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

*Date of Decision : 13<sup>th</sup> February, 2018*

+ **RFA 992/2016**

**SATTAR AHMED & ANR.**

..... Appellants

Through: Ch. Ranjit Singh, Advocate (M-9810222625).

versus

**SAROJ**

..... Respondent

Through: Ms. Amita Singh Kalkal and Mr. Prashant Singh, Advocates (M-9910636932, 9810170243).

**CORAM:**

**JUSTICE PRATHIBA M. SINGH**

**Prathiba M. Singh, J. (Oral)**

1. This is a first appeal against judgment/decreed dated 27<sup>th</sup> September, 2016 by which the suit for possession filed by the Respondent/Plaintiff (*hereinafter, 'Plaintiff'*) has been decreed. Notice was issued in the appeal on 4<sup>th</sup> January, 2017 on which date, the Appellants/Defendants (*hereinafter, 'Defendants'*) were directed to pay a sum of Rs.10,000/- per month to the Plaintiff towards use and occupation charges of the suit premises. The Defendants submit that the payment has been made continuously to the Plaintiff.

***Brief Background***

2. The Defendants came into possession of the property in August, 2007

when an alleged loan of Rs.2 lakhs was advanced to the Plaintiff by Defendant No.1 and an agreement to sell was executed. The agreement to sell is not registered, though it requires registration under Section 17 of the Registration Act, 1908 (*hereinafter, 'Registration Act'*), as it was coupled with possession. The Defendants had issued notice to the Plaintiff on 15<sup>th</sup> December, 2007 seeking enforcement of the agreement to sell as the last date for conclusion of the sale transaction was 14<sup>th</sup> December, 2007. The Plaintiff failed to comply with the requisitions in the legal notice. Accordingly, the Defendants had instituted a suit for specific performance against the Plaintiff on 16<sup>th</sup> May, 2011. The said suit for specific performance came to be dismissed on 29<sup>th</sup> August, 2011. The judgment in the said case is on record. The findings therein are:

*“6. Perusal of the record reveals that suit of the plaintiff for Specific Performance of a contract is based upon a document i.e. Agreement to Sell and Purchase dated 14.08.2007 and as per the said document the defendant was agreed to sell the suit property to the plaintiff for the total sale consideration of Rs.4,25,000/- and out of the said amount the plaintiff paid Rs.2,00,000/- to the defendant as earnest money and balance sale consideration was agreed to be paid by the plaintiff to the defendant on or before 14.12.2007 in lieu which the defendant would execute the transfer documents in favour of the plaintiff. The instant suit has been filed by the plaintiff only on 16.05.2011, and according to the date decided by the parties for making balance payment of sale consideration and execution of transfer documents qua the suit property, the suit has to be filed within the period of three years i.e. on or before 13.12.2010 which is the stipulation provided by the law. Even the filing of application of condonation of delay with the*

*suit itself shows that the plaintiff has admitted that his suit is not with the period of limitation. In 2010 (116) DRJ 452 titled as Sehenker India Pvt. Ltd. Vs. Sirpur Papers Mills Ltd., It has been held that*

*“..... Section 5 of the Limitation Act does not apply to the suit as the word “suit” is omitted by the legislature in the language of the said section. Therefore, delay in filing the suit cannot be condoned by invoking Section 5 of the Limitation Act, much less the same can be done by resorting to Section 151 of the CPC.....”*

The said judgment dated 29<sup>th</sup> August, 2011 has attained finality as the Defendants have not challenged the same.

3. The Plaintiff thereafter filed the subject suit for possession. The counsel for the Defendants submits that in the suit filed by the Plaintiff seeking possession, the Plaintiff has not been fair and candid. On the one hand, the Plaintiff in the plaint states that possession was given in 2011, whereas the possession was actually given in August, 2007. It is the submission of the Counsel for the Defendants that the Plaintiff has to stand on the strength of her pleaded case and accordingly, the Plaintiff has not made out a case for possession, inasmuch as conflicting pleadings were made by it. On the other hand, the Plaintiff claims that the Defendants are trespassers, however, in cross-examination, the Plaintiff admits that she gave possession to the Defendants in August, 2007 in lieu of the loan of Rs.2 lakhs.

4. Learned counsel for the Defendants, Mr. Ranjit Singh, relies upon the judgment of Supreme Court in ***Badri Prasad Bhola Nath v. Ganesh Prasad (1977) 4 SCC 603*** to the effect that the issue as to whether a Defendant is a

trespasser or an unauthorized occupant or a licensee or a tenant cannot be evaded by the Plaintiff. The Plaintiff has to be clear as to what is the status of the Defendant and in the absence of the same, the pleadings in the plaint being evasive and ambiguous, no decree is liable to be passed.

5. On the other hand, counsel for the Plaintiff submits that the facts are crystal clear in this matter. The only basis on which the Defendants came into possession was the agreement to sell dated 14<sup>th</sup> August, 2007. The Defendants attempted to seek specific performance of the said agreement and having failed in that, the Defendants do not have any locus to continue to remain in the suit property. It is her submission that in a suit for possession, the only fact that needs to be established is the title of the Plaintiff and nothing more.

6. She submits that one Sh. Om Prakash Nagar was allotted the property in 1967, from whom the mother-in-law of the Plaintiff had purchased the said property vide agreement to sell dated 4<sup>th</sup> May, 1984 (Ex. PW-1/11) and GPA (Ex. PW-1/10), Will dated 23<sup>rd</sup> November, 1984 (Ex. PW-1/13). Smt. Sarbati Devi, the mother-in-law of the Plaintiff sold the property to the Plaintiff vide agreement to sell dated 18<sup>th</sup> March, 2002 which is exhibited as Ex. PW-1/3. Thus, the counsel for the Plaintiff submits that the title of the Plaintiff is not in question and the Defendants have no right in law to remain in possession of the suit property. She accordingly submits that the decree for possession has been rightly passed.

7. A perusal of the pleadings and the evidence on record clearly establishes that the Plaintiff sought possession on the ground that the Defendants had come into illegal occupation of the property. This fact may not be correct, inasmuch as in the cross-examination, the Plaintiff has

admitted as under:

*“It is correct that I had given the possession of first and second floor of the suit property to the defendants in August, 2007.”*

Thus, the Defendants did not come into possession of the property in any illegal manner. However, the question that remains is as to whether they continue to occupy the said premises. The Defendants have pleaded in the written statement that the Plaintiff had approached the Defendants for sale of the property in question and accordingly the Defendants had paid a sum of Rs.2 lakhs as advance out of the total consideration of Rs.4,25,000/-. Thus, clearly the defence of the Defendants and the right to continue to remain in the property is based on the agreement to sell and on no other document.

8. Defendants had sought specific performance, which has however been rejected by judgment dated 29<sup>th</sup> August, 2011. Once the Defendants' prayer for specific performance is rejected, the Defendants do not have any surviving right to remain in the suit property and thus, the Trial Court was right in observing that the Defendants are unauthorised occupants. The Trial Court has further rightly held that the Plaintiff has established her title in the property but not the Defendants.

9. The Defendants' stand is also contradictory, inasmuch as on the one hand, the Defendants claim to have got possession of the property from the Plaintiff but on the other hand, the Defendants seek to challenge the title of the Plaintiff. The Defendants are estopped from challenging the same, having placed reliance on the agreement to sell in their written statement. Viewed from any angle, the Defendants have no right to remain in the possession of the property.

10. Insofar as the judgment relied upon by the counsel for the Defendants is concerned, the case arose out of the U.P. (Temporary) Control of Rent and Eviction Act, 1947 and was not a simple suit for possession. The Supreme Court held that the Plaintiff in the said case had no explanation for the possession of the Defendant. This is not so in the present case. Here, it is categorically averred in the plaint that the Plaintiff had taken a loan of Rs.2 lakhs which has been repaid. It is because of the said loan, the Plaintiff submits that the Defendants had come into possession of the property. Thus, the facts are clearly distinguishable and the said judgement would not help the case of the Defendants.

11. The decree for possession is accordingly upheld. In the facts of the present case, the Defendants are directed to vacate the suit property within a period of 30 days from today. Appeal is dismissed with no orders as to costs.

**FEBRUARY 13, 2018/R**

**PRATHIBA M. SINGH**  
**Judge**