

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 06.12.2010

CS(OS) 2105/1994

M/S INDO SOVIET MEDICAL EDUCATION CARE AND
RESEARCH FOUNDATION

..... PLAINTIFF

Vs

MRS ANJU JAIN & ORS

..... DEFENDANTS

AND

CS(OS) 260/1994

MRS ANJU JAIN

Vs

M/S INDO SOVIET MEDICAL EDUCATION CARE AND RESEARCH FOUNDATION

Advocates who appeared in this case:

Mr Dinesh Agnani with Ms Leena Tuteja & Mr Rahul Arora, Advs. for the
plaintiff in CS(OS) 260/1994 and for the defendant in CS(OS) 2105/1994.

Mr R M Sinha, Advocate for the plaintiff in CS(OS) 2105/1994 and for defendant in CS(OS) 260/1994.

CORAM :-

HON'BLE MR JUSTICE RAJIV SHAKDHER

1. Whether the Reporters of local papers may
be allowed to see the judgment ? No
2. To be referred to Reporters or not ? No
3. Whether the judgment should be reported
in the Digest ? Yes

RAJIV SHAKDHER, J

1. The captioned suits being a mirror image of each other, in the sense that they arise

from the same transaction – therefore, in my view, can be disposed of by a common judgment.

1.1 For the sake of convenience, Indo Soviet Medical Education, Care and Research Foundation will be referred to as the ‘Trust’ while, Mrs Anju Jain and her husband Dr V K Jain will be collectively referred to as ‘Jains’.

1.2 The Trust has instituted CS(OS) 2105/1994 for recovery of money and damages. The Jains through Mrs Anju Jain have instituted CS(OS) 260/1994 for damages.

2. With this preface, let me first detail out the case of the Trust in its suit i.e., CS(OS) 2105/1994. The Trust which claims to undertake scientific research, inter alia in areas of medical science, technology and health care were, according to it, approached by the Jains for sale of their hospital. The hospital goes by the name of Udyan Medical Centre which is evidently owned by a Private Limited Company by the name of Udyan Diagnostic and Therapeutic Consultancy Private Limited (hereinafter referred to as ‘UDTC’). The Jains are directors of UDTC. It is averred that, based on the negotiations held between the representatives of the Trust and the Jains, an agreement was arrived for acquiring the hospital which comprised of the land situate at B-18, Surya Nagar, Ghaziabad (in short ‘Ghaziabad Property’) admeasuring 579.71 square meters, alongwith the super structure, i.e., a 20 bed hospital; expensive medical equipments; fittings and fixtures; laboratory equipments; physiotherapy equipment; and a X-ray machine.

2.1 On record, the super structure and the land underneath, that is, the hospital was owned by Mrs Anju Jain, while the super structure i.e., the hospital alongwith medical equipment sans the X-ray machine was owned by UDTC. The X-ray equipment was owned by Dr V K Jain. The parties pegged the total consideration for purchase of land, the super structure (i.e., the hospital) alongwith medical equipment, as also the X-ray equipment at Rs 42 lacs. The broad terms of the said agreement arrived at between the Trust and the Jains

was recorded in a receipt-cum-agreement dated 09.01.1993 (hereinafter referred to in short as 'the agreement'). This document is admitted by both the parties and is marked as Ex P-1.

2.2 As recorded in the said agreement, a sum of Rs 2 lacs was paid in cash by the Trust to Dr V K Jain. The agreement also records that Rs 2 lacs which was received in cash, was in the nature of non-refundable earnest money, and that balance sum of Rs 40 lacs was to be paid by the Trust by 26.02.1993; failing which, the transaction would be deemed to be cancelled, and the earnest money paid in cash would stand forfeited. The agreement, went on to add that in case the transaction was rescinded by Dr V K Jain then, he would be liable to pay a penalty equivalent to twice the amount (i.e., Rs 2 lacs) received as earnest money.

2.3 It is not disputed by the Jains that they had received Rs 2 lacs in cash, as recorded in the agreement at the time of its execution. It is also not disputed by the Jains that from time to time the Trust paid further sums of money, as detailed out in Paragraph 8 of the plaint save and except a sum of Rs 1 lac alleged to have been paid in cash. The amounts referred to in Paragraph 8 of the plaint give details of sums paid by the Trust to the Jains in the form of pay orders and cash. Out of the total sum of Rs 13 lacs alleged as having been paid by the Trust to Jains, (in addition to Rs 2 lacs paid in cash on 09.01.1993), Rs 12 lacs was evidently paid through pay orders, while the balance amount of Rs 1 lac by way of cash. The Jains have disputed the receipt of Rs 1 lac by way of cash. Resultantly, there is a dispute as to the total amount received by Jains from the Trust pursuant to the execution of the agreement (Exhibit P-1). The Trust says that it has paid to the Jains a sum of Rs 15 lacs in all, which includes Rs 2 lacs in cash paid at the time of execution of the agreement, while Jains accept the receipt of only Rs 14 lacs in all.

3. The Trust alleges that they approached the Jains for completion of formalities with regard to conclusion of the transaction. It is the case of the Trust that the defendants had represented it that they would obtain the necessary permissions and approvals, and thereafter execute an agreement to sell before 26.02.1993 i.e., the date provided in the agreement. The Trust alleges that the defendants did not take requisite steps to obtain

necessary permissions from the local authorities qua the Ghaziabad property or from the Income Tax Authorities as was required at that point in time. Since, Dr V K Jain allegedly threatened the representatives of the Trust, a criminal complaint was lodged with the Magistrate under Sections 403, 406, 420 and 506 of the Indian Penal Code, 1860 (in short 'IPC'). The said criminal complaint, was followed by a legal notice dated 22.03.1993, which was replied to by the Jains vide reply dated 10.04.1993. It is specifically averred that the defendants in their reply had admitted receipt of Rs 14 lacs from the Trust.

4. In this background, the Trust has filed the instant action claiming refund of sum of Rs 15 lacs paid by the Trust to the Jains; interest on the said sum of Rs 15 lacs for the period January-February, 1993 till 20.09.1994 at the rate of 24%, which is quantified at Rs 5,55,000/-; compensation for loss of business, crystallised at Rs 9,45,000; and lastly, compensation for price escalation, and damages for loss of reputation-pegged at Rs 15 lacs. Thus, the total claim has been quantified by the Trust at Rs 45 lacs.

5. The Jains as expected have refuted the claim put up by the Trust. The stand taken by the Jains is thus: the agreement encompasses three separate transactions, which included sale of hospital equipment, fixtures and furniture and machines owned by UDTC the consideration for which was fixed at Rs 9 lacs; the sale of X-Ray machine owned by Dr V K Jain, the price for which was fixed at Rs 1 lac; and lastly, Ghaziabad property and super structure built thereon, which is owned by Mrs Anju Jain; the consideration for which was fixed at Rs 32 lacs. The Jains contend that it is because of this that, on the date of execution of the agreement i.e., 09.01.1993, Rs 2 lacs which was received from the Trust was received by Dr V K Jain on behalf of UDTC. Consequently, it is averred by Jains, that a further sum of Rs 7 lacs vide two cheques; the first dated 19.01.1993 in the sum of Rs 2.5 lacs; and the second dated 22.01.1993 in the sum of Rs 4.5 lacs was drawn by the Trust in favour of UDTC. With these sums, according to the Jains, the sale of the hospital equipment, furniture and fixtures was completed as UDTC had received the agreed amount of Rs 9 lacs in that behalf. Similarly, in respect of the X-Ray machine owned by Dr V K Jain, Rs 1 lac by way of a cheque bearing no. 00063 dated 22.01.1993 was received by Dr V K Jain.

Resultantly, the second transaction was also consummated in so far as the Jains were concerned.

5.1 The problem, according to the Jains, arose qua the third transaction i.e., the sale of the Ghaziabad property, which includes the land and the super structure built thereon. In respect of the said transaction, the Trust paid to Mrs Anju Jain, who owned the land and the building constructed thereon, by way of a cheque dated 09.02.1993, a sum of Rs 4 lacs only. According to the Jains, since the balance sum of Rs 28 lacs was not paid before the due date i.e., 26.02.1993, Mrs Anju Jain forfeited the said amount on 01.01.1994.

5.2 According to the Jains the breach by the Trust of its obligations both to pay the balance money towards the Ghaziabad property and to get necessary approvals was not rectified despite issuance of letters dated 18.02.1993 and 27.02.1993 by Dr V K Jain. It is further contended that the afore-mentioned letters were followed by yet another letter dated 05.03.1993. This letter evidently was issued by Mrs Anju Jain prior to forfeiture whereby she called upon the Trust not only to fulfill the requirement of getting approvals and permission qua the Ghaziabad Property, but also asked the Trust to remove the equipments, furniture and fixtures as also the X-ray machine which, according to the Jains, had already stood sold to the Trust.

6. In the replication the Trust has reiterated its stand that it was a single transaction involving the sale of land, super structure alongwith medical equipment, furniture and fixtures as also the X-ray machine. The stand of the Jains that there were three separate transactions has been refuted. The Trust has also denied the receipt of two out of the three letters i.e., letters dated 27.02.1993 and 05.03.1993.

6.1 The Trust, however, in the replication has asserted that Jains did not comply with the requirement of obtaining a No Objection Certificate from the Ghaziabad Development Authority as also from the Income Tax Authorities even though these were 'pre-requisites' for execution of the sale deed.

7. At this stage, I may also briefly refer to the Jain's suit i.e., CS(OS) 260/1994. In this suit Jains through Mrs Anju Jain allege breach of what they categorise as the third transaction involving the sale of land and the super structure built thereon. In the action filed breach is attributed to the Trust, its Chairman and Secretary. Even though the suit is titled, as one for declaration and damages, the prayer is confined to damages. Damages have been sought by Mrs Anju Jain on account of: "illegal, unauthorized blocking of premises (i.e., Ghaziabad property for the period 01.03.1993 to 31.12.1993; for personal damages for injury caused to her career and reputation; and lastly, deprivation of interest on the balance sum of Rs 28 lacs. The damages on these three counts are quantified at Rs 6 lacs.

8. In defence the Trust has disputed the claim of Mrs Anju Jain. The Trust claims that the suit is vexatious, without merit and is based on 'illusory' and 'imaginary' claims and hence, is liable to be rejected under Order VII Rule 11 of the Code of Civil Procedure, 1908 (in short 'CPC'). The Trust has reiterated the stand that the transaction was a '**composite single deal**' for sale of a running hospital which comprised of: the equipment, furniture and fixtures, medical store, power generation equipment, land and building for a total consideration of Rs 42 lacs. The Trust further reiterated that it was agreed that the balance sum of Rs 40 lacs would be paid at the time of registration of the sale deed, after "**No Objection Certificate**" had been obtained from the Ghaziabad Development Authority (in short 'GDA'); and clearance had been obtained from the Income Tax Authorities under the provisions of Section 269 of the Income Tax Act, 1961, in the prescribed form i.e., Form 37 (I) by Mrs Anju Jain and her associates. The onus, according to the Trust in respect of the same was on Mrs Anju Jain and her husband Dr V K Jain. The sum and substance of the defence was that since, Mrs Anju Jain and her husband had committed breach of the agreement there was no question of payment of damages as alleged or at all. The Trust also took the stand that while Mrs Anju Jain had not suffered any damages the Trust, on the other hand, was out of pocket to the tune of Rs 15 lacs paid by way of 'advance' and/or 'part payment'. The Trust also specifically denied the claim of Mrs Anju Jain in respect of

storage charges claimed at the rate of Rs 50,000 per month for the period 01.03.1993 till 31.12.1993, on the ground that Mrs Anju Jain had suffered no damages as the hospital was running, and subsequently Mrs Jain alongwith her husband Dr V K Jain had closed the hospital and disbanded the staff and removed the equipments for her gain causing a loss to the Trust. The claim for interest was also refuted by the Trust.

9. Based on the aforesaid pleadings, the Court by an order dated 21.08.2010 framed the following issues in the Trust's suit i.e., CS(OS) 2105/1994 :-

- “1. Whether the plaintiff and defendants had entered into a valid agreement dated 9-1-83 where under defendants have received Rs. 15 lacs as part payment?
2. Whether the defendants have committed any breach of agreement dated 9-1-83? If so whether defendants are liable to pay the compensation/damages?
3. Whether plaint has been instituted by properly authorized person?
4. Whether defendant No.1 is justified in forfeiting the amount of Rs. 4 lacs on 1-1-94?
5. Whether the receipt cum memorandum of understanding dated 9-1-83 reflects one composite agreement for the sale of premises? If so, its effect?
6. Relief.”

10. In this very suit an additional issue was framed by an order dated 13.09.2005 which reads as follows:-

“If issue no.1 is answered in favour of the plaintiff, whether the plaintiff is entitled to refund of advance of Rs 15 lakh paid under the agreement dated 09.01.1993? OPP”

11. Similarly, in Anju Jain's suit (being suit no. 260/1994) the Court by an order dated 20.07.2000 framed the following issues:-

- “1. Whether the suit is barred by Order 2 Rule 2 CPC?
2. Whether the suit is bad for non-joinder of necessary parties? If so, to what effect?
3. Whether the plaintiff is entitled to damages/storage charges as alleged in the plaint? If so, at what rate and for what period?
4. Relief.”

12. I may only note that by an order dated 21.08.2001 passed in Mrs Anju Jain's suit i.e., CS(OS) 260/1994 the Court based on an application for consolidation directed that two suits be consolidated. A further direction was issued that the main proceedings shall be conducted in Mrs Anju Jain's suit i.e., CS(OS) 260/1994. Consequently, evidence was led in Mrs Anju Jain's suit i.e., CS(OS) 260/1994.

13. The examination-in-chief was conducted by filing affidavits of evidence of witnesses. In support of her case Mrs Anju Jain examined herself as well as her husband Dr V K Jain, while the Trust examined Dr PS Jain, Chairman of the Trust; Mr Manoj Kumar, the honorary secretary of the Trust and Dr Rajeev Kumar Jain, the secretary of the Trust. Even though affidavit of evidence of Dr Rajeev Jain was filed, he was dropped from the list of witnesses as is recorded in the order dated 13.11.2009 passed in CS(OS) 260/1994. Resultantly, the Trust cited only, the aforementioned two witnesses.

14. Mrs Anju Jain, in support of her examination-in-chief replicated the case set out in the plaint. Specifically she adverted to the fact that she was a lady entrepreneur and one of the directors of UDTC. She deposed that since she alongwith her husband were the shareholders and directors of UDTC, they had decided to dispose of the assets of the hospital which included the land and building owned by her as well as the X-ray machine owned by her husband. For this purpose, she stated that they had taken out an advertisement in Hindustan Times dated 19.07.1992 (Ex PW1/1). She further testified that Dr P S Jain (DW-1) responded to the advertisement vide letter dated 29.07.1992 (Ex.PW1/2). Pursuant thereto, the witness stated that DW-1 had approached her husband Dr V K Jain and had shown his willingness to buy the hospital equipment, furniture and fixtures, X-ray machine as also the land and building owned by her. The witness went on to depose that DW-1 thereupon executed the agreement dated 09.01.1993 (Ex. P-1) with her husband Dr V K Jain, and that it was predicated on a detailed letter dated 05.09.1992 written by UDTC to DW-1. The witness deposed to the effect that the agreement encompassed three separate transactions relating to sale of CS(OS) 2105-1994 & 260-1994

hospital equipment, fixtures and furniture belonging to UDTC; X-ray machine which was owned by Dr V K Jain and lastly; land and building which was owned by her. In consonance with what was pleaded in the plaint separate price was attributed to each of the three transactions. According to the witness, the price agreed for the sale of hospital equipment, fixtures and furniture was fixed at Rs 9 lacs, the price of X-ray machine was fixed at Rs 1 lac and the price of land and building was fixed at Rs 32 lacs. The witness accepted the fact that on execution of the agreement dated 09.01.1993 (Ex.P-1), the defendants had paid in cash a sum of Rs 2 lacs. The witness went on to say that the said amount was received by Dr V K Jain, the director of UDTC on behalf of UDTC. The witness also accepted receipt of entire consideration of Rs 9 lacs by UDTC and similarly, Rs 1 lac by Dr V K Jain. The witness also accepted that in respect of the third transaction i.e., the sale of land and building she had received a sum of Rs 4 lacs. Mrs Anju Jain however in her testimony placed the onus with regard to the completion of third transaction i.e., sale of land and building squarely on the Trust. She adverted to the fact that the agreement dated 09.01.1993 (Ex.P-1) required that the entire consideration be paid on or before 26.02.1993 and, since the Trust had failed to obtain necessary approvals with regard to the sale of land and building from the concerned authorities i.e., State of Uttar Pradesh as the property in issue was situated there and the Income Tax Authorities under Section 269 of the Income Tax Act,1961 (as it then obtained) in the prescribed Form i.e., Form 37(I), the transaction could not be completed. The witness went on to say that despite oral reminders of her husband the third transaction was not completed. She also adverted to the fact that a written communication was sent by Dr V K Jain vide letters dated 18.02.1993 (Ex PW1/5) and 27.02.1993 (Ex PW1/6). These letters were followed by another letter dated 05.03.1993 (Ex PW1/7). The witness further deposed that by virtue of the letter dated 05.03.1993(Ex PW1/7) she had put the Trust to notice that on their failure to complete the transaction on or before 20.03.1993, they would be liable to pay Rs 50,000 per month w.e.f. 01.03.1993 ***“for unnecessarily blocking the plaintiff’s premises with goods purchased by them and for obstructing her future plans of business activities”***.

Mrs Anju Jain also adverted to the fact that the Trust had instructed their advocate to issue a legal notice dated 22.03.1993 (Ex PW1/8) to her and her husband and, also to her father i.e., one Dr V P Goel. She accepted the fact that in the said legal notice the defendants demanded that she and her husband should obtain the necessary approvals from the competent authorities and execute the requisite documents, failing which, they would institute legal proceedings against them. A demand for return of Rs 15 lacs with interest at the rate of 24% was also made to the said legal notice. The fact that the said legal notice of the Trust was replied by her alongwith her husband through their advocate's response dated 18.04.1993 (Ex PW1/9) was also adverted to in her deposition. The witness accepted the fact that she had filed a suit for injunction being suit no. 467/93 in the Court of sub-Judge, Ghaziabad, and by order dated 30.04.1993 a Local Commissioner had been appointed. The said Local Commissioner, the witness went on to say, filed a report in Court (Ex PW1/10). The witness deposed that since the Trust had failed to fulfill its obligations, the sum of Rs 4 lacs paid towards the sale of land and building was forfeited by her.

15. In her cross-examination the said witness deposed that she was the owner of the Ghaziabad property. She accepted the fact that she had not filed any documents on record to show that the property was free hold property. She also accepted the fact that there was no document on record adverting to her ownership in the Ghaziabad property. The witness stated that the Ghaziabad property was at one point in time a lease hold property which was given on lease to her by the GDA. The witness voluntarily stated that the property was converted into free hold property. She did not recollect as to when the property was converted from lease hold to free hold. The witness also went on to accept that in the advertisement taken out in the Hindustan Times there was no reference to the name of the hospital. The witness accepted the fact that in all she had received a sum of Rs 14 lacs from the Trust which included a sum of Rs 2 lacs received as earnest money. The witness denied receipt of Rs 1 lac in cash on 25.01.1993. The witness deposed that she did not represent to the Trust that she would get the property

declared free hold property from GDA prior to 26.02.1993. She also refuted the suggestion that any such oral request was made so that agreement to sell could be executed prior to 26.02.1993. The witness voluntarily stated that at the relevant point in time as per the prevalent procedures in GDA the lease hold properties were transferred and there was no requirement that before selling the property the property had to be converted to free hold. Mrs Anju Jain deposed that she had purchased the property from Mr Gyan Singh and not from the GDA. She also accepted the fact that the property had been rented by her to UDTC. On being asked as to the rent charged from UDTC the witness said that she did not remember the amount of rent charged from UDTC. As to the period the witness stated that the property was on rent from 1988 till the time they negotiated ***“the deal and by the time we closed the nursing home”***. When asked as to when the nursing home (i.e., the hospital) was closed, the witness did not give the date. The witness accepted the fact that no documents as regards closure of the nursing home (i.e., the hospital) were on record nor was any lease deed executed between her and UDTC. The reason for the same was that since the transaction was between the family members no formal lease was required to be executed. The witness went on to depose that she had asked UDTC to close the nursing home (i.e., the hospital) prior to its sale. She also went on to say that the sale was in respect of a running hospital with the Trust and not for a hospital which was shut down. The witness volunteered that a cut off date was decided by which demands were to be made and formalities had to be completed so that they could hand over the hospital in running condition to the defendants. The witness refuted the suggestion that her father Dr V P Goel was known to Dr P S Jain (DW-1). The witness in her cross-examination accepted the fact that the Trust was interested in a running hospital and which is why the agreement was executed for land and building as well as the equipments. The witness also accepted the fact that she had filed a suit for permanent injunction against the defendants in the District Court in Ghaziabad. ***On being asked as to when the said suit was withdrawn she stated “she did not remember the date”. She however***

accepted the fact that a Local Commissioner was appointed by the Court and that she

had accompanied him to the suit property and opened the lock. She also accepted the fact that at the time when the Local Commissioner visited the property only she was present, and that there was no representation on behalf of the defendants. To a specific question as to whether on receipt of Rs 15 lacs from the defendants she had cleared the loan taken by her from the bank. The witness deposed that she had not received Rs 15 lacs but only Rs 14 lacs and that amount was used by her to pay back the loan taken from the bank. The witness went on to state that she had lodged a claim for damages quantified at the rate of Rs 50,000 per month on the basis of loss of her income in the running of the hospital, and the impediment caused in putting the property to better use. The witness however accepted that she had not filed any documentary evidence to show that she had incurred a loss of Rs 50,000 per month. She also deposed that she had sent letters to Dr V K Jain and UDTC to remove the material from her premises as they were impeding use of her premises. To a question that since the equipment belonged to UDTC and X-ray machine to Dr V K Jain why was she given the responsibility to look after the said equipments; she answered by stating as follows: "It is correct but it was a compulsion on me since the goods were lying in my property". To a specific question as to whether in the suit filed for injunction in Ghaziabad damages had been claimed, the witness stated "I do not remember if I had claimed the damages in that suit". She further responded by saying that she did not remember as to whether damages had been claimed in the suit. She then went on to say damages had been claimed from UDTC and Dr V K Jain and thereafter again went on to say that she was not aware whether claim for damages was made against UDTC and Dr V K Jain. Similarly, in so far as to a question as to whether hospital was running the witness stated that "the hospital was in running condition but it was closed". She volunteered that the hospital was closed for opening a new hospital at a different place. She went on to depose that she did not remember as to when the hospital was closed. The witness, however, refuted the suggestion that she had not suffered any damages.

16. Dr V K Jain in his examination-in-chief proved his letter dated 05.08.1992 which was in response to DW-1's letter dated 29.07.1992 issued in response to the Jain's advertisement in Hindustan Times dated 19.07.1992. Dr V K Jain replicated the stand taken by his wife Mrs Anju Jain that the agreement between the parties was reflected in the agreement (Ex P-1) and, that it envisaged three separate transactions. Dr V K Jain also accepted the fact that the other two transactions i.e., the sale of the hospital equipment and X-ray machine stood completed on receipt of requisite consideration. *Dr V K Jain specifically adverted to the fact that DW-1 had agreed that in respect of the sale of the Ghaziabad property an agreement to sell had to be compulsorily registered with the appropriate sub-Registrar, and that the Trust was required to get the necessary permission from the Income Tax Authorities. Mr Jain deposed that since the Trust had failed to do so he wrote to the Trust vide letters dated 18.02.1993 and 27.02.1993.* This was followed by his wife vide her letter dated 05.03.1993 to DW-1. In the cross-examination Dr Jain reiterated that the agreement envisaged three transactions which in all amounting to Rs 42 lacs. *He accepted the fact that the Trust had paid Jains in all a sum of Rs 14 lacs in various tranches.* Importantly, in response to a question whether DW-1 contacted him to fulfill obligations under the agreement Dr Jain responded by stating: *"it is correct that Dr P S Jain contacted me and my wife to fulfill various formalities"* He further accepted the fact that his wife had not written any letters to him asking him to remove medical equipment from the hospital.

17. On behalf of Trust arguments were addressed by Mr.R.M.Sinha, Advocate while on behalf of Jains submissions were made by Mr.Dinesh Agnani. Mr.Sinha while reiterating the stand taken in the pleadings specifically asserted the fact that the transaction was for the running of hospital which included the land and building, equipment, furniture and fixture as also the X-ray machines. Mr.Sinha asserted that a bare perusal of the agreement (Ex. P-1) would show that it was the composite sale comprising of sale of hospital equipment, X-ray machine and the Ghaziabad Property on which the hospital was constructed. It was

submitted that since that agreement was breached by the Jains inasmuch as despite receiving a substantial amount of the total consideration, they did not take requisite steps for effectuating the sale of the hospital. Mr.Sinha said that claim of the Trust was not only for return of a sum of Rs 15 lakhs paid by them to the Jains with interest but also for damages incurred towards loss of business, price escalation and damages towards loss of reputation, on account of breach of obligations by the Jains.

18. On being specifically asked by me as to whether the Trust had placed evidence on record to prove loss of business, price escalation or damages in view of reputation, Mr.Sinha fairly conceded that there was no evidence on record, except for the averments made in that regard in the pleadings and a bare assertion in the examination-in-chief. The position with regard to the interest sought at the rate of 24% p.a. on the amount of refund was the same.

18.1 In support of his contentions Mr Sinha cited two judgments these being *T N Electricity Board vs. N Raju Reddiar: AIR 1996 SC 2025* and *Thiriveedhi Channaiah vs Gudipudi Venkata Subba Rao: AIR 2007 SC 2439*. The first judgment was cited in support of his contention that the agreement Ex P-1 being a written document, no evidence contrary to the agreement could be looked at by the Court. The parties, in Mr Sinha's submission, were bound by the terms of the agreement Ex P-1. In support of his contention that the defendants (i.e., Jains) could forfeit the amount admittedly paid to them by the Trust only if they were able to demonstrate that they had suffered damages-there being no evidence of the same, the alleged forfeiture of the amount was not valid in the eyes of law.

19. As against this Mr.Agnani referred to letters dated 29.7.1992(Ex.PW1/2) written by Dr.P.S.Jain (DW1) in response to the advertisement issued in Hindustan Times dated 19.07.1992 by the Jains; a letter dated 05.08.1992 written by Dr.V.K.Jain on behalf of UDTC to DW-1 (Ex PW2/1) and a letter dated 05.09.1992 (Ex.PW1/4) written by Dr.Jain on behalf of UDTC to demonstrate the following:-

- (i) that it was the Trust which had approached the Jains for sale of the hospital;
- (ii) that pursuant thereto Dr.V.K.Jain had responded to DW-1 giving details with regard to the Hospital in issue; and

- (iii) lastly, the terms and conditions of sale were further detailed out with price which would be charged for each component of the sale. In other words, last letter dated 05.09.1992 exemplified the fact that the sale involved three separate transactions and not one composite deal as contended by the Trust.

20. Therefore, Mr.Agnani argued that contention to the contrary of Mr.Sinha stood falsified. Mr.Agnani went on to submit that in the suit filed by Jains i.e. Suit No.487/93 in the Ghaziabad Court, a Local Commissioner was appointed who filed his report in court on 30.04.1993 (Ex.PW1/10) which evidenced, according to Mr.Agnani, the fact that the equipment was available in the hospital as on the said date contrary to what was contended by the Trust. For this purpose, he relied upon the inventory list filed by the said Local Commissioner in the Ghaziabad Court along with report.

20.1 Mr Agnani attempted to discredit the plaintiff's witnesses in particular of Mr Manoj Kumar (DW2) by stating that the said gentleman was neither present at the meeting held on 01.09.1993 nor was he a signatory to the said agreement Ex P-1. Therefore, his assertions with regard to what transpired in the meeting was obviously not known to him. In this regard reliance was also placed on the legal notice dated 22.03.1993 (Ex PW1/8) issued by the Trust wherein there is no reference to the presence of Mr Manoj Kumar (DW2) at the meeting held on 01.09.1993.

21. Mr Agnani further contended that the breach, if any, in respect of the transaction for the sale of Ghaziabad Property not being consummated was solely on account of the Trust not supplying the copy of the agreement to sell to the Jains. Mr Agnani placed reliance on the cross-examination of DW2 to show that the Trust was aware of the fact that since the property was situate in the State of U.P the requirement of registering the agreement to sell was mandatory. Mr Agnani went on to say that even though the said witness adverted to the fact that a draft agreement to sell was prepared and sent to the Jains on 05.02.1993, there was no proof of the same. The falsity of the stand of the defendant in that regard was clear according to Mr Agnani, on a bare reading of the legal notice issued by the Trust dated 22.03.1993 (Ex PW1/8) wherein, there is no reference made to the fact that a draft agreement to sell was delivered to the Jains on 05.02.1993. Mr Agnani pointed out to that

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part of the cross-examination of Mr Manoj Kumar (DW2) wherein, he admits this fact in so many words; which is that the factum of handing over the draft agreement to sell was not mentioned in Ex PW1/A. Mr Agnani also relied upon that part of the cross-examination, wherein DW2 accepts the fact that he was aware of the requirement under the Income Tax Act, which obtained at that point in time requiring permission of the Income Tax Authorities before consummating a transaction for sale of land or purchase of property beyond a particular amount. Mr Agnani submitted that even though the witness accepted that approval of the Income Tax Authorities was required, the witness deliberately pleaded lack of knowledge that the approval of the Income Tax Authorities had to be obtained in Form 37(I), which required signatures of both parties. It was therefore Mr Agnani's case that neither had the Trust approached the Jains nor the Trust had signed Form 37(I). Mr Agnani also reiterated the fact that the Trust had not been able to place on record any evidence regarding proof of damages, as claimed in the suit or the interest demanded on the sum of Rs 15 lacs paid to Jains.

22. In these circumstances, Mr Agnani submitted that the suit of the Trust deserved to be dismissed and that of the Jains ought to be decreed.

23. Having perused the pleadings and the evidence on record as also having heard the counsel for the parties, in my view, the following clearly emerges in respect of the matter in issue.

24. There is no denial that the Jains had issued an advertisement on 19.07.1992 for sale of a hospital. The Jains have not only relied upon the said advertisement but also accepted the fact that Dr P S Jain (DW1) wrote a letter in response to the Jains. Interestingly, the advertisement read as follows:-

“HOSPITAL FOR SALE
APPROVED *well equipped running hospital*, expansion capacity over
sixty beds at Delhi-UP Border, sound parties, investment above fifty lacs.
Box 67741-CA, Hindustan Times, New Delhi-110001.”

25. A clear reading of the advertisement would show that what the Jains intended to sell was the hospital in its entirety which included equipments installed in the hospital. It is clearly mentioned that the sale was with regard to a “*well equipped running hospital*”.

Therefore, the assertion of the Jains that the agreement (Ex P-1) referred to three separate transactions cannot be accepted. In this regard much stress was laid by Mr Agnani on a letter dated 05.08.1992 to demonstrate that not only extensive details of the hospital were given with respect to the land underneath the hospital, the equipments which were there for sale, approximate price and the owners of each of the equipments but also the price at which the Jains were willing to sell each item in the basket so to say to demonstrate that it was always in the knowledge of parties that there were three separate transactions. The pleadings on record would show that it was UDTC which was the owner of the hospital and Mrs Anju Jain and Dr V K Jain admittedly were the shareholders and directors in the said company. The X-ray machine was admittedly owned by Dr V K Jain and the land on which the property was built was owned by Mrs Anju Jain. It appears that the total consideration of Rs 42 lacs was split only for convenience and perhaps to lessen the burden of tax. The evidence, however, clearly points to the fact that in so far as Trust was concerned it was interested in buying a complete hospital inclusive of the equipments installed therein. This was clearly the purport of the invitation which the Jains sent out to the public at large through its advertisement, as noticed above, dated 19.07.1992 published in Hindustan Times. The sale in my view was clearly a composite sale involving sale of land, the super structure built thereon, the equipment and the X-ray machine.

26. The other significant aspect which has emerged from the evidence, in respect of which there is no dispute is that the Trust over a period of time has paid a sum of Rs 14 lacs to the Jains. Mr Agnani has conceded that the Jains have received a sum of Rs 14 lacs. The Trust have taken the stand that they had paid a sum of Rs 15 lacs. There is a dispute with regard to the last tranche of Rs 1 lac purportedly paid by the Trust on 22.03.1993. The said amount was evidently paid by the Trust in cash. The Trust, however, has not been able to place on record any evidence except for a bald averment, and an assertion by its witnesses in their deposition. On the other hand, the Jains in their pleadings as well as in their depositions have refuted this fact. On balance, I am of the opinion that Trust has not been able to prove the payment of the said additional sum of Rs 1 lac. Therefore, the only conclusion that I can arrive at is that the Trust paid to Jains a sum of Rs 14 lacs. It is

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important to note from the point of view of the Trust, as is noticed by me in the opening part of the judgment, that there are claims with regard to interest on money paid to Jains and damages as well. It is quite clear from the evidence on record that the Trust has not been able to place on record any evidence to show that it had suffered damages. The evidence of DW2 in that regard is quite revealing. I may only extract that portion of the evidence:-

“.....We have charged made interest at the rate of 24% p.a.. The interest was calculated on the basis of market rate which was prevalent at that time. I have not filed any document in support of the same. I have not filed any document in respect of claim of Rs 9,45,000/- on account of compensation, loss of business activities. The said amount was advised by our Chartered Accountant. I have not filed the report of Chartered Accountant in support of the claim. I have not filed any document in support of my claim of Rs 15 lakhs.....”

27. The deposition of Dr P S Jain (DW1) is also quite pertinent. The relevant portion of his deposition is extracted for the sake of convenience:-

“.....We claimed interest @ 24% per annum in our suit on the basis of advice given by our counsel. No separate legal notice was given demanding the interest. We have not filed the detail of amount of Rs 9.45 lac which we claimed on account of loss of business activities. We have not filed any documents in support of our claim of Rs 15 lacs towards price escalation, damages and loss of reputation...”

28. An appreciation of the evidence on record thus propels me to arrive at a conclusion that the Trust has not been able to prove its claim for damages, loss of reputation and escalation of price as also its claim of Rs 9.45 lacs on account of loss of business activities. The same position obtains with regard to the interest which is claimed at the rate of 24%. DW1 has clearly accepted that they had not issued any separate legal notice demanding interest from Jains-which brings me to the crucial aspect as to who was in breach of the agreement (Ex P1). From the pleadings on record and the evidence led by parties, it is quite clear that the agreement evidently could not be consummated as the relevant approvals from the concerned authorities, that is, the State of UP and the Income Tax Authorities had not been obtained. It is not disputed by Mr Manoj Kumar (DW2) that he was aware that agreement to sell was required to be mandatorily registered. It is also not disputed by the very same witness that approval of the Income Tax Authorities was required in that regard. The testimony of DW2 in that regard is quite categorical. It is also emerged in the testimony that the Trust has accepted the fact that they were required to send a draft copy of CS(OS) 2105-1994 & 260-1994

the agreement to sell to the Jains. The Trust has taken the position that such an agreement to sell was delivered to the Jains on 05.02.1993. Therefore, the breach, if any, by either side is pivoted on the fact as to whether an agreement to sell was delivered by the Trust to the Jains on 05.02.1993. There is no proof of delivery. The witness Mr Manoj Kumar (DW2) clearly avoids a direct answer in this regard. The relevant portion of his testimony which points to that aspect of the matter is extracted hereinafter for the sake of convenience:-

“...Mr Sudershan Kumar Jain and Mr Shyam Kishan Jain had no relation with the Trust. Both the said persons were known to Dr P S Jain and they were called as they had knowledge about the property matters of UP and were resident of UP. I do not know whether as on date Dr P S Jain has relations with them. All the said persons informed us that since the property is situated in UP, registered agreement to sell is mandatory for transaction....

.....After knowing the said fact, a draft agreement to sale was prepared and was sent to the other side for execution. I do not know who had drafted the said agreement to sale but was delivered to the vendor's party on 05.02.1993. I did not deliver the same to the vendor's party. I also do not know who delivered the same. I do not know whether copy of the same is available in our office or not. We have also not filed the said copy of the agreement to sale on record. I cannot produce the copy of said agreement to sale. I have mentioned the fact in the plaint that draft agreement was prepared and was sent to the vendor's party for execution....”

28.1. Apart from the above, I am in agreement with the submission of Mr Agnani that, curiously the legal notice issued by the Trust on 22.03.1993 did not allude to the fact that a draft agreement to sell was handed over to Jains on 05.02.1993. Therefore, quite clearly Jains could not have obtained approval till a draft agreement to sell had been handed over to them by the Trust. The position with regard to the signing of Form 37(I) for Income Tax approval is, in fact, even more obscure. The Trust evidently had not handed over to the Jains Form 37(I) with their signatures for obtaining necessary approvals from the Income Tax Authorities. Therefore, in the first instance, the necessary preliminary steps for obtaining approvals, in respect of which obligation rested on the Trust, had not been evidently taken by the Trust. The Trust may have orally informed Jains that the transaction requires to be completed as is evident from the cross-examination of Dr V K Jain wherein he accepts that he was approached by Dr P S Jain. However, no concrete steps were taken by the Trust. The breach, if any, in the transaction for sale of hospital not being consummated appears to be that of Trust.

29. The issue, however, remains as to whether on account of this breach Jains can forfeit the amount of Rs 14 lacs. As a matter of fact, the Jains have said that transaction with regard to the hospital equipment and the X-ray machine stood completed and the forfeiture is only of Rs 4 lacs paid vis-à-vis the Ghaziabad Property. In so far as this stand is concerned, the same is rejected, as I have already indicated in the earlier part of my judgment that it was a composite sale which involved the sale of the hospital i.e., the land, the super structure built thereon and the equipment placed therein which included the X-ray machine. Therefore, the argument that the amount forfeited is only Rs 4 lacs and, therefore, the return ordered by me can be limited to Rs 4 lacs is obviously untenable. In any event, there is no document placed on record by the Jains except letters dated 27.02.1993 and 05.03.1993 to show that the Trust should take away the hospital equipment and the X-ray machine the transaction with respect to which, according to the Jains, had stood completed. The letters on which reliance was placed by the Jains are those, receipts of which are denied by the Jains. The Jains have been unable to prove that the delivery of letter dated 05.03.1993. The same is apparently issued under certificate of posting while, there is no indication as to how letter dated 27.02.1993 (Ex PW1/6) was sent. As a matter of fact in respect of letter dated 27.02.1993 there is no assertion, curiously, by Jains that since the transaction with regard to office equipment and X-ray machine stood completed, the Trust should remove the same. An assertion is, in fact, in letter dated 05.03.1993 the receipt of which the Trust has denied. If that be the situation, then surely the Jains cannot deny the Trust the return of money if they are unable to show that they suffered damages.

29.2 On this aspect of the matter i.e., as to whether the Jains suffered damages the Court record shows that on 16.01.1998 Court vacated its injunction dated 06.01.1997 whereby, it had restrained the Jains from selling, transferring or parting with possession of the Ghaziabad Property, by ordering that they could sell the said property on furnishing a security in the sum of Rs 20 lacs. By the very same order a further liberty was granted to the Jains, which was that if the Jains purchased a new property they could take leave of the Court to furnish it as a security as against deposit of the sum of Rs 20 lacs. This position

obtained greater clarity in the order of the Court dated 13.09.2005 whereby the Jains were given permission to furnish security in the form of a new property which it had purchased being 7-Todar Mal Lane. Interestingly, by the same order liberty had been given to Jains to hand over the machinery to the plaintiff. Since the Trust said that the machinery had become useless at that point in time and they were not interested in taking over the machinery, Mrs Anju Jain was permitted to sell the machinery and deposit the sale proceeds in Court. Whether the Jains sold the machinery thereafter and if they did; the price that they obtained is not known. Furthermore, it is also not known as to the price that the Jains obtained on the sale of Ghaziabad Property. The evidence in this regard was surely available with the Jains. The Jains have not placed any evidence on record that they suffered a loss on account of breach committed by the Trust in consummating the sale of the Ghaziabad Property. That being so, the only inference which can be drawn is that the Jains did not suffer any loss. Therefore, no damages are payable to Jains.

29.3 Damages claimed by Jains at the rate of Rs 50,000 per month for storage charges is not payable. The reason being Mrs Anju Jain in her testimony deliberately stonewalled attempts at disclosing the date on which the hospital was closed which she accepted in her testimony that the hospital was running, no evidence is placed on record to show that she wanted the hospital to be closed so that the equipment could be removed by the Trust. However, much Mrs Anju Jain may attempt to distance herself from UDTC; the fact remains that Mrs Anju Jain and Dr V K Jain control the company, which is, undoubtedly their alter ego.

29.4 Therefore, forfeiture of money paid by Jains would be dependent on having their suffered injury and consequent damages on that account. There being no evidence of the same, the Jains are required to return the monies forfeited. This would, as indicated above, apply both to Rs 4 lacs which the Jains forfeited against the purchase of property and Rs 10 lacs which Jains had received purportedly against sale of office equipment and X-Ray machine. The offer made by the Jains to the Trust to remove the hospital equipment and X-ray machine was made in Court only in September, 2005 by which time the Trust rightly

refused to accept the equipment as it would have depreciated to a large extent on account of lack of use. Accordingly, in my view, the Jains are obliged to return a sum of Rs 14 lacs that they received from the Trust. The Trust, on the other hand, has claimed interest on the refund that it has sought. In my view, since I have come to a conclusion that the Trust was in breach, no interest is payable to the Trust.

30. For these reasons, I am of the view that the Trust would only be entitled to refund of the principal amount of Rs 14 lacs. In view of the discussion above, my answers to the issues in two suits are as follows:-

CS(OS) No.2105/1994

Issue No.1

30.1 My answer to the Issue no.1 is that the Trust and the Jains had entered into a valid agreement (Ex P-1) whereunder the Trust has been able to prove that Jains have received only a sum of Rs 14 lacs. The issue is answered accordingly.

Issue No.2

30.2 In so far as Issue No.2 is concerned, in my opinion, the Jains have not committed any breach. Therefore, the Jains could not be called upon to pay any damages. In any event the Trust has not been able to prove damages that they have claimed in the suit.

Issue No.3

30.3 The plaint has been filed by Mr Manoj Kumar (DW2) who has placed on record the resolution of the Trustees in that regard. Therefore, the issue is answered in favour of the Trust.

Issue No.4

30.4 Mrs Anju Jain is not entitled to forfeit the sum of Rs 4 lacs in view of the discussion above.

Issue No.5

30.5 The receipt-cum-memorandum of understanding dated 09.01.1993 (Ex P1) was an agreement relating to a composite sale of a hospital which included the super structure, the land underneath, the equipment and also the X-ray machine. The effect of composite sale would be that the Jains stand that the claim of refund by the Trust be restricted to Rs 4 lacs, which was, evidently forfeited by them on the ground that this was the only transaction which was not consummated between the parties is untenable. This stance of the Jains is accordingly rejected. The issue is answered accordingly.

Issue No. 6

30.6 The Trust is entitled to refund of Rs 14 lacs, however, no interest is payable to the Trust.

Additional Issue

30.7 In view of my answer to Issue No.6 and Issue No.1, the Trust is entitled to refund of only Rs 14 lacs.

CS(OS) No. 260/1994

31 My answers (not necessarily in seriatim) to issues framed in the afore-mentioned suit are as follows:-

Issue No.3

31.1 This issue is answered against the Jains in so far as they have not been able to discharge their onus with regard to damages or storage charges claimed in the suit.

Issue No.4

31.2 In view of my answer to Issue No.3, no relief is available to the Jains.

Issue Nos 1 & 2

31.3 As a matter of fact in view of my answers to issue nos. 3 and 4, these issues have lost their efficacy. I may, however, note that in so far as the issue no. 1 is concerned, the defence pertaining to the bar of the provisions of Order 2 Rule 2 of the CPC was taken by the Trust on the ground that plaintiff/ Anju Jain had filed a suit bearing no. 467/1993 in the court of Civil Judge, Ghaziabad, U.P. wherein relief of permanent injunction against the Trust had been sought. In my view the defence taken by the Trust appears to be valid as there is no denial by the plaintiff/ Anju Jain that she filed a suit for permanent injunction in Ghaziabad based on a right which accrued to her under the agreement, i.e., agreement dated 09.01.1993. This fact has been admitted by her in her testimony.

31.4 This apart a meaningful reading of the plaint (Ex DW2/P1) would show that the said suit is predicated on the agreement dated 01.09.1993 (Ex P-1). As a matter of fact, in Paragraph 9 there is a clear reference to agreement dated 01.09.1993 (Ex P-1). Similarly, in Paragraph 14 of the plaint (Ex DW2/P1) grievance is made with respect to damages having been suffered on account of removal of hospital equipment and X-ray machine with respect to which purportedly the transaction is complete. It is alleged that damages at the rate of Rs 50,000 per month were suffered. The said paragraph ends with averment that the rights to claim damages was reserved. There is no application placed on record in this regard or any order of the Court giving such liberty. Even though in her testimony she avoided a direct answer to the question whether damages had been claimed, the copy of the plaint filed in the Ghaziabad Court (Ex. PW2/P1) would show no damages was sought for by the plaintiff/ Anju Jain against the Trust and its chairman. This of course is premised on the fact that no amendments to the plaint were sought, and thereafter ordered.

31.5 The provisions of Order 2 Rule 2(3) of CPC are meant to protect the defendant from being sued or vexed twice, and to ensure that plaintiff claims all reliefs which he is entitled to, on a given cause of action. The last part can however be deferred by the plaintiff upon taking leave of the Court. (*See observations in Alka Gupta vs Narender Kumar Gupta: JT 2010 (11) SC 178 paragraph 8.1*).

“The object of Order 2 Rule 2 of the Code is two-fold. First is to ensure that no defendant is sued and vexed twice in regard to the same cause of action. Second is to prevent a plaintiff from splitting of claims and remedies based on the same cause of action. The effect of Order 2 Rule 2 of the Code is to bar a plaintiff who had earlier claimed certain remedies in regard to a cause of action from filing a second suit in regard to other reliefs based on the same cause of action. It does not however bar a second suit based on a different and distinct cause of action.”

31.6 A perusal of the plaint on record would show that the only substantive relief sought was: a prohibitory injunction against the Trust and its chairman from taking possession of the Ghaziabad property and/or in causing obstruction or interference of any sort in the possession and occupation of the super structure. Therefore, the reliefs sought for in the instant suit were very much available to the plaintiff/ Anju Jain who chose not to seek those reliefs in the Ghaziabad suit. As a matter of fact this fact is quiet evident on perusal of the plaint filed in Ghaziabad. The onus, in my view, shifted on to the plaintiff/ Anju Jain, who was required to place on record material to show that the suit filed at Ghaziabad was withdrawn with liberty to file the instant suit. The plaintiff/ Anju Jain has not placed on record any such order. Therefore, the only inference which can be drawn is that no such liberty was sought for by the plaintiff. The instant suit, therefore, which is based on the same cause of action, would be barred under the provisions of Order 2 Rule 2 of the CPC.

32.1 In respect of issue no 2, the defence taken is that the suit is bad for non-joinder of parties since Dr. V.K. Jain, husband of the plaintiff and UDTC are not impleaded as parties to the suit. The plaintiff's submission in this regard appears to be that since all three were separate entities and these were separate transactions, they need not have been impleaded as a party to the instant suit. In my view, before a court can come to a conclusion whether a party is a necessary party, it should be able to come to the conclusion that no effective adjudication can take place without the participation of the party concerned. On the other hand for a party to be categorized as one, which is proper party, the court should be able to come to a conclusion that the participation of such party in the proceedings would assist in adjudication. In my opinion, this is not the situation which has arises in the instant suit. The plaintiff's suit is for a claim for damages against the Trust and its chairman on their

failure to consummate the transaction with regard to the sale of the Ghaziabad property.
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The plaintiff's grievance is solely against the Trust. The damages in the suit are also claimed against the Trust on the ground that they failed to remove the hospital equipment and the X-ray machine in respect of which, according to the plaintiff/ Anju Jain, the transaction had been consummated. In the background of these allegations, it cannot be said that V.K. Jain, husband of the plaintiff/ Anju Jain and UDTC were either necessary or proper parties to the suit instituted by the plaintiff/ Anju Jain. These issues are, therefore, decided against the defendant and in favour of the plaintiff.

33. In view of my response to the issues framed in the two suits, CS(OS) No. 2105/1994 is decreed to the extent that the defendants therein shall refund a sum of Rs 14 lacs to the plaintiff. As regards CS(OS) 260/1994, the same is dismissed. The parties in both suits shall, however, bear their own costs.

DECEMBER 06, 2010
mb/da/kk

RAJIV SHAKDHER, J