(2013) 02 DEL CK 0341

In the Delhi High Court

Case No : LPA 1163 of 2007 and LPA 1171 of 2007 and CM No. 15074 of 2007

Seema Nayyar APPELLANT

Vs

M.C.D. and Others
 M.C.D. Vs Raghu Nayyar RESPONDENT

Date of Decision : 19-02-2013

Acts Referred:

Constitution of India, 1950 — Article 226
Delhi Municipal Corporation Act, 1957 — Section 116A(2), 147
Limitation Act, 1963 — Section 14
Powers of Attorney Act, 1882 — Section 1A, 2
Stamp Act, 1899 — Section 2
Transfer of Property Act, 1882 — Section 53A, 54

Citation : (2013) 02 DEL CK 0341

Hon'ble Judges : D. Murugesan, C.J;V.K. Jain, J

Bench : Division Bench

Advocate : Amita Gupta, Avnish Ahlawat, for the Appellant; B.B. Jain for Respondent No. 2 in LPA No. 1163/2007 and 1164/2007, for the Respondent

Final Decision : Dismissed

Judgement

1. The appellant in LPA No. 1164/2007 Shri Raghu Nayyar entered into an agreement dated 22.08.1997 to purchase Flat No. A-45, Retreat Cooperative Group Housing Society Complex, constructed on Plat No. 20, I.P. Extension, New Delhi for a consideration of Rs. 7,90,000/-. The appellant in LPA 1163/2007 Smt. Seema Nayyar entered into an agreement with one Shri J.S. Pal dated 17.08.1998 to purchase Flat No. A-41 in the aforesaid complex for a consideration of Rs. 9,50,000/-. The vendors executed separate documents such as Power of Attorney in favour of these appellants. No sale deed was executed by either of the vendors. On 15.01.2000, they applied to Delhi Development Authority for conversion of the aforesaid flats from leasehold to freehold. DDA executed Conveyance Deed in favour of these appellants, which was duly registered and the requisite stamp duty on the consideration paid to DDA was also deposited. Disputes arose between the private appellants and MCD with

regard to assessment of property tax in respect of the aforesaid flats and mutation of those flats in the name of the appellants. Municipal Corporation of Delhi, which is the respondent in the appeals filed by Shri Raghu Nayyar and Smt. Seema Nayyar and appellant in LPA No. 1171/2007 and 1172/2007, demanded transfer duty from Shri Raghu Nayyar as a pre-condition for mutation of the flats in their respective names. Writ petitions were filed by Shri Raghu Nayyar and Smt. Seema Nayyar raising grievance with regard to assessment of property tax as well as the demand of transfer duty as a precondition for mutation of the aforesaid floats in their respective names. They also sought compensation from MCD as well as its officers for mental agony, caused to them by raising unjustified demands.

2. During pendency of the writ petitions, the issue of ratable value of the aforesaid flats came to be settled in view of rectification order dated 24.02.2007 passed by MCD u/s 116A(2) of DMC Act, applying the age factor of 0.8 and, therefore, no further directions in this regard was sought by the appellants.

3. The learned Single Judge vide impugned order dated 06.07.2007 which was common to both the writ petitions, held as under:-

38. To summarise the findings and directions:

(i) The stamp duty and transfer duty were rightly assessed and collected by the Collector of Stamps from the petitioners on the basis of the value of Rs. 10,000/- indicated in the conveyance deeds dated 25.6.2001.

(ii) Once the transfer duty stood rightly assessed by and paid to the Collector of Stamps, the MCD was not justified, in terms of the unamended Section 147 DMC Act, in seeking to collect transfer duty from the petitioners as evidenced by its demand dated 11.3.2004 Accordingly the said demand is quashed.

(iii) Since the payment of such transfer duty was made a pre-condition by the MCD for grant of mutation in favor of the petitioners, a direction is issued to the MCD in each of the two writ petitions to carry out mutation of the flats in the petitioner''s respective names within a period of four weeks from today and in any event not later than 6.8.2007.

(iv) This Court is not inclined to grant the relief of compensation as claimed by the petitioners. However, this Court leaves it open to the petitioners to approach the civil court for their claim for damages, if any, payable by all or any of the Respondents.

(v) This Court directs that the MCD will pay to each of the petitioners, within a period of four weeks from today, and in any event not later than 6.8.2007 costs in the sum of Rs. 25,000.

4. Being aggrieved on account of compensation not being granted to them, Shri Raghu Nayyar and Smt. Seema Nayyar have challenged the aforesaid order on the limitation issue, whereas being aggrieved from findings number (i), (ii) and

(iii), MCD is before us by way of LPA Nos. 1171/2007 and 1172/2007.

5. Transfer Duty

The learned counsel for the MCD submits that in view of the provisions contained in Section 147 of DMC Act, MCD is entitled to transfer duty in respect of the flats subject matter of the documents executed in favour of Shri Raghu Nayyar and Smt. Seema Nayyar. Section 147 of DMC Act reads as under:-

147. Duty on transfer of property and method of assessment thereto.-

(1) Save as otherwise provided in this Act, the Corporation shall levy a duty on transfers of immovable property situated within the limits of Delhi in accordance with the provisions hereafter in this section contained.

(2) The said duty shall be levied-

(a) in the form of a surcharge on the duty imposed by the Indian Stamp Act, 1899 (2 of 1899) as in force for the time being in the Union territory of Delhi, on every instrument of the description specified below, and

(b) at such rate as may be determined by the Corporation not exceeding five per cent., on the amount specified below against such instruments-

It would be seen from the perusal of the aforesaid provision that transfer duty was payable only on the instruments of (a) Sale; (b) Exchange (c) Gift (d) Mortgage and (e) Lease in perpetuity, of immovable property. As regards transfer duty on contract for transfer of immovable property, since clause (vi) in Section 147 of MCD Act was admittedly inserted only with effect from 01.08.2003, the aforesaid provision would not apply to the documents executed in favour of Shri Raghu Nayyar and Smt. Seema Nayyar, the said documents having been executed in the years 1997 and 1998.

6. Admittedly, no document for exchange, gift or mortgage of an immovable property was executed by the erstwhile owners in favour of the appellants Shri Raghu Nayyar and Smt. Seema Nayyar. Therefore, clause (ii), (iii) and (iv) of Section 147 of DMC Act do not apply. Admittedly, no perpetual lease in respect of the flats in question was executed in favour of the appellants. Therefore, clause (v) of the aforesaid Section also does not apply.

7. The next question which comes up for consideration is as to whether an instrument of sale of immovable property was executed by the erstwhile owners, in favour of Shri Raghu Nayyar and Smt. Seema Nayyar or not. Admittedly, no sale deed in favour of these appellants was executed. The documents executed in their favour were Power of Attorney, Agreement to Sell, etc. The question for consideration, therefore, would be whether the documents such as Agreement to Sell, Power of Attorney, either individually or collectively, can be said to be an instrument of sale of immovable property or not. The power of attorney, whereby a person authorizes another person to do certain acts and deeds on his behalf is certainly not an instrument of transfer of immovable property since even if the

Power of Attorney relates to an immovable property the ownership of that immovable property continues to vest in the principal and is not transferred to the attorney. This issue was considered by Supreme Court in Suraj Lamp and Industries Pvt. Ltd. Vs. State of Haryana and Another, and the following view was taken:-

13. A power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property. The power of attorney is creation of an agency whereby the grantor authorizes the grantee to do the acts specified therein, on behalf of grantor, which when executed will be binding on the grantor as if done by him

(see Section 1A and Section 2 of the Powers of Attorney Act, 1882). It is revocable or terminable at any time unless it is made irrevocable in a manner known to law. Even an irrevocable attorney does not have the effect of transferring title to the grantee. In State of Rajasthan and Others Vs. Basant Nahata, this Court held:

A grant of power of attorney is essentially governed by Chapter X of the Contract Act. By reason of a deed of power of attorney, an agent is formally appointed to act for the principal in one transaction or a series of transactions or to manage the affairs of the principal generally conferring necessary authority upon another person. A deed of power of attorney is executed by the principal in favor of the agent. The agent derives a right to use his name and all acts, deeds and things done by him and subject to the limitations contained in the said deed, the same shall be read as if done by the donor. A power of attorney is, as is well known, a document of convenience.

Execution of a power of attorney in terms of the provisions of the Contract Act as also the Powers-of-Attorney Act is valid. A power of attorney, we have noticed hereinbefore, is executed by the donor so as to enable the done to act on his behalf. Except in cases where power of attorney is coupled with interest, it is revocable. The done in exercise of his power under such power of attorney only acts in place of the donor subject of course to the powers granted to him by reason thereof. He cannot use the power of attorney for his own benefit. He acts in a fiduciary capacity. Any act of infidelity or breach of trust is a matter between the donor and the done.

8. As regards Agreement to Sell, Section 54 of Transfer of Property Act makes it clear that a contract of sale, i.e., an agreement of sale does not of itself create any right, title or interest in the immovable property subject matter of such agreement. This legal proposition was approved by Supreme Court in Narandas Karsondas Vs. S.A. Kamtam and Another, .

In Municipal Corporation of Delhi Vs. Pramod Kumar Gupta, , Supreme Court, inter alia, held as under:-

The expression ''instrument'' in Section 147 of the Act has the same connotation as the word has under the Stamp Act, the reference to which has been expressly made. Clause 2 of Section 2 of the Stamp Act gives an inclusive definition of the expression. The expression.... The expression ''instrument of sale of immovable property'' u/s 147 of the Act must, therefore, mean a document effecting transfer. The title to the property concerned has to be conveyed under the document. The document has to be a vehicle for the transfer of the right, title and interest. A document merely stating as a fact that the transfer has already taken place cannot be included within this expression. A paper which is recording a fact or attempting to furnish evidence of an already concluded transaction under which title has already passed cannot be treated to be such an instrument.

It is manifest that the title passes under the auction-sale by force of law and the transfer becomes final when an order under Rule 92 confirming it is made. By the Certificate issued under Rule 94, the Court is formally declaring the effect of the same and is not extinguishing or creating title. The object of issuance of such a Certificate is to avoid any controversy with respect to the identity of the property sold, and of the purchaser thereof, as also the date when the sale becomes absolute....The Certificate, therefore, cannot be termed to be an instrument of sale so as to attract Section 147 of the DMC Act.

In Suraj Lamp and Industries Pvt. Ltd. (supra), Supreme Court had an occasion to consider the legal effect of documents such as General Power of Attorney (GPA), Agreement to Sell and Will which normally were being executed in Delhi to evidence transactions affecting immovable properties and are popularly known as ''GPA Sales''. After considering the legal provisions and case law on the subject, the following view was taken by the Apex Court:-

15. Therefore, a SA/GPA/WILL transaction does not convey any title nor create any interest in an immovable property. The observations by the Delhi High Court, in Asha M. Jain Vs. The Canara Bank and Others, that the "concept of power of attorney sales have been recognized as a mode of transaction" when dealing with transactions by way of SA/GPA/WILL are unwarranted and not justified, unintended misleading the general public into thinking that SA/GPA/WILL transactions are some kind of a recognized or accepted mode of transfer and that it can be a valid substitute for a sale deed. Such decisions to the extent they recognize or accept SA/GPA/WILL transactions as concluded transfers, as contrasted from an agreement to transfer, are not good law.

16. We therefore reiterate that immovable property can be legally and lawfully transferred/conveyed only by a registered deed of conveyance. Transactions of the nature of ''GPA sales'' or ''SA/GPA/WILL transfers'' do not convey title and do not amount to transfer, nor can they be recognized or valid mode of transfer of immoveable property. The courts will not treat such transactions as completed or concluded transfers or as conveyances as they neither convey title nor create any interest in an immovable property. They cannot be recognized as deeds of title, except to the limited extent of Section 53A of the Transfer of Property Act. Such transactions cannot be relied upon or made the basis for mutations in Municipal

or Revenue Records. What is stated above will apply not only to deeds of conveyance in regard to freehold property but also to transfer of leasehold property. A lease can be validly transferred only under a registered Assignment of Lease. It is time that an end is put to the pernicious practice of SA/GPA/WILL transactions known as GPA sales.

However, when it was pointed out to the Apex Court that making declarations such transfers are not legally valid modes of transfer, was likely to create hardship to a large number of persons who had entered into such transactions, they should be given sufficient time to regularize the transaction by obtaining deeds of conveyance and the decision should be made applicable prospectively to avoid hardship, it was directed that if such transactions were entered before the date of judgment, they could be relied upon for the regularization of leases by the development authorities. It was made clear that if the documents relating to such transactions had been acted upon by DDA or other authorities, they need not be disturbed merely on account of the said decision. In view of the authoritative pronouncement of the Supreme Court directly on the issue involved in this appeal, we have no hesitation in concluding that the documents which were executed in favour of Shri Raghu Nayyar and Smt. Seema Nayyar not being instruments of transfer of sale of immovable property, did not attract payment of transfer of duty u/s 147 of DMC Act.

Compensation:-

The learned Single Judge, on consideration of the pleadings with respect to award of compensation for harassment and mental agony LPA

alleged to have been caused to Shri Raghu Nayyar and Smt. Seema Nayyar, on account of action of the officers of the MCD, found that these were disputed questions of facts which were required to be decided on the basis of evidence in a civil suit. He further observed that precise role played by each of the respondents and whether they were acting unreasonably and arbitrarily in the performance of their statutory duties would be required to be determined in those proceedings before the question of fastening the liability for payment of compensation is taken up for consideration. The learned Single Judge was of the view that these questions could not be decided in proceedings under Article 226 of the Constitution and accordingly he left it open to these appellants to approach the Civil Court for adjudication of their claim for compensation, if any, payable by all or any of the respondents in the writ petition. He also observed that these appellants would be able to invoke Section 14 of Limitation Act to explain the delay in approaching the Civil Court.

Admittedly, there were no allegations of mala fide against the officers of MCD. Therefore, the question of payment of compensation, if any, to the appellant, would depend upon whether the action taken by the officers of MCD was so perverse, arbitrary and capacious as to warrant awarding of compensation against them or was a bona fide, though wrong in law, decision taken by them, in their respective wisdom, in the interest of the employer they were serving. We are in agreement with the learned Single Judge that such questions, cannot be gone into a writ petition since they require adjudication on the basis of evidence to be led by both the parties, which exercise can be undertaken only in a civil suit. During the course of arguments, we specifically asked the appellants as to how this Court would determine the quantum of compensation in the event of its coming to the conclusion that the action taken by the officers of MCD in this case was so unreasonable, arbitrary and perverse as to warrant award of compensation. The answer given by the appellants was that the Court could award any suitable amount as compensation to them. We, however, cannot agree. The quantum of compensation in the event of the Court holding that the appellants are entitled to such a compensation, cannot be fixed arbitrarily and has to be based upon facts and circumstances, which, in our view, can be ascertained only during the full-fledged trial before a Civil Court. Even after determining the quantum of compensation, if any, payable to these appellants, the Court would be further required to apportion the amount of compensation amongst various respondents and for that purpose, it will have to go into the role played by each of them. Such an exercise cannot be undertaken in a writ petition. Therefore, we find no reason to interfere with the view taken by the learned Single Judge in this regard, particularly when it is open to these appellants in the event their approaching a Civil Court for awarding of compensation to plead that the benefit of Section 14 of Limitation Act should be granted to him.

The appellant Shri Raghu Nayyar has relied upon the decision of Supreme Court in Century Spinning and Manufacturing Company Ltd. and Another Vs. The Ulhasnagar Municipal Council and Another, , where the Court, inter alia, held that a party claiming to be aggrieved by the action of a public body or authority on the plea that the action is unlawful, high-handed, arbitrary or unjust, is entitled to a hearing of its petition on the merits. In the case before Supreme Court, the petition filed by the appellant company did not raise any complicated questions of fact for determination and the Apex Court was of the view that the claim of the appellant could not be characterized as frivolous, vexatious or unjust. Noticing that the High Court had given no reason for dismissing the petition in limine and on consideration of the averments made in the petition and the material placed before it, the Court was of the view that the appellants were entitled to have its grievance tried. However, in the case before us since such disputed questions of fact are involved, which cannot be decided without recording of evidence, an exercise which cannot be undertaken by a Writ Court, the Civil Court, in our opinion, is the only appropriate forum for adjudication on the claim for grant of compensation.

For the reasons stated hereinabove, we find no merit in the appeals and all the appeals are hereby dismissed. There shall be no order as to costs.

