

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

% *Date of decision : December 11, 2015*

+ **RFA(OS) 119/2015**

VIKRAM SANDHU Appellant
Represented by: Mr.Sandeep Sharma, Ms.Richa
Mittal, Advs.
versus

SARDAR BHAG SINGH & ORS Respondent
Represented by: Mr.Sudhir K.Saneja, Adv.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE MUKTA GUPTA
MUKTA GUPTA, J. (ORAL)

CM 26549/2015

For the reasons stated in the application the delay in filing the appeal is condoned. Application is disposed of.

RFA(OS) 119/2015

1. With the consent of parties and the Trial Court Record being available as per practice directions of this Court, we have heard the appeal finally.
2. Sardar Bhag Singh and his wife Smt. Beant Kaur (hereinafter referred as the plaintiffs) instituted a suit being CS(OS) 1143/1996 against the appellant Vikram Sandhu for possession of second floor with terrace forming part of property No.A/11, N.D.S.E. Part-I, New Delhi (in short the suit property) and mesne profit from the date of filing of suit till delivery of possession. In the plaint the plaintiffs claimed to be the owners of the suit property measuring about 428 sq.yds. comprising of basement, ground floor,

first floor and terrace on the second floor besides the 3 servant quarters above the garage. It was stated that in the month of August 1994, Vikram Sandhu approached the plaintiffs for purchase of second floor and lower portion along with garage and 3 servant quarters of the suit property. It was agreed that Vikram Sandhu shall purchase the terrace on the second floor along with servant quarters and the garage block while Kevendra Surana would purchase first floor of the property in question. Pursuant to the agreement dated September 09, 1994 the terrace forming part of the suit property was agreed to be sold to Vikram Sandhu for a total sale consideration of ₹27 lakhs. Vikram Sandhu paid a sum of ₹1 lakh as earnest money and the balance of ₹26 lakhs was to be paid at the time of registration of the sale deed which was to be executed within four months from the date of agreement. It is the case in the plaint that the possession of the premises in question which would be thus the terrace alone, was handed-over to Vikram Sandhu. It is pleaded that as per Clause 5 of the agreement, the plaintiffs were required to apply and obtain the income-tax clearance certificate and after obtaining such permission/s by the plaintiffs, the balance amount of sale consideration was to be paid within 30 days of the receipt of the information by Vikram Sandhu and to get the sale deed registered. On Vikram Sandhu writing a letter dated September 28, 1994 asking the plaintiffs to withhold taking the permission as he was to pay further earnest money, the plaintiffs did not file the necessary application for obtaining income-tax clearance. Despite repeated letters of the plaintiffs no reply was received from Vikram Sandhu. The plaintiffs wrote a letter dated December 20, 1994 which stated that in case Vikram Sandhu failed to comply with the conditions laid down in the letter and the agreement on or before January 09,

1995 the agreement would be treated as null and void. According to the plaintiffs since Vikram Sandhu committed breach of the agreement, the agreement stood terminated and the earnest amount so paid was forfeited. Thus in the plaint prayer was made for decree of possession and mesne profit.

3. In the written statement filed, Vikram Sandhu pleaded that the plaintiffs have forged the so-called letters dated November 20 1994, December 20, 1994 and January 15, 2005 allegedly written by them to him. It was stated that no such letter was ever sent to Vikram Sandhu, besides pleading that the suit was barred under Section 53A of the Transfer of Property Act. However the agreement to sell between the parties was not denied and it was stated that the plaintiffs were liable to execute sale deed after taking necessary permissions from the concerned authorities which they avoided and did not perform their contractual obligations. Since Vikram Sandhu was occupying the premises in question i.e. the terrace pursuant to an agreement to sell no damages were liable to be paid.

4. On an application under Order XII Rule 6 CPC filed by the plaintiffs the issue of possession was decided in favour of the plaintiffs. The learned Single Judge vide order dated February 15, 2011 held that Vikram Sandhu was put in possession in terms of the agreement dated September 09, 1994 and since he failed to abide by the terms of agreement and did not pay the balance consideration and continued to occupy the second floor terrace for 17 years against payment of ₹1 lakh a decree of possession was passed.

5. Issues No.3, 6, 7 & 8 which were left to be decided read as under:

“3. Whether the plaintiffs are entitled to mesne profits/damages for unauthorized use and occupation from the

date of filing of the suit till the date of possession is delivered to the plaintiff? (OPP)

6. *Whether the plaintiffs have forged any document and if so its effect? (OPD)*

7. *Whether the suit is under valued for the purposes of Court fee and jurisdiction? (OPD)*

8. *Relief.”*

6. Since Vikram Sandhu failed to appear he was proceeded ex-parte vide the order dated October 18, 2011. Possession was taken by plaintiffs from Vikram Sandhu in the month of November 2011 after he was proceeded ex-parte. Plaintiffs led ex-parte evidence.

7. Vide the impugned judgment dated January 10, 2014 the learned Single Judge noted that plaintiffs have proved on record another lease deed dated April 28, 2009 in respect of property bearing No.A-12, Ring Road, N.D.S.E. Part-I which was adjacent to the suit property, however the said lease related to the entire property and the property in question was second floor of the building. Thus determining the rate of rent of the second floor at ₹60/- per sq.ft. on the date of filing of the suit and the area of the suit property being 2000 sq.ft. the learned Single Judge calculated mesne profit at ₹1.20 lakh per month with further stipulation of 20% increase after every three years from the date of filing of the suit. While returning this finding the learned Single Judge committed serious flaw. The property in question in the present case was a terrace above the first floor and not a built up second floor. No evidence was led by the plaintiffs to show that even a terrace which was not built up would fetch rent and thus the defendant was liable to pay mesne profit. No doubt, Vikram Sandhu led no evidence, however even on the basis of the evidence led by the plaintiffs there is no

material to show that an unbuilt terrace can fetch some rent. Since the learned Single Judge confused the terrace to the second floor of the building as a built up area and granted the mesne profit on the same basis, the impugned judgment is liable to be set aside.

8. No evidence was led by the plaintiffs for issue No.6 & 7 as noted by the learned Single Judge. Hence except that a decree of possession has been passed in favour of the plaintiffs they are not entitled to any other relief as prayed for. Thus the suit is liable to be dismissed with regard to issues No.3, 6 & 7.

9. Appeal is accordingly disposed of. Decree in terms be passed.

CM 26548/2015 (stay)

Dismissed as infructuous.

(MUKTA GUPTA)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

DECEMBER 11, 2015
‘ga’