

Extension Part-1, New Delhi – 110049 and he had agreed to sell the said property in favour of the plaintiff for a total sale consideration of Rs. 80 lakhs. It is also the case of the plaintiff that he had paid an amount of Rs. 45 lakhs as an advance (bayana) to defendant No. 1 vide three cheques bearing No. 102002 dated 20.9.2007 for Rs. 15,00,000/-, 504187 dated 20.09.2007 for Rs. 5,00,000/- and 504190 dated 3.10.2007 for Rs. 25,00,000/- all drawn on Central Bank of India, Khan Market, New Delhi and bayana receipt dated 16.9.2007 was duly executed by defendant No. 1 at the time of receipt of the said three cheques. It is also the case of the plaintiff that possession of the basement and first floor of the said property was handed over by defendant No. 1 to the plaintiff at the time of the receipt of the said advance amount of Rs. 45 lakhs and it was also agreed by defendant No. 1 that possession of the ground floor and second floor would be delivered to the plaintiff as soon as the tenant who are occupying the same would vacate it. It is also the case of the plaintiff that possession of the ground floor of the said property was handed over to the plaintiff by the

tenant pursuant to the order dated 2.9.2008 passed by this Court in CS(OS) No. 1910/2006. So far as possession of the second floor of the suit property was concerned, as per the plaintiff the same was still in the possession of the tenant. It is also the case of the plaintiff that defendant No. 1 had further sold the said property in favour of defendant No. 2 for a total sale consideration of Rs. 1 crore and on receipt of the said amount, the defendant No. 1 also executed a sale deed in favour of defendant No. 2. After having come to know about the said illegal sale by defendant No. 1 in favour of defendant No. 2, the plaintiff made a complaint to the Commissioner of Police and concerned SHO on 22nd August, 2008. Based on these averments the plaintiff has claimed grant of decree for the specific performance of the contract against defendant No. 1 for the transfer of the said property bearing No.N-22, South Extension Part-1, New Delhi – 110049 in favour of the plaintiff. The plaintiff has also claimed a decree of declaration to declare the sale deed executed by defendant No. 1 in favour of defendant No. 2 as null and void.

3. Defendant No. 1 had earlier been appearing in the matter and in fact has also filed his written statement but later on stopped appearing and vide orders dated 21.12.2011, the defendant No. 1 was proceeded ex parte. So far as defendant No. 2 is concerned, the plaintiff had arrived at a settlement with him and pursuant to the settlement the plaintiff had delivered the peaceful and vacant possession of the said property under his occupation in favour of defendant No. 2. Based on the said settlement, the plaintiff sought deletion of name of defendant No. 2 from the array of parties in the present case and vide orders dated 21.12.2011, the same was allowed by this Court. The relief now sought by the plaintiff is for the recovery of the said amount of Rs. 45 lakhs, which was advanced by the plaintiff to the defendant No. 1 at the time of execution of bayana receipt dated 16.9.2007. As due to the sale of the said property by defendant No. 1 in favour of defendant No. 2 and subsequent handing over of the possession of the property under the occupation of the plaintiff to defendant No. 2, no decree for

specific performance of the contract in favour of the plaintiff can be granted anymore.

4. The plaintiff filed his *ex parte* evidence by way of affidavit and in the said evidence the plaintiff has duly proved on record the original bayana receipt dated 16.9.2007 as Exhibit PW 1/2. The plaintiff has further deposed that he has made the payment of Rs. 45 lakhs through cheques bearing No. 102002 dated 20.9.2007 for Rs. 15,00,000/-, 504187 dated 20.09.2007 for Rs. 5,00,000/- and 504190 dated 3.10.2007 for Rs. 25,00,000/- all drawn on Central Bank of India, Khan Market, New Delhi at the time of executing of bayana receipt dated 16.9.2007. The plaintiff has also deposed that possession of the basement and first floor of the suit property was handed over by defendant No. 1 to the plaintiff at the time of receiving advance of Rs. 45 lakhs and the possession of the ground floor was handed over by the tenant to the plaintiff by the order of the Court in suit bearing No. CS(OS) No. 1910/2006. The plaintiff has proved on record copy of the order dated 2.9.2008 as exhibit PW 1/3 to bring the said fact of receiving possession of the

ground floor premises from the tenant. The plaintiff has also proved complaint dated 22.8.2008 as exhibit PW 1/4 informing the police about the said illegal sale of the property by defendant No. 1 in favour of defendant No. 2. The plaintiff has further proved the memorandum of understanding dated 14.5.2010 as exhibit PW 1/6 to prove the settlement arrived at between the plaintiff and defendant No. 2. The plaintiff has also deposed that the defendant No. 1 has not refunded back the said amount of Rs. 45 lakhs even despite defendant No. 1 having sold the said property in favour of defendant No. 2. The plaintiff has also deposed to claim interest on the said amount of Rs. 45 lakhs @ 18% p.a. from 16.9.2007 till the date of actual payment. The said testimony of the plaintiff remained unchallenged and unrebutted. In the written statement filed by defendant No. 1, defendant No. 1 has not denied the execution of bayana receipt dated 16.9.2007. He has also not denied the receipt of the said amount of Rs. 45 lakhs through the said cheques issued by the plaintiff. Defendant No. 1 in the written statement has also not denied the fact of the said sale of the property by him in favour

of defendant No. 2. Once defendant No. 1 had failed to honour the said agreement/bayana receipt dated 16.9.2007 through which he had agreed to sell the said property to the plaintiff for a total sale consideration of Rs. 80 lakhs and had received an amount of Rs. 45 lakhs towards advance amount by way of three separate cheques and also considering the fact that defendant No. 1 had delivered the possession of the basement and first floor of the said property in favour of the plaintiff, the plaintiff is certainly entitled to recover the said amount of Rs. 45 lakhs from defendant No. 1. As already stated above, the plaintiff is not claiming the grant of decree for specific performance and rightly so when the plaintiff has already delivered the possession of the premises under his occupation in favour of defendant No. 2 in whose favour defendant No. 1 had sold the property by executing a sale deed, therefore, the only relief which can be granted in favour of the plaintiff is recovery of the said amount of Rs. 45 lakhs. Defendant No. 1 has not come forward to contest the said case and in the written statement filed by defendant No. 1 he has not denied the factum of execution of bayana receipt

and also the receipt of said amount of Rs. 45 lakhs and with this unequivocal admission on the part of defendant No. 1, the plaintiff becomes entitled for the recovery of the said amount from defendant No. 1. The suit of the plaintiff for the recovery of Rs. 45 lakhs based on the ex parte evidence adduced by the plaintiff, which remained unchallenged and unrebutted is accordingly decreed. A decree for sum of Rs. 45 lakhs in favour of the plaintiff is passed against defendant No. 1. The plaintiff will also be entitled to claim interest @ 12% p.a. on the said amount of Rs 45 lacs from the date of filing of the suit till realization.

5. The decree sheet be drawn up accordingly.

KAILASH GAMBHIR, J

FEBRUARY 3, 2012

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