

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

19th March, 2020

%

Date of decision: 29th January, 2020.

+

CS(OS) 491/2016

SAROJ BALA

.... Plaintiff

Through: Mr. Pardeep Gupta, Mr. Parinav Gupta, Ms. Mansi Gupta, Mr. Moazzam Ali and Ms. Mamta, Advs.

Versus

BIMLA KHATRI & ORS.

.....Defendants

Through: Mr. Rajiv Bajaj and Ms. Sagrika Wadhwa, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff has instituted this suit against the four defendants, namely (a) Bimla Khatri, (b) Pooja Bhoot, (c) Jitender Kumar and (d) Delhi Development Authority (DDA), pleading that (i) Plot No.14-G, Block-8A, Western Extension Area, Karol Bagh, New Delhi measuring 85.6 sq.yds. (subject property) was allotted vide letter dated 23rd November, 2005 by the defendant no.4 DDA to Suraj Prakash, husband of the plaintiff; (ii) the said Suraj Prakash, on 23rd December, 2005 requested the defendant no.4 DDA to issue No Objection Certificate (NOC) for construction on the subject property and defendant no.4 DDA vide letter dated 13th April, 2009 granted sanction in respect of the building plan, electricity connection, water connection, etc. for the subject property; (iii) the said Suraj Prakash died on 5th September, 2012 and the defendant no.4 DDA vide its letter dated 26th August, 2014 transferred/mutated the subject property in the name of the plaintiff; (iv) the plaintiff applied to defendant no.4 DDA for extension of

time for raising construction on the subject property and deposited the requisite charges therefor; (v) on 16th August, 2015, the plaintiff made a complaint to the police, of some persons raising illegal construction on the subject property and soon thereafter filed a suit in the Court of the Senior Civil Judge, Tis Hazari Courts, Delhi, impleading defendant no.1 Bimla Khatri as a party thereto, for permanent injunction to restrain the defendant no.1 Bimla Khatri from raising any unauthorized construction on the subject property and for mandatory injunction directing the defendant no.1 Bimla Khatri to remove/demolish the unauthorized construction carried out on the subject property; (vi) the defendant no.1 Bimla Khatri, in the said suit produced Agreement to Sell and Power of Attorney, both dated 29th October, 2007 and Will dated 25th October, 2007, purportedly executed by Suraj Prakash in favour of defendant no.2 Pooja Bhoot, transferring his rights in the subject property in favour of defendant no.2 Pooja Bhoot for a sale consideration of Rs. 4 lakhs paid and received in cash; (vii) that the value of the subject property as per the circle rate of the relevant area/category at that time was Rs.19,33,000/-, though the market rate was Rs.85 lakhs; (viii) the Agreement to Sell for Rs.4 lakhs, purportedly executed by the husband of the plaintiff, was thus a sham; (ix) the plaintiff, as wife of Suraj Prakash, would have known of the Agreement to Sell if any entered into by him; (x) the aforesaid documents were witnessed by defendant no.3 Jitender Kumar and for which reason he has also been impleaded as a party; (xi) it was further the plea of defendant no.1 Bimla Khatri in the suit aforesaid that defendant no.2 Pooja Bhoot, vide Agreement to Sell, Power of Attorney, etc. all dated 5th February, 2010 had assigned the rights in the subject property in favour of the defendant no.1 Bimla Khatri

herein; (xii) the plaintiff withdrew the said suit with liberty to sue afresh; (xiii) that Suraj Prakash, under the terms of allotment of the subject property by the defendant no.4 DDA, could not have sold or transferred the same without prior permission of the defendant no.4 DDA and which was never applied for or granted; (xiv) that the Agreement to Sell, Power of Attorney, etc., relied upon by the defendant no.1 Bimla Khatri, do not confer any title in the subject property to her or to defendant no.2 Pooja Bhoot; and, (xv) that as per the records of DDA, the rights in the subject property are of the plaintiff.

2. On the aforesaid pleas, reliefs of (i) declaration as null and void of the Agreement to Sell dated 29th October, 2007, Will dated 25th October, 2007 and Special Power of Attorney dated 29th October, 2007; (ii) declaration as null and void of Agreement to Sell, General Power of Attorney, possession letter, receipt, Will, as well as affidavit, all dated 5th February, 2010; (iii) declaration of the ownership of the plaintiff of the subject property; (iv) declaration that the defendants no. 1 to 3 are not the owners of the subject property and are trespassers thereon; (v) decree for possession of the subject property; and, (vi) decree for permanent injunction to restrain the defendants from dealing with the subject property or raising any construction thereon, are sought.

3. The suit came up first before this Court on 26th September, 2016, when while issuing summons/notice thereof, vide *ex-parte* ad-interim order, the defendants restrained from creating third party rights in the subject property. The said order was made absolute on 20th February, 2019.

4. The defendant no.2 Pooja Bhoot did not appear despite service and was proceeded against *ex-parte* on 25th November, 2016. The defendant no.3 Jitender Kumar also failed to appear despite service and was proceeded against *ex-parte* on 10th March, 2017.

5. The defendant no.4 DDA filed a written statement, pleading (i) that the plot aforesaid was initially allotted in the name of Chunni Lal, under the Gadgil Assurance Scheme; (ii) on demise of Chunni Lal and on application of Suraj Prakash, the plot was mutated in his name; (iii) on demise of Suraj Prakash and on his daughter executing a Relinquishment Deed in favour of the plaintiff, the plot was mutated in the name of the plaintiff; (iv) that the defendant no.1 Bimla Khatri appeared during public hearing hours on 13th August, 2015 along with a complaint enclosing copy of General Power of Attorney and Agreement to Sell duly registered and executed on 29th October, 2007 by Suraj Prakash in favour of defendant no.2 Pooja Bhoot and an Agreement to Sell, Power of Attorney, etc. executed by defendant no.2 Pooja Bhoot in favour of defendant no.1 Bimla Khatri and sought cancellation of mutation in favour of plaintiff and which has been cancelled; (v) General Power of Attorney and Agreement to Sell do not provide for and are not for obtaining permission of defendant no.4 DDA; they are only for purpose of conversion of property into freehold; (vi) if any person has sold a property on the basis of General Power of Attorney and Agreement to Sell, then before seeking freehold conversion of the property, the General Power of Attorney/Agreement to Sell holder has to deposit 33.33% surcharge on prescribed conversion rates; and, (vii) the defendant no.4 DDA cannot comment on genuineness of the General Power of Attorney or Agreement to Sell executed by Suraj Prakash in favour of defendant no.2 Pooja Bhoot.

6. The defendant no.1 Bimla Khatri has contested the suit by filing a written statement, pleading (i) that Suraj Prakash, during his lifetime had executed and registered an Agreement to Sell dated 29th October, 2007 in favour of the defendant no.2 Pooja Bhoot with respect to subject property, against receipt of full consideration; (ii) that Suraj Prakash had also executed a registered Will and Special Power of Attorney in favour of defendant no.2 Pooja Bhoot and also handed over the possession of the subject property to the defendant no.2 Pooja Bhoot on 25th October, 2007; (iii) that the defendant no.2 Pooja Bhoot has further sold the subject property to the defendant no.1 Bimla Khatri and executed a registered Agreement to Sell and registered Power of Attorney both dated 5th February, 2010, affidavit of title and possession letter of the subject property to the defendant no.1 Bimla Khatri against receipt of entire sale consideration; (iv) that Suraj Prakash, during his lifetime, never challenged the title of defendant no.2 Pooja Bhoot or defendant no.1 Bimla Khatri; (v) that the subject property has been under continuous possession of the defendant no.2 Pooja Bhoot since 29th October, 2007 and of the defendant no.1 Bimla Khatri since 5th February, 2010; (vi) that the defendant No.1 Bimla Khatri is in custody of original documents pertaining to the subject property i.e. Allotment Letter dated 23rd November, 2005 issued by the defendant no.4 DDA; (vii) that the plaintiff, since the year 2007, is well aware of the fact that the subject property has been transferred to defendant No.2 Pooja Bhoot; (viii) that the suit is liable to be dismissed under the provisions of Section 53A of the Transfer of Property Act, 1882; (ix) that the defendant No.1 Bimla Khatri has already challenged the mutation of the subject property in the name of the plaintiff and defendant No.4 DDA has already

issued a notice to the plaintiff to show cause why the mutation should not be cancelled; and, (x) that the husband of the plaintiff, at the time of execution of documents in favour of the defendant No.2 Pooja Bhoot, received consideration therefor and thereafter only registered the documents.

7. The plaintiff has filed replications to the written statements of defendants No.1&4 but the need to advert thereto is not felt.

8. On the pleadings aforesaid, the following issues were framed in the suit on 20th February, 2019:

- “(i) *Whether the husband of the plaintiff had agreed to sell property No.14-G, Block 8A, Western Extension Area, Karol Bagh, New Delhi to defendant no.2 Pooja Bhoot and had executed registered Agreement to Sell, registered Power of Attorney, Will and Receipt in favour of defendant no.2 Pooja Bhoot and if so, to what effect? OPD1*
- (ii) *Whether the defendant no.2 Pooja Bhoot has executed Agreement to Sell, Power of Attorney, Will and Receipt with respect to the property in favour of the defendant no.1 and if so, to what effect? OPD1*
- (iii) *Whether the plaintiff is entitled to any mesne profits with respect to property No.14-G, Block 8A, Western Extension Area, Karol Bagh, New Delhi and if so, from which of the defendants, at what rate and for what period? OPP.*
- (iv) *Relief.”*

and the parties relegated to recording of evidence on commission and the onus of the main issue being on the defendant No.1 Bimla Khatri, the defendant No.1 Bimla Khatri directed to lead evidence first.

9. Recording of evidence is informed to have been completed and the counsel for the plaintiff and the counsel for the defendant No.1 Bimla Khatri have been heard.

10. The defendant No.1 Bimla Khatri, in her evidence has examined herself as DW-1, defendant No.2 Pooja Bhoot as DW-2 and one Rajiv Tuli as DW-3 and closed her evidence on 13th May, 2019.

11. The plaintiff, in her evidence has examined herself and an official of the defendant No.4 DDA as PW-2.

12. The defendant No.1 Bimla Khatri in her examination-in-chief, (a) produced the original Allotment Letter dated 23rd November, 2005 of the subject property in favour of Suraj Prakash and proved the copy thereof as Ex.DW-1/1; (b) produced the original of the Document dated 25th May, 2006 of delivery of possession of the subject property by defendant No.4 DDA to Suraj Prakash and proved a copy of the same as Ex.DW-1/2; (c) produced the original Receipt of the defendant No.4 DDA of recovery of damages with respect to the subject property and proved the copy thereof as Ex.DW-1/3; (d) produced and proved the original registered Agreement to Sell dated 29th October, 2007 executed by Suraj Prakash in favour of the defendant No.2 Pooja Bhoot as Ex.DW-1/4; (e) produced the original Will dated 25th October, 2007 executed by Suraj Prakash with respect to the subject property as Ex.DW-1/5; (f) produced and proved the original registered Special Power of Attorney dated 29th October, 2007 executed by Suraj Prakash in favour of the defendant No.2 Pooja Bhoot as Ex.DW-1/6; (g) produced and proved the original registered Agreement to Sell dated 5th February, 2010 executed by defendant No.2 Pooja Bhoot in favour of the defendant No.1 Bimla Khatri as Ex.DW-1/7; (h) produced and proved the original registered General Power of Attorney dated 5th February, 2010 executed by the defendant no.2 Pooja Bhoot in favour of defendant no.1

Bimla Khatri as Ex.DW-1/9; (i) produced the original registered Will dated 5th February, 2010 executed by the defendant no.2 Pooja Bhoot in favour of defendant no.1 Bimla Khatri as Ex.DW-1/10; (j) produced and proved the original Possession Letter dated 5th February, 2010 executed by the defendant no.2 Pooja Bhoot in favour of defendant no.1 Bimla Khatri as Ex.DW-1/11; (k) produced and proved the original Receipt of Consideration executed by the defendant no.2 Pooja Bhoot in favour of defendant no.1 Bimla Khatri as Ex.DW-1/12; (l) produced and proved the original electricity bills with respect to the subject property as Ex.DW-1/16; (m) produced and proved the application under Order VII Rule 11 of CPC filed by the defendant No.1 Bimla Khatri in the earlier suit filed by plaintiff in the court of the Senior Civil Judge, Tis Hazari Courts, as Ex.DW-1/19; (n) produced and proved the complaint dated 16th August, 2015 filed with the Station House Office, Police Station Karol Bagh, Delhi as Ex.DW-1/22; and, (o) deposed that the defendant No.2 Pooja Bhoot, on 5th February, 2010 delivered vacant possession of the subject property to the defendant No.1 Bimla Khatri and since when the defendant No.1 Bimla Khatri is in possession thereof.

13. The defendant No.1 Bimla Khatri appearing as DW-1, in her cross-examination, deposed (i) that she did not know Suraj Prakash but knew defendant No.2 Pooja Bhoot since she had purchased the subject property from her; (ii) that she was not present when defendant No.2 Pooja Bhoot purchased the subject property from Suraj Prakash; (iii) that the defendant No.2 Pooja Bhoot had informed her of the documents executed by Suraj Prakash in her favour; (iv) that Suraj Prakash had not signed the documents executed in favour of defendant no.2 Pooja Bhoot in her presence; (v) that

she did not know whether any NOC was taken from Suraj Prakash at the time of purchasing the subject property from defendant No.2 Pooja Bhoot; (vi) that she had no knowledge whether any attempt for registration of sale deed had been made; and, (vii) that she could not tell whether mutation of the subject property in the records of defendant No.4 DDA was in the name of Suraj Prakash.

14. The defendant No.2 Pooja Bhoot, appearing as DW-2, in her affidavit by way of examination-in-chief Ex.DW-2/A, deposed (a) that she had purchased the subject property from Suraj Prakash through registered Agreement to Sell dated 29th October, 2007 Ex.DW-1/4, registered Will dated 25th October, 2007 Ex.DW-1/5 and registered Special Power of Attorney dated 29th October, 2007 DW-1/6; (b) that the said documents were executed for a valid consideration; (c) that Suraj Prakash handed over possession of the subject property to defendant no.2 Pooja Bhoot on 29th October, 2007 and she was in absolute and uninterrupted power and possession of the subject property from 29th October, 2007 to 5th February, 2010; (d) that the original chain of documents were handed over by defendant no.2 Pooja Bhoot to defendant No.1 Bimla Khatri; (e) that defendant no.2 Pooja Bhoot had sold the subject property to defendant No.1 Bimla Khatri on 5th February, 2010 through a registered Agreement to Sell dated 5th February, 2010 Ex.DW-1/7, registered Will dated 5th February, 2010 Ex.DW-1/10 and registered Special Power of Attorney dated 5th February, 2010 Ex.DW-1/8; (f) that she sold the subject property to defendant No.1 Bimla Khatri for a consideration of Rs.16,85,000/- and handed over possession of the subject property to defendant No.1 Bimla Khatri on 5th February, 2010; and, (g) that she had signed/executed

Agreement to Sell dated 5th February, 2010 Ex.DW-1/7, registered Special Power of Attorney dated 5th February, 2010 Ex.DW-1/8 and General Power of Attorney dated 5th February, 2010 as Ex.DW-1/9.

15. The counsel for the plaintiff, at the time of tendering into evidence of the affidavit by way of examination-in-chief of defendant No.2 Pooja Bhoot as DW-2, objected to her examination on the ground that she was defendant No.2 in the suit and had been proceeded against *ex-parte* and the said objection was kept open for adjudication at this stage.

16. No merit is found in the aforesaid objection. Depending upon the nature of the controversy, it is open to one defendant to, in his/her evidence examine another defendant, even if the said other defendant being examined is *ex-parte*.

17. The defendant No.2 Pooja Bhoot appearing as DW-2, in her cross-examination deposed (a) that the subject property was purchased by her from Suraj Prakash for a consideration of Rs.4 lacs; (b) that she did not remember whether on the date of execution of Agreement to Sell dated 25th October, 2007, any receipt of payment or of possession was prepared; (c) that she could not specify on which date the amount of Rs.4 lacs was given to Suraj Prakash or how it was given; (d) denied the suggestion that no payment of Rs.4 lacs was made to Suraj Prakash; (e) that she could not tell whether as per Clause 6 of the Agreement to Sell dated 29th October, 2007 Ex.DW-1/4, Suraj Prakash filed any application with the defendant No.4 DDA for NOC to transfer the subject property; (f) that she could not tell whether she issued any notice to Suraj Prakash to file any such application with the defendant No.4 DDA and stated that her husband would be

knowing; (g) that she could not tell whether any application for mutation of the subject property as per Clause 7 of the Agreement to Sell dated 29th October, 2007 Ex.DW-1/4 was filed and again stated that her husband would be knowing; (h) though stated that she had been authorized by the Special Power of Attorney dated 29th October, 2007 Ex.DW-1/6 to transfer the subject property, could not show any particular clause to that effect therein; (i) denied that the Special Power of Attorney only authorized her to get the leasehold rights in the land underneath the subject property converted into freehold; (j) denied the suggestion that Suraj Prakash did not execute/sign Agreement to Sell dated 29th October, 2007 Ex.DW-1/4, Will dated 25th October, 2007 Ex.DW-1/5 or Special Power of Attorney dated 29th October, 2007 Ex.DW-1/6; and, (k) denied the suggestion that she had no authority to sell the subject property to defendant No.1 Bimla Khatri.

18. DW-3 Rajiv Tuli, in his affidavit by way of examination-in-chief Ex. DW3/A deposed (i) that he was the attesting witness No.2 to the Agreement to Sell dated 29th October, 2007 Ex.DW-1/4, Will dated 25th October, 2007 Ex.DW-1/5 and Special Power of Attorney dated 29th October, 2007 Ex.DW-1/6 along with defendant no.3 Jitender Kumar, also an attesting witness to the said documents; (ii) that he identified the signatures of defendant No.2 Pooja Bhoot as well as of Suraj Prakash on the aforesaid documents; (iii) that he was present at the time of registration of the said documents along with other attesting witness defendant no.3 Jitender Kumar, defendant No.2 Pooja Bhoot and Suraj Prakash; (iv) that the documents Agreement to Sell dated 29th October, 2007 Ex.DW-1/4, Will dated 25th October, 2007 Ex.DW-1/5, and Special Power of Attorney dated 29th October, 2007 Ex.DW-1/6 had been explained in vernacular to Suraj

CS(OS) 491/2016 *Page 11 of 31*

Prakash and thereafter he and defendant no.3 Jitender Kumar had become attesting witnesses on instructions of Suraj Prakash; (v) identified the points on the documents aforesaid where each of the parties had signed; (vi) that Suraj Prakash was of sound and disposable mind at the time of execution of the documents aforesaid; and, (vii) that Suraj Prakash signed the Will dated 25th October, 2007 Ex. DW1/5 for valid consideration and without any undue influence, pressure and coercion etc.

19. DW-3 Rajiv Tuli, in his cross-examination deposed (a) that the sale consideration mentioned in Agreement to Sell dated 29th October, 2007 Ex.DW-1/4 of Rs.4 lacs was paid in cash by defendant No.2 Pooja Bhoot to Suraj Prakash; (b) that he had signed the documents after reading the same; (c) that he did not know defendant no.2 Pooja Bhoot prior to that date and became acquainted with her after signing the said documents; (d) that defendant No.2 Pooja Bhoot, under Special Power of Attorney dated 29th October, 2007 Ex.DW-1/6 had the authority to further sell the subject property; (e) denied that Suraj Prakash did not appear before the Sub-Registrar for execution of the documents; and, (f) denied the suggestion that he and Madan Khatri, as partners of M.R. Properties, with the defendants no.1-3, have created false and fabricated sale documents by forging the signatures of Suraj Prakash.

20. The plaintiff appearing as PW-1, in her affidavit by way of examination-in-chief Ex.PW1/A deposed on the same lines as her plaint and proved the Indemnity Bond dated 4th July, 2013 executed by her at the time of obtaining mutation of the subject property in her name from the defendant no.4 DDA as Ex.PW-1/5, the letter dated 10th September, 2014 addressed to

the defendant No.4 DDA as Ex. PW-1/6 and Mutation Transfer Certificate dated 26th August, 2014 issued by the defendant no.4 DDA as Ex.PW-1/8 and further deposed, (i) that as per her knowledge from being the wife of Suraj Prakash, no Agreement to Sell dated 29th October, 2007, Will dated 25th October, 2007 and Special Power of Attorney dated 29th October, 2007 were executed by Suraj Prakash nor were the same signed by him; (ii) that she remained in possession of the subject property till 16th August, 2015; (iii) that the market value of the subject property at the time of filing the present suit was Rs.2 crores; (iv) that the documents executed by defendant No.2 Pooja Bhoot in favour of the defendant No.1 Bimla Khatri, did not bear the signatures of Suraj Prakash and his signatures on DW-1/4 to DW-1/6 aforesaid were forged. The plaintiff as PW-1, in her cross-examination further deposed, (a) that the original documents of the subject property were lost by her and she had lodged a report with the Police in that regard; (b) that the documents were lost in the year 2014 when she had gone to the defendant No.4 DDA for mutation; (c) that she had not filed any other case with respect to the subject property; (d) that Will dated 25th October, 2007 Ex.DW-1/5 and Affidavit/Undertaking dated 11th July, 2008 of Suraj Prakash Ex.PW1/D2 did not bear the signatures of her husband Suraj Prakash; (e) that the sum of Rs.41,450/- deposited by her with the defendant No.4 DDA for mutation of the subject property in her name was borrowed by her from her relatives; (f) that the mental condition of Suraj Prakash was all right during his lifetime and Suraj Prakash was in a position to take a decision regarding right or wrong; (g) that she had not brought any photograph of her husband Suraj Prakash inspite of direction; (h) that she did not know how she came to be in possession of Letter dated 12th April,

2007 Ex.PW-2/A, Letter dated 18th July, 2008 Ex.PW-2/B and Affidavit/Undertaking dated 11th July, 2008 Ex.PW-2/C; and, (i) that no photo album of the marriage of her daughter was prepared.

21. The counsel for the plaintiff has argued, (a) that the Special Power of Attorney dated 29th October, 2007 Ex.DW-1/6 did not authorize the defendant No.2 Pooja Bhoot to sell the subject property to anyone or to defendant No.1 Bimla Khatri; (b) that the defendant No.2 Pooja Bhoot in her testimony could not tell from where the sale consideration of Rs.4 lacs claimed to have been paid to Suraj Prakash came; (c) that in the absence of proof of any consideration having been paid by defendant No.2 Pooja Bhoot to Suraj Prakash, the documents claimed to have been executed by Suraj Prakash in favour of the defendant No.2 Pooja Bhoot are void; (d) that Agreement to Sell, Power of Attorney, Will and like documents, as per the dicta of the Supreme Court in *Suraj Lamp and Industries Pvt. Ltd. Vs. State of Haryana* (2009) 7 SCC 363 and (2012) 1 SCC 656, do not create any title; (e) that the plea of Section 53A of the Transfer of Property Act is available only to defendant No.2 Pooja Bhoot and not to defendant No.1 Bimla Khatri; (f) that if Suraj Prakash had sold the subject property to defendant No.2 Pooja Bhoot, there was no need for Suraj Prakash to also authorize defendant No.2 Pooja Bhoot only for the purpose of dealing with defendant No.4 DDA; (g) that the presumption under Section 114 of the Evidence Act, 1872 is that Suraj Prakash would not sell the subject property cheap.

22. The counsel for the defendant No.1 Bimla Khatri has contended, (a) that the documents produced by the plaintiff at pages 33, 36, 38, 40, 41 and

45 of Part III-A file have in fact been obtained under the Right to Information Act, 2005 and it is not as if the plaintiff was possessed of the receipt of payment of damages or NOC; (b) that the said documents were in fact produced by the defendants in the suit earlier filed by the plaintiff before the Senior Civil Judge, Tis Hazari Courts and which has been withdrawn; and, (c) that the plaintiff has not led any evidence of valuation of the subject property, though repeatedly it is stated that the market price of the subject property in September, 2007 was more than Rs.4 lacs.

23. The counsel for the plaintiff, in rejoinder has relied on ***Rambhau Namdeo Gajre Vs. Narayan Bapuji Dhotra*** (2004) 8 SCC 614, laying down that the protection provided under Section 53A of the Transfer of Property Act to the proposed transferee is a shield only against the transferor and that such a right to protect possession against the proposed vendor cannot be pressed into service against a third party. Reference is also made to ***Hemraj Vs. Rustomji*** AIR 1953 SC 503 laying down that the person claiming under the transferor referred to in Section 53A is obviously a person who claims under a title derived subsequently to the date of the transfer and not anterior to the said date and the proviso to Section 53A saves the right of a transferee for consideration who has no notice of the contract of which there was part performance.

24. I have considered the pleadings, evidence and contentions raised and now proceed to return issue-wise findings.

25. The first issue is with respect to execution of the registered Agreement to Sell, Power of Attorney and Will, by Suraj Prakash, husband of the plaintiff, in favour of defendant No.2 Pooja Bhoot. I decide the said

issue in favour of the defendant No.1 Bimla Khatri and against the plaintiff. My reasons therefor are as under:

(A) Each of the three documents vis. Agreement to Sell dated 29th October, 2007 Ex.DW1/4, Will dated 25th October, 2007 Ex.DW1/5 and Special Power of Attorney dated 29th October, 2007 Ex.DW1/6 is a registered document and has a photograph of the executants thereto affixed thereon and also has a photograph taken of the executants and the witnesses at the time of registration. Though the plaintiff in her evidence denied the photograph thereon to be of her husband Suraj Prakash but did not, inspite of being called upon, produce any photograph of her husband Suraj Prakash and in fact also denied that there was any photo album prepared on the occasion of the marriage of the daughter of the plaintiff and Suraj Prakash. Such conduct of the plaintiff speaks volumes in support of the presumption in law with respect to documents which are registered, of the same having been executed by the persons by whom they are purported to be executed and presented for registration. To obviate pleas of registration having been got done by an imposter, now since the year, 2013, a system of clicking of the photographs of the executants and the witnesses, in the office of the Sub-Registrar, at the time of registration, has been in vogue and there is no explanation how the husband of the plaintiff came to be photographed as executant of the said documents, if was not the executant and/or did not present the documents for registration. Section 114 of the Evidence Act empowers the Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events,

human conduct and public and private business. The illustration (e) thereto enables the Court to presume that an official act has been regularly performed and illustration (g) thereto enables the Court to presume that evidence which could be and is not produced, would, if produced, be unfavourable to the person who withholds it. The plaintiff has been unable to dislodge the presumption under the aforesaid provisions, that the registered documents purported to be executed by her husband Suraj Prakash with a photograph purporting to be his affixed thereon and with a photograph purporting to be his imprinted thereon, were executed by her husband Suraj Prakash. The refusal of the plaintiff to produce the photograph of her husband also leads to the presumption that the said photograph if produced by the plaintiff, would have shown that the photographs on the documents purported to have been executed by the husband of the plaintiff Suraj Prakash in favour of defendant no.2 Pooja Bhoot, are of the husband of the plaintiff.

(B) The defendant no.1 Bimla Khatri has proved the execution of the documents by husband of the plaintiff Suraj Prakash, not only by examining defendant no.2 Pooja Bhoot as DW-2 but by also examining Rajiv Tuli, one of the witnesses to the said documents. No dent in cross-examination could be made to the testimony of DW-2 Pooja Bhoot and DW-3 Rajiv Tuli, insofar as deposed about the execution of the documents by the husband of the plaintiff Suraj Prakash. Only suggestions were given that the signatures are not of husband of the plaintiff Suraj Prakash and Suraj Prakash did not present the documents for registration. No other reason /

circumstance has been put forth either in the plaint or in the cross-examination of DW-2 Pooja Bhoot and DW-3 Rajiv Tuli.

(C) Significantly, DW-3 Rajiv Tuli in his affidavit by way of examination-in-chief deposed that he was present at the office of the Sub-Registrar on the instructions of husband of the plaintiff Suraj Prakash and had signed as an attesting witness on the instructions of the said Suraj Prakash and had seen Suraj Prakash signing the said documents. In his cross-examination, he deposed that he did not know defendant no.2 Pooja Bhoot prior thereto and became acquainted with her only at the time of signing of the documents signed by him as an attesting witness at the instructions of Suraj Prakash. The said part of the testimony of DW-3 Rajiv Tuli was not challenged in cross-examination save for giving a suggestion that he had not signed as attesting witness on instructions of husband of the plaintiff Suraj Prakash and that he did not know Suraj Prakash. No question in cross-examination was put to him, of how he knew Suraj Prakash and his relationship / acquaintance with defendant no.3 Pooja Bhoot not even suggested in cross-examination. Thus the testimony of DW-3 Rajiv Tuli to the effect that he, as an attesting witness, signed the documents purporting to be executed by Suraj Prakash in favour of DW-2 Pooja Bhoot, at the asking of Suraj Prakash, has to be accepted.

(D) Though the fulcrum of the case of the plaintiff was that the signatures on the documents with respect to the subject property in favour of defendant no.2 Pooja Bhoot are not of Suraj Prakash but the plaintiff has not produced any documents bearing the signatures of

Suraj Prakash to show that Suraj Prakash used to sign any differently than what is purported to be his signatures on the documents with respect to the subject property in favour of defendant no.2 Pooja Bhoot. It is not the case of the plaintiff that she is not having any document signed by her husband Suraj Prakash. The plaintiff cannot be believed to be not possessed of any document bearing signature of her husband Suraj Prakash. Again, adverse inference has to be drawn against the plaintiff therefor to the effect that had the plaintiff produced the signatures of Suraj Prakash, the same would have demonstrated that the signatures on the documents purported to be executed by Suraj Prakash with respect to the subject property in favour of defendant no.2 Pooja Bhoot are indeed of Suraj Prakash.

(E) The only other reason pleaded by the plaintiff in challenge to the said documents are that the consideration for sale was far below the market value of the subject property and that as per the terms and conditions of allotment of the said property in favour of Suraj Prakash, Suraj Prakash could not have transferred the same.

(F) As far as the plea with respect to insufficiency of sale consideration is concerned, I may note that the Agreement to Sell dated 29th October, 2007 Ex.DW1/4 itself, for the purpose of calculation of stamp duty is valued at Rs.15,85,000/- and stamp duty paid on the said value. However the Agreement to Sell, in the body thereof provides for the consideration for sale to be Rs.4,00,000/- and records the entire sale consideration to have been already received by Suraj Prakash in cash as advance from defendant no.2 Pooja Bhoot. It is thus not as if Suraj Prakash was not aware of the value of the

subject property as per the circle rate. The pages of the Agreement to Sell recording the value of the Agreement to Sell for the purposes of stamp duty at Rs.15,85,000/- as well as providing for sale consideration for which Suraj Prakash was agreeing to sell the subject property to defendant no.2 Pooja Bhoot being Rs.4,00,000/-, are both signed by Suraj Prakash.

(G) I have enquired from the counsel for the plaintiff, the provision of law which makes void, a document for insufficiency of consideration. The counsel for the plaintiff hesitates. Section 25 of the Contract Act, 1872 declares void an agreement “without” consideration and in Explanation 2 clarifies that an agreement is not void merely because the consideration is inadequate. The case of the plaintiff is not of lack of consideration but of inadequacy of consideration and which does not make an agreement void. Though Explanation 2 also provides that inadequacy of the consideration may be taken into account in determining whether the consent of the person was freely given but the case of the plaintiff is also not of the consent of Suraj Prakash to execution of Agreement to Sell in favour of defendant no.2 Pooja Bhoot being not free and of own volition. The case of the plaintiff is of denial of execution of the document by Suraj Prakash. Thus, the ground urged of inadequacy of consideration, for contending the Agreement to Sell to be void, is untenable in law.

(H) The only other ground pleaded by the plaintiff is that Suraj Prakash, under the terms of allotment of the subject property in his favour by the DDA, was not authorized to transfer the same. The

plaintiff in this regard has proved the letters dated 27th May, 1978 and 23rd November, 2005 of defendant no.4 DDA to Suraj Prakash and/or his predecessor as Ex.PW1/10 and Ex.DW1/1 respectively. The letter dated 27th May, 1978 Ex. PW1/10 only informs the predecessor of Suraj Prakash that with reference to his application for allotment of alternative plot in lieu of unauthorized occupation of Block-8A, W.E.A., Karol Bagh, New Delhi, he had been allotted plot ad-measuring 85.6 sq. yds. in Block 8-A, W.E.A., Karol Bagh, New Delhi on perpetual leasehold basis and was asked to convey his consent thereof. The letter dated 23rd November, 2005 Ex.DW1/1 titled "Allotment Letter" allots the land underneath the subject property to Suraj Prakash on perpetual leasehold basis on the terms and conditions contained therein; one of the terms was that no transfer of leasehold rights would be permitted without prior permission from defendant no.4 DDA and except in accordance with the conditions contained in the Lease Deed. Another clause provides that for granting permission for any such transfer, 50% of unearned increase shall be charged. It was thus not as if transfer was absolutely prohibited. Transfer of leasehold rights in the land underneath the subject property was permitted on the terms and conditions prescribed.

(I) The execution of Agreement to Sell, General Power of Attorney and Special Power of Attorney by Suraj Prakash in favour of defendant no.2 Pooja Bhoot was not in violation of the conditions aforesaid of the allotment letter dated 23rd November, 2005 Ex.DW1/1. What is prohibited thereunder is only sale or transfer

without permission. An Agreement to Sell is not a document of sale or transfer and prior to execution thereof, no permission of defendant no.4 DDA was required. In fact, for permission to be applied for, such Agreement to Sell is essential. Similarly, there is no bar to execution of General Power of Attorney and Special Power of Attorney to enable the attorney to exercise rights with respect to the subject property.

(J) Moreover defendant no.4 DDA in its written statement has itself stated that even a Power of Attorney holder / Agreement Purchaser is entitled to have the leasehold rights in the land underneath the property converted into freehold in his own name merely by paying 33% surcharge. It is thus not as if execution of Agreement to Sell of the subject property by Suraj Prakash in favour of defendant no.2 Pooja Bhoot is contrary to any law or public policy and for which reason it can be held to be void. There is thus no merit in the said ground either.

(K) The plaintiff, in her testimony has been unable to depose any reason or circumstance for which it could said that Suraj Prakash could not possibly have executed the documents in favour of defendant no.2 Pooja Bhoot or could not have presented the same for registration on the date they are recorded to have been presented.

(L) The original documents with respect to the subject property have also come from the custody of defendant no.1 Bimla Khatri who has deposed the same to have been handed over to her by defendant no.2 Pooja Bhoot at the time of defendant no.2 Pooja Bhoot agreeing to sell the property to defendant no.1 Bimla Khatri and putting the

defendant no.1 Bimla Khatri in possession thereof. The defendant no.2 Pooja Bhoot in her testimony has deposed that the said documents were handed over to her by Suraj Prakash. The same is in consonance with the common course of human conduct in the matter of sale and purchase of property and again goes to prove that Suraj Prakash had indeed agreed to sell the subject property to defendant no.2 Pooja Bhoot and put defendant no.2 Pooja Bhoot into possession thereof on receipt of entire sale consideration, as, in the ordinary course of human conduct, without receipt of entire sale consideration, documents of title are not parted with to the purchaser. On the contrary, the stand of the plaintiff in this context has been cagey. The plaintiff, in the plaint though referred to the original documents of title of the subject property in favour of Suraj Prakash but did not disclose that the same were not in her custody or possession. The plaintiff, at the time of filing the suit also did not file any documents which would have shown that the original title documents of the subject property in favour of Suraj Prakash were not in custody of the plaintiff. It is only in her cross-examination that the plaintiff deposed that the original title documents of the subject property had been lost by her in the year 2015 when she was about to go for mutation in DDA and she had lodged a police report in this context. The said version / conduct of the plaintiff does not inspire confidence. The custody of the defendant no.1 Bimla Khatri of the original title documents in favour of Suraj Prakash with respect to the subject property also lends support to issue no.(i) being decided in favour of the defendant no.1 Bimla Khatri and against the plaintiff.

(M) The plaintiff, in the plaint has given her address as of Shadipur Depot, Pandav Nagar, New Delhi. The subject property, situated in W.E.A., Karol Bagh, New Delhi, is not so far from the residence of the plaintiff that the plaintiff, from 2007 when Suraj Prakash is proved to have agreed to sell the subject property and delivered possession thereof to defendant no.2 Pooja Bhoot, would be unable to check or take other steps for securing possession thereof. The plaintiff admits possession of the defendant no.1 Bimla Khatri. The defendant no.1 Bimla Khatri has deposed having been in possession since 2010 when defendant no.2 Pooja Bhoot agreed to sell the subject property to defendant no.1 Bimla Khatri and put the defendant no.1 Bimla Khatri in possession thereof. The plaintiff, in her complaint dated 16th August, 2015 to the SHO, Police Station Karol Bagh proved as Ex.DW1/22 stated, “.....according to my information this plot is not being sold to any third party.....Today 16/08/2015 I came to know that some people are doing illegal construction on my plot claiming to be owner of plot on basis of some fraud paper....” and requested the police to stop the construction. The undisputed possession of the defendant no.1 Bimla Khatri of the subject property is also in consonance with Suraj Prakash having executed the Agreement to Sell dated 29th October, 2007 Ex. DW1/4, Will dated 25th October, 2007 Ex.DW1/5 and Special Power of Attorney dated 29th October, 2007 DW1/6 in favour of defendant no.2 Pooja Bhoot.

(N) The defendant no.1 Bimla Khatri has thus proved that Suraj Prakash, husband of the plaintiff had agreed to sell the property No.14-G, Block 8A, WEA, Karol Bagh, New Delhi to the defendant

no.2 Pooja Bhoot and had executed registered Agreement to Sell dated 29th October, 2007 Ex.DW1/4, registered Special Power of Attorney dated 29th October, 2007 Ex.DW1/6 and Will dated 25th October, 2007 DW1/5 in favour of defendant no.2 Pooja Bhoot. However, the effect thereof remains to be adjudicated.

(O) The counsel for the plaintiff is correct in contending that Agreement to Sell and Power of Attorney do not constitute documents of title to property and did not constitute defendant no.2 Pooja Bhoot or the defendant no.1 Bimla Khatri as owner of the subject property. The ownership of the subject property, in law, notwithstanding the execution of the said documents, continued with Suraj Prakash and on demise of Suraj Prakash would vest in his heirs. It is not in dispute that the plaintiff is the wife and heir of Suraj Prakash. The plaintiff has also proved that the daughter of Suraj Prakash has relinquished the share in the subject property inherited from Suraj Prakash in favour of the plaintiff. The plaintiff is thus the owner of the subject property.

(P) The plaintiff as owner of the subject property would thus be entitled to recover possession of the subject property.

(Q) However Section 53A of the Transfer of Property Act reference where to was made by the counsel for the plaintiff himself, provides as under:

53A. Part performance.—Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary

to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

(R) In view of the finding above, of Suraj Prakash having executed the Agreement to Sell dated 29th October, 2007 Ex. DW1/4 in favour of defendant no.2 Pooja Bhoot, the ingredients of Section 53A of the Transfer of Property Act of Suraj Prakash having contracted to transfer for consideration the subject immovable property by writing signed by him and from which terms necessary to constitute the

transfer can be ascertained with reasonable certainty, stands established. It is a term of the Agreement to Sell that the possession of the property agreed to be transferred was being delivered at the time of execution and registration of the Agreement to Sell. The said ingredient of Section 53A thus also stands satisfied. It is not the plea of the plaintiff that the defendant No.2 Pooja Bhoot did not perform or was not willing to perform her part of the contract. Rather, the plaintiff denied the entire transaction. Once the said ingredients are established, Section 53A of the Transfer of Property Act provides that even if instrument of transfer i.e. Sale Deed is not executed, the transferor and persons claiming under the transferor are barred from enforcing against the transferee and persons claiming under him, any right in respect of the property other than a right expressly provided by the terms of the contract.

(S) The plaintiff, as heir of the transferor Suraj Prakash has now stepped into the shoes of Suraj Prakash; the plaintiff is, by way of this suit, seeking to recover possession of the subject property and which right is not provided in the Agreement to Sell dated 29th October, 2007 DW1/4 executed by Suraj Prakash in favour of defendant no.2 Pooja Bhoot. The plaintiff, by Section 53A of the Transfer of Property Act, is thus barred from suing for recovery of possession.

(T) The argument of the counsel for the plaintiff, that the benefit of Section 53A could have been available to defendant no.2 Pooja Bhoot only and not to the defendant no.1 Bimla Khatri as Agreement Purchaser from defendant no.2 Pooja Bhoot, also ignores the language of Section 53A of the Transfer of Property Act barring the transferor

from enforcing rights not only against the transferee but also against “persons claiming under him”. The defendant no.1 Bimla Khatri qualifies as a person claiming under defendant no.2 Pooja Bhoot. in *Rambhau Namdeo Gajre* supra cited by counsel for plaintiff, the agreement purchaser was found to be not entitled to further agree to sell the property.

(U) In this context, I may notice that in the Agreement to Sell dated 29th October, 2007 Ex.DW1/4, proved to have been executed by husband of the plaintiff Suraj Prakash in favour of defendant no.2 Pooja Bhoot described therein as second party, the expression ‘second party’ includes her legal heirs, successors, legal representatives, administrators, executors and assignees. Clause 7 of the Agreement to Sell dated 29th October, 2007 Ex. DW1/4 provides that defendant no.2 Pooja Bhoot could get the subject property mutated/transferred in her or her nominee’s name. Clause 6 also contains an obligation of Suraj Prakash as transferor, to execute the Sale Deed in favour of defendant no.2 Pooja Bhoot or her nominee. Clause 14 of the said Agreement to Sell expressly empowers defendant no.2 Pooja Bhoot to sell the subject property to some other party. Not only so, the defendant no.1 Bimla Khatri has also proved that Suraj Prakash, husband of the plaintiff executed Will dated 25th October, 2007 Ex.DW1/5 and Special Power of Attorney dated 29th October, 2007 Ex.DW1/6 in favour of defendant no.2 Pooja Bhoot. Defendant no.1 Bimla Khatri thus qualifies as the nominee/assignee and legal representative of defendant no.2 Pooja Bhoot and the benefit of Section 53A available to defendant no.2 Pooja Bhoot is available to defendant no.1 Bimla

Khatri as well. For this essential difference in facts, ***Rambhau Namdeo Gajre*** supra is not applicable in the present case. “Persons claiming under him” i.e. the transferor within the meaning of Section 53A, would include, not only heirs but also assignees of the transferee. Parties under an agreement to purchase immovable property, in the absence of any stipulation to contrary in the agreement, are freely assignable/transferrable. ***Hemraj*** supra, also cited, does not deal with this and has no application to facts of this case.

(V) Though I have hereinabove observed that the plaintiff, under the law of succession, would be an heir of her husband Suraj Prakash but the same follows in law only in the event of intestacy of Suraj Prakash. The defendant no.1 Bimla Khatri has proved not only the Agreement to Sell and Special Power of Attorney both dated 29th October, 2007 but also Will dated 25th October, 2007 Ex.DW1/5 executed by Suraj Prakash with respect to the subject property in favour of defendant no.2 Pooja Bhoot. Under the said Will, read with the principle of execution provided for in Section 63 of the Indian Succession Act, 1925 on the demise of Suraj Prakash it is defendant no.2 Pooja Bhoot who would become the owner of the subject property and not the plaintiff. The said Will has been proved by examining an attesting witness thereto. Owing to the subject Will, the plaintiff, on demise of her husband Suraj Prakash, did not acquire any right, title, interest in the subject property to be entitled to possession thereof.

(W) I however clarify that the finding in the preceding paragraph is vis-à-vis the plaintiff and the defendants no.1 and 2 only and will not bind the defendant no.4 DDA and will not come in the way of defendant no.4 DDA computing dues for conversion of leasehold rights in the subject property into freehold.

26. Thus, issue no.(i) is decided in favour of the defendant no.1 Bimla Khatri and against the plaintiff.

27. As far as issue no.(ii) is concerned, the defendant no.1 Bimla Khatri has proved that defendant no.2 Pooja Bhoot executed Agreement to Sell, Power of Attorney, Will, Possession Letter and Receipt all dated 5th February, 2010 proved as Ex.DW1/7, Ex.DW1/9, Ex.DW1/10, Ex.DW1/11 and Ex.DW1/12 respectively with respect to the subject property in favour of defendant no.1 Bimla Khatri. The effect thereof has already been discussed above. Thus, issue no.(ii) also is decided in favour of defendant no.1 Bimla Khatri and against the plaintiff.

28. The plaintiff having been found to be not the owner of the subject property and having no title thereto and being not entitled to possession thereof, cannot be entitled to any *mesne profits* with respect to the subject property. Thus, issue no.(iii) is decided against the plaintiff and in favour of the defendant no.1 Bimla Khatri.

29. The suit thus has to be dismissed.

30. The plaintiff is found to have turned dishonest after the demise of her husband Suraj Prakash and by instituting this suit, got the leasehold rights in the subject property mutated in her favour by misrepresenting to the defendant no.4 DDA and having filed this false

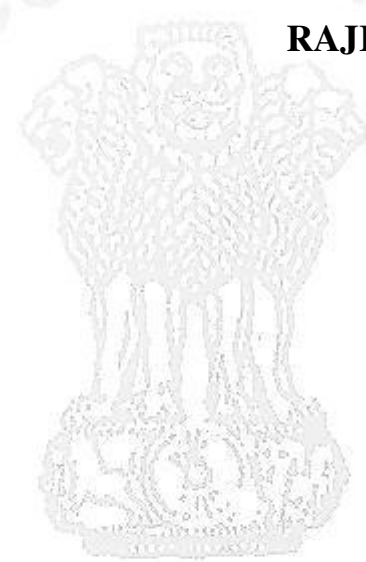
action, the plaintiff is thus liable to pay exemplary costs to the defendant no.1 Bimla Khatri.

31. A decree is accordingly passed, of dismissal of the suit with costs payable by the plaintiff to the defendant no.1 Bimla Khatri, assessed at Rs.1,50,000/-.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

MARCH 19, 2020
JANUARY 29, 2020
'ak/bs/gsr'



नित्यमेव जयते