

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

+ **RFA No.713/2018**

% **29TH AUGUST, 2018**

SUNITA ARORA & ORS.

..... Appellants

Through: Mr. Vivek Aggarwal, Advocate
(M. No.9811770164).

versus

SHASHI BALA

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

C.M. Nos.34779-80/2018(exemption)

1. Exemption allowed subject to just exceptions.

C.M.s stand disposed of.

C.M. No.34781/2018 (for condonation of delay)

2. For the reasons stated in the application, delay of 120 days in re-filing the appeal is condoned.

C.M. stands disposed of.

+RFA No.713/2018 and C.M. No.34778/2018(stay)

3. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff in the suit (along with the defendants who supported the appellant no.1/plaintiff) whereby trial court has only partially decreed the suit for partition filed by the appellant no.1/plaintiff. Suit for partition was filed by the appellant no.1/plaintiff for the first floor, second floor and terrace on the second floor of property bearing no.281, Hauz Rani, Malviya Nagar, New Delhi. Suit has been decreed only with respect to the first floor of the property, and the same has been dismissed qua the relief seeking partition of the second floor and terrace over the second floor, on the ground that the said portions of the property stood transferred by the original owner/Smt. Sudarshan Kumari/mother to the defendant no.1/daughter, and which defendant no.1 is the sole respondent in the present appeal.

4. The facts of the case are that the appellant no.1/plaintiff pleaded that the entire property bearing no.281, Hauz Rani, Malviya Nagar, New Delhi belonged to the mother Smt. Sudarshan Kumari. Smt. Sudarshan Kumari entered into a Collaboration Agreement with

builder whereby the builder was given the basement and ground floor of the property and Smt. Sudarshan Kumari was to become owner of the first floor and second floor with roof rights of the suit property along with proportionate rights in the land. Smt. Sudarshan Kumari died *intestate* on 3.10.1998 leaving behind her legal heirs, who were the parties to the suit. As per the plaint, during the lifetime of Smt. Sudarshan Kumari, she realized that the defendant no.1 (daughter of Smt. Sudarshan Kumari) in collusion and conspiracy with her husband had got executed in her favour two registered documents dated 7.2.1996 being the General Power of Attorney and a Will with respect to the second floor and terrace rights over the second floor as the subject property, and that since these documents were obtained by practicing fraud upon Smt. Sudarshan Kumari, she hence revoked both the documents in terms of Deeds of Revocation dated 3.12.1996 which were got registered before the concerned Sub-Registrar. Accordingly, the appellant no.1/plaintiff pleaded that the suit for partition be decreed giving each of the seven legal heirs of Smt. Sudarshan Kumari being the parties to the suit $1/7^{\text{th}}$ share in the suit property.

5. This suit was contested by the respondent/defendant no.1. It was pleaded by the respondent/defendant no.1 that the mother had executed in her favour various documents being the Agreement to Sell (Ex.PW1/A5), Receipt (Ex.PW1/7), Affidavit (Ex.PW1/6), General Power of Attorney (Ex.PW1/D1) and Will (Ex.PW1/D2) all dated 7.2.1996, on receipt of consideration of Rs.1,10,000/- by the mother ,and whereby the second floor and terrace rights on the second floor were transferred to the respondent/defendant no.1. As already stated above, out of the aforesaid documents dated 7.2.1996, the General Power of Attorney (Ex.PW1/D1) and the Will (Ex.PW1/D2) were registered before the concerned Sub-Registrar. Therefore suit was prayed to be dismissed so far as the second floor and roof rights on the second floor were concerned, and grant of partition was not opposed with respect to the first floor portion, and for which first floor portion a preliminary decree for partition has been passed in terms of the impugned judgment.

6. After pleadings were complete, trial court framed the following issues:-

“1. Whether the deceased Smt. Sudarshan Kumari sold the second floor with terrace rights of property 281, Hauz Rani, Malviya Nagar, New Delhi, to the defendant no.1? OPD-1

2. Whether the documents of sale were got executed fraudulently by defendant no.1 fraudulently and by practicing deceit and if so, to what effect? OPP

3. Whether the documents of revocation of power of attorney and the will were got executed by the plaintiff from the deceased Smt. Sudarshan Kumari fraudulently and by practicing deceit and to what effect, if any? OPD-1

4. Whether the defendant no.1 has acquired any title to any portion of the property under the document claimed by her? OPP.

5. Relief.”

7. Trial court has believed the case of the respondent/defendant no.1 in view of various documents which were proved by her, including the registered documents being the Power of Attorney and the Will dated 7.2.1996, and therefore held the respondent/defendant to be the owner of the second floor and roof rights over the second floor of the subject property. Trial court has also referred to the fact that part of consideration of Rs.30,000/- out of total sale consideration of Rs.1,10,000/- was paid to the mother respondent Smt. Sudarshan Kumari by means of cheque of respondent /defendant no.1/Smt. Shashi Bala bearing no.593270 dated 7.2.1996 drawn on State Bank of India, and that the respondent/defendant no.1

had taken steps to summon the witness from the Bank with the relevant record of the cheque, however this witness DW-2 Sh. Anil Kumar deposed that the relevant record is not available with the Bank as the cheque and voucher are beyond the 10 years period for which records are maintained by the bank. Trial court has also referred to the fact of the electricity connection installation details being in the name of the respondent/defendant no.1, along with electricity bills as Ex.DW3/2 and Ex.DW3/3. Trial court has also referred to the fact that respondent/defendant no.1 has examined Sh. Ashok Kumar as DW-4 who is the attesting witness to the documents and who identified the signatures of Smt. Sudarshan Kumari on Ex.PW1/D5 and Ex.PW1/7 and the cash payment received on 7.2.1996 by Smt. Sudarshan Kumari as mentioned in the Agreement to sell. It is also to be noted that appellant no.1/plaintiff in her cross-examination admitted that the General Power of Attorney and the Will dated 7.2.1996 bear the signatures of the mother as also the mother's thumb impressions, and which were exhibited as Ex.PW1/D3 and Ex.PW1/D4. Trial court has also rejected the argument urged on behalf of the appellant no.1/plaintiff that the documents being the

Agreement to Sell (Ex.PW1/D5), Affidavit (Ex.PW1/D6) and Receipt (Ex.PW1/D7) could not be believed simply because they were only notarized.

8(i). In my opinion, the judgment of the trial court cannot be faulted with because two of the documents executed by the mother Smt. Sudarshan Kumari in favour of the respondent/defendant no.1 are registered documents being a General Power of Attorney and a Will, i.e the documents dated 7.2.1996 transferring rights in the second floor and roof rights over the second floor to respondent/defendant no.1 were duly executed. The case of the appellant no.1/plaintiff that the documents dated 7.2.1996 were cancelled by Deeds of Revocation dated 3.12.1996 (Ex.PW1/1 and Ex.PW1/2), and therefore, the documents dated 7.2.1996 are of no effect has to be rejected because contractual documents cannot be cancelled unilaterally. This is because by a contract when rights are created in favour of one of the parties to the contract, such rights ordinarily become final and cannot be unilaterally cancelled. Obviously a contract which is a bilateral contract cannot be cancelled unilaterally otherwise there would be complete chaos inasmuch as otherwise no contractual documents

including a sale deed would be safe. I have held so in various cases including the case of *Vimla Devi Vs. Pushpa Devi and Ors.* 241 (2017) DLT 568. The relevant para of the judgment in the case of *Vimla Devi (supra)* is para 7 and this para 7 reads as under:-

“7. In my opinion, the courts below have rightly held that the cancellation of the documents dated 11.2.1998 by the appellant/plaintiff by the documentation dated 6.4.1998 is of no legal effect. It is required to be noted that transfer of rights in an immovable property is by a contract i.e the same is a bilateral act, and such bilateral contract cannot be cancelled unilaterally i.e by unilateral cancellation of documents by which rights in immovable property are transferred by the transferor to the transferee. The courts below have also rightly placed reliance upon the Section 202 of the Indian Contract Act as also the judgment delivered by this Court in the case of *Shri Ramesh Chand Vs. Suresh Chand and Anr., 188 (2012) DLT 538* and which holds that documents which are in accordance with the amended Section 53A of the Transfer of Property Act, 1882 and executed prior to 24.9.2001 when by Act 48 of 2001 Section 53A of the Transfer of Property Act was amended to require compulsory stamping and registration of an agreement to sell, then such documents prior to 24.9.2001 are valid documents because the amendment to Section 53A of the Transfer of Property Act is prospective in nature. Also, this aspect is clearly stated by the Supreme Court in the judgment in the case of *Suraj Lamps and Industries Pvt. Ltd. Vs. State of Haryana and Anr., 183 (2011) DLT 1 (SC)* wherein the Supreme Court has held that those agreements to sell, power of attorneys and Wills, which are in accordance with Section 53A of the Transfer of Property Act, Section 202 of the Indian Contract Act and the relevant provisions of the Indian Succession Act, the same will continue to be valid i.e documents executed prior to 24.9.2001 being in accordance with the then existing Section 53A of the Transfer of Property Act which did not require stamping and registration of the agreement to sell would be valid documents. The courts below, in my opinion, have also rightly held that the fact that possession was given to the respondent no.1/defendant no. 1 by the appellant/plaintiff in terms of the documents dated 11.2.1998 shows that the appellant/plaintiff had

received the entire sale consideration. I also adopt the other reasoning as given by the courts below showing that complete sale consideration has been duly received by the appellant/plaintiff.”

(ii). I therefore reject the argument urged on behalf of the appellant no.1/plaintiff that the documents dated 7.2.1996 are of no effect as they were cancelled in terms of the Deeds of Revocation of General Power of Attorney and the Will dated 3.12.1996 proved as Ex.PW1/1 and Ex.PW1/2.

9. I would at this stage like to note that similar to the facts of the case of *Vimla Devi (supra)* in the present case also since the documents executed in favour of the respondent/defendant no.1 are dated 7.2.1996 i.e prior to the amendment of provision of Section 53-A of the Transfer of Property Act, 1882 and the related provisions of the Registration Act, 1908 and the Stamp Act, 1899 by Act 48 of 2001 w.e.f 24.9.2001, the respondent/defendant no.1 will have rights under such documents. This aspect has been considered by this Court in detail and held that such documents confer rights in an immovable property in terms of Section 53-A of the Transfer of Property Act read with Section 202 of the Indian Contract Act, 1872 in view of the

judgment in the case of *Shri Ramesh Chand Vs. Suresh Chand and Anr.*, 188 (2012) DLT 538.

10. Learned counsel for the appellants firstly sought to argue on the basis of the Deeds of Revocation Ex.PW1/1 and Ex.PW1/2, but this argument has no merits, and as already discussed above.

11. Learned counsel for the appellants then sought to argue that respondent/defendant no.1 failed to prove that any consideration has passed because the bank employee who was summoned as DW-2 did not prove the relevant record of the cheque of payment of Rs.30,000/- out of Rs.1,10,000/-, however in my opinion the fact that the respondent/defendant no.1 did make an effort to prove on record the factum with respect to part consideration amount being paid by cheque to the mother Smt. Sudarshan Kumari who executed in favour of respondent/defendant no.1 the documents dated 7.2.1996, is enough in the facts of the case, because respondent/defendant cannot be blamed when the suit has been filed more than 10 years after execution of the documents dated 7.2.1996 in favour of respondent/defendant no.1. Though *stricto sensu* the provisions of the Limitation Act, 1963 will not apply, however it is noted that one of the

objects of the Limitation Act is that on account of passage of a long period of time evidence gets destroyed and therefore limitation period is prescribed with respect to suits, and the substance of this principle will apply in the facts of the present case in favour of the respondent/defendant no.1. I therefore believe the case of the respondent/defendant no.1 that in terms of the documentation dated 7.2.1996, the mother Smt. Sudarshan Kumari received a total sum of Rs.1,10,000/- as stated in the Agreement to Sell, with amount of Rs.30,000/- being received by cheque and balance amount in cash. Also there is a flavor of truth in the case set up by the respondent/defendant no.1 because out of all the documents dated 7.2.1996, two documents being the Power of Attorney and the Will are registered documents and registration thus clearly shows that such documents did come into existence on 7.2.1996. In fact the cheque for the amount of Rs.30,000/- is also dated 7.2.1996 and which is given by the specific number, date and the drawee bank in the Agreement to Sell itself. Therefore it is held that by the documentation dated 7.2.1996, the mother Smt. Sudarshan Kumari on receiving

consideration of Rs.1.10 lacs, transferred rights in the second floor and roof rights over the second floor to the defendant no.1/respondent.

12. In view of the above, I do not find any merit in the appeal. Dismissed.

AUGUST 29, 2018
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VALMIKI J. MEHTA, J

