

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

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Date of decision: 2nd February, 2016

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RFA No.80/2015 &CM No.7519/2015 (for stay)

M/S JAGDAMBEY BUILDERS PVT. LTD.

.... Appellant

Through: Mr. Meet Malhotra, Sr. Adv. with Mr.
Mayank Bansal, Adv.

Versus

J.S. VOHRA

..... Respondent

Through: Mr. K.R. Chawla, Mr. Sunil Verma and
Ms. Renu Verma, Advs.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This first appeal under Section 96 of the Code of Civil Procedure (CPC), 1908 impugns the judgment and decree dated 14th October, 2014 (of the Court of Additional District Judge (ADJ)-05, South District, New Delhi in Suit No.173/2014 bearing Case ID No.02406C0391252010) ejectment of the appellant from first floor of property No.A-14, Neeti Bagh, New Delhi earlier in its tenancy and for recovery of arrears of rent / *mesne* profits at the rate of Rs.30,000/- per month w.e.f. 1st December, 2007 till the filing of the suit on 8th December, 2010 and at the rate of Rs.33,000/- per month w.e.f. 8th December, 2010 till 7th December, 2013 and at the rate of Rs.36,300/- per month w.e.f. 8th December, 2013 till the date of vacation.

2. The appeal came up before this Court for admission on 20th February, 2015 when the contention of the counsel for the appellant was that since the appellant had entered into an agreement to purchase from the respondent / landlord the property in its tenancy and had also paid advance consideration, the appellant was not liable to vacate the premises. This Court however in the order dated 20th February, 2015 observing that the appellant had not filed a suit for specific performance of the agreement to sell and had also not raised a counter-claim in this regard in the suit for ejectment and that the period of limitation for claiming specific performance appeared to have lapsed, suggested that it would be fair and reasonable for the appellant to hand over vacant and peaceful possession of the premises, without prejudice to the appellant's right to file a suit for specific performance, if not already barred by limitation. On request of the counsel for the appellant, the matter was adjourned.

3. Though notice of the appeal had not been issued but thereafter, since 4th March, 2015, the counsel for the respondent has been appearing and efforts for amicable resolution, though were made but failed.

4. On 22nd May, 2015, the counsel for the appellant informed that the appellant had instituted a suit for specific performance of the agreement dated

10th August, 2006 of sale, being CS(OS) No.717/2015 in this Court and of which summons had been issued. It was further informed that in the said suit, an application for interim relief to restrain the respondent herein from dispossessing the appellant from the premises during the pendency of the suit for specific performance had also been filed. This Court in order dated 22nd May, 2015 observed that it would be appropriate for the Court in which the suit for specific performance was pending to consider the claim of the appellant to continue in possession of the premises.

5. On 22nd January, 2016, the senior counsel for the appellant informed that the application of the appellant for interim relief being I.A. No.5533/2015 in the suit for specific performance has been dismissed vide order dated 14th January, 2016. The senior counsel for the appellant was heard at length on 22nd January, 2016 and on his request to again take instructions from the appellant of the possibility of amicable settlement, the matter was adjourned to today. The senior counsel for the appellant today states that the appellant is not agreeable to any settlement; though the senior counsel for the appellant on 22nd January, 2016 had completed his arguments but on request has been permitted to argue further and the counsel for the respondent has also been heard.

6. The senior counsel for the appellant has contended that the status of the appellant in the premises, upon the respondent/landlord agreeing to sell the premises earlier in the tenancy of the appellant, changed from that of a tenant to that of a purchaser and since the appellant on the date of institution of the suit was not in possession of the premises as a tenant but in possession of the premises as a purchaser of property, the suit filed by the respondent/landlord, on the premise of relationship of landlord and tenant, for ejectment from the property was not maintainable and the decree for ejectment has been wrongly passed. Reliance in this regard is placed on ***R. Kanthimathi Vs. Beatrice Xavier*** (2000) 9 SCC 339.

7. The only other contention of the senior counsel for the appellant is that the respondent, in the plaint in the suit for ejectment from which this appeal arises, suppressed / concealed the factum of having agreed to sell the premises to the appellant and thereby practiced fraud and should have been non-suited on this ground alone. Reliance in this regard is placed on ***S.P. Chengalvaraya Naidu Vs. Jagannath*** (1994) 1 SCC 1 laying down that non-production and even non-mentioning, in that case of the lease deed, at the trial tantamounted to playing fraud on the Court and allowing the appeal on that ground alone.

8. The counsel for the respondent has referred to *Abbot India Ltd. Vs. Rajinder Mohindra* 2014 IV AD (Delhi) 395.

9. I have considered the rival contentions.

10. The first question for adjudication is whether the nature of possession of the appellant of the premises, would in law change from that of a tenant to that of a purchaser upon the appellant agreeing to purchase the premises, so as to deny the respondent / landlord the right to eject the appellant from the premises as a tenant.

11. Section 108 of the Transfer of Property Act, 1882 provides for the rights and liabilities of the lessor and lessee in the absence of a contract or legal usage to the contrary. Clause (B)(q) thereof provides that the lessee, on the determination of the lease, is bound to put the lessor into possession of the property.

12. The appellant in his written statement (available in the Trial Court record requisitioned),

(i) admitted having entered into the premises as a tenant @ rent of Rs.30,000/- per month under the respondent on the terms and conditions

contained in an unregistered lease deed dated 14th September, 2005, the duration whereof was of three years only;

(ii) pleaded having entered into a Receipt-cum-Agreement for Sale dated 10th August, 2006 with the respondent / plaintiff qua the premises in the tenancy of the appellant for a total sale consideration of Rs.2,30,00,000/-;

(iii) pleaded having given Rs.15 lakhs as earnest money much prior to the expiry of the lease deed;

(iv) pleaded having given part of sale consideration to the respondent on different occasions;

(v) pleaded that the respondent had agreed to sell his 50% undivided share in the entire property along with possession and ownership of the entire premises in the tenancy of the appellant to the appellant;

(vi) pleaded that the balance sale consideration was to be received by the respondent at the time of registration of the sale / transfer deed;

(vii) pleaded that the respondent inspite of being called upon by the appellant did not execute the necessary sale documents;

(viii) pleaded having given a sum of Rs.10 lakhs on 13th August, 2007;

- (ix) pleaded having given a sum of Rs.25 lakhs on 7th May, 2008;
- (x) pleaded that it was specifically agreed that the appellant can continue to occupy the premises till the requisite title documents are executed in favour of the appellant, without any rent, so as to compensate the appellant for delay in execution of the title deed;
- (xi) pleaded that the possession of the appellant of the premises was not unauthorized or illegal;
- (xii) pleaded that the occupancy of the appellant of the premises is with the consent of the respondent and not otherwise.

13. From the aforesaid, it becomes evident that it was not the plea of the appellant that its status in the premises, from that of a tenant at the time of entering the premises, had changed at any time or was anything other than as a tenant. The appellant significantly did not plead that the respondent had put the appellant into possession of the premises as a purchaser. It was not its plea that the relationship of landlord and tenant had come to an end. It was not its plea that its possession of the premises was anything other than as a tenant.

14. The senior counsel for the appellant during the hearing, also drew attention to the receipt cum agreement for sale dated 10th August, 2006

purportedly executed by the respondent. Though the same is found to contain the confirmation of the respondent of receipt of Rs.15 lakhs as advance / earnest money and part payment towards sale of the property but is not found to contain any statement that the possession of the appellant of the premises was as a purchaser or that possession of the premises had been delivered to the appellant as a purchaser. On the contrary, the same provides that the respondent shall clear all outstandings, taxes, charges, house tax and other demands in relation to the property upto the date of final payment and only thereafter the same shall be borne by the appellant. The same is indicative of the possession of the property in pursuance to the agreement to sell having not been agreed to be given, else the liability for all outgoings would have been taken over by the appellant.

15. Upon the same being put out to the senior counsel for the appellant, he draws attention to an undated possession letter but which is also merely indicative of handing over of possession by the respondent to the appellant of the first floor of the property and does not state that the possession was being handed over as a purchaser.

16. What is thus borne out is that neither is it the plea of the appellant in the written statement in the suit from which this appeal arises that the possession

of the premises in its occupation was given to it in pursuance to the agreement to sell nor do the document containing the agreement to sell or any other document records the possession of the appellant of the property as a purchaser. It is thus not understandable on what basis the senior counsel for the appellant is arguing that the possession of the appellant on the date of institution of the suit was not that of a tenant, but as of a purchaser. Arguments of law, in suits and in appeals arising therefrom, cannot be made *de hors* the pleadings and the evidence. This essential difference appears to have been glossed over. Without laying foundation in pleadings and in evidence, it is not open to the appellant to urge that its possession of the property is that of a purchaser.

17. A mere agreement to sell of immovable property does not create any right in the property save the right to enforce the said agreement. Thus, even if the respondent/plaintiff is found to have agreed to sell the property let out to the appellant to the appellant, the appellant/defendant would not get any right to occupy that property as an agreement purchaser. This Court in ***Jiwan Das Vs. Narain Das*** AIR 1981 Delhi 291 has held that in fact no rights enure to the agreement purchaser, not even after the passing of a decree for specific performance and till conveyance in accordance with law and in pursuance

thereto is executed. Thus in law, the appellant has no right to remain in occupation of the premises or retain possession of the premises merely because of the agreement to sell in his favour.

18. Section 53A of the Transfer of Property Act, 1882 codifies the doctrine of part performance. A purchaser of immovable property, who in pursuance to an agreement to sell in writing has been put into possession of the property, is entitled to so remain in possession. However, the writings relied upon by the appellant in this regard, even if were to be looked into (notwithstanding the contention of the counsel for the respondent that the same were not brought before the Trial Court), do not record the possession of the premises having been delivered to the appellant in pursuance to or in part performance of the agreement to sell. The writings do not even state that the appellant shall be entitled to continue in the premises free of rent as has been pleaded.

19. Even otherwise, the Stamp Act, 1899 and the Registration Act, 1908 as applicable to Delhi were amended w.e.f. 24th September, 2001. After the said amendment, an agreement to sell of immovable property, where-under the possession of the premises is delivered in part performance, can only be by a registered document bearing the prescribed stamp duty i.e. on 90% of the total agreed sale consideration. Section 49 of the Registration Act was also

amended. A plea of part performance, in the absence of a registered document, cannot thus be taken. The appellant/defendant cannot thus in the absence of a registered agreement to sell, protect his possession in part performance of the agreement to sell or take such a plea.

20. What follows is that even if the appellant/defendant were to succeed in his suit for specific performance of agreement to sell, till the execution of a conveyance deed in pursuance to the decree, if any in favour of the appellant, the appellant has no ground in law to save his possession of the premises. The status of the appellant would continue to be as before i.e. of a tenant whose tenancy has been determined.

21. I have in *Sunil Kapoor Vs. Himmat Singh* 167 (2010) DLT 806 (SLP No.6010/2010 preferred whereagainst was dismissed in limine on 12th March, 2010), *M/s. ASV Industry Vs. Surinder Mohan* MANU/DE/2610/2013 and in *Sanjiv Pathak Vs. Som Nath* 204 (2013) DLT 667 dealt exhaustively with this aspect.

22. It was again so dealt by me in *Abbot India Ltd.* supra.

23. I however elaborate further. Once it is found that the appellant was not delivered possession of the premises in his tenancy in part performance of the agreement to sell or that owing to the agreement to sell being not registered, the plea of being in possession of the premises in part performance is not open to the appellant for the reason of there being no registered agreement to sell, the only inference is of the appellant having continued in possession of the premises as a tenant.

24. Section 108B(q) of the Transfer of Property Act as aforesaid imposes an obligation on the tenant to deliver possession to the landlord. Only if the landlord after inducting a person as a tenant in the premises thereafter agrees to sell the premises to the tenant and in part performance of the said agreement to sell delivers possession of the premises to the tenant, will it be deemed that the tenant had delivered back possession of the premises to the landlord for the landlord to thereafter put the tenant into possession of the premises in part performance of the agreement to sell. Once, there is no delivery of possession of the premises in part performance of the agreement to sell, the only inference is that the person continues in the same status as earlier i.e. as a tenant.

25. The principle, “once a tenant always a tenant” can also be invoked in this respect. This Court in *M.R. Sawhney Vs. Doris Randhawa* AIR 2008

Delhi 110 (SLP No. 13820/2008 whereagainst was dismissed on 22nd October, 2010) held “*ex-facie*, once a tenant always remains tenant, unless the status changes by contract or by operation of law”. As far back as in ***Abdul Hakim Mia Vs. Pana Mia Miaji*** AIR 1919 Calcutta 293 (DB) also it was held that the lessee cannot alter the character of his possession and that if the plaintiff inducted the tenant into possession, obviously the character of the possession could not be altered, without the consent of the plaintiff. Similarly, in ***M. Mujibar Rahaman Vs. Isub Surati*** AIR 1928 Calcutta 546 followed in ***Sanapathi Sitharamiah Vs. Nandarapu Ramaswamy*** AIR 1938 Madras 73 it was held that estoppel under Section 116 of the Evidence Act, 1881 continues, even after the expiration of the period of the lease and unless the tenant openly surrenders possession he is estopped from contesting the title of the landlord. The High Court of Punjab & Haryana also in ***Gurcharan Singh Vs. Mukhtiar Singh*** 2010 SCC OnLine P&H 4757 held that a tenant in possession of the property cannot set up title by adverse possession in view of Section 116 of the Evidence Act, challenging the title of the owner/landlord of the property in dispute and that the principle of “once a tenant always a tenant” would apply. I may mention that the position of a tenant in this regard is the same as that of a

licensee qua which it was held by the Supreme Court in ***Sant Lal Jain Vs.***

Avtar Singh (1985) 2 SCC 332:

“the respondent was a licensee and it must be deemed to be always a licensee. It is not open to him, during the subsistence of the licence or in the suit for recovery of possession of the property instituted after the revocation of the licence to set up title to the property in himself or anyone else. It is his plain duty to surrender possession of the property as a licensee and seek his remedy separately in case he has acquired title to the property subsequently”.

26. Mention may also be made of ***Raptakos Brett & Co. Ltd. Vs. Ganesh Property*** (1998) 7 SCC 184 where it was held that in the absence of any contract to the contrary, Section 108B(q) of the Transfer of Property Act remains fully operative by force of Statute itself. It was reiterated that if the tenant wants to show that he is not bound to hand over the vacant possession to the landlord as he has paid the market value of the construction put in by him on the leased premises, there should be an express term to the contrary in the contract of tenancy which would override Section 108B(q) obligation. Naturally, such express term has to be in a contract in accordance with law and the law with effect from 24th September, 2001, as far as Delhi is concerned, requires a contract as pleaded by the appellant to be by a registered document and in the absence of such a registered document, prohibits a plea as sought to

be taken by the appellant. It has thus but to be held that there is no contract to the contrary and thus Section 108B(q) has to be given effect to.

27. As far as ***R. Kanthimathi*** supra on which reliance is placed is concerned, the said reliance is again *de hors* the facts of that case. A reading of the judgment of the Supreme Court shows that in the agreement of sale in writing in the said case, it was mentioned that the possession of the property had already been delivered to the purchaser in pursuance to the agreement of sale. It was in this context that the Supreme Court held that the jural relationship had changed from that of landlord and tenant to that of seller and purchaser of immovable property and the status could not be reverted to that of landlord-tenant merely because of the seller repudiating the agreement to sell.

28. However, in the present case, the appellant has utterly failed to plead that the respondent/landlord at any time in writing delivered possession of the premises in pursuance to or in part performance of the agreement to sell. Moreover, as far as the city of Delhi is concerned, no plea of delivery of possession in part performance of agreement to sell can be taken, without the agreement to sell being a registered one.

29. There is thus no merit in the first of the two contentions of the senior counsel for the appellant.

30. As far as the other contention is concerned, again a judgment is being cited and relied upon without considering, whether the same is applicable in the facts of the present case or not. Supreme Court in *S.P. Chengalvaraya Naidu* supra held non-production / concealment of only such documents as are relevant to the litigation, to be a fraud. In spite of my repeated asking, the senior counsel for the appellant cannot answer as to how in the aforesaid legal scenario, even if it were to be believed that the respondent had indeed entered into agreement to sell and executed the writings relied upon by the appellant, were the same relevant in the suit for ejectment filed by the respondent against the appellant as a tenant of the premises.

31. The only thing which the senior counsel for the appellant suggests is that since it was 'a fact' between the landlord and the tenant, it ought to have been mentioned and had it been so mentioned, the Court may not even have issued summons of the suit.

32. I do not find any merit in the said contention also. I have already recorded hereinabove the position in law, that an agreement to sell by the

landlord to sell the premises let out to the tenant does not, in the absence of the landlord having put the tenant into possession of the property in part performance of the agreement to sell, prevent the landlord from suing the tenant from ejectment. What is not relevant for adjudication of the *lis* being brought before the Court is not required to be pleaded or proved. The senior counsel for the appellant is not able to show any relevancy.

33. No other argument has been urged.

34. Before parting with the matter, it must also be said that a perusal of the order sheet of the Trial Court file shows the appellant to have practised dilatory tactics and which has resulted in the suit having remained pending from 8th December, 2010 till 23rd September, 2014. It is also found that the defence of the appellant to the suit was struck off for non-payment / non-compliance by the appellant of the order for deposit of admitted amounts in accordance with Order XV-A of the CPC as applicable to Delhi. The senior counsel for the appellant has not even argued that the defence of the appellant was wrongly struck off. The appellant, by adopting dilatory tactics has also kept this appeal pending in this Court for the last one year.

35. Dismissed.

36. In the circumstances, the appellant is found to be abusing the process of the Courts and while dismissing the appeal, the appellant is also burdened with costs of Rs.20,000/-.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

FEBRUARY 02, 2016
'pp/bs'