

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA 250/2008**

DR. ASHOK K MITTAL Appellant

Through: Mr. V.Shekhar, Sr. Advocate with
Mr. Zangpo Sherpa, Advocate and
Mr. Anuj Gupta, Advocate

Versus

RAM KUMAR GUPTA AND ANR. Respondents

Through: Mr. Kailash Vasdev, Sr. Advocate with
Mr. D.S.Chauhan, Advocate

RESERVED ON:
19.09.2008

% DATE OF DECISION:
29.09.2008

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? Yes.
2. To be referred to the Reporter or not? Yes.
3. Whether judgment should be reported in Digest? Yes.

PRADEEP NANDRAJOG, J.

1. Ashok Kumar Mittal filed a suit seeking specific performance of an agreement to sell stated to have been entered into by him with Ram Kumar Gupta and Savita Gupta

wife of Ram Kumar Gupta. It was pleaded in the plaint that Ashok Kumar Mittal is a doctor and was wanting a residential plot in a developing area wherein he could reside and also carry on business after constructing a residential house. He stated that Ram Kumar Gupta and his wife Savita Gupta were his distant relative and owned plot No.58 ad-measuring 205.23 square meters in Block 'C', Pocket -8, Sector 17, Dwarka and that in the 3rd week of June 2003 when he visited a property dealer 'Kumar Properties' at Sector 17, Dwarka he chanced to meet Ram Kumar Gupta from whom he learnt that Ram Kumar Gupta and his wife were desirous of selling the plot owned by them. He stated that after discussions, price of the plot was fixed at Rs.12,50,000/- (Rupees Twelve Lac Fifty Thousand). He stated that the deal was finalized through the property dealer 'Kumar Properties'. He stated that on 13.7.2003 he paid Rs.10 lacs to the defendants vide cheque No.191873 drawn on Syndicate Bank, R.K.Puram in the name of Ram Kumar Gupta and received photocopies of the title documents from Ram Kumar Gupta. He stated that it was agreed that balance sale consideration of Rs.2,50,000/- (Rupees Two Lac Fifty Thousand) would be payable at the time of execution of the sale documents. It was stated that on 15.7.2003 an agreement to sell was drafted by the counsel for Ram Kumar Gupta and his

wife and was sent to him for approval and that he incorporated modifications in the draft and returned the same to Ram Kumar Gupta. He further stated that on 7.8.2003, at the asking of Ram Kumar Gupta and his wife he paid a sum of Rs.1 lac by cheque to them by issuing a cheque in the name of Ram Kumar Gupta. He stated that in the last week of August 2003 the cheque in sum of Rs. 10 lacs given by him to Ram Kumar Gupta was returned by Ram Kumar Gupta, stating that Ram Kumar Gupta and his wife have back tracked from the agreement and that he was always ready and willing to pay the balance sale consideration and get the sale deed executed, claim for the agreement to be enforced by a decree was made.

2. Ram Kumar Gupta and his wife admitted the close relationship between the parties but denied any agreement for sale of the plot in question. Receipt of the cheque in sum of Rs.10 lac is denied. Receipt of sum of Rs.1 lac under the cheque dated 7.8.2003 was denied. Receipt and exchange of draft agreements to sell was denied. Photocopies of the title documents of the plot in the hands of Ashok Kumar Mittal was explained by stating that as per the terms of the perpetual lease under which perpetual lease hold rights were acquired by them under DDA a building had to be constructed within 3 years

which period expired in the month of August 2002. It was stated that in April 2003 when Ram Kumar Gupta was sitting in the office of Atul Kumar Mittal, a practicing chartered accountant who is the younger brother of Ashok Kumar Mittal, discussions were held how to proceed in the matter to seek extension of time from DDA for construction. It was stated that whereupon Atul Kumar Mittal said that his brother Ashok Kumar Mittal was a successful doctor and had a lot of contacts and offered that through Ashok Kumar Mittal necessary work could be done at the office of DDA by using contacts in DDA and for said purpose photocopy of the title documents were handed over to Atul Kumar Mittal together with signed copies of the requisite applications. It was pleaded that it was inconceivable for them to have agreed to sell the plot of land having a market value of about Rs.38 lacs for a petty amount of Rs.12.5 lacs.

3. Needless to state the only material issue which arose for consideration at the trial between the parties was whether the parties had entered into an agreement to sell as alleged by Ashok Kumar Mittal.

4. Ashok Kumar Mittal sought to prove his case by examining himself as PW-1; his wife as PW-2; one Jagdeep

Kumar as PW-3; L.P.Singh as PW-4; Satish Kumar as PW-5 and R.P.Gupta examined as PW-6.

5. PW-2 to PW-5 deposed that they were present when the deal was finalized between the parties and supported the case of Ashok Kumar Mittal.

6. PW-6 who brought the summoned record pertaining to the account maintained by Ashok Kumar Gupta with Syndicate Bank, R.K.Puram stated that the cheque dated 7.8.2003, Ex.PW-6/2 was drawn in the name of Ram Kumar Gupta but bore the signatures of Ashok Kumar Mittal at the rear of the cheque and that the cheque was not crossed as an account payee cheque.

7. Ram Prakash Gupta and his wife tendered themselves as their witnesses by filing affidavits by way of examination-in-chief. Ram Prakash Gupta tendered himself for cross examination but without being fully cross examined chose not to appear in the Court for further cross examination. His wife did not tender herself for being cross examined.

8. Three drafts of an agreement to sell came on record as documents filed by Ashok Kumar Mittal and admitted by him as drafts exchanged between the parties. The same are the

document 'Mark D-1', being the photocopy of an agreement to sell bearing no date but recording that the parties had agreed for sale of the plot for a sum of Rs.28,50,000/- (Rupees Twenty Eight Lac Fifty Thousand); Ex.PW-2/3 being the photocopy of an agreement to sell dated 26th July 2003 recording the agreed sale consideration at Rs.12,50,000/- and lastly the original of an undated draft agreement to sell being Ex.PW-2/2 which showed that the stamp paper on which the document was scribed was purchased on 15.7.2003. The same recorded sale consideration at Rs.12,50,000/-.

9. The document, Ex.PW-2/2, has a cross made with a pencil against term No.17, and at the bottom, in hand, with a pencil the redrafted or if we may use the expression the proposed clause 9 has been penned as suggested by the person who has penned the clause in hand.

10. In respect of the cheque stated to have been issued in the name of Ram Kumar Gupta, in his evidence, Ashok Kumar Mittal stated in his evidence that the cheque in question was returned to him as he had stopped payment. Pertaining to the cheque in the sum of Rs.1 lac stated to have been issued by him to Ram Kumar Gupta on 7.8.2003, he admitted that it was he who withdrew the money from the account in respect of the

cheque but stated that he gave the money to Ram Kumar Gupta.

11. Though Ram Kumar Gupta and his wife denied the exchange of any draft agreements, much less 'Mark D-1', Ex.PW-2/3 and Ex.PW-2/2 but later on back tracked from said defence. As noted above, after being partially cross examined Ram Kumar Gupta chose not to subject himself to further cross examination. On 11.10.2007 his counsel made the following statement in Court:-

"I am the counsel for the defendants. The evidence affidavit of defendant No.1 though was filed and defendant No.1 appeared on two occasions for cross-examination, he was cross-examined but was deferred. Now, the defendant No.1 has informed me that he is unable to appear in this court because of illness and that defendant No.1 do not want to submit for further cross-examination, even by the Commission and defendant do not want to lead any evidence. So, I close defendant evidence."

12. Thereafter, on 11.1.2008 the counsel for Ram Kumar Gupta and his wife made the following statement:-

"That the writing at Point X on Ex.PW-2/2 though has been denied by the defendant in his cross-examination but I say that writing may be treated as it was being written by the defendant Ram Kumar Gupta in his own handwriting for the purpose of argument and disposal of this case."

13. In view of the fact that Ram Kumar Gupta chose not to be fully cross examined and his wife did not even enter the witness box for cross examination, the fate of the dispute obviously hinged on whether Ashok Kumar Mittal could stand on his own legs or not, with the defence having nothing to rebut the evidence against it.

14. The learned Trial Judge noted that the agreements to sell Ex.PW-2/2, 'Mark D-1' and Ex.PW-2/3 were not signed by the parties. Noting that on Ex.PW-2/2, Ram Kumar Gupta and his wife accepted that Ram Kumar Gupta had made the corrections by pencil in his own hand, learned Trial Judge concluded that said documents at best evidence some kind of a talk between the parties for sale of the land in question.

15. However, the basic question which was posed, and in our opinion correctly, was: whether the parties had finalized the terms of the sale and that the same required Ram Kumar Gupta and his wife to sell the plot in question to Ashok Kumar Mittal for Rs.12,50,000/-. Needless to state, this issue required to be considered with reference to the case pleaded by Ashok Kumar Mittal that he had handed over a cheque of Rs.10 lacs to Ram Kumar Gupta and had also paid Rs.1 lac on 7.8.2003 through the bearer cheque Ex.PW-6/2 as sale consideration with further

plea that he had received back the cheque in sum of Rs.10 lacs from Ram Kumar Gupta when he stopped payment by issuing instructions to his banker not to clear the said cheque.

16. Now, Ashok Kumar Mittal having admitted that he stopped payment of the cheque in sum of Rs.10 lacs and that when he did so, Ram Kumar Gupta returned the cheque to him, was found as a strange conduct by the learned Trial Judge who has discussed the said conduct in para 16 of the decision as under:-

“16. The plaintiff examined himself as PW-1. In the evidence affidavit plaintiff mentioned that he gave a cheque of Rs.10 lac towards the token amount of the said deal to the defendant. In the cross examination he says that he did not obtain any receipt of the said amount. He further says that the defendant returned the said cheque to him so he stopped payment. He further says that he stopped the payment of cheque of Rs.10 Lac in August 2003. This averment admitted by the plaintiff would only prove or to brings to conclusion that either there was no agreement to sale of the property or even if it was so then it was oral. Even if it is so when the cheque was returned there was no reason for plaintiff for stopping the payment. The deposition of the plaintiff that he stopped payment would shows that he is not deposing correctly regarding giving of a cheque of Rs.10 Lac.”

(Note: The above para is a verbatim quote with the grammatical and syntax errors in para 16 of the judgment)

17. The learned Trial Judge has discussed Ex.PW-2/2, Ex.PW-2/3 and 'Mark D-1; in para 17 of the decision. It reads as under:-

"17. Apart from that one more aspect is that the plaintiff himself has placed on record certain document claiming to be agreement drafted for the purpose of sale of the property. One of the agreement to sale filed on record bears the date of 26th July 2003 it does not bear the signatures of any body and it referred regarding giving of a cheque of Rs.10 Lac. The consideration amount is shown as 12.5 Lac i.e. on Rs.100 stamp paper. Another document filed is one more agreement to sale i.e. on Rs.50 stamp paper, exhibited as PW-2/2. It is a computer typing, that again also do not bear the signatures of anybody. It is on a stamp paper of dated 15th July 2003, not signed by any one. In that also amount is shown as Rs.12.5 Lac and that cheque of Rs.10 Lac is stated to have been given by the defendant. There is one more document which was also filed by the plaintiff himself which is again referred as sale agreement, photocopy is filed and is marked as D-1. Though it was filed by the plaintiff himself but he plaintiff did not exhibit it. There interesting part of this agreement is that it is typed on the same typewriter on which agreement Ex.PW-2/2 is shown to have been typed which was filed in original. The first page (the photocopy) of this document marked as D-1 is the same photocopy of Ex.PW-2/2. The second page which has been filed is also from the same computer. Though in that it was shown that a cheque of Rs.10 Lac was given to the defendant, part of consideration amount of Rs.28.5 Lac in words also, written and balance has been shown as Rs.18.5 Lac in words also it is written. The all other paras of this agreement is the same as para No.2 of the Ex.PW-2/2. There is page No.3 also of these two agreements, both are the same. None of these were signed by anyone nor witnessed by anyone. The plaintiff counsel strongly argued regarding a writing which was written with the pencil on the 3rd page of Ex.PW-2/2 as under "**The second party will also be**

entitled to get the conversion in its name direct after full payment to first party”. The Ld. counsel for the plaintiff argued that the defendant in the cross-examination has denied to have written this in his handwriting but subsequently defendant counsel made statement that he admitted this handwriting of the defendant. The plaintiff counsel also filed handwriting expert report regarding this, through there was no need for the same because Ld. counsel for the defendant has categorically made statement that he admitted this handwriting of the defendant for the purpose of disposal of the case. I am also taking it as it was written by the defendant but again plaintiff has not explained that for what reasons he got drafted three agreements, one on the stamp paper dated 26.7.2003, not signed by any one, exhibit as PW2/3 and other is on the stamp paper of Rs.50 exhibited as Ex.PW-2/2 dated 15.7.2003. And 3rd one is marked as D-1 which is a photocopy on a stamp paper of Rs.50. The plaintiff did not file the back side of the said stamp paper and did not produce the original. It seems that the defendant initially drafted the agreement for sale for Rs.28.5 Lacs showing 10 Lac as advance by the cheque but subsequently for filing the suit he has changed page N.2 and make out consideration amount of Rs.12.5 Lac. The clause 9 which was written by pencil is on page No.3 and not of page No.2. So, it seems that plaintiff has not come to the court with the clean hands and has failed to prove that there was an agreement to sale even orally by the defendant to sell the above referred plot for a sum of Rs.12.5 Lac.”

(Note: The above para is a verbatim quote with the grammatical and syntax errors in para 17 of the judgment)

18. The issue of payment of Rs.1 lac by cheque on 7.8.2003 has been discussed by the learned Trial Judge in para 18 of the judgment which reads as under:-

"It may be that same agreement might have been there for a sum of Rs.28.5 Lac and even for that agreement the defendant might have not agreed and so plaintiff make out this false case showing as defendant agreed to sell the property for a sum of Rs.12.5 Lac in which he has miserably failed to establish. Though the defendant has also made an attempt to make out a case as if a sum of Rs.1 Lac was paid by the plaintiff to the defendant by way of bearer cheque. In that aspect he has produced one witness namely PW-6 Sh. R.P.Gupta, a witness from Syndicate Bank. In the cross-examination this witness deposed that he has no personal knowledge about the cheque. It was a bearer cheque. According to him cheque was presented on 13th August 2003 and it was encashed on the same day. It was encashed by the person whose signatures were taken on the back side of the cheque, at the time of issuing of token No.308. The photocopy of that cheque has been produced. On perusal of the said photocopy of the cheque, it is found that it bears the signatures on the back side of the cheque. So it is taken that plaintiff who made an attempt to make out a case against the defendant that bearer cheque was withdrawn on behalf of the defendant whereas it was withdrawn by the plaintiff under his signatures though filed in the name of the defendant. More-so, it is also a fact that plaintiff has stated that this cheque was demanded by the defendant on 7.8.2003 as urgently required and so he has to give the bearer cheque. But as per the record this cheque was encashed on 13.8.2003. Here also the claim of the plaintiff falsify, if it was required by the defendant urgently then the amount would have been withdrawn on the same day or the next day. This all shows that plaintiff has attempted to make out a false case against the defendant and he is unable to prove the issue in his favour that there was any agreement with the defendant for a sum of Rs.12.5 Lac and an earnest amount was been paid."

(Note: The above para is a verbatim quote with the grammatical and syntax errors in para 18 of the judgment)

19. In view of the discussion noted hereinabove, the learned Trial Judge has proceeded to dismiss the suit filed by Ashok Kumar Mittal.

20. At the hearing of the appeal the contention urged by Sh.V.Shekhar, learned senior counsel on behalf of Ashok Kumar Mittal was that the learned Trial Judge failed to appreciate that Ram Kumar Gupta chose not to subject himself to full cross examination and his wife chose not to be subjected to any cross examination and thus their defence in toto had to be rejected. Counsel urged that Ram Kumar Gupta having admitted as per statement by his counsel on 11.1.2008 that the corrections in hand in Ex.PW-2/2 were made by Ram Kumar Gupta re-enforced the authenticity of the said document. Counsel urged that from the fact that Ram Kumar Gupta made only one correction in the draft agreement to sell pertaining to clause 9 evidenced that all other terms of the agreement to sell as recorded in Ex.PW-2/2 were admitted by Ram Kumar Gupta and his wife. It was urged that the learned Trial Judge has failed to appreciate the evidence in the correct perspective.

21. In respect of the reasoning of the learned Trial Judge, Sh.V.Shekhar, learned senior counsel for Ashok Kumar Mittal urged that keeping in view that the parties were distantly

related, un-officiousness in the 'inter se' business dealings between the parties was natural. Thus, counsel urged that the version of Ashok Kumar Mittal is plausible that he drew the cheque in sum of Rs.1 lac in the name of Ram Kumar Gupta at the request of Ram Kumar Gupta and withdrew the amount under the cheque himself and paid the amount to Ram Kumar Gupta.

22. The submissions made by learned senior counsel for Ashok Kumar Mittal merit no deep consideration by us for the reason a very vital document has gone unexplained and unnoticed by the parties at the trial. The said document is Ex.PW-2/12.

23. Ex.PW-2/12 is a calculation sheet with notes and has been proved at the trial by the wife of Ashok Kumar Mittal. In her deposition as examination in chief filed as an affidavit she stated as under:-

“15. We also asked for conversion charges of the plot from lease hold to free hold and the said property dealer in his own hand made rough calculations on a paper of the amount payable in case the conversion is applied by the defendants and in case it is applied by the plaintiff. The said calculation sheet is Ex.PW-2/12.”

24. The document, Ex.PW-2/12, makes a very interesting reading and proves what is actually happening in the city of

Delhi. The usual story of deals being settled with part sale consideration agreed to be paid under hand i.e. in black money and part sale consideration paid over the table i.e. in white money. The document proved by Ashok Kumar Mittal through his wife i.e. Ex.PW-2/12 records conversion charges to be paid to convert the lease hold tenure to free hold tenure; further recording that this would be if parties desire a regular sale deed to be executed. It also records as to what amount of stamp duty would be payable if the sale has to be by means of a general power of attorney; a will and an agreement to sell the usual documents being executed in Delhi while conveying interest in an immovable property and cheating the revenue. The document Ex.PW-2/12, inter alia records as under:-

“If **white amount** is Rs.12,50,000/- - then for this amount agreement to sell is must to be registered at the rate of 7.5 on Rs.12,50,000/- stamp duty which comes to Rs.93,000/-.

Then you can apply for hold in your name.”

25. The document further records that on the sale deed the stamp duty payable would be “**8% duty on white amount**”.

26. Faced with the document, Ex.PW-2/12, Sh.V.Shehkar, learned senior counsel for the appellant had virtually no

submission to make. Indeed, having himself relied upon Ex.PW-2/12 and proved the same as the rough notes of the property dealer, Kumar Properties, which records that Rs.12,50,000/- was the agreed white amount of the transaction, meaning thereby there was some black amount agreed to be paid, learned senior counsel could only submit that save and except the document coming on record, neither party has rendered or offered any explanation thereon.

27. We are not satisfied with the response of learned senior counsel for Ashok Kumar Mittal. Ex.PW-2/12 has been relied upon by Ashok Kumar Mittal and being his document, binds him to its contents. The document establishes the ugly face of the society and the under-belly of the so called educated citizens of Delhi.

28. Indeed, disputes pertaining to agreements to sell in Delhi are packed up with a plethora of false evidence which we have been noticing over the years because of an undisclosed black element in the sale transaction which obviously can never be pleaded in a Court of Law. To justify the contents of the document which obviously does not reveal the truth, false evidence is brought on record through the testimony of witnesses.

29. Truth has insidiously emerged in the instant case through the medium of Ex.PW-2/12.

30. This document is sufficient to non-suit Ashok Kumar Mittal. Even otherwise we find that under Section 29 of the Indian Contract Act, agreements, the meaning of which is not certain or capable of being made certain are void. Assuming there was an agreement between the parties, in the instant case there is just no evidence whether Ex.PW-2/3 was the draft of the agreement to sell agreed upon between the parties or Ex.PW-2/2 was the draft of the agreement between the parties or 'Mark D-1' was the draft of the agreement settled between the parties.

31. Each one of them purports to be an agreement to sell. None of them has been executed by the parties. Whereas 'Mark D-1' shows sale consideration agreed upon at Rs.28,50,000/-, the other two documents i.e. Ex.PW-2/2 and Ex.PW-2/3 record the sale consideration agreed upon at Rs.12,50,000/-.

32. One thing is clear. The fact that certain draft agreements were drawn up evidences the intention of the parties to bind themselves on the jural relationship only after executing a written agreement to sell. None being executed by

the parties suggests that parties had some kind of negotiations but did not finalize the deal.

33. Further, the cheque in sum of Rs.10 lacs, assuming it to be tendered to Ram Kumar Gupta having been admitted by Ashok Kumar Mittal to be returned to him also shows, that the deal fell through at the negotiation stage itself

34. There is no evidence that Ram Kumar Gupta received any further amount, much less Rs.1 lac as alleged by Ashok Kumar Mittal.

35. We concur with the reasoning of the learned Trial Court pertaining to the said cheque as discussed by the learned Trial Judge in para 18 of his judgment.

36. The appeal has to be dismissed. But before bringing the curtains down we would like to discuss on the issue of imposing cost.

37. We propose to impose exemplary cost on the appellant Ashok Kumar Mittal and even on the respondents, Ram Kumar Gupta and his wife because both parties have stated falsehood and have consumed precious judicial time at the trial stage and the appellate stage.

38. The defence of the Ram Kumar Gupta and his wife that no talks were held for sale of the plot is falsified by his admission made through his counsel and as recorded in the order dated 11.1.2008 by learned Trial Judge that the writing at point 'X' on Ex.PW-2/2 may be treated as being written by him. Trial Court Record evidences that the plaintiff closed his evidence on 2.3.2007 and the defendants commenced leading evidence on 18.4.2007. Ram Kumar Gupta was partly cross examined on said date. He was further cross examined on 1.5.2007. Thereafter, on 16.8.2007 Ram Kumar Gupta did not enter the witness box and the matter was adjourned. On the next date i.e. 12.9.2007 the matter was further adjourned. It was further adjourned on 11.10.2007 after recording that Ram Kumar Gupta does not desire to be further cross examined. An application was thereupon filed by the plaintiff to lead evidence on an expert to prove that the handwriting on Ex.PW-2/2 was of Ram Kumar Gupta. Arguments were heard on the application and an order was passed on 11.1.2008 recording the concession made by Ram Kumar Gupta and his wife through their counsel that the writing be accepted as that of Ram Kumar Gupta. Precious judicial time was wasted by Ram Kumar Gupta who took a false stand that no discussions whatsoever were held between the parties for sale of the plot. As noted above, Ex.PW-

2/12 evidences some kind of a deal between the parties having an element of part sale consideration to be paid in black money and part sale consideration to be paid in white money. Ram Kumar Gupta and his wife i.e. the respondents have to be burdened with cost, if for no other reason, to send out a message to litigants that defences if found to be false would require corrective action in terms of the system to be recompensed. Similarly, qua Ashok Kumar Mittal we find that even he has not come to the Court with a clean version. Even he did not reveal the truth to the Court. Even he is responsible for playing with the judicial system and wasting precious judicial time. What has pained us the most is that Ashok Kumar Mittal is a qualified doctor. Ram Kumar Gupta and his wife are also educated persons and yet all of them have contrived to speak a bundle of lies on oath. They and their witnesses have lied on oath and have committed perjury. With the Courts being already over burdened with litigation directing prosecution of witnesses who lie under oath would further burden the system, though it is advisable to direct prosecution in such cases, but we feel that in the least such litigating parties should be burdened with heavy cost to be paid to the State which spends money on providing the judicial infrastructure.

39. We dismiss the appeal imposing exemplary cost of Rs.1,00,000/- (Rupees One Lac) on the appellant Ashok Kumar Mittal and an equal cost of Rs.1,00,000/- (Rupees One Lac) on the respondents Ram Kumar Gupta and his wife Savita Gupta to be jointly paid by them. The cost shall be deposited by the parties in the account of Delhi High Court Legal Services Committee within 2 weeks from the date of the instant judgment.

40. A copy of this judgment would be sent to the Secretary, Delhi High Court Legal Services Committee for his information and follow up action to recover the cost imposed if not paid as afore-directed.

PRADEEP NANDRAJOG, J.

J.R. MIDHA, J.

SEPTEMBER 29, 2008
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