

(2015) 05 RAJ CK 0171

In the Rajasthan High Court

Case No : Civil Revision Petition No. 30 of 2015

Rekhraj and Others

APPELLANT

Vs

Roshanlal and Others

RESPONDENT

Date of Decision : 06-05-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11
Transfer of Property Act, 1882 — Section 40, 54

Citation : (2015) 05 RAJ CK 0171

Hon'ble Judges : Vineet Kothari, J

Bench : Single Bench

Advocate : Om Mehta, for the Appellant; A.A. Bhansali, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Dr. Vineet Kothari, J.—The petitioners, Rekhraj, Sumer Singh and Manmohan, all sons of Sh. Madanlal Kachhawaha, had filed the present suit for possession against their own brother, namely, Roshanlal, (respondent No. 1 herein) and Smt. Kalawati W/o Roshanlal. The said suit was numbered as Civil Original Suit No. 28/2013-Rekhraj and Ors. v. Roshanlal and Anr., which is pending adjudication before the learned Additional District Judge No. 3, Jodhpur Metropolitan. The plaintiffs claimed that their father Sh. Madanlal Kachhawaha, had executed a registered gift-deed in their favour with respect to suit house in question situated at Pata "C" Road, Jodhpur, on 14.03.2012 and on the basis of said registered gift-deed executed in their favour, the plaintiffs filed the suit for possession against their fourth brother, Roshanlal.

2. In the said suit, the defendants/respondents No. 1 and 2, namely, Roshanlal and his wife, Smt. Kalawat, filed a counter claim alleging therein that the father of respondent No. 1, Sh. Madanlal, had already executed an Agreement to Sell the said suit house in his favour on 01.12.2005 and thereafter through the power of attorney executed by Sh. Madanlal Kachhawaha, in favour of his daughter-in-

law, Smt. Kalawati, wife of Roshanlal Kachhawaha, even a registered sale-deed has been executed by Smt. Kalawati in favour of her husband, Rohshanlal on 05.04.2012 and, therefore, the possession suit filed by other three brothers was liable to be dismissed and said gift-deed itself was liable to be cancelled.

3. Challenging the said counter-claim filed by the defendants, Roshanlal Kachhawaha and Smt. Kalawati, under which the defendants claimed cancellation of gift-deed executed in favour of three sons (petitioners/plaintiffs herein) filed an application under Order 7 Rule 11 CPC before the learned trial court, which came to be rejected by the learned trial court of A.D.J. No. 3, Jodhpur Metropolitan vide the impugned order dated 19.11.2014. The reasons given by the learned trial court in the impugned order are quoted herein below for ready reference: -

4. Mr. Om Mehta, learned counsel for the petitioners/plaintiffs submitted that mere existence of an Agreement to Sell executed by father Madanlal Kachhawaha, in favour of his son Roshanlal on 01.12.2005, does not undo the registered gift-deed dated 14.03.2012, which is a valid conveyance of immovable property in question in favour of petitioners and unless the defendants sought the enforcement of Agreement to Sell dated 01.12.2005, for which they could have filed a suit for specific performance, but Roshanlal could not file such a counter claim in the present suit filed by the plaintiffs/petitioners for possession seeking declaration or cancellation of the gift-deed dated dated 14.03.2012 in favour of plaintiffs. He relied upon following judgments in support of his contentions:

"1. Bai Dosabai Vs. Mathurdas Govinddas and Others, AIR 1980 SC 1334 : (1980) 3 SCC 545 : (1980) 3 SCR 762 : (1980) 12 UJ 655 .

2. Gurbax Singh Vs. Kartar Singh and Others, AIR 2002 SC 959 : (2002) 173 CTR 477 : (2002) 254 ITR 112 : (2002) 2 JT 52 : (2002) 2 PLR 346 : (2002) 2 SCALE 124 : (2002) 2 SCC 611 : (2002) 1 SCR 940 : (2002) 125 STC 531 : (2002) 122 TAXMAN 121 : (2002) 1 UJ 514 : (2002) AIRSCW 658 : (2002) 2 Supreme 59 .

3. Atla Sidda Reddy Vs. Busi Subba Reddy and Others, (2010) 5 SCALE 751 : (2010) 6 SCC 666 .

4. Kodapalli Satyanarayana Vs. Kondapalli Mavullu and others, AIR 1999 AP 170 : (1999) 2 ALD 175 : (1999) 2 ALT 79 : (1999) 1 APLJ 140 ."

5. On the other hand, Dr. A.A. Bhansali, learned counsel for the respondents No. 1 and 2/defendants, Roshanlal and his wife, Smt. Kalawati, urged that the agreement to sell executed in favour of fourth brother, Roshanlal (defendant), was prior in the point of time and, therefore, the subsequent gift-deed executed in favour of three sons, plaintiffs in the present suit, was subject to the rights of defendants, Roshanlal, under the said agreement, which ultimately fructified in a registered sale-deed dated 05.04.2012, executed by the power of attorney of Sh.

Madanlal Kachhawaha, namely, Smt. Kalawati. He submitted that for enforcement of the rights of the defendants in the said counter claim, the learned trial court was bound to consider the said Agreement to Sell dated 01.12.2005 and the effect thereof on the gift-deed dated 14.03.2012 and, therefore, such counter claim could not be thrown out on the anvil of Order 7 Rule 11 CPC.

6. I have heard the learned counsel for the parties at some length and perused the impugned order as well as judgment cited at Bar.

7. Para 6 of the judgment of Hon''ble Supreme Court in the case of Bai Dosabai (supra), is quoted to its relevant extract:

"..... The ultimate paragraphs of Section 54 of the Transfer of Property Act, expressly enunciates that a contract for the sale of immovable property does not, of itself, create any interest in or charge on such property. But the ultimate and penultimate paragraphs of Section 40 (sic! 54) of the Transfer of Property Act make it clear that such a contract creates an obligation annexed to the ownership of immoveable property, not amounting to an interest in the property, but which obligation may be enforced against a transferee with notice to the contract or a gratuitous transferee of the property. Thus, the Equitable ownership in property recognized by Equity in England is translated into Indian law as an obligation annexed to an interest in the property, but an obligation which may be enforced against a transferee with notice or a gratuitous transferee."

8. Similarly position was reiterated by the Andra Pradesh High Court in the case of Kondapalli Satyanarayana (supra) in the following manner:

"The subsequent transferee with notice stands in a fiduciary capacity and holds the property in trust to the prior agreement-holder, but the prior agreement-holder cannot automatically become the owner by seeking declaratory relief and has to necessarily file a suit for specific performance impleading both the vendor and the subsequent transferee."

9. Similarly, the Hon''ble Apex Court in the case of Atia Sidda Reddy (supra) also held that registered sale-deed prior in time will prevail over the subsequently executed registered sale-deed for the same property and no right or title accrue on the basis of subsequently executed registered sale-deed.

10. Section 54 of the Transfer of Property Act, 1882, which defines the word "sale" and says that a "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised, itself makes it clear towards the end of that provision that contract for sale, a contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest or charge on such property.

11. Interpreting this provision only, the Hon''ble Apex Court in the case of Bai Dosabai (supra) had laid down that equitable ownership in property recognized

by equity in England is translated into Indian law as an obligation annexed to the ownership of property, not amounting to an interest in the property, but an obligation which may enforced against the transferee with notice or a gratuitous transferee.

(emphasis supplied)

12. The said settled legal position clarifies that the gift-deed dated 14.03.2012 executed in favour of plaintiffs, who are thus gratuitous transferees of the said suit property, a residential house, will remain under an obligation created by donor, Sh. Madanlal Kachhawaha in favour of plaintiffs under the Agreement to Sell executed by him in favour of his fourth son, Roshanlal Kachhawaha at a prior point of time on 01.12.2005. In what manner that obligation is sought to be enforced by the defendants, in the present case, Roshanlal, is for him to pursue but the plaintiffs cannot wriggle out of that by seeking the throwing out the counter claim itself at the initial stage by filing present application under Order 7 Rule 11 CPC.

13. It is true that defendants could seek enforcement of that agreement only by filing a suit for specific performance in his favour, but the facts as brought to the notice of the learned court below in the counter-claim itself and also before this Court that in fact, the sale-deed has already been executed in favour of the fourth son, Roshanlal on 05.04.2012 by the power of attorney holder of Madanlal Kachhawaha, namely, Smt. Kalawati W/o Sh. Roshanlal. Therefore, as far as enforcement of the agreement is concerned, that already appears to have been enforced qua the suit property in question, and the right to seek a declaration in respect to cancellation of gift-deed dated 14.03.2012 executed in favour of plaintiffs/petitioners definitely subsists in favour of defendants. In the opinion of this Court, the learned court below has not committed any error in rejecting the plaintiffs' application under Order 7 Rule 11 CPC against that counter claim of the defendants.

14. The present civil revision petition filed by the plaintiffs/petitioners is thus found to be bereft of any merit and the same is hereby dismissed. No costs. A copy of this order be sent to the concerned parties and the court below forthwith.