

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on: 29th November, 2011
Judgment Pronounced on: 05th December, 2011

+ RFA(OS) 64/2011

OM PRAKASH GUPTA & ANR. DECD THR LRS Appellants
Through : Mr.J.M.Bari, Advocate.

versus

RAMESHWAR YADAV & ANR. Respondents
Through : Mr.Sanjay Goswami, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE S.P.GARG

S.P. GARG, J.

1. Present appeal has been preferred by the appellants against the judgment and decree dated 25.03.2011 whereby the suit filed by the appellants for declaration, cancellation of instruments and possession was dismissed.

2. Case of the appellants as per the plaint was that appellant No.2 Somwati, being owner of property No.TA-171/1, Tughlakabad Extension, New Delhi intended to raise construction thereon and needed money. Respondent No.1 Rameshwar Yadav, agreed to initially advance ₹2,50,000/- and such further amount as would be required by the appellants for the purpose of construction as a loan without any interest. It was further agreed that appellants would mortgage an area of

40 sqr.yards having one big room at their property No.TA-105, Tughlakabad Extension, New Delhi to respondent No.1 and would hand over possession of the same to be used by respondent No.1 as godown. The parties acted upon the said terms and conditions.

3. Appellants further pleaded that after receiving the said amount of ₹2,50,000/-, on 31.03.1992, the appellants started raising construction in the property in question. During the course of construction, appellants faced shortage of money and took ₹1,24,000/- on different dates mentioned in the plaint from the respondent No.1 as loan as per the agreement of mortgage without interest. Before giving further sum of ₹1,24,000/-, the respondents insisted for execution and registration of the mortgage deed to which the appellants agreed.

4. Grievance of the appellants in the plaint was that under the garb of getting the documents registered for mortgage, the respondents fraudulently got some documents executed in October, 1993 and claimed ownership of the property in question on the basis of those documents i.e. agreement to sell, Will and General Power of Attorney etc. When the appellants came to know in October, 1993 about the said documents, immediately a legal notice dated 18.10.1993 was got sent to the respondents cancelling the alleged Will and the power of attorney dated 23.02.1993 purported to have been executed by the appellant No.2.

5. Further case of the appellants was that on 26.10.1993 the respondents forcibly entered into the property

bearing No.TA-171/1, Tughlakabad Extension, New Delhi except one hall on the ground floor and dispossessed them in connivance with Incharge Police Post, Govindpuri. A complaint was lodged with SHO, P.S.Kalkaji. However, no action was taken against the respondents.

6. Case of the appellants is that the respondents have no right, title or interest in the property in question and they are the absolute owner of the same; they never executed agreement to sell dated 17.02.1993. They never sold, transferred or alienated property in question. Construction over the property in question was raised by them and it was completed in June, 1993. They spent huge amount in raising construction in the property in question.

7. In the written statement, the respondents controverted the allegations of the appellants and asserted that they had purchased the property in question from the appellant No.2 who had executed various documents in their favour for a sum of ₹8,00,000/-. The respondent No.1 is the absolute and exclusive owner of the property in question purchased vide agreement to sell, receipt and possession letter dated 17.02.1993 along with a registered Will and General Power of Attorney. After taking possession of the property in question, the respondents raised construction over it; spending about ₹20,00,000/-. The appellants are in possession of a small portion on the ground floor for the possession of which a civil suit has already been filed which is pending before Tis Hazari Court, Delhi. No mortgage was effected of any portion in the

property bearing No.TA-105, Tughlakabad Extension, New Delhi.

8. After the issues were settled, the parties adduced evidence to support of their respective version. On the appraisal of the evidence adduced on record, the learned Single Judge dismissed the suit filed by the appellants. Aggrieved by the said order the appellants have come up in appeal.

9. Learned counsel for the appellants has urged that they never executed documents conveying title in the property in question in favour of the respondents. The appellant No.2 was an illiterate lady and was not aware about the contents of the documents Ex.PW-1/D-1 to Ex.PW-1/D-5. The respondents under the garb of getting documents executed for mortgage of some portion in the property No.TA-105, Tughlakabad Extension, New Delhi got all these documents prepared for consideration in sum of ₹8,00,000/- which was never received by the appellants. There are additions/ interpolations in the documents whereby particulars including payment of ₹8,00,000/- apparently have been manipulated afterwards. The appellants have produced on record number of documents showing that they never parted with the possession of the property in question even after the execution of the documents in question. The respondents forcibly dispossessed the appellants in October, 1993 for which a complaint was made to the Police Station but no action was taken against the respondents and lastly that the defendants have deliberately

withheld Ram Kishan Yadav, the stated witness to the execution of the documents Ex.PW-1/D1 to Ex.PW-1/D5.

10. The respondents failed to prove before the learned Single Judge as to how and from where they had paid the huge amount of ₹8,00,000/- to the appellants. The learned Trial Court was not justified to return findings in favour of the respondents showing them to be the owner of the property in question.

11. The learned counsel for the respondents has vehemently controverted these arguments.

12. Burden was heavily upon the appellants to prove that the documents Ex.PW-1/D-1 to Ex.PW-1/D-5 dated 23.02.1993 were never executed by them or that the same were forged or fabricated by the respondents or that they induced appellant No.2 being an illiterate lady to execute those documents on the pretext of getting documents prepared for mortgage. Again it was for the appellants to establish that in fact there was an agreement to mortgage any portion of the property No.TA-105, Tughlakabad Extension, New Delhi and for that purpose, she had executed some documents.

13. Scanning the evidence on record adduced by the appellants, it reveals that the appellants miserably failed to produce cogent and reliable evidence to substantiate their plea that the respondents got all these documents Ex.PW-1/D-1 to Ex.PW-1/D-5 executed under the garb of getting mortgage documents prepared. Agreement to sell Ex.PW-1/D-1 is on a stamp paper. It is having signatures of appellant No.1, husband of appellant No.2 Somwati, as a witness. One Ram Kishan Yadav is another attesting witness to this document. Notary

Public had attested the same on 17.02.1993. The appellants have admitted their signatures and thumb impression over this document but have denied its contents. The appellants failed to produce attesting witness Ram Kishan Yadav or Notary Public to show as to how and under what circumstances this document was executed and what was the nature of the document/ transaction. Again on the same date 17.02.1993 another document receipt Ex.PW-1/D-2 showing payment of ₹8,00,000/- was executed on a stamp paper. Again appellant No.2 and Ram Kishan Yadav had put their signatures over the same as attesting witnesses.

14. In his deposition, respondent No.1 filed his affidavit in examination in chief supporting his stand taken in the written statement. He was cross-examined by the learned counsel for the appellants. In the cross-examination the respondent No.1 asserted that thumb impression of appellant No.2 Somwati on agreement to sell Ex.PW-1/D-1 at point A1; on receipt Ex.PW-1/D-2 at point A1, possession letter Ex.PW-1/D-3 at point A1, General Power of Attorney Ex.PW-1/D-4 at point A1 and Will Ex.PW-1/D-5 at point A1 were put in his presence. Suggestion was put to this witness that appellant No.2 Somwati Devi never put her thumb impression on Ex.PW-1/D-1, PW-1/D-2 and PW-1/D-3 and that the same were forged and fabricated by him. No suggestion was put whatsoever to the respondent No.1 in the cross-examination if the respondents had agreed to advance loan of any specified amount for mortgage of any portion of property bearing No.TA-105, Tughlakabad Extension, New Delhi or that the appellants had gone to the office of the

Sub Registrar to execute some documents in that connection. No suggestion was put in the cross-examination of respondent No.1, if he induced appellant No.2 to execute these documents under the garb of preparation of documents for mortgage. Thus, an entirely contradictory stand was put by the appellants alleging that these documents Ex.PW-1/D-1 to PW-1/D-3 were never executed by them or that appellant No.2 never put her thumb impression over the same. The appellants took stand that these documents were forged and fabricated. Appellants failed to recollect that at one stage earlier they had admitted that these documents were signed and thumb marked by them considering the same to be the documents being prepared for mortgage. Again nothing was suggested in the cross-examination of respondent No.1 that any consideration of ₹2,50,000/- or ₹1,24,000/- was received on any particular date by the appellants from him. Nothing was suggested in the cross-examination as to how and by whom these documents were forged and fabricated. The facts in the affidavit Ex.DW-1/A recording examination in chief of the respondent No.1 have remained unchallenged in cross-examination on medical facts. DW-1 was also not cross-examined as to in what manner the appellants were dispossessed from the property in question.

15. In the plaint, the appellants pleaded that respondent No.1 was approached to advance loan on mortgage of one big room having an area of 40 sqr.yards in TA-105, Tughlakabad Extension, New Delhi. However, no date was disclosed as to when the respondent No.1 was approached to advance loan on mortgage of the said property. It was also not disclosed as to

for what amount the appellants had agreed to mortgage the said property. A vague assertion was made that initially the respondent No.1 was to give ₹2,50,000/- and thereafter, he was to advance further amount as loan as would be required by the appellants for the purpose of construction. It was also not disclosed as to on which particular date, ₹2,50,000/- were paid by the respondent No.1 or possession of the big room in the said property was handed over to him. No mortgage deed is stated to have been executed at the time of advancement of alleged sum of ₹2,50,000/-. In the written statement, there is complete denial by the respondents.

16. Submissions of appellants do not appeal to mind as without getting any documents prepared for mortgage, the respondents were not expected to advance loan of ₹2,25,000/- to the appellants. Again the appellants pleaded to have taken further loan of ₹1,24,000/- on different dates ranging between 10.08.1992 to 05.07.1993 of various amounts from the respondents. Again without insisting for execution of any documents all these payments were not expected to be made by the respondents.

17. In para No.5 of the plaint, the appellants pleaded that in the month of December, 1994 respondent No.1 asked them for documents of the property No.TA-171/1, Tughlakabad Extension, New Delhi for his perusal and satisfaction. The same were kept by him in his custody and were not returned to the appellants despite demand. This claim of the appellants is devoid of any merit. In para No.6 appellants claimed that in October, 1993 itself they had come to know that the

respondents were claiming title on the basis of Will and General Power of Attorney regarding the property in question executed by appellant No.2 and the appellant No.2 got sent legal notice dated 18.10.1993 to the respondents cancelling the alleged Will and Power of Attorney dated 23.02.1993. Under these circumstances, it was highly impossible that in December, 1994 the appellants would hand over original documents regarding the property in question to the respondent No.1 for his perusal and satisfaction. There was no occasion to hand over the original title documents by the appellants to the respondents. Possession of these title deeds with the respondents to support their claim that the transaction was for sale.

18. The appellants suppressed best evidence to establish their possession in the property in question prior to 26.10.1993 when allegedly they were forcibly dispossessed by the respondents. The appellants did not examine any witness from the locality to prove their residence in the property in question till the date of alleged dispossession. No document like ration card was proved to show their residence in the property in question. Contrary to that, Power of Attorney Ex.PW-1/KK in favour of the appellant No.1 executed by appellant No.2 on 16.08.1993 shows residence of the appellants at property No.TA-105, Tughlakabad Extension, New Delhi. Subhash Chander, son of appellant No.1, who appeared as PW-3, in his deposition before the Court, admitted that he was residing at TA-105, Tughlakabad Extension, New Delhi. He changed his version immediately and claimed that his residence was at TA-171/1, Tughlakabad Extension, New Delhi

and his office was at TA-105, Tughlakabad Extension, New Delhi. However, he admitted that he had not brought any proof to show his residence at TA-171/1, Tughlakabad Extension, New Delhi. He expressed his ignorance whether his name was in the ration card or he had election card in his name showing address of TA-171/1, Tughlakabad Extension, New Delhi. He rather admitted that his election card showed address of TA-105, Tughlakabad Extension, New Delhi.

19. The appellants did not elaborate as to how; under what circumstances, by whom and in what manner they were dispossessed on 26.10.1993 by the respondents. No witness from the neighbourhood was examined if any of them had witnessed the said incident. Appellants remained silent as to what happened to their belongings lying in the premises in question. Delay in filing the suit for possession has not been explained by the appellants.

20. Appellant No.1 appeared as Attorney of appellant No.2 in the witness box. Appellant No.2 herself never appeared as a witness to throw light as to what was the nature of transaction entered into by her with the respondents. As rightly observed by the learned Single Judge, Power of Attorney Ex.PW-1/KK in favour of appellant No.1 Om Prakash Gupta pertained to property bearing No.TA-105, Tughlakabad Extension, New Delhi. No express authority was given by appellant no.2 to appellant no.1 to give evidence on her behalf regarding the property in question. In the cross-examination, the appellant no.1 merely pretended that the appellant no.2 could not appear as a witness as she was unwell. However, no

document showing illness of appellant No.2 was filed on record to infer that she was unable to depose due to her medical condition. All these facts were within the special knowledge of appellant No.2 and adverse inference is drawn against the appellant No.2 for not appearing in the witness box.

21. We find no substance in the plea of the learned counsel for the appellants that the appellant No.2 being an illiterate lady was unable to understand the contents of the documents and have executed the same considering them to be documents for mortgage. At the time of execution of these documents none else but appellant No.1, her husband, accompanied her in the office of Sub Registrar to execute the documents. Appellant No.1 put his signatures as an attesting witness. Appellant No.1 never claimed that he was an illiterate and did not understand the nature of the transaction. Appellant No.2 also can't be taken as an illiterate lady as when she became the owner of the property in question, all such type of documents were got executed in her name from the previous owner. These documents are in the judicial file.

22. Appellant No.1 has admitted that there were nine litigations regarding this property and property No.TA-105, Tughlakabad Extension, New Delhi between them and others even prior to the execution of these documents. Under these circumstances, the appellants can't be termed innocent lay persons not to understand the contents of the documents executed by them. Appellants have placed on record number of documents showing purchase of material for raising construction. Such vigilant appellants can't be expected to be

trapped to execute documents showing sale of the property in question under the garb of execution of mortgage deed.

23. The respondents examined DW-2 Veena Bakshi Advocate, who proved that she was a Central Government authorized Notary Public and had attested the documents Ex.PW-1/D-1. It contained her signature and stamp at point A and B. Attestation was done as per rules. Document Ex.PW-1/D-1, agreement to sell, was executed in due course. Respondents also examined DW-6 Sher Singh from the office of Sub Registrar and he testified that original documents GPA Ex.PW-1/D-4 and will Ex.PW-1/D-5 were registered at their office. Respondents also examined attesting witness Ram Kishan who on affidavit testified that the agreement to sell and other documents were signed in his presence by the appellants. Since learned counsel for the appellants had raised a grievance that Ram Kishan was not tendered for purposes of cross-examination, we need to highlight that as per the procedures prescribed under the Original Side Rules the evidence was recorded before a Local Commissioner appointed by this Court and on 3 consecutive dates Ram Kishan was present but due to absence of counsel for the appellants he could not be cross-examined and thus the learned Local Commissioner closed the opportunity to cross-examine the witness. By and under IA No.10118/2006 the appellants sought recall of the order closing their right to cross-examine Ram Kishan as also a few other witnesses whose examination-in-chief was led by the defendants by filing affidavit by way of evidence. Vide order dated 27.09.2006, IA No.10118/2006 filed by the appellants

was allowed but upon the term that it would be the duty of the appellants to deposit the requisite expenses to summon the said witnesses i.e. it became the responsibility of the appellants to summon the witnesses. The appellants took no steps to summon Ram Kishan and it was recorded in the order dated 24.09.2010 passed by the learned Local Commissioner that plaintiffs had taken no steps to summon said witnesses. On the next date i.e. 28.09.2010 the learned Local Commissioner recorded that counsel for the plaintiff desires to recall only one witness Mr.Valsa Chandran for cross-examination. Having abandoned the right to cross-examine Ram Kishan the witness to the documents executed by the appellants, they cannot raise a grievance that Ram Kishan was not tendered for cross-examination. Highlighting that Ram Kishan has deposed that the entire consideration as recorded in the agreement to sell, Power of Attorney, Will etc. executed by the appellants was paid by the defendants in his presence, which statement has gone unchallenged, it further strengthens the case of the respondents. As regards the plea that the documents have an interpolation, we have examined the documents and find no interpolation thereon. A look at the documents would reveal that computer generated printouts were drawn on the requisite papers as per usual language to be seen in such kind of documents and when the computer generated printouts were taken out the place where consideration had to be typed was left blank and thereafter with a different typed script the consideration has been typed. An interpolation would mean that something written on the document is effaced and

replaced by some other writing. But where a document is scribed with blank spaces thereon, intended to be filled up when parties exchange the necessary consideration and at that stage the consideration is written on the document, it would not be a case of interpolation but would be a case of making complete and incomplete document.

24. We find no merits in the plea of the learned counsel for the appellants that adverse inference is to be drawn against the respondents as they failed to prove payment of ₹8,00,000/- to the appellant No.2. If this contention of the appellants is considered again there is no such proof on record whereby any payment for advancing loan to the appellants was made by the respondents. Appellants have admitted loan of ₹3,24,000/- as advanced by the respondents to the appellant No.2. Hence it can't be inferred that no consideration was paid by the respondents to the appellant No.2 at the time of execution of the documents. The payment of consideration depicted in the documents specifically receipt Ex.PW-1/D-2 shows the payment of ₹8,00,000/- by the respondents.

25. Documents executed by the appellants are primarily the documents which transferee used to execute at the time of transfer of the immovable property. It is so apparent as when appellant No.2 became the owner of the property in question prior to the transaction in question, she herself had acquired the right, title and interest in the property in question on the basis of all such documents (GPA, agreement to sell, receipt etc.). Possession of the respondents coupled with these

documents definitely creates right and interest in favour of the respondents under Section 53(A) Transfer of Property Act.

26. We find no merits in the appeal and the same is dismissed.

27. No costs.

(S.P.GARG)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

December 05, 2011
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