
(1996) 07 DEL CK 0064

In the Delhi High Court

Case No : Suit No's. 450 and 451 of 1986

Vijaya Srivastava and Another

APPELLANT

Vs

Mirahul Enterprises and Others

RESPONDENT

Date of Decision : 01-07-1996

Acts Referred:

Citation : (1996) 4 AD 95 : (1996) 63 DLT 283

Hon'ble Judges : K. Ramamoorthy, J

Bench : Single Bench

Advocate : S. Ghosh and T.K. Ganju, for the Appellant;

Judgement

K. Ramamoorthy, J.

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

(2) At the outset, I have to state that these two cases are typical, of the parties trying to over reach the other and as the one could not win the day against the other they are before this Court. In or about the beginning of 1982 the second defendant Mr. S.B. Kishore had approached "V and "S" offering to sell flats in his Complex and by Ex. P.9 he would appear to have obtained sanction of the plan for the construction of the flats. On 16.7.1982 "V" had paid a sum

of Rs.10,000.00 as advance towards the price of the flat. On 7.1.1983 (Ex. P.17) the second defendant issued a certificate to the following effect :

"This is to certify that Smt. Vijaya Srivastava W/o Brig. K.K. Srivastava residing at J-43A, Nds Part I, New Delhi-49 has booked a residential flat measuring 1869 sq. ft. in Mirahul Apartments as per drawing attached at approximate cost of Rs. 411854.00 ".

Along with this, the second defendant had given the drawing Ex. P.18. As per this, there is no contract but Public Witness .I (V) and Public Witness . 2 Brig. K.K. Srivastava had spoken about this as a confirmed arrangement. On 8.2.1983 (Ex. P.16) second defendant wrote to Public Witness . 2 requesting him to ask Mr."S" who had taken flat S-4 to send a sum of Rs. 75,000.00 . On 2.5.1983 (Ex.P.14) second defendant wrote to Mrs. "V in the following terms:

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

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

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

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

"Please refer to your registered letter addressed to me dated 2 May, 1983. You are fully aware that I have booked only one flat on the second floor facing Uphar Cinema and have paid to you sufficient amount towards the same in terms of your agreement for sale. We have also tried our best to promote the sale of additional flat for your enterprises without any profit motives attached to it. You have now discussed the matter directly regarding the sale of the second two bed room flat with Admiral Rishi Raj Sood on 8 May at your residence. Hereafter the correspondence regarding second flat can be made directly with him. Please ensure that in all future correspondence with me please refer to only one flat on second floor facing Uphar Cinema as regards my booking is concerned and account my deposits accordingly."

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

"Reference your letter of 9.5.83 delivered to us yesterday kindly note that we have cancelled yours flats bearing Nos. S-2 & S-4, as we have not recd. your payment by 10.5.83 to enable us to get the agreement to sell finalised and have forfeited your advance as per our conditions of sale. However we shall reconsider the revival of the flats in case you pay your full installments due by 31.5.83 i.e.

70% of the flat value or have the flats rebooked and recover your advance from each flat from rebooking as a gesture of goodwill."

On 14.5.83 (Ex. Public Witness 2/3) Mrs. "V wrote to the second defendant about the discussions had on 13.5.83. The letter reads as follows :

" "Please refer to your discussions with my husband on the evening of 13th May and your subsequent visit to our house on 14 May in the morning with some documents pertaining to your Court case in respect of Rahul Food. Your replies to our queries are not very convincing and we Therefore request you to submit the following documents towards your legal title in respect of the land/building as well as flats under construction at Annexee A-13, Green Park Extension, New Delhi-110016. This is essential to remove any doubt regarding fraudulent sale of flats - (a) Non encumbrance Certificate from appropriate authority in respect of land/building/flat situated at A-13 (Annexee) Green Park Extension New Delhi-16. (b) An attested copy of title deed in respect of land and building - A-13 (Annexee) Green Park Extension, New Delhi-16. (c) An attested copy of partnership deed in respect of Mirahul Enterprises and authority to sign the sale deed in respect of flats under construction at A-13, Green Park Extension, New Delhi-16. (d) An affidavit signed by all the members of your family as well as any other partner in Mirahul Enterprises indicating that the title of the land and building at A-13 (Annexee), Green Park Extension has been handed over to Mirahul Enterprises for purposes of constructing residential flats and selling them to public/prospective buyers. (e) Name, address and account number of bankers in respect of Mirahul Enterprises. You are once again requested to expeditiously furnish me all the above mentioned documents so as to enter into final agreement with you for the flat booked by me for which I have already advanced you a substantial sum as per receipts issued by you and registration letter issued by you. Should you fail to submit/produce the above mentioned documents to my entire satisfaction before 31 May, I shall have no other alternative but to act as may be advised by my Advocate. I sincerely hope that you have not mortgaged this property as claimed by you and A-13, Green Park Extension, is free from any litigation. Should the facts be to the contrary, you will be liable under the laws to make good any loss and expenditure that I may have to incur, due to your actions or due to the direct/indirect actions of your family members or partners in Mirahul Enterprises. Hope you will produce the documents as stipulated in this letter before 31 May and refrain from any action which will jeopardise the situation regarding advance collected from me."

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

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

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

(5) Therefore, on 2.11.83 there were agreements between the parties. In Ex. PWI/2 relevant, preamble portion reads as follows :

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

Clause I of the agreement reads as follows :

"(1) That the sellers have already received the sum of Rs. 1.70 lacs at the time of signing this Agreement to sell as earnest money. That the sum of remaining payment towards the consideration is to be made in the manner prescribed below: Total cost of the flat Rs.264261.00 ."

In Ex. DPWI first four pages are the same as in Ex. Public Witness . 1/2 but in the 5th page there is difference and it is stated over and above Rs. 2,64,461.00 , a, sum of Rs. 1,71,712.00 is to be paid by "V. In Ex. Public Witness 2/21 agreement between "S" and second defendant the relevant preamble portion reads as follows :

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

Clause I of the agreement reads as follows :

"(1) That the sellers have already received the sum of Rs. 1.80 lacs at the time of signing this Agreement to sell as earnest money. That the sum of remaining payment towards the consideration is to be made in the manner prescribed below; Total cost of the flat Rs. 2.68 lacs."

Ex. P.41 dated 9.11.1983 receipt for Rs. 10,000.00 issued by second defendant to "V. Ex. P.42 dated 24.11.1983 receipt for cheque for Rs. 10,000.00 issued by second defendant in favor of "V. Ex. P.43 dated 24.11.1983 receipt for the cheque issued for Rs. 15,000.00 . Ex. P.44 dated 13.12.83 receipt for the cheque for Rs. 15,000.00 . Ex. P.45 dated 14.12.83 receipt for the cheque for Rs. 10,000.00 .

(6) The plaintiff "V is stated to have given interest free loan to second defendant

as evidenced by the following documents :

Ex. P.46 dated 11.2.84 Rs. 10,000.00 by cheque. Ex. P.47 dated 21.3.84 Rs. 5,000.00 by cheque. Ex. P.48 dated 21.3.84 Rs.15,000.00 in cash. Ex. P.49 dated 5.4.84 Rs. 50,000.00 by cheque. Ex. P.50 dated 19.4.84 Rs. 8,000.00 by cheque. Ex. P.51 dated 19.4.84 Rs. 7,000.00 by cheque. Ex. P.52 dated 6.5.84 Rs. 20,000.00 in cash. Ex. P.53 dated 11.5.84 Rs. 10,000.00 in cash. Ex. P.54 dated 23.5.84 Rs. 20,000.00 by cheque.

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

"Please refer to your telephonic conversation of 7 Oct. with my husband and confirm the following: (a) Suitable dates when the registration of flats can be finalised. (b) Suitable date when we can start fitting the flat with Almirah, cupboards etc. An early confirmation is requested".

On 12.12.1984 (Ex. , the second defendant wrote to "V in the following terms:

"This is to advise you to kindly have the regular "AGREEMENT To SELL" signed between us to enable us to confirm the allotment of Flat S-2 measuring approx. 950 sq. ft. in Mirahul APARTMENTS. If for any reason this is not done by 31.12.84 then we shall treat the provisional allotment as cancelled. Kindly note that any advance given for provisional booking of this flat is no firm commitment on our part for allotting the flat to you unless the regular "AGREEMENT To SELL" is signed between us."

On 15.12.1984 (Ex. P.4) "V wrote to the second defendant in the following terms:

"This refers to your Regd. letter dated 12.12.84 addressed to me. I am glad to learn that you desire to finalise the Agreement to sell 950 sq. ft. as against 1156 sq. ft. for which we have entered into agreement on 2nd Nov., 83. It may be recalled that vide my letter dated 8 Oct., 84, I had already expressed my desire to take over the possession of the flats as per our agreement. It may please be noted that I have already made full and adequate payment. Only a small amount was supposed to be paid at the time of possession. I again repeat that full and adequate payment in respect of this flat has already been made to you. I once again confirm my willingness to finalise the agreement to sell i.e., registration of the flat well before 31.12.84 as desired by you vide your letter dated 12 Dec 84. Please note that there was no provisional booking or provisional allotment but a regular agreement to sell was entered and signed between us on 2.11.83 for purchase of 1156 sq. ft. and in terms of this agreement full and adequate payment has been made and nothing is payable even though you have arbitrarily reduced the area from 1156 sq. ft. to 950 sq. ft. Without prejudice to my claim for full, complete and fair performance of contract dated 2.11.83 I am prepared to enter into "final agreement to sell" for 950 sq. ft. as stated by you in your letter dated 12.12.84. Kindly intimate the date and time when I should come and sign the contracts and complete any other necessary things."

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

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

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

"Please refer to your letters dated 29 Dec., 84 addressed to my wife - Mrs. Vijaya Shrivastava and Rear Admiral R.R. Sood, dispatched in one registered cover dated 28 Dec., 84 and received by Mrs. Vijaya Shrivastava on 29 Dec., 84. The above mentioned letters have brought out only a part of what was agreed to. To put the records straight, I would like to record the remainder facts agreed to between us- (a) Our meeting took place at your residence on 28 Dec., 84. (b) It was agreed that the Written Agreements dated 22 Nov., 84 between Mirahul enterprises and MRS.VIJAYASHRIVASTAVA as well as Mirahul Enterprises and Rear Admiral R.R. Sood will be given effect and- (i) the flats will be handed over soonest as per the written agreements dated 22 Nov., 83. (ii) Payments were made to you (seller) by the purchasers on the basis of approximate area mentioned in the agreements. Final Accounts will be settled after actual measurement of the flats. (iii) The loan-deposit was to continue as non-interest bearing loan- deposit up to 31 Dec., 84 as a special case as requested by you and thereafter it will bear an interest rate of 15% (fifteen percent only) per annum payable monthly to compensate towards monthly liabilities of Rear Admiral R.R. Sood in respect of loan from Housing Development and Finance Corporation Ltd., and rent of the present building occupied by our family. Further that the complete amount of the loan shall be refunded by 31 March, 85. (iv) The accommodation purchased by Mrs. Vijay Shrivastava being fully ready, the possession would be handed over much before 31 Jan., 85. This extended period is to enable her to get the electrical connections. As suggested by you she is to submit the application for electric connection attaching a copy of the "Agreement to Sell" dated 22 Nov., 84. (v) Remainder accommodation would be handed over

to Rear Admiral R.R. Sood or his authorised attorney i.e. to me on completion of the balance of work, if any before 31 Mar., 85. Since you also brought out that at present there are some differences of opinion amongst the partners of Mirahul Enterprises in respect of certain policy matters and issue of possession letters to the buyers, two copies of this letter are enclosed for return of one copy duly signed by all the partners of Mirahul Enterprises for our record before 15 Jan., 85."

Ex. P.I is the postal receipt and acknowledgement card. The same are marked as Ex. P.W. 2/14 in Suit No. 450/86. Ex. Public Witness .I/I is the power of attorney given by "V to P.W. 2. Ex. PW2/4 is the statement of amounts stated to have been paid by "V and "S" to second defendant and the statement was filed in the Court on 28.4.1990. Ex. PW2/1 dated 9.1.85 is communication from Hindustan Commercial Bank Ltd. to P.W. 2 about three cheques issued by Public Witness .2 in favor of second defendant for three amounts Rs. 8,000.00 , Rs. 10,000.00 and Rs. 10,000.00 .

(8) In Suit No. 450/86Ex.P.6dated21.3.1984 is a certificate given by the second defendant in the following terms :

"This is to certify that R/Adm. Rishi Raj Sood Vr. C.N.M. has booked the flat number "S-1" measuring 950.50 sq. ft. in Mirahul Apartments, A-13, Green Park Extension, New Delhi. It is also certified that this building is being made as per sanctioned plan of M.C.D. vide their letter No. 854/B/HQ/81 of 25.1.82 (Attested copy attached). This affidavit is being given after ascertaining full facts on the subject on behalf of all the partners of Mirahul Enterprises and constitutes a surety that no violation of building bye-laws would be made : We have not violated any building bye-laws nor any case is pending against us for violation of building regulations. We hold responsibility in case of any hindrance from any local Authority."

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

"As request by Mrs. V. Srivastava we have tentatively allotted Flat S-1 to you. All advance received against Flat S-4 shall be transferred to Flat S-1. It is requested that an early "agreement to sell" is finalised against Flat S-1."

On 24.10.83 the receipt is issued by the second defendant for Rs. 40,000.00 given by cheque by "S". On 11.5.83 (Ex. P.8) second defendant wrote to "S" saying that it was not possible for him to allot any flat. The letter written by "S" on 9.5.83 is marked as Ex.P.9. Ex. P.II is the receipt dated 22.11.83 for payment of Rs. 10,000.00 by cheque. Ex. P.12 dated 13.12.83 is receipt for payment by cheque for Rs. 30,000.00 . Ex. P.13 is the receipt dated 10.1.84 for payment of Rs. 6,000.00 by way of cheque. Ex. P. 14 is the receipt dated 20.1.84 for payment of Rs. 10,000.00 by way of cheque. Ex. P.15 is receipt dated 25.1.84 for payment of Rs. 7,000.00 by way of cash towards the cost of the flat. Ex P.I 6 is receipt dated 14.6.84 for payment of Rs. 20,000.00 by way of cheque.

(9) "S" also has paid money by way of interest free loan. Ex. P.17 is the receipt issued by second defendant dated 7.7.84 for the payment of Rs. 25,000.00 in cash. Ex. P.18 is the receipt dated 9.7.84 for payment of Rs. 45,000.00 as interest free loan by way of cash.

(10) On 14.1.1985 (Ex. Public Witness /13) "S" executed the general power of attorney in favor of Public Witness . 2. Ex. PW.2/18 dated 12.8.86 is the certificate issued by Hdfc stating that the original agreement for sell between "S" and the second defendant have been deposited with the Hdfc as a security against the loan advanced to him. Ex. PW.2 / 20 is the same statement of amounts filed before this Court on 28.4.85.

(11) EX.P.LDATED29.12.1984IS from the second defendant to "S" in the following terms:

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

Ex. P.3 is the letter dated 20.12.84 by "S" to the second defendant stating that a sum of Rs. 19,000.00 was payable by him towards the cost of the flat. Ex. P.4 is the acknowledgement card showing the letter sent by "S" to second defendant. Ex. P.5 is the letter dated 12.12.84 from second defendant to "S" in the following terms:

"This is to advise you to kindly have the regular "AGREEMENT To SELL" signed between us to enable us to confirm the allotment of Flat S-1 measuring approx. 955 sq. ft. in Mirahul APARTMENTS. If for any reason this is not done by 31.12.84 then we shall treat the provisional allotment as cancelled. Kindly note that any advance given for provisional booking of this flat is no firm commitment on our part for allotting the flat to you unless the regular "AGREEMENT To SELL" is signed between us."

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

(13) plaintiff "V" claims the relief of specific performance against the second defendant and also the 6th defendant. According to "V" the second defendant

has sold a portion of the property includible in the flat of the plaintiff "V" to the 6th defendant.

(14) The case of plaintiff "V" is that inspire of specific agreement on 2.11.83, as evidenced by Ex. PWI/2, second defendant has not been ready and willing to execute the sale deed and as a matter of fact a portion of it had been sold to the 6th defendant and, Therefore, the plaintiff "V" was forced to file this suit. plaintiff "V" also claims recovery of money from the second defendant paid as loan to the second defendant.

(15) plaintiff "S" claims the relief of specific performance and also the recovery of money paid as loan to the second defendant.

(16) The case of the second defendant is that there was no concluded agreement of sale between the parties and the interest free loan was also paid towards the price of the flat and plaintiff cannot seek to recover the amount. I have noticed the plea of the second defendant in the written statement while taking the stand that there was no concluded contract between the plaintiffs and the second defendant, the plaintiffs cannot club the loan transactions with these suits. Therefore, the plea by the second defendant relating to the loan transaction has to be considered in the light of his specific stand that there was no concluded contract between the plaintiffs and the second defendant for the sale of flats. Therefore, here itself I want to mention that it is not open to the plaintiffs to say that there is an admission by the second defendant in the written statement about the loan transaction. If I come to the conclusion that there has been a concluded contract between the plaintiffs and the second defendant, it becomes necessary for me to consider the purpose of the demand of money as loan by the plaintiffs to the second defendant. "Therefore, the short point that would arise for consideration in these two cases is whether there was a concluded contract between the parties for the sale of the flats for the entire money paid by the plaintiffs to the second defendant towards sale consideration. document Ex.DPW.I dated 2.11.83, which I had already referred to, assumes- importance for the purpose of deciding the question and the same has to be considered in the light of the documents summoned by the plaintiff "V" from the Income Tax Department with reference to the records of the second defendant and the first defendant with the Income Tax Department. One aspect I want to notice here is that the plaintiffs filed applications for injunction and also for mandatory injunction directing the second defendant to put them in possession of the flats. This Court passed an order on 21.8.1987 directing the second defendant to put the plaintiffs in possession of the flats and the plaintiffs are in possession of these flats now. The order passed by this Court was confirmed by the Supreme Court.

(17) Following issues were framed in the two suits : lessness (Suit No. 451186)

1. Whether the plaint has been signed and verified by a person competent to do so and suit instituted by a duly authorised person? Opp 2. Whether the

agreement dated 2.11.1983, executed between the plaintiff and the defendants 1-5 and set up by the plaintiff, is binding in all respects on the parties ? Opp 3. If Issue No. 2 is held in favor of the plaintiff, whether defendants 1- 5 are not liable to execute the sale deed and transfer possession of the flat measuring 1156 sq. ft. to the plaintiff ? OPD's 1-5 . 4. Whether the plaintiff is liable to pay to defendants 1-5 any sum over and above the admitted sum of Rs. 2,64,261.00 in execution of agreement to sell? OPD's 1-5. 5. Whether the plaintiff was ready and willing to perform his part of the agreement at all material points of time ? Opp 6. Whether the plaintiff/her husband made any additional writings as part of the agreement to sell dated 2.11.1983, as alleged by defendants 1-5? If so, to what effect? OPD's 1-5. 7. Whether any sum by way of loan was advanced to defendants 1-5 by the plaintiff ? If so, what amount and during what period and on what terms and whether plaintiff can seek relief in respect to said loan in the present suit ? Opp 8. In case defendants are held entitled to recover from the plaintiff in the event of specific performance being granted, any amount over and above the admitted amount of Rs. 2,64,261.00 , then, whether the plaintiff is entitled to claim adjustment for the excess claim against the alleged loan amount ? ; 9. Whether the sale or parting with possession by defendants 1-5 of one bed room of the flat in question in favor of defendant No. 6 is fraudulent, illegal and not binding on the plaintiff for the reasons stated in paras 24(a) to 24(i) of the plaint ? Opp 10. Relief. Opp r "Issues (Suit No. 450/86) " I. Whether the plaint has been signed and verified by a person competent to do so and suit instituted by a duly authorised person ? Opp 2. Whether the agreement dated 2.11.1983,executed between the plaintiff and the defendants 1-5 and set up by the plaintiff, is binding in all respects on the parties ? Opp 3. If Issue No. 2 is held in favor of the plaintiff, whether defendants 1- 5 are not liable to execute the sale deed and transfer possession of the flat measuring 955 sq. ft. to the plaintiff ? OPD's 1-5 4. Whether the plaintiff is liable to pay to defendants 1-5 any sum over and above the admitted sum of Rs. 2,68,000.00 in execution of agreement to sell ? OPD's 1-5. 5. Whether the plaintiff was ready and willing to perform his part of the agreement at all material points of time ? Opp 6. Whether the plaintiff/her husband made any additional writings as part of the agreement to sell dated 2.11.1983, as alleged by defendants 1-5? If so, to what effect ? OPD's 1-5. 7. Whether any sum by way of loan was advanced to defendants 1-5 by the plaintiff ? If so, what amount and during what period and on what terms and whether plaintiff can seek relief in respect to said loan in the present suit ? Opp 8. In case defendants are held entitled to recover from the plaintiff in the event of specific performance being granted, any amount over and above the admitted amount of Rs. 2,68,000.00 , then, whether the plaintiff is entitled to claim adjustment for the excess claim against the alleged loan amount ? 9. Relief. Opp

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

(19) ON-22.3.1994 the evidence of "V was commenced. In the evidence she

would state as Public Witness .I that there was a confirmed booking as per Exs. P. 17 and P.18. The total amount paid by her was Rs.3,15,000.00 .After 2.11.83 Rs.88,000.00 was paid as evidenced by Exs. P.44 and P.45 and the balance was Rs. 1,261.00 . According to her, the interest free loan is evidenced by Exs. P.47 to P.54. According to Public Witness .I by letter dated 12.12.84 (Ex. P.6) second defendant cancelled the allotment. About taking possession of the flat S-2, pursuant to the orders of the Supreme Court, Public Witness . I would state in the plan Ex. P.9 flat S-2 is shown which is supposed to be three bed rooms, three bathrooms and two stores but Mr. Kishore gave us one bath room, one bed room and one store room less. According to her, the third bed room is with the 6th defendant. About Ex. DPW.I in the cross-examination Public Witness .I would state "the agreement to sell Ex. Pwi /2 has five pages. Ex. DPW.I is signed by me on pages 1,2,3,4 and 5. (The witness wishes to volunteer a statement in addition to what has been said. It is so detailed in the volunteered statement. Note: That I am going to ask her to repeat so that it is taken verbatim on record). I do not recollect, but I remember in 1983 after signing all the pages of the agreement to sell when S.B. Kishore insisted on witnessing my husband and R.R. Sood. My husband noticed that he has put some money. I do not know some amount of money that we have to pay after possession of the flat, but my husband started arguing, saying, I have paid every amount. He said this is not meant for you, and this is meant for the people who will book flat after you. So after the argument, he changed the agreement to sell last page. He went inside A-13, Green Park Extension, and then he changed the last page, and that is why this change is there. 295 Q. Please state in whose handwriting is the portion encircled in red and marked "A" on page 5 of Ex. D.P.W.I ? Ans. The portion marked "A" is in the hand of my husband, but portion marked "B" is not in the handwriting of my husband. Portion marked "C" is not in the handwriting of my husband. I cannot say whose handwriting is this. Q. I put it to you that I signed at portion marked "B" to attest the portion marked "A" on page 5 of Ex.D.P.W.I. What have you to say ? Ans. I had not seen my husband writing the text part of portion marked "A". I recognise the handwriting of my husband. I and my husband went to Notary public where my signatures and the signatures of S.B. Kishore of my husband at page 5 were attested by Notary Public. The Notary Public was at Green Park. It is incorrect to suggest that what was written in hand by my husband was for Hdfc loan. I do not recollect taking an affidavit from Mr. Kishore dated 21.3.84. Exhibit PW2 is the letter written by me to defendant No. 1. It is correct that the present suit was filed in 1986." She would say that she was not able to recollect that whether there was any suit in the subordinate Court in 1985. She was not able to say whether she filed Suit No. 165/85 in the subordinate Court for injunction. Again, about Ex. DPW.I the questions and answers are in the following terms in her evidence dated 24.3.94 :

"Q.According to the 5th page of Ex. D.PWI, what is the total value of the Hat? Ans. According to the 5th page of Ex. D.PWI, the amount payable by us was Rs. 2,64,261 .00 plus Rs. 1,71,712.00 . (Volunteered - these amounts were not

agreed to be paid by us) Q. Please read the first paragraph of Ex. D.PWI at page 5. Ans. The first paragraph at page 5 reads as: "This agreement is provisional and a proper sale deed will be made after the flat will be ready, and is drawn up for the purchaser to get a loan from Hdfc and shall be treated as cancelled, at the time of issue of possession letter by the builders when a fresh agreement will be entered into between the seller and the purchaser. Q. Please state whether what is to be found at page 5 of Ex. D.PWI is a photo copy of "original" ? Ans. I do not know. Q. You did not file page 5 of the agreement in the action filed for specific performance. What is your reason ? Ans. I did not file it because I did not have that page. Q. I suggest it to you that you did not file page 5 because the original was with me. I detained it. What have you to say ? Ans. No. 296 Q. I suggest it to you that the value of the flat No. (sic.) 43,970.00 . You gave an earnest money of Rs. 2,37,000.00 , and the balance due was Rs. 1,98,000.00 . What have you to say ? Ans. I do not think we have to pay anything to the defendant. Q. I suggest it to you that you have given Rs. 1,45,000.00 as advance to Mirahul Enterprises. Ans. I gave a loan of Rs. 1,45,000.00 to defendant No. 2, not defendant No. 1. Out of the receipts which total Rs. 1,45,000.00 , paid by me, only Ex. P.53 and Ex. P.54 are signed by S.B. Kishore for Rs. 30,000.00 . The other receipts which are for Rs. 1,15,000.00 are signed by Rahul Kishore as partner of Mirahul Enterprises. It is incorrect to suggest that defendant No. 2 tried to return the loan of Rs. 1,45,000.00 to me. Q. On 12.12.1984, I asked you to come and sign agreement for 954 sq. ft. You wrote that you are prepared to sign regular agreement. Do you have the agreement of 954 sq. ft., the flat in which you are living today? [The witness requests for seeing the document.] (Note: This answer is prompted by interjection of Mr. B. Mohan, Counsel for the plaintiff]. Ans. I have got agreement of 1156 sq. ft. Q. Did I (S.B. Kishore) ever ask you for loan ? Ans. Yes. Q. Do you have any letter written by me, asking for loan ? Ans. My husband might be having it. Q. Why have you shown in the specific performance application that you want interest at 15% when the receipt shows very clearly "interest free loan", and there is no time limit to give it back. Ans. Please ask this question from my husband, because I had not attended the Court for the last 10 years. This is first time I have attended the Court. Q. Why have you clubbed the prayer for return of the loan with the specific performance suit, as it has nothing to do with the specific performance? Ans. I do not know."

Therefore, the second defendant elicited from this witness that Rs. 1,45,000.00 which was received as loan" was only towards the price of the flat.

(20) BRIG. K.K. Srivastava, husband of "V and attorney of "S", was examined as P.W.2 and the examination commenced on 22.3.96. He would state that the total cost agreed was Rs. 2,64,263.00 . About Ex. D.PWI dated 2.11.83 Public Witness . 2 would give us a version in the following terms :

"Q. 22. Please see the document Ex. DPWI. What is this document about ? Ans. This document was the first agreement which was given to my wife for signatures, which was brought duly signed by defendant No. 2. After she had

signed it, it was given to me for witnessing and I had witnessed it. At that stage, Adm. Sood was signing his documents and he also gave it to me for witnessing. I witnessed that agreement also. Then defendant No. 2 told Adm. Sood to sign some corrections. Therefore, I started reading this document Ex. Dpwi and on the 1st page I found objectionable terms which were not agreed between us. So I protested to defendant No. 2. Adm. Sood also protested when he also saw similar things. Defendant No. 2 said that this agreement is for future buyers and not for you people. He suggested certain corrections which on the carbon copy of the agreement of both the flat buyers I recorded and reread. Both myself and Adm. Sood did not agree even with these modifications. So we, again told defendant No. 2 that we do not agree to these conditions. Defendant No. 2 readily agreed to change the entire documents and said we will have to go to the High Court for typing and notarised. Accordingly, we came to the High Court. Adm. Sood had certain office meeting in the afternoon so his fresh agreement was typed first and was signed by both the seller and buyer and was witnessed by me and was notarised at the High Court. After that my wife's agreement was also typed. But my wife had gone away since children were to come from school bus. I remained with defendant No. 2, got the agreement typed and we both returned home and we were to meet in the evening for signing and not arising at Green Park, where a Notary resides. We met at the Notary's place in the evening. The agreement was signed by both the parties and witnessed by me and Adm. Sood. But unfortunately the Notary had not come and we had to go to Airport. So that agreement was not notarised on that day. It was later on notarised on 5.11.83."

According to Public Witness . 2, Ex. Pwi / 2 was prepared in the High Court and notarised in the High Court. Ex. DPW.I was not acted upon by the parties and it was not notarised in his presence and this document was not by consent of parties and copy of this document was not given to him. When asked whether the second defendant gave a copy to Public Witness . 2, Public Witness . 2 would state : Q. 27. What did defendant No. 2 tell you about this document ? Ans. When the new agreements were being typed in the High Court, defendant No. 2 destroyed certain documents which included some stamp paper also. I had no disbelieve or loss of faith that defendant No. 2 did not destroy these documents at that time. I all the time trusted him and kept on paying money in good faith." P.W. 2 expects us to believe that the second defendant promised to destroy this document and he accepted that statement. He would further state :

"Q. 28.Did he tell you that defendant No. 2 will destroy the document Ex. Dpwi ? Ans. Yes on 5.11.83 when the documents were being notarised he reaffirmed that all the old documents have been destroyed and please be rest assured including Ex. DPWI. Q. 29. Why did you not keep a copy of this document ? Ans. As I said earlier, we had no opportunity for any distrust and we had good faith on defendant No. 2.

(21) Second defendant has examined himself as D.W. I and he would speak to

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

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

(23) A look at Ex. PWI/2 and Ex. Dpwi and a close examination of these documents would reveal the real facts. The stamp papers were purchased by "V" on 4.10.83. The stamp paper for Rs. 5.00 for Ex. PWI/2, the number is given as 28422. The stamp for Rs. 5.00 for Ex. Dpwi, the number is given as 28421. The stamp paper for Rs. 5.00 for Ex. PW2/21, agreement between "S" and second defendant bears the number 28418 dated 4.10.83. All the stamp papers were purchased from stamp vendor Smt. Prem Kumari, license No. 157, Patiala House Courts, New Delhi. In Ex. PWI/2 and Ex. DPW.I first four pages are identical. Page No. 5 in Ex. PW.I/ 2 reads as follows :

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

In this page second defendant has signed on behalf of the first defendant, plaintiff "V has signed as purchaser, Public Witness .2 and plaintiff "V have signed as witnesses. Ex. PWI/2 is attested by the Notary Public Mr. G.C. Verma on 5.11.83. Ex. Dpwi is also attested by Mr. G.C. Verma on the same date i.e. 5.11.83. In all the five pages in both the documents, Mr. G.C. Verma has put his seal. Ex. PW.2/21 is signed by the Notary Public, whose name I am not able to decipher from the document. It was notarised on 2.11.83 and Public Witness . 2 has witnessed the document. Therefore, the theory by Public Witness . I and Public Witness . 2 that they were not present at the time Ex. DPW.I was attested by the Notary Public and they are not aware of the 5th page in Ex. Dpwi cannot at all be accepted. For reasons best known to them, the parties had not placed the full facts as to how these two documents had come into existence. It may also be noticed that Public Witness . 2 denied his signatures in Ex. DPW.I. But on 4.3.87 he admitted the signatures before this Court and this Court passed the following order:

"Learned Counsel for the plaintiff states that it was by mistake that he had denied the document in question but in fact it is admitted that it is signed by the

plaintiff and also that the writing on the last page of the agreement produced by the defendant bears the writing in the hand of Brig. K.K. Srivastava."

The evidence of Public Witness . 1 and Public Witness . 2 in this respect directs the needle of suspicion towards them and they are trying to be too smart and they do not hesitate in indulging in falsehood. According to Public Witness . 2 the total consideration is Rs. 2,64,261.00 . And as on 2.11.83 Rs. 1,17,000.00 had been paid and the balance also have been paid except to the extent of Rs. 1,261.00 . If that is so, Public Witness .2 is not able to give any Explanation as to how did the second defendant give a statement to the Income Tax Department that he had received a total advance of Rs. 5,80,000.00 from plaintiff "V". If we take into account the payments made by plaintiff "V" including Rs. 1,45,000.00 , which is stated to be "loan" that would not come to Rs. 5,80,000.00 . There is a balance of nearly Rs. 1,72,000.00 . It is not the case of Public Witness . 2 that the statement given by the second defendant to the Income Tax Department is not correct. It is also not the case of Public Witness .2 that he paid extra Rs. 1,72,000.00 over and above Rs. : 4,08,000.00 (including the loan amount) to the second defendant towards the cost of the flat. Therefore, by some arrangement which as I had mentioned earlier, both parties had come to some understanding for paying the consideration and they are not prepared to tell us as to how the plaintiff "V" had paid Rs. 5,80,000.00 . Therefore, the case of the second defendant that there was no loan transaction at all and the alleged loan transaction was only a nomenclature adopted by the parties for their own convenience and the plaintiff "V" cannot claim any amount and seek to recover the same from the second defendant is truck and I have no hesitation in accepting the same.

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

(25) In Suit No. 451/86 there is one more aspect i.e. with reference to the claim of specific relief against the 6th defendant. The 6th defendant has not chosen to contest and was set *ex parte*. From the documents filed in the case, I find no difficulty in coming to the conclusion that the 6th defendant is only an alias or alter ego of the second defendant. Therefore, the second defendant had not delivered possession of the complete area agreed to by him to the plaintiff "V".

(26) With reference to Suit No. 450/86, Mr. Sood has not entered the witness box and Public Witness .2 as attorney sought to give evidence on his behalf also. Public Witness .2 speaks about the transaction between "S" and the second defendant.

Q. 60. Please see the documents at pages 14 to 16 of documents filed in suit 450/86, by the plaintiff and tell us about what they are about ? , Ans. Ex. PW2/15,2/16 are house tax receipts. Ex. PW.2/17 is the sanction order issued by

the MCD. Q. 61. Please see the document at page 17, what is this about ? Ans. Ex. Public Witness . 2/18 is the certificate issued by Hdfc that original agreement to sale is deposited with Hdfc for the loan advanced to Admiral Sood. Q. 62. Please see page 18, what is this document about and who has signed it? Ans. Ex. PW.2/19 is the agreement to sell signed by defendant No. 2 as seller and Admiral Sood as purchaser and witnessed by me and attested at Delhi High Court. Q. 63. Was this agreement signed in your presence ? Ans. Yes by both the seller and the purchaser and was notarised in my presence. Q. 64. Please see page 23, what is this document about ? Ans. This is the building plan signed by defendant 2 on behalf of defendant I and Admiral R.R. Sood as purchaser. This is Ex. P.9. Q. 65. Please see the statement showing payments to the defendant, is the statement correct ? Ans. Yes. The statement is filed by the party today and is marked as Ex. P.W.2/20. Q. 66. Was the plaintiff in suit 450/86 ready and willing at all material times to perform his obligations under the agreement to sell ? Ans. Yes. Q. 67. Please state whether the agreement to sell dated 2.11.83 was executed by plaintiff in Suit No. 450/86 was confirmed and irrevocable agreement. Ans. Yes. Q. 68. Please see the document Ex.PW.2/21 who has assigned this, whether this was signed in your presence ? Ans. This is the original agreement to sell between defendant I and Admiral Sood and has been signed in my presence by defendant 2 for defendant I and Adm. Sood. It bears my signature as witness and was notarised in my presence."

P.W. 2 does not speak about Exs. P. 17 and P. 18, which are stated to be receipts by the second defendant for the payment of cash made by plaintiff "S". These payments were made by plaintiff "S" to the second defendant. It is not the case "Ws. 2 that he was present, when the case of plaintiff "V about the loan cannot be accepted, the case of plaintiff "S" relating to loan" would automatically fall to the ground because the nature of the transactions between plaintiff "V, plaintiff "S" and second defendant were the same. Because misunderstanding had arisen between the parties they had chosen to put forth extreme contentions with a view to defeating the rights of the other party. Therefore, the case of plaintiff "S" that Rs. 00.00 was paid for to be returned by the second defendant cannot at all be . Though Public Witness . 2 purported to represent the plaintiff "S", as power of holder, on this aspect of the case evidence of plaintiff "S" is very essential. - examination of "S" is very crucial and it is well settled that the parties must all evidence before the Court and they cannot keep themselves out of the witness box leaving the Court to guess about facts. Therefore, I have no hesitation to draw adverse inference against plaintiff "S" relating to the transaction of loan" of Rs. 70,000.00 to the second defendant. Therefore, the case of plaintiffs "V and "S" on the question of loan" has to be rejected. Even in the statement filed before this Court by plaintiffs "V" and "S" dated 28.4.95, the amounts mentioned by second defendant before the Income Tax Department are referred to. Therefore, on the basis of the oral evidence of Public Witness .I, Public Witness . 2 and DW1 and the documentary evidence including the documents summoned from the Income Tax Department by the plaintiff "V, the conclusion is

irresistible that there was a concluded contract between plaintiff "V and second defendant and plaintiff "S" and the second defendant and all the amounts paid by plaintiffs "V and "S" would go to the cost of the flats. Whether the amounts given by plaintiff "S" is mentioned by the second defendant before the Income Tax Department is there before Court or not, the pattern being the same as that of plaintiff "V, the inference is that plaintiff "S" paid Rs. 70,000.00 in the form of loan" towards the cost of the flat.

(27) The learned Senior Counsel Mr. Ghosh submitted that the case of the plaintiffs must be accepted in toto and the second defendant appearing in person submitted that the plaintiffs did not have any final agreement and, Therefore, their claim for specific performance must be rejected and they are not entitled to the return of the money also.

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

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

(30) In Suit No. 451/86 on Issue No. 11 find that the plaint has been signed and verified by a competent person. The issue is answered accordingly.

(31) On Issue No. 21 find that there was a concluded agreement on 2.11.1983 between plaintiff and defendants 1 to 5. The issue is answered accordingly.

(32) On Issue No. 31 find that the defendants are liable to execute the sale deed. The issue is answered accordingly.

(33) On Issue No. 51 find that the plaintiff has always been ready and willing to perform her part of the contract. The issue is answered accordingly.

(34) On Issue No. 61 find that as contended by defendants 1 to 5 there was an agreement executed on 2.11.1983, which is marked as Ex. DPW.1, and that is also binding on the parties.

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

(36) On Issue No. 91 find that 6th defendant is bound to convey to the plaintiff Along with defendants 1 to 5 the third bed room, which formed part of the agreement between the parties.

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

(38) On Issue No. 21 find that there was a concluded contract on 2.11.83. This issue is answered accordingly.

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

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

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

(42) Consequently, in Suit No. 451/86, there shall be a decree :

(i) directing defendants 1 to 6 to execute a sale deed in favor of the plaintiff "V" with reference to flat No. S-2, Green Park Extension, New Delhi within eight weeks from today and in the event of defendants failing to execute the sale deed within the time stipulated, an officer of this Court shall execute the sale deed in favor of the plaintiff in accordance with law; (ii) dismissing the claim of the plaintiff for the recovery of Rs. 1,45,000/-; (iii) directing the defendants 1 to 6 to put the plaintiff in possession of the third bed room in S-2, Green Park Extension, New Delhi; (iv) directing the parties to bear their own costs. In Suit No. 450/86 there shall be a decree: (i) directing defendants 1 to 5 to execute a sale deed in favor of the plaintiff "S" with reference to flat No. S-1, Green Park Extension, New Delhi within eight weeks from today and in the event of defendants failing to execute the sale deed within the time stipulated, an officer of this Court shall execute the sale deed in favor of the plaintiff in accordance with law; (ii) dismissing the claim of the plaintiff for the recovery of Rs. 70,000.00 . (iii) directing the parties to bear their own costs.