

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

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Date of decision: 24th January, 2013

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CS(OS) 86/2009

BABU RAM AGGARWAL & ANR.

..... Plaintiffs

Through: Ms. Swati Yadav for Mr. Sarabjit
Sharma, Adv.

versus

KRISHAN KUMAR BHATNAGAR & ORS.

..... Defendants

Through: None.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. The two plaintiffs seek a decree for specific performance against the defendants No.2,3&4, by directing the defendant No.2 to execute the Sale Deed of 1/3rd share in respect of property bearing No.C-23, Hauz Khas, New Delhi and by directing the defendants No.3&4 to execute the Sale Deeds of 1/6th share each, in favour of the plaintiffs.

2. The case set out in the plaint is:-

- (i). that Shri Shiv Prasad Bhatnagar father of the defendants No.1&2 and grandfather of defendants No.3&4 was the owner of property No.C-23, Hauz Khas, New Delhi;
- (ii). that Shri Shiv Prasad Bhatnagar died on 14th May, 1985 leaving a registered Will dated 19th January, 1978 whereunder the said

property was bequeathed in favour of the his three sons namely defendants No.1&2 and Shri Prem Nath Bhatnagar and the said property was also mutated in the records of the MCD vide letter dated 1st November,1990 in the names of the defendants No.1&2 and their brother Shri Prem Nath Bhatnagar;

- (iii). that the defendants No.1&2 and their brother Shri Prem Nath Bhatnagar entered into an Agreement of Construction dated 14th January, 1992 with M/s D.S. Associates for re-development of the said property and the re-developed property was then divided amongst the defendants No.1&2 and their brother Shri Prem Nath Bhatnagar as per the Family Settlement/Agreement dated 17th March, 1998;
- (iv). that under the aforesaid Family Settlement/Agreement dated 17th March, 1998 the defendants No.1&2 and their brother Shri Prem Nath Bhatnagar became co-owners to the extent of 1/3rd share each in respect of the complete dwelling unit at the rear side of the second floor and the roof of the total second floor of the said property together with proportionate undivided share in the land underneath the said property;
- (v). that Shri Prem Nath Bhatnagar died on 18th November, 2004 leaving defendants No.3&4 as his son and daughter as his only legal heirs;

- (vi). that vide Memorandum of Family Settlement dated 5th March, 2005 between the defendants No.3&4, they became owners of 1/6th share each in the 1/3rd share of their father Shri Prem Nath Bhatnagar in the aforesaid second floor flat;
- (vii). that the plaintiff No.1 in November, 2006 approached the defendant No.1 for purchase of the aforesaid second floor flat and the defendant No.1 on 2nd December, 2006 informed the plaintiff No.1 that he had obtained the consent of the defendants No.2 to 4 by communicating with them on telephone to sell off the said second floor flat with terrace thereon for a total consideration amount of Rs.48 lacs and that they had also authorized the defendant No.1 to negotiate and finalize the deal;
- (viii). that the plaintiff No.1 and the defendant No.1 entered into an Agreement to Sell dated 9th December, 2006; the defendant No.1 signed the Agreement on his behalf as well as on behalf of defendants No.2 to 4;
- (ix). the plaintiff No.1 in the second week of January, 2007 requested the defendant No.1 to obtain the formal consent of the defendants No.2 to 4 in writing; the son of the defendant No.1 Mr. Rahul Bhatnagar affirmed that he had already sent one email dated 12th December, 2006 to defendants No.3&4; he further affirmed that an email dated 10th January, 2007 for obtaining the consent of defendants No.3&4 was again sent; that through two emails dated 17th January, 2007 sent by

defendant No.3 to defendant No.1 and Mr. Rahul Bhatnagar, consent was given for sale of the property in suit; copy of the email dated 1st February, 2007 confirming the consent given by defendants No.3&4 was delivered by the defendants No.1 to the plaintiffs;

- (x). the defendant No.1 also confirmed that he had obtained the consent of defendant No.2 on telephone by making three phone calls in November 2006, for sale of the share of the defendant No.2 for Rs.16 lacs; copy of the bill of three telephone calls made was also given by the defendant No.1 to the plaintiff;
- (xi). that Clause No.6 of the Agreement to Sell dated 9th December, 2006 allowed the plaintiff No.1 to get the Sale Deed executed in favour of a nominee and exercising which right specific performance is claimed in favour of both the plaintiffs;
- (xii). that the defendants through defendant No.1 received a sum of Rs.5 lacs as earnest money and the balance of Rs.43 lacs was to be paid by the plaintiff No.1 when the vacant physical possession was to be delivered by the defendants to the plaintiff No.1;
- (xiii). that the defendant No.1 being authorized by the defendants No.2 to 4, accepted the balance sale consideration of Rs.43 lacs and executed a Sale Deed dated 3rd September, 2008 of his 1/3rd share in the said second floor flat; the defendant No.1 accepted

Rs.16 lacs on account of his share, Rs.16 lacs on account of share of defendant No.2 and Rs.8 lacs each on account of share of the defendants No.3&4;

(xiv). that the defendant No.1 handed over vacant physical possession of the second floor flat to the plaintiffs;

(xv). however the cheques given by the plaintiffs to the defendant No.1 in the names of defendants No.2 to 4 were not presented for encashment and the defendants No.2 to 4 also did not come forward to execute the Sale Deed;

(xvi). that upon the plaintiffs approaching the defendant No.1, he informed that he had couriered the cheques in the name of defendants No.2 to 4 to the defendants No.2 to 4 and also vide letter requested the defendants No.2 to 4 to come to Delhi and execute the Sale Deeds of their respective shares in favour of the plaintiffs; however the defendants No.2 to 4 had not complied;

3. Though the relief claimed in the suit is against the defendants No.2 to 4 only and who as per the plaint also were/are not residing at C-23, Hauz Khas, New Delhi but the plaintiffs, in the plaint and the memo of parties, qua the defendants No.2 to 4, made an endorsement "Service to be effected through Defendant No.1 C-23, Hauz Khas, New Delhi – 16".

4. Summons of the suit and notice of the application for interim relief were issued to the defendants on 16th January, 2009 and vide *ex parte* order

of the said date, the defendants were restrained from creating any third party interest in respect of the property. The plaintiffs having, in the plaint and the memo of parties, given the address for service of the defendants No.2 to 4 as that of the defendant No.1 only, the summons were sent at the said address only. Compliance by the plaintiffs of Order 39 Rule 3 of the CPC was also at the said address only. Though the summons were issued for 12th March, 2009 but even prior thereto, the defendant No.1 made an application for direction to the plaintiffs to deposit Rs.32 lacs in favour of the defendants No.2 to 4 in the Court. Notice of the said application was issued and accepted by the plaintiffs on 13th February, 2009. The Advocate for the defendant No.1 on 13.02.2009 also, stated that the Agreement to Sell was entered into by the defendant No.1 on his own behalf as well as on behalf of defendants No.2 to 4 and took time to obtain instructions from defendants No.2 to 4 and to file *Vakalatnama* on behalf of defendants No.2 to 4 as well. However on the next date of hearing i.e. 25th February, 2009, the defendant No.1 withdrew the said application.

5. The report on the summons sent to the defendants No.2 to 4 being that they had ‘shifted’ from the aforesaid address or they were ‘out of station’, the plaintiffs on 13th November, 2009 stated that the only address available with the plaintiffs of the defendants No.2 to 4 was as given in the plaint/memo of parties, and on oral request of the counsel for the plaintiffs for substituted service, vide order dated 13th November, 2009 the defendants No.2 to 4 were ordered to be served through publication in the newspaper ‘The Statesman’ “having circulation in the locality of the defendants” and by affixation at the last known address of the said defendants namely at C-23,

Hauz Khas, New Delhi. Since none appeared on their behalf, they were vide order dated 23rd March, 2010 proceeded against *ex parte*. Though in some of the earlier orders the presence of the counsel for the defendant No.1 had also been noted qua defendant No.2, but the said counsel on 23rd March, 2010 clarified that she had entered appearance on behalf of defendant No.1 only. It was further clarified that since no relief had been claimed against the defendant No.1, no written statement was required to be filed. The plaintiffs were accordingly ordered to lead their *ex parte* evidence and the earlier interim order was made absolute.

6. Though the counsel for the defendant No.1 had made the statement aforesaid, but continued to appear thereafter and affidavit verified on 21st March, 2011 by way of admission/denial was also filed by the defendant No.1, without being required to file such affidavit, admitting all the documents of the plaintiffs.

7. The plaintiffs filed the affidavit by way of examination-in-chief of the plaintiff No.1 and closed his *ex parte* evidence.

8. Part arguments of the counsel for the plaintiffs were heard on 14th January, 2013, when it was enquired from the counsel for the plaintiffs as to how the defendants No.2 to 4 against whom only the relief is claimed in this suit can be said to be properly served with the summons of the suit when the address for their service given by the plaintiffs is through the defendant No.1 only with whom the plaintiffs have no *lis* and who is rather supporting the case of the plaintiffs. The counsel for the plaintiffs argued that since the Agreement to Sell of which specific performance is claimed had been

executed by the defendants No.1 only, not only for himself but also on behalf of defendants No.2 to 4, the plaintiffs are justified in serving the defendants No.2 to 4 through the defendant No.1. It was further contended that the only address available to the plaintiffs of the defendant No.2 to 4 was through the defendant No.1. It was however put to the counsel for the plaintiffs on that date that the plaintiffs could have sought to serve at least the defendants No.3 &4 through email, address whereof was available to the plaintiffs. It was further put to the counsel for the plaintiffs that the plaintiffs could have asked the defendant No.1 also, who has throughout been appearing in the suit and supporting the plaintiffs, to furnish the address of the defendants No.2 to 4 who are his close relatives. It is also the case of plaintiffs and defendant No.1 that cheques in the names of defendants No.2 to 4 delivered by plaintiffs to defendant No.1 were sent / couriered by defendant No.1 to them. This would have been possible only if the address of defendants No.2 to 4 was known. The oral statement of the counsel for the plaintiffs while seeking order for substituted service, that the plaintiffs had no other address of the defendants No.2 to 4 available with them is thus found to be without any substance, as ways and means were available to the plaintiffs to know the address of the defendants No.2 to 4 and serve them at that address. Further hearing was adjourned on that date.

9. Though the matter has been listed nearly daily thereafter and owing to paucity of time could not be taken up, but the counsel for the plaintiffs on none of the said dates made any request for service of the defendants No.2 to 4 at their address. No such request is made today also. The counsel for the plaintiffs has been heard further.

10. Before the matter is discussed further, it may be mentioned that yet another affidavit verified on 21st March, 2012 has been filed by the defendant No.1 further affirming even the contents of the documents admitted by him in his earlier affidavit and also affirming the factum of having delivered copies of emails and telephone bills to the plaintiffs and giving his no objection to the suit being decreed.

11. There is admittedly no authority in writing of the defendants No.2 to 4 in favour of the defendant No.1 to execute the Agreement to Sell, specific performance whereof is claimed in this suit. The counsel for the plaintiffs was thus asked to satisfy this Court on this aspect. Attention of the counsel for the plaintiffs was also drawn to the Memorandum of Family Settlement/Agreement dated 17th March, 1998 between the defendants No.1&2 and their brother Shri Prem Nath Bhatnagar and on photocopy whereof Exhibit PW-1/4 has been put, and Clauses 5&6 whereof are as under:-

- “5. That neither of any party can have power to construct, sell, mortgage, Gift or transfer in any way the entire terrace of Second Floor and rear portion’s dwelling unit of C-23, Hauz Khas, New Delhi, without the written consent of the other parties.*
- 6. That if any of the above said deal is executed by any of the party with the written consent of the other parties relating to the entire terrace of Second Floor and the rear portion’s dwelling unit of Second Floor of property No.C-23, Hauz Khas, New Delhi, then the same shall be binding amongst the three parties mentioned above.”*

It was put to the counsel for plaintiffs, that as per the aforesaid agreement of the defendant No.1 with the defendant No.2 and the predecessor of the defendants No.3 and 4, the defendant No.1 was not authorized to transfer the said second floor flat without the written consent of the other parties. It is asked from the counsel for the plaintiffs, where is the said written consent.

12. The counsel for the plaintiffs, to show the consent of the defendant No.2 has invited attention to Exhibit PW-1/6, being the photocopy of a STD/ISD Detail of Telephone No.2460551 showing one call having been made to Jaipur on 13th November, 2006 and two calls on 16th November, 2006. The counsel for the plaintiffs has argued that in the said telecons, the defendant No.2 had given consent to the defendant No.1 to enter into the Agreement to Sell on his behalf.

13. The counsel for the plaintiffs has next invited attention to email dated 12th December, 2006, Exhibit PW-1/8 from Rahul, son of defendant No.1 to the defendant No.3, which is as under:-

“Dear Prashant,

hope all is fine at your end. As per our earlier discussions and mutual consent I’m going ahead with the sale proceedings of Raje Chacha’s portion and terraces for Rs.48 lakhs.

Pls confirm your and didi’s programme so that we can complete sale proceedings accordingly.

Did u speak to Mahinder Chacha?

give love to kids and blessing to Mona

love

Rahul”

14. It has been enquired from the counsel as to whether there is anything on record to show that the reference to “Raje Chacha’s portion” is reference to the father of the defendants No.3&4. There is nothing on record. It has further been put to the counsel for the plaintiffs that the said Email is of after the Agreement to Sell of 9th December, 2006 and whether there is any email of prior thereto. There is none.

15. The counsel for the plaintiffs has next referred to email dated 17th January, 2007 Exhibit PW-1/11 from defendant No.3 to the defendant No.1 and his son is as under:-

“Respected Kishan Chacha and Rahul Bhai,

Namastey,

Hope this mails finds you, resp chachi and bhabhi in best of health and spirits, and kids must also be busy in their routines.

I am receipt of your two mails below, and have noted its contents. My pre-occupation with new job and activities here prevented me from replying for long.

It is a welcome decision of resp. Kishan Chacha to sell the flat of raja chacha in order to help you tide over your financial liabilities. Its only in such times that family members can be of good help. As mentioned in your mail below and as also conveyed to you over phone, I had spoken

to resp. Mahender chacha about this decision of resp. Kishan Chacha to sell the flat He told me that you have already spoken to Sarita chachi about the same. I am sure by now he would have spoken to resp Kishan Chacha – and the elders in the family must have taken decisions taking into account the interests of resp raja chacha.

Efforts of resp. Kishan chacha and yourself in taking care of resp. raja chacha is quite ludable, as having seen the same done by Respected Papa & me for a long time and by Respected Didi before her marriage, i can appreciate it quite well.

I am sending the family agreement between myself and didi and am in the process of arranging the balance documents and shall send you the same in due course, for helping you in the process.

In the meantime, may I request you to let me and did know the break up of payments terms (how much money, when and how they shall be made), so that share of the sales proceeds.

Nothing more to pen, pls convey regards to elders and luv to young ones. We look forward to your visit to singapore, whenever convenient and possible for you all.

regards

Reena didi and Prashant.”

16. Email dated 1st February, 2007 Exhibit PW-1/12 from defendant No.3 to the defendant No.1 is as under:-

“Respected Chachaji,

Namastey

Apologise for not replying to you earlier as was extremely busy in the new office activities.

I can appreciate the urgency from your side, as I believe by now all the formalities must have been completed from your side, including submission of all the relevant documents by respected Mahender chacha.

Regarding the sale of flat, both myself and didi have already given the consent and have even send the family agreement, wherein it says about the share of assets. Pls do let us know in case anything needs to be done from our side.

As I do not have any power of attorney in India as of now, pls tell me procedure so that I can issue this power of attorney in your favor, so that you can transact on my behalf.

Regarding the MCD notice for bhikaji, I checked with respected did and she has requested in case you may send the same to Jijaji's residence in Jaipur.

We sincerely thank you for all your efforts and taking care of things on our behalf.

Thanking you and with regards to self and resp chachiji, rahul bhai, bhabhi and luv to kids.

yours respectfully,

prashant''

17. Email dated 1st October, 2007, again of the son of defendant No.1 to the defendants No.3&4 and on which Exhibit PW-1/9 has been put and which is as under:-

“Respected Sanjeev Jijaji, Reena Didi & Dear Prashant,

Which you all a very happy new year.

Hope all is fine at your end. Howzz weather at Newzeland, when r u planning to come to india howzz our little sukku and dear savy r doing???

prashant, pls note the breakup for raje chacha’s portion and front terrace, the evaluation for 2nd floor flat with back terrace is for approx Rs.38 to 40 lakhs and the front terrace evaluation is for Rs.8 to 10 lakhs, pls also note the aggarwal chemist from hauz Khas Market opposite Mandir is interested to Buy the entire Portion and already given us the token amount of Rs.5 lakhs, if you need to keep the front terrace its fine with us. We also have to pay 2% commission to the agent who is involved in this deal.

Mr. aggarwal has to take Bank Loan against above said property and Bank wants following Documents:-

- 1) Death certificate of Tauji & Taiji*
- 2) Family agreement between you & Reena did (as there is no will by Tauji).*
- 3) General power of Attorney from U, Reena Didi & Mohinder Chacha or you Reena Didi & Mohinder Chacha should be present at the time of finalising the Deal.*

give love to kids and blessing to Mona

Love

Rahul”

18. What falls for adjudication in the present case is whether on the basis of the aforesaid emails, the defendant No.1 can be said to be having the written consent of the defendants No.3 &4 to transfer or agree to transfer the aforesaid second floor flat.

19. However before discussing the contents of the emails it may be stated that as per Section 65B of the The Indian Evidence Act, 1872, for such emails to be proved, it has to be proved/established that the computer during the relevant period was in the lawful control of the person proving the email; that information was regularly fed into the computer in the ordinary course of the activities; that the computer was operating properly and the contents printed on paper are derived from the information fed into the computer in the ordinary course of activities and a certificate identifying the electronic record has to be proved. Most of the emails aforesaid are stated to be exchanged by the defendants No.3&4 with the son of the defendant No.1 who has however not been produced in evidence. The plaintiff No.1 in his affidavit by way of examination-in-chief has also not satisfied the aforesaid conditions of Section 65B of the Act. The emails on which reliance is placed to plead written consent of the defendants No.3&4 cannot thus be said to be proved.

20. However even if the said emails were to be held to be proved, in my view the same do not constitute written consent of the defendants No.3&4 to the defendant No.1 agreeing to transfer the share of the defendants No.3&4

in the second floor flat, within the meaning of the Memorandum of Family Settlement/Agreement dated 17th March, 1998 supra for the following reasons;

- (a). There is no email of prior to the date of Agreement to Sell.
- (b). There is no statement that the email address with which the said emails had been exchanged are that of the defendants No.3&4.
- (c). The defendant No.1 or his son with whom the emails are stated to have been exchanged by the defendants No.3&4 have not been examined as witnesses.
- (d). What is conveyed by the son of the defendant No.1 to the defendant No.3 in the email Exhibit PW-1/8 dated 12th December, 2006 is that he was going ahead with the sale when as aforesaid the Agreement to Sell had already been executed prior thereto.
- (e). There is no evidence as to who is Raje Chacha, referred to in the emails.
- (f). There is nothing to show that the e-mails purported to have been sent by the defendant No.1 or his son were delivered to the defendants No.3&4.
- (g). Even in the email dated 1st October,2007, what is purported to be conveyed to the defendant No.3 is that the Aggarwal Chemist from the Hauz Khas Market (plaintiff No.1) was

interested to buy and option was given to the defendant No.3 to keep the front terrace. The language thereof is indicative of nothing having been finally decided till then, when as aforesaid the Agreement of which specific performance is claimed is of a date prior thereto.

- (h). The email Exhibit PW-1/10 dated 17th January, 2007 purportedly from the defendant No.3 is only of forwarding the certain documents and does not confirm consent to sell. Email Exhibit PW-1/11 dated 17th January, 2007 again purportedly of the defendants No.3&4 shows that Raje Chacha is still alive. Reference to Raje Chacha thus cannot be to the father of the defendants No.3&4. Once that is so, the email Exhibit PW-1/8 dated 12th December, 2006 referring to the sale of Raje Chacha's portion cannot be with respect to the Second Floor flat aforesaid in which the defendants No.3&4 had a share. In this regard, it may be mentioned that admittedly the property bearing No.C-23, Hauz Khas, New Delhi has other flats also besides the second floor flat and which also belong to the family.
- (i). The email Exhibit PW-1/12 dated 1st February, 2007, purportedly from the defendant No.3 is also of consent to sell off Raje Chacha's share which as aforesaid cannot be a reference to the defendants No.3 or 4, or their deceased father. Further, by the said email defendant No.3 is asking for the

procedure so that he can issue Power of Attorney in favour of the defendant No.1 to enable the defendant No.1 to transact on his behalf; it means that till then there was no such Power of Attorney.

- (j). The defendant No.1 admittedly was never so authorized by the defendants No.3&4 in as much as he ultimately executed the Sale Deed of his share only of the second floor flat and not of the share of the defendants No.3 & 4.
- (k). Though as per Agreement dated 09.12.2006 advance of Rs.5 lacs was received on behalf of all defendants but was adjusted in sale consideration of defendant No.1 only; there is thus no consideration paid by plaintiffs to defendants No.2 to 4 as sought to be represented.
- (l). The hesitation of the plaintiffs and the defendant No.1 to serve the defendants No.2 to 4 at their addresses. The statement made by the counsel for the plaintiffs while seeking the order for substituted service of the defendants No.2 to 4 was obviously false in as much as it is the case of the plaintiffs that the defendant No.1 forwarded the cheques of consideration amount of the share of the defendants No.2 to 4 to the said defendants by courier; though the original courier receipt is not proved, but a photocopy of a courier dispatched by the defendant No.1 to the defendant No.3 at the address of Singapore is filed.

However no attempt was made by the plaintiffs or the defendant No.1 to serve the defendants No.2 to 4 at their known address.

(m). The eagerness of the defendant No.1 to help/assist the plaintiffs.

21. As far as defendant No.2 is concerned, according to the plaintiffs and defendant No.1 also, the consent is also verbal; while as per Memorandum / Settlement Agreement dated 17.03.1998, written consent was required.

22. From the entire conduct of the suit it thus appears that the present suit is a collusive suit between plaintiffs and the defendant No.1, intended to have the Sale Deed of the share of the second floor flat of the defendants No.2 to 4 executed in favour of the plaintiffs, without even the defendants No.2 to 4 coming to know of the same. It may be mentioned that once a decree for specific performance is passed, the plaintiffs shall be entitled to have the same executed by having a Sale Deed of the Share of the defendants No.2 to 4 in the second floor flat executed in their favour, and all without even the defendants No.2 to 4 coming to know of the same.

23. Not only has thus the plaintiffs chosen to not serve the defendants to the suit at their correct address but even on merits the plaintiffs are not found to have proved a case of the defendant No.1 having been authorized by the defendants No.2 to 4 to enter into an Agreement to Sell on their behalf with the plaintiffs or with any other person; accordingly no specific performance of such agreement against defendants No.2 to 4 can be ordered.

24. The suit is dismissed. The plaintiffs having taken up the time of the Court, are burdened with costs of Rs.20,000/- payable to the Delhi Legal Services Authority within four weeks of today. Decree Sheet be drawn up.

RAJIV SAHAI ENDLAW, J

JANUARY 24, 2013

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