

Calcutta High Court

HON'BLE JUDGE(S): **BISWAJIT BASU , J**

UDAY KUMAR PATRA ALIAS UDAY PATRA V. SUBRATA PATRA

S.A. 87 of 2011, decided on 14/12/2022

Specific Relief Act (47 of 1963) , S.34 Proviso— Suit for partition and declaration of title - Against Power of Attorney (PoA) for executing sale deed without authority – Maintainability - PoA was executed in favour of brother-co-sharer to represent plaintiff in suit during his absence from village - Co-sharer who was not in possession of joint property can maintain suit for partition without specifically seeking relief of recovery of possession - Such suit does not come within mischief of Proviso appended to S. 34 - Dismissal of suit on ground of failure of plaintiff to seek relief of recovery of possession, erroneous.

(Para 14)

Case Referred :

Chronological Paras

AIR 2022 SC 1640

Para No.(8, 13)

AIR 2012 SC 3912

Para No.(12)

AIR 2001 SC 965

Para No.(10)

AIR 1993 Cal 144

Para No.(10)

Name of Advocates

Debasish Roy, Sukanta Das, for Petitioner; Basudeb Gayen, Aniruddha Chatterjee, Debabrata Roy, Sukumar Ghosh, Moumita Ghosh, for Respondent.

1. **JUDGMENT:-**The instant second appeal is at the instance of the plaintiff in a suit for partition and declaration of title and is directed against the appellate decree dated August 31, 2010 passed by the learned Additional District Judge, Fast Track-3rd Court, Paschim Medinipur in Title Appeal No. 30 of 2009 thereby reversing the judgment and decree dated March 17, 2009 and March 26, 2009 respectively passed by the 1st Court of Learned Civil Judge(Junior Division), Paschim Medinipur in Title Suit No. 128 of 2003.

2. The summary the plaint case of the connected suit is that the defendant No. 2 is

the elder brother of the plaintiff and by a registered deed of conveyance dated April 02, 1986, they jointly purchased 2 decimals of land in suit plot No. 170 under Mouza- Lutunia, District - Paschim Medinipur, (the 'suit property' in short) from one Basudev Patra, who filed a suit against both the brothers. The plaintiff on February 03, 1989, executed a registered power of attorney (POA in short) thereby authorised his said elder brother to represent him in the said suit during his absence from the village. The plaintiff, noticing some adverse action of his elder brother, revoked the said POA on June 27, 1990 by a registered deed of cancellation. The plaintiff on May 15, 2003 found that the

defendants are carrying on construction over the suit property. The defendant No. 2, on enquiry disclosed that being authorised by the said POA, he, on behalf of the plaintiff, by a registered deed of conveyance dated June 23, 1990 has sold the plaintiff's share in the suit property (hereinafter referred to as the 'said share') to his mother-in-law Chhabi Rani Makar, she in turn sold it to one Gorachand Samanta on September 10, 1997 who, on January 21, 1998 sold it to the defendant No. 1, the minor son of the defendant No. 2. Under such circumstances, the plaintiff on May 30, 2003 requested his elder brother to execute appropriate deed of release in his favour in respect of the said share but he refused, hence the suit.

It is the specific case of the plaintiff that he executed the said POA only to take all necessary steps to defend his title in the suit filed by the said Basudev Patra, but he never authorised his elder brother to sell the said share.

3. The defendants filed a joint written statement to contest the suit. The case of the defendants in the said written statement is that the plaintiff by the said POA not only authorised the defendant No. 2 to defend the title of the plaintiff in the suit filed by the said Basudev Patra but also authorised the defendant No. 2 to sell the said share by executing and registering necessary deed of conveyance to meet the expenses of the said suit.

4. The learned Trial Judge scrutinised the clauses of the said POA (Exhibit-9) to ascertain whether the plaintiff, by the said POA empowered the defendant No. 2 to sell the said share and concluded that nowhere in the said exhibit, the plaintiff entrusted the defendant No. 2 for the specific purpose to sell the said share, consequently cancelled the deed of conveyance in favour of said Chhabi Rani Makar (Exhibit-6) and also declared all subsequent deeds i.e. deed in favour of said Gorachand Samanta (Exhibit- 8) and deed in favour of the defendant No. 1 (Exhibit-3) and void. The learned Trial Judge decreed the suit in preliminary form declaring half share of the plaintiff in the suit property.

5. The defendants being aggrieved by and dissatisfied with the aforesaid judgment and decree of the learned Trial Judge preferred the appeal. The appeal Court below by the impugned judgment and decree has reversed the judgment and decree of the learned Trial Judge and dismissed the suit. The Appeal Court found that the plaintiff in his cross-examination admitted that he obtained the certified

copy of the deed of conveyance in favour of the said Chabi Rani Makar before sending the advocate's notice dated November 16, 1994 (Exhibit-2), as such the plaintiff must have had the knowledge of the said transfer at least since 1994 and not from May 15, 2003 as alleged and held that the suit since was filed after the expiry of the period of limitation, is barred. The Appeal Court further held that a suit for declaration of title without seeking the relief of recovery of possession is not maintainable under the law.

6. The instant second appeal was admitted by the Hon'ble Division Bench on April 06, 2011 to answer the following substantial questions of law:

I. "Whether the learned Judge in the lower appellate court, substantially, erred in law in reversing the decree passed by the learned trial Judge proceeding on the basis that the suit was instituted immediately after knowledge of making construction by the defendants?"

II. "Whether the learned Judge in the lower appellate court, substantially, erred in law in holding that the suit was barred under Section 34 of the Specific Relief Act, 1963, when the suit was instituted against the power of attorney holder on the allegation that he had exceeded his right in transferring the property in favour of a third party?"

7. Mr. Debasis Roy learned counsel for the appellant submits that a cursory look to the clauses of the said POA would show that the plaintiff by the said document, had empowered his said elder brother to take all necessary steps to defend him in the suit filed by said Basudev Patra, but he never authorised the defendant No. 2 to sell the said share. He further submits that the evil intention of the defendant No. 2 to grab the property of his brother would be apparent from the design of the impugned transactions as the defendant No. 2 ultimately was successful in getting the property of his brother transferred in favour of his son.

8. Mr. Roy further submits that the Appeal Court below has misconstrued the scope of the suit and has totally overlooked that it is not a suit for declaration simplicitor but a suit for partition upon declaration of title, in such a suit, the plaintiff is not always obliged to seek cancellation of the unauthorised alienations and in support of his such contention, he places reliance on the decision

of the Hon'ble Supreme Court in the case of *Umadevi Nambiar v. Thamarasseri Roman Catholic Diocese*, reported in (2022) 7 SCC 90 : (**AIR 2022 SC 1640**). He adds that such being the scope of the suit, the Appeal Court below has committed substantial error of law in holding that the suit is barred by limitation. In conclusion, he submits that the Appeal Court below has committed further error of law in holding that the failure of the plaintiff to seek the relief of recovery of possession affects the maintainability of the suit inasmuch as in view of the nature of the suit, the plaintiff is not required to seek the said relief.

9. Mr. Aniruddha Chatterjee, learned advocate for the respondents on the other hand puts much emphasis on the following quoted recital of the said POA to contend that the defendant No. 2 by the said document was authorised to execute and register any sale deed on behalf of the plaintiff, and the defendant No. 2 having such authority had sold the said share:-

(. and to sign any deed in my name on my behalf before or after or during pendency of the case and get the deed registered in any registration or sub-registration office.)"

10. Mr. Chatterjee places reliance on the decision of the Hon'ble Supreme Court in the case of Santosh Hazari v. Purushottam Tiwari (Deceased) by L.Rs., reported in (2001) 3 SCC 171 : **AIR 2001 SC 965** to contend that the questions of law formulated in the present second appeal not being substantial ones, the High Court cannot interfere with the findings of the first appellate Court to correct the errors of law or the errors of fact. With regard to the scope of Section 100 of the Code of Civil Procedure, he refers to the Full Bench decision of this Court in the case of Ratanlal Bansilala and others v. Kishorilal Goenka and others, reported in **AIR 1993 Cal 144**. Heard learned counsel for the parties perused the materials-on-record.

11. A close look to the relevant recitals/clauses of the POA is necessary to answer the formulated substantial questions of law, as such, they are reproduced below:-

Uday Patra live elsewhere and as it is inconvenient for me to pursue the said case and as I do not have the capacity to bear expenses of contesting the case and as my elder brother has told me that he will bear the entire expenses for the case I do hereby appoint my elder brother Sri Uttam Kumar Patra son of Sri Jaladhar Patra, by faith-Hindu, occupation- cultivation, residing at Lakshya, P.S. and Sub-registration office Subang District Medinipur as my Constituted Attorney and empower him to perform whatever is necessary to conduct the case i.e. to appoint advocates and solicitors etc. and to transfer the case to High Court and to produce and adduce witnesses and evidence etc.

and to prefer appeal after disposal of the case ad to file plaint and application and to do all other things that are required and to sign any deed in my name on my behalf before or during pendency of the case and get the deed registered in any registration or sub-registration office and to assign the receipt given after seeing the copy of the deed and issued under Section 52 to anybody else and thus to take delivery of the deed. All the aforesaid acts and deeds done and performed by my said constituted attorney will be treated considered and accepted as done by me. This constituted attorney will be entitled to do all types of work on my behalf and those will be treated as the work done by me. To this import with sound state of mind in simple mind is presence of witness I execute this Power of Attorney.

Finish. Date 20th Magh of the year 1395 Bengali Calendar rd corresponding to 3 February of the year 1989 AD)"

12. The above quoted recitals/clauses of the POA unmistakably suggest that the plaintiff executed the said POA to authorise the defendant No. 2 to take all steps to represent him in the suit filed by the said Basudev Patra against both the brothers, there is no recital/clause in the said POA specifically authorising the defendant No. 2 to sell the said share. It is well settled that a POA has to be strictly construed. In order to agree to sale or effect a sale by a POA, the power should also expressly authorised the power to agent to execute the sale agreement/sale deed. (See CHURCH OF CHRIST CHARITABLE TRUST AND EDUCATIONAL CHARITABLE SOCIETY, REPRESENTED BY THE CHAIRMAN v. PONNIAMMAN EDUCATIONAL TRUST REPRESENTED BY ITS CHAIRPERSON/MANAGING TRUSTEE reported in (2012) 8 SCC 706 : AIR 2012 SC 3912). The authority to execute and register deed before, after or during the pendency of the said suit must be interpreted in agreement with the main purpose for which such authority was given, in other words, the said recital/clause as suggested by Mr. Chatterjee cannot be read in isolation from the other recitals/clauses of the said document to confer a specific authority upon the defendant No. 2 to execute and register a deed of conveyance in respect of the said share, besides, the POA is completely silent about the authority of the defendant No. 2 either to receive consideration price for the sale of the said share or to deliver possession of the said share to the purchaser on behalf of the plaintiff, absence of these authorities clearly indicate that the defendant No.2 was not authorised to execute the deed of conveyance in respect of the said share, as such, the said defendant No. 2, in excess of his authority sold the said share. Furthermore, the recital/clause of the POA quoted below records that the defendant No. 2 assured the plaintiff that he would meet the expenses of the suit filed by said Basudev Patra which falsifies the defence of the defendants that by the said POA, the plaintiff authorised the defendant No. 2 to sell the said share to meet the expenses of the said suit:

". as I do not have the capacity to bear expenses of contesting the case and as my elder brother has told me that he will bear the entire expenses for the case. "

13. The appeal Court below has overlooked that the plaintiff is seeking the relief of partition of the said share, in such a suit plaintiff is not always obliged to seek cancellation of the alienations, particularly when such alienations are unauthorised. In this context, it is apposite to quote paragraph 15 of the decision of the Hon'ble Supreme Court in the case of Umadevi Nambiae, AIR 2022 SC 1640 (supra):-

"15. It is not always necessary for a plaintiff is 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, High Court was wrong in putting against the appellant, her failure to challenge the alienations."

14. The plaintiff since is not required to challenge the unauthorised alienations to get the relief of partition, the plaintiff's knowledge of the said alienations has no relevance in deciding the maintainability of the connected suit. A co-sharer not in possession of the joint property can maintain a suit for partition without specifically seeking the relief of recovery of possession; such a suit does not come within the mischief of the proviso appended to Section 34 of the Specific Relief Act, 1963. The appeal Court below, therefore, has committed substantial error of law in dismissing the connected suit on the ground of limitation and on the failure of the plaintiff to seek the relief of recovery of possession. The error committed by the appeal Court below in reversing the judgment and decree of the learned Trial Judge is substantial one inasmuch as the appeal Court below has failed to appreciate the scope of the connected suit and has erroneously interpreted the recitals/clauses of POA, therefore, neither of the decisions cited by Mr. Chatterjee are applicable in the facts and circumstances of the present case.

Summing up the discussion made above, this Court answers both the substantial questions of law in affirmative, in consequence the impugned judgment and decree of the appeal Court below are set aside and the judgment and decree of the learned Trial Judge stand restored.

15. The parties are at liberty to apply for appointment of Partition Commissioner, if such an application is made, the learned Trial Judge is requested to dispose of the same expeditiously, in accordance with law.

16. S.A. 87 of 2011 is thus allowed without any order as to costs.

17. Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(BISWAJIT BASU, J.)

18. LATER Let the connected Lower Courts Records be sent down to the learned Courts below by special messenger at the cost of the appellant, such costs be put in within a week from date.

Appeal Allowed