

08.05.96

S.No.450/86

DW-2

~~DW-2~~ S.B. KISHORE RECALLED FOR CROSS-
EXAMINATION BY SHRI T.K. GANJU LEARNED
COUNSEL FOR THE PLAINTIFFS.

ON S.A.

Q.1 Mr.Kishore please tell to this Hon'ble Court that
is it your case that agreement to sell dated
02.11.1983 (Exhibit PW1/2) was signed by you only
for the purpose of plaintiff's obtaining loan from
HDFC.?

Ans. Yes.

Q.2 Mr. Kishore is it your same case with respect to
the document (Exhibit PW2/21) which is the
agreement to sell dated 02.11.1982 in Suit No.
450/86?

Ans. Yes.

Q.3. Mr. Kishore, I put it to you that the Exhibit
PW1/2 records that you had received Rs.1.70 lakhs
in Suit No. 451/86 and Exhibit PW1/21 which is the
agreement to sell in Suit No. 450/86 records that
you had received 1.80 lakhs but you received these
amount towards part consideration of the sale

Signature Not Verified

Digitally Signed By: AMULYA
Certify that the digital file and
physical file have been compared and
the digital data is as per the physical
file and no page is missing.

price of the two plats, what do you say about this?

Ans. I had received as an advance.

Q.4 Mr. Kishore, please tell to this Hon'ble Court that does Exhibit PW 1/2 bear your signatures?

Ans. Yes.

Q.5 Mr. Kishore, please also tell to this Hon'ble Court that document Exhibit PW2/21 (agreement to sell) in Suit No. 450/86 does it bear your signature?

Ans. Yes.

Q.6 Please also see Exhibit P-9, the building plan has been annexed with the Exhibit PW1/2 does it also bear your signatures?

Ans. Yes.

Q.7 Mr. Kishore in the same Exhibit, i.e. Exhibit P-9, the building plan is shown here is it as per the sanctioned building plan?

Ans. No.

Q.8 Mr. Kishore have you made construction contrary to the sanctioned plan?

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Ans. I have diverted from the sanctioned plan and within the limited bye-laws.

Q.9 Mr. Kishore, I put it to you that the plaintiff in Suit No. 451/86 had never told you that she wanted to apply for a loan from HDFC, what do you say about this?

Ans. That is not correct.

Q.10 I put it to you that as on 02.11.1983, the plaintiff in Suit No. 451/86 have paid to you a total amount of Rs. 3.55 lakhs which included the loan amount given to you and as such there could be no necessity for applying HDFC loan, what do you say about this?

Ans. That is not correct.

Q.11 Mr. Kishore, I put it to you that only Adml. Sood the plaintiff in Suit No. 450/86 had applied for loan from HDFC and had also deposited an agreement to sell (Exhibit PW 2/21) with the HDFC what do you say about it?

Ans. I have to say that you have now admitted in court that you required an agreement to sell to take loan from HDFC and thus to cover my interest; the last page of the agreement which you have signed, you have concealed in the court and the total of

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this value on the last page is the same as in Exhibit D-6 identical. Since Mr. Sood filed affidavit collected by the attorney covered the other suit flat also which he had admitted.

Q.12 Mr. Kishore you have deposed that you used to take cash amount from the prospective buyers before signing the agreement to sell, what was the proportion of this cash amount to the cost of the flat?

Ans. Yes I took cash.

Q.13 I put it to you that the plaintiffs in both the suit had never agreed to pay any amount in cash to you for the two flats, is it correct?

Ans. I deny it.

Q.14 Mr. Kishore can you say what was the cash amount demanded by you from the plaintiffs in both the suits?

Ans. I do not want to divulge it.

Q.15 Mr. Kishore can you say what was the cash amount received by you from Defendant no.6, Madhu Javrani, N.K. Vachhani Jolly Sudershan Kumar, and Smt. Karam Kaur Seble to whom you have sold the flats in the building?

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Ans. I do not want to divulge.

Q.16 Mr. Kishore did you account for these cash amount in the account books?

Ans. I do not want to divulge.

Q.17 Mr. Kishore, I put it to you that you have not accounted for any cash amount received from these persons?

Ans. I deny the suggestion.

Q.18 Mr. Kishore, please produce the power of attorney given in your favour by defendant no.6?

Ans. I have already filed the power of attorney given to me by defendant No. 6 and marked as Exhibit DW1/1.

Q.19 Have you identified the signatures of defendant No6?

Ans. Yes.

Q.20 Is defendant No.6 aware of the proceedings in this Court?

Ans. Yes.

Q.21 Please see the document which is agreement to sell. Is it a part of Exhibit PW2/11 and is it the

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agreement to sell entered upon by defendant No.6 with you; is it the same agreement, what do you say about this?

Ans. Yes and it is signed by me.

Q.22 Mr. Kishore when did you receive an amount of Rs. 1.20 lakhs from Defendant No.6?

Ans. It is on the record. I do not remember the date.

Q.23 I put it to you whether this payment of Rs. 1.20 lakhs was received by you after January 1985?

Ans. I gave possession of the flat to defendant No. 6 on 18.8.1984 which mean that I got the first payment on the date of signing this agreement and the second payment of 1.32lakhs I got on 30.7.1984.

Q.24 Did you receive both the payments by cheque or by cash?

Ans. Both the payments were received by me by bank draft.

Q.25 Please see the statement advance received by you from flat buyers given by you alongwith your Income Tax return, is it correct?

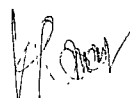
Ans. This is suit for specific performance what I did and what I do with my property with other buyers is nothing to do with this suit.

Q.26 Mr. Kishore I repeat the same question with regard to other returns as on December 31, 1986, December 31, 1987 (these are exhibits DW1/3 and DW 1/4) what do you say about these returns?

Ans. No comments.

R.D & A.C

May 8, 1996
Ban


K. Ramamoorthy, J

08.05.96

S.No.450/86

AT 3.30 p.m.

DW-2

DW-2 S.B. KISHORE RECALLED FOR CROSS-EXAMINATION BY SHRI
T.K. GANJU LEARNED COUNSEL FOR THE PLAINTIFFS.

ON S.A.

Q.27 Mr. Kishore is it correct that you have filed Form
34A with respect to the agreement to sell of
Defendant No. 6 on 21.8.1985?

Ans. I do not remember the date but after giving
possession and getting the sale registered every
one has to file Form 34A.

Q.28 Is it correct that the financial year which you
are maintaining in your books of accounts starts
from 1st January and ending on 31st December?

Ans. I do not know.

Q.29 I put it to you that in your return for the year
ending December 31, 1984 there is no mention of
any advance amount received from defendant No.6?

Ans. That you can ask my Chartered Accountant.

Q.30 I put it to you that Income Tax Return ending 31st December 1985 shows that you have received an amount of Rs. 1.20 lakhs from defendant No.6, is it correct?

Ans. If it is shown in the income tax return it must be correct.

Q.31 I put it to you that same is the position with respect to Income Tax Return for the year ending 1986 and 1987?

Ans. My accountant knows it. I do not know.

Q.32 Mr. Kishore are you maintaining books of accounts?

Ans. My Chatered Accountant knows it.

Q.33 Is it correct that Mr. G.R. Parti filed mortgage suit being Suit No. 905/82 against you?

Ans. It is filed and cleared.

Q.34 Is it correct that the suit property that is A-13, Green Park, New Delhi, was mortgaged by you in favour of Mr. G.R. Parthi?

Ans. It was mortgaged and subsequently paid off.

Q.35 I put it to you that this suit was compromised by

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this Compromised Application 5404/83 in Suit No. 905/82, a certified copy of which is shown to you, what do you say about this?

Ans. The certified copy shown to me is the compromise application filed in the proceedings and the same is Exhibit DW1/5.

Q.36 I put it to you that term of this compromise application you have given a security bond to the Registrar of this Court, a certified copy of which is shown to you, what do you say about this?

Ans. The security bond (a copy of which is shown to me) is correct and marked as exhibit DW1/6.

Q.37 Mr. Kishore I put it to you that in term of this security bond flat No. S-4 measuring 713 sq. ft was given as a security by you on 27.10.1983, is it correct?

Ans. Yes.

Q.38 I put it to you that the mortgage in favour of Mr. G.R. Parthi was redeemed by execution of redemption deed dated 23.03.1985, which is marked as Exhibit PW 2/6, is it correct?

Ans. Must be correct.

Q.39 I put it to you that prior to 23.03.1985, you could not have sold the flat No. S-4 to anybody, what do you say about this?

Ans. I sold the flat in August 1984.

Q.40 Mr. Kishore please see exhibit P-9 which is a building plan in Suit No. 451/86 what do you say about this?

Ans. Yes. It is correct.

Q.41 What is the area shown in the plan of flat No. S-4?

Ans. 713.50 sq. ft.

Q.42 Mr. Kishore is there any flat by the number S-5 in the building?

Ans. No.

Q.43 I put it to you that as per the approved building plan there is no flat S-4 shown on the first floor of the building?

Ans. No. Not on any floor.

Q.44 What does letter 'S' in flat No. S-4 stand for?

Ans. I do not know, architect. He made the plan.

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Q.45 I put it to you that defendant No. 6 had booked Flat F-4 on the first floor, is it correct?

Ans. It is not correct. He never booked F-4.

Q.46 You had filed your written statement in Suit No. 165/85 in the District Court, a certified copy of which is shown to you please see and tell to this Hon'ble Court is it the same?

Ans. Yes. it is signed by me. The same is made by me. The copy is marked as Exhibit DW 1/7.

Q.47 Mr. Kishore I put it to you that in your written statement in the Lower Court, there is no allegation made by you that the last page of the document Exhibit DFW1 was retained by you what do you have to say about this?

Ans. That was not necessary.

Q.48 I put it to you that in your written statement in the Lower Court you have stated that the copy of the document marked Exhibit DWP1 was given to the plaintiff?

Ans. I never stated so.

Q.49 I put it to you that the document Exhibit DFW1 was

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neither acted upon nor was agreed to be destroyed by you what do you have to say about it?

Ans. I never agreed to destroy this document alongwith page 5. The agreement to sell which the attorney has denied here is of 4 pages and 5th page is missing which he admitted on 4.3.1987 in this Court. This agreement was meant to get loan from HDFC as is evident from Annexure attached with IA 11159/95 and 11160/95 wherein they have not denied the documents in reply which amounts to admission. I am not bound by that agreement DPW1.

Q.50 I put it to you that the agreement to sell dated 02.11.1983 which is Exhibit PW1/2 and Exhibit PW2/21 is the similar agreement executed by you with other flat buyers what do you have to say about it?

Ans. The difference between your agreement to sell and the other agreement to sell signed by the other people was agreement to sell last page attached with other flat buyer do not have the last page.

Q.51 Please see exhibit PW1/2, agreement to sell dated 02.11.1983 which is the last page you are referring, what do you say about it?

Ans. This document does not have the last page.

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Q.52 On page 5 are there your signature?

Ans. Yes. This is my signature on document DPW1 at page 5.

Q.53 Mr. Kishore I put it to you that the plaintiff had never requested you to adjust the loan amount given to you against the alleged cash payment what do you have to say about it?

Ans. That is the mistake they have made by giving prayer No. 3 in the plaint what meaning they wanted to by flat as per the agreement to sell which I have denied it.

Q.54 Mr. Kishore I put it to you that agreement to sell dated 02.11.1983 being Exhibit PW 1/2 and PW2/21 is a confirm and irrevocable agreement and there is nothing the provisional about it?

Ans. This is no agreement to sell at all as I have already explained because of the last page I have no legal binding.

Q.55 When did you shift to your flat at A-13, Green Park, New Delhi?

Ans. Sometime in 1984.

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Q.56 Which is the flat occupied by you?

Ans. G-1 A-13, Green Park, New Delhi.

Q.57 Please point out what is it that is provisional about these two agreements being Exhibit PW1/2 and PW2/21?

Ans. The reply is document DPW1 in Suit No. 451/86 and other reply is as per the order dated 4.3.1987.

Q.58 I put it to you that in the Income Tax Return filed by you for the years ending 1982-87 you have not shown the amounts received by you in cash from other flat buyers?

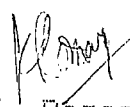
Ans. I deny the suggestion.

Q.59 I put it to you that you never returned the loan amount given to you by both the plaintiffs?

Ans. I deny the suggestion.

R.O. & A.C

May 8, 1996
Ban


K. Ramamoorthy, J

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IN THE HIGH COURT OF DELHI

Suit No. 451/86

Date of decision: July .1996.

Mrs. Vijaya Srivastava	..	Plaintiff through
W/o Brig. K.K.Srivastava		Dr. S. Ghosh, Sr.
J-43-A, South Extension,		Advocate with
Part-I,		Mr. T.K. Ganju
New Delhi.		Advocate.

Versus

1. M/s. Mirahul Enterprises Defendants 1 to 5
a partnership firm through defendant
having its principal No. 2.
of business at Annexe
A-13, Green Park Extn. Defendant No. 6
New Delhi-110 016. through Nemo.
to be served through its
Managing partner
Sh. S.B. Kishore.
2. Sh. S.B. Kishore,
S/o late Dr. R.B. Ram Kishore,
Managing partner of defendant No.1
R/o A-13, Green Park Extension,
New Delhi-110 016.
3. Smt. Kusum Kishore,
W/o Sh. S.B. Kishore,
Partner of defendant No.1
R/o A-13, Green Park Extension,
New Delhi-110 016.
4. Sh. Rahul Kishore,
S/o Sh. S.B. Kishore,
Partner of defendant No.1
R/o A-13, Green Park Extension,
New Delhi-110 016.
5. Miss Simira Kishore,
D/o Sh. S.B. Kishore,
Partner of defendant No.1
R/o A-13, Green Park Extension,
New Delhi-110 016.
6. Sh. S.S. Mohd. Arshad,
S/o lte Sh. S.S.Mohd. Abdullah
Partner of defendant No.1

R/o A-13, Green Park Extension,
New Delhi-110 016.
and also at 44, Dr. B.N. Reddy Road,
Theyaganaya Nagar,
Madras-17.

AND

SUIT NO. 450/86

Rear Adml. Rishi Raj Sood .. Plaintiff through
S/o late Sh. H.C. Sood Dr. S. Ghosh, Sr.
presently at Navy House, Advocate with
Port Blair, Mr. T.K. Ganju
through his Special Attorney Advocate.
Brig. K.K. Srivastava (Retd.)

Versus

1. M/s. Mirahul Enterprises Defendants through
a partnership firm defendant No.2.
having its principal
of business at Annexe
A-13, Green Park Extn.
New Delhi-110 016.
to be served through its
Managing partner
Sh. S.B. Kishore.
2. Sh. S.B. Kishore,
S/o late Dr. R.B. Ram Kishore,
Managing partner of defendant No.1
R/o A-13, Green Park Extension,
New Delhi-110 016.
3. Smt. Kusum Kishore,
W/o Sh. S.B. Kishore,
Partner of defendant No.1
R/o A-13, Green Park Extension,
New Delhi-110 016.
4. Sh. Rahul Kishore,
S/o Sh. S.B. Kishore,
Partner of defendant No.1
R/o A-13, Green Park Extension,
New Delhi-110 016.
5. Miss Simira Kishore,
D/o Sh. S.B. Kishore,
Partner of defendant No.1
R/o A-13, Green Park Extension,
New Delhi-110 016.

CORAM

Hon'ble Mr. Justice K. RAMAMOORTHY

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether their Lordships wish to see the fair copy of the judgment?

K. RAMAMOORTHY, J.

1. Mrs. Vijaya Srivastava is the plaintiff in suit No. 451/86. Rear Admiral R.R. Sood is the plaintiff in suit No. 450/86. Brig. K.K. Srivastava has given evidence on behalf of his wife Smt. Vijay Srivastava and Rear Admiral R.R. Sood as P.W.2, though his wife Smt. Vijaya Sriastava was also examined as P.W.1. The plaintiff in suit No. 451/86 is hereinafter referred to as 'V' and the plaintiff in suit No. 450/86 is hereinafter referred to as 'S'. Defendants 1 to 5 are hereinafter referred to as the second defendant. Though oral evidence is recorded in suit No. 451/86, documents have been marked in both the suits separately to which I shall refer to them at the appropriate stages. Defendants 1 to 5 are common to the two suits and there is the 6th defendant in suit No. 451/86. The facts are almost same and, therefore, the two suits are being disposed of by this common judgment in suit No. 451/86.

2. At the outset, I have to state that these two cases are typical, of the parties trying to over reach the other and as the one could not win the day against the other they are before this Court. In or about the beginning of 1982 the second defendant Mr. S.B. Kishore had approached 'V' and 'S' offering to sell flats in his Complex and by Ex. P.9 he would appear to have obtained sanction of the plan for the construction of the flats. On 16.7.1982 'V' had paid a sum of Rs.10,000/- as advance towards the price of the flat. On 7.1.1983 (Ex. P.17) the second defendant issued *(signed)* a certificate to the following effect :-

"This is to certify that Smt. Vijaya Srivastava W/o Brig. K.K. Srivastava residing at J-43A, NDSE Part I, New Delhi-49 has booked a residential flat measuring 1869 sq. ft. in Mirahul Apartments as per drawing attached at approximate cost of Rs.411854/-".

Along with this, the second defendant had given the drawing Ex. P.18. As per this, there is no contract but P.W.1 (V) and P.W.2 Brig. K.K. Srivastava had spoken about this as a confirmed arrangement. On 8.2.1983 (Ex. P.16) second defendant wrote to P.W.2 requesting him to ask Mr. 'S' who had taken flat S-4 to send a sum of Rs.75,000/-. On 2.5.1983 (Ex.P.14) second defendant wrote to Mrs. 'V' in the following

:5:

S.No. 451/86

terms:-

"Further to our letter of 10.4.83 and subsequent several requests to make payment and have the agreement to sell finalised but you have failed to comply to our needs. It is hereby notified that by 10.5.83 kindly make payment due and have the agreement to sell completed failing we shall cancel your flat allotments and forfeit the advance given."

On the same date (Ex. P.15) the second defendant sends the following certificate relating to Mr.

'S':-

"This is to certify that Rear Admiral R.R. Sood has booked a flat in our Mirahul Apartments measuring 713 sq. ft. through Mrs. Vijay Srivastava."

On 9.5.83 (Ex. P.13) Mrs. 'V' wrote the following to the second defendant :-

"Please refer to your registered letter addressed to me dated 2 May 1983.

You are fully aware that I have booked only one flat on the second floor facing Uphar Cinema and have paid to you sufficient amount towards the same in terms of your agreement for sale.

We have also tried our best to promote the sale of additional flat for your enterprises without any profit motives attached to it. You have now discussed the matter directly regarding the sale of the second two bed room flat with Admiral Rishi Raj Sood on 8 May at your residence.

Hereafter the correspondence regarding second flat can be made directly with him.

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Please ensure that in all future correspondence with me please refer to only one flat on second floor facing Uphar Cinema as regards my booking is concerned and account my deposits accordingly."

On 12.5.1983 (Ex.P.12) second defendant wrote to Mrs. 'V' in reply to Ex. P.13 in the following terms :-

"Reference your letter of 9.5.83 delivered to us yesterday kindly note that we have cancelled yours flats bearing Nos. S-2 & S-4, as we have not recd. your payment by 10.5.83 to enable us to get the agreement to sell finalised and have forfeited your advance as per our conditions of sale.

However we shall reconsider the revival of the flats in case you pay your full instalments due by 31.5.83 i.e. 70% of the flat value or have the flats rebooked and recover your advance from each flat from rebooking as a gesture of goodwill."

On 14.5.83 (Ex.PW2/3) Mrs. 'V' wrote to the second defendant about the discussions had on 13.5.83.

The letter reads as follows :-

"Please refer to your discussions with my husband on the evening of 13th May and your subsequent visit to our house on 14 May in the morning with some documents pertaining to your court case in respect of Rahul Food.

Your replies to our queries are not very convincing and we therefore request you to submit the following documents towards your legal title in respect of the land/building as well as flats under construction at Annexee A-13 Green Park Extension, New Delhi 110016. This is essential to remove any doubt regarding fraudulent sale of flats -

(a) Non encumbrance Certificate from appropriate authority in respect of land/building/flat situated at A-13 (Annexee) Green Park Extension New Delhi-16.

(b) An attested copy of title deed in respect of land and building - A-13 (Annexee) Green Park Extension, New Delhi-16.

(c) An attested copy of partnership deed in respect of Mirahul Enterprises and authority to sign the sale deed in respect of flats under construction at A-13, Green Park Extension New Delhi-16.

(d) An affidavit signed by all the members of your family as well as any other partner in Mirahul Enterprises indicating that the title of the land and building at A-13 (Annexee) Green Park Extension has been handed over to Mirahul Enterprises for purposes of constructing residential flats and selling them to public/prospective buyers.

(e) Name, address and account number of bankers in respect of Mirahul Enterprises.

You are once again requested to expeditiously furnish me all the above mentioned documents so as to enter into final agreement with you for the flat booked by me for which I have already advanced you a substantial sum as per receipts issued by you and registration letter issued by you.

Should you fail to submit/produce the above mentioned documents to my entire satisfaction before 31 May, I shall have no other alternative but to act as may be advised by my advocate. I sincerely hope that you have not mortgaged this property as claimed by you and A-13 Green Park Extension, is free from any litigation. Should the facts be to

the contrary, you will be liable under the laws to make good any loss and expenditure that I may have to incur, due to your actions or due to the direct/indirect actions of your family members or partners in mirahul enterprises.

Hope you will produce the documents as stipulated in this letter before 31 May and refrain from any action which will jeopardise the situation regarding advance collected from me."

From this letter it is clear as on 14.5.83 parties had not come to any final agreement.

3. In Ex.PW2/2 (May 83) Mrs. 'V' wrote to the second defendant calling upon him to comply with what is stated in the letter dated 14.5.83 (Ex.PW2/3). Ex. P.10 dated 20.8.1983 is an affidavit by the second defendant about the constitution of the first defendant firm. Ex. P.11 dated 27th day of January 1982 is the partnership deed of the first defendant.

4. Ex.PW1/2 dated 2.11.83 is the agreement between 'V' and the second defendant. At this stage itself, I want to refer to the agreement produced by the second defendant giving a different version about it I will deal with a little later i.e. Ex.DPW1 dated 2.11.83. The agreement between 'S' and the second defendant is of the same date and that is marked as Ex.PW2/21 in suit No. 450/86.

5. Therefore, on 2.11.83 there were

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:9:

S.No. 451/86

agreements between the parties. In Ex.PW1/2 relevant, preamble portion reads as follows :-

"And whereas the Sellers have agreed to sell and the purchasers have agreed to purchase part portion of the building measuring approximately 1156 sq. ft. at 2nd floor, flat No. S-2 in Mirahul Apartments New Delhi as shown in the plan attached and marked by a red coloured boundary signed by both the parties for the purpose of future verification."

Clause I of the agreement reads as follows:-

"1) That the sellers have already received the sum of Rs. 1.70 lacs at the time of signing this Agreement to sell as earnest money. That the sum of remaining payment towards the consideration is to be made in the manner prescribed below :-

Total cost of the flat
Rs.264261/-."

In Ex.DPW.1 first four pages are the same as in Ex.P.W.1/2 but in the 5th page there is difference and it is stated over and above Rs. 2,64,461/- a sum of Rs. 1,71,712/- is to be paid by 'V'. In Ex.PW2/21 agreement between 'S' and second defendant the relevant preamble portion reads as follows :-

"And whereas the Sellers have agreed to sell and the purchasers have agreed to purchase part portion of the building measuring approximately 950 sq. ft. at 2nd floor, flat No. S-1 in Mirahul Apartments New Delhi as shown in the plan attached and marked by a red coloured boundary signed by both the parties for the purpose of future verification."

Clause I of the agreement reads as follows:-

"1) That the sellers have already received the sum of Rs. 1.80 lacs at the time of signing this Agreement to sell as earnest money. That the sum of remaining payment towards the consideration is to be made in the manner prescribed below :-

Total cost of the flat Rs.2.68 lacs."

Ex. P.41 dated 9.11.1983 receipt for Rs. 10,000/- issued by second defendant to 'V'. Ex. P.42 dated 24.11.1983 receipt for cheque for Rs. 10,000/- issued by second defendant in favour of 'V'. Ex.P.43 dated 24.11.1983 receipt for the cheque issued for Rs. 15,000/-. Ex. P.44 dated 13.12.83 receipt for the cheque for Rs. 15,000/-. Ex. P.45 dated 14.12.83 receipt for the cheque for Rs. 10,000/-.

6. The plaintiff 'V' is stated to have given interest free loan to second defendant as evidenced by the following documents :-

Ex.P.46 dated 11.2.84 Rs. 10,000/- by cheque.

Ex.P.47 dated 21.3.84 Rs. 5,000/- by cheque.

Ex. P.48 dated 21.3.84 Rs.15,000/- in cash.

Ex. P.49 dated 5.4.84 Rs. 50,000/- by cheque.

Ex.P.50 dated 19.4.84 Rs. 8,000/- by cheque.

Ex. P.51 dated 19.4.84 Rs. 7,000/-

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by cheque.

Ex. P.52 dated 6.5.84 Rs. 20,000/-
in cash.

Ex. P.53 dated 11.5.84 Rs. 10,000/-
in cash.

Ex.P.54 dated 23.5.84 Rs. 20,000/-
by cheque.

7. On the 8th of October 1984 (Ex. P.7) 'V'
wrote to the second defendant in the following
terms:-

"Please refer to your telephonic
conversation of 7 Oct with my
husband and confirm the following :-

(a) Suitable dates when the
registration of flats can be
finalised.

(b) Suitable date when we can start
fitting the flat with almirah,
cupboards etc.

An early confirmation is requested".

On 12.12.1984 (Ex. P.6) the second defendant wrote
to 'V' in the following terms :-

"This is to advise you to kindly
have the regular 'AGREEMENT TO SELL'
signed between us to enable us to
confirm the allotment of Flat S-2
measuring approx. 950 sq. ft. in
MIRAHUL APARTMENTS. If for any
reason this is not done by 31.12.84
then we shall treat the provisional
allotment as cancelled.

Kindly note that any advance given
for provisional booking of this flat
is no firm commitment on our part
for allotting the flat to you unless
the regular 'AGREEMENT TO SELL' is
signed between us."

On 15.12.1984 (Ex. P.4) 'V' wrote to the second

defendant in the following terms :-

"This refers to your Regd. letter dated 12.12.84 addressed to me.

I am glad to learn that you desire to finalise the Agreement to sell 950 sq. ft. as against 1156 sq. ft. for which we have entered into agreement on 2nd Nov. 83.

It may be recalled that vide my letter dt. 8 Oct 84, I had already expressed my desire to take over the possession of the flats as per our agreement. It may please be noted that I have already made full and adequate payment. Only a small amount was supposed to be paid at the time of possession.

I again repeat that full and adequate payment in respect of this flat has already been made to you. I once again confirm my willingness to finalise the agreement to sell i.e registration of the flat well before 31.12.84 as desired by you vide your letter dated 12 Dec 84.

Please note that there was no provisional booking or provisional allotment but a regular agreement to sell was entered and signed between us on 2.11.83 for purchase of 1156 sq. ft. and in terms of this agreement full and adequate payment has been made and nothing is payable even though you have arbitrarily reduced the area from 1156 sq. ft. to 950 sq. ft.

Without prejudice to my claim for full, complete and fair performance of contract dt. 2.11.83 I am prepared to enter into "final agreement to sell" for 950 sq. ft. as stated by you in your letter dt. 12.12.84.

Kindly intimate the date and time when I should come and sign the contracts and complete any other necessary things."

It may be noted that 'V' had agreed to enter into a final agreement to sell. It appears on 21.12.84 a police complaint had been given by 'V' against the second defendant. On 29.12.84 (Ex. P.2) second defendant wrote to 'V' in the following terms :-

"This has reference to the discussion your Brig. K.K. Srivastava had with the undersigned today, wherein it was mutually agreed that unless "loan" money given to the firm is returned it is not possible to have the regular "Agreement to Sell" finalised. Therefore, we are extending the date to sign the regular "Agreement to Sell" date to 31.3.1985 from 31.12.85 as stated in our letter of 12.12.84. This also disposes your Regd. A/D letter of 20.12.84."

By December 1984 the plaintiff 'V' had paid all the amounts and there must have been some discussion about the interest free loan. That is why reference is made by the defendant No. 2 about the interest free loan. The point to be decided is, which I have to refer to when I discuss the oral evidence, whether the interest free loan so called was to go towards the price of the flat and whether the plaintiff 'V' can seek to recover the amount on the basis of the relationship of creditor and debtor between 'V' and the second defendant. On the 31st of December 1984 (Ex. PW1/3) Brig. K.K. Srivastava P.W.2 wrote to the second defendant on behalf of 'V' and 'S' in the

following terms :-

"Please refer to your letters dated 29 Dec 84 addressed by my wife - Mrs. Vijaya Shrivastava and Rear Admiral R.R. Sood, despatched in one registered cover dated 28 Dec 84 and received by Mrs. Vijaya Shrivastava on 29 Dec 84.

The above mentioned letters have brought out only a part of what was agreed to. To put the records straight, I would like to record the remainder facts agrees to between us--

(a) Our meeting took place at your residence on 28 Dec 84.

(b) It was agreed that the WRITTEN AGREEMENTS dated 22 Nov 84 between MIRAHUL ENTERPRISES and MRS. VIJAYA SHRIVASTAVA as well as MIRAHUL ENTERPRISES and REAR ADMIRAL R.R. SOOD will be given effect and--

(i) the flats will be handed over soonest as per the written agreements dated 22 Nov 83.

(ii) Payments were made to you (seller) by the purchasers on the basis of approximate area mentioned in the agreements. Final Accounts will be settled after actual measurement of the flats.

(iii) The loan-deposit was to continue as non-interest bearing loan-deposit upto 31 Dec 84 as a special case as requested by you and thereafter it will bear an interest rate of 15% (fifteen percent only) per annum payable monthly to compensate towards monthly liabilities of Rear Admiral R.R. Sood in respect of loan from Housing Development and Finance Corporation Ltd., and rent of the present building occupied by our family. Further that the complete amount of the loan shall be refunded by 31 March 85.

iv). The accommodation purchased by Mrs. VIJAY SHRIVASTAVA being fully ready, the possession would be handed over much before 31 Jan 85. This extended period is to enable her to get the electrical connections. As suggested by you she is to submit the application for electric connection attaching a copy of the "Agreement to Sell" dated 22 Nov 84.

v) Remainder accommodation would be handed over to Rear Admiral R.R. Sood or his authorised attorney i.e. to me on completion of the balance of work, if any before 31 Mar 85.

Since you also brought out that at present there are some differences of opinion amongst the partners of MIRAHUL ENTERPRISES in respect of certain Policy matters and issue of Possession letters to the buyers, two copies of this letter are enclosed for return of one copy duly signed by all the partners of Mirahul Enterprises for our record before 15 Jan 85."

Ex. P.1 is the postal receipt and acknowledgement card. The same are marked as Ex. P.W.2/14 in suit No. 450/86. Ex.P.W.1/1 is the power of attorney given by 'V' to P.W.2. Ex.PW2/4 is the statement of amounts stated to have been paid by 'V' and 'S' to second defendant and the statement was filed in the Court on 28.4.1990. Ex.PW2/1 dated 9.1.85 is communication from Hindustan Commercial Bank Ltd. to P.W.2 about three cheques issued by P.W.2 in favour of second defendant for three amounts Rs.8,000/-, Rs. 10,000/- and Rs. 10,000/-.

8. In suit No. 450/86 Ex. P.6 dated 21.3.1984 is a certificate given by the second

defendant in the following terms :-

"This is to certify that R/Adm. Rishi Raj Sood Vr.C.N.M. has booked the flat number "S-1" measuring 950.50 sq. ft. in MIRAHUL APARTMENTS, A-13, Green Park Extension New Delhi.

It is also certified that this building is being made as per sanctioned plan of M.C.D. vide their letter No. 854/B/HQ/81 of 25.1.82 (Attested copy attached).

This affidavit is being given after ascertaining full facts on the subject on behalf of all the partners of MIRAHUL ENTERPRISES and constitutes a surety that no violation of building bye laws would be made :-

We have not violated any building bye-laws nor any case is pending against us for violation of building regulations. We hold responsibility in case of any hindrance from any local Authority."

On 25.10.83 (Ex.P.7) second defendant wrote to 'S' in the following terms :-

"As request by Mrs. V. Srivastava we have tentatively allotted Flat S-1 to you. All advance received against Flat S-4 shall be transferred to Flat S-1.

It is requested that an early "agreement to sell" is finalised against Flat S-1."

On 24.10.83 the receipt is issued by the second defendant for Rs. 40,000/- given by cheque by 'S'. On 11.5.83 (Ex. P.8) second defendant wrote to 'S' saying that it was not possible for him to allot any flat. The letter written by 'S' on 9.5.83 is

marked as Ex. P.9.

Ex. P.11 is the receipt dated 22.11.83 for payment of Rs. 10,000/- by cheque.

Ex.P.12 dated 13.12.83 is receipt for payment by cheque for Rs.30,000/-.

Ex.P.13 is the receipt dated 10.1.84 for payment of Rs. 6,000/- by way of cheque.

Ex. P.14 is the receipt dated 20.1.84 for payment of Rs. 10,000/- by way of cheque.

Ex. P.15 is receipt dated 25.1.84 for payment of Rs. 7,000/- by way of cash towards the cost of the flat.

Ex. P.16 is receipt dated 14.6.84 for payment of Rs. 20,000/- by way of cheque.

9. 'S' also has paid money by way of interest free loan. Ex. P.17 is the receipt issued by second defendant dated 7.7.84 for the payment of Rs. 25,000/- in cash. Ex. P.18 is the receipt dated 9.7.84 for payment of Rs. 45,000/- as interest free loan by way of cash.

10. On 14.1.1985 (Ex.P.W/13) 'S' executed the general power of attorney in favour of P.W.2. Ex.PW.2/18 dated 12.8.86 is the certificate issued by HDFC stating that the original agreement for sell between 'S' and the second defendant have been deposited with the HDFC as a security against the loan advanced to him. Ex.PW.2/20 is the same

statement of amounts filed before this Court on 28.4.85.

11. Ex. P.1 dated 29.12.1984 is from the second defendant to 'S' in the following terms :-

"This has reference to the discussion your Brig. K.K. Srivastava had with the undersigned today, wherein it was mutually agreed that unless "loan" money given to the firm is returned it is not possible to have the regular "Agreement to Sell" finalised. Therefore, we are extending the date to sign the regular "Agreement to Sell" date to 31.3.1985 from 31.12.85 as stated in our letter of 12.12.84. This also disposes your Regd. A/D letter of 20.12.84."

Ex. P.3 is the letter dated 20.12.84 by 'S' to the second defendant stating that a sum of Rs. 19,000/- was payable by him towards the cost of the flat. Ex. P.4 is the acknowledgement card showing the letter sent by 'S' to second defendant. Ex. P.5 is the letter dated 12.12.84 from second defendant to 'S' in the following terms :-

"This is to advise you to kindly have the regular 'AGREEMENT TO SELL' signed between us to enable us to confirm the allotment of Flat S-1 measuring approx. 955 sq. ft. in MIRAHUL APARTMENTS. If for any reason this is not done by 31.12.84 then we shall treat the provisional allotment as cancelled.

Kindly note that any advance given for provisional booking of this flat is no firm commitment on our part for allotting the flat to you unless the regular 'AGREEMENT TO SELL' is signed between us."

12. Plaintiff 'V' had filed through the second defendant, when he was examined, Ex. DW1/2 dated 31.12.85 showing the details of advance received from the party by the second defendant. This is a document summoned from the Income Tax Department. Ex. DW1/3, a statement of advance as on 31.12.86. Ex. DW1/4 the statement of advance as on 31.12.87. Why I am mentioning this is these are the documents sent for by the plaintiff 'V' and marked for the purpose of plaintiff 'V', though they are marked on the side of the second defendant. The contents of these documents I have to make it clear now itself cannot be disputed by 'V' or 'S'.

13. Plaintiff 'V' claims the relief of specific performance against the second defendant and also the 6th defendant. According to 'V' the second defendant has sold a portion of the property includible in the flat of the plaintiff 'V' to the 6th defendant.

14. The case of plaintiff 'V' is that inspite of specific agreement on 2.11.83, as evidenced by Ex. PW1/2, second defendant has not been ready and willing to execute the sale deed and as a matter of fact a portion of it had been sold to the 6th defendant and, therefore, the plaintiff 'V' was forced to file this suit. Plaintiff 'V' also

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claims recovery of money from the second defendant paid as loan to the second defendant.

15. Plaintiff 'S' claims the relief of specific performance and also the recovery of money paid as loan to the second defendant.

16. The case of the second defendant is that there was no concluded agreement of sale between the parties and the interest free loan was also paid towards the price of the flat and plaintiff cannot seek to recover the amount. I have noticed the plea of the second defendant in the written statement while taking the stand that there was no concluded contract between the plaintiffs and the second defendant, the plaintiffs cannot club the loan transactions with these suits. Therefore, the plea by the second defendant relating to the loan transaction has to be considered in the light of his specific stand that there was no concluded contract between the plaintiffs and the second defendant for the sale of flats. Therefore, here itself I want to mention that it is not open to the plaintiffs to say that there is an admission by the second defendant in the written statement about the loan transaction. If I come to the conclusion that there has been a concluded contract between the plaintiffs and the second defendant, it becomes necessary for me to consider the purpose of the demand of money as loan by the

SSA

plaintiffs to the second defendant. Therefore, the short point that would arise for consideration in these two cases is whether there was a concluded contract between the parties for the sale of the flats or the entire money paid by the plaintiffs to the second defendant towards sale consideration. document Ex.DPW.1 dated 2.11.83, which I had already referred to, assumes importance for the purpose of deciding the question and the same has to be considered in the light of the documents summoned by the plaintiff 'V' from the Income Tax Department with reference to the records of the second defendant and the first defendant with the Income Tax Department.

One aspect I want to notice here is that the plaintiffs filed applications for injunction and also for mandatory injunction directing the second defendant to put them in possession of the flats. This Court passed an order on 21.8.1987 directing the second defendant to put the plaintiffs in possession of the flats and the plaintiffs are in possession of these flats now. The order passed by this Court was confirmed by the Supreme Court.

17. Following issues were framed in the two suits :-

ISSUES (Suit No. 451/86)

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1. Whether the plaint has been signed and verified by a person competent to do so and suit instituted by a duly authorised person? OPP
2. Whether the agreement dated 2.11.1983, executed between the plaintiff and the defendants 1-5 and set up by the plaintiff, is binding in all respects on the parties? OPP
3. If Issue No. 2 is held in favour of the plaintiff, whether defendants 1-5 are not liable to execute the sale deed and transfer possession of the flat measuring 1156 sq. ft. to the plaintiff? OPDs 1-5
4. Whether the plaintiff is liable to pay to defendants 1-5 any sum over and above the admitted sum of Rs. 2,64,261/- in execution of agreement to sell? OPDs 1-5.
5. Whether the plaintiff was ready and willing to perform his part of the agreement at all material points of time ? OPP
6. Whether the plaintiff/her husband made any additional writings as part of the agreement to sell dated 2.11.1983, as alleged by defendants 1-5? If so, to what effect? OPDs 1-5.
7. Whether any sum by way of loan was advanced to defendants 1-5 by the plaintiff? If so, what amount and during what period and on what terms and whether plaintiff can seek relief in respect to said loan in the present suit? OPP
8. In case defendants are held entitled to recover from the plaintiff in the event of

specific performance being granted, any amount over and above the admitted amount of Rs. 2,64,261/-, then, whether the plaintiff is entitled to claim adjustment for the excess claim against the alleged loan amount?

9. Whether the sale or parting with possession by defendants 1-5 of one bed room of the flat in question in favour of defendant No. 6 is fraudulent, illegal and not binding on the plaintiff for the reasons stated in paras 24(a) to 24(i) of the plaint? OPP

10. Relief. OPP

ISSUES (Suit No. 450/86)

1. Whether the plaint has been signed and verified by a person competent to do so and suit instituted by a duly authorised person? OPP
2. Whether the agreement dated 2.11.1983, executed between the plaintiff and the defendants 1-5 and set up by the plaintiff, is binding in all respects on the parties? OPP
3. If Issue No. 2 is held in favour of the plaintiff, whether defendants 1-5 are not liable to execute the sale deed and transfer possession of the flat measuring 955 sq. ft. to the plaintiff? OPDs 1-5
4. Whether the plaintiff is liable to pay to defendants 1-5 any sum over and above the admitted sum of Rs. 2,68,000/- in execution of agreement to sell? OPDs 1-5.
5. Whether the plaintiff was ready and willing to perform his part of the agreement at

all material points of time ?
OPP

6. Whether the plaintiff/her husband made any additional writings as part of the agreement to sell dated 2.11.1983, as alleged by defendants 1-5? If so, to what effect? OPDs 1-5.
7. Whether any sum by way of loan was advanced to defendants 1-5 by the plaintiff? If so, what amount and during what period and on what terms and whether plaintiff can seek relief in respect to said loan in the present suit? OPP
8. In case defendants are held entitled to recover from the plaintiff in the event of specific performance being granted, any amount over and above the admitted amount of Rs. 2,68,000/-, then, whether the plaintiff is entitled to claim adjustment for the excess claim against the alleged loan amount?
9. Relief. OPP

18. Now I shall deal with the oral evidence and thereafter I shall give my findings separately on the issues framed.

19. On 22.3.1994 the evidence of 'V' was commenced. In the evidence she would state as P.W.1 that there was a confirmed booking as per Ex. P.17 and P.18. The total amount paid by her was Rs. 3,15,000/-. After 2.11.83 Rs. 88,000/- was paid as evidenced by Ex. P.44 and P.45 and the balance was Rs. 1,261/-. According to her, the interest free loan is evidenced by Ex. P.47 to

P.54. According to P.W.1 by letter dated 12.12.84 (Ex.P.6) second defendant cancelled the allotment. About taking possession of the flat S-2, pursuant to the orders of the Supreme Court, P.W.1 would state "in the plan Ex. P.9 flat S-2 is shown which is supposed to be three bed rooms, three bath rooms and two stores but Mr. Kishore gave us one bath room, one bed room and one store room less. According to her, the third bed room is with the 6th defendant. About Ex.DPW.1 in the cross-examination P.W.1 would state "the agreement to sell Ex.PW1/2 has five pages. Ex. DPW.1 is signed by me on pages 1,2,3, 4 and 5. (The witness wishes to volunteer a statement in addition to what has been said. It is so detailed in the volunteered statement.

Note: That I am going to ask her to repeat so that it is taken verbatim on record).

I do not recollect fully, but I remember in 1983 after signing all the pages of the agreement to sell when S.B. Kishore insisted on witnessing my husband and R.R. Sood. My husband noticed that he has put some money. I do not know some amount of money that we have to pay after possession of the flat, but my husband started arguing, saying, I have paid every amount. He said this is not meant for you, and this is meant for the people who will book flat after you. So after the argument, he changed the agreement to sell last page. He went inside A-13, Green Park Extension, and then he changed the last page, and that

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is why this change is there.

Q. Please state in whose handwriting is the portion encircled in red and marked 'A' on page 5 of Ex. D.P.W.1?

A: The portion marked 'A' is in the hand of my husband, but portion marked 'B' is not in the handwriting of my husband. Portion marked 'C' is not in the handwriting of my husband. I cannot say whose handwriting is this.

Q. I put it to you that I signed at portion marked 'B' to attest the portion marked 'A' on page 5 of Ex.D.P.W.1. What have you to say?

Ans. I had not seen my husband writing the text part of portion marked 'A'. I recognise the handwriting of my husband.

I and my husband went to Notary public where my signatures and the signatures of S.B. Kishore or of my husband at page 5 were attested by Notary Public. The Notary Public was at Green Park. It is incorrect to suggest that what was written in hand by my husband was for HDFC loan. I do not recollect taking an affidavit from Mr. Kishore dated 21.3.84. Exhibit PW2 is the letter written by me to defendant No. 1. It is correct that the present suit was filed in 1986."

She would say that she was not able to recollect that whether there was any suit in the subordinate court in 1985. She was not able to say whether she filed suit No. 165/85 in the subordinate court for injunction. Again, about Ex.DPW.1 the questions and answers are in the following terms, in her evidence dated 24.3.94 :-

"Q. According to the 5th page of

Ex.D.PW1, what is the total value of the flat?

Ans. According to the 5th page of Ex.D.PW1, the amount payable by us was Rs. 2,64,261/- plus Rs. 171712/-.

(Volunteered - these amounts were not agreed to be paid by us)

Q. Please read the first paragraph of Ex.D.PW1 at page 5.

Ans. The first paragraph at page 5 reads as : "This agreement is provisional and a proper sale deed will be made after the flat will be ready, and is drawn up for the purchaser to get a loan from HDFC and shall be treated as cancelled, at the time of issue of possession letter by the builders when a fresh agreement will be entered into between the seller and the purchaser.

Q. Please state whether what is to be found at page 5 of Ex.D.PW1 is a photo copy of "original"?

Ans. I do not know.

Q. You did not file page 5 of the agreement in the action filed for specific performance. What is your reason?

Ans. I did not file it because I did not have that page.

Q. I suggest it to you that you did not file page 5 because the original was with me. I detained it. What have you to say?

Ans. No.

Q. I suggest it to you that the value of the flat No. 43,970/-. You gave an earnest money of Rs. 2,37,000/-, and the balance due was Rs. 1,98,000/-. What have you to say?

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Ans. I do not think we have to pay anything to the defendant.

Q. I suggest it to you that you have given Rs. 1,45,000/- as advance to Mirahul Enterprises.

Ans. I gave a loan of Rs. 1,45,000/- to defendant No. 2, not defendant No. 1. Out of the receipts which total Rs. 1,45,000/-, paid by me, only Ex. P.53 and Ex. P.54 are signed by S.B. Kishore for Rs. 30,000/-. The other receipts which are for Rs. 1,15,000/- are signed by Rahul Kishore as partner of Mirahul Enterprises.

It is incorrect to suggest that defendant No. 2 tried to return the loan of Rs. 1,45,000/- to me.

Q. On 12.12.1984, I asked you to come and sign agreement for 954 sq. ft. You wrote that you are prepared to sign regular agreement. Do you have the agreement of 954 sq. ft., the flat in which you are living today?

[The witness requests for seeing the document.]

[Note: This answer is prompted by interjection of Mr. B. Mohan, counsel for the plaintiff].

Ans. I have got agreement of 1156 sq. ft.

Q. Did I (S.B. Kishore) ever ask you for loan?

Ans. Yes.

Q. Do you have any letter written by me, asking for loan?

Ans. My husband might be having it.

Q. Why have you shown in the specific performance application that you want interest at 15% when the receipt shows very clearly "interest free loan", and there is

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no time limit to give it back.

Ans. Please ask this question from my husband, because I he not attended the court for the last 10 years. This is first time I have attended the court.

Q. Why have you clubbed the prayer for return of the loan with the specific performance suit, as it has nothing to do with the specific performance?

Ans. I do not know."

Therefore, the second defendant elicited from this witness that Rs. 1,45,000/- which was received as 'loan' was only towards the price of the flat.

20. Brig. K.K. Srivastava; husband of 'V' and attorney of 'S', was examined as P.W.2 and the examination commenced on 22.3.96. He would state that the total cost agreed was Rs. 2,64,263/-. About Ex.D.PW1 dated 2.11.83 P.W.2 would give us a version in the following terms :-

"Q.22. Please see the document Ex.DPW1. What is this document about?

Ans. This document was the first agreement which was given to my wife for signatures, which was brought duly signed by defendant No. 2. After she had signed it, it was given to me for witnessing and I had witnessed it. At that stage, Adm. Sood was signing his documents and he also gave it to me for witnessing. I witnessed that agreement also. Then defendant No. 2 told Adm. Sood to sign some corrections. Therefore, I started reading this document Ex. DPW1 and on the 1st page I found

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objectionable terms which were not agreed between us. So I protested to defendant No. 2. Adm. Sood also protested when he also saw similar things. Defendant No. 2 said that this agreement is for future buyers and not for you people. He suggested certain corrections which on the carbon copy of the agreement of both the flat buyers I recorded and re-read. Both myself and Adm. Sood did not agree even with these modifications. So we, again told defendant No. 2 that we do not agree to these conditions. Defendant No. 2 readily agreed to change the entire documents and said we will have to go to the High Court for typing and notarised. Accordingly, we came to the High Court. Adm. Sood had certain office meeting in the afternoon so his fresh agreement was type first and was signed by both the seller and buyer and was witnessed by me and was notarised at the High Court. After that my wife's agreement was also typed. But my wife had gone away since children were to come from school bus. I remained with defendant No. 2, got the agreement typed and we both returned home and we were to meet in the evening for signing and notarising at Green Park, where a Notary resides. We met at the Notary's place in the evening. The agreement was signed by both the parties and witnessed by me and Adm. Sood. But unfortunately the Notary had not come and we had to go to Airport. So that agreement was not notarised on that day. It was later on notarised on 5.11.83."

According to P.W.2, Ex.PW1/2 was prepared in the

W03

High Court and notarised in the High Court. Ex.DPW.1 was not acted upon by the parties and it was not notarised in his presence and this document was not by consent of parties and copy of this document was not given to him. When asked whether the second defendant gave a copy to P.W.2, P.W.2 would state :

"Q.27. What did defendant No. 2 tell you about this document?

Ans. When the new agreements were being typed in the High Court, defendant No. 2 destroyed certain documents which included some stamp paper also. I had no disbelief or loss of faith that defendant No. 2 did not destroy these documents at that time. I all the time trusted him and kept on paying money in good faith."

P.W.2 expects us to believe that the second defendant promised to destroy this document and he accepted that statement. He would further state :

"Q.28. Did he tell you that defendant No. 2 will destroy the document Ex.DPW1?

Ans. Yes on 5.11.83 when the documents were being notarised he reaffirmed that all the old documents have been destroyed and please be rest assured including Ex.DPW1.

Q.29. Why did you not keep a copy of this document?

Ans. As I said earlier, we had no opportunity for any distrust and we had good faith on defendant No. 2.

21. Second defendant has examined himself as D.W.1 and he would speak to the fact that there was an agreement on 2.12.83 and the agreement is only provisional and the plaintiffs are not entitled to the relief. He would state "In 1987 when the matter was in DB-I and with a such strong order behind him I made two pay orders for the total value of the loan to be given back but, they never took it. Their prayer was they wanted their loan back with interest and swallow my flats at 60% of the total value." He speaks about the order passed by this Court on 21.8.87 and the appeal therefrom. His evidence is that there was no concluded contract and if the plaintiffs can give back the flats to him he can give back the money back to them. Therefore, there is no admission by the second defendant that there were loan transactions.

22. Thus, we have to see on the evidence of P.W.2 and the evidence of D.W.1 (second defendant) to come to a decision on the question of concluded contract and the total consideration.

23. A look at Ex.PW1/2 and Ex.DPW1 and a close examination of these documents would reveal the real facts. The stamp papers were purchased by 'V' on 4.10.83. The stamp paper for Rs. 5/- for Ex.PW1/2, the number is given as 28422. The stamp for Rs. 5/- for Ex. DPW1 the number is given

as 28421. The stamp paper for Rs. 5/- for Ex.PW2/21 agreement between 'S' and second defendant bears the number 28418 dated 4.10.83. All the stamp papers were purchased from stamp vendor Smt.Prem Kumari, Licence No. 157, Patiala House Courts, New Delhi. In Ex.PW1/2 and Ex.DPW.1 first four pages are identical. Page No. 5 in Ex.PW.1/2 reads as follows :-

"IN WITNESSETH WHEREAS of the parties aforementioned have set their respective hands on this Agreement and have signed the same on the day, month and the year as written above."

In this page second defendant has signed on behalf of the first defendant, plaintiff 'V' has signed as purchaser, P.W.2 and plaintiff 'V' have signed as witnesses. Ex.PW1/2 is attested by the Notary Public Mr. G.C. Verma on 5.11.83. Ex.DPW1 is also attested by Mr. G.C. Verma on the same date i.e. 5.11.83. In all the five pages in both the documents, Mr. G.C. Verma has put his seal. Ex.PW.2/21 is signed by the Notary Public, whose name I am not able to decipher from the document. It was notarised on 2.11.83 and P.W.2 has witnessed the document. Therefore, the theory by P.W.1 and P.W.2 that they were not present at the time Ex.DPW.1 was attested by the Notary Public

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and they are not aware of the 5th page in Ex.DPW1 cannot at all be accepted. For reasons best known to them, the parties had not placed the full facts as to how these two documents had come into existence. It may also be noticed that P.W.2 denied his signatures in Ex.DPW.1. But on 4.3.87 he admitted the signatures before this Court and this Court passed the following order :-

"Learned counsel for the plaintiff states that it was by mistake that he had denied the document in question but in fact it is admitted that it is signed by the plaintiff and also that the writing on the last page of the agreement produced by the defendant bears the writing in the hand of Brig. K.K. Srivastava."

The evidence of P.W.1 and P.W.2 in this respect directs the needle of suspicion towards them and they are trying to be too smart and they do not hesitate in indulging in falsehood. According to P.W.2 the total consideration is Rs. 2,64,261/-. And as on 2.11.83 Rs. 1,17,000/- had been paid and the balance also have been paid except to the extent of Rs. 1,261/-. If that is so, P.W.2 is not able to give any explanation as to how did the second defendant give a statement to the Income Tax Department that he had received a total advance of Rs. 5,80,000/- from plaintiff 'V'. If we take into account the payments made by plaintiff 'V' including Rs. 1,45,000/-, which is

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stated to be 'loan' that would not come to Rs. 5,80,000/-. There is a balance of nearly Rs. 1,72,000/-. It is not the case of P.W.2 that the statement given by the second defendant to the Income Tax Department is not correct. It is also not the case of P.W.2 that he paid extra Rs. 1,72,000/- over and above Rs. 4,08,000/- (including the loan amount) to the second defendant towards the cost of the flat. Therefore, by some arrangement which as I had mentioned earlier, both parties had come to some understanding for paying the consideration and they are not prepared to tell us as to how the plaintiff 'V' had paid Rs.5,80,000/-. Therefore, the case of the second defendant that there was no loan transaction at all and the alleged loan transaction was only a nomenclature adopted by the parties for their own convenience and the plaintiff 'V' cannot claim any amount and seek to recover the same from the second defendant is true and I have no hesitation in accepting the same.

24. On the question of concluded contract between the parties, I have no hesitation in accepting the case of the plaintiff 'V' that second defendant had agreed to sell the flat and plaintiff 'V' has always been ready and willing to perform her part of the contract.

25. In suit No. 451/86 there is one more aspect i.e. with reference to the claim of

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specific relief against the 6th defendant. The 6th defendant has not chosen to contest and was set ex parte. From the documents filed in the case, I find no difficulty in coming to the conclusion that the 6th defendant is only an alias or alter ego of the second defendant. Therefore, the second defendant had not delivered possession of the complete area agreed to by him to the plaintiff 'V'.

26. With reference to suit No. 450/86, Mr. Sood has not entered the witness box and P.W.2 as attorney sought to give evidence on his behalf also. P.W.2 speaks about the transaction between 'S' and the second defendant.

Q.60. Please see the documents at pages 14 to 16 of documents filed in suit 450/86, by the plaintiff and tell us about what they are about?

Ans. Ex.PW2/15, 2/16 are house tax receipts. Ex.PW.2/17 is the sanction order issued by the MCD.

Q.61. Please see the document at page 17, what is this about?

Ans. Ex.Pw.2/18 is the certificate issued by HDFC that original agreement to sale is deposited with HDFC for the loan advanced to Admiral Sood.

Q.62. Please see page 18, what is this document about and who has signed it?

Ans. Ex. PW.2/19 is the agreement to sell signed by defendant No. 2 as seller and Admiral

Sood as purchaser and witnessed by me and attested at Delhi High Court.

Q.63. Was this agreement signed in your presence?

Ans. Yes by both the seller and the purchaser and was notarised in my presence.

Q.64. Please see page 23, what is this document about?

Ans. This is the building plan signed by defendant 2 on behalf of defendant 1 and Admiral R.R. Sood as purchaser. This is Ex. P.9.

Q.65. Please see the statement showing payments to the defendant, is the statement correct?

Ans. Yes. The statement is filed by the party today and is marked as Ex.P.W.2/20.

Q.66. Was the plaintiff in suit 450/86 ready and willing at all material times to perform his obligations under the agreement to sell?

Ans. Yes.

Q.67. Please state whether the agreement to sell dated 2.11.83 was executed by plaintiff in suit No. 450/86 was confirmed and irrevocable agreement.

Ans. Yes.

Q.68. Please see the document Ex. PW.2/21 who has signed this, whether this was signed in your presence?

Ans. This is the original agreement to sell between defendant 1 and Admiral Sood and has been signed in my presence by

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defendant 2 for defendant 1 and Adm Sood. It bears my signature as witness and was notarised in my presence."

P.W.2 does not speak about Ex. P.17 and P.18, which are stated to be receipts issued by the second defendant for the payment of cash made by plaintiff 'S'. These two payments were made by plaintiff 'S' to the second defendant. It is not the case of P.W.2 that he was present, when the case of plaintiff 'V' about the loan cannot be accepted, the case of plaintiff 'S' relating to 'loan' would automatically fall to the ground because the nature of the transactions between plaintiff 'V', plaintiff 'S' and the second defendant were the same. Because misunderstanding had arisen between the parties they had chosen to put forth extreme contentions with a view to defeating the rights of the other party. Therefore, the case of plaintiff 'S' that Rs. 70,000/- was paid for to be returned by the second defendant cannot at all be accepted. Though P.W.2 purported to represent the plaintiff 'S', as power of attorney holder, on this aspect of the case evidence of plaintiff 'S' is very essential. Non-examination of 'S' is very crucial and it is well settled that the parties must place all evidence before the Court and they cannot keep themselves out of the witness box leaving the Court to guess

about facts. Therefore, I have no hesitation to draw adverse inference against plaintiff 'S' relating to the transaction of 'loan' of Rs. 70,000/- to the second defendant. Therefore, the case of plaintiffs 'V' and 'S' on the question of 'loan' has to be rejected. Even in the statement filed before this Court by plaintiffs 'V' and 'S' dated 28.4.95, the amounts mentioned by second defendant before the Income Tax Department are referred to. Therefore, on the basis of the oral evidence of P.W.1, P.W.2 and D1W1 and the documentary evidence including the documents summoned from the Income Tax Department by the plaintiff 'V', the conclusion is irresistible that there was a concluded contract between plaintiff 'V' and second defendant and plaintiff 'S' and the second defendant and all the amounts paid by plaintiffs 'V' and 'S' would go to the cost of the flats. Whether the amounts given by plaintiff 'S' is mentioned by the second defendant before the Income Tax Department is there before Court or not, the pattern being the same as that of plaintiff 'V', the inference is that plaintiff 'S' paid Rs. 70,000/- in the form of 'loan' towards the cost of the flat.

27. The learned senior counsel Mr. Ghosh submitted that the case of the plaintiffs must be accepted in toto and the second defendant

appearing in person submitted that the plaintiffs did not have any final agreement and, therefore, their claim for specific performance must be rejected and they are not entitled to the return of the money also.

28. Having regard to the facts and circumstances, which I had analysed above, it is clear that there was a concluded contract for the sale of flats between plaintiff 'V' and the second defendant and plaintiff 'S' and the second defendant.

29. I shall now take up the issues and give my findings.

30. In suit No. 451/86 on issue No. 1 I find that the plaint has been signed and verified by a competent person. The issue is answered accordingly.

31. On issue No. 2 I find that there was a concluded agreement on 2.11.1983 between plaintiff and defendants 1 to 5. The issue is answered accordingly.

32. On issue No. 3 I find that the defendants are liable to execute the sale deed. The issue is answered accordingly.

33. On issue No. 5 I find that the plaintiff has always been ready and willing to perform her part of the contract. The issue is answered

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accordingly.

34. On issue No. 6 I find that as contended by defendants 1 to 5 there was an agreement executed on 2.11.1983, which is marked as Ex.DPW.1, and that is also binding on the parties.

35. On Issue Nos. 4, 7 and 8, I find that the plaintiff is not entitled to recover any amount and the plaintiff is also not obliged to pay any amount over and above the amounts paid to the defendants No. 1 to 5. These issues are accordingly answered.

36. On issue No. 9 I find that 6th defendant is bound to convey to the plaintiff along with defendants 1 to 5 the third bed room, which formed part of the agreement between the parties.

37. In suit No. 450/86 on issue No. 1, I find that the plaint has been signed and verified by a competent person. This issue is answered accordingly.

38. On issue No. 2 I find that there was a concluded contract on 2.11.83. This issue is answered accordingly.

39. On issues 3 and 5, I find that the plaintiff has always been ready and willing to perform his part of the contract and the defendants 1 to 5 are bound to execute the sale deed in favour of the plaintiff. It has already been found that possession has already been handed

over to the plaintiff. These issues are decided accordingly.

40. Issue No. 6 does not arise for consideration in this case.

41. On issues No. 4, 7 and 8 I find that the plaintiff has given the full consideration to the defendants 1 to 5 and defendants are not obliged to pay any amount to the plaintiff. These issues are answered accordingly.

42. Consequently, in suit No. 451/86, there shall be a decree :-

(i) directing defendants 1 to 6 to execute a sale deed in favour of the plaintiff 'V' with reference to flat No. S-2, Green Park Extension, New Delhi within eight weeks from today and in the event of defendants failing to execute the sale deed within the time stipulated, an officer of this Court shall execute the sale deed in favour of the plaintiff in accordance with law;

(ii) dismissing the claim of the plaintiff for the recovery of Rs. 1,45,000/-;

(iii) directing the defendants 1 to 6 to put the plaintiff in possession of the third bed room in S-2, Green Park Extension, New Delhi;

(iv) directing the parties to bear their own costs.

In suit No. 450/86 there shall be a decree :

(i) directing defendants 1 to 5 to execute a sale deed in favour of the plaintiff 'S' with reference to flat No. S-1, Green Park Extension,

New Delhi within eight weeks from today and in the event of defendants failing to execute the sale deed within the time stipulated, an officer of this Court shall execute the sale deed in favour of the plaintiff in accordance with law;

(ii) dismissing the claim of the plaintiff for the recovery of Rs. 70,000/-.

(iii) directing the parties to bear their own costs.

July 5, 1996.

'9'



K. RAMAMOORTHY, J.

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v/o 13, Rule 9
also 1020, Rule 5