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

Reserved on : 19th February, 2019
Date of decision :15th April, 2019

\+ **RFA 544/2016 & CM APPL. 7381/2017**

DINESH TANWAR & ANR. ..... Appellants

Through: Mr. Madhu Sudan Bhayana, Advocate.
Mr. J.K. Sharma, Mr. Mahender Singh & Mr. Aabhas Dahiya, Advocates (M-9810808725)

versus

KUNWAR SINGH TANWAR & ORS. ..... Respondents

Through: Mr. Achal Gupta & Ms. Annie Rais, Advocates for R-1 (M-8860751919)
Inspector Ram Kishan and SI Pardeep.

AND

\+ **RFA 695/2016 & CM APPLS. 20788/2017, 20809/2017, 23088/2017**

PRATIBHA ..... Appellant

Through: Mr. Madhu Sudan Bhayana, Advocate.
Mr. J. K. Sharma, Mr. Mahender Singh & Mr. Aabhas Dahiya, Advocates.

versus

KANWAR SINGH TANWAR & ORS. ..... Respondents

Through: Mr. Achal Gupta & Ms. Annie Rais, Advocates for R-1

CORAM:
JUSTICE PRATHIBA M. SINGH

JUDGMENT

<u>Prathiba M. Singh, J.</u>

1. The Plaintiff – Shri Kanwar Singh Tanwar (*hereinafter, 'Plaintiff'*)

filed the present suit for specific performance of *bayana* cum receipt agreement dated 15th March, 2010 against Mr. Devender Kumar and Mrs. Pratibha (*hereinafter, 'Defendants'*), both residents of WZ-508, Village Basai Dara Pur, New Delhi. The case of the Plaintiff was that the Defendants represented themselves to be the absolute owners of property bearing No. WZ-523/30, situated at village Basai Dara Pur, New Delhi admeasuring 170 Sq. Yards (*hereinafter, 'suit property'*). The agreed sale consideration was at the rate of Rs.35,000/- per sq. yard i.e. for a total consideration of Rs.59,50,000/-. According to the Plaintiff, the period for execution of the sale deed, in terms of the agreement, was to expire on 14th August, 2010. The Plaintiff had paid an advance of Rs.1 lakh. The Plaintiff approached the Defendants on several occasions that he is ready with the balance sale consideration, however, the Defendants avoided the issue and failed to even give original title documents to the Plaintiff.

2. Thereafter, legal notice dated 3rd July, 2010 was issued, calling upon the Defendants to appear before the Sub-Registrar on 16th August, 2010, to execute the sale deed in favour of the Plaintiff. However, the Defendants did not turn up. The Plaintiff then filed a suit for permanent injunction as he was apprehending that the Defendants may create third party interest in the suit property. The suit bearing No.143/2010 was filed before the Ld. Senior Civil Judge, Delhi seeking injunction. The Defendants moved an application under Order VII Rule 11 CPC, in the said suit, on the ground that the said suit is not maintainable, as an alternate remedy of specific performance was available to the Plaintiff. Accordingly, the present suit came to be filed where the Plaintiff seeks the following reliefs:

> *"In view of the aforesaid facts and circumstances, it is,*

therefore, most respectfully prayed that this Hon'ble Court may be pleased to pass a decree of specific performance in favour of the plaintiff, and against the defendants, thereby directing the defendants to specifically perform their part of the contract in terms of the bayana receipt cum agreement dated 15.03.2010 and to transfer the property/land bearing No.WZ 523/30, situated at Village Basai Darapur, New Delhi, total measuring 170 sq. yds., by executing the necessary sale documents in respect of the said property in favour of the plaintiff on receipt of the balance sale consideration amount of Rs.58,50,000/- (Rupees fifty eight lacs and fifty thousand only). In case, the defendants fail to execute the Sale Deed in favour of the plaintiff in respect of the said property on receipt of the balance consideration amount of Rs.58,50,000/- (Rupees fifty eight and fifty thousand only) in that event, this Hon'ble Court may be please to appoint an officer of this Hon'ble Court to execute the Sale Deed in favour of the plaintiff in respect of the aforesaid property, in accordance with the bayana receipt cum agreement dated 15.03.2010;
Costs of the present suit/proceedings be also awarded in favour of the plaintiff and against the defendants.
Such other or further orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case be also passed in favour of the plaintiff and against the defendants to meet the ends of justice.
It is prayed accordingly."

3. Summons were issued in the suit on 27th September, 2010. Thereafter, on 22nd March, 2011, the parties were referred to mediation. In the meantime, the Defendants filed their written statement. The case of the Defendants was that the *bayana* receipt dated 15th March, 2010 stood repudiated on 26th May, 2010. It was pleaded that on 11th May, 2010, the Defendants called upon the Plaintiff to produce the original *bayana* receipt

and also to make payment of the balance sale consideration within 15 days. However, since the same was not done, on 26th May, 2010 the *bayana* receipt stood repudiated. The Defendants further contended that the *bayana* receipt lacked the essential ingredients to constitute a binding agreement, as there was no description of the property or the area or the amount in it. Further, the stamp paper on which the *bayana* receipt was issued, was dated December, 2009, and the notarisation on the same was post-dated i.e., on 15th March, 2010, which is the date of the agreement as per the Plaintiff. Accordingly, the Defendants sought dismissal of the suit on the ground that it lacked cause of action.

4. The Plaintiff, however, denied the receipt of letter dated 11th May, 2010 and claimed that the said letter was a forged document. Reliance is placed on the letter dated 28th July, 2010 sent by the Defendants, in response to legal notice dated 3rd July, 2010, sent on behalf of the Defendants which contains no reference to notice dated 11th May, 2010. It was contended that the Defendants are liable for forgery of the same. The receipt of Rs.1 lakh out of the total sale consideration, having been admitted by the Defendants, the Plaintiff contended that he is entitled to specific performance.

5. Mediation efforts were made but were not fruitful between the parties. An application under Order XI Rule 12 CPC being I.A. No.12678/2011 was filed calling upon the Defendants to produce the original documents/envelope containing the letter dated 11th May, 2010. It was directed on 10th August, 2011 that Defendant No.2 shall produce all the original documents, copies of which are on record. On 31st October, 2011, time was sought by the Defendants for production of the originals. It was, thereafter, claimed that the original documents were filed by the Defendants,

which were somehow not on record. Further, the Ld. Joint Registrar notes on 16th January, 2012 that no such documents are on record.

6. The Defendants acquired knowledge that the suit property has been sold to one Smt.Kiran Tanwar and Shri Dinesh Tanwar vide two registered sale deeds dated 29th December, 2011 and 31st December, 2011. Accordingly, two applications – one for impleadment under Order I Rule 10 CPC being I.A. No.3062/2012 was filed and another application being I.A. No.3063/2012, under order XXXIX Rules 1 and 2, were filed. Notices were issued in the said applications on 21st February, 2012 to proposed Defendant Nos. 3 and 4, Smt. Kiran Tanwar and Shri Dinesh Tanwar. On 18th April, 2012, *status quo* order was granted. Appeal FAO (OS) 363/2012 against the said order was dismissed on 8th August, 2012. On 28th January, 2013, the application under Order I Rule 10 CPC was allowed and Smt. Kiran Tanwar and Mr. Dinesh Tanwar were impleaded as Defendant Nos.3 & 4. The *status quo* order in respect of title and possession was also confirmed. Thereafter, issues were framed in the suit on 25th February, 2014 and the same read as under:

> "*(i) Whether the bayana receipt-cum-agreement, of which specific performance is sought, was executed on 15.03.2010 as claimed by the plaintiff or in December, 2009 as claimed by the defendants No.1&2? OPP and OPD-1 & 2*
>
> *(ii) Whether the plaintiff has been ready and willing to perform his part of the Agreement to Sell? OPP*
>
> *(iii) Whether the defendants No.1&2 had sent and served any letter dated 11.05.2010 as claimed in the written statement? OPD1&2*
>
> *(iv) Whether the bayana receipt-cum-agreement stood*

repudiated by efflux of time on 26.05.2010? OPD 1&2

(v) If the Issue No.1 is decided in favour of the defendants No. 1&2, whether the plaintiff is not entitled to the relief of specific performance for the reason of having misrepresented facts? OPD 1&2

(vi) Whether time for payment of balance sale consideration /completion of the sale was essence of the Agreement? OPD1&2

(vii) Whether the discretion implicit in the grant of the relief of specific performance is to be exercised in favour of the plaintiff? OPPr

(viii) Relief."

7. A Court Commissioner was appointed for recordal of evidence. At that stage, in view of the increase in the pecuniary jurisdiction of the Delhi High Court, the suit was transferred to the District Court vide order dated 9th December, 2015. The suit was heard by the Ld. Additional District Judge. In the said suit, the Plaintiff led evidence of 10 witnesses. Most of the witnesses were official witnesses including from the Delhi High Court, Tis Hazari Court, State Bank of India, Oriental Bank of Commerce and Syndicate Bank as also Rural Electrification Corporation Ltd. Apart from these official witnesses, the Plaintiff examined himself, Shri Ramesh Kumar Tanwar, Shri Gajraj Singh Tanwar and Mr. Mahipal Tanwar, who were PW-7, PW-8, PW-9 and PW-10 respectively. Various other affidavits were also filed of other witnesses, however, the said witnesses were not summoned or deposed.

8. On behalf of the Defendants, no evidence was led by Defendant Nos.1 & 2, the original owners. Defendant Nos.3 & 4 also did not lead any

evidence as it was claimed that the purchase of the suit property by them was an admitted fact.

9. Based on the pleadings and the evidence on record, the Trial Court arrived at the following findings:

a) The execution of the *bayana* receipt dated 15th March, 2010 was proved on record. The same was to expire in August, 2010, therefore, there was no question of repudiation of the same on 26th May, 2010.

b) The Plaintiff had shown availability of funds as also financial status and liquidity to pay the balance sale consideration to the Defendants.

c) Since there was no injunction order, Defendant Nos.1 & 2 had sold the property to Defendant Nos.3 & 4, along with the additional area. The sale was *malafide* as the same was during the pendency of the suit.

d) The amount, for which the property was sold to Defendant Nos.3 & 4, was not in variance with the sale consideration mentioned in the Plaintiff's *bayana* agreement.

10. The Trial Court, vide its judgment dated 23rd April, 2016, concluded as under:

> "*28. Relief: In view of the discussion made herein above, instant suit is decreed in favour of the plaintiff and against the defendants No. 1 and 2 with cost whereby <u>defendants are directed to execute the necessary registered sale documents in favour of plaintiff in respect of the suit property</u> bearing No.WZ-523/30, Village Basai Darapur, New Delhi, total measuring 170 sq. yds within two months against*

receipt of balance sale consideration amount. Decree sheet be prepared accordingly. File be consigned to record room."

11. Two appeals have been filed challenging the impugned judgment dated 23rd April, 2016. One appeal, being RFA 695/2016 has been filed by one of the original owners Mrs. Pratibha. The second appeal being RFA 544/2016 has been filed by the subsequent purchasers Defendant Nos.4 & 3, Shri Dinesh Tanwar and Smt. Kiran Tanwar. Contention in these appeals was that the *bayana* receipt was not proved on record. Date of the *bayana* receipt is not clear as to whether it is December, 2009 or March, 2010. Further, the Plaintiff had not shown availability of funds or even readiness and willingness to pay the balance sale consideration. The so-called visit to the Sub-Registrar's Office is also not established by producing any receipt. The *bayana* receipt stood repudiated by the Defendants vide letter dated 26th May, 2010. No stamp paper was even produced to show that the Plaintiff was willing to purchase the property.

12. On the other hand, it is argued on behalf of Plaintiff that the findings of the Trial Court are liable to be upheld. The Defendants had not led any evidence in the matter. The Plaintiff, on the other hand, had led evidence of various witnesses to establish its case. Further, the subsequent purchasers had no right in law as they had purchased the property during pendency of the suit. The Plaintiff, being the earlier purchaser, had a better right and title to the suit property. Reliance is placed on Section 52 of the Transfer of Property Act, 1882. Plaintiff also relied on the following judgments.

- ***Guruswamy Nadar v. P. Lakshmi Ammal (Dead) Through LRs & Ors. (2008) 5 SCC 796***

- ***A. Nawab John and Ors. V. N. Subramaniyam (2012) 7 SCC 738***

Analysis and Findings

13. The present two appeals have two separate dimensions. One is in respect of the dispute between the Plaintiff- Mr. Kanwar Singh Tanwar arising out of the *bayana* receipt dated 15th March, 2010. Second dimension is the disappearance of one of the original owners of the suit property namely Mr. Devender Kumar during the pendency of the suit. Both are dealt with separately.

Judgement on merits in the RFAs

14. A perusal of the *bayana* receipt shows that the *bayana* receipt is in Hindi and it is written and signed on a 100/- rupee stamp paper. The signature of Plaintiff and Mr. Devender Kumar on the same are not disputed. The translated text of the bayana receipt reads as under:

> *"We both sister and brother (Devender Kumar S/o Mr. Chhotey Lal and Pratibha, wife of Shri Sunil Kumar) have sold our portion of land WZ-523/30, Basai Dara Pur to Shri Kanwar Singh Tanwar S/o Shri Ramesh Tanwar R/o WZ-407, Basai Dara Pur at 35,000 (Rupees Thirty Five Thousand) per square yards for which we have received Rs.1 lakh as bayana (token money). Remaining amount has to be paid within five months at the time of execution of papers.*
>
> *Signed by Devender Kumar Tanwar (in Hindi and English)*
>
> *signed by Pratibha*
>
> *signed by Shri Kanwar Singh Tanwar*
> *Dated 15.03.2010*
> *Sagar Singh*
> *WZ-113A, Basai Dara Pur, New Delhi-15."*

The rear side of stamp paper shows that it was purchased in December, 2009 by Mr. Kanwar Singh Tanwar.

15. The following persons appeared as witnesses of the Plaintiff:

- **PW-1**: Shri Kumar Kala, Judicial Assistant, RKD Branch, Delhi High Court;
- **PW-2:** Shri Suresh Kumar, Junior Judicial Assistant, Tis Hazari Court, Record Room Civil, Delhi;
- **PW-3:** Shri Benoy Joseph, Clerk, State Bank of India, Moti Nagar, New Delhi;
- **PW-4:** Shri Raj Kumar Aggarwal, Clerk, Oriental Bank of Commerce, Kirti Nagar Branch, New Delhi;
- **PW-5:** Shri Jitender Kumar, Senior Officer, Rural Electrification Corporation Ltd., New Delhi;
- **PW-6:** Shri Madan Singh, Clerk, Syndicate Bank, Kirti Nagar Branch, New Delhi;
- **PW-7:** Shri Kanwar Singh Tanwar, the Plaintiff;
- **PW-8:** Shri Ramesh Kumar Tanwar, father of the Plaintiff;
- **PW-9:** Shri Gajraj Singh, uncle of the Plaintiff;
- **PW-10:** Shri Mahipal Tanwar, cousin brother of the Plaintiff.

16. The documents, which have been exhibited by the Plaintiff's witnesses, are as under:

- **Exhibit P-1** – Original *bayana* receipt executed between the Plaintiff and the Defendants;
- **Exhibit P-2** – Legal notice dated 3rd July, 2010 sent by the Plaintiff to the Defendants;

- **Exhibit P-3** – Reply dated 28th July, 2010 to legal notice dated 3rd July, 2010;
- **Exhibit PW2/A–** Plaint of Suit no.143/2010 filed by the Plaintiff, seeking permanent injunction;
- **Exhibit PW2/B** – Application under Order VII Rule 11 filed by the Defendants in Suit No.143/2010;
- **Exhibit PW1/A**– Certified copy of judgment dated 28th May, 2008, passed in the CS(OS) 600/89, filed by the father of the Defendants for partition;
- **Exhibit PW3/A** – Statement of account of Mr. Mohar Singh, by State Bank of India;
- **Exhibit PW3/B** – Statement of Account of Mr. Ramesh Kumar Tanwar, by State Bank of India;
- **Exhibit PW4/A –** Statement of Account of Mr. Ramesh Kumar Tanwar, by Oriental Bank of Commerce;
- **Exhibit PW5/A –** Certificate of investment of Mr. Mohar Singh, issues by Rural Electrification Corporation Ltd., wherein the Plaintiff is the nominee;
- **Exhibit PW6/A** – Acknowledgment of issuance of FDR to the Plaintiff by Syndicate Bank

17. The evidence led on behalf of the Plaintiff, apart from the official witnesses, was by 4 witnesses - PW-7, PW-8, PW-9 & PW-10. Their cross-examination was conducted before the Local Commissioner.

Summary of evidence of PW-7 – Shri Kanwar Singh Tanwar

18. He exhibited all the relevant documents. The case in his affidavit in

evidence was identical to the one pleaded in the plaint. In his cross examination, he stated that Defendant Nos.1 & 2 belong to the same village as his, though there is no relationship between them. He stated that he had approached Defendant Nos.1 & 2 for purchase of the suit property, which was owned by Mr. Devender Kumar and Mrs. Pratibha. He had seen the *fard* of the suit property and the partition order relating to the land in which Mr. Devender Kumar was recorded as the owner of the suit property. In the Court order, which was shown recording partition, Mr. Devender Kumar's name was shown. The Plaintiff, further, claimed that he knew Mr. Devender Kumar since childhood. He denied the suggestion that he was mentally sick. He also stated that when he went for execution of *bayana* receipt, he was accompanied by one Shri Sagar and both the Defendants were also present. The document was executed at the house of the Defendants at WZ-508, Basai Darapur, New Delhi.

19. He claimed that he was running a pathology lab and his annual income was Rs.6 to 7 lakhs. In his income tax return, he showed Rs.2 to Rs.2.5 Lakhs as his income. He confirmed the sale consideration of Rs.35,000/- per sq. yards for the suit property, which was the market price. He did not deal in disputed properties. He denied the suggestion that the consideration was less than the market price. There was one tenant in possession of the plot. Initially, demand was for Rs.40,000/- per sq. yards but was later re-negotiated after 8 to 10 meetings. He confirmed that apart from Rs.1 lakh, he had not paid any other amount to the Defendants. He stated that in July, 2010, he had served a notice on the Defendants. He confirmed having received Ex..P3 i.e. notice dated 28th July, 2010 issued on behalf of the Defendants. There was no agreement in respect of the suit

property, which was executed except the *bayana* receipt. He stated that he had sufficient funds to pay the remaining consideration. A period of five months was agreed for registration of the sale deed. He stated that he had cheques at the time when he visited the office of the Sub-Registrar for execution of the sale deed. The same were signed by his family members. Though the stamp papers were not purchased for execution of the sale deed, the same would have been purchased by him at the office of the Sub-Registrar. He stated that Ex.P3 i.e. notice dated 28th July, 2010 was issued after filing of the injunction suit.

20. He stated that before entering into the agreement with Defendant Nos.1 & 2, he had consulted Defendant No.4, Mr. Dinesh Tanwar. He had also informed Defendant No.4 that Defendant Nos.1 & 2 were not executing the sale deed. He stated that Defendant Nos.3 & 4 purchased the property after 15th August, 2010. He learnt about the same only when the Sub-Registrar issued letter dated 27th January, 2012 to him. He denied the suggestion that he was well aware that Defendant Nos.3 & 4 were purchasing the property. He also denied that the suit was filed in collusion with Defendant Nos.3 and 4 in order to extort money from Defendant No.1 and 2.

Summary of evidence of PW-8 - Shri Ramesh Kanwar Tanwar

21. He is the father of the Plaintiff. He confirmed that he used to be the senior manager of Oriental Bank of Commerce and that he owned agricultural land. He stated that he is not an income tax assessee. He stated that whenever his son required money, he could take from him, as all of his money belonged to his son. He stated that he had fixed deposits and bank accounts in Oriental Bank of Commerce and State Bank of India. For

payment of the consideration, he had not encashed the fixed deposits but he was capable of raising loan. Whenever his son demanded a huge amount, he gave payment by way of cheque.

Summary of evidence of PW-9 – Shri Gajraj Singh

22. He is the uncle of the Plaintiff – Mr. Kanwar Singh Tanwar. He stated that the family was living jointly. He also stated that the Plaintiff had asked him for arrangement of some money. He was aware of the agreement entered into with Mr. Devender Kumar Tanwar in 2010. He also confirmed that he had bank accounts in Oriental Bank of Commerce, State Bank of Patiala and State Bank of India. He stated that in August, 2010 he had not signed any cheques for withdrawing any amounts.

Summary of evidence of PW-10 – Shri Mahipal Tanwar

23. He is the brother of the Plaintiff. He stated that he was working in the firm *'Action Shoes'* since 2007. He was also aware of the agreement with Mr. Devender Kumar. He stated that he had bank accounts in State Bank of Patiala, Oriental Bank of Commerce, State Bank of Bikaner and Jaipur. He stated that his brother had asked him for money from time to time which he sometimes gave in cash or sometimes by way of cheque. He also stated that if his brother requested for cheques in somebody else's name, he would issue the same. He further stated that his brother told him to make arrangements for money.

24. Apart from the above four witnesses, bank officials, record keepers of the courts, etc. produced the office records. The documents placed on record by PW-1, Shri Kumar Kala, Judicial Assistant, RKD Branch, Delhi High Court, pertained to the partition suit no.600/1989 and showed that vide judgment dated 28th May, 2008, in a suit for partition filed by the

Defendants' father, the suit property devolved upon Shri Devender Kumar only. Relevant extract of the said judgment is set out herein below:

> *"14………… The record of the Arbitrators shows that another compromise was entered into between the parties on 11th April, 1976 and in this compromise the parties recorded as under:*
>
> > *"Sir,*
> > *We, Mangat Ram & Chottey Lal have mutually compromised to divide the undermentioned jointly owned properties mentioned in our compromise dated 4.4.1974 amongst our children as under:-*
> >
> > 1. *………………*
> > 2. *………………*
> > 3. *………………*
> > 4. *That property No.WZ-523/30 rented out to M/s Jalapano Industrial is given to Shri Devinder Tanwar s/o Shri Chotay Lal.*
> > 5. *………………*
> >
> > *It is therefore, requested that the aforesaid compromise be made part of the arbitration proceeding.*
> >
> > *Delhi*
> > *Dated 11.4.1976*
> >
> > *Sd/- Mangat Ram*
> > *Sd/- Chhotey Lal"*
>
> *……………………*
>
> *19. I, therefore, come to conclusion that plaintiff and defendant had entered into an agreement dated 11th April, 1976 apportioning the properties among themselves. The agreement is a valid agreement since it was signed by both the parties and was presented before Arbitral Tribunal and was accepted by the Arbitral Tribunal after recording statement of the parties. Even though the agreement does not find mention in the final award but it is part of the Arbitral*

Tribunal records and it cannot be said that there was no agreement between the parties or the agreement was not a valid agreement only because in the final award there is no mention of it."

25. Further, the bank statements, placed on record, of various members of the family of the Plaintiff show balance of around Rs.15 lakhs, Rs.3 lakh, Rs.2 lakh, Rs.1.50 lakhs, in different bank accounts, being available with them. The said officials had also placed on record copies of the non-convertible redeemable bonds for Rs.2.63 lakhs, Rs.2.73 lakhs, Rs.4.73 laksh etc. The Defendants led no evidence.

Findings on the merits of the case

26. It is clear from a perusal of the pleadings and the evidence that the Plaintiff's family was reasonably well off. They were all living together and were earning members. They operated as a joint family. They had capacity to pay as they were also owners of agricultural land and had agricultural income. Further, the *bayana* receipt is itself an admitted document. The *bayana* receipt mentions the date., the consideration amount and it mentioned that papers have to be finalized within five months. The date on the agreement is 15th March, 2010. It bears the signature of the Plaintiff, Defendant Nos.1 & 2, as also the witness. Payment of Rs.1 lakh is also admitted. Thus, the findings of the Trial Court are completely justified.

27. The subsequent sale deeds entered into with Defendant Nos.3 & 4 (at pages 941 and 965 of the Trial Court Record) show the total sale consideration as Rs.72 lakhs for 200 sq. yards. However, the Plaintiff had agreed to purchase 170 sq. yards. Thus, the effective price between the Plaintiff's transaction and transaction of Defendant Nos.3 and 4, was almost

the same i.e. in the Plaintiff's case, it was Rs.35,000/- per sq. yard and in the Defendants' case it was Rs.36,000/- per sq. yards. Though the Plaintiff's transaction was of March, 2010, and the sale to the Defendant Nos. 3 and 4 was in December, 2011 there was not much difference in the price between the two transactions. The price being comparable, the Plaintiff being the prior purchaser, its agreement being admitted and the Plaintiff having established his readiness and willingness as also availability of funds, the decree for specific performance is liable to be upheld.

28. The Plaintiff, pursuant to the said judgment, deposited the entire balance sale consideration amount to the tune of Rs.67,63,580/-, in the Tis Hazari Court, which is lying in an FDR there. After the judgment was pronounced, the Plaintiff moved an application under Section 152 CPC, seeking modification/correction of the judgment. Vide its order dated 20th September, 2016, the Trial Court observed as under:

> *"8. In the instant matter, it is apparent on record that measurement of the property was mentioned at 170 sq. yards in the plaint. Upon the objection taken by the defendant in written statement regarding the area being 200 sq. yards, as submitted in the replication, plaintiff was willing and ready to purchase the entire premises in terms of bayana cum sale agreement which is basis of entire dealing between the parties. Plaintiff had agreed to purchase the entire property against the sale consideration of Rs.35,000/- per yard, which itself is suggestive of the fact that the entire property was intended to be sole by defendants No.1 and 2 in favour of plaintiff at above mentioned rate. The contention of plaintiff was that he was given the impression about measurement of property as 170 sq. yards which if, it was 200 sq. yards, he was ready to purchase the same at the same rate as mentioned in bayana receipt.*

9. Issues were framed in the presence of parties and no issue was framed on the said aspect, nor was ever pressed for by defendants to be framed. Judgment has been passed in favour of plaintiff holding his entitlement to seek specific performance which has to be in consonance with agreement between the parties and provision of Section 152 CPC, does not disempower the Court to make accidental slips or omissions corrected at any time.

10. <u>The decree, accordingly, stands modified to the extent that necessary registered sale documents shall be executed in favour of plaintiff in respect of the suit property bearing No. WZ-523/30, Village Basai Darapur, New Delhi within two months against receipt of balance sale consideration amount.</u>

*11. <u>With regard to defendants No.3 and 4, Judgment having been passed in favour of plaintiff, defendants No.3 and 4 shall also be bound to above by Judgment and decree, passed as respective sale deeds in their favour also become null and void consequent to Judgment having been passed in favour of plaintiff. They can also ensure the protection of their interest seeking release of balance sale consideration amount deposited by plaintiff in their favour instead of defendants No.1 and 2.</u> However, Counsel for the plaintiff placed reliance upon **Lala Durga Prasad and Anr. v. Lala Deep Chand and Ors. (1954 SCR 360)**, wherein it was observed that "proper form of decree is to direct specific performance of the contract between the vendor and plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to plaintiff." As suggested and directed by Hon'ble Apex Court, subsequent transferees are also joined in the conveyance. Operative portions of Judgment with modification shall be read as follows:*

> *"instant suit is decreed in favour of the plaintiff and against the defendants No.1 and 2 with*

> *cost whereby defendants are directed to execute the necessary registered sale documents in favour of plaintiff in respect of the suit property bearing No.WZ-523/30, Village Basai Darapur, New Delhi, at sale consideration amount of Rs.35,000/- per yard within two months against receipt of balance sale consideration amount. Defendants No.3 and 4 shall be involved in conveyance and after conveyance has been executed, defendants No.3 and 4 shall be paid equal share of Rs.67,63,580/- lying deposited in this Court as compensation for the loss suffered by them with further rights they may have against defendants No.1 and 2. Fresh decree sheet be drawn.""*

29. In the modification order dated 20th September, 2016, the Trial Court also records that the Plaintiff was willing to purchase the suit property at the same rate, if it was a 200 sq. yards property, as agreed to by Defendant Nos.3 & 4. Thus, as per the above modification order, the Trial Court made the decree of specific performance dated 23rd April, 2016, binding even on the subsequent purchasers i.e. Defendant Nos.3 & 4. They have been directed to join in the conveyance and then the money lying deposited would be released in their favour. Following the judgment of the Supreme Court in ***Lala Durga Prasad v. Lala Deep Chand AIR 1954 SC 75***, even the transferees are liable to be joint in the conveyance when a specific performance decree is passed. This position is again reiterated by the Supreme Court in its recent judgment in ***Vijay A. Mittal and Ors. v. Kulwant Rai (Dead) thr. L.Rs and Ors. [Civil Appeal No. 5177/2009 decided on 29th January, 2019]***. Thus, Defendant Nos.3 & 4 shall be bound by the decree of specific performance granted in favour of Plaintiff. This

modification order is liable to be upheld.

30. It is, accordingly, directed that the sale deed shall be executed by Mrs. Pratibha with confirmation by Defendant Nos.3 & 4, Mrs. Kiran Tanwar and Mr. Dinesh Tanwar, within three months. Upon the sale deed being registered and the certified copy of the same being placed before the Executing Court, the amount of Rs.67,63,580/- lying deposited in the Tis Hazari Court, Delhi shall be released in favour of Mrs. Kiran Tanwar and Mr. Dinesh Tanwar in equal proportions. Any interest, which has accrued on the same, shall be reimbursed to the Plaintiff.

31. The appeals are disposed of in the above terms. All pending applications also stand disposed of. Decree sheet be drawn.

Developments post filing of the present suit – Mr. Devender Kumar going missing and conduct of Mrs. Pratibha in RFA 695/2016

32. In the present appeal filed by Mrs. Pratibha, being RFA 695/2016, her brother Mr. Devender Kumar, who was the owner of the suit property was not impleaded, either as a party or as Respondent. He has gone missing and is completely untraceable. His bank accounts are being operated, huge sums of cash are being collected by his sister from the sale of his properties and despite repeated efforts by the court, the police have not conducted proper investigation and Mr. Devender Kumar continues to be missing.

33. Due to the non-impleadment of Mr. Devender Kumar, an objection was taken by the Plaintiff that the original owners, who had executed the *bayana* agreement, were Mrs. Pratibha and her brother Mr. Devender Kumar, and accordingly he ought to be impleaded in the appeal. Counsel appearing for Mrs. Pratibha, at that stage, stated that the non-impleadment of

Mr. Devender Kumar was an inadvertent, *bonafide* error. Time was sought to implead Mr. Devender Kumar and one week's time was granted. Despite him being impleaded as a Respondent, Mr. Devender Kumar was not served in the appeal. An objection was taken by the Plaintiff that the intention of Mrs. Pratibha in making her brother as a Respondent was merely to delay the hearing in the appeal.

34. On 5th July, 2017, in RFA 695/2016, execution proceedings were allowed to continue, but it was observed that no final order would be passed. An application came to filed being I.A.20788/2017 by Mrs. Pratibha under Order XXXII CPC for appointing her as the *'next friend'* of her brother Mr. Devender Kumar– Respondent No.4. The pleading in the application was that Mr. Devender Kumar had a history of mental sickness, epilepsy attacks, and reliance was placed on medical certificates/prescriptions issued by MGS hospital, dated 11th October, 2005, Deen Dayal Upadhaya Hospital, and Khetrapal Hospital. It was, further, pleaded that the condition of Mr. Devender Kumar had worsened in 2014 and he suffered from complete memory loss. It is then stated that Mr. Devender Kumar left the house in February, 2016 and did not return, and that he has gone missing. Thus, it is prayed that Mr. Devender Kumar be impleaded as an Appellant, after appointing Mrs. Pratibha as her next friend. The relevant extracts of the said application are set out below:

> "*3. During the pendency of the suit, Davinder Kumar (brother of Pratibha) had a history of mental illness, epilepsy attack etc. True copy of medical report of Davinder Kumar is annexed herewith and marked as Annexure-A/1*
> *4. That the condition of Devender Kumar became worse in 2014 and thereafter due to this medical*

condition he remained in state of forgetfulness and there was complete memory loss. Thus, Davinder Kumar was bodily fine, however without any memory. He was taken care of by the applicant (Pratibha) and her family members only.

There are no other brothers/sisters of Davinder who took care of him and it is in this background Davinder was being looked after by Pratibha only.

5. That Davinder Singh left the house on Feb 2016, did not return. Applicant and her family got concern and they even got his complaint registered with police.

4. That the suit property belonged to Mr. Davinder Kumar, who has lost his memory and as a person of unsound mind now has gone missing. Therefore, it is in the interest of justice that his sister Mrs. Pratibha/Applicant herein be appointed as his 'next friend' so as to take care of his legal interest before the Hon'ble Court. Due to memory loss, Davinder Kumar falls in the category of unsound mind whose interest is to be protected till the time he himself becomes fit in his mental faculties and/or becomes competent to protect his own interest.

5. In light of the above, the cause title of the present appeal be shown as Appellant 'Davinder Kumar S/o Chhote Lal through Next Friend Ms. Pratibha and memo of parties be corrected in the said terms. True Copy of the corrected memo of parties is annexed herewith and is marked as Annexure A-2

6. That the present application should have been filed at the time of filing of appeal but due to inadvertence, same could not be done. At this stage it is pertinent to note that Ms. Pratibha in the appeal is espousing the cause of 'Davinder Kumar S/o Chhote Lai' only as it is he who was the owner of the property in question.

7. Present application is made bonafide and in the interest of justice."

35. The said application is accompanied by the following medical

certificates:

- Certificate dated 11th October, 2005 issued by Department of Radio-Diagnosis & Imaging at M.G.S. Hospital;
- Out-patients Ticket from Deen Dayal Upadhaya Hospital, dated 4th October, 2005;
- Prescription for Convulsion Disorder and Head CT Scan from Khetrapal Hospital, dated 27th August, 1997;
- Chest X-Ray report from Khetrapal Hospital dated 27th August, 1997;
- Out-patients Ticket from Deen Dayal Upadhaya Hospital, dated 11th July, 1996;
- Out-patients Ticket from Deen Dayal Upadhaya Hospital.
- Certificate issued from Khetrapal Hospital for Convulsion disorder dated 26th August, 1997.

36. Along with this application, two other applications, one for exemption and another application for placing on record the amended memo of parties showing Mr. Devender Kumar as Appellant No.2, was filed. When the said applications were listed before Court on 19th February, 2018, the Court directed as under:

> *"Counsel for the Appellant submits that Mr. Devinder Tanwar for whom the Appellant wishes to act as next friend is missing since the last one year. On instructions from the Appellant who is present in Court, he submits that a complaint has been filed by the Appellant with the SHO PS Janak Puri that her brother is missing. A copy the complaint be produced before the Court on the next date of hearing.*
> *Relist on 15th March, 2018.*
> *Parties shall remain present on the next date"*

37. On the next date i.e. 15th March, 2018, the following order was passed:

> *"1. Appellant in RFA 695/2016 is present in court. She has produced an extract of the missing person register maintained by S.H.O., Police Station, Janak Puri which shows that Mr. Devender Kumar who was the actual owner of the property has been missing since 23 October, 2013. It is surprising that this fact was not brought to the notice of any of the courts till today until the application was filed by the Appellant to act as next friend. There are two sets of documents that have been executed qua the suit property. The first set of documents are executed with the Respondent No.l, Mr. Kanwar Singh Tanwar by which it was agreed that the suit property was to be sold for a sum of Rs.70 lakhs vide documents dated 15th March, 2010. Counsel for Respondent No.l submits that Rs.l lakh which was paid at the time of the agreement was entered into and after passing of the impugned decree, the balance amount has been deposited before the Trial Court.*
>
> *2. The second sets of documents have been executed with Mr. Dinesh Tanwar and Mrs. Kiran Tanwar. These sets of documents are dated 29th December, 2011 to 31st December, 2011. As per this set of sale deeds, Rs.72 lakhs was the agreed consideration. The sale deeds record that Rs.40 lakhs has been paid by cash and Rs.32 lakhs has been paid by cheque. Mr. Dinesh Tanwar is present in court who submits that Mr. Devender Kumar is his first cousin i.e. Chacha's son. When asked as to where his whereabouts, he says that Mr. Devender Kumar used to reside with his sister, Mrs. Pratibha and brother-in-law, Mr. Sunil Arya. Mrs. Pratibha is present in court and submits that Mr. Sunil Arya is working in BSES. Mr. Dinesh Tanwar further submits that cash was handed over to Mr. Devender Kumar and to Mrs. Pratibha, but the cheques were given in the name of Mr. Devender*

Kumar. On a query as to who is operating the bank accounts of Mr. Devender Kumar (Saving Bank Account No.65025152475), who is reportedly missing since 23rd October, 2013, she submits that no one is operating the bank account.

3. The Manager of State Bank of Patiala, Bali Nagar Branch (now merged into State Bank of India) is directed to produce a complete statement of account of the bank accounts of Mr. Devender Kumar from 1st January, 2010 till date. He will also produce any letters and documents which are on the bank records to show as to who is operating the said account. A responsible official of the bank shall be present in Court on the next date. Let Court notice be issued to the Manager, State Bank of Patiala, Bali Nagar Branch along with a copy of the present order.

4. The S.H.O. Police Station Janak Puri is also directed to file a status report as to the whereabouts of Mr. Devender Kumar and any investigation conducted in respect thereof, including the details as to when the complaints was made as to when he is missing.

5. Relist on 20th April, 2018."

38. From the above, it was clear that the police record in police station Janakpuri showed that Mr. Devender Kumar was missing since 23rd October, 2013. However, this fact was not brought to the notice of any Court, till the filing of the application for *'next friend'* in May, 2017. The proceedings in the Court also revealed that Mr. Devender Kumar used to reside with his sister Mrs. Pratibha. The subsequent purchasers, Defendant Nos.3 and 4, had handed over the sale consideration to Mr. Devender Kumar and Mrs. Pratibha. The cheques were in the name of Mr. Devender Kumar. The cash was given Mrs.Pratibha. It was not clear as to who was operating the bank account of Mr. Devender Kumar, who was stated to be missing

since 23rd October, 2013. The Bank Manager of State Bank of Patiala was directed to produce the complete statement of account of the bank account of Mr. Devender Kumar, and a status report was also called from the SHO police station Janak Puri.

39. On the next date i.e. on 20th April, 2018, a constable from the police station Janak Puri submitted that no missing persons complaint in respect of Mr. Devender Kumar in the year 2013 was recorded with them. Mr. Ranbir Singh, the official who appeared from the State Bank of India and submitted the statement of account of Mr. Devender Kumar for the period from 1st January, 2010 to 18th April, 2018. The statement of account showed that there are two entries showing deposit of Rs.16 lakhs in the bank account on 26th November, 2010 and 29th November, 2010. Out of the amount of Rs.32 lakhs which was deposited, Rs.29 lakhs had been withdrawn or transferred to some other account vide entries dated 29th November, 2011, for Rs.15 lakhs and 20th December, 2011 for Rs.14 lakhs. It was not clear as to who had signed the cheques or the forms for withdrawal/transfer of the impugned amounts. The bank official was, accordingly, directed to produce the vouchers and all other details to show the manner in which a sum of Rs.32 lakhs was moved. In fact, the last debit in the account of Mr. Devender Kumar was on 4th June, 2014, which is subsequent to the missing persons report claimed to have been filed.

40. <u>On the said date, Mrs. Pratibha, who had originally stated that her brother was missing from 23rd October, 2013, now stated that he went missing only in 2016</u>. Mrs. Pratibha, was paid cash of Rs.40 lakhs by the subsequent purchasers, Mr. Dinesh Tanwar and Kiran Tanwar. She was directed to file an affidavit as to who accepted the cash payments and how it

was utilised.

41. On 15th May, 2018, last opportunity was granted to Mrs. Pratibha to comply with the earlier orders of the Court. On 22nd May, 2018, since both Mrs. Pratibha and her husband did not appear before Court, bailable warrants were issued to ensure their presence. On the said date, the bank statements, which were produced, showed that the amounts from the account of Mr. Devender Kumar were transferred to Mrs. Pratibha's account, vide three cheques dated 29th November 2011, 20th December 2011 and 23rd October, 2012. Mrs. Pratibha, thereafter, filed an affidavit dated 30th May, 2018 pursuant to the order dated 20th April, 2018. In this affidavit, she stated that her brother was of fragile health. She further stated that the sum of Rs.40 lakhs received in cash and Rs.32 lakhs received by way of cheques in the name of Mr. Devender Kumar, from the subsequent purchasers, were utilised for the welfare of Mr. Devender Kumar. Relevant extracts of the affidavit are set out hereinbelow:

> "*16. That the sale of the present property which is the subject matter of the present appeal was also one of the efforts to make him independent and the amount as received against the sale consideration of the same (4000000/- as cash as well as 32 lacs as cheque were utilized for paying his debt as well as for his welfare.*
> *17. That the payment as received in cash quantified to be Rs.4000000/- was utilised for the payment of the liabilities of the brother of the deponent as sum of Rs.300000/- (thirty lacs) were paid to one Sh. Braham who had paid to the brother of the deponent the sum of Rs.1500000/ as earnest money* ***towards some property*** *and further sum of Rs.600000/ were given to him as interest on the same.*
> *18. That the sum of Rs.500000/ were given to the tenant to get the factory premises vacated. The name of*

the tenant was Mr. Puran Singh, the deponent is having the documentary proof qua the same which she can file before the Hon'ble Court as and when directed.
19. That the sum of Rs.500000/ were also paid to one Sh. Vinod Kumar and in addition to the same a sum of Rs.200000/ were also paid to him in cash. And all the payment were made on the insistence of the brother of the deponent.
20. <u>That there was a joint property of the brother of the deponent and the deponent herself and at one point of time the deponent had to pay a sum of Rs.1500000/- to get the same vacated to then tenant occupied the premises</u>.
………………..."

42. In the above affidavit, Mrs. Pratibha, apart from stating that the cash, which was paid by Defendant Nos.3 & 4, to her, was utilized for treatment of Mr. Devender Kumar also stated that she and her brother owned another property bearing No. WZ-508, Village Basai Dara Pur, New Delhi. She further submits that there were some tenants in the said property, who had to be evicted and the money given by Defendant Nos.3 & 4 was utilized for the said purpose.

43. It was further stated in this affidavit that further amounts were given to various tenants to get the property vacated. The said property was another property of which Mr. Devender Kumar and Mrs. Pratibha were claimed to be the joint owners. It was also stated that all the payments were made to the tenants on the insistence of Mr. Devender Kumar.

44. Upon perusing the said affidavit, on 31st May 2018, it was directed that the said joint property, for which the amounts were utilised being, property No.WZ-508, Village Basai Darapur, Delhi shall remain attached.

There was no other explanation in respect of the amount of Rs.72 lakhs, which were paid by Defendant Nos. 3 and 4, to Mrs. Pratibha.

45. The status report filed by SHO police station Sagar Pur showed that the last transaction in the bank account of Mr. Devender Kumar was of 6th April, 2014 in favour of his sister – Mrs. Pratibha. On the next date, a shocking state of affairs was revealed, that the joint property bearing No.WZ-508, Basai Darapur, New Delhi, which was attached, had in fact been sold. The statement of Mrs. Pratibha was recorded, wherein she stated as under:

> "***Statement of Pratibha, w/o Sh. Sunil Arya, R/o WZ-46A/10 Gali No.2, Village Sagarpur Main, New Delhi.***
>
> *On SA*
>
> *The property WZ-508, Village Basai Dara Pur, New Delhi-110015 stands in my name. The same was inherited by me from my father. Total of 16 flats have been constructed in that plot. All the 16 flats stand in my name. Some of the flats are vacant and some have been given on rent. The rent is not received by me. I had given the property on Power of Attorney to Mr. Prathvi Dutt Sharma (M-9811411501) and Mr. Ashok Shukla for them to construct. The loan was taken by the said dealers who are dealing with the tenants. I am not aware of the actual amounts. The whereabouts of my brother, Mr. Davinder Kumar are not known. I don't know in whose name the electricity and water meters are. I cannot deposit the sum of Rs.72,00,000/- (Rupees Seventy Two Lakhs) which has been paid by Mr. Dinesh Tanwar."*

46. In this statement, she resiled from the earlier statement made in the affidavit that property bearing No. WZ-508, Basai Darapur, New Delhi, was

a joint property. She now stated that the said property belonged to her. In view of her statement, a Local Commissioner was appointed to ascertain the exact status of property bearing No. WZ-508, Village Basai Dara Pur, New Delhi.

47. The report of the Local Commissioner was received, which showed that Mrs. Pratibha had sold 290 sq. metre of the property bearing No. WZ-508, Village Basai Darapur, New Delhi, in favour of Mrs. Meera Shukla. The sale deed is dated 16th January 2013 for a total consideration amount of Rs.1,12,00,000/- and is claimed to have been witnessed by Mr. Devender Kumar, the missing brother. The sale deed also specified that a relinquishment deed dated 4th January, 2013 had been executed by Mr. Devender Kumar in favour of his sister Mrs. Pratibha for property bearing No. WZ-508, Village Basai Darapur, New Delhi. Another sale deed dated 17th December, 2013 had also been entered into by Mrs. Pratibha in favour of Mrs. Renu Sharma W/o Mr. Prithvi Dutt Sharma for a consideration of Rs.56 lakhs. The Local Commissioner's report showed that the statement made by Mrs. Pratibha on 20th July, 2018 that she had given the property bearing No. WZ-508, Village Basai Darapur, New Delhi, on power of attorney to Mr. Prithvi Dutt Sharma and Mr. Ashok Shukla, was a false statement. She had, in fact, sold the property to their respective wives and collected total consideration of Rs.1.12 crores + Rs.56 lakhs = Rs.1.68 crores.

48. On 3rd August, 2018, after perusing the Local Commissioner's report, notice to show cause was issued as to why contempt action ought not to be taken against Mrs. Pratibha. She had made several false statements, as recorded in paragraph 5 of the said order. On the said date, the Inspector

who had appeared from police station Sagar Pur informed the Court that Mr. Devender Kumar was last found missing from the house of Mrs. Pratibha. FIR was also directed to be registered to investigate the missing status of Mr. Devender Kumar.

49. On 4th September, 2018, since no reply was filed to show cause for contempt, last opportunity was granted to Mrs. Pratibha. The SHO police station Sagar Pur had filed a further status report. On 26th September, 2018 a status report was filed which showed that some of the relatives of Mr. Devender Kumar claimed that he was missing only since 2017. Mrs. Pratibha then claimed that she did not have any medical records of her brother. The status report further revealed that a sum of Rs.1.12 crores was received by Mrs. Pratibha from Mr. Ashok Shukla, and there was no explanation as to what was done with the said amount.

50. On 12th October 2018, a new counsel appeared on behalf of Mrs. Pratibha in the contempt initiated against her and sought further time to file reply to the show cause for contempt. The same was granted, subject to payment of costs. The SHO police station Sagar Pur also reported that they had moved the CFSL for conducting a lie-detector test on Mrs. Pratibha and her husband in order to determine the whereabouts of Mr. Devender Kumar. On 11th December, 2018 no reply to show cause notice was filed. No counsel put in appearance in the contempt matter for Mrs. Pratibha. The right to file reply was closed and Mrs. Pratibha was directed not to leave the jurisdiction of this Court. On 19th February, 2019, orders were reserved in the main appeal as also in the contempt proceedings.

51. A perusal of the various status reports and the affidavits filed, as also the statements of the various bank officials reveals the following facts:

a) That the suit property actually belonged only to Mr. Devender Kumar. The consideration was paid by the subsequent purchasers, partly by cheque and partly by cash. The cheques were issued in the name of Mr. Devender Kumar and the cash payment was accepted by Mrs. Pratibha.

b) Apart from filing the written statement, Mr. Devender Kumar has not appeared before the trial court.

c) At the time of filing of the appeal, Mrs. Pratibha simply filed the appeal without impleading her brother, on the ground she was aggrieved by the impugned judgement.

d) The appeal was filed in 2016, but no disclosure was made that the brother, Mr. Devender Kumar, who is the original owner of the suit property, was missing;

e) Statement was made on 2nd November, 2016 that the omission to implead Mr. Devender Kumar was inadvertent and *bonafide*;

f) Application for being appointed as next friend is moved on the basis of completely false statements made in the application;

g) That in the application under Order XXXII CPC, Mrs. Pratibha claimed that <u>her brother was missing since February, 2016</u>. Thus, she had prayed for being allowed to appear for her brother as his next friend.

h) However, thereafter on 15th March 2018, she made a statement that her brother has been missing since 23rd October 2013.

i) That she suddenly resiled from her stand recorded on 20th April, 2018 when she stated that her <u>brother was missing since 2016</u>. Para 6 of the said order reads as under:

> "*6. Today Mrs. Pratibha states that her brother who was initially missing in 2013, had come back and again went missing from her house in 2016.*
> *Insofar as the amount allegedly paid by the Appellants in cash of Rs.40,00,000/-, Mrs. Pratibha and her husband Mr. Sunil Arya to file affidavit in this Court within two weeks as to who accepted the same and how the same was utilized. Both Mrs. Pratibha and her husband Mr. Sunil Arya shall remain present on the next date of hearing.*"

j) The status report dated 26th September 2018 submitted by SHO police station Sagar Pur shows that Mr. Devender Kumar was missing only since 2017 as per the other relatives.

k) It was originally claimed that property bearing No.WZ-508, Village Basai Darapur, New Delhi was a joint property of Mrs. Pratibha and Mr. Devender Kumar, as per the affidavit of Mrs. Pratibha dated 30th May, 2018. Paragraph 20 of the said affidavit reads as under:

> "*20. That there was a joint property of the brother of the deponent and the deponent herself and at one point of time the deponent had to pay a sum of Rs.1500000/- to get the same vacated to then tenant occupied the premises.*"

l) That a part of the amount of consideration received from the subsequent purchasers of the suit property was utilized to vacate the tenant from the joint property bearing No.WZ-508, Village Basai Darapur, New Delhi.

m) On 20th July 2018 it was submitted that the property bearing No.WZ-508, Village Basai Darapur, New Delhi, has been given on power of attorney to Mr. Prithvi Dutt Sharma and Mr. Ashok Shukla. Her statement reads as under:

> *"I had given the property on Power of Attorney to Mr. Prathvi Dutt Sharma (M-9811411501) and Mr. Ashok Shukla for them to construct."*

n) The Local Commissioner's report further revealed that Mrs. Pratibha had sold the property to the wives of Mr. Prithvi Dutt Sharma and Mr. Ashok Shukla for a consideration of Rs.1.12 crores and Rs.56 lakhs, respectively, in the year 2013 itself.

o) The stand of Mrs. Pratibha is now that the second property i.e., WZ-508, Village Basai Darapur, was owned by her, and Mr. Devender Kumar had executed a relinquishment deed in her favour qua his share in the said property.

52. The conduct of Mrs. Pratibha, who was Defendant No.2 in the suit and is the Appellant in RFA 695/2016 reveals that she has, during pendency of this litigation, been making completely misleading and false statements before this Court. She has, in fact, not only been misrepresenting to the various parties i.e. the purchasers concerned, who are the Appellants in RFA 544/2016, and the Plaintiff in the suit, but has also indulged in some severe contumacious conduct towards the Court. The suit property was sold initially by her along with her brother jointly to the Plaintiff – Shri Kanwar Singh Tanwar, as per the *bayana* agreement dated 15th March, 2010. The written statement filed by Mrs. Pratibha and Mr. Devender Kumar were joint in nature. An affidavit was also signed by Mr. Devender Kumar in support thereof.

53. During the pendency of the suit, vide two agreements to sell dated 29th December, 2011 and 31st December, 2011, the property was again sold by Mrs. Pratibha and Mr. Devender Kumar to Defendant Nos.3 & 4. This

was done without seeking permission of the Court. The amount of consideration paid by Defendant Nos.3 & 4 was collected substantially by Mrs. Pratibha in cash. There was no clarity as to how she utilized the said amount. Even the amount of Rs.32 lakhs paid by cheque to Mr. Devender Kumar, has been substantially withdrawn by Mrs. Pratibha from Mr. Devender Kumar's account. Since the written statement itself originally claimed that Mr. Devender Kumar was an epileptic patient and not in a sound mental condition, it is not clear as to who negotiated the second transaction for the suit property and how the entire consideration came to be paid. Thereafter, at some point, Mr. Devender Kumar had gone missing and continues to be missing till this date. Initially, Mrs. Pratibha was directed, by this Court, to deposit the amount of Rs.72 lakhs vide order dated 31st May, 2018, in the Court, however, she refused to do so, thereafter. On the Court calling for an explanation as to how she utilized the amount paid by Defendant Nos.3 & 4, she made a false statement, misleading the Court that the same was used for the medical treatment of Mr. Devender Kumar and some portion was used to evict the tenant from the joint property of Mr. Devender Kumar and Mrs. Pratibha. Further enquiry was made into this new fact, which she revealed, and even these statements were proven to be false. In fact, the second property i.e., WZ-508, Village Basai Dara Pur, New Delhi, which she claimed was jointly owned by her with her brother, was sold by her to third parties on the basis of a relinquishment deed executed by Mr. Devender Kumar in her favour. So, it is not clear as to whether Mr. Devender Kumar, in fact, was a party to the second sale of the suit property which took place in 16th January, 2013 It is not clear as to whether he actually signed as a witness to the sale of the second suit property in Basai Dara Pur, though he is shown to be a witness. It is not clear as to whether he actually executed the relinquishment deed or not in his sister's favour, as during this entire period, nobody seems to be aware of the whereabouts of Mr. Devender Kumar.

54. His bank account is being continuously operated. Substantial amounts have been withdrawn from the same and most of the amounts have gone to Mrs. Pratibha. She had earned a huge sum of money by reselling the suit property, by selling away the second property, and she continued to mislead the Court as to the true status of the whereabouts of Mr. Devender Kumar. She, in fact, tried to play innocent and moved an application to be permitted to act as *'next friend'* of her brother, without disclosing in the application that her brother was missing. In the said application, it was only claimed that the brother was mentally ill. It was only after consistent probing and enquiry by the Court that a completely sad state of affairs has been revealed wherein a sister has been involved in misusing her brother's property and cornering to herself all the money arising from the sale of his properties. This entire sequence of events has played out during the pendency of the litigation while the Court was adjudicating the issues. At no point of time, does Mrs. Pratibha reveal to the Court the serious nature of her brother's illness or that the fact that he was missing. She has indulged in completely contumacious conduct, which has impeded adjudication of the disputes involved in the suit.

55. Two sets of purchasers are before the Court. One of them has deposited the entire sale consideration in the Court. The second set of purchasers have paid the money to Mrs. Pratibha and Mr. Devender Kumar, however, the said amount is not forthcoming. This Court took *suo moto*

notice of her conduct, which clearly constitutes contempt and she was directed to file reply to the show cause as to why contempt action should not be taken against her, but no reply has been filed by her to the said notice.

56. The conduct of Mrs. Pratibha, in completely usurping all the money of her brother and not revealing the true facts to this Court, deliberately and consciously clearly constitutes contempt. She has sold the suit property jointly owned by her and her brother and accepted the sale consideration in cash. She sold the second property belonging to her brother, as also all along made false and incorrect statements before the Court. There is serious non-disclosure of material and relevant facts before this Court. In fact, Mr. Devender Kumar, brother of Mrs. Pratibha is still untraceable, despite investigations by the police. The owner of the suit property, subject matter of the appeal, was Mr. Devender Kumar. The money was accepted by Mrs. Pratibha in her brother's name. It is not even clear as to whether the affidavits filed in the present case, affidavits/pleadings filed by Mr. Devender Kumar were, in fact, filed by him at all. Huge sums have been siphoned off by Mrs. Pratibha from her brother's account and repeated sales of the same property are being made. Even orders imposing costs on Mrs. Pratibha have not been complied with. Mr. Devender Kumar was a signatory to the agreement to sell/*bayana* receipt dated 15th March, 2010 in the present case. He was supposed to have gone missing since 2013. He has, however, been shown as a witness to the sale deed in respect of a portion of the property bearing No.WZ-508, Village Basai Darapur, New Delhi dated 16th January, 2013 in favour of Mrs. Meera Shukla. It is not clear if the signatures on the said sale deed and relinquishment deed are even genuine as he was purportedly missing. Even the date since when Mr.

Devender Kumar is missing is not clear. The signatures and spelling of Mr. Devender Kumar as is available in the affidavit filed in support of the written statement before the Trial Court, appear to be *prima facie* different from the signatures appearing on the cheques placed on record by the bank official. It is, thus, possible that the amounts have been withdrawn from the account of Mr. Devender Kumar by forging his signatures, which will however require an investigation.

57. The two purchasers of the property are before this Court. The facts reveal an alarming situation, wherein a brother has gone missing and his sister has garnered to herself the entire money in respect of the joint property. Mrs. Pratibha has showed scant regard to the orders passed by this Court and in fact, made false and misleading statements, time and again, as recorded herein above. The contents of her application as *`next friend'* are telling. In the said application, which is supported by her affidavit, she has claimed that only Mr. Devender Kumar is the owner of the suit property. She doesn't reveal the facts as to exactly from when he is missing, but states that it was near February, 2016. She pleads that she inadvertently did not make her brother a party to the appeal. She has feigned innocence when clearly her brother was last residing with her and she was aware all along that he is missing. She has impeded the administration of justice and repeatedly violated orders passed by this Court. This is nothing but contempt in the face of the Court.

Analysis of the Law

58. The jurisprudence on contempt of Courts is fairly well settled in India. The relevant provisions of the Contempt of Courts Act, 1971, are set out below:

*"**Section 2. Definitions.** – In this Act, unless the context other requires, -*
(a)……………
(b) "civil contempt" means willful disobedience to any judgment, decree, direction, order, writ or other process of a court or willful breach of an undertaking given to a court;
(c) "criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which –

(i) scandalizes or tends to scandalize, or lowers or tends to lower the authority of, any court; or
(ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or
(iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner;
………………

***Section 12. Punishment for contempt of court.** – (1) Save as otherwise expressly provided in this Act or in any other law, a contempt of court may be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both:*
Provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the court.
Explanation. – An apology shall not be rejected merely on the ground that is qualified or conditional if the accused makes it bona fide.
(2) Notwithstanding anything contained in any other law for the time being in force, no court shall impose a sentence in excess of that specified in sub-section (1) for any contempt either in respect of itself or of a court subordinate to it.
(3) Notwithstanding anything contained in this section, where a person is found guilty of a civil contempt, the

court, if it considers that a fine will not meet the ends of justice and that a sentence of imprisonment is necessary shall, instead of sentencing him to simple imprisonment, direct that he be detained in a civil prison for such period not exceeding six months as it thinks fit.
(4)……….(5)………"

59. As held in ***Louis Vuitton Malletier v. Omi & Anr. (2018) 251 DLT 472***, in case of false and misleading statements being made before the Court, the Court can invoke its contempt jurisdiction. The Court specifically observed, following the judgment of the Supreme Court in ***Dhananjay Sharma v. State of Haryana (1995) 3 SCC 757,*** that swearing of false affidavit in judicial proceedings results in obstruction of administration of justice. It reveals the intention of the parties in perverting the course of justice. The Ld. Single Judge in the said case observed as under:

"*32. Contempt in the face of the Court may be criminal or civil contempt. However, in both cases of contempt in the face of the Court, the procedure under Section 14 of the Act, 1971 is attracted. For all other cases of criminal contempt Section 15 is applicable.*
33. Further, this Court is of the opinion that a contemnor is not in a position of an accused and contempt proceedings are separate and distinct from criminal proceedings. In a criminal trial where a person is accused of an offence, there is a Public Prosecutor who prosecutes the case on behalf of the prosecution against the accused, but in contempt proceedings the Court is both the accuser as well as the Judge of the accusation as observed by the Supreme Court in Debarata Bandopadhyay v. State of West Bengal, AIR 1969 SC 189. In fact, contempt proceeding is sui generis. It has peculiar features which are not found in criminal proceedings. In this

view the contemnors do not stand in the position of a person accused of an offence and the Court is free to evolve its own procedure consistent with principles of fair play and natural justice. The Supreme Court in Delhi Judicial Service Association, Tis Hazari Court, Delhi v. State of Gujarat, (1991) 4 SCC 406 has held so. The relevant portion of the said judgment is reproduced hereinbelow:-

> *"12………………. A criminal is punishable by the superior courts by fine or imprisonment, but it has many characteristics which distinguishes it from ordinary offence. An offence under the criminal jurisdiction is trial by a Magistrate or a Judge and the procedure of trial is regulated by Code of Criminal Procedure, 1973 which provides an elaborate procedure for framing of charges, recording of evidence, cross examination, argument and the judgment. But charge of contempt is tried on summary process without any fixed procedure as the court is free to evolve its own procedure consistent with fair play and natural justice. In contempt proceedings, unlike the trial for a criminal offence, no oral evidence is ordinarily recorded and the usual practice is to give evidence by affidavits……"*
>
> *………………*

36. In any event, the Apex Court in Leila David v. State of Maharashtra, (2009) 10 SCC 337 has held, "Although, Section 14 of the Contempt of Courts Act, 1971, lays down the procedure to be followed in cases of criminal contempt in the face of the Court, it does not preclude the court from taking recourse to summary proceedings when a deliberate and willful contumacious incident takes place in front of their eyes and the public at large………"

37. In the opinion of this Court, the present case is a case of contempt in the face of the Court and *therefore, Section 14 of the Act, 1971 applies.*"

60. Recently, in the case of ***National Lawyers Campaign for Judicial Transparency and Reforms and Ors. v. Union of India [W.P.(C) No.191/2010 decision dated 12th March, 2019]***, the Supreme Court observed as under:

> *"13. When contempt is committed in the face of the Court, judges' hands are not tied behind their back"*

61. In ***Suman Chand v. Central Bank of India (2018) 254 DLT 29 (DB)***, a Division Bench of this Court, considering the various uses of contempt jurisdiction has held that making a false statement, willful disobedience, persistent and continuous disobedience with an intention to violate an undertaking made to the Court, non-adherence of promises and representations made to the Court are in inexcusable and constitutes contempt. The relevant portion of the said judgment is set out herein below:

> *"52. The decision in Rita Markandey (supra) would be squarely applicable to the facts of the present case, even if we were to assume that the appellants had not given any "undertaking" to the Court. The observations made in the said case are significant and refer to another facet when contempt jurisdiction can be invoked, different and distinct from cases where parties have given undertaking to the court and have thereafter willfully refused to abide and comply with the same. However, we must caution that where a party has given a statement and made a promise and representation to the court with the intent and purpose to comply with the same but due to subsequent events and for bonafide reasons compliance could not be made, it would not be a case of willful disobedience. In such cases, the party aggrieved must ask for execution of the decree or implementation of the order and the*

court would not exercise its discretion in the contempt jurisdiction.

53. Facts of the case, as noticed by the learned single Judge, are glaring and disclose the cavalier attitude, scorn and abuse of the process of the Court by the appellants, not on one occasion but several occasions, and demonstrate the intent of the appellants to deceive and procure interim orders by giving undertaking and making promises on solemn assurance to the Court, notwithstanding the true intent and knowledge that the undertaking to the Court would not be complied with.

54. It is stated and observed in several cases that the contempt is between the Court and the contemnor and the aggrieved party cannot insist that the Court should exercise such jurisdiction. The discretion is exercised by the Court for maintenance of Court's dignity and majesty of law. However, it would not be entirely correct to state that punishment under the contempt jurisdiction is granted to uphold the dignity of the Court. Contempt jurisdiction is invoked and punishment is imposed to uphold the authority of the Court to punish the contemnor and to act as a deterrent to others. This deterrent is motivated in the interest of the public in order to prevent future incidents of willful disregard and disobedience of the Court orders by a party. Further, contempt jurisdiction may even invoke belated compliance, which is in public interest and when such compliance is made, the contemnor may seek reduction or discharge of the sentence in view of subsequent conduct to purge the contempt by complying with the order. Contempt jurisdiction is invoked when breaches are of the highest level of culpability in the sense that they are willful. Further, persistence and continuous damage and disobedience could in a given case reflect no remorse from the person against whom action is taken."

62. Considering the settled law, as contained in the above judgments, there is no doubt that Mrs. Pratibha is liable to be punished for contempt of Court. Her initial non-disclosure of her brother's illness and his missing status is a deliberate concealment. Thereafter, filing of the application and affidavit praying for her to be appointed as her brother's next friend without disclosing the missing status of her brother, is again willful misrepresentation and deliberate concealment. The initial statement made by her that her brother is missing since 2013 was recorded by the Court. She resiled from it when she got cornered into a piquant situation, which revealed that in subsequent documents and bank account transactions money has been transferred to her account from her brother's account. She then changed her statement and stated that her brother is missing from 2016. The status report filed by the police reveals that the brother, Mr. Devender Kumar was last residing with his sister. Some relatives, however, claim that he was missing since 2017. Mr. Devender Kumar owned various properties, all of which have been sold and money has been taken by Mrs. Pratibha. She has repeatedly appeared before the Court along with her husband Mr. Sunil Arya, who is a BSES employee. Despite repeated enquiries, they have not revealed the true facts.

63. Mrs. Pratibha has usurped the entire money paid by the subsequent purchasers i.e. Defendant Nos.3 & 4. She has made false statements about the second property, i.e., WZ-508, Village Basai Dara Pur, New Delhi, which is revealed to have been sold by her, as per the report of the Local Commissioner. She initially stated that the said property was given for construction on power of attorney basis to Mr. Prithvi Dutt Sharma and Mr.

Ashok Shula, whereas it was revealed that she had sold the property in question to the wives of the said two persons. She was directed vide order dated 31st May, 2018 to deposit the sum of Rs.72 lakhs, which was paid as consideration by Defendant Nos.3 and 4, which she has not complied with. Repeated costs have been imposed on her, which have not been complied with. She has not even bothered to file a reply to the show cause notice for contempt issued against her. Though she continues to instruct her counsel to defend her case on merits, in her appeal i.e., RFA 695/2016, she has not filed any reply to the show cause notice of contempt. She has earned more than Rs.2 crores by selling the properties owned by her brother as also those jointly owned by them. Mr. Devender Kumar continues to be missing.

64. This case has shaken the conscious of the Court as to how a sister can, in fact, behave in this completely deceitful and unscrupulous fashion, towards her own brother. She has initially concealed the whereabouts of her brother and repeatedly made false statements as to since when he is missing. She has sold his properties and appropriated all the sale consideration, having scant regard for the Court and to her own role as a sister. The brother's missing status has not caused any concern to his sister as she has shown no remorse even while appearing in Court and has, in fact, exhibited complete defiance. She has violated orders passed by the court including order dated 31st May, 2018 directing deposit of a sum of Rs.72 lakhs, i.e., the money she has received from the subsequent purchasers and orders 12th October, 2018 and 11th December, 2018 directing deposit of costs. In the overall facts and circumstances of the present case, Mrs. Pratibha is held guilty of contempt of Court. Her conduct, clearly, constitutes even civil contempt, which can be punished by this Court under the provisions of the

Contempt of Courts Act, 1971. It is contempt on the face of the court. She is held guilty of contempt of Court and is sentenced to simple imprisonment for a period of three months.

65. In the circumstances, it is also directed that a Writ petition be registered as a habeas corpus petition, to investigate the missing person case of Mr. Devender Kumar, so that a comprehensive investigation is conducted into the disappearance of Mr. Devender Kumar, as also to investigate the misuse of his bank accounts and his money and property. For the said purpose, let the matter be placed before the Hon'ble Chief Justice for marking to the appropriate Bench. The order sheets of these two appeals, various status reports filed by the Investigating officers, Police Station Sagar Pur, including the present judgment be placed before the appropriate Court.

66. The contempt proceedings are disposed of in the above terms.

67. The SHO, Sagarpur is directed to take Mrs. Pratibha into custody for serving the sentence.

68. Both RFAs are disposed of in the above terms. All pending applications are also disposed of. *Dasti*.

PRATHIBA M. SINGH, J.
JUDGE

APRIL 15, 2019/*dk*