

IN THE HIGH COURT OF DELHI AT NEW DELHI

RFA NO.152/2006

Judgment reserved on: 25.11.2010

Judgment delivered on: 09.03.2011

REHMANIA ACADEMY OF SCIENCES,
MATHURA

.....Appellant

Through: Mr.Yunus Malik and Mr.Ravi
Kishore, Advocates.

Vs.

SHRI B.B.D.BHARGAVA & OTHERS

.....Respondents

Through: Ms.Ritu Singh Mann and
Mr.Dheeraj Garg, Advocates
for the respondent
No.1.**CORAM:**

HON'BLE MR. JUSTICE KAILASH GAMBHIR

1. Whether the Reporters of local papers may yes
be allowed to see the judgment?

2. To be referred to Reporter or not? yes

3. Whether the judgment should be reported yes
in the Digest?

KAILASH GAMBHIR, J.

*

1. By this appeal filed under Section 96 of the Code of Civil Procedure, 1908 the appellant seeks to set aside the judgment and decree dated 16.11.2005 whereby the suit filed by the respondents for declaration was decreed in favour of the respondents and against the appellant.

2. Brief facts of the case relevant for deciding the present appeal are that the appellant and respondents entered into an agreement to sell 4/7th share of the property belonging to the respondents bearing Nazul Plot No.38, Company Bagh, Civil Lines, Mathura dated 2.6.02 and it was stipulated between the parties that the complete payment of the said property would be made by the appellant by 31.8.02. That due to the failure of the appellant to pay the requisite amount by the said date, the respondents No.1 to 3 rescinded the contract vide notice dated 26.10.02 and filed a suit for declaration of the same which vide judgment and decree dated 16.11.05 was decreed in favour of the respondents holding that the agreement was rightly terminated by the respondent no.1 to 3. Feeling aggrieved with the same, the

appellant has preferred the present appeal. Respondent no.4, however, being a performa respondent had sold her 1/7th share to the appellant vide a separate sale deed dated 9.4.2003 and during the pendency of the suit, respondent nos. 2 and 3 vide sale deed dated 8.6.04 and 24.11.04 also sold their respective shares to the appellant.

3. Assailing the impugned judgment and decree on the point of jurisdiction, counsel appearing for the appellant submitted that the suit filed by the respondents no. 1 to 3 was clearly hit by Section 16 (Clauses a to f) of CPC, as the Courts at Delhi lacked the territorial jurisdiction to entertain the said suit filed by the respondents. Elaborating this argument, counsel further submitted that by seeking the declaration in their favour, the respondents no. 1 to 3 sought to enforce the right flowing from the immovable property and not independent of the immovable property. Counsel further contended that the said issue being legal, the same can even be considered by this Court in exercise of its appellate jurisdiction. In support of his arguments, counsel for the

appellant placed reliance on the decision of the Hon'ble Apex Court in ***Harshad Chiman Lal Modi Vs. DLF Universal Ltd & Anr. (2005) 7 SCC page 79*** with special emphasis on paras 16, 31 and 33.

4. On the merits of the case, counsel for the appellant submitted that no notice to rescind the agreement, as envisaged in Clause 3 of the agreement to sell dated 2.6.2002, was given by the respondents to the appellant. Inviting attention of this Court to the legal notice dated 26.10.2002, counsel submitted that the respondents have not given any notice of termination, but in fact rescinded the agreement straightway through the said notice itself and such termination notice was clearly in contravention of clause 3 of the said agreement. Counsel for the appellant further submitted that the respondents had suppressed a very vital fact from the learned trial court by not disclosing that the respondents No.2, 3 and 4, who were plaintiffs nos.2 and 3 and defendant no.2 before the learned trial court respectively, had sold their respective shares in favour of the

appellant during the pendency of the said suit. Counsel further stated that the photocopies of the sale deeds executed by these respondents in favour of the appellant have been placed on record. He further stated that it was only the respondent No.1, who was plaintiff No.1 before the learned trial court, who did not come forward to sell his share to the appellant. Counsel thus contended that due to the said willful suppression on the part of the respondents, the learned trial court did not come to know about the respondent nos. 2 and 3 having honoured the said agreement and, therefore, there would not have arisen any question of termination or rescission of the said agreement so far the respondents No.2 and 3 are concerned. Counsel for the appellant also placed reliance on Clause (d) of Sub Section 2 of Section 27 of the Specific Relief Act to support his argument that a part of the contract could not have been rescinded by the respondent No.1 alone, as it was an indivisible contract which could not have been severed by the respondent No.1 alone more particularly when all other

respondents had come forward and agreed to honour the said agreement and in fact had executed sale deeds in favour of the appellant during the pendency of the suit. Counsel also stated that in fact the respondent No.1 was to refund the money as per his share and this fact by itself would show that the contract could not have been severed, the same being an indivisible contract.

5. Refuting the submissions of counsel for the appellant, Ms.Ritu Singh Mann, learned counsel for the respondent No.1 argued that the judgment cited by the counsel for the appellant would not be applicable to the facts of the present case. Distinguishing the facts of the said case the counsel pointed out that the suit filed by the appellant therein was to claim specific performance of the agreement and for possession of the property, besides seeking declaration and permanent injunction, while in the present case, the respondents had sought the relief of declaration to the effect that the agreement dated 2.6.2002 was rightly rescinded by the respondents herein. Counsel further stated

that as per Section 16 CPC, the jurisdiction is barred only where the case of the parties is covered in one of the Clauses (a) to (f) of the Section and not otherwise. The contention of the counsel for the respondents was that the respondents never claimed any right or interest in the immovable property and, therefore, the case of the respondents would not be covered even under Clause (d) of Section 16 CPC, rather the same would fall under Section 20 CPC. Counsel for the respondent placed reliance on Section 54 of the Transfer of Property Act to contend that since there was only an agreement between the parties, therefore, no right by the said agreement could have been created by the respondents in favour of the appellant and, therefore, there was no question of determination of any right or interest in respect of the immovable property, which right was still vested with the respondents and was never transferred to the appellant.

6. Counsel for the respondents however did not dispute the fact that the sale deeds were executed by the

respondents No.2 and 3 in favour of the appellant during the pendency of the suit and that the respondent No.4 who was defendant No.2 before the learned trial court had sold her share prior to the filing of the said suit. Counsel thus did not dispute the photocopies of the sale deeds filed by counsel for the appellant but stated that even the appellant, who was duly represented by his Advocate, never disclosed the fact of the execution of the sale deeds before the learned trial court. The counsel invited the attention of this court to the fact that the Advocate of the appellant herein was present at the stage of final arguments and the presence of Mr.B.A.Hasim, Advocate for defendant No.1 has been shown on the decree sheet also. Counsel for the respondents also submitted that valid notice of termination to rescind the agreement was given to the appellant in terms of Clause 3 of the agreement. Counsel also submitted that after the termination of the said contract, if any, fresh contracts were entered into between the appellant and the other

respondents then the same will not defeat the rights of the respondent No.1 claimed by him in the said suit.

7. Counsel for the respondent also submitted that the said sale was made by the respondents No.2 and 3 at a lesser rate than the rate earlier agreed upon by them in the agreement to sell dated 2.6.2002. Drawing attention of the Court to one of the photocopies of the sale deeds placed on record by the appellant, counsel submitted that the respondent No.4, who was defendant No.2 before the learned trial court, had sold her share of 2167.63 sq. yds. for a total consideration of Rs.31,59,405/-, which comes to (Approx.) Rs.1457/- sq. yd. Counsel further submitted that the sale amount even in the sale deeds executed by the respondents No.2 and 3 during the pendency of the case were at somewhat lesser rate and no reference has been made to the earlier agreement dated 2.6.2002 in the said sale deeds. Counsel also stated that in the subsequent sale deeds the appellant has purchased the 3/7th share of the land admeasuring 15173.4 sq yards, although in the notice sent by

the appellant, the appellant took a position that the area at site falls short by 1350 sq. yds. Counsel also submitted that the respondents had agreed to sell the plot on '*as is where is*' basis and this was specifically stated in the agreement. Counsel further submitted that the appellant never took or resorted to the remedy of seeking specific performance of the contract based on the agreement to sell even till date.

8. In rejoinder arguments, counsel for the appellant submitted that the right or interest claimed by the respondents has flown only because of the agreement to sell which concerns the sale of the immovable property which is situated in Mathura (U.P.) and not in Delhi and, therefore, only the Mathura Courts could have entertained the said suit and not the Delhi Courts. Counsel further submitted that in the subsequent sale deeds, there is a clear reference to the earlier agreement dated 2.6.2002 and the said sale was made by the respondents No.2 and 3 at a rate of Rs.1600 /- sq. yds

only which was also the rate as per the agreement to sell dated 2.6.02.

9. I have heard learned counsel for the parties at considerable length and gone through the records of the case.

10. A suit for declaration was filed by respondents No. 1 to 3 (plaintiffs in the suit) against the appellant (defendant No. 1 in the suit) and respondent No. 4 (defendant no.2 in the suit) seeking declaration to the effect that the respondents No. 1 to 3 had rightly terminated and rescinded the agreement dated 2nd June, 2002. In the said suit a declaration was also sought that out of the total sum of Rs. 28 lakhs refundable by respondents No. 1 to 3 and respondent No. 4, respondents No. 1 to 3 were liable to refund only an aggregate amount of Rs. 2,25,000/- to the appellant. It is not in dispute between the parties that the subject property i.e. Nazul plot No. 38, Company Bagh, Civil Lines is situated in Mathura and respondents No. 1 to 3 were the co-owners of 3/7th undivided share of the property while respondent No. 4

was co-owner of 1/7th share . It is also not in dispute that earlier there was an oral agreement and then the agreement in writing was executed on 2nd June, 2002 between the parties and the total consideration between the parties was settled at Rs. 1,38,72,822.80 and out of the said sale consideration an advance of Rs. 1 lakh was paid by the appellant on 31.10.2001. On 9.1.2002, a further payment of Rs. 22 lakhs was made by the appellant to respondent No. 1, who accepted the said payment on behalf of the said sellers and out of the said payment of Rs. 22 lakhs, cash payment of Rs. 2 lakhs was meant for paying stamp duty etc. In terms of the oral agreement between the parties, the appellant had agreed to pay the entire balance sale consideration amount within 7 days after the said property was converted from lease hold to free hold. Since the appellant failed to make the payment of the balance amount of Rs. 1,15,72,822.80 within the period of one week from the date of the registration of the conveyance deed of the said property, both the parties came forward to reduce the terms of the agreement in

writing through the said agreement to sell dated 2nd June, 2002. At the time of the execution of the said agreement to sell, further payment of Rs. 25 lakhs was made by the appellant to the seller on 2nd June, 2002 through a demand draft in the name of respondent no.4 and the appellant had agreed to pay the balance amount with the agreed rate of interest in terms of clause 2 of the agreement to sell on or before 31st August, 2002. In terms of Clause 3 of the agreement to sell, it was also agreed between the parties that if the appellant failed to make the said payment by 31.8.2002, then the seller shall have the option to rescind the agreement after giving a written notice to the appellant. In clause 3 of the said agreement it was also agreed between the parties that the time is the essence of the agreement and the balance sale consideration has to be paid on or before 31st August, 2002, failing which the agreement shall stand terminated at the option of the seller. It was also agreed that in case the seller chooses to rescind the agreement then the buyer shall forfeit Rs. 20 lakhs from the amount of advance already paid

by him and the balance amount will be refunded within a period of four months from the date of exercising such option of rescinding the contract but without any interest. As per the averments made in the plaint, in September, 2002 the appellant through its Secretary Mr. A. R. Sani approached the respondent No. 1 with draft of Rs. 30 lakhs with a request of extension of time for payment, but the said request of the appellant was not entertained by the respondents. The appellant had also sent a notice dated 18th September, 2002 wherein the plea was taken by the appellant that the area of the suit property was found short by 1350 sq yards. Respondent No. 1 on the other hand sent a legal notice dated 26th October, 2002 to the appellant thereby terminating the said agreement. The appellant was also informed through the said notice that an amount of Rs. 20 lakhs stood forfeited by them in terms of clause No. 3 of the agreement to sell. Thereafter the respondent no.1 to 3 filed a suit for declaration for the rightful termination of the contract, wherein, the appellant was proceeded ex parte before the

learned Trial Court. The appellant had moved an application under Order IX Rule 7 CPC before the learned Trial Court to seek setting aside of the ex parte order but the said application of the appellant was dismissed by the learned Trial Court vide order dated 16th May, 2005 with costs of Rs. 5,000/-. The learned Trial Court in the said order observed that the application moved by the appellant was nothing but a pack of lies. The said order dated 16th May, 2005 dismissing the application of the appellant was never challenged by the appellant and, therefore, the said order became final between the parties. After the dismissal of the said application, the matter was taken up for final arguments by the learned Trial Court on 16.9.2005. On 16.9.2005, the Advocate representing the appellant sought to advance his arguments but the said request was opposed by the respondent on the ground that the appellant had failed to pay the costs as was imposed by the Trial Court vide order dated 16.5.2005. The matter was accordingly adjourned to 19.10.2005 giving an opportunity to the appellant to deposit the said costs. On 19.10.2005

respondents No. 1 to 4 gave up prayer Nos. 2 and 3 of the plaint. The final arguments were heard by the Court in the pre-lunch session and after lunch session. It was observed in the said order that in the pre-lunch session the appellant was duly represented by his Advocate but after the lunch the Advocate did not appear. The matter was accordingly reserved for orders by the Court for 16.11.2005. The learned Trial Court, however, still granted an opportunity to the appellant to advance arguments before the next date after having paid the costs imposed by the Court vide order dated 16th May, 2005. The appellant did not choose to advance the final arguments and the learned Trial Court vide orders dated 16.11.2005 passed the final order thereby decreeing the suit filed by the respondents No. 1 to 3 in terms of prayer No. 1 of the plaint.

11. The narration of aforesaid sequence of facts became necessary as the main argument advanced by the counsel for the appellant before this court was that the Delhi Court had no territorial jurisdiction to entertain the suit in

terms of Section 16 of the Code of Civil Procedure. Counsel also contended that the objections concerning the territorial jurisdiction being legal can be agitated even at the stage of appeal. Counsel for the appellant also placed reliance on the decision of the Apex Court in the case of ***Harshad Chiman Lal Modi (Supra)***. Before I deal with the said legal objection raised by the counsel for the appellant, it would be appropriate to reproduce Section 16 of the Code of Civil Procedure as under:-

"16. Suits to be instituted where subject-matter situate.

Subject to the pecuniary or other limitations prescribed by any law, suits-

- (a) for the recovery of immovable property with or without rent or profits,
- (b) for the partition of immovable property,
- (c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property,
- (d) for the determination of any other right to or interest in immovable property,
- (e) for compensation for wrong to immovable property,
- (f) for the recovery of movable property actually under

easily discernable from the language of the said section that the suit for declaration arising out of non-performance of the terms of the agreement concerning sale of immovable property cannot be filed at a place other than the place of location of the immovable property. The learned Apex Court in the said judgment of ***Harshad Chiman Lal Modi (Supra)*** has clearly held that a Court within whose territorial jurisdiction the property is not situated has no power to deal and decide the rights or interest in respect of such property. So far the contention of counsel for the respondents that the suit filed by the respondents before the Delhi Courts is maintainable in terms of proviso of Section 16 CPC, this Court is constrained to observe that the argument of counsel for the respondents is totally misplaced. The proviso of Section 16 CPC cannot be interpreted in a manner to enlarge the scope of the Section. For the applicability of the proviso the relief sought must be one which can be obtained entirely through personal obedience of the defendant which means that the obedience must be such which the defendant can

render without going beyond the jurisdiction of that Court. In any case the proviso of Section 16 would be applicable only in a case where the personal obedience of the defendant can be secured only if the defendant resides within the local limits of the jurisdiction of the court, or carries on business within those limits which is not the situation in the present case as the defendant No.1 (the appellant herein) does not reside or works within the jurisdiction of the courts at Delhi. It would be of advantage to reproduce the following paras of the said judgment as under:-

"Section 16 thus recognizes a well established principle that actions against res or property should be brought in the forum where such res is situate. A court within whose territorial jurisdiction the property is not situate has no power to deal with and decide the rights or interests in such property. In other words, a court has no jurisdiction over a dispute in which it cannot give an effective judgment. Proviso to Section 16, no doubt, states that though the court cannot, in case of immovable property situate beyond jurisdiction, grant a relief in rem still it can entertain a suit where relief sought can be obtained through the personal obedience of the defendant. The proviso is based on well known maxim "equity acts in personam", recognized by Chancery Courts in England. Equity Courts had jurisdiction to entertain certain suits respecting immovable properties situated abroad through personal obedience of the defendant. The principle on which the maxim was based was that courts could grant relief in suits respecting immovable property situate abroad by enforcing their judgments by process in personam, i.e. by arrest of defendant or by attachment of his property.

In Ewing v. Ewing, (1883) 9 AC 34 : 53 LJ Ch 435, Lord Selborne observed :

"The Courts of Equity in England are, and always have been, courts of conscience operating in personam and not in rem; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts in trusts as to subjects which were not either locally or ratione domicilli within their jurisdiction. They have done so, as to land, in Scotland, in Ireland, in the Colonies, in foreign countries."

The proviso is thus an exception to the main part of the section which in our considered opinion, cannot be interpreted or construed to enlarge the scope of the principal provision. It would apply only if the suit falls within one of the categories specified in the main part of the section and the relief sought could entirely be obtained by personal obedience of the defendant".

13. The argument of the learned counsel for the respondent that section 16(d) would have no application in view of section 54 of the Transfer of Property Act and the case of the respondents would be covered under section 20 of CPC does not hold any ground. For determining the jurisdiction with regard to an immoveable property, Sections 16 to 19 would be applicable and certainly section 54 of the TPA cannot be construed to determine the jurisdiction as to the place of suing. In view of the aforesaid legal position, it would be quite manifest that the suit filed by the respondents No. 1 to 3 is duly covered under Section 16(d) of the Code of

Civil Procedure and proviso of Section 16 will have no application. The courts at Delhi cannot act *in personam* as the defendant (the appellant herein) is not subject to the jurisdiction of this Court. Hence the courts at Delhi do not have the jurisdiction to entertain the said suit filed by the respondents.

14. Although the aforesaid legal position to this extent is on the side of the appellant, but the moot question here is as to whether the plea of lack of territorial jurisdiction would be available to the appellant at the appellate stage. Section 21 of the Code of Civil Procedure is an answer to the plea raised by the counsel for the appellant. Under Section 21 of the Code of Civil Procedure the mandate of law is that no objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled, either at the stage of settlement of issues or before such stage. On the satisfaction of these requirements the appellant has to

further satisfy the Court that due to the lack of territorial jurisdiction there has been a consequent failure of justice. It would be appropriate to reproduce the said section here:

"21. Objections to jurisdiction.

[(1)] No objection as to the place of suing shall be allowed by any appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice.

[(2)] No objection as to the competence of a Court with reference to the pecuniary limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity, and in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.

(3) No objection as to the competence of the executing Court with reference to the local limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the executing Court at the earliest possible opportunity, and unless there has been a consequent failure of justice.

Therefore it would be manifest from above that in order that an objection to the place of suing must be entertained by an Appellate or Revisional court, the fulfillment of the following conditions is necessary:

1. The objection was taken at the court of first instance;
2. It was taken at the earliest possible opportunity and in cases where issues are settled, at or before such settlement;
3. There has been a consequent failure of justice;
4. All the above three conditions must co-exist

15. Section 15 of the Code of Civil Procedure deals with 'pecuniary jurisdiction' while Sections 16 to 20 deal with 'place of suing'. The heading 'place of suing' covers Section 15 also. The Apex Court in ***Bahrein Petroleum Co. Ltd. vs. P.J. Pappu AIR 1966 SC 634*** made no distinction between Section 15 on one hand and Sections 16 to 20 on the other hand in the context of Section 21 of the CPC. Thus it is quite apparent that the objection to the territorial jurisdiction and to pecuniary jurisdiction is treated at par by Section 21 of the Code of Civil Procedure. So far objection to the jurisdiction of a Court concerns the subject matter, in that case the objection can be taken at any stage even if it is not

taken at the first instance as there will be an inherent lack of jurisdiction with such a Court and decree passed by such a Court would be a nullity. In ***Hiralal Patni vs Kali Nath AIR 1962 SC 1999*** the Supreme Court held as under:-

"It is well settled that the objection as to local jurisdiction of a Court does not stand on the same footing as an objection to the competence of a Court to try a case. Competence of a Court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction. On the other hand, an objection as to the local jurisdiction of a Court can be waived and this principle has been given a statutory recognition by enactments like s. [21](#) of the Code of Civil Procedure."

The present is a case where the learned trial court at Delhi clearly had the jurisdiction so far as the subject matter of the suit was concerned and therefore this court in exercise of its appellate powers cannot entertain the plea of lack of jurisdiction as the courts below at Delhi did not suffer from any inherent lack of jurisdiction.

16. Recently, dealing with the law on the subject relating to Section 21, the Apex Court in ***Subhash Mahadevasa Habib vs Nemasa Ambasa Dharmadas (Dead) by Lrs. And Others (2007) 13 SCC 650*** held that:

"It may be noted that Section 21 provided that no objection as to place of the suing can be allowed by even an appellate or revisional court unless such objection was taken in the court of first instance at the earliest possible opportunity and unless there has been a consequent failure of justice. In 1976, the existing section was numbered as sub-section (1) and sub-section (2) was added relating to pecuniary jurisdiction by providing that no objection as to competence of a court with reference to the pecuniary limits of its jurisdiction shall be allowed by any appellate or revisional court unless such objection had been taken in the first instance at the earliest possible opportunity and unless there had been a consequent failure of justice. Section 21-A also was introduced in 1976 with effect from 1-2-1977 creating a bar to the institution of any suit challenging the validity of a decree passed in a former suit between the same parties on any ground based on an objection as to the place of suing.

Also, in the case of ***Mantoo Sarkar vs. Oriental Insurance Company Ltd. (2009)2 SCC 244*** the Apex Court held that the Appellate court has to pose unto itself the question as to whether the appellant raising the plea of lack of jurisdiction at the stage of the appeal has been able to show sufferance of any prejudice and if it has not suffered any prejudice or otherwise no failure of justice had occurred, the High Court should not entertain the appeal on that ground alone. In the present case the appellant has failed to show any miscarriage of justice caused to it due to the lack of territorial jurisdiction

of the court at Delhi. It also cannot be lost sight of the fact that the object underlying the provision in Section 21 is not to encourage litigants who invoke the jurisdiction of a court not having jurisdiction whatsoever for ulterior motives but to avoid harassment to litigants who with bona fide and in good faith commenced proceedings in a court which is later found to be wanting in jurisdiction. (*ONGC vs. Utpal Kumar Basu (1994) 4 SCC 711*)

17. Hence, applying the aforesaid principles of law to the facts of the present case, it would be manifest that the appellant never raised such an objection of lack of territorial jurisdiction before the trial Court. In fact it seems that the appellant was never serious in contesting the said suit filed by the respondents No. 1 to 3 as the appellant did not even challenge the order dated 16th May, 2005 whereby the application filed by appellant under Order IX Rule 7 CPC was dismissed. The appellant also even did not address oral arguments despite the fact that sufficient opportunities were granted by the learned Trial Court in this regard. Thus the

appellant having not fulfilled the conditions as stipulated by Section 21 of the CPC, the objection taken by the counsel for the appellant assailing the order of the learned Trial Court on the ground of lack of territorial jurisdiction lacks merit and cannot be entertained by this court at this stage.

18. Coming to the next objection of the counsel for the appellant that no notice was given by the respondents No. 1 to 3 to rescind the agreement in conformity with Clause 3 of the agreement, the argument of counsel for the appellant is equally devoid of any merit as the respondents were well within their right to rescind the agreement once the appellant failed to fulfill its part of obligation to pay the balance sale consideration amount before the stipulated date 31.8.2002, as settled between the parties in the agreement dated 2.6.2002. It is not the case of the appellant that the said agreement was rescinded by the respondent No. 1 to 3 even after the payment of the balance sale consideration. In terms of Clause 3 of the agreement, option was given to the seller i.e. respondents to rescind the agreement in the event

of buyer not paying the sale consideration amount and the interest amount on or before 31st August, 2002. This Court, therefore, does not find any force in the argument of the counsel for the appellant that prior notice was not given by the respondents 1 to 3 before rescinding the said agreement.

19. Dealing with the next argument of counsel for the appellant that the respondent has failed to disclose the fact that respondents No. 2 and 3 had sold their respective shares in favour of the appellant during the pendency of the suit, this argument of counsel for the appellant is equally misplaced as the appellant also did not disclose the said fact before the learned trial Court and, therefore, at this stage the appellant cannot put blame on the respondents for such suppression on their part.

20. Coming to deal with the last argument of counsel for the appellant that respondent No. 1 could not have rescinded the agreement while other respondents had agreed to honour the agreement and in support whereof the counsel

had also placed reliance on Clause (d) of sub section 2 of Section 27 of the Specific Relief Act. This argument of the learned counsel for the appellant will also not sustain as it is not in dispute between the parties that as on the date of the termination of the agreement when the notice dated 26.10.2002 was served on the appellant there was a uniform decision taken by all the respondents to rescind the agreement. However, the respondent no.4 executed the sale deed on 9.4.03 and this fact was before the learned trial court as it was duly mentioned in the plaint and the suit was filed on 1.5.03, after the execution of the sale deed. Also, it is only during the course of the pendency of the suit that the respondents no.2 and 3 came forward to sell their respective shares in favour of the appellant. Due to this subsequent development, which was not brought to the notice of the Court by both the parties, the appellant cannot challenge the maintainability of the suit as on the date of rescission of agreement to sell there was no such severance of the contract. Also, the sale deed executed between the appellant

and respondent no.4 to sell her 1/7th share of the property which was also a part of the 4/7th share to be sold to the appellant vide agreement to sell dated 2.6.02 is a clear admission on the part of the appellant admitting the severance of the contract and now the appellant cannot turn around and take the plea of section 27(2)(d) of the Specific Relief Act to contend that it was an indivisible contract. Even otherwise these respondents had agreed to sell their undivided share in the said property in question and, therefore, every co owner is well within his/her right to sell his/her own share even after rescinding the earlier contract.

21. In the light of the aforesaid discussion, this Court does not find any merit in the present appeal and the same is hereby dismissed.

March 09th, 2011
dc/rkr

KAILASH GAMBHIR, J