

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

+ **Date of Decision: 26.09.2012**

% **FAO(OS) 468/2012**

BHAGWAN DAS & ANR. Appellants
Through: Mr. Samrat K. Nigam and Mr.
Kartikey Mahajan, Advocates
versus

SATISH MEHRA & ANR. Respondents
Through: Mr. Rajesh Kumar, Advocate for
Respondent no.1.

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J.

Caveat No. 985/2012

Learned counsel for the caveator-respondent has entered appearance and, thus, the caveat stands discharged.

C.M. No. 17014/2012(Exemption)

Allowed subject to just exceptions.

FAO(OS) No. 468/2012

1. The present appeal is directed against the order dated 6.8.2012 passed by the Learned Single Judge in I.A. No.3565/2004 under Section 52 of the Transfer of Property Act, 1882 (TPA) while dealing with O.M.P. No. No. 245/2003 and CCP No. 74/2004. The aforesaid Original Miscellaneous Petition had been preferred by Shri Suresh Kumar–

respondent No. 2 herein under Section 34 of the Arbitration and Conciliation Act, 1996 (the Act) to assail the arbitral award dated 19th April, 2003 rendered in disputes between respondent No. 2 and Shri Satish Mehra, respondent No. 1 herein. By the said Award, the Arbitrator held that the respondent Nos. 1 and 2 had entered into an agreement to sell in respect of second floor of property at B-123, Swasthaya Vihar, New Delhi – 110 092 (the suit property) on 21st March, 2002, where under respondent No. 2 had agreed to sell the suit property to respondent No. 1 for a total consideration of Rs. 5 lacs. The defence of respondent No. 2 that the actual transaction between respondent Nos. 1 and 2 was that of a loan advanced by respondent No. 1 to respondent No. 2, and that the Agreement to Sell had been executed only as a security for the said loan was rejected by the arbitral tribunal. The Arbitrator directed respondent No. 2 to execute the regular sale deed regarding the suit property as per the Agreement to Sell dated 21st March, 2002. The claimant-respondent No. 1 had also claimed that the symbolic possession of the suit property had been delivered by the vendor i.e. respondent No.2 to him and thereafter, respondent no.2 had become a tenant in the suit property on a monthly rent of Rs. 17,000/-. This claim was also accepted by the learned Arbitrator. The Arbitrator directed respondent No. 2 to hand over vacant and physical possession of the suit property to respondent No. 1 and also directed the payment of Rs. 2,04,000/- as rent of the suit property for the period ending 20th March, 2003 and to continue to pay mesne profits at the rate of Rs. 17,000/- per month to respondent No. 1 till possession of the property is delivered to him.

2. During the pendency of the aforesaid OMP, the claimant/respondent No. 1 filed I.A. No. 1613/2004 to seek a restraint against respondent No. 2 from dealing with the suit property. On 12th March, 2004, this application was taken up for consideration by the Court and respondent no2. was restrained from transferring, alienating or creating any third party interest in the suit property.

3. Respondent No. 1 filed the aforesaid contempt petition i.e. CCP No. 74/2004 on the premise that it had come to his knowledge that respondent No. 2 and his wife Smt. Maya Kumar – respondent No. 3 and the appellants herein, namely, Shri Bhagwan Dass and Smt. Geeta Rani (arrayed as contemnors Nos. 3 and 4), had breached the interim order dated 12th March, 2004. Respondent No. 1 stated that on or about 29th April, 2004, he had learnt that since 13th April, 2004, the appellants herein were staying in the suit property as unauthorized occupants. Upon a police complaint being made by him, the documents were recovered from the appellants who claimed that they had purchased the property in question from the respondent No. 2 and his wife respondent No.3. The said documents included a sale deed dated 26th February, 2004, executed by respondent No. 3, as General Power of Attorney (GPA) holder of her husband respondent No. 2, in favour of herself. Also recovered were copies of GPA, Special Power of Attorney (SPA) and Will dated 24th March, 2004 purportedly selling the suit property in favour of the appellants. Upon notice being issued in the contempt petition, a reply was filed on 15th July, 2004 by respondent No. 2. Respondent No. 3 was served through publication but failed to appear before the court.

Consequently, bailable warrants were issued against her. She appeared through counsel but she did not contest the proceedings. The appellants filed their reply on 19th November, 2005. They claimed that the suit property had been purchased by them from respondent No. 3 for consideration of Rs. 7 lacs. They stated that registered GPA, SPA, Agreement to Sell and Will, all dated 24th March, 2004 were executed in their favour by respondent no.3. Their case was that they were bona fide purchasers without notice for valuable consideration in respect of the suit property from respondent No. 3. They had not purchased the property from Shri Suresh Kumar-respondent No. 2, the original owner against whom the order of injunction dated 12th March, 2004 was passed in I.A. No. 1613/2004. They claimed ignorance of the said order of injunction.

4. Respondent No.1, while filing the aforesaid contempt petition, also filed I.A. No. 3565/2004 in the aforesaid O.M.P. under Section 52 of the TPA seeking a declaration that the execution of the documents by respondent No. 3 in favour of the appellants was invalid in the eyes of the law, and that the said documents and the keys of the suit property should be directed to be deposited in the court.

5. By the impugned order, the learned Single Judge rejected the objections to the award; held all the contemnors i.e. respondent Nos. 2 and 3 and the appellants guilty of willfully disobeying and violation of the interim order dated 12th March, 2004, and; declared the documents executed in favour of the appellants to be invalid. They were accordingly cancelled by the Court.

6. As aforesaid, in the present appeal, the appellants are aggrieved by the order passed by the learned Single Judge in I.A. No. 3565/2004 whereby the documents in favour of the appellants executed by respondent No. 3 stand declared as invalid and cancelled.

7. The submission of learned counsel for the appellants, Mr. Samrat K. Nigam, is that the chronology of events would show that the appellants acted completely bona fide and without notice of the order of injunction dated 12th March, 2004, and being bona fide purchases of the suit property for valuable consideration, their rights ought to have been preserved. It is further argued that merely on the basis of an interim application, the documents of title executed in their favour could not have been cancelled or declared invalid by the Court without even a trial. It is argued that the husband respondent No. 2 had executed a GPA in favour of his wife respondent No. 3 as early as in March, 2002 i.e. even prior to the making of the award by the sole arbitrator on 19th April, 2003. On the basis of the GPA, respondent No. 3 had executed a sale deed in her own favour on 26th February, 2004. It is argued that both these actions, namely, the execution of the GPA in favour of respondent No. 3 and the execution of the sale deed dated 26th February, 2004 in her favour had taken place prior to the passing of the order of injunction on 12th March, 2004. Mr. Nigam also relies on the explanation furnished by respondent No. 2 in answer to the contempt petition, wherein respondent No. 2 stated that there were differences between respondent No. 2 and his wife respondent No. 3 which led to respondent No. 2 leaving the suit property. Eventually, a petition to obtain divorce by mutual consent was filed by

respondent Nos. 2 and 3 in January, 2004 which was granted in April, 2004. Respondent No. 2 claimed that only after he received the notice in the contempt petition, he learnt that his wife-respondent No. 3 had got the suit property transferred to herself by a registered sale deed dated 26th February, 2004, on the strength of the GPA executed by him in her favour in March, 2002 and, thereafter, she had entered into an Agreement to Sell with the appellants on the strength of the sale deed dated 26th February, 2004. Mr. Nigam submits that there was no way that the appellants could have been aware of any of the earlier developments, namely, the execution of the Agreement to Sell between respondent Nos. 1 and 2 dated 21st March, 2002; the passing of the award by the sole Arbitrator dated 19th April, 2003; the filing of the objection petition i.e. O.M.P. No. No. 245/2003 by respondent No. 2 under Section 34 of the Act, or; the passing of the interim order dated 12th March, 2004. It is argued that the appellants also had no manner to discover that the title of respondent No. 3 was under a cloud for any reason whatsoever. It is argued that the appellants came out with their stand before the Court at the earliest opportunity when they became aware of the pending disputes between the respondent No. 1 and respondent No. 2.

8. We have heard learned counsel for the appellants and perused the impugned order which is detailed, and discusses not only all the facts as aforesaid, but also the respective submissions of the parties. To us, it appears that the conclusions drawn by the learned Single Judge that the appellants had acted in collusion with respondent Nos. 2 and 3 is the correct conclusion. Having so acted, and having acted in breach of the

order of injunction dated 12th March, 2004, the conclusion which follows upon application of Section 52 of the TPA is that the title derived by the appellants is null and void.

9. It is a well settled principle of law that a *bona fide purchaser for valuable consideration*, without notice at the time of purchase, of an equitable right, is entitled to priority in equity as well as at law over the previous transferee. The said proposition is based on the principle of English law which fix priority between a legal right and an equitable right. This principle also finds mention in the Specific Relief Act. Section 19(b), which reads:

“19. Relief against parties and persons claiming under them by subsequent title -

Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against –

xxx xxx xxx xxx

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract.

xxx xxx xxx xxx”

10. However to fall within the aforesaid class and claim protection, as taken note by the Supreme Court in ***Ram Niwas vs. Bano*** (2000) 6 SCC 685, the subsequent transferee must show that:

(a) He has purchased the property for value;

(b) He has paid his money to the vendor in good faith; and

(c) He had no notice of the earlier transaction.

11. A subsequent transferee for consideration who departs from the above principle- either by avoiding to acquire knowledge of his vendor's title from his wilful ignorance of defects or by failing to discover/investigate the deeds relating to the title property- is not allowed to derive any advantage. The said proposition is embodied in Section 3 of the T.P.A, which *inter-alia* states that:

"a person is said to have notice" of a fact when he actually knows that fact, or when but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it."

12. Wilful abstention is taken to mean such abstention as would show want of bona fides. The word "wilful" makes it clear that the abstention from an inquiry should be designed. Therefore, in cases where the court is satisfied from the evidence before it that the subsequent transferee had designedly abstained from inquiry for the very purpose of avoiding notice, the subsequent transferee would be deemed to have notice and as such would not be classified as a *bona fide purchaser for value consideration without notice*. Similarly, a subsequent transferee who, but for his gross negligence, would have had notice, would be deprived of the protection which a court of equity would extend to a *bona fide purchaser for value without notice*. (See *B.B. Mitra on the Transfer of Property Act, 1882*)

13. The law affixes knowledge/notice upon a subsequent transferee of the affairs relating to the property, which a reasonable and

prudent person dealing with the real property would be aware of in the usual course of business. One such case, where a subsequent transferee would be deemed to have notice of the prior transactions/title deeds relating to the property, is when such transactions/titled deeds are registered, as required by law. Explanation I to the Section 3 of the TPA states that:

“Where any transaction relating to immoveable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, share or interest in such property shall be deemed to have notice of such instrument as from the date of registration...”

14. In the present case, respondent No. 2 had executed a GPA in favour of respondent No. 1 (Ex.CW1/2 before the Arbitral Tribunal). This being a registered document - a search by the appellants in the office of the Sub Registrar concerned, would have revealed the said instruments to the appellants. Moreover, the appellants must, obviously, have examined the title deed of the vendor i.e. respondent No.3 at the time of purchasing the said property from her. The said title deed dated 26th February, 2004 itself should have alerted the appellants as it was executed by respondent No. 3, acting as the General Attorney of respondent No. 2 - her husband, in her own favour. We are, therefore, of the view that the transaction set up by the appellants cannot be said to be without notice of the earlier transaction in respect of the suit property between respondent Nos.1 and 2.

15. The sequence of dates and events, and the proximity of the date of execution of the documents in favour of the appellants by

respondent No. 3 to the date of the passing of the injunction order is also highly relevant in material. The injunction order was passed on 12th March, 2004 whereas the documents were executed in favour of the appellants by Smt. Maya Kumar on 24th March, 2004 i.e. 10 days later. Not only that, despite becoming aware of the order of injunction dated 12th March, 2004 (the appellants were served with the contempt petition as well as the application under Section 52 of the TPA on 9th December, 2004), the appellants brazenly proceeded to get the sale deed registered in their names on 10th February, 2005 acting in a similar fashion as respondent No. 3 (i.e. on the basis of the GPA executed by respondent No. 3 in their favour).

16. Pertinently, respondent No. 2 did not disclose to the court on 12th March, 2004 (when the injunction order was passed), or at any point of time thereafter) that he was not in possession of the suit property or that his allegedly estranged wife was in occupation thereof. He also did not disclose that he had filed a divorce petition to obtain divorce by mutual consent from respondent No. 3, his wife, in January, 2004 or that he had already executed a GPA, an agreement to sell for Rs.2 lakhs and other documents in her favour in 2002 in respect of the suit property. If that had been the position, respondent No. 2 would have, obviously, disclosed the said position to the Court when the order dated 12th March, 2004 was passed against him, restraining him from dealing with the suit property. Fraudulent conduct of both - respondent Nos. 2 and 3 is evident from the fact that respondent No. 2 purported to execute a registered GPA, an Agreement to Sell in respect of the suit property for a consideration of Rs.

2 lacs, possession letter etc. in favour of his own wife on 1st March, 2002, and within three weeks thereafter executed another Agreement to Sell, registered GPA etc. in respect of the suit property in favour of the respondent No. 1 for a consideration of Rs. 5 lacs.

17. It is clear that respondent Nos. 2 and 3 by adopting the said modus operandi designedly sought to keep an escape route open so as to evade the enforcement of his rights by respondent No. 1 and to defeat rights of respondent No. 1. It is by adoption of the said escape route by respondent Nos. 2 and 3, that the appellants appear to have been set up by them as bona fide purchasers without notice for valuable consideration with an intent to defeat the rights accrued in favour of respondent No. 1 after a long drawn arbitration and proceedings under Section 34 of the Act which remained pending for nine years. The above conspectus of facts and circumstances contraindicate malafides rather than bonafides on the part of respondent Nos.2 and 3 and the appellants.

18. In our view, the learned Single Judge is right in observing that the sale deed dated 26th February, 2004 executed by respondent No. 3-wife, both as GPA holder of the seller and the buyer, in her own favour, and that too for an unrealistic consideration of Rs. 2 lacs, makes the entire transaction highly dubious and that the said transaction was entered into with a view to defeat the rights of respondent No. 1 arising from the Agreement to Sell dated 21st March, 2002. The said transaction is clearly hit by Section 53 of the TPA which deals with fraudulent transfers. The learned Single Judge has also rightly taken exception to the non-appearance of respondent No. 3 in the proceedings despite having been

served. She has chosen not to rebut the case of respondent No. 1 as made out against her. Clearly, the collusive transactions between respondent Nos. 2 and 3, and between respondent No. 3 and the appellants were entered into with a view to present the Court and respondent No. 1 with a *fait accompli*. The doctrine of *lis pendens* applied to all transactions concerning the suit property undertaken during the pendency of the objection petition. We concur with the view of learned Single Judge that the transfer of the suit property in favour of respondent No. 3 on the basis of the GPA in her favour dated 1st March, 2003 was a fraudulent transaction designed to frustrate the rights of respondent No. 1 and the execution of the decree arising out of the Award dated 19th April, 2003, and as such the sale deed in favour of respondent No. 3 dated 26th February, 2004 is fraudulent, invalid and is liable to be cancelled. Any further transaction founded thereupon between respondent No. 3 and the appellants also must fall through.

19. It would be a great travesty of justice if the respondent No. 1 were to be required to now start another round of litigation against the appellants to secure the property under his Agreement to Sell with respondent No. 2 executed on 31st March, 2003 where under the entire consideration stood paid to respondent No. 2. In our view, the courts must come down heavily on all such fraudulent transactions, and such efforts deserve to be put down by the courts with an iron hand. Litigants who secure decrees after hard toil and at great expense should not be made to suffer by adoption of such stratagem by the decree/award debtors. Accordingly, we dismiss the present appeal while leaving it open to the

appellants to enforce their claims, if any, against respondent Nos. 2 and 3.
There shall be no order as to costs.

C.M. Nos. 17012-13/2012

In view of the orders passed in the above appeal, these applications do not survive and the same are dismissed as such.

VIPIN SANGHI, J.

SANJAY KISHAN KAUL, J.

SEPTEMBER 26, 2012

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