

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

% *Date of Judgment: 24.11.2010*

+ **RSA No.215/2010 & CM No.20953/2010**

BHAGAT PRASAD Appellant
Through: Mr.Surender Kumar Gupta, Advocate.

Versus

RAMESH CHAND Respondent
Through: Nemo.

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. (Oral)

CM No.20954/2010 (for exemption)

Allowed subject to just exceptions.

RSA No.215/2010 & CM No.20953/2010 (for stay)

1. This appeal has impugned the judgment and decree dated 26.8.2010 which had reversed the finding of the Trial Judge dated 17.4.2010. Vide the judgment and decree dated 17.4.2010 the suit of the plaintiff Bhagat Prasad seeking possession and permanent injunction had been decreed in his favour. Vide impugned judgment dated 26.8.2010 the said decree had been set aside; suit had been dismissed.

2. The appellant before this Court was the plaintiff in the Trial Court. He had filed a suit for possession and permanent injunction.

Parties were neighbours and had cordial relations. In November 2002, the defendant approached the plaintiff offering to sell him some part of the land from his house on account of financial crisis. The plaintiff purchased 20 sq. yards of vacant land for a sale consideration of Rs.2,50,000/-. The General Power Attorney, Agreement to Sell, Will and Receipt all dated 29.11.2002 had been executed. Physical possession of the land was, however, not handed over to the plaintiff. In spite of request, the defendant refused to do so. Suit was accordingly filed.

3. Defendant had contested the suit. It was stated that the documents are forged; he denied their execution.

4. Trial Judge had framed three issues. They inter alia read as follows:

“1.Whethertheplaintiff has become the owner of the suit property vide execution of the documents dated 29.11.2002 and whether he is entitled to the possession of the same?

OPP

2.Whether the defendant took a loan of Rs.1,25,000/- from the plaintiff and the documents dated 29.11.2002 are doom documents? OPD

3.Relief.

5. In view of the oral and documentary evidence adduced on behalf of the parties the suit of the plaintiff was decreed.

6. Impugned judgment had set aside this finding. Relevant extract of the impugned judgment reads as follows:

“11. The appellant has examined two witnesses whereas respondent has examined four witnesses in all. The testimony of PW1 shows that on 29.11.02 he has purchased the suit property from the appellant for a sum of Rs.2.50 lacs who executed agreement to sell Ex.PW1/A, GPA Ex.PW1/B and receipt Ex.PW1/C in his favour. His testimony shows that transaction took place in his house in the presence of PW2 Sanjeev Kumar who accompanied them to the office of Sub-Registrar, Seelampur. PW2 Sanjeev Kumar stated that on 29.11.02 he accompanied the parties to the suit to the office of Sub Registrar at Seelampur

where a sum of Rs.2.50 lacs was paid by the respondent to the appellant for the purchase of suit property. The documents namely GPA, agreement to sell and receipt were executed which were duly signed by the appellant. The documents bear his signature at point B. PW3 Manish Kumar has brought the summon record who has proved that GPA Ex.PW1/B was duly registered with the office of Sub-Registrar, Seelampur. DW1 in his affidavit stated that on 29.11.02 he availed a friendly loan of Rs.1.25 lacs from the respondent who got executed GPA and agreement to sell with respect to the suit property instead of executing mortgage deed and the said amount was repaid by him in 27 EMI's of Rs.5000/- each from January, 03 to March, 05. He came to know of the malafide intention of the respondent and served a notice dated 11.02.08 Ex.DW1/A to cancel GPA dated 29.11.02 and accordingly cancelled the GPA on 28.02.08 vide cancellation deed Ex.DW1/C. He never received a sum of Rs.2.50 lacs and didn't execute the receipt which is forged and fabricated. In the cross examination he admitted that Sanjeev Kumar is his neighbour who accompanied them for the execution of documents. Sh. Rajender Kumar didn't go with him for the execution of documents. He is not aware about the nature of documents. He doesn't know whether PW2 Sanjeev Kumar signed at point B on documents Ex. PW-1/A to C. He didn't take any receipt from the respondent with respect to the payment of amount from January, 03 to March 05. The notice Ex. Dw-1/A was issued after the filing of the suit. DW2 Virender Kumar is other witness examined by the appellant to show that it was a loan transaction. In the cross examination he stated that loan was not received in his presence. He was told by the parties to the suit that payment of Rs.1.25 lacs has been made which is repayable in installment of Rs.5000/- each. He was present at the time of discussion that documents GPA and agreement to sell were to be executed and to be destroyed after repayment of loan amount. He doesn't know whether appellant raised any objection about the execution of documents. He didn't accompany the appellant.

12. The testimony of all these witnesses show that parties are known to each other. PW-2 is known to both the parties who was present at the time of execution of documents. The testimony of PWS 1 and 2 show that appellant in fact has received the sale consideration for the suit property from the respondent and executed documents namely GPA, agreement to sell and receipt. PW2 has even denied in cross-examination that appellant has borrowed a sum of Rs.1.25 lacs from the respondent. Rather, respondent had given a sum of Rs.2 lacs to the appellant in his house in his presence. No aspersion has been casted by appellant

on the conduct of PW2. There is no question or suggestion that he has sided with the respondent for the reasons best known to him. On the other hand, appellant has failed to show that it was a loan transaction. PW2 has not supported his version. He has not placed any receipt on record to show the repayment of any amount to the respondent. He has not disclosed the name of any person in whose presence the amount was returned. He cannot draw any support from the testimony of DW2 as he was not present at the time of alleged transaction. He didn't accompany the parties to the office of Sub-Registrar so he is not aware as to what transpires between the parties to the suit. His testimony is hearsay as such no support can be drawn from his testimony. DW1 has not filed any complaint with the police if the receipt Ex.PW-1/C was forged. He has not taken any legal action against the respondent for the reasons best known to him. The appellant has failed to bring anything that it was a loan transaction.

13. PW4 (inadvertently recorded as PW3) S.P.Singh is examined by the respondent to show that receipt Ex.PW-1/C bears the signatures and thumb impression of the appellant vide his report Ex.PW1/1. The appellant has not led any evidence to show that receipt doesn't bear his signature or thumb mark. There is no counter evidence to this effect. There is nothing on the record that report given by PW4 is manipulated or procured by the respondent. The testimony of PWS clearly show that the appellant has executed the documents namely GPA, agreement to sell and receipt after receiving the sale consideration of suit property.

14. Learned counsel for the appellant submitted that GPA, agreement to sell and receipt does not confer any right in favour of the respondent who cannot claim ownership on the basis of said documents. Learned counsel for the respondent urged to the contrary. Heard and perused the record. Section 54 of Transfer of Property Act says that "sale is a transfer of ownership in exchange for a price paid or promise or part paid and part promised and transfer of the tangible immovable property of the value of 100 rupees and upwards can be way of a registered instrument". Section 54 of the Act has to be read with section 17 of Indian Registration Act.

15. In G.Ram v. DDA, AIR 2003 Delhi 120, it was held by their lordship that an agreement of sale is not a document of transfer nor by reason of execution of power of attorney, the right, title or interest of immovable property can be transferred. Such a transfer can only be effected by executing the registered documents as provided under section 54 of Transfer of Property Act r/w sec. 17 of Indian Registration Act. In Lallan Prasad v. MCD, 2002 (3) RCR (Civil) 249, it was held by their lordship that

agreement to sell, Will and power of attorney doesn't confer any right in favour of the plaintiff to claim that he is owner of the property. Same is the findings in Imtiaz Ali v. Nasim Ahmad, 1987 (1) RCR (Rent) 413 (Delhi).

16. The argument has to be appreciated in the backdrop of above stated legal preposition. In the instant case, appellant has executed the registered GPA Ex.PW1/B coupled with agreement to sell Ex.PW1/A in favour of the respondent. The respondent of said documents has been duly proved. The bargain is not followed by delivery of possession to complete the transaction. There is no sale deed by appellant in favour of respondent. Section 54 of the Act cannot be ignored. A person cannot claim ownership on the basis of agreement to sell and power of attorney executed in his favour in the absence of registered sale deed. There ought to have been a registered sale deed in favour of the respondent to confer the ownership rights. No ownership right can be claimed on the basis of GPA, agreement to sell and receipt. Reliance is placed upon G.Ram v. DDA, Lallan Prasad v. MCD and Imtiaz Ali v. Nasim Ahmad, Supra, I find force in the submission of Learned counsel for the appellant.

17. Learned counsel for the appellant submitted that suit of the respondent is not maintainable in view of section 41h of Specific Relief Act because equally efficacious remedy was available to the respondent. Learned counsel for the respondent submitted that suit for possession and permanent injunction is maintainable as appellant assured him to vacate the suit property as and when desired. Heard and perused the record. Section 41h of Specific Relief Act provides that an injunction cannot be granted when an equally efficacious relief can certainly be obtained by any other usual mode of proceedings except in case of breach of trust. In the instant case, the perusal of the plaint shows that possession of suit property was not given to the respondent. The respondent has admitted in the cross-examination that he has never been in possession of the suit property. It is crystal clear that possession was never delivered to the respondent. The respondent should have filed a suit for specific performance of the agreement to sell dated 29.11.02 instead of filing of suit for possession. The relief of possession claimed by the respondent by virtue of present suit in other way amounts to by passing the remedy of specific performance. Further, in the absence of the delivery of possession in the part performance of the agreement to sell, it is not possible to grant the relief of the permanent injunction. I have drawn support from Smt.Dilip Kaur v. Harbans Singh, AIR 1989 Punjab and Haryana High court 16. To my mind, an equally efficacious remedy was available which was not availed for the reasons best

known to respondent. I find force in the submission of Learned counsel for the appellant.

18. In view of my aforesaid discussion, I am of the view that Learned Trial Court has not properly appreciated the law in the given facts and circumstances of the case. The appeal filed by the appellant is allowed. The judgment and decree dated 17.04.10 is set aside. The suit filed by the respondent for possession and permanent injunction with respect to the suit property measuring 20 sq. Yards being No.1/4279-B, Gali No.8, Ram Nagar Extension, Mandawali, Delhi is dismissed.”

7. This is a second appeal. On behalf of the appellant, it has been urged that a substantial question of law has arisen as the impugned judgment has failed to appreciate that the documents GPA, agreement to sell, receipt and will dated 29.11.2002 had in fact created a title in favour of the plaintiff; even if possession had not been handed over to the plaintiff; the intention of the parties had to be gathered which was not appreciated by the Courts below. This has raised a substantial question of law. The substantial questions of law have been formulated on page 1 of the appeal; they read as follows:

- “i. Whether in equity no interest whatsoever in the Land purchased is created in favour of the Appellant/Buyer even on the payment of the entire sale consideration?
- ii. Whether the documents of Sale like Registered General power of Attorney, Agreement to Sell and Receipt do not create any interest in faovur of the purchaser to claim possession of the property under purchase thereafter particularly when the entire sale consideration has been paid to the seller?
- iii. Whether the non-registration of the Sale Deed debarred the purchaser from claiming the possession of the property under purchase when he has already paid the entire sale consideration to the seller?”

8. Learned counsel for the appellant has also placed reliance upon a judgment of this court reported in 1999 RLR 20 Kuldip Singh Suri Vs. Surinder Singh as also another judgment of this Court reported in 94(2001) DLT 841 (DB) Asha M. Jain Vs. Canara

Bank & Ors. It is submitted that on the strength of these judgments the plaintiff had an interest in the suit property and the suit based on the aforementioned documents dated 29.11.2002 i.e. the GPA, agreement to sell, receipt and will had transferred interest in this immovable property in favour of the plaintiff. Reliance has also been placed upon a judgment reported in III(2001) SLT 22 Lakha Ram Vs. Madho Ram as also another judgment of the Apex Court reported in II(2009) SLT 789 Kaliaperumal Vs. Rajagopla & Anr. to support a submission that even in the absence of a sale deed intention of the parties could be seen from the other documents as aforementioned.

9. This is a second Appeal Court. It is not a third fact finding court. This Court is vested with the jurisdiction only if a substantial question of law arises. The impugned judgment had categorically returned a finding that the documents relied upon by the plaintiff dated 29.11.2002 had not been coupled with the physical possession of the property in favour of the plaintiff; in fact it was an averment in the plaint itself that physical possession of the suit property has not been handed over to the plaintiff. Judgment reported in Kuldip Sing (supra) and Asha M. Jain (supra) do not come to the aid of the appellant as in those cases physical possession was in favour of the contesting party. The suit of Lakha Ram (supra) was initially a suit for possession it was later on amended and the relief of specific performance was added. Ratio of this judgment is also inapplicable as in this case impugned judgment has returned a finding that the proper course for the appellant would have been to seek relief of specific performance on the aforementioned documents and not possession. Judgment of

Kaliaperumal (supra) is also applicable as admittedly in that case a sale deed had been executed between the parties and the recitals in the sale deed deciphered the intention of the parties. In the instant case there is no sale deed.

10. In no manner, it can be said that the findings in the impugned judgment are perverse; it had returned a clear finding that in view of the claim made in the plaint proper course for the appellant would have been to have filed a suit for specific performance and not suit for possession. The document i.e. the agreement to sell, GPA, will and receipt which were not coupled with possession did not create interest in the immovable property in favour of the plaintiff. There is no fault in the said finding. The appeal as also the application is dismissed in limine.

INDERMEET KAUR, J.

NOVEMBER 24, 2010
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