

* **HIGH COURT OF DELHI: NEW DELHI**

% Judgment pronounced on: 07.03.2012

+ **I.A Nos.7178/2009 & 13107/2011 in CS (OS) No.243/2009**

RAJ KUMARI GARG Plaintiff

Through Mr. G.S. Raghav Adv with
Mr. Pankaj Kumar Adv

Versus

S.M. EZAZ & ORS. Defendants

Through Mr. K.R. Chawla, Adv with
Mr. Sunil Verma & Mr. Arvind
Varma, Advs.

CORAM:

HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. By this order I propose to decide two abovementioned applications. The brief summary of the facts is that the plaintiff herein has filed the present suit for possession and perpetual injunction for the commercial property bearing No.23, Ground Floor, Defence Colony Market, New Delhi-110024, admeasuring about 92.78 sq yards (hereinafter referred to as suit property). The plaintiff claims to be the exclusive owner of the suit property having perpetual leasehold rights granted to her by Land & Development Office, Ministry of Rehabilitation, Government of India, Nirman Bhawan, vide perpetual lease deed dated 19.12.1974, which now consisting of basement, ground floor, first floor and second floor.

2. The plaintiff states that she had received the suit property through funds received under a duly signed voluntary "Family Settlement" dated 11.07.1974 executed between Late Sh. Lala Ram, Shyam Behari, Bhagwan Dass, Balkrishan and Smt. Kalawati w/o Sri Badri Prasad. An amount of Rs. 32,880/- was given to the plaintiff to purchase the suit property with a specific condition that the plaintiff will have no right to sell the property so purchased from the money provided by them. Accordingly, a lifetime limited right to use/enjoy and the income generated there from. The plaintiff purchased the suit property for a consideration of Rs. 30,000/-.

3. Further, the plaintiff states that she was in actual possession of the suit property until one Mr. Dinesh Gupta, s/o Late R.K. Gupta and his mother Smt. Nirmala Gupta, fraudulently obtained plaintiff's signature and thumb impression on some documents such as Agreement to Sell etc. which were written in English. According to the plaintiff, she does not know how to read and write in English, therefore, she could not read the documents in English and under misrepresentation of facts and law she signed those documents. They gave her a sum of Rs.25 lac and took physical possession of the suit property by execution of an Agreement to Sell dated 07.07.1998 between them. But, as the family of the plaintiff was against the sale of the suit property to the said Dinesh Gupta and his mother, therefore, the plaintiff immediately informed them in July, 1998 only that she did not want to sell the suit property and that all the documents including agreement to sell dated 07.07.1998 be treated as cancelled. She also offered to return their Rs.25 lac.

4. According to the plaintiff, a fraud was committed by said Dinesh Gupta and his mother Nirmala Gupta, the defendant No.3 and 4 herein who sold the suit property to defendants No.1 and 2 by way of Agreement to Sell dated 01.05.2004 for a sum of Rs.35 lac without obtaining proper permission from the plaintiff or the Government of India. The entire sum was misappropriated by them. She also filed an FIR being No.685/04 on 17.12.2004, with the Defence Colony Police Station against defendants No. 3 and 4 in this regard.

5. In the written statement, the defendant Nos.1 & 2 have raised the defence that the suit itself is not maintainable as it has been filed with the intention to harass the defendants. The following defences have been raised by the defendant Nos.1 and 2 in the written statement :

a) It is stated in the written statement that the suit is not only malafide and false but, it is also not maintainable under the provisions of law. The defendants No.1 & 2 are the bonafide purchasers of the suit property.

b) It is further submitted that the suit is highly malafide and a gross abuse and misuse of the judicial process. After selling the property to the defendants No.3 & 4 in 1998, the plaintiff ceased to have any right, title or interest in the suit property. The present suit has been filed with dishonest and malafide intentions to harass and pressurize the defendants No.1 & 2 to extract some money illegally from them.

c) It is further alleged that the suit as framed is not maintainable because the suit, is only for possession and injunction. It

is submitted that the suit without seeking the relief of declaration of cancellation of sale document is not maintainable because the plaintiff ceased to have any right, title or interest in the suit property w.e.f. 07.07.1998 when she executed various sale documents in favour of defendant Nos. 3 & 4 and took the entire sale consideration and gave the possession. Those sale documents have admittedly not been cancelled.

d) The defendant Nos.1 and 2 state that the present suit is a malafide tactic to grab the property of the answering defendants, which the plaintiff legally could not do under the provisions of law. If, the plaintiff had any grievance regarding the sale made by her in 1998, she could have filed a suit for cancellation of the sale document. But, as the plaintiff did not file any suit for cancellation of the sale documents within the limitation period of three years (till today about 11 years) therefore, she cannot ask for the relief of cancellation of sale document because, it has become time barred since about 8 years. However, the plaintiff knowing fully well that she cannot seek the relief of cancellation of sale document has filed the present suit for possession against the answering defendants which is not maintainable.

e) It is further stated that the suit is otherwise barred under Section 53-A of the Transfer of Property Act, 1882 (hereinafter referred to as 'the Property Act'). Documents were executed/registered, entire sale consideration was received by the plaintiff and the possession was given to the defendants and therefore, the suit is barred under Section 53-A of the Property Act and the same has been filed in collusion with defendant Nos.3 and 4 which is evident from the fact that the defendant Nos. 3 and 4 have been made

proforma defendants (as per amended memo of parties dated 19.02.2009 filed by the plaintiff).

f) The suit is not maintainable against the defendant Nos. 1 and 2 who are the bonafide purchasers of the suit property from Sh. Dinesh Gupta and Smt. Nirmala Gupta vide Agreement to Sell, GPA etc. for a total sale consideration of Rs.35,00,000/-. The entire sale consideration was paid, the vacant physical possession was taken on 01.05.2004 when the agreement was executed after payment of entire sale consideration. Thereafter, the answering defendants got the property mutated in their names vide mutation letter dated 17.02.2005. The defendants No.1 and 2 have also been paying the house tax since then.

g) The suit is also under valued and under stamped and therefore, it is liable to be dismissed. Further, the suit is for possession and injunction and for the relief of possession, hence the suit is to be valued according to market value. The market value of the suit property is more than Rs.1 crore (It is relevant to point out that the plaintiff in her written statement dated 16.02.2005 filed in another suit titled as Sh. Dinesh Gupta & Ors. Vs. Smt. Raj Kumari Garg has stated that the market value of the suit shop was more than a crore of rupees even in 1998). But, the plaintiff has valued the present suit at Rs.35 lac.

h) The suit is also barred under Section 41 of the Property Act.

6. During the pendency of the suit, both plaintiff and defendants No.1 & 2 have filed the two applications, the details of which are given as under:

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- (a) I.A. No.7178/2009 under Order XII, Rule 6 CPC by the plaintiff for judgment on admissions.
 - (b) I.A. No.13107/2011 under Order VII, R.11 CPC by the defendants No.1 and 2 seeking relief of rejection of plaint.

7. Both the parties have made their submissions. No one appeared on behalf of defendants No.3 & 4. As per record written statement on their behalf is also not available.

I.A. No. 7178/2009 (u/o XII, R.6 r/w Sec.151 CPC)

8. In this application, it is alleged by the plaintiff that she is the legal owner of the suit property which was allegedly conveyed to Dinesh Gupta and Nirmala Gupta (defendant No.3 & 4 respectively), vide Agreement to Sell dated 07.07.1998. The said Agreement to Sell dated 07.07.1998 is void ab initio, as the plaintiff had never authorized them to negotiate/sell or transfer the suit property, as the said property is still leasehold and defendant Nos. 3 & 4 did not get any proper permission from the Land & Development Office. Hence, the whole transaction entered into by the defendants should stand cancelled.

9. Further, the agreement executed between the plaintiff and defendants No.3 and 4 is an unregistered document. As no registered sale deed is executed in favour of defendants No.3 and 4, thus, it is not a valid document in the eyes of law. Any further Agreement to Sell made by the said defendants No.3 and 4 in favour of defendants No.1 and 2 is illegal and without the consent of the plaintiff. Therefore, the sale cannot be considered as valid sale. Admittedly, as there was no contract of any kind between the plaintiff and defendants No. 1 and 2, in view of settled law, the present application is liable to be allowed, consequently decree for possession must follow in the matter.

10. As regards the other contention of the plaintiff that she could not have sold the suit property to defendants No.3 & 4 as per the specific condition of family settlement dated 11.07.1974, the learned counsel appearing on behalf of defendants No.1 & 2 argued that the plea of said document has already been rejected by this Court in order dated 08.12.2009 passed by this Court in the litigation between defendants No.3 & 4 who filed a suit for specific performance against the plaintiff after execution of the Agreement to Sell dated 07.07.1998. The observations made in para-3 of the said order read as under:-

“3. The plea taken by defendant to amend the written statement on the ground that she recently discovered a document of family settlement, in my view is untenable. The law requires that the defendant while filing written statement is not only supposed to disclose all facts within his/her knowledge but is also supposed to conceal not fact from the Court and has to come out with clean hands. She was supposed to file all documents in her power and possession and also to file a list of these documents which were not in her power and possession but were relied upon by her. The alleged family settlement, according to defendant was entered into 1974. There is no reason as to why the defendant could not have mentioned the family settlement in the written statement and could not have brought these facts to the notice of the Court. Moreover, even with the present application only a copy of alleged family settlement has been filed and the original family settlement allegedly entered into has not been brought on record. One has to ponder why law requires that a party is not only supposed to file documents in its power and possession but also supposed to file a list of those documents which are not in its power and possession but are available with someone else. This provision is made so as to rule out a possibility of manufacturing documents, which has become one of the biggest menaces today and strikes at the very root of justice. Some litigants with the help of professionals get

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the document manufactured and try to sneak them into a case at a subsequent stage of litigation, when they find that the litigation was not going the way they liked. It is for this reason that statute provided that all documents must be filed along with written statement. There is no reason to believe the averment of defendant that she suddenly discovered a family settlement lying in the papers while she was searching the Janampatri of her son. If she could remember about the Janampatri of her son, there is no reason that she could not have remembered about the family settlement. I feel that the plea taken by defendant of discovering the alleged family settlement is false and frivolous plea. The present application has been made by the defendant after commencement of trial, just to delay the proceedings and to introduce new facts."

11. After some arguments on this aspect, the learned counsel appearing on behalf of the plaintiff has given up the said plea of family settlement as mentioned in the plaint.

12. As far as proposition of law of the provision of Order XII Rule 6 CPC is concerned, there is no dispute between the parties. Similar aspect has also been discussed and decided by the Apex Court in the case of Uttam Singh Duggal & Co. Ltd. v. United Bank of India: (2000) 7 SCC 120, wherein it has been held that wherever there is a clear admission of facts in the face of it which is impossible for the party making such admission to succeed, the principle will apply.

13. After having gone through the facts stated in the plaint, the statements made in the written statement as well as the documents placed on record, I do not find any admission made by the defendants No.1 and 2 in their written statement and other pleadings and documents as alleged by the plaintiff. Therefore, the question of exercising my discretion in favour of plaintiff under Order XII, Rule 6

CPC does not arise. The present application filed by the plaintiff is wholly false and frivolous and the same is hereby dismissed with cost of Rs.10,000/- (Rupees Ten Thousand only).

I.A. No.13107/2011 (u/O VII, R.11 CPC filed by defendants No.1 and 2)

14. Now, coming to the second application filed by the defendants No.1 & 2 for rejection of plaint as the suit is not maintainable on the following grounds:-

(a) The defendants submits that suit is barred under section 53A of the Transfer of Property Act. The documents were executed/registered and the entire consideration was paid and thereafter only the said property was transferred to defendants Nos. 3 & 4. Vacant possession was given to the defendant 1 & 2 who are the bonafide purchasers.

(b) The suit is also barred under Specific Relief Act. The defendants submits that the plaintiff did not seek any other suit for cancellation of the alleged Sale Deed hence now the plaintiff cannot seek cancellation of the entire transaction.

(c) The plaintiff ceased the rights in the said property on and from 07.07.1998. The present suit is also barred by section 41 of the Transfer of the Property Act. But in the present case, the plaintiff admittedly sold the said property to defendant Nos.3 & 4.

(d) The plaintiff has not filed any suit for cancellation of sale document executed by her in 1998. It is submitted that the limitation period for cancellation of document is three years which has expired 8 years ago. The plaintiff has, therefore, no locus-standi to challenge the sale now after 11 years of selling of the property in question.

(e) The suit filed by the plaintiff is also not maintainable because the same is merely filed for possession and injunction. It is contended by the defendants that the plaintiff in the present case has ceased to have any right, title or interest in the suit property with effect from 07.07.1998 when she executed various

sale documents in favour of defendants No.3 & 4. She also took the entire sale consideration and delivered the possession. Hence, the plaintiff has no locus-standi to challenged the sale made by defendants No.3 & 4 in favour of defendants No.1 & 2.

15. In the reply filed by the plaintiff, it is stated that plea taken under section 53A of the Property Act is misconceived and meritless as the suit is filed to seek possession of the suit property. Defendant Nos. 1 & 2 are in possession of the same through an alleged Agreement to Sell dated 01.05.2004 executed by defendants 3 & 4 who did not have any claim to the property whatsoever. The objection of Section 41 of the Property Act is without any merit as it was necessary for defendants No.1 and 2 to examine before entering into the agreement dated 01.05.2004 that whether defendant Nos. 3 & 4 had any right, title & interest over the suit property.

16. Now, I shall deal with the objections raised by the defendants No.1 and 2 as well as the plaint in question while deciding the application filed under Order VII, Rule 11 CPC.

17. As far as the ground taken by the defendants about limitation is concerned, the Limitation Act, 1963 (for short, 'the Act') prescribes time limit for all conceivable suits, appeals etc. Section 2(j) of that Act defines the expression "period of limitation" to mean the period of limitation prescribed in the Schedule for suit, appeal or application. Section 3 of the Act, lays down that every suit instituted, appeal preferred or application made after the prescribed period shall, subject to the provisions of Sections 4 to 24, be dismissed even though limitation may not have been set up as a defence. If, a suit is not covered by any specific article, then, it would fall within the residuary

article. In other words, the residuary article is applicable to every kind of suit not otherwise provided for in the Schedule.

18. Article 58 of the Act has bearing in the present case. The period of limitation of the suit relating to declaration is three years when the right to sue accrues. In the present case, admittedly, the plaintiff had sold the property to defendants No.3 & 4 on 07.07.1998 vide agreement to sell and other documents. The execution of said documents is not denied by the plaintiff. She has also not denied having received the entire consideration mentioned in the documents. She has also admitted that the possession was handed over to defendants No.3 & 4. She also had knowledge that the defendants No.3 and 4 had sold the suit property to defendants No.1 & 2 in the year 2004. The present suit is filed by her in the year 2009, i.e. after 11 years from the date of Agreement to Sell between the plaintiff and the defendants No.3 and 4 and five years after the sale of suit property in favour of defendants No.1 & 2 by the defendants No.3 and 4. The factum of Agreement to Sell between defendants No.3 & 4 and defendants No.1 & 2 was known to the plaintiff.

19. The learned counsel appearing on behalf of the plaintiff has argued that Article 58 of the Act is not applicable, as the present suit is for possession and not for declaration. Therefore, the limitation for filing such a suit is twelve years. Hence, the suit is maintainable. Now, the point before this Court is that in view of facts of this case, whether the suit merely for possession is maintainable without seeking the declaration for cancellation of documents executed by the parties.

20. In the case of Ms. Jyotika Kumar vs. Mr. Anil Soni and Ors., being FAO(OS) No.178/2008, decided on 09.01.2009 by this Court, the similar issue has been discussed in paras-20, 22 & 23 which read as under:-

“20. The respondent No.1 and 2 in their suit have only sought the prayer for possession from respondent No.3 and 4 with whom they have no privity of contract. The said respondent No.1 and 2 have not prayed for possession from respondent No. 7 (Defendant No.4 in the suit) who has not filed his written statement. In the absence of suit for declaration of title of suit property in their favour, the suit filed by the respondent Nos. 1 and 2 was not maintainable and is barred by law in view of the reasons given above. There was no valid cause of action against the appellant as on the date of filing of the suit, the prayer of the suit for declaration has already become time-barred under Article 58 of the Limitation Act. It is clear that respondent No.1 and 2 have no cause of action for filing the suit and the suit is barred by law under the provisions of Order 7 Rule 11 CPC. A mere reading of the plaint itself shows that the suit filed by respondent No.1 and 2 is not maintainable.

22. The findings of the learned single Judge are not sustainable due to the reason that the suit filed by respondent No.1 and 2 for possession was itself not maintainable on the date of filing of the suit as the possession of the property was already decided by the Division Bench of this Court in Crl. Writ Petition No. 779/94 when the possession was restored and the order of the Division Bench was confirmed by the Hon'ble Apex Court vide order dated 9th August 1999 while dismissing the special leave petition except the question of title for determination between the parties. The respondent No.1 and 2 had not filed the suit for declaration of title of the disputed property. Suit for possession was filed after the expiry of 5 years from the date of order passed by the Apex Court. It appears that the respondent No.1 and 2 did not file the suit for declaration as they felt that it is already barred by time. The limitation for filing of the suit under Article 58 of the

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Limitation Act for suit for declaration is 3 years. We feel at this stage, even an application for amendment of the plaint is also not maintainable. The application filed by the appellant under Order 7 Rule 11 of Code of Civil Procedure is, therefore, allowed.

23. In view of the facts and circumstances of the matter, we hold that the suit filed by respondent No.1 and 2 is not maintainable being time barred and without any cause of action. The appeal is allowed and the impugned order is set aside. The suit filed by the respondent No.1 and 2 is dismissed with costs. All interim orders granted in the suit stands vacated."

21. It is also pertinent to mention here that the plaintiff has filed the suit merely for possession which itself is not maintainable without seeking the cancellation of the sale documents. The plaintiff did not file any such suit for cancellation of the said sale documents within the limitation period of three years and even till date when about 13 years have passed, therefore, she now cannot ask for relief of cancellation of the sale documents, because it has become time barred after more than 10 years. It is also to be noted that the plaintiff had knowledge about the said transaction and if, the plaintiff had any grievance regarding the sale made by her in the year 1998, she could have filed the suit for cancellation of the documents immediately.

22. In the case of T. Arivandandam vs. T.V. Satyapal and another, reported in (1977) 4 SCC 467, it has been held as under:-

"5. We have not the slightest hesitation in condemning the petitioner for the gross abuse of the process of the court repeatedly and unrepentantly resorted to. From the statement of the facts found in the judgment of the High Court, it is perfectly plain that the suit now, pending before the First Munsif's Court, Bangalore, is a flagrant misuse of the mercies of the law in receiving plaints. The learned

Munsif must remember that if on a meaningful – not formal –reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Order VII Rule 11 C.P.C. taking care to see that the ground mentioned therein is fulfilled."

23. In the present case, it appears very clearly that the plaintiff without seeking declaration of cancellation of documents has filed the suit for possession in order to get rid of avoiding objection about period of limitation which is three years. She purposely and knowingly filed the suit for possession, where limitation is twelve years. It has been done by the plaintiff in order to create the illusion of a cause of action and try to cover the period of limitation by means of clever drafting which is not permissible in view of the settled law.

24. The next ground for rejection of plaint mentioned in the application is that the suit is barred under Section 53-A of the Property Act. On the other hand, the plaintiff has submitted that the said provision is not applicable in the facts and circumstances of the present case. It is alleged by the plaintiff that since defendants No.1 & 2 are in possession of the suit property through the alleged Agreement to Sell dated 01.05.2004 executed by defendants No.3 & 4 who did not have any claim of the property whatsoever, therefore, the said provision cannot be invoked by the transferee, as the plaintiff and defendants No.1 & 2 have no contract between them. The learned counsel for the plaintiff has also referred few decisions in support of his contentions.

25. In order to deal with the rival submissions of the parties, Section 53-A of the Property Act is reproduced here as under:-

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"53-A. Part Performance.- Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

26. In the present case, it is the admitted position that there was an Agreement to Sell to transfer the immovable property against the consideration, between the plaintiff and defendants No.3 & 4. The said agreement was in writing and was signed by the plaintiff as well as defendants No.3 & 4. The said agreement was also clearly worded about the transfer of immovable property against the entire consideration which has been received by the plaintiff. The defendants No.3 & 4 who were the transferees, in furtherance of the contract have transferred the property to defendants No.1 & 2. In terms of the

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Agreement to Sell between the plaintiff and defendants No.3 & 4/transferees who have performed their part of the contract as per the clause 18 of the Agreement to Sell dated 07.07.1998 which reads as under:-

“18. That the Second Party shall be vested with unfettered and interrupted rights and powers to further sell or otherwise transfer the said portion in any manner in whole or in parts, to anybody and the First Party shall have no claim or objection for the same.”

27. The few relevant Clauses-2, 8 & 11 are also reproduced here as below:-

“2. That the physical possession of the said portion, as mentioned hereinbefore, is with M/s Domino's Pizza India Ltd. who has been instructed by the First Party to attorn the Second Party and the Second Party have stepped into the shoes of the First Party and shall recover and realize Licence Fee from the licensee from 1st July, 1998.

8. That the Second Party is entitled to get their name mutated in the records of Land & Development Office, M.C.D., D.V.B., or any other authority on the basis of this agreement or its certified copy.

11. That the First Party has delivered the symbolic possession and proprietary rights of the said portion of the property and has executed all the relevant documents such as, G.P.A., Will, Agreements, S.P.A., Affidavits, Undertakings, an Indemnity Bond, Attornment Letter etc. in favour of the Second Party and/or their nominees. The First Party will not revoke the attornies or any other document executed by her for the purpose of completing the transfer in favour of the Second Party.”

28. In view of Clause-18 of the agreement, defendants No.3 & 4 were given the rights and powers to further sell or transfer the suit property to anybody and the plaintiff would have no claim or objection for the same. Later on, defendants No.3 & 4 by Agreement to Sell

dated 01.05.2004 have entered into the Agreement to Sell the property with defendants No.1 & 2. Defendants No.1 & 2 have also got mutated the property from the concerned authorities.

29. Mr. Raghav, learned counsel for the plaintiff, has referred to the case of **Rambhau Namdeo Gajre vs. Narayan Bapuji Dhotra (Dead) through LRs.**, reported in (2004) 8 SCC 614, however, the said judgment has no application in the facts and circumstances of the present case as in the said case, the original agreement of sale between Narayan Bapuji Dhotra and Pishorrilal was not placed on the record and the certified copy produced as Exhibit 16/1-D had not been proved, as indicated in para-4 of the judgment. In para-8 of the said judgment, the Supreme Court has referred the essential conditions which are required to be fulfilled if a transferee wants to defend or protect his possession under Section 53-A of the Act that have been culled out by this Court in **Shrimant Shamrao Suryavanshi and Anr. Vs. Pralhad Bhairoba Suryavanshi (dead) by LRs & Ors.**, reported in (2002) 3 SCC 676, the same reads as under :

- “(1) there must be a contract to transfer for consideration of any immovable property;
- (2) the contract must be in writing, signed by the transferor, or by someone on his behalf;
- (3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;
- (4) the transferee must in part-performance of the contract take possession of the property, or of any part thereof;
- (5) the transferee must have done some act in furtherance of the contract; and
- (6) the transferee must have performed or be willing to perform his part of the contract.”

30. In the present case, the plaintiff who was the sole and absolute owner of the suit property sold the entire ground floor, i.e. Shop No.23, Defence Colony Market, New Delhi to Sh. Dinesh Gupta and Smt. Nirmala Gupta on 07.07.1998 vide Agreement to Sell, GPA, Will, Affidavit, etc. at a sale consideration of Rs.25 lac. The plaintiff received the entire sale consideration of Rs.25 lac and also handed over the possession to the purchasers. Later on, Sh. Dinesh Gupta and Smt. Nirmala Gupta sold the suit property to the defendants No.1 & 2 on 01.05.2004 at a sale consideration of Rs.35 lac. The sellers Sh. Dinesh Gupta and Smt. Nirmala Gupta executed various documents, such as Agreement to Sell, GPA and other relevant documents in favour of the said defendants. The entire sale consideration of Rs.35 lac was also received by the sellers. The sellers handed over the physical and vacant possession to them on 01.05.2004.

31. The next case referred to by Mr. Raghav is **Suraj Lamp and Industries Private Limited vs. State of Haryana and another**, reported in (2012) 1 Supreme Court Cases 656. He argued that in view of this latest judgment delivered by the Supreme Court, despite execution of documents about the sale of the property to the defendants No.3 and 4 in the year 1998 and even having received entire consideration, the said transfer is not legal and valid. Both such transactions may have to be declared illegal as per the decision. The said argument of Mr Raghav on this aspect of is without any merit in view of facts referred in earlier para. The said decision of the Supreme Court does not help in view of the findings arrived in paras 17 & 18 of the judgment. The said paras are reproduced here as below:-

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“17. It has been submitted that making declaration that GPA sales and SA/GPA/WILL transfers are not legally valid modes of transfer is likely to create hardship to a large number of persons who have entered into such transactions and they should be given sufficient time to regularize the transactions by obtaining deeds of conveyance. It is also submitted that this decision should be made applicable prospectively to avoid hardship.

18. We have merely drawn attention to and reiterated the well-settled legal position that SA/GPA/WILL transactions are not ‘transfers’ or ‘sales’ and that such transactions cannot be treated as completed transfers or conveyances. They can continue to be treated as existing agreement of sale. Nothing prevents affected parties from getting registered Deeds of Conveyance to complete their title. The said ‘SA/GPA/WILL transactions’ may also be used to obtain specific performance or to defend possession under section 53A of TP Act. If they are entered before this day, they may be relied upon to apply for regularization of allotments/leases by Development Authorities. We make it clear that if the documents relating to ‘SA/GPA/WILL transactions’ has been accepted acted upon by DDA or other developmental authorities or by the Municipal or revenue authorities to effect mutation, they need not be disturbed, merely on account of this decision.”

32. The learned counsel for the defendants in support of his submissions has referred to the following judgments:

a) In the case of Asha M. Jain vs. Canara Bank & Ors. reported in *94 (2001) DLT 841 (DB)*, similar situation had arisen and the Division Bench of this Court clearly held that the transferor in similar situation is debarred from claiming back the property. Relevant para 16 of the judgment reads as under:

“16. We have considered this aspect taking into consideration these judgments and we are in agreement with the view that the concept of power of attorney sales have

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been recognised 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 favor 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."

- b) **In Shikha Properties (P) Limited v. S. Bhagwant Singh and Ors.**, reported in 74 (1998) DLT 113, it was held that cases where agreement to sell is executed with irrevocable power of attorney and full consideration having been paid, would be covered by Section 202 of the Contract Act, 1872 since, the purchasers deal with such properties practically as owners for fairly long and have "interest" in it. Thus in such a case agent has an interest in property which is the subject matter of the agency and which cannot be terminated to the

prejudice of such interest in terms of Section 202 of the Contract Act, 1872.

33. In the present case, at the time of sale of the property by the plaintiff in favour of defendants No.3 and 4, she executed the following documents:

- a. Agreement to Sell dated 07.07.1998.
- b. General Power of Attorney dated 07.07.1998.
- c. Will dated 07.07.1998.
- d. Possession Letter dated 07.07.1998.
- e. Receipt of Rs.24.5 lac dated 07.07.1998.
- f. Affidavit dated 07.07.1998.
- g. Receipt of Rs.50,000/- dated 07.07.1998.

34. In view of the abovementioned facts and circumstances, it is clear that the present suit is barred under Section 53-A of the Property Act.

35. The next ground taken in the application filed by defendants No.1 & 2 is that the suit is also barred and is not maintainable under Section 41 of the Property Act. The said Section reads as under:-

“41. Transfer by ostensible owner.- Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it:

Provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.”

36. From the reading of the above said Section, it appears that to attract the benefit of Section 41 of the Property Act, the claimant has to make out a case in order to take benefit of protection under this provision. The principles under this provision have been laid down by the Supreme Court in the following cases:

- (a) **Hardev Singh vs. Gurmail Singh (Dead) by LRs.**, reported in *(2007) 2 Supreme Court Cases 404*, the relevant paras of which read as under:-

“9. Application of Section 41 of the Act is based on the law of estoppel to the effect that if a man has represented that the transferor consents to an act which has been done and that he would not offer any opposition thereto, although the same could not have been lawfully done without his consent and he thereby induces others to do that from which they might have abstained, he could not question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct.

10. The ingredients of Section 41 of the Act are:

- 1) the transferor is the ostensible owner;
- 2) he is so by the consent, express or implied, of the real owner;
- 3) the transfer is for consideration;
- 4) the transferee has acted in good faith, taking reasonable care to ascertain that the transferor had power to transfer.”

- (b) **Kashmir Singh and others vs. Panchayat Samiti, Ferozpur and others**, reported in *(2004) 6 Supreme Court Cases 207*, the relevant para of which reads as under:-

"9. Under section 41 of the Transfer of Property Act, transfer made by an ostensible owner with the consent, express or implied of the real owner is protected provided that the transferee after taking reasonable care to ascertain that the transferor had the power to make transfer had acted in good faith. Learned counsel for the appellant was unable to show from the record that the State government had transferred the land in favour of the appellant acting as an ostensible owner with the consent, express or implied, given by the respondent in favour of the State Government. Learned counsel for the appellant was also unable to show that the appellant had taken any care to ascertain that the State Government was either the owner or had the power to transfer the land and that he had acted in good faith. On the contrary, it has been brought on record that the appellant had taken the land on lease from the respondent in the year 1989-90 which clearly demonstrates that he knew that the respondent was the owner of the land. Even in the Zamabandi, Exhibit P-9, wherein the State Government has been shown to be the owner, the possession of the appellant in column No.5 has been shown to be through the respondent-panchayat samiti. In spite of knowing all these facts the appellant did not take care to ascertain the title of his vendor. In these circumstances the appellant is not entitled to the protection provided under section 41 of the Transfer of Property Act."

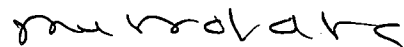
37. In view of the facts already mentioned in the earlier part of my order, it is clear that all the ingredients of Section 41 of the Property Act are strictly applicable in favour of defendants No.1 & 2. It is not in dispute that the plaintiff was the owner of the property. But, the conduct of the plaintiff also shows that with her consent, the suit property was sold by her in favour of defendants No.3 & 4. In the agreement to sell, defendants No.3 & 4 were allowed to further sell the

property to anyone. There was a complete express consent mentioned in the Agreement to Sell. The said transfer made by the plaintiff was also for consideration which has been received by the plaintiff to the tune of Rs.25 lac and the said fact is not disputed by her. The transferee, i.e. defendants No.3 & 4 had acted in good faith to sell the property to defendants No.1 & 2 taking reasonable care to ascertain and had the power from the transferor to transfer the said property in view of Clause-18 of the Agreement which reads as under:-

“18. That the Second Party shall be vested with unfettered and interrupted rights and powers to further sell or otherwise transfer the said portion in any manner in whole or in parts, to anybody and the First Party shall have no claim or objection for the same.”

38. Hence, all the requirements of Section 41 of the Property Act have been satisfied in the present case. This suit is barred under Section 41 of the Property Act.

39. In view of the above-said reasons, the plaintiff has no cause of action to file the present suit which itself is barred under the law. The present application filed by the defendants is allowed and accordingly, the plaint of the present suit is rejected. All pending applications, if any, also stand disposed of.


MANMOHAN SINGH, J.

MARCH 07, 2012

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