

* **HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on June 3rd, 2016*
Judgment pronounced on 28th November, 2016

+ CS(OS) 2134/2006 & CC No.990/2007

SHRI RAJINDER KUMAR SETHI Plaintiff
Through: Mr.S.C.Singhal, Advocate

versus

SHRI SUSHIL KUMAR SETHI Defendant
Through: Mr.Anil Sapra, Sr.Advocate with
Mr.A.P.S.Gambhir & Mr.Dileep Mehra,
Advocates

CORAM:
HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J

1. The Plaintiff has filed the present suit for possession, damages and mesne profits. The parties are real brothers. During the pendency of the suit, the defendant (Sh.Sushil Kumar Sethi), died on 6.12.2010. His legal heirs being son and daughter have been brought on record. The subject matter of the present suit is an immovable property known by the number as A-8, Vishal Enclave, New Delhi (hereinafter referred to as 'the suit property'). As per the plaint, plaintiff is the absolute owner of the suit property; which was taken on lease from the Municipal Corporation of Delhi vide perpetual lease dated 11.5.1971. It is also the case of the plaintiff that thereafter a three storey building was constructed over the plot by him by his funds and resources. The property was converted into free-hold in favour of the plaintiff vide conveyance deed dated 5.1.2011. The plaintiff paid all the expenses from his own account for conversion of the property into free hold, and thus, claims to be the absolute owner of the suit

property, which according to him is his self-acquired property.

2. It is also the case of the plaintiff that the defendant, who is the elder brother of the plaintiff, was allowed to use and occupy the first floor and two rooms and one bath room on the second floor in the suit property out of natural love and affection. The plaintiff had never charged any consideration for use and occupation of the suit property from the defendant. The plaintiff thereafter revoked the licence so granted orally in the month of September, 2006. The defendant sought 15 days time to shift, remove all the belongings and hand over physical possession to the plaintiff, but despite the assurance so given, the property was not vacated, resultantly a legal notice dated 26.10.2006 was issued to the defendant by registered AD and certificate of posting.
3. Despite service, the defendant neither replied to the notice nor complied with the same. As per the notice, the licence with respect to the suit property was revoked and 7 days time was granted to the defendant to shift and remove all his belongings and hand over vacant possession. Since the defendant did not comply with the same, the present suit was instituted. According to the plaint, the possession of the defendant is unauthorized w.e.f. 4.11.2006, hence, the defendant is liable to pay damages and mesne profit for unauthorized use and occupation of the suit property.
4. It has further been averred in the plaint that in case the suit property was let out in the open market it would fetch rent @ Rs.30,000/- per month and accordingly, the plaintiff has claimed Rs.1,000/- per day as use and occupation charges. The plaintiff has further claimed damages and mesne profit, *pendente lite* and future till the handing over of the vacant possession of the suit property at the said rate or such other rates at which the court may consider after holding an enquiry under Order XX Rule 12

of the Code of Civil Procedure.

5. The defendant has filed his written statement and also set up a counter claim. In the written statement, the execution of the lease deed dated 11.5.1971 was not disputed, but it was disputed and denied that the plaintiff was the owner of the suit property. It has also been denied that the plaintiff built a three storey house on the said plot. According to the written statement, the ground floor of property was constructed out of the joint funds of the plaintiff and the defendant. The first and the second floor were got constructed by the defendant solely out of his funds pursuant to a family arrangement whereby the first and the second floor would belong to the defendant. It has also been denied that the entire sum for getting the property converted from lease-hold to free-hold was paid by the plaintiff alone. It is the claim of the defendant that the first and the second floor of the suit property fell to the share of the defendant by virtue of a family arrangement, which took place nearly 21 years prior to the said conversion and thus the ownership rights of the first floor and the second floor of the suit property would flow in favour of the defendant.
6. It has been categorically asserted that the entire construction above the ground floor was carried out and paid for by the defendant alone, however, as per the family settlement, the defendant allowed the plaintiff to use portion of the second floor of the suit property. Receipt of legal notice and assurance to vacate the property, as claimed by the plaintiff is denied by the defendant. The correctness of the legal notice was also denied by the defendant.
7. In the *preliminary* objections which have been raised in the written statement, it has been stated that the suit is not maintainable, is not properly valued, is barred by limitation and is also barred by the law of adverse possession. It has also been disputed and denied in the written

statement the entitlement of the plaintiff to claim damages for use and occupation.

8. An exhaustive counter claim has been filed. As per the counter claim, upon the demise of the father of the parties [late Sh.Trilok Chand Sethi] both the sons i.e. the plaintiff, Sh.Rajinder Kumar Sethi and defendant, Sh.Sushil Kumar Sethi, inherited the entire business and estate of the father, most of which was joint. In the written statement /counter claim the defendant has given details of the proprietorship concerns and other business which was started by late Sh.Trilok Chand Sethi. It has been asserted by the defendant that apart from the auction, from where the suit property was acquired, other assets / properties were also acquired out of the joint funds and / or funds from the business which was being run jointly, till they were dissolved. A list of assets acquired out of the joint funds has been detailed in the counter claim, which comprises of A-8, Vishal Enclave, (suit property) measuring 400 sq. yds., which was acquired in auction on 25.10.1970. According to the defendant, the plaintiff, defendant and their father participated in the auction and on being successful, the name of the plaintiff was got recorded by their father in order to overcome clause 1 of the terms and conditions of the auction, as per which a person, who owned a property in Delhi could not have participated in the auction and further the plaintiff was in a better position to obtain a loan. The property was purchased in the name of the plaintiff and the initial amount of Rs.10,300/- as well as the remaining instalments were paid out of joint funds, as per the counter claim. Further as per the written statement/counter claim, although the perpetual lease deed dated 11.5.1971 was executed in the name of the plaintiff alone, the plaintiff had assured that he would get the name of his brother (defendant herein) inserted as a joint / co-owner after the construction.

9. It is stated in the counter claim that the property was mortgaged by the plaintiff to secure a loan and thereafter the plaintiff in November, 1976 applied for sanction of the building plans for carrying out construction on the ground floor. After the plans were sanctioned, a dwelling unit was got constructed by using the joint funds, as detailed in the occupancy certificate on 16.5.1981. The families of the plaintiff and defendant shifted to the ground floor on 4.11.1979 prior thereto both the families were residing together in another property bearing No.B-1 Radhey Puri Delhi, measuring 175 sq. yds., which stands in the name of the defendant. It is also stated that there is no dispute with regard to the ownership and legal possession of the defendant over the property at Radhey Puri Delhi. The third property which has been mentioned by the defendant is a property known by No.D-253, Vivek Vihar, Jhilmil Tahirpur Residential Scheme, Delhi. As per the counter-claim this property was originally allotted to the father of the parties and was transferred in the name of the defendant on 20.5.1978, whereafter he is the undisputed and sole owner thereof. The aforesaid property was sold in the year 1979 with a view to carry out construction over the first floor and second floor of the suit property. The fourth property so mentioned by the defendant is B-100, Mayapuri Industrial Area, Phase-I, New Delhi, which is a 1372 sq. yds. lease-hold commercial / industrial property, which was locked into litigation between the parties, however, the plaintiff has during the pendency of this case purchased the share of the defendant by paying him Rs.5.0 crores in a suit for dissolution of partnership. It is also the case of the defendant that the entire joint family of Sh.Trilok Chand Sethi, which comprises of Sh.Sushil Kumar Sethi and Sh.Rajinder Kumar Sethi and their families had all along lived together in Krishna Nagar, Radhey Puri and thereafter at A-8, Vishal Enclave. The only reason why the suit

property was purchased in the name of the plaintiff, despite the fact that the money was paid out of the joint funds, is that the plaintiff was always based in Delhi while the father of the parties and the defendant were mainly on tour for the purpose of promoting the joint business and the plaintiff was in a position to secure a loan for constructing the property; and on account of this understanding and the assurance that at the appropriate time the name of the brother (defendant herein) would be included. It is also the stand of the defendant that after the occupancy certificate for the ground floor and garage block was obtained in May, 1981, the parties shifted to the property and a family arrangement was arrived at. As per the family arrangement, plaintiff was to assist the defendant in getting all the plans sanctioned and installation of water and electricity meters in the name of defendant.

10. As per the counter claim, it was agreed that the first and second floor of the suit property would be constructed by the defendant out of his own funds and in the event the property was to be sold, the sale proceeds would be divided equally. The defendant utilised the funds received by him from the sale of Vivek Vihar Property and from the drawings from his business for getting the construction on the first and second floor as per plans, which were sanctioned on 24.3.1988.
11. It is also the case of the defendant that in the records of the MCD the name of Mr.Sushil Kumar Sethi, defendant, and his son, Mr.Sandeep Sethi, were got noted as owners and occupants of the first and second floor of the property as during the period of construction all the officers only met the defendant and his son.
12. Reliance is placed on a notice dated 13.10.1989 received by the defendant from the MCD, which according to the defendant would confirm that the structure standing on A-8, Vishal Enclave (suit property) was under the

use and occupancy of the defendant and his son. It has also been averred in the counter claim that in the middle of the year 2003 at the request of the plaintiff, son of the plaintiff was permitted to use part of the second floor for the purpose of storage. Subsequently, additional areas were also taken over by the plaintiff.

13. It is also contention of the defendant that on account of the family arrangement between the parties and on account of the fact that the plot was purchased out of the joint funds construction over the first and second floor was carried out exclusively by the defendant, the defendant has sought a declaration that the first and second floor belongs to the defendant, and, thus, his name should be recorded in the Office of the concerned Departments. Although a plea of adverse possession has also been raised but no arguments were addressed on the plea of adverse possession. It is pointed out that an amended written statement was also filed.
14. During the life time of the defendant an application was filed seeking amendment of the written statement. Before the said application could be decided the defendant died. The legal heir, being his son, made an identical application, which was allowed.
15. While amending the written statement additional grounds were urged wherein the defendant gave details of how after partition the party stayed at Jammu with their maternal uncle and thereafter moved to Karnal and thereafter to Delhi. The father of the parties had been allotted a shop, which was sold. The parties shifted to a rented house. Additional rooms were constructed. A detailed account has been given to show that many houses were taken on rent and thereafter the parties shifted to Radhepuri and all along the parties resided together and jointly.
16. Additionally, it was brought to the notice of the Court that as per the

terms and conditions of the auction only such a person could participate, who did not own any residential property in Delhi, failing which he would incur a disqualification. Hence, it was for this reason that the name of the plaintiff was got recorded by the father of the parties in order to overcome clause I of the terms and conditions of the auction.

17. It may be noticed that replication to the first written statement was filed but no replication to the amended written statement was filed. Mr.Singhal, has clarified that by the time the amended written statement was taken on record the matter had been sent for trial and the plaintiff had even concluded his evidence.

18. On the pleadings of the parties following issues were framed on 4.7.2007 in the suit:

- “1. Whether the plaintiff is entitled to a decree of possession in respect of A-8, Vishal Enclave, New Delhi, as claimed?*
- 2. Whether the plaintiff is entitled to damages/mesne profits of Rs.2000/- from the defendant till the period of filing of the suit and @ Rs.1000/- per day for the period after filing of the suit and @ Rs.1000/- per day for the period after filing of the suit from the defendant as claimed or damages/mesne profits at any other rate? OPD*
- 3. Whether the suit is barred by limitation? OPD*
- 4. Whether the suit has not been properly valued and liable to be dismissed for want of court fee? OPD”*

19. On the same very date following issues were framed in the counter claim:

- “1. Whether the defendant is entitled to decree of declaration that he was the owner of 1st and 2nd floor and proposed owner of land underneath A-8, Vishal Enclave, New Delhi?*
- 2. Whether the defendant is entitled to mandatory injunction as claimed in the counter claim for removal of obstructions of plaintiff and his agents and servants etc in use and occupation of 1st and 2nd Floor of the property by the defendant?*

3. *Whether there was any family settlement as claimed by the defendant dated 25.10.1970 and 4.11.1979? OPD.*
 4. *Whether the counter claims have not been properly valued and are liable to be dismissed for want of proper court fee?*
 5. *Whether the counter claims of the defendant are barred under Benami Transaction Act? OPD*
 6. *Relief.”*
20. Issue no.1 in the suit and issue no.1 and 3 in the counter-claim are inter-dependent and are to be dealt together, which read as under:
“Issue no.1 in suit:
1. *Whether the plaintiff is entitled to a decree of possession in respect of A-8, Vishal Enclave, New Delhi, as claimed?*
- Issue no.1 and 3 in counter-claim:
1. *Whether the defendant is entitled to decree of declaration that he was the owner of 1st and 2nd floor and proposed owner of land underneath A-8, Vishal Enclave, New Delhi?*
 3. *Whether there was any family settlement as claimed by the defendant dated 25.10.1970 and 4.11.1979? OPD.”*
21. Counsel for the plaintiff submits that the defendant by filing the counter claim has sought decree of declaration regarding their ownership and also referred to a family settlement which amounts to an admission on behalf of the defendant that the plaintiff is the registered owner of the suit property. He also submits that the plaintiff has proved on record the perpetual lease deed and conveyance deed in his favour, he has also proved the occupancy certificate, house tax receipts, assessment orders and various notices. These documents conclusively prove that the plaintiff is the owner of the suit property.

22. Counsel further submits that the defendant has not produced any document to show that there was any family settlement dated 25.10.1970 and 04.11.1979 neither the 19 witnesses produced have proved any family settlement as claimed by the defendant.
23. Counsel also submits that the defendant failed to prove that there was any HUF of Lt.Sh. Trilok Chand Sethi. The defendant placed on record the documents of partnership deed (Ex.DW1/1) which also shows that it was a partnership firm of the original parties herein and thus by no stretch of imagination it can be said that any HUF was in existence.
24. Counsel for the plaintiff has further submitted that the arguments of the defendant that the plot was acquired jointly out of the joint funds in the name of the plaintiff, thereafter ground floor was raised out of the joint funds and 1st & 2nd floor was constructed by the defendant out of his own funds is without any basis. The stand of the defendant that the entire money for converting the leasehold rights into freehold rights was not paid by the plaintiff alone; as per family arrangement arrived on 25.10.1979 the plaintiff was to assist the defendant in getting all plans sanctioned and installation of electricity and water meters in the name of the defendant; plaintiff was to get the name of the original defendant added as the co-owner and defendant was to give up his claim on amount spent by him on construction of the ground floor and further defendant was to pay for entire construction of 1st & 2nd floor, are misconceived and baseless. None of the documents i.e. sanctioned plan, occupancy letter, house tax, electricity and water meters, are in the name of the defendant. There is no explanation as to why so-called family settlement was not given effect to and why defendant remained silent throughout.
25. In cross-examination of DW1, Sh.Sandeep Sethi admitted that there was no registered property in the name of Sh.Trilok Chand Sethi on the day of

auction. It is, thus, contended by Mr.Singhal that the stand taken by the defendant that the property stands in the name of the plaintiff in view of the stipulation in the lease is baseless.

26. Counsel also submits that Sh.Trilok Chand Sethi in his lifetime executed a Will and property acquired by him i.e. D-253, Vivek Vihar, Delhi was bequeathed to the original defendant and cash amount was bequeathed to two grand daughters and jewellery was bequeathed to wife of the plaintiff. This itself shows that there was no such family arrangement. It is also contended that the defendant has already received more than his share.
27. Counsel further submits that the defendant has placed on record a letter Ex.DW1/16 issued by MCD relating to the unauthorized construction and the said notice was replied by the plaintiff. He has further submitted that DW1 in his cross-examination admitted that the property at Vivek Vihar was sold by his father and he purchased one flat at Mumbai and even DW1 is also a member of Varun Co-operative Group Housing Society and as such this clearly shows that there was no family arrangement or joint property.
28. It is also argued by Mr.Singhal that DW1 has admitted in the cross-examination that there was nothing in writing with regard to the family arrangement and DW1 also stated that he cannot show any document to show that his father ever made payment of the house tax in respect of the 1st & 2nd floor of the suit property, or payment of lease money or charges for converting the property from leasehold to freehold. The only document produced by DW1 was a receipt of 200 bags of cement and said receipt is in the name of DW1, Sandeep Sethi, however there is no plea that DW1 constructed any floor. Moreover, in cross-examination DW1 stated that he is not aware as to how much money was spent on the construction.

29. Counsel for the plaintiff has submitted that based on the evidence the plaintiff is the undisputed owner of the suit property and the deceased defendant was only a licensee whose licence was revoked earlier orally and thereafter by issuing a legal notice dated 26.10.2006 (Ex.PW1/15).
30. Per contra, counsel for the defendant has pointed out the evidence regarding the admissions made by the plaintiff. Relevant paras of the plaintiff's cross-examination dated 16.12.2009, 21.12.2009, 8.9.2010 and 25.10.2010 are extracted as under:

"16.12.2009

.....My father was running a proprietorship concern under the name and style of M/S Trilokchand Sethi & Sons till 1973 and the said firm was trading in rubber balloons. The said business was amalgamated into M/s Tara Rubber Industries in 1973 by my father when he became partner in the said firm alongwith me and my brother...."

21.12.2009

".....It is correct that my father owned some plots at Vishwas Nagar, Delhi and the same had been acquired by the Government in the year 1962. It is correct that an alternative plot bearing no. D-253, Vivek Vihar, Phase-, Delhi had been allotted to my father in lieu of the aforementioned acquisition. It is correct that the plot bearing no. D-253, Vivek Vihar, Phase-I, Delhi had not been sold by my father during his life time. My father had passed away on 21.02.1977. The said plot bearing no. D-253, Vivek Vihar, Phase-I, Delhi had been transferred in the name of the defendant after death of our father..."

"8.9.2010

It is correct that the suit property had been purchased in an auction by Municipal Corporation of Delhi. The date of the said auction was 25.10.1970. I was present in the said auction alongwith my father and my brother, the

defendant..... It is incorrect that my father was making the bids. Volunteered. I was making the bid and my father was only guiding me.....

Q. What was the amount to be deposited at the fall of hammer?

A. Rs.10,300/-

Q. Is it correct that your father had taken Rs.5000/- from Mr.Kailash Chand Kapoor for making the deposit of Rs.10,300/-?

A. It is incorrect. Volunteered my father was having sufficient money with him.”

“25.10.2010

.....It is correct that my father owned some plots at Vishwas Nagar, Delhi and the same had been acquired by the Government in the year 1962. It is correct that an alternative plot bearing no. D-253, Vivek Vihar, Phase-I, Delhi had been allotted to my father in lieu of the aforementioned acquisition. It is correct that the plot bearing no. D-253, Vivek Vihar, Phase-I, Delhi had not been sold by my father during his life time. My father had passed away on 21.02.1977. The said plot bearing no. D-253, Vivek Vihar, Phase-I, Delhi had been transferred in the name of the defendant after death of our father....”.

31. Counsel for the defendant has also relied upon various paragraphs of the affidavit by way of evidence of defendant no.1(a).
32. Plaintiff has filed his affidavit by way of evidence and same has been exhibited as Ex.PW1/A. In his evidence plaintiff has deposed that the suit property was purchased by the plaintiff in an auction conducted by the Municipal Corporation of Delhi for a sum of Rs.41,200/- which amount was paid by him out of his own earning and perpetual lease deed dated 11.5.1971 was executed in name of the plaintiff. Original perpetual lease deed has been exhibited as Ex.PW1/2. He has also deposed that

under the scheme of granting of freehold rights, the plaintiff after depositing the necessary charges obtained a Conveyance deed dated 05.01.2001 in his name and same has been exhibited as Ex.PW1/3.

33. PW1 has also deposed that the amount of premium of the plot was paid by the plaintiff out of his own earnings and funds. Plaintiff also raised the constructions out of his own earnings and funds which were acquired from his share in the business, by selling the properties and even by selling the jewellery and by mortgaging the suit property to the Delhi Administration. It has also been deposed that after raising the construction of the ground floor and partly first floor, the plaintiff obtained the occupancy certificate and the same has been exhibited as Ex.PW1/4. Plaintiff has also been paying the house tax for the entire property. It has also been deposed that the plaintiff got constructed the upper floors i.e. the entire first floor and part of second floor after getting building plan sanctioned from the Municipal Corporation of Delhi in his own name. The house tax, assessment order and various notices received in the name of the plaintiff have been exhibited as Ex.PW1/5 to Ex.PW1/12.
34. PW1 has further deposed that after construction of the upper floors, the plaintiff allowed the defendant, who is the elder brother of the plaintiff, to live on the first floor and two rooms with bathroom on the second floor as shown in red lines in the attached plan which has been exhibited as Ex.PW1/1. He has also deposed that the defendant and his son started misbehaving with the plaintiff and his family members and as such the plaintiff asked the defendant to shift from the premises and revoked his license orally and also issued a notice dated 26.10.2006. Copy of notice dated 26.10.2006 has been exhibited as Ex.PW1/15, postal documents such as UPC have been exhibited as Ex.PW1/16 and the postal receipts have been exhibited as Ex.PW1/17. Notice was duly served on the

defendant, however, defendant did not comply with the notice and as such the defendant became unauthorized occupant w.e.f. 04.11.2006 in respect of the suit property.

35. The defendant has also filed affidavit by way of evidence of defendant no.1(a), Sandeep Sethi(DW1), who is the son of the deceased defendant. He has deposed that the original parties to the suit along with their father come from Lahore to India at the time of partition in 1947, stayed at Jammu with their maternal uncle and thereafter shifted to Karnal at their aunt's place and lastly moved to Delhi. At the first instance the family stayed for some time at a Dharamshala at Fatehpuri, Delhi. Around 1948-49, the father of the parties started a small business of toys and balloons and from the said income the family moved to a rented accommodation at 9135, Zamirvali Gali, Nawab Ganj, Delhi. The father of the parties was allotted a shop at Azad Market in lieu of the rented shop. In the meantime the father of the original parties had also taken on rent a shop no.6065 Bari Market, Sadar Bazar, Delhi. The mother of the parties passed away and the original defendant was married at the same rented home.
36. DW1 has also deposed that around 1958 the family shifted to another rented house at F-16/16, Krishna Nagar, Delhi and the defendant no.1(a) and 1(b) were born in 1962 and 1958, respectively. Around 1961, the original defendant with the assistance of his father started the business in the name of Tara Rubber Industries. At that time the plaintiff was studying and around 1964 the plaintiff joined said business. The plaintiff insisted and got a partnership deed executed on 06.04.1964 and the same has been exhibited as Ex.DW1/1. He has also deposed that the in laws of the plaintiff were not financially well off and no gold jewellery was received from them by the plaintiff. The only gold in the house was that bought by and belonging to either Sh.T.C Sethi (father of the original

parties) or the wife of the original defendant.

37. DW1 has further deposed that in 1965 the families shifted to F-11/27, Krishna Nagar, Delhi, which was also rented. The plaintiff's daughter and son were born there in 1965 and 1971, respectively. In the meantime A-1, B-3 & 4 Radhey Puri, Delhi were taken on rent by the family and a balloon manufacturing unit was set up, which was started by the defendant with the help of his father. This business was merged with Tara Rubber Industries when the partnership deed was signed on 06.04.1964. Thereafter, B-1 & B-2, Radhey Puri which comprised of some portions being used as residence and some shops was purchased in the name of the original defendant and in 1971 the family shifted to the said address.
38. DW1 has next deposed that the suit property [A-8, Vishal Enclave], was purchased in an auction in 1970. The original parties, their father and an old friend of the plaintiff, Mr.K.C.Kapoor, went for the Municipal Corporation of Delhi auction of properties. Mr.K.C.Kapoor's bid for some property was unsuccessful therefore he lent his Rs.5000/- to father of the parties. Mr.T.C.Sethi was explained the terms and conditions of the bidding (including the requirement of not owning any other property). As the original defendant and his father both had small properties in their names, Sh.T.C.Sethi and Sh.K.C.Kapoor gave Rs.5000/- each to the plaintiff to deposit with MCD after their bid for Rs.41,200/- was accepted for the suit property. A copy of the said terms and conditions of bidding has been exhibited as Ex.DW1/2. He has also deposed that the balance payment towards the cost of the plot was made by withdrawing cash from joint business funds of the original parties and their father. Around 1970 some gold was sold by Sh.T.C.Sethi to repay Sh.K.C.Kapoor's loan taken at the time of bidding.
39. DW1 has also deposed that Sh.T.C.Sethi died in 1977, but by then he had

paid all amounts towards cost of the suit property to MCD and no money was paid by the plaintiff. He has also deposed that the construction of the ground floor was carried out from the joint/business funds of the plaintiff and original defendant. The construction cost of 1st and 2nd floor was paid solely by the original defendant in 1988-89.

40. DW1 has further deposed that a property known by the number D-253 Vivek Vihar which was in the name of the original defendant was sold after both the families shifted to the suit property on 04.11.1979. As per the wishes of the father of the parties the ground floor and mumtee was constructed out of the common funds of the parties. The understanding had all along been that the joint families of the plaintiff and the original defendant will stay together. He has also deposed that a joint saving bank account was opened by the plaintiff being account no.10464179676 in the State Bank of India, Rajouri Garden, in the names of the plaintiff and the original defendant and the joint and common funds thereof were used for payment of all water/electricity and telephone etc. bills of the suit property. Copy of the pass-book has been exhibited as Ex.DW1/3.
41. DW1 has next deposed that around 1988-89, the defendant out of his own funds generated by the sale of the properties owned by him and using his share of the partnership funds got the 1st and 2nd floor constructed. He has also deposed that this was strictly in accordance with and on the understanding that the said 1st and 2nd floors were for the defendant and his family alone. The plaintiff had also all along assured that as and when the scheme for conversion of the property from leasehold to freehold was floated he would apply to get the name of the defendant included therein.
42. DW1 has also deposed that when he was to get married, on the suggestion of the plaintiff, a kitchen on the 1st floor was made operational and the family of the original defendant shifted upstairs. He has also deposed that

while carrying out the said construction all material like cement etc was purchased by either the original defendant or DW1. A copy of one bill of cement has been exhibited as Ex.DW1/4. In accordance with the understanding/settlement regarding the suit property the original defendant was getting the entire construction carried out and was all along being treated and presented as the owners even by the plaintiff. This was reinforced by the fact that after an inspection, MCD had issued a notice to Sandeep Sethi DW1 during the said construction, with respect to the alleged violations in the construction of cross-beams on the 1st and 2nd floor. A copy of the said notice has been exhibited as Ex.DW1/13. He has also deposed that the plaintiff had all along been taking care of all matters relating to any/all authorities, banks etc including getting the income tax assessment of the firms, individuals, HUFs, etc. It has also been deposed that the original as well as present defendants had all along complete faith on the plaintiff and had been signing any document etc as asked by the plaintiff.

43. Further, son of the plaintiff, Ajay Sethi stayed elsewhere and his name was accordingly deleted by the plaintiff from the ration card. He only came to stay in the said property in 2003 and he started a gym in the garage. He requested the defendant and was allowed to store gym equipments on the 2nd floor built up by the original defendant. A copy of the ration card of the plaintiff has been exhibited as Ex.DW1/8.
44. DW1 has next deposed that various businesses were started by late Sh.Trilok Chand Sethi in partnership with one or both his sons as well as in sole proprietorship. It has also been deposed that the name of plaintiff was recorded for the suit property by the father of the parties and original defendant to enable ease of getting loan, as both Sh.T.C.Sethi and the original defendant were involved in a lot of travelling and might not have

been available on an urgent basis. It has also been deposed that the initial amount of Rs.10,300/- was paid by the father of the plaintiff and the original defendant and the remaining instalments were paid out of the joint funds. It has also been deposed that the plaintiff assured the original defendant to get his name inserted as a joint/co-owner after construction is completed from the joint funds. Accordingly, the original defendant started providing funds out of the business and other savings. The plaintiff after securing a loan by mortgaging the suit property and using original defendant's funds in November 1976 applied for sanction of building plans for carrying construction on the ground floor. The said loan was repaid out of the common funds. He has also deposed that on 04.11.1979, when the entire ground floor was in a livable condition, the original parties with their families shifted to the suit property.

45. DW1 has also deposed that the entire joint family of Sh.Trilok Chand Sethi i.e. the original parties and their families had all along lived together in Krishna Nagar, Radhey Puri and thereafter in the suit property.
46. DW1 has further deposed that the plaintiff and his family has been raising, causing and putting hindrances and obstructions in the free and peaceful use of the 1st and 2nd floor of the suit property by the original defendant (since deceased) and his family as well as obstructing their easementary rights. He has also deposed that the 1st and 2nd floor of the suit property was always agreed to be under the ownership of the original defendant as per the agreement of 1970 and family arrangement of 1974 and 04.11.1979. As the original defendant (since deceased) had done his part of the said agreement and now his legal heirs have become entitled to enforcement of the remaining part of the agreement by the plaintiff by principle of part performance. A declaration to the said effect has therefore been sought in the present suit by way of counter-claim.

47. DW-1 has also deposed that the family of the defendant has been staying on the ground floor of the suit property from 1979 till 1993 and thereafter on the 1st and 2nd floor without any dispute or challenge to their right. He has deposed that even by the law of adverse possession the said portion now belong to the defendants and they deserve a declaration decree to that effect. Defendants have also claimed decree of mandatory injunction on the plaintiff to remove all the obstruction and a permanent injunction to enforce each of the above decrees.
48. Defendants have also filed affidavit by way of evidence of defendant no.1(b), Ritu Suri, who is the daughter of original defendant (since deceased) and the same has been exhibited as Ex.19/A. She has deposed on the lines of DW1.
49. As per the plaint, the plaintiff had never charged any consideration for use and occupation of the suit property from the defendant. The plaintiff revoked the license in the month of September, 2006. The defendant sought 15 days time to shift and remove all the belongings and hand over physical possession to the plaintiff, but despite the assurance the property was not vacated, resultantly legal notice dated 26.10.2006 was issued, according to which the licence with respect to the suit property was revoked and 7 days time was granted to the defendant to shift and remove all his belongings and hand over the vacant possession. Since the defendant did not comply with the same, the present suit was instituted.
50. On the basis of the evidence led and documents placed on record, plaintiff has been able to establish that he is the owner of the suit property by virtue of perpetual lease deed dated 11.05.1971 (Ex.PW1/2) and conveyance deed dated 05.01.2001 (Ex.PW1/3). Plaintiff has proved that the sanctioned plan, occupancy letter, house tax, electricity and water meters are in his name. Defendants have claimed ownership of the 1st &

2nd floor and proportionate ownership of land of the suit property by virtue of family settlement dated 25.10.1970 and 04.11.1979, however, defendants have failed to place any evidence to prove the said family arrangement/settlements. No document was produced to show that there was any family settlement and defendants also failed to provide any satisfactory explanation as to why said family settlement was not given effect. None of the witnesses so produced were able to prove or establish any family settlement between the parties. Defendant also failed to show any document or place any document on record to show any payment made by the original defendant for house tax in respect of the 1st & 2nd floor of the suit property or he made any payment of the lease amount or any payment of conversion charges for converting the suit property from leasehold to freehold. In the cross-examination of defendant no.1(a), he stated as under:

“There was nothing with regard to family arrangement which is stated to have taken place on 25.10.70, 4.11.74 and October,1979, the mention of which has been made in my affidavit. I cannot show any document which may show that my father had made payment for house tax in respect of the first and second floor of the suit property. I also cannot show any document which may show that my father had made payment of the lease amount in respect of the suit property. My answer is same with regard to the payment of charges for converting the suit property from leasehold to freehold.”

51. Defendants have failed to place on record any document to show that any amount was ever spent by the original defendant on the construction of the ground floor or 1st and 2nd floor. Only document placed on record by the defendant is a receipt of 200 bags of cement in the name of defendant no.1(a), however, same is not conclusive to prove the construction done by the original defendant on the suit property. Defendants have also failed

to show any payment regarding the suit property made from the joint funds. Defendants have placed on record one passbook of the joint account of plaintiff and original defendant, however the said passbook does not prove anything about the payments for electricity and water bill etc of suit property made as claimed by the defendant. Therefore, the plaintiff being the absolute owner of the suit property is entitled to a decree of possession with respect to the suit property.

52. In the above circumstances, issue no.1 in the suit and issues no.1 and 3 in the counter claim are decided in the favour of the plaintiff and against the defendant.

53. Coming to issue no.2 in the suit, which reads as under:

“Issue no.2 in suit:

2. *Whether the plaintiff is entitled to damages/mesne profits of Rs.2000/- from the defendant till the period of filing of the suit and @ Rs.1000/- per day for the period after filing of the suit and @ Rs.1000/- per day for the period after filing of the suit from the defendant as claimed or damages/mesne profits at any other rate? OPD”*

54. The plaintiff has claimed damages and mesne profits at the rate of Rs.30,000/-, per month, we.f. 4.11.2006.

55. During the course of hearing, learned counsel for the plaintiff had submitted that the Court can take judicial notice of the fact that the suit was filed in the year 2006 and with the passage of time the market rate of rent has increased and, thus, Rs.30,000/-, per month, is claimed.

56. On careful reading of the cross-examination, I find that there is no cross-examination or rebuttal by the defendant with regard to rate of damages/mesne profits. Although the rate of damages/mesne profits would have increased but having regard to the relationship between the parties, damages/mesne profits at the rate of Rs.30,000/-, per month, is

granted in favour of the plaintiff and against the defendant.

57. I now proceed to decide issue no.3 in the suit, which reads as under:

“Issue no.3 in suit:

3. *Whether the suit is barred by limitation? OPD”*

58. The onus of this issue was on the defendant. Defendants have claimed that the family of original defendant has been staying in the suit property on ground floor from 1979 till 1993 and thereafter on the first and second floor without any dispute or challenge to their right. Therefore, by law of adverse possession the said portion belong to defendants and hence the present suit is barred by limitation.

59. In the case of **Hemaji Waghaji Jat v. Bhikhabhai Khengarbhai Harijan & Ors.**, reported at AIR 2009 SC 103, Apex court has held as under:

“18. In Karnataka Board of Wakf v. Govt. of India MANU/SC/0377/2004 : (2004) 10 SCC 779 at para 11, this court observed as under:-

In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Nonuse of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. The court further observed that plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should

show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. 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 facts necessary to establish his adverse possession.”

60. Having regard to the above principle as laid down by the Apex Court, defendants have failed to establish adverse possession over the suit property. Defendant did not produce any evidence or anything to show that the suit is barred by limitation. The licence of the defendant was revoked by a legal notice dated 25.10.2006 (Ex.PW1/15) sent by the plaintiff and the suit was filed on 06.11.2006, therefore the suit was filed well within the period of limitation. This issue is accordingly decided in favour of the plaintiff and against the defendant.

61. The next issue in the suit reads as under:

“Issue no.4 in suit:

4. *Whether the suit has not been properly valued and liable to be dismissed for want of court fee? OPD ”*

62. The onus of this issue was on the defendant, however, defendant has not pressed this issue. The suit is valued by the plaintiff as per the market value of the suit property. This issue is, therefore, decided in favour of the plaintiff and against the defendant.

63. Coming to counter claim, issue no.2 reads as under:

“Issue no.2 in counter-claim:

2. *Whether the defendant is entitled to mandatory injunction as claimed in the counter claim for removal of obstructions of plaintiff and his agents and servants etc in use and occupation of 1st and 2nd Floor of the property by*

the defendant?”

64. The defendant has filed photographs of the gym run by Sh. Ajay Sethi, son of the plaintiff, at the suit property to show the obstructions caused by the plaintiff and his agents, servants etc in use and occupation of the suit property by the defendant. However, since the plaintiff has proved his ownership over the property and the defendant has failed to establish any right or title with regard to the suit property, this issue is decided in favour of the plaintiff and against the defendant.
65. The next issue in the counter claim was framed as under:

“Issue no.4 in counter-claim:

4. *Whether the counter claims have not been properly valued and are liable to be dismissed for want of proper court fee?”*

66. Paragraph 25 of the Counter Claim, providing the valuation of the Court fees is reproduced hereunder:

“25. The valuation of the present Counter Claim for decrees as under is calculated and affixed as under-

- (a) *For declaration of having performed part performance of Agreement and settlement dated 25/10/70 and 4/11/79 and for declaration of counter claimant as co-owner of ownership of A.8 Vishal Enclave New Delhi -27 valued under section II Article 17 (iii) of the Court fee Act at Rs.20 on which Court fee of Rs.30/- is affixed.*
- (b) *For declaration of adverse possession in favour of the Counter claimant related to ownership of A.8, Vishal Enclave New Delhi – 27 valued under section ((Article 17 (iii) of the Court fee Act at Rs.20 on which Court fee of Rs.30/- is affixed.*

- (c) *For relief of mandatory injunction to remove obstructions as detailed in paras 19 (i) to 19 (v) above, valued at Rs.20/-.*
- (d) *For relief of permanent injunction regarding all of the above, valued at Rs.20/- on which Rs.20/- has been affixed.*
- (e) *That territorial jurisdiction of the Hon'ble Court has been admitted and in any the same is there as both the parties as well as the property is situated within the Delhi.*
- (f) *That no other suit or claim has been filed regarding A-8, Vishal Enclave by Sh. Sushil Kumar Sethi who reserved its right under Order 2 Rule 2 of CP.P.C. to file any other suit for damages or other relief as and when the same arise or are found to have been arisen or are calculated accordingly."*

67. Since there is no dispute that the 1st and 2nd floor of the suit property are in possession of the defendant, I am of the view that the counter claims have been properly valued as per para 25 of the counter claim. Therefore, this issue is decided in favour of the defendant and against the plaintiff.

68. Lastly, I come to issue no.5 in the counter claim, which reads as under:

"Issue no.5 in counter-claim:

5. Whether the counter claims of the defendant are barred under Benami Transaction Act? OPD"

69. The onus of this issue was on the defendant. Plaintiff has proved his ownership over the suit property as discussed hereinabove. The defendant has claimed that the original defendant had invested money and the property was purchased in the name of the plaintiff but it is barred under the Benami Transaction Act.

70. In the case of **Duvuru Jaya Mohana Reddy vs. Alluru Nagi Reddy**

reported at AIR 1994 SC 1647, Supreme Court has held as under:

“6.In view of the said decision it must be held that the defence raised by the contesting respondents that the transaction of sale under the sale deed dated October 9, 1957 executed in favour of the appellants was a benami transaction is prohibited in view of Section 4(2) of the Act.....”

71. Section 4 of The Benami Transactions (Prohibition) Act, 1988 provides as under:

"4. Prohibition of the right to recover property held benami. - (1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.

(2) No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.

(3) Nothing in this section shall apply, -

(a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or

(b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity."

72. In view of Section 4(2) of The Benami Transactions (Prohibition) Act, 1988, this issue is decided in favour of the plaintiff and against the defendant.

73. In view of the decisions in the issues so framed, present suit is decreed in

favour of the plaintiff and against the defendants. Order dated 17.11.2006 is confirmed.

74. Defendants are directed to handover the possession of the entire first floor and two rooms & one bathroom on the second floor of the suit property as shown within red lines in the site plan, within two months of receipt of this order. Defendants shall also pay to the plaintiff damages/mesne profits to the tune of Rs.30,000/- per month together with *pendente lite* and future interest at the rate of 6%, per annum, from the date of filing of the suit till the possession is handed over.
75. Decree-sheet be drawn up accordingly.

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76. Counter claim stands dismissed in view of the order passed in the suit.

NOVEMBER 28th, 2016

//msr

G.S.SISTANI, J