

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

Reserved on: 25.05.2016
Pronounced on: 24.08.2016

+ **FAO(OS) 437/2015, C.M. APPL.14113-14114/2015**

GOPAL KRISHNA KAPOOR & ORS Appellants
versus
R S CHHABRA & ORS Respondents

+ **FAO(OS) 461/2015, C.M. APPL.15308-15309/2015**

SHRI GOPAL KRISHAN KAPOOR & ORS Appellants
versus
R S CHHABRA & ORS Respondents

+ **FAO(OS) 462/2015, C.M. APPL.15312-15313/2015**

GOPAL KRISHAN KAPOOR & ORS Appellants
versus
R S CHHABRA & ORS Respondents

Through : Sh. P. Kapoor, Ms. Bina Gupta, Sh.
Ramesh Singh and Sh. Ranjit Raut, Advocates, for
appellants in Item Nos. 3 to 5.

Sh. C.L. Sachdeva, Sh. Preet Pal Singh and Sh.
Yash Chawla, Advocates, for Respondents in Item
Nos. 3 to 5.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT

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1. These three appeals arise from the judgment of the learned Single Judge dated 06.05.2015 whereby three applications viz. I.A. Nos. 2286/2010, 1460/2014 and 5310/2014 in CS(OS) 353/2006 were dismissed, and execution of the compromise decree dated 20.03.2006 was directed.

Facts

2. The appellants entered into a Memorandum of Understanding (hereafter “first MOU”) to sell the suit property, No. 14B (or 14C), Bazar Marg, Old Rajinder Nagar, to the second respondent, Rajesh Kumar (hereafter “Rajesh”) on 28.02.2005 for a consideration of ₹ 5,20,00,000/-. Clause 3 of the MOU provided that the balance consideration of ₹ 4,65,00,000/- was to be payable at the time of execution and registration of the sale deed before the Sub-Registrar, mutation of the property in the name of the appellants and its conversion from leasehold to freehold. The appellants were responsible for the said conversion and mutation. Clause 7 of the first MOU enabled Rajesh to further nominate and assign his rights in the MOU in favour of any nominee(s) or assignee(s), to which the appellants could not object. Clause 3 also provided that the second respondent was entitled to get the sale deed executed in favour of nominees- again, to this too the appellants agreed not to object. Rajesh entered into an MOU on 20.04.2005 (hereafter “second MOU”) with the first respondent (hereafter “Chhabra”) to assign and get the sale deed executed in the latter’s favour.

3. In terms of the second MOU, between Chhabra and Rajesh, the latter agreed to “sell, transfer, convey and assign” the disputed property to the former (Chhabra) for his *bonafide* needs and requirements, and he agreed to purchase it in the same terms and conditions as stated in the first MOU with the appellants. As the second respondent had paid ₹ 1,00,00,000/- to the

appellants, Chhabra agreed to repay it to Rajesh. While ₹ 80,00,000/- was paid already, the balance amount of ₹20,00,000/- was to be paid at the time of assignment of the agreement by the appellants in favour of Rajesh. It was further agreed that once the balance amount of ₹ 20,00,000/- was paid, all rights were to be transferred to the first respondent.

4. Rajesh, alleging fraud in regard to their failure to convey the suit property, filed CS(OS) 353/2006 against the present appellants, late Smt. Sanjogta Bakshi and Chhabra and sought specific performance of the contract. An order for *ex-parte* ad-interim injunction was passed on 27.02.2006. The plaintiff Rajesh alleged that the appellants were requested time and again to mutate the property and convert it into freehold as Chhabra had the funds ready, yet no action was taken. It was alleged that the respondents found out that the appellants were contacting brokers in the area to sell the property to some other third party, despite representing to the second respondent for a year that the property will be sold to him after the mutation. Furthermore, the demand was increased to the prevalent market price of ₹ 7,00,00,000/- on the ground that the property rates had gone up. During the pendency of the suit a compromise decree dated 20.03.2006 was entered into between the present appellants and Chhabra wherein it was agreed that the latter, would be entitled to the property after having paid the remainder amount. The compromise decree further stated that Chhabra would be responsible for settlement with the second respondent, Rajesh.

5. On 18.05.2006, Rajesh filed I.A. No. 6399/2006 in CS(OS)353/2006 impugning the compromise decree dated 20.03.2006 on the ground of fraud and misrepresentation by Chhabra. Rajesh claimed that there was no valid assignment of rights in favour of Chhabra by the second MOU due to which

Chhabra lacked the competence to enter into the compromise decree with the present appellants. Chhabra filed I.A. No. 8638/2006 in CS(OS)353/2006 seeking the implementation of the compromise decree. The said applications were dismissed on the ground that both Chhabra and Rajesh were parties to CS(OS) 691/2009 which was filed by the present appellants seeking the declaration of the compromise decree as void on account of fraud.

6. The appellants and Rajesh filed I.A. No. 14573/2007 and I.A. No. 55198/2008 respectively in CS(OS)691/2007 seeking interim injunction against the execution of the compromise decree, after Chhabra filed Execution Petition No. 232/2007. A learned Single Judge by his order dated 29.04.2009 dismissed the application on the ground that no *prima facie* fraud was made out. The appellants appealed (FAO (OS) No. 314/2009) against the said order. The Division Bench by its order dated 27.07.2009 dismissed Rajesh's appeal wherein it held that the effect of the second MOU was that the right to get the sale deed executed was vested in Chhabra, and the only right left with Rajesh was to get the remaining amount (₹ 20,00,000/-) from Chhabra. This remaining amount, ₹ 20,00,000/- was later on paid by Chhabra to Rajesh before the learned Single Judge on 23.08.2012. The appellants' appeal (against the learned Single Judge's order rejecting the challenge to the compromise) was dismissed, by order dated 20.08.2009. The Division Bench rejected the appellants' contention that there was no assignment in favour of Chhabra and held as follows:

“If the Plaintiffs/Appellants were aware of the contents of the Memorandum of Understanding dated 20.4.2005 as is evident from the fact that the original document was annexed to the plaint in CS(OS) No.353/2006 and a copy of the same was filed by them as Annexure P-2 to the Writ Petition, it cannot be said

that a material fact was withheld from them or a fraud was played upon them. Whether the Memorandum of Understanding dated 20.4.2005 executed between Defendant No.1 and Defendant No.2 amounted to assignment of the M.O.U. dated 20.4.2005 in favour of Defendant No.1 or it only gave a right to Defendant No.1 to get it assigned in his favour at a later date is a matter of interpretation of document. If the Plaintiffs/Appellants after considering the Memorandum of Understanding dated 20.4.2005 and consulting their Advocate agreed with the contention of Defendant No.5 that by virtue of Memorandum of Understanding dated 20.4.2005, the earlier M.O.U. dated 28.2.2005 stood assigned in his favour. It cannot be said that a fraud was played upon them by Defendant No.1. There can be a genuine difference of opinion on the legal interpretation of a document. But since long as the document itself was made available to them, it cannot be said that there was a fraud upon the Plaintiffs/Appellants merely because Defendant No.1 interpreted it to mean as assignment of the first M.O.U. in his favour and the Plaintiffs/Appellants agreed with him and that too after consulting their Advocate. In such circumstances, neither there was any concealment nor any fraud.”

7. Rajesh filed an application, EA No. 397/2009 objecting against the execution of the compromise decree. The learned Single Judge dismissed the said application by an order dated 31.08.2009. In that the court appointed a Court Commissioner to execute the compromise decree and directed him to get the property converted into freehold by getting the conveyance deed executed in favour of the present appellants. The Court directed the sale consideration, for the purpose of registration of the sale deed to be deposited by Chhabra in court within a period of 15 days from the conversion being directed. Chhabra also had to submit the draft sale deed to the Court Commissioner in order to get it registered within a period of two weeks

thereafter; he also had to deposit the stamp duty. With the registration of the sale deed, the Court Commissioner was allowed to take possession of the property and hand it over to Chhabra. He was also directed to deposit an amount of ₹ 20,00,000/- in court within 15 days from the date of execution of conveyance deed, to be withdrawn by Rajesh. The relevant extract of the said order, is as follows:

"In view of the fact that the suit property is a leasehold property, it will have to be converted to freehold. An application in that regard is stated to be pending in the office of L and DO. Since the Defendants 1 to 5 in the suit are not coming forward to take further steps, the learned Court Commissioner is directed to take the necessary steps in terms of this order (along with a certified copy of the decree) and get the conveyance deed executed in the office of the L and DO in favour of the JDs/ Defendant Nos. 1 to 5 within the next two weeks. The balance sale consideration for the purpose of registration of the sale deed shall be deposited in this Court by the DH within a period of 15 days from the date that the conveyance deed is executed in favour of the JDs.

22. *As a next step, within two weeks thereafter, the DH will submit to the learned Court Commissioner the draft sale deed and after finalizing the same the learned Court Commissioner will take steps to have it registered. The DH will be called upon to deposit the stamp duty by the learned Court Commissioner within a period of two weeks. A sum of Rs.20 lakhs which has to be paid by the DH will also be deposited in this Court by the DH within a period of fifteen days front the date of execution of the conveyance deed. Upon such deposits it will be open to the applicant Mr. Rajesh Kumar to file an appropriate application seeking withdrawal of the said amount of Rs. 20 lakhs and the original sellers to file an application for withdrawing the balance sale consideration.*

23. *The fees of Mr. J.K. Aggarwal, the learned Court*

Commissioner is fixed at Rs. 40,000/- which will be paid by the DH within a period of two weeks from today. Simultaneous with the registration of the sale deed, the learned Court Commissioner will take possession of the suit property and hand it over to the DH. It will be open to the learned Court Commissioner to seek the assistance of the local police, if any, for carrying out the directions aforementioned.

24. With the above directions, the execution petition is disposed of A certified copy of this order.”

8. The appellants and Rajesh appealed to the Supreme Court of India (SLP Nos. 17719/2009 and 29485/2009 respectively). The Supreme Court by its order dated 20.11.2009 dismissed both the petitions, holding that there was no reason to interfere with the order of the lower court. At the same time, it granted liberty to the petitioners to challenge the order under proviso to Rule 3 of Order XXIII Code of Civil Procedure (CPC).

9. Pursuant to the Supreme Court's order, the appellants filed an application- under proviso to Rule 3 of Order XXIII- i.e. I.A. No. 2286/2010. CS(OS)691/2007 was subsequently withdrawn on 10.08.2010 by order of learned Single Judge of this Court. Later, the appellants filed applications under Section 28 of the Specific Relief Act (I.A. No. 1460/2013) on 23.01.2013; and under Order XI Rule 12 (I.A. No. 5310/2014) on 19.03.2015 in CS(OS)353/2006.

Impugned order

10. The learned Single Judge, dismissed all three applications by the impugned order, dated 06.05.2015. Reliance was placed on the dismissal of Rajesh's application by the Supreme Court, along with the attainment of finality in the matter, before the Supreme Court of the orders passed in

CS(OS)691/2007. The learned Single Judge held that the assignment of rights in favour of Rajesh by Chhabra was a complete assignment. It was further held that the plea of fraud urged by the appellants was unmerited. I.A. No. 2286/2010 was dismissed on account of there being no violation of any provisions of the Indian Contract Act, 1872 in obtaining of the consent decree dated 20.03.2006, and on account of the application being barred by the law of limitation. I.A. No. 1460/2013 was dismissed on account of the appellant's fault for not cooperating in the execution of the conveyance deed, due to which Chhabra could not fulfill his subsequent obligation of making the payment for the disputed property. I.A No. 5310/2014 was dismissed on the ground that there is no reason to examine Chhabra's capacity to pay, since the payment has to be made only after the conveyance deed has been executed, but that it had not been done till then. The learned Single Judge noted that the appellants did not come to court with clean hands, and also rejected the alternative plea to increase the compensation amount for the disputed property. A Court Commissioner was appointed to ensure that the conveyance deed is executed in favour of the appellants, and that Chhabra paid the balance amount to the appellants within a period of 15 days from the date of execution of the conveyance deed.

Appellant's contentions

11. It is argued- by Mr. Prates Kapoor and Mr. Rajesh Singh, learned counsels, that Rajesh the second respondent, entered into the second MOU, without the consent and knowledge of the appellants. They argue that the compromise decree was obtained by fraud and misrepresentation since there was no valid assignment in favour of Chhabra as the remaining amount of ₹ 20,00,000/- required for a valid assignment was paid only in 2012 and not at

the time of the passing of the compromise decree. Reliance is placed on *Ravinder Singh v. Mahamaya Builders Pvt. Ltd.* to urge that under Section 15(b) of the Specific Relief Act, a person holding a back-to-back agreement with the original proposed buyer would not be allowed to sue on the first agreement in the absence of a valid and completed assignment in his favour. The appellants allege fraud and cheating on part of the first two respondents, alleging that neither of them had the intention or the means to honor the compromise decree. They also argue that the learned Single Judge ought not to have relied on the orders passed in CS(OS)691/2007 in passing the impugned order. That suit was barred because of Order XXIII Rule 3A.

12. The appellants' counsel also argue that I.A. No. 5310/2014 should have been taken up and disposed of first as the application would have a material bearing on the disposal of the other applications; and that Chhabra has made no effort to pay the remaining of the decretal amount. They have further argued that the decree is liable to be set aside under Section 28 of the Specific Relief Act as the obligation to pay on Chhabra in terms of the executing court's order dated 31.08.2009 was without recourse to the appellants. It was stressed here that since the court directed the Court Commissioner to take steps towards effectuation of the terms, including the responsibility of securing conversion of the property into freehold, the impugned order was in error in holding that the appellants did not take steps. Learned counsel submitted that all that the order dated 31.08.2009 did was to impose a time limit for taking steps towards conversion into freehold. This did not detract from the fact that the purchaser, i.e Chhabra had to perform his part of the contract and deposit the amounts.

13. Learned counsel for the appellants argue that the duty to convert the property was not upon the appellants, but on the Court Commissioner, and Chhabra did not take any steps to ensure completion of the same. Chhabra did not adhere to the timeline given by the executing court. Therefore, it is argued that the compromise decree is liable to be set aside under Section 28 of the Specific Relief Act. Reliance has been placed on *Parvesh Kumar Gulati v. Darshan Singh Gulati* 69 (1997) DLT 996, VS *Palanichamy Chettiar Firm v. C. Alagappan* (1999) 4 SCC 702 in support of this argument. It is further urged that after the death of Mrs. Sanjogta Kapoor due to cancer, the purpose and object of selling the property was frustrated and defeated, as the money was required for her treatment.

14. It is submitted that the learned Single Judge failed to see that Section 28 has the effect of mandating a continuing obligation on the purchaser to exhibit and prove willingness to perform his or its part of the bargain, right till the end, i.e till execution of the sale deed. In the present case, the respondents' failure to deposit the amount, at least in court, undermined this condition and exposed their real intention, i.e. to indulge in speculative transactions. Counsel submitted that in any case, without prejudice to the other arguments, the court could readily have considered enhancing the consideration amount, given the passage of time and pendency of multiple legal proceedings.

15. The respondents rely on the report of the Court Commissioner, which according to them, undercuts the claim for recession of the decree for specific performance. They point to the fact that the Court Commissioner had submitted three interim reports (dated 05.10.2009, 18.11.2009 and 12.12.2009). In the report dated 18.11.2009, a categorical statement made

was that the Deputy L&DO had addressed a letter to the defendant Krishan Kumar Bakshi asking her to be present before the L&DO with all the requisite documents to execute the conveyance deed. However, in spite of intimation by the Deputy L&DO to the appellants/judgment debtors, they had not cared to appear. The respondents urge that in the report, the Court Commissioner clearly stated that on 12.11.2009, Krishan Kumar Bakshi (first defendant) had-received this communication from the Deputy L&DO and had replied by her communication dated 16.11.2009 wherein she had stated that since the Special Leave Petition was pending before the Supreme Court and she had sought a stay of the execution, the directions-of the Court Commissioner be kept in abeyance.

16. It is argued that the judgment debtors concededly were aware of the proceedings initiated by the Court Commissioner but they chose deliberately and intentionally to avoid them and not to appear before the Land and Development Officer for execution of the conveyance deed. Learned counsel also relied on the Court Commissioner's last report dated 12.12.2009 setting out all relevant facts to the knowledge of the Court such as the fact that the Deputy L&DO has again asked for the presence of the parties in order that the conveyance deed could be executed in their favour and in spite of notice to their counsel, none had appeared for the judgment debtor. The respondents also submit that there was complete reluctance on the part of the appellants, who at every stage did everything they could to undermine the decree and are now turning around to say that the consent was recorded fraudulently or that it ought to be rescinded.

Findings

17. This court first would deal with FAO (OS) No. 437/2015, which is an appeal against the order in I.A. No. 2286/2010 filed under Order XXIII Rule 3 CPC. The said rule reads as:-

“3. Compromise of suit.- Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit: -

Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the court, for reasons to be recorded, thinks fit to grant such adjournment.

Explanation : An agreement or compromise which is void or avoidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule.”

18. The appellants argue that the compromise decree dated 20.03.2006 in CS(OS)353/2006 was obtained through fraud and misrepresentation, and, therefore, it is not a lawful agreement. The submission of the appellants is that Chhabra is not a valid assignee as firstly, the assignment in his favour was without the consent and knowledge of the appellants, and secondly,

because the said MOU dated 20.04.2005 was only an agreement to assign and not a valid assignment deed.

19. The submission of the appellants that the assignment through the second MOU was without their consent and knowledge has no bearing on the validity of the assignment, because by Clause 7 of the first MOU dated 28.02.2005 between them and Rajesh, the latter had a right to further nominate and assign the rights as specified in the Memorandum of Understanding in favour of any nominee(s) or assignee(s), to which the appellants agreed not to object. Further, the appellants voluntarily entered into the compromise decree with Chhabra on 20.03.2006, despite knowing that they entered into the first MOU on 28.02.2005 with Rajesh and not Chhabra. At that stage, the appellants did not object expressing their lack of knowledge about legality of Chhabra's right as assignee or that it was contrary to the terms of the first MOU. Indeed, they could not have done so, because Chhabra, in his suit [CS(OS)353/2006], had annexed a copy of the second MOU (dated 20th April, 2005). The appellants signed the compromise/settlement after receiving summons in the suit and without filing a written statement, with full knowledge about the assignment. Indeed, they agreed to receive the amounts from Chhabra. Therefore, they clearly waived their right to object to the further assignment of rights under the first MoU in two ways- firstly by the terms of the agreement and secondly by conduct. Now this cannot be a ground to assail the Memorandum of Understanding dated 20.04.2005. This court is further of the opinion that the allegations about collusion between Chhabra and Rajesh are unfounded, because apart from general averments, there is nothing to substantiate it. In fact, Rajesh made this allegation of collusion in his applications, which

sought stay of execution of the compromise decree. He urged that the appellants had colluded with Chhabra and he did not receive the amounts he was entitled to.

20. In their appeal (FAO 314/2009) against denial of stay of execution of the compromise decree, in the suit filed by the appellants (CS(OS) No.691/2007) against the order dated 09.04.2009, the Division Bench, while rejecting the appeal, noted that they (the appellants) were aware about the second MOU, because they adverted to it in a writ petition. The Division Bench, in its order dated 20.08.2009, rejecting the appeal, also observed that:

“10. If the Plaintiffs/Appellants were aware of the contents of the Memorandum of Understanding dated 20.4.2005 as is evident from the fact that the original document was annexed to the plaint in CS(OS) No.353/2006 and a copy of the same was filed by them as Annexure P-2 to the Writ Petition, it cannot be said that a material fact was withheld from them or a fraud was played upon them. Whether the Memorandum of Understanding dated 20.4.2005 executed between Defendant No.1 and Defendant No.2 amounted to assignment of the M.O.U. dated 20.4.2005 in favour of Defendant No.1 or it only gave a right to Defendant No.1 to get it assigned in his favour at a later date is a matter of interpretation of document. If the Plaintiffs/Appellants after considering the Memorandum of Understanding dated 20.4.2005 and consulting their Advocate agreed with the contention of Defendant No.5 that by virtue of Memorandum of Understanding dated 20.4.2005, the earlier M.O.U. dated 28.2.2005 stood assigned in his favour. It cannot be said that there was a fraud upon the Plaintiffs/Appellants merely because Defendant No.1 interpreted it to mean as assignment of the first M.O.U. in his favour and the Plaintiffs/Appellants agreed with him and that too after consulting their Advocate. In such circumstances, neither there was any concealment nor any fraud.

11. As noted by us, while dismissing the appeal filed by

respondent No. 2, Rajesh Kumar, Clause 7 of the Memorandum of Understanding dated 28th February, 2005 executed between him, on the one hand, and the appellant and late Smt. Sanjogta Kapoor, on the other hand, shows that Respondent No. 2 Shri Rajesh Kumar was specifically granted right to nominate and assign Memorandum of Understanding in favour of any nominee(s) and assignee(s). As further noted by us, since Shri Rajesh Kumar had divested all his rights in favour of Shri R.S. Chhabra (Respondent No. 1, herein). The Memorandum of Understanding dated 20th April, 2005 specifically stipulated that he (Respondent No. 1, Shri R.S. Chhabra) shall be entitled to get the sale deed executed in his favour, balance payment was to be made directly to the sellers and the possession was also to be handed over by them to Shri R.S. Chhabra. After execution of the second Memorandum of Understanding, Respondent No. 2 Shri Rajesh Kumar was not entitled, either in law or in equity, to get the suit property sold to him under the Memorandum of Understanding dated 28th February, 2005. Therefore the appellants having compromised with respondent No. 1, after examining the terms and conditions of Memorandum of Understanding dated 20th April, 2005 and after consulting their advocate, it cannot be said that a fraud was played upon them by respondent No. 1 by claiming that the Memorandum of Understanding dated 28th February, 2005 had been assigned in his favour. Respondent No. 1 may have bonafidely interpreted the Memorandum of Understanding dated 20th April, 2005 to mean that the earlier Memorandum of Understanding dated 28th February, 2005 stood assigned in his favour. But that by itself would not constitute a fraud upon the appellants, particularly, when the Memorandum of Understanding was very much in the knowledge of the appellants. In fact, we failed to appreciate what difference it would have made to the appellants had the Memorandum of Understanding dated 20th August, 2005, actually assigned the previous Memorandum of Understanding dated 28.2.05 to Respondent No.1, instead of only giving him a right to get the previous Memorandum of Understanding assigned in his favour at a later date. For them what was material was that they had

entered into a Memorandum of Understanding with respondent No. 2 Rajesh Kumar on 28th February, 2005 and under that documents they had given special right to him to assign his rights under the Memorandum of Understanding in favour of any nominee or assignee and Respondent No.2, Shri Rajesh Kumar, by signing the Memorandum of Understanding dated 20.4.05 with respondent No.1, has already divested him of all his rights under the MOU dated 28.2.2005. For them what is material is that they are getting agreed consideration from respondent No. 1 and are not committing any breach of the terms and conditions contained in the Memorandum of Understanding executed on 28th February, 2005 between them and Respondent No. 2, Rajesh Kumar. They have nothing to lose by executing the sale deed in favour of Respondent No. 1. It is more so when not only the application filed by Shri Rajesh Kumar for grant of interim injunction against execution of the compromise decree dated 28th March, 2006 passed in CS (OS) No. 353 of 2006 has been dismissed, the appeal filed by him has also been dismissed by this court.”

In our opinion, the same logic applies in respect of the argument made on behalf of the appellants, with regard to the plea of fraud. In *Banwari Lal Vs. Chando Devi* (1993) 1 SCC 581, the Supreme Court examined the provisions of Order XXIII Rule 3-A in some detail and in light of the amendments introduced in the CPC and held that:

“7. By adding the proviso along with an explanation the purpose and the object of the amending Act appears to be to compel the party challenging the compromise to question the same before the court which had recorded the compromise in question. That court was enjoined to decide the controversy whether the parties have arrived at an adjustment in a lawful manner. The explanation made it clear that an agreement or a compromise which is void or voidable under the Act shall not be deemed to be lawful within the meaning of the said rule. Having introduced the proviso along with the explanation in

Rule 3 in order to avoid multiplicity of suit and prolonged litigation, a specific bar was prescribed by Rule 3-A in respect of institution of a separate suit for setting aside a decree on basis of a compromise..”

As is evident from the entire discussion, there is no proof that the appellants were deceived about the second MOU; that transaction was never kept in the dark. Their only contention about its fraudulent nature was that it was collusive and its purport was unknown to them. No doubt, courts are to examine the legality of agreements that are to be embodied as compromise decrees. At the stage when the application was made under Order XXIII, CPC, the appellants were clearly in the know about the second MOU, Chhabra's status as an assignee and his rights and obligations. They voluntarily agreed to enter into the compromise, which was embodied in the decree, drawn up later. By that agreement, they clearly represented that the suit property would be conveyed to Chhabra, the assignee. However, they were quick to take advantage of Rajesh's applications, and allege that the ground on which he sought for stay of decree, was also a ground of fraud. Therefore, clearly, it was not as if they were deceived by any misrepresentation or suppression of fact, or concealment, which would have amounted to fraud, in the first instance, at the stage of formation of the contract- which alone can be the basis for setting aside the compromise decree. Post contract absence of performance *ipso facto*, which may amount to breach of contract or decree, cannot be the basis of alleging fraud.

21. This brings us to the second ground, that there was no valid assignment in favour of Respondent No. 2. It is submitted that the terms of the second MOU dated 20.04.2005 were not fully complied with on the date

the compromise decree was entered into, and hence the assignment in favour of Chhabra was incomplete. A perusal of the said second MOU dated 20.04.2005 reveals that the only condition that was yet to be completed was the payment of the balance amount of ₹ 20,00,000/- by Chhabra to Rajesh. The payment of this balance amount was to be done after the fulfillment of a condition precedent- that of the assignment of the first MOU by the appellants in favour of Chhabra. Since the appellants did not assign the Memorandum of Understanding to Chhabra, he did not pay ₹ 20,00,000/- to Rajesh in absence of the compliance of the condition precedent by the appellants. Further, the second MOU dated 20.04.2005 discloses the clear and unambiguous intention of Rajesh to assign all his rights in the first MOU to Chhabra, for which eighty percent of the consideration amount was already paid by the former (Chhabra) to the latter. It must also be noted that by entering into the compromise decree dated 20.03.2006, the appellants have waived off their right to object against the validity of the second MOU dated 20.04.2005 as that document was in their full knowledge and they had every chance to verify the validity of the assignment. Instead, they raised this plea only after Rajesh alleged this in court. Furthermore, that second MOU dated 20.04.2005 is a valid assignment has attained finality in light of the Supreme Court's rejection of Rajesh's appeal in SLP No. 29485/2009 against the compromise decree by order dated 20.11.2009. In any case, the balance amount of ₹ 20,00,000/- was paid by Chhabra to Rajesh on 23.08.2012. Therefore, this court holds that the assignment in favour of Rajesh by second MOU dated 20.04.2005 was a valid assignment. The reliance placed on *Ravinder Singh v. Mahamaya Builders* and AIR 1975 Mad 379 to submit that a person holding a back-to-back agreement to sell

with the original proposed buyer would not be entitled to sue on the first agreement in the absence of a valid and completed assignment in his favour, is without any avail since in the present case there has been a valid assignment.

22. The Indian Contract Act, 1872 defines “fraud” and “misrepresentation” as follows:

“17. ‘Fraud’ defined.—‘Fraud’ means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract-

(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent. Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence, is, in itself, equivalent to speech.

18. “Misrepresentation” defined.—“Misrepresentation” means and includes—

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(2) any breach of duty which, without an intent to deceive, gains an advantage of the person committing it, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him;

(3) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is the subject of the agreement.”

23. By no stretch of imagination can it be said that the factual matrix of the present case discloses fraud or misrepresentation played out on the appellants. The appellants were in full knowledge of the second MOU dated 20.04.2005, which Rajesh was empowered to enter into, and over which the appellants had no right to object. In light of the above findings, it is held that the compromise decree was lawful, and I.A. No. 2286/2010 under Order XXIII Rule 3 had to fail. The findings of the learned Single Judge on this aspect do not call for interference. Furthermore, as noted by the learned Single Judge in her judgment dated 06.05.2015, I.A. No. 2286/2010 is also time-barred as the applicants admittedly learnt about the fraud or the misrepresentation after Respondent No. 2 filed an application on 18.05.2006 praying that the compromise decree be set aside. Yet, the present application was filed only in December 2010, and, therefore, is clearly barred by the law of limitation. FAO (OS) No. 437/2015, as it concerns I.A. No. 2286/2010 stands dismissed.

24. FAO (OS) No. 461/2015 is against the order in I.A. No. 1460/2013. This application had been filed under Section 28 of the Specific Relief Act. Section 28 reads as-

“28. Rescission in certain circumstances of contracts for the sale or lease of immovable property, the specific performance of which has been decreed.—

(1) Where in any suit a decree for specific performance of a contract for the sale or lease of immovable property has been made and the purchaser or lessee does not, within the period allowed by the decree or such further period as the court may

allow, pay the purchase money or other sum which the court has ordered him to pay, the vendor or lessor may apply in the same suit in which the decree is made, to have the contract rescinded and on such application the court may, by order, rescind the contract either so far as regards the party in default or altogether, as the justice of the case may require.

(2) Where a contract is rescinded under sub-section (1), the court—

(a) shall direct the purchaser or the lessee, if he has obtained possession of the property under the contract, to restore such possession to the vendor or lessor, and

(b) may direct payment to the vendor or lessor of all the rents and profits which have accrued in respect of the property from the date on which possession was so obtained by the purchaser or lessee until restoration of possession to the vendor or lessor, and if the justice of the case so requires, the refund of any sum paid by the vendee or lessee as earnest money or deposit in connection with the contract.

(3) If the purchaser or lessee pays the purchase money or other sum which he is ordered to pay under the decree within the period referred to in sub-section (1), the court may, on application made in the same suit, award the purchaser or lessee such further relief as he may be entitled to, including in appropriate cases all or any of the following reliefs, namely:—

(a) the execution of a proper conveyance or lease by the vendor or lessor;

(b) the delivery of possession, or partition and separate possession, of the property on the execution of such conveyance or lease.

(4) No separate suit in respect of any relief which may be claimed under this section shall lie at the instance of a vendor, purchaser, lessor or lessee, as the case may be.

(5) The costs of any proceedings under this section shall be in the discretion of the court.”

25. The appellants have relied on certain decisions to support the settled proposition of law that where a decree for specific performance has been passed, such decree is in the nature of a preliminary decree and the court does not lose its jurisdiction over the matter. In terms of Section 28, where the decree holder does not come forth and pay the purchase money in the time fixed by the decree, the Court may rescind the contract of sale. However, such relief is not granted in every case, but instead the Court has to exercise its discretion and act in the interests of equity depending on the factual matrix of the case before it. The Supreme Court held in *V.S. Palanichamy Chettiar Firm vs C. Alagappan* (1999) 4 SCC 702 that-

“Provisions to grant specific performance of an agreement are quite stringent. Equitable considerations come into play. Court has to see all the attendant circumstances including if the vendee has conducted himself in a reasonable manner under the contract of sale.”

26. In the present case, the executing court's order dated 31.08.2009 in EP 232/2007 prescribed a strict timeline as noted previously. Since the present appellants were not cooperating in the execution of the conveyance deed, the court appointed a Court Commissioner to expedite the process. The balance consideration for the disputed property was to be paid by Chhabra only after the execution of the conveyance deed. While it is true that in terms of the

executing court's order *per se* the onus was not on the appellants to execute the conveyance deed, their cooperation was vital in order to ensure its successful execution. The following three reports filed by the Court Commissioner dated 5.10.2009, 18.11.2009, and 11.12.2009 material parts of which are reproduced below, speak volumes about their evasive conduct:

The first report (dated 5.10.2009):

"1. That the Hon'ble Court by order dated 31.08.2009 appointed the undersigned as Court Commissioner with the directions to take necessary steps in terms of the said order dated 31.08.2009 and get the conveyance deed executed in the Office of L&DO in favour of the JDs/defendant Nos. 1 to 5 within the next two weeks.

2. That pursuant to the above directions of Hon'ble Court dated 31.08.2009, reference was made to the Secretary, Ministry of Urban Development (L&DO office) by letter dated 11.09.2009 requesting that the application pending with them for the purpose may be processed so that conveyance deed in respect of the suit property, i.e. 145 B (also known as 14-C), Bazar Marg, Old Rajinder Nagar, New Delhi may be executed in favour of the JDs/defendant Nos. 1 to 5. It was further requested that the date and time for execution of the conveyance deed be intimated so that undersigned is present at the time of its execution. A copy of the letter dated 11.09.2009 is annexed herewith and marked as Annexure-"A"

3. That in reply, Mr. Surendra Singh, Dy. Land & Development Officer, Ministry of Urban Development, Govt. of India by his letter No.L&DO/PS-II/750 dated 23.09.2009 has intimated that the case for conversion has been pending due to dispute in the property and that as per the court orders the following actions are involved in finalizing the case:-

- (i) Technical inspection*
- (ii) Issue of breach notice*

- (iii) Response to breach notice by the applicant*
- (iv) Calculation of charges*
- (v) Audit of charges*
- (vi) Issue of demand*
- (vii) Payment by applicant against demand*
- (viii) Issue of call letter*
- (ix) Execution of conveyance deed*
- (x) Registration of conveyance deed.*

In order to complete the above actions, extension of time has been sought by two months. It has also been intimated that the case has been processed for technical inspection. A copy of his letter dated 23.09.2009 is annexed hereto and marked as Annexure "B".

4. That by letter dated 24.09.2009, a copy of the aforesaid letter dated 23.09.2009 received from the Department of Land and Development Officer has been forwarded to Mr. R.S. Chhabra, the plaintiff/DH in the matter requesting him to intimate the position with regard to the aforesaid issues raised in the letter dated 23.09.2009 immediately so that the matter may again be taken up with Land and Development Office as per orders of Hon'ble Court dated 31.08.2009 passed in the matter. A copy of the letter dated 24.09.2009 is annexed hereto and marked as Annexure "C".

5. That the undersigned has also spoken to Mr. Surendra Singh, Dy. L&DO Officer and he has informed that the matter has already been sent for technical inspection of the case property, however, keeping in view the orders of the Hon'ble Court he was impressed upon to have the matter expedited and get the necessary formalities completed expeditiously. He assured accordingly. He has also requested for extension of time for completion of all the formalities till 15.11.2009."

The second report (dated 18.11.2009):

"6. That the Decree Holder Sh. R.S. Chhabra by his letter dated 07.11.09 intimated that as per his information all the requisite documents have already been submitted by the JDs to the L&DO earlier and the application for a conversion was at a very advanced stage and as such the Decree Holder does not have any of the documents called for and in view of the history of the case the JDs are not likely to cooperate. The above letter of the Decree Holder dated 07.11.09 was forwarded to the Dy. Land and Development Officer by letter dated 07.11.09 with the request that the matter may be processed in a time bound manner and all the formalities including execution of conveyance deed to be done in the office of Land & Development Office in favor of the JDs/Defendant nos. 1 to 5 in terms of court orders dated 31.08.09 may be got done within the prescribed time well before the time allowed by this Hon'ble Court till 15.11.09.

7. That in reply, the Dy. Land and Development Officer, by his letter No.L&DO/PS-II/916 dated 11.11.09, has intimated that neither the co-lessees appeared on 5.11.09, the fixed date and time nor any response has been received for execution of the conveyance deed and, therefore, the co-lessees need to be directed to cooperate in the matter. He has further stated that earlier also the parties were called for execution of the conveyance deed vide letter dated 20.2.2006 and 7.4.2006 but they did not turn up. Again the parties were called for the execution of conveyance deed vide letter No.L&DO/PS-II/916 dated 11.11.09 and letter dated 7.11.09 but they did not turn up. The execution of the conveyance deed is not possible unless the conveyance is sign by lessor and lessee(s) and two witnesses with photos. The conveyance deed after execution shall have to be registered with concerned Sub-Registrar of GNCTD. Therefore, the co-lessees need to be directed by the Hon'ble Court for completion of legal formalities on their part and in the event of their failure the Court Commissioner may get orders for execution of Conveyance deed on behalf of the JDs (co-lessees). He has further requested that with the help of local police original lease deed be taken back as the same is a

registered document which has not been submitted by the lessee(s) in their office so far. An undertaking in the prescribed format is also required on Rs.10/-stamp paper (proforma enclosed). It is to be signed by co-lessees or on their behalf by Court Commissioner. Further conversion policy as approved by the Union Cabinet, as per para 31, only a lessee can apply for conversion. Para 34 relates to production of original lease deed for making an endorsement on it, failing which it can be misused. In order to get the property mutated in the name of the plaintiff on the basis of court orders and then convert the property in their name, the plaintiffs be advised to submit an application in the prescribed form available at Information Facilitation Centre immediately, so that rest of the formalities can be completed. A copy of the letter dated 11.11.2009 is annexed hereto and marked as Annexure "D".

8. *That, by letter dated 12.11.09, a copy of the above letter was forwarded to Mrs. Krishna Kumari Bhakshi & Ors. directing them to immediately deposit the original registered lease deed (in respect of the suit property) with the Land and Development Office, New Delhi and to complete the necessary formalities including furnishing of the requisite application in the prescribed form as requested by Land & Development Office immediately so that orders of the Hon'ble Court dated 31.08.2009 are complied with, as directed. The letter has been received by Mr. Shahil, who is stated to be grandson of Mrs. Krishna Kumar Bakshi at the given address on 12.11.09.*

9. *That on 16.11.2009 at about 4 p.m. a letter has been received from Mrs. Krishna Kumar Bakshi, wherein it is mentioned that Special Leave Petition (C) no.29485 of 2009 titled as 'Gopal Krishan Kapoor & Ors. Vs. R.S. Chhabra & Ors.' has been filed before the Hon'ble Supreme Court of India which is listed before the Hon'ble Supreme Court on 20.11.2009 with a specific prayer to stay the Execution Petition No.232/2007 and order passed by the Delhi High Court dated 31.08.2009 in the said execution petition. It has further been requested to keep the direction as per undersigned letter dated*

12.11.2009 in abeyance till the disposal of the Special Leave Petition (C) No.29485 of 2009. Copy of said letter is annexed hereto and marked as Annexure "E".

10. That in view of the fact that in the letter of Mrs. Krishna Kumar Bakshi, J.D. dated 16.11.2009, there is no mention of any order of Hon'ble Supreme Court staying the execution petition No.232/2007 and order passed by Hon'ble Delhi High Court dated 31.08.2009 in the said execution petition, by letter dated 16.11.2009 (copy of the said letter is annexed herewith as Annexure "F"), delivered to Mrs. Krishna Kumari Bakshi and Ors, J.Ds on 17.11.2009 have once again been directed to immediately deposit the original registered lease deed (in respect of the suit property) with the Land & Development Office, New Delhi and to complete necessary legal formalities on their part including submission of original registered lease deed in the office of L&DO and on furnishing of the requisite application in the prescribed form as requested by Land& Development Office immediately so that orders of Hon'ble Court dated 31.08.2009 are complied with, as desired."

The third report (dated 11.12.2009):

"1. That after filing of the Interim Report-II dated 30.11.2009 Sh. G.H. Ratra, Deputy Land & Development Officer, Ministry of Urban Development, Govt. of India, by his letter No.L&DO/Conversion Cell/404 dated 04.12.2009 (copy annexed hereto as annexure "J") has intimated that fresh date for execution of Conveyance Deed has been fixed for 11.12.2009 at 2.00 p.m.

2. That a copy of the above letter has been forwarded to the parties including Ms. Bina Gupta, Advocate, for information and necessary action, by the undersigned letter dated 08.12.2009 (copy annexed hereto as Annexure "K").

3. That Shri Surendra Singh, Deputy Land and Development Officer, Ministry of Urban Development, Govt. of

India, by his letter Letter No.L&DO/PS-II/1003 dated 11.12.2009 (copy annexed hereto as annexure-"L") has now intimated that neither the party attended their office for execution of conveyance deed on the date and time nor any information has been received from them in this regard till 3.30 p.m. on 11.12.2009."

27. As is evident, the parties did not appear on 05.11.2009 which was the date fixed for the execution of the conveyance deed. The Land and Development Officer (L&DO) also has informed the Court Commissioner that the parties were called by letters dated 11.11.2009, 07.11.2009 and also 20.02.2006 and 07.04.2006, but they did not appear. The appellant Krishna Kumari Bakshi was directed to immediately deposit the original registered lease deed in respect of the suit property to the Land and Development Officer, to which she replied by letter dated 16.11.2009 that SLP No. 29485/2009 was pending before the Supreme Court which sought stay of the Delhi High Court's order dated 31.08.2009. Another letter, dated 17.11.2009 was delivered to Krishna Kumari Bakshi, asking her to deposit the original registered lease deed and to complete other legal formalities, and the same was again not complied with. The Land and Development Officer was once again forced to fix a fresh date for the execution of the conveyance deed on 11.12.2009 and once again neither of the parties appeared in this regard nor was any communication received from them.

28. In light of this, it is evident that the appellants themselves have not cooperated in the execution of the conveyance deed. By moving an application under Section 28 of the Specific Relief Act, they give the impression that they were willing to execute the conveyance deed but the respondent, Chhabra was defaulting, whereas the reports of the Court

Commissioner paint a different picture. The appellants in this case did not approach the court with clean hands. Due to the non-cooperation of the appellants, the conveyance deed could not be executed despite repeated efforts of the Land and Development Officer; no opportunity arose for Chhabra to make the balance payment. Since the non-payment of the purchase money by Chhabra within the time allowed for by the execution order dated 31.08.2009 was due to the repeated lapses on part of the appellants, this Court does not discern any equity in favour of the appellants, entitling them to relief. The court deciding a matter under Section 28 of the Specific Relief Act has to act in the interest of equity, and the factual matrix of this case does not call for the Court to exercise its discretion and set aside the agreement to sell. In *K.S. Vidyanadam & Ors. vs. Vairavan* (1997 (3) SCC 1) the Supreme Court referred to the circumstances to be considered by the Court in exercising discretionary power to decree specific performance of agreement for the sale of immovable property. It was held that-

“In the case before us, it is not mere delay. It is a case of total inaction on the part of the plaintiff for 2½ years in clear violation of the terms of agreement which required him to pay the balance, purchase the stamp papers and then ask for execution of sale deed within six months... The delay has brought about a situation where it would be inequitable to give the relief of specific performance to the plaintiff.”

In the present case, we find that it will be inequitable to grant relief under Section 28 to the appellants in light of there being no effort on part of the appellants to execute the conveyance deed through all the years since the passing of the execution decree on 31.08.2009. Further, I.A. No 1486/2014 is also time-barred as the non-payment of the purchase money by Chhabra took

place in 2009 after the passing of the executing order on 31.08.2009, and the application was moved only in 2014. FAO (OS) No. 461/2015 is accordingly dismissed.

29. In light of the above reasoning, FAO (OS) No. 462/2015 is also dismissed. As noted by the learned Single Judge in her order dated 31.08.2009, the question of Chhabra's capacity to pay comes at a later stage, once the appellants cooperate in getting the conveyance deed executed. The submission that I.A. No. 5310/2014 should be dealt with separately is without any merit as there is no reason to call for the discovery of the records evidencing Chhabra's capacity to pay.

30. The appellant's argument that the reliance of the learned Single Judge on the orders passed in CS(OS) 691/2007 being misplaced is also liable to be rejected. The orders relied upon by the learned Single Judge in her order dated 06.05.2015 have all attained finality before the Supreme Court of India. The orders relied upon give answers to questions of fact, the facts being the same in the present batch of appeals. The recordings of the various benches in CS(OS)691/2007 are a product of judicial reasoning, and the maintainability of CS(OS)691/2007 does not affect the binding value attained by the orders regarding questions of fact in light of the Supreme Court's order dated 20.11.2009.

31. The appellants have also argued that post the death of Mrs. Sanjogta Kapoor, the object of the first Memorandum of Understanding dated 28.02.2005 itself got frustrated. This submission too is without any merit as that document does not state that the object of the sale is to raise money for the expenses involved in Late Mrs. Sanjogta's treatment. That plea does not appear to have been urged at any stage earlier as well.

32. For the above reasons, the present batch of appeals is dismissed as unmerited. There shall be no order as to costs.

**S. RAVINDRA BHAT
(JUDGE)**

**DEEPA SHARMA
(JUDGE)**

AUGUST 24, 2016

