

\$~33 & 15

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: 7th May, 2019

+ **CS(OS) 984/2014 & I.A. 8291/2017**
SIMMI DHAWAN Plaintiff
Through: Ms. Kajal Chandra, Advocate.

versus

NAVIN MALHOTRA & ORS. Defendants
Through: Mr. S. C. Singhal, Advocate.

And

+ **CS(OS) 75/2017 & I.A. 17118/2018**
NAVEEN MALHOTRA Plaintiff
Through: Mr. S. C. Singhal, Advocate.

versus

SMT. SIMMI DHAWAN Defendant
Through: Ms. Kajal Chandra, Advocate.

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

CS(OS) 984/2014

1. The Plaintiff – Smt. Simmi Dhawan has filed the present suit being CS(OS) 984/2014 seeking specific performance of agreement to sell dated 23rd December, 2013. On 29th August, 2018, arguments were heard on behalf of the parties and judgment was reserved. However, it was thereafter brought to the notice of the Court that another connected suit between the same parties, being CS(OS) 75/2017 was also pending and evidence was underway in the said matter. In CS(OS) 75/2017, evidence has since been concluded. Accordingly, the present judgment would be disposing of both

the suits. At the time when submissions were heard in CS(OS) 984 /2014, the Defendants were duly represented by Mr. S.C. Singhal, Advocate. After hearing submissions, judgement was reserved. However, once evidence in CS(OS)75/2017 concluded, Mr. Singhal Ld. Counsel has sought discharge in the said suit and has, accordingly, been discharged.

2. The case of the Plaintiff- Mrs. Simmi Dhawan is that vide agreement to sell and purchase dated 23rd December, 2013, the Defendant – Sh. Naveen Malhotra @ Navin Malhotra had agreed to sell the front portion of the two and a half storied building - freehold property bearing no. No.B-24, land area measuring 305 sq.yds. approx., along with front half portion of Garage, situated in the residential colony known as 'Kailash Colony' at Village Zamrudpur, on Lajpat Nagar and Kalkaji Link road, in Delhi (*hereinafter 'suit property'*). As per the said agreement, the agreed sale consideration was a sum of Rs.6.5 crores along with brokerage, etc.

3. Mrs. Dhawan's case is that she has paid the entire sale consideration to the Defendant, however, since the property was mortgaged with M/s Indiabulls Housing Finance Ltd., Mr. Malhotra sought time to obtain the original documents from Indiabulls and thereafter register the sale deed, in her favour. On 25th January, 2014, M/s Indiabulls and Mr. Malhotra entered into a settlement and the loan account of Indiabulls was finally settled. The 'No Dues Certificate' was also issued by Indiabulls on 14th February, 2014. After the issuance of the No Due Certificate, Mrs. Dhawan claims to have again approached Mr. Malhotra for executing the sale deed.

4. However, Mr. Malhotra got issued notice dated 22nd March, 2014 alleging that there existed an MOU dated 23rd December, 2013 between the

parties. As per the said MOU, the sale consideration for the property was Rs.13.50 crores. Thus, it was alleged in the notice that only a sum of Rs.7.02 crores had been paid by Mrs. Dhawan and since the remaining amounts were not paid by her, Mr. Malhotra had forfeited the entire amount paid by Mrs. Dhawan. It was under these circumstances that the suit came to be filed. Mrs. Dhawan seeks the following reliefs.

“a) Pass a decree of Specific Performance in favour of the Plaintiff and against the Defendants No. 1 directing him to specifically perform and enforce the Agreement to sell and purchase dated 23.12.2013 in respect of the Suit Property bearing No.B-24, land area measuring 305 sq.yds. approx., along with front half portion of Garage, situated in the residential colony known as 'Kailash Colony' at Village Zamrudpur, on Lajpat Nagar and Kalkaji Link road, in Delhi;

b) Pass a decree of possession in favour of the Plaintiff and against the Defendant no.1 directing him to deliver the vacant and peaceful physical possession of the Suit property bearing No.B-24, land area measuring 305 sq.yds. approx., along with front half portion of Garage, situated in the residential colony known as 'Kailash Colony' at Village Zamrudpur, on Lajpat Nagar and Kalkaji Link road, in Delhi to the Plaintiff.

c) Pass a decree of permanent injunction in favour of the Plaintiff and against the Defendant No.1 & 2 restraining them or their agents, assignees, relatives, representatives or anybody claiming through them from selling, leasing, disposing off, alienating, parting or creating any third party interest and/or transferring the possession of the Suit property, to any person in any manner, except the Plaintiff.

d) Pass a decree of permanent injunction in favour of the Plaintiff and against the Defendant No.1 & 2 restraining them or their agents, assignees, relatives,

representatives or anybody claiming through them from carrying out any modification/alternation and/or construction in the Suit property;

e) Pass a decree of permanent injunction in favour of the Plaintiff and against the Defendant No.3 restraining them or their agents, assignees, relatives, representatives from handing over the original documents pertaining to the suit property bearing No.B-24, land area measuring 305 sq.yds. approx., along with front half portion of Garage, situated in the residential colony known as 'Kailash Colony' at Village Zamrudpur, on Lajpat Nagar and Kalkaji Link road, in Delhi to defendant no. 1 & 2 and/or anybody claiming through them, except the Plaintiff

f) Pass ex-parte order(s) in favour of the Plaintiff and against the Defendants.

g) Award cost of the Suit in favour of the Plaintiff and against the Defendants; ”

5. On 3rd April, 2014, Mr. Malhotra appeared and after hearing the parties, the Court passed the following order:

“CS(OS) 984/2014 & I.A. 6338/2014 (u/O.39 Rules & 2 CPC)

Defendants no.2 and 3 are deleted from array of parties, as counsel for the plaintiff submits that defendants no.2 and 3 are the proforma parties.

Plaintiff has filed the present suit for specific performance and permanent injunction with respect to the agreement to sell dated 23.12.2013 with respect to the property bearing No.B-24, land area measuring 305 sq. yds. approx. along with front half portion of garage, situated in the residential colony known as 'Kailash Colony' at village Zamrudpur on Lajpat Nagar and Kalkaji Link Road, Delhi.

According to the plaintiff, the total sale

consideration was fixed at Rs.6.50 crores, plaintiff claims to have paid Rs.6.62 crores (as per the plaintiff Rs.12.0 lacs towards brokerage, which was also tendered to the defendant). Counsel for the plaintiff submits that despite payment of the entire money, the defendant has failed to complete the transaction and execute the sale deed. It is also submitted that the amounts stand acknowledged in the receipts, copies of which have been placed on record and also acknowledged in the legal notice issued by the defendant.

Issue summons in the suit and notice in the application.

Counsel for the defendant accepts summons in the suit and notice in the application. Counsel for the defendant submits that along with the agreement to sell dated 23.12.2013, parties had also entered into an Memorandum of Understanding on the same date, wherein sale price was fixed at Rs.13.50 crores. It is also submitted that the plaintiff is now trying to wriggle out of the agreed amount of Rs.13.50 crores and is forcing the defendant to execute the sale deed on almost half of the agreed sale consideration. It is also submitted that in fact the plaintiff has received a total sum of Rs.7.02 crores.

Counsel for the defendant also submits that till the next date of hearing, defendant will not sell, alienate or part with possession of the suit property. It is also agreed that a direction be issued to the M/s.Indiabulls Housing Finance Ltd. that the title deed of the property bearing No.B-24, land area measuring 305 sq. yds. approx. along with front half portion of garage, situated in the residential colony known as 'Kailash Colony' at village Zamrudpur on Lajpat Nagar and Kalkaji Link Road, Delhi, shall not be released to any party, till further orders of this Court.

Accordingly, till the next date of hearing, defendant is restrained from selling, alienating, transferring or

parting with possession of the property bearing No.B-24, land area measuring 305 sq. yds. approx. along with front half portion of garage, situated in the residential colony known as 'Kailash Colony' at village Zamrudpur on Lajpat Nagar and Kalkaji Link Road, Delhi. Order passed by this court today, will be brought to the notice of M/s.Indiabulls Housing Finance Ltd. for strict compliance.”

6. On 30th April, 2014, M/s Indiabulls Housing Finance Ltd., appeared and it was submitted that the title documents of the suit property had been handed over to Mr. Malhotra. However, it undertook to file the original documents within two days. The interim order was then confirmed and was to operate during the pendency of the suit. The said order dated 30th April, 2014 reads as under:

“Counsel for the parties submit that there has been no settlement between the parties.

Ms. Salwan, learned counsel for defendants No.1 and 2 submits that M/s. Indiabulls Housing Finance Ltd. has handed over title documents of the suit property to the defendant No.1 prior to the order dated 03.04.2014. India Bulls in a communication addressed to the plaintiff has also confirmed the same. Ms. Salwan submits that original title documents shall be filed in Court within two days. Let the title documents be filed within two days from today after giving a photocopy of the same to counsel for the plaintiff. Counsel for the defendants seeks time to file written statement. Let written statement be filed within 30 days from today. Replication thereto be filed within 30 days thereafter. Parties to file original documents within the same period. List before the Joint Registrar for admission/denial of documents on 21.07.2014. List before the Court on 20.08.2014 for framing of issues. Parties to bring suggested issues to Court as agreed.

As agreed, interim order dated 03.04.2014 is confirmed till disposal of the suit subject to variation at the instance of either of the parties.

In the order dated 03.04.2014, in the penultimate paragraph of page 2 of the order, it has been stated that "It is also submitted that in fact the plaintiff has received a total sum of Rs.7.02 crores", the word plaintiff should read as defendant. The error is corrected."

7. On 26th November, 2014, the following issues were framed in the suit:

*"(1) Whether the plaintiff is entitled to a decree of specific performance of the Agreement to Sell and Purchase dated 23.12.2013 in respect of the suit property bearing no.B-24, land area admeasuring 305 sq. yards, approximately, along with front half portion of garage, situated in the residential colony known as 'Kailash Colony' at Village Zamrudpur, on Lajpat Nagar and Kalkaji link? **OPP***

*(2) Whether the plaintiff is entitled to a decree of possession of the suit property and against defendant no.1? **OPP***

*(3) Whether the plaintiff is entitled to a decree of permanent injunction against defendant no.1? **OPP***

*(4) Whether any Memorandum of Understanding dated 23.12.2013 was entered into between the plaintiff and defendant no.1 for the sale of the suit property to the plaintiff, as contended by defendant no.1 in his written statement? **OPD***

*(5) Whether the agreement dated 23.12.2013 is not a conclusive agreement between the parties? **OPD***

(6) Relief"

8. A Local Commissioner was also appointed for recording evidence.

The evidence was recorded and the matter was heard finally.

9. Mrs. Simmi Dhawan appeared as PW1. She stated in her affidavit in evidence that she and her husband Mr. Gurinder Dhawan had negotiated the transaction with Mr. Naveen Malhotra. She further stated that the agreed sale consideration was Rs.6.50 crores, and the entire sum was, in fact, paid. She further stated that the broker Mr. Gony Ahluwalia was introduced by Mr. Naveen Malhotra to them and the entire brokerage amount of Rs.12 lakhs was also paid to Mr. Naveen Malhotra for being paid to the broker. Mrs. Dhawan exhibited various documents, which are as under:

- i) **Ex P.W. 1/1** - Copy of the Agreement to Sell dated 23rd December, 2013
- ii) **Ex. PW 1/5**- Receipt dated 27th January, 2014 issued by Defendant No. 1
- iii) **Ex P.W. 1/2**, **Ex. P.W. 1/3** and **Ex. P.W. 1/4** - True copies of three bankers' cheques
- iv) **Ex. P.W. 1/6** – True copy of letter dated 25th January, 2014 from Indiabulls Housing Finance Ltd. to Mr. Naveen Malhotra in respect of full and final settlement for foreclosure of the loan amount
- v) **Ex. P.W. 1/7** – Copy of No Due Certificate dated 14th February, 2014

10. She further stated that she was ready and willing to perform her part of obligations under the agreement. In paragraph 14 of her affidavit, she stated that a mistake had occurred in the replication, where the amount paid has been mentioned as Rs.7,02,00,000/-. She denied the Defendant's stand that the sale consideration amount was Rs.13.5 crores. She also denied the execution of any MoU dated 23rd December, 2013. She further stated that Mr. Naveen Malhotra had not informed her of any mortgage that was created by him on the said property with various banks. She stated that she

and her husband were only informed about the liability of Mr. Malhotra towards Indiabulls Housing Finance Ltd. She further stated that two cheques of Rs.40 lakhs and Rs.20 lakhs were inadvertently left with Mr. Malhotra, which were not returned by him and when the same were presented at a later date, these were dishonored. She further mentioned the fact that the market value of the property was not Rs.18 crores as claimed by Mr. Malhotra, and in her affidavit, she states as under:

“19. I state that it is not correct that the defendant had sold the suit property in distress as claimed by him or that its value was Rs.18 crores. The sale consideration of Rs.6,50,00,000/- (Rupees Six Crores Fifty Lacs only) agreed between the parties was a duly negotiated price keeping in view the market price of the suit property, the same being not a full property but only a part of a bigger property and no construction/addition/alteration could be carried out in it and it being mortgaged. Infact the price of Rs.6,50,00,000/- was suggested by the defendant only to which me and my husband agreed.

20. I state that the defendant has cheated and defrauded large number of people of over Rs.100 crores by entering into sham transactions and there are large number of criminal cases/FIRs that have been filed against him. I have also a criminal complaint against the Defendant with the police.”

11. In her cross examination, she stated that she was not aware as to why the consideration amount was written in pen in the agreement to sell. She confirmed all the payments made to Mr. Malhotra once again. She further stated that she was unable to trace the original receipt dated 27th January, 2014, which was exhibited by her as Ex.PW-1/5. She stated that no other transaction had taken place with Mr. Malhotra except the present transaction

and no other payments were made to him. Various questions were put to the witness Mrs. Dhawan in respect of MoU dated 23rd December, 2013. She denied that the original MoU was kept in escrow with the broker Mr. Ahluwalia.

12. She confirmed the execution of two cheques for sums of Rs.20 lakhs and Rs.40 lakhs (Ex.PW-1/D2 and Ex.PW-1/D3) as also the bank memos (Ex.PW-1/D4 and Ex.PW-1/D5), which showed that the same were returned due to insufficient funds.

13. Mr. Gurinder Dhawan, the husband of Mrs. Simmi Dhawan appeared as PW-2. His evidence is broadly the same as that of the Plaintiff. He exhibited the same documents again. In his cross examination, he confirmed that he is running a glass business and a guest house. He stated that he learned of the fact, that Mr. Naveen Malhotra wished to sell the suit property, from the local area itself. He contacted Mr. Naveen Malhotra through his sister. He stated that the draft agreement was received from Mr. Naveen Malhotra. He denied that Rs.6.50 crores was only the circle rate of the property. He also categorically denied the existence of the MoU. He confirmed that Mr. Malhotra did not execute any indemnity bond. He also denied the fact that the MoU was given to Mr. Ahluwalia, the broker for keeping in safe custody.

14. The SHO of the area, from police station GK-I appeared and stated that no action was taken on the complaint filed by Mrs. Dhawan as the entire matter was *sub judice* before this Court.

15. Mr. Naveen Malhotra filed his evidence by way of affidavit and deposed that he had informed the Plaintiff and Plaintiff's husband about the

mortgage with Indiabulls, Andhra Bank, Punjab National Bank, Capital First Ltd. He also stated that the property dealer was sent by Mrs. Dhawan, who had contacted his sister. He stated that the original MoU was with the property broker. He confirmed that the agreement to sell was signed by him, however, he stated that the columns, which were left blank in the said document, were filled by Mrs. Dhawan or her representative and the same were not filled at the time of signing of the document. He stated that both the MoU and the agreement to sell were prepared by Mrs. Dhawan. He claimed that he received a sum of Rs.7.20 crores. Cheques of Rs.40 lakhs and Rs.20 lakhs, which had been signed by Mrs. Dhawan, were dishonored due to insufficient funds. In his affidavit, he finally concluded as under:

“12. That the plaintiff has not complied with their obligations as contained in the Memorandum of Understanding Ex.DW-1/1 hence the deal stood cancelled as the time was the essence of the agreement as the deponent was to pay huge amount to the banks and on account of non-payment his liability has further increased. The plaintiff has not complied with her obligations as agreed and detailed out in the Memorandum of Understanding and was not ready and willing to comply with the same; hence not entitled to maintain the present suit rather liable to pay all damages to the deponent which he has suffered on account of non-compliance of the terms of the Agreement by the plaintiff.

13. The suit of the Plaintiff is totally false.”

16. In his cross-examination, when asked to produce the mortgage deeds with the other banks, Mr. Malhotra replied ‘*I have to look at them*’. He could not give the exact amount of loan given by Punjab National Bank. He stated that he had entered into other sale-purchase transactions of properties

and when asked to name the broker who had facilitated these transactions, he named Mr. Gony Ahluwalia. However, on a specific suggestion that he knew Mr. Gony Ahluwalia prior to these transactions, he denied the same. He further confirmed that prior to Mr. Ahluwalia contacted him, he had given advertisements for sale of the property. He also confirmed that he had not got the valuation done for the suit property. According to his estimate, the value of the property was approximately Rs.20 crores. He further confirmed that in the advertisements he had not informed about the fact that the property was mortgaged with different banks and financial institutions. He further stated that though the market value was Rs.20 crores but as he was in dire need of money, he agreed to sell the property to Mrs. Dhawan for Rs.13.5 crores. He confirmed that the payments were not made by Mrs. Dhawan, however, in response to the question whether he had executed any receipt, he stated, *"I do not remember"*. He confirmed the execution of the agreement to sell and MoU. He also confirmed that he had retained copies of the MoU and agreement to sell. He explained that he had to write by hand, in the agreement to sell, that the property was mortgaged to banks. He denied the suggestion that he received cash in lieu of the cheques, which were dishonored. He denied the suggestion that the MoU did not exist. He confirmed that the transaction was to be completed till 31st January, 2014. Some part of his cross-examination is relevant and is set out herein below:

"Q. Please tell according to you why an MoU was prepared and signed as claimed by you when it was to be torned?"

A The MoU was prepared as the total price was Rs.13.50 Crores.

Q. For whose benefits this MoU was prepared?

A Since the total price was fixed Rs. 13.50 Crores, this MoU was prepared.

Q. Can you give the reason why you give such a big responsibility of retaining the MoU to Mr. Goni Ahluwalia?

A He was the property dealer of the area where I reside for 40 years and also resides their besides Mr. Gurvinder Dhawan, so it was mutually agreed that that this MoU is to be kept with the third person i.e. Mr. Goni Ahluwalia.

Q. I put it to you that Mr. Goni Ahluwalia was one of property dealers mentioned in para 1 of your affidavit whom you have contacted for selling the property:

A Mr. Goni Ahluwalia contacted me for this deal.

Q. Is it correct that the transaction was to be completed by 31.01.2014?

A It is correct.

Q. Is it correct that whatever payment was received by you from the plaintiff has been received by 31.01.2014?

A I do not remember”

17. On behalf of Mrs. Simmi Dhawan, Mrs. Kajal Chandra, Id. Counsel has made submissions and has relied upon all the exhibits filed by the witnesses. She submitted that Indiabulls had given the no dues certificate and accordingly, the property ought to have been transferred in favour of Mrs. Dhawan. She submitted that the sale consideration having been admitted by Mr. Malhotra to have been received, her client is entitled to a decree of specific performance.

18. On behalf of Mr. Naveen Malhtora-the Defendant, Mr. S. C. Singhal,

ld. Counsel submits that there were several blanks in the agreement to sell, which were filled in and hence a question mark has been raised in respect of the said document. He submitted that the MoU was, in fact, entered into and the Mr. Malhotra's case ought to be given credence. He relied on a copy of the MoU to argue that the entire sale consideration was not paid.

19. A perusal of the pleadings and the documents, as also the evidence shows that the main stand of Mr. Malhotra is that there exists a MoU dated 23rd December, 2013. Mr. Malhotra has, however, not been able to produce the original MoU. He has placed on record the original documents to show the title in his favour– which is not disputed. A copy of the MoU has been produced by Mr. Malhotra, which, however is neither registered nor admitted. The case of the Defendant itself is that the original MoU was with Mr. Gony Ahluwalia, the broker. Mrs. Dhawan has vehemently denied the existence of the said MoU.

20. The agreement to sell is an admitted document. The onus of proving that the MoU existed was on Mr. Malhotra – the Defendant, which onus he has failed to discharge. In the absence of the original document or any independent evidence to prove the MoU, issue no.4 is decided against Mr. Malhotra.

21. Moreover, there is no doubt that the property was sold under distress. Mr. Malhotra also failed to produce the broker Mr. Gony Ahluwalia. Mr. Malhotra was a person experienced in the sale and purchase of the properties and thus, he ought to have been aware that any such MoU has no validity in the eyes of law. All transactions for such sale and purchase of property especially by a person, who had experience in the past, ought to have been

done in accordance with law. The MoU having not been proved is also of no evidentiary value. No valuation report has been filed to establish Mr. Malhotra's case that the market value was Rs.20 crores. Nothing has been produced to establish that the property was mortgaged with other institutions apart from Indiabulls. No copy of the advertisement issued by Mr. Malhotra for sale of the property has been produced. Under these circumstances, this Court has no option but to hold that the defence of the Defendant-Mr. Malhotra that there exists a MoU, is not made out.

22. Mr. Malhotra has received a huge consideration running into crores of rupees. As per his own evidence, he received a sum of Rs.7.02 crores whereas Mrs. Dhawan states that a sum of Rs.6.50 crores has been paid. Mr. Malhotra is not in a position even to return the money that he has received from Mrs. Dhawan. The written statement of Mr. Malhotra admits the receipt of the said sum. It is submitted that the additional sum of Rs.52 lakhs was paid towards dealership brokerage etc. The case of Mr. Malhotra that there were two parallel transactions i.e. first, the agreement to sell and second, the MoU, is not borne out from the record. Mr. Malhotra has also not placed on record any document to prove the circle rates prevalent at the said time.

23. Though it is slightly unusual for the Plaintiff-Mrs. Dhawan to admit payment of Rs.52 lakhs, as has been done in the Replication, over and above the sale consideration as agreed in the agreement to sell, Mrs. Dhawan's explanation in the evidence is that the same was done due to an error by the junior lawyer, who was drafting the replication. According to Mrs. Dhawan, the total payment made is as stated in the plaint. The receipt of the amounts

being not in dispute, execution of the agreement to sell having not been disputed, the execution of the MoU having not been established, this Court holds that the Plaintiff-Mrs. Dhawan is entitled to a decree of specific performance. As per the documents i.e. the agreement to sell proved on record, the entire sale consideration stands paid and hence this Court is not to go into the question of readiness and willingness.

24. The case of Mr. Malhotra is that there exists a MoU, as per which the sale consideration was not Rs.6.5 crores, as contained in the agreement to sell, but in fact it was Rs.13.5 crores. The further case of Mr. Malhotra is that the present suit is nothing but a counter blast to the legal notice dated 22nd March 2014 sent on his behalf to Mrs. Dhawan. What is however interesting is that in the pleadings, in para 5 of the written statement, Mr. Malhotra categorically admits that a sum of Rs.7.02 crores stands paid. In fact, Mr. Malhotra admits in the written statement that the suit property has been mortgaged by him to various financial institutions such as Indiabulls Housing Finance Ltd., Capital First Ltd., Andhra Bank, Punjab National Bank and Punjab & Sind Bank. Mr. Malhotra submits that the market value of the property is approximately Rs.18 crores, but in view of MOU dated 23rd December, 2013, its sale consideration was agreed to be Rs.13.5 crores. Thus, the entire case of the Defendant was based upon MoU dated 23rd December, 2013.

25. The parties led evidence in the matter. The Plaintiff led the evidence of three witnesses, namely, Smt. Simmi Dhawan – PW-1, Sh. Gurinder Dhawan – PW-2 (Plaintiff's Husband) and SI Sanjay Bhatt – PW3. On the other hand, the Defendant – Sh. Naveen Malhotra filed his affidavit before

the Court and appeared on 23rd May, 2016 and 24th May, 2016, on which dates the cross-examination was conducted. Thereafter, he stopped appearing. From the Defendant's side, Smt. Neeta Prakash – the sister of Sh. Naveen Malhotra appeared as DW-2.

26. DW-2 in her evidence stated that the advertisement for sale of the property was given a number of times and that her telephone number was given as the contact number. She confirmed various payments including a sum of Rs. 1 crore in cash apart from 20 lakhs as RTGS. She also confirmed the issuance of 2 or 3 cheques. She did not recollect as to how many copies of the agreement were signed. She stated that the agreement to sell had various blanks, but the deal was for a sum of Rs. 13.5 crores. She claimed that the circle rate had been mentioned in the agreement to save stamp duty, and that Mr. Malhotra had not agreed for the circle rate. She stated that she and her brother were in the know of Mr. Gony Ahluwalia who was the property dealer in the area. She further deposed that she did not know the details of the cheques which were given.

27. The evidence of the sister of Mr. Malhotra is not reliable as she was, in effect, a party to the transaction. The advertisement was issued with her name/contact details. She played an active role in the sale of the property. The advertisement, admittedly, did not contain any details about the various mortgages or liens created on the property. Thus there was a clear attempt by both Mr. Malhotra and his sister to deceive gullible and innocent buyers of the property. When the property had so many encumbrances, they could not have issued an advertisement for sale of the property, and collected huge sums from parties like Mrs. Dhawan. This itself, is dishonest and illegal

conduct on behalf of the Mr. Malhotra. The agreement to sell being an admitted document, the amount of payment made being admitted, the MOU having been denied and also having not been proved in accordance with law, the relief of specific performance in favour of the Plaintiff- Mrs. Dhawan, is liable to be granted.

28. Accordingly, a decree of specific performance is passed in favour of the Plaintiff – Smt. Simmi Dhawan against the Defendant – Sh. Naveen Malhotra in respect of property bearing no. No.B-24, land area measuring 305 sq.yds. approx., along with front half portion of Garage, situated in the residential colony known as 'Kailash Colony' at Village Zamrudpur, on Lajpat Nagar and Kalkaji Link road, in Delhi. Further, a decree of possession is also passed in favour of Mrs. Dhawan directing Mr. Malhotra to deliver the vacant and peaceful possession of the suit property. Till the sale deed is executed and possession is transferred to Mrs. Dhawan, there shall be a permanent injunction restraining Mr. Malhotra from creating any third party interest in the suit property.

CS(OS) 75/2017

29. After filing of CS (OS) 984/2014, the Mr. Naveen Malhotra filed CS(OS) 75/2017 seeking a decree for a sum of Rs.6.05 crores, that according to him is the balance sale consideration along with the interest. The prayer sought is as under:

“It is therefore prayed that a decree for sum of Rs.6,05,00,000/- together with cost and interest at the rate of 12% per annum both pendenite lite and future till realization may be passed in favour of the Plaintiff and against the Defendant.”

30. In brief, the case of Mr. Naveen Malhotra is that as per the MoU dated 23rd December, 2013, the total sale consideration agreed was Rs.13.5 crores out of which a sum of Rs.6.05 crores is outstanding. In the said suit, the following issues were framed on 9th April, 2018.

*“1. Whether any Memorandum of Understanding dated 23rd December, 2013 was entered into between the plaintiff and the defendant for the sale of the property being No.B-24, land measuring 305 sq. yds. (approx.) along with the front half portion of garage situated in the residential colony known as Kailash Colony, New Delhi? **OPP***

*2. Whether the plaintiff has suffered a loss of sum of Rs.6,05,00,000/- and is entitled to a decree of recovery for the said amount together with cost and interest at the rate of 12% per annum both pendent lite and future till realization? **OPP***

*3. Whether the suit is liable to be stayed under Section 10 CPC as the issues raised in the present suit are directly and substantially in issue between the parties in a previously instituted suit filed by the defendant being CS(OS) No.984/2014? **OPD***

4. Relief.”

31. After framing of issues, Mr. Naveen Malhotra had to lead evidence in the matter. On 31st August, 2018, he was directed to file his affidavit in evidence and since in the connected matter the trial was also concluded, one month time was granted for conclusion of the Plaintiff's evidence. He filed his affidavit in evidence, which was similar to the stand that he had taken in the earlier suit. Even with this affidavit, the original MoU was not produced. Mr. Malhotra was partly cross-examined on 25th September, 2018, however, thereafter, he stopped appearing. On 16th October, 2018, one last opportunity

was granted to Mr. Malhotra to appear for cross-examination and a peremptory order was passed that if the evidence was not concluded, the right of Mr. Malhotra to lead further evidence would be closed. This order was appealed against by Mr. Malhotra. Vide order dated 8th February, 2019, the Division Bench had permitted Mr. Malhotra to conclude his evidence within 45 days. Dates were fixed on 25th February, 2019 and 27th February, 2019, on which dates he failed to appear. The Joint Registrar again adjourned the matter to 13th March, 2019 and 14th March, 2019 and again to 20th March, 2019. Despite this opportunity having been given, Mr. Malhotra failed to appear before the Court. Only PW-2 –his sister appeared and adduced evidence. The evidence of Mr. Malhotra was, accordingly, closed.

32. Mrs. Dhawan appeared as DW-1 and was cross-examined. In this suit, the entire basis of Mr. Malhotra's prayer for recovery of Rs.6.05 crores is the MoU dated 23rd December, 2013. The original MoU has not been produced. None of the witnesses have appeared on behalf of Mr. Malhotra for leading evidence. This Court has also arrived at a finding in CS (OS) 984/2014 above that the only admitted document being the agreement to sell and the sale consideration having been mentioned in the same, the plea in respect of the MoU is untenable.

33. The Court cannot accept the contention by any party that on the same date, two documents had been executed, both of which have contradictory statements in respect of the sale consideration. It is nigh possible that the parties were attempting to hoodwink the tax authorities. However, that is an issue that this court is not expected to go into, as the existence of the MoU is itself shrouded in mystery. On the basis of the evidence on record, the

agreement to sell being admitted, the receipt of the sale consideration being admitted, the MoU having not been proved on record, this Court is of the opinion that the suit of Mr. Malhotra is liable to be dismissed. No submissions have also been addressed on behalf of Mr. Malhotra in this suit as Mr. Singhal, Id. Counsel for the Plaintiff had sought discharge.

34. Insofar as the suit for damages is concerned, the same is based on the MOU dated 23rd December, 2013, which has not been proved by the Plaintiff – Sh. Naveen Malhotra. The Plaintiff has neither appeared before the Court nor produced the original MOU. Further, the claim for Rs.6.05 crores is a claim for damages on account of loss suffered, no evidence has been led to establish any damage or loss which has been suffered. Under Sections 73 and 74 of the Indian Contract Act, 1872 the factum of loss has to be established. In the present case, the factum and the quantum of loss would have to be proved as there is no pre-determined sum which was agreed to between the parties as compensation in case of any breach. The MOU which is the fulcrum of the suit for damages, having not been proved or produced, the suit for damages is not liable to be entertained.

35. CS (OS) 984/2014 is decreed in terms of paragraph 28. CS (OS) 75/2017 is dismissed.

36. Actual costs are awarded to Mrs. Simmi Dhawan. Cost statement be filed.

PRATHIBA M. SINGH
JUDGE

MAY 07, 2019
Rahul/dk

(Corrected and released on 28th May, 2019)