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

+ RFA 15/2013

% Judgment reserved on 16th May, 2013
Judgement delivered on 25th July, 2013

FIRSTCORP INTERNATIONAL LIMITED Appellant
Through :Mr. Anil Gera and Ms.
Parvinder Khatra, Advs.

Versus

KULJIT SINGH BHUTALIA Respondent
Through :Mr. Daljit Singh, Sr.
Advocate along with Mr.
Saurabh Sandilya, Adv.

CORAM:
HON'BLE MR. JUSTICE A.K. PATHAK

A.K. PATHAK, J.

1. Appellant-defendant has filed this appeal aggrieved by the judgment and decree of possession and mesne profits / damages passed by the trial court against it.
2. Respondent-plaintiff filed a suit for recovery of possession and mesne profits in respect of third floor of property bearing no. 39, Sadhna Enclave, New Delhi-110017 (for short hereinafter referred to as “suit property”) against the appellant with the

allegations that he was owner of the entire property bearing No.39, Sadhna Enclave, New Delhi-110017. On 1st October, 2002 M/s. Earthtech Enterprises Ltd. (“EEL”, for short) through Shri O.P. Aggarwal took second floor on rent from him. Sometime in the month of December, 2002 Shri O.P. Aggarwal suggested that if a temporary construction is raised on the roof of second floor, he will take the same on rent for using it as a guesthouse of EEL. Respondent agreed to the said proposal on the condition that some funds may be advanced for raising such structure to be adjusted towards the rent for the first two years. Respondent raised construction and completed the same by March, 2004. Thereafter, newly constructed structure was let out to appellant on the suggestion of Sh. O.P. Aggarwal, who was the real controlling figure in the company which was managed by him through Directors and other employees. As agreed, with effect from 1st April, 2006 appellant started paying rent @ ₹15,000/- per month after deducting tax at source. Appellant was tenant on month to month basis. Appellant had been paying rent to respondent after deducting TDS. Vide notice dated 7th August, 2008, respondent

terminated the lease by serving a notice under Section 106 of the Transfer of Property Act, 1882, ('The Act' for short) thereby called upon the appellant to vacate the tenanted premises on or before 31st August, 2008. Appellant did not vacate the suit property by 31st August, 2008 and became a trespasser and was entitled to pay damages @ ₹75,000/- per month, which was the prevalent market rent in the area.

3. In the written statement, appellant denied that it was a tenant in respect of the suit property. It was denied that EEL had taken on rent second floor on 1st October, 2002 through Sh. O.P. Aggarwal. It was stated that sister concern of appellant, namely, M/s. Earthtech Enterprises Ltd. (EEL) was in possession of second floor of the suit property with effect from 3rd September, 2002. In the month of October, 2002, respondent approached EEL and offered to sell the roof of second floor on the ground that he was facing some financial problems. EEL agreed to purchase the roof rights of second floor for the appellant. It was made clear that EEL was not in a position to pay the entire sale consideration in a lump sum and would pay it in instalments. Thus, an oral agreement was

arrived at between EEL and respondent with regard to the roof of the second floor for a total sale consideration of ₹60 lacs along with the cost of construction. EEL was to pay ₹11,000/- per month by cheque to respondent which was to be adjusted towards part payment of total sale consideration. It was further agreed that appellant will raise construction of third floor, that is, suit property. Respondent also represented that he wanted to help his daughter, thus, EEL should pay ₹11,000/- per month with effect from 14th October, 2002 in the name of his daughter's firm, namely, M/s. Art Forum and the said amount was to be treated as part payment of the total sale consideration of ₹60 lacs. Accordingly, EEL started paying ₹11,000/- per month with effect from 14th October, 2002 through cheques drawn in the name of M/s. Art Forum, which was subsequently increased to ₹20,000/- per month with effect from April, 2003. Appellant paid ₹5 lacs in cash on 29th April, 2005 to respondent against receipt. Thereafter, respondent handed over possession of the roof of second floor to appellant. Accordingly, appellant started construction in the month of May, 2005. Another sum of ₹10 lacs was paid on 15th September, 2005 against receipt

towards part payment of total sale consideration. Construction was ultimately completed at the end of November, 2005 and thereafter appellant paid another sum of ₹5 lacs against receipt dated 24th November, 2005 issued by the respondent. Appellant requested the respondent to execute a proper Agreement to Sell but he avoided to do so on the pretext of proceedings pending before the Debt Recovery Tribunal (DRT) between respondent and the Bank. In the month of March, 2006 suit property was furnished by the appellant and thereafter appellant started using the same as its office. At the request of respondent, appellant started paying ₹15,000/- per month through cheques with effect from 6th October, 2006 towards part payment of the total sale consideration. Deduction of TDS from the instalments being paid towards part sale consideration was made at the instance of respondent. It was alleged that the suit had been filed by the respondent as a counterblast to the suit bearing CS (OS) NO. 1861/2008 filed by the appellant for specific performance as well as mandatory and perpetual injunction against the respondent. Receipt of notice dated 7th August, 2008 was denied. It was denied that appellant

became an unauthorized occupant after alleged termination of lease and was liable to pay the damages as claimed in the plaint.

4. In the replication, respondent denied the allegations levelled in the written statement and reiterated the averments made in plaint. Oral agreement, as alleged by the appellant, was denied. It was stated that respondent had never agreed to sell his property or any part thereof to appellant orally or otherwise. Respondent claimed that appellant had no right to challenge the title of respondent in view of Section 116 of the Evidence Act, 1872. No statutory declaration by the appellant with the Registrar of Companies (ROC) was made with regard to purchase of the property.

5. Following issues were framed by the trial court on 18th December, 2009:-

(i) Whether the defendant is not a tenant in respect of 3rd floor of 39, Sadhna Enclave, Panchsheel Park, New Delhi? OPD

(ii) If issue no. 1 is proved against the defendant, whether the tenancy has been validly terminated? OPP

(iii) Whether the plaintiff is entitled to a decree for recovery of possession in respect of the suit property? OPP

(iv) Whether the plaintiff is entitled to damage/mesne profit in respect of the suit property? If so, at what rate and for which period? OPP

(v) Relief.

6. Respondent examined himself as PW1. Respondent also examined Shri Mahinder Pal Singh Kohli as PW2. PW1 proved site plan Ex. PW1/A. TDS certificates for the period 1st April, 2006 to 31st March, 2007 and 1st April, 2007 to 31st March, 2008 were proved as Ex. PW1/1 “collectively”. Notice of termination of tenancy along with postal receipts were proved as Ex. PW1/2 to Ex. PW1/5. Order passed by the DRT dated 28th January, 2004 was put to PW1 in his cross-examination and was proved as PW1/D1. PW2 Shri Maninder Pal Singh Kohli proved certified copies of two registered lease deeds as Ex. PW2/1 and Ex. PW2/2, respectively. As against this, appellant examined five witnesses. Shri Avdhesh Kumar Singh was examined as DW1. He proved Certificate of Incorporation as Ex. DW1/1; Certificate of commencement of business was proved as Ex. DW1/2; various letters were proved as

Ex.DW1/3. Another witness Shri Mahavir Prasad Mishra was examined as DW2. He was confronted with Form 16A (TDS certificates) for the period 1st April, 2003 to 31st March, 2004; from 1st April, 2004 to 31st March, 2005; 1st April, 2005 to 31st March, 2006; 1st April, 2006 to 31st March, 2007; 1st April, 2007 to 31st March, 2008 and 1st October, 2002 to 31st March, 2003 and the same were exhibited as Ex. DW2/X1 to Ex. DW2/X6. Hire Charges Agreement was proved as DW2/X7; vouchers of different dates were exhibited as Ex. DW2/8 to Ex. DW2/13. One Shri Laxman Bhatt was examined as DW3. Shri Anil Sharma was examined as DW4. He deposed with regard to various payments made by the appellant to respondent towards alleged purchase of the suit property. One Shri Sanjeev Bhutani was examined as DW5. In rebuttal respondent examined Shri Shanti Dave as PW3.

7. After hearing arguments of the parties and scrutinizing the documentary as well as ocular evidence on record, trial court has held that landlord tenant relationship between the parties stood proved from the TDS certificates. The plea taken by appellant that TDS certificates were sham documents was rejected. It was further

held that appellant had failed to establish its case for having made the payments to plaintiff towards sale consideration in view of the relevant provisions of the Companies Act, 1956 which mandate incorporation of such payment made towards purchase of any immovable property in the balance sheet of the company. It was further held that defence raised by the appellant that it purchased roof rights of second floor stands contradicted from TDS certificates wherein nature of payment was specifically mentioned as rent. Explanation rendered that the TDS certificates were drawn at the insistence of respondent since he was having a dispute pending in DRT wherein immovable property was involved, was not found convincing, in view of the order of the DRT which indicated that the matter stood compromised and entire compromised amount in full and final settlement to the satisfaction of the bank stood paid. It was held that though the plea of oral Agreement to Sell would be valid in view of Alka Bose v/s Parmatma Devi AIR 2009 SC 1525 still such a plea was not enough for the appellant to retain possession in this case. Argument of the appellant that an unregistered Sale Deed was

admissible in evidence in a suit for specific performance by placing reliance on *S. Kala Devi vs. V.R. Soma Sundra*, AIR 2010 SC 1654 was of no help to the appellant since protection under Section 53-A of the Act was not available to appellant. Trial Court has placed reliance on *Sunil Kapoor Vs. Himmat Singh and Others*, 167 (2010) DLT 806 for holding that protection under Section 53-A of the Act was not available to appellant. Reliance has also been placed on *Ashok Goenka vs. Chandra Bhushan Singh*, 2010 (1) PLJR 3317, to conclude that appellant cannot protect his possession in a suit for possession instituted by a landlord against his tenant by taking plea of an agreement to sell. It has been further held that tenancy was validly terminated by serving the notice under Section 106 of the Act. Notice was sent at correct address through registered post and since undelivered envelope was not received back a presumption can be safely drawn under Section 27 of the General Clauses Act, 1897, regarding its service since address reflected in the postal receipts or AD card was not disputed. Bare denial of receipt of notice was not sufficient in these circumstances. Besides this, the service of summons in the

suit itself was a sufficient compliance of requirement of Section 106 of the Act. Reliance was placed on M/s. Jeevan Diesels and Electricals Ltd. Vs. M/s. Jasbir Singh Chadha (HUF) & Anr. 182 (2011) DLT 402 on this point. As regards damages/mesne profits, the same have been quantified at ₹75,000/- (Rupees Seventy Five Thousand Only) per month from September, 2008 till the actual delivery of vacant possession of the suit property by placing reliance on the registered lease deeds Ex. PW2/1 and Ex. PW2/2 in respect of the similarly situated properties in Ex. PW2/1 and Ex. PW2/2 wherein monthly rent was mentioned as ₹1.5 lacs.

8. Relevant it would be to mention at this stage that respondent had filed a suit for recovery of possession against EEL, that is, sister concern of appellant. In the said case respondent had alleged that second floor of property bearing no. 39, Sadhna Enclave, New Delhi-110017 was leased out to EEL on a monthly rent of ₹75,000/- with effect from 1st October, 2002 which was, subsequently, increased to ₹30,000/- per month with effect from 1st April, 2003 in terms of the fresh lease deed. Thereafter, rent was again increased to ₹25,000/- with effect from 31st October, 2006.

Since lease agreements were unregistered tenancy was on month to month basis ending on the last day of same month. In the said case also EEL had taken the same defences which have been taken by the appellant in this case. Plea of oral Agreement to Sell was set up, inasmuch as it was contended that suit for specific performance, based on the oral agreement, was pending, thus, decree of possession could not have been passed. Respondent had placed reliance on TDS certificates in the said case as well. On an application under Order 12 Rule 6 CPC filed by the respondent a decree of possession was passed against EEL in the said case. It was held that admissions made in TDS certificates were categorical, unambiguous and unequivocal about the landlord-tenant relationship between the respondent and EEL. Aggrieved by the decree passed by the Trial Court EEL approached this Court vide an appeal which was dismissed vide the judgment *Earthtech Enterprises Ltd. vs. Kuljit Singh Butalia*, 199 (2013) Delhi Law Times 194. Similar arguments, which have been advanced in this case, were advanced in the said case and were negated as regards to the correctness and acceptance of TDS certificates to infer

Landlord-tenant relationship between the parties. It was held that any oral plea was barred by Sections 91 and 92 of the Indian Evidence Act on the face of TDS certificates. It was held that appellant had come in possession of the second floor as a tenant. EEL preferred Special Leave Petition in the Supreme Court against the judgment passed by this court which has been dismissed.

9. Learned counsel has vehemently contended that TDS certificates could have only been relied upon, if these were part of the lease agreement or a tenancy agreement. In this case no written lease agreement was executed between the parties, whether registered or unregistered, thus, TDS certificates do not fall within the ambit and scope of Sections 91 and 92 of the Evidence Act, 1872. Sections 91 and 92 of the Evidence Act, 1872 can supplement each other. Section 91 would be frustrated without the aid of Section 92. Similarly, Section 92 would be inoperative without the aid of Section 91. In absence of any written agreement executed between the respondent and appellant, the provisions of Section 92 of the Evidence Act, 1872 would not be attracted in this case since the case is based on oral agreement. Reliance has been

placed on S. Saktivel (Dead) by LRs vs. M. Venugopal Pillai and Ors. (2000) 7 Supreme Court Cases 104; Sudesh Madhok Vs. Paam Antibiotics Ltd. and Another, 174 (2010) DLT 594; Smt. Gangabai vs. Smt. Chhabubai, AIR 1982 Supreme Court 20-Head note (B); Ishwar Das Jain (Dead) by LRs. Vs. Sohan Lal (Dead) by LRs. AIR 2000 SC 426 Head Note (E) and R. Jankiraman vs. State AIR 2006 SC 1106.

10. Similar arguments were advanced in Earthtech (Supra) and have been answered thus:

“7.....TDS certificates were also not disputed by the appellant, inasmuch as, same being statutory documents have rightly been read against the appellant so as to draw an inference about existence of landlord-tenant relationship between the parties. Part B of Chapter XVII of the Income Tax Act, 1968 provides for “deduction of tax at source” by the payer in respect of certain specified payments. Section 194-I of the Income Tax Act, deals with “deduction of tax at source” in respect of rent paid by the tenant to landlord. It mandates a tenant to deduct tax @ 10% from the rent paid to landlord for the use of land or building or land appurtenant to a building. Section 200 of the Income Tax Act further envisages that the amount of tax so deducted shall be deposited with the Central Government against Permanent

Account Number of the payee. Section 203 of the Income Tax Act casts a duty on the person to deduct tax at source and deposit the same with the Central Government and also to provide a certificate to the payee (landlord in this case) in a prescribed format. Rule 31 (1) (b) of the Income Tax Rules, 1962 provides that the certificate of deduction of tax at source under Section 194 I shall be in the shape of Form No.16-A. TDS certificate in the shape of Form 16-A, in this case, relates to the period 1st October 2002 to 31st March 2008 wherein nature of tax deducted has been shown from the rent paid to respondent. It is thus, clear that the appellant continued to pay rent to the respondent uptill the end of March, 2008 and landlord-tenant relationship can be inferred from the admitted TDS certificates. Order 12 Rule 6 CPC is wide enough to afford relief not only in case of admission in pleadings but also in the case of admission dehors pleadings. Thus, admission made in TDS certificates cannot be ignored and will be sufficient to infer categorical admission about the landlord-tenant relationship by the appellant”.

“8. Learned counsel for the appellant has vehemently contended that TDS certificates were issued on the insistence of the respondent in view of the pendency of DRT litigation. He submits that this defence is required to be proved in evidence, thus, it cannot be said that the appellant had admitted landlord-tenant relationship after the year 2003. He has

placed reliance on Smt. Gangabai v/s Smt. Chhububai AIR 1982 SC 20, Ishwar Dass Jain v/s Sohan Lal AIR 2000 SC 426 and Krishnabai Ganpatrao Deshmukh v/s Appasaheb Tuljaramrao Nimbalkar AIR 1979 SC 1880. I have perused the judgments and find them in the context of different facts. In Gangabai (supra), plea taken was that the sale deed was a sham document and never intended to be acted upon between the parties. In the said case, it was held that bar imposed by Sub Section 1 of Section 92 of the Indian Evidence Act would not be attracted. In Ishwar Dass (supra) also, a plea was taken that the mortgage deed was a sham document and in this context, it was observed that evidence to prove that the mortgage is a sham document was admissible. In Krishnabai (supra), nomenclature of a document was in issue. In this case, Income Tax Act mandated deduction of tax, its deposit with Central Government and the said fact to be reduced in the form of a document, that is, TDS certificate, thus, Sections 91 and 92 of the Indian Evidence Act will be attracted and no oral contradictory evidence would be admissible.”

11. I do not find any force in the contention of learned counsel for the appellant that TDS certificates without being part of a written lease between the appellant and respondent cannot be taken as a proof of landlord – tenant relationship or that same do not fall

within the ambit and scope of Sections 91 and 92 of the Evidence Act, 1872. TDS is to be deducted and deposited with the Income Tax Authority and certificates have to be drawn as mandated by the Income Tax Act, thus, same would attract the provisions of Section 92 of the Evidence Act. Sections 91 and 92 of the Evidence Act also takes in its sweep such matter which is required to be reduced in the form of a document. Thus, the TDS certificates which are required to be reduced in writing in the form of a document under the Income Tax Act would fall within the ambit and scope of Section 92 of the Act and no evidence contrary to the contents of such document would be admissible. That apart, plea taken by the appellant that TDS certificates were issued on the insistence of respondent in view of pendency of DRT litigation have not been found correct by the trial court rightly so in view of the DRT order which indicated that the matter had already been compromised by respondent with the bank

12. Accordingly, I am of the view that TDS certificates proved on record have rightly been accepted as proof of landlord-tenant relationship between the parties.

13. Even otherwise, the plea of oral Agreement to Sell taken by the appellant is of no consequence in the present suit for possession. The plea of oral agreement has been dealt with in Earthtech Enterprises Ltd.'s case (supra) in the following manner:

“11. In P.P.A. Impex (supra), the decree of possession passed by the Single Judge, on an application under Order 12 Rule 6 of the Code, has been upheld by the Division Bench of this Court. In the said case, defendant had claimed an independent right in the suit property pursuant to an agreement to sell. As per the defendant his defence could have been substantiated only during the trial and no decree on admission could have been passed. Division Bench found the defence of defendant to be moonshine. Division Bench observed thus “the courts are already groaning under the weight of bludgeoning and exponentially increasing litigation. The weight will unvaryingly increase if moonshine defences are needlessly permitted to go to trial”. In Om Wati (supra) also, a decree of possession was passed in favour of the landlord on admission of tenant in the written statement-cum-counter claim that she came in possession of the suit premise as a tenant, however, she set up a defence of agreement to sell. In this context, Division Bench of this Court held as under:-

The defence of possession being protected under Section 53A of the Transfer of Property Act, 1882 in the context of the alleged oral agreement was negated by the

learned Single Judge holding that Section 53A of the Transfer of Property Act would come into play only when there was a written agreement to sell under which possession was handed over and sale consideration paid. With respect of the defence taken, we must hold the same to be a sham and of a kind which no Court of justice or equity would countenance. If these kinds of defences are to be permitted to be set up, it would create havoc in the society. Every tenant would start claiming that some relative of his or hers or he himself rendered some services of effected delivery of certain goods which was to be re-compensated by way of sale consideration for the sale of the tenanted property.

12. Section 17 (1)(A) of the Registration Act which has come into force with effect from 24th September, 2001 reads as under :-

Documents containing contracts to transfer for consideration, any immoveable property for purpose of Section 53-A of the Transfer of Property Act, 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, they shall have no effect for the purpose of the said Section 53-A.

13. A bare perusal of aforesaid provision makes it clear that a person can protect his possession under Section 53-A of the Transfer of Property Act, 1882 on the plea

of part performance only if it is armed with a registered document. Even on the basis of a written agreement he cannot protect his possession. In this case, plea of existing oral agreement has been set. In any event, in this case, appellant cannot protect his possession under the shield of Section 53-A of the Transfer of Property Act. Even otherwise, mere agreement to sell of an immovable property, even if the plea of oral agreement is accepted for the sake of argument, would not create any right in favour of the tenant-appellant to hold over the possession of the suit property.

14. In Sunil Kapoor (supra), a Single Judge of this Court has held thus “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 v/s Narain Das, AIR 1981 Delhi 291 has held that in fact no right inure 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.” In the said case also, tenant had filed a suit for specific performance of agreement to sell.

Subsequently, landlord filed a suit for ejectment and mesne profit. In the case filed by the landlord, tenant set up a defence that landlord had agreed to sell the suit property to him. Tenant filed an application under Section 10 of the Code before the trial court for staying the ejectment suit which was dismissed. High Court declined to stay the suit for ejectment till adjudication of the suit for specific performance. It was further observed that plea of part performance in absence of unregistered document cannot be taken by the tenant for protecting his possession. In para 14 it was held as under :-

“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 whereunder 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.”

14. Appellant is a company registered under the Companies Act, 1956 and responsible to follow the requirements as laid down under Section 209 of Companies Act, 1956, inasmuch as has to maintain books of account and record all the transactions regarding

assets and liabilities of the Company in balance sheet and submit with the Registrar of Companies. No such account books and balance sheets produced which also creates a serious doubt about the whole transactions.

15. I do not find any force in the contentions of learned counsel for the appellant that respondent had failed to prove tenancy by any cogent evidence, inasmuch as no question was put to appellant's witness about the tenancy. Evidence adduced by the appellant was sufficient to prove landlord-tenant relationship. There was no need to produce his daughter by the respondent in view of the overwhelming evidence on record.

16. Reliance has also been placed on Narayan Bhagwantrao Gosavi Balajiwale vs. Gopal Vinayak Gosavi and Ors. AIR 1960 SC 100 – Head Note (b); Raghunathi and Anr. Vs. Raju Ramappa Shetty AIR 1991 SC 1040 and NTPC Thermal Power Station vs. Umesh Kumar Mishra (2010) III LLJ 663 Delhi but I find these judgments in the context of different facts. I also do not find any force in the contention of the appellant's counsel that respondent is guilty of suppression of material facts and relevant documents.

17. Even otherwise appellant does not appear to be truthful in making the statements regarding the manner and circumstances in which it came in possession of the second floor. In the written statement it was stated that respondent handed over the possession of the roof of second floor to the appellant who raised construction thereon. DW5 Sanjeev Bhutani has been produced by the appellant to support the contention that construction was raised by it. However, in his cross-examination the whole story stands demolished in view of the answer given by him to the effect “the material for constructing the roof of the 3rd floor was purchased by Mr.Kuljeet Singh. It is correct that the work was started by Mr.Kuljeet Singh and I only completed the job. I do not remember what percentage of work was completed by me”. This is yet another circumstance which goes in favour of respondent and demolishes the defence of the appellant.

18. As regards quantum of damages/mesne profits as fixed by the trial court, same is on the basis of registered lease deeds and same also does not require any interference.

19. For the foregoing reasons, I do not find any perversity,

irregularity or impropriety in the impugned judgment and decree.

Consequently, appeal is dismissed. No order as to costs.

A.K. PATHAK, J.

JULY 25, 2013

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