

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

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Date of decision: 18th February, 2014.

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RFA 588/2013

SHRI VINOD KUMAR SHARMA & ANR Appellants

Through: Mr. Gaurav Duggal, Mr. Suraj
Agarwal and Ms. Sakshi Yadav,
Advocates.

Versus

SHRI VIRENDER KUMAR SHARMA Respondent

Through: Mr. Gaurav Gaur, Adv.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. The appeal impugns the *ex parte* judgment and decree dated 13th November, 2013 of the Court of the Addl. District Judge-06 (West), Tis Hazari Courts, Delhi of specific performance against the appellants, directing the appellant no.1 to execute the Sale Deed/Relinquishment Deed in favour of the respondent/plaintiff in respect of property No.C-25, New Krishna Park,Dhauri Piau, New Delhi – 110 018.

2. The appeal came up for admission/hearing, first on 18th December, 2013 when the counsel for the respondent/plaintiff being on caveat appeared. Though this is a first appeal but considering the nature of the controversy

and since copies of the entire relevant Trial Court record had been filed with the Memorandum of Appeal, with the consent of the counsels the appeal was finally heard and judgment reserved. However by way of abundant caution the Trial Court record and the file of W.P.(Crl.) No.272/2008 referred to in the impugned judgment was also requisitioned. The counsels during the hearing also referred to two other criminal writ petitions which were also pending along with W.P.(Crl.) No.272/2008. The counsels were directed to furnish particulars thereof. The counsels informed the numbers of the said writ petitions to be W.P.(Crl.) No.269/2008 and W.P.(Crl.) No.271/2008. The record thereof has also been requisitioned.

3. The respondent/plaintiff on 26th November, 2009 instituted the suit from which this appeal arises, for the reliefs of specific performance and injunction, pleading:-

- (a) that the appellant no.1 is the brother and the appellant no.2 Shri Aman Gaur is the nephew of the respondent/plaintiff;
- (b) that the respondent/plaintiff and the appellant no.1 along with their two other brothers purchased number of

properties, out of funds of the joint family business, in the names of the members of the joint family;

- (c) that one such property was property No.C-25, New Krishna Park, Dholi Piau, New Delhi which was purchased in the names of the other two brothers of the respondent/plaintiff and the appellant no.1;
- (d) that the other two brothers of the respondent/plaintiff and the appellant no.1 have since died;
- (e) that the appellant no.1 got executed a registered Gift Deed in his favour with respect to the 50% share of one of the said brothers;
- (f) that in or about 1999 disputes arose between the respondent/plaintiff and the appellants and some FIRs were also got registered against each other;
- (g) that the appellant no.1 also filed a suit for partition against the respondent/plaintiff and his sons and also against the legal heirs of one of the deceased brothers

with respect to the said property, suppressing the factum of the said property having been acquired from the joint family funds;

- (h) the respondent/plaintiff contested the said suit for partition pleading that the property had been acquired through the joint family funds;
- (i) that a family settlement was arrived at amongst the family members of the respondent/plaintiff, appellant no.1 and the legal representatives of the two deceased brothers and which was got registered before the Sub Registrar on 15th April, 2008 and under which settlement the respondent/plaintiff, appellants and the legal representatives of each of the two deceased brothers had 1/4th share each in the aforesaid property;
- (j) that after the family settlement, the appellant no.1 approached the respondent/plaintiff and made a proposal that the respondent/plaintiff should purchase the share of

the appellant no.1 in the aforesaid property and to which the respondent/plaintiff agreed;

- (k) that the appellants demanded a sum of Rs.10 lacs in lieu of their share in the aforesaid property;
- (l) the respondent/plaintiff gave a cheque of Rs.10 lacs in the name of Shri Gulshan Kumar from the account of his son Sh. Vivek Gaur; the said cheque was duly honoured and the appellants handed over the vacant and peaceful physical possession of their share of the suit property;
- (m) that the respondent/plaintiff and the appellant no.1 filed Criminal Writ Petitions for quashing of the FIRs lodged against each other;
- (n) that the appellant no.1 also filed an affidavit in W.P.(Crl.) No.272/2008 stating the factum of relinquishing his share in the said property;
- (o) that the respondent/plaintiff approached the appellant no.1 for executing a Sale Deed or for relinquishing his

share through a Deed of Relinquishment as per the affidavit filed in W.P.(Crl.) No.272/2008 but the appellant no.1 avoided;

- (p) that some differences arose between the respondent/plaintiff and the appellants and complaints were made against each other in various Government Departments; and,
- (q) that the respondent/plaintiff has already paid the entire sale consideration and has been ready and willing to purchase the share of the appellants in the aforesaid property.

accordingly, decree for specific performance directing the appellant no.1 to execute the Sale Deed or Deed of Relinquishment in favour of the respondent/plaintiff in respect of his share in the aforesaid property and in the alternative a decree for recovery of Rs.10 lacs with interest, besides of injunction restraining the appellants from dealing with the property was sought.

4. The appellants failed to appear in the suit despite service and were proceeded against *ex parte*. The respondent/plaintiff in his *ex parte* evidence, besides himself examined Shri Sandeep Gaur son of his deceased brother as well as the Clerk from the Record Room of this Court to prove the certified copy of the affidavit filed in W.P.(Crl.) No.272/2008.

5. On 9th February, 2012 when the suit was posted for hearing final arguments the counsel for the appellant no.2 appeared before the Court and sought adjournment for moving proper application pleading that both the appellants were in judicial custody for two years and thereafter filed an application for setting aside of the order proceeding *ex parte* against the appellants. The respondent/plaintiff filed reply to the said application. The learned Addl. District Judge vide order dated 20th October, 2012 dismissed the said application holding that the appellants/defendants were arrested after about two months of service of summons of the suit on them and their being in judicial custody was therefore no ground for setting aside the order proceeding *ex parte* against them. The appellants filed CM(M) No.1200/2012 thereagainst in this Court. Though while issuing notice of the said CM(M) Petition, further proceedings in the suit were stayed but on 22nd July, 2013 when the CM(M) was listed for hearing, the counsel for the

appellants stated that the appellants were not seeking taking on record of their written statement but only a liberty to address arguments before the Trial Court and to which the counsel for the respondent/plaintiff gave his no objection. Accordingly CM (M) Petition was disposed of with a direction that the appellants would be heard at the stage of final arguments.

6. The learned Addl. District Judge, vide the impugned judgment, has decreed the suit finding/observing/holding:-

- (i) that the counsel for the appellants/defendants had argued:-
 - (a) that the suit was not maintainable as there was no valid enforceable contract;
 - (b) that the respondent/plaintiff in his plaint has not specifically pleaded the terms & conditions agreed upon between the parties; reliance was placed on ***Mayawanti Vs. Kaushalya Devi*** (1990) 3 SCC 1 and ***V.R. Sudhakara Rao Vs. T.V. Kameswari*** (2007) 6 SCC 650;
 - (c) that the respondent/plaintiff had also not pleaded when the Relinquishment Deed was to be executed, how the

consideration of Rs.10 lacs was paid, which portion of the property represented the appellants' 25% share;

(d) that the appellant no.1 in reply to the notice preceding the suit had clearly stated that on 9th December, 1988 Shri Vivek Gaur son of the respondent/plaintiff had borrowed a sum of Rs.4 lacs on interest at 18% per annum from the appellant no.1 and as on 18th June, 1998 an amount of Rs.10,86,000/- had become due from the said Shri Vivek Gaur and in part payment thereof Shri Vivek Gaur paid a sum of Rs.10 lacs;

(e) that the affidavit of the appellant no.1 in W.P.(Crl.) No.272/2008 does not amount to creation or extinguishing of right, title and interest in the property and the affidavit is a forged document;

(ii) that the counsel for the respondent/plaintiff had relied on ***Birla Textiles Mills Vs. Ashoka Enterprises*** 191 (2012) DLT 499 laying down that where the defendant is *ex parte* the evidence of the plaintiff must be accepted as true and correct and on ***Brij***

Mohan Vs. Sugra Begum (1990) 4 SCC 147 and ***Alka Bose Vs. Parmatma Devi*** AIR 2009 SC 1527 laying down that an oral contract of sale of property is valid;

- (iii) that the arguments of the counsel for the appellants/defendants were devoid of any merit;
- (iv) that in the present case there was no doubt about the identity of the parties and the property and the consideration for sale was also definite and had already been paid by the respondent/plaintiff and accepted by the appellants/defendants;
- (v) that the respondent/plaintiff by proving the Memorandum of Family Settlement dated 15th April, 2008 as Ex.PW1/A had proved that the appellant no.1 had 25% share in the property;
- (vi) that the respondent/plaintiff had also proved the offer given by the appellant no.1 and acceptance thereof by the respondent/plaintiff through the testimony of PW2 Shri Sandeep Gaur;

- (vii) that the respondent/plaintiff had also proved the affidavit filed by the appellant no.1 in W.P.(CrI.) No.272/2008 wherein the appellant no.1 had admitted that he had settled to relinquish his rights in the property in favour of the respondent/plaintiff in lieu of consideration of Rs.10 lacs which had also been received by him;
- (viii) PW-2 Shri Sandeep Gaur also proved that possession of the property had already been delivered by the appellants/defendants to the respondent/plaintiff;
- (ix) thus the contention of the counsel for the appellants/defendants that there was no valid and enforceable contract was without any substance;
- (x) rather the contract had been partly executed and only the execution of the Sale Deed/Relinquishment Deed remained;
- (xi) the contention of the appellants/defendants that the affidavit filed in W.P.(CrI.) No.272/2008 had been obtained fraudulently

was without any merits as inspite of nearly five years having elapsed, no challenge thereto had been made;

(xii) that in view of the un rebutted testimony of the respondent/plaintiff and his witnesses, the suit was entitled to be decreed;

7. The counsel for the appellants/defendants has raised the same arguments as raised before the Trial Court and has further contended that on a reading of the plaint and the evidence, no case for specific performance is made out, more so as the respondent/plaintiff had in alternative thereto claimed the relief of damages.

8. The counsel for the respondent/plaintiff has supported the impugned judgment and has also relied on my own *ex parte* judgment dated 17th January, 2013 in CS(OS) No. 1387/2009 titled ***Nirbhay Trehan Vs. Vijay Bhardwaj***, where observing that the version of the plaintiff had remained un rebutted and there was no reason to disbelieve the same, the suit for recovery of money was decreed.

9. I have perused the Trial Court record as well as records of the three criminal writ petitions requisitioned as aforesaid.

10. Admittedly, the agreement of which specific performance is claimed is not in writing. The Supreme Court in **Brij Mohan** supra has held that though there is no requirement of law that an agreement or contract of sale of immovable property should only be in writing, however, in a case where the plaintiff comes forward to seek a decree for specific performance of contract of sale of immovable property on the basis of an oral agreement alone, heavy burden lies on the plaintiff to prove that there was consensus *ad-idem* between the parties for a concluded oral agreement for sale of immovable property and that whether there was such a concluded oral contract or not would be a question of fact to be determined in the facts and circumstances of each individual case. Finding in the facts of that case that the plaintiffs had only conveyed their approval to purchase the suit property for Rs.10 lacs, it was held that it was not possible to accept the plaintiff's claim that the defendant had agreed to obtain the permission from the ceiling authority, for, without first determining the sale price, it was quite unlikely that the parties would have bargained as to who should obtain the clearance under the Urban Land Ceiling Act and it was thus held that no agreement

was finally concluded or settled between the parties. Similarly in **V.R. Sudhakara Rao** supra, the Supreme Court, finding that from the oral evidence there was no clear proof relating to the other terms and conditions of the contract which could be termed as essential conditions like delivery of possession and obtaining of permission under the Urban Land Ceiling Authorities, held that it could not be concluded that a contract had been established for it to be possible to grant a decree for specific performance of the same. It was further reiterated that in case of an oral agreement of sale, the defence under Section 53A of the Transfer of Property Act, 1882 is not available to a party who alleges to be in possession of the property. Mention may also be made of **Ganesh Shet Vs. Dr. C.S.G.K. Setty** (1998) 5 SCC 381 where the Supreme Court held that in a suit for specific performance the evidence and proof of agreement must be absolutely clear and certain and though normally it is permissible to grant relief on the basis of what emerges from the evidence, even if not pleaded, provided there is no prejudice to the opposite party, such a principle is not applied in suits relating to specific performance. It was yet further held that the burden of proving his case rests on the plaintiff and if there is any conflict of evidence as leaves any uncertainty in the mind of the court as to what the terms of the parole

contract were, its interference will be refused. The Supreme Court held that special principles apply to suits for specific performance. Though the Supreme Court in the said judgment carved out an exception with respect to cases of part performance by delivery of possession, but in the absence of a written agreement in the present case, the question of applicability of the doctrine of part performance enshrined in Section 53A also does not arise.

11. The respondent/plaintiff in the present case, in the plaint did not set-out any particulars whatsoever of the oral agreement to sell. Even the date of the said Agreement to Sell or any other terms thereof save for the consideration agreed, were not pleaded. The respondent/plaintiff in his examination-in-chief by way of affidavit also, merely repeated the contents of the plaint and did not give any evidence of any other terms and conditions settled.

12. The respondent/plaintiff hinges his case, only on the affidavit filed in W.P.(CrI.) No.272/2008 and on the basis whereof the learned Addl. District Judge also has decreed the suit. The said affidavit is as under:-

*“IN THE HON’BLE HIGH COURT OF DELHI, AT NEW DELHI
WRIT PETITION (CRIMINAL) NO.272/2008*

*IN THE MATTER OF:
VIRENDER KUMAR SHARMA
AND OTHERS* PETITIONERS

VERSUS

*THE STATE (DELHI ADMN. DELHI)
AND ANR* RESPONDENTS

AFFIDAVIT

I, VINOD KUMAR SHARMA, S/O LATE SHRI D.D. SHARMA, RESPONDENT NO.2, R/O A-303 DREAM APARTMENTS, PLOT NO.14, SECTOR-22, DWARKA, NEW DELHI DO SOLEMNLY AFFIRM AND DECLARE AS UNDER:

- 1. That deponent is the real brother of the Petitioner No.1 and the real uncle of the Petitioner No.2 to 4.*
- 2. That deponent filed a complaint Case Before the CMM, Delhi and the same was listed before Shri Puran Chand, MM, Rohini, Delhi who directed for registration of FIR, and the same was registered vide No.364/07, P.S Vikas Puri, Delhi.*
- 3. That with the involvement of the relatives and friends all the disputes have been resolved between the parties. And subsequent to the aforesaid settlement a Family settlement was got registered before the sub-registrar.*
- 4. That to avoid even the probability of any future disputes it was further settled among the family that the deponent would relinquish all sort of the claim (right) with respect to the property involved herein i.e. C-25 New Krishna Park, New Delhi – 18 in favor*

*of Virender Kumar Sharma (brother of deponent)
and in lieu deponent will receive Rs. Ten lakhs.*

- 5. That as per settlement among the family, that deponent will purchase a new house for himself and his family and for this purpose Virender Kumar Sharma or his sons will pay Rs. Ten lakhs to Vinod Kumar Sharma in lieu of relinquishing the said share as aforesaid, pursuant to this Deponent acknowledges that he received Rs. Ten lakhs from Vivek Gaur vide Cheque dt.*
- 6. That Deponent has undertaken that he will not claim in future any right whatsoever regarding property involved herein as he has already received the settled amount as aforesaid and if he will raise any claim that shall be deemed as withdrawn.*
- 7. That under the aforesaid facts and circumstances the Deponent do not want pursue the said matter any more and want no further action to be taken in this matter and I have no objection if the said FIR and the proceedings arising out of it is Quashed by this Hon'ble Court.*

DEPONENT

VERIFICATION:

Verified on this day 16th of October, 2008 that the aforesaid facts and circumstances are true and correct to the best of my knowledge.

DEPONENT"

13. A perusal of W.P.(Crl.) No.272/2008, certified copy whereof is also found on the Trial Court record, shows that the said writ petition was filed by the respondent/plaintiff for quashing of FIR No.364/2007 under Sections 380/453/34 IPC of PS Vikas Puri against the respondent/plaintiff at the instance of the appellant no.1 and the proceedings in pursuance thereto. In the said petition, quashing of the FIR and proceedings was sought on the ground that the disputes between the respondent/plaintiff and the appellant no.1 who were members of a family had been mutually settled and the appellant no.1 (who was impleaded as respondent No.2) had consented to the quashing of the FIR. W.P.(Crl.) No.269/2008 was filed by the appellant no.1 for quashing of FIR No.438/06 under Sections 120B/34/420/465/467/468/471/474 IPC of Police Station Dabri lodged against the appellant at the instance of the respondent/plaintiff, also on the ground of mutual settlement aforesaid and the respondent/plaintiff (who was impleaded as respondent No.2) having agreed to the quashing. W.P.(Crl.) No.271/2008 was also filed by the appellants for quashing of FIR No.830/2006 under Section 120B/34/420/465/467/468/471/474 IPC of Police Station Dabri lodged against the appellants at the instance of Shri Sandeep Gaur (who appeared as a witness on behalf of the

respondent/plaintiff), again on the ground of mutual settlement and that the said Shri Sandeep Gaur (who was impleaded as respondent No.2) had agreed to the quashing.

14. It appears that the respondent/plaintiff and the appellants got listed all the said three writ petitions aforesaid on the same date i.e. 27th February, 2008 when none appeared on behalf of the petitioners in either of the three petitions and all three were dismissed for non-prosecution. Applications with consecutive numbers for restoration of all the three petitions were filed and were all listed on 29th February, 2008 when the petitions were restored to their original position. Notice of all the three petitions was issued on 25th March, 2008. The order dated 21st April, 2008 in all the three petitions records that the properties in question had been mortgaged to Dena Bank and Punjab National Bank, and in view thereof the said banks were directed to be made parties to the petitions and notice was ordered to be issued to them. The order dated 23rd October, 2008 in all the three petitions records that affidavit had been filed by the respondent no.2 in each of the petitions. While the said affidavit in W.P.(Crl.) No.272/2008 is as aforesaid, the affidavits in the other two writ petitions were of no objection to quashing. After some adjournments, while W.P.(Crl.) No.272/2008 was withdrawn by

the respondent/plaintiff on 8th April, 2009 stating that he was not pressing the petition as the complainant i.e. the appellant No.1 herein was not ready to compromise the matter, in the other two writ petitions applications were filed by respondent No.2 in each of them of withdrawal of no objection earlier given to quashing and the said two petitions were dismissed on 21st July, 2010 in view of “the compromise which was entered between the parties” having “fizzled out and no compromise was there” and the respondent/plaintiff having “withdrawn similar petition being W.P.(Crl.) No.272/2008 for quashing of a counter case”.

15. Thus the affidavit on which the respondent/plaintiff pegged his case and on the basis whereof the learned Addl. District Judge also has decreed the suit, was in support of a compromise/settlement arrived at between the parties which the respondent/plaintiff himself in the petitions aforesaid admitted had “fizzled out”. Though the certified copy of the entire order sheet of W.P.(Crl.) No.272/2008 is found on record of the Trial Court but appears to have escaped attention and the Trial Court does not appear to have made any query from the respondent/plaintiff as to how the contents of the affidavit in support of a compromise which the respondent/plaintiff

admits to have fizzled out, can be said to be surviving so as to seek specific performance of the settlement recorded therein.

16. The aforesaid reveals yet another interesting aspect. The order sheet as aforesaid in W.P.(Crl.) No.272/2008 records of the subject property being mortgaged to banks. In fact W.P.(Crl.) No.269/2008 and W.P.(Crl.) No.271/2008 themselves contained an averment that as per the settlement arrived at between the parties, the loans which were taken from Indian Bank and Punjab National Bank were to be repaid and the parties had made some payment towards the discharge of their liability on account of loans. The appellants herein, who were the petitioners in the other two writ petitions had therein also pleaded that the settlement arrived at between the parties was that the subject property shall remain the joint property of the appellant no.1, respondent/plaintiff and the legal heirs of the two deceased brothers and Partition Deed/Settlement Deed in respect of the said property would be executed at a later stage after the repayment of the loans. The respondent/plaintiff, neither in the plaint pleaded as to what was agreed between him and the appellants with respect to the said loans i.e. whether the same were to remain the liability of the appellants notwithstanding the appellants having agreed to sell their 25% share in the property to the

respondent/plaintiff or the appellants were to be relieved of the said liability for discharging of the loans nor in his testimony, even though *ex-parte*, gave any clarification on this aspect. The learned Addl. District Judge is thus clearly not correct in holding that there was no term of sale qua which there was any ambiguity.

17. Not only so, though the affidavit aforesaid speaks of the appellant no.1 relinquishing his share in the property, the respondent/plaintiff in the plaint, has used the words “Relinquishment Deed/Sale Deed” interchangeably. There was then a vast difference between the Stamp Duty on a Relinquishment Deed and on a Sale Deed and it has not been pleaded that if a Sale Deed were to be executed, who was to bear the burden thereof.

18. The respondent/plaintiff, prior to the institution of the suit had served a legal notice on the appellant no.1 calling upon the appellant no.1 to execute the Relinquishment Deed/Sale Deed of his 1/4th share aforesaid in the property in favour of the respondent/plaintiff. The respondent/plaintiff in his *ex parte* evidence has proved the said legal notice dated 30th October, 2009 as well as the reply dated 18th November, 2009 got sent by the appellant no.1 thereto. The appellants in the said reply, with respect to the assertion of the respondent/plaintiff of having already paid the consideration

of Rs.10 lacs as aforesaid, though admitted receipt of cheque for Rs.10 lacs from the son of the respondent/plaintiff in the name of Gulshan Kumar but stated the same to be on account of a loan transaction, as was argued by the counsel for the appellants before the learned Addl. District Judge and as recorded above. Notwithstanding the said defence of the appellants and which was known to the respondent/plaintiff prior to the institution of the suit, the respondent/plaintiff neither in his plaint nor in the affidavit by way of examination in chief made any attempt to prove that the said payment of Rs.10 lacs was as consideration for relinquishment/purchase of the share in the property aforesaid. In my view, even though the appellants were *ex parte*, the respondent/plaintiff in the face of such assertion of the appellants in the reply to the legal notice which the respondent/plaintiff himself had proved, owed a duty to satisfy the Court that the payment which he was claiming to have been made with respect to the property, was indeed with respect to the property and not on any other account. Merely because the defendant is *ex parte* does not absolve a plaintiff in a suit for specific performance who pleads to have paid the entire sale consideration, from proving such payment. The respondent/plaintiff has not proved his Books of

Accounts or Income Tax Returns showing such payment to be on account of property purchased.

19. The Supreme Court in ***Ramesh Chand Ardawatiya Vs. Anil Panjwani*** (2003) 7 SCC 350 has held that even if the suit proceeds ex parte and in the absence of a written statement, unless the applicability of Order 8 Rule 10 is attracted and the Court acts thereunder, the necessity of proof by the plaintiff of his case to the satisfaction of the Court cannot be dispensed with. It was further held that though in a case which has proceeded ex parte, the Court is not bound to frame issues, yet the trial Court should scrutinize the available pleadings and documents under the evidence adduced and would do well to frame points for determination and proceed to construct the ex parte judgment dealing with the points at issue one by one. In fact the Supreme Court in ***Shantilal Gulabchand Mutha Vs. Tata Engineering & Locomotive Company Ltd.*** (2013) 4 SCC 396 though in the context of Order 8 Rule 10 reiterated that the Courts should not act blindly on the averments made in the plaint merely because the written statement has not been filed by the defendant traversing the facts set out therein and the Court before passing judgment against the defendant must be satisfied that the plaintiff has proved his case.

20. Furthermore, though in the three criminal writ petitions the appellants/defendants as well as the respondent/plaintiff had pleaded a compromise/settlement and as part whereof the appellants/defendants had agreed to transfer their 25% share in the suit property to the respondent/plaintiff but subsequently both the appellants/defendants and the respondent/plaintiff informed that the said compromise/settlement had fallen through. I have wondered as to how the agreement even if any by the appellants/defendants to transfer their 25% share in the property to the respondent/plaintiff for a consideration of Rs. 10 lacs could survive when the entire compromise/settlement had fallen through. Significantly, the respondent/plaintiff was/is not seeking specific performance of the entire compromise/settlement. Though the Specific Relief Act, 1963 provides for specific performance of a part of a contract but the respondent/plaintiff did not plead or prove that the conditions therefor were satisfied. Even otherwise, as part of the said compromise/settlement the respondent/plaintiff had given his consent/no objection to the quashing of the FIR lodged by the respondent/plaintiff against the appellants/defendants and which consent the respondent/plaintiff subsequently withdrew and which resulted in the petition filed by the appellants/defendants for quashing of the FIR being

dismissed. It is thus clear that the respondent/plaintiff had reneged from his obligation of having the FIR against the appellants/defendants quashed. The respondent/plaintiff cannot while reneging from his obligation under the compromise/settlement compel the appellant/defendants to perform their obligations. Though a consideration of Rs. 10 lacs is pleaded to have been agreed for transfer of the share of the appellants/defendants in the property to the respondent/plaintiff but whenever there is such an umbrella settlement whereunder consideration for transfer of property as well as quashing of the FIR's are agreed upon, the consideration at which the person agrees to transfer his property has a bearing to the transferee cooperating in quashing of the FIR against the transferor. In such cases transfer of property cannot be insisted upon while refusing to consent to the quashing of the FIR. This is the principle established in Section 51 of the Indian Contract Act, 1872 also with respect to performance of reciprocal promises. The Supreme Court also in *HPA International Vs. Bhagwan Das Fateh Chand Daswani* (2004) 6 SCC 537 refused specific performance of a part of one integrated and indivisible contract.

21. Not only so, I am also of the opinion that the respondent/plaintiff himself, by withdrawing W.P.(Crl.) No. 272/2008 filed by him stating that the appellants/defendants herein were not ready to compromise the matter admitted termination/recession of the agreement of transfer of appellants/defendants share in the property to him.

22. Though the appellant no. 1 had filed the affidavit aforesaid in W.P.(Crl.) No. 272/2008 but the same was in terms of the settlement earlier arrived at and which the respondent/plaintiff subsequently stated was not agreeable to the appellants/defendants. It cannot also be lost sight of that the affidavit aforesaid was dated 16th October 2008 and W.P.(Crl.) No. 272/2008 in which it was filed was withdrawn on 8th April 2009 but the suit from which this appeal arises was filed after more than one year from the affidavit aforesaid and more than six months after the date of withdrawal of the petition on 26th November 2009.

23. The respondent/plaintiff has also not pleaded or proved the date of delivery of possession. There is no mention thereof in the affidavit supra also. There is no evidence of delivery of possession. Thus there is no proof of the plea of the respondent/plaintiff of the appellants/defendants having delivered possession of their share of the property to the respondent/plaintiff.

24. For all the aforesaid reasons I am unable to agree with the conclusion reached by the learned Addl. District Judge. Resultantly the appeal succeeds. The impugned judgment and decree are set aside. The respondent/plaintiff is not found entitled to the alternative relief claimed of recovery of Rs.10 lacs also, having not proved the payment of the said sum of Rs.10 lacs as consideration for transfer of the property. Thus the suit filed by the respondent/plaintiff is dismissed; however the appeal having been allowed on grounds not urged by the counsel for the appellants, no costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

FEBRUARY 18, 2014.

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