

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

RSA No. 2661 of 2023 (O&M)

Reserved On: 07.11.2023

Pronounced On: 21.12.2023

Rupinder Singh

...Appellant / defendant No. 1

Versus

Smt. Sita Devi (since deceased) through her
legal heirs and another

...Respondents

CORAM: HON'BLE MR. JUSTICE HARKESH MANUJA

Present: Mr. Kanwal Goyal, Advocate and
Mr. Govind Tanwar, Advocate
for the appellant.

Mr. P.S. Saini, Advocate
for respondent No. 1-A.

Mr. B.S. Thind, Advocate
for respondent No. 1-B.

Mr. Akshay Jain, Advocate
for respondent No. 2.

HARKESH MANUJA, J.

CM-10512-C-2023

Prayer in the application is for placing on record the
compromise dated 15.09.2023 (Annexure C-1) executed between the
appellant and respondent No. 1-B (Karan).

Learned counsel for the applicant-appellant submits that
he does not want to press the present application.

Dismissed as not pressed.

MAIN CASE:

By way of present appeal, challenge has been made to the judgments and decrees dated 09.09.2016 and 24.03.2023 passed by the Courts below, whereby suit for declaration as well as for consequential relief of possession and mandatory injunction, filed at the instance of the respondent No. 1 (hereinafter reference to respondent No. 1 shall include his LRs as well), stands decreed.

[2] Briefly stating, respondent No. 1 filed a suit for declaration; possession as well as for mandatory injunction while stating therein that the property in question i.e. Booth No.204, Sector-22C, Chandigarh was allotted by the office of respondent No. 2 in favour of her son, i.e. Varinder Kumar @ Virender Kumar (since deceased) vide allotment letter dated 05.05.1993 on lease hold basis and possession thereof was also handed over. It was further pleaded that on account of having suffered financial losses, said Varinder Kumar closed his business in the aforesaid Booth w.e.f. June, 1995 and thereafter, went under treatment for mental depression and loss of mental balance. Subsequently, Varinder Kumar got married on 20.07.1999 which unfortunately resulted into divorce vide decree dated 25.04.2009. Out of the said wedlock, respondent 1-B, namely, Karan was born on 13.04.2001. It was also pleaded that Varinder Kumar died on 11.06.2009 leaving behind his mother-Sita Devi and son, as legal heirs. Upon death of Varinder Kumar, his mother-Sita Devi moved an application before the office of respondent No.2/defendant No.2 for

transfer of the suit property in her name as well as in the name of Karan (son of deceased) being mother and son of deceased-Varinder Kumar, however, she came to know that appellant-defendant No.1 was staking his claim over the suit property on the basis of registered irrevocable GPA dated 14.08.1995 besides registered Will of the same date; an affidavit and an indemnity bond dated 21.08.1995; allegedly executed by Varinder Kumar (deceased) in his favour.

In short, by alleging those documents to be forged and fabricated, a prayer was made for declaration to the effect that appellant-defendant No.1 was having no right, title and interest over the suit property besides claiming mandatory injunction for directing respondent No.2/defendant No.2 to transfer the same in favour of the plaintiffs and also for grant of decree for possession thereof.

[3] Upon notice, respondents appeared and filed their separate statements. In written statement filed at the instance of appellant-defendant No.1, he claimed himself to be the owner in possession of property in question while relying upon the following documents allegedly executed by deceased-Varinder Kumar in favour of appellant-defendant No.1:-

- (i) Agreement to sell dated 14.08.1995;
- (ii) General Power of Attorney dated 14.08.1995;
- (iii) Will dated 14.08.1995;
- (iv) Affidavit dated 14.08.1995;
- (v) Indemnity Bond dated 21.08.1995.

It was further pleaded that during his life-time i.e. from 14.08.1995 till 11.06.2009, deceased-Varinder Kumar never ever assailed the authenticity or veracity of any of the documents numbered (i) to (v) above before any Court/Authority of competent jurisdiction. Appellant-defendant No.1 also filed a counter-claim, claiming himself to be owner in possession over the suit property on the basis of aforementioned documents. It was also pleaded that in terms of condition-9 of the allotment letter, Varinder Kumar was not in a position to alienate the property in his possession that is why instead of execution of transfer/sale deed, the aforementioned documents were executed by him in favour of appellant-defendant No.1. No material was there in the written statement filed on behalf of respondent No.2 except for disclosing the factum of pendency of certain proceedings against appellant-defendant No.1 before the Estate Officer.

[4] In support of their respective pleadings, parties led their evidence and the Trial Court after consideration, decreed the suit in favour of plaintiff(s)-defendant No.1 vide judgment and decree dated 09.09.2016 and directed the appellant-defendant No.1 to hand over the vacant physical possession of the suit property to respondent No 1. On the other hand, counter-claim filed at the instance of appellant-defendant No.1 was dismissed. Aggrieved thereof, appellant-defendant No.1 filed first appeal, however, the same came to be dismissed vide judgment and decree dated 24.03.2023 passed by learned Additional District Judge, Chandigarh.

[5] Impugning the aforesaid judgments and decrees passed by the Courts below, learned counsel for appellant-defendant No.1 submits that both the Courts failed to take into consideration the documents in the shape of agreement to sell, irrevocable registered GPA, registered Will, affidavit as well as indemnity bond, executed by deceased-Varinder Kumar (allottee) in favour of appellant-defendant No.1. He further submits that by virtue of aforementioned documents, the allottee intended to alienate all his ownership/allotment/possessory rights to defendant No.1-appellant for execution of sale deed which could not be legally done in terms of Clause 9 of the allotment letter dated 05.05.1993 creating an embargo for a period of 15 years as regards transfer of his leasehold rights under the allotment letter. Clause-9 of the allotment letter being relevant is reproduced hereunder:-

“9. You shall not be entitled to transfer the building or alienate your lease hold rights or title in any manner whatsoever including giving the booth on monthly rent for a period of 15 years. Such permission shall be given, only after the lessee had paid full premium and ground rent due under the lease for the building and after expiry of 15 years from the date of allotment. The partnership for carrying business in the said booth shall tantamount to transfer which is not permissible.”

[6] Learned counsel for appellant-defendant No.1 also places reliance upon illustration to Section 202 of the Indian Contract Act, 1872 (**hereinafter to be referred as ‘1872 Act’**), to contend that when an agency in the shape of an irrevocable power of attorney dated 14.08.1995 was executed by deceased-Varinder Kumar in favour of

appellant-defendant No.1 after receiving the entire consideration, the same never stands terminated, even on account of death of the Doner. He further submits that in the wake of aforementioned irrevocable power of attorney dated 14.08.1995, which was proved on record as Ex. D3, no rights in the property in question, could devolve upon the natural heirs of deceased-Varinder Kumar. In support of his submissions, Mr. Kanwal Goyal, learned counsel for appellant-defendant No.1, relies upon judgment rendered by this Court in case of **“Smt. Parkash Devi Vs. Rajinder Kumar and Ors.”**, reported as ***2022(4) RCR (Civil) 145*** and another by Hon’ble Delhi High Court in case of **“Ramesh Chand (Shri) Vs. Suresh Chand”**, reported as ***2012(27) RCR (Civil) 54***. Section 202 of 1872 Act for the purpose of discussion is reproduced hereunder:-

“202. Termination of agency, where agent has an interest in subject-matter.—Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest. —Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.” Illustrations

(a) A gives authority to B to sell A’s land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor can it be terminated by his insanity or death.

(b) A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself out of the price the amount of his own advances. A cannot revoke this authority, nor is it

terminated by his insanity or death. (b) A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself out of the price the amount of his own advances. A cannot revoke this authority, nor is it terminated by his insanity or death."

[6.1] Learned counsel for the appellant-defendant No.1 further submits that once the vacant possession of the property in question was handed over to appellant-defendant No.1 under an agreement to sell dated 14.08.1995 against receipt of full and final sale consideration and the said document was never assailed by Varinder Kumar during his life-time, his successors could not claim restoration of possession as the same was protected in terms of Section 53(A) of the Transfer of Property Act, 1908. In support, he also places reliance upon the judgment rendered by the Hon'ble Supreme Court in case of "**Suraj Lamp and Industries Pvt. Ltd. Vs. State of Haryana and another**", reported as **2011(4) RCR (Civil) 669**. Relevant para-18 of the same is reproduced hereunder:-

"18. We have merely drawn attention to and reiterated the well-settled legal position that SA/GPA/WILL transactions are not 'transfers' or 'sales' and that such transactions cannot be treated as completed transfers or conveyances. They can continue to be treated as existing agreement of sale. Nothing prevents affected parties from getting registered Deeds of Conveyance to complete their title. The said 'SA/GPA/WILL transactions' may also be used to obtain specific performance or to defend possession under section 53A of TP Act. If they are entered before this day,

they may be relied upon to apply for regularization of allotments/leases by Development Authorities. We make it clear that if the documents relating to 'SA/GPA/WILL transactions' has been accepted acted upon by DDA or other developmental authorities or by the Municipal or revenue authorities to effect mutation, they need not be disturbed, merely on account of this decision."

[6.2] Learned counsel for appellant-defendant No.1 also submits that the findings recorded by the First Appellate Court as regards the appellant-defendant No.1 not being the owner in possession are totally illegal, perverse and contrary to the claim made by the plaintiff-respondents in their plaint itself.

[7] On the other hand, learned counsel representing respondent 1(A) submits that the documents relied upon by appellant-defendant No.1 were all forged and fabricated and even during his life-time, deceased-Varinder Kumar disputed those documents in his representations submitted before the authorities. He also submits that in terms of Clause 9 of the allotment letter dated 05.05.1993, no such document could have been executed for and on behalf of Varinder Kumar and thus, the same do not create any right, title or interest in favour of appellant-defendant No.1. While referring to Para Nos. 18 to 22 of the judgment passed by the First Appellate Court, he further submits that upon appreciation of documentary evidence, findings in detail were recorded by the First Appellate Court to the effect that appellant-defendant No.1 was never in possession of the property in question and the same cannot be disturbed by this Court in Regular

Second Appeal, for the said purpose, he placed reliance upon the judgments rendered by the Hon'ble Supreme Court in cases of "Mst. Sugani Vs. Rameshwar Das & Anr", reported as **2006(4) RCR (Civil) 319** and "Narayanan Rajendran and another Vs. Lekshmy Sarojini and others", reported as **2009(2) RCR (Civil) 286**.

[7.1] Learned counsel representing respondent 1(A), while referring to Section 69 and 70 of the Indian Succession Act, 1925 (**hereinafter to be referred as "Succession Act"**), also submits that Will dated 14.08.1995 (Ex. D4) executed by Varinder Kumar (deceased) in favour of appellant-defendant No.1 *qua* the property in question automatically stood revoked in view of the later development; Varinder Kumar (deceased) having got married on **20.07.1999**; having blessed with a son, respondent 1-B on 13.04.2001 and thus, submits that the Will even did not create any right or interest in favour of appellant-defendant No.1.

[8] No material arguments were raised on behalf of respondent No.1-B while stating that the dispute in the *lis* was primarily between the private parties.

[9] I have heard learned counsel for the parties; gone through the paper-book as well as records of the case including the judgments cited at the bar and I find substance in the arguments raised by learned counsel for the appellant.

[10] A perusal of the judgment rendered by the Trial Court reveals that though it was admitted that appellant was able to prove the Will, however, it was held that it automatically got revoked in view of

Sections 69 and 70 of the Succession Act and hence, appellant had no legal right, claim or interest in the demised booth. With respect to possession, in view of documents exhibited as P4/4 to P4/9, it was held that possession given as per Clause (6) of the agreement to sale was only symbolic possession and actual possession still lied with respondent No 1-plaintiff. Accordingly, direction was issued to the appellant to deliver vacant possession of the booth within two months to respondent No 1.

[11] Similarly, the Appellate Court, while admitting that the documents brought on record as Exhibits D1, D2, D3 & D8 were proved, rejected the contention regarding Will in favour of appellant on the similar ground as held by the Trial Court. Further, relying upon the communication between the original allottee-Varinder Kumar and respondent No 2, brought on record as exhibit P4/1 to P4/38 for the proceedings carried out on account of subletting of booth as well as other reasons specified in para 18 to 22, it was also held that appellant was not able to prove his possession over the demised booth. Additionally, the Appellate Court after specifically noticing the fact that delivering the possession, as per Clause 6 of the Agreement to Sell, was in violation of 15 years condition imposed in the allotment letter, held that there was no illegality in the judgment passed by the Trial Court and so, no interference was warranted.

[12] In the humble opinion of this Court, the present appeal raises following points for consideration:-

- (i) Whether the possession of demised booth was handed over to the appellant-defendant No. 1 under the five documents executed by deceased-Varinder Kumar
- (ii) Whether Section 202 of the Indian Contract Act, 1872, protects the termination of irrevocable GPA (Registered), even on account of death of the doner?
- (iii) Whether the alleged transfer of possession in favour of appellant-defendant No.1 in terms of following documents needs to be protected under Section 53A of the Transfer of Property Act, 1908:-
 - a. Agreement to sell;
 - b. GPA;
 - c. Will;
 - d. Affidavit;
 - e. Indemnity Bond.
- (iv) Whether Will in favour of appellant stands revoked on account of marriage of the Varinder Kumar?

ANALYSIS REGARDING POSSESSION

[13] Firstly, finding by the Courts regarding the possession is required to be examined and then, I shall examine the legal prepositions expounded by both sides. While admittedly, this Court shall not intervene in the concurrent findings of the fact recorded by the Trial Court and Appellate Court, however, it is also settled law that when the findings are perverse the records or on the basis of misreading of evidence, there is no legal impediment in doing so. This is also required to be taken into consideration that Regular Second Appeals in the States of Punjab, Haryana and Union Territory, Chandigarh, are regulated by Section 41 of the Punjab Courts Act, 1918, and not by

Section 100 of the Code of Civil Procedure, 1908. Reliance in this regard can be placed on a judgment of Co-ordinate Bench of this Court in **Parkash Devi's case (supra)**, relevant para of which is reproduced here under

“ The Regular Second Appeals in the States of Punjab, Haryana and Union Territory, Chandigarh, are regulated by Section 41 of the Punjab Courts Act, 1918, and not by section 100 of the Code of Civil Procedure, 1908. Reference in this regard can be made to the judgment of the Five Judge Bench in Pankajakshi v. Chandrika (2016) 6 SCC 157. Under Section 41, the High Court is entitled to reappraise the evidence if the judgments passed by the Courts below not only reflect misreading of evidence but also suffer from perversity.”

[14] Now let us take a look at the prayer made by the respondents/plaintiffs in the suit filed by them before the Trial Court in the present case which is reproduced as below:

*“ AMENDED suit for Declaration to the effect that plaintiff No. a & b (Legal heir of Sita Devi W/o Dharam Dev (deceased) and Virinder Kumar (deceased) son of Late Sh. Dharam Dev being her minor son and Raj Kumar respectively. And further declaration to the effect that the defendant No. 1 has no legal right, claim or interest to get the allotment of booth No. 204, Sector 22-C, Chandigarh transpired his name **and as a consequential relief for possession thereby directing the defendant No. 1 to vacate Booth No. 204, Sector 22-C, Chandigarh and handover the vacant possession of the same to plaintiff No. a & b (Legal heirs of Sita Devi and Varinder Kumar) from all encumbrances, if any, created by them.**”*

(Emphasis supplied)

A perusal of the same reveals that prayer for consequential relief was also made to the effect that vacant possession of the demised booth be delivered by appellant-defendant No 1 to plaintiff, thereby meaning that it was admitted by the plaintiff/respondent No 1 that possession of the booth was with the appellant. Rather, an admission in this regard was duly recorded by the Trial Court in para-13 of the judgment as well, which is reproduced as below:

*“13. Learned counsel for the plaintiffs has argued that the plaintiffs are the legal heirs of the deceased Sh. Virender Kumar and hence they are entitled to the suit property in question. **He further argued that the possession of the suit property is with the defendant no. 1 and thus the possession of the suit property must be restored.** Hence, he prayed that suit may kindly be decreed and counter claim may be dismissed.”*

(Emphasis supplied)

[15] In view of the above conceded position regarding possession with the appellant-defendant No. 1, supported by Clause 6 of the Agreement to Sell, findings recorded by the Courts below that only symbolic possession was delivered to the appellant is not only perverse to the record, but it is also against the case set up by the plaintiffs/respondents. Consequently, decree awarded by the Courts below to deliver the vacant possession to the respondents, make the order self contradictory, because if the possession is already vested with respondent No 1, there was no requirement to issue any such decree. On the other hand, with respect to the fact that till lately,

communication with respondent No. 2 was made by Varinder Kumar only, the explanation offered by appellant that it was done to protect his interest, sounds plausible in view of the peculiar circumstance present due to Clause 19 of the allotment letter as the appellant in order to secure his interest would avoid anything, which could show that any step in violation of this clause has been taken.

[16] In addition to the above, there are many other factors which weigh in favour of the appellant. Since the suit was instituted by the plaintiffs/respondents, the obligation was on them to prove their possession and in view of Clause 6 of the Agreement to Sell, *prima facie* possession was settled in favour of appellant. If the possession delivered to appellant was in violation of Clause-9 of the allotment letter, action could be taken by respondent No. 2 in accordance with law, but on this ground, documents executed between appellant and Varinder Kumar could not be nullified to the extent of delivery of possession.

[17] Moreover, it is the case of respondent No 1 that Varinder Kumar closed his business in 1995 on account of huge loss and subsequently went into depression, there is no further averment regarding when he again started the business and thus, came into the possession of the booth. Respondent No. 1(A), while appearing as PW1-A admitted in his testimony that neither he was aware whether dues were being paid every year nor any complaint was made regarding the documents which he alleged had been forged by appellant. Even there is admission on his part that originals are not with plaintiffs /

respondent No 1 and no explanation has come forward that how they reached into the possession of appellant. Judgments relied upon by the learned counsel for respondent No. 1-A does not come to his rescue on two accounts. Firstly, they were passed in case of appeals where proceedings were governed by Section 100 of CPC, scope of which in comparison to Section 41 of the Punjab Courts Act, 1918, by which present appeal is governed, is quite narrow. Secondly, in any case, finding regarding possession is apparently perverse to record and pleadings as well as self-contradictory. Hence, the finding in this regard is required to be reverted and it has to be held that actual and physical possession of the demised booth was with the appellant.

DISCUSSION REGARDING SECTION 202 OF THE INDIAN CONTRACT ACT, 1872

[18] Before proceeding further with respect to the submissions regarding Section 202 of the Indian Contract Act, 1872, despite of repetition, it is necessary to point out that there existed two registered Power of Attorneys in favour of appellant (Exs. D2 & D3), after payment of entire consideration and delivering possession to the appellant as stipulated in the agreement to sell. Therefore, it was not appropriate by the Courts below to conclude that appellant had no interest/right in the demised booth. It was held by the Hon'ble Delhi High Court in "**Ramesh Chand (Shri) v. Suresh Chand**", reported as **2012(27) R.C.R.(Civil) 54**, that entitlement under such power of attorney remains irrevocable because it had elements of commercial transaction which could not be allowed to be frustrated on account of

death of the executants of the power of attorney. Relevant para of the same is reproduced here under:

"4. ...The object of giving validity to a power of attorney given for consideration even after death of the executants is to ensure that entitlement under such power of attorney remains because the same is not a regular or a routine power of attorney but the same had elements of a commercial transaction which cannot be allowed to be frustrated on account of death of the executant of the power of attorney."

In ***Prakash Devi's case (supra)*** as well, it was held that entitlement under such registered General Power of Attorney continues to remain in force even after the death of doner. Relevant para of the same is reproduced here under:

"14. It is evident that illustration (b) to section 202 of the Indian Contract Act, 1872, itself explains that the agency in which the agent has an interest is neither terminated by insanity nor death of the principal. In the present circumstances, it is evident that the agency created in favour of late Sh. Diwan Chand Chowdhary vide registered General Power of Attorney dated 01.02.1984, continued to remain in force even after the death of late Sh. Bishamber Dass. The law on the point is clear. Reliance can be placed on the judgment of the Division Bench of the Gujarat High Court in Maharani Shanta Devi (her highness) v. Shavjibhai H. Patel and others, 1998(4) Civil Law Journal 252 = (1998) 2 Gujarat Law Reporter 1521. In para 19 of the report, the Court discussed the effect of death of the principal while interpreting that the death of the principal cannot bring about the termination of the agency. Thus, both the Courts have erred in recording the aforesaid finding."

[19] In "**Ramesh Mohan vs. Raj Krishan**", reported as **PLR (1984) 86 P&H 211**, an irrevocable General Power of Attorney in respect of an immovable property was executed alongwith the agreement to sell, receipt of entire sale consideration and delivery of possession. The power of attorney was later cancelled which came for consideration before this Court and this Court held that interest was created in the suit property when its possession was delivered and the total sale consideration was received in pursuance of the agreement under Section 54 of the Transfer of Property Act, 1882. Relevant para of the same is reproduced hereunder:-

" 4. ...In the present case, the agreement, Exhibit D.W. 1/1, was not a mere agreement to sell, but more than that because practically, the transaction was complete in all respects except the execution of the regular sale deed and the registration thereof. Thus, interest was created in the property under the agreement and the provisions of Section 202 of the Contract Act are applicable to the facts of the present case. Moreover, the words, "an interest in the property which forms the subject-matter of the agency" occurring in Section 202 of the Contract Act, are of wide amplitude than the words, "interest in or charge on, such property," in section 54 of the Act. It is true that the mere execution of the agreement for sale without doing anything more will not create any interest in the property to be sold, but where the vendor has received the sale price and in pursuance of the agreement of sell possession thereof has been delivered to the prospective vendee, then it could not be successfully argued on the basis of section 54 of the Act that no interest was created in the property. The words, 'of itself' in section

54 of the Act, are very material to reach the right conclusion in a given case. Thus, on the facts of the present case, the irresistible conclusion is that in view of the provisions of Section 202 of the Contract Act, as well as because of the agreement itself the power of attorney, Exhibit, P.W.5/3, was irrevocable. Ram Narain, defendant-appellant continued to be the agent of the plaintiffs-respondents in spite of any cancellation of the power of attorney, Exhibit P.W. 5/3. Thus, the decree suffered by Ram Narain, on behalf of the plaintiffs in the suit filed on behalf of Romesh Mohan, defendant-appellant, was binding on them. "

In another judgment by the Hon'ble Delhi High Court in ***"Harbans Singh vs. Shanti Devi"***, reported as ***1977 R.L.R. 487***, it was held that even if the person who is the beneficiary of an agreement of sale does not enforce his right for the purposes of the Transfer of Property and the Registration Acts, he still have a valid interest for the purposes of Section 202 of the Contract Act. Relevant para of the same is reproduced hereunder:

"7. For the purposes of the Law of Contract, therefore, it would not be useful to restrict the meaning of the word "interest" by the narrow compass in which this word is used at times in relation to immovable property. For instance, the last sentence of section 54 of the Transfer of Property Act states that a contract for sale of itself does not create any interest in or charge on immovable property. Similarly, section 17(1)(b) of the Registration Act makes only those documents compulsorily registerable which create, declare, assign, limit or extinguish any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards to or in immovable property. Since an

agreement for sale does not create such a right, title or interest, it may not be compulsorily registerable. But in the context of the Contract Act, it cannot be said that a person who is the beneficiary of an agreement of sale has no right or interest in the subject-matter of the sale. He has a legally enforceable right and interest in enforcing the contract of sale by the execution of a sale deed and in getting possession of the property agreed to be sold under the provisions of the Specific Relief Act. In the English Common Law, the specific performance of contracts was a part of the law of contract. This is why Chapter Iv of the Contract Act deals with the performance of contracts which includes the performance of contracts relating to immovable property also. In fact, section 4 of the Transfer of Property Act says that the chapters and sections of that Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872. Therefore, the respondent in whose favour the appellant had executed an agreement for the sale of an immovable property had an interest in the subject-matter of the contract, namely, the shop, turn the purposes of section 202 of the Contract Act if not for the purposes of the Transfer of Property and the Registration Acts.”

In view of the two power of attorney, as well as the agreement to sell executed in favour of appellant by Varinder Kumar, vide which substantial rights including the right to sell, gift and manage the demised booth were vested with the appellant, the same cannot be withdrawn or revoked.

DISCUSSION REGARDING SECTION 53-A OF THE TRANSFER OF PROPERTY ACT

[20] At this stage, it also becomes necessary to have a look at the definition of Section 53A of the Transfer of Property Act, which is reproduced below:

“53A. Part Performance

Where any person contracts to transfer for consideration any immovable 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 the contract, though required to be registered, has not been registered, or, 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.”*

In simplicitor, if a transferee in part performance of the contract, has obtained the possession, the transferor or any person

claiming under him shall be debarred from enforcing against the transferee any right in respect of the property. In “**Ghanshyam vs. Yogendra Rathi**”, reported as **2023 AIR (Supreme Court) 2754**, it was held by the Hon'ble Apex Court that possessory rights of prospective purchaser cannot be invaded by transferer or any person claiming under him, if transferee has already performed his part of the contract. Relevant paras of the same are reproduced here under:

" 9. No doubt, agreement to sell is not a document of title or a deed of transfer of property by sale and as such, may not confer absolute title upon the plaintiff-respondent over the suit property in view of Section 54 of the Transfer of Property Act, 1882, nonetheless, the agreement to sell, the payment of entire sale consideration as mentioned in the agreement itself and corroborated by the receipt of its payment and the fact that the plaintiff-respondent was put in possession of the suit property in accordance with law as is also established by the possession memo on record, goes to prove that the plaintiff-respondent is de-facto having possessory rights over the suit property in part performance of the agreement to sell. This possessory right of the plaintiff-respondent is not liable to be disturbed by the transferor, i.e., the defendant-appellant. The entry of the defendant-appellant over part of the suit property subsequently is simply as a licensee of the plaintiff-respondent. He does not continue to occupy it in capacity of the owner.

xxx

15. Legally an agreement to sell may not be regarded as a transaction of sale or a document transferring the proprietary rights in an immovable property but the prospective purchaser having performed his part of the contract and lawfully in possession acquires possessory title which is liable to be protected in view of Section 53A of the Transfer of Property Act, 1882. The said possessory rights of the prospective

purchaser cannot be invaded by the transferer or any person claiming under him.

16. *Notwithstanding the above as the plaintiff-respondent admittedly was settled with possessory title in part performance of the agreement to sell dated 10.04.2002 and that the defendant-appellant has lost his possession over it and had acquired the right of possession under a licence simpliciter, exhausted his right to continue in possession after the licence has been determined. Thus, the defendant-appellant parted with the possession of the suit property by putting the plaintiff-respondent in possession of it under an agreement to sell. The plaintiff-respondent in this way came to acquire possessory title over the same. The defendant-appellant, as such, ceased to be in possession of it as an owner rather occupied it as a licensee for a fixed period which stood determined by valid notice, leaving the defendant-appellant with no subsisting right to remain in possession of the suit premises."*

[21] Legal position that GPA/Agreement to Sell etc. can be used to defend possession under Section 53A of Transfer of Property Act, even came to be recognised by the Hon'ble Apex Court in ***Suraj Lamp's case (supra)*** as well. Concluding para of this judgement recognizing this fact is reproduced here under:

"18. We have merely drawn attention to and reiterated the well-settled legal position that SA/GPA/WILL transactions are not 'transfers' or 'sales' and that such transactions cannot be treated as completed transfers or conveyances. They can continue to be treated as existing agreement of sale. Nothing prevents affected parties from getting registered Deeds of Conveyance to complete their title. The said 'SA/GPA/WILL transactions' may also be used to obtain specific performance or to defend possession under section 53A of Transfer of

Property Act. If they are entered before this day, they may be relied upon to apply for regularisation of allotments/leases by Development Authorities. We make it clear that if the documents relating to 'SA/GPA/WILL transactions' has been accepted acted upon by DDA or other developmental authorities or by the Municipal or revenue authorities to effect mutation, they need not be disturbed, merely on account of this decision."

In "***Ude Singh & Ors. vs. Ram Chander***", reported as ***2009(1) R.C.R.(Civil) 41***, in the circumstance, when entire sale consideration was paid by the vendee and possession was delivered to him, though sale deed was not registered, Co-ordinate Bench of this Court, estopped the vendor from reclaiming possession. Relevant para of this judgement are reproduced here under:

"9. There is no finding by any Court that the plaintiff was dispossessed on 03.11.76. In absence of there being any finding of dispossession and in view of the evidence led by the defendants that the defendants were put in possession on 05.07.63 the Lower Appellate Court has committed glaring illegality in declaring the possession of the defendants as unauthorised. The document Ex. D2 has not been denied by the plaintiff nor there is any evidence to rebut the evidence led by the defendants to prove the document. The defendants paid the entire sale consideration and also obtained the possession of the disputed plot from the father of plaintiff. Even if no title on the basis of unregistered sale deed/receipt can be conferred, the plaintiff is stopped from reclaiming possession on the ground that there is no valid sale deed. Rule of estoppel contained in Section 115 of the Evidence Act is clearly attracted in the present Act.

10. I am fortified with a judgment of Full Bench of J&K reported as Ghulam Qadir and another v. Ghulam Husain, AIR

1973 Jammu and Kashmir 11. In this case, an agreement to sell was executed between the parties and full consideration of the sale amount as also possession delivered to the vendee. Consequently, the vendor repudiated the sale and asked for recovery of possession. Hon'ble the Full Bench in the case aforesaid considered the issue and held as under:-

" For the reasons we find that even though the possession of the defendant may be permissive, since the plaintiff has received the entire consideration money and allowed the position to be changed to the prejudice of the defendant, he will be estopped from repudiating the sale transaction and recovering possession from the defendant. On this ground alone, in our opinion, the defendant is entitled to succeed." "

[22] While examining this issue, it has also to be determined as to what was the intent and purpose of this transaction between Varinder Kumar and appellant and for said purpose, while executing all these documents and while doing so, all the documents have to be read cumulatively. In **"S. Chattanatha Karayalar vs. The Central Bank of India Ltd."**, reported as **AIR 1965 SC 1856**, It was held by the Hon'ble Apex Court that the principle is well established that if the transaction is contained in more than one document between the same parties, those must be read and interpreted together and have the same legal effect for all purposes as if those are one document.

In the facts and circumstances of the present case, on the basis of a conjoint perusal of all these documents, it can be safely concluded that this entire transaction was a commercial transaction for the purpose of transferring all the rights in favor of appellant,

which earlier vested with Varinder Kumar on account of allotment letter dated 05.05.1993 in his favour by respondent No 2. Even on this account, Varinder Kumar having received the entire consideration and consequently by executing bunch of documents, which vested the interests in appellant earlier vested in Varinder Kumar, neither he nor anyone claiming under him was entitled to reclaim the possession.

WHETHER REGISTERED WILL GOT REVOKED AFTER MARRIAGE

[23] The last point which is required to be determined by this Court is whether on account of marriage of Varinder Kumar, the Will dated 14.08.1995 got automatically revoked. Both the Courts below, despite holding that the Will was proved by the appellant, held that in view of Sections 69 & 70 of Indian Succession Act, 1925, after the marriage of the Varinder Kumar, it got revoked. Even no contention in this regard has been made by learned counsel for appellant; however, for the sake of complete determination of the right of the parties, it is necessary to adjudicate on this issue as well.

Both the learned Courts below, while applying Sections 69 & 70 of the Succession Act, escaped the scope of Section 57, which is applicable to Wills and codicils made by any Hindu, Buddhist, Sikh or Jaina. This Section also provides that marriage shall not revoke any such will or codicil. Section 57 of the Succession Act is reproduced hereunder:

“57. Application of certain provisions of Part to a class of wills made by Hindus, etc.--The provisions of this Part which

are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply—

(a) to all wills and codicils made by any Hindu, Buddhist, Sikh or Jaina, on or after the first day of September, 1870, within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and

(b) to all such wills and codicils made outside those territories and limits so far as relates to immoveable property situate within those territories or limits, 2[and

(c) to all wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the first day of January, 1927, to which those provisions are not applied by clauses (a) and (b):]

Provided that marriage shall not revoke any such will or codicil.”

This Section further specifies that while applying this part in relation to Will made by a Hindu, it shall apply subject to the restrictions and modifications specified in Schedule III, which does not contain the Section 69, thereby meaning that this section is not applicable to Will made by a Hindu. On the other hand, in Condition-4, it has been specified that “than by marriage or” shall be omitted.

Relevant condition specified in Schedule-III is reproduced below:

“ Restrictions and modifications in application of foregoing sections

xxx

4. In applying section 70, the words “than by marriage or” shall be omitted.”

[24] Inapplicability of revocation by marriage clause to a will made by a Hindu testator is aptly captured by the Hon'ble Bombay High Court in "**Kalyan Kumar Nag vs. Dina Guha**", reported as **1974(76) BomLR 815**, relevant paras of which are reproduced here under:

"4. section 21 of the Special Marriage Act, 1954 provides that notwithstanding any restrictions contained in the Indian Succession Act, 1925, with respect to its application to members of certain communities, succession to the property of any person whose marriage is solemnized under the Special Marriage Act shall be regulated by the provisions of the Indian Succession Act. The restrictions with respect to the application of the Indian Succession Act to Hindus are contained in Sections 57 and 58 of and Schedule III to the Indian Succession Act. With regard to wills made after January 1, 1927, Section 57 and el. (c) thereof provide that the provisions of Part VI, which are set out in Schedule III, would, subject to the restrictions and modifications specified therein, apply to all wills and codicils made by a Hindu after January 1, 1927. Section 57 also contain a proviso that marriage shall not revoke any such will or codicil as referred to in the section. Schedule III does not refer to section 69 of the Indian Succession Act. Therefore, Section 69 would not apply to Hindus. Item 4 of Schedule III refers to Section 70 which is applied to Hindus after omitting the words "than by marriage or". In my opinion there is an error in this item inasmuch as the word "than" ought not to be omitted. If that word is omitted, Section 70 becomes ungrammatical. I shall, therefore, retain the word "than" in the section and omit only the words "by marriage or". As so modified, Section 70 in its application to Hindus provides that no will or codicil or any part thereof shall be revoked otherwise than by another will or codicil. This means that a will of a Hindu shall not be revoked by marriage.

This would undoubtedly be a restriction in respect, of the application of the Indian Succession Act to Hindus because Section 69 provides that every will shall be revoked by the marriage of the maker except certain wills with which we are not concerned.

5. *The position, therefore, is that while under section 69 of the Indian Succession Act marriage revokes the will, Section 70 as modified by item 4 of Schedule III and applied to Hindus provides that a will shall not be revoked by marriage. Similarly, the proviso to Section 57 also puts a restriction on the application of the Indian Succession Act to Hindus inasmuch as it provides that marriage shall not revoke a will or codicil.”*

[25] It may, therefore, be noticed that even though as per Section 70 of the Succession Act, subsequent marriage of the testator brings a revocation of the Will, the said provision has no application in the case of Wills executed by a Hindu (or Buddhist, Sikh or Jaina) in view of conjoint reading of restriction No. 4 of Schedule III read with Section 57 of the Succession Act. Accordingly, marriage by a Hindu (or Buddhist, Sikh or Jaina) testator does not induce the revocation of the Will.

Fact that Varinder Kumar, whose complete name was Varinder Kumar Khurana @ Virendra Kumar Khurana, was a Hindu can be ascertained from the *ex parte* judgement of divorce dated 25.04.2009 brought on record by the respondent No 1 as Ex-P1. In that scenario, finding by both the Courts below that will got revoked after the marriage of the Varinder Kumar is also required to be reverted and it is held that registered Will was in operation when appellant

applied for transfer of demised booth in his name before respondent No.2.

[26] There are few other factual averments as well, which required consideration by the Courts below but were left unattended. While the plea taken by plaintiff/respondent No. 1 regarding the mental incapacity of the initial allottee-Varinder Kumar was held to be not proved by the Courts; apart from bare averments in the pleadings, there was no counter from their side regarding the other documents out of which, Will and two Power of Attorneys in favour of appellant were duly registered as well. Even the factum regarding payment of entire consideration was not refuted by the plaintiff/respondent No. 1 by bringing on record any evidence, while a substantial amount was paid by way of demand drafts. It is trite to observe here that registered documents carries a presumption regarding their authenticity and reliance in this regard can be placed on ***Prakash Devi's case (supra)***, relevant paras of which are reproduced below:

“15. A registered power of attorney may be proved by its production without further proof when, on the face of it, it purports to have been executed in the Court before the Registrar and is authenticated by him. section 33(4) of the Registration Act, 1908, provides that the power of attorney may be proved by its production in the Court particularly when it has been executed before and authenticated by the Registrar. Section 33(4) is extracted as under:-

"33. Power-of-attorney recognisable for purposes of section 32.-

(1) For the purposes of section 32, the following powers-of-attorney shall alone be recognized, namely:-

(a) if the principal at the time of executing the power-of-attorney resides in any part of [India] in which this Act is for the time being in force, a power-of-attorney executed before and authenticated by the Registrar or Sub-Registrar within whose district or sub-district the principal resides;

(b) if the principal at the time aforesaid [resides in any part of India in which this Act is not in force], a powerof- attorney executed before and authenticated by any Magistrate;

(c) if the principal at the time aforesaid does not reside in 1 [India], a power-of-attorney executed before and authenticated by a Notary Public, or any Court, Judge, Magistrate, [Indian] Consul or Vice-Consul, or representative of the Central Government: Provided that the following persons shall not be required to attend at any registration-office or Court for the purpose of executing any such power-of-attorney as is mentioned in clauses (a) and (b) of this section, namely:-

(i) persons who by reason of bodily infirmity are unable without risk or serious inconvenience so to attend;

(ii) persons who are in jail under civil or criminal process; and

(iii) persons exempt by law from personal appearance in court

[Explanation.-In this sub-section "India" means India, as defined in clause (28) of section 3 of the General Clauses Act, 1897 (10 of 1897).]

(2) In the case of every such person the Registrar or Sub-Registrar or Magistrate, as the case may be, if satisfied that the power-of-attorney has been voluntarily executed by the person purporting to be the principal, may attest the same without requiring his personal attendance at the office or Court aforesaid.

(3) To obtain evidence as to the voluntary nature of the execution, the Registrar or Sub-Registrar or Magistrate may either himself go to the house of the person purporting to be the principal, or to the jail in which he is confined, and examine him, or issue a commission for his examination.

(4) Any power-of-attorney mentioned in this section may be proved by the production of it without further proof when it purports on the face of it to have been executed before and authenticated by the person or Court hereinbefore mentioned in that behalf."

16. Moreover, section 85 of the Indian Evidence Act, 1872, provides for a rebuttable presumption of law which the Court to presume that every document purporting to be a power of attorney has been duly executed before or authenticated by a Registrar or was so executed and authenticated. The Court is bound to draw such presumption in favour of the power of attorney holder though the other party may disprove the same by leading evidence. Section 85 is extracted as under:-

"85. Presumption as to powers-of-attorney. -- The Court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by, a Notary Public, or any Court, Judge, Magistrate, [Indian] Consul or Vice Consul, or representative of the [Central Government], was so executed and authenticated. "

17. Furthermore, Section 114 (illustration (e)) of the Indian Evidence Act, 1872, provides for presumption as to regularity of procedure before a registration officer. The registration of a document is a solemn act to be performed in the presence of a competent official appointed to act as the Registrar. It is his duty is to carry out fair and valid registration process by ensuring that proper persons/parties are present, who are competent to act and their identity is verified to his satisfaction. All acts done before him in his official capacity

and verified by his signatures shall be presumed by the Court to have been carried out in a proper manner by virtue of section 85 of the Indian Evidence Act, 1872. Where an endorsement made on a document by the Sub-Registrar shows that it was presented for registration by the executant, there is a presumption in favour of the correctness of this endorsement.”

[27] In view of the discussion held above, present appeal stands **allowed**; judgments and decrees dated 09.09.2016 and 24.03.2023 passed by the Courts below are set aside; the appellant is held entitled not only for retaining possession of the demised booth but he is also entitled for the transfer of allotment of the booth in question in his name on the strength of the Registered Will dated 14.08.1995 in his favour and the counter-claim filed by him is decreed. Decree sheet be prepared accordingly.

[28] Pending application(s), if any, shall also stand disposed off.

December 21, 2023
‘dk kamra’

(HARKESH MANUJA)
JUDGE

Whether Speaking / Reasoned :	Yes	
Whether Reportable :	Yes	