

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

+ **CM(M) 393/2014**

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Reserved on: 13th April, 2015
Decided on: 21st April, 2015

BABITA JOSHI (THROUGH HER
DULY APPOINTED ATTORNEY) Petitioner
Through Mr. Mohit Kumar, Adv.

versus

DILIP RAWAT Respondent
Through Mr. Dalip Kumar, Adv.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. Aggrieved by the order dated 19th February, 2014 dismissing the application of the petitioner/plaintiff under Order 12 Rule 6 CPC the petitioner Babita Joshi prefers the present petition.

2. Babita Joshi filed a suit for possession, recovery of arrears of rent, permanent injunction and mesne profits against Dilip Rawat the defendant through her power of attorney Pradeep Jain. In the plaint Babita stated that she was the joint owner/landlady of 1st floor portion of suit property bearing No. UG-1 part of freehold property No. A-130/3 out of khasra No. 1076/5/2/141 situated at Dilshad Colony by virtue of a registered sale deed dated 19th July, 2003 (in short the suit property). It was further stated that Babita Joshi had let out the property to Dilip Rawat in March 2007 on a

monthly rent of ₹5000/- which was later enhanced to ₹6000/- in 2010 excluding the maintenance and other charges. It was clarified that there was no water and electricity connection at the suit property. Though Dilip Rawat stated that he would reside himself and did not require water and electricity connection, he later called on his wife and children to live in the suit premises without the knowledge and permission of Babita Joshi and thereafter theft of electricity and water started. Thus the suit property was raided by BSES officials on 12th November, 2007 and a case of theft was registered against Dilip Rawat. In 2011 Babita Joshi approached Dilip Rawat. He made part-payment of ₹17,511/- on 22nd February, 2011 to BSES for which a receipt was given to Babita Joshi. Despite assurance Dilip Rawat did not make the balance payment. Later in June 2012 Dilip Rawat stated that he would provide receipts of payment to BSES after deducting the amount paid to BSES from the rent but later changed his idea in July 2012. In July 2012 Dilip Rawat stopped paying the monthly rent since he expressed his inability due to financial crunch. In view of the old relations Babita Joshi gave him some time to make the payment. Again in December 2012 when rent was demanded he abused her and threatened of dire consequences. Thus, Dilip Rawat was required to pay monthly rent with effect from July 2012 to August 2013 i.e. ₹ 84,000/- along with damages and mesne profits per month till the actual handing over of the possession.

3. In the written statement Dilip Rawat took the objections that the suit was not maintainable. Babita Joshi had concealed material facts and fabricated allegations, no cause of action arises and no pecuniary jurisdiction vested with the Court to entertain the suit as the value of the suit property was more than 20 lakhs. It was stated that Babita Joshi was ready to sell her

joint property for a total consideration of ₹7,50,000/- but documents could not be executed as her husband has been missing since 2005 and unless 7 years pass-by the documents could not be executed. Babita Joshi stated that she had no account of hers and the money be transferred to the bank account of Pradeep who was the mediator in the deal. Thus Dilip Rawat issued cheques in the name of Pradeep dated 10th August, 2007 and 28th August, 2007 for a sum of ₹1,00,000/- and ₹10,700/-respectively. He further deposited sums of ₹3600, ₹72,000/-, ₹10,000/- and ₹10,000/- in the account of Rajinder Joshi. When the bank officials asked why he was depositing money it was stated that it was the sale consideration. Since Rajinder Joshi was missing, the bank officials refused to accept the money. Pradeep further received a sum of ₹ 2,04,700/-, ₹44,000/- and ₹40,000/- in cash. Dilip Rawat had paid a total sum of ₹4,96,200/- in respect of suit property. There was no relationship of landlord/tenant. Dilip Rawat also wrote to BSES to install the electricity meter in his name, however since Rajinder Joshi was not available, the same could not be done.

4. Though Babita Joshi did not give any notice for termination under Section 106 of the Transfer of Property Act, however as held by this Court in M/s. Jeevan Diesels and Electricals Ltd. Vs. Jasbir Singh Chadha 183 (2011) DLT 712 and Nanak Ram Jaisinghani Vs. Tilak Raj Salooja & Ors. 208 (2014) DLT 193 service of summons in the suit can be held as a notice under Section 106 of the T.P. Act for terminating tenancy.

5. Challenging the impugned order learned counsel for Babita Joshi contends that a notice in terms of Section 106 of the Transfer of Property Act is not essential for termination of the tenancy and summons in the suit serve the same purpose as held by this Court in M/s. Jeevan Diesels & Electricals

Ltd. Vs. M/s. Jasbir Singh Chadha (HUF) & Anr. 183 (2011) DLT 712. Relying upon the decisions of this Court in Sunil Kapoor Vs. Himmat Singh & Ors. 167 2010 DLT 806 it is contended that oral agreement to sell do not confer any title in the property and hence a judgment on admissions is required to be passed. Learned counsel for Babita Joshi relies upon A.Shanmugam Vs. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalani Sangam Represented by its President Etc. AIR 2012 SC 2010 and Panchi Devi Vs. Omwati 2011 SCConline Del 2796.

6. Learned counsel for the respondent on the other hand relying upon M/s. Jeevan Diesels (supra) and Himani Alloys Ltd. Vs. Tata Steel Ltd. 2011 (7) SCALE 566 contends that for a judgment on admissions of facts under Order 12 Rule 6 CPC the admission should be clear, unambiguous and categorical. In the present case there is no admission much less any clear unambiguous admission and thus there is no illegality in the impugned order.

7. In A. Shanmugam the Supreme Court while dealing with the possession of an unauthorized occupant held:

“66. A title suit for possession has two parts - first, adjudication of title, and second, adjudication of possession. If the title dispute is removed and the title is established in one or the other, then, in effect, it becomes a suit for ejectment where the Defendant must plead and prove why he must not be ejected.

67. In an action for recovery of possession of immovable property, or for protecting possession thereof, upon the legal title to the property being established, the possession or occupation of the property by a person other than the holder of the legal title will be presumed to have been under and in subordination to the legal title, and it will be for the person resisting a claim for recovery of possession or claiming a right to continue in possession, to establish that he has such a right.

To put it differently, wherever pleadings and documents establish title to a particular property and possession is in question, it will be for the person in possession to give sufficiently detailed pleadings, particulars and documents to support his claim in order to continue in possession.”

8. The learned Trial Court dismissed the application for the reasons that Dilip Rawat disputed the relationship of landlord-tenant and there was no unambiguous and undisputed admission. As noted above Dilip Rawat does not admit of entering into the premises as a tenant but says that an oral agreement to sell was entered into pursuant to which money was transferred, however the sale documents could not be executed as the period of 7 years since Babita Joshi’s husband was missing had not elapsed.

9. Dilip Rawat has claimed possession on the basis of an oral agreement to sell, however the law does not protect the possession of a person who claims to have obtained it under an oral agreement to sell in his favour. Section 53A T.P. Act provides as under:

“53A. Part performance.—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 where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the

transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him 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:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.”

10. Thus, possession of a person is protected under Section 53A of the T.P. Act only if he claims it under a written contract to transfer the property to him for consideration. In Nathulal Vs. Fool Chand 1970 2SCR 854 the Supreme Court in respect of a defence of a part performance to an action in ejectment by the owner laid down the following conditions:

“(i) that the transferor has contracted to transfer for consideration any immovable 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;

(ii) 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;

(iii) that the transferee has done some act in furtherance of the contract; and

(iv) that the transferee has performed or is willing to perform his part of the contract.”

11. A mere agreement to sell of a movable property does not create any right in the property, save, the right to enforce the said agreement. Admittedly till date Dilip Rawat has not filed any suit for specific performance. Thus even if it is accepted that an oral agreement to sell was

entered into, firstly it was entered into only with one of the joint owners and Dilip Rawat has got no right to occupy the property as an agreement purchaser unless there is conveyance in accordance with law. Thus, Dilip Rawat has no right to remain in occupation of the premises or retain possession merely because of oral agreement to sell in his favour. The contention of learned counsel for Dilip Rawat that there is no unambiguous admission deserves to be rejected. The case of Dilip Rawat specifically is on the basis of an oral agreement to sell and that too with one of the joint owners only as the other joint owner Rajinder Joshi had been missing and his whereabouts were not known.

12. Thus, the impugned order is set aside. In view of the observations made above, the learned Trial Court will pass a preliminary decree in regard to possession as prayed for in the application under Order 12 Rule 6 CPC and proceed in accordance with law thereafter.

13. Petition is disposed of.

(MUKTA GUPTA)
JUDGE

APRIL 21, 2015
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