

IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 10th December, 2013.

+

RFA 653/2004

SUSHILA DEVI (DECEASED) THROUGH LR's Appellant

Through: Mr. Arun Mohan, Sr. Adv. with Mr.
Arvind Bhat & Mr. Kuber Giri, Advs.

Versus

ADELINE D. LALL

(DECEASED) THROUGH LRS & ANR. Respondents

Through: Mr. Pradeep Dewan, Sr. Adv. with
Ms. Anupam Dhingra, Mr. Siko
Sankar Mishra & Mr. Adbhut Pathak,
Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. The appeal impugns the judgment and decree (dated 16th September, 2004 of the Court of the Additional District Judge (ADJ), Delhi in Suit No.107/2004 filed by the respondents) of specific performance of an Agreement to Sell dated 7th September, 1985 by the appellant of sale of House No.27, Road No.17, Punjabi Bagh, New Delhi, to the respondents/plaintiffs.

2. The appeal was admitted for hearing and vide interim order dated 3rd May, 2005, the direction in the impugned judgment for execution of the

Sale Deed and the dispossession of the respondents/plaintiff who were admittedly in possession of the property, stayed. The appellant/defendant died during the pendency of the appeal and an application for substitution of her legal heirs was filed; at that stage the appeal was dismissed in default but on the application of the legal heirs of the appellant/defendant, was restored to its original position and the legal heirs substituted. The counsels have been heard and synopsis of submissions permitted to be filed and which have been perused.

3. The respondent/plaintiff No.1 Mrs. Adeline D. Lall who died during the pendency of the suit and whose legal heirs were substituted and her husband Shri Tajammul David Lall (respondent/plaintiff No.2) on 23rd May, 1988 instituted the suit from which this appeal arises, pleading:

- (i) that the appellant/defendant vide Agreement to Sell dated 7th September, 1985 agreed to transfer the house aforesaid to the respondents/plaintiffs for a total sale consideration of Rs.5 lakhs;
- (ii) that at the time of execution of the Agreement to Sell, a sum of Rs.40,000/- was paid by the respondents/plaintiffs to the appellant/defendant;
- (iii) that as per the terms and conditions of the agreement to sell, it

was the duty of the appellant/defendant to obtain Income Tax Clearance Certificate, Wealth Tax Clearance Certificate and permission to sell under the Urban Land (Ceiling & Regulation) (ULCR) Act, 1976 and all other requisite permissions from the concerned authorities for execution of the regular Conveyance Deed;

(iv) that the appellant/defendant in September, 1986 represented having obtained all the permissions;

(v) that the respondents/plaintiffs believing the word of the appellant/defendant got the bank draft for a sum of Rs.4,60,000/- prepared;

(vi) that the appellant/defendant was however unable to show the requisite permissions and consequently the Sale Deed could not be executed;

(vii) that though the appellant/defendant assured that she will obtain the permissions in a day or two, but did not produce the same;

(viii) that since the respondents/plaintiffs were tenants in the house which was subject matter of sale, there was no anxiety on the part of the respondents/plaintiffs and they kept on waiting, believing that the appellant/defendant will come forward with requisite permissions;

(ix) that the respondents/plaintiffs have otherwise been always ready and willing;

(x) that the respondents/plaintiffs just before the institution of the suit learnt that the appellant/defendant was attempting to sell the property to some other and hence instituted the suit.

4. The appellant/defendant contested the suit by filing a written statement, on the grounds:

(a) that the respondents/plaintiffs had failed to perform their part of the Agreement to Sell dated 7th September, 1985 and accordingly the amount of Rs.40,000/- paid, stood forfeited and the respondent/plaintiff No.2 continued to be a tenant in the property and was liable to pay monthly rent of Rs.600/- which also he had failed to pay;

(b) that the application for permission to the Competent Authority under ULCR Act was to be submitted jointly by the purchaser and seller, along with the proposed Sale Deed; that the appellant/defendant after execution of the Agreement called upon the respondents/plaintiffs several times to execute and sign the necessary application forms for grant of permission under the ULCR Act but the

respondents/plaintiffs failed to sign such application and as such the permissions could not be obtained and the respondents/plaintiffs were to blame for the same;

(c) denying that the appellant/defendant had in September, 1986 represented having obtained all the permissions; that since the respondents/plaintiffs had not signed the requisite application for permission under the ULCR Act, they could not have expected the appellant/defendant to have obtained the permissions;

(d) denying that the respondents/plaintiffs had got any bank draft for Rs.4,60,000/- prepared or purchased the stamp papers for execution of the Sale Deed;

(e) that the respondents/plaintiffs did not have the balance sale consideration for payment to the appellant/defendant;

(f) that no notice had even been served by the respondents/plaintiffs on the appellant/defendant for execution of the Sale Deed.

5. The respondents/plaintiffs filed a replication:

(I) denying that the respondent/plaintiff No.2 continued to be a tenant in the property at a monthly rent of Rs.600/- and denying the

liability of the respondent/plaintiff No.2 to pay any rent;

- (II) that no permission under the ULCR Act was required to be obtained as the area which was to be transferred was less than 500 sq. mtrs. and denying that the appellant/defendant had ever called upon the respondents/plaintiffs to sign any application in that regard; and,
- (III) otherwise, generally denying the contents of the written statement and reiterating the case in the plaint.

6. On the pleadings aforesaid of the parties, the following issues were framed in the suit on 18th March, 1993:

- “i) *Whether the plaintiffs were and are ready and prepared to perform their obligation to get the sale deed executed?*
OPP
- ii) *Whether the plaintiffs failed to perform in accordance with the terms and conditions of the agreement to sell and sign relevant papers/documents for seeking permission to sell? If so, its effect?* *OPD*
- iii) *Whether the plaintiffs have committed laches. If so, what is the effect?* *OPD*
- iv) *Whether the plaintiffs are entitled to a decree for specific performance?* *OPP*
- v) *Relief.”*

7. The respondents/plaintiffs, besides examining respondent/plaintiff No.2, examined two other witnesses. The power of attorney holder of the

appellant/defendant appeared in defence.

8. The learned ADJ has decreed the suit, finding/observing/holding:

(A) that the time fixed for execution of the Conveyance Deed was one year from the date of the Agreement;

(B) that the only obligation to be performed by the respondents/plaintiffs was to pay the balance sale consideration and to bear the registration charges;

(C) that the respondents/plaintiffs had placed on record the stamp papers purchased on 2nd September, 1986 with the Sale Deed typed thereon;

(D) that the respondents/plaintiffs had also proved having got prepared two bank drafts for a total sum of Rs.4,60,000/- on 9th September, 1986;

(E) that the appellant/defendant was required to obtain the Income Tax Clearance, Sale Permission under the ULCR Act, besides other permissions from all other concerned authorities within a period of six months from the date of the Agreement and which was pre-requisite for execution of the Conveyance Deed; that it was not the case of the appellant/defendant that she had obtained Wealth Tax

Clearance, Income Tax Clearance and permission from the Competent Authority under the ULCR Act and other requisite clearances necessary for execution of the Sale Deed;

(F) that thus the respondents/plaintiffs have successfully proved that they were ready with the payment and had sufficient funds at their disposal during the said period of one year from the date of the Agreement to Sell;

(G) that the only plea of the appellant/defendant in the written statement was of the respondents/plaintiffs having failed to join in applying for permission under the ULCR Act; that there was no plea that the appellant/defendant had obtained Income Tax Clearance, Wealth Tax Clearance and other permissions from the concerned authorities which were required before execution of the Conveyance Deed;

(H) that however in evidence, the attorney of the appellant/defendant had made out a different case, of the permission under ULCR Act being not required but which was against the written terms and conditions of the Agreement to Sell and contrary to the averments in the written statement; that nothing had also been

brought on record to prove the said plea and no such *query* was put to the respondent/plaintiff No.2 also in his cross-examination;

(I) that the attorney of the appellant/defendant in the evidence had also deposed that the Income Tax Clearance could not be obtained as the respondents/plaintiffs had failed to sign the requisite form or give the draft of the proposed Sale Deed—however all this evidence was beyond pleadings;

(J) that the attorney of the appellant/defendant in his deposition had on the one hand stated that no permission under the ULCR Act was required and on the other hand stated that the respondents/plaintiffs had failed to join in applying for the said permission and had thus contradicted himself;

(K) that the obligation to obtain the permission under the ULCR Act was of the appellant/defendant;

(L) that it was thus proved that the appellant/defendant had failed to perform her part of the contract;

(M) that no evidence had been led by the appellant/defendant on Issue No.(iii) which was decided against the appellant/defendant;

(N) that though the Agreement to Sell provided for interest @ 1%

per month for delay on the part of the respondents/plaintiffs in getting the Conveyance Deed executed but the said interest was payable only if the respondents/plaintiffs had delayed the execution of the Sale Deed; that since the delay/breach was of the appellant/defendant, the appellant/defendant was liable to execute the sale Deed on receipt of the balance sale consideration of Rs.4,60,000/- only.

9. Before I proceed to discuss the respective contentions, it is deemed necessary to set out herein below the relevant clauses of the Agreement to Sell, in which the appellant/defendant is described as the 'first party' and the respondents/plaintiffs as the 'second party' and in which the sum of Rs.40,000/- is described as earnest money and part of sale proceeds, as under:

"2. That within a period of six months from the date hereof, the first party after receipt of Income Tax Clearance Certificate and necessary permissions to sell under The Urban Land (Ceiling and Regulation) Act, 1976, and any other requisite permission, from the authority concerned, shall execute the sale deed and to have the same registered in favour of the second party or their nominees, on receipt of the balance sum of Rs.4,60,000/- (Rs. Four lac, sixty thousand only) before Sub-Registrar, Delhi. That in case the second party delays the registration on any reason, whatsoever, after receipt of permissions by the first party, then the first party will be entitled to receive an interest over the balance amount of Rs.4,60,000/- (Rs. Four lac sixty thousand only) at the rate of 1% P.M. after the expiry of the said stipulated period six

months, for further period of six months, thereafter.

3. In this way the limitation of this agreement is fixed between the parties of one year only.

4. That the said entire property is under the tenancy of Mr. T.D. Lall of M/s ST. MARY'S SCHOOL, 27/17, Punjabi Bagh, New Delhi as per agreement, on the monthly rent of Rs.600/- (Rs. Six hundred only) and the said rent amount shall stand ceased from the date of execution of this agreement. That the first party shall deliver the proprietary possession of the said property to the second party at the time of registration of sale deed.

5.....

6. That any house tax and any other dues, arrears upto the date of this agreement shall be paid by the first party and thereafter shall be paid by the second party.

7....

8.....

9. That in case the first party backs out from the said transaction, then the second party is fully entitled to get the said transaction enforced through court of law by specific performance or suit at the risk and costs of the first party and in case the second party backs out from the said transaction, then in that case, their paid up amount shall stand forfeited in favour of the first party and the above said rent amount shall continue with effect from the date of this agreement and the tenancy of M/s St. Mary's School will remain continued and the said transaction shall be deemed as cancelled.

10. That all court cases pertaining to the said property, both the parties are bound to withdraw the same after execution of this agreement with the mutual consent by the tenant and Land Lord/Land Lady."

10. The senior counsel for the appellant/defendant has argued:

- (i) that the respondents/plaintiffs in their evidence did not prove the bank drafts for Rs.4,60,000/- which they claimed to have got prepared and only proved the certificate issued by the Bank;
- (ii) that the said certificate has an addition in a different hand writing;
- (iii) that the ledger statements of account of the respondents/plaintiffs with the Bank have not been proved in accordance with law;
- (iv) that the certificate appended to the said ledger statement is not in accordance with the Bankers' Books Evidence Act, 1891;
- (v) that the respondents/plaintiffs have not proved their passbooks to show availability of funds in their bank account and which would be primary evidence;
- (vi) that the respondents/plaintiffs even if had got the bank drafts prepared, kept the same in their pocket;
- (vii) that no notice was given to the appellant/defendant to reach the office of the Sub-Registrar on 9th September, 1986;
- (viii) that no notice was given to the appellant/defendant thereafter

also of the appellant/defendant having not reached the Sub-Registrar's office;

(ix) that no intimation of preparation of the bank draft also was sent in writing;

(x) that the respondents/plaintiffs/purchasers are tenants sitting in the property;

(xi) that the photocopies of the bank drafts filed, though not *produced*, are clearly fabricated;

(xii) that the falsity of the ledger is also proved from the same having no withdrawal of Rs.40,000/- for purchase of stamp papers;

(xiii) that the copies of the ledger are thus not genuine;

(xiv) that the conduct of the respondents/plaintiffs is not in accordance with the ordinary course of human behaviour;

(xv) that the jurisdiction exercised by the Court in grant of specific performance is a jurisdiction of equity and ought not to be exercised in favour of the respondents/plaintiffs, for the reasons:

(a) that the respondents/plaintiffs being tenants in possession of the property had as such agreed to purchase the property for Rs.5 lakhs which was half of the then market value

- of the property;
- (b) that the respondents/plaintiffs have paid less than 10% i.e. 8% of the total sale consideration as earnest money;
 - (c) that the respondents/plaintiffs had also stopped payment of rent;
- (xvi) that once the case set up by the respondents/plaintiffs of having visited the office of the Sub-Registrar on 9th September, 1986 is disbelieved, the respondents/plaintiffs in any case, would be disentitled from the discretionary relief of specific performance;
- (xvii) that the respondents/plaintiffs ought to have sued immediately after the failure alleged of the appellant/defendant to appear before the Sub-Registrar on 9th September, 1986;
- (xviii) that a plaintiff in a suit for specific performance is not only to show readiness, meaning to have capacity to pay the balance sale consideration, but also willingness;
- (xix) that from the non-tendering of the bank drafts for the balance sale consideration, even if prepared, to the appellant/defendant, the elements of willingness is lacking.

11. The senior counsel for the respondents/plaintiffs, has argued:

- (I) that of all the grounds urged, none are pleaded in the memorandum of appeal;
- (II) that the appellant/defendant in the cross-examination of the witnesses of the respondents/plaintiffs had not challenged the preparation of the bank drafts;
- (III) that the preparation of the bank drafts for the balance sale consideration is also admitted in the grounds of appeal;
- (IV) that adequacy of consideration is not to be seen in the grant or refusal of the relief of specific performance;
- (V) that in accordance with the Agreement to Sell, the property tax is being paid by the respondents/plaintiffs since the year 1986;
- (VI) that the balance sale consideration is lying deposited in this Court and the respondents/plaintiffs is thus already out of pocket (there was no such direction in this appeal and the deposit if any must be while seeking execution of the decree);
- (VII) that the bank drafts were kept alive for nine months in the hope that the appellant/defendant will execute the Sale Deed;
- (VIII) that the son and attorney of the appellant/defendant had given

contrary statement with respect to the permission under the ULCR Act;

(IX) that though the appellant/defendant, without pleading in the written statement attempted to prove issuance of letters to the respondents/plaintiffs but all are purported to have been sent by UPC and there is no explanation as to why the same were not sent by registered post AD and it further shows fabrication of such documents.

12. The senior counsel for the appellant/defendant in rejoinder has contended that the certificate issued by the Bank of the respondents/plaintiffs has not been proved as the witness from the Bank has not deposed of familiarity with the signatures of the issuer of such certificate.

13. The counsel for the appellant/defendant in his written submissions has referred to:

- (i) ***Tata Consulting Engineers Vs. UoI*** ILR 1994 Karnataka 913;
- (ii) ***Smt. Swarnalata Tat Vs. Chandi Charan Dey*** AIR 1984 Calcutta 130;
- (iii) ***Appropriate Authority Vs. Lytton Hotel (P) Ltd.*** (2003) 263 ITR 498 (Cal.);

on the aspect of price of a tenanted property being much below the market price of other similar vacant properties.

(iv) ***Nehru Place Hotels Ltd. Vs. Kanta Aggarwal*** (2011) 123 DRJ 148;

(v) Judgment dated 30th April, 2012 in RFA No.421/2003 titled ***M/s. Krishna Sweet House Vs. Gurbhej Singh***;

(vi) Judgment dated 10th July, 2012 in CS(OS) No.1154/1989 titled ***Jinesh Kumar Jain Vs. Iris Paintal***;

(vii) Judgment dated 8th August, 2012 in CS(OS) No.1735/1997 titled ***Sushil Jain Vs. Meharban Singh***;

to contend that discretion implicit in the grant of relief of specific performance should not be exercised in favour of purchasers, after long lapse of time and who has paid less than 10% of the sale consideration.

(viii) ***Meer Usdoollah Vs. Mussumat Beeby Imaman*** 1 Moore's Indian Appeals 19,'44;

(ix) ***Ramchandra Vs. Champabai*** AIR 1965 SC 354;

(x) ***Chaturbhuj Pande Vs. Collector, Raigarh*** AIR 1969 SC 255;

(xi) ***Tej Bahadur Singh Vs. State of U.P.*** AIR 1990 SC 431;

(xii) *N. Narayanan Vs. Adjudicating Officer, SEBI* (2013) 6 SCALE 438;

(xiii) *Jyotirmoy Das Vs. Land Acquisition Collector* (1999) ILR 2 Calcutta 167;

(xiv) Judgment dated 29th July, 2010 in CRP No.1375/2010 titled *K.C. Chandrasekar Vs. C. Balasundaram*;

(xv) *A.P. Abdul Rasheed Vs. Hotel K.K. Residency* 2010-4 LW 871;

in support of the proposition that the conduct of the respondents/plaintiffs of not issuing a single letter or notice is contrary to normal human behaviour and preparation of Bank Drafts, even if proved, was only in creation of evidence.

(xvi) *Maria Margarida Sequeria Fernandes Vs. Erasmo Jack De Sequeria* AIR 2012 SC 1727;

to contend that foundation of any litigation is pleadings and no particulars of bank drafts were given in plaint or replication.

(xvii) *Ved Parkash Kharbanda Vs. Vimal Bindal* 198 (2013) DLT 555;

on the normal conduct of parties to an agreement of sale purchase

(xviii) *Mussauddin Ahmed Vs. State of Assam* (2009) 14 SCC 541;

on the effect of non production of best evidence of original bank drafts.

(xix) *Muthian Vs. Syndicate Bank* AIR 1987 Madras 248;

(xx) *Suresh Patial Vs. State of H.P.* 2010 (3) Shim.LC 106

on effect of non production of primary evidence.

(xxi) *N.P. Thirugnanam Vs. Dr. R. Jagan Mohan Rao* AIR 1996 SC 116;

(xxii) *Raj Rani Bhasin Vs. S. Kartar Singh Mehta* AIR 1975 Delhi 137;

(xxiii) *His Holiness Acharya Swami Ganesh Dassji Vs. Sita Ram Thapar* AIR 1996 SC 2095;

on what is readiness and willingness and the distinction between the two.

(xxiv) *Manick Lal Seal Vs. K.P. Chowdhury* AIR 1976 Calcutta 115;

(xxv) *Wasim Ahmad Vs. Haji Shamsuddin* 2012 (3) ADJ 187;

on the effect of the respondents/plaintiffs not calling upon the appellant/defendant to execute the Sale Deed.

(xxvi) *K.S. Vidyadnam Vs. Vairavan* AIR 1997 SC 1751;

(xxvii) *Vimaleshwar Nagappa Shet Vs. Noor Ahmed Sheriff* (2011)
12 SCC 658;

(xxviii) *Tribeni Prasad Singh Vs. Jainarain Singh* AIR 1937 Patna
425;

(xxix) *Vuppalapati Butchireju Vs. Rajah Sri Ranga Satyanarayana*
AIR 1967 Andhra Pradesh 63;

(xxx) *Vejanla Piothi Raju Vs. Vuppalapati Butchi Raju* (Civil
Appeal No.1076 (N) of 1966 (SC));

(xxxi) *Lourdu Mari Vs. Louis Chinnaya Arogiaswamy* AIR 1996 SC
2814;

(xxxii) *Kommisetti Venkatasubbayya Vs. Karamsetti Venkateswarlu*
AIR 1971 Andhra Pradesh 279;

(xxxiii) *Gangabai Vs. Srinivasrao* AIR 1971 Andhra Pradesh 293;

(xxxiv) *Bishwanath Mahto Vs. Srimati Janki Devi* AIR 1978 Patna
190;

(xxxv) *Dagadu Bapu Shinde Vs. Vasam Shankar Nimbalkar* AIR
1988 Bombay 22;

(xxxvi) *Krovidi Kameswaramma Vs. Kudapa Balaramayya* 1998 (5)
Andhra Law Times 69;

(xxxvii) *Ram Kumar Agrawal Vs. Thawar Das* AIR 1999 SC 3248;

(xxxviii) *Ram Karan Vs. Raghunath* RLW 2006 (4) Raj. 2919;

(xxxix) *Subbanna Gounder Vs. Subbayammal* AIR 2003 Madras 437.

on the discretionary and equitable nature of the relief of specific performance and the respondents/plaintiff being not entitled to exercise of discretion in their favour for the reasons of delay/laches and increase in prices.

14. The respondents/plaintiffs in their written arguments have referred to:

(a) *Parbhawati Devi Vs. Mahendra Narain Singh* AIR 1981 Patna 133;

(b) *Bujhawan Singh Vs. Mt. Shyama Devi* AIR 1964 Patna 301;

(c) *Jaigobind Misir Vs. Nagesar Prasad* AIR 1953 Patna 326;

(d) *Raj Nandan Singh Vs. Ram Kishun Lohar* AIR 1958 Patna 571;

on the aspect of the argument/evidence of the respondents/plaintiffs having not done what was required to be done by them for obtaining permission being of no avail in the absence of pleadings;

(e) *Raghunath Rai Vs. Jageshwar Prashad Sharma* AIR 1999

Delhi 383;

(f) *Shantha Bai Prabhu Vs. Shahul Hameed* 1990 ILR (KAR) 4407.

on the said argument, even if accepted, being of no avail.

15. I have considered the rival contentions.

16. An analysis of the Agreement to Sell dated 7th September, 1985, shows:

(A) that the parties had agreed to execution and registration of the Sale Deed within six months i.e. on or before 6th March, 1986, after the appellant/defendant had received Income Tax Clearance Certificate and necessary permission to sell under the ULCR Act and any other requisite permissions;

(B) that if the respondents/plaintiffs delayed the registration after permissions have been received by the appellant/defendant, then the appellant/defendant was to be entitled to receive the balance sale consideration together with interest @ 1% per month for a period of six months after the expiry of six months from the Agreement to Sell i.e. till 6th September, 1986;

(C) that the limitation of the Agreement was thus upto one year i.e.

till 6th September, 1986;

(D) that though the proprietary possession of the property was agreed to be delivered by the appellant/defendant to the respondents/plaintiffs at the time of registration of the Sale Deed; meaning, that possession in part performance of the Agreement to Sell was not delivered; further meaning that the status of the respondent/plaintiff No.2 as the tenant was to continue; but for the period of limitation of the Agreement fixed at one year, no rent was to be paid;

(E) that it appears that there was litigation between the parties at that time (must be for eviction of the respondent/plaintiff no.2 as tenant) and which was to be withdrawn by the respective parties.

17. Though the 'limitation of the Agreement was fixed of one year only', but inspite of expiry of the said period on 6th September, 1986 and notwithstanding the Agreement having not been performed, neither was any letter/notice issued by the respondents/plaintiffs calling upon the appellant/defendant to complete the Agreement nor was any suit for specific performance filed till 23rd May, 1988 i.e. for more than one and a half years of the expiry of the limitation fixed of the Agreement.

18. Of course, the appellant/defendant also did not act during the said time; neither did she say that the Agreement had come to an end nor did she demand rent from the respondent/plaintiff No.2 and which had been suspended for the period of Agreement only i.e. till 6th September, 1986.

19. However, in a suit for specific performance, the test is of readiness and willingness of the plaintiff and the laxity, even if any by the defendant, is of no significance and cannot be a substitute for the readiness and willingness of the plaintiff.

20. The senior counsel for the appellant/defendant, though has cited plethora of judgments aforesaid, but has not referred to the path changing judgment of the Supreme Court in *Saradamani Kandappan Vs. S. Rajalakshmi* (2011) 12 SCC 18, holding:

- (a) that the question, whether time is the essence of the contract, with reference to the performance of a contract, may arise for consideration either with reference to the contract as a whole or with reference to a particular term or condition of the contract which is breached;
- (b) in a contract relating to sale of immovable property, if time is specified for payment of the sale price but not in regard to the execution of the sale deed, time will become the essence only with reference to

payment of sale price but not in regard to execution of the sale deed;

(c) normally in regard to contracts relating to sale of immovable properties, time is not considered to be the essence of the contract unless such an intention can be gathered either from the express terms of the contract or impliedly from the intention of the parties as expressed by the terms of the agreement;

(d) the intention to make time, stipulated for payment of balance consideration, will be considered to be essence of the contract where such intention is evident from the express terms or the circumstances necessitating the sale, set out in the agreement;

(e) even if the urgent need for the money within the specified time is not set out, if the words used clearly show an intention of the parties to make time the essence of the contract, with reference to payment, time will be held to be the essence of the contract;

(f) though in the absence of contract to the contrary, the purchaser is bound to tender the balance consideration only at the time and place of completing the sale but if it is found that there is a conscious effort to delink the terms relating to payment of balance price from the term relating to execution of sale deed and making the time of essence only

in regard to the payment of the balance sale consideration, it is a clear indication that while time would be the essence of the contract in regard to the terms relating to payment of balance price, time would not be the essence of the contract in regard to the execution of the sale deed;

(g) the precedents from an era, when high inflation was unknown, holding that time is not of the essence of the contract in regard to immovable properties, may no longer apply because the circumstances that existed when the said principle was evolved, no longer exist;

(h) the principle that time is not of the essence of contracts relating to immovable properties took shape in an era when market value of immovable properties were stable and did not undergo any marked change even over a few years; however there has been a galloping inflation and prices of immovable properties have increased steeply, by leaps and bounds; market values of properties are no longer stable or steady; the steep increase in prices is a circumstance which makes it inequitable to grant the relief of specific performance where the purchaser does not take steps to complete the sale within the agreed period and the vendor has not been responsible for any delay or non-performance; in such circumstances a purchaser can no longer take

shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to cover his delays, laches, breaches and 'non-readiness';

(i) to hold, that a vendor who took an earnest money of say about 10% of the sale price and agreed for three or four months as the period for performance, did not intend that time should be the essence, will be a cruel joke on him, and will result in injustice;

(j) in these circumstances, the greater scrutiny and strictness has to be applied in considering whether the purchaser was ready and willing to perform his part of the contract.

21. On the analysis as aforesaid of the Agreement to Sell, I am of the view that the time mentioned therein for completion of the sale, was of the essence of the contract, for the following reasons:

(i) the purchaser was in possession of the property as a tenant and there was litigation between the seller as landlord and purchaser as tenant and which litigation was being withdrawn in pursuance to the Agreement to Sell;

(ii) the Agreement to Sell pertained to an era when the Delhi Rent Control Act, 1958 governing the relationship between the landlord

and tenant, was all pervasive; the same, notwithstanding the term for which the premises had been let out having expired, prohibited the landlord from evicting the tenant, except on the grounds of eviction provided for in the Rent Act itself and also prohibited the landlord from increasing the rent or charging the market rent from the tenant;

- (iii) the parties agreed to a definite time span for completion of the sale and did not leave the time for sale indefinite by providing for the sale to be completed only after receipt of such permissions;
- (iv) the landlord also agreed to suspend the payment of rent;
- (v) though the time fixed for completion was six months but a grace period of one year was granted to the purchaser, subject to payment of interest;
- (vi) forfeiture of earnest money was provided for the default of the purchaser;
- (vii) the other consequence of default of the purchaser was of the tenancy continuing.

22. The delay on the part of the respondents/plaintiffs/purchasers in instituting the suit, of more than one and a half years from the expiry of the limitation fixed of the Agreement to Sell and of more than two years from

the date by which the appellant/defendant was to obtain the permissions and which had not been obtained, is to be looked at in the aforesaid light. The Supreme Court in *K.S. Vidyanadam Vs. Vairavan* (1997) 3 SCC 1 reiterated in *Sardamani Kandappan* supra has held that Courts will frown upon suits which are not filed immediately after breach/refusal and the fact that limitation is three years does not mean that a purchaser can wait for one or two years to file a suit and obtain specific performance. It was further held that three year period is provided to assist the purchaser in special cases, as where major part of the consideration has been paid and possession delivered in part performance. The bare pleas and statements of the respondents/plaintiffs of having approached the appellant/defendant from time to time, would not suffice.

23. The respondents/plaintiffs chose to sit pretty, neither paying the balance sale consideration nor the rent.

24. Again, though neither of the counsels have adverted to the said fact and the same has escaped the learned ADJ also, but what is of much significance is that though the respondents/plaintiffs filed the suit averring non-obtaining of permissions by the appellant/defendant for sale including the permission under ULCR Act but upon the appellant/defendant setting up

a plea of the respondents/plaintiffs having not joined in applying for permission under the ULCR Act, the respondents/plaintiffs in their replication dated 2nd February, 1990 took a somersault and pleaded that such a permission was not required.

25. The aforesaid somersault of the respondents/plaintiffs is to be seen in the light of the legislative history.

26. Section 27 of the ULCR Act prohibited transfer by way of sale of any urban land with a building or a portion only of such building except with the previous permission in writing of the Competent Authority constituted under the said Act. Sub Section (2) of Section 27 required the person desiring to make a transfer to make an application in writing to the Competent Authority in such form and in such manner as may be prescribed. Sub Section (3) provided for the Competent Authority to after making such enquiry as it deemed fit, by order in writing, grant or refuse to grant permission applied for; Sub Section (4) provided that if refusal of the permission was not communicated to the applicant within 60 days of the receipt of the application, the permission would be deemed to have been granted. The Urban Land (Ceiling Regulations) Rules, 1976, by Rule 14 prescribed the application under Section 27(2) to be in Form-VIII to the said

Rules. A perusal of the said prescribed form shows that the application was required to be not only by the transferer and was required to be accompanied with a copy of the document to be executed in regard to the transfer but was also required to be signed by the transferee and the transferee was also required to state in the said form the purpose for which the transferee intended to utilize the property for as well as to furnish a declaration that he did not hold any urban or urbanizable land with a building or give particulars of such urban land with building held by him.

27. Though the Supreme Court in *Maharao Sahib Shri Bhim Singhji Vs. Union of India* AIR 1981 SC 234 had declared Section 27(1) of the ULCR Act as invalid in so far as it imposed restriction on transfer of any urban land with building which was within the ceiling area but it appears that at the time of entering into the Agreement to Sell in the year 1985, the parties were still under impression of such permission being required. Rather, the respondents/plaintiffs filed the suit pleading that such permission had not been obtained and only when faced with the defence of the appellant/defendant of their own failure to join in applying for the said permission, took the plea of the permission being no longer required. Such inconsistency, on the part of the respondents/plaintiffs, shows, that their

pleas, of the appellant/defendant having kept on assuring them, even after one year, that she was obtaining permissions, were palpably false. The respondents/plaintiffs are not entitled to the grant of the relief of specific performance on this ground as well.

28. The Supreme Court in *Ganesh Shet Vs. Dr. C.S.G.K. Setty* (1998) 5 SCC 381 has held that the plaintiff in a suit for specific performance cannot be permitted to abandon the case made out in the plaint and to invite the Court to decree specific performance of a different contract and the plaintiff having failed to prove what he had set up will be refused specific performance in different circumstance. The somersault of the respondents/plaintiffs in the replication is thus fatal to the case set up in the plaint. If, notwithstanding the clause in the Agreement to Sell, of permission under ULCR Act being obtained, the same was not to be obtained, and at least the respondents/plaintiffs became aware of the same, as pleaded by them in replication, they ought to have informed the appellant/defendant also so and asked her to pursue for other permissions. On the contrary, the respondents/plaintiffs in the plaint set up a case, of permission under the ULCR Act being required and having not been taken by the appellant/defendant. It shows that the respondents/plaintiffs also, till the

filing of the suit were of the view that the said permission was required. It also proves that they, after the signing of the Agreement to Sell, had not done anything. Had they pursued for such permission, they would have known that it was not required, as pleaded by them in the replication.

29. As far as the other permissions are concerned, neither the respondents/plaintiffs in the evidence nor the senior counsel appearing for them have elaborated as to what were such permissions which had to be obtained. Section 269UC was introduced in the Income Tax Act only w.e.f. 1st October, 1986 i.e. much after the Agreement to Sell dated 7th September, 1985 and the limitation of one year expiring on 6th September, 1986 for completion of the sale. Moreover, the apparent sale consideration above which the said provision was applicable (in Delhi), till 30th June, 1995 was Rs.20 lacs. The permission thereunder was certainly not required.

30. I cannot think of any other permission which may have been required except the permission under Section 230A of the Income Tax Act. Undoubtedly the Form 34A prescribed therefor does not require the signatures of the purchaser but requires the copy of the document to be registered to be filed therewith. However the said permission is not such, for obtaining which a period of six months may have been fixed. The purpose

for providing for obtaining such permission is only to ensure that no taxes are due from the seller. For the appellant/defendant to apply for such permission, a draft Sale Deed was to be prepared and which could be only with the consent of the respondents/plaintiffs. If the respondents/plaintiffs had been pursuing the matter with the appellant/defendant for obtaining such permission, such a draft of the proposed Sale Deed would have been got prepared. The only reason for non grant of such permission could have been Income Tax dues of the appellant/defendant and it is not the case of the respondents/plaintiffs that such a draft of the proposed Sale Deed was prepared and that the appellant/defendant ever informed so. The only inference again is that the respondents/plaintiffs, after signing the Agreement to Sell, did not pursue the matter further and slept over the same, till the institution of the suit.

31. That brings me to the most important argument of the respondents/plaintiffs and which prevailed over the learned Addl. District Judge also, of the readiness and willingness of the respondents/plaintiffs being evident from the respondents/plaintiffs getting the bank draft made and purchasing the stamp papers for execution of the Sale Deed. Even though the senior counsel for the appellant/defendant has contested the same

having not been proved but I am of the opinion that even if the respondents/plaintiffs had so got the bank draft prepared and purchased the stamp paper, it belies logic and normal human conduct that no notice in writing to the appellant/defendant would have been given thereof. It cannot be lost sight of that the date of purchase of stamp paper (2nd September, 1986) and the date of the bank draft (9th September, 1986) is very close to the limitation agreed upon between the parties for completion of sale of 6th September, 1986. Had the appellant/defendant misrepresented to the respondents/plaintiffs about having obtained the permissions and had stood up the respondents/plaintiffs inspite of the respondents/plaintiffs having purchased the stamp duty for the Sale Deed and got the bank draft made, the respondents/plaintiffs in the normal course of human behaviour would have definitely got a writing from the appellant/defendant of extension of limitation earlier agreed to for completion of sale. It cannot be lost sight of that the relationship between the parties was not cordial and they were at the time of entering into the Agreement to Sell in litigation with each other, with the appellant/defendant wanting back possession of her property in occupation of the respondents/plaintiffs.

32. A perusal of the examination-in-chief of the respondent/plaintiff no.2 shows that he in his examination-in-chief stuck to the permission in ULCR Act being required. In cross examination, when quizzed as to whether he had also bank draft prepared for the amount of the interest at 1% per annum agreed to be paid under the Agreement to Sell, he did not state that no interest was payable as there was no delay on his part; rather he said that he was to pay the interest in cash. Except for the explanation of cordiality of relations with the appellant/defendant (and which cannot be believed for the aforesaid reasons) no other reason for not sending any communication to the appellant/defendant of the readiness and willingness of the respondents/plaintiffs is given. I therefore tend to agree with the contention of the senior counsel for the appellant/defendant that the case set up by the respondents/plaintiffs of the appellant/defendant having informed them orally of having obtained the permissions and the respondents/plaintiffs having purchased the stamp papers and got the bank draft prepared thereafter and of the appellant/defendant standing the respondents/plaintiffs up and inspite thereof the respondents/plaintiffs having still not given any communication in writing or obtained any extension of time in writing from the appellant/defendant is against the grain of human behaviour and cannot

be accepted and is against the preponderance of probabilities.

33. It was also put to the respondent/plaintiff no.2 in his cross examination whether he had paid any rent to the appellant/defendant and if not why. His reply thereto, of the same being not necessary since he had already entered into the Agreement to Sell is again in contravention of the Agreement to Sell and demonstrates his non-readiness to comply therewith. The payment of rent was suspended only for the period of limitation of the Agreement which as aforesaid was still 6th September, 1986 and it was clearly stipulated in the Agreement that the respondent/plaintiff no.2 would be liable to pay rent thereafter if the sale had not been completed. In spite thereof the respondents/plaintiffs till the date of cross examination i.e. 1st December, 2000 had not paid any rent i.e. for a period of over 14 years.

34. Though the respondents/plaintiffs claim not to have issued any writing/communication to the appellant/defendant when the appellant/defendant made them purchase the stamp paper of the Sale Deed and have the bank drafts prepared, a telegram is claimed to have been sent on 7th December, 1987. There is no explanation of the occasion for sending the telegram at that stage. The said telegram does not refer to the incident of September, 1986. It only calls upon the appellant/defendant to execute the

Sale Deed within three days. Though the said telegram also has not been proved but even though the appellant/defendant did not so execute the Sale Deed, the suit as aforesaid was filed after nearly six months therefrom also, only on 23rd May, 1988. The entire conduct shows that the respondents/plaintiffs taking advantage of being in possession as tenant of the property and not even paying any rent thereof were in no hurry and filed the suit only to save the limitation.

35. The only other witness examined by the respondents/plaintiffs in support of their case besides the witness from the bank is one Mr. Amart Nath Dhamija, property broker who claimed to have brokered the deal. Significantly he was not named in the suit. Had he been the broker, ordinarily he would have pursued the obtaining of such permissions. He does not even claim to have pursued the appellant/defendant to obtain the permission at any point of time. He could not even tell whether any proposed Sale Deed was required to be submitted along with the application for Income Tax permission.

36. There is a distinction between having the financial capacity to pay the balance sale consideration and willingness to pay the balance sale consideration. The preparation of the bank draft and the purchase of the

stamp paper for the Sale Deed at best proved the financial capability of the respondents/plaintiffs. They do not show or demonstrate the wiliness. Though undoubtedly, in the normal course of human behaviour the person who purchases the stamp papers and gets the bank draft prepared would be presumed to be also willing but in the context of the facts of the present case, where the respondents/plaintiffs were in possession of the property, the preparation of bank draft has to be seen only as a creation of evidence and without any presumption of the respondents/plaintiffs having informed the appellant/defendant of the same. The Supreme Court in ***J.P. Builders Vs. A. Ramadas Rao*** (2011) 1 SCC 429 held that the word readiness refers to the financial capacity and the word willingness refers to the conduct of the plaintiff wanting performance. This Court recently in ***Asman Investments Ltd. Vs. K.L. Suneja*** 181 (2011) DLT 156 held that the purchaser never displayed its willingness by tendering the amount at any time.

37. The aforesaid coupled with the fact that the sale was to a sitting tenant in litigation with the seller and from which circumstance the Agreement to Sell though not voidable would certainly be in the nature of conferring an unfair advantage on the respondents/plaintiffs/purchaser over the

appellant/defendant/seller, the discretion is not to be exercised in favour of the respondents/plaintiffs. The circumstances in which the appellant/defendant entered into the contract though not rendering the contract voidable, definitely makes its specific performance inequitable. In *Asman Investments Ltd.* supra also discretion was exercised against a purchaser who was tenant in the property.

38. The appeal therefore succeeds. The impugned judgment and decree of the learned Addl. District Judge is set aside and the suit of the respondents/plaintiffs is dismissed. The respondents/plaintiffs shall be entitled to withdraw the sale consideration which they claim to have deposited with the Execution Court. The appellant/defendant is awarded costs of this appeal assessed at Rs.20,000/- against the respondents/plaintiffs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

DECEMBER 10, 2013

Bs/pp