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

% DATE OF DECISION : FEBRUARY 28, 2012

+ **RFA(OS) 53/2006**

PARVEEN ARORA Appellant
Represented by : Mr.Anil Sapra, Sr.Adv.
instructed by Ms.Praneeta
Vir and Mr.Shahid R.Ahmed,
Adv.
versus

RAJ KARNI MEHRA AND ORS. Respondents
Represented by : Mr.B.B.Gupta, Adv. with Mr.
Harsh Hari Haran, Adv. for
R1 to R4.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE PRATIBHA RANI

PRATIBHA RANI, J. (Oral)

1. The appellant (plaintiff in CS(OS) No.105/1996) has impugned the judgment and decree dated 22.02.2006 passed by the learned Single Judge of this Court dismissing suit seeking specific performance filed by the appellant on the strength of a receipt-cum-agreement dated 31.12.1992.

2. In brief, the case of the appellant is that Late Sh.F.C.Mehra, husband of respondent No.1 and father of respondents No.2 to 4, agreed to sell property No.13-B, Rajendra Park, Pusa Road, New Delhi for a total consideration of ₹1.5 crores. While entering into the agreement, the appellant paid ₹2,51,000/- as advance and further agreed to

pay ₹12,50,000/- before 20.01.1993. Balance sale consideration was to be paid at the time of execution of the sale deed.

3. The further case of the appellant is that though he was required to pay only a sum of ₹12,50,000/- to the respondents by 20.01.1993, he paid a sum of ₹25,20,000/- on 15.01.1993 vide six bank drafts of ₹4,20,000/- each. While bank drafts No.230194, 230195 and 230196 were prepared in the name of Madan Lal Ashok Kumar Mehra (HUF), bank draft No.230197 was prepared in the name of Madan Lal Mehra, bank draft No.230198 in the name of Ashok Kumar Mehra and bank draft No.230199 in the name of Brij Lal Mehra.

4. After about a month of making the above payment, inquiries were made about the progress of the requisite permission including the one required under Section 37-I of Income Tax Act but in return, only an assurance was given that needful would be done. Subsequently, there was some collusive correspondence between Sh.F.C.Mehra and the respondents and they also resorted to collusive litigation.

5. Even a suit under Section 31 of the Punjab Relief of Indebtedness Act was also filed by Sh.F.C.Mehra which was dismissed on the ground that it was filed against the property brokers who were not creditors, thus the suit was not maintainable.

6. The appellant filed a suit seeking injunction restraining the respondents from selling the suit property. The respondents were directed to maintain status quo in respect of

the transfer of the suit property.

7. When Sh.F.C.Mehra was served with the summons of said suit, he refused to accept the agreement dated 31.12.1992 compelling the appellant to file the instant suit for specific performance.

8. The respondents, while filing the written statement in the suit, denied the authority of Sh.F.C.Mehra to enter into any agreement to sell the property alleging that he had no title vested in him to enter into any agreement. Although the execution of the 'Receipt' dated 31.12.1992 by Sh.F.C.Mehra was not denied, the plea taken was that the property brokers approached Sh.F.C.Mehra for sale of the property and at that time, he informed that it could be sold only with the consent of respondents No.1 to 4. The amount of ₹2,51,000/- was paid to him in anticipation of the consent to which they never agreed. It has also been pleaded that the bank drafts got prepared by the appellant were never accepted by them. Sh.F.C.Mehra was neither the constituted attorney in respect of half share belonging to respondents No.2 to 4 nor the *Karta* of HUF. The property was purchased by respondent No.2 Mr.Madan Lal Mehra vide registered sale deed and he threw his share in the said property in hotchpotch of joint Hindu family consisting of himself, his mother and two brothers. Sh.F.C.Mehra expired on 26.06.1994 leaving behind his widow, three sons and three daughters. They never wanted to sell the suit property and it was so informed to respondents No.5 and 6 and they were asked to collect back the cash amount paid as well as the

original bank drafts against receipt giving in writing that there existed no concluded agreement between the parties.

9. On the pleadings of the parties, following issues were settled:-

“(1) Whether F.C.Mehra represented to the plaintiff that he hold power of attorneys for defendants no.2 to 4 before entering into the Receipt-cum-Agreement to sell dated 31st December, 1992 of property no.13-B, Rajindra Park, Pusa Road, New Delhi as alleged?

(2) Whether F.C.Mehra was otherwise competent to execute Receipt-cum-Agreement to sell as Karta of HUF, namely, M/s. MAdan Lal Ashok Kumar Mehra as alleged in para 20 of the plaint?

(3) Whether defendants no.1 to 4 were aware of the deal with the plaintiff since beginning as also alleged in para 20 of the plaint?

(4) Whether suit is bad for non-joinder of necessary parties as alleged in para 1 of the preliminary objections of written statement of defendants No.1 to 4?

(5) Whether suit is barred by time?

(6) Whether Reciept-cum-Agreement to sell was repudiated by F.C.Mehra during his lifetime?

(7) Whether F.C.Mehra did not have the authority from defendants no.1 to 4 to negotiate for sale on their behalf of the suit property as alleged?

(8) Whether plaintiff is entitled to specific performance of Receipt-cum-Agreement to sell? If so, on what terms?

(9) Relief.”

10. Learned Single Judge dealt with issues No.1, 2, 7 and 8 and returned the finding that the ‘Receipt’ dated 31.12.1992

which itself mention about proper agreement to sell to be entered into, was not an agreement in the eyes of law but a step towards such agreement and as the real owners of the property were not inclined to sell the same, no agreement to sell could be executed. Sh.F.C.Mehra took steps to refund the money received under the 'Receipt'. Thus, the appellant failed to prove any authority and proper agreement to sell between him and the respondents. While issues No.3 was also decided against the appellant, issues No.4 and 5 were not pressed and in view of the findings returned on above issues, the suit was dismissed.

11. Learned counsel for the appellant challenged the finding of the learned Single Judge on the alleged interpolation in the 'Receipt' wherein in bracket the words '*Shri F.C.Mehra, sign on behalf of Shri B.L.Mehra, Sh.M.L.Mehra & Smt.Raj Karni Mehra*' were written, to be not in the handwriting of Sh.F.C.Mehra. The findings returned thereon that aforesaid words were added afterwards by some other person, has been urged to be without any basis which has prejudiced the case of the appellant. It has been further submitted that undisputedly half portion of the property vested in HUF and remaining half was owned by three brothers and Sh.F.C.Mehra being *Karta* of HUF was competent to enter into an agreement to sell at least in respect of half portion of the property and in the circumstances, the suit could not have been dismissed as a whole when the execution of 'Receipt' was not disputed. The bank drafts prepared in the name of HUF and the respondents

No.2 to 4 were got prepared by the appellant much before the specified date and handed over to Sh.F.C.Mehra. Thus they had performed their part by handing over the bank drafts of ₹25,20,000/- dated 15.01.1993 though required to pay only ₹12,50,000/- by 20.01.1993.

12. Learned counsel for the appellant urged that no doubt the heading given to the document executed on 31.12.1992 is 'Receipt' but a bare perusal of its contents would reveal that it is receipt-cum-agreement to sell for the reasons that (1) the property is identified; (2) total sale consideration is specified; (3) advance money is given; (4) further payment schedule is given; and (5) names of the parties entering into the agreement are also given. Thus, there is certainty not only about the property to be sold and the total sale consideration but also the parties entering into the agreement are identified, hence the learned Single Judge was wrong in returning the findings that the 'Receipt' dated 31.12.1992 cannot be termed as agreement to sell and that it is not binding on respondents No.1 to 4.

13. Referring to the admission of respondents No.1 to 4 that amount was sought to be returned after deducting ₹10,000/- paid towards brokerage to respondents No.5 and 6, it has been urged that this also shows that the deal materialized and only thereafter there was any question of paying the brokerage to respondents No.5 and 6 – the property brokers.

14. On behalf of respondents No.1 to 4 it has been submitted that no doubt there is admission on their part that the amount

received from the appellant was sought to be returned by Sh.F.C.Mehra minus ₹10,000/- paid towards brokerage but had the deal been finalized, there was no occasion for the appellant to be litigating before this Court to seek specific performance of the so called 'agreement to sell'. It is not disputed that respondents No.5 and 6 were instrumental in bringing Sh.F.C.Mehra and the appellant to bargain the deal and if for that purpose, they charged some commission, it does not effect the nature of the negotiation between Sh.F.C.Mehra and the appellant vide 'Receipt' dated 31.12.1992. When the appellant has approached the Court seeking the relief for specific performance, this 'Receipt' has to be considered and interpreted in that light only.

15. On behalf of respondents, it has been further contended that Sh.F.C.Mehra had no authority to enter into any agreement to sell in respect of sale of property No.13-B, Rajendra Park, Pusa Road, New Delhi. Though receipt of advance of ₹2,51,000/- vide 'Receipt' dated 31.12.1992 was not denied and handing over of bank drafts for a sum of ₹25,20,000/- was also not disputed, it has been submitted that these steps were taken by the plaintiffs to make Sh.F.C.Mehra persuade his sons for entering into agreement to sell the said property to which they never agreed and immediately thereafter this was communicated to the appellant and property brokers and steps were taken to return the money and bank drafts handed over to Sh.F.C.Mehra which are even now lying deposited in the Court. It has been submitted that

there was no valid agreement to sell between the parties of which specific performance can be enforced and suit has been rightly dismissed by learned Single Judge.

16. We have carefully gone through the 'Receipt' dated 31.12.1992 and discussion thereon in the impugned judgment. First of all, it is necessary to dispel the fear in the mind of learned counsel for the appellant that the observation by learned Single Judge in the judgment that the portion in bracket i.e. '*Shri F.C.Mehra, sign on behalf of Shri B.L.Mehra, Sh.M.L.Mehra & Smt.Raj Karni Mehra*' was in different handwriting added afterwards by some other person, had prejudiced his case is ill-founded. Learned Single Judge has dealt with the submission of learned counsel for respondents No.1 to 4 in this regard making a passing reference that in the absence of original having been produced, there appears to be force in the submission.

17. That the case of the appellant has been considered on its own merit is further clear from the observation made by learned Single Judge on page 16 of the judgment wherein it has been specifically observed that even if it is presumed that the aforesaid words in bracket were written on the receipt, that would not advance the case of the appellant. Thus, this submission has been noted to make it clear that the receipt has been considered in its possible perspectives including whether it forms an acknowledgment of the amount received by Sh.F.C.Mehra from the appellant or the contents thereof can be construed as an agreement to sell irrespective of the fact that

it has been termed as 'receipt'. We would highlight that the receipt-cum-agreement to sell, captioned as a 'receipt', clearly refers to the fact that an agreement to sell would be executed and Form-37(i) would be signed when sum of ₹12,50,000/- would be received on 20.01.1993. Therefrom, we concur with the view taken by the learned Single Judge that the receipt is not intended to be an agreement to sell, though it has all the features of an agreement to sell. It is captioned as a receipt and is intended to be only a receipt.

18. On the subject of the authority and capacity of Sh.F.C.Mehra to enter into an agreement in respect of property No.13-B, Rajendra Park, Pusa Road, New Delhi with the appellant, except the receipt dated 31.12.1992, we have nothing on record to establish that Sh.F.C.Mehra had any right, title or interest in the property which he could transfer to the appellant. Even if it is assumed for the sake of arguments that being *Karta* of the HUF, in respect of 50% portion of the suit property, he could enter into an agreement to sell to that extent, the situation is not going to change for the simple reason that the receipt does not speak that Sh.F.C.Mehra entered into any agreement with the appellant as *Karta* of HUF. The Receipt also does not contain any recital that the property was being sold for any legal necessity or any other justification requiring him to enter into the deal as *Karta* of HUF.

19. The remaining 50% portion admittedly is owned by respondents No.2 to 4. The bracketed portion in the receipt reflect that he signed on behalf of Shri B.L.Mehra, Sh.M.L.Mehra

& Smt.Raj Karni Mehra. We have no document to prove that respondents No.2 to 4 ever authorized Sh.F.C.Mehra to enter into any agreement on their behalf in respect of their share in the suit property. Merely because, Sh.F.C.Mehra was father of respondents No.2 to 4, that ipso facto did not confer any right on him to enter into any agreement to sell their property without having any power of attorney/authorization in this regard from them.

20. With a view to appreciate the rival contentions, it is necessary to reproduce the 'Receipt' so that the averments made in the pleadings and the contentions raised can be considered/examined in the right perspective :-

"Received ₹2,51,000/- from Shri Parween Arora, S/o Shri Late P.C.Arora, 1/1, Nai Basti, Kishanganj, Delhi a advance against the sale of property No.13-B, Pusa Road, Rajindra Park, New Delhi. The total consideration settled at Rs. One Crore Fifty Lacs. Further Rs.12,50,000/- will be paid by the purchaser before 20th January, 1993 at the time of signing an agreement to sell and 37-I. The seller will hand over the physical possession of the main building and garages alongwith two tenants who are the tenants in the two annexy flats. The purchaser will make the payment of one crore thirty five lacs at the time of execution of sale deeds.

PTO
[Shri F.C.Mehra
Sign on behalf of
Shri B.L.Mehra, Sh.
M.L.Mehra & Smt. Raj
Karni Mehra]

Witness:-

Sd/-

- i. Vijay Kumar Suri,
S/o L.Shri Ram Lal Suri
A,59, Preet Vihar,

sd/-
ii. Avinash Malhan
S-16, Pratap Chambers,
Gurudwara Road,
Karol Bagh,
New Delhi.”

21. The controversy in this appeal centers around the receipt dated 31.12.1992 executed by Late Sh.F.C.Mehra (husband of respondent No.1 and father of respondents No.2 to 4) on receiving ₹2,51,000/- from Sh.Parveen Arora. The question that arises for determination is whether this receipt executed by Sh.F.C.Mehra constitutes an agreement to sell entered into by him in respect of property No.13-B, Rajendra Park, Pusa Road, New Delhi with the plaintiff, the specific performance of which can be enforced.

22. The plaintiff predicated his claim on the Receipt dated 31.12.1992 and six bank drafts prepared for ₹25,20,000/- i.e. three bank drafts in the name of Madan Lal Ashok Kumar Mehra (HUF), one in the name of Madan Lal Mehra, one in the name of Ashok Kumar Mehra and one in the name of Brij Lal Mehra for ₹4,20,000/- each.

23. We are in agreement with learned counsel for the appellant that a duty is cast upon the Court to examine the documents and not to go by its title. Merely because the agreement has been styled as ‘Receipt’ is not sufficient to reach at the conclusion that agreement to sell was not entered into. Legal position in this regard was clarified in AIR 1991 Delhi 315 M/s. Nanak Builders and Investors Pvt. Ltd. vs. Vinod Kumar Alag while making the following observation :-

“Mere heading or title of a document cannot deprive the document of its real nature. It is the substance which has to be seen and not the form. Where the document acknowledging the receipt of earnest money towards the side of plot of land contains all the essential and basic ingredients required for an agreement to sell the same is signed by both the vendor and vendee and is also witnessed by an attesting witness and it does not contain any mention that a formal agreement to sale will be executed, the fact that the vendee parts with a substantial amount in favour of the vendor shows that the parties have reached a consensus on the various terms of the arrangement between them meaning thereby that a contract has been arrived at, and, merely because the document is titled as a receipt, it does not render the document as to mere receipt. The document is a contract which is capable of being specifically enforced.”

24. The Apex Court in AIR 1976 SC 640 Commissioner of Income Tax, Punjab, Haryana, J&K, H.P. and Union Territory of Chandigarh vs. Panipat Woollen and General Mills Co. LTd., laid down in no uncertain terms that *“It is well settled that the Court in order to construe an agreement has to look to the substance or the essence of it rather than to its form. A party cannot escape the consequences of law merely by describing an agreement in a particular form though in essence and in substance it may be a different transaction.”*

25. It would be apposite to refer (1990) 2 SCR 350 Mayawanti vs. Kaushalya Devi wherein it was observed as under :-

“In a case of specific performance it is settled law, and indeed it cannot be doubted, that the jurisdiction to order specific performance of a contract is based on the existence of a valid and enforceable contract. The Law of Contract is based on the ideal of freedom of contract and

it provides the limiting principles without which the parties are free to make their own contracts. Where a valid and enforceable contract has not been made, the court will not make a contract for them. Specific performance will not be ordered if the contract itself suffers from some defect which makes the contract invalid or unenforceable.

26. In the light of the aforesaid legal principles, now we examine the 'Receipt' dated 31.12.1992 to find out whether it constitute an agreement to sell or is merely acknowledgment of the payment received which was to be followed by the agreement to sell that never came into existence.

27. Admittedly the 'Receipt' is in the hand of Late Sh.F.C.Mehra duly signed by him and two witnesses. It may be true that a receipt executed only by the seller and not by the buyer, having all features of an agreement to sell, can be proved to be an agreement to sell for the reason a writing by one party can be proved to be orally accepted by the other. But, as is to be noted and as we have already discussed, this very document mentions that ₹12,50,000/- will be paid by the purchaser at the time of signing the 'agreement to sell' and '37-I'. And thus, it can safely be said that even Sh.F.C.Mehra contemplated a proper agreement to sell being executed and the obvious reason which emerges is that he knew that it were defendants No.1 to 4 who had to join in the sale. Even if half property was HUF property, if the sale thereof was not for necessity, all coparceners have to join in the sale.

28. Since we are concurring with the view taken by the learned Single Judge, we have briefly reflected herein above to

discharge our duty as an Appellate Court to re-look at the evidence and the pleadings for the reason, being a first appeal, apart from errors of law, even the errors of fact can be corrected.

29. Any amount lying in deposit in this Court shall be returned to the appellant.

30. No costs.

PRATIBHA RANI, J.

PRADEEP NANDRAJOG, J.

FEBRUARY 28, 2012

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