

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

%

**Date of decision: 8<sup>th</sup> October, 2013**

**+ RFA No.31/2005 & CM No.1099/2005 (of appellant u/O 41 R-27 CPC)**

**PREM PRAKASH CHAUHAN**

**.....Appellant**

Through: Mr. Saurabh Banerjee, Adv.

Versus

**RAMESH CHANDER CHAWLA & ORS**

**..... Respondents**

Through: None.

**CORAM :-**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

**RAJIV SAHAI ENDLAW, J**

1. The appeal impugns the judgment and decree dated 17<sup>th</sup> January, 2005 of the Court of Additional District Judge (ADJ), Delhi of dismissal of Suit No.210/2003 filed by the appellant/plaintiff for specific performance of an Agreement of Sale of immovable property and ancillary reliefs.

2. Notice of the appeal was issued and vide *ex-parte* ad-interim order dated 27<sup>th</sup> January, 2005 the respondents/defendants were directed to maintain *status quo* with regard to the nature, title and possession of the suit property being basement floor of property No.C-47, Lawrence Road, Industrial Area, Delhi. The appeal was on 23<sup>rd</sup> August, 2006 admitted for hearing. There is no order confirming or vacating the interim order and the same is thus deemed to have

continued till today. None appeared for the respondents/defendants when the appeal came up for hearing on 1<sup>st</sup> July, 2013. It was as such directed to be listed thereafter with notation in the cause list of this Court of ‘notice of default to the counsel for the respondents/defendants’. The matter is so listed since then, none has appeared for the respondents/defendants thereafter also. Need is not felt to await the respondents/defendants any further, the respondents having been duly served with notice of the appeal and having entered appearance earlier. The counsel for the appellant/plaintiff has handed over note of arguments which and the Trial Court record have been perused.

3. The appellant/plaintiff instituted the suit, against dismissal of which this appeal arises, pleading:

- (i) that the respondent/defendant No.1 representing himself to be sole and absolute owner of property No.C-47, Lawrence Road Industrial Area, Delhi constructed over 200 sq. yds. had vide Agreement to Sell dated 1<sup>st</sup> May, 1997 agreed to sell the basement therein to the appellant/plaintiff for consideration of Rs.2 lakhs out of which a sum of Rs.40,000/- was paid at the time of execution of the Agreement to Sell and the receipt whereof, the respondent/defendant No.1 had acknowledged by a separate receipt;

- (ii) that the said basement was represented to be let out to the respondent/defendant No.2 Sh. Dalip Gupta;
- (iii) that the balance sale consideration was payable upon the respondent/defendant No.1 obtaining vacant, physical possession from the respondent/defendant No.2 tenant and against execution of transfer documents;
- (iv) that the respondent/defendant No.1 inspite of repeated enquiries of the appellant/plaintiff did not give intimation, as he was required to give under the Agreement, of vacation of the premises by the respondent/defendant No.2;
- (v) that on 27<sup>th</sup> January, 2003, the appellant/plaintiff found the respondent/defendant No.2 to be removing his articles and goods from the premises and the respondents/defendants No.3 & 4 namely Sh. Dinesh Mittal and Sh. Ramesh Kumar placing their goods in the said basement. On enquiry, it was learnt that respondents/defendants No.3 & 4 were negotiating for purchase of the said basement and as part of the said transaction, the respondent/defendant No.2 had agreed to vacate the same;

(vi) that the respondent/defendant No.1 upon being approached stated that he has higher offer from the respondents/defendants No.3 & 4 and that he could sell the same to the appellant/plaintiff, if the appellant/plaintiff agreed to pay Rs.7 lakhs;

accordingly, the suit claiming the reliefs of specific performance, injunction restraining the respondents/defendants from dealing with the property and for cancellation of the documents signed by the respondent/defendant No.1 in favour of the respondents/defendants No.3 & 4 with respect to the said basement was filed.

4. The respondent/defendant No.1 in his written statement, pleaded:

(a) that he had never executed the Agreement to Sell dated 1<sup>st</sup> May, 1997;

(b) that the suit was a counterblast to the suit filed by M/s. Hydraulic Fitting Company of the respondent/defendant No.2 against the appellant/plaintiff for demolition of the unauthorized construction raised by the appellant/plaintiff and which vide order in the said suit had been ordered to be demolished;

(c) that the appellant/plaintiff in his written statement in the said suit aforesaid for demolition of unauthorized construction had not pleaded of

the respondent/defendant No.1 having agreed to sell the basement floor to the appellant/plaintiff;

(d) that the respondent/defendant No.2 in the suit for unauthorized constructed aforesaid had pleaded having executed a Memorandum of Understanding (MoU) dated 28<sup>th</sup> April, 1999 with regard to the said basement and the appellant/plaintiff had not rebutted the averments of the respondent/defendant No.2 with regard to the said MoU with the respondent/defendant No.1;

(e) that the claim for specific performance was barred by time;

(f) that the respondent/defendant No.1 had vide MoU dated 28<sup>th</sup> April, 1999 agreed to sell the basement to the respondent/defendant No.2 and the respondent/defendant No.1 had received Rs.2.5 lakhs through cheque from the respondent/defendant No.2 in this regard;

(g) that the respondent/defendant No.1 had not received any sum of Rs.40,000/- from the appellant/plaintiff;

(h) that the appellant/plaintiff had never approached the respondent/defendant No.1 enquiring about the vacation of the basement by the respondent/defendant No.2 and the appellant/plaintiff was fully

aware of the MoU between the respondent/defendant No.1 and the respondent/defendant No.2;

(i) that the appellant/plaintiff had no rights whatsoever to the basement.

5. The respondent/defendant No.2 also filed a separate written statement, pleading;

(I) that the Agreement to Sell dated 1<sup>st</sup> May, 1997 relied upon by the appellant/plaintiff was a fabrication;

(II) that the suit was barred by time;

(III) that the respondent/defendant No.2 had filed a suit for permanent and mandatory injunction on the ground that the appellant/plaintiff had carried out unauthorized construction in the open verandah and in the plaint in the said suit, the respondent/defendant No.2 had pleaded the Agreement/MoU dated 28<sup>th</sup> April, 1999 with the respondent/defendant No.1 for purchase of the said property; the appellant/plaintiff in his written statement in that suit did not mention the Agreement to Sell dated 1<sup>st</sup> May, 1997 in his favour and thus admitted the ownership of M/s. Hydraulic Fitting Company in which the respondent/defendant No.2 is one of the partners;

(IV) that M/s. Hydraulic Fitting Company was the owner in possession of the basement floor.

6. None appeared for the respondents/defendants No.3 & 4 in the suit despite service and they were proceeded against *ex-parte*.

7. No replications are found to have been filed by the appellant/plaintiff to the written statements of the respondents/defendants No.1 & 2.

8. On the pleadings of the parties, the following issues were framed in the suit on 5<sup>th</sup> April, 2004:

*“(1) Whether the suit has been filed by the plaintiff within the period of limitation? OPP*

*(2) Whether the defendant No.1 entered into agreement for sale of this suit property dated 1.5.97 to the plaintiff, if so, its effect? OPP*

*(3) Whether the plaintiff is entitled for decree of specific performance? OPP*

*(4) Whether the plaintiff is entitled for injunction as claimed by him? OPP*

*(5) Relief.”*

9. The appellant/plaintiff besides himself examined the record clerk of Punjab National Bank, Lawrence Road, Delhi. The respondents/defendants No.1 & 2 examined themselves only in their defense.

10. The learned ADJ has vide the impugned judgment, found/observed/held:

- (i) that the respondent/defendant No.1 had admitted his signatures on the Agreement to Sell dated 1<sup>st</sup> May, 1997, though denied contents thereof;
- (ii) that it was the suggestion of the counsel for the respondent/defendant No.1 in the cross-examination of the appellant/plaintiff that the respondent/defendant No.1 was drunk when he signed the document dated 1<sup>st</sup> May, 1997;
- (iii) that as per the terms of the Agreement to Sell dated 1<sup>st</sup> May, 1997, the respondent/defendant No.1 was to get the basement vacated from the respondent/defendant No.2 and inform the appellant/plaintiff thereof in writing by registered post AD and the appellant/plaintiff was to make payment of the balance sale consideration within fifteen days thereof;
- (iv) that the respondent/defendant No.1 in his cross-examination had stated that the appellant/plaintiff got his signatures on blank paper and thereafter converted them into an Agreement to Sell dated 1<sup>st</sup> May, 1997;
- (v) that it was not a case of the appellant/plaintiff that the respondent/defendant No.2 had ever vacated the premises;
- (vi) that the appellant/plaintiff had failed to prove that the respondent/defendant No.2 had vacated the premises and that the

respondents/defendants No.3 & 4 had taken the possession of the premises;

(vii) that though the respondent/defendant No.1 had executed an Agreement to Sell in favour of the respondent/defendant No.2 but no Sale Deed of the said basement had been executed;

(viii) that the basic condition for enforcement of the Agreement to Sell dated 1<sup>st</sup> May, 1997 was the respondent/defendant No.1 getting vacant physical possession of the basement;

(ix) that no time had been specified in the Agreement to Sell dated 1<sup>st</sup> May, 1997 for getting the basement vacated from the respondent/defendant No.2;

(x) that the respondent/defendant No.1 was thus not in a position to perform his part of the contract;

(xi) that though the rent of the basement payable by the respondent/defendant No.2 was Rs.4,880/- per month and the respondent/defendant No.1 was in a position to file a suit for eviction by terminating the tenancy of the respondent/defendant No.2 but the appellant/plaintiff never insisted upon the respondent/defendant No.1 terminating the tenancy of the respondent/defendant No.2;

(xii) that since on account of non-vacation of the basement by the respondent/defendant No.2, the respondent/defendant No.1 was not in a position to perform his part of the contract, mere communication dated 27<sup>th</sup> January, 2003 by the respondent/defendant No.1 to the appellant/plaintiff that he had received an offer of Rs.9 lakhs from another person could not be said to be a refusal to perform his part of the contract and the suit could not have been filed and the cause of action for the suit would arise only when the respondent/defendant No.1 was successful in obtaining possession from the respondent/defendant No.2;

(xiii) that thus the suit, instead of being barred by time, was premature;

(xiv) that the appellant/plaintiff in his cross-examination had stated that he had entered into three agreements with regard to the different portions of the property, first Agreement dated 18<sup>th</sup> April, 1997 being with respect to the first floor, second Agreement dated 1<sup>st</sup> May, 1997 being with respect to the basement and the third Agreement dated 30<sup>th</sup> August, 1999 being with respect to the portion of the ground floor;

(xv) that the respondent/defendant No.1 had admitted receipt of Rs.40,000/- from the appellant/plaintiff and that though he had also received a sum of Rs.2.5 lakhs towards part sale consideration of the

basement from the respondent/defendant No.2 but he was still the owner of the basement and the respondent/defendant No.2 remained a tenant under him in the basement;

(xvi) that in the suit filed by M/s Hydraulic Fitting Company through its partner respondent/defendant No.2 against the appellant/plaintiff and the respondent/defendant No.1, it was pleaded that the respondent/defendant No.1 had entered into an Agreement/MoU on 28<sup>th</sup> April, 1999 for sale of entire basement floor and had received Rs.2.5 lakhs towards consideration; that the appellant/plaintiff in his written statement to the said suit though referred to the Agreements to Sell dated 18<sup>th</sup> April, 1997 and 30<sup>th</sup> August, 1999 with respect to other two portions of the property, did not refer to the Agreement to Sell dated 1<sup>st</sup> May, 1997 of which specific performance is claimed in these proceedings;

(xvii) that the appellant/plaintiff in his cross-examination, on being enquired as to why he had not disclosed the Agreement to Sell dated 1<sup>st</sup> May, 1997 in that suit, merely stated that it was not necessary;

(xviii) that the aforesaid explanation of the appellant/plaintiff is not satisfactory as on the same parity of reasoning, there was no need to

mention the other two Agreements dated 18<sup>th</sup> April, 1997 and 30<sup>th</sup> August, 1999 also but which had been mentioned;

(xix) that the omission by the appellant/plaintiff to mention the Agreement dated 1<sup>st</sup> May, 1997 in his written statement filed on 27<sup>th</sup> August, 2002 in the suit filed by M/s. Hydraulic Fitting Company was conspicuous and showed that till 27<sup>th</sup> August, 2002, no such agreement had taken place between the appellant/plaintiff and the respondent/defendant No.1;

(xx) that though the respondent/defendant No.1 had admitted his signatures on the Agreement to Sell dated 1<sup>st</sup> May, 1997 but his conduct had been dubious; sometimes he stated that the appellant/plaintiff obtained signatures on the blank papers and sometime that he was drunk when he signed the same;

(xxi) that however since the rights of the respondent/defendant No.2 were also at stake, the matter could not be decided on the conduct of the respondent/defendant No.1 alone;

(xxii) that though it was the evidence of the appellant/plaintiff that the Agreement to Sell was typed in the Court premise but had it been so, it would have been on a stamp paper but is on a plain paper;

(xxiii) that though the receipt of Rs.40,000/- was also of the same day but the ink in which the receipt was written and the ink in which the signatures of the respondent/defendant No.1 on the Agreement to Sell existed were different; if the receipt had been executed at the same time as Agreement to Sell, the same ink would have been used;

(xxiv) that it would thus be unsafe to rely on such a document;

(xxv) that the respondent/defendant No.2 had proved the MoU/Agreement dated 28<sup>th</sup> April, 1999 in his favour and that he had stopped paying rent as per terms and conditions thereof;

(xxvi) that the possibility of the respondent/defendant No.1 colluding with the appellant/plaintiff after executing the MoU with the respondent/defendant No.2 could not be ruled out;

(xxvii) that the letter dated 27<sup>th</sup> January, 2003 by the respondent/defendant No.1 to the appellant/plaintiff was also suspicious;

(xxviii) that thus the Agreement to Sell and receipt were of doubtful veracity and could not be relied upon and the appellant/plaintiff had been unable to prove that he had entered into a valid Agreement to Sell for purchase of the basement;

(xxix) that when no valid Agreement to Sell is proved, there can be no specific performance.

11. The counsel for the appellant/plaintiff in the note of arguments, besides giving a summary of the pleadings and the evidence in the suit has merely highlighted paras F, G, H, I, J, K, M, O, Q, R, S, V, Z, AA, BB, CC and DD of the grounds of appeal, without even making any contentions.

12. The aforesaid does not amount to arguing the appeal.

13. Else, no error is found in the reasoning/logic aforesaid in the impugned judgment. I have satisfied myself that the recording of facts and inferences in the impugned judgment is as per the pleadings and the evidence on record. Still, to satisfy my judicial conscience, I have perused the grounds of appeal highlighted in the note of arguments and do not find the said grounds also to be in negation of the reasoning/logic in the impugned judgment.

14. In my view, the following are enough to justify the dismissal of the claim of the appellant/plaintiff for specific performance:

A. The appellant/plaintiff, inspite of M/s. Hydraulic Fitting Company, a partnership of respondent/defendant No.2 and one Sh. Bhupender Singh, in the plaint in the suit for unauthorized construction filed prior to the institution of the suit from which this appeal arises claiming

Agreement of purchase of the basement in its favour, did not plead the Agreement to Sell dated 1<sup>st</sup> May, 1997 of which specific performance is claimed;

B. The appellant/plaintiff by non-disclosure of the Agreement to Sell dated 1<sup>st</sup> May, 1997 of which specific performance is claimed in the suit filed by M/s. Hydraulic Fitting Company claiming to be owner/agreement purchaser of the basement, let the said M/s. Hydraulic Fitting Company believe/presume that the appellant/plaintiff was not claiming adversely to it vis-à-vis the said basement;

C. The contention of the appellant/plaintiff that it was not necessary to disclose the Agreement to Sell dated 1<sup>st</sup> May, 1997 in the written statement in the suit filed by M/s. Hydraulic Fitting Company, is misconceived; M/s. Hydraulic Fitting Company in the plaint in the said suit set up title with respect to the basement in itself as owner and not as a tenant and complained of interference by the appellant/plaintiff in collusion with the respondent/defendant No.1 in the passage thereto; the appellant/plaintiff in the said plaint was described as an occupant of another portion of the property; the appellant/plaintiff in the written statement pleaded that it was in occupation of certain portions of the

property under Agreement to Sell with the respondent/defendant No.1 and expressly referred to the Agreements to Sell dated 18<sup>th</sup> April, 1997 and 30<sup>th</sup> August, 1999; it nowhere denied the title claimed by the said M/s. Hydraulic Fitting Company as owner of the said basement; in the light of the said M/s. Hydraulic Fitting Company expressly claiming ownership of the basement even though on the basis of the Agreement/MoU dated 28<sup>th</sup> April, 1999, it was incumbent upon the appellant/plaintiff to not only deny the same but to inform of the Agreement, if any in his favour;

D. Even though the appellant/plaintiff was aware of the said claim of M/s. Hydraulic Fitting Company but still the said M/s. Hydraulic Fitting Company was not impleaded as a party to the suit for specific performance and mere impleadment of the respondent/defendant No.2 who is but one of the partners of M/s. Hydraulic Fitting Company does not amount to impleadment of the said M/s. Hydraulic Fitting Company;

E. In fact, the Agreement/MoU between the respondent/defendant No.1 and the said M/s. Hydraulic Fitting Company and of which the appellant/plaintiff was made aware prior to the institution of the suit from which this appeal arises, records the said M/s. Hydraulic Fitting

Company a partnership firm and not the respondent/defendant No.2 alone, being the tenant in the said basement; still M/s. Hydraulic Fitting Company was not impleaded as a party to the suit from which this appeal arises;

F. The inferences in the impugned judgment of collusion between the appellant/plaintiff and the respondent/defendant No.1 are well founded specially from the *inter se* transaction between respondent/defendant No.1 and the respondent/defendant No.2 with respect to sale of two other portions of the property;

G. Even if no time for performance is provided in the Agreement to Sell, the settled law is (see ***Chand Rani Vs. Kamal Rani*** (1993) 1 SCC 519) that the same has to be performed in a reasonable time; the quietus of the appellant/plaintiff in the present case from 1<sup>st</sup> May, 1997 till 2003 when the suit was filed i.e. of nearly six years, is inexplicable;

H. Even if the performance of an Agreement to Sell by the seller is dependant upon such pre-conditions, the purchaser cannot so sit quietly for unreasonable long time, especially when it is not the case that any efforts were being made by the respondent/defendant No.1 for vacation of the premises; there is no challenge to the reasoning given by the

learned ADJ of it being open to the respondent/defendant No.1 to have the said basement vacated through the process of law, since the tenancy of the respondent/defendant No.2 was not protected by the Delhi Rent Control Act, 1958 but the appellant/plaintiff did not pursue the respondent/defendant No.1 for instituting any proceeding for ejectment of the respondent/defendant No.2;

I. It is nowhere the case of the appellant/plaintiff, neither in the suit nor before this Court that he is willing to take the basement with the respondent/defendant No.2; admittedly, the respondent/defendant No.2 has not vacated the basement till now and such eviction cannot be subject matter of the present proceedings and the Agreement is thus incapable of performance;

J. If the respondent/defendant No.1 within a reasonable time of the Agreement to Sell did not take steps for having the basement vacated, the appellant/plaintiff ought to have immediately sued for specific performance by directing the respondent/defendant No.1 to take steps for having the premises vacated from the respondent/defendant No.2.

15. I am therefore in agreement with the reasoning/logic given by the learned ADJ, and also hold the suit to be barred by time and the appellant/plaintiff to

have been not ready and willing to perform his part of the Agreement to Sell and do not find any merit in this appeal and dismiss the same with costs.

16. As far as the application of the appellant/plaintiff under Order 41 Rule 27 CPC is concerned, the appellant/plaintiffs wants to lead evidence to show that the partnership of M/s. Hydraulic Fitting Company had ceased to exist in the year 2002; on the basis thereof, the contention is that the Agreement/MoU dated 28<sup>th</sup> April, 1999 had been abandoned. In view of findings above, this aspect is irrelevant.

Decree sheet be drawn up.

**RAJIV SAHAI ENDLAW, J.**

**OCTOBER 08, 2013**

‘bs’