

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

% DATE OF DECISION: July 19, 2010

+ **RFA No.312/2008 & CM 10686/2008, 12815/2009**

RAJIV SOOD & ANOTHER Appellants
Through: Ms.Anjali Chopra, Advocate.

versus

MOHD.YUSUF & ANOTHER Respondents
Through: Respondents are ex-parte

CORAM:
HON'BLE MS. JUSTICE REVA KHETRAPAL

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

: REVA KHETRAPAL, J.

1. This appeal is directed against the judgment and decree dated 06.05.2008 whereby and whereunder the suit of the appellants/plaintiffs for possession and permanent injunction against the defendants was dismissed by the learned Additional District Judge, Delhi.
2. The facts material for deciding the present appeal are as follows.
3. The appellants are the owners of the plot bearing Khasra No.94/4 measuring about 440 sq.yards, Main 60 Foota Road, Baba Colony, Burari, Delhi (hereinafter referred to as “the suit property”). The suit

property is part of land measuring approximately 900 sq. yards. The appellants had purchased approximately half of the said land through various documents such as Agreement to Sell, General Power of Attorney, Will, Receipt etc. At the time of the purchase of the suit property, the erstwhile owner of the said property had handed over the actual vacant peaceful possession of the suit property to the appellants. After purchasing the suit property, the appellants made construction of a boundary wall and fixed a door in the boundary wall. The appellants also constructed tin sheds on the back side of the suit property.

4. The respondent Nos.1 and 2 are real brothers and the respondent No.1 at the relevant time was working as a Chowkidar in the adjoining plot of the suit property under the ownership of one Shri Gumbarwala.

5. It is the case of the appellants that in the month of February, 2007 when the appellants visited the suit property, which they were visiting in due course after every few months, they found the suit property intact and in the condition in which the same had been purchased by them. However, in the month of June, 2007, i.e., on 15.06.2007 when they visited the suit property, they were shocked and surprised to see that the respondents had raised construction with a view to sell the suit property to various persons. The appellants assert that they came to know that the prospective buyers were also visiting the suit property for the purpose of its purchase. The appellants accordingly approached the local police for redressal of their grievance, but the local police having refused to help

the appellants, the appellants filed the present suit seeking the following reliefs:-

(a) a decree of possession in favour of the plaintiffs and against the defendants, thereby directing the defendants to hand over the actual, vacant and peaceful/physical possession of the suit property i.e. property/plot bearing Khasra no.94/4, measuring about 440 sq.yds., Main 60 foota Road, Baba Colony, Burari, Delhi, which has been more clearly shown in red colour in the site plan attached, after demolishing the existing structure over;

(b) a decree of permanent injunction in favour of plaintiffs and against the defendants, thereby restraining the defendants their agents, employees, associates, workers, officers/officials and the persons working on their behalf from selling, transferring, alienating and/or creating any third party interest in the suit property i.e. property/plot bearing Khasra no.94/4, measuring about 440 sq.yds., Main 60 foota Road, Baba Colony, Burari, Delhi, which has been more clearly shown in red colour in the site plan attached, in whole or in part in any manner whatsoever in favour of any person, in the interest of justice.

6. After the institution of the suit, the appellants amended the plaint to incorporate the plea that during the pendency of the suit, the respondents had illegally constructed two other shops in the property and thereafter the suit property comprised of four shops.

7. By an order dated 01.08.2007, the respondents were proceeded ex-parte in the suit proceedings. After the appellants had adduced ex-parte evidence, the following findings were rendered by the learned Additional District Judge, resulting in the filing of the instant appeal:

“**Firstly**, plaintiffs claims to have become owner of the suit property by virtue of several documents i.e. GPA, Affidavit, agreement to sell, Will, Receipt dt.18.01.1999. Out of all these documents only GPA and Will are

registered documents. For becoming an owner of immovable property, plaintiff should have Sale Deed in his favour. By virtue of these documents i.e. GPA and Will, plaintiff does not become owner.

Secondly, plaintiffs claimed in the suit that they are the owners of the suit property. As stated above the GPA etc. are not the document of ownership and the ownership can be acquired only through registered Sale Deed.

It may be noted that at the time of execution of these documents, the required stamp fees has also not been paid.

Thirdly, one Sh.Kanwal Singh has been shown as owner of the suit property. To show Sh.Kanwal Singh as owner of the suit property a Khatoni Pamaish of the year 1980-81 which is Ex.PW1/2 has been filed. This Khatoni Pamaish does not bear the signature or stamp of concerned Revenue Authority.

Hence, it is not a document to show that Sh.Kanwal Singh was owner of the agricultural land shown in Khatoni Paimaish Ex.PW1/2.

Fourthly, even otherwise Khatoni Pamaish is of the year 1980-81 much before the time Sh.Kanwal Singh sold the suit land to Sh.Dalip Singh on 01.06.1998.

Fifthly, it is alleged that Sh.Kanwal Singh sold the land to Sh.Dal p Singh on 01.06.1998 and Sh.Dalip Singh as attorney of Sh.Kanwal Singh sold the suit land to the present plaintiffs on 18.01.1999. There is no mutation or record showing mutation in favour of Sh.Dalip Singh or in favour of present plaintiffs despite claims to have purchased on 18.01.1999.

A person is not the owner of the agricultural land unless his name appears in the Khasra Girdawari or Khatoni of as latest as possible.

Lastly, the facts as stated by plaintiff does not inspire the confidence of this Court.

Plaintiffs states that they were in possession. One day they found that they have been dispossessed. They made report to the police.

What police did, is not on record of the Court nor any record from police has been filed whether any action taken or not and what was the action?”

8. Notice to show cause as to why the appeal be not admitted was issued to the respondents, who were eventually served through publication and having failed to enter appearance, were proceeded ex-parte on 11.03.2010.

9. In the aforesaid circumstances, Ms.Anjali Chopra, the learned counsel for the appellants was heard and the record perused.

10. A scrutiny of the record reveals that there is unrebutted evidence on record that the appellants are co-owners of the suit property at Burari measuring about 440 sq.yds., as shown in the site plan attached with the suit, being Exhibit PW-1/1, and that when the suit was filed by the appellants, there were only two shops in the suit property. During the pendency of the suit, however, the respondents constructed two more shops in the suit property. Hence, another site plan was filed, being PW-1/1A. There is also unrebutted evidence on record to show that the appellants had purchased the suit property from Shri Dalip Singh, who had purchased the said property from Shri Kanwal Singh. A copy of the Khatoni Pamaish in favour of Shri Kanwal Singh is placed on record as Exhibit PW1/2. General Power of Attorney, Agreement to Sell and Receipt dated 03.04.1998 executed by Shri Kanwal Singh in favour of Mr.Dalip Singh in respect of the area measuring 900 sq. yds. are on record as Exhibit PW1/3, Exhibit PW1/4 and Exhibit PW1/5. A General

Power of Attorney, Agreement to Sell, Affidavit, Receipt and Will dated 18.01.1999, duly registered in the Office of the Sub-Registrar concerned, executed by Shri Dalip Singh in favour of the appellants herein, showing that Shri Dalip Singh had sold an area measuring 440 sq. yds., out of the aforesaid plot of land measuring 900 sq.yds, to the appellants are on record as Exhibit PW1/6, Exhibit PW1/7, Exhibit PW1/8, Exhibit PW1/9 and Exhibit PW1/10 respectively. There are also on record the unrebutted statements on oath of the appellant No.1 and the appellant No.2 that at the time of purchase of the suit property, the erstwhile owner of the suit property (Shri Dalip Singh) had handed over the actual vacant and peaceful possession of the suit property to the appellants. There are also on record the unrebutted statements of the appellants that a part of the plot of land measuring 900 sq. yds. was sold by the erstwhile owner of the suit property to one Shri Rajinder Sharma.

11. It has further emerged in evidence that the appellants were in legal possession of the suit property from the date of the purchase of the suit property till 15.06.2007, when the appellants were shocked to see that the respondents had raised construction on the suit property and were claiming ownership rights in the same. The appellants approached the local police and on the failure of the local police to redress their grievance, filed a suit before this Court for possession and permanent injunction from which the present appeal arises.

12. A perusal of the order of the learned Additional District Judge shows that the principal ground on which the relief prayed for by the appellants has been denied to them is that out of the documents relied upon by the appellants, i.e., General Power of Attorney, Affidavit, Agreement to Sell, Will and Receipt dated 18.01.1999, only the General Power of Attorney and Will are registered documents and for becoming an owner of immovable property, the appellants should have a registered sale deed in their favour. By virtue of the General Power of Attorney and Will alone, the appellants do not become the owners. It is further held that the requisite stamp duty has also not been paid in the instant case.

13. Indubitably, the instant case is a case of Power of Attorney sale and is one of the innumerable cases where the sale of immovable property is affected by execution of various documents other than the sale deed. Such type of sales have been recognized by Courts of law having been necessitated by expediency, to which aspect of the matter I shall presently advert. Suffice it to say for the moment that the practice of disposal of plots by executing various documents other than sale deeds was dealt with by this Court in *Usha Malhotra Vs. G.S.Uppal, 1991 RLR 223*, wherein this Court noticed the practice of entering into a construction agreement to use it as a camouflage for an agreement to sell. That was a case where the seller executed: (1) Two Wills, one by himself and the other by his wife bequeathing the property to the

purchaser (2) General power of attorney appointing the husband of the purchaser as the lawful attorney of the sub-lessee (3) Agreement to sell stating that since the sub-lessee was not able to construct a building on the plot therefore she agreed to sell the same to the purchaser. Besides the above documents and several others including a letter of repudiation of kind executed in the instant case, the parties also executed a construction agreement. While the purchaser brought a suit for specific performance, the sub-lessee, plot owner, filed an application under Section 20 of the Arbitration Act to enforce the arbitration clauses occurring in the construction agreement. In the suit filed by the purchaser the sub-lessee filed an application under Section 41 of the Arbitration Act. A learned Single Judge of this Court while dismissing the application observed as follows:

“It is a matter of common knowledge that in Delhi due to various restrictions imposed on the owners of plots held by them on perpetual leaseholder basis, they devise methods to dispose of their plots by entering into various documents like in the present case. The construction agreement is not to be read in isolation. I find, when the Uppals filed the present petition u/s 20 of the Act, they withheld material information from the Court. They said nothing except the construction agreement. After written statement was filed, they in their replication admitted execution of various documents mentioned above. They said that agreement to sell was no doubt executed by the parties on 1.8.78 itself, but said that the parties immediately thereafter discussed the matter the same day and in view of the fact that such a contract was forbidden by law, decided to execute the construction agreement superseding the agreement to sell. This cannot be true. They have been then unable to explain the execution of the Wills and the general power of attorney which was presented for registration on 2.8.81. If the stand that the

agreement to sell was superseded with the construction agreement is to be believed, they have no answer to the execution of the documents. Prima facie, it does appear to me that the parties agreed to the sale of the plot in question by Uppals to Usha. Otherwise, it is difficult for Uppals to explain the delay as to why for five years after the construction agreement dated 1.8.78 till April, 1983 they kept quiet, and particularly when Usha was not in construction business.”

At a subsequent stage, when the same dispute found its way to this Court, the Court further observed:

“..... In fact the transaction appears to be one of a sale by power of attorney notwithstanding the lack of formality of the execution of the formal sale deed, which could not be executed in view of certain restrictions contained in the sale deed. Under the scheme whereby DDA has given the liberty to the plot holders to obtain free hold title, the position of purchasers by sale on power of attorney has been recognized notwithstanding the fact that such a sale could not be considered to be a sale of the property in the eye of law under Transfer of Property Act.”

14. Following the ratio in the aforesaid case, a learned Single Judge of this Court (Hon’ble Mr. Justice Anil Dev Singh) in the case of ***Kuldip Singh Suri Vs. Surinder Singh, reported in 1999 RLR 20***, observed in the context of power of attorney sales that such type of sales are a reality which cannot be wished away. In paragraph-38 of its judgment, the Court delineated the reasons why the Courts had recognised the power of attorney sale method as follows:

“38. It is a manner of common knowledge that in all sub-leases executed on behalf of the President of India such like restrictive clauses have been incorporated. It is also a matter of common knowledge that due to such like restrictions the power of attorney sales in thousands have been effected. If the instant transaction is held to be

illegal then in that eventuality thousands of such transactions on the same token would have to be declared as illegal. This would cause colossal loss and misery to the vendees. Though both the vendors and the vendees are in *pari delicto*, the vendors would be making capital out of their breach by getting back their properties which over the years have appreciated astronomically. It would be wholly inequitable to declare such agreements being violative of perpetual sub-lessees. Learned counsel for the plaintiff contended that the fetter imposed by Clause 6 of the perpetual sub-lease Ext. D-3 is meant to protect public interest as the land in Delhi has become a scarce commodity and therefore, any violation of the same would not only give impetus to the illegal sales but would also be in conflict with public policy. Argument though attractive must be repelled. *Public policy is not a immutable concept. It must change with the march of time. The Supreme Court in Central Inland Water Transport Corp. Vs. Brojo Nath, (1986) 3 SCC 156, has observed that public policy connotes some matter which governs the public good and the public interest. The principles governing the doctrine of public policy must be and are capable, on proper occasion, of expansion or modification.*”

15. A Division Bench of this Court in *Asha M.Jain Vs. The Canara Bank & Others, reported in 2002 II AD (Delhi) 734* discussed the rationale behind power of attorney sales as under:

“The Delhi Development Authority undertook the task of land development of Delhi and in the process constructed a large number of flats. The property in question is one such flat. Registered documents were not executed in respect of sale transaction because of the liability to pay unearned increase. The unearned increase is a difference between the market value of the sale and the original cost of purchase a part of which is required under the terms of allotment or conveyance to be paid to the perpetual lessor. The nature of such transaction has been considered by the Delhi High Court in different judgments. In Harbans Singh Vs. Shanti Devi, 1977 Rajdhani Law Reporter 487, it was held that if a person owning a property executes an agreement for sale in favour of a lady

and executes a irrevocable power of attorney in respect of the same property in favour of her husband then he cannot cancel or revoke power of attorney on account of interest or right created in the subject matter so as to prejudice the said interest. The provisions of Section 202 of the Contract Act, Section 54 of the Transfer of Property Act, 1882 and Section 17 of the Registration Act, 1908 were analysed and it was held that the interest in property means right, benefit or advantage whether tangible or intangible.”

16. In *Asha Jain’s case (supra)*, the documents executed in respect of the property in question, apart from Agreement to sell were a Receipt, an Affidavit, a registered General Power of Attorney, a Special Power of Attorney and a registered Will. After considering the judgments of this Court rendered in *Usha Malhotra’s case (supra)* and *Kuldip Singh Suri’s case (supra)*, the Division Bench held as follows:

“We are in agreement with the view that the concept of power of attorney sales have been recognized as a mode of transaction. These transactions are different from mere agreement to sell since such transactions are accompanied with other documents including General Power of Attorney, Special Power of Attorney and Will and affidavits and full consideration is paid. This is what also has happened in the present case. There are two general power of attorneys, special power of attorney and the Will apart from the agreement to sell. One of the general power of attorney is registered. Further the Will is also registered. Thus there are two contemporaneous documents which are registered and they lend authenticity to the date of execution of documents. The power of attorneys’ are for consideration within the meaning of Section 202 of the Contract Act, 1872. Thus there is no doubt that interest has been created in the property in favour of the appellant. Possession is also been handed over. Thus the provisions of Section 53A of the Transfer of Property Act would also come into play. The bank is debarred from enforcing any right qua the property other than the right conferred by the agreement to sell. The agreement to sell has nowhere reserved any right on the transferor either for resuming the property or payment of

any additional money. The transferor is debarred from claiming back the property from the appellant. The net result of all this is that the rights have been created in favour of the appellant which cannot be defeated by the attachment order.”

17. Keeping in view the above position of law, as enunciated time and again by this Court, and the evidence on record which is altogether un rebutted and uncontroverted, I have no hesitation in holding that the findings rendered by the learned Additional District Judge that for becoming an owner of the immovable property, the party should have a registered sale deed in his favour and that the documents such as General Power of Attorney, Agreement to Sell, Will, Receipt etc. relied upon by the appellants are of no avail to them, are erroneous. The General Power of Attorney and Will in the instant case are registered documents, which amply bear out that the transaction was one of sale by Power of Attorney notwithstanding the non execution of a formal sale deed. The impugned judgment and order of the learned Additional District Judge is accordingly set aside and the suit is decreed in terms of prayers (a) and (b) in the plaint. The Registry is directed to prepare a decree sheet accordingly.

The appeal and the applications stand disposed of accordingly.

**REVA KHETRAPAL
(JUDGE)**

July 19, 2010
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