

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

+ **RFA No. 359/2018**

% **27th April, 2018**

RAMO DEVI Appellant

Through Mr. Kotla Hashvardhan & Ms.
Mansi Sood, Advocates

versus

GAURAV KHANDUJA & ANR Respondents

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

C.M. No.17023/2018 (exemption)

1. Exemption allowed subject to just exceptions.

C.M. stands disposed of.

CM No. 17022/2018 (delay in filing)

2. For the reasons stated in the application, delay in filing is
condoned.

CM stands disposed of.

RFA No. 359/2018 & CM No. 17021/2018 (stay)

3. This Regular First Appeal under Section 96 of the Code
of Civil Procedure, 1908 (CPC) is filed by the defendant impugning

the judgment of the Trial Court dated 16.10.2017 in the suit for possession of the suit property being first floor and second floor of Khasra Nos.64/6, 14/1, 64/10/1, 65/10/1 situated in Palam Village, Colony Raj Nagar-1, New Delhi. By the impugned judgment besides decreeing the suit for possession filed by the respondents/plaintiffs, an independent suit filed by the appellant/defendant for seeking cancellation of the Sale Deed dated 17.04.2014 executed by the appellant/defendant in favour of the respondents/plaintiffs has been dismissed i.e. the Sale Deed dated 17.04.2014 executed by the appellant/defendant in favour of the respondents/plaintiffs was held to be duly executed and hence valid.

4. The facts of the case are that parties entered into a collaboration agreement whereby on the plot/property owned by the appellant/defendant, the respondents/plaintiffs were to make a new construction. For making of the new construction and the appellant/defendant also receiving an amount of Rs.8 lacs, the respondents/plaintiffs were to become owners of the suit property being the first and second floor of the property. I may note that as per the case of the respondents/plaintiffs for execution of the sale deed of

the first floor and second floor the appellant/defendant had received , not a sum of Rs.8 lacs as stated above, but a total amount of Rs.13 lacs with a sum of Rs.10 lacs being received in cash and Rs.3 lacs by means of a cheque.

5. The disputes between the parties arose inasmuch as respondents/plaintiffs had become owners of the first and second floor in terms of the Sale Deed dated 17.04.2014 executed by the appellant/defendant in favour of the respondents/plaintiffs but the appellant/defendant contended that appellant/defendant did not receive the consideration of Rs.13 lacs as stated in the sale deed and the appellant/defendant further claimed that appellant/defendant had executed the sale deed only as a nominal document so that the respondents/plaintiffs could raise monies for further construction on the suit property. Accordingly after construction on the property was complete, the respondents/plaintiffs filed their suit for possession, pleading to be the owners of the first and second floor in terms of the registered Sale Deed dated 17.04.2014, and to which defence of the appellant/defendant including by way of filing of the independent suit was to plead and claim that the sale deed dated 17.04.2014 was an

nominal and illegal document and it did not transfer title of the first and second floor of the property to the respondents/plaintiffs.

6. After pleadings were complete in both the suits, the following issues were framed:

“5. On the basis of the pleadings of the parties, in the suit for possession, the following issues were framed on 09.03.2017:

ISSUES

- (i) Whether the suit filed by the plaintiff is bad due to mis-joinder of the parties ? OPD.
- (ii) Whether the defendant has not been paid the entire sale consideration as shown in the sale deed dated 17.04.2014 ? OPD.
- (iii) Whether the plaintiff is entitled to a decree of possession in respect of the property bearing no. RZ-643D/1, measuring 50 sq. yards, i.e. 41.80 sq. meters, out of khasra nos. 64/6, 14/1, 64/10/1, 65/10/1 situated in revenue estate of Palam Village, Delhi Estate, area abadi known as Colony, Raj Nagar-I, New Delhi ? OPP.
- (iv) Whether the plaintiff is entitled to a decree of damages and mesne profits, pendent lite and future damages at the rate of Rs. 300 per day, as prayed for ? OPP.
- (v) Relief.

6. On the basis of the pleadings of the parties, in the suit for cancellation, the following issues were framed on 19.05.2017 :

ISSUES

- i). Whether the defendant no.1 neither completed the building within the period of ten months nor paid balance amount of Rs. 9 Lacs to the plaintiff ? OPD.
- ii). Whether the plaintiff is entitled to a decree of cancellation thereby canceling the sale deed dated 17.04.2014 registered vide Regd. No. 4771, registered with Sub-Registrar-IX, Delhi ? OPP.
- iii). Whether the plaintiff is entitled to a decree of permanent injunction, as prayed for ? OPP.
- iv). Relief.”

7. Trial court by the impugned judgment has held that the respondents/plaintiffs have been successful in proving that a valid Sale Deed dated 17.04.2014 was executed and registered in their favour by the appellant/defendant whereunder the appellant/defendant had received the consideration of Rs.13 lacs as stated in the sale deed. Trial court has also held that the appellant/defendant is barred because of Section 92 of the Indian Evidence Act, 1872 from questioning the terms of the registered sale deed that the appellant/defendant did not receive the sale consideration of Rs.13 lacs.

8. From the facts of the present case it is seen that admittedly there is a duly executed and registered sale deed of the suit property comprising of the first and second floor by the appellant/defendant in favour of the respondents/plaintiffs and the issue to be decided is as to whether appellant/defendant could have argued or has successfully argued that the appellant/defendant did not receive payment of Rs.13 lacs as stated in the registered sale deed dated 17.04.2014 or that the sale deed was only a nominal document/sham transaction.

9. I completely agree with the conclusion of the trial court that once the sale deed has been proved to have been executed and registered by the appellant/defendant in favour of the respondents/plaintiffs then the contents of the sale deed as regards the receipt of the consideration by the appellant/defendant from the respondents/plaintiffs cannot be questioned and that such a plea of the appellant/defendant is barred because of Section 92 of the Indian Evidence Act. I may note that it is an undisputed fact that appellant/defendant admits that she did execute and register the subject sale deed in favour of the respondents/plaintiffs but the case of the appellant/defendant is that she did not receive the consideration as mentioned in the sale deed because the sale deed was executed as a nominal document in order that the respondents/plaintiffs can arrange monies for construction.

10(i) So far as the plea of sale deed being a nominal document, counsel for the appellant/defendant has relied upon the judgment of the Supreme Court in the case of *Smt. Gangabai vs Smt.Chhabubai (1982) 1 SCC 4* and which holds that the bar under Section 92 of the

Indian Evidence Act will not apply if the document is a nominal document.

(ii) I cannot agree with the argument urged on behalf of the appellant/defendant by placing reliance upon the judgment of the Supreme Court in the case of ***Gangabai (supra)*** inasmuch as to take benefit of the ratio of the judgment of Supreme Court in the case of ***Gangabai (supra)*** it has to be proved first that the document was only a nominal document or that the transaction was a sham transaction. Appellant/defendant except making her self-serving averment has led no evidence whatsoever that the subject sale deed was not executed and registered by her for consideration. Making of self-serving averment is not discharge of onus of proof with respect to vital issue of alleged nominal document because if simple oral statements are to be taken as proof of the document being a nominal document then there will be no sale deed which is duly executed and registered and as a result of which valuable rights in an immoveable property are transferred, will be safe. Argument urged on behalf of the appellant/defendant placing reliance upon ***Gangabai's*** case (*supra*) is rejected.

11(i) Learned counsel for the appellant/defendant then argued that in the subject Sale Deed dated 17.04.2014 it is mentioned in para 2 that appellant/defendant had transferred possession whereas appellant/defendant did not transfer possession and therefore this shows that the terms of the document cannot be read in finality. It is also argued that whereas the sale deed talks of receipt of consideration of Rs.13 lacs in cash the admitted fact is that a sum of Rs.3 lacs was in fact received by the appellant/defendant by means of a cheque, and which aspect again shows that the terms of the document should not be taken as final. For not taking terms of the document as final, reliance on behalf of the appellant/defendant is placed upon the judgment of the Supreme Court in the case of ***Kaliaperumal vs. Rajagopal and Another (2009) 4 SCC 193***. By relying upon this judgment, it is argued on behalf of the appellant/defendant that whether or not title in an immoveable property is transferred by a sale deed depends on the intention of the parties and if it is established that the sale consideration is not paid being a pre-requisite to transfer of title, then title in the property does not pass and parties can always lead evidence, without the bar of the Section 92 of Indian Evidence

Act coming into play, that the consideration did not pass under a sale deed, although it is so stated in the sale deed.

(ii) I cannot agree with the argument urged on behalf of the appellant/defendant by placing reliance upon the judgment of the Supreme Court in the case of *Kaliaperumal's (supra)* because the judgment of the Supreme Court in *Kaliaperumal's* case (*supra*) applies only to those facts where the seller under the sale deed after execution of the document did not appear before the Sub-Registrar for registration and where the buyer got the sale deed registered before the Sub-Registrar by exercising of the powers by the Sub-Registrar under the Registration Act, 1908 in holding that the sale deed was executed. In other words the observations which have been made by the Supreme Court in *Kaliaperumal's* case (*supra*) are confined to facts of the said case where there was dispute between the buyer and the seller with respect to execution of the sale deed because after execution of the sale deed which mention receipt of consideration, the seller did not appear before the Sub-Registrar on the ground that the consideration as stated in the sale deed has not been received by the seller. Therefore there was dispute with respect to the execution of the

document being the sale deed itself and in such circumstances Supreme Court held that evidence could be looked into to examine as to whether consideration passed or did not pass under the sale deed. I may note that in the present case the sale deed is admittedly executed and registered by the appellant/defendant before the Sub-Registrar, and which sale deed clearly mentions receipt of consideration of Rs.13 lacs, and therefore once the document is proved to have been duly executed, registered and having coming into existence, therefore the terms of the document can only be those terms as stated in the sale deed by virtue of Section 91 of the Indian Evidence Act and exception contained in Section 92 of the Indian Evidence Act would not apply unless the document was proved to be a nominal document and which has not been proved on behalf of the appellant/defendant.

Kaliaperumal's case (*supra*) does not lay down a ratio that even if there is a duly executed and registered sale deed, and which is not proved to be a nominal document, yet the parties to the transaction being the sale deed can question the terms of the document as to that consideration which is stated to be received in the sale deed, is not received. In my opinion therefore appellant/defendant cannot place

reliance upon the ratio of the judgment of *Kaliaperumal's* case (*supra*) in which facts were different and especially because there was no finality to the sale deed, and consequently only after there is finality of the sale deed only thereafter that the document only can be looked into for its terms as per Section 91 of the Indian Evidence Act.

12(i) Learned counsel for the appellant/defendant then placed reliance upon the judgment of Supreme Court in the case of *Janak Dulari Devi And Another vs. Kapildeo Rai And Another (2011) 6 SCC 555* to argue that in para 13 of this judgment, Supreme Court has held that with respect to a registered sale deed where possession is to be delivered on payment of entire consideration, then where the purchaser admits that he had not paid the entire consideration or where the vendor proves that the consideration was not paid, then the title would not pass. Accordingly, it is argued that as per *Janak Dulari's* case (*supra*) appellant/defendant is entitled to lead evidence to show that consideration as stated in the subject Sale Deed dated 17.04.2014 did not pass to the appellant/defendant. Para 13 of the judgment in *Janak Dulari's* case (*supra*) which is relied upon reads as under:

“13. Where the sale deed recites that on receipt of the total consideration by the vendor, the property was conveyed and possession was delivered, the clear intention is that title would pass and possession would be delivered only on payment of the entire sale consideration. Therefore, where the sale deed recited that on receipt of the entire consideration, the vendor was conveying the property, but the purchaser admits that he has not paid the entire consideration (or if the vendor proves that the entire sale consideration was not paid to him), title in the property would not pass to the purchaser.”

(ii) I cannot agree with the argument urged on behalf of the appellant/defendant because the answer to the argument urged on behalf of the appellant/defendant by relying upon ***Janak Dulari's*** case (*supra*) is given by the Supreme Court in para 24 of that judgment itself, clarifying that the ratio laid down by the Supreme Court in ***Janak Dulari's*** case (*supra*) is peculiar to the facts of that case on account of practice which has developed in Bihar of the registration receipt of the sale deed remaining with the seller till the consideration was paid, although consideration is stated to have been paid in terms of the sale deed. This para 24 of the judgment in ***Janak Dulari's*** case reads as under:-

“24. We hasten to add that the practice of *ta khubzul badlain* (of title passing on exchange of equivalent) is prevalent only in Bihar. Normally, the recitals in a sale deed about transfer of title, receipt of consideration and delivery of possession will be evidence of such acts and events; and on the execution and registration of the sale deed, the sale would be complete even if the sale price was not paid, and it will not be possible to cancel the sale deed unilaterally. The exception to this rule is stated in *Kaliaperumal*.

The practice of *ta khubzul badlain* in Bihar recognizes that a duly executed sale deed will not operate as a transfer in *presenti* but postpones the actual transfer of title, from the time of execution and registration of the deed, to the time of *exchange of equivalents* that is registration receipt and the sale consideration, if the intention of the parties was that title would pass only on payment of entire sale consideration. As a result, until and unless the duly executed and registered sale deed comes into the possession of the purchaser, or until the right to receive the original sale deed is secured by the purchaser by obtaining the registration receipt, the deed of sale remains merely an agreement to be performed and will not be a completed sale. But in States where such a practice is not prevalent, possession of Registration Receipt by the Vendor, may not, in the absence of other clear evidence, lead to an inference that consideration has not been paid or that title has not passed to the purchaser as recited in the duly executed deed of conveyance. Where the purchaser is from an outstation, the vendor being entrusted with the registration receipt, to collect the original sale deed and deliver it to the purchaser, is common. Be that as it may.”

(iii) Therefore, appellant/defendant cannot place any reliance on judgment of Supreme Court surely because ***Janak Dulari's*** case (*supra*) did not intend to wipe out the provisions of Sections 91 and 92 of the Indian Evidence Act from the statute book. I may also note that there is no observation and nor any ratio laid down by the Supreme Court in ***Janak Dulari's*** case (*supra*) that even if a document being a sale deed is proved to have been executed and registered and even though it is not proved to be a nominal document, yet the seller of the sale deed can question the fact that consideration has not passed to the seller although recorded otherwise in the duly executed and registered sale deed.

13. Finally learned counsel for the appellant/defendant argued that since admittedly the sale deed mentions receipt of amount in cash whereas admittedly a sum of Rs.3 lacs is received by cheque therefore the sale deed must fail is an argument in my opinion only a technicality because the issue is that even if it is wrongly mentioned in the sale deed of consideration being received in cash, although the consideration is received both by cash and cheque, yet the fact of the matter remains is that the appellant/defendant is taken to have received the entire consideration as stated in the subject Sale Deed dated 17.04.2018.

14. In view of the aforesaid discussion, I do not find any merit in the appeal. Dismissed.

APRIL 27, 2018
ns

VALMIKI J. MEHTA, J