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

+ RFA 292/2012

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Judgment reserved on 3rd May, 2013

Judgement delivered on 22nd May, 2013

SURAJ PRAKASH

..... Appellant

Through : Mr. Arvind Pandey and
Ms. Rakhi Suneja, Advs.

versus

KANTA KUNDRA

..... Respondent

Through :Ms. Sangeeta Chandra,
Adv.

CORAM:

HON'BLE MR. JUSTICE A.K. PATHAK

A.K. PATHAK, J.

1. This appeal is directed against the judgment and decree dated 14.5.2012 passed by the trial court whereby decree of possession has been passed against the appellant in respect of first floor of the house bearing no. 122/144, South Enclave, Dakshin Puri, New Delhi, more particularly shown in red colour in the site plan Ex. PW1/2 (for short hereinafter referred to as "suit property"); money decree of ₹20,000/- (Rupees Twenty Thousand Only) towards damages for use and occupation of the suit property from 1st December, 2005 till 31st March 2006 @ ₹5,000/- (Rupees

Five Thousand Only) per month besides future damages @ ₹5,000/- (Rupees Five Thousand Only) with effect from 1st April, 2006 till handing over possession of suit property to the respondent has also been passed.

2. As per the plaint appellant had purchased the suit property from Shri Arvinder Singh Kathuria against sale consideration of ₹3,24,000/- (Rupees Three Lacs Twenty Four Thousand Only) vide a registered Sale Deed dated 2nd December, 2005. Appellant was in possession of the suit property at that time. Upon enquiry he claimed that he had purchased the suit property from Shri Vasdev Dhingra on 21st May, 1996 on the basis of receipt and he had already filed a suit for declaration and permanent injunction in trial court. Suit property was originally allotted to Shri Vasdev Dhingra. Upon enquiry from Shri Vasudev Dhingra he informed that he had not signed any document in favour of appellant. Shri Vasdev Dhingra was aged about 75 years and was not in a position of taking any action against the appellant, thus, had sold the suit property to Shri Subhash Singh vide Agreement to Sell and registered General Power of Attorney the dated 25th September,

1998. Suit property was got converted into freehold and thereafter DDA executed a Conveyance Deed in favour of Sh. Subhash Singh. Subsequently, he sold the suit property to Shri Arvinder Singh Kathuria vide registered Sale Deed dated 11th June, 2004. Later on, Shri Arvinder Singh Kathuria sold the suit property to the respondent. Accordingly, respondent became owner of suit property. Appellant was an unauthorised occupant in the suit property. Respondent served a legal notice dated 25th February, 2006 on the appellant thereby called upon him to handover vacant possession of the suit property besides damages @ ₹5000/- (Rupees Five Thousand Only) per month with effect from 1st December, 2005. Despite service of notice to quit, appellant did not vacate the suit property; hence, the suit.

3. In the written statement, appellant has simply denied the averments made in the plaint besides claiming himself to be owner of the suit property. He denied that he was an unauthorised occupant in the suit property. He alleged that he had purchased the suit property from Shri Vasdev Dhingra. It was further alleged that respondent had no concern or right over the suit property.

Appellant claimed that the suit was based on a concocted story. Respondent had not approached the Court with clean hands, inasmuch as same was without any cause of action and was liable to be dismissed.

4. In the replication, respondent denied the averments made in written statement and reiterated the averments made in plaint. It was specifically reiterated that appellant had no right, title or interest in the suit property and was an unauthorised occupant.

5. Following issues were framed by the trial court on 6th January, 2006:-

(i) Whether the plaintiff has not approached the court with clean hands and has concocted a false story? OPD

(ii) Whether the plaintiff is entitled to possession of the suit property? OPP

(iii) Whether the plaintiff is entitled to damages for user w.e.f. 01.12.2005 @ Rs.5000/-? OPP.

(iv) Relief.

6. Respondent examined herself as PW1. She also examined Shri Arvinder Singh Kathuria as PW2. Both these witnesses have proved entire chain of documents regarding title emanating right

from the original allottee Shri Vasdev Dhingra upto the respondent. Shri Mohit Sharma of Citi-Financial Consumer Finance India Ltd. was examined as PW3. He produced original Sale Deed dated 1st December, 2005 executed by Shri Arvinder Singh Kathuria in favour of the respondent in Court certified copy whereof was already on record as Ex. PW1/1. Respondent proved the site plan as Ex. PW1/2. Registered General Power of Attorney dated 25th September, 1998 executed by Shri Vasdev Dhingra in favour of Smt. Sushila Rani wife of Shri Subhash Singh was proved as Ex. PW1/4. Conveyance Deed executed by the DDA on 28th January, 2002 in favour of Subhash Singh was proved as Ex. PW1/5. Sale Deed dated 11th June, 2004 executed by Shri Subhash Singh in favour of Shri Arvinder Singh Kathuria was proved as Ex. PW1/6. PW2 Shri Arvinder Singh Kathuria identified the signatures on registered Sale Deed dated 11th June, 2004 Ex. PW1/6. As against this, appellant examined himself as DW1. He also examined Shri Ram Singh and Smt. Basanta as DW2 and DW3, in support of his plea that he purchased the suit property from Shri Vasdev Dhingra, through an agreement Mark DW2/1 even though no reference of

this agreement had been made in the written statement. DW1 also deposed that he was in love with the daughter of Shri Vasdev Dhingra and had married her. Later on, he had purchased the suit property from Shri Vasdev Dhingra (his father-in-law). However, no sale deed was produced on record by him inasmuch as he admitted in his cross-examination that no sale deed was executed by Shri Vasdev Dhingra in his favour. DW2 and DW3 also deposed in line with the statement of DW1.

7. On a careful examination of entire material placed on record, trial court has returned a categorical finding that respondent had succeeded in proving that she was owner of the suit property. Respondent had placed and proved on record the entire chain of documents emanating from the original allottee which were sufficient to prove that respondent was owner of suit property. As against this, appellant had miserably failed to prove that he had purchased the suit property from Shri Vasdev Dhingra. Bald statement of appellant that he had purchased the suit property from Shri Vasdev Dhingra not supported by any document was not sufficient to conclude that he was having any ownership right, title

or interest in the suit property. Agreement produced by the appellant was not even exhibited being beyond pleadings. Testimonies of DW2 and DW3 were also of no help to substantiate the plea of appellant that he had purchased the suit property from Shri Vasdev Dhingra. Trial court observed that best evidence, which appellant could have produced, was Shri Vasdev Dhingra, as only he could have supported the plea of appellant that suit property was purchased by him. As against this, respondent had produced the registered Sale Deed in her favour coupled with entire chain of documents emanating from Shri Vasdev Dhingra. Though it was not pleaded in the written statement but appellant contended in his written submissions that appellant was a tenant in respect of the suit property. This plea was taken by him on the basis of Clause 2 of the Agreement to Sell Ex. PW2/1 and Clause 3 of the Sale Deed Ex. PW1/6 wherein it was referred that the property was a tenanted property. Trial court rejected this contention being beyond pleadings.

8. I have heard learned counsel for the parties and have carefully perused the entire trial court record and I am of the view

that findings returned by trial court are in consonance with the trial court record including the evidence led by the parties. The view taken by trial court is strictly in conformity with the settled legal principles and does not suffer from any infirmity or illegality. Stand of the respondent all along had been that she was owner of the suit property having purchased the same from Arvinder Singh Kathuria vide registered Sale Deed Ex. PW1/1 against sale consideration. Shri Arvinder Singh Kathuria has stepped in the witness box as PW2 and has supported the version of respondent. He deposed that he sold the suit property to respondent vide registered Sale Deed Ex. PW1/1. He further deposed that he had purchased the suit property from Shri Subhash Singh vide registered Sale Deed Ex. PW1/6. Conveyance Deed Ex. PW1/5 executed by DDA in favour of Shri Subhash Singh was also placed on record. Shri Vasdev Dhingra was the original allottee and it is on the basis of General Power of Attorney, Agreement to Sell etc. DDA, after verifying the facts, transferred the suit property and executed a Conveyance Deed in favour of Shri Subhash Singh. From the chain of documents placed on record and proved by the

respondent, it is clear that respondent is the owner of suit property. As against this, appellant has miserably failed to prove that he had purchased the suit property from Shri Vasdev Dhingra. This plea taken by him in the written statement is as vague as it could be, inasmuch as no reference of any agreement with date and sale consideration was made in the written statement. Appellant, who stepped in the witness box as DW1, admitted in his cross-examination that there was no Sale Deed in his favour. If that is so, then bald plea taken by him has rightly not been accepted by the trial court. Alleged agreement produced by him had remained unproved inasmuch as he failed to examine the best evidence, that is, Shri Vasdev Dhingra thus an adverse inference can be drawn against the appellant. Bald statements of DW2 and DW3 are also not sufficient to prove the defence of appellant.

9. As regards the plea of appellant that he was a tenant in the suit property same has rightly not been accepted by the trial court being beyond pleadings. In the written statement, appellant has made a positive assertion that he was the owner of suit property having purchased the same from Shri Vasdev Dhingra. No such

plea of tenancy was set up in the written statement, inasmuch as case set up by the appellant in the written statement is that he was owner of suit property. Even otherwise, appellant is estopped from taking diametrically opposite pleas of ownership on the one hand and tenancy on the other. A party has to take a clear stand regarding the manner of possession. Accordingly, reference made in the sale deeds regarding property being under tenancy is of no help to the appellant more so when his name does not find a mention in the said documents. Accordingly, trial court has rightly rejected the contention of the appellant that he was a tenant in the suit property.

10. Judgments relied upon by the appellant titled T.K. Mohammed Abubucker (D) Through LRs. & Ors. vs. P.S.M. Ahamed Abdul Khader & Ors. IV (2009) SLT 156 and Rangammal vs. Kuppuswami & Anr. IV (2011) SLT 243 are in the context of different facts and are of no help to the appellant. In T.K. Mohammed's case (supra) Supreme Court held that plaintiff in a suit for declaration of title and possession, can succeed only by making out his title and entitlement to possession and not on any

alleged weakness in title or possession of defendants. In this case, suit for possession of respondent has been decreed in view of the fact that respondent has successfully proved her title and entitlement to possession of the suit property and not on the basis of weakness in title of appellant. In Rangammal's case (supra) Supreme Court held that plaintiff has to positively establish its case on the basis of material available to succeed in the case and cannot rely on the weaknesses or absence of defence to discharge onus. In this case, appellant has proved her case by leading cogent evidence and the suit has not been decreed on the basis of weakness in defence of appellant. Burden of proving facts always lies upon the person who asserts, such facts. Respondent had made a positive assertion that she was the owner of suit property and appellant was occupying the same unauthorisedly which version she succeeded in proving. As against this, appellant miserably failed to prove his defence that he was owner of suit property.

11. Respondent has categorically disposed that she had sent a legal notice dated 25th February, 2006 to the appellant whereby called upon him to handover the vacant and peaceful possession of

suit property along with damages @ ₹5000/- (Rupees Five Thousand Only) per month with effect from 1st December, 2005 and the said notice was duly served on the appellant. She has proved legal notice as Ex. PW1/7 and the postal receipt relating thereto as Ex. PW1/8. In his cross-examination, appellant (DW1) admitted receipt of notice. After service of notice to quit appellant was divested of any right to retain possession inasmuch as became liable to pay damages.

12. As regards quantum of damages, respondent had claimed ₹5,000/- per month in the legal notice. Same amount has been claimed in the plaint. In the written statement appellant did not say that this rate was not prevalent as rent in the area in respect of equivalent premises. Respondent in her affidavit specifically deposed that she was entitled to the damages @ ₹5,000/- per month. Her this deposition has remained unchallenged. That apart, keeping in mind the rent prevalent in Delhi ₹5,000/- per month in respect of the suit property cannot be said to be excessive from any angle.

13. For the foregoing reasons, appeal is dismissed.

A.K. PATHAK, J.

MAY 22nd, 2013

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