

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

% **Date of decision: 16th May, 2018**

+ **CS(OS) No.2167/2013**

PANNALAL RATHORE & ANR. Plaintiffs

Through: Ms. Anjali J. Manish, Adv.

Versus

**W.H. DEETH (BALLABGARH)
& CO. & ORS.Defendants**

Through: Mr. Kunal Sinha, Adv. for D-1.
Ms. Ripu Adlakha, Adv. for D-4.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The two plaintiffs viz. Panna Lal Rathore and Vinay Gugnani have instituted this suit for cancellation of Agreement to Sell dated 1st April, 2012, pleading i) that the plaintiff no.1 Panna Lal Rathore, as sole proprietor of "Salem Handloom Textiles", was a tenant under the defendant no.1 W.H. Deeth (Ballabgarh) & Co. with effect from 1st January, 2003 till 11th June, 2008 at a monthly rent of Rs.70,000/- in GF-1, 75-76, Manisha Building, Nehru Place, New Delhi-110019 ad-measuring 1067 sq. ft.; ii) that the plaintiff no.1 was carrying on business from the aforesaid premises in the name and style of "Awesome", in partnership with the defendant no.4 Vijay Adlakha; iii) that the defendant no.1 suggested to the plaintiff no.1 its willingness to sell the aforesaid premises in possession of the plaintiff no.1 to the plaintiff no.2 Vinay Gugnani who is the business friend of the plaintiff no.1; iv) that the defendant no.1, on 12th June, 2008 entered into an Agreement to Sell the aforesaid premises to the plaintiffs for a

consideration of Rs.4,00,12,500/- and it was agreed that the plaintiffs would pay Rs.25 lacs as advance and the rest of the consideration would be paid by 30th October, 2008; v) that the plaintiffs paid a sum of Rs.25 lacs to the defendant no.1 by way of cheque; vi) that the possession of the premises was already with the plaintiff no.1 as a tenant and the defendant no.1 asked the plaintiff no.1 to continue in the said premises; vii) that the status of the plaintiff no.1, since 11th June, 2008, was changed from lessee to that of a vendee; viii) that on 18th June, 2008, the plaintiff no.2 Vinay Gugnani paid a further amount of Rs.1 crore to the defendant no.1 by cheque and it was orally agreed that on receipt of remaining sale consideration of Rs.2,75,12,500/-, the Sale Deed would be executed; ix) that the aforementioned Agreement to Sell had no forfeiture or exit clause; x) that the plaintiff no.2 Vinay Gugnani sent a cheque dated 21st October, 2008 for Rs.5 lacs in furtherance of the consideration amount to the defendant no.1 and also sent an e-mail to the defendant no.1 but no reply was received from the defendant no.1; xi) that the defendant no.1, on 7th November, 2008 got issued a notice to the plaintiffs stating that the plaintiffs had failed to pay the balance sale consideration by 30th October, 2008 and he was terminating the Agreement to Sell dated 12th June, 2008; xii) that the defendant no.1 W.H. Deeth (Ballabgarh) & Co. filed CS(OS) No.211/2009 for ejectment of the plaintiffs as tenants from the aforesaid property by suppressing the Agreement to Sell dated 12th June, 2008 and the legal notice dated 7th November, 2008 and vide order dated 2nd February, 2009 in the said suit, the plaintiff no.1 Panna Lal Rathore was restrained from creating third party rights or transferring the property; xiii) the plaintiff no.1 Panna Lal Rathore filed a written statement in CS(OS) No.211/2009

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aforesaid claiming to be in possession, after 12th June, 2008, as vendee under the Agreement to Sell dated 12th June, 2008 and entitled to protection under Section 53A of the Transfer of Property Act, 1882; xiv) that the plaintiffs instituted CS(OS) No.1094/2012 for specific performance of the Agreement to Sell dated 12th June, 2008; xv) that both CS(OS) Nos.211/2009 and 1094/2012 were pending; xvi) that the defendant no.1 W.H. Deeth (Ballabgarh) & Co., on 20th November, 2012 stated that it had sold the property to defendant no.2 Kunal Adlakha, son of defendant No.4 Vijay Adlakha; however in support of such sale, an Agreement to Sell dated 1st April, 2012 was handed over in the Court; xvi) that a perusal of the Agreement to Sell dated 1st April, 2012 by the defendant no.1 in favour of defendant no.2 showed the same to be for a total sale consideration of Rs.1.5 crores only as against the Agreement to Sell by the defendant no.1 in favour of the plaintiffs for a sale consideration of Rs.4,00,12,500/-; xvii) that it further emerged that the defendant no.1 had agreed to sell the property to defendant no.5 Rai Kumar Sadh who had nominated the defendants no.2 and 3 viz. Kunal Adlakha and Namita Adlakha being the son and daughter-in-law of the defendant no.4 Vijay Adlakha for purchase; xviii) that the defendants, by entering into the transactions *inter se*, have tried to nullify the effect of the Agreement to Sell dated 12th June, 2008 by the defendant no.1 in favour of the plaintiffs; xix) that the defendant no.1, in the Agreement to Sell dated 1st April, 2012, did not disclose the prior Agreement to Sell dated 12th June, 2008 with the plaintiffs; xx) that the defendant no.2 Kunal Adlakha, being the son of defendant no.4 Vijay Adlakha who was the partner as aforesaid of the plaintiff no.1 in the business being run from the aforesaid premises, was aware of the CS(OS) No.2167/2013

Agreement to Sell dated 12th June, 2008 in favour of the plaintiffs; xxi) that the defendants could not have entered into the aforesaid transactions *inter se* as Section 52 of the Transfer of Property Act prevents any agreement with respect to transfer of property in respect of which litigation is pending; and, xxii) that the Agreement to Sell dated 1st April, 2012 refers to CS(OS) No.1968/2011 filed by the defendant no.5 Rai Kumar Sadh and which was disposed of on 30th January, 2012.

2. This suit came up before this Court on 8th November, 2013 when it was ordered to be listed before the same Bench before which CS(OS) No.2011/2009 and CS(OS) No.1094/2012 were pending. On 18th November, 2013, summons of the suit and notice of the application for interim relief were ordered to be issued. Since then, pleadings have been completed and written statements have been filed by defendant no.1, defendants no.2 to 4 and defendant no.5 and to which replications have been filed by the plaintiffs.

3. The plaintiffs have filed an application for amendment of the plaint stating that the plaint remained to be signed by the plaintiff no.2 and seeking to file an amended plaint with the signatures of both the plaintiffs.

4. The suit came last before this Court on 19th March, 2018, when the following order was passed:

“1. This suit was not on the Board of this Bench but has been sent to this Bench owing to the pendency of CS(OS) 1094/2012 before this Bench.

2. In CS(OS) 1094/2012, evidence is being recorded and the suit is listed before the Joint Registrar for the said purpose on 24th May, 2018.

3. *IA No. 17886/2013 of the plaintiff under Order XXXIX Rules 1 and 2 of the CPC and IA No. 3105/2015 of the plaintiff under Order VI Rule 17 of the CPC are for consideration in this suit.*
4. *It is informed, (a) that CS(OS) 1094/2012 was filed for specific performance of an Agreement of Sale of immovable property by the defendant No. 1 in favour of the plaintiffs; and, (b) this suit has been filed for cancellation of Agreement to Sell by the defendant No. 1 of the same property to the defendants No. 2 to 4 in this suit.*
5. *I have enquired from the counsel for the plaintiffs, the need for the plaintiff to pursue CS(OS) 2167/2013 and/or the locus of the plaintiff to impugn the Agreement to Sell executed by the defendant No.1 in favour of defendants No. 2 to 4.*
6. *The counsel for the plaintiffs states that the Agreement to Sell in favour of defendants No. 2 to 4 is of a date after the Agreement to Sell in favour of the plaintiffs and that the plaintiffs are in possession of the property in part performance of the Agreement to Sell in their favour.*
7. *Section 19 (b) of the Specific Relief Act, 1963 provides for specific performance to be enforced against a person in whose favour title to the property has passed subsequent to the Agreement to Sell of which specific performance is sought. Thus, if title to the property had passed from the defendant No.1 to defendants No. 2 to 4 after the Agreement to Sell, of which specific performance is sought in CS(OS) 1094/2012, the remedy of the plaintiffs was to implead the defendants No. 2 to 4 in CS(OS) 1094/2012 only and the plaintiffs cannot maintain a separate suit. It was held so as far back as in **Lala Durga Prasad Vs. Lala Deep Chand** AIR 1954 SC 75.*
8. *However, in the present case, the title has not so passed from the defendant No.1 to defendants No. 2 to 4.*
9. *Once that is so, there is no locus in the plaintiff to challenge or impugn the Agreement to Sell in favour of defendants No. 2 to 4.*
10. *The counsel for the plaintiffs contends that the said aspect has never arisen earlier and seeks adjournment to address on the same.*

11. *The counsel for the defendant No. 4 has drawn attention to my order dated 24th October, 2017 in Transfer Petition (C) No. 15/2017 between the same parties when an identical observation was made.*

12. *The counsel for the defendant No. 4 is correct in contending that the counsel for the plaintiff should have come prepared to address on the said aspect.*

13. *Be that as it may, list CS(OS) 2167/2013 on 16th May, 2018 and CS(OS) 1094/2012 be listed before the Joint Registrar for evidence as already scheduled.”*

5. The counsel for the plaintiffs has today handed over her written submissions and which are taken on record.

6. The written submissions are nothing but a repetition of the facts as recorded hereinabove and the only submission therein qua the query raised in the order dated 19th March, 2018 reproduced above is, i) that Section 31 of the Specific Relief Act, 1963 provides for cancellation of Agreement by any person against whom a written instrument is void or voidable and who has reasonable apprehension that such instrument, if left outstanding may cause serious injury to him; and, ii) that the present suit has been filed apprehending that the Agreement to Sell by defendant no.1 in favour of defendants no.2 and 3 will cause injury to the plaintiffs.

7. Though ***Uday Shankar Triyar Vs. Ram Kalewar Prasad Singh*** (2006) 1 SCC 75 and ***Haryana State Cooperative Supply & Marketing Federation Ltd. Vs. Jayam Textiles*** (2014) 4 SCC 704 are also cited in para no.24 of the written submissions and copies thereof annexed thereto but the same are in support of the application for amendment of the plaint

and not qua a query put to the counsel for the plaintiffs on 19th March, 2018.

8. Though Section 31 of the Specific Relief Act undoubtedly provides for seeking cancellation of a written instrument but for the plaintiffs to be entitled thereto, the plaintiffs have to satisfy the test of reasonable apprehension of serious injury from the written instrument if left outstanding and of *locus standi* and/or cause of action to sue for cancellation.

9. In my opinion, the plaintiffs in the present case neither have *locus standi* nor cause of action to sue for cancellation and ought not to have any apprehension, least reasonable apprehension, qua the written instrument dated 1st April, 2012 of which cancellation is sought in the present suit.

10. It is the admitted case of the plaintiffs that the plaintiff No.1 came in occupation/possession of the premises as a tenant under the defendant No.1. The plaintiffs claim an agreement to sell dated 12th June, 2008 by the defendant No.1 in their favour. Though it is also pleaded that in pursuance to the said agreement to sell, the possession of the plaintiffs of the premises, w.e.f. 11th/12th June, 2008, instead of as a lessee/tenant is of a purchaser but it is not the case that the agreement to sell in favour of the plaintiffs is registered. With effect from 24th September, 2001, the Stamp Act, 1899, Registration Act, 1908 and the Transfer of Property Act, 1882 were amended and an agreement to sell immovable property, under which possession of the property agreed to be sold is delivered in part performance of the agreement to sell, has to be compulsorily registered and if not registered, the purchaser is disentitled from taking the plea of being in

possession in part performance of the agreement to sell or from invoking Section 53A of the Transfer of Property Act. Thus the plaintiffs, owing to the agreement to sell claimed by them in their favour being not registered, cannot claim any other rights save as an agreement purchaser and cannot claim rights under Section 53A of the Transfer of Property Act. Reference in this regard if any required can be made to *Som Dev Vs. Rati Ram* (2006) 10 SCC 788, *Arun Kumar Tandon Vs. Akash Telecom Private Limited* ILR (2010) II Delhi 727 and *Anuj Chopra Vs. Vaneeta Khanna* 2016 SCC OnLine Del 3356 (DB).

11. With respect to an agreement purchaser also, the law is clear. It has been consistently held in *Samarjeet Chakravarty Vs. Tej Properties* 2014 SCC OnLine Del 3809, *Cement Corporation of India Vs. Life Insurance Corporation of India Ltd.* 2014 SCC OnLine Del 4336 (DB), *Satish Kapoor Vs. Ishwari Assudani* 2012 SCC OnLine Del 1808 (DB), *Sunil Kapoor Vs. Himmat Singh* 2010 (115) DRJ 229 and *Jiwan Das Vs. Narain Das* AIR 1981 Delhi 291 that an agreement purchaser has no right in the property subject matter of the agreement, till a decree for specific performance of the agreement to sell is passed in his favour and in pursuance to the said decree a conveyance deed of the property is executed in his favour. Thus the plaintiffs, as mere agreement purchasers of the premises of which they claim to be in possession of, cannot claim any title or ownership rights to the property.

12. Once it is found that the plaintiffs are not in possession of the premises in part performance of the agreement to sell, as claimed in the plaint, the possession of the plaintiffs of the premises has to be either as a

tenant holding over or, if the plaintiffs have abandoned their tenancy rights also, as in unauthorized possession of the premises. Such rights do not entitle the plaintiffs to sue for cancellation of an agreement to sell the property entered into by the admitted owner of the property i.e. defendant No.1 herein, in favour of any other person be that may be defendant No.5 or defendants No.2 and 3. Similarly, the plaintiffs have no right or locus to challenge the inter se agreement between the defendants no. 2 to 5 with respect to the property.

13. The plaintiffs as mere agreement purchasers of the premises or as tenant in the premises or in unauthorized occupation/possession of the premises have no locus to sue for cancellation of the agreement to sell entered into by the owner of the premises i.e. defendant No.1 with others and can have no reasonable apprehension that such instrument if left outstanding may cause the plaintiffs serious injury. The only right of the plaintiffs as agreement purchasers is to sue for specific performance of the said agreement to sell. The plaintiffs have already sued for specific performance of the Agreement to Sell dated 12th June, 2008 in their favour.

14. The plaintiffs in the plaint have given two reasons for their apprehension that the agreement to sell of which cancellation is sought, if left outstanding, may cause serious injuries to the plaintiffs. The first reason is of the agreement to sell of which cancellation is sought being hit by *lis pendens*. Presumably it is the case of the plaintiffs that the agreement to sell of which cancellation is sought has been executed during the pendency of the suit for specific performance of the agreement to sell filed by the plaintiffs. However, even if that be so, the same does not entitle the

plaintiffs to institute this suit. The principle of *lis pendens*, as far as India is concerned, is enshrined in Section 52 of the Transfer of Property Act and which *inter alia* provides that during the pendency in any Court of any suit or proceedings in which any right to immovable property is in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceedings so as to affect the rights of any party thereto under any decree or order which may be made therein except under authority of the Court and on such terms as it may impose. It has been held in ***K.A. Khader Vs. Rajamma*** AIR 1994 Ker 122 which view was also approved by the Supreme Court in ***Vijaya Shrivastava Vs. Mirahul Enterprises*** (2007) 15 SCC 180 that Section 52 does not annul the transfer but only renders its subservient to the rights of the parties under the decree or order which may be made in the suit and that it only makes the decree passed in the suit binding on the transferee if he happens to be a third person even if he is not party to it.

15. Thus even if the defendant No.1 has during the pendency of the suit for specific performance filed by the plaintiff executed the agreement to sell in favour of the defendant No.5 and / or in favour of the defendants No. 2 and 3, all that Section 52 provides is that if the plaintiffs succeed in their suit for specific performance against the defendant No.1, the defendant No. 5 and/or the defendants No. 1 and 2 having entered into the agreement to purchase during the pendency of the suit for specific performance, will remain bound by the decree for specific performance in favour of the plaintiffs and the said decree in favour of the plaintiffs will not be defeated

for the reason of the said agreement. Section 52 does not entitle the plaintiffs herein to seek annulment of the agreement.

16. The only other reason given by the plaintiffs for seeking cancellation is the prior agreement to sell claimed by the plaintiffs and for specific performance of which the plaintiffs have sued.

17. I have already in order dated 19th March, 2018 reproduced above referred to ***Lala Durga Prasad*** supra. Supreme Court in the said case was concerned with the question of the nature of the decree to be passed in a suit for specific performance where the seller, after the agreement to sell in favour of the plaintiff had transferred title in the property to another. It was noticed that the practice of the Courts in India in the past was not uniform. While some Courts held that the proper form of the decree is to declare the subsequent purchase void as against the plaintiff and direct conveyance by the seller alone in favour of the plaintiff, some other Courts had adopted the form of directing both the seller and the subsequent purchaser to join in conveying the title in favour of the plaintiff. Yet another set of Courts were following the practice of directing the subsequent purchaser alone in whom the title had vested, to execute the conveyance deed in favour of the plaintiff. It was held by the Supreme Court that (i) the subsequent sale is not void but only voidable at the option of the earlier purchaser; (ii) as the title no longer vests in the seller, it would be illogical, from conveyance point of view, to compel him to convey to the plaintiffs what he himself did not possess; (iii) though a direction to the subsequent purchaser to convey to the plaintiff would convey title to the plaintiff but it might be inequitable to compel the subsequent purchaser to enter into terms and

covenants with the plaintiff to which he had never agreed; (iv) it was thus held that the proper form of decree is to direct specific performance of the contract between the plaintiff and the seller and by directing the subsequent purchaser to join in the conveyance so as to pass on the title which resided in him to the plaintiff; thereby the subsequent purchaser does not join in any special covenants made between the plaintiff and the defendant.

18. It is for the aforesaid reason that I had on 19th March, 2018 observed that inspite of the law having been laid down as far back as in the year 1954, suits as the present one continue to be filed and which are totally misconceived.

19. I may also mention that the plaintiffs have only sued for specific performance of the agreement to sell in their favour. It is not yet known whether the plaintiffs will be entitled to such specific performance or not. I have wondered that if the plaintiffs were to be ultimately held to be not entitled to specific performance, what will be the effect of this Court in this suit interdicting with the agreement entered into by the defendant No.1 with the defendant No.5 and/or the defendants no. 2 and 3. It would be highly inequitable for this Court to, even before the plaintiffs herein having been found entitled to specific performance of the agreement to sell, to interfere with the rights of the defendant no.1 as owner of the property to enter into an agreement to sell the same with any person whatsoever.

20. However Section 19(b) of the Specific Relief Act permits specific performance to be enforced against any other person claiming under the seller by a title arising subsequently to the contract of which specific performance is sought. Here, according to the plaint also, only an

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agreement to sell has been executed by the defendant No.1 in favour of the defendant No.5 and/or defendants No. 2 and 3. Such agreement to sell does not constitute a title. Thus as of today, no title stands conveyed from the defendant No.1 to the defendant No.5 and / or defendants No. 2 and 3 and which they can be directed under Section 19(b) to join in conveying to the plaintiffs. The only remedy of the plaintiffs can be to, in their suit for specific performance of agreement to sell, restrain the defendant No.1 from in pursuance to the agreement to sell conveying any title to the defendant No. 5 and/or defendants No. 2 and 3.

22. The reasonable apprehension referred to in Section 31 has to be justifiable in law and merely a fear in the mind of the plaintiff without any legal basis cannot constitute reasonable apprehension.

23. For the reasons aforesaid, the suit is found to be misconceived and by way of harassment and multiplicity of litigation and is dismissed with costs of Rs.50,000/- to the defendant No.1.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

MAY 16, 2018

‘gsr/M’..

(corrected and released on 29th May, 2018).