

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

+ **RSA No.139/2014**

% **27th May, 2014**

BHARAT SINGH & ANR. Appellants

Through: Mr.Chetan Sharma, Sr.Advocate with
Mr.Surender Kaliraman and
Ms.Pushpa Kaliraman, Advocates.

Versus

AJAY KUMAR & ANR. Respondents

Through:

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This second appeal is filed against the impugned judgment of the first appellate court dated 28.2.2014 by which the first appellate court has set aside the judgment of the trial court dated 01.5.2012. The judgment of the trial court dated 01.5.2012 is the common judgment disposing of two suits. One suit was Suit No.269/2008 filed by Ajay Kumar against Bharat Singh and Munni Devi (Vijay Lakshmi) as defendant Nos. 1 & 2 and DDA as defendant no.3 for specific performance. The second suit was Suit No.239/2008 filed by Bharat Singh and his wife Vijay Lakshmi essentially against Ajay Kumar, who was the plaintiff in Suit No.269/2008 for

mandatory and permanent injunction. The trial court dismissed the suit filed by Ajay Kumar and decreed the suit of Bharat Singh with the following operative portions:-

“ **Relief :-** In view of my findings given on these issues, suit no.269/08 is dismissed. Plaintiff there in is not entitled to any relief. No order as to cost. Decree sheet be prepared accordingly. Suit no.239/08 is decreed and defendnat no.1 is restrained from selling, alienating or creating any third party interest in the property bearing plot no. 136, Pocket-I, Block-A, Sector 32, Rohini, Delhi. As far as the relief of the mandatory injunction to return 25 signed blank papers is concerned, since Ajay Kumar has already used these papers in his suit, this relief has become infructuous. However, no order as to cost. Decree sheet be also prepared in this suit. Both the files are consigned to Record Room.”

2. The first appellate court has set aside the judgment of the trial court and decreed the suit for specific performance filed by Ajay Kumar being Suit No.269/2008 and dismissed the Suit No.239/2008 filed by Bharat Singh for injunction by the following operative portion:-

“ Appeal is accepted, with the result that the suit of the appellant/Sh.Ajay Kumar bearing C.S.No.269/08 decreed in his favour and the suit of respondent/Bharat Singh in C.S.No.239/08 dismissed.”

3. For the sake of convenience, parties are referred to by their names for the purpose of disposal of this second appeal.

4. The case of Ajay Kumar was that Bharat Singh with his wife Vijay Lakshimi had executed a receipt dated 12.8.2000 (Ex.PW1/1) agreeing to sell the suit property to Ajay Kumar for a total sale consideration of Rs.2,45,000/-. The suit property is Plot No.136, Pocket-I, Block-A, Sector 32, Rohini, Delhi admeasuring 200 sq. mtrs. The receipt (Ex.PW1/1) was followed by an agreement to sell dated 22.8.2000 (Ex.PW1/2). To avoid confusion at this stage, it is stated that the wife of Bharat Singh is referred to both as Smt. Munni Devi and also Smt. Vijay Lakshimi. The effect of the receipt (Ex.PW1/1) and the agreement to sell (Ex.PW1/2) was that the appellants/sellers/Bharat Singh and Vijay Lakshimi/Munni Devi agreed to sell the suit property to Ajay Kumar for a total sale consideration of Rs.2,45,000/-, and out of which total amount a sum of Rs.1,95,000/- was received by the appellants/Bharat Singh and his wife Vijay Lakshimi/Munni Devi. Since Bharat Singh and his wife Vijay Lakshimi filed a suit for seeking injunction against Ajay Kumar to prevent Ajay Kumar from claiming benefit of the agreement to sell dated 22.8.2000, Ajay Kumar filed the suit for specific performance.

5. Bharat Singh and his wife Vijya Lakshmi/Munni Devi did not dispute their signatures on the receipt (Ex.PW1/1) and the agreement to sell

(Ex.PW1/2), but contend that these documents were signed in blank by them because Ajay Kumar was to obtain a loan on the basis of these papers.

6. The following issues were framed in the suits:-

“ On the pleadings of the parties, following issues were framed in suit no. 269/08 on 02.02.2009 as under:- (appellant/Ajay Kumar’s suit)

1. Whether the agreement dated 12.08.2000 was never entered into between the parties and defendants no.1 and 2 and has been forged by plaintiff, its validity and effect? OPD
2. Whether the suit is time barred? OPD
3. Whether the suit is bad for mis-joinder of necessary parties? OPD
4. Whether the plaintiff is entitled to equitable relief of specific performance of Agreement dated 12.08.2000 as prayed for? OPP
5. Whether the plaintiff is entitled to the equitable relief of permanent injunction as prayed for? OPP
6. Relief.

7. Following issues were framed in suit no.239/08 (Respondent/Bharat Singh’s suit) as under:-

1. Whether the suit bad for mis-joinder of necessary parties, as stated in preliminary objection No.5? OPD
2. Whether the suit has not been properly valued for the purpose of court fees, as stated in preliminary objection No.2? OPD]
3. Whether the plaintiff is entitled to equitable relief of permanent injunction as prayed for? OPP
4. Whether the plaintiff is entitled to equitable relief of mandatory injunction as prayed for? OPP
5. Relief.”

7. The trial court placed great emphasis on the fact that in the receipt (Ex.PW1/1), there was written in hand a phone number and which could not be of the year 2000 when the receipt dated 12.8.2000 (Ex.PW1/1) was executed. This aspect has been dealt with by the first appellate court by observing that there can be many innocent reasons why a phone number is mentioned in the receipt (Ex.PW1/1), but the mere factum of mentioning of a phone number cannot wash away the entire document. The relevant observations of the first appellate court in this regard are contained in paras 18 to 22 of the impugned judgment and which read as under:-

“ 18. Throughout the arguments concluded over a substantial period of time, running into several days, in most of the part, undue emphasis was being lead by Ld. Counsel for respondent/Bharat Singh as has also been placed by Trial Court in the impugned judgment, on the telephone number written on the back of a document, which was not connected to the document anywhere. But just because the telephone number happens to be an eight digit number with the prefix “ 2” and that the said eight digit telephone number series had not started in Delhi in the year 2000, it was taken to imply that the document in question was ante dated/manufactured and fabricated document i.e. a handwritten receipt as Ex.D1/1.

19. This would be a highly misconceived and a lopsided view, ignoring the fact that there could be hundreds of other explanations for this telephone number to be appearing on the back of the said document.

20. Firstly the document if actually assumed for a moment to have been executed in the year 2000 when it was alleged to be, (the suit had been filed in the year 2008), in a long interval of eight years, the documents must have been in the possession of

the appellant/Ajay Kumar herein, and it is not uncommon for a person who is in possession of some original documents, might have been carrying it with him, to a lawyer or to any other person for a meeting or in a discussion, and in the course of that, he might just have, in an emergency, noted down a number at the back of the said document, and at that time, it might not have been in the year at that time, rather it may have been 2002 or any other year subsequent thereto, and it might have even been nearer the filing of the suit, when the appellant/Ajay Kumar must have been seeking legal advice, and visiting the offices of the lawyers here and there.

21. Be that as it may have been, so much significance could not have been attached in this manner, to a mere writing of a telephone number on the back of a document, so as to render it as a fabricated/antedated document.

22. On the contrary, if a party manufactures a document, the document normally appears a new and well polished look, and the party would certainly be vigilant enough not to touch the document in such a casual manner. In fact, he would not have written a phone number at the back of the document Ex.DW-1/1, which is showing the absolute casual and rather innocent conduct of the appellant/Ajay Kumar here.” (underlining added)

I completely agree with the aforesaid conclusions of the first appellate court because mere appearing of a phone number written in hand cannot take away the other contents of the document which is a hand-writing and not typed document.

8. So far as the aspect that the documents were signed in blank, as claimed by Bharat Singh and his wife Vijay Lakshimi/Munni Devi, the First appellate court rightly holds that if these documents were blank documents

and were only given for the purpose of taking loan, there was no reason why these documents would not have been prayed for being returned by Bharat Singh and Vijay Lakshimi/Munni Devi or a suit for declaration filed to have them cancelled. This is so observed by the first appellate court in paras 52 to 56 of its impugned judgment and which read as under:-

“52. Ld. Counsel for appellant/Ajay Kumar, thereafter, strongly urged that if respondent /Bharat Singh was actually concerned about the documents being misused in the future, what prevented him from seeking declaration vis-a-vis the said document to be declared forged and fabricated, and to seek their cancellation.

53. Though this suit was filed in the year 2008, even thereafter, throughout the pendency of the suit, the respondent/Bharat Singh never sought a declaration, which certainly goes against him.

54. The version of the respondent/Bharat Singh was, that appellant/Ajay Kumar was engaged in arranging financial help from institutions and knowing this, the respondent/Bharat Singh approached him, appellant/Ajay Kumar had assured to get the loan sanctioned from a financial institution against the recommended plot and he would be charging Rs. 5000/- for his service and as the respondent/Bharat Singh was under compulsion so they accepted the proposal and assurance, it is their specific allegation that the plaintiff got certain blank papers (about 25 in number), from the defendant, and he has misused the same in the present litigation.

55. Ld. Counsel for appellant/Ajay Kumar has taken the Court to the replies of respondent/Bharat Singh in the cross-examination which clearly belie his version, referred above. In fact, the side Bharat Singh/respondent who was examined as PW-1 did not even know from which bank or

private financier, the loan was to be arranged for him by the appellant/Ajay Kumar.

56. He did not know from which loan department, the papers were to be collected, which he was alleging that appellant had taken away from him. The PW-1/Bharat Singh/respondent surprisingly did not even see it necessary to enquire from the appellant/Ajay Kumar about the particulars and whereabouts of the loan department, and furthermore surprising, was that upon the alleged refusal of the appellant/Ajay Kumar to return the documents to the respondent/Bharat Singh, respondent/Bharat Singh did not see any need to approach the police or any other authority against the appellant/Ajay Kumar. He did not even send any notice either himself, or through a counsel, to the appellant to demand the return of the alleged blank papers, and to return the original allotment letters/demand letters etc. Even more strange, was the conduct of the respondent/Bharat Singh, that while handing over so many valuable documents and even bland (alleged) documents, the respondent/Bharat Singh did not see any need to, at least obtain a receipt or acknowledgment from the appellant/Ajay Kumar.”(underlining added)

9. The first appellate court has also stated that mistakes were found in the language of the agreement to sell (Ex.PW1/2) with respect to possession and consideration, however, these mistakes are because people tend to use templates of documents which contain a pre-set language and which set language may not apply to the facts of a particular case. The first appellate court notes that though it is mentioned in the agreement to sell that possession was taken by Ajay Kumar, however, it was nobody's case that Ajay Kumar received possession under the agreement to sell (Ex.PW1/2)

dated 22.8.2000. The first appellate court rightly holds it as insignificant that the contradiction with respect to how Rs.1,95,000/- can be the total consideration paid because the total consideration under the agreement to sell was Rs.2,45,000/- The relevant observations in this regard which are made by the first appellate court are contained in paras 50 and 51 of the impugned judgment and which read as under:

“50. Ld. Counsel for respondent/Bharat Singh also referred to a self-contradiction in the testimony of DW1 regarding handing over of possession and contradicting it with the document i.e. Ex.DW1/2 i.e. the agreement, wherein it was stated that possession of the property with all the documents had been handed over to the second party (appellant/Ajay Kumar) on the spot, but in the cross-examination of DW1, he replied to the contrary, saying that possession was not handed over to him on 22.08.2000.

51. To this Id. Counsel for appellant/Ajay Kumar has submitted that it was throughout, nobody's case that possession had been handed over and therefore, taken in the entire context of the pleadings, since beginning, and in view of the affidavits of the parties, the line appearing in para 10 of the agreement Ex.DW1/2 was clearly only a typographical mistake, and ascribed to the reason that the draftsman who prepared such like agreements are doing so in routine and are using set proformas to prepare the agreements; and parties who are not even quite educated, do not pay much attention to the contents, they simply sign or put their thumb impressions, where they are told to do so.”

10. In my opinion, therefore, the first appellate court has rightly passed a decree for specific performance holding that the documents being the receipt

(Ex.PW1/1) and agreement to sell (Ex.PW1/2) were not blank documents as was contended by Bharat Singh and his wife Vijay Lakshimi/Munni Devi.

11. The learned senior counsel for the appellants, i.e Bharat Singh and Vijay Lakshimi/Munni Devi argues before this Court the following aspects:-

(i) Once the first appellate court in para 25 of the impugned judgment observed that if there was doubt with regard to the handwriting in the receipt dated 12.8.2000 (Ex.PW1/1), then the same should have been sent to the FSL/Govt. expert, consequently the First Appellate Court committed an error in not accordingly directing the documents for being sent for examination of an expert.

(ii) As per the allotment made to Bharat Singh of the suit property, the same could not have been transferred without permission of the Delhi Development Authority (DDA, which was defendant no.3 in the suit filed by Ajay Kumar), and accordingly the documents dated 12.8.2000 and 22.8.2000 were void documents as they were entered into without obtaining permission of the DDA.

(iii) Ajay Kumar was a property dealer and the appellants Bharat Singh and his wife Vijay Lakshimi were defrauded in signing the blank documents, which is the modality used by the property dealers when plots are allotted by

the DDA, and therefore, the judgment of the first appellate court deserves to be set aside.

12. I am unable to agree with any of the arguments urged on behalf of the appellants. Firstly, merely because certain observations have been made by the first appellate court in para 25 of the impugned judgment that Bharat Singh ought to have asked for sending the disputed document for taking the opinion of a government expert/FSL and which was not done by Bharat Singh, the same cannot mean that the Court should *suo moto* send the documents for examination by an expert. It is party who has to prove its case and it is not for the Court that the Court must substitute itself in a proactive role for and on behalf of the parties in every case. Also, in this case, the issue of the handwriting expert in my opinion would be irrelevant because the receipt (PW1/1) is not disputed to be signed by the appellant Bharat Singh and, in fact, the receipt was succeeded by the agreement to sell (Ex.PW1/2), which is a typed document. Therefore, there was no requirement in any case of sending the documents to an expert for opinion, and for which in any case the onus was on the appellants with respect to which they failed to act. The first argument, therefore, urged on behalf of the appellants does not have any merits and is therefore rejected.

13. The second argument urged is that since as per the allotment letter dated 01.7.2000, the appellant could not transfer the property except with the prior permission of the DDA, therefore, the documents being the receipt (Ex.PW1/1) dated 12.8.2000 and agreement to sell (Ex.PW1/2) dated 22.8.2000 are null and void, is in fact really a very specious argument. Firstly, permission is required from the DDA for selling the property and not at the time of entering into an agreement to sell with respect to the property. Secondly, as the first appellate court notes that it is not as if the DDA has refused to grant permission, and that therefore the agreement has become void. The first appellate court notes that there is difference between void and voidable agreement till DDA would refuse to grant permission to sell. and in the present case the agreement is voidable and not void agreement. Thirdly, I would like to state that this argument raised before the Court below and this Court is misconceived and fully covered against the appellants in view of the judgment of the Supreme Court in the case of *Chandnee Widya Vati Madden vs. Dr. C.L. Katiai*, AIR 1964 SC 978., and which holds that wherever a suit for specific performance is filed on the basis of the agreement to sell which requires a prior permission of the superior lessor such as the DDA, then, the contract is not a void contract but only a contingent contract as per Section 31 of the Contract Act, 1872. The

Supreme Court in the judgment in *Chandnee Widya Vati (supra)* holds that such suits for specific performance have to be decreed and only after the decree is passed, that issue will come up in execution as to the DDA giving or not giving permission to sell the property. I may note that under Order 21 Rule 32 of CPC, if the defendant refuses to apply for permission to sell from the competent authority such as the DDA, the executing court can appoint a local commissioner to act for and on behalf of the seller/defendant so as to obtain permission from the competent authority. Thus, in my opinion, the second argument urged on behalf of the appellants does not have any merits and is accordingly rejected.

14. The third argument which was urged on behalf of the appellants was that Ajay Kumar was a property dealer and he had got signed blank documents from the appellant's as per modalities of property dealers to defraud persons, is an argument without merits because when I asked the senior counsel for the appellants to show me any pleading or any evidence that Ajay Kumar was a property dealer, the learned senior counsel for the appellants could not point out to me any pleadings of the appellants as per which they had stated that Ajay Kumar was a property dealer resorting to the modality of entering into agreement to sell etc and defrauding persons. In fact, para 2 of the preliminary objections in the written statement filed by

Bharat Singh in the suit of Ajay Kumar shows that Ajay Kumar was in fact alleged to be a liaison agent for providing loans ie Ajay Kumar was not a property dealer. In any case, in my opinion, whether Ajay Kumar was or was not a property dealer is immaterial to the merits of the matter and issues to be decided. In the facts of the present case, the appellants had to prove their case that they have signed the documents in blank which they failed to prove. More importantly, the first appellate court in paragraph 52 and 56 of the impugned judgment has rightly concluded that if the blank documents were signed only for the purpose of taking of the loan, then there was no reason why the appellants took no steps for sending return of the documents once the alleged loan was not sanctioned or did not file the suit for as many as seven years seeking a declaration that the alleged documents of August 2000 were fabricated. The third argument urged on behalf of the appellants, also therefore does not have any merits and is accordingly rejected.

15. At this stage, I would like to note that the judgment rendered by the first appellate court is incomplete so far as its operative portion is concerned because except stating that the suit for specific performance of Ajay Kumar is decreed, no directions have been issued for payment to Bharat Singh and his wife of the balance consideration of Rs.50,000/- and which was payable as per the agreement to sell (Ex.PW1/2) dated 22.8.2000. As per plaint para-

6 of the suit filed by Ajay Kumar, it is admitted that the balance sale consideration of Rs.50,000/- is payable. Therefore, I in exercise of my powers under Order 41(33) read with Order 42 (1) CPC modify the judgment of the first appellate court, and while upholding the same, it is directed that the appellants will be paid by Ajay Kumar a sum of Rs.50,000/- along with interest @ 18 % per annum simple from 22.8.2000 till payment is made to the appellants or deposited in the trial court. It is only on deposit of this amount before the Trial Court or payment to the appellants, that Ajay Kumar will be entitled to seek execution of its decree for specific performance.

16. In view of the above, no substantial question of law arises, and therefore, this appeal is dismissed, subject to the aforesaid observations as regards balance payment with interest. Parties are left to bear their own costs.

**MAY 27, 2014
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VALMIKI J. MEHTA, J.