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

Date of Decision : 10.01.2020

+ RSA 2/2020

MUNNI DEVI & ANR Appellants

Through: Mr.Siddharth Aggarwal, Adv.

versus

MAHI PAL SINGH Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

CM APPL. 555/2020 (Exemption)

Allowed, subject to all just exceptions.

CM APPL. 556/2020 (DELAY)

This is an application seeking condonation of 180 days delay in refilling of the appeal.

For the reason stated in the application, the delay is condoned and application stands allowed.

RSA 2/2020

1. This appeal has been filed challenging the judgment dated 24.12.2018 passed by the learned Senior Civil Judge in RCA No. 4/2016 titled *Smt. Munni Devi & Anr. vs. Shri Mahi Pal Singh*. By

the Impugned Judgment, the learned Appellate Court has dismissed the appeal filed by the appellants herein.

2. The appellants herein had filed the Suit bearing no. 384/2009 claiming themselves to be the owners of the property bearing no. D-599, Amar Colony, Illaqa Shahdara, Delhi-94 by way of an Agreement to Sell, General Power of Attorney (GPA) and a Receipt, all dated 16.11.1989, and marked as Exhibit PW-1/3 to PW-1/5 respectively. It is further the case of the appellants that the Suit Property had been given on license for the occupation of respondent herein, who is the brother-in-law of the appellants.

3. The learned Trial Court as also the Appellate Court have dismissed the Suit of the appellants holding that the appellants were unable to prove EX PW-1/3 to EX PW-1/5. The learned Appellate Court has held that as neither the plaintiffs/appellants nor any of the attesting witnesses of the above documents had appeared as witnesses in the trial and instead only the Power of Attorney Holder of the plaintiffs/appellants namely Mr.Pawan Kumar had appeared as a witness, the said documents remained unproved.

4. The learned Appellate Court further held that as the documents namely the Agreement to sell and the General Power of Attorney are not signed by the beneficiaries, there is a doubt on their veracity.

5. The learned Appellate Court further, relied upon Section 54 of the Transfer of Property Act, 1882 and held that the said document even otherwise do not create a title in favour of the appellants.

6. As far as the receipt is concerned, the learned Appellate Court had held that the same does not specify the object of the consideration amount nor records that it has any connection with the alleged Agreement to Sell or the GPA.

7. Based on the above, the learned Appellate Court has confirmed the finding of the learned Trial Court that the appellants have failed to prove their title over the Suit Property.

8. The learned Appellate Court has further confirmed the finding of the learned Trial Court on the aspect that the appellants have failed to prove the relationship of the licensor and the licensee.

9. The learned counsel for the appellants submits that the findings of the Appellate Court are liable to be set aside by this Court inasmuch as the learned Appellate Court has failed to consider that the PW-1, that is, the Power of Attorney Holder of the plaintiffs, in his examination in chief had clearly stated that the Agreement to Sell and the GPA were executed in his presence. The said documents were therefore, duly proved on record. He further submits that merely because the Agreement to Sell was not signed by the beneficiaries, the veracity of the same could not be doubted. Relying upon the judgment of the Supreme Court in *Alka Bose vs. Parmatma Devi and Ors.*, MANU/SC/8475/2008, he submits that the Agreement to Sell need not be signed by the Vendee. He further submits that the Agreement to Sell does not require attestation, mere non examination of the attesting witness would again be of no consequence. In support, he relies upon the judgment of the Supreme Court in *Hans Raji vs. Yosodanand*,

MANU/SC/0208/1996 and of this Court in *Ramesh Chand Sharma vs. R.S. Aggarwal*, MANU/DE/0380/1982.

10. As far as the GPA is concerned, placing reliance on the judgment of the this Court in *Kamla Rani and Ors. vs. Texmaco Ltd. and Ors.*, MANU/DE/7343/2007, he submits that as the General Power of Attorney was duly notarized, in terms of Section 85 of the Indian Evidence Act, 1872, there is a presumption of its due execution and authentication and, therefore, the onus of proving otherwise was on the defendant/respondent herein which he failed to discharge. He submits that in view of the above submissions, the findings of the learned Appellate Court cannot be sustained.

11. As far as the relationship of the licensor or licensee is concerned, he submits that the respondent has failed to produce any evidence in support of his submission that the construction of the property had been conducted by the respondent. Infact, relying upon the suggestion given to the PW-1, he submits that the construction of the property was made when the respondent, as per his own case, was in the village.

12. I have considered the submissions made by the learned counsel for the appellants, however, find no merit in the same. It is to be noted that the appellants/plaintiffs themselves did not come to the witness box in support of their claim. The learned Appellate Court has found this to be one of the main ground for disbelieving the case of the appellants/plaintiffs and mere statement of PW-1 in his examination in chief to state that these documents were executed in his presence, in

my opinion, would not suffice or negate the effect of the plaintiffs not entering the witness box to prove their case.

13. The Supreme Court in judgment dated 01.10.2019 passed in Civil Appeal No(s) 2869-70/2010, titled ***Mohinder Kaur v. Sant Paul Singh***, has held as under:

*“6. In **Janki Vashdeo** (supra), it was held that a power of attorney holder, who has acted in pursuance of the said power, may depose on behalf of the principal in respect of such acts but cannot depose for the principal for the acts done by the principal and not by the power of attorney holder. Likewise, the power of attorney holder cannot depose for the principal in respect of matters of which the principal alone can have personal knowledge and in respect of which the principal is entitled to be cross-examined. In our opinion, the failure of the respondent to appear in the witness box can well be considered to raise an adverse presumption against him as further observed therein as follows :*

*“15. Apart from what has been stated, this Court in the case of **Vidhyadhar v. Manikrao** observed at SCC pp. 583-84, para 17 that:*

“17. Where a party to the suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct....”

14. Even otherwise, the question of proving all these documents, specifically in light of the fact that the appellants/plaintiffs or the attesting witnesses of such documents had not entered the witness box; the documents did not bear the signatures of the beneficiaries; the documents are unregistered; and even otherwise, the relationship between the parties, are matters of appreciation of evidence and of

arriving at a probability, which is the standard to be applied in a civil case. This Court in exercise of its jurisdiction under Section 100 of the Code of Civil Procedure, 1908 cannot examine the case by re-appreciating the evidence. I further find no substantial question of law having been made for interfering in the Impugned Judgment.

15. In **S.Subramanian v. S.Ramasamy and Ors.**, MANU/SC/0650/2019, the Supreme Court, in relation to the powers of the Court under Section 100 of the Code of Civil Procedure, 1908, has held as under:

“8.1.....As per catena of decisions of this Court, while deciding the second appeal Under Section 100 of the Code of Civil Procedure, the High Court is not required to re-appreciate the entire evidence on record and to come to its own conclusion and the High Court cannot set aside the findings of facts recorded by both the Courts below when the findings recorded by both the Courts below were on appreciation of evidence. That is exactly what is done by the High Court in the present case while deciding the second appeals, which is not permissible under the law.

8.2 Even otherwise, it is required to be noted that as per catena of decisions of this Court and even as provided Under Section 100 of the Code of Civil Procedure, the Second Appeal would be maintainable only on substantial question of law. The Second Appeal does not lie on question of facts or of law. The existence of ‘a substantial question of law’ is a sine qua non for the exercise of the jurisdiction Under Section 100 of the Code of Civil Procedure. As observed and held by this Court in the case of Kondiba Dagadu Kadam (Supra), in a second appeal Under Section 100 of the Code Of Civil Procedure, the High Court cannot substitute its own opinion for that of the First Appellate Court, unless it

finds that the conclusions drawn by the lower Court were erroneous being:

(i) Contrary to the mandatory provisions of the applicable law;

OR

(ii) Contrary to the law as pronounced by the Apex Court;

OR

(iii) Based on in-admissible evidence or no evidence.

It is further observed by this Court in the aforesaid decision that if the First Appellate Court has exercised its discretion in a judicial manner, its decision cannot be recorded as suffering from an error either of law or of procedure requiring interference in Second Appeal. It is further observed that the Trial Court could have decided differently is not a question of law justifying interference in Second Appeal.”

16. In view of the above, the appeal is dismissed.

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NAVIN CHAWLA, J

JANUARY 10, 2020/rv