

\* IN THE HIGH COURT OF DELHI AT NEW DELHI

**+ RFA No. 453/2001**

Reserved on : 13.11.2009

Pronounced on: 09.12.2009

IN THE MATTER OF :

GUR PARSAD CHADHA & ANR.

..... Appellants

Through: Mr. T.A.Francis and

Ms.Shivangi Sharma, Advocates

versus

NARENDER PAL MALIK

..... Respondent

Through: Nemo

**CORAM**

**\* HON'BLE MS.JUSTICE HIMA KOHLI**

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|--------------------------------------------------------------------------|-----|
| 1. Whether Reporters of Local papers may be allowed to see the Judgment? | Yes |
| 2. To be referred to the Reporter or not?                                | Yes |
| 3. Whether the judgment should be reported in the Digest?                | Yes |

**HIMA KOHLI, J.**

1. The present appeal is directed against a judgment dated 13.8.2001 passed in a suit for specific performance and permanent injunction instituted by the appellants (plaintiffs in the court below), against the respondent (defendant in the court below) praying *inter alia* for directions to the respondent/defendant to perform his obligations under the Agreement dated 24.1.1989 and execute a sale deed in respect of a shop situated on the ground floor of a premises

bearing No.I-C/125, Lajpat Nagar, New Delhi (hereinafter referred to as 'the shop'), after getting the same converted into freehold. The appellants/plaintiffs also sought a decree of permanent injunction against the respondent/defendant restraining him from disturbing the peaceful possession and enjoyment of the appellants/plaintiffs in respect of the shop and from selling, transferring or alienating the said shops.

2. A brief backdrop of the case, as set out by the appellants/plaintiffs in the plaint is that in January 1989, they were on look out for a commercial shop to run their business activity of providing Crane Services and sale of car accessories. The appellants/plaintiffs came to know that the respondent/defendant was offering to sell commercial shops on the ground floor of the suit premises. A site plan of the said shop marked in red was enclosed with the plaint. The appellants/plaintiffs averred that the sale price of the shop was finalized at Rs.1,25,000/-. It is the case of the appellants that as the property in question was a leasehold property, the respondent/defendant could not execute an outright sale deed, and therefore the parties decided to execute an Agreement to Sell-cum-Lease Deed. The said document entitled a "Lease Deed", was executed on 24.1.1989. The appellants/plaintiffs stated that they had paid a major portion of the sale consideration to the respondent/defendant, amounting to Rs.1,00,000/- and that he agreed

to get the property converted into freehold as and when it was permissible and to execute a sale deed in favour of the appellants/plaintiffs upon receipt of the balance sum of Rs.25,000/-. In the meantime, it was agreed that the appellants/plaintiffs would pay a sum of Rs.600/- per month to the respondent/defendant as notional lease rent for occupying the premises.

3. The appellants/plaintiffs claimed that they remained in peaceful and continuous possession of the shop since 21.1.1989 and conducted their business from the said shop. They also tendered a sum of Rs.600/- per month to the respondent/defendant on a monthly basis, in terms of the agreement, till July, 1993. In the meantime, the Municipal Corporation of Delhi passed an attachment order dated 30.6.1993 in view of outstanding property tax pertaining to the premises and attached the lease rent being paid by the appellants/plaintiffs to the respondent/defendant. As a result, from August 1993 onwards, the appellants/plaintiffs started depositing the said amount on a monthly basis with the MCD.

4. As averred by the appellants/plaintiffs in November 1993, the policy for conversion of leasehold rights in immovable properties situated in Delhi, into freehold rights was formulated by the Land & Development Officer. The appellants/plaintiffs stated that they approached the respondent/defendant on 13.4.1994 and requested him to complete the formalities for getting the suit property converted

into freehold, as promised by him. They tendered the balance sale consideration of Rs.25,000/- to the respondent/ defendant, but he refused to accept the same. He also refused to take any steps to convert the property into freehold. A legal notice dated 18.4.1994 was served by the appellants/plaintiffs on the respondent/defendant calling upon him to specifically perform his obligations under the Agreement dated 24.1.1989. The appellants/plaintiffs expressed their readiness and willingness to perform the obligations on their part, but the respondent/defendant did not reply to the said notice and nor did he perform his part of the obligations under the Agreement. Instead, he started creating hurdles in the peaceful enjoyment of the facilities of toilet and water connection situated on the ground floor of the premises and threatened the appellants/plaintiffs that he would disconnect their electricity supply. As a result, the appellants/plaintiffs along with other shop owners, instituted a suit for injunction against the respondent/defendant on 15.4.1994. The respondent/defendant filed a written statement in the aforesaid suit, but the appellants/plaintiffs submitted that they were permitted to withdraw the suit on account of some formal defects, with liberty to institute a fresh suit on the same cause of action. Subsequently, in May 1994, the appellants/plaintiffs instituted the present suit in the trial court.

5. Summons in the suit were issued by the trial court to the respondent/defendant. He entered appearance and filed his written

statement. After the pleadings were completed, the respondent/defendant stopped appearing in the matter. Vide order dated 29.10.1996, he was proceeded against ex-parte. Thereafter, the appellant No.1 examined himself as PW-1. After hearing the counsel for the appellants/plaintiffs and considering the evidence produced on record, the trial court dismissed the suit of the appellants/plaintiffs by holding that the lease deed dated 24.1.1989 could not be enforced as an Agreement to Sell and that the contingency to exercise the option of converting the premises from leasehold to freehold not having arisen, the appellants/plaintiffs could not claim a decree for specific performance to execute a conveyance deed in their favour. Aggrieved by the aforesaid judgment dated 13.08.2001, the appellants/plaintiffs preferred the present appeal, which was admitted vide order dated 11.10.2001. The respondent was served by publication and affixation. But he did not enter appearance and was proceeded against ex-parte vide order dated 08.05.2009.

6. Counsel for the appellants/plaintiffs submitted that a bare reading of the document in question shows that the said document is an Agreement to Sell and not a simple lease deed. In support of the aforesaid submission, he relied on a judgment of this Court in the case of M/s Nanak Builders and Investors Pvt.Ltd. Vs. Vinod Kumar Alag reported as **AIR 1991 DELHI 315**. He further stated that the

contract in question was not a contingent contract or a contract of such a nature where the rights of the parties were inchoate and hence specific performance of the same could have been sought by the appellants/plaintiffs and granted by the trial court. In support of the aforesaid submission, he relied on the following judgments:

(i) Mrs. Chandnee Widya Vati Madden Vs. Dr.C.L.Katial and others **AIR 1964 SC 978**

(ii) Ramesh Chandra Chandiok and another Vs. Chuni Lal Sabharwal(dead) by his legal representatives and others **AIR 1971 SC 1238.**

(iii) Nirmala Anand Vs. Advent Corporation Pvt.Ltd. and others **AIR 2002 SC 2290.**

7. Lastly, it was urged that the objection taken by the respondent/defendant in the written statement to the effect that the suit of the appellants/plaintiffs was barred by limitation, is without any basis as Article 54 of the Limitation Act entitles the appellants/plaintiffs to institute a suit within a period of three years from the date of first refusal by the respondent/defendant to specifically perform the contract. In support of the aforesaid submission, he relied on a judgment of the Supreme Court in the case of Rojasara Ramjibhai Dahyabhai Vs. Jani Narottamdas Lallubhai (dead by LRs.) and another reported as **AIR 1986 SC 1912.**

8. None appeared on behalf of the respondent despite service effected on him by way of publication. I have heard the counsel for the appellants/plaintiffs. Counsel for the appellants/plaintiffs has

taken this court through the trial court record and the relevant documents.

9. The fountainhead of the dispute is the document dated 24.01.1989, entitled "Lease Deed". The first submission of the counsel for the appellants/plaintiffs that the aforesaid document was not merely a lease deed, but an Agreement to Sell, has to be tested in the light of the terms and conditions contained in the said document. It is trite that a mere heading or a title of a document cannot deprive the document of its real nature and that it is the substance which is to be seen and not the form (Refer: C.I.T.Punjab, Haryana, J & K, H.P. and Union Territory of Chandigarh Vs. M/s Panipat Woollen and General Mills Co.Ltd., Chandigarh, AIR 1976 SC 640 and M/s Nanak Builders and Investors Pvt.Ltd. Vs. Vinod Kumar Alag, AIR 1991 DELHI 315). The relevant clauses of the document in question are reproduced hereinbelow for ready reference:

"NOW THIS DEED OF LEASE WITNESSETH AS UNDER:

1. That on consideration of the rent hereinafter reserved and all the covenants and conditions hereinafter contained and on the part of the lessees to be paid, observed and performed by the Lessor hereby demised into the lessees a part portion at Ground Floor, measuring 10'X15' approx. of house No. I-C/125, Lajpat Nagar, New Delhi at the monthly rent of Rs.600/- (Rupees Six hundred only).

NOW THE LESSEES HEREBY CONVENANTS WITH THE LESSOR AS FOLLOWS:

1. XXXX

2. To pay the monthly rent of Rs.600/- (Rupees Six hundred only) per month hereby reserved on or before the 24<sup>th</sup> day of each English Calendar month failing which a penalty of Rs.10/- per day shall be charged.

3. XXXX

4. XXXX

5. That the Lessees had already deposited an amount of Rs.1,00,000/- (Rupees one lac only) with the Lessor as Security Deposit through Mr. Parvinder Sodhi vide Lease Agreement dated 24<sup>th</sup> January, 1989.

THE LESSOR HEREBY CONVENANTS WITH THE LESSEES AS UNDER:-

1. XXXX

2. That the demises premises mentioned above is a part of House No. I-C/125, Lajpat Nagar, New Delhi, which is a leasehold property under Land and Development Authority, Nirman Bhawan, New Delhi. In case of the above property becomes freehold at any time then the Lessees shall have the option to purchase the same and get it registered in their favour in the office of the Sub-Registrar, New Delhi and the Lessor shall not refuse to sign any document required for the smooth transfer of the abovesaid premises in favour of the Lessees, without demanding any monetary consideration/ remuneration.

3. That a sum of Rs.25,000/- (Rupees Twenty five thousand only) shall have to be paid by the Lessees to the Lessor before or at the time of registration of regular sale deed in the office of the Sub-Registrar New Delhi, in addition to the amount of Rs.1,00,000/- (Rupees one lac only) i.e. Rs.1,25,000/- (Rupees one lac twenty five

thousand only) shall be merged towards the cost and sale price of the aforesaid portion.

4. That the sum of Rs.1,25,000/- (Rupees one lac twenty five thousand only) shall remain the final sale price out of which the lessees had already paid a sum of Rs.1,00,000/- (Rupees one lac only) and the remaining balance of Rs.25,000/- (Rupees Twenty five thousand only) shall be paid by the lessees to the lessor before or at the time of registration of regular sale deed, before the Sub-Registrar, New Delhi, and the lessor shall be strictly bond to above price and shall not demand any remuneration from the lessees at the time of registration of regular sale deed.

5. XXXX

6. XXXX

7. That all the expenses towards the cost of registration of sale deed i.e. stamp duty, registration fee etc. shall be borne and paid by the lessees.

8. XXXX"

10. A perusal of the aforesaid terms and conditions contained in the document (Ex.PW1/2), undoubtedly shows that though the document is described as a lease deed, the same does mention in clauses 2 to 4 that in case the premises becomes freehold at any time, then the appellants/plaintiffs shall have the option to purchase the same and get it registered in their favour and at that time, the lessor/respondent would not refuse to sign any document and would not demand any further monetary consideration beyond a sum of

Rs.25,000/-, Rs.1,00,000/- having already been deposited with the respondent/defendant as security deposit, which amount would, at that time, be treated as the sale price of the shop. Thus, what emerges is that a sum of Rs.1,25,000/- was agreed as the final sale consideration of the shop. A sum of Rs.1,00,000/- having already been paid by the appellants/plaintiffs to the respondent/defendant, the balance sum of Rs.25,000/- was agreed to be paid by the appellants/plaintiffs at the time of registration of a regular sale deed in their favour. In the meantime, it was agreed that the appellants/plaintiffs would continue to pay rent at the rate of Rs.600/- per month to the respondent/defendant, apart from charges for consumption of electricity and water on actual basis.

11. The trial court examined the aforesaid document and arrived at the conclusion that the terms set out in the document (Ex.PW1/2) were vague and that it could not be construed that the said document was only an Agreement to Sell. Instead, it was observed that the document was optional depending upon the contingency as to whether the property became freehold and whether the appellants/plaintiffs opted for getting a conveyance deed executed in their favour. While relying on a judgment of the Bombay High Court in the case of Sau. Shantabai Vs. Manakchand Ratanchand Raka reported as **AIR 1988 Bombay 82**, it was observed that the alternative option for specific performance of agreement to sell was

unenforceable as the contingency to enforce it had not arisen, as contemplated in Ex.PW-1/2. Ultimately, the suit of the appellants/plaintiffs was dismissed by the learned ADJ by holding that till the date of institution of the suit, the property remained leasehold and as the respondent/defendant was not under any obligation to get the property converted to freehold, the appellants/plaintiffs could not claim or be granted specific performance of the Agreement to Sell.

12. Having carefully perused the terms and conditions contained in the aforesaid document, this Court does not find any reason to differ with the reasoning of the trial court. The second covenant of Ex.PW-1/2 is worded in such a manner that the obscurity in specifying the time span for converting the property into freehold is inherent. Only in case the property would become freehold at any time in the future, would the appellants/plaintiffs have the option to purchase the same. It is not disputed that till date, the property has not been got converted from leasehold into freehold. Hence the contingency not having arisen, the question of the appellants exercising the option under the second covenant by approaching the respondent does not arise. If the property would have been converted into freehold, then the appellants could have exercised their option to purchase the same and they could also have approached the respondent for getting the sale deed registered in their favour. Upon failure on the part of the respondent to do the needful, the appellants

were also entitled to seek specific performance of the Agreement by instituting a suit in that regard. Such a contingency not having arisen, the appellants had no cause of action to approach the court for seeking specific performance of the Agreement. Only upon such a contingency arising, could the appellants have instituted the suit in the first place.

13. Coming to the judgments relied on by the counsel for the appellants/plaintiffs, they are clearly distinguishable on facts and do not take the case of the appellants further. In the case of Chandnee Widya Vati Madden (supra), the plaintiffs therein had entered into a contract of sale of a house belonging to the defendant on the plot granted by the Government. One of the terms of the contract was that the vendor would obtain necessary permission of the Government for the sale within two months of the agreement and if the permission was not forthcoming within that time, it was open to the vendees to extend the date or to treat the agreement as cancelled. Though the vendor made an application for permission, but for reasons of her own, withdrew the same. As a result, the plaintiffs filed a suit for specific performance of the contract or in the alternative, for damages, wherein the trial court found that the plaintiffs were always ready and willing to perform their part of the contract and it was the defendant who willfully refused to perform her part of contract. Despite the said finding, the trial court dismissed the suit for specific performance of the contract on the ground that the agreement was inchoate in view of

the fact that the previous sanction of the Chief Commissioner to the proposed transfer had not been obtained. The High Court on appeal came to the conclusion that the agreement was a completed contract for sale of the house in question, subject to the sanction of the Chief Commissioner before the sale transaction could be concluded. Aggrieved by the said order, the vendor/defendant filed an appeal in the Supreme Court wherein the main ground of attack was that the contract was not enforceable being of a contingent nature and the contingency had not been fulfilled. The said plea was turned down by the Supreme Court by holding that under the document it was for the defendant/vendor to make the necessary application for permission to the Chief Commissioner. Unlike the facts of the present case in hand, in the aforesaid case, there was a certainty of time frame for the vendor to obtain permission from the Chief Commissioner within two months of the agreement and only if the permission was not forthcoming within that time, was it open to the vendees to extend the date or treat the agreement as cancelled. In the present case, there is complete obscurity in specifying the time span for converting the property from leasehold to freehold. The agreement only provided that in case the property becomes freehold at any time, then the appellant would have the option to purchase the same. No specific time frame was thus contemplated, much less stipulated in the

agreement for completing the process of converting the property into freehold.

14. In the case of Ramesh Chandra Chandiok(supra), the vendee agreed to purchase a leasehold plot from the vendor on a date when the vendor was not in possession thereof and in respect of which he had not obtained a lease deed from the Government. The receipt for earnest money provided that the balance sale consideration was to be paid within a month at the time of execution of the registered sale deed. A lease deed was executed by the Government in favour of the vendor, after the agreement to sell entered into by him with the vendee wherein the vendor was required to obtain sanction of the Government before transfer of the leasehold plot. Though the vendor was aware of the aforesaid condition and intimated the vendee that the sale deed would be executed by him only after obtaining required sanction and further, undertook to inform the vendee as soon as sanction was obtained by him, he never undertook any steps to apply for sanction. Instead, he informed the vendee that he was not willing to wait indefinitely for want of sanction and that if the rest of the consideration was not paid to him within a period, the earnest money would be forfeited and the agreement cancelled. Subsequently, the vendor applied for and obtained required sanction, but did not inform the vendee and cancelled the contract, thus compelling the vendee to file a suit for specific performance of the contract against the vendor.

In the aforesaid case, while the trial court refused the relief of specific performance to the vendee, a money decree was granted in his favour. Aggrieved by the said judgment, the vendee filed an appeal before the High Court. The High Court held that there was nothing to indicate that the absence of such a sanction invalidated the transfer *ab initio* or rendered it *void*. It held that even a defeasible interest could be the subject matter of sale and that the sale could be effected without the sanction having been previously obtained. It was further held that the vendees had not satisfactorily shown that they had sufficient funds to pay the balance amount and that once the appellant had obtained satisfaction of the money decree passed by the trial court in execution proceedings, they were disentitled to claim specific performance. The Supreme Court however set aside the order of the High Court by holding that as long as the title of the vendor was incomplete, there was no question of the sale being completed and they have never applied for sanction, the vendees were under no obligation to complete the sale before any information was received by them about the sanction having been obtained.

15. In the present case, it is not as if the respondent had ever applied to the L&DO for converting the property from leasehold to freehold, there being no timeframe contemplated in the agreement. Hence the eventuality of the property becoming freehold had not arisen. In such circumstances, the appellants could not have sought

to exercise their option to purchase the same and get the suit property registered in their favour by execution of a regular sale deed. The issue of readiness and willingness is therefore not relevant to the facts of the present case. The wordings of the relevant covenants contained in the agreement in question are such that till the property gets actually converted into freehold, no cause of action could be claimed to have arisen in favour of the appellants, so as to institute the suit in question. Hence the facts of the aforesaid case are also distinguishable from those of the present case.

16. In the case of Nirmala Anand (supra), counsel for the appellant relied upon para 11 wherein reference has been made to the aforesaid decisions of the Supreme Court in the case of Chandnee Widya Vati Madden (supra) & Ramesh Chandra Chandiok(supra) which have already been dealt with hereinabove and need not be repeated.

17. The argument urged by the counsel for the appellants with regard to the objection of the respondent, taken in his written statement to the effect that the suit of the appellants was barred by limitation, need not detain this Court as the same was not considered by the trial court while dismissing the suit.

18. While concurring with the reasons given in the impugned judgment to disentitle the appellants to claim a decree for specific performance of lease agreement and permanent injunction, this Court

is however, of the opinion that the suit of the appellants could not have been dismissed by the trial court. The order of dismissal of the suit of the appellants has resulted in complete deprivation of the appellants' right to claim a decree for specific performance on a future date as and when the contingency contemplated in the agreement arises. The suit ought to have been rejected under the provisions of Order VII Rule 11 of the Code of Civil Procedure, on the ground that the same was without any cause of action, for the reason that the occasion for the appellants to have instituted the suit had not arisen, as the property had not been converted into freehold. It would therefore be appropriate to modify the impugned judgment by holding the suit filed by the appellants was liable to be rejected. The impugned judgment and decree is therefore modified to the extent that instead of dismissing the suit of the appellants, the same is rejected as being devoid of any cause of action. Decree sheet be drawn accordingly. The appeal is disposed of with no order as to costs. Trial court record be released forthwith.

DECEMBER 09, 2009  
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(HIMA KOHLI)  
JUDGE