

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

RSA No.76 of 2015 (O&M).
Decided on:-February 06, 2017.

Sarabjit Kaur and others

.....Appellants.

Versus

Jayant Chauhan and others

.....Respondents.

CORAM: HON'BLE MR. JUSTICE HARI PAL VERMA.

Present:- Mr. D.K. Bhatti, Advocate
for the appellants.

HARI PAL VERMA, J.

Appellants-plaintiffs have filed the present regular second appeal against the judgment and decree dated 30.09.2014 passed by learned Additional District Judge, Fast Track Court, Ludhiana whereby their appeal against the judgment and decree dated 01.12.2012 passed by learned Civil Judge (Junior Division), Ludhiana, was dismissed.

Briefly stated, the appellants-plaintiffs had filed a suit for declaration and permanent injunction against the respondents-defendants with an averment that late S. Malkiat Singh was the owner and was in actual and physical possession of the suit property i.e. double storey building bearing plot No.141-146-147, Street No.1 measuring 300 square yards, situated at New Moti Nagar, Jamalpur Awana, Ludhiana, fully mentioned in the head note of the plaint. He had purchased the suit property for

consideration vide sale deed dated 30.05.1975. However, he had expired intestate and his wife Manjit Kaur had also expired leaving behind the plaintiffs and defendant No.4 as their only first class legal heirs. Thereafter, the suit property devolved upon the plaintiffs and defendant No.4 in equal shares to the exclusion of everyone else. Said Malkiat Singh had availed a housing loan of Rs.4 lakhs from the State Bank of Hyderabad, SSI Branch, against the equitable mortgage of the suit property. The original sale deed of the suit property is lying with the said bank as collateral security. During his life time, Malkiat Singh had neither executed any general power of attorney in favour of defendant No.1 to deal with the suit property nor he could sell any part of the suit property. He had not sold the suit property himself or through alleged attorney defendant No.1 as the suit property was already mortgaged with the bank.

It has been further pleaded that the defendants No.1 to 3 had forged the alleged general power of attorney dated 04.05.2004 to execute the sale deed registered vide Vasika No.4095 dated 01.06.2004 in favour of defendants No.2 and 3 for a paltry amount of Rs.12,00,000/-. The plaintiffs came to know about the said conspiracy when they received a legal notice from the counsel of the bank. Now the bank has filed a suit for recovery against defendants No.2 and 3 including the plaintiffs and defendant No.4 as co-defendants. The defendant No.2 and 3 have refused to set aside the sale deed. Rather, they threatened to alienate the valuable suit property under the garb of sale deed in their name and defendants No.1 to 3 also attempted to dispossess the plaintiffs from the suit property. Hence, the suit.

On notice, respondents-defendants No.2 and 3 appeared and filed their written statement taking preliminary objections that the plaintiffs have not approached the Court with clean hands and have suppressed the true material facts. The suit is barred under Order VII Rule 11 CPC. The suit property was purchased by defendants No.2 and 3 vide sale deed dated 01.06.2004 from Malkiat Singh through his attorney Jayant Chauhan i.e. defendant No.1. Malkiat Singh had taken the suit property on rent @ Rs.4000/-per month for two years in the presence of marginal witnesses on the plea that he was supposed to build a new house out of the money received from the defendants. Malkiat Singh or his attorney had never disclosed the fact that the suit property was mortgaged with the bank and the entire sale consideration was paid to the seller. Malkiat Singh had informed the defendants that the suit property was his self-acquired property and not an ancestral one.

On merits, the defendants No.2 and 3 had denied all the other averments made by the plaintiffs and prayed for dismissal of the suit.

On the basis of pleadings of the parties, following issues were framed by learned trial Court:

1. Whether the plaintiff is entitled to the declaration as prayed for? OPP
2. Whether the plaintiff is entitled to the permanent injunction as prayed for? OPP
3. Whether the plaintiff has not come to the court with clean hands? OPD
4. Whether the plaintiffs have concealed and suppressed the material facts of the case? OPD
5. Whether the suit as filed by the plaintiff have not been

properly verified, inter alia, in terms of provisions of Order VI Rule 15 of CPC? OPD

6. Whether the plaintiffs are barred by their act and conduct from filing the present suit? OPD
7. Whether the suit is not maintainable? OPD
8. Relief.

Vide judgment and decree dated 01.12.2012, learned trial Court had dismissed the suit of the plaintiffs.

Aggrieved against the aforesaid judgment and decree passed by the trial Court, the appellants-plaintiffs had filed an appeal before the lower appellate Court, but the same was also dismissed by learned Additional District Judge, Fast Track Court, Ludhiana vide judgment and decree dated 30.09.2014. The relevant observations of learned lower appellate Court read as under:

*“11. The power of attorney Ex P-2 executed by Malkiat Singh in favour of defendant no.1 and sale deed Ex P-3 executed by defendant no.1 in favour of defendants no.2 and 3 being the attorney of Malkiat Singh are registered document and registration of document itself gives the presumption that document has been validly executed and is prima facie valid in law. The onus is always on the person is challenged it who to lead the evidence to rebut this. Reference in this regard can be made to the law laid down in **2008(4) Civil Court Cases, 312(S.C) Ranganayakamma & Anr. Vs K.S.Parkash(D) by Lrs.& Ors. And 2014(1) Civil Court Cases, 296(P&H) Mohinder Singh & Ors versus Lachhman Singh & Ors.** Even the registration of the document is a certificate that the consideration has been passed and burden of proof that no consideration has been passed has always on the vendor who is*

denying the consideration. reference in this regard can be made to the law laid down in 2007(2) RCR(Civil) 123 Raj Kumar and others versus Hardwari and others and 2005(4) RCR(Civil) 780 Mehar Singh (Died through L.Rs. Versus Baltej Singh and another. So in view of above judgment of the Hon'ble Apex Court as well as of Hon'ble Punjab & Haryana High Court, it is clear that once the document has been registered presumption is that it was validly executed and valid in law. It is also a certificate of passing of consideration. Further this presumption is rebuttable and onus is always on the person challenging the same. The plaintiffs have alleged that power of attorney Ex P-2 was not executed by Malkiat Singh and in order to prove this plaintiff Kamaljit Singh and Jaswinder Kaur have appeared in the witness box tendering their affidavits Ex PA & ExPB respectively alleging that Ex P-2 does not bear the signature of their father and also the photograph of their father. This evidence is not sufficient to prove that power of attorney Ex P-2 to be forged and fabricated. Record has not been summoned from the office of Sub Registrar whether it was registered on 6-5-2004. The plaintiffs/appellants are alleging that photograph of their father Malkiat Singh is not there and someone has appeared, but no record from the office of Sub Registrar has been summoned and even the certified copies of photographs have not been taken or produced in the file. No witness of power of attorney was examined. Even any official of Sub Registrar was not examined to prove that power of attorney Ex P-2 is forged and fabricated document.

12. *Counsel for the appellants has argued that they have given application for summoning the witnesses but court has not summoned the same. Mere filing of the application is not sufficient. Efforts are to be made. The plaintiffs/appellants are required to take Dasti summons for summoning of the witnesses. So it is not established that power of attorney Ex P-2*

is forged and fabricated document and also that sale deed Ex P-3 executed in favour of defendant no.2 and 3 by defendant no.1 being the attorney of Malkiat Singh is without consideration.

13. *Another argument of the counsel for the appellants is that the possession was not delivered, so the sale deed has got no value in the eyes of law. In this case the defendant has come with the specific plea that after the execution of the sale deed Malkiat Singh has taken on rent property in dispute at a monthly rent of Rs.4000/- and he remained in possession during his lifetime. Malkiat Singh has never agitated and even challenged the sale deed. So in view of specific plea taken by the respondents/defendants that possession remained with Malkiat Singh as a tenant shows that possession has been transferred. The defendants have come up with the plea that they have also filed ejectment petition under East Urban Rent Restriction Act.*

14. *Another plea taken by the appellants is that property was mortgaged, so title cannot be pass to defendants no.1 and 2. In order to establish this PW-3 Ashwinder Singh Assistant Manager, State Bank of Hyderabad has been examined who has proved the document Ex PW-3/1 to Ex PW-3/20 to prove the mortgage of the property. Even the defendants in the written statement has come with the plea that at the time of execution of sale deed, they have no knowledge of the mortgage, .Moreover if the property is mortgaged then the same can be sold further, however, the mortgage remains the first charge over the property. Only the ownership of the property is transferred and mortgagee can enforce his right against the subsequent vendees. It is settled principle of law that until and unless property is redeemed from mortgage it will also remained under mortgage. In the present case when sale deed was executed in favour of defendants no.2 and 3 property was*

mortgaged with State Bank of Hyderabad, so it is for the vendee who are to suffer and they are liable to pay the mortgage amount to get the property redeemed from State Bank of Hyderabad who has lien over the property.”

Still aggrieved, the appellants-plaintiffs have filed the present regular second appeal.

The appellants-plaintiffs have formulated the following law points:

- a) Whether mere production of registered document is a sufficient proof for the propounder of the registered document has to prove its content?
- b) Whether sale on the basis of GPA is no sale and do not convey title and do not amount to transfer as held by Hon'ble Supreme Court of India in Suraj Lamp & Industries Pvt. Ltd. versus State of Haryana and Anr. 2011(4) RCR (Civil) 669?
- c) Whether when any property is under encumbrance and has been purchased while it was mortgaged with the Bank such sale is apparently sham specially under the circumstances when the sale is 5 to 8 times less amount of the price prevailing in the market at the time of sale?

Learned counsel for the appellants-plaintiffs has argued that the general power of attorney dated 04.05.2004 and the sale deed dated 01.06.2004 are under clouds as the same have been executed just before the death of Malkiat Singh, who died on 12.07.2004. Mere registration of documents i.e. power of attorney dated 04.05.2004 and sale deed dated 01.06.2004 is not sufficient to establish their genuineness and does not alleviate the onus of the defendants or the propounder of the documents to prove their genuineness and correctness. Neither photographs of Malkiat Singh nor his signatures on the power of attorney dated 04.05.2004 are

tallying, but still there is no such finding of the Courts below on these assertions made by the appellants-plaintiffs. Once the property was mortgaged with the State Bank of Hyderabad and the original sale deed dated 30.05.1975 is still in the possession of the Bank as loan was not redeemed, there was no occasion for Malkiat Singh to execute a general power of attorney for selling the same property which was already subject matter of mortgage.

Learned counsel for the appellants-plaintiffs has referred to the judgment in *Suraj Lamp & Industries Private Limited Versus State of Hayrana and another 2011(4) RCR(Civil) 669* to contend that the sale through general power of attorney is no sale and no validity can be granted to such sale deed. Further, when possession of the property remained with Malkiat Singh and his successors and no attempt was made by the defendants to take possession, and after execution of the sale deed, Malkiat Singh became tenant in the same property, it clearly shows that the documents were created just to usurp the property. Moreover, when the suit was filed, the defendants had failed to appear. In this manner, the lower appellate Court has wrongly appreciated and accepted the plea that the father of the appellants became a tenant.

I have heard learned counsel for the appellants-plaintiffs and perused the paper book.

The appellants-plaintiffs have sought declaration that the power of attorney dated 04.05.2004 executed by Malkiat Singh in favour of respondent-defendant No.1 is a forged and fabricated document and the sale deed executed by respondent-defendant No.1 on the basis said power of

attorney in favour of respondents-defendants No.2 and 3 is illegal. The appellants-plaintiffs have placed reliance on the photocopy of general power of attorney dated 04.05.2004, whereas certified copy of the same has not been placed and proved on record. No attempt has been made by the appellants-plaintiffs to lead secondary evidence to prove that the original power of attorney has been lost or misplaced. The sale deed dated 01.06.2004 was executed by respondent-defendant No.1 in favour of respondents-defendants No.2 and 3 which was registered in the office of Sub-Registrar vide Vasika No.4095. Therefore, presumption of truth is attached with a document which is validly executed and is a registered document. The onus of proof would be on a person who leads evidence to rebut this presumption, but no such evidence has been produced by the appellants-plaintiffs.

Even no such material has been placed on record that general power of attorney dated 04.05.2004 executed in favour of respondent-defendant No.1 by Malkiat Singh was ever revoked and, therefore, ceased to exist. Accordingly, the Courts below have rightly declined the decree of declaration and injunction in favour of the appellants-plaintiffs. Ashwinder Singh (PW3), Assistant Manager, State Bank of Hyderabad has proved that the suit property was mortgaged with the bank. But merely because the suit property is mortgaged with the bank is not sufficient to declare the sale deed as null and void. The fact of mortgage of the property has even been admitted by respondents-defendants No.2 and 3, though they have pleaded that this fact came to their notice after they had purchased the property.

Once the general power of attorney dated 04.05.2004 (Ex.P2)

had been executed by Malkiat Singh in favour of defendant No.1 and thereupon, the sale deed dated 01.06.2004 (Ex.P3) was executed by defendant No.1 in favour of defendants No.2 and 3 being the attorney of Malkiat Singh and these documents are registered one, it leads to a presumption that these documents have validly been executed and, therefore, *prima facie* valid in law. In this regard, learned lower appellate Court has rightly placed reliance upon the law laid down in **2008(4) Civil Court Cases 312 (SC)** titled as ***Ranganayakamma and another Versus K.S. Parkash (D) by LRs. and others*** as well as in **2014(1) Civil Court Cases 296 (P&H)** titled as ***Mohinder Singh and others Versus Lachhman Singh and others***.

Registration of a document in itself is a certificate that consideration has been passed and burden of proof that no consideration has been passed is always on the vendor who is denying the consideration as held in **2007(2) RCR(Civil) 123** titled as ***Raj Kumar and others Versus Hardwari and others*** as also in **2005(4) RCR(Civil) 780** titled as ***Mehar Singh (Died) through LRs Versus Baltej Singh and another***.

Though the appellants-plaintiffs have alleged that the power of attorney dated 04.05.2004 (Ex.P2) was never executed by Malkiat Singh and in support thereof, they have examined Kamaljit Singh and Jaswinder Kaur, who tendered their affidavits Ex.PA and Ex.PB respectively alleging therein that the document Ex.P2 does not bear the signatures of their father Malkiat Singh and also the photographs of their father. But this evidence is not sufficient to prove that the power of attorney dated 04.05.2004 (Ex.P2) was forged and fabricated as the record which was otherwise available with the office of Sub-Registrar has never been summoned. In the absence of such

record from the office of Sub-Registrar, the appellants-plaintiffs cannot succeed on this assertion. Further, no witness, who signed the said power of attorney, was examined by the appellants-plaintiffs. Therefore, it cannot be held that the power of attorney dated 04.05.2004 (Ex.P2) was a forged and fabricated document.

So far as the argument as raised by learned counsel for the appellants-plaintiffs that possession of the suit property was not delivered to the vendee and, therefore, the sale deed dated 01.06.2004 (Ex.P3) has no value in the eyes of law is concerned, this argument cannot be accepted more particularly when the respondents-defendants No.2 and 3 have made a specific plea in their written statement that after execution of the sale deed, Malkiat Singh had taken the property in dispute on a monthly rent of Rs.4,000/- on the pretext that he was to build a new house out of the money received from the defendants. Similarly, the plea that the property in dispute was mortgaged with the bank and, therefore, title cannot be passed to defendant No.1, again cannot be accepted particularly when the respondents-defendants No.2 and 3 in their written statement had come with a plea that at the time of execution of the sale deed, they had no knowledge of the mortgage. Moreover, if the property is mortgaged, then the same can be sold further. However, the mortgage remains the first charge over the property. It is only the ownership of the property, which is transferred and mortgagee can still enforce his right against the subsequent vendee.

The judgment cited by learned counsel for the appellants-defendants in *Suraj Lamp & Industries Private Limited's case (supra)* is not attracted in the facts and circumstances of the present case as the general

power of attorney dated 04.05.2004 (Ex.P2) as well as the sale deed dated 01.06.2004 (Ex.P3) were already registered documents and the appellants-plaintiffs have failed to make out a case that these documents were not validly executed and registered.

There is categorical and concurrent finding of fact recorded by the Courts below and the same does not warrant any interference.

Therefore, no substantial question of law is involved in the present regular second appeal. Accordingly, the impugned judgments and decrees passed by the Courts below are affirmed and the present regular second appeal is dismissed.

February 06, 2017
Yag Dutt

(HARI PAL VERMA)
JUDGE

Whether speaking/reasoned: Yes

Whether Reportable: No