

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

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CM(M) No.1215/2007

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Date of decision: 29th January, 2010

SUNIL KAPOOR

..... Petitioner

Through: Mr. Sanjay Jain, Sr. Advocate with Mr. Pawan Mathur, Sonia Raima & Mr. Sarfaraz Ahmad, Advocates.

Versus

HIMMAT SINGH & ORS.

..... Respondents

Through: Mr. Sanjiv Kakra with Mr. Atul Kumar, Advocates

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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

RAJIV SAHAI ENDLAW, J.

1. This petition under Article 227 of the Constitution of India has been preferred by the defendant in a suit pending before the Court of Additional District Judge, aggrieved from the order dated 14th May, 2007 dismissing the application of the petitioner/defendant under Section 10 of the CPC.

2. The respondents/plaintiffs sued the petitioner/defendant for ejectment and for recovery of mesne profits / damages for use and occupation. It is the case of the respondents/plaintiffs that the petitioner/defendant was a tenant under the respondents/plaintiffs with respect to premises at N-246, Greater Kailash, Part-I, New

Delhi at a rent of Rs.4,000/- per month; that the tenancy of the petitioner/defendant has been determined; that he has failed to vacate the premises.

3. The petitioner/defendant does not dispute that he was a tenant under the respondents/plaintiffs at a rate of Rs.4,000/- per month. He applied under Section 10 of the CPC contending that he had prior to the institution of the suit for ejectment against him instituted a suit in this Court being CS(OS) No.1018/2004 against the respondents/plaintiffs for specific performance of agreement to sell of immovable property. It was his plea that he was defending the suit for ejectment and mesne profit filed by the respondents/plaintiffs also on the ground that the respondent/plaintiffs had agreed to sell the premises to him and thus common questions of law and fact arise in the subsequent suit for ejectment and mesne profits and thus the proceedings in the suit for ejectment be stayed till the adjudication of the suit for specific performance of agreement to sell.

4. This Court while issuing notice of this petition, vide ex parte order dated 7th September, 2007 stayed the proceedings in the suit for ejectment before the trial court and the said order continues to be in force till date.

5. The Additional District Judge dismissed the application holding that the matter in issue in the two suits is different and this Court in the suit for specific performance had also not deemed it appropriate to stay the proceedings in the suit for ejectment and thus dismissed the application.

6. The senior counsel for the petitioner/defendant has relied upon ***Harjeet Singh Maini Vs. Paramjit Singh Maini*** 2008 (102) DRJ 446 and ***Maxwell Securities Pvt. Ltd. Vs. National Stock Exchange of India Ltd.*** 2001 (60) DRJ 685 both of which are containing principles applicable to Section 10 of the CPC.

7. However, the emphasis of the senior counsel for the petitioner was on consolidation of the suits by transferring the suit for ejectment pending before the Additional District Judge to this Court for trial along with the suit for specific performance filed by the petitioner/defendant.

8. The senior counsel for the petitioner/defendant has also contended that it will be highly inequitable to evict the petitioner/defendant before his claim for specific performance is decided inasmuch as if the claim for specific performance is decided in his favour, he would be entitled to come back into possession and his possession ought not be disturbed for the interregnum.

9. Per contra, the counsel for the respondents/plaintiffs relies on:-

- (i) ***Lachaman Nepak Vs. Badankayalu Syama Babu Subudhi*** AIR 1989 Orissa 154 where the Division bench of the Orissa High Court declined the stay of eviction proceedings under the Rent Control Act for the reason of pendency of the suit for specific performance on the ground that mere agreement to sell cannot create any interest in or charge in the property under Section 54 of the Transfer of Property Act.
- (ii) ***Karri Satyanarayana Vs. Pichika Veerraju*** 1996 AIHC 2642 (A.P.) where also stay of eviction proceedings under the local rent statute was denied notwithstanding previously instituted suit for specific performance of sale of that premises.
- (iii) ***Dr. N.P. Tripathi Vs. Smt. Dayamanti Devi*** AIR 1988 Patna 123 where the Division Bench again declined stay holding that proceedings for eviction under the Rent Act stand on a different footing, the Rent Act being a complete code in itself.

The counsel for the respondent also drew attention to the copy of the order dated 17th February, 2009 in the suit for specific performance, wherein an issue has been framed as to the very existence of the agreement to sell relied upon by the petitioner/defendant.

10. A perusal of the plaint in the suit for specific performance filed by the petitioner/defendant and copy whereof has been filed before this Court shows that the case of the petitioner/defendant therein is:-

- (a) that the respondents 1 and 2 herein only had on 23rd February, 2004 entered into the oral agreement to sell with him for the premises in his tenancy for a total consideration of Rs.80,00,000/-;
- (b) at the time of the aforesaid oral agreement to sell, a sum of Rs.2,00,000/- is stated to have been paid in cash to the respondent no.1 only and against receipt executed by the respondent No.1 but also stated to be signed by the respondent No.2 in token of confirmation of the same;
- (c) a perusal of the aforesaid receipt shows that the same is titled "Token Receipt" and the sum of Rs.2,00,000/- was received as token money; it is also mentioned in the receipt that the detailed terms and conditions and price shall be discussed and formal agreement to sell shall be made within two months. The receipt is typed. The total consideration of Rs.80,00,000/- is not in type but in hand;
- (d) the petitioner/defendant claims to have paid further amount totaling Rs.10,00,000/- out of the sale consideration of Rs.80,00,000/- from time to time including by way of adjustments. He also relies on receipts of the sum of Rs.10,00,000/- stated to have been executed on 8th May, 2004 and 8th July, 2004 by the respondent no.2;

- (e) it is his case that on 8th July, 2004, the respondent no.2 met him and told him that the sale deed cannot be executed immediately so the respondents/plaintiffs will not charge any rent from the petitioner w.e.f. 1st August, 2004 and the petitioner can enjoy the premises in his own right in pursuance to the agreement to sell till the sale deed is executed by the petitioner/defendant;
- (f) that contrary to what transpired on 8th July, 2004, the respondents served the notice dated 22nd July, 2004 on the petitioner/defendant of termination of tenancy.

The suit for specific performance was filed immediately thereafter.

11. A mere agreement to sell of immovable property does not create any right in the property save the right to enforce the said agreement. Thus, even if the respondents/plaintiffs are found to have agreed to sell the property, the petitioner/defendant would not get any right to occupy that property as an agreement purchaser. This Court in *Jiwan Das Vs. Narain Das* AIR 1981 Delhi 291 has held that in fact no rights enure to the agreement purchaser, not even after the passing of a decree for specific performance and till conveyance in accordance with law and in pursuance thereto is executed. Thus in law, the petitioner has no right to remain in occupation of the premises or retain possession of the premises merely because of the agreement to sell in his favour.

12. Section 53 (A) of the Transfer of Property Act codifies the doctrine of part performance. A purchaser of immovable property, who in pursuance to an agreement to sell in writing has been put into possession of the property, is entitled to so remain in possession. However, in the present case, there is no agreement to sell in writing. The respondents/plaintiffs deny inter alia the averments of the petitioner/defendant of what transpired on 8th July, 2004. Be that as it may, in none of the receipts relied upon by the petitioner/defendant, is there any mention of delivery of possession/constructive possession to the petitioner/defendant of the premises in part performance of the

agreement to sell. The express plea of the petitioner/defendant in this regard is also of an oral agreement to that effect on 8th July, 2004. Even if the receipts relied upon by the petitioner/defendant are to be termed as an agreement in writing, the same as per the petitioner/defendant also are executed by the respondents 1 & 2 only. There is no agreement in writing with the respondent no.3. The property admittedly belongs to all three of them and the petitioner is claiming the agreement with all three of them. There is no authority in writing shown of the respondent no.3 in favour of respondent no.1 and/or respondent no.2. The agreement to sell with the respondent no.3 as per the plea of the petitioner/defendant is thus oral only.

13. Even the writing claimed by the petitioner/defendant does not provide the possession of the premises having been delivered to the petitioner/defendant in pursuance to the agreement to sell. From the pleas of the petitioner/defendant himself, notwithstanding the oral agreement to sell dated 23rd February, 2004, he was liable to pay rent thereof and also continued to pay the rent. It is his case that only on 8th July, 2004, it was orally agreed by the respondent No.2 with the petitioner/defendant that he should not pay rent w.e.f. 1st August, 2004 and thereafter should continue to occupy the premises in pursuance to the agreement to sell. There is nothing to support the said plea of the petitioner/defendant which essentially is of an oral agreement on 8th July, 2004. The said plea, in the face of the notice dated 22nd July, 2004 sent by all the respondents of termination of tenancy of the petitioner even otherwise does not inspire confidence. It is not the case of the petitioner/defendant that anything has happened between 8th July, 2004 and 22nd July, 2004 owing where to the respondents/plaintiffs change their mind. It defies logic as to why the respondent no.2, alleged to have agreed with the petitioner/defendant on 8th July, 2004 not to pay rent w.e.f. 1st August, 2004, within days thereafter will change her mind and have a notice of termination of tenancy issued to the petitioner/defendant. Ordinarily there is a hiatus between the date of instructing the advocate and the date of issuance of the notice. It can be presumed that the instructions for issuance of notice dated 22nd July, 2004 would have been issued even earlier to that

date. In the circumstances, the plea of the petitioner/defendant of what transpired on 8th July, 2004 cannot be accepted.

14. Even otherwise, the Stamp Act and the Registration Act as applicable to Delhi were amended w.e.f. 24th September, 2001. After the said amendment an agreement to sell of immovable property where-under the possession of the premises is delivered in part performance, can only be by a registered document bearing the prescribed stamp duty i.e. on 90% of the total agreed sale consideration. Section 49 of the Registration Act was also amended. A plea of part performance in the absence of a registered document cannot thus be taken. The petitioner/defendant cannot thus protect his possession in part performance of the agreement to sell.

15. What follows is that even if the petitioner/defendant were to succeed in his suit for specific performance of agreement to sell, till the execution of a conveyance deed in pursuance to the decree, if any, in favour of the petitioner, the petitioner has no ground in law to save his possession of the premises. The status of the petitioner would continue to be as before i.e. of a tenant whose tenancy has been determined.

16. Once that is found to be the position in law, the defence of the agreement to sell is not a legal defence available to the petitioner in the suit for ejectment. If that be so, there is no common question involved in the previously instituted suit for specific performance and the subsequently instituted suit for ejectment.

17. I also find that beside the judgments relied by the counsel for the respondents/plaintiffs, another Single Judge of the Andhra Pradesh High Court in ***Gollu Bhavani Sankar Vs. Bhogavalli Rajeswara Rao*** MANU/AP/0851/1999 and the Madhya Pradesh High Court in ***Prakash Chand Soni Vs. Anita Jain*** MANU/MP/0143/2002 have also refused to stay the eviction proceedings due to pendency of suits for specific performance of agreement to sell.

18. The Division Bench of this Court in *Jai Singh Rana Vs. Mohinder Mohan Goel* 1994 IV AD Delhi 582 was concerned with an interim injunction claimed by the plaintiff in a suit for specific performance against his eviction as a tenant from the premises subject matter of the agreement. The Division Bench observed that it might appear to be just that a tenant should not be allowed to be evicted pending a suit for specific performance and it may be said that this would cause serious hardship to tenant. The Division Bench however held that there can be no generalisation or presumption and laid down the approach to be followed in such cases as under:-

“ (1) In every suit for specific performance and permanent injunction, if an interlocutory application is filed under Order 39 Rule 1 Civil Procedure Code for temporary injunction or for stay of the Rent Control case it will be necessary for the concerned Court to decide whether the tenant who is the petitioner in such an application has made out a prima facie case and whether the balance of convenience lies in staying the Rent Control Case (2) If indeed there is prima facie proof of the genuineness of the agreement of sale, the Court could consider the question of stay of the Rent Control case on merits. Even assuming that the Court came to the conclusion that a prima facie case was made out in favour of the tenant, the balance of convenience might not lie in granting stay of the Rent Control case. In such cases, the Court may even allow the rent control case to be decided and judgment and, decree pronounced but grant stay to the execution thereof, allowing the parties to complete the appeal against Rent Controller's decision or even the further appeal/revision as the case may be so that the whole exercise need not be commenced after the disposal of the civil suit for specific performance. (3) If, on the other hand, the tenant does not make out a prima facie case in regard to the genuineness of the agreement set up by him, there will, in our view, be absolutely no justification for interfering with the rent control proceedings. It all depends on how far the tenant has established the prima facie case about the genuineness of the agreement of sale setup by

him. (4) If indeed the eviction is not stayed and the tenant is evicted and later the suit for specific performance and possession succeeds, there can be no difficulty in executing the decree in the civil suit and putting back the tenant-purchaser, in possession, after properly adjusting their rights.”

In the facts of that case, the tenant was not found to have made out a prima facie case in his favour.

19. Similarly in *Oriental Insurance Vs. Lakhanpal Pvt. Ltd.* MANU/DE/1246/2000 also the Division Bench refused to injunct eviction proceedings (in that case under the Public Premises Act) during the pendency of the suit for specific performance of an agreement of renewal of lease and the only order which was granted was of restraining forcible dispossession.

20. Though the aforesaid two judgments of the Division Bench of this Court are on injunction application in suits for specific performance, but the principles laid down therein would apply here. The jurisdiction, if any, to stay eviction pending a suit for specific performance is of the court where the suit for specific performance is pending and the court where the suit for ejectment / eviction is pending ought not to restrain its hands merely because the suit for specific performance has been filed.

21. The contention of the senior counsel for the petitioner of consolidation though attractive is again loaded against the respondents/plaintiffs. In view of the lesser pendency of cases in the courts where, the suit for ejectment filed by the respondents is pending, it can be disposed of within a few months. On the contrary, if it were to be transferred to this Court to be decided along with suit for specific performance and which requires voluminous evidence, the disposal thereof would be undoubtedly delayed. The petitioner/defendant would thereby achieve indirectly what it is otherwise unable to achieve in law. Thus, the said plea cannot also be allowed.

22. The senior counsel for the petitioner has also urged that defence of the petitioner/defendant in the suit for ejectment that the relationship of landlord and tenant had come to end on 8th July, 2004 and thus the determination of tenancy vide notice of 22nd July, 2004 is of no avail. However, the said argument suffers from a fallacy. The said relationship is pleaded to have come to an end owing to the agreement of delivery of possession part performance and which by law was required to be registered. It has admittedly not been registered. The relationship of the landlord and tenant thus cannot be said to have come to an end.

23. I am pained that notwithstanding there being no ambiguity in law, the suit for ejectment filed by the respondents/plaintiffs has remained stayed for the last over two years for the reason of the petitioner having preferred this petition. No amount of costs can compensate the respondents/plaintiffs for the same. In the circumstances rather than imposing any costs on the petitioner while dismissing the petition and vacating the order staying the proceedings in the ejectment suit, I direct the learned Additional District Judge before whom the suit for ejectment is pending to dispose of the same before 15th April, 2010. Needless to add that any observation made herein shall not prejudice the petitioner/defendant in the suit for specific performance filed by him.

**RAJIV SAHAI ENDLAW
(JUDGE)**

January 29th, 2010
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