

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

+ **Date of Decision : 12.05.2009**

% **CS(OS) No. 154/2008**

M/S. SUNRISE CONSTRUCTION Plaintiff
Through: Mr. Dinesh Kumar Garg, Advocate.

versus

MS. VEENA WAHI Defendant
Through: Mr. Davinder Singh, Sr. Advocate
with Mr. Jasmeet Singh, Advocate.

**CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI**

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

VIPIN SANGHI, J. (Oral)

1. The plaintiff has filed the present suit to seek a decree for specific performance in respect of the defendant's 1/5th undivided share in property bearing no. D-8, South Extension Part-II, New Delhi. The case of the plaintiff as set out in the plaint is that one Dr. Desh Raj Kehar was the owner of built up property No. D-8, N.D.S.E., Part-II, New Delhi admeasuring 1080 Sq. Yds. He died in the year 1967 leaving behind eight legal heirs. Smt. Durga Devi, the widow of late Dr. Desh Raj Kehar disposed off a part of the property admeasuring 330 Sq. Yds.

situated at the rear side and after such sale, the area left with the said legal heirs of late Sh. Desh Raj Kehar was 764 Sq. Yds (herein referred to as the "said property"). Smt. Durga Devi, also died on 03.03.1993 leaving behind five legal heirs namely Dr. Prem C. Kehar (son), Mahinder Kumar Kehar (son), Mrs. Swaran Kapoor (daughter), Veena Wahi (daughter), Dr. Mrs. Jagjeet Moorti (daughter).

2. The aforesaid five legal heirs inherited the said property admeasuring 764 Sq. Yds. in equal share i.e. $\frac{1}{5}$ th undivided share each. Three of the aforesaid legal heirs namely Dr. Prem C. Kehar, Dr. Mrs. Jagjeet Moorti and the legal heirs of Mrs. Swaran Kapoor sold their $\frac{1}{5}$ th undivided share by way of three sale deeds executed on 28.04.2006, 28.04.2006 and 25.05.2006 respectively in favour of the plaintiff.

3. It is the case of the plaintiff that the defendant, owner of $\frac{1}{5}$ th undivided share of the said property, (herein referred to as the suit property), who also claimed to be in actual physical possession of one room, one kitchen and the right to use the terrace in common in the said property, had entered into an oral agreement with the plaintiff on 18.09.2007 to sell all her rights, titles and interest in the suit property to the plaintiff for a total consideration of Rs. 1,60,00,000/- (One Crore Sixty Lacs Only). The plaintiff further states that after having entered into the oral agreement the plaintiff had paid, and the defendant had received a part of the sale consideration of Rs. 25,50,000/- from the plaintiff. Of the said amount, Rs. 50,000/- was paid by cash and Rs.

25,00,000/- was tendered by cheque bearing no. 261087 dated 18.09.2007 drawn on Dena Bank, South Extension Branch, New Delhi. The balance consideration of Rs. 1,34,50,000/- was agreed to be paid on or before 31.12.2007 at the time of execution and registration of the sale deed and handing over of the possession of the portion in the defendant's possession. Receipt for Rs. 25,50,000/- was executed, acknowledging the receipt of the said amount, and also containing the essential terms of the agreement. The receipt cum agreement was written in hand by the son-in-law of the defendant, signed by the defendant, and the daughter of the defendant was a witness thereto.

4. The plaintiff further states that before 31.12.2007, the plaintiff approached the defendant with a request to perform her part of the obligations to convey her undivided share in the suit property as the plaintiff was ready and willing to perform its part of the contract. The plaintiff states that it did not receive any positive response from the defendant to complete the sale and purchase transaction, and was convinced that the defendant was intentionally and deliberately delaying the matter with malafide intentions to avoid the performance of her part of the obligations as the real estate value had appreciated considerably in the meanwhile. The plaintiff states that it served a legal notice dated 17.12.2007 upon the defendant calling upon her to perform her part of the obligations. Along with the notice the plaintiff also sent photocopy of pay order bearing no. 579548 dated 15.12.2007 issued by the Dena Bank, South Extension Branch, New Delhi for the

entire balance sale consideration of Rs. 1,34,50,000/- with a stipulation that the original pay order would be handed over to the defendant at the time of execution and registration of sale deed and handing over of possession. The said notice was duly received by the defendant. However, she neither replied nor complied with the terms thereof. Plaintiff states that it has always been ready and willing to perform its part of the contract.

5. Upon summons being issued and served, the defendant has filed her written statement. The defence of the defendant is primarily contained in para 10 of the written statement. The same reads as follows:

“10. That the contents of para 10 of the plaint are wrong, misconceived and vehemently denied. In response it is submitted that the plaintiff called the defendant several times to meet him regarding some important matters. The defendant in good faith went to the plaintiff's office, where the plaintiff insisted that she should sell her share in the suit property i.e. D-8 New Delhi Extension Part II, New Delhi. The plaintiff told the defendant that the value of the entire property i.e. D-8 New Delhi South Extension Part II, New Delhi is approximately Rs. 35,00,00,000/- (Thirty Five Crores) and if the defendant sells her share i.e. 1/5th in the suit property, the plaintiff would give her Rs. 6,50,00,000/-. In addition to giving Rs. 6,50,00,000/- against the sale of the 1/5th share of the defendant, plaintiff would also give the defendant 400 sq. ft. piece of land in the same property on Ground Floor, D-8 New Delhi South Extension Part II, New Delhi so that the defendant could run a boutique therefrom to earn her livelihood. That the defendant is a widow having no earnings from many years and is financially dependent on her daughter. The said proposal gave her rays of hope to live

in her own home having some earnings and self-respect in life. The plaintiff insisted that he did not have this much money to pay to the defendant at that time and neither can get into any agreement to transfer the right of the land (400 sq. ft.) exclusively on the name of the defendant since he did not have 100% right on the complete property yet. The plaintiff also insisted that he had already bought 3/5th of the share of the said property and if defendant can get him a receipt then it would help him to raise loan from the bank after which he would get into proper agreement with the defendant.

That the daughter of the defendant and son-in-law joined the defendant during this meeting. On good faith, defendant asked her son-in-law to write what the plaintiff mentioned, thus he wrote what the plaintiff wanted. Before signing the paper, defendant objected on the value mentioned on the paper and also on the point where it was mentioned that defendant was receiving Rs. 50,000/- plus Rs. 25,00,000/- cheque since she was not given either of it (neither cash nor cheque). But plaintiff insisted that this document was not an agreement but was required only for raising a loan. Also the reason he mentioned for quoting smaller value on the paper (which is Rs. 1.6 crore) is that he wanted to save upon stamp duty at the time of registration in future. Thus in good faith, defendant signed this paper.

Thereafter, defendant had neither got any oral nor any written communication from the plaintiff, until in January, 2008 whereas defendant received a couple of calls asking her to hand over the possession of a room and kitchen in lieu of Rs. 1.60 crores, else plaintiff would file a case against the defendant. This was a shock to the defendant and defendant refused him since the agreed/committed deal by him was Rs. 6.50 crores plus 400 sq. ft. of land on the main road towards the sale of her 1/5th share in property i.e. D-8 New Delhi South Extension Part II, New Delhi. After this also defendant received some more threatening/pressurizing calls regarding the same. As far as plaintiff claimed that he had sent the legal notice/written communication to

the defendant, however, defendant has not received any written communication from the plaintiff. This claim of the plaintiff is also plotted against the defendant since the matter of fact is that that plaintiff has possession of one room in premises bearing No. D-8 New Delhi South Extension Part II, New Delhi, which is the first room from the main gate where he is maintaining an office where his people sit from morning to evening and it is presumed that someone from the staff of the plaintiff has received the same (Registered AD) to be used against the defendant in Court of law."

6. The appearance of the defendant was mandated vide order dated 03.02.2009. The defendant appeared in court on 17.02.2009 when her statement was recorded by the court. The said statement reads as follows:

"The document Ex. D-1 bears my signatures and signatures of my daughter at points 'A' and 'B' respectively. The document is in the hand writing of my son-in-law Sh. Jeetinder Suneja. I am graduate. The document was signed at office of Mr. Ashok Chaudhary at Sant Nagar, Delhi. I had gone there alone. While I was in the office, I received a telephone call from my daughter asking me where I was? Then I was sitting in the office of Mr. Ashok Chaudhary. After I informed her, she came there alongwith her husband.

I have very good relations with my daughter and son-in-law.

My daughter is M.Sc. and MBA. My son-in-law is also MBA. I had read the document before I signed it. My daughter had not read it. My son-in-law had written this document at the instance of Mr. Ashok Chaudhary. Mr. Ashok Chaudhary had told my son-in-law in my presence what is to be recorded in the document. Whatever is written in the document is not correct. I signed a wrong

document in the presence of my daughter and son-in-law in good faith of Mr. Chaudhary. “

7. The court on the same date put the defendant to notice that the matter would be heard on the next date on the aspect of passing of a decree for specific performance under Order 12 Rule 6 CPC. That is how the matter has been heard today and after hearing the parties and having considered their respective submissions and the judgment cited by them, I am proceeding to decree the suit.

8. Apart from the aforesaid defence on merits, the defendant has raised the following preliminary objections:

1. The present suit is not maintainable in law and on facts of the case.
2. The suit is not properly valued for the purpose of court fees and hence the same is liable to be dismissed.
3. The alleged receipts which are the basis of the present suit are neither registered nor are properly stamped documents. The suit is not maintainable on the basis of these documents.
4. The suit for specific performance on the basis of the alleged agreement is not maintainable in view of Section 17 of the Registration Act, 1908.
5. The receipt relied upon by the plaintiff is without consideration. No amount whatsoever has even been paid by the plaintiff to the defendant, hence there is no question of any agreement between the parties.
6. The plaintiff has not come to the court with clean hands and has suppressed the material facts.

9. Of the above preliminary objections, preliminary objection no.

1, 5 and 6 stem out of the defence of the defendant on merits and, therefore, would stand decided with the decision on merits. The objection to the valuation for purpose of court fee is vague and non-specific. However, at the time of argument, Mr. Davinder Singh, learned Senior Counsel for the defendant submitted that the said objection has been taken as, according to the defendant, the sale consideration agreed between the parties for the defendant's 1/5th share in the suit property was Rs. 6.50 crores and not Rs. 1.60 crores. This issue would also, therefore, depend on the decision of the court on merits of the defendant's defence.

10. So far as the preliminary issue nos. 3 and 4 are concerned, a perusal of the receipt dated 18.09.2007 exhibit P-1 shows that the same has been executed on stamp paper of Rs. 50/- purchased on 18.09.2007 vide Serial No. 42294 in the name of the plaintiff. The same is sufficiently stamped and this is evident from a plain reading of the new revised Schedule 1A substituted by the Indian Stamp (Delhi Amendment) Act, 2001 to the Indian Stamp Act, and in particular to entry at Serial No. 5 (c) *"Agreement or Memorandum of an agreement- (c) if not otherwise provided for"* read with the entry at Serial No.53 *"Receipt"*, exemption (a), and Section 6 of the Indian Stamp Act. An agreement to sell does not by itself convey any right in an immovable property. It is not the case of either of the parties that the same was accompanied with delivery of possession. Consequently, there is no merit in the submission of the defendant that the same was required to

be registered under Section 17 of the Registration Act. Therefore there is no merit in preliminary objection nos. 3 and 4 raised by the defendant and they are rejected.

11. The submission of the learned Senior Counsel for the defendant is that the defence set up by the defendant as extracted hereinabove in para 10 of the written statement is that the defendant had executed the receipt exhibit P-1 in good faith. The said receipt does not reflect the actual transaction between the parties. The transaction as initially entered into between the parties was that the plaintiff would pay to the defendant Rs. 6.50 crores in addition to giving her 400 Sq. ft. built up area on the ground floor so that she could run a boutique therefrom. Her defence also is that the plaintiff did not have the money readily available to pay to her the amount of Rs. 6.50 crores and the plaintiff also stated that he could not make a commitment to transfer rights in her favour in respect of 400 Sq.ft on the ground floor of the property since he did not have 100% rights in the complete property. The plaintiff desired the execution of the receipt by the defendant as dictated by him, so that he could use the same to raise a loan from the bank, after which he would get a proper agreement executed with the defendant. The defence is that the agreement was executed in good faith and upon the plaintiff's assurance that the document was not to be used as an agreement, but was required only for raising a loan. It is also stated by the defendant that the smaller amount of Rs. 1.60 crores was written on

exhibit P-1 as the plaintiff wanted to save the stamp duty at the time of registration in future.

12. Mr. Singh submits that these aspects require a trial. He also submits that there is no unambiguous and clear admission by the defendant of the transaction set up by the plaintiff. He submits that in these circumstances it is not permissible for the court to pass a decree under Order 12 Rule 6 CPC. This provision can be invoked only in the case of a clear and unambiguous admission by the defendant in favour of the plaintiff. He submits that the entire defence of the defendant is to be taken and read as a whole and a part of it cannot be read in isolation. Mr. Singh has also relied upon the following decisions in support of his aforesaid submission:

1. AIR 1986 SC 1509 ***Doodhnath Pandey Vs. Suresh Chand Bhattasali*** wherein the Hon'ble Supreme Court held that if the court had to rely upon the alleged admission in the written statement, the admission must be taken as a whole and it is not permissible to rely on a part of the admission ignoring the rest.
2. 129 (2006) DLT 755 (DB) ***Raj Kumar Chawla Vs. Lucas Indian Services*** wherein the Division Bench of this court held that if there is no unambiguous, specific and clear admission by the defendant of his liability towards the plaintiff, much less of any definite claim as stated in the plaint, in the written statement and large factual and legal controversies have

been raised which require determination by the court of competent jurisdiction, a decree could not be passed by invoking Order 12 Rule 6 CPC.

3. 2007 VII AD (DELHI) 266 ***Vijay Gupta and Ors (Mrs.) Vs. Sh. Ashok Kumar Gupta***, wherein the Division Bench held that to pass a decree under Order 12 Rule 6 C.P.C there should be unambiguous and clear admission which alone can form the basis for passing such decree.
4. 149 (2008) DLT 303 ***Daljit Singh Anand Vs. Harjinder Singh Anand*** wherein the court held that in case the defendant in no uncertain terms disclaims the genuineness and veracity of the transaction pleaded by the plaintiff, and the averments indicate fraud was allegedly played upon by him and his father, and the averments also are to the effect that the defendant executed certain documents under a mistaken belief, the Court has to keep these in mind and cannot ignore the effect of such pleadings, merely with a view to give effect to provisions of Order 12 Rule 6 C.P.C.

13. Mr. Singh, therefore, submits that no decree under Order 12 Rule 6 C.P.C can be passed in the facts and circumstances of the present case.

14. Mr. Garg on the other hand submits that it is not permissible for the defendant to set up a defense, as set up by her in the written

statement, by virtue of Sections 91 and 92 of the Evidence Act and in the face of admitted document i.e. Exhibit P-1. The defence set up by the defendant is contrary to the terms of the admitted document.

15. He submits that the first defence set up by the defendant is that the agreed sale consideration was Rs. 6.50 crores, in addition to the defendant being given 400 Sq.ft. area on the ground floor to run a boutique. He submits that this defence is contrary to the express term of the receipt-cum-agreement which state that the consideration for the sale of the defendant's 1/5th undivided share in the suit property is Rs. 1.60 crores. There is no mention of the defendant being given any area on the ground floor. In contra distinction, there is a specific mention of the terrace remaining common for all.

16. The second defence of the defendant is that the plaintiff had stated that he did not have the means to pay the amount of Rs. 6.50 crores and therefore, requested the defendant to execute the receipt Ex.P-1 so that the plaintiff could obtain a loan from the bank by using the receipt. This stand of the defendant is unintelligible. It does not stand to reason that if the market value of the defendant's share was indeed Rs.6.50 crores, as claimed by her, why should the plaintiff ask the defendant/her son-in-law to record the total consideration as Rs.1.60 crores, if the purpose of the execution of Ex.P-1 was to obtain a loan from the bank. The stand of the defendant is also contrary to the terms of the document Ex. P-1, inasmuch as, the receipt Ex.P-1 does not purport to be a document created to enable the plaintiff to

obtain the loan. Ex.P-1 very clearly sets out the transaction entered into between the parties, viz. namely that the defendant has agreed to sell her 1/5th undivided share in the suit property to the plaintiff for a total consideration of Rs. 1.60 crores.

17. The third defence set up by the defendant is that the defendant has not received any consideration from the plaintiff. To this Mr. Garg submits that even this defence is not permissible since the receipt itself records the receipt of Rs. 50,000/- in cash and Rs. 25,00,000/- by cheque. It is not open to the defendant to contend otherwise. He submits that if the defendant chose not to encash the cheque, the same was at her own peril. She cannot deny the receipt of Rs. 50,000/- in cash. She also cannot deny the factum of having received the cheque for Rs. 25,00,000/-. She admitted receipt thereof at the time of execution of the receipt Ex.P-1.

18. Having considered the submissions of Mr. Garg, I am inclined to agree with him.

19. Sections 91 and 92 of the Evidence Act are relevant and are reproduced herein below:

“91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of documents.—When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of

property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Exception 1. - When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2. - Wills [admitted to probate in [India]] may be proved by the probate.

Explanation 1. - This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one.

Explanation. 2. - Where there are more originals than one, one original only need be proved.

Explanation 3. - The statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

92. Exclusion of evidence of oral agreement.—When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Proviso (1). - Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party [want or

failure] of consideration, or mistake in fact or law:

Proviso (2). - The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document:

Proviso (3). - The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4). - The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5). - Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved:

Provided that the annexing of such incident would not be repugnant to, or inconsistent with the express terms of the contract:

Proviso (6). - Any fact may be proved which shows in what manner the language of a document is related to existing facts."

20. Section 92 of the Evidence Act, inter alia, states that when the terms of a contract have been reduced to the form of a document and the same has been proved in accordance with Section 91, no evidence of any oral agreement or statement shall be admitted, as

between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms. The various provisos to the said Section carve out aspects on which a party would be entitled to lead evidence in connection with the document containing the contract, grant or other disposition of property.

21. The first proviso states that any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto such as fraud; intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law. Pertinently, the aspects on which it would be open to a party to a contract reduced to writing and proved according to Section 91 to lead evidence, are those which would make the contract void or voidable under Chapter II of the Contract Act.

22. The defence set up by the defendant is not that the defendant has been defrauded or that exhibit P-1 was executed under intimidation or that it is illegal. i.e. it is contract to any law. It is also not the defendant's case that she did not have the capacity to contract. The case that there was no consideration is belied on a plain reading of Ex. P-1. The contract contained in Ex.P-1 shows that the contract was for valuable consideration of Rs.1.60 crores. It is one thing to say that there is no consideration named in the agreement and another to say that no consideration has passed thereunder. The

case of the defendant falls under the latter category. It is not her case that there was a mistake in fact, or in law in as much, as, she did not understand the transaction when she executed exhibit P-1.

23. The defence set up by the defendant also does not fall under proviso 2 to Section 92, inasmuch as, she has not set up any separate oral agreement on any matter on which the document is silent. She has, undoubtedly, set up a separate oral agreement but that oral agreement is on the same matter on which the agreement Ex.P-1 is speaking, and not silent. She has set up an oral agreement to the effect that the agreed sale consideration was Rs.6.50 crores. This is inconsistent with the terms of Ex.P-1. Similarly, she claims that under the separate oral agreement she was to get further consideration in the shape of space of 400 sq.ft. This is also contrary to, and inconsistent with Ex.P-1 which narrates that the "total" consideration/value agreed for sale of the suit property between the parties is Rs.1,60 crores and nothing more. "Total" connotes final and whole. It contraindicates any other or remaining consideration of any kind. Coupled with this is the fact that the parties clearly record that the terrace is common area for all. So when it came to the defendant retaining or getting any right in any physical portion of the said property, the parties have specifically spoken about the same and not remained silent about it. By resort to proviso 2, the defendant cannot set up a separate oral agreement the terms whereof are inconsistent with the terms of exhibit P-1. She cannot add to the terms contained

in Ex.P-1. Her defence does not fall within proviso 3 to 6. Mr. Singh has not made any effort to bring the case of the defendant in any of the said provisos of Section 92. Consequently, in my view the defence set up by the defendant as extracted from para 10 of the written statement is hit by the main provision of Section 92, and not saved by the provision to Section 92 of the Evidence Act. The defence set up by the defendant purports to contradict, vary and add to the terms of Ex. P-1.

24. The defence that the document Ex.P-1 was executed only to enable the plaintiff to obtain a bank loan, because the plaintiff was not having sufficient funds to pay to the defendant Rs.6.50 crores is indeed unintelligible. Common sense dictates that the agreement would have been created for at least the alleged “actual” consideration to be able to raise enough loan from the bank(if the story of the defendant is to be believed). The loan that the bank can sanction in respect of a transaction worth Rs.6.50 crores would certainly be more than what it can sanction for a transaction, the value whereof is Rs.1.60 crores. Therefore, it does not stand to reason that the plaintiff would obtain a receipt showing consideration as Rs.1.60 crores to be able to raise a bank loan to pay to the seller Rs.6.50 crores.

25. The defence that the amount of Rs.1.60 crores was written in Ex.P-1 because the plaintiff wanted to avoid payment of stamp duty is a veiled allegation of the so-called “balance” payment i.e. the difference between Rs.6.50 crores and Rs.1.60 crores ie. Rs. 4.90

crores being paid separately, either in cash (accounted or unaccounted) or through cheque though not as disclosed consideration for the sale of the suit property. In either case, the purport of this defence is that the plaintiff was desirous of evading a tax viz. the Stamp Duty, to which the defendant consented. Does it lie in the mouth of the defendant to urge the same? In my view no. The defendant cannot be heard to say that she had an agreement with the plaintiff whereunder the two had agreed that the plaintiff would commit an illegality and to which the defendant had consented. Such a plea would be barred by the rule of *pari delicto*. The rule of *pari delicto* is the embodiment of the principle that the Courts will refuse to enforce an illegal agreement at the instance of a person who is himself a party to an illegality or fraud. **(See 135 (2006) DLT 273 Virender Singh VS. Laxmi Narain).**

26. In the aforesaid decision the court quoted from Blacks' Law Dictionary (fifth edition) the meaning of the maxim *pari delicto portior est condition possidentis (defendentis)* to mean:

"In a case of equal or mutual fault [between two parties] the condition of the party in possession [or defending] is the better one. Where each party is equally in fault, the law favours him who is actually in possession. Where the fault is mutual, the law will leave the case as it finds it."

27. The aforesaid decision also quotes from *Herbert Broom's 'A Selection of Legal Maxims'* (10th edition), which explains the maxim as follows:

“The maxim, in *pari delicto portior est conditio possidentis*, is as thoroughly settled as any proposition of law can be. It is a maxim of law, established, not for the benefit of plaintiffs or defendants, but is founded on the principles of public policy, which will not assist a plaintiff who has paid over money, or handed over property, in pursuance of an illegal or immoral contract, to recover it back; ‘for the Courts will not assist an illegal transaction in any respect’. The maxim is, therefore, intimately connected with the more comprehensive rule of our law, *ex turpi causa non oritur action*, on account of which no Court will ‘allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal’; and the maxim may be said to be a branch of that comprehensive rule : for the well-established test, for determining whether the money or property which has been parted with in connection with an illegal transaction can be recovered in a Court of justice, is to ascertain whether the plaintiff, in support of his case, or as part of his cause of action, necessarily relies upon the illegal transaction : if he ‘requires aid from the illegal transaction to establish his case, ‘ the Court will not entertain his claim.”

28. Pertinently the transaction in question, contained in exhibit P-1, by itself, is not an illegal transaction. It cannot be said to have been entered into to commit an illegality. It is the defence set up by the defendant to avoid the contract contained in exhibit P-1, which is an illegality. If on account of the above stated illegality the defendant could not have enforced her so called agreement to sell with the plaintiff with consideration as Rs. 6.50 crores, in my view, she is equally disentitled from setting up a defence founded upon that illegality. Accordingly, I hold that the defendant is barred from raising a defence that the agreed sale consideration was Rs. 6.50 crores but that the same was recorded in Ex. P-1 as Rs. 1.60 crores as the plaintiff desired to evade Stamp Duty.

29. Coming to the decisions relied upon by learned Senior counsel for the defendant, I am of the view that none of these decisions apply in the facts and circumstances of the present case.

30. The decision of the Supreme Court in ***Doodnath Pandey*** (supra) says that the admission must be taken as a whole and it is not permissible to rely on a part of document ignoring the other. That is not the case in hand. The admission has been made by the defendant in her statement recorded in court wherein she admits the execution of exhibit P-1 in the presence of her daughter and son-in-law who are both highly qualified. The defendant herself is a graduate. In any event, I have dealt with the defence set up by the defendant and it certainly cannot be said to have been ignored.

31. The decision of the Division Bench in ***Raj Kumar Chawla*** (supra) to the effect that there should be an unambiguous, specific and clear admission by the defendant of his liability towards the plaintiff for a decree under Order 12 Rule 6, does not apply in the facts of this case. It does not come in the way of a decree being passed under Order 12 Rule 6 C.P.C in this case because firstly, the defendant has admitted the execution of the document exhibit P-1 which contains material terms and conditions of the agreement to sell entered into between the parties. Secondly, the defence set up by the defendant itself is barred under Section 92 of the Evidence Act and is therefore, liable to be rejected. In fact there is no subsisting defence after the defence set up by the defendant has been held to be unstateable. As

the defendant has admitted the execution of exhibit P-1, the same tantamounts to an unambiguous, specific and clear admission by the defendant of her liability towards the plaintiff under the said agreement to sell. For the same reason, the decision in **Vijay Gupta** (supra) has no application in the facts of this case.

32. The decision in **Daljeet Singh Anand** (surpa) is clearly distinguishable. In that case the defence set up by the defendant was a defence of fraud and mistaken belief. Fraud and mistaken belief are both grounds under the Contract Act to make the transaction voidable at the instance of the party which has been defrauded, or who has suffered from and acted under a mistaken belief. However, that is not the case on hand. It is not the defendant's defence that the plaintiff has practiced any fraud, or that the defendant was under any delusion with regard to the nature of transaction recorded in Ex. P-1. In fact, her defence is that she was aware of the transaction being recorded in exhibit P-1 and she objected to the same. A mere breach of "good faith", as alleged by the defendant, is not a reason good enough to invalidate the transaction under the Contract Act. It is for this reason that a defence of "good faith" without anything more has not been included within any of the provisions to Section 92 of the Evidence Act.

33. If the plaintiff has made its claim founded upon a documented transaction and the execution of the document is admitted, one of the fundamental concern of a court while considering whether a case for passing of a decree under Order 12 Rule 6 CPC is

made out or not, is that the defendant is given ample opportunity to prove his pleaded defence. However, in a case where defence itself is unstateable and/or is barred under some law, it is a case of “no defence” and in my view it is not necessary to drag the suit. The court can proceed to decide the matter on its merits. After all, the purpose of holding a trial is only to enable the parties to lead evidence in support of their stated case. A party cannot spring a surprise upon the opposite party at the stage of trial. His case, whether as a plaintiff or as a defendant has to be clearly stated in his pleading. He cannot set up a new case at the stage of trial, which is not even pleaded by him.

34. In the present case, in my view, the defence set up by the defendant is unstateable and no other averment of the defendant gives rise to any material issue, the decision of which could have a bearing on the eventual outcome of the suit.

35. Under Order 37 C.P.C, a summary suit for recovery of money based on a bill of exchange, a hundi or a promissory note, and a suit in which the plaintiff seeks to recover a debt or liquidated demand of money payable by the defendant either on a written contract or on an enactment where the sum sought to be recovered is a fixed sum of money, or in the nature of a debt other than penalty, or on a guarantee, where the claim against the principal debtor is in respect of a debt or liquidated demand only, a written agreement, is maintainable. In a summary suit, the defendant is not entitled to defend the proceedings as a matter of right. The defendant must seek

the leave of the court to defend the suit. The defendant must in its application to seek leave to defend indicate that he has a substantial defence to raise. If the court finds that the defendant has not indicated the existence of a substantial defence or the defence intended to be put up by the defendant is found to be frivolous or vexacious, the Court is not bound to grant leave to defend to the defendant, and the Court may proceed to decree the suit. In the special category of suits to which the summary procedure under Order 37 C.P.C applies, in the first instance, the plaintiff is not obliged to lead any further evidence to prove his claim, if he otherwise satisfies the requirements of Rule 1(2) of Order 37 C.P.C. The summary procedure throws the ball in the court of the defendant to show to the Court that the defendant has a substantial defence to raise. If the defence that the defendant wishes to raise is not found to be substantial, and if the same appears to be frivolous or vexacious, the Court could refuse leave to defend the suit to the defendant. In a summary suit, if the conditions set out in Rule 1(2) of Order 37 are met, the focus shifts to examine the quality of the defence that the defendant show cases in his application to seek leave to defend.

36. The reason why a summary procedure is prescribed to deal with suits falling within the categories specified in Rule 1(2) of Order 37 C.P.C is not that the substantive law accords any higher degree of sanctity to transactions covered by the said rule. One of the reasons for the prescription of a summary procedure in a class of cases

appears to be the simplicity and straight forwardness of such claims which allows the adoption of the summary procedure. The object underlying the summary procedure is to prevent unreasonable obstruction by a defendant who has no defence (See Mulla on the Code of Civil Procedure 16th Edition, Vol.4 page 3640). A Division Bench of the Bombay High Court, in **Bankay Bihari G.Agrawal V. M/s. Bhagwanji Meghiji & Others**, 2001 Vol.130(1) Bom.L,R 823 observed:

“It is the general experience of Courts, particularly in this country, taking into account the low amount of costs awarded, that the Defendants tend to delay the trial of the suit in the hope of postponing the evil day of decree against them. Consequently, all kinds of defences, good, bad or indifferent, are trotted out to postpone the judgment day. The Legislature was very much conscious of the efforts on the part of dishonest Defendant, without even a semblance of defence, to delay the trial of suit. Hence, departing from the general procedure applicable to all suits, the Legislature thought it fit that in purely commercial matters, or in matters where the claim is admitted or practically indefensible, a summary procedure ought to be made available, so that such suits could be disposed of expeditiously. This is the guiding principle behind Order 37 of the Code of Civil Procedure.”

37. No doubt, a case like the present does not come within the ambit of Order 37 C.P.C and that is why the defendant was called upon to file her written statement, as it was her right to defend the suit. But that does not mean that the suit must go through all the stages provided for in the C.P.C and only after the said gestation, the same

can be decided. There is no reason why the Court cannot cut short the procedure in a case like the present, which is founded upon an admitted document, and the defence is found to be unstateable, unsustainable and barred under the laws of evidence and in equity.

38. When no material issues of fact arise from the pleadings of the parties, merely because legal issues remain to be determined the Court may not postpone the decision of the legal issues till after the conduct of a meaningless trial. Looking to the burgeoning dockets of the Courts, I feel the Court should seize the opportunity at the earliest to examine whether material triable issues of fact arise which would require a trial, or whether the suit can be decided on the basis of the admitted facts by application of established legal principles. The prescribed procedures have been evolved to serve as the hand maids of justice; to comply with the rules of natural justice, and a routine adherence to procedure in the facts of a given case may not necessarily be called for and may work injustice to one of the parties. However, departure from the uniform procedure would require the existence of justifiable reasons in a given case. If justifiable reasons exist, the procedures cannot weigh down the progress and disposal of a cause. I may refer to the decision of the Division Bench of this Court in 142 (2007) DLT 483 (DB) **Vijaya Myne Vs. Satya Bhushan Kaura**. The Division Bench summarized the purpose and objective of enacting Order 12 Rule 6 CPC, which enables the court to pronounce judgment and save parties from going through the rigmorale of a protracted trial.

The Division Bench held:

“The admission can be in the pleadings or otherwise, namely in documents, correspondence etc. These can be oral or in writing. The admissions can even be constructive admissions and need not be specific or expressive which can be inferred from the vague and evasive denial in the written statement while answering specific pleas raised by the plaintiff. The admissions can even be inferred from the facts and circumstances of the case. No doubt, for this purpose, the Court has to scrutinize the pleadings in their detail and has to come to the conclusion that the admissions are unequivocal, unqualified and unambiguous. In the process, the Court is also required to ignore vague, evasive and unspecific denials as well as inconsistent pleas taken in the written statement and replies. Even a contrary stand taken while arguing the matter would be required to be ignored.”

39. What remains to be now examined is whether the plaintiff has been ready and willing to complete the transaction contained in exhibit P-1 and whether relief of specific performance, which is a discretionary relief under the Specific Relief Act should be granted or only the alternative relief of damages should be awarded, in case the former issue is decided in favour of the plaintiff.

40. The plaintiff has made a specific pleading in para 15 to the effect that the plaintiff sent a legal notice dated 15.12.2007 along with photocopy of pay order no. 579548 issued by Dena Bank, South Extension Branch for the entire balance consideration of Rs. 1,34,50,000/- with the stipulation that the original pay order would be

handed-over to the defendant at the time of execution and registration of the sale deed and delivery of possession. Para 15 and 16 of the plaint, and the corresponding reply given by the defendant are as follows:

Paras 15 and 16 of the plaint.

“15. That when the plaintiff did not get any positive response from the defendant with regard to the completion of the sale and purchase transaction on or before 31.12.2007 as per agreed terms and when the plaintiff was convinced that the defendant is intentionally and deliberately delaying the matter with malafide intentions to avoid the performance of her part of obligations as the real estate value had appreciated considerably in the meanwhile, the plaintiff served a legal notice dated 17.12.2007 upon the defendant calling upon the defendant to perform her part of the obligations. Alongwith the said legal notice, the plaintiff had also sent the photocopy of pay order No. 579548, dated 15.12.2007, issued by Dena Bank, South Extension Branch, New Delhi for entire balance sale consideration of Rs. 1,34,50,000/- with a stipulation that the original pay order would be handed over to the defendant at the time of execution and registration of sale deed and handing over of possession.

16. That the notice was duly received by the defendant. In spite of receipt of the notice, neither the defendant replied nor complied with the terms of the said notice, however, the advocate of the defendant called up the advocate of the plaintiff proposing some settlement, but the fact remains that no settlement was reached.

Paras 15 and 16 of the Written Statement.

15. That the contents of para 15 of the plaint are wrong, misconceived and hence denied.

16. That the contents of para 16 of the plaint are wrong, misconceived and hence denied. In view of the facts stated in the preceding paras, the plaintiff cannot seek relief against the answering defendant.”

41. Consequently, there is no specific denial of the averments made in para 15 and 16 of the plaint. However, in para 10 of the written statement the defendant has stated:

“As far as plaintiff claimed that he had sent the legal notice/written communication to the defendant, however, defendant has not received any written communication from the plaintiff. This claim of the plaintiff is also plotted against the defendant since the matter of fact is that that plaintiff has possession of one room in premises bearing No. D-8 New Delhi South Extension Part II, New Delhi, which is the first room from the main gate where he is maintaining an office where his people sit from morning to evening and it is presumed that someone from the staff of the plaintiff has received the same (Registered AD) to be used against the defendant in Court of law.”

42. Therefore, it cannot be said that the defendant has not denied the receipt of the notice stated to have been sent by the plaintiff on 17.12.2007. However, that does not raise a triable issue and in spite of the said denial, in my view, no issue arises on the said aspect. This is so because in the same paragraph of her written statement a little earlier the defendant admits that she had received *“a couple of calls asking her to hand over the possession of a room and kitchen in lieu of Rs. 1.60 crores, else plaintiff would file a case against the defendant”*. She further states that *“after this also the defendant received some more allegedly threatening/pressurizing calls regarding the same”*. The aforesaid admissions clearly show that so far as the plaintiff is concerned, the plaintiff was seeking to enforce the agreement contained in Ex.P-1 with the defendant. It was not

necessary for the plaintiff to have got the pay order for the balance amount prepared and to have sent a copy of the same to the defendant, as has allegedly been done by the plaintiff. Even if the averments of the plaintiff with regard to the preparation of the pay order for the balance amount and with regard to the sending of the notice dated 17.12.2007 were to be ignored, it stands admitted that the plaintiff repeatedly called upon the defendant to act in terms of the agreement contained in Ex.P-1. That clearly shows the readiness and willingness of the plaintiff to complete the transaction. It is not the defence of the defendant that she offered to complete the transaction upon the plaintiff paying the balance consideration which, according to her, was Rs.6.50 Crores and that the plaintiff backed out of the alleged transaction.

43. The conduct of the defendant does not support her defence which appears to be contradictory and malafide. She states that she was shocked by the demand made by the plaintiff to handover possession of the room and kitchen in lieu of Rs.1.60 Crores as, according to her, the agreed/committed deal by the plaintiff was for Rs.6.50 Crores plus 400 sq. feet of land on the main road towards the sale of her 1/5th share in the suit property. What is significant is that the defendant despite being “shocked” upon the conduct of the plaintiff in seeking to enforce the conditions contained in agreement Ex.P-1, does not claim to have taken any action to refute the said claim of the plaintiff. She, evidently, remained silent. Her muted response

does not inspire confidence in her defence.

44. The plaintiff has approached the court within less than a month of expiry of 31.12.2007. The present suit was filed by the plaintiff on 24.01.2008. There is no delay or laches on the part of the plaintiff in approaching this court. The aforesaid conduct of the plaintiff establishes the readiness and willingness of the plaintiff to perform its part of the agreement. In the aforesaid decision of **Vijaya Myne** (supra) the Division Bench also considered the aspect of exercise of discretion by the Court in decreeing specific performance of an agreement. The following extracts of the said decision is relevant:

“15. Section 20 of the Specific Relief Act which provides ‘Discretion as to decreeing specific performance’ also stipulates the manner in which such a discretion is to be exercised. It is made clear in Sub section 1 of Section 20 itself, which provides that ‘the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal’. Sub-section 2 gives three situations in which discretion not to decree specific performance is to be exercised. These are as under:

“(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or

(c) where the defendant entered into the contract under circumstances which though

not rendering the contract voidable, makes it inequitable to enforce specific performance.”

16.....

17. It is clear that normally hardship is to be determined with reference to the circumstances existing at the time of contract in order to see as to whether performance of a contract would involve hardship on the defendant. Exception is in those cases where hardship has resulted from any act of the plaintiff subsequent to the contract. Admittedly, no allegation is made by the appellant that hardship has resulted from any act of the plaintiff. What, therefore, is to be examined is as to whether any hardship has resulted with reference to the circumstances existing at the time of contract which the appellant could not foresee.

18.....

19. The grant of relief for specific performance is a rule and it was for the appellant to demonstrate as to how her case would fall in any of the exceptions carved out under sub Section 2 of Section 20 of the Specific Relief Act. There has to be valid and cogent reasons for refusal of the relief of specific performance and applying the exception”

45. The Division Bench quoted from the decision of Karnataka High Court in **Lt. Cdr. M.C. Kendall v. S. Chadrasekhar** AIR 1991 Kar. 4142 dealing with Section 20 of the Specific Relief Act. The same being relevant is reproduced below:

“A perusal of the aforesaid provision would go to show as to under what circumstances hardship can be taken into consideration in refusing specific performance. It is not possible to enumerate the different circumstances which constitute hardship. It will suffice if it is noted that the question of hardship will have to be adjudged in the facts and circumstances of the case. In this connection, the observations of the Privy Council in the Decision in **DEVIS v. SHWE GO**, 11 I.C. 801 (PC) throws light on

an important aspect of the matter. Among other things, it is observed in the said case as under:

'In the absence of any evidence of fraud or misrepresentation on the part of the plaintiff which induced the defendant to enter into the contract, their Lordships see no reason to accede to the argument. The bargain is onerous, but there is nothing to show that it is unconscionable. The defendant knew all along that a lakh was the plaintiff's limit; it is in evidence that he had frequently urged the defendant's daughter to advise him to sell the land if he was getting a higher offer. It is difficult to say under the circumstances that he took an improper advantage of his position or the difficulties of the defendant.'"

46. In the light of the aforesaid legal position I may note some of the relevant facts and circumstances of the case. The defendant, admittedly, is the owner of 1/5th undivided share in the suit property, of which the plaintiff has admittedly purchased 3/5th undivided share in the year 2006 from three other co-sharers. The defendant intended to sell her undivided 1/5th share in the suit property to the plaintiff. She agreed to sell the same for a total consideration of Rs.1.60 Crores. She even received Rs.50,000/- in cash and Rs.25 Lacs by cheque. It appears that she has not encashed the cheque of Rs.25 Lacs taken by her. The transaction itself was reduced in writing by none other than her own son-in-law, whereon the defendant admittedly signed, and her daughter witnessed. All of them are well-educated. The agreement was arrived at on 18.09.2007 and the present suit was filed in January, 2008. The time under the agreement as fixed for completion of transaction was 31.12.2007. Consequently, not much time elapsed between the time the agreement was arrived at and the time within

which the same was scheduled to be performed on the one hand, and the time when the present suit was filed. From the date of filing of the suit it is evident that the plaintiff did not seek to take any undue advantage of withholding the balance consideration by delay in filing of the suit. Considering the significant decline in the rates of inflation and correspondingly the rates of interest, the defendant would have got the same worth of her money on the date of filing of the suit, as she would have got on 31.12.2007, the date by which the transaction was to be completed. Even if she does suffer some amount of loss of interest, the same is on account of reasons attributable to her own conduct and not to the conduct of the plaintiff.

47. For the aforesaid reasons I am of the view that the receipt-cum-agreement Ex.P-1 being an admitted document, and the defence of the defendant being barred, inter alia, under the laws of evidence, in equity, and it, being contradictory, there is no issue arising in the present case which requires the holding of a trial. The case of the plaintiff stands established to the hilt. Accordingly, I pass a decree under Order 12 Rule 6 CPC in favour of the plaintiff and against the defendant for specific performance of the agreement contained in the receipt cum agreement dated 18.09.2007 exhibit P-1. The defendant has not encashed the cheque of Rs.25 Lacs tendered by the plaintiff. Accordingly, the plaintiff is now bound to tender the balance consideration of Rs.1,59,50,000/- to the defendant. I therefore, direct the defendant to perform her obligation under exhibit P-1 by executing

and getting registered the sale deed in favour of the plaintiff in respect of her 1/5th undivided share, right and title in the suit property bearing no. D-8, N.D.S.E. Part-II, New Delhi, admeasuring 764 Sq. Yds. against the receipt of balance consideration of Rs. 1,59,50,000/-, and to deliver the peaceful possession of portion under her occupation namely one room, kitchen and right to use the terrace in common in the suit property. The defendant shall execute the deed, as aforesaid, and deliver possession within three months from today. The plaintiff shall also be entitled to costs.

VIPIN SANGHI, J.

MAY 12, 2009
dp/rsk