IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: October 10, 2013
Decision on: November 7, 2013

CS (OS) 247 of 2004

RITNAND BALVED EDUCATION FOUNDATION..... Plaintiff

Through: Mr. Rajesh Yadav, Mr. Rajan Chawla & Ms. Ruchira V. Arora, Advocates

versus

PAUL NANDA & ORS. ..... Defendants

Through: Mr. T.K. Ganju, Senior Advocate with Mr. Vikas Dhawan & Mr. S.P. Das, Advocates

WITH

CS (OS) 1318 of 2004 & IA Nos. 11036 of 2007, 15251 of 2009, 2071 of 2011, 5356 of 2012

PAUL NANDA & ORS. ..... Plaintiff

Through: Mr. T.K. Ganju, Senior Advocate with Mr. Vikas Dhawan & Mr. S.P. Das, Advocates

versus

RITNAND BALVED EDUCATION FOUNDATION..... Defendant

Through: Mr. Rajesh Yadav, Mr. Rajan Chawla & Ms. Ruchira V. Arora, Advocates

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
07.11.2013

1. Both these suits arise out a common set of facts. They have been tried

together. CS (OS) No. 247 of 2004 has been filed by Ritnand Balved Education Foundation ('RBEF') against late Admiral S.M. Nanda for a permanent injunction, restraining the Defendant from dispossessing the Plaintiff from the property at B-104, Defence Colony, New Delhi (hereinafter the 'suit property') and from creating any third party interest or encumbering in any manner or alienating the suit property.

2. On 15th March 2004, while directing issuance of summons, an interim order was passed in IA No. 1635 of 2004 under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 ('CPC'), restraining Admiral Nanda from selling, alienating, parting with possession or creating third party interest in the suit property.

3. The averments in the plaint in CS (OS) No. 247 of 2004, as originally filed, stated that a registered perpetual lease deed dated 11th September 1959 had been executed by the Land and Development Officer ('L&DO') in respect of the suit property which was a plot of land ad measuring 361 sq. yds. Thereafter, Admiral Nanda raised construction on the ground floor, first floor, part of the second floor, garage, servant quarters etc. The Municipal Corporation of Delhi approved the use of land in front of the house to the extent of 10 sq. yds. by a letter dated 5th March 1963. A conveyance deed was executed by the L&DO in favour of Admiral Nanda on 8th June 1997 for conversion of the property from leasehold to freehold.

4. RBEF stated that it a society registered under the Societies and Registration Act, 1860 and the suit was being filed through its Secretary

General, Mr. Anand Chauhan, who was duly authorised to file the suit. The registered office of RBEF was at E-27, Defence Colony, New Delhi, which was situated next to the suit property. It was stated that Admiral Nanda had very good relations with Dr. Ashok K. Chauhan, the founder President of RBEF. Admiral Nanda had requested Dr. Chauhan to instruct his guards to take care of the suit property as it was lying vacant at that point in time. This was around four years prior to the filing of the suit. According to RBEF, sometime towards the end of 2002, it was approached by Admiral Nanda who expressed his willingness to sell the suit property to RBEF and give the sale proceeds to one of his sons, Mr. Paul Nanda. According to RBEF, negotiations thereafter took place between the parties. RBEF stated that initially Admiral Nanda demanded a sum of Rs. 2,50,00,000, whereas RBEF offered Rs. 2,20,00,000. According to RBEF, the sale consideration was mutually settled at Rs. 2,35,00,000 "in a meeting which was attended by the Defendant, his son Mr. Paul Nanda, Dr. Ashok K. Chauhan, Founder President of the Plaintiff Society and Mr. Arun Chauhan, a member of the Plaintiff Society, on 26.3.2003." According to RBEF, it was further agreed between the parties that RBEF would pay Admiral Nanda 10% of the total sale consideration, i.e., Rs. 23,50,000 as earnest money and that upon such payment, Admiral Nanda would handover the actual physical possession of the ground floor of the suit property to RBEF. It was further averred in the plaint that RBEF had a pay order ('PO') dated 29th March 2003 prepared favouring Admiral Nanda in the sum of Rs. 23,50,000. This was delivered to Admiral Nanda along with a covering letter dated 29th March 2003, enclosing a draft copy of the Agreement to Sell. It was stated that, on 31st March 2003, Mr. Paul Nanda thanked Mr. Arun Chauhan for sending the

PO and asked Mr. Arun Chauhan to let him know the documents that would be required for executing the Sale Deed. RBEF stated that Admiral Nanda promised to hand over the physical possession of the ground floor of the suit property to RBEF on 31st March 2003 on receipt of the PO and that the possession of the remaining portion would be handed over shortly thereafter upon removal of the goods of Admiral Nanda lying therein. RBEF claimed that, on 1st April 2003, Mr. Arun Chauhan, wrote a letter to Mr. Paul Nanda, setting out the list of documents required by RBEF. It was claimed that Mr. Paul Nanda delivered a photocopy of the Conveyance Deed and also assured that he would ensure payment of all the electricity, water and telephone dues up-to-date.

5. RBEF stated that, on 5th April 2003, it was informed by Admiral Nanda, for the first time, that the suit property had been tendered in the Court of the learned Additional Sessions Judge, Patiala House Courts, New Delhi as security in the case of "State v. Sanjeev Nanda." According to RBEF, Admiral Nanda claimed to have obtained legal advice to the effect that prior to executing the Sale Deed in respect of the suit property, Admiral Nanda was required to get the suit property released from the Court by substituting it with another property. Admiral Nanda stated that he had been advised not to encash the PO of Rs. 23,50,000. It is stated that Admiral Nanda handed over the documents regarding the tendering of the suit property in the aforementioned case to RBEF. It was claimed by RBEF that Admiral Nanda declined to encash the PO, stating that he did not want to be in contempt of Court. RBEF claimed to be in possession of an envelope in the handwriting

of Mr. Paul Nanda in which the PO was purportedly returned. It has been marked as Exhibit PW1/9.

6. RBEF claimed that subsequently another Agreement to Sell was prepared, in pursuance of which a sum of Rs. 1,00,000 was paid by RBEF to Admiral Nanda as earnest money by a cheque dated 14th April 2003. It was stated that the said cheque was returned by Admiral Nanda for fear of contempt of Court. Admiral Nanda also expressed his inability to sign even the said Agreement to Sell on the basis of some legal advice. RBEF claimed that at a meeting held at 4, Prithvi Raj Road, New Delhi, the parties had agreed that RBEF would pay Admiral Nanda Rs. 50,000 per month instead of a sum equivalent to 7% of the total sale consideration in 12 equal instalments, with each instalment working out at Rs. 1,37,100, since only the possession of the ground floor of the suit property had been given to RBEF. RBEF further averred that "the very next date, Mr. Paul Nanda informed on behalf of the Defendant that even the acceptance of Rs. 50,000 per month may amount to contempt of court." According to RBEF, a sum of Rs. 35,000 was paid to M/s Dynatron Services of Mr. Paul Nanda towards the electricity dues in respect of the suit property. In para 22 of the of the plaint, it is stated that RBEF had named the suit property as "AMITY-II" for its administration purposes; that it had installed furniture such as tables, chairs, office equipments, computers etc. in the suit property; that it was using the suit property as its office for holding conferences and seminars; that it had laid the extension telephone lines to the suit property from its main exchange at E-27, Defence Colony, New Delhi and that it was bearing the day-to-day expenses of maintaining the suit property. In para 23, it was

stated that RBEF has always been ready and willing to perform its part of contract, i.e. limited to arranging the sale consideration and purchasing the stamp papers of necessary denomination and that RBEF would have paid the total sale consideration, had the Defendant got the property released from the Court. However, on 28th January 2004, Mr. Paul Nanda visited the suit property and asked RBEF's employees to vacate it. Dr. Ashok K. Chauhan and Mr. Arun Chauhan met Admiral Nanda at 4, Prithvi Raj Road, New Delhi. According to RBEF, Admiral Nanda "with great persuasion agreed to fulfill his obligations and undertook to get the suit property released from the Court and register a sale deed in favour of the Plaintiff, as soon as possible." It was stated that on 2nd February 2004, Mr. Paul Nanda again came to the suit property and asked RBEF's employees to vacate it. It was claimed by RBEF that on 4th February 2004, Mr. Arun Chauhan received a phone call from a property dealer informing him that the suit property was up for sale and that there were other similar calls from other property dealers confirming the said fact. It was stated that another meeting took place between RBEF and Mr. Paul Nanda at 4, Prithvi Raj Road, New Delhi on 6th March 2004, when Admiral Nanda refused to get the suit property released from the Court and execute a sale deed. In the circumstances, the present suit was filed, seeking the reliefs, as first mentioned.

7. In the written statement filed on 27th April 2004, Admiral Nanda denied that there was any agreement to sell between the parties. It was contended at the outset that RBEF "has unlawfully and illegally grabbed and taken occupation of a substantial part of the ground floor of suit property." Further

it was stated that RBEF "is alleging to have been put in possession of the ground floor of the premises pursuant to an alleged oral agreement to sell, without having paid any amount". It was contended that the occupation by RBEF of a part of the ground floor of the premises was "unauthorized and illegal." RBEF had "no right, title or interest in the suit property." It was "admittedly neither a tenant nor a lessee and/or licensee nor admittedly had he come into possession of the premises under any written agreement to sell after having performed some part of his obligations under the alleged agreement to sell." RBEF was thus liable to be evicted from the said part of the suit property and was also liable to compensate Admiral Nanda towards *mesne* profits and other damages. Admiral Nanda stated that he was filing a separate suit against RBEF.

8. Admiral Nanda contended that since the property was offered as security in the criminal case arising out of First Information Report (FIR) No. 17 of 1999 and to the knowledge of RBEF there could be no specific performance of the purported agreement to sell. It was contended that RBEF's suit for permanent injunction was, therefore, barred under Sections 41(e) and (h) and 17 of the Specific Relief Act, 1963 ('SRA').

9. The case of Admiral Nanda was that RBEF's founder Dr. Anand K. Chauhan, who stayed in E-27 Defence Colony, which was across the suit property, had cordial relations with Admiral Nanda and, as a good neighbour, had offered to take care of the suit property during the absence of Admiral Nanda and his wife, both of whom would travel abroad for a few months every year. RBEF had plenty of security guards and offered to keep

a watch over the suit property and also offered to sort out the problems with the electricity bills. On account of cordial relations and mutual trust that had developed, Admiral Nanda permitted Dr. Ashok K. Chauhan to have personal meetings with visitors in a drawing room on the ground floor of the suit property. After visiting abroad, Admiral Nanda returned in July 2003. Although he stayed for sometime in the suit property, since he could not climb the stairs to the bedroom on the first floor, he decided to stay with his son, Mr. Paul Nanda at 4, Prithvi Raj Road, New Delhi.

10. The case of Admiral Nanda was that, although Dr. Ashok K. Chauhan had approached him several times in the year 2003 for sale of the suit property, Admiral Nanda had pointed that the suit property could not be sold since it had been offered as security in the criminal proceedings. Admiral Nanda was categorical that "at no point of time any agreement to sell either verbal or in writing, was entered into and/or agreed upon by the Defendant with the Plaintiff. No sale consideration was ever agreed nor was any amount offered and/or paid to the Defendant."

11. Admiral Nanda stated that in December 2003, the servant in the suit property informed him that Dr. Ashok K.Chauhan was still holding the meetings. Admiral Nanda, therefore, called upon Dr. Ashok K. Chauhan to stop holding such meetings. According to Admiral Nanda, Dr. Ashok K. Chauhan promised him that he would not hold such meetings. The same request was reiterated by Admiral Nanda in February 2004. When Dr. Ashok K. Chauhan insisted that the suit property may be sold to him,

Admiral Nanda declined, since it had been offered as security in the criminal proceedings.

12. In the circumstances, Admiral Nanda stated that he was surprised to receive a copy of the order dated 16th March 2004 in the present proceedings. Admiral Nanda stated that after the suit was filed and an interim order was passed, RBEF had "by way of creating false evidence and even in violation of the said status quo order, forcibly entered into the bedroom, kitchen on the ground floor by threatening the servants of the Defendant through use of force by the security staff which he had engaged."

13. It was denied in the written statement that another letter dated 29th March 2003, enclosing the PO of Rs. 23,50,000 was received by Admiral Nanda and was returned on 31st March 2003. It was denied that there was any cheque for Rs. 1,00,000 delivered to Admiral Nanda and that there was any further agreement to sell which Admiral Nanda declined to sign. It was denied that there was any agreement between the parties regarding payment of Rs. 1,37,100 per month or even the sum of Rs.50,000, as alleged by RBEF. It was reiterated that at all times, the suit property was maintained by Admiral Nanda and all electricity and water bills were paid by him from his own account. The averments regarding property dealers contacting RBEF were also denied.

14. Replication was filed on 17th August 2004, in which it was stated that RBEF had filed an application under Order VI Rule 17 CPC for amending the plaint, incorporating the relief for a decree of specific performance.

15. On 16th November 2004 Admiral Nanda, filed CS (OS) No. 1318 of 2004 against RBEF for possession of the suit property and *mesne* profits. Prayer (a) in para 32 was for recovery of possession of the suit property; prayer (b) for recovery of Rs. 12,00,000, being *mesne* profits and/or damages for wrongful use and occupation of the ground floor of the suit property and further period subsequent to the institution of the suit till delivery of possession upon inquiry under Order XX Rule 12 CPC together with interest @ 12% p.a. till realization and prayer (c) was for recovery of Rs. 2,00,000 for wrongful use of furniture and fixtures as described in Annexure-II to the plaint and for the subsequent period beyond the delivery of furniture and fittings, as may be determined by the Court together with interest @ 12% p.a.

16. Summons in the suit was issued on 23rd November 2004. While directing issuance of notice in IA Nos. 7824-25 of 2004 on the same date, the Court directed that RBEF should deposit Rs. 50,000 with the Registrar-General of this Court within thirty days and *mesne* profits with effect from March 2004.

17. Subsequently, on 27th September 2005, the Court allowed IA No. 5257 of 2004, permitting RBEF to amend the plaint in CS (OS) No. 247 of 2004 to enable it to seek the relief of specific performance, apart from the original relief of injunction. As regards the interim arrangement during the pendency of the suit, the following order was passed by the Court with the consent of the parties:

"i) The Plaintiff shall pay to the Defendant a sum of Rs. 1 lakh per month with effect from September, 2005 to be paid in advance by the 7th of each month.

ii) The amount deposited by the Plaintiff in Court in suit No. 1318/2004 be released to the defendant.

iii) The defendant shall not alienate, encumber or transfer the property in question or part with possession of the portion in his possession.

iv) The Plaintiff shall not also alienate, encumber or transfer the property in question or part with possession of the portion in his possession.

v) The ingress or egress of the defendant, his family members and servants to the first floor of the suit property, garage and servant quarters shall not be obstructed by plaintiff.

vi) Defendant will not interfere with the possession of the Plaintiff in respect of the ground floor of the property in question.

vii) In case Plaintiff ultimately succeeds in the suit, the amount paid to the defendant by the plaintiff will be adjusted against the amount payable by the Plaintiff in pursuance of the alleged oral agreement to sell.

viii) In case of Plaintiff failing in the present suit, the amount paid to the defendant will be liable to be adjusted against the claim of the defendant in Suit No. 1318 of 2004."

18. By the same order, the Court also framed the following issues:

"(i) Whether the defendant entered into an oral agreement to sell in favour of the plaintiff in respect of the suit property as alleged in the plaint? OPP

(ii) In case issue No.1 is decided in favour of plaintiff, whether the plaintiff is entitled to a decree for specific performance of the alleged agreement to sell? OPP

(iii) Relief."

19. In CS (OS) No. 1318 of 2004, the following issues were framed:

"i) Whether the defendant is entitled to retain possession of the suit property? OPD

ii) Whether the plaintiff is entitled to mesne profits/damages? If so, at what rate and for which period? OPP

iii) Whether the plaintiff is entitled to any interest on the claim for damages? If so, at what rate, on what amount and for which period? OPP

iv) Relief."

20. The two suits were interlinked and directed to be tried together. On behalf of RBEF, the witnesses named included Mr. Arun Chauhan. Dr. Ashok K. Chauhan was not examined. The affidavits dated 21st February 2006 of the following RBEF's witnesses were filed: Mr. Arun Chauhan (PW-1), Mr. Bachan Singh Nainwal (PW-6), Mr. S. Muraleedharan (PW-3), Mr. Pradeep Kumar (PW-5), Mr. Ashish Bindra (PW-2) and Lt. Col. R.C. Thaplial (PW-4). The said witnesses were examined between 5th April 2006 and 8th May 2006.

21. The following further witnesses were examined on behalf of RBEF: Mr. B.M. Verma, Divisional Engineer, Jor Bagh telephone exchange (PW-7), Sub-Inspector Surender Singh of Police Station Defence Colony (PW-8), Mr. Ramesh Chandra, Section Officer (Accounts), BSES Rajdhani Power

Limited (PW-9), Mr. T.S. Vedha Narayanan, Manager, UTI Bank Ltd. (PW-10), Mr. Sri Pal Upadhyay, Project Office of RBEF (PW-12), Mr. Ashok Malik, UDC, Office of ZRO, Delhi Jal Board (PW-11), Mr. R.K. Singh, Nodal Officer, Bharti Airtel Ltd. (PW-13), Mr. Harish Verma, Marketing Executive, Indian Engineering Company (PW-14), Mr. J.P. Chaudhary, property dealer (PW-15), Mr. Dinesh Gupta, Sales Executive, Jawala Prasad and Co. Pvt. Ltd. (PW-19), Mr. Shingara Singh, proprietor of M/s Bola Electricals Co. (PW-18), Mr. Dalip Kumar Singh, Sales Coordinator, CSI Telecoms (PW-16), Mr. K.C. Samal, Proprietor, K.C. Samal & Co. (PW-17), Mr. Islamuddin (PW-20), Mr. Anuj Goel (PW-21), Mr. Rahul Mistry, Accounts Manager, M/s. Dynatron Services (PW-22), Mr. Vikrant Puri (PW-23) and Mr. Paul Nanda (PW-24).

22. Admiral Nanda filed his affidavit of examination-in-chief dated 16th November 2006. Admiral Nanda expired during the pendency of the suit and by an order dated 16th September 2009, his legal representatives (LRs) were brought on record. A statement was made by Mr. Vikas Dhawan, learned counsel for late Admiral Nanda in CS (OS) No. 247 of 2004 that he did not wish to examine any witness and that the evidence led by him in CS (OS) No. 1318 of 2004 may be read as his evidence in CS (OS) No. 247 of 2004.

23. On 25th November 2009, an order was passed by the Court, permitting the recording of evidence of Smt. Sumitra Nanda, wife of late Admiral Nanda, before Mr. S.M. Chopra, Additional District Judge (Retd.), who was appointed as Commissioner. He would also record the remaining cross-

examination of Mr. Paul Nanda. This exercise was completed on 21st December 2009.

24. Smt. Sumitra Nanda also expired on 24th February 2011 and the cause title of CS (OS) No. 247 of 2004 was, by an order dated 17th March 2011, directed to be corrected as "Ritnand Balved Education Foundation v. Mr. Paul Nanda & Ors."

25. Mr. Rajesh Yadav, learned counsel appearing for RBEF, first addressed arguments in relation to the issue as to whether there was any agreement to sell between the parties in respect of the suit property. According to him, the written statement to the amended plaint failed to make any specific denial to the following averments in the amended plaint and, therefore, under Order VII Rules 3, 4 and 5 CPC, it would amount to an admission:

(i) the averment in para 8 of the amended plaint that the Defendant wanted to settle the matter of inheritance during his lifetime and, therefore, was keen to sell the suit property and give the proceeds thereof to Mr. Paul Nanda;

(ii) the averment in para 10 of the amended plaint that the Plaintiff had gotten prepared a PO for a sum of Rs. 23,50,000, being 10% of the total sale consideration drawn on UTI Bank Ltd.;

(iii) the averment in para 11 of the amended plaint that on 31st March 2003 Mr. Paul Nanda had thanked Mr. Arun Chauhan for sending the PO and asked Mr. Chauhan to let him know which documents would be required for executing the sale deed and that late Admiral S.M. Nanda had handed over the actual possession of the ground floor of the suit property to the Plaintiff on 31st March 2003 on receipt of the PO;

(iv) the averment in paras 11 and 12 regarding the role of Mr. Arun Chauhan in taking possession of the suit property from Mr. Paul Nanda on 31st March 2003; talks with Mr. Paul Nanda regarding the documents required;

(v) the averment in para 14 of the plaint regarding the envelope given by Mr. Paul Nanda;

(vi) the admission in para 21 of the written statement to the amended plaint that "the bills were given to Shri Ashok Chauhan by the Plaintiff who through his employees and staff had assured to get the bills corrected";

(vii) The failure of the Defendant to deny in the written statement to the amended plaint the averments made in paras 23 and 24 that the Plaintiff was ready and willing to perform its part of contract;

(viii) admissions in para 25 to 27 of the written statement to the amended plaint about the frequent visits of Mr. Paul Nanda to the suit property and the meeting of Mr. Arun Chauhan with late Admiral S.M. Nanda at 4, Prithvi Raj Road, New Delhi in the end of January 2004.

26. As regards the above submission, the Court is unable to be persuaded to hold that there is any admission by Admiral Nanda as to the existence of an oral agreement to sell between the parties in respect of the suit property. The averments made at the outset in the written statement filed by Admiral Nanda, as well as to the amended plaint in CS (OS) No. 274 of 2004 and in his affidavit dated 16th November 2006 of examination-in-chief in CS (OS) No. 1318 of 2004, leaves no manner of doubt that, according to late Admiral Nanda, there was, in fact, no agreement to sell between the parties whatsoever. It is futile to contend that there is any admission by late Admiral Nanda regarding an oral agreement to sell between the parties. Indeed, it

appears extraordinary to the Court that in respect of the valuable immovable property to an extent of 361 sq. yds. located in Defence Colony, New Delhi, and in respect of which even according to RBEF the agreed sale consideration was Rs. 3.25 crores, the parties, particularly RBEF, would be content with an oral agreement to sell. While in law there is no prohibition against an oral agreement to sell an immovable property, a heavy burden would be placed upon the party asserting such an oral agreement to prove it in the first place.

27. When the case of RBEF is based on an oral agreement to sell, the Court would proceed on the basis of the evidence led by the parties on that aspect rather than go by statements in the pleadings from which any admission might be inferred. Also, for the purpose of such inference, it is important not to read the pleadings selectively, but in totality in order to discern if there is any unequivocal admission as regards the principal issue in CS (OS) No. 247 of 2004 i.e. the existence of an oral agreement to sell. In the present case, when the pleadings are read as a whole, the so-called admissions as a result of the failure of Admiral Nanda to specifically deny the averments in the amended plaint do not persuade the Court to conclude that there was an oral agreement to sell between the parties.

28. The evidence of Mr. Arun Chauhan, who appeared as PW-1, was relied upon by Mr. Rajesh Yadav, Advocate, to contend that it was proof of the fact that a number of meetings were held between the parties in the year 2003 and that at the meeting which took place on 26th March 2003, the oral agreement to sell was finalized.

29. The cross-examination of Mr. Arun Chauhan, which took place on 6th April 2006, shows that he could not produce any minutes of the meetings held between the parties. The letters (PW-1/4 and PW-1/6), written by Mr. Arun Chauhan to late Admiral S.M. Nanda and Mr. Paul Nanda, were referred to in the cross-examination. While PW-1/4 is a letter dated 29th March 2003, PW-1/6 is a letter dated 1st April 2003, purportedly written by Mr. Arun Chauhan to late Admiral Nanda and Mr. Paul Nanda respectively. Both these documents have been denied by Admiral Nanda. It is the case of Admiral Nanda that, in fact, both the letters were fabricated and never sent. There is nothing produced in the evidence to show, in fact, that these letters were delivered to Admiral Nanda and Mr. Paul Nanda. In his cross-examination on this aspect, the question put to late Admiral S.M. Nanda and his answers read as under:

"Q. Is it correct that Mr. Ashok Chauhan and Mr. Arun Chauhan have visited 4, Prithvi Raj Road to meet you number of times?

A. I cannot exactly remember, I think four or five times.

Q. Do you know the year in which they have visited 4, Prithvi Raj Road?

A. I do not remember and I do not keep a record of this.

Q. Can it be end of Dec, 2002 or March, 2003 and April, 2003 and March, 2004 and sometime in between?

A. I told you that I do not remember.

Volunteered: in jest, Mr. Chauhan would be keeping the record.

Q. Is it correct that on 26th of March, 2003 Mr. Ashok Chauhan and Mr. Arun Chauhan visited you at 4, Prithvi Raj Road?

A. I do not remember.

Q. Is it correct that Mr. Ashok Chauhan, Mr. Arun Chauhan visited you at 4, Prithvi Raj Road on 11.4.2003 at 4.45 PM.

A. I do not remember.

Q. Is it correct that Mr. Ashok Chauhan, Mr. Arun Chauhan visited you at 4, Prithvi Raj Road on 6th March 2004 from 3.00 PM to 3.40 PM.

A. I do not remember.

Q.Is it correct that on all these dates while you were meeting Mr. Ashok Chauhan, Mr. Arun Chauhan, Mr. Paul Nanda was present?

A. I do not remember.

Q. I put it to you that all these meetings were held on the first floor of 4, Prithvi Raj Road?

A. I do not remember."

30. The above answers do not enable the Court to conclude that there was, in fact, any meeting held between the parties on the dates, as alleged by RBEF and, in particular, that a meeting took place on 26th March 2003 between the parties when the oral agreement to sell was finalized.

31. In the additional written arguments filed by RBEF on 10th October 2013, it is asserted that the events preceding the return of the PO for Rs. 23,50,000, alongwith the draft agreement to sell, show that "the parties were *ad idem* as regards the sale of the property in terms thereof." Mr. Yadav urged that Mr. Paul Nanda had confirmed that the original PO of Rs. 23,50,000 had been delivered to Admiral Nanda. This submission is contradicted by the following questions and answers recorded during the cross-examination of Mr. Paul Nanda before the Court Commissioner on 17th December 2009:

"Q. I put to you that on 29.3.2003, Mr. Arun Chauhan had delivered a pay order of Rs. 23.50 lacs along with draft copy of agreement to sell of property to your father?

A. This question was asked to my father and he had already answered the same.

Q. I put to you that your father had received a pay order of Rs. 23.50 lacs and agreement to sell of the suit property, what have you to say?

A. Again my father would have answered this question and I am unable to answer on his behalf.

Q. Did your father talk to you about having received the pay order and a draft agreement to sell?

A. Not to the best of my knowledge."

32. Mr. Paul Nanda in fact denied the suggestion that a sum of Rs. 23,50,000, constituted earnest money equal to 10% of the agreed sale consideration. He stated:

"It is wrong to suggest that my late father offered to sell the suit property to Dr. Chauhan in March 2003. It is further wrong to suggest that my father had offered to sell the property to Dr. Chauhan in March 2003 because he wanted to give sale proceed to me so that I could purchase a flat at Prithvi Raj Road.

Q. Do you remember that on 26.3.2003 a meeting had taken place at 4, Prithvi Raj Road between you, your father, Dr. Ashok Chauhan and Arun Chauhan?

A. A meeting had taken place but the exact date I do not remember and I joined the meeting when probably it was ending and I just happened to notice them i.e. Dr. Chauhan and Arun Chauhan sitting.

Q. I put to you that this meeting was to settle the terms of sale of the suit property?

A. I think the Chauhans were well aware that my father does not and cannot sell the suit property because he wanted to keep a roof over his head and technically also because the property was tendered as surety and it could not be sold.

It is wrong to suggest that we quoted a price of Rs. 2.50 crore and Chauhans offered 2.20 crores and after some deliberation the sale consideration was fixed at 2.35 crores.

It is wrong to suggest that it was also agreed in that meeting that 10% of the sale consideration amounting to Rs. 23.50 lacs would be paid as an earnest money by Chauhans."

33. Mr. Yadav again relied upon the evidence of Mr. Paul Nanda to argue that the possession of the ground floor of the suit property had been handed over by him to Mr. Arun Chauhan. In his cross-examination before the Court Commissioner on 17th December 2009, the answers given by Mr. Paul Nanda on this aspect read as under:

"It is wrong to suggest that on 31.3.2003 after receipt of the pay order I had handed over the possession of the entire ground floor to Mr. Arun Chauhan.

It is wrong to suggest that I had assured on behalf of my father to handover the possession of the remaining portion of the suit property shortly after 31.3.2003 on removal of the goods.

Q. Do you remember that at the time of handing over the possession of the ground floor of the suit property to the Chauhans you also handed over some show pieces as gift for the wife of Dr. Ashok Chauhan.

A. I did not handover the property to Chauhans, I had no authority to handover the property to them and I am not a fool to handover the property free of charge. I did not handover any show pieces as suggested."

34. Therefore, the assertions by Mr. Yadav on behalf of RBEF that the evidence showed that there was an oral agreement to sell between the parties, that a cheque for Rs. 23,50,000, constituting 10% of the sale consideration was tendered to Admiral Nanda and was returned by him and that the possession of the ground floor was handed over to RBEF by Mr. Paul Nanda, are not borne out by the evidence on record.

35. It is then contended that there was no need for RBEF to have prepared a PO for Rs. 23,50,000, which fact had been brought on record from the evidence of Mr. Ashish Bindra, PW2. In his cross-examination, PW-10, Manager, UTI Bank Ltd., states that he does not know the purpose for which the PO dated 29th March 2003 was prepared. The crucial element here is the actual handing over of the said PO to Admiral Nanda and not so much its preparation. On both the aspects of handing over of the PO for the sum of

Rs. 23,50,000 and the handing over of the alleged possession of the ground floor, reliance is placed by Mr. Yadav on the evidence of PW-4, Lt. Col. R.C. Thaplial, PW-5, Mr. Pradeep Kumar and PW-6, Mr. Bachan Singh Nainwal. It must be remembered that all these are RBEF's witnesses and are bound to speak in its favour. The Court is therefore not assured by the veracity of the statements of these witnesses. There is nothing to show that there was any oral agreement to sell between the parties. In the absence of such agreement, it is inconceivable that the possession would be actually handed over of the valuable immovable property by Admiral Nanda to RBEF.

36. Reliance is placed by Mr. Yadav on the cross-examination of Admiral Nanda which took place on 6th January 2007. The questions and answers recorded during the above cross-examination read as under:

> "Q. I put it to you that after the sale price was finalized all of you shook hands and Dr. Ashok Chauhan and Mr. Ashok Chauhan touched your feet and sought your blessings?
>
> A. I do not remember, it could be that we may have met.
>
> Volunteered: Every time when the question came up I said that the property is in court and I cannot sell.
>
> Q. I put it to you that after the meeting was over you had deputed and authorized your son Mr. Paul Nanda to get the Agreement to Sell prepared in writing in consultation with Mr. Arun Chauhan?
>
> A. No.

Q. I put it to you that on 29.3.2003 a pay order of Rs. 23.50 lacs was delivered at 4, Prithvi Raj Road to you along with a covering letter dated 29.3.2003 written by Mr. Arun Chauhan?

A. I am sorry, it was never delivered to me.

(The witness is shown the letter exhibit PW1/4 and copy of a pay order mark C).

A. I have not received letter exhibit PW1/4 nor the pay order mark C. These may have been sent to Mr. Paul Nanda and Mr. Paul Nanda told me that they are trying to deliver these to me. But I told him that you cannot do so, because this property has been given as surety in the Patiala House Court.

Q. When did Mr. Paul Nanda tell you that they are trying to deliver the pay order?

A. I do not remember the date. I do not keep a record. It was never delivered to me, he told me they have tried to pressurize.

Q. Did Mr. Paul Nanda tell you that photocopy of the pay order and a draft of the Agreement to Sell have been delivered at his house on the same date?

A. Mr. Paul Nanda mentioned to me that they are trying to pressurize me. I said that there is no question of selling the property as it is already with the Court. I do not know he never told me that and they are trying to pressurize me.

Q. What kind of pressure was put on you and Mr. Paul Nanda?

A. No pressure was put on me I told you what Mr. Paul Nanda told me.

Volunteered: My answer was the property is with the Court and it cannot be sold.

Q. What did Mr. Paul Nanda tell you about the pressure being put on him?

A. He never said anything just said they are trying to pressurize me.

Q. Did you or your son Mr. Paul Nanda file any report with the Police about the pressure or took any action?

A. What action should I take because there was no pressure on me.

Q.What about Mr. Paul Nanda? Did he take any action or filed any report?

A. Not that I know.

Q. How did Mr. Paul Nanda come in possession of the pay order?

A. (Objected to)

A. I do not know anything about the pay order.

(Witness puts a counter question: was this pay order encashed?)

Q. Do you know when this pay order was returned, who returned it and to whom?

(Objected to)

A. I do not know anything about the pay order.

Q. Is it correct that on 5.4.2003 Mr. Paul Nanda for the first time told to Mr. Arun Chauhan that the suit property has been tendered as a surety in Patiala House Court?

A. I do not know.

Q. Is it correct that this fact was mentioned in a draft of agreement to sell which was prepared and brought by Mr. Paul Nanda?

A. I do not know anything about it.

Q. I put it to you that at the time of finalization of the sale consideration the fact that the suit property has been given as surety was not told by you to Chauhans?

(Objected to)

A. Sorry, I had told them. I have told them that this property cannot be sold as the property has been given as surety in the court. First time we discussed this matter I told them that this property cannot be sold.

Q. Is it correct that after 5.4.2003 you and Mr. Paul Nanda requested Mr. Arun Chauhan that since the property has been tendered as surety therefore an agreement to sell cannot be signed and executed till the release of the property from the surety bond?

A.I told to Mr. Chauhan on the first day when he said that he wanted to buy the property.

Q. Is it correct that you had told Mr. Arun Chauhan that you cannot encash the pay order otherwise you would violate the terms of the surety bond?

(Objected to)

A. I am sorry I have already answered this question.

Q. You have said that you told Mr. Chauhan on first day when he wanted to buy the property, when was this first day? Do you know the day, month and year?

A. No, I do not remember the day, month or year, it was just a casual conversation, when they came to see me.

Q. I put it to you that the pay order of Rs. 23.50 lacs was delivered back by Mr. Paul Nanda to Mr. Arun Chauhan?

(Objected to)

A. I said, I do not know anything about this pay order."

37. It is seen from the above line of questions that there is a constant and desperate attempt by learned counsel for RBEF to elicit some answer from Admiral Nanda that, in fact, the PO dated 29th March 2003 for Rs. 23,50,000 was delivered to Mr. Paul Nanda. Admiral Nanda stood resolute in his stand that no such PO had been received. At the highest, his answers indicate that Mr. Paul Nanda told Admiral Nanda that RBEF was pressurizing him to accept the PO, which obviously was not delivered. There is absolutely nothing in the above answers that helps the case of RBEF.

38. On the aspect of the possession of the ground floor of the suit property, the questions put to late Admiral S.M. Nanda and his answers read as under:

"Q. Is it correct that between 31.3.2003 when the Defendant was handed over possession and till filing of written statement by you no action was taken by you against the Defendant?

(Objected to)

A. Firstly the possession was never handed over. And as reasonable people I expected them to vacate the property as they already have 5 properties in Defence Colony."

39. Even on the question of exchange of the draft agreement to sell, the delivery of the PO dated 29th March 2003 and its alleged return in the envelope, Exhibit PW-1/9, no useful answers could be elicited either from Admiral Nanda or Mr. Paul Nanda. The answers given by Mr. Paul Nanda on 1st May 2007 during his cross-examination before the Joint Registrar read as under:

"I did not receive any letter from Mr. Arun Chauhan enclosing draft copy of agreement to sell and copy of pay order dated 29.03.2003 for Rs. 23,50,000. I did not receive any letter from Mr. Arun Chauhan asking him to supply documents relating to the suit property such as Sale Deed, Conveyance Deed, Property Tax Receipt, etc. The writing in green colour on exhibit PW1/9 is not in my handwriting. I don't think that I had exchanged any draft copies of Agreement to Sell with Mr. Arun Chauhan on e-mails. Again said No, I had not exchanged such e-mails. I did not meet Mr. Arun Chauhan in his office regarding settlement of the terms of Agreement to Sell in respect of the suit property."

40. Further, the questions and the answers recorded on this aspect on 4th May 2009 read as under:

"Q. Do you remember the date and year, when Mr. Arun Chauhan sent you the copy of draft of agreement to sell and copy of pay order of Rs. 23.50 lacs at your residence?

A. Since I do not receive any of these, the question of date and year does not arise.

I do not recall plaintiff handing over a pay order of Rs. 23.50 lacs to my father at his residence.

Q. Do you recall having returned the pay order to Mr. Arun Chauhan in an envelope?

A. Question does not arise since I have not received any pay order."

41. The Court fails to appreciate how the above evidence can be read as

proving the case of RBEF that there was an oral agreement to sell between the parties, whereby the suit property was agreed to be sold by Admiral Nanda to RBEF for Rs.2.35 crores. In the considered view of the Court, RBEF has miserably failed to prove this crucial issue.

42. Mr. Yadav referred to Section 106 of the Indian Evidence Act, 1872 ('Evidence Act') and submitted that the onus of proving the facts concerning the delivery of possession of the ground floor of the suit property was on Admiral Nanda, since these facts were specially within his knowledge. In the first place, this argument is totally misconceived. It is RBEF which has been asserting throughout that the possession of the ground floor of the suit property was given to Mr. Arun Chauhan by Mr. Paul Nanda who was present at the time of handing over of the possession. On this aspect the evidence of RBEF's interested witnesses are self-serving and not trustworthy. The best evidence is that of Mr. Paul Nanda whose deposition unmistakably shows that he did not put RBEF in possession of the ground floor of the suit property at all. In the circumstances, the Court is unable to accept the submission of Mr. Yadav that the onus was on Admiral Nanda to show how RBEF came into possession of the ground floor of the suit property.

43. It is then contended that if, indeed, RBEF had forcibly entered into the suit property then Admiral Nanda would have filed a police complaint. The answer given by Mr. Paul Nanda in his cross-examination is that on account of past cordial relations between the parties, his father did not think of

adopting that course, appears plausible and reasonable. The said answer reads as under:

> "To the best of my knowledge, my father did not lodge any police complaint against the plaintiff and did not serve any notice of ejectment upon the plaintiff as he was hoping that since they have been very good friends, they would vacate the suit property amicably."

44. The Court is also not persuaded to accept the submission of Mr. Yadav that the envelope, Exhibit PW-1/9, had to be referred to a handwriting expert. The reliance on the decisions in ***G. Someshwar Rao v. Samineni Nageshwar Rao (2009) 14 SCC 677*** and ***K.S. Satyanarayana v. V.R. Narayana Rao AIR 1999 SC 2544*** is misplaced, since RBEF has not been able to lay the basic foundation for the need to make such a reference. There is nothing to indicate that there was any cheque placed in that envelope which, in any event, Paul Nanda has denied as having emanated from him.

45. Mr. Yadav referred to the decision in ***State of Uttar Pradesh v. Nahar Singh AIR 1998 SC 1328*** and submitted that in the absence of cross-examination of RBEF's witnesses its evidence had to be accepted by the Court. In the considered view of the Court, the reliance on the aforementioned decision, which was in a criminal case, is wholly misplaced. Factually in the present case, there has been extensive cross-examination of each of RBEF's witnesses. Merely because some part of the statement of the RBEF's witnesses is not contradicted in the cross-examination, does not mean that it has to be believed by the Court. The entire evidence has to be seen as a whole, i.e., both the examination-in-chief and the cross-

examination in order to determine whether it bears out the case of RBEF. While the decisions in ***J.C. Enterprises (Regd.) v. Ranganatha Enterprises 178 (2011) DLT 689*** and ***Suresh Chand Mathur v. Harish Chand Mathur 174 (2010) DLT 665*** also hold that to the extent a certain statement made by a witness remains unchallenged it must be deemed to have been admitted, the said cases turned on their own facts. As far as the present case is concerned, each of the Plaintiff's witnesses, in fact, has been cross-examined and that there is nothing in the answers given in their cross-examination which persuades the Court to hold that on the crucial aspect of there being an oral agreement to sell, an inference of a deemed admission can be drawn.

46. It is then contended that Mr. Chaman Lal, who was the servant of Admiral Nanda was the crucial witness to prove the handing over of the possession of the ground floor of the suit property to RBEF since he was staying in the servants' quarters. Relying on the decisions in ***Mussauddin Ahmed v. State of Assam (2009) 14 SCC 541*** and ***Gopal Krishanaji Ketkar v. Mohamed Haji Latif AIR 1968 SC 1413***, it is contended that since Mr. Chaman Lal was under the control of Admiral Nanda and since his evidence, which would have thrown light on the issue in controversy, was withheld, an adverse inference should be drawn.

47. In the considered view of the Court, the entire submission is misconceived. It is RBEF's case that Mr. Arun Chauhan on behalf of RBEF was handed over the possession of the ground floor of the suit property by Mr. Paul Nanda. RBEF has miserably failed to prove its case in this regard. In a civil suit where the Plaintiff asserts certain facts, the burden of proving

those facts is on the Plaintiff. The question of the Defendant withholding any evidence in this regard does not arise at all.

48. It was then contended that the order dated 27th September 2005 in CS (OS) No. 1318 of 2004 was not an order for consolidation and that it was merely a direction that the two cases be "tried together". Relying on the decision in ***Mitthulal v. State of M.P. (1975) 3 SCC 529***, it is sought to be contended that in CS (OS) No. 247 of 2004, the evidence of RBEF has remained uncontroverted by Admiral Nanda and, therefore, RBEF is entitled to a decree.

49. The above submission is totally misconceived. The order dated 27th September 2005 clearly states that both the suits should be tried together. This is because admittedly they arose from the same set of facts. There was no need to repeat the evidence of the parties in the suits. Admiral Nanda was entitled to contend that his evidence as Plaintiff in CS (OS) No. 1318 of 2004 should be read as his evidence as Defendant in CS (OS) No. 247 of 2004. It is for this reason that when a statement to that effect was made by his counsel, in the presence of the counsel for RBEF, no objection was raised. The order recording the above statement was not questioned. On the other hand, RBEF's witnesses have been extensively cross-examined. Therefore, it is futile to contend that RBEF's evidence remains uncontroverted.

50. Mr. Yadav then referred to Section 2(b) read with Section 9 of the Indian Contract Act, 1872 and the decisions in ***Bharat Petroleum***

Corporation Ltd. v. Great Eastern Shipping Co. Ltd. (2008) 1 SCC 503, ***Aloka Bose v. Parmatma Devi, (2009) 2 SCC 582, Kollipara Srimamulu v. T. Aswatha Narayana AIR 1968 SC 1028***, ***B. Rajamani v. Azhar Sultana AIR 2005 AP 260*** and ***Moturi Seeta Ramabrahmam v. Bobba Rama Mohana Rao AIR 2000 AP 504*** to contend that there could be an oral agreement to sell. He referred to Section 54 of the Transfer of Property Act, 1882 and contended that the payment of sale consideration was not a *sine qua non* for completion of the sale, and could be deferred. Reliance was placed on ***Vidhyadhar v. Manikrao (1999) 3 SCC 573, Gurubari Lekha v. Dulani Thakurani AIR 1971 Orissa 147*** and ***Claude-Lila Parulekar v. Sakal Papers (P) Ltd. (2005) 11 SCC 73***.

51. The legal position as regards oral agreements to sell, as explained in the above decisions, is well settled. In the present case, RBEF has been unable to establish through evidence that there was in fact an oral agreement to sell between the parties. Therefore, the Court fails to understand how the above decisions can help RBEF overcome the basic difficulty it faces in the present case to establish in the first place that there was an oral agreement to sell between the parties.

52. Mr. Yadav then placed reliance on ***Mayawanti v. Kaushalya Devi [1990] 2 SCR 350*** where, even on the basis of an oral agreement to sell, specific performance was ordered. The said decision clearly holds that:

> "the intention of the offeree to accept the offer must be expressed without leaving room for doubt as to the fact of acceptance or to the coincidence of the terms of acceptance with those of the offer. The rule is that the acceptance must be absolute, and must correspond

> with the terms of the offer. If the two minds were not *ad item* in respect of the property to be sold, there cannot be said to have been a contract for specific performance."

53. In the present case, the evidence does not support the contention of RBEF that there was an oral agreement to sell between the parties.

54. As a result, in CS (OS) 247 of 2004, issue (i) is answered against RBEF and in favour of Admiral Nanda. It is held that there was no oral agreement to sell entered into between the parties whereby late Admiral Nanda agreed to sell to RBEF the suit property as alleged in the plaint. Consequently, issue (ii) does not survive. In other words, it is held that RBEF is not entitled to seek a decree of specific performance of the alleged agreement to sell.

55. Consequently, as far as CS (OS) No. 1318 of 2004 is concerned, issue (i) is answered in favour of Admiral Nanda and against RBEF. It is held that RBEF is not entitled to retain the possession of the suit property.

56. The issue that remains to be decided is *mesne* profits/damages that the estate of late Admiral Nanda is entitled to. There is evidence placed on record to show what the current market value of the suit property was at the time RBEF took over its possession. The evidence of Mr. Vikrant Puri, who happens to be a property dealer, is relevant. During his cross-examination, on 8th December 2008, he stated that the value of the suit property in 2003 would be approximately Rs. 3.75 crores to Rs. 4 crores. He stated

that the lease rent of the suit property could be around Rs. 3,50,000 to Rs. 4,00,000 per month, with an increase between 10 to 12% thereafter.

57. Accordingly, the Court holds that the estate of late Admiral Nanda would be entitled to *mesne* profits @ Rs. 3,00,000 per month from 1st September 2003 till 31st December 2003, with an increase of 10% per month in the said amount from 1st April 2004 onwards till the date of delivery of vacant possession of the suit property by RBEF to the estate of late Admiral Nanda through his son, Mr. Paul Nanda. The Court further directs that peaceful and vacant possession of the suit property should be handed over by RBEF to the LRs of late Admiral Nanda within a period of eight weeks from today. It is further held that on the aforementioned sums calculated, the estate of late Admiral S.M. Nanda would be entitled to simple interest @ 9% p.a from the date they became due till the date of payment. The amounts deposited by RBEF in Court will be paid over to the LRs of late Admiral Nanda through Mr. Paul Nanda by the Registry within a period of twelve weeks from today, together with any interest that may have accrued thereon, and the sums so paid, would be adjusted against the sums found due as *mesne* profits/damages. Issues (ii) and (iii) in CS (OS) No. 1318 of 2004 are accordingly decided.

58. The issue that remains in both suits is as regards costs. RBEF offered to provide guards for the suit property and went on to forcibly occupy it. Faced with the prospect of being dispossessed, RBEF proceeded to file a vexatious suit setting up a false plea of an oral agreement to sell, which it failed to prove. RBEF exploited the delays of the legal system. Neither

Admiral Nanda nor his wife survived the litigation. This is a case that calls for the award of exemplary costs.

59. The net result is that CS (OS) No. 247 of 2004 is dismissed, in the above terms, with costs of Rs. 1,00,000, which will be paid by RBEF to the LRs of late Admiral S.M. Nanda within eight weeks. CS (OS) No. 1318 of 2004 is decreed, in the manner indicated hereinbefore, together with costs of Rs. 1,00,000, which will be paid by RBEF to the LRs of late Admiral S.M. Nanda within eight weeks. Decree sheets be drawn up accordingly.

S. MURALIDHAR, J.

NOVEMBER 7, 2013
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