

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

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Date of decision: 16th July, 2013

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RFA No.142/2002

SUDESH RANI

..... Appellant

Through: Mr. Ashish Mohan with Mr. Varun
Garg, Adv.

versus

SUBHASH SINGH & ORS.

..... Respondents

Through: Mr. Mahabir Singh, Sr. Adv., Mr.
& Mr. Nikhil Jain, Adv. for R-1&2.
Mr. Rakesh Dahiya, Adv. for R-
5,6,7&8.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. The appeal impugns the judgment and decree dated 7th November, 2001 of the learned Addl. District Judge, Delhi dismissing suit No.305/1992 (old suit No.64/1985) filed by the appellant for specific performance of an Agreement dated 24th April, 1969 of sale of property No.12/43, Old Rajinder Nagar, New Delhi.

2. Notice of this appeal was issued and the appeal was admitted for hearing on 17th July, 2003. Though the parties were referred to mediation but the same remained unsuccessful.

3. Shri Tola Singh and Shri Bhagat Singh were the owners of the property and who were averred to have vide agreement to sell dated 24th

April, 1969, agreed to sell the property to the appellant. However Shri Tola Singh died prior to the institution of the suit in the year 1985 and which was instituted against his heirs and Shri Bhagat Singh. Shri Bhagat Singh also died during the pendency of the suit and his legal heirs were substituted. Several of the respondents died during the pendency of the appeal and their legal heirs were substituted.

4. The counsels have been heard.

5. On the pleadings of the parties in the suit, the following issues were framed on 16th February, 1987 and 17th September, 1996:-

- “(1) Whether the suit of the plaintiff is within time? O.P.P.*
- (2) Whether Sh. Bhagat Singh and Sh. Tola Singh had entered into an agreement dated 24.4.1969? O.P.P.*
- (3) Whether the agreement dated 24.4.1969 is binding on the defendants? O.P.P.*
- (4) Whether the defendants are bound and liable to perform specifically the agreement dated 24.4.1969 and execute and register a sale deed in favour of the plaintiff conveying to her quarter No.12/43, Old Rajinder Nagar, New Delhi, if so on what terms? O.P.P.*
- (5) Relief.*
- (6) Whether the plaintiff is ready and willing to perform her part of contract? O.P.P.*
- (7) Relief.”*

6. The counsel for the appellant has fairly informed at the outset that the issue No.(1) aforesaid qua limitation was decided against the appellant and the suit for the relief of specific performance was held by the Trial Court to have been filed beyond the prescribed period of limitation for filing thereof.

7. Article 54 of the Schedule to the Limitation Act, 1963 prescribes limitation of three years for instituting a suit for the relief of specific performance, commencing from, if a date is fixed for performance, from the said date and if no date is fixed for performance, from the date when the plaintiff first has notice that performance is refused.

8. It has as such been enquired from the counsel for the appellant as to whether the Agreement to Sell of which specific performance was claimed provided for any date for performance.

9. The counsel for the appellant has replied that though the Agreement did not fix any date for performance but the learned Addl. District Judge has held the suit to have been filed beyond the period of limitation for the reason of having been filed after three years even from the date when the appellant instituted a suit for permanent injunction to restrain the respondents/their predecessors from dealing with the property. It is informed that the said suit

for permanent injunction was filed in the year 1981 and the suit for specific performance from which this appeal has arisen was filed after nearly four years therefrom in the year 1985.

10. It has in the circumstances been enquired from the counsel for the appellant as to what is the error in such finding in the impugned judgment, in as much as, but for a specific plea in this regard, the appellant on the date of institution of the suit for injunction is deemed to have notice that the respondents are refusing performance.

11. The counsel has fairly admitted that there is no specific plea and has contended that the appellant in the present case, in pursuance to the agreement to sell, is in possession of the *barsati* floor and in symbolic possession of the ground floor of the property and therefore the bar of limitation would not apply. Reliance in this regard is placed on ***Parnam Balaji Vs. Bathina Venkatramayya*** AIR 1988 Andhra Pradesh 250 to contend that in such a situation the suit cannot be barred by time.

12. I may at the outset state that Article 54 of the Limitation Act, 1963 does not carve out an exception qua contracts in pursuance to which possession of the property has been delivered. Moreover the judgment relied

upon also does not do so and after arriving at the finding that there was no refusal to perform, holds that since the purchaser was in possession in part performance of the contract, limitation did not begin to run for the enforcement of the contract and the mere lapse of three years from the date of Agreement did not automatically put an end to the contract. There can be no dispute with the said proposition of law. As per the language of Article 54 also, limitation begins to run only when the purchaser first has notice that performance is being refused; since in that case the High Court of Andhra Pradesh held that there was no refusal, there was no question of limitation commencing to run. However in the present case there is a finding that the appellant admitted in the plaint in the suit for injunction filed by her more than three years prior to the institution of the suit for specific performance that the respondents were refusing to perform the contract and thus no error can be found in the finding of the Trial Court of the appellant, at least at the time of institution of the suit for injunction first had notice of the refusal of the respondents to perform their part of the Agreement. It is not the case of the appellants that there was any subsequent agreement.

13. No further argument has been addressed on the aspect of limitation. Thus, no error can be found in the finding in the impugned judgment of the

claim for specific performance being barred by time.

14. The counsel for the appellant has next contended that the written Agreement to Sell of which specific performance was claimed, was executed not by Shri Tola Singh and Shri Bhagat Singh who were the owners of the property but by Shri Sant Singh and Shri Harnam Singh as attorneys of Shri Tola Singh and Shri Bhagat Singh respectively. He has further stated that the Trial Court has held the appellant to have not proved that the said Shri Sant Singh and Shri Harnam Singh had been authorized by the owners Shri Tola Singh and Shri Bhagat Singh to execute the Agreement to Sell. He has further contended that notwithstanding the claim for specific performance being barred by time, since the appellant is in possession as aforesaid of part of the premises, the appellant will suffer prejudice from the said findings.

15. The senior counsel for the respondents no.1&2 of course controverts that the appellant is in possession of any part of the premises.

16. On enquiry whether any finding has been returned by the Trial Court on the said aspect, both counsels state that no categorical finding has been returned by the Trial Court and no specific issue also on this aspect was framed in the suit.

17. The counsel for the appellant has further contended that though the respondents till date have not instituted any proceedings for recovery of possession of the portion of the premises in occupation of the appellant but if the respondents do so, the defence of the appellant to the said proceedings, notwithstanding the dismissal of her claim for specific performance, could be of Section 53A of the Transfer of Property Act, 1882 or of adverse possession or of the claim for possession being barred by time. It is contended that it is thus important for the appellant to have the finding in the impugned judgment of there being no Agreement to Sell set aside in as much as the said finding would be *res judicata* in the subsequent suit for possession and would prevent the appellant from taking up the defence of Section 53A of the Transfer of Property Act, 1882. The counsels have as such been heard on the said aspect. Even otherwise, it is incumbent to return finding on all issues.

18. The appellant, to prove that Shri Sant Singh and Shri Harnam Singh who are claimed to have executed the Agreement to Sell, were authorized by the owners Shri Tola Singh and Shri Bhagat Singh respectively to sell the property had relied on power of attorneys executed separately by Shri Tola Singh and Shri Bhagat Singh in favour of Shri Sant Singh and Shri Harnam

Singh and on which during evidence before the Trial Court Ex.PW8/1 and Ex. PW9/1 were put. It is argued that the Trial Court has however held the said documents to have been not proved and thus held Shri Tola Singh and Shri Bhagat Singh to have not entered into the Agreement of which specific performance was claimed and being not bound thereby. The counsel has further argued that the Trial Court has not considered that the perpetual Lease Deed of the land underneath the property and the Conveyance Deed of the structure have also been executed by the said Shri Sant Singh and Shri Harnam Singh as attorneys of Shri Tola Singh and Shri Bhagat Singh. It is further contended that in the said documents Shri Sant Singh and Shri Harnam Singh are defined as general attorneys of Shri Tola Singh and Shri Bhagat Singh and thus Shri Sant Singh and Shri Harnam Singh would also have a right to sell the property or agree to sell the property.

19. Trial Court record has been perused. Ex.PW8/1 and Ex.PW9/1 have been put on photocopies of registered power of attorneys purportedly executed by Shri Tola Singh and Shri Bhagat Singh in favour of Shri Sant Singh and Shri Harnam Singh respectively.

20. It has been enquired whether the originals of the said documents were produced/got produced before the Court.

21. The answer is in the negative.

22. It has next been enquired whether the foundation for laying secondary evidence in the form of photocopies was led.

23. The answer is again in the negative.

24. Needless to state that the respondents/their predecessors denied the said documents and denied the authority of Shri Sant Singh and Shri Harnam Singh to enter into Agreement to Sell on behalf of Shri Tola Singh and Shri Bhagat Singh. In the face of such denial it was incumbent upon the appellant who was averring so, to prove the said documents and which could have been proved only by primary evidence i.e. by having the original produced and/or if the same was not possible by laying foundation for reception of secondary evidence. In the absence thereof the said documents cannot be said to have been proved and no error can be found in the reasoning of the Trial Court.

25. However, since the photocopies on which Ex.PW8/1 and Ex.PW9/1 has been put are of certified copies from the Sub Registrar's office, it has been enquired from the counsel for the appellant whether the record of the Sub Registrar's office was requisitioned to show that the original power of

attorneys were registered.

26. Though the counsel had earlier stated that no witness from the Sub Registrar's office was summoned but now during the dictation has interrupted and has drawn attention to the testimony of PW11 Shri Rajesh Kumar, LDC, Sub Registrar Office, Asaf Ali Road, New Delhi. The said witness has put Ex.PW11/1 also on the document Ex.PW9/1 being the power of attorney of Shri Tola Singh in favour of Shri Sant Singh. Putting of the said mark Ex.PW11/1 also was of course subject to objection of the respondents.

27. Though of course PW11, witness from the Sub Registrar's office could not identify the signatures of Shri Tola Singh on the original of Ex.PW9/1 (also Ex.PW11/1) in Sub Registrar's record but did identify the signatures of the Sub Registrar who had registered the said document. From the testimony of PW11, the factum of power of attorney having been granted by Shri Tola Singh in favour of Shri Sant Singh is proved and cannot be doubted. It further stands proved that Ex.PW9/1 (also Ex.PW11/1) is a copy of that power of attorney.

28. But strangely, the appellant though had summoned the witness from

the Sub Registrar's office, has not got proved the power of attorney stated to have been given by Shri Bhagat Singh in favour of Harnam Singh. It has thus been enquired as to whether the appellant had examined Shri Sant Singh and Shri Harnam Singh as witnesses.

29. The counsel for the appellant while replying in the negative contends that since Shri Sant Singh and Shri Harnam Singh were in collusion with the respondents, the question of the appellant examining them did not arise as the appellant could not have cross examined the said witnesses who were likely to depose in favour of the respondents.

30. I am unable to agree.

31. The appellant, with the permission of the Court, could have always cross examined the said witnesses if found to be not deposing the truth. The procedure in this regard, of declaring a witness hostile, is not restricted to the criminal trials only and is equally applicable to civil trials also.

32. Be that as it may, the learned Addl. District Judge in the impugned judgment has also held that the said power of attorneys, even if held to be proved, to be not containing any authority to sell or agree to sell the property.

33. The documents have as such been gone into. Ex.PW8/1, the counsel for the appellant has highlighted, is irrevocable general power of attorney authorizing Shri Harnam Singh to represent the executant Shri Bhagat Singh before all authorities to deal with the said property and to pay all dues with respect thereto. In fact it also authorizes Shri Harnam Singh to enter into any Agreement for Sale of the said property and to execute and register the Deed of Conveyance and receive consideration. The learned Addl. District Judge has however not held the said power of attorney to be authorizing Shri Harnam Singh to sell the property for the reason that the same in para 5 thereof contains the consent of the executant Shri Bhagat Singh to ratify all acts done by the attorney Shri Sant Singh. He has thus held that while the said power of attorney purports to appoint Shri Harnam Singh as attorney but seeks to ratify the acts of Shri Sant Singh.

34. The counsel for the appellant has contended that since two power of attorneys were being prepared, the name of Shri Sant Singh who was the attorney appointed under the other power of attorney executed by Shri Tola Singh was mistakenly mentioned in the power of attorney by Shri Bhagat Singh in favour of Shri Harnam Singh. It is also stated that Shri Sant Singh

was a witness to the power of attorney by Shri Bhagat Singh in favour of Shri Harnam Singh.

35. It has however been enquired whether any evidence of such a mistake has been led.

36. The answer is in the negative.

37. The learned Addl. District Judge has further held that the power of attorney Ex.PW9/1 (also Ex.PW11/1) executed by Sh. Tola Singh does not even contain a specific power of sale and cannot be said to be authorizing Shri Sant Singh even if held to be appointed as the attorney of Shri Tola Singh, to sell Tola Singh's shares in the property.

38. The counsel for the appellant has argued that since the appointment is as a general attorney, it would include the power to sell also.

39. I am unable to accept the aforesaid contention which is in contradiction to the other submission made. It is the contention of the counsel for the appellant that a mistake as aforesaid occurred in the power of attorney granted by Shri Bhagat Singh in favour of Shri Harnam Singh owing to the two power of attorneys being executed simultaneously. If that had been so, the language of both would have been identical. However it is

not found to be so; while one of the power of attorneys i.e. by Shri Bhagat Singh in favour of Shri Harnam Singh expressly empowers Shri Harnam Singh to sell or agree to sell Shri Bhagat Singh's share in the property, the power of attorney executed by Shri Tola Singh in favour of Shri Sant Singh does not do so, though constituting Shri Sant Singh a general attorney to manage the property. The only inference possible is that Sh. Tola Singh did not intend to vest Shri Sant Singh with a power to sell or agree to sell the property.

40. I am for all the aforesaid reasons not inclined to arrive at a different conclusion than that reached by the Trial Court before which evidence was recorded i.e. that the appellant has been unable to prove the authority of the executants of the Agreement to Sell to do so on behalf of the owners of the property.

41. No other arguments on any of the other issues have been addressed.

42. During the course of hearing it has also been informed that another suit for specific performance of an Agreement of Sale of the entire said property was filed by one Shri Madhusudan Sahni against the respondents and which has been decreed vide judgment dated 19th January, 2013 against

the respondents herein and in which suit the appellant herein was also a party. On enquiry, the senior counsel for the respondents no.1&2 states that the respondents had not contested the said suit and have not preferred any appeal against the said decree also. The counsel for the appellant has no instructions whether the appellant has preferred any appeal against the said judgment and decree.

43. It cannot be lost sight of that the grant of the relief of specific performance is a discretionary relief, discretion wherein of course has to be exercised on settled parameters as laid down in Section 20 of the Specific Relief Act, 1963. It has been enquired as to what was the sale consideration in the agreement subject matter of this appeal and how much of it was paid by the appellant to the respondents.

44. The counsel for the appellant informs that the sale consideration was Rs.45,000/- and the entire of which was paid in cash to Shri Sant Singh and Shri Harnam Singh aforesaid.

45. On enquiry that if the entire sale consideration had been paid, why possession of the ground and first floors was not taken by the appellant, it is stated that the same were in possession of the tenants and the tenants had

attorned to the appellant. On further enquiry whether there is any finding to the said effect in the impugned judgment, it is replied in the negative.

46. In the aforesaid circumstances also it is felt that now after more than 40 years and especially when the finding of the plaint for specific performance being barred by time has been affirmed, it is even otherwise not appropriate to arrive at a different findings than the learned Addl. District Judge in so far as to the existence of the agreement is concerned.

47. No merit is thus found in this appeal which is dismissed; however no costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

JULY 16, 2013

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