

(2010) 03 DEL CK 0415

In the Delhi High Court

Case No : Regular First Appeal 312 of 2007

Shri Satpal Singh Sethi

APPELLANT

Vs

Mrs. Gursev Kaur (through L.Rs.) and Others

RESPONDENT

Date of Decision : 25-03-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 22 Rule 4

Citation : (2010) 170 DLT 671 : (2011) 7 RCR(Civil) 1077

Hon'ble Judges : P.K. Bhasin, J

Bench : Single Bench

Advocate : V.K. Makhija and L.C. Bajaj, for the Appellant; None, for the Respondent

Judgement

P.K. Bhasin, J.—This is an appeal by the unsuccessful plaintiff in a suit for cancellation of sale deeds, declaration of title and possession in respect of property No. H-7, N.D.S.E.-I, New Delhi (hereinafter to be referred to as "the suit property"). The appellant is aggrieved by the judgment and decree dated 3rd May, 2007 passed by the learned Additional District Judge whereby the appellant's suit was dismissed.

2. Facts of the case leading to the filing of the suit by the appellant herein (hereinafter to be referred as "the plaintiff") have been noticed by the trial Court in paras No. 3 to 5 of its judgment and the same are re-produced below:

3. DLF Construction (P) Ltd. sold a plot measuring 319 sq. Yards bearing plot No. H-7, NDSE Part I, New Delhi to Sh. Rattan Singh by sale deed dated 27.12.1958. Sh. Rattan Singh sold the plot to Sh. Bihari Lal on 17.1.59 by way of sale deed. Sh. Bihari Lal further sold the property to Sh. Raghubir Singh by sale deed dt. 15.6.1962 then Raghubir Singh appointed Sh. Kulwant Singh as his attorney to sell the plot and the super structure to Sh. Jagjit Singh Sethi for consideration of Rs. 49,000/-. Since Raghubir Singh was a resident of Thailand and the power of attorney was attested by Officer In-charge, Embassy of India in Thailand. Hence, Raghubir Singh through his attorney Kulwant Singh executed sale deed dt.

14.9.1967 in respect of aforementioned property in favour of Jagjit Singh Sethi for total consideration of Rs. 49,000/-.

4. plaintiff Satpal Singh Sethi is son of Sh. Jagjit Singh Sethi and Sh. Jagjit Singh died in 1973, therefore, letter of administration was applied (probate case No. 23 of 1977) before Ld. District Judge, Delhi. The letter of administration was granted by Ld. District Judge on 21.1.1979.

5. The plaintiff filed an eviction petition against the tenants in the suit property and also for recovery of the rent. During the course of the proceedings it came to the knowledge of the plaintiff that defendant No. 5 were claiming ownership of the property No. H 7, NDSE, Part I, New Delhi (hereinafter referred the property), on the basis of sale deed dt. 30.9.88, as if they have purchased property from Smt. Kusum Lata Khajanchi whereas, sale deed dt. 19.2.88 executed by Sh. Joginder Lal acting as an attorney of Raghubir Singh in favour of Kusum Lata Khajanchi, is forged and fabricated power of attorney (Power of Attorney dt. 28.12.87). Raghubir Singh never appointed Joginder Lal as his attorney, his signatures on the power of attorney are forged. Otherwise, when Sh. Raghubir Singh had sold the property by sale deed dt. 14.9.1967 in favour of Jagjit Singh Sethi, he had left with no right of authority or title to further execute or authorise to execute sale deed dt. 19.2.88 or power of attorney 28.12.1987 in respect of the property. The sale deed dt. 19.2.88 does not pass title in favour of Kusum Lata Khajanchi (defendant No. 4). Consequently, the sale deed dt. 30.9.88 executed by Defendant No. 4 in favour of defendant No. 5 M/s. Gwalior Securities and Traders Ltd. did not pass any title. In fact, Raghubir Singh was resident of Thailand and he was not in Delhi on 28.12.87 and sale deed dt. 19.2.88 narrates that Raghubir Singh had continued holding all rights, title and interest in the property adverse to Sh. Jagjit Singh Sethi or sale deed dt. 14.9.1967 does not pass any title in favour of Sh. Jagjit Singh Sethi or the title passed became time barred, however, all these narration are false throughout. Hence the present suit has been filed through plaintiff's attorney Sh. Kuldip Singh.

3. Summons of the suit were not served upon defendants 1 and 2, who were living in Thailand, but defendant No. 3 entered appearance on their behalf also as their attorney and one advocate also appeared for all the three on 02/05/90 but thereafter that advocate disappeared. Then the trial Court noticed that that advocate's vakalatnama was not on record and so fresh summons were ordered to be served on defendants 1 and 2. Trial Court's record does not show service of summons on these two defendants. However, on 22/02/91 again the advocate who had earlier appeared on behalf of defendants 1-3 on 02/05/90 appeared and filed a written statement which was signed by defendant No. 3 for himself and as attorney of defendants 1 and 2. The defence of these defendants was that Shri Raghubir Singh had not sold the suit property through Shri Kulwant Singh to the plaintiff's father nor had he executed any Power of Attorney in favour Shri Kulwant Singh authorising him to sell the suit property to the plaintiff's father. It

was also pleaded in the alternative that since even after execution of the alleged sale deed in favour of the plaintiff's father by Shri Raghubir Singh through his said attorney plaintiff's father had not exercised any right or authority in respect of the suit property and the property continued to be in possession and control of Shri Raghubir Singh the title in favour of plaintiff's, if any, was lost "through adverse possession and reverted back to the real owner". Another objection taken by these defendants was that suit for declaration without the consequential relief of possession was not maintainable. Regarding the sale deed purporting to have been executed by Shri Raghubir Singh through defendant No. 3 as attorney in favour of defendant No. 4 Mrs. Kusumlata Khajanchi, the stand of these defendants was that that was the validly executed sale deed through a lawfully constituted attorney of Shri Raghubir Singh. It was denied that the Power of Attorney in favour of defendant No. 3 Joginder Lal, pursuant to which defendant No. 3 had executed the sale deed in respect of the suit property in favour of defendant No. 4, was a forged document.

4. In view of the objection taken by defendants 1 to 3 that suit without the relief of possession was not maintainable the plaintiff amended the plaint and claimed the relief of physical possession in respect of the portion of the suit property which was in actual possession of defendant No. 5 and symbolic/constructive possession of the rest of the portion which was in occupation of the tenants much prior to the execution of the sale deeds in favour of defendants 4 and 5.

5. Written statement to the amended plaint was filed by defendant No. 3 but this time he did not file it on behalf of defendants 1 and 2 and they themselves also did not file separate amended written statement. In the amended written statement the defendant No. 3 maintained the stand he had already taken in the earlier written statement filed by him on his on behalf and on behalf of defendants 1 and 2 as their attorney. Additionally an objection was taken that the suit was bad for non-joinder of the tenants in actual occupation of some portions in the suit property and from whom constructive possession was being claimed by the plaintiff.

6. Defendant No. 4, in whose favour Shri Raghubir Singh had allegedly executed sale deed dated 19th February, 1988 in respect of the suit property by defendant No. 3 as his attorney and defendant No. 5 in whose favour defendant No. 4 had subsequently executed the sale deed dated 30th September, 1988 in respect of the suit property and which sale deeds, according to the plaintiff, had cast a cloud over his title in respect of the suit property, did not contest the suit though they had entered appearance in the suit through an advocate on 07/11/89 and some other dates even though summons of the suit had not been served on them. Later on their advocate also disappeared from the scene.

7. During the pendency of the suit defendant No. 2 died. His mother was already a party to the suit as defendant No. 1 and since the plaintiff claimed that he had no knowledge of any other legal heir of the deceased defendant No. 2 no application under Order 22 Rule 4 CPC was moved by the plaintiff. Subsequently

defendant No. 1 also died and her legal heirs were brought on record but they chose not to appear in the trial despite service of notice by way of publication in newspapers as they were also residents of Thailand.

8. On the pleadings of the plaintiff and defendants 1-3 the trial Court had framed following issues on 29.5.2006:

1. Whether the suit of the plaintiff is time barred? (OPD)
2. Whether the suit of the plaintiff is barred by non-joinder of necessary parties? (OPD)
3. Whether the suit of the plaintiff is not properly valued for the purpose of court fee and jurisdiction? (OPD)
4. Whether any cause of action to implead defendant No. 3 as party has arose and as such suit is not maintainable against defendant No. 3? (OPP)
5. Whether the Special Power of Attorney dated 07.08.1967 executed by Raghubir in favour of Kulwant Singh and sale deed dated 14.09.1967 are the valid documents? (Onus to prove upon parties)
6. Whether the plaintiff is entitled for relief of declaration and possession on the basis of sale deed dated 14.09.1967? (Onus to prove upon parties)
7. Whether the relief of declaration as exclusive owner in the name of plaintiff is maintainable? (OPP)
8. Whether the sale deed dated 30.09.1967 executed in favour of M/s. Gwalior Securities passes valid title in favour of defendant No. 5? If so, what is its effect? (OPD5)
9. After framing of the issues when the case was at the stage of plaintiff's evidence and before any evidence could be recorded defendant No. 3 appeared in Court on 13th September, 2006 and made a statement that proceedings against him should be dropped since he was only the attorney of Shri Raghubir Singh and he had died. In view of that the plain tiff through his attorney withdrew the suit against defendant No. 3 on 13th September, 2006. Thereafter the suit proceeded further ex parte against all the defendants.
10. The plaintiff then adduced ex parte evidence by way of his own affidavit(Ex.PW-1/1-A) in which he re-affirmed the factual averments made in the plaint. He also examined one witness from the office of Sub-Registrar to prove the certified copies of the two sale deeds dated 19th February,1988 executed on behalf of Shri Raghubir Singh in favour of defendant No. 4 and 30th September,1988 executed by defendant No. 4 in favour of defendant No. 5 cancellation of which sale deeds was sought for by the plaintiff.
11. The learned trial Judge, however, dismissed the suit vide judgment dated 3rd May, 2007. In that judgment the trial Court did not give issue-wise findings. After referring to the facts in paras 1-10 of its judgment the trial Judge arrived at the

following conclusions in para No. 11:

11. I have considered the record minutely assessing the features of the case consolidatedly in the light of record available...despite framing of issues, this ex parte judgment is being delivered without specific findings on the issues.

...However, the contention raised/pleaded by the plaintiff is not tenable and the suit for cancellation of Sale Deed, declaration and possession is dismissed for the following reasons:

(i) Firstly, the plaintiff has sought cancellation of Sale Deed dated 19.2.1988 (Ex. PW2/2) in favour of defendant No. 4 Smt. Kusum Lata Khajanchi executed on the basis of Power of Attorney dated 28.12.1987. The plaintiff has sought cancellation of Sale Deed by allegation of forged Power of Attorney, however, neither the plaintiff has sought declaration to declare Power of Attorney dated 28.12.1987 as forged or fabricated document nor there is any evidence to prove that the Power of Attorney dated 28.12.1987 is a forged document.

(ii) Secondly, the plaintiff failed to secure or got secured Power of Attorney dated 28.12.1987 on record. The plaintiff or his attorney has not seen Power of Attorney dated 28.12.1987 then how can they come to conclusion or asserts that the Power of Attorney dated 28.12.1987 is a forged or fabricated document.

(iii) The plaintiff is seeking declaration for cancellation of Sale Deed dated 19.2.1988 for the reasons that it was executed on the basis of forged Power of Attorney dated 28.12.1987 whereas neither the plaintiff has seen such Power of Attorney nor he has proved the Power of Attorney as forged and fabricated document.

(iv) Fourthly, the plaintiff seeks cancellation of sale deed dated 30.9.1988 (Ex. PW2/1) executed by defendant No. 4 in favour of the defendant No. 5 merely for the reasons that Sale Deed dated 19.2.1988 in favour of defendant No. 4 was executed on the basis of General Power of Attorney, however, this plea does not sustain for the reasons enumerated (i) and (iii) above.

(v) The defendant No. 3 Sh. Joginder Lal appeared in the Court on 13.9.2006 and he gave statement that he was attorney of Sh. Raghubir Singh, who died later on, therefore, the defendant No. 3 had no interest, claim or title in the suit property. On the basis of this statement, the plaintiff through his attorney withdrew the suit against the defendant No. 3 and consequently suit qua defendant No. 3 was dismissed as withdrawn.

Whereas Sale Deed dated 19.2.1988 Ex. PW2/2 was executed by Sh. Joginder Lal defendant No. 3 on the basis of Attorney dated 28.12.1987; Sh. Joginder Lal was one of the necessary party to the suit since the entire Sale Deed was subject matter of execution on the basis of Power of Attorney dated 28.12.1987 in favour of the defendant No. 4 Smt. Kusum Lata Khajanchi executed by the defendant No. 3 on behalf of Sh. Raghubir Singh. Sh. Joginder Lal defendant No. 3 in his statement dated 13.9.2006 reiterated that he was General Attorney of Sh.

Raghubir Singh. Since the plaintiff got the suit dismissed as withdrawn against the defendant No. 3 Sh. Joginder Lal, attorney, his presence in the trial was indispensable as the entire case is based on Power of Attorney dated 28.12.1987 alleged to be the forged and fabricated document, despite that the plaintiff got the defendant No. 3 Sh. Joginder Lal relieved from the adjudication.

(vi) There is no dispute in respect of original sale deed dated 27.12.1958(Ex. PW1/1) in favour of Sh. Rattan Singh Tiwana or in respect of sale deed dated 20.1.1959 (Ex. PW1/2) by Sh. Rattan Singh Tiwana in favour of Sh. Bihari Lal or subsequent sale deed dated 15.6.1962 (Ex. PW1/3) by Sh. Bihari Lal in favour of Sh. Raghubir Singh or possession of these original deeds with the plaintiff.

Despite that, the sale deed dated 14.9.1967 (Ex. PW1/5) reflects delivery of actual physical possession of plot along with the entire structure to Sh. Jagjit Singh Sethi but despite existence of such sale deed Ex. PW1/5, the plaintiff could not establish possession of property or constructive possession of property with him for the reasons ? (a) in case the plaintiff had raised physical construction of property then there is no evidence to suggest as to whom the property was let out by the plaintiff or who are the tenant in different portions of the property or what portion is in occupation of defendant No. 5 M/s. Gwalior Securities and Traders Ltd. or how defendant No. 5 came into the possession of such portion? Today Id. Counsel for the plaintiff was also asked whether there is any site plan other than site plan Ex. PW1/8 depicting portions in the possession of tenants or in the possession of defendant No. 5 and it has been explained that there is no other site plan filed or proved on record except site plan Ex. PW1/8. The site plan Ex. PW1/8 depicts un-scaled lay out of the suit plot without any elaboration of occupancy of particular tenant or of defendant No. 5; (b) the sale deed dated 19.2.1988 Ex. PW2/2 not only enumerates names/detail of tenants occupying certain portions in the suit property but also it declares that till the execution of sale deed dated 19.2.1988 Sh. Raghubir Singh was occupying/possessing or having dominance or control on the property, besides reflecting his income from such tenants. The sale deed Ex. PW2/2 proved by the plaintiff, also reflects overleaf about income tax certificate/clearance and permission from Reserve Bank of India. Thus, the plaintiff could not establish as to which portion is in possession of a particular tenant or which portion in the suit property is in occupation of defendant No. 5 M/s. Gwalior Securities and Traders Ltd. or how such possession came to the defendant No. 5 or to others?

(vii) Since the plaintiff failed to prove of Power of Attorney dated 28.12.1987 was a forged and fabricated document or consequently sale deed dated 19.2.1988 Ex. PW2/2 was executed on the basis of forged Power of Attorney, therefore, it cannot be said that sale deed dated 30.9.1988 Ex. PW2/1 executed by the defendant No. 4 in favour of the defendant No. 5 became a forged document.

The suit property is a freehold property, therefore, the plaintiff could not drive any benefit either the original record deeds (Ex. PW1/1 to Ex. PW1/4) are in his possession or sale deed dated 14.9.1967 Ex PW1/5 is more than 30 years old

document, since the features reflected in the pleading or in the sale deed Ex. PW1/5 are inconsistent to the other document proved by the plaintiff particularly when the plaintiff is seeking possession of property or a portion of property from defendant No. 5, there ought to have been specific plea as how defendant No. 5 came into the possession of such portion or under what capacity the plaintiff is seeking possession from defendant No. 5; in fact, neither the plaintiff has narrated such specific portion in occupation of defendant No. 5 or in possession of other tenants nor there is any evidence to that effect and it also appears as if the plaintiff is not aware who are in possession or possession of portion of the property.

(vii) The site plan Ex. PW1/8 does not depict the property completely except a rectangle that it comprises three storied building in 318 sq. Yards (=265 sq. Meter) and suit property is located in South Extn. Part-I, New Delhi; whereas building can be constructed there by way of sanctioned building plan. Besides that site plan Ex. PW1/8 (un-scaled) does not depict portion or portions in possession of tenants or in possession of defendant No. 5.

(viii) Therefore, for the detailed reasons (1) to (vii) above, the plaintiff failed to establish/prove that General Power of Attorney dated 28.12.1987 was forged document or consequently sale deeds dated 19.2.1988 or 30.9.1988 were also forged documents, therefore, plaintiff's request for cancellation of sale deeds or possession of suit property or for declaration is declined. Suit is dismissed. Let both the parties bear their own cost. Decree sheet be drawn accordingly.

12. Feeling aggrieved, the plaintiff filed the present appeal. Arguments were advanced on behalf of the plaintiff-appellant by learned senior advocate Shri V.K. Makhija. During the pendency of the appeal the appellant moved an application for amendment of the valuation para No. 7 of his plaint to give the valuation of the plaint for the relief of possession. There was no opposition to that application since in the appeal none of the respondents entered appearance. That amendment application was allowed and the amended plaint was taken record.

13. The main ground of challenge to the impugned judgment put forth in the Memorandum of Appeal as well as during the course of arguments was that the trial Judge having not given findings issue-wise as is the requirement of law the so-called judgment under challenge is no judgment in the eyes of law. Mr. Makhija contended that the learned trial Court has not given any finding in respect of the most crucial point viz. whether the sale deed in respect of the suit property in favour of the plaintiff's father was a genuine document, as was the case of the plaintiff, or whether the same was not a genuine sale deed since Shri Kulwant Singh who had signed the same as the attorney of Shri Raghbir Singh was in fact not the attorney, as was the defence taken by defendants 1-3 in their written statement, and in respect of which controversy issues No. 5 and 6 had been specifically framed. It was contended that if the trial Court had given the finding on this controversy and held that the sale deed in favour of the plaintiff's father was a valid document, which in fact was the only conclusion which

according to Mr. Makhija, that could be arrived at in the absence of any evidence to the contrary from the opposite side, the controversy regarding genuineness of power of attorney in favour of defendant No. 3 would have become irrelevant. Even if that was a genuine document the sale deed executed by him would not have conferred any title in favour of defendant No. 4 if Shri Raghubir Singh had already sold the suit property to plaintiff's father. However, in the end the suggestion to the Court given by the learned senior Counsel while submitting that the suit should have been decreed in the absence of any evidence by the defendants was that the most appropriate course would be to remand back the matter to the trial Court for giving separate findings on each of the eight issues framed by it.

14. I am in full agreement with the submission of the learned senior Counsel for the appellant that the trial Court has erred in not giving issue-wise findings which should have been done despite the fact that the defendants had been proceeded against *ex parte*. The fact is that there was a written statement on record filed on behalf of defendants 1 to 3 and another written statement of defendant No. 3 to the amended plaint. It was after considering the averments made in the plaint and the written statements that the learned trial Court had framed as many as 8 issues. The findings of the trial Court in para No. 11 of its judgment show that the main consideration which had weighed in the mind of the trial Judge was that the plaintiff had failed to establish that the Power of Attorney executed in favour of defendant No. 3 by Shri Raghubir Singh was a forged document. As noticed already, the controversy was whether the sale deed in favour of plaintiff's father in respect of the suit property was validly executed title document or not but the learned trial Court has not even adverted to that controversy at all. Mr. Makhija was right in his submissions that if the trial Court had held that the sale deed in favour of plaintiff's father was genuine or a forged document the question whether Shri Raghubir Singh had appointed defendant No. 3 Joginder Lal as his attorney or not would have become irrelevant. It was also rightly contended that if the Court had accepted the sale deed in favour of plaintiff's father the subsequent sale deeds in respect of the suit property would have been of no help to the so called subsequent purchasers, namely, defendants No. 4 and 5. The learned trial Court has also not given any finding on the issue of limitation, non-joinder of necessary parties. As far as the issue of non-joinder of necessary parties is concerned, it is significant to note that plaintiff himself had moved one application under Order I Rule 10 CPC for impleading his sisters also in the suit since he was claiming a decree of declaration that he had become the exclusive owner of the suit property upon the death of his father. That application somehow or the other had remained pending.

15. The judgment as laid down by the CPC though it might be an *ex-parte* judgment, must contain a precis of the plaint and the points that arose for determination and it should also record the findings. It should also contain succinctly the summary of the discussion of the evidence and the effect of the document in the suit. Nothing of the sort has been done in this case. The Court

should bear in mind that a heavy burden lies on the Court especially in matters where the defendants are ex parte. The burden becomes much more onerous in ex parte matters. Even in ex parte suits the Court cannot resort to the present method of writing the judgment which has been extracted above.

16. I am, therefore, of the view that the trial Court's judgment needs to be set aside and the matter requires to be remanded back to the trial Court with a direction to pass a fresh judgment by giving issue-wise findings. The judgment and decree passed by the trial Court, therefore, are set aside and the case is remanded back to the trial Court for the afore-said purpose. Since the matter is old, it would be open to the parties' counsel, if they appear in the matter, to address arguments afresh on all aspects. As the case is being remanded to the trial Court the appellant shall be entitled to get a certificate for refund of Court Fees in accordance with law, as was also the prayer made during the course of arguments on behalf of the appellant.

17. The trial Court shall take up the matter on 26th April, 2010 at 2 p.m.

Trial Court record be sent back along with the original amended plaint which was filed during the pendency of this appeal after retaining its copy on record.