

ESA No. 28 of 2012(O&M)

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In the High Court of Punjab and Haryana at Chandigarh

ESA No. 28 of 2012(O&M)

Date of Decision: August 24, 2016

Ram Ratti and others

---Appellants

vs.

Anita Rani and others

---Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr.Sanjay Mittal, Advocate
for the appellants
Mr. Ankit Goel, Advocate
for respondent No. 1

Rekha Mittal, J.

The present Execution Second Appeal (in short “the ESA”) has been directed against orders dated 11.10.2010 passed by the Civil Judge (Senior Division), Sonipat (in short “the Executing Court”) and dated 24.1.2012 passed by the Additional District Judge, Fast Track Court, Sonipat whereby application filed by respondent No. 1 was allowed and the

appeal preferred by the appellants against order dated 11.10.2010 has been dismissed.

A brief backdrop of the case is that Satya Parkash Vashisht filed an application under Section 13 of the Haryana Urban (Control of Rent and Eviction) Act, 1973 (in short “the Act”) against Manoj Kumar, Parmod Kumar and Suresh Kumar, respondents No. 2 to 4 respectively on the premise that Manoj Kumar and Parmod Kumar have sub let the property in question to Suresh Kumar, respondent No. 4. He also sought eviction on the ground of non-payment of rent by respondent Nos. 2 and 3. The eviction proceedings culminated in order of ejectment dated 9.10.1993 passed by the Rent Controller, Sonipat and the same has attained finality. Satya Parkash Vashisht did not file any application for execution of the eviction order during his life time. He passed way on 28.1.1997. Legal representatives of Satya Parkash Vashisht (appellants herein) filed an execution petition in the year 2004. In pursuance of warrant of possession issued by the Executing Court, possession was delivered to legal representatives of Satya Parkash Vashisht on 17.8.2007.

Anita Rani wife of Subhash Chand, respondent No. 1 filed

application dated 25.8.2007 seeking restoration of possession on the plea that she is owner of area measuring 240 square yards of the property in dispute that was purchased by her vide sale deed No. 2366 dated 21.7.1995 for a sale consideration of Rs. 48,000/- through general power of attorney namely Naresh Kumar from Satya Parkash Vashisht. A detailed description of the property purchased by respondent No. 1 was given in para three of the application. It has further been averred that as possession was with the owner, the same was delivered to the applicant on the same day through Naresh Kumar and since then, she is in actual physical possession of the property in dispute being a bona fide purchaser. She has further pleaded that the appellants with the help of bailiff and police of Sonipat took forcible possession of the plot and constructed portion thereon in her absence by breaking the lock and thrown out the household articles. A small portion where she has constructed a shop was left and possession of the said shop is still with her.

Reply to the application was filed by the appellants, seriously contesting claim of the respondent/applicant in regard to her being the owner in possession of any area out of the property subject matter of the

execution proceedings. The power of attorney in favour of Sh. Naresh Kumar purported to be executed by Sh. Satya Parkash Vashisht is stated to be false, fabricated and fraudulent. It is averred that Anita Rani respondent is real *bhabhi* of Judgment debtor No. 3 (Suresh Kumar) and sale deed propounded by her was signed by Suresh Kumar as a witness. All other material averments of the application have been denied with a prayer for dismissal of the same.

The controversy between the parties led to framing of following issues by the Executing Court:-

1. Whether the applicant is bona fide purchaser of the property by way of registered sale deed No. 2366 dated 21.7.1995 ?
OPO
2. If issue No. 1 is proved whether the applicant is entitled to restore the possession? OPO
3. Whether the power of attorney in the name of Naresh Kumar on the basis of which sale deed was executed is forged and fabricated. If so, to what effect? OPR
4. Relief.

The parties were permitted to adduce evidence in support of their respective claims. After having heard counsel for the parties and bestowing its thoughtful consideration to the materials on record, the Executing Court recorded findings on issue Nos. 1 and 2 taken up jointly in favour of the respondent whereas issue No. 3, the onus whereof was laid upon the appellants was answered against them. The application filed by the respondent was allowed and the appellants were directed to restore possession of the disputed property to the objector within one month from 11.10.2010 failing which she was allowed to take possession through process of the Court.

As has been noticed hereinbefore, the appeal preferred by Ram Ratti and others against order dated 11.10.2010 passed by the Executing Court did not find favour with the Court of Appeal and the findings recorded by the Executing Court were affirmed.

Still feeling dissatisfied, the present ESA has been preferred by the appellants (Lrs of Satya Parkash Vashisht).

Counsel for the appellants has submitted that the alleged power of attorney in favour of Sh. Naresh Kumar, purported to be executed by

Satya Parkash Vashisht has not been proved in accordance with law. The original power of attorney has not seen the light of day and no permission was sought to prove the document by way of secondary evidence. In addition, it is argued that if certified copy of the power of attorney is held to be admissible in evidence, the power of attorney is surrounded by suspicious circumstances inter alia on the following grounds:-

1. The power of attorney was registered at Kharkhoda whereas the deceased Satya Parkash Vashisht was resident of Delhi and the property in question is situated at Sonipat.
2. The names of the witnesses on the power of attorney have not been typed.
3. The name of scribe is not mentioned on the power of attorney.

Another submission made by counsel is that as per recitals in the power of attorney, Naresh Kumar son of Bhola Ram attorney holder is stated to be a relative of Satya Parkash Vashisht but in his cross examination, Naresh Kumar failed to reveal his relationship with Satya Parkash Vashisht who even did not know name of elder brother of Satya

Parkash Vashisht. It has further been argued by counsel for the appellants that the application filed by the respondent for restoration of possession does not fall within the purview and ambit of Section 144 CPC, therefore, the same is not maintainable.

Counsel for the contesting respondent, on the contrary, would urge that the respondent examined number of witnesses both official and private to prove that power of attorney Ex. PW2/1 was executed by Satya Parkash Vashisht in favour of Naresh Kumar OW-6 on the basis whereof, the sale deed in respect of property in question measuring 240 square yards was executed in favour of the respondent on 21.7.1995. It is further submitted that Naresh Kumar not only executed sale deed dated 21.7.1995 in favour of the respondent, he also executed other sale deeds in favour of different persons in regard to different parcels of property on the basis of power of attorney Ex. PW2/1. According to counsel, there is nothing on record suggestive of the fact that legal heirs of Satya Parkash Vashisht ever challenged the other sale deeds executed by Naresh Kumar on the basis of power of attorney. Further dilating, it is argued that as the courts below have consistently held in favour of the respondent that power of attorney

Ex. PW2/1 was executed by Satya Parkash Vashisht in favour of Naresh Kumar, the factual findings consistently recorded by the Courts below cannot be challenged in the second appeal on the analogy of principles applicable in a regular second appeal filed under Section 100 CPC.

So far as the plea that the power of attorney is not admissible in evidence, it is argued that certified copy of power of attorney is a public document and therefore, the same is per se admissible. In support of his contention, he has referred to judgments of this Court *Santokh Singh vs. Bishan Singh 1994(1) R.R.R. 630, Gajjan Singh vs. Virsa Singh and others 2007 (3)RCR(Civil)3*.

To refute contention of the appellants that the application filed by the respondent is not maintainable, it is argued that as the respondent was wrongly and illegally dispossessed in pursuance of warrants of possession issued in execution proceedings to which she was not a party, her grievance in regard to her dispossession by ordering restoration of possession has rightly been redressed by the Courts below.

I have heard counsel for the parties, perused the paper book and the records.

The substantial questions that arise for adjudication are:

“1. Whether the certified copy of power of attorney Ex. PW2/1 is not admissible in evidence for want of production of original or permission to prove the original by way of secondary evidence?

2. Whether the application filed by the respondent for restoration of possession is not maintainable, in the circumstances of the present case?”

Before addressing the aforesaid two questions, it is appropriate to deal with submissions of the appellants that the power of attorney in favour of Naresh Kumar is a forged and fabricated document. The two courts below have recorded consistent findings negating plea of the appellants that the power of attorney was not executed by Satya Parkash Vashisht or the same is result of forgery/fabrication. As has been rightly argued by counsel for the respondent that consistent findings of fact recorded by the courts below cannot be interfered by this Court in second appeal. This apart, I have carefully examined copy of the power of attorney marked as exhibit as well as the statements of witnesses examined to prove

the power of attorney. The power of attorney was executed in the year 1994 and the sale deed in favour of respondent Anita Rani was executed on 21.7.1995. In the cross examination of Naresh Kumar attorney holder, it has been revealed that besides executing sale deed in favour of Anita Rani in respect of an area measuring 240 square yards, the attorney holder executed other sale deeds on the basis of said power of attorney. There is nothing on record suggestive of the fact that Satya Parkash Vashisht during his life time or his legal representatives ever challenged those sale deeds executed by Naresh Kumar in favour of Ram Kishan and Anwar. Further more, a careful analysis of cross examination of Naresh Kumar does not lead to record a finding that the power of attorney is the result of forgery or fabrication. Naresh Kumar has stated that Satya Parkash Vashisht was living in their neighbourhood and was being called *chacha* by him. He (Satya Parkash Vashisht) had been attending the weddings in his family. No doubt, he could not tell exact relationship between the two but the said fact alone is not sufficient to record a finding that power of attorney was not executed by Sh. Satya Parkash Vashisht.

The property in question is situated at Sonipat and the power

of attorney was registered at Kharkhoda. In the concluding part of his cross examination, Naresh Kumar has deposed that power of attorney was got registered at Kharkhoda as the authority at Sonipat had not been registering the power of attorneys. In this view of the matter, I find myself unable to accept the submissions of the appellants that the power of attorney Ex. PW2/1 is a forged or fabricated document and sale deed executed on the basis thereof cannot operate to create ownership rights in favour of respondent No. 1 on the basis of sale deed dated 21.7.1995.

This brings the Court to the questions formulated hereinbefore and invite answer.

The contention raised by counsel for the appellants that certified copy of the power of attorney is not admissible in evidence is untenable. In *Santokh Singh's case (supra)* this Court by relying upon an earlier judgment of this Court *Ajit Singh vs. Sajjan Singh and another (1989) PLJ 332* has held that a registered general power of attorney is a public document within the meaning of Section 74(2) and as such, a certified copy is per se admissible in evidence and it was not even necessary for the petitioner to produce secondary evidence to prove the

existence of a power of attorney. In this view of the matter, question No. 1 is answered against the appellants and in favour of the respondent.

Counsel for the appellants has raised an issue with regard to maintainability of the application by referring to the provisions of Section 144 CPC. No doubt, the provisions of Section 144 CPC would not be attracted in the circumstances of the present case as the eviction order on the basis of which the execution proceedings are initiated is neither varied nor reversed in any appeal, revision or other proceedings nor is set aside or modified in any suit instituted for the purpose. Nevertheless, the application is maintainable under Order 21 Rule 99 CPC that provides for dispossession by decree holder or purchaser. A relevant extract from Rules 99 to 101 of Order 21 CPC, germane to the controversy, reads as follows:-

99. Dispossession by decree holder or purchaser.- (1)

Where any person other than the judgment debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the court complaining of such dispossession.

(2) Where any such application is made, the court shall

proceed to adjudicate upon the application in accordance with the provisions herein contained.

100. Order to be passed upon application complaining of dispossession.- Upon the determination of the questions referred to in rule 101, the court shall, in accordance with such determination,—

(a) make an Order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or

(b) pass such other Order as, in the circumstances of the case, it may deem fit.

101. Question to be determined.- All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under rule 97 or rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the court dealing with the application, and not by a separate suit and for this purpose, the court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions.

A conjoint reading of above extracted rules leaves no manner of doubt that the application filed by the respondent is maintainable under

Rule 99 and the executing court upon determination of the question referred to in Rule 101 is competent to make an order allowing the application and directing that the applicant be put into possession of the property or dismiss the application or pass such other order as, in the circumstances of the case, it may deem fit.

Anita Rani respondent appeared in the witness box and tendered into evidence her duly sworn affidavit Ex. OW9/A and reiterated the entire version set up in the application qua her dispossession in execution of warrants of possession issued by the Court. In her cross examination, there is no challenge to her testimony in regard to her being in possession of the property in question and her dispossession in execution of warrants of possession issued by the court. There is no cross examination on her statement that still she is in possession of a part of the property i.e. shop constructed on a part of the plot in question. It is an undisputed position in law that if testimony of a witness on a particular point is not challenged during cross examination, it amounts to admission by the adversary. As a matter of fact, there is hardly any cross examination of the respondent to challenge correctness of her version with regard to her

possession prior to dispossession and dispossession in pursuance of warrants of possession issued by the Court. The respondent has proved her plea that she was in possession of the property in question wherefrom she was dispossessed in execution of warrants of possession issued against respondents No. 2 to 4 on the basis of an eviction order passed way back in the year 1993. In view of the above discussion, no error much less illegality can be found in the order passed by the Executing Court directing restoration of possession of the property in question in favour of the respondent, duly affirmed in appeal.

For the foregoing reasons, the appeal fails and is accordingly dismissed with costs.

(Rekha Mittal)
Judge

August 24, 2016
paramjit

Whether speaking/reasoned: Yes/No
Whether reportable : Yes/No