

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

Reserved on: 19.07.2012

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Date of decision: 13.08.2012

+ RFA (OS) No.38 of 2012 & FAO (OS) No.204 of 2012

RAJ KUMARI GARG

....APPELLANT

Through: Mr. G.S. Raghav & Mr. Pankaj Kumar,
Advs.

Versus

S.M. EZAZ & ORS.

....RESPONDENTS

Through: Mr. K.R. Chawla, Mr. Sunil Varma &
Mr. Aravind Varma, Advs. for R-1 & 2.
None for R-3 & 4.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE VIPIN SANGHI

SANJAY KISHAN KAUL, J.

1. The subject matter of dispute in the present cases is the ground floor of a commercial property on a plot area measuring 92.78 sq.yds. bearing No.23, Defence Colony Market, New Delhi-110024. The leasehold rights in the plot are stated to have been transferred by the Settlement Officer (G.P.B.) Jam Nagar House in favour of one Shri Hans Raj vide a perpetual lease deed dated 31.1.1964. Shri Hans Raj in turn sold the property to Shrimati Raj Kumari Garg, appellant herein, vide sale deed dated 27.8.1974. She raised construction on the same by converting the property to a basement, ground floor, first floor and second floor. The property was mutated in her name by the L&DO vide Mutation

letter dated 19.12.1974. The land use is stated to have been changed from residential to commercial in pursuance of a supplement deed dated 18.3.1980 executed in her favour by the L&DO.

2. Shrimati Raj Kumari Garg entered into an agreement to sell & purchase dated 7.7.1998, which is a registered document, qua the ground floor of the said property in favour of Shri Dinesh Gupta and Shrimati Nirmala Gupta, mother of Shri Dinesh Gupta (respondents 3 & 4 herein). The agreement to sell & purchase records that the ground floor was licensed to M/s. Domino's Pizza India Limited (for short 'M/s. Domino's') at a monthly license fee of ₹1.25 lakh vide a Deed of License dated 18.5.1996 and that the property was otherwise a self-acquired property where no one else including her legal heirs, successors or anyone else had any right, title or interest. The stated consideration as per the agreement is ₹25.00 lakh out of which ₹24.50 lakh had been paid and the balance ₹50,000.00 was to be paid on execution and registration of the sale deed in favour of respondents 3 & 4 or their nominee(s). The balance sum of ₹50,000 is stated to have been paid by Respondent No. 3 & 4 to the Appellant herein vide receipt dated 8.7.1998, i.e., the very next day, without waiting for execution of the sale deed. Thus, full consideration stands paid. The transfer was of the entire ground floor along with the structure thereon and fittings and fixtures together with 2/5th undivided share in the land. The agreement specifically states that respondents 3 & 4 had stepped into the shoes of the appellant qua the license agreement and, thus, the license fee would be payable to them from 1.7.1998

by M/s. Domino's who were in physical possession of the said portion. Clause 9 of the agreement reads as under:

“9. That if it is required or policy changes in future, the First Party shall apply and obtain the Sale Permission from the Land & Development Office, Nirman Bhawan, New Delhi or will apply for conversion of Lease hold to freehold in respect of the property under sale, in favour of the Second Party or his nominee(s), at his own costs and expenses. That after obtaining the sale permission/conversion the First Party will sign and execute proper Sale Deed in favour of the Second Party or his nominee(s) and will get the same registered with the Sub-Registrar, concerned.”

3. The appellant was required to obtain a No Objection Certificate from the Income Tax Department in Form 34A under Section 230A(1) of the Income Tax Act, 1961. The agreement to sell & purchase was not a solitary document and, as per clause 10 of the agreement, was accompanied by other documents to fortify the title of respondents 3 & 4 being GPA, Will, Agreements, SPA, Affidavits, Undertakings, Indemnity Bond, Attornment letter, etc. There is specific authorization vested with respondents 3 & 4 giving them unfettered and uninterrupted rights and powers to further sell or otherwise transfer, in any manner, in whole or in part to anybody and that the appellant would have no claim or objection to the same. It may be noted here that there are apparently two versions of the agreement, both of the same date. This clause is numbered as clause 18 in the agreement to sell & purchase filed in the suit in the present case but the original agreement to sell & purchase has been filed in CS (OS) No.68/2005 instituted by respondents 3 & 4 for specific

performance, where this clause is numbered as 17. The clause reads as under:

“17. That the Second Party shall be vested with unfettered and interrupted rights and powers to further sell or otherwise transfer the said portion in any manner in whole or in parts, to anybody and the First Party shall have no claim or objection for the same.”

4. Clause 12 of the agreement records that the licensee had made an interest free deposit of ₹7.50 lakh with the appellant which would be transferred to respondents 3 & 4 by refunding the same to the licensee who shall in turn give the same back to respondents 3 & 4 at the time of execution of fresh license agreement. In furtherance to this agreement there was a Tripartite Agreement entered into between the Appellant, Respondent No.3 & 4 and M/s. Domino's on 7.7.1998 wherein it was agreed that the license fee will be payable to the Respondent No. 3& 4 from 8th July 1998 after deducting TDS.
5. The Government came out with a scheme for conversion of leasehold rights into freehold and in view thereof respondents 3 & 4 submitted an application dated 8.4.2004 seeking conversion of the title in their name on a freehold basis. Another development which took place was that respondents 3 & 4 entered into a further agreement to sell dated 1.5.2004 in favour of respondents 1 & 2. The objective apparently was to get the property converted into freehold in the name of respondents 3 & 4 and thereafter execute a sale deed in favour of respondents 1 & 2.
6. It is at this stage that disputes have arisen between the appellant on the one hand and respondents on the other. The appellant claims

that the application for conversion of property into freehold was without her consent and knowledge and by forging her signatures and even filed an FIR on 15.7.2004 against respondents 3 & 4. It is in view of this dispute that respondents 3 & 4 filed CS (OS) No.68/2005 for specific performance of the agreement to sell dated 7.7.1998 seeking a prayer for conversion of property into freehold and execution of sale deed in their favour. The appellant sought to contest the suit *inter alia* on the ground that respondents 3 & 4 had no *locus standi* to maintain the suit as they had parted with their rights in the property in terms of agreement to sell dated 1.5.2004 and the claim for specific performance was barred by limitation. The appellant also pleaded that she had revoked the agreement to sell dated 7.7.1998 in July 1998 itself and had refused to act in pursuance of the same. The appellant also sought to set up a story that her husband and other family members were against the sale of the property when they came to know that she had already entered into an agreement to sell & purchase which was the reason of her revoking the agreement. It is, however, not disputed that the full consideration of ₹25.00 lakh paid to her was never returned nor is there any document evidencing an intent to return the same. A plea of fraud is also sought to be raised.

7. Insofar as the present appeals are concerned, the controversy has arisen on account of a suit for possession & injunction filed by the appellant against the respondents i.e. CS(OS) No. 243/2009. For the first time in the plaint a plea is sought to be raised that the funds for acquisition of the property by the appellant were received under a family settlement dated 11.7.1974. Interestingly the

appellant is not a party to the family settlement and what is averred is in complete contradiction to the agreement to sell & purchase dated 7.7.1998. It has been alleged that respondents 3 & 4 fraudulently procured the signatures and thumb impression of the appellant on the agreement to sell and other documents and the appellant being an almost illiterate person could not understand the English language document. She claims to have informed both the said respondents in July, 1998 itself that she did not want to sell the property and all the documents executed should be treated as cancelled. However, admittedly no such Cancellation Deed was executed nor is there any writing available conveying such an intent. In fact, the basic dispute becomes apparent from the pleadings qua the value of the property being much higher than the apparent consideration even in 1998. It is, thus, alleged that the defendants had come into possession of the suit property not in part performance of the contract but in illegal and unauthorized manner.

8. We may notice that it is not in dispute that the licensee attorned in favour of respondents 3 & 4, and the license fee was paid from 8.7.1998 to respondents 3 & 4 and the security deposit was refunded to the licensee who, in turn, gave it to respondents 3 & 4 - all acts taken in furtherance of the agreement to sell & purchase.
9. The most interesting aspect is that the plaint alleges that it is respondents 3 & 4 who slept over the matter till they filed a suit for specific performance. It is stated that the defendants have no subsisting legal rights as there was no privity of contract between

the appellant and respondents 1 & 2 and, thus, the respondents are liable to hand over possession to the appellant.

10. The plaint as originally framed was only against respondents 1 & 2 who were the subsequent purchasers but subsequently respondents 3 & 4 were added as parties. Respondents 1 & 2 moved an application, IA No.13107/2011, under Order 7 Rule 11 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'said Code') for rejection of the plaint while the appellant sought a decree under Order 12 Rule 6 of the said Code, vide an application IA No.7178/2009. Arguments were heard on both these applications and judgement was pronounced on 7.3.2012 rejecting the application of the appellant and allowing the application of respondents 1 & 2. The learned single Judge came to the conclusion that the appellant as plaintiff has no cause of action to file the suit which was barred under law.
11. It may be noticed at the threshold that the plea of there being a family settlement under which the appellant received money was given up by the appellant as recorded in para 11 of the impugned order. Since on going through the pleadings it was found that there was no admission made by respondents 1 & 2 in the written statement, there could be no question of exercising the discretion in favour of the appellant under Order 12 Rule 6 of the said Code. Thus, that application was dismissed with costs of ₹10,000.00 against which FAO (OS) No.204/2012 has been preferred.
12. RFA (OS) No.38/2012 has been preferred against the order passed on the application of respondents 1 & 2 rejecting the plaint under

Order 7 Rule 11 of the said Code. We have, thus, proceeded to hear both the appeals together.

FAO (OS) No.204/2012

13. As noticed above IA No.7178/2009 filed by the appellant under Order 12 Rule 6 of the said Code has been dismissed by the impugned order. The application averred that the appellant as the plaintiff has made out a case in the plaint of being the legal title holder of the suit property with no entitlement to respondents 3 & 4 to convey any interest to respondents 1 & 2. Permission to transfer was never obtained from the perpetual lessor and the agreement in favour of respondents 1 & 2 by respondents 3 & 4 was, thus, without any authority. Since respondents 1 & 2 were not put in possession by the appellant, required permission for sale was admittedly not obtained and in the absence of any contract between the appellant and respondents 1 & 2, the said respondents had not disputed the material facts but have raised only legal issues which on the face of it are legally untenable. The relief sought in the suit was only of possession against respondents 1 & 2 and in the absence of any written statement of respondents 3 & 4, the provisions of Order 12 Rule 6 of the said Code should be invoked for passing a decree in favour of the appellant.
14. The aforesaid application has been contested by respondents 1 & 2, who are stated to be in possession, setting out the factual matrix which we have already set out.
15. The findings recorded by the learned single Judge are that in view of the conspectus of the disputes raised, it could hardly be said that there are any admissions in the written statement which could

entitle the appellant to a decree under Order 12 Rule 6 of the said Code. There is no clear or unequivocal admission where the principles of Order 12 Rule 6 of the said Code would apply.

16. We are in complete agreement with the view taken by the learned single Judge and the application appears to have been filed just for the sake of it without the necessary ingredients being satisfied in the present case. The admissions have to be clear and unequivocal, which are missing. On the other hand, in the present case, the averments made in the plaint have been seriously contested. In fact, the additional story sought to be set up by the appellant of the property having been acquired from the funds in pursuance of a family settlement has been given up. The application was completely meritless and, thus, has been rightly dismissed with costs of ₹10,000.00.

RFA (OS) No.38/2012

17. The application filed by respondents 1 & 2 under Order 7 Rule 11 of the said Code which has been allowed by the impugned order and the plaint rejected is predicated on the grounds discussed in the impugned order. Para 14 of the impugned order begins by setting out the five (5) grounds which formed the basis of the application:
 - i. A legal bar to the suit under Section 53A of the Transfer of Property Act, 1882 (hereinafter referred to as the 'TP Act') as the agreement to sell & purchase in favour of respondents 3 & 4 by the appellant dated 7.7.1998 and other documents executed with it are duly registered and notional possession given to the said respondents as the actual possession was

with the licensee, M/s. Domino's. M/s. Domino's subsequently vacated and physical possession came over to respondents 3 & 4 who in turn gave the possession to respondents 1 & 2, the said respondents claiming under respondents 3 & 4.

- ii. The plaint as framed was not maintainable as the appellant did not seek cancellation of the agreement to sell & purchase and other collateral documents dated 7.7.1998. The suit, is, thus, stated to be barred under the Specific Relief Act, 1963 (hereinafter referred to as the 'Specific Relief Act').
- iii. The rights of the appellant in the suit property ceased on 7.7.1998 on her transfer of the property in favour of respondents 3 & 4. The suit is, thus, claimed to be barred under Section 41 of the TP Act.
- iv. The claim of the appellant for cancellation of sale documents executed in 1998 would be way beyond time as the specified period of limitation was three (3) years while the suit for possession had been filed after eleven (11) years. Thus, by merely styling the suit as one for possession, the appellant cannot indirectly do what she could not do directly.
- v. The appellant having appropriated the entire sale consideration and having executed the agreement to sell & purchase and collateral documents along with delivery of possession to respondents 3 & 4, has no *locus standi* to challenge the documents executed by respondents 3 & 4 in

favour of respondents 1 & 2. The suit as framed was only for possession and injunction.

18. We now proceed to record the basis for the findings of the learned single Judge qua the aforesaid five (5) aspects, the challenge laid to the same in appeal and our findings.

Grounds (ii), (iv) & (v)

19. The learned single Judge has referred to the provisions of the Limitation Act, 1963 (hereinafter referred to as the 'Limitation Act'). It can really not be disputed that Article 58 of the Schedule to the Limitation Act prescribing period of limitation for suits relating to declaratory decrees would apply if the documents have to be cancelled. The period prescribed is three (3) years from the date the right to sue accrues. In fact, under Section 3 of the Limitation Act, suits, appeals and applications made after the prescribed period of limitation, subject to the provisions of Sections 4 to 24 of the Limitation Act, are liable to be dismissed even though limitation may not have been set up as a defence. If the appellant was to claim cancellation of the documents executed in favour of respondents 3 & 4 on 7.7.1998, execution of which is not denied nor receipt of full consideration with possession being parted, the period of limitation had expired long time back in July, 2001. The suit for possession was filed in the year 2009, i.e., after eleven (11) years from the date when the cause of action accrued.
20. The reason why the three issues have been dealt with together is because of the ingenious frame of the suit and the plea sought to be advanced on behalf of the appellant that she does not seek

cancellation of documents but only seeks possession and, thus, the limitation should be treated as twelve (12) years.

21. The aforesaid plea is only stated to be rejected as the issue is no more *res integra* in view of the judgement of the Division Bench of this Court in Jyotika Kumar Vs. Anil Soni & Ors. 156 (2009) DLT 685 (DB). The factual matrix is quite similar where possession was sought without seeking cancellation of the documents and also from parties with whom there was no privity of contract. Thus, the judgement applies on all fours. It has been observed that there can be no valid cause of action on the date of filing of the suit when the prayer for declaration would be time barred under Article 58 of the Limitation Act. A mere suit for possession could not have been maintained.
22. It is quite obvious that the appellant has filed the mere suit for possession with an injunction without seeking declaration of cancellation of documents being conscious of the claim for cancellation being beyond time and, thus, would have faced a defence of the suit being barred by time. An illusion of cause of action is sought to be created to get over the period of limitation. There has to be a meaningful reading of the plaint and not a mere formal reading as observed by the Supreme Court in T. Arivandandam Vs. T.V. Satyapal & Anr. (1977) 4 SCC 467.
23. The observations of the Supreme Court in Ramaiah Vs. N. Narayana Reddy (Dead) By LRs. AIR 2004 SC 4261 are enlightening. It has been observed in para 10 while referring to the commentary on the Limitation Act by Sanjiva Row (Ninth Edition-II Volume page 549) that the question as to which of the two

articles would apply to a particular case should be decided by reference to pleadings though the plaintiff cannot be allowed by skilful pleading to avoid the inconvenient article. We may also note that respondents 1 & 2 have denied any title continuing to vest with the appellant and it has been held by the Supreme Court in Anathula Sudhakar Vs. P. Buchi Reddy (Dead) LRs. & Ors. (2008) 4 SCC 594 that where there is such denial of title and a cloud over the claim of the plaintiff, relief of declaration is necessary.

24. We are in complete agreement with the views expressed by the learned single Judge that the plaint as framed merely for possession cannot be maintained in law without the relief of declaration for cancellation of the documents executed by the appellant in favour of respondents 3 & 4 and the real issue cannot be obfuscated by seeking to raise a plea that only possession is being sought (and that too from respondents 1 & 2) as those respondents do not have any right to continue in possession even though there is no privity of contract between the appellant and respondents 1 & 2.

Ground (i)

25. We have recorded aforesaid that there is no dispute about the execution of agreement to sell and purchase and collateral documents on 7.7.1998 coupled with notional possession being parted as the licensee was in possession who subsequently surrendered possession to respondents 3 & 4 and who in turn gave it to respondents 1 & 2. Thus, respondents 1 & 2 are claiming under respondents 3 & 4. The plea raised by respondents 1 & 2 is

predicated on the provisions of Section 53A of the TP Act, which reads as under:

“53A. Part performance

Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

PROVIDED that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.”

26. There can be no doubt that the parties have contracted to transfer the immovable property when they executed the agreement to sell & purchase and collateral documents. It is also coupled with possession being parted with by the appellant in favour of respondents 3 & 4 in part performance of the contract and full consideration stands paid by respondents 3 & 4 and appropriated by the appellant. Thus, the prohibition envisaged against the

transferor in the absence of any instrument to transfer would come into play under the provisions of Section 53A of the TP Act. In fact, the right to make further transfers has been specifically conferred under Clause 18 of the agreement to sell & purchase dated 7.7.1998 as observed by the learned single Judge. It is in exercise of such a right that respondents 3 & 4 executed the agreement to sell dated 1.5.2004 in favour of respondents 1 & 2.

27. In State of U.P. Vs. District Judge & Others 1997 (1) SCC 496, [which has been relied upon by the Supreme Court in Rambhau Namdeo Gajre Vs. Naryan Bapuji Dhotra (Dead) Through LR. (2004) 8 SCC 614], the Hon'ble Supreme Court was dealing with a case relating to the applicability of the U.P. Imposition of Ceiling on Land Holdings Act, 1980 (the U.P. Act) to the land which the owner/vendor had agreed to sell to a vendee. The issue that arose for consideration was whether such land could be included in the holding of a person for computing the ceiling limit of his holding under Section 5(1) of the U.P. Act. The contention of the owner/vendor was that since he had agreed to sell a part of his holding to the vendee, and put the vendee in possession thereof, the said land could not be included for computing the ceiling of his holding. The Hon'ble Supreme Court negated this submission on the premise that unless a transfer of land takes place by a registered instrument, the vendor continues to remain the full owner thereof. Consequently, it was held that the said land would form part of the owner's/vendor's holding for purposes of the aforesaid Act. The Hon'ble Supreme Court further observed that the right to protect possession against the proposed vendor (which

is available to the proposed vendee under Section 53A of the Transfer of Property Act (TPA), in cases where the requirements of the said Section are fulfilled) cannot be pressed in service against a third party, like the State, which seeks to enforce the provisions of the U.P. Act against the tenancy holder/owner/vendor.

28. We may observe that the aforesaid decision did not deal with a situation like the present, where the vendee under an agreement to sell had further agreed to transfer his rights, under the said agreement to sell, to yet another person. The relevance of the said decision for our purpose is only that the Hon'ble Supreme Court re-stated the well-established legal position that the owner/vendor remains the full owner of the land, till the land is legally conveyed by a sale deed to the vendee, and that Section 53A of the T.P.A. does not impinge on the said legal position, as Section 53A merely protects the possession of the vendee in cases where the requirements of that Section are fulfilled. The judgment further observes that the vendee cannot invoke the protection granted by Section 53A of the T.P.A. against a third party, who seeks to enforce its statutory right in respect of the land agreed to be transferred to the vendee.
29. Learned counsel for the appellant laid emphasis only on the views expressed by the Supreme Court in Rambhau Namdeo Gajre case (supra), which places reliance on State of U.P. Vs. District Judge & Others case (supra). The similarity between the present case and the facts of that case rest only with there being an agreement to sell without there being a sale deed. There were no collateral

documents executed. The party purchasing under the agreement to sell sold it further to a third party who in turn claimed the defence of Section 53A of the TP Act. One important fact in that case noticed is that the original agreement to sell was not proved and neither was it brought on record. It is in these circumstances that the subsequent purchaser was held not entitled to the defence of Section 53A of the TP Act. In the facts of the present case, all the rights are transferred by the appellant to respondents 3 & 4 under the agreement to sell & purchase which is duly registered and is accompanied by other collateral documents like the GPA, SPA, Will, etc. and parting of notional possession as there was a licensee. Ultimately the physical possession also came to respondents 3 & 4. A specific clause 18 of the agreement to sell & purchase confers unfettered and uninterrupted rights and powers on Respondents 3 & 4 to further sell or otherwise transfer, in any manner, in whole or in part to anybody and that the appellant would have no claim or objection to the same. Therefore, the appellant gave the unfettered right of assignment of their rights under the agreement to sell dated 7.7.1998 to respondents 3 & 4. There was no such authority in Rambhau Namdeo Gajre case (supra). In the present case both the first purchaser and the subsequent purchase have been made parties and respondents 1 & 2 are claiming under respondents 3 & 4. Respondents 3 & 4 have already sued for getting the property converted into freehold and for getting the conveyance deed executed in their favour as the intent of the appellant has become dishonest when the conversion was applied for conversion of leasehold rights into freehold.

30. Section 53A of the T.P.A. debars the transferor or any person claiming under him” from enforcing against “the transferee and persons claims under him” any right in respect of the property of which the transferee has taken or continued in possession, other than the right expressly provided by the terms of the contract. The said provision, therefore, consciously protects the rights of not only the transferee, but also of persons claiming under the transferee, even though the rights of the transferee are not perfected as there is only an agreement to sell and not a registered sale deed/conveyance deed. Therefore, it cannot be argued that a person claiming under the transferee would not be entitled to protect his possession, merely because the title of the transferee was not perfected. The intention of the law clearly is to protect the rights of not only the transferee, but also of persons claiming under the transferee. even though the transferee does not have perfect title. If the transferee had a perfected title on the basis of a registered conveyance deed, the question of involving Section 53A of the TPA would not arise.
31. Pertinently, the Hon’ble Supreme Court in paragraph 12 observed that the doctrine of part performance as contemplated by Section 53A can be availed of by the transferee, or any person claiming under him. However, it did not deal with the issue whether the defendant appellant was a person claiming under the transferee. It only observed that the appellant not being the transferee within the meaning of Section 53 of the T.P.A., could not invoke the doctrine of part performance to protect his possession as against the plaintiff respondent.

32. In our view, the respondents No. 1 & 2 are persons claiming under the transferee, i.e. respondents No. 3 & 4 having taken over the rights of respondents No. 3 & 4 in respect of the agreement to sell and purchase dated 07.07.1998 from respondents No. 3 & 4.
33. A Division Bench of the Kerala High Court in A.M.A Sultan (deceased by LRs) and Ors. Vs. Seydu Zohra Beevi, AIR 1990 Kerala 186, was dealing with an appeal filed by defendants in suit for rendition of accounts and injunction, which had been decreed by the trial court. The plaintiff in the suit had executed a power of attorney in favour of defendant no.1 for the purpose of managing the plaintiff's property. It was the case of the plaintiff that defendant no.1 did not render the accounts and had misappropriated the amounts due to her (the plaintiff). Defendant no.1, in his written statement, admitted to the power of attorney being executed in his favour. However, at the same time, it was contended that the plaintiff had subsequently executed an agreement for sale in his favour and that he (defendant no.1) had paid the entire consideration under the same and as such was entitled to protection under Section 53A, T.P.Act. It was also contended that the property was now in the possession of defendant no.2. Defendant no.2 reiterated the contentions of defendant no.1. The question considered by the Court was whether, on the pleadings, defence under Section 53A was available to the defendants. As regards defendant no.1, the Court rejected the plea based on the agreement for sale. We need not go into the reasons therefor. Rejecting the plea of defendant no.2, as regards the protection under Section 53A on the ground that it was

not the case of the defendants that the agreement in favour of the first defendant were ever assigned in favour of the second defendant, the Division Bench observed as under:-

“13. Section 53A enacts that the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract. A person claiming under a transferee can make a valid defence under Section 53A only if he is armed with an agreement in his favour. As there is no pleading of the assignment or any agreement in favour of the second defendant he cannot definitely claim benefit under Section 53A. A person claiming under a transferee as per assignment can defend his possession in his favour. Second defendant has no case that he obtained assignment of the agreements relied on by the first defendant.”

(emphasis supplied)

34. Another aspect taken note of in the impugned order and which was canvassed before us arises from the judgement of the Supreme Court in Suraj Lamp & Industries Private Limited (2) Through Director Vs. State of Haryana & Anr. (2012) 1 SCC 656. The execution of agreement to sell & purchase coupled with collateral documents like GPA, SPA, Will, etc. has been a common practice in Delhi. The validity of such a practice has been examined in the said judgement and it has been held that the bunch of such documents cannot be recognized as deeds of title, “except to the limited extent of Section 53A of the TP Act”. In fact, it has been observed in paras 26 & 27 that the observations of the Supreme Court are not intended in any way to affect the validity and powers

of attorney executed in genuine transactions and the bunch of documents can continue to be treated as existing agreements of sale which would not prevent the affected parties from getting the registered deeds of conveyance to complete their title. The said bunch of documents can also be used to obtain specific performance or to defend possession under Section 53A of the TP Act. We reproduce para 26 of the said judgement as under:

“26. We have merely drawn attention to and reiterated the well-settled legal position that SA/GPA/WILL transactions are not 'transfers' or 'sales' and that such transactions cannot be treated as completed transfers or conveyances. They can continue to be treated as existing agreement of sale. Nothing prevents affected parties from getting registered Deeds of Conveyance to complete their title. The said 'SA/GPA/WILL transactions' may also be used to obtain specific performance or to defend possession under Section 53A of Transfer of Property Act. If they are entered before this day, they may be relied upon to apply for regularization of allotments/leases by Development Authorities. We make it clear that if the documents relating to 'SA/GPA/WILL transactions' has been accepted acted upon by DDA or other developmental authorities or by the Municipal or revenue authorities to effect mutation, they need not be disturbed, merely on account of this decision.”

It is, thus, clear that the present case fits in with the legal principles laid down and the defence of Section 53A of the TP Act in such a case would be available to respondents 3 & 4 and since respondents 1 & 2 are claiming under them, similarly to them too.

35. We are, thus, of the view that the possession of respondents 3 & 4 (and in turn of respondents 1 & 2) is protected under Section 53A of the TP Act.

Ground (iii)

36. Respondents 1 & 2 have also raised the plea of bar of Section 41 of the TP Act, which reads as under:

“41. Transfer by ostensible owner

Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it:

PROVIDED that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.”

37. The learned single Judge in para 36 of the impugned judgement has discussed the principles of this provisions as set out by the Supreme Court in Hardev Singh Vs. Gurmail Singh (Dead) by LRs. (2007) 2 SCC 404 specifying the ingredients as under:
- i. the transferor is the ostensible owner;
 - ii. he is so by the consent, express or implied, of the real owner;
 - iii. The transfer is for consideration;
 - iv. The transferee has acted in good faith, taking reasonable care to ascertain that the transferor had power to transfer.
38. Learned counsel for the appellant relied upon the judgement of the Supreme Court in Anathula Sudhakar Vs. P. Buchi Reddy (Dead) LRs. & Ors. case (supra) to contend that such a plea can be decided only on trial. We may, however, note that it has also been simultaneously observed that reasonable care and good faith can be decided only in a suit for declaration of title while the appellant has chosen to file only a suit for possession. It has also been

observed that in the absence of any prayer for declaration there can be no adjudication on that aspect.

39. We are of the view that we need not detain ourselves on this aspect as the appellant had failed to file a declaratory suit and in any case the other grounds are sufficient to knock out the suit of the appellant. Thus, the plea of the appellant that such a defence can be raised only post trial would not preclude the plaint from being rejected on other grounds.

The plea of the appellant of learned single Judge going beyond the scope of Order 7 Rule 11 of the said Code:

40. Learned counsel for the appellant canvassed before us that while deciding an application under Order 7 Rule 11 of the said Code, the plaint and the documents filed along with the plaint alone can be looked into and not the defence or the documents filed with the written statement. Interestingly, this grievance is made qua the document, the agreement to sell & purchase dated 7.7.1998, which the appellant deliberately kept away while filing the plaint though it was referred to in the plaint. In fact, this document is the very basis of cause of action of the appellant. The document undoubtedly was filed by the defendants but it is an undisputed document. The law required the appellant to file all the documents referred to in the plaint and relied upon along with the plaint. Thus, in a way the plaint suffers from breach of mandate of Order 7 Rule 14 of the said Code, which reads as under:

“Order VII. Plaint

....

[14. Production of document on which plaintiff sues or relies

(1) Where a plaintiff sues upon a document or relies upon document in his possession or power in support of his claim, he shall enter such document in a list, and shall produce it in court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof, to be filed with the plaint.

(2) Where any such document is not in the possession or power of the plaintiff, he shall, wherever possible, state in whose possession or power it is.

[(3) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.];

(4) Nothing in this rule shall apply to document produced for the cross examination of the plaintiffs witnesses, or, handed over to a witness merely to refresh his memory.]”

41. We are fortified, in our view, by the pronouncement of the Supreme Court in Civil Appeal No.4841/2012 titled The Church of Christ Charitable Trust & Educational Charitable Society, represented by its Chairman Vs. M/s Ponniamman Educational Trust represented by its Chairperson/Managing Trustee decided on 3.7.2012 where it has been held that Order 7 Rule 14 of the said Code mandates the plaintiff to produce all the documents on which the cause of action is based, therefore, he has to produce the power of attorney when the plaint is presented by him and if he is not in possession of the same, he has to state as to in whose possession it is. While deciding an application under Order 7 Rule 11 of the

said Code, such documents are to be treated as part of the plaint and, thus, can be relied upon. The appellant cannot be, thus, permitted to keep away the documents on the basis of which she sues and then state, when those undisputed documents are filed by the defendants, that they should not be relied upon for the purposes of Order 7 Rule 11 of the said Code.

Vexatious Litigation!:

42. We are of the view that apart from the fact that the plaint of the appellant is barred by law and, thus, is liable to be rejected under Order 7 Rule 11 of the said Code, the suit is a perfect example of vexatious litigation. The appellant transferred the rights in the suit and appropriated full consideration in 1998. The registered agreement to sell & purchase was executed along with collateral documents like the GPA, SPA, Will. There is not a whisper thereafter on the part of the appellant disputing these documents right till 2004. The property was in possession of a licensee who attorned in favour of the purchasers, respondents 3 & 4 and started paying them rent since July, 1998. The deposit kept with the appellant was refunded to the licensee and thereafter given to respondents 3 & 4. These are all acts in furtherance of the agreement. The notional possession was handed over and ultimately the physical possession also came to respondents 3 & 4 by surrender from the licensee. The specific rights were given in favour of respondents 3 & 4 under the agreement to sell & purchase to transfer the property further and clear declaration was made on the document that the rights in the property were exclusively of the said respondents.

43. The appellant sought to initially create a sham plea of having received monies under family settlement and the family opposing the transaction soon after the execution. If that was so, the appellant would have acted soon thereafter for whatever it was worth. This did not happen. The intent of the appellant became dishonest obviously on account of the escalated value of the real estate over a period of time and the appellant sought to take advantage of the fact that the sale deed had not been executed. Thus, everything had been done except execution of the sale deed possibly because it was a leasehold property. The Government came up with a scheme for conversion of leasehold rights into freehold on payment of certain charges even qua properties purchased on power of attorney basis by paying some extra premium. It is when respondents 3 & 4 sought to convert the property into freehold from leasehold that the appellant started putting objections.
44. The appellant was conscious of the legal limitation of any plea to cancel documents after almost eleven (11) years. Respondents 3 & 4 were left with no option but to file a suit for specific performance for conversion of property into freehold and execution of conveyance deed in their favour so that they can in turn execute the sale deed in favour of respondents 1 & 2. It is at that time that the appellant devised another method to harass respondents by filing a suit styling it as only one for possession and injunction without seeking cancellation of documents. The plea, thus, sought to be advanced was that since the possession was with respondents 1 & 2, it could be directly claimed without

bringing respondents 3 & 4 into the picture. Having realized the impossibility of the same, respondents 3 & 4 were impleaded as parties. However, these antics of the appellant have not been helpful and the plaint has been rejected.

45. The appellant has sought to cast cloud over the title of the property and has wasted judicial time by initiating frivolous litigation. This has deprived the Court of valuable judicial time which could have been used better in deciding serious cases. The Courts must, thus, penalize such parties and that too heavily. We may draw strength from the pronouncement of the Supreme Court in T. Arivandandam Vs. T.V. Satyapal & Anr. case (supra) where the importance of recourse to exemplary costs under Section 35A and Order 7 Rule 11 and Order 10 of the said Code was emphasized. Frivolous, sham and vexatious litigation must suffer adverse fate and that too quickly. The suit proceedings in question were held to be a gross abuse of the process of court. The observations of Justice V.R. Krishna Iyer (as he then was) are extracted below:

“2. Here is an audacious application by a determined engineer of fake litigations asking for special leave to appeal against an order of the High Court on an interlocutory application for injunction. The sharp practice or legal legerdemain of the petitioner, who is the son of the 2nd respondent, stultifies the court process and makes decrees with judicial seals brutum fulmen. The long arm of the law must throttle such litigative caricatures if the confidence and credibility of the community in the judicature is to survive. The contempt power of the Court is meant for such persons as the present petitioner. We desist from taking action because of the sweet reasonableness of counsel Sri Ramasesh.”

46. In K.K. Modi Vs. K.N. Modi & Ors. AIR 1998 SC 1297, once again, it was emphasized that the expression “abuse of process of court” has to be understood in the context that the process of court must be used *bona fide* and properly and must not be abused. Thus, the Court would prevent improper use of its machinery and will in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation and the categories of such conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant circumstances. Thus, absolutely careless proceedings have been held to be frivolous and vexatious and the court has the power to stop such proceedings summarily and prevent the time of the public and the court from being wasted.
47. In Chandra Shahi Vs. Anil Kumar Verma (1995) 1 SCC 421, it has been observed as under:
- “1. The stream of administration of justice has to remain unpolluted so that purity of court's atmosphere may give vitality to all the organs of the State. Polluters of judicial firmament are, therefore, required to be well taken care of to maintain the sublimity of court's environment; so also to enable it to administer justice fairly and to the satisfaction of all concerned.
2. Anyone who takes recourse to fraud, deflects the course of judicial proceedings; or if anything is done with oblique motive, the same interferes with the administration of justice. Such persons are required to be properly dealt with, not only to punish them for the wrong done, but also to deter others from indulging in similar acts which shake the faith of people in the system of administration of justice.”

48. We may add here that withholding vital documents from the Court has been held by the Supreme Court as a fraud when it is used to gain advantage at the cost of other party since every party is bound to file all documents. It is in that context that the Supreme Court in S.P. Chengalvaraya Naidu (dead) by LRs. Vs. Jagannath (dead) by LRs & Ors. (1994) 1 SCC 1, observed as under:

“1. "Fraud-avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and honest in the eyes of law. Such a judgment/decree - by the first court or by the highest court - has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings.”

49. The respondents assisted this Court by relying upon the judgement of the Supreme Court in Maria Margarida Sequeira Fernandes & Ors. Vs. Erasmo Jack De Sequeira (Dead) Through LRs (2012) 5 SCC 370 where the abuse of process of court through institution of civil suit or false claims or false defences have been noticed and exemplary costs was imposed. Such a practice has gained currency especially in property litigations by unscrupulous litigants and, thus, there has to be judicial determination to unmask those who have inherent interest in dragging on frivolous litigations and to frustrate their attempts and impose adequate punishment and/or afford relief to the *bona fide* opposite party, was an aspect stressed.

50. The dishonesty of the appellant, the vexatious nature of the litigation initiated and the continuation of the appeal proceedings

leaves us with no manner of doubt that it is a fit case where exemplary costs must be used to discourage litigants like the appellant.

Conclusion:

51. We, thus, dismiss the appeals as meritless with costs of ₹1.50 lakh payable to respondents 1 & 2 within fifteen (15) days from today.

SANJAY KISHAN KAUL, J.

AUGUST 13, 2012
b'nesh

VIPIN SANGHI, J.