
(2001) 10 DEL CK 0053
In the Delhi High Court
Case No : E.F.A. (OS) 3 of 1990

Asha M. Jain

APPELLANT

Vs

The Canara Bank and Others

RESPONDENT

Date of Decision : 15-10-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58
Contract Act, 1872 — Section 202
Registration Act, 1908 — Section 17
Specific Relief Act, 1963 — Section 27, 3
Transfer of Property Act, 1882 — Section 40, 53A, 54
Trusts Act, 1882 — Section 91

Citation : (2001) 94 DLT 841 : (2002) 61 DRJ 101 : (2002) 1 RCR(Civil) 543

Hon'ble Judges : Sanjay Kishan Kaul, J;Devinder Gupta, J

Bench : Division Bench

Advocate : Ravi Gupta, for the Appellant; Bakshi Bikram Singh, for the Respondent

Final Decision : Allowed

Judgement

Sanjay Kishan Kaul, J.—The appellant, who purchased property No. A-27/C, DDA Flat Munirka, New Delhi, on a power of attorney basis is aggrieved by the impugned order dated 31.10.1990 dismissing the objection filed by the appellant under Order XXI Rule 58 of the Code of Civil Procedure, 1908, against the attachment order dated 29.04.1989.

2. The appellant is stated to have purchased the aforesaid property in question by an agreement to sell dated 21.5.1984 for a consideration of Rs. 90,000/- stated to have been paid by cheque drawn on State Bank of India. The documents in respect of the property in question, apart from the agreement to sell dated 21.5.1984, are Receipt dated 22.5.1984, affidavit dated 22.5.1984, a registered general power of attorney dated 22.5.1984, a special power of attorney dated 22.5.1984, another general power of attorney dated 22.5.1984 and a registered Will dated 21.5.1984. It is stated that this property was

purchased on what is commonly called a power of attorney sale where the registered documents of sale is not executed but a set of documents consisting of agreement to sell, General Power of Attorney, Special Power of Attorney Will etc. are executed. In view of the fact that the property in question was a lease hold property and transfer would not be recognised by the Lesser without consent and without payment of unearned increase, only a power of attorney sale took place. Reliance is also placed on behalf of the appellant on a notice published in the "Statement" of 30.7.1987 bringing to the notice of the public a resolution dated 22.7.1987 adopted by the Delhi Metropolitan Council for treating sale transactions effected through such power of attorney sale as valid sale, purchase or transfer of interest for all practicable purposes and for necessary amendments to be carried out in law for the necessary amendments to be carried out in law for the said transactions completed prior to the date of resolution.

3. The property in question was purchased through the documents executed by one Shri N.K. Duggar, respondent No. 3, who was the allottee of the flat in question in pursuance to the conveyance deed registered on 23.8.1984. This is so set out in the agreement to sell dated 21.5.1984. It appears that around the same time or just before the transaction in question in respect of the aforesaid property, certain loan facilities were availed of from Canara Bank, Connaught Circus Branch, respondent No. 1 by respondent No. 2 to 4. Since the borrowers and the guarantor failed to adhere to the financial discipline of the bank, a suit bearing NO. 679/1986 was filed and was decreed on 7.11.1986 for a sum of Rs. 3,21,635.40 along with interest. The execution petition was filed almost two and a half years later as execution case No. 4/1989 and an order of attachment dated 29.4.1989 was issued in respect of the property in question as respondent No. 3 was the judgment debtor and registered owner of the property.

4. It would be relevant to state that the suit was not a mortgage suit and further during the pendency of the suit no interim order was sought against in respect of the property in question. Not only this no action was taken against the property in question for almost two and a half years even after the decree was passed.

5. Since the attachment order was passed on 29.4.1989, the appellant herein filed objections to the same being is No. 239/1989 under Order XXI Rule 58 of the Code of Civil Procedure, 1908. In terms of the impugned order dated 31.10.1990 the learned Single Judge dismissed the objection on the ground that an agreement to sell does not create any interest in immovable property in view of the Section 54 of the Transfer of Properties Act, 1882.

6. Mr. Ravi Gupta, learned counsel for the appellant has assailed the impugned order primarily on the ground that the provisions of Section 53A of the Transfer of Property Act, 1882 has been ignored specifically keeping in mind the fact that the appellant had been in enjoyment of the property for a period of over six years after having paid the full consideration. Learned counsel for the appellant contended that the learned Single Judge has failed to take into consideration the

fact that the case of the appellant did not rest merely upon the agreement of sale but was coupled with payment of full consideration, transfer of possession and execution of other documents including General Power of Attorney, Special Power of Attorney and Will.

7. Mr. Ravi Gupta, learned counsel for the appellant, relied upon the judgment of the Supreme Court in Vannarakkal Kallalathil Sreedharan Vs. Chandramaath Balakrishnan and Another, wherein it has been held that if a contract for sale was entered into before attachment, the conveyance after attachment in pursuance of the contract passes on a good title in spite of the attachment. This judgment is noticed by the learned Single Judge in the impugned order but has been distinguished on the ground that in the present case no registered sale deed in respect of the property in question was executed even thereafter. Learned counsel for the appellant also referred to a recent judgment of the Supreme Court in Rajender Singh Vs. Ramdhar Singh and Others, , to the same effect that the agreement for sale creates an obligation attached to the ownership of property and since the attaching creditor is entitled to attach only the right, title and interest of the judgment-debtor, the attachment cannot be free from the obligations incurred under the contract for sale.

8. Mr. Ravi Gupta, learned counsel for the appellant further referred to the judgment of the Calcutta High Court in Purna Chandra Basak v. Daulat Ali Mollah, AIR Cal 432 to advance the submission that though a contract for sale of immovable property u/s 54 of the Transfer of Property Act does not itself create any interest in or charge on such property, it does create a personal obligation the fiduciary character of which is recognised in Section 3 of the Specific Relief Act and Section 91 of the Trust Act. The Calcutta High Court held that a contract for sale does not create any interest in land but creates a personal obligation of a fiduciary character which can be enforced by a suit for specific performance not only against the vendor but also against a volunteer and a purchaser for consideration with notice. The Calcutta High Court further observed in para 8 as under :

"If the promisor sells and gifts the property and hands over its possession to another with notice of the contract, the promises can enforce it against that other person also u/s 27 of the Specific Relief Act as also Section 40 of the Transfer of Property Act. It is true that the right of the promises is a right in persona and not in rem. But it is an obligation annexed to the ownership of immovable property and is in the nature of a trust u/s 91 of the Indian Trust Act. In my view such a right comes within the meaning of that term in Order 38, Rule 10 of the Code and the attachment u/s 64 is subject to that right. it is true that this right is a right in persona but there is nothing in rule which lends support to the view that it is restricted only to right in rem. The attachment also does not create any interest in or charge upon the property. It merely keeps it in custodia legis and prevents its alienation in certain cases. The attachment may not necessarily be of the property itself but of the right, title and interest of the

debtor in the property at the date of the attachment. An attaching creditor can only attach the right title and interest of his debtor at the date of the attachment and on principle, his attachment cannot confer upon him any higher right than the judgment-debtor had at the date of the attachment. If a person, having a contract of sale in his favor, has such pre-existing right the attachment could not be binding upon him. If the promise gets a conveyance, after the attachment, in pursuance of his contract, he takes a good title in spite of the attachment."

9. Mr. Ravi Gupta, learned counsel also referred to Section 53A of the Transfer of Property Act, 1882 which reads as under:

"53A. 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,

then, 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."

10. Mr. Ravi Gupta, learned counsel thus contended that the principles of the said provisions would squarely apply in the present case since contract to transfer is for consideration is duly signed and possession has been taken in part performance of the agreement to sell under which full consideration has been paid apart from the execution of collateral documents being the agreement to sell, General Power of Attorney, Special Power of Attorney, Will etc. It is thus contended by Mr. Ravi Gupta that at best the Bank will step into the shoes of "any person" who is the transferor which would debar the bank from acting in a manner which will have the effect of enforcing against the appellant who is the transferee, any right in respect of the property of which the appellant has taken possession, other than a right expressly provided by the terms of the contract.

11. Mr. Bakshi Bikram Singh, learned counsel for respondent No. 1, on the other

hand has contended that the conclusion arrived at by the learned Single Judge is right and has relied on the provisions of Section 54 of the Transfer of Property Act to contend that no rights had been created in law in favor of the appellant in pursuance to the agreement to sell. Mr. Bakshi referred to a Division Bench judgment in AIR 1947 254 (Nagpur) to advance his submission in this behalf that a contract for sale of immovable property does not create any interest in or charge on such property. Mohd. Abdul Jabbar's case (supra) dealt with the property agreed to be sold which was compulsorily acquired and where it was held that vendee suing for specific performance is not entitled to the compensation money lying with the Collector. Mr. Bakshi also referred to the Division Bench judgment of the Calcutta High Court in Amulya Gopal Majumdar Vs. United Industrial Bank Ltd. and Others, where it was held that the English equitable doctrine has no application in India in view of the provisions of Section 54 of the Transfer of Property Act that a contract for sale of immovable property does not by itself create an interest in immovable property.

12. Mr. Bakshi also referred to the judgment of the Supreme Court to the same effect in Rambaran Prosad Vs. Ram Mohit Hazra and Others, which was relied upon by the Calcutta High Court in Amulya Gopal Majumdar's case (Supra).

13. In order to appreciate the true nature of the controversy it is necessary to examine the transactions which are called the power of attorney sales in Delhi, normally executed in respect of lease hold properties due to restrictive nature of covenants of the terms of lease or the terms of allotment.

14. The Delhi Development Authority undertook the task of land development of Delhi and in the process constructed a large number of flats. The property in question is one such flat. Registered documents were not executed in respect of sale transaction because of the liability to pay unearned increase. The unearned increase is a difference between the market value of the sale and the original cost of purchase a part of which is required under the terms of allotment or conveyance to be paid to the perpetual Lesser. The nature of such transaction has been considered by the Delhi High Court in different judgments. In Harbans Singh v. Shanti Devi, 1977 R L R 487, it was held that if a person owning a property executes an agreement for sale in favor of a lady and executes a irrevocable power of attorney in respect of the same property in favor of her husband then he cannot cancel or revoke power of attorney on account of interest or right created in the subject matter so as to prejudice the said interest. The provisions of Section 202 of the Contract Act, Section 54 of the Transfer of Property Act, 1882 and Section 17 of the Registration Act, 1908 were analysed and it was held that the interest in property means right, benefit or advantage whether tangible or intangible.

15. In Shikha Properties(P) Limited Vs. S.Bhagwant Singh and Others, it was held that cases where agreement to sell is executed with Irrevocable power of attorney and full consideration having been paid would be covered by Section 202 of the Contract Act since the purchasers deal with such properties practically

as owners for fairly long and have "interest" in it. Thus in such a case agent has a interest in property which is the subject matter of the agency and which cannot be terminated to the prejudice of such interest in terms of Section 202 of the Contract Act, 1872.

16. The power of attorney sales and their effect has been considered in *Kuldip Singh v. Surinder Singh*, 1999 R L R 20. The learned Single Judge of this Court has observed that power of attorney sales in Delhi is the common mode of sale of immovable property to get over the legislative restrictions of transfer of properties. The power of attorney is for consideration and the bargain is followed by delivery of possession to complete the transaction. Further to prevent arbitrary cancellation, Will and affidavit about renouncing rights are taken. The Court repelled the contention that since sub-lease with the Government prohibited transfer, such transfer was opposed to public policy, since in the view of the Court, public policy gets modified with march of time. The Court recognised the fact that restrictions to sell made everyone dishonest and the power of attorney sale method was devised to get over the restrictions. In fact the Government has partially recognised this since even power of attorney buyers can apply for conversion into free hold on paying penalty. The learned Single Judge relied upon the judgment of the Supreme Court in *S. Chattanatha Karayalan v. Central Bank of India Ltd. and Ors.* AIR 1965 S C 1856 and *Indira Kaur and Ors Vs. Sheo Lal Kapoor*, , where it was held that in order to arrive at a real nature of transaction, it is open to the Court to look into the attendant and surrounding circumstances and contemporary documents. The learned Single Judge also relied upon the observations in the case of *Usha Malhotra v. G.S. Uppal* in 1991 R L R 223 dealing with the issue of construction agreement which are camouflage for agreement to sell.

17. We have considered this aspect taking into consideration these judgments and we are in agreement with the view that the concept of power of attorney sales have been recognised as a mode of transaction. These transactions are different from mere agreement to sell since such transactions are accompanied with other documents including General Power of Attorney, Special Power of Attorney and Will and affidavits and full consideration is paid. This is what also has happened in the present case. There are two general power of attorneys, special power of attorney and the Will apart from the agreement to sell. One of the general power of attorney is registered. Further the will is also registered. Thus there are two contemporaneous documents which are registered and they lend authenticity to the date of execution of documents. The power of attorneys" are for consideration within the meaning of Section 202 of the Contract Act, 1872. Thus there is no doubt that interest has been created in the property in favor of the appellant. Possession is also been handed over. Thus the provisions of Section 53A of the Transfer of Property Act would also come into play. The bank is debarred from enforcing any right qua the property other than the right conferred by the agreement to sell. The agreement to sell has nowhere reserved any right on the transferor either for resuming the property or payment of any

additional money. The transferor is debarred from claiming back the property from the appellant. The net result of all this is that the rights have been created in favor of the appellant which cannot be defeated by the attachment order.

18. Another aspect relevant for this purpose is the conduct of respondent No. 1 in the present case. The suit was filed in 1986 and though it is claimed by learned counsel for respondent that bank had knowledge of this property being owned by respondent No. 3, no proceedings were taken for interim protection during the pendency of the suit. Not only this, no execution proceedings were taken out for almost two and a half years post the decree.

19. We are thus of the considered view that it is not a fit case where valuable rights of the appellant should be put under jeopardy by the attachment order in respect of the property in question which for all practical purposes vests in the appellant. It is also relevant to add at this stage that though there was a scheme of conversion from lease hold to free hold learned counsel for the appellant has stated that the appellant was unable to seek conversion and get a registered document executed in her favor on account of the pendency of the present proceedings since the term of conversion require that there should be no litigation pending in respect of the property in question.

20. The appeal is allowed. The impugned order dated 31.10.1990 is set aside. The application EA No. 239/1989) filed by the appellant is allowed thereby revoking the order of attachment dated 29.4.1989 in respect of property No. A-27/C, DDA Flats, Munirka, New Delhi. No Costs.