

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

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Reserved on: 11th September, 2019

Decided on: 15th October, 2019

+ **CS(OS) 223/2017 & I.A. 6233/2017 (u/O XXXIX Rule 1&2 CPC)**

ANIL KUMAR LUTHRA & ANR Plaintiffs

Represented by: Ms.Sudeepti Singh, Ms.Akansha Jain
and Ms.Meena Khanna, Advocates.
Plaintiff No.1 in person.

versus

PARTIK ARORA & ORS

..... Defendants

Represented by: Mr.Arun Vohra, Advocate for
defendant Nos.6 to 9.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. Present suit has been filed by the plaintiffs inter-alia seeking a decree of specific performance of the Agreement to Sell dated 7th October, 2015 entered into between the plaintiffs and late Satish Arora and defendant Nos.4 and 5 and further directions to defendant Nos.7 to 9 to confirm the Agreement to Sell dated 7th October, 2015 by signing the said agreement as a witness as per the Memorandum of Understanding dated 6th May, 2015 and complete the construction, hand over the possession and execute a sale deed of the second floor of the property bearing No.5/22, Roop Nagar, Delhi (in short 'the suit property'), or in the alternate refund the sale consideration of ₹3,85,05,374/- along with the interest @24% per annum, damages and compensation and a decree of permanent injunction restraining the defendants or their legal heirs, attorneys from selling, alienating or creating any third party interest in the suit property.

2. Plaintiffs in the suit have impleaded Pratik Arora, Poonam Arora and Shruti Arora, the legal heirs of late Satish Arora as defendant Nos.1, 2 and 3

respectively, Alok Nanda as Proprietor of Immarat Construction as defendant No.4, Akhil Nanda, Ashok Kumar @ Ashok Kumar Makker, Rajesh Anand, Anju Anand and Gagan Makker as defendant Nos.5 to 9 respectively.

3. Summons in the suit were issued on 19th May, 2017 whereafter the defendants entered appearance. As the defendants No.1 to 3 failed to file the written statements despite opportunity their right to file written statement was closed. Written statement of defendants No.4 and 5 was taken off the record due to the delay in filing the written statement being not condoned. Thus the written statement only on behalf of defendant Nos.6 to 9 is on record. Defendant Nos.7 to 9 had also filed an application under Order VII Rule 11 CPC which was dismissed by this Court on 31st January, 2018 on the ground that the stage to look into the pleas had not reached and could be seen at the stage of framing of issues when written statements of the parties were on record. The suit is at the stage of settling the issues when learned counsel for the defendants No.6 to 9 prays for rejection of the plaint whereas learned counsel for the plaintiff seeks a decree under Order VIII Rule 10 CPC in the absence of written statements of defendants No.1 to 5 being not on record.

4. Case of defendant Nos.6 to 9 is that the plaintiffs seek specific performance of the Agreement to Sell which has been entered with the parties who are not the owners of the property. Moreover the Agreement to Sell/MOUs are void ab initio because the major portions relating to consideration etc. are blank. Further the plaintiffs have not placed on record the complete chain of documents revealing the title of the original owners of the suit property. Hence before proceeding to settle the issues and

proceeding with the evidence this Court has heard arguments on the plea of the defendant Nos.6 to 9 as to whether the present suit is liable to be rejected for not disclosing any cause of action or whether the same is liable to be decreed in favour of plaintiffs for non-filing of written statements by defendants No.1 to 5.

5. Case of the plaintiffs in the suit is that late Satish Arora along with defendant Nos.4 and 6 entered into an Agreement to Sell as joint owners with S. Kanwaljeet Singh and Ms.Shalu Walia on 22nd August, 2014 to buy land measuring 1331.13 sq. yards being property bearing No.5/22, Roop Nagar, Delhi. On 20th May, 2015 defendant Nos.4 and 5 along with late Satish Arora entered into an Agreement to Sell with the plaintiffs on buy back basis in respect of the entire second floor. The defendant Nos.4 and 6 along with late Satish Arora also entered into two Memorandum of Understandings with defendant Nos.7 to 9 however, the said Memorandum of Understandings were never shown nor copies supplied to the plaintiffs despite repeated requests. On 7th October, 2015 a fresh Agreement to Sell was entered into between the plaintiffs and late Satish Arora and defendant Nos.4 and 5 for changing the Agreement to Sell dated 20th May, 2015 from buy back agreement to final sale agreement for a total sale consideration of ₹3,87,00,000/-. When the plaintiffs visited the construction site defendant Nos.7 to 9 were present who threatened the plaintiffs and claimed that defendant Nos.4, 5 and late Satish Arora had relinquished their rights to sell the floors in favour of defendant Nos.7 to 9, hence the plaintiffs issued a legal notice to late Satish Arora and defendant No.4 on 8th November, 2016 to complete the construction, execute a sale deed and hand over the

possession of the second floor of the suit property. Having not acceded to the prayer, the plaintiffs filed the present suit.

6. Case of defendant Nos.6 to 9 in the written statement is that the defendant Nos.7 to 9 are the bona fide registered owners of the central/middle portion of the land underneath measuring 334.44 sq.mtrs, that is, 400 sq.yards with all its land rights and complete ownership up to the roof/terrace thereof, out of the said built up entire freehold property bearing No.5/22, built on Plot No.22 in Block No.5 on a total land measuring 1112.96 sq.mtrs, that is, 1331.13 sq.yards situated in the Northern City Extension Scheme No.II, Colony known as Roop Nagar, Delhi-110007 i.e. the suit property having purchased the same from Smt.Shalu Walia vide registered Sale Deed dated 5th May, 2015 for a total sale consideration of ₹4,44,00,000/- only. Details of payments made by Rajesh Anand, Anju Anand and Gagan Makkar have also been noted. It is claimed that defendant Nos.7 to 9 are in actual and physical possession of the suit property and have been carrying on construction thereto thus all the previous MOUs, agreement to sell inter-se amongst the defendant No.6 with M/s Pentagon Realors and Developers, M/s Immarat Construction and Akhil Nanda, if any, stood terminated, negated and superseded by the Sale Deed dated 5th May, 2015. It is claimed that the plaintiffs have no right, title or interest and/or share in the second floor of the property under construction by defendant Nos.7 to 9 in their property bearing No.5/22, Roop Nagar, Delhi nor are defendant Nos.7 to 9 privy to any contract with the plaintiffs. It is also claimed that the plaintiffs seek to enforce the Agreement to Sell dated 7th October, 2015 which was purportedly executed in furtherance of their earlier Agreement to Sell dated 20th May, 2015, however, the two

Agreements to Sell are neither registered nor are signed by defendant Nos.7 to 9 who are the registered owner of the suit property nor even witnessed by defendant Nos.7 to 9. Agreement to Sell sought to be enforced by the plaintiffs also notes that defendant Nos.7 to 9 are the registered owner of 400 sq.yards falling in the middle of the plot and no Memorandum of Understanding whatsoever has ever been executed or signed by defendant Nos.7 to 9 in favour of M/s Pentagonam Realtors and Developers, M/s Immarat Construction and/or Akhil Nanda. It is also claimed that the suit is barred by limitation for the reason the sale consideration has not been paid as per law and has been given by way of either adjustment or in cash and on the said basis the suit is barred by limitation. Further Clause-I of the Agreement to Sell details the same to be Buy Back Agreement which was valid for a period of 720 days and thus the plaintiff cannot claim sale of the property. Clause-4 of the Agreement to Sell was also on buy back basis. The purported sale considerations in the second Agreement to Sell have been drastically reduced and out of the same substantial amount is claimed to have been already paid. The Agreement to Sell dated 7th October, 2015 is not binding on defendant Nos.7 to 9 and the Memorandum of Understanding dated 9th September, 2019 purportedly executed by defendant No.6 became a nullity after the registration of the sale deed in favour of defendant Nos.7 to 9 for a valuable consideration.

7. Before proceeding further it would be appropriate to note the three major documents on which plaintiffs base their case, that is, Agreement to Sell dated 22nd August, 2014 between S. Kanwaljeet Singh and Mrs. Shalu Walia as First Party and M/s. Pentagonam Realtors & Developers, Immarat Constructions and Sh. Ashok Kumar as Second Party followed by

Memorandum of Understanding dated 6th May, 2015 between M/s. Pentagon Realtors & Developers and M/s. Immarat Constructions as First Party and Sh. Ashok Kumar as Second Party and Agreement to Sell dated 7th October, 2015 between M/s. Pentagon Realtors & Developers and M/s. Immarat Construction as First Party and Sh. Anil Luthra jointly with Smt. Sunita Luthra and Anil Kumar Luthra (HUF) as the Second Party.

8. Relevant paras of Agreement to sell dated 22nd August, 2014 reads as under:-

“THIS AGREEMENT TO SELL is executed at Delhi, on this 22nd day of August 2014 by and between:

S. Kanwaljit Singh S/o Late S. Trilok Singh R/o 5/22, Roop Nagar, Delhi-110007, (General Power of Attorney of Kanwar Kultar Singh S/o late S. Trilok Singh and Mrs. Shalu Walia W/o s. Ravinderjit Singh Both R/o 5/22, Roop Nagar, Delhi – 110007)

(hereinafter called and referred to as the “FIRST PARTY”)

.....And.....

- i) M/S Pentagon Realtors & Developers through its prop. Sh. Satish Arora s/o late Sh. Sardar Chand having office at E-70, Basement, Kamla Nagar, Delhi – 110007.*
- ii) M/S Immarat Construction through its proprietor Sh. Alok Nanada S/o Late K.C. Nanda having office at E-70, Basement, Kamla Nagar, Delhi- 110007.*
- iii) Sh. Ashok Kumar S/o Sh. Hari Chand R/o 9/1, Indra Vikas Colony, Delhi- 110009.*

(hereinafter called as the joint owners and referred to as “SECOND PARTY”)

(At the time of registration of sale deed a proper demarcated 1/3rd portion shall be allocated to each of the three share holders or their assignees/ nominees i.e. part of the second party)

THAT the expressions of the First Party and the second party shall mean and include the parties, their respective heirs,

successors, executors, administrators, legal representatives, nominees and assignees etc.

THAT the party of the First Part is the registered attorney of the OWNER OF A FREE-HOLD PROPERTY BEARING NO.5/22-B, LAND MEASURING 1331.13 SQ.YDS. situated in the colony known as Roop Nagar Delhi-110007 and party of the second part is the Gift deed holder of the entire property to be conferred this right by the party of the First Part.

(hereinafter called and referred to as the "Said Property")

Previous title of the property:

Originally the Delhi improvement Trust the then owner of the land herein mentioned above had agreed to sell the same to Shri Banarsi Das Perte S/o Lala Mathura Das of House No. 1999, Lal Darwaja, Bazar Sitaram, Delhi – 110006 by an agreement dated 10.09.1948 And whereas said Shri Banarsi Das Perte transferred his rights in the said land by an agreement dated 03/06/1949 in favour of Kanwar Kultar Singh S/o late S. Trilok Singh R/o 5/22, Roop Nagar, Delhi – 110007. Ultimately the Delhi Improvement Trust was succeeded by Delhi Development Authority under the Delhi Development Act 1959 No. 61 of 1957 and all contracts entered into by the Delhi Improvement Trust were deemed to have been entered into by the DDA. Finally the DDA transferred the said piece of land in favour of Shri Kultar Singh S/o late S. Trilok Singh R/o 5/22, Roop Nagar, Delhi-110007, vide sale deed registered as Document No. 7040 in Addl. Book No. 1 Volume No. 2446 from pages 157 to 159 dated 15/09/1970 with the Sub-Registrar-1, Delhi.

Subsequently the said Kanwar Kultar Singh S/o late S. Trilok Singh executed a Registered General power of Attorney in favour of his brother Shri Kanwaljit Singh S/o late S. Trilok Singh R/o 5/22, Roop Nagar, Delhi-110007 registered with registration No. 950 in Book No.4 Vol. No.2882 on page 167 to 174 on dated 21/02/2011 in the office of Sub Registrar 1 Delhi. The property, subject matter of this agreement, is in complete occupation of S. Kanwaljit Singh. On the basis of the said registered attorney, through which Kanwar Kultar Singh S/o late S. Trilok Singh R/o 5/22, Roop Nagar, Delhi-110007 has vested all his rights in respect of the said property in favour of

his brother Shri Kanwaljit Singh S/o late S. Trilok Singh R/o 5/22-B, Roop Nagar, Delhi-110007, and now S. Kanwaljit Singh has transferred his rights in the said property to Mrs. Shalu Walia W/o S.Ravinderjit Singh through a registered gift deed, the detail of which is as follow: Regd.As Document No. 7661, in Addl. Book No.1, Volume No. 5454 on pages 57 to 65, Regd. on 26/08/14, with the office of the Sub-Registrar, Delhi. Hence on the basis of the facts stated above both the part of the first party are entitled to enter into this agreement to sell with the second party.

AND WHEREAS, the first party for their bonafide needs and requirements and in the best interest of their family has agreed to sell the property bearing No.5/22-B situated in Roop Nagar, Delhi-110007 admeasuring 1331.13 sq.yd.

Unto second party for a total sale consideration amount of ₹ _____ (Rupees _____ only) and the second party has also agreed to purchase the same from the first party on the following terms and conditions:-

NOW THIS AGREEMENT WITNESSTH AS UNDER:

1. THAT out of total consideration amount ₹ _____ (Rupees _____ only) the second party has already paid a sum of ₹ _____ (Rupees _____) with following details:

By cash ₹ _____ (Rupees _____ only) And by Cheque bearing No. 463023 dated 12/07/2014 ₹5,00,000/- (Rupees Five Lacs only), drawn on syndicate Bank Kamla Nagar, Delhi in favour of S. Kanwaljit Singh and ₹30,00,000/- (Rupees Thirty Lacs only) through RTGS from Syndicate Bank Kamla Nagar, Delhi vide UTR No. SYNBR92014071600551 in the account of S. Kanwaljit Singh, to the first party as earnest money/ bayana and the first party has already issued two separate receipts dated 12/07/2014 and 16/07/2014

The Second Party has agreed to pay a further sum of ₹60,00,000/- (Rupees Sixty Lacs only) to the First Party at the time of execution of this agreement, being the advance payment amount and the same paid through R.T.G.S. ₹30,00,000/- (Rupees Thirty Lacs only) dated 22/08/2014, through RTGS

from Syndicate Bank Kamla Nagar, Delhi vide UTR No. (SYNBR92014082200643254) in the account of Mrs. Shalu Walia and ₹30,00,000/- (Rupees Thirty Lacs only) dated 22/08/2014, through another RTGS from Syndicate Bank Kamla Nagar, Delhi vide UTR No. (SYNBR92014082200643234) both in the account of Mrs. Shalu Walia and the first party acknowledges and confirms the receipt of the above said amount from the second party, through a separate receipt.

Immediately after the gift deed is executed and the copy of the same is received in hand the first party through second party shall apply for the sanctioning of plan with the competent authorities and the same shall be got sanctioned within 30 to 45 days as per the assumption of the second party.

2. THAT the balance amount of ₹_____ (Rupees _____ only) shall be paid by the second party to the First Party by or before 25th Dec.2014, to be extended with the mutual consent of both the parties with a period of thirty days only and at the same time the First Party shall execute the sale deed in favour of all three share holders of the second part or their nominees/ assignees as well as hand over the peaceful and actual possession of the property to the second party. It is expressly agreed that time shall be the essence of this agreement.

3. THAT, on receipt of full and final payment the first party shall execute the proper documents/ sale deed in respect of the said property under sale in favour of the second party or their nominee(s) and the first party shall deliver the vacant physical possession of the property under sale to the second party, and the first party shall also handover the complete chain of the original documents and relevant documents relating to the above said property under sale to the second party.

4. xxxx xxxx

5. xxxx xxxx

6. THAT, the first party hereby assures the second party that the PROPERTY UNDER SALE is free from all kinds of encumbrances such as prior sale, prior agreement to sell, mortgage, gift, transfer, lease, lien, charges, litigations and legal flaws etc., and if proved otherwise or if the second party

suffers any loss due to any defect in the ownership/ title of the first party or if somebody comes forward with a claim on this property then the first party shall settle all such claims on their own and shall keep the second party indemnified as well as shall manage the transfer of clear and marketable title in favour of the second party or their nominees/ assignees within the stipulated time of registration of sale deeds as mentioned above.

7. *THAT, the first party shall not create any charge up on the said property under sale after the execution of this agreement, and the first party hereby undertakes not to enter into any sort of agreement with anybody else for the sale and transfer of the above said property after execution of the AGREEMENT TO SELL.*

8. *THAT, the First Party further confirms and declares that this AGREEMENT is IRREVOCABLE, CONCLUSIVE AND BINDING on the First Party and/or his heirs, successors and assignees etc.*

9. *THAT this agreement to sell is final and conclusive between the parties in respect of the above said property under sale, and thus this agreement to sell revokes and supersedes all previous agreement(s) if any between the parties in respect of the above said property under sale.*

10. *THAT the first party shall not have any objection/ reservation for the transfer/ execution of the transfer documents of the above said property under sale in favour of the second party or his nominees/ assignees. And the first party shall also be bound to transfer the said agreement to sell in favour of the nominees/ assignees of the second party, if the second party desires so.*

11. *THAT both the parties shall abide by the terms and conditions of this agreement.*

IN WITNESS WHEREOF, both the parties have set their respective hands on this agreement at Delhi on the date mentioned here above in the presence of the following

Witnesses:

First Party

*S.Kanwaljit Singh S/o late S. Trilok Singh R/o 5/22,
Roop Nagar, Delhi-110007 (General Power of*

Attorney of Kanwar Kultar Singh S/o late S. Trilok Singh and Mrs. Shalu Walia W/o S. Ravinderjit Singh both R/o 5/22, Roop Nagar, Delhi-110007)

Second Party

M/s Pentagram Realtors & Developers through its proprietor Sh. Satish Arora s/o Late Sh. Sardar Chand, having office at E-70, Basement, Kamla Nagar, Delhi-110007.

M/s Immarat Construction through its proprietor Sh. Alok Nanda S/o late K.C. Nanda, having office at E-70, Basement, Kamla Nagar, Delhi-110007.

Sh. Ashok Kumar S/o sh. Hari ?Chand R/o 9/1, Indra Vikas Colony, Delhi-110009.”

9. Memorandum of Understanding dated 6th May, 2015 reads as under:-

“Memorandum of Understanding

This M.O.U is made herein Delhi, on this 6th Day of May 2015 by & between:

- i) M/S Pentagram Realtors & Developers through its prop. Sh. Satish Arora S/o Late Sh. Sardar Chand having office at E-70, Basement, Kamla Nagar, Delhi-110007.*
- ii) M/s. Immarat Construction through its proprietor Sh. Alok Nanda S/o Late K.C. Nanda, Kamla Nagar, Delhi-110007.*

(hereinafter called and referred to as the Party of the First Part)

.....AND.....

Sh. Ashok Kumar s/o Sh. Hari Chand R/o 9/1, Indra Vikas Colony, Delhi – 110009.

(hereinafter called and referred to as the party of the Second Part)

THAT the expressions of the First Party and the Second Party shall mean and include the parties, their respective heirs, successors, executors, administrators, legal representatives, nominees and assignees etc.

Whereas the First Party along with the Second Party had entered into an agreement with the OWNERS i.e. S. Kanwaljit

Singh S/o Late S. Trilok Singh R/o 5/22, Roop Nagar, Delhi – 110007, (General Power of Attorney of Kanwar Kultar Singh S/o Late S. Trilok Singh) and Mrs. Shalu Walia w/o S. Ravinderjit Singh R/o 5/22, Roop Nagar, Delhi-110007, empowered through registered Gift Deed by S. Kanwaljit Singh and the detail of Gift Deed is as follows: Reg. As Document No. 7661, in Book No.1, Volume No. 5454 on Pages 57 to 65 Regd. On 26.08.2014, with the office of the Sub-Registrar, Delhi, OF A FREE-HOLD PROPERTY BEARING NO. 5/22-B, LAND UNDERNEATH MEASURING 1331.13 SQ.YDS. situated in the colony known as Roop Nagar Delhi-110007 and as per the understanding of both the parties sale deed of approx 400 sq.yds. falling in the middle of the said property shall be got executed in favour of the Second Party or his nominees and the area of the same portion shall be specifically demarcated i.e. the middle portion of the plot over which four residential floors shall be constructed having approx. floor area 2450 sq.ft. each floor. The Second Party has agreed to make an investment of ₹ X (Rupees X amount only), in the above said property and all the detailed financial terms have been included in the MOU dated 09.09.2014 signed between both the First and Second Party.

As the agreement of the whole property is in favour of the first party and the second party both, and as per the understanding between both the parties the property shall be developed by the first party only and shall be built comprising of one villa on the eastern side having land area admeasuring approx 451 sq.yds., one block of Four flats and a basement in the middle portion having land area admeasuring approx 400 sq.yds. and one block of Four flats with a basement on the western side having plot area 481 sq.yds.

The sale deed of the land admeasuring 400 sq.yds falling in the middle of the plot has been executed by the First Party from the owners of the property bearing No. 5/22, Roop Nagar, Delhi – 110007 in favour of the nominees of Mr. Ashok Kumar i.e. 1)SH. RAJESH ANAND (HAVING 33.5% UNDIVIDED SHARE) S/O SH. JAGDISH ANAND R/O 178, TAGORE PARK DELHI- 110009, 2) SMT. ANJU ANAND (HAVING 33.5%

UNDIVIDED SHARE) W/O SHRI RAJESH ANAND, R/O 178, TAGORE PARK, DELHI – 110009, 3) SHRI GAGAN MAKKER (HAVING 33% UNDIVIDED SHARE) S/O HARI CHAND MAKKER, R/O D-12, OLD GUPTA COLONY, DELHI-110009, vide registration No.3655 in book No.1 vol No. 5736 on pages 22 to 31 on dated 05/05/2015 office of Sub Registrar, Delhi. As far as booking of flats mentioned above is concerned, the first party shall have right to enter into an agreement to sell of only Basement, Ground, Second and Third floor with the prospective buyers and receive 50% of the total sale proceeds. And the right to sale the first floor shall remain with second party only. The right of execution of sale deed of all the floors shall remain with the second party's nominees only whose names are mentioned above. However, the sale agreements with the prospective buyers of basement, Ground, Second and Third floors shall be valid only if witnesses by one of the representatives/ nominees of the Second Party.

In the presence of the following witnesses, both the parties have put their respective hands on this set of paper.

Witnesses:

First Party

M/s Pentagon Realtors & Developers through its proprietor Sh. Satish Arora s/o Late Sh. Sardar Chand having office at E-70, Basement, Kamla Nagar, Delhi- 110007.

M/s Immarat Construction through its proprietor Sh. Ashok Nanda S/o late K.C. Nanda having office at E-70, Basement, Kamla Nagar, Delhi – 110007.

Second Party

Shri Ashok Kumar s/o Shri Hari Chand R/o 9/1, Indra Vikas Colony, Delhi-110009.

Nominees 1) SH. RAJESH ANAND (HAVING 33.5% UNDIVIDED SHARE) S/O SH. JAGDISH ANAND R/O 178, TAGORE PART, DELHI- 110009, 2) SMT. ANU ANAND (HAVING 33.5% UNDIVIDED SHARE) W/O SH. RAJESH ANAND R/O 178, TAGORE PART, DELHI-110009, 3) SH. GAGAN MAKKER (HAVING 33% UNDIVIDED SHARE) S/O

SH. HARI CHAND MAKKER R/O D-12, OLD GUPTA COLONY, DELHI-110009. ”

10. Agreement to sell dated 7th October, 2015:-

“THIS AGREEMENT TO SELL is executed at Delhi, on this 7th day of October 2015 by and between:

i) M/S Pentagram Realtors & Developers through its proprietor Sh. Satish Arora s/o late Sh. Sardar Chand, R/o-flat No.6, First Floor, 5/1 Roop Nagar Delhi- 110007, having office at E-70 Basement, Kamla Nagar,

ii) M/S Immarat Construction through its proprietor sh. Alok Nanda, s/o late Sh. K.C. Nanda, R/o Flat No.-9, Second Floor 5/1 Roop Nagar, Delhi-110007 having office at E-70, Basement, Kamla Nagar, Delhi-11007 and Sh. Akhil Nanda S/o late Sh. K.C. Nanda, R/o Flat No.-9, Second Floor, 5/1, Roop Nagar, Delhi-110007. (Being as confirming party) (hereinafter called and referred to as the ‘FIRST PARTY’)

.....AND.....

Sh. Anil Kumar Luthra, S/o Sh. Jagdish Chander Luthra, R/o 20, State Bank Colony, G.T. Karnal Road, Delhi-110009. (Jointly with Mrs. Sunita Luthra W/o Sh. Anil Kumar Luthra, R/o 20, State Bank Colony, G.T. Karnal Road, Delhi-110009 and Anil Kumar Luthra (HUF) Through its Karta Sh. Anil Kumar Luthra S/o Sh. Jagdish Chander Luthra, R/o 20, State Bank Colony, G.T. Karnal Road, Delhi-110009)

(hereinafter called and referred to as the “Second Party”

THAT the expressions of the First Party and the second party shall mean and include the parties, their respective heirs, successors, executors, administrators, legal representatives, nominees and assignees etc.

AND WHEREAS, the first party entered into a Purchase Agreement with the owners of a Freehold property bearing No. 5/22-B, Roop Nagar, Delhi-110007 having plot area admeasuring approx 1332 sq.yds. and has proposed to construct the above-said property the plans already got sanctioned from the competent authority and the said property shall be developed with one villa on the eastern side of the land

area approx 451 sq.yds., one block comprising of four floors having built up area approx 2500 sq.ft. each floor with basement in the middle portion on the land area admeasuring approx 400 sq.yds. and one block comprising of four floors having built up area approx 2400 sq.ft. each floor with the basement on the western side on the plot area admeasuring approx 481 sq.yds.

The sale deed of the land admeasuring 400 sq.yds. falling in the middle of the plot has been got executed by the first party from the owners of the property bearing No.5/22-B, Roop Nagar, Delhi-7 in favour of the nominees of one of their co-purchasers i.e. 1)SH. RAJESH ANAND (HAVING 33.5% UNDIVIDED SHARE) S/O SH. JAGDISH ANAND R/O 178, TAGORE PARK DELHI- 110009, 2) SMT. ANJU ANAND (HAVING 33.5% UNDIVIDED SHARE) W/O SHRI RAJESH ANAND, R/O 178, TAGORE PARK, DELHI – 110009, 3) SHRI GAGAN MAKKER (HAVING 33% UNDIVIDED SHARE) S/O HARI CHAND MAKKER, R/O D-12, OLD GUPTA COLONY, DELHI-110009, vide registration No.3655 in book No.1 vol No. 5736 on pages 22 to 31 on dated 05/05/2015 office of Sub Registrar, Delhi. Further the first party entered into an MOU dated 9th Sep 2014 with their above said nominees to have the rights to enter into an agreement to sell with the prospective buyers of the floors proposed to be built over the said portion and to receive bayana as well as running account payment and to leave the right of execution of sale deed of the respective floors with the above said registered owners only in whose name the sale deed of the portion mentioned above has been executed.

AND WHEREAS the first party has agreed to sell the PROPOSED/ under construction Entire second floor without ownership rights of roof/terrace. In the middle portion and said floor having covered area admeasuring 2500 sq.ft. (as per the plan annexure herewith) and with proportionate rights of the land underneath the building i.e. 400 sq.yds, to be fitted with separate electricity and water meters/ connections, along with common passage and common stair case, with an uninterrupted right of ingress and egress from the passage and stair case, lift provided for the same and with all other common

facilities along with 1/4th undivided share in the stilt portion meant for parking of Two cars, out of the free hold property bearing No.5/22-B, situated in the colony known Roop Nagar, Delhi-110007. Total plot area of the property approx 1332 sq.yds and land area beneath the proposed flats approx 400 sq.yds and WHICH IS BOUNDED AS UNDER:

NORTH: ROAD

EAST: PLOT/PROPERTY NO.5/23

SOUTH: ROAD

WEST: PLOT/PROPERTY NO.5/21

(hereinafter called and referred to as the "said property")

Unto second party for a total sale consideration amount of ₹3,87,00,000/- (Rupees Three Crore eighty Seven Lacs Only) and the second party has also agreed to purchase the same from the first party on the following terms and conditions.

As the first party and second party has already entered into an agreement to sell of this said property on 20th day of May 2015 by E stamp certificate No. IN-DL 98002283631315N with detailed statement of payment made to the first party by the second party time to time, and an affidavit on E stamp certificate No. IN-DL 88534413730566N dt. 20th day of May 2015 by affirming and declaring some more points. Now by this current agreement to sell dt. 7th October, 2015, it will change into the Final Sale of said property to the second party by the first party and will NOT be on buy back basis anymore as agreed in the old agreement dt. 20th day of May 2015 on E stamp certificate No. IN-DL 98002283631315N.

NOW THIS AGREEMENT WITNESSSTH AS UNDER:

1. (a) THAT out of total consideration amount of ₹3,87,00,000/- (Rupees Three Crore Eighty Seven Lacs Only) the second party has paid already a sum of ₹3,02,00,000/- (Rupees Three Crore Two lacs only) with the details as mentioned in "Agreement to sell" dt. 20th day of May 2015 on E stamp certificate No. In-DL 98002283631315N and the First Party acknowledges the same to the Second Party.
(b) THAT out of the sum of ₹3,02,00,000/- (Rupees Three Crore Two lacs Only) paid already to the first

party will now be adjusted as per the payment plan given in the monthly payment sheet starting from October 2015 and is signed and acknowledged by both the parties. Now 15 Monthly installments of ₹25,00,000/- (Rupees Twenty Five Lacs Only) totaling to ₹3,75,00,000/- (Rupees Three Crores Seventy Five Lacs Only) and balance of ₹12,00,000/- (Rupees Twelve Lacs only) at the time of registration of documents and handing over of possession of the above said portion, will be adjusted per month towards the sale of above said property and is as per construction linked plan. The Second Party is entitled for quarterly interest @ 2% per month by the First Party on the balance amount left after adjusting the monthly installment. The first party acknowledges and confirms the monthly payment plan of the above said amount on a separate sheet. That the first party hereby undertakes to finish the said floor complete in all respect on or before, and shall make the above said property ready for deliver.

(c) As this monthly installment is towards the construction linked plan of the said property it will be assessed time to time and if required the changes can be made in monthly payment plan according to the progress of the project, by mutual understanding of both the parties.

2. That the first party at the time of possession of the property under sale to the second party shall also handover the PHOTOSTAT/ CERTIFIED COPIES of the previous papers, complete chain of the title deeds and the relevant documents relating to the above said property under sale to the second party.

3. THAT, the cost of stamp papers, registration fee and other incidental charges of this transaction shall be paid and borne by the second party.

4. THAT, the House-Tax, development charges, electricity and water bills, and all other dues and demands, rates and taxes, DUE IF ANY, relating to the said property under sale up

to the date of finalization of this deal/ final payment shall be paid and borne by the first party.

5. *THAT, the first party hereby assures the second party that the ENTIRE ABOVE SAID PROPERTY/ THE PROPERTY UNDER SALE is free from all kinds of encumbrances such as prior sale, prior agreement to sell, mortgage, gift, transfer, lease, lien, charges, litigations and legal flaws etc., and if proved otherwise or if the second party suffers any loss due to any defect in the ownership/ title of the first party then the first party shall indemnify the second party up to the extent of loss sustained by the second party.*

6. *THAT, the first party shall not create any charge up on the said property under sale after the execution of this agreement, and the first party hereby undertakes not to enter into any sort of agreement with anybody else for the sale and transfer of the above said property after execution of the AGREEMENT TO SELL.*

7. *THAT, the First Party hereby confirms and declares that this AGREEMENT is IRREVOCABLE, CONCLUSIVE AND BINDING on the First Party and/or his heirs, successors and assignees etc.*

8. *THAT this agreement to sell is final and conclusive between the parties in respect of the above said property under sale, and thus this agreement to sell revokes and supersedes all previous agreement(s) if any between the parties in respect of the above said property under sale.*

9. *THAT both the parties shall abide by the terms and conditions of this agreement.*

IN WITNESS WHEREOF, both the parties have set their respective hands on this agreement at Delhi on the date mentioned here above in the presence of the following

Witnesses:

First Party

M/s Pentagon Realtors & Developers through its proprietor Sh. Satish Arora s/o Late Sh. Sardar Chand, R/o Flat No.6, First Floor, 5/1 Roop Nagar Delhi-110007, having office at E-70, Basement, Kamla Nagar, Delhi-11007.

M/s Immarat Construction through its proprietor Sh. Alok Nanda S/o late K.C. Nanda, R/o Flat No.9, Second Floor 5/1 Roop Nagar, Delhi-110007 having office at E-70, Basement, Kamla Nagar, Delhi-110007.

And Sh. Akhil Nanda S/o Late Sh. K.C. Nanda, R/o Flat No.9, Second Floor, 5/1, Roop Nagar, Delhi-110007 (Being as confirming party)

Second Party

Sh Anil Kumar Luthra, S/o Sh. Jagdish Chander Luthra, R/o 20, State Bank Colony, G.T. Karnal Road, Delhi – 110009. (Jointly with Mrs. Sunita Luthra w/o Sh Anil Kumar Luthra, R/o 20, State Bank Colony, G.T. Karnal Road, Delhi- 110009

AND Anil Kumar Luthra (HUF) through its Karta Sh. Anil Kumar Luthra S/o Sh. Jagdish Chander Luthra, R/o 20, State Bank Colony, G.T. Karnal Road, Delhi-110009).”

11. A perusal of the Agreement to Sell dated 22nd August, 2014 reveals that it was executed between Sardar Kanwaljit Singh s/o late S. Trilok Singh as general power of attorney holder of Kanwar Kultar Singh and Smt. Shalu Walia w/o Sardar Ravinderjit Singh with M/s Pentagram Realtors & Developers through its proprietor Satish Arora, whose legal heirs have been impleaded as defendant Nos.1 to 3 herein, M/s Immarat Construction through its proprietor Alok Nanda who has been impleaded as defendant No.4 and Ashok Kumar @ Ashok Kumar Makker who has been impleaded as defendant No.6 in the present suit. The Agreement to Sell dated 22nd August, 2015 also shows that M/s Pentagram Realtors and Developers, M/s Immarat Construction and Ashok Kumar had entered into a purchase agreement and had proposed to thereafter construct the property with one villa on the eastern side of the land area approx 451 sq.yds., one block

comprising of four floors having built up area approx 2500 sq.ft. each floor with basement in the middle portion of the land area admeasuring approx 400 sq.yds. and one block comprising of four floors having built up area approx 2400 sq.ft. each floor with the basement on the western side of the plot area admeasuring approx 481 sq.yds.

12. Further a sale deed of the land admeasuring 400 sq. yard was executed in favour of nominees of Ashok Kumar, one of the co-purchaser i.e. Rajesh Anand, Anju Anand and Gagan Makker having 33.5% undivided share in the middle portion which deed was registered on 5th May, 2015.

13. A perusal of the Agreement to Sell dated 7th October, 2015 further reveals that though the sale deed of the middle portion of the plot admeasuring 400 sq.yards wherein four floors were to be built had been executed with defendant Nos.7, 8 and 9 as co-purchasers, however, the Agreement to Sell dated 7th October, 2015 was entered into between the plaintiffs and M/s Pentagon Realtors & Developers, M/s Immarat Construction and Akhil Nanda, who were not the owners of the said middle portion which admittedly was sold to the defendant Nos.7 to 9 as noted in the Agreement to Sell itself. Thus there is no privity of contract between the plaintiffs and defendant Nos.7 to 9 who as per the own documents of the plaintiffs were the owners of the middle portion of the suit property by virtue of the registered Sale Deed dated 5th May, 2015 which facts are noted in the Agreement to Sell dated 7th October, 2015 itself. Hence the Agreement to Sell between the plaintiffs and Satish Arora on behalf of M/s Pentagon Realtors and Developers, Alok Nanda on behalf of M/s Immarat Construction and Akhil Nanda being the confirming party cannot be enforced.

14. In the decision reported as 1969 (2) SCC 343 M.C. Chacko Vs. The State Bank of Travancore, Trivandrum it was held:

“9. Kottayam Bank not being a party to the deed was not bound by the covenants in the deed, nor could it enforce the covenants. It is settled law that a person not a party to a contract cannot subject to certain well recognised exceptions, cannot enforce the terms of the contract: the recognised exceptions are that beneficiaries under the terms of the contract or where the contract is a part of the family arrangement may enforce the covenant. In Krishna Lal Sadhu v. Pramila Bala Dasi [ILR 55 Cal 1315] Rankin, C.J. observed:

“Clause (d) of Section 2 of the Contract Act widens the definition of ‘consideration’ so as to enable a party to a contract to enforce the same in India in certain cases in which the English law would regard the party as the recipient of a purely voluntary promise and would refuse to him a right of action on the ground of nudum pactum. Not only, however, is there nothing in Section 2 to encourage the idea that contracts can be enforced by a person who is not a party to the contract, but this notion is rightly excluded by the definition of ‘promisor’ and ‘promisee’.”

Under the English common law only a person who is a party to a contract can sue on it and that the law knows nothing of a right gained by a third party arising out of a contract: Dunlop Pneumatic Tyre Co. v. Selfridge and Co. [1915 AC 847] It has however been recognised that where a trust is created by a contract, a beneficiary may enforce the rights which the trust so created has given him. The basis of that rule is that though he is not a party to the contract his rights are equitable and not contractual. The Judicial Committee applied that rule to an Indian case Khwaja Muhammad Khan v. Husaini Begam [(1910) 37 IA 152] In a later case Jamna Das v. Ram Autar [(1911) 39 IA 7] the Judicial Committee pointed out that the purchaser's contract to pay off a mortgage debt could not be enforced by the mortgagee who was not a party to the contract. It must therefore be taken as well settled that except in the case

of a beneficiary under a trust created by a contract or in the case of a family arrangement, no right may be enforced by a person who is not a party to the contract.”

15. As per the discussion though the plaintiff will not be entitled to the relief of specific performance of the agreement to sell dated 7th October, 2015, however, it is well settled if the plaintiff is entitled to the relief against any of the defendants the suit cannot be rejected piecemeal [See 2019 (7) SCC 158 Madhav Prasad Aggarwal & Anr. Vs. Axis Bank Ltd. & Anr.]. Though as discussed above no decree of specific performance of the agreement to sell dated 7th October, 2015 can be passed, however the suit is not liable to be rejected for the other reliefs sought and other defendants impleaded as a plaint cannot be rejected piecemeal against some of the defendants [See (2019) 7 SCC 158 Madhav Prasad Aggarwal & Anr. Vs. Axis Bank Ltd. & Anr.]. Thus though the plaintiffs will not be entitled to the relief of specific performance of the contract however having paid a sum of ₹3,02,00,000/- as acknowledged in the agreement to sell dated 7th October, 2015, the plaintiffs would be entitled to refund of the same from defendant Nos.1 to 5 as they have failed to file the written statements and judgment can be passed under Order VIII Rule 10 CPC against defendants No.1 to 5.

16. The Agreement to Sell dated 7th October 2015 entered into between the plaintiff and M/s. Pentagram Realtors & Developers through its Proprietor Satish Arora whose legal heirs have been impleaded as defendants No.1 to 3, M/s. Immarat Construction through its Proprietor Alok Nanda impleaded as defendant No.4 and Akhil Nanda defendant No.5 as confirming party reveals that out of the total sale consideration of ₹3,87,00,000/- the plaintiffs had already paid a sum of ₹3,02,00,000/- to

M/s. Pentagram Realtors & Developers through its proprietor Satish Arora, M/s. Immarat construction through its proprietor Shri Alok Nanda and Shri Akhil Nanda. Pratik Arora, Poonam Arora and Shruti Arora have been impleaded as defendants No.1 to 3 being the legal heirs of late Satish Arora, Alok Nanda as proprietor of Immarat Construction & defendant No.4 and Akhil Nanda as defendant No.5. As noted above, the right to file the written statement of defendant Nos.1 to 3 has been closed and written statement of defendant No.4 & 5 have been taken off the record. Thus, there being no defence on behalf of defendants No.1 to 5 and the documents acknowledging the receipt of a sum of ₹3,02,00,000/- from the plaintiff being on record, the plaintiff is entitled to a decree against the defendants No.1 to 5 jointly and severally for recovery for a sum of ₹3,02,00,000/-. The plaintiff would also be entitled to an interest @ 9% per annum from the date of institution of the suit till realization from defendants No.1 to 5.

17. Suit is accordingly disposed of. Decree sheet be drawn accordingly.

18. IA 6233/2017 is dismissed as infructuous.

(MUKTA GUPTA)
JUDGE

OCTOBER 15, 2019
‘ga’/‘vn’