

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

% **Date of decision: 10th April, 2019**

+ **CS(OS) No.444/2018, IAs No.12262/2018 (u/O XXXIX R-1&2 CPC) & 3769/2019 (u/O VI R-17 CPC).**

TARA SIKAND ATWAL

..... Plaintiff

Through: Mr. Ravi Gupta, Sr. Adv. with Mr. Akhil Sachhar, Mr. Sachin Jain, Ms. Jiya Kapoor & Ms. Sunanda Tulsyan, Advs.

Versus

VIRAJ SIKAND & ORS.

.....Defendants

Through: Mr. Gaurav M. Liberhan & Mr. Ankit Jain, Advs. for D-1.
Ms. Monisha Handa, Adv. for D-2&3.
Ms. Cauveri Birbal & Mr. Sohan Kumar, Advs. for D-5.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff has instituted this suit against (a) Viraj Sikand, (b) Smt. Gita Sikand, (c) Indira Sikand, (d) Vikram Sikand, (e) Sanjay Sikand, for (i) cancellation of registered Relinquishment Deed dated 6th October, 2015; (ii) declaration that the Relinquishment Deed dated 6th October, 2015 executed by defendants no.2 to 5 are not valid and binding on the plaintiff; (iii) partition of property No.98, Sunder Nagar, New Delhi holding the plaintiff to be entitled to 40% share therein; and, (iv) permanent injunction restraining the defendants from alienating, encumbering or otherwise dealing with the property No.98, Sunder Nagar, New Delhi.

2. The suit came up before this Court first on 12th September, 2018 when while issuing summons thereof, vide *ex parte* ad-interim order the

defendants were restrained from dispossessing the plaintiff from property No.98, Sunder Nagar, New Delhi.

3. Finding that the defendant no.4 Vikram Sikand, in the memo of parties itself was described as deceased, vide order dated 17th December, 2018 the defendant no.4 Vikram Sikand was deleted.

4. On 17th December, 2018, on going through the averments in the plaint, it was also *prima facie* felt that the suit as framed was not maintainable and questions as to the maintainability of the suit were raised and the suit posted to 14th March, 2019 for completion of pleadings and for hearing on the maintainability of the suit and if found to be maintainable, for framing of issues if any in suit.

5. The matter could not be heard on 14th March, 2019 and was adjourned to today. The senior counsel for the plaintiff and the counsel for the defendant no.1 have been heard.

6. The case of the plaintiff is, that (i) properties No.96 and 98, Sunder Nagar, New Delhi were owned by the Hindu Undivided Family (HUF) of which Harnam Dass Sikand was the Karta and the Manager; (ii) vide preliminary decree for partition dated 26th May, 1976 in Suit No.123/1976 of properties No.96 and 98, Sunder Nagar, New Delhi, the share of (a) Harnam Dass Sikand was declared as 1/5th; (b) Ashok Sikand, son of Harnam Dass Sikand was declared as 1/5th; (c) Krishan Sikand, son of Harnam Dass Sikand was declared as 1/5th; (d) Anil Sikand, son of Harnam Dass Sikand was declared as 1/5th; and, (e) Prita Sikand, wife of Harnam Dass Sikand was declared as 1/5th; (ii) Krishan Sikand, son of Harnam Dass Sikand died intestate on 2nd October, 1982 leaving defendant no.5 Sanjay

Sikand as his natural heir; (iii) Prita Sikand, wife of Harnam Dass Sikand died intestate on 27th December, 1982; (iv) Ashok Sikand, son of Harnam Dass Sikand died intestate on 5th October, 1983 leaving behind his widow Neira Sikand, plaintiff as his daughter and defendant no.1 as his son; Neira Sikand died intestate leaving plaintiff and defendant no.1 as her heirs; (v) Anil Sikand, son of Harnam Dass Sikand died intestate on 26th August, 2013 leaving defendant no.2 Gita Sikand as his widow and defendant no.3 Indira Sikand as his daughter as his only natural heirs; (vi) Harnam Dass Sikand died on 12th March, 2009 leaving behind a Will dated 21st January, 2009 bequeathing his 1/5th share in property No.96, Sunder Nagar, New Delhi in favour of defendant no.5 Sanjay Sikand and leaving his 1/5th share in property No.98, Sunder Nagar, New Delhi “in favour of the defendant”; (vii) in terms of Family Settlement concerning share of Prita Sikand wife of Harnam Dass Sikand in properties No.96 and 98, Sunder Nagar, New Delhi her 1/5th share in property No.98, Sunder Nagar, New Delhi fell to the share of “the plaintiff and defendant jointly” and her 1/5th share in property No.98, Sunder Nagar, New Delhi devolved on Krishan Sikand; (viii) though the plaintiff was married on 12th April, 1993 and residing along with her husband in her matrimonial home but on the insistence of the mother of the plaintiff, the plaintiff in the year 1997 along with her husband and daughter permanently shifted to “the suit property”, presumably property no.98, Sunder Nagar, New Delhi, also being a co-owner thereof; (ix) the plaintiff along with her husband and daughter have been residing on the ground floor of the property and the defendant no.1 resides on the first floor of the property; the plaintiff and the defendant no.1 have a common kitchen on the ground floor; the barsati floor is lying vacant; (x) the defendant no.1,

being the brother of the plaintiff, in September, 2013 broached the idea of reconstruction of property No.98, Sunder Nagar, New Delhi where the branch of Ashok Sikand was residing to the exclusion of the other branches of the larger family of Harnam Dass Sikand; (xi) the defendant no.1 met several builders in this context but represented that in the absence of a comprehensive Family Settlement, the property was owned severally by three branches of the patriarch Harnam Dass Sikand and for reconstruction of the property, it was imperative to have a Family Settlement wherein it is expressly recorded that the property belongs exclusively and solely to the branch of the family of Ashok Sikand; (xii) it was always the understanding between the plaintiff, the defendant no.1 and their mother Neira Sikand that pursuant to reconstruction of the property, one floor of the property shall devolve exclusively to the share of the plaintiff; (xiii) post the demise of Neira Sikand, on 23rd November, 2013, the share in property No.98, Sunder Nagar, New Delhi of (a) plaintiff Tara Sikand Atwal is 1/5th; (b) defendant no.1 Viraj Sikand is 2/5th; (c) family of Anil Sikand is 1/5th; and, (d) the family of Krishan Sikand is 1/5th; (xiv) though on the demise of Neira Sikand, the proposal for reconstruction of the property was shelved but the defendant no.1 again in September, 2015 approached the plaintiff and represented that in order to reconstruct the property, it was imperative to have some arrangement on paper wherein it is expressly recorded that the property belongs exclusively and solely to the branch of the family of Ashok Sikand; (xv) the defendant no.1 proposed the concept / idea of execution of some documents by the plaintiff in his favour to facilitate the same and represented that he would formally purchase the share of the plaintiff for an agreed consideration and till such time he purchases the

share of the plaintiff, the plaintiff and her family would continue to be in possession of the property in her own right; (xvi) thus the concluded agreement between the plaintiff and the defendant no.1 was that the defendant no.1 would buy out the share of the plaintiff and the plaintiff would be adequately compensated for the value of her share in the property; (xvii) the plaintiff reposed complete faith in her brother defendant no.1 and agreed to the said proposal; (xviii) the Relinquishment Deed executed by the plaintiff in favour of defendant no.1 was to enable the defendant no.1 to facilitate with the builder; otherwise, the plaintiff was to secure a best market value of her share in the suit property; (xix) this arrangement was entered into between the plaintiff and the defendant no.1 with the express understanding that defendant no.1 shall remit consideration of a sum as agreed *inter se* the parties and the same was in any case to be equivalent to the value of at least one floor in the property which is commensurate to the size and situs of the property; (xx) in the backdrop of this understanding, the family members of late Krishan Sikand and Late Anil Sikand, in order to arrive at an amicable settlement, met the plaintiff and the defendant no.1 in the month of September, 2015; (xxi) accordingly, the branches of the families of Late Krishan Sikand, Late Ashok Sikand and Late Anil Sikand executed contemporaneous Relinquishment Deeds dated 6th October, 2015 wherunder the members of each branch relinquished their respective share with the understanding that (A) other properties jointly held viz. 8, Kasturba Gandhi Marg, New Delhi and 7, Barakhamba Road, New Delhi would vest solely in the branch of the family of Anil Sikand represented by defendants no.2 and 3; (B) property No.96, Sunder Nagar, New Delhi shall vest solely and exclusively in the branch of the family of Krishan Sikand

represented by defendant no.5; and, (C) property No.98, Sunder Nagar, New Delhi shall vest solely and exclusively in the branch of the family of Ashok Sikand comprising of plaintiff and defendant no.1; (xii) after the execution and registration of the Relinquishment Deed, though for sometime the behaviour of defendant no.1 to the plaintiff was friendly and affable and the defendant no.1 kept on assuring the plaintiff that the Relinquishment Deed executed by the plaintiff was a mere paper document and that he would remit to the plaintiff adequate consideration to enable her to purchase an alternate accommodation of the same repute but in August, 2017, there was a change in behaviour of the defendant no.1 towards the plaintiff and the defendant no.1 started claiming to be the sole owner of property No.98, Sunder Nagar, New Delhi; finally in December, 2017, the defendant no.1 also questioned the right of the plaintiff to continue residing in the property; (xxiii) when the plaintiff sought to remind the defendant no.1 of the concluded understanding between the plaintiff and defendant no.1, of him remitting consideration towards purchase of an alternative residential accommodation of the same repute, the same was completely denied by the defendant no.1; (xxiv) it seems the intent of the defendant no.1 right from the inception of the understanding was to fraudulently induce the plaintiff to relinquish her share in the property; (xxv) the defendant no.1 in August, 2018 alleged that the plaintiff had no right to continue residing in the property and called upon the plaintiff to vacate the property; (xxvi) due to the dishonest acts of defendant no.1, the Relinquishment Deed executed by the plaintiff is void at the option of the plaintiff and the plaintiff has reasonable apprehension that the same, if left outstanding may cause serious injury to the plaintiff; (xxvii) the

Relinquishment Deeds executed by defendants no.2,3 and 5 relinquishing their share in property No.98, Sunder Nagar, New Delhi exclusively in favour of the defendant no.1 were also pursuant to the holistic Family Settlement and on the understanding that the defendant no.1 shall remit adequate consideration to the plaintiff and since the defendant no.1 is reneging from the said understanding, the Relinquishment Deeds executed by defendants no.2,3 and 5 of their share in property No.98, Sunder Nagar, New Delhi in favour of defendant no.1 are also not binding on the plaintiff; and, (xxvii) in any event the Relinquishment Deed dated 6th October, 2015 does not specifically relinquish the 4/90th share inherited by the plaintiff from Neira Sikand; thus even if Relinquishment Deed dated 6th October, 2015 is valid, the plaintiff in any case has a 4/90th in the property.

7. During the hearing on 17th December, 2018, it was enquired from the counsel for the plaintiff, whether not the claim of the plaintiff in the suit was contrary to the registered document and if so how, was it sustainable. Doubt was also expressed that the ground pleaded, of the plaintiff having executed the Relinquishment Deed on the understanding that she will be paid some money and it had not been paid, constitutes a ground for setting aside of a registered document. It was further enquired as to what was the locus of the plaintiff to seek setting aside of the Relinquishment Deeds executed by defendants no.2,3 and 5 in favour of defendant no.1. The basis of valuation of the suit for the purpose of court fees and jurisdiction and of the court fees paid was also enquired.

8. The senior counsel for the plaintiff has today contended, that (i) “the plaintiff is not challenging any term of registered document” i.e. the

Relinquishment Deed executed by the plaintiff of her share in property No.98, Sunder Nagar, New Delhi in favour of defendant no.1; (ii) it is the case of the plaintiff that there was a separate agreement of the plaintiff with the defendant no.1 whereunder the defendant no.1 had agreed to pay money equivalent of the value of one of the floors of the reconstructed / re-developed property; (iii) the plaintiff has been residing in the property since 1997 and save for the Family Settlement aforesaid there was no other reason for the plaintiff to relinquish her share in the property in favour of defendant no.1; (iv) Section 92 of the Evidence Act, 1872 does not come in the way of the plaintiff; the case of the plaintiff is covered by proviso 3 thereto which provides that “existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved”; and, (v) the suit can thus be not dismissed at the threshold as not maintainable and an opportunity has to be given to the plaintiff to prove such separate oral agreement constituting a condition precedent to any obligation of the plaintiff under the Relinquishment Deed executed by the plaintiff.

9. The counsel for the defendant no.1 has argued that the plaintiff being a signatory to the Relinquishment Deed has to pay ad-valorem court fees on the value of the share relinquished and the suit valued for the purpose of jurisdiction at Rs.30 crores with court fees only of Rs.20/- suffers from deficiency of court fees and the plaintiff is liable to make good the deficiency in court fees and pay ad-valorem court fees on Rs.30 crores. It is also argued that the suit is not maintainable and is liable to be dismissed at

the threshold in terms of *Aditya Prasad Dube Vs. Shobha Dube* 2018 (169) DRJ 52.

10. The counsel for the defendants no.2 and 3 states that the defendants no.2 and 3 are supporting the plaintiff. However, on enquiry whether they have made any counterclaim or claim otherwise for cancellation of the Relinquishment Deeds executed by them in favour of defendant no.1, the counsel for the defendants no.2 and 3 states that the defendants no.2 and 3 though supporting the plaintiff are not seeking setting aside of the Relinquishment Deeds executed by them in favour of defendant no.1 and are also not pleading that the defendant no.1 was liable to pay any monies to the defendants no.2 and 3. It is stated that the support to the plaintiff is only to the extent of the agreement pleaded by the plaintiff whereunder the defendant no.1 had agreed to pay money to the plaintiff.

11. The counsel for the defendant no.5 states that the plaintiff cannot in her suit seek setting aside of the Relinquishment Deed executed by the defendant no.5 in favour of defendant no.1. It is stated that the parties are bound by the registered documents executed by them.

12. I have enquired from the senior counsel for the plaintiff, whether not the Relinquishment Deed admittedly executed by the plaintiff in favour of defendant no.1 relinquishing the plaintiff's share in property No.98, Sunder Nagar, New Delhi in favour of the defendant no.1, is in consideration of love and affection for the defendant no.1.

13. The senior counsel for the plaintiff states that the Relinquishment Deed nowhere mentions the same to have been executed in consideration of love and affection of the plaintiff for the defendant no.1.

14. I have next enquired from the senior counsel for the plaintiff that if not love and affection what is the consideration for the Relinquishment Deed.

15. The senior counsel for the plaintiff states that no consideration is set out and it is for this reason only that the plaintiff is entitled to plead and prove a separate agreement and to which the bar of Section 92 of the Evidence Act does not apply.

16. The counsel for the defendant no.1 points out that on page no.1 of the Relinquishment Deed, also bearing the signatures and photograph of the plaintiff, against the column "Consideration Price (Rs.)" on the e-stamp paper of the Relinquishment Deed, "0 (Zero)" is written.

17. I have further enquired from the senior counsel for the plaintiff, whether not a Relinquishment Deed on a stamp paper of Rs.100/-, as on which subject Relinquishment Deed is engrossed, is permissible in law only when executed in consideration of natural love and affection in favour of a sibling or a parent and else if transfer for consideration is affected of a share in the property, even if in favour of a sibling or a parent, the stamp duty as per the consideration set out or as per the valuation of the property transferred / sold as per the prescribed circle rates in Delhi has to be paid and such document generally has the nomenclature of a Transfer Deed or a Sale Deed and not the nomenclature of a Relinquishment Deed.

18. The senior counsel for the plaintiff agrees.

19. I have further enquired from the senior counsel for the plaintiff that if it is the case of the plaintiff, as has been argued, that the plaintiff is "not

challenging any term of the registered document” and that the plaintiff is pleading a separate agreement with the defendant no.1 of payment of money equivalent to value of one floor of the re-constructed / re-developed property, by the defendant no.1 to the plaintiff, why has the plaintiff sued for cancellation of the Relinquishment Deed and whether not the remedy of the plaintiff for such a relief is to seek specific performance of the Agreement pleaded and / or seek recovery of the money due from the defendant no.1 to the plaintiff.

20. The senior counsel for the plaintiff states that the “plaintiff is unable to do so as the Relinquishment Deed executed by the plaintiff will come in the way of the plaintiff in such a suit”.

21. That lets the cat out of the bag. Once the plaintiff admits that the registered document will come in the way of the plaintiff enforcing the separate agreement pleaded, it necessarily follows that the plaintiff is pleading oral agreement contradicting, varying, adding to or subtracting from the terms of the registered documents and which is barred by Section 92 of the Evidence Act and the proviso (3) thereto has no application.

22. The senior counsel for the plaintiff has referred to ***Gangabai Vs. Chhabubai*** (1982) 1 SCC 4, particularly to para 11 thereof, laying down that the bar imposed by Section 92 (1) applies only when a party seeks to rely upon a document embodying the terms of the transaction; in that event, the law declares that the nature and intent of the transaction must be gathered from the terms of the document itself and no evidence of any oral agreement or statement can be admitted as between the parties to such document for the purpose of contradicting or modifying its terms; however

the said provision is not attracted when the case of the party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham – such a question arises when the party asserts that there was a different transaction altogether, and what is recorded in the document was intended to be of no consequence whatsoever – for that purpose oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether not recorded in the document, was entered into between the parties. It is stated that the said judgment was followed recently in *Sparsh Builders Pvt. Ltd. Vs. Maharishi Ayurveda Products Pvt. Ltd.* 206 (2014) DLT 63 and appeal whereagainst was dismissed by the Division Bench of this Court in *Maharishi Ayurveda Products Pvt. Ltd. Vs. Sparsh Builders Pvt. Ltd.* 2016 SCC OnLine Del 1383.

23. I have enquired from the senior counsel for the plaintiff, whether not the present suit is not maintainable in terms of *Karan Madaan Vs. Nageshwar Pandey* 2014 SCC OnLine Del 1277, appeal whereagainst was dismissed by the Division Bench of this Court in *Nageshwar Pandey Vs. Karan Madaan* MANU/DE/0312/2016.

24. The senior counsel for the plaintiff states that *Karan Madaan* supra does not notice *Gangabai* supra and thus notwithstanding *Karan Madaan*, *Ganga Bai* would bind this Bench. It is also contended that in *Karan Madaan* no separate agreement within the meaning of proviso (3) supra was pleaded.

25. It is apposite to set out hereinbelow Sections 91 and 92 of the Evidence Act:

“91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of document

When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Exception 1. – When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2. – Wills admitted to probate in India may be proved by the probate.

Explanation 1- This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document and to cases in which they are contained in more documents than one.

Explanation 2—Where there are more originals than one, one original only need be proved.

Explanation 3. – The statement, in any document whatever, of a fact other than the facts referred to in this section, shall, not preclude the admission of oral evidence as to the same fact.

92. Exclusion of evidence of oral agreement

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for purpose of contradicting, varying, adding to, or subtracting from, its terms;

Proviso (1) – Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, [want or failure] of consideration, or mistake in fact or law.

Proviso (2) – The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3). – The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4). – The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5) – Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved. Provided that the annexing of such incident

would not be repugnant to, or inconsistent with the express terms of the contract.

Proviso (6).—Any fact may be proved which shows in what manner the language of a document is related to existing facts.”

26. I have in *Aditya Prasad Dube* supra (SLP(C) No.996/2018 preferred whereagainst was dismissed on 4th July, 2018) referred to *Ranganayakamma Vs. K.S. Prakash* (2008) 15 SCC 673 reiterating that renunciation, in the Indian context, may be for consideration or may not be for consideration; property can be transferred without consideration—such transfer is a gift; a registered instrument releasing the right, title and interest of releasor without consideration operates as a transfer by way of a gift if the document clearly shows an intention to effect the transfer and is signed by or on behalf of the releasor and attested by at least two witnesses. It was also held that when a property is owned by two parties or co-owners, the releasee has already an undivided share in the property and what the releasor purports to do by the document is to effect himself, in respect of both his title and his right to possession in favour of the releasee. It was yet further reiterated that love and affection is also a consideration within the meaning of Sections 122 and 123 of the Transfer of Property Act, 1882.

27. This Court in *Karan Madaan* supra was concerned with an application under Order VII Rule 11 of the CPC for rejection of a counterclaim (for cancellation of sale deed) in a suit (for recovery of possession) of immovable property, registered sale deed with respect where to had been executed by the defendant/counterclaimant in favour of the plaintiff and which sale deed recorded possession having been

delivered. It was the case of the defendant / counterclaimant that possession had not been delivered because the intention was not to transfer the property by way of sale deed. It was held, that (i) the defendant / counterclaimant having admitted that he was executing the sale deed, it was not open to the defendant / counterclaimant to claim that the instrument of sale was hit by fraud because according to the defendant / counterclaimant the intent of the parties was to create a security for the loan granted; (ii) the spirit and purpose of enacting Sections 91 and 92 of the Evidence Act is to render the written contract, grant or other disposition, the sole repository of the terms contained therein; (iii) if the intention of the parties was, as is claimed by the defendant/counterclaimant, then that intention/objective/purpose should have been so spelled out in the instrument; (iv) to permit a party to plead contrary to the terms of a sale deed to which he is a party, would be to put premium on dishonesty; (v) the terms of a contract reduced to writing cannot be ascertained by allowing parole evidence as to what transpired antecedent to the contract or what the parties did subsequent to the contract; once the contract between the parties is reduced to writing, the court can only look at the writing alone in order to construe what the terms of the contract are; (vi) the terms of a registered document can be altered, rescinded or varied only by subsequent registered document and not otherwise; (vii) if the oral arrangement is allowed to be substantiated by parole evidence it would mean re-writing of the registered document which is not permissible; and, (viii) once there is an admission of execution of sale deed, the defence which is barred by Sections 91 and 92 of the Evidence Act has to be ignored. Resultantly, the counterclaim was rejected.

28. Similarly in ***Jai Bhagwan Vs. Rajesh*** 2008 Indlaw Del 419 also, the suit seeking cancellation of registered sale deeds executed in favour of the defendants on the plea that the entire sale consideration was not received and the sale deed was got executed for more land than intended to be conveyed by taking advantage of the illiteracy of the plaintiff therein, was summarily dismissed. It was further added that a bare allegation that the plaintiff had not received the full consideration or that the plaintiff had signed the document without reading the contents thereof is not a ground for cancellation; if the plaintiff chooses not to read the document, he does so at his own peril.

29. To the same effect is ***Phoolwati Vs. Ram Dei*** (2008) 150 DLT 105 where the plea of the plaintiff for seeking declaration of the sale deed as null and void because the intention was to create a mortgage was held to be barred. Recently, ***Om Prakash Vs. IOCL Officers Welfare Society*** MANU/DE/0232/2019, a suit for recovery of balance sale consideration under a sale deed, when sale deed recorded that the entire agreed sale consideration had been paid, was summarily rejected, again discussing the law on the said aspect in detail.

30. I am afraid, the claim of the plaintiff in the present suit is in the teeth of the said judgments.

31. I may also state that the proviso to Section 92 of the Evidence Act which is sought to be invoked is of 1872 vintage i.e. nearly 150 years old, of an era when most of the population of India lived in rural areas and did not have the benefit of literacy, and most importantly when practices as of benami were peculiar to India and when even the practicing advocates in

the Courts in India were not considered to be well versed in drafting pleadings and benefit thereof was given by the British Courts and the British Judges. The said law, though remains on a statute book, in today's day and age has to be applied contemporaneously and appropriately and not by blindly following the words thereof, made in the context of the then prevailing conditions and circumstances. The plaintiff here claims to have studied in Modern School, New Delhi and further pleads the reason for wanting to reside in the property, to be able to have her daughter admitted in the same school. To say the least, the plaintiff is educated and well aware and the law made for the cases of illiterates and novices, cannot be blindly pasted on to the plaintiff.

32. The plaintiff here also admits to having agreed to execute Relinquishment Deed of her share in favour of her brother defendant no.1 and while so relinquishing her share in the property in favour of her brother defendant no.1 did not provide / record the consideration which her brother defendant no.1 had agreed to pay to her and for which she was so relinquishing her share. Rather, from the nature of the document executed by the plaintiff, which could have been executed only when there was no consideration for such relinquishment except natural love and affection and from the factum of the plaintiff on the document mentioning the consideration as '0 (Zero)', the plaintiff was fully aware that she was not to receive any consideration for so relinquishing her share. The plaintiff admits such relinquishment to be part of a Family Settlement and whereunder not only the plaintiff but the other defendants also similarly relinquished / released their share in the subject property in favour of the

defendant no.1. In fact, the plaintiff in this suit is seeking setting aside not only of Relinquishment Deed executed by her in favour of defendant no.1 but also the Relinquishment Deeds executed by other defendants in favour of defendant no.1. However, though the plaintiff pleads that in accordance with the said Family Settlement other properties viz. 8, Kasturba Gandhi Marg, New Delhi, 7, Barakhamba Road, New Delhi and 96, Sunder Nagar, New Delhi fell to the exclusive share of the other defendants and in implementation whereof the plaintiff as well as the defendant no.1 must have executed Relinquishment Deeds of their respective shares in the said properties in favour of the other defendants but the plaintiff is not seeking the setting aside of the said Relinquishment Deeds, not even of the Relinquishment Deed executed by her of her share in the said other properties. The only inference is that the plaintiff is selectively reneging from only some parts of the Family Settlement and not from the other parts of the Family Settlement. The plaintiff, by seeking cancellation of Relinquishment Deeds executed by the other defendants in favour of defendant no.1, is claiming to have 40% share in the property, without reciprocally seeking cancellation of Relinquishment Deeds executed by her and by the defendant no.1 with respect to their respective shares in the other properties.

33. The plaintiff, though has pleaded the Family Settlement but not filed the document if any recording the Family Settlement along with her documents. However, the defendant no.1 along with his Counter Claim has filed the Memorandum of Partition of September, 2015 executed by all the parties to the suit containing the same Family Settlement as pleaded by the

plaintiff. The said Memorandum of Partition with respect to all the properties aforesaid also unequivocally records that defendant no.1 would become the owner of property No.98, Sunder Nagar, New Delhi upon giving up of shares therein by the defendants as well as the plaintiff herein. The plaintiff has neither denied her signatures on the said Memorandum of Partition nor sought setting aside thereof or challenged the same in any manner whatsoever. For this reason alone, the suit is liable to be dismissed. Rather, the plaintiff is guilty of concealment of the said document.

34. Family Settlement admittedly pleaded by the plaintiff, has been given a special status under the Indian law and such settlement, even if not arrived at and implemented following the technicalities of law, is not permitted to be disturbed / challenged, with a view to preserve harmony and peace of the family which has been accorded a special status in the Indian culture and preservation of which is found to be essential for maintaining the fabric of the society. For this reason also, it is felt that the Family Settlement admittedly arrived at between the members of the larger family of Harnam Dass Sikand should not be permitted to be disturbed on such specious pleas which would put not only the said property but also properties bearing No.96, Sunder Nagar, New Delhi, 8, Kasturba Gandhi Marg, New Delhi and 7, Barakhamba Road, New Delhi into dispute and which properties may also have been dealt with in the last nearly four years and third party rights wherein may have been created in favour of *bona fide* unsuspecting people.

35. The Relinquishment Deed executed by the plaintiff and cancellation whereof the plaintiff is now seeking is an executed contract and not an

executory contract whereunder the plaintiff “relinquished, gave up, abandoned, surrendered and waived all her rights, titles, interests or claims (half of 1/5th share) in property No.98, Sunder Nagar, New Delhi in favour of defendant no.1”. The plaintiff therein also declared that “hereafter she will be left with no right, title, interest or claims in the above said property bearing No.98, Sunder Nagar, New Delhi in any manner whatsoever and he / she / they disclaim all his / their rights or title to the same in any manner whatsoever.” At the moment of the registration of the said Relinquishment Deed, the plaintiff ceased to have any right in the property and no obligation to be performed by the plaintiff under the said Relinquishment Deed remained to be performed and which the plaintiff can refuse to perform claiming that a condition precedent for performance whereof agreed by the plaintiff with the defendant no.1 has not been performed.

36. As far as reliance by the senior counsel for the plaintiff on ***Gangabai*** supra is concerned, the case of the plaintiff therein was that though she had executed a sale deed of her property in favour of the defendant and executed a rent agreement taking the said property on rent from the defendant and was paying rent to the defendant but the real transaction between of parties was of a loan and a sham of sale deed and rent agreement was created to secure the repayment of loan by the plaintiff to the defendant and to disguise payment of interest as rent. Supreme Court held the said plea to be not barred by Section 92 of the Act. However, that is not the position here. It is not the case of the plaintiff that the Relinquishment Deed was a sham for any other transaction between the plaintiff and the defendant no.1. I have, in ***Satyendra Jain Vs. Omway***

Buildestate Pvt. Ltd. (2013) 199 DLT 710, held that the law permits a plea of a transaction being a sham one being taken but for such a plea to be taken, the circumstances in which the person pleading the transaction to be a sham was made to succumb thereto and the reasons for creating a camouflage have be pleaded. Though the said judgement was reversed vide order dated 10th July, 2013, in FAO(OS) No. 254/2013 preferred thereagainst, but on consent of the parties and on the defendant therein furnishing bank guarantee for 50% of the suit amount and depositing balance 50% of the suit amount in the Court as a condition for grant of leave to defend.

37. The plaintiff admits that the property is to exclusively vest in the defendant no.1 and in support of which plea the senior counsel for the plaintiff has argued that he is “not challenging any term of the registered Relinquishment Deed”. The case of the plaintiff is that the defendant no.1 had agreed to, after re-development of the property, pay the value equivalent to that of one floor of the property to the plaintiff. The same does not amount to creating a sham document to disguise another transaction between the parties. Moreover, though in ***Gangabai*** supra the Court found reasons to secure the repayment of the loan and payment of interest through a sham document, the only reason given by the plaintiff here is, for the purpose of re-developing the property. However such re-development, as the senior counsel for the plaintiff also agrees, could have been carried out by obtaining release of share of other defendants in property No.98, Sunder Nagar, New Delhi besides in favour of defendant no.1 also in favour of the plaintiff and by the plaintiff and the defendant

no.1 jointly taking steps for re-development of the property including of entering into an agreement with a builder. Thus, the plaintiff has not pleaded a case of the need to create a sham document or the reason therefor.

38. It has been held in *Sunrise Construction Vs. Veena Wahi* 2009 (111) DRJ 710 that proviso (2) to Section 92 does not apply where the separate oral agreement is on the same matter on which the agreement in writing is and where the separate oral agreement is contradictory to and inconsistent with the agreement in writing. Here, the separate oral agreement pleaded, of payment of consideration by defendant no.1 to plaintiff for relinquishment by plaintiff of her share in the property in favour of defendant no.1 is contradictory of and inconsistent with the consideration for relinquishment shown as “Zero” in the Relinquishment Deed.

39. I may also mention that *Karan Madan* supra takes notice of *Roop Kumar Vs. Mohan Thedani* (2003) 6 SCC 595 and sets out passages thereof referring to *Gangabai* supra. It thus cannot be said that *Karan Madan* is in ignorance of *Gangabai* or is not to be followed for this reason. In fact, mention is found in *Karan Madan* of *Sparsh Builders Pvt. Ltd.* supra also.

40. Thus, I hold the cause of action for the suit to be on a pleading which the plaintiff is barred from proving and the suit claim is thus barred by law.

41. As far as the contention of the senior counsel for the plaintiff, of the plaintiff in any case having 4/90th share in the property, inherited from her mother Neira Sikand, is concerned, the same is also contrary to the terms of the registered Relinquishment Deed and the pleaded case of the plaintiff.

The plaintiff, vide the Relinquishment Deed admittedly executed by her “relinquished, gave up, abandoned, surrendered and waived all her rights, titles, interests or claims” in the property in favour of the defendant no.1 and declared that she was left with “no right, title, interest or claim in the property in any manner whatsoever and disclaimed all her rights and titles to the property in any manner whatsoever”. Use of such language would also include the share inherited by the plaintiff from her mother. It is not as if the mother of the plaintiff has died after the date of execution of the Relinquishment Deed for the plaintiff to contend that she could not have relinquished the share which till then had not vested in her. The mother of the plaintiff had admittedly died prior to the date of execution of the Relinquishment Deed and the plaintiff, by use of such language has relinquished the share inherited from the mother Neira Sikand also, even though in the recitals to the Relinquishment Deed the same has not been mentioned. However, the recitals in a Relinquishment Deed do not affect the operative part i.e. habendum of the document and it is the words used in the operative part / habendum of the document which prevail over the recitals. The operative part / habendum of a deed cannot be controlled, cut down or qualified by a recital if the operative words are clear and unambiguous. Reference, if any required, in this regard may be made to i) ***Dharmshi D. Bhanushali Vs. Municipal Corporation of Greater Bombay*** MANU/MH/3431/2018, ii) ***Bharti Televentures Ltd. Vs. Crystal Technology Pvt. Ltd.*** 2011 SCC OnLine Del 4906 (DB) [SLP(C) No.2987/2012 preferred whereagainst is pending in the Supreme Court as of this date], iii) ***Commercial Auto Sales (P) Ltd. Vs. Auto Sales*** MANU/UP/2393/2010, iv) ***Muslim Educational Society Vs. K.A. Paryayi*** CS(OS) No.444/2018

AIR 1987 Ker 80 (DB), v) **Bankidas Moolraj & Co. Vs. The State of Rajasthan** MANU/RH/0100/1967 (DB), vi) **Beli Ram & Brothers Vs. Chaudri Mohammed Afzal** AIR 1948 PC 168, vii) **Bhanu Lal Chaudhari Vs. W.A. Vincent** AIR 1922 Pat 619 (FB), and, viii) **T. Hussain Vs. Chin Chong** (1925) ILR 3 RANG 53 (DB).

42. I am also of the view that the plaintiff has no locus to seek setting aside of the Relinquishment Deeds executed by the other defendants in favour of the defendant no.1 and to which the plaintiff is not a party. The plaintiff has not pleaded and the senior counsel for the plaintiff has not even made any argument in this respect. A third party to a document is not entitled to seek cancellation thereof without pleading any prejudice from the said document. While under Section 31 of the Specific Relief Act, 1963 any party against who a written instrument is void or voidable is entitled to seek cancellation thereof, it is essential for the party to establish an apprehension of serious injury being caused if the written instrument is left standing, in order to claim relief therein. Reference in this regard may be made to i) **Jika Dula Vs. Bai Jivi** AIR 1938 Bom 37, ii) **Debi Prasad Vs. Malika** AIR 1972 All 376, and, iii) **Yanala Malleshwari Vs. Anathula Sayamma** AIR 2007 AP 57 (FB).

43. Query on 17th December, 2018 as to the maintainability of the suit was also made with respect to valuation of the suit and court fees paid thereon. Para 12 of the plaint in this respect is as under:

“12. That for the purpose of Court Fees and Jurisdiction, the value of the property is only tentatively assessed at Rs.30 crores. The Plaintiff is in joint, actual and constructive possession of the suit property and has

accordingly affixed fixed court fee of Rs.20/-. The Plaintiff submits that the value of the Suit for the purpose of relief of cancellation is an amount of Rs.200 on which a fixed court fee of Rs.20/- is affixed. The Plaintiff submits that the value of the Suit for the purpose of relief of declaration is an amount of Rs.200 on which a fixed court fee of Rs.20/- is affixed. The value of the suit for the purposes of seeking the relief of Permanent Injunction is valued at Rs.130/- on which a fixed court fee of Rs.13/- is affixed. The Plaintiff undertakes to pay any additional fee as she may be directed to pay upon the final adjudication of the present suit.”

44. The only argument of the senior counsel for the plaintiff with respect to valuation and court fees is that the document, setting aside of which is sought, is of no value so no court fees could be paid thereon.

45. However a perusal of para 12 of the plaint set out hereinabove would show that the plaintiff has invoked the pecuniary jurisdiction of this Court by valuing the suit for the purpose of partition at Rs.30 crores and paying fixed court fees of Rs.20/- thereon by claiming to be in joint and constructive possession of the property. However, the plaintiff in the face of the Relinquishment Deed has no share in the property to have any locus to claim partition thereof. The relief claimed of partition is consequential to the relief claimed of cancellation of the Relinquishment Deed and which if were to be permitted to be cancelled and upon cancellation whereof if permitted, the plaintiff would have had a share in the property to entitle the plaintiff to claim partition of the property. The relief of partition being consequential to the relief of cancellation, this Court if not having pecuniary jurisdiction to entertain the suit for cancellation of the

Relinquishment Deed, would not have jurisdiction to entertain the suit on account of the relief of partition. The relief of cancellation has been valued at Rs.200/- only and which is below the minimum pecuniary jurisdiction of this Court.

46. In view of the aforesaid, need to go into the aspect of valuation of the suit for court fees and jurisdiction and court fee payable on the reliefs claimed in the suit is not felt.

47. The defendant no.1, along with his written statement is found to have filed a counterclaim for mandatory injunction directing the plaintiff to vacate the portion of the property in her possession and for permanent injunction restraining the plaintiff from dealing with the property. However, neither the said counterclaim has been numbered till now nor notice thereof has been issued.

48. Though a counterclaim, notwithstanding the dismissal of the suit, has to be proceeded with but the defendant no.1 is found to have valued the counterclaim for the reliefs of mandatory and permanent injunction at Rs.130/- i.e. below the minimum pecuniary jurisdiction of this Court. I have thus enquired from the counsel for the defendant no.1 / counterclaimant whether the defendant no.1 counterclaimant is willing to value the counterclaim appropriately.

49. The counsel for the defendant no.1 states that in view of the dismissal of the suit, the defendant no.1 does not press the counterclaim, with liberty to separately sue the plaintiff for the reliefs claimed in the counterclaim and

/ or reliefs to which the defendant no.1 may be entitled to against the plaintiff.

50. The counterclaim is disposed of as not pressed with liberty as claimed.

51. The suit is dismissed as not maintainable.

52. I refrain from imposing costs on the plaintiff in the hope that the good sense will prevail on the plaintiff and the plaintiff will not further precipitate the matter. However, if the plaintiff chooses to do so, it will be open to the defendant no.1 to, in appeal, also seek costs of the suit.

Decree sheet be prepared.

RAJIV SAHAI ENDLAW, J.

APRIL 08, 2019

‘gsr’

(Corrected & released on 22nd April, 2019)