

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of decision: 17th January, 2014.

+ **RFA 207/2013, CM No.6908/2013 (for condonation of 285 days delay in filing the appeal) & CM No.6907/2013 (for stay).**

ABBOT INDIA LTD.

..... Appellant

Through: Mr. Sandeep Sethi, Sr. Adv. with Mr. Darpan Wadhwa, Mr. Nakul Sachedev & Ms. Saloni Chowdhry, Advs.

Versus

RAJINDER MOHINDRA & ANR.

..... Respondents

Through: Mr. Shankar Vaidialingum, Adv. for R-1.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. The appeal impugns the judgment and decree (dated 21st April, 2012 of the Court of the Additional District Judge (ADJ) (Central)-12, Tis Hazari Courts, Delhi in CS No.39/2004 (Unique Case ID No.02401C60492004) filed by the two respondents/plaintiffs against the appellant/defendant) on admissions of ejectment of the appellant/defendant, after determination of tenancy, from property No.E-44/10, Okhla Industrial Area, Phase-II, New Delhi-110020.

2. The appeal is accompanied with an application for condonation of 285

days delay in filing thereof. Notice only of the application for condonation of delay was issued and the counsel for the respondents/plaintiffs has filed reply thereto. On 11th July, 2013, while adjourning hearing on the application on request of the counsel for the appellant/defendant, the counsels were asked to, subject to the outcome of the application for condonation of delay, also come prepared for arguments on the merits of the appeal. Since the enquiry into mesne profits/damages was then still underway before the Trial Court and by requisitioning the Trial Court record the said enquiry would have got stalled, on the statement of the counsel for the appellant/defendant that the copies of the entire Trial Court record had been filed and giving liberty to the counsel for the respondents/plaintiffs to file copies of any other document on Trial Court record, the matter was adjourned.

3. On the next date i.e. 24th September, 2013, following order was passed:

“1. This appeal is preferred against the judgment on admissions, of ejectment of the appellant from the premises earlier in its tenancy.

2. The senior counsel for the appellant states that the appellant had also entered into an agreement to purchase the tenancy premises and had filed a suit for specific performance of the said agreement and which suit has been dismissed on merits;

however a first appeal, being RFA(OS) No.39/2011 against the said dismissal is pending consideration and vide interim order dated 23rd March, 2011 confirmed on 5th October, 2011 therein, the appellant has been restrained from parting with possession of the property without leave of the Court and the respondents have also been restrained from creating third party interest in the property without leave of the Court. He states that the same amounts to an order of status quo qua possession and thus the hearing of the present appeal be adjourned awaiting the outcome of RFA(OS) No.39/2011.

3. It has been enquired from the senior counsel for the appellant, whether in part performance of the agreement to sell, the possession of the property was delivered to the appellant.

4. The senior counsel for the appellant answers that the appellant, without prejudice to its rights and contentions had continued to pay the rent after the agreement to sell also.

5. The aforesaid is indicative of the tenancy having continued and the agreement of sale being distinct from the agreement of tenancy.

6. In that view of the matter, in my view, the outcome of the present appeal is not dependent upon the outcome of the appeal preferred against the dismissal of the suit for specific performance. I have recently in **Sunil Kapoor Vs. Himmat Singh** 167 (2010) DLT 806 had an occasion to discuss in detail the said aspect and where it has been held that the ejectment in such cases cannot await the decision in a claim for specific performance of an agreement of sale of the property.

7. As far as the contention of the senior counsel for the appellant, of the interim orders in RFA(OS) No.39/2011 is concerned, the same in my view, do not come in the way of ejectment in accordance with law of the appellant as a tenant from the property. The appellant if successful in the claim for specific performance, would be entitled to possession in accordance therewith.

8. It has thus been informed that the appellant can continue in possession only if it arrives at mutually acceptable terms with the respondents of payment of market rent till the decision of the claim for specific performance.

9. *The senior counsel for the appellant at this stage states that the matter be adjourned by two weeks to enable the appellant to obtain clarification from the Bench before which RFA(OS) No.39/2011 is listed.*

10. *Though the counsel for the respondents opposes but it is deemed appropriate to give such opportunity to the appellant.*

11. *It may be noted that the aforesaid is without prejudice to the application of the appellant for condonation of 285 days delay in filing the appeal and also without prejudice to other arguments which may be addressed by the appellant against the order of ejectment.*

12. *List on 22nd October, 2013.”*

4. On 22nd October, 2013, the senior counsel for the appellant/defendant stated that the appellant/defendant had decided not to obtain clarification from the Bench before which RFA(OS) No.39/2011 is pending and the appellant/defendant wanted to press the appeal. In the circumstances, the senior counsel for the appellant/defendant as well as the counsel for the respondents/plaintiffs, were heard on the application for condonation of delay as well as on the merits of the appeal and judgment reserved.

5. The respondents/plaintiffs instituted the suit from which this appeal arises, pleading:

(i) that the respondents/plaintiffs are the owners of the property aforesaid;

(ii) that the appellant/defendant was inducted as a tenant in the said

property vide registered Lease Deed dated 8th April, 1986 which had expired by efflux of time on 31st March, 2001;

(iii) that the tenancy of the appellant/defendant had also been terminated vide notice dated 7th March, 2001 duly served on the appellant/defendant;

(iv) that the appellant/defendant was thus in unauthorized use and occupation of the premises;

(v) that the appellant/defendant was last paying rent to the respondents/plaintiffs of Rs.32,199/- per month besides Rs.5,367/- per month towards hire charges of fittings and fixtures provided in the premises;

(vi) that both the respondents/plaintiffs were settled in United States of America (USA) and in the year 1987 acquired citizenship of USA and on making enquiries from the Reserve Bank of India were informed that they were violating the Foreign Exchange Regulation Act, 1973 and were bound to dispose of the property to an Indian citizen;

(vii) that the appellant/defendant offered to purchase the property

and an Agreement dated 20th November, 1989 of sale of property by the respondents/plaintiffs to the appellant/defendant was executed;

(viii) that the respondents/plaintiffs (for the reasons which is not necessary to burden this judgment with) opted to exit from the said Agreement to Sell and vide their letter dated 28th December, 1993 to the appellant/defendant cancelled the Agreement to Sell and returned the sum of Rs.3 lakhs received from the appellant/defendant;

(ix) that the appellant/defendant filed a suit for specific performance of the said Agreement to Sell and by an interim order in the said suit, the parties were directed to maintain *status quo* qua possession and title and the appellant/defendant was directed to continue to pay the admitted amount of rent to the respondents/plaintiffs; the said suit was pending at the time of institution of the suit (in or about October, 2001) from which this appeal arises;

(x) that the pendency of the suit for specific performance of the Agreement to Sell did not come in the way of the respondents/plaintiffs seeking ejectment of the appellant/defendant from the premises as a tenant as the appellant/defendant admittedly

continued as a lessee till the expiry on 31st March, 2001 of the Lease Deed dated 8th April, 1986;

(xi) that though the tenancy of the appellant/defendant had expired by efflux of time but by way of abundant caution, a notice dated 7th March, 2001 of determination of tenancy had also been served on the appellant/defendant.

Accordingly, the suit for the reliefs of ejectment after determination of tenancy of the appellant/defendant and for recovery of mesne profits/damages for use and occupation of the premises was filed.

6. The appellant/defendant contested the suit by filing a written statement, on the grounds:

(a) “that the defendant herein is in possession of the suit property by virtue of an indenture of lease dated 8.11.1986 whereby the plaintiff gave to the defendant the property in question on the terms and conditions contained in the indenture of lease.”;

(b) that though the appellant/defendant as per the Agreement to Sell, had under cover of its letter dated 9th June, 1993 forwarded a sum of Rs.3 lakhs vide demand draft to the respondents/plaintiffs as earnest

money but the respondents/plaintiffs unilaterally and illegally terminated the Agreement and returned the said demand draft;

(c) that the appellant/defendant was entitled to specific performance of the Agreement to Sell;

(d) that the suit for ejectment had been filed as a counterblast to the suit for specific performance filed by the appellant/defendant;

(e) that the Lease Deed dated 8th April, 1986 had not expired by efflux of time and the appellant/defendant was not in unauthorized occupation;

(f) that the appellant/defendant vide its letters dated 7th April, 2001, 27th June, 2001 and 7th August, 2001 had called upon the respondents/plaintiffs to renew the lease in terms of Clause 3 thereof;

(g) “it is submitted that the defendant is in possession of the suit property by virtue of the specific terms and conditions of the registered Lease Deed dated 8.4.1986 and thereafter by virtue of the Court orders passed in Suit No.705/1994 filed by the defendant herein.”

(h) that the request of the appellant/defendant for extension of the lease had been rejected by the respondents/plaintiffs without giving any reasons whatsoever;

(i) that as per the terms and conditions of the Hire Agreement dated 8th April, 1986 also, the right of the appellant/defendant as lessee to continue to occupy the premises even after 15 years and to extension of the lease was made out;

(j) “In terms of Clause 3 of the Lease Deed dated 8th April, 1986, the defendant sought extension of the Lease for a further period of 5 years on an increased rent of 25% and thereafter for further periods of 5 years each as provided therein. This is without prejudice to the contention of the defendant that they are entitled to remain in use and occupation of the suit premises in terms of the Agreement for Sale dated 20th November, 1989 and in terms of the order dated 25th March, 1994 in Suit No.705/1994.”;

(k) that the action of the respondents/plaintiffs of refusing to extend the lease and to execute a fresh lease deed without giving any reasons for the same, is in flagrant violation of Clause 3 of the Lease Deed.

7. Though the respondents/plaintiffs filed replication to the written statement aforesaid but need is not felt to advert thereto.

8. In the aforesaid state of affairs, the respondents/plaintiffs applied under Order XII Rule 6 of the Civil Procedure Code (CPC), 1908 for a decree for ejectment on admissions and which application has been allowed by the learned ADJ vide the impugned judgment and decree, finding/observing/holding:

(I) that in a suit seeking relief of possession on the basis of termination of tenancy, the Court has to look into three aspects:

(i) Whether the relationship of landlord and tenant is admitted;

(ii) Whether the rent was above Rs.3,500/- or not;

(iii) Whether the lease has been terminated by serving a notice or not.

If the answer to all the above factors is in affirmative, the Court has to venture into an enquiry if the defences raised by the defendant have any bearing upon the above factors;

(II) that there is categorical admission of the appellant/defendant that its entry into the premises in question was as a lessee;

(III) that there was nothing to suggest that the nature of possession had ever changed despite the execution of an Agreement to Sell;

(IV) that the possession of the appellant/defendant of the premises continued to be as a lessee as was evident from letters dated 7th April, 2001, 27th June, 2001 and 7th August, 2001 of the appellant/defendant seeking extension/renewal of the lease, the term whereof had expired on 31st March, 2001;

(V) that there was nothing on record to indicate that possession of the property was handed over to the appellant/defendant pursuant to the Agreement of Sale and Purchase;

(VI) that thus the relationship of landlord and tenant subsisted between the parties;

(VII) that it was also not in dispute that the last rent paid by the appellant/defendant to the respondents/plaintiffs was of Rs.32,199/- per month besides hire charges; thus the premises were outside the ambit of the Delhi Rent Control Act, 1958;

(VIII) that the appellant/defendant in admission/denial of documents had admitted the notice of termination, though denied the contents thereof; similarly the AD Cards filed by the respondents/plaintiffs to show service of the said notice had also been admitted; thus, there was an admission of receipt of notice of determination of tenancy;

(IX) that even otherwise, as per the dicta of this Court in ***Jeevan Diesels & Electricals Ltd. Vs. Jasbir Singh Chadha (HUF)*** 183 (2011) DLT 712, service of summons of a suit for ejectment amounted to termination of tenancy;

(X) that the appellant/defendant even otherwise vide letters dated 7th April, 2001, 27th June, 2001 and 7th August, 2001 had admitted expiry of the Lease on 31st March, 2001; in view thereof, notice of termination of tenancy was not necessitated;

(XI) that the doctrine of part performance did not come to the aid of the appellant/defendant.

Accordingly, finding the appellant/defendant to have admitted the relationship of landlord and tenant, the premises being outside the ambit of the Rent Act and determination of tenancy, a decree for ejectment on

admissions, has been passed.

9. The senior counsel for the appellant has argued:

- (aa) that the appellant / defendant in the written statement had pleaded agreement for purchase of the property and that the appellant / defendant is entitled to remain in use and occupation of the premises in terms of the said Agreement of Sale;
- (bb) that the appellant / defendant being an agreement purchaser of immovable property cannot under Section 53A of the Transfer of Property Act, 1882 be ejected therefrom;
- (cc) that the learned ADJ in the impugned order has not recorded that the appellant / defendant has made an admission that it is not liable to the protection under said Section 53A of the Transfer of Property Act, 1882;
- (dd) that the appellant / defendant though in the written statement filed had not expressly taken a defence of Section 53A of Transfer of Property Act but had applied for amendment of the written statement to take the said plea and which application

for amendment of the written statement was dismissed by the Trial Court vide order dated 27.07.2007; that the appellant / defendant had preferred CM (M) No.1418/2007 to this Court against the said order and which was disposed of vide order dated 26.11.2008 observing that the “preliminary objection sought to be introduced is purely legal in nature. It is settled law that in pleadings parties are not required to plead law and evidence. Parties are only required to plead facts affecting their case. The law can be pleaded at the final stage when the arguments are heard..... At the final stage when evidence has been led, both the parties are at liberty to plead before the Court all legal issues and factual matrix of the case. Learned Trial Court at the time of deciding this case, shall not be prejudiced by any interim order passed earlier and the decision shall be given on merits of the case.”;

- (ee) that according to the aforesaid order of this Court, evidence was required to be recorded in the suit and the appellant / defendant after recording of evidence was entitled to argue the defence of Section 53A of the Act and the learned ADJ in the

impugned order has failed to notice the said direction of this Court;

- (ff) that in the order dated 22.02.1993 in Civil Writ No.310/1990 of this Court, challenging the order of the Appropriate Authority under the Income Tax Act, 1961 of compulsory purchase of the said property in exercise of powers under the then Chapter XXC of the Income Tax Act, it is recorded “The petitioner was a lessee of the premises, which were later on purchased by it from the landlord.....Moreover the purchaser as an erstwhile lessee for a long period of 15 years. This matter is also to be kept in view while passing an order of acquisition. Therefore, it is a case in which the Appropriate Authority has to pass a fresh order and to decide whether it is subject to encumbrances or not.”; that the respondents / plaintiffs were the parties to the said writ petition and from the said order it is evident that the appellant / defendant in the said proceedings was referred to as ‘ex-lessee’ of the premises, meaning that the possession then of the appellant / defendant was not as a lessee but as a purchaser;

- (gg) that the letters dated 07.04.2001 and 27.06.2001 of the appellant / defendant to the respondents / plaintiffs for renewal of lease and which the learned ADJ in the impugned order has considered to be clinching evidence to negate the applicability of Section 53A of the Transfer of Property Act were “without prejudice to the rights and contentions that the appellant / defendant was entitled to remain in use and occupation of the premises pursuant to the Agreement to Sell’ as expressly stated in both the letters”;
- (hh) that the authorized representative of the appellant / defendant in the statement under Order 10 of the CPC recorded by the learned ADJ on 23.04.2010 and on 06.07.2010 had also stated that the appellant / defendant after the Agreement to Sell remained in the property as a tenant purchaser under the Agreement to Sell;
- (ii) that the appellant / defendant after the institution of the suit for specific performance, was paying rent to the respondents / plaintiffs in accordance with the condition imposed on the appellant / defendant by the Court while granting the interim

order of *status quo* to be maintained, to continue to pay the admitted amount of rent to the respondents / plaintiffs till further orders and the said order was without prejudice to the rights and contentions of the appellant / defendant and thus the mere fact of the appellant / defendant having continued to pay the rent cannot be construed as an admission on the part of the appellant / defendant of continuing as a lessee and not as an agreement purchaser in possession of the property;

- (jj) that thus there were questions arising for adjudication in the suit on which there were no admissions of the appellant / defendant;
- (kk) that as per the dicta in ***Jeevan Diesels & Electricals Ltd. Vs. Jasbir Singh Chadha (Huf)*** (2010) 6 SCC 601, the admissions have to be clear and to be such as would show that the plaintiff is clearly entitled to the relief asked for and Order 12 Rule 6 does not apply when there is a serious question of law to be argued;
- (ll) that as per the dicta in ***Ram Kumar Agrawal Vs. Thawar Das***

(1999) 7 SCC 303 a plea under Section 53A of the Transfer of Property Act is a mixed question of law and fact and there being no clear admission of the appellant / defendant of Section 53A of the Act being not applicable, no order of ejectment under Order 12 Rule 6 of the CPC could have been passed;

(mm) that the defence of Section 53A against dispossession is available even after dismissal of a suit for specific performance as held in ***Balasaheb Manikrao Deshmukh Vs. Rama Lingoji Warthi*** AIR 2000 Bom 337;

(nn) that the judgment of dismissal of the suit for specific performance of the Agreement of Sale of immovable property (and which judgment is under appeal) though holds the appellant / defendant to have been ready and willing to perform its part of the Agreement to Sell has denied the appellant / defendant the relief of specific performance in exercise of discretion implicit in the grant of relief of specific performance and holding the Agreement to Sell to be terminable;

- (oo) that the learned ADJ for denying the benefit of Section 53A of the Transfer of Property Act has considered only the three letters dated 07.04.2001, 27.06.2001 and 07.08.2001 and none of the other material available on record;
- (pp) that the finding of the learned ADJ that there are clear, specific, unambiguous and unequivocal admissions is contrary to the written statement of the appellant / defendant.

10. Per contra, the counsel for the respondents / plaintiffs has argued:

- (i) that there was no pleading of the appellant / defendant being in possession of the premises in part performance of the Agreement to Sell, in the written statement of the appellant / defendant;
- (ii) that this is evident from the application filed by the appellant / defendant for amendment of the written statement and which application was dismissed;
- (iii) that none of the observations in the order dated 27.07.2007 in CM(M) No.1418/2007 preferred by the appellant / defendant against the dismissal of the application for amendment can be

relied upon as the CM(M) petition was ultimately dismissed;

- (iv) that there is no plea in the plaint in the suit for specific performance filed by the appellant / defendant also of the appellant / defendant being in possession of the property in part performance of the Agreement to Sell;
- (v) that the appellant / defendant has nowhere pleaded that its possession of the premises, admittedly initially as a lessee, changed to that as of a purchaser;
- (vi) that the appellant / defendant in its written statement in the suit from which this appeal arises had clearly admitted being in possession of the property as lessee;
- (vii) that there is long delay of 285 days in preferring the appeal and there is no cause least sufficient cause for condonation thereof;
- (viii) that the reason given for condonation of said delay, of pendency of review before the learned ADJ, is no reason as there is no affidavit of any advocate who may have advised the appellant / defendant of there being good ground for

review.

11. The senior counsel for the appellant / defendant in rejoinder has argued that review of the impugned judgment was sought before the learned ADJ on the ground of the learned ADJ having not taken note of the plea of the appellant / defendant of Section 53A of the Transfer of Property Act, 1882 and notice of the review application was issued which remained pending and the pendency of the review is sufficient ground for condonation of delay in preferring the appeal.

12. I have considered the rival contentions.

13. As would be evident from the aforesaid, the senior counsel for the appellant / defendant has not challenged insofar as the learned ADJ finds no factual adjudication to be required on the aspect of existence of relationship of landlord and tenant, the premises being outside the purview of the Rent Act and determination of tenancy (I may notice that the judgment of this Court in ***Jeevan Diesels & Electricals Ltd.*** supra relied upon by the learned ADJ for the principle of determination of tenancy by service of summons of a suit for ejectment and expiry of 15 days therefrom was indeed based on the dicta of the Supreme Court in ***Nopany Investments (P) Ltd. Vs. Santokh***

Singh (HUF) (2008) 2 SCC 728)

14. The only questions thus for determination are:

- (i) Whether the appellant / defendant had taken a plea of Section 53A of the Transfer of Property Act;
- (ii) The effect of the order dated 27.07.2007 in CM(M) No.1418/2007 supra preferred by the appellant / defendant;
- (iii) if the plea of Section 53A of the Transfer of Property Act is found to have been taken by or available to the appellant / defendant, whether the adjudication of the said plea requires any trial.

15. I have examined the record from the aforesaid perspective.

16. The Agreement to Sell dated 20.11.1989 which is an admitted document, records:

- (A) that the appellant / defendant was a lessee under the respondents / plaintiffs in the property;

- (B) the agreement of the respondents / plaintiffs to sell the property to the appellant / defendant after obtaining the requisite permissions;
- (C) the agreement of the parties for payment by the appellant / defendant to the respondents / plaintiffs of a sum of Rs.3,00,000/- as earnest money within a week of the respondents / plaintiffs obtaining the necessary permission from the RBI;
- (D) the agreement of the respondents / plaintiffs to after receipt of other approvals / permissions, execute a Deed of Conveyance / Assignment in favour of the appellant / defendant, presenting the same for registration with the registering authority and “handing over possession of the said premises” to the appellant / defendant and provides that upon such completion, appellant / defendant shall pay to the respondents / plaintiffs the balance consideration after adjusting the earnest money;
- (E) that the respondents / plaintiffs shall refund the deposit of Rs.2,15,000/- placed by the appellant / defendant with the

respondents / plaintiffs pursuant to the Lease Agreement dated 08.04.1986 simultaneously upon receipt of balance sale consideration.

17. Section 53A of the Transfer of Property Act provides that where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty and the transferee has in part performance of the contract taken possession of the property or any part thereof or the transferee being already in possession continues in possession in part performance of the contract and has done some act in furtherance of the contract and the transferee has performed or is willing to perform his part of the contract then notwithstanding that the transfer has not been completed in the manner prescribed therefor by the law, the transferor shall be debarred from enforcing against the transferee any right in respect of the property of which the transferee has taken or continued in possession other than a right expressly provided by the terms of the contract. It is thus evident that for Section 53A of the Transfer of Property Act to be invoked, the transferee should have in part performance of the contract of transfer taken possession of the property or if already in

possession of the property should after the contract of transfer continue in possession in part performance of the contract of transfer. Section 53A cannot be invoked wherever there is an agreement of sale of immovable property, unless possession of the property has been taken/delivered in part performance of agreement to sell.

18. The appellant / defendant was at the time of Agreement to Sell already in possession of the property as a tenant. What has to be determined is whether the appellant / defendant under the Agreement to Sell was entitled to thereafter continue in possession in part performance of the said Agreement to Sell i.e. as a purchaser in possession or the possession of the appellant / defendant even after the Agreement to Sell was to be that of a lessee / tenant only. As would be evident from above, there is no clause in the Agreement to Sell though formally drafted, indicating that the nature and character of the possession of the appellant / defendant of the property was to change after the Agreement to Sell or delivering possession of the property to the appellant / defendant in pursuance thereto or to the effect that the possession of the appellant / defendant of the property after the Agreement to Sell was to be as an agreement purchaser and not as a lessee / tenant as prior thereto. On the contrary, the agreement expressly provides that the respondents /

plaintiffs were to handover possession of the property to the appellant / defendant at the time of execution of the sale deed. If the intent of the parties was for the possession of the property to be delivered to the appellant / defendant in part performance of the Agreement to Sell, at the time of execution thereof, there would have been no occasion for the agreement to provide for handing over of possession of the property at the time of execution of the sale deed. Not only so, the Agreement to Sell provided for refund by the respondents / plaintiffs to the appellant / defendant of the security deposit made by the appellant / defendant with the respondents / defendants as per the lease deed only against receipt of balance sale consideration. Again, had the intent of the parties been to determine the relationship of lease deed at the time of execution of the Agreement to Sell, there was no occasion for providing for refund of the security deposit paid under the lease deed only at the time of execution of the sale deed.

19. Also, there is no clause in the Agreement to Sell that the payment of rent by the appellant / defendant to the respondents / plaintiffs under the Lease Deed would cease after the signing of the Agreement to Sell. There is no such plea also of the appellant / defendant that it stopped payment of rent on the signing of the Agreement to Sell. On the contrary, it is the express

plea of the respondents / plaintiffs in the plaint in the suit from which this appeal arises and which is not controverted in the written statement that the appellant / defendant after the Agreement to Sell dated 20.11.1989, on expiry of the first five years of lease on 31.03.1991 exercised option for renewal of the lease and increased the rent and hire charges by 25% and upon expiry of another five years on 31.03.1996 again exercised the option of renewal of lease and further increased the rent by 25%. If the relationship of landlord and tenant under the Lease Deed had come to an end upon the signing of the Agreement to Sell, there would have been no occasion for the appellant / defendant to exercise the option of renewal of the lease. It has thus but to be held that the Agreement to Sell does not provide for the appellant / defendant as purchaser, either being delivered possession of the property in part performance of the Agreement to Sell or being already in possession as a lessee, continuing in possession thereof thereafter in part performance of the Agreement to Sell.

20. Section 91 of the Indian Evidence Act, 1972 provides that when the terms of a contract or any other disposition of property have been reduced to the form of a document and in all cases in which any matter is required by law to be reduced in the form of a document, no evidence in proof of the

terms of such contract, grant or disposition of property except the document itself shall be given. Section 53A of the Transfer of Property Act is available only where the Agreement to Sell is in writing. Thus the present is a case where for a plea of Section 53A of the Transfer of Property Act to be available, the Agreement to Sell is required by law to be in writing. Reception of any other evidence of such Agreement to Sell in writing except the document itself is prohibited and no adjudication is thus required. The Agreement to Sell is admitted and does not require any trial to interpret the terms thereof.

21. Thus, on a reading of the terms of the Agreement to Sell, no plea of Section 53A of the Transfer of Property Act is found to be available to the appellant / defendant for the reason of the same not providing for delivery of possession of the property to the appellant / defendant in part performance of the Agreement to Sell or of the appellant / defendant being already in possession as lessee, after the Agreement to Sell, continuing in possession in part performance of the Agreement to Sell.

22. The appellant / defendant by its admissions in response to paras No.11&12 of the plaint, of renewal of lease with effect from 01.04.1991 and thereafter with effect from 01.04.1996 has also admitted the case of the

respondents / plaintiffs of continuing in possession of the property after the Agreement to Sell also as a lessee and not in part performance of the Agreement to Sell. The appellant / defendant has also admitted continuing payment of rent and increased rent on each renewal, after the Agreement to Sell. Had the relationship of landlord and tenant come to an end and the possession after the Agreement to Sell of the appellant / defendant been as an agreement purchaser in part performance, there would have been no question of the appellant / defendant paying any rent. Not only so, the respondents / plaintiffs have also pleaded the letters dated 7th April, 2001, 27th June, 2001 and 7th August, 2001 being written by the appellant / defendant for renewal of lease and the appellant / defendant in the written statement has admitted the same. Though undoubtedly in the said letters, it is the case of the appellant / defendant that further renewal of lease was without prejudice to its right to continue in possession under the Agreement to Sell but the question of continuing in possession under the Agreement to Sell would arise only if the appellant / defendant in pursuance to the Agreement to Sell been delivered possession or continued in possession in part performance of the Agreement to Sell and not otherwise.

23. The appellant / defendant instituted the suit for specific performance

in or about March, 1994 i.e. long prior to the suit from which this appeal arises and after availing of the first renewal of the lease in 1991 i.e. after the Agreement to Sell. During the hearing, I enquired from the senior counsel for the appellant / defendant whether the appellant / defendant in the plaint in the said suit for specific performance took the plea of being in possession of the property in part performance of the Agreement to Sell. Though the senior counsel for the appellant / defendant invited attention to the said plaint but could not point out therefrom any such plea. Rather, the specific performance of the Agreement to Sell, which provides for delivery of possession at the time of execution and registration of the Sale Deed, was sought. Thus, it has but to be held that the appellant / defendant, in the plaint in the suit for specific performance also impliedly admitted that it was not in possession of the property in part performance of the Agreement to Sell.

24. As far as the reliance by the senior counsel for the appellant / defendant on the interim order in the said suit for specific performance, making the order of *status quo* regarding possession and title subject to payment of admitted amounts by the appellant / defendant is concerned, in the face of the appellant / defendant in the plaint in that case having not set up a case of being not liable to pay rent as lessee and in fact from the factum

of, from the date of the Agreement to Sell till the filing of the suit for specific performance continuing to pay the rent, it cannot be said that the payment of rent thereafter is only owing to a direction of the Court and not owing to the liability otherwise of the appellant / defendant under the Lease Deed. Not only so, after the institution of the said suit for specific performance also, renewal of lease which was not subject matter of that suit was availed of and it was not the case of the appellant / defendant that the same was in pursuance of any order in the suit for specific performance.

25. That takes me to the aspect of effect of the order dated 27.07.2007 in CM(M) No.1418/2007 supra. In the written statement as originally filed in the suit for ejectment from which this appeal arises, again there is no plea of appellant / defendant having been delivered possession of the property in part performance of the Agreement to Sell or continuing in possession of the property in part performance of the Agreement to Sell. The Division Benches of this Court in ***Kanhya Lal Vs. Birdhi Chand Girdhari Lal*** MANU/DE/0333/1972 and in ***State Bank of India Vs. Pushpa Arora*** 64 (1996) DLT 557 have held that a plea of part performance which necessarily involves questions of fact cannot be permitted to be raised in appeal, when it was not taken in the written statement in the Trial Court though when a

defendant in the written statement states all the essential facts without stating the effect of those facts, the benefit of Section 53A of the Transfer of Property Act cannot be denied to him merely on the ground that there is no specific mention of Section 53A of the Transfer of Property Act. The Supreme Court also in **Williams Vs. Lourdusamy** (2008) 5 SCC 647 held that it is one thing to say that a person is in possession of the property and it is another thing to say that he has a right to possess pursuant to or in furtherance of an agreement for sale and that for application of Section 53A of the Transfer of Property Act, requisite ingredients must be pleaded.

26. The filing of the application by the appellant / defendant for amendment of the written statement to take the plea of Section 53A of the Transfer of Property Act is also an admission of the said plea being non-existent in the written statement as originally filed. The said application for amendment was dismissed by the learned ADJ and though the appellant / defendant preferred the CM(M) No.1418/2007 supra but the end result thereof was also of dismissal. Undoubtedly, this Court while dismissing the CM(M) No.1418/2007 observed that the said plea would be available to the appellant / defendant if established. The said observations appear to have come to be made in the light of the dictas aforesaid of the Division Benches

of this Court laying down that even without naming Section 53A, if the necessary ingredients thereof are pleaded, the said plea would be available. However the appellant / defendant in the present case has not only not pleaded the necessary ingredients of Section 53A of the Transfer of Property Act but as aforesaid admitted other facts which run counter to the possession of the premises having been delivered to the appellant / defendant in part performance of the Agreement to Sell.

27. I am unable to accept that a stray observation made by this Court in the said order in the CM(M) petition while ultimately dismissing the said CM(M) petition would confer a right on the appellant / defendant to lead evidence when there is no plea in the pleadings on which the evidence is sought to be led. Apart from the fact that a party cannot be permitted to lead evidence on an aspect for which no foundation has been laid in the pleadings (see ***Bachhaj Nahar Vs. Nilima Mandal*** (2008) 17 SCC 491), it is pertinent to note that even this Court while dismissing the CM(M) petition of the appellant / defendant was of the view that the issue sought to be raised was 'purely legal in nature'. It was in this light, that the contention under Section 53A was made available to the appellant / defendant at the time of final arguments. The appellant / defendant cannot thus, on the one hand rely on

the aforesaid order to contend that such a plea is available to it, and on the other hand, argue that part performance being a mixed question of law and fact, it be permitted to lead evidence and no judgment on admissions should be passed.

28. The same is the position with respect to the observations in the order dated 22.02.1993 in CW No.301/1990. This Court in the said proceeding was not concerned with the question whether the lease had come to an end or not. All that this Court was concerned with was of the property agreed to be sold to being encumbered by way of a tenancy in favour of the purchaser itself. Thus, merely because the order records the appellant / defendant as an 'erstwhile lessee' cannot change the agreement between the parties. Moreover, even after that order as aforesaid, the appellant / defendant continued to deal with the property as a tenant by paying rent thereof and by availing of renewal thereof.

29. Undoubtedly, the plea under Section 53A of the Transfer of Property Act is a mixed question of law and fact but the question of adjudication of such question of fact by giving an opportunity to lead evidence arises only when the plea is taken or the ingredients thereof pleaded and which is not the case in the present case. A mere plea of having agreed to purchase the

property does not tantamount to taking the plea under Section 53A.

30. The Supreme Court in *D.S. Parvathamma Vs. A. Srinivasan* (2003) 4 SCC 705 was concerned with whether the appellant in that case was entitled to protect his possession under Section 53A and hence not liable to suffer eviction based on landlord-tenant relationship which had ceased to exist on account of subsequent events. It was held that one of the essential features of the equitable doctrine of part performance as statutorily modified and incorporated in Section 53A is that the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract. It was further held that since the appellant had failed to allege that he was delivered possession in part performance of the contract or having already been in possession as lessee, continued in possession in part performance of the agreement to purchase i.e. by mutual agreement between the parties, his possession as lessee ceased and commenced as that of a transferee under the contract and further since the appellant in spite of entering into a contract of purchase had not disowned his character as lessee and was treated as such by the parties, the defence of Section 53A was not

available to him. It was yet yet further held that when a person already in possession of the property in some other capacity enters into a contract to purchase the property, to confer the benefit of protecting possession under the plea of part performance, his act effective from that day must be consistent with the contract alleged and also such as cannot be referred to the preceding title. The Supreme Court further held that the appellant having entered into possession as a tenant and having continued to remain in possession in that capacity, cannot be heard to say that by reason of agreement to sell his possession was not that of a tenant.

31. The procedure prescribed in the Code of Civil Procedure, 1908 for disposal of suits provides for issues to be framed only on material propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence. Else, Order 15 provides that where the parties are not found at issue on any question of law or fact, the Court should at once pronounce judgment. Once it is found that there is no defence as alleged of Section 53A of the Transfer of Property Act, merely because a bogey thereof is raised at the stage of framing of the issues or upon the respondents / plaintiffs filing an application for decree on admissions, would not call for framing of an issue. It has been

held in ***T. Arivandandam Vs. T.V. Satyapal*** AIR 1977 SC 2421, ***Liverpool & London S.P. & I Association Vs. M.V. Sea Success I*** (2004) 9 SCC 512 and ***ITC Ltd. Vs. Debts Recovery Appellate Tribunal*** (1998) 2 SCC 70 that the pleadings have to be read meaningfully and if on such a reading, it is found that there is no lis to be tried and the claim or defence is ultimately one destined to doom, the Courts should not waste their time on trial of such cases, to the prejudice of deserving cases. I have in ***Kawal Sachdeva Vs. Bala Rana*** MANU/DE/1050/2013 dealt in detail the said aspect and need is thus not felt to elaborate further.

32. In the present case the argument raised by the appellant / defendant of the defence of Section 53A of the Transfer of Property Act is but a bogey or an illusion intended to delay the ejectment of the appellant / defendant from the property and cannot be allowed to come in the way of immediate disposal of the suit. There is nothing worth adjudication neither on the factual pleas nor on legal pleas so as to deprive the respondents / plaintiffs from a decree of ejectment under Order 15 or under Order 12 Rule 6 of the CPC.

33. I have besides in ***Sunil Kapoor*** supra also in ***M/S ASV Industry Vs. Surinder Mohan*** MANU/DE/2060/2013 held that unless the nature of

possession is found to have been changed from that of a tenant to an agreement purchaser in part performance, as per dicta of this Court in **Jiwan Das Vs. Narain Das** AIR 1981 Del. 291 an agreement purchaser simpliciter has no rights in the property not only till the passing of a decree for specific performance of the agreement but even till the execution of the conveyance in pursuance thereto, and a tenant is not entitled to continue in possession merely for the reason of having filed a suit for specific performance of the Agreement to Sell.

34. There is another aspect of the matter. If it were to be the case of the appellant / defendant that possession was indeed agreed to be delivered and delivered to it in part performance of the Agreement to Sell and which is not borne out from a bare reading of the Agreement to Sell itself then it would be a case of an agreement from which the terms cannot be ascertained with reasonable certainty and in which case also the defence of Section 53A of the Transfer of Property Act is not available.

35. No merit is thus found in the appeal which is dismissed with costs.

Counsels fee assessed at Rs.20,000/-.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

JANUARY 17th, 2014
bs/gsr