

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

+ **RFA No.553/2018**

% **20th July, 2018**

LOKESH BHARTI Appellant

Through: Mr. Madan Lal Sharma, Advocate.

versus

HARISH CHANDER (DECEASED) THROUGH HIS LRS & 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. 28388/2018 (for exemption)

1. Exemption allowed, subject to just exceptions.

C.M. stands disposed of.

RFA No.553/2018 and C.M. Appl. Nos. 28195/2018 (for stay) & 28196/2018 (for additional evidence)

2. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant no. 2 in the suit impugning the judgment of the Trial Court dated 27.3.2018 by which the trial court has decreed the suit for possession, injunction and

mesne profits filed by the respondent Nos.1 to 4 against the appellant/defendant no. 2 and respondent no. 5/defendant no.1. The suit property is one bearing no. 166-B, part of Khasra No. 24/25, 100 sq. yards, Village Ranhola, now known as Rishal Garden, Najafgarh, Nangloi Road, New Delhi.

3. Original plaintiff in the suit Sh. Harish Chander (since expired and his now represented by respondents no.1 to 4 as his legal heirs), was the father-in-law of the respondent no.5/defendant no. 1 in the suit. Appellant/Defendant no. 2 in the suit is the brother of respondent no.5/defendant no. 1. By the suit the plaintiff claimed ownership of the suit property and set up a cause of action that in term of the documents executed by plaintiff in favour of defendant no.1, being the General Power of Attorney, Will, Gift Deed and Possession Letter dated 23.10.2002, the plaintiff did not transfer the suit property to the respondent no.5/defendant no. 1. Appellant /Defendant no. 2 in the suit being the brother of respondent no.5/defendant no. 1 was originally not a party to the suit but was added on his application as the defendant no.2 in the suit because the appellant/defendant no. 2 pleaded that by the documentation dated

24.6.2009 (being the Agreement to Sell, General Power of Attorney, Will, Possession Letter, etc.), rights in the suit property were transferred by respondent no. 5/defendant no.1 to appellant/defendant no. 2.

4. The facts of the case are that admittedly the original plaintiff Sh. Harish Chander was the owner of the suit property. The daughter of the plaintiff Smt. Rekha @ Radhika was married to the respondent no. 5/defendant no.1 on 17.2.2002. Earlier there was a *roka* ceremony of the daughter of the plaintiff with respondent no. 5/defendant no. 1 on 7.4.2001. Since the respondent no.5/defendant no. 1 at the time of matrimony was living in a very small accommodation on a plot of 25 sq. yards, the plaintiff for residence of respondent no.5/defendant no.1 and his family purchased the suit plot from the erstwhile owner one Sh. Jaiveer Singh on 3.7.2001 by means of usual documentation being the Agreement to Sell, Affidavit, Possession Letter, etc. As per the plaint the suit property was thereafter constructed by the plaintiff and for which he had used the help of respondent no. 5/defendant no. 1. Plaintiff pleaded that he had paid an amount of Rs.1,10,000/- to the respondent no. 5/defendant no. 1 by

means of cheques for construction and also in addition a sum of Rs.85,000/- in cash. The further case in the plaint was that since respondent no. 5/defendant no. 1 pressurized the plaintiff, therefore to keep peace in the family and his own daughter happy, with respect to the suit property, the plaintiff executed the General Power of Attorney, Will, Possession Letter and Gift Deed on 23.10.2002 in favour of the respondent no.1/defendant no. 1. The matrimonial relationship between the plaintiff's daughter and the respondent no. 5/ defendant no. 1 did not work out and a consent decree of divorce was obtained from the concerned Court 6.10.2007. The plaintiff cancelled the General Power of Attorney and Will dated 23.10.2002 vide Cancellation Deed dated 9.6.2009. Hence the subject suit was filed seeking possession and *mesne* profits qua the suit property.

5. Respondent no.5/Defendant no. 1 contested the suit and pleaded that he had purchased the suit property from the plaintiff by means of the subject documentation dated 23.10.2002 by paying a sum of Rs.7,00,000/-. It was also pleaded that the plaintiff and the respondent no.5/defendant no. 1 had entered into a Rent Agreement on 15.3.2002. Suit was therefore prayed to be dismissed. In the written

statement of appellant/defendant no. 2, besides supporting respondent no.5/defendant no. 1, it was pleaded that the appellant/defendant no. 2 had purchased the suit property in terms of documentation dated 16.4.2009/24.6.2009.

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

- “1. Whether the plaintiff is entitled for the decree of possession of the suit property? OPP.
2. Whether the plaintiff is entitled to damages as prayed for? OPP.
3. Whether the plaintiff is entitled for permanent and mandatory injunction as prayed for?OPP.
4. Whether the plaintiff is the owner of the suit property? OPP.
5. Relief.”

6. Evidence was thereafter led by the parties and these aspects are recorded in paragraphs 19-26 of the impugned judgment and these paragraphs read as under:-

“PLAINTIFF'S EVIDENCE:-

19. Plaintiff has examined 4 witnesses in his evidence. Initially, the plaintiff filed his affidavit in evidence, who was also examined in chief but due to his death, he was not subject to cross examination, therefore, his evidence cannot be read.

20. After the death of plaintiff, his son Gunjan Kumar examined himself as PW-1. PW-2 Danveer Sharma, UDC from the office of Sub Registrar, PW-3 Mukesh Kumar, Clerk from Punjab National Bank, Branch West

Patel Nagar, New Delhi and PW-4 Rajesh Kumar, Clerk from Corporation Bank.

21. PW-1 Gunjan Kumar has filed his affidavit in evidence in which he has reiterated and reaffirmed the same facts as stated in the plaint. He has relied upon the following documents:-

- (a) Mark A, B and C - GPA, Agreement to sell and receipt, respectively, in favour of plaintiff (since deceased) all dated 13.07.2001;
- (b) Mark D - GPA dated 23.10.2002 in favour of defendant no.1 executed by plaintiff;
- (c) PW1/2 and PW1/3 - cancellation deed dated 09.06.2009 and WILL, respectively;
- (d) PW1/4 - certified copy of divorce petition of plaintiff's daughter;
- (e) Ex.PW1/5 - statements of both the parties recorded in divorce petition;
- (f) PW1/6 - decree sheet u/s 13 B(2) of HMA;
- (g) PW1/7 - notice dated 9.6.2009, sent by plaintiff to defendant;
- (h) Ex.PW1/8 - proof of service of the notice;
- (i) Ex.PW1/9 - publication in the newspaper dated 19.6.2009;
- (j) PW1/10 - notice dated 4.7.2009 sent to defendant no.1;
- (k) Ex.PW1/11 - proof of said notice;
- (l) Ex.PW1/12 - site plan of the suit property;
- (m) Ex.PW1/13 - marriage card of plaintiff's daughter and defendant no.1.

22. While tendering the affidavit by PW-1, certain objections were raised by defendants counsel, therefore, the documents Ex.PW1/3 and Ex.PW1/2 were given mark PX3 and PX2. Similarly, Ex.PW1/12 was given mark as PX12. PW1/10 was also given mark as PX10 and PW1/11 was marked as PX11.

23. PW-2 has proved the summoned record i.e. cancellation deed dated 09.06.2009 of GPA and WILL.

24. PW-3 had proved the statement of account of plaintiff for the period 1.1.2001 to 31.12.2002.

25. PW-4 is Rajesh Kumar from Cooperation Bank. He has proved the summoned record i.e. statement of account of defendant no.1 for the period 1.10.2007 to 30.11.2007.

DEFENDANTS' EVIDENCE:-

26. Defendant no.1 has examined only himself in his evidence. He has filed his affidavit in evidence in which he has reiterated and reaffirmed the same facts as stated by him in the written statement. He has relied upon the following documents:-

- (a) Ex.D1W1/A - Deed of gift dated 23.10.2002
- (b) Ex.D1W1/B - Deed of WILL dated 23.10.2002
- (c) Ex.D1W1/C - Possession letter
- (d) Ex. D1W1/C-1 - affidavit dated 23.10.2002
- (e) Ex. D1W1/D - agreement to sell and purchase dated 16.04.2009.
- (f) Ex.D1W1/E - Receipt dated 16.04.2009
- (g) Ex.D1W1/F - GPA dated 24.06.2009
- (h) Ex.D1W1/G - agreement to sell dated 24.6.2009
- (i) Ex.D1W1/H - affidavit dated 24.6.2009
- (j) Ex.D1W1/I - receipt dated 24.6.2009
- (k) Ex.D1W1/J - possession letter dated 24.6.2009
- (l) Ex.D1W1/K - WILL dated 24.6.2009
- (m) Ex.D1W1/L - rent agreement dated 15.03.2002, which was de-exhibited and marked as mark X.”

7. To the extent that the trial court had held that the alleged Gift Deed dated 23.10.2002 said to have been executed by the erstwhile plaintiff in favour of defendant no. 1 is not a legally valid document as neither the Gift Deed is registered and nor is the same

witnessed as required by law, and therefore the requirements of a valid Gift Deed specified under Section 123 of the Transfer of Property Act, 1882 were not satisfied, counsel for the appellant/defendant no.2 could not and did not raise any argument. The finding of the trial court in this regard in any case being factually and legally correct, since the gift deed is neither registered nor witnessed as required under Section 123 of the Transfer of Property Act, the Gift Deed dated 23.10.2002 could not have transferred the ownership rights in the suit property to the respondent no. 5/defendant no.1.

8(i). The only issue now to be examined is as to whether the General Power of Attorney and the Will dated 23.10.2002 executed by the erstwhile plaintiff in favour of the respondent no.5/defendant no.1 transferred rights in the suit property. In this regard, learned counsel for the appellant/defendant no.2 argued by placing reliance upon the clause of the General Power of Attorney dated 23.10.2002 as per which General Power of Attorney is irrevocable, and accordingly it is argued that the respondent no.5/defendant no.1 got ownership rights in the suit property by virtue of this General Power of Attorney.

8(ii). I cannot agree with the argument urged on behalf of the appellant that the General Power of Attorney dated 23.10.2002 is irrevocable inasmuch as every Power of Attorney is revocable unless the Power of Attorney is given for consideration. This is so specified in Section 202 of the Indian Contract Act, 1872. Neither in the subject power of attorney there is any mention of payment of consideration by the respondent no.5/ defendant no. 1 to the erstwhile plaintiff, and nor has this passing of alleged consideration has been proved by the defendants in the suit and as against the plaintiffs. At the cost of repetition, no amount of moneys have been proved to have been transferred by the respondent no.5/defendant no. 1 to the erstwhile plaintiff under the documentation dated 23.10.2002. Therefore once there is no consideration which passed under the General Power of Attorney dated 23.10.2002, therefore the General Power of Attorney cannot be irrevocable merely because it is so mentioned in the General Power of Attorney inasmuch as a power of attorney as per Section 202 of the Indian Contract Act only becomes irrevocable if it is executed for consideration which passes. The General Power of Attorney was therefore validly cancelled by the

plaintiff in terms of the Cancellation Deed dated 9.6.2009/Ex.PW1/2 as the General Power of Attorney was irrevocable but revocable.

9. So far as the Will is concerned, admittedly the Will has been revoked by the Cancellation Deed dated 9.6.2009/Ex.PW1/2 during the lifetime of the original plaintiff, and since a Will can always be revoked by the executant before his death, therefore, the respondent no.5/ defendant no. 1 in the suit could not have claimed ownership rights in the suit property in terms of the Will dated 23.10.2002.

10. I may note that the documentation executed in favour of the erstwhile plaintiff by the original owner Sh. Jaiveer Singh are dated 3.7.2001, i.e prior to the amending of Section 53A of Transfer of Property Act w.e.f 24.9.2001 by Act 48 of 2001, and therefore such documentation did confer rights in the nature of ownership rights, though not strictly an owner, to the plaintiff in the suit. The documentation however executed by the erstwhile plaintiff in favour of the respondent no.5/defendant no.1 are subsequent to the amendment of Transfer of Property Act and the related provisions of Stamp Act, 1899 and Registration Act, 1908 by Act 48 of 2001, and

therefore the unregistered documentation dated 23.10.2002 said to have been executed by the erstwhile plaintiff in favour of the respondent no.5/defendant no.1 were in any case beyond the sanction of law. Since respondent no.5/defendant no.1 was not the owner, hence the respondent no.5/defendant no.1 could not have validly transferred any rights in the suit property to the appellant /defendant no.2, and in any case the documents in favour of the appellant/defendant no.2 again being of the year 2009 i.e. post the Act 48 of 2001, and these documents are unregistered documents, these documents in themselves also, without anything further, did not create any rights in the suit property in favour of the appellant/defendant no.2.

11. Learned counsel for the appellant/defendant no.2 argued that trial court has wrongly awarded a very high rate of *mesne* profits against the defendants in the suit, being the appellant and the respondent no.5, and which argument *prima facie* seemed to have merit, however, in the peculiar facts of this case, and once trial court has taken judicial notice of the increase of rent and thus of *mesne* profits, in the facts of the present case, I would not like to interfere

with the findings with respect to the *mesne* profits given under issue no.2 at paragraph 41 of the impugned judgment.

12. In view of the above, I do not find any merit in the appeal and the same is hereby dismissed.

JULY 20, 2018

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VALMIKI J. MEHTA, J

