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IN THE HIGH COURT OF DELHI

Judgment reserved on : November 27, 2008

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Judgment delivered on : December 17, 2008

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RFA No. 200/2008

PUR POLYURETHANE PRODUCTS P.LTD. Appellant
Through: Mr. Harshad V.Hameed, Adv.

versus

GEETA BHARGAVA Respondent
Through: Mr. Jayant Bhushan, Sr. Adv. with
Mr. Buddy Ranganadhan,
Mr. Atul Shanker Mathur and
Mr. Ajay Bhargava, Adv.

CORAM:

Hon'ble Mr.Justice Pradeep Nandrajog
Hon'ble Mr.Justice J.R. Midha

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether judgment should be reported in Digest?

: PRADEEP NANDRAJOG, J.

1. Vide Ex.DW-1/1, on 13.12.1977, Delhi State Industrial Development Corporation (DSIDC for short) allotted under a lease-hold tenure an industrial shed bearing No.22, Okhla Industrial Complex, Phase II, New Delhi to the

respondent. On 27.8.1990, vide Ex.DW-1/2, respondent executed a license deed in favour of the appellant permitting the appellant to use the shed except the first floor thereof at a monthly license fee of Rs.19,000/- for a period of 3 years with effect from 1.9.1990.

2. A sum of Rs.1,14,000/- was paid as advance license fee to be recovered @ Rs.4,750/- per month i.e. in 24 months. Another sum of Rs.1,14,000/- was paid as interest free security deposit, to be refunded when the licensed premises was vacated.

3. Two months' license fee thereafter was paid by the appellant who ceased to pay any further license fee because DSIDC issued an eviction order against the respondent on 20.11.1990, Ex.DW-1/5. It was alleged therein that the lease money payable by the respondent to DSIDC had not been paid and that the respondent was liable to be evicted.

4. The appellant faced a threat of eviction. It filed a writ petition registered as W.P.(C) No.3916/90. The order Ex.DW-1/5 was challenged in the writ petition. Vide order dated 10.12.1990, Ex.DW-1/6, while issuing show cause notice in the writ petition, operation of Ex.DW-1/5 was stayed.

5. Respondent challenged the eviction order, Ex.DW-1/5 by filing an appeal under Section 9 of the Public Premises (Eviction of Unauthorized Occupants) Act 1971 which was

allowed vide order dated 15.5.1991, Ex.DW-1/17. The eviction order was set aside. Matter was remanded before the Estate Officer for fresh adjudication.

6. Vide Ex.PW-1/3, on 28.11.2000, respondent called upon the appellant to surrender possession of the entire shed alleging that the appellant had trespassed into the first floor thereof pertaining to which area no license was granted to the appellant. Stating that if appellant treated it to be a tenant, tenancy was determined after 15 days of receipt of the notice and that mesne profits would be payable for unauthorized occupation. Not receiving back the possession, respondent instituted a suit stating that as the licensor it was entitled to recover possession of the licensed area and as the owner of the remaining was entitled to receive possession thereof as possession of the appellant was unauthorized. It was stated that license fee for a period 3 years prior to the filing of the suit in sum of Rs.6,84,000/- was payable. Future mesne profits were claimed at Rs.1,50,000/- per month.

7. Appellant defended the suit by alleging misrepresentation of facts, being the non-disclosure of the eviction order passed against the respondent and the filing of WP(C) No.3916/1990 by the appellant. It was stated that vide Ex.DW-1/31 and Ex.DW-1/32, DSIDC had floated a scheme to regularize the allotment in favour of the sub allottees and that

under the scheme, the appellant had deposited Rs.14,22,500/- with DSIDC and that vide order dated 3.9.1993, Ex.DW-1/41, the Division Bench before which W.P.(C) No.3916/90 was pending had permitted the appellant to deposit the amount with DSIDC. It was pleaded that aforementioned facts being not pleaded in the plaint, the suit merited a summary dismissal. It was pleaded that the respondent had lost title to the property and that the appellant was in occupation as an owner being directly recognized as the owner by DSIDC. It was alleged that the respondent had entered into the license agreement under a void title and hence could not rely upon the same. Bar of res judicata was predicated with reference to the pendency of W.P.(C) No.3916/90. It was pleaded that the suit was barred by limitation. It was pleaded that the respondent was not entitled to even maintain the suit by virtue of Section 41 of the Specific Relief Act.

8. On the pleadings of the parties 13 issues were settled, being as under:-

- “1. Whether the suit is liable to be dismissed for concealment and misrepresentation of facts?
2. Whether the license granted by the plaintiff to the defendant was inoperative and void ab initio?
3. Whether the defendant is entitled to continue in possession of the premises?
4. Whether the plaintiff has no right to claim relief of Mandatory Injunction & Possession? OPD

5. Whether the present suit is barred by res judicata? OPD
6. Whether the present suit is barred by limitation? OPD
7. Whether the suit is not maintainable under Section 41 of the Specific Relief Act?
8. Whether the suit is not correctly valued for the purpose of court fees and jurisdiction? OPD
9. Whether the defendant was a licensee/tenant in the premises, if so, whether the license/tenancy of defendant has been validly determined? OPP
10. Whether the plaintiff is entitled to possession of the property? OPP
11. To what amount, if any, is the plaintiff entitled to recover from the defendant? OPP
12. Whether the plaintiff is entitled to mesne profits, if so, at what rate and from what period? OPP
13. Relief."

9. Before discussing the findings of the learned Trial Judge and the arguments urged in the appeal, suffice would it be to state that the defences pertaining to suppression of facts and res judicata did not require any issue to be settled. We say so for the reason certain pleadings are wholly irrelevant and need not result in settlement of issues. Suppression of facts has a relevance where the remedy sought is discretionary and it is permissible to urge a defence that because of the conduct of the plaintiff, the Court should not exercise the discretionary jurisdiction in favour of the plaintiff.

But where the remedy is by way of right and no discretion is left with the Court, such kind of defences have no place. Similarly, pleas of res judicata have to be with respect to decisions in an earlier proceedings between the same parties or their predecessor-in-interest on the same subject matter or substantially the same subject matter. In the instant case, no reference whatsoever was made to an earlier decision. The plea of res judicata was predicated on the matter being allegedly in issue in W.P.(C) No.3196/90, which writ petition was pending when the suit was filed. At best, Section 10 of the Code of Civil Procedure 1908 could have been invoked.

10. Needless to state the decision of the learned Trial Judge is against the appellant pertaining to issue No.1 and issue No.5 which findings were not questioned during arguments in the appeal.

11. Though various documents have been exhibited at the trial, the material documents which have been considered by the learned Trial Judge are the ones referred to by us in the preceding paragraphs while introducing the facts relevant for the present decision.

12. We may note certain other facts pertaining to W.P.(C) No.3196/90 and another writ petition filed by the appellant as also the fact that ultimately DSIDC settled its dispute with the respondent and executed a conveyance deed

in favour of the respondent on 13.11.2006, conveying a free hold tenure in the land in favour of the respondent and ownership rights qua the super structure in property bearing No.22, Okhla Industrial Complex, Phase II, New Delhi. The writ petition No. W.P.(C) 3196/90 was dismissed by a Division Bench of this Court on 3.7.2006. Review sought of said order was dismissed vide order dated 25.7.2006. Petition seeking Special Leave to Appeal against the order of the Division Bench was dismissed on 14.8.2006. The appellant filed another writ petition being W.P.(C) No.12589/2006 praying that DSIDC be directed to execute title documents conveying title in the shed in question in favour of the appellant. Said writ petition was dismissed by a learned Single Judge vide order dated 11.7.2007. Appeal being LPA No.1269/2007 against the order of the learned Single was dismissed by the Division Bench on 9.10.2007. The appellant has filed another writ petition being W.P.(C) No.2589/2007 challenging the conveyance deed executed by DSIDC in favour of the respondent, which is still pending.

13. To put it pithily, the finding returned by the learned Trial Judge is that the appellant cannot question the title of the licensor which title in any case stands perfected with the execution of the conveyance deed in favour of the respondent. The suit being filed before expiry of 12 years reckoned when

the license period was over or even reckoned from November, 1990, it has been held that the suit is within limitation. The appellant has been directed to restore possession of the entire property. Mesne profits @ Rs.50,000/- per month have been awarded with effect from 22.5.2001 till possession is handed over.

14. At hearing held on 27.11.2008, learned counsel for the appellant urged that with the threat of ejectment by DSIDC looming large when DSIDC cancelled the allotment in favour of the respondent and ordered ejectment, the appellant applied under the scheme of DSIDC which permitted unauthorized occupants to regularize their possession under DSIDC by paying Rs.14,22,500/- to DSIDC and hence the well-recognized principle of law that the relationship between the licensor and the licensee came to an end with simultaneous creation of a right in favour of the licensee under the title paramount of the licensor was fully applicable in the facts of the instant case. Counsel urged that it was not necessary for the title paramount to first eject the licensor or the licensee and thereafter create a new relationship directly with the licensee. Counsel urged that but for the intervention by the appellant who had filed W.P.(C) No.3916/90 to challenge the ejectment order by DSIDC, the respondent had lost title to the property for good.

15. With respect to the said plea of the appellant, it would be useful to note that the issue was considered, though in a different context, when CM(M) No.645/2007 filed by the respondent was decided by this Court on 30.7.2007. In said petition, the respondent had challenged an order dated 5.3.2007 passed by the learned Trial Judge impleading the title paramount i.e. DSIDC as a defendant.

16. Setting aside the order dated 5.3.2007 and allowing CM(M) No.645/2007, it was observed as under:-

“6. The issues were framed on 19.9.2002. Parties proceeded to lead their evidence. Evidence was recorded. On 19.1.2006 case was notified for final arguments to be heard on 28.1.2006. Parties were directed to file their written submissions. On 28.1.2006, plaintiff filed the written submissions. Matter was renotified for the defendant to submit its written statement. On 3.2.2007 the application under Order 1 Rule 10 CPC was filed by the defendant stating that in view of the defence taken in the written statement, namely, that DSIDC which had allotted the shed to the plaintiff under a hire purchase scheme had floated a scheme to regularize allotment in favour of the person who was occupying the premises, presence of DSIDC was necessary for a final and a proper adjudication of the suit. Learned Trial Judge has allowed the said application.

7. To be fair to the parties, I may note that various events have transpired after DSIDC allotted, under its hire purchase scheme, the shed to the plaintiff and thus learned counsel made extensive reference to the said facts. But in my opinion, an extensive narration of the said facts would result in penning down facts which ultimately have no bearing upon the issue, for the reason said facts relate to the passing of an order of eviction under the Public Premises (eviction of unauthorized occupation) Act 1971 by the Estate Officer, DDA. Challenge thereto by way of an appeal and a further challenge by way of a writ petition.

8. Suffice would it be to note that the respondent has filed a writ petition in this Court registered as W.P.(C) No.12589/2006 praying that DSIDC should be directed to formalize allotment of the shed in the name of the respondent and execute a lease deed in its favour.

9. During pendency of the said writ petition, DSIDC has executed a conveyance deed on 13.11.2006 in favour of the plaintiff. With the result, W.P.(C) No.12589/2006 was dismissed. The respondent has filed another writ petition, registered as W.P.(C) No.2589/07 challenging the conveyance deed executed by DSIDC in favour of the petitioner.

10. The principle of law that a tenant or a licensee cannot question the title of the lessor or the licensor as the case may be is subject to an exception, namely, it does not apply where the plea taken is that after grant of the license or the lease, the licensor or the lessor as the case may be has lost the title. If after so pleading, the licensee or the lessee pleads a direct attornment under a third party, presence of the said third party would be necessary in a suit for possession. The estoppel contemplated by Section 116 of the Indian Evidence Act is restricted to the denial of title at the commencement of the tenancy and does not extend to a plea of title being lost after the tenancy was created. [See AIR 1987 SC 1656 Mangat Ram Vs. Sardar Meharban Singh; Halsbury's Laws Of England, IVth Edition, Para 238 AIR 1987 SC 2192 D.Satyanarayana Vs. P.Jagadish and (2002) 3 SCC 1998 J.J.Lal Pvt. Ltd. Vs. M.R.Murali].

11. Pertaining to a litigation where the subject matter thereof would result in a declaration as regards status or a legal character, summarizing Order 1 Rule 10 of the Code of Civil Procedure, in the report published as AIR 1958 SC 886 Raziya Begum Vs. Sahebzadi Anwar Begum, in para 13, Supreme Court observed as under:-

“(13) As a result of these considerations, we have arrived at the following conclusions :

(1) That the question of addition of parties under R.10 of O.1 of the Code of Civil Procedure, is generally not one of initial jurisdiction of the court, but of a judicial discretion which has to be exercised in view of all the facts and

circumstances of a particular case; but in some cases, it may raise controversies as to the power of the court, in contradiction to its inherent jurisdiction, or, in other words, of jurisdiction in the limited sense in which it is used in S. 115 of the Code;

(2) That in a suit relating to property, in order that a person may be added as a party, he should have a direct interest as distinguished from a commercial interest, in the subject-matter of the litigation;

(3) Where the subject-matter of a litigation, is a declaration as regards status or a legal character, the rule of present or direct interest may be relaxed in a suitable case where the court is of the opinion that by adding that party, it would be in a better position effectually and completely to adjudicate upon the controversy;

(4) The cases contemplated in the last proposition, have to be determined in accordance with the statutory provisions of Ss. 42 and 43 of the Specific Relief Act;

(5) In cases covered by those statutory provisions, the court is not bound to grant the declaration prayed for, on a mere admission of the claim by the defendant, if the court has reasons to insist upon a clear proof apart from the admission;

(6) The result of a declaratory decree on the question of status, such as in controversy in the instant case, affects not only the parties actually before the Court, but generations to come, and in view of that consideration, the rule of 'present interest', as evolved by case law relating to disputes about property does not apply with full force; and

(7) the rule laid down in S. 43 of the Specific Relief Act, is not exactly a rule of *res judicata*. It is narrower in one sense and wider in another."

12. Thus, at first blush, considering the nature of the defence raised by the respondent in the written statement, impugned order appears to be in harmony

with the various decisions noted in paras 10 and 11 above, but the impugned order has to be set aside for the simple reason, the controversy pertaining to formalization of possession of the respondent directly under DSIDC has taken a different legal shape with DSIDC executing a conveyance deed in favour of the plaintiff, which conveyance deed has been challenged by the respondent by and under WP(C) No.2589/07 in this court.

13. Thus, as of today, admitted facts between the parties are that DSIDC recognizes the petitioner as the allottee under DSIDC. A conveyance deed has been executed. The legality of the action of DSIDC is being adjudicated under a writ petition filed by the respondent.

14. If DSIDC would be permitted to be impleaded as a co-defendant in the suit filed by the petitioner, the respondent would have to then amend the written statement and lay a challenge to the action of DSIDC in executing a conveyance deed in favour of the plaintiff. This would change the very nature of the suit. It would no longer be a case of a tenant or a licensee protecting possession on the plea that the licensor or lessor has lost title after the grant and that some third party has acquired title to the property and that the defendant has attorned to said third party.”

17. Said order was challenged before the Supreme Court vide SLP (C) No.21814/2007 which was dismissed vide order dated 7.12.2007.

18. Ex facie, the issue of permitting the appellant to raise a challenge to the title of the respondent does not even arise for consideration because of the events which transpired during the pendency of the suit resulting in the respondent perfecting the title under the title paramount i.e. DSIDC.

19. We need to speak a few words on the law as to when a tenant or a licensee can question the title of the

landlord or the licensor. Needless to state the rule of estoppel under Section 116 of the Evidence Act does not prohibit the tenant or the licensee to challenge the title of the landlord or the licensor but the same has to be on the pleading that subsequent to the lease/license, the landlord or the licensor as the case may be, has lost title. Additionally, to non-suit the landlord/licensor it has to be proved that the tenant attorned directly to the title paramount or the licensee so attorned to the title paramount. This was so held in the decision reported as 1987 (4) SCC 424 D.Satyanarayana Vs. P.Jagdish.

20. In the decision reported as 2002 (2) SCC 50 Vashu Deo Vs. Balkishan, the decisions of the Privy Council reported as AIR 1915 PC 96 Bilas Kunwar Vs. Desraj Ranjeet Singh and AIR 1933 PC 29 Currimbhoy & Co. Ltd. Vs. LA Creet were noted and it was held as under:-

“As held by the Privy Council in Currimbhoy & Co. Ltd. Vs. L.A. Creet and Bilas Kunwar Vs. Desraj Ranjit Singh the estoppel continues to operate so long as the tenant has not openly restored possession by surrender to his landlord. It follows that the rule of estoppel ceases to have applicability once the tenant has been evicted. His obligation to restore possession to his landlord is fulfilled either by actually fulfilling the obligation or by proving his landlord’s title having been extinguished by his landlord’s eviction by a paramount title-holder. Eviction by paramount title-holder is a good defence bringing to an end the obligation of the tenant to put the lessor in possession of the property under Section 108 (q) of the Transfer of Property Act. The burden of proving eviction by title paramount lies on the party who sets up such defence.”

21. It is thus apparent that eviction by paramount title holder is the sine qua non to non-suit the plaintiff who seeks ejectment as a landlord or seeks a mandatory injunction to restore possession as the licensor. It is true that to constitute eviction by a title paramount, physical dispossession is not necessary. But what is necessary is to establish that the title paramount was armed with a legal process for eviction which could not be lawfully resisted. In other words, a voluntary attornment would not enable the tenant to non-suit his landlord.

22. Their Lordships of the Hon'ble Supreme Court who authored the decision in Vashu Deo's case (supra) penned another decision soon thereafter, reported as 2002 (2) SCC 256 Om Prakash Gupta Vs. Ranbir B.Goyal. The ratio in Vashu Deo's case was explained as culled out in para 10 of the said decision as under:-

“To constitute eviction by title paramount so as to discharge the obligation of the tenant to put his lessor into possession of the leased premises three conditions must be satisfied: (i) the party evicting must have a good and present title to the property; (ii) the tenant must have quitted or directly attorned to the paramount title-holder against his will; and (iii) either the landlord must be willing or be a consenting party to such direct attornment by his tenant to the paramount title-holder or there must be an event, such as a change in law or passing of decree by a competent court, which would dispense with the need of consent or willingness on the part of the landlord and so bind him as

would enable the tenant handing over possession or attorning in favour of the paramount title-holder directly; or, in other words, the paramount title-holder must be armed with such legal process for eviction as cannot be lawfully resisted. The burden of raising such a plea and substantiating the same, so as to make out a clear case of eviction by paramount title-holder, lies on the party relying on such defence.”

23. On facts, in Om Prakash Gupta's case (supra) it was held that the tenant failed to establish direct attornment under the landlord.

24. The facts in Om Prakash Gupta's case (supra) are identical with the facts of the instant case. In said case, Ranbir B.Goyal, the respondent before the Hon'ble Supreme Court i.e. the plaintiff cleared the cloud over his title raised by the title paramount i.e. Haryana Urban Development Authority during pendency of the eviction proceedings against Om Prakash Gupta. The Hon'ble Supreme Court held that merely because at some stage the title of the landlord came under a cloud did not entitle the tenant to resist the eviction. The facts of the case were that the suit premises were constructed by Haryana Urban Development Authority (HUDA for short). The same were allotted to Ranbir B.Goyal on certain terms. Alleging violation thereof and imposing a penalty, proceeding under Section 17 of Haryana Urban Development Authority Act 1977 HUDA sought eviction of Ranbir B.Goyal who prior thereto had let out the premises to Om Prakash Gupta sometimes in

August 1989. On 22.2.1999 the Estate Officer HUDA cancelled the allotment in favour of Ranbir B.Goyal and issued a notice dated 7.4.1999 to Om Prakash Gupta asking him to vacate the subject premises. On 19.5.1999 Om Prakash Gupta requested HUDA to allot the suit premises to him as per rules applicable. Ranbir B.Goyal challenged the eviction order before the Appellate Authority which quashed the same vide order dated 22.6.2000. The said order attained finality resulting in Ranbir B.Goyal clearing the cloud over his title. In view of the aforementioned facts, in para 10 of its decision, Hon'ble Supreme Court observed as under:-

“For two reasons we do not think that the defendant-appellant is entitled to any relief and for setting aside of the decree for eviction. Firstly, there is neither any order of resumption and forfeiture within the meaning of Section 17 of the Act passed by HUDA against the respondent nor is there an allotment by HUDA directly in favour of the appellant. In view of the order of the Estate Officer having been set aside by the Appellate Authority under the Act the allotment made by HUDA in favour of the respondent continues to subsist. His title, under which he had inducted the appellant in possession of the suit premises, has not come to an end. The triple test, laid down by this Court in Vashu Deo case is not satisfied. Secondly, the appellant is placing reliance on an event happening after the institution of suit i.e. a subsequent event and a case for taking notice of such subsequent event by court so as to impair the judgment under appeal is not made out.”

25. It is relevant to note that during the pendency of WP(C) No.3916/1990, the appellant was permitted to amend the writ petition vide order dated 28.1.1991 and seek a relief

against DSIDC i.e. to direct DSIDC to directly allot the shed to the appellant. With the dismissal of WP(C) No.3916/1990 vide order dated 3rd July 2006, said relief was declined. Review sought by the appellant of the order dismissing the writ petition was dismissed by the Division Bench on 25.7.2006. Petition seeking Special Leave to Appeal being SLP(C) No.12883/2006 was dismissed on 14.8.2006. The second writ petition filed by the appellant being WP(C)No.12589/2006 seeking relief of DSIDC being directed to allot the shed to the appellant suffered a dismissal on 11.7.2007. Letters Patent Appeal being LPA No.1269/2007 challenging the order dated 11.7.2007 was dismissed on 9.10.2007. The appellant has lost on all legal forums vis-à-vis the claim for direct allotment under DSIDC. The question of it being held that the appellant has attorned under DSIDC does not arise. On the contrary, the respondent has obtained a free-hold tenure in its favour under the conveyance deed executed by DSIDC in its favour on 13.11.2006.

26. We note that on the issue of mesne profits, no submissions were advanced. The finding of the learned Trial Judge was questioned on the bar of limitation. The said plea is not sustainable for the simple reason, as held by the learned Trial Judge the suit was filed within 12 years when cause of action accrued. It has to be noted that the suit was filed on

22.5.2001. The appellant was inducted as a licensee vide Ex.P-1 on 1.9.1990. In fact the suit was filed within 12 years of the induction of the appellant as a licensee.

27. We find no merits in appeal.

28. The same is dismissed with costs.

PRADEEP NANDRAJOG, J.

J.R. MIDHA, J.

December 17, 2008
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