

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

+ **FAO (OS) Nos.12/2011 and 35/2011**

% **Reserved on : 20.01.2011**
Date of Decision : 28.01.2011

1. FAO (OS) NO.12/2011

SMT.RANI SHARMA APPELLANT
Through : Mr. Arvind K. Nigam, Sr. Advocate
with Mr. Divyesh Pratap Singh and Ms.
Kamini Jaiswal.

Versus

MS.SANGEETA RAJANI & OTHERS RESPONDENTS
Through : Mr. Sanjeev Anand, Mr. M.C. Dixit and
Mr. Vinod Sharma, Advocates.

AND

2. FAO (OS) NO.35/2011

MS.SANGEETA RAJANI & OTHERS APPELLANTS
Through : Mr. Sanjeev Anand, Mr. M.C. Dixit
and Mr. Vinod Sharma, Advocates.

Versus

SMT.RANI SHARMA .. RESPONDENT
Through : Mr. Arvind K. Nigam, Sr. Advocate
with Mr. Divyesh Pratap Singh and
Ms. Kamini Jaiswal.

CORAM:
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M. L. MEHTA

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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. |

M.L. MEHTA, J.

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1. These are two appeals filed against the order dated 26th November, 2010 passed by learned Single Judge in Original Suit being CS(OS) No.1498/2010 whereby the application under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC') of the plaintiffs, namely, Sangeeta Rajani and others (hereinafter referred to as 'the plaintiffs') was dismissed. Simultaneously, while dismissing the said application, the learned Single Judge directed the defendant, namely, Ms.Rani Sharma (hereinafter referred to as 'the defendant') to deposit a sum of Rs.7.00 crores within a period of three months with the Registrar General of this Court. It was also ordered that till such time the money was deposited, the defendant shall not part with the possession of her share comprising of first floor and 2/9th share in the ground floor of the premises bearing No.S-46, Panchshila Park, New Delhi.
2. The admitted facts are that the defendant being the owner of the first floor and 2/9th share in the ground floor, agreed to sell the same to the plaintiffs vide Memorandum of Understanding/Agreement to Sell dated 30th July, 2006 (hereinafter referred to as 'the agreement').

3. The defendant is the second wife of late Capt. Ravi Sharma, who had two daughters, namely, Rekha and Rashmi and one son, Sanjay. A partition suit was pending between them with regard to the premises bearing No.S-46, Panchshila Park, New Delhi. That case was decreed on the basis of a compromise arrived at between them whereby first floor came to be acquired by the defendant. The two daughters and son got 2/9th share each in the said premises. Sometime in 1983, an understanding was arrived at by the defendant with daughters for the sale of their shares. Since, it did not materialize, she filed a suit for specific performance against daughters, which came to be dismissed, and the appeal there from is stated to be pending. In the meantime, daughter Ms. Rashmi Sharma, entered into an agreement to sell her share in the suit premises with an outsider, Mr.Sanjiv Anand. The defendant (Rani Sharma) filed a suit against her under Section 44 of the Transfer of Property Act, 1882. The defendant also acquired 2/9th share of son Sanjay in the ground floor of premises. However, admittedly the entire ground floor was in occupation of the Official Liquidator appointed in terms of the Company Court of this Court.

4. The plaintiffs filed the suit for specific performance based on the agreement against the defendant on 20th July, 2010. An application under Order XXXIX Rules 1 and 2 read with Section 151 of CPC was also filed. It was also an admitted case that a sum of Rs.60.00 lakhs was paid by the plaintiffs to defendant at the time of agreement and Rs.20.00 lakhs each on 12th March, 2007 and 19th March, 2007, thereby making a total payment of Rs.1.00 crore.
5. The case of the plaintiffs for specific performance and permanent injunction against the defendant was set up on these averments:
 - i. A sum of Rs.1.00 crore stood paid as per the agreement.
 - ii. As per clause 6 of the agreement, it was specifically agreed between the parties that the agreement shall not be cancelled by either of them and so the agreement dated 30th July, 2006 is irrevocable.
 - iii. The plaintiffs offered balance consideration to the defendant a number of times and have always been ready and willing to pay the balance sale consideration.
 - iv. As per clauses 4 and 5, they were entitled to negotiate with the daughters, Rekha and Rashmi, to purchase their shares, but since the same could not materialise, the

defendant is bound to execute the Agreement to Sell her share.

- v. No specific date was fixed for execution of the agreement which was contingent upon their purchasing the share of daughters of defendant. However, that itself cannot be a ground for the defendant to delay the execution of transaction and handover the possession of the premises comprising of first floor and 2/9th share in the ground floor of the premises.
- vi. With regard to the cause of action, it was their case that it also arose on 4th May, 2010 when the defendant became furious and refused to refund the amount and also on 2nd June, 2010 when the defendant did not respond to their notice of this date to take steps to execute the documents of title for transfer of premises in their name.

- 6. It is also noted that the plaint was subsequently amended by incorporating that a sum of Rs.6.00 lakhs was paid by plaintiffs on different dates by cheques/pay orders in the name of the defendant's lawyer at her request. This fact was however, denied by the defendant.
- 7. The plaintiffs have assailed the impugned order mainly on the grounds that the learned Single Judge failed to appreciate that

a valuable right of the plaintiffs was created in the suit premises and the same was required to be protected till the disposal of the suit. Learned counsel for the plaintiffs submitted that the interest of both the parties would have been better served by securing the suit premises till final adjudication and by restraining the defendant from dealing with the same. The learned counsel further submitted that it was the defendant who defaulted by not being able to sort-out her family disputes, whereas the plaintiffs were always ready and willing to perform their part of the contract in respect of the entire property as also of the suit premises comprising of the first floor and 2/9th share in the ground floor. The learned counsel for the plaintiffs referred to some of the clauses of the Agreement to substantiate his submissions.

8. On the other hand, learned counsel for the defendant took us through various clauses of the agreement and submitted that the agreement had become incapable of compliance since the plaintiffs failed to adhere to the terms of the Agreement and also failed to negotiate with the daughters with regard to their share in the premises. He submitted that the agreement with the defendant was subject to completion of the deal by the plaintiffs with the daughters regarding their share and the plaintiffs have slept over the matter for more than four years

and have not taken any steps in this regard and in the mean the daughters having agreed to sell their share to Mr. Sanjiv Anand, the agreement in respect of the suit premises has thus become unenforceable.

9. Since learned counsel for both the parties have referred to different clauses of the agreement to base their submissions, reading of those clauses in isolation will take us nowhere, much less towards the intent of the parties. Therefore, before advertng to the submissions of learned counsel it will be useful to refer to the relevant portion of the agreement, which reads as follows:-

“Whereas keeping in view the absolute right of the Seller to the extent of 1/3rd plus 2/9th shares in the said property; the Seller has agreed to sell her shares to the Purchasers herein her right, title and interest for a total sale consideration of Rs.7 crores (Rupees seven crores) on the terms and conditions stated hereinafter.

NOW THIS MEMORANDUM OF UNDERSTANDING/AGREEMENT TO SELL WITHESETH AS UNDER:-

- (1) The Purchasers have paid a sum of Rs.60 Lacs (Rupees sixty lacs only) to the Seller, simultaneously with the signing of this MOU/Agreement to Sell and the receipt of the said payment, the Seller hereby acknowledges. The details of the payment made by the Purchasers to the Seller are given in the Annexure annexed hereto.
- (2) It is also agreed between the parties that on the signing of the MOU/Agreement to Sell, the parties shall vigorously pursue the litigation pending in the Court and the Seller shall ensure that any restraint order issued against her in any proceedings is vacated at the earliest. The Seller shall also pursue her claim to possession of the Ground Floor in the Company Court, where the proceedings of winding up of the tenant Company are pending in order to facilitate the completion of the transaction relating to the entire property.

- (3) It is also agreed between the parties that the Seller shall act in the Court proceedings in the best interest of the Purchasers and shall be entitled to receive a further sum of Rs.40 Lacs (Rupees forty lacs only) after a period of six months, from the date of signing of this MOU/Agreement to Sell, in case of delay in the disposal of the proceedings.
- (4) It is also agreed between the parties that the Purchasers shall be entitled to negotiate with the step-daughters of the Seller and all costs for purchase of their shares would be paid by the Purchasers, without affecting the sale price, payable to the Seller herein, for her share. The Purchasers further assures the Seller, that they shall try to conclude the deal with the step-daughters of the Seller as soon as possible and in case any amount is required to be deposited in court by the seller on account of her right of pre-emption, the Purchaser shall pay the said amount to the seller for doing the needful.
- (5) It is also agreed between the parties that after purchasing the shares of Ms.Rekha Sharma by way of settlement and Ms.Rashmi Sharma through court, in the said property within the shortest possible period from the date of this Agreement, the Purchasers shall complete the sale transaction with the Seller herein, within a period of three months and shall pay the balance sale price to the Seller against handing over of possession and execution of the other title documents to the satisfaction of the Purchasers.
- (6) It is also agreed between the parties that none of the parties shall be entitled to cancel the MOU/Agreement to Sell in question.
- (7) The Seller hereby agrees with the Purchasers that all costs of litigation shall be borne by the Seller, till the state of purchase of shares of Ms.Rekha Sharma and Ms.Rashmi Sharma by the Purchasers.
- (8) The parties agree that the seller undertakes to take all necessary steps to take possession at its own cost in the winding up proceedings against the tenant Company so that the vacant possession is available for the benefit of the purchaser of the said portion of the property.
- (9) The parties also agree that they have understood the implications of the pending litigation and have agreed to sign this memorandum of Understanding/Agreement to Sell to facilitate the ultimate purchase of the entire property by the Purchasers.
- (10) It is also agreed between the parties that the Seller shall not in any manner create any third party interest in her portion of the property. The Purchasers have also agreed with the Seller that they shall not be entitled to assign their rights under this Agreement to any third party."

10. Reading the agreement, it may be noted that it was specifically agreed between the parties that plaintiffs were entitled to negotiate with the daughters (Ms. Rekha Sharma and Ms. Rashmi Sharma) without affecting the sale price agreed with the defendant for the suit premises. The plaintiffs assured the defendant that they will try to conclude the deal with the daughters ***as soon as possible*** and in case any amount was required to be deposited in the Court by the defendant, (in the litigation going on between defendant and daughters) the plaintiffs shall pay the said amount for doing the needful. It may also be seen that as per clause 5, the parties further agreed that after purchasing shares of the daughters within the ***shortest possible*** period of the agreement, the plaintiffs were to complete the transaction with the defendant ***within the period of three months*** by making payment of the balance sale price simultaneously with the taking of possession and execution of the title documents.
11. Though no specific date or time was fixed for the completion of the transaction, as rightly submitted by the learned counsel for the plaintiffs, but by reading of clauses 4 and 5, it seems that the intention of the parties was to complete the transaction ***as soon as possible*** and within the ***shortest possible*** period from the date of the agreement. On completion of the

transactions with the daughters within ***shortest possible period***, the plaintiffs were to complete the transaction with the defendant ***within the period of three months***. What was ensured for the plaintiffs as per clause 4 was the negotiated sale price of 7 crores. A plain reading of this clause with the required emphasis on words ***“without affecting the sale price, payable to seller”*** would bring out this meaning. It was presumably for the reason that if the transaction with the daughters was at some other price, the sale consideration of the suit premises payable to the defendant was to remain at agreed 7 crores. It is in this context that clause 6, which was mainly relied upon by the learned counsel for the plaintiffs, has to be read. This clause cannot be read in isolation. Clause 9 further makes the parties intention clear that this agreement was being executed to facilitate the ultimate purchase of entire property by plaintiffs. Accordingly, we are of the view that purchase of shares of the daughters by the plaintiffs was a condition precedent to the implementation of the agreement. Admittedly, the plaintiffs have not been able to fulfill the condition precedent and now it is not possible since the daughters have admitted by agreed to sell their shares to Mr. Sanjiv Anand.

12. The learned counsel took us through the pleadings of plaint where it is averred that since the deal with the daughters could not materialize, the stage for the completion of the transaction has not arisen and that since 2/9th share of son, Sanjay on the ground floor along with the other portion of sisters is lying sealed and there has been delay in conclusion of the proceedings, consequently the present transaction is not being concluded. It appears that may be because of these factors the plaintiffs did not take any action to make payment of the balance amount for finalizing the transaction. It may be that they might have tried to negotiate the deal with the daughters. However, the admitted fact now is that the daughters have struck a deal with Mr. Sanjiv Anand, may be on a higher price. It is then that the plaintiffs have chosen to file the suit against the defendant.

13. Considering all these facts and circumstances, the learned Single Judge was of the view that there is nothing on record to demonstrate that the plaintiffs had at any point of time called upon the defendant to conclude the transaction qua her share in the suit premises after the execution of the agreement on 30th July, 2006 till 2nd June, 2010 when notice was issued to her for completion of the transaction. The learned Single Judge rightly recorded that the essence of clause 5 providing

shortest possible time should be taken to be the reasonable time which in the given circumstances has already elapsed. The period of four years was rightly held to be far too long. We are in agreement with the learned Single Judge that in these circumstances, the defendant was *prima facie* entitled to say that sale price has become unrealistic and she is no longer willing to suffer the transaction. It is not in dispute that the prices of the immovable properties in Delhi have considerably risen in the recent past. It was fairly stated by learned counsel for the defendant that the present value of the suit premises was not less than Rs.28 crores. This fact was not disputed by learned counsel for the plaintiffs.

14. Keeping in view the above discussion, the question for consideration would be as to whether, in these circumstances, the learned Single Judge ought to have restrained the defendant from dealing with the suit premises? We do not find any merit in the contention of the learned counsel for the plaintiffs. In the case of ***K.S. Vidyadnam and others v. Vairavan***, AIR 1997 SC 1751, the Hon'ble Supreme Court laid as under:

"10. It has been consistently held by the courts in India, following certain early English decisions, that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically provided to that effect. The period of limitation prescribed by the Limitation Act for filing a suit is three years. From these two circumstances, it does not follow that any and every suit for specific performance of the agreement [which does not

provide specifically that time is of the essence of the contract] should be decreed provided it is filed within the period of limitation notwithstanding the time limits stipulated in the agreement for doing one or the other thing by one or the other party. That would amount to saying that the time-limits prescribed by the parties in the agreement have no significance or value and that they mean nothing. Would it be reasonable to say that because time is not made the essence of the contract, the time-limits specified in the agreement have no relevance and can be ignored with impunity? It would also mean denying the discretion vested in the court by both Sections 10 and 20. As held by a Constitution Bench of this Court in *Chand Rani v. Kamala Rani* , "it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract, the court may infer that it is to be performed in a reasonable time if the conditions are (evident?): (1) from the express terms of the contract; (2) from the nature of the property; and (3) from the surrounding circumstances, for example, the object of making the contract". In other words, the court should look at all the relevant circumstances including the time-limits specified in the agreement and determine whether its discretion to grant specific performance should be exercised. Now in the case of urban properties in India, it is well-known that their prices have been going up sharply over the last few decades..."

11. ...Indeed, we are inclined to think that the rigor of the rule evolved by courts that time is not of the essence of the contract in the case of immovable properties - evolved in times when prices and values were stable and inflation was unknown - requires to be relaxed, if not modified, particularly in the case of urban immovable properties. It is high time, we do so. learned Counsel for the plaintiff says that when the parties entered into the contract, they knew that prices are rising; hence, he says, rise in prices cannot be a ground for denying specific performance. May be, the parties knew of the said circumstance but they have also specified six months as the period within which the transaction should be completed. The said time-limit may not amount to making time the essence of the contract but it must yet have some meaning. Not for nothing could such time-limit would have been prescribed. Can it be stated as a rule of law or rule of prudence that where time is not made the essence of the contract, all stipulations of time provided in the contract have no significance or meaning or that they are as good as nonexistent? All this only means that while exercising its discretion, the court should also bear in mind that when the parties prescribes certain time-limits for taking steps by one or the other party, it must have some significance and that the said time-limits cannot be ignored altogether on the ground that time has not been made the essence of the contract [relating to immovable properties]."

15. In the aforesaid case, the Apex Court also observed that it is a case of total inaction on part of the plaintiffs for two-and-a-half years in clear violation of the terms of agreement which required him to pay the balance, purchase the stamp papers and then ask for execution of sale deed. The Apex Court held that the delay is coupled with substantial rise in prices, which, according to the defendants, are three times - between the date of agreement and the date of suit notice. The delay has brought about a situation where it would be inequitable to give the relief of specific performance to the plaintiffs.
16. The Apex Court also reiterated that the true principle is the one as stated by the Constitution Bench in the case of ***Chand Rani v. Kamala Rani***, AIR 1993 SC 1742. In this case it was held that even where time is not the essence of the contract, the plaintiff must perform his part of the contract within reasonable time and the *reasonable time should be determined by looking at the surrounding circumstances including the express terms of the contract and the nature of the property.*
17. Applying the principles of law as laid by the Apex Court in the aforesaid cases, we may, at the sake of repetition, state that we cannot be oblivious to the reality which is that a considerable period of over four years has elapsed from the execution of the

agreement without any action being taken by the plaintiffs to fulfill the terms and conditions and in the meantime not only the prices of the suit premises have risen to four times, but the co-owners have also created third party interests in their shares in the premises. All this has made the completion of transaction beyond implementation and unenforceable. In such circumstances, the defendant could not be made to suffer the transaction.

18. There is another aspect of the matter, which needs to be mentioned. It was contended by the learned counsel for the defendant that plaintiffs had rescinded/abandoned the agreement and consequently the advance sum of Rs.1.00 crores along with interest of Rs.32,28,495/- was refunded to them, and therefore, *no cause of action survives*. He drew our attention to the pleading of the plaint where it is pleaded that the cause of action also arose on 4th May, 2010, when the defendant became furious and refused to refund the amount of the earnest money. The learned counsel submitted that this averment was predicated on the premise that the agreement to the knowledge of plaintiffs stood rescinded or cancelled prior to 4th May, 2010.

19. The learned counsel for the defendant also raised the questions of validity of agreement, the limitation and also non maintainability of the plaint in the present form. An issue was also raised alleging the agreement to be a product of fraud played upon the defendant at the instance of her previous lawyer. We need not go into all these issues in the present proceedings.
20. Keeping in view the entire facts and circumstances and also the age of the defendant (68 years), the learned Single Judge was of the view that the suit property cannot be subjected to any injunction whereby the defendant, at this stage, is asked to wait to enjoy the fruits of her property. We are in complete agreement with the learned Single Judge that in the given circumstances neither the *prima facie* case nor the balance of convenience is in favour of the plaintiffs to restrain the defendant. With regard to question of irreparable loss, the learned Single Judge noted that an offer without prejudice to her rights was made by the defendant to deposit a sum of Rs.7.00 crores within three months. Though, the said offer was rejected by the plaintiffs, but to protect the interest of both the parties, the learned Single Judge accepted this offer of the defendant of deposit of Rs.7.00 crores. It was

presumably on the perception that if the plaintiffs are entitled to any compensation, their interest may remain secured.

21. The learned Single Judge has examined all aspects of the matter and also the principles of applicability of Order XXXIX Rules 1 and 2 CPC. Having analysed ourselves that there is no infirmity in the impugned order and guided by the principles of law laid down by the Supreme Court in the case of ***Skyline Education Institute (India) Pvt. Ltd. v. S L. Vaswani & Another***, (2010) 2 SCC 142, we are not inclined to interfere with the well reasoned order of learned Single Judge.
22. The defendant in her appeal, i.e., FAO(OS) No.12/2011, impugned this part of the order of deposit of Rs.7.00 crores alleging it to be excessive. We have noted above that this was the offer of the defendant herself without prejudice to her rights and the same was considered and accepted by the learned Single Judge to secure the interests of both the parties. We do not see any infirmity or illegality in the order of the learned Single Judge in this regard.
23. For the aforesaid reasons, we also do not see any merit in the appeal, i.e., FAO(OS) No.35/2011 of the plaintiffs which

deserves dismissal. Consequently, both the appeals are dismissed with no orders as to costs.

24. It is clarified that the observations made by us will not have any bearing on the merits of the original suit.

**M.L. MEHTA
(JUDGE)**

JANUARY 28, 2010
Dev/AK

**A.K. SIKRI
(JUDGE)**