

(2014) 08 DEL CK 0173**Delhi High Court****Case No:** Regular First Appeal 302/2014 and CM Appl. No. 11752/2014

Sanjay Bansal

APPELLANT

Vs

Tara Chand Aggarwal

RESPONDENT

Date of Decision: Aug. 1, 2014**Acts Referred:**

- Hindu Adoptions and Maintenance Act, 1956 - Section 10(4)
- Transfer of Property Act, 1882 - Section 123, 53A, 54

Hon'ble Judges: A.K. Pathak, J**Bench:** Single Bench**Advocate:** Vijay K. Gupta, Advocate for the Appellant; Dinesh Agnani, Sr. Advocate, Madan Lal Sharma and Varun Nischal, Advocate for the Respondent**Judgement**

A.K. Pathak, J.

Respondent is appellant's elder brother. Respondent - plaintiff filed a suit for possession and recovery of damages/mesne profits against the appellant - defendant before the trial court, wherein decree of possession has been passed vide judgment and decree dated 29th May, 2014, which has been impugned in this appeal. Relief of mesne profits has been declined by the trial court.

2. Respondent alleged in the plaint that he was a member of Naveen Cooperative Group Housing Society Ltd. ("the Society", for short). The Society constructed residential flats on Plot No. 13, Sector No. 5, Dwarka, (Pappan Kalan), New Delhi. Respondent was allotted flat No. A-402 (hereinafter referred to as "flat in question") in the draw of lots conducted by the officials of Delhi Development Authority and Registrar Cooperative Societies on 19th April, 2000. Physical possession of the flat was handed over to the respondent soon thereafter. In the month of April, 2001 respondent allowed the appellant to use and enjoy the flat in question on licence basis and without payment of any licence fee. Subsequently, behaviour of appellant became hostile towards the respondent. Accordingly, respondent revoked the

licence vide notice dated 1st July, 2002 sent through a lawyer by way of registered AD post, thereby called upon the appellant to handover physical possession of the flat in question to respondent, on or before 19th July, 2002. It was further stated therein that in case flat in question was not vacated, appellant shall pay damages @ Rs. 500/- per day. Appellant did not vacate the flat in question; instead he threatened that he would sell the flat in question to a third party, hence the suit.

3. In the written statement, appellant admitted that respondent, being a member of the Society, was allotted the flat in question. He further alleged that flat in question was acquired by the respondent from the joint family funds, as business of the family was common. Appellant pleaded that he was adopted by the respondent on 17th October, 1986. Adoption ceremony as per Hindu rites was performed. After adoption, appellant joined the business run by respondent and other family members in the name and style of M/s. Shyam Lal Pawan Kumar. All the family members used to reside at House No. 257, Gali No. 7, Padam Nagar, Delhi (for short hereinafter referred to as "said house"). In the month of March, 2001, an oral family settlement arrived at between the respondent and appellant wherein it was agreed that appellant would start his independent business and leave the said house and in lieu thereof will be given the flat in question. It was agreed that the flat in question would be exclusive property of appellant. Later, said oral family settlement was confirmed by the respondent in writing on 28th April, 2001. The said family settlement dated 28th April, 2001 was written by the respondent in his own handwriting and was duly witnessed by his two brothers. Thus, appellant was the owner of flat in question. It is alleged that appellant and respondent, being son and father, had no embargo to enter into an oral family settlement, which was, subsequently, confirmed by the respondent in writing on 28th April, 2001. It was denied that appellant had occupied the flat in question as a "licensee" of the respondent. It was alleged that notice dated 1st July, 2002 was untenable in the above facts. It was denied that appellant threatened that he would sell the flat in question to a third party.

4. In the replication, respondent denied the contents of written statement and reiterated the averments made in the plaint. It was denied that respondent had adopted the appellant on 17th October, 1986. It was alleged that as on 17th October, 1986 appellant was above the age of 15 years, thus, under the law of adoption alleged adoption, otherwise was not legal and valid. Respondent alleged that flat in question was his self acquired property. It was denied that family settlement, as pleaded by the appellant, ever took place. Respondent also took a plea that house at Padam Nagar was a joint family property and respondent had no right to permit or disallow the appellant to occupy or leave the said house. Regarding document dated 28th April, 2001, it is alleged that respondent was suffering from heart-problem in the year 1996 and was not able to manage his sole proprietorship business, thus, had entrusted the affairs of his sole proprietorship business run in the name and style of M/s. Shyam Lal Pawan Lal to his brother Shri

Babu Lal, who in collusion with appellant misappropriated the funds of the said business and obtained the document dated 28th April, 2001 from the respondent by playing fraud and undue influence.

5. From the pleadings of the parties following issues were framed:-

"(i) Whether the defendant is the owner in possession of the suit property in view of family settlement and declaration of the plaintiff? OPD

(ii) Whether the plaintiff is entitled to a decree of possession in respect of the suit property? OPP

(iii) Whether the plaintiff is entitled to any mesne profits and if so, its quantum and period? OPP

(iv) Relief."

6. Respondent examined himself as PW1. He proved ten documents. Copies of share certificate and no dues certificate issued by the Society were proved as Ex. PW1/1 and Ex. PW1/2, Allotment Letter dated 21st April, 2000 was proved as Ex. PW1/3, Passbook issued by the Society relating to the payments made to the Society by the respondent was proved as Ex. PW1/4, Possession Letter was proved as Ex. PW1/5, Site plan was proved as Ex. PW1/6, Copy of legal notice together with postal receipts were proved as Ex. PW1/7 to Ex. PW1/10. One Dr. S.K. Sood, Officer/Executive of the Society was examined as PW3. He produced records of allotment of the flat in question. One Ms. Pushpa Mittal, Clerk of the school of appellant was examined as PW2 in order to prove the school records with regard to age and parentage of appellant. One Mr. Murari Lal, Section Officer was examined as PW4 and he produced the certificate of school examination of the appellant. As against this, appellant examined himself as DW1. He also examined his brothers Shri Anil Bansal and Shri Shyam Lal Aggarwal as DW2 and DW3, respectively. They had witnessed the document dated 28th April, 2001 and have deposed in this regard.

7. After hearing the counsel for the parties and scrutinizing the evidence adduced on record, trial court has held that appellant had failed to prove his ownership rights in the flat in question. It was held that appellant had failed to prove that he was adopted by the respondent. As per school records as well as certificate issued by the C.B.S.E., it was established that appellant was more than 15 years of age as on 17th October, 1986, thus, no legal or valid adoption can be said to have taken place in view of Section 10(4) of the Hindu Adoption and Maintenance Act, 1956 which envisages that a person, who is not under the age of 15 years, cannot be adopted by any Hindu. As regards plea of family settlement is concerned, trial court has held that the same has also remained unproved as appellant had failed to disclose his pre-existing rights in the flat in question, subject matter of settlement. Reliance was placed on Smt. Pushpa Saroha Vs. Shri Mohinder Kumar and Others, and A.C. Lakshmipathy and another Vs. A.M. Chakrapani Reddiar and five others, . Trial court

has held that neither the respondent nor appellant had any pre-existing rights in the house at Padam Nagar, thus, there was no question of any family settlement between the appellant and respondent to swap the rights in the said house with the flat in question. Trial court has observed that appellant, in his cross-examination, had admitted that said house was jointly owned by the wives of two brothers, that is, respondent and Shri Babu Lal who were not even party to the family settlement, thus, it cannot be said that flat in question could have been swapped with the said house. Though not pleaded, but during the course of hearing appellant took a shifting stand and contended that the document dated 28th April, 2001 (Ex. DW1/4) was, in fact, a Gift Deed. This plea has also been negated by the trial court by placing reliance on Wing Commander (Retd.) Wg. Cdr. (Retd.) R.N. Dawar Vs. Shri Ganga Saran Dhama, wherein it has been held that a gift of immovable property, which is not registered, is bad in law and cannot pass any title to the donee, under Section 123 of the Transfer of Property Act, 1882 ("the Act", for short) which envisages that a gift of immovable property can only be made by a registered instrument, signed by or on behalf of the donor and attested by at least two witnesses. Admittedly, Ex. DW1/4 is an unregistered document. Trial court has concluded that appellant had failed to prove his ownership rights in flat in question. As regards title of respondent is concerned, same was not in dispute. Trial Court has held that status of appellant in flat in question was that of a "licensee". Since license was revoked by the respondent vide legal notice Ex. PW1/7, therefore, appellant was liable to handover the physical possession of the flat in question to respondent.

8. I have heard learned Senior Counsel/Counsel for the parties and have perused the material placed on record and do not find any illegality and perversity in the impugned judgment and decree. Learned counsel for the appellant has vehemently contended that decree of possession could not have been passed in favour of respondent, since he had failed to prove his ownership in respect of the flat in question. Even in an ex-parte matter, it is incumbent upon the plaintiff to prove his ownership before seeking possession. Respondent cannot take benefit of the weakness of defence. I do not find any force in this contention of learned counsel. In this case, ownership of the respondent was not disputed in the written statement, inasmuch as appellant himself has claimed ownership rights flowing from the respondent, inasmuch as no issue on this point was framed. If a fact is admitted by the defendant, the same is not required to be proved by the plaintiff. Even otherwise sufficient evidence was adduced by the respondent that he was a member of the Society, which constructed the flats and allotted to its members, in a draw of lots.

9. It has been vehemently contended by the learned counsel that appellant had acquired ownership rights in the flat in question vide Ex. DW1/4, which was executed in terms of the oral family settlement and/or in the alternative, by virtue of the gift, thus, no decree of possession could have been passed against the appellant, since he was occupying the flat in question in his own rights and not as a "licensee" of respondent. Relevant it would be to refer to the contents of Ex. DW1/4

which is on Rs. 2/- stamp paper and reads as under:-

"Main Tarachand S/o. Shri Late Ganga Ram R/o. 257 Padam Nagar, Gali-7, Delhi-7 ka rahne wala hun. Maain Papankal Coop. Naveen Society ka Flat no. A-402 jo ki mere naam hai. Uprokt flat ko main aaj dinak 28/04/2001 ko Shri Sanjay Bansal S/o. Shri Tarachand ke naam kar raha huan. Aaj ke baad jo bhi uprokt flat mein kisi kism ka bakaya hoga uski dendari main karunga. Aage ki dendari Sanjay Bansal S/o. Tarachand ki dendari ki jimmewari hogi.

Uprokt shapth patra poore hosh hawaash me likh kar de raha huan. uprokt Plot no. A-402 se mera koi lena dena nahi hoga.

Date 28/04/2001

Sd./-

Tara Chand S/o. Late Shri Ganga Ram

257, Padam Nagar, Gali-7,

Delhi-7"

10. A perusal of Ex. DW1/4 makes it clear that there is no mention of any family settlement therein. Rather, the word "sapath patra" used in Ex. DW1/4, clearly indicates that the same is nothing but an affidavit and is not sufficient to transfer ownership rights of an immovable property in favour of appellant. That apart, there is no mention of any other property much less the house in Padam Nagar, Delhi in lieu whereof the flat in question was allegedly given to appellant. As per the written statement, flat in question was given to appellant in lieu of his rights in the house at Padam Nagar. Sufficient evidence has already come on record, which has been discussed by the trial court in detail that appellant had no right in the said house which was in the joint names of wives of two brothers. Accordingly, even respondent had no rights to swap the flat in question in lieu of the said house, inasmuch as appellant had no property rights in the above properties. In absence of any pre-existing rights of appellant, no family settlement could have taken place. It is trite law that for a family settlement to take place, there has to be a pre-existing right in the property subject matter of settlement in favour of the family members or all the family members part of the settlement. By a family settlement, such rights can be restricted or given up or rights of others can be expended to the extent of making them the absolute owners of a property which but for the settlement would have belonged to all. However, by a family settlement no fresh or new rights can be created in favour of a family member, who otherwise had no rights to the property. Reference is also made to Pushpa Saroha (supra) and A.C.I. Lakshumipathy (supra). Finding of the trial court, in this regard, is in conformity with the settled position of law on this point.

11. First of all, plea of the appellant that flat in question was gifted to him vide Ex. DW1/4 cannot be entertained, since no such plea was taken in the written statement. Even otherwise, Ex. DW1/4 cannot be termed as a Gift Deed nor it qualifies to be a Gift Deed, in view of Section 123 of the Act, which envisages that for the purpose of making a gift of an immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. In this case, admittedly, Ex. DW1/4 is not a registered document, thus, trial court has rightly held that Ex. DW1/4 was not sufficient to vest ownership rights in the appellant. Ownership rights in an immovable property could have been transferred by the appellant in favour of respondent either by way of sale within the meaning of Section 54 of the Act or by way of gift under Section 123 of the Act. Ex. DW1/4 cannot either be termed as document of sale, since ownership has not been transferred in exchange for a price paid or promised or part-paid and part-promised. As already held above Ex. PW1/4 also does not qualify to be a Gift Deed within the meaning of Section 123 of the Act.

12. Learned counsel for the appellant has next contended that possession of the appellant is protected under Section 53A of the Act. This argument needs to be rejected straightway being fallacious. Section 53A of the Act reads as under:-

"53-A. Part performance - Where any person contracts to transfer for consideration any immovable 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 therefore 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."

13. A bare perusal of aforesaid provision makes it clear that to attract Section 53A of the Act: (a) there must be a contract to transfer for consideration an immovable property; (b) the contract must be in writing signed by the transferor or by someone on his behalf; (c) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained; (d) the transferee must, in part performance of the contract, take possession of the property or of any part thereof; (e) the transferee must have taken some act in furtherance of the contract and (f)

the transferee must have performed or be willing to perform his part of contract. After commencement of registration and other related laws and Amendment Act, 2001, which has been made effective from 24th September, 2001 another requirement is to be fulfilled that such document has to be registered document.

14. Ex. DW1/4, by no stretch of imagination, can be termed as contract to transfer for consideration any immovable property. Ex. DW1/4 has not been signed by the appellant, inasmuch as the flat in question was not agreed to be transferred for consideration. Possession was not handed over to appellant by the respondent in part performance of any contract.

15. No other argument advanced nor any other point pressed by the parties.

16. For the foregoing reasons, appeal is dismissed. Miscellaneous application is disposed of as infructuous.