

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

+ **RSA No.61/2016**

% **9th August, 2016**

SHRI KAPIL SACHDEV

..... Appellant
Through: Mr. Amit Bansal, Advocate
and Ms. Ritika Mehra,
Advocates.

versus

SMT. SHIBANI DAS GUPTA & ORS

..... Respondents
Through: Mr. Danish and Ms. Akshita
Manocha, Advocates.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. Appl. No. 15614/2016 (for exemption)

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

RSA No.61/2016 and C.M. Appl. No. 15613/2016

1. Affidavit filed on behalf of the appellant in terms of Order dated 2.8.2016 is accepted.

2. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) is filed against the concurrent Judgments of the courts below; of the Trial Court dated 26.8.2014 and the First Appellate Court

dated 21.8.2015; by which the courts below have dismissed the suit without trial on the admitted facts, inasmuch as, the two causes of action for the entitlement of the reliefs claimed by the plaintiff with respect to the suit property being the second floor of B-20, Geetanjali Enclave, New Delhi, were found to be baseless.

3. As per the case of the appellant/plaintiff in the plaint, he entered into a Collaboration Agreement with the original owner of the suit property Sh. Jyotirmoy Sen on 17.10.2001. On this date, even a Will is said to have been executed by Sh. Jyotirmoy Sen in favour of the appellant/plaintiff. Claiming accordingly rights in the suit property, firstly on the basis of Collaboration Agreement dated 17.10.2001 and secondly on the Will dated 21.10.2001, the subject suit was filed claiming the following reliefs:-

“(a) Defendant no. 4 be directed to cancel the mutation of the plot bearing no. B 20, Geetanjali Enclave, New Delhi-17 in the name of defendant no 1.

(b) Defendant no.4 be restrained from carrying on the conversion of leasehold rights to freehold rights in favour of defendant no.1 with respect to B-20, Geetanjali Enclave, New Delhi-17.

(c) Defendant no. 1 to 3 be restrained from selling or entering into any sale or transfer agreement with any party or parties and cancel all negotiations, dealings, agreements etc. with respect to B-20, Geetanjali Enclave, New Delhi-17 with any party or parties.”

4. So far as the claim of the appellant/plaintiff by placing reliance upon the document being the collaboration agreement is concerned, it is seen that these documents are post 24.9.2001 when by Act 48 of 2001 the provision

of Section 53A of the Transfer of Property Act, 1882 was amended along with related sections of the Court-fees Act, 1870. As per the Act 48 of 2001 which became operative from 24.9.2001, the effect of the same was that an agreement which is relied upon as in the nature of part performance under 53A of the Transfer of Property Act, such an agreement cannot be looked into unless the same is registered and stamped on 90% of the consideration of the sale deed. Admittedly, the Collaboration Agreement dated 17.10.2001 in favour of the appellant/plaintiff is not registered and therefore, appellant/plaintiff cannot rely upon the collaboration agreement as it falls foul of Section 53A of the Transfer of Property Act. Essentially the right in an immovable property as claimed by the appellant/plaintiff will arise only under Section 53A of the Transfer of Property Act, and once such right cannot be legally claimed on account of amendment to Section 53A of the Transfer of Property Act with effect from 24.9.2001 because the collaboration agreement is not stamped and registered, hence the appellant/plaintiff can claim no ownership right in the suit property by invoking the doctrine of part performance under Section 53A of the Transfer of Property Act.

5. Once appellant/plaintiff can claim no rights under the collaboration agreement as per Section 53A of the Transfer of Property Act, the appellant/plaintiff at best could have filed a suit for specific performance and

which has not been done. Thus the claim of the plaintiff on the basis of collaboration agreement has been rightly rejected by the courts below.

6. So far as the claim of the appellant/plaintiff placing reliance on the Will of the deceased Sh. Jyotirmoy Sen is concerned, the admitted position which emerges is that the appellant/plaintiff had filed a probate petition for this Will, but this probate petition was dismissed as the appellant/plaintiff did not file an original Will but only filed a draft of the Will. Once a probate petition is dismissed the same is *res judicata* against the appellant/plaintiff with respect to their not existing the alleged Will dated 21.10.2001 relied upon by the appellant/plaintiff. I may note that probate petition was filed by the appellant/plaintiff on 1.6.2006 in respect of the Will dated 21.10.2001 and the same was dismissed by the learned Additional District Judge vide Order dated 20.1.2007.

7. I may also note that the trial court has given appropriate and correct findings as per paragraphs 26, 28, 31, 32, 43 and 45 of its judgment and which paragraphs read as under:-

“26. I find force in the contention of the Ld. Counsel for defendant no.1 that the Collaboration Agreement at best was an Agreement to Sell under which plaintiff had to renovate the property and in addition had to pay a total sum of Rs 25 lacs and only then a Sale deed w.r.t 2nd floor of the suit property was to be executed in favour of plaintiff and the only relief available to the plaintiff was to file a suit for damages or specific performance of the agreement.

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28. I further find force in the contention of the Ld. Counsel for defendant no.1 that the Collaboration Agreement dated 17.10.2001 is not a registered document though it ought to have been registered in terms of section 53A of the Transfer of Property Act read with section 17(1A) of the Registration Act. In this regard reliance has been placed by Ld counsel for defendant no.1 on judgment of Hon'ble Delhi High Court in case titled as **Mac Associates v. S.P.Singh Chandel; (2013) 198 DLT (CN) 9** wherein, it was held as follows:

"13. If the matter is viewed from another angle then also suit for possession on the basis of Collaboration Agreement, which at best can be taken at par with the Agreement to Sell, is not maintainable even if, for the sake of arguments, it is accepted that the respondent was agent of appellant. Agreement to Sell does not vest any right in favour of a person to the possession of property. Even if a person is put in possession of property through an Agreement to Sell, he cannot protect his possession on the pretext of part performance under Section 53A of the Transfer of Property Act, 1882 unless such an agreement is a registered document. Section 17 (1A) of the Registration Act, 1908, which has come into force with effect from 24th September, 2001, reads as under: Documents containing contracts to transfer for consideration, any immoveable property for purpose of Section 53A of the Transfer of Property Act, 1882 shall be registered if they have been executed on or after the commencement of the Registration and other Related Laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, they shall have no effect for the purpose of the said Section 53A.

Once a person cannot even protect the possession, which he is holding, in absence of an unregistered Agreement to Sell, then how such a person can seek possession on the basis of such a document. In Sunil Kapoor v/s Himmat Singh & Ors. 167 (2010) Delhi Law Times 806, a Single Judge of this Court has held thus "a mere agreement to sell of immovable property does not create any right in the property save the right to enforce the said agreement. Thus, even if the respondents/plaintiffs are found to have agreed to sell the property, the petitioner/defendant would not get any right to occupy that property as an agreement purchaser. This Court in Jiwan Das v/s Narain Das, AIR 1981 Delhi 291 has held that in fact no right inure to the agreement purchaser, not even after the passing of a decree for specific performance and till conveyance in accordance with law and in pursuance thereto is executed."

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31. It is pertinent to mention here that the dispute between defendants amongst themselves with regard to the ownership of the suit property was settled vide compromise dated 18.12.2006 arrived at between the defendants in suit no.87/2004 filed by the defendant no. 2 herein and the said compromise has attained finality after Special Leave Petition filed by the plaintiff against said compromise has been dismissed by Hon'ble Supreme Court vide order dated 09.07.2010.

32. As per the discussion above it is clear that the plaintiff has no right, title or interest in the 2nd floor of the suit property. Moreover, it is not the case of the plaintiff that he's the owner, therefore, plaintiff cannot seek cancellation of the mutation in favour of the defendant no.1 on the basis that the same has been obtained by defendant no.1 by misrepresentation and concealment. Furthermore, the argument advanced by the plaintiff that he has become the owner of the suit property by adverse possession does not come to the rescue of the plaintiff for the simple reason that the said plea was never put forward by the plaintiff in his pleadings and now at this stage plaintiff cannot de novo raise the plea of being owner on the basis of adverse possession.

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43. It is the contention of the Ld. Counsel for the plaintiff that the period of limitation for cancellation of mutation in favour of defendant no. 1 will begin from the date of knowledge i.e. the date when the plaintiff came to know about the mutation in favour of defendant no.1 but nowhere in his pleadings plaintiff has mentioned as to when and in what manner he came to know about the mutation having been done in favour of defendant no.1.

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45. Further, according to Article 59 of the Schedule of the Limitation Act, 1963, a suit for cancellation or to set aside an instrument or a decree or for the rescission of a contract, the period of limitation is three years but this period of three years is to be reckoned with effect from the date, when the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first become known to him.” (underlining added)

8. Counsel for the appellant/plaintiff sought to argue that earlier also the respondents/defendants had moved an application under Order VII Rule 11 CPC which was rejected, and therefore as per the counsel for the appellant/plaintiff the court below could not frame preliminary issues for disposing of the suit without trial, however, this argument urged on behalf of the appellant/plaintiff is misconceived because the issues decided by the impugned judgments are totally different than the issues which were decided as per the earlier orders rejecting the application of the defendants under Order VII Rule 11 CPC. In the earlier Order of the trial court dated 31.10.2011, no issue

arose and hence not decided as to bar of the present suit on account of the amended Section 53A of the Transfer of Property Act.

9. I completely agree with the reasons and conclusions given by the trial court, and which have been adopted by the first appellate court in the impugned Judgment dated 21.8.2015, as the same are in accordance with law.

10. In view of the above, no substantial question of law arises for this second appeal to be entertained under Section 100 CPC. The present Regular Second Appeal is therefore dismissed.

AUGUST 09, 2016

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VALMIKI J. MEHTA, J