

Suraj Lamp & Industries (P) Ltd.Tr.Dir vs State Of Haryana & Anr on 11 October, 2011

Equivalent citations: AIR 2012 SUPREME COURT 206, 2011 AIR SCW 6385 AIR 2012 SC (CIVIL) 91, AIR 2012 SC (CIVIL) 91, 2011 AIR SCW 6385, 2012 (2) AIR JHAR R 682, 2012 (1) SCC 656, (2011) 4 CIVILCOURTC 558, (2011) 8 MAD LJ 43, (2011) 5 MAD LW 289, (2012) 1 ALLMR 464 (SC), (2011) 4 RECCIVR 669, (2011) 11 SCALE 438, (2012) 1 ALD(CRL) 92, (2012) 3 CIVLJ 380, (2011) 6 ALL WC 6296, (2011) 6 KANT LJ 69, (2011) 4 ICC 853, (2011) 2 CLR 1000 (SC), (2011) 89 ALL LR 445, (2011) 3 ALL RENTCAS 645, (2011) 2 HINDULR 545, (2012) 340 ITR 1, (2012) 1 LANDLR 430, (2011) 4 KER LJ 682, (2012) 1 WLC(SC)CVL 43, AIR 2012 SC (CIV) 91, (2012) 115 REVDEC 1, (2011) 183 DLT 1, 2011 (107) AIC (SOC) 1 (SC), 2011 (4) KLT SN 84 (SC), (2012) 107 CORLA 8 SN, (2012) 1 BOM CR 808

Author: R. V. Raveendran

Bench: H. L. Gokhale, A. K. Patnaik, R. V. Raveendran

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (C) NO.13917 OF 2009

Suraj Lamp & Industries Pvt. Ltd.

.....Petitioners

Vs.

State of Haryana & Anr.

....Respondents

J U D G M E N T

R. V. Raveendran J.

By an earlier order dated 15.5.2009 [reported in Suraj Lamp & Industries Pvt.Ltd. vs. State of Haryana & Anr. - 2009 (7) SCC 363], we had referred to the ill - effects of what is known as General Power of Attorney Sales (for short 'GPA Sales') or Sale Agreement/General Power of Attorney/Will transfers (for short 'SA/GPA/WILL' transfers). Both the descriptions are misnomers as there cannot be a sale by execution of a power of attorney nor can there be a transfer by execution of an agreement of sale and a power of attorney and will. As noticed in the earlier order, these kinds of transactions were evolved to avoid prohibitions/conditions regarding certain transfers, to avoid payment of stamp duty and registration charges on deeds of conveyance, to avoid payment of capital gains on transfers, to invest unaccounted money ('black money') and to avoid payment of 'unearned increases' due to Development Authorities on transfer.

2. The modus operandi in such SA/GPA/WILL transactions is for the vendor or person claiming to be the owner to receive the agreed consideration, deliver possession of the property to the purchaser and execute the following documents or variations thereof:

(a) An Agreement of sale by the vendor in favour of the purchaser confirming the terms of sale, delivery of possession and payment of full consideration and undertaking to execute any document as and when required in future.

Or An agreement of sale agreeing to sell the property, with a separate affidavit confirming receipt of full price and delivery of possession and undertaking to execute sale deed whenever required.

(b) An Irrevocable General Power of Attorney by the vendor in favour of the purchaser or his nominee authorizing him to manage, deal with and dispose of the property without reference to the vendor.

Or A General Power of Attorney by the vendor in favour of the purchaser or his nominee authorizing the attorney holder to sell or transfer the property and a Special Power of Attorney to manage the property.

(c) A will bequeathing the property to the purchaser (as a safeguard against the consequences of death of the vendor before transfer is effected).

These transactions are not to be confused or equated with genuine transactions where the owner of a property grants a power of Attorney in favour of a family member or friend to manage or sell his property, as he is not able to manage the property or execute the sale, personally. These are transactions, where a purchaser pays the full price, but instead of getting a deed of conveyance gets a SA/GPA/WILL as a mode of transfer, either at the instance of the vendor or at his own instance.

Ill-Effects of SA/GPA/WILL transactions

3. The earlier order dated 15.5.2009, noted the ill-effects of such SA/GPA/WILL transactions (that is generation of black money, growth of land mafia and criminalization of civil disputes) as under:

"Recourse to `SA/GPA/WILL' transactions is taken in regard to freehold properties, even when there is no bar or prohibition regarding transfer or conveyance of such property, by the following categories of persons:

(a) Vendors with imperfect title who cannot or do not want to execute registered deeds of conveyance.

(b) Purchasers who want to invest undisclosed wealth/income in immovable properties without any public record of the transactions. The process enables them to hold any number of properties without disclosing them as assets held.

(c) Purchasers who want to avoid the payment of stamp duty and registration charges either deliberately or on wrong advice. Persons who deal in real estate resort to these methods to avoid multiple stamp duties/registration fees so as to increase their profit margin.

Whatever be the intention, the consequences are disturbing and far reaching, adversely affecting the economy, civil society and law and order. Firstly, it enables large scale evasion of income tax, wealth tax, stamp duty and registration fees thereby denying the benefit of such revenue to the government and the public. Secondly, such transactions enable persons with undisclosed wealth/income to invest their black money and also earn profit/income, thereby encouraging circulation of black money and corruption.

This kind of transactions has disastrous collateral effects also. For example, when the market value increases, many vendors (who effected power of attorney sales without registration) are tempted to resell the property taking advantage of the fact that there is no registered instrument or record in any public office thereby cheating the purchaser. When the purchaser under such `power of attorney sales' comes to know about the vendors action, he invariably tries to take the help of musclemen to `sort out' the issue and protect his rights. On the other hand, real estate mafia many a time purchase properties which are already subject to power of attorney sale and then threaten the previous `Power of Attorney Sale' purchasers from asserting their rights. Either way, such power of attorney sales indirectly lead to growth of real estate mafia and criminalization of real estate transactions."

It also makes title verification and certification of title, which is an integral part of orderly conduct of transactions relating to immovable property, difficult, if not impossible, giving nightmares to bonafide purchasers wanting to own a property with an assurance of good and marketable title.

4. This Court had therefore requested the learned Solicitor General to give suggestions on behalf of Union of India. This Court also directed notice to States of Delhi, Haryana, Punjab, Uttar Pradesh to give their views on the matter. The four states have responded and confirmed that SA/GPA/WILL

transfers required to be discouraged as they lead to loss of revenue (stamp duty) and increase in litigations due to defective title. They also referred to some measures taken in that behalf. The measures differ from State to State.

In general, the measures are: (i) to amend Registration Act, 1908 by Amendment Act 48 of 2001 with effect from 24.9.2001 requiring documents containing contract to transfer for consideration (agreements of sale etc.) relating to any immovable property for the purpose of section 53A of the Act, shall be registered; and (ii) to amend the stamp laws subjecting agreements of sale with delivery of possession and/or irrevocable powers of attorney in favour of non-family members authorizing sale, to the same stamp duty as deed of conveyance. These measures, no doubt, to some extent plugged the loss of revenue by way of stamp duty on account of parties having recourse to SA/GPA/WILL transactions, instead of executing deeds of conveyance. But the other ill-effects continued. Further such transaction which was only prevalent in Delhi and the surrounding areas have started spreading to other States also. Those with ulterior motives either to indulge in black money transactions or land mafia continue to favour such transactions. There are also efforts to thwart the amended provisions by not referring to delivery of possession in the agreement of sale and giving a separate possession receipt or an affidavit confirming delivery of possession and thereby avoiding the registration and stamp duty. The amendments to stamp and registration laws do not address the larger issue of generation of black money and operation of land mafia. The four States and the Union of India are however unanimous that SA/GPA/WILL transactions should be curbed and expressed their willingness to take remedial steps.

5. The State of Haryana has however taken a further positive step by reducing the stamp duty on deeds of conveyance from 12.5% to 5%. A high rate of stamp duty acts as a damper for execution of deeds of conveyance for full value, and encourages SA/GPA/WILL transfers. When parties resort to SA/GPA/WILL transfers, the adverse effect is not only loss of revenue (stamp duty and registration charges) but the greater danger of generation of 'black' money. Reducing the stamp duty on conveyance to realistic levels will encourage public to disclose the maximum sale value and have the sale deeds registered. Though the reduction of the stamp duty, may result in an immediate reduction in the revenue by way of stamp duty, in the long run it will be advantageous for two reasons: (i) parties will be encouraged to execute registered deeds of conveyance/sale deeds without any under valuation, instead of entering into SA/GPA/WILL transactions; and (ii) more and more sale transactions will be done by way of duly registered sale deeds, disclosing the entire sale consideration thereby reducing the generation of black money to a large extent. When high stamp duty is prevalent, there is a tendency to undervalue documents, even where sale deeds are executed.

When properties are undervalued, a large part of the sale price changes hand by way of cash thereby generating 'black' money. Even when the state governments take action to prevent undervaluation, it only results in the recovery of deficit stamp duty and registration charges with reference to the market value, but the actual sale consideration remains unaltered. If a property worth `5 millions is sold for `2 millions, the Undervaluation Rules may enable the state government to initiate proceedings so as to ensure that the deficit stamp duty and registration charges are recovered in respect of the difference of `3 millions. But the sale price remains `2 millions and the black money of `3 millions generated by the undervalued sale transaction, remains undisturbed.

6. In this background, we will examine the validity and legality of SA/GPA/WILL transactions. We have heard learned Mr. Gopal Subramanian, Amicus Curiae and noted the views of the Government of NCT of Delhi, Government of Haryana, Government of Punjab and Government of Uttar Pradesh who have filed their submissions in the form of affidavits.

Relevant Legal Provisions

7. Section 5 of the Transfer of Property Act, 1882 ('TP Act' for short) defines 'transfer of property' as under:

"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." xxx xxx Section 54 of the TP Act defines 'sales' thus:

"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 immoveable 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 immoveable 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 immoveable 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."

Section 53A of the TP Act defines 'part performance' thus :

"Part Performance. - Where any person contracts to transfer for consideration any immoveable 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."

8. We may next refer to the relevant provisions of the Indian Stamp Act, 1999 (Note : Stamp Laws may vary from state to state, though generally the provisions may be similar). Section 27 of the Indian Stamp Act, 1899 casts upon the party, liable to pay stamp duty, an obligation to set forth in the instrument all facts and circumstances which affect the chargeability of duty on that instrument. Article 23 prescribes stamp duty on 'Conveyance'. In many States appropriate amendments have been made whereby agreements of sale acknowledging delivery of possession or power of Attorney authorizes the attorney to 'sell any immovable property are charged with the same duty as leviable on conveyance.

9. Section 17 of the Registration Act, 1908 which makes a deed of conveyance compulsorily registrable. We extract below the relevant portions of section 17.

"Section 17 - Documents of which registration is compulsory- (1) The following documents shall be registered, namely:--

xxxxx

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property.

xxxxx (1A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said section 53A.

Advantages of Registration

10. In the earlier order dated 15.5.2009, the objects and benefits of registration were explained and we extract them for ready reference :

"The Registration Act, 1908, was enacted with the intention of providing orderliness, discipline and public notice in regard to transactions relating to immovable property and protection from fraud and forgery of documents of transfer. This is achieved by requiring compulsory registration of certain types of documents and providing for consequences of non-registration.

Section 17 of the Registration Act clearly provides that any document (other than testamentary instruments) which purports or operates to create, declare, assign, limit or extinguish whether in present or in future "any right, title or interest" whether vested or contingent of the value of Rs. 100 and upwards to or in immovable property.

Section 49 of the said Act provides that no document required by Section 17 to be registered shall, affect any immovable property comprised therein or received as evidence of any transaction affecting such property, unless it has been registered. Registration of a document gives notice to the world that such a document has been executed. Registration provides safety and security to transactions relating to immovable property, even if the document is lost or destroyed. It gives publicity and public exposure to documents thereby preventing forgeries and frauds in regard to transactions and execution of documents. Registration provides information to people who may deal with a property, as to the nature and extent of the rights which persons may have, affecting that property. In other words, it enables people to find out whether any particular property with which they are concerned, has been subjected to any legal obligation or liability and who is or are the person/s presently having right, title, and interest in the property. It gives solemnity of form and perpetuate documents which are of legal importance or relevance by recording them, where people may see the record and enquire and ascertain what the particulars are and as far as land is concerned what obligations exist with regard to them. It ensures that every person dealing with immovable property can rely with confidence upon the statements contained in the registers (maintained under the said Act) as a full and complete account of all transactions by which the title to the property may be affected and secure extracts/copies duly certified."

Registration of documents makes the process of verification and certification of title easier and simpler. It reduces disputes and litigations to a large extent.

Scope of an Agreement of sale

11. Section 54 of 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 and Anr.*

(1977) 3 SCC 247, observed:

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 *Rambaran Prosad v. Ram Mohit Hazra* [1967]1 SCR

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

In India, the word 'transfer' is defined with reference to the word 'convey'. The word 'conveys' in section 5 of Transfer of Property Act is used in the wider sense of conveying ownership... ..that only on execution of conveyance ownership passes from one party to another...."

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

"Protection provided under Section 53A 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 in service against a third party."

It is thus clear that a transfer of immoveable 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 immoveable property can be transferred.

12. 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 TP Act and will not confer any title nor transfer any interest in an immovable property (except to the limited right granted under section 53A of TP Act). According to TP Act, an agreement of sale, whether with possession or without possession, is not a conveyance. Section 54 of TP Act enacts that sale of immoveable 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.

Scope of Power of Attorney

13. 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 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 (see section 1A 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. In State of Rajasthan vs. Basant Nehata - 2005 (12) SCC 77, this Court held :

"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.

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."

An attorney holder may however execute a deed of conveyance in exercise of the power granted under the power of attorney and convey title on behalf of the grantor.

Scope of Will

14. 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 life time 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. (see sections 69 and 70 of Indian Succession Act, 1925).

Registration of a will does not make it any more effective.

Conclusion

15. Therefore, a SA/GPA/WILL transaction does not convey any title nor create any interest in an immovable property. The observations by the Delhi High Court, in Asha M. Jain v. Canara Bank - 94 (2001) DLT 841, that the "concept of power of attorney sales have been recognized as a mode of transaction" when dealing with transactions by way of SA/GPA/WILL are unwarranted and not justified, unintendedly misleading the general public into thinking that SA/GPA/WILL transactions are some kind of a recognized or accepted mode of transfer and that it can be a valid substitute for a

sale deed. Such decisions to the extent they recognize or accept SA/GPA/WILL transactions as concluded transfers, as contrasted from an agreement to transfer, are not good law.

16. We therefore reiterate that immovable property can be legally and lawfully transferred/conveyed only by a registered deed of conveyance.

Transactions of the nature of `GPA sales' or `SA/GPA/WILL transfers' do not convey title and do not amount to transfer, nor can they be recognized or valid mode of transfer of immoveable property. The courts will not treat such transactions as completed or concluded transfers or as conveyances as they neither convey title nor create any interest in an immovable property.

They cannot be recognized as deeds of title, except to the limited extent of section 53A of the TP Act. Such transactions cannot be relied upon or made the basis for mutations in Municipal or Revenue Records. What is stated above will apply not only to deeds of conveyance in regard to freehold property but also to transfer of leasehold property. A lease can be validly transferred only under a registered Assignment of Lease. It is time that an end is put to the pernicious practice of SA/GPA/WILL transactions known as GPA sales.

17. It has been submitted that making declaration that GPA sales and SA/GPA/WILL transfers are not legally valid modes of transfer is likely to create hardship to a large number of persons who have entered into such transactions and they should be given sufficient time to regularize the transactions by obtaining deeds of conveyance. It is also submitted that this decision should be made applicable prospectively to avoid hardship.

18. We have merely drawn attention to and reiterated the well-settled legal position that SA/GPA/WILL transactions are not `transfers' or `sales' and that such transactions cannot be treated as completed transfers or conveyances. They can continue to be treated as existing agreement of sale.

Nothing prevents affected parties from getting registered Deeds of Conveyance to complete their title. The said `SA/GPA/WILL transactions' may also be used to obtain specific performance or to defend possession under section 53A of TP Act. If they are entered before this day, they may be relied upon to apply for regularization of allotments/leases by Development Authorities. We make it clear that if the documents relating to `SA/GPA/WILL transactions' has been accepted acted upon by DDA or other developmental authorities or by the Municipal or revenue authorities to effect mutation, they need not be disturbed, merely on account of this decision.

19. We make it clear that our observations are not intended to in any way affect the validity of sale agreements and powers of attorney executed in genuine transactions. For example, a person may give a power of attorney to his spouse, son, daughter, brother, sister or a relative to manage his affairs or to execute a deed of conveyance. A person may enter into a development agreement with a land developer or builder for developing the land either by forming plots or by constructing apartment buildings and in that behalf execute an agreement of sale and grant a Power of Attorney empowering the developer to execute agreements of sale or conveyances in regard to individual

plots of land or undivided shares in the land relating to apartments in favour of prospective purchasers. In several States, the execution of such development agreements and powers of attorney are already regulated by law and subjected to specific stamp duty. Our observations regarding 'SA/GPA/WILL transactions' are not intended to apply to such bonafide/genuine transactions.

20. We place on record our appreciation for the assistance rendered by Mr. Gopal Subramaniam, Senior Counsel, initially as Solicitor General and later as Amicus Curiae.

21. As the issue relating to validity of SA/GPA/WILL has been dealt with by this order, what remains is the consideration of the special leave petition on its merits. List the special leave petition for final disposal.

.....J (R. V. Raveendran)J (A. K. Patnaik)J
(H. L. Gokhale) New Delhi;

October 11, 2011.