

(2016) 05 KAR CK 0011
In the Karnataka High Court
Case No : R.F.A. No. 813 of 2012

U. Vijaya Kumar

APPELLANT

Vs

Smt. Malini V. Rao

RESPONDENT

Date of Decision : 30-05-2016

Acts Referred:

Citation : (2016) 3 AirKarR 337 : (2017) 1 CivilLJ 568 : (2016) 4 ICC 188 :
(2016) ILRKarnataka 2670 : (2016) 3 KCCR 2059

Hon'ble Judges : N. Kumar and B. Manohar, JJ.

Bench : Division Bench

Advocate : Sri R Udayashankar Rai, Advocate, for the Appellant; Sri S. Vivekananda, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

1. This is the defendants' regular first appeal challenging the judgment and decree dated 24.02.2012 in O.S.No.2405/2010 passed by the XII Addl. City Civil Judge, Bangalore, decreeing the plaintiff's suit by declaring that the sale-deed dated 17.2.2009 in respect of "B" schedule property, executed by the 1st defendant as the GPA holder of M/s. Tex X International in favour of the 2nd defendant is null and void and not binding on the plaintiff etc. and for damages at the rate of Rs.50,000/- p.m.

2. For the sake of convenience, the parties are referred as per their original rank before the trial court.

3. The subject matter of the suit is "B" schedule property measuring 12070 Sq. feet forming the western portion of "A" schedule property, an industrial shed measuring 2074 Sq. meters.

4. The plaintiff's case is that she is the proprietress of M/s. Tex X International, Bangalore: Karnataka Industrial Area Development Board (for short "KIADB") allotted and sold "A" schedule property in favour of the said Firm under registered sale-deed dated 04.05.1995. The 1st defendant is her brother and the

2nd defendant is his wife. When the 1st defendant lost his job and was unemployed for nearly an year in 1988, she arranged for rent free accommodation for him and his family at her sister-in-law's house bearing No. 42, P&T Colony, 2nd Cross, R.T. Nagar, Bangalore; the defendants resided there for a period of six years. In 1989 she constructed an industrial shed on the "A" schedule property, entrusted its management to the 1st defendant with the intention of generating income to help him. The 1st defendant let out the said property and utilised the entire income derived therefrom: and he has not spent any money from his pocket towards managing the said property.

5. On 27.5.2005, she and the 1st defendant entered into a memorandum of understanding that the 1st defendant should pay her a sum of Rs.5,00,000/- towards the past usage of "A" schedule property and the rental income; a sum of Rs.2,00,000/- towards rental income for 2005-06 and 2006-07 and a sum of Rs.6,00,000/- from May 2005 till March 2007. It was further agreed that the 1st defendant should pay enhanced rent at the rate of 107c on Rs.2,00,000/- from the end of 2006 till March 2010 towards the rental income. The said rental income of Rs.2,00,000/- is also a meager amount compared to the prevailing rent in that area. The 1st defendant had sent a number of e-mails to her about the difficult times and that he is depending on the rental income derived from the "A" schedule property.

6. She and her husband were carrying on business in the USA. So while going to USA. she handed over all the original records pertaining to the "A" schedule property to the 1st defendant. Their business in the USA suffered as her husband was down with bone cancer for seven years and she had to manage the business in the USA single handed and also look after him. On account of this, they decided to wind up the business in the USA and settle down in Bangalore; they also purchased a villa in Bangalore with that intention. The rental income from "A" schedule property was sufficient to lead a decent and comfortable life.

7. During January 2009, when she requested the 1st defendant to send the original title deeds of "A" schedule property and the khata extract, the 1st defendant postponed it on one pretext or the other. On 08.01.2009 and 27.01.2009, the 1st defendant had sent e-mails advising her to wait for two years, not to go for distress sale of the property as the real estate market had hit a low and to permit him to run the industry for 5 more years. She grew suspicious of the said conduct and got applied for the khata extract of "A" schedule property through a friend at Bangalore in August 2009 and came to know that while the original Khata No. 37 stood in the Firm's name, khata No. 37/A pertaining to "B" schedule property was mutated in the name of the 2nd defendant on the basis of a sale-deed dated 17.02.2009.

8. On obtaining certified copy of the sale-deed dated 17.02.2009 through her friend, she came to know that the 1st defendant, as a power of attorney holder of M/s.Tex X International, had sold 12070 sq. ft. out of "A" schedule property in favour of the 2nd defendant for Rs.5,00,000/-. But, the value of "B" schedule

property for the purpose of stamp duty and registration charges is shown in the said sale-deed as Rs.96,56,000/-. She, however, has not executed the general power of attorney dated 05.07.1995 as proprietress of M/s.Tex X International in favour of the 1st defendant authorising him either to sell "A" schedule property or a portion thereof in favour of the 2nd defendant or anybody, at concessional rate. The GPA dated 05.07.1995 is executed in her individual capacity for a different purpose and not as the proprietress of the Firm or in respect to "A" schedule property. On 26.03.1999, the 1st defendant had sent an e-mail that for the purpose of applying for a term loan of Rs.5,00,000/- from Karnataka Bank Ltd., in the name of M/s.Tex X International, he wanted a power of attorney and a letter from her. In her reply mail dated 27.03.1999, she had clarified certain things. Thereafter the 1st defendant sent another e-mail on 06.04.1999 with draft power of attorney to be executed by her as the proprietress of M/s.Tex X International with respect to "A" schedule property as an attachment stating that it was drafted by their father's friend, Advocate Sri. Raghavendra Rao. In her e-mail dated 4.6.1999, it was made clear that selling and pledging of the land and building should be excluded from the GPA and she also indicated corrections to be made in the GPA.

9. On 07.01.2009, the defendants wrote a lengthy letter concocting a story referring to their contributions towards improvements made to the property. Within a month therefrom, the 1st defendant fraudulently created the sale-deed dated 17.2.2009 alienating "B" schedule property in favour of his wife, the 2nd defendant; the same is not binding on her. In the sale-deed, there is a recital to the effect that consideration of Rs.5,00,000/- is paid by the 2nd defendant through cheque bearing No. 203811 dated 15.2.2009 drawn on Karnataka Bank, Sanjay Nagar Branch, Bangalore. However there is no reference to deposit of cheque for the said amount or the said sale transaction, in the 1st defendant's e-mail dated 11.7.2009 and 12.7.2009. At her request, the 1st defendant had sent copy of the statement pertaining to her account with Karnataka Bank Ltd. wherein the name of Geetha (the 2nd defendant) was struck off and her name was written in that place. Through e-mail dated 11.07.2009 she has confirmed receipt of the account extract and she was under the impression that Rs.5,00,000/- is deposited by the 1st defendant towards rental income as per the MOU.

10. The 1st defendant was operating her bank account as a GPA holder. She got issued a legal notice on 11.09.2009 to the defendants and also cancelled the general power of attorney executed in favour of the 1st defendant. She has also informed the Bank about cancellation of GPA. The prevailing rent in that area is Rs. 15/- per sq.ft. Had she let out the "B" schedule property, it would have fetched rent of Rs.1,80,000/- per month. However, damages for the wrongful use and occupation of the B" schedule property by the defendants from the date of (he suit till the date of delivery of possession is restricted to Rs.50,000/-p.m She is also entitled for Rs.6,50,000/- towards 13 months rent as damages and possession of the property. The sale-deed dated 17.2.2009 executed by the 1st

defendant as GPA Holder of M/s.Tex X International in favour of the 2nd defendant in respect of "B" schedule properly is null and void and it is not binding on her. The 2nd defendant has not derived interest, title and right over "B" schedule property.

11. After service of summons, the defendants appeared and filed the written statement denying that the plaintiff was carrying on the business under the name and style of M/s.Tex X International in Bangalore. It is their specific case that originally KIADB allotted the property in the year 1980 on lease-cum-sale basis for starting grease and cutting oils factory/industry. The 1st defendant is having knowledge in the said field. Out of the initial payment of Rs.30,500/-, the 1st defendant and his father gave Rs.30,000/-. The plaintiff left to USA in the year 1981 to join her husband. A person leaving the country has to surrender the land to KIADB, but the plaintiff did not do so. The 1st defendant will his contacts carried on lubricants business to show production activities in "A" schedule property during the year 1995 and also helped the plaintiff by paying Rs. 15000/- to complete the sale transaction with KIADB. At that point of time, no monetary transaction took place from the USA and the plaintiff had not opened any account in India. In fact the plaintiff requested the 1st defendant to do the business as she had settled in the USA. The 1st defendant neither lost the job in 1988 nor was unemployed for a period of 1 year. The 1st defendant was working for Castrol India Ltd. in Belgaum during 1988 and thereafter, with Savitha Oil Technologies Ltd. Both his children were born in Belgaum. The 1st defendant came to Bangalore in September 1990 and the plaintiff's sister-in-law's husband Sri.Sambashiva Rao accommodated them at No. 42. P&T Colony, 2nd Cross, R.T. Nagar, Bangalore between 01.10.1990 and 15.5.1996 to avoid the Rent Control Act, which was in fore - at that time. During 2005, when they visited the plaintiff in the USA, their passport and return tickets were withheld. Under these circumstances, the 1st defendant was forced to sign the alleged MOU. The 1st defendant has paid a sum of Rs. 12,82,149/- in the following manner, to the plaintiff to maintain cordial relationship with the elder sister.

a) Rs.9,25,000/- paid to the account of the plaintiff with the Karnataka Bank Ltd., Sanjayanagar Branch, Bangalore.

b) Rs. 1,57,149/- towards property tax, wealth tax, etc. property tax etc.

c) Rs.2,00,000/- towards jewelleryes.

12. After signing lease-cum-sale agreement, the plaintiff went to USA in 1981 and no construction took place in the A schedule property between 1980 to 1990. The 1st defendant got the plan re-validated on 21.2.1990 and the plan clearly shows that he supervised the construction and completed the industrial shed between 1990 to 1993 out of his own efforts and funds, out of affection for the plaintiff. Since the plaintiff was a tenant/lessee of KIADB from 1980 till execution of sale-deed in the year 1995, she could not have entrusted the responsibility of leasing the shed to the 1st defendant. There was absolutely no

income from the schedule "A" property till 1995. The plaintiff has not sent any amount from USA. Even as per the MOU the plaintiff confirms that the 1st defendant has spent amount towards the development of schedule "A" property. The plaintiff did not even know the name of Firm and the nature of its business even during the year 2005. The plaintiff came to India in 1985 to get the sale-deed of "A" schedule property registered. Since the document was under valued, the Sub-Registrar did not hand over the original deed to the plaintiff and referred the matter to the District Registrar. The plaintiff left to USA on 07.07.1995 without receiving the original document. It is the 1st defendant, who got the document, released in 1996. The sale-deed executed by him is in accordance with law as the GPA authorising him to sell the property belonging to the plaintiff was in force at that time. There is no prohibition for selling a property at a rate lesser than the Government rate. As a gesture towards the effort put by the 1st defendant to improve "A" schedule property, the plaintiff, had orally agreed to sell a portion of schedule "A" property to the 2nd defendant. In fact the plaintiff had agreed for the sale consideration of Rs.5,00,000/- even though the market value of schedule "B" property was Rs 96,56,000/- for the purpose of payment of stamp duty and registration charges, keeping in mind the effort, energy, time spent by the 1st defendant in managing "A" schedule property over the years. The 1st defendant had looked after the schedule "A" property for 19 years i.e., from the year 1990 to 2009 without any hindrance and by putting all his effort, funds, time etc. The plaintiff never bothered to visit India all these years because she was aware of the 1st defendant's ability to look after the property.

13. On the aforesaid pleadings, the trial Court framed the following issues:

"1. Whether the plaintiff proves that she is the absolute owner of the suit schedule property?

2. Whether the plaintiff proves that she has not executed the GPA dated 5.7.1995 as proprietress of M/s.Tex X International in favour of the 1st defendant?

3. Whether the plaintiff proves that the Sale Deed executed in respect of the Schedule "B" property by the 1st defendant in favour of the 2nd defendant does not bind her?

4. Whether the court fee paid is sufficient?

5. What order?

14. In support of the claim, the plaintiff got examined herself as PW1 and got marked Ex: PI to P31. The 1st defendant got examined himself as DW1 and his witness as DW2 and got marked Exs.D1 to D30.

15. The trial Court on appreciation of oral and documentary evidence on record and after hearing the learned counsel for the parties has decreed the suit holding that the plaintiff is the absolute owner of "A" schedule property. Though the plaintiff's GPA dated 05.07.1995 authorised the 1st defendant to alienate the

property, the plaintiff had not consented in terms of Section 215 of the Indian Contract Act, for selling the "B" schedule property in favour of the 2nd defendant. The sale of "B" schedule property for a meager consideration of Rs.5,00,000/- has been dishonestly concealed by the defendants and the said transaction has been disadvantageous to the plaintiff. The plaintiff, therefore is justified in repudiating the sale. Aggrieved by the same, the defendants have preferred this appeal.

16. Learned counsel for the appellants firstly argued that the suit is for declaration of title and non binding nature of the sale-deed and therefore the plaintiff ought to have sought for consequential relief of cancellation of the sale-deed. Therefore, the suit is hit by Section 34 of the Specific Relief Act and it ought to have been dismissed on that ground alone. Secondly, the defendants have adduced evidence to show that they have paid the plaintiff a sum of Rs. 12,82,149/-, in terms of the MOU dated 27.05.2005. But the trial Court has failed to consider and discuss this evidence. Thirdly, having regard to the close relationship between the parties to the suit and for the services rendered by the 1st defendant in running the business and maintaining "A" schedule property, there was a mutual understanding between them and a portion of the property has been given to the 2nd defendant. This aspect has not been properly appreciated by the trial Court. Lastly, it was contended that no issue is framed by the trial Court while awarding of damages and therefore the impugned judgment and decree needs to be set aside.

17. Per contra, the learned counsel for the respondent supporting the impugned judgment and decree argued that Section 34 of the Specific Relief Act contemplates that the suit for declaration is not maintainable if the plaintiff is entitled for further relief in addition to the relief of declaration, but omits to seek such further relief. In the instant case, not only the plaintiff has sought for declaration, but also further relief of possession and damages. The plaintiff need not seek cancellation of the sale-deal and therefore, the suit is not hit by Section 34 of the Specific Relief Act. Since the 1st defendant sought for adjustment of the amount mentioned in the written statement as the one paid towards tax and jewellery, which is not the subject matter of MOU, it cannot be said that the 1st defendant has complied with the terms of MOU. The 1st defendant, in fact, was in arrears of substantial amount in terms of the MOU on the date of alleged sale. The 1st defendant has not taken the consent of the plaintiff before executing the sale-deed. It is elicited in the cross- examination of DW1 that he is collecting Rs.11 to 12 lakhs as commission by using the schedule property as godown. It is in that context, the trial Court has granted the decree for damages. Therefore it was urged that mere absence of issue cannot vitiate the judgment and decree passed by the trial court and no case for interference is made out.

18. In the light of the above, the following points arise for our consideration:

(1) Whether the suit of the plaintiff is hit by Section 34 of the Specific Relief Act in not seeking further relief?

(2) Whether the 1st defendant has proved that he obtained the consent of the plaintiff before executing the sale-deed in favour of his wife and that the said dealing is not disadvantageous to the plaintiff?

(3) Whether the decree for damages awarded by the trial Court is justified?

Point No. I :-

19. Before dealing with this point, we find it necessary to refer to Section 34 of the Specific Relief Act and the same reads as under:

"34. Discretion of court as to declaration of status or right. - Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation.-A trustee of property is a "person interested to deny" a title adverse to the title of some one who is not in existence, and whom, if in existence, he would be a trustee".

20. This Section speaks about declaration of status or rights. The object of the Section is to provide a perpetual bulwark against adverse attacks on the title of the plaintiff, where a cloud is cast upon it and to prevent further litigation by removing the existing cause of controversy. It gives remedy to a person against all persons who not only claim an adverse interest to his own, but against all those who may do so, and it is intended that all such claims may once and for all be determined in one suit. For the application of this provision, it is essential that the plaintiff must have a present interest in some legal character or right to property, though it may not be one of immediate enjoyment of the property.

21. The proviso to Section 34 of the Specific Relief Act is imperative and makes it obligatory on every court not to make any declaration in cases where the plaintiff being able to seek further relief, omits to do so. A suit should be dismissed if the plaintiff, being able to seek further relief, omits to do so. Therefore objection to the maintainability of a suit on the ground that it does not seek consequential relief, must be taken up with promptitude.

22. The proviso becomes available only when plaintiff is able to seek further relief against the defendant. The phrase "further relief" refers to a relief:

(i) that naturally flows from the relief of declaration, and

(ii) that which is not automatically granted to the plaintiff by the declaration.

Such further relief should be available to the plaintiff at the institution of the suit and it should complete the claim of the plaintiff. The object is to avoid multiplicity of suits, in relation to the legal right to property which the plaintiff is entitled to.

It must be a relief ancillary to the main relief, and not one in the alternative. If the further relief is remote and not connected in any way with the cause of action, it need not be claimed. In such an event the suit would not be barred by Section 34 of the Specific Relief Act.

23. The distinction between Section 34 on the one hand and Sections 37 and 38 on the other, is that in the case of the former the Court cannot grant a declaratory relief where further relief is capable of being granted. In the latter case there is no such restriction, and injunction can be granted without any prayer for declaration, although in many cases declaration is inherent in the grant of injunction. For deciding the nature of the suit the entire plaint has to be read, and not merely the relief sought.

24. The question whether the further relief is consequential upon the declaration depends upon the facts and circumstances of a case. The Court cannot compel the plaintiff to claim such relief or deem such relief to have been claimed. On perusal of the pleadings, if the Court were to come to the conclusion that the plaintiff should have asked for further relief, it shall refuse to grant declaration. It cannot compel the plaintiff to add a prayer. Nor can it refuse to admit the plaint on the ground that further relief is not claimed.

25. Learned counsel for the appellants relied on the judgment of the Apex Court in the case of Vishwambhar and others v. Laxminarayana (dead through) L.Rs and another, reported in AIR 2001 SC 2607 wherein at para-9 it is held that:

"9. On a fair reading of the plaint, it is clear that the main fulcrum on which the case of the plaintiffs was balanced was that the alienations made by their mother-guardian Laxmibai were void and therefore, liable to be ignored since they were not supported by legal necessity and without permission of the competent Court. On that basis the claim was made that the alienations did not affect the interest of the plaintiffs in the suit property. The prayers in the plaint were inter alia to set aside the sale-deeds dated 14-11-1967 and 24-10-1974, recover possession of the properties sold from the respective purchasers, partition of the properties carving out separate possession of the share from the suit properties of the plaintiffs and deliver the same to them. As noted earlier, the trial Court as well as the first appellate Court accepted the case of the plaintiffs that the alienations in dispute were not supported by legal necessity. They also held that no prior permission of the Court was taken for the said alienations. The question is in such circumstances are the alienations void or voidable? In Section 8(2) of the Hindu Minority and Guardianship Act, 1956, it is laid down, inter alia, that the natural guardian shall not, without previous permission of the Court, transfer by sale any part of the immovable property of the minor. In sub-section (3) of the said section it is specifically provided that any disposal of immovable property by a natural guardian, in contravention of sub-section (2) is voidable at the instance of the minor or any person claiming under him. There is, therefore, little scope for doubt that the alienations made by Laxmibai which are under challenge in the suit were voidable at the instance of the plaintiffs and the

plaintiffs were required to get the alienations set aside if they wanted to avoid the transfers and regain the properties from the purchasers. As noted earlier in the plaint as it stood before the amendment the prayer for setting aside the sale-deeds was not there, such a prayer appears to have been introduced by amendment during hearing of the suit and the trial Court considered the amended prayer and decided the suit on that basis. If in law the plaintiffs were required to have the sale-deeds set aside before making any claim in respect of the properties sold then a suit without such a prayer was of no avail to the plaintiffs. In all probability realising this difficulty the plaintiffs filed the application for amendment of the plaint seeking to introduce the prayer for setting aside the sale-deeds. Unfortunately, the realisation came too late. Concededly, plaintiff No. 2 Digamber attained majority on 5th August, 1975 and Vishwambhar, plaintiff No. 1 attained majority on 20th July, 1978. Though the suit was filed on 30th November, 1980 the prayer seeking setting aside of the sale-deeds was made in December, 1985. Article 60 of the Limitation Act, prescribes a period of three years for setting aside a transfer of property made by the guardian of a ward, by the ward who has attained majority and the period is to be computed from the date when the ward attains majority. Since the limitation started running from the dates when the plaintiffs attained majority the prescribed period had elapsed by the date of presentation of the plaint so far as Digamber is concerned. Therefore, the trial Court rightly dismissed the suit filed by Digamber. The judgment of the trial Court dismissing the suit was not challenged by him. Even assuming that as the suit filed by one of the plaintiffs was within time the entire suit could not be dismissed on the ground of limitation, in the absence of challenge against the dismissal of the suit filed by Digamber the first appellate Court could not have interfered with that part of the decision of the trial Court. Regarding the suit filed by Vishwambhar it was filed within the prescribed period of limitation but without the prayer for setting aside the sale-deeds. Since the claim for recovery of possession of the properties alienated could not have been made without setting aside the sale-deeds the suit as initially filed was not maintainable. By the date the defect was rectified (December, 1985) by introducing such a prayer by amendment of the plaint the prescribed period of limitation of seeking such a relief had elapsed. In the circumstances the amendment of the plaint could not come to the rescue of the plaintiff."

This was a case where additional reliefs were claimed by way of amendment to the prayer column beyond the time prescribed for claiming such relief and therefore the suit came to be dismissed. As such, the ratio laid down in the said judgment has no application to the facts of this case.

26. Learned counsel for the appellant also relies upon the unreported judgment of this Court in case of Srinivas v. Mohan in RFA 1745/2007, dated 28.2.2012 wherein at Para-17 it is held thus:

"17. Even otherwise, the suit being the one for declaration to the effect that the

subject sale transaction is null and void and does not bind the plaintiff but having left at that without seeking for necessary further reliefs and particularly for not seeking the relief of setting aside the sale transaction is again hit by the proviso to Section 34 of the Specific Relief Act. Mere declaration in favour of the plaintiff, but without setting aside would not be of much value to the plaintiff without seeking for setting aside the sale transaction and as a result for recovery of the possession from the third defendant. Such a prayer also not having been sought for in the proper manner, we find only additional reasons as to why the suit was required to be dismissed but nothing in favour of the appellant to interfere with the judgment and decree of the Court below."

This was a case where only the relief of declaration was sought without there being a prayer for either setting aside the sale transaction or recovery of possession and, therefore, the suit was held not maintainable.

27. In the case on hand, while claiming the relief of declaration, the plaintiff has sought to recover possession of property. However she has not sought for cancellation of the sale-deed executed by 1st defendant in favour of the 2nd defendant. Therefore the question for consideration is, whether it is necessary to seek cancellation of the instrument when a declaration is sought to the effect that it is not binding on the plaintiff?

28. There is a clear and well marked distinction between a suit for cancellation of a deed affecting certain property and a suit for declaration that a particular document is inoperative as against the plaintiff. A suit for cancellation must be brought by a person who was a party to the deed or by a person who is otherwise bound by it in law. But a person who is neither party to the deed nor bound by it need not sue for its cancellation. Where the plaintiff seeks to establish title in himself but, cannot do so without removing an inseparable obstacle to such a deed to which he may be a party, he must get it cancelled. However, when he seeks to establish a title and finds himself threatened by a transaction between some parties, his remedy is to get a declaration that the decree or deed or transaction is invalid so far as he is concerned. When a person is a party to the deed, he can get over the effect of such deed, only in a manner provided under the Indian Contract Act, especially when third party interests are created. But when he is economically a party but in law is not a party to such deed, he can seek a declaration that such a deed is not binding on him, when no third party interest is created. A sale-deed obtained by an agent in the name of his wife cannot be treated as a sale-deed in favour of a third party. It is a sale deed in favour of the agent only, which is void, until the condition stipulated in Section 215 of the Contract Act is fulfilled. The effect of such declaration is the sale-deed becomes inoperative and purchaser under the sale-deed cannot claim any right under the sale deed, in view of the declaration granted by the Court. The title of the plaintiff to the property under dispute was never in doubt, as the purchaser traces his title to plaintiff. The said sale-deed creates a cloud on the title of the plaintiff. The declaration granted by the Court that the said sale-deed is not

binding on the plaintiff, removes the cloud and the plaintiff continues to be the owner, notwithstanding the said sale-deed. The said sale-deed is in the name of the wife of the agent. No third party interest is involved. Therefore, no relief of cancellation need be prayed for.

29. In the instant case, there is no dispute that the plaintiff was the owner of "A" schedule property and the sale-deeds stand in her name. The possession of the property is with the 1st defendant; he is also the Power of Attorney Holder of the plaintiff. The plaintiff is a resident of USA and the 1st defendant by virtue of the Power of Attorney, is managing the schedule "A" property. Now, under the same Power of Attorney the 1st defendant has executed a sale-deed in his wife's favour in respect of the "B" schedule property for a consideration of Rs.5,00,000/- without the knowledge and consent of the plaintiff. The 1st defendant being the agent is now claiming adverse interest of his own in the property. By such transaction, a cloud is cast upon the title of the plaintiff over the "B" schedule property.

30. From the evidence on record it is clear that the sale-deed was executed without the plaintiff's knowledge and consent and it is disadvantageous to her. The defendants concealed the same from her and therefore the plaintiff has repudiated the transaction. The defendants are since asserting title over "B" schedule property by denying the plaintiff's title, it has become necessary for the plaintiff to seek a declaration that the said sale deed is null and void and does not bind her. Section 34 of the Specific Relief Act confers on the plaintiff a right to seek such declaration.

31. Having come to know the fraudulent transaction, the plaintiff has already cancelled the General Power of Attorney and repudiated the transaction. Therefore she, necessarily, has to recover possession of the property from the defendants. Else, a mere declaration as above, in effect will be no relief at all. In the facts and circumstances of the present case, the relief of possession is the "further relief that ought to be sought in terms of proviso to Section 34 of the Specific Relief Act and not cancellation of the sale-deed as canvassed by the learned Counsel for the appellants. The decree of declaration of title, notwithstanding the existence of a sale-deed in favour of the second defendant, has the effect of nullifying the sale-deed and therefore, there is no need to seek the cancellation of the sale-deed. Unless the decree of possession is granted, the claim of the plaintiff would not be complete. Hence, it is prayed for and granted. Thus the requirements of proviso to Section 34 is complied with. For these reasons we are of the view that, the Trial Court's finding that the suit is not hit by Section 34 of the Specific Relief Act is well founded and does not suffer from any illegality.

Point No. (2)

32. Before dealing with the point as to whether the 1st defendant had obtained consent of the plaintiff before selling "B" schedule property in favour of his own

wife and that such sale was not to the disadvantage of the plaintiff, as canvassed by the appellants it is essential to understand to what extent the acts of an agent binds the principal, in the light of Section 215 of Indian Contract Act.

33. In law, Agency connotes the relation that exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and the third parties. The essential feature of an agent is his power of making the principal answerable to third parties. In other words, it enables the principal to sue third parties directly, or render him liable to be sued directly by the third party. An agent though not subject to the direct control or supervision of the principal, is bound to act within the limits of his authority.

34. There is a distinction between a contract of sale and contract of agency for stile, between a buyer and an agent for sale. The principal does not sell to his agent. The essence of sale is the transfer of title to the goods for a price paid, or promised to be paid. The question whether there was an agreement for sale or an agreement of agency, must depend upon the facts and circumstances of each case. The basic principle of agency is that the principal must be capable of doing in law what he wants his agent to do; no consideration is necessary in order to create an agency. The authority of an agent may be express or implied.

35. Section 215 of the Indian Contract Act which deals with the right of the principal when the agent deals, on his own account, in business of agency without the principal's consent, reads as under:

"215. Right of principal when agent deals, on his own account, in business of agency without principal's consent.- If an agent deals on his own account in the business of the agency without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows, either that any material fact has been dishonestly concealed from him by the agent, or that the dealing of the agent have been disadvantageous to him.

Illustrations

(a) A directs B to sell A's estate. B buys the estate for himself in the name of C. A, on discovering that B has bought the estate for himself, may repudiate the sale, if he can show that B has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.

(b)-----

36. The principle underlying the above pro-vision is that an agent should not deal on his own account in the business of agency, without the consent of the principal. If he has not obtained the principal's consent to do so or has not acquainted him with all the material circumstances within his knowledge, the principal may repudiate the transaction if:

- (a) any material fact has been dishonestly concealed from him by the agent or
- (b) the dealings indulged in by the agent have been disadvantageous to him.

37. An agent is bound not only not to injure the interest of his principal, but also to further it. This means that the agent should not place himself in a position where his interest might be adverse to that of the principal. No agent will be permitted to put himself in a position where his interest conflicts with his duty and therefore, he must not enter into any transaction which is likely to produce such results. If an agent desires to do so, he must confide in the principal and must obtain his prior consent. An agent cannot, without the knowledge or consent of his principal, be allowed to make any profit out of the subject matter of his agency beyond the proper remuneration as an agent. An agent therefore, may not use his position as an agent or his principal's property, or confidential information arising from the agency for making a profit for himself.

38. Where an agent employed to sell, becomes the purchaser himself, then he must show beyond reasonable doubt, that this was with the knowledge and consent of the Principal and that the price paid was the full value of the property so purchased. Thus, in order to set aside a transaction by an agent dealing on his own account, the agent should have concealed material fact dishonestly or that the dealing should have been to the disadvantage of the principal.

39. A principal who seeks to set aside a transaction on the ground that the provisions of Section 215 of Indian Contract Act have been violated must take proceedings for that purpose within a reasonable time after becoming aware of the circumstances relied on. The burden of proof lies on the agent to prove full disclosure or that the transaction is not disadvantageous to the principal.

40. What is disadvantageous to the principal and what is not depends upon the facts of each case. Anyone standing in the position of an agent cannot be allowed to put his duty in conflict with the principal's interest. If the principal proves that his consent had not been obtained for such an act and that the agent had not acquainted him with all material circumstances, it is not further necessary for him to establish any dishonest concealment by the agent or that the transaction was to his disadvantage. Any transaction creating conflict between the agent's duty and the interest of the principal, must be presumed to be disadvantageous to the principal who is not informed of the fact. When there is no disclosure, the fairness of the transaction is immaterial and such transaction should be voidable at the principal's option.

41. In the instant case, admittedly the plaintiff who is the owner of "A" schedule property executed a General Power of Attorney in favour of her brother, the first defendant on 15.07.1995. The evidence on record shows that a portion of the "A" schedule property measuring about 12,070 square feet as described in the "B" schedule is sold by the first defendant in favour of his own wife, the second defendant for a sum of Rs.5,00,000/- while the market price of the property as per Government guidelines was Rs.96,56,000/-. This would demonstrate that the

transaction between the defendants is a nominal one and in fact, the 1st defendant has purchased the property for himself and his wife is only a name lender.

42. The material on record discloses that Hx.P3, the MOU between the plaintiff and the 1st defendant is silent about the plaintiff agreeing for such sale. In Ex.P18, e-mail dated 08.01.2009 the 1st defendant requests the plaintiff to sacrifice 30% of the sale value of "A" schedule property to him and his family anti to decide the sale price. He has also advised the plaintiff not to go for distress sale of the said property owing to bad condition of real estate market. He had even advised her to wait for two years and to permit him to run (he industry for two years. In this background if one were to consider the defense put forth by the 1st defendant, it would be patently fallacious and unacceptable.

43. It is also seen from the evidence on record that an attempt was made by the defendants to conceal the sale transaction in question, after depositing Rs.5,00,000/- into her account, by erasing her name in the statement of accounts and inserting the 2nd defendant's name in that place. So that she would not come to know about such deposit and take any action against the defendants immediately. Not only this, the 1st defendant has sold a property worth Rs.96,00,000/- just for Rs.5,00,000/- and this could by no stretch of imagination be said to be advantageous to the plaintiff. The plaintiff thus has every right to repudiate the transaction and such a statutory right is conferred upon the principal under Section 215 of the Indian Contract Act. The trial court, after appreciating the legal evidence on record, has come to the right conclusion and we do not find any reasons to interfere with the same.

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44. The plaintiff has claimed a sum of Rs.50,000/- per month damages for the wrongful use and occupation of the "B" Schedule Property by the defendants, from the date of sale of "B" schedule property, till the date of the suit for 13 months amounting to a sum of Rs.6,50,000/- and future damages at the same rate from the date of the suit till the date of payment. He has paid the requisite Court fee on the sum of Rs.6,50,000/-claim. The defendant in his written statement has traversed these allegations and denied the liability to pay the said amount. No issues are framed by the Court on this aspect. However, the plaintiff in his examination-in-chief has reiterated what he has stated in the plaint . The defendant in his examination-in-chief again has denied the said liability. The Trial Court, on appreciation of the aforesaid facts and the evidence on record has held that in view of its finding that the possession of the 2nd defendant is not lawful and considering the area of "B" Schedule property, it held that the 2nd defendant is liable to pay Rs.50,000/ per month for its use and occupation from the date of sale-deed up to the date of filing of the suit and till the vacant possession is handed over. One of the reasons weighed with the Trial Court in awarding the said damages is that a sum of Rs. 15,00,000/- per year was derived by the 1st defendant from lease of the schedule properties.

45. In appeal, it was contended that in the absence of an issue being framed, the Trial Court committed a serious error in decreeing the suit of the plaintiff for the said amount. No doubt, no issues are framed. There is a specific plea in the plaint. Defendant has understood the case of the plaintiff and has denied the said liability in the written statement. Both of them have spoken about the said aspect of the matter in their respective evidence. The total extent of land, which is the subject matter of sale in respect of which damages is claimed measures in all 12070 sq. ft. The prevailing rent in the area according to the plaintiff is around Rs. 15/- per sq. ft. Then the rent payable would be Rs. 1,80,000/-. However, the plaintiff has restricted her claim to a sum of Rs.50,000/-. Roughly, it works out to Rs.3? per sq. ft. The title of the property is not in dispute. In view of our finding, the sale-deed obtained from the 1st defendant is illegal and it is declared to be not binding on the plaintiff, as the 2nd defendant is in possession of the "B" Schedule property, the said possession is unlawful, unauthorized and therefore, she is liable to pay damages to the plaintiff. Under these circumstances, we do not find any justification to interfere with the finding recorded by the Trial Court insofar as the payment of damages at the rate of Rs.50,000/- per month is concerned.

46. In the light of the above discussions, we do not find any merit in this appeal. Accordingly, the appeal is dismissed.