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

\+ **CS(OS) 734/2011 & IANos.4838-39/2011, 9386/12, 10189/12 & 4704/2013**

SUBHASH ARORA ..... Plaintiff

Through: Ms Damini Chawla, Advocate.

versus

KALVINDER SINGH SANDHU & ORS. ..... Defendants

Through: None being *ex parte*.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% **26.09.2016**

VIBHU BAKHRU, J

1. The plaintiff has filed the present suit for specific performance, *inter alia*, praying as under:

> "a) pass a decree of specific performance in favour of Plaintiff and against the Defendants No. 1 and 2 and other legal heirs of Late Shri Kewal Singh Sandhu directing the Defendant No. 1 and other legal heirs to specifically perform to Agreement to Sell dated 20.07.2010 and direct Defendant No. 2 to join Defendant No. 1 and other legal heirs of Late Shri Kewal Singh Sandhu in executing the Sale deed in favour of the Plaintiff in pursuance to Agreement to Sell dated 20.07.2010 and handover the vacant and peaceful possession of the "suit property" to the Plaintiff and also deliver all the original documents of the suit property and in the alternative, if for any reason this Hon'ble Court comes to a conclusion that the aforesaid decree of Specific Performance cannot be passed in favour of plaintiff, a decree for Rs.9.25 crores may be passed in

favour of the plaintiff and against the defendant and other legal heirs of late Shri Kewal Singh Sandhu as difference in price of the property from the date of agreement to sell upto date of filing of the suit which includes refund of Rs.2.6 crores paid as advance/part sale consideration by plaintiff to defendant and late Kewal Singh Sandhu and such further increase in the market rate of properties along with interest @ 18% per annum.

b) pass a decree of permanent injunction in favour of plaintiff and against the defendant and other legal heirs of late Shri Kewal Singh Sandh restraining them from in any way selling, transferring, mortgaged encumbering or creating third party interest or handing over possession of the property B-8/A, Kailash Colony, New Delhi."

2. Summons in the present suit and notice in the application under Order XXXIX Rule 1 &2 were issued by this Court on 25.03.2011. By an order dated 28.04.2011, defendant no1 was restrained from creating any third party interest in the suit property without prior permission of the Court and was further directed to disclose on affidavit Class-I heirs of Late Mr Kewal Singh Sandhu (father of defendant no1). Thereafter, plaintiff filed an application being I.A no 10188/2012 under O I Rule 10 r/w O VI Rule 17 seeking impleadment of Mr Sukhvinder Singh Gill, the alleged subsequent purchaser of the property in question. By an order dated 25.04.2012, Mr Sukhvinder Singh Gill was also restrained from creating any third party rights in respect of the Property. By an order

dated 21.04.2014, this Court impleaded defendants no 2-5 as necessary parties being legal heirs of Late Mr Kewal Singh Sandhu. Defendant Nos.1-5 appeared initially and a Written Statement dated 15.08.2012 was filed by defendant No 1. Thereafter, Defendant Nos. 1-5 did not participate in the present proceedings and they were proceeded *ex parte* by an order dated 19.02.2015.By the same order, Mr Sukhvinder Singh Gill was impleaded as defendant no 6 and further, the plaint was permitted to be amended for introducing the necessary averments and amending the prayer clause. Since defendant no. 6 also did not participate in the present proceedings, he was directed to be proceeded *ex parte* on 26.05.2016.

3. Mr Subhash Arora (the plaintiff herein and hereafter referred to as 'PW1'), has filed an Affidavit affirming the averments made in the plaint.

4. Briefly stated, the following facts emerge from the affidavit of PW1:

4.1 The defendant no 1 and his father Late Mr. Kewal Singh Sandhu came in contact with the plaintiff and represented that they are the owners of property bearing no. B-8/A, Kailash Colony, New Delhi, admeasuring 496 sq. yds (hereinafter ‘the Property') and also that they have full authority to sell, dispose and transfer the said property. It was further represented that the Property was purchased by them from one Smt Sushilawati by way of a sale deed dated 26.07.1982. It is stated by PW1 that after negotiations, it was agreed that defendant no 1 and his father would sell the Property to the plaintiff. Thereafter, an Agreement to Sell dated 20.07.2010 (hereafter 'the Agreement') was executed between defendant no 1 and his father, Late Mr Kewal Singh Sandhu on one hand and the plaintiff on the other in respect of the Property for a total sale consideration of ₹13,25,00,000/- out of which ₹2,60,00,000/- was paid by the plaintiff as advance/part consideration to defendant no 1 and his father. The original Agreement to Sell dated 20.07.2010 along with Receipt indicating receipt of ₹2.6 crores by defendant no 1 has been exhibited as Exhibit PW1/1. PW 1 has also placed on record the copies of Bankers cheques and Bank statement of the plaintiff evidencing payment by the plaintiff as Mark F and Exhibit PW1/2 respectively.

4.2 It is averred by PW 1 that within 100 days of execution of Agreement to Sell, defendant no 1 and his father were liable to execute and register the sale deed in favour of the plaintiff against the receipt of balance payment of ₹10.65 crores and handover the vacant and peaceful possession of the Property to the plaintiff.

4.3 PW1 states that sometime in first week of May, 2012, the plaintiff met with a real estate agent and came to know that the Property has been put on sale and also came across a copy of a sale deed dated 26.10.2010(hereafter 'the Sale Deed'). The plaintiff further came to know that the Property has been purchased by Mr Sukhvinder Singh Gill (Defendant no 6 herein) from defendant no 1 and his father by way of the Sale Deed. It is further stated that in terms of the Sale Deed, consideration price of the Property was shown as ₹1,75,00,000/- which was much less than ₹13,25,00,000/- as agreed between the plaintiff and defendant and his father. It is averred by PW1 that on enquiries with bank, it has come to his knowledge that the cheque for consideration of ₹1,75,00,000/- was never presented for encashment by the defendant. It is further stated that the Sale Deed is a collusive document executed by defendant no 1 and 6 to avoid the obligation of the Agreement and therefore, is a sham document which is *non-est* in the eyes of law.

4.4 PW 1 has stated that defendant no 6 is a subsequent purchaser of the Property and was aware of the Agreement and had executed the Sale

Deed only with an oblique objective to defraud the plaintiff and to frustrate the Agreement.

4.5 PW1 has affirmed that he has always been ready and willing to perform his part of obligation as per the Agreement; however, the defendant no 1 and his father and now defendant no 1 to 5 have avoided to comply with their obligations as per the Agreement.

5. Defendant no1 in his written statement dated 15.08.2012, has admitted the execution of the Agreement with the plaintiff and in Paragraph G has also stated that he is ready to execute the sale deed in favour of the plaintiff on receiving the balance sale consideration of ₹10.75 crores and on Ms Sukhvender Kaur being removed from the Property. Defendant no 1 has further admitted receiving ₹2.5 crores from the plaintiff.

6. Defendant no 1 has further claimed that plaintiff is not entitled to the equitable relief of specific performance. It is stated that a Civil Suit captioned as ***Kewal Singh Sandhu and Anr. v. K.S. Sidhu and Anr*: Civil Suit No. 1990 of 2000** had been filed by the defendant no 1 and his father before this Court for possession and mesne profits in respect of the

Property. Defendant no. 1 has further averred that during the pendency of the said suit, possession of the Property was handed over to defendant no1 by M/s Wimpy International on 22.11.2003 and only the prayer for *mesne* profits remained. It is further stated that on assurances from the plaintiff to pay the entire sale consideration to defendant no1, defendant no 1 had withdrawn the said suit on 30.07.2010.

7. Defendant no. 1 further states that the Sale Deed dated 26.10.2010 executed in favour of Mr Sukhvinder Singh Gill could not fructify and the parties are in the process of filing a cancellation deed with Sub-Registrar, Delhi.

8. I have heard learned counsel for the plaintiff.

9. From the facts as narrated above, it is clear that there is no dispute as to the execution of the Agreement to Sell dated 20.07.2010.While it is contended by the plaintiff that he had paid ₹2,60,00,000/- at the time of Agreement to Sell as earnest money, defendant no 1 contends that he received only ₹2,50,00,000/-.

10. PW 1 has duly proved the receipt (Exhibit PW1/1) dated 20.07.2010 clearly evidencing that ₹2,60,00,000/- had been received by

defendant no 1 from the plaintiff at the time of execution of the Agreement.

11. Thus, it must be held that the plaintiff has paid a sum of ₹2,60,00,000/- and defendant' no 1's contention that he received only ₹2,50,00,000/- cannot be accepted.

12. Even though a sale deed has been executed after the agreement to sell had been entered into with the plaintiff, it is not necessary for the plaintiff to seek cancellation of the sale deed. The Supreme Court in ***Prem Singh & Ors v Birbal & Ors*: AIR 2006 Supreme Court 3608,** had held as under:

> "When a document is valid, no question arises of its cancellation. When a document is void ab initio, a decree for setting aside the same would not be necessary as the same is non-est in the eye of law, as it would be a nullity."

13. In ***Lala Durga Prasad And Another v. Lala Deep Chand and Others*: AIR 1954 Supreme Court 75,** the Supreme Court had held as under :

> "In our opinion, the proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join

> in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff. This was the course followed by the Calcutta High Courtin Kafiladdin v. Samiraddin (I), and appears to be the English practice. See Fry on Specific Performance, 6th edition, page 90, Paragraph 207; also Potter v. Sanders(2)"

14. Thus, the defendants are directed to specifically perform the Agreement dated 20.07.2010 on plaintiff making a payment of a sum of ₹10,65,00,000/-. Defendant Nos. 1-5 shall register the sale deed for the Property bearing No. B-8/A Kailash Colony, New Delhi in favour of the plaintiff and defendant No. 6 shall confirm the sale deed.

15. Costs be also awarded in favour of the plaintiff.

16. Let the decree sheet be drawn up. Pending applications also stand disposed of.

VIBHU BAKHRU, J

SEPTEMBER 26, 2016
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