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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment Reserved on: September 13, 2012

Judgment Pronounced on: September 20, 2012

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RFA(OS) 5/2011

VATIKA LTD.

..... Appellants

Represented by: Mr.D.S.Chauhan, Advocate.

versus

KARAN MAHENDRU & ANR.

..... Respondents

Represented by: Mr.Sudhanshu Batra, Sr.Advocate
instructed by Mr.D.R.Bhatia, Advocate.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE MANMOHAN SINGH

PRADEEP NANDRAJOG, J.

1. Arguments were advanced in appeal only with reference to issues No.(iii) and issues No.(vi), (vii), (viii) and (ix), which read as under:-

“(iii) Whether the present suit is barred by Law of Limitation? (OPP)

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(vi) Whether the plaintiff failed to pay the sale consideration agreed to under the purchase agreement dated 16.7.1988 and if so, its effect? (Onus on parties).

(vii) If the aforesaid issue is answered in favour of the defendant, whether the plaintiff also failed to perform his part under the purchase agreement dated 16.7.1988? (Onus on parties).

(viii) Whether the agreement dated 16.7.1988 was duly and rightly terminated, and if so, whether the

defendant could also forfeit the advance consideration paid by the plaintiff? (OPD)

(ix) Whether the plaintiff is entitled to a decree of specific performance or in the alternative for a decree of an amount of ₹25 lacs as compensation? (OPP)”

2. It was agreed by learned counsel for the parties that issues (vi), (vii), (viii) and (ix) encompass only one issue: Whether towards sale consideration the respondents had to pay a further sum of ₹1 lakh apart from ₹1 lakh admittedly paid in two installments by them to the appellant on June 05, 1987 and November 19, 1987.

3. Vide Ex.P-2, the appellant invited people to purchase farm land on a 300 acre land proposed to be developed by the appellant, and in the brochure Ex.P-2, inter-alia, informed as under:-

“This will be spread out on an area of 300 acres, where besides these evergreen trees the promoters will provide the ultimate in recreational facilities for the exclusive use of the investors and their families.

On a 5 acre plot, we are offering you a beautiful house on a 3500 sq. Ft. built in area worth ₹6.90 lakhs. On a 2 ½ acre plot, you can get a cottage worth ₹3.90 lakhs with 2000 sq. ft. Area and on a 1 acre plot a cottage worth ₹2.80 lakhs on a 1500 sq.ft. built in area. These prices are exclusive of the cost of Land.

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It is true that eucalyptus trees grow fairly well in a variety of soil, topographic and climatic conditions. The difference however is between obtaining the intended high profitability or just the average profitability Eucalyptus plantation management is not

so simple as some believe. Vatika Planatations have secured the services of experts on a continuous basis at every stage including the land preparation, selecting the right variety of seeds, raising good stock using the latest nursery techniques. The stress is on the requisite management input right from the start of planting activity to harvesting and marketing. It is indeed true that if these activities are planned and executed in such a scientific manner, the results will be most rewarding.

All these facilities for an investment of ₹85,000/- for one acre, ₹200,000/- for 2½ acres and ₹400,000/- for 5 acres of developed land, which includes all other expenses incurred by the promoters. The land purchased by you will be registered in your name and you will be required to transfer the power of attorney to the promoters. At the end of 6 years this amount will fetch you the sales proceeds of 800 trees per acre. Because of its proximity to the other colonies, land appreciation is also inevitable. You have yet another option, to put your land to second coppicecrop of eucalyptus which will give a 25% additional produce. When combined with the 25% price escalation (approx) you will get an income of nothing less than 50% more in the second 6-year rotation.”

4. Suffice would it be for us to note that as per Ex.P-2, the price to be paid for a one acre plot of land was ₹85,000/- and for a 2½ acre land, the price was ₹2,00,000/-.

5. The respondents applied for being allotted a 2½ acre farm land, and there is no evidence led by the parties whether the application was in writing or the request was verbal. But, respondents paid ₹50,000/- to the appellant on June 05, 1987 and for which appellant issued the receipt Ex.P-3. They paid further sum of ₹50,000/- on November 19, 1987 and for which

the appellant issued the receipt Ex.P-4.

6. Thereafter, on July 16, 1988, using a printed proforma agreement which was got printed by the appellant, by filling up the blanks, the appellant and the respondent reduced the terms of their bargain into writing Ex.P-5, in which, inter-alia following stands recorded:-

“1. That the Vendor has agreed to sell and the FARM-HOLDER has agreed to purchase all that piece of land comprised in Farm-House bearing private No.A-10(a) having an area of 2.5 acres hereinafter called the “Farm-House” more fully described in Schedule-I mentioned hereunder.

Consideration

2. Towards consideration to the above sale; the Farm-Holder shall pay to the Vendor in all a sum of ₹1,00,000/- which shall be paid in the following manner:

- (a) ₹50,000/- at the time of entering into this agreement.
- (b) ₹.....
- (c) ₹.....
- (d) ₹50,000/- at the time of registration of sale deed of the Farm House.

Registration of Sale Deed and terms of sale.

3. (a) Upon the payment of a sum of ₹1,00,000/- being the full price of the Farm lands, the Vendor shall execute and get registered in favour of the Farm Holder a Sale Deed in respect of the Farm.

(b) The sale deed shall embody the terms of this agreement relating to the raising of Eucalyptus trees, their reaping and sharing of dividends as mentioned

hereafter. A specimen of the sale deed to be executed by the Vendor in favour of the Farm Holder is available for inspection at the registered office of the Vendor.

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6. Plantation and Inter Crops

(i) The entire land in the farm house saving the land reserved or used for inroads, passages provided further, in case the Farm Holder opts for a dwelling unit, saving the land specified for the farm house and the open set back all around the farm house, roads, passages, the remaining cultivable portion of the farm shall be utilized by the Vendor at his own costs for agricultural purposes by growing Eucalyptus trees together with inter-crops in accordance with the horticulture pattern which the Vendor may be advised or deem fit.

Lease Deed of Land and its Terms.

(ii) (a) To enable the Vendor to do the plantations, its maintenance, irrigation and upkeep, the farm holder shall create a lease of the farm land, saving the dwelling unit or the area meant for it, in favour of the Vendor. A specimen of the lease deed to be so executed is available for inspection at the registered office of the Vendor.

(b) The lease of the said lands in favour of the Vendor shall be for a period of seven years from the date of its execution. The lease deed shall be executed and registered in favour of the Vendor simultaneously with the sale deed of the Farm Land which the Vendor shall execute in favour of the Farm Holder.

(c) It is specifically agreed that the Vendor shall not be entitled to assign, sub-lease, mortgage or in any other manner transfer the lease hold rights created in its favour by the Farm Holder.

(d) After the expiry of the period of lease, the Vendor shall have no right or concern with the land held by it under lease. However, right is reserved in favour of the Vendor to cut his share of the Eucalyptus trees and inter-crops, if standing, after the expiry of seven years but not later than one monsoon from the expiry of seven years commencing from the monsoon next arriving from the date of plantation of trees, which period is hereinafter stated as the “maturity period”. Notwithstanding the above, after the expiry of the period of lease, the ownership rights of the Farm Holder with respect to the Farm House shall be absolute.

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Return and Dividends of Eucalyptus Trees and Crops

(iv) (a) On the advent of the maturity period, the Vendor will hand over to the Farm Holder in standing position fully grown up Eucalyptus trees at the rate of 800 trees per acre.

(b) It shall be the absolute choice of the Farm Holder to select the particular trees which he may like to retain towards his share of trees. The choice of the Farm Holder shall be acceptable and binding upon the Vendor and the Vendor shall not be entitled to raise any objections against the same.

(c) Saving the Eucalyptus trees selected by and falling to the share of the Farm Holder, the Vendor shall be entitled to remove within a period of twelve

weeks from the maturity period without any objection, interference or hindrance from the Farm Holder the remaining Eucalyptus trees and the inter-crop, if standing at the said lands and which trees and crops shall be the absolute and exclusive property of the Vendor. It is further stipulated that before the expiry of the above stated period, the Farm Holder shall have no right to compel the Vendor to remove the standing trees and/or crop.

(d) The Vendor shall, upon request from the Farm Holder make necessary arrangement for the cutting and sale of the Eucalyptus trees falling in the share of the Farm Holder and, for which services the Vendor may claim necessary remunerations by way of commission or otherwise as may be agreed upon.”

7. Serving a legal notice Ex.P-6 dated February 24, 1996, i.e. 7 years and 7 months and a few days after Ex.P-5 was executed, respondents demanded a sale deed to be executed and took a stand that the agreed sale consideration for a 2 ½ acre farm land was ₹1,00,000/-, which respondents claim to have paid, evidenced by Ex.P-3 and Ex.P-4 on dates prior to execution of Ex.P-5.

8. The suit was filed seeking specific performance of Ex.P-5 on September 02, 1996 i.e. after 8 years and a little over 1 month of Ex.P-5 being executed.

9. As per the written statement filed it was pleaded that the suit was barred by limitation. It was asserted that the sale price was ₹2 lakhs and since the respondents had paid ₹50,000/- each, on June 05, 1987 and November 19, 1987, Ex.P-5 recorded the balance sale consideration to be paid in sum of ₹1 lakh, which was neither tendered nor offered to be tendered even as per the averments made in the plaint. The appellant thus

pleaded the suit to be dismissed on the bar of limitation as also on merits.

10. In the aforesaid backdrop of the pleadings of the parties that issues were settled, and ignoring the technical issues which learned counsel for the parties conceded in appeal requiring the same to be ignored, we would simply highlight that issue No.(iii) pertained to the bar of limitation and issues No.(vi), (vii), (viii) and (ix) all center around: Whether the agreed sale consideration was ₹1 lakh or the sale consideration was ₹2 lakh and since respondents had already paid ₹1 lakh, ₹1 lakh recorded as payable in Ex.P-5 was the balance sale consideration.

11. Vide impugned judgment and decree dated July 02, 2010 the learned Single Judge has held against the appellant.

12. One of the fundamental grievance of the appellant is that notwithstanding its counsel appearing and arguing the matter and presence recorded in the judgment dated July 02, 2010, the main body of the judgment proceeds to record that no assistance was rendered by the appellant whose counsel did not appear. It is urged that the contentions advanced by counsel for the appellant had not even been noted, and in fact incorrect facts have been recorded. We do find an apparent conflict in that the presence of the counsel is recorded in the memo of appearance and yet, at the same time, in the main judgment it is recorded that none appeared for the appellant/defendant.

13. The impugned judgment also erroneously records, in paragraph 5: *'It is not in dispute that the plaintiffs applied and paid a sum of ₹2 lakhs; they are evidenced by Ex.P-3 and Ex.P-4.'* This finding of fact recorded in paragraph 5 of the impugned decision is concededly wrong and erroneous since admittedly the respondents had paid only ₹1 lakh as evidenced by

Ex.P-3 and Ex.P-4.

14. The second patent and glaring error, is once again in para 5 of the impugned decision, where the learned Single Judge has recorded that Ex.P-5, the agreement dated July 16, 1988 acknowledges receipt of ₹50,000/-.

15. On the subject of Ex.P-5 recording ₹50,000/-, we highlight that the said sum is mentioned only in covenant No.2 of the agreement under the caption: **Consideration** and vide sub-para (a) thereof, in conjunction with main covenant No.2 reads:

“2.Towards consideration to the above sale; the Farm-Holder shall pay to the Vendor in all a sum of ₹1,00,000/- which shall be paid in the following manner:

(a) ₹50,000/- at the time of entering into this agreement.”

16. Thereafter in sub-para (d) of covenant No.2 it stands recorded that ₹50,000/- shall be paid at the time of registration of the farmhouse.

17. Now, sub-para (a) of covenant No.5 records that ₹50,000/- shall be paid *at the time of entering into this agreement*, and not as recorded by the learned Single Judge of having received ₹50,000/-. It is not the case of the respondents that they paid ₹50,000/- when Ex.P-5 was executed on July 16, 1988. Respondents concede to have paid ₹50,000/- each on June 05, 1987 and November 19, 1987.

18. With respect to the basic controversy: Whether ₹2 lakhs was the price for the farmhouse ad-measuring 2½ acre or whether it was ₹1 lakh, the learned Single Judge has, with reference to covenants No.2 and 3, opined that the same clearly and unequivocally record the sale price to be ₹1 lakh and thus has opined, in para 18 of the impugned decision, that nothing

would turn upon the brochure Ex.P-2 where it is recorded that a 2½ acre farm land would be sold for ₹2 lakhs.

19. Now, it assumes importance to note that the parties had entered into an agreement, which was obviously oral argument, evidenced by the fact that two payments were admittedly paid in sum of ₹50,000/- each on June 05, 1987 and November 19, 1987, evidenced by Ex.P-3 and Ex.P-4. It was in this context that the language of Ex.P-5 had to be considered. Without acknowledging having received ₹1 lakh, and not expressly stating that the agreed sale consideration for the farm land was either ₹2 lakhs or ₹1 lakh, Ex.P-5, in covenant No.2, records: *Towards consideration to the above sale; the farm holder shall pay to the vendor in all a sum of ₹1,00,000/-*, and vide covenant No.3 records: *Upon a payment of sum of ₹1,00,000/- being the full price of the farm lands.....*

20. Grammatically read, the view taken by the learned Single Judge is a plausible view for the reason covenant No.2 envisages that consideration for the vendor to sell the farm land is ₹1 lakh to be paid by the farm holders. But, what the learned Single Judge has ignored is that the parties have not recorded that this sale consideration has already been paid. For if the agreed sale consideration was ₹1 lakh, then nothing more was payable and vide sub-para (a) and (d) of covenant No.2 the parties would not have recorded that the respondents would pay ₹50,000/- at the time of entering into the agreement and ₹50,000/- at the time of registration of the sale deed. Further, covenant No.3 records that *upon the payment of a sum of ₹1,00,000/- being the full price of the farm lands, the vendor shall execute the sale deed*. The words ‘*upon the payment*’ are clearly suggestive of a futuristic payment.

21. Unfortunately, in the impugned decision we do not find any

incisive evaluation of the language of Ex.P-5 as aforesaid in the context of the admitted fact that before Ex.P-5 was executed, evidenced by Ex.P-3 and Ex.P-4, the respondents had paid to the appellant ₹50,000/- each on two dates. In our view the error of recording in paragraph 5 of the impugned decision that it is not in dispute that the respondents had paid ₹2 lakhs to the appellant has misled the learned Single Judge and the further journey traversed by the decision appears to be analyzing the evidence, somewhat permeated by the said taint. Though, we do find an attempt made to resolve the issue, in paragraph 18 of the impugned decision, which is sans the taint found in paragraph 5, but without looking into the language of the covenants of Ex.P-5, as we have so done.

22. That Ex.P-5 records ₹50,000/- to be paid when Ex.P-5 was executed and ₹50,000/- to be further paid when sale deed would be executed and the parties fully knowing that respondents had already paid appellant ₹1 lakh, it is apparent that the sum of ₹1 lakh recorded in covenant No.2 and 3(a) of Ex.P-5, was the balance sum of ₹1 lakh to be paid and not that ₹1 lakh was the agreed sale consideration; and suffice would it be to state that if there is any ambiguity in a document, the surrounding evidence, preceding and succeeding the execution of the document can be looked into.

23. As pleaded in the plaint, the case of the respondents was that they had to pay only ₹1 lakh towards sale consideration, which they paid, and thus there being no averments that the respondents were always ready and willing to pay the balance sum of ₹1 lakh, would render the suit liable to be dismissed on account of the respondents neither pleading nor proving their readiness and willingness to pay ₹1 lakh being the balance sale consideration.

24. On the subject of the suit being barred or not by limitation, the learned Single Judge, with reference to covenant No.6, which has been reproduced in paragraph 5 of the impugned decision, has noted the plea of the respondents that a 6 years' waiting period was envisaged before the sale deed had to be executed. In paragraph 14 and 15 of the impugned decision, reflecting upon covenants No.3 and 6, the learned Single Judge has opined as under:-

“14. The issue was framed at the behest of the defendant who objected to the suit, contending that it is time-barred. The facts disclosed also show that the agreement to sell in this case was entered into by the parties on 16.07.1988. Clause 3 of the said agreement no doubt stipulated that immediately on the execution of the document was to execute the sale of conveyance deed. At the same time, Clause-6, which follows Clause-3 clearly stipulates that the defendant had a right to continue in the premises, as a lessee for a period of six years. For that purpose, a separate lease deed had to be executed. No doubt, no such lease deed was executed by the defendant, but it continued to retain possession and on the other hand, did not execute sale deed, as required and took no further steps.

15. The relevant provision under the Limitation Act for a suit for specific performance of an agreement to sell immovable property is Article 54, which prescribes that the period of limitation commences from the time when the demand for enforcement of the agreement is denied or resisted, and where no date for performance is fixed, within three years from the time the plaintiff has notice that the performance has been refused. The facts of this case indicate that the plaintiff could not have approached the Court during the Six Year period after 16.07.1988, i.e. on or before 15.07.1994 and the plaintiff has placed on record Ex.P-6, a copy of the legal notice issued on

24.02.1996. Having regard to these facts, it is clear that the plaintiff has approached the Court within the three year period commencing from 24.02.1996. Even otherwise, the suit has been filed within three-years from 15.07.1994. This issue is accordingly answered in favour of the plaintiff and against the defendant.”

25. The learned Single Judge has correctly noted in paragraph 14 that as per covenant No.6 the respondents were obliged to let out the farmland to the appellant, but has wrongly recorded the duration to be 6 years. As per sub-para (b) of covenant No.6(ii), the period is 7 years and not 6 years. But this is a typographic error, and we overlook the same as it does not impact the reasoning. The last sentence of paragraph 14: *No doubt no such lease deed was executed by the defendant, but it continued to retain possession, and on the other hand did not execute sale deed as required and took no further steps*’ is a finding completely out of sync with Ex.P-5 for the reason, covenant No.6 requires the vendee to execute a lease deed in favour of the vendor. As per covenant No.3, upon payment of the sale consideration, the appellant was to execute a sale deed in favour of the respondents, and for fulfilling its obligations to plant eucalyptus trees on the land and maintain the same for a period of 7 years, covenant No.6 required the respondents to execute a lease deed in favour of the appellant. The learned Single Judge has committed a gross error in misreading covenant No.6 as if it was the appellant which had to lease the land to the respondents. It was vice-versa. Thus, the very foundation, to hold in paragraph 15, that the right to sue would accrue after 6 years of execution of Ex.P-5 being faulty, the conclusion drawn that the suit was within limitation is patently incorrect.

26. A perusal of Ex.P-5 would reveal that parties clearly envisaged that upon payment of sale consideration, a sale deed would be executed which would contain terms, as per sub-para (b) of covenant No.3 of Ex.P-5 pertaining to raising of Eucalyptus trees, their reaping and sharing of dividends as mentioned herein after. Covenant No.6 obliged the vendor i.e. the appellant to, at its own cost, grow eucalyptus trees. The same covenant required the farm holder to execute a lease in favour of the vendor. What more clear language could the parties use other than the words: *'The farm holder shall create a lease of the farm land, saving the dwelling unit or the area meant for it, in favour of the vendor.'* The same covenant, as per sub-para (b) of sub-covenant (ii) clearly says, by recording, that the lease of the land in favour of the vendor shall be for a period of 7 years from the date of its execution. The same covenant as per sub-covenant (iv) contemplates the return of dividends of eucalyptus trees.

27. The right to sue therefore did not accrue, as held by the learned Single Judge, after 6 years of execution of Ex.P-5. Since Ex.P-5 does not record any date to pay the balance sale consideration, which we have held to be ₹1 lakh, it would be obvious that the same had to be paid within a reasonable time and the same cannot be 6 years when respondents issued Ex.P-6, the legal notice on February 24, 1996.

28. The suit was thus clearly barred by limitation.

29. The agreement Ex.P-5, mentions the farm land to be bearing a private number A-10(a) and as noted by us in paragraph 6 above, vide covenant No.1 contemplates the description thereof as in Schedule 1 to the agreement. But we find no Schedule 1 to the agreement. Though not pleaded as a defence in the written statement, we wonder as to how would

the respondents execute the decree, which simply decrees the suit requiring appellant to execute a sale deed with respect to farm land bearing No.A-10(a) having area 2.5 acres. But where is this farm land? Nobody knows. As per the brochure Ex.P-2, a 300 acre contiguous agricultural land had to be developed into farm houses by the appellant and the farm houses could be either 1 acre, 2½ acre or 5 acre. In the absence of any Schedule 1 to the agreement and there being no evidence of any plotted development, the requirement of Rule 3 of Order VII in the pleadings, where the subject matter of a suit is immovable property assumes significance. It requires, where the subject matter of the suit is immovable property, the plaint to contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the specifics of such boundaries or numbers. Now, neither the plaint nor Ex.P-5 nor any other document specifies the boundaries of farm land No.A-10(a). The number is a private number and is not a record of any settlement or survey. As held in various decisions noted in **THE AIR MANUAL CIVIL AND CRIMINAL 6TH EDN. VOL. 5, NOTE 2**, such a decree, i.e. a decree which does not sufficiently identify immovable property, if passed, will be incapable of execution.

30. We are only highlighting the problem which the impugned decree would face even it was to stand.

31. Ignoring paragraph 29 of our opinion, we hold on issue No.(iii) that the suit was hopelessly barred by limitation. On issues No.(vi), (vii), (viii) and (ix) we hold that the agreed sale consideration was ₹2 lakhs out of which the respondents only paid ₹1 lakh and took a dishonest stand that this was the only agreed sale consideration and thus they, neither having averred

nor proved their readiness and willingness to pay the balance sale consideration, would not be entitled to specific performance of Ex.P-5.

32. But we note that learned counsel for the appellant had fairly stated during arguments that to bring the curtains down the appellant was ready and willing to refund ₹1 lakh to the respondents, notwithstanding the appellant being entitled to forfeit the same, together with interest at a reasonable rate. Counsel stated that the appellant was willing to pay a sum of ₹5 lakhs to the respondents. After we had reserved the matter for judgment, an affidavit deposed to by Shri Anil Bhalla, the Chairperson of the appellant has been filed as per which the appellant has agreed to pay ₹5 lakhs to the respondents. Accordingly, we dispose of the appeal setting aside the impugned judgment and decree dated July 02, 2010 and we dispose of the suit filed by the respondents passing the decree in their favour and against the appellant in sum of ₹5 lakhs. The amount payable as per the present decision would be paid half-and-half to the two respondents.

33. Parties shall bear their own costs all throughout.

(PRADEEP NANDRAJOG)
JUDGE

(MANMOHAN SINGH)
JUDGE

SEPTEMBER 20, 2012
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