

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

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**Date of decision: 4<sup>th</sup> February, 2014.**

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**RFA 604/2004**

**HUKAM SINGH**

**..... Appellant**

Through: Mr. Ashok Sapra and Mr. Jagdish  
Singh, Advocates.

Versus

**GULSHAN KUMAR GAMBHIR**

**..... Respondent**

Through: Mr. S.K. Sharma, Mr. Rahul Sharma,  
Mr. Mayank Bansal and Mr. Milan  
Deep Singh, Advocates.

***CORAM :-***

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

**RAJIV SAHAI ENDLAW, J.**

1. The appeal impugns the judgment and decree (dated 6<sup>th</sup> January, 2004 of the Court of the Additional District Judge (ADJ), Delhi in Suit No.74/2001 filed by the respondent) against the appellant of recovery of possession of the entire second floor of property No.WZ-21A, Village Shakurpur, Sri Nagar, Delhi and *mesne* profits/damages for use and occupation at the rate of Rs.4,000/- per month with effect from the date of the filing of the suit and till the delivery of possession.

2. The respondent/plaintiff instituted the suit from which this appeal arises, pleading:-

- (a) that the respondent/plaintiff is the owner of the said entire property No.WZ-21A, Village Shakurpur, Sri Nagar, Delhi comprising of a three storeyed building constructed over land *ad measuring* 125 sq. yds.;
- (b) that the said property was earlier owned by the appellant/defendant who vide Agreement to Sell, General Power of Attorney, Will and Receipt dated 14<sup>th</sup> March, 2000 and against receipt of Rs.6,25,000/- as earnest money handed over symbolic possession of the entire ground floor and two rooms on the first floor of the property which were already in possession of the respondent/plaintiff and physical possession of the remaining property to the respondent/plaintiff;
- (c) however on request of the appellant/defendant and his mother to allow them occupation of one room on the second floor for a period of about two months with the promise to handover physical possession of that room on purchase of new property, the respondent/plaintiff on human grounds allowed the

appellant/defendant and his family members to occupy the said room and kitchen on the second floor for two months only as permissive user;

- (d) that the appellant/defendant though was supposed to handover physical possession of the said room to the respondent/plaintiff by the end of July, 2000 but requested time till 23<sup>rd</sup> August, 2000;
- (e) that the appellant/defendant however did not vacate the said room and on the other hand got a suit filed through his mother against the respondent/plaintiff and got issued a false and frivolous Notice dated 6<sup>th</sup> November, 2000;
- (f) that the appellant/defendant made a false complaint to the Police against the respondent/plaintiff on 4<sup>th</sup> December, 2000 and in pursuance where to the respondent/plaintiff and his wife were taken to the Police Station and when came back late at night found all the original papers of the property in question missing and of which report was immediately lodged;
- (g) that the appellant/defendant got a suit for permanent injunction filed through his mother and after obtaining *status quo* order

dated 1<sup>st</sup> November, 2000 therein broke open the locks of the remaining rooms on the second floor and thus took possession of the entire second floor; and,

- (h) that the possession of the appellant/defendant of the said second floor was thus unauthorized.

accordingly suit for recovery of possession of second floor along with *mesne* profits at Rs.5,000/- per month was filed.

4. The appellant/defendant contested the suit by filing a written statement on the ground:-

- (i) that the suit was bad for non-joinder of his mother Smt. Som Wati who was also a co-owner of the property and had already filed a Civil Suit which was pending consideration;
- (ii) that the respondent/plaintiff had got the registered Power of Attorney executed from the appellant/defendant fraudulently and dishonestly and coercively and the appellant/defendant after learning of the said fraud had got the said Power of Attorney and Will cancelled on 7<sup>th</sup> April, 2001;
- (iii) that the appellant/defendant had entered into an Agreement with the respondent/plaintiff on 14<sup>th</sup> March, 2000 for sale of the said

property for a consideration of Rs.20,25,000/- and the respondent/plaintiff had got a receipt for Rs.6,25,000/- executed from the appellant/defendant which included the mortgage amount which terminated on 10<sup>th</sup> October, 2000 and the amount whereof was not liable to be adjusted in the sale consideration;

- (iv) that the respondent/plaintiff paid a sum of Rs.2,50,000/- only to the appellant/defendant as earnest money;
- (v) that the land underneath the property was allotted in the name of the father of the appellant/defendant after whose death it was inherited by the appellant/defendant and his mother and the appellant/defendant was not the absolute owner thereof;
- (vi) that the respondent/plaintiff in the month of October, 1999 approached the appellant/defendant to take mortgage of one hall on the ground floor for godown purposes for a period of one year and equitable mortgage was created for a consideration of Rs.1,25,000/- vide agreement dated 7<sup>th</sup> October, 1999 and the property was to be redeemed after 7<sup>th</sup> October, 2000;
- (vii) that thereafter the respondent/plaintiff approached the appellant/defendant for creating equitable mortgage in respect

of two rooms at the first floor for one year and the mortgaged amount was agreed at Rs.50,000/- on 15<sup>th</sup> December, 1999 and which was also to be redeemed on 15<sup>th</sup> December, 2000;

- (viii) that the respondent/plaintiff exercising undue influence and fraud on the appellant/defendant made the appellant/defendant to sell the entire property at a consideration of Rs.20,25,000/- to the respondent/plaintiff on 14<sup>th</sup> March, 2000 and accordingly an Agreement of Sale was made and the respondent/plaintiff was to pay the amount of Rs.20,25,000/- within a month;
- (ix) that as the respondent/plaintiff could not pay the sale consideration within a month he sought extension;
- (x) that the respondent/plaintiff asked the appellant/defendant to come before the Sub Registrar, Pitampura for registration of the documents and for taking payment from the respondent/plaintiff and got executed a receipt for Rs.6,25,000/- and gave only one bank draft for Rs.2,50,000/-;
- (xi) that the respondent/plaintiff also got executed General Power of Attorney and Will in his favour from the appellant/defendant on 23<sup>rd</sup> May, 2000;

- (xii) that the possession of the respondent/plaintiff of the ground floor and two rooms on the first floor of the property was also illegal as the mortgage lapsed and the appellant/defendant is entitled to take back the possession thereof from the respondent/plaintiff;
- (xiii) that the appellant/defendant is an illiterate person and put his signatures in Hindi and the respondent/plaintiff taking advantage thereof got so many documents written in English; and,
- (xiv) that the appellant/defendant never gave possession of any portion except under the mortgage deeds dated 7<sup>th</sup> October, 1999 and 15<sup>th</sup> December, 1999 to the respondent/plaintiff.

A counter claim was also sought to be made for possession of the ground floor and two rooms on the first floor of the property together with *mesne* profits thereof.

5. The respondent/plaintiff filed a replication, pleading:-

- A. that Smt. Som Wati mother of the appellant/defendant was a witness to the documents registered on 23<sup>rd</sup> May, 2000 and no

title to the property in her favour adversely to the appellant/defendant could be pleaded; and,

B. not denying that the total sale consideration settled between the parties was of Rs.20,25,000/ and further pleading that the General Power of Attorney, Will , Possession Letter etc. were executed against the receipt of entire sale consideration.

6. The learned ADJ vide order dated 10<sup>th</sup> April, 2001 directed the counter claim of the appellant/defendant to be registered separately. However the same is not found to be so registered.

7. On the pleadings of the parties, the following issues were framed on 30<sup>th</sup> April, 2001:-

- “1. Whether the suit is bad for non joinder of parties as alleged in preliminary objection no.2 of the written statement? OPD*
- 2. Whether the plaintiff got the registered general power of attorney executed from the defendant fraudulently, dishonestly and under pressure, as alleged in para 9 of the preliminary objections in the written statement? If so, to what effect? OPD*
- 3. Whether the plaintiff is entitled to the decree of possession of the suit property? OPP*
- 4. Whether the plaintiff is entitled to any use and occupation charges/mesne profits @ Rs.5,000/- per month as prayed for? OPD*
- 5. Relief.”*

8. As would be obvious, no issues were framed in the counter claim, perhaps because no Court Fees was paid thereon.

9. Vide order dated 3<sup>rd</sup> July, 2002 the application of the respondent/plaintiff under Section 65 of the Indian Evidence Act, 1872 was allowed and the respondent/plaintiff allowed to lead secondary evidence with respect to the Agreement to Sell, Power of Attorney etc.

10. On the basis of the evidence led, the learned ADJ, in the impugned judgment, has found/observed/held:-

- (a) that from the depositions of the appellant/defendant it stood established that he had executed the documents fully understanding their nature and that his mother and wife were also present at that time and aware that the appellant/defendant was selling/disposing of the property in favour of the respondent/plaintiff;
- (b) the appellant/defendant utilized the sale consideration for acquiring new assets;

- (c) there were material contradictions between the examination-in-chief and cross examination of the appellant/defendant, reducing his trustworthiness;
- (d) the appellant/defendant was aware that Power of Attorney for sale of property is a recognized mode for effecting transfer of properties in Delhi;
- (e) that the mother of the appellant/defendant was aware that she was not having any right, title or interest in the property being transferred to the respondent/plaintiff and/or had approved and joined in the same;
- (f) the appellant/defendant had failed to prove any fraud having been played by the respondent/plaintiff;
- (g) that the appellant/defendant had subsequently concocted a story to usurp the possession of the second floor of the property to which he had no right after transferring the same and delivering possession thereof to the respondent/plaintiff;
- (h) the only defence of the appellant/defendant was that he was not paid the full consideration and which defence also he had tried to create much after the trial of the suit had started;

- (i) the appellant/defendant had failed to prove any fraud having been practiced by the respondent/plaintiff or the respondent/plaintiff having pressured the appellant/defendant into executing any document;
- (j) the price of the property sold and purchased in the market showed much depressed consideration in comparison to actual amount paid therefor;
- (k) the suit was not bad for non-joinder of Smt. Som Wati mother of the appellant/defendant and who was proved to be aware of the sale of the property by the appellant/defendant to the respondent/plaintiff; moreover the Civil Suit which the Smt. Som Wati had filed was dismissed in default;
- (l) that the respondent/plaintiff had proved Sale Agreement, General Power of Attorney, Will, Receipt of Consideration and Possession Letter executed by the appellant/defendant with respect to the property and which constituted a good title to the property and amounted to transfer of ownership of property;

- (m) such documents could not have been unilaterally cancelled by the appellant/defendant and which he was not entitled to, the same being for consideration;
- (n) that even if the appellant/defendant is held to have not handed over actual possession of the entire second floor of the property after sale of the property, his capacity stood reduced to mere licensee after executing the documents constituting the sale of the property;
- (o) the appellant/defendant thus had no right to retain possession of the second floor of the property after the two months from the date of sale and the respondent/plaintiff was entitled to maintain a suit for possession with respect thereto; and,
- (p) *mesne* profits of Rs.4,000/- per month were held to meet the ends of justice.

11. Notice of the appeal was issued and vide order dated 24<sup>th</sup> November, 2004 dispossession of the appellant/defendant from the property stayed subject to the appellant/defendant depositing rupees one lac in this Court and further subject to the appellant/defendant continuing to pay *mesne* profits at Rs.2,000/- per month to the respondent/plaintiff. Vide subsequent order

dated 25<sup>th</sup> April, 2005 such *mesne* profits were ordered to be deposited in this Court and permitted to be withdrawn by the respondent/plaintiff. The parties were referred to mediation cell of this Court, which was successful. A Settlement Agreement dated 4<sup>th</sup> October, 2006 was signed between the parties whereunder the appellant/defendant agreed to purchase the rights of the respondent/plaintiff in the property for a total consideration of Rs.23 lacs to be paid by the appellant/defendant within three months therefrom and against receipt of which the respondent/plaintiff agreed to handover possession to the appellant/defendant. The appellant/defendant however did not pay the amount within three months and sought extension of two months which was allowed vide order dated 6<sup>th</sup> March, 2007. The appellant/defendant still did not make the payment and sought more time which was vide order dated 11<sup>th</sup> May, 2007 refused and the appeal ordered to be heard and the interim relief earlier granted was vacated and the application for interim relief dismissed. I am informed that the respondent/plaintiff has executed the decree for possession and taken possession of the second floor from the appellant/defendant. The appellant/defendant on 28<sup>th</sup> April, 2008 stated that he was then ready to deposit the amount of Rs.23 lacs in terms of the Settlement. The

respondent/plaintiff took a stand that he was no longer bound by the Settlement. Vide order of the said date the appellant/defendant was permitted to make a deposit of Rs.23 lacs in this Court without prejudice to his rights and contentions. The said amount is reported to have been deposited.

12. The appeal was on 15<sup>th</sup> July, 2008 admitted for hearing. The appellant/defendant died during the pendency of the appeal and vide order dated 24<sup>th</sup> April, 2009 his legal heirs were substituted.

13. The counsels have been heard.

14. The question for adjudication in this appeal is, whether the factual findings returned by the learned ADJ are on a correct appreciation of the evidence led in the suit.

15. During the hearing of the appeal on 7<sup>th</sup> August, 2013 it was enquired from the counsel for the respondent/plaintiff whether the respondent/plaintiff had sought specific performance of the Agreement to Sell. The counsel for the respondent/plaintiff stated that since the entire agreement stood performed by payment of entire consideration and delivery of possession, need was not felt for suing for specific performance. It was next enquired

from the counsel for the respondent/plaintiff as to on what basis possession of the second floor was claimed, whether on the basis of previous possession and not on title or whether on the basis of title. It was further enquired whether a mere agreement purchaser in possession in part performance can be said to be having title to the property so as to sue for possession of one room which the respondent/plaintiff claims to have allowed the appellant/defendant to temporarily use or of the remaining second floor in which the appellant/defendant was alleged to have trespassed. Though the hearing was adjourned to enable the counsel for the respondent/plaintiff to reply but no answer has come forward.

16. Arguments of the counsel for the appellant/defendant are the same i.e. of the appellant/defendant being illiterate and the respondent/plaintiff having defrauded him. Reliance is placed on:

- (i) *Pratap Singh Vs. State* (2010) VII AD (Delhi) 490 to contend that the onus to prove that the documents were prepared under the instructions of the appellant/defendant and were understood by the appellant/defendant before signing the same, was on the respondent/plaintiff; (though the said judgment is in relation to a Will)

- (ii) ***Ramjan Khan Vs. Baba Raghunath Dass*** AIR 1992 Madhya Pradesh 22 laying down that the burden is on the person relying upon the document to prove that the document was read and explained to the executant and mere proof that person's signature appear on the document, cannot by itself amount to proof of execution of the document particularly when the executant is an illiterate person and has affixed his thumb impression to the document;
- (iii) ***Somnath Misra Vs. Narahari Das*** AIR 1977 NOC 304 (Orissa) again laying down that when the executant of a document is an illiterate person, mere proof of signature is not sufficient and the onus lies on the person who wants to rely on such document;
- (iv) ***Kali Dei Vs. Brundaban Malik*** AIR 1972 Orissa 132 laying down that a person relying upon a document and seeking to bind a *Paradanashin* or an illiterate lady with the contents thereof, must not only formally prove the document but in addition prove that the contents were read over and explained to the executant;
- (v) on Sections 17 & 49 of the Registration Act, 1908 and Section 54 of the Transfer of Property Act, 1882;

(vi) Rules 24 & 25 of the Delhi High Court Mediation & Conciliation Act, 2004.

17. The counsel for the respondent/plaintiff has handed over photocopies of the following judgments, though not making any arguments on the basis thereof:

- (a) ***R. Kanthimathi Vs. Beatrice Xaviers*** (2000) 9 SCC 339;
- (b) ***Shikha Properties (P) Limited Vs. S. Bhagwant Singh*** 74 (1998) DLT 113;
- (c) ***Kuldip Singh Suri Vs. Surinder Singh Kalra*** 76 (1998) DLT 232;
- (d) ***Asha M. Jain Vs. The Canara Bank*** 94 (2001) DLT 841;
- (e) ***Hardip Kaur Vs. Kailash*** 193 (2012) DLT 168; and,
- (f) ***Sant Lal Jain Vs. Avtar Singh*** (1985) 2 SCC 332.

18. Though the counsel for the appellant/defendant has not read any portion of the oral evidence recorded to show that the findings returned by the learned ADJ of the appellant/defendant having executed the documents fully understanding their nature and against the receipt of entire sale consideration and which had been used by the appellant/defendant for acquiring new assets, are contrary thereto but I have, to satisfy my judicial

conscience and particularly in the face of the argument of the appellant/defendant being an illiterate person, still minutely gone through the evidence recorded and I am unable to find any error having been committed by the learned ADJ in appreciation thereof. The appellant/defendant, though may have been illiterate, does not on the reading of the said evidence come across as lacking in understanding or common sense. The argument raised by the counsel for the appellant/defendant of illiteracy is thus found to be hollow and does not come to the rescue of the appellant/defendant. Only the legal question raised in para 15 above, thus remains to be adjudicated.

19. The law permits a claim for possession for immovable property being made either on the basis of prior possession or on the basis of title. In the facts of the present case, the respondent/plaintiff has proved having entered into an agreement for purchase of the said property from the appellant/defendant and has further proved having been put into possession of the said property by the appellant/defendant in pursuance of such agreement. The respondent/plaintiff has further proved having thereafter granted license to the appellant/defendant to use a part of the second floor of the property and having been dispossessed by the appellant/defendant from the remaining part of the second floor. Though undoubtedly the

respondent/plaintiff did not claim specific performance of the said agreement and resultantly does not till date have title to the property but on the other hand the appellant/defendant also has not taken any steps whatsoever for recovery of possession from the respondent/plaintiff of the remaining property of which the respondent/plaintiff is admittedly in possession. Though the Supreme Court in *Suraj Lamp and Industries Private Limited Vs. State of Haryana* (2012) 1 SCC 656 has set aside the judgment of the Division Bench of this Court in *Asha M. Jain* supra but it cannot be lost sight of that the Division Bench of this Court in *Asha M. Jain* supra had held that judicial notice can be taken of the transactions of immovable properties in the city of Delhi through the medium of agreement to sell, power of attorney, Will etc. clubbed with delivery of possession under Section 53A of the Transfer of Property Act. All that the Supreme Court has held is that the same does not amount to vesting of title in the property. Undoubtedly so. However, the judgment of the Supreme Court in *Suraj Lamp and Industries Private Limited* supra does not interfere with the rights of possession in the property under Section 53A of the Transfer of Property Act. I have wondered that when the law permits a claim for possession of immovable property being made on the basis of prior

possession, what is the impediment to such a claim for possession being made against the title holder of the property who forcibly dispossesses the person to whom he had agreed to sell the property and to whom he has delivered possession thereof in part performance of the Agreement to Sell. I am unable to find any such impediment.

20. In view of the aforesaid, there is also no legal error found in the judgment and decree of the learned ADJ.

21. Though during the pendency of this appeal a settlement agreement was signed between the parties and whereunder the respondent/plaintiff agreed to give up his rights in the property against receipt of Rs.23 lacs from the appellant/defendant but the fact remains that the appellant/defendant did not pay the said amount within the time agreed. The reliance now placed by the counsel for the appellant/defendant on Rules 24 & 25 of the Mediation & Conciliation Rules, is misconceived. It is evident from the orders in the appeal after the date of the settlement agreement that the said settlement agreement was given a go by and the appeal posted for hearing on the original cause of action.

22. There is thus no merit in the appeal, which is dismissed. The counsel for the respondent/plaintiff having not answered the queries raised during the hearing, no costs. The amount deposited by the appellant/defendant in this Court towards settlement agreement together with interest, if any, accrued thereon be refunded to the appellant/defendant.

Decree sheet be drawn up.

**RAJIV SAHAI ENDLAW, J.**

**FEBRUARY 04, 2014.**

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