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* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment Pronounced on: May 01, 2012

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RFA(OS) 75/2008

SNEH LATA GULLIYA Appellant
Represented by: Mr.Abhinav Vashisht, Sr.Advocate
instructed by Mr.Saurabh Chauhan,
Advocate.

versus

R.K. GUPTA & ORS. Respondents
Represented by: Mr.Vijay Gupta with Ms.Geeta Goel
and Mr.Chetan Swarup, Advocates.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

PRADEEP NANDRAJOG, J. (Oral)

C.M.No. _____/2012

1. An application has been filed in Court today by Sh.Vijay Gupta Advocate, calling upon us to recuse from the matter.
2. The application is taken on record.
3. The registry is directed to number the application.
4. Heard learned counsel for the applicant.
5. The application seeking recusal, in paragraph 1 states that since certain developments have taken place during the listing of the case before DB-IV i.e. the present Division Bench, the

respondents are making a prayer for us to recuse.

6. Now, it is stated in paragraph 1 that '*certain developments have taken place during the listing*' of the case before this Court.

7. If we understand the sentence to mean that there is contrivance, in the appeal being listed before Division Bench-IV, we would highlight that the roster allocation requires all Regular First Appeals against decisions by learned Single Judges on the original side of this Court to be heard by the present Division Bench and the roster has been notified by the Hon'ble Acting Chief Justice, and therefore we see no scope for there being any developments which have resulted in the listing of the appeal before this Bench.

8. If the expression intends to convey that during listening i.e. hearing of the appeal, certain development have taken place, we would only record that what those 'certain developments' are, have not been highlighted.

9. Making an attempt to highlight the 'certain developments', it is pleaded in paragraph 2 of the application that when the matter was taken up for hearing on April 26, 2012, counsel for the appellant 'may certain suggestions', which expression we understand to convey 'made certain suggestions' for the consideration of the Court and the respondents for a possible settlement of the matter, in the same paragraph it is stated that the Court was favourably inclined to the suggestions made and deferred hearing for April 30, 2012.

10. In paragraph 3 of the application it is stated that, on said date, counsel for the respondents made certain counter-

proposals which were not acceptable to the appellant nor did they appeal to the Bench and thus no settlement was possible.

11. In paragraph 4 it is stated that in view of the atmosphere created by the aforesaid developments, we should recuse from the matter for the reason the applicant apprehends that this Bench would not give an open and unbiased decision.

12. Let us put the record straight.

13. The appeal is listed for final hearing in the category of 'Regular Matters'. It reached for hearing on April 26, 2012 in the forenoon session. As learned senior counsel for the appellant opened arguments, it was orally observed by us that, prima facie, the weight of evidence led during the trial was against the appellant and that the view taken by the learned Single Judge was correct. It was observed by us, that prima facie, the relevant evidence and circumstances had been well-weighed by the learned Single Judge and it appeared to be a case where the appellant had not much to argue; all observations of the kind which are the result of an interactive dialogue when counsel argued and the judges received arguments. The dialogue was plainly favourable to the respondents.

14. After the lunch recess, Sh.Abhinav Vasisht, learned senior counsel for the appellant fairly stated that during the lunch recess he had spoken to the appellant and made her agree not to press the appeal. Learned counsel stated that in respect to the suit property, in respect whereof appellant had sought a decree for specific performance, it was under the ownership of the appellant who had agreed to sell the same to the respondents and after receiving the entire sale consideration had executed an

agreement to sell and a power of attorney in their favour, and this would mean that their possession would be protected by Section 53(A) of the Transfer of Property Act. Learned counsel stated that the respondents had yet to acquire a registered title in their favour pertaining to the property in question. Learned senior counsel made an offer that not only would the appellant not press the appeal, but would take two further steps in favour of the respondents. Firstly, the appellant would execute a sale deed in favour of the respondents with respect to the agreement to sell under which the appellant had put respondents in possession of the suit property, in respect whereof, the appellant was relying upon a receipt evidencing a re-conveyance agreement by the respondents to sell back the property to the appellant. The second concession which the appellant offered to make was, was in respect of the house tax which the appellant had been paying with respect to the subject property. The concession was that the respondents may take the benefit of the house tax paid. Learned counsel for the appellant stated that the reciprocal concession appellant sought from the respondents was: (i) not to press the criminal contempt against the appellant with respect to the receipt relied upon by the appellant, which has been prima facie opined to be a document not signed by the respondents, as per the impugned decision; and (ii) the respondents agreeing that the finding returned by the learned Single Judge that the document is a fabricated document be set aside.

15. As any other logical and reasonable person would react, this Court did state to the respondents to favourably consider the suggestions, which ex-facie are worthy of being

considered. This Court, did not, as pleaded in paragraph 2 of the application show any favourable inclination by agreeing with the suggestions made by the appellant. We clarify, the Court did orally state to the respondents that the suggestions were worthy of being favourably considered; as indeed there were.

16. The matter was retained on board. No order was penned. It was agreed between the parties that the matter would be taken on April 30, 2012 so that the respondents have enough time to consider and respond.

17. On April 30, 2012 i.e. yesterday, the respondents stated through their counsel that they were prepared to accept the suggestions made by the appellant, save and except to agree for the observations in the impugned judgment pertaining to the receipt relied upon by the appellant being a fabricated document being set aside. Learned counsel stated that the respondents were ready to make a statement that they would not press the criminal contempt action against the appellant and would not be initiating any criminal proceedings.

18. Having conceded to a settlement by walking that far, it was certainly suggested by us that the stand of the respondents was of allowing the elephant to pass but not letting the tail go by. We had indicated to the respondents that the impugned finding certainly affects the honour and reputation of the appellant and in view of the settlement proposal of the respondents, they would gain nothing by having the said finding on the record. Requiring the respondents to consider the settlement offer made by the appellant keeping in view that the respondents had yielded much, in fact virtually everything, it would be futile to quibble over

pennies. The matter was retained on board for the response today and while so doing, we had even brought to the notice of learned counsel the opinion of the Constitution Bench reported as A.I.R. 2005 SC 2199 Iqbal Singh Marwah & Anr. vs. Meenakshi Marwah that forgeries of documents pertaining to documents not custodia legis and custodia legis have different consequences; the latter being actionable in an action under Section 340 Cr.P.C and the former requiring a criminal complaint to be filed by the aggrieved party.

19. It is unfortunate that the instant application has been filed in the aforesaid backdrop.

20. As we understand, a judge should recuse from a matter if the judge has; (i) a pecuniary interest in the subject matter; (ii) a personal knowledge about the subject matter and; (iii) there is likelihood of bias.

21. We highlight that the instant application seeks recusal only on the third ground i.e. bias.

22. What would be the bias? None has been brought out.

23. In paragraph 4 of the application it is stated that in view of the atmosphere that has developed in this case, the respondents feel that this Bench would not be of an open and an unbiased mind.

24. We presume that the atmosphere referred to in paragraph 4, is the settlement proposals which were discussed on April 26, 2012 and April 30, 2012.

25. We just do not understand as to in what manner the said settlement proposals which were discussed would result in an atmosphere being created wherefrom a litigating party would

have a fair and a reasonable apprehension in its mind that the Court would not have an open and an unbiased mind.

26. Forum shopping has to be brought down with heavy hands. An attempt to brow-beat the judges has to be brought down with a heavy hand. We think that the application is to brow-beat the Bench so that the matter is not heard.

27. The application is dismissed, but we refrain from imposing any costs, for the reason applicant No.1 happens to be the brother of the lawyer who has filed the application and it is regretted that a lawyer of this Court who is supposed to be an officer of the Court has given ill-advice to his brother; and since the counsel is a senior member of the bar whom we respected as our senior when we were junior members of the bar, we bring the curtains down by dismissing the application and proceeding to hear arguments in Court, and if the arguments conclude today itself, to proceed to judgment.

(PRADEEP NANDRAJOG)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

MAY 01, 2012

RFA (OS) No.75/2008

1. The appellant (plaintiff) and the respondents (defendants) litigated with respect to Ex.PW-1/1, dated January 26, 1996.

2. Respondent No.1 is the husband of respondent No.2 and is

the Karta of respondent No.3 - HUF.

3. Ex.PW-1/1, though recorded as a receipt, has all the features of an Agreement to Sell. It purports to record that the respondents have agreed to sell Flat No.S-2, R-8, Nehru Enclave, Kalkaji, New Delhi to the appellant for a sale consideration of ₹22 lakhs. It records the respondents having received, in cash, ₹3 lakhs. It records that the balance sale consideration in sum of ₹19 lakhs shall be paid within eight months when possession would be simultaneously handed over to the appellant.

4. The flat in question i.e. S-2 at Plot No.R-8, Nehru Enclave, Kalkaji, New Delhi, admittedly, was constructed by the appellant and after having received ₹8.25 lakhs from the respondents, in various installments, recording the receipt of the sum of ₹8.25 lakhs being the total sale consideration, in the month of September, 1991, the appellant executed Ex.PW-1/X-1 to Ex.PW-1/X-5 i.e. Agreement to Sell, Power of Attorney, Will etc. - the usual sale documents being executed in the city of Delhi in the year 1991 to transfer title in the flat in question to the respondents.

5. No sale deed was executed by the appellant. The respondents never sought any to be executed. Something happened between the appellant and the respondents. Relations soured. In the year 1994, the respondents filed police complaints Ex.PW-1/X-7 to Ex.PW-1/X-14 against the appellant.

6. The same year i.e. 1994, the appellant instituted a suit Ex.PW-1/X-6 praying for a decree of permanent injunction against the respondents from selling, disposing of, transferring or dealing with the flat in question or acting under the power of attorney

executed by the appellant in their favour. The suit was dismissed in default on November 10, 1998 and no steps have admittedly been taken to have the suit revived.

7. It is in the aforesaid backdrop of the admitted facts that the instant suit seeking decree for specific performance of Ex.PW-1/1 was filed by the appellant on March 29, 1997.

8. Ex.PW-1/1 bears the date January 26, 1996 of it being executed.

9. The respondents had sensed that the suit would be instituted and thus entered appearance on the first day itself. They accepted the summons in the suit and filed a written statement. Execution of Ex.PW-1/1 was denied. Receipt of ₹3 lakhs was denied.

10. It is apparent that the principle issue settled for decision was whether Ex.PW-1/1 was executed by the respondents after receiving ₹3 lakhs towards earnest money cum part sale consideration.

11. The appellant requested the learned Single Judge that Ex.PW-1/1 be sent for forensic examination, in that, a handwriting expert for expert opinion. The request was accepted by the Court and Ex.PW-1/1 was sent to the Scientific Officer-cum-Chief Examiner, CFSL, Delhi.

12. The report received, which we find has not been exhibited at the trial, but was treated as a proved document, opined that the signatures of respondent No.1 were not his. Pertaining to signatures of respondent No.2, the wife of respondent No.1, the report was that in the absence of a sample signature pertaining to the year 1996, no conclusive opinion could be rendered.

13. Shri V.C.Mishra, PW-2, a handwriting expert examined by the appellant proved a report Ex.PW-2/A, as per which it was opined that the purported signatures of Shri R.K.Gupta were not his, but those of Sunita Gupta i.e. respondent No.2, were hers.

14. Appellant made an attempt to obtain the signatures of Sunita Gupta as of the year 1996, as recorded in the order dated September 21, 1999 passed in the suit. Counsel for respondent No.2, as recorded in the said order, informed the Court that no signatures of respondent No.2 as of the year 1996 were available.

15. Parties examined themselves as their witnesses at the trial and suffice would it be to state each stood by the version projected in the pleadings.

16. Vide impugned judgment and decree dated September 22, 2008, the learned Single Judge has opined that the weight of evidence does not establish Ex.PW-1/1 being executed by the respondents and thus has concluded by stating that the document is a forged and fabricated document.

17. Briefly summarized, the reasoning of the learned Single Judge is:-

(i) Whereas, when appellant executed the documents Ex.PW-1/X-1 to Ex.PW-1/X-5 in September, 1991 it was clearly recorded that sale consideration in sum of ₹8.25 lakhs has been received by cheque, but the receipt Ex.PW-1/1, records that part sale consideration has been paid in cash. Therefrom, the learned Single Judge has inferred a course of conduct which normally would not have been followed by the parties by highlighting that their past conduct evidences making payment by cheque.

(ii) Appellant's claim of having withdrawn ₹5 lakhs from the

bank a day prior to January 26, 1996 remained merely a claim. We note that no bank record has been proved to establish said fact.

(iii) The receipt Ex.PW-1/1 dated January 26, 1996 was to be considered with reference to it being executed in light of the fact that relations between the parties were sour, evidenced by the police complaints made by the respondents against the appellant in the year 1994 i.e. Ex.PW-1/X-7 to Ex.PW-1/X-14 and the appellant having filed a suit Ex.PW-1/X-6 against the respondents. Therefrom, the learned Single Judge has inferred that it would be difficult to believe that the parties had executed a document pertaining to sale which dissolves and resolves the dispute between the parties in respect whereof complaints were made to the police and a suit had been filed and was pending, without drawing up a proper document of settlement.

(iv) The birth of Ex.PW-1/1 being as of January 26, 1996, it would be difficult to believe that the same would not have formed the basis to inform the Court which was seized of the plaint Ex.PW-1/X-6 since 1994, to have the suit got disposed of as compromised. The learned Single Judge has highlighted that the suit lingered on till it was permitted to be dismissed in default on November 10, 1998.

(v) The opinion of the Senior Scientific Examiner as also the opinion of the Handwriting Expert examined by the appellant, both of whom concurred, that the signatures of respondent No.1 on the receipt Ex.PW-1/1 was not his, was an evidence to establish the non-execution of the receipt, notwithstanding the fact that the Forensic Examiner gave inconclusive opinion qua the

signatures of Sunita Gupta on the receipt and handwriting expert examined by the appellant gave a conclusive negative opinion against the stand taken by the respondents.

(vi) No attempt being made by the appellant to examine Shri Brahm Dutt and Shri Deepak Sawhney, the two purported witnesses to the receipt Ex.PW-1/1, requiring an adverse inference to be drawn against the appellant.

18. Questioning the reasoning of the learned Single Judge Shri Abhinav Vashisth, learned Senior Counsel for the appellant urges that the learned Single Judge has ignored certain admissions made by respondent No.2 during cross-examination.

19. It is urged that in the written statement filed, the respondents asserted that the value of the flat was ₹50 lakhs and therefrom pleaded that why would they sell it for ₹22 lakhs to bring home the point that inadequacy of the consideration was a reflection of the document being a forged document. It was highlighted that during cross-examination, respondent No.1 and respondent No.2 admitted that the value of the subject flat could possibly be between ₹21 lakhs to ₹22 lakhs. It is urged that when respondent No.2 was cross-examined on November 22, 2007, to the question regarding the availability of her signatures in various documents contemporaneous with the period of time when Ex.PW-1/1 was executed, she responded that her lawyer did not inform her and had she been informed, she would have made available her admitted signatures as of the contemporaneous time. Learned counsel urges, that in paragraph 29 of the impugned decision, the learned Single Judge has incorrectly opined that the Power of Attorney dated November 05, 1996

marked Ex.DX-1 was an immaterial document. With reference to the same, learned senior counsel urges that Ex.DX-1 shows the desire of the respondents to sell the flat in question, inasmuch as, the person in whose favour the Power of Attorney is executed i.e. Mr.N.K.Nagpal, has been authorized to sell the subject flat.

20. With reference to the admission made by the respondents that as of the year 1996, the probable price of the flat was ₹21 lakhs or ₹22 lakhs, learned Senior Counsel urges by posing a question: 'Why should the appellant forge a document taking on a liability to pay the contemporaneous price for the flat in question?' The answer to the question provided by the learned counsel is: 'If somebody was to forge a document, it would obviously be to gain a benefit i.e. get a property at a price much lower than the market value, if the forgery pertains to an immovable property.'

21. As per The Indian Evidence Act, 1872, a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

22. Thus, where the evidence led is of a kind that a reasonable person, reasonably reading the evidence, would come to a reasonable conclusion that a fact exists, it could safely be said that a fact is proved.

23. The reasons given by the learned Single Judge are certainly germane. It is certainly relevant that when the appellant entered into an Agreement to Sell with the respondents to sell the flat in question to the respondents, she took the sale consideration by

cheque and thereafter executed Ex.PW-1/X-1 to Ex.PW-1/X-5. That she would be paying money in cash, when the flat is being re-conveyed to her, would certainly be a relevant fact if the opposite party denies the execution of a written document relied upon by the appellant. A reasonable person would certainly consider the past practice while drawing conclusions.

24. Further, in light of the police complaints Ex.PW-1/X-7 to Ex.PW-1/X-14, it would certainly be relevant that if a civil dispute was settled, the parties would be more formal in giving effect to the settlement. This assumes importance with reference to the fact that the plaint Ex.PW-1/X-6 was filed in the year 1994. The Civil Suit was pending when the date January 26, 1996 arrived. Any reasonable person would expect that a formal document is drawn up and filed before the learned Civil Judge, bringing to the attention of the Court that the dispute has dissolved, with the parties arriving at a settlement. That the suit was not withdrawn and was proceeded on, till it suffered its natural death on November 10, 1998, is again a fact of relevance. The trinity of the aforesaid three facts, the fact of the CFSL report as also the handwriting expert examination of the appellant, which two opinions conclusively opine that signatures on the receipt were not those of respondent No.1 would lend weight to the aforesaid three circumstances and lead towards an inference to be drawn against the appellant.

25. It may be true that respondent No.2 had attempted to withhold and prevent bringing on record her admitted signatures contemporaneous to the period of time when Ex.PW-1/1 was executed, but that would not mean that onus would shift and the

weight in the scale of evidence would give birth to a presumption in favour of the appellant, who has felt shy of not examining Shri Brahm Dutt and Shri Deepak Sawhney, the two purported witnesses to the receipt.

26. The submission of learned Senior Counsel for the appellant that immediately when the suit was instituted, the respondents filed a criminal contempt petition in which it was pleaded that Shri Brahm Dutt and Shri Deepak Sawhney have connived with the appellant to forge the document, which criminal contempt petition was kept on hold by the learned Judge to await the decision in the suit, acted as a deterrent for the said two persons to step into the witness box and depose, notwithstanding they being the neighbours of the appellant, is noted and rejected by us as not worthy of much credence. Brahm Dutt and Deepak Sawhney could have come clean if they were cited as witnesses to the document by deposing on oath before a competent Court of Law, while supporting or denying they having witnessed the execution of Ex.PW-1/1.

27. We agree with the reasoning of the learned Single Judge that the weight of evidence leans in favour of the finding being returned that the appellant has not been able to prove the due execution of Ex.PW-1/1. But that does not necessarily mean that it would be a case of a conclusive proof of the document being forged. It happens that a party is not able to lead satisfactory evidence and thus not being able to discharge the burden of proof.

28. Highlighting, that it is a case where even Sunita Gupta i.e. respondent No.2 has prevented to bring on record her

contemporaneous signatures, as were executed by her in normal course of business, but therefrom it not being possible to concur with the appellant that the weight of evidence leans in her favour, we dismiss the appeal by holding that the appellant has failed to establish due execution of Ex.PW-1/1 and simultaneously, clarify that the finding has been arrived upon preponderance of probabilities at a civil trial with respect to a fact being proved.

29. The appeal is dismissed.

30. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

MAY 01, 2012
KA/dn