

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

% **Date of decision:31<sup>st</sup> January, 2014.**

+ **RFA 500/2012, CM No.20871/2012 (for condonation of 1577 days delay in filing the appeal) and CM No.20867/2012 (for stay)**

**ING VYSYA BANK LTD. .... Appellant**

Through: Mr. Rajiv Bansal with Mr. Meenal Kashyap, Mr. S.K. Garg & Mr. Gaurav Kumar Singh, Advocates.

Versus

**VIKRAM HINGORANI & ORS .... Respondents**

Through: Dr. Aman Hingorani with Ms. Priya Hingorani, Advocates for R-1 to 6.  
Mr. S.S. Tripathi, Adv. for R-8 & 9.

**AND**

+ **RFA 93/2013 & CM No.4689/2013 (u/S 151 CPC)**

**ING VYSYA BANK LTD. .... Appellant**

Through: Mr. Rajiv Bansal with Mr. Meenal Kashyap, Mr. S.K. Garg & Mr. Gaurav Kumar Singh, Advocates.

Versus

**VIKRAM HINGORANI AND ORS .... Respondents**

Through: Dr. Aman Hingorani with Ms. Priya Hingorani, Advocates for R-1 to 6.  
Mr. S.S. Tripathi, Adv. for R-8 & 9.

**AND**

+ **RFA 105/2013 & CM No.3127/2013(for stay)**

**PUSHPA BUILDER LTD. .... Appellant**

Through: Mr. Chetan Sharma, Sr. Adv. with Ms. Gurkamal Hora Arora, Adv.

Versus

**VIKRAM HINGORANI & ORS**

**..... Respondents**

Through: Dr. Aman Hingorani with Ms. Priya  
Hingorani, Advocates for R-1 to 6.  
Mr. S.S. Tripathi, Adv. for R-8 & 9.

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

**RAJIV SAHAI ENDLAW, J.**

1. All the three appeals arise from CS No.217/2011 (Old No.364/2004) of the Court of the Additional District Judge (ADJ)-08, Central Delhi. While RFA No.500/2012 impugns the judgment and preliminary and final decree dated 24<sup>th</sup> April, 2008 of partition in the said suit, RFAs No.93/2013 & 105/2013 impugn the subsequent judgment and decree dated 15<sup>th</sup> January, 2013 on admissions, of possession of portions of property No.13, Patel Road, West Patel Nagar, Delhi in respective occupation of appellants in RFAs No.93/2013 & 105/2013.

2. RFA No.500/2012 is accompanied with an application for condonation of 1577 days delay in preferring the same. Notice only of the said application for condonation of delay was issued and to which replies have been filed by the contesting respondents.

3. Notice of RFA No.93/2013 was also issued on 13<sup>th</sup> February, 2013 but vide order of the said date, the application for interim relief for stay of operation of the judgment and decree dated 15<sup>th</sup> January, 2013 on admissions

of recovery of possession, was dismissed. The appellant ING Vysya Bank Ltd. (Bank) preferred SLP(C) No.9211/2013 to the Supreme Court which was granted and converted into Civil Appeal No.4609/2013 and vide order dated 22<sup>nd</sup> February, 2013, while issuing notice, the execution of the decree for possession against the Bank was stayed. Subsequently, the counsels for the decree holders (respondents no. 1 to 6 in these appeals) made a statement that they will not press for eviction of the Bank till the disposal of the appeal. Accepting the said statement and directing this Court to endeavour to hear and dispose of the appeal as expeditiously as possible and as far as practically within a period of six months, the said appeal was disposed of.

4. Notice of RFA No.105/2013 was also issued.

5. The counsel for the Bank, the senior counsel for Pushpa Builder Ltd. (Builder) and Dr. Aman Hingorani, Advocate have been heard.

6. The respondents No.1 to 6 i.e. Dr. Vikram Hingorani, Ms. Anita Hingorani, Ms. Lata Hingorani, Dr. Aman Hingorani, Ms. Shweta Hingorani and Ms. Priya Hingorani (all hereinafter called as the plaintiffs) instituted the suit from which these appeals arise, for the relief of delivery of legacy/share in immovable property with consequential reliefs of partition, injunction and rendition of accounts, pleading:

- (i) that their paternal grandfather Mr. Hardasmal Banasing Hingorani, in December, 1956, had purchased the property No.13, Patel Road, West Patel Nagar, Delhi in the name of Mr. R.B. Tahilramani being the husband of his daughter Ms. Sati Tahilramani;
- (ii) that Mr. R.B. Tahilramani vide registered Gift Deed dated 27<sup>th</sup> July, 1959 gifted the said property to his wife Mrs. Sati Tahilramani;
- (iii) that the monies on the acquisition and construction of the said property were however also contributed by Mr. Nirmal Hingorani, son of Mr. Hardasmal Banasing Hingorani;
- (iv) that disputes arose between Mrs. Sati Tahilramani, Mr. Hardasmal Banasing Hingorani and Mr. Nirmal Hingorani as to the ownership of the said property as well as another property at Bombay and which were referred to arbitration and in which arbitration proceedings, Mrs. Sati Tahilramani took a stand that she was the owner of half share only in the property and the other half share was owned by her father Mr. Hardasmal Banasing Hingorani;

- (v) Mr. Hardasmal Banasing Hingorani executed his Will dated 13<sup>th</sup> September, 1974 whereunder he bequeathed his undivided half share in the said property to his wife Ms. Rochi Hingorani and after her death equally to (i) his another son Mr. Bahar Hingorani; (ii) to his yet another son Mr. Mohan Hingorani; and (iii) to Dr. Aman Hingorani, Dr. Shweta Hingorani and Ms. Priya Hingorani being the children of his son Mr. Nirmal Hingorani;
- (vi) that in the arbitration proceedings aforesaid, an Award dated 30<sup>th</sup> September, 1974 was published holding/declaring Mr. Hardasmal Banasing Hingorani and Mrs. Sati Tahilramani to be the owners in equal share of the said property; Mr. Nirmal Hingorani was held to be the sole owner of the Bombay property;
- (vii) that the said Award was vide order dated 25<sup>th</sup> November, 1975 of this Court made the rule of the Court and a decree passed in terms thereof;
- (viii) that Mr. Hardasmal Banasing Hingorani died on 22<sup>nd</sup> February, 1981 and as per his Will aforesaid, his half undivided share in

the property devolved on his wife Mrs. Rochi Hingorani for her lifetime;

- (ix) that Mrs. Sati Tahilramani though owner of only one half share in the property, entered into a Collaboration Agreement dated 20<sup>th</sup> September, 1988 with the builder, whereunder the builder was to at its own expense construct a new building in place of the construction then existing on the said property and was to in turn take 50% of the sale proceeds of the new construction on the said property; a Power of Attorney dated 29<sup>th</sup> August, 1988 was also executed in favour of the Managing Director of the builder;
- (x) that the builder in or about the year 1990 demolished the old construction on the said property and commenced new construction;
- (xi) that however the Municipal Corporation served a Notice dated 28<sup>th</sup> July, 1992 alleging unauthorized construction in the property and owing whereto Mrs. Sati Tahilramani vide Legal Notice dated 17<sup>th</sup> October, 1992 terminated the Collaboration Agreement with the builder and revoked the Power of Attorney

given to the Managing Director of the builder;

(xii) Mrs. Sati Tahilramani on 18<sup>th</sup> April, 1994 also filed suit No.935/1994 in this Court to restrain the builder and its Managing Director from raising further construction on the property and for demolition of the unauthorized construction raised; vide order dated 28<sup>th</sup> April, 1994 in the said suit, the builder and its Managing Director were so restrained from raising unauthorized construction in the property;

(xiii) that on 5<sup>th</sup> April, 1994, the builder also filed a suit No. 740/1994 under Section 20 of the Arbitration Act, 1940 in this Court seeking reference to arbitration of disputes which had arisen with Mrs. Sati Tahilramani with respect to the Collaboration Agreement; vide order dated 6<sup>th</sup> April, 1994 in the said suit, *status quo* qua title and possession with respect to the property was directed to be maintained;

(xiv) Mrs. Rochi Hingorani died on 13<sup>th</sup> June, 1996; her son Mr. Bahar Hingorani had predeceased her; accordingly, upon coming to an end of the life estate of Mrs. Rochi Hingorani of half share of the said property, the said half share devolved

upon, (i) Dr. Vikram Hingorani, Mrs. Anita Bhawnani and Mrs. Lata Sabharwal being the heirs of Mr. Bahar Hingorani; and, (ii) Dr. Aman Hingorani @ Mahesh, Dr. Shweta Hingorani @ Gita and Ms. Priya Hingorani being the children of Mr. Nirmal Hingorani and upon Mr. Mohan Hingorani (respondent no. 7 in the appeals);

(xv) that the suit under Section 20 of the Arbitration Act, 1940 filed by the builder was dismissed in default on 24<sup>th</sup> September, 1998; an application for restoration was filed but the same was also dismissed on 2<sup>nd</sup> February, 1999;

(xvi) Mrs. Sati Tahilramani died on 21<sup>st</sup> January, 2002 whereupon her half share in the property devolved on her two sons Mr. Gul @ George R. Tahilramani and Mr. Gautam R. Tahilramani (respondent no. 8 and 9 in the appeals);

(xvii) the plaintiffs called upon Mr. Mohan Hingorani, Mr. Gul @ George R. Tahilramani and Mr. Gautam R. Tahilramani to partition the property but to no avail;

(xviii) that the builder had granted license to the bank of a substantial portion of the said property for opening its branch and a



showroom against the security deposit of Rs.2.48 crores and annual payment of about Rs.14 lacs as licence fee; and,

(xix) that neither the builder nor the bank which had come into use and occupation of the substantial portion of the property through the builder had any right to the property after the dismissal of the suit under Section 20 of the Arbitration Act, 1940 earlier filed by the builder.

Accordingly, the suit for the reliefs of (i) partition of the property; (ii) delivery of possession of the property; (iii) injunction; and, (iv) rendition of accounts, was filed impleading the aforesaid Mr. Mohan Hingorani, Mr. Gul @ George R. Tahilramani and Mr. Gautam R. Tahilramani, builder and its Managing Director and the bank as defendants thereto.

7. Though Mr. Gul @ George R. Tahilramani and Mr. Gautam R. Tahilramani being the sons of Mrs. Sati Tahilramani initially contested the suit but need is not felt to refer to their defence since subsequently an application under Order 23 Rule 3 of the CPC was filed by the plaintiffs on the one hand and the said Mr. Gul @ George R. Tahilramani and Mr. Gautam R. Tahilramani on the other hand.

8. The builder and its Managing Director contested the suit, by filing a

written statement, on the grounds:-

- (a) that the plaintiffs had no right to the property which belonged exclusively to Mrs. Sati Tahilramani;
- (b) that the plaintiffs had not asserted any rights in the property and had allowed Mrs. Sati Tahilramani to deal with the same as absolute owner thereof;
- (c) denying the Will of Mr. Hardasmal Banasing Hingorani under which the plaintiffs claimed;
- (d) that Mrs. Sati Tahilramani had no right to unilaterally cancel the Collaboration Agreement and revoke the Power of Attorney;
- (e) that the builder had the right to recover 50% of the sale proceeds of the property;
- (f) that the 50% of the sale proceeds of the property had already been paid to Mrs. Sati Tahilramani in her lifetime in terms of the Collaboration Agreement; and,
- (g) that the builder had created third party interest in favour of various persons with respect to different portions of the property in the years 1991-1992 as per the Collaboration Agreement.

9. The bank also contested the suit, by filing a written statement, on the grounds:-

- A. that it was the owner in possession of the property by virtue of Agreement dated 20<sup>th</sup> March, 1995 and Memorandum of Understanding (MoU) dated 20<sup>th</sup> March, 1995 entered into with the builder and in terms of the Collaboration Agreement between the builder and Mrs. Sati Tahilramani;
- B. that it had paid the entire consideration to the builder who had handed over possession to it on 22<sup>nd</sup> November, 1995; and,
- C. that it had also paid the misuse/regularization/commercial charges with respect to the portion of the property in its occupation and had also been paying the Property Tax with respect to the said portion of the property.

Else, the defence of the bank was the same as that of the builder.

10. The plaintiffs filed replications to the written statements of the builder and the bank *inter alia* pleading that the possession of the builder of the property was on behalf of the owners of the property and the builder, after the termination of the Agreement, had no lien over the property; that the builder inducted the Bank into the property in violation of the injunction

orders aforesaid.

11. The defendant no.1 (respondent no. 7 in these appeals) Mr. Mohan Hingorani did not contest the suit and was proceeded against *ex parte*. He has not appeared before this court also.

12. The learned Addl. District Judge vide order dated 14<sup>th</sup> July, 2005 directed the builder to deposit in the Court the license fee collected by it from the bank. FAO No.325-326/2005 was preferred to this Court against the said order. The contention in the said appeal, of the builder and the bank also was, of their rights in the property under the Collaboration Agreement. Per contra, the contention of the plaintiffs herein was that the Collaboration Agreement was not fully acted upon and in any case had been terminated. This Court, vide order dated 18<sup>th</sup> May, 2011, while dismissing the appeal, held:-

*“that the Collaboration Agreement was not fully performed. Once a Collaboration Agreement is not performed, the appellant no.1/builder cannot claim complete rights under the Collaboration Agreement without having performed the complete obligation. A contract is a package deal. Contract means reciprocal promises which have to be performed before benefit is claimed of the corresponding reciprocal promise. Considering the fact that the builder had filed a suit to claim rights on the basis of Collaboration Agreement and which suit was not pursued by the builder itself and*

*which dismissal in default became final vide order dated 2.2.1999 i.e. more than 11 years back, the position which would emerge is that the rents from the property which are being received need to be protected by depositing the same in the Court”.*

Of course vide subsequent order dated 29<sup>th</sup> July, 2011 it was clarified that the said observations were relevant to the issue of disposal of interim application only.

13. An application dated 28<sup>th</sup> March, 2008 was filed by the plaintiffs and the defendants no.2&3 (respondents no. 8 and 9 in these appeals) Mr. Gul @ George R. Tahilramani and Mr. Gautam R. Tahilramani under Order 23 Rule 3 of the CPC admitting that the plaintiffs no.1 to 3 (i.e. heirs of Bahar Hingorani) on the one hand, plaintiffs no.4 to 6 (i.e. children of Nirmal Hingorani) on the second hand and the defendant no.1 Mohan Hingorani on the third hand, each had 1/6<sup>th</sup> share in the property and the defendants no.2&3 had the remaining half share in the property and dividing the property between themselves by metes and bounds.

14. On the aforesaid application under Order 23 Rule 3 of the CPC, a preliminary decree for partition declaring the shares as aforesaid of the parties and also a final decree for partition by metes and bounds on the terms recorded in the application was passed in the Suit on 24<sup>th</sup> April, 2008 and

against which decree RFA No.500/2012 along with an application for condonation of 1577 days delay in filing thereof has been filed.

15. The builder as well as the bank filed applications under proviso to Rule 3 of Order 23 of the CPC, objecting to the compromise aforesaid between the plaintiffs on the one hand and the defendants no.2&3 on the other hand resulting in the preliminary and final decree for partition, asserting their rights in the property under the Collaboration Agreement aforesaid executed by Mrs. Sati Tahilramani. The said applications were dismissed vide a detailed order dated 23<sup>rd</sup> September, 2011 of the learned Addl. District Judge, finding/observing/holding (i) that the contention of the builder and the bank that Mrs. Sati Tahilramani was the sole absolute owner of the property was contrary to the judgment dated 25<sup>th</sup> November, 1975 of this Court in terms of the arbitral award dated 30<sup>th</sup> September, 1974 declaring Mr. Hardasmal Banasing Hingorani and Mrs. Sati Tahilramani to be equal owners of the property; (ii) that though the builder and the bank had challenged the Will of Mr. Hardasmal Banasing Hingorani but being not his heirs/family members, were not entitled to do so; (iii) that no rights in the property were transferred in favour of the builder under the Collaboration Agreement or the Power of Attorney in favour of the Managing Director of

the builder; reliance in this regard was placed on ***Suraj Lamp and Industries (P) Ltd. Vs. State of Haryana*** (2009) 7 SCC 363; (iv) that the builder and the bank were not required to be joined as a party to the compromise between the plaintiffs on the one hand and the defendants no. 2 and 3 on the other hand; the builder and the bank were even otherwise not the members of the family to be joined to the family settlement leading to the compromise; (v) that the builder and the bank even otherwise being not parties to the compromise were not entitled to challenge the same; reliance in this regard was placed on ***H.C. Shastri Vs. Dolphin Canpack P Ltd.*** 67 (1997) DLT. 652 and on ***Bai Chanchal . Vs. Syed Jalaluddin*** AIR1971 SC1081; and, (vi) that it is open to a few of the parties to a litigation to enter into a mutual settlement and it is not necessary for them to join the other parties to the suit in the compromise and the suit can continue qua the remaining defendants; reliance in this regard was placed on ***Pushpa Devi Bhagat Vs. Rajinder Singh*** AIR 2006 SC 2628.

16. The builder preferred CM (M) No.29/2012 to this Court impugning the order dated 23<sup>rd</sup> September, 2011 supra to the Addl. District Judge dismissing the application of the builder objecting to the compromise between the plaintiffs on the one hand and the defendants no.2 & 3 on the

other hand and the preliminary and the final decree for partition in consequence thereto. The said CM (M) petition was dismissed vide detailed Judgment dated 13<sup>th</sup> January, 2012, observing (i) that the builder and its Managing Director under the Collaboration Agreement were acting only as an agent of Mrs. Sati Tahilramani and which agency was terminated by Mrs. Sati Tahilramani vide Legal Notice dated 17<sup>th</sup> October, 1992 and vide Public Notice dated 24<sup>th</sup> March, 1994 and whereafter the builder had no right to remain in the property or to handover possession of any part of the property to the bank; (ii) that the delivery of possession of part of the property by the builder to the bank was “admittedly” in contravention of the *status quo* order which had been passed on 6<sup>th</sup> April, 1994 in suit No.740/1994 supra; (iii) that though suit No.740/1994 was filed by the builder challenging the termination of the Collaboration Agreement and revocation of the Power of Attorney but the said suit itself was dismissed in default on 24<sup>th</sup> September, 1998; (iv) reliance was placed on *Southern Roadways Ltd., Madurai Vs. S.M. Krishnan* AIR 1990 SC 673 to hold that an agent has no right to remain in possession of the property after termination of his agency; (v) reliance was also placed on *Master Builder Vs. United States of America* 43 (1991) DLT 719 (DB) holding that where the agreement of the builder has been



terminated, the builder/contractor could not be allowed to remain in possession of the property and could not hold on to the property; (vi) that the objections to the compromise were in any case misconceived as the appropriate remedy against allowing or refusing a compromise is an appeal; reliance in this regard was placed on *The National Small Industries Corporation Ltd. Vs. M/s Industrial Textile Products (P) Ltd.* 2001 (60) DRJ 144; (vii) “admittedly” in terms of the Collaboration Agreement the builder did not have any right, title or interest in the property; under the said agreement the builder was to at best get 50% of the sale proceeds and that too only after the sale of the property; (viii) “admittedly” the construction was yet to be completed and thus the question of sale did not arise; (ix) rightly or wrongly the Collaboration Agreement had been terminated and the suit filed by the builder challenging the said termination stood dismissed; (x) the right if any of the builder was to prefer an appeal against the compromise decree; and, (xi) that the compromise decree was of sharing of rights in the property between the co-owners; the builder on the basis of the Collaboration Agreement had no such rights; thus nothing precluded the plaintiffs and the defendants no.2&3 to enter into the compromise.

17. The bank also preferred CM (M) No.389/2012 to this Court against

the dismissal of its application objecting to the compromise aforesaid but on 30<sup>th</sup> March, 2012 withdrew the said petition to seek appropriate legal remedy by filing an appeal. Vide order dated 30<sup>th</sup> March, 2012, the said petition was dismissed as withdrawn. Thereafter RFA 500/2012 has been filed.

18. The builder preferred RFA No.185/2012 in this Court along with an application for condonation of 1327 days delay in filing the same, challenging the compromise, preliminary and final decree for partition but on 23<sup>rd</sup> April, 2012 withdrew the same stating that it was intending to challenge the order dated 13<sup>th</sup> January, 2012 supra of dismissal of CM(M) No.29/2012.

19. The plaintiffs thereafter moved an application under Order 12 Rule 6 of the CPC before the Addl. District Judge, for a decree for possession against the builder and the bank, on admissions, pleading:-

(a) that their predecessor-in-interest Mr. Hardasmal Banasing Hingorani was the owner of one half undivided share of the property as per the judgment and decree dated 25<sup>th</sup> November, 1975 of this Court in suit No.640-A/1974 making the arbitral award dated 30<sup>th</sup> September, 1974 a *Rule* of the Court;

(b) that the Will dated 13<sup>th</sup> September, 1974 of Mr. Hardasmal Banasing Hingorani had been admitted by all his natural heirs

and in terms thereof a preliminary decree for partition of the property had already been passed.

- (c) that though the builder and bank were disputing the Will of Mr. Hardasmal Banasing Hingorani but had no locus to do so;
- (d) that the builder was inducted into the suit premises only in the year 1988 and the bank was inducted into a portion of the suit property by the builder only in the year 1995 and there was no occasion for either of them to in any case know of the Will dated 13<sup>th</sup> September, 1974 of Mr. Hardasmal Banasing Hingorani;
- (e) that the Collaboration Agreement under which Mrs. Sati Tahilramani had inducted the builder was unregistered and did not confer any right in the property on the builder;
- (f) that as per the admitted terms of the Collaboration Agreement, the builder was not to have any title in the suit property but merely a claim to 50% of the sale proceeds of the flats/units/floors constructed on the property within a period of 20 months of the date of sanction of building plans;
- (g) that the builder also in his written statement had admitted the

said position;

- (h) that the builder had not completed the construction which was still incomplete; in fact the Collaboration Agreement was not fully acted upon and had been revoked/terminated.
- (i) that the builder by filing suit No.740/1992 in this Court had admitted termination of the Collaboration Agreement vide Legal Notice dated 17<sup>th</sup> October, 1992 followed by Public Notice dated 24<sup>th</sup> March, 1994;
- (j) that the challenge by the builder to the termination of the Collaboration Agreement was however dismissed on 24<sup>th</sup> September, 1998/2<sup>nd</sup> February, 1999;
- (k) that the bank was inducted in the suit property by the builder vide License Deed dated 20<sup>th</sup> March, 1995 in violation of the order dated 6<sup>th</sup> April, 1994 of *status quo* in suit No.740/1994;
- (l) that the builder being only an agent of Mrs. Sati Tahilramani for the specific purpose of construction, could not hold on to the property after the agency agreement had come to an end; accordingly the builder had no right of possession, management and control over any portion of the property or to even induct

the bank into possession of the property; and,

- (m) that the portion of the property in occupation of the bank, under the final decree for partition had fallen to the share of the plaintiffs and the bank had no right to continue in occupation thereof.

20. The builder filed a reply to the aforesaid application under Order 12 Rule 6 of the CPC pleading:-

- (i) that Mrs. Sati Tahilramani was the absolute owner of the property;
- (ii) Mrs. Sati Tahilramani as absolute owner had entered into the Collaboration Agreement dated 20<sup>th</sup> September, 1988 with the builder;
- (iii) though Mr. Hardasmal Banasing Hingorani was vide judgment and decree 25<sup>th</sup> November, 1975 of this Court in suit No.640-A/1974 making the arbitral award dated 30<sup>th</sup> September, 1974 a *Rule* of the Court had become the owner of one half share in the property with the other half share being owned by Mrs. Sati Tahilramani but the claim of the plaintiffs under the Will of Mr. Hardasmal Banasing Hingorani was unsustainable as:-

- A. though Mrs. Sati Tahilramani was the executrix of the said Will but continued to act as the absolute owner of the property; and,
  - B. no probate of the said Will had been obtained;
  - C. that the present suit had been filed in the year 2004 i.e. almost after 30 years of the decree dated 25<sup>th</sup> November, 1975 making the arbitral award a *Rule* of the Court;
- (iv) that Mrs. Sati Tahilramani had in pursuance to the Collaboration Agreement given possession of the property to the builder;
  - (v) that under the Collaboration Agreement the builder was empowered to mortgage, sell, alienate, transfer or part with possession of the property;
  - (vi) that the builder had paid large sums of money to Mrs. Sati Tahilramani towards her 50% share of the sale proceeds in the property;

- (vii) that the plaintiffs were nowhere in picture when the Collaboration Agreement was entered into, or when the earlier construction was demolished and new construction raised on the property;
- (viii) that the builder was in possession of the property in its independent right under the Collaboration Agreement;
- (ix) that it was expressly provided in the Collaboration Agreement that the builder was not the agent of Mrs. Sati Tahilramani;
- (x) that the provisions of Order 12 Rule 6 were not attracted;
- (xi) that the plaintiffs had not paid the appropriate Court Fees; and,
- (xii) that the suit filed by Mrs. Sati Tahilramani against the builder was also dismissed in default on 4<sup>th</sup> May, 2007 and as such the validity of cancellation of the Collaboration Agreement had not been adjudicated.

21. The bank also contested the application under Order 12 Rule 6 of the CPC on the same grounds as the builder and additionally pleading:-

- I. that the bank had vide Agreement dated 20<sup>th</sup> March, 1995 r/w MoU dated 20<sup>th</sup> March, 1995 with the builder acquired three

flats in the property and had paid the entire amount of consideration therefor to the builder; and,

II. that the bank was a *bona fide* purchaser of the said partition of the property and legal owner thereof.

22. The learned Addl. District Judge has vide impugned judgment and decree dated 15<sup>th</sup> January, 2013 allowed the application of the plaintiffs under Order 12 Rule 6 of the CPC and passed a decree for possession against the builder and the bank, finding/observing/holding:-

A. that it was not in dispute that this Court vide decree dated 25<sup>th</sup> November, 1975 in the suit No.640-A/1974 in terms of made the arbitral award, declared Mr. Hardasmal Banasing Hingorani and Mrs. Sati Tahilramani as owners in equal share of the property;

B. as per the aforesaid decree which was not challenged at any time by Mrs. Sati Tahilramani, Mr. Hardasmal Banasing Hingorani was the owner of the 50% of the property;

C. the legal heirs of Mr. Hardasmal Banasing Hingorani were not disputing his Will dated 13<sup>th</sup> September, 1974 whereunder the plaintiffs and the defendant no.1 had succeeded to the 50%



share of Mr. Hardasmal Banasing Hingorani in the property;

- D. that under the Collaboration Agreement relied upon by the builder and the bank, the builder only had a right of 50% of the sale proceeds of the property;
- E. that as per the judgment dated 13<sup>th</sup> January, 2012 supra in CM(M) No.29/2012 preferred by the builder and which had attained finality, the builder had no right, title or interest in the property;
- F. it was the admitted position that the Collaboration Agreement had been terminated by Mrs. Sati Tahilramani vide Notice dated 17<sup>th</sup> October, 1992 followed by Public Notice dated 24<sup>th</sup> March, 1994;
- G. it was again the admitted position that though the builder had challenged the said termination by filing a suit but the said suit was dismissed in default vide order dated 24<sup>th</sup> September, 1998;
- H. upon dismissal of the suit aforesaid the challenge to the termination of Collaboration Agreement had come to an end and had attained finality;

- I. that the builder thereafter had no right to remain in possession of the property;
- J. that the bank had no privity of contract with the plaintiffs and claimed rights only through the builder;
- K. that though the bank claimed to be in possession as owner of the property through the builder but the builder refuted the said right of the bank and according to the builder the bank was in occupation of the property as a licensee and not as the owner;
- L. that the documents executed between the builder and the bank also showed the transaction to be only of license and not of sale;
- M. that the bank cannot get a better title than the builder;
- N. that when the builder itself was not having any right, title or interest in the property it could not have transferred any such right to the bank;
- O. that the contention of the bank of being a *bona fide* purchaser was thus without any merit;
- P. that the property already stood partitioned by metes and bounds between the plaintiffs and the defendants no.1to3;

- Q. that though the said partition had been challenged by the bank and the builder but without any success;
- R. that as per the said final decree for partition, the plaintiffs are the owners of the portion in occupation of the bank; and,
- S. that there was thus nothing requiring adjudication and there is no impediment to granting a decree for possession in favour of the plaintiffs.

23. The counsel for the bank has argued:-

- (a) that there is no prayer in the plaint for relief of possession;
- (b) that the bank was originally not even impleaded as a defendant to the suit and though was subsequently added as a defendant but no amendment to the plaint incorporating any pleas against the bank was sought with the result that no averments/relief exist in the plaint against the bank (however the counsel admits that no such objection has been taken in the written statement);
- (c) that the relief claimed in the plaint for delivery of legacy can only be with respect to movable and not with respect to immovable property; reliance is placed on the definition of

legacy in the Oxford English Reference Dictionary; P. Ramanatha Aiyar's The Law Lexicon, Black's Law Dictionary and West's Legal Thesaurus/Dictionary;

- (d) thus no decree for recovery of movable property in possession of the bank could have been passed;
- (e) that the Gift Deed of the property by Mr. R.B.Tahilramani in favour of Mrs. Sati Tahilramani was not set aside by the Arbitrator in his award (however on enquiry it is again admitted that no such plea exists in the pleadings);
- (f) that there is no judgment declaring Mr. Hardasmal Banasing Hingorani as the owner of 50% share in the property;
- (g) that the plaintiffs are in collusion with the defendants no.2&3;
- (h) that the said collusion is evident from the fact that though the predecessor of the defendants no.2&3 namely Mrs. Sati Tahilramani had entered into a Collaboration Agreement and through whom the bank is claiming but in the division effected by the plaintiffs and the defendants no.2&3 of the property between themselves, the portion in occupation of the bank has been allocated to the plaintiffs and not to the defendants no.2&3

who as heirs of Mrs. Sati Tahilramani who had entered into the Collaboration Agreement could not have recovered possession from the bank.

- (i) that the decree is against the equities of the case;
- (j) that the bank has been wronged; and,
- (k) alternatively it is argued that liberty be granted to the bank to proceed against the heirs of Mrs. Sati Tahilramani.

24. The senior counsel for the builder has argued, (i) that the Arbitration Award dated 30<sup>th</sup> September, 1974 is not registered; reliance is placed on paras 5,7,15 & 20 *Lachhman Dass Vs. Ram Lal* (1989) 3 SCC 99 and on *Satish Kumar Vs. Surinder Kumar* AIR 1970 SC 833; (ii) that there were no admissions on the basis of which a decree under Order 12 Rule 6 of the CPC could have been passed; (iii) attention is invited to the Collaboration Agreement to contend that the same amounts to 'liquified sale' and having been acted upon by Mrs. Sati Tahilramani taking 50% of the total sale proceeds, the builder cannot be deprived of the rights thereunder; (iv) that there has been no adjudication of the rights claimed by the builder; attention is invited to para 3 of the written statement on merits of the builder containing the plea that the builder has a right to retain 50% of the share in

the said project as the sale proceeds of the remaining 50% have already been paid to Mrs. Sati Tahilramani during her lifetime; (v) attention is invited to the reply filed by the builder to the application under Order 12 Rule 6 of the CPC where in para 16 it is pleaded that though the defendants no.2&3 had initially contested the claim of the plaintiffs but subsequently took a summersault and admitted claim of the plaintiffs in collusion with the plaintiffs; (vi) that the vested rights of the builder cannot be disturbed; (vii) that the Trial Court proceeded on the premise that the order dated 24<sup>th</sup> April, 2008 of preliminary and final decree of partition had attained finality when the same is still subject matter of challenge in RFA No.500/2012; (viii) that CM (M) petitions aforesaid were filed challenging the order dated 23<sup>rd</sup> September, 2011 and not the preliminary and final decree of partition; (ix) that in any case the judgment dated 13<sup>th</sup> January, 2012 of this Court of dismissal of CM(M) No.29/2012 is also on the ground of the same being not maintainable and thus any observations on merits therein would also be obiter; and, (x) that the collusion is also apparent from Dr. Aman Hingorani having earlier appeared for Mrs. Sati Tahilramani.

25. Dr. Aman Hingorani has argued:-

A. that the builder having withdrawn RFA No.185/2012 preferred

against the preliminary and final decree for partition is not entitled to argue thereagainst;

- B. that though the aforesaid RFA No.185/2012 was withdrawn stating that the builder was taking its remedies before the Supreme Court against the judgment dated 13<sup>th</sup> January, 2012 of this Court in CM(M) No.29/2012 but the builder has not approached the Supreme Court till now;
- C. that the RFA No.500/2012 filed by the bank which claims through the builder is also thus not maintainable;
- D. that the documents between the builder and the bank show the bank to be only a licensee and the bank thus does not have any independent right;
- E. that the bank in fact is acting like a shark and is a trespasser in the property;
- F. the builder as well as the bank are bound by their admissions as contained in the judgment dated 13<sup>th</sup> January, 2012 in CM(M) No.29/2012 preferred by the Builder;
- G. that RFA No.500/2012 in any case is palpably barred by time

and the delay in filing thereof is not liable to be condoned; reliance is placed on (i) *Ajit Singh Thakur Singh Vs. State of Gujarat* (1981) 1 SCC 495; (ii) *Rabindra Nath Samuel Dawson Vs. Sivakami* AIR 1972 SC 730; and, (iii) *Pundlik Jalam Patil Vs. Executive Engineer, Jalgaon Medium Project* (2008) 17 SCC 448;

- H. Reliance is placed on the definition of “deliver” in P. Ramanatha Aiyar’s The Law Lexicon 1987 Reprint Edition;
- I. that the arbitral award culminating in a decree of the Court was not required to be registered; reliance in this regard is placed on (i) *N. Khosla Vs. Rajlakshmi* AIR 2006 SC 1249; (ii) *Nathu Lal Vaishi (Dr.) Vs. G.S. Kamal Advocate* 166 (2010) DLT 751; (iii) *Som Dev Vs. Rati Ram* (2006) 10 SCC 788; and, (iv) *P.K. Nangia Vs. The Land & Development Officer, New Delhi* ILR (1987) I Delhi 405;
- J. that the arguments raised are not based on any pleading, neither in the written statement nor in the memorandum of appeal;
- K. that the Will dated 13<sup>th</sup> September, 1974 of Mr. Hardasmal Banasing Hingorani is of a date after Mrs. Sati Tahilramani had



in the arbitration proceedings then pending admitted Mr. Hardasmal Banasing Hingorani to be the owner of 50% share in the property;

- L. that the builder or the bank have no locus to challenge the Will of Mr. Hardasmal Banasing Hingorani;
- M. that the Gift Deed by R.B.Tahilramani in favour of his wife Mrs. Sati Tahilramani was superseded by the subsequent arbitration award;
- N. that the builder acquiesced in termination of the collaboration agreement;
- O. reliance is placed on (i) ***Chairman, U.P. Jal Nigam Vs. Jaswant Singh*** AIR 2007 SC 924; (ii) ***Ferro Alloys Corp. Ltd. Vs. Union of India*** AIR 1999 SC 1236; and, (iii) ***Fateh Kumar Singh Vs. Kishan Chand Kachar*** AIR 1935 Calcutta 816 to contend that the builder having not pursued the challenge to the termination of the Collaboration Agreement, cannot be permitted to in this suit/proceeding challenge the termination;
- P. reliance is placed on ***D.C.M. Ltd. (M/s) Vs. M/s R.K. Towers (India) Pvt. Ltd.*** 2008 IX AD (Delhi) 553 to contend that once

the builder has not claimed specific performance of the Collaboration Agreement, he is deemed to have waived/given up its claim for performance and cannot be allowed to resurrect the same and a transaction cannot be left in a state of flux indefinitely;

Q. reliance is placed on (i) *Arun Mehra Vs. Durga Builders P. Ltd.* (2007) 138 Comp. Case 935 (Delhi); and, (ii) *Dalchand Vs. Seth Hazarimal* AIR 1932 Nagpur 34 to contend that the builder has acquiesced in termination; and,

R. reliance is placed on (i) *Salim Makkar Vs. N.K. Pansari* AIR 2001 Calcutta 162; and, (ii) *Miyabhai Jamalbhai Vs. Karim Bhai Mahomedbhai* AIR 1967 Gujarat 16 to contend that the bank as a licensee of the builder is bound by the judgments binding on the builder.

26. The counsel for the bank in rejoinder has referred to *Shivashankar Prasad Sah Vs. Baikunth Nath Singh* AIR 1969 SC 971 laying down that dismissal in default of a proceeding does not amount to “heard and finally decided by the court”.

27. The senior counsel for the builder in rejoinder has invited attention to

the grounds in the memorandum of appeal urging that Mrs. Sati Tahilramani had entered into the Collaboration Agreement being owner of half of the suit property and as sole executrix of the estate of Mr. Hardasmal Banasing Hingorani and being in possession of the same and thus the plaintiffs claiming under the said estate of Mr. Hardasmal Banasing Hingorani are bound by her actions.

28. I have considered the rival contentions and perused the records.

29. A perusal of the Collaboration Agreement dated 20<sup>th</sup> September, 1988 aforesaid shows:-

A. that the same was entered into by Mrs. Sati Tahilramani as sole absolute owner of the property on the basis of the Gift Deed dated 23<sup>rd</sup> May, 1958 executed in her favour by her husband Mr. R.B.Tahilramani and not in her capacity as the executrix of the Will of Mr. Hardasmal Banasing Hingorani;

B. that the transaction between Mrs. Sati Tahilramani and the builder was not of transfer/sale/assignment by Mrs. Sati Tahilramani to the builder of any right, title or interest in the property but of Mrs. Sati Tahilramani allowing the builder to carry out construction of new building on the property at its

own costs and expense after obtaining the various sanctions therefor and of the builder in *lieu* of the expenses so incurred by it, sharing 50% of the sale proceeds of the property and being given a right to transfer and dispose of the said property; and,

C. the builder was also to apply for and obtain Completion Certificate of the building.

30. I had during the hearing enquired from the counsels whether any Occupancy Certificate was obtained with respect to the property.

31. Neither counsel could confirm. I had in fact further enquired from the bank as to how the bank agreed to occupy the property and open its branch therein without the property having Occupancy Certificate and whether not the same is violative of the guidelines of the Reserve Bank of India. No proper answer was forthcoming.

32. The documents dated 20<sup>th</sup> March, 1995 between the builder and the bank with respect to the said property comprise of a MoU and agreements with respect to individual flats. While the MoU *inter alia* provides that the builder had availed of credit facilities from the bank and against which amounts were outstanding from the builder to the bank and in satisfaction whereof the builder had agreed to sell portions of the said property to the

bank, under the agreements, the builder granted license to the bank to use the said portions of the property. Needless to state that both sets of documents are unregistered.

33. I have bestowed my thoughtful consideration to the controversy. Though on first blush, the decree for recovery of possession of immovable property against the bank and the builder without any trial, especially in view of the aforesaid history appears to be doubtful but on deeper consideration I am unable to place my finger on any plea/defence of the builder or the bank on which trial may be necessary. In fact I had repeatedly during the hearing also enquired from the counsels for the builder and the bank that even if the matter was to be put to trial, which is their plea/defence, on proving/establishing of which they have a chance of defeating the claim of the plaintiffs for recovery of possession of the property from them. No answer was forthcoming.

34. It is the settled position in law that if on a meaningful and not a formal reading of the pleadings, it were to be found that there is nothing to be put to trial and that on the undisputed facts, the *lis* can be decided, the Court is not to unnecessarily, for the sake of complying with procedure, put the parties through the rigmarole of trial. A Division Bench of this Court in ***P.P.A.***

*Impex Pvt. Ltd Vs. Mangal Sain Mittal* 166 (2010) DLT 84 extended the principle laid down in *T. Arivandandam Vs. T.V. Satyapal* (1977) 4 SCC 467 in relation to a plaint, to the written statement also and held that a defence which is implausible and on a meaningful, not formal reading, is manifestly vexatious and meritless, clever drafting should not be allowed to create an illusion and such defences should not be needlessly permitted to go to trial. . The Supreme Court also recently in *M/s Gian Chand Brothers Vs. Rattan Lal* MANU/SC/0015/2013 reiterated that it shall not be sufficient for a defendant to deny generally the grounds alleged by the plaintiff, but he must be specific with each allegation of fact. It was further held that where there is evasive denial, the defendant cannot be permitted to lead evidence, when nothing is stated in the pleadings.

35. The undisputed position which emerges is as under:-

- (a) that though the property was acquired in the name of Mr. R.B.Tahilramani and was gifted by him to his wife Mrs. Sati Tahilramani and was standing in the name of Mrs. Sati Tahilramani;
- (b) such plea of *benami* till the coming into force on 19<sup>th</sup> May, 1988 of the Benami Transactions (Prohibition) Act, 1988, a plea that

the person in whose name the property may be recorded, was not the real owner, was available;

- (c) the dispute so raised by Mr. Hardasmal Banasing Hingorani claiming to be the real owner of the said property was referred to arbitration and in which Mrs. Sati Tahilramani conceded to her father Mr. Hardasmal Banasing Hingorani being the owner of 50% share in the property;
- (d) the arbitration award declared Mrs. Sati Tahilramani and Mr. Hardasmal Banasing Hingorani to be the owners in equal share of the property;
- (e) the said arbitration award was made a *Rule* of the Court by this Court;
- (f) that thus as on 25<sup>th</sup> November, 1975 i.e. when the arbitration award was made a *Rule* of the Court, though the property was standing in the sole name of Mrs. Sati Tahilramani but Mrs. Sati Tahilramani was the owner of only 50% share in the property and her father Mr. Hardasmal Banasing Hingorani was the owner of the other 50% share in the property; the counsels for the builder and the bank though have argued that the arbitration

award and the decree making it the same *Rule* of the Court were required to be registered but have been unable to make good the same and thus it cannot be said that for non-registration or for any other reason Mr. Hardasmal Banasing Hingorani did not become the owner of 50% share in the property;

- (g) that thus, Mrs. Sati Tahilramani, on the date of the Collaboration Agreement was not the complete owner of the property was not entitled to enter into the Collaboration Agreement with the builder with respect to the entire property and the said Collaboration Agreement entered into by her did not bind Mr. Hardasmal Banasing Hingorani or his heirs;
- (h) the Will dated 13<sup>th</sup> September, 1974 of Mr. Hardasmal Banasing Hingorani bequeathing his 50% share in the property to his wife for her lifetime and thereafter to the plaintiffs and the defendant no.1 could have been challenged only by the legal heirs or persons having chance of succession to the estate of Mr. Hardasmal Banasing Hingorani and not by any other person. Thus the challenge by the builder and the bank to the said Will by putting the plaintiffs to proof thereof is of no avail,



especially when none of the natural heirs of Mr. Hardasmal Banasing Hingorani are challenging the Will and have rather admitted the same;

- (i) the plaintiffs along with the defendant no.1, under the said Will have become entitled to 50% share in the property;
- (j) that the Collaboration Agreement entered into by Mrs. Sati Tahilramani with the builder though binding on the 50% share of Mrs. Sati Tahilramani in the property, was terminated by Mrs. Sati Tahilramani;
- (k) the builder though initiated legal proceedings challenging the said termination but did not pursue the same;
- (l) even if the Collaboration Agreement is to be considered as an agreement by Mrs. Sati Tahilramani to transfer right, title, interest, share in her 50% share in the property in favour of the builder, the same remained an 'agreement to transfer' and did not translate into 'transfer';
- (m) the builder did not do anything to complete the said transfer;
- (n) even a purchaser of immovable property is not entitled to

continue possession in pursuance to an agreement to purchase without applying for completion of purchase/transfer save under Section 53A of Transfer of Property Act, 1882;

- (o) there is no plea of the builder under Section 53A of the Transfer of Property Act; The Division Benches of this Court in ***Kanhya Lal Vs. Birdhi Chand Girdhari Lal*** MANU/DE/0333/1972 and in ***State Bank of India Vs. Pushpa Arora*** 64 (1996) DLT 557 have held that a plea of part performance which necessarily involves questions of fact cannot be permitted to be raised in appeal, when it was not taken in the written statement in the Trial Court though when a defendant in the written statement states all the essential facts without stating the effect of those facts, the benefit of Section 53A of the Transfer of Property Act cannot be denied to him merely on the ground that there is no specific mention of Section 53A of the Transfer of Property Act. The Supreme Court also in ***Williams Vs. Lourdusamy*** (2008) 5 SCC 647 held that it is one thing to say that a person is in possession of the property and it is another thing to say that he has a right to possess pursuant to or in furtherance of an

agreement for sale and that for application of Section 53A of the Transfer of Property Act, requisite ingredients must be pleaded.

(p) the supreme court in *Mohan Lal Vs. Mirza Abdul Gaffar* (1996) 1 SCC 639 held that once the agreement purchaser/transferee loses his right of specific performance by dismissal of the suit thereof, it would be inconsistent and incompatible with his right to remain in possession under the agreement; it was further held that the agreement to transfer does not create title or interest in property and once the agreement has met with dismissal of suit, the willingness of purchaser/transferee to perform his part of the contract does not arise.

(q) Similarly in *D.S. Parvathamma Vs. A. Srinivasan* (2003) 4 SCC 705 it was held that after dismissal on merits of a suit for specific performance it cannot be said that the purchaser/transferee had performed or was willing to perform his part of the contract and is thus not entitled to protect his possession under section 53-A of the Transfer of Property Act, 1882.

- (r) Though the supreme court in *Shrimant Shamrao Suryavanshi Vs. Pralhad Bhairoba Suryavanshi* (2002) 3 SCC 676 held that merely because the claim for specific performance has become barred by time would not disentitle the purchaser /transferee from invoking section 53-A but the said judgment would not be applicable since present is the case of a builder having initiated challenge to transfer and the same having been dismissed in default.
- (s) it has been consistently held by this court in *Jiwan Das Vs. Narain Das* AIR 1981 Del. 291, *Sunil Kapoor Vs. Himmat Singh* 167 (2010) DLT 806 and *M/S ASV Industry Vs. Surinder Mohan* MANU/DE/2060/2013 that an agreement purchaser simpliciter has no rights in the property, not only till the passing of a decree for specific performance of the agreement but even till the execution of the conveyance in pursuance thereto.
- (t) the rights even if any agreed to be created by Mrs. Sati Tahilramani in favour of the builder with respect to her share in the property thus never fructified and the possession of the

builder and through the builder of the bank of the property is unauthorized.

36. On all the aforesaid aspects there is no disputed fact which requires adjudication by trial.

37. The CPC after completion of pleadings requires the Court to see whether any material issue of law or fact arise from the pleadings of the parties. If no material issue of law or fact to be adjudicated in trial arise, order 15 of the CPC requires the Court to pass a decree forthwith.

38. Though the argument that there are no admissions is an attractive one but as held by the Division Bench of this Court in ***Vijaya Myne Vs. Satya Bhushan Kaura*** 142(2007) DLT 483(DB), SLP(C) No. 20273/2007 whereagainst was dismissed on 12<sup>th</sup> November, 2007, that the admissions can also be constructive which can be inferred from vague and evasive denial while answering specific pleas and that admissions can be inferred from the facts and circumstances of the case. Moreover as aforesaid the Court is to read the pleadings meaningfully and not formally. In the present case as aforesaid on a meaningful reading of the pleadings the aforesaid undisputed facts emerge and which are enough for a decree for possession to be passed against the appellants. The counsels for the appellants are at a loss

to show any defence which have required to establish/prove in trial and if successful wherein they would be entitled to defeat the claim for possession.

39. Though there is undue delay in preferring the RFA No.500/2012 and there is no sufficient cause disclosed for condonation thereof and the conduct of the appellants is replete with negligence, I may notice but even otherwise no merit is found therein. Firstly the RFA No.185/2012 preferred by the builder against the preliminary and final decree for partition on compromise has been withdrawn and which binds the bank also. Secondly, once it is found that the builder and the bank claiming through the builder, after having failed to challenge the termination of the Collaboration Agreement were left with no rights whatsoever in the property, they would have no locus to challenge the preliminary and final decree for partition even if on consent between the plaintiffs and the defendants no.2&3, mutually dividing the property between themselves.

40. For all the aforesaid reasons, there is no merit in either of the appeals which are dismissed with costs.

Decree sheet be drawn up.

**RAJIV SAHAI ENDLAW, J.**

**JANUARY 31, 2014/bs/pp..**