

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 15th March, 2011
% Date of decision: 13th May, 2011

+ RFA(OS) 88-89/2006, CM 13368/2006, CM 18516/2010 &
CM 2081/2011

SHAILENDRA NATH ENDLAY & ANR. Appellants
Through: Mr. Sudhir Nandrajog, Senior
Advocate with Mr. Jainendra
Maldahiyar, Advocate.

-versus-

KULDIP GANDOTRA Respondent
Through: Mr. Kailash Vasdev, Senior
Advocate with Ms. Shraddha
Bhargava and Ms. Richa Kapoor,
Advocates.

CORAM:
HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

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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. |

J U D G M E N T

SIDDHARTH MRIDUL, J.

1. The present Appeal is instituted against the judgment and decree dated 4th July, 2006 passed by the learned Single Judge in CS(OS) No.901/2004, whereby the suit for specific performance of the agreement to sell dated 31st March, 2004

(hereinafter 'the said agreement to sell') in respect of flat bearing No.C-9/9551, Vasant Kunj, New Delhi-110070 (hereinafter 'the said flat'), was decreed in favour of the Respondent and against the Appellants.

2. The facts as are necessary for disposal of the present Appeal are as follows:

(a) The parties to the present Appeal entered into the said agreement to sell in respect of the said flat (Ex.P-1). As per the said agreement to sell dated 31st March, 2004, the Respondent was the Vendee whereas the Appellants herein were the Vendors. The said agreement to sell dated 31st March, 2004 was entered into, on behalf of the Appellant No.1, by the Appellant No.2, who held a General Power of Attorney in her favour. The Appellant No.1 had acquired the said flat on allotment from the Delhi Development Authority (DDA) and the same was a leasehold property. The said flat was eligible for conversion into freehold on payment of prescribed charges as per the policy of DDA.

(b) At the time the parties entered into the said agreement to sell dated 31st March, 2004, the said flat was in occupation of a tenant, who had been

inducted by the Appellant No.1. At the time of the said agreement to sell dated 31st March, 2004, it was agreed that the sale would be completed after the property was got vacated from the tenant and that the vacant possession of the said flat would be handed over to the Respondent by the Appellants.

- (c) The salient and important terms of the said agreement to sell dated 31st March, 2004 were that the sale consideration was fixed at ₹32,50,000/- out of which a sum of ₹1,00,000/- had been paid to the Appellant No.1 through the Appellant No.2 at the time of entering into the said agreement to sell. The balance sale price of ₹31,50,000/- was payable at the time of registration of the Sale Deed. Vacant possession of the said flat was to be delivered by the Appellant No.1 and 2 at the time of registration of the Sale Deed. The date of vacation of the said flat by the tenant was indicated as 30th June, 2004. The said flat was to be got vacated by the Appellants. The learned Single Judge held that the Appellants had also undertaken the obligation of getting the said flat converted into freehold as per the prevalent

policy. However, the necessary fees/charges for said conversion were to be borne by the Respondent.

- (d) Thereafter according to the Appellants they got the said flat vacated from the tenant on 15th May, 2004 and informed the Respondent accordingly, telephonically as well as personally. This was vehemently denied by the Respondent. The Respondent states that he deposited a sum of ₹80,000/- or so on account of conversion fee/charges in May, 2004 at the behest and instance of the Appellants. However, the Appellants did not take all the necessary steps to get the said flat converted into freehold. Consequently, the Respondent wrote a letter dated 9th July, 2004(Ex.D-2) calling upon the Appellants to get the said flat converted into freehold before 15th July, 2004, the time stipulated in the said agreement to sell dated 31st March, 2004. The Respondent further informed the Appellants vide the said letter dated 9th July, 2011 that he was ready with the balance consideration amount which payable to the Appellants at the time of execution of the Sale Deed. In response thereto the Appellants sent a legal notice dated 13th July, 2004 (Ex.P-2) to

the Respondent requiring him to make payment of the balance sale consideration on or before the 15th July, 2004 and intimating him that in case the Respondent failed to do so, the advance of ₹1,00,000/- would be forfeited by the Appellants. In the said legal notice dated 13th July, 2004 the Appellants also stated that as per the terms and conditions of the agreement it was the liability and responsibility of the Respondent to get the flat converted into freehold. This was followed by the notice dated 21st July, 2004 (Ex.D-3) issued by the Respondent's advocate to the Appellants' advocate and a notice dated 27th July, 2004 (Ex.P-3) sent on behalf of the Appellants to the Respondent. As per the last notice dated 27th July, 2004 the Appellants alleged that time was of the essence of the contract and that the Respondent was required to make payment of the balance sale consideration by 15th July, 2004 and that the Respondent having failed to make the said payment the amount of ₹1,00,000/- stood forfeited by the Appellants and the said agreement to sell dated 31st March, 2004 stood cancelled.

(e) Immediately thereafter, the Respondent filed the Civil Suit bearing CS(OS) No.901/2004 on 10th August, 2004. The Respondent stated that he had kept a sum of ₹33,00,000/- since April, 2004 in the form of Fixed Deposit Receipts encashable at any time in order to fulfill his obligation under the said agreement to sell dated 31st March, 2004. The said Fixed Deposit Receipts for the balance consideration were deposited by the Respondent in Court as indicated in the order dated 29th September, 2004 passed by the learned Single Judge.

(f) On completion of the pleadings the following issues were cast in the said suit:

“1. Whether proper Court fee has not been paid?
OPD.

2. Whether the time was the essence of the contract and the plaintiff failed to perform his part under the agreement? OPD.

3. Whether the plaintiff is entitled to a decree for specific performance on the grounds pleaded in the plaint? OPD.

4. Whether in the alternative, the plaintiff is entitled to refund of the amount alongwith damages and interest as prayed? OPP

5. Relief.”

(g) The following documents filed on behalf of the Respondent were exhibited:-

- “i) Original agreement to sell dated 31.03.2004(Exhibit-P-1).
- ii) A copy of notice dated 13.07.2004 sent on behalf of the defendant No.2 to the plaintiff(Exhibit-P-2).
- iii) A copy of notice dated 27.07.2004 sent on behalf of the defendants to the plaintiff(Exhibit-P-3).
- iv) A copy of the Challan dated 24.05.2004 depositing a sum of Rs.11075(Exhibit-P-4).
- v) Acknowledgement receipt of DDA dated 11.06.2004(Exhibit-P-5).
- vi) Conveyance Deed (draft of) to be issued on conversion of lease hold into free hold(Exhibit-P-6).
- vii)Letter from DDA regarding stamping of Conveyance Deed dated 29.04.2004(Exhibit-P-7).
- viii) Copy of Special Power of Attorney dated 10.05.2004(Exhibit-P-8).
- ix) Copy of Challan No.8083 in respect of cash Rs.66060/- paid on 25.05.2004 (Exhibit-P-9).
- x) Copy of Challan 80834 dated 25.05.2004 for a sum of Rs.20(Exhibit-P-10).”

(h) The Appellants, inter alia, filed the following documents:

- “i) Copy of General Power of Attorney dated 25.08.1982 executed by the defendant No.1 in favour of, inter alia, defendant No.2 (Exhibit-D-1).
- ii) Original Possession Slip issued by Mr. Ravi Kapila dated 15.05.2004 (Exhibit-DW-1/5).
- iii) Original Possession Slip Issued by Viney Lata Chandra dated 15.05.2004(Exhibit-DW-1/6).

- iv) Original letter dated 09.07.2004 sent by the plaintiff to the defendants (Exhibit-D-2).
- v) Original notice dated 21.07.2004 issued by the plaintiff's advocate to the defendants' advocate (Exhibit-D-3)."

- (i) With regard to Issue No.1 the learned Single Judge found that the same was not pressed by the learned Counsel for the Appellants and as such decided the same in favour of the Respondent.
- (j) With regard to Issue No.2 the learned Single Judge found that the Respondent was required to do three things, namely, (a) to make the payment of the advance amount of ₹1,00,000/-, which he did; (b) to make the payment for conversion charges and fee, which also he did; and (c) to make the payment for the balance amount of ₹31.5 lakhs as also the stamp duty and registration fee necessary for the execution and registration of the Sale Deed, which occasion did not arise because the Appellants had not got the said flat converted from leasehold to freehold, but which the Respondent was ready and willing to do as it came in evidence that he had funds for the same. As regards the Appellants they were required to:- (a) evict the tenant from the said flat; (b) to get

the said flat converted from leasehold to freehold; and (c) to execute the Sale Deed and hand over the vacant physical possession of the same to the Respondent at the time of registration. The Appellants fulfilled the obligations referred to in (a) above, but did not fulfill the obligation of having the said flat converted from leasehold to freehold, which obligation was cast upon the Appellants. Therefore, there was no failure on behalf of the Respondent to meet his commitment under the said agreement, and that by not fulfilling their obligations it was indeed unfair on the part of the Appellants to insist upon the Respondent to make the balance payment by 15th July, 2004 on the premise that time was of the essence of the contract. Therefore, the learned Single Judge came to the conclusion that in view of the unfulfilled obligations of the Appellants it could not be said that the time was of the essence of the contract. As regards the question of the Respondent having failed to perform his part of the agreement, it was held that the Respondent did all it could do and the Respondent was ready and willing to perform his obligation of making the balance payment of ₹31.5

lakhs provided the flat was converted from leasehold to freehold by the Appellants. Therefore, the Issue No.2 was decided in favour of the Respondent and against the Appellants.

- (k) With regard to Issue No.3, the learned Single Judge found that the Respondent had been able to prove the existence of the said agreement to sell dated 31st March, 2004. He had further proved that the payments, with regard to fees and charges for conversion of the property, an obligation cast upon him, were made by him. The advance amount of ₹1,00,000/- was paid to the Appellants and the only thing remaining to be done was to pay the balance amount of ₹31.5 lakhs to the Appellants on their fulfilling their obligations of evicting the tenant from the said flat and getting the same converted from leasehold to freehold. The Respondent had also demonstrated that he had the funds available and was ready and willing to go through with the contract at all relevant times. Therefore, the learned Single Judge decided Issue No.3 in favour of the Respondent and against the Appellants.

- (l) With regard to Issue No.4 the learned Single Judge held that in view of the decision in favour of the Respondent under Issue No.2 and 3, this issue did not fall for consideration. Accordingly, with regard to Issue No.5 the learned Single Judge decreed the suit for specific performance in favour of the Respondent and against the Appellants and directed the Appellants to carry out conversion of the said flat from leasehold to freehold and thereafter execute the Sale Deed and hand over the vacant physical possession to the Respondent in terms of the said agreement.
- (m) Aggrieved by the said judgment and decree as aforesaid the Appellants have preferred the present Regular First Appeal.

3. During the pendency of the present Appeal, the Appellants were directed to hand over possession of the demised premises to the Respondent and the latter was permitted to retain possession thereof as a Receiver of this Court to abide by any decision that may be passed at the final determination of the Appeal. The Respondent was also directed to be liable to pay the Society dues and electricity and water charges as well as House Tax. In an Appeal against the said order dated 8th September,

2010, the Hon'ble Supreme Court was pleased to pass the following orders:-

“We have heard learned counsel for the parties.

In the peculiar facts and circumstances of the case, we request the High Court to dispose of R.F.A.(OS) No.88-89/2006 as expeditiously as possible, in any event, within six months from the date of communication of this order. During the interregnum period, the respondent may occupy the premises on or after 1st November, 2010. The respondent undertakes to pay Rs.18,000/- per month to the petitioner before 10th of every month. This interim order is subject to the final order passed by the High Court in R.F.A.(OS) No.88-89/2006.

With these observations, this Special Leave Petition is disposed of.”

4. On behalf of the Appellants, predicated on the pleadings filed by them in the Suit and the oral testimony of Appellant No.2, it was urged that it was the responsibility of the Respondent to get the subject property converted from leasehold to freehold. According to the Appellant, for such conversion requisite permission was to be obtained from the DDA after filing of necessary charges and documents and the entire responsibility thereof was that of the Respondent as per the oral agreement between the parties, inasmuch as, the Appellant No.2, who was the General Power of Attorney holder of the Appellant No.1, being an old lady of seventy years, would be unable to run around securing the said permission and completing the formalities required to effect such permission.

5. On the other hand, it was urged on behalf of the Respondent that the burden of conversion of the suit property was the responsibility of the Appellants although the necessary cost to be incurred for such conversion were to be borne by the Respondent. In this behalf, attention of this Court was drawn to Clause 4 of the said agreement to sell dated 31st March, 2004. It was, therefore, urged that the said Clause 4 of the said agreement to sell dated 31st March, 2004 was clear and unequivocally written clause of the contract which made it incumbent upon the Appellants to effect conversion of the flat from leasehold to freehold and no oral evidence contrary to the said specific term of the contract was admissible.

6. In the circumstances, the main controversy in the present Appeal revolves around Clause 4 of the said agreement to sell entered into between the parties. In this behalf, it was necessary to consider the nature and scope of Section 91 and 92 of the Indian Evidence Act, 1872. The scope and ambit of the said Sections 91 and 92 of the Evidence Act, 1872 came up for consideration before the Supreme Court in ***Roop Kumar***-vs.-***Mohan Thedani***, (2003) 6 SCC 595. The Supreme Court held as follows:

“13. Section 91 relates to evidence of terms of contract, grants and other disposition of

properties reduced to form of document. This section merely forbids proving the contents of a writing otherwise than by the writing itself; it is covered by the ordinary rule of law of evidence, applicable not merely to solemn writings of the sort named but to others known some times as the "best evidence rule". It is in reality declaring a doctrine of the substantive law, namely, in the case of a written contract, that all proceedings and contemporaneous oral expressions of the thing are merged in the writing or displaced by it. (See *Thayer's Preliminary Law on Evidence*, p. 397 and p. 398; *Phipson Evidence*, 7th Edn., p. 546; *Wigmore's Evidence*, p. 2406.) It has been best described by Wigmore stating that the rule is no sense a rule of evidence but a rule of substantive law. It does not exclude certain data because they are for one or another reason untrustworthy or undesirable means of evidencing some fact to be proved. It does not concern a probative mental process - the process of believing one fact on the faith of another. What the rule does is to declare that certain kinds of facts are legally ineffective in the substantive law; and this of course (like any other ruling of substantive law) results in forbidding the fact to be proved at all. But this prohibition of proving it is merely that dramatic aspect of the process of applying the rule of substantive law. When a thing is not to be proved at all the rule of prohibition does not become a rule of evidence merely because it comes into play when the counsel offers to "prove" it or "give evidence" of it; otherwise any rule of law whatever might reduced to a rule of evidence. It would become the legitimate progeny of the law of evidence. For the purpose of specific varieties of jural effects - sale, contract etc. there are specific requirements varying according to the subject. On contrary there are also certain fundamental elements common to all and capable of being generalised. Every jural act may have the following four elements:

- (a) the en-action or creation of the act;
- (b) its integration or embodiment in a single memorial when desired;
- (c) its solemnization or fulfilment of the prescribed forms, if any; and

(d) the interpretation or application of the act to the external objects affected by it.

14. The first and fourth are necessarily involved in every jural act, and second and third may or may not become practically important, but are always possible elements.

15. The enactment or creation of an act is concerned with the question whether any jural act of the alleged tenor has been consummated; or, if consummated, whether the circumstances attending its creation authorise its avoidance or annulment. The integration of the act consists in embodying it in a single utterance or memorial - commonly, of course, a written one. This process of integration may be required by law, or it may be adopted voluntarily by the actor or actors and in the latter case, either wholly or partially. Thus, the question in its usual form is whether the particular document was intended by the parties to cover certain subjects of transaction between them and, therefore, to deprive of legal effect all other utterances.

16. The practical consequence of integration is that its scattered parts, in their former and inchoate shape, have no longer any jural effect; they are replaced by a single embodiment of the act. In other words, when a jural act is embodied in a single memorial all other utterances of the parties on the topic are legally immaterial for the purpose of determining what are the terms of their act. This rule is based upon an assumed intention on the part of the contracting parties, evidenced by the existence of the written contract, to place themselves above the uncertainties of oral evidence and on a disinclination of the Courts to defeat this object. When persons express their agreements in writing, it is for the express purpose of getting rid of any indefiniteness and to put their ideas in such shape that there can be no misunderstanding, which so often occurs when reliance is placed upon oral statements. Written contracts presume deliberation on the part of the contracting parties and it is natural they should be treated with careful consideration by the courts and with a disinclination to disturb the conditions of matters as embodied in them by the act of the parties. (See *McKelvey's Evidence*, p. 294.) As

observed in *Greenlear's Evidence*, p. 563, one of the most common and important of the concrete rules presumed under the general notion that the best evidence must be produced and that one with which the phrase "best evidence" is now exclusively associated is the rule that when the contents of a writing are to be proved, the writing itself must be produced before the Court or its absence accounted for before testimony to its contents is admitted.

17. It is likewise a general and most inflexible rule that wherever written instrument are appointed, either by the requirement of law, or by the contract of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict or alter them. This is a matter both of principle and policy. It is of principle because such instruments are in their own nature and origin, entitled to a much higher degree of credit than parol evidence. It is of policy because it would be attended with great mischief if those instruments, upon which men's rights depended, were liable to be impeached by loose collateral evidence. (See *Starkie on Evidence*, p. 648.)

18. In Section 92 the legislature has prevented oral evidence being adduced for the purpose of varying the contract as between the parties to the contract; but, no such limitations are imposed under Section 91. Having regard to the jural position of Sections 91 and 92 and the deliberate omission from Section 91 of such words of limitation, it must be taken note of that even a third party if he wants to establish a particular contract between certain others, either when such contract has been reduced to in a document or where under the law such contract has to be in writing, can only prove such contract by the production of such writing.

19. Sections 91 and 92 apply only when the document on the face of it contains or appears to contain all the terms of the contract. Section 91 is concerned solely with the mode of proof of a document with limitation imposed by Section 92 relates only to the parties to the document. If after the document has been produced to prove its

terms under Section 91, provisions of Section 92 come into operation for the purpose of excluding evidence of any oral agreement or statement for the purpose of contradicting, varying, adding or subtracting from its terms. Sections 91 and 92 in effect supplement each other. Section 91 would be inoperative without the aid of Section 92, and similarly Section 92 would be inoperative without the aid of Section 91.

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21. The grounds of exclusion of extrinsic evidence are (1) to admit inferior evidence when law requires superior would amount to nullifying the law, and (ii) when parties have deliberately put their agreement into writing, it is conclusively presumed, between themselves and their privies, that they intended the writing to form a full and final statement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith and treacherous memory."

7. In the present case, it is an admitted position that the parties entered into an agreement to sell dated 31st March, 2004 Exhibit P-1. It is also observed that Clause 4 of the said agreement to sell dated 31st March, 2004 reads as under:-

"4. That after getting the property converted into freehold the VENDOR will sign and execute proper Sale Deed in favour of the VENDEE or his nominee(s) and will get same registered with sub-registrar, New Delhi however the expenses for conversion of flat into free hold will be borne by vendee."

8. From a plain reading of Clause 4, it is apparent that the Appellant (Vendor) after getting the property converted into freehold was required to sign and execute proper Sale Deed in favour of the Respondent (Vendee) and was required to get the

same registered with the sub-Registrar, New Delhi, however, subject to the expenses for conversion of flat into freehold being borne by the Respondent (Vendee). As was correctly observed by the learned Single Judge all the obligations preceding the word “however” were cast upon the Appellant (Vendor) and the obligations as regards the expenses which follow the word “however” was cast upon the Respondent (Vendee). Further, it is an admitted position that the Respondent had paid the requisite fee of ₹41,275/- and ₹24,765/- being the stamp duty and transfer duty respectively to fulfill his obligations as stipulated in the Clause 4 of the said agreement to sell. It is also noted that the Respondent has further paid a sum of ₹11,075/- as service charges to the DDA. Furthermore, by his letter dated 9th July 2004 (Ex. D-2) the Respondent had requested the Appellants to take necessary steps to adhere to the time stipulated in the said agreement to sell i.e. 15th July, 2004. It was also indicated in this letter that the Respondent was ready with the balance consideration amount which was payable to the Appellants at the time of execution of the Sale Deed before the sub-Registrar to meet the time stipulated in the said agreement to sell. The Respondent has been able to demonstrate that he was ready with the balance amount of ₹31.5 lakhs as was further demonstrated by his depositing Fixed Deposit Receipts

maintained in this behalf with the Registry of this Court. This clearly indicates that not only was the Respondent ready and willing on the due date of performance, but his readiness and willingness continued at the time of institution of the Suit as well. Thus, it is seen that as provided by the said Clause 4 the obligation of getting the said flat converted from leasehold to freehold was on the Appellant (Vendor) but the expenses for such conversion were to be borne by the Respondent (Vendee). In this behalf, it is seen that the learned Single Judge came to the conclusion that when the plain meaning of the said clause is clear, then the assistance of extrinsic evidence could not be availed of.

9. From the above discussion it is clear that the obligation of getting the said flat converted into freehold was on the Appellants and not on the Respondent. Insofar as, the Respondent was concerned his obligations under the said agreement to sell dated 31st March, 2004 were to make payment of the advance amount of ₹1lakh; to make the payment for conversion charges and fee; and to pay the balance amount of ₹31.5 lakhs as also the stamp duty and registration fee necessary for the execution and registration of the Sale Deed. The first two acts were admittedly done by him and the occasion did not arise for him to perform the last because the Appellants

failed to get the suit property converted from leasehold to freehold. On the other hand, the Appellants were required to vacate the tenant from the said flat which they did; and get the said flat converted from leasehold to freehold prior to the execution of the Sale Deed and hand over the physical possession to the Respondent at the time of Registration, which acts the Appellants failed to perform. As regards the contention raised on behalf of the Appellants, that it was orally agreed between the parties that the Respondent would be responsible for getting the said flat converted into freehold, is concerned the said assertion is devoid of merit. It is a well settled principle of interpretation that Evidence Act forbids proving the contents of a writing other than by the writing itself. This doctrine described by the Supreme Court as "best evidence rule" is in reality a doctrine of substantive law, namely, that in case of a written contract all proceedings and contemporaneous oral expressions of the thing are merged in the writing and displaced by it. In other words, when persons express their agreement in writing, it is for the express purpose of getting rid of any indefiniteness and to put their ideas in such shape that there can be no misunderstanding, which so often occurs when reliance is placed upon oral statements. Written contracts presume deliberation on the part of the contracting parties and

it is natural they should be treated with careful consideration by the courts and with a disinclination to disturb the conditions of matters as embodied in them by the act of the parties. The Supreme Court in *Roop Kumar (supra)* has observed:

“17. It is likewise a general and most inflexible rule that wherever written instrument are appointed, either by the requirement of law, or by the contract of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict or alter them. This is a matter both of principle and policy. It is of principle because such instruments are in their own nature and origin, entitled to a much higher degree of credit than parol evidence. It is of policy because it would be attended with great mischief if those instruments, upon which men's rights depended, were liable to be impeached by loose collateral evidence. (See *Starkie on Evidence*, p. 648.)”

10. Thus, it is seen that the provisions of the Evidence Act come into operation for the purpose of excluding evidence of any oral agreement or statement for the purpose of contradiction, varying, adding or subtracting from its terms, after the document has been produced to prove its terms.

11. In the circumstances, the present Appeal is devoid of merit and is hereby dismissed. The Appellants shall carry out the conversion of the said flat from leasehold to freehold within a period of two months and shall thereafter execute and register the Sale Deed within ten days. Since the Respondent is already

in possession as a Receiver of the said flat, the payment of the balance amount by the Respondent shall take place simultaneously with the execution of the Sale Deed. The Respondent is permitted to utilize the Fixed Deposit Receipts deposited with the Court for the purposes of making the payment of the balance consideration amount. The Respondent shall be entitled to refund of ₹18,000/- per month paid to the Appellants towards the occupation charges of the said flat from 1st November, 2010 and may adjust the said amount whilst paying the balance consideration towards the purchase of the said flat. No order as to costs.

SIDDHARTH MRIDUL, J.

VIKRAMAJIT SEN, J.

MAY 13, 2011

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