

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

+ **RFA No.521-522/2006**

% **25th October, 2018**

**MAHINDER LAL KAPOOR (DECEASED) NOW REPRESENTED
BY VARSHA KAPOOR**

..... Appellants

**Through: Mr. Dilip Kumar, Advocate
(M. No.9873987294).**

versus

RAJESHWARI

..... Respondent

**Through: Mr. Ashish Rana, Advocate
with Mr. Anurag Kumar Singh,
Advocate (M. No.9650250561).**

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff in the suit impugning the Judgment of the Trial Court dated 05.09.2005 by which trial court has dismissed the suit for specific performance filed by the appellant/plaintiff with respect to the Agreement to Sell dated

18.07.1996 for the property on a plot of 22.5 sq yards situated at D-8, Old Seemapuri, Delhi, comprising of one shop, one room, staircase on the ground floor, two rooms, staircase on the first floor, latrine and bathroom on the second floor.

2. Before proceeding further, it requires to be stated that originally there were two plaintiffs in the suit, being the brother and sister, namely Sh. Mahender Lal Kapoor and Smt. Varsha Kapoor. These two plaintiffs were the proposed purchasers under the subject Agreement to Sell. Plaintiff no.1 died during the pendency of the suit and he was therefore substituted by his mother Smt. Sita Devi, who also expired, and on the death of Smt. Sita Devi, the other legal heirs of Smt. Sita Devi being the siblings of the plaintiff no.2, Smt. Varsha Kapoor, gave their no objections for the plaintiff no.2 becoming the sole beneficiary of the rights under the subject Agreement to Sell. Plaintiff no. 2, Smt. Varsha Kapoor, hence became the sole plaintiff in the suit.

3. I need not narrate the facts in details because it is not disputed that parties did enter into the Agreement to Sell dated 18.07.1996/Ex.PW1/1 for the suit property. The total sale

consideration was fixed at Rs. 4,60,00/- of which admittedly a sum of Rs. 2,65,000/- was received in cash by the respondent/defendant from the appellant/plaintiff. The time fixed under the Agreement to Sell was 18.07.1997. Whereas the case of the appellant/plaintiff was that Smt. Varsha Kapoor went to the office of the Sub-Registrar on 21.07.1997 (inasmuch as 18.07.1997 was a holiday), alongwith balance payment and the stamp papers purchased for execution of the sale deed, however the respondent/defendant failed to appear for registration of the sale deed. The respondent/defendant, on the contrary, contended that she was in fact present before the Sub-Registrar, but it was the original plaintiffs who failed to appear before the Sub-Registrar for making payment of the balance sale consideration and for execution of the sale deed. The respondent/defendant therefore claimed that she sent a Legal Notice dated 22.07.1997 to the original plaintiffs, and thereafter the respondent/defendant forfeited the amount of Rs. 2,65,000/- received by her under the subject Agreement to Sell. The respondent/defendant also pleaded that she had entered into an Agreement to Sell dated 16.05.1997/Ex.DW1/1 with one Sh. Dinesh Kumar to purchase his

property of 75 sq. yds. out of Khasra no. 642, situated at village Chandravali, bearing no. 2216 in the abadi of Jwala Nagar, Illaqa Shahdara, Delhi-110032, and an amount of Rs. 1,50,000/- was paid to Sh. Dinesh Kumar, but since on account of the default of the appellant/plaintiff to pay the balance sale consideration, the respondent/defendant could not go through the agreement with Sh. Dinesh Kumar, and hence Sh. Dinesh Kumar forfeited the amount of Rs.1,50,000/- paid to him by the respondent/defendant under the Agreement to Sell dated 16.05.1997.

4. After pleadings were complete, trial court framed issues. The trial court has dismissed the suit by deciding issue nos.1 and 4 against the appellant/plaintiff by holding that the appellant/plaintiff was guilty of breach of contract because she did not prove her financial capacity to pay the balance sale consideration of Rs. 1,95,000/-. The relevant observations of the trial court in this regard read as under:-

“ISSUE NO. 1 & 4

1. Whether the plaintiffs are entitled to a decree of specific performance of contractor in the alternative, recovery of damages of Rs.5,00,000/-? OPP

4. Whether the plaintiffs are guilty of breach of the agreement or that the plaintiffs have failed to perform their part of contract as alleged, if so, to what effect? OPD

14 Both these issues are interconnected. It has been submitted by counsel for the plaintiffs that plaintiffs were ready and willing to perform their part of contract. They were ready with the money. The defendant had not vacated the house as has been admitted by her, therefore, the plaintiffs are entitled to the decree of specific performance. In the alternative they are entitled to claim the damages. On the other hand counsel for the defendant, in his memo of arguments, has averred that the plaintiffs were not ready with the money. They were not willing to purchase it. Therefore, the suit is liable to be dismissed.

15. Some of the dates and the contents of the documents relied on by counsel for the parties are relevant. The agreement to sell Ex.PW1/1 had admittedly been executed on 18.7.1996. The sale deed was to be executed upto 18th July 1997. The preset suit was filed on 22.8.1997. The written statement was filed on 16.3.1998. The plaintiff had allegedly sent a telegram. Although, the defendant had denied the receipt of any telegram, yet, in the report made to DCP (North-East) on 26.8.1997 vide Ex.PW1/6 there is a reference of the telegram dated 20.7.1997 sent on behalf of Mahender Lal Kapoor to her (defendant). Therefore, it can be said that the defendant did receive the telegram of the plaintiff asking her to remain present in the Office of Sub Registrar Seelampur on 21.7.1997. The question arises as to whether the plaintiffs were ready with the money or not. When Smt. Varsha Kapoor was cross-examined on 5.2.2003 a specific question was put to her as to whether she was in possession of any documentary evidence to show that she was having money to purchase the property on 21.7.1997, she had sought adjournment. The defendant had taken a risk as by that time no documentary evidence had been produced by the plaintiffs to show that they were ready with the money. She (PW1) appeared on 28.2.2003 and had produced a certificate Ex.PW1/RX issued by Syndicate Bank, Chandni Chowk, Delhi. There is an entry dated 14.7.1997 of withdrawal of Rs.One lac by her vide chque no.

179397. It was a bearer cheque and the amount in her account was Rs.1,36,824.50/-. It was claimed by her that she had encashed her FDRs. However, she did not produce any documentary evidence to substantiate this particular fact. In my view she failed to prove the fact that she was having sufficient money on 21.7.1997, the date on which she claims to have gone to the Office of Sub Registrar, Seelampur. I repeat that a direct question had been put to her in the cross-examination and she was given sufficient time to produce that record. In fact she should have placed all the documentary evidence on record to substantiate her claim that she was ready and willing to perform her part of the contract. Here I would like to mention that vide Ex.PW1/1 the balance amount which was to be paid at the time of execution of the document was Rs.1,95,000/-. Even if, it is assumed that she had withdrawn the amount of Rs.One lac on 14.7.1997 to get the sale deed executed, it can not be said that she was having sufficient amount with her. The onus to establish this particular fact was on the plaintiffs. They were required to prove this fact to the hilt and to the satisfaction of the court. The plaintiffs could have examined the bank officials to prove that the two FDRs in the name of Smt. Varsha Kapoor or any other person were got encashed by her prior to 21.7.1997. The amount was not a small one and therefore it can not be said that Smt. Varsha Kapoor was ready with the amount. It was a substantial amount of Rs.95,000/-.

16. It was argued by counsel for the plaintiffs that the defendant had not reached the office of Sub Registrar on 21.7.1997 and fake entries were got made by her in the record of the Sub Registrar. I need not express any opinion in this regard as both the parties have placed on record the receipts dated 21.7.1997 to show that they had attended the office of Sub-Registrar, Seelampur on 21.7.1997.

17. I have already held that the plaintiffs were not ready with the amount, therefore, even if it is taken that both the parties had been in the office of Sub Registrar on 21.7.1997, it would not have made any difference as the plaintiffs could not have paid the balance amount to the defendant to get the documents executed.

18. The main plank of argument of counsel for the plaintiffs that the possession of the property was to be delivered first and thereafter the balance amount was to be paid or the documents were to be executed

is misconceived. The delivery of vacant possession to the plaintiffs before payment or before execution of the document would have created more problems than it has created now. In that case the defendant would have been compelled to rush to the court to recover the balance amount or to recover the possession of the property in dispute. Had the plaintiffs been ready with the amount, the matter would have been different. In that case the defendants would have handed over the key of the premises to them after obtaining the balance amount and after executing the necessary documents in favour of the plaintiffs. The plaintiffs did make a last effort to refute the claim of the defendant. Smt. Varsha Kapoor, PW-1, in her examination in chief has stated that they had gone to the house of defendant and the defendant had told that “she was not in a position to vacate the property in dispute on the ground that as to where would she take her children”. In the first instance, this particular fact was not pleaded. It does not find mention in the notice Ex.PW1/2 dated 29.7.1997. Had this particular fact being true, the plaintiffs would not have failed to mention this particular fact in the reply dated 29.7.1997 (Ex.PW1/2) which was in response to notice dated 22.7.1997 (Ex.PW1/3) sent on behalf of defendant intimating the plaintiff regarding for forfeiture of the earnest money.

19. Both these issues are decided in favour of the defendant and against the plaintiffs.”

(Underlining Added)

5. This Court, therefore, is called upon to decide the issue as to whether the trial court has rightly arrived at a finding that the appellant/plaintiff were the persons who were guilty of breach of contract and that the appellant/plaintiff did not have the financial capacity to pay the balance sale consideration of Rs. 1,95,000/-.

6. At this stage, it is required to be noted that the present suit seeking specific performance is not a suit wherein a proposed buyer claims specific performance by paying just between 5% to 10% or 10% to 20% of the sale consideration. Admittedly, as on the date of entering into of the Agreement to Sell, approximately 57% of the sale consideration stood paid by the appellant/plaintiff to the respondent/defendant. Admittedly, the respondent/defendant had delivered the original title documents of the suit property to the plaintiffs/proposed purchasers. The issue therefore is as to whether the appellant/plaintiff had the financial capacity to pay the balance sale consideration. I may also note that the appellant/plaintiff in the trial court led evidence and proved the stamp papers purchased for going through the transaction as Ex.PW1/8 to Ex.PW1/11. These stamp papers are dated 17.07.1997 and 21.07.1997.

7(i) As regards the capacity to show availability to pay the balance sale consideration of Rs. 1,95,000/-, it is seen that out of this amount, the amount of Rs. 1,00,000/- was proved to have been withdrawn by the appellant/plaintiff from her account with Syndicate Bank, Chandni Chowk Branch, Delhi. This withdrawal of Rs.

1,00,000/- on 14.07.1997 with 21.07.1997 being the date of appearance of the plaintiff before the Sub-Registrar for registration. The sum of Rs. 1,00,000/- being available with appellant/plaintiff is hence proved from the statement of account of Syndicate Bank, Chandni Chowk Branch, Delhi as Ex.PW1/RX. This withdrawal of Rs. 1,00,000/- by the appellant/plaintiff from her account is in law sufficient to show the availability of Rs. 1,00,000/- with the appellant/plaintiff as on 21.07.1997. This Court cannot ignore the fact that originally, under the subject Agreement to Sell, even the earlier paid amount of Rs. 2,65,000/- was paid by the appellant/plaintiff to the respondent/defendant in cash. Therefore, the withdrawal of Rs. 1,00,000/-, being shown from the account of the appellant/plaintiff on 14.07.1997, shows that out of the balance sale consideration of Rs. 1,95,000/-, the appellant/plaintiff had with them an amount of Rs. 1,00,000/-.

7(ii). So far as the amount of Rs. 95,000/- is concerned, it is seen that this amount would be about 20 odd percent of the balance sale consideration inasmuch as 57% of the sale consideration has already been received by the respondent/defendant and out of Rs.

1,95,000/-, a sum of Rs. 1,00,000/- is shown to be in the hands of the appellant/plaintiff for payment. Therefore, the availability of Rs. 95,000/- has to be seen in a practical way, in the facts and circumstances of the present case, for about 20% of the total sale consideration where mode of payment is in cash. As regards the availability of Rs. 95,000/-, in the opinion of this Court, in the peculiar facts of the present case as stated above, the appellant/plaintiff in my opinion has proved the availability of this amount of Rs. 95,000/- inasmuch as it has been deposed by the appellant/plaintiff in her cross-examination on 05.02.2003 that this amount of Rs.95,000/- she had arranged from her mother and also the brother who was the plaintiff no.1 in the suit and who expired during the pendency of the suit and no suggestion was given to appellant/plaintiff that she had not arranged the balance amount from her brother and her mother.

8(i). Also, since the plaintiff no.1/brother of the present appellant/plaintiff, expired in the year 1999, therefore, no evidence could have been led by the plaintiff no.1/brother/Sh. Mahender Kapoor. No adverse inference can be drawn against the appellant/plaintiff for not recording the evidence of plaintiff no.1, who

had expired by the time of leading of his evidence, as issues were framed on 26.07.1999, and after 26.07.1999 only one date was fixed being the very next date of 27.09.1999 and since no witness was present on this next date after framing of issues, hence the case was listed for plaintiffs' evidence on 29.11.1999, and by this date the brother/plaintiff no.1/Sh. Mahender Kapoor of the appellant/plaintiff had expired.

8(ii). In my opinion, in the facts of the present case, also no adverse inference can also be drawn against the appellant/plaintiff for not leading the evidence of the mother, Smt. Sita Devi, who was substituted in place of Sh. Mahender Kapoor/plaintiff no.1 as Smt. Sita Devi expired *pendente lite* and after completion of evidence of the appellant/plaintiff, inasmuch as there is no suggestion which is given by the respondent/defendant to the appellant/plaintiff on 05.02.2003 that she had not arranged the balance sale consideration of Rs. 95,000/- from her mother Smt. Sita Devi and her brother.

9. In view of the aforesaid discussion, in my opinion, in the facts and circumstances of the present case, it has to be held that appellant/plaintiff had the necessary financial capacity to go ahead

with the sale transaction as she had the financial capacity to pay the balance sale consideration of Rs.1,95,000/-. This Court therefore sets aside the finding of the trial court that the appellant/plaintiff did not have financial capacity to pay the balance sale consideration of Rs. 1,95,000/-, and it is held that the appellant/plaintiff was ready and willing to perform her part of the Agreement To Sell.

10(i) At this stage, it is required to be noted that today for the first time an application under Order I Rule 10 CPC has been filed by the applicant, Sh. Jitender Verma, son of the respondent/defendant for being impleaded as a party in this appeal. This appeal is of the year 2006 and this application is coming up today for the first time on 25.10.2018 when the appeal is listed for final disposal. Also, it is seen that the subject suit was filed in August 1997, and the claim of right, title and interest of the applicant is now being asserted in October 2018, and that too by means of documents which sequentially commenced from 19.08.1997 i.e. around 21 years earlier as will be detailed hereinafter.

10(ii). By means of the application being **CM Appl. No. 44395/2018** filed under Order I Rule 10 CPC, the applicant Sh.

Jitender Verma, son of the respondent/defendant pleads that the respondent/defendant had transferred ownership rights to her son, Sh. Dhirender Kumar Verma, in terms of the General Power of Attorney and Will dated 19.08.1997. Sh. Dhirender Kumar Verma then is said to have transferred the ground floor portion of the suit property in favour of the applicant in terms of the documentation dated 05.01.2016. The applicant, Sh. Jitender Verma, son of the respondent/defendant further sets up a case that Sh. Dhirender Kumar Verma, the other son of the respondent/defendant who claims to have documentation in his favour being the General Power of Attorney and the Will dated 19.08.1997, transferred ownership rights of first floor to third floor with roof rights of the suit property in favour of the respondent/defendant in terms of documentation dated 05.01.2016 being the General Power of Attorney, Gift Deed, Affidavit etc. It is then pleaded in the application that Smt. Radha Verma, sister of the applicant and the daughter of the respondent/defendant, purchased the first floor up to the third floor with roof rights from her respondent/defendant/mother vide documentation dated 06.04.2016. Smt. Radha Verma is thereafter said to have purchased the ground

floor of the property in terms of the documentation dated 06.04.2016. The applicant, Sh. Jitender Verma, is said to have purchased from his sister Smt. Radha Verma the ground floor right till the third floor with roof rights in terms of the documentation dated 06.06.2016. Accordingly, it is pleaded that since the applicant, Sh. Jitender Verma, has become owner of the entire property in terms of the aforesaid series of documentation dated 19.08.1997, 05.01.2016, 06.04.2016 and 06.06.2016, therefore, the applicant should be added as a party to the present appeal.

10(iii) In my opinion, the application, **CM Appl. No. 44395/2018**, filed by Sh. Jitender Verma, son of the respondent/defendant herein, is an abuse of the process of law and is an endeavour to make a mockery of the law. The entire set of documentation relied upon by the applicant commencing from documentation dated 19.08.1997 to 06.06.2016 are clearly a case of sham and fraudulent/fabricated documentation qua title of suit property and created only to frustrate the decree which would be passed in favour of the appellant/plaintiff on this appeal being allowed. The set of documentation is a sham and fraudulent

documentation because consideration is stated to have passed under these documentation in cash only and which is conveniently stated because by stating payment in cash, actual payment of cash and receipt of cash need not be proved, and thus, this alleged consideration/payment in fact never came to exist/paid because the documentation were only sham and fraudulent documentation. The consideration which is stated under the documentation dated 06.06.2016 is a sum of Rs.10,50,000/- in cash, and the consideration which is stated in the documentation dated 06.04.2016 is a sum of Rs.10,00,000/- and again which is in cash. In the different documentation there are two gift deeds also, but these gift deeds are unregistered and once the gift deeds are unregistered, the same violate Section 123 of the Transfer of Property Act, 1882 which requires that the gift deeds have to be registered. Also, all documentation after 24.09.2001, in the nature of rights of part performance under Section 53A of Transfer of Property Act cannot create rights unless such documents are stamped and registered in view of the amendment of Section 53A of the Transfer of Property Act (with the related provisions) by Act 48 of 2001. For all the aforesaid reasons, of the

documents really not passing any consideration, being unregistered documents, being put up for the first time in a suit filed in 1997 on 25.10.2018, being fraudulent and sham documents are held as illegal and void documents so far as the rights of the appellant/plaintiff are concerned and it is held that such documents being sham etc. and void documents, would have no bearing upon the right of the appellant/plaintiff in the present suit and appeal.

11(i). Learned counsel for the applicant- Sh. Jitender Verma places reliance upon ***Lala Durga Prasad and Ors. v. Lala Deep Chand and Ors., AIR 1954 SC 75*** to argue that the subsequent purchaser being the applicant and his predecessors-in-interest being sons and daughter of the respondent/defendant and who purchased rights by documentation dated 19.08.1997, 05.01.2016, 06.04.2016 and 06.06.2016 have to be added as parties because these persons have an independent title on the property because the title arose under the documentation dated 19.08.1997 which are of a date prior to the suit filed on 26.08.1997.

11(ii). In my opinion, however, this argument is misconceived because the ratio of the judgment of the Supreme Court in the case of

Durga Prasad and Ors. (supra) is to implead genuine third party purchasers claiming independent title who enter into the sale deed with the seller after the entering into of the earlier agreement to sell by the seller with the plaintiff in a suit for specific performance, and in the present case it has already been held that the entire documentation dated 19.08.1997, 05.01.2016, 06.04.2016 and 06.06.2016 are completely sham and fraudulent documents and would thus not create any right, title and interest in favour of the applicant or any other person who allegedly purchased rights in the suit property from the respondent/defendant, and all these persons are none other than the sons or daughters of the respondent/defendant. This **C.M. Appl. No. 44395/2018** is therefore misconceived, *malafide* and an abuse of process of law, and is accordingly dismissed.

12. In view of the aforesaid discussion, this appeal is allowed. Impugned Judgment of the trial court dated 05.09.2005 is set aside. The appellant/plaintiff will be entitled to specific performance of the Agreement to Sell dated 18.07.1996.

13. However, this is not the end of the matter because this Court will have to balance the equities inasmuch as the

respondent/defendant has not received the amount of Rs. 1,95,000/- which was due as on 18.07.1997. In my opinion, in the facts and circumstances of the present case, the interest of justice would be served by directing the appellant/plaintiff to pay to the respondent/defendant the balance amount of Rs. 1,95,000/- alongwith interest @ 21% per annum simple and this rate of interest will cover increased price of the property over all these years proportionate to the amount of Rs. 1,95,000/- to the total amount of Rs. 4,60,000/- . Let the appellant/plaintiff deposit in the concerned trial court, a sum of Rs. 1,95,000/- alongwith interest @ 21% per annum simple from 21.07.1997 within a period of four months from today, and on such deposit, the appellant/plaintiff will be entitled to execution of the title documents in her favour as regards the entire suit property as it exists today.

14. I may note that this Court has adopted a course of action of giving an unusually high rate of interest at 21% per annum simple as in the case of *Nehru Place Hotels Ltd. v. Kanta Aggarwal, 2011 (123) DRJ 148*, and the Supreme Court in the cross appeals filed by both the parties against the aforesaid judgment in the case of *Nehru*

Place Hotels Ltd. (supra,) dismissed the cross appeals *SLP(C) Nos. 22065/2011 & 22130/2011* vide order dated 19.03.2012.

15. In view of the aforesaid discussion, this appeal is allowed. The appellant/plaintiff is held entitled to the specific performance of the Agreement to Sell dated 18.07.1996 with respect to the property being a plot of 22.5 sq yards situated at D-8, Old Seemapuri, Delhi as it exists today. The appellant/plaintiff will deposit in the concerned trial court a sum of Rs.1,95,000/- alongwith simple interest at 21% per annum simple from 21.07.1997 till date within a period of four months from today. On such deposit as aforesaid being made by the appellant/plaintiff, the respondent/defendant is directed to execute at the cost of the appellant/plaintiff all the necessary documents and thus give a title to the appellant/plaintiff of the suit property. The parties are left to bear their own costs. The trial court record be sent back.

OCTOBER 25, 2018
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VALMIKI J. MEHTA