

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on: 28.09.2010
% *Judgment Delivered on: 01.10.2010*

+ **R.S.A. No.21/2008 & C.M.Nos.1152 &16974 of 2008**

REHMAT BEE

.....Appellant
Through: Mr. Manoj Goel, Mr. Jagmohan
Sharma and Mr. Gopal Verma,
Advocates.

Versus

NOOR MOHD. & ORS.

.....Respondents
Through: Mr. Vishwa Lochan Madan and
Ms. K.K. Madan, Advocates.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J.

1. This appeal has impugned the judgment and decree dated 08.09.2007 which had endorsed the finding of the trial judge dated 07.12.2002 decreeing the suit of the plaintiff/respondent.
2. The respondent/plaintiff i.e. Sh. Noor Mohd had filed a suit for permanent injunction and possession against three defendants namely Smt. Rehmat Bee, SI K.P. Kukreti and Pyare Khan. Plaintiff claimed to be the absolute owner of the property bearing no. M-16 measuring 100 square yards being a part of khasra no. 455/256 in the abadi known as Abdul Fazal Enclave, New Delhi (Okhla). Plaintiff had purchased this property comprising of one room, basement and boundary wall from its erstwhile owner, Sh. Pyare Khan (defendant no. 3) for a consideration of Rs 1,40,000/-.

Documents to the said effect had been executed and the physical possession property had been handed over by defendant no. 3 to the plaintiff. Plaintiff reconstructed the property and started using it for a residential cum commercial purpose. On 02.04.1994, Rehmat Bee (defendant no. 1) along with 10 to 15 other persons came to his property and started beating the members of his family. Complaint was made to the Police Station. Defendant no. 1 staked her claim to the suit property. The suit property was locked by the defendant no. 2. Thereafter, defendant no. 2 in collusion with defendant no. 1 handed over the keys of the suit premises to defendant no. 1. Defendant no. 3 sought to buy back this property from the plaintiff. He gave cheques totalling Rs. 1,92,000/- to the plaintiff, all of which were dishonoured. On 26.09.1994, plaintiff learnt that the defendant is proposing to carry out construction in the suit property. Present suit was accordingly filed.

3. Defendant no. 1 in his written statement claimed ownership of the property having purchased it in 1984 from defendant no. 3. Her contention was that in 1993-1994, plaintiff had approached her and asked her to sell the property to him; at her refusal, he threatened her with dire consequences.

4. Defendant no. 2 did not file any written statement. Defendant no. 2 was proceeded ex-parte.

5. Defendant no. 3 averred that he had sold the suit property to the plaintiff; thereafter at the request of the plaintiff, he had agreed to buy back this property; he admitted that his cheques of Rs. 1,92,000/- had been dishonored; he had however paid a sum of Rs. 98,000/- to the plaintiff.

6. The Trial Judge framed eight issues which inter alia read as follows.

- “1. Whether there is no cause of action in favour of the plaintiff? OPD 1.
2. Whether this court has no jurisdiction to try and dispose of the present suit? OPD 1
3. Whether defendant no. 3 ever sold the property to defendant no. 1. If so, its effect? OPP 1
4. Whether the defendant no. 3 sold the property to the plaintiff? If so, its effect? OPP
5. Whether the plaintiff and his family was illegally dispossessed from the suit premises by defendant no. 1? If so, its effect? OPD
6. Whether the suit has been filed by the plaintiff with mala fide intention to grab the plot in question in which the defendant no. 1 is residing since 1984? OPD 1.
7. Whether the plaintiff is entitled to the relief claimed? OPP
8. Relief.”

7. Three witnesses were examined on behalf of the plaintiff. Two witnesses were examined on behalf of the defendant. The testimony of the aforementioned witnesses as also the documentary evidence adduced by them was scrutinized in an in-depth detail. Trial judge held that the plaintiff had legal title to the suit property, he having purchased it from defendant no. 3. Defendant no. 2 had illegally locked the premises; defendant no.1 had no right and title to the same. The suit of the plaintiff was decreed. Defendant no. 1 was directed to hand over peaceful and vacant possession of the suit property to the plaintiff; further directions were given not to raise any construction thereon.

8. The impugned judgment and decree had endorsed the finding of the trial judge. Before the first appellate court, an application under Order 41 Rule 25 for framing additional issues and a second application under Order 41 Rule 27 for leading additional evidence had been filed. The additional issues sought to be framed were considered; impugned judgment held that the eight issues already

framed by the trial judge had covered the issues which were now sought to be framed through this application. Finding no merit in the application, it was dismissed. The second application seeking permission to place additional documents on record was also dismissed on the ground that earlier an application to the said effect had been filed which had been withdrawn unconditionally i.e. on 04.11.2004; this second application was accordingly dismissed.

9. The title set up by the plaintiff and the title sought to be set up by defendant no. 1 and their respective documentary evidence adduced was scrutinized. The plaintiff had relied upon four documents Ex. PW-1/1 to Ex. PW-1/4 i.e. an agreement to sell, general power of attorney, receipt and a will, all of which were dated 13.04.1993. Defendant no. 1 had set up the claim that she had purchased this property in 1984 relying upon a receipt. Ex.D3W1/1 to the effect that Sh. Pyare Khan had sold the suit property to defendant no. 1; this document was rejected. The impugned judgment endorsed the finding that the plaintiff is the owner of the suit property.

10. This court is sitting in second appeal. Two substantial question of law have to be answered. The first substantial question of law had been formulated on 17.7.2008 and the second substantial question of law had been formulated on 22.9.2010. They read as under:

“1.Whether agreement of sale, power of attorney, receipt etc. can be treated as documents of transfer of title in respect of immoveable properties?

2.What is the effect of the conflicting stand of the respondent/plaintiff Noor Mohd. in the FIR No.336/1994 registered under Section 420/506 of the IPC, P.S. Sriniwas Puri where he was the complainant and his averments in the suit proceeding i.e. Suit No.201/2002 titled as Noor Mohd. Vs. Rehmat Bee?”

11. Learned counsel for the appellant has urged that the plaintiff/respondent has taken a conflicting and opposing stand in the criminal proceedings i.e. in FIR No. 336/94 (registered under Section 420/506 of IPC on the complaint of Noor Mohd against Pyare Khan) qua the proceedings before the Civil Court i.e. the averments in the plaint. Such a smart litigant should not be allowed to hamper the course of the free flow of justice; such an illegal interference in the administration of justice raises a substantial question of law. It is submitted that the documents relied upon by the plaintiff Ex. PW 1/1 to Ex. PW 1/4 are unregistered documents and they cannot transfer any title qua immovable property in favour of such a party; they are hit by the provisions of Section 17 (1) (a) & Section 49 of the Indian Registration Act, 1908 as also Section 54 of the Transfer of Property Act, 1882. A suit for mandatory injunction was not maintainable when admittedly the plaintiff was not in possession of the suit property at the relevant time. It was also barred by limitation. It was a collusive suit between the plaintiff and Pyare Khan and this is evident from the fact that the counsel appearing for the plaintiff Noor Mohd in the suit proceedings was also the same counsel appearing for Pyare Khan in the criminal complaint. It is submitted that the FIR which had been registered against Pyare Khan under Section 420 of the Indian Penal Code was on the complaint of Noor Mohd; his contention being that his cheques had been dishonored and Pyare Khan had cheated him; thereafter the complainant Noor Mohd and the accused Pyare Khan had settled their disputes by getting the offence compounded; thereafter in collusion with one another, Pyare Khan had falsely deposed in the

present case supporting the case of the plaintiff whereas the real story is that this suit property had already been sold by Pyare Khan to defendant no. 1 in the year 1984.

12. Learned counsel for the appellant has placed reliance upon 89 2001 DLT 511 (FB) Rajneesh Kumar Singhal vs. State (National Capital Territory of Delhi) as also another judgment of this court reported in MANU/DE/1195/2008 Reflex International Pvt.Ltd. vs. Rajinder Dev Chopra to support his submission that a party cannot be allowed to approbate and reprobate, conflicting stands given by the parties before different courts amount to an abuse of the process of the court which evil is liable to be nipped in bud itself. Attention has also been drawn to the definition of “compounding” as contained in Black’s Law dictionary; this definition also supports the stand of the appellant that compounding is only an agreement by the party not to prosecute the crime but it does not take away the fact that the crime actually stood committed.

13. Arguments have been countered by the learned counsel for the respondent. It is pointed out that no shifting stands have been adopted by the plaintiff Noor Mohd; his stand has all along been the same; his version being that his signatures had been obtained on a blank paper pursuant to which the complaint had been lodged against Sh. Pyare Khan. The police had in fact colluded with Rehmat Bee and this is the primary reason why the chowki Incharge i.e. SI K.P. Kukreti has been arrayed as defendant no. 2 in the present suit proceedings. Stand of the plaintiff/respondent has continuously been that he had purchased this property from Pyare Khan in the year 1993 vide documents i.e. agreement to sell, general power of attorney, receipt and a will and

on the same date, physical possession of the suit property had been handed over to him. This has also been evidenced in the version of Pyare Khan who has been examined as D3W1. It is submitted that a civil suit is always based on the principle of a preponderance of probabilities: the scale of evidence had heavily tilted in favour of the plaintiff; his documents of title coupled with the oral testimony of the witnesses as against the no-evidence by the defendant it had rightly led the Courts below to decree the suit of the plaintiff. It is pointed out that the sole document Ex. D1W1/3 which was a receipt purported to have been executed by Pyare Khan was never put to Pyare Khan when he had come into the witness box; this shows that the defendant himself was unsure about the veracity of this document and that is why he did not have the courage to confront Pyare Khan with this document. The learned counsel for the respondent has placed reliance upon a judgment of this Court reported in 94 2001 DLT 841 Asha M Jain vs. Canara Bank & Ors. which was a Division Bench judgment of this court wherein it was held that a general power of attorney coupled with other documents i.e. a will, receipt and an agreement to sell, would effect a transfer of interest in immovable property. For the proposition, reliance has also been placed upon another judgment of this court reported in 104 (2003) DLT 707 Veer Bala Gulati vs. M.C.D. & Anr. It is submitted that even an unregistered document can be looked into for a collateral purpose i.e. to establish the character of possession and for this proposition, reliance has been placed upon AIR 1989 Delhi 144 Rajesh Wadhwa vs. Dr.(Mrs.) Sushma Govil. The impugned judgment calls for no interference.

14. In rebuttal, the learned counsel for the appellant has submitted that the judgments relied upon by the learned counsel for the appellant in the case of Asha Jain (supra) and Veer Bala Gulati (Supra) are distinct on their own facts; it is pointed out that in both of those cases, the general power of attorney and the Will were registered documents; moreover the provisions of Section 17 and Section 49 of the Indian Registration Act had not been gone into. It is pointed out that the aforementioned judgments were pronounced in cases where there was no lis between two contesting parties; the judgment in Veer Bala Gulati (supra) was delivered in the domain of a levy of "transfer duty". The said judgments would be inapplicable. It is pointed out that by virtue of the amendment in the Delhi Municipal Corporation Act (2003 amendment) (hereinafter referred to as 'the DMC Act'), the ratio of the aforementioned judgments is washed away as Section 147 of the Delhi Municipal Corporation Act stands amended and duty on a contract for transfer of property has now been categorized under an additional head; this amendment has enunciated the intention of the legislature; two separate categories i.e. a sale of immovable property and a contract for transfer of immovable property have now been engrafted separately.

15. This court shall answer the second question first. Complainant in FIR no.336/1994 registered under Sections 420/506 IPC was Noor Mohammed; his categorical stand is that his signatures had been obtained on a blank paper, the FIR did not bear his signatures; the same was not read over or explained to him. Before the concerned criminal court i.e. the court of the Metropolitan Magistrate; Noor Mohammed had appeared as PW-2.

He had deposed that he had purchased a plot from Pyare Khan upon which he got construction raised; in the year 1994 Rehmat Bee claimed ownership of the said plot stating that she had purchased it from Pyare Khan; police had been called to settle the dispute between the parties; parties had been directed to file their respective documents of title; the police i.e. SI K.P.Kukreti (defendant no.2 in the suit proceedings) had locked the suit premises; after 20 days he had handed over the keys of the house to Rehmat Bee (defendant no.1); talks for compromise were initiated; four cheques were given to him by Pyare Khan which were dishonored; complaint Ex.PW-1/1 was lodged but his signatures (i.e. of Noor Mohammed) had been obtained on blank papers. This stand of PW-2 in the criminal proceedings was also the same stand which had been adopted by him in his plaint i.e. in the suit proceedings bearing suit no.201/2002. In these proceedings the plaintiff had averred that he had purchased this suit property from Pyare Khan against documents i.e. a general Power of Attorney, agreement to sell, a receipt and an affidavit; on 2.4.1994 Rehmat Bee along with some other ladies tried to interfere with the suit property; police was called at No.100; defendant no.2 i.e. SI K.P.Kukreti locked the suit property on 3.4.1994; parties were directed to give their documents of title; on 22.4.1994 defendant no.2 handed over the suit premises to defendant no.1; meanwhile defendant no.3 (Pyare Khan) sought to buy back this property from the plaintiff and gave cheques of Rs.1,92,000/- which were dishonored. Para 17A of the amended plaint has also been perused; plaintiff has stated that FIR no.336/1994 had been registered on twisted facts on the oral

version of the plaintiff whose signatures had been obtained in good faith; plaintiff had never averred that Pyare Khan had sold the property to Rehmat Bee; the police had colluded with Rehmat Bee and recorded this oral version in the FIR which had not been read over to him.

16. These averments of Noor Mohammed made in the criminal complaint i.e. his testimony on oath before the criminal court and his averments in the plaint are in no manner in conflict with one and other. This is evident from the aforementioned narration. Judgments relied upon by learned counsel for the appellant on this score are clearly inapplicable as no such proposition about the conflicting stand of the respondent has been established.

17. Both the courts below had also dealt with this contention. The trial judge had recorded a finding in this regard while dealing with Issue no.4 & 5 which inter alia reads as follows:

“Now perusal of the same shows that in this statement also the plaintiff has more or less stated same facts that he has stated before this court. In particular in his statement before the Ld. MM, the plaintiff reiterates that defendant no.2 had taken over the keys of the suit property and handed it over to defendant no.1. He also submits that defendant no.2 had taken his signatures on blank papers. Before the Ld. MM also plaintiff had produced the documents of sale vide which he had purchased the suit property. Therefore, I find no contradiction between the statement made by the plaintiff before this court and that made before the Ld.MM. In other words defendant no.1 is not disputing the execution of the documents by defendant no.3 in favour of the plaintiff nor is she disputing the incident of 2-4-94 or that she was handed over the keys by the police officials. In the entire cross examination it has not been suggested to the plaintiff that these facts are wrong.”

The first appellate court had endorsed this finding, the relevant extract of which reads as under:

“The testimony of the plaintiff has remained consistent both in the criminal case and in the present suit that Pyare Khan had sold the

property to him and Rehmat Bi had entered into its possession. As noted above, the statement made before the Ld. MM was two years prior to the application by Noor Mohd to implead Pyare Khan as a defendant to this suit, when no collusion is alleged to have existed. Thus, the statement of the defendant no.3 before the Trial Court confirming the title of the Pyare Khan will not be sufficient to hold that there was collusion between the two of them to defeat the rights of the defendant no.1/appellant, who in any case has failed to prove that any sale had taken place between her and Pyare Khan. Again, statement of Noor Mohd before the Sessions Court on the basis of which Pyare Khan was acquitted, being consistent with his testimony on oath before the Ld. MM, will also not suffice to conclude collusion or that the statement was the consideration for the defendant lno.3 to appear before the Civil Court and support the plaintiff, Noor Mohd.”

18. These findings have emanated from the record on which no interference is called for. Learned counsel for the appellant has further contended that admittedly on the evidence adduced before the trial court, Pyare Khan had been convicted under Section 420 of the IPC by the Metropolitan Magistrate vide its order dated 29.4.2000; on 5.5.2000 he had been sentenced to undergo imprisonment for three years and to pay a fine of Rs.5000/-. It is submitted that thereafter the subsequent compounding of the offence between the parties does not wash out the guilt of the accused; the offence for which Pyare Khan had stood convicted was not wiped out. This proposition raised by the learned counsel for the appellant is not in dispute. However, this court is not concerned with this aspect of the matter. It is the stand of Noor Mohammed which had been taken by him in the criminal proceedings qua the present suit proceedings which is relevant for deciding the substantial question of law raised before this Court. As already noted above the version of Noor Mohammed in the criminal proceedings was not in conflict or contrary to the averments made by him in the suit. The Metropolitan Magistrate

had convicted Pyare Khan primarily on the testimony of PW-4 and PW-5.

19. At this juncture, it is also relevant to state that a finding given in a criminal proceeding is not binding on a civil court; it has a limited application only i.e. limited for ascertaining as to who the accused was and what was the result of the criminal proceeding. By no stretch of imagination can it be said that such a finding in a criminal proceeding would be binding in a civil proceeding. This had been held by the Supreme Court in 2009 13 SCC 729 Vishnu Dutt Sharma vs. Daya Sapra.

20. Substantial question no.2 is accordingly answered as follows:

The stand of Noor Mohammed in the criminal proceedings in FIR No.336/1994 under Section 420/506 of the IPC is not in conflict with the averments which have been made by him in the plaint i.e. the suit proceedings in suit no.201/2002 titled as Noor Mohammed vs. Rehmat Bee and Ors.

21. This court shall now deal with first substantial question of law as formulated by it on 17.7.2008. Suit of the plaintiff is a suit for possession. The documents of title as set up by him are the documents Ex.PW-1/1 to Ex.PW-1/4; Ex.PW-1/1 is the General Power of Attorney; Ex.PW-1/2 is the agreement to sell, Ex.PW-1/3 is the affidavit and Ex.PW-1/4 is a receipt. All the aforementioned documents are dated 13.4.1993. They are admittedly unregistered. Plaintiff by virtue of these documents has sought to establish that he had purchased this property from Pyare Khan, the details of which have been mentioned in Ex.PW-1/2 for a consideration of Rs.1,40,000/-.

22. In the Division Bench judgment of this court reported in Asha M. Jain (supra), this court had considered the transactions based on power of attorney sales in Delhi which were normally being executed in respect of lease-hold properties. These proceedings had emanated from a suit for recovery filed by the Bank against its borrowers; this judgment had been rendered in a pending lis. Relying upon the judgment reported in 76 (1998) DLT 232 Kuldip Singh Suri vs. Surinder Singh Kalra & Anr. where a Single bench of this court had held:

15. power of attorney sales in Delhi is the common mode of sale of immovable property to get over the legislative restrictions of transfer of properties. The power of attorney is for consideration and the bargain is followed by delivery of possession to complete the transaction. Further to prevent arbitrary cancellation, Will and affidavit about renouncing rights are taken. The Court repelled the contention that since sub-lease with the Government prohibited transfer, such transfer was opposed to public policy, since in the view of the Court, public policy gets modified with march of time. The Court recognised the fact that restrictions to sell made everyone dishonest and the power of attorney sale method was devised to get over the restrictions.

23. The Division Bench of this court relying upon the aforementioned ratio had held that the concept of power of attorney sales has been recognized as a mode of transaction for sale of immovable properties and since these transactions comprised not merely of an agreement to sell but were accompanied with other documents including a general power of attorney, special power of attorney, will and affidavit; such documents do transfer interest in an immovable property and when followed by possession, provisions of Section 53-A of the Transfer of Property Act also get attracted; in such a case a transferor or any person claiming under him is

debarred from claiming back the property from the transferee. This recognition to sales of immovable properties evidenced by a power of attorney, agreement to sell, will and receipt was also recognised by a subsequent judgment of this court reported in MANU/DE/1174/2009 in M/s Murli Manohar Leasing & Finance Co.Pvt. Ltd. vs. M/s Intraport (India) Ltd. & Ors.

24. The vehement contention of the learned counsel for the appellant that in this case all the documents are unregistered whereas in the cases cited and relied upon by the learned counsel for the respondent the documents were registered and as such would have no application to the facts of the instant case is an argument which does not merit any consideration. In Asha M. Jain (supra) out of four documents relied upon by the court evidencing a transfer of interest in immovable property, two of the said documents i.e. the general power of attorney and the will were registered. Court had held that these two contemporaneous documents lent authenticity to the date of the execution of the documents. The registration of the documents had lent support to its date of execution i.e. to that limited extent. The other two documents i.e. the agreement to sell and the special power of attorney were admittedly unregistered; the entire transaction and its details were worded in the agreement to sell. In the subsequent judgment of this court reported as Veer Bala Gulati (supra) the clauses recited in the agreement to sell were relied upon by the court to return a finding that this document had transferred interest in immovable property. Nowhere from this judgment can it be deciphered that this agreement to sell was a registered document.

25. Ex.PW-1/1 to Ex.PW-1/4 was the documentary evidence relied upon by the respondent to establish his title to the suit property. Apart from this documentary evidence the oral version of Pyare Khan (examined as D3W1) is also relevant; he was admittedly the owner of the suit property. He on oath categorically stated that he had sold this property only once to Noor Mohammed on 13.4.1993 and he had never sold this property to anybody either before or after; he had handed over the suit property peacefully to Noor Mohammed on 13.4.1993; Ex.PW-1/1 to Ex.PW-1/4 were executed by him in favor of the plaintiff Noor Mohammed at the time of the sale of the suit property. Plaintiff had examined himself as PW-1. He had also reiterated the averments made in the plaint.

26. It was this oral and documentary evidence which had been taken into account by the courts below to return a finding that the plaintiff was the owner of the suit property and entitled to a decree of possession as had been rightly granted in his favour.

27. There is no doubt to the proposition that the burden of proof in a criminal case is distinct from the burden of proof in a civil case. Whereas in a criminal case the prosecution has to establish its case beyond all reasonable doubt, in a civil proceeding the rule of preponderance of probabilities prevails. The prosecution in a criminal trial has to stand on its own legs; so also the plaintiff in a civil proceeding and in an uncontested proceeding the absence of the defendant will not work to the advantage of the plaintiff who nevertheless must prove his case to the satisfaction of the court. However, where both parties have adduced evidence the question of burden of proof loses its importance. This has been reiterated

by the Supreme Court in AIR 1973 SC 626 Prem Lata vs. Arhant Kumar Jain and again in (1994) 4 SCC 350 Arumugham (dead) by LRs and Ors. vs. Sundarambal & Anr.

28. The evidence which had weighed in the mind of two courts below was not only the oral version of the witnesses of the plaintiff, the testimony of D3W1 but also the documentary evidence Ex.PW-1/1 to Ex.PW-1/4 which together with the actual physical delivery of possession of the suit property in favour of the plaintiff on 13.4.1993 had recognized the sale of this immovable property in his favour. The defendant had set up a plea that he had purchased this property in 1983; yet he had not adduced an iota of documentary evidence to establish this stand. Ex.D1W1/3 was a receipt set up by the defendant purported to have been executed by Pyare Khan in his favour. It was an undated document; it had not been put to Pyare Khan in his evidence when he had come into the witness box as D3W1; Pyare Khan in fact had categorically deposed that he had executed only one transaction of sale of this suit property and it was in favour of Noor Mohammed on 13.4.1993; neither before and nor after the said date had he entered into any other sale transaction with any other person; Ex.D1W1/3 had been rightly disbelieved by the courts below. The preponderance of probabilities was clearly in favour of the plaintiff.

29. Under Section 53-A of the Transfer of Property Act the transferee who has got an unregistered document of a contract of sale in his favour coupled with the actual delivery of possession of the suit property can use it as a protective shield against the transferor or any person claiming under him. The contention of the learned counsel for the respondent that the defendant can use this

protective shield against Rehmat Bee who is a person claiming through Pyare Khan is also an argument which cannot be ignored.

30. The 2003 amendment in Section 147 of the DMC Act relates to the levy of stamp duty and the method of assessment; it would in no manner affect the law laid down by this court in relation to sales by way of power of attorney as has been argued by the learned counsel for the appellant.

31. The first substantial question of law is accordingly answered as follows:

The agreement to sell, power of attorney, receipt coupled with the oral evidence had transferred title of the suit property in favour of the plaintiff.

32. There is no merit in this appeal; appeal as also the pending applications are dismissed.

INDERMEET KAUR, J.

OCTOBER 01, 2010

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