

**(2011) 07 DEL CK 0452**

**Delhi High Court**

**Case No:** CS (OS) No. 1445 of 2010

Panchi Devi

APPELLANT

Vs

Omwati

RESPONDENT

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**Date of Decision:** July 11, 2011

**Acts Referred:**

- Transfer of Property Act, 1882 - Section 106, 106(1), 106(2), 106(3), 53A

**Hon'ble Judges:** V.K. Jain, J

**Bench:** Single Bench

**Advocate:** Sachin Puri, for the Appellant; Akhilesh, for the Respondent

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### **Judgement**

V.K. Jain, J.

IA 3237/2011 (Order 8 Rule 1 and 10 CPC)

1. This is a suit for recovery of possession, arrears of rent and damages for use and occupation.

2. The case of the Plaintiff is that she is the owner of the third floor (Left Side) of property No. 4/22, WEA, Karol Bagh, New Delhi, which she let out to the Defendant in June, 2002. It is also alleged that the last rent paid by the Defendant was Rs. 13,000/- per month. The tenancy of the Defendant is alleged to have been terminated vide legal notice dated 03.06.2010. The Plaintiff has now claimed possession of the premises which was let-out to the Defendant, along with arrears of rent amounting to Rs. 8,780/- for the period from 01.06.2010 to 22.06.2010 and damages for use and occupation with effect from 21.06.2010 at the rate of Rs. 1 lakh per month.

3. It has been alleged in the written statement that in June, 2002, the Plaintiff and her son Naval Kishore Khandelwal requested the husband of the Defendant, namely, Shri Parmanand, to purchase and occupy the third floor (Left Side) of property No. 4/22, WEA, Karol Bagh, New Delhi, which they had illegally constructed,

for a total consideration of Rs. 20 lakhs. They also agreed that the husband of the Defendant could purchase the property in the name of the Defendant and the sale consideration could be paid in instalments. According to the Defendant, the amount of sale consideration was thereafter paid partly in instalments though the receipts issued by the Plaintiffs indicated that the amount paid to her was rent. It is also alleged that a sum of Rs. 50,000/- was taken by the Plaintiff and her son from the Defendant, through her husband for the purpose of meeting expenses of MCD. It is further alleged that the Defendant gave jewellery worth Rs. 13,50,000/- to Mr. Manoj, brother of the Plaintiff and she has always been ready to adjust the price of that jewellery against the sale consideration. Thus, according to the Defendant, the entire sale consideration stands paid in the form of (i) jewellery for Rs. 13,50,000/-; (ii) a sum of Rs. 50,000/- paid for MCD purpose and (iii) the balance amount paid in instalment. The Defendant has thus set up an oral Agreement to Sell in her favour. The Defendant has also filed a counter-claim seeking specific performance of the oral agreements alleged to have been executed by the Plaintiff in her, favour for sale of the aforesaid premises to her for consideration of Rs. 20 lakhs.

4. The Plaintiff has filed IA 3237/2011 for passing a decree on the basis of the admission made by the Defendant in the written statement. The application has been opposed by the Defendant.

5. The notice dated 03.06.2011 was sent by the Plaintiff to the Defendant, through her counsel. Vide this notice, the tenancy of the Defendant was terminated with effect from 15th day of the receipt of the notice and she was asked to hand over the physical possession of the premises. This notice was followed by a reminder notice dated 23.06.2010. The notice was replied by the Defendant, through counsel, on 26.06.2010. It is thus an admitted case that the legal notice dated 03.06.2010 stands duly served on the Defendant.

6. In view of the provisions contained in Section 106(1) of Transfer of Property Act, the tenancy, being for residential purpose and being a tenancy from month to month, was terminable, on the part of either lessor or lessee, by giving 15 days" notice. Sub-section (2) of Section 106 of the Act provides that the period mentioned in Sub-section (1) shall commence from the date of the receipt of the notice. Sub-Section 3 provides that the notice shall not be deemed to be invalid merely because the period mentioned therein falls short of the period specified under Sub-section (1), provided the suit or proceeding is filed after the expiry of the period mentioned in Sub-section (1). Since the suit has been filed on 13.07.2010, more than 15 days after the notice dated 03.06.2010 was replied by the Defendant, the termination of the tenancy is legal and in accordance with the provisions contained in Section 106 of Transfer of Property Act.

7. As regards the oral Agreement to Sell, pleaded by the Defendant, the law does not protect the possession of a person who claims to have obtained it under an oral Agreement to Sell in his favour. Section 53A of Transfer of Property Act reads as

under:

53A. 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 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].

It would be seen that the possession of a person is protected u/s 53A of the Act only if he claims it under a written contract to transfer the property to him for consideration. Unless a written agreement is set up, the provisions of Section 53A of the Act do not come into play and consequently, the person claiming possession under the oral agreement is not entitled to defend his possession.

8. In [Nathulal Vs. Phoolchand](#), Supreme Court while interpreting Section 53-A culled out the following conditions to be fulfilled for making out the defence of part performance to an action in ejectment by the owner, as under:

(i) that the transferor has contracted 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;

(ii) that 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;

(iii) that the transferee has done some act in furtherance of the contract; and

(iv) that the transferee has performed or is willing to perform his part of the contract.

In [Sardar Govindrao Mahadik and Another Vs. Devi Sahai and Others](#), it was reiterated that to qualify for the protection of the doctrine of part performance it must be shown that there is an agreement to transfer of immovable property for

consideration and the contract is evidenced by a writing signed by the person sought to be bound by it and from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty.

Supreme Court in [Rambhau Namdeo Gajre Vs. Narayan Bapuji Dhotra \(dead\) through Lrs.](#), held that the doctrine of part performance aims at protecting the possession of such transferee provided certain conditions contemplated by Section 53-A are fulfilled. These conditions are:

- (i) there must be a contract for transfer for consideration of any immovable property,
- (ii) the contract must be in writing, signed by the transferor or someone on his behalf,
- (iii) the writing must be in such words from which the terms necessary to construe the transfer may be ascertained,
- (iv) the transferee must in part performance of the contract take possession of the property, or of any part thereof,
- (v) the transferee must have done some act in furtherance of the contract, and
- (vi) the transferee must have performed or be willing to perform his part of the contract.

9. Thus, if the plea taken by the Plaintiff is accepted, the possession of the Defendant is unauthorized, her tenancy have been terminated. If the plea set up by the Defendant is accepted, her possession is still unauthorized since she is not claiming a written agreement in her favour and the possession under an oral agreement is not protected by Section 53A of the Act.

10. For the reasons given in the preceding paragraphs, the decree for recovery of possession of third floor (Left Side) of property No. 4/22, WEA, Karol Bagh, New Delhi, is hereby passed in favour of the Plaintiff and against the Defendant.

11. The suit of the Plaintiff to the extent it relates to arrears of rent and damages for use and occupation as well as the counter-claim of the Defendant for specific performance of the oral agreement pleaded by her will however continue.

The application stands disposed of.

CS(OS) No. 1445/2010

The matter be listed before the Joint Registrar for admission/denial of documents on 29th August, 2011 and, thereafter before the Court on 22nd December, 2011 for framing of issues.