

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

% **Date of decision: 28th August, 2018**

+ **RSA 196/2017 & CM No.27311/2017 (for stay)**

SHARDA Appellant
Through: Mr. Yog Verdhan, Adv.

Versus

KUSUM GUPTA Respondent
Through: Mr. Shamindra Kadian, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree [dated 27th March, 2017 in RCA No.4/2017 of the Court of Additional District Judge (South-West)] of dismissal of First Appeal under Section 96 of the CPC filed by the appellant against the judgment and decree [dated 26th December, 2016 in Civil Suit No.425372/2016 of the Court of Senior Civil Judge (South-West)] allowing the suit of the respondent/plaintiff against the appellant/defendant for recovery of possession of immoveable property and for recovery of rent and *mesne* profits.

2. The appeal came up first before this Court on 1st August, 2017, when notice thereof was ordered to be issued and execution stayed, though without formulating or indicating the substantial question of law, if any arising and the Trial Court record was requisitioned.

3. The counsel for the respondent/plaintiff has been appearing and the proceedings have been adjourned from time to time. None of the

subsequent orders also record or indicate the substantial question of law, if any entailed in this appeal.

4. The counsels for the parties have been heard and the Trial Court record requisitioned perused.

5. The respondent/plaintiff instituted the suit, from which this appeal arises, pleading (i) that the respondent/plaintiff had purchased the subject property from the appellant/defendant vide Agreement to Sell, Power of Attorney etc. and the appellant/defendant had put the respondent/plaintiff into possession of the property agreed to be sold; (ii) however, after some time, the appellant/defendant approached the respondent/plaintiff for taking the same property on rent and which was agreed to by the respondent/plaintiff and the property was let out by the respondent/plaintiff to the appellant/defendant at a rent of Rs.5,000/- per month; (iii) that the appellant/defendant was irregular in payment of rent; and, (iv) that the respondent/plaintiff thus determined the tenancy of the appellant/defendant. Hence, the suit for recovery of possession and for recovery of arrears of rent and *mesne* profits.

6. The appellant/defendant contested the suit *inter alia* denying any transaction of sale or letting and pleading that the respondent/plaintiff had taken the signatures of the appellant/defendant on some blank papers.

7. The following issues were framed/got framed in the suit:

“1. Whether the plaintiff obtained the signatures and thumb impression of the defendant on some blank papers and fabricated the same as documents dated 16.07.2012 in the nature of GPA etc. with respect to the suit property? OPD

2. *Whether the defendant is still the owner of the suit property? OPD*
3. *Whether a landlord – tenant relationship was created between the parties in November 2012? OPP*
4. *If a landlord-tenant relationship was created, whether the plaintiff has terminated the tenancy of the defendant?..OPP*
5. *Whether the plaintiff is entitled to the recovery of arrears of rent, and interest upon the same, if so, at what rate and for what term?.....OPP*
6. *Whether the plaintiff is entitled to the recovery of damages, if so, at what rate and for what term?....OPP*
7. *whether the defendant has attempted to create third party interest in the suit property? OPP*
8. *Relief.”*

8. The Suit Court allowed the suit reasoning, (i) that the defence of the appellant/defendant qua Agreement to Sell, Power of Attorney etc. in favour of the respondent/plaintiff was of bald denial; (ii) though the appellant/defendant admitted her signatures on documents other than possession letters and Will, she denied the contents of these documents asserting that her signatures were obtained on blank papers/printed papers; (iii) that the admission of signatures/thumb impression on documents raised the presumption of awareness of contents thereof, as a prudent person is presumed to have either read the contents or accepted whatsoever may be recorded on such papers; (iv) with the admission by the appellant/defendant of the signatures/thumb impression on General Power of Attorney, Agreement to Sell, affidavit and receipt, it stands admitted that the

appellant/defendant appointed the respondent / plaintiff as her attorney for the property, for consideration and also agreed to sell the property to the appellant/defendant; (v) that the denial of signatures on possession letter and Will was thus irrelevant; (vi) that the Power of Attorney being for consideration, could not under Section 202 of the Indian Contract Act, 1872, be terminated; (vii) that the appellant/defendant in her cross-examination also admitted sale of other portions of the same property to others at about the same time as the sale claimed by the respondent/plaintiff; (viii) that since the appellant/defendant knowingly sold other portions of the property at the same time, it was highly improbable that she was duped by the respondent/plaintiff; (ix) denial by the appellant/defendant was contrary to normal course of human conduct; reference was made to Sections 15,16 & 114 (f) of the Indian Evidence Act, 1872; (x) the circumstances in which the appellant/defendant claimed that her signatures were obtained on blank/printed papers had not been established/proved; (xi) the Agreement to Sell, Power of Attorney etc. in favour of the respondent/plaintiff were witnessed by Suresh Kumar Aggarwal, to whom the appellant/defendant admitted to have sold other portion of the property; (xii) that it was not the plea of the appellant/defendant that the said Suresh Kumar Aggarwal was in collusion with the respondent/plaintiff; (xiii) issues no.1&2 aforesaid were thus decided in favour of the respondent/plaintiff and against the appellant/defendant; and, (xiv) qua issue no.3 it was held that though there was no written Rent Agreement between the parties but a tenancy could be oral also and that considering that the defence of the appellant/defendant

had been disbelieved, the preponderance of probabilities was of a tenancy having come into effect as claimed by the respondent/plaintiff, at a rent of Rs.5,000/- per month; issue no.3 was thus decided in favour of the respondent/plaintiff and against the appellant/defendant.

9. Resultantly the suit was decreed.

10. The First Appeal preferred by the appellant/defendant has been dismissed framing the following two points for determination:-

“1. Whether the impugned order and judgment dated 26.12.2016 granting recovery of possession in favour of the plaintiff without declaring the plaintiff owner of the same is as per law.

2. Whether the judgment and decree passed by the Ld. Trial Court is even otherwise sustainable in the eyes of law.”

and holding/reasoning, (i) that though Agreement to Sell, Power of Attorney etc., as per dicta of the Supreme Court in ***Suraj Lamp & Industries P. Ltd. Vs. State of Haryana*** (2012) 1 SCC 656, did not constitute documents of title, the respondent/plaintiff had proved better title to the property than the appellant/defendant; (ii) reliance in this regard was placed on ***Suresh Kumar Vs. Saroj Atal*** 189 (2012) DLT 285 and ***Hardip Kaur Vs. Kailash*** 193 (2012) DLT 168; and, (iii) that since the appellant/defendant had failed to prove her version of having signed on blank papers and the respondent/plaintiff had been found to have a better title than the appellant/defendant, it was most probable that the version of the respondent/plaintiff, of creation of oral tenancy at a monthly rent of Rs.5,000/-, was correct.

11. It would thus be seen, that both the Courts below have presumed the existence of relationship of landlord and tenant, from the respondent/plaintiff having title to the property and/or from the respondent/plaintiff having better title to the property than the appellant/defendant.

12. Though the title of the suit from which the appeal arises, was 'for recovery of possession' but in law, a suit by a landlord for ejectment of tenant is distinct from a suit for recovery of possession of immovable property, on the basis of prior possession or title, in which either prior possession or title has to be established. On the contrary, in a suit for ejectment by landlord against tenant, the question of title to the property is not relevant (See *Jai Sujanti Vs. Sudarshan Chadha* 2013 SCC OnLine Del 2860; *Precision Steels Vs. Reeta Salwan* 205 (2013) DLT 695; *Sanjay Singh Vs. Corporate Warranties Pvt. Ltd.* (2013) 204 DLT 12; *Ram Kumar Vs. S.K. Gulati* (2013) 203 DLT 588; *Vansons Footwear (P) Ltd. Vs. USP Fashion Weaves (P) Ltd.* 2018 SCC OnLine Del 6998; and, *Gayatri Gupta Vs. Bimla Devi* 2018 SCC OnLine Del 10726) and the only question to be determined is the existence of relationship of landlord and tenant.

13. In an ejectment suit, the issues of title to the property and of obtaining of signatures by the respondent/plaintiff of the appellant/defendant on blank papers were not required to be framed.

14. This is a classic example of how a misdirected trial, not only leads to neither party benefitting therefrom, but also leads to waste of judicial time.

15. Though issues are to be framed by the Court, but once the parties to a suit are represented by the counsels, the said counsels are expected to assist the Court in framing of issues. Even if the Court had framed issues on the aspects not required to be determined, it was bounden duty of the counsels, to point the same out. The counsels in the present case did not do so and proceeded to lead evidence on such issues. Axiomatically, a misdirected trial has led to a misdirected judgment with the Courts below pronouncing on the issues and holding the respondent/plaintiff, on the basis of Agreement to Sell, Power of Attorney etc. to be having a better title than the appellant/defendant, forgetting that the respondent/plaintiff, by pleading purchase of property from appellant/defendant, had admitted the title of the appellant/defendant to the property. In such circumstances, it is not understandable, as to how the test of better title, if at all valid in law, was invoked in a suit for recovery of possession of immovable property on the basis of title.

16. The First Appellate Court also failed to realise the aforesaid mistrial and proceeded to dismiss the appeal in the same spirit.

17. *De hors* the title, the Suit Court as well as First Appellate Court have held that there is no evidence of relationship of landlord and tenant between the parties or of the rent agreed by the parties being Rs.5,000/- per month. The rate of rent becomes relevant because as far as the city of Delhi is concerned, the jurisdiction of the Civil Court to entertain a suit for ejectment of a tenant from a premises is barred if the rent of the premises is Rs.3,500/- or less per month. If the rent is Rs.3,500/- or less per month, the Rent Controller under Delhi Rent Control Act, 1958 has to be approached.

18. I have thus asked the counsel for the respondent/plaintiff, as to the evidence if any of existence of relationship of landlord and tenant.

19. The counsel for the respondent/plaintiff has fairly stated that out of all of the witnesses examined by the respondent/plaintiff, only PW-8 Mohd. Mushtaq has deposed about such relationship.

20. I have perused the affidavit by way of examination-in-chief and cross-examination of the said witness. All that the said witness has deposed is that on his approaching the respondent/plaintiff for taking the premises on rent, the respondent/plaintiff replied that he had already let out the premises to the appellant/defendant 'half an hour back' and that the appellant/defendant was also present over there. The said witness has not whispered a single factum about the rate of rent. The bare statement of PW-8 could not withstand the cross-examination.

21. Choice has been given to the counsel for the respondent/plaintiff that if he is willing to consent to decision of the appeal by substantial question of law in this judgment itself, the appeal can be allowed today itself and whereafter the respondent/plaintiff can institute a suit for recovery of possession of the property on the basis of the title or prior possession as he may consider appropriate and that the findings in the impugned judgment on aspects which were not relevant to be decided would not constitute *res judicata*, or to have the substantial question of law framed today and have the appeal admitted for hearing to be listed in the category of 'Regulars' and as a result whereof the respondent/plaintiff, till the decision of the appeal, would also not be entitled to institute a suit for possession.

22. The counsel for the respondent/plaintiff states that he is not able to give consent.

23. I may mention that the reasoning given by the Suit Court, of preponderance of probability also is contrary to law. It has been held in ***Mahabir Prasad Jain Vs. Ganga Singh*** (1999) 8 SCC 274, ***Kamini Lal Vs. Raman Lal Sethi*** MANU/DE/2938/2018, ***Mohd. Farooq Vs. Mubassara*** 2014 SCC OnLine Del 805 and ***Akila Vs. Nisar Ahmad*** AIR 2012 All 93 that mere possession of premises of another does not give rise to an inference of tenancy.

24. The appeal raises/entails following substantial questions of law:

“Whether the Suit Court and the First Appellate Court have misdirected themselves and the trial by misconstruing the suit for ejectment as a suit for recovery of possession on the basis of title.”

25. At this stage, the counsel for the respondent/plaintiff states that the respondent/plaintiff be permitted to withdraw the suit from which this appeal arises, with liberty to file appropriate proceedings. He states that the liberty be also clarified to include a second suit for ejectment.

26. I have considered whether the respondent/plaintiff would be entitled to institute a second suit for ejectment and on consideration, I am of the view that even if one of the suits for ejectment is dismissed, the same does not bar the landlord from filing a second suit for ejectment. Reference if any required in this regard may be made to ***Chhaganlal Vs. Parwati Bai*** MANU/MP/0199/1969, ***Noor Jahan Rahim Vs. Arokiadas*** ILR 1979 Kar

186 and *Nand Kumar and Brothers Vs. Ram Prasad Rajak* 1996 SCC OnLine Pat 217.

27. Else, the counsel for the appellant/defendant also agrees that findings returned in the impugned judgments qua title to the property or qua the documents claimed to have been executed by the appellant/defendant, were beyond the scope of a suit for ejectment and would not constitute *res judicata*.

28. The counsel for the appellant/defendant also has no objection to liberty being granted to the respondent/plaintiff either to sue for recovery of possession on the basis of title or prior possession or to sue afresh for ejectment of the appellant/defendant as a tenant.

29. In the peculiar facts of the case, since the trial has been misdirected, the respondent/plaintiff is permitted to, at this stage of second appeal, withdraw the suit from which this Second Appeal arises and with liberty to take appropriate proceedings for recovery of possession or for ejectment of the appellant/defendant and with further clarification that none of the findings returned by the Suit Court or by the First Appellate Court qua title to the property or qua the documents on the basis of which the respondent/plaintiff claims title, would constitute *res judicata* in subsequent proceedings if any instituted and the said questions will be decided afresh on the basis of evidence led in said proceedings.

30. In view of the above, this appeal is infructuous and is disposed of as such. However, in the circumstances, the respondent/plaintiff, as a

condition for instituting fresh proceedings, to pay costs of Rs.25,000/- to the appellant/defendant.

The Trial Court record requisitioned in this Court be returned forthwith.

RAJIV SAHAI ENDLAW, J.

AUGUST 28, 2018

bs/sr..

