

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

Reserved on: August 23, 2012

Pronounced on: September 03, 2012

+ (i) **RFA No. 82/2007 & C.M. No. 2011/2007**

AIR MARSHAL SHIV DEV SINGH Appellant

Through: Mr.Rajive Sawhney, Senior
Advocate with Mr.Vineet Jhanji,
Advocate

versus

SWADESH BHARDWAJ Respondent

Through: Mr.Kailash Vasudev, Senior
Advocate with Mr.K.B.Rohtagi,
Ms.Aparna Rohtagi Jain,
Mr.Mahesh Kasana, Advocates

+ (ii) **RFA No. 84/2007**

AIR MARSHAL SHIV DEV SINGH Appellant

Through: Mr.Rajive Sawhney, Senior
Advocate with Mr.Vineet Jhanji,
Advocate

versus

SWADESH BHARDWAJ Respondent

Through: Mr.Kailash Vasudev, Senior
Advocate with Mr.K.B.Rohtagi,
Ms.Aparna Rohtagi Jain,
Mr.Mahesh Kasana, Advocates

CORAM:

HON'BLE MR. JUSTICE SUNIL GAUR

JUDGMENT

1. The above titled two appeals assail common impugned judgment of 17th October, 2006 vide which appellant's suit for possession and *mesne* profits stands dismissed whereas,

respondent's counter claim for specific performance of *Agreement of Sale of 23rd January, 1984* stands decreed. Since the arguments addressed by both the sides in the above titled two appeals were the same, therefore, by this common judgment, the above titled two appeals are being disposed of.

2. Appellant vide *Agreement of sale of 23rd January, 1984* had agreed to sell his leasehold residential premises, i.e, D-1/53, Vasant Vihar, New Delhi (*henceforth referred to as the subject premises*) to the respondent for a consideration of ₹14 lacs only, out of which sum of ₹13 lacs only was received by appellant from respondent and upon obtaining of requisite permission from the authorities concerned to transfer the leasehold rights in the subject premises, respondent was to pay the balance sale consideration of Rupees one lac only and to also pay the unearned increase of ₹8 lacs only or any such amount as determined by the DDA.

3. At the time of execution of *Agreement of sale of 23rd January, 1984* (Ex.DW-1/1), possession of the subject premises was handed over by appellant to respondent. Vide communication of 3rd June, 1987, DDA had informed appellant that the unearned increase payable was ₹15,28,556/- and next very day, appellant had called upon respondent orally as well as vide letter of 4th June, 1987 to pay unearned increase. Since aforesaid dues were not cleared, therefore, DDA vide its communication of 27th November, 1987 (Ex.PW-1/2) had informed appellant that permission for transfer stood revoked. Aforesaid demand of unearned increase by DDA was challenged by the respondent by way of C.W. No.3846/1990, in which there was no interim order staying the impugned demand.

4. As respondent was not willing to pay the unearned increase

as demanded by the DDA and so, appellant vide notice of 24th January, 1988 (Annexure A-11), terminated the *Agreement of sale of 23rd January, 1984* (Ex.DW-1/1) as fresh period for completion of the sale transaction stipulated by the appellant vide letter of 17th May, 1988 (Ex.P-8) stood expired, thus, suit for possession of the subject premises alongwith claim of mesne profits was filed by appellant before the Trial Court. Respondent in her written statement to the suit of appellant had raised a counter claim for specific performance of *Agreement of sale of 23rd January, 1984* (Ex.DW-1/1). During the pendency of suit before the Trial Court, the verdict returned in CW No.3846/1990 on 20th October, 2003, in respect of the unearned increase was that it was a non-issue, thus not payable and conversion of the leasehold rights into freehold in respect of the subject premises were to await the outcome of this Civil Suit.

5. The parties had led their evidence before the Trial Court and thereafter, finding returned vide impugned judgment of 17th October, 2006 is that respondent is entitled to specific performance of *Agreement of sale of 23rd January, 1984* (Ex.DW-1/1) as there was no violation of the Agreement in question by either side and the delay in its specific performance was due to exorbitant unearned increase demanded by DDA and since the requirement of payment of unearned increase has been dispensed with by virtue of the decision in CW No.3846/1990, so upon payment of the balance sale consideration of Rupees one lac only and on payment of charges for conversion of the subject premises from leasehold to freehold, the Agreement in question be performed.

6. The challenge laid to the impugned judgment by learned senior counsel for appellant is on the premise that *Agreement of*

sale of 23rd January, 1984 (Ex.DW-1/1) became unenforceable as respondent had refused to pay the unearned increase, without which permission for sale of the subject premises could not be obtained and so, appellant is entitled to recover possession of the subject premises and the *mesne* profits as claimed.

7. Senior counsel for appellant had drawn the attention of this Court to Section 39 of the Indian Contract Act, 1872, and to the decisions in *K.Narendra vs. Riviera Apartments (P) Ltd.*, (1999) 5 SCC 77; *Nirmala Anand vs. Advent Corp.(P) Ltd. & ors.*, (2002) 5 SCC 481; and *Dayal Singh vs. Collector of Stamps*, AIR (1972) Delhi 131, to contend that appellant was entitled to cancel the agreement in question, as it was impossible for appellant to have obtained the requisite permission from DDA on account of respondent defaulting in paying the unearned increase.

8. While relying upon the decision in *Manjunath Anandappa vs. Tammanasa and ors.*, (2003) 10 SCC 390, it was contended that the respondent had failed to prove that she had means to pay the balance sale consideration and as per the dictum in *N.P.Thirugnanam (D) by Lrs vs. Dr.R.Jaganmohan Rao & ors.*, JT 1995 (5) SC 553; *M.Meenakshi and ors. Vs. Metadin Agarwal (D) & ors.*, (2006) 7 SCC 470, readiness and willingness to perform the agreement has to be proved but respondent's willingness to perform her part of the agreement does not stand proved. The decision in *Rambhau Namdeo Gajre vs. Narayan Bapuji Dhotra (D)*, (2004) 8 SCC 614 was relied upon by appellant's counsel to assert that doctrine of part performance could not be invoked in favour of the respondent who had not paid the unearned increase.

9. Finally, reliance was placed on behalf of the appellant upon

decisions in *N.P.Thirugnanam (D) by lrs vs. Dr.R.Jaganmohan Rao & ors.*, JT 1995 (5) SC 553; *Aasman Investments vs. Shri K.L.Suneja & Anr*, 2011(181) DLT 156; *Boots Pharmaceuticals Ltd. Vs. Rajinder Mohindra*, 177(2011) DLT 260; *J.L.Gugnani (HUF) vs. O.P.Arora & Ors.*, (2011) IX AD (Delhi); *Spring Valley Finance vs. Smt. Prakash Kaur*, 148(2008) DLT 767; and *Ravi Sood & anr vs. Veer Bala Sharma*, 71(1998) DLT 254, to contend that the ingredients of Section 20 of the Specific Relief Act, 1963 have to be satisfied before specific performance of sale agreement can be ordered and in the instant case, there was clear lack of willingness on the part of respondent to pay the unearned increase, thereby frustrating the *Agreement of sale of 23rd January, 1984* (Ex.DW-1/1). Thus, it was vehemently urged by learned senior counsel for the appellant that the impugned judgment of 17th October, 2006 deserves to be set aside and the suit of appellant ought to be decreed and the counter claim of respondent be dismissed.

10. Submission of senior counsel for the respondent is that appellant had supported the respondent in questioning the quantum of unearned increase and so, there is no question of the *Agreement of sale of 23rd January, 1984* (Ex.DW-1/1) being frustrated on account of non-payment of unearned increase as the same was subject matter of challenge before the court of law.

11. It is seriously disputed by learned senior counsel for the respondent that there was lack of willingness and readiness to pay the balance sale consideration as it was to be paid after the appellant had obtained the sale permission in respect of the subject premises and the decision in CW No.3846/1990 facilitates the

specific performance of the *Agreement of sale of 23rd January, 1984* (Ex.DW-1/1), as payment of conversion charges was never an issue and the decisions relied upon on behalf of appellant have no application to the facts of instant case. While relying upon the decision in *Janaki Vashdeo Bhojwani and anr vs. Indusind Bank*, (2005) 2 SCC 217; *Man Kaur (Dead) by LRs vs. Hartar Singh Sangha*, JT 2010 (10) SC 565, it was contended that respondent being in possession of the subject premises in part performance of the *Agreement of sale of 23rd January, 1984* (Ex.DW-1/1) is entitled to its specific performance as there was a specific covenant in the *Agreement of sale of 23rd January, 1984* (Ex.DW-1/1) entitling respondent to get the specific performance of this agreement and time was never the essence of the agreement in question. Thus, it is submitted on behalf of the respondent that there is no substance in these appeals, which merit outright dismissal.

12. Having considered the submissions advanced, the record of this case and the decisions cited, this court finds that when appellant had filed the suit, there was some substance in it as DDA was demanding the unearned increase from appellant but due to supervening circumstance of onerous condition of payment of unearned increase being lifted by virtue of the decision in CW No.3846/1990, it cannot be said that the justification to terminate the *Agreement of sale of 23rd January, 1984* (Ex.DW-1/1) remains and infact it provides a cause for ensuring that the *Agreement of sale of 23rd January, 1984* (Ex.DW-1/1) is performed by the parties upon payment of balance sale consideration of Rupees one lac and the requisite charges as ordered by the Trial Court.

13. In the aforesaid view of this matter, I do not find any

substance in the contentions raised on behalf of appellant in the face of the evidence on record, which remains unassailable and so, the decisions relied upon by the appellant are of no avail, as the decision in CW No.3846/1990 takes out the wind from the sails of the appellant, requiring specific performance of the *Agreement of sale of 23rd January, 1984* (Ex.DW-1/1).

14. Finding no illegality or infirmity in the impugned judgment of 17th October, 2006, I dismiss both the appeals and the pending application while refraining to impose costs.

(SUNIL GAUR)
Judge

September 03, 2012

pkb/rs