2022 INSC 381

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No.2592 of 2022
(Arising out of Special Leave Petition (C) No.20047 of 2017)

MRS. UMADEVI NAMBIAR ...APPELLANT(S)

VERSUS

THAMARASSERI ROMAN CATHOLIC
DIOCESE REP BY ITS PROCURATOR
DEVSSIA'S SON REV. FATHER
JOSEPH KAPPIL ...RESPONDENT(S)

J U D G M E N T

V. Ramasubramanian

1. Their suit for partition having been decreed by the trial Court but reversed by the High Court in a regular first appeal, the plaintiffs have come up with the above appeal.

2. We have heard Shri Dushyant A. Dave, learned senior counsel for the appellant and Shri Thomas P. Joseph, learned counsel for

the respondent.

3. The suit schedule property originally belonged to one Ullattukandiyil Sankunni. After his death, the property devolved upon his two daughters, one of whom is the appellant herein. The appellant herein executed a general Power of Attorney on 21.07.1971, registered as Document No.35 of 1971, in favour of her sister Smt. Ranee Sidhan. However, the said power was cancelled on 31.01.1985. But in the meantime, the appellant's sister was found to have executed four different documents in favour of certain third parties, assigning/releasing some properties. Therefore, the appellant first filed a suit in O.S.No.16 of 1986 followed by another suit in O.S.No.27 of 1988 against the assignees/releasees. Though a preliminary decree was passed in the second suit on 7.01.1989, the appellant came to know later that the assignees/releasees had sold the property to the respondent herein.

4. Therefore, the appellant filed yet another suit in O.S No.130 of 1989, seeking partition and separate possession of her half share in the suit property. The trial Court granted a preliminary decree in favour of the appellant. However, the regular appeal filed by the

respondent herein was allowed by a Division Bench of the High Court by the judgment and decree impugned in this appeal. Therefore, the appellant has come up with the above appeal.

5. At the outset, it should be stated that the respondent herein did not dispute the fact that the suit schedule property originally belonged to the father of the appellant and her sister and that the appellant and her sister were entitled to equal shares in the property. But the respondent contested the suit on the grounds *inter alia* ***(i)*** that in view of two prior suits for partition, namely, O.S. No.16 of 1986 and O.S.No.27 of 1988, the suit was barred under Order II Rule 2 of CPC; ***(ii)*** that the general Power of Attorney executed by the appellant in favour of her sister, authorized the agent to sign all documents and present them for registration; ***(iii)*** that by virtue of the said power, the appellant's sister transferred the suit schedule properly to four persons, for the purpose of discharging the debts incurred in the family business; ***(iv)*** that those transferees, in turn, sold the property to the respondent herein for a valuable consideration; ***(v)*** that though the

appellant was earlier residing in England, she came back to India and was staying in a house just 1 km. away from the plaint schedule property; ***(vi)*** that the appellant was therefore aware of all the transfers including the transfer in favour of the respondent and the development made by the respondent over the suit property; ***(vii)*** that, therefore, the appellant is guilty of acquiescence; and ***(viii)*** that the respondent has actually developed a commercial complex on the suit property and hence entitled at least to the value of improvements, in the event of a decree being passed.

6. The trial Court framed as many as 23 issues for consideration in the suit. The objection on the basis of Order II Rule 2 of CPC was rejected by the trial Court on the ground that the appellant's sister had committed a fraud and that the cause of action for the present suit was different from the cause of action for the previous suits. The contention that the appellant was guilty of acquiescence was rejected by the trial Court on a factual finding that the appellant was not aware of the transfer. On an examination of the recitals contained in the Power of Attorney, the trial Court came to the

conclusion that the document did not confer any power to sell the property and that, therefore, the appellant's sister was not entitled to alienate the property. Since the original alienations made in 1981 and 1982 by the appellant's sister were null and void on account of lack of express power to sell, the subsequent sale made by those alienees in favour of the respondent herein was also held to be invalid. On the basis of these findings, the trial Court decreed the suit, as prayed for.

7. While reversing Judgment and decree of the trial Court, the High Court held: ***(i)*** that the failure of the appellant to seek the relief of setting aside the documents of transfer and/or recovery of possession of the property was fatal to her case; ***(ii)*** that though the principle behind Order II Rule 2 CPC may not be applicable to suits for partition, the appellant must be held to have had constructive notice of the alienations made by her sister, in view of Section 3 of the Transfer of Property Act, 1882 (hereinafter referred to as "*the Act*"); ***(iii)*** that once constructive notice is attributed to the appellant, any relief for cancellation of the documents of alienation

would have already become time barred, by the time the Power of Attorney was cancelled; ***(iv)*** that since the deed of general Power of Attorney filed as Exhibit A-1 did not contain any express power to sell the suit property, the transferee cannot be held to have exercised *'reasonable care'* as required by the proviso to Section 41 of the Transfer of Property Act, 1882; and ***(v)*** that despite this fact, the appellant was not entitled to a decree for partition, in view of her failure to seek the cancellation of the alienations, in spite of having constructive notice of the alienations.

8. As could be seen from the judgments of the trial Court and the High Court, the deed of general Power of Attorney executed by the appellant in favour of her sister on 21.07.1971, did not specifically contain any power of sale. Therefore, the trial Court as well as the High Court held in no uncertain terms that the appellant's sister was not competent to sell the property to the predecessor-in-interest of the respondent. However, the learned counsel appearing for the respondent argued, ***(i)*** that while construing a document, all punctuation marks should be given due weightage; ***(ii)*** that the deed

of Power of Attorney was drafted by a doyen of the Bar; ***(iii)*** that Clause 22 of the deed of Power of Attorney conferred upon the agent, the power to execute and register all documents; ***(iv)*** that the power to execute a document and present the same for registration, should be understood to mean the power to execute documents requiring registration in the light of Section 49 of the Registration Act, 1908; and ***(v)*** that, therefore, a *bonafide* purchaser like the respondent should not be made to suffer.

9. But we do not agree with the above submissions of the learned counsel for the respondent. It remains a plain and simple fact that the deed of Power of Attorney executed by the appellant on 21.07.1971 in favour of her sister contained provisions empowering the agent: ***(i)*** to grant leases under Clause 15; ***(ii)*** to make borrowals if and when necessary with or without security, and to execute and if necessary, register all documents in connection therewith, under Clause 20; and ***(iii)*** to sign in her own name, documents for and on behalf of the appellant and present them for registration, under Clause 22. But there was no clause in the deed authorizing and

empowering the agent to sell the property. The argument that the deed was drafted by a doyen of the Bar, is an argument not in favour of the respondent. This is for the reason that the draftsman has chosen to include, ***(i)*** an express power to lease out the property; and ***(ii)*** an express power to execute any document offering the property as security for any borrowal, but not an express power to sell the property. Therefore, the draftsman appears to have had clear instructions and he carried out those instructions faithfully. The power to sell is not to be inferred from a document of Power of Attorney. The trial Court as well as the High Court were *ad idem* on the finding that the document did not confer any power of sale.

10. In fact the High Court rejected even the refuge sought by the respondent under Section 41 of the Transfer of Property Act which reads as follows:

> ***"Transfer by ostensible owner***.- *Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it:*

Provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith."

11. The High Court has held and in our view rightly so, that if the respondent had exercised reasonable care as required by the proviso to Section 41, they could have easily found out that there was no power of sale.

12. Unfortunately after finding ***(i)*** that the Power of Attorney did not contain authorization to sell; and ***(ii)*** that the respondent cannot claim the benefit of Section 41 of the Act, the High Court fell into an error in attributing constructive notice to the appellant in terms of Section 3 of the Act. The relevant interpretation clause in Section 3 of the Act reads as follows:

"Interpretation Clause-

xxxx xxx xxxx

"***a person is said to have notice***" of a fact when he actually knows that fact, or when, but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it.

Explanation 1-Where any transaction relating to immoveable property is required by law to be and has been effected by a registered instrument, any person acquiring

such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or, where the property is not all situated in one sub-district, or where the registered instrument has been registered under sub-section (2) of section 30 of the Indian Registration Act, 1908 (16 of 1908), from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired, or of the property wherein a share or interest is being acquired, is situated:

Provided that--

(1) the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908 (16 of 1908) and the rules made thereunder,

(2) the instrument or memorandum has been duly entered or filed, as the case may be, in books kept under section 51 of that Act, and

(3) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under section 55 of that Act.

Explanation II.--Any person acquiring any immoveable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.

Explanation III.--A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material:

Provided that, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud."

13. Two things are important for the above interpretation clause to

come into effect. They are: ***(i)*** wilful abstention from an enquiry or search; and ***(ii)*** gross negligence. *Explanation I* and *Explanation II* under the above interpretation clause are applicable to the person acquiring an immovable property, the transaction relating to which is required by law to be effected by a registered instrument. The High Court has turned the above interpretation clause upside down and held the Principal in relation to a deed of Power of Attorney, to have had constructive notice in terms of Section 3, of a sale effected by the agent.

14. The reasoning given by the High Court for holding that the appellant ought to have challenged the alienations, is that the appellant was out of possession. Here again, the High Court failed to appreciate that the possession of an agent under a deed of Power of Attorney is also the possession of the Principal and that any unauthorized sale made by the agent will not tantamount to the Principal parting with possession.

15. It is not always necessary for a plaintiff in a suit for partition to seek the cancellation of the alienations. There are several reasons

behind this principle. One is that the alienees as well as the co-sharer are still entitled to sustain the alienation to the extent of the share of the co-sharer. It may also be open to the alienee, in the final decree proceedings, to seek the allotment of the transferred property, to the share of the transferor, so that equities are worked out in a fair manner. Therefore, the High Court was wrong in putting against the appellant, her failure to challenge the alienations.

16. The learned counsel for respondent relied upon the decision of this Court in ***Delhi Development Authority*** *vs.* ***Durga Chand Kaushish***[1], in support of his argument about the rule of interpretation to be adopted while construing Exhibit A-1, the deed of general Power of Attorney. He also relied upon the Judgment of this Court in ***Syed Abdul Khader*** *vs.* ***Rami Reddy and Others***[2] for driving home the question as to how the deed of Power of Attorney should be construed.

17. We do not know how the ratio laid down in the aforesaid

1 (1973) 2 SCC 825
2 (1979) 2 SCC 601

decisions could be applied to the advantage of the respondent. As a matter of plain and simple fact, Exhibit A-1, deed of Power of Attorney did not contain a clause authorizing the agent to sell the property though it contained two express provisions, one for leasing out the property and another for executing necessary documents if a security had to be offered for any borrowal made by the agent. Therefore, by convoluted logic, punctuation marks cannot be made to convey a power of sale. Even the very decision relied upon by the learned counsel for the respondent, makes it clear that ordinarily a Power of Attorney is to be construed strictly by the Court. Neither Ramanatha Aiyar's Law Lexicon nor Section 49 of the Registration Act can amplify or magnify the clauses contained in the deed of Power of Attorney.

18. As held by this Court in ***Church of Christ Charitable Trust and Educational Charitable Society*** *vs.* ***Ponniamman Educational Trust***[3] the document should expressly authorize the agent, ***(i)*** to execute a sale deed; ***(ii)*** to present it for registration; and ***(iii)*** to admit execution before the Registering Authority.

3 (2012) 8 SCC 706

19. It is a fundamental principle of the law of transfer of property that "*no one can confer a better title than what he himself has*" (*Nemo dat quod non habet*). The appellant's sister did not have the power to sell the property to the vendors of the respondent. Therefore, the vendors of the respondent could not have derived any valid title to the property. If the vendors of the respondent themselves did not have any title, they had nothing to convey to the respondent, except perhaps the litigation.

20. Therefore, the appeal is allowed, the impugned judgment of the High Court is set aside and the Judgment and preliminary decree passed by the trial Court are restored. There will be no order as to costs.

.....J.
(Hemant Gupta)

.....J
(V. Ramasubramanian)

APRIL 1, 2022

NEW DELHI.