

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

% *Judgment Reserved on: February 21, 2017*
Judgment Delivered on: March 01, 2017

+ **RSA 221/2016**

NIRMALA DEVI & ORS. Appellants
Through: Mr.S.C.Singhal, Advocate

versus

JAI DUTT Respondent
Through: Mr.T.R.Kashyap, Advocate

CORAM:
HON'BLE MS. JUSTICE PRATIBHA RANI

JUDGMENT

RSA 221/2016

1. By way of this Regular Second Appeal, the appellants are invoking the jurisdiction of this Court under Section 100 of the Code of Civil Procedure impugning the judgment and order of the First Appellate Court passed in Civil Appeal No.RCA-02/2014 whereby the appeal filed by the respondent herein (defendant in Civil Suit No.177/2012) was allowed and the judgment and decree dated 4th January, 2014 passed by the learned Trial Court was set aside.

2. The facts in brief are that the Civil Suit No. 177/2012 was filed by Sh.Anand Dev Sharma (deceased now represented through his legal heirs Smt.Nirmala Devi, the appellant No.1 and their children, appellant Nos.2 to 11) for possession and damages/mesne profits in respect of the shop bearing No.RZ-450-C, Raj Nagar, Part-I, Palam Colony, New Delhi pleading that the

respondent/defendant Jai Dutt was inducted as a tenant in respect of a shop shown as red in the site plan annexed with the plaint. At the time of institution of suit, the last paid rent was ₹700/-per month. The tenancy of the respondent/defendant was terminated by the landlord vide legal notice dated 11th April, 2012. The tenancy stood terminated with effect from 30th April, 2012. It was also pleaded that suit property is not governed by Delhi Rent Control Act. The prevalent market rent of the suit property was pleaded to be ₹10,000/- per month. The appellants/plaintiffs sought a decree for possession in respect of the suit property as well damages @ ₹300/- per day.

3. In the written statement, the respondent/defendant took the plea that in the year 1986 he had entered into an agreement for sale in respect of suit property for a sum of ₹40,000/- with the owner/landlord (plaintiff). At the time of execution of sale agreement, he had paid ₹5,000/- towards advance and remaining ₹35,000/- was paid in cash later in the presence of the witnesses. It was further pleaded that after execution of agreement Ex.P1 in 1986, he has not paid any rent to the landlord. The defence taken is that possession of the respondent/defendant was protected under Section 53A of the Transfer of Property Act, being transferred to him pursuant to part performance to the sale contract. The three rent receipts for the period February to April, 2012 placed on record by the appellants/plaintiffs were denied alleging the same to be forged and fabricated taking the plea that after entering into an agreement in 1986, there was no question of paying any rent to the appellants/plaintiff.

4. On the basis of the pleading of the parties, learned Trial Court framed the following issues:-

(i) Whether the plaintiff is entitled for the possession/ejectment as prayed for. OPP

(ii) Whether the plaintiff is entitled for recovery of ₹2700/- as prayed for. OPP

(iii) Whether the plaintiff is entitled for a decree of damages/mesne profits as prayed for. OPP

5. During trial, Sh.Ramesh Kumar Sharma – attorney of the plaintiff was examined as PW-1 and PE was closed on 24th January, 2013. However, the learned Trial Court felt necessary to examine the plaintiff in person, hence the plaintiff Anand Dev Sharma was examined as Court Witness as CW-1 on 1st December, 2013.

6. The defendant Jai Dutt examined himself as DW-1 and also produced one witness namely Sh.Bhagwan Dass as DW-2 to prove that balance ₹35,000/- was paid to the plaintiff by the defendant in his presence.

7. During trial, the plaintiff expired on 26th February, 2013 and his legal heirs were substituted before learned Trial Court.

8. Learned Trial Court after discussing the doctrine of part performance under Section 53-A of the Transfer of property Act, held that there was no document to prove the title of the tenant in the suit property for the reason that any right in the immovable property of the value of more than ₹100 could have been transferred only by way of registered document as required under Section 17 of the Registration Act. Learned Trial Court noted that except the document exhibited as Ex.P-1, there was no other document in favour of respondent/defendant to create any right, title or interest in the suit property. There was no document to establish that after the execution of exhibit P-1, he ever claimed himself to be owner of the suit property by paying house tax and obtained electricity connection in his own name. Rather the electricity/house tax bills exhibit PW-1/4-6 are in the name of landlord which proved that the tenant never asserted to be owner of the suit property. Learned Trial Court also held that tenancy of the

respondent/defendant stood terminated on expiry of period of 15 days from the date of service of notice exhibit PW-1/13 dated 11th April, 2012 and in any case from the date of filing of the suit for possession. The learned Trial Court passed the decree for possession in favour of plaintiff in respect of the suit shop as shown red in the site plan exhibit PW-1/3 and also awarded damages @ ₹1500/- per month from the date of institution of suit.

9. The First Appellate Court vide impugned judgment set aside the judgment of the learned Trial Court observing as under:-

16. The reason followed by the Ld. Trial Court was that the plaintiff's photocopies were correct but the defendant's photocopies were not correct. This Court looks at the problem differently. The documents of both the parties are highly deficient. These documents are not able to prove anything being photocopies. Their contents are highly misleading and are not capable of being the basis of any judicial pronouncement. Therefore, this Court for the purpose of present proceedings deems it fit to deny the documents of both the parties for the reasons of being Photostat and also under the mandate of Section 31, 58 and 64 Evidence Act as discussed above. These documents are of no value at all for being used in an adjudicatory process before the Court.

17. But, one thing is still there. The possession of the defendant in the suit premises for last about 40 years and the undisclosed ground by the plaintiff as to what prevented him to file the appropriate proceedings before the Court for seeking possession against the defendant for 40 long years. The answer given by the plaintiff has already been discussed above. But this has not satisfied the Court.

18. Plaintiff cannot seek the success on the basis of defendant's failure to prove the contrary. The plaintiff has filed some other ancillary documents like house tax receipts by these are of no value in adjudication deciding rights of the parties against a possession.

19. *For the aforesaid reasons, this Court is of the view that plaintiff's evidence is highly deficient and does not show anything in favour of the plaintiff to be the basis of his entitlement to see possession of the suit premises qua the defendant in this suit. The deficiency of evidence is fatal for the plaintiff's claim to succeed.*

20. *It is decided that plaintiff has failed to prove his entitlement. This issue is held to be 'Not Proved'.*

10. On 2nd February, 2017, after hearing learned counsel for the parties, the following substantial question of law was formulated:

Whether the judgment of the First Appellate Court suffers from perversity?

11. On behalf of the appellants, Mr.S.C.Singhal, Advocate has submitted that it is admitted case of the parties that provision of Rent control Act are not applicable to the suit property. It is also not disputed by the respondent/defendant that there existed a relationship of landlord and tenant between the parties. Mr. S.C.Singhal, Advocate has referred to the three receipts Ex.PW1/10 to Ex.PW1/12 which have not been held to be forged and fabricated by any of the Courts below. Learned counsel for the appellants has contended that the document exhibit P-1 was executed in 1986 and merely by making payment of ₹5,000/-, the respondent/defendant cannot claim to have become owner of the suit property till the entire transaction was completed. Being a tenant he could have continued enjoying the possession in respect of the suit property till his tenancy was terminated. Once legal notice has been served on him terminating his tenancy or otherwise by filing of the suit for possession which also have the effect of terminating the tenancy, his possession became unauthorized after the termination of tenancy. There is no evidence to prove that the balance

payment of ₹35,000/- was ever made by him to complete the sale transaction. By merely paying ₹5,000/- that too in the year 1986, he does not become owner of the suit property. Learned counsel for the appellants has drawn the attention of this Court to the electricity bills Ex.PW1/5 and PW1/6 showing energisation date to be 1st April, 1997 and the connection being in the name of Anand Dev Sharma i.e. the landlord. He has also drawn the attention of this Court to the property tax receipt Ex.PW1/8 in respect of the suit property dated 31st March, 2005 which also shows the assessee to be Anand Dev Sharma – the landlord. Even the Self Assessment Return Form (Form-C) for the assessment year 2004-2005 Ex.PW1/9 has been filed by Anand Dev Sharma – the landlord. It was contended that had the respondent/tenant become owner by virtue of Ex.P-1 executed in 1986, all these documents would have been in his own name and not in the name of the landlord.

12. On behalf of the respondent, Mr.T.R.Kashyap, Advocate has submitted that the document exhibit P-1 is an agreement for sale. The defendant was already in possession of the suit property as a tenant and on execution of exhibit P-1, his possession is protected under Section 53-A of the Transfer of Property Act. It was also contended that no rent receipt, except the three receipts Ex.PW1/10 to Ex.PW1/12 immediately preceding the institution of suit, have been filed to prove that any rent was paid by the respondent after execution of the agreement Ex.P1 in 1986.

13. Learned counsel for respondent has contended that the document exhibit P-1 was executed in the 1986 whereas the three receipts placed on record are of the period February to April, 2012. The landlord could have produced the receipts for the period 1986 onward for the rent received by him after the execution of agreement for sale exhibit P-1. Failure on the part

of appellant to produce any rent receipt except these three receipts prove the same to be fabricated for filing the suit for possession. It has been contended that after the execution of document exhibit P-1 the defendant has never paid any rent and he has been enjoying the suit property in his capacity as owner in possession in part performance of the agreement for sale Ex.P1.

14. In addition to oral submissions, written submissions have also been filed by the respondent submitting that the appellants/plaintiffs failed to prove their case and the First Appellate Court rightly set aside the judgment of the learned Trial Court as the plaintiff was required to stand on his own legs and could not have taken any advantage of the weaknesses in the defence. It has been further contended that to prove the relationship of the landlord and tenant between the parties the appellants/plaintiffs failed to place on record the rent receipts of the period after the date of agreement for sale on 21st July 1986 till filing of the suit. The three rent receipts placed on record do not bear the signature of the tenant and have been denied by him. The appellants/plaintiffs failed to prove that the signature of the tenant appear on these three rent receipts or led any oral or documentary evidence to prove payment of rent after 21st July, 1986. These facts though not considered by learned Trial Court, have been appreciated by the First Appellate Court while setting aside the judgment and decree of the learned Trial Court. Learned counsel for the respondent/tenant has also contended that wide structural changes were made in the suit premises by the tenant and his long possession in itself was sufficient to prove that his possession was as owner of the property. The evidence adduced by the appellants/plaintiffs to prove the jural relationship of landlord and tenant between the parties so as to seek the relief of possession, was found highly deficient by the First

Appellate Court and the suit has rightly been dismissed vide impugned judgment.

15. I have perused the LCR. It is necessary to mention here that so far as relationship of landlord and tenant between the parties is concerned, it is respondent's own case that he was a tenant under Sh. Anand Dev Sharma in respect of the suit property which is a shop. His defence is that after entering into an agreement and paying ₹5,000/- as advance, his status was changed to that of an owner and he was not required to pay any rent nor he has paid the rent thereafter i.e. July, 1986.

16. The case of the appellants/plaintiffs was that till the filing of the suit the rent was paid by the respondent/tenant and after the termination of tenancy vide notice exhibit PW-1/13 dated 11th April, 2012, the suit for possession was filed and as the status of the tenant after termination of the tenancy became that of an unauthorized occupant and damages for use and occupation at market rent were claimed.

17. The issue which fall for determination is the effect of agreement Ex.P1, which though a photocopy is an admitted document. The jural relationship of landlord and tenant between the parties at the time of execution of agreement Ex.P1 is also admitted. It is necessary to refer to the contents of the document exhibit as P-1 which is a photocopy of the document which was prepared on stamp paper of ₹1 and bear the signature of the vendor/owner/landlord Anand Dev Sharma. The agreement for sale Ex.P1 reads as under:-

‘IKRARNAMA

*Main Anand Dev Sharma, putra Shri Braham Dutt Sharma yeh
tehrir karta hoon ki main apne ke chowk isthit plot mein
lagbhag 12 X 9 foot mein bani hui ek dukan ko ab jaisi bhi
halat mein hai apne mojuda kirayedar Shri. Jai Dutt, putra Sh.*

Shriram ko ₹40,000/- (challis hazar rupaye) mein dene ko sehmata hoon. Iske liye mujhe Jai Dutt se paanch hazar rupaye peshgi mil gaye hain. Baki ₹35,000/- paitis hazar rupaye ka bhugtaan aur aage ki karyawahi ki tareekh dono paksh baad mein mil kar apni suvidha anusaar taiy karenge.

Tehrir likh di taaki satad rahe.

*Anand Dev Sharma
C-207, Ranjit Nagar.'*

18. The above document exhibit P-1 is to the effect that Anand Dev Sharma has agreed to sell his shop measuring 12x9 sq. feet situated at RZ-450-C Raj Nagar, Part I, Palam Colony, New Delhi to his tenant Jai Dutt, S/o Sh.Ram Singh for total sale consideration of ₹40,000/- and ₹5,000/- has been paid by Jai Dutt towards advance. Balance amount of ₹35,000/- shall be paid and further action would be taken at a date mutually convenient to the parties which shall be decided by them later on.

19. It is well settled that mere agreement to sell of immovable property does not create any right, title or interest except to seek performance of the said agreement. In the decision reported as Jiwan Das vs. Narain Das AIR 1981 Delhi 291 it was so held:-

'10. Adverting, Therefore, to the merits of the controversy, it may at the outset be taken note that unlike the law in England where an agreement of sale creates an equitable estate in the purchaser, the law in India does not recognise any such estate. Section 54 of the Transfer of Property Act in specific terms provides that a contract for sale does not, of itself, create any interest in or charge on such property. Such contract is merely a document creating a right to obtain another document in the form of sale deed to be registered in accordance with law. In other words, a contract for sale is a right created in personam and not in estate, No privity in estate can be deduced there from which can bind estate, as is the position in cases of mortgage,

charge or lease. Of course, such personal right created against the vendor to obtain specific performance can ultimately bind any subsequent transferee who obtains transfer of the property with notice of the agreement of sale. (See in this respect MANU/SC/0212/1966 : [1967]1SCR293 , Ram Baran v. Ram mohit,

11. Till, Therefore, a decree for specific performance is obtained, the vendor or a purchaser from him is entitled to full enjoyment of the property. In fact, even if a decree for specific performance of contract is obtained, and no sale-deed is actually executed, it cannot be said that any interest in the property has passed. (See in this respect MANU/WB/0047/1956 : AIR1956Cal147 , Govinda Chandra v. Provabati Ghose, and MANU/AP/0245/1956 : A.I.R. 1957 AP 960 S. Ramalingm v. G.R. Jagadammal.'

20. In another decision reported as K.Mani vs. M.D.Jayavel & Ors. 2012 (1) RCR (Rent) 111 the High Court of Madras, while reiterating the legal position as laid down in B.Kuppulal vs. D.Sagunthala & Anr. (1987) 1 MLJ 242 and Duraisami Nadar vs. Nagammal 1981 (1) MLJ 35 held that mere agreement of sale will not terminate landlord-tenant relationship unless there is specification to that effect in agreement itself. It was further held that notwithstanding the agreement of sale, the relationship of landlord and tenant continues to operate till there is a specific agreement to end the relationship of landlord and tenant and that merely by entering into an agreement of sale the tenant did not acquire any right in the property. It was further held that if possession is traceable to the agreement of sale, then such possession can be sustained on the basis of the principle of part performance under Section 53-A of the Transfer of Property Act. Even assuming that the petitioner is entitled to the benefit of Section 53-A, his liability to pay rent

does not cease unless the agreement of sale puts an end to that liability in specific terms.

21. Whether the photocopy of the document exhibit P-1 which is an unregistered document confers any title on the tenant/respondent so as to change his status from that of a tenant to that of an owner, the answer has to be in negative. A mere agreement for sale of an immovable property does not create any right in the property, till the time such agreement is specifically enforced. Thus even if it is admitted by the landlord/plaintiff that he had agreed to sell the suit property to the respondent/tenant, that would not give him any right to occupy that property as an owner (as held in the decision reported as *Jiwan Das Vs. Narain Das*, AIR 1981 Delhi 291).

22. Although the document exhibit P-1 is inadmissible in evidence but even if it is considered to be duly proved, at best his defence is that he became owner by virtue of this document and continued to be in possession thereafter as an owner. This defence had to be rejected for the reason that it is nowhere mentioned in the said agreement exhibit P-1 that on the day of execution of this document, possession was delivered to the tenant in part performance of the agreement. Section 53-A of the Transfer of Property Act codifies the doctrine of part performance. A purchaser of an immovable property who has been put into possession of the property pursuant to the agreement for sale, is entitled to seek protection in respect of his possession in that capacity but the requirement of law is that the agreement should be sufficiently stamped and registered. No interest in the immovable property can be claimed or transferred on the strength of an unregistered document. The writing exhibit P-1 nowhere provides that possession has been delivered to him in part performance of the agreement so as to seek protection under Section 53-A of Transfer of Property Act.

23. It is admitted case of the parties that after execution of the document exhibit P-1 in July, 1986, none of them had mutually decided further action for completing the transaction as per their convenience. Neither the landlord/owner had called upon the tenant to pay ₹35,000/- i.e. the balance sale consideration and get the transaction completed nor the tenant had asked for either refund of the advance payment or offered the balance sale consideration of ₹35,000/- and asked for execution of documents.

24. The landlord/owner was above 90 years of age at the time of institution of the suit. He had appointed his son as an attorney who was examined as PW-1. Thereafter, when landlord was examined as Court witness, he had deposed about the relationship of the landlord and tenant between the parties as well admitted receipt of only ₹5,000/- in cash vide document (photocopy) exhibit P-1. He denied that balance ₹35,000/- was paid to him in cash. The defence of the tenant is that he paid ₹35,000/- later on in cash in presence of DW-2 Bhagwan Das was denied. Except self serving oral statement in evidence by defendant (DW-1) and Sh.Bhagwan Dass (DW-2) that ₹35,000/- was paid in cash to the landlord towards balance sale consideration, there is no documentary evidence to prove this version.

25. This is otherwise not probable. If the initial payment of ₹5,000/- was recorded on a stamp paper, the payment of ₹35,000/- required something more to be done i.e. execution and registration of the necessary title document in favour of the tenant. Neither the defendant in the written statement nor in his examination in chief has given the date/month on which the cash payment of ₹35,000/- was made to the landlord without obtaining any receipt. DW-2, Bhagwan Das also did not state the date, month or the year when this payment of ₹35,000/- was made in his presence and why no receipt was executed in respect of entire balance sale consideration i.e. of

₹35,000/- without execution of title deeds in favour of respondent/tenant. The fact that at no point of time the tenant served a notice on the landlord calling upon him to execute the title documents in his favour claiming that he has paid the entire sale consideration of ₹40,000/-, suggests that the balance payment of ₹35,000/- was never made by him. By paying just ₹5,000/- towards advance, his status in respect of the suit property does not become that of an owner but remained that of a tenant till the sale transaction is completed which has not been done till date. The First Appellate Court has failed to examine the oral and documentary evidence led by the parties in the light of legal position enumerated in various decisions referred to above.

26. In the instant case the photocopy Ex.P1, which is an admitted document, on the basis of which the respondent herein is claiming his ownership rights only records the fact of the parties agreeing for sale and purchase of shop in tenancy of Jai Dutt for a sum of ₹40,000/- and an acknowledgment of ₹5,000/- was given towards advance (peshgi). Rest of the issues i.e. payment and date of further action was to be decided mutually as per the convenience.

27. Even if the documents Ex.P1 is considered as an agreement to sell, it does not create any right in the property save the right to enforce the said agreement on the basis of the seller agreeing to sell the property and receiving ₹5,000/- towards advance. The right of the respondent/defendant would not be as an agreement purchaser as the wordings of Ex.P1 do not stipulate that the respondent/defendant had been delivered the possession of the said shop in pursuance to the agreement Ex.P1.

28. It is evident from the evidence led by the parties that the respondent/defendant admitted the jural relationship of landlord and tenant between the parties. None of the parties had given the date, month or the

year when the tenancy started or what was the initial rate of rent. The starting point of the relationship of landlord and tenant between the parties has not been provided by either of the parties. The document Ex.P1 also is undated. It is only from the date of purchase of the stamp paper i.e. 21st July, 1986, that one can guess about the agreement being entered into between the parties somewhere on or after 21st July, 1986. All that the respondent has pleaded and tried to prove is that he has not paid any rent to the owner/landlord after July, 1986. Once the defendant/tenant admitted the relationship of the landlord and tenant between the parties, having agreed to purchase the same from Sh.Anand Dev, he is estopped from denying the title of the appellant during the continuance of the benefit that he had drawn under this relationship. Section 116 of the Indian Evidence Act estoppes the tenant in occupation of the tenanted premises from denying the title of the landlord who inducted him as a tenant and handed over the possession.

29. A three-Judge of the Supreme Court in the decision reported as Sri Ram Pasricha v. Jagannath and Ors. (1976) 4 SCC 184 reiterated the principle that a tenant in a suit for possession was estopped from questioning the title of the landlord Under Section 116 of the Evidence Act.

30. Undisputedly, the rent receipts (except receipts Ex.PW1/10 to Ex.PW1/12) with effect from July, 1986 till institution of the suit in the year 2012 have not been placed on record by any of the parties. Learned First Appellate Court failed to consider that it was not a case for recovery of rent but recovery of possession for which the Court was required to see the relationship of landlord and tenant between the parties and whether the provision of Delhi Rent Control Act were applicable and if not to ascertain termination of tenancy and entitlement of the owner/landlord to seek possession.

31. No doubt after July, 1986 while the respondent/defendant admitted that he has not paid any rent and the three rent receipts produced by the landlord are for the month February to April, 2012 i.e. just preceding the institution of the suit. But without going into the controversy whether the receipts are genuine or forged, the fact remains that merely by paying ₹5,000 vide Ex.P1, till remaining sale consideration is paid and title documents are executed in favour of the tenant, the jural relationship of landlord and tenant continue and he was bound to pay the rent.

32. It is noteworthy that neither the respondent/tenant nor DW-2 Bhagwan Das has given any date of making payment of ₹35,000 to the landlord. No receipt showing this payment of ₹35,000 is pleaded or proved. Apart from that it is nowhere the case of the respondent/tenant that he ever tried to enforce the so-called agreement to sell Ex.P1 by calling upon the landlord to execute the documents in his favour or even serving any legal notice that despite receiving the entire sale consideration, he had failed to execute the title documents so as to pass on the title in respect of the suit property to the respondent/tenant. No doubt there is long time gap from the date of execution of document Ex.P1 in July 1986 till institution of the suit in 2012 but that itself was no ground to dismiss the otherwise legitimate claim of the plaintiff for the simple reason that at the most on failure to produce and prove the rent receipt immediately after the execution of the Ex.P1 in July 1986, the landlord could not claim the rent for the period beyond three years. But Ex.P1 did not have the effect of bringing an end to the relationship of landlord and tenant between the parties. When no time limit was fixed in the agreement Ex.P1 to finalise the deal, the respondent/tenant could not have stopped making the payment of rent till the transaction is completed.

33. The findings returned by the First Appellate Court are perverse and liable to be set aside.

34. In view of the aforesaid discussion, the substantial question of law is decided in favour of the appellants and against the respondent.

35. The impugned judgment of the First Appellate Court dated 9th July, 2016 is set aside and that of the learned Trial Court dated 04th January, 2014 is restored and Civil Suit No.177/2012 stands decreed.

36. The appeal is allowed.

37. No costs.

38. LCR be sent back alongwith copy of this order.

CM No.29459/2016 (Stay)

Dismissed as infructuous.

MARCH 01, 2017
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PRATIBHA RANI
(JUDGE)

