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(2001) 04 DEL CK 0124

Delhi High Court

Case No: I.A. No. 10462 of 1999 in S. No. 548 of 1993

Pritpal Singh Kohli — APPELLANT

Vs

Surjit Kaur and Another — RESPONDENT

Date of Decision: April 23, 2001

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 10 Rule 2, Order 18 Rule 3, 151

Citation: (2001) 4 AD 16 : AIR 2001 Delhi 363 : (2001) 91 DLT 476 : (2001) 59 DRJ 401

Hon'ble Judges: A.K. Sikri, J

Bench: Single Bench

Advocate: Arun Mohan and Anil Kher, for the Appellant; G.L. Rawal, for the Respondent

Final Decision: Dismissed

Judgement

A.K. Sikri, J.

This order shall dispose of the application filed by the plaintiff under Order X Rule 2 with Section 15 of the Code of Civil Procedure. The suit is at the stage where evidence of the plaintiff is being recorded. Statement of PW-1 was recorded on 24th August, 1998 and that of PW-2 was recorded on 26th August, 1998. Thereafter the plaintiff produced himself as PW-3. His statement was partly recorded on 20th September, 1999. On 21st and 22nd September, 1999 further evidence was not recorded at the request of the plaintiff''s Counsel. Fresh dates of trial were fixed for 21st October and 1st November, 1999. Before that, present application was filed and the prayer made in the application is that before recording further evidence of the plaintiff, the defendant No. 1 be directed to appear in the Court for recording her statement and her defense regarding revocation or cancellation of the General Power of Attorney (Ex. PW-3/1). The reason for moving such an application at this stage is stated in the application which would be properly understood after the nature of the main suit and the defense raised by the defendant No. 1 in the written statement is appreciated.

2. The plaintiff has filed the suit praying for decree of declaration to the effect that he is the exclusive and absolute owner in possession of plot of land bearing M-289 measuring approximately 400 sq. yards situated at Greater Kailash-II, New Delhi. The main averments made in the suit are that the property in suit (M-289 GK-II) was purchased by the defendant No. 1 (Surjit Kaur) from DLF by registered sale deed dated 22nd January, 1974 (Ex. P-1). The defendant No. 1, Smt. Surjit Kaur appointed Shri Naveen Kumar as attorney by deed dated 16th April, 1974 registered as Document No. 1823, in Addl. Book No. 4, Volume No. 514 on page No. 5 with Sub-Registrar, New Delhi on 17th April, 1974 (Ex. PW-3/1). Smt. Surjit Kaur (through attorney Naveen Kumar) sold this property to the plaintiff by registered sale deed dated 30th April, 1974 in favor of Shri Pritpal Singh (Ex. PW-3/2). The plaintiff assumed possession and has thereafter been paying the taxes to the Municipal Corporation. The plaintiff also raised brick walls around the plot and covered it. Copy of the receipt is filed as Annexure D.

3. In the written statement filed by the defendant No. 1, the defendant No. 1 has put the defense that the General Power of Attorney in favor of Shri Naveen Kumar (Ex. PW-3/1) was revoked on 29th April, 1974. We are not concerned with other defenses at this stage.

4. Issues were framed on 5th August, 1997 and issue No. 2 relates to the revocation of the General Power of Attorney, It reads as under:

"Whether GPA dated 16th April, 1974 executed in favor of Navin Kumar was legally cancelled by defendant No. 1 on 20.4.1974 as alleged? If so, its effect."

5. Onus to prove the issue is on defendant No. 1. After the framing of the issues, as already noted above, trial started and evidence of the plaintiff as PW-1 has been partly recorded. However, the plaintiff states that he is feeling difficulties in giving his evidence as the defendant No. 1 has not categorically stated as to in what manner General Power of Attorney dated 16th April, 1974 was revoked. If the defendant No. 1 is called upon to explain as to on what date and how did she revoke or cancel the General Power of Attorney, much of the evidence would be curtailed. The reason, it was submitted by learned Counsel for the plaintiff, was that although averment is made in the written statement that the defendant No. 1 had revoked the aforesaid General Power of Attorney on 20th April, 1974, the defendant No. 1 has not filed or produced any document showing this version of revocation. He submitted that the defendant No. 1 should either file an affidavit to this effect or her statement be recorded under the provisions of Order 10 Rule 2, CPC.

6. The application is vehemently opposed by learned Counsel for the defendant No. 1 who submits that the application is misuse and abuse of the process of law and is not maintainable at this stage inasmuch as evidence of the plaintiff has started and further that the burden of proving issue No. 2 is on defendant No. 1 and Therefore, it is her responsibility to prove this issue, namely cancellation of General Power of Attorney dated 16th April, 1974.

7. After examining the record and hearing both the Counsel, I am in agreement with the submissions made by learned Counsel for the defendant No. 1. The plaintiff has filed the suit on the basis of allegations that he has purchased the suit property from defendant No. 1 through her attorney Shri Naveen Kumar who was given the General Power of Attorney which was duly registered on 16th April, 1974. It is not in dispute that the defendant No. 1 had in fact executed the General Power of Attorney dated 16th April, 1974 in favor of Shri Naveen Kumar. Therefore, if Shri Naveen Kumar had, acting on the basis of said General Power of Attorney, sold the property to the plaintiff by registered sale deed dated 30th April, 1974, in ordinary course the plaintiff would become the owner of the property. However, the bone of contention is as to whether General Power of Attorney dated 16th April, 1974 executed by defendant No. 1 in favor of Shri Naveen Kumar was cancelled by defendant No. 1 on 20th April, 1974. This is what is alleged by defendant No. 1. Issue No. 2 is framed the burden of which is on defendant No. 1 to prove that she had cancelled the General Power of Attorney dated 16th April, 1974. If she fails to prove this issue, the consequence of that may be that the General Power of Attorney dated 16th April, 1974 executed by her in favor of Shri Naveen Kumar was not legally cancelled, and Therefore, he could act on the basis of said General Power of Attorney and sell the property to the plaintiff which he did vide sale deed dated 30th April, 1974. No doubt the defendant No. 1 has not produced any document on record to show that the General Power of Attorney dated 16th April, 1974 was legally cancelled by her. However, the defendant No. 1 may be doing so as her risk and the consequences of non-production of such a document, whatever they are, would follow. The defendant No. 1 had taken a particular plea but did not file the document. It was known to the plaintiff at the time of filing of the documents itself. Admission/denial of documents was done. The issues were framed. Till that stage the plaintiff did not insist on recording of the statement by the defendant No. 1 on this question. After the issues are framed and even the evidence of the plaintiff has started, provisions of Order 18, CPC would come into play. At this stage, it will not be appropriate to direct the defendant No. 1 to give her statement as demanded by the plaintiff in this application. The object of the examination under Order 10 Rule 2, CPC is to ascertain the matters in dispute and not to take evidence or ascertain what is to be the evidence in the case. Thus examination under this rule is not intended to be a substitute for a regular examination oath. This Court in the case of Om Builders (P) Ltd. Vs. Edward Keventer (Successors) Pvt. and Others, held that power under this rule is intended to be used by the Judge only where he finds it necessary to obtain from a party nor on any material question relating to the suit, and ought not to be employed so as to supersede the ordinary procedure at trial as prescribed in Order 18, CPC. To same effect is the judgment of Allahabad High Court in the case of Smt. Mango Vs. Prem Chand, , and the case of AIR 1931 175 (Privy Council) At this stage, afterall, plaintiff is required to prove his case for which he has already started his evidence and at this stage he may produce his evidence in affirmative. Thereafter ball would be in the Court of defendant No. 1 and it would be for her to lead evidence and prove issue No. 2 regarding legal cancellation of the General Power of Attorney. She would swim or sink depending upon the outcome of this issue (Refer Rule 3 of Order xviii, CPC). Therefore, it

is her outlook or responsibility to prove the question formulated in this application which in fact is nothing but a question already formulated in the form of issue No. 2. Keeping in view the stage of the case and the fact the evidence of the plaintiff has already commenced, I am not inclined to grant the prayer in this application at this stage. This I.A. is accordingly dismissed.

8. I.A. dismissed.