

(2013) 12 DEL CK 0058

Delhi High Court

Case No: CS (OS) 2095 of 2013 and I.A. 17420-22 of 2013 and 18000-18001 of 2013

Mukesh Kapil

APPELLANT

Vs

Parag P. Tripathi and Others

RESPONDENT

Date of Decision: Dec. 10, 2013

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 23 Rule 3A, Order 4 Rule 2
- Contract Act, 1872 - Section 17
- Transfer of Property Act, 1882 - Section 40, 54

Citation: (2013) 205 DLT 569

Hon'ble Judges: Vipin Sanghi, J

Bench: Single Bench

Advocate: Harish Uppal, for the Appellant;

Judgement

Vipin Sanghi, J.

The plaintiff has filed the present suit to seek the following substantial reliefs:

- a) That a decree of declaration be passed in favour of the plaintiff and against the defendants declaring that settlement dated 01.10.2001 is unlawful, illegal, and not enforceable in law, having been obtained by fraud and being per incuriam;
- b) That a decree for declaration be passed in favour of the plaintiff and against the defendants declaring the order/decree dated 03.10.2001 & 2.11.2001 passed in AA 12/96 & connected suits bearing CS(OS) No. 627/97, 628/97, 1045/97, 1180/97, 1188/97 and 1190/97 as well as CCP no. 39/97, 35/98, 36/98 and 43/97 be declared as null and void as having been obtained by fraud and being per incuriam and in consequence thereof the sale deed dated 1.3.2011 in favour of defendant no. 5 be directed to be cancelled and set aside and possession of the whole property 14, Bazar Lane of all the floors be directed to be restored to the plaintiff;

- c) That a decree of declaration that order dated 28.5.2002 passed in CW 1933/2002 by S.K. Mahajan, J be set aside as the defendant no. 1 had no locus standi and as such order was obtained by fraud and falsehood stated in the court;
- d) That a decree for mandatory injunction be passed directing the revival of the Arbitration Application AA No. 12/96 titled as Darshan Lal Kapil v. Ranjit Towers Pvt. Ltd. and such all other cases mentioned therein may also be revived accordingly which were disposed/decreed/decided by orders/decree dated 3.10.2001 and 2.11.2001;
- e) That a decree for perpetual injunction be passed restraining the defendants their agents, servants, nominees and employees etc. from assigning, parting or in any way creating any third party interest in the suit property;

At the outset, the learned counsel for the plaintiff was called upon to make his submissions to satisfy the Court with regard to the maintainability of the suit, in light of the averments made therein and the documents filed along with the suit. The issue with regard to the maintainability of the suit arises in the following factual background discernable from the averments made in the plaint and the documents filed on record.

2. The plaintiff's father late Sh. Darshan Lal Kapil was the original lessee of the property bearing No. Block No. 205-C Plot No. 22 (Old) now known as 14, Bazar Lane, New Delhi. The lease was granted and duly registered on 23.04.1936 by the Governor General in Council, i.e. the lessor. The plaintiff states that defendant No. 3 M/s. Ranjit Towers (I) Private Limited entered into an agreement with late Sh. Darshan Lal Kapil on 17.02.1992 for re-development/addition and alteration of the suit property on the terms & conditions mentioned therein. Under the said agreement dated 17.02.1992, defendant No. 3 was obliged to re-develop the property-and, in consideration thereof, was entitled to deal with certain portions of the suit property.

3. Some of the relevant recitals and terms of the agreement dated 17.02.1992 entered into between late Sh. Darshan Lal Kapil and defendant No. 3 for re-development of the property read as follows:

And Whereas the Owners want to redevelop the above mentioned property. However, the Owners are not fully equipped to execute and complete the work of development of the said property and have negotiated with the Developers to make additions, alterations, and redevelop the property bearing no. 14, Bazar Lane, Babar Road, New Delhi as per the sanctioned plans with permissible and compatible deviations.

And Whereas the parties here to mutually agreed to utilise the said property for redeveloping on the terms and conditions hereinafter appearing.

Therefore, It is Hereby Agreed, Declared, Covenanted, Recorded by and Between the Parties Hereto As Follows:

1. That the subject matter of this Agreement between the Owners and Developers is the existing property No. 14, Bazar Lane, Babar Road, New Delhi for redevelopment/construction of residential dwelling units consisting of ground floor, 1st floor, 2nd floor and basement, as shown in the sanctioned plan of New Delhi Municipal Committee, with necessary and permissible deviations.
2. That the Developer undertake to develop the said property at their own cost, expenses and resources after procuring the requisite permissions, sanctions and approvals of all the concerned authorities on owner's name and thereafter to develop the Basement, Ground Floor, First & Second Floor/space on the said property.

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6. That the Owners agree to sell, transfer and convey to the Developers or their nominee (s) rights for Basement, first and second floors with proportionate land rights in consideration of the Developers developing Basement, Ground floor, first floor and second floors plus the consideration of Rs. 15,00,000/- (Rupees Fifteen lakhs only). The interest in land will be available to the prospective purchasers proportionately in respect of Basement, First and Second floor only. The terrace rights over second floor be with the Owners for further construction whenever it is permissible under the law, however the usage of terrace shall be common for all occupants till further construction is done

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9. That the Owners undertake irrevocably to constitute the Developers or their nominee as their General attorney by separate document for negotiating and finalising sale/transfer of basement, first floor and second floor with usage of terrace rights and for submitting applications requisitions, approvals, sanctions, documents of building or other materials statutorily to be done and performed in connection with the development construction and completion of the said residential building. The owners will apply and obtain the income tax clearance certificate on the basis of the consideration and the name of the nominees intimated by the... for the basement, first floor and for second floor.

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11. That the Developers shall always be fully competent to settle terms for the transfer of their Basement, first floor and second floor in the building and proportionate land underneath to any persons at any time either during or after the building is fully completed and the Developers can enter into the Agreement to sell for the sale of Developer's portion and accept cash, cheques, pay order, drafts etc. from all such would be transferees in their (Developer's) own name and at their own

risk and responsibility can issue receipts for all such payments made to them. In this context, the Owners herein agree, declare and record that they shall always join in all such Agreements for sale/conveyance Deeds to be given to prospective unit buyers of the Developer's portion on such terms as the Developers may deem fit at their absolute discretion. In case of conversion from lease hold to free hold the betterment charges shall be proportionately borne by the parties.

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18. That the Developers shall have the right to construct and sell the single unit on Basement, First and Second Floor to the prospective buyers and the sale consideration received by such sale shall be exclusively of the Developers and the Owners will have no objection to the same

4. Defendant No. 3 entered into two agreements on 25.07.1993 with defendants No. 1 & 2 for purchase of undivided half share of the first floor each. Defendant No. 4 entered into an agreement on 29.08.1992 with defendant no. 3 in respect of the basement floor in the re-constructed building even prior to the same being built. The plaintiff claims that his father late Sh. Darshan Lal Kapil passed away on 09.01.1998, and that he has succeeded to the suit property by virtue of a registered will dated 20.10.1997 executed by late Sh. Darshan Lal Kapil. From the documents filed on record, it transpires that several suits and proceedings came to be filed in this court inter se the parties. Some of these proceedings were:

- (i) Arbitration Petition No. 12/1996
- (ii) CS (OS) 627/1998 and CCP No. 35/1998
- (iii) CS(OS) 628/1997 and CCP No 36/1998
- (iv) CS (OS) 1045/1997 and CCP No. 39/1997
- (v) CS (OS) 1180/1997
- (vi) CS(OS) 1188/1997
- (vii) CS(OS) 1190/1997 and CCP No. 43/1997

5. It further appears that the parties in the aforesaid proceedings-who are also parties to the present suit, arrived at a settlement agreement on 01.10.2001 in respect of their rights and obligations under the agreements dated 17.02.1992, 29.08.1992 and 25.07.1993, and in respect of certain other related matters, and on the basis of the said settlement agreement dated 01.10.2001, the aforesaid suits and proceedings were disposed of vide orders dated 03.10.2001 as modified/corrected on 02.11.2001. Suit Nos. 1180/1997, 1188/1997, 627/1997 and 628/1997 were decreed by the court in terms of the settlement dated 01.10.2001. AA No. 12/1996, Suit Nos. 1045/1997, 1190/1997 as well as CCP Nos. 43/1997, 39/1997, 35/1998 and 36/1998 were also disposed of vide order dated 02.11.2001. The

relevant clauses from the said agreement dated 01.10.2001 read as follows:

1. That all the parties to the litigation mentioned above hereby confirm the collaboration agreement dated 17.2.1992 entered into between First Party and the Second Party with the additions contained in this settlement

x x x

6. That before the stipulated date i.e. 2.4.2002 within six months from the date of recording of the compromise, second party shall complete the construction of stair case leading upto the terrace on the second floor as well as the "Mumti" above the same. Whatever steps requiring including the sanctioning of the plan, if required in that behalf from the NDMC, shall be taken before the aforesaid date, and for the same the first party shall fully cooperate with the second party. The work in accordance with this clause shall commence within one month of the signing of this agreement.

x x x

13. In accordance with the Collaboration Agreement dated 17.2.1992 the terrace rights over second floor will be with the owner/first party i.e. Sh. Mukesh Kapil for further construction when ever it is permissible under the law, however, the usage of terrace shall be common for all occupants till further construction is done. However, the door granting access to the terrace will be kept under lock with one key each to be kept by the party of the first part, the Tripathis and the party of the second part or the prospective occupants of the basement and the second floor.

6. The Court recorded its satisfaction "that the agreement entered into between the parties is a lawful agreement and there is no impediment in passing a decree in terms thereof Having regard to the fact that parties have settled the dispute, decree in terms of settlement dated 1st October, 2001 is hereby passed. The settlement which is marked as Exh. A shall form part of the decree".

7. The order dated 03.10.2001 was modified on 02.11.2011 upon an application being moved, i.e. I.A. No. 9952/2001 in A.A. No. 12/1996. The Court, inter alia, directed as follows:

Suit Nos. 1180/1997, 1188/1997, 627/1997 and 628/1997 shall stand decree in terms of settlement. AA No. 12/1996, Suit Nos. 1045/1997, 1190/1997 as well as CCP Nos. 43/1997, 39/1997, 35/1998 and 36/1998 stand disposed of. In terms of the order passed in this process shall stand vacated and decree shall now be passed in terms of the settlement

8. Learned counsel for the plaintiff, during the course of his submissions has stated that the said property was converted from leasehold to freehold in the year 2007. It further appears that defendant nos. 1 and 2 preferred Ex. Pet Nos. 36/2010 and 35/2010 respectively since the plaintiff herein was allegedly not coming forward to

execute the transfer deed in favour of defendants No. 1 & 2. In these execution proceedings, this court passed orders on 04.09.2013 and 04.10.2013 while examining the drafts of the sale deeds proposed by the parties-to be executed by the judgment debtors, including the plaintiff herein, in favour of the decree holders, namely, defendant nos. 2 and 1 herein respectively. While passing the order dated 04.09.2013, the court dealt with the submission of the plaintiff herein that for computing the proportionate share in the land of the decree holders, it was only the area falling under the building which had to be taken into account and not the entire plot area. The court rejected this submission and the discussion is found in Paras 16 to 20 of the order dated 04.09.2013. Vide order dated 04.10.2013, this court dealt with the objection of the plaintiff herein to the effect that the decree holders i.e. defendant nos. 2 and 1 respectively had no right to require the provision of an underground water tank in the backyard, wherefrom water would then have to be pumped to the overhead water tanks. The Court also dealt with the plaintiffs submission that the construction of an underground water tank in the rear courtyard is not permissible under the building bye laws, and that it is not a compoundable deviation. This court rejected these submissions of the plaintiff herein and directed that the judgment debtor no. 2 i.e. defendant no. 3 herein shall take requisite steps for creating an underground water tank and installation of the requisite pipeline in the manner detailed in the said order. By these orders, the Court finalised the terms of the sale deed to be executed in favour of defendants No. 1 & 2 as decree holders.

9. The plaintiff states that in the original lease granted in favour of late Sh. Darshan Lal Kapil, Clause 2(11) and Clause IX obliged the lessee, i.e. late Sh. Darshan Lal Kapil to obtain prior approval in written before assigning or transferring the suit property or any part thereof. It is also provided in Clause 2(11) that all assignees and transferees and heirs of the lessee shall be bound by all the covenants and conditions contained in the perpetual lease. Clause IX provides that the lessee shall not, without the consent of the Chief Commissioner signified in writing, directly or indirectly, assign, transfer or otherwise part with any interest that he may have in the piece of land which is the subject of the lease, or in the building or materials thereon, and not create any special interest therein, nor shall he underlet the land or any part thereof.

10. The case of the plaintiff is that defendant No. 3 was aware of these conditions while entering into the agreement dated 17.02.1992 with late Sh. Darshan Lal Kapil. He states that defendants No. 1 & 2, and defendant no. 4 were also well aware of these conditions while entering into the agreements dated 25.07.1993 and 29.08.1992 respectively with defendant No. 3 in respect of the two half undivided shares in the first floor portion of the re-constructed property, and the basement portion. The submission of the plaintiff is that the said conditions stood breached when the aforesaid agreements were entered into, firstly, between late Sh. Darshan Lal Kapil and defendant No. 3, and again when defendant No. 3 entered into the

agreements with defendants No. 1 & 2 and defendant No. 4. The case of the plaintiff is that the grant of the lease in favour of late Sh. Darshan Lal Kapil was a Government grant, governed by the provisions of the Government Grants Act, 1895 (in this respect reliance is placed on the judgment of this Court in Union of India and Another Vs. Jor Bagh Association (Regd.) & Others rendered in LPA No. 415 decided on 28.02.2012). Therefore, the provisions, restrictions, conditions and limitations contained in the grant are valid and effectual, notwithstanding any rule/law/statute or enactment of the legislature to the contrary. He submits that no prior permission was obtained from the primary lessor, i.e. the President of India through the L & DO, Government of India before the aforesaid agreements were entered into. The submission of the plaintiff is that the breach of the aforesaid conditions of the perpetual lease vitiates the said transactions.

11. Though the plaintiff makes reference to CS(OS) Nos. 627/1997 & 628/1997-stated to have been filed by defendants No. 1 & 2, the plaintiff does not clearly set out in the plaint the background in which the said suits were filed. The plaintiff states that defendants No. 1 & 2 in their aforesaid suits had claimed that they have "purchased" half portions of the first floor of the suit property.

12. The plaintiff also obliquely refers to the orders passed by the Courts in the aforesaid suits on 03.10.2001 and 02.11.2001, without clearly stating as to what these orders are. The case of the plaintiff is that the said orders are per incuriam, and they are allegedly unlawful and non-est. The reason for claiming so is that the said orders were passed in ignorance of the terms of the statute, or the terms of the lease having the force of law, namely the terms & conditions of the perpetual lease above referred to.

13. In this regard, reliance is placed on the judgment of the Supreme Court in Central Board of Dawood Bohra Vs. State of Maharashtra dated 17.12.2004. The plaintiff claims that a per incuriam decision does not operate as res judicata. Reliance in this regard is placed on Union of India Vs. IRSS Association, (1995) Suppl. (3) SCC 600 .

14. The plaintiff goes on to aver that fraud was played upon the plaintiff and the Courts in arriving at agreements dated 17.02.1992 and 01.10.2001, and in the passing of the orders dated 03.10.2001 and 02.11.2011, and in the execution of the agreement dated 29.08.1992 and 25.07.1993 between defendants No. 1 to 4. The alleged fraud was that the defendants had no intention to implement the obligations undertaken in the said agreements for the benefit of the plaintiff. The plaintiff claims that he was deceived into entering into the said agreements.

15. Though it is well settled, and prescribed in the CPC in Order IV Rule 2 that only the relevant and material facts are required to be pleaded in the plaint, the plaintiff extensively cites the law in his plaint.

16. The plaintiff claims that several clauses of the agreement dated 17.02.1992 and of the settlement dated 01.10.2001 have not been enforced in favour of the plaintiff, and the defendants have no intention to comply with them and, consequently, the plaintiff was deceived into signing the said agreements on the assurances given by the defendants. He states that he has no remedy to enforce his rights, as there does not exist any decree in his favour. The plaintiff states that the agreements and settlement, above referred to, were entered into by the plaintiff on the premise that due permission would be obtained from the L & DO or other authorities-which was to the responsibility of the defendants, to raise construction of the staircase from the second floor to the terrace above the second floor along with the mumty. The plaintiff states that it was understood by him that the front & rear open areas/land will be in the plaintiffs exclusive possession and ownership, and only the land underneath the building will be proportionately divided between the four parties, i.e. the owners of the ground floor, first floor, second floor and the basement floor. He further states that if, subsequently, further floors are allowed to be constructed, the plaintiff shall have the exclusive right to raise the same and he alone shall have the rights to the terrace thereon, and the land under the building will be owned in proportion to the future construction. The plaintiff states that it was also agreed that the staircase from the second floor to the terrace above the roof of the second floor and the mumty shall be constructed, to ensure that the plaintiff will not have any problem/impediment in construction of the third floor and above, whenever permitted. The plaintiff claims that the floors could not have been divided, and could have to be sold as a single unit.

17. Learned counsel for the plaintiff has sought to rely upon the definition of the expression "Fraud" contained in Section 17 of the Contract Act. The plaintiff states that he became aware of the fraud on 09.05.2013 when the defendants obtained an order-by misleading the Court, that stairs from the second floor to the terrace cannot be constructed and the mumty on the roof of the second floor also cannot be constructed. The plaintiff claims that the defendants obtained orders from this Court in Execution Petitions Nos. 35-36/2010 by misleading the Court on 04.09.2013 and 04.10.2013. He states that the said orders are the subject matter of appeal being FAO(OS) No. 476/2013 Similarly, it is stated that orders were obtained from this Court in CS(OS) No. 2670/2011 on 22.10.2013 by misleading the Court. Several other averments have been made in the suit, which are wholly irrelevant.

18. The plaintiff has also filed documents on record which throw light on the history of litigation undertaken in the earlier rounds between the parties and the orders passed therein, some of which have been taken note of hereinabove. As aforesaid, unfortunately, the averments made in the plaint are sketchy and they conceal more than they disclose in respect of the earlier proceedings.

19. The submission of the plaintiff that the agreements dated 17.02.1992 executed between late Sh. Darshan Lal Kapil and defendant No. 3 for redevelopment of the

property, as well as the agreement dated 29.08.1992 entered into between defendants No. 3 & 4 (in respect of the basement), and the two agreements entered into on 25.07.1993 between defendant No. 3 and defendants No. 1 & 2 (in respect of the half undivided portion of the first floor) are void, on account of prior permission not being obtained from the primary lessor in terms of the perpetual lease executed in favour of late Sh. Darshan Lal Kapil has absolutely no merit. The only manner known to law for transfer of property or assignment of rights in property is by a registered instrument. Mere entering into an agreement in respect of a property does not amount to transfer or assignment of the property. In Bai Dosabai Vs. Mathurdas Govinddas and Others, the Court observed that "The ultimate paragraph of Section 54 of the Transfer of Property Act, expressly enunciates that a contract for the sale of Immovable property does not, of itself, create any interest in or charge on such property. But the ultimate and penultimate paragraphs of Section 40 of the Transfer of Property Act make it clear that such a contract creates an obligation annexed to the ownership of Immovable property, not amounting to an interest in the property, but which obligation may be enforced against a transferee with notice of the contract or a gratuitous transferee of the property."

20. Admittedly, no registered instrument purporting to transfer or assign any portion of the property was entered into either between the predecessor in interest of the plaintiff and defendant No. 3, or defendant No. 3 and defendants No. 1 & 2/defendant No. 4 during the currency of the perpetual lease in favour of late Sh. Darshan Lal Kapil. Merely because defendants No. 1 & 2 described themselves as the "purchasers" of the first floor of the property does not lead to the inference that they became the transferees or assigns of the rights in the suit property in respect of the first floor thereof. Moreover, the plaintiffs predecessor in interest, and thereafter the plaintiff, was party to the aforesaid litigations. No such objection was raised by either the predecessor in interest of the plaintiff, or the plaintiff in those proceedings. On the contrary, the plaintiff entered into the settlement agreement on 01.10.2001 thereby confirming the collaboration agreement on 17.02.1992 and undertaking several obligations thereunder. The said settlement dated 01.10.2001 was accepted by the Court while holding that there was no illegality therein. Even at that stage, the plaintiff did not claim that there was any breach of any term of the perpetual lease. Pertinently, even the primary lessor never raised any such issue at any point of time and the property was converted to freehold in the year 2007. The predecessor in interest of the plaintiff, and the plaintiff, ought to have raised all such pleas in the earlier round of litigation which culminated in the settlement agreement dated 01.10.1992, and the consequent decrees dated 03.10.2001. Not having done so, the plaintiff is clearly barred by res judicata from raising any such issue. In Forward Construction Co. and Others Vs. Prabhat Mandal (Reqd.), Andheri and Others, the Court held that an adjudication is conclusive and final not only as to the actual matter determined, but as to every other matter which the parties might and ought to have litigated and invited a decision on, as incidental to, or

essentially connected with subject matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim, and defence.

21. The plaintiff is also barred by Order XXIII Rule 3A CPC which states that "No suit shall lie to set aside a decree on the ground that the compromise on which the decree is passed was not lawful". In Smt. Simrat Katyal Vs. Shri Varinder Katyal, RFA (OS) No. 20.1996 decided on 03.12.2010, while examining the scope of Order 23, the Division Bench relied upon the judgment in Joginder Singh Bedi Vs. Bawa Darbara Singh and Ors., which in turn relied upon the decision in Uttam Chand Bhatia Vs. Amir Chand Bhatia. S. No. 284/84, decided on 6th December, 1984, wherein the Court observed that "The fact remains that by filing the present suit the Plaintiff seeks the relief of a declaration to the effect that the compromise application, the judgment and the decree dated 26-4-1982 in Suit No. 349/1982 be declared as illegal, void, nullity and not binding on the Plaintiff. The provisions of Rule 3A of Order 23 are very clear and exhaustive. No scope is left for filing or entertaining such like suits. The intention of the Legislature in enacting this provision was to put an end to the frivolous litigation, after the parties had entered into a compromise with open eyes. The bare reading of this Rule goes to show that even if the compromise was made the basis of the passing of the decree was not lawful, yet no suit shall lie to set aside the said decree. " In Pushpa Devi Bhagat (D) th. LR. Smt. Sadhna Rai Vs. Rajinder Singh and Others, the Court observed that the only remedy available to a party to a consent decree to avoid such consent decree, is to approach the court which recorded the compromise and made a decree in terms of it, and establish that there was no compromise. In that event, the court which recorded the compromise will itself consider and decide the question as to whether there was a valid compromise or not.

22. The plaintiff never questioned the finding returned by the Court while recording the compromise and decreeing the suits, as aforesaid, to the effect that the agreement entered into between the parties, i.e. on 01.10.2001 is a lawful agreement and that there is no impediment in passing a decree in terms thereof. The order dated 03.10.2001 as modified on 02.11.2001 has attained finality and cannot be questioned at this stage by the plaintiff, much less by filing a separate suit.

23. The plaintiff has sought declarations in respect of the settlement dated 01.10.2001 and the order/decree dated 03.10.2001 and 02.11.2001, as aforesaid-to declare them null & void on the ground of the same being vitiated by fraud and being per incuriam. As aforesaid, there is no illegality involved in the making of the agreements dated 17.02.1992, 29.08.1992 and 25.07.1993 since there was no breach of Clause 2(11) and Clause IX of the perpetual sub lease. In any event, the so-called illegality, if any, occurred when the said agreements were entered into. The plaintiffs predecessor in interest himself entered into agreement dated 17.02.1992

and was aware of its terms. He was also aware of the terms of the perpetual lease executed in his favour by the Governor General in Council. He did not seek any declaration in respect thereof within a period of three years from the time when the right to sue first accrued in his favour. He was obliged to bring an action within the said period by virtue of Article 58 of the Schedule to the Limitation Act, 1963. The said right to sue accrued in his favour upon the execution of the agreement on 17.02.1992. Therefore, to claim a declaration in respect of the agreement dated 17.02.1992 is clearly barred by limitation. In [Khatri Hotels Private Limited and Another Vs. Union of India \(UOI\) and Another](#), the Court observed that while enacting Article 58 of the Limitation Act, 1963 the legislature has designedly made a departure from the language of Article 120 of the 1908 Act. The word "first" has been used between the words "sue" and "accrued". This would mean that if a suit is based on multiple causes of action, the period of limitation will begin to run from the date when the right to sue first accrues. The Court observed that successive violation of the right will not give rise to fresh cause and the suit will be liable to be dismissed if it is beyond the period of limitation counted from the day when the right to sue first accrued. Relying upon the aforesaid observation in Khatri Hotels (supra), in [Board of Trustees of Port of Kandla Vs. Hargovind Jasraj and Another](#), the Court observed that

21. The right to sue in the present case first accrued to the lessee on 13th December, 1978 when in terms of order dated 8th August, 1977 the lease in favour of the lessee was terminated. A suit for declaration that the termination of the lease was invalid hence ineffective for any reason including the reason that the person on whose orders the same was terminated had no authority to do so, could have been instituted by the lessee on 14th of December 1978. For any such suit it was not necessary that the lessee was dispossessed from the leased property as dispossession was different from termination of the lease. But even assuming that the right to sue did not fully accrue till the date the lessee was dispossessed of the plot in question, such a dispossession having taken place on 14th of December, 1978, the lessee ought to have filed the suit within three years of 15th December, 1978 so as to be within the time stipulated under Article 58 extracted above. The suit in the instant case was, however, instituted in the year 1996 i.e. after nearly eighteen years later and was, therefore, clearly barred by limitation. The Courts below fell in error in holding that the suit was within time and decreeing the same in whole or in part.

24. The plaintiffs predecessor in interest and, thereafter the plaintiff, became aware of the agreements dated 29.08.1992 and 25.07.1993 when these agreements were set up by defendant No. 4 and defendants No. 1 & 2 respectively in their respective suits. In any event, the plaintiff was aware of the rights claimed by defendants No. 1 & 2 and defendant No. 4 under the said agreements when he entered into the settlement agreement dated 01.10.2001. The right to sue in respect of the said agreements dated 29.08.1992 and 25.07.1993 accrued in favour of the plaintiff when

these agreements were set up by defendant No. 4 and defendants No. 1 & 2 respectively. The plaintiff did not seek any declaration within three years thereof as provided for in Article 58 of the Schedule to the Limitation Act. Consequently, the declarations now sought, on the premise that the said agreements are void on account of the so-called breach of the conditions of the perpetual sub lease are clearly barred by limitation.

25. So far as the plaintiffs plea that the said agreements are a result of a fraud is concerned, there are two aspects pleaded by the plaintiff and argued by his counsel. Firstly, it is pleaded and argued that the right of the purchasers in the land is restricted to a proportionate share in the land falling only under the built up structure, and the proportionate right does not extend to the open areas on the front and rear sides. The submission is that this Court has ruled in its order dated 04.09.2013 passed in execution petition Nos. 35-36/2010 that the proportionate right in the land of the purchasers of the basement, first and second floor would be computed on the basis of the area of the entire plot, and not just area falling under the constructed building. According to the plaintiff, his understanding was not as that ruled by this Court as, according to the plaintiff, the plaintiff retained the absolute right of ownership in the areas falling in the front and rear setbacks, and the proportionate right of the owners of the basement, first and second floor was limited to the area falling under the constructed building.

26. There is absolutely no merit in this submission of the plaintiff. Even if the understanding of the plaintiff was as claimed by him, that does not lead to the commission of a fraud upon the plaintiff by the defendants. The agreement of the parties is contained in the collaboration agreement dated 17.02.1992 read along with the settlement agreement dated 01.10.2001. The decree had been passed in terms of the settlement arrived at between the parties. While passing the order dated 04.09.2013, this Court has interpreted the settlement on the basis of which the decree has been passed. The intention of the parties is to be gathered from the written instrument when there is one. Merely because one of the parties may claim that he has understood the written agreement in a particular way, which interpretation may not be accepted by the other parties and the Court, it does not lead to the consequence of the agreement being rendered void or voidable on account of mistake, much less, on account of a fraud. In this regard I may refer to a few decisions on the subject. In *North Eastern Ry. Co. v. Lord Hastings*, 1900 AC 260, it was observed that "the words in the deed were plain and unambiguous; that the fact that the parties had interpreted the words in a sense different from that which the words themselves plainly bore could not affect the construction". In [Ramkishore Lal Vs. Kamal Narain](#), the Court observed that "The golden rule of construction, it has been said, is to ascertain the intention of the parties to the instrument after considering all the words, in their ordinary, natural sense. To ascertain this intention the Court has to consider the relevant portion of the document as a whole and also to take into account the circumstances under which the particular words were

used."

27. The other limb of the plaintiff's argument to allege fraud in respect of the settlement dated 01.10.2001 is that defendant No. 3 had undertaken to build the staircase from the second floor to the terrace above the second floor along with a mumty, and the said obligation undertaken by the defendant No. 3 led the plaintiff to sign the settlement dated 01.10.2001. The plaintiff claims that the defendant No. 3 was aware that the said obligation was incapable of being performed, even when undertaken, on account of the fact that defendant No. 3 had exhausted the FAR while constructing the second floor flat and not left sufficient FAR unutilised to enable the raising of the staircase along with mumty from the second floor to the terrace above the second floor.

28. In this regard, I may refer to, firstly, the agreement dated 17.02.1992 entered into between late Sh. Darshan Lal Kapil and defendant No. 3. I have extracted hereinabove Clause 6 of the said agreement dated 17.02.1992 which, inter alia, provides that the terrace rights over the second floor shall remain with the owner, i.e. the plaintiff for further construction whenever it is permissible under the law. However, usage of terrace shall be common for all occupants till further construction is done. Pertinently, this agreement dated 17.02.1992 does not cast any obligation on defendant No. 3 to raise a staircase with a mumty from the second floor to the terrace above the second floor. Thereafter, disputes arose between the parties. By the time settlement dated 01.10.2001 came to be executed-as disclosed by learned counsel for the plaintiff himself, the construction of the building was complete. In fact, the building was built up to the year 1997 when it was completed. In this background the parties entered into the settlement dated 01.10.2001. Clause 6 of this settlement agreement obligated the second party, i.e. defendant No. 3 herein to complete the construction of staircase leading up to the terrace on the second floor as well as mumty above the same. However, the said obligation was not an unconditional or absolute obligation.

29. Clause 6 of the said settlement agreement also provides that whatever steps are required to be taken, including sanctioning of the plan from the NDMC, shall be taken before expiry of six months. The plaintiff himself states that sanction has not been granted by the NDMC for raising construction of the staircase and the mumty from the second floor to the terrace above the second floor. The obligation to raise the staircase and to make a mumty, as aforesaid, was clearly conditional upon the grant of sanction for building the same by the NDMC. It was not the agreement of the parties that defendant No. 3 shall raise construction of the staircase and the mumty without a sanction, irrespective of a sanction, and; contrary to a sanction. It is not the plaintiff's case that defendant No. 3 did not take steps to obtain the sanction.

30. The grievance of the plaintiff is that defendant No. 3 ought to have demolished a portion of the second floor to enable the raising of the construction of the staircase

and the mumty has merit. No such obligation was undertaken by defendant No. 2 while entering into the settlement agreement dated 01.10.2001. None is discernible from the said settlement agreement dated 01.10.2001. As aforesaid, the building was completed by the year 1997. Consequently, the plaintiff was aware of the extent of construction raised by defendant No. 3 on the second floor. He consciously and, with open eyes, entered into the settlement dated 01.10.2001 knowing fully well that raising of the staircase and the mumty, as aforesaid, would require sanction from the NDMC. Therefore, the settlement dated 01.10.2001 provided that sanction shall be obtained from the NDMC for raising such construction.

31. Reliance placed by learned counsel for the plaintiff on the definition of "fraud" contained in Section 17 of the Contract Act, 1872 is misplaced. Learned counsel has sought to argue that the defendants and, in particular defendant No. 3, entered into the settlement agreement dated 01.10.2001 with the intention to deceive the plaintiff and to induce himself to enter into the said settlement by making a promise, without intending to perform it. According to the plaintiff, defendant No. 3 promised that it would raise the construction of the staircase and the mumty while being fully aware that under the building bye laws that would not be permissible as the entire FAR stood exhausted in the making of the second floor. As aforesaid, this submission of the plaintiff has no merit. In Black's Legal Dictionary, Fraud is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part some valuable thing belonging to him or surrender a legal right; a false representation of a matter of fact whether by words or by conduct by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury.

32. The promise undertaken by defendant No. 3 in Clause 6 of the settlement dated 01.10.2001 was that it would raise the staircase and the mumty from the second floor to the terrace above the second floor after obtaining and subject to the sanction of the plans by the NDMC. The NDMC has not granted the sanction, as reflected in their letter dated 10.10.2013, which reads as follows:

DEPARTMENT OF ARCHITECTURE & ENVIRONS

New Delhi MUNICIPAL COUNCIL

PALIKA KENDRA: New Delhi

File no. CA/BP/14, Bazar Lane, New Delhi/D-1948-49

Dated 10.10.2013

Sh. Mukesh Kapil

14, Bazar Lane,

Bengali Market,

New Delhi-110001

Subject: Plans for Add/Alt. of plans in R/o. 14, Bazar Lane, Bengali Market, New Delhi.

With reference to your building application on above said subject received vide scheme no. 0099/2013 dated 12.08.2013 it is to intimate that as per the orders of the Competent Authority, NDMC dated 03.10.2013, you are required to comply with the following shortcomings within 60 days for further necessary action.

1. The pergola in front of second floor balcony has been covered, which is not permissible and needs rectification.
2. Deposition of Rs. 6052/- as Labour Welfare Cess.
3. Deposition of Rs. 890/- as security for non removal of malba.
4. Submission of 1 set of photographs of the premises duly signed by the applicant/architect.
5. Submission of NOC from DUAC is required.
6. Submission of Structural drawings duly signed by the applicant/engineer.
7. Submission of an affidavit/undertaking that the municipal water will not be used for the construction purpose.
8. Submission of an affidavit/undertaking that the open to sky area will not be covered.
9. Plans need corrections w.r.t. area chart, dimension, staircase shape, parking, pergola, schedule of door and windows, balcony width, external wall, number of riser, staircase width, tread, coloring etc. & otherwise.

(A.M. ATHALE)

CHIEF ARCHITECT

Copy to:-

Sh. Manish Saini

Shop No. 122, Sec-15 Main Market

Sonepat (Haryana)

CHIEF ARCHITECT

33. If the plaintiff has any grievance in respect of the communication dated 10.10.2013 of the NDMC, it is for the plaintiff to take action against the NDMC. The plaintiff cannot insist that the staircase and the mumty be constructed by defendant No. 3 even without the sanction of the building plans, and thereby commit an

illegality. The right of the plaintiff, if any, against defendant No. 3 arising out of the settlement agreement and the decree passed by the Court in the aforesaid suits lies in execution, and not in seeking a declaration that the settlement agreement is voidable or void.

34. In the light of the above discussion, I am of the view, that no cause of action has arisen in favour of the plaintiff to seek a declaration that the settlement agreement dated 01.10.2001 and the decree passed by the Court on 03.10.2001 as modified on 02.11.2001 was obtained by fraud, or that the same is unlawful, illegal or not enforceable or is per incuriam. The said reliefs are also barred by limitation. The other reliefs prayed for in the suit are consequential to the reliefs prayed for as reliefs (a) and (b) and, therefore, cannot be granted.

35. I may refer to the two orders passed by this Court on 03.09.2013 and 04.10.2013 in Execution Petitions No. 35-36/2010. It is clear that the plaintiff is hell bent in somehow denying the rights of the defendants arising out of the compromise decree. The conduct of the plaintiff has been noted by the Court while passing the aforesaid orders, and he has also been subjected to Costs for his said conduct. The plaintiff, however, is relentless in his endeavour and the present is a completely frivolous suit filed by the plaintiff to abuse the process of this Court. Much time was taken by learned counsel for the plaintiff to meet the queries of the Court with regard to the maintainability of the suit. As aforesaid, the suit has been drafted in a highly unsatisfactory manner. Full facts have not been clearly stated and disclosed, and law has been pleaded in a wholesome manner. This has resulted in consuming enormous amount of time of the Court in framing the judgment. The parties who approach the Court with such like frivolous cases should be made to bear the burden of their misadventure.

36. Accordingly, while rejecting the plaint as not disclosing a cause of action and also being barred under Order 23 Rule 3A CPC, barred by res judicata and law of limitation, I subject the plaintiff to Costs of Rs. 30,000/-, to be paid to the Delhi Legal Services Authority within four weeks. A copy of this order be sent to the Delhi Legal Services Authority for their knowledge and execution.