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IN THE HIGH COURT OF DELHI

Judgment reserved on : 3rd December 2008

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Judgment delivered on : December 17, 2008

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RFA No. 329/2006

O.P.DAWAR

..... Appellant

Through: Mr. T.A. Mir, Advocate,

versus

SUNIL KUMAR & ANR.

..... Respondents

Through: Mr. D. K. Rastogi, Advocate
for respondent No.1.
Ms. Pinki Anand, Sr. Advocate
With Ms. Aakanksha
Munjhal, Advocate for
respondent No. 2.

RFA 660/2006

SUNIL KUMAR @ SUNNY

.....Appellant

Through: Mr. D. K. Rastogi, Advocate

Versus

O.P. DAWAR & ANR.

.....Respondents

Through: Mr. T. A. Mir, Advocate for
Respondent No. 1.
Ms. Pinki Anand, Sr. Advocate
With Ms. Aakanksha
Munjhal, Advocate for
respondent No. 2.

CORAM:

Hon'ble Mr.Justice Pradeep Nandrajog

Hon'ble Mr.Justice J.R. Midha

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether judgment should be reported in Digest?

: **PRADEEP NANDRAJOG, J.**

1. Sunil Kumar @ Sunny filed a suit for declaration and specific performance of an agreement to sell dated 14.1.1998, Ex-PW1/7 alleging that flat No. 1225A, Sector B-1, Vasant Kunj, Delhi was allotted by DDA to one Smt. Pushp Rajani Chhabra vide allotment letter dated 17.3.1989 and that on 15.9.1997, O.P.Dawar, purchased the said flat from Smt. Pushp Rajani Chhabra for a consideration of Rs.6,00,000/- (Rupees Six Lakhs only) and that in October, 1997, O.P.Dawar agreed to sell the flat to him and pending formalization of the transaction delivered possession of the flat to him. It was further pleaded that he i.e. Sunil Kumar spent approximately Rs.3,00,000/- (Rupees Three Lakhs only) on renovating the flat and that in January, 1998 the agreement to Sell was executed. It was alleged that with mala fide intent, O.P.Dawar mortgaged the flat with Central Bank of India after obtaining a loan from the bank. Alleging that the agreed sale consideration was Rs.10,00,000/-(Rupees Ten Lakhs only) out of which, as recorded in Ex-PW1/7, Rs.8,00,000/-(Rupees Eight Lakhs only) had been paid to O.P.Dawar and that he was always ready and willing to pay the balance sale consideration; prayer made was to compel O.P.Dawar to execute the sale deed in his favour after receiving balance sale consideration of Rs.2,00,000/- (Rupees Two Lakhs only). Declaration sought was to declare that the bank did not have any lien on the flat.

2. O.P.Dawar denied having executed Ex-PW1/7. He stated that he had purchased the flat for resale to earn profit; and since it was lying vacant he permitted Sunil Kumar to occupy the flat with a clear understanding that possession would be restored on demand. He pleaded that on 28.10.2002, vide Ex-DW1/2, he served a legal notice asking Sunil Kumar to return possession. He denied having received Rs.8,00,000 (Rupees Eight Lakhs only) from Sunil Kumar. He admitted the mortgage in favour of the bank and justified the same as his right being the owner of the flat.

3. The bank filed a written statement affirming the mortgage and denying any interest of Sunil Kumar in the flat as claimed by Sunil Kumar.

4. Needless to state on the pleadings of the parties, the two material issues which arose for consideration were, whether there existed any agreement between Sunil Kumar and O.P.Dawar as alleged by Sunil Kumar and what was the effect of the mortgage of the flat by O.P.Dawar in favour of the bank by deposit of the title deeds.

5. Ex-PW1/7, the stated agreement to sell dated 14.1.1998, is scribed in hand. It is on a plain paper. It reads as under:-

“RECEIPT.

Received a sum of Rs.8,00,000 (Eight Lakhs only) from Sh. Sunil Kumar @ Sunny S/O Sh. Prem

Singh R/o 63/9, Kishan Garh, Vasant Kunj, New Delhi for selling the flat No:-B-1/1225A, Vasant Kunj, New Delhi, out of total consideration of Rs:- 10,00,000(Rupees Ten Lakhs only). The balance payment of Rs.2,00,000(Rupees Two Lakhs only) shall be made on the date fixed for transfer deed the date fixed for transfer deed preferably within 30 days of the receipt of information of execution of perpetual lease deed in my favour. The cost of renovation already carried out by Sh. Sunil Kumar after taking possession will not be adjusted in the balance consideration. Sunil Kumar shall be free to use the flat the manner he likes.

Sd/-
O.P. Dawar
C-57, Shivalik
New Delhi."

6. Sunil Kumar examined himself as PW1 and reiterated his stand as pleaded in the plaint. He stated that Ex-PW1/7 was duly signed by O.P.Dawar. He asserted being in possession of the flat since October 1997. He stated that he paid about Rs.3,00,000/- to Sharma Interior Decorators for renovation work in the flat as per bills Ex-PW1/5 and Ex-PW1/6 raised by the said firm on him. He proved Ex-PW1/14 a notice dated 1.5.2003 served by his counsel on O.P. Dawar calling upon O.P.Dawar to execute a sale deed in his favour. He proved the postal receipt Ex-PW1/15 pertaining to the notice. He proved the AD card, Ex-PW1/17 evidencing receipt of the registered envelope by O.P. Dawar. He proved Ex-PW1/8, the Residents Welfare Association directory contained his name as the occupant of the flat. He proved his Ration Card, Ex-PW1/9 showing his residence in the flat.

7. We eschue reference to other documents as they are of little significance.

8. Sunil Kumar examined a handwriting expert Sh. S. P. Singh as PW2 who proved his report Ex-PW2/1 as per which the signatures on Ex-PW1/7 were those of O.P.Dawar.

9. O.P.Dawar examined himself as DW1 and denied having executed Ex-PW1/7. He reiterated that he gave possession to Sunil Kumar on friendly terms. D. S. Dahiya, Sr. Manager, Central Bank of India was examined as DW2 who affirmed the mortgage of the flat by deposit of title deeds. V. C. Mishra, a handwriting expert was examined as DW3 who proved his report Ex-DW-3/A which was to the effect that signatures of O.P.Dawar on Ex-DW-1/7 were forged.

10. Decreeing the suit for specific performance the learned trial judge has noted that according to Sunil Kumar, Ex-PW1/7 was scribed by a person accompanying O.P.Dawar. Since O.P.Dawar did not examine said person, who according to the learned judge was a material witness, an adverse inference has been drawn against O.P.Dawar. Learned judge has further noted that O.P.Dawar had put a suggestion that Ex-PW1/7 was self written by Sunil Kumar. It has been held that O.P.Dawar should have proved, by examining a handwriting expert, that the writing on Ex-PW1/7 was that of Sunil Kumar. Having not examined any handwriting expert, learned judge

has opined that an adverse inference was required to be drawn against O.P.Dawar. Lastly, learned trial judge has noted that in Ex-DW1/2, the notice dated 28.10.2002 got issued by O.P.Dawar and served upon Sunil Kumar he had admitted having handed over possession of the flat to Sunil Kumar in January, 1998. With reference to the claim of Sunil Kumar of being in possession in the flat under an agreement for sale, learned trial judge has opined as under:-

“Ex-DW1/2 is a notice which was issued by defendant No. 1 through his counsel, it is dated 28.10.02. In this notice, defendant No. 1 has admitted plaintiff had approached him in January 1998 with a request to deliver him possession of the suit premises. He has also mentioned in DW1/2 that the plaintiff wanted to set up his business and for that purpose accommodation was required and defendant No. 1 handed over the possession thereof to the plaintiff in good faith. It does not appeal to the reasons that even when a friend requires premises to run a business, another friend would consent to delivery of possession thereof to him without any consideration. It is important to note both plaintiff and defendant No 1 are property dealer by profession and they are well versed with the technicalities involved in sale/purchase deals of immovable properties. Even PW-1 has admitted in his testimony that he was having arrangement with defendant No 1 for sharing commission/brokage. I am, therefore, of the view that preponderance of probabilities weigh more in favour of the inference that defendant No 1 had executed Ex.PW-1/7 and it bears his signatures. Therefore, I am of the view that testimony of PW-1 that Ex.PW-1/7 bears the signatures of defendant No 1 is trust worthy and can be relied upon. Secondly, his testimony is duly corroborated by the testimony of PW-2 Sh.S.P.Singh, expert

witness.”

11. Declining the relief to declare that the mortgage in favour of the bank be declared a nullity, the learned trial judge has held that the bank acted bone fide while accepting the mortgage by deposit of title deeds. The finding returned is that the decree of specific performance in favour of Sunil Kumar shall be subject to the charge of the bank qua the flat in question.

12. Needless to state, Sunil Kumar the appellant of RFA No. 660/2006 has challenged the finding returned that his rights are subject to the charge created in favour of the bank and O.P.Dawar, the appellant of RFA No. 329/06 is aggrieved by the decree of specific performance against him.

13. Pertaining to the appeal filed by Sunil Kumar, it may be noted at the out set that it raises a very simple issue. Unfortunately, neither counsel drew the attention of the learned trial judge to law on the subject. In fact, even in appeal, evidenced from the grounds urged by Sunil Kumar, the relevant legal provisions have not been noted by learned counsel.

14. Explanation II to Section 3 of the Transfer of Property Act, 1882 reads as under:-

“Explanation II.- Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have noticed of the title, if any, of any person who is

for the time being in actual possession thereof.”

15. As was held in the decision reported as 1853 (14) ER 204 Barnhart Vs. Green Shields, notice by possession is not only notice of title of the person in possession but extends also to the interest of such person under collateral agreements. Thus, a tenant who has obtained an agreement to sell the subject property under the landlord would be entitled to urge that any subsequent purchaser has a notice of his possessory right under the agreement to sell.

16. In the decision reported as AIR 1980 SC 1334 Bai Dosabai Vs. Mathurdas Govinddas it was held (refer para 6): *it is clear from the ultimate para of Section 54 and the ultimate and pen-ultimate paras of Section 40 of the T. P. Act that a contract for the sale of immovable property though does not, of itself, create any interest in or charge on such property creates an obligation annexed to the ownership of immoveable property, not amounting to an interest in the property, but which obligation may be enforced against a transferee with notice of the contract or a gratuitous transferee of the property. Thus the Equitable ownership in property recognized by Equity in England is translated into Indian law as an obligation annexed to the ownership of property, not amounting to an interest in the property, but an obligation which may be enforced against a transferee with notice or a*

gratuitous transferee.

17. In terms of Clause b of Section 19 of the Specific Relief Act, 1963 specific performance of a contract can be enforced against a person acquiring title to the property subsequent to the agreement to sell except where the transferee has paid money in good faith and without notice of the original contract.

18. The bank had notice of the possessory interest of Sunil Kumar evidenced by Sunil Kumar's possession qua the flat, which is an admitted fact. Explanation II of Section 3 of the Transfer of Property Act, 1882 is the source of the deemed notice. Thus, if it is proved by Sunil Kumar that Ex-PW1/7 was duly executed by O.P.Dawar and on RFA 329/2006 being dismissed the inevitable conclusion has to be a declaration in favour of Sunil Kumar that his rights under the agreement to sell would have precedence over the right of the bank as the mortgagee and that Sunil Kumar can retain his possession without interference from the bank. The only correction which would be required would be to direct Sunil Kumar to pay Rs.2,00,000/- to the bank.

19. But, good-luck can smile on Sunil Kumar if appeal filed by O.P.Dawar is dismissed.

20. Before we discuss the reasoning of the learned trial judge we must note the findings of the learned trial judge in

para 23 of the decision wherein the learned trial judge has discussed whether O.P.Dawar played a fraud on his friend by mortgaging the flat by depositing the title deeds thereof with the bank. Learned trial judge has held as under:-

“In his affidavit, PW-1 Sunil Kumar has deposed that after execution of the conveyance deed in his favour, defendant No. 1 fraudulently and without informing him about the conveyance deed delivered the same in original to defendant No. 2 for creating lien for his personal loan. He has also deposed that defendant No. 1 had played fraud on defendant bank and had created a lien by misusing the conveyance deed of the suit property. In his cross examination, he has admitted that suit property stands mortgaged with defendant No 12 i.e. Central Bank of India which he has come to know recently, though agreement in his favour was executed on 15.9.97. In his cross examination, he has also admitted that he along with defendant No 1 was having some arrangement with defendant No 1 for sharing commission brokage/ brokage. He has even admitted that he had purchased a Maruti Zen Car and that he got the money to purchase the car from the account of the defendant but his case is that he had paid the money to him. He was specifically asked whether defendant No 1 got installed an AC in the suit premises through his credit card and his answer was that one friend of defendant No 1 had an AC shop, he had made payment in cash for AC but did not know as to how defendant No 1 made payment to his friend. He is silent on the issue if it was defendant No 1 who got the AC installed in the suit property. It is, therefore, clear that even after delivery of possession to the plaintiff, the possibility of defendant No 1 using the premises in question and running his business from there can not be ruled out. On the other hand, defendant No 1 has examined himself as DW-1. His case is that he had never entered into agreement with plaintiff but had delivered the possession to the plaintiff as a licensee.

But the plaintiff did not vacate the premises despite notice. In his cross examination, he has admitted that renovation work was done in the suit premises in November, 1997. He has admitted that he had mortgaged the suit property in July, 1998. However, his case is that renovation work was carried out at his instance and expenses.”

21. Let us contrast the findings in para 23 with the discussion of the learned trial judge in para 19 of the decision, relevant extract whereof has been reproduced in para 10 above. It is apparent to the reader of the two paragraphs that the learned trial judge has applied a different yardstick viz-a-viz the interse dealings between Sunil Kumar and O.P.Dawar. Indeed, when cross-examined on their dealings, Sunil Kumar stated: *it is correct that I had purchased one Maruti Zen. I can not from where I had got the money for the same. Perhaps I had got the money from defendant account. But I had paid the money in cash to defendant No. 1 and the draft was prepared from defendant's account. I can not say from where I had got the money again said it was mine. I can not say that if the amount paid was 3,65,000/- i.e. the price of the car but it might be round 3 lacs (Vol. defendant No. 1 was in need of cash and he asked me to give the cash and take the draft).*

22. To the question: *is it correct that defendant No. 1 had got installed an AC which was purchased by him through his Credit Card in the suit premises?* The answer given by Sunil Kumar is: *one friend of defendant No. 1 had a AC shop I had*

made the payment of the AC to defendant No. 1 in cash and I do not know how defendant No. 1 had made the payment to his friend. I do not know from which shop this AC was brought. I also do not know the exact amount paid for the AC.

23. The findings of the learned Trial Judge that it does not appeal to reason that a friend would give possession of a flat to his friend without consideration, on the facts of the instant case, stands watered down by the learned Judge in his findings in para 23 of the decision. Indeed, the testimony of Sunil Kumar, noted in para 21 and 22 above, which has formed the basis of the finding returned by the learned Trial Judge in para 23 of the decision shows the inofficiousness in the dealings inter se between Sunil Kumar and O.P. Dawar. The two transact their worldly affairs as if each has a right to dip his hand into the pocket of the other. We may note that in his deposition, Sunil Kumar stated that he had paid Rs.4,00,000/- (Rupees Four Lacs only) to O.P. Dawar in October 1997. He admitted having no receipt with him. Pertaining to the source of funds he stated : *I had purchased the suit flat in October 1997 from defendant No.1 and I had paid the money amounting to Rs.4 Lacs. I do not remember the date. The amount was paid in cash. I do not remember as to from which bank I had drawn the money and from which source the money was brought by me. No documents were executed by*

defendant No.1 when the money was paid. Pertaining to his testimony that he paid further sum of Rs.4 lacs in cash in January 1998, on cross-examination he deposed: *I do not remember as to from which bank I had withdrawn the above 4 lacs. I do not remember as to what amount was drawn from the bank. (vol. I had paid the said amount from my own funds lying with me and I had borrowed certain monies from my friend). I do not remember as to what amount was borrowed from which friend. I do not remember the names of friends from whom the money was borrowed.*

24. The learned Trial Judge has ignored the aforementioned testimony of Sunil Kumar, which, shows that he is a very shaky witness. In any case, his testimony brings out the fact that he failed to show that he had with him Rs.4 lacs in the month of October 1997 and Rs.4 lacs in the month of January 1998. This casts a very serious doubt of his having paid Rs.8 lacs to O.P.Dawar.

25. In his testimony, Sunil Kumar admitted being in the business of sale and purchase of property. He stated : *I along with defendant No.1 had finalized certain property deals during the period of 10/12 years. I was having some arrangement with the defendant No.1 for sharing the commission/brokage.* On being cross-examined as to what usual documents would be got executed by him when he

would finalize deals for sale of property between third parties, Sunil Kumar stated : *We usually get the GPA, agreement to sell and will, receipt etc. executed between the parties. These documents are executed on the stamp paper when the deal is final. I have knowledge that the GPA and agreement to sell are prepared on stamp paper.*

26. Learned Trial Judge has ignored the fact that Sunil Kumar was a property dealer and as per his own admission was aware as to on what kind of papers agreements to sell and general power of attorney require to be scribed. It is strange that he purchased a property without getting executed said documents. It need hardly be emphasized that pertaining to O.P.Dawar giving possession of the flat to Sunil Kumar as a friend, learned Trial Judge has opined, as noted in para 10 above, that O.P.Dawar was a property dealer by profession and was well versed with the technicalities involving deals of immovable property. But the same reasoning has been thrown to the winds while considering the evidence pertaining to the conduct of Sunil Kumar, who, too is a property dealer by profession and admitted the importance of getting executed agreements to sell, general power of attorney etc. on stamp papers.

27. The reasoning of the learned Trial Judge that an adverse inference had to be drawn against O.P.Dawar for

withholding the person who scribed Ex.PW-1/7 is patently faulty for the reason, O.P.Dawar denied that any person known to him had scribed Ex.PW-1/7; needless to state execution thereof was denied by O.P.Dawar. On the contrary it was for Sunil Kumar to have named the person who had scribed Ex.PW-1/7 and produced him as his witness. The onus cast by the learned Trial Judge on O.P.Dawar to have examined a handwriting expert pertaining to who scribed Ex.PW-1/7 is unwarranted in the facts and circumstances of the instant case.

28. The reasoning of the learned Trial Judge that nobody gives his property to a friend without consideration may conform to ordinary human conduct, but the testimony of O.P.Dawar and Sunil Kumar show that both of them conduct their affairs without any prudence and regards to the law of the land. Both of them appear to be tax evaders. Both of them deal with a lot of cash. Banking channels appear to be not the medium of transportation adopted by the two to move money.

29. Pertaining to the stated work got executed in the flat and the bills Ex.PW-1/5 and Ex.PW-1/6 produced by Sunil Kumar, the learned Trial Judge has failed to appreciate that Sunil Kumar did not prove the availability of funds to pay Rs.3 lacs to Sharma Interior Decorators the stated contractors who

had allegedly executed the works. No witness was produced from the contractor to prove execution of the works and receipt of money from Sunil Kumar.

30. The best thing which the learned Trial Judge ought to have done, which has not been done, is to see with his own eyes, the signatures on Ex.PW-1/7.

31. We have done so. The purported signatures of O.P.Dawar are nothing but a scribble, akin to smoke being shown in a drawing. The signatures are nothing but a repeated angular "Os" scribbled with an overlap, akin to the strokes used if smoke has to be shown emanating from a chimney. We have compared the said signatures with the signatures of O.P.Dawar on the documents admittedly executed by him i.e. the written statement, affidavits and the vakalatnama. It is apparent to the naked eye that the signatures just do not tally.

32. A very material circumstance has been ignored by the learned Trial Judge. The same is that, admittedly, O.P.Dawar purchased the flat from Smt.Pushp Rajni Chhabra on 15.9.1997. It is strange that within 15 days thereof he agreed to sell the flat to Sunil Kumar. By October 1998 Pushp Rajni Chhabra was still armed with a letter of allotment and a formal conveyance deed had yet to be executed in her name by DDA. If indeed, Sunil Kumar had purchased the flat from

O.P.Dawar, we see no reason why he did not obtain either a direct document in his favour from Pushp Rajni Chhabra or alternatively from O.P.Dawar, empowering him to deal with the flat in question.

33. Thus, the inevitable conclusion has to be to allow RFA No.329/2006 and as a result to set aside the impugned judgment and decree dated 3.5.2006 with a finding that Sunil Kumar has failed to prove due execution of Ex.PW-1/7.

34. We allow RFA No.329/2006. Impugned judgment and decree dated 3.5.2006 is set aside. Suit filed by Sunil Kumar is dismissed.

35. We dispose of RFA No.660/2006 by holding that as a result of our finding that no agreement to sell was executed by O.P.Dawar, no declaration can be granted in favour of Sunil Kumar to protect his alleged rights under the agreement to sell. The bank would be free to enforce its rights under the mortgage which has been validly created as per law.

36. O.P.Dawar and the Bank shall be entitled to costs from Sunil Kumar all throughout.

PRADEEP NANDRAJOG, J.

J.R. MIDHA, J.

December 17, 2008
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