

(2007) 11 AHC CK 0115

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 14259 of 1996

Abdul Salam Qureshi @ Islam (Dead) Through L.Rs APPELLANT

Vs

VIIIth Additional District and Sessions Judge, Meerut and others RESPONDENT

Date of Decision : 26-11-2007

Acts Referred:

Citation : (2007) 11 AHC CK 0115

Hon'ble Judges : S.U.Khan, J

Final Decision : Allowed

Judgement

S.U. Khan, J.—Question of interpretation of a deed termed as Thekenama dated 17.10.1970 executed in between petitioner and ownerrespondent No. 3 Jagdish Prasad Gupta is involved in this writ petition.

2. Jagdish Prasad Gupta since deceased and survived by legal representatives was/is owner of a double storied house. Since before 17.10.1970 petitioner was tenant of the first floor accommodation and the ground floor accommodation was in occupation of two other tenants Pooran and Yasin. On 17.10.1970 two deeds were executed in between the parties (Jagdish Prasad Gupta and Abdul Salam Qureshi). One was for agreement for sale of the entire double storied building executed by Jagdish Prasad Gupta in favour of Abdul Salam Qureshi; the other was a deed termed as Thekenama. According to the agreement for sale, Jagdish Prasad Gupta had agreed to sell the entire property to Abdul Salam Qureshi for a consideration of Rs. 31,000 and half of the agreed sale consideration i.e. Rs. 15,500 had been paid as earnest money by Abdul Salam Qureshi to Jagdish Prasad Gupta and sale deed was to be executed within a year after payment of balance sale consideration. It was also provided in the agreement that in case after execution of agreement for sale and before execution of sale deed Abdul Salam Kuresi paid some amount towards part of the remaining sale consideration (in addition to Rs. 15,500 paid as earnest money at the time of execution of the agreement for sale) then Jagdish Prasad Gupta would be liable to pay 1.5% per

month interest on the said additional amount till execution of the sale deed.

3. Copy of the Thekenama is Annexure4 to the writ petition. According to the said deed Abdul Salam Qureshi took the entire property on Theka from Jagdish Prasad Gupta at the rate of Rs. 232.50 per month for one year on the conditions mentioned in the said deed. It was further stated in the deed that white washing, painting, repair and payment of tax and all sort of maintenance, present and future would be the responsibility of Thekedar i.e. Abdul Salam Qureshi and Jagdish Prasad Gupta would not be responsible for the same at any time on any condition (para 4). Condition No.5 of the Thekanama is important according to which during the continuance of the said deed Abdul Salam Qureshi would be entitled either to use the property by himself, to receive rent from the existing tenants, to evict them, to induct new tenants, to increase the rent etc. and to manage the property, however, in case the said deed was cancelled, all these rights would revert back to Jagdish Prasad Gupta and in that eventuality in case Jagdish Prasad Gupta received less than the Theka amount (i.e. Rs. 232.50 per month) then the said deficiency would be recoverable from Abdul Salam Qureshi. Clause7 provides for renewal of the period for Thekenama. In para 2 of the said deed it is stated that Abdul Salam Qureshi has obtained possession of the property under Theka from Jagdish Prasad Gupta. In clause 3 of the said Thekenama it was provided that Jagdish Prasad Gupta would be entitled to get the Thekenama cancelled through Competent Court and to evict Abdul Salam Qureshi, thereafter.

4. Respondent No. 3 Jagdish Prasad Gupta instituted SCC suit No. 47 of 1990 against petitioner giving rise to the instant writ petition. The suit was filed before JSCC, Meerut. In the plaint reference was made to Thekenama dated 17.10.1970 and it was stated that since 17.2.1980 the Theka amount (i.e. Rs. 232.50 per month) was not paid by the defendant to the plaintiff. The relief claimed was that actual possession should be delivered to the plaintiff over first floor and formal possession of the ground floor. Arrears of Theka amount (which was termed as rent in the plaint) was also claimed in the plaint.

5. Additional JSCC, Meerut dismissed the suit through judgment and decree dated 10.9.1993. The Trial Court held that through Thekenama possession was delivered by Jagdish Prasad Gupta to Abdul Salam Qureshi in part performance of agreement for sale of the same date and that the amount of Rs. 232.50 per month payable by Abdul Salam Qureshi to Jagdish Prasad Gupta was nothing but interest at the rate of 1.5% per month on balance sale consideration of Rs. 15,500. Trial Court placed reliance upon an authority of this Court in Surendra Kumar Sharma v. 1st Additional District Judge, Meerut and others. 1984 ARC 183. Trial Court ultimately held that there was no relationship of landlord and tenant in between the parties.

6. Against the judgment and decree dated 10.9.1993 original respondent No. 3 Jagdish Prasad filed SCC Revision No. 248 of 1993. VIII Additional District Judge, Meerut allowed the revision through judgment and order dated 29.3.1996, set

aside the judgment and decree passed by the Trial Court and decreed the suit for eviction and recovery of arrears of rent. The said judgment of the Revisional Court has been challenged through this writ petition.

7. Revisional Court held that the Thekenama dated 17.10.1970 was nothing but rent deed and amount of Rs. 232.50 payable every month under the said deed was nothing but rent hence petitioner was tenant of respondent No. 3.

8. During arguments it was inquired from learned Counsel for both the parties as to whether petitioner had filed any suit for specific performance of agreement for sale or not. Learned Counsel stated that such a suit was filed in the form of original suit No.235 of 1992 which was dismissed by Additional Civil Judge (SD), Court No. 8, Meerut on 6.2.2003, copy of the said judgment was also supplied. It was further stated that against said judgment appeal was pending.

9. In the suit giving rise to the instant writ petition it was pleaded by tenant that he had paid the balance sale consideration of Rs. 15,500 on 20.2.1980 however, no categorical finding in respect of this plea of defendant was recorded by the Trial Court. Revisional Court did not accept this plea.

10. The Supreme Court has dealt with the point in question in two authorities; one is in Arjun Lal Bhatt Mall Gothani v. Girish Chandra Dutt AIR 1973 SC 2256. and the other in R. Kanthimathi and others v. Mrs. Beatrice Xavier AIR 2003 SC 4149. In the latter authority the earlier authority has been considered and followed. Paragraphs 1, 6, 7 and 8 of the latter authority (R. Kanthimathi and others) are quoted below:

1. Heard learned Counsel for the parties. The question raised in this appeal is an interesting question and of some importance. The question is: "whether on the execution of agreement to sell, by the landlord with the tenant and landlord having received substantial portion of the sale consideration, the relationship of landlordtenant inter se between them ceases and fresh rights and obligations flows under this agreement?"

6. Any jural relationship between two persons could be created through agreement and similarly could be changed through agreement subject to the limitations under the law. Earlier when appellants were inducted into tenancy it only means both agreed that their relations is to be that of a landlord and tenant. Later when landlord decides to sell this property to the tenant and tenant agreed by entering into agreement they by their positive act changed their relationship as purchaser and seller. When sellerlandlord accepts sum he actually acts under this agreement. This acceptance preceded by agreement of sale changes their relationship. This is how they intended. Once accepting such a change then their relationship of landlord tenant ceases.

7. This Court in Arjunlal Bhatt Mall Gothani v. Girish Chandra Dutta (1973) 2 SCC 197 = AIR 1973 SC 2256. held as under:

The appellants were tenants in the premises of the respondentlandlord and three

suits, including an eviction suit, were pending against them. By an agreement between the appellants and the respondent, the respondent agreed to sell the whole property to the appellants for a certain sum to be paid to him by equal instalments. Clause 5 of the agreement provided that in case of default of any instalment, the agreement for sale would stand cancelled and if the purchasers failed to pay the defaulted instalments within one month's notice the payments made would stand forfeited and purchasers would make over possession of the property to the vendor.

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"Under Clause (5) of the agreement the question of giving notice arises only if the vendor wanted to forfeit the instalments paid by the purchaser. Not even one instalment having been paid the question of forfeiture does arise and no notice was necessary for cancelling agreement. It stood automatically cancelled. It was sought to be argued before us that once the agreement stood cancelled the appellants stood restored to their original position as tenants and the suit could not be filed without giving notice under the Transfer of Property Act. We are of opinion that when the agreement, dated June 7, 1959 was entered into the old relationship of landlord and tenant came to an end. The rights and liabilities of the parties have to be worked out on the basis of that agreement."

This decision clearly spells out that once there is agreement of sale between a landlord and a tenant, the old relationship as such comes to an end. It goes on to record that even after the cancellation of such agreement of sale the status of tenant is not restored as such. In other words, on the date of execution of the aforesaid agreement of sale their status as that of landlord and tenant changed into a new status as that of a purchaser and a seller.

8. Thus within this legal premises, the submission by learned Counsel for the respondent of revival of their old relationship of landlord and tenant when she repudiates this agreement by sending back to the tenant Rs. 20,000 through a cheque, (which according to the appellant was not encashed) cannot be accepted. So we have no hesitation to reject the same. Every conduct of the landlady right from the date of entering into agreement of sale, accepting money towards the sale consideration, delivering possession in lieu of such agreement all clearly indicates and has to be construed in law that she repudiated her old relationship of landlord and tenant. Thus after this parties enter into new cloak of seller and purchaser and their relationship to be governed under the said terms of the agreement. Every right and obligation thereafter would flow from it. Even if parties under the agreement of sale does not perform their obligations remedy may be availed in law as permissible under the law. Hence we have no hesitation to hold that Courts below including High Court committed error in holding that tenant committed wilful default. When appellant is no more tenant how can nonpayment be construed as wilful default.

11. Applying the principle of law laid down by the above authorities of the Supreme Court it is quite clear that after execution of Thekenama dated 17.10.1970 relationship of landlord and tenant in between the parties changed into that of prospective vendor and vendee. The following ingredients of the Thekenama also indicate towards that direction:

- (i) Deed was not termed as kirainama (rent deed) but as Thekenama. (ii)
- (ii) Liability of the tenant Abdul Salam Qureshi to pay the old rent came to an end
- (iii) Abdul Salam was required to pay 1.5% per month of unpaid sale consideration. Under the agreement for sale vendor was required to pay 1.5% per month interest on any payment made by the vendee towards the balance sale consideration. In case Abdul Salam had paid any such amount then his liability to pay 1.5% per month interest on the said amount under Thekenama would have stood adjusted against the liability of Jagdish Prasad to pay 1.5% per month interest to Abdul Salam on such payment.
- (iv) Abdul Salam was permitted to realise rent from the other tenant, to evict them and to induct new tenants, and to increase the rent. Increase in the rent was not related with the amount payable by the Abdul Salam to Jagdish Prasad.
- (v) All repairs etc. were to be done by Abdul Salam and taxes were also to be paid by him.
- (vi) Under clause 5 it was also provided that in case of cancellation of Thekenama Jagdish Prasad would start dealing directly with the property (including its tenants) and in such eventuality if Jagdish Prasad realised less than Rs. 232.50 per month as rent then the deficiency in the said amount would be recoverable by him from Abdul Salam.

12. The above terms and conditions clearly prove that not only nature of possession of Abdul Salam in respect of first floor portion which was already in his tenancy occupation changed but he was also delivered possession over the ground floor which was in tenancy occupation of two other tenants. The amount of Rs. 232.50 per month payable by Abdul Salam to Jagdish Prasad was nothing but 1.5% per month interest on unpaid sale consideration. By no stretch of imagination this amount can be termed as rent. The position becomes crystal clear by that portion of clause 5 of the Thekenama according to which if Jagdish Prasad, after cancellation of Thekenama, was able to recover less than that amount, then the balance could be recovered by him from Abdul Salam. This clearly proves that the aforesaid amount of Rs. 232.50 per month was neither rent nor related to the rent in any manner.

13. Accordingly, in my opinion in view of the aforesaid Supreme Court authorities Abdul Salam did not remain tenant of 1st floor after execution of the Thekenama and agreement for sale and nature of his possession changed from tenant to possessor in part performance of agreement for sale. In respect of ground floor which was in tenancy occupation of two other tenants possession was delivered

to Abdul Salam in part performance of agreement for sale.

14. Revisional Court has also mentioned that original Thekenama was filed but original agreement for sale was not filed. Agreement for sale was not denied by Jagdish Prasad. That agreement was not directly in issue in the suit. It was relevant only for interpretation of Thekenama of the same date hence filing of the original agreement was not necessary. Jagdish Prasad never disputed the fact that such an agreement had been executed by him.

15. The fact that suit for specific performance of agreement for sale has been dismissed by the Court below is not much relevant. Even after dismissal of the suit Abdul Salam does not become tenant. By maximum dismissal of suit may make way to Jagdish Prasad to seek cancellation of Thekenama and possession from regular Court. He can not seek eviction of Abdul Salam treating him as tenant from the Court of JSCC which can only try suit for eviction from immovable property in between landlord and tenant.

16. Some authorities have been cited for proposition that a person who is in possession in part performance of agreement for sale does not become owner of the property. However, those authorities are not relevant as Trial Court did not hold the petitioner to be owner. Further, by way of abundant precaution, it is made clear that neither the Trial Court's judgment nor this judgment shall be taken to hold that petitioner is entitled to continue in possession of the entire property in dispute. The only thing which has been held is that petitioner did not remain tenant after execution of Thekenama dated 17.10. 1970 hence suit for eviction against him treating him to be tenant before JSCC was not maintainable. Substituted legal representatives of Jagdish Prasad are at liberty to initiate appropriate legal proceedings before appropriate Court for eviction of the petitioner from the entire property. All other questions shall independently be decided in such proceedings if initiated except that after execution of Thekenama dated 17.10.1970 petitioner did not remain tenant.

17. Writ petition is therefore, allowed subject to the above observations. Judgment and order passed by the Revisional Court is set aside. Judgment and decree passed by the Trial Court is restored.