effect that the constructions on the first floor were recent and were continuing when the commission was executed.

7. On the basis of the pleadings of the parties, following issues were settled by the learned Trial Court:-

“1. Whether the plaintiff is entitled to partition of the suit property as having half share therein? OPP

2. Whether the defendant has purchased the suit property with his own fund and is in possession of the same as stated in W/S? If so, what effect? OPD

3. Whether the suit property is not properly valued for the purpose of jurisdiction? OPD

4. Whether the plaint does not disclose any cause of action as mentioned in the W/S? OPD

5. Relief.”

8. At the trial, the plaintiff stepped into the witness-box as PW-1 and reiterated the stand taken by her in the plaint. Mr.S.S.Rawat, UDC, Office of Sub-Registrar – IV, Seelam Pur, Shahdara, Delhi, PW-2 proved the certified copy of the sale deed dated 04.08.1971 as Ex.PW-2/1. Ms.Santosh Jain, Advocate, PW-3 who was appointed as Local Commissioner by the Trial Court proved the inspection report dated 27.11.1995 prepared by her as Ex.PW-3/1. As per the Report, the Local Commissioner visited the suit property on 21.11.1995 and found that there existed four rooms on the first floor of the suit property which appeared to be newly constructed and that some construction material was also lying on the said floor. Mr.Jagdish Pershad, AZ Inspector, MCD House Tax Deptt., Shahdara, South Delhi proved the house-tax receipt evidencing the payment made by the plaintiff of house tax in respect of the suit property as Ex.PW-4/1. Mr.Radhey Shyam Rastogi, PW-5 who was the husband of the plaintiff and Mr.Harish Chand Rastogi, PW-6 who was the brother-in-law of the parties deposed on the lines of the plaint. Mr.R.R.Nagpal, Engineer and Civil Surveyor, PW-7 proved the valuation report prepared by him in respect of the suit property as Ex.PW-7/1.

9. On behalf of the defendant, Mr.Anil Kumar Malhotra, Mr.Tilak Raj and Mr.Rajesh Kumar who were the neighbours of the defendant were examined as DW-1, DW-2 and DW-3 respectively. They deposed that the suit property was

demolished and reconstructed by the defendant and that the entire suit property was in the possession of the defendant and her family and the defendant had raised construction on the first floor/roof of the suit property in the year 1993. The defendant examined herself as DW-4 and reiterated the stand taken by her in the written statement. Mr. Anil Kumar Gupta, Architect, DW-5 proved the valuation report prepared by him in respect of the suit property as Ex.DW-5/1.

10. Vide judgment and decree dated 14.03.2002, the learned Trial Court decreed the suit filed by the plaintiff thereby directing that the plaintiff is entitled to $\frac{1}{2}$ share in the 'ground floor' of the suit property. Reasons which led the learned Trial Court to arrive at said conclusion can be summarized as under:-

(I) The admission of the defendant of execution of the sale deed Ex.PW2/1 and her failure to prove that the entire sale consideration in respect of the suit property was paid by her from her funds establishes that the plaintiff was a co-owner of the 'suit property' and not benami/ostensible owner thereof as alleged by the defendant.

(II) The defendant has not been able to establish that she had perfected her title in the suit property by adverse possession for the reason she had neither pleaded nor proved as to what overt act was done by her in order to claim herself as the exclusive owner of the suit property.

(III) The pleas of benami and adverse possession are inconsistent to each other and therefore could not have been simultaneously taken by the defendant in the present suit.

(IV) No documentary evidence was produced by the defendant to establish that she had got demolished the suit property and reconstructed the same from her own funds and contributions made by her family.

(V) Even assuming the defendant had reconstructed the suit property the same was done at her own peril and would not in any way adversely affect the legal rights of the plaintiff in the suit property as the defendant had not taken permission from the plaintiff who was a co-owner of the suit property for raising said reconstruction.

(VI) The report dated 27.11.1995, Ex.PW3/1, submitted by the Local Commissioner, photographs annexed thereto Ex.PW3/3 to Ex.PW3/14 and contradictions between the pleading in the written statement and the testimony of the defendant as DW-4 regarding the occupation of the first floor of the suit property by the tenant establishes that the said construction was raised by the defendant on the first floor/roof of the suit property in the year 1995 and that cause of action for filing the present suit arose when the defendant started raising construction on the first floor/roof of the suit property without the consent of the plaintiff who was a co-owner of the suit property.

11. After passing of the impugned judgment and decree dated 14.03.2002 by the learned Trial Court, the plaintiff filed an application under Order VI Rule 17 read with Sections 152 and 153 of the Code of Civil Procedure seeking amendment of prayer clause of the plaint on the ground that due to an inadvertence the plaintiff instead of seeking decree for partition of entire suit property for which he was legally entitled prayed for a decree for partition of only ground floor of the suit property.

12. Vide order dated 09.03.2004, the learned Trial Court dismissed the application filed by the plaintiff for amendment of the plaint.

13. Being aggrieved by the judgment and decree dated 14.03.2002 passed by the learned Trial Court the defendant has invoked the appellate jurisdiction of this Court by filing the present appeal (RFA No.416/2002) under Section 96 of the Code of Civil Procedure.

14. Being aggrieved by the order dated 09.03.2004 passed by the learned Trial Court dismissing the application seeking amendment of plaint the plaintiff has invoked the supervisory jurisdiction of this Court by filing the present petition CM(M) No.633/2004 under Article 227 of the Constitution of India.

15. Noting that the appeal preferred by the plaintiff against the impugned judgment and decree dated 14.03.2002 passed by the learned Trial Court is pending adjudication before a Division Bench of this Court, vide order dated 26.04.2004, a learned Single Judge of this Court transferred CM(M) No.633/2004 to the Division Bench of this Court in order to be heard along with the appeal.

16. The adjudication of the matter involves consideration of following three legal issues:-

- I Law relating to proof of benami transactions.
- II Law of adverse possession.
- III Legal principles relating to amendment of pleadings.

LAW RELATING TO PROOF OF BENAMI TRANSACTIONS

17. The law relating to onus of proof of a property being benami and discharge of said onus was first expounded by the Federal Court in the decision reported as **Gangadara Ayyar & Ors v Subramania Ayyar & Ors** AIR 1949 FC 88 in following terms:-

“It was contended by the learned Counsel for the appellants that the decision of the Court below against the appellants regarding these properties had been reached because of a wrong approach to this matter in law and that the rule of onus of proof as regards benami transactions had not been fully appreciated. It is settled law that the onus of

establishing that a transaction is benami is on the plaintiff and it must be strictly made out. The decision of the Court cannot rest on mere suspicion, but must rest on legal grounds and legal testimony. In the absence of evidence, the apparent title must prevail....." (Emphasis Supplied)

18. In the decision reported as **Jaydayal Poddar & Anr v Mst. Bibi Hazra & Ors** AIR 1974 SC 171 the Hon'ble Supreme Court enumerated six circumstances which must be looked into by the courts in determining whether a particular transaction is benami or not. It would be apposite to refer to following observations made by the Hon'ble Court in the said decision:-

"It is well settled that the burden of proving that a particular sale is benami and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of Benami or establish circumstances unerringly and reasonably raising an inference of that fact. The essence of a benami is the intention of the party or parties concerned; and not unoften such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him; nor justify the acceptance of mere conjectures or surmises, as a substitute for proof. The reason is that a deed is a solemn document prepared and executed after considerable deliberation and the person expressly shown as the purchaser or transferee in the deed, starts with the initial presumption in his favour that the apparent state of affairs is the real state of affairs. Though the question, whether a particular sale is Benami or not, is largely one of fact, and for determining this question, no absolute formulae or acid tests, uniformly applicable in all situations, can be laid down; yet in weighing the probabilities and for gathering the relevant indicia, the courts are usually guided by these circumstances : (1) the source from

which the purchase money came; (2) the nature and possession of the property, after the purchase; (3) motive, if any, for giving the transaction a benami colour; (4) the position of the parties and the relationship, if any between the claimant and the alleged benamidar; (5) the custody of the title-deeds after the sale and (6) the conduct of the parties concerned in dealing with the property after the sale.

The above indicia are not exhaustive and their efficacy varies according to the facts of each case. Nevertheless No. 1, viz. the source whence the purchase money came, is by far the most important test for determining whether the sale standing in the name of one person, is in reality for the benefit of another." (Emphasis Supplied)

19. After noting leading judicial pronouncements on the point, the Hon'ble Supreme Court in the decision reported as **Valliammal (D) by Lrs. v Subramaniam & Ors** AIR 2004 SC 4187 summarized the law related to proof of benami transactions as under:-

"There is a presumption in law that the person who purchases the property is the owner of the same. This presumption can be displaced by successfully pleading and proving that the document was taken benami in name of another person for some reason, and the person whose name appears in the document is not the real owner, but only a benami. Heavy burden lies on the person who pleads that recorded owner is a benami-holder." (Emphasis Supplied)

20. Having laid down the afore-noted legal position in respect of proof of benami transactions, the Hon'ble Supreme Court proceeded to note the six circumstances enumerated in **Jaydayal Poddar**'s case (supra) and concluded that the source from where the purchase money came and the motive as to why

the property was purchased benami are the most important tests for determining whether the sale standing in the name of one person, is in reality for the benefit of another person. The Hon'ble Court emphasized that a party invoking the plea of benami in order to prove the real ownership of the property which is the subject-matter of lis is required to show that there were valid reasons for purchase of the property in name of the benamidar and that the purported real owner had paid the sale consideration for the purchase of the property.

21. In the backdrop of afore-noted legal position, we shall appreciate the evidence led by the defendant on the aspects of source of sale consideration of the suit property and the motive for allegedly giving benami colour to the purchase of the suit property.

22. As regards the source of sale consideration of the suit property, the defendant had pleaded and deposed to the effect that she had paid entire sale consideration of the suit property from her own funds and contributions made by her family.

23. A perusal of the evidence led by the defendant reveals that no documentary evidence was led by her to establish that she had paid entire sale consideration of the suit property from her own funds and contributions made by her family.

24. In such circumstances, the learned Trial Court has rightly held that except for the mere bald statement of the defendant there is no corroborative piece of evidence which establishes that the defendant had paid the entire sale consideration of the suit property from her own funds and contributions made by her family.

25. Lastly, it is pertinent to note an interesting feature of the cross-examination of the plaintiff. In the cross-examination, a question was put to the plaintiff that whether it is correct that the house situated in Jogiwara fell in her share and the suit property fell in the share of the defendant to which she replied in negative. The defendant by putting said question to the plaintiff has attempted to set up a case that she had become the exclusive owner of the suit property on account of some family arrangement between the parties and this attempt of the defendant casts serious doubts on the case set up by her in the pleadings that she is the exclusive owner of the suit property inasmuch as she had paid the entire sale consideration of the suit property from her own funds and contributions made by her family.

26. In so far as motive for allegedly giving benami colour to the sale of the suit property is concerned, it is relevant to note that the factum of execution of sale deed Ex.PW2/1 which records the name of the plaintiff as a co-owner of the suit

property was admitted by the defendant in her written statement and that no reasons/explanation were stated therein for existence of said recording in the sale deed when allegedly plaintiff had not paid any consideration in respect of the purchase of the suit property.

27. The plaintiff in her testimony as PW-1 had deposed that the original sale deed of the suit property is in the possession of husband of the defendant. When questioned about the same, the defendant deposed that the same is in her possession and that she will produce the same in the court. However, subsequently the defendant expressed her inability to produce the same and instead produced the photocopy of said sale deed which was exhibited as Ex.DW4/X. The defendant also deposed that the sale deed Ex.DW4/X wrongly records the name of the plaintiff as a co-owner of the suit property, she came to know of the said recording the moment sale deed was handed over to her and that she discussed the same with her husband who told her that there is no need to rectify the said error.

28. The fact that no reasons/explanation were stated in the written statement while admitting the execution of the sale deed Ex.PW2/1 strongly probablizes that the version put forward by the defendant in her testimony of sale deed DW4/X containing a wrong recording is merely an afterthought.

29. Moreover, the decision of the learned Trial Court that it does not appeal to reason that the defendant would have taken no action to rectify the alleged wrong recording in the sale deed Ex.PW2/1 had she paid the entire sale consideration of the suit property is perfectly correct.

30. In such circumstances, it has to be held that the defendant has miserably failed to prove the motive for allegedly giving benami colour to the sale of the suit property.

31. Before rendering final decision on said aspect of the matter, it is necessary to deal with the contention advanced by the defendant in the present appeal that the testimony of the plaintiff (PW-1) to the effect that she had never met the seller of the suit property, she is not aware as to whether any earnest money was paid or any agreement to sell was executed before the execution of the sale deed of the suit property, she has no knowledge regarding the registration of the sale deed and she never appeared before Sub-Registrar for registration of the sale deed as also the testimony of her husband (PW-5) that she has never met the seller of the suit property and that payment of the sale consideration of the suit property was not made in his presence strongly probablizes that the plaintiff had not paid any sale consideration in respect of the suit property.

32. As regards the said contention advanced by the appellant, suffice would it be note the following dictum laid down by the

Hon'ble Supreme Court in the decision reported as **M. Nagendriah v M. Ramachandraiah & Anr** 1969 (1) UJ 697

(SC):-

“.....Now if that is so, then the onus of proving that these purchase were benami was on the appellant and it was for him to show by convincing evidence that the source of money for these acquisitions was traceable to the joint funds from this business. Admittedly this has not been shown by any affirmative evidence, Shri Gupta, however, laid stress on the contention that the respondent had also not been shown to possess sufficient funds with which properties in question could be acquired. On this reasoning the counsel tried to induce us to infer that the properties must be held to be joint of the appellant and Ramachandraiah. This, in our opinion, is not a correct approach. Ostensible owner must be held to be a true owner in the absence of cogent evidence establishing that he is a mere benamidar, or is holding property for another person who claims to be the beneficial or real owner. The onus also does not change merely because the beneficial owner and the ostensible owner are brothers or they may be owning some other property jointly. **The mere circumstance that the ostensible owner has not proved that he had himself paid the price or that he had sufficient funds to be able to do so, would also not be enough by itself to sustain the claim of the alleged beneficial owner.** The initial onus is always on the party seeking to dislodge the ostensible title. We are not unmindful of the fact that in this country benami transactions are not uncommon and they are certainly not forwarded upon. We are equally conscious of the fact that the appellant and respondent Ramachandraiah are real brothers and not utter strangers. But at the same time it cannot be ignored, as just observed, that the initial onus must as a matter of law be on the party asserting benami nature of title.....” (Emphasis Supplied)

33. In view of laid down by the Hon'ble Supreme Court in **M. Nagendriah'** s case (supra) the contention of the defendant

that the plaintiff has not able to establish that she had paid the sale consideration for purchasing the suit property is of no effect when the defendant had not been able to discharge the initial onus of dislodging the alleged ostensible title of the plaintiff in the suit property.

34. In view of the fact that the defendant has failed to prove that she had provided the money for the purchase of the suit property and has given no reasons why she had purchased the suit property benami in name of the plaintiff, we have no hesitation in holding that the defendant has not been able to establish that the plaintiff who name is recorded as a co-owner in the sale deed Ex.PW2/1 was not real owner of the suit property.

LAW OF ADVERSE POSSESSION

35. As noted herein before, the learned Trial Court has held that the plea of benami and adverse possession are inconsistent to each other therefore could not have been simultaneously taken by the defendant in the present suit.

36. The Code of Civil Procedure does not prohibit inconsistent pleadings and there is nothing therein which prevents either party from setting up two or more inconsistent sets of material facts and claim reliefs thereunder in the alternative. The plaintiff may rely upon several different rights alternatively

though they may be inconsistent to each other. Likewise, defendant may also raise as many separate, distinct and inconsistent defences as he may think proper. For this proposition, a reference may be made to the decision of the Supreme Court reported as **Firm Srinivas Ram Niwas v Mahabir Prasad** AIR 1951 SC 177 wherein it was held as under:-

".....it was certainly open to the plaintiff to make an alternative case to that effect and make a prayer in the alternative for a decree for money even if the allegations of the money being paid in pursuance of a contract of sale could not be established by evidence. The fact that such a prayer would have been inconsistent with the other prayer is not really material. A plaintiff may rely upon different rights alternatively and there is nothing in the Civil P.C. to prevent a party from making two or more inconsistent sets of allegations and claiming relief thereunder in the alternative."

37. In the decision reported as **Chapsibhai Dhanjibai Dand v Purushottam** AIR 1971 SC 1828 the Hon'ble Supreme Court has held that the parties to the suit are entitled to make contradictory pleas in the alternative in their pleadings.

38. We may note that contradictory pleas which are mutually destructive cannot be pleaded. A plea of benamidar and ownership by adverse possession are not mutually destructive for the reason evidence pertaining to the plea of benamidar would not destroy the plea of adverse possession or vice versa.

39. In view of afore-noted legal position, the learned Trial Court was not correct in holding that the defendant could not

have simultaneously taken the plea of benami and acquisition of title by adverse possession.

40. Having said so, it remains to be seen whether the defendant has been able to establish that she had perfected her title in the suit property by adverse possession.

41. The defendant is claiming to have perfected her title in the suit property by way of adverse possession on account of her enjoying continuous, peaceful, uninterrupted and exclusive possession of the suit property since the date of the purchase of the suit property.

42. The question which arises for consideration is whether mere long possession of one co-sharer in the property which is the subject-matter of the lis is sufficient to oust the other co-sharer by way of adverse possession.

43. In this regard, a reference may be made to an earliest decision of the Privy Council reported as **Hardit Singh v Gurumukh Das** AIR 1918 PC 1 wherein it was observed as under:-

“If by exclusive possession of joint estate is meant that one member of the joint family alone occupies it, that by itself affords no evidence of exclusion of other interested members of the family. Uninterrupted sole possession of such property, without more, must be referred to the lawful title possessed by the joint holder to use the joint estate, and cannot be regarded as an assertion of a right to hold it as separate, so as to assert an adverse claim

against other interested members. If possession may be either lawful or unlawful, in the absence of evidence, it must be assumed to be the former. The evidence of actual user is not sufficient to establish abandonment or exclusion." (Emphasis Supplied)

44. After examining a series of judicial decisions on the issue of adverse possession and extracting legal propositions contained therein, the Hon'ble Supreme Court in the decision reported as **Md. Mohd Ali v Jagadish Kalita** (2004) 1 SCC 271 laid down the legal position relating to adverse possession vis-à-vis co-owners/co-shares in following terms:-

"Long and continuous possession by itself, it is trite, would not constitute adverse possession. Even non-participation in the rent and profits of the land to a co-sharer does not amount to ouster so as to give title by prescription. A co-sharer, as is well settled, becomes a constructive trustee of other co-sharer and the right of the appellant and/or his predecessors in interest would, thus be deemed to be protected by the trustee....."

x x x

For the purpose of proving adverse possession/ ouster the defendant must also prove animus possidendi.

x x x

The respondents herein, as noticed hereinbefore, has failed to raise any plea of ouster. No finding has been arrived at by the High Court as to from which date they began to possess adversely against the plaintiff or his predecessors in interest. Mere non-payment of rents and taxes may be one of the factors for proving adverse possession but cannot be said to be the sole factor. The High Court has not assigned any reason as to how there had been an open ouster by Prafulla Kalita since 1950.

45. It was further held by the Hon'ble Supreme Court that in order to prove ouster of a co-sharer it is obligatory upon the person claiming ouster to specifically plead and prove as to since when his possession became adverse to the other co-sharer.

46. The legal meaning of the term 'ouster' was explained by the Hon'ble Supreme Court in the decision reported as **Vidya Devi v Prem Prakash** AIR 1995 SC 1789 in following terms:-

“"Ouster" does not mean actual driving out of the co-sharer from the property. It will, however, not be complete unless it is coupled with all other ingredients required to constitute adverse possession, Broadly speaking, three elements are necessary for establishing the plea of ouster in the case of co-owner. They are(i) declaration of hostile animus(ii) long and uninterrupted possession of the person pleading ouster and (iii) exercise of right of exclusive ownership openly and to the knowledge of other co-owners.....”

47. In the decision reported as **Govindammal v R. Perumal Chettiar** AIR 2007 SC 204 the Hon'ble Supreme Court has held that mere long possession is not a factor to oust a co-sharer but something more positive is required to be done. There must be a hostile open possession, denial and repudiation of rights of the co-sharers and said denial and repudiation must have been brought to the knowledge of the co-sharers who are sought to be ousted.

48. In the instant case, the defendant has only pleaded and attempted to prove her long, uninterrupted and exclusive

possession of the suit property. However, the other important element of the plea of ouster i.e. declaration of hostile animus or communication by the person claiming adverse possession of his intention to dispossess to the person sought to be dispossessed has neither been pleaded nor proved by the defendant.

49. The defendant has all along pleaded and attempted to prove that she is enjoying the exclusive possession of the suit property since the date of its purchase but has nowhere pleaded as to since when her possession in the suit property became adverse to the plaintiff.

50. The importance of the pleadings and proof thereof in a case of adverse possession was highlighted in the decision reported as **Mahesh Chand Sharma v Raj Kumari Sharma** AIR 1996 SC 869 wherein the Hon'ble Supreme Court held that a person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all the facts necessary to establish his adverse possession.

51. In view of the afore-noted legal position and the fact that the pleadings of the defendant suffers from material deficiencies (same has been noted in paragraphs 48 and 49 above), we have no hesitation in holding that the defendant has

not been able to establish that she had perfected in her title in the suit property by way of adverse possession.

LEGAL PRINCIPLES RELATING TO AMENDMENT OF PLEADINGS

52. The approach to be taken by the courts in the matters of amendment of pleadings has been set out by the Hon'ble Supreme in the decision reported as **Rajesh Kumar Aggarwal and Ors. v. K.K. Modi and Ors.** AIR 2006 SC 1646 where it has been observed that the object of Order VI Rule 17 of the Code of Civil Procedure is that the court should try the merits of the case that come before them and should consequently allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the either side. The rule of amendment is essentially a rule of justice, equity and good conscience and the power of amendment should be exercised in larger interest of doing full and complete justice to the parties before the court. Thus, the court should always give leave to amend pleadings of a party unless it is satisfied that the party applying was acting malafide. The amendment to pleading should be liberally allowed since procedural obstacles ought not to impede the dispensation of justice.

53. In this regard, reference may also be regard to judgment of the Hon'ble Supreme Court in the decision reported as **L.J. Leach and Co. Ltd. v. Messrs Jardine Skinner and Co.** AIR

1957 SC 357. The case related to a suit filed in respect of a contract giving exclusive rights to sell a product. The suit was for damages for conversion alleging that the goods in question were due to the plaintiff under the government quota and the defendants who had ordered them on their behalf had no title to them. The plaintiffs averred that in importing the goods the defendants were acting as their agents. The defendants resisted the suit alleging that the property in goods was with the defendants. The suit was decreed but the judgment was reversed in appeal where after the matter came to the Supreme Court. It was at that stage that the plaintiffs applied before the Supreme Court for amendment of the plaint by raising in the alternative a claim for damages for breach of contract for non delivery of goods which application was resisted. The Supreme Court however held that it was a fit case in which the amendment ought to be allowed. It was held that the plaintiffs had not claimed any damages for wrongful termination of the agreement but the claim is only damages for non delivery of goods in respect of orders passed by them and accepted by the defendants prior to the termination of the agreement by that notice. The agreement between the parties contained an express clause reserving the rights to the plaintiff. It was thus held that the suit being founded on a claim based on a clause in the contract could not be said to be foreign to the scope of the suit. All the allegations which were necessary for sustaining the

claim for damages for breach of contract were already in the plaint and what was lacking was only the allegation that the plaintiff in the alternative was entitled to claim damages for breach of contract by the defendants in not delivering the goods.

54. While allowing the amendment of the plaint, the Hon'ble Supreme Court emphasized that amendment should be allowed where the interests of justice so require.

55. In the decision reported as **Pankaja & Anr v Yellapa (D) by LRs & Ors** AIR 2004 SC 4102 the Hon'ble Supreme Court held that the amendment sought after substantial delay could be allowed even if barred by limitation if that sub- serves the cause of justice and avoids further litigation. In said case, the suit was originally filed for permanent injunction restraining interference with possession. The amendment sought declaration of title and a dispute arose whether the declaration sought was barred by limitation. It was held that since factual details as regards title were already mentioned in the plaint it could not be said that the amendment was for a new relief.

56. From the afore-noted judicial authorities, the legal proposition that the courts should allow amendment which does not alter the nature or character of the suit is reinforced.

57. In the instant case, suit was filed on the basis that the defendant is attempting to raise construction on the suit property and that she is not legally entitled to do the same without obtaining the consent of the plaintiff who is the co-owner of the suit property.

58. At the time of filing the suit, the plaintiff was under the impression that there exists no construction on the roof of the suit property and therefore sought partition of only ground floor of the suit property.

59. Though the fact that the plaintiff is also co-owner in respect of roof of the suit property was not specifically pleaded in the plaint but the plaintiff by seeking a decree of permanent injunction for restraining the defendant from raising any construction on the roof/first floor of the suit property impliedly pleaded that she is co-owner in respect of the roof of the suit property. And the said implied pleading was well understood by the defendant evident from the fact that she took a categorical defence that the plaintiff had no concern with the first floor of the suit property as she had raised the said construction much before the filing of the suit from her own funds and contributions made by her family.

60. It is therefore clear that by way of amendment the plaintiff has not introduced a new case but is merely bringing on record what was implied in the plaint filed by him.

61. In view of the settled legal position relating to amendment of pleadings noticed by us in the preceding paragraphs, the legal proposition that the transfer of a single storeyed building includes the roof unless the contrary is proved (See the decisions of this Court and Hon'ble High Court of Punjab and Haryana reported as **Ms.Santosh Ahluwalia v Arvind Mehta** 93 (2001) DLT 706 and **Bhal Singh Malik v Dr. Nagar Singh** 1976 RCR 145 (Pun) respectively) and the decision of the learned Trial Court while deciding the issue pertaining as to when cause of action for filing the present suit arose that the defendant had raised construction on the roof/first floor of the suit property without obtaining the consent of the plaintiff, the amendment sought was justified. But, unfortunately the plaintiff did not realize that the suit stood decreed much prior and hence the learned Trial Judge could not have entertained the application seeking amendment.

62. But in the light of the fact that the learned Trial Court has held that the defendant had raised the construction on the roof/first floor of the suit property without obtaining the consent of the plaintiff, which finding is affirmed by us, and the settled legal position that a co-owner is not entitled to raise construction of joint land without the consent of the co-owners and if does so the prejudiced co-owner is entitled to get a decree of partition in respect of said unauthorized construction (See the decisions of Hon'ble High Court of Punjab and Haryana

and Karnataka High Court reported as **Paras Ram v B.S. Amarmmeet** (1998) 120 PLR 26 and **N.S. Bangera v Rama Bangera** ILR 1989 Kar 1382 respectively), coupled with the fact that the report of the local commissioner establishes that the defendant had raised fresh constructions on the first floor we deem it fit to modify the judgment and decree dated 14.03.2002 passed by the learned Trial Court insofar it directs that the plaintiff is entitled to a decree of partition in respect of only ground floor of the suit property and direct that the plaintiff is entitled to a decree of partition in respect of entire suit property.

63. The upshot of the entire discussion is that RFA No.416/2002 is dismissed for the reason the defendant has neither been able to establish that the plaintiff was the name lender to the suit property or that the defendant had perfected her title in the suit property by adverse possession.

64. C.M.(M) No.633/2004 is disposed of as infructuous.

65. Respondent is entitled to cost against the appellant.

66. TCR be returned.

PRADEEP NANDRAJOG, J.

J.R.MIDHA, J.

October 20, 2008
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