

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

+ **RFA No. 24/2008**

% **19th April, 2012**

B.L.JOSHI & ANR. Appellants

Through: Mr. Sanjay Sood &
Mr. M.A.Niyazi, Advs.

versus

NITIN JAIN & ANR. Respondents

Through: Ms. Rachna Agrawal, Adv.

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this Regular First Appeal filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the Trial Court dated 16.7.2007 decreeing the suit for specific performance filed by the respondents/plaintiffs with respect to a shop admeasurinig 18.79 sq. metres bearing no.161, Block Nos.4 & 5, Rajindra Place (District Centre), New Delhi.

2. The facts of the case are that the respondent no.1/plaintiff no.1 as a proposed buyer and the appellants/defendants as proposed sellers entered into an agreement to sell dated 4.2.2005. There is no dispute that there is an agreement to sell which was entered into. The total sale consideration under the agreement to sell was ₹5,40,000/-, and out of which price a substantial amount of ₹ 3,70,000/-, i.e. approximately 68% was paid to the appellants/defendants. This also is not disputed. As per paragraph no. 2 of the agreement to sell, the balance price of ₹1,70,000/- was to be paid within 15 days of entering into the agreement to sell, however, this clause makes it clear that simultaneously the appellants/defendants will hand over physical vacant possession of the suit property and also execute the necessary legal documents such as either a sale deed or a registered agreement to sell, power of attorney, Will, etc. Pursuant to the agreement to sell, the original title documents of the suit property were also handed over by the appellants/defendants to the respondent no.1/plaintiff no.1. The title documents which are to be executed by the appellants/defendants were to be either in the name of the respondent no.1/plaintiff no.1 or his nominee, and for which purpose respondent no.1/plaintiff no.1 had appointed his mother-in-law, Smt. Sunita Jain and who was arrayed as plaintiff no.2 in the suit. The respondent

no.1/plaintiff no.1 contended that the appellants/defendants failed to hand over vacant peaceful possession within 15 days and also did not receive the balance price and did not execute the sale documents. It was also pleaded that the respondent no.1/plaintiff no.1 prepared a pay order dated 28.4.2005 for the balance sale consideration of ₹1,70,000/- in the name of the appellants/defendants but the appellants/defendants failed to vacate the suit property as a result of which the respondent no.1/plaintiff no.1 sent a legal notice dated 27.5.2005 calling upon the appellants/defendants to perform their part of obligation in terms of the agreement to sell. Reply was sent to this legal notice by the appellants/defendants on 31.5.2005 alleging default on the part of the respondent no.1/plaintiff no.1. The subject suit for specific performance thereafter came to be filed.

3. The appellants/defendants filed a joint written statement wherein as stated above the execution of agreement to sell was not disputed but it was pleaded that the respondent no.1/plaintiff no.1 was guilty of breach of contract. It was pleaded that the agreement was valid only for 15 days and since balance payment was not made within 15 days by the respondent no.1/plaintiff no.1 the agreement lapsed as the respondent no.1/plaintiff no.1 did not perform his part of the contract. There are allegations in the written statement of the respondent no.1 being a property

dealer and the appellants/defendants agreeing to sell the suit property due to financial crisis at the time of entering into the agreement to sell. It was denied that the appellants/defendants sought extension of time for vacating the property or that they at all promised to vacate the property on 30.4.2005. It is also pleaded that the plaintiff no.1 manipulated the legal notice dated 27.5.2005 which was in fact sent on 1.6.2005 after receipt of notice sent by the appellants/defendants.

4. After the pleadings were completed, the Trial Court framed the following issues:-

- “1. Whether the suit filed by the plaintiffs is not maintainable, as alleged in the preliminary issue no.2 of the written statement? OPD
2. Whether the suit is bad for mis-joinder of parties? OPD.
3. Whether the plaintiff has not approached the Court with clean hands and has suppressed various material facts from the Court ? OPD.
4. Whether the plaintiff is entitled to a decree for specific performance? OPP.
5. Whether the plaintiff is entitled to a decree of permanent injunction? OPP.
6. Relief.”

5. The main issues which were decided by the Trial Court with respect to the entitlement to specific performance were issue nos. 4 and 5.

With regard to these issues, the Trial Court has held as under:-

“12. Both these issues are decided together being inter-related to each other. Agreement to sell Ex.PW1/1 is not in dispute. It is also in dispute that the sale consideration in respect of the suit property i.e. shop no.161, Block No.4 and 5, measuring 18.79 square metres, situated at Rajindra Place (District Centre), New Delhi was fixed at ₹5,40,000/-. It is also not in dispute that a sum of ₹3,70,000/- was paid by the plaintiff no.1 to the defendants in cash at the time of execution of the agreement to sell. However, learned counsel for the defendants has contended that the balance sale consideration of ₹1,70,000/- was to be paid within a period of 15 days from the date of agreement to sell. Since this amount was not paid by the plaintiff, the agreement lapsed and cannot be specifically enforced. As against this, learned counsel for the plaintiffs has contended that plaintiffs were always ready and willing to perform their part of contract and ₹1,70,000/- was ready with the plaintiffs. However, the defendants did not vacate the suit property and promised to do so on or before 30th April, 2005. He also agreed to execute the transfer documents. Accordingly, plaintiffs got prepared a draft of ₹1,70,000/- on 28.4.2005 in favour of the defendants. Plaintiffs also got prepared the transfer documents i.e. agreement to sell, Will, General Power of Attorney, Special Power of Attorney etc. as the defendants agreed to transfer the shop by executing such documents. He has contended that it was the defendants who backed out from the sale transaction and did not come forward to execute the documents and hand over the vacant and peaceful possession of the suit property to the plaintiffs.

13. I have considered the rival contentions of both the parties on this point. Plaintiff no.1 has entered in the witness box as PW1 and has categorically deposed that

defendants did not vacate the suit property within fifteen days; Defendants on repeated requests offered to hand over the possession on 30.04.2005 and on this assurance he got the stamp papers purchased in the name of his nominee i.e. plaintiff no.2 and got typed all the stamp papers/transfer documents of the suit property. He also got prepared a pay order for the balance amount of ₹1,70,000/- for handing over the same to the defendants at the time of completion of sale transaction. Pay order dated 28.4.2005 for ₹1,70,000/- has been proved as Ex.PW1/10. Other documents which plaintiff no.1 got prepared i.e. General Power of Attorney, Special Power of Attorney, Affidavit, Receipt, Possession Letter etc. have also been placed on record and have been proved as Ex.PW1/1 to Ex.PW1/9. He has also categorically deposed that he approached the defendants with a request to execute and register the transfer documents and simultaneously hand over the vacant and peaceful possession of the suit property on receiving the balance sale consideration, but the defendants failed to comply with the request of the PW1. He has also proved legal demand notice dated 27th May, 2005 sent by him as Ex.PW1/11. Postal receipts have been proved as Ex.PW1/12 to Ex.PW1/15. Acknowledgment cards have been proved as Ex.PW1/16 and Ex.PW1/17. His testimony on material points has remained un-shattered in his cross-examination. In his cross-examination PW1 has reiterated that amount was not paid to the defendants since the defendants had failed to hand over the possession of the suit property. He has categorically deposed that he was always ready and willing to perform his part of contract. PW1 has also proved a certificate issued by the Bank of Baroda, Basant Lok Branch, Delhi as Ex.PW1/2. Certified copy of statement of account issued by the Bank of Baroda, Basant Lok Branch, Delhi clearly shows that sufficient amount was lying in the account of M/s. Dharam Chand Jain & Sons of which PW1 is Sole Proprietor. This clearly shows that sufficient amount was lying in the bank account of the plaintiff no.1 to pay it to the defendants within a period of 15 days from the date of execution of Ex.PW1/1.

14. DW1 has admitted in his cross-examination that he was in possession of the shop in question from where he was carrying on his business. He has deposed that he was to shift his business to a tenanted premises. He has deposed that he had arranged for a shop on rent as one of his friends had agreed to give a shop on rent to him. However, he has failed to give the name of his friend. He also failed to give the number of the shop, which defendant no.1 proposed to take on rent for shifting his business. From the evasive replies in his cross-examination it is clear that defendant no.1 had not made any alternative arrangement for shifting his business to a tenanted premises which was being run from the shop-in-question. Defendants no.1 has admitted that he is still in possession of the4 suit premises. This clearly shows that defendant no.1 was not serious in handing over the possession of the shop to the plaintiff no.1 within a period of fifteen days or thereafter. Evasive replies given by the defendant no.1 in his cross-examination clearly show that he is not a trustworthy witness. As against this version given by the plaintiff no.1 (PW1) is more plausible and convincing. Balance sale consideration was to be paid at the time of handing over of the possession and also at the time of execution of the transfer documents. From the demand draft and other transfer documents, which were got prepared by the plaintiff no.1, it is clear that plaintiffs were always ready and willing to perform their part of obligations and it is the defendants who were unwilling to perform their part of contract i.e. handing over the vacant and peaceful physical possession of the suit property to the plaintiffs and also in executing the necessary transfer documents.

15. Learned counsel for the defendants has contended that the suit property was taken by the defendants on lease basis from the Delhi Development Authority. Suit property cannot be sold to any one without seeking prior permission from the Delhi Development Authority. The agreement to sell Ex.PW1/1 was void document since transfer of suit property was prohibited as per the terms and conditions stipulated in the lease agreement executed between the Delhi Development Authority and the defendants. Thus,

according to learned counsel for the defendants, decree for specific performance cannot be passed. As against this learned counsel for the plaintiffs has contended that there was no complete bar with regard to transfer of a leasehold property. Leasehold property can be transferred by the lessee after seeking permission of the lessor. Defendants are required to obtain requisite permission from the Delhi Development Authority and thereafter execute transfer documents. Defendants were aware that the suit property was a leasehold property and a permission from the Delhi Development Authority for effecting transfer was required to be taken. Despite this defendants had agreed to sell the suit property to the plaintiffs, therefore, at this stage they cannot take any such plea that the suit property could not have been sold. Learned counsel has further contended that a decree of specific performance can be granted in respect of a leasehold property. He has placed reliance on a judgment rendered by the Hon'ble apex Court titled as Shri Vishwa Nath Sharma Vs. Shyam Shankar Goela & Anr. reported in 139 (2007) Delhi Law Times 91 (SC).

16. I have considered the rival contentions of both the parties on the above point and I do not find any force in the contentions of the learned counsel for the defendants. Defendants were aware at the time of executing Ex.PW1/1 that the suit property was a leasehold property and seller is required to take permission from the Delhi Development Authority before transferring the leasehold property to any third parties. Knowing fully well this fact they executed Ex.PW1/1, therefore, it is for the defendants to obtain requisite permission from the lessor for sale of the leasehold property. In case the Delhi Development Authority refuses to grant permission the plaintiffs may not be able to enforce the decree for specific performance of contract but that by itself may not bar the Court to pass a decree for that relief. Thus, it cannot be said that a decree of specific performance of the contract cannot be granted in respect of leasehold properties. In para 12 of Shri Vishwa Nath Sharma's case, judgment cited supra, the Hon'ble apex Court has held as under:-

“The Privy Council in Motilal V. Nanhelal, AIR P.C. 287 laid down that if the vendor had agreed to sell the property which can be transferred only with the sanction of some Government authority, the Court has jurisdiction to order the vendor to apply to the authority within a specified period, and if the sanction is forthcoming, to convey to the purchaser within a certain time. This proposition of law was followed in Mr.s Chandnee Widya WAti Madden V. C.L. Katiyal, AIR 1964 SC 978, and R.C.Chandlok V. Chuni Lal Sabharwal, AIR 1971 Sc 1238. The Privy Council in Motilal’s case (supra), also laid donw that there is always an implied covenant on the part of the vendor to do all things necessary to effect transfer of the property regarding which he has agreed to sell the same to the vendee. Permission from the Land and Development Officer is not a condition precedent for grant of decree for specific performance. High Court relied upon its decision in Mrs. Chandnee Widya Wati madden Vs. Dr. C.L. Katial (supra), and Maharo Saheb Shri Bhim Singhji V. Union of India, AIR 1961 SC 234m to substantiate the conclusive. IN Mrs. Chandnee Widya (supra), this Court confirmed the decision of the Punjab and Haryana High Court holding that if the Chief Commissioner ultimately refused to grant the sanction to the sale, the plaintiff may not be able to enforce the decree for specific performance of the contract but that was not a bar to the Court passing a decree for that relief. The same is the position in the recent case. If after the grant of the decree of specific performance of the contract, the Land and Development Officer refused to grant permission for sale and decree holder may not be in a position to enforce the decree but it cannot be held that such a permission is a condition precedent for passing a decree for specific performance of the contract.”

17. In view of above discussions, I am of the opinion that decree for specific performance can be ordered in respect of the suit property. Till the time defendants execute the transfer documents and hand over the vacant and peaceful possession of the suit property they are also required to be

restrained from selling, transferring, alienating and/or parting with the possession of the suit property to any third party. Both the above issues are answered accordingly in favour of the plaintiffs and against the defendants in the above terms.”

(underlining added)

6. A reading of the aforesaid paragraphs shows that the Trial Court has decreed the suit for specific performance inasmuch as the execution of the agreement to sell was admitted. The appellants/defendants received an amount of Rs.3,70,000/- out of the total price of Rs.5,40,000/-, i.e. 68% of the price. Trial Court has also found that the agreement to sell cannot be said to have lapsed after the expiry of 15 days even assuming that the respondents/plaintiffs did not pay the amount within 15 days. Importantly the Trial Court has held that really there was no default in payment within 15 days, inasmuch as, as per clause 2 of the agreement to sell, payment of the balance sale consideration was to be simultaneous with the appellants/defendants handing over possession of the suit shop to the respondents/plaintiffs and also executing either a sale deed or the power of attorney, Will, etc. The Trial Court in this regard has correctly held that appellants/defendants were carrying on business in the suit shop and though they claimed that they had arranged for an alternative shop, however, no details were whatsoever forthcoming as to which was the alternative shop premises which had been arranged to shift their shop and

what was the name of the friend who was to let out a shop to them was also not mentioned. Trial Court has also noted that as early as on 28.4.2005, the respondent no.1/plaintiff no.1 had prepared a bank draft for Rs.1,70,000/- of Syndicate Bank, New Delhi bearing no.636470 and which showed that the respondents/plaintiffs were always ready and willing to perform their part of the contract. The Trial Court has also referred to the statement of accounts/ certificate, Ex.PW2/A/Ex.PW1/2 issued by the bank of the respondents/plaintiffs to show that there were also sufficient funds with the respondents/plaintiffs to make the payment of balance consideration. The agreement to sell has been exhibited as Ex.PW1/1. The pay order for Rs.1,70,000/- towards the balance sale consideration has been proved and exhibited as Ex.PW1/10. The other documents which were got prepared by the plaintiff no.1/respondent no.1 being the General Power of Attorney, Special Power of Attorney, Affidavit, etc. were proved and exhibited as Ex.PW1/4 to Ex.PW1/9. The certificate of the respondent no.1/plaintiff no.1, i.e. Bank of Baroda, Vasant Lok, Delhi with respect to the financial capacity of the respondent no.1/plaintiff no.1 was proved and exhibited as Ex.PW1/2.

7. I completely agree with the aforesaid findings and conclusions of the Trial Court inasmuch as not only the agreement to sell was executed

but as much as 68% of the price of the property was paid to the appellants/defendants, and who handed over possession of the original title documents of the suit shop to the respondent no.1/plaintiff no.1 pursuant to the subject agreement to sell. The respondent no.1/plaintiff no.1 has also proved readiness and willingness including his financial capacity, and in fact a pay order for the balance amount of Rs.1,70,000/- was also prepared and filed on record. I may only add that as per para 2 of the agreement to sell, the appellants/defendants were wrong in justifying that they should receive the balance amount of Rs.1,70,000/- within 15 days inasmuch as there was a reciprocal promise whereupon the appellants/defendants on receipt of the amount of Rs.1,70,000/- were to hand over physical vacant possession of the suit shop in terms of that very clause and the Trial Court has given the correct finding that the appellants/defendants did not hand over physical vacant possession of the suit shop to the respondent no.1/plaintiff no.1 and therefore, the balance payment could not be made to the appellants/defendants.

8. So far as the requirement of seeking prior permission from Delhi Development Authority (DDA), I find that the Trial Court has correctly examined, analyzed and decided the legal position in paras 15 to 17 of the judgment wherein it has been held that merely because there is a

bar to execution of the sale deed without first taking prior permission of the competent authority, would not mean that the suit for specific performance cannot be decreed inasmuch as the permission will be obtained after the suit for specific performance is decreed. To the aforesaid findings of the Trial Court, I must add that in terms of Order 21 Rule 32 CPC in case the appellants/defendants fail to apply for the necessary permission, in execution proceedings, the executing Court can appoint a Local Commissioner to act for/on behalf of the appellants/defendants for applying for permission as also to execute the sale deed.

9. There is one other issue which I need to advert to before closing the case. Though this point is not argued before me, I am of the opinion that the appellants/defendants in addition to receiving of the balance price of Rs.1,70,000/- will, in addition thereto, be held entitled to receive interest on the said balance amount at 21% per annum simple from 28.4.2005 till the date of passing of today's judgment, to be paid within a period of 2 months from today, and which amount if refused to be received by the appellants/defendants, can be deposited by the respondent no.1/plaintiff no.1 before the Trial Court/Executing Court. I am granting interest in order to adjust equities and in accordance with the judgment of the Supreme Court in the case of the *Nirmal Anand Vs. Advent*

Corporation (P) Ltd. (2002) 8 SCC 146 which allows a Court to increase the price or grant suitable compensation considering the time lapse from the date when the transfer documents were to be executed to the date of disposal of the litigation. Of course, I must hasten to add that it is the appellants/defendants who are responsible for the present position because they themselves did not accept the balance consideration because they did not hand over possession, however, only as a matter of equity and justice, I am awarding this high rate of interest at 21% per annum simple on the balance price. I am granting the aforesaid interest as the respondent No.1/plaintiff no.1 will now have the benefit of the present market value of the property but the appellants/defendants are only getting the balance price. Considering all these facts, including that the appellants/defendants were guilty of breach of contract, interest @21% per annum simple from 28.4.2005 till the passing of this judgment will meet the ends of justice. I have in the judgment reported as ***Nehru Place Hotels Ltd. vs Smt. Kanta Aggarwal, 2011 (123) DRJ 148*** decreed the suit for specific performance granting interest at 21% per annum simple on the balance price payable and SLPs which were preferred by both the parties vide SLP Nos. 22130/2011 & 22065/2011 against the said judgment were dismissed by the Supreme

Court on 19.3.2012. The relevant observations of this Court in the judgment of *Nehru Place Hotels Ltd.(supra)* are as under:-

18. There is finally one aspect which I need to address in favour of the appellant/defendant, though no argument was raised before me, being grant of interest on the charges which have been held to be payable by the trial Court in favour of the appellant/defendant and against the respondent/plaintiff. I note that the trial Court has not granted any interest to the appellant/defendant for the monies which are required to be paid by the respondent/plaintiff to the appellant/defendant. No doubt, it is because of the appellant/defendant that the situation came to the present pass inasmuch as the appellant/defendant wrongly changed the allocation of space from the prime location of upper ground floor to the lower ground floor and also reduced the area from 403 Sq. feet to 372 sq. feet, however, the respondent has used these monies which are held payable by her to the appellant/defendant. However, while dealing with this aspect I must hasten to add that so far as the portion of charges relating to maintenance etc. under Clause 17, the respondent/plaintiff has not received the benefit of possession which would have been received by her on payment of these charges and the escalation charges, and also that the appellant/defendant itself has been using this allocated space as its own office space. Therefore, balancing the equities, though interest should be awarded to the appellant/defendant on the escalated cost portion of the price payable, the issue really would be of the rate of interest which ought to be awarded in favour of the appellant/defendant and against the respondent/plaintiff with respect to the escalation charges which are payable to the appellant/defendant as per the impugned judgment and whether interest should be payable on the charges other than the escalation charges. Nowadays the Supreme Court has been directing that the rates of interest which should be awarded by the Courts should be at a lower side in view of the changed economic scenario,

liberalization of the economy and the consistent fall in the rates of interest. The recent judgments of the Supreme Court, in this regard, are *Rajendra Construction Co. v. Maharashtra Housing & Area Development Authority and others*, 2005 (6) SCC 678, *McDermott International Inc. v. Burn Standard Co. Ltd. and others*, 2006 (11) SCC 181, *Rajasthan State Road Transport Corporation v. Indag Rubber Ltd.*, (2006) 7 SCC 700 & *Krishna Bhagya Jala Nigam Ltd. v. G.Harischandra*, 2007 (2) SCC 720 and *State of Rajasthan Vs. Ferro Concrete Construction Pvt. Ltd* (2009) 3 Arb. LR 140 (SC). The Supreme Court has granted rates of interest varying between @ 6% to 9%. per annum simple.

In the facts of the present case, however, I find that instead of a lower rate of interest, the appellant/defendant should get a higher rate of interest considering that the transaction pertains to an immovable property and benefit of which will go to the respondent/plaintiff. Therefore, I hold the appellant/defendant entitled to pendente lite and future interest @ 21% per annum simple on the amount of escalation charges as decreed by the trial Court. For the other charges which are payable by the respondent/plaintiff to the appellant/defendant which have been granted by the trial Court, the same however would be without payment of any interest because the said charges are towards maintenance and other related charges with respect to the property and the respondent has not enjoyed the property during all this period which in fact the appellant/defendant has used.”

10. So far as the argument on behalf of the appellants/defendants that the respondents/plaintiffs would be liable to pay all charges towards property tax, etc. cannot be a ground to decline the specific performance inasmuch as at best after execution of the sale deed and becoming the owner, the respondent no.1/plaintiff no.1 will also have to bear this

additional liability in terms of the clause 6 of the agreement to sell, however, this clause in itself cannot mean that the respondents/plaintiffs will not be entitled to specific performance.

11. In view of the above, the appeal is dismissed, leaving the parties to bear their own costs, subject however to the observations of the appellants/defendants being entitled to interest at 21% per annum simple as stated above. Decree sheet be prepared. Trial Court record be sent back.

VALMIKI J. MEHTA, J.

APRIL 19, 2012
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