

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

+ **RFA No.707/2010**

% **9th December, 2011**

SH. MADAN LAL Appellant
Through: Mr. Ravi Sharma, Advocate.

Versus

SH. SUNDER LAL Respondent
Through: Mr. T.C. Sharma, Advocate.

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this Regular First Appeal under Section 96 of Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 11.5.2010. By the impugned judgment, the suit of the respondent/plaintiff for possession with respect to a shop i.e. shop No.1, ground floor, BE-306, Gali No.5, Hari Nagar, New Delhi was decreed. Parties to the present case are brothers.

2. The facts, as pleaded by the respondent/plaintiff in the plaint, are that the respondent/plaintiff purchased the suit plot admeasuring 50 sq.

yds. by means of a registered sale deed dated 28.7.1990 and thereafter constructed three shops on the same out of which the disputed shop No.1 is one of the shops. It is pleaded that the appellant/defendant being a brother requested that a shop be given to him because he wanted to carry out his business therein. The subject shop was therefore given to the appellant/defendant where he started his cycle repairing business and subsequently the business of steel iron in the name of M/s S M Steel Company. The respondent/plaintiff claimed that thereafter the appellant/defendant purchased his own properties, including one shop in the property bearing No.BE-176, Hari Nagar, New Delhi and therefore having an alternative place to do business, the appellant/defendant was asked to vacate the premises but he failed to do so whereupon the subject suit for possession was filed.

3. The appellant/defendant laid two defences before the trial Court. The first defence was that the respondent/plaintiff had purchased a plot of 100 sq. yds. within the same municipal number of the property i.e. in BE-306 (in addition to the suit plot which again is on the same municipal number and which is of 50 sq. yds.), and, this plot of 100 sq. yds. was actually purchased out of the funds which were got by the
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respondent/plaintiff from the sale of the property bearing No.3/106, Subhash Nagar, Delhi which belonged to the father of the parties. It was pleaded that under an agreement/settlement, appellant/defendant was to retain the subject shop for not claiming any share in the property being plot of 100 sq. yds. which was said to have been purchased from the joint/common funds available at the time of sale of quarter No.3/106, Subhash Nagar, Delhi belonging to the father of the parties. An alternative plea of adverse possession was also set up.

4. Learned counsel for the appellant has only argued the appeal with respect to plea of adverse possession.

5. The law with respect to adverse possession is now well settled. The plea of adverse possession commences in wrong and is continued against right. The plea of adverse possession has to be established by showing open, hostile and continuous possession adverse to the true owner. Such an adverse possession has to be clearly shown preferably by very strong documentary evidence. In the present case, admittedly not a single document was filed by the appellant/defendant to prove his alleged case of adverse possession. In fact, even in the evidence filed by way of affidavit,

there is no averment as to the appellant/defendant being in adverse
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possession. In this affidavit by way of evidence, the claim is only with respect to ownership on the ground of settlement/agreement of becoming owner of the suit shop for not claiming rights in 100 sq. yds. plot which was said to have been purchased out of the funds available from the sale of quarter No.3/106, Subhash Nagar, Delhi belonging to the father of the parties. In this affidavit by way of evidence filed by the appellant/defendant there is no specific date or month or year as to when the possession was notified to be hostile to the respondent/plaintiff and how it has since continuously continued to be hostile. Obviously, therefore the appellant/defendant miserably failed to prove the plea of having become owners by means of adverse possession. Long possession cannot be adverse possession.

6. Since the counsel for the respondent has argued for sustaining the judgment also on the other ground that the settlement as pleaded was not proved, let me deal with this aspect also. This other plea which was set up by the appellant/defendant in the trial Court of the settlement, was a plea which was not proved because there is again no date, month or year of this alleged settlement. There is no documentary proof of the alleged settlement.

Further, no evidence was led before the trial Court as to in fact whether the
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funds from the property of the father were utilized for the purchase of 100 sq. yds plot. There were only respective oral statements of both the parties on this aspect. Whereas the appellant/defendant pleaded that funds utilized for the purchase of 100 sq. yds of plot on which the suit shop is constructed, were out of the funds of the father, the respondent/plaintiff on the other hand claimed that father died in the year 1960 and the subject property was already sold by the father during his life time in the year 1956. The plot of 100 sq. yds was purchased in the year 1966 i.e. six years after the death of the father and about 10 years after the sale of quarter in Subhash Nagar. The appellant/defendant has not filed any documentary evidence on record with respect to his alleged plea of the quarter having been sold after the death of the father, and, I find that his affidavit by way of evidence also fails to depose on this aspect. In fact, the affidavit by way of evidence filed on behalf of the appellant/defendant shows that the property at Subhash Nagar was probably sold during the life time of the father himself. This becomes clear when we refer to the written statement filed on behalf of the appellant/defendant, and para 4 thereof in which the averment is: “that the quarter No.3/106 Subhash Nagar, Delhi was allotted to Shri Ramesh

Rehabilitation Ministry. The above mentioned property i.e. Quater No.3/106 was sold in 1960's and Shri Ramesh Chander died" i.e. as if deposing that the Quater No.3/106 was sold even before the death of the father-Ramesh Chand.

7. Finally, I may add that plea of benami ownership of the respondent/plaintiff and the entitlement of ownership of the appellant/defendant with respect to the plot of 100 sq. yds, is in fact quite clearly barred by Benami Transactions (Prohibition) Act, 1988. I actually therefore need not have gone into details with respect to even this alleged settlement/agreement on the ground that the appellant/defendant was an alleged co-owner in the plot of 100 sq. yds. To conclude, I may add that the appellant/defendant in his cross-examination admitted categorically that the shops were constructed by the respondent/plaintiff and he was given the subject shop by the respondent/plaintiff because he was the brother of the respondent/plaintiff.

8. A civil case is decided on balance of probabilities. Once as per the title documents the respondent/plaintiff was the owner, the burden was heavily upon the appellant/defendant to prove the plea of adverse possession

or the alleged settlement (assuming it could have been raised in spite of
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Benami Transactions (Prohibition) Act, 1988) and which pleads the appellant/defendant has miserably failed to prove.

9. In view of the above, there is no merit in the appeal, which is accordingly dismissed, leaving the parties to bear their own costs. Trial Court record be sent back.

VALMIKI J. MEHTA, J

DECEMBER 09, 2011

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