

(2001) 01 DEL CK 0126

Delhi High Court

Case No: Suit No. 1575 of 1982

D.R. Puri

APPELLANT

Vs

Kamlesh Sawhney and Another

RESPONDENT

Date of Decision: Jan. 10, 2001

Acts Referred:

- Transfer of Property Act, 1882 - Section 53A, 53A

Citation: (2001) 60 DRJ 738

Hon'ble Judges: Madan B. Lokur, J

Bench: Single Bench

Advocate: D.N. Sawhney and Ashok Gurnani, for the Appellant; Arun Mohan and L.K. Garg, for the Respondent

Judgement

Madan B. Lokur, J.

The plaintiff has filed a suit praying, inter alia, for a direction to the Defendants to render accounts to the plaintiff in respect of the building constructed on plot No. 18-A, New Friends Colony, New Delhi and for a decree of possession in respect of this property which is hereinafter referred to as the suit property. The plot of land is referred to as the aforesaid plot.

2. The plaintiff was allotted plot No. 18, Block A, New Friends Colony, New Delhi by a perpetual sub-lease dated 6th February, 1973 by the Delhi Development Authority. The sub-lease was duly registered and the plaintiff also became a member of the New Friends Co-operative House Building Society Ltd., New Delhi (hereinafter referred to as the Society). According to the plaintiff, he was posted in Jaipur (Rajas-than) and on account of exigencies of services he was liable to be transferred from time to time. He also found some difficulty in obtaining building materials, particularly cement and steel for the construction of a house on the aforesaid plot. He was stated to be in a financially tight position since his wife had started a business of manufacture and export of garments and it was not possible for him to

arrange the necessary funds for constructing a house on the aforesaid plot.

3. Accordingly, the plaintiff approached Defendant No. 2 who was an old family friend and explained to him the difficulties faced by him. Defendant No. 2 is alleged to have told the plaintiff that his wife is the daughter of one of the biggest cement stockists in northern India and in view of his connections and permanent location in Delhi, it would not be difficult for him to construct a house for the plaintiff on the aforesaid plot. Defendant No. 2 is stated to have offered a sum for Rs. 1,40,000/- as a security for constructing a house on the aforesaid plot of land for and on behalf of the plaintiff. The plaintiff accepted the representations of Defendant No. 2 and pursuant thereto he executed a series of documents. The documents executed by the plaintiff were in favor of Defendant No. 1 (who is the wife of Defendant No. 2) and are as follows :

1. Agreement: dated 24.10.79 (Exh. D-1).

2. Agreement of Construction dated 24.10.79 (Exh. D-2).

3. General Power of Attorney dated 24.10.79 (Exh. D-3). This was registered on 26th October, 1979.

4. Special Power of Attorney dated 24.10.79 (Exh. D-4). This was registered on 26th October, 1979.

5. Affidavit of the plaintiff dated 26th October, 1979 (Exh. D-5) acknowledging receipt of an amount of Rs. 1,40,000/- and stating that the General Power of Attorney is irrevocable.

6. Affidavit of the plaintiffs wife dated 26th October, 1979 (Exh. DA) stating that she has no objection to the Will of the plaintiff bequeathing the plot of land in favor of Defendant No. 1; she has no objection to Defendant No. 1 being nominated as a member of the Society and she is relinquishing her interest in the plot of land.

7. Affidavit of the plaintiff's daughter dated 26th October, 1979 (Exh. DB), This affidavit is to the same effect as the affidavit given by the plaintiffs wife.

8. Affidavit of the plaintiffs son dated 26th October, 1979 (Exh. DC). This affidavit is also to the same effect as the affidavit given by the plaintiffs wife.

9. Will of the plaintiff dated 24th October, 1979 (Exh. D -6) bequeathing all his rights, title and interest in the aforesaid plot in favor of Defendant No. 1 and nominating her as his nominee with the Society. This Will was registered on 26th October, 1979.

10. A letter dated 24th October, 1979 (Exh. D-7) addressed to the Secretary of the Society nominating Defendant No. 1 as his nominee.

11. Undated repudiation letter (Exh. D-8) from the plaintiff to Defendant No. 1 stating that he is unable to arrange for necessary funds to pay to Defendant No. 1

for the construction on the aforesaid plot of land and consequently, the plaintiff has no objection to the transfer of the lease hold rights in respect of the plot of land of Rs. 1,40,000/- which may be adjusted towards the consideration in full and final settlement of the transfer.

12. Receipt dated 26th October, 1979 (Exh. DD) acknowledging receipt of Rs. 1,40,000/- from Defendant No. 1.

4. Apart from the above documents, the plaintiff gave to Defendant No. 1 all the original documents pertaining to the aforesaid plot of land including the correspondence with the Society and the Delhi Development Authority. These documents are marked as Exh. D-9 to Exh. D-26. The plaintiff also handed over to Defendant No. 1 the original of the sub-lease that he had entered into with the Delhi Development Authority.

5. According to the plaintiff, possession of the aforesaid plot of land was handed over to the Defendants for permitting them to construct a house thereon for and on behalf of the plaintiff. When the construction was complete, the plaintiff served a notice dated 1st July, 1982 offering to the Defendants the full amount of the cost of construction and requesting them to hand over vacant possession of the suit property. In response, the Defendants told the plaintiff that they were not prepared to hand over the suit property and that the aforesaid plot had been sold to them for a consideration of Rs. 1,40,000/-.

6. On these facts, the following issues were framed :-

1. Whether the plaintiff is entitled to recover possession of the suit property, if so, on what terms ? OPP.

2. Whether the defendants are not liable to render accounts to the plaintiff regarding the construction of building on plot No. 18, Block A, New Friends Colony, New Delhi? OPD.

3. What is the true nature of the transaction between the parties? (Onus on the parties).

4. Whether the suit is barred u/s 53-A of the Transfer of Property Act? OPD.

5. Whether the plaintiff is entitled to mesne profits?

6. Whether the plaintiff is estopped from going back from the agreement of sale? OPD.

7. Whether the suit is not premature as alleged in para 6 of the written statement? OPD.

8. Whether the plaintiff has valued the suit properly for purposes of court-fee and jurisdiction and has paid proper court-fee? OPD.

7. Learned counsel for the parties made their submissions on 3rd January, 2001 when judgment was reserved.

8. According to learned counsel for the plaintiff, the two arguments entered into between the plaintiff and Defendant No. 1 were for the construction of a house on the aforesaid plot of land. Possession of the aforesaid plot was given pursuant to the construction agreement only and not in pursuance of any alleged agreement to sell. It was contended that in terms of Clause 1 of the alleged agreement to sell "after the completion of Building and non-payment by the Vendor for construction and other dues, vendor agrees to convey, transfer and alienate the sub-lease-hold rights" in the aforesaid plot of land. It was submitted that the question of non-payment of the cost of construction does not arise in this case because as per the notice dated 1st July, 1982 the amount was tendered to the Defendants but it was refused. It was contended that none of the documents make any reference to a sale or an intention to sell. It was submitted that on a reading of the alleged agreement to sell or the construction agreement, one cannot presume any intention in executing these documents other than what was stated therein. It was finally contended that even assuming that there was an agreement to sell between the parties, the Defendants have not been ready and willing to perform their part of the agreement and, Therefore, they are not entitled to any relief.

9. Learned counsel for the Defendants rightly contended that Issue No. 3 is really the central issue in this case. According to learned counsel, all the documents were executed contemporaneously and, Therefore, all of them have to be, considered together; it is not as if one or two documents only have to be considered and interpreted. According to learned counsel for the Defendants, an identical situation arose before another learned Single Judge of this Court who held that the execution of such types of documents indicates a sale transaction. This view was upheld by a Division Bench of this Court and, Therefore, I am bound by the views expressed by the Division Bench of this Court.

10. After considering the facts of the case, I am in full agreement with learned counsel for the Defendants.

11. Section 53-A of the Transfer of Property Act, 1882 is of some significance. This section reads as follows :

"53-A. Part performance - Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract, than, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed Therefore by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

12. In [Nathulal Vs. Phoolchand](#), the Supreme Court has clearly laid down four conditions that are necessary for making out the defense of part performance to an action in ejectment by the owner. The four conditions laid down by the Supreme Court are as follows :

1. That the transferor has contracted to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty;
2. That the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession continues in possession in part performance of the contract;
3. That the transferee has done some act in furtherance of the contract; and
4. That the transferee has performed or is willing to perform his part of the contract.

13. All the abovementioned four conditions have been fulfilled in this case, as will be evident a little later.

14. It is true that the Supreme Court has held in [Delhi Development Authority Vs. Durga Chand Kaushish](#), that the primary rule of construction is that the meaning of the document is to be sought for in the document itself. The Supreme Court approved the view expressed in *Monypenny v. Monypenny* (1861) 9 HLC 114 which is as follows :

"the question is not what the parties to a deed may have intended to do by entering into that deed, but what is the meaning of the words used in that deed: a most important distinction in all cases of construction and the disregard of which often leads to erroneous conclusions".

15. Consequently, one cannot presume the intention of the parties but regard must be had to the words used in the document.

16. In [S. Chattanatha Karayalar Vs. The Central Bank of India and Others](#), the Supreme Court stated in paragraph 3 of the Report as follows :

"The principle is well established that if the transaction is contained in more than one document between the same parties they must be read and interpreted together and they have the same legal effect for all purposes as if they are one document".

17. In the present case, it is not as if the parties had executed only one document. A series of documents were executed which not only included agreements but also two Powers of Attorney, affidavits of the entire family of the plaintiff as well as the plaintiff's Will. If the parties had entered into a simple construction agreement, as alleged by the plaintiff, there was absolutely no reason for the plaintiff to execute a Will and hand it over to the Defendants. Similarly, there was absolutely no reason for the family of the plaintiff to execute affidavits relinquishing their rights in the aforesaid plot of land.

18. There is also no reason why the plaintiff should hand over to the Defendants all the original documents including the sub-lease and correspondence entered into between the plaintiff and the Delhi Development Authority on the one hand and the plaintiff and the Society on the other.

19. An analysis of the various documents executed by the plaintiff clearly shows that the transaction between the parties was not a mere construction agreement but was something much more. Indeed, it was nothing short of a sale of the aforesaid plot of land.

20. Clause 1 of the construction agreement (Exh. D-2) states as follows :

"That the Contractor has agreed to undertake, commence and complete the construction of a dwelling house on the aforesaid plot of land in accordance with the sanctioned building plans and to provide necessary funds for meeting the cost of building material, labour charges and other incidental expenses and to provide all the amenities of electricity, sanitary fittings, water laying, sewage pipes, wood-work etc., as per specifications and drawings to be approved through the approved Architects. The agreed cost of construction complete in every respect as mutually agreed to is Rs. 125/- per sq. feet of the covered area and the allottee has agreed to the same."

21. A perusal of the above Clause indicates the complete vagueness on vital matters of construction. The building plans were not even sanctioned on the date of this agreement, yet the construction was to be as per the sanctioned building plans. The quality and standard of the construction has not even been discussed. The kind of material to be used was also not specified. Theoretically, it was possible for the Defendants to make the construction at Rs. 75/- per sq. ft and yet recover the cost of construction at Rs. 125/- per sq."ft. Surely, this could never has been intended by the parties. The "approved Architects" have also not been mentioned.

22. Furthermore, Clause 6 of the construction agreement (Exh. D-2) did not provide for any escalation in the cost of construction. Clause 8 of this agreement required the Defendants to pay the lease money for the aforesaid plot of land, the property tax, water and electricity charges. Quite clearly, the plaintiff would not have agreed to this if he continued to be the owner of the aforesaid plot of land.

23. Clause 17 of the construction agreement (Exh. D-2) reads as follows :

"That the allottee specifically agrees that he will not mortgage, sell, dispose off, or alienate in any manner whatsoever, his rights, titles and interests in the said plot of land and assures that he has not done any such acts so far in respect of this plot".

24. It appears to me that such a restriction on the plaintiff was totally unnecessary and irrelevant in the case of a simple construction agreement.

25. The General Power of Attorney (Exh. D-3) executed by the plaintiff also makes rather strange reading in the context of the contention of learned counsel for the plaintiff. The Defendants who are the alleged contractors have been given a Power of Attorney by the plaintiff to sell the suit property, which sale is ratified by the plaintiff. The Special Power of Attorney (Exh. D-4) grants to the Defendants the power to sell off the suit property on behalf of the plaintiff. Both these Powers of Attorney are irrevocable. One fails to understand why the plaintiff should permit the Defendants to sell off the aforesaid, plot of land and the construction thereon if the Defendants were merely building contractors.

26. The documents on record show that the plaintiff also gave an undated letter (Exh. D-8) which makes interesting reading. This letter reads as follows :

Dear Madam,

With reference to your notice offering me the possession of the completed building at Plot No. 1.8, Block "A", New Friends Colony, New Delhi (the colony sponsored by the New Friends Co-operative House Building Society Ltd., Mathura Road, New Delhi) against the payment of your dues in accordance with the terms of agreement of construction dated 24th October, 1979 I have to inform you that I am unable to arrange for the necessary funds to be paid to you and as such I have no objection in your exercising your option to transfer the lease-hold rights in respect of the said plot by you in accordance with law, against Rs. 1,40,000/- which is lying in deposit with me and the same be adjusted towards the consideration in full of the said plot and you will remain as "Mortgage in possession," till formal and final transfer is made.

27. There was absolutely no reason for the plaintiff giving such a letter even before he had handed over possession of the aforesaid plot of land, much less even before construction thereon had commenced. It is quite obvious from a reading of this letter that the plaintiff had severed his links with the suit property. By executing the abovementioned undated letter (Exh. D-8) as well as various other documents, the

plaintiff had given a carte blanche to the Defendants to deal with the suit property.

28. Continuing in this vein, the plaintiff and his entire family had inexplicably sworn to an affidavit stating that they have no objection to the Will executed by the plaintiff. The Will (Exh. D-6) bequeaths all the rights, title, benefits and privileges in the aforesaid plot of land in favor of Defendant No. 1 who is the sole beneficiary of the Will.

29. It seems rather odd that all this documentation should be executed because the Defendants were supposed to only construct a house on the aforesaid plot of land.

30. The execution of all these documents, read together as held by the Supreme Court, unmistakably lead to the conclusion that what has actually transpired between the parties is not a mere construction agreement but a transaction for sale of the aforesaid plot of land,

31. An identical situation arose in [Kuldip Singh Suri Vs. Surinder Singh Kalra](#), In that case also, similar documents were executed by the plaintiff therein. After examining the various documents and the case law on the subject, a learned Single Judge of this Court came to the conclusion that the plaintiff therein had agreed to sell the plot of land to the Defendant and the so-called construction agreement was a sham agreement and had no existence in the eyes of law. The plaintiff in that case preferred an appeal before a Division Bench of this Court. By an order dated 22nd November, 2000 passed in RFA(OS) 3/2000, the Division Bench upheld the decision of the learned Single Judge and held that there is no manner of doubt that the nature of the transaction entered into between the parties was an agreement to sell and not a construction agreement. It was also held that the property was conveyed to the Respondents therein "on the basis of the usual documents, which are normally executed in Delhi, may be for whatever reasons."

32. It may be mentioned, an passant, that this aspect of "usual documents which are normally executed in Delhi" has also been referred to by a learned Single Judge in [Sushil Kanta Chakravarty Vs. Rajeshwar Kumar](#), wherein it is stated that "..... in Delhi it is common knowledge that the property is transferred and re-transferred on the basis of a Power of Attorney....."

33. Be that as it may, the oral evidence on record also clearly brings out that the construction agreement was a sham document. In one of the recitals in this agreement, it is stated that since the plaintiff is in Government service and is likely to be posted anywhere in India, he is not in a position to look after and supervise the construction in Delhi. In his examination-in-chief the plaintiff admitted that he was residing in Delhi till May .1982. In other words, he was in Delhi during the entire period of construction because he further says that the construction on the aforesaid plot was completed in May and June, 1982. Quite clearly, Therefore, the recital in the construction agreement did not reflect the factual position. In his cross-examination, the plaintiff also stated that he met Defendant No. 1 for the first

time in 1979 and that he had not met her before the execution of the documents (Exh. D-1 and Exh. D-2). It is" astonishing (to say the least) that the plaintiff, on the day that he must Defendant No. 1, chose to bequeath his rights, title and interest in the aforesaid plot of land to Defendant No. 1 allegedly out of "love and affection". It is also extremely unnatural that the entire family of the plaintiff, two days later, swear affidavits relinquishing their rights in the aforesaid plot of land in favor of Defendant No. 1.

34. The plaintiff also says in his cross-examination that Defendant No. 2 deals in readymade garments and that he did not know if Defendant No. 2 had ever acted as a contractor to construct any building or if he had any past experience in constructing a building. Under these circumstances, it is extremely odd that the plaintiff should ask Defendant No. 2 (who is dealing in readymade garments) to construct a house for him.

35. The plaintiff admits that he has no idea about who was the architect of the building; he does not know the date, month and year when the construction began on the aforesaid plot of land. He stated that he had not entered the house constructed on the aforesaid plot from the date of construction till the date he was examined in Court. This is really unnatural on the part of a person who is wanting to construct his own house.

36. Quite apart from this, the plaintiff admits that he does not have a bank account either in the New Bank of India or in the Bank of Saurashtra. Payments of ground rent and other dues in respect of the aforesaid plot of land were made from these two accounts, which incidentally happen to be the banks of the Defendants. It follows, Therefore, that even the legitimate dues pertaining to the aforesaid plot of land were not paid by the plaintiffs after 24th October, 1979 but were paid by the Defendants. This would only happen if the Defendants were the owners of the aforesaid plot of land : the plaintiff would refrain from making these payments only if he had no interest in the aforesaid plot of land.

37. In their oral testimony, both the Defendants have referred to a broker through whom the transaction was entered into between the parties. This broker appeared as DW-3 and categorically testified about the execution of various documents by the plaintiff. This witness also brought his register which he maintained during the usual course of his business. This register pertained to an inquiry made by the plaintiff about the sale of the aforesaid plot of land. The testimony of this witness is quite reliable.

38. On the basis of the available material, it is quite clear, Therefore, that the documentary as well as oral evidence unmistakably point to the fact that a transaction for sale of the aforesaid plot of land was entered into between the parties and that the so-called construction agreement was a mere cover up or a camouflage.

39 Learned counsel for the plaintiff submitted that there was one distinguishing factor between the decision rendered by the Division Bench and this case. According to him, the distinguishing factor was that the receipt in the case before the Division Bench mentioned a "token advance" for the plot of land. He says that these words are missing in the receipt (Exh. DD) in this case. I am afraid that the absence of a few words here or there cannot make any material difference. All the documents have to be looked at together, as held by the Supreme Court, and it is then that their substance has to be ascertained: it is not the language used in each and every document that has to be critically analysed for arriving at a conclusion. In view of this line of thought, it is quite clear that the appearance of a few words here or there do not detract from the sum and substance of the available documents.

40. It was finally contended by learned counsel for the plaintiff that one of the ingredients of Section 53-A of the Transfer of Property Act, 1882 is that the transferee must be ready and willing to perform his part of the contract. It was his contention that the Defendants were not willing to perform their part of the contract and that a suit for specific performance of the contract (assuming it to be an agreement to sell) cannot now be instituted because it is barred by time. Reliance in this regard was placed by learned counsel on [Raju Roy and Others Vs. Kasinath Roy and Others](#), .

41. It is no doubt true that the appropriate course of action for the Defendant would have been to either raise a counter claim against the plaintiff or to file a suit against the plaintiff for specific performance of the agreement to sell. This has not been done by the Defendants,

42. However, I am of the view that this by itself is not enough to decree the suit in favor of the plaintiff. The reason for this is that the right of the Defendants is not extinguished. It is only that the remedy cannot be resorted to by the Defendants because it is barred by time. There is nothing to indicate that the Defendants are not willing to perform their part of the contract. On the contrary, as far as they are concerned, the contract stood concluded when they paid an amount of Rs. 1,40,000/- to the plaintiff and received possession of the aforesaid plot of land as well as all the original documents pertaining to the aforesaid plot of land. The only other thing which was required to be done was to actually have the property mutated in the name of Defendant No. 1 and to have the title registered in accordance with law so as to perfect it in favor of Defendant No. 1.

43. A down-to-earth view of the whole case has also to be taken. Looked at from this point of view, it must be accepted that the Defendants took possession of the aforesaid plot of land in 1979 ; that they spent a considerable amount in constructing a house on the aforesaid plot of land ; and that they have been living in the suit property since 1982. Is it possible to realistically say that they now have no interest in the aforesaid plot of land?

44. The mere fact that the Defendants did not file a counter claim or a suit for specific performance, cannot lead to any conclusion that they have given up all their rights in the aforesaid plot of land. It can, at best, be said that the Defendants have lost the opportunity of perfecting their title. Under the circumstances, I am of the view the decision cited by learned counsel for the plaintiff does not really help him.

In view of the above, my answer to the various issues that have been framed is as follows:

1. Whether the plaintiff is entitled to recover possession of the suit property, if so, on what terms? OPP. The plaintiff is not entitled to recover possession of the suit property.

2. Whether the defendants are not liable to render accounts to the plaintiff regarding the construction of building on plot No. 18, Block A, New Friends Colony, New Delhi ? OPD.

The Defendants are not liable to render accounts to the plaintiff regarding the construction of a building on the plot in dispute,

3. What is the true nature of the transaction between the parties ? (Onus on the parties).

The true nature of the transaction between the parties is that there is a transfer of property by an agreement to sell executed by the plaintiff in favor of Defendant No.

1. The agreement of construction is a sham document.

4. Whether the suit is barred u/s 53-A of the Transfer of Property Act? OPD.

The suit is barred under the provisions of Section 53-A of the Transfer of Property Act, 1883.

5. Whether the plaintiff is entitled to mesne profits? The plaintiff is not entitled to mesne profits.

6. Whether the plaintiff is estopped from going back from the agreement of sale ? OPD. The plaintiff is estopped from going back on the agreement to sell.

7. Whether the suit is not premature as alleged in para 6 of the written statement? OPD.

8. Whether the plaintiff has valued the suit properly for purposes of court-fee and jurisdiction and has paid proper court-fee ? OPD

Both these issues were not pressed by learned counsel for the Defendants and are, Therefore, not answered.

The suit is, accordingly, dismissed. The plaintiff will pay costs of Rs. 5,000/-"to the Defendants.