

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

+ **RSA No.199/2017**

% **4th August, 2017**

USHA RASTOGI Appellant
Through: Mr. F.S. Chauhan, Mr. Kapil
Chaudhary, Mr. B.S. Pal,
Advocates.
versus

NISHA RASTOGI Respondent

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. No.27840/2017 (exemption)

1. Exemption allowed subject to just exceptions.

C.M. stands disposed of.

RSA No.199/2017 and C.M. No.27839/2017 (stay)

2. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant in the suit impugning the concurrent judgments of the courts below; trial court dated 17.4.2017 and the first appellate court dated 3.6.2017; by which the courts below have decreed the suit for the relief of

possession with respect to the ground floor of property no. 424, Gali Pan Wali, Farsh Bazar, Shahdara, Delhi. The suit was also decreed by granting a permanent injunction restraining the appellant/defendant from creating third party rights in the suit property.

3. The facts of the case are that respondent/plaintiff filed the subject suit seeking relief of possession and injunction by pleading that the appellant/defendant is the real sister-in-law of the respondent/plaintiff and that appellant/defendant approached the respondent/plaintiff in the year 2005 to support her and to provide her shelter. Appellant/defendant was therefore allowed to live in the suit property by the respondent/plaintiff. Respondent/plaintiff pleaded that when in May 2015 appellant/defendant was asked to vacate the suit property as the property is required for her son being a heart patient, however, the appellant/defendant instead of vacating the property she falsely claimed that she had purchased the suit property and had paid Rs. 4,38,000/- towards sale consideration of the suit property to the respondent/plaintiff on 2.3.2014. It was pleaded by the respondent/plaintiff that the amount in question was actually and only taken by the respondent/plaintiff from the appellant/defendant as a

security and which was to be refunded on the appellant/defendant vacating the property and for which purpose a security agreement dated 2.3.2014 was entered into between the parties.

4. Appellant/defendant contested the suit by pleading that respondent/plaintiff had agreed to sell the property on 2.3.2014 for a total consideration of Rs. 7 lakhs of which Rs. 4,38,000/- was paid under the agreement dated 2.3.2014. Appellant/defendant claimed that she was residing in the suit property since the year 2005, and therefore the suit has to be dismissed because the security agreement dated 2.3.2014 is not a security agreement but an agreement to sell.

5. It is seen that there is no dispute that the parties entered into the security agreement dated 2.3.2014. Appellant/defendant claims that the agreement dated 2.3.3014 is not a security agreement but is an agreement to sell. First appellate court has therefore held that even if the agreement has to be taken as an agreement to sell, yet, since the agreement to sell was not in accordance with Section 53-A of the Transfer of Property Act, 1882 as amended by Act 48 of 2001 which came into effect on 24.9.2001 inasmuch as agreement to sell is not registered, therefore, the appellant/defendant cannot claim rights

under the same. In the opinion of this Court, the courts below have rightly held that appellant/defendant cannot have benefit of Section 53-A of the Transfer of Property Act.

6. I would like to note that the contention of the appellant/defendant that the agreement in question was not a security agreement but was an agreement to sell, is an argument which the appellant/defendant cannot be permitted to take as it is barred by Sections 91 and 92 of the Evidence Act, 1872. Section 91 of the Evidence Act stated that the agreement is proved by the document being the agreement itself and once the agreement is so proved the agreement cannot be contradicted by any parol evidence. In my opinion, therefore once the agreement dated 2.3.2014 is a security agreement the same cannot be as per its literal language be taken as an agreement to sell because that would amount to the appellant/defendant being permitted to contradict the terms of the agreement dated 2.3.2014 and which is not permissible under Section 92 of the Evidence Act. I cannot agree with the argument urged on behalf of the appellant/defendant that appellant/defendant is allowed to show that the agreement in question is an agreement to sell on

account of para 3 of the preliminary objections of the written statement inasmuch as the averments made in para 3 of the preliminary objections of written statement if allowed and pleaded to be proved would be hit by the Section 92 of the Evidence Act and hence not a permissible defence in law. The averments made in para 3 of the preliminary objections of written statement does not set up a case of fraud or undue coercion in terms of First Proviso to Section 92 of the Evidence Act and therefore, the averments in para 3 of the preliminary objections of the written statement that an agreement to sell was signed and not a security agreement cannot bring into play the First Proviso to Section 92 of the Evidence Act. Para 3 of the preliminary objections of the written statement is reproduced below for the sake of convenience:-

“3. That, there is no relationship of licensor and Licensee between the plaintiff and the defendant. The defendant is residing in the Suit property as owner of Ground Floor portion as the defendant had paid a sum of Rs.4,38,000/- to the plaintiff as an earnest money / part payment with respect to purchase of the said property from the plaintiff for total consideration of Rs.7,00,000/- and had paid the earnest money / part payment of Rs.4,38,000/- with respect to the purchase of the said property on 02.03.2014. The plaintiff has intentionally and deliberately got typed a Security Agreement in respect of the said sum of Rs.4,38,000/- instead of Agreement to Sell to be executed between, the Plaintiff and Defendant. It is pertinent to mention here that defendant is a widow lady and is residing in the suit property alone and plaintiff with connivance of her son and husband got typed the alleged security agreement between plaintiff and defendant. The defendant reserves its right to file appropriate legal proceeding for cancellation of the said document.”

7.(i) Learned counsel for the appellant/defendant sought to place reliance upon the judgment of the Supreme Court in the case of ***S.M. Asif Vs. Virender Kumar Bajaj, (2015) 9 SCC 287*** to argue that the present was not a fit case for applying Order XII Rule 6 CPC not only because power under Order XII Rule 6 CPC is discretionary but also because appellant/defendant should be allowed to prove her stand that the agreement in question is not a security agreement but is an agreement to sell.

(ii) I cannot agree with the argument urged on behalf of the appellant/defendant for two reasons. Firstly, the judgment in the case of ***S.M. Asif (supra)*** will not apply in the facts of the present case because in ***S.M. Asif's*** case (***supra***) the fact is that the defendant relied on an agreement which was in fact an agreement to sell the premises and in fact a suit for specific performance had been also filed on the basis of the agreement to sell. In the present case, there is no agreement to sell and there is only a security agreement with the fact that there is no suit filed by the appellant/defendant for specific performance against the respondent/plaintiff. The second reason for

not accepting the argument urged by the appellant/defendant that present is not a fit case under Order XII Rule 6 CPC because as already discussed above the defences which are raised by the appellant/defendant even if taken as correct are those defences which are impermissible in law being barred by Section 53-A of the Transfer of Property Act and Sections 91 and 92 of the Evidence Act and once a defence cannot be looked into legally, then such a defence cannot be allowed to be continued as the said defence would not even if proved allow the appellant/defendant the prayer for dismissal of the suit. Order XII Rule 6 therefore has been rightly relied upon/invoked by the courts below. Therefore, the judgment in the case of *S.M. Asif (supra)* relief upon by the appellant/defendant has no application to the facts of the present case and is distinguishable for the reasons stated hereinabove.

8. In view of the above, I do not find any substantial question of law raised for this second appeal to be entertained under Section 100 CPC.

9. Dismissed.

AUGUST 04, 2017 / godara

VALMIKI J. MEHTA, J