

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

+ **RFA No. 229/2001**

% 9th February, 2011

SH. JAMIL BEG & ORS. Appellants.

Through: None.

VERSUS

SH. AZIZ BEG & ORS. Respondents

Through: None.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

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

VALMIKI J. MEHTA, J (ORAL)

1. This case is on the Regular Board of this Court since 3.1.2011 and today it is effective item No.5 on the Regular Board. It is 2.30 P.M. No one appears for the parties. I have therefore perused the record and am proceeding to dispose of the appeal.

2. The challenge by means of this Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is to the impugned judgment and decree dated 3.3.2001 whereby the suit for partition filed by the respondent No.1 was decreed granting the respondent No.1 two third share of the property No.1791 (built on 182 sq. yds.) at Kalan Mahal,

Delhi and which was purchased by a registered sale deed in the name of all the parties to the suit in the year 1954. The defendant Nos.3 to 5 were said to have sold their undivided share in the suit property to the plaintiff by a registered sale deed dated 23.4.1984 whereby the plaintiff's share got enhanced and he became owner of the $\frac{2}{3}$ rd share in the property. It was further alleged that the appellants/defendant No.1 (appellants are legal heirs of original defendant No.1 namely Bashir Beg and reference in this judgment to the appellants/defendant No.1 will include reference to the appellants who are the legal heirs of late Sh. Bashir Beg or Sh. Bashir Beg as per the context) was realizing the rent from the tenants during the life term of the mother and was paying the same to the mother and thereafter to the other brothers subsequent to the death of the mother. Later since the appellants/defendant No.1 failed to pay the rent to the other brothers and in fact filed a suit for declaration of ownership of the property, the present suit for partition came to be filed.

3. The appellants/defendant No.1 appeared and contested the suit and was supported by the defendant No.2. The other defendants supported the plaintiff/respondent No.1. It was contended by the appellants/defendant No.1 that in fact the entire monies for the purchase of the property were paid by him and therefore he was the real owner of the property and the other brothers including the plaintiffs were only benamidars. Alternative claim put forth was that the appellants/defendant No.1 had become the owner by adverse possession.

4. After pleadings were complete, trial Court framed the following issues:-

- “1. Whether the plaintiff is owner to the extent of 2/3rd share in the suit property?
2. Whether the suit has been properly valued for purposes of court fees and jurisdiction?
3. Whether defendant No.1 is absolute owner of the suit property as alleged in the written statement?
4. Whether the sale deed dated 23.4.84 in favour of the plaintiff is bogus and without consideration if so its effect?
5. Whether the plaintiff is entitled to claim rendition of accounts if so to what extent? OPP
6. Relief.”

5. The main issues which have been dealt with by the trial Court are issue Nos.1 and 3, and the findings on these issues were in favour of the respondent No.1/plaintiff. Trial Court had held that the defendant No.1 failed to prove that he had paid the consideration for purchase of the property. The trial Court has referred to the fact that the stand of the respondent No.1/plaintiff was that in fact father of the parties paid the consideration for purchase of the property, and which was purchased in the name of all the sons, and at which time the defendant No.1 was the only major person at that time, however, the defendant No.1 had just attained majority and was in fact assisting the father in the business of the father which was that of selling firewood. The trial Court has further arrived at a finding that the defendant No.1 was not recovering the rent of the property as the landlord because there was no receipt filed in the name of the defendant No.1. There is also a finding of fact that rent was

received by the father since the inception of the tenancy and who used to issue rent receipts and the father used to keep the rent which was not paid to any of the sons. Trial Court has also referred to the admission of the defendant No.1 that during the life time of the mother the entire rent was being paid to the mother for her maintenance and therefore it cannot be said that the defendant No.1 was getting the benefit of the rent recovered. Trial Court has rightly disbelieved the stand of the defendant No.1 that the property was purchased by him and the other brothers were only benami owners. So far as the plea of the defendant No.1 being owner by adverse possession is concerned, trial Court has arrived at a finding of fact that the plea of adverse possession is not easily to be accepted and that the defendant No.1 has failed to plead and prove the date from which the adverse possession began. Trial Court has further referred to the fact that the house tax bill was received in the name of all the owners and there is not even an electricity or water connection in the name of Sh. Bashir Beg/defendant No.1. The first act claiming ownership by Sh. Bashir Beg was a suit filed for declaration of ownership of the property in the year 1984 and within three months of which the subject suit for partition was filed by the respondent No.1. The trial Court has thus rightly disbelieved the plea of adverse possession of the defendant No.1.

6. Some of the relevant observations, discussions and findings of the trial Court, with which I completely agree, read as under:-

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If the contents of written statement are relied upon then uptill 1981 either the father was realizing the rent or defendant No.1 was realising the rent on behalf of the father and even after his death, whatever rent was realised by defendant No.1 was paid to the mother of the parties for her maintenance. Hence, there was no dispute and no rent was being realised by defendant No.1 for his own use and on his behalf adverse to the interest of other co-sharers. When the sale deed of immovable property is in the name of all the parties, prima-facie presumption is that all the parties are co-owners. The person who claims ownership by adverse possession has to prove it by specific and cogent evidence that from which particular date his possession became hostile to the other co-sharers. Very clinching evidence is required to prove this fact that when the limitation started running against the other co-sharers. The property was purchased in 1954. There is no averment in the written statement that since the date of purchasing the property the defendant no.1 was claiming himself absolute owner of the property. Even in evidence no specific date is given that when possession of defendant No.1 became open and hostile to the other co-sharers.

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The plea must be taken in the pleadings and a specific averment as to the point of time from which possession became adverse is necessary. When the adverse possession is pleaded the area of land and age of possession must be states specifically. The plea of adverse possession cannot be sustained in the absence of any animus possidenti. Mere possession for the statutory period is not sufficient unless there is an assertion of hostile title. In the absence of assertion of hostile, possession be if of what ever length does not ripen to title. Therefore, long possession of property is not necessarily adverse possession. A person who claims title to a property by adverse possession must definitely allege and prove as to how and when the adverse possession commenced, what was the nature of possession and whether the fact of his adverse possession was known to the real owner. In the light of this proposition of law, whether the defendant no.1 has succeeded to prove his claim of ownership by adverse possession? DW-1 deposed that his father used to collect the rent and used to issue receipts in favour of the tenants. No such rent receipt is proved on record and even if for the sake of arguments, it is admitted that defendant was issuing rent receipts to the tenants, it only proves that he was landlord qua the tenants. The landlord and owner are two distinctive rights invested in a owner of the property. One must be landlord qua a particular tenant but it is not necessary that he is owner of the property. the landlord is a person who let outs the premises and has a right to receive the rent from the tenants inducted by him, whereas ownership is

wider term and a owner has a title in the property. Firstly, no rent receipt is proved on record, secondly, there is not even an iota of evidence led on record that defendant no.1 claimed himself as owner to the exclusion of other co-owners at any point of time. DW-1 admitted that his father was working with his grand father at his firewood Taa. He was not having any other independent source of income. No evidence is led that sale consideration was paid by defendant No.1. In the facts and circumstances, presumption is that sale consideration was paid by father of the parties and property was purchased by him in the name of all his sons including those who were minors at that time.

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DW-1 has admitted that till date house tax of the property is received in the name of all the co-owners. There is no electricity and water connection in the exclusive name of Bashir Ahmed in the property in dispute. No over act was done by Bashir Beg, at any stage, expressing his intention to claim ownership of the property to the exclusion of other co-owners. The first over act claiming ownership to the exclusion of other co-sharers was done by him by filing a suit for declaration against other co-sharers seeking the relief that he was the owner of the property in dispute. The suit was filed in 1984. Although that suit stands dismissed but at once the limitation started running against the defendants from the date of filing of that suit. Within three months of the filing of the suit for declaration by defendant no.1, suit for partition has been filed by the plaintiff, hence hostility declared by defendant no.1 has not ripened into his claim for adverse possession because immediately within a short period of three months suit was preferred by the plaintiff. Hence I hold that defendant no.1 has failed to prove by leading any sufficient evidence that he has become owner of the property by adverse possession. The sale deed exists in the name of all the brothers."

7. In addition to the abovesaid finding and conclusions, the trial Court has referred to the fact that defendant Nos.3 to 5 had sold their share in the property to the respondent No.1 by sale deed dated 24.3.1984 and therefore the appellants had no locus standi to question the transfer of the shares by the defendant Nos.3 to 5 in favour of the plaintiff/respondent No.1.

8. I do not find any illegality or perversity in the impugned judgment and decree which calls for interference by this Court in appeal. This Court is not entitled to interfere with the impugned judgment and decree merely because two views are possible unless the view taken by the trial Court is perverse and causes grave injustice. There is therefore no merit in the appeal which is accordingly dismissed, leaving the parties to bear their own costs. Trial Court record be sent back.

FEBRUARY 09, 2011
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VALMIKI J. MEHTA, J.