

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

% **Date of decision: 18th March, 2020.**
19th February, 2020.

+ **CS(OS) 113/2013**

ASHA V. WADHWANI & ANR **Plaintiffs**
Through: Mr. Rajiv Talwar and Ms. Rishu
Agarwal, Advs.

Versus

ARUN JETHMALANI (DECEASED) THROUGH LRs & ORS **Defendants**
Through: Mr. Manoj Arora and Mr. Prabjot
Hora, Advs. for D-1(a).
Mr. Raj Shekhar Rao, Mr. Prasouk
Jain and Ms. Rabiya Thakur, Advs.
For D-1(b)&1(c).
Mr. Tarun Rana, Adv. for D-2(b).
Mr. Abhinav Hansarin, Adv. for D-3.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The two plaintiffs, namely Asha V. Wadhwani and Rina V. Wahdwani, instituted this suit, (i) for declaration of their title and ownership of ground floor of property bearing No.B-59, East of Kailash, New Delhi; (ii) for recovery of possession thereof; and, (iii) for ancillary reliefs, against defendants No.1 to 8, namely (a) Arun Jethmalani, (b) Mohiney K. Jethmalani, (c) Ashish Hingorani, (d) C.V. Hingorani, (e) G.V. Hingorani, (f) Tulsi V. Hingorani, (g) Padma V. Hingorani and (h) Delhi Development Authority (DDA).

2. It was the case of the plaintiffs in the plaint, (i) that Devi Verhomal Hingorani was the owner of the property no. B-59, East of Kailash, New Delhi comprising of two and a half storey building with land underneath; (ii) that on demise of Devi Verhomal Hingorani, in accordance with her Will dated 26th October, 1979, defendant No.3 Ashish Hingorani (Ashish) became the owner of the ground floor of the property, defendants No.6&7 Tulsi V. Hingorani and Padma V. Hingorani became the owner of the first floor of the property; defendant No.5 G.V. Hingorani became the owner of the second floor of the property; defendant No.4 C.V. Hingorani was the named executor under the Will; (iii) that Ashish, vide Agreement to Sell dated 24th March, 1992 agreed to sell ground floor of the property to the plaintiffs and on receipt of entire purchase consideration from the plaintiffs, executed Will, Receipts, Affidavits, Indemnity Bonds, Special Power of Attorney in favour of the plaintiffs or their nominee V.T.Wadhwani and also put the plaintiffs into possession of the property; plaintiff No.1 is the mother of plaintiff No.2; (iv) that the plaintiffs, since 24th March, 1992 are in possession of the property; (v) that the plaintiffs, who were at Bangalore, permitted defendants No.1&2 Arun Jethmalani (Arun) and Mohiney K. Jethmalani (Mohiney), being closely related to the plaintiffs, access to the said ground floor, as care taker; Arun is son of Mohiney; (vi) that Mohiney is the sister of the husband of the plaintiff No.1 i.e. V.T.Wadhwani aforesaid; (vii) that sometime in April, 2010, Mohiney, during her telephone conversation with the husband of the plaintiff No.1, mentioned that the ground floor belonged to her as she had purchased the same from Ashish; (viii) the plaintiffs, on making enquiries learnt that the owners of the first and second floors of the property, in the first half of the year 2005, had

executed certain documents including Special Power of Attorney dated 30th March, 2005 in favour of the husband/father namely Kessu Jethmalani, of Mohiney/Arun; (ix) that the plaintiffs also learnt that the husband/father of Mohiney/Arun had also obtained a Special Power of Attorney dated 18th July, 2005 from Ashish; (x) that the plaintiffs further learnt that the leasehold rights in the land underneath the property had been got converted into freehold vide Conveyance Deed dated 2nd December, 2005, jointly in favour of defendants No.3 to 7, to whom different portions of the property had been bequeathed under the Will of Devi Verhomal Hingorani; (xi) that the plaintiffs then got a Sale Deed dated 2nd November, 2011 executed with respect to the ground floor of the property in their favour from V.T. Wadhwani, being the attorney of Ashish, in pursuance to the Agreement to Sell dated 24th March, 1992 executed by Ashish in favour of the plaintiffs; and, (xii) that the plaintiff No.2, during her visit to Delhi in November, 2012 found that Arun had opened his office on the ground floor of the property and Arun and Mohiney were claiming themselves to be the owners in possession of the ground floor of the property.

3. The suit came up first before this Court on 21st January, 2013, when summons thereof were ordered to be issued to Arun, Mohiney and Ashish only and Arun, Mohiney and Ashish were restrained from creating any third party rights in the ground floor of the property. Vide subsequent order dated 19th July, 2017, the said order was made absolute till the disposal of the suit.

4. No summons, on any subsequent date also were issued to the defendants other than defendants No.1 to 3. The defendants No.4 to 8 are thus deleted from the array of defendants.

5. Both, Arun and Mohiney have since died and have been substituted by the wife, son and daughter of Arun; another son of Mohiney has also been impleaded as an heir of Mohiney.

6. The defendants No.1&2 contested the suit by filing a joint written statement pleading, (a) disputing the Will dated 26th October, 1979 of Devi Verhomal Hingorani, though admitting her to be the owner of the property; (b) that even if the Will were to be accepted, the devolution of the respective portions of the property thereunder was subject to the consent of the other beneficiaries and which was never taken; (c) that the plaintiffs had entered into an agreement to assign / sell all their rights in the ground floor of the property in favour of Arun and had also received part sale consideration from Arun; (d) that Arun and the plaintiffs are close relatives and the entire dealing between them was on trust and utmost good faith; (e) that the plaintiffs had also handed over the original Receipt, Power of Attorney and other documents to Arun and also informed Ashish of having assigned their rights under the Agreement to Sell, executed by Ashish in their favour, in favour of Arun; (f) that thus no Sale Deed of the ground floor could have been executed in favour of the plaintiffs and for this reason only, the plaintiffs are seeking declaration with respect thereto; (g) that even otherwise, the original Power of Attorney given by Ashish in favour of V.T. Wadhwani, being husband/father of plaintiff No.1 and plaintiff No.2, on the basis of which he has executed the Sale Deed in favour of the plaintiffs, had been handed over by the plaintiffs to Arun at the time of agreeing to sell the ground floor to Arun; (h) that the Agreement to Sell by Ashish in favour of plaintiffs is signed by Ashish only and is not even signed by the plaintiffs;

(i) that paragraphs 4, 6 & 12 of the preliminary objections of the written statement are as under:

“4. That the suit is liable to be dismissed since the plaintiffs have made absolutely false and misleading submissions in the plaint. It is submitted that the Defendants are residing in the property as the owner and any submission to the contrary is false and controverted as Defendant No.1 is in proprietary possession of the suit property since 2005. It is further submitted that the Defendant No.2 has been in uninterrupted possession of the suit property since 1992 and any submission to the contrary is controverted.

5.

6. That the relief regarding possession or claim of mesne profits is untenable. It is respectfully submitted that the possession of the Defendant No.1 is fully protected by virtue of Section 53-A of the Transfer of Property Act. It may be appreciated that the Defendant No.1 who was already in possession of the suit property continues to be in possession of the suit property in part performance of the contract and has paid the plaintiffs a sum of Rs.32,00,000 (Thirty two lakhs only, i.e. 64% of the agreed sale consideration), out of which a sum of Rs.10 lakhs was paid by cheque and the balance by cash. It is further submitted that the Defendant No.1 was ready and willing and is ready and willing to perform his part of the contract.

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to

11.

12. Without prejudice to the above, it is submitted that once the Agreement to sell had been entered into with the defendant No.1, the unilateral act of the Plaintiffs in registration of the Sale Deed is malafide, illegal and liable to be set aside.”;

(j) that thereafter, under the head “Preliminary Submission”, the defendants No.1&2 i.e. Arun and Mohiney have pleaded as under:

“That without prejudice to the specific submission that the Defendant No.1 has vested rights in the suit property on account of the oral agreement to sell executed between him and the Plaintiffs, coupled with making part sale consideration by the Defendant No.1, using the property at his sole discretion and also making renovations, additions and alternations in the suit property, it is respectfully submitted that the Defendant No.2 has become the owner of the suit property by way of adverse possession. It is respectfully submitted that the possession of the Defendant No.2 has been in continuity, in publicity and adverse to the plaintiffs since the year 1992. It is submitted that there was a complete ouster of the plaintiffs and the possession of the Defendant No.2 is open, peaceful, uninterrupted hostile possession since 1992 and there was a complete ouster of the plaintiffs since the year 1992 and as such the Defendant No.2 is liable to be declared as the owner by way of adverse possession.”;

(k) that thereafter under the heading “Brief Facts”, the defendants No.1&2 i.e. Arun and Mohiney, in their joint written statement, pleading the true facts, have stated (i) that the property was originally owned by Devi Verhomal Hingorani who died on 19th June, 1986 and the property was inherited as per the terms of her Will dated 26th October, 1979; (ii) that on 9th May, 1997, the property was mutated in the name of beneficiaries of the Will; (iii) that in the year 2004, Arun was diagnosed with a tumour in his spine and was unable to walk; (iv) that the plaintiff No.2 came to Delhi and along with her family resided on the ground floor of the property along with Arun and his family; (v) that around 15th March, 2005, while Arun was bedridden, the husband of the plaintiff No.1 namely V.T. Wadhwani came

to Delhi and visited Arun and Mohiney and the issue of conversion of leasehold rights in the land underneath the property into freehold was mooted; (vi) however the husband of the plaintiff No.1 was not interested; (vii) that it was then that Arun, son of Mohiney, who was residing in the property told the husband of the plaintiff No.1 that he was prepared to purchase the property from the plaintiffs and after telephonic discussions with the plaintiffs, it was finally mutually agreed around 15th March, 2005 that the ground floor shall be sold by the plaintiffs to Arun for a consideration of Rs.50 lacs and Arun would pay for stamp duty etc.; (viii) that a cash sum of Rs.5 lacs was payable forthwith and Rs.27 lacs was payable on demand in the year 2005, as per requirements and demands of the plaintiffs; (ix) that the balance payment of Rs.18 lacs was to be made at the time of execution of the Sale Deed by plaintiffs in favour of Arun; (x) that a sum of Rs.5 lacs in cash was paid at the time of Agreement to Sell around 15th March, 2005 and Rs.27 lacs was paid thereafter between 23rd May, 2005 and 8th November, 2005, in instalments, in cash, save for the instalment of Rs.6 lacs and Rs.4 lacs paid on 27th October, 2005 and 8th November, 2005 by cheque in the name of plaintiff No.1; (xi) that in November, 2005, leasehold rights of the land underneath the property were converted into freehold and since the plaintiffs had already agreed to sell the ground floor to Arun, the entire expense for conversion was borne by Arun; (xii) because both Arun and Mohiney were ailing, the formal execution of Sale Deed by plaintiffs in favour of Arun remained pending; (xiii) however, during the meeting on 2nd January, 2013, V.T. Wadhwani, being the husband of the plaintiff No.1, while admitting receipt of Rs.32 lacs from Arun, denied having agreed to sell the ground floor and offered to return the

money claimed to have been received for some investment, with interest; and, (xiv) that thereafter the plaintiffs filed the present suit.

7. Though the plaintiffs are found to have filed replication to the joint written statement aforesaid of defendants No.1&2 i.e. Arun and Mohiney, but need to advert thereto is not felt.

8. On the pleadings aforesaid of the parties, the following issues were framed in the suit on 19th July, 2017:

*“1. Whether the plaintiffs are owners in respect of the suit property? **OPP***

*2. Whether the plaintiffs are entitled for vacant and peaceful possession of suit property? **OPP***

*3. Whether the plaintiffs are entitled to permanent injunction in respect to the suit property as prayed in prayer (C) of the plaint? **OPP***

*4. Whether defendant nos.1 and 2(a) are in lawful possession of suit property? **OPD***

*5. Whether defendants are entitled to protection under Section 53(A) of Transfer of Property Act? **OPD***

*6. Whether there was any oral agreement to sell between the plaintiff and defendant nos. 1 and 2(a) as stated in para 9 of preliminary objections of written statement of defendant no.1? **OPD***

*7. Whether possession of defendant nos.1 and 2(a) are protected by way of adverse possession? **OPD***

*8. Whether defendant no.3 is discharged of all liabilities and obligations after transferring title and possession of suit property on 24th March, 1992? **OPD***

*9. Whether the plaintiffs are entitled to mesne profits as claimed? **OPP***

10. Relief.”

and the parties relegated to evidence.

9. At the stage when PW-1 was partly cross-examined, some talks of settlement started and the parties, vide order dated 24th April, 2018, referred to Mediation Cell. At that stage, Arun died on 20th September, 2018 and his wife, daughter and son were substituted in his place. The order dated 10th May, 2019 of the Joint Registrar records that while the wife of Arun so substituted, did not want to file any fresh written statement, the daughter and son of Arun sought to file fresh written statement and which was allowed and pleadings ordered to be completed. The Joint Registrar, vide order dated 22nd October, 2019 ordered the suit to be listed before this Court on 5th November, 2019 for direction. On 5th November, 2019, the following order was passed:

“1. Adjournment is sought by Mr. Subhranshu Mohapatra, Advocate for defendant no.1(b) and 1(c) on the ground that the main counsel Mr. Prasuk Jain, Advocate has chosen to appear in Chandigarh Court and not in this Court.

2. Mr. Wasim Akram, Advocate appearing for the defendant no.2(b) also seeks adjournment on the ground of Mr. Tarun Rana, Advocate for defendant no.2(b) having chosen not to appear and instead go to Patiala House Court, lawyers where are stated to be not doing Court work.

3. The counsel for the plaintiffs has opposed the adjournment and states that (i) the plaintiffs have instituted this suit for recovery of possession of immovable property claiming title thereto under registered Sale Deed and Conveyance Deed of freehold rights in land, from defendant no.3 who is not contesting the claim of the plaintiffs; (ii) only the defendants no.1 and 2 who are in possession are contesting the claim of the plaintiffs; and, (iii) the defendants no.1 and 2 claim an oral Agreement to Sell in their favour from defendant no.3; however

the heirs of defendants no.1 and 2 are claiming to be in adverse possession of the property and the two claims are mutually inconsistent.

4. It is found that issues in the suit were framed as far back as on 19th July, 2017 and recording of evidence is underway and the suit is listed today on the defendants no.1(b) and 1(c), on substitution, having filed a written statement and to which a replication has been filed by the plaintiffs.

5. It is inexplicable as to why the legal heirs were permitted to file a written statement.

6. The counsel for the defendant no.1(a) on enquiry of defence in the suit states that the defendant no.1(a) is claiming adverse possession. However on enquiry, where the defendant no.1 has asserted title adversely and how the defendant no.1(a) can take the plea of adverse possession if predecessor defendant no.1 was claiming an Agreement to Sell, Mr. Manoj Arora, Advocate for the defendant no.1(a) states that he is not prepared and seeks adjournment.

7. I have also enquired of the date of the oral Agreement to Sell claimed by the defendants no.1 and 2.

8. The counsel for the plaintiffs states that no date has been pleaded. Mr. Manoj Arora, Advocate for defendant no.1(a) is also unable to give any date.

9. It appears that issues were framed and trial has been underway without considering whether on the pleas of the defendants, any trial is at all required or not.

10. Prima facie, it appears that on a plea of oral Agreement to Sell the benefit of Section 53A of the Transfer of Property Act, 1882 is not available and the plea of adverse possession has no merit in view of the plea also taken of lawful possession under an oral Agreement to Sell and no trial is necessary.

11. Subject to the defendants no.1(a) of the first part, defendant no.1(b) and 1(c) of the second part and defendant

no.2(b) of the third part, all paying costs of Rs.15,000/- each to the counsel for the plaintiffs for today's adjournment, list on 19th February, 2020 for hearing on all the aforesaid aspects.

12. The counsels to also come prepared to address on the law with respect to the entitlement of defendants no.1(b) and 1(c) to file a fresh written statement in contradiction to the written statement of their predecessor."

10. The daughter and son of Arun, substituted in his place, preferred FAO(OS) No.254/2019 against the order aforesaid and which was dismissed vide order dated 19th December, 2019, reasoning that the order aforesaid is purely an interim one expressing only a *prima facie* view.

11. The counsels have been heard on the aspect of need to put the suit to trial.

12. The counsels for the legal heirs of Arun and Mohiney have argued, that the defence of the defendants no.1 (b) and 1(c) is of adverse possession of the ground floor since 1992. It is informed that the defendants no.1(a) to 1(c) (defendants) are in occupation of the upper floors as owners and on enquiry, it is further informed that the ground floor was owned by Ashish but was abandoned by him and Arun and Mohiney occupied the same. In response to the observation in the order dated 5th November, 2019 aforesaid that the claim for adverse possession was antithetical to the claim of lawful possession under an Agreement to Sell, it is argued that the adverse possession since 1992 fructified into title on expiry of 12 years therefrom and thus the Agreement to Sell of 15th March, 2005 pleaded by Arun and Mohiney does not affect their title to the ground floor by way of adverse

possession, which was perfected prior to March, 2005. Reliance in this respect is placed on *L.N. Aswathama Vs. P. Prakash* (2009) 13 SCC 229. On enquiry, where all, the defendants declared themselves to be the owners of the ground floor, it is stated that the electricity meters on the ground floor are in the name of the defendants, the house tax has been paid by the defendants and receipts therefor are in the name of the defendants and the address of the defendants at various places is of the ground floor.

13. The counsel for the defendants has further argued, (a) that Arun has not pleaded adverse possession and has only generally stated so; (b) that it is Mohiney who has pleaded adverse possession and Mohiney does not say that Arun is in possession; (c) that the heirs of Mohiney would have the benefit of adverse possession of Mohiney; (d) that though the heirs of Mohiney as well as Arun are the same but in their two capacities, one as heir of Arun and the other as heir of Mohiney; (e) that though Arun, having pleaded agreement to purchase, as heir of Mohiney could not have pleaded adverse possession but the heirs of Arun in their capacity as heirs of their grandmother Mohiney are entitled to do so; (f) that Mohiney perfected her title by way of adverse possession in the year 2004; (g) that the Conveyance Deed of the plaintiffs is of thereafter i.e. of 2nd December, 2005 and the plaintiffs, till 2004 when Mohiney perfected her adverse possession, did not even have title; and, (h) that issues having been framed in the suit on 19th July, 2017, any decision can be only after recording of evidence is completed and which can be expedited.

14. On enquiry, how having an electricity meter in one's own name, payment of electricity charges and house tax, amounts to declaration of

ownership by adverse possession, it is stated that the defendants, during the course of evidence will examine witnesses who will depose that the defendants, in their conversation with them, have been proclaiming themselves to be the owners of the ground floor. On yet further enquiry, whether the defendants had at any time openly and continuously to the knowledge of plaintiffs claimed ownership, it is contended that the same is not required and merely examining others to whom the defendants have been so representing, is enough. On yet yet further enquiry, who are those persons and whether any list of witnesses has been filed, it is stated that though no list of witnesses has been filed by the defendants but the defendants can in law, on their own responsibility, bring the said persons to the Court.

15. On the aspect of right of the legal heirs to file a fresh written statement, reliance is placed on ***Abdul Razak Vs. Mangesh Rajaram Wagle*** (2010) 2 SCC 432.

16. The counsel for the defendants has also contended that now, per ***Ravinder Kaur Grewal Vs. Manjit Kaur*** (2019) 8 SCC 729, person claiming title by adverse possession is also entitled to assert his right and seek declaration thereof and the defendants have filed CS(OS) No.68/2020, which was listed before the Joint Registrar and of which summons have been ordered to be issued.

17. The counsel for the plaintiffs has referred to ***Thakur Kishan Singh Vs. Arvind Kumar*** (1994) 6 SCC 591, ***A.S. Vidyasagar Vs. S. Karunanandam*** 1995 Supp. (4) SCC 570 and ***Mohan Lal Vs. Mirza Abdul Gaffar*** (1996) 1 SCC 639 on the aspect of defence of Section 53A of the CS(OS) 113/2013

Transfer of Property Act, 1882 and adverse possession being inconsistent and to ***Jagdish Chander Chatterjee Vs. Shri Sri Kishan*** (1972) 2 SCC 461 and ***Vidyawati Vs. Man Mohan*** (1995) 5 SCC 431 on the aspect of, the heirs on substitution being not entitled to file a fresh written statement.

18. I have considered the aforesaid contentions and for the reasons following, am of the view that no trial is necessary in the present suit, notwithstanding issues having been framed and the plaintiffs are entitled to a decree for possession forthwith:

(A) The contention of the counsel for the defendants, that because issues have been framed, trial is necessary, and the Court, even if during the recording of evidence finds that, on the pleadings, there is no need for trial, cannot pass judgment, is no longer *res integra*. Reference may be made to ***Charanjit Lal Mehra Vs. Kamal Saroj Mahajan*** (2005) 11 SCC 279, ***Parivar Seva Sansthan Vs. Dr. Veena Kalra*** 2000 SCC OnLine Del 469 (DB) (SLP(C) Nos.18712-18713/2000 preferred whereagainst was dismissed on 27th November, 2000), ***KR Impex Vs. Punj Lloyd Ltd.*** 2019 SCC OnLine Del 6667, ***State Trading Corporation of India Ltd. Vs. Nirmal Gupta*** 2012 SCC OnLine Del 3556 (DB), ***Meera Gupta Vs. Dinesh Chand*** 2001 SCC OnLine Del 830 (DB) and ***Sanjay Sharma Vs. Madan Mohan Sharma*** 2013 SCC OnLine Del 2434 where it has been unequivocally held that even after framing of issues, decree on admissions can be passed.

(B) The counsel for the defendants has not even pressed the aspect of the plaintiffs being entitled to continue in possession under the

protection of Section 53A of the Transfer of Property Act. The defendants have not pleaded any written Agreement to Sell and which is a *sine qua non* for invocation of Section 53A. Reference in this regard may be made to ***Sardar Govindrao Mahadik Vs. Devi Sahai*** (1982) 1 SCC 237, ***Mool Chand Bakhru Vs. Rohan*** (2002) 2 SCC 612, ***Nanjegowda Vs. Gangamma*** (2011) 13 SCC 232, ***Shrimant Shamrao Suryavanshi Vs. Pralhad Bhairoba Suryavanshi*** (2002) 2 SCC 676 and ***Kaushal Aggarwal Vs. Ashok Malhotra*** 2009 SCC OnLine Del 373. As far as the plea of the defendants, of oral Agreement to Sell is concerned, the defendants, notwithstanding the pendency of this suit since the year 2013, have till date not initiated any action for specific performance thereof and the claim, even if any of the defendants for specific performance, would now be barred by time.

(C) The defendants have pegged their case on adverse possession and all that needs to be adjudicated at this stage is, whether there is any plea of adverse possession and whether the plea, even if any of adverse possession, is such which is required to be put to trial. The defendants have not pleaded any other defence. If the defendants fail on their plea of adverse possession, a decree for possession would be liable to be passed against them.

(D) Thus, there is no need to adjudicate Issue No.(5) on the plea of Section 53A of the Transfer of Property Act or Issue No.(6) on the plea of oral Agreement to Sell pleaded by Arun and Mohiney. The existence of the Agreement to Sell, even if any, does not entitle the

defendants to defend a claim for possession on the basis of title by the owner. The only remedy of an agreement purchaser is to sue for specific performance and which has not been done by the defendants. Reference in this regard may be made to ***Jiwan Dass Rawal Vs. Narain Dass*** 1981 SCC OnLine Del 156, ***Sunil Kapoor Vs. Himmat Singh*** (2010) 167 DLT 806, ***Satish Kapoor Vs. Ishwari Assudani*** 2012 SCC OnLine Del1808 (DB) [SLP(C) No. 21561/2012 preferred whereagainst was dismissed on 3rd August, 2012], ***Cement Corporation of India Ltd. Vs. Life Insurance Corporation of India Ltd.*** 2014 SCC OnLine Del 4536 (DB), ***Chander Dutt Sharma Vs. Prem Chand Punj*** 2019 SCC OnLine Del 8112.

(E) Though Issue No.(1) has also been framed with respect to title of the plaintiffs as owners but Arun and Mohiney are found to have in their written statement, summary whereof is recorded hereinabove, admitted the title of the plaintiffs and not disputed the same. Moreover, Arun and Mohiney by claiming Agreement to Purchase dated 15th March, 2005 from the plaintiffs and by pleading adverse possession against the plaintiffs, have admitted the ownership of the plaintiffs and are estopped from controverting the same. Reference in this regard may be made to ***Dagadabai Vs. Abbas*** (2017) 13 SCC 705, ***Mohan Lal Vs. Mirza Abdul Gaffar*** (1996) 1 SCC 639, ***Roop Singh Vs. Ram Singh*** (2000) 3 SCC 708, ***Mallikarjunaiah Vs. Nanjaiah*** (2019) 15 SCC 756 and ***Hans Raj Vs. Raghuvir Singh*** 2020 SCC OnLine Del 26.

(F) The argument today, of the counsel for the defendants convey an impression that separate written statement had been filed by Arun and Mohiney. However on going through the record, Arun and Mohiney are found to have filed a joint written statement. The plea of adverse possession in the written statement of defendants no. 1(b) and 1(c) has to be considered in the context thereof.

(G) It is quite obvious that it is only now, pursuant to the order dated 5th November, 2019, that the yarn of Arun and Mohiney having separate defences, with Arun having a defence of agreement purchaser and Mohiney having a defence of adverse possession, has been spun/woven. Else, the framing of the issues also shows issues no.(4) to (7) having been framed jointly qua Arun and Mohiney and not separately qua the defences of Arun and Mohiney, as indeed cannot be, once a joint written statement has been filed. It is for this reason only that I have hereinabove quoted some of the passages from the joint written statement of Arun and Mohiney.

(H) It cannot be lost sight of that Arun was the son of Mohiney and both were residing together. Arun and Mohiney have throughout been represented by the same Advocate. The verification dated 1st April, 2013 of the contents of the written statement is also joint with both Arun and Mohiney having verified the contents of paragraphs 1 to 12 of the preliminary objections and the preliminary submission, as true and correct on legal advice received and the contents of facts in the preliminary objections and paragraphs (A) to (R) of the brief facts and paragraphs 1 to 21 of reply on merits as true and correct to their

knowledge. The written statement is accompanied, though with separate affidavits of Arun and Mohiney, but again with respect to the entire written statement and not with respect to separate paragraphs of the written statement.

(I) In the aforesaid state of affairs, the contention, that while the possession of Mohiney was adverse to the plaintiffs, the possession of Arun was as agreement purchaser from the plaintiffs, cannot be accepted. In fact, I enquired from the counsel for the defendants, whether Arun and Mohiney have in their written statement, which till then were presumed to be separate, specified the respective portions in their possession and to which the answer of the counsel for the defendants was in negative.

(J) Once Arun and Mohiney, both were in possession of ground floor of the residential House No.B-59, East of Kailash, New Delhi, there can be no plea of adverse possession by one when the other is claiming to be in possession as an agreement purchaser.

(K) Even otherwise, arguments, I am afraid to record, have been addressed *de hors* the written statement and in an attempt to have the matter listed for evidence, pleadings, specially the pleadings of Arun and Mohiney, thus have been disregarded.

(L) Though the counsel for the defendants, in an attempt to have the matter listed for recording of evidence on the plea of adverse possession and which as per ***Thakur Kishan Singh, A.S. Vidyasagar*** and ***Mohan Lal*** supra cited by the counsel for the plaintiffs is antithetical to the plea of lawful possession as an agreement

purchaser, contended that the adverse possession had been perfected in the year 2004 but it is nowhere pleaded so in the written statement. It is nowhere pleaded or argued, why if title had been perfected by adverse possession, agreement was entered into with the plaintiffs to purchase the property. If the plaintiffs had already lost title to Mohiney, Arun could not have entered into agreement of purchase of that title from plaintiffs, who stood divested of their title. Merely on ingenious arguments, as an afterthought, findings in a judgment, *de hors* pleaded facts cannot be returned. In fact, the defendants are found to be abusing the process of the Court by putting the plaintiffs to trial to prove ownership, in the hope that the plaintiffs will fail to prove the same. The defendants in their written statement, have at one place, while not denying the document purporting to be the Will of Devi Verhomal Hingorani, denied that Ashish became the owner of the ground floor, however today it is argued that Ashish had abandoned the property and moved to another place. In the written statement, the defendants have admitted that the property devolved and freehold conversion thereof obtained in accordance with the said Will. Today, the counsel for the defendants has argued that the defendants are in occupation of the upper floors of the property as owners but have not pleaded or disclosed, from whom else the title to the upper floors have been acquired, if not in accordance with the devolution of title with respect thereto under the Will of Devi Verhomal.

(M) The entire defence in the written statement, is of being in possession as agreement purchaser from the plaintiffs and the words

‘adverse possession’ find mention only in one paragraph of the preliminary submission in the written statement and nowhere else.

(N) Owing to the relationship between Arun and Mohiney and owing to the lack of any plea, of Arun and Mohiney being in possession of the separate portions of the ground floor of the residential House No.B-59, East of Kailash, New Delhi, the plea of adverse possession and the argument of adverse possession on behalf of Mohiney, is nothing but a red herring and which clever drafting and arguments cannot and ought not make the Court put to trial something which can otherwise clearly be seen as a ruse in day light and permits of no ambiguity.

(O) It is quite obvious that the defendants are insisting upon recording of evidence, to defer the evil day of a decree for recovery of possession being passed against them. However, the Court has to cut through the web of pleas spun in the written statement of the defendants and if finds the plea of adverse possession on which emphasis is laid today, to be without any substance, on account of other pleas in the written statement, is not to pedantically and mechanically order evidence to be recorded and allow its process being abused. The time and resources of the Court can be utilised for appropriate cases indeed requiring recording of evidence and trial and in which findings cannot be returned, without such trial. If the Court finds that findings on the defence raised by the defendants of adverse possession can be returned even without trial, the Court would definitely be within its powers to do so.

(P) The defendants, though learnt of the Sale Deed dated 2nd November, 2011 executed by Ashish in favour of the plaintiffs from the plaint, have not challenged the said Sale Deed till now.

(Q) The counsel for the defendants, at the fag end of the hearing has also meekly stated that the defendants have also challenged the title of the plaintiffs. However, the challenge to title is firstly on the plea of Ashish being not entitled to execute the Sale Deed in favour of the plaintiffs for the reason of the plaintiffs having informed Ashish of assignment of rights by the plaintiffs under the agreement to sell executed by Ashish in favour of the plaintiffs. However, as aforesaid, the defendants have till date not challenged the Sale Deed in favour of the plaintiffs. The second ground on which challenge to the title was made was of the original Power of Attorney executed by Ashish in favour of V.T.Wadhwani, the husband/father of the plaintiffs, having been entrusted by the plaintiffs with the defendants at the time of entering into the agreement to sell. However, once the execution of the Power of Attorney by Ashish in favour of V.T. Wadhwani, husband/father of the plaintiffs is admitted, he would remain entitled to execute the Sale Deed. Moreover, the laws to challenge the execution of the Sale Deed by the husband/father of the plaintiffs in favour of the plaintiffs on the basis of the Power of Attorney executed by Ashish, is of Ashish and the defendants have no locus to challenge the title of the plaintiffs on this ground. The only other argument on which title is challenged, by the defendants in preliminary objections of their written statement, is that the said Will of Devi Verhomal Hingorani required the consent of the beneficiaries. However, the

defendants themselves in the brief facts pleaded in their written statement have referred to the said Will and the property having devolved in accordance with the Will and leasehold rights in the land underneath the property having been converted into freehold on the basis of the Will. As aforesaid, the defendants claim to be the owners of the upper floor of the property and the defendants have shied away from pleading that they have purchased the upper floors of the property from persons other than those to whom they had been bequeathed under the Will. The defendants cannot, on the one hand profess title to the first and second floors of the property on the basis of the Will of Devi Verhomal Hingorani and on the other hand challenge the title claimed by the plaintiffs of Ashish, of the ground floor, under the same Will and under which Ashish the plaintiffs claimed to have acquired title. Not only so, the defendants also claimed to have obtained Power of Attorney from Ashish in the year 2005 for the purposes of having the leasehold rights in the land underneath the property converted into freehold including in the name of Ashish.

(R) The plea of the defendants, of Mohiney being in adverse possession since 1992, is also falsified from the conversion of leasehold rights in the property to freehold in the name of Ashish on 12th December, 2005. It is not in dispute that the steps for such freehold conversion were taken by the defendants. The defendants, if in the year 2004, had perfected their title by way of adverse possession, could not have got freehold conversion done, including in the name of Ashish, in the year 2005.

(S) Though the counsel for the defendants has argued that Ashish had abandoned the property but the said argument is again *de hors* the written statement where no such plea is found.

(T) The defendants in their joint written statement have pleaded the Arun to be in possession as agreement purchaser and Mohiney to have been in adverse possession since 1992. It is however not the plea in the written statement that Mohiney was at any point of time claiming adversely to the rights claimed by Arun as an agreement purchaser, again falsifying the plea of adverse possession.

(U) The *mala fides* of the defendants are evident from the fact that though only Mr. Raj Shekhar Rao, Advocate addressed the arguments dealt with herein, but appearance appears to have been given separately of Mr. Raj Shekhar Rao, Advocate with Mr. Prasouk Jain, Advocate for defendants No.1(b) and 1(c) namely Siena Jethmalani and Varun Jethmalani and of Mr. Abhinav Hansarin, Advocate for Ashish Hingorani. No arguments were addressed by Mr. Tarun Rana, Advocate for Sonjoy Jethmalani, brother of Arun and another son of Mohiney but whose address given is of Manhattan, New York, United States of America.

19. Thus, the plaintiffs are entitled to a decree for recovery of possession forthwith.

20. The plaintiffs have also sued for *mesne* profits. However, considering the close relationship of the parties and that both Arun and Mohiney are now no more, it is deemed appropriate that the enquiry into *mesne* profits should not be ordered separately and only future *mesne* profits, taking judicial

notice of the prevalent rates of rent, be stipulated. It is expected that the defendants at least now will see reason and not indulge in any further litigation on false mutually destructive pleas bordering on contemptuous conduct interfering with administration of justice. However, if the defendants take up the matter in appeal, it shall be open to the plaintiffs to also seek a decree for past and *pendente lite mesne* profits.

21. Considering all the facts and circumstances of the case and taking judicial notice of prevalent rate/rent, future *mesne* profits are fixed at Rs.30,000/- per month.

22. A decree is accordingly passed, in favour of the plaintiffs and jointly and severally against the defendants No.1&2 through heirs, (i) of recovery of possession of ground floor of property No.B-59, East of Kailash, New Delhi; (ii) of recovery of *mesne* profits/damages for use and occupation with effect from 1st March, 2020 at the rate of Rs.30,000/- per month with interest @ 10% per annum on arrears from the last date of the month from which arrears are due till the date of payment/realization; and, (iii) of costs of the suit computed at the court fees paid plus Rs.7.5 lacs on account of legal fees and expenses.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

MARCH 18, 2020

FEBRUARY 19, 2020

‘bs’..