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

\+ **RFA No. 1027/2018**

% ***19th December, 2018***

SIMMI BHALLA

..... Appellant

Through: Mr. Ashok Bhalla, Advocate with Mr. Rajeev Kumar, Advocate.

versus

GAUTAM JOHAR AND ORS.

.....Respondents

Through:

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. No. 53698/2018 (exemption)

1. Exemption allowed subject to just exceptions.

C.M. stands disposed of.

RFA No. 1027/2018 and C.M. No. 53697/2018 (stay)

2. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff in the suit

impugning the Judgment of the trial court dated 28.09.2018 by which the trial court has dismissed the suit for injunction, *mesne* profits etc. filed by the appellant/plaintiff. In the suit there were a total of four defendants. Respondent no.1/Defendant no.1 was the brother of the appellant/plaintiff. Respondent nos. 2 and 3/Defendant nos. 2 and 3 are the sisters of the appellant/plaintiff i.e. appellant/plaintiff and defendant nos.1 to 3 are brother and sisters. Defendant no. 4 in the suit was the purchaser of the suit property from defendant no. 1. The suit property is an LIG flat bearing no. BB-35C, Shalimar Bagh (West), Delhi. Respondent no. 5/Defendant no.5/Mr. Saleem Raj Usmani was deleted from the array of defendants in terms of the Order of the trial court dated 03.06.2008. Therefore, there remained only four defendants in the suit as stated above.

3. The facts of the case are that it was pleaded by the appellant/plaintiff that the suit property was purchased by her father for an amount of Rs. 4,38,000/- and the Power of Attorney dated 07.04.1994 was accordingly executed by the seller Ms. Abha Mathur in favour of the father of the appellant/plaintiff, namely Late Mr. Bal Kishan Johar. It was pleaded that the father Late Mr. Bal Kishan

Johar died intestate, and therefore, the suit property will be co-owned to the extent of 1/4th share each by the appellant/plaintiff and respondent no. 1-3/defendant nos. 1-3. Hence, the suit seeking partition etc. was filed.

4. Respondent no. 1/Defendant no.1 appeared in the suit, but after filing the written statement, he withdrew the same, as recorded in the Order of the trial court dated 21.05.2015. Respondent nos.2 and 3/defendant nos.2 and 3 were also proceeded ex-parte in the suit vide Order of the trial court dated 23.10.2010. The suit was mainly contested by the respondent no.4/defendant no.4 pleading that the suit property was not owned by the father/ Late Mr. Bal Kishan Johar of the appellant/plaintiff and the respondent no. 1-3/defendant nos. 1-3, but the suit property was exclusively owned by the respondent no. 1/defendant no.1 in terms of the Documentation dated 07.04.1994 executed by the erstwhile owner Ms. Abha Mathur in favour of the respondent no.1/defendant no.1. This documentation included Agreement to Sell, Power of Attorney, Will, Affidavit etc. It was pleaded that the respondent no. 1/defendant no.1 had transferred the suit property to respondent no. 4/defendant no.4 in terms of the

Agreement to Sell dated 08.05.2007 under which a consideration of Rs. 2,00,000/- was paid to the respondent no.1/defendant no.1 by the respondent no.4/defendant no.4 and who had received the actual, physical, vacant possession of the suit property. The registered GPA was also executed by the respondent no.1/defendant no.1 in favour of the respondent no.4/defendant no.4 on the same date i.e. 08.05.2007. The suit was therefore prayed to be dismissed.

5. After the completion of pleadings, the trial court framed the following issues:

> ***"1. Whether suit of plaintiff is bad for non-joinder and mis-joinder of necessary parties? OPD***
>
> ***2. Whether plaintiff has suppressed material facts or has not come with clean hands and is not entitled for relief as prayed for? OPD***
>
> ***3. Whether plaintiff is entitled for decree of declaration, partition, permanent and mandatory injunction, mesne-profits and damages as prayed for? OPP***
>
> ***4. Relief.***
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> **<u>Additional issues</u>**
>
> ***1. Whether agreement–to-sell dated 08-05-2007 entered between defendant no.1 and 4 is null, void and of no legal consequences? OPP***
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> ***2. Whether General Power of Attorney executed by defendant no.1 in faovur of defendant no.4 which was registered in the office of Sub-Registrar, District North-West is illegal, null, void and are of no legal consequences? OPP***

3. Whether plaintiff has pre-imptive right of purchase the share of defendant no.1, if same was intending to sell his share in favour of defendant no.4? OPP"

6. The trial court has dismissed the suit by disbelieving the case of the appellant/plaintiff that the suit property was purchased by the father of the appellant/plaintiff and respondent no. 1-3/defendant nos.1-3. The trial court has held that respondent no. 4/defendant no. 4 has succeeded in proving that the suit property was transferred to and owned by the respondent no. 1/defendant no.1 only in terms of the documentation being agreement to sell, receipt, indemnity bond etc., and which were proved before the trial court as Ex.D4W-1/6 to Ex.D4W-1/9 and these original title deeds were in possession of the respondent no. 4/defendant no. 4. Further, the trial court has held that the power of attorney of the same date proved as Ex.PW1/4 in favour of the father Late Mr. Bal Kishan Johar would not confer any rights in the suit property in favour of Sh. Balkishan Johar as the power of attorney is not executed for consideration, inasmuch as the consideration under the transaction dated 07.04.1997 was paid by the respondent no. 1/defendant no.1 to the seller. I may note that it is only if a power of attorney is executed for consideration, the same gives

right to an immovable property as per Section 202 of the Contract Act, 1872. The relevant para of the trial court judgment discussing these aspects is para 34 and this para 34 reads as under:-

> "34. In the case in hand, it has not been proved on behalf of the plaintiff that the original title documents of the suit property were found to be in possession of late Shri Balkishan Johar in whose favour, the power of attorney Ex.PW-1/4 was allegedly executed by Smt. Abha Mathur. Moreover Shri H.S. Mathur, father of Smt. Abha Mathur, had executed agreement –to-sale and purchase Ex.D4W-1/6, receipt Ex.D4W-1/7, Will Ex.D4W-1/8, indemnity bond Ex.D4W-1/9 in favour of the defendant no.1 on the same day i.e. 07-04-1994, Smt. Abha Mathur, daughter of Shri H.S. Mathur had allegedly executed GPA Ex.PW-1/4 in favour of late Shri Balkishan Johar. As per agreement-to-sale Ex.D4W-1/6, the sale consideration of the suit property was paid by the defendant no.1 to Shri H.S. Mathur by way of pay orders bearing nos. 494130 and 494129 for a sum of ₹45,000/- each. Therefore, it can not be held that the GPA was executed by Smt. Abha Mathur for consideration. It is not the case of the plaintiff that Will was also executed by Smt. Abha Mathur in favour of late Shri Balkishan Johar. The original title documents such as agreement-to-sale, receipt, registered Will all executed by Shri Adarsh Kalia on 02-05-1984 in favour of Shri H.S. Mathur and agreement-to-sale, receipt, registered Will, indemnity bond all executed by Shri H.S. Mathur on 07-04-1994 in favour of Shri Gautam Johar, defendant no.1 are in possession of defendant no.4. Therefore, plaintiff can not take advantage of the law laid-down in case-law ***Raj Kumar Singh & anr. Vs Jagjit Chawla & ors. (supra)*** because the facts of the case in hand are different from the facts of the said case." 2
>
> (Underlining Added)

7. I would also like to state that the subject Documentation dated 07.04.1994 has been executed prior to the amendment of Section 53A of the Transfer of Property Act, 1882 w.e.f. 24.09.2001 by Act 48 of 2001 whereby the agreement to sell executed after 24.09.2001

could only be looked into if the agreement to sell was stamped as per 90% of the sale consideration and also got registered. The judgment in the case of ***Suraj Lamps & Industries (P.) Ltd. v. State of Haryana and Anr., (2012) 1 SCC 656*** does not in any manner cancel documentation executed prior to 24.09.2001 on the ground that they are unstamped and unregistered because such documents are protected as per the observations made by the Hon'ble Supreme Court in the case of ***Suraj Lamps & Industries (supra)*** itself. I have dealt with this aspect in the judgment in the case of ***Ramesh Chand v. Suresh Chand and Anr., (2012) 188 DLT 538,*** and the relevant paras of the judgment in the case of ***Ramesh Chand (supra)*** are paras 1 to 3 which read as under:

> "1. This Regular First Appeal was dismissed by a detailed judgment on 28.2.2011. A Special Leave Petition was filed in the Supreme Court against the judgment dated 28.2.2011 and the Supreme Court has remanded the matter back for a fresh decision by its order dated 31.10.2011. The order of the Supreme Court dated 31.10.2011 is based on the issue of the Supreme Court passing the judgment in the case of ***Suraj Lamps & Industries Pvt. Ltd. Vs. State of Haryana and Anr. 183 (2011) DLT 1 (SC),*** and as per which judgment the Supreme Court overruled the Division Bench judgment of this Court in the case of ***Asha M. Jain Vs. Canara Bank 94 (2001) DLT 841.*** Since the judgment of this Court dated 28.2.2011 had relied upon the Division Bench judgment in the case of ***Asha M. Jain (supra),*** and which judgment was over ruled the Supreme Court in the case of ***Suraj Lamps & Industries Pvt. Ltd. (supra),*** the matter was therefore remanded back to this Court.
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> 2. Before I proceed to dispose of the appeal, and which would turn

substantially on the judgment in the case of ***Suraj Lamps & Industries Pvt. Ltd. (supra),*** it is necessary to reproduce certain paras of this judgment of the Supreme Court, and which paras are paras 12, 13, 14 and 16, and which read as under:-

"12. Any contract of sale (agreement to sell) which is not a registered deed of conveyance (deed of sale) would fall short of the requirements of Sections 54 and 55 of Transfer of Property Act and will not confer any title nor transfer any interest in an immovable property (**except to the limited right granted under Section 53A of Transfer of Property Act**). According to Transfer of Property Act, an agreement of sale, whether with possession or without possession, is not a conveyance. Section 54 of Transfer of Property Act enacts that sale of immoveable property can be made only by a registered instrument and an agreement of sale does not create any interest or charge on its subject matter.

Scope of Power of Attorney

13. A power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property. The power of attorney is creation of an agency whereby the grantor authorizes the grantee to do the acts specified therein, on behalf of grantor, which when executed will be binding on the grantor as if done by him (see Section 1A and Section 2 of the Powers of Attorney Act, 1882). It is revocable or terminable at any time **unless it is made irrevocable in a manner known to law**. Even an irrevocable attorney does not have the effect of transferring title to the grantee. In State of Rajasthan v. Basant Nehata MANU/SC/0547/2005 : 2005 (12) SCC 77 this Court held:

"A grant of power of attorney is essentially governed by Chapter X of the Contract Act. By reason of a deed of power of attorney, an agent is formally appointed to act for the principal in one transaction or a series of transactions or to manage the affairs of the principal generally conferring necessary authority upon another person. A deed of power of attorney is executed by the principal in favor of the agent. The agent derives a right to use his name and all acts, deeds and things done by him and subject to the limitations contained in the said deed, the same shall be read as if done by the donor. A power of attorney is, as is well known, a document of convenience.

Execution of a power of attorney in terms of the provisions of the Contract Act as also the Powers-of-Attorney Act is valid. A power of attorney, we have noticed hereinbefore, is executed by the donor so as to enable the done to act on his behalf. **Except in cases where power of attorney is coupled with interest**, it is revocable. The done in exercise of his power under such power of attorney only acts in place of the donor subject of course to the powers granted to him by reason thereof. He cannot use the power of attorney for his own benefit. He acts in a fiduciary capacity. Any act of infidelity or breach of trust is a matter between the donor and the donee."

An attorney holder may however execute a deed of conveyance in exercise of the power granted under the power of attorney and convey title on behalf of the grantor.

Scope of Will

14. A will is the testament of the testator. It is a posthumous disposition of the estate of the testator directing distribution of his estate upon his death. It is not a transfer inter vivo. The two essential characteristics of a will are that it is intended to come into effect only after the death of the testator and is revocable at any time during the life time of the testator. It is said that so long as the testator is alive, a will is not be worth the paper on which it is written, as the testator can at any time revoke it. If the testator, who is not married, marries after making the will, by operation of law, the will stands revoked. (see Sections 69 and 70 of Indian Succession Act, 1925). Registration of a will does not make it any more effective.

16. We therefore reiterate that immovable property can be legally and lawfully transferred/conveyed only by a registered deed of conveyance. Transactions of the nature of 'GPA sales' or 'SA/GPA/WILL transfers' do not convey title and do not amount to transfer, nor can they be recognized or valid mode of transfer of immoveable property. The courts will not treat such transactions as completed or concluded transfers or as conveyances as they neither convey title nor create any interest in an immovable property. They cannot be recognized as deeds of title, except to the limited extent of Section 53A of the Transfer of Property Act. Such transactions cannot be relied upon or made the basis for mutations in Municipal or Revenue Records. What is stated above will apply not only to deeds of conveyance in regard to freehold property but also to transfer of leasehold property. A lease can be validly transferred only under a registered Assignment of Lease. It is time that an end is put to the pernicious practice of SA/GPA/WILL transactions known as GPA sales."

(emphasis added)

3. A reference to the aforesaid paras shows that unless there is a proper registered sale deed, title of an immovable property does not pass. The Supreme Court has however reiterated that rights which are created pursuant to Section 53A of the Transfer of Property Act, 1882 dealing with the doctrine of *part performance* (para 12), an irrevocable right of a person holding a power of attorney given for consideration coupled with interest as per Section 202 of the Contract Act, 1872 (para 13) and

> devolution of interest pursuant to a Will (para 14). Therefore, no doubt, a person strictly may not have complete ownership rights unless there is a duly registered sale deed, however, certain rights can exist in an immovable property pursuant to the provisions of Section 53A of the Transfer of Property Act, 1882, Section 202 of the Contract Act, 1872. There also takes place devolution of interest after the death of the testator in terms of a Will."

8. The Ld. counsel for the appellant/plaintiff further argued that the respondent no. 1/defendant no.1 was only 20 years of age when the Documentation dated 07.04.1994 was executed, and therefore due to his young age, it could be assumed that the consideration was not paid by him under the Documentation dated 07.04.1994, however, I cannot agree with this argument for two reasons. Firstly, once it is written in the documentation that a particular thing has happened, no parol evidence can be looked into in view of Section 92 of the Indian Evidence Act, 1872. Secondly, and in any case, even assuming that the consideration was paid by the father, the consideration paid to the seller would be first by the moneys being gifted by the father Late Mr. Bal Kishan Johar to the respondent no. 1/defendant no.1 and who then eventually paid to the seller, and for this very reason the documentation of the suit property was executed by the seller in favour of the respondent no. 1/defendant no.1. This argument of the appellant/plaintiff is therefore rejected.

9. The Ld. counsel for the appellant/plaintiff then in furtherance of her argument based on the premise that the father, Late Mr. Bal Kishan Johar, was the owner of the suit property and not respondent no. 1/defendant no. 1 (subsequently respondent no. 4/defendant no. 4) sought to place reliance upon the Power of Attorney dated 07.04.1994 executed by the seller in favour of the father, Late Mr. Bal Kishan Johar, and it was further pleaded that this original Documentation dated 07.04.1994 was stolen by the respondent no. 4/defendant no. 4. However, in my opinion, this argument has to be rejected. It is to be noted that in the absence of original Documents dated 07.04.1994 and thereafter by merely setting out a case of the original documents being stolen will not help the appellant/plaintiff, unless the appellant/plaintiff proved that there was some documentation other than the proved Documentation dated 07.04.1994, as it was necessary to prove such alleged documents to support the argument that the respondent no.1/defendant no.1 was not the owner of the suit property. However, on the contrary, the respondent no. 1/defendant no. 1 and subsequently respondent no.

4/defendant no. 4 have been able to prove their respective ownerships vide Documents dated 07.04.1994 and 08.05.2007.

10. In view of the aforesaid discussion, there is no merit in the appeal. Dismissed.

DECEMBER 19, 2018 **VALMIKI J. MEHTA, J**
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