* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision: 29th March, 2019.

\+ **CS(OS) No.175/2019 & IA No. 4616/2019 (u/s 151 CPC)**

MAHENDER KEHAR .....**Plaintiff**

Through: Mr. Jaspreet Singh Rai, Adv.

Versus

SKYLAND BUILDERS PVT. LTD. & ORS. ...**Defendants**

Through: None.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff has instituted this suit against (i) Skyland Builders Pvt. Ltd; (ii) Lalit Mohan Madhan; (iii) Prateek Madhan; (iv) Sunil Kumar; and, (v) Sunrise Constructions, pleading that:-

(i) the father of the plaintiff late Shri Desh Raj Kehar, during his lifetime had purchased and acquired a plot of land *ad measuring* 1083 sq. yds. bearing Municipal No.D-8, New Delhi South Extension (NDSE), Part-II, New Delhi vide Sale Deed dated 16th February, 1957;

(ii) the said Shri Desh Raj Kehar died on 12th April, 1967 leaving behind his wife Smt. Durga Devi Kehar and three sons including the plaintiff and four daughters;

(iii) Shri Desh Raj Kehar had executed a Will dated 7th July, 1966 creating life interest in the aforesaid property in favour of his wife Smt. Durga Devi Kehar for her lifetime and thereafter the property was to devolve on all his children;

(iv) one of the sons of Shri Desh Raj Kehar died in July, 1972; he was unmarried and issueless;

(v) the wife of Shri Desh Raj Kehar i.e. mother of the plaintiff executed a General Power of Attorney in respect of the aforesaid property in favour of one of her daughters and who, acting thereunder sold a part of the land *ad measuring* 327 sq. yds. out of the total land *ad measuring* 1083 sq. yds. to Vidhata Construction Co. Pvt. Ltd.;

(vi) the mother of the plaintiff died on 3rd March, 1993 leaving a Will dated 4th February, 1993 bequeathing the property aforesaid exclusively in favour of the plaintiff;

(vii) relying upon the Will aforesaid of his mother, the plaintiff entered into an Agreement to Sell dated 27th August, 1999 with one Virender Bhatnagar;

(viii) in the year 2004, disputes arose between the plaintiff and his siblings with respect to the said property and the said disputes were resolved and a settlement was arrived at whereunder it was agreed that the plaintiff and each of his four surviving siblings namely (a) Dr. Prem Chand Kehar; (b) Ms. Swarn Kehar Kapur; (c) Dr. Ms. Ajit Murti; and, (d) Ms. Veena Wahi would be entitled to 1/5th undivided share in the property and a Declaration-cum-Undertaking dated 4th May, 2004 was executed;

(ix) on 22nd February, 2006, a joint application was also filed by the plaintiff and his four siblings aforesaid, for mutation of the property in their joint names and in the year 2006 itself the property so stood mutated;

(x) Dr. Ms. Ajit Murti, sister of the plaintiff, Dr. Prem Chand Kehar, brother of the plaintiff and the heirs of Ms. Swarn Kehar Kapur, sister of the plaintiff, vide Sale Deeds dated 28th April, 2006, 28th April, 2006 and 25th May, 2006 respectively sold their respective 1/5th share in the property to defendant no.4 Sunil Kumar;

(xi) Smt. Veena Wahi, sister of the plaintiff, on 18th September, 2007 executed an Agreement to Sell with respect to her 1/5th share in favour of defendant no.5 Sunrise Constructions, of which defendant no.4 is one of the partners;

(xii) defendant no.5 Sunrise Constructions filed CS(OS) No.154/2008 for specific performance of the said Agreement to Sell against the said Smt. Veena Wahi and which suit was decreed on 12th May, 2009 and RFA(OS) No.63/2009 against the said judgment and decree was also disposed of and a Sale Deed executed by Smt. Veena Wahi in favour of defendant no.5 Sunrise Constructions;

(xiii) M/s. AKN Developers Pvt. Ltd., claiming to be the nominee of Virender Bhatnagar aforesaid, filed CS(OS) No.1181/2005 for specific performance of the Agreement to Sell dated 27th August, 1999 executed by the plaintiff in favour of the said Virender Bhatnagar; the plaintiff contested the said suit, contending that though the plaintiff had entered into the Agreement to Sell as sole owner of the property but had only 20% share in the property under the Family Settlement with his siblings;

(xiv) one Praveen Jain filed CS(OS) No.1223/2009 for specific performance of a Receipt-cum-Agreement dated 26th July, 2008 purported to be executed by the plaintiff for sale of his 1/5th undivided share in the property to the said Praveen Jain;

(xv) one Vidhata Construction also filed CS(OS) No.2187/2008 against the plaintiff claiming right of passage from the front portion of the property;

(xvi) at the behest of his sister Smt. Veena Wahi, the plaintiff filed CS(OS) No.1366/2010 seeking setting aside of the judgment and decree dated 12th May, 2009 aforesaid in favour of Sunrise Constructions and for cancellation of Sale Deed executed by Smt. Veena Wahi in favour of Sunrise Constructions Pvt. Ltd.;

(xvii) the plaintiff, to corroborate his stand in CS(OS) No.1366/2010 against Sunrise Constructions Pvt. Ltd., was also constrained to file CS(OS) No.2224/2010 against defendant no.4 Sunil Kumar, challenging all the three sale deeds executed in his favour by Dr. Ms. Ajit Murti, Dr. Prem Chand Kehar and heirs of Smt. Swarn Kehar Kapur, siblings of the plaintiff;

(xviii) the plaintiff has been contesting/pursuing the aforesaid litigations;

(xix) the defendant no.2 Lalit Mohan Madhan approached the plaintiff in the year 2014 with an offer to purchase the suit property, representing that he would settle with all the concerned parties and lured the plaintiff by representing that the profit so generated, after cleaning the title of the property, would be shared by him with the plaintiff along with the defendants no.1 to 3; the defendant no.3 Prateek Madhan is the son of defendant no.2 Lalit Mohan Madhan and both of them are directors of defendant no.1 Skyland Builders Pvt. Ltd.;

(xx) the plaintiff informed the defendants no.2&3 of all the pending cases and that though the plaintiff was claiming himself to be the sole and absolute owner of the property but his rights therein were bound by the Family Settlement dated 4th May, 2004 with his siblings and on the basis whereof mutation was also carried out in the year 2006;

(xxi) the defendants no.2&3, after verifying and perusing the entire record of all the cases, were satisfied and assured the plaintiff that they would take care of all the legal proceedings;

(xxii) the plaintiff executed a Power of Attorney dated 14th August, 2014 in favour of defendant no.2 to enable the defendants no.1 to 3 to inspect the Court record of all cases;

(xxiii) Memorandum of Understanding (MoU) was signed by the plaintiff and defendants no.1 to 3 in the month of September, 2014;

(xxiv) the defendants no.1 to 3, to lure the plaintiff, had started making payments to the plaintiff even prior to the execution of the MoU in September, 2014;

(xxv) the defendants no.1 to 3 represented to the plaintiff that they would be in a position to settle all the disputes if the plaintiff executes a Sale Deed in their favour; the plaintiff opposed stating that there was an interim injunction vide order dated 31st August, 2005 against the plaintiff in the suit filed by M/s. AKN Developers Pvt. Ltd. as well as vide order dated 10th July, 2009 in the suit filed by Praveen Jain;

(xxvi) the defendants no.1 to 3 assured the plaintiff that they had already entered into a settlement with M/s. AKN Developers Pvt. Ltd. and Praveen Jain and on execution of Sale Deed in their favour by the plaintiff, the said M/s. AKN Developers Pvt. Ltd. and Praveen Jain will withdraw the suits filed by them;

(xxvii) the plaintiff, on such assurances executed the Sale Deed dated 23rd January, 2015 for a total sale consideration of Rs.16 crores; however the defendants no.1&2 gave post-dated cheques for the remaining consideration;

(xxviii) though the Sale Deed mentions a payment of Rs.16 crores to the plaintiff but the plaintiff was only paid Rs.4,95,00,000/- and the defendant no.2 stated that the amount as reflected in the Sale Deed was only a notional figure so as to get the Sale Deed registered in view of prevailing circle rates;

(xxix) the sale deed was not to transfer and convey any rights in favour of defendants no.1 to 3 but only to facilitate them to get the settlement effected with various other parties claiming adversely to the plaintiff;

(xxx) the Sale Deed was never meant to be acted upon till all the disputes were settled;

(xxxi) the defendants no.1 to 3, even after the Sale Deed, continued to make some *ad hoc* payments to the plaintiff from time to time, amounting to Rs.85,00,000/-, and the defendants no.1 to 3 stated that the same were towards interest;

(xxxii) the plaintiff has thus received a total sum of Rs.5,80,00,000/- from the defendants no.1 to 3 till the year 2017;

(xxxiii) since the defendants no.1 to 3 failed to pay the balance sale consideration with respect to the property inspite of three years from the date of the Sale Deed, the plaintiff got issued a Legal Notice dated 17th January, 2018 served on the defendants asking them to pay the balance sale consideration of Rs.11.05 crores along with interest;

(xxxiv) no reply was given by the defendants no.1 to 3 to the notice but the defendants, between 19th April, 2018 and 29th September, 2018 made deposits through RTGS in the account of the plaintiff of the total value of Rs.65,00,000/-;

(xxxv) in or about July/August, 2018, the plaintiff was served with notice of an application being IA No.8081/2018 filed by M/s. AKN Developers Pvt. Ltd. in CS(OS) No.1181/2005, seeking initiation of contempt proceedings against the plaintiff for violation of the interim order in that suit restraining the plaintiff from dealing with the property;

(xxxvi) immediately on receipt of notice, the plaintiff approached defendant no.2 but defendant no.2 refused to entertain the plaintiff and claimed to be the sole absolute owner of the property on the basis of Sale Deed dated 23rd January, 2015 executed by the plaintiff ; however the defendants no.1 to 3, on or about 29th September, 2018 made an RTGS of Rs.5,00,000/- in a different saving account of the plaintiff, purportedly in full and final payment; the plaintiff refused to accept the said payment which is still lying in the said account;

(xxxvii) the plaintiff then understood that the intention of the defendants no.2&3 was only to defraud and cheat the plaintiff;

(xxxviii) the Sale Deed dated 23rd January, 2015 executed by the plaintiff in favour of the defendants no.1 to 3 is illegal and liable to be set aside because:-

(a) it is in breach of interim order dated 31st August, 2005 in CS(OS) No.1181/2005 filed by M/s. AKN Developers Pvt. Ltd. and interim order dated 10th July, 2009 in CS(OS) No.1223/2009 filed by Praveen Jain against the plaintiff;

(b) the defendants no.1 to 3 got the Sale Deed executed without payment of Sale Consideration;

(c) possession of the property has never been handed over to the defendants no.1 to 3 and the plaintiff has always been and still enjoying possession;

(d) it was got executed by influencing the plaintiff and because the plaintiff never intended to complete the transaction;

(e) had the plaintiff been aware of the *mala fide* and dishonest intention of the defendants no.1 to 3, he would not have executed the Sale Deed;

(f) the plaintiff was not handed over a copy of the MoU or the Sale Deed got executed by the defendants no.1 to 3 from the plaintiff;

(g) though the defendants no.1 to 3 had filed an application for substitution in place of the plaintiff but had withdrawn the same; and,

(h) the plaintiff, vide Notice dated 17th January, 2018 has rescinded the agreement with the defendants no.1 to 3.

(xxxix) the plaintiff learnt of the fraud played by the defendants no.1 to 3 on him on receipt of notice in July/August, 2018 of application filed by M/s. AKN Developers Pvt. Ltd. for initiation of contempt proceedings against the plaintiff;

2. Para 44 of the plaint, qua limitation, is as under:-

> *"44. That the cause of action for filing the present suit is traceable to the execution of Will dated 07.07.1966 executed by Late Shri Deshraj Kehar and the Will dated 04.02.1993 executed by Late Smt. Durga Devi. The cause of action first arose when the Plaintiff executed impugned sale deed on 23.01.2015 in favour of the defendant no.1 but was not paid the sale consideration of Rs.16 crores, the cause of action further arose when the Defendants No.1-3 paid interest(s) towards sale consideration to the Plaintiff, it further arose when in January, 2018 the Plaintiff issued Notice to the said defendants to which they chose neither to reply nor to pay the outstanding. The cause of action further arose in the month of July-August 2018, when the plaintiff*

became aware of the fraud having been played by the defendant Nos.1-3 when he received the Application under Order XXXIX Rule 2A filed M/s AKN Developers Pvt. Ltd. in CS(OS) No.1181 of 2005. The cause of action further arose on 23.10.2018 when the Complaint was filed before the SHO, Hauz Khas but the Defendants still failed to pay the outstanding amounts. The cause of action further arose in December 2018 when the Defendant No.1 through the other Defendants and Board Members intimidated the Plaintiff and threatened him with dire consequences in case the property is not vacated. The cause of action is till subsisting and continues to accrue in favour of the Plaintiff."

3. The plaintiff has sought *inter alia* the following reliefs in this suit:-

> *"(a) Cancel the Sale Deed dated 23.01.2015 executed by the Plaintiff in favour of the Defendant No.1 with regards to the suit property.*
>
> *(b) Grant Permanent Injunction restraining the Defendants their agents, representatives, assignees, employees, successors-in-interests etc. from creating third party rights in the suit property."*

4. This suit, instituted on 28th March, 2019 has come up today for admission.

5. I have at the outset enquired from the counsel for the plaintiff, which Article of the Schedule to the Limitation Act, 1963 applies to the suit/reliefs claimed.

6. The counsel for the plaintiff replies, "Article 59".

7. Article 59, for a suit to cancel or set aside an instrument or for rescission of a contract, lays down limitation of three years commencing from the date "when the facts entitling the plaintiff to have the instrument cancelled or set aside or the contract rescinded first become known to him". I have enquired from the counsel for the plaintiff, whether not the plaintiff, on the very date of execution of the Sale Deed dated 23rd January, 2015 knew (i) that it is in violation of the interim orders in the suits filed by M/s. AKN Developers Pvt. Ltd. and Praveen Jain against the plaintiff; (ii) that the entire sale consideration of Rs.16 crores, though stated in the registered Sale Deed to have been paid to the plaintiff, had not been paid to the plaintiff; (iii) that vacant physical possession of the property was recorded in the Sale Deed to have been delivered by the plaintiff to the defendants no.1 to 3 (though I may record that the Sale Deed is in favour of the defendant no.1 only); (iv) that M/s. AKN Developers Pvt. Ltd. and Praveen Jain, at whose instance there was a restraint order against the plaintiff, had not signed any document or told the plaintiff that they were settling or willing to settle with the defendants no.1 to 3; and, (v) that per the language of the Sale Deed, the title in the property stood conveyed from the plaintiff to the defendants no.1 to 3, divesting the plaintiff of all rights, title and interest in the property. It has as such been enquired, whether not the suit is barred by time.

8. The counsel for the plaintiff states that the plaintiff executed Sale Deed under influence of the defendants no.1 to 3 and was defrauded by the defendants no.1 to 3.

9. I have enquired from the counsel for the plaintiff, how the plaintiff, who in the immediate as well as long past before the execution of the Sale Deed, has been embroiled in various litigations with respect to the property and been dealing with advocates, can claim to be defrauded or influenced.

10. The counsel for the plaintiff, though admits that the plaintiff has been embroiled in litigation and has been dealing with various advocates, conveniently states that he himself has taken over as counsel for the plaintiff in all the litigations recently only.

11. I have also drawn the attention of the counsel for the plaintiff to the recent judgment dated of this Court in ***Rohtash Singh Vs. New Zone Buildtech Pvt. Ltd.*** 2019 SCC OnLine Del 7810 and to my earlier judgment in ***Om Prakash Vs. IOCL Officers Welfare Society*** 2019 SCC OnLine Del 6719, in turn relying on ***Karan Madaan Vs. Nageshwar Pandey*** 2014 SCC OnLine Del 1277, squarely applicable to the facts of the case, and enquired how inspite thereof, the present suit is maintainable.

12. The counsel for the plaintiff states that he is not aware of the said judgments.

13. It seems, judgments are being written by us only for the Appellate Court, and the advocates are not reading the same before filing suits.

14. Though need to reiterate what has already been held in the said judgments, thereby burdening this judgment, is not felt but for the sake of completeness, succinctly it may be stated:-

A. In ***Karan Madaan*** supra this Court was concerned with an application under Order VII Rule 11 of CPC for rejection of a counter-claim in a suit for recovery of possession of immovable property, registered sale deed with respect whereto had been executed by the defendant in favour of the plaintiff and which sale deed recorded possession having been delivered. It was the case of the defendant that possession had not been delivered as the intention was not to transfer the property to the plaintiff by way of sale deed. It was held that, (i) a mere mention of fraud in a pleading is not sufficient; (ii) a party pleading fraud is obliged, under Order VI Rule 4 of CPC, to give particulars of the pleaded fraud, with dates and items in the pleadings; (iii) the defendant having admitted knowledge that he was executing the sale deed, it was not open to the defendant to claim that the instrument of sale was hit by fraud because according to the defendant, the intention of the parties was to create a security in favour of the plaintiffs for the loan granted to the defendant; (iv) the spirit and purpose of enacting Sections 91 and 92 of the Indian Evidence Act, 1872 is to render the written contract, grant or other disposition the sole repository of the terms contained therein; (v) if the intention of the parties was, as was claimed by the defendant, then that intention, objective and purpose should have been so spelled out in the instrument; (vi) to permit a party to plead contrary to the terms of the Sale Deed to which he is a party, would be to put premium on dishonesty; (vii) the terms of a contract reduced to writing cannot be ascertained by allowing parole evidence as to what transpired antecedent to the contract or what the parties did subsequent to the contract; once the contract between the parties is reduced to writing, the court can look at the writing alone in order to construe what the terms of the contract are; (viii) the terms of a registered document can be altered, rescinded or varied only by subsequent registered document and not otherwise; (ix) if the oral agreement is allowed to be substantiated by parole evidence, it would mean re-writing of the registered document which is not permissible; (x) once there is an admission of execution of Sale Deed, the defence which is barred by Sections 91 and 92 of the Indian Evidence Act has to be ignored. Resultantly, the counterclaim was rejected. I find that the appeal preferred against this judgment was also dismissed vide ***Nageshwar Pandey v. Karan Madaan*** 2016 SCC OnLine Del 816.

B. In ***Om Prakash*** supra I was concerned with a suit for recovery of money towards balance sale consideration for sale of immovable property. Finding, that the total sale consideration pleaded was inconsistent with that mentioned in the registered Sale Deed of the property and further finding that the plaintiff in the Sale Deed to have admitted the receipt of entire sale consideration, it was held that the plaintiff was barred by Section 92 of the Evidence Act from pleading and proving in contradiction of the registered Sale Deed and the plaint was rejected.

C. ***Rohtash Singh*** supra also was a suit for declaration as void and *non est* of a Sale Deed admittedly executed by the plaintiff, on the ground of the sale consideration mentioned in the Sale deed being less than the agreed sale consideration. Again, it was held that the suit instituted after more than three years was barred by time and merely by pleading "fraud", no case of fraud is made out.

15. Section 17 of the Contract Act, 1872 defines fraud by a party to a contract as an act committed with intent to deceive another party to induce him to enter into an agreement by suggesting what is untrue or by active concealment of a fact or by making a promise without any intention to perform it. Section 16 of the Contract Act provides that a contract is said to be induced by undue influence where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. The plaintiff has not pleaded any such position. The case of the plaintiff is that the defendants no.1 to 3 lured the plaintiff into executing the Sale Deed by informing that they would settle with M/s. AKN Developers Pvt. Ltd. and Praveen Jain, who in suits instituted against the plaintiff had obtained an interim order restraining the plaintiff from dealing with the property. The plaintiff admits that he was aware of the said restraint against himself. The question which arises is, even if it be believed that the defendants no.1 to 3 lured the plaintiff representing that they had settled with M/s AKN Developers Pvt. Ltd. and Praveen Jain and the plaintiff acted on such representation, whether the plaintiff is entitled to

claim a fraud to have been committed on him. In my opinion, the plaintiff cannot. The plaintiff admits knowledge of the restraint order against himself. From such admission it can be presumed that the plaintiff knew that anything done by him in violation of the said restraint order would be unlawful and illegal. Lure/consideration, even if any meted out by the defendants no.1 to 3, to make the plaintiff commit violation of the interim order against him being itself illegal, cannot give a right in the plaintiff to claim to have been defrauded.

16. Rather, the present suit is an abuse of the process of law. The plaintiff, after on his own volition having executed a Sale Deed in favour of the defendant no.1 in violation of the interim orders of this Court, has instituted this suit as a defence to the punishment to which he has made himself liable for and cannot be permitted to use the process of this Court to perpetuate the illegalities committed by him. The plaintiff cannot be permitted to take advantage of his own illegalities. If at all the Sale Deed executed by plaintiff in favour of defendant No.1 is void, it is for AKN Developers Pvt. Ltd. and Praveen Jain to contend so.

17. As far back as in ***Kedar Nath Motani Vs. Prahlad Rai*** AIR 1960 SC 217 it was reiterated that the principle of public policy is *ex dolo malo non oritur actio* i.e.no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act; if, from the plaintiff's own stating or otherwise the cause of action appears to arise *ex turpi causa* or the transgression of a positive law of this country, there the Court says he has no right to be assisted. Similarly, in ***Surasaibalini Debi Vs. Phanindra Mohan Majumdar*** AIR 1965 SC 1364 it was held that if the plaintiff seeks

the assistance of the Court to effectuate an unlawful transaction, the Courts will refuse to assist him. In ***Nais Service Society Vs. Rev Father K.C. Alexander*** AIR 1968 SC 1165, it was held that in a case in which the plaintiff must rely on his own illegality, the Court may refuse him assistance. In ***Bhartiya Seva Samaj Trust Vs. Yogeshbhai Ambalal Patel*** (2012) 9 SCC 310 relying on the legal maxim *allegans suam turpitudinem non est audiendus*, it was held that a person alleging his own infamy cannot be heard at any forum. It was further held that if a party has committed a wrong, he cannot be permitted to take the benefit of his own wrong. I have also in ***Abhey Dewan Vs. Manoj Sethi*** (2013) 202 DLT 392 and ***New Era Impex (India) Pvt. Ltd. Vs. Oriole Exports Private Ltd.*** (2016) 234 DLT 615 applied the said principles for denying relief.

18. As far as the ground, of the Sale Deed being illegal owing to the plaintiff having not received the entire sale consideration is concerned, the registered Sale Deed records (i) admission and acknowledgment of the plaintiff of receipt of entire sale consideration of Rs.16 crores as per receipt signed, in full and final sale of the property and nothing being due to be paid by the defendant no.1 to the plaintiff; (ii) that the liability of the plaintiff to pay outgoings with respect to the property having come to an end on the execution of the Sale Deed and the liability therefor thereafter being of the defendant no.1; (iii) the representation of the plaintiff that the original title documents of the property had been misplaced and undertaking, to as and when traced, handover the same to the defendant no.1; (iv) consent of the plaintiff that the defendant no.1 could thereafter have the property mutated in its favour; (v) representation of the plaintiff

that there was no impediment to sell; (vi) conveyance of absolute title and all his rights, title and interest in the property by the plaintiff to the defendant no.1; and, (vii) the undertaking of the plaintiff to, from time to time do all acts, deeds and things to further assure and convey the property to the defendant no.1. It has been held in the judgments above referred to, that a plaintiff is barred by Section 92 of the Evidence Act from pleading and proving contrary to the registered document.

19. As far as the ground, of the Sale Deed being illegal for the reason of the plaintiff continuing to be in possession of the property is concerned, the registered Sale Deed records that the plaintiff had handed over vacant physical possession of the property to the defendant no.1 upon execution of the Sale Deed and again, it has been held in the judgments above referred to that the plaintiff cannot plead and prove to the contrary. Possession, even if any of the plaintiff of the property, necessarily has to be under or through the defendant no.1.

20. In the aforesaid state of affairs, the present suit is a deadwood and in abuse of the process of the Court and does not merit admission and is dismissed.

21. I am not imposing costs on the plaintiff because the plaintiff has already expended on court fees; else, the plaintiff would have been liable for exemplary costs.

RAJIV SAHAI ENDLAW, J.

MARCH 29, 2019/'pp'
(corrected & released on 5th April, 2019)