

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

% *Judgment Reserved on : January 06, 2014*
Judgment Pronounced on : January 22, 2014

+ **RFA(OS) 3/2014**

RITNAND BALVED EDUCATION
FOUNDATION

..... Appellant

Represented by: Mr.R.Venkatramani, Sr.Advocate
with Mr.Rajesh Yadav, Mr.Vinay
Garg, Mr.Rajan Chawla,
Mr.Gautam Chauhan,
Mr.Kameshwar Nath Tripathi and
Mr.Shodhan Babu, Advocates

versus

PAUL NANDA & ORS

..... Respondents

Represented by: Mr.Chetan Sharma, Sr.Advocate
with Mr.Vedanta Varma, Advocate

RFA(OS) 4/2014

RITNAND BALVED EDUCATION
FOUNDATION

..... Appellant

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with Mr.Rajesh Yadav, Mr.Vinay
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Mr.Shodhan Babu, Advocates

versus

PAUL NANDA & ORS

..... Respondents

Represented by: Mr.Chetan Sharma, Sr.Advocate
with Mr.Vedanta Varma, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR.JUSTICE JAYANT NATH

PRADEEP NANDRAJOG, J.

1. We shall hereinafter be referring to Ritnand Balved Education Foundation as '*RBEF*' and to Late Admiral S.M.Nanda and his legal heirs as '*Nanda*'.

2. CS (OS) No.247/2004 was filed by RBEF against Late Admiral S.M.Nanda initially seeking a decree for injunction. The plaint was amended pursuant to an order dated September 27, 2005 when IA No.5257/2004, seeking to amend the plaint and praying for a decree of specific performance, was allowed. As per the amended plaint, RBEF pleaded that Nanda was the owner of property No.B-104, Defence Colony, New Delhi ad-measuring 361 square yards and had constructed a building thereon. As of the year 2002, the property was lying vacant and since Nanda knew Dr.Ashok K.Chauhan, the Founder President of RBEF, at the asking of Nanda, Dr.Ashok K.Chauhan had instructed his guards to take care of the suit property since RBEF's registered office was in a building adjacent to Nanda's property. Towards the end of the year 2002, Nanda desired to sell the property. Dr.Ashok K.Chauhan, Nanda and his son Paul Nanda, held negotiations. The negotiations fructified into an oral agreement at a meeting held on March 23, 2003, when Nanda agreed to sell the subject property to RBEF for a sale consideration of ₹2,35,00,000/- (Rupees Two Crores and Thirty Five Lacs only). It was agreed that 10% of the sale consideration i.e. ₹23,50,000/- (Rupees Twenty Three Lacs Fifty Thousand only) shall be paid as earnest money with possession of the ground floor of the property being simultaneously handed over. Accordingly, on March 29, 2003, RBEF got prepared a banker's cheque drawn on UTI Bank Ltd. in sum of ₹23,50,000/- (Rupees

Twenty Three Lacs Fifty Thousand only) and delivered the same to Nanda along with a covering letter dated March 29, 2003, enclosing therewith, apart from the banker's cheque, a draft copy of the agreement to sell. Receiving the same on March 31, 2003, Mr. Paul Nanda thanked Mr. Arun Chauhan (son of Dr. Ashok K. Chauhan) for sending the banker's cheque and promised to hand over the possession of the ground floor on March 31, 2003. He told Mr. Arun Chauhan to give him a list of documents which would be required to execute the sale-deed. On April 01, 2003 Mr. Arun Chauhan gave the list of documents, and as per the list, Mr. Paul Nanda handed over a photocopy of the conveyance deed, documents showing conversion of the property from lease-hold tenure to free-hold tenure and a house tax bill. Possession of the ground floor was handed over. On April 05, 2003 Nanda conveyed that he had stood surety for his son Sanjeev Nanda in some criminal trial and had tendered the suit property as security to the Court. Nanda told Dr. Ashok K. Chauhan that his lawyer had told him that if he would sell the property, he would be in contempt. That he was advised not to encash the banker's cheque. The banker's cheque was returned in an envelope on which Paul Nanda had written something. At that stage parties further discussed the issue and another agreement to sell was prepared and finalized on those lines. That it was agreed that RBEF shall pay ₹1,00,000/- (Rupees One Lac only) to Nanda as earnest money, which amount was tendered vide a banker's cheque dated April 14, 2003, which was returned by Nanda for fear of contempt of Court and Nanda expressed his inability to sign even the new agreement to sell. Nanda assured that he would sell the property to RBEF when the same got released from the Court and since possession of the ground floor was with RBEF it was agreed that in order to safeguard the monetary loss to Nanda he would be paid 7% of the sale

consideration per annum in 12 equal installments till sale-deed would be executed. However, this amount was subsequently agreed to be reduced to ₹50,000/- per month. That thereafter Paul Nanda informed that even accepting ₹50,000/- per month may amount to contempt of court, it was agreed that said sum of ₹50,000/- per month shall be paid along with the sale consideration when the sale deed would be executed and that till then electricity and water charges shall be paid by RBEF which shall also maintain the building. Nanda did not agree to RBEF paying the dues directly and thus it was agreed that the bills raised for water and electricity shall be paid by Nanda but RBEF would recompense in some other form being bills raised for alleged services by '*Dynatron Services*' a company of Sh.Paul Nanda and RBEF paying amount under the bills. That on January 28, 2004 Paul Nanda directed employees of RBEF to vacate the suit property. The said act was Nanda's intention not to abide by the oral agreement to sell. Thereafter Dr.Ashok K.Chauhan and Sh.Arun Chauhan personally met Nanda at his residence on January 29, 2004 as also on January 31, 2004 to persuade him to abide by the oral agreement to sell. Surprisingly Paul Nanda came to the suit property on February 02, 2004 and created a scene asking RBEF's employees to get out of the suit property. On March 06, 2004, as a last resort, Ashok Chauhan and his son tried to prevail upon Nanda to sell the property, but he refused to do so.

3. The written statement filed would reveal that Nanda admitted that Ashok Chauhan approached him several times in the year 2003 for sale of the house to him but Nanda told him that he could not sell the house since he had furnished a security in Court in FIR No.17/1999 with respect to the house. Nanda denied any oral or written agreement. He denied receiving any sale consideration or returning the same. Nanda denied

each and every averment in the plaint and explained possession of the ground floor being with RBEF as a case of unlawful and illegal grabbing. He pleaded that Ashok Chauhan was residing in House No.E-27, Defence Colony which is across the suit property was friendly with Nanda, and since the suit property was vacant Ashok Chauhan took the responsibility to take care of the house and requested Nanda to permit him to have personal meeting with the visitors in the drawing room at the ground floor, and for said reason, the key of the ground floor premises was given to Ashok K.Chauhan.

4. At this stage, we may note that during arguments, we were informed that the construction on the ground floor consists of a large drawing-cum-dining room, a kitchen with an attached store, a bed room with an attached toilet.

5. The pleadings in Suit No.1318/2004, in which Late Admiral S.M.Nanda is the plaintiff, and RBEF is the defendant, need not be elaborately stated because the same would be obvious. The defence in Suit No.247/2004 by Nanda is his plaint and the plaint by RBEF in Suit No.247/2004 became the defence. Nanda not only sought decree for possession but even mesne profits.

6. Vide order dated September 27, 2005 the following issues were settled in CS (OS) No.247/2007:-

“(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.”

7. Vide an order of even date i.e. September 27, 2005 the following issues were settled in CS(OS) No.1318/2004:-

“(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.”

8. In CS (OS) No.1318/2004 Nanda led evidence by examining himself as the sole witness. In sync with his stand in the plaint filed by him and the written statement filed by him in the cross suit filed by RBEF he simply denied any oral agreement to sell and deposed possession of the ground floor being with RBEF as per his pleading in the plaint and the written statement. Subjected to a lengthy cross examination, Nanda held good the ground and nothing was shown to us to discredit Nanda's testimony.

9. RBEF examined only one witness by way of defence evidence in CS (OS) No.1318/2004. Mr.Arun Chauhan DW-1 deposed facts as per the pleadings of RBEF in the suit filed by RBEF and stated that his testimony and 56 documents exhibited as Ex.PW-1/1 to Ex.PW-1/56 in the suit filed by RBEF i.e. CS (OS) No.247/2004 be read as his testimony. He additionally proved Ex.DW-1/1, being copy of the resolution dated February 17, 2006 authorizing him to depose on behalf of RBEF, Ex.DW-1/2, the certificate of registration and memorandum of

association of RBEF, Ex.DW-1/3 and Ex.DW-1/4 being certified copies of lease deeds dated September 01, 2004 and May 16, 2000, evidencing letting of ground floor of property No.B-107, Defence Colony comprising a drawing-cum-dining, lobby, three bed rooms with attached toilets, a kitchen on the ground floor and a servant quarter on the terrace and letting of ground floor of property No.E-12, Defence Colony comprising a drawing-cum-dining, three bed rooms with attached toilets, a kitchen on the ground floor and a servant quarter on the terrace. The former being let out on September 01, 2004 for a period of two years at a monthly rent of ₹35,000/- (Rupees Thirty Five Thousand only) and the latter for a period of three years at a monthly rent of ₹27,000/- (Rupees Twenty Seven Thousand only).

10. RBEF examined 24 witnesses in CS (OS) No.247/2004.

11. Arun Chauhan PW-1 proved 56 documents while deposing facts as per the plaint. A brief reference to the 56 exhibits may be noted by us. The same is as under:-

- | | |
|-----------|--|
| Ex.PW-1/1 | Resolution authorizing him to act on behalf of RBEF. |
| Ex.PW-1/2 | Resolution verifying the plaint. |
| Ex.PW-1/3 | Certification of registration of RBEF. |
| Ex.PW-1/4 | Letter dated March 29, 2003 tendering banker's cheque with photocopy of the banker's cheque in sum of ₹23,50,000/- (Rupees Twenty Three Lacs and Fifty Thousand only) marked as 'C'. |
| Ex.PW-1/5 | Letter dated February 05, 2004 by Manager of UTI Bank confirming that the banker's cheque (Mark 'C') was returned to the bank for cancellation on April 28, 2003. |

Ex.PW-1/6	Letter dated April 01, 2003 written by Arun Chauhan to Paul Nanda listing list of documents to facilitate drawing up of the sale-deed.
Ex.PW-1/7	Draft of agreement to sell.
Ex.PW-1/8	Visiting card of Sh. Paul Nanda.
Ex.PW-1/9	Envelope stated to be having a writing thereon in the handwriting of Mr.Paul Nanda. (stated to be the one in which pay order, photocopy whereof is Mark 'C' was returned).
Ex.PW-1/10	Draft agreement to sell.
Ex.PW-1/11	Letter dated August 28, 2003 addressed by Admiral S.M.Nanda to the Executive Director, MTNL making a grievance to the change of the telephone exchange resulting in the code number of his telephones being changed.
Ex.PW-1/12	Letter dated November 25, 2003 addressed to RBEF by M/S Dynatron Services enclosing therewith bill Ex.PW-1/13.
Ex.PW-1/13	Bill dated November 25, 2003 in sum of ₹35,000 from M/S Dynatron Services to RBEF.
Ex.PW-1/14	Public notice dated January 26, 2004 giving nomenclature 'Amity-II' to the suit property.
Ex.PW-1/15 to Ex.PW-1/25	Bills raised on RBEF by different suppliers for supply of different goods and materials, which as per the description in the bills are goods and materials used

for repair and interior decoration. The bills show the address of RBEF as the suit property and are dated between August, 2003 till February, 2004.

- Ex.PW-1/26 Negatives of photographs showing possession of RBEF on the ground floor.
- Ex.PW-1/27 Twelve photographs showing possession of RBEF on the ground floor.
- Ex.PW-1/28 to
Ex.PW-1/47 Electricity bills stated to be paid by RBEF from April 2003 onwards.
- Ex.PW-1/48 Bill dated March 11, 2004 raised by DJB in the name of Ms.Sumitra Nanda in respect of suit property.
- Ex.PW-1/49 Receipt for bill dated March 11, 2004 issued by DJB on March 12, 2004.
- Ex.PW-1/50 Speed Post receipt statedly pertaining to the letter dated April 01, 2004 (Ex.P-15) written by Arun Chauhan to S.M.Nanda. **(Ex.P-15, receipt whereof has been admitted by Nanda refers to draft general power of attorney and draft agreement to sell being enclosed.)**
- Ex.PW-1/51 Speed Post receipt statedly pertaining to the letter dated April 12, 2004 (Ex.P-16) written by Arun Chauhan to S.M.Nanda **(Ex.P-16 receipt whereof has been admitted by Nanda refers to Ex.P-15 and that Arun Chauhan has not been reverted to by Nanda with reference to Ex.P-15.)**
- Ex.PW-1/52 Details of call records of Mobile No.9810065666 statedly subscriber whereof was Arun Chauhan

showing calls made to the mobile phone of Paul Nanda.

- Ex.PW-1/53 Details of call record of Mobile No.9810065666 statedly subscriber whereof was Arun Chauhan showing calls made to the mobile phone of Paul Nanda.
- Ex.PW-1/54 Reply to notice dated April 19, 2004 (Ex.P-19) dated May 01, 2004 submitted by RBEF to the SHO, PS Defence Colony.
- Ex.PW-1/55 Warranty certificate dated June 25, 2003 issued by Indian Engineering Company to RBEF for a generator statedly installed at the suit premises.
- Ex.PW-1/56 Letter dated August 23, 2002 from Indian Engineering Company to RBEF pertaining to a generator statedly installed at the suit premises.

10. Sh.Aashish Bindra PW-2, the General Manager, Corporate Finance RBEF deposed that he had got prepared the banker's cheque in sum of ₹23,50,000/- (Rupees Twenty Three Lacs and Fifty Thousand only) and that there used to be regular meetings between Arun Chauhan and Paul Nanda between March, 2003 and April, 2003.

11. Sh.Muraleedharan PW-3 the Executive Assistant, Amity Business School deposed that in the months of March and April, 2003 Paul Nanda had various meetings with Arun Chauhan regarding finalization of the agreement to sell and that the agreement to sell Ex.PW-1/7 was generated from the computer of Paul Nanda and that the agreement to sell Ex.PW-1/10 was drafted by him.

12. Lt. Colonel R.C.Thapliyal (Retd.) PW-4, working as a Deputy Director, First Grade Force Pvt. Ltd., Amity Institute Campus, Sector -44,

Noida deposed that he was present when possession of the ground floor was handed over by Paul Nanda to Arun Chauhan on March 31, 2003.

13. Sh.Pradeep Kumar PW-5 OSD to Dr. Ashok K.Chauhan, Founder president of RBEF deposed that in his presence, in the evening of March 29, 2003, pay order in sum of ₹23,50,000/- (Rupees Twenty Three Lacs and Fifty Thousand only) was handed over to Sh.S.M.Nanda and thereafter the possession of the ground floor was handed over by Paul Nanda to Sh.Arun Chauhan in his presence and that RBEF brought fictions and equipments in the property.

14. Sh.Bachan Singh Nainwal PW-6, working as Administrative Officer in RBEF stated that in his presence on March 31, 2003 Paul Nanda handed over possession of the ground floor to Arun Chauhan and that mode of payment of electricity bills suggested by Paul Nanda to Arun Chauhan requiring M/s.Dynatron Services to issue fictitious bills towards amount payable under the electricity bills was in his presence. He confirmed that Ex.PW-1/29 to Ex.PW-1/46 were the electricity bills pertaining to the suit property and so was the water bill Ex.PW-1/48 and the receipt Ex.PW-1/9 pertaining thereto. He deposed that the four letters dated May 12, 2003 marked 'M', 'N', 'O' and 'P' were written and so was the letter dated August 08, 2003 Mark 'Q'.

15. Sh. B.M.Verma PW-7, Divisional Engineer, Jorbagh Exchange deposed that in response to the letter Ex.PW-1/11 necessary action was taken by reverting the code of the two telephones by changing the exchange from 246 to 243 on June 30, 2003.

16. SI Surender Singh PW-8, PS Defence Colony deposed that Ex.PW-1/54 was received at PS Defence Colony.

17. Sh. Ramesh Chandra PW-9, Section Officer (Accounts), BSES, Nizamuddin deposed that the billing account statement of the four

electricity connections in the suit property were Ex.PW-9/1 to Ex.PW-9/29 and the bills Ex.PW-1/28 to Ex.PW-1/47 were issued by BSES Office Nizamuddin and bills Ex.PW-1/28 to Ex.PW-1/31 and Ex.PW-1/36 to Ex.PW-1/47 were paid by cheque.

18. Sh. T.S Vedha Narayanan PW-10, Manager, UTI Bank deposed that he was the Manager UTI Bank and had signed the banker's cheque photocopy whereof was Mark 'C' on March 29, 2003. The cheque was issued by him because RBEF had cut out a cheque Ex.PW-10/1 from their account for similar sum with a request that a banker's cheque be issued in favour of S.M.Nanda. That said transaction was evidenced from the statement of account Ex.PW-10/2. He received a letter dated April 28, 2003 Ex.PW-10/4 for cancellation of the pay order and acting thereupon reverse entries were made in the account of RBEF as per Ex.PW-10/5.

19. Sh. Ashok Malik PW-11, UDC, DJB Office, GK-1 deposed that Ex.PW-1/48 and Ex.PW-1/49 were issued by the Delhi Jal Board.

20. Sh. Sri Pal Upadhyaya PW-12 working as project officer with RBEF deposed that he had checked up the house tax dues of the suit property at the Lajpat Nagar office of MCD and was told that for the year 2003-04 property tax in sum of ₹2,740/- was due.

21. Sh. R.K. Singh PW-13 working as Nodal Officer, Bharti Airtel, Ltd., D-184, Okhla, Phase -I, New Delhi -24 deposed that Ex.PW-13/1 was the computer generated print out showing call details of mobile number 9810065666 from March 2003 till December, 2003.

22. Harish Verma PW-14 the Marketing Executive of Indian Engineering Company, 11 Okhla Industrial Estate, New Delhi deposed that Ex.PW-1/55 and Ex.PW-1/56 were issued by his company and they pertained to two generator sets at E-27, Defence Colony.

23. J.P.Chaudhary PW-15, a property dealer deposed that in February 2004 he learnt that the suit property was for sale and the seller wanted ₹3.25 crores.
24. Dilip Kumar Singh PW-16, Sales Co-ordinator deposed that the bill Ex.PW-1/15 was raised by CSI Telecom.
25. Sh.K.C.Samal PW-17 deposed that he was the proprietor of K.C.Samal & Co. and the bills Ex.PW-1/17, Ex.PW-1/22 and Ex.PW-1/23 were raised by him.
26. Sh.Singhara Singh PW-18 deposed that he was the proprietor of M/s.Bhola Electrical and that the bill Ex.PW-1/16 was raised by him.
27. Sh.Dinesh Gupta, PW-19, Sales Executive of Jwala Prashad & Co. deposed that the bills Ex.PW-1/19, Ex.PW-1/20 and Ex.PW-1/21 were issued by the company.
28. Sh.Islamuddin PW-20, deposed that he had raised the bill Ex.PW-1/24.
29. Anuj Goyal PW-21 deposed that he was a partner of M/s.Sesta and the bill Ex.PW-1/21 was raised by the partnership firm.
30. Rahul Mistry PW-22, Accounts Manager M/s.Dynatron Services deposed that the bills Ex.PW-1/12 and Ex.PW-1/13 were signed by him and admitted that RBEF had not issued any work order pertaining to the bills and that no worksheet or challan regarding repair of the generator sets was available. He stated that he did not remember whether Sh.Paul Nanda was a Director of Dynatron Services.
31. Vikrant Puri PW-23, deposed that he was a family friend of Paul Nanda. 5-6 years ago, he had offered one property to Paul Nanda, who then referred him to Arun Chauhan. Paul Nanda never accompanied him to see Arun Chauhan. He stated that he never spoke to Admiral Nanda over the telephone with respect to the suit property.

32. Deposing as a witness of RBEF and turning hostile in that he denied having spoken to Admiral Nanda regarding the suit property, Vikrant Puri was declared hostile and was cross-examined by counsel for RBEF. Suffice it to state that in cross-examination RBEF put its case to the witness, which he denied. We have perused the cross-examination and find that except for putting suggestions which were denied by the witness, no serious attempt has been made to discredit the witness.

33. Sh.Paul Nanda PW-24, for reasons which surprise us, was produced as a witness by RBEF, and thus it is apparent that he did not support the case of RBEF. He was declared hostile and cross-examine. Case of RBEF was put to him. He denied the same. We find that except for putting suggestions as per the case of RBEF, no serious attempt was made to discredit the witness.

34. As recorded in the order dated February 05, 2008 in CS(OS) No.247/2004 evidence led by Nanda as plaintiff in CS(OS) No.1318/2004 was to be read in evidence of Nanda in CS(OS) No.247/2004.

35. Vide impugned judgment and decree dated November 07, 2013, making a reference to the testimony of Arun Chauhan and that of Paul Nanda and Admiral S.M.Nanda the learned Single Judge has held that onus to prove the oral agreement by RBEF was not discharged and thus finding returned is that there was no oral agreement to sell as alleged by RBEF. Believing possession of the ground floor being handed over to Ashok Chauhan as pleaded by Nanda the learned Single Judge has held that RBEF was liable to be ejected from the suit property. With reference to the testimony of Vikrant Puri PW-23 who stated that the lease rent of the property in the year 2003 would be around ₹3,50,000/- (Rupees Three Lacs and Fifty Thousand only) to ₹4,00,000/- (Rupees Four Lacs only) with 10% increase each year, vide judgment and decree dated November RFA (OS) 3/2014 & 4/2014

07, 2013 the learned Single Judge has decreed mesne profits in sum of ₹3,00,000/- (Rupees Three Lacs only) per month from September 01, 2003 with increase of 10% per month from April 01, 2004; realizing that 10% increase of rent per month was a typographic error vide order dated November 29, 2013, the learned Single Judge has corrected the increase to be 10% per annum.

36. We have troubled ourselves and thereby the reader of our opinion by noting each and every document exhibited at the trial, with a brief reference to the contents thereof for the reason, the impugned decision, in our opinion has overlooked some very critical points emerging from a few exhibits, and this appears to be the result of learned counsel for the parties not drawing attention of the learned Single Judge to said documents.

37. Now, as deposed to by Sh.Arun Chauhan and in respect to which case suggestions were made to Paul Nanda and S.M.Nanda drafts agreement to sell were handed over to Nanda under cover of a letter dated March 29, 2003. But we find that RBEF has itself filed the letters Ex.P-15 and Ex.P-16 which are dated April 01, 2004 and April 12, 2004. The year cannot be a typographic error for the reason as deposed to by Arun Chauhan, Ex.P-15 was sent through speed post vide receipt Ex.PW-1/50 which is dated April 02, 2004. Similarly, Ex.P-16 has been sent through speed post vide receipt Ex.PW-1/51 which is dated April 12, 2004.

38. The two letters Ex.P-15 and Ex.P-16, dated April 01, 2004 and April 12, 2004 respectively read as under:-

Exhibit P-15

“April 01, 2004

Mr.S.M.Nanda

*4, Prithvi Raj Road
New Delhi-110 001*

Sub.: B-104 Defence Colony

Dear Shri Nanda ji,

We take reference of your personal visit to AKC House along with Mr. Paul Nanda, on 22nd March 2004 evening, and the discussion held therein.

As desired, please find enclosed herewith the following documents:-

- 1. Draft General Power of Attorney*
- 2. Agreement to sell*

We would wait urgently for your approval of the above documents.

Thanking you,

Yours sincerely,

Sd/-

Arun Chauhan

Encl: a/a”

Exhibit P-16

“April 12, 2004

BY SPEED POST

*Adm S.M.Nanda
4, Prithvi Raj Road
New Delhi 110 011*

Sub.: B-104 Defence Colony

Dear Shri Nanda ji,

Further to your personal visit to AKC House on 22nd March 2004, as per your desire, the drafts of General Power of Attorney and Agreement to Sell were sent to you on 1st April 04 by hand as well as on 2nd April 04 by speed post.

We have heard as yet from you. Please let us know the further course of action.

With best regards,

Sd/-

Arun Chauhan”

39. As noted above Ex.P-15 which is the letter dated April 01, 2004 refers to a draft general power of attorney and a draft agreement to sell being enclosed. But, the entire case pleaded is that the first draft agreement Ex.PW-1/7 was sent on March 29, 2003 along with the banker's cheque and after the cheque was returned by Nanda informing that he could not sell the property because he had offered the same as security, the parties renegotiated and arrived at another agreement that the sale-deed would be executed when the property is got released from the Court and till sale deed is executed monthly rent would be paid but when the sale deed is executed. In paragraph 16 of the plaint it is categorically averred that another agreement to sell was drawn up and delivered along with the cheque dated April 14, 2003 in sum of ₹1,00,000/- (Rupees One Lac only). As per RBEF the said agreement is Ex.PW-1/10. Ex.P-15 and Ex.P-16 as also the postal receipts Ex.PW-1/50 and Ex.PW-1/51 completely demolish the oral testimony of witness of RBEF. Ex.P-15, Ex.P-16 and Ex.PW-1/50 as also Ex.PW-1/51 are documents of RBEF. It is apparent that nothing of the kind as alleged by RBEF i.e. exchange of draft agreements took place in March and April, 2003. The documents

would evidence that in April, 2004 Ex.P-15 and Ex.P-16 were sent by RBEF, and the stand of Nanda that he received the two letters but their contents were incorrect, is probablized for the reason there are strong circumstances to infer that Ex.P-15 and Ex.P-16 were written to create evidence. Assuming that the two letters were written bona-fide and correctly reflected the true and correct facts, then the position would be, evidenced by the fact that on April 01, 2004 Arun Chauhan wrote that with respect to the discussions held on March 22, 2004, he was enclosing copy of the draft general power of attorney and an agreement to sell, that RBEF admits that till March, 2004 the parties were in negotiation. It is in this context it assumes importance to note that as per the plaint no further discussion pertaining to any agreement to sell took place after April-May, 2003. The pleading in paragraph 25 of the plaint that on January 28, 2004 Paul Nanda visited the suit property and asked employees of RBEF to vacate the property and that because of said act Chauhans met Nanda on January 29, 2004 to impress upon him to fulfill his obligations under the agreement to sell with further pleading in paragraph 26 that on February 02, 2004 Paul Nanda once again created a scene at the suit property by asking RBEF's employees to vacate the same and further pleading in paragraph 30 of the plaint that on March 06, 2004, as a last resort Chauhans' impressed upon Nanda to fulfill his obligations under the agreement to sell would require it to be held that it is not the case of the plaintiff that specific performance of the agreement to sell sought for was the one which took place in March or April, 2004. Looked at from this aspect of the pleadings in the plaint and the contents of Ex.P-15 and Ex.P-16, there is a complete mismatch between the pleadings and the two letters.

40. Ex.PW-1/52, Ex.PW-1/53 and Ex.PW-13/1 would evidence repeated and numerous telephone calls made from the mobile number of Arun Chauhan to Paul Nanda in the month of March and April, 2003. It is apparent that something urgent and serious was being spoken between the two over the telephone. That from the account of RBEF, as deposed to by Arun Chauhan and duly corroborated by PW-2, PW-3, PW-5 and PW-10 after debiting the account of RBEF a banker's cheque in sum of ₹23,50,000/- (Rupees Twenty Three Lacs and Fifty Thousand only) was issued by the Manager of the UTI Bank on March 29, 2003 and later on the entries were reversed when the banker's cheque was cancelled on April 28, 2003, is proof of the fact that a cheque in sum of ₹23,50,000/- (Rupees Twenty Three Lacs and Fifty Thousand only) was drawn in the name of S.M.Nanda but later on cancelled.

41. That photocopies of the title documents of Nanda were handed over to Ashok Chauhan is an indicator that a deal with respect to Nanda's property was being discussed between Ashok Chauhan and Nanda.

42. Possession of the ground floor of the property being with Nanda is also an indicator that something was discussed between Nanda and Ashok Chauhan.

43. The totality of the evidence would establish that there was some serious conversation between the parties which were transactional in nature and the parties seriously discussed the sale of the suit property. But, the conduct of the parties as a whole has to be seen to determine whether a concluded oral bargain capable of being called as a contract came into existence and further whether the parties intended to bind themselves only when a written document evidencing the same was signed. We turn to the plaint and the evidence. It is the case of RBEF that soon after the price was finalized and pending finalization of an

agreed written agreement to sell, Nanda returned the banker's cheque in sum of ₹23,50,000/- (Rupees Twenty Three Lacs and Fifty Thousand only) which he had received as earnest money and part sale consideration and RBEF took back the cheque. RBEF's witness T.S.Vedhanarayan PW-10, the Manager of UTI Bank who had issued the banker's cheque on March 29, 2003 deposed that on April 28, 2003, the cheque was returned after cancellation to the bank. As per the plaint the parties further negotiated, and this would mean that any prior consensus, if at all, was by mutual consent cancelled. As pleaded in paragraph 15 and 16 of the plaint, talks took place for sale of the property contingent upon Nanda getting the property released from the Court to which it was offered as a security. It was agreed that Nanda would be paid 7% of the sale price as annual rent payable in 12 equal installments as compensation by way of rent for RBEF to occupy the ground floor of the property till upon the execution of the sale-deed and payment of the sale consideration. But even this agreement, as per the plaint, was given a go by because it is pleaded in paragraph 18 of the plaint thereafter that it was agreed that till sale deed was executed and sale consideration paid, Nanda would receive monthly rent in sum of ₹50,000/- (Rupees Fifty Thousand only). But as pleaded in the plaint, even this was given a go by. It is pleaded that Nanda agreed to receive ₹50,000/- per month at the time of execution of the sale deed along with receiving the sale consideration.

44. Thus, even as per the plaint at 4 points of time, 4 different terms of the agreement to sell surfaced. The first being that Nanda agreed to receive 10% of the sale consideration for sale of the house at a price of ₹2.35 crores and received ₹23,50,000/- (Rupees Twenty Three Lacs and Fifty Thousand only) on March 29, 2003. The bargain was settled. The second being when Nanda returned the earnest money cum part sale

consideration and it was agreed that for the same sale consideration Nanda would sell the house after clearing the property which was offered by way of security to the Court and would additionally receive 7% of the sale consideration per annum in 12 installments per year as compensation for letting ground floor of the property being used by RBEF. The third being that this compensation was reduced to ₹50,000/- (Rupees Fifty Thousand) per month to be received each month. The fourth being that the compensation in sum of ₹50,000/-(Rupees Fifty Thousand) would be paid along with the tender of the sale price when sale deed was executed.

45. Thus, evidence probablizes that everything remained nebulous. Desirous of selling his property, Nanda was scared of violating the Court orders in that he had offered the suit property by way of security in a criminal court. RBEF was finding ways to convince Nanda to agree to a term of settlement where he could enter into an agreement to sell fearless of inviting any adverse action against him by the Court. Nanda remained hesitant. A concluded agreement eluded the parties.

46. There is yet another way to look at the issue. That Ex.PW-1/7 and Ex.PW-1/10, as claimed by RBEF were drawn up is proof that the parties intended to record the terms of their agreement if any into writing before they would be bound by what they discussed. That the parties never executed a written agreement to sell is indicative of the fact that the parties could not agree on the nitty gritty of the deal. That the parties moved in the direction of executing a written agreement to sell evidences that even if during discussions the parties unconsciously or consciously agreed upon, what in law would be a binding contract, they clearly envisaged that it is only when their thoughts are inked would alone a binding contract come into existence.

47. It would be useless for us to discuss the effect of the documents that RBEF was in possession of the ground floor of the property and was paying the electricity bills for the electricity consumed as also water bills and additionally had spent money to repair or refurbish the ground floor of the suit property for the reason possession of the ground floor of the property with RBEF was not disputed as also RBEF paying water and electricity bills.

48. Lastly, and this is our reasoning in the alternative. Even assuming that the parties had agreed to the terms of the sale, specific performance being admittedly a discretionary remedy, RBEF would not be entitled to a specific performance of the alleged agreement to sell and Nanda would be entitled to be relieved of the obligation to be bound by the same for the reason admittedly not a penny was received by Nanda under the alleged oral agreement to sell. The suit for specific performance filed in the year 2004 meandered leisurely 9 years later and came to be decided in November, 2013. Price of the property has risen many fold since then. As observed by the Supreme Court in the decision reported as (2002) 8 SCC 146 Nirmala Anand Vs. Advent (P) Corporation Ltd. a decree for specific performance can be denied if there is delay in instituting the suit seeking specific performance and additionally or alternatively taking into account the wrong period of time spent in Court and in the interregnum price of the property rising many fold. The two facts : (i) No part of sale consideration being received by Nanda; and (ii) The suit being decided after more than 9 years and in the meanwhile price of the property rising many fold would compel this Court to deny specific performance of any oral agreement to sell entered into in April, 2003. We re-emphasize that our view in the instant paragraph is to be read as an independent and an alternative reasoning premised on the assumption that even if RBEF

succeeded in establishing an oral agreement to sell, it would not, in equity, be entitled to a decree for specific performance.

49. RFA (OS) 3/2014 challenges the impugned decree in so far CS (OS) No.247/2004 filed by RBEF has been dismissed. RFA (OS) 4/2014 challenged the impugned decree in so far CS (OS) No.1318/2004 has been allowed in favour of Nanda.

50. In view of our reasoning hereinabove RFA (OS) 3/2014 is dismissed.

51. As regards RFA (OS) 4/2014, the same has to be dismissed in so far it challenges the impugned decree in CS(OS) No.1318/2004 decreeing the suit for ejectment against RBEF and in favour of Nanda.

52. However, we find that the learned Single Judge, probably for the reason his attention was not drawn to the lease deeds Ex.DW-1/3 and Ex.DW-1/4 proved in CS(OS) No.1318/2004, has incorrectly awarded mesne profits with reference to the testimony of PW-23, who merely opined that in his view the ground floor could receive a rent between ₹3,50,000/- (Rupees Three Lacs and Fifty Thousand only) to ₹4,00,000/- (Rupees Four Lacs only) per month. Ex.DW-1/3 is a lease deed dated September 01, 2004 and pertains to the ground floor of property No.B-107, Defence Colony having drawing-cum-dining, lobby, three bed rooms with attached toilets and a kitchen with a servant quarter on the terrace. Let out for two years the monthly rent is ₹35,000/- (Rupees Thirty Five Thousand only). Ex.DW-1/4 is a lease deed dated May 16, 2000 and pertains to property No.E-12, Defence Colony comprising drawing-cum-dining, three bed rooms with attached toilets and a kitchen on the ground floor with a servant quarter on the terrace. Let out for three years, the monthly rent is ₹27,000/-(Rupees Twenty Seven Thousand only).

53. Thus, the fair market rent of the suit property i.e. the ground floor in respect whereof mesne profits have been claimed by the Nandas have to be fixed for the same would determine the damages.

54. Concededly, the construction on the ground floor is a drawing-cum-dining with one bed room and a toilet besides a kitchen. This would depress the rental vis-à-vis similar three bed room properties.

55. There cannot be 100% exactness in two properties and thus law recognizes commonsense principles to be applied while evaluating empirical data in arriving at a fair market value of a property. An element of probablization is inherent in such determination.

56. Guided by Ex.DW-1/3 and Ex.DW-1/4 fair market rent of the ground floor would be ₹25,000/- (Rupees Twenty Five Thousand only) per month as of September 01, 2003 with 10% increase every 3 years.

57. Accordingly, RFA(OS) 4/2014 is disposed of modifying the impugned decree in so far as CS(OS) No.1318/2004 has been decreed awarding mesne profits @ ₹3,00,000/- (Rupees Three Lacs only) per month from September 01, 2003 with 10% increase per year from January 01, 2004 onwards; the mesne profits determined are ₹25,000/- (Rupees Twenty Five Thousand only) per month with effect from September 01, 2003 with 10% increase every three years till date of possession.

58. We leave the parties to bear their own costs all throughout for the reason we find that even Nanda has not come clean on the dispute by denying that he had any discussions for sale of the property, his limited admission that Ashok Chauhan approached him for sale of the house but he flatly refused, is incorrect. As we have discussed above, evidence establishes serious discussions between the Chauhans and the Nandas and the subject of the discussion was sale of the property. A truthful defence

by Nanda could have curtailed the trial and valuable judicial time could be saved. There would have been no need to examine PW-2 to PW-23 by RBEF. Only one witness, PW-1 and at best another being PW-24 could have been examined.

(PRADEEP NANDRAJOG)
JUDGE

(JAYANT NATH)
JUDGE

JANUARY 22, 2014
mamta