

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

+ **RFA No.543/2017 and C.M. No.20511/2017(stay)**

% **19th July, 2018**

PAWAN KATARIA & ORS.

..... Appellants

Through: Ms. Neha Jain, Advocate with
Ms. Divya Gupta, Advocate,
Mr. Luv Menon, Advocate and
Mr. Dishank Dhawan,
Advocate.

versus

ARDEEP KUMAR BATTA & ANR.

..... Respondents

Through: Mr. Rajeev Sharma, Advocate.

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 plaintiffs in the suit impugning the Judgment of the Trial Court dated 1.5.2017 by which trial court has dismissed the suit for specific performance filed by the appellants/plaintiffs pertaining to a Contract dated 5.3.1997. The subject suit though is a suit for specific performance, it is not a classical suit for specific performance as will be seen from the facts

narrated below, because the Contract dated 5.3.1997 is stated to be a contract of re-transfer of the suit property by the respondent no.1/defendant no.1 in favour of Ms. Poonam, wife of the appellant no.1/plaintiff no.1.

2. Before I proceed further, I would like to note that no evidence was led on behalf of the appellants/plaintiffs in the trial court, and ultimately evidence was closed. The appellants/plaintiffs had filed an application for leading secondary evidence on account of the allegation that it was the respondent no.1/defendant no.1 who had in his possession the original documents dated 5.3.1997, and appellants/plaintiffs be therefore allowed to lead secondary evidence, but in spite of granting of one opportunity by the High Court to lead evidence, evidence was not led by the appellants/plaintiffs on the date fixed being 1.5.2017, hence the same led to the closure of the evidence of the appellants/plaintiffs, and resultantly the dismissal of the suit.

3. The facts of the case are that the appellants/plaintiffs pleaded that the suit property bearing no.42, 1st floor, Rajya Sabha Secretariat Employees Cooperative Society, Perijat Apartments, West Enclave, Pitampura, Delhi was purchased from the erstwhile owner

Sh. H.K. Saxena on 1.3.1995. It was the case of the appellants/plaintiffs that the original owner Sh. H.K. Saxena had sold the suit property to the appellant no.1/plaintiff no.1/Sh. Pawan Kataria but the transfer documents were executed in the name of the respondent no.1/defendant no.1 as the parties are related as real brothers-in-law. It is the case of the appellants/plaintiffs that the respondent no.1/defendant no.1 had undertaken to re-transfer the suit property in the name of the appellant no.1's/plaintiff no.1's wife Smt. Poonam, and that for this purpose the documents dated 5.3.1997 were executed, and with respect to this Contract dated 5.3.1997 specific performance was sought. These documents dated 5.3.1997 were Affidavit, Agreement to Sell, Power of Attorney etc. The original documents dated 5.3.1997 as per the appellants/plaintiffs were taken away by the respondent no.1/defendant no.1 from the house of the appellant no.1/plaintiff no.1 and appellant no.1/plaintiff no.1 therefore only had photocopies of these documents dated 5.3.1997 with him. Accordingly, as per the suit plaint it was pleaded that the suit be decreed and the suit property be transferred in the name of the

appellant no.1/plaintiff no.1 in terms of the documentation dated 5.3.1997.

4. Suit was contested by the defendants and it was pleaded that the suit property was not purchased by the appellant no.1/plaintiff no.1, but that the suit property was purchased by the respondent no.1/defendant no.1. The total sale consideration was Rs.3 lacs and this amount was paid to erstwhile owner Sh. H.K. Saxena by banking instruments. Out of the sum of Rs.3 lacs, a sum of Rs.1.50 lacs was paid by the defendant no.1 by means of account payee Cheque no.1109808 from his Saving Bank Account in Union Bank of India, Shahdra Branch, New Delhi and the balance amount of Rs.1.50 lacs was paid by making of a Bank Draft no.06290 dated 6.1.1995 from Oriental Bank of Commerce, Ferozepur Cantt. Both these banking instruments were in the name of the seller Sh. H.K. Saxena and consequently by transfer documents dated 1.3.1995 being the Agreement to Sell etc the suit property came to be purchased by the respondent no.1/defendant no.1. It was denied that the respondent no.1/defendant no.1 had ever executed the re-transfer documents dated 5.3.1997 in favour of Smt. Poonam, the wife of the appellant

no.1/plaintiff no.1. It was also denied that the original documents of the suit property were taken away by the respondent no.1/defendant no.1 from the house of the appellant no.1/plaintiff no.1.

5. Issues were framed in the suit on 25.4.2011, and these issues read as under:-

- “1. Whether the suit has not been properly valued? OPD
2. Whether the suit is barred under Order 2 Rule 2 CPC? OPD
3. Whether the plaintiff has no locus standi to file the present suit, in his personal capacity? OPD
4. Whether the suit is barred by time? OPD
5. Whether the plaintiff is entitled to a decree for specific performance of agreement dated 05.03.1997, as prayed? OPD
6. Whether the plaintiff is entitled to a decree of mandatory injunction against the defendants, as prayed? OPP
7. Whether the plaintiff is entitled to a decree against defendant No.3 for mutation of impugned flat in the name of the plaintiff, as prayed? OPP
8. Whether the plaintiff is entitled to a decree of permanent injunction against defendant No.1 & 2, as prayed? OPP
9. Relief.

Additional issue framed on 2.3.2013

Whether suit filed by the plaintiff is based on forged and fabricated documents? OPD”

6. Right from 2.3.2013, and when the additional issue was framed, and till 27.5.2016, adjournments were granted in the suit either because the appellants/plaintiffs did not lead evidence or the

appellants'/plaintiffs' application to lead secondary evidence was pending. It is seen that a total of three opportunities were granted/dates fixed for the appellants/plaintiffs evidence, and rest of the dates were fixed from 2.3.2013 till 27.5.2016 either for disposal of the application of the appellants/plaintiffs to lead secondary evidence or disposal of a formal amendment application to change of address, which was filed by the appellants/plaintiffs. The application to lead secondary evidence was dismissed by the Trial Court as per its Judgment dated 27.5.2016. By an Order dated 24.8.2016 passed by a learned Single Judge of this Court in CM(M) No.789/2016, the appellants/plaintiffs were given opportunity to lead secondary evidence, and therefore, taking note of this fact the trial court on 31.1.2017 fixed the long date of 1.5.2017 for the appellants/plaintiffs to lead secondary evidence, but on 1.5.2017 since no evidence was led, trial court therefore closed the right of the appellants/plaintiffs to lead additional evidence and consequently dismissed the suit inasmuch as since appellants/plaintiffs led no evidence, the respondents/defendants also did not feel any necessity to lead the additional evidence.

7(i) Learned counsel for the appellants/plaintiffs argued before this Court that appellants/plaintiffs be given one opportunity to lead evidence and the matter be remanded.

(ii) Ordinarily Courts are liberal in granting opportunity to lead evidence but in the facts of the present case it is seen that really the issue is not of one opportunity but the fact that issues were framed way back on 25.4.2011 and there was really no need for filing an application to lead secondary evidence because secondary evidence is automatically taken on record provided in the examination-in-chief of a witness basis is laid as to non-availability of originals and on that basis secondary evidence is thereafter led. Also, in order to examine the *bonafides* of the appellants/plaintiffs in case such as the present, I have in a *prima facie* manner sought to understand the merits of the disputes as to whether injustice will be caused to the appellants/plaintiffs by not allowing the appellants/plaintiffs to lead evidence, and which should be allowed as per the appellants/plaintiffs by recalling the order dated 1.5.2017 passed by the trial court closing the right of the appellants/plaintiffs to lead the evidence.

8. In my opinion, the following aspects/reasons show that the suit filed by the appellants/plaintiffs prima facie is a *malafide* suit, and therefore, this Court in the peculiar facts of the present case would not like to exercise discretion to allow the appellants/plaintiffs to lead evidence. The reasons are:-

(i) If the appellants/plaintiffs claim that it is the appellant no.1/plaintiff no.1 who had purchased the property from the erstwhile owner Sh. H.K.Saxena, and that the payments were made by the respondent no.1/defendant no.1 on behalf of appellant no.1/plaintiff no.1, then, surely the original title documents executed by Sh. H.K.Saxena ought to have been in possession of the appellant no.1/plaintiff no.1, but it is not even the case of the appellant no.1/plaintiff no.1 that original documents executed by Sh. H.K.Saxena of the suit property are in possession of the appellant no.1/plaintiff no.1. The original documents with respect to the suit property are in possession of the respondent no.1/defendant no.1.

(ii) The stands of the appellants/plaintiffs of ownership of the suit property are contradictory. This is because on the one hand it is claimed that the suit property was purchased by i.e owned by the

appellant no.1/plaintiff no.1, though in the name of the respondent no.1/defendant no.1, yet the subject suit is a suit for specific performance of the documentation dated 5.3.1997, and as per the case of the appellants/plaintiffs by these documents dated 5.3.1997, the respondent no.1/defendant no.1 agreed on payment of consideration to re-transfer the suit property to the appellant no.1's/plaintiff no.1's wife Smt. Poonam. Re-transfer necessarily therefore means that firstly it is the respondent no.1/defendant no.1 who is the owner of the suit property and not the appellant no.1/plaintiff no.1, and therefore this stand of the appellants/plaintiffs is mutually destructive of the stand of the appellants/plaintiffs that the suit property was owned by the appellant no.1/plaintiff no.1 though the documentation were executed by Sh. H.K.Saxena in favour of the respondent no.1/defendant no.1.

(iii) Also it is seen that as per the alleged re-transfer documentation dated 5.3.1997, it is shown that a consideration of Rs.4,20,000/- has in terms of these documents dated 5.3.1997 already been paid in cash to the respondent no.1/defendant no.1, and therefore really there did not arise any issue of execution of any re-transfer documents because the set of documents dated 5.3.1997 themselves being prior to the

amendment of Section 53A of Transfer of Property Act, 1882 with effect from 24.9.2001 by Act 48 of 2001, the appellant no.1's/plaintiff's no.1 wife Ms. Poonam always (by these documents dated 5.3.1997) had rights equal to ownership rights under Section 53A of the Transfer of Property Act and hence there was really no need for seeking of execution of re-transfer documents by the respondent no.1/defendant no.1 in favour of the wife of the appellant no.1/defendant no.1.

(iv) It is also required to be noted that the payment of consideration of Rs.4,20,000/- by Smt. Poonam to defendant no.1/respondent no.1 is conveniently said to have been paid in cash and not through any banking instrument, with the fact that there is nothing on record whatsoever or even so pleaded by the appellants/plaintiffs as to how the sum of Rs.4,20,000/- existed with Ms. Poonam for being paid to respondent no.1/defendant no.1.

(v)(A) In fact, even taking it in one way or the other, that re-transfer was or was not required, the fact of the matter is that on the execution of the Agreement to Sell dated 5.3.1997, allegedly executed by the respondent no.1/defendant no.1 in favour of Ms. Poonam, the wife of

the appellant no.1/plaintiff no.1 being more or less a complete as per Section 53A of the Transfer of Property Act as then existing, the wife of the appellant no.1/plaintiff no.1 Smt. Poonam from 5.3.1997 hence could have applied for mutation of this property in the necessary public records, but admittedly from 5.3.1997 till the suit was filed around 13 years later on 18.9.2010 not a single step was taken by the appellant no.1/plaintiff no.1 or his wife Smt. Poonam for getting the alleged documents dated 5.3.1997 recorded in any public record whatsoever. Thirteen years is indeed a long period, and that if really there did exist the documentation dated 5.3.1997, there is no reason why such documents would not have been acted upon and come in the public domain in the long period of 13 years from 5.3.1997 till filing of the suit in September ,2010.

(B) Also, Ms. Poonam, the wife of the appellant no.1/plaintiff no.1, was alive for around 10 years after the documents were executed because she is said to have been died in the year of 2007 and from 1997 till 2007, the wife of the appellant no.1/plaintiff no.1 took no open and declared steps to claim rights in the suit property on the basis of the documentation dated 5.3.1997.

9. Learned counsel for the appellants/ plaintiffs argued that on 1.5.2017 no evidence was led because compromise talks were going on, however, I do not agree with this argument not only because this is not recorded in the order dated 1.5.2017, and which is to be taken with the fact that in the peculiar facts of this case where over 4 years had already gone for plaintiffs to lead evidence, the appellants/plaintiffs could not have presumed that the Court would automatically give them an adjournment on account of alleged compromise talks. I therefore reject the argument that the appellants/plaintiffs should now be given one more opportunity to complete their evidence.

10. In view of the aforesaid discussion, and rejection of the contention of the counsel for the appellants/plaintiffs that they should be allowed one more opportunity to lead evidence, the impugned judgment of the trial court dated 1.5.2017 does not call for any interference. Dismissed.

JULY 19, 2018/ Ne

VALMIKI J. MEHTA, J