

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved On: 11th November, 2011
Judgment Delivered On: 17th November, 2011

+ RFA(OS) 59/2007

DEEPA TRADE & COMMERCE LTD. Appellant
Through: Mr.C.Mukund, Mr.Ashok Kumar Jain &
Mr.Amit Kasera, Advocates.

versus

RAJ BHALLA Respondent
Through: Mr.Sandeep Sharma, Advocate

RFA(OS) 60/2007

HARISON TRADERS LTD. Appellant
Through: Mr.C.Mukund, Mr.Ashok Kumar Jain &
Mr.Amit Kasera, Advocates.

versus

RAJ BHALLA Respondent
Through: Mr.Sandeep Sharma, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE S.P. GARG

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

PRADEEP NANDRAJOG, J.

1. Two suits, seeking specific performance of four oral agreements dated 17.09.1988 (three agreements being the subject matter of CS(OS) No.2860/1991 and the fourth being the subject matter of CS(OS) No.2861/1991), in respect of the first and the second floor of property bearing No.5 Babar Road, New Delhi have been decided vide impugned decree, holding that the evidence establishes the defence that no concluded contract between the parties came into existence. The sum of ₹1 lakh received by the defendant pertaining to the discussions held, which would have fructified into four agreements, has been decreed in favour of the two plaintiffs together with interest @7% per annum from date of filing of the suit till realization.

2. The plaintiffs are in appeal and a two-fold grievance is raised. Firstly that the learned Single Judge has eschewed a reference to the testimony of the witnesses and thus it is a case where material evidence has been ignored while declining relief prayed for. Second point urged is that the learned Single Judge has ignored the language of the four receipts dated 01.10.1988 executed by the defendant when she received further sum of ₹25,000/-, in cash pertaining to the three agreements between the parties and ₹75,000/- received in cash pertaining to the further agreement(s), in which receipts she specifically referred to the sum received by her '*in continuation of earlier amount paid against earnest money*'. It is urged that as held in the decision reported as 1996 (4) SCC 249 HUDA & Anr. vs. Kewal Krishan Goel & Ors., '*earnest*' would mean the amount given at the moment when a contract is concluded, for the reason

it represents a guarantee that the contract will be fulfilled and if the transaction is carried out, it would form part of the purchase price and if the transaction falls through by reason of the default or failure of the purchaser, the amount would be forfeited. In a nutshell, earnest money is given for the purpose of binding a contract, is the submission made.

3. Plaintiff which resulted in CS(OS) No.2860/1991 being registered pleaded that on 17.09.1988, three companies (i)Tulika Traders & Investors Pvt. Ltd., (ii)Abhilasha Investment Pvt. Ltd. and (iii)Sarvopari Properties & Finance concluded an oral agreement to sell with the defendant who was the owner of a building constructed on plot bearing Municipal No.5 Babar Road, New Delhi in respect of the front portion of the first floor of the building, the back portion of the first floor of the building and the front portion of the second floor of the building respectively, for an agreed consideration of ₹5 lakhs each and said companies handed over to the defendant three cheques, one each on behalf of the three companies, in sum of ₹75,000/- each, which cheques were received by the defendant as earnest money. The cheques were tendered under cover of three identically worded letters dated 17.09.1988.

4. We note the contents of one such letter i.e. the one written by Tulika Traders & Investors Pvt. Ltd. which reads as under:-

"Mrs.Raj Bhalla
No.5 Babar Road New Delhi

17th Sept. 88

Dear Madam,
We are enclosing herewith one No.296599 dated
17/9/88 for ₹75,000/- drawn on UCO Bank

payable at New Delhi as per the agreement for sale entered with you with our company. Please acknowledge receipt.

Thanking You,

Yours faithfully,

(For Tulika Traders & Investors Pvt. Ltd.)

Sd/- (illegible)

Director

Encl: As above."

5. The two other letters are identically worded, except the cheque number is different.

6. Acknowledging receipt of the cheque each tendered to her under cover of the three letters, the defendant wrote on the office copy of the letters:-

"Received against sale of my property as mentioned above. Sd/- Raj Bhalla"

7. It was further pleaded that on 01.10.1988, further sum of ₹25,000/-, in cash, pertaining to the three agreements to sell i.e. three sums of ₹25,000/- was paid to the defendant, who executed three receipts dated 01.10.1988.

8. We note the contents of the receipt pertaining to M/s.Tulika Taders & Investors Pvt. Ltd. It reads as under:-

" Dated 1.10.1988

Receipt

Received with thanks from M/s.Tulika Traders & Investors Pvt. Ltd. No.5 Russell Street, Calcutta-700071 (buyer) a sum of ₹25,000/- (Rupees Twenty Five Thousand only) in cash in continuation of earlier amount paid against earnest money for sale of one flat comprising of front portion on the first floor of premises No.5 Babar Road, New Delhi with one bedroom with

attached bath, one drawing-dining room along with canopy together with common entrance etc. admeasuring approx. 983 sq.ft. covered area including canopy.

Sd/-
Mrs.Raj Bhalla
(Owner)”

9. Alleging further that as per scheme of merger sanctioned by the learned Company Judge, the three companies i.e. Tulika Traders & Investors Pvt. Ltd., Abhilasha Investment Pvt. Ltd. and Sarvopari Properties & Finance were amalgamated with ‘Harison Traders Ltd.’ as per scheme of amalgamation dated 27.06.1989. It was pleaded that since the defendant did not come forward to execute the sale deed and receive balance sale consideration, a notice dated 24.08.1991 was served upon her by Harison Traders Ltd. calling upon the defendant to receive the balance sale consideration and execute the necessary sale deed and alleging further that the defendant having failed to do so, the suit was filed seeking a decree for specific performance.

10. Suffice would it be to highlight that Harison Traders Ltd. sued as a plaintiff on account of the three companies Tulika Traders & Investors Pvt. Ltd., Abhilasha Investment Pvt. Ltd. and Sarvopari Properties & Finance being amalgamated with it and as per the scheme of merger all assets and the liabilities of the three companies were vested in it.

11. Plaint which resulted in CS(OS) No.2861/1991 being registered pleaded that on 17.09.1988 ‘Kamayani Investment Pvt. Ltd.’ concluded an oral agreement to sell

with the defendant, who was the owner of a building constructed on plot bearing Municipal No.5 Babar Road, New Delhi in respect of the rear portion of the second floor of the building for an agreed consideration of ₹5 lakhs and handed over to the defendant a cheque in sum of ₹25,000/- which cheque was received by the defendant as earnest money. The cheque was tendered under cover of a letter dated 17.09.1988, which we note is worded identically as per the letter noted by us in para 4 above, on which letter the defendant made an acknowledgment in the language as noted in para 6 above. That thereafter, ₹75,000/- in cash was paid to the defendant on 01.10.1988 and in respect whereof she executed a receipt in the language as noted in para 8 above. That the company Kamayani Investment Pvt. Ltd. merged with Deepa Trade & Commerce Pvt. Ltd. It is further pleaded that since the defendant did not execute the sale deed, a notice dated 25.08.1991 was served upon her calling upon her to receive the balance sale consideration and execute the sale deed. Alleging that the defendant did not do so, the suit was filed praying for a decree for specific performance.

12. The defendant i.e. Raj Bhalla admitted that some discussions were held between the parties and that she received three cheques in sum of ₹75,000/- each and the fourth cheque in sum of ₹25,000/- on 17.9.1988 and subsequently had received three cash payments in sum of ₹25,000/- each and a payment in sum of ₹75,000/- on 01.10.1988. She admitted the acknowledgment made by her on the four letters dated 17.09.1988 under cover of

which the four cheques were tendered to her as also having executed the four receipts dated 01.10.1988 when she received a further sum of ₹25,000/- each from three companies and ₹75,000/- from the fourth, but denied any concluded agreement between the parties. She stated that she received the amounts through one Mr.S.S.Satija of M/s.Satija Builders. She pleaded that terms and conditions of the sale including the sale consideration and the time within which the reciprocal obligations had to be discharged could not be agreed upon and that she returned the money received by her and further sum of ₹25,000/- (as penalty) to Mr.S.S.Satija who assured that he would pay the same to the four companies with whom she had commenced negotiations, and that Mr.S.S.Satija paid ₹1,25,000/- to each of the four companies. She denied any liability to execute any sale deed in favour of the plaintiffs. She pleaded in the alternative that assuming the contract concluded, it would be iniquitous and unjust, causing hardship to her, to specifically enforce the same.

13. It needs to be highlighted that in the written statement filed to CS(OS) No.2860/1991 she pleaded that vide cheque No.292727 dated 20.08.1989, cheque No.292728 dated 19.9.1989 and cheque No.292729 dated 25.9.1989, all drawn on the Bank of Maharashtra, ₹1,25,000/- each was paid to the three companies Tulika Traders & Investors Pvt. Ltd., Abhilasha Investment Pvt. Ltd. and Sarvopari Properties & Finance. She filed photocopies of three acknowledgments under the signatures of one Pramod pertaining to the three

cheques. In the written statement filed to CS(OS) No.2861/1991 she pleaded payment of ₹1,25,000/- to Kamayani Investment Pvt. Ltd. vide cheque No.292725 dated 19.08.1989 drawn on Bank of Maharashtra. She filed photocopy of an acknowledgment under signatures of Mr.Pramod pertaining to the said cheque.

14. Since there were unclear pleadings in the plaint(s) or the written statement(s) on some aspects, before issues were settled on 08.02.1996, statement of Rajesh Chopra, a Chartered Accountant and a retainer on behalf of the plaintiff companies was recorded, who denied Pramod being an employee of the companies. He denied that the four companies had received the four cheques claimed by the defendant as having been delivered. The statement of the defendant was also recorded in which he stated that she was demanding a sale consideration between ₹50 lakhs to ₹55 lakhs for the four flats and the purchasers were offering only ₹40 lakhs and thus the negotiations broke down and that she returned the money received by her to Mr.Satija who in turn issued four cheques in the names of the four companies which were received on behalf of the companies by Mr.Pramod.

15. Needless to state, common questions of law and fact arose in the two suits and thus evidence was recorded jointly in the two suits and we find the same being placed in the file pertaining to CS(OS) No.2860/1991 'Harison Traders Ltd. vs. Mrs.Raj Bhalla'. Identical issues were settled on 08.02.1996, being seven in number as under:-

“(1) Whether the terms and conditions including the sale consideration for the sale of flats as set

out in paras 3, 4 and 5 of the plaint was agreed with the defendant? OPP

(2) Whether there was no concluded contract for sale of the properties as contended in para 3 of the Preliminary Objection of written statement? OPD

(3) Whether the understanding/agreement to sell the property was mutually cancelled and defendant refunded to the plaintiff the amount advanced i.e. ₹1,00,000/- together with penalty of ₹25,000/- for each transaction through Sh.S.S.Satija? OPD

(4) Whether the defendant is not entitled to a decree of specific performance on the grounds set forth in paras 5, 6 and 7 of preliminary objection of written statement? OPD

(5) Whether the plaintiff was ready and willing to perform his (sic) part of the contract? OPP

(6) Whether the suit is not bad for misjoinder of cause of action and transactions? OPP

(7) Relief.”

16. At the trial, the plaintiff(s) examined four witnesses. Sh.Sanjay Balasangkar was examined as PW-1. Sh.J.L.Jain was examined as PW-2. Sh.Hanuman Prasad Ganeriwala was examined as PW-3 and Sh.N.K.Gupta was examined as PW-4. The defendant examined, besides herself as DW-6, 12 witnesses. Sh.Chander Bhan was examined as DW-1, Sh.Shanti Saroop Satija as DW-2, Sh.Rakesh Raina as DW-3, Sh.Krishan as DW-4, Sh.Jagdish as DW-5, Mr.I.M.Paschricha as DW-7, Mr.M.T.Ranganathan as DW-8, Mr.R.K.Kapila as DW-9, Mr.A.K.Singh as DW-10, Mr.Pawan Ruiya as DW-11, Mr.Bishram Singh as DW-12 and Mr.Kaviraj Singh as DW-13.

17. We propose to briefly note the testimony of the witnesses, but before that would highlight that vide impugned judgment(s) and decree(s) dated 28.07.2006, the learned Single Judge has decided only issues No.1 and 2, holding that the same go to root of the matter. Briefly summarizing the reasoning of the learned Single Judge, it has been held that no formal agreement to sell in writing has been executed and keeping in view that the buyers were companies registered under the Companies Act, ordinarily it would be expected that a juristic entity would conclude contracts in writing pertaining to sale or purchase of immovable property. Conceding to the position that a receipt executed by a seller could evidence a concluded contract, the learned Single Judge has opined that in said situation, the receipt must bring out that the parties were ad-idem on the material aspects of a bargain, and where the same relates to an agreement to sell immovable property, the sale price must be determinable from the receipt; the time within which the necessary sale permissions would be obtained has to be settled (it be highlighted that in the year 1988, as per the provisions of the Income Tax Act, for sale of immovable property a clearance certificate from the Income Tax Authorities was essential); the time within which the balance sale consideration would be paid had to be settled. The twin documentary evidence i.e. the four letters dated 17.09.1988 addressed to the defendant by the four proposed purchaser companies and the four acknowledgments thereon by the defendant and the four receipts dated 01.10.1988, contents whereof have been

noted by us in paras 4, 6 and 8 above, have been found to be inchoate evidence held to be not discharging the onus upon the plaintiff(s) to establish that a contract was concluded between the parties. Noting further that the defence could not establish, as pleaded in the written statement(s), that the defendant not only returned the money which she had received from the four companies but additionally paid penalty in sum of ₹25,000/- each to the four companies, the learned Single Judge has passed a decree in favour of the plaintiffs pertaining to the amounts received by the defendant under the inchoate bargain, together with interest @7% per annum from date when suits were instituted till realization.

18. We have already noted in para 2 above the contentions urged during hearing of the two appeals and since one contention pertains to the fact that the learned Single Judge has eschewed reference to the testimonies of the four witnesses of the plaintiff(s) and besides herself, the twelve witnesses of the defendant, we deem it appropriate to briefly note the relevant testimony of the seventeen witnesses who deposed at the trial.

19. Sanjay Balsangkar PW-1 deposed that he was a resident representative of the plaintiff companies. He proved the scheme of merger of Tulika Traders & Investors Pvt. Ltd., Abhilasha Investment Pvt. Ltd. and Sarvopari Properties & Finance with Harison Traders Ltd. as also the scheme of merger of M/s.Kamayani Investments Pvt. Ltd. with M/s.Deepa Trade & Commerce Pvt. Ltd. Pertaining to the transaction between the parties, he deposed that

Mr.Sujit Datta Rai, a director of the four companies had asked Mr.Hanuman Prasad Ganeriwala to help the companies to buy some property and that Mr.Ganeriwala informed that property No.5 Babar Road, New Delhi was available for sale. He along with Mr.Ganeriwala and Mr.J.L.Jain, a broker from their side, negotiated with the defendant and finalized the deal in respect of the first and second floor of the property. Two floors were agreed to be sold for ₹20 lakhs. He explained that no agreement in writing was executed because (Quote): *'Mr.J.L.Jain who was the broker had assured us about the execution of the required documents very soon.'* He stated that the four companies had to pay ₹2,50,000/- by 20.09.1988 and a sum of ₹1,50,000/- by 01.10.1988 and the balance after the defendant obtained the necessary permission from the Income Tax Authorities as also the title paramount i.e. L&DO. Thus, he claimed, this was the reason why three cheques were issued to the defendant in sum of ₹75,000/- and one cheque in sum of ₹25,000/- on behalf of four companies and later on three payments in sum of ₹25,000/- and one payment in sum of ₹75,000/- in cash was paid by the four companies to the defendant. The four cheques Ex.PW-1/3 to Ex.PW-1/6 dated 17.09.1988 and the four letters dated 17.09.1988 Ex.PW-1/7 to Ex.PW-1/10 were proved by him as also the endorsement encircled 'X-1' by the defendant thereon. The four receipts dated 01.10.1988 were proved by him as Ex.PW-1/11 to Ex.PW-1/14. Legal notice dated 24.08.1991 and 25.08.1991 were proved as Ex.PW-1/15 and Ex.PW-1/16. The two AD cards

acknowledging receipt of the two legal notices, signed by the defendant, were proved as Ex.PW-1/17 and Ex.PW-1/18. He stated that he did not know any person by the name of Mr.S.Satija of Satija Builders and that the four companies had no employee by the name of Pramod. He proved the statement of accounts of the four companies as Ex.PW-1/19 to Ex.PW-1/22, which we note pertain to the dates on which the defendant pleaded Mr.Satija having paid ₹1,25,000/- each to the four companies by means of four cheques drawn on Bank of Maharashtra and the said statements of account do not show any such amounts credited in the account of the four companies. He deposed that a letter dated 20.6.1989 mark 'A' was written by the defendant to Mr.Sujit Datta Rai but does not know how the letter was received at Calcutta. He denied that the defendant ever sought sale permission from the income tax authorities. We eschew reference to other exhibits proved by the witness as also the remainder testimony qua the financial position of the four merger companies; as the same is irrelevant.

20. Relevant would it be to note that during cross examination, Sh.Sanjay Balsangkar PW-1 admitted (Quote): *'I had conversation with Mr.Ganeriwala and Mr.J.L.Jain in respect of transaction (sic) but I had some conversation with the defendant as well. I do not remember if I had informed the defendant ever about the merging of the companies with the plaintiff's companies.'* He admitted that the merger took place in June 1989. He admitted during cross-examination that talks commenced in August 1988 and stated specifically that the final agreement was arrived at in

the evening at around 5:00 PM or 6:00 PM on 17th September 1988. He stated that no payment was made to the defendant on said date, but was made on 19th September 1988. He stated that the four cheques paid to the defendant were bankers' cheque got prepared from banks at Calcutta before the closing hours on 17.09.1988. He categorically admitted (Quote): *'It would be correct that some broad agreement had taken place sometime a week before 17th September 1988.'* He further admitted that after merger took place, the defendant was never informed to seek the sale permission from the Income Tax Authorities disclosing that the buyer would be the two plaintiff companies. He admitted that M/s. Tulika Trades & Investors Pvt. Ltd. had an account with UCO Bank in Calcutta. He stated that he could not deny that the companies had their bank account in UCO Bank Calcutta.

21. Relevant would it be to note that the witness claimed that the bargain was authorized at a Board meeting of the directors of the four companies, but neither proved any nor even disclosed the date thereof. Also it would be relevant to note that while recording evidence, the Commissioner who was recording the evidence, at request of the defendant, made an observation in respect of letter mark 'A' that there was no evidence on the face of the letter of it being folded.

22. J.L.Jain PW-2, whose status was stated to be as that of the broker of the four companies as per the deposition of PW-1, deposed that he knew the plaintiff companies through Sh.Hanuman Prasad Ganeriwala and that he was associated

in finalizing the deal between the four companies and the defendant and that sale consideration agreed was ₹5,00,000/- payable by each of the four companies to the defendant for sale of two portions each on the first and the second floor of the building at 5 Babar Road, New Delhi. He deposed that the deal was finalized at 9:00 AM on 17.09.1988. He stated that to his knowledge the deal was never called off by the defendant.

23. On being cross-examined, whether he had proof of any commission received, to justify his claim of having brokered the deal, he admitted not having received any commission. He denied that ₹4 lakhs received by the defendant was only a token money. It needs to be highlighted that he admitted that it was agreed that the defendant would give a written agreement sometimes before 5th October, 1988.

24. Sh.Hanuman Prasad Ganeriwala PW-3 deposed in sync with the testimony of PW-2 and also claimed that the bargain was finalized in the morning of 17th September 1988. He deposed that the defendant was told that the four companies would draw out a written agreement, but stated that the defendant said that she would get the needful done through her lawyer.

25. On being cross-examined Mr.Hanuman Prasad Ganeriwala PW-3 stated that commission was not paid to Mr.J.L.Jain as he demanded none and volunteered (Quote): *'He was not entitled as the deal was not matured.'* He denied knowledge of the fact that on 12.9.1988, vide document mark 'B' (which we note subsequently got exhibited as Ex.DW-6/1), the defendant had applied for

income tax clearance to sell the roof rights in the property for a sum of ₹9 lakhs.

26. Mr.N.K.Gupta PW-4 proved resolutions passed by the plaintiff companies on 2.1.1991 i.e. Ex.PW-4/1 and Ex.PW-4/2, contents whereof are irrelevant and hence we do not note the same as they do not concern the issue at hand i.e. whether a concluded contract came into existence between the parties.

27. Chander Bhan DW-1, a clerk from the Small Cause Courts Tis Hazari, proved the insolvency petition titled '*Shanti Saroop Satija vs. H.B.Kaushal*' bearing Suit No.9/1992 pertaining to the insolvency sought for self by Shanti Saroop Satija, as per which name of Mr.Pawan Ruiya was entered into the list of the creditors of Shanti Saroop Satija and debt payable reflected therein was ₹5,00,000/-

28. Shanti Saroop Satija DW-2 deposed that he knew Mr.J.L.Jain and Mr.Hanuman Prasad Ganeriwala. That in collaboration with the defendant he had built the building on 5 Babar Road, New Delhi and that Hanuman Prasad Ganeriwala and J.L.Jain had introduced one Mr.Pawan Ruiya to him telling him that he was a Chartered Accountant of various companies in Calcutta and the companies whom he represented were desirous of purchasing some property in Delhi. He showed them many properties in Bengali Market Area including 5 Babar Road. The defendant and her husband demanded ₹60 lakhs for sale of the first and second floor. He assured that he could get the deal settled between ₹50 lakhs to ₹55 lakhs. Some talks took place. Some money was exchanged. The defendant scaled down

her demand to ₹50 lakhs but Mr.Ruiya did not offer a penny beyond ₹38 lakhs. The deal was called off. He drew out four cheques in sum of ₹1,25,000/- in the name of the four companies and handed over the same to one Mr.Pramod who received the same and executed the acknowledgments Ex.DW-2/1 to Ex.DW-2/4 (which we note are the same which were filed by the defendant along with the written statement). That two out of the four cheques bounced and two were encashed. Mr.Ganeriwala and Mr.Ruiya demanded ₹5 lakhs from him and since he had no money and was desirous of being declared an insolvent person, in the insolvency petition filed by him he had entered the name of Mr.Ruiya as his creditor showing liability to pay ₹5 lakhs to him.

29. Rakesh Raina DW-3, a clerk from Bank of Maharashtra, Dr.Mukherjee Nagar, deposed that CBI had seized the summoned record, which we note is the record pertaining to the bank account in the name of Mr.S.S.Satija. Letter dated 15.10.1998 Ex.DW-3/1 to said effect signed by the Bank Manager was proved by him. Statement of account Ex.DW-3/2 annexed with the letter was proved by him, which we note relates to current account No.000734 in the joint names of M/s.Hindustan Builders and S.S.Satija and spans the period 01.08.1989 till 29.08.1989 and as per which no debit entry is to be found with respect to the four cheques purported to have been drawn by him in sum of ₹1,25,000/- each in the name of the four companies with whom the defendant had entered into a negotiation as claimed by her

and with whom, as claimed by the four companies, the bargain was struck.

30. Sh.Krishan DW-4 an employee of Punjab National Bank, Branch Bengal Market proved the statement of account of the husband of the defendant and Jagdish DW-5 a clerk from the Central Bank of India proved the statement of account of the defendant; a purpose which could not be explained by either counsel.

31. Raj Bhalla DW-6 deposed that in collaboration with M/s.Satija Builders she had got the building built at 5 Babar Road and the share of the builder was the basement and the ground floor. The first and the second floor were hers and she had desired to sell the first and second floor since she had a handicapped daughter and needed residence at a ground floor. Sh.S.S.Satija assured her that a deal could be finalized between ₹50 lakhs to ₹55 lakhs. In the first week of August 1988 Mr.Satija came to her with Mr.Ganeriwala, Mr.Ruiya and Mr.J.L.Jain. Mr.Ruiya introduced himself as a Chartered Accountant representing companies in Calcutta and Mr.Jain introduced himself as a property dealer. Mr.Ganeriwala introduced himself as a relation of Mr.Ruiya. She demanded ₹60 lakhs for the sale of first and the second floor. Since Mr.Ruiya desired to purchase the roof rights as well informing her that said rights would be purchased for ₹9 lakhs to which she consented she applied for income tax clearance as per Ex.DW-6/1. The discussions continued for sale of the first and the second floor and as token money for not negotiating with others, she received four drafts Ex.PW-1/3 to Ex.PW-1/6 and thereafter received cash for which she

executed the receipts Ex.PW-1/7 to Ex.PW-1/10. Since Mr.Ganeriwala and Mr.Ruiya refused to pay her beyond ₹38 lakhs, the deal was struck off. Since she had invested money with Mr.Satija he drew out four cheques in sum of ₹1,25,000/- which were received by Mr.Pramod as per acknowledgments Ex.DW-2/1 to Ex.DW-2/4. She deposed that the deal fell through and thus she never pursued the matter with the income tax authorities any further.

32. I.M.Pasricha DW-7 deposed that Ex.DW-7/1 was a copy of the seizure memo under which CBI had seized certain record of the bank on 01.02.1996 in respect of R.C.7/1994-SJU(VIII). Relevant would it be to note that amongst other documents, CBI seized the Cheque Return Registers of Bank of Maharashtra.

33. M.T.Ranganathan DW-8, Manager, National Clearing RBI, deposed that he had brought the computerized 0.05.1 report maintained by RBI regarding local clearances of cheques and that there is no mention of cheque No.292725 dated 20.8.1989 or cheque No.292727 dated 19.8.1989 pertaining to the account of Hindustan Builders with Bank of Maharashtra.

34. R.K.Kapila DW-9, Deputy Manager, Bank of Maharashtra deposed that letters Ex.DW-9/1 to Ex.DW-9/3 were signed by the then Branch Manager Mr.A.K.Singh and the information provided in Ex.DW-9/2 and Ex.DW-9/3 was based on the cheque return register for the period in question, which was seized by CBI and finds a mention in the seizure memo Ex.DW-7/1.

35. Relevant would it be to highlight that Ex.DW-9/2 is a letter dated 4.2.1994 written by the Branch Manager Sh.A.K.Singh to the defendant informing her that cheque No.292725 and cheque No.292727, each in sum of ₹1,25,000/- drawn on the account of Hindustan Builders were presented for encashment to the bank and were returned on 22.8.1989.

36. Sh.A.K.Singh DW-10, Inspector CBI, deposed that the record summoned through him which was seized was returned to the bank on 18.03.1999.

37. Mr.Pawan Ruiya DW-11, deposed that he did not know any person by the name of S.S.Satija. Said man owes no money to him. He has no business dealings in Delhi. He knew Mr.Hanuman Prasad Ganeriwala who was his cousin. He had no dealings with Tulika Traders & Investors Pvt. Ltd., Abhilasha Investment Pvt. Ltd., Sarvopari Properties Ltd., Kamayani Investment Pvt. Ltd., Harison Traders Ltd. and Deepa Trade & Commerce Ltd. He admitted knowing J.L.Jain through whom he had purchased a property but denied knowing the defendant.

38. Bishram Singh DW-12, Deputy Manager, Bank of Maharashtra deposed that he had brought the cheque return register (Ex.DW-12/1 being the relevant page thereof) for the period 2.5.1989 till 20.10.1989 and as per which cheques bearing No.292725 and 292727 in sum of ₹1,25,000/- each were returned to UCO Bank i.e. the bank where the cheques were deposited for collection. The cheques were drawn on the account of M/s.Hindustan Builders, but could not say as to in which branch of UCO

Bank the said cheques were presented by the holder for collection.

39. Mr.Kaviraj Singh DW-13, deposed facts which are totally irrelevant and hence we do not note the same.

40. Before discussing the evidence, it needs to be noted that the four bank drafts, deposed to as cheques by the witnesses dated 17.9.1988 in favour of the defendant being Ex.PW-1/3 to Ex.PW-1/6 are all drawn on UCO Bank, Jawahar Lal Nehru Road, Calcutta and the first three exhibits are in sum of ₹75,000/- each and the fourth is in sum of ₹25,000/-.

41. We think that we are now in a position to deal with the twin argument advanced by learned counsel for the appellants and as noted in para 2 above. The twin argument is akin to the two sides of the same coin. The coin is the argument that a contract was concluded between the parties for sale of the first and the second floor of property No.5 Babar Road, New Delhi. The first side of the coin is the agreement that the testimony of the witnesses would reveal a concluded bargain and the second side of the coin is the language of the four letters dated 17.09.1988 and the acknowledgement thereon by the defendant as also the language of the four receipts dated 01.10.1988 when the defendant received further amounts from the four companies.

42. Dealing with the testimony of the witnesses of the plaintiffs, suffice would it be to state that except for the word of mouth that the bargain was concluded on 17.09.1988 and the agreed sale consideration for sale of the first and the second floor of property No.5 Babar Road was

₹20 lakhs, nothing more has surfaced. By what date was the sale deed to be executed? There is no evidence. The land is admittedly held under perpetual lease hold tenure by the defendant and thus required sale permission from L&DO as also unearned increase to be paid. Who would bear the burden of the unearned increase? Whether the seller or the buyers? There is no evidence. Thus, evidence leans in favour of the fact that parties entered into a dialogue but could not conclude the same and thus no contract came into existence. We also find a material discrepancy in the deposition of the witnesses of the plaintiffs on one aspect. Whereas PW-1 deposed categorically that the final agreement was arrived at around 5:00 PM or 6:00 PM on 17.09.1988, PW-2 and PW-3 deposed that the agreement was concluded at around 9:00 AM. It also assumes importance to note that the four cheques Ex.PW-1/3 to Ex.PW-1/6 are all drawn by UCO Bank Branch, Jawahar Lal Nehru Marg and are dated 17.09.1988. These are the cheques which were tendered under cover of the four letters Ex.PW-1/7 to Ex.PW-1/10 on 17.09.1988. It would thus be difficult to believe that an oral contract which stood concluded on 17.09.1988 at New Delhi would have four banker cheques issued by a bank in Calcutta being delivered to the defendant on 17.09.1988 and this probablizes the version of DW-2 as also of the defendant who examined herself as DW-6 that negotiations were being held since the first week of August 1988 and were continuing even on 17.09.1988 and that the amounts received on said date were in the nature of a token money

to bind the defendant not to commence negotiations with any third party, a practice which is very common in Delhi. It is also important to note that Sanjay Balsangkar PW-1 admitted during cross-examination, as noted in para 20 above, that some broad agreement had taken place sometime a week before 17.09.1988. The testimony of the star witness of the plaintiffs, Sanjay Balsangkar PW-1, who claimed to be the resident representative of the plaintiff companies as also the four companies which had merged in the plaintiff companies, does not inspire confidence inasmuch as, conscious of the fact that the defendant had taken a stand that four cheques bearing Nos.292725 dated 19.08.1989, 292727 dated 20.08.1989, 292728 dated 19.09.1989 and 292729 dated 25.09.1989 were issued by S.S.Satija from the account of his sole proprietary firm M/s.Hindustan Builders whereunder a sum of ₹1,25,000/- each was returned to the four companies when the bargain could not materialize and that it was the further case of the defendant that the said four companies had presented the cheques for encashment and that two cheques were encashed and two were dishonoured and that it was the further case of the defendant that the four companies were maintaining accounts with a branch of UCO Bank at Calcutta where the four cheques were deposited for collection, feigned ignorance whether the four companies were maintaining an account with a branch of UCO Bank at Calcutta, ignoring the fact that in his examination-in-chief he had proved as Ex.PW-1/3 to Ex.PW-1/6 the four cheques issued in the name of the defendant; all of which were

drawn to the account of UCO Bank Branch Jawahar Lal Nehru Marg, Calcutta. Brokers charge, a part of the commission when an agreement to sell is finalized and the balance when the sale deed is executed was never paid. J.L.Jain PW-2 was admittedly, as per the testimony of the four witnesses of the plaintiffs, the broker of the plaintiffs and he admittedly not having received any commission from the plaintiffs is also an indicator that the bargain was not finalized. Except for self-serving statements of the four witnesses of the plaintiffs that the agreed sale consideration for both floors was ₹20 lakhs, there is no evidence to support the said sum being the agreed sale consideration. On the other hand, though at the fringe, there is some evidence to support the version of the defendant that she had desired a sale consideration of at least ₹60 lakhs but since the offer from the other side did not exceed ₹38 lakhs, the negotiations were called off and that during discussions, pending final agreement on the price, since the representative of the four companies had told that for the roof rights they would pay her ₹9 lakhs, vide Ex.DW-6/1, she sought income tax clearance certificate in the name of Tulika Traders and Investors Pvt. Ltd. i.e. the company to which she proposed to sell the terrace rights. Thus, there is better quality of evidence from the side of the defendant.

43. We need to highlight that the witnesses of the plaintiffs did not admit the said document, which was marked as document Mark 'B' when shown to the witnesses of the plaintiffs during cross-examination to confront them with the case of the defendant, but while arguing the

appeal, learned counsel for the appellants heavily relied upon the said document and in the written submissions filed vide sub-para (b) of para III at page 6 of the written submissions has submitted in the following words:-

“Parties having agreed on the consideration amount, also stands evidences (sic) by perusal of Form-34A (Mark-B) filed with the Income Tax Authorities.”

44. Highlighting that the document Mark-B was ultimately proved by the defendant as DW-6, it assumes importance that in the said document the stated sale consideration for the terrace rights on the second floor was shown at ₹9 lakhs and thus it would be most improbable that the total agreed sale consideration for the first floor, the second floor and the terrace rights above was only ₹20 lakhs as claimed by the plaintiffs.

45. The deposition of PW-2 and PW-4, as noted hereinabove in paras 23 and 24 would evidence that they admitted that a written agreement was required to be executed. None being executed is also a pointer in the direction that the bargain could not be concluded.

46. We need to halt and spend some time on the evidence pertaining to the four cheques bearing Nos.292725, 292727, 292728 and 292729 dated 19.08.1989, 20.08.1989, 19.09.1989 and 25.09.1989 respectively, each in the sum of ₹1,25,000/-, claimed by the defendant to have been returned through one Mr.Pramod to the four companies with whom she was negotiating with when the deal did not materialize.

47. The plaintiffs were aware that the CBI had seized the relevant record pertaining to the bank accounts of Sh.Shanti Saroop Satija and thus very boldly denied having received the four cheques as also the fact that these cheques were deposited in the accounts maintained by the four companies with a branch of UCO Bank at Calcutta. But, the testimony of DW-3, DW-9 and DW-12 would prove that Mr.S.S.Satija and his firm M/s.Hindustan Builders were maintaining an account with the Bank of Maharashtra and that two out of the four cheques i.e. cheque bearing No.292725 and 292727 were received for collection but were returned dishonoured and that the two cheques were sent for collection by some branch of UCO Bank. Though of a very weak character and of very little weightage, we do have some evidence of the two cheques being deposited for collection with a branch of UCO Bank and we have good evidence that the four companies were maintaining an account with UCO Bank Branch at Jawahar Lal Nehru Marg, Calcutta and if we add on the fact that the star witness of the plaintiffs i.e. PW-1 made a pretence of not recollecting whether the four companies were maintaining an account with UCO Bank Branch Jawahar Lal Nehru Marg Calcutta, we have evidence of suspicious conduct of the plaintiffs and this also probablizes the version of the defendant that since the sale price could not be agreed to, Mr.S.S.Satija, the builder in collaboration with whom she had got the building constructed and who was instrumental in helping her with the negotiations, not only sought to return the amount of ₹4 lakhs received by her as token money not to enter into

negotiations with anybody else, but tendered ₹25,000/- extra to each of the four companies. It is a different matter that the cheques were dishonoured and qua said fact we shall discuss a little more a few paragraphs later.

48. Learned counsel for the plaintiffs also heavily relied upon the document Mark-A, being the stated letter written by the defendant, to which reference was made only in the testimony of Sanjay Balsangkar PW-1 and as noted in para 19 herein above who deposed that he did not know how was the letter received at Calcutta. As noted in para 21 above, while recording evidence, at the asking of learned counsel for the defendant, the Court Commissioner made an observation that the letter in question Mark-A has no evidence of it being folded. It belies commonsense and logic for a letter written on a sheet of paper to be sent to Calcutta in an envelope having dimensions 8" x 12". There is contrivance obviously on the part of the plaintiffs to create documentary evidence.

49. That apart, the letter Mark-A remained an unproved document and cannot be used against the defendant.

50. The oral evidence led by the plaintiffs is not credible wherefrom a prudent person would form a reasonable belief that the fact in issue i.e. that a concluded oral contract came into existence on 17.09.1988; at an agreed sale consideration of ₹20 lakhs. On the contrary, the quality of evidence led by the defendant is far better.

51. We have to deal with the documentary evidence on the subject. The same is four identically worded letters dated 17.09.1988 and four identically worded

endorsements, by way of acknowledgments thereon, and four identically worded receipts dated 01.10.1988, contents whereof have been noted by us in para 4 (letters), para 6 (acknowledgments) and para 8 (receipts).

52. It is no doubt true that the four letters, while tendering money to the defendant use the expression '*As per the agreement for sale entered with you (sic) with our company*' and the endorsements thereon also uses the expression '*against sale of my property*' and that the four receipts, when further sums were received from the four companies uses the expression '*against earnest money for sale*', but the question would be: Whether the parties were using legal language or were using legal expressions as lay persons?

53. The four companies with whom the dialogue was going on were expected to know that to bind a company to a contract, authority in a living person must be expressly manifested. The testimony of the four witnesses examined by the plaintiffs would reveal that as per the plaintiffs only Mr.Sanjay Balsangkar, Mr.Hanuman Prasad Ganeriwala and Mr.J.L.Jain participated in the discussions. Where is the authority proved by the plaintiffs in any one of said three persons to enter into a binding contract on behalf of the four companies? None whatsoever. It also assumes importance that the claim of PW-1 that the agreement was authorized at a Board Meeting of the directors of the four companies remained a mere word of mouth inasmuch as no board resolution was produced that the directors of the four companies had agreed to a contract on behalf of the companies to pay ₹20 lakhs for sale of the two floors and

had further authorized PW-1 to formalize the contract. What prevented the four companies to type in the four letters or the four receipts that the agreed sale price was ₹20 lakhs? No answer is forthcoming except the answer that it was not so written, because the payments were being tendered not by way of earnest money as understood in law but by way of token money, as claimed by the defendant, so that she would not enter into negotiations with any other person till she was in '*nexi*' with the brokers who were negotiating on behalf of the four companies.

54. In *Kewal Krishan Goel's* (supra) relied upon by learned counsel for the plaintiffs, para 6 and 8 of the decision, would highlight the point that the Supreme Court was discussing the legal meaning of the word 'earnest' in the context of earnest money being paid pursuant to a concluded contract where the terms of the concluded contract were manifestly evident. The decision is not an authority on the point that wherever on a document acknowledging receipt of payment, the word 'earnest money' is used would mean that the document has to be treated as evidence of a concluded contract.

55. Pertaining to sale of immovable property, the sale price would be at the heart of a contract for sale and if there is no credible evidence that a price was settled, whatever be the language used in a document, it cannot be treated as evidence of a concluded contract between the parties.

56. There is yet another important facet of the instant case. While deposing as the star witness of the plaintiffs, PW-1 admitted that the four companies with whom it was

claimed that a bargain was struck had merged in the plaintiff companies in June 1989. If this was so and if there existed a concluded contract, knowing fully well that the income tax permission to be obtained as per Form No.34A of the Income Tax Act required the seller to obtain a permission in the name of the buyer, one would have expected that on the merger of the four companies with the plaintiffs, it would be made known to the defendant with a request to move applications before the income tax authorities, so informing, and obtain the necessary permissions. The omission on the part of the four companies to do so is telling its own story i.e. of there being no concluded contract. The further story told by the documentary evidence i.e. the two legal notices dated 24.08.1991 and 25.08.1991, Ex.PW-1/15 and Ex.PW-1/16 is the telling silence from the side of the plaintiffs to sit quiet for three years; not a letter written either by way of query or a demand from the plaintiffs to or upon the defendant to complete the sale pursuant to the agreement to sell statedly settled orally on 17.09.1988. The silence speaks it all and we leave it to the intelligent reader to understand the sound of silence.

57. A word upon the view taken by the learned Single Judge that the defendant had miserably failed to prove having returned any money to the four companies as claimed by her through the medium of the four cheques bearing No.292725, 292727, 292728 and 292729 dated 19.08.1989, 20.08.1989, 19.09.1989 and 25.09.1989 on which learned counsel for the appellants heavily relied to

bring home the point that if the defendant failed to prove return of what she claimed was token money pending finalization of an agreement to sell, which amount she should have returned if she received the same as token money if the agreement was not finalized as claimed by her; to draw the inference that non-return of said amount would obviously evidence a concluded contract and hence the permanent retention of the money by the defendant.

58. The argument ignores the fact that there is evidence, as discussed by us herein above, which has been ignored by the learned Single Judge, of the four companies having an account with Jawahar Lal Nehru Marg Branch of UCO Bank at Calcutta and two out of the four cheques being presented for encashment at some branch of UCO Bank at Calcutta. The defendant was an old lady and as per the evidence of her witnesses she was heavily relying upon Shri S.S.Satija, a builder to sell two floors of her property. Shri S.S.Satija went into insolvency. Divorced from the actions of Shri S.S.Satija, her conduct would certainly look inchoate, but in the chaotic way in which property is bought and sold in Delhi through property dealers, of which we experience aplenty, as Judges in Delhi, we have the same chaotic evidence in the instant case of deals being struck in a circuitous manner in Delhi. Mr.S.S.Satija, the builder concerned claims that it was Pawan Ruiya who was acting as the front man of the four companies and that when the deal could not materialize he agreed to pay ₹5 lakhs to Mr.Pawan Ruiya and before he could pay the money he went into insolvency and in the insolvency petition showed his

being a debtor in sum of ₹5 lakhs to Sh.Pawan Ruiya, a fact established from the list of creditors annexed with Suit No.9/1992 i.e. the Insolvency Petition filed. But, Sh.Pawan Ruiya denied being a creditor. It is indeed a funny situation. The debtor acknowledges the debt as also the creditor! But the creditor refutes!

59. A little elaboration is needed on the fact that notwithstanding the four cheques drawn out by Sh.S.S.Satija not being honoured and the defendant keeping quiet. Now, there is evidence that the defendant was past her mid age and was heavily relying upon Sh.S.S.Satija to manage her commercial affairs. That Sh.S.S.Satija drew out four cheques in sum of ₹1,25,000/- (each) to return the money which she had received as token amount was a fact within her knowledge. If the cheques were dishonoured, the four companies ought to have informed the same to her. Admittedly, between 1.10.1988 and 24.8.1991 when the first legal notice was issued to her, there is no evidence of any written communication between the parties. Thus, the innocent lady having remained cocooned in the belief that everything was over is well within the realm of contemplation.

60. It cannot be lost sight of that the suit was filed just about the time when three years period of limitation was about to expire reckoned with effect from 17.09.1988 i.e. the date on which the plaintiffs claim the agreement to sell being settled. It would be iniquitous to decree specific performance in view of the decisions of the Supreme Court reported as 1997 (3) SCC 1 K.S.Vidyanandam vs. Vairavan,

1999 (5) SCC 77 K.Narendra vs.Rivera Apartment (P) Ltd.
and 2006 (7) SCC 470 M.Meenakshi & Ors. vs. Metadin Aggarwal and we find that the learned Single Judge has decreed the sum of ₹4 lakhs received by the defendant and in respect whereof we find that there is irrefutable evidence that two out of four cheques statedly issued by way of refund as claimed by the defendant through the account of the sole proprietary firm of Sh.S.S.Satija were dishonoured and two were probably never presented for encashment and thus the amount remained outstanding. Interest has also been granted from the date of the suit and thus we find that the plaintiffs have been adequately recompensed.

61. The appeals fail and are dismissed. However, the parties are left to bear their own costs in the appeals.

(PRADEEP NANDRAJOG)
JUDGE

(S.P. GARG)
JUDGE

NOVEMBER 17, 2011
dk / mm