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

% *Judgment Reserved On :August 16, 2016*
Judgment Delivered On : August 22, 2016

\+ **RFA (OS) 3/2016**

S K MUKHERJEE & ANR .....Appellants
Represented by: Mr. M.Dutta, Advocate

versus

HARVINDER PAL SINGH & ANR. .....Respondents
Represented by: Mr.Tuhin Batra, Advocate

\+ **RFA (OS) 4/2016**

S K MUKHERJEE & ANR .....Appellants
Represented by: Mr. M.Dutta, Advocate

versus

HARVINDER PAL SINGH & ANR. .....Respondents
Represented by: Mr.Tuhin Batra, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J.

1. CS (OS) No.572/2006 filed by the respondents (hereinafter referred to as the Singhs) and CS (OS) No.380/2009 filed by the appellants (hereinafter referred to as the Mukherjees) have been disposed of by a

common judgment and decree dated August 12, 2015. Whereas CS(OS) No.572/2006 has been decreed, CS(OS) No.380/2009 has been dismissed.

2. Claim in CS(OS) No.572/2006 was to pass a decree requiring Mukherjees to execute a sale-deed in favour of the Singhs pertaining to the ground and the first floor of property bearing Municipal No.8/70, Punjabi Bagh, West, New Delhi in terms of the agreement to sell Ex.PW-1/1 dated October 21, 2004; as per which the sale consideration was agreed in sum of ₹91,51,000/-, (Rupees Ninety One Lacs Fifty One Thousand only) out of which the Mukherjees had received a sum of ₹65,51,000/- (Rupees Sixty Five Lacs Fifty One Thousand only) on various dates disclosed in the plaint, with further relief that the Mukherjees should remove the illegal constructions on the second floor as also the relief that the Mukherjees should be restrained from creating any encumbrance on the ground floor and the first floor of the property in question. Claim in CS (OS) No.380/2009 was for possession of the ground and the first floor of Property No.8/70, West Punjabi Bagh, New Delhi as also damages for unauthorized use and occupation in sum of ₹72,00,000/- (Rupees Seventy Two Lacs only) with further damages in sum of ₹15,00,000/- (Rupees Fifteen Lacs only) for the damage caused to the household goods of the Mukherjees.

3. The issue settled vide order dated January 06, 2010 in CS(OS) No.572/2006 was whether the Singhs are entitled to a decree for specific performance as prayed for. The issues settled in CS (OS) No.380/2009 on July 21, 2010 was whether the Mukherjees are entitled to a decree of possession for the ground and the first floor of property No.8/70, Punjabi

Bagh, West, New Delhi and whether they are entitled to damages, and if yes, with interest at what rate.

4. Mid-way during recording of evidence in the two suits, vide order dated February 25, 2013 the two suits were clubbed. The result thereof is that the Mukherjees and the Singhs have led their respective evidence in the affirmative as plaintiffs in the two suits and there is no rebuttal evidence. Learned counsel for the parties stated that keeping in view the issues settled in the two suits, their respective evidence led in the suits in which they are the plaintiffs be read as their affirmative evidence and at the same time, rebuttal in the other suit.

5. For record we may note that in CS(OS) No.380/2009 the Singhs have filed affidavit by way of evidence of 10 witnesses but none were tendered in evidence and thus said affidavits have to be ignored.

6. Since the Singhs instituted the suit seeking specific performance we note their case as pleaded in the plaint of CS(OS) No.572/2006. Claiming to be husband and wife, the Singhs plead that the Mukherjees agreed to sell the ground floor and the first floor of property bearing Municipal No.8/70, Punjabi Bagh West, New Delhi, of which they were the owners, to them for a sale consideration of ₹91,51,000/- (Rupees Ninety One Lacs Fifty One Thousand only) and the written agreement to sell Ex.PW-1/1 dated October 21, 2004 was executed. As per the Singhs ₹10,21,000/- (Rupees Ten Lacs Twenty One Thousand only) was paid at the time of the execution of the agreement to sell and as per the same balance sum of ₹81,30,000/- (Rupees Eighty One Lacs Thirty Thousand only) was to be paid in three installments : (i) ₹25,30,000/- (Rupees Twenty Five Thousand Thirty Thousand only) on or before November 30, 2004; (ii) ₹15,00,000/-

(Rupees Fifteen Lacs only) on or before January 15, 2005; and (iii) the remainder ₹41,00,000/- (Rupees Forty One Lacs only) on or before March 07, 2005, which was the date contemplated for sale-deed to be executed. All demands towards house tax, water consumption and electricity bills up to the date of the sale had to be cleared by the Mukherjees. A lift which was having a well inside the house had to be shifted outside. A separate receipt Ex.PW-1/2 acknowledging receipt of ₹10,21,000/- (Rupees Ten Lacs Twenty One Thousand only) was executed on October 21, 2004. Thereafter, the Singhs paid ₹25,30,000/- (Rupees Twenty Five Lacs Thirty Thousand only) on November 30, 2004, as per the date contemplated by the agreement to sell for which receipt Ex.PW-1/6 was executed, followed by payment in sum of ₹15,00,000/- (Rupees Fifteen Lacs only) on January 03, 2005 as per the date contemplated by the agreement to sell for which receipt Ex.PW-1/4 was executed. It is pleaded that the Singhs contacted the Mukherjees to receive the balance sale consideration in sum of ₹41,00,000/- (Rupees Forty One Lacs only) but the Mukherjees could not be contacted. On March 11, 2005 the Mukherjees received further sum of ₹15,00,000/- (Rupees Fifteen Lacs only) and executed the receipt Ex.PW-1/5. Pleading that the Mukherjees tried to wriggle out of their commitment and they filed a false criminal complaint against the Singhs on September 07, 2005, it is pleaded that with the intervention of friends it was agreed that vacant possession of the two floors would be given by the Mukherjees to them on February 18, 2006 and sale-deed would be executed on March 23, 2006. The Mukherjees had appointed a contractor to build upon the second floor and shift the lift cage to outside the built-up area. On March 23, 2006 whereas Singhs reached the office of the Sub-Registrar evinced by the declaration certificate Ex.PW-1/7, the Mukherjees did not appear. Pleading their readiness and willingness to pay balance sale consideration of ₹26,00,000/- (Rupees Twenty Six Lacs only) suit was filed making prayer as aforenoted.

7. Case pleaded by the Mukherjees in CS (OS) No.380/2009 is that after the agreement to sell Ex.PW-1/1 was executed and payment received by them as recorded in Ex.PW-1/2 as also the agreement to sell, they received further sum of ₹15,00,000/- (Rupees Fifteen Lacs only) on January 03, 2005 evinced by Ex.PW-1/4 and further sum of ₹15,00,000/- (Rupees Fifteen Lacs only) evinced by Ex.PW-1/5, but not on March 11, 2005. As per them the payment was received on March 01, 2005. Though not pleaded in the plaint, in the written statement to the suit filed by the Singhs they claimed that the Singhs made an interpolation on the receipt Ex.PW-1/5 by adding the numeral '1' before the existing numeral '1' so as to change the date from the 1st day of March, 2005 to 11th day of March, 2005. As per the Mukherjees, on September 26, 2005, at the residence of Mr.Shashi Kapila, the parties met and it was agreed that on account of increase in the price of the properties the Singhs would pay ₹1,25,00,000/- (Rupees One Crore Twenty Five Lacs only). A rough agreement to sell was drawn up. The sale was to be finalized by March, 2006. That the Singhs thereafter trespassed into the ground floor and the first floor which information was received by them on April 01, 2006.

8. In the written statement filed to the suit instituted by the Mukherjees the Singhs denied having made any interpolation in the receipt Ex.PW-1/5 and additionally pleaded that they had paid ₹3,50,000/- (Rupees Three

Lacs Fifty Thousand only) to the company supplying electricity evidenced by the receipt Ex.PW-11/2.

9. From the aforenoted pleadings it becomes apparent that the central issue turned upon the receipt Ex.PW-1/5, for if the Singhs proved having paid ₹15,00,000/- (Rupees Fifteen Lacs only) to the Mukherjees on March 11, 2005 it would be good evidence that the parties had agreed to shift the date March 07, 2005 contemplated by the agreement to sell as the date by which full sale consideration had to be paid. If the receipt was proved to be dated March 01, 2005, it would dent the case of the Singhs that the Mukherjees agreed to shift the date by which the sale had to be finalized.

10. Before noting and highlighting the relevant evidence on said aspect of the dispute it would be profitable to summarize the testimony of the witnesses examined by the Singhs. Apart from examining the husband as PW-1 in the suit filed by the Singhs they examined Inderpreet Singh, Harkishan Singh Dua, Vijay Kumar, Kulwinder Singh, Paramjeet Singh, Varinder Singh, Gurpreet Singh, Abdul Ansari, Surender Singh, Anant Kumar, Lalit Mohan and Jarrar Rizwi as PW-2 to PW-13. Briefly put, the testimony of PW-2, PW-3, PW-4, PW-5, PW-6 and PW-7 is to the effect that the Singhs shifted into the property after the Mukherjhees gave possession voluntarily on February 18, 2006. Through the testimony of PW-8, PW-9, PW-10 and PW-11 the Singhs established their means to pay the balance sale consideration and we do not note their testimony in detail as also the contents of Ex.PW-1/13, Ex.PW-1/24 and Ex.PW-1/M because learned counsel for the Mukherjees did not raise any argument concerning finding returned by the learned Single Judge that the Singhs have proved their readiness and willingness to pay the balance sale consideration.

Through the testimony of Lalit Mohan, Treasury Officer examined as PW-12 the Singhs proved having purchased the necessary stamp papers for sale-deed to be executed when they went to the office of the Sub-Registrar on March 23, 2006.

11. As regards the Mukherjees, they examined four witnesses. Appellant No.1 examined himself as PW-1, Shashi Kapila, Harish Chander Anand and Pandit Ramesh Kumar were examined as PW-2, PW-3 and PW-4 respectively. Through the testimony of Shashi Kapila and Harish Chander, the Mukherjees sought to establish that the Singhs had trespassed into the suit property and further (through the testimony of Shashi Kapila) that at a meeting held at his residence on September 26, 2005 it was mutually agreed that the sale would be enhanced to ₹1,25,00,000/- (Rupees One Crore Twenty Five Lacs only) and the sale to be finalized by March, 2006. Through the testimony of Pandit Ramesh Kumar PW-4, the Mukherjees sought to establish that on March 30, 2006 they were still in possession of the suit property.

12. Appellant No.1 deposed in sync with the version of the Mukerjees in their pleadings and proved the complaints Ex.P-6 and Ex.P-7 dated April 03, 2006 made to the SHO of PS Punjabi Bagh and the DCP in-charge of the area. Photographs collectively Ex.P-26 were proved to show the furniture of the Mukherjees dumped into the basement.

13. Noting the aforesaid pleadings and the evidence, the learned Single Judge has rightly centered on the receipt Ex.PW-1/5, for the reason if ₹15,00,000/- (Rupees Fifteen Lacs only) recorded therein was received by the Mukherjees on March 11, 2005, it would constitute good evidence that the parties had agreed to extend the time to complete the sale beyond the

date March 07, 2005 fixed by them as per the agreement to sell Ex.PW-1/1. The learned Single Judge has given four reasons in support of the Singhs to hold that there was no interpolation and the date March 11, 2005 recorded in Ex.PW-1/5 was correct. The first was that the date 11.3.2005 appeared at four places on the receipt. The first at the top of the receipt when its date of execution was recorded; the second on the revenue stamp when the Mukherjees signed to record execution of the receipt; the third when the Singhs wrote the acknowledgment of having received the receipt and the fourth after the witness signing the receipt. The second reason is the lack of a legal notice sent by the Mukherjees after March 07, 2005, for normal conduct would be to write to the purchaser that the date contemplated to execute the sale-deed had lapsed and that the seller was forfeiting the earnest money. The third is actually an extension of the first wherein the learned Single Judge notes that by receiving payment on March 11, 2005 the Mukherjees consented for date of sale to be extended. The fourth is that, ignoring the month of March and April, 2005 when admittedly no notice was sent by the Mukherjees, no notice beyond said month was proved. The learned Single Judge has reasoned that once the time fixed by the parties to complete the sale was extended, time could be made the essence of the contract if the seller proved having sent a notice specifying the extended date, and none was proved by the Mukherjees.

14. Noting the testimonies of the witnesses of the Singhs and their financial capacity as also their deposition that they would have lent money to the Singhs with further proof of the means of the Singhs, learned Single Judge has held that the Singhs proved their readiness and willingness to pay the balance sale consideration in sum of ₹22,50,000/-

(Rupees Twenty Two Lacs Fifty Thousand only), and this aspect of the evidence we need not recap because learned counsel for the Mukherjees conceded said point. In view of Ex.PW-12/1 and Ex.PW-12/2 the learned Single Judge has held that the Singhs have proved having purchased stamp paper in sum of ₹56,000/- (Rupees Fifty Six Thousand only) on which the sale-deed could be executed on or after November 21, 2005. In view of the declaration Ex.PW-1/7 the learned Single Judge has held that the Singhs proved being present in the office of the Sub Registrar for execution of the sale-deed.

15. On the issue whether the Mukherjees were forcibly dispossessed from the suit property on April 01, 2006, the learned Single Judge has held that it became irrelevant to decide said issue because the Singhs would be entitled to a decree for specific performance and if they were not in possession they would be entitled to be in possession of the suit property upon them being called upon to pay the balance sale consideration. Notwithstanding this approach, the learned Single Judge has in paragraph 28 of the impugned judgment opined that it was not a case of forceful dispossession because the household goods of the Mukherjees were in the basement proved by the photographs filed by Mukherjees themselves and reasoned if the dispossession was forceful the goods would have been thrown on the road.

16. Interestingly, the learned Single Judge has hammered the nail in the coffin of the case of the Mukherjees, with reference to Ex.P-4, which is a photocopy proved by the Mukherjees as evincing a revised agreement between the parties in October 2005. The learned Single Judge has noted that he gave an option to the Mukherjees to receive ₹1,25,00,000/- (Rupees

One Crore Twenty Five Lacs only) payable as of March 2006 as claimed by the Mukherjees being the revised date for the sale to be finalized at the increased sale price together with simple interest @ 6% from the date of the suit filed by the Mukherjees or to receive the balance sale consideration ₹22,50,000/- (Rupees Twenty Two Lacs Fifty Thousand only) with reference to the sale price of ₹91,51,000/- (Rupees Ninety One Lacs Fifty One Thousand only) as per the agreement to sell dated October 21, 2004 with interest thereon @ 21% per annum reckoned from March 07, 2005. The learned Single Judge has clarified that this option given would not be treated as consent of the Mukherjees for a decree of specific performance to be passed against them and would be limited to the consequence of the view taken by the learned Single Judge that the Singhs had proved their entitlement for a decree of specific performance to be passed. Obviously, the Mukherjees would have exercised the option which would have given them more money. The option was that the sale price be enhanced to ₹1,25,00,000/- (Rupees One Crore Twenty Five Lacs only) with interest as proposed by the learned Single Judge and thus the learned Single Judge has decreed the suit filed by the Singhs seeking specific performance by directing the Singhs to pay ₹55,99,000/- (Rupees Fifty Five Lacs Ninety Nine Thousand only) to the Mukherjees together with simple interest thereon @ 6% per annum from February 12, 2009 till when the decree was passed. Payment was to be made within three months.

17. On the central issue concerning the date when the Mukherjees received further sum of ₹15,00,000/- (Rupees Fifteen Lacs only) being March 01, 2005 or March 11, 2005, we concur with the view taken by the

learned Single Judge and have an additional reason to concur. As noted by the learned Single Judge the date March 11, 2005 is recorded four times on the receipt in question. The mode of writing is: 11/03/2005. Now, it shows the propensity of the signatories to the receipt to indicate the day and the month by prefixing '0' before the numeral representing the month. The month of March which is the third month of the calendar year has not been indicated with the numeral '3'. It has been indicated with the numeral '03'. It lends credence to the view that if the receipt was executed on the 1^{st} day of March, the signatories would have penned the date as : 01/03/2005. This not being so, the logical inference would be that the signatories put the date 11/03/2005. The legal consequences would be that since the receipt is proved by consent, the parties waived the date March 07, 2005 fixed by the agreement to sell as the essence of the contract. The Mukherjees were thus obliged to prove having notified the Singhs the revised date by which the sale had to be finalized. The Mukherjees have not proved so. Mukherjees alleged and the Singhs admit that in the month of September, 2005 they had a meeting to resolve the issue. There is variance in the versions of the parties as to what was decided in this meeting. As per the Mukherjees, it was agreed that on account of increase in the price of the properties the revised sale consideration would be ₹1,25,00,000/- (Rupees One Core and Twenty Five Lacs only). As per the Singhs, no consensus was arrived at between the parties. Ex.P-4 proved by the Mukherjees is a photocopy of a purported agreement to sell and it does not bear the signatures of the parties. This would be proved of what the Singhs assert : no consensus arrived at between the parties. Now, from out of the agreed sale consideration of ₹ 91,51,000/- (Rupees Ninety One Lacs

Fifty One Thousand only) the Singhs had paid and the Mukherjees had received a sum of ₹65,51,000/- (Rupees Sixty Five Lacs Fifty One Thousand only) meaning thereby that they had received about 71.5% of the sale consideration. They were also enjoying the suit property. Logically, Mukherjees would not be entitled to full appreciation in the value of the property. There being no choate agreement between the parties which has been proved, having waived the date March 07, 2005 to complete the sale, the Mukherjees were legally bound to notify the Singhs the date by which the Singhs had to pay the balance sale consideration requiring Mukherjees to execute the sale-deed. As per the agreement to sell, the sum of ₹10,21,000/- (Rupees Ten Lacs Twenty One Thousand only) paid by the Singhs to the Mukherjees has been recorded as earnest money received. There is no covenant that the same was liable to be forfeited and assuming that it was, if there was a breach by the Singhs, notifying the same, the Mukherjees had to return the balance amount received by them on March 30, 2004, January 15, 2005 and March 11, 2005. The Mukherjees admittedly have not done so.

18. Under the circumstances, the view taken by the learned Single Judge that the Singhs would be entitled to a decree for specific performance cannot be faulted.

19. As regards whether the Singhs took forcible possession of the ground and the first floor, we note that the photographs proved by the Mukherjees themselves show that their household goods have been shifted to the basement. Now, it would be presumed that the basement was under the lock and key of the Mukherjees and it was not possible for the Singhs to shift the furniture and household belongings of Mukherjees in the

basement unless the Singhs broke the lock of the door leading to the basement. It is not the case pleaded by Mukherjees that the Singhs trespassed into their basement after breaking open the lock of the door leading to the basement and shifted their household furniture therein. It may be true that the Singhs do not have any document establishing that the Mukherjees gave possession of the ground floor and the first floor to them, but from the facts noted herein above it is apparent that both : the Mukherjees and the Singhs were fairly inofficious in their dealings, but from the fact that the household articles of Mukherjees are seen in the basement we have evidence that there was consent between the parties.

20. The learned Single Judge has settled the equities by taking note of certain decisions wherein on account of rise in the value of the property the Courts have directed the purchaser to pay a higher sale consideration. In the instant case, as noted hereinabove, pursuant to the agreement to sell and by the date contemplated initially for the sale to be finalized, the Singhs had already paid approximately 71.5% of the agreed sale consideration and the Mukherjees had the benefit of the same. It is not a case where 10% to 15% sale consideration was paid as earnest money when the agreement to sell was executed. Thus, the Singhs would have an equitable interest in 71.5% of the property and price rise if any would enure to their benefit qua said percentage share in the price rise meaning thereby applying equitable principles the Mukherjees would be entitled to 30% rise in price of the property. The discretion exercised by the learned Single Judge to enhance the sale consideration to ₹1,25,00,000/- (Rupees One Crore Twenty Five Lacs only) is fully justified and calls for no interference. The learned Single Judge has gone by the version of the Mukherjees that the parties

had agreed to finalize the sale by March, 2006 at the increased sale price of ₹1,25,00,000/- (Rupees One Crore Twenty Five Lacs only).

21. Looked at from any angle we find no infirmity in the view taken by the learned Single Judge with reference to the evidence on record and the discretion exercised.

22. The Mukherjees obtained a stay of the impugned decree and the result was that the balance sale consideration together with the interest at the rate directed by the learned Single Judge which was deposited by the Singhs was permitted to be withdrawn as per order dated May 13, 2013 passed in the appeals.

23. Since the impugned decrees are being maintained we grant the Singhs six weeks time from today to deposit the balance sale consideration together with interest at the rate and from the date directed by the learned Single Judge. Needless to state, the deposit would be in the suit seeking decree for specific performance filed by the Singhs. Upon executing the sale-deed for which the Singhs would bear the expenses the Mukherjees would be entitled to withdraw the said sum.

24. Parties shall bear shall their own costs in the appeal.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

AUGUST 22, 2016
mamta/skb