

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

% **Date of decision: 9th August, 2017**

+ **C.R.P. 9/2014, CM No.1355/2014 (for stay) & CM No.1357/2014**
(for condonation of 4 years 2 months delay in filing the petition)

MOHAN SINGH

..... Petitioner

Through: Mr. L.K. Singh & Mr. Raj Kumar,
Advs.

Versus

DALIP SINGH

..... Respondent

Through: Mr. S.M. Chugh, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Revision Petition under Section 115 of the Code of Civil Procedure, 1908 (CPC) impugns the order [dated 4th August, 2009 in RCA No.11/2002 of the Court of Additional District Judge (ADJ)-08 (Central), Tis Hazari Courts, Delhi] of dismissal of the appeal filed by the petitioner / defendant against the judgment and decree dated 8th February, 2002 in suit No.M-36/1995 of the Court of M/s Savita Rao, Civil Judge, Delhi.

2. The petition was entertained and notice thereof ordered to be issued and record of the appellate Court as well as the trial Court requisitioned. The counsel for the respondent / plaintiff has been appearing.

3. The counsels were partly heard on 26th July, 2017 and remaining arguments have been heard today.

4. The respondent /plaintiff instituted the suit from which this petition arises, for recovery of Rs.13,380/- from the petitioner / defendant towards rent at the rate of Rs.300/- per month of shops in property No.313/2,

Inderlok, New Delhi. The said suit was contested by the petitioner / defendant.

5. Vide judgment dated 8th February, 2002, a decree, in favour of the respondent / plaintiff and against the petitioner / defendant, for recovery of Rs.13,380/- along with interest at the rate of 12% per annum till the date of realisation was passed against the petitioner / defendant.

6. The petitioner / defendant preferred an appeal under Section 96 of the CPC and which appeal as aforesaid has been dismissed by the learned ADJ on 4th August, 2009.

7. Section 102 of the CPC, introduced with effect from amendment of the CPC of the year 2002, having barred second appeals from any decree when the subject matter of original suit is for recovery of monies not exceeding Rs.25,000/-, instead, this Revision Petition has been filed. I may also notice that the petitioner first filed a Second Appeal, registered as RSA No.144/2009, against the judgment dated 4th August, 2009 supra and has filed this petition only after withdrawing the same on 29th October, 2013. Though the petition was accompanied with an application for condonation of delay of about four years and two months in filing thereof but the delay has not been condoned as yet. Now that this petition has been pending for three years, it is not deemed appropriate to go into the aspect of delay.

8. I have, at the outset, enquired from the counsel for the petitioner / defendant that the legislative intent being not to allow a second appeal from suits subject matter whereof is recovery of money not exceeding Rs.25,000/-, how would this Revision Petition be maintainable. I find the same doubt to

have also been expressed by the High Court of Rajasthan in *Municipal Council, Sawai Madhopur Vs. Civil Judge (S.D.), Sawai Madhopur* 2003 SCC OnLine Raj 432. I also find High Court of Andhra Pradesh in *Shaik Abdul Haq Vs. Aiswarya Nilaya Chit Fund Pvt. Ltd.* MANU/AP/0194/2005 to have held that if petitions under Article 227 of the Constitution of India are entertained with respect to judgments and decrees for recovery of money not exceeding Rs.25,000/-, the legislative enactment of Section 102 of the CPC with the clear and obvious object of reducing the scope of the litigation and to give quietus to the same will be defeated. It was further held that entertaining a petition under Article 227 of the Constitution of India would amount to exercising appellate jurisdiction which is prohibited.

9. The counsel for the petitioner / defendant states that the petitioner / defendant cannot be left remediless and when there is a void created by a statute, the remedy of Revision or a Petition under Article 227 of the Constitution of India would lie.

10. Though I agree with the view taken by the High Court of Andhra Pradesh inasmuch as once the legislature has barred further judicial remedies against a particular kind of suit, to which the subject suit belongs, the legislative intent cannot be frustrated / defeated by entertaining a Revision Petition or a petition under Article 227 of the Constitution of India but it has still been enquired from the counsel for the petitioner / defendant as to what would be the scope of interference.

11. The counsel for the petitioner / defendant has sought to suggest that it would be the same as second appeal.

12. The same cannot be. At the same time, it has to be remembered that even a second appeal was provided only on a substantive question of law and the scope of judicial review in exercise of power of Revision and / or under Article 227 of the Constitution of India, if at all, has to be narrower.

13. The factual position which emerges after hearing the counsels and perusing the record is i) the respondent / plaintiff claims that Mukand Singh was the owner of the shops in tenancy of petitioner and died leaving a validly executed last registered Will whereunder he bequeathed the said shops to his brother's son Satnam Singh and who has vide sale deed sold the said shops to the respondent / plaintiff; ii) that the petitioner / defendant was a tenant in the said shops under Mukand Singh at a rent of Rs.300/- per month; iii) that the petitioner / defendant contested the suit filed by the respondent / plaintiff for recovery of Rs.13,380/- pleading that Mukand Singh had agreed to sell the subject shops to the petitioner / defendant vide Agreement to Sell dated 30th September, 1986 and against receipt of entire sale consideration of Rs.85,000/- in cash, put the petitioner / defendant into possession of the shops in part performance of the Agreement to Sell and besides the Agreement to Sell, also executed a Receipt of money, Possession Letter, Power of Attorney and Will in favour of the petitioner / defendant (the counsel for the petitioner / defendant however clarifies that the Will was not produced before the Trial Court and was produced for the first time before the appellate Court); iv) that the petitioner / defendant contested the suit for recovery of Rs.13,380/- denying any relationship of landlord and tenant and setting up the plea of being in possession of the premises in part

performance within the meaning of Section 53A of the Transfer of Property Act, 1882.

14. On the pleadings of the parties in the suit, the following issues were framed:

- “1. Whether there exists any valid will dated 28.4.84, as alleged? OPP.
2. Whether the plaintiff has become owner of the suit property by way of alleged sale deed dated 12.8.88? OPP.
3. Whether the sale deed is bogus and forged? OPD.
4. Whether the defendants are owners of the property? OPD.
5. Whether the defendants are tenants in the suit property? OPP.
6. Whether the plaintiff is entitled for the relief claimed? OPP.
7. Relief.”

15. Though the issues do not reflect any plea of Section 53A of the Transfer of Property Act but I have on perusal of the written statement in the trial Court record satisfied myself that the petitioner / defendant in his written statement did take the said plea as under:

“H). That in view of the facts disclosed herein above the suit is hit by Section 53-A of the Transfer of Property Act, and doctrine of part performance is applicable in this suit. Answering defendant and his brother Prit Pal Singh are in possession of Shops Nos.9,10 and 12 and continue in possession in part performance of the contract between them and late Mukand Singh. The transferor or the plaintiff or Satnam Singh claiming under late Mukand Singh the transferor are debarred from enforcing against the transferees Sarvshri Mohan Singh and Pritpal Singh sons of late S. Parduman Singh any right in respect of said shops Nos.9,10 and 12 of which the said transferees are in continuous possession. Hence the present suit is not maintainable and is liable to be dismissed with heavy costs as the suit is false and vexatious to the knowledge of the plaintiff.”

16. At this stage, it is deemed appropriate to also set out herein below the Clauses in this regard in the Agreement to Sell set up by the petitioner / defendant. The same are as under:-

- “1. The first party has received / hereby acknowledges to have received said sum of Rs.85,000/- (Rupees eighty five thousand only) from the second party, in cash, in respect of full and final sale consideration of shops No.9,10 and 12, forming part of property No.313/2, Inderlok, Delhi-35 at the time of execution of this deed. The first party hereby transfers, conveys, assigns his right, title and interest as owner on said shops in favour of second party. Now the second party is no more tenant of first party and second party has become absolute owner of said property / shops exclusively.
2. The first party has handed over the (actual, physical vacant possession of said shops is already with second party) proprietary possession of said shops unto the second party. Since there are no separate documents regarding said shops in the name of first party hence title deed of said property cannot be handed over to second party.
3. Now the first party has left no right, title or interest in said property of any kind whatsoever and the second party has succeeded all the rights, title and interest in said property of first party.”

17. The suit Court, in its judgment, with respect to the said plea has held i) that Section 53A of the Transfer of Property Act would not come into operation where the execution of Agreement to Sell itself is not proved; ii) presuming that the Agreement to Sell and other documents were executed in favour of the petitioner/defendant, even then, the same are covered by the proviso to Section 53A; iii) that admittedly the respondent / plaintiff had purchased the suit property from his brother Satnam Singh who has derived his right by way of Will executed in his favour; iv) that there is nothing on record to show that the respondent / plaintiff is not transferee for

consideration or that he had notice of the contract in favour of the petitioner / defendant or of the part performance thereof; v) that therefore the petitioner / defendant cannot seek protection of Section 53A of the Transfer of Property Act which moreover can be claimed as a shield and not as a sword; vi) that a legal notice got issued by the original landlord Mukand Singh in October, 1986 i.e. after one month of alleged Agreement to Sell of September, 1986 and proved as Ex.PW1/5 also leads to the inference that possession of the shop had not been delivered to the petitioner / defendant in part performance of the Agreement to Sell; viii) that the said notice was purported to be sent by UPC and is presumed to have been served and onus is on the petitioner / defendant to prove that it was not received by him; ix) that since the petitioner / defendant had been unable to prove the transfer of the said property in his name, accordingly the issue no.4 was decided against the petitioner / defendant.

18. In appeal, the learned ADJ, with respect to the aspect of Section 53A of the Transfer of Property Act, has merely observed as under:

“The present suit is for the recovery of arrears of rent from the appellant. In the present suit, there is no relief sought by the respondent for the possession of the suit property, so the question whether the appellant is entitled for the protection of his possession in the suit property as per Section 53A of the Transfer of Property Act is not a issue in the present suit and it is not required to be decided.”

19. I am of the view that even though the subject suit was not a suit for recovery of possession of immovable property but since the respondent / plaintiff was enforcing against the petitioner / defendant right in respect of the property of which the petitioner / defendant claimed to have taken

possession in part performance, the learned ADJ erred in holding that the question of Section 53A of the Transfer of Property Act, was not in issue. Section 53A of the Transfer of Property Act bars enforcement against the transferee who has taken possession in part performance of any right in respect of the property other than a right expressly provided by the terms of the contract.

20. The learned ADJ further erred in presuming that Section 53A of the Transfer of Property Act bars enforcement only of a right to recovery of possession. It bars enforcement of any right in respect of the property. The finding on Section 53A of the Transfer of Property Act is relevant to determine the nature and character of possession of the petitioner/defendant of the subject shops i.e. whether as a tenant or as an agreement purchaser in possession in part performance of the Agreement to purchase. If the possession of the petitioner / defendant were to be held to be as an agreement purchaser in possession in part performance of agreement to purchase, the question of petitioner / defendant being liable for rent would not arise.

21. On enquiry, whether any other proceedings are pending between the parties, it is informed that the respondent / plaintiff has instituted petition for eviction of the petitioner / defendant from the subject shops under the provisions of the Delhi Rent Control Act, 1958.

22. The very maintenance of the said petition for eviction also would be dependent upon the status of the petitioner / defendant as a tenant inasmuch as if the tenancy of the petitioner / defendant came to an end on the petitioner / tenant being put in possession in part performance, the petition for eviction would not be maintainable.

23. We are thus landed with a situation where the first Appellate Court, which is the last Court of appeal as per Section 102 of the CPC, has refused to exercise jurisdiction vested in it.

24. The matter being considerably old, the suit being of the year 1994, option has been given to the parties, either of remand of the matter to the ADJ or addressing the question before this Court howsoever limited the jurisdiction of this Court may be in the light of this Court exercising powers as a Revisionary Court. The counsels have opted to address arguments before this Court, rather than having the matter remanded.

25. Section 53A of the Transfer of Property Act is as under:

“53A. Part performance.—Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.”

[emphasis added]

26. The counsel for the respondent / plaintiff has argued, i) that the Agreement to Sell and other documents have been forged by the petitioner / defendant; ii) that the said forgery is evident from the contradictory evidence of the petitioner / defendant and other witnesses qua the execution of the said documents; iii) that the petitioner / defendant has neither pleaded nor proved the essential ingredients of Section 53A of the Transfer of Property Act, of having been ready and willing to perform his part of the contract. Reliance in this regard is placed on *Venkatesh Vs. D.A.C. Venkoosa* AIR 2008 Kar 5 and *M. Jaya Rao Vs. M. Krishna Rao* AIR 2012 AP 34.

27. Per contra, the counsel for the petitioner / defendant has argued that the Agreement to Sell has been held to be not proved owing to the petitioner / defendant having examined only the attesting witness to the Agreement to Sell and it having been held in para 13 of the judgment 8th February, 2002 that the best evidence of comparison of signatures on the Agreement to Sell of Mukand Singh with admitted signatures of Mukand Singh having not been led, the documents have not been proved. The counsel for the petitioner / defendant has also controverted that there are any contradictions and has contended that the finding that notwithstanding the attesting witness to the Agreement to Sell and allied documents having proved the said document, the same had not been proved, is contrary to law. It is further the contention of the counsel for the petitioner / defendant that once Mukand Singh had entered into the Agreement to Sell with the petitioner / defendant, the

relationship of landlord and tenant which earlier existed between Mukand Singh and the petitioner / defendant came to an end and the possession of the petitioner / defendant of the property would not be as a tenant for the respondent / plaintiff claiming to be successor in interest of Mukand Singh, to claim rent from the petitioner / tenant. Reliance in this regard is placed on ***R. Kanthimathi Vs. Beatrice Xavier (Mrs.)*** (2000) 9 SCC 339.

28. It is deemed appropriate to first have the legal proposition in order. The first question which arises is, whether merely by a landlord agreeing to sell the premises in the tenancy of the tenant to the tenant, even if the agreement to sell does not fructify into a sale, the relationship of landlord and tenant comes to an end. In my view, it does not, unless the nature and character of possession of the premises of the tenant changes from that of a tenant to that of an agreement purchaser in possession in part performance of the agreement to sell. I say so because law recognizes and protects only possession in part performance of an agreement to sell. There is a possibility of the nature and character of possession changing from that as a tenant to an agreement purchaser but without the benefit of Section 53A of the Transfer of Property Act if the intention of cessation of tenancy rights on entering into the agreement to sell is unequivocal. However such possession, in the event of the agreement to sell not fructifying into a sale, would be as a licensee, not protected by law and liable to be returned. It is not the case of either of the parties here that possession of the petitioner / defendant after the agreement to sell, even if any, was of the latter category. We thus, in the present case, are concerned only with possession of the former category i.e. as an agreement purchaser in part performance of an agreement to sell.

29. This Court in ***Jiwan Dass Rawal Vs. Narain Dass*** AIR 1981 Del 291 has held that an agreement purchaser has no right in the property agreed to be purchased, not only till when a decree for specific performance of the said agreement is passed but also till the conveyance deed in pursuance thereto is executed and which judgment has been consistently followed in ***Cement Corporation of India Ltd. Vs. Life Insurance Corporation of India Ltd.*** (2014) 145 DRJ 148 (DB), ***Deewan Arora Vs. Tara Devi Sen*** (2009) 163 DLT 520, ***Sunil Kapoor Vs. Himmat Singh*** (2010) 167 DLT 806, ***ASV Industry Vs. Surinder Mohan*** (2013) 137 DRJ 429.

30. As far as reliance by the counsel for the petitioner / defendant on ***R. Kanthimathi*** supra is concerned, the same on the facts therein found the parties to have intended cessation of relationship of landlord and tenant. It was in this view of the matter that it was held that once there is an agreement to sell between landlord and tenant, the old relationship as such comes to an end and even after cancellation of such agreement of sale, the status of the tenant is not restored as such and changed into a new status as that of a purchaser and seller. I have already hereinabove observed that it is not the case of either of the parties in the present case that the status of the petitioner / defendant as an agreement purchaser is without the benefit of Section 53A of the Transfer of Property Act and in which case the possession of the petitioner / defendant without having sued for specific performance of an agreement of sale claimed would be as a licensee and which possession would be much weaker than the possession as a tenant and in which case the petitioner / defendant would have no defence to a suit for recovery of possession on the basis of title, filed by the respondent / plaintiff.

31. The enquiry thus in the present case has to be whether the possession of the petitioner / defendant is as an agreement purchaser in part performance of the agreement to purchase. The High Court of Karnataka in *Venkatesh* supra cited by the counsel for the respondent / plaintiff held that in order to protect possession under Section 53A of the Transfer of Property Act, it was essential to plead readiness and willingness to perform the contract and that merely because the tenant after agreement to purchase remained in possession, does not prove any title. To the same effect is *M. Jaya Rao* supra.

32. I have combed the Agreement to Sell to find out the acts which the petitioner / defendant as agreement purchaser was required to do. I find that i) vide Clause 4 of the Agreement to Sell, the petitioner / defendant was required to pay all the charges, dues, house tax, penalties, tax etc. with respect to the shop with effect from the date of Agreement to Sell; ii) vide Clause 7 of the Agreement to Sell, the petitioner / defendant was required to have executed from Mukand Singh, all documents for transfer of the property in the name of the petitioner / defendant and to pay all charges for such transfer; and, iii) vide Clause 9 of the Agreement to Sell, the petitioner / defendant was to bear the costs of the stamp paper for completion of transfer.

33. In the written statement, no plea in this regard is found and the counsel for the respondent / plaintiff is also correct in his contention that there is no compliance of making a plea of the petitioner / defendant having performed and / or being willing to perform his part of the contract. In fact, in the written statement, I have not found any plea of the petitioner / defendant having approached Mukand Singh or any of the heirs of Mukand Singh for

completion of the transfer. Rather, the petitioner / defendant took a stand in the written statement that the Will claimed of Mukand Singh in favour of Satnam Singh was of no avail owing to Mukand Singh having transferred the shops to the petitioner / defendant when in fact there had been no transfer and there was only an Agreement to Sell.

34. I have enquired from the counsel for the petitioner / defendant, whether, notwithstanding there being no plea in this regard in the written statement, there is any evidence to the said effect.

35. The counsel for the petitioner / defendant fairly states that no evidence to the said effect also exists.

36. Once that is so, then the counsel for the respondent / plaintiff is correct in his contention that notwithstanding the controversy about the proof of the Agreement to Sell and allied documents, the petitioner / defendant is not entitled to invoke Section 53A of the Transfer of Property Act, one of the essential ingredients whereof is of petitioner as agreement purchaser having performed and / or having been willing to perform his part of the contract.

37. I have further enquired, that it being the plea of the respondent / plaintiff in the plaint itself, of having acquired the shop by purchase, whether any plea was taken in the written statement of the respondent / plaintiff having notice of the Agreement to Sell in favour of the petitioner / defendant or of the petitioner / defendant having been put into possession of the property as purchaser in part performance of the said Agreement to Sell.

38. Again, there is neither any plea nor any evidence, though the counsel for the petitioner / defendant contends that the respondent / plaintiff was

earlier a tenant in another shop in the same property under Mukand Singh and was related to Mukand Singh and there was litigation between the respondent / plaintiff and Mukand Singh and thus there would be implied knowledge.

39. However in the absence of any plea of the respondent / plaintiff having notice of the same, such implied inference cannot be drawn. Moreover on enquiry, it is further informed that there is no cross-examination by the petitioner /defendant of the respondent / plaintiff on the said aspect.

40. Thus, under no circumstances can it be held, even if the Agreement to Sell is held to be proved, that the petitioner / defendant was put into possession or is in possession of the shop in part performance of the Agreement to Sell, to avail the benefit of Section 53A of the Transfer of Property Act or that the said benefit is available even against the respondent / plaintiff, a transferee for consideration.

41. Besides the aforesaid, the counsel for the petitioner / defendant has raised two other arguments. Firstly, it is contended that the application of the petitioner / defendant under Order XLI Rule 27 of the CPC to prove the Will executed by Mukand Singh in favour of the petitioner/defendant was not allowed observing that the same was not relevant since the suit was only for arrears of rent. The second contention is that the sale deed of the property in favour of the petitioner / defendant records that the property of which sale was effected was already in possession of the respondent / plaintiff.

42. The counsel for the respondent / defendant points out, as was noticed on the earlier date of hearing also, that the sale deed is accompanied with a site plan and which correctly shows the shop in the tenancy of the petitioner / defendant. Thus there is no merit in the second of the aforesaid arguments.

43. As far as the first argument aforesaid is concerned, the Will set up by the petitioner / defendant in defence would not enure to the benefit of the petitioner / defendant as the same was admittedly oral. Only a soldier employed in an expedition or engaged in actual warfare or an airman so employed or engaged or any mariner being at sea, is entitled under Sections 65 and 66 of the Indian Succession Act, 1925 to make a Will by word of mouth. The said plea also has no merit.

44. There is thus no merit in the petition.

Dismissed.

No costs.

RAJIV SAHAI ENDLAW, J.

AUGUST 09, 2017

‘gsr’..

(corrected & released on 29th September, 2017)