

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

+ **RFA No.334/2018**

% **Reserved on: 23rd April, 2018**
Pronounced on: 25th April, 2018

GEETA BISWAS Appellant

Through: Mr. Manoj Kumar, Advocate
with Mr. S.A. Rao, Advocate
and Mr. Saurabh Sharma,
Advocate.

versus

NAMITA DASS & ANR. Respondents

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. Nos.15670/2018 & 15672/2018 (exemption)

1. Exemption allowed subject to just exceptions.
C.M.s stand disposed of.

C.M. No.15671/2018 (for condonation of delay)

2. For the reasons stated in the application, delay in re-filing
the appeal is condoned.
C.M. stands disposed of.

RFA No.334/2018 and C.M. No.15669/2018 (stay)

3. This Regular First Appeal under Section 96 of the Code
of Civil Procedure, 1908 (CPC) is filed by the defendant no.1 in the

suit impugning the judgment of the Trial Court dated 16.1.2018 whereby the trial court has decreed the suit filed by the respondent no.1/plaintiff for cancellation of sale documents dated 25.8.2003 and holding them as null and void with respect to the undivided half share of the respondent no.1/plaintiff in the built up property bearing no. RZ-68/350-A (front side), situated on a plot of 35 sq. yards out of Khasra No.350, situated in the Revenue Estate of Village Nasirpur, colony known as West Sagar Pur, New Delhi. Respondent no.1/plaintiff has also been held entitled to by the impugned judgment and decree to mandatory injunction directing the appellant/defendant no.1 to remove herself and her belongings from the first floor of the suit property and hand over vacant physical possession to the respondent no.1/plaintiff. Respondent no.1/plaintiff has been further held entitled to the decree of specific performance against the respondent no.2/defendant no.2 whereby the respondent no.2/defendant no.2 has been directed to execute the necessary conveyance documents *qua* the suit property in favour of the respondent no.1/plaintiff as also entitled to permanent injunction in

her favour and against the defendants in the suit restraining them from creating third party interest in the suit property.

4. The facts of the case are that the respondent no.1/plaintiff filed the subject suit seeking specific performance of the Agreement to Sell dated 11.6.2003 executed by the respondent no.2/defendant no.2 in favour of the respondent no.1/plaintiff pertaining to the suit property. It was pleaded in the plaint that respondent no.1/plaintiff received a sum of Rs.3.50 lacs towards maintenance and permanent alimony from her husband on the dissolution of her marriage in terms of the judgment and decree dated 11.1.2002. Out of the aforesaid amount, respondent no.1/plaintiff withdrew an amount of Rs.94,000/- from her savings bank account on 2.12.2002 and deposited the same in the account of the appellant/defendant no.1/mother. The subject Agreement to Sell dated 11.6.2003 was executed in favour of the respondent no.1/plaintiff by the respondent no.2/defendant no.2 and who is the uncle of the respondent no.1/plaintiff. The total sale consideration was agreed to be Rs.3,20,000/- of which respondent no.1/plaintiff paid to the respondent no.2/defendant no.2 a sum of Rs.1,50,000/- on the date of execution of the Agreement to Sell. Out

of the balance amount of Rs.1,70,000/-, the respondent no.1/plaintiff paid to the respondent no.2/defendant no.2 a sum of Rs.20,000/- on 4.8.2003 and to this effect an endorsement was made on the back side of the Agreement to Sell. A further amount of Rs.50,000/- was paid by the respondent no.1/plaintiff to the respondent no.2/defendant no.2 on 5.8.2003 leaving a balance amount only of Rs.1 lac payable by the respondent no.1/plaintiff to the respondent no.2/defendant no.2. It is further pleaded in the plaint that the respondent no.1/plaintiff was remarried to one Sh. Amit Dass and since she was living in a rented accommodation, she kept the original of the subject Agreement to Sell dated 11.6.2003 and the receipt with her mother/appellant/defendant no.1 and retained only a photocopy with herself. It is further pleaded that the balance amount of Rs.1 lac was paid by the respondent no.1/plaintiff to her mother because her mother said that the respondent no.2/defendant no.2 was asking for the balance amount, and therefore, the respondent no.1/plaintiff withdrew a sum of Rs.92,000/- from her savings bank account and adding thereto a sum of Rs.8,000/-, a total amount of Rs.1 lac was paid to the appellant/defendant no.1 for being paid to the respondent

no.2/defendant no.2. Respondent no.1/plaintiff has further pleaded in the plaint that the appellant/defendant no.1 however fraudulently on 25.8.2003 got documents executed with respect to the suit property in her favour allegedly on account of the respondent no.1/plaintiff being in family way and thus not available. Respondent no.1/plaintiff therefore pleaded that the documentation dated 25.8.2003 got executed by the appellant/defendant no.1 in her favour from the respondent no.2/defendant no.2 were void in view of the Agreement to Sell dated 11.6.2003 executed by the respondent no.2/defendant no.2 in favour of the respondent no.1/plaintiff. Accordingly, the documentation in favour of the appellant/defendant no.1 dated 25.8.2003 was prayed for being cancelled through the suit filed by getting them declared null and void and further for getting the Agreement to Sell dated 11.6.2003 specifically performed by the respondent no.2/defendant no.2 in favour of the respondent no.1/plaintiff.

5.(i) Suit was contested by the appellant/defendant no.1, but the respondent no.2/defendant no.2 however did not deny due execution of the Agreement to Sell dated 11.6.2003 executed by him in favour of the respondent no.1/plaintiff and that the respondent

no.2/defendant no.2 had in fact received the complete amount of the sale consideration of Rs.3,20,000/- for transfer of the suit property. It was the case of the respondent no.2/defendant no.2 that it was the respondent no.1/plaintiff who was to be the owner of the suit property as is the case of the respondent no.1/plaintiff that the respondent no.2/defendant no.2 had entered into the Agreement to Sell dated 11.6.2003 and had also received from her the entire consideration.

(ii) The appellant/defendant no.1 filed her written statement denying that respondent no.1/plaintiff paid the amounts to the respondent no.2/defendant no.2 under the Agreement to Sell, and as otherwise detailed in the plaint. In the written statement the appellant/defendant no.1 pleaded to be the owner of the ground floor of the suit property. It was pleaded in the written statement of the appellant/defendant no.1 that respondent no.2/defendant no.2 had left the premises on 25.8.2003 after executing the necessary documentation in favour of the appellant/defendant no.1 and which includes the Agreement to Sell, General Power of Attorney, receipt, affidavit, possession letter and Will.

6. After completion of pleadings, the trial court framed the following issues:-

- “(i) Whether plaintiff is entitled to a decree of declaration, as claimed ? OPP.
- (ii) Whether plaintiff is further entitled to a decree of mandatory injunction, as claimed ? OPP.
- (iii). Whether plaintiff is further entitled to a decree of specific performance in respect of agreement to sell dated 11.06.2003 ? OPP.
- (iv). Whether plaintiff is further entitled to a decree of permanent injunction, as claimed ? OPP.
- (v). Relief.”

7. Respondent no.1/plaintiff led evidence and which aspects are recorded in paras 7 and 8 of the impugned judgment and these paras read as under:-

“7. To prove her case, plaintiff examined herself as PW-1 and tendered in evidence her affidavit as Ex.PW1/1 and produced the documents i.e. Decree of divorce petition as Ex. PW1/A; account statement of herself as Mark-B; copy of pass-book of defendant no.1 i.e. Geeta Biswas as Mark-A; site plan of the property in question as Ex. PW1/C and bayana receipt dated 11.06.2003 as Mark-C. She was extensively cross-examined by the Ld. counsel for defendant no.1. Plaintiff has also examined Defendant No. 2, Sh. Anoop Kumar Biswas as PW-2 who tendered his affidavit in evidence as Ex. PW2/A. He relied upon the copy of judgment and decree dated 11.01.2002 of divorce which is already Ex. PW1/A on behalf of the plaintiff. He also identified his signature on the agreement to sell dated 11.06.2003. He admitted to have received the sale consideration from the plaintiff in his affidavit. However, in his cross-examination, he deposed that Mark-C i.e. agreement to sell dated 11.06.2003 is not the bayana receipt given by him to the plaintiff. Plaintiff has also examined one Sanat Kumar Dey (neighbour of the plaintiff and defendants) as PW-3 who tendered his affidavit in evidence as Ex.PW3/A who also relied upon the copy of bayana receipt/agreement to sell dated 11.06.2003 as already Mark-C. He also deposed that one day when the quarrel arose between the family of plaintiff and defendant regarding the property, he was called to intervene as everybody

in the social circle was aware of the fact that the property had been purchased by the plaintiff. Plaintiff also examined one Israel Ansari as PW-4 being her neighbour who tendered his affidavit in evidence as Ex. PW4/A. He deposed in his affidavit in evidence on the same lines as of PW-3. Both the witnesses PW-3 and PW-4 have been cross-examined by the Ld. Counsel for defendant no.1.

8. Plaintiff further examined Sh. Prem Singh Sagar, Sr. Manager from UCO Bank, Janakpuri as PW-5 who deposed that the records of saving bank account no. 008155, bank statement from the date 27.08.2002 to 20.08.2003 pertaining to the plaintiff Smt. Namita Dass are not available with us as the same are old record i.e. more than 10 years. Finally, plaintiff also summoned one Sh. Chandra Shekhar Azad, Branch Manager, SBI, Janak Cinema Complex Branch who produced the original cheque bearing No. 707709 of dated 25.08.2003 of Rs. 92,000/- of State Bank of Mysore which is Ex. PW6/1. He further deposed that the records pertaining to the year 1993 to 2003 have been destroyed on 28.08.2013 under the record retention policy dated 15.10.2011 (Circular No.GC 176/2011-12 dated 15.10.2011), which is Ex. PW6/2 and later on dated 20.09.2017 alongwith the photocopy of entries made in the register of the destroyed record as Ex. PW6/3. Thereafter, plaintiff's evidence was closed and defendant no.2 was proceeded ex-parte on 06.05.2017.”

8. The appellant/defendant no.1 did not lead evidence in terms of the statement recorded on her behalf on 16.10.2017 and 24.11.2017. Therefore the suit was decided and this appeal has also to be decided only on the basis of the evidence led by the respondent no.1/plaintiff.

9. In my opinion, no fault can be found with the impugned judgment inasmuch as respondent no.1/plaintiff proved her case by leading evidence whereas the appellant/defendant no.1 has led no evidence. The divorce petition as a result of which respondent

no.1/plaintiff received a sum of Rs.3,50,000/- is proved as Ex.PW1/A. The original agreement to sell could not be proved as the statement was made by the respondent no.1/plaintiff that the original Agreement to Sell dated 11.6.2003 and the receipt of the same date was in possession of the appellant/defendant no.1/mother. Respondent no.1/plaintiff also summoned one Sh. Chandra Shekhar Azad from SBI, Janak Cinema Complex Branch who produced the original cheque dated 25.8.2003 of Rs.92,000/- which was exhibited as Ex.PW6/1. The appellant/defendant no.1 led no evidence to show that she at all had any source of moneys to pay or had actually paid her own moneys as consideration of Rs.3,50,000/- for the documents executed in her favour on 25.8.2003 by the respondent no.2/defendant no.2. Therefore, in my opinion, once the respondent no.1/plaintiff led evidence and proved her case and the appellant/defendant no.1 led no evidence i.e did not even file her affidavit by way of evidence as examination-in-chief, and refused to stand the test of cross-examination, hence it has to be held that the respondent no.1/plaintiff was the beneficiary under the Agreement to Sell dated 11.6.2003 executed by the respondent no.2/defendant no.2 in her favour and

hence the subsequent documentation dated 25.8.2003 in favour of the appellant/defendant no.1 had to be cancelled and the Agreement to Sell dated 11.6.2003 in favour of the respondent no.1/plaintiff had to be specifically performed by the conveyance documents of the suit property being executed by the respondent no.2/defendant no.2 in favour of the respondent no.1/plaintiff.

10.(i) Learned counsel for the appellant/defendant no.1 argued that the suit was barred by limitation because the case of the respondent no.1/plaintiff was that she came to know of the documents dated 25.8.2003 only for the first time on 6.2.2011, and therefore, the suit had to be filed within one year from 6.2.2011 as per Section 17(2) of the Limitation Act, 1963 but the suit was filed after limitation on 24.8.2012.

(ii) This argument urged on behalf of appellant/defendant no.1 is completely misconceived and has been rightly rejected by the trial court. I may note that the provision of Sub-Section (2) of Section 17 only applies to execution of a decree and when execution of the decree has been got prevented by a force or fraud and for this eventuality the period of one year as stated in Sub-Section (2) of Section 17 applied

accordingly with respect to execution of the decree and Sub-Section (2) of Section 17 is not with respect to filing of a suit for specific performance or cancellation of the illegal documents and with respect to which the period of limitation is three years as provided under the Limitation Act, with the period of three years commencing from the time when the knowledge of fraud is discovered. In the present case, the fraud was discovered by the respondent no.1/plaintiff in this case on 6.2.2011, and therefore, the suit filed on 24.8.2012 was very much within limitation. I may also note that the appellant/defendant no.1 never got any issue framed of limitation, and therefore, this issue of limitation in any case was not available for being argued by the appellant/defendant no.1. Trial court in this regard has rightly discussed as under:-

“15. The defendant no.1 has also contended that the suit is barred by limitation, however, no issue has been pressed by defendant no.1 to be framed in this regard. Nonetheless, the contention is without any merit in view of the fact that the documents such as Agreement to Sell, Receipt, Affidavit, Possession letter etc dated 25.08.2003 which the plaintiff is seeking to be declared as null and void, is stated to have come to the knowledge of the plaintiff for the first time on 06.02.2011 and thus, the limitation period commenced from the said date as per Section 17 of the Limitation Act. Admittedly, the suit has been filed in August, 2012 and thus, the same is within the limitation. As far as relief seeking specific performance of the agreement to sell dated 11.06.2003 is concerned, the same is also within limitation as the contention of the plaintiff is that defendant no.2 undertook to execute the sale documents in pursuance to agreement to sell whenever the sale becomes permissible by government. The defendant no.1 has neither adduced any evidence to controvert the

above said nor plaintiff was cross-examined by defendant no.1 on this aspect.”

11.(i) Learned counsel for the appellant/defendant no.1 then argued that the respondent no.2/defendant no.2 in his cross-examination on 26.4.2017 agreed that the receipt which is Mark-C, and which was said to be executed on 11.6.2003 by the respondent no.2/defendant no.2 in favour of the respondent no.1/plaintiff was not given by the respondent no.2/defendant no.2 to respondent no.1/plaintiff and accordingly it is argued by the appellant/defendant no.1 that the receipt is not proved and hence the suit had to be dismissed.

(ii) Trial court in my opinion has rightly rejected this argument by observing that the respondent no.1/plaintiff has proved her case which is not based only on the receipt but that various other facts and documents have been proved including of the payment of sale consideration to the respondent no.2/defendant no.2, and the respondent no.2/defendant no.2 not disputing her case. The relevant para of the judgment of the trial court in this regard is para 18 and this para 18 reads as under:-

“18. The onus to prove this issue is upon the plaintiff. The case of the plaintiff that an agreement to sell was executed by the defendant no.2 in her favour on 11.06.2003 is supported by defendant no.2 who admitted in her written statement and affidavit in lieu of evidence to have entered into an agreement to sell in her favour in respect of the suit property for a total sale consideration of Rs. 3,20,000/-. However, the original of the said agreement was stated to be in possession of defendant no.2 and a copy of the said agreement to sell is placed on record and the same is marked as Mark-C. In her cross-examination, she has deposed that the said Mark-C was prepared in her handwriting and the said agreement does not bear her signature and the original was retained by her mother. The plaintiff has examined PW-3 and PW-4 who stated that a sum of Rs. 1,50,000/- was paid to defendant no.2 in their presence on the date of execution of the agreement to sell Mark-C and they admitted their signature on the said document. Though, the defendant no.2 has denied in his cross-examination for the first time that Mark-C is not that agreement to sell which has been executed by him, yet the fact remains that the witnesses have identified their signatures on the said agreement and defendant no.2 has not denied that no agreement was entered into between him and the plaintiff for the sale of the suit property. The plaintiff has succeeded in proving agreement to sell between her and defendant no.2 and having paid all the sale consideration of Rs. 3,20,000/- and thus, the plaintiff is entitled to a decree of specific performance qua the suit property. Moreover, the defendant no.2 in his written statement has averred that he had already received the whole of sale consideration from the plaintiff and he would abide by the direction of this court. In view of the aforesaid discussions, defendant no.2 is directed to execute the necessary sale documents in favour of the plaintiff in accordance with law. Thus, issue no.3 is decided in favour of the plaintiff and against the defendants.”

12. I find no illegality in the observations and conclusions of the trial court in para 18 of the impugned judgment and the said observations and conclusions are therefore upheld more so because the appellant/defendant no.1 led no evidence, did not file her affidavit by way of evidence and did not step into the witness box to stand the test

of cross-examination with respect to her deposition which would have been given in examination-in-chief.

13. In view of the aforesaid discussion, there is no merit in the appeal. Dismissed.

APRIL 25, 2018
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VALMIKI J. MEHTA, J

