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

Date of decision: 27th August, 2019

+ **CM(M) 39/2018**

VIMAL AGGARWAL

..... Petitioner

Through: Mr. Vikas Arora and Ms. Radhika
Arora, Advocates (M: 9811414440).

versus

BHANU PRATAP

..... Respondent

Through: Mr. Rajender Mathur, Advocate.

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petition has been filed challenging the impugned order dated 27th October, 2017 by which the application filed by the Plaintiff under Order XII CPC Rule 6 was dismissed by the Trial Court.
2. The brief background is that the Plaintiff/Petitioner (*hereinafter Plaintiff*) filed a suit for possession, mesne profits/damages against the Defendant in respect of the first floor of property bearing No. 10 F-10/18, Model Town-II, Delhi-110007. The case of the Plaintiff is that the Defendant was inducted as a tenant into the suit property vide lease deed dated 2nd December, 2009. The monthly rent initially was Rs. 28,000/- per month. The rent amount was increased by 10% up to 30th September, 2011. Since the Defendant did not vacate the suit property, the Plaintiff issued a legal notice on 20th September, 2012. Finally, vide notice dated 11th February, 2015, the tenancy was terminated and the Defendant was called upon to vacate the property by 28th February, 2015. The Defendant did not vacate the property.

3. The Plaintiff then filed a suit before the Id. Trial Court seeking the following reliefs:-

“(i) a decree of possession in respect of the suit property,

(ii) a decree for a sum of Rs. 25,000/- on account of arrears of damages / mesne profits for the month of April 2015.

(iii) a decree for recovery of damages / mesne profits for use and occupation charges for the suit premises from 01.05.2015 till the date of recovery of the possession of the suit premises from the defendant @Rs.60,000/- p.m. or at such higher amount as this Hon'ble Court may deem fit and proper,

(iv) May further pleased to grant the pendente lite and future interest @18% p.a. on the damages / mesne profits,

(v) any other further relief (s) which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case in the interest of justice.”

4. The Defendant, in his written statement, admitted that he came into possession of the property as a tenant in October, 2011. However, the Defendant set up a case of an oral agreement to sell entered into with the Plaintiff for purchase of the property. The plea of the Defendant in paragraph 4 of the written statement read as under:-

“4. It is stated that initially the defendant came into the possession of the suit premises as tenant however somewhere in the month of October, 2011 the plaintiff and her husband evinced an idea to sell the property and disclosed their desire to the defendant. As the defendant was having complete faith over the plaintiff, therefore the defendant paid an amount of Rs. 1 lakh to the plaintiff as bayana amount. For the payment of remaining amount it was mutually discussed and accepted that after the delivery of copy of the paper, the

defendant will apply for a loan with a financial bank and the substantial amount would be paid through the bank. It is relevant to mention here that subsequently thereafter on several occasion in terms of the instruction and desire of the plaintiff and her husband the defendant has paid an amount of Rs. 32,00,000/- as cash to the plaintiff and her husband as part consideration amount in respect to the suit property. It is further relevant to mention here that apart from the cash amount the plaintiff has also paid various amount in the form of account payee cheque.”

5. On the basis of the abovementioned plea, the Defendant resists the suit for possession. The Defendant has also filed a suit seeking specific performance against the Plaintiff and the said suit is also pending between the parties. On 28th October, 2015, the following issues were framed by the Court:-

“1. Whether there is any relationship of landlord and tenant between the parties? OPD

2. Whether the plaintiff is entitled for a decree of possession of suit property bearing no. (First Floor) F-10/18, Model Town-II, Delhi-110007 against the defendant? OPP

3. Whether plaintiff is entitled for a decree of sum of Rs. 25,000/- on account of arrears of damages/mesne profits for the month of May, 2015 till its realization against the defendant? OPP

4. Whether the plaintiff is entitled for a decree of damages/mesne profits for use and occupation charges of the suit property @ Rs.60,000/- per month from 01.05.2015 till its realization with interest @ 18% per annum? OPP”

6. Thereafter, the Plaintiff moved an application under Order XII Rule 6 based on the admission in the written statement that the Defendant had

initially entered the property as a tenant and hence is not entitled to retain possession of the suit property.

7. However, the said application was dismissed by the impugned order.

8. The submission of Id. counsel appearing for the Plaintiff is that the relationship between landlord and tenant having been admitted, in the sense that Defendant having agreed that he had come into possession in view of the lease deed, even an oral agreement to sell is not sufficient for the Defendant to continue to retain possession of the suit property. Mr. Vikas Arora, Ld. Counsel submits that the Defendant cannot resist the relief of possession as the only defence which is available to the Defendant is under Section 53A of the Transfer of the Property Act, 1882. If an agreement to sell is coupled with possession, the same has to be registered and since the case of the Defendant is that the agreement to sell is an oral one and that the same is not registered, the defence under Section 53A is not available. He further submits that even after issues are framed, an application under Order XII Rule 6 is maintainable.

9. He relies upon -

- ***Saurabh Sharma v Om Wati and Others, 250 (2018) DLT 544,***
- ***Smt. Shakuntala Devi and Another v M/s Seven Star Electricals (p) Ltd and Others* and**
- ***Shiv Kumar versus Sumit Gulati, RSA 417/2015, Decided on 4th December, 2015***
- ***Babita Joshi v Dilip Rawat (2015) 219 DLT 697***
- ***Kaushal Aggarwal v Ashok Malhotra CS(OS) 165/2009 Decided on 17th February, 2009***

- ***Shri Sudhir Sabharwal v Shri Rajesh Pruthi, CM (M) 1087/2013, Decided on 7th August, 2014.***

10. On the other hand, ld. counsel for the Defendant submits that once issues are framed, the Court cannot entertain an application under Order XII Rule 6. He relies upon ***Crown Commercial House and Others v ICICI Bank and Others, 162 (2009) DLT 427.***

11. It is the further submission of ld. counsel for the Defendant that under Order XII Rule 6, the admission has to be unequivocal, unambiguous, and the written statement has to be read as a whole. He further submits it is not permissible for the Court to consider a part of the admission and ignore the remaining averments in the written statement. In support of these submissions, he relies upon –

- ***Dudh Nath Pandey (dead by LRs) v Suresh Chandra Bhattasali (dead by LRs), AIR 1986 SCC 1509*** and
- ***Dena Bank v M/s Bindal Construction Pvt. Ltd. AIR 1992 Delhi 171.***

12. The Court has perused the pleadings and the documents as also the judgments relied upon by the ld. counsels. There is no doubt that admissions would always be read as a whole and it is not permissible for the Court to consider parts of the averments in the written statements. A perusal of the stand of the Defendant in the written statement shows clearly that the Defendant agreed that he came into possession in the property as a tenant. However, the same is qualified with the subsequent sentence i.e. that in October, 2011, there was an oral agreement to sell and some part of the consideration was also paid. The question, therefore, is whether the above statement, even if considered as a whole, can justify the Defendant retaining

possession of the suit property.

13. The best case of the Defendant is that he initially came into possession of the property as a tenant, and thereafter entered into negotiation with the Plaintiff for purchase of the property and had an oral agreement to sell with the Plaintiff. He further claims to have been paid a sum of Rs. 32,00,000/-, which is claimed to be a part consideration in respect of the suit property. Taking this stand of the Defendant as a whole, can the Defendant continue to remain in possession? The answer to this has to be under Section 53A of the Transfer of the Property Act. The clear legal position is that since the amendment in Section 53A, in 2001, unless there is a registered agreement to sell, the possession of the property cannot be defended or safeguarded by the person who is retaining possession.

14. This is clear from a reading of the judgement of this Court in ***Shiv Kumar (supra)*** where under similar circumstances, the Court has held that when the Defendant claims possession on the basis of an oral agreement to sell, the same would not be recognisable in view of the amended Section 53 A. This view has also been taken in various other judgements including, ***Babita Joshi versus Dilip Rawat (supra)***, ***Kaushal Aggarwal v Ashok Malhotra(supra)*** and ***Shri Sudhir Sabharwal v Shri Rajesh Pruthi (supra)***

15. The above legal position is quite clear, and there is no judgement to the contrary that has been cited by the Defendant on this aspect. The provision i.e. Section 53A is quite clear that unless and until there is a registered agreement to sell, possession cannot be retained or defended.

16. The Defendant's case of oral agreement to sell either as a defence in the present suit or as a Plaintiff in a specific performance is yet to be adjudicated. While the relationship between the landlord and tenant is an

admitted possession as on date, the right of the Defendant to continue to remain in the possession is a right which has not yet come into effect and requires evidence and adjudication. On the basis of non-existing rights, the Defendant cannot seek to continue to retain possession of the suit property. The application under Order XII Rule 6 was incorrectly rejected by the Trial Court. The relief of possession deserves to be granted to the Plaintiff in the facts and circumstances of the presents case.

17. The suit is accordingly decreed in terms of prayer no. (i) of the suit. In so far as the remaining reliefs are concerned, evidence shall be continued before the Id. Trial Court and shall be adjudicated in accordance with law. In so far as the application under Order XXXIX Rule 10 is concerned, the Id. Trial Court would adjudicate upon the mesne profits payable after taking the evidence. The decree sheet be prepared in terms of the above.

18. The petition is disposed of in the above terms.

AUGUST 27, 2019
MR

PRATHIBA M. SINGH
JUDGE