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

% **Date of decision: 31st May, 2016**

\+ **<u>RFA No.528/2004 & CM No.9903/2015 (of the respondent under Order 39 R-1&2 CPC)</u>**

SANGEETA CHAUHAN **..... Appellant**
Through: Mr. Sanjeev Narula, Mr. Ajay Kalra and Mr. Adrija Thakur, Advs.

versus

RUMALI DEVI **..... Respondent**
Through: Mr. Pawan Kr. Behl and Mr.Veeresh Kr. Sharma, Advs.

CORAM:-
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This first appeal under Section 96 of the Code of Civil Procedure (1908) impugns the judgment and decree dated 26th August, 2004 of the Court of Shri H.S. Sharma, Additional District Judge (ADJ), Delhi in Suit No.662/2001; a) of recovery of possession of the first floor (with mezzanine floor) of property no.C-217, Gali No.1, Majlis Park, Delhi; b) of recovery of *mesne* profits/damages for use and occupation at the rate of Rs.5,000/- per month w.e.f. 16th October, 2004 till the date of delivery of possession; and, c) of injunction restraining the appellant/defendant from creating any third party interest in the said portion of the property and from handing over possession thereof to any other person.

2. The appeal was filed as an indigent person and finding that the appellant has no immovable property and no source of livelihood except Rs.4,000/- per month which the appellant is getting as maintenance from her husband, was entertained and notice thereof issued and the operation of the impugned judgment and decree stayed. Considering that the appellant is the daughter-in-law of the respondent, attempts at settlement were made and the parties referred to mediation, but without any success. Ultimately on 13th May, 2008 the appeal was admitted for hearing and the interim order earlier granted made absolute. CM No.8488/2010 was filed by the appellant to bring on record subsequent events inter alia of demise of her husband on 22nd January, 2010 and the appellant/defendant during the illness of her husband preceding his death having set aside disputes and differences and having started living with him. In the said application, an understanding of the husband of the appellant/defendant with his parents, to buy the whole property was also pleaded.

3. Vide judgment/order dated 26th July, 2011 the appeal was dismissed with the clarification that the said dismissal will not come in the way of the daughters of the appellant asserting the right which according to the appellant they had in the property. Review Petition No.494/2011 preferred was on 9th September, 2011 dismissed as not pressed.

4. The appellant preferred SLP (C) No.35044/2011 to the Supreme Court against the order of dismissal of her appeal and which was granted and converted into Civil Appeal No.6602/2011 and vide order dated 21st July, 2014, the order dated 26th July, 2011 of dismissal of appeal was set aside only on the ground of not containing any discussion of facts or on the findings recorded by the Trial Court and this appeal restored for re-hearing and decision in accordance with law.

5. The appeal, on 2nd December, 2014 was dismissed in default of appearance of the appellant or her counsel but was vide order dated 11th August, 2015 restored to its original position.

6. CM No.9903/2015 was filed by the respondent to restrain the appellant from entering into the ground and second floors of the property aforesaid contending that though the respondent was earlier residing therein but owing to the disputes with the appellant had been forced to shift to another premises and taking advantage whereof the appellant was trying to enter into the ground and second floors of the property which were earlier in possession of the respondent. The said application also came up before the Court on 11th August, 2015 when the counsel for the appellant though admitted that it was not the

plea of the appellant in the written statement to the suit or in the appeal till then but the appellant as per understanding arrived at with her husband and with the respondent and her husband had been given the possession of the ground and second floors also. Needless to state that this was controverted by the counsel for the respondent. In this view of the controversy, the Station House Officer (SHO), Police Station-Adarsh Nagar was directed to visit/have visited the property to find out as to who was in occupation, possession and habitation of the ground and second floors of the property and if none was found in the possession and occupation thereof, to lock the said floors. The SHO in his Report dated 13th October, 2015 reported that the ground and second floors were locked but the appellant opened the locks thereof and the same were in a very bad condition and seemed to be not in use for a very long time. CM No.23635/2015 was filed by the appellant for amendment of the written statement and CM No.23632/2015 has been filed by Ms. Akansha and Ms. Shivanshi daughters of the appellant for impleadment in the appeal. The said applications came up before this Court on 16th October, 2015 when the following order was passed:

> 1. This appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree dated 26th August, 2004 of the Additional District Judge (ADJ), Delhi decreeing the suit filed by the respondent against the appellant for recovery of possession of the first and

mezzanine floors of property No.C-217, Gali No.1, Majlis Park, Delhi along with *mesne* profits.

2. The appeal was entertained and there is a stay not only of dispossession of the appellant in pursuance to the decree but also of the decree for payment of *mesne* profits.

3. After this appeal has remained pending in this Court since 2004, these applications have been filed. It is stated by the counsel for the appellant and applicants that the respondent / defendant, who is mother-in-law of the appellant, had during the pendency of the suit from which this appeal arises agreed to sell the entire aforesaid property i.e. including the ground and the second floors to the husband of the appellant, with the purchase being in the name of the appellant and her two daughters i.e. applicants herein, for a consideration of Rs.77,65,142/- and which entire money was paid by making Fixed Deposit Receipt (FDR) for the said amount, till then in the exclusive name of the husband of the appellant, into the joint name of the husband of the appellant and the husband of the respondent and in pursuance to which the possession of the remaining two floors i.e. ground and the second were also handed over by the respondent to the husband of the appellant and the father of the applicants.

4. The appellant and the applicants want to amend the written statement filed in the suit from which this appeal arises to take the said pleas and since the said pleas *inter alia* are of the purchase to be made besides in the name of the appellant also in the name of the applicants, to implead the applicants as appellants to this appeal as well as the defendants to the suit from which this appeal arises.

5. It is also disclosed that the appellant and the applicants have already filed a suit for specific performance being CS(OS) No.3089/2015, which is pending consideration in this Court.

6. The counsel for the appellant and applicants has argued that it is a settled principle of law that amendment of pleadings in the suit can be allowed in appeal also and the pleas sought to be taken being by way of subsequent events ought to be allowed to be taken by way of amendments. It is further argued that since the respondent is denying all the said pleas, after allowing these applications, the appeal be disposed of by remanding the matter to the Trial Court for adjudication of the said controversy.

7. On enquiry, it is told that the husband of the appellant died on 22nd January, 2010 and the FDR aforesaid was changed on 4th January, 2010.

It is further told on enquiry that the agreement aforesaid was arrived orally on 2nd December, 2009 and the possession was delivered on 3rd December, 2009.

8. The counsel for the appellant and applicants further states that after the death of the husband of the appellant, the money of the FDR aforesaid was transferred in the joint name of the husband of the respondent and the respondent.

9. On enquiry as to the date on which the Sale Deed was to be executed, it is stated that the time for execution of the Sale Deed on 2nd December, 2009 was agreed of five years. On further enquiry, whether there are separate electricity meters for the ground and second floors and who has been paying the bills thereof, since 2nd December, 2009, it is stated that there is only one electricity meter of the property supplying electricity to all the floors of the house. On enquiry, as to who has been paying the property tax of the property, after 2nd December, 2009, it is informed that the appellant or the applicants have not been paying the property tax. On enquiry, whether the appellant and / or the applicants have declared themselves as the owners or agreement purchasers of the said property before any authority, the answer is in the negative.

10. As far as the contention of the counsel for the appellant and applicants, that after allowing these applications, the appeal be remanded for adjudication of the factual matrix pursuant to the said amendment, it has been enquired from the counsel, how the said factual matrix can be the subject matter of the suit for specific performance admittedly filed before filing of these applications as well as the subject matter of decision in these proceedings, post these applications.

11. The counsel for the appellant and applicants states that since grant of the relief of specific performance is a discretionary relief, the appellant and applicants may or may not be granted the relief of specific performance in the suit but if they succeed in proving the pleas sought to be taken by way of amendment, they would have a defense to the subject suit for possession.

12. Though the counsel has made the aforesaid contention but is himself unable to support the same.

> 13. There cannot possibly be a denial of the relief of specific performance but an order allowing the appellant and the applicants to continue in possession, without being entitled to specific performance. The only exception thereto is in Section 53A of the Transfer of Property Act, 1881 but the benefit thereunder of the doctrine of part performance is also not available in the present case inasmuch as the alleged agreement to sell is not in writing as is mandatorily required thereunder. Moreover, with effect from September, 2002, the benefit of part performance is available only when the agreement to sell is registered. Attention of the counsel in this regard is drawn to ***Cement Corporation of India Ltd. Vs. Life Insurance Corporation of India Ltd.*** 2014 Indlaw Del 2550 (DB) and ***Ravinder Nath Sahni Vs. Poddar Construction Company Pvt. Ltd.*** 2014 (211) DLT 561 where it has been unequivocally held that pendency of a claim for specific performance of an agreement to sell is not a defense to a claim for possession on the basis of title. The appellant and the applicants by pleading an agreement to sell by the respondent, have in fact admitted to the title of the respondent."

7. The counsels were heard on 5th November, 2015 and judgment reserved. After the judgment was reserved, Mr. Jaspreet Singh Rai, Advocate mentioned the matter on 16th November, 2015 and handed over an application on behalf of Ms. Akansha and Ms. Shivanshi daughters of the appellant/defendant informing that the respondent/plaintiff died on 9th November, 2015 and seeking substitution in her place along with another son, daughter and husband of the respondent. The trial court record requisitioned has been perused.

8. The respondent, on 11th September, 2001 instituted the suit for recovery of possession and *mesne* profits and injunction from which this appeal arises pleading (i) that she was the lawful owner in possession of the property no.C-

217, Gali No.1, Majlis Park, Delhi comprising of 2 ½ floors; (ii) that the elder son of the respondent namely Shri Anil Pratap Singh Chauhan married the appellant on 12th July, 1989 and the respondent permitted her son and the appellant, being her daughter-in-law to live with her on the first floor and mezzanine floor of the said property; (iii) that disputes and differences arose between the appellant and her husband resulting in police complaints being lodged and legal proceedings being initiated against each other; and (iv) that owing to the said disputes the respondent had been forced to change her residence from the ground and second floors of the property to the residence of her another son.

9. The appellant/defendant contested the suit pleading (i) that the said property was her matrimonial home; (ii) that the suit was not properly valued for Court Fees and jurisdiction; (iii) that the suit was filed in collusion with her estranged husband, to compel the appellant to agree to divorce; (iv) that her minor daughters Ms. Akansha and Ms. Shivanshi also had a right of residence in the said property; (v) that the appellant/defendant had been left destitute by her husband; (vi) denying that the respondent/plaintiff was the owner of the house and pleading that the first floor had been got constructed by her husband

just a few months before the marriage and thus the property was a joint family property.

10. Though the respondent/plaintiff also filed replication but need to refer thereto is not felt. On 4th March, 2002, the following issues were framed in the suit:-

> *"1. Whether the plaintiff is entitled for a decree of possession as prayed? OPP*
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> *2. Whether the plaintiff is entitled for recovery of damages amounting to Rs.65,000/- from 1.7.2000 to 31.3.2001? OPP*
>
> *3. Whether the plaintiff is entitled for permanent injunction as prayed? OPP*
>
> *4. Whether the suit has not been properly valued for the purposes of court fee and jurisdiction? OPD*
>
> *5. Whether the suit of the plaintiff is bad for misjoinder of the necessary parties? OPD*
>
> *6. Whether the suit of the plaintiff is maintainable in the present form? OPD*
>
> *7. Relief."*

The respondent/plaintiff examined her husband as her attorney and one other witness. The appellant/defendant besides herself examined four other witnesses.

11. The learned ADJ, in the impugned judgment;

(a) has decided Issue no.4 in favour of the respondent/plaintiff and against the appellant/defendant reasoning:-

(i) that the appellant/defendant on whom the onus of the issue rested had not proved that the value of the property for recovery of possession whereof the suit was filed was higher than what had been pleaded by the respondent/plaintiff;

(ii) on the contrary the respondent/plaintiff had proved the Sale Deed of purchase of the land *ad measuring* 100 sq. yds. underneath property;

(iii) that the appellant/defendant in the cross examination of the husband of the respondent/plaintiff had also not even suggested that the value of the property at the time of institution of the suit was as pleaded by her or beyond the pecuniary jurisdiction of the Court; and,

(b) has held that the challenge by the appellant/defendant to the Special Power of Attorney executed by the respondent/plaintiff in

favour of her husband on the ground of the signatures of the respondent/plaintiff thereon having not been made before the Notary Public who had attested the same, was without any merit.

(c) has decided Issue No.5 against the appellant/defendant and in favour of the respondent/plaintiff observing that since the minor daughters of the appellant/defendant were admittedly residing with their father as per the orders in another proceedings and the appellant/defendant had only been granted permission to meet them on two days in a week, they were not a necessary party to the suit and the suit was not bad for their mis-joinder;

(d) has held that the ownership of the respondent/plaintiff of the property stood proved from the Sale Deed of the land underneath the property in her favour;

(e) has held that the appellant/defendant was not claiming ownership of the property but was claiming only the right to occupy the property being the daughter-in-law of the respondent/plaintiff;

(f) has held that the appellant/defendant could not claim any right in the property independently of her husband;

(g) has held that it was for the husband of the appellant/defendant to state that the first floor had been constructed by him from his own funds and claim ownership thereof and which he had not done;

(h) has held that the claim of the appellant/defendant for a matrimonial home could be only against her husband;

(i) has held that if the husband of the appellant/defendant is not claiming any right to possession the property, the question of the appellant/defendant claiming any such right did not arise;

(j) has held that the appellant/defendant was not claiming that the portion in her occupation had been constructed by her;

(k) held that merely because the documents proved by the appellant/defendant indicated that the portion of the first floor had been constructed sometime in 1985 or 1986 and not in 1972-73 as claimed by the respondent/plaintiff did not mean that the respondent/plaintiff was not entitled to the relief claimed in the suit;

(l) has found that in fact the claim of the appellant/defendant was that the first floor had been constructed in 1988-89;

(m) held that the claim of the appellant/defendant that at one time her husband had claimed to be the owner of the property was devoid of any merit;

(n) has found that in the suit for permanent injunction earlier filed by the appellant/defendant to protect her possession, the respondent/plaintiff had merely given a statement not to forcibly dispossess the appellant/defendant and the same did not prevent the respondent/plaintiff from filing the suit for recovery of possession;

(o) has accordingly decided Issues no.1&6 against the appellant/defendant and in favour of the respondent/plaintiff; and,

(p) has however under Issue no.2 not awarded arrears of *mesne* profits/damages for use and occupation claimed but awarded future *mesne* profits/damages for use and occupation at the rate of Rs.5,000/- per month if the appellant/defendant failed to vacate the property on or before 15th October, 2004.

12. The counsel for the appellant/defendant during the hearing on 15th November, 2015 fairly stated that he was not challenging the findings of the learned ADJ on Issue no.4 with respect to the valuation of the suit for the purposes of Court Fee and jurisdiction and that in view of the earlier order dated 16th October, 2015 (reproduced hereinabove) of dismissal of application filed by the appellant/defendant for amendment of the written statement and the application filed by the daughters of the appellant/defendant for impleadment he was not challenging the findings of the learned ADJ on Issue no.5 with respect to the mis-joinder of necessary parties. The arguments thus confined to the findings of the learned ADJ in the impugned judgment on Issues no.1&6 supra in the suit.

13. It was the contention of the counsel for the appellant/defendant (i) that the respondent/plaintiff did not depose herself in the suit; (ii) that under Section 60 (b) of the Indian Easement Act, 1882, a licence cannot be revoked by the grantor if the licencee, acting upon the licence, has executed a work of permanent character and incurred expenses in the execution; and (iii) that the licence granted by the respondent/plaintiff to her son i.e. the husband of the appellant/defendant to construct the first and mezzanine floors of the property is thus irrevocable. Attention in this regard was invited to the evidence of DW-

5 Upper Division Clerk (UDC) from the office of Municipal Corporation of Delhi (MCD) who proved the office orders dated 27th October, 1986 and 29th August, 1986 of the MCD and to the document proved as Ex.DW-4/1, 4/2 and 4/3 to contend that they establish that the first floor and mezzanine floor was not constructed by the respondent/plaintiff in the year 1972-73 as claimed by her but subsequently and it was argued that the husband of the appellant/defendant having constructed the first floor and mezzanine floor, it is the matrimonial home of the appellant/defendant.

14. Per contra, the counsel for the respondent/plaintiff argued (i) that in the earlier application filed by the appellant/defendant in this Court for taking subsequent events on record there was no plea of any agreement to sell in favour of the husband of the appellant/defendant or in favour of the appellant/defendant and her daughters; that on the date of which the Agreement to Sell is alleged, cross examination of witnesses was recorded in the divorce proceedings and which continued between the appellant/defendant and her husband till the death of the husband of the appellant/defendant; (ii) that the criminal proceedings between the appellant/defendant and her husband also continued till the death of the husband of the appellant/defendant and the husband of the respondent/plaintiff was acquitted therein on 13th October, 2015;

(iii) that as per the valuation reports filed, the construction of the property was partly in the year 1972-73 and remaining in the year 1980-81; (iv) that even in the SLP aforesaid earlier filed by the appellant/defendant there was no mention of the Agreement to Sell; and, (v) that the appellant/defendant continued to claim maintenance even after the date of the alleged Agreement to Sell.

15. I have carefully perused the pleadings, issues and the evidence recorded, on the trial court record and am unable to find any merit in the only argument urged before me, of the husband of the appellant/defendant having an irrevocable licence in terms of Section 60(b) supra under the respondent/plaintiff with respect to the first floor and mezzanine floor of the property to which the suit and this appeal pertain and the appellant/defendant thus having a right to continue in possession thereof. I may in this regard notice (i) that though the appellant/defendant in the written statement denied ownership of the respondent/plaintiff of the property but in CM No.23635/2015 for amendment of the written statement pleaded "the appellant's husband (late Shri Anil Pratap Singh Chauhan) agreed to purchase the entire suit property being property bearing no. C-217, Gali No.1, Majlis Park, Delhi (comprising of ground floor, first floor, mezzanine floor and second floor) from defendant no.1, in the name of the appellant and her daughters for a total sale

consideration of Rs.77,65,142"; (ii) that in the written statement filed it was not the plea of the appellant/defendant that the respondent/plaintiff had granted licence to her son i.e. the husband of the appellant/defendant with respect to terrace above the ground floor of the property or that her husband, acting upon the licence granted by the respondent/plaintiff, had executed a work of permanent character and incurred expenses in the execution i.e. construction of the first floor and the mezzanine floor; rather, the plea was "in fact, first floor of property no.C-217, Gali No.1, Majlis Park, Delhi, which is the property in dispute was got constructed by Shri Anil Pratap Singh Chauhan husband of the appellant/defendant just a few months before his marriage with the defendant. The house no. C-217, Gali No.8, Majlis Park, Delhi is a joint family property and the plaintiff is not the exclusive owner"; (iii) thus the appellant/defendant in the written statement was not claiming any licence lest an irrevocable licence with respect to the portion of the property qua which the suit was filed but was denying the ownership of the respondent/plaintiff of the entire property and was claiming the entire property to be a joint family property; (iv) no issue also on the argument now urged by the counsel with his own ingenuity was raised and the argument is thus *de hors* any foundation in pleadings or evidence; (v) that in the cross examination of the husband and attorney of the

respondent/plaintiff also, the suggestion given was that the daughters of the appellant/defendant also had an interest in the property being members of joint Hindu family and that the first floor was built by the husband of the appellant/defendant with his own funds and not that it was so constructed in accordance with any licence granted by the respondent/plaintiff; (vi) that the appellant/defendant in her own affidavit by way of evidence also merely deposed that she was living in the house as a daughter-in-law, the said house being her matrimonial home and that the first floor was built by her husband by his own funds and the property was thus a joint family property and not that the respondent/plaintiff had granted any licence to the husband of the appellant/defendant with respect to the first floor or that the husband of the appellant/defendant in accordance with the said licence had carried out construction of permanent nature over the property; (vii) even if it were to be believed that the expenses of construction of the first floor were borne by the husband of the appellant/defendant (though not proved), the said fact would not *ipso facto* invoke Section 60(b) supra particularly on account of the relationship of the mother and son between the respondent/plaintiff and the husband of the appellant/defendant; (viii) the appellant/defendant in her cross examination stated that she did not know as to who got the ground floor and the second floor

of the property constructed and, (ix) the appellant/defendant did not lead any evidence of the funds for construction of the first floor and mezzanine floor having flown from her husband.

16. The documents referred to by the counsel for the appellant/defendant during his arguments also are not indicative of the husband of the appellant/defendant having any role in the construction of the first floor and the mezzanine floor. The same relate to assessment of property for house tax and only show that the building plan originally got sanctioned for construction of the subject property was with respect to ground floor and half constructed first floor only and till the year 1983-84 there were only two rooms on the first floor and construction of upto two and a half floor was permitted vide general orders dated 29th August, 1986 and 27th October, 1986 Ex DW5/P-1 and DW5/P-2 only. The learned ADJ is correct in holding that merely because the remaining construction on first floor was done on a date subsequent to the date of construction of ground floor and half first floor did not mean that the same was got constructed by husband of the appellant/defendant. It is not the case of appellant/defendant that second floor was constructed subsequent to remaining construction on the first floor. However no rights with respect to second floor are claimed. In the ordinary course of human behaviour, the construction on

second floor would be done simultaneously with construction of unconstructed portion of second floor. Moreover, from the evidence of appellant/defendant herself it stands established that two rooms of the first floor were constructed from the time of construction of ground floor which the appellant/defendant does not dispute was constructed in 1972-73 by the respondent/plaintiff. This alone, in my view, falsifies the claim of irrevocable licence of entire first floor.

17. Supreme Court, in ***Ram Sarup Gupta Vs. Bishun Narain Inter College*** (1987) 2 SCC 555 noticed judgments holding that a) three conditions are required to be fulfilled under Section 60(b) supra to prove that the licence is irrevocable and those are i) that the licencee executed work of a permanent character; ii) that he did so acting upon the licence; iii) that he incurred expenses in doing so; and, b) that the onus of proving these facts is upon the licencee and in the absence of any evidence on these, the question of licence being irrevocable does not arise. It thus follows that a licencee is not entitled to prove irrevocability merely because has carried out work of permanent character/nature by incurring expenses and has to also show that he has done so pursuant to a right granted to do so.

18. The appellant/defendant fails on all the aforesaid counts. There is thus no merit in the said argument.

19. The argument of the counsel for the appellant/defendant, of the husband of the respondent/plaintiff who appeared as a witness on behalf of the respondent/plaintiff having no authority to do so, is also without any merit when tested on the law laid down in ***Janki Vashdeo Bhojwani Vs. IndusInd Bank Ltd*** (2005) 2 SCC 217 and ***A.C. Narayanan Vs. State of Maharashtra*** (2014) 11 SCC 790. The husband of the respondent/plaintiff is fully in the know of the facts of the case and is competent to depose about the facts in dispute on his own behalf and his evidence cannot be rejected even if the Power of Attorney in his favour is not proved. It is only if the facts of the case are such which the party to the litigation himself/herself only could have deposed of, can the evidence of the attorney be rejected. In the present case the facts were such which the husband of the respondent/plaintiff, who is the father-in-law of the appellant/defendant was competent to depose on his own behalf.

20. No other argument has been urged.

21. There is thus no merit in the appeal the same is dismissed.

22. In the aforesaid facts and the respondent/plaintiff having died after the arguments were heard and judgment reserved, need to formally deal with the application handed over as aforesaid for substitution of LRs of respondent/plaintiff is not felt.

23. However taking a compassionate view of the matter it is directed that if the appellant/defendant vacates the property within three months, she will be relieved from decree insofar as of recovery of *mesne* profit from her. However if the appellant/defendant does not so vacate the premises, the respondent/plaintiff shall be entitled to execute the decree in entirety.

24. Though it was the contention of the counsel for the respondent/plaintiff that this Court should also pass a decree for recovery of possession of the ground floor and the second floor unauthorisedly occupied by the appellant/defendant during the pendency of this appeal and though their contention appears to be *prima facie* correct but it is not deemed appropriate to grant the said relief in this appeal.

No costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

May 31, 2016
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