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

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Date of Decision: 20.09.2017

% **RFA(OS) 43-44/2017**

J K KASHYAP

..... Appellant

Through: Mr. M. Dutta, Advocate.

versus

RAJIV GUPTA & ANR

..... Respondents

Through: Mr. Sanjiv Narula, Mr. Saad Shervani
and Mr. Abhishek Singh, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MS. JUSTICE REKHA PALLI

VIPIN SANGHI, J. (ORAL)

1. The appellant J.K. Kashyap has preferred the aforesaid two Regular First Appeals to assail the common judgment rendered by the learned Single Judge in C.S.(O.S.) No.2156/2007 – preferred by the appellant against the respondents, and C.S.(O.S.) No.277/2007 – preferred by the respondent against the appellant. The learned Single Judge has dismissed the suit preferred by the appellant, i.e. C.S.(O.S.) No. 2156/2007, while decreeing the suit of the respondents, i.e. C.S.(O.S.) No. 277/2007.

2. The appellant had preferred the aforesaid suit essentially to seek a decree of specific performance against the respondents herein in respect of

the Memorandum to Sell dated 31.01.2005 entered into between the parties in relation to property bearing No.1/14 (Eastern side and adjacent to property No.1/13), Shanti Niketan, New Delhi, measuring 600 square yards along with building comprising of Basement, Ground Floor, First Floor, Second Floor and Terrace (hereinafter referred to as the suit property) shown in Orange colour in the plan filed by the appellant with his plaint. The appellant also sought a direction against the respondents that they should receive the balance sale consideration and execute and register a deed of sale in his favour after completing all the required formalities and that they should handover the balance area in their possession in his favour, i.e. First Floor, Second Floor and Terrace to the plaintiff appellant. The plaintiff also sought a mandatory injunction against the respondents/ defendants No.1 & 2, as well as against defendant No.3 in the suit, i.e. Mr. N.P. Gupta (who has not been impleaded as party respondent in the present appeals) to execute and register a formal deed of partition along with sanction plan showing separate allocation of buildable area on the suit property and site plan, in order to facilitate and enable registration of sale deed and conveyance of independent clear marketable title in favour of the appellant/ plaintiff.

3. On the other hand, the respondents herein in their suit, i.e. C.S.(O.S.) No. 277/2007 sought a decree of possession against the appellant herein/ defendant in respect of the Basement and Ground Floor of the suit property shown in red colour in the site plan filed along with the plaint, apart from pendente lite damages at the rate of Rs.5,000/- per day. They also claimed travel expenses of Rs. 2 Lakhs incurred by them for travel from USA to India and back, to execute the sale deed in pursuance of the Memorandum to

Sell dated 31.01.2005.

4. The undisputed facts taken note of by the learned Single Judge may now be noticed.

5. Mr. Chander Prakash Gupta was the original owner of the half portion of the property bearing No.1/14, Shanti Niketan, New Delhi – 110021, i.e. the suit property measuring 600 square yards. He died on 02.01.2000 leaving behind his last Will and Testament dated 09.03.1995, bequeathing all his rights, title and interest in the suit property jointly in favour of his children - the respondents Mr. Rajiv Gupta and Mrs. Chitra Mehta. Thus, the respondents became co-owners of the suit property upon the demise of Mr. Chander Prakash Gupta. The other half portion of the aforesaid property belongs to Mr. N.P. Gupta – impleaded as defendant No.3 in the suit filed by the appellant, i.e. C.S.(O.S.) No. 2156/2007, who is the uncle of defendants No.1 & 2.

6. There is no dispute between the parties that they did enter into the Memorandum to Sell dated 31.01.2005 (Exhibit P-1), whereunder the respondents agreed to sell the suit property to the appellant for a sale consideration of Rs.4.80 Crores. The appellant paid Rs.50 Lakhs to the respondents at the time of entering into the Memorandum to Sell (Exhibit P-1). The remaining sale consideration of Rs.4.30 Crores was to be paid at the time of completion of the sale.

7. On the Ground Floor and the Basement Floor of the suit property, one Mrs. Jamila Gupta and her family members were in occupation. Under the

Memorandum to Sell (Exhibit P-1), the appellant had undertaken to settle their claim for vacation of the portion of the suit property in their occupation, which he did, by making payment of Rs.45 Lakhs – Rs. 11 Lakhs was received by her from the appellant through Demand Draft, as acknowledged in the Memorandum of Understanding dated 18.02.2005 (Exhibit P-2), and a sum of Rs.34 Lakhs was received by her in cash, as recorded in the second Memorandum of Understanding (Exhibit P-3), also dated 18.02.2005. Mrs. Jamila Gupta acknowledged receipt of the said amounts as compensation for vacation of the Ground Floor and Basement Floor of the suit property. Under the Memorandum to Sell (Exhibit P-1), the appellant retained possession of Ground Floor and the Basement Floor of the suit property.

8. Another Memorandum of Understanding (Exhibit DW-1/2) was also executed on 18.02.2005 by Mrs. Jamila Gupta, whereunder Mrs. Jamila Gupta and her son gave up their right to occupy the said portion of the suit property i.e. the Ground floor and the Basement floor. Under the Memorandum to Sell (Exhibit P-1), the appellant had taken upon himself the responsibility of getting the property converted from leasehold to freehold. Consequently, a Conveyance Deed of 01.09.2005 was prepared by the DDA in favour of the respondents Mr.Rajiv Gupta and Mrs. Chitra Mehta, which is Exhibit P-4. For the conversion of the property from leasehold to freehold, the appellant paid the conversion charges to the DDA.

9. There is no dispute between the parties that apart from the amount of Rs.50 Lakhs paid by the appellant to the respondents at the time of

execution of Exhibit P-1, further amounts were paid by the appellant to the respondents totaling to Rs.1.44 Crores, as evident from Exhibits P-5 to P-8.

10. The dispute that arose between the parties was in relation to the interpretation of terms of the Memorandum to Sell (Exhibit P-1). Whereas the respondents claimed that the balance amount payable by them under the Memorandum to Sell (Exhibit P-1) was Rs.3.36 Crores (i.e. Rs.4.80 Crores minus Rs.1.44 Crores), according to the appellant, the amounts paid by him to Mrs. Jamila Gupta amounting to Rs.45 Lakhs, and the amount of Rs.17.60 Lakhs paid by him towards conversion of the suit property from leasehold to freehold to the DDA, were liable to be adjusted from the balance sale consideration. Thus, the appellant claimed that Rs.2.086 Crores, in effect, stood already paid to the respondents, and only the balance amount was payable to the respondents under the Memorandum to Sell (Exhibit P-1). The appellant also claimed that he had expended an amount of Rs.2 Lakhs for travel of the respondent Mr. Rajiv Gupta from USA, and back, for facilitating the execution of the sale deed, which too was liable to be adjusted from the balance sale consideration.

11. The divergent stands of the parties, as aforesaid, resulted in termination of the Memorandum to Sell (Exhibit P-1) by the respondents and forfeiture of Rs.50 Lakhs on the ground that the appellant had breached the same by not offering the balance sale consideration and by dishonestly seeking to adjust amounts therefrom which the appellant had to bear under the Memorandum to Sell (Exhibit P-1). The respondents also called upon the appellant to handover physical vacant possession of the Ground Floor

and the Basement Floor of the suit property to them. Since the parties were at cross-purposes, they filed the two suits, as taken note of hereinabove.

12. The issues framed by the learned Single Judge in C.S.(O.S.) No.277/2007 on 03.10.2007 were the following:

“(i) Whether the defendant failed to carry out his obligations under the Memorandum to Sell dated 31.1.2005? OPP

(ii) Whether the plaintiffs validly terminated the said Memorandum to Sell dated 31.1.2005? OPP

(iii) Whether the plaintiffs are entitled to the possession of the basement and ground floor of the suit property? OPP

(iv) Whether the plaintiffs are entitled to damages from the defendant for unauthorised occupation and use of the basement and ground floor? If so, the extent thereof? OPP

(v) Relief.”

13. The suit filed by the appellant was consolidated with the suit of the respondents on 08.08.2011. Thereupon, two additional issues were framed, which read as follows:

“(i) Whether the plaintiff in Suit No.2156/2007 is entitled to specific performance of the Memorandum to Sell dated 31st January 2005? OPP

(ii) Whether the balance sale consideration payable to the defendants in terms of the Memorandum to Sell dated 31st January 2005 comes to Rs.2.80 Crores as alleged in the plaint? OPP”

14. The parties went to trial. The appellant examined himself, apart from Mrs. Jamila Gupta and her son Mr. Shabi-ul-Hasan, who were earlier

occupying the Ground and Basement Floors of the suit property. The respondent Mr. Rajiv Gupta examined himself in support of his case.

15. While the respondents admitted to have received only Rs.1.44 Crores from the appellant under the Memorandum to Sell (Exhibit P-1), the appellant claimed to have paid Rs.2.086 Crores to the respondents in the following manner:

(i)	Admittedly received by the respondents	Rs.1.44 Crores
(ii)	Paid by appellant to Mrs. Jamila Gupta & her son	Rs.45 Lakhs
(iii)	Paid by the appellant towards conversion charges	Rs.17.60 Lakhs
(iv)	Paid by the appellant for the travel of the respondent Mr. Rajiv Gupta from and back to USA to facilitate execution of the sale deed	Rs. 2 Lakhs
	TOTAL	Rs.2.086 Crores

16. The appellant justified his stand for claiming adjustment of Rs.45 Lakhs paid by him to Mrs. Jamila Gupta towards the sale consideration by placing reliance on the Memoranda of Understanding (Exhibits P-2 & P-3), both dated 18.02.2005 between him and Mrs. Jamila Gupta. Mrs. Jamila Gupta had acknowledged that the amount received by her under the said Memoranda of Understanding (Exhibits P-2 & P-3) were towards the sale consideration payable by the appellant to the respondents under the

Memorandum to Sell (Exhibit P-1).

17. The appellant also relied upon the cross-examination of respondent No.1/ Mr. Rajiv Gupta, to claim that he had admitted that the payment of Rs.45 Lakhs made by him to Mrs. Jamila Gupta was part of the consideration payable under the Memorandum to Sell (Exhibit P-1). The respondent No.1 Mr. Rajiv Gupta, in his cross-examination, had not denied the Memoranda of Understanding (Exhibits P-2 & P-3). The appellant sought to establish his readiness and willingness to conclude the transaction with the respondents, by placing on record his bank statement (Exhibit P-1/77) to show that he had the money to make payment of the balance sale consideration of Rs.2.80 Crores.

18. The learned Single Judge, by placing reliance on *Man Kaur (Dead) by LRs Vs. Hartar Singh Sangha*, (2010) 10 SCC 512, recapitulated the essentials that the plaintiff must prove to succeed in a suit for specific performance, which were: the validity of the sale agreement; breach of the said agreement by the defendant, and; readiness & willingness of the plaintiff to perform his part of the sale agreement.

19. The learned Single Judge held that there is no dispute about the existence and validity of the agreement to sell contained in the Memorandum to Sell dated 31.01.2005 (Exhibit P-1). The same is clear, specific, unambiguous and a validly executed document.

20. Thus, the attention of the learned Single Judge turned to the determination of the issue: as to who has committed breach of the

Memorandum to Sell (Exhibit P-1). In this regard, the learned Single Judge has returned a finding that under the Memorandum to Sell (Exhibit P-1), it was the obligation of the appellant J.K. Kashyap to pay the monetary compensation to Mrs. Jamila Gupta and her family, who were occupying the Basement and Ground Floor of the suit property to get the said portion vacated.

21. Since, this is the most crucial aspect of the matter, and the appellant has sought to urge that the findings returned by the learned Single Judge on this aspect is contrary to the record, we proceed to deal with the same at the outset.

22. We may set out hereinbelow the relevant terms recorded in the Memorandum to Sell (Exhibit P-1) in this regard. The “First Party” described in Exhibit P-1 are the respondents, and the “Second Party” is the appellant.

23. Firstly, the recital in Exhibit P-1 records:

“AND WHEREAS the Vendor/First Party has agreed to sell, transfer and convey the said property with all the easementary rights, lease hold rights, hereditaments, structures, fittings, fixtures etc. to the Second Party for a total sale consideration of Rs.4,80,00,000 (Rupees Four Crores and Eighty Lakhs only) and the Vendees/Second Party have agreed to purchase said property from the first party with all the buildings, fittings, fixtures existing and installed therein into all rights and entitlements, for a total sale consideration of Rs.4,80,00,000 (Rupees Four Crores and Eighty Lakhs only)” (emphasis supplied)

24. Thus, the total sale consideration agreed to be paid by the appellant/ vendee to the respondents/ vendors under the Memorandum to Sell (Exhibit P-1) was Rs.4.80 Crores. The appellant had also undertaken to bear all the expenses for conversion of the property from leasehold to freehold and the expenses to be incurred for execution of conveyance deed, stamp duty charges. This is evident from the following recital in Exhibit P-1:

“AND WHEREAS the said property has been allotted on leasehold basis. It has been agreed between the parties that the first party shall execute a regular sale deed in favour of the second party. Since prior to execution of the regular sale deed lease hold rights in respect of the said property are required to be converted into freehold rights from DDA and the conveyance has to be executed by DDA in favour of first party as such. The first party shall immediately apply for conversion of leasehold rights to free hold rights in respect of said property and thereafter for the execution of conveyance deed in their favour from DDA. The second party has agreed to bear all the expenses of leasehold to free hold conversion charges and conveyance deed stamp duty charges, as per the requisite and relevant rules.” (emphasis supplied)

25. Secondly, in the recital of (Exhibit P-1), the parties recorded:

“The Basement and Ground Floor is presently occupied by Mrs. Jamila Gupta, second wife of Late Shri C. P. Gupta, her son, daughter-in-law, daughter, son-in-law and their family. The Vendee has agreed to take exclusive responsibility of getting the vacant possession of the Basement and Ground Floor from the aforesaid occupants. The Vendee has also agreed to bear all the expenses and the monetary consideration to be paid to Mrs. Jamila Gupta/ Occupants (her son, daughter-in-law, daughter, son-in-law and their family) for obtaining the vacant possession of the Basement and Ground Floor of the said property and for fulfilling the

condition imposed upon Shri Rajiv Gupta by Late Shri C.P. Gupta in respect of Smt. Jamila Gupta in his Will dated 9.03.1995. Further, the Vendee assures the Vendor that on payment of the amount mentioned hereinabove, the Vendee shall obtain from Mrs. Jamila Gupta/ Occupants a valid receipt of the monetary consideration paid to them, proof that all chargers, bills, penalties and fines for electricity etc. related to the Basement and Ground Floor have been paid and a Memorandum of Understanding from Smt. Jamila Gupta/occupants relinquishing their rights, interests and claim in respect of the said property and the movable and immovable assets as mentioned in the Will dated 9.03.1995 of Late Shri C.P. Gupta. The possession of the Ground Floor and the Basement shall remain with the Vendee subject to execution of all terms and conditions as witnessed in this memorandum.” (emphasis supplied)

26. Thirdly, clause 1 of Exhibit P-1 records that the appellant has paid “earnest money towards the sale consideration totaling to Rs.50 Lakhs” to the vendors, i.e. the respondents. It further records that an additional part payment of Rs.50 Lakhs shall be paid by the vendee/ appellant to the vendor/ respondents on or before 28.02.2005. It goes on to record:

“The remaining sale consideration of Rs.3,80,00,000 (Rupees Three Crores and Eighty Lakhs Only) shall be paid to the Vendor by the Vendee between April 1st 2005 to April 15th 2005 upon the payment of which the First Party hereby agrees to absolutely sell, convey and transfer all their ownership freehold rights in the said property to the Vendees/Second Party or their heir, nominee(s), free and clear from all liens, demands, mortgages, legal defects, encumbrances, lis pendense, proceedings, third party claim, gift, loans, further sale, or any other kind of encumbrance.” (emphasis supplied)

27. From the aforesaid, it is clear as day light, that the total sale

consideration payable by the appellant/ vendee to the respondents/ vendors was Rs.4.80 Crores.

28. It was clearly represented to the appellant that the property was leasehold, and the conversion charges were agreed to be borne entirely by the appellant. It was clearly represented to the appellant that the Ground and the Basement Floors were in occupation of Mrs. Jamila Gupta and her son, etc. It was agreed between the parties that the appellant shall pay compensation to them, in lieu of obtaining possession of the Ground and Basement Floors of the suit property from them. The amount of compensation that may be paid to Mrs. Jamila Gupta etal was, however, not ascertained at that stage, since that was a matter of negotiation between the appellant and Mrs. Jamila Gupta.

29. The Memorandum to Sell (Exhibit P-1), thereafter, proceeded to record that Rs.50 Lakhs towards earnest money had been paid at the time of execution of Exhibit P-1; an additional payment of Rs.50 Lakhs shall be paid on or before 28.02.2005 and; that “*the remaining sale consideration of Rs.3,80,00,000/- (Rupees Three Crores Eighty Lakhs) shall be paid by the vendor to the vendee between 01.04.2005 to 15.04.2005*”.

30. From the above, it is evident that the amount payable by the appellant to Mrs. Jamila Gupta and her family did not form part of the sale consideration agreed to be paid by the appellants to the respondents under Exhibit P-1. Otherwise, in clause 1, the parties would not have set out the amount payable by the appellant to the respondents between 01.04.2005 to 15.04.2005, i.e. Rs.3.80 Crores after adjustment of Rs.1 Crore, which the

appellant was obliged to pay in the form of Rs.50 Lakhs towards earnest money, and a further additional amount by way of part payment of Rs.50 Lakhs on or before 28.02.2005.

31. Similarly, the amount payable by the appellant towards conversion charges and conveyance duty, stamp duty charges were also not liable to be adjusted from the sale consideration of Rs.4.80 Crores, since the appellant had expressly undertaken to bear all the expenses in this regard.

32. No clause in Exhibit P-1, even remotely, suggests that the amounts that may be paid by the appellant/ vendee towards conversion, or towards settlement of the compensation eventually agreed to be paid to Mrs. Jamila Gupta would be adjusted from the consideration of Rs.4.80 Crores. The incorporation of such a clause is also highly improbable, since it would be fraught with risk for the vendor, and no prudent person would ever agree to such a clause. This is for the reason that the consideration that would, eventually, flow to the vendors would remain unascertained and contingent upon the amount that may be negotiated between the vendee and the occupant, who may have to be compensated for handing over physical vacant possession of the portion in his/ her occupation. Pertinently, the Memorandum to Sell (Exhibit P-1) did not provide that the negotiation for the amount payable to Mrs. Jamila Gupta and her family would be undertaken by the vendors/ respondents. Thus, they had no concern with the amount that the appellant may have agreed to pay, and Mrs. Jamila Gupta and her family members may have agreed to accept towards compensation/ consideration. Exhibit P-1 specifically provides that “*the vendee had agreed*

to take exclusive responsibility of getting the vacant possession of the basement and ground floor from the aforesaid occupants. The vendee, has also, agreed to bear all the expenses and the money consideration to be paid to Mrs. Jamila Gupta for obtaining the vacant possession of the basement and ground floor from the said property”.

33. Before the learned Single Judge, the appellant placed reliance on the language used in Exhibits P-2 and P-3 the Memoranda of Understanding executed between the appellant and Mrs. Jamila Gupta. Noticeably, the respondents are not parties to the said Memoranda Exhibits P-2 and P-3. They have been executed only between the appellant and Mrs. Jamila Gupta. Thus, it could not be assumed that the respondents were privy to the terms & conditions as agreed upon the appellant and Mrs. Jamila Gupta, much less that they had any concern with the said terms & conditions. It appears from Exhibits P-2 and P-3 that the signatures of respondents had been affixed but only as witnesses. The mere recording in Exhibits P-2 and P-3 that the amount paid by the appellant to Mrs. Jamila Gupta under those agreements, are a part of the total sale consideration as envisaged in Exhibit P-1, therefore, does not bind the respondents. The said clause is a self-serving clause, presumably inserted by the appellant in the hope of using the same against the respondents. Mrs. Jamila Gupta had nothing to lose by inserting such a clause and obliging the appellant, from whom she was receiving good money.

34. The learned Single Judge has considered and rejected another submission of the appellant, namely, that in his cross-examination

respondent No.1/ Mr. Rajiv Gupta had admitted that the payment of Rs.45 Lakhs made by the appellant to Mrs. Jamila Gupta and her family was part of the Memorandum to Sell (Exhibit P-1) and was included in the net price.

35. The learned Single Judge has observed that oral evidence in the face of documentary evidence is not preferred, except when it is shown to be vitiated by fraud. In this regard, he has placed reliance on Section 92 of the Indian Evidence Act, 1872. It was not the case of the appellant that his case falls under any of the provisos to Section 92. The learned Single Judge also observes that Mr. Rajiv Gupta was not confronted with the said Memoranda of Understanding (Exhibits P-2 and P-3). Pertinently, the consistent stand taken by respondent No.1/ Mr. Rajiv Gupta in his testimony was that it was the exclusive responsibility of the appellant to get the vacant possession of the Basement and Ground Floor of the suit property from Mrs. Jamila Gupta and to bear all the expenses and pay the monetary consideration to her for obtaining vacant possession and to fulfill the condition imposed by late C.P. Gupta in his Will qua the rights of Mrs. Jamila Gupta. We find no infirmity with this finding returned by the learned Single Judge and affirm the same.

36. We may only take note of some of the statements made by Mr. Rajiv Gupta on oath during his testimony. In his evidence on affidavit/ examination-in-chief, he states as follows:

“10. I state and submit that in terms of the memorandum to sell dated 31.1.2005 the Plaintiff undertook the exclusive responsibility of getting the vacant possession of the basement and ground floor of the suit property from Smt. Jamila Gupta. That in terms of the MOU dated 31.1.2005, the Plaintiff had to

pay all the expenses and monetary consideration to Smt. Jamila Gupta for obtaining the vacant possession of basement and ground floor of the suit property and for fulfilling the condition imposed upon the Deponent by his father, late Shri C.P. Gupta qua Smt. Jamila Gupta, in respect of his Will dated 9.3.1995.

x x x x x x x x x x

14. I state and submit that the Plaintiff in collusion with Smt. Jamila Gupta entered into two self serving agreements dated 18.2.2005 (EXHIBIT P-2 and P-3). The deponent herein was not present in India at the time of alleged execution of the said agreements and never confirmed the contents thereto. The deponent signed on the agreements much later and the said signatures were appended in furtherance to confirm the receipt of the copies of the agreement.

x x x x x x x x x x

16. I state and submit that the aforesaid agreements (Exhibit P-2 & P-3) were prepared by the Plaintiff. The contents of the agreement entered into between Defendants and Smt. Jamila Gupta (Exhibit DW 1/2) was the owner verified and confirmed by the Defendant no.2, which agreement was also signed by the Plaintiff. However, the contents of other two agreements (Exhibit P-2 and P-3) entered into between Plaintiff and Smt. Jamila Gupta were never confirmed and Defendant No.2 was just a mere witness to the execution of the said two agreements and not a conforming party.

x x x x x x x x x x

26. ... The Plaintiff, contrary to the terms and conditions of the MOU dated 31.1.2005, made a demand to adjust the expenses incurred to have the ground floor vacated, be adjusted in the total sale consideration. I state and submit that the said demand was contrary to the terms of the MOU dated 31.1.2005, as in terms thereof, the Plaintiff had agreed to bear all expenses and monetary consideration for obtaining the

possession of the Basement and ground Floor.

x x x x x x x x x x

34. *I state and submit that the Plaintiff was unwilling and unable to perform his part of the contract as he did not have the financial strength to make payments of the Balance sale consideration of Rs.3.80 Cr and also had turned dishonest after inducting himself in the basement and ground floor of the suit property. The Plaintiff vide his letter dated 27th September, 2005 (Exhibit P-11 in CS(OS) 2156/2007) again attempted to make demands for adjustment of Consideration paid to Ms. Jamila Gupta, which demand was untenable and contrary to the Terms of the MOU dated 31.1.2005 (Exhibit P-1 in CS(OS) 2156/2007).*

35. *I state and Submit that the Defendants vide their letter dated 28th September, 2005 (Exhibit P-12 in CS(OS) 2156/2007) reiterated the extracts of the MOU dated 31.1.2005, which clearly stipulated that “the vendee has also agreed to bear all the expenses and the monetary consideration to be paid to Mrs. Jamila Gupta /occupants (her daughter-in-law, daughter, son-in-law, and their family) for obtaining the vacant possession of the basement and the ground floor...” and again clarified reaffirmed that the execution and payments were to be done in accordance with the terms of the MOU dated 31.1.2005 and in addition the Plaintiff was liable to compensate the Defendants for the loss in addition to the loss specified in email dated 19th September, 2005 (Exhibit D-13 in CS(OS) 277/2005).”*

37. During his cross-examination, Mr. Rajiv Gupta (DW-1), inter alia, stated that “The plaintiff failed to make the balance payment of Rs.3.36 Cr. And put additional demands which were well beyond the scope of the memorandum to sell dated 31.1.2005 Exhibit P-1.”. From the cross-examination of PW-1 Mr. Rajiv Gupta, it is evident that he was never

confronted, and was never asked a direct question - or even suggested, that the amount paid by the appellant to Mrs. Jamila Gupta was adjustable from the consideration of Rs.4.80 Crores payable to the respondents.

38. Thus, in our view, the learned Single Judge has rightly concluded that it was the appellant, who was in breach of the Memorandum to Sell (Exhibit P-1) since the appellant sought to renege from the agreement contained in Exhibit P-1. It is the appellant, who dishonestly sought to adjust the amount paid by him, firstly, towards conversion of the rights in the property from leasehold to freehold, and secondly, towards settlement of the claim of Mrs. Jamila Gupta and her family, from the agreed sale consideration of Rs.4.80 Crores payable by him to the respondents/ vendors. Not having adverted to the terms & conditions agreed to in Exhibit P-1, and not having offered to pay the balance consideration of Rs.3.36 Crores after adjusting the amount of Rs.1.44 Crores, admittedly received by respondents/ vendors, within the time reserved, or even thereafter, the appellant obviously, could not be said to have been ready & willing to pay the said amount to the respondents.

39. In the face of the aforesaid factual position, the issue whether the appellant was possessed of the sufficient means to make payment of balance sale consideration pales into insignificant. This is because, a person may be possessed of the liquidity to pay the balance sale consideration, yet he would be in default if he seeks to alter the terms of the agreement to sell unilaterally, by offering lesser amount than what is payable under the agreement. In any event, the bank statement produced by the appellant (Exhibit PW-1/77) also did not exhibit availability of requisite funds with

the appellant to make payment of Rs.3.36 Crores to the respondents/ vendors on the due date.

40. The next submission of learned counsel for the appellant is that the learned Single Judge while dismissing the appellant's suit for specific performance and decreeing the respondents' suit for possession, has upheld the forfeiture of Rs.50 Lakhs by the respondents on the ground that the appellant had failed to make payment of the balance consideration for execution of the sale deed. Learned counsel submits that in Exhibit P-1 there is no clause for forfeiture of any amount in the event of the said agreement being breached by the appellant. Thus, the said amount could not have been forfeited.

41. The further submission of learned counsel for the appellant is that even if the amount of Rs. 50 lakhs is forfeited being earnest money deposit, the remaining amount paid to the respondents, and to their account, could not have been forfeited. The details of the amounts paid/ expended by the appellant is as follows:

(i)	Amount directly paid to the respondents	Rs. 144 lakhs
(ii)	Amount paid towards conversion of the suit property from leasehold to freehold	Rs. 17.60 lakhs
(iii)	Amount paid to Mrs. Jamila Gupta and her family for getting vacant portion of the Ground Floor and Basement Floor of the suit property	Rs. 45 lakhs

(iv)	Amount incurred by the appellant towards travel of the respondents to India	Rs. 2 lakhs
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The aforesaid amount comes to Rs. 2.086 crores.

42. The submission of learned counsel for the appellant is that the learned Single Judge has held that no amount is refundable to the appellant from the said amount of Rs. 2.086 crores. Learned counsel further submits that the learned Single Judge has awarded consolidated damages in favour of the respondents for the unauthorized occupation of the Basement and Ground Floor of the suit property by the appellant, of Rs. 94 lakhs, meaning thereby that the remaining amount of Rs. 1.146 crores, in any event, should have been directed to be refunded to the appellant.

43. On the other hand, the submission of learned counsel for the respondent/caveator is that if the agreement (Exhibit P-1) had not been entered into, the respondents would not have got the property converted from leasehold to freehold. Conversion of the property from leasehold to freehold has been undertaken only for the benefit of the appellant, so that the appellant is saved from the obligation of paying the unearned increase charges to the DDA, which would have been far in excess of the conversion charges. Thus, the respondents are not liable to pay to the appellant the said amount, since the Agreement (Exhibit P-1) has been breached by the appellant and the said expense was incurred by the appellant as a part of its obligation under the Agreement, and not for the benefit of the respondents.

44. Learned counsel further submits that since the agreement (Exhibit P-1) stands breached by the appellant, and the appellant failed to conclude the transaction by 15.04.2005, the appellant has no right to occupy any portion of the suit property after the said date. Thus, the occupation of the Ground Floor and the Basement Floor of the suit property of the appellant after 15.04.2005 became unauthorized, and the appellant was obliged to restore possession of the said portion to the respondents since they are the owners of the entire suit property.

45. Learned counsel submits that considering the fact that the suit property is situated in one of the very posh localities of Delhi, and the appellant was in possession of the Ground Floor and Basement Floor thereof, which is also the most important part of the suit property, the compensation payable by the appellant at market rates far exceeds the amount of Rs. 2.086 crores.

46. We do not find any merit in the submission of learned counsel for the appellant that under the Memorandum to Sell (Exhibit P-1), no amount was liable to be forfeited towards earnest money even upon breach of the agreement by the appellant/vendee. The Agreement (Exhibit P-1), in clause (1), clearly stipulates that the Second Party i.e. the appellant '*has paid an earnest money towards the sale consideration totaling to Rs.50 lakhs (rupees fifty lakhs) to the vendor/First Party at the time of execution of this Memorandum.....*'.

47. The use of the expression, 'earnest money' by the parties itself shows that the said amount was liable to be forfeited by the respondents in the

event of the agreement being breached by the appellant. Otherwise, the parties would not have used the said expression, which has a legal connotation of being a deposit liable to forfeiture in the event of a breach by the person making the deposit. The parties could have used the expression, 'advance payment' or 'part payment' or the like. The parties having consciously agreed to describe the initial payment of Rs.50 lakhs by the appellant to the respondent as 'earnest money', there is no reason why the said deposit of Rs. 50 lakhs should be treated only as an advance payment, or partial payment and liable to refund even upon the breach of the agreement by the appellant/vendee. Pertinently, the appellant in his cross-examination responded to the question, "*what is your occupation?*" by stating that he is in real estate business as an investor. In response to another question as to what is his source of income, the appellant responded by stating, "*I buy property for myself, make payment and thereafter depending on my requirement or prevalent market conditions, I decide whether to sell or retain the property*". In response to another query, "*Have you any idea approx. how many property transaction you have concluded?*", the appellant responded by saying, "*So many. It must be 20-25*".

48. Thus, the appellant is an investor in properties, and must have been aware of the meaning of the expression, 'earnest money' as understood in law and in the field of property transactions.

49. 'Earnest money' is the sum of money paid by the buyer of property under a contract for sale in order to bind the sellers to the terms of the agreement of sale. In other words, it is a guarantee for the performance of a

contract. (See **Puttu Lal Govind Dass V. Achchey Lal Nandu Lal**, AIR 1956 VP 42, 43). The earnest money is a part of the purchase price when the transaction gets through, and the same is forfeited when the transaction falls through by reason of default or failure on the part of the vendee. (see **HUDA Vs. Kewal Krishan Goel**, AIR 1996 SC 1981, **Maula Bux Vs. Union of India**, AIR 1970 SC 1955 and **V.Lakshmanan Vs. B.R.Mangagiri**, 1995 Supp (2) SCC 33).

50. Blacks Law Dictionary, 7th Edition, 1999, states in respect of 'Earnest Money' that it is a deposit paid (often in escrow) by a prospective buyer (esp. of real estate) to show a good-faith intention to complete the transaction, and ordinarily forfeited if the buyer defaults. Although earnest money has traditionally been a nominal sum (such as a nickel or a dollar) used in the sale of goods, it is not a mere token in the real-estate context : it may amount to many thousands of dollars. - Also termed *earnest; bargain money; caution money; hand money*.

51. The Supreme Court in **Delhi Development Authority Vs. Grihsthapana Cooperative Group Housing Society Ltd.**, AIR 1995 SC 1176, has laid down the following principles for forfeiture of earnest money;

“(1) It must be given at the moment at which the contract is concluded.

(2) It represents a guarantee that the contract will be fulfilled or, in other words, 'earnest' is given to bind the contract.

(3) It is part of the purchase price when the transaction is carried out.

(4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.

(5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest.”

52. All the above conditions are clearly met in the facts of the present case. Pertinently, in the agreement Exhibit P-1, there is no clause to contraindicate that the earnest money was not liable to forfeiture in the event of the breach of the agreement by the appellant. Thus, there is no merit in the submission of learned counsel for the appellant that the agreement (Exhibit P-1) did not provide for forfeiture of the earnest money deposit of Rs. 50 lakhs in the event of Agreement (Exhibit P-1) being breached by the appellant.

53. The occupation of the Ground Floor and the Basement Floor by the appellant was only in the capacity of a licensee, and nothing more. Till the agreement Exhibit P-1 was not breached and thereafter terminated, that license continued. But when the agreement was breached by the appellant, and terminated by the respondents, the appellant had no right to retain possession, and was obliged to deliver possession of the Ground Floor & Basement Floor to the respondents. Keeping in view the fact that the respondents issued a notice dated 12.12.2005 (Exhibit P-16) calling upon the appellant to handover peaceful vacant possession of Ground Floor and Basement Floor of the suit property to them, we proceed on the basis that the damages for the unauthorized occupation of the Ground Floor and Basement Floor of the suit property fell on the appellant from 1st of January, 2006.

The appellant still continues to hold the Ground Floor and Basement Floor of the suit property i.e. even after 144 months upto 30.09.2017. Even on a conservative estimate, the monthly compensation for such a property would be at least in the range of Rs. 1.25 to 1.5 lakhs per month from 01.01.2006 for the Ground Floor alone. The appellant is in possession of the Ground Floor & the Basement Floor. We may also observe that though the property prices in the least year or two may have stagnated, or even dipped marginally, the property prices were booming in 2006 and that trend continued for quite a few years. Thus, the market rent till about 2012-13 would have increased substantially and not stagnated between Rs. 1.25-1.5 lakhs for the Ground Floor, which itself is a very conservative figure. Even if the compensation is worked out at Rs. 1.35 lakhs per month constantly from 01.01.2006 to 30.09.2017 for 144 months for both the floors, the same works out to Rs.194.4 lakhs, which is in excess of the amount of Rs. 1.146 crores. Thus, in our view, there is no merit in the appellant's submission that he was entitled to refund of any amount, on any account whatsoever.

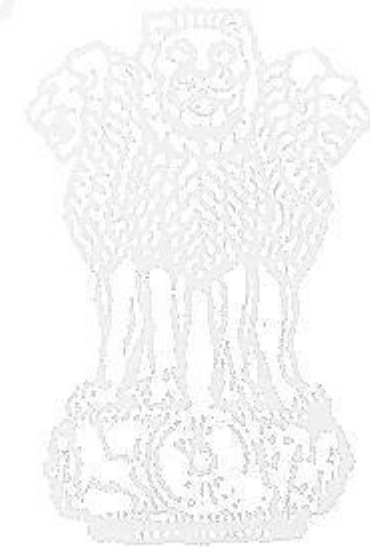
54. We may observe that during the course of hearing, learned counsel for the respondent/caveator even offered, that if the appellant were to hand over peaceful vacant possession immediately i.e. within a month or so, at the time of vacation, without prejudice to the rights and contentions of the respondents, they are even willing to offer as much as Rs. 1 crore to the appellant – just to end the litigation and buy peace. This offer was put to the appellant, but the appellant has rejected the same.

55. In the aforesaid circumstances, we find no merit in the present appeals and, they are, accordingly, dismissed leaving the parties to bear their respective costs.

VIPIN SANGHI, J.

REKHA PALLI, J.

SEPTEMBER 20, 2017



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