

* **HIGH COURT OF DELHI : NEW DELHI**

+ **I.A. No.12142/2007, I.A. No.12850/2008, I.A. No.3446/2009, I.A. No.4404/2009 & I.A. No.8885/2009 in CS (OS) No. 2079/2006**

Judgment reserved on: 20th October, 2009

% Judgment decided on : 8th January, 2010

Sh. Harish N. Salve & Anr. ...Plaintiffs
Through: Mr. Arun Mohan, Sr. Adv. with
Mr. D.P. Mohanti & Mr. Arvind Bhatt, Adv.

Versus

Spiritual Regeneration Movement Foundation of IndiaDefendant
Through: Mr. H.L. Tiku, Sr. Adv. with Mr. M.A.
Niyazi, Adv.

Coram:

HON'BLE MR. JUSTICE MANMOHAN SINGH

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

MANMOHAN SINGH, J.

1. This order shall dispose of the five applications filed by the parties details of which are given as under:-

- (i) I.A. No.12142/2007 under Section 151 of the Code of Civil Procedure, 1908 (for short the 'Code') filed by the plaintiffs for depositing the balance amount in court;
- (ii) I.A. No.8885/2009 under Section 151 CPC by the defendant to deposit the cheque of Rs.6 crores in the form of FDR;
- (iii) I.A. No.12850/2008 by the plaintiffs under Order 11 Rule 12 and 14 CPC;
- (iv) I.A. No.3446/2009 under Order 11 Rule 21 CPC by the plaintiffs, and
- (v) I.A. No.4404/2009 under Section 151 CPC by the defendant for modification of order dated 14th November,

2008.

2. The plaintiffs have filed the present suit for specific performance of the alleged Agreement to Sell dated 3rd December, 2003 in respect of property bearing No.54, Golf Link, New Delhi (hereinafter referred to as the 'suit property'). The total agreement was for Rs.14 crores out of which Rs.6 crores were admittedly paid by the plaintiffs to the defendants and the remaining Rs.8 crores were also deposited in this court by the plaintiffs and are lying in this Court.

3. The main case of the defendant is that the alleged document dated 3rd December, 2003 is a Memorandum of Understanding (for short 'MOU') which cannot be termed as Agreement as there was no proper authorisation to the person who signed the MOU dated 3rd December, 2003 in respect of the suit property nor the Board of Management was competent to authorise any person in that behalf.

4. Now, I shall deal with all the five applications filed by the parties.

I.A. Nos. 12142/2007 and 8885/2009

5. The first application (I.A. No.12142/2007) has been filed by the plaintiffs mainly on the ground that the defendant is trying to delay the proceedings on several reasons and there has been an increase in price of the property which has taken place and may also take place in future when the suit comes up for hearing and in order to avoid any such defence of increased property rates at the final stage of the suit and in order to show bona fide, the plaintiffs, who have always been ready and

willing to pay the balance consideration, have deposited the balance sum payable under the Agreement to Sell to the tune of Rs.8 crores vide the cheque bearing no.100087 dated 12th October, 2007 drawn on Citi Bank and it is also stated that the defendant can have no possible objection to withdraw the said amount from the court. The cheque was enclosed with the present application and following orders were passed when the notice of this application was issued:-

“Issue notice, returnable on 12.11.2007.

In the meanwhile, the cheque filed along with the application in favour of the Registrar General of this Court shall be encashed and be treated as deposit in the court without prejudice to the rights and contentions of the parties. The said deposit shall await further orders.”

6. The defendant, on the other hand, has opposed the application on the ground that since there is no contract between the parties and the alleged document dated 03.12.2003 is merely a MOU and since a pre-contract under the law is not a contract, therefore, the suit itself is liable to be dismissed and the plaintiffs should not be allowed to deposit the said amount and the amount already deposited by the plaintiffs should be returned to the plaintiffs due to the reason that the suit itself is not maintainable.

7. It is not in dispute that under the alleged Agreement to Sell, the defendant has received a sum of Rs.1 crore on 03.12.2003 and thereafter on 03.03.2006 a further part payment of Rs.5 crores was made. Out of the agreed price of Rs.14 crores, the defendant has

admittedly received Rs.6 crores.

8. Appendix A, Form no.47 of the Code of Civil Procedure mandates that at the time of filing of the suit for specific performance and in order to succeed in the matter the plaintiff has to show his readiness and willingness specifically in the plaint to perform his part of the Agreement otherwise no suit for specific performance is maintainable under Sections 14 and 15 of the Specific Relief Act, 1963.

9. Admittedly, the defendant has not filed any suit under Sections 27 and 31 of the Specific Relief Act, 1963 for recession of the contract, which is the remedy available to the defendant. The present suit is also not a suit with the alternative prayer of damages, therefore, in view of the mandate of the law, no prejudice would be caused to the defendant in case the said amount is deposited with this court. Since the defendant is not ready to accept the said balance consideration, the amount already deposited by the plaintiffs with the Registrar General of this court shall be kept in FDR for a period of one year. The application I.A. No.12142/2007 is disposed of accordingly.

10. As far as the second application (I.A. No.8885/2009) is concerned, whereby it is alleged by the defendant that in view of the objection/submission made in the written statement and the law on the subject, the receipt of Rs.6 crores by the defendant from the plaintiffs is irrelevant, inconsequential and gives no right to the plaintiffs and, therefore, the defendant be allowed to deposit the accompanying cheque of Rs.6 crores in the form of FDR in this court as the defendant has not taken any advantage of the said amount in any manner.

11. Along with the application, the defendant has also enclosed the cheque bearing No.795101 dated 2.7.2009 in the sum of Rs.6 crores drawn on Bank of India in the name of Registrar General of this Court.

12. The said application filed by the defendant is strongly opposed by the learned senior counsel for the plaintiffs on the ground that the alleged Agreement to Sell was arrived at between the parties on 3.12.2003. The contention of the learned senior counsel for the plaintiffs is that the defendant have used the abovementioned amount of Rs.6 crores for more than three years and there is no bona fide on the part of the defendants to deposit the said amount. The second submission of the learned senior counsel for the plaintiffs is that the application filed by the defendant is against the law as there is no provision in the Code of Civil Procedure, 1908 or in the Specific Relief Act, which allows a defendant to deposit the part payment already received from the plaintiff with this court. Third submission is that there is no decree against the defendant under Order XXI Rule 2 CPC, therefore, the question of said deposit does not arise.

13. Mr. Tikku, learned senior counsel for the defendant, has argued that since the plaintiffs have deposited the balance consideration before this court, therefore, the defendant be also permitted to deposit the receipt of the said amount as the suit itself is not maintainable and no prejudice would be caused to the plaintiffs if the said amount is deposited with this court.

14. After thoughtful consideration, I do not agree with the contentions of the defendant due to the reason that it is the plaintiffs

who are seeking the relief of specific performance and as per well settled law, in order to succeed in the action the plaintiff has to show his readiness and willingness to pay or to deposit the balance consideration. Further in case the defendant is not ready to accept the balance consideration, the court can ask the plaintiffs to deposit the same in court even if the agreement in question is disputed by the defendant.

15. In the present case, it is not in dispute that the defendant has admittedly received a total sum of Rs.6 crores on 3.12.2003 and 3.3.2006. The same principle cannot be applied to the defendant in the absence of any provision in law to permit the defendant to deposit the part payment already received from the plaintiffs, at the initial stage of the suit. Further, the plaintiffs have not filed the present suit for alternative prayer for damages, therefore, the prayer sought by the defendant cannot be accepted. On the other hand I accept the contention of the plaintiffs and dispose of the present application with the direction that the prayer of deposit by the defendant and the objections thereto raised by the plaintiffs shall be considered at the final stage of the suit.

16. The application is disposed of accordingly. The defendant is directed to take back the cheque of Rs.6 crores attached with the present application.

IA No.12850/2008

17. This application under Order XI Rule 12 and 14 of the Code has been filed by the plaintiffs seeking a direction to be given to the

defendant to produce and make specific and general discovery of documents. It is stated that the defendant has already filed photocopies of some documents with the written statement and orders have been passed by this Court on 18th July, 2008 directing the defendant to produce the above said documents. The defendant in compliance with the order supplied some copies of the documents but did not supply the rest. The plaintiffs also sent a letter dated 12th August, 2008 to the defendant for supply of the documents sought with a list of the same along with the copies filed by it. The plaintiffs in their application have sought the recovery of the documents as per the detail given in Annexure 'C'. The detail of the said documents is given as under:-

“Annexure ‘C’

1. Copy of the statement of the account No.SB-8032 with Bank of Baroda for the period after 22.05.2006 (balance brought forward Rs.4,53,80,664.80) till 25.04.2007.
2. Copy of the bank account (for the period 1.12.2003 to 15.04.2004) to which Rs.75,00,000/- were transferred from your account No.SB-8032 with Bank of Baroda by cheque No.107265 on 8.12.2003.
3. Copy of bank account (for the period 1.12.2003 to 15.4.2004) to which Rs.26,00,000/- were transferred from your account No.SB-8032 Bank of Baroda by cheque No.114402 on 24.12.2003.
4. Copy of bank account/s (for the period 20.3.2006 to 15.7.2006) to which the following moneys were transferred from account No.SB-8032 with Bank of Baroda :

Date	Cheque No.	Amount
21.3.2006	583121	1,50,00,000/-
21.3.2006	Transfer Fixed Account 300	25,00,000/-
21.3.2006	Transfer Fixed Account 300	25,00,000/-
21.3.2006	Transfer Fixed Account 300	25,00,000/-
21.3.2006	Transfer Fixed Account 300	25,00,000/-

Cheque No.583123

22.3.2006	580950	19,00,000/-
22.3.2006	583122	1,00,00,000/-
23.3.2006	583124	1,00,00,000/-
27.3.2006	583125	50,00,000/-

	Total	4.69 crores

Only for clarification, these appear to be onward transfers out of the money (Rupees five crores) received from Plaintiffs and credited to this Bank of Baroda account on 6.3.2006.

5. Copy of the statement of the account with ICICI Bank for the period 1.3.2006 till 15.7.2006) from which cheque No.135495 for Rs.1,73,35,104 was issued in favour of L & DO for the property in suit.

6. Photocopies of all correspondence and document/s received from L & DO or submitted to L & DO for the period 3.12.2004 till date relating to property No.54, Golf Links including any Conveyance Deed for conversion to freehold and papers/documents relating to that.

7. Only to avoid any room for confusion, discovery and production is asked for the documents which primarily fall in two categories :

(1)all correspondence and documents ensued between the defendant and the L & DO in relation to the property in suit during the period 3.12.2003 till date; and

(2)documents (cheques, deposit slips and copies of bank accounts) including any deposit accounts which evidence or relate to movement of the one crore paid on 3.12.2003 and five crores paid on 6.3.2006 and the user/parking of those moneys till date.

8. Generally all documents which are or have been in the possession or power relating to the matter in controversy in this suit.”

18. In reply, the defendant submits that order dated 25th April, 2007 directed the defendant to produce the statement of account of the bank account being maintained by the defendant with Bank of Baroda, New Friends Colony (Bharat Nagar), New Delhi-65 for the period from

1st December, 2003 till date (i.e. 25th April, 2007). It is further stated in the reply that this court also vide order dated 14th August, 2007 directed the defendant to file the photocopies of the documents available with the defendant with respect to correspondence of the defendant with L & DO in relation to suit property between 1.1.2005 till date (i.e 14.8.2007). The defendant on or about 25th May, 2007 filed the available statement of account of the Bank of Baroda for the period 01.12.2003 and 22.05.2006. The defendant in or around March, 2007 further filed the correspondences with L & DO between the period 23.12.2003 and 30.08.2006. Further, it is stated in the reply that as far as the statement of account after 22.05.2006 till 25-04-2007 and correspondences with L & DO after 30.08.2006 till the issuance of conveyance deed dated 14.01.2008 are concerned, the defendant is now filing the same before this court along with the present reply. It is further stated that in view of the compliance of the orders of this court dated 25.04.2007 and 14.08.2007 by the defendant, nothing infact survives in the present application. Copies of the statement of account and correspondences with L & DO are already on record.

19. Learned counsel for the plaintiffs on 18th July, 2008 made a statement before the court that in compliance of orders dated 14th August, 2007 and 5th October, 2007 counsel for the defendant has handed over almost all the documents sought by the plaintiffs except a few. The defendant sought three weeks time to furnish the remaining documents sought by the plaintiffs, if the same are in the power and possession of the defendant. Thereafter the defendant was given further

time to comply with the orders dated 18th July, 2008. Despite orders and letters issued by the plaintiffs to the defendant the remaining documents were not filed.

20. Thereafter the plaintiffs filed the I.A. No.3446/2009. In this application filed on 2nd March, 2009 the plaintiffs prayed for striking out the defence of the defendant in view of the fact that the defendant has not filed all the documents and the affidavit in the prescribed form deliberately with malafide intentions. This court on 14th November, 2008 directed the defendant to file the relevant documents as referred by the plaintiffs in the application being IA No.12850/2008 along with an affidavit in the form prescribed in CPC. The plaintiffs also wrote letters dated 25th October, 2008 and 18th December, 2008 to file the documents but no response was given by the Defendant. Again on 5th January, 2009 the Joint Registrar of this Court directed the parties to exchange the list of the documents.

21. During the pendency of these two applications the defendant filed I.A. No.4404/2009. This application was filed by the defendant under Section 151 CPC for modification of the order dated 14th November, 2008. It is stated by the counsel for the defendant that he appeared for the first time on 14th November, 2008 in this matter and was not able to assist the court. Due to personal difficulties, he sought further time from the Joint Registrar for filing the reply to the application filed by the plaintiffs being IA No. 12850/2008 under Order XI Rule 12 and 14 CPC. The learned counsel argued that under the provisions of Order XI Rule 12 CPC, this court can pass the orders for

production of documents only after hearing the said application which has not been done by the court. However, this court passed an order on 14th November, 2008 directing the Defendant to file the relevant documents as referred by the plaintiffs. The defendant prayed that the defendant be directed to file the reply to the above application and be given an opportunity of hearing.

22. In reply, the learned counsel for the plaintiffs submits that IA No.12850/2008 was filed after repeated orders to the Defendant to produce and file the relevant documents. It is stated that the plaintiffs' advocate also communicated to the Defendant to file the documents but without any response.

23. The plaintiffs on the other hand urged that the defendant deliberately did not file the copies of the bank account with ICICI Bank for the period from 1.3.06 till 15.7.06 which would allegedly show movement and parking of the money paid by the plaintiffs to L & DO for the property in suit.

24. The law relating to discovery of the documents under the provision of Order XI of the Code of Civil Procedure is pretty settled. Before deciding these applications it is relevant to have a look of Order XI Rules 12 and 14 CPC which enumerates as under:-

12. Application for discovery of documents—Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the suit, or make such

order, either generally or limited to certain classes of documents, as may, in its discretion be thought fit:

Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

14. Production of documents—It shall be lawful for the Court, at any time during the pendency of any suit, to order the production by any party thereto, upon oath of such of the documents in his possession or power, relating to any matter in question in such suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.”

25. In the case of **Sasanagouda Vs. Dr. S.B. Amarked & Ors.**

AIR 1992 SC 1163 it was observed by the Apex Court that under Order XI rule 14 CPC, the court is clearly empowered and it shall be lawful for it to order the production, by any party to the suit, such documents in his possession or power as relate to any matter in question in the suit provided the court shall think right that the production of the documents are necessary to decide the matter in question. The court also has been given power to deal with the documents when produced in such manner as shall appear just. Therefore, the power to order production of documents is coupled with discretion to examine the expediency, justness and the relevancy of the documents to the matter in question. These are relevant considerations which the court shall have to advert to and weigh before deciding to summoning the documents in possession of the party.

26. In the case of **Cimmco Ltd. Shyam Mohan Jain AIR 1997 Raj. 180**, similar observations were made and it was held that:

“9. In the instant case, the trial Court while allowing the application of the plaintiff has only observed that "summoning of service books is necessary." The expediency, justness and the relevancy of the service books to the matter in question has not been examined. The relevant consideration which the trial Court ought to have weighed, were not adverted to before taking decision about summoning of the service books. Such an approach of the trial Court cannot be termed as 'judicial approach.' It is not the intention of the Legislature that such an order should be made as a matter of routine and as one of no serious consequences.”

27. In the case of **2001 V AD (Delhi) 1029, Punj Star Industries (P) Ltd. vs. Atna Investment Pvt. Ltd. & Ors.**; wherein the court held that under Order XI R 12, 13, 14 read with Section 151 CPC the plaintiff cannot be allowed to make a fishing and roving enquiry. Though no fishing enquiry can be allowed, however, under Order XI R 14 CPC the Court has the power to direct production of the document by any party at any time during the pendency of the suit, but before giving a direction to a party to make discovery of document in his possession or power or for production of documents, the Court has to be satisfied that the document in question is relevant for the proper adjudication of the matter involved in the suit.

28. In **AIR 1987 Orissa 207 M/s. J.S. Construction Pvt. Ltd. vs. Damodar Rout**; it was held that the parties seeking discovery or production of document need not satisfy the court that the document in question is admissible as evidence in the suit, it would be sufficient to show that the contents of the document would throw light on the subject matter of the suit.

29. In **Bustros vs. White 1876, 1 QBD 423**; it was held that the

court has no discretion to refuse production provided the documents relate to the matter in question and are not privileged. The power to order production of documents is coupled with the direction to examine the expediency, justness and the relevancy of the documents to the matter in question.

30. The provisions make it amply clear that before giving a direction to a party to make discovery of document in his possession or power or for production of document, the court has to be satisfied that the document in question is relevant for proper adjudication of the matter involved in the suit. The privilege vested in a party to the suit by the provisions under Order 11 Rule 12 and 14 of the Code is not intended to enable him to cause a roving enquiry to fish out information which may or may not be relevant for disposal of the suit. No doubt, the party seeking discovery or production of the document need not satisfy the court that the document in question is admissible as evidence in the suit; it would be sufficient to show that the contents of the document would throw light on the subject-matter of the suit. Unless these basic requirements are insisted upon by the court before issuing a direction under the aforesaid provisions, the provisions are likely to be utilised for harassing the other party instead of helping in proper adjudication of the dispute in the case.

31. From the order dated 14th November, 2008 it is clear that the court granted four weeks' time to the defendant to file the reply to the application along with the relevant documents referred by the plaintiffs in their application being I.A. No.12850/2008 which is without

considering the application of the plaintiffs on merit as well as the relevance of the documents, therefore, the said order passed to produce the documents sought by the plaintiffs for discovery in I.A. No.12860/2008 is passed without filing the reply or considering the merit of the application. Thus, I.A. No.4404/2009 is allowed.

32. So far as main application being IA No.12850/2009 is concerned, the plaintiffs have admitted in his notice dated 12th August, 2008 that the defendant has filed the following documents :

1. Copy of letter dated 25.05.2007.
2. Copy of the bank statement of SB No.8032 Bank of Baroda for the period 04.07.2003 to 22.05.2006.
3. Cheque No.580947 drawn on Bank of Baroda of payment to the broker.
4. Counterfoil for tax deduction of payment of commission to the broker.
5. Conversion to freehold application dated 23.12.2003 submitted by SRM to L & DO.
6. L & DO's letter dated 13.08.2004 demanding Rs.7,04,28,297/-.
7. Representation dated 30.09.2004 submitted by SRM giving reply to L&DO letter dated 13.08.2004.
8. SRM's letter dated 20.12.2004 submitting affidavit, certificate from CA and Balance Sheets.
9. L&DO's letter dated 20.12.2004 asking to furnish CC.
10. SRM's reply vide letter dated 15.02.2005 to L&DO's letter dated 20.12.2004.
11. SRM's letter dated 20.10.2005 giving reminders to L&DO.
12. SRM's letter dated 25.05.2006 depositing Rs.7,04,28,297/- as per court order dated 09.05.2006.
13. L&DO's letter dated 28.06.2006 demanding Rs.1,73,35,104/-.
14. SRM's letter dated 13.07.2006 depositing Rs.1,73,35,104/-.
15. L&DO's letter dated 17.08.2006 asking to submit certain documents.
16. Letter dated 29.08.2006 from SRM to L&DO thereby submitting all the required documents demanded by L&DO.
17. Pay-in-slip dated 05.12.2003 (photocopy of both sides) by which the plaintiffs' cheque No.036534 dated 03.12.2003 drawn on Citi Bank, N.A., New Delhi for Rupees One Crore was deposited with the Bank of Baroda, Bharat Nagar, New Delhi.
18. Pay-in-slip dated 04.03.2006 (photocopy of both sides) by

which the plaintiffs' cheque No.907729 dated 03.03.2006 drawn on Citi Bank, N.A., New Delhi for Rupees Five Crores was deposited with the Bank of Baroda, Bharat Nagar, New Delhi.

33. In the present case the amount of Rs.6 crores paid by the plaintiffs to the defendant is already admitted by the defendant. As mentioned in the earlier para No.32 the defendant has filed most of the documents before this court. The learned counsel for the plaintiffs has also admitted before the court on 14th November, 2008 that the defendant has handed over almost all the documents sought by the plaintiffs except a few. In view of the above said position, coupled with the fact that the defendant has admitted the receipt of amount of Rs.6 crores from the plaintiffs, I am of the considered view that no further orders in their applications being IA No.12850/2008 and IA No.3446/2009 are required to be passed except the defendant is directed to file the statement of account with ICICI Bank for the period 01.03.2006 till 15.07.2006 from which cheque No.135495 for Rs.1,73,35,104 was issued in favour of L & DO for the property in suit if the same are in power and possession of the defendant within 15 days from the date of present order. However, liberty is granted to the plaintiffs to summon/discover the requisite document/s, if any, relating to the matter in question from the defendant or from the witness by issuing a notice under Order XII Rule 8 CPC at the appropriate stage of the matter.

34. Both I.A. Nos.12850/2008 and 3446/2009 are disposed of with the above mentioned directions. No costs.

CS (OS) No.2079/2006

33. List the matter before the court on 4th March, 2010.

MANMOHAN SINGH, J.

JANUARY 08, 2010

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