

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

+ **RFA No.589/2018**

% **25th July, 2018**

ASHA MALIK & ANR. Appellants

Through: Mr. Sanjeev Salhan, Advocate
with appellant no.1 in person.

versus

UMA SINGH Respondent

Through: Mr. Naresh Kumar Beniwal,
Advocate.

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. No.29414/2018(exemption)

1. Exemption allowed subject to just exceptions.

C.M. stands disposed of.

C.M. No.29413/2018(for condonation of delay)

2. For the reasons stated in the application, delay of 75 days

in re-filing the appeal is condoned.

C.M. stands disposed of.

RFA No.589/2018 and C.M. No.29412/2018(stay)

3. This Regular First Appeal under Section 96 of Code of Civil Procedure, 1908(CPC) is filed by the defendants in the suit impugning the judgment of the Trial Court dated 30.1.2018 by which trial court has decreed the suit for possession and *mesne* profits filed by the mother/respondent/plaintiff/Smt. Uma Singh. Smt. Uma Singh is the mother of the appellant no.1/defendant no.1. Appellant no.2/defendant no.2 is the husband of the appellant no.1/defendant no.1 ie appellants/defendants are wife and husband.

4. The facts of the case are that the subject suit was filed by the respondent/plaintiff pleading ownership of the residential property bearing no.C-379-A, Palam Extension, Amberhai Road, Sector-7, Dwarka, New Delhi-45 on a plot admeasuring 115 sq yds. Respondent/plaintiff pleaded that she had purchased the suit property from the earlier owner Sh. Ranbir Singh Malik by means of usual set of documents of Agreement to Sell, General Power of Attorney, Will etc dated 31.10.1988 (Ex.PW1/9 to Ex.PW1/13). The earlier title documents in favour of Sh. Ranbir Singh were filed and proved as Ex.PW1/4 to Ex.PW1/8 and which are also the same set of documents

being Agreement to Sell, General Power of Attorney and Will etc. The original allottee of the suit property was Mr. Kewal and who executed the transfer documents of the suit property in favour of Sh. Ranbir Singh Malik on 12.9.1988 being the documents Ex.PW1/4 to Ex.PW1/8. In favour of Mr. Kewal, ownership of the suit property was in terms of the allotment letter-cum-receipt of the Gram Panchayat dated 31.8.1984/Ex.PW1/3 and the Praman Patra dated 31.8.1984 of the Gram Panchayat /Ex.PW1/2. The respondent/plaintiff pleaded that on the request of the appellants/defendants, in July, 1997 they were allowed to stay in the suit property as the respondent's/plaintiff's husband in April, 1995 went to Navi Mumbai to take possession of the newly completed flat of the Army Welfare Housing Organization which was booked by the husband of the respondent/plaintiff. The respondent/plaintiff thereafter in August, 1995 joined her husband at Navi Mumbai. At the time of going to Navi Mumbai the suit property was handed over for being taken care of by respondent/plaintiff's husband's younger brother Sh. Devender Singh, and thereafter in July, 1997 appellants/defendants were allowed to live in the suit property at the

request of the appellants w.e.f 5.8.1997. The respondent/plaintiff pleaded that her daughter/appellant no.1/defendant no.1 became very rude with her and on the respondent/plaintiff visiting the suit property on 12.5.2004, it was found that the locks which the respondent/plaintiff had put in the room which contained her belongings were broken by the appellants/defendants. The appellants/defendants misbehaved with the respondent/plaintiff. Since the appellants/defendants failed to vacate the suit property, the respondent/plaintiff served a Legal Notice dated 31.3.2006 terminating the licence (gratuitous) of the appellants/defendants, and thereafter filed the subject suit for possession and *mesne* profits.

5. The appellants/defendants contested the suit by filing their written statement. It was pleaded by the appellants/defendants that they have been living in the suit property for 14 years and hence they have become owners by adverse possession. It was also pleaded by the appellants/defendants that under a Family Settlement of the year 1988-89, it was agreed that the suit property would be given to the appellant no.1/defendant no.1 at the time of her marriage and consequently this suit property came to be owned by the appellant

no.1/defendant no.1 as being given as a gift in her marriage. It was also pleaded by the appellants/defendants that they raised construction in the suit property from December, 1998 to February, 1999. Suit was therefore prayed to be dismissed.

6. After pleadings were complete, trial court framed the following issues:-

“(i) Whether the suit of the plaintiff as against the defendants is without any cause of action as claimed by the defendants in the preliminary objection no.1 of their written statement? OPD.

(ii) Whether the defendant no.1 has become de facto owner of the suit property as alleged in the written statement? If so, its effects? OPD-1.

(iii) Whether the plaintiff gifted the suit property to the defendant as alleged in the written statement? OPD.

(iv) Whether the plaintiff is the owner of the suit property? OPP.

(v) Whether the plaintiff is entitled for the decree of possession as claimed in the prayer clause of the plaint? OPP.

(vi) Whether the plaintiff is entitled for the decree of any damages/mesne profits? If so, what amount and for what period? OPP.

(vii) Whether the plaintiff is entitled for the decree of permanent injunction as claimed in the prayer clause of the plaint? OPP.

(viii) Relief.

3.(a) Vide order dated 02/03/2010, following two additional issues were framed by the Court:-

(1) **Issue No.2A**:- Whether the plaintiff has contributed any amount towards the purchase and construction over the suit property? If so, what is its effect? OPD-1.

(2) **Issue No.2B:-** Whether the defendant no.1 alternatively becomes the owner on account of the adverse possession? OPD.”

7. Parties led evidence, and summary of which is recorded in paras 4 to 5(k) of the impugned judgment, and these paras read as under:-

“4. Plaintiff examined five witnesses in support of her case i.e. PW1 Smt. Uma Singh, PW2 Lt. Col. (Retd.) Narendra Pratap Singh, PW3 Lt. Col. Yashpal Kajla, PW4 ASI Pinki Dhaniya and PW5 Sh. Krishan Kumar.

4.(a) Plaintiff Smt. Uma Singh deposed as PW1 and filed her affidavit of evidence Ex. PW1/A in which she deposed the same facts as mentioned in the plaint. PW1 relied upon the following documents in support of her evidence:-

- Ex. PW1/1 is the site plan of the suit property.
- Ex. PW1/2 is the original Gram Panchayat Palam, Praman Patra dated 31/08/1984, vide which suit property was allotted in favour of Mr. Kewal S/o. Sh. Deep Chand.
- Ex. PW1/3 is original L.R. Form/Receipt dated 31/08/1984 issued by Gram Panchayat, Palam Village, New Delhi-45 regarding deposit of fees of Rs.51.75 by allottee Mr. Kewal S/o. Sh. Deep Chand.
- Ex. PW1/4 to Ex. PW1/8 are the original Agreement to Sell, G.P.A, Affidavit, Receipt and Will, all dated 12/09/1988 executed by Sh. Kewal regarding sale of suit property to Sh. Ranbir Singh Malik for an amount of Rs.25,000/-
- Ex. PW1/9 to Ex. PW1/13 are the original Agreement to Sell, G.P.A, Affidavit, Receipt and Will, all dated 31/10/1988 executed by Sh. Ranbir Singh Malik regarding sale of suit property to plaintiff Smt. Om Kumari (@ Smt. Uma Singh) for an amount of Rs.50,000/-.
- Ex. PW1/14 is the original Extract of Govt. of Maharastra Gazette of 30/11/2000 showing change of name of the plaintiff from Smt. Om Kumari to Smt. Uma Singh.

- Ex. PW1/15 is the original registered Will dated 10/12/1999 executed by plaintiff through which she bequeathed the suit property to her son Vikram Khazan.
- Ex. PW1/16 is Legal Notice dated 31/03/2006.

4.(b) PW2 Lt. Col. (Retd.) Narendra Pratap Singh filed his affidavit of evidence Ex. PW2/A through which he supported the plaintiff's case. PW2 relied upon the following documents in support of his evidence:-

- Ex. PW2/1 is MTNL Telephone Bill for the period of 01/11/1995 to 31/12/1995, in which the residence of PW2 is that of suit property i.e. C-380A, Palam Extension, New Delhi-45.

- Similarly documents Ex. PW2/2 to Ex. PW2/6 show the residence of PW2 as that of suit property.

-The receipt dated 25/05/1981, Ex. PW2/7, issued by Hindustan Petroleum mentions the residence of PW2 as H. No. 145, Pratap Chowk, Delhi Cantt, New Delhi.

- The complaints made by PW2 against defendant no.1 to the police and NHRC are Ex. PW2/9 and Ex. PW2/10.

- The Statement of Account Ex. PW2/12 to Ex. PW2/15 shows withdrawal of different amounts by defendant no.1 from Bank Account of PW2 upon cheques issued in her favour from time to time by PW2 from dated 06/12/1999 to 23/07/2003.

4.(c) PW3 Lt. Col. Yashpal Kajla is son of the plaintiff. He also supported the case of plaintiff. He deposed that there was no family settlement to gift the suit property to defendant no.1 on her marriage, neither was it gifted to defendant no.1. He deposed that defendant no.1 did not contribute money in purchase of suit property. He deposed that his parents had sufficient funds to purchase the suit property. He deposed that his mother was owner of the suit property, whereas, defendants are in unauthorized user and occupation of the same since 01/05/2006.

4.(d) PW4 ASI Pinki Dhaniya produced the record of DD No.37B dated 18/06/2004, Ex. PW4/1 (OSR).

4.(e) PW5 Krishan Kumar produced the summoned record of registered Will Ex. PW1/15.

5. Defendants examined 11 witnesses in favor of their defence. DW1 Smt. Asha Malik filed her affidavit of evidence Ex. DW1/A in

which she deposed on the lines of her written statement. The relevant documents relied upon by DW1 in her testimony are as follows:

- The site plan of the suit property filed by the defendants is DW1/1.
- The photographs of the suit property alongwith negatives are Ex. DW1/2 to Ex. DW1/7.
- The photocopy of electoral card of defendant no.1, dated 09/05/1994 to show that she was resident of suit property as on 09/05/1994 is Ex. DW1/9.

5.(a) DW2 Girjesh Kumar, peon in MDH School, Janak Puri, New Delhi, produced the summoned record regarding admission of Master Rohit Malik, son of the defendants, the copy of which is Ex. DW2/1.

5.(b) DW3 HC Vishram Singh only stated that the office record of kalandra upto 31/12/2008 had been destroyed as per rules.

5.(c) DW4 John P. Minj, Sub-Regional Employment Officer, Directorate of Employment, Delhi University Campus, deposed that the record regarding issuance of I card by Directorate of Employment to defendant no.1 was not traceable in the office.

5.(d) DW5 Amitabh Srivastava, Clerk, Shiksha Bharti Public School, Sector-7, Dwarka, New Delhi, produced the admission register regarding admission of Master Rohit Malik in the school.

5.(e) DW6 Mahender Singh, UDC, Election Department, produced the summoned record regarding electoral roll of AC-30, Palam, for the year 2005 & 2008.

5.(f) DW7 Ct. Lekhram produced the summoned record regarding DD No.31, 04/03/2006 and stated that the complaint register had been destroyed as per rules.

5.(g) DW8 Sanjeev Narang, Chief Section Supervisor, MTNL, produced the computer generated record of telephone installed in the name of defendant no.2 at the suit property. As per record, the telephone was installed on 25/07/1997 and was permanently closed on 31/12/2004. The installation reports are Ex. DW8/1 and Ex. DW8/2.

5.(h) DW9 Achche Lal produced the summoned record of account opening form of Sunny Overseas.

5.(i) DW10 Amitabh Srivastava, Shiksha Bharti Public School, produced the summoned record, as per which the son of defendants was admitted in the said school on 11/01/1997.

5.(j) DW Dr. Nikhil Mehta, Safadarjang Hospital, was inadvertently examined as PW10. He stated that summoned record was not available in the hospital, being already destroyed as per rules.

5.(k) DW11 Chittar Singh produced the summoned record regarding driving licence detail of defendant no.1.”

8. In my opinion, trial court has rightly held that the appellants/defendants have failed to prove that they had contributed Rs.52,000/- towards purchase of suit property as was alleged by the appellants/defendants because no proof whatsoever has been filed with respect to appellants/defendants having contributed towards purchase of the suit property. Trial court also has rightly held that case of the appellants/defendants is vague because if they gave only Rs.52,000/- towards purchase the suit property then it is not pleaded or proved that what was the balance sale consideration and how this balance sale consideration was paid by the appellants/defendants to the respondent/plaintiff. This is so observed by the trial court in para 8(ii) of the impugned judgment, and this para 8(ii) reads as under:-

“8.(ii) The defendants took the defence but did not prove that defendant no.1 actually contributed Rs.52,000/- towards purchase of suit property. The defendants did not mention what was the consideration amount for purchase of the suit property and how much

balance amount was contributed by husband of the plaintiff. The money receipt dated 31/10/1988, Ex. PW1/12, executed by Sh. Ranbir Singh Malik in respect of the sale of the suit property to the plaintiff is itself in the amount of Rs.50,000/-. Thus, defendant no.1 could not have contributed Rs.52,000/- as part purchase amount of the suit property. Defendant No.1 gave no proof that she was earning in the year 1988 to be able to contribute towards purchase of the suit property. In fact, she admitted in cross examination that she had completed her graduation in the year 1988. Thus, in order to prove issue no. 2A defendants led no evidence that defendant no.1 had contributed money towards purchase of the suit property.”

9. Trial court in my opinion has also rightly held that appellants/defendants have failed to prove their case of adverse possession. Trial court has held that requirement of adverse possession is that possession must be *nec vi, nec clam, nec precario* i.e open, hostile and continuous and in this regard the appellants/defendants had failed. Trial court has rightly observed that there is a difference between possession and adverse possession and merely that appellants/defendants proved themselves to be in possession would not mean that they would be taken to have become owners by adverse possession because there is no pleading or evidence filed as to how and on what basis there was assertion of the title by the appellants/defendants and what was the point of time when the possession of the appellants/defendants became adverse to that of the respondent/plaintiff. The relevant observations of the trial court in

this regard are contained in para 8(iv) to 8(ix) of the impugned judgment and these paras, with which I agree, read as under:-

“8.(iv) The defendants claimed that defendant no.1 had become de facto owner of suit property by continuous and interrupted possession over the suit property for 14 years before filing of the plaint. In the alternate, defendants pleaded ownership by way of adverse possession over the suit property.

8.(v) The defendants pleaded that they came in possession of the suit property in September-1991, whereas, the plaintiff and her husband shifted to the suit property in October-1991. As per written statement, the plaintiff and her husband permanently shifted to Navi Mumbai in April-1995 without their belongings. On the other hand, plaintiff pleaded that she went to Navi Mumbai in August-1995 to temporarily stay there with her husband for two years. The suit was instituted on 06/10/2006.

8.(vi) The defendants did not specifically plead in the written statement at what point of time their possession became adverse to the interest of plaintiff. A mere long and uninterrupted possession of even more than 12 years is not enough to constitute adverse possession unless it was openly hostile to the knowledge of actual owner. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. In this case, the defendants, on one hand pleaded that the suit property was gifted to defendant no.1 by plaintiff on her marriage in the year 1991, on the other hand, they pleaded adverse possession of the same. In the former situation they claimed title through the plaintiff, whereas, in the latter, against the plaintiff. The defendants took contradictory stand by asserting ownership through as well as against the plaintiff. The claim of 'de facto' ownership of the suit property is completely alien to law, regarding which issue no. 2 was framed.

8.(vii) In Karnataka Board of Wakf Vs. Govt. of India (2004) 10 SCC 779 Hon'ble Supreme Court observed that in the eyes of law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time would not 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', i.e. peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that the possession is adverse to the true owner. The person who claim 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.

8.(viii) 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.

8.(ix) In the present case, the defendants pleaded that they obtained possession of suit property from the plaintiff and her husband, which runs contrary to the defence of adverse possession. The defendants did not plead at what point of time they asserted ownership and denied the title of plaintiff over the suit property. Considering the fiduciary relationship of mother- daughter between plaintiff and defendant no.1, it became all the more necessary for defendants to adduce specific evidence of hostile possession over suit property to the knowledge of plaintiff for the statutory period. In the absence thereof, the defence of adverse possession must fail.”

10. Trial court has also held that the appellants/defendants have to fail on the ground that there was any gift of the suit property in favour of the appellant no.1/defendant no.1 at the time of her marriage, because there cannot be a gift in favour of the appellant no.1/defendant no.1 without the gift being by means of a registered instrument as required by Section 17(1)(b) of the Registration Act,

1908. I may note that actually the relevant provision in this regard is Section 123 of the Transfer of Property Act, 1882 which provides that when there is gift of an immovable property then the gift can only be by a registered document and which has to be appropriately witnessed.

11. The only argument which is urged on behalf of the appellants/defendants before this Court is that trial court has gravely erred in arriving at a finding that the suit property was not gifted to the appellant no.1/defendant no.1 at the time of her marriage. It is argued that as per law oral gift is permissible and that there is no necessity that when a gift of an immovable property is made to an unmarried daughter by the parents at the time of her marriage, then such a Gift must be by a registered gift deed. Reliance in support of this argument is placed upon the judgment of the Supreme Court in the case of ***Kamla Devi and another Vs. Bachu Lal Gupta and others, AIR 1957 SC 434*** and a Division Bench judgment of Andhra High Court in the case of ***Bhubaneswar Naik Santoshrai Vs. The Special Tahsildar Land, AIR 1980 AP 139.***

12. Before discussing the legal issue as to whether appellants/defendants can take up a case of an oral gift of an

immovable property, for the sake of arguments let us presume that oral gift of an immovable property is permissible. The issue is that whether the appellants/defendants have proved that the respondent/plaintiff/mother gave an oral gift of the suit property at the time of marriage of the appellant no.1/defendants no.1 with the appellant no.2/defendant no.2, and that possession was delivered to appellant no.1/defendant no.1 on 24.4.1991 i.e the very next date of the marriage which was solemnized on 23.4.1991. The best proof that a thing has happened is the fact that it is shown to have been acted upon as such. If the appellant no.1 was gifted the suit property, then the appellant no.1 would also have acted as an owner of the suit property from 24.4.1991. However it is seen that from 24.4.1991 till the suit was filed on 16.9.2006 appellants have not applied for mutation of the suit property in the name of the appellant no.1 in the Municipal Corporation record. Also, neither there is any receipt issued by the Municipal Corporation for house tax in the name of the appellant no.1 nor the appellant no.1 has filed and proved any receipts of house tax showing that she acted as an owner by making payment of the house tax of the property from the year 1991 till the suit was

filed in the year 2006. Also no income tax returns or any other public record, or even a private document executed by the respondent/plaintiff, has been filed by the appellants/defendants that the suit property stands gifted to the appellant no.1/defendant no.1/daughter by the respondent/plaintiff/mother. Therefore I reject the argument urged on behalf of the appellants/defendants that the suit property was orally gifted to the appellant no.1/defendant no.1 at her time of marriage.

13. On the legal issue as to whether there can be an oral gift of an immovable property, the counsel for the appellants/defendants has relied upon the Supreme Court judgment in the case of ***Kamala Devi (supra)***, however I note that the relevant portion of the judgment which is relied upon by the counsel for the appellants/defendants in fact goes against the appellants/defendants because in this para Supreme Court has specifically stated that a gift becomes legally effectively only when a registered instrument is executed in the manner laid down in Section 123 of the Transfer of Property Act. The judgment in the case of ***Kamala Devi (supra)*** therefore does not help the appellants/defendants but goes against the appellants/defendants.

Reliance placed by the counsel for the appellants on the Division Bench judgment in the case of ***Bhubaneswar Naik Santoshrai (supra)*** on a legal proposition appears to be justified, however with all respect and humility, I cannot agree with the observations of the Division Bench of Andhra High Court in the case of ***Bhubaneswar Naik Santoshrai (supra)*** inasmuch as if the ratio of ***Bhubaneswar Naik Santoshrai (supra)*** is accepted the same will set at naught the specific provision of Section 123 of the Transfer of Property Act which provides in so many words that gift of an immovable property can only and only be by means of a registered instrument and which is to be appropriately witnessed. In fact the judgment of the Andhra High Court in the case of ***Bhubaneswar Naik Santoshrai (supra)*** does not refer to the judgment of the Supreme Court in the case of ***Kamala Devi (supra)*** which specifically holds that the Gift Deed of an immovable property becomes valid only when it is effected by a registered instrument in the manner provided in Section 123 of the Transfer of Property Act.

14. These days, courts are flooded with litigations where it is found, and this I say so with some amount of hesitation, that children

have become greedy and have relations towards their parents only for taking property of the parents. This aspect has been vividly shown in a recent Hindi movie “102 Not Out”. Obviously facts of this case are some sort of a type of the script of the Hindu movie “102 Not Out”. Here we have a daughter and her husband who are harassing her aged mother who is today about 75 years of age, and the mother is getting this reward of putting her daughter and her husband /appellants in the suit property so that it would have helped her daughter and her husband, a hope which is quite clearly belied in view of the *malafide* and dishonest actions of the appellants/defendants. Therefore, finding no merits in this appeal, the same is dismissed with costs of Rs.2 lacs which shall be paid by the appellants/defendants to the respondent/plaintiff/mother within a period of six weeks from today.

15. Appeal is dismissed and disposed of accordingly.

JULY 25, 2018
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VALMIKI J. MEHTA, J