

(2012) 05 DEL CK 0251

In the Delhi High Court

Case No : Regular First Appeal No. 865 of 2003

Shri Man Mohan Batra

APPELLANT

Vs

Shri Bharat Bhushan Batra and Others

RESPONDENT

Date of Decision : 08-05-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 24, 96
Contract Act, 1872 — Section 202
Evidence Act, 1872 — Section 91, 92
Limitation Act, 1963 — Section 27
Powers of Attorney Act, 1882 — Section 1A, 2
Transfer of Property Act, 1882 — Section 53A, 54, 55, 55(4)(b)

Citation : (2012) 05 DEL CK 0251

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Ravi Gupta with Mr. Nishant Datta, for the Appellant; Ranjeev Kumar, for R-1, for the Respondent

Final Decision : Dismissed

Judgement

Valmiki J Mehta, J.

CM No. 5180/2012 (Restoration)

There is no opposition to the restoration and therefore, this application is allowed and the appeal is restored to its original number. Application is disposed of accordingly.

RFA No. 865/2003

1. This Regular First Appeal filed u/s 96 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment of the trial Court dated 1.8.2003 dismissing the suit for partition filed by the appellant/plaintiff inasmuch as it was found that the appellant/plaintiff by virtue of registered documents being the Agreement to Sell, Power of Attorney, Will (registered), receipt etc. transferred his 1/4th right in the

suit property in favour of the defendant no. 1. The facts of the case are that the appellant/plaintiff filed the subject suit for partition claiming that he and the defendants who are his brothers jointly purchased the suit property bearing No. BJ (5), West Shalimar Bagh, Delhi and he had executed a General Power of Attorney and Special Power of Attorney, both dated 26.5.1995, in favour of defendant no. 1 qua his share in the said property so that his interest could be looked after. It was pleaded that since the defendant no. 1 was acting against the interest of the appellant/plaintiff, the appellant/plaintiff cancelled the General Power of Attorney and Special Power of Attorney on 23.4.1996. It was further pleaded in the plaint that the documents executed by the appellant/plaintiff in favour of the defendant no. 1 on 26.5.1995 are without consideration and therefore conferred no right/interest in favour of the defendant no. 1. The appellant/plaintiff also pleaded to have issued legal notice dated 13.5.1996 seeking partition of the property claiming that he was in joint possession of the suit property. Since the claim of partition was refused, the subject suit for partition came to be filed.

2. The defendants being the three brothers filed a written statement. In the written statement, it was pleaded that the rights in the suit property were transferred by means of the documents being the Agreement to sell, Power of Attorney, Will etc. dated 26.5.1995 by the appellant/plaintiff in favour of the defendant No. 1. It was pleaded that the defendant no. 1 had with him the original title documents of the suit property and which was in furtherance of the transfer of interest of the appellant/plaintiff to the defendant no. 1 on 26.5.1995. The legal notice of the appellant/plaintiff is said to have been replied to.

3. After the pleadings were complete, the trial court framed the following issues.

Issues

(i) Whether the pltf. executed GPA, SPA, agreement to sell, receipt dated 26.5.95 with or without consideration Onus on parties.

(ii) Whether the pltf. could not legally cancelled the GPA and SPA as claimed in para 2 of plaint

(iii) Whether the suit has been properly valued for purposes of Court fees and proper Court fee has been paid OPP

(iv) Whether the suit is not maintainable in the present from as alleged in P.O.No. 3 of the W.S. OPD

(v) Whether the pltf. is entitled to preliminary decree of partition in respect of property No. BJ(5), West Shalimar Bagh, Delhi

(vi) Relief.

4. The only issue which has been argued before this Court is with regard to the validity of the documents being the Agreement to Sell, Power of Attorney, Will etc executed by the appellant/plaintiff in favour of respondent No. 1/defendant

No. 1 which have been proved and exhibited before the trial court as Ex.PW1/D3 to Ex.PW1/D9. On behalf of the appellant/plaintiff, it was argued that the documents were void inasmuch as no consideration flowed under the same to the appellant/plaintiff. It was pleaded that the lines in the documents being the receipt, Ex.PW1/D3 and the Agreement to Sell, Ex.PW1/D6 showed that there were interpolations with regard to the consideration of Rs. 1,35,500/-. It was also argued that it is not disputed that the cheque which was issued by the defendant no. 1/respondent no. 1 was not encashed and which showed that the documents dated 26.5.1995 were bad on account of lack of consideration.

5. Learned counsel for respondent no. 1/defendant no. 1, in response, argued that there are no interpolations in the documents dated 26.5.1995, and which have so been concluded by the trial Court. It is argued that if the appellant/plaintiff did not encash the cheque, he cannot lay the blame on the door of the respondent no. 1/defendant no. 1, inasmuch as the consideration which is stated in the documents dated 26.5.1995 is not the only consideration which flowed to the appellant/plaintiff. Basically the arguments of the respondent no. 1/defendant no. 1 are for upholding the impugned judgment as per the detailed reasoning given by the trial Court. During the course of arguments, learned counsel for respondent no. 1/defendant no. 1 also pleaded that the suit for partition as framed was not maintainable because the suit should have been a suit for possession inasmuch as the appellant/plaintiff was neither in physical possession nor in constructive possession of any part of the suit property. It is also argued that till date no suit has been filed for cancellation of the documents dated 26.5.1995 executed by the appellant/plaintiff in favour of the defendant No. 1/respondent No. 1 and even in the present suit there is no such relief which has been claimed and therefore the documents have become binding as challenge to the same is barred by Article 59 of the Limitation Act, 1963.

6. The impugned judgment is a detailed judgment in which the reasoning with respect to the main issue nos. 1 and 2 are dealt with in as many as 27 pages. I would seek to reproduce some of the relevant findings and conclusions of the trial Court, and which persuaded the trial Court to dismiss the suit for partition. These findings and conclusions read as under:

8. xxx

Coming to the facts of the present case, first of all it has to be seen whether the pltf. has executed the documents Ex.PW1/D3 to D9 in favour of defts, secondly whether any tampering has been done in the documents Ex.PW1/D3, Ex.PW1/D4 and Ex.PW1/D6, thirdly whether these documents were executed by the pltf. without any consideration and lastly whether the pltf. could have cancelled these documents. So far as the execution of the documents Ex.PW1/D3 to D9 are concerned, pltf. as well as his wife have admitted that they have executed the documents i.e. receipt Ex.PW1/D3, indemnity bond Ex.PW1/D4, affidavit Ex.PW1/D5, agreement to sell Ex.PW1/D6, special power of attorney Ex.PW1/D7, Will Ex.PW1/D8 and General Power of attorney Ex.PW1/D9. So it has to be held that

on 26.5.95 the pltf. executed these documents Ex.PW1/D3 to D9 in favour of the deft. which were duly signed by his own wife i.e. P.W.2 Smt. Rama Batra as a witness. Out of these seven documents, three documents are registered i.e.GPA, SPA and Will and it is not alleged that any tampering has been done with GPA, SPA and Will Ex.PW1/D9, PW1/D7 and Ex.PW1/D8 respectively. When this question is to be considered by the Court regarding tampering of the documents only one or two documents a like the receipt, agreement to sell etc. cannot be considered in isolation. Rather all the documents executed on 26.5.95 have to be taken into consideration to ascertain whether any tampering has been done or not and if so, at what stage and by whom. The Will Ex.PW1/D8 has been executed by the pltf. in favour of his elder brother Sh. Bharat Bhushan Batra, deft. No. 1 on 26.5.95. This date in the first line of the Will has been written with pen meaning thereby that this Will was prepared prior to 26.5.95 but the date was put on the date of registration in the space initially left blank. As admittedly no tampering is attributed on this registered Will it has to be considered as a genuine document duly executed and registered by the pltf. himself making his wife as a witness to the Will. The mere fact that younger brother is executing a Will in favour of his elder brother in respect of his 1/4th share in the suit property and also mentioning therein that incase anyone raises any objection and challenge this Will, the objection shall be treated as null and void, clearly establishes that this Will has been executed with a view to avoid any future objection by his own legal heirs and for the benefit of deft. No. 1 as part of the sale transaction and in view of the prevailing trend of POA sales. Now I come to the affidavit Ex.PW1/D5. No tampering has been pointed out in this affidavit. Para 1 and 2 of this affidavit is to the effect that the deponent Man Mohan Batra had executed general and special power of attornies, affidavit, agreement to sell, Will, receipt and indemnity bond in respect of 1/4th share of builtup property No. BJ-5/Pas) Shalimar Bagh, Delhi measuring 225.50 sq. mtr. in favour of Bharat Bhushan Batra, hereinafter called the purchaser. It is also mentioned in para 3 of the affidavit that the deponent shall not revoke or cancel the above said documents in any circumstances. In para 4, it is mentioned that he has delivered the vacant possession of the said property alongwith all previous documents to the said purchaser on spot. The contents of this affidavit are sufficient to make it clear that on 26.5.95 at the time of execution of documents Ex.PW1/D3 to D9 the intention of the pltf. behind the execution of all the document was to sell 1/4th share in the suit property to deft. No. 1. Now I come to the document Ex.PW1/D4 which is indemnity bond. It is contended that at point -A to A the date 26.5.95 has been added subsequently. If all other documents including Will are dated 26.5.95, where was the occasion for the deft. to tamper with indemnity bond and insert the date 26.5.95 at subsequent stage. This contention is falsified if all the documents executed on 26.5.95 are considered together. Now the receipt Ex.PW1/D3 is to be considered. It has been claimed by the pltf. that this receipt has been tempered with by inserting portion A to A, B to B and C to c subsequently. This receipt not only bears the photograph of the pltf. but has been duly attested by the Notary Sh. M.S.Mehta alongwith other documents. Though it

appears that amount and details of the cheque have been inserted subsequently but as I have already observed while discussing about the Will Ex.PW1/D8, it is natural for the parties to get the documents prepared in advance and fill up the dates and other relevant particulars at the time of actual transaction but it does not mean that any subsequent addition which has been done after preparation of the document but before registration/attestation can be termed as tampering with the documents. Here I would like to mention that the documents which are on stamp papers have been purchased on 17.5.95 and their serial number makes it clear that they have been purchased at one time which further proves that stamp papers were purchased on 17.5.95 and thereafter the set of the documents was got prepared but registration/attestation of the documents was done on 26.5.95 and accordingly dates and amount were mentioned subsequently. Thus I am of the considered view that none of the documents have been tampered with after their registration/attestation by the Notary.

xxx

Now the suit point to be considered by the Court is whether these documents have been executed without consideration. There is oral statement of pltf. and his wife that they have not received any amount from the deft. at the time of execution of these documents as the amount was not settled and the deal was not finalized. This statement of the pltf. and his wife is highly improbable as no person is going to execute and get the documents registered without receiving the consideration. No wife will permit her husband and also become witness to the documents unless the consideration has been received. The mere fact that pltf.s own wife has signed the various documents as attesting witness including the Will executed for this POA sale of 1/4th share of the pltf. in favour of deft. No. 1, is sufficient to draw the inference that this transaction was for consideration. No doubt it is admitted case of the parties that the cheque No. 147788 dated 26.5.95 was never presented by the pltf. for encashment and the deft. never offered the amount in lieu of cheque to the pltf. and it makes the matter a little bit complicated to ascertain as to what was the consideration paid in this case, but the solution is not difficult to find because the Court cannot ignore the trend in the society that in the documents in order to avoid stamp duties and also for house tax purposes, the properties are shown as undervalued. If it was a case that the pltf. agreed to sell his 1/4th share only for Rs. 1,35,500/- to deft. No. 1 then after execution of the documents on 26.5.95 he would not have remained silent for such a long time i.e. almost one year without demanding any payment from the deft. or filing any suit for specific performance or damages. Here in the given case the pltf. has not even presented the cheque for encashment. While sending the notice dated 13.5.96 Ex.P1 the pltf. is silent about the documents like agreement to sell, Will, receipt, indemnity bond and affidavit and has referred only the GPA and SPA and the cancellation of the same. It is also mentioned in Ex.P1 in para 1 that the said power of attorneys have been cancelled and deft. No. 1 was informed accordingly, but prior to 13.5.96 no communication has been placed on record by the pltf. to show the

reason behind cancellation of power of attornies and the communication of the same to the deft. Although the pltf. has failed to prove on record the original cancellation deed or power of attorney but as the photocopies of the same have been filed by the pltf. and the same can be looked at the instance of the opposite party, these copies of deeds of cancellation of power of attornies are dated 23.4.96 and in one of these cancellation deeds, no payment of consideration and cause of cancellation has been mentioned. Rather the pltf. has preferred to mention that due to some reasons, the executants wants to cancel these GPA and SPA. Non-disclosure of reasons in these cancellation deeds clearly suggests that there was no dispute about consideration and the pltf. has become wise about the consideration only on 17.5.96 while sending a letter Rx.P4 so as to add that the said documents are without consideration. It is worthwhile to mention here that notice Ex.P1 dated 13.5.96 has been posted on 15.5.96 (as can be seen from the postal stamp on postal receipt Ex.P2). Before this letter could reach the hands of deft. No. 1, another notice dated 17.5.96 has been sent and this second notice Ex.P4 has been posted on 18.5.96 which is clear from the postal receipt Ex.P5. These two letters in quick succession without waiting even for the reply of the first letter clearly proves that the consideration was not in dispute in this matter otherwise first of all pltf. would not have executed and got registered the document on 26.5.95 and even if it is presumed for the sake of arguments that he trusted his elder brother and executed the documents hoping to receive the consideration in near future, even then in normal course a time limit is fixed or agreed and pltf. would have reacted immediately on expiry of that time limit. The silence by both the parties regarding the non-presentation of the cheque dated 26.5.95 which has been shown as consideration amount in the present deal further strengthens the belief that some unaccounted money must have changed the hands in this transaction and both the parties being real brothers mentioned the details of the cheque at the time of transaction for valuation purposes. What was the consideration paid by deft. No. 1 to the pltf. is not known but it can safely be said that this transaction was for consideration. The joint written statement was for consideration. The joint written statement filed by deft. No. 1 to 3 further proves that the pltf. has executed documents Ex.PW1/D3 to D9 with the intention to sell his 1/4th share in the suit property. Even otherwise had the pltf. not agreed to sell his share to deft. No. 1 for consideration, he would have sent a simple notice seeking partition to his other three brothers that he wants the property to be partitioned by meets and bounds. No such notice or letter was ever sent by the pltf. to deft. No.2 and 3. The mere fact that the letter dated 13.5.96 has been addressed only to deft. No. 1 referring about the cancellation of attornies and seeking partition by meets and bounds clearly establishes that the pltf.wanted to enforce his right only against deft. No. 1 and this could have been done only when he had entered into sale agreement with him and he wanted the effect of documents dated 26.5.95 to be nullified. Keeping in view the joint written statement of remaining three brothers, it stands proved that pltf. had agreed to sell his 1/4th undivided share in the suit property to deft. No. 1 for consideration.

XXX

Now coming to the facts of the present case, it is admitted case of the parties that they themselves have purchased the suit property on the basis of GPA, SPA, Will receipt etc. and thereafter the pltf. agreed to sell his 1/4th undivided share in the suit property to deft. No. 1, his elder brother on the basis of GPA, Agreement to sell, Will, receipt, indemnity bond and affidavit etc. Although the pltf. has not proved on record the cancellation of GPA and SPA and even if it is assumed for the sake of arguments that these two documents have been cancelled by the pltf., the agreement to sell was never cancelled by the pltf. and it is proved on record that the possession has also been handed over by the pltf. to deft. No. 1 while executing these documents. Hence, the pltf. had no right to cancel or revoke the documents dated 26.5.95 which were executed in favour of deft. No. 1 for purpose of sale of his 1/4th share of deft. No. 1.

In view of the above discussion, I hold that the pltf. has executed the document dated 26.5.95 i.e. receipt Ex.PW1/D3, indemnity bond Ex.PW1/D4, affidavit Ex.PW1/D5, agreement to sell Ex.PW1/D6, special power of attorney Ex.PW1/D7, Will Ex.PW1/D8 and General Power of Attorney Ex.PW1/D9 in favour of deft. No. 1 for consideration and cannot legally cancel the GPA and SPA as claimed in para 2 of the plaint. Both these issues are decided accordingly.

(underlining added)

7. (i) A reference to the aforesaid findings and conclusions of the trial Court shows that the trial Court has held that there is nothing unusual when consideration which passes under the documents is mentioned by way of subsequent insertions brought about by typing on the prepared documents and therefore, it cannot be said that the documents dated 26.5.1995 are bad on account of interpolations.

(ii) The trial court has also arrived at a finding with respect to passing of consideration, other than what is stated in the documentation dated 26.5.1995.

(iii) There was complete silence on the part of the appellant/plaintiff of the documents being void for lack of consideration for a long period of one year inasmuch as the first notice to the respondent No. 1/defendant No. 1 is dated 13.5.1996 (Ex.P-1) and the supplementary notice thereto is dated 17.5.1996 (Ex.P-4).

(iv) The appellant/plaintiff executed deeds of cancellations of General Power of Attorney and Special Power of Attorney dated 23.4.1996 which were registered before the Sub-Registrar, however, there is no valid reason that the documents could be cancelled because no consideration flowed under the document dated 26.5.1995. I may note that the documents in this case are of the year 1995 i.e. before 24.9.2001 when Act 48 of 2001 came into operation requiring registration and stamping of an Agreement to Sell when the same is of the nature of Section 53A of the Transfer of Property Act, 1882.

8. Rights are conferred by means of the usual documents being an Agreement to Sell, Power of Attorney etc in view of Section 53A of the Transfer of Property Act, 1882 and Section 202 of the Contract Act, 1872 vide the judgment of a Division Bench of this court in the case of Harbans Singh Vs. Shanti Devi 1977 RLR 48. I may also note that the Supreme Court, in the recent judgment of Suraj Lamp and Industries Pvt. Ltd. Vs. State of Haryana and Another, has in paras 12, 13 and 16 upheld rights u/s 53A of Transfer of Property Act, 1882 and Section 202 of the Contract Act, 1872 and these paras read as under:-

12. Any contract of sale (agreement to sell) which is not a registered deed of conveyance (deed of sale) would fall short of the requirements of Sections 54 and 55 of Transfer of Property Act and will not confer any title nor transfer any interest in an immovable property (except to the limited right granted u/s 53A of Transfer of Property Act). According to Transfer of Property Act, an agreement of sale, whether with possession or without possession, is not a conveyance. Section 54 of Transfer of Property Act enacts that sale of immoveable property can be made only by a registered instrument and an agreement of sale does not create any interest or charge on its subject matter.

Scope of Power of Attorney

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 donee to act on his behalf. Except in cases where power of attorney is coupled with interest, it is revocable. The donee 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 donee.

An attorney holder may however execute a deed of conveyance in exercise of the power granted under the power of attorney and convey title on behalf of the grantor.

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.

(emphasis added)

9. I completely agree with the aforesaid findings and conclusions of the trial Court and in addition thereto I would like to reiterate and add the following reasoning as an Appellate Court under Order 41 Rule 24 CPC.

(a) The appellant/plaintiff in the plaint claimed that he had executed the General Power of Attorney and Special Power of Attorney dated 26.5.1995 so that the respondent No. 1/defendant No. 1 took care of his interest in the property. This is ex facie unbelievable inasmuch as not only are there the two power of attorneys being the General Power of Attorney and Special Power of Attorney (which have been exhibited before the trial Court as Ex.PW1/D7 and Ex.PW1/D9), but also there are other documents of the same date being a Receipt, Indemnity bond, Agreement to Sell, Will and Affidavit. If the object of the appellant/defendant was to allow the respondent No. 1/defendant No. 1 only to manage the property, there was no need to execute other documents being the Agreement to Sell, Affidavit, Will, Receipt and Indemnity Bond, and all of which are of the same date of execution of the two power of attorneys on 26.5.1995. The appellant/plaintiff in fact does not dispute his signatures on these documents and in fact admits to have executed these documents. The trial Court has in this regard rightly noted that the stamp papers of these documents are purchased in a series, and which becomes clear from the stamping of the documents at their back, and which is therefore another reason to hold that it does not lie in the mouth of the appellant/plaintiff to allege that the documents were executed only

for the reason that respondent no. 1/defendant no. 1 would take care of the interest of the appellant/plaintiff in the suit property. Ex facie this contention is not believable.

(b) As per Sections 91 and 92 of the Evidence Act, 1872, once there is a written document of the transaction, the terms of the said document cannot be in any manner contradicted by oral evidence unless the documents have been executed by force, fraud, coercion etc. to nullify the documents as a whole. It is not the case of the appellant/plaintiff in the facts of the present case that there was any force, fraud etc. The two grounds which have been alleged are that the documents were bad on account of lack of consideration and the documents were executed for defendant No. 1 to take care of the interest of appellant/plaintiff on the suit property. In my opinion, the two pleas as taken by the appellant/plaintiff in the plaint, one of the documents having been executed so that the respondent no. 1/defendant no. 1 takes care of the interest of the appellant/plaintiff in the suit property and the second plea of the documents being void for lack of consideration are mutually inconsistent and in fact mutually destructive. Once the appellant/plaintiff pleads that the documents were in fact executed and only allegedly for taking care of the interest of the suit property, where does arise the issue of there being any consideration under the documents flowing from the defendant No. 1/respondent No. 1 to the appellant/plaintiff. Clearly, the appellant/plaintiff is seeking to play fast and loose, and therefore, the case of the appellant/plaintiff really has no legs to stand upon.

(c) In my opinion, the suit was in fact not maintainable as framed inasmuch as, the appellant/plaintiff admittedly was not in physical possession of the property. A suit for partition only lies when the plaintiff is either in physical possession of the property or in constructive possession of the property i.e. when the property is held by a co-owner for all the other co-owners. In the present case, once it was shown that the appellant/plaintiff was not in physical possession of the property, and could not be in constructive possession because the respondent no. 1/defendant no. 1 claimed rights in the property under the documentation dated 26.5.1995, which mentioned that possession was handed over to defendant No. 1, ouster was clearly pleaded and it was incumbent on the appellant/plaintiff to amend his plaint to seek the relief of possession. Admittedly, no relief of possession is sought and hence the suit as framed is not maintainable. Also, in my opinion, the suit for possession if now sought to be amended to claim the relief would in the peculiar facts of this case be hopelessly barred by limitation inasmuch as once ouster is clear from the year 1996, the period of 12 years under Article 65 expires in 2007, and thereafter by virtue of Section 27 of the Limitation Act, 1963 the rights of the appellant/plaintiff assuming they existed in the suit property would stand extinguished. Thus, neither the suit as framed was maintainable as a suit for partition and the relief for possession as of today, if the suits were to be converted into a suit for possession, the relief for possession cannot be granted because the suit for possession as on today will be barred if the same is filed today.

(d) If the case of the appellant/plaintiff is that the documents are void on account of lack of consideration, then, in law u/s 55(4) (b) of the Transfer of Property Act, 1882 the remedy by the buyer, who has not received consideration is not for cancellation of the transfer documents but only for seeking payment of the balance sale consideration. The Supreme Court in the case of Kaliaperumal Vs. Rajagopal and Another, has held that unless and until the passing of consideration is a sine qua non to transfer of title and it is so pleaded, merely because consideration does not pass, cannot mean that the transfer of title will not take place. Where the payment of consideration is not a pre-condition to the transfer of title, the seller can only ask for payment of the sale consideration or balance sale consideration in terms of Section 55(4) (b) of the Transfer of Property Act, 1882. The relevant observations of the Supreme Court are contained in para 8 of this judgment and which reads as under:-

8. Sale is defined as being a transfer of ownership for a price. In a sale there is an absolute transfer of all rights in the properties sold. No rights are left in the transferor. The price is fixed by the contract antecedent to the conveyance. Price is the essence of a contract of sale. There is only one mode of transfer by sale in regard to immovable property of the value of Rs.100/- or more and that is by a registered instrument. It is now well settled that payment of entire price is not a condition precedent for completion of the sale by passing of title, as Section 54 of Transfer of Property Act, 1882 ("Act" for short) defines "sale" as a transfer of ownership in exchange for a price paid or promised or part paid and part promised. If the intention of parties was that title should pass on execution and registration, title would pass to the purchaser even if the sale price or part thereof is not paid. In the event of non-payment of price (or balance price as the case may be) thereafter, the remedy of the vendor is only to sue for the balance price. He cannot avoid the sale. He is, however, entitled to a charge upon the property for the unpaid part of the sale price where the ownership of the property has passed to the buyer before payment of the entire price, u/s 55(4) (b) of the Act. Normally, ownership and title to the property will pass to the purchaser on registration of the sale deed with effect from the date of execution of the sale deed. But this is not an invariable rule, as the true test of passing of property is the intention of parties. Though registration is prima facie proof of an intention to transfer the property, it is not proof of operative transfer if payment of consideration (price) is a condition precedent for passing of the property. The answer to the question whether the parties intended that transfer of the ownership should be merely by execution and registration of the deed or whether they intended the transfer of the property to take place, only after receipt of the entire consideration, would depend on the intention of the parties. Such intention is primarily to be gathered and determined from the recitals of the sale deed. When the recitals are insufficient or ambiguous the surrounding circumstances and conduct of parties can be looked into for ascertaining the intention, subject to the limitations placed by Section 92 of Evidence Act.

(underlining added)

In the present case, it is not the case of the appellant/plaintiff that the passing of the sale consideration was a condition precedent and therefore, the documents dated 26.5.1995 must fall. It is only pleaded that the documents must fall because the consideration has not passed, and therefore, it is not a case of the appellant/plaintiff that payment of consideration is a pre-condition sine qua non for transfer of title of property and payment of consideration as a pre condition for transfer is also not so mentioned in the documents. Therefore, in my opinion, at best, the appellant/plaintiff could have sued to receive the consideration payable under the documents dated 26.5.1995.

I may at this stage state that though the trial Court seems to have made observations with regard to unstated consideration having passed between the parties, however in my opinion, one possibly may not be able to recognize these issues though of course the same may be the reality.

10. Learned senior counsel for the appellant/plaintiff argued that the argument of the appellant/plaintiff is not hit by Section 92 of the Evidence Act, 1872 because the plea is a plea of insertion or interpolation of the lines with respect to consideration, and therefore, the appellant/plaintiff can plead that the documents are illegal. In my opinion, merely putting the argument in a particular fashion cannot change the substance thereof and which is that the argument seeks to contradict the term of the documents which specifically states that the same have been executed for consideration of Rs. 1,35,500/-. Once the documents are found to have been executed by the appellant/plaintiff, and there is no plea of force, fraud coercion or undue influence, it cannot be pleaded that one of the terms of the document is wrongly found therein and which is an argument really causing conflict/contradiction with one of the main terms of the document and thus prohibited by Section 92 of the Evidence Act, 1872. What cannot be done directly cannot be done indirectly and therefore I have no hesitation to reject the argument as urged on behalf of the appellant. I may only reiterate that I have already affirmed the findings of the trial Court which say that in fact really there were no interpolation in the documents being the receipt, Ex.PW1/D3 and the Agreement to Sell, Ex.PW1/D6 which mentions the factum of sale consideration of Rs. 1,35,500/- and its payment by means of a cheque as stated in the receipt, Ex.PW1/D3. As held by the trial Court and which finding I uphold that many a times after leaving space for mentioning of certain facts which are not available when the documents are first typed, subsequently these spaces are filled up and mentioning of consideration of a particular amount if inserted subsequently after the first typing of the documents cannot mean that in fact the insertions were after the execution of the documents. As already stated above, the Power of Attorney and the Will are registered documents, and which, the appellant/plaintiff would not have got registered if really no consideration had otherwise flowed to him or in any case, he had not agreed to transfer title on receipt of consideration. Of course for reasons which I difficult to fathom the appellant/plaintiff has not encashed the cheque of Rs. 1,35,500/-.

11. A civil case is decided on balance of probabilities. In a civil case, after evidence is led by both the parties the Court puts the same in a melting pot so as to decide the final picture which has to emerge therefrom. Merely because two views are possible, the Appellate Court will not interfere in the findings and conclusions of the trial Court unless the same are illegal or perverse. The facts of the present case show that the trial Court has rightly arrived at the finding that the appellant/plaintiff did in fact execute documents for transfer of his interest in the suit property by means of the documents dated 26.5.1995. Besides the reasoning of the trial Court, I have also given my additional reasoning to uphold the conclusions which have been drawn by the trial Court. Though it has not been argued before me that there is no issue that the documents dated 26.5.1995 transfers some interest of the suit property in favour of the respondent No. 1/defendant No. 1, I may note that the transactions in this case are of the year 1995 i.e. they are not hit by the amendment of Transfer of Property Act 48/2001 as per which, unless the stamping is with 90% of the consideration of the sale deed and there is registration of such an agreement to sell, the same cannot be looked into. Further, as have already observed above, the Supreme Court in the Judgment of Suraj Lamp and Industries Pvt. Ltd. Vs. State of Haryana and Another, in paras 12, 13 and 16 has preserved the rights which flow u/s 53A of the Transfer of Property Act, 1882 and Section 202 of the Contract Act, 1872. In the present case, therefore, the respondent No. 1/defendant No. 1 can take the benefit of Section 53A of the Transfer of Property Act, 1882 as then existing and also Section 202 of the Contract Act, 1872. In view of the above, I do not find any merit in the appeal, which is accordingly dismissed leaving the parties to bear their own costs.