

* **IN THE HIGH COURT OF DELHI AT NEW DELH**
+ **RFA NO. 648 OF 2006**

Date of Decision: 1st October, 2010

SMT. HARDIP KAUR Appellant
Through: Mr. Pradeep Kumar Yadav, Mr. Kaushal
Yadav and Mr. H.M. Singh, Advocates

Versus

\$ **SMT. KAILASH & ANR.** Respondents
^ Through: Mr. Sanjeev Sindhvani and Mr. Neeraj
Yadav, Advocates.

* **CORAM:**
HON'BLE MR. JUSTICE P.K.BHASIN

1. Whether Reporters of local papers may be allowed to see the Judgment?(No)
2. To be referred to the Reporter or not?(No)
3. Whether the judgment should be reported in the digest?(No)

JUDGMENT

P.K.BHASIN, J:(ORAL)

The appellant is unsuccessful plaintiff in a suit for possession and damages/mesne profits for unauthorized occupation of her property in East of Kailash by the respondents herein and one Smt. Mohinder Kaur who, however, had died during the pendency of the suit. The suit has been dismissed by the trial Court vide judgment and decree dated 19th

September, 2006.

2. The suit for possession and damages/mesne profits was filed by the appellant-plaintiff (who shall hereinafter referred to as 'the plaintiff') on the allegations that she was owner of property no. E-318, East of Kailash, New Delhi and she had agreed to sell the first and second floors of the said property to Smt. Mohinder Kaur (who was impleaded in the suit as defendant no. 1 and who shall hereinafter be referred to as 'the deceased defendant no. 1') on 5th June, 1989 for a sale consideration of ` 4,50,000 and possession of the first and second floors was also handed over to her. As per the agreement to sell the deceased defendant no. 1 was to take certain steps for obtaining sale permission from the Delhi Development Authority but she did not do that for three years and so the agreement became time barred and unenforceable. On 9th March, 1992 the plaintiff cancelled the General Power of Attorney executed by her in favour of the son of the deceased defendant no. 1 and the deceased defendant no. 1 sometime in July/August 1992 allowed the defendants no. 2 and 3 to illegally occupy first, second and third floors. The plaintiff then called upon the defendants to hand over the vacant possession of her property to her but they did not accede to that demand and, therefore, she filed the suit for possession as well as damages/mesne profits for unauthorized occupation of the three floors of her property (to be referred hereinafter as 'the suit property').

3. The deceased defendant no. 1 filed her written statement in which her defence was that she had purchased three floors from the plaintiff and she had further sold those floors to the defendants no. 2 and 3 vide agreement to sell dated 1st September, 1992 executed by her in favour of defendant no. 2. It was also pleaded that the plaintiff having already sold the three floors to her vide agreement to sell dated 5th June, 1989 was estopped from claiming that she was still the owner thereof. The deceased defendant no. 1 also pleaded that she had no knowledge about the cancellation of the sale documents and that in any event the General Power of Attorney and agreement to sell executed by the plaintiff could not be cancelled/revoked so the cancellation of the agreement to sell, if any, was of no effect.

4. Defendants no. 2 and 3 filed a joint written statement in which they took the plea, inter-alia, that they were not unauthorized occupants of the suit property but were the lawful owners thereof having purchased the same from the deceased defendant No.1 after execution of various documents including an Agreement to Sell.

5. The aforesaid pleadings of the parties have left for the following issues by the trial Court:-

- 1. Whether there exists any cause of action in favour of the plaintiff to file the present suit against the defendants 2 and 3? OPP.*

2. *Whether the suit has not been properly valued for the purposes of Court-fees and jurisdiction? OPD*
3. *Whether the agreement of sale executed by the plaintiff in favour of defendant no. 1 became time barred because of non-performance of agreement by defendant no. 1? If so, to what effect? OPP.*
4. *Whether the defendants 2 and 3 are the lawful owners in possession having purchased the property from defendant no. 1 for a valuable consideration? OPD.*
5. *Whether the plaintiff is the owner of the suit premises? OPD.*
6. *Whether the plaintiff had any right to terminate the registered General Power of Attorney executed in favour of defendant no. 1 dated 5th June, 1989? If so, its effect?*
7. *Whether the plaintiff is entitled to any mesne profits/damages. If so, at what rate, from whom and for what period?*
8. *Relief."*

6. The learned trial Judge after considering the evidence adduced from both the sides came to the conclusion that by virtue of various documents executed by the plaintiff in favour of the deceased defendant No.1 and her son the defendant No.1 had become the owner of the suit property and consequently plaintiff could not have cancelled/revoked those documents including the Agreement to Sell dated 5th June, 1989. It was also held that, in fact, there was a default on the part of the plaintiff in performing her part of the contract and that even if the deceased defendant no. 1 had not perfected her title the suit could not be decreed. The learned trial Court also rejected the plaintiff's claim that only first and second floors of her property were agreed to be sold to the deceased defendant No.1 and it

came to the conclusion that even the terrace floor was agreed to be sold to the deceased defendant No.1 by the plaintiff. As a consequence of these findings, the plaintiff's suit came to be dismissed.

7. During the course of hearing of this appeal the arguments from the side of the defendants no. 2 and 3 (respondents herein) mainly centered around the controversy as to whether the plaintiff could have revoked the General Power of Attorney executed by her in favour of the son of the deceased defendant No.1 as also the availability of the benefit of Section 53-B of the Transfer of Property Act to them. The counsel for the plaintiff, however, argued that the trial Court has not considered at all the effect of cancellation of the entire sale deal by her and had wrongly confined its decision only on the revocability of the power of attorney executed by her in favour of the son of the deceased defendant no. 1 and it had also been wrongly concluded that the agreement to sell dated 5th June, 1989 had not become unenforceable because of the deceased defendant no. 1 not getting it specifically enforced within the limitation period.

8. However, I need not go into the merits of these rival submissions at present for the view which I intend taking in the matter. The plaintiff claimed to have cancelled the deal with the deceased defendant no. 1 for the sale of the two floors of her property alleging breach of terms thereof by the deceased defendant no. 1. The stand of the deceased defendant no. 1 in her written statement was that she had no knowledge of the

cancellation of various documents executed in her favour by the plaintiff and also that the agreement to sell and the power of attorney in any case could not be cancelled/revoked by the plaintiff since she had accepted the sale consideration. Since the deceased defendant no. 1 had not admitted the cancellation of the various documents executed by the plaintiff in her favour for the sale of the suit property to her before the execution of the agreement to sell with defendant no. 2 the trial Court should have framed an issue in respect of this material question of fact and returned its findings on that issue. If such an issue had been framed the Court would have come to the conclusion either to the effect that the agreement of sale with the deceased defendant no. 1 to the knowledge of the deceased defendant no. 1 or that the same had not been cancelled at all.

I am of the view that a very material issue of fact has not been framed and tried by the trial Court which was essential for the right decision of the case. So, it is a fit case for remand under Order XLI Rule 25 of the Code of Civil Procedure after framing an additional issue.

9. Accordingly, the following additional issue is framed:-

1. Whether the sale transaction between the plaintiff and deceased defendant no. 1 in respect of the suit property was cancelled by the plaintiff. If so, to what effect?

10. The matter is now remanded back to the trial Court with a direction for giving its decision on the aforesaid additional issue and to return its findings to this Court within three months.

11. The case shall be now taken up by the trial Court on 28th October, 2010 and the appeal shall be placed before the Court again for hearing after receipt of the findings of the trial Court on the additional issue.

OCTOBER 01, 2010/pg

P.K. BHASIN,J