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

% *Date of Decision: May 18, 2017*

+ **CM(M) 413/2017**

ASHA MALIK Petitioner

Through: Mr.N.M.Popli, Advocate with
Mr.Sushil Ahlawat, Advocate and
petitioner in person

versus

RAM NARESH DUBEY & ORS Respondents

Through: Mr.Hemant Payak, Advocate for R-1
with R-1 in person
Mr.Naresh Kumar Beniwal, Advocate
for R-4 & R-5 with R-4 & R-5 in
person

AND

+ **CM(M) 416/2017**

ASHA MALIK AND ANR Petitioners

Through: Mr.N.M.Popli, Advocate with
Mr.Sushil Ahlawat, Advocate and
petitioner No.1 in person.

versus

UMA SINGH Respondent

Through: Mr.Naresh Kumar Beniwal, Advocate
with respondent in person

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

JUDGMENT (Oral)

CM(M) 413/2017 & CM(M) 416/2017

1. The petitioner has invoked the jurisdiction of this Court under Article 227 of the Constitution of India feeling aggrieved by the order dated 30th

January, 2017 whereby the prayer made by the petitioner under Section 10 of Code of Civil Procedure for staying of the civil suit Nos. 535/06 (filed by mother) & 238/16/06 (filed by Ram Naresh Dubey, purchaser) has been declined by learned trial Court by two separate orders.

2. Both these petitions being CM(M) Nos.413/2017 & 416/2017 shall be disposed of by this common order as the ground for seeking stay of the two subsequent suits bearing Nos. 535/06 & 238/16/06 is common i.e. the Civil Suit No.28/06 was filed by the petitioner Asha Malik prior to the institution of above two suits and the matter in issue in the subsequent suit is directly and substantially in issue in the previously instituted suits by her.

3. Before considering rival contentions, it is necessary to refer to the nature of the three suits and the relationship between the parties as well the basis of their respective claims in the three suits.

4. The parties are litigating claiming their respective title in respect of the properties bearing No.C-379A, Palan Extn., Sector-7, Dwarka, New Delhi and No.C-380A, Palan Extn., Sector-7, Dwarka, New Delhi. Both these properties were initially owned by Smt.Om Kumari @ Uma Singh, who is mother of petitioner Asha Malik. Lt.Col.N.P.Singh (Retd.) is father of petitioner Asha Malik.

Civil Suit No.28/2006

5. Civil Suit No.28/06 seeking the relief of declaration, mandatory injunction and permanent injunction has been filed on 24th January, 2006 by petitioner Asha Malik impleading her mother as defendant No.1 and her father as defendant No.2 by claiming herself to be the *de facto* owner of the suit property on the basis of an 'oral gift'. In the civil suit filed by the petitioner, prayer has been made that she be declared as an absolute owner of the suit property as the same being gifted to her at the time of her marriage.

She also sought declaration that the construction raised on the portion of the suit property was by her (Asha Malik) and the alleged document of transfer, if any by her parents in favour of any other person be declared as null and void. Decree of permanent injunction has also been prayed directing her parents not to create any third party interest and they be restrained from dispossessing her and her family members from the suit property. In addition a decree for mandatory injunction was also prayed directing the defendants not to deal with the suit property in any manner whatsoever as they have no right title or interest in respect of the suit property bearing No.C-379A & C-380A, Palam Extn., Sector-7, Dwarka, New Delhi-110045.

6. In Civil Suit No.28/06 an application under Order XXXIX Rules 1 and 2 CPC was also filed wherein learned ADJ, prima facie, on the basis of the plaintiff being in possession in respect of the suit property passed an injunction order restraining the defendants from creating any third party interest and also from dispossessing her from the property till the disposal of the suit. This civil suit is still at the stage of plaintiff's evidence and the petitioner/plaintiff Asha Malik, who herself is an advocate, is enjoying possession, hence appears to be in no hurry to lead plaintiff's evidence in a suit instituted by her in the year 2006.

Civil Suit No.535/2006

7. The second suit i.e. Civil Suit No.535/2006 was filed by Smt.Om Kumari @ Uma Singh – mother of the plaintiff Asha Malik on 16th September, 2016 seeking recovery of possession and damages against the petitioner Asha Malik and her husband pleading herself to be the owner and her married daughter and her husband to be a licensee in the said property. After the lengthy trial, running over a period of eleven years, now this suit has reaching the stage of final arguments.

Civil Suit No.238/16/06

8. The third suit i.e. Civil Suit No.238/16/06 was filed by Sh.Ram Naresh Dubey in September, 2006 claiming himself to be owner of property No.C-380A, Palam Extn., Sector-7, Dwarka, New Delhi having been purchased on 17th August, 2005 from Smt.Om Kumari @ Uma Singh through registered power of attorney and other documents and the documents being witnessed by Lt.Col. N.P.Singh (Retd.), who is father of the petitioner Asha Malik and husband of owner Smt.Om Kumari @ Uma Singh. The respondent Ram Naresh Dubey - plaintiff in Civil Suit No.238/16/06 is claiming possession from the petitioner Asha Malik in respect of the property No.C-380A, Palam Extn., Sector-7, Dwarka, New Delhi on the basis of title documents.

9. Though all the three suits have been instituted in the year 2006 and trial is going on separately in all the three suits, till the Civil Suit No.535/2006 filed by Smt.Om Kumar @ Uma Singh reached the stage of final arguments, it was nowhere the case of the petitioner that the matter in issue in the previously instituted suit by her is directly and substantially in issue in the two subsequent suits, one filed by her mother i.e. Civil Suit No.535/06 and another suit i.e. Civil Suit No.238/16/06 filed by Sh.Ram Naresh Dubey who purchased the same on 17th August, 2005 i.e. much prior to the institution of the suit by the petitioner Asha Malik in January, 2006.

10. Learned Trial Court dismissed the application under Section 10 CPC in both the suits interalia for the following reasons:-

(i) While the petitioner Asha Malik is claiming the relief of declaration and mandatory and permanent injunction, the relief claimed in the other two suits is for possession/damages. Ms.Uma Singh had purchased two adjacent plots of 115 sq. Yards out of which she has already sold property No.

C-380A, Palam Extn., Sector-7, Dwarka, New Delhi to Ram Naresh Dubey, who has also filed a separate suit pending in the same Court. The suit filed by the petitioner/defendant is not proceeding ahead and still at the stage of plaintiff's evidence whereas the suit filed by her mother has reached at the stage of final arguments.

(ii) Merely because the subject matter in controversy in all the suits is the same i.e. property No.C-379A & C-380A, Palam Extn., Sector-7, Dwarka, New Delhi-110045, the matter in issue in the two suits filed by Smt.Uma Singh, mother and Ram Naresh Dubey, the purchaser in respect of property No. C-380A, Palam Extn., Sector-7, Dwarka, New Delhi-110045 is not directly and substantially the same as in the suit for declaration and injunction filed by the petitioner, Asha Malik.

(iii) The relief sought in suit filed by the petitioner/defendant Asha Malik is different from the relief sought in the suits filed by the mother and Ram Naresh Dubey as owner of the suit properties.

11. Whereas the suits for possession and damages filed by the mother of the petitioner and Sh,Ram Naresh Dubey are on the basis of title in respect of properties No.C-379A & C-380A, Palam Extn., Sector-7, Dwarka, New Delhi-110045 respectively, the petitioner, Asha Malik is claiming her title by taking the plea that suit property was gifted to her orally at the time of her marriage and as her *istridhan*. Even the plea has been taken that she has become owner by way of adverse possession as she is enjoying the uninterrupted possession for more than 14 years. The petitioner Asha Malik is claiming herself to be the *de facto* owner of the suit property. Her rights, title or interest in the suit property is yet to be adjudicated.

12. It is noteworthy that the civil suit for declaration and injunction filed by the petitioner, after the injunction was granted, the trial has not proceeded

as the case is still at the stage of plaintiff's evidence till date. It appears that after a lengthy trial when Civil Suit No.535/06 filed by her mother, Smt.Uma Singh seeking possession and damages has reached the stage of final arguments after more than 11 years, with a view to delay the final disposal of the said civil suit, she filed this application under Section 10 CPC to ensure that the suit filed by her mother is stayed and she continue to enjoy the possession which has been protected by the Court while disposing of the application under Order XXXIX Rules 1 & 2 CPC in the year 2006.

13. The civil suits filed by Smt.Uma Singh and Mr.Ram Naresh Dubey seeking possession are based on title. Civil suit filed by the petitioner is based on the plea of oral gift/istridhan/defacto owner/owner by adverse possession.

14. Legal position is well settled that no interest in the immovable property can be transferred except through registered document.

15. Since the suit filed by the Smt.Om Kumari @ Uma Singh is mature for disposal whereas the earlier instituted suit filed by the petitioner Asha Malik is still at the stage of evidence, learned Trial Court has rightly declined the prayer of the petitioner for stay of the subsequently instituted suits noting her conduct in para 9 of the order as under:-

“5. In the present matter upon completion of pleadings, issues were framed on 23.05.2008. Thereafter, matter remained pending for recording PE. Plaintiff has examined five witnesses. PW-1 and PW-2 were cross-examined at length. Upon completion of PE on 20.7.2011 matter remained pending for recording DE. Defendants have examined as many as 11 witnesses. DE was closed on 27.7.2016. It is when the matter was listed for final arguments, present application was moved seeking stay of the present suit.”

16. Explanation 1 to Section 11 of Code of Civil Procedure reads as under:

'11. Res judicata –

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Explanation I. – The expression “former suit” shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.'

17. Thus, even if the contention of the petitioner that the matter in issue in Civil Suit No.28/06 instituted by her is directly and substantially same as in the two suits subsequently instituted by her mother as owner of property C-379A, Palam Extn., Sector-7, Dwarka, New Delhi and subsequent purchaser of property No.C-390A, Palam Extn., Sector-7, Dwarka, New Delhi, decision in the suit decided prior to the Civil Suit No.28/06 shall operate as *res judicata* in terms of above explanation.

18. In the case ***Inacio Martins v. Narayan Hari Naik, (1993) 3 SCC 123***, almost identical question arose. In that case, the plaintiff had prayed for protection of his possession by a prohibitory injunction. That prayer was refused. Subsequent suit was for recovery of possession. The Supreme Court held that in the former suit the only relief that the Court could have granted was in regard to the declaration sought for, which the Court could not have granted in view of the provisions of the Specific Relief Act. The cause of action for the first suit was based on the apprehension about likely forcible dispossession. The cause of action of the suit was not on the premise that he had, in fact, been illegally and forcefully dispossessed and needed the courts' assistance for restoration of possession. In that background this Court held that subsequent suit was based on a distinct cause of action, not found in or

formed the subject matter of the former suit. The ratio of the decision has full application to the facts of the instant case.

19. The claim of the petitioner Asha Malik to be declared as owner is subject matter of adjudication in Civil Suit No.28/06, whereas other two suits seeking possession are based on title.

20. Merely because the subject matter of the three suits is properties No.C-379A and C-380A, Palam Extn., Sector-7, Dwarka, New Delhi that itself is not sufficient to stay the subsequent suits which are entirely on different cause of action i.e. seeking possession/damages on the basis of title whereas the claim of the petitioner is defqcto owner/owner by adverse possession/instridhan which are yet to be adjudicated by the learned Trial Court in the case filed by her.

21. The impugned order does not suffer from any illegality or infirmity so as to warrant exercise of extraordinary power vested in this Court under Article 227 of the Constitution of India.

22. Any observation made herein by this Court is only for the disposal of these two petitions and shall not be considered as expression on merits of case in any of the three suits.

23. The petitions are dismissed.

CM No.14237/2017 in CM(M) No.413/2017

CM No.14246/2017 in CM(M) No.416/2017

Dismissed as infructuous.

PRATIBHA RANI, J.

MAY 18, 2017

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