

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

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Date of decision: 10th February, 2016

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RFA No.388/2015

HARI GOPAL MANU

..... Appellant

Through: Mr. Amit Andley and Mr. Arun K. Sharma, Advs.

Versus

B.S. OJHA

..... Respondent

Through: Mr. Arun Khatri, Adv.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. In this first appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) against the judgment and decree dated 19th January, 2015 (of the Court of Additional District Judge (ADJ)-3, South East, Saket Courts, New Delhi in Civil Suit No.58/2014), on 3rd February, 2016 after hearing the counsel for the appellant and the counsel for the respondent and perusing the Trial Court record requisitioned, the following order was passed:

“1. The appeal impugns a judgment and decree on admissions of ejectment of the appellant from the premises earlier in his tenancy. Inquiry into mesne profits is underway.

2. Notice of the appeal was issued. The counsels have been heard.

3. It is not in dispute that the appellant had entered into the premises as a tenant at a rent in excess of Rs.3,500/- per month and there is no registered Lease Deed between the parties. The only defence of the appellant was that the respondent had agreed to sell the premises to the appellant for a total sale consideration

of Rs.1.5 crores and out of which the appellant has paid Rs.15 lacs. The appellant relies upon a Memorandum of Understanding (MoU) in this regard.

4. Needless to state that the respondent / plaintiff controverts.

5. The learned Additional District Judge in these circumstances has passed a decree for ejectment on admission.

6. The counsel for the appellant has contended that even though the respondent had denied the Agreement to Sell or having executed the MoU, the same was required to be established in evidence and no decree on admissions could have been passed. It is further contended that as per the said plea of the appellant/defendant, the nature of possession of the appellant/defendant on the date of institution of the suit was not as a tenant but as of a purchaser.

*7. I have however enquired from the counsel for the appellant/defendant, whether not the appellant/defendant having entered into possession of the premises as a tenant, not obliged in law to return possession of the premises to the respondent/landlord and that if at all the nature of possession of the appellant/defendant was to change from that of a tenant to that of a purchaser, the same could be done in accordance with law and not otherwise. This Court in **M.R. Sahni Vs. Doris Randhawa** AIR 2008 Delhi 110 held that once a tenant, always a tenant unless the status changes by contract or by law. Parity can also be drawn with a licence, in the context whereof Supreme Court in **Sant Lal Jain Vs. Avtar Singh** (1985) 2 SCC 332 held that once a licensee always a licensee and the licence without surrendering possession as a licensee, cannot set up another title to property.*

8. Such change in accordance with law could have been by the appellant/defendant coming into possession of the premises in part performance of the Agreement to Purchase and which could have happened, after the amendment of the Stamp Act and the Registration Act w.e.f. September, 2001 only by a registered document.

9. There is admittedly no registered document recording such delivery of possession.

10. The counsel for the appellant/defendant though has not filed MoU alleged to have been executed, has on request handed over a copy thereof in the Court but therefrom also is unable to show that the respondent/landlord as a seller has put the appellant/defendant into possession of the premises in part performance of the Agreement to Sell.

11. Thus there does not appear to be any triable issue owing where to it can be said that the judgment and decree on admission is fallacious.

12. The principles of Order 15 of the CPC can also be invoked in this respect i.e. a meaningful reading of the written statement not disclosing any triable issue.

13. The counsel for the appellant/defendant seeks time to obtain instructions from the appellant to find out whether the appellant/defendant desires to obtain any time for vacating the premises subject to giving undertaking to the Court.

14. List on 10th February, 2016.”

2. The counsel for the appellant today states that the appellant wants decision of the appeal on merits.

3. Though the reasoning given in the order dated 3rd February, 2016 is enough, but this being a first appeal, it is deemed appropriate to further elaborate.

4. The respondent filed the suit from which this appeal arises pleading (i) that the appellant/defendant was a tenant under the respondent/plaintiff in Flat No.96, Mandakani Enclave, Alakhnanda, New Delhi on a monthly rent of Rs.36,600/- excluding electricity and water charges; (ii) that the last unregistered lease deed dated 1st June, 2012 executed between the parties was

for a period of eleven months only and which period had expired on 30th April, 2013; and, (iii) that the respondent/plaintiff had vide legal notice dated 25th March, 2013 determined the tenancy of the appellant/defendant and called upon the appellant/defendant to vacate the premises but the appellant/defendant had failed to do so.

5. The appellant/defendant filed a written statement pleading (a) that there was no relationship of landlord and tenant between the parties; (b) that the respondent/plaintiff had executed a Memorandum of Understanding (MoU) on 7th May, 2013 with the appellant/defendant and whereunder the appellant/defendant had paid a sum of Rs.15 lakhs in cash and cheque to the respondent/plaintiff as part consideration for sale of the premises in the tenancy of the appellant/defendant along with certain other portions of the same property for a total sale consideration of Rs.1,50,00,000/-; (c) that the respondent/plaintiff on execution of the MoU had put the appellant/defendant in possession of the premises as proposed owner.

6. The respondent/plaintiff applied for decree for possession on admissions under Order XII Rule 6 of the Code of Civil Procedure, 1908 (CPC) and the learned ADJ allowed the same.

7. I have recently in *M/s Jagdambey Builders Pvt. Ltd. Vs. J.S. Vohra*

MANU/DE/0310/2016 held as under:

“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.

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 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 esstopped 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.”

8. I may mention that the MoU dated 7th May, 2013 relied upon by the appellant/defendant in this case also, save for recording in recitals thereof that the appellant/defendant is a tenant in the premises and for recording in para 4 thereof “that the purchaser is already in peaceful possession of the premises” does not state that the possession of the premises had been given to the appellant/defendant as purchaser in part performance of the agreement to sell. Also, the portion of the premises besides that in occupation of the appellant/defendant as tenant was also let out to other tenants and the liability

under the said MoU for having the same vacated is also of the seller. Therefrom also, the question of handing over of the possession of the premises agreed to be sold in part performance of the agreement to sell does not arise.

9. There is thus no merit in the appeal. Dismissed.

No costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

FEBRUARY 10, 2016

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