

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

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Date of decision: 19th September, 2013

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RFA No.411/2000

CHANCHAL DHINGRA

.....Appellant

Through: Mr. Harish Malhotra, Sr. Adv. with
Mr. R.K. Modi, Adv.

Versus

RAJ GOPAL MEHRA

..... Respondent

Through: Mr. Anil Sapra, Sr. Adv. with Mr.
M.S. Ahluwalia, Adv.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. The appeal impugns the judgment and decree dated 30th May, 2000 of the Court of the Addl. District Judge, Delhi in Suit No.559/1993 cancelling documents Exhibit DW1/1 to DW1/5 and Ex.DW2/1 and of recovery of possession of flat No.34, Cottage Enclave, Paschim Vihar, New Delhi from the appellant / defendant on payment by the respondent/plaintiff to the appellant/defendant of Rs.62,000/-.

2. The respondent/plaintiff had instituted the suit from which this appeal arises, pleading:-

- (a). that the respondent/plaintiff had been working in Cash Branch in the Central Cottage Industries Emporium, New Delhi;
- (b). that there was a Group Housing Society of the employees of the aforesaid Emporium and of which Society the

respondent/plaintiff was the member and by virtue of which membership the respondent/plaintiff had been allotted flat no.34 aforesaid and the cost whereof was assessed at Rs.1,05,000/-;

- (c). that the respondent/plaintiff had made part payments for the aforesaid flat out of his personal savings and from loan from the Delhi Co-operative Housing Finance Society Ltd.;
- (d). that one Shri K.P. Dhingra working as Assistant Manager in the Emporium aforesaid introduced the respondent/plaintiff to Shri Madan Lal Dhingra (husband of the appellant/defendant) as the respondent/plaintiff was in need of money to pay the balance price of the flat aforesaid;
- (e). that the said Shri Madan Lal Dhingra, in or about February, 1987, agreed to advance a sum of Rs.62,000/- required by the respondent/plaintiff but in order to secure re-payment, obtained signatures of the respondent/plaintiff on some papers without supplying any copy thereof to the respondent/plaintiff; Shri Madan Lal Dhingra also required the respondent/plaintiff to allow him user of the said flat as his caretaker without any right, title or interest of any nature whatsoever therein; the respondent/plaintiff agreed and allowed the said Shri Madan Lal Dhingra to remain in occupation of the said flat as its caretaker;

- (f). that the occupation of Shri Madan Lal Dhingra of the aforesaid flat was as a licensee/caretaker and which came to an end upon his demise in October, 1990; the respondent/plaintiff never granted any license to the widow of Shri Madan Lal Dhingra i.e. the appellant/defendant and as such vide notice dated 26th November, 1990 asked her to remove herself from the said flat by 20th December, 1990;
- (g). that the appellant/defendant however started claiming rights in the flat under the documents executed by the respondent/plaintiff in favour of her husband Shri Madan Lal Dhingra;
- (h). that the respondent/plaintiff was ready and willing to refund the sum of Rs.62,000/- together with interest as may be payable but the appellant/defendant still refused; and,
- (i). that “the said documents” were mere camouflage and were otherwise contrary to the terms and conditions of the grant of the flat to the respondent/plaintiff and were therefore void under the provisions of Section 23 of the Indian Contract Act, 1872 and did not vest any right, title or interest in Shri Madan Lal Dhingra or after his death in the appellant/defendant in the said flat.

The respondent/plaintiff accordingly sought reliefs, (i) of possession of the flat; (ii) of cancellation of the documents obtained by Shri Madan Lal

Dhingra from the respondent/plaintiff in February/March, 1987; and, (iii) an enquiry into *mesne* profits.

3. The appellant/defendant contested the suit, by filing a written statement, on the grounds:-

- (i). that the claim made in the year 1992 of cancellation of documents executed in the year 1987 was barred by time;
- (ii). that the suit was not correctly valued for the purposes of Court Fees and jurisdiction;
- (iii). denying that the respondent/plaintiff had approached Shri Madan Lal Dhingra for loan and pleading that in fact the respondent/plaintiff had sold the flat to Shri Madan Lal Dhingra and had after receiving the entire sale consideration of Rs.1,52,000/- handed over vacant possession of the flat to Shri Madan Lal Dhingra and also executed Agreement to Sell, Power of Attorney, Will etc. in his favour and Shri Madan Lal Dhingra occupied the flat as the owner;
- (iv). that after the death of Shri Madan Lal Dhingra appellant/defendant along with other legal heirs of Shri Madan Lal Dhingra became the owner of the flat; and,
- (v). denying that the documents executed by the respondent/plaintiff with respect to the said flat in favour of Shri Madan Lal Dhingra were liable to be cancelled.

4. The respondent/plaintiff filed a replication denying having executed any Agreement to Sell, Power of Attorney or Will in favour of Shri Madan Lal Dhingra and denying having received sale consideration of Rs.1,52,000/- from Shri Madan Lal Dhingra and reiterating his case in the plaint.

5. On the pleadings of the parties issues were framed in the suit on 14th September, 1995; however the Suit Court in the order dated 19th November, 1997 observed that the issues framed did not appear to be correct and directed the parties to file proposed issues and after perusal whereof the following issues were framed on 11th December, 1997:-

- “1. Whether the suit is within time? OPP*
- 2. Whether the suit has been properly valued for the purpose of Court fees and jurisdiction? OPP*
- 3. Whether the plaintiff is entitled to get delivered up and cancelled the documents i.e. G.P.A. agreement to sell, affidavit, receipt, possession letter, Will allegedly executed in favour of the defendant? OPP*
- 4. Whether the plaintiff is entitled to possession? OPP*
- 5. Whether the agreement to sell alongwith documents was executed by the plaintiff in favour of the defendant for total sale consideration of Rs.1,52,000/-, so its effect? OPD*
- 6. Whether earnest money of Rs.62000/- was paid by the defendant to the plaintiff under agreement to sell, if so its effect? OPD*
- 7. Whether the suit is barred under Delhi Co-operative Societies' Act? OPD*

8. *Relief.”*

6. The respondent/plaintiff besides examining himself, examined the official from the House Tax Department, the official of the Group Housing Society which had constructed the flat and three other private witnesses of the loan transaction alleged by the respondent/plaintiff. The appellant/defendant besides examining herself examined a neighbour to depose that the respondent plaintiff had never occupied the subject flat and Shri Madan Lal Dhingra was in occupation thereof and a relative who was a witness to the documents and the Advocate/Notary who had notarized the General Power of Attorney purportedly executed by the respondent/plaintiff in favour of Shri Madan Lal Dhingra.

7. The Addl. District Judge has decreed the suit of the respondent/plaintiff finding/observing/holding:-

- (i). that the claim for possession as well as for cancellation of the documents was within time;
- (ii). that the valuation of the suit for the relief of possession ought to have been Rs.1,52,000/- and directing the respondent/plaintiff to pay additional Court Fees; subsequently vide order dated 19th July, 2000 (and qua which the senior counsel for the appellant / defendant has contended, was without notice to the appellant / defendant) it was held that the suit was properly valued for the purposes of Court Fees and jurisdiction;
- (iii). that the relative of the appellant/defendant who was the witness to the documents executed by the respondent/plaintiff had on

the Agreement to Sell Ex.DW1/4 identified the signatures of Shri Madan Lal Dhingra as his own;

- (iv). that the Agreement to Sell Ex.DW1/4 creates suspicion and doubt as the last page thereof though should be numbered as page 3 was shown as page 2;
- (v). that the said page of the Agreement to Sell was a carbon copy while the first two pages were in original type and were not carbon copies;
- (vi). that if the Agreement to Sell Ex.DW1/4 was genuine then the original last page of the Agreement ought to have been produced – not only was it not produced, there was no explanation with respect thereto also;
- (vii). that the said relative witness to the Agreement to Sell named Shri Madan Lal Gulati was shown as resident of 373, Sudershan Park, New Delhi but he had in his deposition stated his residential address as 54, Cottage Enclave, New Delhi – 110 060 – from the same also it seemed that he was a made-up witness;
- (viii).that the particulars of the other witness on the Agreement to Sell were not clear and nobody could say who he was;
- (ix). that the Agreement to Sell being suspicious and doubtful should not be relied upon;

- (x). so was the position of the receipt for Rs.1,52,000/- proved as Ex.DW2/1 – the said receipt was also a carbon copy and the original was not produced – in the absence of original the carbon copy could not be relied upon;
- (xi). the receipt also did not show the residences of the attesting witnesses thereto;
- (xii). there was no explanation where was the original receipt;
- (xiii).thus the receipt Ex.DW2/1 could also not be relied upon;
- (xiv).document Ex.DW1/5 which is affidavit and which had been denied by the respondent/plaintiff had not been proved in accordance with law;
- (xv). that since possession of Shri Madan Lal Dhingra was admitted by the respondent/plaintiff so the document Ex.DW1/3 of delivery of possession could not be disputed;
- (xvi).that the Will Ex.DW1/2 was to be operative only on the death of the respondent/plaintiff and thus could not create any right, title or interest in the property owned by the respondent/plaintiff during the lifetime of the respondent/plaintiff;
- (xvii).that the General Power of Attorney Ex.DW1/1 had no legal force and could not be converted into Agreement to Sell;
- (xviii).thus documents Ex.DW1/1, DW1/2, DW1/5 and DW2/1 had no legal force and could not be relied upon;

- (xix).that the Agreement to Sell Ex.DW1/4 showed the full sale consideration to have been paid – if that was so, Sale deed of the flat ought to have been executed and there was no explanation therefor;
- (xx). that the receipts produced by the respondent/plaintiff for the period from 27th June, 1990 to 26th June, 1997 proved that the respondent/plaintiff had been paying the loan installment, maintenance charges, arrears of electricity and water charges to the Group Housing Society;
- (xxi).that the respondent/plaintiff had also produced the latest House Tax Receipt dated 16th February, 1996;
- (xxii).that though the Advocate for the appellant/defendant had in admission/denial denied the legal notice dated 26th November, 1990 but since the appellant/defendant had not personally denied the same, the same shall be deemed to have been admitted;
- (xxiii).that if at all there was any sale, the appellant/defendant was required to apply to the Group Housing Society for enrollment as a member and the Society in turn was to give no objection to the appellant/defendant;
- (xxiv).that the requirement of reporting the sale/purchase transaction to the DDA through the Group Housing Society had also not been fulfilled;

- (xxv). without consent of the Group Housing Society/DDA there could not be any sale or purchase of flat in question;
- (xxvi).that there was no document produced by the appellant/defendant to show that she had acted in compliance with the Agreement to Sell Ex.DW1/4;
- (xxvii).merely having the Agreement to Sell in the pocket will serve no purpose;
- (xxviii).even Agreement to Sell dated 30th January, 1987 had expired after three years;
- (xxix). that no efforts to have the Sale Deed executed had been made;
- (xxx). that the documents aforesaid without anything further to show that they had been acted upon remained paper tigers whose limitation had expired and which had no legal validity;
- (xxxi).if the documents have no legal validity they are liable to be cancelled and delivered;
- (xxxii). when the Agreement to Sell did not stand proved then possession letter had got no legal validity;
- (xxxiii).the respondent/plaintiff had explained that these documents were got executed as security for refund/re-payment of the loan;
- (xxxiv).the payment of Rs.1,52,000/- was not a small amount which should be paid in cash;
- (xxxv). thus payment of Rs.1,52,000/- under the Agreement to Sell has to be disbelieved;

- (xxxvi).that since the respondent/plaintiff had admitted receipt of Rs.62,000/- as loan, he was liable to refund the same along with interest at 18% per annum;
- (xxxvii).the interest shall be set off against the *mesne* profits;
- (xxxviii).there was no question of referring the matter to arbitration under the Delhi Co-operative Societies Act; and,
- (xxxix). once the Agreement to Sell and payment thereunder had not been proved, the respondent/plaintiff was entitled to possession of the flat.

8. The appeal was admitted for hearing and vide ex-parte order dated 7th August, 2000 the dispossession of the appellant stayed. Vide subsequent order dated 19th April, 2002, the said ad interim order was made absolute till the disposal of the appeal. Arguments were heard in the appeal on 24th January, 2011, 4th February, 2011 and 7th February, 2011 and judgment reserved. Vide order dated 14th February, 2011, it was observed that since it was the plea of the respondent/plaintiff that his signatures on the Agreement to Sell, General Power of Attorney, Receipt and Affidavit had been forged and fabricated and that if really he had transferred the flat to the appellant/defendant, there was no reason for him to have continued to repay the loan installments of the flat and other charges of the Society, the present was a fit case for exercising *suo moto* power under Order 41 Rule 27 (1) (b) of the CPC as additional evidence was required to enable the Court to pronounce judgment. It was further held that additional evidence required was under two heads—firstly, as to what was the amount which was paid by

the respondent/plaintiff towards repayment of the loan and interest and maintenance or any other charges with respect to the flat after execution of the documents dated 30th January, 1987; it was observed that there was certain evidence led before the Trial Court in this respect but there was no clarity on the exact amount which had been paid under the heads of loan along with interest and maintenance charges to the Society. It was yet further observed that if the said amount was enough to have an impact on the sale price of Rs.1,52,000/-, then the same would be a factor to be considered to decide the genuineness and validity of the transaction. The second head on which additional evidence was held to be needed was of an expert witness to report whether the signatures of the respondent/plaintiff on the documents Ex.DW1/1 (General Power of Attorney), DW1/4 (Agreement to Sell), DW1/5 (Affidavit) and DW2/1 (Receipt) were genuine or not. It was further observed that instead of calling for private handwriting experts of both the parties, it was expedient that the signatures on the questioned documents be sent for examination to Central Forensic Science Laboratory (CFSL) for examination through handwriting expert.

9. The documents were accordingly sent to CFSL whose report has been received. Vide subsequent order 6th February, 2012, it was clarified that instead of remanding the matter to Trial Court for additional evidence on the first aspect aforesaid on which additional evidence was required, evidence be recorded before the Joint Registrar.

10. The respondent/plaintiff failed to lead any evidence whatsoever before the Joint Registrar.

11. The senior counsel for the appellant/defendant states that since the respondent/plaintiff has failed to lead any evidence, there is no need for the appellant/defendant to rebut the same.

12. Though, there is no formal order till now closing the right of the respondent/plaintiff to lead additional evidence as directed in the order dated 14th February, 2011 (supra), the same is now ordered.

13. Mediation was thereafter attempted between the parties, which has remained unsuccessful. Counsels have been heard.

14. CFSL in its report has confirmed the signatures on the Agreement to Sell, General Power of Attorney, Affidavit and Receipt to be of the respondent/plaintiff. No objection has been filed by the respondent/plaintiff to the said report of the CFSL. The senior counsel for the respondent/plaintiff during the hearing also has not challenged the said report and rather accepted the same.

15. The senior counsel for the appellant/defendant has argued:

(i) that in view of the report of CFSL and the failure of the respondent/plaintiff to lead additional evidence in terms of the order dated 14th February, 2011 (supra), the appeal is to be allowed;

(ii) that the reasoning given in the impugned judgment for disbelieving the Agreement to Sell with respect to the flat in favour of the appellant/defendant, that if the full payment had been made, Sale Deed would have been executed, is erroneous—no Sale Deed could have been executed without the leasehold rights in the flat being converted into freehold and the flat was transacted as per the practice

then prevalent, through the medium of Agreement to Sell, Will, Power of Attorney etc. coupled with delivery of possession in part performance of Agreement to Sell;

(iii) that the reasoning given in the impugned judgment for disbelieving the Receipt, of the same being a carbon copy, is also erroneous inasmuch as though the writing on the Receipt is a carbon copy but the signatures of the respondent/plaintiff are in original; that the documents were prepared in duplicate as is generally the practice in such transactions and it is a matter of chance that instead of the original, the carbon copy remained with the appellant/defendant; however the carbon copy with original signatures is as good as original;

(iv) that the reasoning given in the impugned judgment for disbelieving the Agreement to Sell, of discrepancy in the address of the witness is erroneous. The said witness in his cross-examination has explained that he was at the time of signing the Agreement to Sell, as a witness, residing at the address given therein and had since changed his residence.

16. I have during the hearing asked the senior counsel for the appellant/defendant whether any evidence of payment of the entire sale consideration of Rs.1,52,000/- has been led.

17. The senior counsel for the appellant/defendant has stated that the said payment was in cash and has candidly stated that no evidence with respect thereto has been led except for the Receipt executed by the

respondent/plaintiff of the said payment and has further contended that the payment admitted by the respondent/plaintiff of Rs.62,000/- is also in cash.

18. A perusal of the Trial Court record shows the respondent/plaintiff to have in his examination-in-chief deposed that he was paying regular subscription to the Society for the loan taken from the Group Housing Society. Upon being quizzed in the cross-examination, he deposed that he has filed the receipt of payment from August, 1971 to April, 1985. However, he did not choose to prove the said receipts. The respondent/plaintiff however also examined the Secretary of the Housing Society who deposed that the respondent/plaintiff was paying the installments with respect to the flat and who proved the receipts with respect thereof as Ex.PW3/1 to PW3/8. A perusal of the said receipts shows the same to be dated 28th December, 1994, 30th March, 1995, 29th September, 1995, 30th December, 1995, 20th November, 1996, 12th March, 1997, 31st March, 1997 and 26th June, 1997 i.e. all of a date after the institution of this suit from which this appeal arises in or about February, 1992. Thus, no credence can be given thereto.

19. The senior counsel for the respondent/plaintiff has argued:

- (a) that the respondent/plaintiff was unwell and for this reason could not lead additional evidence in terms of order dated 14th February, 2011 (supra);
- (b) that the font of the type and the spacing on each of the three pages of the Agreement to Sell relied upon by the appellant/defendant is different, with the first page being typed in double space and the

second and third pages being typed in single space; it is contended that the same is indicative of an attempt to squeeze the content into three pages only;

(c) that the Will of the respondent/plaintiff relied upon by the appellant/defendant and which is a registered document and on which the respondent/plaintiff had admitted his signatures is attested by one witness only and the said document is not entitled to the nomenclature of a Will and is thus to be ignored;

(d) that the relative of the appellant/defendant Sh. Madan Lal Gulati who is also witness to the Agreement to Sell while identifying his signatures at point 'A' thereon has put point 'A' against the signatures admittedly of the deceased Sh. Madan Lal Dhingra and his evidence is thus unreliable;

(e) that the receipt of Rs.1,52,000/- is not stamped;

(f) that the Notary who has notarized the General Power of Attorney and who was examined as a witness by the appellant/defendant has also in his testimony admitted that he was not present;

(g) that the General Power of Attorney though is dated 30th January, 1987 but is notarized on 21st March, 1987;

(h) that while the date of Agreement to Sell in para 2 of the Affidavit is 29th January, 1987, the date which the Agreement to Sell bears is 30th January, 1987;

(i) that the learned Additional District Judge was correct in holding all the aforesaid to be suspicious circumstances belying correctness of the defence of the appellant/defendant;

(j) that the signatures on the Agreement to Sell are not above the place earmarked for the signatures of the “first party” and “second party” which also shows the Agreement to have been typed on blank papers bearing the signatures of the respondent/plaintiff;

(k) that the Supreme Court in *Suraj Lamp and Industries Private Limited Vs. State of Haryana* (2012) 1 SCC 656 has held that the documents such as Agreement to Sell, Power of Attorney are not documents of transfer of title to the property and the said judgment is prospective only qua documents of Agreement to Sell, General Power of Attorney, Will etc. which have been accepted/acted upon by Delhi Development Authority or other developmental authorities or by the municipal or revenue authorities to affect mutation and which has not happened in the present case;

(l) that no suggestion in the cross-examination was given to PW-4 Sh. Sanjay Kapoor (who had deposed that the respondent/plaintiff had signed blank papers) that signatures were not put on blank papers.

20. I have during the hearing enquired whether the appellant/defendant has filed any suit for specific performance of the Agreement. The counsels have replied in the negative.

21. The senior counsel for the respondent/plaintiff has contended that since the appellant/defendant has not chosen to specifically enforce the

Agreement to Sell, the impugned judgment is justified and ought not be disturbed.

22. Per contra, the senior counsel for the appellant/defendant has contended that the non-filing of a suit for specific performance by the appellant/defendant does not come in the way of the appellant/defendant protecting her possession under Section 53A of the Transfer of Property Act, 1882. He has in this regard relied on *Shrimant Shamrao Suryavanshi Vs. Pralhad Bhairoba Suryavanshi* (2002) 3 SCC 676 laying down that person obtaining possession of property in part performance of an Agreement of Sale can defend his possession in a suit for recovery of possession filed by the transferor, even if a suit for specific performance of the Agreement to Sell has become barred by time.

23. I have further enquired whether the respondent/plaintiff has, between the date of the execution of the documents aforesaid i.e. in or about January, 1987 and till the institution of the suit from which this appeal arises in or about February, 1992, exercised any rights as owner, by declaring himself to be the owner of the said flat before any authority or otherwise.

24. The answer is in the negative, though the senior counsel for the respondent/plaintiff has referred to the Receipts issued by the Group Housing Society aforesaid but which are all of a date after the institution of the suit and thus no credence can be given thereto. Once, the dispute between the parties had crystallized, the said Receipts of a period thereafter are but to create evidence in such dispute.

25. I have also enquired from the senior counsel for the respondent/plaintiff that if the case of the respondent/plaintiff was of deposit of original title documents of the flat with the appellant/defendant and of signing documents, whether in blank or otherwise, to secure the repayment of the loan taken of Rs.62,000/-, was the claim of the respondent/plaintiff not of redemption of mortgage and whether not the suit ought to have been filed for the said relief and in the manner prescribed in Order 34 of the CPC.

26. No proper answer is forthcoming.

27. The senior counsel for the appellant/defendant in rejoinder has contended that there is no limitation to take defence under Section 53A of the Act.

28. I have considered the rival contentions.

29. In my opinion, no argument can be made by the respondent/plaintiff, of the suspicious circumstances argued above relating to the documents, without confronting the appellant/defendant therewith in cross-examination and which has not been done in the present case. Though the senior counsel for the respondent/plaintiff attempted to contend that there was no need for the respondent/plaintiff to cross-examine the appellant/defendant with respect to the suspicious circumstances apparent on record and to the naked eye, but I am unable to agree. All the suspicious circumstances argued are such which are explainable or which can well be mistakes / errors during preparation and execution of documents. Such mistakes / errors generally happen when a transaction is happening in an atmosphere of cordiality, without the contracting parties suspecting each other. The possibility of

such mistakes is remote when documents are forged and fabricated to serve a purpose and with knowledge that the same will be subject to scrutiny in law and usually when it is doubly verified that there is no mistake therein. It cannot be lost sight of that the evidence of the respondent/plaintiff is not, of the signatures on the documents being his and matter thereon being typed subsequently (which was the plea taken in the plaint) but of denial of signatures on the documents. The respondent/plaintiff in the cross-examination also deposed that he had not put his signatures on the General Power of Attorney, Agreement to Sell, Affidavit, Will and the Receipt and his signatures had been forged by Sh. Madan Lal Dhingra. Once that was the evidence, the argument of the appellant / defendant / her husband having squeezed the contents on three sheets of paper signed by the respondent / plaintiff in blank disappears; if the appellant/defendant/her husband were forging the signatures of the respondent/plaintiff on three sheets of paper on which the Agreement to Sell is typed, they could very well have forged the same on four or five sheets of paper and there was no need for them to use different font or different spacing on different pages. Judicial notice can be taken of the manner in which such documents are usually prepared. Unfortunately, documents relating to transfer of valuable properties are not always drafted by Advocates in the peace of their office but are mostly got prepared from Deed Writers or pool of typists sitting in the Court compound or in the office of the Sub-Registrars and for the sake of saving on time, the work of typing is often distributed amongst several typist available and which can result in different pages of the same document being in different fact and having different spacing.

30. Similarly, the putting of point 'A' during the testimony of Sh. Madan Lal Gulati, witness to the Agreement to Sell, against the signatures of Sh. Madan Lal Dhingra and not against the signatures of Sh. Madan Lal Gulati is clearly a case of mistake/error, perhaps due to the same first and middle name of the two. The respondent/plaintiff ought to have in the cross-examination of the said witness quizzed him in this respect and without doing so, cannot take any advantage thereof. The Supreme Court in **Rajinder Pershad Vs. Darshana Devi** (2001) 7 SCC 69 has held that there is an age old rule that if you dispute the correctness of the statement of a witness you must give him an opportunity to explain his statement by drawing his attention to that part of it which is objected to as untrue, otherwise you cannot impeach his credit. The following observation of Lord Herschell, L.C. in **Browne Vs. Dunn** (1893) 6 R 67 (HL) was cited with approval:

"I cannot help saying, that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which, it is suggested, indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness, you are bound, whilst he is in the box, to give an opportunity of making any explanation which is

open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but it is essential to fair play and fair dealing with witnesses.”

The same principles were recently reiterated in ***Laxmibai Vs. Bhagwantbuva*** (2013) 4 SCC 97 and it was further held that they are essential to ensure fair play and fairness in dealing with the witness.

31. There is also no merit in the argument, of the Receipt being not proved and stamped. The Receipt in possession of the appellant/defendant is admittedly a carbon copy, though with the original signatures of the respondent/plaintiff. The Supreme Court in ***Prithi Chand Vs. State of Himachal Pradesh*** (1989) 1 SCC 432 held a carbon copy of a medical certificate bearing even signatures in carbon to be primary evidence. The same view was taken in ***Kewal Krishan Mayor Vs. Kailash Chand Mayor*** 95 (2002) DLT 115, ***Continental Telepower Industries Ltd. Vs. Union of India*** MANU/DE/1691/2009 and ***Narender Nath Nanda Vs. The State*** MANU/DE/1626/2010. Usually, the stamp is put on the original and not on the carbon copy. It is thus not as if the Receipt cannot be admitted in evidence for the said reason.

32. Yet similarly, there is no cross-examination on the difference in dates which the General Power of Attorney bears and the date of notarization thereof or the difference in the date of the Agreement to Sell mentioned in the Affidavit and the date which the Agreement to Sell bears. The same is the position with respect to the signatures of the “first party” and the “second party” on the Agreement to Sell. The basis of all the said arguments of

suspicion, is the legal acumen of the counsel for the respondent / plaintiff and not the foundation laid therefor in evidence and in cross examination. The appellant/defendant cannot be condemned on such discrepancies / suspicions without having an opportunity to explain the same. The Supreme Court, though in the context of a Will, in ***Madhukar D. Shende Vs. Tarabai Aba Shedage*** (2002) 2 SCC 85 has held that the law of evidence does not permit conjecture or suspicion having the place of legal proof nor permit conjectures or suspicion to demolish a fact otherwise proved by legal and convincing evidence. It was further held that suspicion alone cannot form the foundation of a judicial verdict – positive or negative. All the documents viz. Agreement to Sell, General Power of Attorney, Will, Receipt and Affidavit have been proved in accordance with law and the signatures thereon also now have been conclusively proved to be of the respondent / plaintiff and cannot be discarded on the basis of suspicious circumstances argued and of which no opportunity was given to the appellant / defendant and her witnesses to explain.

33. I am also unable to concur with the reasoning given in the impugned judgment, of the said documents viz. Agreement to Sell etc. being unbelievable for the reason that if the entire sale consideration had been paid, Sale Deed would have been got executed and not Agreement to Sell etc. The said reasoning loses sight of the fact that no Sale Deed could have been executed of a flat in a group housing society, land underneath which is leasehold. The Division Bench in ***Asha M. Jain Vs. Canara Bank*** 94 (2001) DLT 841 had taken judicial notice of such transactions being prevalent in Delhi. Though the Supreme Court in ***Suraj Lamp and Industries Private***

Limited supra has overruled the said judgment but only to the extent that such documents do not confer title to immovable property. Such overruling does not take away the judicial notice taken by the Division Bench of this Court of the prevalence of such transactions and the reason therefor. The appellant / defendant, on the basis of the said Agreement to Sell etc. is not claiming title to the property but defending her possession and which Section 53A of the Transfer of Property Act entitles her to do. In fact, it having emerged in the evidence that till the date of the execution of the said documents even the loan taken by the respondent / plaintiff from the Delhi Cooperative Group Housing Financial Society Ltd. had not been repaid; there was no possibility of execution of Sale Deed for this reason also. Rather, if DDA had been approached for such sale, the same would have resulted in cancellation of allotment of the flat in favour of the respondent / plaintiff.

34. The reasoning given by the learned Additional District Judge, of there being no possibility of sale or purchase of the flat in question without the consent of the Group Housing Society / DDA is also fallacious and contrary to the dicta of the Supreme Court in **Vishwa Nath Sharma Vs. Shyam Shankar Goela** (2007) 10 SCC 595, **K. Raheja Constructions Ltd. Vs. Alliance** (1995) Supp. (3) SCC 17 and **Van Vibhag Karamchari Griha Nirman Sahkari Sanstha Maryadit Vs. Ramesh Chander** (2010) 14 SCC 596 laying down that the Agreements to Sell with delivery of possession in part performance, of properties constructed on leasehold land or land allotted by Cooperative Group Housing Societies are not void for the reason of the prohibition contained in lease of land against alienation.

35. Similarly, the reasoning given in the impugned judgment, of the Agreement to Sell having expired and / or of having the Agreement to Sell in pocket serving no purpose for the appellant / defendant is erroneous and overlooks the provisions of law protecting possession delivered in part performance of such Agreements. Reliance by the senior counsel for the appellant / defendant on *Shrimant Shamrao Suryavanshi* supra is apposite in this regard.

36. The senior counsel for the appellant / defendant is also correct in his submission that the occasion for the appellant / defendant to prove payment of sale consideration of Rs.1,52,000/- did not arise as the payment admittedly received by the respondent / plaintiff of Rs.62,000/- was also in cash. I may notice that the respondent / plaintiff has been shifting his stand. The stand in the plaint was of the husband of the appellant / defendant obtaining signatures of the respondent / plaintiff on some papers without supplying any copy thereof. The plea was not of husband of the appellant / defendant having got the signature of the respondent / plaintiff on blank papers as the question of supplying copy of a blank paper does not arise. The respondent / plaintiff in his evidence altogether denied his signatures also and did not depose that the signatures were his but at the time of signing there was no matter / content on the papers. However his witnesses deposed of the signatures of the respondent / plaintiff having been taken on blank papers. Now the report of the CFSL confirms that the signatures are of the respondent / plaintiff. The argument taken today is again of signatures having been taken on blank paper but which was not the case pleaded in the plaint. In fact CFSL has reported that the signatures on Possession Letter –

Ex.DW1/3 (which was marked as Question Document-6) were put when printed matter was available. Such report with respect to the other documents could not be given as there was no intersection of the signatures with the printed matter on the other documents.

37. That even otherwise, the conduct of the parties, of delivery of possession of the flat by the respondent / plaintiff to the deceased husband of the appellant / defendant is more in consonance with the transaction of Agreement to Sell than with a transaction of mortgage. It is not as if the husband of the appellant / defendant was known to the respondent / plaintiff for the respondent / plaintiff to while taking loan from him and depositing the documents of title of his flat with him by way of security, not execute any document regarding the terms and conditions of mortgage or to also deliver possession of the flat and to sign papers / documents without reading the same or retaining any copy thereof. Generally a person does not retain any copies of the papers which he is signing only when he has received the entire consideration for executing such papers and is in future to have nothing to do with the property subject matter of such papers / documents. Though the respondent / plaintiff claimed that the husband of the appellant / defendant had been introduced to him for the purpose of loan transaction by Sh. K.P. Dhingra but the respondent / plaintiff did not examine the said Sh. K.P. Dhingra also as a witness.

38. The learned Additional District Judge also fell in error in disbelieving the transaction of sale purchase for the reason of the respondent / plaintiff having continued to pay the loan installments with respect to the flat. The learned Additional District Judge failed to notice that it was a term of the

Agreement to Sell that the respondent / plaintiff shall be responsible for the repayment of the loan amount. There is nothing unusual in such a clause also. The respondent / plaintiff having received the entire sale price of the flat had agreed to convey a clear title therein to the husband of the appellant / defendant. As far as the reference by the learned Additional District Judge to the payment by the respondent / plaintiff of maintenance, electricity and water charges with respect to the said flat after the date of the Agreement to Sell is concerned, no such payments of the period between the date of the Agreement to Sell and the date of institution of the suit have been proved and the payments proved of a date after the institution of the suit being in the nature of creation of evidence, cannot be given any weightage. Moreover the respondent / plaintiff has failed to avail of the opportunity to lead evidence in this regard before this Court also and adverse inference on this aspect has to be drawn against the respondent / plaintiff.

39. The respondent / plaintiff admits the execution and registration of the document titled as Will. The execution of the said document is also in consonance with a transaction of sale / purchase and the occasion for execution of such a document in a transaction of mortgage would not have arisen. It matters not whether the said document is attested by two witnesses or not. What is important is that the respondent / plaintiff has failed to explain the reason for execution of such a document if the transaction was only of mortgage.

40. I again find it strange that though the plea taken by the respondent / plaintiff was of a transaction of mortgage but neither is it pleaded as to what was to be the rate of interest on the loan taken or as to what were the terms

for repayment of the loan. It is in this context that my query aforesaid of the nature of the suit which the respondent / plaintiff was expected to file assumes significance. The respondent / plaintiff claiming redemption of mortgage could not have filed the suit as filed for cancellation of documents and for recovery of possession. The factum that no Agreement is pleaded of the terms of repayment or the rate of interest is also in consonance with a transaction of sale / purchase and against the transaction of mortgage.

41. The impugned judgment can thus not be sustained and is set aside. The appeal accordingly succeeds. The suit of the respondent / plaintiff is dismissed with costs throughout. Exemplary costs of Rs.10,000/- are also imposed on the respondent / plaintiff who is found to have indulged in false and frivolous litigation.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

SEPTEMBER 19, 2013

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