

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

% **Pronounced on: 22nd October, 2021**

+ CS(OS)33/2021, I.As.790/2021 (by the plaintiff under Order XXXIX Rules 1 & 2 read with Section 151 CPC for grant of ad interim ex-parte injunction) & 1206/2021 (by the plaintiff under Order VII Rule 14(3) read with Section 151 CPC for filing of additional documents)

ASHWANI KUMAR **..... Plaintiff**

Through: Mr. Jayant Mehta, Sr. Advocate
with Mr. Sambit Nanda and
Ms. Anu Srivastav, Advocates

versus

ADITYA MANNOHAR BHIDE AND ORS. **.....Defendants**

Through: Ms.Malavika Rajkotia, Mr.Vivek
Singh and Ms. Akriti Tyagi,
Advocates for D-1

CORAM:
HON'BLE MS. JUSTICE ASHA MENON

J U D G M E N T

1. The plaintiff/Ashwani Kumar has filed the present suit for specific performance of an oral agreement to sell property bearing No.E-63, Vasant Marg, Vasant Vihar, New Delhi 110057, measuring 1240 sq. yds. (hereinafter referred to as the "**Suit Property**"). The four defendants are the owners of the suit property. It is to be noted that summons in the suit had not been issued as Ms.Malavika Rajkotia, learned counsel for the defendant No.1, appearing on advance notice, submitted that the suit was without cause of action and deserves to be rejected. In between, the

parties were referred to the Delhi High Court Mediation and Conciliation Centre to enable them to work out an amicable settlement. However, the Mediation Centre reported that the efforts had failed.

2. Mr. Jayant Mehta, learned senior counsel for the plaintiff, submitted that the question of maintainability could be raised by the defendants after the summons and the notice were issued and if necessary, a preliminary issue in this regard could also be framed. There was no occasion to allow the defendants to raise objections to the maintainability of the suit without even the defendants being summoned in this suit. It was submitted that the defendants could not be heard at this juncture. It was also submitted that the question of existence and non-existence of an oral agreement would be a matter of trial and evidence. Relying on the various emails placed on the record at pages No.6 to 28 and 30 to 34 in the “Documents Folder” of the E-file filed by the plaintiff, it was submitted that it was clear that the defendants were interested in selling the suit property and the plaintiff was interested in its purchase. The sale price was fixed at Rs.70 crores. However, subsequently on 10th November, 2020, the defendant No.1 became dishonest and sought a higher sale consideration of Rs.80 crores, which derailed the entire process. It was submitted by the learned senior counsel that at all times, the plaintiff was ready and willing to perform its part of the contract and had kept the required amount in the bank for immediate payment of the consideration, as was reflected in the Certificate dated 11th January, 2021 issued by the State Bank of India.

3. Learned senior counsel for the plaintiff also pointed out that the

law recognized oral agreements to sell and the courts had enforced such oral agreements directing the vendor to execute sale deeds in terms of the said oral agreements. Learned senior counsel argued that the court can consider only the averments made in the plaint and look into the documents that were relied upon by the plaintiff to determine this question as to whether there was a cause of action disclosed, and could not consider the stand taken by the defendants at this juncture. Reliance has been placed on several judgments being, *Kollipara Sriramulu v. T. Aswatha Narayana*, (1968) 3 SCR 387, *Aloka Bose v. Parmatma Devi*, (2009) 2 SCC 582, *Brij Mohan v. Sugra Begum*, (1990) 4 SCC 147, *Nathulal v. Phoolchand*, (1969) 3 SCC 120, *Devender Singh v. Malik Buildcon Pvt. Ltd.*, 2018 SCC OnLine Del 10920, *Ravinder Singh v. Chuckles Kohli*, 2010 SCC OnLine Del 4271 and *Chuckles Kohli v. Ravinder Singh*, 2012 SCC OnLine Del 2135, in support of these contentions. In this regard, it was also submitted that the plaintiff had filed an application under Order VII Rule 14(3) the Code of Civil Procedure, 1908 (“CPC” for short) seeking to place on record a recorded conversation between the plaintiff, Sh.Virendra Sahlot and the defendants No.1 and 2, along with its transcript, to show that in actual fact an oral agreement had been reached between the parties, which the plaintiff could legitimately seek to enforce. Thus, it was submitted that the suit was maintainable and the summons be issued, the pleadings be completed and the interim protection be granted restraining the defendants from creating any third party interests in the suit property.

4. Learned counsel for the defendant No.1 referred to an order dated

23rd July, 2021 of a Co-ordinate Bench of this Court in *Tajunissa v. Vishal Sharma*, 2021 SCC OnLine Del 3803, to submit that the courts had the powers to determine the maintainability of a suit even before the issuance of summons and at that stage, to permit the defendants to make their submissions to point out how the suit was not maintainable. Reliance was also placed on the decisions of the Supreme Court in *Saleem Bhai v. State of Maharashtra*, (2003) 1 SCC 557 and in *Dahiben v. Arvindbhai Kalyanji Bhanusali* (2020) 7 SCC 366 in support of this submission. It was submitted that there was no concluded agreement between the parties. The sale consideration had not been determined, as the discussions were being carried out by Sh.Virendra Sahlot, on behalf of the plaintiff, and the wife of the defendant No.1, whereas the confirmation of the remaining defendants of the sale consideration being Rs.70 crores had not been conveyed to the purchaser. Learned counsel submitted that even if the transcript of the recorded conversation was to be considered, it would show that the defendants No.3 and 4 were not participating in the discussions and there was nothing to show that they had agreed to the sale price being Rs.70 crores. In any case, it was submitted that the other terms of the agreement were not settled. Relying on *Brij Mohan and Ors. v. Sugra Begum and Ors.* (1990) 4 SCC 147, learned counsel submitted that until and unless the parties were ad idem in respect of the material aspects of the agreement, such as, the sale consideration, the payment schedule, the execution of documents, possession, etc., no agreement can be held to have come into existence. According to learned counsel, the emails reflected negotiations and nothing more. The parties were still working out a final agreement and

which was to be either the agreement to sell, followed by a sale deed, or a straight sale deed. A tenant was in occupation of the suit premises and the tenancy had also to be completed and vacant possession handed over before the transaction was to be effected. These dates were also still not decided. Moreover, pointing out to the contents of these emails, the learned counsel submitted that the wife of the defendant No.1 had also asked the purchaser for a firm offer, which was never sent and a draft agreement was not finalized.

5. It was also submitted by learned counsel for the defendant No.1 that though the plaintiff claims that Sh.Virendra Sahlot was the common representative, at no point of time, had the defendants authorized Sh.Virendra Sahlot to finalize the deal on their behalf. Even the manner of payment of his commission was not decided. Thus, the learned counsel for the defendant No.1 submitted that even if the averments in the plaint were accepted on demurrer, the dots did not connect. No sale consideration, including earnest money, had been paid by the plaintiff to the defendants. Thus, nothing in the nature of an agreement, oral or otherwise, existed, the specific performance of which could be sought by the plaintiff.

6. There is no doubt that the court on receipt of a plaint acts well within its powers to consider whether the summons have to be issued or whether the suit as framed was maintainable or not. These powers are drawn from Order VII Rule 10 and Rule 11 CPC. A Co-ordinate Bench of this Court has already observed in *Tajunissa (supra)* that even at the pre-summoning stage, the court could hear both the parties on the question of

the maintainability of the suit under Order VII Rule 11 CPC. This Court finds no reason to take a different view. It has been held in *Devender Singh (supra)* that an oral agreement to sell of an immovable property can be enforced, though the existence of an oral agreement to sell would have to be based on cogent facts and evidence.

7. Another Co-ordinate Bench of this Court in *Hardip Kaur v. Kailash*, 2012 SCC OnLine Del 2937 was dealing with a case in which the appellant's suit for possession and mesne profits was dismissed by the trial court. The court observed that the appellant had received the total consideration and had handed over the vacant peaceful possession of the suit property to the defendant No.1 in that suit, despite which the suit for possession was filed. In that background, the court made the following observations: -

“26. False claims and defences are really serious problems with real estate litigation, predominantly because of ever escalating prices of the real estate. Litigation pertaining to valuable real estate properties is dragged on by unscrupulous litigants in the hope that the other party will tire out and ultimately would settle with them by paying a huge amount. It is a matter of common experience that Court's otherwise scarce time is consumed or more appropriately, wasted in a large number of uncalled for cases.”

8. Keeping this cautionary advice in mind, the present case needs to be considered carefully. It is no longer *res integra* that when the court is considering the question of maintainability under Order VII Rule 11 CPC, it has to consider whether clever drafting is creating illusions of a cause of action. This careful scrutiny is called for in suits of specific

performance to a greater degree since after the amendment to Section 10 of the Specific Relief Act w.e.f. 2018, it is now an obligation on the court to enforce the specific performance of a contract subject to Sub-section 2 of Section 11, Section 14 and Section 16. As rightly pointed out by the learned counsel for the defendant No.1, a higher threshold, will have to be crossed.

9. While the contentions of the defendants that Mr. Adarsh Agrawal had no authority, the wife of the defendant No.1 had no authority, the powers of attorney executed by the defendants No.2, 3 & 4 were only reflective of an intention to sell the property, are all contentions that would reflect the defence available to the defendants and need not be considered at this juncture, this Court can certainly consider whether in fact an oral agreement to sell had been reached by the parties. Learned senior counsel for the plaintiff argued that even in *Brij Mohan (supra)*, relied upon by learned counsel for the defendant No.1, the decision had been rendered after trial and therefore, such an opportunity must be granted to the plaintiff in the present case as well. However, it is to be noted that the plaintiff has built his case on the foundation of the emails exchanged between the parties and the transcript of a recorded conversation. Since all the emails, WhatsApp messages and the transcript are already on record, this Court can consider whether the emails relied upon by the plaintiff establish the existence of such an oral agreement. We may, therefore, turn to the emails placed on the record and as highlighted by the learned senior counsel for the plaintiff. These emails are dated 16th June, 2020 onwards, and the last email is dated 15th

November, 2020. The transcript of the recorded call, which has been sought to be placed on the record, is dated 12th July, 2020.

10. On 16th June, 2020, an email was sent by Sh. Virendra Sahlot to Smt. Sunita Bhide, wife of the defendant No.1, with an attachment. The attachment placed at page No. 7 in the “Document Folder” of the E-file filed by the plaintiff, is with a subject *“confirmation of agreed service/facilitation charges of 1% amount Rupees Seventy Lacs of the sale value of your property bearing No. 63 Vasant Marg Vasant Vihar New Delhi”* (sic.). It seeks to provide to him a confirmation letter *“so that sale of your property can be proceeded accordingly”* (sic.). It suggested that the said service/facilitation charges would be payable by the defendants in the manner i.e. 25% of the settled service/facilitation charges *“at the time of signing agreement with the buyer”* and balance 75% of the service/facilitation charges to be paid by the defendants *“at the time of execution of sale deed and receipt of balance payment and handing over of physical possession of the property along with the handing over of all original documents and relevant photocopies of the said property (sic.)”*.

(i) This letter has been sent by Sh.Virendra Sahlot “on behalf of Aesthetic Developers Pvt. Ltd.”, which is the company of the plaintiff. Thus, the claim of the plaintiff that Sh. Virendra Sahlot was the common representative of the parties, is not substantiated from this document. Further, it is clear that the payment of service charges and the manner of its payment was still under discussion. There is reference to the signing of an agreement even before the execution of the sale deed, which, in other

words, meant that the parties had in their mind the execution of a written agreement to sell. This was the position on 15th June, 2020.

(ii) It appears that a response was sent on behalf of the defendant No.1 to this letter, which email is at the bottom of page No.8 and running into page No.9 of the “Documents Folder” filed by the plaintiff. This email, on behalf of the defendant No.1, sought to clarify certain aspects. While it was expressed that the defendants were agreeable to pay cumulatively a fee of 1% for the sale of the property at the rate of Rs.70 crore, they expressed that Rs.35 crores would be paid *“at the time of signing the agreement”* and a further Rs.35 crores *“15 days prior to the handing over the property”*, which they expected would happen in January, 2021. The commission was to be paid 50% *“at the time of signing the sale deed”* and balance 50% *“at the time of handing over the property”*. It was clarified that the delay in the schedule was not acceptable. It was further recorded in this email *“kindly confirm and get the buyer’s confirmation that this would be acceptable”*.

(iii) From this email, it is clear that the terms of the agreement were still under negotiations till June, 2020. The parties were yet to decide the payment schedule, the sequence of handing over vacant possession, execution of sale deed and payment of commission. Most importantly, it again shows the intention of the parties to enter into a written agreement to sell.

(iv) That this was the position, is evident from the next email dated 16th June, 2020 sent by Sh.Virendra Sahlot, which is placed at page No.8 of the “Documents Folder”, recording “payment schedule for buyer

is very clear”, which was that the payment would be made within one month on vacation of the property by the tenant. It also recorded that “*the buyer would like to go for a one-time sale deed by all the sellers as and when happens, but in case time was taken for the tenant to vacate, “the plaintiff would like to have an agreement for sale now and sale deed for entire property”*” later in January, 2021. Again, confirmation of these terms were sought from the defendants. In any case, the mail reiterates the intent to enter into a written agreement to sell.

11. The emails dated 17th June, 2020, 18th June, 2020, 22nd June, 2020 and 29th June, 2020 relate to “due diligence”. The email dated 20th July, 2020, sent by the defendant No.4/Radhika Dilip Rasgotra to Sh.Virendra Sahlot, is of a copy of the power of attorney without the High Commission attestation. This also seems to be part of “due diligence”. The WhatsApp messages sent by the defendant No.3/Rahul Aswhini Bhide were also in relation to the power of attorney, again, in furtherance of the requirement of “due diligence”. None of these emails and WhatsApp messages reflect the conclusion of an agreement, but seem to be part of the negotiation process.

12. There is another email placed at page No.13 of the “Documents Folder”, sent by the plaintiff, which is dated 21st June, 2020. This was addressed to Smt. Sunita Bhide, wife of the defendant No.1. A perusal of this email, once again shows that confirmation of the price of Rs.70 crores for the suit property was still being worked out. It records that “the purchaser i.e., the plaintiff, was willing to increase the consideration from Rs.68 crores to Rs.70 crores, subject to finalization of the other terms

(sic.)”. A deal structure was also set out. Once again, it is important to note that at point No.6, Sh.Virendra Sahlot informed Smt. Sunita Bhide that the buyer i.e., the plaintiff, was ready to pay 10% of the sale value “at the time of signing agreement”, with a further schedule for payment of balance amount within two months as and when the tenant vacated the property before 31st November, 2020, and within 15 days of physical possession taken by the defendants, in case the tenant vacated the suit property in January, 2021.

13. The payment of the service charges was reiterated as 25% “at the time of signing agreement” and the balance “at the time of execution of sale deed”. Once again, this email dated 21st June, 2020 reflects that the parties were still negotiating the terms of the contract and they still envisaged the signing of a written agreement to sell. Even if the conversation that happened on 12th July, 2020 is to be considered, the fact that the defendants No.3 & 4 were only sending the scanned copies of the powers of attorney for the purposes of “due diligence”, as late as on 26th July, 2020, would show that the deal had not been finalized. It is clear that a written agreement of sale was required to be executed between the parties and that the parties understood that for a written agreement to sell to be executed, a draft was to be exchanged and confirmed, but that did not happen.

14. Even the email placed at page No.20 of the “Documents Folder” stated to be from Sh.Adarsh Aggarwal to Sh.Virendra Sahlot does not further the case of the plaintiff since, while confirming the price of Rs.70 crores, it is informed to the plaintiff that the due diligence of the buyer

was required to be done for which all details were required from Sh.Virendra Sahlot and once again, it is recorded that the confirmation was required from the side of the plaintiff “so that I can proceed accordingly for due diligence and thereafter, can enter in an agreement for sale”. This again means that no agreement was concluded. The material aspects of the sale transaction were yet to be completed, including “due diligence” from both sides. The payment schedule of the sale consideration has also not been determined and accepted by both parties, even if it was to be taken that sale consideration could be Rs.70 crores. Even up to 29th August, 2020, the parties were still in the “due diligence stage”, with no terms of the transactions finalized.

15. The emails are the only documents on the basis of which the plaintiff seeks to prove his case of there being a concluded oral agreement to sell. The emphasis is only on the so-called consent of the defendants No.1 and 2, through Sh.Adarsh Aggarwal, that the defendants had agreed to sell their property for a sum of Rs.70 crores. Even if this fact was conceded that the sale price had been agreed to by the parties, it is very clear from the emails that the parties were yet to work out the payment schedule, the schedule for handing over vacant possession and the execution of the sale deed. The parties were not ad idem because the emails show that they were moving back-and-forth on these terms. In the cases relied upon by the learned senior counsel for the plaintiff, the facts are vastly different, in that in those cases, either consideration had been paid by the plaintiff, or there was a written agreement executed and partly acted upon. Even in *Devender Singh (supra)*, the fact was that the 70%

of the consideration had already been paid. Admittedly, not a penny has been paid by the plaintiff to the defendants. In the present case, the intention of the parties was clear, as recorded in these emails, that a written agreement to sell be executed. This intention of the parties cannot be overlooked only because the plaintiff seeks to pin the defendants down to Rs.70 crores as the sale consideration. In the absence of a written agreement to sell, it cannot be held that there is any agreement to sell, the specific performance of which the plaintiff can seek to enforce.

16. It has been held by the Supreme Court in *Brij Mohan (supra)* that in order to determine the binding nature of a contract between the parties, the mere acceptance of the sale price is not sufficient. The other terms of the contract, such as, the schedule of payment, the amounts to be paid, the handing over of vacant possession by the tenant, execution of the sale deed, etc., were also important terms of the contract, which are to be accepted by both sides before a contract of a binding nature could come into existence. It was highlighted that an agreement to sell relates to valuable property and the intention of the parties to reduce the terms of the agreement into writing had to be kept in mind before determining the existence of an oral agreement which was binding. This case held that while an oral agreement could be enforced, but for such an enforceable oral agreement, the sale consideration, the time of completion of the sale deed and the mode of payment, were all vital terms on which the parties ought to have been in agreement to result in a binding oral agreement.

17. Thus, it is clear on facts and in law, the plaintiff has no cause of action, as no oral agreement, as claimed, had ever come into existence

and neither was such an oral agreement intended by the parties, as they repeatedly referred to a written agreement to sell in the emails on which the plaintiff relies. Without a binding agreement between the parties, there is nothing to enforce specific performance of.

18. Thus, the present suit is rejected as disclosing no cause of action under Order VII Rule 11(a) CPC, along with the pending applications.

19. There is no order as to cost.

20. The judgment be uploaded on the website forthwith.

(ASHA MENON)
JUDGE

OCTOBER 22, 2021

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