

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

% **Date of decision: 20th January, 2020**

+ **CS(OS) 279/2018, IA No.7771/2018(u/O.XXXIX R-1&2 CPC) & IA No.4497/2019(u/O.XXXIX R-1&2 CPC)**

SUNIL KUMAR AND ANR. Plaintiffs

Through: Mr. Kuldeep Kumar & Mr. Ranjan Roy,
Adv. with Mr. Sunil Kumar, plaintiff in
person.

Versus

RAJEEV SURI AND ORS. Defendants

Through: Mr. R.K.Sachdeva, Adv. for D-1.
Ms. Gunjan Sinha Jain, Adv. for D-3.
Mr. Kuljeet Rawal & Mr. Vikram Alung,
Adv. for D-4&5.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The two plaintiffs, namely (i) Sunil Kumar; and, (ii) Quaid Johar, have instituted this suit against defendants no. 1 to 5 namely, (i) Rajeev Suri; (ii) Chhote Lal Pahlwan; (iii) Shweta Abbey; (iv) Satinder Singh; and, (v) Arvinder Singh, for (a) specific performance of Agreement of Sale and Purchase/*bayana* receipt dated 17th September, 2015; (b) permanent injunction to restrain the defendants from dealing with the property; and, (c) recovery of damages for Rs.10,00,000/-.

2. The plaintiffs plead, (i) that the plaintiffs and the defendant no.1 entered into the Agreement dated 17th September, 2015 for sale by the defendant no.1 to the plaintiffs of plot bearing no. E-124, Greater Kailash-I, New Delhi; (ii) that the said plot was purchased by Swaran Nayar, mother of the defendant no.3, who constructed a residential building thereon; (iii) Swaran Nayar died on 18th April, 1999 leaving behind the defendant no.3 as

a daughter and one Anil Kumar Nayar as her son; (iv) on 19th November, 2009, a Collaboration Agreement was entered into by Anil Kumar Nayar with defendants no.4 and 5 for reconstruction of the property; (v) on 29th November, 2011, a separate agreement was executed between defendant no.3 and defendants no. 4 and 5, whereunder the defendant no.3 alienated certain rights in the property to the defendants no. 4 and 5; (vi) the defendant no.3 had filed a suit for partition being CS(OS) No.608/2010 which was dismissed on 25th November, 2010 and RFA(OS) No.42/2011 preferred thereagainst was also dismissed on 19th October, 2011 and SLP(C) No.12530/2012 preferred thereagainst was dismissed on 27th April, 2012; (vii) that defendants no. 4 and 5 instituted CS(OS) No.783/2013 against Anil Kumar Nayar and vide order dated 7th May, 2013 therein Anil Kumar Nayar was restrained from dealing with the property and which interim order was continuing; (viii) that Anil Kumar Nayar died on 9th May, 2014 and the defendant no.2 filed an application in CS(OS) No.783/2013 for substitution as an heir of Anil Kumar Nayar on the basis of a document dated 25th April, 2014 claimed to be the Will of Anil Kumar Nayar in favour of defendant no.2 with respect to the property; (ix) that the plaintiffs, believing that the defendant no.2 was the absolute owner of the property under the Will of Anil Kumar Nayar and that the defendant no.2 had assigned the rights in the property in favour of the defendant no.1, entered into an agreement with the defendant no.1 for purchase of the property for Rs.2,10,00,000/- and paid advance sale consideration of Rs.50,00,000/-, out of which Rs.30,00,000/- was paid in cash and Rs.20,00,000/- by way of pay order; and, (x) the defendant no.2, on 23rd September, 2015 withdrew the

application filed by him in CS(OS) No.783/2013 for substitution as heir of Anil Kumar Nayar.

3. Paragraph 19 of the plaint is as under:-

“That the said defendant no.2 (herein) on dated 23.09.2015 one hand made agreement of sell other hand withdraw his stake from Hon’ble High Court reason best known to them.”

4. This suit is ripe for framing of issues.

5. The counsel for the plaintiffs, the counsel for the defendant no.1 and the counsel for the defendant no.3 have handed over their proposed issues and which are taken on record and be tagged to Part I File. No issues have been proposed by counsel for the defendants no. 4 and 5.

6. None appears for the defendant no.2.

7. On enquiry, attention is drawn to the orders dated 27th March, 2019 and 3rd April, 2019. The order dated 27th March, 2019 records the presence of the counsel for the defendant no.2 and his statement that he is not objecting to the interim order sought. The order dated 3rd April, 2019 records the presence of defendant no.2. However, the defendant no.2 has not filed any written statement and the order dated 10th December, 2019 records the statement of the counsel for the plaintiffs that the defendant no.2 was supporting the case of the plaintiffs and hence had not filed the written statement.

8. The counsels have been heard to evaluate the controversy and the records perused.

9. The counsel for the defendant no.3 states that the defendant no.3, in her written statement has pleaded that the defendant no.3, vide Sale Deeds dated 8th December, 2017, 5th December, 2018 and 24th December, 2018, has

sold the property, as sole owner thereof, to one M/s Jairaj Developers, who are vide the Sale Deeds aforesaid the owners of the property and have not been impleaded as a party to the suit and the decree for specific performance cannot be passed against the defendants, neither of whom today is the owner of the property.

10. The counsel for the defendant no.3 also states that the defendant no.3 arrived at a settlement with defendants no. 4 and 5 and in pursuance whereof CS(OS) No.783/2013 was withdrawn.

11. The counsel for the defendants no. 4 and 5 states that in fact the defendants no. 4 and 5 had arrived at a settlement with Jairaj Developers LLP and in pursuance to which the defendants no. 4 and 5 had withdrawn the CS(OS) No.783/13.

12. The counsel for the defendant no.3 has also drawn attention to subparagraph (xxii) of paragraph 4.1 of the preliminary submissions in the written statement of the defendant no.3, where it is pleaded that the defendant no.2, though had filed Probate Case No.35/2017 with respect to the document claimed by him to be the Will of Anil Kumar Nayar, but withdrew the same on 7th April, 2018 on a settlement being arrived at with the defendant no.3.

13. In the aforesaid scenario, I have enquired from the counsel for the plaintiffs, how on the averments in the plaint a cause of action for the relief of specific performance exists.

14. What emerges is, that (i) the plaintiffs entered into an agreement to purchase the property with the defendant no.1 on the premise of the defendant no.1 having an agreement to purchase the property from the defendant no.2; (ii) the defendant no.2, after had so agreed to sell the

property to the defendant no.1 and after the defendant no.1 had agreed to sell the property to the plaintiffs, withdrew the Probate Case filed by him for proof of the document claimed to be the validly executed last Will of Anil Kumar Nair.

15. The counsel for the plaintiffs states that the defendant no.3 has no right to the property. It is stated that the defendant no.3 had filed the suit for partition aforesaid being CS(OS) No.608/2010 against Anil Kumar Nayar and which was dismissed till the Supreme Court.

16. However dismissal of the suit for partition would not affect the rights of the defendants no.3 in the property. The suit for partition is found to have been dismissed for the reason of the defendant no.3 having not proved her case.

17. Be that as it may, in the plaint in the present suit there is an admission of the plaintiffs in the plaint itself, (i) that Swaran Nayar was the sole owner of the property; and, (ii) that the defendant no.3 and Anil Kumar Nayar were the daughter and son respectively of Swaran Nayar. Thus, the defendant no.3, on demise of her mother, in the absence of Will in favour of any other person, would inherit 50% share in the property, with the other 50% being of Anil Kumar Nayar and the title of the defendant no.3 cannot be disputed. Moreover, the defendant no.3 has been impleaded by the plaintiffs as a party in this suit for specific performance of Agreement of Sale of immovable property, though not having any agreement with the plaintiffs, only for the reason of being the owner of the property and else there was no need for the plaintiffs to implead the defendant no.3.

18. On enquiry, it is stated by the counsel for the defendant no.3 that Anil Kumar Nayar, though was married but his marriage was *annulled* and had no issues at the time of death.

19. The counsel for the plaintiffs, except for stating that there is no document to the said effect, has neither impleaded any other person as heir of Anil Kumar Nayar nor made any averment in that regard.

20. Under the Hindu Succession Act, 1956, on Anil Kumar Nayar dying issueless and having no wife, the defendant no.3, as his sister, would be his sole heir and also inherit the 50% share of Anil Kumar Nayar in the property.

21. The counsel for the plaintiffs though states that there are conflicting judgments, whether on dismissal of suit for partition right in property is extinguished or not, but is unable to cite any.

22. However even if it is presumed that the 50% right of defendant no.3 in the property stood extinguished on dismissal till the Supreme Court, of her suit for partition, and Anil Kumar Nayar was sole owner of the property, on demise as aforesaid of Anil Kumar Nayar, in the absence of any Will, the defendant no.3 would still, as his heir, become owner of the property.

23. The counsel for the plaintiffs again reiterates that he does not admit that Anil Kumar Nayar did not leave any Class I heir but is unable to even today state, who were the Class I legal heirs of Anil Kumar Nayar.

24. A perusal of the Agreement for Sale dated 23rd September, 2015 by defendant no.2 in favour of defendant no.1, redacted copy thereof has been filed by the plaintiffs at page 58 of Part IIIA file shows, the defendant no.2 to have agreed to register a Power of Attorney in favour of defendant no.1 and the defendant no.1 to have agreed to pay an undisclosed consideration to

defendant no.2 “for whatever share belongs” to the defendant no.2 after the death of Anil Kumar Nayar, through his unregistered Will with respect to the property. However, the Power of Attorney if any executed by defendant no.2 in favour of defendant no.1 has not been filed.

25. A perusal of the Agreement to Sell dated 17th September, 2015 by defendant no.1 in favour of the plaintiffs shows the plaintiffs to have agreed to pay a sum of Rs.2 crores 10 lakhs to the defendant no.1 “for whatever share belongs” to defendant no.2 after the death of Anil Kumar Nayar through his Will.

26. Owing to the defendant no.2 having withdrawn the Probate sought of the document claimed by him to be the Will of Anil Kumar Nayar in his favour, no share in the property belonged to defendant no.2, for which the defendant no.2 had entered into an agreement with the defendant no.1 and for the same reason no share belonged to the defendant no.1, for the plaintiffs to be the nominees of defendant no.1 with respect thereto.

27. Thus, on the pleadings of the parties and the documents filed by the plaintiffs, no cause of action in favour of the plaintiffs against any of the defendants, for the relief claimed of specific performance, is found.

28. Though the counsel for the plaintiffs has also contended that the defendant no.2, after the entering into the agreement with the defendant no.1 and also after the defendant no.1 has entered into the agreement in favour of the plaintiffs, of which specific performance is sought, could not have withdrawn the petition seeking Probate of the document claimed to be the Will of Anil Kumar Nayar, but for the fraud if any played by the defendant no.2 vis-à-vis the plaintiffs, the remedy of the plaintiffs is qua the offence so committed by the defendant no.2 and not by way of specific performance

against the admitted owner of the property and with whom no agreement or transaction is pleaded.

29. The plaintiffs however are evidently in collusion with defendant no.2, as is evident from the statement on 10th December, 2019 of the defendant no.2 supporting the plaintiffs and as also evident from the appearance of the counsel for the defendant no.2 before this Court on 27th March, 2019 at the behest of the plaintiffs, even though no notice had been issued of the application for interim relief.

30. The counsel for the defendant no.1 states that the defendant no.1 does not admit the Agreement to Sell dated 17th September, 2015 of which specific performance is sought and the signatures purportedly of the defendant no.1 thereon are not of the defendant no.1. However, receipt of Rs.20 lakhs vide demand draft is admitted though receipt of Rs.30 lakhs in cash is denied.

31. The counsel for the defendant no.1, on enquiry states that the defendant no.1 is willing to refund the sum of Rs.20 lakhs to the plaintiffs.

32. The plaintiffs, in this suit, besides the relief of specific performance have sought recovery of damages of Rs.10 lakhs only and once the defendant no.1 is willing to refund Rs.20 lakhs, the said part of the suit also stands satisfied.

33. Accordingly, a decree is passed, (i) of dismissal of the suit of the plaintiffs, insofar as the relief of specific performance; (ii) in favour of the plaintiffs and against the defendant no.1, of recovery of Rs.20 lakhs; the defendant no.1 is granted time till 31st March, 2020 to pay the said amount, failing which the defendant no.1 shall also be liable to pay interest thereon with effect from today, till the date of payment/recovery, @ 10% per annum.

34. The statement on oath of the plaintiff no.1 stated to be present, qua the cash payment, has been recorded but in view of what has emerged above, the same is of no relevance.

35. The counsel for the plaintiffs, at this stage states that the defendant no.2 was appearing before 27th March, 2019 also and for this reason had appeared on 27th March, 2019 and not owing to collusion with the plaintiffs.

36. However the aforesaid contention is not borne out from the orders.

37. The counsel for the defendant no.1 states that liberty to recover the amount of Rs.20 lakhs from defendant no.2 be given.

38. Neither any provision of law requires such liberty to be given nor is the counsel for the defendant no.1 able to state such law. The apprehension expressed, of the claim of defendant no.1 being barred by time cannot be addressed in this proceeding.

39. The parties are left to bear their own costs.

40. Decree sheet be prepared.

RAJIV SAHAI ENDLAW, J

JANUARY 20, 2020

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(Corrected and released on 10th February, 2020)