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

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Delivered on : 13th March, 2020

+ **RFA 409/2018 and CM APPL No.19824/2018**

PREM LAL & OTHERS

..... Appellants

Through: Mr.Abhinav Hansaria, and
Mr.Nikhil Sharma, Advocates.

versus

DEEPAK BADHWAR

..... Respondent

Through: Ms.Deepika V.Marwaha,
Ms.Gayatri Puri, Ms.Kalpna,
Mr.Alok Pandey, Ms.Raunika
Johar, Advocates.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This appeal is preferred by the appellants against the judgment and preliminary decree dated 25.01.2018 passed by the learned Additional District Judge-5, South District, Saket Courts, New Delhi (hereinafter referred as the learned '*Trial Court*') in CS No.7746/2016 whereby the suit filed by respondent for possession and mesne profit was decreed for the relief of possession against the appellants.

2. The dispute pertains to a part of land in property bearing No.Y-84, Hauz Khas, New Delhi-110016, admeasuring 800 square yards (668.90 square meters) hereinafter referred as the '*disputed property*'.

3. The facts in brief and as alleged are - on 27.11.1963 the DLF Housing and Construction Private Limited executed a sale deed in favour of one Smt.Dhanwanti in respect of the disputed land and in the year 1970 the appellants came in possession of the part of the disputed property admeasuring 113.70 square yards (95.06 square meters) (hereinafter referred the 'suit property') as servants and are in uninterrupted and exclusive possession thereof.

4. In the year 1976 the Urban Land (Ceiling and Regulation) Act, 1976 (hereinafter referred to as the "Act"), was enacted in which a ceiling limit was prescribed and no person was entitled to hold any vacant land in excess of such ceiling limit. For Delhi, the ceiling limit was fixed at 500 square meters (approx 600 square yards). Section 20 of the Act empowered the Government to exempt excess ceiling land on such terms and conditions as may be specified.

5. On 11.05.1978, the Delhi Government passed an exemption order No.F.36(11)/869/76/I&B(ULC) whereby in exercise of powers and discharge of its functions under Section 20(1) of the Act it exempted excess vacant land admeasuring 168.90 square meters (approx 200 square yards) out of the disputed property with following stipulation:-

"iv. That the excess vacant land will not be transferred to any other person by sale, gift, lease or otherwise without the previous permission of the Government (presently the Lt. Governor, Delhi). However, there will be no objection to mortgage (without possession) the vacant land so exempted to support financial loan from a bank or a financial institution."

6. On 09.08.1978 Dhanwanti entered into an Agreement to Sell with late Shri. A.K. Badhwar (original plaintiff No.1) and late Smt.Sukanya Badhwar (plaintiff No.2) and the respondent No.1/Plaintiff No.1(a)

herein for selling 500 square meters (600 square yards) out of the disputed property. The ATS noted *presently transferable only 500 square meters* and the responsibility of vacation of unauthorised occupants would be of the vendor. On 14.05.1979 the competent authority under Section 26 & 27 of the Act issued a certificate in favour of the original owner certifying Delhi Government does not wish to purchase the portion of the disputed property, admeasuring 500 square meters which the original owner sought to sell to the respondents. On 02.06.1979 Dhanwanti executed sale deed of land admeasuring 500 square meters (600 square yards) out of the disputed property in favour of the plaintiffs/respondents and the said portion did not include the suit property admeasuring 113.70 square yards in possession of the appellants. The relevant portion of the sale deed dated 02.06.1979 noted it was for an area of 500 square meters i.e. about 600 square yards and the vendor was permitted to sell such land after the certificate dated 14.05.1979 issued by the competent authority under the provisions of the Act. The sale deed dated 02.06.1979 noted:-

“That the vendor for her legal needs and requirements has agreed to sell the said land admeasuring 500 sq. meters for a sum of Rs.2,20,000/- (Rs.Two Lac & Twenty thousands only) unto the vendees and the vendees have agreed to purchase the same from the vendor.

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7. That the excess land of plot No.Y/84, Hauz Khas, New Delhi shown blue in the plan attached shall remain in the possession of the vendees for enjoyment with the land under sale and the vendees are not permitted to build the said excess land.

*8. That if the Govt. will take the possession of the said land from the vendees then the vendor shall not be held liable and responsible for the same **otherwise the vendor shall not demand any further amount of the said excess land from the vendees and the same shall be deemed to be included with the consideration along with the said land measuring 500 sq. meters under sale.***

*11. That if the excess land of the said plot will be **released** afterwards by the Govt. then the same shall also be enjoyed by the vendees without any claim of the vendor or any other person/persons claiming under the vendor.”*

7. It was alleged by the learned senior counsel for appellant this was nothing but playing with the provisions of the Act and to an extent of excess land being transferred was violative of the Act as such the entire sale deed was void. Reference was also made to various letters which the purchasers had written to various authorities namely - letter dated 05.02.1991 written to the Zonal Engineer (Building), MCD, Green Park, New Delhi; letter dated 31.03.1981 to the Zonal Engineer (Building) South Zone, Green Park, New Delhi; letter dated 25.07.1981 to the Station House Officer, Police Station Hauz Khas, New Delhi; letter dated 14.03.1983 written to the Chief Executive Councilor (Delhi Administration); letter dated 05.04.1983 written to the Zonal Engineer (Building), Green Park, New Delhi stating *inter alia* that on the said piece of land are *unauthorised Jhuggis* being constructed and though those were demolished in August 1981, but since the nominee was down with heart attack, he could not take possession and those persons reconstructed their Jhuggis and are still there. Hence, it was argued by the appellants even it is presumed the appellants' Jhuggi were demolished in the year 1981 yet they came in possession in 1981 hence they were in their *adverse possession* starting from 1981.

8. It is also on record on 17.10.1996, the appellants filed a Civil Suit for permanent injunction wherein they prayed they are in adverse ownership of the part of the total land of property No.Y-84 (supra) and since they were threatened by the respondents herein, injunction be granted. In the plaint, the appellants sought declaration they were owners by way of *adverse possession*. However, on 07.07.2001, the suit was dismissed in default.

9. In the year 1999, the Act was repealed by Section 2 of the Urban Land (Ceiling and Regulation) Repeal Act, 1999 as under:-

“2. Repeal of Act 33 of 1976.—The Urban Land (Ceiling and Regulation) Act, 1976 (hereinafter referred to as the principal Act) is hereby repealed.

3. Saving.—

(1) The repeal of the principal Act shall not affect—

(a) the vesting of any vacant land under sub-section (3) of Section 10, possession of which has been taken over the State Government or any person duly authorised by the State Government in this behalf or by the competent authority;

(b) the validity of any order granting exemption under sub-section (1) of Section 20 or any action taken thereunder, notwithstanding any judgment of any court to the contrary;

(c) any payment made to the State Government as a condition for granting exemption under sub-section (1) of Section 20.

(2) Where—

(a) any land is deemed to have vested in the State Government under sub-section (3) of Section 10 of the principal Act but possession of which has not been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority; and
(b) any amount has been paid by the State Government with respect to such land then,

such land shall not be restored unless the amount paid, if any, has been refunded to the State Government.”

10. In the year 2001, the present suit was filed viz No.2251/2001 where in plaint the respondents allegedly admitted the appellants remained in possession since the purchase of the suit property by them vide sale deed dated 02.06.1979. The plaint also referred to the permission received by Smt.Dhanwanti from Delhi Administration qua the clearance under the Act of the portion of the excess land admeasuring 168.90 square meters forming part of the property No.Y-84(supra). In the written statement, of course, the plea of adverse possession was raised by the appellants.

11. During her cross examination *PWI* admitted the permission was taken only qua 600 square yards and the sale deed could have been only with regard to the area 600 square yards. She also admitted the sale deed

dated 02.06.1979 - Ex.PW1/D1 is only qua 600 square yards and the dispute with the appellant is qua the land situated beyond 600 square yards which in fact is the subject land of this suit. PW1 further deposed the sanctioned plan for the building was only qua the land admeasuring 600 square yards as nothing could be built on the excess land.

12. PW2 when cross examined on 04.01.2014 replied to the following question as under:-

"Q- Is it correct that the sale deed relied upon by your parents in the present case pertains to land measuring only 600 Sq.yards?"

A. The sale deed is regarding land admeasuring 600 Sq.yards alongwith 200 Sq.yards which was to be given to the owners after the land ceiling Act was to be abolished.

It is correct that no separate sale deed qua the 200 Sq.yards was executed. (Vol. It could not have been executed as it was a part of Y-84 and was to come in possession subsequent to the abolition of the Land Ceiling Act). Land Ceiling Act is not in force. I cannot say as to when the Land Ceiling Act was abolished.

Q- Is it correct that after abolition of Land Ceiling Act no further documents for transfer of remaining 200 Sq. yards was executed and registered in your parents favour?

A. It is correct as it was not required.

It is correct that the previous owner did not deliver the possession of 200 Sq.yards to my parents. It is wrong to suggest that the previous owner did not inform my parents that the defendants were in permissive occupation of 200 Sq.yards. I do not have any document to show that the previous owner represented that the defendants were in permissive occupation of 200 Sq.yards.

It is correct that I was not present and involved when the sale deed was executed by the previous owner in favour of my parents qua the 600 Sq. yards. (Vol. I was involved during the execution of Agreement to Sell.) It is wrong to suggest that I was not involved during the execution of Agreement to Sell for 600 Sq.yards. I have seen and read the Agreement to Sell, I do not remember when. I do not remember if it was before the institution or after the institution of the present suit. I cannot recall if I had signed the Agreement to Sell. I can neither admit nor deny that I had not signed the Agreement to Sell. I do not recall if the Agreement to Sell mentions that the possession of defendants is unauthorized."

13. On the basis of above evidence, learned Trial Court passed the impugned judgment decreeing the suit of the respondent as follows:-

"34. The instant suit was filed in the year 2001 i.e. before expiry of limitation period of 12 years from the year 1996. The adverse possession of the defendants began in the year 1996 and was not perfected into title till the instant suit was filed as statutory period of 12 years had not lapsed by then. The contention of Ld. Counsel for the defendants to the effect that the defendants were described as unauthorized occupants in the Suit Property by the plaintiffs themselves since the year 1981, but no suit was instituted within 12 years, is also of no help because the said objections to the occupation of the defendants was from the plaintiffs who only had a contingent interest in the Suit Property till repeal of the Urban Land (Ceiling and Regulations) Act, 1976, and not from the true owner Smt. Dhanwanti Dev Raj Singh. Hence, this period is not material in deciding the limitation.

35. The Suit Property demised in favour of the plaintiffs on repeal of Urban Land (Ceiling and Regulations) Act, 1976 in the year 1999. Smt. Dhanwanti Dev Raj Singh was in de jure possession of the Suit Property through the defendants who were her permissive occupants admittedly, till the filing of the Suit for Injunction in the year 1996 when defendants expressed their intentions to hold the Suit Property adverse to her title. Smt. Dhanwanti Dev Raj Singh is the predecessor in interest of the plaintiffs admittedly, and hence plaintiffs can be said to be in de jure possession of the Suit Property within 12 years of filing of the present Suit. Defendants became unauthorized occupants in the Suit Property the moment they claimed adverse possession and are thus liable to pay mesne profits to the plaintiffs for use and occupation of the Suit Property.

Decision

36. In view of the discussion above, it is held that the plaintiffs are owners of the Suit Property measuring 113.70 sq. yards forming part of the Property bearing no. Y84, Hauz Khas, Delhi. The defendants are unauthorized occupants over the Suit Property. The Suit has been filed within the limitation period of 12 years. Issue no.1, 2 and 3 are decided accordingly in favour of the plaintiffs and against the defendants. It is also held that the defendants being unauthorized occupants, are liable to pay mesne profits for the use and occupation of the Suit Property to the plaintiffs from the date of filing of the Suit till the date of handing over of possession, and a part of issue no.4 regarding entitlement to mesne profits and period for which it should be granted, is decided accordingly.

37. Defendants are directed to handover peaceful and vacant possession of the Suit Property measuring 113.70 sq. yards forming part of Y84, Hauz Khas, Delhi, as shown in orange colour in the site plan Ex. PW1/1, to the plaintiffs forthwith and pay mesne profits from the date of institution of the Suit till the date of handing over of the possession, at the rate to be ascertained after an enquiry as per Order XX Rule 12 CPC. Costs of the Suit is also awarded in favour of the plaintiffs and against the defendants."

14. Thus learned senior counsel for appellant raised following issues viz. **a)** the respondents have no right in the subject land; **b)** the Repeal Act of 1999 did not give any vested right to Smt. Dhanwanti or to the

purchasers; and *c)* the possession of the appellants become *adverse* in 1976 and/or in the alternative in the year 1981.

15. Qua *a)*, the learned counsel for appellant referred to following Sections of the Indian Contract Act, 1872; Transfer of Property Act, 1882 and the Registration Act, 1908 to say the subject land could never be transferred as it was forbidden by law:-

“23. What consideration and objects are lawful, and what not.—The consideration or object of an agreement is lawful, unless—
it is **forbidden by law**;

is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

24. Agreements void, if considerations and objects unlawful in part.—If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

The Transfer of Property Act, 1882

6. What may be transferred.—Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force,—

(h) No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) [for **an unlawful object** or consideration within the meaning of section 23 of the Indian Contract Act, 1872 (9 of 1872)], or (3) to a person legally disqualified to be transferee;

7. Persons competent to transfer.—Every person competent to contract and entitled to transferable property, or authorised to dispose of transferable property not his own, is competent to transfer such property either wholly or in part, and either absolutely or conditionally, in the circumstances, to the extent and in the manner, allowed and prescribed by any law for the time being in force.

54. “Sale” defined.—“Sale” is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Sale how made.—Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property. Delivery of tangible

immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Contract for sale.—A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property.

The Registration Act, 1908

17. Documents of which registration is compulsory.

1A The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said section 53A.”

16. It was argued the handing over of possession of the subject land on same consideration along with 500 meters was forbidden by the Urban Land (Ceiling and Regulation) Act, 1976 and hence such sale deed was void per sections above and secondly the respondent had only sought a decree of possession without any decree for declaration despite there being a cloud over the title of the suit land. Reference was also made to *Anathula Sudhakar vs P. Buchi Reddy (Dead) by LRs and others* AIR 2008 SC 2033 wherein the Court noted:-

“17. To summarize, the position in regard to suits for prohibitory injunction relating to immovable property, is as under:

(a) Where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

17. The learned counsel for the appellant further referred to the notification dated May, 1978 of the Land and Building Department, Vikas Bhawan wherein it was mentioned the excess vacant land will not be transferred to any person *except* with previous permission of the

Government and he also referred to clauses 7 and 11 of the sale deed dated 02.06.1979 to say only possession of the excess land of the plot was given to the respondent and they were not permitted to build on the said excess land.

18. The learned counsel for the appellant thus argued the sale deed executed on 02.06.1979 in favour of the respondent itself notes there are some unauthorised occupants in the premises and further there was a correspondence made by the purchaser to the MCD asking it to remove the unauthorised occupants from subject premises hence a suit ought to have been filed against the respondent within 12 years at least, from 1980-81 and thus filing it in 2001 was barred by limitation.

19. Heard.

20. Before proceeding further let me clarify if a suit for declaration was required to be filed. In *Muddasani Venkata Narsaiah (D) through LRs vs Muddasani Sarojana* AIR 2016 SC 2250 the Court noted:-

“13. We are fortified in our aforesaid conclusion by a decision in Kurella Naga Druva Yudaya Bhaskara Rao v. Galla Jani Kamma (2008) 15 SCC 150, wherein this Court has examined the question of maintainability of suit for possession without prayer for declaration of title. This Court has referred to its earlier decision in Anathula Sudhakar v. P. Buchi Reddy (2008) 4 SCC 594, wherein the plaintiff had purchased the suit land under registered sale deed dated 10.4.1957 and the defendant did not claim the title with reference to any document but claimed to have perfected title by adverse possession. It was held by this Court that the said plea did not prima facie put any cloud over the plaintiff's title calling him to file suit for declaration of title. Unless there is serious cloud over the title of the plaintiff there is no need to file suit for declaration of title. The suit for possession was maintainable.”

21. Further let me say various clauses of sale deed dated 02.06.1979 more specifically clause(s) 8 and 11 (supra) only create a contingent interest qua 168.90 square yards which would be vested only upon

happening of some uncertain events. Contingent interest is defined in Section 21 of Transfer of Property Act as under:-

“21. Contingent interest.—Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest, in the former case, on the happening of the event, in the latter, when the happening of the event becomes impossible.

(Exception) —Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent.”

22. Admittedly during the enforcement of 1976 Act such additional land could never have been transferred and thus the respondent had only a contingent interest in such subject land. Clauses No.8 and 11 rather noted in future it could become a vested interest only upon release of excess land by the government and in that event too the vendor shall have *no claim* over the subject land. Such right admittedly accrued only in the year 1999 when the Act of 1976 was repealed and respondent no.1 became *de-jure* owner of the subject premises.

23. Moreso, the excess land was even exempted from the provision of the Chapter III of the Act, 1976 hence even otherwise it could never have been vested in the Government. Further admittedly, per certificate dated 14.05.1979 of the Competent Authority the Delhi Government was never willing to purchase this property.

24. Thus, on repeal only, the respondent became an absolute owner thereof and thus filed this suit within time i.e. in the year 2001. The requirements of the principle of adverse possession are it must be adequate in *continuity*, in *publicity* and in extent to show that possession

is adverse to the true owner. The *Animus Possidendi* as per Black's Law Dictionary means –“*the intent to possess a thing*”. Thus the said intent, viz the animus, has to be of the person claiming to be in adverse possession. The learned Trial Court, however, in the para 33 of the impugned judgment held as under:-

“A reading of para 3 above makes it clear that there is no specific reference to the defendants in the said clause and it thus cannot be ascertained with precision and certainty that Smt. Dhanwanti Dev Raj Singh was referring to the defendants. Even if it is assumed that she was referring to the defendants, what is important for establishing adverse possession is not her intentions but intention of the defendants to hold the property adverse to the true owner. Defendant being in permissive occupation could not be said to have requisite intention to claim adverse possession”. The only positive evidence led by the defendants reflecting their intention to possess the Suit Property adverse to the true owners is the certified copy of the pleadings in the Suit for Injunction filed in the year 1996 wherein defendants claimed adverse possession.”

25. Further, qua the letters issued by the respondent to various authorities for removal of unauthorised construction in 1981 and if such letters would create any right to appellants, I may refer to the evidence of three witnesses of the appellant, who are residing in the subject premises. The appellant in his cross-examination recorded on 05.8.2017 deposed he was an owner of Y-84, Hauz Khas but *neither he nor his father ever informed* the plaintiff or to Smt.Dhanwanti that they were in adverse possession. Similarly DW4 in his cross-examination recorded on 28.08.2017 had deposed there was *no need to inform* Smt.Dhanwanti, Shri. A.K. Badhwar, Smt.Sukanya Badhwar, Sh.Deepak Badhwar and Sh.Satyan Badhwar that he or his father were the owners of the suit property. Similarly, DW6 Smt.Asha in her cross-examination deposed she was an owner of the subject property since her birth, as her parents were the owners and *she do not remember* if she or her father ever informed the plaintiff/Sh.A.K.Badhwar or Smt.Dhanwanti that they were

in adverse possession of the property. Thus *animus possidendi* was missing.

26. The other document which the appellants had relied upon was the plaint of suit for permanent injunction, filed in 1996, wherein the appellants prayed for *not to be dispossessed*. Interestingly, in the said plaint also the appellants never sought any declaratory relief of having perfected title by way of *adverse possession*. In *Uttam Chand (D) Through LRs. vs. Nathu Ram (D) through LRs. & Ors.* Civil Appeal No.190/2020, wherein the decision in *Brijesh Kumar & Anr. V. Shardabai (Dead) by LRs & Ors.* (2019) 9 SCC 369 was relied upon, it was held “*Animus possidendi as is well known is a requisite ingredient of adverse possession. Mere possession does not ripen into possessory title until the possessor holds the property adverse to the title of the true owner for the said purpose. The person who claims adverse possession is required to establish the date on which he came in possession, nature of possession, the factum of possession, knowledge to the true owner, duration of possession and that possession was open and undisturbed*”.

27. Further in *Ravinder Kaur Grewal and Ors. vs. Manjit Kaur and Ors.* (2019) 8 SCC 729 also it was held “*Animus possidendi under hostile colour of title is required. Trespasser's long possession is not synonym with adverse possession. Trespasser's possession is construed to be on behalf of the owner, the casual user does not constitute adverse possession. The owner can take possession from a trespasser at any point in time*”.

28. Last but not the least, it is pertinent to point out a decree for mesne profits was also passed in favour of the respondent, but on request of appellants and on compassionate grounds, the respondent did not pursue the decree for damages, and the appellants rather instituted the present appeal despite now being trespassers in a prime property in South Delhi and residing therein without paying any money to the respondent.

29. In view of above, I find no illegality in the impugned judgment passed by learned Trial Court and it cannot be faulted with. There is no merit in the appeal, hence is dismissed. The pending application, if any, also dismissed. The LCR be remitted forthwith. No order as to costs.

MARCH 13, 2020

M/DU

YOGESH KHANNA, J.

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