IN THE HIGH COURT AT CALCUTTA

CIVIL APPELLATE JURISDICTION

APPELLATE SIDE

Present:

THE HON'BLE JUSTICE HARISH TANDON

&

THE HON'BLE JUSTICE PRASENJIT BISWAS

S.A.T 78 of 2023

Surojit Pathak

Vs.

David Christopher Somerset & Ors.

Appearance:

For the Petitioners : **Mr. Malay Kumar Das, Adv.**

Mr. Dibyajyoti Raha, Adv.

Judgment On : **14.07.2023**

PRASENJIT BISWAS, J.:

The instant appeal has been preferred by the defendant/appellant challenging the concurrent findings of the courts below.

David Christopher Somerset as plaintiff (herein respondent no.1) filed a Title Suit being no. 267/12 against the present defendant/appellant impleading his sister Margaret as *proforma* defendant. Plaintiff claimed to be the owner along with his sister in respect of the suit property by way of inheritance from their mother Anastasia. During lifetime Anastasia executed a general power of attorney in favour of one Gerald Emile Moses on 15.03.1990 which was subsequently revoked by her on 24.03.1994. Thereafter another power of attorney was executed in favour of Brian Anthony Jennings. Anastasia died on 09.10.2003.

During his visit to India present respondent no.1/plaintiff came to know that the present appellant/defendant claimed to be the owner of the suit property by virtue of a sale deed executed on 09.02.2003 in connection with Title Execution Case No. 194 of 2008 arose out of Title Suit No. 465 of 2007. It was further revealed that Title Suit No. 465 of 2007 was filed by the present defendant/appellant for specific performance of contract dated 31.07.1993. The said title suit was decreed ex parte by the trial court when the original owner Anastasia was no more in world. Respondent No. 1 filed a Title Suit against the present appellant/defendant and Gerald Emile Moses for eviction, declaration of title along with a further declaration that the purported sale deed dated 9th February, 2009 is not binding upon this respondent/plaintiff.

The suit was decreed *ex parte* in favour of the plaintiff and it declared the sale deed dated 09.02.2009 is not binding upon him. The said *ex parte* order was challenged by the present appellant before the first appellate Court and an application along with some documents was filed for taking additional evidence.

The parameters of considering the application filed under Order 41 Rule 27 have been summed up by the Supreme Court in the case of ***Union of India vs. Ibrahim Uddin & Anr. reported in (2012) 8 SCC 148*** which for the sake of convenience is being reproduced below:-

"48. To sum up on the issue, it may be held that application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite condition incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage."

Those parameters have been considered by the court below while rejecting the said application, the defendant/ appellant did not contest the suit and there is no evidence on his behalf. The first appellate Court rightly observed that the appellant should not be allowed to adduce and rely upon additional evidence when additional evidence unmistakably presupposing some prior evidence and not encompassing the case of no evidence.

Anastasia, the mother of the present respondent No. 1 and *proforma* respondent No.3 died on 09.10.2003 and accordingly Gerald could neither have had entered into agreement in respect of suit property as her constituted agent nor could he has been sued by the defendant/ appellant in the year 2007 for the specific performance of agreement. Undoubtedly, if the principal dies, a power of attorney ceases to exist. The purpose of a power of attorney is for the agent to act on behalf of the principal when the principal is unable to carry out their own legal matters. However, once the principal dies, the agent loses this authority as they can no longer make any decisions on behalf of the deceased principal.

The Title Suit being No. 465/2007 filed by this defendant/ appellant was against a dead person as there is no valid representation of the estate of the deceased as Gerald ceased to be the constituted agent of Anastasia since the time of her death. It appears to us that Anastasia died on 09.10.2003 whereas the sale deed was executed on 09.02.2009 which indicates that the sale deed being no.00466 for the year 2009 is palpably ineffective one. Moreover *ex-parte* decree for specific performance of contract for sale was passed on 21.02.2008. All these incidents indicate about the fraudulent act committed upon the respondent no.1. The sale deed was executed by the court on 09.02.2009 but due to death of Gerald the power of attorney executed by Anastasia in favour of Gerald came to an end since her death. So, no right, title and interest was vested upon the appellant through the impugned deed.

We, thus, do not find any merit in the instant appeal nor an involvement of the substantial question of law. The appeal is dismissed.

There shall, however, be no order as to costs.

Urgent Photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

I agree.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)