

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

% **Date of decision: 12th October, 2017.**

+ **C.R.P. 66/2017**

MUJEEB REHMAN

..... Petitioner

Through: Mr. D.K. Rustagi, Mr. Kapil Gulati, and
Mr. Mayank Rustagi, Advs.

Versus

MOHD NABI & ORS

..... Respondents

Through: Mr. Raj Kumar Chandiwal and Ms. Natasha
Rani Khudania, Advs. for R-1.
Mr. Joby P. Varghese, Adv. for R-2 to 5.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Revision Petition under Section 115 of the Code of Civil Procedure, 1908 (CPC) impugns the order (dated 22nd October, 2016 in CS No.618819/16 (219/16) of the Court of Additional District Judge-09 (Central), Tis Hazari Courts, Delhi) of dismissal of the application of the petitioner / defendant no.1 as well as the application of the respondents / defendants no.2 to 4, both under Order VII Rule 11 of the CPC.
2. The petition was entertained and notice thereof ordered to be issued.
3. The counsel for the petitioner / defendant no.1, the counsel for the respondent no.1 / plaintiff and the counsel for the respondents / defendants no.2 to 5 have been heard.
4. The counsel for the respondents / defendants no.2 to 5 states that the application filed under Order VII Rule 11 of the CPC was on behalf of all the defendants no.2 to 5 who are respondents no.2 to 5 herein and not merely on

behalf of defendants no.2 to 4 as erroneously recorded in the impugned order.

5. The respondent no.1 / plaintiff instituted the suit from which this petition arises, pleading (i) that the petitioner / defendant no.1 and the respondent no.1 / plaintiff and six others had executed a Memorandum of Understanding (MoU) dated 16th May, 2011 for purchase of properties no.643-648 and 674-675 with freehold land total *ad measuring* 446.46 sq. mtrs. situated in Gali Gurudwara, Farash Khana behind G.B. Road, Delhi from the lawful owners thereof; (ii) that as per the MoU dated 16th May, 2011, the respondent no.1 / plaintiff and six others were to invest their funds for purchase of the property and the petitioner / defendant no.1 was not to contribute any monies for purchase of the property; (iii) in pursuance to the aforesaid MoU, Sale Deed dated 30th June, 2011 was executed by the owners of the aforesaid properties in favour of the petitioner / defendant no.1; (iv) that as per the MoU dated 16th May, 2011, the old construction on the properties was demolished and new construction raised after obtaining sanction from the concerned authorities; (v) the petitioner / defendant no.1, the respondent no.1 / plaintiff and the aforesaid six others executed another MoU dated 15th July, 2011 distributing share of each one in the newly constructed property; (vi) that as per the said MoU dated 15th July, 2011 (in which petitioner/defendant No.1 was described as 'party No.1' and the respondent No.1/plaintiff was described as 'party No.2'), the petitioner / defendant no.1 also, though had not contributed anything to the purchase price of the property, was also allocated a share in the property and clause 2 of the said MoU dated 15th July, 2011 was as under:-

“It is agreed that the party no.1 shall transfer and conveyed the portion $\frac{1}{2}$ undivided share in upper ground floor in property bearing no.643 to 648 and 674 – 675, situated in Gali Gurudwara, Farash Khana, behind G.B. Road, Delhi – 06, out of total measuring 446.46 sq. mtr. without roof / terrace right as per proposed site plan of the property and also the portion as $\frac{1}{2}$ undivided share on the roof of the second floor of the property in the name of the party no.2 Mohd. Nabi by registered sale deed before the Sub-Registrar Delhi”.

(vii) that though the petitioner / defendant no.1 in accordance with the aforesaid MoU dated 15th July, 2011 has executed Sale Deeds of the portions allocated to the five others in favour of the five others but has not executed the Sale Deed of the portion allocated to the respondent no.1 / plaintiff and one Mohd. Afaq, inspite of repeated requests; and, (viii) that on 18th June, 2016, the respondent no.1 / plaintiff found construction activity to have commenced in the portion of the property, which under the MoU clause aforesaid, was to be allocated to the respondent no.1 / plaintiff and realised that the petitioner / defendant no.1 has executed Sale Deeds of the said portion in favour of the respondents / defendants no.2 to 5.

6. On the aforesaid pleas, the respondent no.1 / plaintiff, in the suit, claimed the reliefs of (i) declaration that the Sale Deeds executed by the petitioner / defendant no.1 in favour of the respondents / defendants no.2 to 5 are null and void and for cancellation thereof; (ii) mandatory injunction directing the petitioner / defendant no.1 to transfer and execute the Sale Deed in favour of the respondent no.1/plaintiff, in respect of the portion of the property of the respondent no.1 / plaintiff's share in terms of MoU dated 15th July, 2011; and, (iii) permanent injunction restraining the petitioner /

defendant No.1 and respondents/defendants No.2 to 5 from alienating, encumbering or parting with possession of the said portion of the property and from making any construction on the property.

7. The learned Additional District Judge has vide the impugned order dismissed the identical applications of the petitioner / defendant no.1 and the respondents / defendants no.2 to 5 under Order VII Rule 11 of the CPC *inter alia* observing that the respondent no.1 / plaintiff under the garb of mandatory injunction was seeking the relief of specific performance of the Agreement to Sell dated 15th July, 2011 and since the respondent no.1 / plaintiff on enquiry had disclosed the market value of the portion of the property of which the respondent no.1 / plaintiff had sought Sale Deed in his favour to be Rs.47,00,000/-, the respondent no.1 / plaintiff is liable to pay the court fees on the amount of Rs.47,00,000/-.

8. On enquiry it is informed that the respondent no.1 / plaintiff has paid the said deficient court fees.

9. I have enquired from the counsel for the respondent no.1 / plaintiff, whether not the remedy of the respondent no.1 / plaintiff on the aforesaid facts is to seek specific performance of the Agreement contained in MoU dated 15th July, 2011.

10. The counsel for the respondent no.1 / plaintiff has at the outset drawn attention to the order dated 19th December, 2016 in CRP No.206/2016 titled ***Saniya S. Yusuf & Ors. Vs. Mohd. Nabi & Anr.*** preferred by the respondents / defendants no.2 to 5 against the dismissal of their application under Order VII Rule 11 of the CPC and which Revision Petition was withdrawn with liberty “to press for framing of appropriate preliminary

issues, as per law, before the Trial Court including on the alleged bar to the suit under the provisions of the Benami Transactions (Prohibition) Act, 1988”.

11. The mere fact that the respondents / defendants no.2 to 5 withdrew the challenge made by them to the dismissal of their application under Order VII Rule 11 of the CPC cannot come in the way of the challenge made by the petitioner / defendant no.1 being considered on its own merits. It is not as if a common application was filed by the petitioner / defendant no.1 and the respondents / defendants no.2 to 5. Separate applications were filed, though stated to be identical and dealt by a common order. It would have been a different matter if Revision Petition preferred by the respondents / defendants no.2 to 5 had been dismissed on merits. Mere withdrawal of the Revision Petition by the respondents/defendants no.2 to 5 would not bar the present Revision Petition.

12. Though the counsel for the respondent no.1 / plaintiff has not offered any other answers save for stating that the respondent no.1 / plaintiff in fact is seeking the relief of specific performance only and for which the requisite court fees has been paid but having not found any averment in the plaint as required to be made in a suit for specific performance by Section 16(c) of the Specific Relief Act, 1963, I have enquired from the counsel for the respondent no.1 / plaintiff whether there is any such plea.

13. The counsel also has been unable to state that there is any such plea.

14. The counsel for the petitioner / defendant no.1 states that there is none.

15. The question which arises for consideration is, whether relief in the nature of enforcement of the contractual obligations can be claimed by seeking a mandatory injunction.

16. The Specific Relief Act, as per preamble thereto, was enacted to define and amend the law relating to certain kinds of reliefs, and the specific reliefs dealt in Part II thereof are of “Recovering Possession of Property”, “Specific Performance of Contracts”, “Rectification of Instruments”, “Rescission of Contracts”, “Cancellation of Instruments”, “Declaratory Decrees”, in Chapters I to VI thereunder. Part III of the said Act titled “Preventive Relief” is divided into “Injunctions Generally” and “Perpetual Injunctions”, in Chapters VII and VIII thereunder. Part I of the said Act titled “Preliminary”, in Section 4 thereof provides that specific relief can be granted only for the purpose of enforcing individual civil rights and not for the mere purpose of enforcing a penal law.

17. It will thus be seen that both, the law relating to specific performance of contracts as well as the law relating to injunctions, are defined and contained in the same Specific Relief Act.

18. The law relating to specific performance of contracts in Chapter II under Part II of the Act prescribes, (a) the defences respecting suits for relief based on contract; (b) cases in which specific performance of contract is enforceable; (c) cases in which specific performance of contracts connected with trusts is enforceable; (d) contracts which are not specifically enforceable; (e) who may obtain specific performance; (f) personal bars to the relief of specific performance, etc.

19. Sections 36 & 37 of the Act in Chapter VII under Part III of the Act titled “Injunctions Generally”, *inter alia* provides that preventive relief is granted by injunction, temporary or perpetual and that a perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit and that the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff. Section 39 in Chapter VIII titled “Perpetual Injunctions” under the said Part III is titled “Mandatory Injunctions” and is as under:

“39. Mandatory injunctions.—When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.”

20. It will thus be seen that a mandatory injunction is to be granted to prevent the breach of an obligation by compelling performance of certain acts which the Court is capable of enforcing.

21. The word ‘obligation’ is defined in Section 2(a) of the Act as including “every duty enforceable by law”.

22. The definition of the word ‘obligation’, would cover an obligation under a contract which is enforceable by law. Read in this fashion, when to prevent the breach of an obligation under a contract, it is necessary to compel the performance of certain acts, mandatory injunction can be granted. On a plain/literal reading, thus it cannot be said that mandatory injunction cannot be granted to compel performance of certain acts to

prevent breach of an obligation of the defendant under a contract with the plaintiff.

23. The same would however result in a situation where a plaintiff having a contract with the defendant, an obligation under which contract the defendant is in breach of, having a choice, either to sue for specific performance of the contract under Chapter II of Part II of the Specific Relief Act or to sue for mandatory injunction under Chapter VIII of Part III of the same Act.

24. I have however wondered that if that was so, what was the need for the Legislature, while enacting the Specific Relief Act, to provide separately for specific performance of contracts and mandatory injunctions.

25. Interpreting so, not only has the Legislature so provided for two separate remedies for the same grievance/relief but made detailed provisions under the respective Chapters with respect thereto. For instance, under the Chapter relating to specific performance of contracts, as aforesaid, it is prescribed which contracts can be specifically enforced and which cannot, who can obtain specific performance and against who all, who is barred from claiming the relief of specific performance (and which *inter alia* bars a person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contracts which are to be performed by him) and the practices to be followed by the Court in granting or refusing the relief of specific performance of the contract; no such detailed provisions are to be found in the Chapter relating to injunctions, save in Section 41 which lists the cases in which injunction cannot be granted.

26. Not only does the Specific Relief Act enact separately with respect to relief of specific performance of contracts and injunctions but the Court Fees Act, 1870 and the Suits Valuation Act, 1887 also separately provide for valuation of the reliefs of specific performance of contracts and injunctions, for the purposes of court fees and pecuniary jurisdiction.

27. If it were to be held that the plaintiff aforesaid has a discretion, whether to sue for specific performance of contract or to sue for perpetual mandatory injunction, it would lead to complexities viz. whether the provisions in the Specific Relief Act under the Chapter pertaining to specific performance of contracts are to be applied when relief claimed is of mandatory injunction to compel performance of certain acts under a contract of which the defendant is in breach of, and whether to value the suit for the purposes of court fees and jurisdiction as provided for a suit for mandatory injunction or as provided for a suit for specific performance of contract.

28. The Legislature, while enacting the same Act, cannot be assumed to have created the anomaly aforesaid. The only way, in my opinion, to interpret the aforesaid two Chapters of the Specific Relief Act, by applying the principles of interpretation of statutes of “a construction giving rise to anomalies should be avoided” and “avoiding uncertainty and friction in the system which the statute purports to regulate”, is by holding that the obligations, to prevent breach whereof performance of certain acts can be compelled by issuing a decree for mandatory injunction, are obligations in law, other than those under a contract. If the obligation is under a contract and performance of certain acts which the defendant has undertaken to do under the contract, has to be compelled, the remedy to be invoked would

have to be under the Chapter relating to specific performance of contracts and not under the Chapter of mandatory injunction.

29. This becomes clear from Section 41 supra, clause (e) whereof provides that injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced and also from clause (h) thereof which provides that an injunction cannot be granted when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust.

30. The same Act having provided the efficacious relief of performance of certain acts undertaken to be done under a contract, by suing for specific performance of contract, clause (h) of Section 41 would bar the grant of mandatory injunction to compel performance of act undertaken to be done under a contract. Clause (e) of Section 41 also bars specific performance of a contract which is impermissible under the Chapter of the Specific Relief Act pertaining to specific performance of contracts, by grant of mandatory injunction.

31. Section 42 of the Act under the Chapter relating to perpetual injunctions however opens a limited window and provides for cases relating to contracts in which injunction can be granted and is as under:

“42. Injunction to perform negative agreement.—
Notwithstanding anything contained in clause (e) of section 41, where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstances that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement:

Provided that the plaintiff has not failed to perform the contract so far as it is binding on him.”

The same permits injunction to enforce negative covenant in a contract, even though the contract is not specifically enforceable.

32. I thus conclude, that for seeking performance of contractual acts of which the defendant is in breach of, the relief of mandatory injunction cannot be granted.

33. The reasoning of the learned ADJ in the impugned order, of the respondent No.1/plaintiff claiming relief of specific performance in the garb of injunction, cannot thus be accepted. Though suing under a wrong nomenclature is merely an irregularity and is curable/ignorable but as I have already noticed above, the suit as framed is not in accordance with law relating to specific performance of contracts. Moreover, even if the respondent No.1/plaintiff is permitted to proceed with the suit, treating it in fact as for the relief of specific performance of contract and in the garb of mandatory injunction, the plaint in the suit will then have to be rejected and/or the suit be dismissed for the reason of being not compliant with Section 16(c) supra. Moreover, the relief of mandatory injunction claimed, as aforesaid, is barred by Section 41(h) supra of the Specific Relief Act.

34. The respondent No.1/plaintiff, in the suit from which this petition arises, besides claiming the relief of mandatory injunction, has also claimed the relief of declaration of the sale deeds executed by the petitioner/defendant No.1 in favour of the respondents/defendants No.2 to 5 as null and void and for cancellation thereof as also the relief of restraining the defendants in the suit from dealing with the property. However once the

respondent No.1/plaintiff is not found entitled to the relief in the garb of mandatory injunction, of specific performance, the respondent No.1/plaintiff otherwise has no locus to seek declaration with respect to and for cancellation of the sale deeds with respect to the property and/or to restrain the defendants from dealing with the property. Only if the respondent No.1/plaintiff enforces the rights which he claims with respect to the property, would the question of annulment of the rights created in the property in negation of the rights claimed by the respondent No.1/plaintiff and/or of restraining dealing with the property in contravention thereof, arise.

35. I may in this respect also state that the relief claimed by the respondent No.1/plaintiff in the suit for cancellation of the sale deeds executed by petitioner/defendant No.1 in favour of the respondents/defendants No.2 to 5, besides the relief of mandatory injunction is also contrary to the provisions contained in the Chapter pertaining to specific performance of contracts in Specific Relief Act. Supreme Court as far back as in ***Lala Durga Prasad Vs. Lala Deep Chand*** AIR 1954 SC 75 was concerned with the proper form of the decree where the defendant, in breach of contract pertaining to transfer of immoveable property to the plaintiff, has transferred/conveyed the property to others. Supreme Court noticed that the practice of Courts in India was not uniform and three distinct lines of thought emerged. According to one point of view, the proper form of decree was to declare the subsequent purchase void as against the plaintiff and direct conveyance by the transferor defendant alone in favour of the plaintiff; a second point of view considered that both, the defendant who had entered into the contract with the plaintiff and the defendant to whom the

property had been transferred in breach of the contract should join in conveying/transferring the property to the plaintiff; the third point of view was of the defendant to whom the property had been transferred in breach of contract with the plaintiff, alone being directed to convey the property to the plaintiff. It was held that the proper form of decree is to direct the defendant who had contracted to convey the property to the plaintiff to convey/transfer the same to the plaintiff and to further direct the subsequent transferee to join in the said transfer so as to pass on the title which resides in them to the plaintiff. The same is provided in Section 19(b) under the Chapter pertaining to specific performance of contracts in the Specific Relief Act by providing that the specific performance of a contract may be enforced against any other person (not a party to the contract) claiming under the party to the contract by a title arising subsequently to the contract.

36. It would thus be seen that if the respondent No.1/plaintiff were to sue for the relief of specific performance of contract instead of for mandatory injunction, there is no need for the respondent No.1/plaintiff to separately claim the relief of cancellation of the sale deeds executed by the petitioner/defendant No.1 in favour of the respondents/defendants No.2 to 5.

37. I thus conclude the suit filed by the respondent No.1/plaintiff, in the form filed, to be not maintainable and to be barred by law, as aforesaid and which would qualify as a ground for rejection under Order VII Rule 11(d) of the CPC.

38. Though the averments of the defendants are not to be considered at the stage of consideration of application under Order VII Rule 11 of the CPC, I may record that the counsel for the petitioner / defendant no.1 disputes the

MoUs aforesaid and has also contended that there is no mention thereof in the Sale Deeds in favour of the five others aforesaid and which Sale Deeds are for a consideration as mentioned therein. It is yet further contended that the respondent no.1 / plaintiff in the plaint has nowhere given particulars of the monies claimed to have been invested by him and has sought execution of the Sale Deed in his favour without any consideration.

39. The petition thus succeeds.

40. The impugned order dated 22nd October, 2016 is set aside.

41. Axiomatically, the application of the petitioner / defendant no.1 under Order VII Rule 11 of the CPC is allowed and the plaint in the suit from which this petition arises is rejected.

42. Since the respondent no.1 / plaintiff, under the impugned order which has been set aside, has been made to pay additional court fees, it is also directed that on the respondent no.1 / plaintiff taking requisite steps, a certificate entitling the respondent no.1 / plaintiff to obtain refund of 90% of the court fees paid in pursuance to the impugned order which has been set aside shall be issued by the Suit Court, entitling the respondent no.1 / plaintiff to such refund.

No costs.

RAJIV SAHAI ENDLAW, J.

OCTOBER 12, 2017

‘pp/bs’