

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

Reserved on: 04.03.2016
Pronounced on: 22.04.2016

+ **FAO(OS) 344/2015 and CM Nos. 11596-11597/2015**

ROHIT TYAGI

..... Appellant

Through: Mr. Manish Pratap Singh, Advocate.

versus

UMAWATI SOOD & ORS

..... Respondents

Through: Mr Atulay Nehra, Advocate.

+ **RFA(OS) 77/2015 and CM No. 14389/2015**

ROHIT TYAGI

..... Appellant

Through: Mr. Manish Pratap Singh, Advocate.

versus

UMAWATI SOOD & ORS

..... Respondents

Through: Mr Atulay Nehra, Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT

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1. This appeal is directed against two orders of 14.05.2015 - the first (made in O.A. 195/2015) dismissed a Chamber Appeal by the appellant who was arrayed as defendant in CS(OS) 3325/2014. The appellant was aggrieved by an order which foreclosed his right to file written statement.

The learned Single Judge rejected his appeal and upheld the order of the Joint Registrar.

2. The second order was made by the learned Single Judge in CS(OS) 3325/2014 whereby the power under Order VIII Rule 10 CPC was invoked and the respondents' (referred to hereafter as "the plaintiffs") suit for possession was decreed. Learned Single Judge relegated the parties for an enquiry into the issue of *mesne profits* and mandatory injunction.

3. The undisputed facts are that CS(OS) 3325/2014 was filed for possession, mandatory injunction and *mesne profits*. The plaintiffs were co-owners of property, being M-16, Greater Kailash Part-I, M-Block, New Delhi, measuring about 3000 square feet (hereafter referred to as "the suit property"). The suit alleges that the property is originally purchased by late Sh. Suresh Chandra Sood [hereafter referred to as "Sh. S.C. Sood"] by registered sale deed dated 16.09.1960 and that pursuant to final decree in a partition suit, the suit property was divided equally amongst the sons of late Sh. Suresh Chandra Sood and subsequently the portion owned by Sh. A.C. Sood was given in a family settlement of 27.06.2001 to Sh. S.C. Sood, the elder brother except to the extent of mezzanine floor room and open courtyard in front thereto. The plaintiff inherited - by testamentary disposition and Will dated 02.12.1997 all properties owned by the said Sh. S.C. Sood (who was her husband) along with his two sons. The plaintiffs the stated owners of the property, on 21.08.2009 entered into a lease deed with the appellant, in respect of second and third floors except one room at the entrance/stilt level of the second floor) for monthly lease rental of ₹1,50,000/- for the period 15.10.2009 to 14.01.2010. The rent was to be

increased to ₹1,80,000/- from 15.01.2010 onwards. The payment was to be made in advance on or before the seventh of each English calendar month. The parties agreed that the lease dated 21.08.2009 was for a total period of nine years (including the initial period of three years starting from 15.10.2009 to 14.10.2012 and renewable thereafter for two terms of three years each subject to enhancement of lease rent @ 15% on the last paid rent). The lease deed was also required to be registered. The terms of the agreement further stipulated that in the event of default of rent for a continuous period of 45 days, the lessors, i.e. the plaintiffs were entitled to terminate the arrangement.

4. The suit further alleged that the appellant paid amounts towards lease rent for one month and thereafter stopped paying the amount of rent agreed in terms of Clause 5 of the Lease deed. Apparently, the defendant started seeking extension of time to pay rent repeatedly. One of the co-owners, i.e. Brijesh Sood died on 21.12.2013 and his share devolved on his legal representatives, i.e. Plaintiff Nos. 5 to 8 [hereafter referred to collectively as "plaintiffs"]. The suit referred to attempts to have the amounts collected and the alleged harassment meted out to the plaintiffs in the hands of appellant/defendant. Eventually, the plaintiffs caused a legal notice to be issued on 14.03.2014 through their counsel, terminating the lease deed and demanding the payment of ₹63,63,500/- together with 18% interest. The suit recounted the unreasonable demands upon the plaintiffs inasmuch as the defendant allegedly said that the amounts offered by him ought to be accepted failing which he threatened the plaintiffs to implicate them in numerous false cases. The suit further stated that on 10.03.2014, a criminal

complaint was lodged. The other co-owner, i.e. Sh. Dinesh Sood also died on 03.07.2014 and his share devolved on the first plaintiff, i.e. the mother of the surviving Plaintiff Nos. 5 to 8. The suit further stated that one Avneesh Tyagi sent legal notice dated 04.03.2014 allegedly with connivance of the defendant and one Vinay Tyagi, claiming that Sh. Brijesh Sood had taken loan of ₹72 lakhs from one Avneesh Tyagi to which the defendant stood as surety. The legal notice was replied, pointing out that Sh. Brijesh Sood had died on 29.12.2013 and that he had never taken any loan as alleged, from Sh. Avneesh Tyagi or from the appellant or from Vinay Tyagi. On the basis of these allegations, the reliefs of injunction, possession and *mesne profits* for the period of occupation without payment were made.

5. Upon the filing of the suit, summons were issued on 07.11.2014. The record shows that service of the summons was effected upon the defendant/appellant through speed post on 13.11.2014. It is also matter of record that the appellant/defendant received the summons on 18.11.2014. On 06.01.2015, the appellant/defendant caused appearance to be filed through his counsel (Sh. S.A. Sayantan Mandal). The same day, the learned counsel sought time to file written statement. The Court granted four weeks and listed the matter before the Joint Registrar on 27.03.2015; the order sheet for the same day directed the matter to be listed before the Court on 27.04.2015, for framing of issues. The defendant/appellant was directed to be present in Court for recording statement on 27.03.2015. On 27.03.2015, i.e. the date fixed, the defendant/appellant had not filed the written statement. By this time, the maximum period admissible in law for entering defence and filing written statement had elapsed given that the summons were served upon the

defendant on 13.11.2014. In these circumstances, the appellant/defendant's right to file written statement was foreclosed. His counsel requested time to carry-out admission/denial of documents. Subsequently, on 27.04.2015, when the matter was listed before the Court, the defendant had not complied with the earlier order and was not present in Court. The case was, therefore, directed to be listed on 14.05.2015.

6. By the time the suit was listed, an appeal under Rule 4 Chapter II of the *Delhi High Court (Original Side) Rules* was filed against an order foreclosing the right to file a written statement. The appeal, O.A. 195/2015 was premised on the ground that the appellant had limited understanding of legal procedures and that his substantial right would be prejudiced if the order of foreclosure were upheld. The appellant also sought to rely upon a medical certificate in the Court. Interestingly, the appeal, O.A. did not mention of any illness or medical condition which precluded the appellant from instructing his counsel for the purpose of filing a written statement. the learned Single Judge rejected the explanation and also was unconvinced about the argument with respect to substantial prejudice and accordingly dismissed O.A. No.195/2015. The learned Single Judge then went on to invoke the power under Order VIII Rule 10 CPC and proceeded to decree the suit so far as it claimed the relief of possession.

Appellant's contention:

7. The appellant argues that the impugned order and decree has resulted in grave miscarriage of justice inasmuch as without a trial, the suit for possession was decreed. The appellant contends and his counsel argues that the late co-owners - Sh. Dinesh Sood and Sh. Brijesh Sood - were in the

habit of taking frequent loans which they did not return. It was submitted that because of their financial condition and their inability to repay the loans, late Brijesh Sood entered into a loan agreement-cum-promissory note with the eleventh respondent (Avneesh Tyagi) by which he secured the loan of ₹72 lakhs. The suit property was mortgaged for a tenure of four years and 1.72% was charged as interest on the loan amount for the period between December 2009 and November 2010 and 1.5% from November 2010 onwards till repayment of principle amount. It was alleged that Sh. Brijesh Sood had drawn three cheques in favor of the mortgagee as a security and assured for timely repayment. It was further alleged that few days later, another loan for ₹30 lakhs was sought by the mortgaging the suit property for the same terms and this was contained in an Agreement for sale dated 14.04.2009 which acknowledged payment of ₹30 lakhs. This agreement clearly recorded that in case Sh. Dinesh Sood and Sh. Brijesh Sood failed to pay total amounts of ₹1.02 crores or interests, the mortgagee was entitled to pay ₹13 lakhs in addition to what he had already paid as principle loan and get the property registered in his favor.

8. It is alleged that consequent upon this arrangement, the payment of rent towards the terms stood adjusted. The appellant alleges that Sh. Brijesh Sood expired on 29.12.2013 and he (the appellant) kept paying rent against the suit property which was evidenced through rent receipts in his possession. The interest portion against the secured loan was regularly paid by the appellant to Respondent No.11. The appellant further contends that a complaint, being No.121/1/14 was filed against Sh. Brijesh Sood under Section 138 of the *Negotiable Instruments Act*, seeking recovery of the loan

amounts. The complaint was filed in March 2014. It is further stated that the appellant was arrayed as a guarantor in those proceedings and since he had no valid defence and to avoid conviction and to show his *bona fide* paid ₹72 lakhs in his capacity as guarantor in the mortgage agreement and avoid criminal liability. Furthermore, on 17.10.2014, the appellant remitted a further sum of ₹30 lakhs to the mortgagee complainant and foreclosed his all liabilities as sole guarantor. Consequently, he entered into a Memorandum of Understanding (MoU) on 17.10.2014 with the mortgagee, i.e. Avneesh Tyagi whereby the appellant acquired all rights, title and interest as a mortgagee. The arrangement also postulated that the rights as a secured creditor would vest in the appellant and that he could enforce the loan agreement. It was further submitted that a Suit, being CS(OS) 1115/2015 was instituted on the file of this Court, claiming specific performance of the agreement entered into between Avneesh Tyagi and the original co-owners. The appellant filed a suit since he had succeeded to the interest of Avneesh Tyagi by virtue of the MoU.

9. It is argued that having regard to the totality of these circumstances, the course adopted by the learned Single Judge in first foreclosing the right to file written statement and then in decreeing the suit without further evidence but merely on the strength of the averments in the suit and the materials on record, was erroneous and contrary to law. Learned counsel relied upon the judgment of the Supreme Court in *S.M. Asif v. Virender Kumar Bajaj* 2015 (9) SCC 287 and submitted that even invocation of provisions of Order XII Rule 6 CPC and decreeing the suit on admissions is

not warranted. In the present case, the learned Single Judge should have insisted that the parties lead evidence having regard to the circumstances.

Respondent's contentions

10. Learned counsel for the plaintiffs submitted firstly that the whole case of the defendant/appellant, i.e. that a mortgage deed or an agreement to convey the property was entered into with Avneesh Tyagi by one or both of the deceased co-owners is a fabrication. It is contended that such facts were claimed for the first time when the plaintiffs caused legal notice to be issued for payment of outstanding arrears of rent. It is pointed out that though a suit allegedly based upon the withdrawal of complaint by Avneesh Tyagi and subsequent settlement deed between Avneesh Tyagi and the appellant was the basis for a suit for specific performance [CS(OS) 1115/2015], that suit was in fact dismissed. It was argued that in that suit, no relief of repayment or claim for money was made. Furthermore, no leave to institute fresh proceedings on those allegations was ever sought. In these circumstances, the defendant/appellant has no valid ground to urge that the suit so far as it claimed possession had to be decreed.

11. It is argued that there is no dispute that the legal notice terminating the arrangement was served upon the defendant. The defendant also received summons on 13.11.2014 - a fact not disputed at any stage during the proceedings. Learned counsel argued that even if there were some controversy with respect to termination of the lease, at least upon the receipt of summons, the termination of tenancy took place. In these circumstances, if the defendant were to insist on a trial on the question of possession, there had to be a valid triable ground on which trial was to proceed. No valid

document was ever placed on the record showing that in the circumstances and having regard to the default in the payment of rent, the defendant nevertheless had a right to continue in the premises. It is urged that even in the proceedings before this Court, no rent receipt or any document evidencing payment to the plaintiff has been produced or relied upon by the defendant/appellant.

12. It is highlighted that even though the provision under Order VIII Rule 10 CPC is discretionary and in certain given cases, the Court may choose not to exercise it but rather prefer to try the controversy and issues arising in a suit, the facts of the present case did not warrant trial and inquiry as urged by the appellant.

Analysis and conclusions

13. The above factual narrative would reveal that the defendant does not dispute that possession was handed of the suit premises, pursuant to the lease deed alleged by the plaintiffs. The defendant does not claim that rent was paid to the plaintiffs nor is reliance placed upon any receipt issued by the plaintiffs in discharge of his obligation to do so under the lease deed. Furthermore, the receipt of legal notice terminating the tenancy and calling for handing over of vacant possession and also claiming arrears of rent has not been disputed anywhere. The appellant's contentions hinge entirely upon different set of circumstances. This is based upon two documents alleged to have been executed to secure loan transactions to the extent of ₹72 lakhs and ₹30 lakhs. The averments in the appeal - for the first time, urged before the Court (in the absence of any averment to this fact before the learned Single

Judge in O.A. 195/2015, or in any application made in CS(OS) 3325/2014) are not supported by any documents. Furthermore, it is not as if the alleged mortgage/sale agreements are registered documents. The defendant/appellant vaguely suggests that monthly rentals were paid in bifurcation of the application - firstly, towards the interest payable on the said alleged loan of ₹1.02 crores and that other amounts were paid to the alleged mortgagee Avneesh Tyagi. Indisputably, a mortgage deed or agreement which creates an interest in the property has to be mandatorily registered under Section 17 of the Registration Act, 1908. In the absence of such registration, it is not only inadmissible, but even unenforceable as it cannot be said to create any right, title or interest in the immovable property. The appeal concededly does not claim that the alleged mortgage deed which contained a clause of conveyance of the suit property to the mortgagee in the event of default, was registered. Therefore, this question could not even otherwise have been gone into in the suit assuming it could have been urged in a written statement if it were permitted to be filed.

14. This Court is also unconvinced by the appellant's arguments that triable issues were involved on account of the facts relating to payment of loan and the alleged subrogation of the mortgage of Avneesh Tyagi's rights to him (the defendant). Firstly, the suit filed by the appellant [CS(OS) 1115/2015] was held to have been not maintainable on 14.05.2015. Consequently, even if a collateral claim for money - assuming for argument's sake - were to be held admissible, *per se* that would itself not be a valid defence to a suit for possession filed against occupier of property who has ceased to be a tenant.

15. The appellant - to reiterate again - has nowhere relied upon any rent receipt issued by the plaintiff or any of the co-owners in discharge of the rent liability nor has he placed on record receipts which can be linked to be payment of such rents. The appellant also did not choose to have himself examined under Order 10 CPC even though he was asked to be present before the learned Single Judge when the matter was listed on 27.04.2015. The absence of any explanation by the appellant and the absence of any document to show that he had any semblance of legal right to continue despite termination of tenancy at best meant that there was no defence. The non-payment of rent in terms of the lease deed and arrangement between the parties rendered the agreement liable to termination. The termination of tenancy as a matter of fact is not disputed. There exists no registered document authorizing appellant's valid continuation in the suit property. In these circumstances, all submissions made with respect to the impugned judgment or that it is erroneous is devoid of merit.

16. In view of the above findings, both appeals have to fail. FAO(OS) 344/2015 and RFA (OS) 77/2015 are accordingly dismissed.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

APRIL 22, 2016