

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

+ **RFA No.635/2017**

% **21st July, 2017**

PANKAJ TYAGI & ANR. Appellants

Through: Mr. G.S. Bala Murugan,
Advocate.

versus

RAJENDER KUMAR & ORS. Respondents

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. Appl. No. 25473/2017 (for exemption)

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

RFA No. 635/2017 and C.M. Appl. No. 25472/2017 (for stay)

1. This first appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant nos. 1 and 2 in the suit impugning the judgment of the trial court dated 22.2.2017, whereby the suit for declaration of the illegality of the sale deeds dated

20.5.2009 was decreed and cancellation directed of the sale deeds. A decree for possession was also passed in favour of the respondent no. 1/plaintiff with respect to the suit property admeasuring 100 sq. yards bearing no. G-13 West Arjun Nagar, Delhi.

2. The facts of the case are that the suit property was originally and admittedly owned by one Sh. Chander Pal. Sh. Chander Pal died on 13.1.2006. Sh. Chander Pal had, however, died leaving behind his registered Will dated 28.4.2005 as per which the suit property fell to the son of Sh. Chander Pal being the respondent no. 1/plaintiff. Respondent no. 1/plaintiff applied for a probate in terms of a Probate Petition no. 35/2006 with respect to the Will dated 28.4.2005 executed by Sh. Chander Pal. During the pendency of the probate petition, an order of *status quo* was passed on 2.4.2008 whereby it was directed that no third party interest shall be created in respect of the suit property. Defendant nos. 3 and 4 in the suit, being the respondent nos. 2 and 3 in this appeal, however, in spite of the *status quo* order transferred the suit property to the appellants, and who were the defendant nos. 1 and 2 in the suit. In the suit it was pleaded that transfer of the suit property by the respondent nos. 2 and

3/defendant nos. 3 and 4 in favour of the appellants/defendant nos. 1 and 2 was illegal as it was in violation of the *status quo* order dated 2.4.2008 and also bringing into play Section 52 of the Transfer of Property Act, 1882. At this stage itself, this Court would note the fact that probate petition filed by respondent no.1/plaintiff was decreed, and which will have a great bearing on decision of this appeal, though this aspect has not been considered by the trial court.

3.(i) Appellants/defendant nos. 1 and 2 claim to be *bona fide* purchasers from the respondent nos. 2 and 3/defendant nos. 3 and 4 of the suit property for consideration having paid a sum of Rs.10,50,000/-. It may, however, be noted that appellants/defendant nos. 1 and 2 did not file the written statement as their right to file the written statement was closed and which order has become final. Therefore, there is neither any pleading nor any evidence which could have been led or was led on behalf of the appellants/defendant nos. 1 and 2 with respect to their pleas.

(ii) I also note that although the right of the appellants/defendant nos. 1 and 2 to file the written statement was closed, surprisingly they have been allowed to lead evidence, and which in law could not have

been allowed because evidence is lead on a pleading. Once there is no pleading then the defendant whose right has been closed to file the pleading, cannot lead any evidence. At best, the entitlement of the defendant whose defence has been struck off is to cross-examine the witnesses of the plaintiff. Be that as it may, trial court framed the flowing issues and allowed both the parties to lead evidence and which is referred to in paras 4 to 6 of the impugned judgment and which read as under:-

“4. On the pleadings following issues were framed:-

- 1) Whether the suit is not maintainable in view of the objections raised by the defendant no. 1 and 2 in their application under Order 7 Rule 11 CPC? OPD 1 and 2.
- 2) Whether the plaintiff is entitled for cancellation of two illegal sale deeds detailed in prayer clause A of the plaint? OPP
- 3) Whether the plaintiff is entitled for possession of the suit property bearing No. G-13, West Arjun Nagar, Delhi, as prayed for? OPP
- 4) Whether the plaintiff is entitled for damages @ Rs.10,000/- per month for illegal use and occupation of the suit premises by defendant no. 1 and 2 as prayed for? OPP.
- 5) Relief.

PLAINTIFF'S WITNESS

PW1 Rajedner Kumar, the plaintiff

5. PW1 Rajender Kumar, the plaintiff has proved his affidavit Ex.PW1/A.

DOCUMENTS RELIEF UPON BY THE PLAINTIFF:-

Ex.PW1/1	Death Certificate of Sh. Chander Pal
Ex.PW1/2	Deed of Will
Ex.PW1/3	Copy of order dated 02.04.2008 Passed in (Test No. 35/2006)
Ex.PW1/4	Copy of judgment passed in probate case No. 35/2006
Ex.PW1/5	Relinquishment deed
Ex.PW1/6	Sale deeds
Ex.PW1/7	

Ex.PW1/8 Copy of Complaint dated 24.05.2009
Ex.PW1/9 Copy of complaint dated 05.06.2009
Ex.PW1/10 Copy of complaint to Commissioner of Police.

DEFENDANT'S WITNESS:-

DW1 Pankaj Tyagi, defendant no. 1.
DW2 Jhabbar Singh, the defendant 2
DW3 Jugal Arora

6. DW1 Pankaj Tyagi, the defendant no. 1, DW2 Shri Jhabbar Singh, the defendant no. 2 and DW3 Jugal Arora have proved their affidavits as Ex.DW1/A, Ex.DW2/A and Ex.DW3/A.”

4. The court below has held by reference to a passing of the *status quo* order on 2.4.2008, Ex.PW1/3, that since the respondent nos. 2 and 3/defendant nos. 3 and 4 were restrained from creating third party interest during the pendency of the probate petition, transfer of the suit property to the appellants/defendant nos. 1 and 2 during the pendency of the probate petition and continuation of the interim order is illegal. Though various decisions have been referred to by the trial Court in its detailed judgment, I need to only refer to the celebrated decision of the Supreme Court in the case of ***Delhi Development Authority Vs. Skipper Construction Co. (P) Ltd. (1996) 4 SCC 622*** and which has also been followed in a recent judgment of the Supreme Court in the case of ***Ghanshyam Sarda Vs. Shashikant Jha, Director M/s J.K. Jute Mills Company Limited and Others (2017) 1 SCC 599*** holding that any transfer of a suit property in violation of the

injunction order should be treated as void. Once the admitted position is that the suit property was purchased by the appellants/defendant nos. 1 and 2 from the respondent nos. 2 and 3/defendant nos. 3 and 4 during the continuation of interim order, the transfer in favour of the appellants/defendant nos. 1 and 2 was legally invalid.

5. Trial court has further held the purchase of the suit property by the appellants/defendant nos. 1 and 2 as being hit by the doctrine of *lis pendens* contained in Section 52 of the Transfer of Property Act. However, in my opinion, possibly this may not be the correct view in view of the language of Section 52 of the Transfer of Property Act which specifies that the bindingness and the prohibition of Section 52 of the Transfer of Property Act is only if any suit or proceeding is pending where a right to immovable property is directly and specifically in question. In a probate petition the question will be of existence or otherwise of a Will, and it cannot be said that in a probate petition right to an immovable property would be directly and specifically in question. Of course, I need not finally observe on this aspect in one way or the other, inasmuch as, this first appeal can be

disposed of on another admitted factual and legal position as stated below.

6. The factual and legal position is that admittedly the probate petition filed by the respondent no. 1/plaintiff bearing no. 35/2006 was allowed and judgment dated 31.5.2012 passed which has been exhibited as Ex.PW1/4 by the trial court. Once, a probate petition is allowed and a Will is probated, judgment in such a case operates not only between the parties to the probate petition but against all other persons as the judgment of a probate court is a judgment in *rem* in view of Section 41 of the Indian Evidence Act, 1872. Section 41 of the Evidence Act reads as under:-

“41. Relevancy of certain judgments in probate, etc., jurisdiction.—A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial admiralty or insolvency jurisdiction which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant. Such judgment, order or decree is conclusive proof—

That any legal character, which it confers accrued at the time when such judgment, order or decree came into operation;

That any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person.

That any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease; order or decree declared that it had ceased or should cease;" and that anything to which it declares any person to be so entitled

was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property, order or decree declares that it had been or should be his property.”

7. In my opinion, therefore, *de hors* the issue with respect to the suit property being transferred to the appellants/defendant nos. 1 and 2 by the respondent nos. 2 and 3/defendant nos. 3 and 4 in violation of the *status quo* order dated 2.4.2008 and the transfer being allegedly hit by Section 52 of the Transfer of Property Act, the suit had in any case to be decreed in view of the allowing of the probate petition in terms of the judgment Ex.PW1/4 whereby the respondent no.1/plaintiff became the sole owner as per the registered Will dated 28.4.2005 of late Sh. Chander Pal. Once probate is granted in favour of the respondent no. 1/plaintiff, accordingly, then it will be the respondent no. 1/plaintiff who would be the sole owner and not any other legal heir, including the respondent nos. 2 to 4/defendant nos. 3 to 5. Accordingly, once the respondent no. 1/plaintiff was the owner of the suit property in terms of the probate petition, there could not have been transfer of the suit property by the other legal heirs of the deceased Sh. Chander Pal (being the respondent nos. 2 and 3/defendant nos. 3 and 4) in favour of appellants/defendant nos. 1 and

2 as no other legal heirs including the respondent nos. 2 to 4/defendant nos. 3 to 5 had any title to the suit property. Once the appellants/defendant nos. 1 and 2 cannot be the owners of the property hence the sale deeds executed in their favour by the other legal heirs of late Sh. Chander Pal were liable to be declared void and hence cancelled and therefore rightly declared to be void by the impugned judgment and its cancellation directed. Accordingly, the suit for possession has also rightly being decreed in favor of the respondent no. 1/plaintiff who was the owner of the suit property, and which was originally owned by Sh. Chander Pal who had executed the probated Will dated 28.4.2005 in favour of the respondent no. 1/plaintiff.

8. I may note that this Court is entitled to give additional reasons to sustain the judgment of the trial court in view of the provision of Order XLI Rule 24 CPC and which provides that a matter has not to be remanded once the record of the trial court is complete and the appellate court has to decide in terms of the record of the trial court and which includes giving of any additional or different reasoning for sustaining the judgment of the trial court.

9. Learned counsel for the appellants/defendant nos. 1 and 2 argued that the rate of *mesne* profits granted at Rs.10,000/- per month is excessive, however, I cannot agree, inasmuch as, the suit property is a property of 100 sq. yards in New Delhi, and when even a hutments cost Rs.3,000/- per month as rent in Delhi then there is no reason why rate of *mesne* profits of Rs.10,000/- per month of a 100 sq. yards in New Delhi can be argued to be in any manner excessive. In fact, the appellants have already had a benefit because no interest has been awarded on *mesne* profits as payable to the respondent no. 1/plaintiff, and thus I need not interfere with the *mesne* profits awarded.

10. In view of the aforesaid position, I do not find any merit in the appeal. Dismissed.

JULY 21, 2017

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VALMIKI J. MEHTA, J