

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

% **Date of decision: 23rd March, 2020**
27th September, 2019

+ **CS(OS) 190/2018, IA No.5709/2018(u/O.XXXIX R-1&2 CPC), IA No.13603/2019 (u/O.VI R-17 CPC) & IA No.13604/2019 (for condonation of delay of 88 days in refilling IA No.13603/2019)**

PRALEEN CHOPRA

..... Plaintiff

Through: Mr. N.K. Vohra, Adv.

Versus

HONEY BHAGAT & ORS

..... Defendants

Through: Mr. Kuldeep Balhara, Adv. for D-1&2.

Mr. Sanjay Relan, Adv. for D-3.

Mr. Lalit Gupta & Mr. Siddharth Arora,
Adv. for D-5.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff Praleen Chopra has instituted the suit against the five defendants namely (i) Honey Bhagat; (ii) Rohit Bhagat; (iii) RV Akash Ganga Infrastructure Ltd.; (iv) Dewan Housing Finance Corporation Ltd.; and, (v) Tanisha INFO Pvt. Ltd., for the reliefs of (i) declaration as null, void and *nonest* of Sale Deed dated 25th May, 2016 executed by defendants no. 1 to 3 in favour of defendant no.5 with respect to third floor of the North side portion of property No.47 North Avenue Road, Punjabi Bagh, New Delhi; (ii) for cancellation of the said Sale Deed; (iii) recovery of vacant, peaceful and physical possession of the said property; (iv) permanent injunction restraining defendants no. 1 to 5 from dealing with the property; (v) mandatory injunction directing defendant no.5 to deliver vacant,

peaceful and physical possession of the property to the plaintiff; and, (vi) recovery of mesne profits.

2. It is the case of the plaintiff in the plaint, (i) that the plaintiff is the Director of M/s Earthz Urban Spaces Pvt. Ltd. (EARTHZ) and has been authorized by the Board of Directors of EARTHZ to institute the present suit; (ii) that on the basis of the Collaboration Agreement dated 18th February, 2008 and registered General Power of Attorney dated 2nd November, 2010, the plaintiff became absolute owner and acquired title and exclusive possession of third floor Northern side portion, *ad measuring* area of 142.66 sq.mts., of property No.47, Northern Avenue Road, West Punjabi Bagh, New Delhi; (iii) that the defendants no. 1 and 2 as Directors of defendant no.3 agreed to purchase the said property along with terrace thereon from the plaintiff for Rs.7,31,00,000/- but represented that they had applied for home loan to the defendant no.4 which had sanctioned the housing loan for Rs.4,54,99,809/- only; (iv) that the plaintiff in good faith executed and registered a Sale Deed dated 1st November, 2013 in favour of defendants no. 1 to 3 with respect to the third floor aforesaid without terrace thereon; (v) simultaneously, with the execution of the Sale Deed, on 1st November, 2013 itself, a Memorandum of Understanding was executed between the plaintiff on the one hand and defendants no. 1 to 3 on the other hand whereunder the defendants no. 1 to 3 undertook to pay the balance sale consideration of Rs.2,81,00,000/- on or before 31st December, 2013 to the plaintiff and did not take possession of the third floor of the property with respect whereto Sale Deed was executed, as security to pay the balance sale consideration of Rs.2,81,00,000/-; (vi) owing to typographical errors in the

Sale Deed dated 1st November, 2013, a Rectification Deed dated 12th December, 2013 was also executed between the plaintiff on the one hand and defendants no. 1 to 3 on the other hand; (vii) that under the MoU dated 1st November, 2013, the defendants no.1 to 3 had no right to sell the third floor with respect to which Sale Deed was executed in their favour, without paying the balance consideration of Rs.2,81,00,000/-; (viii) that the defendants no. 1 to 3, in violation of the MoU dated 1st November, 2013, have executed the impugned Sale Deed dated 25th May, 2016 with respect to the third floor of the property in favour of defendant no.5, without even paying the balance consideration of Rs.2,81,00,000/- to the plaintiff; (ix) that the defendants no.1 to 3 had handed over post-dated cheques to the plaintiff for the said sum of Rs.2,81,00,000/- but the said cheques were also dishonoured; (x) that the defendants no.4 initiated proceedings before the Debt Recovery Tribunal and managed the affairs in the said proceedings at the back of the plaintiff, to deliver the possession of the property to the defendant no.5; (xi) that since the Sale Deed dated 25th May, 2016 executed by the defendants 1 to 3 with respect to the third floor of the property in favour of defendant no.5 is in violation of the prohibition contained in the MoU dated 1st November, 2013, the Sale Deed dated 25th May, 2016 is void; (xii) that the defendant no.3 itself filed a civil suit for declaration of the Sale Deed dated 1st November, 2013 executed by the plaintiff in favour of defendants no. 1 to 3 of the third floor of the property to be void; (xiii) that the Sale Deed dated 25th May, 2016 was executed during the pendency of the aforesaid suit; (xiv) that as per the MoU dated 1st November, 2013, the physical possession of the third floor with respect whereto Sale Deed was executed, was to remain with the plaintiff and to be delivered only on

payment of the balance sale consideration of Rs.2,81,00,000/-; (xv) that the possession of the defendant no. 1 to 3 of the third floor was in terms of MoU dated 1st November, 2013; and, (xvi) that the defendant no.4 took possession of the third floor aforesaid in illegal exercise of powers under Section 13(4) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act).

3. The suit came up first before this Court on 27th April, 2018, when summons/notice thereof were ordered to be issued but no *ex parte* interim order sought granted, observing that the doctrine of *lis pendens* will apply.

4. Written Statements have been filed by defendants no. 1 and 2, defendant no.3 and defendant no.5 and to which replications have been filed. The defendant no.4 has not filed any written statement nor has been appearing in spite of service and vide order dated 5th February, 2019, the right of defendant no.4 to file written statement has already been closed. Today also none appears for the defendant no.4. The defendant no.4 is thus proceeded against *ex parte*.

5. The suit is ripe for framing of issues. However, IA No.13603/2019 of the plaintiff under Order VI Rule 17 read with Order I Rule 10 CPC and IA No.13604/2019 of the plaintiff for condonation of delay of 88 days in re-filing IA No.13603/2019 are also listed for the first time before this Court.

6. For the reasons stated in IA No.13604/2019, the delay of 88 days in re-filing IA No.13603/2019 is condoned.

7. IA No.13604/2019 is disposed of.

8. The plaintiff vide IA No.13603/2019 seeks amendment only to change the name of defendant no.3 M/s RV Akash Ganga Infrastructure Ltd. to the new name of M/s AkashGanga Infraventures India Ltd.

9. Considering the formal nature of the application for amendment, need to call for reply has not been felt and the counsel for the defendant no.5 and the counsel for the defendant no.3 and the counsel for the defendants no. 1 and 2 have fairly stated that they have no objection to the amendment being allowed. IA No.13603/2019 is allowed and the amended memo of parties filed therewith is taken on record and be transposed to Part I File.

10. As aforesaid, the suit is ripe for framing of issues. However, the counsel for the defendant no.5 has contended that the suit, on the averments in the plaint is not maintainable and the plaintiff, on the averments in the plaint and documents filed therewith is not entitled to the reliefs claimed and the suit is liable to be dismissed.

11. The counsel for the defendant no.5 has been heard. The counsel for the defendant no.3 and the counsel for the defendants no. 1 and 2 have not opposed the submissions of the counsel for the defendant no.5.

12. The counsel for the defendant no.5 has argued, (i) that the plaintiff, vide Sale Deed dated 1st November, 2013 sold the third floor aforesaid to the defendants no. 1 to 3; (ii) that on the same day i.e. 1st November, 2013 after execution of the Sale Deed, the MoU dated 1st November, 2013 was executed between the plaintiff on the one hand and defendants no. 1 to 3 on the other hand; (iii) that the corrections/rectifications to the Sale Deed dated 1st November, 2013 vide Rectification Deed dated 12th December, 2013 are

inconsequential for the present purpose; (iv) that the defendants no. 1 to 3 had purchased the property aforesaid after availing of loan from defendant no.4; (v) that the defendants no. 1 to 3 were unable to repay the said loan and which led to defendant no.4 initiating proceedings under the SARFAESI Act with respect to the property aforesaid, i.e., the Northern side portion of the third floor only of the property (without terrace thereon); (vi) that a settlement was arrived at before the Debt Recovery Tribunal and as part of which settlement, the defendant no.5 paid of the dues of the defendant no.4 in consideration of the defendants no. 1 to 3 selling the said third floor to the defendant no.5 and in pursuance to which settlement the Sale Deed dated 25th May, 2016 impugned in this suit was executed; (vi) that the plaintiff has throughout been aware of all the aforesaid and in fact had also preferred an appeal under Section 14 of the SARFAESI Act to the Debt Recovery Tribunal with respect to the action initiated by defendant no.4 under the SARFAESI Act with respect to the property aforesaid; and, (vii) that the plaintiff also instituted the WP(C) No.8963/2014 in this Court impugning the order of the Metropolitan Magistrate under Section 14 of the SARFAESI Act with respect to the said portion of the third floor of the property.

13. The counsel for the defendant no.5 has further argued that, (i) the present suit is barred by the principles of constructive *res judicata*; (ii) that the present suit is barred by Order II Rule 2 of the CPC, reference is made to ***Virgo Industries (Eng.) Pvt. Ltd. Vs. Venturetech Solutions Pvt. Ltd.*** (2013) 1 SCC 625; (iii) that the plaintiff, without impugning the Sale Deed dated 1st November, 2013 admittedly executed by plaintiff in favour of defendants no. 1 to 3, is not entitled to challenge/impugn the Sale Deed

dated 25th May, 2016 executed by defendants no. 1 to 3 in favour of defendant no.5 with respect to the said portion of the third floor; (iv) that the defendant no.5 is concerned with the third floor, as aforesaid, of the property and is not claiming any right with respect to terrace thereon with respect to which plaintiff claims right; and, (v) that the remedy, if any, of the plaintiff was to sue for specific performance of the MoU dated 1st November, 2013.

14. The counsel for the plaintiff has *per contra* contended that since the Sale Deed dated 25th May, 2016 executed by the defendants no.1 to 3 in favour of defendant no.5 with respect to the said portion of the third floor of the property is in contravention of what the defendants no. 1 to 3 had undertaken in the MoU dated 1st November, 2013 i.e. to the effect that the defendants no. 1 to 3 will not sell the property till payment of balance sale consideration of Rs.2,81,00,000/- to the plaintiff, the Sale Deed dated 25th May, 2016 is liable to be cancelled.

15. I have considered the rival contentions.

16. A perusal of the documents shows the Sale Deed as well as MoU, both dated 1st November, 2013, though executed by the plaintiff in favour of defendants no. 1 to 3, having been executed by the plaintiff in his capacity as the attorney of Ms. Savita Bhatia, Mr. Rajeev Narula, Mr. Rakesh Narula and Mr. Hitesh Narula. The counsel for the defendant no. 5 explains that the said Ms. Savita Bhatia, Mr. Rajeev Narula, Mr. Rakesh Narula and Mr. Hitesh Narula were/are the owners/recorded owners of property no. 47, North Avenue Road, Punjabi Bagh, New Delhi; that EARTHZ, of which the plaintiff claims to be a Director, had entered into an agreement with the said owners of the property and which agreement, in common parlance, is known

as a 'Collaboration Agreement', whereunder EARTHZ was to, at its own cost and expense demolish the existing construction of property no.47, North Avenue Road, Punjabi Bagh, New Delhi and to raise new construction thereon and in lieu thereof entitled to certain built-up portion of the property; and, that EARTHZ was thus entitled to the third floor aforesaid and terrace thereabove.

17. Finding the suit to have been instituted neither by EARTHZ nor by Ms. Savita Bhatia, Mr. Rajeev Narula, Mr. Rakesh Narula and Mr. Hitesh Narula, but having been filed by the plaintiff in his own individual name, I have enquired for the counsel for the plaintiff, the title of the plaintiff to the property no.47, North Avenue Road, Punjabi Bagh, New Delhi or any part thereof, to be entitled to maintain this suit for cancellation of the Sale Deed dated 25th May, 2016 executed with respect to third floor aforesaid of the said property by the defendants no. 1 to 3 in favour of defendant no.5 and for recovery of possession thereof.

18. The counsel for the plaintiff states that the plaintiff, in the memo of parties has described himself as Director of EARTHZ and the suit has thus been instituted by EARTHZ and not by the plaintiff.

19. The memo of parties describes the plaintiff as:

i) PRALEEN CHOPRA

S/O SH. ARUN CHOPRA

Director of M/s. Earthz Urban Spaces Pvt. Ltd.

R/o A8/22C, Vasant Vihar New Delhi.

20. The counsel for the plaintiff states that since the plaintiff has described himself as Director of EARTHZ, the suit is by EARTHZ. Though that may be the position in respect of societies registered under the Societies Registration Act, 1860, Section 6 whereof requires the suit by the society to be filed in the name of President Chairman or Principal Secretary of the Society, it is not the position with respect to companies under the Company Law by which EARTHZ is governed. Section 34 of the Companies Act, 1956 required an incorporated company to sue in its own name and not in the name of its Director or Managing Director.

21. The suit thus cannot be treated as filed by EARTHZ as contended by the counsel for the plaintiff.

22. I may in this regard also notice that the plaintiff elsewhere also in the affidavits etc. accompanying the plaint, has not described EARTHZ as the plaintiff and merely described himself, besides by his lineage and residence, also as a Director of EARTHZ. Merely because in the plaint it is pleaded that the Board of Directors of EARTHZ has passed a Resolution authorizing the plaintiff to institute this suit would not constitute it a suit as on behalf of EARTHZ. Resolution of the meeting of the Board of Directors of EARTHZ held on 17th April, 2018 also merely authorizes the plaintiff to institute a suit for cancellation of Sale Deed dated 25th May, 2016 and for recovery of possession of third floor aforesaid of the property without specifying the same to be on behalf of the company. Rather, I have enquired from the counsel for the plaintiff that if the counsel for the plaintiff suing in his personal capacity after his name and other details also describes himself as

an Advocate of Delhi High Court, whether the suit so filed would be deemed to have been filed on behalf of the High Court of Delhi.

23. The description by the plaintiff in the memo of parties of himself, besides on the basis of his lineage and address also as a Director of EARTHZ, is merely a description and no more.

24. However, even if the plea of the counsel for the plaintiff of the suit having been instituted by EARTHZ was to be accepted, in my view, the same would not place the suit in any better position. EARTHZ itself was merely a Collaborator as per the Collaboration Agreement and by virtue of the said Collaboration Agreement did not get any right, title or interest in the property. Ordinarily, in pursuance to such Collaboration Agreement, a Power of Attorney from the owner of the property as is claimed to have been obtained in favour of the plaintiff herein is obtained, to enable the Collaborator to deal with the portion of the property which under the Collaboration Agreement is to fall to the Collaborator's share. The fact that the Collaborator or his nominee, who is appointed as an attorney of the owners, does not have any independent right to the property, is also evident from the Sale Deed dated 1st November, 2013 by the plaintiff merely in favour of purchasers i.e. defendants no.1 to 3 of the Collaborator's portion, being executed by the plaintiff merely as attorney of the owners and not in his own capacity.

25. The suit, if at all maintainable, could have been maintained by Ms. Savita Bhatia, Mr. Rajeev Narula, Mr. Rakesh Narula and Mr. Hitesh Narula and in which case the suit would have been filed in their names, even if with the plaintiff as an attorney and the suit filed by the plaintiff in his own name

and even if considered on behalf of the EARTHZ, is not maintainable and is liable to be dismissed on this ground only.

26. The counsel for the defendant no.5 states that this is one of the pleas of the defendant no.5 also in its written statement.

27. A perusal of the judgment dated 23rd December, 2014 of this Court in WP(C) No.8963/2014 shows, (i) that the challenge therein by the plaintiff was to the order dated 26th September, 2014 of the Chief Metropolitan Magistrate under Section 14 of the SARFAESI Act, appointing a Receiver to take possession of third floor as aforesaid of the property and to the order dated 5th November, 2014 of the Metropolitan Magistrate whereby the plaintiff's application for review of the earlier order was rejected; (ii) the contention of the plaintiff therein was, that since as per the MoU dated 1st November, 2013, the plaintiff was entitled to continue in possession of the third floor till the balance sale consideration of Rs.2,81,00,000/- was not paid, and it was the plaintiff who was in possession and he could not be divested of such possession of the property, was rejected by this Court, holding that the Chief Metropolitan Magistrate is not to adjudicate any dispute between the person in possession and the secured creditors and is only to satisfy that the ingredients of Section 14 have been complied with; (iii) powers under Section 14 are not confined to only those cases where the borrower is in possession of secured asset; the procedure under Section 14 of SARFAESI Act is concerned with taking over possession of a secured asset and recourse to Section 14 is available in all such circumstances where possession is to be recovered; (iv) admittedly the plaintiff had executed a sale deed selling/conveying/transferring/assigning his right, title and interest

in the property to defendants no.1 to 3 and affirming that the plaintiff was left with no right/title/interest/claim/lien of any nature in the property sold; (v) the defendant no.4 Dewan Housing Finance Corporation Ltd. granted loan to the defendants no.1 to 3 on the basis of the transfer of title executed by the plaintiff; and, (vi) in view of this, the plaintiff could not be permitted to claim any interest contrary to the sale deed concededly executed by him.

28. The contention of the counsel for the defendant no.5, on the basis of aforesaid is, that the suit is barred by the principles of *res judicata*.

29. I have enquired from the counsel for the defendant no.5 as to how the decision in a writ petition and more so in the facts aforesaid can be *res judicata* for a suit. The writ petition aforesaid was concerned only with the legality of the challenge to the decision of the Chief Metropolitan Magistrate under Section 14 of the SARFAESI Act and was not concerned with the disputes as have been raised in the present suit.

30. Elaborating on the contentions of the suit being barred by Order II Rule 2 of the CPC, the counsel for the defendant no. 5 has contended that the plaintiff, prior to the institution of this suit, has instituted CS(OS) 86/2017 in this Court under Order XXXVII of the CPC for recovery of Rs.2,81,00,000/- from the defendant no. 1 namely, Honey Bhagat, on the basis of the post-dated cheques of Rs.1,50,00,000/- and Rs.1,31,00,000/- handed over in pursuance to the MoU dated 1st November, 2013. It is argued that the cause of action if any on which the present suit has been filed accrued to the plaintiff prior to institution of CS(OS) 86/2017 and the plaintiff ought to have made the claim as made in the present suit, in the said earlier suit and is not entitled to file a second suit therefor.

31. On enquiry, counsel for the plaintiff states that the leave to defend application filed in CS(OS) 86/2017 has been dismissed. The counsel for the defendants no. 1 and 2 confirms. Though, the copy of the plaint in CS(OS) 86/2017 has not been filed but on asking, the counsels for the appearing defendants have handed over a copy of the same and the same is taken on record and be tagged to Part IIIB File.

32. At this stage, it is appropriate to reproduce the portions of the Sale Deed dated 1st November, 2013 executed by plaintiff in favour of defendants no. 1 to 3 with respect to the third floor only of the subject property. The portions of the said Sale Deed relevant for the present purposes are as under:

“This Sale Deed is executed at New Delhi, on this 1st day of November 2013 by:- (1) Mrs. Savita Bhatia W/o Shri Rajeev Bhatia, R/o 81, Poorvi Marg, Vasant Vihar, New Delhi-110057, (2) Shri Rajeev Narula, S/o Late Shri R.K.Narula, R/o 47, North Avenue Road, Punjabi Bagh (West), New Delhi, (3) Shri Rakesh Narula, S/o Late Shri R.K.Narula, r/o 47, North Avenue Road, Punjabi Bagh (West), New Delhi, and (4) Shri Hitesh Narula, S/o Late Shri R.K. Narula, R/o 47, North Avenue Road, Punjabi Bagh (West) New Delhi, hereinafter jointly called the “VENDORS” of the one part, represented through their General Attorney Mr. Praleen Chopra S/o Shri Arun Chopra, R/o S-268, Greater Kailash Part-I, New Delhi, Director of M/s Earthz Urban Spaces Private Limited, appointed vide (1) General Power of Attorney dated 02.11.2010, duly registered as Registration No.2243 in Book No.4, Volume No.611, on pages 78 to 86, on date 02.11.2010, in the office of the Sub-Registrar, Sub-District No.IIA, Punjabi Bagh, New Delhi, and (2) General Power of Attorney dated 28.02.2012, duly registered as Registration No.377, in Book No.4, Volume No.674,

on page 159 to 167, on date 01.03.2012, in the office of the Sub-Registrar, SR II-A-PUNJABI BAGH, New Delhi/Delhi.

...IN FAVOUR OF...

(1) Mr. Rohit Bhagat, son of Mr. Ramesh Bhagat, resident of I-88, Ashok Vihar, Phase-I, Delhi-110052 (having 45% undivided share), (2) Mrs. Honey Bhagat, wife of Mr. Rohit Bhagat, resident of I-88, Ashok Vihar, Phase-I, Delhi-110052 (having 45% undivided share) & (3) M/s. R.V. Ganga Enterprises, having its office at 206, 1st Floor, A-6, DDA LSC, Paschim Vihar, New Delhi-110063 through its Director Mrs. Honey Bhagat, wife of Mr. Rohit Bhagat, resident of I-88, Ashok Vihar, Phase-I, Delhi-110052, duly authorized vide Resolution passed in the meeting of Board of Directors, held on dated 07.10.2013 (having 10% undivided share), hereinafter called the "VENDEES" of the other part.

AND WHEREAS in the manner aforesaid, Mrs. Savita Bhatia, Shri Rajeev Narula, Shri Rakesh Narula and Shri Hitesh Narula became the absolute and joint owners of the freehold property bearing No.47 (Class 'B'), measuring 1365 square yards, situated on North Avenue Road, West Punjabi Bagh, New Delhi.

AND WHEREAS the Vendors through Attorney have reconstructed the said property, after getting the building plan sanctioned from concerned authority.

NOW THIS SALE DEED WITNESSETH AS UNDER:

1. That in pursuance of this Sale Deed and in consideration of a total sum of Rs.4,50,00,000/- (Rupees Four Crores Fifty Lacs only) which amount has been received by the Vendors through Attorney from the Vendees, in the following manner:

- (i) Rs.4,00,00,000/- (Rupees Four Crore only) vide Cheque No.631761, dated 29.10.2013 drawn on Axis Bank Ltd, Mumbai Branch,
- (ii) Rs.50,00,000/- (Rupees Fifty Lacs only) vide Cheque No.268291, dated 01.11.2013 drawn on ICICI Bank, Punjabi Bagh Branch, New Delhi-110026, as full and final sale consideration, in full and final settlement, the receipt of which the Vendors through Attorney admit and acknowledge hereby.

2. That now the Vendors through Attorney doth hereby sell, convey, grant, transfer and assign all their rights, titles and interests in the said portion of the said property, with super-structure standing therein, alongwith proportionate undivided, indivisible and impartible share of ownership rights in the land underneath, including easements and appurtenances whatsoever, pertaining to the said property **TO HAVE AND TO HOLD THE SAME unto the Vendees ABSOLUTELY AND FOREVER.**

3. That the Vendors admit that they have been left with no right, title, interest, claim or lien of any nature whatsoever in the said portion of the said property, hereby sold, and the same has become the absolute property of the Vendees, with the right to use, enjoy, sell and transfer the same by whatsoever mean the Vendees

like, without any demand, objection, claim or interruption by the Vendors or any person(s) claiming under or in trust for vendors through attorney.

4. That the Vendors through Attorney have assured the Vendees that the said portion of the said property, hereby sold, is freehold in nature and is free from all kinds of encumbrances, such as prior sale, mortgage, gift, Will, lease, loan, surety, security, lien of any court or person, litigations, stay order, notices, charges, family or religious disputes, acquisition, decree, injunction, hypothecation, Income Tax or Wealth Tax attachments, or any other registered or unregistered encumbrances whatsoever, and if it is proved otherwise, as a result of which if the Vendees is deprived off from the said portion of the said property or any part thereof, then the Vendors through Attorney shall be liable and responsible to indemnify all the losses/damages, thus suffered by the Vendees.

5. That the Vendors through Attorney shall pay and clear the House tax, Water and Electricity charges and other dues & demands of the concerned authorities in respect of the said portion of the said property, upto the date of handing over the vacant and physical possession of the said portion of the said property to the Vendees, and thereafter the same shall be paid by the Vendees.

13. That the said portion of the said property has been sold to the Vendees without terrace thereupon of the said property and the owners of the terrace have got complete right to construct further floor(s) on the said terrace, without any objection or obstruction from the Vendees. In such a case the overhead tanks will be shifted to the newly built terrace of the said property.”

33. It is also apposite at this stage, to reproduce hereinbelow the relevant parts of the MoU dated 1st November, 2013 and which are as under:-

“This Memorandum of Understanding is executed at New Delhi, on this 1 day of November, 2013, between:

- (1) Mrs. Savita Bhatia, W/o Shri Rajeev Bhatia, R/o 81, Poorvi Marg, Vasant Vihar, New Delhi-110057,*
- (2) Shri Rajeev Narula, S/o Late Shri R.K. Narula, R/o 47, North Avenue Road, Punjabi Bagh (West), New Delhi,*
- (3) Shri Rakesh Narula, S/o Late Shri R.K. Narula, R/o 47, North Avenue Road, Punjabi Bagh (West), New Delhi, and*
- (4) Shri Hitesh Narula, S/o Late Shri R.K. Narula, R/o 47, North Avenue Road, Punjabi Bagh (West), New Delhi,*

represented through their General Attorney Shri Praleen Chopra, S/o Shri Arun Chopra, R/o S-268, Greater Kailash Part-I, New Delhi, Director of M/s Earthz Urban Spaces Private Limited, appointed vide (1) General Power of Attorney dated 02.11.2010, duly registered as Registration No.2243 in Book No.4, Volume No.611, on page 78 to 86, on date 02.11.2010, in the office of the Sub-Registrar, SR IIA-PUNJABI BAGH, New Delhi/Delhi, and (2) General Power of Attorney dated 28.02.2012, duly registered as Registration No.377, in Book No.4, Volume No.674, on page 159 to 167, on date 01.03.2012, in the office of the Sub-Registrar, SR II-A-PUNJABI BAGH, New Delhi / Delhi, hereinafter called the FIRST PARTY;

AND

- (1) Mr. Rohit Bhagat, son of Sh. R.K. Bhagat, resident of I-88, Ashok Vihar, Phase-I, Delhi-52 (having 45% undivided share), (2)*
- Mrs. Honey Bhagat, wife of Mr. Rohit Bhagat, resident of I-88, Ashok Vihar, Phase-I, Delhi-52, (having 45% undivided share),*

and (3) M/s R.V. Ganga Enterprises, having its office at 206 (FF), DDA Local Shopping Complex, Block-A6, P. Vihar through its Director, Mrs. Honey Bhagat, through Board Resolution dated 7/10/2013, (having 10% undivided share hereinafter called the SECOND PARTY.

WHEREAS the first party is the owner of the Right hand side Portion of Third Floor (adjoining to Property No.45, North Avenue Road, West Punjabi Bagh, New Delhi / Right hand side flat facing the building), consisting of 4 Bedrooms with attached Bathrooms, 1 Drawing Dining room, 1 Kitchen, Lobby, with Right hand side Portion of Terrace over and above the Third Floor, (adjoining to Property No.45, North Avenue Road, West Punjabi Bagh, New Delhi) with 2 Car Parking as per plan attached, with common Lift, of the Property bearing No.47, (Class 'B'), measuring 1365 sq. yards, situated on North Avenue Road, West Punjabi Bagh, New Delhi, in the Revenue Estate of Village Madipur, alongwith proportionate, undivided, indivisible and impartible share of ownership rights in the land underneath.

AND WHEREAS the first party has agreed to sell the said Right hand side Portion of Third Floor (adjoining to Property No.45, North Avenue Road, West Punjabi Bagh, New Delhi / Right hand side flat facing the building), consisting of 4 Bedrooms with attached Bathrooms, 1 Drawing Dining room, 1 Kitchen, Lobby, with right hand side Portion of Terrace over and above the Third Floor, (adjoining to property No.45, North Avenue Road, West Punjabi Bagh, New Delhi), with 2 Car Parking as per plan attached, with common Lift, of the Property bearing No.47, (Class 'B'), measuring 1365 sq. yards, situated on North Avenue Road, West Punjabi Bagh, New Delhi, in the Revenue Estate of Village

Madipur, along with proportionate, undivided, indivisible and impartible share of ownership rights in the land underneath, to the second party for a total sale consideration of Rs.7,31,00,000/- (Rupees seven crores thirty one lacs only) and the second party has agreed to purchase the same from the same amount.

NOW THIS MEMORANDUM OF UNDERSTANDING WITNESSETH AS UNDER:

1. *That out of the total sale consideration of Rs.7,31,00,000/- (Rupees seven crores thirtyone lacs only) to the first party and on the request of the second party the first party has executed the Sale Deed in respect of the Right hand side Portion of Third Floor (adjoining to Property No.45, North Avenue Road, West Punjabi Bagh, New Delhi/Right hand side flat facing the building), consisting of 4 Bedrooms with attached Bathrooms, 1 Drawing Dining room, 1 Kitchen, Lobby, with 2 Car Parking as per plan attached, with common Lift, of the Property bearing No.47, (Class 'B'), measuring 1365 sq. yards, situated on North Avenue Road, West Punjabi Bagh, New Delhi, in the Revenue Estate of Village Madipur, alongwith proportionate, undivided, indivisible and impartible share of ownership rights in the land underneath, only in favour of the second party on date _____. However, the vacant and physical possession of the said Right hand side portion of Third Floor (adjoining to property No.45, North Avenue Road, West Punjabi Bagh, New Delhi / Right hand side flat facing the building) of the said property, along with Right hand side portion of Terrace over & above the third floor of the said property is vest with the first party only.*

That the payment of Rs.2,81,00,000/- (Rupees two crores eighty one lacs only) shall be paid by the second party to the first party within two months from the date of this Memorandum of Understanding. As security the second party has issued post-dated cheques for the balance amount to Rs.2,81,00,000/- (Rupees two crores eighty one lacs only) to the first party, which shall be encashed by the first party on due dates. And has also issued promissory note of the sum of Rs.2,81,00,000/- (Rupees two crores eighty one lacs only). The details of post-dated cheques are as follows:

(i)Rs.1,50,00,000/-(Rupees One crore Fifty lacs only) vide cheque No.053365, dated 15.12.2013 drawn on Union Bank of India Punjabi Bagh Branch, New Delhi-110026.

(ii) Rs.1,31,00,000/- (Rupees One Crore Thirty One Lacs only) vide Cheque No.053369, dated 15.12.2013, drawn on Union Bank of India, Punjabi Bagh Branch, New Delhi-110026.

That on clearance of balance payment of Rs.2,81,00,000/- (Rupees two crores eighty one lacs only) the first party shall hand over the vacant and physical possession of the said Right hand side portion of Third Floor alongwith Right hand side portion of Terrace over & above the third floor of the said property to the second party. And also Sale Deed shall be signed and executed in favour of the second party in respect of the Right hand side portion of Terrace over & above the third floor of the said property, alongwith 1 Car parking.

2. *That the second party shall be liable to pay an interest @2.5% per month after expiry of two months.*

3. *That after expiry of six months the first party shall have full right and an authority to sell the apartment in the market to prospective buyer and out of the sale proceeds repay diwan housing finance limited a home loan of Rs.4,50,00,000/- (Rupees four crores fifty lacs only) and recover the balance payment of first party with Interest after paying that home loan from the rest amount and from the second party. If the first party is not able to recover his full amount and interest payments then it shall be indemnified fully for any losses by the second party.*

4. *That although a Sale Deed of Right hand side portion of Third Floor with 2 Car parkings of the said property has been executed by the first party in favour of the second party but the second party will have no right and authority to enter into any third party agreement for the said property till the time complete payment of Rs.2,81,00,000/- (Rupees two crores eighty one lacs only) alongwith interest if any is cleared to the first party.*

5. *That this Memorandum of Understanding shall remain binding upon both the parties.”*

34. On reading the aforesaid document, I have enquired form the counsel for the plaintiff whether not it is settled law that the contents of a registered document can be altered only by another registered document (See **Chandrakant Shankarrao Machale Vs. Parubai Bhairu Mohite** (2008) 6

SCC 745 and *S. Saktivel Vs. M. Venugopal Pillai* (2000) 7 SCC 104) and how can the contents of the unregistered MoU supersede the contents of the registered Sale Deed. It may be mentioned that there is no doubt from the language of the two documents, that the MoU was executed after the Sale Deed, though both on the same day.

35. The counsel for the defendants no. 1 and 2, the counsel for the defendant no.3 and the counsel for the defendant no.5, on enquiry whether any of the said defendants claim any right, title, interest or share in the terrace above the aforesaid property, have replied in the negative.

36. A reading of the Sale Deed leaves no manner of doubt that the plaintiff, on execution and registration of the Sale Deed divested himself of all rights with respect to the third floor of the property and vested title therein in favour of defendants no. 1 to 3. Though there is no clause in the registered Sale Deed, as is usually found, of delivery of possession of the property sold, but that to my mind is not relevant at this stage. Once the title in the property stood conveyed from the plaintiff or whosoever on whose behalf the plaintiff was acting in the matter of execution of Sale Deed, in favour of defendants no.1 to 3, the defendants no. 1 to 3 under the law became entitled to deal with the said third floor of the property and such dealing with the third floor of the property by the defendants no. 1 to 3, including by execution of Sale Deed dated 25th May, 2016 in favour of defendant no.5, cannot be avoided on the ground of the unregistered MoU, as also held by this Court in judgment dated 23rd December, 2014 in W.P.(C) no.8963/2014 which has attained finality. In the registered Sale Deed, there was no bar to the defendants no. 1 to 3 dealing with the property

and the said bar could have been altered only by a subsequent registered document and not otherwise.

37. Section 91 provides that when the terms of a contract or of a grant or of any other disposition of property, have been reduced in the form of a document, and in all such cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself. The present case does not fall in either of the two exceptions thereof. Section 92 provides that when the terms of any such contract grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to Section 91, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms. Though proviso 2 thereto permits proof of existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms, but in the present case the clause in the MoU to the effect that the defendants no.1 to 3 will have no right or authority to enter into any third party agreement with respect to the portion aforesaid of the third floor, till the time complete payment of Rs.2,81,00,000/- along with interest if any is cleared to the plaintiff, is inconsistent to the clause in the sale deed whereunder the plaintiff sold, conveyed, granted, transferred and assigned all his rights, title and interest in the said portion to the defendants no.1 to 3, to have and to hold the same absolutely and forever, as well as to the clause in the sale

deed that the plaintiff was left with no right, title, interest, claim or lien of any nature whatsoever in the property sold and the same had become the absolute property of the defendants no.1 to 3 with the right to use, enjoy, sell and transfer the same by whatsoever mean, without any demand, objection or interruption by the plaintiff or any person claiming under the plaintiff. In ***Roop Kumar Vs. Mohan Thedani*** (2003) 6 SCC 595 it was held that it is general and most inflexible rule that wherever written instruments 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. The said law applies on all fours in the present case. The plaintiff, by executing the sale deed in favour of defendants no.1 to 3, with the language as reproduced above, entitled any person dealing with the defendants no.1 to 3 on the basis of the said sale deed to believe that the defendants no.1 to 3 were absolute owners of the property and entitled to deal with the same without any claim or interference from the plaintiff. In fact the defendant no.4, on the basis of the said sale deed dealt with the defendants no.1 to 3 as absolute owners of the property, entitled to mortgage the same, and subsequently the defendant no.5, on the basis of the said sale deed dealt with the defendants no.1 to 3 as absolute owner of the property and purchased and acquired title in the property from the defendants no.1 to

3. The plaintiff, after having so led the defendants no.4&5 into dealing with the defendants no.1 to 3, is estopped from challenging the title of defendants no.1 to 3 to the property, thereby pulling the rug from under the feet of defendant no.4 and particularly defendant no.5. Reference in this context may also be made to *A. Entertainment Pvt. Ltd. Vs. Applause Entertainment Pvt. Ltd.* (2013) 197 DLT 174 (DB) and *Gaurav Monga Vs. Premier Inn India Private Limited* 2017 SCC OnLine Del 6405. Thus, the plaintiff is barred from leading any evidence including in the form of MoU aforesaid or otherwise, contradicting the terms of the sale deed executed by the plaintiff in favour of the defendants no.1 to 3. Reference may further be made to *Nageshwar Pandey Vs. Karan Madaan* 2016 SCC OnLine Del 816 (DB).

38. That brings me to another aspect. Per Section 55(4)(b) of the Transfer of Property Act, 1882, in the absence of a contract to the contrary, where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, the seller is entitled only to a charge upon the property in the hands of the buyer, or in the hands of any transferee without consideration or in the hands of any transferee with notice of payment, for the amount of the purchase money remaining unpaid together with interest thereon. It is evident from the clauses of the sale deed executed by the plaintiff in favour of the defendants no.1 to 3 that the ownership of the property sold thereunder passed to the defendants no.1 to 3 and there was no contract to the contrary in the sale deed. Had the plaintiff desired ownership of the property not to pass to the defendants no.1 to 3 notwithstanding the execution of the sale deed, the plaintiff ought to have provided so in the sale

deed and which the plaintiff did not. Once it is so, according to law the plaintiff is not entitled to void the sale deed for the reason of entire agreed consideration having not been paid but is only entitled to recover the balance consideration from the defendants no.1 to 3, as also from any transferee without consideration from defendants no.1 to 3, as well as from any transferee from the defendants no.1 to 3 with notice of non-payment. It is not the case of the plaintiff, that either the mortgage of the property by the defendants no.1 to 3 in favour of the defendant no.4 or the transfer/sale of the property by defendants no.1 to 3 in favour of defendant no.5 is without consideration. It is also not the case that the transfers by defendants no.1 to 3, of mortgage rights in favour of defendant no.4 or of title in favour of defendant no.5 is with notice of non-payment. Thus the claim of the plaintiff for recovery of balance price if any, is against defendants no.1 to **3 only** and not against defendant no.4 or defendant no.5. In any case the plaintiff in the present suit has not sought the relief of recovery of balance sale consideration but has sought the reliefs of annulling the sale deed by defendants no.1 to 3 in favour of defendant no.5, of recovery of possession and of recovery of *mesne* profits and to which reliefs the plaintiff is not entitled under Section 55(4)(b) of the Transfer of Property Act. Reference in this regard can again be made to ***Nageshwar Pandey*** supra and to my judgment dated 28th November, 2019 in CS(OS) No.619/2019 titled ***Manjeet Kaur Vs. Devender Dagar***, and other judgments referred therein. Further the relief of recovery of balance sale consideration, to which alone the plaintiff is entitled under Section 55(4)(b), has already been claimed against defendant no.1 Honey Bhagat in CS(OS) No.86/2017. The counsel for the defendant, in the context of Section 55(4) (b) has drawn attention to

Kaliaperumal Vs. Rajagopal (2009) 4 SCC 193 holding (i) in a sale, there is an absolute transfer of all rights in the properties sold; no rights are left in the transferor; (ii) the price is fixed by the contract antecedent to the conveyance; price is the essence of a contract of sale; (iii) there is only one mode of transfer by sale in regard to immovable property of the value of Rs.100/- or more and that is by a registered instrument; (iv) it is now well settled that payment of entire price is not a condition precedent for completion of the sale by passing of title, as Section 54 of Transfer of Property Act defines 'sale' as a transfer of ownership in exchange for a price paid or promised or part paid and part promised; (v) if the intention of parties was that title should pass on execution and registration, title would pass to the purchaser even if the sale price or part thereof is not paid; (vi) in the event of non-payment of price or balance price thereafter, the remedy of the vendor is only to sue for the balance price; he cannot avoid the sale.

39. The counsel for the plaintiff draws attention to Section 11 of the Transfer of Property Act as under:-

“11. Restriction repugnant to interest created.

– Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

[Where any such direction has been made in respect of one piece of immovable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which

the transferor may have to enforce such direction or any remedy which he may have in respect of a breach thereof.]”

40. I am unable to see how the same comes to the rescue of the plaintiff. It provides that once interest in property is transferred absolutely, even if the terms of transfer direct such interest to be applied or enjoyed in a particular manner, the transferee shall be entitled to dispose of such interest ignoring the said direction. The same is rather against, than in favour of the plaintiff. The High Court of Punjab & Haryana in ***Lilawati Vs. Firm Ram Dhari Suraj Bhan*** AIR 1971 P&H 87 was concerned with the question, whether after vendor has made an absolute sale, he can enforce the payment of the sum of the rent from the vendee under the terms in that respect in the sale deed. Relying on ***Rameshwar Bakhsh Vs. Balraj Kuar*** AIR 1935 PC 187 it was held that the clauses in the sale deed regarding payment of rent by purchaser to the seller being repugnant to the absolute estate created in favour of the purchaser, cannot cut down that estate and must be held to be invalid. It was held that the sale deed cannot be converted into a perpetual lease. The counsel for the defendant no.5, in this context has drawn attention to ***Sarla Mehra Vs. Praleen Chopra*** (2009) SCC OnLine Del 1025 where it was held that the object and principle behind Section 11 is that the transferor should not be allowed to put a clog or restriction on the right of a vendee so as to be repugnant to the property sold and that the main provision in a transfer is to be given effect to and the repugnant one discarded.

41. The counsel for the plaintiff has referred to ***P.V. Guru Raj Reddy Vs. P. Neeradha Reddy*** (2015) 8 SCC 331 holding that rejection of plaint under order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC) is a drastic

power and at the stage of exercise of said power, the stand of the defendants in the written statement or in the application for rejection is wholly immaterial and has argued that thus the suit cannot be summarily dismissed.

42. Undoubtedly so. However where under the law, the plaintiff on his own averments and on his own documents and in view of other admitted facts including earlier legal proceedings, is not entitled to the relief claimed, the suit is not to be kept pending pedantically and allowed to take up the resources of this Court, at the cost of other deserving cases and has to be nipped in the bud.

43. Not only is the suit not so maintainable but in my view this Court as the Civil Court does not even have the jurisdiction to entertain this suit.

44. The plaintiff, in the plaint itself admits having been informed by the defendants no.1 to 3 that the defendant no.3 had applied for and availed of a housing loan from defendant no.4, a Financial Institution, and that the defendant no.4 had sanctioned a housing loan for Rs.4,54,99,809/-. The plaintiff, knowing the said fact, executed and registered the Sale Deed for Rs.4,50,00,000/- in favour of defendants no.1 to 3. The plaintiff thus knew that the property so sold by him would be mortgaged with a Financial Institution i.e. the defendant no.4, on the basis of Sale Deed executed by plaintiff in favour of defendants no.1 to 3 and that the defendant no.4 would extend loan to the defendant no.3 on the basis of the said Sale Deed. The plaintiff is thus presumed to know that in the event of the defendants no.1 to 3 not repaying the dues of defendant no.4, the defendant no.4, in exercise of powers vested in it under the SARFAESI Act, would be entitled to take possession of the property. The plaintiff thus is privy to the representations

made to the defendant no.4 for extending loan to the defendant no.3 on the security of the Sale Deed of the property executed by the plaintiff in favour of defendants no.1 to 3. The plaintiff stood estopped from obstructing the defendant no.4 from enforcing its security interest under the SARFAESI Act.

45. Moreover, even if the plaintiff was aggrieved from the measures taken by the defendant no.4 with respect to the property, including under Section 13(4) of the SARFAESI Act, the remedy of the plaintiff thereagainst was / is before Debts Recovery Tribunal (DRT), under Section 17 of the SARFAESI Act and the powers of the Tribunal under Section 17(3) are wide enough to grant the reliefs as claimed by the plaintiff herein. Vide Section 34 of the SARFAESI Act, the jurisdiction of this Court to entertain any suit in respect of any matter which the Tribunal is empowered to determine, is barred. The defendant no.5 has produced before this Court the orders dated 8th December, 2016 and 28th December, 2016 in SA No.255/2014 of Debts Recovery Tribunal – III, Delhi filed by the plaintiff, recording the statement of defendant no.4 Dewan Housing Finance Corporation Ltd. that the matter had been settled and the defendant no.4 had already released the documents and disposing of SA No.255/2014 filed by the plaintiff as infructuous. It is evident therefrom that the plaintiff did invoke the remedy under Section 17 of the SARFAESI Act though the same became infructuous in view of the statement of defendant no.4 Dewan Housing Finance Corporation Ltd. Owing thereto, it cannot *stricto sensu* be said that jurisdiction of this Court is barred. The plaint, however otherwise is not entitled to reliefs claimed, as described above.

46. Merit is also found in the contention of the counsel for defendant no.5, that the plaintiff, without impugning the Sale Deed executed in favour of defendants no.1 to 3, and which is not done in the suit, is not entitled to any of the reliefs claimed.

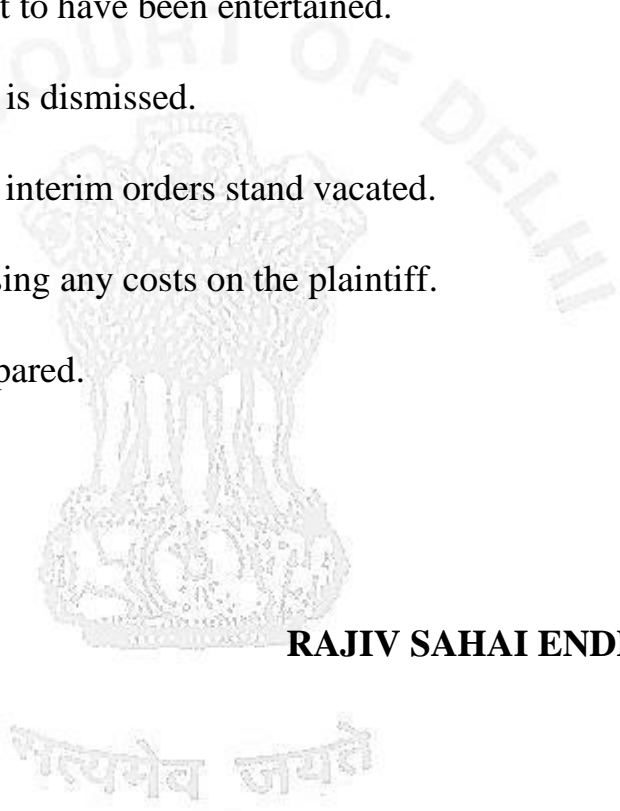
47. Thus, whichever way one looks at, this suit for the reliefs claimed, on the averments in the plaint and documents filed therewith was / is not maintainable and ought not to have been entertained.

48. Resultantly, the suit is dismissed.

49. Needless to state all interim orders stand vacated.

I refrain from imposing any costs on the plaintiff.

Decree sheet be prepared.



RAJIV SAHAI ENDLAW, J.

MARCH 23, 2020
SEPTEMBER 27, 2019
'ak/pp/gsr'..