

# Shri Noor Hassan vs Shri Ashok Kumar Passi on 13 April, 2021

**Author: V. Kameswar Rao**

**Bench: V. Kameswar Rao**

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\* IN THE HIGH COURT OF DELHI AT NEW DELHI  
+ RFA 216/2021, CM No. 13312/2021  
SHRI NOOR HASSAN

..... Appellant

Through: Mr. Rabindra Kanth, Adv.

versus

SHRI ASHOK KUMAR PASSI

..... Respondent

Through: Mr. N.K. Aggarwal, Adv.

CORAM:  
HON'BLE MR. JUSTICE V. KAMESWAR RAO  
ORDER

% 13.04.2021 This matter is being heard through Video-Conferencing.

1. The challenge in this appeal, is to an order dated February 03, 2021 whereby the Trial Court decided the respondent's application under Order VIII Rule 10 read with Section 151 CPC by allowing the same holding that the respondent / plaintiff is entitled to decree of possession of the suit property.

2. The facts as noted are, that the respondent / plaintiff filed a suit for recovery of possession, arrears of rent, water and electricity charges, mesne profits / damages/declaration stating that defendant was inducted as tenant in the ground and first floor portion of the property at the rate of Rs.13,000/- per month apart from the electricity and water charges of Rs.12,000/- i.e. Rs.25,000/- per month. It was the case of the respondent / plaintiff that the appellant / defendant being in arrears of rent and also defaulter in payment of electricity and water charges, the tenancy of the appellant / defendant was terminated vide legal notice dated February 20, 2016 and he was called to vacate the property within 30 days.

3. It was the case of the respondent / plaintiff that the appellant / defendant had illegally trespassed into the basement portion of the property and is presently occupying the same without paying a single penny to the respondent / plaintiff.

4. Neither written statement to the plaint nor reply to the application, was filed by the appellant / defendant.

5. The submission on behalf of the appellant / defendant before the Trial Court was primarily that he has filed a suit being CS No.57307/2016 titled Noor Hasan v. Ashok Kumar Passi for specific performance of Agreement to Sell dated January 13, 2016 and in view of Section 10 of CPC, the parties being the same and the matter in issue is also directly and substantially same in both the suits, therefore the suit in question, where the impugned order has been passed, being a subsequent suit, need to be stayed.

6. The case of the respondent / plaintiff was that the appellant's suit for specific performance is based on Agreement to Sell, possession letter and receipt, which are forged and fabricated and an FIR has been registered against the appellant / defendant. Even otherwise, the documents like Agreement to Sell, possession letter and receipt even if executed by the plaintiff, the documents do not create right, title or interest in the suit property as the same are unregistered. Reliance was placed by the respondent / plaintiff on the judgment of Hari Gopal Manu v. B.S. Jha, 2016 SCC Online Del 985.

7. The Trial Court considered the issue whether on the basis of unregistered document, stay of the proceedings of the suit filed by the respondent herein, can be granted. The Trial Court relied upon the judgment of this Court in the case of M/s Jagdambey Builders Pvt. Ltd. v. J.S. Vohra, AIR 2016 Del 203 to hold that even if the appellant / defendant was to succeed in his suit for specific performance of the agreement to sell, till the execution of conveyance deed in pursuance to the decree, if any, in favour of appellant / defendant, he has no ground in law to save his possession of property.

8. It appears that the argument was also raised by the appellant / defendant that under Order VIII Rule 10 CPC, the respondent / plaintiff is not entitled to a judgment. The Trial Court after noting the fact that number of opportunities were granted to the appellant / defendant and relying upon the judgment of the Supreme Court in the case of Salem Advocate Bar Association, Tamil Nadu v. Union of India, AIR 2005 SC 3353 held that as the appellant / defendant has not filed the written statement, therefore the defence of the appellant / defendant need to be struck off and the respondent / plaintiff is entitled to the decree of possession of the suit property.

9. The submission of the learned counsel for the appellant / defendant is that even if the right of the appellant / defendant has been struck off, the appellant / defendant is entitled to right of cross examination of the respondent / plaintiff at least to the extent to show that the respondent / plaintiff is not entitled to the reliefs, as prayed for. In this regard, he has relied upon the judgment of the Supreme Court in the case of Modula India v. Kamakshya Singh Deo 1988 Law Suit Supreme Court 592. He also submits that the appellant / defendant being a purchaser of the suit property, pursuant thereto the consideration has been paid and possession granted to the appellant / defendant, the Trial Court could not have decreed the suit for possession. That apart, he reiterates the submission as taken before the Trial Court that the present suit being a subsequent suit, as the appellant / defendant had already filed a suit for specific performance, the suit could not have been decreed for possession.

10. On the other hand, Mr. N.K. Aggarwal, learned counsel for the respondent / plaintiff justifies the impugned order of the Trial Court by stating that despite getting many opportunities, written statement having not been filed by the appellant / defendant, the Trial Court was within its right to strike off the defence of the appellant/ defendant and decree the suit insofar as the prayer of possession in favour of the respondent herein. He states, the Trial Court has rightly relied upon the judgment of the Supreme Court in the case of Salem Advocate Bar Association, Tamil Nadu (supra).

11. That apart, it is his submission that the suit for recovery of possession, arrears of rent, water and electricity charges, mesne profit / damages/declaration could not have been stayed, though the appellant / defendant may have filed a suit for specific performance earlier to the filing of the suit by the respondent / plaintiff as the issue in question in both the suits is not identical. In this regard, he has relied upon the judgment of this Court in Sunil Kapoor v. Himmat Singh & Ors. CM(M) 1215/2007 decided on January 29, 2010. That apart, he stated that the plea of the learned counsel for the appellant / defendant that though the defence has been struck off, the appellant / defendant shall be entitled to cross examine the respondent / plaintiff to the extent to prove that the respondent / plaintiff is not entitled to the relief of recovery of possession is untenable as in the absence of the documents being registered on paying the appropriate stamp duty in terms of the amendments carried out in the year 2001, the documents would not be read in evidence and the cross examination even if allowed, would be of no avail and shall be an empty formality. He states, the judgment in M/s Jagdambey Builders Pvt. Ltd. (supra) of this Court was rightly relied upon by the Trial Court for granting the order of possession.

12. Having heard the learned counsel for the parties, insofar as the first submission is concerned that the Trial Court could not have granted the decree of possession, merely because the appellant / defendant has not filed a written statement is concerned, the same is not appealing. This I say so, in view of the judgment of the Supreme Court in the case of Balraj Taneja & Anr. v. Sunil Madan & Anr. (1999) 8 SCC 396 wherein the Supreme Court has held, if the written statement has not been filed by the defendant, it will be open to the Court to pronounce judgment against him or make such order in relation to the suit as it thinks fit. In other words, discretion is given to the Court to pass the judgment or to pass such order as it thinks fit.

13. I am conscious of the fact that the Supreme Court has also held where a written statement is not filed, the Court must be cautious in proceeding under Order VIII Rule 10 CPC and before passing a judgment, the Court must satisfy that judgment can be passed without the plaintiff requiring to prove any facts mentioned in the plaint.

14. In the case in hand, the appellant / defendant has primarily relied upon documents like Agreement to Sell, receipt and possession letter. The documents admittedly are not registered. The law on this aspect is very clear that an unregistered Agreement to Sell cannot be relied upon to seek the benefit of Section 53 A of the Transfer of Property Act, 1882. In other words, an unregistered document shall have no effect for the purpose of Section 53 A of the said Act. The Trial Court had rightly relied upon the judgment of this Court in the case of M/s Jagdambey Builders Pvt. Ltd. (supra) wherein, in paragraphs 17, 18, 19 and 20, the Court has held as under:-

"17. A mere agreement to sell of immovable property does not create any right in the property save the right to enforce the said agreement. Thus, even if the respondent/plaintiff is found to have agreed to sell the property let out to the appellant to the appellant, the appellant/defendant would not get any right to occupy that property as an agreement purchaser. This Court in *Jiwan Das Vs. Narain Das* AIR 1981 Delhi 291 has held that in fact no rights enure to the agreement purchaser, not even after the passing of a decree for specific performance and till conveyance in accordance with law and in pursuance thereto is executed. Thus in law, the appellant has no right to remain in occupation of the premises or retain possession of the premises merely because of the agreement to sell in his favour.

18. Section 53A of the Transfer of Property Act, 1882 codifies the doctrine of part performance. A purchaser of immovable property, who in pursuance to an agreement to sell in writing has been put into possession of the property, is entitled to so remain in possession. However, the writings relied upon by the appellant in this regard, even if were to be looked into (notwithstanding the contention of the counsel for the respondent that the same were not brought before the Trial Court), do not record the possession of the premises having been delivered to the appellant in pursuance to or in part performance of the agreement to sell. The writings do not even state that the appellant shall be entitled to continue in the premises free of rent as has been pleaded.

19. Even otherwise, the Stamp Act, 1899 and the Registration Act, 1908 as applicable to Delhi were amended w.e.f. 24th September, 2001. After the said amendment, an agreement to sell of immovable property, where-under the possession of the premises is delivered in part performance, can only be by a registered document bearing the prescribed stamp duty i.e. on 90% of the total agreed sale consideration. Section 49 of the Registration Act was also amended. A plea of part performance, in the absence of a registered document, cannot thus be taken. The appellant/defendant cannot thus in the absence of a registered agreement to sell, protect his possession in part performance of the agreement to sell or take such a plea.

20. What follows is that even if the appellant/defendant were to succeed in his suit for specific performance of agreement to sell, till the execution of a conveyance deed in pursuance to the decree, if any in favour of the appellant, the appellant has no ground in law to save his possession of the premises. The status of the appellant would continue to be as before i.e. of a tenant whose tenancy has been determined."

15. The aforesaid position is also reiterated by this Court in the case of *Sunil Kapoor (supra)* on which reliance is placed by Mr. Aggarwal, wherein the Court has held that the appellants / defendants do not have any right to remain in possession of the suit premises till they acquire a title in pursuance of the decree for specific performance. A Division Bench of this Court, on an identical issue, in the case of *Pawandeep Singh & Anr. v. Gurdeep Singh Viridi RFA(OS) 42/2018*, decided on August 02, 2019 has in paragraphs 19, 20 and 21 held as under:-

19. The law on this aspect is clear. An unregistered Agreement to Sell cannot be used as a shield under Section 53 A of the TPA since Section 17 (1-A) of the Registration Act, 1908 makes the documents containing a contract to transfer for consideration, any immovable property for the purpose of Section 53 A, compulsorily registrable. If such documents are not registered, they shall have no effect for the purposes of Section 53 A. For purposes of ready reference, Section 17 of the Registration Act, 1908 is reproduced below: -

17. Documents of which registration is compulsory.--(1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been examined on or after the date on which, Act XVI of 1864, or the Indian Registration Act, 1866 (20 of 1866), or the Indian Registration Act, 1871 (8 of 1871), or the Indian Registration Act, 1877 (3 of 1877), or this Act came or comes into force, namely--

- (a) instruments of gift of immovable property;
- (b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;
- (c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and
- (d) lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;
- (e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property:

Provided that the State Government may, by order published in the Official Gazette, exempt, from the operation of this sub-section any leases executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees.

(1-A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of Section 53-A of the Transfer of Property Act, 1882 (4 of 1882), shall be registered if they have been executed on or after the commencement of the Registration and Other Related Laws (Amendment) Act, 2001 and, if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said Section 53-A."

20. The remedy, if any, for the appellant no.1 would have been to sue for specific performance as Section 49 of the Registration Act, 1908 states that a suit for specific performance can be initiated on the basis of an unregistered Agreement to Sell. Section 49 reads as under:

"49. Effect of non-registration of documents required to be registered.--No document required by Section 17 or by any provision of the Transfer of Property Act, 1882 to be registered shall--

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882, 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 or as evidence of any collateral transaction not required to be effected by registered instrument."

21. The appellants herein do not have any right to remain in possession of the suit premises till they acquire a title in pursuance to a decree for specific performance. It was so held in Sunil Kapoor v. Himmat Singh ILR (2010) 11 Delhi 616. We may note that SLP (C) No.6010/2010 against the said judgment was dismissed by the Supreme Court on 12.03.2010."

16. So it follows that in the facts, the Trial court has rightly struck off the defence of the appellant / defendant on failure to file written statement and passed the decree of possession. In fact, even the right of limited cross examination would not have helped the case of the appellant as the factum of tenancy, duration of tenancy, rent payable, termination of the same, have not been disputed, so as to enable the appellant secure the possession.

17. Insofar as the plea that this suit being a subsequent suit as, earlier the appellant / defendant has filed a suit for specific performance which is pending, need to be stayed is concerned, the same is also not appealing. This Court in the case of Sunil Kapoor (supra), as relied upon by Mr. Aggarwal, has held as under:-

"16. Once that is found to be the position in law, the defence of the agreement to sell is not a legal defence available to the petitioner in the suit for ejectment. If that be so, there is no common question involved in the previously instituted suit for specific performance and the subsequently instituted suit for ejectment."

18. In other words, in the suit for possession, arrears of rent, water and electricity charges, mesne profits / damages/declaration is not an issue in question, which is identical to the issue in suit for

specific performance. The reliance placed by Mr Kanth on the judgement of the Supreme Court in Modula India (Supra) is concerned, the same is not applicable in the facts of this case and in view of my conclusion above.

19. In view of my above discussion, this Court is of the view that the Trial Court has rightly decreed the suit for possession. I may make it clear that the appellant / defendant has to prove its case for specific performance in suit being CS 57307/2016 titled Noor Hasan v. Ashok Kumar Passi filed by the appellant / defendant herein.

20. In view of the above, I do not see any merit in the appeal. The same is dismissed. No costs.

Dismissed as infructuous.

V. KAMESWAR RAO, J APRIL 13, 2021/ak