

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

Decided on: 31.10.2013

+ **RFA (OS) 99/2013, C.M. NOS.12541-43/2013 & 12545/2013**

SHRI HARISH SHARMA Appellant
Through: Sh. Yashpal Singh with Sh.
Rikesh Singh, Advocates.

versus

RAJ KUMAR AND ORS. Respondents
Through: Sh. Kush Sharma with Sh. Ishwar
Upneja, Advocates, for Resp. Nos. 1 and 5.
Sh. C. Prakash, Advocate, for Resp. Nos. 3
and 4.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)
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C.M. NO.12543/2013 (for condonation of delay)

For the reasons mentioned in the application, the delay is condoned.
C.M. No.12543/2013 is allowed in the above terms.

RFA (OS) 99/2013, C.M. NOS.12541/2013 (for stay), 12542/2013 (for filing addl. Documents) & 12545/2013 (seeking exemption from filing deficient Court Fees and extension of time in making up the deficient Court Fee)

1. This is a Regular First Appeal from an order of a learned Single Judge in CS(OS) 3001/2011, dismissing the suit for a failure to disclose any cause of action in the plaint.

2. Briefly, the plaintiff, Harish Sharma, seeks to impugn a registered General Power of Attorney signed by him in favour of the defendant, Raj Kumar. The plaint, alleged that the appellant purchased, and was in possession of, Property No. C-486-B, Gali No. 20, Bhajanpura, Delhi (hereinafter the "*suit property*") through sale deed dated 8th February, 2007 for a sale consideration of ₹3,05,000/- from one Smt. Sosan Masih. The appellant argued that thereafter, on account of financial constraints in 2009, the defendant, who knew him previously, agreed to advance a loan of ₹13,00,000 to him at 2% interest, with repayment stipulated in 6 months. It is claimed however, that in return the defendant required a General Power of Attorney (hereinafter "*GPA*") to be registered in his favour in respect of the suit property and for possession of the plot to be handed over to him. It is alleged that though the appellant insisted upon the execution and registration of a mortgage deed only, the defendant insisted on a GPA and nothing else. The plaintiff claims that he required the loan to pay the erstwhile owner of the suit property in accordance with a

compromise dated 04.08.2009. It is argued that the appellant was not in possession of the suit property on the date of the GPA (03.08.2009), and that he came into possession only on 15.09.2009.

3. It is admitted by the plaintiff that possession of the property was given to the defendant subsequently, though it is contended that the GPA was only to secure re-payment of the loan and that the defendant never acquired any independent right or interest in the ownership of the property. Accordingly, the plaintiff claims that when he offered repayment of the loan (with a total payment of ₹14,51,500/-), the defendant's claims to the suit property ended.

4. The terms of the GPA in this case are broad and unqualified, and do not admit any restrictions or reservations in the manner in which the attorney could deal with the property. Neither does the plaintiff deny that this GPA was indeed signed in these terms. In order to vitiate the GPA, which is the basis of the defendant's authority to have let out the suit premises or to have dealt with it in any manner as he has done, the plaintiff's counsel alleges various faults with the GPA, which would be dealt with in turn.

5. It is claimed that the plaintiff was illiterate and thus, did not know the contents of the documents he was signing. It is argued that the documents signed were in English, and the plaintiff/Appellant had primary education in a Hindi medium

school and studied only up to Class VI. Therefore, as the contents of the documents were not read out to him in vernacular, it is argued that the GPA was signed on the basis of fraud. For this, learned counsel for the plaintiff places reliance on the judgment in *Mahiruddin Borbhuiya v. Mustt. Rythun Nessa*, AIR 1998 Gau 22, where it is argued that the matter was decided in favour of the executant of the document, who, being illiterate, was made to sign sale deed, misrepresenting it to be agreement to sell. It was contended here that the plaintiff was “coerced” and terms were “dictated” to him such that he had no choice but to sign the GPA, believing it to be mere security for the loan. This plea of misrepresentation was further pursued, by arguing that the defendant,

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.....in a scheming way impressed upon the minds of the appellant and convinced that the demand of execution of power of attorney and possession of the suit property is only to satisfy him regarding the guaranteed return of the loan amount. It was further impressed upon the mind of the appellant that the suit property would be kept by the Respondent No. 1 under his lock and keys as a mere security and would not be used by him. As and when the said loan amount would be returned along with interest, all the documents and the possession of the suit property would be handed over to the appellant.....” (paragraph 10, Appeal Memorandum).

Further, the appellant claims that

“11..... on being misrepresented about the contents of the proposed power of attorney and promise made by the Respondent No. 1 to return the possession as well as original papers on getting back his loan amount, reluctantly accepted the said terms of the Respondent No. 1 in good faith, considering his dire need and his troubled situation. The appellant was made to believe that the said power of attorney bears comparatively higher legal sanctity and is only a replacement of mortgage deed in order to secure the repayment of the loan amount. The appellant being trapped was left with no other option but to believe the words of Respondent No. 1, scribed his signature on the said power of attorney.....”

6. To this effect, in order to prove the allegations, and to prove that free consent was vitiated, learned counsel for the plaintiff relied on a letter sent to the Office of the Sub-Registrar for cancellation of the GPA on 12.10.2011. Moreover, it is argued that no one in his senses would dispose off the property for a meagre amount of ₹14,51,500/-, for which he had already paid ₹15,05,000/- (out of which ₹12,00,000/- was paid before Court in compliance of the undertaking and ₹3,05,000/- was paid at the time of execution of sale deed by the original owner, and remaining ₹13,00,000/- was to be paid to her. It would be beyond the gamut of any prudent person's reasoning as to why anyone would sell the suit property for half the rate, more so, when the entire endeavour to borrow the amount was with the sole intention to get the possession of the property as well as to save

the amount of ₹15,05,000/- (being already paid to the original owner).

7. Learned counsel also argued that the mortgage deed was registered on 03.08.2009, proving that the original intention of the parties was only to secure a limited interest in the suit property for repayment of the loan and not otherwise. Moreover, it is argued that the GPA was signed on 03.08.2009 (with registration finally effected on 24.09.2009), but the cancellation of the mortgage deed allegedly on 04.08.2009 was not registered, as is required by the Registration Act, 1908. Thus, it is argued that the mortgage deed, still operative, negates the effect of the GPA. To demonstrate that the defendant had conducted the transaction *mala fide*, and as evidence of fraud, learned counsel relied on the purchase of stamp paper by paying stamp duty of ₹43,600/- on 01.08.2009 by him as exhibiting a revealing picture – that the defendant intended to acquire an interest over the property, as opposed to a limited interest in return for the loan amount. Thus, on the basis of these allegations, absence of free consent is alleged due to undue influence, coercion, fraud and misrepresentation under Sections 15-19 of the Contract Act, 1872.

8. Counsel for the plaintiff relied on the decision of the Supreme Court in *Suraj Lamp and Industries Pvt. Ltd. v. State of Haryana and Anr.* 2011 (11) SCR 848, for the proposition that the execution of power of attorney cannot be treated at par with a

sale deed and that a property cannot be sold on the basis of power of attorney. Thus, it is argued that Mr. Kumar's further alienation of the property was invalid.

9. The learned Single Judge, in continuation of orders dated 01.05.2013 and 09.05.2013, dismissed the plaint for not demonstrating any cause of action. The Court brushed aside the question of fraud, undue influence, coercion and misrepresentation, holding: (a) that the averments in the plaint recognized that the GPA had been signed voluntarily; (b) the plea of illiteracy was not taken in the pleadings, and thus cannot be recognized; (c) the mere insufficiency of consideration cannot lead to an inference of absence of free consent or vitiate the transaction in any other way; (d) in order to make out a case for absence of consent (fraud etc.), there must be express allegations with material facts to make out a case with a high degree of precision, and (e) the power of attorney was unrestricted, and no legal bar lay to a sale of the property by the defendant under the GPA. On the question of whether a sale can be made under a GPA, the learned Single Judge noted that the decision in *Suraj Lamp (supra)* was "*expressly made prospective*" by the Supreme Court, and thus, the decision in *Asha M. Jain v. The Canara Bank and Ors.*, 94 (2001) DLT 841, holds sway. The learned Single Judge, ultimately dismissed the plaint for failure to disclose any cause of action.

10. Before entering the merits of this case, and to address an additional submission by the learned counsel for the plaintiff, it is important to note that Order VII, Rule 11 of the Code of Civil Procedure (“CPC”) permits rejection of the plaint for failure to disclose a cause of action. As Supreme Court noted in *Mayar (H.K.) Ltd. and Others v. Owners and Parties, Vessel MV Fortune Express and Others*, 2006 (3) SCC 100,

“11.....So long as the plaint discloses some cause of action which requires determination by the court, mere fact that in the opinion of the Judge the plaintiff may not succeed cannot be a ground for rejection of the plaint. In the present case, the averments made in the plaint, as has been noticed by us, do disclose the cause of action and, therefore, the High Court has rightly said that the powers under Order VII Rule 11 of the Code cannot be exercised for rejection of the suit filed by the plaintiff-appellants.”

11. Thus, the Court may, when presented with a matter, *reject* the plaint for failure to disclose a cause of action under Order VII, Rule 11, or if indeed, a cause of action is disclosed on a reading of the plaint, commit the matter to trial. In the ordinary course, a plaintiff has the right to prove his cause of action through supporting evidence at trial. Whilst the Supreme Court has, as the learned Single Judge rightly notes, considered the question of ‘deadwood’ litigation, which clogs up the justice system, in *T. Arivandandam v. T. V. Satyapal and Another*, 1977 (4) SCC 467, at the same time, in *Liverpool and London S.P. & I Asson. Ltd. v. M.V. Sea Success I and Anr.*, (2004) 9 SCC 512, and *ITC Limited v. Debts*

Recovery Appellate Tribunal and Ors., 1998 (2) SCC 70. It was held that these decisions do not hold that litigants are to be deprived of their right to a trial if they have, in the opinion of the Judge, at the time of institution of the litigation, a weak case. Indeed, in *Liverpool (supra)* itself, the Supreme Court recognized the principle of delay and frivolous litigation within the confines of Order VII Rule 11 CPC and not otherwise:

“136. The idea underlying Order 7 Rule 11A is that when no cause of action is disclosed, the courts will not unnecessarily protract the hearing of a suit. Having regard to the changes in the legislative policy as adumbrated by the amendments carried out in the Code of civil Procedure, the Courts would interpret the provisions in such a manner so as to save expenses, achieve expedition, avoid the court's resources being used up on cases which will serve no useful purpose. A litigation which in the opinion of the court is doomed to fail would not further be allowed to be used as a device to harass a litigant.”

12. Thus, unless the Court holds that the plaint does not disclose a cause of action under Order VII Rule 11 CPC, the matter must proceed to trial, independent of the strength of its merits. This was recognized by a Division Bench of this Court in *Inspiration Clothes & U v. Colby International Limited*, [RFA (OS) 11/2000] MANU/DE/1315/2000:

“9.....The power to reject the plaint on this can be exercised only if the Court comes to the conclusion that even if all the allegations are taken to be proved, the plaintiff would not be entitled to any

relief whatsoever. A distinction must always be drawn between a case where the plaint on the face of it discloses no cause of action and another in which after considering the entire material on the record the Court comes to the conclusion that there is no cause of action. In the first case the plaint can be rejected but in the latter case the plaint cannot be rejected. The suit has to be dismissed. Learned Single Judge adopted the second approach. This was not the stage where the Court was expected to enter into this controversy that whether there was a cause of action to the plaintiff against the defendant or not. No doubt that where the plaint is based on a document, the Court will be entitled to consider the said document also and ascertain if a cause of action is disclosed in the plaint, but validity of the document cannot be considered at this stage. To enable a Court to reject a plaint on the ground that it does not disclose a cause of action, it should look at the plaint and documents accompanying the plaint only and nothing else.”

13. Indeed, dismissing a plaint, as the Single Judge has done, as opposed to rejecting it under Order VII, Rule 11 CPC, itself has far reaching consequences, as

“9. The effect of dismissal of suit is altogether different and distinct from the effect of rejection of the plaint. In case plaint is rejected under Order 7 Rule 11 C.P.C. filing of a fresh plaint in respect of the same cause of is specifically permitted under Rule 13 of Order 7. C.P.C. Altogether different consequence follows in the event of dismissal of suit, which has the effect of precluding the plaintiff to file a fresh suit on the same cause of action. Rejection of plaint takes away the very basis of the suit rendering as if there was no suit at all or that no suit was instituted. Order of dismissal of suit while recognizing the existence of a

suit indicates its termination. While deciding the application under Order 7 Rule 11 C.P.C. learned Single Judge ought not and could not have dismissed the suit."

14. Therefore, in dismissing the suit for failure to disclose a cause of action, the Court must be certain that the averments in the plaint, and the documents produced, if taken to be true, still cannot justify the relief prayed for. In doing so, the Court may, as noted in *T. Arivandandam* (supra), "5.....exercise his power under Order VII Rule 11, C.P.C. taking care to see that the ground mentioned therein is fulfilled. And, if clear drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order X, C.P.C....."

15. In this case, the learned Single Judge *dismissed* the suit for failure to disclose a cause of action. The case of the plaintiff, as explained above, is that he required the loan in question in order to pay Smt. Masih in an earlier litigation, and the attached contempt proceedings, in respect of the suit property and accordingly, took a loan from the defendant. Here, it is claimed that the original mortgage deed signed between the two parties was replaced, at the defendant's insistence, and in the plaintiff's view, as a result of influence/coercion/fraud/misrepresentation, by a GPA. Under this GPA, the defendant alienated the property in favour of a third party. The suit was thus filed for a decree of recovery of possession, account for profits (for the revenue accrued from rent), cancellation of the GPA, mandatory and

permanent injunction against the defendant from interfering with the use of the property. Equally, a plea was made that the plaintiff was illiterate, and thus, the defendant must be put to strict proof as to the veracity of the GPA (which, according to the plaintiff, was represented to him as being a limited mortgage deed that only transferred a limited interest in the nature of security for repayment of the loan). For this, reliance was placed on *Mahiruddin Borbhuiya (supra)*.

16. Importantly the learned Single Judge has held that “.....the plaintiff, knowingly signed a General Power of Attorney in favour of defendant No. 1.....” (paragraph 11 of the impugned order; emphasis supplied). This goes to the very core of the plaintiff’s case, i.e. whether the GPA, the document from which the defendant draws his alleged powers, was signed knowingly or whether its contents were misrepresented or free consent vitiated for any other reason. In *Mahiruddin Borbhuiya (supra)*, thus, a decision that the learned Single Judge does not disagree with, the High Court noted that since “5.....there is no justification whatsoever as to why the plaintiff should part with such a huge area of land at such a nominal price.....”, it upheld the lower court’s order casting doubt on the veracity of a sale deed executed between two parties. Indeed, the Court noted that, in cases of illiterate persons, it

“7. must take a strict view of such a document and the Court must be satisfied that

the document was executed by the person having the physical as well as mental intention. It is a Division Bench decision and it is binding on me. If that measuring rod is applied to decide the validity of the present document, then also it will be found that the execution of this document as required was not proved and established.

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17. Similarly, in this case, if taken to be true, the plaintiff’s plea can – assuming the evidence adduced proves those facts – lead to the reliefs claimed for. To have held that he *knowingly* signed the GPA is a finding of fact by the learned Single Judge, and undercuts the entire cause of action in itself. Indeed, the plaint does not admit that the plaintiff *knew* the contents of the GPA. Rather, it admits that he signed the document believing it to be a document that transfers a limited interest. Thus, while it is admitted that the plaintiff did physically sign the document, the intention to be bound by it and knowledge of its contents were absent. This represents an issue that is to be tried, and given the judgment in *Mahiruddin Borbhuiya (supra)*, one that seemingly involves a mixed question of law and fact. Equally, the learned Single Judge has noted that particulars of the plea of undue influence or misrepresentation have not been pleaded, and that, in line with the holding of the Supreme Court in *Shanti Budhiya Vesta Patel and Ors. v. Nirmala Jayprakash Tiwari and Ors.*, (2010) 5 SCC 104, there must be express allegation with all material facts in support thereof laid down with a high degree of precision. However, that

case, and those specific remarks, pertains to the burden of proof in such cases at trial, rather than what is required in order to hold that no cause of action is disclosed under Order VII, Rule 11 CPC. Rather, in this case, in the plaint, specific allegations of misrepresentation and fraud (see, paragraphs 7 and 8 of the plaint) are to be found (along with a version of events that the plaintiff argues proves his case, i.e. the timing of the loan taken in view of the contempt proceedings, the timing of the mortgage deed and the GPA within one day of each other, purchase of stamp paper two days before the GPA, the valuation of the property and the money spent by the plaintiff in earlier litigation as compared to the alleged money paid by the defendant in consideration for the GPA, Mr. Sharma's literacy etc.). Whether these allegations represent a strong or a weak case is a question that is to be decided at trial, or by the exercise of powers under Order X, CPC, but cannot, as long as there is a possibility of these facts being proven at trial, result in a dismissal/rejection of the plaint for failure to disclose a cause of action.

18. Finally, on the question of whether a GPA authorizes sale, or what the Supreme Court referred to in *Suraj Lamp* (supra), as 'GPA sales', in considering the legal consequences of GPA sales, i.e. where a purchaser pays a price for a property, but instead of receiving a deed of conveyance from the vendor, receives an irrevocable GPA, the Supreme Court noted that:

“13.....A power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property. The power of attorney is creation of an agency whereby the grantor authorizes the grantee to do the acts specified therein, on behalf of grantor, which when executed will be binding on the grantor as if done by him (see Section 1A and Section 2 of the Powers of Attorney Act, 1882).....Even an irrevocable attorney does not have the effect of transferring title to the grantee.

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19. The decision in *Asha. M. Jain v. The Canara Bank and Ors.*, 94 (2001) DLT 841, thus, to the extent it was inconsistent was overruled. Whilst the learned Single Judge here has relied on *Asha Jain (supra)*, on the ground that *Suraj Lamp (supra)* was made applicable only prospectively, a closer reading of the decision indicates otherwise. In *Suraj Lamp (supra)*, the Supreme Court was invited by counsel to make the decision applicable prospectively. Paragraph 17 of the judgment records this:

“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.”

20. However, the judgment then reads:

“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 Transfer of Property 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.”

21. Thus, the Supreme Court’s decision in *Suraj Lamp (supra)* was indicative of the general law on this principle, and the prospective application of the judgment operates only insofar as action has been taken by developmental/municipal/revenue authorities on the basis of such documents. Indeed, here, the question arises between two private entities, and as the Court noted, in order to complete the transfer of title (which is what the plaintiff would need in order to have made third party transfers as he has done), a *further* deed of conveyance would be required.

22. Accordingly, for the above reasons, the order of the learned Single Judge dated 13.05.2013 is liable to be set aside. The appellant herein/plaintiff in the suit may pursue the applications

for amendment to include the subsequent transferee in the suit, and any other applications as permitted by law, before the learned Single Judge. Parties are directed to be present before the learned Single Judge on 21.11.2013 when proceedings in the suit can go further. The appeal is allowed in the above terms, with no order as to costs.

**S. RAVINDRA BHAT
(JUDGE)**

**NAJMI WAZIRI
(JUDGE)**

OCTOBER 31, 2013