

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

Reserved on: 30.10.2013
Pronounced on: 29.11.2013

+ **RFA (OS) 112/2013, C.M. NO. 13694/2013**

SH. NARENDER SINGH NARULA Appellant
Through: Mr. Rakesh. K. Sharma and Ms.
Arijita, Advocate.

versus

SH. RAJAN DHINGRA AND ANR. Respondents
Through: Mr. Sachin Mishra, Advocate, for
Resp. No.1.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S. RAVINDRA BHAT

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1. The present judgment will dispose off an appeal against the judgment and decree dated 31.05.2013 in CS (OS) 960/2012 and the review, preferred by the appellant (first defendant in the case) on 13.08.2013.

2. Briefly, the facts of the case are that the parties (i.e. the plaintiff, the vendee, referred to as such and the appellant/defendant, referred to as the defendant) entered into an agreement on 19.10.2010, for the sale of property, being A-94, Vikas Puri. A receipt was executed evidencing payment of an advance amount of ₹15 lakhs; it is not in dispute that the property in question was A-94, Vikas Puri and the total consideration, ₹87,21,000/-. It is also not in dispute that the

plaintiff-vendee had paid ₹45 lakhs. The plaintiff also averred that the arrangement was premised upon the defendant possessing the authority to dispose off the property, after duly developing and constructing the floor concerned, within 12 months of the parties entering into the transaction. Claiming that the defendant despite being told of the plaintiff's readiness and willingness to comply with the terms and make payments of the balance amounts, did not take any further steps, the former (i.e. the plaintiff) filed a suit for specific performance, on 11.04.2012.

3. The defendant, upon being served, filed a written statement. His defence was that even though parties had entered into an agreement for the sale of the property, for the consideration adverted to in the plaint, that was of no consequence, because later, on 27.09.2011, they agreed to cancel the arrangement. As consideration (for cancellation of the deal) the plaintiff was to receive a further amount of ₹20 lakhs, over and above the amount paid by him, which was to be refunded. The entire amount, according to the defendant, was to be paid to the plaintiff, on or before 27.11.2011. In his plea, the plaintiff-vendee denied the second arrangement (of cancellation of the agreement to sell) entirely. The defendant-builder (i.e. the appellant) was consequently asked to produce the original of the receipt/the cancellation agreement document dated 27.09.2011, which was relied on by him to refute the suit claim. Consequently, he did so, on 03.12.2012. On that date, the Court made the following order:

“The original receipt has been placed on record by the defendant no.1. Counsel for the defendants submit that the matter was settled between the parties and in terms of the settlement the plaintiff had already received a sum of Rs.20 lacs from the defendants towards full and final settlement for canceling the agreement to sell and purchase dated 19.10.2010. Counsel also submits that the said original receipt was duly witnesseth by Mr. Rajesh and Mr. R.K.Chaudhary. Counsel submits that Mr. Rajesh is the relative of the plaintiff who played prominent role in persuading the parties to settle their disputes. On the other hand, plaintiff present in the court submits that the said receipt is forged and fabricated document as the same does not carry his signatures. The plaintiff further submits that he does not know any person with the name Rajesh and therefore there is no question of Rajesh being a relative of the plaintiff. The plaintiff further submits that he also does not know any person with the name R.K. Chaudhary who is also alleged to have witnesseth the said receipt.

During the course of hearing of the present matter, both the counsel, on instructions from the respective parties present in the court, have agreed that the original receipt can be sent for scientific analysis of the signatures of the plaintiff to the office of FSL and the parties will be bound by the report of the FSL. Let the specimen signatures of the plaintiff present in the court be taken at the first instance.

The original agreement to sell dated 19.10.2010 shall be placed on record by the plaintiff within a period of three days. Let the original receipt dated 6.12.2011 which carries the disputed signatures of the plaintiff along with the admitted signatures of the plaintiff on the original agreement to sell dated 19.10.2011, along with

the sheet carrying his specimen signatures, be sent to the office of FSL by the registry within a period of one week from the date of this order. The office of the FSL shall submit its report on the questioned signatures of the plaintiff within a period of two months from the date of this order.

List the matter for further directions on 1.3.2013.

The parties shall remain present in the court on the next date.”

4. Thereafter, on 01.03.2013 and subsequent dates, no significant orders were made. On 08.05.2013, the Court directed that the validity of FDRs deposited with it, be extended; on 13.05.2013, it was directed that the reports received from the CFSL (the forensic laboratory) in respect of the signature samples of the plaintiff, and those in the questioned documents, i.e. the receipt dated 27.09.2011 as well as the admitted documents should be collected and placed on record. This direction to the Registry was complied with. In these circumstances, the Court, on 30.05.2013, made the following order:

“1. In this suit for specific performance of an Agreement to Sell of immovable property, it was inter alia the contention of the contesting defendant no.1 that the plaintiff is not entitled to the relief of specific performance for the reason of having agreed to annul the contract on refund of Rs.20 lacs by the defendant no.1 to the plaintiff out of the admitted advance sale consideration of Rs.45 lacs from the plaintiff.

2. On 03.12.2012 when the matter was listed before this Court, the counsel for the plaintiff and the defendant

no.1, on instructions from their respective clients present in the Court, agreed that the original receipt of Rs.20 lacs relied upon by the defendant no.1 in support of aforesaid plea be sent for scientific analysis of the signatures of the plaintiff to the FSL and the parties will be bound by the report of the FSL.

3. The document was accordingly sent to the FSL.

4. The report of the FSL has been received in a sealed envelope along with the documents sent to the FSL for scientific analysis. The said report is in favour of the plaintiff and against the defendant no.1.

5. The plea of the defendant no.1, of the Agreement to Sell of which specific performance is sought having been agreed to be cancelled thus fails.

6. Though the counsel for the defendants states that the documents be sent to some other laboratory but the order dated 03.12.2012 being a consent one, cannot be varied.

7. The question which arises is as to the further proceedings in the suit.

8. It has been enquired from the counsel for the defendant no.1 as to why in the face of the said report, with which the defendant no.1 had agreed to be bound, the suit be not decreed immediately and the defendant no.1 be not prosecuted for fabricating a document for use in the present proceedings.

9. The counsel for the defendant no.1 states that the defendant no.1 has in the written statement taken other defences also besides the aforesaid plea and the said pleas have to be put to trial.

10. Though the order dated 03.12.2012 does not specify the future course of action but on a reading thereof it appears that the purport thereof was to dispose of the suit on the basis of the report to be received from FSL.

11. I have also examined the written statement of the defendant no.1. Though the defendant no.1 has also taken a plea of the plaintiff having agreed to receive Rs.76 lacs from the defendant no.1 in the event of the defendant no.1 being not able to sell the property, the defendant no.1 himself has in para no.5 of the written statement denied any such agreement.

12. It thus prima facie appears that there is no other issue for adjudication in the present suit.

13. However it is deemed expedient to grant an opportunity to the defendant no.1 to address on the said aspect as well as on the aspect of the prosecution of the defendant no.1.

14. List on 31st May, 2013; both the parties to remain present in person.

Sd/-
Judge”

The order of 31st May, 2013 reads as follows:

- “1. This order is in continuation of yesterday’s order.
2. Both parties are present in person.
3. The counsel for the defendant no.1 states that the defendant no.1 is ready and willing to perform the Agreement, for specific performance of which the present suit has been filed on the following conditions:-

- (i). *that the plaintiff gives up the claim if any of prosecution of the defendant no.1; and,*
 - (ii). *the balance sale consideration lying deposited in this Court together with interest accrued thereon is paid to the defendant no.1.*
4. *The counsel for the plaintiff is agreeable to the first of the aforesaid conditions but states that interest be not awarded to the defendant no.1.*
5. *The jurisdiction, to prosecute a litigant upon finding fabrication of a document/evidence, is of the Court and the opposite party can merely invite attention of the Court to the same and ask the Court to institute inquiry. Thus, the waiver by the plaintiff of the right to prosecute the defendant would not free the defendant of such prosecution unless this Court in exercise of its discretion orders so.*
6. *I have bestowed my consideration to the matter. I am of the opinion that the present is a case where the said discretion should be exercised in favour of the defendant for the reasons of (i) the defendant no.1 at the earliest possible opportunity having agreed to sending of the document to the FSL and to being bound by the report thereof; and, (ii) the defendant no.1 immediately upon receipt of the said report again having conceded to the claim of the plaintiff in the present suit. I thus deem this not to be a proper case for holding an inquiry under Section 340 of the Cr.PC or for directing prosecution of the defendant no.1*
7. *As far as the claim of the defendant no.1 for interest is concerned, the Agreement to Sell was for a total sale consideration of Rs.87,21,000/-*

out of which a sum of Rs.45 lacs stood paid by the plaintiff to the defendant no.1 prior to the institution of the suit. Upon suit for specific performance being filed by the plaintiff, this Court vide order dated 13th April, 2012 while granting ex parte ad interim relief restraining the defendants from selling, alienating or creating third party interest in respect of the property agreed to be sold, imposed a condition on the plaintiff to deposit the balance sale consideration of Rs.42,21,000/- in the form of FDR with the Registrar General of this Court. Hardly about an year has passed therefrom. The Agreement to Sell was with respect to the second floor of the property and which at the time of execution of the Agreement to Sell was still under construction. Though the construction is stated to have been completed but it is stated that about six weeks are required to give the finishing touches. It is thus not as if the plaintiff has suffered in any way by the delay on the part of the defendant no.1. I thus deem it appropriate that the interest earned on the balance sale consideration amount of Rs.42,21,000/- as deposited by the plaintiff in the form of FDR with the Registrar General of this Court in pursuance to the direction contained in the order dated 13th April, 2012, be paid to the defendant no.1 only.

8. It has now been agreed between the parties that the defendant no.1, upon the entire balance sale consideration of Rs.42,21,000/- together with interest aforesaid being paid by the plaintiff to the defendant no.1 within six weeks of today, shall execute/transfer documents in favour of the plaintiff and put the plaintiff into vacant, peaceful, physical possession of the premises.

9. *The Registry is directed to immediately release the FDR deposited by the plaintiff in this Court.*
10. *A decree is accordingly passed in favour of the plaintiff and against the defendant in terms of above, leaving the parties to bear their own costs.*
11. *Decree sheet be drawn up.*

*RAJIV SAHAI ENDLAW, J
MAY 31, 2013”*

5. The defendant/appellant filed a review petition, claiming to be a victim of fraud. It was alleged that the counsel who had appeared in the case previously improperly conducted it, in that the defendant was never aware of the pleas taken. Alleging that he never appeared in Court either on 03.12.2013, or on the last two dates, i.e. 30.05.2013 and 31.05.2013, the appellant urged that the Court should review its order. It was also stated that fraud unravels all and consequently, the previous orders directing specific performance should be reviewed. It was also alleged that the second defendant, the original owner of the property, never parted with the title to it, to the defendant. The review petition was dismissed on 13.08.2013; the Single Judge held as follows:

“Review Petition No.405/2013, IA No.12732/2013 (for condonation of delay) & IA No. 12733/2013 (for stay)

3. *Review is sought of the consent order dated 31st May, 2013 disposing of the suit and the decree in pursuance thereto.*

4. The defendant/review applicant though admits engagement of the Advocate who had appeared before this Court on 31st May, 2013 and 30th May, 2013 (since the order dated 31st May, 2013 is in continuation of the order dated 30th May, 2013) but denies his signatures on the written statement filed by the said Advocate as well as his presence before the Court on 31st May, 2013 as recorded in the order of that date

5. Needless to state that review is sought through a different Advocate.

6. The Advocate appearing today upon being asked whether the defendant no.1/review applicant is present in Court points out to a gentleman. The Advocate appearing on 31st May, 2013 had also similarly stated that the defendant no.1 was present in person in the Court and the counsel today appearing is unable to reply as to why he should be believed and not the Advocate who had appeared on 31st May, 2013.

7. The counsel for the defendant no.1/review applicant states that an RTI application with respect to the issuance of entry pass if any to the defendant no.1 on 30th May, 2013 or 31st May, 2013 has been made.

8. It has been enquired from the counsel for the defendant no.1/review applicant whether any FIR has been filed against the Advocate who in these applications is accused of serious misconduct.

9. The answer is in the negative. The counsel at this stage states that a complaint has been made to SHO Police Station-Vikaspuri, New Delhi but is unable to give the date or to produce a copy and

admits that there is no acknowledgment thereof.

10. The Courts function on the basis of statements made by the Advocates. The entire fabric of the justice delivery system will collapse if upon a new Advocate being engaged such allegations are lightly made against the earlier Advocate and if the Courts entertain such applications. Significantly no notice even has been given to the earlier Advocate accusing him of the conduct as mentioned in these applications and in which case the reply of that Advocate would have been before this Court.

11. No ground for review is made out.

12. Dismissed”

6. It is argued on behalf of the Appellant that serious prejudice has been caused by the two impugned orders of the learned Single Judge because the entire edifice of the decree is based on fraud played upon the Court and the appellant himself. It was argued that the plaintiff suppressed vital information about having made a complaint before the police, alleging to have been duped in regard to the payment promised under the cancellation agreement of September, 2011. In these circumstances, the Court could not have proceeded to decree the suit. Moreover, argued counsel, the written statement filed in Court did not contain signatures of the defendant; he did not agree to the so-called settlement and never appeared in or visited the Court. Counsel also relied on RTI sourced information to suggest that they bear out the contention that the defendant and no one on his behalf or behest ever visited the Court, at the relevant times, to instruct the

previous Court. It was pointed out that the defendant had issued a notice to the previous counsel, and had taken remedial steps as soon as he became aware, to secure his interest.

7. This Court has considered the submissions. It has also considered the suit records, which were called for and are part of the electronic records of this case. The forensic laboratory report is conclusive that upon a comparison of the admitted signatures of the plaintiff, (in the original agreement to sell, of October 2010, and the sample signatures given to it), and the disputed signatures in the document of 27.09.2011, the signatures on the latter were not, and could not have been written by him. This, in the opinion of the Court, having regard to the standard of proof applicable to civil cases, i.e. preponderance of probabilities, substantiates and proves the plaintiff's version that he never agreed to cancellation of the document, or the cancellation of the agreement to sell, previously entered into by the parties.

8. As far as the other material aspects are concerned, if the cancellation is out of the way, there really is no defense by the defendant. He never disputed that the agreement to sell had been entered into; nor did he dispute having received the sum of ₹45 lakhs, as part of the consideration. Furthermore, the period within which the property had to be developed and conveyed to the plaintiff too had come to an end. He never showed, in support of his allegation that the deal was cancelled, that the amount of ₹76 lakhs, (even as per his version) was ever tendered to the plaintiff, on or before 27.11.2011. At least that was not the purport of any of his pleas. In these

circumstances, as far as the *lis* between the parties went, the documents, the pleadings, and the FSL report were sufficient for the Court to direct a decree to be drawn for specific performance.

9. Now, dealing with the aspect of fraud. No doubt, fraud unravels all – a proposition well known and applied in law. However, in the present case, the defendant's argument on this score wears thin. The argument belies the circumstance that the receipt relied on by him, was produced on 03.12.2012 in Court. If indeed he had no inkling of what was happening, nor was present, the defendant does not explain how the original receipt was placed on record on that date. Nor does the defendant impeach the contents of the CFSL report, which are concededly part of the record of this case. He had access to it, through his new counsel, who concededly inspected the original file in this case. Therefore, having regard to the overall conspectus of circumstances, the Court is of opinion that this argument is without merit.

10. In view of the above discussion, the Court is of opinion that the impugned orders of the learned Single Judge do not call for any interference. The appeal is, therefore, dismissed as meritless.

**S. RAVINDRA BHAT
(JUDGE)**

**NAJMI WAZIRI
(JUDGE)**

NOVEMBER 29, 2013