**IN THE HIGH COURT AT CALCUTTA**
**CIVIL APPELLATE JURISDICTION**
**APPELLATE SIDE**

PRESENT:

**THE HON'BLE JUSTICE SOUMEN SEN**
**&**
**THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE**

**F.A. 55 of 2017**

**Smt. Sashi Jain @ Shashi Jain**
**Vs.**
**Sandip Sarkar**

For the Appellant : Ms. Sabita Mukherjee Roy Chowdhury,

For the Respondent : Mr. Sourav Sen, Adv.

Hearing Concluded on : 18th January, 2022

Judgment on : 2nd March, 2022

**Soumen Sen J.:** The appeal is arising out of a judgment and decree dated January 31, 2017 passed by the learned Judge, 10th Bench, City Civil Court at Calcutta in a suit for recovery of possession and injunction being Title Suit No. 2917 of 2010. The learned Trial Court decreed the suit on contest and dismissed the counter claim filed by the defendant.

The defendant in the suit is the appellant herein.

Shorn of unnecessary details, the plaintiff/respondent is the landlord in respect of the suit premises. The defendant/appellant was a tenant under the plaintiff in respect of the second floor of the suit premises. Earlier to the present suit, the plaintiff/respondent filed a suit for eviction being Ejectment Suit No. 1386 of 2001 in the Small Causes Court at Calcutta for eviction of the defendant/appellant.

During the pendency of the suit the appellant expressed her willingness to purchase the second floor of the suit premises. On the basis of the said proposal the parties negotiated, and during such negotiation the plaintiff had agreed to sell the said floor for a consideration of Rs.13 lakhs and the appellant agreed to purchase the said flat at the said consideration. The parties thereafter executed an agreement for sale on 15th February, 2006 which contained the detailed terms and conditions for the sale. Under the said agreement it was agreed that the entire consideration amount of Rs.13 lakhs shall be paid in installments commencing from December, 2006 and ending with November, 2008. It was further agreed that a sum of Rs.5 lakhs shall be paid within March 2007 as a condition precedent. The purchaser/defendant/appellant also agreed to pay a sum of Rs.40,000/- at the time of execution of the agreement which she paid by an account payee cheque bearing no. 253304 dated December 11, 2006. Till the entire consideration money is paid and the sale agreement is registered, the tenant had agreed to pay *'occupancy charges'* at the rate of Rs. 2,000/- per month on and from January 2007 until payment of Rs.5 lakh and thereafter the *'occupancy charges'* would get reduced by Rs.150/- per lakh. The plaintiff/respondent received Rs.40,000/- by cheque as the first installment. Admittedly, the balance consideration money was not paid. The defendant/appellant had also failed to make the payment of Rs.5 lakh within March 2007 as agreed between the parties. In view of such breach the plaintiff/respondent rescinded the said agreement and sued the defendant/appellant for recovery of possession.

The defendant contested the suit and filed the written statement denying the allegations. The defendant alleged that the plaintiff mischievously had her water supply disconnected at the tenanted premises for which she had to incur an expenditure sum of Rs.13,500/- as water lifting charges from May 2010 to January 2011. She also denied and disputed that she had failed to make payment of the balance consideration money or failed to register the alleged deed of conveyance.

The learned trial judge, on consideration of the evidence, held that by reason of the agreement for sale entered into between the plaintiff and the defendant, the relationship of landlord and tenant came to an end, and the plaintiff was entitled to sue the defendant for recovery of possession upon establishing his right.

Ms. Sabita Mukherjee Roy Chowdhury, the Learned Counsel for the appellant has submitted that the Trial Judge had completely erred in arriving at a finding that by reason of the execution of the agreement for sale, the relationship of the plaintiff and defendant as landlord and tenant ceased to exist. It is submitted that the agreement was unregistered and never acted upon. Notwithstanding the agreement for sale, if at all such agreement can be looked into, it does not, in any event, alter the relationship. The agreement for sale would specifically show that the appellant would be required to pay *'occupancy charges'* for a certain period of time which militates against an agreement for sale. It is quite unusual and inconceivable that the purchaser would agree to *pay 'occupancy charges'* after entering into an agreement for sale. Moreover, there is no deed of relinquishment or surrender by the appellant in favour

of the respondent/landlord, whereby the tenant gave up her tenancy rights in the suit premises.

Ms. Sabita Mukherjee Roy Chowdhury has strenuously argued that the intention of the parties was to continue with the relationship of the landlord and tenant until the execution of the sale deed. The termination of the agreement does not, *ipso facto,* give right to the landlord to evict the tenant on the ground of surrender of tenancy.

It is, thus, submitted by the Learned Counsel that the judgment of the Trial Court suffers from inherent lack of understanding of law.

Curiously enough, the defendant/appellant although had filed a counter claim for reimbursement of water lifting charges, she did not pray for specific performance of the agreement for sale. She also could not justify non-payment of the balance consideration money. The execution of the agreement was never disputed.

In view of the agreement for sale a new relationship emerges and the parties have agreed to alter their position *vis a vis* the other. Moreover, the said agreement was acted upon partly when the appellant paid a sum of Rs.40,000/- on 11th December, 2006 as part consideration. The payment of *'occupancy charges'* cannot in any manner revive the relationship of landlord and tenant. The parties have in expressed terms agreed to be treated as purchaser and seller and not as landlord and tenant.

Mr. Sourav Sen, the learned Counsel for the plaintiff/respondent, submits that it is significant to note that the agreement for sale used the expression *'occupancy charge' as opposed to "rent"* thereby giving a clear

indication that the period for which the appellant would remain in possession she would pay occupancy charges.

It is submitted that if the argument of the other side is accepted then two relationships would be running concurrently namely, purchaser and tenant till the execution of the sale deed**,** which was never the intention of the parties nor such dual relationship is tenable in the eye of law. The plaintiff accepted the breach and sued the defendant for eviction.

Mr. Sourav Sen submits that the appellant has no intention to perform her obligation and by reason of the agreement for sale the rights and liabilities of the parties are to be worked out on the basis of that agreement and not on the basis of any earlier agreement or arrangement.

Mr. Sourav Sen submits that when the appellant was inducted as tenant it meant that both the parties agreed that their relationship was to be that of landlord and tenant**,** which position however altered later when the landlord decided to sell the suit property to the tenant. Appellant and the tenant agreed by entering into agreement and it was this positive act on the part of the parties that is relevant consideration to decide the relationship between the parties. The landlord having accepted the part consideration had thereby agreed to act in terms of the sale agreement. This is equally true for the appellant/tenant/purchaser who had tendered the amount in terms of the said agreement.

Mr. Sourav Sen, in this regard, has relied upon two decisions of the Hon'ble Supreme Court in ***Arjunlal Bhatt Mall Gothani & Ors., Vs. Girish Chandra Dutta & Ors.*** reported in **1973 (2) SCC 197** (paragraph

5) and in ***R. Kanthimathi and Ors., Vs. Beatrice Xavier*** reported in **(2000)9 SCC 339** (paragraph 6).

In reply Ms. Sabita Mukherjee Roy Chowdhury has submitted that the judgment in ***Arjunlal*** *(supra)* is distinguishable as in the agreement for sale which has clearly stated that if the purchaser failed to pay the defaulted installments the purchaser shall make over possession of the land and house shown in schedule to the vendor which is conspicuously absent in the present agreement.

We have heard the Learned Counsels for the parties and have carefully examined the pleadings, evidences and judgment under appeal. There cannot be any iota of doubt that the parties have consciously entered into the agreement for sale thereby altering their respective status. The agreement for sale was entered to at a point of time when the earlier suit for eviction was pending.

The agreement for sale was entered into during the pendency of the Ejectment Suit No.1386 of 2001 before the Small Causes Court. The agreement for sale was on 15th February, 2006. The said agreement for sale was marked as Exhibit without any objection from the defendant/appellant. The defendant/appellant did not deny the due execution of the said agreement.

Curiously the defendant/appellant did not file any suit for specific performance of the agreement for sale although she has alleged in her written statement that she did not commit breach of the terms of the agreement for sale. She did not make any counter-claim in her written statement seeking specific performance for the agreement of sale. One

would have expected that a person who is ready and willing to perform her obligation would make a specific pleading to that effect and claim appropriate reliefs in the suit. The denials are evasive and it seems that the defendant had misled the landlord in entering into an agreement for sale knowing fully well that she would not be able to perform her obligations. In the process the plaintiff lost many years and still could not recover the property. The evidence shows that the said agreement was acted upon and parties have altered their position on the basis of the said agreement. Once the agreement was entered into and acted upon the old relationship of landlord and tenant came to an end.

This would be obvious from the fact that in agreement for sale the word rent was omitted and the defendant was asked to pay *'occupancy charges'*.

Ms. Sabita Mukherjee Roy Chowdhury, the Learned Counsel for the appellant has laid much emphasis that the clause requiring the appellant to pay *'occupancy charges'* mentioned in the agreement for sale clearly indicates that tenancy would continue. If the parties really intended to be treated as buyer and seller then there should not have been any such provision for payment of any rent or occupancy chares till the entire purchase money is paid.

However, this argument is not acceptable as similar question came up for consideration in ***R. Kanthimathi*** (supra) where the Hon'ble Supreme Court had considered such payment made under the agreement and held that the acceptance of the said amount was in terms of the agreement and not *de hor*s the agreement.

In the instant case, the appellant was in possession of the suit property and the acceptance of Rs.40,000/- as earnest money by the landlord clearly shows that such acceptance was made in terms of the agreement for sale and all other payments received are in terms of the said agreement.

When the plaintiff/landlord accepted the sum he actually acted under the agreement for sale. This acceptance was preceded by agreement of sale, changing their relationship and this was what they had actually intended.

This has been clarified in Paragraph 8 of the ***R Kanthimathi*** (supra) which stated that:

> "*This decision clearly spells out that once there is agreement of sale between a land lord 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.*"

The parties who have acted in terms of the agreement for sale and altered their relationship consciously cannot now go back to their old relationship and seek relief in terms of such relationship. There is a clear and conscious act on the part of the appellant to surrender her right as a tenant to acquire a superior right of an owner of the second floor of the suit premises.

Whenever a certain relationship exists between two parties in respect of a subject-matter and a new relationship arises as regards the identical subject-matter the two sets of mutually contra relationships

cannot co-exist as being inconsistent and incompatible, that is to say, if the latter can come into effect only on termination of the earlier that would be deemed to have been terminated in order to enable the latter to operate. [See: ***Velu v Lekshmi & Ors.,*** reported in **AIR 1953 TRAVANCORE-COCHIN 584]**

In view of the above, we do not find any reason to interfere with the judgment and decree passed by the learned Judge 10th Bench, City Civil Court on 31st January, 2017.

The appeal stands dismissed.

However there shall be no order as to costs.

**(Soumen Sen, J.)**

I agree

**(Ajoy Kumar Mukherjee, J.)**