

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

+ **RFA No.515/2001**

% **24th May, 2012**

MRS. SAVIDA SADH Appellant
Through: Mr. T.A.Francis and Mr. Mahesh
Katyayan, Advocate.

VERSUS

NARENDER PAL MALIK Respondent
Through:

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment of the trial Court dated 13.8.2001 dismissing the suit for specific performance and injunction filed by the appellant/plaintiff. The suit has been dismissed although the proposed

seller/defendant no.1 failed to appear in the proceedings i.e. no written statement was filed, the witness of the appellant/plaintiff was not cross-examined and no evidence was led by the defendant no.1/respondent.

2. The facts as per the plaint are that the appellant/plaintiff entered into an Agreement to Sell of the suit property being commercial space measuring 14'x 15' (fully covered) alongwith 10'x15' of open area facing the street on the south side and forming part of property no. I-C/125, Lajpat Nagar, New Delhi (shown in red in the site plan annexed with the plaint), hereinafter referred to as the suit property. The total sale consideration under the Agreement to Sell dated 1.11.1988 was stated to be ₹ 1,75,000/- out of which, a sum of ₹1,50,000/- was paid to the respondent /defendant no.1. The balance amount was payable after the property was to be got converted into freehold and at the time of registration of the sale deed. Till such time, to compensate the respondent/defendant no.1, a nominal amount of rent of ₹500/- per month was payable and was paid. The appellant/plaintiff was put in peaceful possession of the suit property, and which possession has continued to be with the appellant/plaintiff since that date. It was further pleaded in the plaint that a new Government was formed in November, 1993

and which allowed the conversion of the leasehold plots into freehold plots and therefore the appellant/plaintiff requested the respondent/defendant no.1 to get the property converted into freehold, but, the respondent/defendant no.1 became greedy on account of prices of the property having gone up and demanded a sum of ₹3 lacs, and failed to get the property converted into freehold. The subject suit for specific performance therefore came to be filed. The defendant no.2/Municipal Corporation of Delhi (MCD) was only a proforma party which had filed its written statement. MCD was thereafter deleted from the array of parties.

3. The appellant/plaintiff stepped into the witness box and proved the site plan Ex.PW1/1. Copy of the agreement was proved as Ex.PW1/2. The appellant/plaintiff affirmed payment of ₹1,50,000/- and continuing to pay ₹ 500/- per month as rent. The legal notice served was proved and exhibited as Ex.PW1/5 and postal receipts as Ex.PW1/6 and Ex.PW1/7. There is the necessary deposition that the appellant has always been ready to perform her part of contract.

4. The trial Court has dismissed the suit drawing two conclusions; first was that the agreement in question was only a lease agreement and not an

Agreement to Sell, the second conclusion was that the agreement stood frustrated inasmuch as no permission was obtained to convert the property from leasehold to freehold.

5. Both conclusions of the trial Court are clearly misplaced, more so because the respondent/defendant no.1 has failed to appear in the Court, and therefore the deposition of the appellant/plaintiff made as PW-1 was bound to be believed. The agreement in question Ex. PW1/2 though is titled as lease agreement however, it is settled law that nomenclature of a document is not material and what has to be seen is the substance of the same. When we look at the agreement Ex.PW1/2, it was clear that the agreement in question was really also an Agreement to Sell inasmuch as no one would pay a huge amount of ₹1,50,000/- out of a total amount of ₹1,75,000/- which of course for the sake of convenience is called security deposit. Para 4 of the agreement however clearly shows that amount of ₹ 1,75,000/- is a final sale price. Paras 2 to 4 of the Agreement Ex. PW1/2 are relevant, and the same read as under:-

“2. That the demised premises mentioned above is part of the House No.C-1/125, Lajpat Nagar, New Delhi-24, which is a lease hold property under land & Development Authority, Nirman Bhawan New Delhi. In case the above property become Free-hold at any time then the Lessee shall have the option to purchase the same and get it

registered in his favour in the office of the sub-registrar, New Delhi, and the Lessor shall not refuse to sign any documents required for the smooth transfer of the above said premises in favour of the Lessee or his nominee/nominees of legal representatives without demanding any money/monetary consideration/remuneration.

3. That a sum of ₹ 25,000/-(Rupees twenty five thousand only) shall have to be paid by the Lessee to the Lessor at the time of registration of registered sale deed before the sub-registrar, New Delhi, in addition to the amount of ₹ 1,50,000/- (Rupees one lac fifty thousand only) paid as Security deposit ie. ₹ 1,75,000/- (Rupees one lac seventy five thousand only) shall be merged towards the cost and sale price of the above said portion.
4. That as sum of ₹1,75,000/-(Rupees one lakh seventy five thousand only) shall remain the final sale price,out of which the Lessee has already paid a sum of Rs 1,50,000/- (Rupees one lac fifty thousand only) and the remaining balance of Rs 25,000/- (Rupees twenty thousand only) shall be paid by the Lessee to the Lessor at the time of registration of regular sale deed before the Sub-Registrar, New Delhi and the Lessor shall be strictly bound to above price and shall not demand any remuneration from the lessee at the time of registration of regular sale deed.”
(Emphasis supplied)

In view of the above paras of Ex.PW1/2, the trial Court was clearly unjustified in holding the agreement only to be a lease agreement and not an Agreement to Sell.

6. So far as the second conclusion of the trial Court is concerned that the agreement could not be specifically performed as the property could not be converted from leasehold to freehold, I must note that the conversion from leasehold to freehold is pursuant to the policy of Land and Development Office and which is the superior lessor in this case, and which will have to be approached after decree of the suit before arriving at a conclusion that the property cannot be converted from leasehold to freehold. Every executing Court under Order 21 Rule 32 CPC is entitled to get the duty, which is to be performed by the defendant/judgment debtor, performed from an officer appointed by the Court. First a decree has to be passed for specific performance directing conversion of the property from leasehold to freehold and only then in execution proceedings if the property is not converted from leasehold to freehold would the issue arise of the sale deed not being capable of being executed. However, the trial Court cannot preempt the issue of conversion to freehold by not even passing a decree in favour of the appellant/plaintiff for specific performance. I therefore, hold that the conclusion of the trial Court to dismiss the suit for specific performance merely because the lease rights were not converted into freehold till the passing of the judgment is palpably erroneous inasmuch as the

appellant/plaintiff after passing of the decree will be entitled to take necessary steps to approach the superior lessor/Land and Development Office, UOI to get the property converted from leasehold to freehold. Learned counsel for the appellant states that appellant will pay all the necessary charges to convert the property from leasehold to freehold, besides the charges towards stamp duty and registration of the sale deed.

7. The appeal is therefore allowed. The suit of the appellant for specific performance of the Agreement to Sell dated 1.11.1988 will stand decreed and the defendant no.1/respondent is directed to execute the sale deed of the suit property in favour of the appellant/plaintiff. The appellant/plaintiff is allowed a period of two months to deposit the amount of ₹ 25,000/- in this Court, and this amount will be available to the respondent/defendant no.1 as the balance sale consideration. Registry is directed to put this amount in a fixed deposit so as to earn maximum interest. In execution proceedings, the appellant/plaintiff will be entitled to seek assistance of the Court in accordance with law, including by invoking the provision of Order 21 Rule 32 CPC, to convert the property from leasehold to freehold. The appellant/plaintiff thereafter will also be entitled to get the sale deed executed

in her favour either from the respondent /defendant no.1 or through officer of the Court and to get the same registered. Parties are left to bear their own costs. Decree sheet be prepared. Trial court record be sent back.

May 24, 2012
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VALMIKI J. MEHTA, J.