

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

+ **RFA No.100/2018**

% ***12th September, 2018***

SMT. SANTOSH KUMARI

..... Appellant

Through: Mr. Himanshu Dhawan,
Advocate (M. No.9999309222).

versus

SMT. MAHENDRI & ORS.

..... Respondents

Through: Mr. Abhay Kumar, Advocate
with Mr. Sandeep Garg,
Advocate for respondent Nos.1
to 3 with respondent no.3 in
person (M. No.9560830290).

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal under Section 96 of Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff/sister against her respondent no.1/ defendant no.1/ real sister/ for possession and *mesne*

profits with respect to half portion of the property being H. No.140, Gali No.2, Bhagatan Mohalla, Village Ghonda Shahdara, Delhi as shown in Red Column in Site Plan Ex. PW1/1. The trial court has dismissed the suit essentially on the ground that documents as per which the appellant/plaintiff claims co-ownership of the suit property with the respondent no.1/defendant no.1/sister, are unregistered and unstamped documents, and therefore the said documents do not confer any title upon the appellant/plaintiff in view of the judgment of the Supreme Court in the case of ***Suraj Lamps & Industries Pvt. Ltd. v. State of Haryana and Anr. 183 (2011) DLT 1 (SC); (2012) 1 SCC 656.***

2. The facts of the case are that the appellant/plaintiff pleaded that she and the respondent no. 1/defendant no.1, both being sisters, were owners of the suit property. The said suit property was purchased by the father, Sh. Ram Saran, in the joint names of the appellant/plaintiff and the respondent no.1/defendant no.1 in terms of the set of documentation dated 03.05.1989 executed by the erstwhile owner Smt. Satya Wati. The appellant/plaintiff pleaded that her father undertook two separate constructions/ buildings on the suit plot. The

respective two portions were divided by a wall while the North side portion belonged to the respondent no.1/defendant no.1 and the South side portion was in the name of the appellant/plaintiff. The case of the appellant/plaintiff was that respondent nos.2 and 3/defendant nos.2 and 3, who are the husband and son of respondent no.1/defendant no.1 respectively, illegally entered into possession of the portion belonging to the appellant/plaintiff and therefore she was forced to file the subject suit for possession.

3. Respondent nos.1 to 3/Defendant nos.1 to 3 contested the suit and prayed for dismissal of the suit by raising various preliminary objections which are not stated in detail herein inasmuch as the same are immaterial. The main defence raised in the preliminary objection was that the suit was barred by limitation i.e. effectively the defence being of a claim of adverse possession with respect to which an issue was framed and decided by the trial court against the respondent nos.1 to 3/defendant no.1 to 3 and in favour of the appellant/plaintiff. The respondent nos. 1 to 3/defendant nos.1 to 3 pleaded that the respondent no. 1/defendant no.1 is the sole and exclusive owner of the property in question on account of adverse possession for the past 22

years since the property was purchased in the year 1989. Respondent nos.1 to 3/Defendant nos. 1 to 3 also denied that the suit property was jointly owned by the appellant/plaintiff and respondent no.1/defendant no.1. In para 2 of the written statement, it was pleaded by the respondent nos.1 to 3/defendant nos.1 to 3 that the suit property was purchased in the name of the respondent no.1/defendant no.1 by savings and funds of the respondent nos.1 and 2/defendant nos.1 and 2. There is reference to a bayana amount being paid by the respondent nos.1 and 2/defendant nos.1 and 2 to the erstwhile owner on 03.03.1989 and further that the entire amount was paid by the respondent nos.1 and 2/defendant nos.1 and 2. Suit was hence prayed to be dismissed.

4. After pleadings were complete trial court framed the issues and these issues are referred to in para 5 of the impugned judgment and this para 5 reads as under:-

“5. In view of the pleading of the parties, following issues were framed vide order dt. 04.04.2012:-

(i) Whether plaintiff is the owner of the suit property? If yes whether she is entitled to decree for possession of the same ? OPP

(ii) Whether plaintiff is entitled to recovery of damages/ mesne profits @ Rs. 5,000/- per month with effect from date of legal notice 04.03.2011 till gaining possession of the premises ? OPP

(iii) Whether the defendant has become owner of the suit premises by way of adverse possession? OPD

(iv) Whether suit is barred by limitation ? OPD

(v) Relief.

The following addl. issue as issue No. 4-A was also framed in view of the application of the defendant U/o 7 Rule 11 CPC:-

4-A Whether the minimum circle rates notified by Govt. of NCT of Delhi on 04.02.2011 applies to the suit property? If in the affirmative, whether this court does not have the pecuniary jurisdiction to entertain the suit? OPD”

5. After framing of issues, parties led evidence and these aspects are recorded in paras 6 and 7 of the impugned judgment and these paras read as under:-

“6. The plaintiff filed her affidavit by way of evidence Ex. PW 1/A and examined herself as PW-1 in support of the case. The witness deposed nothing but as per averments made in the plaint. The witness has also deposed regarding the documents i.e. Ex. PW 1/1 site plan of the suit property bearing No. 142 which is shown in red, Ex. PW 1/ 2 are the copies of the title documents, Ex. PW 1/ 3 is the copy of police report dt. 01.06.2010, Ex. PW 1/ 4 is the copy of police report dt. 11.06.2010, Ex. PW 1/ 5 is police complaint dt. 04.07.2010, Ex PW 1/ 6 is complaint dt. 08.11.2010, Ex. PW 1/ 9 is the legal notice dt. 04.03.2011, Ex. PW 1/ 10 to 14 are the postal receipts of legal notice and Ex. PW 1/ 15 to 19 are the AD Cards of the legal notice.

Plaintiff examined other witness i.e. her father as PW-2 by way of affidavit Ex. PW 2/ A.

PW-3 i.e. Sh. Tota Ram examined by the petitioner by way of affidavit Ex. PW 3/ A.

Petitioner also examined the witness i.e. Sh. Rajender as PW-4 by way of affidavit Ex. PW 4/ A. PE was thereafter closed.

7. Sh. Ranvir Singh Kanungo office of the SDM Seelampur, Delhi was examined by defendants as DW-1 appeared with the summoned record which is Khatauni in regarding village Ghonda Gujran Bangar for the

years 1988-89 in respect of Khata No. 40/71, Khasra No. 8, Area 40 Bigha 16 Biswas recorded as abadi deh. Copy of the same Ex. DW 1/1.

Defendant No. 1 examined herself as DW-1 by way of affidavit Ex.DW 1/ A who deposed nothing but as deposed in the WS.

Defendant No. 3 examined himself as DW-3 by way of affidavit Ex. DW 3/ A who deposed nothing but as deposed in the WS.

Defendant No. 5 examined himself as D5W1 by way of affidavit Ex. D5W1/ A. Witness has relied upon the documents i.e. 13 certified copies of the rent receipts marked as mark X-1 to X-13

Defendant No. 5 also examined other witness i.e. Ash Mohd. as D5W2 by way of affidavit Ex. D5W2/A.

Defendant No. 2 examined himself as D2W1 by way of affidavit Ex.D2W1/A who deposed nothing but as deposed in the WS. DE was thereafter closed.”

6. In my opinion, the trial court has committed a gross illegality in rejecting the documents Ex.PW1/2 (colly) dated 03.05.1989 allegedly on the ground that these documents are illegal documents as they are not stamped and registered. The reasoning and conclusion of the trial court is clearly faulty because these documents are of the year 1989, i.e. much prior to 24.09.2001 when by Act 48 of 2001, the provision of Section 53-A of the Transfer of Property Act, 1882 was amended alongwith related provisions of the Stamp Act, 1899 and Registration Act, 1908, and only as per these provisions, after 24.09.2001, there was a requirement for stamping and registration of the documents. It is only an Agreement to Sell and

related documents which are executed after 24.09.2001 which require stamping and registration and these aspects I have considered in detail by reference to relevant paras of the judgment of the Supreme Court in the case of *Suraj Lamps & Industries Pvt. Ltd. (supra)* in the judgment in the case of *Ramesh Chand v. Suresh Chand and Anr., 188 (2012) DLT 538* and the relevant paras 1 to 3 of which judgment read as under-

“1. This Regular First Appeal was dismissed by a detailed judgment on 28.2.2011. A Special Leave Petition was filed in the Supreme Court against the judgment dated 28.2.2011 and the Supreme Court has remanded the matter back for a fresh decision by its order dated 31.10.2011. The order of the Supreme Court dated 31.10.2011 is based on the issue of the Supreme Court passing the judgment in the case of *Suraj Lamps & Industries Pvt. Ltd. Vs. State of Haryana and Anr. 183 (2011) DLT 1 (SC)*, and as per which judgment the Supreme Court overruled the Division Bench judgment of this Court in the case of *Asha M. Jain Vs. Canara Bank 94 (2001) DLT 841*. Since the judgment of this Court dated 28.2.2011 had relied upon the Division Bench judgment in the case of *Asha M. Jain (supra)*, and which judgment was over ruled the Supreme Court in the case of *Suraj Lamps & Industries Pvt. Ltd. (supra)*, the matter was therefore remanded back to this Court.

2. Before I proceed to dispose of the appeal, and which would turn substantially on the judgment in the case of *Suraj Lamps & Industries Pvt. Ltd. (supra)*, it is necessary to reproduce certain paras of this judgment of the Supreme Court, and which paras are paras 12, 13, 14 and 16, and which read as under:-

“12. Any contract of sale (agreement to sell) which is not a registered deed of conveyance (deed of sale) would fall short of the requirements of Sections 54 and 55 of Transfer of Property Act and will not confer any title nor transfer any interest in an immovable property (**except to the limited right granted under Section 53A of Transfer of Property Act**). According to Transfer of Property Act, an agreement of sale, whether with possession or without possession, is not a conveyance. Section 54 of Transfer of Property Act enacts that sale of

immoveable property can be made only by a registered instrument and an agreement of sale does not create any interest or charge on its subject matter.

Scope of Power of Attorney

13. A power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property. The power of attorney is creation of an agency whereby the grantor authorizes the grantee to do the acts specified therein, on behalf of grantor, which when executed will be binding on the grantor as if done by him (see Section 1A and Section 2 of the Powers of Attorney Act, 1882). It is revocable or terminable at any time **unless it is made irrevocable in a manner known to law**. Even an irrevocable attorney does not have the effect of transferring title to the grantee. In *State of Rajasthan v. Basant Nehata* MANU/SC/0547/2005 : 2005 (12) SCC 77 this Court held:

“A grant of power of attorney is essentially governed by Chapter X of the Contract Act. By reason of a deed of power of attorney, an agent is formally appointed to act for the principal in one transaction or a series of transactions or to manage the affairs of the principal generally conferring necessary authority upon another person. A deed of power of attorney is executed by the principal in favor of the agent. The agent derives a right to use his name and all acts, deeds and things done by him and subject to the limitations contained in the said deed, the same shall be read as if done by the donor. A power of attorney is, as is well known, a document of convenience.

Execution of a power of attorney in terms of the provisions of the Contract Act as also the Powers-of-Attorney Act is valid. A power of attorney, we have noticed hereinbefore, is executed by the donor so as to enable the donee to act on his behalf. **Except in cases where power of attorney is coupled with interest**, it is revocable. The donee in exercise of his power under such power of attorney only acts in place of the donor subject of course to the powers granted to him by reason thereof. He cannot use the power of attorney for his own benefit. He acts in a fiduciary capacity. Any act of infidelity or breach of trust is a matter between the donor and the donee.”

An attorney holder may however execute a deed of conveyance in exercise of the power granted under the power of attorney and convey title on behalf of the grantor.

Scope of Will

14. A will is the testament of the testator. It is a posthumous disposition of the estate of the testator directing distribution of his estate upon his death. It is not a transfer inter vivos. The two essential characteristics of a will are that it is intended to come into effect only

after the death of the testator and is revocable at any time during the life time of the testator. It is said that so long as the testator is alive, a will is not be worth the paper on which it is written, as the testator can at any time revoke it. If the testator, who is not married, marries after making the will, by operation of law, the will stands revoked. (see Sections 69 and 70 of Indian Succession Act, 1925). Registration of a will does not make it any more effective.

16. We therefore reiterate that immovable property can be legally and lawfully transferred/conveyed only by a registered deed of conveyance. Transactions of the nature of 'GPA sales' or 'SA/GPA/WILL transfers' do not convey title and do not amount to transfer, nor can they be recognized or valid mode of transfer of immoveable property. The courts will not treat such transactions as completed or concluded transfers or as conveyances as they neither convey title nor create any interest in an immovable property. They cannot be recognized as deeds of title, except to the limited extent of Section 53A of the Transfer of Property Act. Such transactions cannot be relied upon or made the basis for mutations in Municipal or Revenue Records. What is stated above will apply not only to deeds of conveyance in regard to freehold property but also to transfer of leasehold property. A lease can be validly transferred only under a registered Assignment of Lease. It is time that an end is put to the pernicious practice of SA/GPA/WILL transactions known as GPA sales.” **(emphasis supplied)**

3. A reference to the aforesaid paras shows that unless there is a proper registered sale deed, title of an immovable property does not pass. The Supreme Court has however reiterated that rights which are created pursuant to Section 53A of the Transfer of Property Act, 1882 dealing with the doctrine of *part performance* (para 12), an irrevocable right of a person holding a power of attorney given for consideration coupled with interest as per Section 202 of the Contract Act, 1872 (para 13) and devolution of interest pursuant to a Will (para 14). Therefore, no doubt, a person strictly may not have complete ownership rights unless there is a duly registered sale deed, however, certain rights can exist in an immovable property pursuant to the provisions of Section 53A of the Transfer of Property Act, 1882, Section 202 of the Contract Act, 1872. There also takes place devolution of interest after the death of the testator in terms of a Will.”

7. The finding of the trial court, therefore, that the documents dated 03.05.1989 executed by the erstwhile owner in favour of the appellant/plaintiff and respondent no.1/defendant no.1 are illegal documents and cannot be looked into, is clearly illegal and set aside. Once the set of documents dated 03.05.1989 are referred to and which include Agreement to Sell, Receipt, General Power of Attorney and Will, it is clear that these set of documents show joint ownership of the suit plot as in the name of the appellant/plaintiff and the respondent no.1/defendant no.1. Accordingly, it is held that appellant and respondent no.1/defendant no.1 were co-owners of the entire property, and the appellant/defendant after construction became owner of that portion which was on the south-side.

8. I may also note at this stage that the father, Sh. Ram Saran, appeared as a witness for the appellant/plaintiff and he also confirmed the execution of the documents Ex.PW1/2 showing original joint ownership of the property in the name of the appellant/plaintiff and the respondent no.1/defendant no.1. The original documentation Ex.PW1/2 were in possession of the father Sh. Ram Saran and were brought by him in the Court including the earlier chain of title

documents in the name of the seller. The father specifically deposed with respect to the suit property being constructed in two parts for two daughters with red colour portion of the property for being given to the appellant/plaintiff and other portion being given to the respondent no.1/defendant no.1. The father also deposed with respect to moneys spent by him on construction and reconstruction. He further deposed that the respondent nos.1 and 2/defendant nos.1 and 2 were residing in the suit property as tenants of the erstwhile owner at the time when the suit property was purchased by the father with his funds in the name of the appellant/plaintiff and respondent no.1/defendant no.1. In my opinion, it has to be held that respondent no.1/defendant no.1 was not the owner of the suit property as claimed by the respondent nos.1 and 2/defendant nos.1 and 2 inasmuch as if the funds were allegedly provided by respondent nos.1 and 2/defendant nos.1 and 2, then, there was no reason why the entire original chain of title documents of the suit property would be with the father Sh. Ram Saran.

9(i) Counsel for the respondent nos.1 to 3/defendant nos.1 to 3 argued that respondent nos.1 to 3/defendant nos.1 to 3 are the owners of the suit property by adverse possession, however, the only

documents relied upon by respondent nos.1 to 3/defendant nos.1 to 3 for claiming adverse possession are electricity bills and water bills of the suit property being in the name of the respondent no.1/defendant no.1. Counsel for the respondent nos.1 to 3/defendant nos.1 to 3 also argued that address in the said ID proof of the respondent nos.1 to 3/defendant nos.1 to 3 are of the suit property and thus showing their possession of the suit property.

(ii) In my opinion, the argument urged on behalf of the respondents that they have become owners by adverse possession has to be rejected for the reasons that adverse possession has to be proved *nec vi nec clam nec precario* i.e open, hostile and continuous for a period of 12 years. Mere possession is different than adverse possession because in adverse possession there has to be claim against the world at large including the owner and that the owner does not have title and it is the person in adverse possession who has title adverse to the real owner. Counsel for the respondent nos.1 to 3/defendant nos.1 to 3 could not dispute that these respondent nos.1 to 3/defendant nos.1 to 3 have not made any application for mutation with the local authorities of the property in the name of the respondent

no.1/defendant no.1 that respondent no.1/defendant no.1 is the sole owner of the suit property. It is also important to note that these respondents have also not filed any document filed with any public authority including income tax authority establishing that defendant no.1 is the only owner of the suit property. Courts look at towards a plea of adverse possession with disfavour, unless the same is proved to the satisfaction of the Court because the claim of adverse possession begins in a wrong and continues against, a right i.e. the right of the true owner and title of the true owner. Even tenants get electricity and water connections in their names and therefore, in the facts of this case, merely because of electricity and water bills being in the name of defendants 1 & 2 it cannot be held that they have become owners by adverse possession. In the opinion of this Court, respondents have miserably failed to prove their adverse possession *nec vi nec clam nec precario* and therefore it is held that respondent no.1/defendant no. 1 or respondent nos.1 and 2/defendants no. 1 and 2 have failed to prove that they have become owners by adverse possession of the suit property.

10. I may note that though the suit is for possession and *mesne profits* but since the appellant/plaintiff has failed to prove rate of rent prevailing in the area therefore no *mesne profits* can be granted to the appellant/plaintiff.

11. In view of the aforesaid discussion, this appeal is allowed. Impugned judgment of the Trial Court dated 17.11.2017 is set aside. Suit for possession filed by the appellant/plaintiff is decreed with respect to the red colour portion shown in the site plan Ex.PW1/1 being the Southern portion of the property being H. No.140, Gali No.2, Bhagatan Mohalla, Village Ghonda Shahdara, Delhi. Appellant/plaintiff is also entitled to costs of this appeal as also the suit and which are quantified at Rs.1 lakh and which costs shall be payable by respondent nos.1 to 3/defendant nos.1 to 3 to the appellant/plaintiff within a period of six weeks from today.

SEPTEMBER 12, 2018
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VALMIKI J. MEHTA, J