

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

+ **RFA No. 1008/2017**

% **Reserved on: 5th December, 2017**
Pronounced on: 8th December, 2017

MADAN LAL KHURANA & ORS. Appellants
Through: Ms. Richa Kapoor, Advocate.

versus

SANTOSH KHURANA & ORS. Respondents

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J

CM No. 43682/2017 (Exemption)

Exemption allowed subject to just exceptions.

CM stands disposed of.

RFA No. 1008/2017 & CM Nos. 43679/2017 (stay), 43680/2017 (U/o XXXIX R 2(A) & CM No. 43681/2017 (U/o XLI R 27 CPC)

1. This Regular First Appeal is filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) by the defendants in the suit impugning the judgment of the trial court dated 3.8.2017 by which the trial court has decreed the suit of the respondent no.1/plaintiff for

possession of the suit property bearing no. 172, first floor, Jagriti Enclave, I.P. Extension, Delhi as also for *mesne* profits at Rs.10,000/- per month along with the interest at 6% per annum.

2. The subject suit was filed by the respondent no.1/plaintiff against the appellants/defendants. Appellant no.1/defendant no.1 is the son of the respondent no.1/plaintiff. Respondent no.1/plaintiff is 72 years of age and her husband is 82 years of age. The property 172, Jagriti Enclave, I.P. Extension, Delhi was purchased by the respondent no.1/plaintiff by means of usual documents of agreement to sell, power of attorney etc dated 29.12.1983 and such set of documents was superseded by duly registered sale deed dated 5.3.1993 in favour of the respondent no.1/plaintiff. On payment of conversion charges a conveyance deed dated 12.2.1998 was executed and registered by the DDA in favour of respondent no.1/plaintiff. Respondent no.1/plaintiff therefore pleaded to be the owner of the suit property.

3. As per the case set up in the plaint, it was pleaded that the appellant no.1/defendant no.1 being the son of the respondent no.1/plaintiff was married in the year 1988 with the appellant no.2/defendant no.2. Plaint thereafter talks of various disputes

between the respondent no.1/plaintiff and the appellant nos. 1 and 2/defendant nos. 1 and 2. In sum and substance the facts of the case are that the appellant nos. 1 and 2/defendant nos. 1 and 2 with their children, being the appellants no. 3 to 5/defendant nos. 3 to 5, were permitted as gratuitous licencees to stay in the suit property. Respondent no.1/plaintiff further pleaded that she and her husband as also her younger son Sh. Sanjay Khurana has been harassed and troubled by the appellant nos.1 and 2/defendant nos. 1 and 2 and respondent no.1/plaintiff is pleaded to have executed a Will dated 22.6.2001 of the Jagriti Enclave property in favour of her younger son Sh. Sanjay Khurana who was taking care of the respondent no.1/plaintiff and her aged husband. The gratuitous licence of the appellants/defendants was terminated by a notice dated 6.12.2005 and thereafter the subject suit for possession and *mesne* profits was filed.

4. As per the written statement filed by the appellants/defendants the plea which was raised was that the suit property was purchased out of the joint funds. The suit property was pleaded to be joint property of the appellant no.1/defendant no.1 and his father Sh. Tilak Raj Khurana i.e husband of respondent

no.1/plaintiff. It was pleaded in the written statement that the respondent no.1/plaintiff and her husband, i.e the parents of the appellant no.1/defendant no.1 were playing into the hands of two other brothers namely Sh. Surender Khurana and Sh. Sanjay Khurana. The suit was therefore prayed to be dismissed.

5. After pleadings were complete, the trial court framed the issues and only the respondent no.1/plaintiff led evidence. Appellants/defendants led no evidence and after granting of repeated opportunities evidence of the appellants/defendants was closed *vide* order dated 8.2.2017. One more opportunity was granted subject to payment of costs of Rs.20,000/- but the appellants/defendants did not deposit the costs. Again an application was filed by the appellants/defendants for recalling of the order dated 8.2.2017 and which application was also dismissed *vide* order dated 28.7.2017. The issues which have been framed and the aspects with respect to leading of evidence are mentioned in paras 7 to 9 of the impugned judgment and these paras read as under:-

“(7) Thereafter, replication filed on behalf of plaintiff and in replication plaintiff has reiterated the facts mentioned in her plaint. From the pleadings of the parties following issues were framed by Hon’ble High Court on 24.10.2008:-

(a) Whether property no.172 Jagriti Enclave IP Extension New Delhi was acquired from the funds of the partnership firm M/s Khurana Traders and effect thereof? OPD

(b) Whether the defendants are not barred from taking the plea that the property no. 172 Jagriti Enclave IP Extension New Delhi is not owned by the plaintiff in view of the provisions of Benami Transaction (Prohibition) act, 1988? OPD

(c) Whether the plaintiff is entitled to decree of possession of the first floor of the property bearing no. 172, Jagriti Enclave IP Extension, new Delhi? OPP

(d) Whether the plaintiff is entitled to mesne profits and if so, at what rate and from which defendant? OPP

(e) Relief.

(8) In order to prove her case, the plaintiff has examined herself as PW-1. No other witness was examined on behalf of plaintiff. She relied upon the documents Ex.PW1/A to Ex.PW1/D. Vide separate statement of counsel for plaintiff dated 29.01.2015 plaintiff evidence was closed and matter was listed for DE, since the defendants failed to lead their evidence. Vide order dated 08.02.2017, right of defendants to lead DE was closed. Vide order dated 17.11.2015 chamber appeal was allowed and one opportunity was granted to defendants to lead evidence subject to cost of Rs.20,000/-, however, defendants have not shown their bonafide as they have not even deposited the costs.

(9) Thereafter, on 16.03.2017, application under Section 151 CPC has been filed on behalf of defendant no.1 seeking recall of the order dated 08.02.2017 and allow the defendant no.1 to lead evidence in his defence which was dismissed vide order dated 28.07.2017 and matter was listed for arguments.”

6. In my opinion, the trial court has rightly decreed the suit because admittedly the respondent no.1/plaintiff was the owner of the suit property. The appellants/defendants did not dispute that the title documents of the suit property were in the name of the respondent no.1/plaintiff because the case of the appellants/defendants was that the suit property was purchased out of the joint funds of the appellant no.1/defendant no.1 and his father Sh. Tilak Raj Khurana, the husband

of the respondent no.1/plaintiff. Onus of proof was therefore upon the appellants/defendants to show that the suit property was purchased out of the joint funds and that whether at all such a plea of the joint funds was available in view of the bar contained in Section 4 of the Prohibition of Benami Property Transactions Act, 1988 (in short 'the Benami Act').

7. It is already noted above that the appellants/defendants have failed to lead evidence. Once the appellants/defendants failed to lead any evidence obviously the onus of proof upon them was not discharged that the suit property was not owned by the respondent no.1/plaintiff but was owned by the appellant no.1/defendant no.1 and his father Sh. Tilak Raj Khurana. Trial court has in this regard also rightly held that the suit is barred by Section 4 of the Benami Act because the plea of the appellants/defendants was a plea of the suit property being benami in the name of the respondent no.1/plaintiff and there is no pleading or evidence of the appellants/defendants as to the appellants/defendants being covered by the exceptions contained in Section 2(9)(A) of the Benami Act, or the erstwhile Section 4(3) of the Benami Act of there existing any HUF or any fiduciary capacity or

other reason as found in the aforesaid exceptions contained in Section 2(9)(A) of the Benami Act.

8.(i) Learned counsel for the appellants/defendants argued that the appellants/defendants had an interim order in their favour which was violated by the respondent no.1/plaintiff inasmuch as during the pendency of the suit there was a gift deed executed by the respondent no.1/plaintiff in favour of her son Sh. Sanjay Khurana and that in these contempt proceedings evidence was going on and therefore the impugned judgment could not have been passed till contempt proceedings were decided by the trial court.

(ii) In my opinion this argument urged on behalf of the appellants/defendants carries no substance because this Court fails to understand as to how any issue of violation of interim order will have any bearing on the merits of the disputes in the suit as to the respondent no.1/plaintiff being the owner of the suit property and the appellants/defendants having failed to lead evidence and discharge the onus of proof of the suit property having been purchased out of the joint funds, and which plea also in any case was barred by the Benami Act. This argument of the appellants/defendants is therefore rejected.

9. Counsel for the appellants/defendants then argued that the impugned judgment and decree was a collusive decree inasmuch as respondent no.1/plaintiff was being aided and abetted by her son Sh. Sanjay Khurana, however once again this Court fails to understand this argument because how can such an argument have bearing on the merits of the matter which was as to the respondent no.1/plaintiff being the owner of the suit property and therefore the appellants/defendants who were gratuitous licencees could not stay in the suit property on account of termination of such gratuitous licence by the respondent no.1/plaintiff.

10. Counsel for the appellants/defendants then argued that the suit property was in fact purchased out of the joint funds of the partnership being carried between the appellant no.1/defendant no.1 and his father and therefore Section 14 of the Indian Partnership Act, 1932 applied however once again this argument is completely baseless because as already stated above the appellants/defendants have failed to lead evidence in support of their case and therefore a mere pleading of joint funds without any evidence led to prove the same would not mean that the suit of the respondent no.1/plaintiff/owner of the suit

property should have been dismissed. Also the plea of the suit property having been purchased out of the joint funds and that the suit property was benami in the name of the respondent no.1/plaintiff was barred by the provision of Section 2(9)(A) read with Section 4 of the Benami Act.

11. Learned counsel for the appellants/defendants then argued that respondent no.1/plaintiff failed to prove that appellants/defendants were licencees and once again this argument is meaningless because the licencees includes gratuitous licencees i.e once respondent no.1/plaintiff was the owner of the suit property and appellants/defendants who were permitted to occupy the suit property failed to show any right, title and interest in the suit property, then it has been rightly held by the trial court that the appellants/defendants were staying on account of the gratuitous licences created by the respondent no.1/plaintiff i.e allowing her son and his family to stay in the property as gratuitous licencees. This argument of the appellants/defendants is therefore rejected.

12. Learned counsel for the appellants/defendants finally argued that appellants/defendants have filed an application in this Court

under Order XLI Rule 27 CPC for leading additional evidence being C.M. No.43681/2017, however, I fail to understand as to how the present is a case of additional evidence because admittedly the appellants/defendants failed to lead evidence in spite of repeated opportunities and therefore right to lead evidence was rightly closed and in fact an application to recall the order closing evidence was dismissed and which proceedings have become final. Therefore, Order XLI Rule 27 CPC cannot be called in aid for the benefit of the appellants/defendants because this provision applies when there is some evidence already of a party in the trial court and then in such case the additional evidence is sought to be led subject to satisfying the ingredients of Order XLI Rule 27 CPC. In any case this application under Order XLI Rule 27 CPC cannot be allowed because it would amount to recalling the order closing the evidence of the appellants/defendants and which has become final. C.M. No.43681/2017 is accordingly meritless and is therefore dismissed.

13. There is no merit in the appeal. Dismissed.

DECEMBER 08, 2017
ib/Ne

VALMIKI J. MEHTA, J