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* IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment Reserved on : July 24, 2012*
Judgment Pronounced on: July 30, 2012

+ **FAO(OS) 139/2012**

SMT.SUNITA SINHA Appellant
Represented by: Mr.Ravi Gupta, Senior Advocate
instructed by Mr.P.S.Bindra,
Advocate

versus

M/S.LEELA BUILDERS PVT. LTD. & ORS. Respondents
Represented by: Mr.Neeraj Kishan Kaul, Senior
Advocate instructed by Mr.Samar
Singh Kachwaha and
Mr.Raghvendra M.Bajaj, Advocate.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE MANMOHAN SINGH

PRADEEP NANDRAJOG, J.

1. Under the President of India, Late Shri R.N.Luthra held perpetual lease-hold rights in 48 Sunder Nagar, New Delhi, as per perpetual lease-deed dated November 30, 1961. He constructed a residential building consisting of 2½ floors; a garage block with servant quarters on top. He executed a will on September 10, 1971 bequeathing 1/3rd undivided share to his two daughters Smt.Santosh Sethi and Smt.Nirmal Krishan and grandson Rajiv Luthra. Upon his death, on December 16, 1972 the will was got probated in Probate Case No.1/1974 as per order dated November 26, 1975 passed by this Court. Santosh Sethi executed a will on February 20, 1983

bequeathing her share to her son Sanjiv Sethi and upon her death on June 29, 1984, Sanjiv Sethi acquired 1/3rd undivided share in the property. Nirmal Krishan executed a will on December 30, 1988 bequeathing her 1/3rd undivided share to her husband G.D.Krishan. But, during her lifetime, Nirmal Krishan along with Rajiv Luthra and Sanjiv Sethi executed an agreement to sell on January 24, 1989 in favour of 6 companies, impleaded as defendants No.1 to 6 in the suit filed by Sunita Sinha and Arvind Krishan Malhotra who are the daughter and son respectively of Nirmal Krishan and claim to be the owners of 1/3rd share in the property on the plea that upon Nirmal Krishan dying on October 03, 1990 her husband G.D.Krishan inherited her 1/3rd share in the property and upon G.D.Krishan dying intestate, they i.e. Sunita Sinha and Arvind Krishan Malhotra acquired 1/3rd share in the property.

2. The agreement to sell records that the six companies who were acting through their Directors U.S.Sitani and Leela Sitani, impleaded as defendants No.7 and 8 in the suit, would pay ₹80,70,000/- as sale consideration for sale of the house. It records Nirmal Krishan, Rajiv Luthra and Sanjiv Sethi having received ₹10,50,000/- and envisages that upon clearance being obtained under the Income Tax Act within six months the six companies would pay another sum of ₹62,40,000/- and the balance sum of ₹7,80,000/- would be paid when sale deed would be executed. It stands further recorded that simultaneously upon receipt of ₹62,40,000/- the sellers shall deliver vacant physical possession of such portion of the house which was self-occupied and symbolic possession of the rented portion to the buyers. The document records that the property had been re-entered by the lessor and envisages the

purchasers to have the re-entry cancelled and such amount as was payable to the lessor would be paid by the purchasers, but the same would be adjustable from the amount payable to the sellers.

3. On August 03, 1989 Nirmal Krishan, Sanjiv Sethi and Rajiv Luthra executed a General Power of Attorney in favour of U.S.Sitani, describing him as the nominee of the six purchaser companies; and under the General Power of Attorney empowered him to deal with the property and do acts, which an owner could perform i.e. demolish the existing construction and reconstruct a building, let out the property and even sell the same. And on the same day handed over possession of such portions of the property as were with Nirmal Krishan, Sanjiv Sethi and Rajiv Luthra and wrote to the tenant to attorn to the purchasers. Thereafter the six companies paid money to the tenant to vacate such portions of the property as were tenanted, and in all paid ₹45,00,000/- to the tenant.

4. Since August 03, 1989 possession of the entire property remained with the purchasers, who paid ₹8,23,646.72 to the lessor for the re-entry to be revoked.

5. Noting that the agreed sale consideration was ₹80,70,000/- and out of which as per the agreement to sell ₹10,50,000/- was received by the sellers, the stage for paying further sum of ₹62,40,000/- was within six months of the execution of the agreement to sell on January 24, 1989 and that left balance sale consideration in sum of ₹7,80,000/-, to be paid, but from which amount such sum which the purchasers had to pay to the lessor for revocation of the re-entry notice had to be deducted, suffice would it be to state that if the

purchasers would have paid ₹62,40,000/-, no further amount was payable to the sellers; rather it was the sellers who would have to make a refund to the buyers inasmuch as the buyers paid ₹8,23,646.72 to the lessor.

6. Everything remained quiet till the appellants, Sunita Sinha and her brother Arvind Krishan filed a suit on September 04, 2002 to restrain defendants No.1 to 8 from using the property and for the decree of possession.

7. In the written statement filed by defendants No.1 to 8, who we note are the six purchasers companies and their two directors who represented the companies, it was pleaded that the six companies are the owners of the property having paid full sale consideration for the same. It was pleaded that the suit filed in the year 2002 was highly belated and was barred by limitation.

8. Now, as per the agreement to sell, the sale consideration in sum of ₹80,70,000/- had to be paid at three stages. Firstly when the agreement to sell was executed. At this stage, ₹10,50,000/- was to be paid; and was paid. The second stage was to pay ₹62,40,000/- within six months. That left ₹7,80,000/- to be paid when sale deed was to be executed, but from which such amount as was paid by the buyers to the lessor for re-entry to be revoked had to be deducted. In the written statement filed it was pleaded that the entire sale consideration was paid, and suffice would it be to state that since ₹8,23,646.72 was admittedly paid by the buyers to the lessor and further since admittedly ₹10,50,000/- was paid to the sellers when the agreement to sell was executed, the defence would succeed if the buyers could prove having paid ₹62,40,000/- to the sellers, in respect whereof it has been

pleaded in the written statement that entire sale consideration was paid.

9. It may be true that there is no specific plea in the written statement as to when ₹62,40,000/- was paid; the general plea taken is that the entire sale consideration was paid, and it is equally true that no documentary evidence by means of a receipt, acknowledgement or payment by a mode under which there would be proof that ₹62,40,000/- flowed from the coffers of the buyers to those of the sellers has been filed, but one fact of importance needs to be noted i.e. the agreement to sell dated January 24, 1989 recording that ₹62,40,000/- would be paid within six months and simultaneously therewith vacant possession of such portion of the property as was with the sellers would be parted with to the buyers and symbolic possession of the rest would be given, and that just at the expiry of six months of January 24, 1989 i.e. on August 03, 1989 possession of such portions as were with the sellers was handed over to the buyers as also symbolic possession of the tenanted portion was handed over.

10. The appellants i.e. the plaintiffs filed IA No.3759/2010 under Order XII Rule 6 CPC praying for a decree on admission in which it was pleaded that the defendants have admitted the agreement to sell in question; have admitted having paid ₹10,50,000/- out of the agreed sale consideration in sum of ₹80,70,000/- and that in the absence of a specific pleading and further in the absence of any proof that the defendants paid ₹62,40,000/-, it is apparent that the purchasers have not acquired any title to the property and thus a decree should follow.

11. Dismissing the application the learned Single Judge has held that a suit can be decreed under Order XII Rule 6 CPC if there is a clear admission, and none has been found.

12. Suffice would it be for us to note that an admission by a party may be relied upon by the opposite party through the medium of a pleading or even otherwise. But the law is clear, the admission must be clear and unequivocal.

13. We do not find any admission made by the defendants which warrants a decree to follow. It may be true that the defendants have not pleaded the date when they paid ₹62,40,000/- to the sellers and further have no documentary proof to sustain said fact. But conduct of a party is also relevant and admissible evidence. The plaintiffs will have to explain the conduct of their mother along with the other two co-owners handing over vacant possession of such portions of the suit property as were with them to the buyers as also they giving symbolic possession of the tenanted portion and permitting the purchasers to pay money to the tenant for the tenant to vacate the tenanted portion of the property. The plaintiffs would also have to explain the conduct of their mother and the other two co-owners executing a General Power of Attorney in favour of a director of the six purchaser companies and authorizing him thereunder to sell the property. The power of attorney has been executed just after six months of the date when the agreement to sell was executed, and relevant would it be to state that it is the case of the defendants that when the power of attorney was executed on August 03, 1989 physical possession of the vacant portion and symbolic possession of the tenanted portion was delivered. This is a matter of trial and surely a

matter of a good argument that from the fact that the agreement to sell envisages ₹62,40,000/- to be further paid and simultaneously possession handed over; from the fact that possession was handed over would be proof that ₹62,40,000/- was paid. The ominous silence for over 10 years has also to be explained, and who says that silence has no sound, we remind ourselves of the famous song : *'The Sound of Silence'* by Simon & Garfunkel.

14. On the subject of possession, notwithstanding there being no sale deed executed in favour of the buyers, Section 53A of the Transfer of Property Act needs to be noted. Possession by a purchaser can be successfully defended against even the title holder of a property upon proof that the possession is under an agreement to sell and sale consideration has been paid.

15. The appeal merits a dismissal on facts. But we need to pen a few more words inasmuch as an issue of the very maintainability of the appeal was raised before us.

16. Under Section 10 of the Delhi High Court Act 1966 an appeal lies to a Division Bench against a judgment by a Single Judge exercising ordinary Original Civil Jurisdiction.

17. Whereas an application under Order XII Rule 6 of the Code of Civil Procedure, if allowed would result in a decree being passed and hence the decision allowing the application would be appealable as a decree, the question would arise what would happen when an application under Order XII Rule 6 is dismissed. As per the Code of Civil Procedure an appeal would lie against such orders which are listed in the various clauses of Rule 1 of Order XXXIII, and in which provision we find no reference to Order XII Rule 6. Thus, the Code of Civil

Procedure does not envisage an appeal from an order dismissing an application under Order XII Rule 6 of the Code.

18. In the celebrated decision reported as AIR 1981 SC 1786 Shah Babu Lal Khimji v. Jayaben Kaniya & Anr. the Supreme Court noted that the concept of a judgment; defined narrowly in the Code of Civil Procedure, cannot be physically imported in the definition of the word 'judgment' as used in clause 15 of the Letters Patent of the Bombay High Court. The Supreme Court noted that an adjudication could be of three kinds. A final adjudication where all issues in controversy are decided by the Trial Judge leaving nothing else to decide, and these would be judgments which would be followed by a decree. There would be no manner of doubt that such adjudications are judgments. The second would be an adjudication with respect to a preliminary point which finally decides the matter so far as the Trial Judge is concerned. There would be no manner of doubt that even such adjudications are judgments. A second limb of such preliminary adjudicatory decision would be such adjudication where a preliminary objection is decided against the objector. The Supreme Court observed that even such orders, though keep alive a suit, but undoubtedly deciding an important aspect which affects a vital right of a party may also be construed akin to judgments. The last category were intermediary or interlocutory adjudications, which may cause prejudice to a party, but not of a kind where a valuable right in the main suit itself is lost. Such adjudications were held not to be a judgment.

19. We may note that in para 120 of the opinion the Supreme Court listed a few kinds of interlocutory orders which

required to be treated of judgments and at serial No.6 of the list are mentioned : Orders rejecting an application for a judgment on admission under Order XII Rule 6 of the Code.

20. Holding that the appeal is maintainable, we conclude by recording that the appeal is not sustainable : maintainability and sustainability being different concepts; agreeing with the view taken by the learned Single Judge that there is no admission of a kind which requires a decree to be passed, we dismiss the appeal but without there being any orders as to costs.

(PRADEEP NANDRAJOG)
JUDGE

(MANMOHAN SINGH)
JUDGE

JULY 30, 2012
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