

(2010) 08 DEL CK 0278

Delhi High Court

Case No: Regular Second Appeal No. 99 of 1986

Krishna Kumari

APPELLANT

Vs

Ram Singh (through LRs.) and
Swarn Kanta

RESPONDENT

Date of Decision: Aug. 20, 2010

Acts Referred:

- Contract Act, 1872 - Section 201
- North Western Provinces Tenancy Act, 1901 - Section 20(2)
- Transfer of Property Act, 1882 - Section 53(A)

Hon'ble Judges: Indermeet Kaur, J

Bench: Single Bench

Advocate: K. Bhardwaj and Ajay Sejwal, for the Appellant; Satish Sahai, for the Respondent

Final Decision: Allowed

Judgement

Indermeet Kaur, J.

This second appeal has impugned the judgment of the first appellate court dated 10.4.1986 whereby the judgment of the trial court dated 6.3.1984 was reversed; the finding of the trial court that Roshan Lal Vohra was not the duly authorized general power of attorney to file the suit was set aside. Appeal against that judgment was allowed.

2. Briefly stated the facts of the case are as follows:

(i) plaintiffs Ram Singh and Girwar Singh had filed a suit for possession against the defendants/appellants. The property in dispute was a plot of land measuring 2 bighas 17 biswas falling in khasra No. 275 situated in Village Chandrawal area, Shahdara, Delhi. plaintiffs claimed to be the owner of cultivatory possession and marusi rights in the said property. As per the averment in the plaint, vide general power of attorney dated 12.3.1975 (Ex.PW-1/1) the plaintiff Ram Singh and Girwar

Singh had given possession of this land to Roshan Lal Vohra who was authorized to cut the disputed land into plots for residential purposes and to sell the same to prospective purchasers. On 29/30.11.1979 defendants illegally took unauthorized possession of the aforesighted suit property which became known to the plaintiff on 1.12.1979. Police report was lodged. Defendants being in unauthorized possession of the suit property are liable to be evicted. Suit for possession with a decree for mandatory injunction that the defendants be directed to demolish the super-structure raised has been prayed for.

(ii) Defendants contested the suit. It was submitted that the power of attorney Ex.PW-1/1 dated 12.3.1975 had come to an end on the death of the co-plaintiff Girwar Singh who had died on 23.8.1975. Suit filed thereafter on this power of attorney was a nullity. Ex.PW-1/1 was void; it had transferred rights in the suit land which are not transferable in view of the bar of Section 20(2) of the Agra Tenancy Act (hereinafter referred to as "the said Act"). Further the plaintiffs have relinquished their share in favour of Durga Devi on 13.3.1975 as per the pleadings in a previous suit between the parties which was held to be a void transfer in terms of the judgment dated 3.8.1979 Ex.DX which has since attained a finality. Further defence was that the defendants are in possession of the suit property even as per the plaintiff since 29/30.11.1979 and are in legal possession in view of documents of transfer executed in their favour on 26.12.1979 by the owner Shiv Narain i.e. a power of attorney and an agreement to sell.

(iii) Trial judge had framed eight issues. After the scrutiny of the two witness who had been examined on behalf of the plaintiff and two witnesses who had deposed on behalf of the defendant, the trial judge had decided all the issues in favour of the plaintiffs except issue No. 3. It was held that the plaintiffs had marusi and possessory rights qua the property in dispute. Power of attorney Ex.PW-1/1 was however not a valid document; it had come to an end on the death of Girwar Singh on 23.8.1979, since it was a document executed jointly by both Ram Singh and Girwar Singh. The suit filed on the basis of this power of attorney was not maintainable as Roshan Lal Vohra did not have any authority to do so. This was held by the trial judge while disposing of issue No. 3. Suit was dismissed.

(iv) The first appellate court vide judgment dated 10.4.1986 had reversed the finding of the trial judge on issue No. 3. It was held that the death of Girwar Singh did not take away the validity of Ex.PW-1/1 i.e. power of attorney dated 12.3.1975 executed by Ram Singh and Girwar Singh in favour of Roshan Lal Vohra. The suit filed by Roshan Lal Vohra on the strength of this power of attorney executed by the surviving co-executant Ram Singh was maintainable. Appeal was allowed.

3. This is a second appeal. On 19.11.2007, following three substantial questions of law were formulated:

1. Whether the irrevocable power of attorney Ex.PW-1/1 dated March 12, 1975 is void and illegal?
2. Whether the general power of attorney Ex.PW-1/1 stood terminated on the death of co-tenant Shri Girwar Singh in the year 1975?
3. Whether the jurisdiction of the civil court is barred in view of the allegations that the occupancy tenant was illegally dispossessed?
4. On 9.8.2010, another additional substantial question of law has been formulated which reads as under:

What is the effect of the judgment Ex.D-X dated 3.8.1979 on the rights of the parties?

5. Learned Counsel for the appellant is not pressing any arguments qua question No. 3 i.e. on the jurisdiction of the civil court to entertain the suit. It is submitted that the findings of the two courts below on this question is not challenged. Attempt has been made by the Learned Counsel to bring to the notice of this Court that there was a close connected nexus between the plaintiffs Ram Singh and Girwar Singh on the one hand with Roshan Lal Vohra and Durga Devi to malafidely oust the legal possession of the appellants/defendants. Roshan Lal Vohra is the son-in-law of Durga Devi and the husband of Swarn Kanta who is respondent No. 4 in the present appeal. Smt. Swarn Kanta had been permitted to be impleaded in these proceedings pursuant to the order of this Court dated 18.11.2002.

6. It is submitted that the power of attorney Ex.PW-1/1 dated 12.3.1975 had terminated on the death of Girwar Singh who had died on 23.8.1979. The decree passed in this suit filed in the year 1980 based on a power of attorney where admittedly even the second executor of this power of attorney i.e. Ram Singh had not come into the witness box is a nullity. Further this power of attorney was executed by Ram Singh and Girwar Singh on 12.3.1975 in favour of Roshan Lal Vohra whereby possession of the suit land had been given to him permitting him to cut plots and sell the same. On the following day i.e. on 13.3.1975 Ram Singh and Girwar Singh had entered into an agreement to sell with Durga Devi, mother-in-law of Roshan Lal Vohra and possession of the same had also been parted in her favour on 13.3.1975. plaintiffs not being the owners of the suit land were not authorized to transfer the suit land; they themselves had cultivatory/marusi rights only. Section 20(2) of the said Act creates a statutory bar on such a transfer. The judgment dated 3.8.1979 Ex.DX also conclusively held that Ex.D1 which was an agreement to sell entered into between Ram Singh/Girwar Singh on 13.3.1975 with Durga Devi was a void document. These findings have since attained a finality and have not been challenged. Further in the year 2000, by concealing all the aforesaid facts Durga Devi had obtained an ex-parte decree in a suit for specific against Ram Singh and Girwar Singh (filed after 21 years of 13.3.1975) whereby a sale deed of the suit land had been executed in her favour. Swarn Kanta who has now got herself impleaded

in the present proceedings is no other person but the daughter of Durga Devi. The entire exercise is an active collusion between Roshan Lal Vohra/Durga Devi, Swarn Kanta all members of one family with Ram Singh and Girwar Singh who themselves have no legal title in the suit property. Attention has been drawn to the testimony of DW-2 Shiv Narain, the owner of the suit land. As per his deposition he had executed Ex.DW-2/1 and Ex.DW-2/2 in favour of the appellants. It is submitted that the findings rejecting these documents is an erroneous finding. Ram Singh and Girwar Singh were admittedly not the owners of the suit land as such they could not pass a better title than what they themselves possessed. In these circumstances, there is no question of Durga Devi and Swarn Kanta (her successor-in-interest and claiming through her) having any legal title to the suit property.

7. Reliance has also been placed upon Janki Vashdeo Bhojwani and Another Vs. Indusind Bank Ltd. and Others, to support a submission that a power of attorney holder cannot depose in place of the principal. In this case Ram Singh and Girwar Singh who were the executors of this power of attorney had never come into the witness box; testimony of Roshan Lal by himself was not sufficient to prove this document. The Learned Counsel for the appellants has also placed reliance upon a judgment reported in 1994 RLR (SC) 102 S.P. Chengalvaraya (D) v. Jaganath (D) to support a submission that if a party withholds vital document to deceive and cheat to secure an unfair gain or advantage, it amounts to fraud on the Court and the resultant judgment and decree obtained is a nullity. It is submitted that the decree for possession passed by the appellate judge is a nullity as vital facts as aforesaid had been concealed before the court; such a decree is void.

8. Arguments have been countered by Learned Counsel for the respondent. It is stated that the impugned judgment calls for no interference. This Court is sitting in second appeal and has to confine itself only to the substantial questions of law as formulated by it. Arguments propounded before this Court have gone far beyond the aforesaid propositions; fact findings even if wrong cannot be interfered with. It is only on substantial questions of law that this Court can interfere.

9. The first appellate court has in depth and detail examined the power of attorney. The proposition urged before this Court is that the power of attorney Ex.PW-1/1 had terminated on the death of co-tenant Girwar Singh in the year 1979.

10. The said power of attorney dated 12.3.1975 Ex.PW-1/1 reads as under:

This irrevocable General Power of Attorney is made at Delhi on this 12th day of March, 1975 by Ram Singh (2), Girwar Singh sons of Shri Sondhu residents of 75, Gali Jain Mandir, Shahdara, Delhi-32 hereinafter called the executants in favour of Roshan Lal Vohra son of Diwen Chand Vohra resident of 181, Ansari Road, Darya Ganj, Delhi, hereinafter called the General Attorney.

Whereas the executants are the owners of cultivatory possession and Marusi rights of a piece of land of an area of 2 bighas 17 biswas of Khasra No. 275 situated in the

area of village Chandrawli alias Shahdara, Delhi-32.

For performance of certain duties and formalities we do hereby nominate, constitute and appoint the said General Attorney to do the acts and things in our name and on our behalf.

To cut the piece of land into plots.

To make the construction on the said piece of land.

To apply for house tax to the proper authority.

To apply for water and electric connection to the property authority.

To apply for no objection certificate to the property authority.

To appoint the arbitrator for the said piece of land.

To give the above piece of land for Patta etc. and to give the said piece of land on rent and to collect the rent from the tenants and to deal with such tenants in all stages.

To sell the above said property, to receive earnest money, execute receipts and agreement with respect to the property.

To execute the sale deed or deeds, present them for registration before the Sub Registrar concerned, admit the execution, receive the consideration, deliver the possession and get them duly registered.

To sell, mortgage, gift the above said property and execute the deeds for the same and present them before the Sub Registrar concerned for registration.

To receive the compensation from the proper authorities, to receive the dues and outstanding relating to the above said property.

To file all kinds of applications, affidavits, petitions, suits, revisions, reviews, appeal and take all miscellaneous proceedings in the courts and the departments concerned, Civil and Criminal, Revenue, etc. for the original jurisdiction to the appellate jurisdiction with the matters relating to the above said properties.

To appoint further attorney or attorneys, vakils, barristers, with the matters relating to the above said property.

I do hereby ratify and confirm that the above acts, deeds and things done by the said attorney shall be binding on me in all respects.

In witness whereof the Executant has set his hands to this deed on the day, month and year above mentioned.

Witnesses:

1. Jugal Kishore Singh
s/o Sh. P.N. Sodhi
r/o 1/14, Krishan Nagar, Delhi.
2. Illegible.

sd/- Ram Singh

sd/- Girwar Singh

11. This document was jointly executed by Ram Singh and Girwar Singh in favour of Roshan Lal Vohra on 12.3.1975. Girwar Singh had expired on 23.8.1979. The present suit had been filed in the year 1980 on which date admittedly Girwar Singh was not alive. The impugned judgment had returned a finding that the death of Girwar Singh had not taken away the life of this document. The co-executant Ram Singh was still alive and the suit filed by him was maintainable. This issue has been discussed in detail while disposing of issue No. 2. The appellate court had relied upon a judgment of the Nagpur Bench reported as AIR 1937 314 (Nagpur) ; a judgment of the Calcutta Bench reported as Monindra Lal Chatterjee Vs. Hari Pada Ghose and Others, ; the judgment of the Punjab Bench reported as Gopal Singh v. Mehnge Singh 1968 (70) PLR 515 as also another judgment of the Full Bench of Punjab and Haryana reported as Ajmer Singh Vs. Shamsher Singh and Others, to draw a finding that a power of attorney executed by the surviving executant did not terminate on the death of the other; Ex.PW-1/1 dated 12.3.1975 was thus a valid and alive document. Relevant extract of this finding by the first appellate court is contained in para 11 and reads as under:

After perusing the said judgments and the facts of the present case and the relief claimed in particular by the respondent-plaintiff, I am of the considered opinion that even a co-tenant is competent to file a suit for possession against the trespassers, because it will not offend interest of the co-tenant even if he is not a party to that. The co-owner and co-tenant stands on equal footing, because the interest of both is the same as in the instant case Ram Singh and Girvar Singh the principals and were occupancy co-tenants in respect of the suit land. Any one of them could have sued the trespassers without impleading the other.

12. A power of attorney is based on the principle of agency. By virtue of such a document an authority is given by a formal instrument i.e. by the principal to his agent to act on his behalf. It may be a general or a special attorney with a limited or an unlimited authority. The revocation of an authority has been contemplated u/s 201 of the Indian Contract Act, 1872. It specifies that an agency is limited by the principal revoking his authority; or by either the principal or the agent dying. However, where the authority is given by one or more principals; it is a matter of a construction of the document itself whether on the death of one such principal, the power comes to an end or whether it is continued even thereafter. The intention of the parties to the contract, terms as contained therein and the surrounding circumstances are the deciding factors. Ex.PW-1/1 had been construed in the light of these observations and the Court below had rightly held that death of Girwar Singh did not affect the validity of Ex.PW-1/1; admittedly both Ram Singh and Girwar Singh

had a common and joint interest in the property in respect of which this power of attorney had been executed. The judgment reported in Janki Vashdeo Bojwani (supra) is inapplicable; contents of Ex.PW-1/1 are not under challenge; only contention is that on the death of one executant, the document dies.

13. The substantial question of law No. 2 is accordingly answered in the affirmative holding therein that the power of attorney Ex.PW-1/1 even on the death of Girwar Singh remained alive.

14. Substantial questions of law No. 1 and the additional question as formulated on 9.8.2010 are inter related; the effect of one upon the other would be relevant in coming to a finding on these substantial questions of law.

15. Admittedly, the plaintiffs Ram Singh and Girwar Singh were not the owners of the suit property. They had cultivatory/marusi rights only. Section 20(2) of the said Act reads as under:

20(2). The interest of an ex-proprietary tenant, an occupancy tenant, or a non-occupancy tenant, other than a thekedar, is, subject to the provisions of this Act, heritable, but is not transferable in execution of a decree of a Civil or Revenue Court or otherwise than by voluntary transfer between person in favour of whom as co-sharers in the tenancy such right originally arose, or who have been become by succession co-sharers therein.

16. Under this provision of law the cultivatory rights of an occupancy or a non-occupancy tenant cannot be transferred. Vide Ex.PW-1/1 Ram Singh and Girwar Singh had transferred their cultivatory/marusi rights in favour of Roshan Lal Vohra to cut plots and to sell the land.

17. Ex.DX the judgment dated 3.8.1979 of Sh. S.P. Chaudhary, ADJ was rendered in an appeal endorsing the judgment of the trial court dated 28.10.1977 in suit proceedings between Ram Singh and Shiv Narain. Shiv Narain was admittedly the owner of the suit property. He had filed a suit for injunction against Ram Singh and Girwar Singh restraining them from selling or transferring the suit property. This judgment had held that Ex.D-1 dated 13.3.1975 vide which the suit property rights had been transferred by Ram Singh and Girwar Singh to Durga Devi was a void document. The suit was decreed in favour of the owner Shiv Narain restraining Ram Singh and Girwar Singh from creating any third party interest in the suit property. This judgment dated 3.8.1979 has attained a finality; neither party filed any appeal against the said judgment.

18. As a necessary consequence what emerges is that both under the statute as also in terms of Ex.DX Ram Singh and Girwar Singh were restrained from creating any third party interest in the suit property. As such the transfer of possessory rights on 12.3.1975 to Roshan Lal Vohra was illegal and void. The transfer of the suit land to Durga Devi on 13.3.1975 was also void.

19. The plaintiff in para 4 of his plaint has stated that on 29/30.11.1979 defendants had illegally taken possession of the suit property. This is a pleading of the plaintiff himself. Defendants have relied upon Ex.DW-2/1 and Ex.DW-2/2 which are dated 26.12.1979 to establish his claim to the suit property; these are an agreement to sell and power of attorney executed by Shiv Narain, the owner of the suit property in favour of defendants agreeing to sell the disputed property to the defendants for a consideration of Rs. 3000. Contention of defendant is that he is adequately protected by the provisions of Section 53A of the Transfer of Property Act.

20. Section 53A of the Transfer of Property Act reads as follows:

This doctrine of part performance is available as a defence to the defendant to debar the transferor or any person claiming under him from enforcing against the transferee any right in respect of the disputed property.

21. DW-2 Shiv Narain had come into the witness box to substantiate that the aforesaid documents i.e. Ex.DW-2/1 and Ex.DW-2/2 had been executed by him in favour of the defendants. These documents had not been relied upon by the courts below only for the reason that they were not registered documents and in the absence of which they could transfer title in immovable property; documents had not been assailed on any other ground.

22. Admittedly, as per the case of the plaintiff himself defendants were in possession of the suit property on 29/30.11.1979. Ex.DW-2/1 and Ex.DW-2/2 give adequate protection to such a defendant who is already admittedly in physical possession of the suit property; by virtue of the aforesaid documents the possession of such a transferee stands protected.

23. In [Patel Natwarlal Rupji Vs. Shri Kondh Group Kheti Vishayak and another](#), it has been held as follows:

Though the doctrine of part performance embodied in Section 53A of the Act is part of equitable doctrine in English law, Section 53A gives statutory right which is available to the transferee for consideration in possession of the property under the contract. In terms of the section, so long as the transferee has done and is willing to perform his part of the contract or, in other words, is always ready to abide by the terms of the contract and has performed or is always ready and willing to perform his part of the contract, the transferee is entitled to avail of this statutory right to protect his possession as a shield but not as a sword. The right to retain possession of the property rests on the express provisions of the Act and on his compliance therewith. Section 53-A confers no title on the transferee but imposes a statutory bar on the transferor to seek possession of the immovable property from the transferee. Equally, Section 53-A does not confer any title on the defendant in possession nor can he maintain a suit on title. The benefit of Section 53-A can be availed of as a shield to retain possession.

24. Accordingly the substantial question of law No. 1 and the additional question are answered as follows:

(i) Power of attorney Ex.PW-1/1 dated 12.3.1975 is void and illegal; it could not have transferred possession or given right of sale of the suit property to Roshal Lal Vohra in view of the admitted statutory bar contained in Section 20(2) of the said Act.

(ii) Ex.DX dated 3.8.1979 had rejected Ex.D-1 in terms of which transfer of suit land by Ram Singh and Girwar Singh on 13.3.1975 in favour of Durga Devi was void.

25. In a judgment reported in [Shri Bhagwan Sharma Vs. Smt. Bani Ghosh](#), while considering the scope of the powers of the second appellate court, the Supreme Court had held that High Court must hear fully with reference to the entire evidence on record relevant to the issue in question; conclusion cannot be pre judged. In this context the Supreme Court had made the following observations which are relevant and are extracted herein below:

The High Court was certainly entitled to go into the question as to whether the findings of fact recorded by the first appellate court which was the final court of fact were vitiated in the eye of law on account of non-consideration of admissible evidence of vital nature.

26. Result of aforesated discussion is that the findings in the impugned judgment dated 10.4.1986 decreeing the suit of the plaintiff being vitiated are set aside. plaintiff Ram Singh could not seek possession from the defendant who was adequately protected u/s 53A of the Transfer of Property Act. Appeal is allowed.