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

+ **Date of Decision: 04.09.2015**

% **RSA 324/2015**

SHANKAR GOSWAMI

..... Appellant

Through: Mr. Om Prakash, Advocate

versus

SARITA GOSWAMI

..... Respondent

Through: Mr. Sumit Chander, Advocate

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

C.M. No.18154/2015

Exemption allowed, subject to all just exceptions. The application stands disposed of.

Cav No.934/2015

Learned counsel for the respondent/caveator has appeared and the caveat stands discharged.

RSA 324/2015 & C.M. No.18153/2015

1. The present second appeal is directed against the judgment and decree dated 12.05.2015 passed by the learned ADJ-06, South Distt., New Delhi in RCA No.17/2015 preferred by the appellant/defendant to assail the

judgment and decree passed by the learned Civil Judge-04 in CS No.84/2004 preferred by the respondent/plaintiff to seek recovery of possession, damages and mesne profits.

2. The First Appellate Court has dismissed the appellants first appeal and affirmed the judgment and decree passed by the Trial Court with the slight modification that the damages awarded @ Rs.1500 per month were made payable w.e.f. from 01.02.2011, and not from 23.04.2010.

3. The respondent/plaintiff filed the said suit on the premise that she is the owner of the property no.K-139, Dakshinpuri, New Delhi admeasuring 25 sq yds. The plaintiff claimed that she had purchased the said property from Smt. Kusum Lata, wife of Sh Sant Ram vide agreement to sell dated 28.04.1997 (Ex PW-1/1). The plaintiff claimed that the power of attorney (Ex PW-1/2); the possession letter (Ex PW-1/3) were also executed. She produced the site plan (Ex PW-1/4). The possession of the property was handed over to the plaintiff. Thereafter, the plaintiff claimed to have constructed three floors on the suit property and one room and bathroom on the terrace. The plaintiff claimed that she was residing with her family in the suit property and the defendant/appellant is the younger brother of the husband of the plaintiff. The defendant was allowed to reside with his family on the top floor of the suit premises temporarily till he finds his own place to live in. He uses the electricity from the meter connection in the name of the plaintiff. The plaintiff stated that the defendants use was permissive. The plaintiff stated that due to the misbehaviour of the defendant, she withdrew her permission to the defendant to reside in the suit property by sending a legal notice dated 07.04.2010 (Ex PW-1/6) and called

upon the defendant to vacate the premises and hand over possession. The plaintiff also claimed damages @ Rs.1500 per month if the premises were not so vacated.

4. Since the defendant did not vacate the premises and pay the damages, the suit was filed. Upon issuance of summons, the defendant filed his written statement. His defence was that the plaintiff is neither the owner nor the landlord of the property, and that the documents relied upon by the plaintiff did not confer any right on her. He denied the receipt of legal notice. He stated that he is the owner of the suit property, and claimed to have purchased the same from his hard earned money. He denied that he was residing in the premises with the permission of the plaintiff. He claimed that he was residing in the property in his own independent right. He stated that the suit property had been purchased from the income of the entire family including his elder brother, the husband of the plaintiff, and that the plaintiff had no source of income to purchase the suit property.

5. The following issues were framed by the Trial Court:

- i) Whether there is no cause of action to file the present suit and hence, suit is liable to be dismissed? OPP
- ii) Whether plaintiff is entitled to decree of possession of the top floor of the suit premises, as prayed in prayer No.A?
- iii) Whether the plaintiff is entitled to recover the damages as prayed for in prayer No.B? OPP
- iv) Relief, if any.

6. The plaintiff examined herself as PW-1. She also got examined Sh.

Mohd. Altaf as PW-2 – a tenant in the suit property. He stated that the plaintiff is the landlady, and he was paying rent to her. The plaintiff also examined Sh Dalip Singh Negi as PW-3, who also stated that as a tenant, he was paying rent to the plaintiff. The plaintiff also examined Sh Mansha Ram as PW-4, who was the witness to Ex. PW-1/1 and PW-1/2. The plaintiff also produced Sh Sant Ram as PW-5 - the husband of Smt. Kusum Lata from whom the plaintiff claimed to have acquired rights in the property by the aforesaid documents.

7. In his defence, the defendant/appellant filed his own affidavit and examined himself as DW-1 reiterating his stand taken in the written statement. However, he did not lead in evidence any other material to substantiate his plea that he had contributed towards the purchase of the suit property, or for its construction.

8. On the basis of the evidence led by the parties, the Trial Court returned the finding that the plaintiff had been able to establish that she had acquired interest in the suit property. On the other hand, the defendant had failed to establish his defence that he had contributed in either the purchase or construction of the suit property. The Trial Court held that he had no interest in the suit property. Consequently, the suit was decreed as aforesaid.

9. The first appeal preferred by the appellant has been dismissed with the slight modification as aforesaid. The First Appellate Court concurred with the findings returned by the Trial Court.

10. The submission of Counsel for the appellant, firstly, is that the averment of the plaintiff that she had created a license in favour of the appellant/defendant by permitting him to occupy a portion of the suit

property is defective and devoid of any particulars. It has not been disclosed as to on what date the license had been so created. Learned counsel further submits that the appellant had deposed in his examination in chief that he too had contributed for the purchase and construction of the suit property, and he was not cross examined on the aforesaid aspects by the plaintiff.

11. Having heard learned counsel for the appellant, perused the impugned judgments of the courts below, as well as the evidence relied upon, I am of the view that there is absolutely no merit in this appeal and no substantial question of law arise for consideration by this Court. The concurrent findings returned by the Trial Court and the First Appellate Court are premised on the appreciation of evidence led by the parties, and the appellant has not been able to point out any perversity or patent illegality in the appreciation of evidence by the courts below.

12. The first submission of the appellant that no date for creation of license has been mentioned has no merit. It was not necessary for the plaintiff to give a specific date as to when the license was granted to the defendant to reside in a portion of the suit property. Obviously, the said license could be granted only after the property was reconstructed by the plaintiff. What is relevant is that the capacity in which the appellant occupied the suit property was that of a licensee, since he failed to establish any right title or interest therein by leading any cogent evidence. The plaintiff examined the two tenants - who were attorning to the plaintiff alone, and the defendant had no role to play in the creation of tenancies or in receiving the rent. The plaintiff also examined the husband of the vendor, who stated that the plaintiff had purchased the interest of the vendor in the

suit property. The plaintiff also examined one of the witnesses to the documents exhibited as PW-1/1 and PW-1/2 as aforesaid.

13. On the other hand, the defendant failed to lead any cogent evidence to establish his contribution in either the purchase, or construction of the property. Even otherwise, if the defendant had any right title or interest in the suit property, and had contributed towards its purchase and construction, firstly, his name would have found mention, along with the plaintiff, in the agreement to sell and general power of attorney. Secondly, he would have exercised the right of ownership by leasing out portions of the property along with the plaintiff, and sharing the rent received from the tenants. However, it was the plaintiff alone, who exercised the rights of the owner, without any protest or demur from the appellant/defendant.

14. The submission that the defendant was not cross examined in respect of the claim that he had made contribution for purchase and construction of the property, is not true to the record. A perusal of the cross examination of DW-1 shows that he was thoroughly cross examined by the plaintiff on the said aspects. In his cross examination, the defendant showed his ignorance about the date of purchase of the suit property. He admitted that he had not placed any documentary evidence to prove that he is also the owner of the suit property. He denied the suggestion given to him that he had not contributed for purchase of the suit property. He also denied the suggestion that he did not have the source of funds either to construct or purchase the suit property. He also admitted that the electricity connection was in the name of the plaintiff. Since it was the positive case of the defendant that he had made contribution for purchase and construction of the property in

question, it was for him to lead positive evidence in this respect. The plaintiff could not have proved the negative, or a fact which did not exist according to her.

15. Counsel for the appellant, lastly, submits that the appellant had relied on three judgments before the courts below, which have not been considered. The said three judgments are:

- i) ***Patel Natwarlal v. Sh. K.G.K.V.***, 1997 RLR 287;
- ii) ***M.L. Aggarwal v. Oriental Bank of Commerce & Ors.***, 128 (2006) DLT 407;
- iii) ***T.K. Mohammed Abubucker (D) Thru LRs v. P.S.M. Ahamed Abdul Khader & Ors.***, AIR 2009 SC 2966

16. ***Patel Natwarlal*** (supra) is wholly irrelevant. In this case, the Supreme Court held that an agreement to sell, which does not appear genuine, and is executed by the transfer to avoid the decree that may be passed against him, does not confer any right on the transferee to sue for declaration and injunction. The Supreme Court held that when a valuable property is cheaply and collusively sold to a person with insufficient means, then it indicates a fraud. The plaintiff who comes to court with unclean hands is not entitled to equitable relief. The Supreme Court observed that Section 53A can be used as a shield and not as a sword by a bonafide transferee in possession. The latter cannot file a suit on the basis of title.

17. I fail to appreciate how this decision has any application in the facts of the present case. The plaintiff/respondent has a better title than that of the appellant/defendant in the suit property – being the agreement purchaser and

holding the general power of attorney from the original owner. The plaintiff did not file the suit to seek a declaration of a title qua the agreement transferor. Since the occupation of the appellant/defendant in the suit property was merely permissive – as he has not been able to establish any other right tile or interest in the suit property, the respondent/plaintiff could maintain the suit, without being the recorded owner of the suit property.

18. For the same reasons, the decision in ***T.K. Mohammed Abubucker*** (supra) would have no application in the facts of the present case.

19. The decision in ***M.L. Aggarwal*** (supra) has been relied upon on account of the observation made in para 11 to the following effect:

“11. From the facts of the case, we find no merit in this petition. In our opinion, the petitioner has no right, title or interest in the property as he has not purchased it by any registered Sale Deed. An immovable property cannot be purchased by a mere Power of Attorney or Agreement to Sell. Moreover, the Power of Attorney is said to have been cancelled”.

20. No doubt, the ownership in respect of an immovable property can be acquired only by a registered sale deed. However, it cannot be denied that the agreement purchaser to an agreement to sell has an interest in the property. It cannot also be denied that the respondent/plaintiff had a better title than that of the appellant/defendant, and the appellant/defendant was inducted into the suit property by the respondent/plaintiff. It is not even open to a tenant to question the title of his landlord, much less it is open to a licensee, who is inducted by the agreement purchaser, to question the title of the licensor. The decision, therefore, has no application in the facts of the present case.

21. In view of the aforesaid, there is no merit in this appeal and, accordingly, the same is dismissed.

VIPIN SANGHI, J

SEPTEMBER 04, 2015

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