

\$-13

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

+

RFA 766/2010

%

9th November, 2011

KAMAL KAUL

..... Appellant

Through: Mr. Ajay Garg, Advocate.

versus

PRADEEP KUMAR & ANR

..... Respondents

Through: Mr. Prashant Jain, Advocate.

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 CPC is to the impugned judgment of the trial Court dated 02.08.2010. By the impugned judgment, the trial Court has dismissed the suit for specific performance by holding that once there is a clause in the Agreement for payment of double the amount of the earnest money, then, specific

performance cannot be granted. The second ground was that the subject property was a lease hold property and, therefore, contract with respect to the same cannot be specifically performed. The suit has been dismissed without trial.

2. The impugned judgment is clearly illegal and bound to be set aside inasmuch as Section 23 of the Specific Relief Act, 1963 specifically provides that even if a contract provides payment of compensation/liquidated damages, the same is not a bar to the suit for specific performance. Section 23 of the Specific Relief Act clearly provides that the Court has to see various attending circumstances in order to decide whether specific performance ought to be granted or damages ought to be granted. This aspect can only be therefore decided at the stage of final arguments in the suit after trial is complete. The impugned judgment, however, dismissed the suit at the stage of pleadings without allowing the parties to lead evidence.

3. The issue as to whether the property which is sought to be sold is only a lease hold property and whether contract with respect to the same is barred, is dealt with by the Supreme Court in the case of ***Mrs. Chandnee Widya Vati Madden Vs. Dr. C. L. Katial, & Others; AIR 1964 SC 978*** that contracts of such a nature are contingent contracts and specific performance lies for enforcing of such contracts inasmuch as after the decree for specific performance is granted, the respondent/seller will be

bound to approach the concerned authority to obtain the necessary permission.

4. I have had an occasion to deal with this aspect in a recent judgment of this Court in **Col. A.B. Singh (Through L.Rs) Vs. Shri Chunnilal Sawhney & Others** RFA No.96/2002 decided on 5th October, 2011, in which I have held that in case the defendant/seller does not obtain the necessary permission, then, in execution proceedings, the Court will appoint a Local Commissioner under Order XXI Rule 32 CPC to obtain the necessary permission for sale of the property.

5. In any case, the issues decided by the trial Court are not issues which can be decided at the threshold by virtue of Order XIV Rule 2 CPC inasmuch as only those legal issues which affect the jurisdiction of the Court can be decided as preliminary issues and the issues decided by the impugned judgment are issues of merit and not of jurisdiction.

6. In view of the above, the impugned judgment is set aside. The trial Court is directed now to hear and dispose of the suit in accordance with law.

7. Nothing contained in the present judgment will, in any manner be a reflection on merits of the case of either of the parties and the suit will be decided at the stage of final arguments and in accordance with law uninfluenced by any observations made in today's judgment.

8. Parties to appear before the District & Session Judge, Tis Hazari, Delhi on 16th December, 2011, and on which date, the District & Sessions Judge, will mark the suit to a competent Court for disposal in accordance with law.

9. Appeal is allowed and disposed of accordingly.

November 09, 2011
vk

VALMIKI J. MEHTA, J.