

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

+ **RFA No.231/2001**

% **8th March, 2011**

SMT. HARSH BALA & ORS Appellants
Through: Mr. L.D.Adlakha and Mr. Ripu
Adlakha, Advocates.
VERSUS

SMT. USHA SIBAL AND ORS Respondents
Through: Mr. Ashish Bhagat, Mr. Abdhesh
Chaudhary, Ms. Monisha Suri and
Mr. Dushyant Arora, Advocates.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

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

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this regular first appeal under Section 96 of the Code of Civil Procedure, 1908 is to the impugned judgment and decree dated 30.4.2001 whereby the suit for specific performance of the appellants/plaintiffs was dismissed for the relief of specific performance by decreeing instead the alternative relief of refund of the amount paid under the agreement to sell, along with interest at 12% per annum.

2. The facts of the case are that late Sh. Maharaj Kishan Sibal, the predecessor-in-interest of the defendants/respondents, entered into an agreement to sell dated 3.4.1993 with the appellants/plaintiffs with respect to the ground floor and the roof of the first floor with all terrace rights of the property bearing no. B-53, New Rajinder Nagar, New Delhi, constructed on a plot admeasuring 128 sq. yds, for a total consideration of Rs.4.60,000/-, and of which amount, a sum of Rs.3,60,000/- was paid on the date of the agreement to sell, exhibited as Ex.PW1/2 in the trial court. Further amounts were paid by the appellants to Sh. Maharaj Kishan Sibal and as a result whereof, out of the total sale consideration of Rs.4,60,000/-, a sum of Rs.4,06,000/- was paid to Sh. Maharaj Kishan Sibal. As Maharaj Kishan Sibal was threatening to dispossess the appellants/plaintiffs, a civil suit for injunction was filed against Sh. Maharaj Kishan Sibal and in the said suit Sh. Maharaj Kishan Sibal made a statement admitting the agreement to sell and the receipt of the amount of Rs.3,60,000/-. It was agreed by Sh. Maharaj Kishan Sibal that he would not dispossess the appellants/plaintiffs. A further amount of Rs.25,000/- was received by Sh. Maharaj Kishan Sibal in court. Sh. Maharaj Kishan Sibal died on 12.9.1993 leaving behind the defendants as his legal heirs. Originally, the defendant no.1 in the suit was his widow Smt. Usha Sibal who expired during the pendency of the suit in the trial court, and since the other two defendants were the two daughters of late Sh. Maharaj Kishan Sibal and deceased defendant No.1/Smt.Usha Sibal, they were taken on record as legal heirs of defendant no.1. As of today, therefore the two

daughters of Sh. Maharaj Kishan Sibal are the persons who are contesting the proceedings.

3. On account of failure of the legal heirs of Sh. Maharaj Kishan Sibal to execute the sale deed in favour of the appellants/plaintiffs, the subject suit came to be filed. The defendants no.1 and 2 being the widow and daughter of Sh. Maharaj Kishan Sibal in the suit were served for 12.4.1996, the suit having been filed on 7.3.1996. The defendants no.1 and 2 subsequently in the trial court had moved an application under Order 2 Rule 2 read with Order 6 Rule 5 and Section 10 CPC on 27.5.1996. Defendant no.3 was not served for various dates of hearings during the years 1996 and 1997. It is surprising that initially no one chose to appear for defendant no.3 who was the other daughter although counsel had appeared for one daughter and the widow of late Sh. Maharaj Kishan Sibal in the trial court. Defendant no.3 was ultimately proceeded ex parte after service on 8.2.1997. Defendant no.1 Smt. Usha Sibal died in around April, 1997 and this was so stated by her counsel on 5.5.1997 and time was sought accordingly whereby the matter was put for further proceedings on 30.5.1997. Since the defendants no.2 and 3 being the daughters of Smt. Usha Sibal were the only legal heirs, on 30.5.1997 it was so recorded and the matter was fixed thereafter on 29.8.1997. On 29.8.1997 since no one appeared for the defendants no.2 and 3/respondents/daughters of Sh. Maharaj Kishan Sibal, the matter was therefore proceeded ex parte against the defendants.

4. I may note that subsequently an application was filed for setting aside the ex parte proceedings, which was dismissed, and the further challenge to the said order before this court failed. Though, both the defendants were ex parte, however, their counsel had appeared and argued the case at the time of final arguments.

5. On behalf of the plaintiffs, evidence was led and the agreement to sell dated 3.4.1993 was proved and exhibited as Ex.PW1/2. The receipts for payments were proved as Ex.PW1/3 to Ex.PW1/6. The result of the aforesaid is that there is a valid agreement to sell in respect of the suit property and of which almost the entire consideration except an amount of Rs.54,000/- was received by late Sh. Maharaj Kishan Sibal. The trial court has also accordingly found that there was a valid agreement to sell and that a sum of Rs.4,06,000/- was received by Sh. Maharaj Kishan Sibal and that the defendants were guilty of breach of contract in failing to execute the sale deed. However, surprisingly, after giving the aforesaid findings in favour of the appellants/plaintiffs, the trial court denied the relief of specific performance on the ground that Sh. Maharaj Kishan Sibal was not feeling well and he needed money for his treatment and therefore though there may not be mental disability the circumstances make it inequitable to grant specific performance. The reasoning is very surprising and puzzling and I can do no better except reproduce the same:-

“11. It is established from the testimony of PW1 Dilbag Rai that Shri Maharaj Kishan Sibal, predecessor in interest of the defendants, had in fact entered into an agreement with the

plaintiff to sell the suit property for a consideration of Rs.4,60,000/-. It is also established that Shri Maharaj Kishan Sibal received an amount of Rs.4,06,000/- on different dates from the plaintiffs in pursuance of the sale agreement. The question is whether specific performance of the contract should be directed or not. In this context, I may point out to para 4 of the plaint where the plaintiffs allege that they were previously residing in the suit property as tenants. This averment is not in harmony with the sale agreement Ex.PW1/2 where it is stated that the purchase were in occupation of the property through Dharam Veer and Sh. Prem Chand. It is also to be noted that the sale agreement was executed on 03.04.93 and the last payment was made on 20.07.93 and Shri Kishan Sibal died shortly thereafter. As a matter of fact, Maharaj Kishan Sibal mentions in the letter Ex.PW1/5 itself that he was not feeling well and he needed the money for his treatment. The possibility cannot be ruled out that Maharaj Kishan Sibal was not in a proper mental frame to understand his interests. This may not amount to any mental disability and may not be enough to render the agreement voidable but it is a definite indication that Maharaj Kishan Sibal entered into the contract under circumstances which make it inequitable to enforce specific performance. The specific performance of a contract is a discretionary relief and Section 20 of Specific Relief Act lays down the conditions which should govern the exercise of such discretion. Since I feel that it would not be equitable to enforce specific performance, I would not grant the relief of specific performance. Instead, I would direct the defendants to refund the amount of Rs.4,04,000/- which had been received by their father from the plaintiffs. The defendants shall also pay pendente lite and future interest @ 12% per annum till the date of realisation." (underlining added)

6. No doubt, the relief for specific performance is a discretionary relief and is also so laid down in various decisions of the Supreme Court. Counsel for the respondents for this proposition relied upon ***Sen Mukherjee and Co., Vs. Smt. Chhaya Banerjee, AIR 1998 Calcutta 252*** (DB). There is no quarrel with this proposition of law that specific performance is a discretionary relief. This is in fact so stated in Section 20 of The Specific Relief Act, 1963. The discretion with respect to the grant of the relief for specific performance however is a judicial discretion which is to be exercised

objectively and not subjectively. Section 20 gives some instances when specific performance may not be granted. The question, therefore, is whether judicial discretion has been rightly exercised by the trial court to deny the relief of specific performance. I do not think that merely because a person is sick, and so stated in one of the letters Ex.PW1/5, itself means that the relief of specific performance can be declined. The scales of justice, in the facts of the present case, cannot be said to be tilted in favour of the respondents/defendants for denying the relief of specific performance considering the fact that most part of the total sale consideration of Rs.4,60,000/- i.e., Rs.4,06,000/- was already received by late Sh. Maharaj Kishan Sibal. Every person sells a property for a particular reason, and merely because there would be a reason of illness would not mean that itself should result in denial of the relief of specific performance to a proposed buyer who has paid almost the entire consideration. This would surely be injustice when we look at the issue from the point of view of a proposed buyer because after all what fault has he done, inasmuch as he entered into a valid agreement to sell and paid the agreed consideration which is not alleged to be inadequate nor the agreement entered into by coercion because no such stand was even taken up by Maharaj Kishan Sibal in his lifetime.

7. Learned counsel for the respondents relied upon the decision of the Supreme Court in the case of ***Parakunnan Veetill Joseph's Son Mathew Vs. Nedumbara Kuruvila's son and others AIR 1987 SC 2328*** to

canvass the proposition that specific performance should not be granted when litigation is used as an instrument of oppression to have an unfair advantage. Once again there is no dispute to this proposition of law, however, facts of each case have to be seen whether an unfair advantage is being derived so that the specific performance should be refused. The learned counsel for the respondents contended that the appellants were already tenants in the ground floor and therefore they had an undue advantage. Frankly, a person being a tenant in a property and then choosing to purchase the property cannot ipso facto mean that a tenant had an unfair advantage. If this argument is accepted in absolute terms then no tenant will enter into any agreement to purchase with his landlord and no suit by a tenant against his landlord for specific performance can ever be decreed. I have already noted that there is no argument that the consideration which was fixed and received for the property was inadequate or that there was any coercion or fraud or misrepresentation. I therefore cannot accept the argument of the learned counsel for the respondents otherwise, it would mean that every agreement entered into between a tenant and a landlord is not capable of specific performance. As a general rule, therefore, the proposition argued by the learned counsel for the respondents that tenant should not be entitled to specific performance of the agreement is clearly misconceived. Further, though I am not required to consider this argument on merits as raised, I am only dealing with this argument in deference to the argument raised by the learned counsel for the respondents, inasmuch as,

the respondents were ex parte in the trial court and there is no pleading on their behalf to this effect and therefore they cannot be allowed to take defences on merits. The claim for setting aside the ex parte proceedings were dismissed right up to this court. Allowing arguments on merits therefore when no written statement stands filed would mean allowing entry from the back door as it were because arguments on merits can only be allowed when a written statement is filed and evidence is led to substantiate the pleas contained in the written statement.

8. The trial court has also erred and not granting specific performance on the ground that there is an alleged inconsistency between para 4 of the plaint where the plaintiffs stated that they were previously residing in the suit property as tenants and the contents of sale agreement Ex.PW1/2 where it was stated that plaintiffs were in occupation through Sh. Dharam Vir and Sh. Prem Shankar. The logic employed by the trial court is a classic case of making a mountain out of a mole hill because Dharam Vir and Prem Shankar were the husbands of the plaintiffs no.2 and 3, and therefore, the strained reasoning of the trial court in this regard is clearly erroneous.

9. Learned counsel for the respondents also argued that there was no reason for Sh. Maharaj Kishan Sibal to sell the property inasmuch as he was receiving rent for the property. Once again, though I am dealing with this submission, as already stated above there was no such stand in the trial court inasmuch as there were no pleadings of the respondent before the trial

court. I am of the opinion that the argument as raised by the learned counsel for the respondents is without substance because there cannot be an argument that merely because a person is receiving rent for the property, therefore, he would not like to sell the same. Every day, properties are sold and purchased which are tenanted. In fact, a landlord may want to use the sale consideration for myriad purposes including that he cannot stay in the property where his tenants are living. After all a sale takes place when there is a need and needs can be many. Therefore, it is not correct to say that merely because rent was received from the property, specific performance should be refused because Maharaj Kishan Sibal ought not to have agreed to sell the property. It is not the case on behalf of the respondents that the property sold was their residential house where they were residing and therefore if the same was sold, they would not have any roof over their heads. I may state that the learned counsel for the respondents admitted in the course of arguments that no portion of the property was at all in physical possession of Maharaj Kishan Sibal inasmuch as the first floor was already sold to another person and the ground floor was in the tenancy of the husbands of two of the plaintiffs. In fact, part of the property being the front portion thereof is commercial and is put to such use by the appellants/defendants. It is thus not as if that the only residential house of a family was being sold, and which factor therefore should be considered for refusing the relief of specific performance.

10. In view of the above, the appeal is accepted. The impugned judgment and decree is set aside. The suit of the appellants/plaintiffs for specific performance with respect to the subject matter of the agreement dated 3.4.1993 being the entire ground floor and roof of the first floor with terrace rights is decreed against the defendants/respondents. The appellants shall deposit in the trial court the balance consideration of Rs. 54,000/- within a period of two months from today along with the interest at the rate of 18% per annum thereon from 3.4.1993 till date. The amount when deposited will be put by the trial court in a fixed deposit so as to earn maximum rate of interest. The respondents are held entitled to withdraw the amount as deposited by the appellants. On deposit of the amount in court, respondents will execute the sale deed of the property which is the subject matter of the agreement to sell dated 3.4.1993 within a period of one month thereof. In case, the respondents fail to execute the sale deed, the appellants are entitled to get the sale deed executed in execution in accordance with Order 21 CPC. Parties are left to bear their own costs. Decree sheet be prepared. Trial court record be sent back.

MARCH 08, 2011
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VALMIKI J. MEHTA, J.