

## **Tarun Gandhi vs Mrs. Shakuntala Sharma on 16 March, 2023**

Suit No. 16472/16

Suit No. 266/2023

IN THE COURT OF SH. DIVYANG THAKUR, LD. ADJ03,  
SOUTHWEST DISTRICT, DWARKA COURTS, DELHI

Civil Suits No: 266/2023 and 16472/2016

CNR Nos. : DLSW01-002624-2023 and DLSW01-002043-2016

Tarun Gandhi  
R/o Flat No. 443,  
Princes Park Apartments,  
Sector-6, Dwarka, Delhi-110075

....Plaintiff/Defendant

Versus

Mrs. Shakuntala Sharma  
W/o Mr. Munish Kumar Sharma  
R/o CB-248,  
Naraina Ring Road  
New Delhi-110028

....Defendant/Plaintiff

SUIT FOR RECOVERY OF MONEY AND SUIT FOR  
DAMAGES

DATE OF INSTITUTION : 09.04.2009/08.02.2010

DATE OF FINAL ARGUMENTS : 26.11.2022

DATE OF DECISION : 16.03.2023

Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma  
Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi  
Suit No. 16472/16  
Suit No. 266/2023

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JUDGMENT

## BRIEF BACKGROUND OF THE LITIGATION

1. Vide present common judgment, I would decide two suits namely suit filed by Tarun Gandhi against Shakuntala Sharma which was originally filed before the Ld. District Judge, Dwarka Courts and numbered as suit no. 55/2009 and titled as 'Tarun Gandhi Vs. Shakuntala Sharma' and the suit filed by Shakuntala Sharma against Tarun Gandhi which was originally filed before the Hon'ble High Court of Delhi and numbered as CS (OS) 210/2010 and titled as 'Shakuntala Sharma Vs. Tarun Gandhi.' Thereafter, the suit of Tarun Gandhi pending before the Ld. ADJ was transferred to the Hon'ble High Court by order of the Hon'ble High Court dated 10.02.2011 whereby it was ordered that in order to avoid the possibility of conflicting findings and because the subject matter of both the suits being the same and issues in both the suits being identical, it would be appropriate that both the suits are tried together and are disposed off by a common judgment. Thereafter, in accordance with the aforesaid order, both the suits were being tried before the Hon'ble High Court of Delhi. However, in view of the change in the pecuniary jurisdiction, both the suits were transferred vide order dated 11.01.2016 to the Ld. District Judge, Dwarka Courts, New Delhi. Thereafter, both the suits have been tried in accordance with law and the said trial has resulted in the present common judgment in both the suits. Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi

2. To avoid confusion and as there are only two parties in both the suits and as both the parties are Plaintiff in one suit and Defendant in the other, for the sake of clarity, the parties have been referred to by their name throughout the present judgment i.e. Tarun Gandhi and Shakuntala Sharma.

Plaint Of The Suit Filed In The Year 2009 By Tarun Gandhi against Shakuntala Sharma being suit no. 55/2009

3. The plaintiff Tarun Gandhi had initially filed the present suit before Ld. AD & SJ, Dwarka Courts on 09.04.2009 seeking (a) passing of decree of recovery of Rs. 15,00,000/- in favour of plaintiff

(b) pendente lite and future interest @ 18% per annum (c) costs of the suit.

4. In the plaint of this suit, the plaintiff had pleaded that the defendant had acquired rights, title and interest in flat no. 111, SHIG (First Floor) (hereinafter referred to as "said flat") in Adarsh Purwal Vaish Co-op G.H. Society Ltd., also known as Princes Park Apartments, Sector-6, Plot No. 33, Dwarka, New Delhi (hereinafter referred to as "society"), by virtue of a registered Agreement to Sell dated 23.11.2005 executed by Col. Virinder Kochhar S/o Late Sh. B.R. Kochhar, the allottee of the said flat vide allotment letter dated 30.03.2001 issued by the society. The said Col. Virinder Kochhar had also executed and got registered a General Power of Attorney, Special Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi Power of Attorney and Will, all dated 23.11.2005 in favour of the defendant. It is further averred that Sh. Munish Kumar Sharma, husband of defendant (in the present suit) approached the plaintiff Tarun Gandhi sometime in the month of August 2008 through a real estate agent to sell the said flat to the plaintiff. Plaintiff further avers that relying on the representations and assurances as held out by the defendant, plaintiff agreed to purchase the said flat and consequently, an agreement to sell dated

05.09.2008 (hereinafter referred to as "said agreement") was executed between the plaintiff and the defendant, whereby the defendant agreed to sell the said flat to plaintiff for a total sale consideration of Rs. 1,05,51,000/-. At the time of execution of the said agreement, defendant had received a sum of Rs. 15,00,000/- as advance from the plaintiff and issued a receipt thereof.

5. Plaintiff further avers in the plaint that vide said agreement, the balance sale consideration was payable in the following manner:

(a) first part payment of Rs. 35,00,000/- to be made in 60 days from the date of handing over the photocopy of registered conveyance deed (i.e. freehold);

(b) final payment of Rs. 55,51,000/- shall be made within 15 days after second payment of Rs. 35,00,000/-.

6. It is further averred that it was agreed between the plaintiff and the defendant that the payment of Rs. 35,00,000/- would Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi be subject to production of original title documents by the defendant and on satisfaction thereof by the plaintiff. Simultaneously, with the execution of the said agreement, defendant told the plaintiff to occupy the said flat and carry out necessary modifications/alterations/interior changes at his own expenses. It is also averred that despite repeated requests of the plaintiff, directly as well as through his property dealer Sh. Surendra Singh Arora, defendant did not produce the original title documents and paid no heed to it, however, sent the photocopy of the conveyance deed along with her letter dated 02.12.2008. Plaintiff further averred that on 06.02.2009, plaintiff was shocked and surprised to find that his lock on the said flat was broken and replaced by new one and thus, plaintiff, on the very next day i.e. 07.02.2009 wrote a letter to the society asking clarification from them. The society, vide its letter dated 11.02.2009, informed the plaintiff that the said lock has been broken by Mr. Munish Kumar Sharma (husband of defendant) and also instructed the guards not to allow anyone to enter the said flat without his permission. In the plaint, it is also averred that subsequently, defendant issued a legal notice dated 07.02.2009 through her advocate, demanding the payment of balance consideration and threatening to forfeit the advance payment made by the plaintiff and to terminate the said agreement. It is also averred that in the said legal notice, it was stated that the said flat was mortgaged with the bank, which meant that the flat was neither free from Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi encumbrances nor had clear marketable title as was represented by the defendant in the said agreement. Plaintiff further avers that he had sent a reply dated 23.02.2009 to the aforesaid notice and asked refund of Rs. 30,00,000/- being double of the advance received by the defendant as per the terms of the said agreement.

7. Plaintiff has further categorically averred clause 3 of the said agreement in the plaint which is extracted herein:

"That the Seller assures the buyer that the above said property is free from all sorts of encumbrances such as Mortgage, gift, sale, litigation, attachment and proceedings of

any nature. If proved otherwise, the seller shall be liable and responsible for the same." It is also averred that defendant, in her legal notice, has admitted that the said flat is mortgaged with the bank. Consequently, on these grounds, the plaintiff has filed the present suit for recovery. Written Statement, Replication, Admission-Denial Of Documents And Framing Of Issues (Suit filed by Tarun Gandhi against Shakuntala Sharma bearing no. 55/2009)

8. A perusal of the Court file reveals that the summons was ordered to be issued qua Shakuntala Sharma, on 13.04.2009 and Written Statement on behalf of Shakuntala Sharma was filed. Replication was filed on 28.05.2009 and issues were framed.

9. In the WS filed on behalf of Shakuntala Sharma, she had Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi pleaded that it was Tarun Gandhi who breached the agreement by not paying the part payment of Rs. 35 lakhs as required by the agreement to sell dated 05.09.2008 and despite time being granted by Shakuntala Sharma, he refused to honor the agreement. It was further pleaded that the factum of mortgage had already been disclosed by her to Tarun Gandhi at the time of entering into the agreement and therefore, there was no question of consent being vitiated.

10. On the basis of pleadings, following issues were framed on :

(I) Whether the plaintiff was willing and ready to perform his part of the contract at the relevant time? (OPP) (II) Whether the defendant had misrepresented about the title/charge on the said property at any point of time to the plaintiff before entering into the transaction? (OPP) (III) Whether the plaintiff is entitled to the recovery of the amount as prayed? (OPP) (IV) If yes, at what rate of interest? (OPP) (V) Relief.

No other issue arose or was pressed for. Matter was proceeded for plaintiff's evidence.

EVIDENCE LED BY THE PARTIES (in the suit filed by Tarun Gandhi against Shakuntala Sharma bearing no. 55/2009) Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi

11. On 25.08.2009, PW-1 Sh. Tarun Gandhi tendered his evidence by way of affidavit Ex. PW1/A and relied upon the following documents:

(a) Ex. PW1/1 (OSR) i.e. copy of the agreement to sell dated 05.09.2008;

(b) Ex. PW1/2 i.e. receipt of advance payment of Rs.

15,00,000/-;

(c) Ex. PW1/3 i.e. office copy of letter dated 07.02.2009 addressed to Manager, Adarsh Purwal Vaish CGHS Ltd;

(d) Ex. PW1/3-A i.e. reply dated 11.02.2009 sent by Adarsh Purwal Vaish;

(e) Ex. PW1/4 i.e. letter dated 06.02.2009 written by the husband of the defendant to the Secretary of Princess Park Dwarka;

(f) Ex. PW1/5 i.e. legal notice;

(g) Ex. PW1/6 i.e. reply of the legal notice and

(h) Ex. PW1/6-A i.e. postal receipt.

PW-1 was cross examined and discharged on 17.12.2009. SUIT FILED BEFORE HON'BLE HIGH COURT OF DELHI BY SHAKUNTALA SHARMA IN THE YEAR 2010 (CS (OS) 210/2010)

12. Meanwhile, during the pendency of the aforesaid suit filed by Tarun Gandhi, Smt. Shakuntala Sharma had filed a suit for recovery of damages of Rs. 57,51,000/- against Tarun Gandhi before Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi Hon'ble High Court of Delhi. The same was filed on 08.02.2010. Brief facts of the said plaint are reproduced herein as under:

(a) Shakuntala Sharma had acquired rights, title and interest in Flat no. 111, SHIG (First Floor) in Adarsh Purwal Vaish Cooperative Group Housing Society Limited (also known as Princess Park Apartments, Sector-6, Plot no. 33, Dwarka, New Delhi) (hereinafter referred to as the Property) by virtue of a Registered Agreement to Sell dated 23.11.2005 executed by Col. Virender Kochhar son of Late B.R. Kochhar, who was the actual allottee of the said flat vide letter dated 30.03.2001 issued by the Society. The said Col. Virender Kochhar had also executed and got registered Special Power of Attorney Receipt, all dated 23.11.2005 in favour of Shakuntala Sharma.

(b) Tarun Gandhi is a resident of the Society where the property is situated and is a builder/investor by profession. Tarun Gandhi, through a local property broker namely M/s Chanakya Associates approached the husband of Shakuntala Sharma as well as her to purchase the property and after negotiations, the deal was finalized for a sum of Rs. 1,05,51,000/-. Thereafter, the parties formally entered into an Agreement to Sell dated 05.09.2008.

(c) As per the terms of Agreement to Sell, Tarun Gandhi had made initial payment of Rs. 15,00,000/- to Shakuntala Sharma. As per the covenants of the Agreement to Sell, Shakuntala Sharma was Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi required to get the property converted from lease hold to free hold by way of getting a registered conveyance deed and Tarun Gandhi was required to make part payment of Rs. 35,00,000/- within a period of 60 days from the date of handing over of the photocopy of the registered conveyance deed to him.

(d) Accordingly, Shakuntala Sharma applied to the respective authorities for conversion of the property from lease hold to freehold and the needful was done by the respective authorities on 21.11.2008. A copy of the registered conveyance deed was sent to Tarun Gandhi on 02.12.2008. Shakuntala Sharma, at the time of entering into the Agreement to sell, clearly disclosed to Tarun Gandhi that the original papers in respect of the property are lying with the Standard Chartered Bank, Connaught Place, New Delhi as security and part payment has to be made to get the original title deeds and Rs. 35,00,000/- was agreed as part payment to be made on 03.02.2009, however, the same was not paid despite several requests.

(e) Feeling aggrieved by the same, she sent a legal notice through her Counsel dated 07.02.2009 to Tarun Gandhi giving him a period of 7 days to make the part payment and balance payment within a period of 15 days thereafter. Reply dated 23.02.2009 to the legal notice was received by her in which Tarun Gandhi stated that she was duty bound to provide the original title documents to him before the release of the part payment. However, it has been averred by her Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi that no such condition was provided in the Agreement to Sell.

(f) It has been further averred in the plaint that Tarun Gandhi had filed a civil suit no. 55/2009 in April, 2009 against her at Dwarka Courts, Delhi for recovery of Rs. 15,00,000/- along with interest and she had filed her Written Statement in the aforesaid suit therein. Shakuntala Sharma has further averred that her Counsel had made a genuine offer to Tarun Gandhi in the civil suit no. 55/2009 that he could directly clear the dues payable to the bank and the balance could be deposited in the Court, which would be released to Shakuntala Sharma once the sale deed is executed in favour of Tarun Gandhi. But the same was never accepted by him. Thereafter, left with no other option, Shakuntala Sharma herein sold the property to a buyer on 22.07.2009 for a sum of Rs. 48,00,000/- as she was in dire need of money and property rates had fallen down and also because no other buyer could be found due to vacuum created by Tarun Gandhi in the market. Therefore, it is alleged that loss of Rs. 57,51,000/- has been caused to Shakuntala Sharma due to the breach of the agreement to sell by Tarun Gandhi.

Written Statement, Replication, Admission-Denial Of Documents And Framing Of Issues (Suit filed by Shakuntala Sharma against Tarun Gandhi in the year 2010)

13. A perusal of the Court file reveals that the summons was ordered to be issued qua Tarun Gandhi, on 08.02.2010 Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi and he appeared before the Hon'ble High Court of Delhi on 10.09.2010. Meanwhile, interim applications u/s 24 r/w Section 151 of CPC and under Section 10 r/w Section 151 of CPC were filed on behalf of Shakuntala Sharma. WS was filed on behalf of Tarun Gandhi on 02.11.2010.

14. Meanwhile, in Civil Suit titled "Tarun Gandhi Vs. Shakuntala Sharma" before the Ld. ADJ in Dwarka District Courts, Tarun Gandhi re-examined himself and PE was closed vide order dated 01.04.2010 and the matter therein was proceeded for defendant's evidence. However, Shakuntala Sharma has not examined any of the witnesses and thus, DE was also closed vide order dated 18.05.2010.

15. However, the interim applications filed before the Hon'ble High Court of Delhi were disposed off accordingly and the suit titled "Tarun Gandhi Vs. Shakuntala Sharma" filed before the Ld. ADJ, Dwarka Courts, New Delhi was transferred and clubbed with the ongoing civil suit titled as "Shakuntala Sharma Vs. Tarun Gandhi"

filed before the Hon'ble High Court of Delhi vide order of the Hon'ble High Court dated 10.02.2011.

16. In the WS filed by Tarun Gandhi in the civil suit filed before the Hon'ble High Court of Delhi, he had pleaded that the suit filed by Shakuntala Sharma was false and fabricated one and the transaction and losses alleged by Shakuntala Sharma were not genuine.

Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi

17. Thereafter, admission-denial of documents completed and it was agreed on behalf of both parties that admission-denial conducted in the civil suit filed before the Ld. ADJ, Dwarka Courts, New Delhi be treated the same in the civil suit filed before the Hon'ble High Court of Delhi. Thereafter, issues already framed in the civil suit bearing no. 55/2009 (filed before the Ld. ADJ, Dwarka Courts) were treated the same in the suit filed before the Hon'ble High Court of Delhi. However, additional issues were framed as following:

(I) Whether the plaintiff in Suit No. CS (OS) No. 210/2010 is entitled to claim made by him? (OPP) (II) Relief.

No other issue arose or was pressed for. It was also agreed that the evidence which has been led earlier in the old suit be allowed to be led in the suit filed before the Hon'ble High Court of Delhi. Shakuntala Sharma was directed to file her evidence by way of affidavit and matter was proceeded for plaintiff's evidence. Further Evidence Led By The Parties

18. PW-1 Sh. Manish Kumar tendered his evidence by way of affidavit and relied upon the following documents:

(a) Ex. PW-1/1 is the correct copy of the Agreement to Sell dated 05.09.2008;

(b) Ex. PW-1/2 is the correct copy of the SPA dated Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi 23.11.2005;

(c) Ex. PW-1/3 is the correct copy of the Conveyance Deed dated 21.11.2008;

(d) Ex. PW-1/4 is the correct copy of the letter dated 02.12.2008;

(e) Ex. PW-1/5 is the correct copy of legal notice dated 07.02.2009 and

(f) Ex. PW-1/6 is the correct copy of the sale deed. Thereafter, cross-examination of PW-1 could not be conducted before Hon'ble High Court of Delhi as the civil suit was transferred to the Court of Ld. District and Sessions Judge, Dwarka, New Delhi for further adjudication from where it was transferred to Ld. ADJ, Dwarka District Courts, New Delhi. Civil suit titled as "Tarun Gandhi Vs. Shakuntala Sharma" was ordered to be treated as the main suit vide order dated 01.06.2016 passed by Ld. ADJ-05, Dwarka Courts, New Delhi and PW Manish Kumar was now read as DW-1 thereon. Plaintiff's evidence on behalf of Tarun Gandhi was closed on 17.12.2009. DW-1 Sh. Munish Sharma was cross examined and discharged.

19. DW-2 Sh. Ravi Sharma tendered his evidence by way of affidavit exhibited as Ex. DW-2/A. He was cross examined and discharged on 24.01.2019 and DE was closed vide separate statement of Ld. Counsel for defendant recorded on 24.01.2019. Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi

20. Thereafter, PW-1 Sh. Tarun Gandhi tendered his affidavit Ex. PW-1/B in rebuttal on 05.08.2019, cross examined and discharged. Plaintiff's evidence in rebuttal was closed vide separate statement of the plaintiff recorded on 19.09.2019 and matter was proceeded for final arguments. In the meanwhile, an application u/s 151 CPC was filed on behalf of defendant for placing additional documents on record which was allowed. DW Sh. Harish Kumar, DEO at Office of Sub-Registrar-IX, Kapashera was summoned and examined. However, since none had appeared for plaintiff, opportunity to cross examine the defendant's witness was closed. CONTENTION OF PARTIES

21. Written submissions were filed on behalf of both Tarun Gandhi and Shakuntala Sharma and oral submissions were also heard. It was submitted on behalf of Tarun Gandhi that there had been a misrepresentation and fraud by Shakuntala Sharma and that therefore, Tarun Gandhi was entitled to receive back Rs. 15,00,000/- from Shakuntala Sharma. It was submitted while relying upon Section 55(1)

(b) of the Transfer of Property Act that the documents of title were not produced by Shakuntala Sharma and therefore, the statutory duty imposed was also violated. It was further submitted, therefore, that Tarun Gandhi was entitled under Section 19 of the Indian Contract Act to avoid the Agreement of Sale and was therefore, entitled to receive Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi the amount paid under the voidable Contract. It was further submitted that the defence taken up by Shakuntala Sharma was completely baseless and hid by the provisions of the Sections 91 and 92 of the Indian Evidence Act. It was further submitted that parties cannot be allowed to accept one clause of the contract while in the same breath repudiating another clause of the same agreement. It was further submitted that the evidence led by Shakuntala Sharma through Munish who was her husband on basis of a power of Attorney was completely inadmissible in light of judgment of the Hon'ble Supreme Court in "Janki Vaishdeo Bhojwani Vs. Indusind Bank Ltd. 2005 2 SCC 217." It was further submitted that the suit for damages filed by Shakuntala Sharma deserve to be dismissed as she had not approached the Court with clean hands and moreover, the contract already provided for liquidated damages in terms of Section 74 of the Indian Contract Act and in such situation, a suit based on Section 73 of the Indian Contract Act for consequential damages due to subsequent sale of the property by



Shakuntala Sharma to Jaileshwari Devi for a lesser consideration would not be maintainable. It was further submitted that the evidence led was contradictory in nature and that the sale transaction between Shakuntala Sharma and Jaileshwari Devi did not appear to be genuine. It was further submitted that no evidence was led to show that the real estate market had gone down to the extent that property rates had fallen by more than 50%. Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma  
Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi

22. Per Contra, in the written submissions filed by Shakuntala Sharma, it was submitted that it was Tarun Gandhi who had failed to abide by the agreement and not paid Rs. 35,00,000/- as required and therefore, his suit for recovery of the earnest money was not maintainable. It was further submitted that the factum of the property being mortgaged was disclosed to Tarun Gandhi and therefore, he could not rely on the clause in the agreement which is part of the general format of the agreement to sell. It was further submitted that clause (a) of para 2 of the agreement to sell was specifically provided so that on payment of Rs. 35 lakhs by Tarun Gandhi, Shakuntala Sharma could pay the bank for release of the title documents and for closure of the mortgage. It was further submitted that Tarun Gandhi was not a bonafide purchaser but merely a speculator in real estate and he was not having financial capacity and therefore, he reneged on the agreement. It is further submitted that once Tarun Gandhi did not perform his part of the agreement, therefore, the property had to be sold at throw away of a price due to which Shakuntala Sharma suffered a loss of Rs. 57,51,000/- due to the breach committed by Tarun Gandhi. It was further submitted that since it was Tarun Gandhi who had breached the agreement, the earnest money was liable to be forfeited. The judgments of "Sh. Hanuman Cottonmills Vs. Tata Aircraft Ltd., 1969 (3) SCC 522" and "Satish Batra Vs. Sudhir Rawat, 2013 (III) AD (SC) 557" have been relied Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi upon.

## FINDINGS

23. I have perused the record and heard the parties. Before deciding the issues, it would be pertinent to summarise the admitted positions and rival contentions of the parties in the pleadings in both the suits filed by them. The Plaintiff Tarun Gandhi has submitted that an agreement to sell was entered into between him and Shakuntala Sharma dated 05.09.2008 which agreement was exhibited as Ex. PW1/1 and is an admitted document as between the parties. The Plaintiff has mainly relied upon clause 3 of the said agreement which states that "the seller assures the buyer that the above said property is free from all sorts of encumbrances such as mortgage, gift, sale/litigation, attachment and proceedings of any nature. If proved otherwise, the seller shall be liable and responsible for the same."

24. It is the case of Tarun Gandhi that in pursuance of the agreement to sell, he paid Rs. 15,00,000/- which was received by Shakuntala Sharma vide Ex. PW1/2. The said fact is also not being denied by Shakuntala Sharma. However, Tarun Gandhi further avers that he came to know vide a legal notice issued by Shakuntala Sharma on 07.02.2009 for the first time that the said flat which was a subject matter of the agreement to sell between the parties, was mortgaged with a bank. Here the cases of the parties diverge as Shakuntala Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi Sharma submits in paras 2 and 3 of her written statement filed in the

suit of Tarun Gandhi that Tarun Gandhi had been informed in the first instance itself that the property was mortgaged with Standard Chartered Bank, Connaught Place, New Delhi along with dues of Rs. 30 to Rs. 35 lakhs. In para 2 of her Written Statement, it is further averred that ".....At that point of time itself, it was mutually agreed between the parties that initially the Plaintiff will pay the earnest money and the Agreement to Sell will be executed with a condition that interim payment will also be made by the Plaintiff so as to enable the Defendant to clear the dues of the Bank and the balance instalment/payment will be paid at the time of execution of Sale Deed by the Plaintiff."

25. Shakuntala Sharma further avers that it was Tarun Gandhi who breached the contract as Rs. 35 lakhs were to be paid within 60 days from the date of handing over the photocopy of the registered conveyance deed and it is further submitted that the conveyance deed was sent to Tarun Gandhi in accordance with the contract vide letter dated 02.12.2008. However, it is the case of Shakuntala Sharma that Tarun Gandhi did not want to perform his part of the agreement and therefore, took up the excuse of the property being mortgaged which fact was already known to him at the time of execution of the agreement to sell. Pertinently, in para 16 of her WS, it Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi is averred that "It is also relevant to point out that such type of Agreement to Sell are generalized typed and which have same type of Clauses with minor changes in it. However, even as per Clause 3 of the said Agreement to Sell, this clearly stipulates that if there is any sort of encumbrance/s found, the seller will be liable and responsible for the same. This to say that it will be the responsibility casted upon the Seller to get the same rectified and which even today the Defendant is ready and willing to do the same if the Plaintiff makes the interim payment as per the terms of the Agreement to Sell which he was duty bound to make as per Clause 2 (a) of the Agreement to Sell."

26. It is pertinent to note that vide para 13 of the WS of Shakuntala Sharma, she has admitted Tarun Gandhi's assertion that she had sent the legal notice dated 07.02.2009 which was also exhibited as Ex. PW1/5. In the said legal notice Ex. PW1/5, Shakuntala Sharma has averred that Tarun Gandhi had already been informed at the time of entering into the Agreement to Sell that the property is mortgaged with the bank. Tarun Gandhi has relied upon the reply to the said legal notice which has been proved as Ex. PW1/6, a reading of which shows that Tarun Gandhi demanded that Shakuntala Sharma pay him double the advance amount i.e. Rs. 30 lakhs on Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi ground that she had made a misrepresentation with regard to the encumbrance on the property.

27. Tarun Gandhi has prayed in the present suit that a money decree be passed in his favour for a sum of Rs. 15 lakhs which is the advance amount admittedly paid by Tarun Gandhi to Shakuntala Sharma along with pendente lite interest. Apart from the above facts, it is also necessary to note that it is an admitted position between the parties that subsequent to the execution of the Agreement to Sell, Shakuntala Sharma handed over the physical possession of the flat to Tarun Gandhi to carry out necessary modifications/alterations on his own expense. It is further alleged by Tarun Gandhi that on 06.02.2009, he found that the lock that he had placed on the flat had been broken and replaced by a new one in respect of which Tarun Gandhi wrote a letter to the society and it is further averred that the society vide its letter dated 11.02.2009 informed Tarun Gandhi that the said lock had been broken by Mr. Munish Kumar Sharma who had also instructed the guards not to allow

anyone to enter the property without his permission. The letter dated 07.02.2009 written by Tarun Gandhi and addressed to the society Adarsh Porwal Vaish Co-operative CGHS Society Ltd. is exhibited as Ex. PW1/3 and the response of the society is exhibited as Ex. PW1/3A. Tarun Gandhi has also proved one letter Ex. PW1/4 which as per him was written by the husband of Shakuntala Sharma i.e. Munish Sharma to the Secretary of the Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi concerned society. It is relevant to note that the aforesaid facts as detailed have not even been denied by Shakuntala Sharma in the WS in para 12 corresponding to para 12 of the plaint where specifically, the aforesaid facts were averred.

28. In sum and substance, the crux is that Tarun Gandhi alleges that Shakuntala Sharma made a fraudulent representation vide clause 3 of the written agreement which entitled him to rescind the contract and made Shakuntala Sharma liable to refund the entire advance of Rs. 15 lakhs whereas, the defence taken by Shakuntala Sharma is that Tarun Gandhi had been informed orally about the mortgage of the property with the bank and it was Tarun Gandhi who had breached the contract by failing to pay the amount of Rs. 35 lakhs within 60 days of the handing over of the photocopy of the registered conveyance deed and that the consent of Tarun Gandhi was not affected by clause 3 of the said agreement as the same was a general language usually used in such agreements and that he well knew about the mortgage and that is why, he had agreed to pay sum of Rs. 35 lakhs as part payment on receiving the photocopy of the registered conveyance deed. It is also the defence of Shakuntala Sharma that Tarun Gandhi could have paid the amount of Rs. 35 lakhs which would have enabled Shakuntala Sharma to redeem the mortgage but he was never interested in purchasing the property and wanted to rescind the contract whereas, on the other hand, Shakuntala Sharma Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi was always ready and willing to perform her part of the agreement.

29. In the suit filed by Shakuntala Sharma, it would be pertinent to note that the same has been filed for the recovery of damages amounting to Rs. 57,51,000/- on account of breach committed by Tarun Gandhi of Agreement to Sell dated 05.09.2008. Though, most of the facts in the said suit of Shakuntala Sharma are reiteration of the pleadings in the Written Statement as noted above, it is relevant to note that it has been pleaded that Tarun Gandhi created a vacuum in the market that the property is disputed and Shakuntala Sharma was in dire need of money and the property values were going down and money was required for medical needs. A buyer was found for the property but it is alleged that the buyer only agreed to buy the property for a sum of Rs. 48 lakhs and as Shakuntala Sharma was not having any option, agreed to sell the property for a sum of Rs. 48 lakhs only. On the aforesaid grounds, it has been alleged that the damages of Rs. 57,51,000/- have been caused being the difference between the sale consideration of Rs. 1,05,51,000/- as agreed to between Shakuntala Sharma and Tarun Gandhi and the actual sale consideration of Rs. 48 lakhs which were received after selling to some other person.

#### Findings In The Case Of 'Shakuntala Sharma Vs. Tarun Gandhi'

30. Having noted the foundational facts forming the basis of Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi both the suits, I proceed to firstly decide the additional issue framed in the suit filed by Shakuntala Sharma first. The following issue was framed

in the said suit namely "Whether the plaintiff in Suit No. CS (OS) No. 210/2010 is entitled to claim made by him? (OPP)"

31. Before advertng to the evidence led in the suit by Shakuntala Sharma, it would be appropriate to refer to the relevant provision of the Indian Contract Act on which the present suit for damages for breach of contract is based upon.

32. Section 73 of the Indian Contract Act, 1872 is reproduced here as under:

"73. Compensation for loss or damage caused by breach of contract-When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.....74. Compensation for breach of contract where penalty stipulated for.-When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

33. The Agreement to sell contains the following clause namely clause 11 which is extracted herein:

"11. In the event of the breach of any clause of this agreement by the Buyer, the Seller shall have the right to terminate this agreement and forfeit the advance/earnest money which is received by him. And incase of breach of any clause of this agreement by the seller or the Seller does not give possession of the said property according to the terms of this agreement then the Seller will have to pay the double of the earnest money/advance received by him. The earnest money gainer shall have to pay the 4% commission to the concerned dealer as stated in para 11 of this agreement."

34. I find that the suit of Shakuntala Sharma for consequential damages due to breach of contract amounting to Rs. 57,51,000/- cannot be decreed for the reason that in the present case, the parties had already agreed to a clause providing for liquidated damages within the meaning of Section 74 of the Indian Contract Act, Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi whereas, the present suit for consequential damages falls under Section 73 of the Indian Contract Act. The parties by agreement, can provide for liquidated damages and in such cases, where the parties have agreed on a liquidated sum in the agreement, in case of a breach, the

party who is aggrieved can only claim damages which is not more than the liquidated sum provided for. In the present case, clause 11 of the Agreement as extracted above, is clearly a stipulation by way of penalty providing that the seller can forfeit the advance money received which was in this case Rs. 15,00,000/-. When the agreement to sell Ex. PW1/1 itself provides for a liquidated sum to be paid or forfeited in the case of a breach, then the claim for consequential damages due to non performance of the agreement, and on the ground of the subsequent distress sale by Shakuntala Sharma to Jaleshwari Devi for a sum of Rs. 48 lakhs, is not maintainable.

35. Even otherwise, on the merits of the evidence adduced, I find that Shakuntala Sharma has not been able to establish her case for recovery of Rs. 57,51,000/- as consequential damages due to non performance. Section 73 which provides for the grant of damages requires that the compensation can be recovered where loss or damage arose in the usual course of things from such breach or which the parties knew at the time they made the contract as likely to result from such breach. However, Section 73 excludes the grant of compensation for remote or indirect loss. It is also a requirement in law that the Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi Plaintiff filing a suit for damages has to take all reasonable steps to mitigate the loss consequent on the breach. There must be a connection between the breach of contract and the loss suffered to the Plaintiff that is to say that the loss must have been caused by the breach itself and not by the manner of the breach (Reference can be had in this regard to page 1119 of Pollock and Mulla's commentary on the Indian Contract Act, 1872, 15th Edition).

36. In the present case, even if it is assumed that it was Tarun Gandhi who had committed a breach of contract, I find that Shakuntala Sharma had not made out a case for the recovery of Rs. 57,51,000/-.

37. The case of Shakuntala Sharma in a nutshell, is that due to the alleged breach of contract by Tarun Gandhi, the property had to be sold at a much lesser value as (i) Tarun Gandhi had created doubt over the title of the property; (ii) money was immediately required by Shakuntala Sharma due to various reasons such as interest on the loan taken from the bank and for the medical expenses of her son; (iii) real estate values and market rates had fallen.

38. However, on consideration of the evidence, I find that none of the aforesaid aspects have been proved by any reliable evidence. Firstly, it was alleged in the plaint by Shakuntala Sharma in para 12 that property value were going down but no reliable evidence, other than bare averment, has been led to prove the same. Judicial Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi notice can be taken of the fact that contrary to the assertion of Shakuntala Sharma in her plaint, the property values of flats in Delhi NCR have been increasing by leaps and bounds. To buttress her claim to the contrary, the onus was strictly on Shakuntala Sharma to prove that due to some extraordinary circumstances, property values had fallen down in Dwarka or specifically in the area where the suit property is located. No such evidence has been led in this regard by either producing record of sales of similarly placed immovable properties in the region or through oral evidence of property dealers who could testify to such fall in real estate prices. Moreover, the claim of Shakuntala Sharma that property prices had fallen to such extent that a property which was sold at price of more than Rs. 1 crore in the year 2008 had to be sold for a sum

of Rs. 48 lakhs within one year is hardly credible, especially in the light of the conspicuous absence of any convincing evidence to the contrary. There is no evidence to show that property prices of flats in Dwarka had fallen by more than 50% in the year 2008 to 2009. No mention of such drastic fall in price has been made by DW-1 Munish Kumar (Attorney Holder of Shakuntala Sharma) or DW-2 Ravi Sharma who is stated to be a property dealer since 2005.

39. Another reason given for the distress sale by Shakuntala Sharma is that bank interest was accruing on her head, however, during evidence of DW-1, it has come on record that Shakuntala Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi Sharma did not even deposit Rs. 15 lakhs received from Tarun Gandhi in the loan account to reduce the interest. If Shakuntala Sharma was in such dire straits that she had to sell the property at a loss of more than 50% due to the bank interest, then it is unclear as to why no effort was made to lessen the burden by depositing the sum of Rs. 15 lakhs received in the loan account. The whole story of the distress sale, therefore, appears to be unreliable and incredible.

40. Another reason given is due to the urgent need of medical expenses, however, no evidence has been produced to corroborate such claim.

41. Even otherwise, I find that the damages claimed are remote and that Shakuntala Sharma has nowhere led any evidence that she did everything in her power to mitigate the alleged breach of contract by Tarun Gandhi. It has come on record during the cross examination of DW-1 Sh. Munish Kumar that Shakuntala Sharma did not give any kind of advertisement for sale of the subject property in any newspaper. Though, DW-1 deposed that Shakuntala Sharma started to search for a subsequent buyer after expiry of 22 days from 07.02.2009, but he has not deposed in his affidavit as to what were the measures taken to search for an appropriate buyer. On the other hand, DW-2 Ravi Sharma who is the property dealer and also is relative of Shakuntala Sharma who is his maternal aunt as deposed by him in the cross-examination, has also not deposed with respect to the measures Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi taken to search for the buyer. He has only deposed that he searched for the buyer and there was a vacuum in the market and therefore, the buyer agreed for a very less amount. He has also deposed that when he used to take potential buyers to show the suit property, Tarun Gandhi would contact them and tell them that there is litigation going on in respect of the suit property. However, no details have been given of such persons by DW-2 and otherwise also, his evidence does not inspire confidence due to the fact that he is related to Shakuntala Sharma and cannot be said to be an uninterested party. Moreover, the story itself is highly improbable and does not inspire confidence. During the cross-examination of DW-2, he has deposed that Smt. Jaleshwari Devi had purchased the property through him and that he met Jaleshwari Devi at the gate of Princess Park Society and he has also further deposed that execution of Agreement to Sell and payment of earnest money took place within 10-15 days of first meeting at the gate of Princess Park Society. It is highly improbable that the deal of a valuable immovable property was conducted in such sketchy manner to a buyer for such less amount as compared to the fair market value in such speedy manner. The manner in which such deal for the sale of the property for Rs. 48 lakhs was arrived at, has remained opaque and there seems to be no good reason for the same. Moreover, Shakuntala Sharma has taken no efforts to produce the buyer Jaleshwari Devi before this Court to testify with regard to the transaction to Mr.

Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi corroborate the story as put forward. Therefore, it does not seem that even if the story put forward by Shakuntala Sharma is taken at face value, that all efforts were made that would have been otherwise made by a reasonable person to lessen the loss by selling the property at somewhat approximate to the market value. Even otherwise, the chain of causation as pleaded to show that loss was caused due to the alleged breach does not point towards the damage being the proximate cause of such breach. It does not appear that the parties could have contemplated that Shakuntala Sharma would suffer loss of Rs. 57 lakhs due to the non performance of the agreement to sell dated 05.09.2008. It has not even been pleaded that the parties could have foreseen such drastic change in the value of the property as alleged. Moreover, no reliable evidence has been led to prove that there was any action committed by Tarun Gandhi which led to the reduction in the sale price of the property.

42. One another aspect which impinges upon the testimony of DW-1 Munish Sharma and its probative value is that Shakuntala Sharma never stepped into the witness box to testify and face cross- examination. Munish Sharma is stated to be Power of Attorney holder of Shakuntala Sharma, however, the Agreement to Sell between Tarun Gandhi and Shakuntala Sharma was not executed by Munish Sharma in his capacity as Power of Attorney Holder. It is not the case that it was Munish Sharma who also entered into the sale deed with Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi Jaleshwari Devi being the Power of Attorney holder.

43. In "Janki Vashdeo Bhojwani and Another vs Indusind Bank Ltd. and Others (2005) 2 Supreme Court Cases 217", Hon'ble Supreme Court of India has held as under:

"10. The second fallacy of the order of the Tribunal was allowing Mr. V.R.Bhojwani (power-of-attorney holder), husband of Appellant 2 Ms Mohini Laxmikant Bhojwani, to appear in the witness box on behalf of the appellants. It may be noted that the appellants were shying away from gracing the box. The respondent Bank vehemently objected to allowing the holder of power of attorney of the appellants to appear in the witness box on behalf of the appellants. This Court had clarified that the burden of proving that the appellants have a share in the property was on the appellants and it was incumbent on the appellants to have graced the box and discharged the burden that they have a share in the property, the extent of share and the independent source of income from which they had contributed towards the purchase of the property. The entire context of the order dated 10.2.2004 was forwarded to the Tribunal for the purpose. It is unfortunate that the Tribunal has framed its own issues not consistent with the directions and recorded a finding contrary to the directions as Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi aforesaid.

.....

13. Order 3 Rules 1 and 2 CPC empower the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in power-of-attorney

holder in exercise of power granted by the instrument. The term "acts" would not include deposing in place and instead of the principal. In other words, if the power-of-attorney holder has rendered some "acts" in pursuance of power of attorney, he may depose for the principal in respect of such acts, but he can not depose for the principal for the acts done by the principal and not by him. Similarly, he can not depose for the principal in respect of the matter of which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross- examined.

14. Having regard to the directions in the order of remand by which this Court placed the burden of proving on the appellants that they have a share in the property, it was obligatory on the part of the appellants to have entered the box and discharged the burden. Instead, they allowed Mr. Bhojwani to represent them and the Tribunal erred in allowing the power-of-attorney holder to enter the box and Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi depose instead of the appellants. Thus, the appellants have failed to establish that they have any independent source of income and they had contributed for the purchase of the property from their own independent income. We accordingly hold that the Tribunal has erred in holding that they have a share and are co-owners of the property in question. The finding recorded by the Tribunal in this respect is set aside.

15. Apart from what has been stated, this Court in the case of Vidhyadhar v. Manirao observed at SCC pp.583-84, para 17 that:

"17. Where a party to the suit does not appear in the witness box and stated his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct....."

16. In civil dispute the conduct of the parties is material. The appellants have not approached the Court with clean hands. From the conduct of the parties it is apparent that it was a ploy to salvage the property from sale in the execution of decree."

44. Therefore, when it is not the case that it was Munish Sharma who had executed the Agreement to Sell with Tarun Gandhi or Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi the sale deed with Jaleshwari Devi while acting in pursuance of any Power of Attorney, then it was incumbent upon Shakuntala Sharma to step into the witness box. As seen, in Janki Vaishdeo (supra), the Hon'ble Supreme Court of India had found that such practice of a Power of Attorney holder deposing in place of the principal is not permissible and moreover, in a civil suit, where the party itself does not step into the witness box, then it is open to the Court to draw a presumption that the case set up is not correct. In that case also, the husband had stepped in to the witness box instead of his wife and deposed in her place. Therefore, I find that on basis of the aforesaid dictum of law also, along with the reasons as detailed above, the story of Shakuntala Sharma in her suit with regard to the losses suffered by her due to a subsequent sale of the property has not been proved.



45. Lastly, one more aspect which weakens the case of Shakuntala Sharma is that the sale in favour of Jaleshwari Devi for a sum of Rs. 48 lakhs also seems to be unreliable in addition to what has been stated above for the reason that no cogent evidence has been led with regard to the exact amount received from the sale. During cross examination of DW-1 Sh. Munish Kumar, he had deposed that:

"I have not brought the passbook and statement of account of Smt. Shakuntala Devi as the account has been closed. It is wrong to suggest that I have intentionally not brought the aforesaid document which would reveal transactions in Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi that account as well as financial strength of defendant Smt. Shakuntala Sharma.

I am not aware whether any document/bank statement with respect to encashment of cheque/consideration money in the account of Smt. Shakuntala Devi has been filed alongwith plaint. I have however brought photocopy of deposit slip for Rs. 1,83,350/- in cash by Smt. Jaleshwari Devi in the account of Smt. Shakuntala which is Mark H. I have not filed any statement of account/documentary proof of encashment of cheque no. 886106 dated 25.05.2009 for Rs. 42 Lacs and cheque no. 886108 dated 22.07.2009 for Rs.6 Lacs as mentioned in the sale deed Ex.PW-1/6.

It is correct that deposit slip of Rs.1,83,350/- is not mentioned in sale deed Ex.PW-1/6. Vol. The same was given in cash by Smt. Jaleshwari Devi."

46. On the other hand, in the sale deed between Shakuntala Sharma and Jaleshwari Devi, it has been mentioned in the recitals that the entire sale consideration of Rs. 48 lakhs has been paid through two cheques dated 25.05.2009 and 22.07.2009. Thus, deposition of DW-1, even if assumed to be admissible, severely damages the case put forward as he admits to having received separate amount of Rs. 1,83,350/- by way of cash and no satisfactory explanation has been Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi given as to why such amount was accepted when the entire sale consideration had already been paid through cheques. It is also pertinent to note that no evidence was ever adduced to show the receipt of the aforesaid sum of Rs. 48 lakhs through cheque and in fact, no mention had been made of the additional amount of Rs. 1,83,350/- in the plaint filed by Shakuntala Sharma. The same renders the story of the sale as suspicious and untrustworthy. It is pertinent to note that as of 25.05.2009, the suit filed by Tarun Gandhi was already pending and in fact, issues were also framed by the Court on 28.05.2009.

Therefore, the said issue is decided against Shakuntala Sharma and in favour of Tarun Gandhi. Findings In The Case Of 'Tarun Gandhi Vs. Shakuntala Sharma'

47. Now, coming to the issues as framed in the suit filed by Tarun Gandhi against Shakuntala Sharma. I would decide the following issues together i.e. Issue no. 1 : "Whether the plaintiff was willing and ready to perform his part of the contract at the relevant time? (OPP)"

Issue no. 2 : "Whether the defendant had misrepresented about the title/charge on the said property at any point of time to the plaintiff before entering into the

transaction? (OPP)"

Issue no. 3 : "Whether the plaintiff is entitled to the recovery of the Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi amount as prayed? (OPP)"

Issue no. 4 : "If yes, at what rate of interest? (OPP)"

48. The case of Tarun Gandhi is that he is entitled to receive back the earnest money of Rs. 15 lakhs paid to Shakuntala Sharma on the ground that there was a misrepresentation with regard to the encumbrance on the property and therefore, he was entitled to rescind the contract and was no longer obliged to perform the agreement. On the other hand, it is the claim of Shakuntala Sharma that she had already informed Tarun Gandhi about the mortgage on the property orally and therefore, the present suit filed by Tarun Gandhi was merely an excuse to not perform the contract as he was not interested and was merely a speculator in real estate.

49. To appreciate the rival contentions of the parties, it is important and pertinent to note the law as developed under Section 91 and 92 of the Indian Evidence Act.

50. In "Shailendra Nath Endlay & Anr. Vs Kuldeep Gandotra ILR (2011) III Delhi 783", Hon'ble High Court of Delhi has taken note of the judicial precedents of the Hon'ble Supreme Court and held that:

"6. .... The scope and ambit of the said Sections 91 of the Evidence Act, 1872 came up for consideration before the Supreme Court in Roop Kumar vs Mohan Thedani, (2003) 6 SCC 595. The Supreme Court held as follows:

Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi "13. Section 91 relates to evidence of terms of contract, grants and other disposition of properties reduced to form of document. This section merely forbids proving the contents of a writing otherwise than by the writing itself; it is covered by the ordinary rule of law of evidence, applicable not merely to solemn writings of the sort named but to other known some times as the "best evidence rule".

It is in reality declaring a doctrine of the substantive law, namely, in the case of a written contract, that all proceedings and contemporaneous oral expressions of the thing are merged in the writing or displaced by it. (See Thayer's Preliminary Law on Evidence, p.397 and p. 398; Phipson Evidence, 7th Edn., p. 546; Wigmore's Evidence, p. 2406.) It has been best described by Wigmore stating that the rule is no sense a rule of evidence but a rule of substantive law. It does not exclude certain data because they are for one or another reason untrustworthy or undesirable means of evidencing some fact to be proved. It does not concern a probative mental process - the process of believing one fact on the faith of another. What the rule does is to declare that certain kinds of facts are legally ineffective in the substantive law; and this of course )like any other ruling of substantive law) results in forbidding Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi the fact to be proved at all. But this prohibition of proving it is merely that dramatic aspect of the process of applying the rule of substantive law. When a thing is not to be proved at all

the rule of prohibition does not become a rule of evidence merely because it comes into play when the counsel offers to "prove" it or "give evidence" of it; otherwise any rule of law whatever might be reduced to a rule of evidence. It would become the legitimate progeny of the law of evidence. For the purpose of specific varieties of jural effects - sale, contract etc. there are specific requirements varying according to the subject. On the contrary there are also certain fundamental elements common to all and capable of being generalised. Every jural act may have the following four elements :

- (a) the en-action or creation of the act;
- (b) its integration or embodiment in a single memorial when desired;
- (c) its solemnisation or fulfillment of the prescribed forms, if any; and
- (d) the interpretation or application of the act to the external objects affected by it.

14. The first and fourth are necessarily involved in every jural act, and second and third may or may not become so. In *Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma* and *Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi* the first and fourth are practically important, but are always possible elements.

15. The enactment or creation of an act is concerned with the question whether any jural act of the alleged tenor has been consummated; or, if consummated, whether the circumstances attending its creation authorise its avoidance or annulment. The integration of the act consists in embodying it in a single utterance or memorial - commonly, of course, a written one. This process of integration may be required by law, or it may be adopted voluntarily by the actor or actors and in the latter case, either wholly or partially. Thus, the question in its usual form is whether the particular document was intended by the parties to cover certain subjects of transaction between them and, therefore, to deprive of legal effect all other utterances.

16. The practical consequence of integration is that its scattered parts, in their formal and inchoate shape, have no longer any jural effect; they are replaced by a single embodiment of the act. In other words, when a jural act is embodied in a single memorial all other utterances of the parties on the topic are legally immaterial for the purpose of determining what are the terms of their act. This rule is based upon an assumed intention on the part of contracting parties, evidenced by the existence of the written contract, to place themselves above the uncertainties of oral evidence and on a disinclination of the Courts to defeat this object. When persons express their agreements in writing, it is for the express purpose of getting rid of any indefiniteness and to put their ideas in such shape that there can be no misunderstanding, which so often occurs when reliance is placed upon oral statements. Written contracts presume deliberation on the part of the contracting parties and it is natural they should be treated with careful consideration by the courts and with a disinclination to disturb the conditions of matters as embodied in them by the act of the parties. (See *McKelvey's Evidence*, p. 294). As observed in *Greenleaf's Evidence*, p. 563, one of the most common and important of the concrete rules presumed under the general notion that the best evidence must be produced and that one with which the phrase "best evidence" is now exclusively associated is the

rule that when the contents of a writing are to be proved, the writing itself must be produced before the Court or its absence accounted for before testimony to its contents is admitted.

17. It is likewise a general and most inflexible rule that Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi wherever written instrument are appointed, either by the requirement of law, or by the contract of the parties, to be repositories and memorials of truth, any other evidence is excluded from being used iether as a substitute for such instruments, or to contradict or alter them. This is a matter both of principle and policy. It is of principle because such instruments are in their own nature and origin, entitled to a much higher degree of credit than parol evidence. It is of policy because it would be attended with great mischief if those instruments, upon which men's rights depended, were liable to be impeached by loose collateral evidence (See Sartkie on Evidence, p. 648.)

18. In Section 92 the legislature has prevented oral evidence being adduced for the purpose of varying the contract as between the parties to the contract; but, no such limitations are imposed under Section 91. Having regard to the legal position of Sections 91 and 92 and the deliberate omission from Section 91 of such words of limitation, it must be taken note of that even a third party if he wants to establish a particular contract between certain others, either when such contract has been reduced to in a document or where under the law such contract has to be in writing, can only prove such contract by the production Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi of such writing.

19. Sections 91 and 92 apply only when the document on the fact of it contains or appears to contain all the terms of the contract. Section 91 is concerned solely with the mode of proof of a document with limitation imposed by Section 92 relates only to the parties to the document. If after the document has been produced to prove its terms under Section 91, provisions of Section 92 come into operation for the purpose of excluding evidence of any oral agreement or statement for the purpose of contradicting, varying, adding or subtracting from its terms. Sections 91 and 92 in effect supplement each other. Section 91 would be inoperative without the aid of Section 92, and similarly Section 92 would inoperative without the aid of Section 91. ....

21. The grounds of exclusion of extrinsic evidence are (1) to admit inferior evidence when law requires superior would amount to nullifying the law, and (ii) when parties have deliberately put their agreement into writing, it is conclusively presumed, between themselves and their privies, that they intended the writing to form a full and final statement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi and treacherous memory."

.....

9. .... As regards the contention raised on behalf of the Appellants, that it was orally agreed between the parties that the Respondent would be responsible for getting the said flat converted into freehold, is concerned the said assertion is devoid of merit. It is a well settled principle of interpretation that Evidence Act forbids proving the contents of a writing other than by the writing

itself. This doctrine described by the Supreme Court as "best evidence" is in reality a doctrine of substantive law, namely, that in case of a written contract all proceedings and contemporaneous oral expressions of the thing are merged in the writing and displaced by it. In other words, when persons express their agreement in writing, it is for the express purpose of getting rid of any indefiniteness and to put their ideas in such shape that there can be no misunderstanding, which so often occurs when reliance is placed upon oral statements. Written contracts presume deliberation on the part of the contracting parties and it is natural they should be treated with careful consideration by the courts and with a disinclination to disturb the conditions of matters as embodied in them by the act of the Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi parties. The Supreme Court in Roop Kumar (supra) has observed:

"17. It is likewise a general and most inflexible rule that wherever written instrument are appointed, either by the requirement of law, or by the contract of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict or alter them. This is a matter both of principle and policy. It is of principle because such instruments are in their own nature and origin, entitled to a much higher degree of credit than parol evidence. It is of policy because it would be attended with great mischief if those instruments, upon which men's rights depended, were liable to be impeached by loose collateral evidence. (See Starkie on Evidence, p.648.)"

10. Thus, it is seen that the provisions of the Evidence Act come into operation for the purpose of excluding evidence of any oral agreement or statement for the purpose of contradiction, varying, adding or subtracting from its terms, after the document has been produced to prove its Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi terms."

51. I find that the defence put forward by Shakuntala Sharma that Tarun Gandhi had already been informed about the mortgage, is inadmissible and cannot be considered due to the effect of Section 91 and 92 of the Indian Evidence Act. The claim of Shakuntala Sharma that the Agreement and specifically clause 3 of the said agreement were a generalized and stereotyped clause and that the same is not binding upon her, is not sustainable. It has come on record in the evidence of DW-2 who is the property dealer and also relative of Shakuntala Sharma that the covenants of the Agreement to sell were read over by him, his partner Gagan Jain, Shakuntala Sharma and Munish Sharma. It is not the case that the present agreement to sell was an agreement between two unequal parties, nor does it appear that the present agreement to sell is a standard form of agreement prepared without application of mind. To illustrate, reference can be had to clause 6 of the agreement which records that the seller has handed over the vacant physical possession of the property for carrying out the modifications and alterations by the buyer at his own expense. In the present case, it is the admitted position between the parties in the pleadings and evidence that after the execution of the agreement to sell, the physical possession of the property was handed over to Tarun Gandhi to carry out such modifications as he saw fit. The agreement also records that the seller has received a sum of Rs. 15 lakhs and also Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi details the part payments of Rs. 35 lakhs within 60 days and final payment of Rs. 55 lakhs within 15 days of the aforesaid payment of Rs. 35 lakhs. On reading the aforesaid clauses, it

does not appear that the agreement to sell Ex. PW1/1 was prepared without application of mind and in a generalized format as the same contains clauses highly specific to the facts and situations and surrounding facts and circumstances and having sufficient detail. Therefore, the law as laid down in Roop Kumar (supra) would be fully applicable and the defence that Tarun Gandhi had already been informed orally would be inadmissible.

52. Moreover, while on the one hand, Shakuntala Sharma has termed the aforesaid clause 3 as not binding and merely a general format and having no consequence, whatsoever, on the other hand, Shakuntala Sharma has relied on other clauses of the Agreement to claim that it was Tarun Gandhi who wrongly repudiated the agreement.

53. In "Suresh Chand Jain vs M/s Phalphor Builders P. Ltd. 2010 SCC OnLine Del 4349", it was observed by the Hon'ble High Court of Delhi that:-

"In New Bihar Biri Leaves Co. And Ors. v. State of Bihar and Ors. (1981) 1 SCC 537, the Supreme Court observed that a fundamental principle of general application is that one, voluntarily accepts a contract on certain terms and Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi works it out, he can not be allowed to adhere to and abide by some of the terms of the contract which prove advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him."

54. On the basis of the aforesaid principle, I find that Shakuntala Sharma cannot be permitted on the one hand to plead that one clause was having no legal significance and that the said clause was a generalized typed and on the other hand, to plead that the other clauses were binding on the opposite party.

55. Coming to the question of whether Tarun Gandhi was entitled to rescind the contract, notice can be taken here of the provisions of Sections 17, 18 and 19 of the Indian Contract Act.

"17. 'Fraud' defined- 'Fraud' means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:-

(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it; (4) any other act fitted to deceive;

Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi (5) any such act or omission as the law specially declares to be fraudulent.

Explanation-Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence, is, in itself, equivalent to speech.

18. "Misrepresentation" defined- "Misrepresentation" means and includes-

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(2) any breach of duty which, without an intent to deceive, gains an advantage of the person committing it, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him;

(3) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is the subject of the agreement.

A statement is said to be warranted by the information of the person making it when he receives the information from Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi a trustworthy source. It should not be a mere hearsay; Mohanlal v. Sri Gungaji Cotton Mills Co., (1900) 4 CWN

369.

19. Voidability of agreements without free consent- When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. A party to contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception- If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence. Explanation- A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable."

56. The covenant as to clear title and the lack of encumbrance on the immovable property is an essential clause and Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi part and parcel of any sale of an immovable property. At the very least, the assertion of fact in the agreement that property was completely free from any mortgage despite the said property being mortgaged which is an admitted position between the parties, at the time of the execution of the agreement to sell would be a misrepresentation as contemplated by Section 18 (1) and would actually could reasonably be said to be falling within the definition of Section 17 (1). Therefore, I find that Tarun Gandhi was entitled to rescind the contract and that his case that there

was a fraudulent representation due to which he became entitled to receive back the earnest money deposited has been proved on a preponderance of probabilities. On the other hand, Shakuntala Sharma has not been able to prove her case due to the application of Sections 91 and 92 of the Indian Evidence Act, as also, due to the application of the judgment of the Hon'ble Supreme Court in Janki Vaishdeo (supra) as Shakuntala Sharma has also not stepped into the witness box as already noted above.

57. Moreover, even if there was a breach by Tarun Gandhi, I do not find that the same would be an impediment for him to recover the earnest money of Rs. 15,00,000/- that has admittedly been paid.

58. In Manoj Tomar v. Neena Khatter (2015) SCC OnLine DEL 12831, the Hon'ble High Court had noted that "5. The issue is that even if the plaintiff is guilty of breach Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi of contract, whether the defendants are entitled to forfeit the advance money received by the defendants under the agreement to sell. Para 14 of the written statement shows that defendants have made an averment that the defendants have forfeited the amount because the plaintiff did not call upon the defendants to complete the sale transaction, however there is no averment in the written statement that defendants have forfeited the amount on account of loss being caused to them by the plaintiff on account of the breach of contract, much less details of loss and how caused as required by Order VI Rule 4 CPC is pleaded. In law, once no loss is caused to the aggrieved party as per Section 73 and 74 of the Indian Contract Act, 1872, no cause of action arises for claiming damages or forfeiture of advance money received under the agreement to sell as damages. This is the law as laid down in the Constitution Bench judgment of the Supreme Court in the case of Fateh Chand v. Balkishan Dass, AIR 1963 SC 1405 and which judgment has been recently followed by the Supreme Court in the judgment in the case of Kailash Nath Associates v. Delhi Development Authority, (2015) 4 SCC 136....."

59. Therefore, even if there was a breach as per the judgment of Kailash Nath Associates Vs. DDA (supra), and the Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi aforesaid judgment of Manoj Tomar (supra), Tarun Gandhi would be entitled to receive back the earnest money of Rs. 15 lakhs paid by him, irrespective of whether he had breached the contract or not. I have already found that Shakuntala Sharma has failed in proving that any loss was caused due to the alleged breach. In fact, it is pertinent to note that in the Written Statement filed by Shakuntala Sharma in the suit filed by Tarun Gandhi, it was not even pleaded that any loss has been caused due to the alleged breach of contract by Tarun Gandhi and Shakuntala Sharma has only relied upon clause 11 of the agreement to aver that Tarun Gandhi is not entitled to the earnest money and the same can be forfeited in law.

60. The Hon'ble Supreme Court of India in 'Kailash Nath Associates Vs. DDA (2015) 4 SCC 136, that under such clauses which stipulate a payment of a fixed amount in case of a breach and are by way of penalty, only reasonable compensation will be paid under Section 74 of the Indian Contract Act in terms of the principles of Section 73 of the Indian Contract Act. The party claiming such liquidated amount on basis of a contract, will have to plead and prove actual loss or damage.



61. As already noted in the WS filed by Shakuntala Sharma, it was not pleaded that any loss has been caused. In so far as the suit of Shakuntala Sharma is concerned, I have already found that Shakuntala Sharma was unable to prove her case. Therefore, on this Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi ground also and independent of any finding of a breach of contract, I find that Tarun Gandhi is entitled to be refunded the earnest money deposited with Shakuntala Sharma. It could have been a different matter if Tarun Gandhi was claiming damages, however, such claim has been abandoned by Tarun Gandhi in his plaint itself. Once, he only claimed the earnest money deposited, onus was on Shakuntala Sharma to show that she was entitled to retain the said sum of Rs. 15 lakhs paid as earnest money, which she could not do so.

62. In light of the above, the claim of Shakuntala Sharma that Tarun Gandhi was not ready or willing to perform his part of the contract, pales into insignificance and in fact, is not a material point/issue between the parties.

63. With regard to the claim of Tarun Gandhi for a pendente lite and future interest at the rate of 18% per annum, I find that there is no such agreement between the parties for such rate of interest. I find that, in the interest of justice, it would be sufficient if Tarun Gandhi is granted simple interest at the rate of 6% per annum on the sum of Rs. 15,00,000/- from the date of filing of the suit till date of realization of the amount.

Therefore, all the issues are decided accordingly in favour of Tarun Gandhi and against Shakuntala Sharma. RELIEF Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi

64. Therefore, the suit of Tarun Gandhi is decreed in his favour and against Shakuntala Sharma for a sum of Rs. 15,00,000/- which sum shall carry simple interest at the rate of 6% per annum from the date of filing of the suit till date of realization of the amount. The suit of Shakuntala Sharma is dismissed. Cost of both the suits are awarded to Tarun Gandhi.

65. Decree sheets be prepared accordingly in both the suits.

66. Files be consigned to Record Room after due compliance.

DIVYANG  
THAKUR  
Digitally  
signed by  
DIVYANG  
THAKUR  
Date:  
2023.03.16  
16:33:33  
+0530

Announced in the open court  
On 16.03.2023

(Sh. Divyang Thakur)  
ADJ-03, Dwarka  
New Delhi

Mr. Tarun Gandhi Vs. Mrs. Shakuntala Sharma  
Mrs. Shakuntala Sharma Vs. Mr. Tarun Gandhi