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* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment Reserved on :01st May, 2012
Judgment Pronounced on: 10th May, 2012

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FAO(OS) 366/2011

UPMA KHANNA & ANR. Appellants
Represented by: Mr.Vinoo Bhagat, Appellant No.2 in
person with Mr.Amiet Andlay and
Mr.Arun K.Sharma, Advocates.

versus

TARUN SAWHNEY & ORS. Respondents
Represented by: Mr.Harpreet Singh and Mr.Rajesh
Gupta, Advocates for R-1.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

PRADEEP NANDRAJOG, J.

1. Respondent No.1, Tarun Sawhney, sought specific performance of two agreements to sell both dated September 16, 2009, whereunder he paid ₹90,00,000/- to defendants No.1 to 5 and additionally ₹10,00,000/- to defendant No.5. It be noted that appellant No.1 is defendant No.3 and appellant No.2 is defendant No.5. The agreements pertain to property No.BP-32, Nizamuddin East, New Delhi.

2. Late Ms.Usha Bhagat had executed an agreement to sell on August 14, 1969 in favour of defendant No.5 agreeing to sell to him one-half undivided share in the property. Ms.Usha Bhagat was the sister of defendant No.5.

The brother and sister fell apart. Defendant No.5 had to litigate with his sister and pursuant to a decree, in execution, got half ownership right in the property No.BP-32, Nizamuddin East, New Delhi.

3. Usha Bhagat died on March 01, 2006. She remained unmarried. Defendants No.1 to 5 are her legal heirs. They litigated with respect to a will dated April 10, 2003, but agreed that Usha Bhagat's remaining half share would be equally inherited by her two brothers and three sisters i.e. the defendants; and the other half share would be that of defendant No.5. It was in this backdrop of the ownership that two agreements to sell were executed. The first pertained to defendants No.1 to 5 agreeing to sell their half undivided share in the property and second pertained to defendant No.5 undivided half share being agreed to be sold.

4. The interest in the land being a lease-hold tenure under L&DO, in both the agreements, it was recorded that the sellers shall obtain conversion of the lease-hold tenure to freehold tenure and upon said information being conveyed to the buyer, within 30 days, balance sale price would be paid and sale deed would be executed.

5. The plaintiff took upon himself to pursue, firstly, the property being mutated in the record of L&DO in the name of the five defendants and thereafter to have the conveyance deed executed by L&DO to convert the lease-hold tenure to freehold tenure and needless to state that mutation was the first step.

6. It is the case of the plaintiff that the defendants submitted defective and incomplete applications seeking mutation and that inspite of best efforts he could obtain mutation in the name of the defendants only on July 27, 2010. Grievance in the suit is that conversion could not take place due to a dispute regarding payment of composition fee by the defendants and for which house tax record for the year 1959-1960 was needed.

7. A word needs to be spoken here on the issue of composition fee. It is the charges payable to the lessor for not completion construction of a building within the time granted under the lease. Apparently, in the record of L&DO a demand was outstanding on said account, and unless cleared, L&DO would not have executed the conveyance deed conveying freehold title. The defendants were asserting that no composition fee was payable. Since house tax on a building is levied when construction is complete, the house tax record would evidence the year in which the construction was completed.

8. The two agreements had identically verdicted clauses in Clause No.17 in one and Clause No.20 in the other. They read as under:-

“ If this agreement is not implemented within the twelve calendar months from the date hereof this agreement shall stand terminated and extinguished automatically without any further act of parties and vendors shall be at liberty to sell the said property to any other person after refund of earnest money, as also other lawful charges hereinafter

mentioned if paid by the vendee on behalf of the vendor; the intention of the parties is that they all be resorted to the same position as at the date hereof and as if this agreement had not been executed.”

9. The appellants predicated a stand before the learned Single Judge and sought a declaration that the suit was not maintainable in view of Section 14 (1)(c) of the Specific Relief Act. The said issue has been decided by the learned Single Judge vide impugned order dated July 12, 2011.

10. Section 14(1)(c) of the Specific Relief Act, 1963 reads as under:-

“ 14. **Contracts not specifically enforceable:-** (1)
The following contracts cannot be specifically enforced, namely:-
(a)
(b)
(c) a contract which is in its nature determinable.”

11. And needless to state the case of the appellants was that as per Clause 17 in one agreement and 20 in the other, both of which were identical in language, if the agreement was not implemented within 12 calendar months from the date of the agreement, it shall stand terminated; and thus as per Section 14(1)(c) of the Specific Relief Act, 1963 the agreement could not be specifically enforced. Per contra, the plaintiff pleaded that said clause would apply when the contract in question envisaged it being determinable at the option of both or either party and not where time was fixed for performance of a contract requiring in the interregnum the

seller to take steps and obtain permissions so as to be in a position to execute the sale deed and the seller being in default.

12. To put it in plain language, the plaintiff drew a distinction between agreements being determinable at the option of the parties and not agreements being determinable by way of default.

13. The learned Single Judge has held in favour of the plaintiff.

14. Lack of mutuality is recognized in the common law; resulting in agreements to sell lacking mutuality not being capable of being specifically enforced. But, the law in India has made a conscious departure if we look at Sub-Section 4 of Section 20 of the Specific Relief Act which categorically states that the Court shall not refuse specific performance of a contract merely on the ground that the contract is not enforceable at the instance of a party (See AIR 2002 SC 2290 Nirmala Anand Vs. Advent Corpn. Pvt. Ltd. & Anr.). The 147th report submitted by the Law Commission of India would reveal that it had received a proposal to delete Sub-Section 4 of Section 20 from the statute book so that law in India could conform to the common law, but the proposal was rejected.

15. Thus, we cannot take any guidance on the subject from common law principles.

16. What is the meaning of the expression: *a contract which is in its nature determinable*.

17. The New Shorter Oxford English Dictionary defines 'determinable' to mean, if used as an adjective, fixed, definite.

As a general meaning, to mean: 'liable to come to an end'. The dictionary by **Jowitt's**, Second Edition explains determinable: '*an interest is said to determine when it comes to an end, whether by limitation, efflux of time, merger, surrender or otherwise*'. Thus, it is possible to argue that for whatever reasons it may be the cause for, if an interest comes to an end by efflux of time, a contract would be determinable in nature. This would be an argument in support of the appellants, and as urged.

18. But, the argument overlooks the concept of a fault liability and a fault effect and a no fault liability and a no fault effect. It overlooks the point that one should not rush to conclusions. Clause (c) uses the expression 'in its nature determinable' and does not throw any light whether the determination contemplated embraces a fault effect determination.

19. If a defence by a contracting party that the sufferance of the default and hence the determination of the contract is to be accepted, it would amount to allowing the party committing the wrong to take advantage of its own neglect and this would ex-facie not be acceptable to a court of equity.

20. We need not deal with the two decisions cited at the bar before us, which have been considered by the learned Single Judge, and the ratio extracted. We concur with the same. We concur with the view taken by the learned Single Judge.

21. We do not find any merit in the appeal, which is dismissed.

22. No order as to costs.

(PRADEEP NANDRAJOG)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

MAY 10, 2012
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