

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA-2819-2007(O&M)

Reserved on: 18.05.2022

Date of decision: 05.07.2022

SMT. PARKASH DEVI

..Appellant

Versus

RAJINDER KUMAR (SINCE DECEASED) THROUGH
HIS LRS. AND ORS.

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Satyaveer Singh, Advocate
for the appellant.

Mr. Sanjeev Sharma, Sr. Advocate
with Mr. Vikram Vir Sharda, Advocate
Mr. Sandeep Singh, Advocate
Mr. Vivek Kathuria, Advocate
Ms. Arundhati, Advocate
for respondents.

ANIL KSHETARPAL, J.

1. 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/s 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.

2. In the considered opinion of this Court, the following issues/questions arise, for adjudication:-

1. Where the agent has an interest in the subject matter, then whether, on the death of the principal, the agency created by

executing General Power of Attorney with respect to the immovable property along with the agreement to sell, the Special Power of Attorney, the Will, the affidavit and the other Power of Attorney will cease to be effective?

2. Whether the registered documents produced in evidence will have precedence over the oral evidence?

3. Whether the Court should draw an adverse inference when the plaintiff, despite specific directions of the Court, fails to disclose the particulars which are, in his knowledge?

3. The defendant assails the correctness of the concurrent findings of fact arrived at by the Courts below.

4. The brief facts of the case are that the plaintiff (Sh. Rajinder Kumar son of late Sh. Bishamber Dass) filed a suit for possession by ejectment of the defendant from one of his shops. He claimed the decree of possession on the ground that the tenancy in favour of the defendant (late Sh. Diwan Chand Chowdhary) has been terminated. The defendant, while filing the written statement, denied the relationship of landlord-tenant and in fact, claimed that the premises are owned by his wife Smt. Prakash Devi, who has constructed the shop in dispute as well as the nearby shops on a plot bearing Khasra No.165. It was asserted that late Sh. Bishamber Dass, the plaintiff's father was the owner of 5 biswas of plot comprised in Khasra No.165, which was purchased by an agreement to sell dated 01.02.1984, on payment of the entire sale consideration. Late Sh. Bishamber Dass also executed a registered Will, registered General Power of Attorney, registered Special Power of Attorney and an affidavit on 01.02.1984. Thereafter, on the basis of the aforesaid General Power of Attorney, late Sh. Diwan Chand Chowdhary transferred the property in favour of his wife Smt. Prakash Devi

vide sale deed dated 14.02.1992. The defendant, after the purchase, constructed various shops on the plot in question and started running his business while letting out his other shops to different tenants and has been receiving the rent from the other tenanted shops.

5. The plaintiff filed a replication while submitting that Smt. Prakash Devi has nothing to do with the property as late Sh. Bishamber Dass neither executed any agreement to sell, General Power of Attorney, Special Power of Attorney, registered Will or affidavit nor late Sh. Bishamber Dass has received the sale consideration. Alternatively, it was submitted that Sh. Bishamber Dass died on 12.07.1984, therefore, the General Power of Attorney, if any, ceased to be effective from the date of his death.

6. On appreciation of the pleadings, the trial Court culled out the following issues:-

“i) Whether the tenancy of the defendant was terminated by the plaintiff by serving a valid notice? OPP

ii) If issue No.1 is proved, whether the plaintiff is entitled to the ejectment of the defendant? OPP

iii) Whether the plaintiff is entitled to recover a sum of Rs.26,000/- on account of arrears of rent and interest? OPP

iv) Whether the suit is not maintainable? OPD

v) Whether the premises is owned by Parkash Devi? OPD

vi) Whether the relationship of landlord and tenant exists between the parties? OPP

vii) Whether the suit is bad for non-joinder of necessary parties? OPD

viii) Relief.”

7. The plaintiff, in order to prove his case, examined PW-1 Sh. Amar Singh (draftsman), who had prepared the layout plan of the suit property. The plaintiff himself appeared as PW-2 and closed his evidence. During the pendency of the suit, late Sh. Diwan Chand Chowdhary died and

his legal representatives were brought on the record. In order to prove their case, they examined Smt. Veena Rani, Registry Clerk in the office of Sub-Registrar, Union Territory, Chandigarh, as DW-1, DW-2 Sh. Satyaveer Singh, Patwari, DW-3 Sh. Satinder Kumar Jain son of late Sh. Bishamber Dass, marginal witness of the General Power of Attorney, Special Power of Attorney and the registered Will executed by his father in favour of Sh. Diwan Chand Chowdhary and his other family members. DW-4 Smt. Prakash Devi appeared as her own witness. Thereafter, the evidence of the defendants was closed by order of the Court on 30.10.2002.

8. In substance, the trial Court while dismissing the suit has recorded the following reasons:-

1. On the death of late Sh. Bishamber Dass on 12.07.1984, the General Power of Attorney and the Special Power of Attorney also ceased to be in force. Consequently, the sale deed executed on 14.12.1992, is without the enabling power, hence, Smt. Prakash Devi did not become the owner of the property.
2. Smt. Prakash Devi claims ownership of plot measuring 5 biswas on the basis of the sale deed dated 14.12.1992, but she has failed to show as to who is the tenant in the adjoining shop and further failed to prove that she is their landlord.
3. Once the plaintiff proves the ownership, the relationship of landlord and tenant stands established, hence, eviction of the tenant is consequential.

9. The First Appellate Court, apart from the aforesaid reasons, has also stated that late Sh. Diwan Chand Chowdhary was never the owner of the property and he has failed to examine the scribe as well as the attesting witnesses of the various documents including the General Power of

Attorney. Late Sh. Diwan Chand Chowdhary failed to prove that late Sh. Bishamber Dass signed the various documents and no effort or request was made to compare the signatures of late Sh. Bishamber Dass with his admitted signatures. The First Appellate Court has observed that as late Sh. Diwan Chand Chowdhary failed to get the sale deed executed since 1984, therefore, all the documents are fabricated. The defendant has not taken the plea of protecting his possession under Section 53-A of the Transfer of Property Act, 1882.

10. This Bench has heard the learned counsel representing the parties at length and with their able assistance perused the paperbook as well as the record of the Courts below, which was requisitioned. On liberty being granted by this court, the learned counsel representing the respective parties have also filed their synopsis along with the gist of their arguments.

11. The first and foremost argument of the learned counsel representing the appellant is with reference to Section 202 of the Indian Contract Act, 1872. He submits that where the agent himself has an interest in the property which forms the subject matter of the agency, the agency cannot be terminated, in the absence of a contract to the contrary. He submits that in the present case, the General Power of Attorney was executed on receipt of the entire sale consideration, therefore, the agent namely late Sh. Diwan Chand Chowdhary had an interest in the subject matter i.e. 5 biswas of plot including the suit property.

12. Per contra, the learned Senior counsel representing the plaintiff (respondent herein) contends that the power of attorney even if admitted, ceased to exist or ceased to remain effective on and after 12.07.1984 i.e. on the death of late Sh. Bishamber Dass (the principal).

13. Section 202 of the Indian Contract Act, 1872, is extracted as

under:-

“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.

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.”

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) Vs. 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.

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 power-of-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 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.

18. Now, the main question which arises for consideration is whether the registered General Power of Attorney, registered Special Power of Attorney and the Will have been duly proved or not. The General Power of Attorney and Special Power of Attorney are not required to be attested by witnesses. The original General Power of Attorney as well as the Special Power of Attorney are Ex.D-2 and Ex.D-1, respectively. These have been proved by examining Smt. Veena Rani, an official from the office of the Sub-registrar, Union Territory, Chandigarh, who brought the original record and proved the documents.

19. Furthermore, the General Power of Attorney has been proved by Sh. Satinder Kumar Jain who appeared as DW-3. He is the other son of late Sh. Bishamber Dass-the executant. He identified his signatures on Ex.D-1 and Ex.D-2, apart from the Will Ex.D-9. However, he claims that signatures on Ex.D-1 and Ex.D-2 were taken on blank papers, whereas, signatures on Ex.D-9 were taken when he was at home under the impression that the said document is a lease deed. He denies the signatures of his father-the executant. This part of the statement of Sh. Satinder Kumar Jain is neither believable nor factually correct. All of the three aforementioned documents namely the General Power of Attorney, Special Power of Attorney as well as the Will are registered. On the reverse side of the first page of all these documents, there is an endorsement at the time of registration by the Sub-Registrar and Sh. Satinder Kumar Jain has signed all the three documents at the time of its registration. It is not the case of Sh. Satinder Kumar Jain that the Sub-Registrar came to their residence for the registration of the said documents.

20. Moreover, when Sh. Rajinder Kumar Jain (plaintiff) appeared as PW-2, he was confronted with all the five documents noted above. He

failed to specifically deny the execution of the documents by late Sh. Bishamber Dass. On being specifically questioned about the existence of the signatures of his father, he answered in the following manner:-

“He cannot say whether my father executed documents in favour of Smt. Prakash Devi and Sh. Diwan Chand.”

21. On being confronted, once again, in the later part of the cross-examination, his answer remained evasive. When he was confronted with the signatures of his brother (Sh. Satinder Kumar Jain), he again answered evasively.

22. Most importantly, in the cross-examination, Sh. Rajinder Kumar Jain-plaintiff admitted that his father had an account in the bank. On 25.09.2001, the Court, on the request of the learned counsel representing the defendant, deferred his further cross-examination while directing the plaintiff to bring the said account number. However, when he appeared on 30.10.2001, he did not bring the account number. In such circumstances, the plaintiff withheld the best evidence. Despite directions of the Court, he failed to disclose the account number. Hence, an adverse inference is required to be drawn against the plaintiff particularly when despite directions in this regard by the Court, he did not disclose the account number of his father to enable the legal representatives of defendant to compare the signatures of late Sh. Bishamber Dass.

23. The other marginal witness of the aforesaid three documents is advocate Sh. Satish Kumar Jain. An application to summon him as defendant's witness was filed on 11.01.2002, which was allowed. As per the summons available on the file, he was served for 22.07.2002. However, neither he was present nor the Court passed any order in this regard. In fact, on reading of the order dated 22.07.2002, it is evident that the Court

overlooked this fact.

24. This matter is required to be examined from another perspective as well.

25. Late Sh. Diwan Chand Chowdhary or his legal representatives are strangers to the family of late Sh. Bishamber Dass. The plaintiff has not specifically denied the signatures of his father, the executant of the documents. He has failed to disclose the bank account number to enable the defendant to summon the record from the bank in order to compare the signatures of the executant. In such circumstances, the defendant made all the possible efforts to prove her side of the case. The defendant, while taking a huge risk, summoned Sh. Satinder Kumar Jain, one of the marginal witness who is no one else, but the executant's son. Fortunately, he admitted the existence of his signatures. He is, admittedly, a graduate, living in Chandigarh City from the very beginning. The plea put-forth by him is totally false.

26. It is well settled that the case of the plaintiff has to stand on its own legs. Undoubtedly, the propounder of the documents is required to prove the same, but the registered documents carry a presumption that they were genuinely executed. Therefore, the defendant discharged her primary onus by producing the documents and examining the witnesses. Now, the onus to prove that late Sh. Bishamber Dass never executed all these five documents lay on the plaintiff. In these circumstances, both the Courts have erred while recording the finding that the defendant has failed to prove the aforesaid documents.

27. In the opinion of this court, the observations, made by the First Appellate Court that there is no explanation as to why late Sh. Diwan Chand Chowdhary failed to get the sale deed executed and that all the documents

are fabricated, are without any basis. The First Appellate Court has also erred in making the observation that there is no reason why no other tenant has come forward to state that the plaintiff is not their landlord. The First Appellate Court has also erred in observing that the defendant has failed to seek protection under Section 53-A of the Transfer of Property Act, 1882. In the considered view of this Court, once an argument in this regard was made before it, the Court should have analysed the same, rather than outrightly rejecting it on the ground that such plea has not been taken in the written arguments.

28. Similarly, the trial Court as well as the First Appellate Court have also erred in observing that Smt. Prakash Devi has failed to disclose as to who are the tenants in the adjoining shops. Smt. Prakash Devi, in the very first sentence of her cross-examination, states that she is an illiterate woman. She is the widow of late Sh. Diwan Chand Chowdhary. Unfortunately, her husband passed away during the pendency of the suit. In such circumstances, the Courts should have been more considerate towards her.

29. Both the Courts have erred, again, in observing that the relationship between the landlord and tenant is proved because the plaintiff has proved his ownership. The tenancy is a result of a contract between the parties. In the absence of evidence to prove the contract or agreement or any evidence of payment of rent, the tenancy cannot be held to have been proved. However, the aforesaid question is academic in view of the findings already arrived at.

30. It may be noted here that late Sh. Bishamber Dass was a resident of Chandigarh. He was running a flour mill. Hence, he was not a rustic villager. He appended his 17 signatures on all these five documents at

different places including as many as 6 signatures were appended before the Sub-Registrar, Chandigarh. It may further be noted that late Sh. Bishamber Dass also signed across the revenue stamp affixed on the non-judicial stamp paper wherein a receipt of Rs.35,000/- has been scribed. Some part of his signatures is on the paper, whereas, the remaining part is on the revenue stamps. His son Sh. Satinder Kumar Jain, who was present throughout the registration process, is a graduate. He is not expected to sign as many as three documents and present them for registration when his father is also signing them without, first, knowing the nature of the documents. He appended his signatures at three different places at the time of execution of these documents namely the General Power of Attorney, Special Power of Attorney and registered Will. He also appended his 3 signatures on these documents at different places at the time of their registration. It is for this reason he did not deny his signatures rather admitted the same while appearing in evidence. In these circumstances, it was for the plaintiff to rebut the statutory presumptions of law.

31. The learned Senior counsel representing the plaintiff has failed to draw the attention of the Court to any provision of law which requires that the General Power of Attorney and Special Power of Attorney are required to be attested by the attesting witnesses and consequently, required to be proved in accordance with Section 68 of the Indian Evidence Act, 1872, which is applicable to the documents, which are required to be attested. The General Power of Attorney and Special Power of Attorney are not required to be attested by the witnesses. No doubt, the registered Will is required to be attested by the witnesses and its attestation is required to be proved in accordance with Section 63 of the Indian Succession Act, 1925 read with Section 68 of the Indian Evidence Act, 1872. In the present Case,

the defendant has failed to fulfill the aforesaid requirements. However, that by itself would not affect the result of the case particularly when the power of attorney in favour of late Sh. Diwan Chand Chowdhary continued to be effective even after the death of late Sh. Bishamber Dass. Therefore, late Sh. Diwan Chand Chowdhary has validly transferred the property in favour of his wife Smt. Prakash Devi, on the basis of the power of attorney.

32. This Bench now proceeds to examine and evaluate the arguments of the learned Senior counsel representing the respondent. The learned Senior counsel representing the respondent has submitted that the appellant does not fulfill the parameters of Section 53-A of the Transfer of Property Act, 1882. He relies upon the judgment passed in *Shrimant*

Shamrao Suryavanshi and another Vs. Pralhad Bhairoba Suryavanshi and others, 2002(3) SCC 676. The entire argument is based on the fact that the signatures of late Sh. Bishamber Dass are not proved which is not the factual position. As already concluded, the signatures of late Sh. Bishamber Dass, on the agreement to sell, have been proved. This Court has carefully read the above noted judgment. In the aforesaid case, the Court answered the question as to whether a transferee can defend or protect his possession over the suit property obtained in pursuance of part performance of an agreement to sell under Section 53A of the Transfer of Property Act, 1882, even if the suit for specific performance of the agreement to sell was barred by limitation. The Supreme Court answered in the affirmative while allowing the appeal. The aforesaid judgment does not help the respondent- plaintiff.

33. The next argument of the learned counsel representing the respondent is to the effect that the agreement to sell was compulsorily registrable under Section 17(b) and (c) of the Indian Registration Act, 1908.

In fact, Section 17(1)(b) and (c) are not applicable to an agreement to sell. The learned counsel relies upon a Division Bench judgment in **Ram Kishan and another Vs. Bijender Mann and others 2013(2) RCR (Civil) 419**. The Hon'ble Division Bench was considering the effect of adding Section 17(1)(A) by the Registration and Other Related Laws (Amendment) Act, 2001, which was enforced with effect from 24.09.2001. The Division Bench has held that despite amendment, the suit for specific performance on the basis of an unregistered agreement to sell evidencing delivery of the possession of the property is maintainable in view of proviso to Section 49 of the Registration Act, 1908. Hence, the aforesaid judgment is also not applicable to the present case.

34. The next argument of the learned counsel representing the respondent is that the agreement to sell Ex.D-6, was not admissible in evidence as it was not adequately stamped. It is the contention of the learned counsel that the agreement to sell should have been scribed on a stamp paper according to the total sale consideration i.e. Rs.35,000/- which was paid. Though, the learned counsel draws the attention of the Court to Article 23 of Schedule I attached to the Limitation Act, 1963, which deals with the conveyance, not being transfer, charged or exempted in number 62, however, the agreement to sell in the present case is not covered by Article 23 of the Schedule I. Prior to 2001, Article 5 of Schedule I dealt with the stamp duty payable on an agreement. In any case, no such objection was taken at the time when the agreement to sell was admitted in evidence. Further, in view of Section 36 of the Indian Stamp Act, 1899, the admission of the instrument cannot be questioned except as provided under Section 61 of the aforesaid Act which talks of revision.

35. The next argument of the learned counsel representing the

respondents is with reference to the statement of Sh. Satinder Kumar Jain son of late Sh. Bishamber Dass who appeared as DW-3. The same has already been discussed in detail.

36. The next argument is with reference to the failure of the defendant to examine Sh. Satish Kumar Jain, advocate, the other attesting witness which has also been discussed.

37. The next argument of the learned counsel is with regard to the failure of the defendant to seek protection under Section 53-A of the Transfer of Property Act, 1882, which has also already been thoroughly discussed.

38. The last argument of the learned counsel is to the effect that there is no explanation as to why late Sh. Diwan Chand Chowdhary has transferred the property in favour of his wife by a registered sale deed particularly when there is a Will executed by late Sh. Bishamber Dass in favour of late Sh. Diwan Chand Chowdhary. In the opinion of the Court, the argument does not have any substance. For proving the Will, there is a procedure prescribed under Section 68 of the Indian Evidence Act, 1872. One of the attesting witness is the son of the testator who was not likely to support the case of late Sh. Diwan Chand Chowdhary. In such circumstances, late Sh. Diwan Chand Chowdhary was left with only one attesting witness to the Will which would have made his case harder to be proved. The execution of sale deed in favour of his wife may be in contemplation of such risk. Furthermore, the argument is in the realm of the human conduct. Late Sh. Diwan Chand Chowdhary opted to proceed in a manner which appeared safer to him.

39. Keeping in view the aforesaid discussions the conclusion is inevitable. Both the Courts have erred in decreeing the suit. Consequently,

the appeal is allowed. The judgments and decrees passed by both the Courts below, are set aside. The suit filed by the plaintiff shall stand dismissed with no order as to costs. All the pending miscellaneous applications, if any, are also disposed of.

05th July, 2022

(ANIL KSHETARPAL)
JUDGE

Ay

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No