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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 22nd May, 2018
+ **RFA 700/2016 & CM APPL. 44927/2017**

RISHI RAJ & ORS Appellants

Through: Mr. N.S. Negi, Advocate.
(M-9999029218)

versus

RAKESH YADAV & ORS Respondents

Through: Mr. Shanul Kadian, Advocate for R-1.
(M-9999763303).
Mr. Manoj Mishra, Advocate for R-2
(M-9210317462) along with Mr.
Kamlesh Chandra, R-2.
SI Tahir Hussain, PS, Swaroop Nagar
(M-8860123022)

AND

+ **RFA 809/2016 & CM APPL. 38280/2016**

RAKESH YADAV Appellant

Through: Mr. Shanul Kadian, Advocate.
(M-9999763303).

versus

RISHI RAJ & ORS Respondents

Through: Mr. N.S. Negi, Advocate for R-1 to 3.
(M-9999029218).
Mr. Manoj Mishra, Advocate for R-4
(M-9210317462) along with Mr.
Kamlesh Chandra, R-4.

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The keys of the suit property have been deposited in this Court by SI Tahir Hussain, PS, Swaroop Nagar. The same shall be kept in safe custody.

2. These two appeals arise out of the impugned judgment dated 5th July, 2016 by which the Trial Court rejected the relief of specific performance, but granted the alternate relief of recovery of Rs.8,00,000/- in favour of Mr. Rakesh Yadav- the Plaintiff (*hereinafter, 'Plaintiff'*).

3. The operative portion of the Trial Court's order reads as under: -

“16. In view of the opinion of this court, upon all these issues, relief of specific performance, declaration, possession and permanent injunction is declined against all the defendants but the plaintiff is entitled for alternate relief of recovery of Rs. 8 Lacs as mentioned in the receipt. Therefore, the decree of Rs.8 Lacs as mentioned in the receipt. Therefore, the decree of Rs.8 Lacs is hereby passed in favour of the plaintiff and against the defendants No. 1 to 3 only and all reliefs against defendant No. 4 are declined.”

4. A set of documents including General Power of Attorney, Agreement to Sell, Receipt and Will were executed between Mr. Rishi Raj and Mr. Rakesh Yadav on 6th August, 2013 in respect of a plot measuring 50 square yards out of Khasra No.3/4 situated in the abadi of extended Lal Dora of Village Nathupura, Burari, Delhi-110084 (*hereinafter 'suit property'*). The said documents which have been placed on record in original are signed by Mr. Rishi Raj, Mr. Rakesh Yadav and two witnesses one of whom is Mr. Kamlesh Chandra who was Defendant No.4 and Mr. Kunwar Bhan, the father of Mr. Rishi Raj. The execution of these documents is not disputed between Mr. Rakesh Yadav and Mr. Rishi Raj. The Trial Court refused the grant of specific performance relying upon the judgment of Supreme Court in *Suraj Lamp and Industries Pvt. Ltd. v. State of Haryana & Anr. (2012) 1 SCC 656* (*hereinafter, 'Suraj Lamps'*).

5. The question before this Court is whether the said set of documents required registration and if so, as to whether Mr. Rakesh Yadav is entitled to specific performance.

6. The documents executed on 6th August, 2013 are: -

- (i) General Power to Attorney executed by Mr. Rishi Raj **(Ex.PW1/1)**;
- (ii) Agreement to Sell **(Ex.PW1/2)**;
- (iii) Receipt acknowledging a sum of Rs.8,00,000/- as having been received by Mr. Rishi Raj **(Ex.PW1/3)**;
- (iv) Affidavit of Mr. Rishi Raj **(Ex.PW1/4)**;
- (v) Will of Mr. Rishi Raj **(Ex.PW1/5)**;
- (vi) Possession letter given by Mr. Rishi Raj to Mr. Rakesh Yadav **(Ex.PW1/6)**.

None of these documents are registered.

7. Mr. Rishi Raj claims rights in the suit property through an earlier set of documents executed by Mr. Kamlesh Chandra in his favour dated 26th March, 2012. Mr. Kamlesh Chandra claimed rights in the suit property on the basis of a General Power of Attorney and Agreement to Sell and similar documents dated 17th August, 2011 from Mr. Amit Gupta to him.

8. The case in the Plaint is that despite the Agreement dated 6th August, 2013 having been executed, Defendant No.4, Mr. Kamlesh Chandra, who was in possession, as a caretaker of Mr. Rishi Raj, did not handover the suit property to Mr. Rakesh Yadav. This led to filing of the present suit seeking the following reliefs: -

*“(A) Pass a decree of specific performance whereby
direct the defendant no. 1 to execute a sale deed*

- of the suit property in favour of the plaintiff.*
- (B) Pass a decree of declaration whereby the right, title and interest of the suit property be declare in favour of the plaintiff.*
 - (C) Pass a decree of possession thereby directing the defendants to handover the peaceful and vacant physical possession of the suit property to the plaintiff.*
 - (D) Pass a decree of permanent injunction in favour of the plaintiff and against the defendants 1 to 4, their agents, heirs, administrator and anybody representing or acting on behalf of the defendants 1 to 4 not to create any third party interest or cased any damage and alteration in the suit property i.e. aforesaid flat/suit property.*
 - (E) Pass a decree of refund of paid amount of 13,20,000/- (Rupees thirteen Lac twenty thousand) with pendentelite and future interest against the defendants in case other claim of plaintiff cannot be allowed.*

Suit property is a house measuring 50 sq. yard falls in khasra no. ¾, near Durga Mandir, presently abadi known as Nathupura Burari Delhi 110084 is specifically shown in red in the site plan attached along with the suit”

9. The cheques of Rs.8,00,000/- were duly encashed and there is no doubt that the consideration amount was fully received. Since the Plaintiff, Mr. Rakesh Yadav, could not obtain the possession of the property, suit came to be filed impleading Mr. Rishi Raj, his brother Mr. Sandeep and father Mr. Kunwar Bhan as Defendant No.1, 2 and 3. Defendant No.4, Mr. Kamlesh Chandra, who was in possession of the property, was also impleaded. Though in the written statement, the execution of all the documents is admitted, it is pleaded as under: -

- “1. That the defendant no. 4 has purchased a plot in Khasra no. ¾ situated in the abadi of extended Lal Dora of Village Nahupura, Burari Delhi-110084 from one Sh. Amit Gupta S/O Sh. Babu Ram on 07.08.2011. Copy of the GPA, Agreement to sell, Affidavit, receipt, Possession Letter dated 17.08.2011.
2. That on 26.03.2012 the defendant no. 4 Kamlesh Chandra sold the above mentioned plot to Sh. Rishi Raj by executing the title documents i.e. GPA, Agreement to sell, Affidavit, Receipt, Possession Letter in his favour. Therein the defendant no. 4 signed as the seller.
3. That on 06.08.2013, the said defendant no. 1 further sold the said pot to plaintiff by executing the title documents i.e. GPA, Agreement to sell, Affidavit, Receipt, Possession letter in his favour. Copy of Possession Letter signed by the Plaintiff & Defendant no. 1 is annexed as Annexure ‘A’.
4. That in all the above mentioned transaction, the original chain of the documents handed over to the new/last purchaser i.e. Rakesh Yadav (Plaintiff).
5. That the plaintiff allowed the defendant no. 4 to continue his stay in the said property as a tenant and as per the knowledge of the answering defendants a rent agreement was also executed between Sh. Rakesh Yadav and Sh. Kamlesh Chandra with the agreed rate of rent i.e. Rs. 2800/- per month.”

10. Thus, in the written statement, Defendant No.1, 2 and 3 alleged collusion between the Plaintiff, Mr. Rakesh Yadav and Defendant No. 4 - Mr. Kamlesh Chandra.

11. Mr. Kamlesh Chandra, Defendant No.4, filed his written statement and admitted that he had signed various documents. However he claimed that the same pertained to some transaction in respect of which a friendly

loan of Rs.1,20,000/- was taken by Mr. Rishi Raj's father i.e., Mr. Kunwar Bhan from Mr. Kamlesh Chandra. However, there was another outstanding amount which was to be paid by Mr. Rishi Raj to him.

12. The signatures on the documents dated 6th August, 2013 and 26th March, 2012, however, are not disputed. He admits that in the Agreement between Mr. Rishi Raj and Mr. Rakesh Yadav, he signed as a witness.

13. The following issues were framed in the suit: -

- “1) Whether the plaintiff is entitled for a decree of specific performance against defendant No. 1 w.r.t suit property i.e. house measuring 50 sq. yards falls in Khasra No. 3/4 near Durga Mandir presently abadi known as Nathupura, Burari, Delhi-84, specifically shown in red colour in the site plan? OPP*
- 2) Whether the plaintiff is entitled for a decree of possession against defendants w.r.t above mentioned suit property? OPP*
- 3) Whether the plaintiff is entitled for a decree of permanent injunction against defendants w.r.t above mentioned suit property restraining the defendants, their agents, legal heirs, administrators etc. from creating any kind of 3rd party interest, causing any damages and from altering the suit property? OPP*
- 4) Whether the plaintiff is entitled in alternate of above mentioned claims, for money decree for a sum of Rs.13,20,000/- with pendent lite and future interest against the defendants? OPP*
- 5) Whether the value of the suit property is more than Rs.20 Lacs? OPD (defendants No. 1 to 3)*
- 6) Whether the suit of the plaintiff is properly valued for the purpose of court fees and jurisdiction? OPD (defendants No. 1 to 3)*
- 7) Relief.”*

14. The Plaintiff deposed as PW-1. On behalf of the Defendants, Mr. Rishi Raj and Mr. Kunwar Bhan deposed as DW-1 and DW-3. Mr. Kamlesh Chandra deposed as DW-4. In the evidence of the Plaintiff, all the documents have been exhibited. The Plaintiff further states in his cross-examination as under: -

“I never visited the suit prior to the execution of document in my favour. I was well aware at the time of the execution of document in my favour that Sh. Kamlesh Chandra is residing in the suit property.

It is wrong to suggest that defendant No. 1, 2 and 3 have done all the formalities in handing over the physical vacant possession to me. I have visited 3-4 times the suit property prior to purchase the same. I along with defendant No. 1, 2 and 3 visited the suit property, prior to the purchasing of the same. And at that time I found Kamlesh Chandra residing there. All the relevant document necessary for the transaction were executed by Rishiraj in my favour. It is correct that no relevant /necessary documents left to be executed in my favour by Rishiraj. I do not know the meaning of word “Care Taker”. It is correct that no electricity /water connection exists in the name of Rishiraj, Sandeep and Kanwar Singh at the time of purchase of the suit property in 2013. It is correct that all the three above mentioned person visited the suit property only once in order to help me get the possession from the Kamlesh Chandra.”

15. The Plaintiff also denied that there was any rent agreement between him and Mr. Kamlesh Chandra and despite repeated attempts by him to take possession, Mr. Kamlesh Chandra refused to vacate the property. In so far as Mr. Rishi Raj is concerned, he admits the execution of the agreement with the Plaintiff. DW-3, Mr. Kunwar Bhan, admits as under: -

“I doing my job with MCD as a driver. The plaintiff

was also in service with me. We know well to each other being the colleague of the same department. The suit property was purchased in the name of my son Rishi Raj from defendant no. 4 after paid the entire agreed sale consideration. The defendant no. 4 hand over the original document of chain to us. The defendant no. 4 was in possession of the suit property as caretaker on behalf of us for that we used to take a less amount of rent from the defendant no.4. On the day of execution of document of sale in favour of the plaintiff the defendant no. 4 was also present and he signed all the documents as a witness. It is correct that on the day of execution of said document the suit property was under the possession of defendant no.4. I did not hand over the vacate possession of the suit property because the plaintiff himself agreed to keep the defendant no.4 as tenant in the suit property.”

16. Mr. Kamlesh Chandra DW-4 in his cross-examination categorically admits his signatures on all the documents which have been placed on record. However, it is alleged by him that the same were obtained fraudulently. Apart from claiming that there was some loan transaction, he has not placed any agreement to prove any arrangement with Mr. Rishi Raj. In these circumstances, the Trial Court, passed the impugned judgment

17. When the appeal was listed before this Court on 16th September, 2016, the execution was stayed subject to the Appellants, Mr. Rishi Raj and others depositing a sum of Rs.8,00,000/-. The said amount stands deposited as directed on 11th December, 2017. The same is lying in a FDR in this Court.

18. On 24th January, 2018, none appeared for Mr. Kamlesh Chandra. Arguments were heard in part on behalf of Appellants and the Respondent No.1. Both the parties were *ad idem* that Mr. Kamlesh Chandra was still in

possession of the property and was not handing over the possession because of which this litigation had ensued. Accordingly, this Court had appointed a Local Commissioner to ascertain as to who was in possession of different portions of the property. The Local Commissioner submitted his report and as per the said report, Mr. Kamlesh Chandra was confirmed to be in possession. Directions were issued to ensure the presence of Mr. Kamlesh Chandra in Court as there was no appearance on his behalf. Notice was served through the Local SHO, PS, Swaroop Nagar, pursuant to which Mr. Kamlesh Chandra had entered appearance in Court on 26th April, 2018. Time was sought by his Counsel to file documents to establish his title in the property. However, no documents were filed.

19. On the last date, Mr. Kamlesh Chandra was directed to deposit the keys of the property in Court and the following order was passed on 14th May, 2018:

“Further to the previous orders dated 24th January, 2018, 16th February, 2018, 14th March, 2018 and 26th April, 2018, Mr. Rishi Raj and Mr. Kamlesh Chandra are present in Court today. The statement of Mr. Kamlesh Chandra has been recorded. Admittedly, Mr. Kamlesh Chandra is a witness to the Agreement to Sell and the other documents executed between the Appellant and the Respondent No.1. The same are in original on the Trial Court record. It is obvious that he has complete knowledge of the sale which took place. Further, on the last date, time was granted to Mr. Kamlesh Chandra to file any documents he wishes to rely upon. However, no document has been filed to show that he has any right or claim in the suit property. Two documents relied upon by him in his statement today are GPAs and do not establish any right. In order to effectively resolve the matter between

all the parties, it is directed that Mr. Kamlesh Chandra shall vacate the property and deposit the keys of the property in Court on the next date of hearing.

Mr. Tahir Hussain, Sub Inspector, Police Station, Swaroop Nagar is present in Court who shall ensure that the keys shall be deposited before the Court on the next date.

List on 22nd May, 2018.”

20. Today parties have addressed their submissions. On the first issue as to whether the documents dated 6th August, 2013 required registration, it is the stand of the Plaintiff, Mr. Rakesh Yadav, that no possession was in fact given to him vide the documents executed by Mr. Rishi Raj in his favour. The suit property is located in Lal Dora area. Since no possession was given and the relief for specific performance is being sought, it is his submission, that the documents dated 6th August, 2013 did not require registration.

21. This position is not disputed by the counsel for Mr. Rishi Raj. It is however submitted that the case of the Plaintiff itself being that no possession was handed over, the documents did not require registration.

22. The Plaintiff herein seeks specific performance of agreement to sell dated 6th August, 2013. The question that has arisen is whether the Trial court is right in holding that since the documents are not registered, no right vests in the Plaintiff and no specific performance is liable to be granted. The Trial Court has proceeded on the basis of *Suraj Lamps (supra)*. There is a fundamental difference where a sale is to be recognized merely on the basis of an Agreement to Sell, Power of Attorney, Will etc., and a case where specific performance is sought based on an unregistered Agreement to Sell. In the latter case, the party is seeking the Court's intervention to conclude the sale transaction, which had commenced with the Agreement to Sell. The

Sale is yet to take place. In the case of an Agreement to Sell there are two categories viz., one wherein simultaneously with the execution of the agreement, possession of the property is handed over and one in which no possession is handed over. If the agreement to sell is not accompanied with possession of the property, then the same does not require registration. If the agreement is accompanied with possession, and is not registered, then possession is capable of being protected under Section 53A of the TP Act. However, for the same to be recognised as a sale, it would have to be registered, in view of the amendments carried out in Sections 17(1A) of the Registration Act and 53A of the TP Act. This legal position finds support in two decisions. In ***Sukhwinder Kaur v. Amarjit Singh AIR 2012 P&H 97***, the Punjab & Haryana High Court held:

“8. Section 53-A of the TPA before amendment prescribed that where in pursuance to part performance of the contract, the transferee has taken possession of the property and has done some act in furtherance of the contract, and the transferor has performed or is will to perform his part of the contract then despite the fact that the contract was required to be registered and has not been registered, the transferrer shall be debarred from enforcing against the transferee any right other than a right expressly provided by the contract. Meaning thereby, Section 53-A of the TPA recognized part performance of the contract even though the contract used to be unregistered and the transferee's rights to remain in possession was protected. By the amendment Act No.48 of 2001 (w.e.f. 24.9.2001), the words "the contract, though required to be registered, has not been registered, or" have been omitted from the provision. The effect of the amendment is that now if any person takes possession in pursuance to a contract which is

required to be registered but has not been registered, the transferee has no right to remain in possession of the property. To give effect to this principle, Section 17(1A) has accordingly been inserted in the Act which mandates that such contract is now required to be registered. If such a contract entered into after the amendment is not registered then per Section 49 of the Act, the same can neither affect any immovable property comprised therein nor will it be received as evidence of any transaction affecting such property or conferring such power.

9. Now the question arises as to whether the provision of Section 53-A of the TPA has any applicability on the facts of the present case. The answer is in the negative for the reasons that in the case in hand, the plaintiff is seeking possession of the property by way of specific performance of the agreement to sell. He is not seeking protection of his possession on the basis of agreement to sell. A person seeking protection of his possession on the basis of unregistered agreement is a different situation and where a person seeks possession of the property by way of specific performance of the agreement which is unregistered is a different eventuality. In the latter class of cases, the agreement to sell is not required to be registered as it does not fall within the ambit of either Section 53-A of the TPA or Section 17(1A) of the Act and does not require any registration. Such agreement to sell falls under the mischief of Section 17(2)(v) of the Act. It itself does not create, declare, assign, limit or extinguish any right, title or interest in the property. Rather it creates a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish. Not only that, proviso to Section 49 of the Act makes the things more clear. It envisages that an unregistered document affecting immovable property and required by this Act or the TPA to be registered may be received as evidence of a contract in a suit for specific

performance under Chapter II of the Specific Relief Act, 1877. A conjoint reading of Section 17(2)(v) and proviso to section 49 of the Act leaves no room for doubt that an agreement to sell property itself does not create any right, title to the property. It is the sale-deed which when executed will create right, title and interest in the property. Hence, an agreement to sell is not required to be registered and the same is receivable in evidence in a suit for specific performance under Chapter II of the Specific Relief Act, 1877.

23. This decision has been followed by a Ld. Single Judge of this Court in **Vinod Kumar v. Ajit Singh (2013) 138 DRJ 324** where the Court held

“10. In the instant case, the plaintiff has not sought relief based on part performance under Section 53A of the Transfer of Property Act and that being so, Section 17(1A) of the Registration Act, which was only meant for the provisions of Section 53A of the Transfer of Property Act, was not attracted and thus, the agreement did not require registration. Such an agreement falls under the mischief of Section 17(2)(v) of the Registration Act, and it itself does not create, declare, assign, limit or extinguish any right, title or interest in the property. Rather as held in Sukhwinder Kaur (supra) it creates a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish right, title or interest in the property. Not only this, provisions of Section 49 of the Registration Act make the position more clear. It envisages that an unregistered document affecting immovable property and required by this Act and the Transfer of Property Act to be registered may be received as evidence of a contract in a suit for specific performance under Chapter -II of Specific Relief Act, 1877. As further held in Sukhwinder Kaur (supra), a conjoint reading of Section 17(2)(v) and proviso of Section 49 of the Act leaves no room for doubt that agreement to sell property itself does not create any

right or title over the property. It is the sale deed, which when executed will create such right in the property. Hence, an agreement to sell is not required to be registered and the same is receivable in evidence in a suit for specific performance under Chapter-II of the Specific Relief Act, 1877.”

24. Based on the above judgments it is clear that it is permissible in law to seek specific performance of an unregistered agreement to sell, when possession of the property has not been handed over. In this case, from the evidence which has now come on record, it is clear that physical possession of the property was not handed over to the Plaintiff at the time of the execution of the documents dated 6th August, 2013. As per the documents dated 6th August, 2013 no registration was required for the same.

25. Learned counsel for the Appellants, Mr. Rishi Raj and others also submits that his clients admit the execution of the documents dated 6th August, 2013 and have no objection if the possession of the property is handed over to the Plaintiff, Mr. Rakesh Yadav. It is submitted on their behalf that Mr. Kamlesh Chandra was merely a caretaker who is refusing to vacate the property despite having sold it to Mr. Rishi Raj. It is further submitted that the Defendant No.4, Mr. Kamlesh Chandra, has no rights in the suit property.

26. Learned counsel for Mr. Kamlesh Chandra has also been heard. The submission of his Counsel Mr. Manoj Mishra is that all the signatures were fraudulently obtained and that his client is willing to undergo a Lie Detector Test.

27. From the evidence on record and on hearing the submissions on behalf of Mr. Kamlesh Chandra and the written statement filed by him, it is

clear that he admits the signatures both in the set of documents by which he sold the property to Mr. Rishi Raj and in the documents dated 6th August, 2013 by which the property was sold to Mr. Rakesh Yadav.

28. Under such circumstances, the documents have to be seen for their true purport and any oral submission contradicting the same is not liable to be entertained. Since Mr. Kamlesh Chandra is himself a witness in the transaction of sale between Mr. Rakesh Yadav and Mr. Rishi Raj, he cannot claim ignorance of the same. The counsel for Defendants, Mr. Rishi Raj and others are willing to execute a Sale Deed (*if registrable*) or any other documents as may be needed, in favour of the Plaintiff, Mr. Rakesh Yadav in respect of the suit property. The stamp duty or any other expenses for the same shall be borne by Mr. Rakesh Yadav. The said documents may be executed within four weeks.

29. The keys of the property shall remain in safe custody with the Deputy Registrar. Upon the execution of documents which are needed to be executed including payment of stamp duty, the Plaintiff is permitted to approach the Deputy Registrar, by means of an application, for release of keys in his favour.

30. The amount lying deposited in this Court to the tune of Rs.8,00,000/- would be liable to be returned to Defendant no.1, once the documents are executed and possession has been handed over to the Plaintiff.

31. The appeal is disposed of and all pending applications are disposed of.

32. List for directions on 18th July, 2018.

PRATHIBA M. SINGH
JUDGE

MAY 22, 2018/Rekha