

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

Date of decision: 12th December, 2013.

+ **RFA 522/2013, & CMs No.17822/2013 (for stay) & 17824/2013 (u/O VI R-17 for leave to amend W.S.)**

NANHEY KHAN **Appellant**

Through: Mr. Ajay Kumar, Adv.

Versus

SMT. KALA MEHTA **Respondent**

Through: Mr. M.M. Hasmi, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. The appeal impugns the judgment and decree (dated 26th August, 2013 of the Court of the Additional District Judge (ADJ)-01, South District, Saket Courts, New Delhi in Suit No.186/2011 filed by the respondent against the appellant) of recovery of possession from the appellant/defendant of property No.7C/6, Gandhi Park, Hauz Rani, Malviya Nagar, New Delhi.

2. The appeal came up for hearing first on 11th November, 2013, when the counsel for the respondent/plaintiff being on caveat, appeared. The appeal was admitted for hearing and the Trial Court record requisitioned. Considering the nature of the controversy and further considering that the

parties have been litigating since the year 1993 and yet further finding that the respondent/plaintiff had not been awarded any mesne profits/damages for use and occupation, with consent of the counsels, hearing was expedited and the appeal listed for today for hearing. The counsels have been heard.

3. The respondent/plaintiff sued for possession of the property, pleading:

- (i) that the respondent/plaintiff was the owner of the property;
- (ii) that the respondent/plaintiff though born a Hindu converted to Islam on the date of her marriage to the appellant/defendant on 8th September, 1981;
- (iii) that the Nikahnama contained an Ikrarnama that the appellant/defendant shall have no claim over the movable and immovable properties of the respondent/plaintiff;
- (iv) that after marriage, the appellant/defendant started living with the respondent/plaintiff in the property aforesaid owned and possessed by the respondent/plaintiff; two children from the previous marriage of the respondent/plaintiff were also residing with them in the said property;
- (v) that marital disputes arose between the parties leading to Talaq

on 16th September, 1992 and whereafter, the respondent/plaintiff returned to the religion of her birth;

(vi) that the appellant/defendant however on 21st August, 1993 filed a civil suit seeking declaration, on the basis of some forged documents, that the respondent/plaintiff had sold the said property to him, and permanent injunction restraining the respondent/plaintiff from dispossessing him from the said property;

(vii) that the said suit was dismissed by the Court of the Civil Judge on 12th September, 2007 and first appeal filed by the appellant/defendant was also dismissed on 15th January, 2009 by the Court of the ADJ, Delhi;

(viii) that the appellant/defendant had however failed to vacate the premises even though had no right thereto and inspite of a notice dated 13th February, 2009 got issued by the respondent/plaintiff in this regard.

4. The appellant/defendant contested the suit by filing a written statement, on the grounds:

- (a) that the respondent/plaintiff was not the owner;
- (b) that the suit was undervalued;

- (c) that the notice preceding the suit was defective;
- (d) that the appellant/defendant had been residing in the said property for the last 30 years and had got construction over the plot in question which was lying vacant;
- (e) that the respondent/plaintiff had left the company of the appellant/defendant without any reason and no divorce had taken place.

5. The respondent/plaintiff filed a replication.

6. On the pleadings aforesaid of the parties, the following issues were framed in the suit on 20th October, 2009:

- “1. *Whether the plaintiff is entitled to a decree for possession against the defendant? OPP*
- 2. *Relief.*”

7. The respondent/plaintiff besides herself, examined three other witnesses. The appellant/defendant besides himself, examined one another witness.

8. The learned ADJ has decreed the suit in favour of the respondent/plaintiff, finding/observing/holding:

- (I) that the appellant/defendant, in the suit earlier filed by him, had admitted that the respondent/plaintiff was the owner of the property

before marriage and had failed to prove that the respondent/plaintiff had transferred the property to him; the judgment and decree in the earlier suit filed by the appellant/defendant had attained finality;

(II) that the appellant/defendant had not led any evidence to prove to be in possession of the suit property prior to his marriage with the respondent/plaintiff on 8th September, 1981;

(III) that mere residence in the suit property as the husband of the respondent/plaintiff did not make the appellant/defendant the owner thereof;

(IV) that the appellant/defendant in the suit earlier filed by him had claimed that the respondent/plaintiff had transferred the property to him vide Agreement to Sell, Power of Attorney and Will etc. all dated 30th December, 1993 but the said documents were held to be not genuine;

(V) that the respondent/plaintiff had proved the Nikahnama, whereunder the appellant/defendant had agreed not to claim any share in the property of the respondent/plaintiff;

(VI) that the respondent/plaintiff had also proved dissolution of the marriage by Talaq.

9. The counsel for the appellant/defendant has raised only one argument. It is contended that the claim of the respondent/plaintiff for possession of the property was barred by limitation. It is argued that the cause of action for the relief of possession accrued to the respondent/plaintiff on 21st August, 1993, when the appellant/defendant had filed the suit aforesaid against the respondent/plaintiff and the suit from which this appeal arises filed by the respondent/plaintiff in the year 2009, was beyond 12 years and thus barred by time.

10. On enquiry, as to which Article of the Schedule to the Limitation Act, 1963 governs the period of limitation for such a suit, the counsel for the appellant/defendant refers to Article 65 of the Act.

11. However upon it being pointed out to the counsel for the appellant/defendant that the period of 12 years provided therein begins to run from the date when the possession of the appellant/defendant becomes adverse to that of the respondent/plaintiff and that there is no such plea of the appellant/defendant in his written statement and no such issue was claimed, the counsel for the appellant/defendant invites attention to CM No.17824/2013 accompanying with the appeal, under Order VI Rule 17 of the Civil Procedure Code (CPC), 1908 for amendment of the written

statement to take the plea that the appellant/defendant has remained in uninterrupted, hostile and continuous possession of the suit property for more than 30 years and is eligible to be declared as owner thereof, having perfected his title by way of adverse possession.

12. No case for allowing such amendment is made out. After the amendment of the CPC with effect from 1st July, 2002, no application for amendment can be allowed after the trial has commenced, unless the Court comes to the conclusion that inspite of due diligence, the parties could not have raised the matter before the commencement of the trial. Here, the trial has already been completed. There is not even a whisper in the application of any due diligence inspite of which the plea now sought to be taken by way of amendment, could not be taken earlier. The application is thus liable to be dismissed.

13. There is another aspect of the matter. The Supreme Court in *L.N. Aswathama Vs. P. Prakash* (2009) 13 SCC 229 and certain other judgments followed by this Court in *Chanan Kaur Vs. Ajit Singh* 202 (2013) DLT 433 has held that a plea of adverse possession cannot be taken in alternative to the plea of lawful possession to the property. The appellant / defendant, since the institution of the suit earlier filed by him on 21st August, 1993 and

till the final decree dated 15th January, 2009 in that proceeding, was claiming lawful title to the property and in which claim he failed. He cannot after failing in his claim for lawful title, set up a defence of adverse possession.

14. The counsel for the appellant/defendant has relied on ***Gulab Chaudhary Vs. Govinder Singh Dahiya*** (2012) 189 DLT 236 to contend that a suit for possession has to be filed within 12 years of the date, the possession of the property becomes adverse to that of the appellant/plaintiff. However, the same is not applicable as the claim of the appellant/defendant in the suit filed by him, though adversarial to the title of the respondent/plaintiff to the property, was not on the ground of hostile possession but on the ground of a lawful title and which ground the appellant/defendant could not establish.

15. No other argument has been raised.

16. There is thus no merit in the appeal, which is dismissed with costs in favour of the respondent/plaintiff. Counsel's fee is assessed at Rs.11,000/-.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

DECEMBER 12, 2013

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