2025 INSC 1059

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 6377 OF 2012

RAMESH CHAND (D) THR. LRS. …APPELLANT(S)

VERSUS

SURESH CHAND AND ANR. …RESPONDENT(S)

J U D G M E N T

ARAVIND KUMAR, J.

1. Heard.

2. The appellants are aggrieved by the judgment dated 9th April, 2012, passed by the Hon'ble High Court of Delhi whereby the Regular First Appeal No. 358/2000 filed by them against the judgment and decree dated 11th May, 2000 came to be dismissed and the judgment and decree passed in Suit No. 613/1997 by the Additional District Judge, Delhi decreeing the

suit for possession, mesne profits, declaration, mandatory injunction filed by the Respondent No. 1, who was the plaintiff, came to be confirmed, by dismissing the counterclaim for declaration filed by the Appellant has been affirmed. For convenience, the parties are referred as per their rank before the Trial Court.

FACTUAL MATRIX:

3. Facts necessary for adjudication of the controversy on hand are as follows:

4. The suit property bearing No. 563, at Ambedkar Basti near Balmiki Gate, Delhi - 110053 was originally owned by Shri. Kundan Lal, father of the Appellant/Defendant No. 1 and Respondent No. 1/Plaintiff. The plaintiff claims that he had acquired title to the suit property from his father, Shri. Kundan Lal by virtue of a General Power of Attorney, Agreement to Sell, Affidavit, and a Receipt. He also claimed that his father had executed a registered Will dated 16.05.1996 bequeathing the suit schedule property in his favour. He further claims that defendant No. 1 has been living in the suit property as a licensee and after purchase of the suit property by the plaintiff, the defendant No. 1 was residing in the suit property as a mere trespasser. He further claims that in order to gain

wrongfully, the defendant No. 1 sold half the portion of the suit property to the defendant No. 2, who is the Respondent No. 2 before us. Hence, the plaintiff filed a suit against the defendant No.1 and defendant No. 2 for the recovery of possession, mesne profits, declaration of title and mandatory injunction directing the defendant No. 1 to handover the original documents to him. In response to the said claim of the plaintiff, the defendant No. 1 filed a written statement and also raised a counter claim, contending that the suit property was orally transferred to him by the father in July 1973. He further contended that the plaintiff had earlier filed OS No. 294/1996 wherein he admitted that the father, Shri Kundan Lal was the owner of the property. However, he withdrew the said suit on 06.06.1997. In the counter claim, defendant sought for declaration that the alleged documents i.e. Will, Agreement to Sell, GPA etc. in respect of the suit property by Lt. Sh. Kundan Lal, who expired on 10th April, 1997 was null and void and not binding on him.

5. The Ld. Addl. District Judge decreed the suit in favour of the plaintiff and dismissed the counter claim filed by the defendant No.1 on the ground that the property had been transferred by the Sh. Kundan Lal in favour of the plaintiff by upholding the validity of the documents. The defendant No.1 assailed the same by filing Regular First Appeal No. 358 /

2000 before the High Court of Delhi, which came to be dismissed by the High Court by relying upon the judgment of ***Asha M. Jain v. Canara Bank and Others*** [1] which was later on overruled by this court in ***Suraj Lamp and Industries Private Limited (2) through Director v. State of Haryana and Another.***[2] Against the said dismissal, the defendant No.1 had filed Civil Appeal No. 9012/2011.

6. Vide the order 31.10.2011 aforesaid civil appeal came to be allowed in part and the matter was remanded back to the High Court for fresh disposal with an observation that the Agreement to Sell / General Power of Attorney / Will Transactions are not 'transfers' or 'sales' and such transactions cannot be treated as transfers or conveyances as contemplated under Transfer of Property Act, 1882. Hence, RFA No.358/2000 came to be restored to the file of High Court which has been heard afresh, and by the impugned order, it came to be dismissed on 09.04.2012. Aggrieved by the same, the defendant no.1 is in appeal before us.

SUBMISSIONS

7. Mr. S.Mahendran, Learned Counsel for the defendant No.1 made the following submissions:

1 **(2001) SCC OnLine Del 1157**
2 **(2012) 1 SCC 656**

- That there is no title of ownership conferred merely on the basis of Agreement to Sell, GPA, Affidavit, Receipt, Will etc. without there being any possession thereof.
- That the original title deeds of suit schedule property are in possession of the defendant No.1.
- That the Will has not been proved in accordance with law.
- Section 53A of the Transfer of Property Act is not attracted if the possession of the property is not delivered.
- That Will is not an instrument of sale under Section 54 of Transfer of Property Act. As per Section 54, immovable property can be sold by a registered instrument only.
- That the alleged Attesting Witnesses PW-3 and PW-4 could not prove the execution of the documents filed by the plaintiff such as GPA, Agreement to Sell, Receipt, Will as required by Section 3 of Transfer of Property Act, Section 68 of Indian Evidence Act and Section 63 of Indian Succession Act.
- That the Courts below have failed to appreciate that in the previous suit which is OS No. 294/1996 the plaintiff himself admitted in his replication filed on 12.10.1996 that the father, Shri Kundan Lal is owner of the suit property. On the other hand the present suit is filed

by falsely alleging that he had purchased the suit property from the father on 16.05.1996 which is much prior to the date of filing of the replication.

- That the vital facts clearly reveal that the alleged documents pertaining to the suit property had been obtained by the plaintiff on misrepresentation.
- That ever since 1973, the defendant No.1 has been in continuous, uninterrupted possession and occupation of the suit property in his own right and during this period i.e. 1973 to 1997, the father Shri Kundan Lal neither filed any ejectment proceedings nor served any notice for his eviction during his lifetime, who died on 10.04.1997.

8. The Respondent No.1 / Plaintiff who was duly served has not entered appearance and is proceeded *ex-parte*.

9. Mrs. Rekha Pandey, Learned Counsel for Respondent No.2 / Defendant No. 2 has made the following submissions:

- That the defendant No. 2 has purchased 50% share of the suit property from the defendant No.1 / Ramesh Chand.
- That the High Court vide order dated 28.02.2011 in RFA No. 358/2000 as well as this Court vide interim order dated 26.08.2013 in present appeal has protected the right of the Respondent no. 2 as

he was a bona fide purchaser of the property and is in possession of the property.

- That this Court must protect the rights of Respondent No. 2.

10. Upon hearing the Learned Counsels appearing for the parties and on perusal of the material available on record, the following points would arise for our consideration:

I. Whether the impugned documents, i.e., Agreement to Sell, General Power of Attorney, Receipt of Consideration and the registered Will, allegedly entered into by Mr. Kundan Lal in favour of the Plaintiff would confer a valid title over the suit property?

II. Whether the Plaintiff can claim any benefit under Section 53A of TP Act, which deals with Part Performance?

III. To what relief the parties would be entitled to?

FINDINGS:

RE: POINT NO.1

11. It is an undisputed factual position that plaintiff and defendant no. 1 are brothers, and the suit property belongs to their father Lt. Sh. Kundan Lal. The plaintiff claimed title to the suit property by placing reliance upon four documents, i.e., agreement to sell dated 16.05.1996, power of attorney

dated 16.05.1996, affidavit dated 16.05.1996, receipt dated 16.05.1996, and a registered Will dated 16.05.1996. Admittedly, no sale deed was executed in favour of the plaintiff by his father. Hence, this court is called upon to see whether these documents confer a valid title on him. In order to ascertain the same, it is essential for us to expound on the position of law with respect to the same.

Agreement of Sale

12. The Transfer of immovable property *inter vivos* is governed by the Transfer of Property Act, 1882 (hereinafter referred to as "the TP Act"). Section 5 of the said TP Act defines "transfer of property" as follows:

> "**5. 'Transfer of property' defined.** —In the following sections 'transfer of property' means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself or to himself and one or more other living persons and 'to transfer property' is to perform such act."

13. The TP Act envisages five different modes for transferring a property but for the purpose of the present appeal we are only concerned with one of the modes i.e., by way of "Sale" and the same is dealt under section 54 of the TP Act which defines "sale" and a "contract for sale" as follows:

> "**54. 'Sale' defined**. — 'Sale' is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.
> **Sale how made**. —Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.
> In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.
> Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.
> **Contract for sale**. —A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.
> It does not, of itself, create any interest in or charge on such property."

14. Perusal of above said provisions lays down a specific mode of execution of sale deed with respect to immovable property for concluding the sale of a property. In sale for an immovable property the value of which exceeds Rs. 100/-, the three requirements of law are that the transfer of property of sale must take place through a validly executed sale deed, i.e., it must be in writing, properly attested and registered. Unless the sale deed is in writing, attested and registered, the transaction cannot be construed as sale, or in other words, the property will not be transferred.

15. There is a difference between a sale deed and an agreement for sale, or a contract for sale. A contract for sale of immovable property is a contract that a sale of such property shall take place on terms settled

between the parties. While a sale is a transfer of ownership; a contract for sale is merely a document creating a right to obtain another document, namely a registered sale deed to complete the transaction of sale of an immovable property. Section 54 in its definition of sale does not include an agreement of sale and neither confers any proprietary rights in favour of the transferee nor by itself create any interest or charge in the property. If after entering into a contract for sale of property, the seller without any reasonable excuse avoids executing a sale deed, the buyer can proceed to file a suit for specific performance of the contract.

16. The scope of an agreement for sale has been highlighted by this court in the case of ***Suraj Lamp and Industries Private Limited (2) through Director v. State of Haryana and Another***[3]**,** wherein this Court observed that

> "**16.** Section 54 of the TP Act makes it clear that a contract of sale, that is, an agreement of sale does not, of itself, create any interest in or charge on such property. This Court in Narandas Karsondas v. S.A. Kamtam [(1977) 3 SCC 247] observed:
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> "**32**. A contract of sale does not of itself create any interest in, or charge on, the property. This is expressly declared in Section 54 of the Transfer of Property Act. (See Ram Baran Prasad v. Ram Mohit Hazra [AIR 1967 SC 744]). The fiduciary character of the personal obligation created by a contract for sale is recognised in Section 3 of the Specific Relief Act, 1963, and in Section 91 of the Trusts Act. The personal obligation created by a contract of sale is described in Section 40 of the Transfer of Property Act as an obligation arising out of contract and annexed to the

3 **(2012) 1 SCC 656**

ownership of property, but not amounting to an interest or easement therein.

33. In India, the word 'transfer' is defined with reference to the word 'convey'. … The word 'conveys' in Section 5 of the Transfer of Property Act is used in the wider sense of conveying ownership.

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37. … that only on execution of conveyance, ownership passes from one party to another…."

17. In Rambhau Namdeo Gajre v. Narayan Bapuji Dhotra [(2004) 8 SCC 614] this Court held:

"**10.** Protection provided under Section 53-A of the Act to the proposed transferee is a shield only against the transferor. It disentitles the transferor from disturbing the possession of the proposed transferee who is put in possession in pursuance to such an agreement. It has nothing to do with the ownership of the proposed transferor who remains full owner of the property till it is legally conveyed by executing a registered sale deed in favour of the transferee. Such a right to protect possession against the proposed vendor cannot be pressed into service against a third party."

18. It is thus clear that a transfer of immovable property by way of sale can only be by a deed of conveyance (sale deed). In the absence of a deed of conveyance (duly stamped and registered as required by law), no right, title or interest in an immovable property can be transferred.

19. Any contract of sale (agreement to sell) which is not a registered deed of conveyance (deed of sale) would fall short of the requirements of Sections 54 and 55 of the TP Act and will not confer any title nor transfer any interest in an immovable property (except to the limited right granted under Section 53-A of the TP Act). According to the TP Act, an agreement of sale, whether with possession or without possession, is not a conveyance. Section 54 of the TP Act enacts that sale of immovable property can be made only by a registered instrument and an agreement of sale does not create any interest or charge on its subject-matter."

17. In the instant matter, undisputedly plaintiff claims that there is only an agreement to sell, and there is no sale deed executed in his favour by the father. As per the settled position of law, this document does not confer a valid title on the plaintiff as it is not a deed of conveyance as per Section 54 of the TP Act. At best, it only enables the plaintiff to seek for specific performance for the execution of a sale deed and does not create an interest or charge on the suit property.

General Power of Attorney

18. A power of attorney is a creation of an agency whereby the grantor authorizes the grantee to do the acts specified therein, on behalf of grantor, which when executed will be binding on the grantor as if done by him. It is revocable or terminable at any time unless it is made irrevocable in a manner known to law. A General Power of Attorney does not *ipso facto* constitute an instrument of transfer of an immovable property even where some clauses are introduced in it, holding it to be irrevocable or authorizing the attorney holder to effect sale of the immovable property on behalf of the grantor. It would not *ipso facto* change the character of the document transforming it into a conveyance deed.[4]

4 **Dr. Poonam Pradhan Saxena, *Property Law,* Third Edition, 2017 (Lexis Nexis), p. 66**

19. A power of attorney is not a sale. A sale involves transfer of all the rights in the property in favour of the transferee but a power of attorney simply authorises the grantee to do certain acts with respect to the property including if the grantor permits to do certain acts with respect to the property including an authority to sell the property.[5]

20. In the case of ***State of Rajasthan and Others v. Basant Nahata,***[6] it was held that:

> "**13.** A grant of power of attorney is essentially governed by Chapter X of the Contract Act. By reason of a deed of power of attorney, an agent is formally appointed to act for the principal in one transaction or a series of transactions or to manage the affairs of the principal generally conferring necessary authority upon another person. A deed of power of attorney is executed by the principal in favour of the agent. The agent derives a right to use his name and all acts, deeds and things done by him and subject to the limitations contained in the said deed, the same shall be read as if done by the donor. A power of attorney is, as is well known, a document of convenience.
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> xxxx
>
> **52.** Execution of a power of attorney in terms of the provisions of the Contract Act as also the Powers of Attorney Act is valid. A power of attorney, we have noticed hereinbefore, is executed by the donor so as to enable the donee to act on his behalf. Except in cases where power of attorney is coupled with interest, it is revocable. The donee in exercise of his power under such power of attorney only acts in place of the donor subject of course to the powers granted to him by reason thereof. He cannot use the power of attorney for his own benefit. He acts in a fiduciary capacity. Any act of infidelity or breach of trust is a matter between the donor and the donee."

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5 **Dr. Poonam Pradhan Saxena*, Property Law,* Third Edition, 2017 (Lexis Nexis), p. 301**

6 **(2005) 12 SCC 77**

21. Further, the position of a power of attorney with respect to conferment of title was explained by this Court in the case of ***Suraj Lamp (supra),*** thus:

> "**20.** A power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property. The power of attorney is creation of an agency whereby the grantor authorises the grantee to do the acts specified therein, on behalf of grantor, which when executed will be binding on the grantor as if done by him (see Section 1-A and Section 2 of the Powers of Attorney Act, 1882). It is revocable or terminable at any time unless it is made irrevocable in a manner known to law. Even an irrevocable attorney does not have the effect of transferring title to the grantee."

22. Having discussed the position of law, it is essential to peruse the recitals of the General Power of Attorney, which is on record and pressed into service by plaintiff. The said GPA merely authorises the grantee to manage the affairs of the suit property, which includes the power to let out the property on rent, and create a mortgage of the same, etc. However, it is silent on the aspect of conveyance. Be that as it may. The recitals of the power of attorney would indicate the intent of the grantor is to limit the powers of the grantee to only manage the suit property, and not to create any interest in his favour, which is in consonance with the settled position of law as discussed above that a power of attorney is an agency by which the agent derives the authority or the right to enter into transactions on

behalf of the principal. Even if we accept the validity of the Power of Attorney in favour of the plaintiff, still it does not confer a valid title on him with respect to the suit property.

Will

23. The third document that the plaintiff has relied upon to claim his title over the property is a Registered Will dated 16.05.1996 said to have been executed by his father. The term "Will" has been defined under Section 2(*h*) of the Succession Act, 1925 as "the legal declaration of a testator with respect to his property which he desires to be carried into effect after his death". Its essentials have been further enumerated by this Court in the case of ***Mathai Samuel and Others v. Eapen Eapen (Dead) by Lrs. And Others***[7] thus:

> "**12.** Will is an instrument whereunder a person makes a disposition of his properties to take effect after his death and which is in its own nature ambulatory and revocable during his lifetime. It has three essentials:
> (1) It must be a legal declaration of the testator's intention;
> (2) That declaration must be with respect to his property; and
> (3) The desire of the testator that the said declaration should be effectuated after his death.
>
> **13.** The essential quality of a testamentary disposition is ambulatoriness of revocability during the executant's lifetime. Such a document is dependent upon the executant's death for its vigour and effect."

7 **(2012) 13 SCC 80**

24. Will has also been expounded upon in the case of ***Suraj Lamp (supra),*** thus:

> "**22.** A will is the testament of the testator. It is a posthumous disposition of the estate of the testator directing distribution of his estate upon his death. It is not a transfer inter vivos. The two essential characteristics of a will are that it is intended to come into effect only after the death of the testator and is revocable at any time during the lifetime of the testator. It is said that so long as the testator is alive, a will is not worth the paper on which it is written, as the testator can at any time revoke it. If the testator, who is not married, marries after making the will, by operation of law, the will stands revoked. Registration of a will does not make it any more effective."

25. This Court on the issue of the proof of Wills in the case of ***H. Venkatachala Iyengar v. B.N. Thimmajamma and Others***[8] has succinctly defined the contours as under:

> "**18.** What is the true legal position in the matter of proof of wills? It is well-known that the proof of wills presents a recurring topic for decision in courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. Under Section 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Sections 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. Similarly, Sections 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides

8 **AIR 1959 SC 443**

that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters."

26. Further, in the case of ***Meena Pradhan and Others v. Kamla Pradhan and Another***[9] following essentials to prove a Will were mentioned:

> **"10.1.** The court has to consider two aspects : firstly, that the will is executed by the testator, and secondly, that it was the last will executed by him;
> **10.2.** It is not required to be proved with mathematical accuracy, but the test of satisfaction of the prudent mind has to be applied.
> **10.3.** A will is required to fulfil all the formalities required under Section 63 of the Succession Act, that is to say:
> (a) The testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and the said signature or affixation shall

9 **(2023) 9 SCC 734**

show that it was intended to give effect to the writing as a will;

(b) It is mandatory to get it attested by two or more witnesses, though no particular form of attestation is necessary;

(c) Each of the attesting witnesses must have seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of such signatures;

(d) Each of the attesting witnesses shall sign the will in the presence of the testator, however, the presence of all witnesses at the same time is not required;

10.4. For the purpose of proving the execution of the will, at least one of the attesting witnesses, who is alive, subject to the process of court, and capable of giving evidence, shall be examined;

10.5. The attesting witness should speak not only about the testator's signatures but also that each of the witnesses had signed the will in the presence of the testator;

10.6. If one attesting witness can prove the execution of the will, the examination of other attesting witnesses can be dispensed with;

10.7. Where one attesting witness examined to prove the will fails to prove its due execution, then the other available attesting witness has to be called to supplement his evidence.

10.8. Whenever there exists any suspicion as to the execution of the will, it is the responsibility of the propounder to remove all legitimate suspicions before it can be accepted as the testator's last will. In such cases, the initial onus on the propounder becomes heavier.

10.9. The test of judicial conscience has been evolved for dealing with those cases where the execution of the will is surrounded by suspicious circumstances. It requires to consider factors such as awareness of the testator as to the content as well as the consequences, nature and effect of the dispositions in the will; sound, certain and disposing state of mind and memory of the testator at the time of execution; testator executed the will while acting on his own free will;

10.10. One who alleges fraud, fabrication, undue influence et cetera has to prove the same. However, even in the absence of such allegations, if there are circumstances giving rise to doubt, then it becomes the duty of the propounder to dispel such suspicious circumstances by giving a cogent and convincing explanation.

> **10.11.** Suspicious circumstances must be "real, germane and valid" and not merely "the fantasy of the doubting mind [Shivakumar v. Sharanabasappa, (2021) 11 SCC 277] ". Whether a particular feature would qualify as "suspicious" would depend on the facts and circumstances of each case. Any circumstance raising suspicion legitimate in nature would qualify as a suspicious circumstance, for example, a shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit, etc."

27. Considering the aforementioned cases, it is clear that in order to rely upon a Will, the same has to be proved in accordance with law. A Will has to be attested by two witnesses, and either of the two attesting witnesses have to be examined by the propounder of the will. In the present matter, we have carefully perused the Trial Court's judgment. There is not an iota of discussion about the validity of the Will as contemplated under Section 63 of the Succession Act, 1925 and Section 68 of the Evidence Act, 1872 and yet, the validity of the Will has been upheld. This is contrary to law. Even the High Court, while evaluating the validity of the Will, has gone on a different tangent and has erroneously held that the requirement of examining the attesting witnesses springs into action only in cases of disputes between legal heirs. Such an observation is quite contrary to law, for Section 68 of the Evidence Act makes it mandatory to examine at least one of the attesting witnesses of the Will. Mere fact that the Will was

registered will not grant validity to the document. Besides that, the will propounded by plaintiff is surrounded with suspicious circumstances, in as much as the alleged propounder of the Will, Lt. Sh. Kundan Lal, had four children, including the plaintiff and the defendant No. 1. There is not even a whisper of reasoning as to why the propounder of the Will choose to exclude other three children from the bequest, and whether any other properties or assets were given to them. It is highly unlikely that a father would grant his entire property to one of his children, at the cost of three others, without there being any evidence of estrangement between the father and the children. This suspicious circumstance surrounding the will has not been removed by the plaintiff either. Hence, for these cumulative reasons, the Will propounded by plaintiff though registered would not confer any valid title on the plaintiff either.

Receipt of Consideration / Affidavit

28. Apart from the aforementioned documents, there is also an affidavit dated 16.05.1996 said to have been executed by Sh. Kundan Lal in favour of the plaintiff, along with a receipt of consideration, wherein Sh. Kundan Lal is said to have acknowledged receipt of full consideration for the sale of suit property to the tune of Rs. 1,40,000/- from the Plaintiff. The said instruments do not confer a valid title upon the plaintiff because as per

Section 54 of TP Act, only through a deed of conveyance can a title can be transferred, and none of the other documents and recitals in the said affidavit are not proved by examining any other independent witnesses.

- **RE: POINT NO.2**

29. The plaintiff also lays claim to the property by virtue of Section 53A of the TP Act. Section 53-A of the TP Act defines "part-performance" as follows:

> "***53-A. 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, 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."

30. According to Section 53A of the TP Act, where there is a contract to transfer any immovable property in writing and the transferee has in part

performance of the contract taken the possession of the property or part thereof, then notwithstanding that the transfer has not been completed in the manner prescribed by law, the transferor will be debarred from taking the possession of the property. The essential conditions for invoking the doctrine of part-performance as envisaged u/s 53A of TP Act have been enunciated by this Court in the case of ***Nathulal v. Phoolchand***[10] thus:

> "**9.** The conditions necessary for making out the defence of part performance to an action in ejectment by the owner are:
> (1) that the transferor has contracted 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;
> (2) that 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;
> (3) that the transferee has done some act in furtherance of the contract; and
> (4) that the transferee has performed or is willing to perform his part of the contract.
>
> If these conditions are fulfilled 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 is debarred from enforcing against the transferee 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."

31. A perusal of Section 53A of TP Act, as well as the case law on point, it is forthcoming that one of the main ingredients for taking shelter

10 **(1969) 3 SCC 120**

under Section 53A is the factum of possession. Unless the transferee in the instrument of agreement to sale is able to prove that he has been in possession of the suit property, no benefit u/s 53A will be given. In the instant matter, the very fact that plaintiff has filed the present suit for possession, along with other reliefs, shows that on the date of filing of the suit, plaintiff was not in possession of the entire suit property. Since there was no possession with the plaintiff, he cannot derive any benefit under the doctrine of part-possession.

- **RE: POINT NO.3**

32. Thus, the aforestated discussion would indicate that the property was originally owned by Shri Kundan Lal namely the father of plaintiff and defendant No.1 and on his demise the succession has opened up. The will dated 16.05.1996 propounded by the plaintiff having been held not proved and as such class-I legal heirs of deceased Shri Kundan Lal would be entitled to the share in the suit schedule property.

33. In the instant case, the appellant herein has sold 50% of the suit property in favour of the second defendant. This Court by order dated 26.08.2013 had passed the following order:

> "In view of the statement contained in para 11 of the impugned judgment as well as the operative portion thereof, interim order

> dated 05.09.2012 is modified and it is made clear that the same shall not prejudicially affect the rights of respondent No.2."

34. In the light of the said order passed, we are of the considered view that the right of the second defendant would stand protected to the extent of the share of the appellant only and except reiterating to this effect contentions of all parties are kept open, and no opinion is expressed and they are at liberty to work out their rights if so advised in accordance with law.

35. In the light of the aforementioned discussion, the impugned judgment is set aside, and appeal is allowed, and suit of the plaintiff stands dismissed subject to the observations made herein above. We make no order as to costs. Pending application(s), if any, shall stand consigned to records.

……., J.
[ARAVIND KUMAR]

……., J.
[SANDEEP MEHTA]

New Delhi;
September 01st, 2025.