* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision: 1st May, 2018

\+ **CS(OS) 638/2017**

SHARMISTHA SANYAL & ANR ..... **Plaintiffs**

Through: Mr. Lohit Ganguly, Adv.

Versus

SUJIT SEN & ORS ..... **Defendants**

Through: Mr. Shatadev Chakraborty, Ms. Sonia Dube and Ms. Surbhi Anand, Advs. for D-1.
Mr. Arjun Mitra, Adv. for D-2&3.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

IA No.2848/2018 (of D-1 u/O VII R-11 CPC)

1. The plaintiffs have filed the present suit pleading:

(i) that the land underneath property No.J-1975, Chitranjan Park, New Delhi was earlier granted on leasehold basis and was subsequently on 1st March, 2000 converted into freehold;

(ii) that in the year 2002, defendant No.1 Sujit Sen and his brother Subir Sen executed a registered Partition Deed dated 15th April, 2002 partitioning the property aforesaid into two equal halves, with the front part going to Subir Sen and the rear half falling to the share of the defendant No.1 Sujit Sen;

(iii) that the said Subir Sen had died, leaving defendants No.2&3 Arghya Sen and Aparajita Sen as his heirs;

(iv) that partition of the plot of land underneath the property aforesaid into two halves, was void *ab initio*, being contrary to the Master Plan of Delhi and the Building Bye-Laws and other regulations, and thus Subir Sen and the defendant No.1 remained owners in equal share of the entire property;

(v) that the defendant No.1, vide Sale Deed dated 7th May, 2014, sold the first floor of the rear half of the property to the two plaintiffs;

(vi) that the defendant No.1, preceding the sale, explained to the plaintiffs that he had partitioned the plot with his late brother Subir Sen and under the said partition, he owned the rear half of the property only and the front half belonged to the share of his late brother Subir Sen; it was further represented to the plaintiffs that as per standard practice, the plaintiffs would have a proportionate ownership interest in the entire rear half of the plot;

(vii) that though the Partition Deed dated 15th April, 2002 was disclosed by the defendant No.1 to the plaintiffs but the defendant No.1 did not disclose to the plaintiffs that the said partition was illegal, void *ab initio* and contrary to law;

(viii) that the plaintiffs, at the time of purchase, had enquired from the defendant No.1 as to what would be the share of the plaintiffs in the property in the eventuality of the entire structure on the plot of land collapsing and/or if all the owners of the property decided to sell the property jointly and the defendant No.1 had informed the plaintiffs that the shares of all the owners would be proportionate;

(viii) that the defendant No.1 had also represented to the plaintiffs that if the additional Floor Area Ratio (FAR) would be available on the property, the plaintiffs would have a share therein;

(ix) that the plaintiffs paid consideration of Rs.1.50 crores out of which Rs.62 lakhs less TDS was paid by cheque and the remaining in cash but against receipt;

(x) that the plaintiffs came in possession of the first floor of the rear half of the property in May, 2014 and got the same mutated in their names and the electricity and water connections of the first floor of the rear half of the property were also transferred in the names of the plaintiffs;

(xi) that the rear half of the property, at the time of purchase by the plaintiffs, comprised of ground, first and second floors with terrace above and in which everybody has proportionate rights;

(xii) that the defendant No.1 approached the plaintiffs in 2015 for raising construction of a floor above the second floor and claimed to have obtained the consent of defendants No.2&3 therefor and further stated that the said additional floor could be built jointly by everyone;

(xiii) however the Structural Engineer opined and advised that the additional floor is unfeasible under the existing rules and the existing structure of the building also could not take the load thereof;

(xiv) that the defendant No.1 filed Suit No.208/2015 against the plaintiffs and the same is now pending in the Court of Additional District Judge (ADJ)-04, South-East, Saket Courts, New Delhi;

(xv) that since the Partition Deed dated 15th April, 2002 was/is void *ab initio*, the defendant No.1 could not have alone created title with respect to any specified portion in favour of the plaintiffs and could have at best transferred his undivided share in the property to the plaintiffs;

(xvi) that the Agreement to Sell dated 31st December, 2013 executed by defendant No.1 in favour of the plaintiffs was thus void *ab initio*;

(xvii) that the defendant No.1, vide his letter dated 4th November, 2016, offered to buy back the share of the plaintiffs but for a price of Rs.62 lakhs only and not for the value of Rs.1.5 crores paid by the plaintiffs; and,

(xviii) that the structure of the property aforesaid is unstable and the property may collapse at any time;

2. On the aforesaid pleas, the plaintiffs have claimed the following reliefs:

(a) declaration of the Partition Deed dated 15th April, 2002 as void *ab initio*;

(b) declaration that the property is co-owned by the parties with each of the plaintiffs No.1&2 having 1/12th share, defendant No.1 having 1/3rd share and each of the defendants No.2&3 having 1/4th share each;

Or in the alternative

(c) declaration as void *ab initio* of the Agreement to Sell dated 31st December, 2013 by the defendant No.1 in favour of the plaintiffs;

On in the alternative

(d) mandatory injunction directing defendant No.1 to perform and carry out the offer contained in his letter dated 4th November, 2016 of buying back the share conveyed to the plaintiffs;

Or in the alternative

(e) declaration that the actual consideration amount paid by the plaintiffs for purchase was Rs.62 lakhs but the defendant No.1 had received Rs.1.5 crores (less TDS deducted) and therefore is liable to restitute the balance amount of Rs.88,00,000/- to the plaintiffs.

3. The counsel for the defendant No.1 seeks rejection of the plaint and has argued (i) that the plaintiffs have not sought declaration of the Sale Deed in their favour as null and void; (ii) that under the said Sale Deed, the plaintiffs have acquired definite portion of the property and are not entitled to seek the relief of partition; (iii) that the plaintiffs have no locus to challenge the partition between the defendant No.1 on the one hand and the predecessor of the defendants No.2&3 on the other hand; (iv) that the relief of declaration of the Partition Deed as null and void is barred by time; the plaintiffs were informed of the Partition Deed at the time of Sale Deed dated 7th May, 2014 itself and the suit has been filed beyond three years therefrom; (v) that the plaintiffs, in the suit earlier filed by the defendant No.1, have stated that there is no written agreement to sell and are now estopped from relying on the Agreement to Sell dated 31st December, 2013; and, (vi) the said Agreement to Sell is unregistered and finds no mention in the Sale Deed.

4. It is argued by the counsel for the defendant no.1 that, the plaintiffs have no locus to challenge the Partition Deed dated 15th April, 2002

between the predecessor of the defendants no.2&3 and the defendant no.1; the plaintiffs executed the Sale Deed dated 7th May, 2014 knowing of the said partition and of the entitlement of the defendant no.1 alone to sell the first floor of the rear half of the property to the plaintiffs was owing to the said Deed of Partition and the plaintiffs, without invalidating the Deed under which they have stepped into the property, cannot, while remaining in the property, challenge the said Deed of Partition; the plaintiffs have shied away from seeking annulment of the Sale Deed in their favour and claim refund/damages from the defendant no.1; the plaintiffs, while continuing to retain title under the Sale Deed, cannot challenge the document of title of the defendant no.1 to the property and on the basis whereof the defendant no.1 executed the sale in favour of the plaintiffs.

5. The counsel for the plaintiffs has argued (i) that the plaintiffs have filed the present suit to find out as to what is their share in the property as the plaintiffs are at a total loss about the same; (ii) the plaintiffs do not know that if the property falls down or is demolished, what will be the share of the plaintiffs; (iii) that the use of the word 'proportionate' does not tell the plaintiffs their share in the property and share in the property cannot keep on fluctuating, depending upon the additional construction carried out in the property; (iv) that the Partition Deed dated 15th April, 2002 is null and void and is contrary to the Building Bye-laws of Delhi and the Master Plan; and, (v) that once the Partition Deed is null and void, then the share of the defendant no.1 on the one hand and the defendants no.2&3 on the other hand would be equal and the plaintiffs have acquired a share out of the 50% share of the defendant no.1 in the property.

6. The counsel for the plaintiffs has referred to ***Bansi Lal Vs. Som Parkash*** AIR (39) 1952 Punjab 38 and ***Arunesh Punetha Vs. Boston Scientific Corporation*** MANU/DE/2890/2005 on the aspect of partial rejection of the plaint being not permissible.

7. The counsel for the plaintiffs has also referred to ***Sanjay Kaushish Vs. D.C. Kaushish*** AIR 1992 Del 118 and ***Prem Singh Vs. Birbal*** (2006) 5 SCC 353 to contend that there is no need for the plaintiffs to file for cancellation of the Sale Deed in favour of the plaintiffs.

8. The counsel for the plaintiffs has also argued (i) that the limitation will not commence from the date of execution of the Sale Deed because the plaintiffs came to know that the Partition Deed is void when they came to their Advocate to defend the suit filed by the defendant no.1 against them; (ii) that the question of *locus standi* of the plaintiffs to challenge the Partition Deed does not arise; (iii) that the defendant no.1 also has a sister who has not been given any share in the property; (iv) that the plaintiffs have filed a certificate of the Structural Engineer; and, (v) that the structure of the building is faulty and the building is likely to fall any day; it is argued that the plaintiffs cannot be compelled to reside in a dangerous building.

9. The counsel for the defendant no.1 states that the plaintiffs are not even occupying the property.

10. The counsel for the defendants no.2&3 has supported the counsel for the defendant no.1.

11. The clauses in the Sale Deed, executed by the defendant no.1 in favour of the plaintiffs, and copy of which has been filed by the plaintiffs before this Court, relevant for the present purposes are as under:-

> *"**WHEREAS** by virtue of Perpetual Lease Deed, the President of India through L&DO, New Delhi, granted unto Smt. Supravaa Sen W/o Late Shri B.B. Sen leasehold rights in perpetuity in respect of a residential plot of land bearing No.J-1975, measuring 360 sq. yds., situated at Chittaranjan Park, New Delhi – 110 019, within the limits of Municipal Corporation of Delhi (hereinafter referred to as 'THE SAID PLOT OF LAND') vide Perpetual Lease Deed dated 11.10.1974, duly registered as Document No.3454, in Addl. Book No.I, Volume No.3428, on pages 01 to 04, on 14.11.1974, in the office of the Sub-Registrar, New Delhi."*
>
> ***AND WHEREAS** after the demise of the above said the said Smt. Suprava Sen W/o Late Shri B.B. Sen, on 10th February 1996, her two sons namely Shri Subir Sen and Shri Sujit Sen, got the leasehold rights in respect of aforesaid property substituted in the records of Government of India, Ministry of Urban Affairs and Employment Nirman Bhawan, New Delhi vide Substitution Letter No. L&DO/PS-II/572 dated 14.07.1997 on their joint names, Shri B.B. Sen has already passed away on 13th February, 1970.*
>
> ***AND WHEREAS** the said Shri Subir Sen and Shri Sujit Sen both sons of Late B.B. Sen, also got the leasehold rights in respect of the said plot of land converted into freehold in their own names from the President of India, through L&DO, New Delhi, vide Conveyance Deed dated 03.11.1999, duly registered as Document No.1942 in Addl. Book No.I, Volume No.1809 on pages 185 to 188 dated 01.03.2000, in the Office of the Sub-Registrar, New Delhi.*

***AND WHEREAS** the above said Shri Subir Sen and Shri Sujit Sen, re-constructed/re-developed a residential building on the said property after demolishing the old structure with their own funds and resources after getting the building plan sanctioned from Municipal Corporation of Delhi, vide their Letter No.365/B/CZ/2001/334 dated 24.04.2001.*

***AND WHEREAS** both the above said Shri Subir Sen and Shri Sujit Sen, further entered into a Partition Deed dated 15.04.2002, duly registered as Document No.2747 in Book No.I, Volume No.2780 on pages 154 to 159 dated 16.04.2002.*

***AND WHEREAS** as per the above said Registered Partition Deed, Shri Sujit Sen, the Vendor herein, became the owner of Rear Portion of the above Said Property Bearing No.J-1975, now measuring 180 Sq. Yards.*

***AND WHEREAS** now the Vendor for his bonafide needs and requirements has agreed to sell, transfer and convey the ownership rights of First Floor-Rear Portion of Property bearing No.J-1975, situated at Chittaranjan Park, New Delhi – 110 019 on land measuring 150.45 Sq. Mtrs., alongwith proportionate, undivided, indivisible and impartible leasehold/ownership rights in the land underneath with electricity fittings and connection, water fittings and connection other interior fittings and fixtures installed therein, with all rights, title, interest, easements, privileges and appurtenances thereto with all rights in common entrance, passage, staircase, and other common facilities and amenities provided therein, separate water tank on terrace and underground water tank, (hereinafter collectively called the 'Said Portion of the Said Property'), unto the Vendees, <u>for a total sum of Rs.62,00,000/- (Rupees Sixty Two Lakh Only) and the Vendees have agreed to purchase the same from the Vendor, for the same amount.</u>*

<u>NOW THIS SALE DEED WITNESSETH AS UNDER:</u>

1. *That – That in pursuance of the said agreement and in consideration of Rs.61,38,000/- (Rupees Sixty One Lakh Thirty Eight Thousand Only) which sum has been received by the Vendor from the Vendees (after deducting 1% TDS from the above said consideration amount of Rs.62,00,000/- and the same will be deposited with the Central Government (Income Tax Account) and the Vendees will issue certificate of TDS to the Vendor within 7 days) as entire sale consideration in full and final settlement in the following manner:-*
2. *<u>That the Vendor doth hereby grant, convey, sell, transfer and assign all its rights, titles, interests, claims, benefits in the 'Said Portion of the Said Property' i.e. First Floor-Rear Portion of Property bearing No.J-1975, situated at Chittaranjan Park, New Dehli – 110 019, on land measuring 150.45 Sq. Mtrs., alongwith proportionate, undivided, indivisible and impartible leasehold/ownership rights in the land underneath with the electricity fittings and connection, water fittings and connection other interior fittings and fixtures installed therein with all rights, title, interest, easements, privileges and appurtenances thereto with all rights in common entrance passage, staircase and other common facilities and amenities provided therein, separate water tank on terrace and underground water tank to have and to hold the same onto the Vendees herein absolutely and forever</u>.*
3. *That the actual, clear, lawful, physical, vacant and peaceful possession of the 'Said Portion of the Said Property' has been delivered and handed over by the Vendor to the Vendees and the Vendees have taken over the 'Said Portion of the Said Property' on the spot.*
6. *That the Vendor hereby also grant, assure and convey to the Vendees alongwith the 'Said Portion of the Said*

Property' proportionate, undivided, indivisible, pro-rated impartible share, rights, interests and titles in the freehold plot with all rights, titles, ownership, possession, interest, easement, privileges and appurtenances thereto with all fittings and fixtures, sewer connection, together with the common rights of ingress and egress and use of the main entrance gate, common driveway, passage, separate/common overhead and underground water tank and other common facilities and amenities provided therein, liberties, privileges, appendages, advantages, appurtenances, etc. whatsoever and however, TO HAVE AND HOLD the same jointly and in common with the other occupants of the Said Building.

10. *That the Vendees can get the 'Said Portion of the Said Property' mutated in their own name in the records of M.C.D. and other concerned authorities on the basis of this Sale Deed or through its certified copy.*

12. *That the proportionate monthly common maintenance charges, if any, will be paid by the Vendees in proportion of the area occupied by her/him.*

13. *That the Vendees shall have, as a matter of right, right to use all common entrances, passages, staircase, Mumty and other common faculties as are available in the said building.*

14. *That the common passage and other common services in the Said Building shall remain common. The Vendees shall use and enjoy these services and shall also proportionately share the expenses incurred from time to time for the maintenance of the Said common services with the other owners/occupants of the Said Building.*

17. *That the owners/occupants of the Said Building shall have full right of access through staircase to the top terrace (common area) inter alia at all reasonable times for the*

inspection and maintenance of the water tanks and the installation/maintenance of antennas etc. thereon. That similar condition shall apply to the underground water tank and booster pump etc.

18. *That it is further clarified that the owner of the Terrace shall have full right to raise further construction on the terrace after taking due permission from the MCD and in such event the owner of terrace shall shift the common utility/facilities such as Water Tanks, Mumty on the newly built top terrace at its own cost and expenses and shall ensure that during the course of the construction no damage is caused to the existing structure of the building and the normal water supply is maintained.*

26. *That in the event of the building being damaged or not remaining in existence on any account whatsoever then the Vendees shall have the proportionate rights in the land alongwith other owners of the building and shall have the right to raise construction in proportion to the one as now being sold, conveyed and being transferred under this Sale Deed.*

29. *That the Vendor and Vendees have confirmed that they have been made understood the contents of the Sale Deed in their vernacular language by the Witnesses to this Sale Deed."*

12. As would be obvious from the above, the plaintiffs, under the Sale Deed aforesaid have acquired not an undivided interest or share in the property but specific demarcated portion of the property and have disclaimed rights in the other portions of the property and the plaintiffs being the owner of separate specified portion of the property have no right to seek partition of the entire property which can be claimed only by a

person having undivided share in the property without any specific portion being marked for his/her exclusive use. The question of the plaintiffs being entitled to the relief of declaration, of each of the plaintiffs having 1/12th undivided share in the property or of the defendants being entitled to the shares as claimed by the plaintiffs, does not arise. As and when any dispute arises, determination of which would require determination of share of plaintiffs in the land underneath the property, the same would be determined.

13. As far as the argument of the counsel for the plaintiffs that the plaintiffs do not know what meaning to assign to the word 'proportionate' share in the land underneath the property and/or what will be the situation in the eventuality of the property being demolished or being acquired and in what proportion the compensation or proceeds of the property shall be shared, is concerned, no law permits a person to approach the Court for knowing his rights. The Courts only adjudicate rights which are in dispute/issue between the parties and do not give advance rulings. The plaintiffs have not shown any cause of action for knowing their share in the percentage of their proportionate share in the land underneath the property and as and when a cause of action therefor arises for the plaintiffs and the plaintiffs or any other person approaches the Court with the dispute, the dispute will be decided by the Courts in accordance with law. As far back as in ***Central Bank of India Vs. Workmen*** AIR 1960 SC 12 and reiterated by the Division Bench of this Court in ***Federation of Indian Mineral Industries (FIMI) Vs. Union of India*** 2015 (147) DRJ 137 and ***The Delhi Network of Positive People Vs. Union of India*** MANU/DE/1401/2015, it

was held that Courts do not give rulings in vacuum, without any dispute for resolution before them.

14. As far as the relief claimed by the plaintiffs of declaration as void *ab initio* of Partition Deed, between the defendant No.1 on one hand and predecessor of defendants No.2&3 on the other hand, is concerned, it has been held in ***Inderjit Singh Vs. Tarlochan Singh*** (1991) ILR 2 Delhi 617, ***Chiranji Lal Vs. Bhagwan Das*** AIR 1991 Del 325, ***Mohinder Singh Vs. Kartar Lal*** 1997 (41) DRJ 264 and ***Ram Lal Sachdev Vs. Sneh Sinha*** AIR 2000 Del 92 that even if partition of land is prohibited, partition of superstructure is permissible. Thus, even if there is any bar under the Master Plan or under the Building Bye-laws of Delhi, though only vague pleadings and arguments are made and nothing is shown, the same does not prevent the partition of superstructure (while keeping the land underneath the structure joint) and a separate demarcated portion whereof the plaintiffs have purchased. It appears that the plaintiffs, after paying price of first floor on rear half of property, have now turned greedy and want a foothold into other more valuable parts of the property also.

15. As far as the relief claimed by the plaintiffs with respect to the Agreement to Sell dated 31st December, 2013 is concerned, the said Agreement to Sell has already acted itself out on execution of the Sale Deed in pursuance thereto and stands superseded by the Sale Deed. The plaintiffs now are disentitled from claiming any relief qua the Agreement to Sell which has been novated by the Sale Deed. Reference if any required in this regard can be made to Section 62 of the Contract Act, 1872.

16. As far as the prayer and on which the counsel for the plaintiffs also laid much emphasis, of the defendants being required to abide by their offer of 4th November, 2016 of purchasing back what was conveyed under the Sale Deed aforesaid to the plaintiffs is concerned, the plaintiffs therefor are required to file a suit for specific performance of the offer contained in the letter dated 4th November, 2016 by making the requisite pleas therefor and cannot seek a decree for mandatory injunction qua the same. The relief of mandatory injunction has also not been valued for the purposes of court fees and jurisdiction as a relief of specific performance is required to be so valued. Rather, the counsel for the plaintiffs at this stage states that the plaintiffs are not seeking specific performance. Thus the plaintiffs are not entitled to the said relief of mandatory injunction as well.

17. The last of the reliefs claimed by the plaintiffs, is of declaration and seeking restitution of the balance amount of Rs.88,00,000/- claimed to have been paid.

18. The plaintiffs, if at all entitled to recover Rs.88,00,000/- from the defendant no.1, are required to sue for recovery thereof and cannot seek the said relief in the garb of the relief of declaration and restitution. Admittedly on the relief of recovery of Rs.88,00,000/- also, no court fees has been paid.

19. The counsel for the plaintiffs now today states that he will pay the court fees on Rs.88,00,000/-.

20. Though under Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC) opportunity therefor has to be granted but the present is not found to be a fit case to grant such opportunity inasmuch as the relief of recovery of Rs.88,00,000/- would be below the minimum pecuniary

jurisdiction of this Court and the plaintiffs, if at all entitled to the said relief, will have to institute a suit therefor in the Court of appropriate pecuniary jurisdiction. It may also be mentioned that the Sale Deed is dated 7th May, 2014 and this case was instituted on 27th October, 2017 i.e. beyond three years from the date of Sale Deed. A question would also arise whether the claim of recovery would be within time. *Prima facie* it appears to be barred by time on the date of institution of the suit and the counsel for the plaintiffs is today unable to even state as to which Article of the Limitation Act, 1963 would apply.

21. Thus, each of the reliefs claimed in the plaint is misconceived and the plaintiffs, even on demurrer, are not entitled thereto.

22. Resultantly, the application under Order VII Rule 11 of the CPC is allowed and the plaint is rejected.

23. The plaintiffs are also burdened with costs of Rs.1,00,000/- of this suit, payable to defendant No.1.

RAJIV SAHAI ENDLAW, J.

MAY 01, 2018
bs/pp

HIGH COURT OF DELHI
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