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IN THE HIGH COURT OF DELHI AT NEW DELHI

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C.M. (Main) No.1371 of 2008 & C.M. Appl. No.17532 of 2008

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02.03.2010

ARUN KUMAR TANDON

.....Petitioner

Through: Mr. Navin Kumar, Advocate.

Versus

M/S. AKASH TELECOM PRIVATE LIMITED & ANR.

.....Respondents

Through: Mr. Rajiv Duggal, Advocate.

Date of Reserve: 17th February, 2010

Date of Order: March 02, 2010

JUSTICE SHIV NARAYAN DHINGRA

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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 judgment should be reported in Digest? | Yes. |

J U D G M E N T

1. By this petition, the petitioner has assailed an order dated 24th July, 2008 passed by learned Additional District Judge whereby an appeal filed by the petitioner against an order dated 3rd January, 2008 of learned Civil Judge was dismissed.

2. Brief facts relevant for the purpose of deciding this petition are that the petitioner is owner of a flat bearing No.3473, Sector D, Pocket III, ground floor, Vasant Kunj, New Delhi. He let out this flat to M/s. Akash Telecom Private Limited for residential purpose and the flat was occupied by Mr. Shiv Raj, respondent No.2, Director of M/s. Akash Telecom Private Limited. The flat was let out under a written agreement dated 10th May, 2003 for a period of 11 months. The rent of the flat as per the agreement was Rs.9,500/- exclusive of electricity and water charges and apart from rent vide a separate agreement, the tenant had agreed to pay Rs.4,000/- per month as maintenance charges. Thus, the total amount payable for use and occupation of the flat was Rs.13,500/- per month. Since

the tenancy was for a period of 11 months, tenancy expired on 14th April, 2004. The petitioner filed a suit for possession of the tenanted premises from the respondents. The defence taken by the defendants was that the petitioner was given an advance security of Rs.39,000/-. As the petitioner was not in position to refund the security deposit of Rs.39,000/-, the petitioner then entered into an 'Agreement to Sell' with defendant No.2 and the amount of Rs.39,000/- was adjusted towards part sale consideration. The Agreement to Sell was entered into between the petitioner and respondent No.2, namely, Mr. Shiv Raj on 25th April, 2004 and the petitioner received a sum of Rs.4,50,000/- as part consideration against total consideration of Rs.35 lac and defendant No.2 was permitted to continue to hold the possession of the suit property till the deal was finalized. Thus, it was contended that defendant No.2 was in possession of the property in his own right and was not liable to either give the possession or pay the rent. The plaintiff in replication denied the execution of Agreement to Sell the premises and submitted that the market value of the flat was Rs.75 lac. He had not gone mad to sell it for Rs.35 lac. He stated that the document, namely, 'Agreement to Sell' relied upon by the defendant was a forged document. The plaintiff filed an application under Order 39 Rule 10 CPC read with Section 151 CPC seeking court's direction for defendant to pay arrears of rent with effect from 16th August, 2004 and to pay rent and maintenance charges @ Rs.13,500/- every month during pendency of suit. The learned Civil Judge dismissed this application against which the plaintiff preferred an appeal before the learned Additional District Judge which was also dismissed by the appellate court.

3. It is contended by counsel for the petitioner that both the courts below went wrong in relying upon the Agreement to Sell propounded by the defendants to deny the plaintiff his right to receive rent/user charges of the property of which he was lawful owner and which was in illegal occupation of the defendants. He submitted that the alleged

‘Agreement to Sell’ was on a plain paper and was not registered and was bearing no stamp duty. This Agreement to Sell could not even have been looked into by the courts below in view of provisions of Section 17 & 49 of Registration Act, Section 53 A of Transfer of Property Act and Section 35 read with Article 23 A of Indian Stamp Act. Learned counsel for the respondents states that this argument that the Agreement could not be looked into in view of the provisions of above Acts was being raised by the petitioner for the first time before this court and should not be considered.

4. Perusal of order of the appellate court shows that the appellate court had denied the right of the petitioner to receive rent under Order 39 Rule 10 CPC on the ground of Section 53 A of Transfer of Property Act observing that the benefits of provisions of this Section 53 A can be derived by the respondent in view of the alleged agreement cum receipt where it was specifically mentioned that respondent shall continue to retain possession. Thus, the possession of the respondent cannot be said to be unauthorized and the document cannot be ignored more so, when a suit for specific performance was pending. Thus, the plea of respondent that the issue of Section 53 A of Transfer of Property Act was not raised or considered by the court below is baseless.

5. It is settled law that nobody is above law. Even the courts cannot act in defiance of law and cannot pass orders contrary to the statutory provisions. Section 17 sub-Section 1A of the Registration Act as amended provides as under :-

“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.”

6. It is absolutely clear that in order to give benefits of Section 53A of Transfer of

Property Act, the document relied upon must be a registered document. Any unregistered document cannot be looked into by the court and cannot be relied upon or taken into evidence in view of Sections 17(1A) read with Section 49 of the Registration Act. Thus, benefit of Section 53A could have been given to the respondent if and only if the alleged Agreement to Sell cum receipt satisfied the provisions of Section 17 (1) A of the Registration Act. Section 35 of the Indian Stamp Act gives a mandatory direction to the courts that no instrument chargeable with duty shall be admitted in evidence for any purpose or shall be acted upon by any public officer unless such instrument is duly stamped. Article 23 A provides that where contract is for transfer of immovable property in the nature of part performance in any Union Territory under Section 53A, it attracts 90 per cent of the duty as that of a conveyance deed. Thus, the alleged Agreement to Sell could not have been looked into by the court for any purpose, contrary to the mandate of the statute as given in Section 35 of the Indian Stamp Act.

7. The Agreement to Sell which is relied upon is not in favour of respondent No.1 but is in favour of respondent No.2 and reads as under :-

“I, Arun Kumar Tandon Son of Late Sh. J.C. Tandon Res. of House No.252, Sector 10, FBD (Haryana) received amount of Rs.4,50,000/- (Rs. Four Lac Fifty Thousand in cash) on account of advance against sale of my flat No.D-3/3473, Vasant Kunj, New Delhi-70 on 25.4.04 out of total sale consideration amount of Rs.35,00,000/- (Rs.35 Lac only) from Sh. Shiv Raj S/o Sh. Ho Ram. Balance amount of Rs.30,50,000/- shall be paid in three installments of Rs.4,50,000/- on dated 25.5.04 and Rs.11,00,000/- on 25.6.04. Remaining balance amount of sale amount shall be paid at the time of sale amount shall be paid at the time of sale deed which shall be on or before 25.8.04 and he shall continue to retain the possession.”

8. Even if this Agreement to Sell is looked into, the Agreement to Sell does not say that no rent shall be payable to the landlord even if no sale deed is ever executed. It only talks of retaining possession and does not talk that the right of the landlord to receive rent

came to an end.

9. It is undisputed that the tenancy was created by a written instrument for a period of 11 months. The tenancy came to an end by a efflux of time. It is not the case of the respondent that the tenancy continued after period of 11 months came to an end. The case of the respondent is that tenancy merged into his rights. Determination of lease by merger is provided under Section 111 (d) of Transfer of Property Act, which reads as under :-

“111 **Determination of lease** – A lease of immoveable property determines –

(d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right.”

It is clear that merger takes place when tenant himself becomes the absolute owner of tenanted premises, which is not the case here.

10. I, therefore, consider that the trial court could not have given benefit of Section 53 A of Transfer of Property Act to respondent under any circumstances even if a suit for specific performance filed by respondent No.2 was pending. Pendency of a suit for specific performance would not have debarred the court below from looking into the document relied upon by the respondent and the effect of the document as to whether such a document can even be looked into by the court for any purpose whatsoever. When the document itself could not be looked into, the question of giving benefit to respondent on the basis of this document would not arise. It was obligatory on the court below to be aware of the law and to apply the law as it stood. Section 17 (1) A of the Registration Act and Section 35 of the Indian Stamp Act were very much there on the statute book. No plea can be taken that these sections were not brought to the notice of the court. Like any other citizen of this country, Judges are also supposed to know the law and apply correct

law. Benefit of Section 53A could not have been given to the respondents of a document which could not be looked into. If this document is not looked into, the respondents continue to be in possession unauthorisedly, after expiry of the lease agreement and the respondents were liable to pay the arrears of rent and monthly rent during pendency of the suit to the petitioner as reflected by the lease agreement.

11. It is pleaded by counsel for the respondents that there was no admission made by the respondents in the written statement that agreed rent was Rs.9,500/- and Rs.4,000/-. I consider that this plea must fail. There is no denial that the respondents had come into possession of the premises by virtue of the written lease agreement where rent was specifically agreed by the parties and the maintenance charges were also specifically mentioned. Irrespective of the fact that the respondents in the written statement did not admit himself to be tenant, the court has to rely upon the lease agreement by virtue of which the respondents came into possession, and should have allowed the application under Order 39 Rule 10 CPC directing the respondents to pay at least the rent which was reserved in the lease agreement.

12. I, therefore, allow this petition. The application of the petitioner under Order 39 Rule 10 CPC is allowed. The order of the court below is set aside. The respondents shall deposit the entire arrears of rent till date within 30 days and in case, the rent is not deposited, the court below would be at liberty to act according to law and strike off the defence of the respondents.

March 02, 2010
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SHIV NARAYAN DHINGRA J.