

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

% *Judgment Reserved On :August 29, 2016*
Judgment Delivered On : September 01, 2016

+ **FAO (OS) 476/2013 & CM No.3939/2014**

SHRI MUKESH KAPIL Appellant
Represented by: Mr.J.C.Mahindro, Advocate with
Ms.Sapna S.Kapil, Advocate

versus

SHRI PARAG P TRIPATHI & ORS Respondents
Represented by: Mr.Jayant K.Mehta, Advocate with
Mr.Kunal Bahri, Ms.Suveni Bhagat
and Mr.Abhijeet Srivastava,
Advocates for R-1 & R-2

FAO(OS) 495/2013 & CM No.3940/2014

SHRI MUKESH KAPIL Appellant
Represented by: Mr.J.C.Mahindro, Advocate with
Ms.Sapna S.Kapil, Advocate

versus

SHRI PARAG TRIPATHI & ORS Respondents
Represented by: Mr.Jayant K.Mehta, Advocate with
Mr.Kunal Bahri, Ms.Suveni Bhagat
and Mr.Abhijeet Srivastava,
Advocates for R-1 & R-2

RFA(OS) 47/2014 & CM No.3401/2014

SHRI MUKESH KAPIL Appellant
Represented by: Mr.J.C.Mahindro, Advocate with
Ms.Sapna S.Kapil, Advocate

versus

SHRI PARAG TRIPATHI

..... Respondent

Represented by: Mr.Jayant K.Mehta, Advocate with
Mr.Kunal Bahri, Ms.Suveni Bhagat
and Mr.Abhijeet Srivastava,
Advocates for R-1 & R-2
Mr.Virag Gupta, Advocate for R-5

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J.

1. The disputes in the 3 captioned appeals relate to property bearing municipal number 14, Bazar Lane, Babar Road, New Delhi.
2. By and under a perpetual lease executed by the Governor General Council on April 04, 1939 land ad-measuring 212 sq.yards bearing municipal No.14, Bazar Lane, Babar Road, New Delhi was demised in perpetuity in the name of late Darshan Lal Kapil, the predecessor-in-interest of the appellant in the three appeals. He constructed a building thereon and after a few years desired redevelopment thereof. On February, 1992 he entered into an Agreement with Ranjit Towers India Pvt. Ltd., impleaded as respondent No.3 in the three appeals.
3. It is a typical collaboration arrangement. Respondent No.3 undertook to demolish the existing construction and re-build a building thereon incurring expenses and additionally pay money to the owner of the land and in lieu thereof a share in the reconstructed building being its. In the instant case, the agreement dated February 17, 1992 required a basement, a ground floor, a first floor and a second floor to be constructed and additionally ₹15,00,000/- (Rupees Fifteen Lacs only) to be paid to late Darshan Lal Kapil. As per the agreement the ground floor was to belong to late Darshan Lal Kapil and the

remaining floors were to belong to respondent No.3. The terrace rights were to vest with late Darshan Lal Kapil.

4. Relevant would it be to highlight that the Agreement dated February 17, 1992 empowered respondent No.3 to negotiate the terms of the sale of the floors falling to its share along with proportionate rights in the land underneath and to receive the sale consideration from the prospective purchasers. In this regard, specific mention may be made to clauses 6, 11, 18, 20 and 26 of the Agreement dated February 17, 1992, which read as under:-

“6. That the owners agree to sell, transfer and convey to the developers or their nominee(s) rights for basement, first and second floors with proportionate land rights in consideration of the Developers developing basement, ground floor, first floor and second floors plus the consideration of ₹15,00,000/- (Rupees fifteen laksh only). The interest in land will be available to the prospective purchasers proportionately in respect of basement, first and second floor only. The terrace rights over second floor be with the owners for further construction whenever it is permissible under the law, however, the usage of terrace shall be common for all occupants till further construction is done.

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11. That the Developer shall always be fully competent to settle terms for the transfer of their basement, first floor and second floor in the building and proportionate land underneath to any persons at any time either during or after the building is fully completed and the Developers can enter into the Agreement to Sell for the sale of Developer's portion and accept cash, cheques, pay order, drafts etc. from all such would be transferees in their (Developer's) own name and at their own risk and responsibility can issue receipts for all such payments made to them. In this context, the Owners herein agree, declare and record that they shall always join in all such Agreements for sale / conveyance deeds to be given to prospective unit buyers of the Developer's portion on such terms as the Developers may deem fit at their absolute discretion. In case of conversion from leasehold to freehold the betterment charges shall be proportionately borne by the parties.

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18. That the Developers shall have the right to construct and sell the single unit on basement, first and second floor to the prospective buyers and the sale consideration received by such sale shall be exclusively of the Developers and the Owners will have no objection to the same.

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20. That after development and construction of the building mentioned herein above, for the portion allocable to the Builders / Developers, the owners also undertake to give powers of attorney to the Builders / Developers or his nominee(s), to take necessary permission to his / her name and on his /her behalf and execute the instruments of transfer / sale deed(s), agreements and get these registered in the office of the Sub-Registrar, Delhi for the portion allocable to the Builders / Developers. The Builders / Developer shall also obtain the Income Tax Clearance Certificate under Section 230A(1) of the Income Tax Act, 1961 and other permissions, if and when required on behalf of the Owners for transfer of the portion falling to the share of the Builders.”

(Emphasis supplied)

5. Acting under the authority conferred upon respondent No.3 by late Darshan Lal Kapil the respondent No.3 entered into two Agreements to Sell dated July 25, 1993 with the respondent Nos.1 and 2 for sale of undivided half portion in the first floor of the property alongwith proportionate rights in the land underneath, to each of them.

6. The respondent No.3 is also stated to have entered into another agreement for sale of the basement with one Ms.Madhu Gupta. This, however, does not have any bearing on the present appeals because the said purchaser is not a party in these proceedings nor her rights are in question.

7. Disputes arose between the parties in the present appeals. Numerous proceedings came to be filed by them against each other in this Court. These proceedings included the following:-

- (i) Suits for specific performance of the Agreement to Sell dated July 25, 1993 filed by the respondent Nos.1 and 2 against the appellant and the respondent No.3. [CS(OS) Nos.627/1997 and 628/1997];
- (ii) A petition under Ss. 8 and 9 of the Arbitration & Conciliation Act, 1996 for appointment of an Arbitrator filed by Darshan Lal Kapil against the respondent No.3. [AA No.12/1996];
- (iii) Suit filed by the respondent No.3 against Darshan Lal Kapil and others [CS (OS) No.1188/1997];
- (iv) Suits filed by Darshan Lal Kapil against the respondent Nos.1 and 2 [CS(OS) No. 1045/1997];

8. Briefly put, Darshan Lal Kapil pleaded that respondent No.3 had to reconstruct the building within 12 months of the agreement dated February 17, 1992 and it failed to comply with its obligations. The building constructed had deviations viz-a-viz the sanctioned plan and thus on March 11, 1994 the erstwhile New Delhi Municipal Committee sealed the building. Upon demolition of the unauthorized constructions the building was de-sealed. On March 27, 1996 Darshan Lal Kapil cancelled the agreement dated February 17, 1992. On January 23, 1993 Darshan Lal Kapil moved into the ground floor and obtained the completion certificate as also a water connection.

9. During the pendency of the aforesaid proceedings, Darshan Lal Kapil expired on January 09, 1998 and his interest in the suit property is stated to have been bequeathed to the appellant under a Will dated October 20, 1997.

10. The appellant as the successor of late Darshan Lal Kapil; the respondent Nos.1 and 2; the respondent No.3 and the purchaser of the basement floor, entered into a Settlement Agreement on October 01, 2001 amicably resolving and settling their disputes in the pending litigations. This agreement was jointly filed by the parties in AA No.12/1996 by way of an

application under Order XXIII Rule 3 CPC which was registered as IA No.9309/2001. The relevant terms of the Settlement Agreement dated October 01, 2001 are as follows:-

“1. That all the parties to the litigation mentioned above hereby confirm the collaboration agreement dated February 17, 1992 entered into between the First Party and the Second Party with the additions contained in this settlement.

8.

As soon as the L&DO starts accepting applications for the conversion of lease hold rights into free hold, Sh. Mukesh Kapil will make an application within two weeks of such an announcement seeking conversion. Money to be paid at the initial stage by way of bank draft in favour of L&DO shall be paid proportionately i.e. 1/4th by the first party and 3/4th shall be paid by the second party or the buyers from the second party of various portions as the case may be. The share of Tripathis shall be paid by the Second Party.

For the Purpose of follow up, out of pocket expenses shall also be borne proportionately. For this purpose the first party shall make the payment of its 1/4th share of conversion charges and out of pocket expenses. The first party shall pursue vigorously the application for conversion and keep the other parties informed. It is understood that the sale deed, if any, in respect of any portion of the property, shall be executed only after the property is converted into free hold. In case, any party or his buyer/representative, wish to execute the sale deed earlier, he/she alone shall be responsible for the payment of unearned increase to the L&DO.

The first party shall render all assistance for effectuating this settlement including mutation of the property, converting it into freehold and eventual execution of sale deed of the Basement, First Floor and Second Floor after the conversion is allowed by the L&DO and the property becomes freehold.

15. That Agreement to Sell were entered into with the Tripathis for the first floor and Madhu Gupta for the Basement of the said property. The Agreement contemplate and provide for

conversion of the said property into freehold and in such an event no liability of payment of any unearned increase will arise.

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20. All the parties shall cooperate with each other for the smooth implementation of the terms of the compromise. In the event of any of the party feels that the other party or parties is not cooperating the matter will solved out amicably in a meeting of the parties/their lawyers, and none of the parties will make any complaint anywhere to any Govt. Body or Authority. ”

(Emphasis supplied)

11. By an order dated October 03, 2001, the learned Single Judge recorded the settlement between the parties in terms of an Order XXIII Rule 3 CPC and disposed of the proceedings based thereon.

12. The respondent Nos.1 and 2 filed an application seeking modification of the order dated October 03, 2001 praying therein that in terms of the Settlement Agreement certain suits including those filed by them were to be ‘decreed’ whereas the suits were recorded to have been ‘disposed of’ in the order dated October 03, 2001. This application was allowed by an order dated November 02, 2001.

13. Suffice it to state that all pending issues came to be resolved when the parties entered into a settlement agreement and thus the appellant cannot urge any issues concerning events which transpired before the date of the settlement agreement. Such rights which accrued to the appellant prior to the date of the settlement agreement stood abandoned or waived and thus we hold that rights and obligations of the parties have now to be determined with reference to the settlement agreement dated October 01, 2001 which found itself embedded in the decree passed by the Court on October 03, 2001 as modified by the order dated November 02, 2001.

14. Thereafter, the lease-hold rights in the land in question was converted into free-hold by and under a registered Conveyance Deed dated August 06, 2007. Thence, as per the terms of the Settlement Agreement dated October 01, 2001, sale-deed were to be executed in favour of the purchasers of the Builder's portion in the property, which had been reconstructed by then.

15. Claiming that the appellant was avoiding to execute the sale-deed in respect of the first floor in their favour as per the agreement to sell dated July 25, 1993, the respondents No.1 and 2 filed execution petitions in this Court, which were registered as Execution Petition Nos. 35/2010 and 36/2010.

16. These execution petitions, to which the present controversy relates, were resisted by the appellant inter-alia on the grounds of maintainability as well as alleged breaches by the respondent Nos.1 and 2 of the Settlement Agreement dated October 01, 2001. The appellant disclaimed his obligation to execute the sale-deed in favour of the respondents No.1 and 2.

17. The execution proceedings came to be substantially decided by order dated September 04, 2013 which is under challenge in FAO (OS) 476/2013; by which order the learned Single Judge settled all but one term of the proposed sale-deed. The remaining clauses were settled by learned Single Judge vide an order dated October 04, 2013 which is under challenge in FAO (OS) No.495/2013. Read together, the orders dated September, 04 2013 and October 04, 2013 settle the terms of the proposed sale-deed to be executed by the appellant in favour of the respondents No.1 and 2.

18. Relevant would it be to highlight that before passing the orders dated September 04, 2013 and October 04, 2013, the Executing Court passed various orders, which record that the parties were trying to negotiate the terms of the proposed sale-deed. This is reflected by the orders dated February 18, 2011, March 17, 2011, August 11, 2011, September 15, 2011, October 14, 2011, February 21, 2011, February 21, 2012, April 16, 2012,

May 01, 2012, July 17, 2013, August 14, 2013 and August 21, 2013. Importantly, these orders show that the appellant was agreeable to execute the sale-deed in favour of the respondent Nos.1 and 2. However, since such efforts of the parties failed, the Executing Court proceeded to settle the terms of the draft sale-deed.

19. The appellant did not challenge either the Collaboration Agreement dated February 17, 1992 or the Settlement dated October 01, 2001 in the course of the execution proceedings. The appellant never questioned the decree passed in the suits filed by respondents No.1 and 2, which decrees were the result of the compromise between the parties and as per the orders/decrees dated October 03, 2001.

20. Thereafter, on October 28, 2013, the appellant filed a suit CS (OS) No.2095/2013 seeking the following reliefs:

“A. That a decree of declaration be passed in favour of the plaintiff and against the defendants declaring that settlement dated October 01, 2001 is unlawful, illegal, and not enforceable in law, having been obtained by fraud and being per incuriam;

B. That a decree for declaration be passed in favour of the plaintiff and against the defendants declaring the order / decree dated October 03, 2001 & November 02, 2001 passed in AA 12/96 & connected suits bearing no. CS (OS) no. 627/97, 628/97, 1045/97, 1180/97, 1188/97 and 1190/97 as well as CCP no.39/97, 35/98, 36/98 and 43/97 be declared as null and void as having been obtained by fraud and being per incuriam and in consequence thereof the sale deed dated March 01, 2011 in favour of Defendant no.5 be directed to be cancelled and set aside and possession of the whole property 14, Bazar Lane of all the floors be directed to be restored to the plaintiff;

C. That a decree of declaration that order dated May 28, 2002 passed in CW 1933/2002 by S.K. Mahajan. J be set aside as the defendant no.1 had no ‘locus’ ‘standi’ as such obtained by fraud and falsehood stated in the court;

D. That a decree for mandatory injunction be passed directing the revival of the Arbitration Application AA No.12/96 titled as Darshan Lal Kapil v. Ranjit Towers Pvt. Ltd. and such all other cases mentioned therein may also be revived accordingly which were disposed/decreed/decided by orders/decrees dated October 03, 2001 & November 02, 2001;

E. That a decree for perpetual injunction be passed restraining the defendants their agents, servants, nominees and employees etc. from assigning, parting or in any way creating any third party interest in the suit property.

F. ...”

21. By an order dated December 10, 2013, suit was dismissed by learned Single Judge with the following observations:-

“26. So far as the plaintiff’s plea that the said agreements are a result of a fraud is concerned, there are two aspects pleaded by the plaintiff and argued by his counsel. Firstly, it is pleaded and argued that the right of the purchasers in the land is restricted to a proportionate share in the land falling only under the built up structure, and the proportionate right does not extend to the open areas on the front and rear sides. The submission is that this Court has ruled in its order dated September 04, 2013 passed in execution petition Nos.35-36/2010 that the proportionate right in the land of the purchasers of the basement, first and second floor would be computed on the basis of the area of the entire plot, and not just area falling under the constructed building. According to the plaintiff, his understanding was not as that ruled by this Court as, according to the plaintiff, the plaintiff retained the absolute right of ownership in the areas falling in the front and rear setbacks, and the proportionate right of the owners of the basement, first and second floor was limited to the area falling under the constructed building.

27. There is absolutely no merit in this submission of the plaintiff. Even if the understanding of the plaintiff was as claimed by him, that does not lead to the commission of a fraud upon the plaintiff by the defendants. The agreement of the parties is contained in the collaboration agreement dated February 17, 1992 read along with the settlement agreement

dated October 01, 2001. The decree had been passed in terms of the settlement arrived at between the parties. While passing the Order dated September 04, 2013, this Court has interpreted the settlement on the basis of which the decree has been passed. The intention of the parties is to be gathered from the written instrument when there is one. Merely because one of the parties may claim that he has understood the written agreement in a particular way, which interpretation may not be accepted by the other parties and the Court, it does not lead to the consequence of the agreement being rendered void or voidable on account of mistake, much less, on account of a fraud. In this regard I may refer to a few decisions on the subject. In North Eastern Ry. Co. v. Lord Hastings, 1900 AC 260, it was observed that "the words in the deed were plain and unambiguous; that the fact that the parties had interpreted the words in a sense different from that which the words themselves plainly bore could not affect the construction". In Ramkishore Lal Vs. Kamal Narain., AIR 1963 SC 890, the Court observed that "The golden rule of construction, it has been said, is to ascertain the intention of the parties to the instrument after considering all the words, in their ordinary, natural sense. To ascertain this intention the Court has to consider the relevant portion of the document as a whole and also to take into account the circumstances under which the particular words were used."

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30. Clause 6 of the said settlement agreement also provides that whatever steps are required to be taken, including sanctioning of the plan from the NDMC, shall be taken before expiry of six months. The plaintiff himself states that sanction has not been granted by the NDMC for raising construction of the staircase and the mumty from the second floor to the terrace above the second floor. The obligation to raise the staircase and to make a mumty, as aforesaid, was clearly conditional upon the grant of sanction for building the same by the NDMC. It was not the agreement of the parties that defendant No.3 shall raise construction of the staircase and the mumty without a sanction, irrespective of a sanction, and; contrary to a sanction. It is not the plaintiff's case that defendant No.3 did not take steps to obtain the sanction.

31. The grievance of the plaintiff is that defendant No.3 ought to have demolished a portion of the second floor to enable the raising

of the construction of the staircase and the mumty has merit. No such obligation was undertaken by defendant No.2 while entering into the settlement agreement dated October 01, 2001. None is discernible from the said settlement agreement dated October 01, 2001. As aforesaid, the building was completed by the year 1997. Consequently, the plaintiff was aware of the extent of construction raised by defendant No.3 on the second floor. He consciously and, with open eyes, entered into the Settlement dated October 01, 2001 knowing fully well that raising of the staircase and the mumty, as aforesaid, would require sanction from the NDMC. Therefore, the Settlement dated October 01, 2001 provided that sanction shall be obtained from the NDMC for raising such construction.

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33. The promise undertaken by defendant No.3 in Clause 6 of the Settlement dated October 01, 2001 was that it would raise the staircase and the mumty from the second floor to the terrace above the second floor after obtaining and subject to the sanction of the plans by the NDMC. The NDMC has not granted the sanction, as reflected in their letter dated October 10, 2013, which reads as follows:

*“DEPARTMENT OF ARCHITECTURE & ENVIRONS New Delhi
MUNICIPAL COUNCIL PALIKA KENDRA: New Delhi
File no.CA/BP/14, Bazar Lane, New Delhi/D-1948-49*

Dated 10.10.2013

*Sh. Mukesh Kapil
14, Bazar Lane,
Bengali Market,
New Delhi-110001*

Subject: Plans for Add/Alt. of plans in r/o 14, Bazar Lane, Bengali Market, New Delhi.

With reference to your building application on above said subject received vide scheme no.0099/2013 dated August 12, 2013 it is to intimate that as per the orders of the Competent Authority, NDMC dated October 03, 2013, you are required to comply with the following shortcomings within 60 days for further necessary action.

1. The pergola in front of second floor balcony has been covered, which is not permissible and needs rectification. 2. Deposition of ₹6052/- as Labour Welfare Cess.

3. Deposition of ₹890/- as security for non removal of malba.

4. Submission of 1 set of photographs of the premises duly signed by the applicant/architect.

5. Submission of NOC from DUAC is required.

6. Submission of Structural drawings duly signed by the applicant/engineer.

7. Submission of an affidavit/undertaking that the municipal water will not be use for the construction purpose.

8. Submission of an affidavit/undertaking that the open to sky area will not be covered.

9. Plans need corrections w.r.t area chart, dimension, staircase shape, parking, pergola, schedule of door and windows, balcony width, external wall, number of riser, staircase width, tread, coloring etc. & otherwise.

*(A.M. ATHALE)
CHIEF ARCHITECT*

*Copy to:-
Sh. Manish Saini
Shop No.122,
Sec-15 Main Market
Sonapat (Haryana)*

CHIEF ARCHITECT”

*34. If the plaintiff has any grievance in respect of the communication dated October 10, 2013 of the NDMC, it is for the plaintiff to take action against the NDMC. **The plaintiff cannot insist that the staircase and the mumty be constructed by defendant No.3 even without the sanction of the building plans, and thereby commit an illegality. The right of the plaintiff, if any, against defendant No.3 arising out of the settlement agreement***

and the decree passed by the Court in the aforesaid suits lies in execution, and not in seeking a declaration that the settlement agreement is voidable or void.

35. In the light of the above discussion, I am of the view, that no cause of action has arisen in favour of the plaintiff to seek a declaration that the settlement agreement dated October 01, 2001 and the decree passed by the Court on October 03, 2001 as modified on November 02, 2001 was obtained by fraud, or that the same is unlawful, illegal or not enforceable or is per incurrium. The said reliefs are also barred by limitation. The other reliefs prayed for in the suit are consequential to the reliefs prayed for as reliefs (a) and (b) and, therefore, cannot be granted.

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37. Accordingly, while rejecting the plaint as not disclosing a cause of action and also being barred under Order 23 Rule 3A CPC, barred by res judicata and law of limitation, I subject the plaintiff to Costs of ₹30,000/-, to be paid to the Delhi Legal Services Authority within four weeks.”

(Emphasis supplied)

22. The said order has been challenged in RFA (OS) No.47/2014.

23. Insofar as challenge to the order dated September 04, 2013 is concerned, which is the subject matter of FAO(OS) No.476/2013, the case of the appellant is that:-

(i) The terms of the proposed sale-deed as settled by the order are beyond the terms of the Collaboration Agreement dated February 17, 1992, the Settlement dated October 01, 2001 and the order dated October 03, 2001.

(ii) The description of the area of the first floor as well as the extent of the rights of the respondent Nos.1 and 2 in the plot of land underneath are incorrect. According to the appellant, the proportionate rights of the respondent Nos.1 and 2 in the plot of land would be limited to the area enclosed in the plinth i.e. only under constructed portion of the building. The

appellant also claims that the sale-deed cannot be executed since a staircase from the second floor to the terrace and mumty on the terrace were not constructed by the respondent No.3.

24. The respondent Nos.1 and 2 submitted that there is no merit in any of the contentions of the appellant. In brief, they responded as under:-

(i) The appellant has failed to show any clause of the proposed sale-deed which, according to him, would be beyond the terms of the Collaboration Agreement dated February 17, 1992; the Settlement dated October 01, 2010 and the Order dated October 03, 2001. The appellant objection in this regard is baseless and nothing but a ruse to avoid executing sale-deed in favour of the respondent Nos.1 and 2.

(ii) The proposed sale-deed, as settled by the Executing Court, does not contain any reference to the extent of the area of the first floor. As such, even this plea of the appellant is completely unfounded.

(iii) As regards the proportionate rights over the plot of land, in terms of Clauses 6, 26 and 31 of the Collaboration Agreement dated February 17, 1992, which was accepted and acknowledged by all the parties in the Settlement Agreement dated October 03, 2010, the proportionate rights of the respondent Nos.1 and 2 are in the entire plot of land. Besides, the plot cannot be sub-divided artificially in two parts: one, the land directly under the building; and two, the remaining land comprised within the same plot, as claimed by the appellant.

(iv) The respondent Nos.1 and 2 are not concerned in any manner with the construction of staircase from the second floor to the terrace and mumty on the terrace, which is the obligation of the respondent No.3 and even if it is assumed that the respondent No.3 has not carried out its obligation, the appellant has an independent remedy against the said respondent including

for enforcement of the latter's obligations under the Settlement Agreement dated October 01, 2011.

(v) As per the Settlement dated January 01, 2001, construction of staircase and mumty was subject to sanction of plans by NDMC which were not sanctioned. This fact has also been recorded by the learned Single Judge in the order dated December 10, 2013.

25. Insofar challenge to the order dated October 04, 2013 is concerned, the only ground of challenge by appellant is that the operation of water pumps for pumping water from the underground to overhead water tanks may cause nuisance to them on the ground floor.

26. The respondent Nos.1 and 2 submit that this plea of the appellant is completely unfounded and, in any event, conjectural. They submit that operation of water pumps can be mutually agreed to be done at hours which causes least inconvenience to any of the occupants of the building, while maintaining adequate supply of water.

27. The challenge to the order dated December 10, 2013 by the appellant is on the ground that the learned Single Judge was in error in (a) rejecting the plaint in *limine*; (b) bar of Order XXIII Rule 3A CPC was not attracted; and (c) finding of absence of fraud is erroneous. It is their case that the Settlement Agreement dated October 01, 2001 as also the Order dated October 03, 2001 and November 02, 2001 are vitiated by fraud.

28. The respondent Nos.1 and 2 submitted that rejection of plaint by the learned Single Judge was justified inasmuch as:

(i) Admittedly, the Orders dated October 03, 2001 and November 02, 2001 were passed by a competent court. In other words, it is not the case of the appellant that the said orders are a nullity for want of jurisdiction in the court which passed them.

(ii) About 15 years had passed since the Settlement Agreement dated October 01, 2001 and the Orders dated October 03, 2001 and November 02, 2001. At no point of time, during this long passage of 15 years did the appellant make any challenge to them.

(iii) No challenge was made to the settlement agreement and the orders dated October 03, 2001 and November 02, 2001 when the respondent Nos.1 and 2 filed execution petitions in 2010. In the execution proceedings, the appellant did not take any plea of fraud or their invalidity.

(iv) As is evident from the Orders dated February 18, 2011, March 17, 2011, August 11, 2011, September 15, 2011, October 14, 2011, February 21, 2011, February 21, 2012, April 16, 2012, May 01, 2012, July 17, 2013, August 14, 2013 and August 21, 2013 in Execution Petition Nos.35/2010 and 36/2010, none of which were challenged by the appellant, the plea of fraud was never raised. These orders consistently show that the appellant was agreeable to execute a sale-deed in favour of the respondent Nos.1 and 2 and the only bone of contention were its terms.

(v) No particulars of what fraud and by whom played upon the appellant, were pleaded in the plaint of CS (OS) No.2095/2013. The plaint was laconic and without any material particulars. The allegations of fraud were predicated entirely on the alleged breaches of the Settlement Agreement dated October 01, 2001. In relation to a contract, 'Fraud' is defined by Section 17 of the Indian Contract Act, 1872, which does not include any breach of an agreement.

(vi) The appellant himself filed Execution Petition No.55/2011 seeking execution of the Settlement Agreement dated October 01, 2001 against the respondent No.3. This petition was filed on February 15, 2011 (i.e. after the respondent Nos.1 and 2 filed their execution petitions). Although this petition came to be dismissed as withdrawn on February 14, 2014, but filing

of this petition proves that the appellant's plea of fraud and invalidity of the Settlement Agreement dated October 01, 2001 was frivolous and an afterthought.

(vii) Assuming, arguendo, even if there was any cause of action for filing the suit, the same was hopelessly barred by limitation on account of lapse of a period of over 15 years.

(viii) The appellant not only acted upon the Settlement Agreement dated October 01, 2001 but has also enjoyed its fruits. It is undisputed that he has benefited from the redevelopment of the suit property and was put in possession of the ground floor. Also, the appellant withdrew the proceedings instituted by him and so were the proceedings instituted against him withdrawn. Thus, having obtained and enjoyed its fruits, the appellant is estopped from challenging it.

(ix) Lastly, even otherwise, the suit was barred under Order XXIII Rule 3A CPC as also by the principles of *res judicata* as rightly found by the learned Single Judge.

29. In the decision reported as (2006) 4 SCC 416 Manish Mohan Sharma v. Ram Bahadur Thakur Ltd., the Supreme Court has held, inter -alia as under:

***“27. ... It is well settled that an executing court cannot go behind the decree, unless the decree sought to be executed is a nullity for a lack of inherent jurisdiction. A decree is without jurisdiction if the court passing the decree usurps a jurisdiction which it did not have and which could not be waived by the parties. (See Sunder Dass v. Ram Prakash (1972) 2 SCC 662 at p. 667, Seth Hiralal Patni v. Kali Nath (1962) 2 SCR 747 at p. 750, Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman (1970) 1 SCC 670 at p. 672 and Rafique Bibi v. Sayed Waliuddin (2004) 1 SCC 287 at p. 292.) The last two decisions have also held that the lack of jurisdiction must be patent on the face of the decree in order to enable the executing court to come to the conclusion that the decree is a nullity.*”**

28. Furthermore, the order dated August 19, 1999 was a consent order. Its terms and conditions were contained in MOFA and the transfer document which expressly formed an integral part of the order itself. **A consent decree has been held to be a contract with the imprimatur of the court superadded. It is something more than a mere contract and has the elements of both a command and a contract.** (See *Wentworth v. Bullen* (1829) 9 B&C 840 and *C.F. Angadi v. Y.S. Hirannayya* (1972) 1 SCC 191 at p. 197.) As was said by the Privy Council as early as 1929:

*“The only difference in this respect between an order made by consent and one not so made is that the first stands unless and until it is discharged by mutual agreement or is set aside by another order of the court; the second stands until and unless it is discharged on an appeal. (See *Charles Hubert Kinch v. Edward Keith Walcott* AIR 1929 PC 289 at p. 294.)*

29. It is nobody’s case that the order dated August 19, 1999 was a nullity. The respondents had filed an application for recalling the order dated August 19, 1999. The Company Law Board dismissed that application. An appeal has been filed before the Patna High Court which is said to be pending. However, it has not been drawn to our attention by the respondent that the application for recall was founded on the submission that the order dated August 19, 1999 was a nullity. In the absence of such an issue being raised and decided, the Company Law Board was bound to execute the order. If the Board found that the decree or any of its terms called for interpretation, it was within the Board’s jurisdiction to interpret that particular term and to execute the decree on the basis of such interpretation. As was said by this Court in *Topanmal Chhotamal v. Kundomal Gangaram* AIR 1960 SC 388 at p. 390, if a decree is ambiguous, it is the duty of the executing court to construe the decree. (See also *Central Bank of India Ltd. v. P.S. Rajagopalan* AIR 1964 SC 743 at p. 748.)

30. Both the Company Law Board and the High Court in fact interpreted clause 4.1.1.11 and came to definite, albeit different, conclusions as to what the clause meant. It may be that the conclusion was not what was being contended for by the appellants. It may also be that the interpretation put on the clause

by the Board or the High Court was not in the contemplation of the parties. Nevertheless once having agreed to particular terms of settlement which were incorporated in a decree, the parties concerned are bound to comply with the terms as may be interpreted by the executing court. Once the interpretation is done the decree must be executed as interpreted.”

(Emphasis supplied)

30. Thus, taking cue from the aforementioned observations we are of the opinion that the appellant is precluded from questioning the consent decree passed on October 03, 2001 read with the order dated November 02, 2001, which we find conforms to the settlement signed by the appellant on October 01, 2001 pursuant whereunto IA No.9309/2001 was filed under Order XXIII Rule 3 of the Code of Civil Procedure.

31. Contention of the appellant that the terms of the perpetual lease dated October 04, 1939 prohibited the appellant's predecessor-in-interest from assigning, selling or creating any interest of any nature in the suit property except with the prior permission of L& DO and this permission not being maintained invalidates the agreement to sell executed between respondent No.3 as one party and respondents No.1 and 2 as the other as well as the orders dated October 03, 2001 and November 02, 2001 is misfounded because an Agreement to Sell does not create any interest in the property. Section 54 of the Transfer of Property Act, 1882 makes this explicit and so does the judgment of the Supreme Court in the decision reported as (2012) 1 SCC 656 Suraj Lamp & Industries (P) Ltd. (2) v. State of Haryana, wherein the Supreme Court has held, inter-alia as follows:

“16. Section 54 of the TP Act makes it clear that a contract of sale, that is, an agreement of sale does not, of itself, create any interest in or charge on such property. This Court in Narandas Karsondas v. S.A. Kamtam, (1977) 3 SCC 247 observed: (SCC pp. 254-55, paras 32-33 & 37)

“32. A contract of sale does not of itself create any interest in, or charge on, the property. This is expressly declared in Section 54 of the Transfer of Property Act. (See Ram Baran Prasad v. Ram Mohit Hazra AIR 1967 SC 744.) The fiduciary character of the personal obligation created by a contract for sale is recognised in Section 3 of the Specific Relief Act, 1963, and in Section 91 of the Trusts Act. The personal obligation created by a contract of sale is described in Section 40 of the Transfer of Property Act as an obligation arising out of contract and annexed to the ownership of property, but not amounting to an interest or easement therein.

33. In India, the word ‘transfer’ is defined with reference to the word ‘convey’. ... The word ‘conveys’ in Section 5 of the Transfer of Property Act is used in the wider sense of conveying ownership.

xxx

37. ... that only on execution of conveyance, ownership passes from one party to another....”

17. In Rambhau Namdeo Gajre v. Narayan Bapuji Dhotra (2004) 8 SCC 614 this Court held: (SCC p. 619, para 10)

“10. Protection provided under Section 53-A of the Act to the proposed transferee is a shield only against the transferor. It disentitles the transferor from disturbing the possession of the proposed transferee who is put in possession in pursuance to such an agreement. It has nothing to do with the ownership of the proposed transferor who remains full owner of the property till it is legally conveyed by executing a registered sale deed in favour of the transferee. Such a right to protect possession against the proposed vendor cannot be pressed into service against a third party.”

18. It is thus clear that a transfer of immovable property by way of sale can only be by a deed of conveyance (sale deed). In the absence of a deed of conveyance (duly stamped and registered as

required by law), no right, title or interest in an immovable property can be transferred.”

32. Thus, we hold that the Agreements to Sell entered in to between the respondent No.3 who was acting under the authority of the predecessor-in-interest of the appellant and the respondent Nos.1 and 2 did not transfer, sell, assign, or create any interest in the suit property in favour of the respondent Nos.1 and 2. They were, thus, not in violation of the terms of the perpetual lease. Even otherwise, on August 06, 2007, the suit property has been converted to free-hold and this argument of the appellant does not even survive thereafter.

33. Besides, when the appellant entered into the settlement agreement on October 01, 2001 which resulted in a consent decree being passed on October 03, 2001 as modified/clarified vide order dated November 02, 2001, he was fully aware of the terms of the perpetual lease-deed, his rights and that of the respondents No.1 and 3. Having consented to a decree being passed in terms of the agreement the appellant is estopped from contending any violation of the terms of the perpetual lease. Besides, there are no pleadings in the suit subsequently filed by the appellant, plaint whereof has been rejected by the learned Single Judge, of any representation stated to be a misrepresentation by respondents No.1 and 2 to either the appellant or his predecessor-in-interest. Further, having taken benefit under the collaboration agreement with the builder in terms of monitory consideration and the reconstructed ground floor, the appellant cannot deny corresponding rights created under the collaboration agreement in favour of respondent No.3 or to persons with whom the said respondent entered into agreements to sell. Appellant's conduct can be gleaned by his reply dated March 03, 2016 to L&DO in response to L&DO's letter dated May 04, 2005 and February 07, 2006 in which appellant stated that his predecessor-in-interest has not

breached any clause of the perpetual lease-deed inasmuch as no sale-deed has been executed, meaning thereby that appellant's stand was that the collaboration agreement with the builder and the agreements to sell entered between the builder and respondents No.1 and 2 were legal and valid and not in breach of any term of the perpetual lease-deed.

34. It is classic case of a chronic litigant multiplying proceedings to harass respondents No.1 and 2.

35. The settlement agreement between the parties concerning a staircase to be erected from the second floor to the roof above has no concern with respondents No.1 and 2 who as per the consent decree have to be conveyed title in the ground floor of the property. If the appellant has any issue concerning the construction or non construction of the staircase his remedy is against respondent No.3 and for which the appellant may seek execution of the consent decree or file a suit or resort to such proceedings as the appellant is advised. Under no circumstances can the appellant inter-link said issue with the rights of respondents No.1 and 2. The issue concerning an underground water tank at the plinth level, suffice it to state that all owners/occupants of the building are entitled to water. There is no 24 hours water supply in any area in Delhi. Owners of buildings construct underground water tanks at the plinth level and using a booster pump boost the water to the overhead water tanks wherefrom supply of water is made to the kitchen and the toilets. The appellant cannot make an issue of nuisance created when the booster pump is operated and we agree with the submission of respondents No.1 and 2 that the timing of operation of the booster pump can be mutually agreed i.e. the water to be boosted to the overhead tanks at a time when the occupants of the ground floor are not resting and their sleep is not disturbed. If there are various co-owners of a building owning different floors this trivial issue has to be sorted out by mutual agreement.

36. We note at this stage that in three identically worded civil miscellaneous applications being CM No.3939/2014, 3940/2014 and 3401/2014, one each filed in the three captioned appeals, the appellant places reliance upon certain letters written by NDMC and DUAC concerning sanction to be accorded to erect a staircase from the second floor of the building to the terrace above. The appellant's want said letters to be taken on record and read in evidence. Suffice it to state that the contents of the said letters shows an issue concerning FAR and permission to construct the staircase from the second floor to the terrace above and since we have already held that this issue does not impact the dispute between the appellant and respondents No.1 and 2, the three applications are hereby dismissed. We once again clarify that the terms of the consent decree contained distinct and mutually exclusive obligations and rights inter-se the appellant and respondents No.1 and 2 and inter-se the appellant and respondent No.3. The obligations and rights inter-se the appellant and respondent No.3 cannot be inter-mixed with the obligations and rights inter-se the appellant and respondents No.1 and 2.

37. The three appeals and the three civil miscellaneous applications are accordingly dismissed with one set cost in sum of ₹25,000/- against the appellant and jointly in favour of respondents No.1 and 2.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

SEPTEMBER 01, 2016
mamta/skb