

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

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Date of decision: 4th April, 2014

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CS(OS) No.2595/2008

RUMA KAUR & ORS.

..... Plaintiffs

Through: Mr. Bhupesh Narula & Mr. Yash
Tandon, Advs.

Versus

JOGINDER SINGH RAINA & ORS.

..... Defendants

Through: Mr. G.S. Chaturvedi, Adv. for D-1&2.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

IA No.23346/2012 (of defendant No.2 u/O VII Rule 11 CPC)

1. The two plaintiffs i.e. Ms. Ruma Kaur and her husband Sh. Mohan Singh have instituted the present suit on 07.11.2008 for recovery of possession of:

- (i) property No.A-126 (New No.JE-34 and JE 34A), Gupta Colony, Khirki Extension, Malviya Nagar, Delhi; and,
- (ii) Flats no. F-9/51-52, Sector 15, Rohini, Delhi,

from the four defendants together with *mesne* profits / damages for use and occupation.

2. Summons of the suit were issued. A written statement has been filed on behalf of the defendants 1&2 i.e. Sh. Joginder Singh Raina and Ms. Harminder Kaur. Though the defendant No.4 Mr. Parminder Rana was also served and had appeared through advocate on 23.03.2009 but failed to appear thereafter and has also not filed any written statement. The defendant no.3 was ordered to be served by publication. In the meanwhile, the plaintiff no.2 Sh. Mohan Singh died and an application for substitution of his legal representatives was filed and which was allowed on 13.10.2011. The plaintiffs have filed replication to the written statement of the defendants 1&2. The defendant no.3 Mr. Dinesh Kumar and defendant no.4 Mr. Parminder Rana were proceeded *ex parte* on 19.12.2011.

3. On the pleadings of the plaintiffs and the defendants no.1&2, the following issues were framed on 30.10.2012:

“(i) *Whether the plaint does not disclose any cause of action?*

OPD

(ii) *Whether the suit filed for possession is not maintainable without the relief of declaration? OPD*

(iii) *Whether the suit filed is barred by limitation? OPD*

- (iv) *Whether the plaintiffs are entitled to possession of the properties as claimed in the prayer? OPP*
- (v) *Whether the plaintiffs are entitled to mesne profits? If so, at what rate and for what period? OPP*
- (vi) *Whether the plaintiffs are entitled to interest? If so, on what amount, at what rate and for what period? OPP*
- (vii) *To what relief, if any, are the plaintiffs entitled?"*

The counsel for the defendants no.1&2 on the same date stated that an application under Order VII Rule 11 of the CPC shall be filed and has thereafter filed this application and to which reply has been filed by the plaintiffs.

4. This application was listed for hearing on 02.04.2014 when the counsel for the plaintiffs did not appear and sent a proxy counsel who had no knowledge of the case. The counsel for the applicant / defendants no.1&2 was heard and the hearing adjourned to 03.04.2014 for the counsel for the plaintiffs to address arguments. The counsel for the plaintiffs addressed arguments on 03.04.2014 but upon being quizzed, sought adjournment for today, stating that this is a legal aid matter and he will have to take instructions from the plaintiffs. Today, the counsel for

the plaintiffs has not appeared and has sent a message that this Court may pass appropriate orders.

5. The applicant / defendants no.1&2 seek rejection of the plaint on the ground that the present suit for possession of immovable properties, without seeking the relief of declaration qua the documents under which the defendants hold the property, is barred by time. Reliance in this regard is placed on *Raj Kumari Garg Vs. S.M. Ezaz* (2012) 129 DRJ 284.

6. To understand the aforesaid contention of the counsel for the defendants, it is necessary to analyze the plaint. The case of the plaintiffs as set out in the plaint, though long-winded and incomprehensible, is found to be:

- (a) that the defendant no.1 while working as Manager of the branch at Agartala, Gauhati of the Punjab & Sind Bank, gained the trust of the plaintiffs who were then resident of Agartala;

- (b) that the defendant no.1 induced the plaintiffs to invest their hard earned money to buy a petrol pump in USA and to migrate to USA;
- (c) that the plaintiffs under such inducement by the defendant no.1 sold and disposed of their entire movable and immovable properties and shifted to Delhi and also handed over Rs.22,00,000/- in cash for safe custody of the defendant no.1 for use as consideration for purchase of petrol pump in USA;
- (d) that the plaintiffs were also induced to buy a 200 sq. yds. plot at Malviya Nagar and Janta flats at Delhi as an interim arrangement for use of the sale proceeds thereof for buying the petrol pump in USA;
- (e) that the defendant no.1 however induced the plaintiffs to have the purchase documents of the said properties executed jointly in the name of the plaintiff no.1 and defendant no.1, representing that this will enable him to manage the said properties;

- (f) that the plaintiffs shifted to Delhi in the year 1996;
- (g) that the plaintiffs lodged complaints dated 20.09.2001 and 21.02.2002 against the defendants; however upon the said complaints not meeting with any success, the plaintiffs filed a complaint case and which resulted in FIR No.95/2003 of police station Prashant Vihar under Sections 409/420/467/471/323/506/120B IPC;
- (h) that during the investigation by the Crime Branch pursuant to the aforesaid FIR, on 22.04.2004 documents of property No.A-126, Khirki Extn., Malviya Nagar, Delhi were seized from the defendant no.1 and which showed the plaintiff no.1 and the defendant no.1 to have on 21.04.1988 entered into an agreement to purchase the said property from one Sh. Ashok Kumar Gupta; however, the defendant no.2 Ms. Harminder Kaur who is the sister of defendant no.1 was found to be the GPA holder of the said property since the year 1988;

- (i) that the defendant no.2 claims to have bought the said property No.A-126, Khirki Extn., from the plaintiff no.1 and the defendant no.1 vide agreement to Sell dated 08.11.1996;
- (j) that the said Agreement to Sell is a fabricated document and no sale consideration was paid by the defendant no.2 to the plaintiff no.1;
- (k) that on 22.11.1996, the defendant no.2 sold 100 sq. yds. out of this property to the defendant no.3 Mr. Dinesh Kumar;
- (l) that the documents were referred to the Government Examiner of Questioned Documents (GEQD), Shimla who had opined that signatures on the revenue stamp of the receipt did not match with the specimen / admitted signatures of the plaintiff no.1;
- (m) that the defendant no.1 had also sold the two flats aforesaid at Rohini belonging to the plaintiffs and had not given any sale proceeds thereof to the plaintiffs;

- (n) that the investigations pursuant to the FIR revealed that two property dealers claimed to have paid the sale proceeds of the said flats to the defendant no.1;
- (o) that the defendant no.1 has utilized the monies of the said two flats at Rohini which were worth Rs.7,00,000/-, without accounting for the same to the plaintiffs;
- (p) that the ground floor, basement and second floor of JE-34, Khirki Extn., New Delhi was attached by the Court of the Metropolitan Magistrate in the case relating to the FIR aforesaid;
- (q) that thus the possession of the defendants is unauthorized and unlawful;
- (r) That portion of property no.A-126 (new No.JE-34), Khirki Extn., New Delhi has been transferred to the defendants no.3&4;
- (s) that the cause of action accrued to the plaintiffs against the defendants in the year 2001 when for the first time the

plaintiffs came to know about the illegal acts of the defendants no.1&2 and when the defendants did not return the possession of the property.

7. It is the case of the defendants no.1&2 in their written statement:
- (i) that the suit for possession of immovable property, without any relief for cancellation of the registered and legal documents with respect to the property, is not maintainable and is time barred as the limitation for seeking declaration is three years only;
 - (ii) that the plaintiff no.1 and the defendant no.1 executed legal documents i.e. Agreement to Sell, money receipt, affidavit, letter of possession, GPA and Will all dated 08.11.1996 in favour of the defendant no.2 in respect of property bearing No.JE-34 and JE-34A, old Gupta Colony, Khirki Extn., Malviya Nagar, New Delhi;
 - (iii) that the plaintiff no.1 has nowhere denied her signatures on all these documents except for her signature across the revenue stamp in the money receipt dated 08.11.1996;

- (iv) that even if the money receipt were to be ignored, the plaintiff no.1 is bound by the other documents;
- (v) that owing to the aforesaid documents, the plaintiff no.1 has no title, right or interest in property JE-34 and JE-34A, Khirki Extn., New Delhi;
- (vi) denying the pleas of inducement and contending that the relationship of the father of the plaintiff no.2 and defendant no.1 was only of landlord and tenant at Agartala and nothing more;
- (vii) that the plea of purchase of petrol pump at USA is inherently improbable;
- (viii) that the averments in the plaint are vague;
- (ix) that the plaintiff no.1 and the defendant no.1 had jointly purchased the 200 sq. yds. plot in Khirki Extn., Malviya Nagar, an unauthorized colony, for an amount of Rs.30,000/- equally contributed by the plaintiff no.1 and the defendant no.1 and had on 08.11.1996 sold the same vide documents

aforesaid to the defendant no.2 for a consideration of Rs.4,60,000/- and the plaintiff has admitted her signatures thereon except on the revenue stamp on the receipt of money; that the GPA executed by the plaintiff no.1 in favour of the defendant no.2 was registered with the photograph of the plaintiff no.1;

- (x) that the plaintiff no.1 has not given particulars of any properties sold at Agartala;
- (xi) that the order of attachment of the Court of Metropolitan Magistrate was set aside by the Additional Sessions Judge though the defendant no.2 had given an undertaking that the property will not be sold without the permission of the Court;
- (xii) that the defendant no.2 is the rightful owner of the flats on the ground floor of property No.JE-34 and of the basement, ground and second floor of property No.JE-34A and has let out the same;

(xiii) that the defendant no.1 sold the flat no.F-9/51, Rohini in 1998 and the defendants have no concern with flat no.F-9/52, Rohini.

8. The plaintiffs, in their replication, besides reiterating their case on the aspect of limitation, have stated that the suit for the relief of possession has been filed within the time prescribed therefor.

9. The plaintiffs have filed only the following documents before this Court;

(A) Photocopy of the chargesheet dated 21.02.2003 in FIR case aforesaid;

(B) Photocopy of the Agreement to Sell dated 21.04.1988 executed by Sh. Ashok Kumar as seller of plot of land ad-measuring 200 sq. yds. bearing No.A-126, Khirki Extn., Malviya Nagar, New Delhi in favour of the plaintiff no.1 and the defendant no.1 as purchasers for consideration of Rs.30,000;

- (C) Photocopy of affidavit dated 21.04.1998 of Sh. Ashok Kumar in confirmation of execution of GPA in favour of defendant no.2 with respect to the plot of land aforesaid;
- (D) Photocopy of receipt of Rs.30,000/- executed by Sh. Ashok Kumar in favour of the plaintiff no.1 and defendant no.1;
- (E) Photocopy of registered GPA dated 08.11.1996 executed by plaintiff no.1 and defendant no.1 in favour of the defendant no.2 with respect to plot of land aforesaid;
- (F) Photocopy of registered Will dated 08.11.1996 executed by the plaintiff no.1 in favour of the defendant no.2 with respect to her share of plot of land aforesaid;
- (G) Photocopy of Agreement to Sell dated 08.05.1996 executed by the plaintiff no.1 and defendant no.1 in favour of defendant no.2 with respect to plot of land aforesaid for a sale consideration of Rs.4,60,000/-;

- (H) Photocopy of receipt dated 08.11.1996 executed by plaintiff no.1 and defendant no.1 of Rs.4,60,000/- in favour of defendant no.2;
- (I) Photocopy of Special Power of Attorney executed by one Sh. Mahinder Singh in favour of plaintiff no.1 with respect to DDA built Janta category flat no.52, Pocket F-9, Sector 15, Rohini, Delhi;
- (J) Photocopy of certain other documents not relating to the properties aforesaid.

10. The first question which comes to mind is, as to from whom the plaintiffs in the suit seek to recover possession of the two flats at Rohini. It is not the case of the plaintiffs that the defendants or any of them are in possession of the said flats. Rather what the plaintiffs have pleaded in the plaint is that the defendant no.1 has already sold of the said flats. The plaintiffs have not disclosed to whom the said flats have been disposed of and who is in possession thereof. The plaintiffs have been proceeding with this suit for recovery of the possession of the Rohini flats for the last more than six years without impleading the person/s in possession thereof

as party to the suit. The counsel for the plaintiffs during the hearing also was not able to shed any light on the said aspect. The suit, insofar as for recovery of the possession of the Rohini flats, even if it were to be believed that the same have been illegally sold by the defendant no.1, is clearly misconceived and no purpose will be served in allowing it to burden this Court and which always is at the cost of other deserving cases.

11. That brings me to the ground urged by the defendants no.1&2 in their application under Order VII Rule 11 of the CPC with respect to the Khirki Extn. property. The question for adjudication is, whether in the facts and circumstances aforesaid, the plaintiffs are entitled to sue for the relief of possession alone and if so whether the suit for the relief of possession is within time or whether it was incumbent upon the plaintiffs to seek the relief of declaration qua the documents on the basis of which the defendant no.2 claims to be the owner of the said property and whether the said relief of declaration on the date of institution of the suit was barred by time and whether without being entitled to such declaration, the plaintiffs are not entitled to the relief of possession.

12. The plaintiffs, nowhere in the plaint have denied the execution and registration of the General Power of Attorney dated 08.11.1996 in favour of the defendant no.2 authorizing the defendant no.2 to manage and control the plot of land ad-measuring 200 sq. yds. at Khirki Extn. and to negotiate the sale / transfer thereof and to agree to sell / dispose of the same and execute all documents in this regard. Similarly, the plaintiffs have nowhere in the plaint denied the execution and registration of the Will dated 08.11.1996 with respect to the plaintiff's no.1 share of the said plot of land. The plaintiffs have only sought to poke holes in the Agreement to Sell also purportedly executed by the plaintiff no.1 and the defendant no.1 with respect to the said property in favour of the defendant no.2 and the receipt of money also purportedly executed by the plaintiff no.1 and the defendant no.1 in favour of the defendant no.2.

13. In spite of the defendants 1&2 in their written statement expressly stating that the plaintiffs had not denied their signatures other than on the revenue stamp on the receipt on the said documents, the plaintiffs in their replication still did not deny the said signatures.

14. Upon the same being put to the counsel for the plaintiffs yesterday, he contended that the case of the plaintiffs is of the plaintiffs having signed all the documents under inducement and owing to the misrepresentation and fraud practiced by the defendants no. 1&2 and thus the plaintiffs would be entitled to sue for possession of the property without being required to seek a relief of declaration with respect to the property.

15. I have enquired from the counsel for the plaintiffs, whether a document admittedly signed by the plaintiff no.1 can be unilaterally treated by the plaintiff no.1 as void on the ground of fraud and misrepresentation, without seeking a declaration of the same being void. Attention of the counsel for the plaintiffs in this regard was invited to Sections 19 and 19A of the Contract Act, 1872 which provide that when consent to an agreement is caused by coercion, fraud, misrepresentation or by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. It was further enquired from the counsel for the plaintiffs whether not the same implied that such contracts were not void *per se* but were voidable and for which an option will have to be exercised by the plaintiffs. It was yet yet further enquired

from the counsel for the plaintiffs whether not the limitation provided in the Limitation Act, 1963 for such option to be exercised is governed by Article 56 of the Limitation Act, 1963 providing limitation of three years commencing from the date when the issue of registration becomes known to the plaintiff or by Article 58 which provides limitation of three years commencing from the date when the right to sue first accrues, to obtain any other declaration or under Article 59 which provides limitation of three years commencing from the date when the facts entitling the plaintiffs to have the instrument cancelled or set aside or the contract rescinded first become known to the plaintiffs. It was yet yet further enquired from the counsel for the plaintiffs whether not the said limitation in the present case commenced on 20.09.2001 and 21.02.2002 when the plaintiffs claim to have first lodged complaints or at least in 2003 when the FIR was registered or on 22.04.2004 when the documents were seized and whether not the suit filed more than three years thereafter is barred by time.

16. No answer was forthcoming from the counsel for the plaintiffs yesterday or today.

17. In ***Raj Kumari Garg*** (supra) cited by the counsel for the defendant, this Court held a suit for possession of immovable property to be not maintainable in similar facts. The Division Bench has vide judgment also titled ***Raj Kumari Garg Vs. S.M. Ezaz*** MANU/DE/3860/2012 has affirmed the said view.

18. The counsel for the plaintiffs in yesterday's hearing relied on judgment dated 07.03.2000 of the Supreme Court in ***State of Maharashtra Vs. Pravin Jethalal Kamdar***. However in that case, the documents under which the defendant was holding possession were found to be void *ab initio* for the reason of being in violation of the prohibition contained in the Urban Land (Ceiling & Regulation) Act, 1976. It is not the case of the plaintiffs herein that the documents of transfer of Khirki Extn., property in favour of defendant no.2 are in violation of any statutory prohibition. The plea of the plaintiffs here is of having executed the same under misrepresentation and / or being not bound by the transaction for the reason of having not received the consideration thereunder. Though the counsel for the plaintiffs could not answer but in my view the language of Sections 19 and 19A (supra) of the Contract Act making documents, consent whereto is caused by coercion, fraud or misrepresentation or by undue influence voidable at the option of the party whose consent was so caused, itself negates the said documents

being void *ab initio*. The same requires the party, whose consent was so caused, to exercise the option of having the documents so declared void and for which the period of limitation is prescribed. Once a plaintiff allows such period of limitation to lapse, the only inference is that the plaintiff is thereafter debarred from contending the said documents to be void and without the said documents being treated or declared void, the plaintiffs cannot be entitled to possession. There is another aspect of the matter. The Agreement to Sell, Power of Attorney, Will under all of which, the defendant no.1 claims title to the property and all are dated 08.11.1996. The suit as aforesaid has been instituted on 07.11.2008 i.e. on the last date of expiry of 12 years therefrom, though probably under objection as the same was re-filed on 18.11.2008, 03.12.2008 and finally on 11.12.2008.

19. I am therefore of the view that where the plaintiff claims recovery of possession of the property in the possession of defendant under documents of transfer / title admittedly executed by the plaintiffs and to have which documents declared as void, the plaintiff is required to seek the relief of declaration of their voidability, the plaintiff if does not sue

for declaration within the prescribed time, cannot thereafter sue for possession by contending the relief of possession to be within time.

20. Resultantly, the application succeeds and the suit for the reliefs claimed, on the averments therein, is found to be barred by time and is dismissed.

21. I refrain from imposing any costs on the plaintiffs since the counsel for the plaintiffs stated that this is a legal aid matter, though there does not appear to be anything on record to suggest so.

Decree sheet be prepared.

RAJIV SAHAI ENDLAW, J

APRIL 04, 2014

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