

(2016) 155 DRJ 57

DELHI HIGH COURT

Case No: W.P. (C) 4405/2015 & CM No. 2900/2016

Patricia Helen Atwal

APPELLANT

Vs

ING Vyasa Bank Ltd.
and Others

RESPONDENT

Date of Decision: Jan. 29, 2016

Acts Referred:

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 - Section 19#Registration Act, 1908 - Section 17(1A)#Transfer of Property Act, 1882 - Section 53A

Citation: (2016) 155 DRJ 57

Hon'ble Judges: Pradeep Nandrajog and Mukta Gupta, JJ.

Bench: Division Bench

Advocate: Sachin Dutta, Sr. Advocate instructed by M. Vidur Mohan and Kanu Priya, Advocates, for the Appellant; Vivek Sibal and Jitender Ratta, Advocates, for the Respondent

Final Decision: Disposed off

Judgement

Pradeep Nandrajog, J.

1. The respondent No. 1/bank had advanced a credit to M/s. Atwal and Associates, a partnership firm of which

Zorawar Singh Atwal and Premjit Singh Atwal were partners. The two have stood guarantees to pay the outstanding sum to the bank should the

firm default.

2. Premjit Singh Atwal is the husband of the petitioner.

3. The credit became sticky. The bank initiated recovery proceedings under Section 19 of the Recovery of Debts Due to Banks and Financial

Institutions Act, 1993. The same was registered as OA No. 81/2005. The bank sought attachment of the hypothecated vehicles by the partnership

firms and also two immovable properties, one of which was owned by the husband of the petitioner. The same is a villa bearing No.E.G.3/14,

Garden Estate, Gurgaon - 122002.

4. On October 31, 2005, the respondents in the claim petition filed by the bank were restrained from selling, transferring or alienating the

hypothecated machinery and also the two immovable properties stated in the application, one of which is the villa at Garden Estate.

5. Proceedings before the Debts Recovery Tribunal lingered on. The writ petitioner filed an application before the Debts Recovery Tribunal

seeking intervention and a vacation of the restrained order dated October 31, 2005. She claimed to have purchased the property from her

husband under an agreement to sell dated September 01, 2001. She claimed that on the same date a General Power of Attorney was executed in

her favour followed by a registered power of attorney dated August 20, 2002. She claimed that the entire sale consideration in sum of Rs. 15 lacs

had been paid by her to her husband on September 01, 2001. She further claimed that the Town and Country Planning Department, Haryana

delayed execution of the conveyance deed in her favour on one pretext or the other and ultimately executed the conveyance deed on May 16,

2011.

6. Registered as IA No. 698/2009, after notice was issued, vide order dated December 16, 2009 the application was dismissed in default. An

observation was made by the Debts Recovery Tribunal that considering the documents filed by the appellant were not registered the same were

ex-facie evidence of a sham transaction.

7. Appeal filed against the order dated December 16, 2009, registered as Appeal No. 131/2010, was dismissed by the Debts Recovery

Appellate Tribunal vide order dated March 25, 2010, noting that husband of the petitioner had given a personal guarantee to secure the amounts

advanced by the bank to the partnership firm. The Appellate Tribunal also commented upon the documents filed by the writ petitioner.

8. W.P.(C) No. 6484/2010 filed against the order dated March 25, 2010 passed by the Debts Recovery Appellate Tribunal was disposed of on

September 24, 2010, by a Division Bench of this Court noting that counsel for the petitioner stated that the petitioner was not correctly advised to

move IA No. 698/2009 because she was not a party to the proceedings before the Debts Recovery Tribunal. The property in question was not a

mortgaged property. Counsel for the petitioner stated before the Division Bench that if a recovery certificate was issued, the petitioner would have

had a right to file objections in accordance with law. Counsel submitted that there were observations made in the impugned order which could not

have been made. Counsel argued that the Debts Recovery Tribunal as also the Debts Recovery Appellate Tribunal overlooked that one General

Power of Attorney concerning the property was a registered document. It was noted that counsel for the petitioner sought leave to withdraw IA

No. 698/2009.

9. Noting the submissions the writ petition was disposed of in the following terms:-

We permit the petitioner to withdraw IA No. 698/2009 filed in OA No. 81/2005 and thus the observations made in the impugned orders of the

DRT dated 16.12.2009 and of the DRAT dated 25.03.2010 would not, prejudice the petitioner in any fresh proceedings.

10. The claim petition filed by the bank was decreed on February 07, 2011. OA No. 81/2005 filed by the bank was allowed. The bank filed for

execution and the Recovery Officer attached the villa bearing No.E.G.3/14, Garden Estate, Gurgaon-122002. The writ petitioner filed objections

to the attachment in which she claimed having purchased the property in question under an agreement to sell dated September 01, 2001 and she

relied upon the judgment of the Supreme Court reported as , (2012) 1 SCC 656 Suraj Lamp & Industries Pvt. Ltd. Vs. State of Haryana & Anr.

and highlighted that no doubt the Supreme Court held that sale of immovable property value whereof is more than Rs. 100/- can be effected only

by a sale deed and the Supreme Court frowned upon the rampant practice of sales under agreement to sell and a registered power of attorney

executed by the registered owner of the immovable property in favour of the buyer authorizing the buyer to deal with the property sold as owner

thereof, but the Supreme Court made its decision prospective. As per the petitioner her title documents being the agreement to sell and the power

of attorney were executed prior.

11. Vide order dated July 02, 2014 the Recovery Officer dismissed the objections holding that the property had been transferred after the

injunction order was passed, a reasoning which is ex-facie perverse for the reason, as noted above, the injunction order is dated October 31,

2005 and the claim of the petitioner was that she had purchased the property on September 01, 2001.

12. The petitioner marched right away to the Debts Recovery Tribunal to lay a challenge to the order dated July 02, 2014 passed by the Recovery

Officer.

13. Registered as Appeal No. 48/2014, vide order dated February 03, 2015 the appeal was dismissed.

14. Succinctly put, the reason given by the Debts Recovery Tribunal to dismiss the appeal is that whereas the agreement to sell is dated September

01, 2001, the power of attorney is dated August 28, 2002. It was also highlighted that the special power of attorney relied upon by the petitioner

was registered on August 20, 2002 with registration No. 1726 which was also the number to a general power of attorney relied upon by the

petitioner. The Debts Recovery Tribunal also noted that the power of attorney had been scribed on two stamp papers, one bought from one

vendor and the other from another vendor. It was held that these circumstances show that the documents were fake. The relationship between the

petitioner and the seller i.e. husband-wife forms the signature tune of the order dated February 03, 2015.

15. The petitioner marched forward and filed an appeal before the Debts Recovery Appellate Tribunal challenging the order dated February 03,

2015 passed by the Debts Recovery Tribunal, which has dismissed the appeal registered as Miscellaneous Appeal No. 51/2015 vide impugned

order dated March 31, 2015.

16. Regretfully, without noting the rival facts projected by the writ petitioner and the bank, reasons given by the Debts Recovery Appellate

Tribunal to dismiss the appeal are as under:-

The bank had filed response stating that husband of the appellant is CD No. 4. It is stated that the bank had filed the O.A. in the year 2005 for

recovery of the debt, which was allowed and the R.C. was issued. The appellant had filed an I.A. in the year 2009 praying for vacating the

restraint order passed by the Tribunal in 31.10.2005 in the O.A. against the property. This application was dismissed on 16.12.2009. Aggrieved

against the same, the appellant had filed an appeal, which was also dismissed in the year 2010. This order was challenged by filing a writ petition

before the Hon"ble Delhi High Court, but the said writ petition was got dismissed as withdrawn on the ground that the appellant would take

recourse to her remedy before the R.O. at appropriate time after issuance of R.C.

While considering the I.A. filed by the appellant during the pendency of the O.A., the Tribunal below had considered the documents relied upon by

the appellant which were unregistered agreement to sell and power of attorney etc. The finding by the Tribunal was that all these documents

showed the sale to be a sham transaction. The appeal against this order was dismissed by this Tribunal. It would therefore mean that this Tribunal

had deemingly confirmed this finding, which was challenged in writ petition which challenge was not pursued.

The Tribunal now has considered the conveyance deed in favour of the appellant which is dated 16.5.2011. This action apparently has been taken

by the appellant to get over the defect in her title and this she has done during the pendency of the proceedings before the Tribunal below.

The plea and the claim of the appellant is required to be appreciated in the background that this transaction is between wife and husband. The

Tribunal has rightly noticed this fact and observed that if this transaction had been between the CD and a third party, the genuineness thereof may

not have been subject of any doubt. Merely by pleading that there is irreconcilable difference between husband and wife, the appellant cannot

claim that she is the bona-fide purchaser of this property. The appellant seems to have entered into the transaction being fully aware of the

pendency of the proceeding against her husband which is quite evident from the fact that she had filled the application in the O.A. in 2009.

This thus is a case where appellant is seen making effort to perfect her title, which prima facie is meant to rescue her husband.

The plea that she wanted a permanent abode in India while claiming that she is a British passport holder would be a contradiction of sort. Another

contradiction would be when the appellant claims that she purchased this property as she wanted a permanent accommodation. Would one

purchase property from husband, when one is having strained relation with the husband. The appellant has purchased the property fully knowing

about the pendency of the case which her husband was forcing.

The conveyance deed has been executed by HUDA while restraint order passed by Tribunal was in operation, for which even show-cause notice

was also issued to the Town Planner, HUDA. The Town Planner had come forward to file his reply stating that the husband of the appellant had

submitted the application for transfer of the property on the basis of general power of attorney and the transfer was permitted only after final order

was passed. The doctrine of lis pendens would therefore directly stare at the appellant. Once there is an earlier finding that this is a sham

transaction, it will not change its colour merely because the appellant has been able to obtain a conveyance deed in her favour in the manner which

is not free from taint.

The counsel for the appellant has referred to judgment in the case of Suraj Lamp and Industries Private Limited Vs. State of Haryana & Anr., ,

(2012) 1 Supreme Court Cases 656. It may not be of much help. In this case, the Supreme Court has held that the immovable property can be

transferred/conveyed only by deed of conveyance (sale deed) duly stamped and registered as required by law and that the GPA sales or

SA/GPA/living will transfers neither convey and title nor do they amount to transfer of, or create interest in, immovable property except to the

limited extent of Section 53A of the Transfer of Property Act.

Section 53A has introduced in a limited form the doctrine of part performance. This Section is applicable when the defendant seeks to debar the

transferor for enforcing his rights against the transferee. This section was inserted principally for the protection of ignorant transferees to take

possession or spend money on improvements relying on documents which are ineffective as transfers. It cannot be a shield for sham transactions.

Reference is also made to the case Ram Kishan & Anr. Vs. Bijender Mann alias Vijender Mann & Ors., , (2013) 2 RCR 419 (DB), where the

Court has considered the effect of failure to register a contract which had to be compulsorily registered under Section 17(1A) of the Registration

Act, 1908. The Court has held that such a contract would only deprive the person in possession of any benefit conferred by Section 53A of the

Transfer of Property Act and non registration of such a contract would not prohibit the filing of a suit for specific performance based upon such an

agreement or the leading of such an unregistered agreement into evidence. The issue before the Court thus was right of a person to file suit for

specific performance based on unregistered contract/agreement to sell that contains a clause recording part performance of the contract by delivery

of possession and not the issue which arise in the present appeal.

17. We agree with the submission made by learned counsel for the petitioner that the first reason given by the Appellate Tribunal concerning

proceedings pursuant to IA No. 698/2009 filed by the writ petitioner before the Debts Recovery Tribunal when OA No. 81/2005 filed by the

bank was pending adjudication are perverse. It is apparent that the Debts Recovery Appellate Tribunal has not even bothered to note the decision

dated September 24, 2010 passed by a Division Bench of this Court disposing of W.P.(C) No. 6484/2010 filed by the petitioner. The petitioner

did not give up the pursuit against the order dated December 16, 2009 and the order dated March 25, 2010 passed by the Debts Recovery

Tribunal and the Debts Recovery Appellate Tribunal respectively. Vide order dated September 24, 2010 the Division Bench of this Court

permitted the petitioner to withdraw IA No. 698/2009 recording further that the observations made by the Debts Recovery Tribunal and the Debts

Recovery Appellate Tribunal in the orders dated December 16, 2009 and March 25, 2010 respectively would not prejudice the petitioner in any

further proceedings.

18. The Debts Recovery Appellate Tribunal has not considered the plea of the writ petitioner that she had paid full consideration for sale of the

property to her husband on September 01, 2001 and had an agreement to sell in her favour as also a General Power of Attorney dated September

01, 2010 and a registered special power of attorney dated August 20, 2002 and a registered general power of attorney dated August 20, 2002.

Her plea that the conveyance deed dated May 16, 2011 was to recognize and in furtherance of the sale (improperly so called) effected under the

said documents. Concerning the decision of the Supreme Court in Suraj Lamp's case (supra), the Debts Recovery Appellate Tribunal did not note

the specific direction by the Supreme Court that its decision was prospective and would not upset the past transactions of sale by executing

agreements to sell and registered power of attorneys. We also agree that the Debts Recovery Appellate Tribunal erred in applying Section 17(1A)

of the Registration Act, 1908 for the reason it was introduced in the statute book with effect from September 24, 2001 and as per the writ

petitioner the agreement to sell with possession in her favour was dated September 01, 2001. The Debts Recovery Appellate Tribunal also did not

take note of the correspondence between the writ petitioner and the Director of the Town and Country Planning Department of the State of

Haryana as per which much before when the restraint order was passed on October 31, 2005 by the Debts Recovery Tribunal she was in

communication with said Department concerning execution of a conveyance deed in her favour pursuant to the policy of the Department to

recognize and regularize sales under the agreements to sell and registered power of attorneys.

19. On the other hand, the facts projected by the bank to support its plea that the transaction was a sham have also not been noted by the Debts

Recovery Appellate Tribunal.

20. Succinctly stated they would be : (i) the agreement to sell dated September 01, 2001 records receipt of Rs. 15 lacs and a corresponding

receipt of even date evinces that Rs. 10 lacs was received by the husband of the writ petitioner in cash and Rs. 5 lacs by cheque. There was no

mention of the particulars of the cheque either in the agreement to sell or the receipt. (ii) Two receipts dated September 01, 2001 and December

28, 2001, the former showing receipt of Rs. 10 lacs in cash and the other in sum of Rs. 5 lacs in cash. (iii) The general power of attorney dated

September 01, 2001 was unregistered and could possibly be manipulated by purchasing stamp papers with a back date. (iv) The special power of

attorney dated August 20, 2002, though registered, showed its registration number to be 1726 and the purpose of use of the stamp paper was :

lease- rent deed up to one year. (v) The general power of attorney dated August 20, 2002 also showed it being registered at serial No. 1726,

thereby casting a serious doubt on the authenticity of the special power of attorney as also the general power of attorney. (vi) Two stamp papers

were used for the purposes of scribing and making good the stamp duty on the special power of attorney. One was sold by a stamp vendor at

Parliament Street New Delhi and the other by a stamp vendor at Tis Hazari.

21. Since the specialized Tribunals and the specialized Appellate Tribunals are the final authority on questions of fact, we are constrained to

remand the matter to the Debts Recovery Appellate Tribunal and therefore we do not venture into the analysis of the respective evidence led by

the parties. We would only add that it is the duty of the Debts Recovery Appellate Tribunal to note such facts which are presented by the parties in

support of their claim and deal with them. The orders passed by specialized Tribunal must show that the Presiding Officer has come to grips with

the rival versions and with reasons, in light of the evidence before it, reaches a conclusion.

22. Disposing of the writ petition setting aside the impugned order dated March 31, 2015 passed by the Debts Recovery Appellate Tribunal we

restore Miscellaneous Appeal No. 51/2015 in Appeal No. 48/2015 (Delhi-II) for decision afresh by the Debts Recovery Appellate Tribunal with

a direction that the Debts Recovery Appellate Tribunal would note all the relevant facts projected by the two sides and giving reasons as to why

the conclusion has been arrived at, would re-decide the appeal.

23. Prayer made in CM No. 2900/2016 is to summon the records of the Sub-Registrar Gurgaon to resolve the discrepancy concerning two

documents being registered vide same serial number. Since we are remanding the matter to the Debts Recovery Appellate Tribunal we do not

decide said application on merits and leave it to the writ petitioner to file an appropriate application before the Debts Recovery Appellate Tribunal

making same prayer, and if filed, the Debts Recovery Appellate Tribunal would decide the same as per law.

24. No costs.