

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

%

Date of decision: 6th December, 2013

+

RFA 388/2011

GULSHAN KUMAR & ORS

..... Appellants

Through: Mr. G.L. Rawal, Sr. Adv. with Mr. Kuljeet Rawal, Amarjeet Singh and Mr. Jagjit Singh, Advocates.

Versus

SAT NARAIN TULSIAN (DECEASED)

THROUGH LRS.

..... Respondents

Through: Mr. Ashutosh Dubey, Adv. for R-1, 2 & 4.

Mr. Jayant K. Mehta, Mr. Sukant Vikram and Mr. Anuj Kapoor, Advs for R-3.

Mr. Madan Gera & Mr. Aman Vachher for subsequent purchaser.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. The appeal impugns the judgment and decree (dated 30th April, 2011 of the Court of the Addl. District Judge (Central-07) Delhi in Suit No.383/2010/1980 filed by the four appellants against Shri Sat Narain Tulsian being the predecessor of the respondents no.1 to 6 in this appeal) of

dismissal of the suit for specific performance of a contract for sale of property No.H-3/11, Model Town, Delhi constructed over land *ad measuring* 1250 sq. yds.

2. Notice of the appeal was issued and though the appeal was accompanied with an application for interim relief but the same was not pressed. The Trial Court record was requisitioned. The appellants/plaintiffs however within about ten days moved another application for interim relief to restrain the respondents/defendants from demolishing the subject property. The said application came up before this Court on 11th August, 2011, in order of which date it was observed that the senior counsel for the appellants/plaintiffs was heard at length on the application for interim relief on the date when notice of the appeal was issued but upon the Court being not inclined to grant any interim relief had not pressed the application. The second application for interim relief was thus held to be in abuse of the process of the Court. The application was thus dismissed. The respondents/defendants on that date also informed that the subject property had already been sold by them. The respondent/defendant no.1 Shri Raj Kumar Tulsian died during the pendency of this appeal and his legal heirs were substituted vide order dated 9th November, 2011. The

appellants/plaintiffs also sought impleadment of Smt. Veena Gupta to whom the respondents/defendants no.1 to 6 had sold the property and the said application was also allowed on 9th November, 2011 and the said Smt. Veena Gupta impleaded as a respondent to the appeal (respondent no.9 as per the amended memo of parties). On the same date i.e. 9th November, 2011 the appeal was also admitted for hearing. Hearing of the appeal was expedited as some of the parties thereto are senior citizens. The senior counsel for the appellants/plaintiffs and the counsel for the respondent/defendant no.3 have been heard. The counsel for the subsequent purchaser Smt. Veena Gupta and the counsel for the respondent/defendant no.3 have also filed written submissions/propositions of law which have been perused.

3. The appellants/plaintiffs on 12th May, 1980 instituted the suit from which this appeal arises, pleading:-

- (a) that the defendant Shri Sat Naraian Tulsi was the owner of the property;
- (b) that Shri Bhagat Ram, being father of the present appellants/plaintiffs and husband of the then plaintiff no.5 along

with the appellant/plaintiff no.1 Shri Gulshan Kumar intended to purchase the said property and negotiations were going on which matured on 13th April, 1978 when the defendant agreed to make sale of the said property to the said Shri Bhagat Ram and appellant/plaintiff no.1 for total consideration of Rs.4,50,000/-;

- (c) that the terms orally settled were that the defendant was to take necessary permission from the Competent Authority under the Urban Land (Ceiling and Regulation) Act, 1976 (ULCR) and to obtain Clearance Certificate from the Income Tax Department and to otherwise remove impediments to make himself fit to execute the Sale Deed for the purpose of passing appropriate title to the purchasers and to execute deed and get the same registered within a period of six months computed from 13th April, 1978; it was assured that the property was free from all encumbrances; that the appellants/plaintiffs were to meet the stamp registration charges; the actual and physical possession was to be delivered at the time of execution and registration of the Sale Deed; that if the defendant failed, neglected or refused

to transfer the property with its clean title, the appellants/plaintiffs would be entitled to get the property transferred by an action of suit for specific performance and no amount of compensation would compensate in any circumstances; that if the purchasers refused or neglected in any manner or did not comply with their part of the contract, a sum of Rs.25,000/- shall stand forfeited;

- (d) that earnest money to the tune of Rs.25,000/- as advance part payment as agreed was paid to the defendant by cheque drawn by M/s. Bhagat Ram Gulshan Kumar in which the said Shri Bhagat Ram and the appellant/plaintiff no.1 Gulshan Kumar were partners; the balance Rs.4,25,000/- was payable at the time of registration of the Sale Deed;
- (e) that the defendant executed a receipt for Rs.25,000/- admitting therein the agreement to make sale of the said property and to execute the Sale Deed within the period of six months;

- (f) that Shri Bhagat Ram died on 2nd April, 1979 leaving the appellant/plaintiff no.1 and the remaining appellants/plaintiffs as his sons, daughter and widow;
- (g) that the appellant/plaintiff no.1 was suing as a party to the contract as well as an heir of Shri Bhagat Ram and the remaining appellants/plaintiffs as the heirs of Shri Bhagat Ram;
- (h) that the defendant “now it seems” had not taken any steps for making him fit to execute the Sale Deed and had not obtained the permissions which he had agreed to take;
- (i) that during the lifetime of Shri Bhagat Ram, defendant was being approached by the appellant/plaintiff no.1 and had been promising that he was taking steps to get the necessary permissions and clearances and the purchasers had been believing the defendant;
- (j) that even after the death of Shri Bhagat Ram, the appellants/plaintiffs had been following up with the defendant and were always ready and willing and even then ready and willing to perform their part of the Agreement;

- (k) that the appellants/plaintiffs got issued a notice dated 29th January, 1980 to the defendant to comply with the formalities and deliver vacant peaceful physical possession of the property; and,
- (l) that the defendant by telegraphic reply falsely denied having ever agreed to sell the property.

4. The original defendant Shri Sat Naraian Tulsian contested the suit by filing a written statement, pleading:-

- (i) that there was no agreement between the parties;
- (ii) in any event the alleged agreement was vague, indefinite, incomplete and incapable of enforcement;
- (iii) that the property belonged to the joint family of the defendant;
- (iv) that the firm M/s. Bhagat Ram Gulshan Kumar had expressed desire to the defendant to purchase the property but no concluded agreement was arrived at and the negotiations never entered the domain of a concluded contract;
- (v) that at no time consideration of Rs.4,50,000/- was agreed;

- (vi) that the defendant had very good relations with Shri Bhagat Ram, both being in the same trade; in January, 1978 the defendant had casually expressed a desire to Shri Bhagat Ram that he was thinking of disposing of his property; Shri Bhagat Ram on behalf of M/s. Bhagat Ram Gulshan Kumar started negotiating with the defendant; while the defendant demanded Rs.12,50,000/- as the price of the property, Shri Bhagat Ram offered Rs.11,50,000/- and the negotiations failed;
- (vii) ultimately in the beginning of April, 1978 Shri Bhagat Ram, on behalf of the firm M/s Bhagat Ram Gulshan Kumar again approached the defendant and started negotiations;
- (viii) on 13th April, 1978 it was agreed that the price of the property in question would be settled with the intervention of common friends namely Shri Dhanpat Rai of M/s Parma Nand Dhanpat Rai, Shri Shiv Shankar Tulsian and Shri Gian Chand and within six months from that date a sale will be executed by the defendant in favour of M/s. Bhagat Ram Gulshan Kumar after the defendant had also obtained the consent of other members of the family;

- (ix) in order to bind the defendant, lest he should dispose of the property to any other person, a cheque for Rs.25,000/- was thrust upon the defendant with a condition that the price will be settled with the intervention of the aforesaid common friends;
- (x) that Shri Dhanpat Rai, Shri Shiv Shankar Tulsian and Shri Gian Chand had been having meetings with Shri Bhagat Ram and also with the defendant;
- (xi) in the end of June, 1978, Shri Dhanpat Rai, Shri Shiv Shankar Tulsian and Shri Gian Chand settled the price at Rs.11,95,000/- and directed Shri Bhagat Ram and the defendant to enter into a formal agreement incorporating all the terms thereof and M/s Bhagat Ram Gulshan Kumar should pay another sum of rupees one lac as advance to the defendant on the execution of the agreement;
- (xii) both parties agreed to the price and the modus aforesaid;
- (xiii) however M/s. Bhagat Ram Gulshan Kumar did not pay the amount by the end of August, 1978 nor any final agreement was executed between the parties;

- (xiv) before the agreement could be recorded in writing, there were unprecedented floods in the area of Model Town, Delhi on 5th September, 1978 and the entire property was submerged in water and the said floods remained in the locality for more than ten days;
- (xv) due to this calamity, the prices of the properties in the locality immediately fell;
- (xvi) that when the floods subsided, the defendant approached Shri Bhagat Ram to pay rupees one lac and get the agreement engrossed and to get a draft sale deed prepared to enable the defendant to apply to the Income Tax Department for clearances and to the Land Ceiling Authority for permission under the ULCR Act but Shri Bhagat Ram expressed his inability to do so because of change of circumstances and because of the rumor then prevalent of such floods being likely to re-occur every year;
- (xvii) that the contract thus came to an end;

(xviii) that the defendant thereafter extensively repaired his property to make it habitable; and,

(xix) that owing to the Central Government having made arrangements to prevent such floods in future, the prices of the properties in the locality had gone up and the suit had been filed taking advantage thereof.

5. The appellants/plaintiffs filed a replication denying the averments in the written statement and reiterating their case.

6. On the pleadings aforesaid of the parties, the following issues were framed in the suit on 8th December, 1980:-

- “(1) Was there any valid and concluded agreement of sale with regard to the property in dispute between the parties? If so, when and on what terms and conditions?”*
- (2) Is the property in dispute Joint Hindu Family property of the defendant and his sons etc.?”*
- (3) Was the defendant not competent to enter into any agreement of sale with respect to the property in dispute on account of its being HUF property?”*
- (4) Have the plaintiffs locus standi to sue?”*
- (5) Did the plaintiff abandon the transaction in question at any time as alleged in the written statement?”*

- (6) *Have the plaintiffs been ready and willing to perform their part of the contract and they are still willing to do so? If not, to what effect?*
- (7) *Relief.”*

7. The appellants/plaintiffs examined in all four witnesses. The defendant examined himself in his defence.

8. The learned Addl. District Judge, vide judgment and decree dated 6th April, 2002 dismissed the suit of the appellants/plaintiffs ignoring the oral evidence led by the parties holding that in view of Sections 91 & 92 of the Indian Evidence Act, 1872, the same could not be looked at.

9. The appellants/plaintiffs preferred RFA No.363/2002 to this Court which was disposed of vide judgment dated 11th September, 2008. It was held that the agreement pleaded by the appellants/plaintiffs was not predicated on the receipt for Rs.25,000/- for Sections 91 & 92 supra to be invoked; the case of the appellants/plaintiffs was of an oral agreement with the receipt being an evidence thereof and thus Sections 91 & 92 were not attracted. However since the learned Addl. District Judge had not returned any finding on the basis of the evidence led, though the judgment and decree dated 6th April, 2002 of dismissal of the suit was set aside but the suit remanded to the Addl. District Judge for decision afresh on the existing

pleadings, issues framed and evidence led, after hearing the counsels for the parties.

10. The learned Addl. District Judge has now vide the impugned judgment and decree dated 30th April, 2011 again dismissed the suit, finding/observing/holding:-

- A. that the plea of the defendant that since the cheque for Rs.25,000/- was issued by the partnership firm M/s Bhagat Ram Gulshan Kumar from the bank account of the partnership firm, the appellants/plaintiffs had no *locus standi* to file the suit had no merit as it was not the requirement of the law that the person who intend to purchase the property must have made payment out of his account; accordingly issue no.4 was decided in favour of the appellants/plaintiffs and against the defendant;
- B. that the Sale Deed of the property was in the individual name of the defendant and though the HUF of the defendant was an Income Tax assessee but in the Income Tax Return of the said HUF the said property was not shown; thus issue no.2 was also

decided in favour of the appellants/plaintiffs and against the defendant;

- C. resultantly it was held that the defendant was competent to enter into an agreement for sale of the property and issue no.3 was decided in favour of the appellants/plaintiffs and against the defendant;
- D. that it was the contention of the defendant that if everything was settled between the parties at the time of execution of the receipt, as contended by the appellants/plaintiffs, then those terms would have been incorporated in the receipt itself in the form of an Agreement;
- E. that as per the deposition of the appellants/plaintiffs, the price of Rs.4,50,000/- and other terms and conditions as pleaded were settled on 13th April, 1978 only and the defendant had told them that he would get the agreement for sale prepared recording the said terms and conditions; however subsequently the defendant told them that there was no need to execute the agreement as he would execute the Sale Deed and get it registered;

- F. that the appellants/plaintiffs in their cross examination deposed that though the defendant was to send the agreement within two/three days of 13th April, 1978 and had not sent the same but they themselves did not get any agreement prepared nor sent it to the defendant and did not even given any notice to the defendant till the issuance of the notice on 29th January 1980;
- G. that the appellants/plaintiffs in their deposition admitted heavy flood in which Model Town was submerged on 5th September, 1978 and that the water had remained for five days;
- H. that the appellants/plaintiffs in their deposition also stated that they had verbally agreed to pay one percent commission to the property dealer Shri Dharamvir Verma;
- I. Shri Dharamvir Verma, Property Dealer examined by the appellants/plaintiffs deposed that though the appellants/plaintiffs had asked the defendant to write down the sale consideration of Rs.4,50,000/- which had been agreed upon in the receipt, however the defendant had stated that there was no need thereof; however in cross examination he agreed that

usually sale consideration is mentioned in the document when the earnest money is given though explained that in the subject transaction it was not done because of the intimacy between the parties;

- J. that the defendant in his cross examination stated that the amount of Rs.25,000/- received by him was being still shown as credit to the account of M/s. Bhagat Ram Gulshan Kumar in his account book and he had not till then forfeited the same;
- K. that the defendant also admitted that he had not given any notice of demand of rupees one lac;
- L. that the defendant in his deposition deposed the value of the property to be Rs.13,50,000/- on the basis of Valuation Report;
- M. that since the appellants/plaintiffs had not pleaded about the property broker, his evidence was beyond pleadings;
- N. that the onus to prove the sale consideration and the other terms and conditions settled, was on the appellants/plaintiffs;

- O. that the defendant had failed to examine the three mediators who were pleaded to have been agreed upon to settle the sale consideration;
- P. that though the counsel for the defendant had in arguments explained that two mediators died before the recording of the evidence and one suffered a brain stroke but no evidence to the said effect or proof thereof was produced;
- Q. that though the defendant had approached the High Court during the trial to allow his two sons to be examined as witnesses and the said request was allowed but had failed to examine them also;
- R. that the defendant had thus deliberately avoided to examine the mediators as well as his sons who were alleged to be part of the negotiations;
- S. the defendant had thus failed to substantiate that the said three persons acted as mediators or had settled the sale consideration for Rs.11,95,000/-;

- T. however the failure of the defendant to prove the sale consideration of Rs.11,95,000/- in itself was not sufficient to believe the version of the appellants/plaintiffs of the sale consideration of Rs.4,50,000/-having been agreed;
- U. that though the appellants/plaintiffs had pleaded that on 13th April, 1978 the agreement was concluded and as per which agreement the defendant was to execute the Sale Deed within six months and that there was no need to execute the written agreement to sell after 13th April, 1978 but the appellants/plaintiffs in their testimony had deposed having asked the defendant to mention the sale consideration in the receipt for Rs.25,000/- and the defendant to have responded that he would get the Agreement to Sell prepared on the terms agreed including the sale consideration but of the defendant subsequently saying that there was no need for the Agreement to Sell also; the other witnesses examined by the appellants/plaintiffs had also deposed so;

- V. the deposition of the appellants/plaintiffs and their witnesses to the said effect was contrary to the case of the appellants/plaintiffs in their pleadings;
- W. that the appellants/plaintiffs in their evidence had failed to mention the date, month and year when the defendant stated that there was no need to execute Agreement to Sell and he would execute the Sale Deed directly;
- X. that in the receipt not only the fact of payment of Rs.25,000/- was mentioned but it was also mentioned that the Sale Deed will be executed within six months; it implied that the receipt was not merely an acknowledgment of payment but was something more than that;
- Y. if other terms & conditions including sale consideration were agreed between the parties then, there was no reason to not mention the same in the receipt;
- Z. there was in-consistency as aforesaid in the reasons given by the appellants/plaintiffs for not mentioning the other terms & conditions in the receipt;

AA. that the reason given by the appellants/plaintiffs for not mentioning the sale consideration and other terms in the receipt was not a plausible one;

AB. that the appellants/plaintiffs were running a number of partnership firms and were not laymen but businessmen, having full knowledge of the nature of the transaction, its formalities and the practice prevalent in the market; it was not their case that the defendant executed the said receipt unilaterally; it implies that they were vigilant of the fact that they had to secure the fact of payment of Rs.25,000/-; that is why they got the receipt executed from the defendant despite the fact that the payment was made via cheque and not in cash; in fact the appellants/plaintiffs had also deposed that they had insisted to have a proper and formal Agreement of Sale meaning that they were not satisfied with the oral terms & conditions; however that was not done; it is not the case of the appellants/plaintiffs that they had blind faith upon the defendant; it is also not their case that the defendant had refused the request to execute the Agreement to Sell as well as to mention the sale consideration

in the receipts; as such the appellants/plaintiffs had completely failed to explain that once they got recorded in the receipt the fact of payment and the time period for execution of the Sale Deed, then why they left the total sale consideration as well as the other terms alleged to be settled to be mentioned in the receipt;

AC. that the property broker examined by the appellants/plaintiffs had also admitted the prevalent practice of mentioning of total sale consideration in the receipt;

AD. that the appellants/plaintiffs had completely failed to assign a single reason for deviation from the normal practice to mention the sale consideration in the receipt;

AE. that the appellants/plaintiffs had also failed to explain the basis on which Rs.25,000/- was paid or towards what percentage of the sale consideration the said amount was paid;

AF. the appellants/plaintiffs had failed to explain why everything contrary to the usage and practice was done;

- AG. thus it has to be held that the terms as pleaded in the plaint and the sale consideration of Rs.4,50,000/- was not fixed on 13th April, 1978 and only whatever was agreed between the parties on 13th April, 1978 was mentioned in the receipt;
- AH. that though the appellants/plaintiffs had relied upon sale dated 29th September, 1980 regarding property No.H-3/12, Model Town, Delhi to show the prevalent rate but the same was of no avail as the appellants/plaintiffs had failed to prove sale consideration of Rs.4,50,000/- to have been agreed on 13th April, 1978;
- AI. admittedly there were floods in the colony in September, 1978 and it implies that when the Sale Deed was executed in the year 1980 the prices had fallen and thus the said Sale Deed of the year 1980 cannot give prevalent market price on 13th April, 1978;
- AJ. that the appellants/plaintiffs in their deposition had admitted that the construction of the suit property was of very good quality;

- AK. that the appellants/plaintiffs had failed to establish that the location as well as the quality of construction of suit property and of property No.H-3/12 of which Sale Deed dated 29th September, 1980 was proved, were identical;
- AL. even otherwise on the basis of a single Sale Deed, that too for a different period, it cannot be held that the same rate was prevalent in the year 1978;
- AM. that there was no inconsistency in the stand of the defendant in the reply to the legal notice and in the written statement as contended by the appellants/plaintiffs;
- AN. that though there was a contradiction in the stand of the defendant qua the status of Rs.25,000/-, with the defendant in written statement stating that the said amount was forfeited and in his deposition deposing that the same was still standing to the credit of the appellants/plaintiffs and though the defendant had failed to examine the mediators nor had established any explanation therefor but the said contradictions could not lead to a conclusion that the oral agreement pleaded by the

appellants/plaintiffs existed when the appellants/plaintiffs had failed to prove the same;

AO. that the introduction by the appellants/plaintiffs of the property dealer and of the execution of Agreement to Sell being agreed to be executed, in the evidence and which did not exist in pleading put a question mark on the manner of negotiations and existence of the agreement itself;

AP. the contradictions of the appellants/plaintiffs were more fatal than the contradiction in the defence of the defendant;

AQ. that the receipt itself could not constitute an Agreement to Sell and was not enforceable;

AR. the receipt was not on a Revenue Stamp and did not speak about the sale of the property;

AS. that since no concluded Agreement to Sell was proved/established to have been reached between the parties, the question of specific performance thereof did not arise;

AT. though in the absence of the appellants/plaintiffs proving a concluded Agreement to Sell to have been reached, the issue

No.6 relating to readiness and willingness of the appellants/plaintiffs was irrelevant but the appellants/plaintiffs had proved that they were financially sound at the relevant time and were also in a position to arrange the balance sale consideration;

AU. however the appellants/plaintiffs had failed to prove their willingness; though it was their case that the Sale Deed was to be executed within six months and though they pleaded that they had approached the defendant with a request to execute the Sale deed but no specific date of having so approached the defendant was pleaded/proved and the first missive from the appellants/plaintiffs was only on 29th January, 1980;

AV. thus though the appellants/plaintiffs were financially capable but have not proved themselves to have been ready and willing to perform their part of the agreement pleaded by them; accordingly issue No.6 was decided against the appellants/plaintiffs and in favour of the defendant;

AW. the conduct of the appellants/plaintiffs of neither sending any letter/notice till 29th January, 1980 nor pleading or proving any date on which they may have approached the defendant for execution of the Sale Deed coupled with the admitted floods in the colony in September, 1978 i.e. within six month of the alleged Agreement dated 13th April, 1978 indicated that the appellants/plaintiffs had not shown any interest to go ahead with the transaction; and,

AX. that the appellants/plaintiffs had also deposed that two years prior to 1980 they had purchased a plot of land in Derawala Nagar and were raising construction thereon and had started living therein ; it was not their case that despite the same they wanted to purchase the suit property also for their residence; this was also indicative of the appellants/plaintiffs being not interested in the suit property - accordingly issue No.5 was decided against the appellants/plaintiffs and in favour of the defendant.

and resultantly the suit was dismissed.

11. Before I proceed to record the respective contentions, it is deemed appropriate to re-produce the English translation of the receipt aforesaid in Hindi proved as Ex.P4 as given in the impugned judgment and to which translation no objection has been raised by either counsel. The same is as under:-

“Shree Ganeshay Namah”

*Bavat Kothi No.H-3/11, Model Town Walon Ki
Bawat advance ka cheque Rs.25,000/-, cheque No.762815
Indian Overseas Bank, Model Town upar ka Sh. Bhagat
Ram Gulshan Kumar Ji se vasool paaye. Registry 6 maah
tak karva denge.”*

12. The senior counsel for the appellants/plaintiffs has argued:-
- A. that the defendant has not denied the Agreement to Sell of the property with the appellants/plaintiffs and the oral Agreement to Sell is thus not in dispute;
 - B. the only controversy is of the terms thereof;
 - C. that the defendant did not examine either of the three mediators who according to the defendant had fixed the price; the version of the defendant is thus to be disbelieved; and,
 - D. from the defendant taking a false plea in the written statement of the property belonging to his HUF also it ought to be inferred

that the version of the defendant of the terms of the oral Agreement to Sell is false.

13. The counsel for the respondent no.3 has argued:-

- I. that while issuing notice of the appeal, no interim stay as sought restraining the respondents / defendants from dealing with the property was granted and the respondents / defendants accordingly sold the property;
- II. that the appellants/plaintiffs in the plaint did not plead that on 13th April, 1978 they had asked the defendant to mention the total sale consideration agreed in the receipt or that the defendant had avoided the same stating that he would within two or three days have a formal Agreement to Sell drafted recording terms and conditions agreed and send it to the appellants/plaintiffs for execution, as deposed by the appellants/plaintiffs and their witnesses in evidence and the same showed that the appellants/plaintiffs in the plaint had not pleaded the entire agreement;

- III. that Form 34A under the Income Tax Rules requires the consideration to be mentioned and it is not the plea of the appellants/plaintiffs that any Form 34A was signed by the defendant; the only conclusion is that no sale consideration had been agreed upon between the parties on 13th April, 1978;
- IV. that there was absolutely no communication from the appellants/plaintiffs till the six months from 13th April, 1978 in which time according to the appellants/plaintiffs the permissions were to be obtained and Sale Deed to be executed;
- V. there was no communication for over one year after the expiry of the said six months also, till the notice dated 29th January, 1980 was issued;
- VI. no dates on which the appellants/plaintiffs claim to have contacted the defendant have been pleaded or proved;
- VII. that ordinarily a party to an agreement does not issue a notice straightway and issuance of such a notice shows that the same was in preparation to file a suit;

- VIII. though the appellants/plaintiffs had not pleaded but had deposed involvement of a broker; that there are inconsistencies in the versions of the agreement in the depositions of the appellants/plaintiffs and their witnesses;
- IX. attention is invited to ***V.R. Sudhakara Rao Vs. T.V. Kameswari*** (2007) 6 SCC 650 laying down tests for an oral Agreement to Sell;
- X. that though the appellants/plaintiffs in their evidence sought to justify non-mentioning of the sale consideration in the receipt on account of intimacy with the defendant but have not pleaded such intimacy;
- XI. acquaintance in trade is not intimacy;
- XII. that the conduct of the appellants/plaintiffs as has emerged is not of a prudent person;
- XIII. reliance is placed on ***Lalit Kumar Sabharwal Vs. Ved Prakash Vijn*** 2003 (68) DRJ 670 to contend that merely a receipt signed by one party only cannot be an Agreement to Sell;

XIV. reliance is placed on *Ameer Mohammed Vs. Barkat Ali* AIR 2002 Raj 406 to contend that when the plaintiff bases the suit on the basis of oral Agreement of Sale then it is the duty of the plaintiff to disclose all material facts and particulars with all the conditions of the agreement and the surrounding circumstances including in whose presence the agreement was entered into and what negotiations took place and the plaintiff is required to prove the oral agreement as a whole, by trustworthy evidence;

XV. that the grant of the relief of specific performance is a discretionary one and the said discretion ought not to be exercised in favour of the appellants/plaintiffs 33 years after the Agreement to Sell; and,

XVI. appellants/plaintiffs have not acted with promptitude.

14. The senior counsel for the appellants/plaintiffs in rejoinder has contended:-

(A) that the application for permission in Form-34 A under Section 230A of the Income Tax Act is not required to be signed by the purchaser;

- (B) reliance is placed on *Maman Chand Vs. State* 2008 VII AD (Delhi) 21 & *M/s. Chuni Lal Dwarka Nath Vs. Hartford Fire Insurance Co. Ltd.* AIR 1958 Punjab 440 on the effect of non-cross examination of a witness on any particular aspect;
- (C) that in cases of Agreement of Sale of immovable property, specific performance is the norm and refusal an exception; reliance in this regard is placed on *Ajit Prashad Jain Vs. N.K. Widhani* AIR 1990 Delhi 42;
- (D) that the defendant had been taking adjournments in the suit and is responsible for the long delay and cannot now use the same to defeat the just claim of the appellants/plaintiffs for specific performance;
- (E) that the defendant by taking false plea of property belonging to his HUF forced the appellants/plaintiffs to summon the Income Tax records, further delaying the proceedings;
- (F) that when a identical property in the year 1980 has been proved to have been sold for Rs.6 lacs, the price agreed upon on 13th

April, 1978 as pleaded by the appellants/plaintiffs of Rs.4,50,000 is believable;

- (G) that the discrepancies, in the statements of the witnesses of the appellants/plaintiffs, relied upon by the respondents / defendants are owing to their testimony being recorded after long passage of time;
- (H) that the perusal of the Trial Court record shows that the defendant tried for three years to prevail upon the mediators named in the written statement to depose in his favour but failed;
- (I) that once the version of the defendant of the terms & conditions of the oral Agreement to Sell has not been proved, the version of the appellants/plaintiffs has to be accepted;
- (J) that Section 16 (c) of the Specific Relief Act, 1963 does not require any particulars of readiness and willingness to be pleaded; reliance is placed on *Syed Dastagir Vs. T.R. Gopalakrishna Setty* (1999) 6 SCC 337 and on *Motilal Jain Vs. Ramdasi Devi* (2000) 6 SCC 420 in this regard;

- (K) reliance is placed on *Smt. Shakuntla Devi Vs. M/s. Mohanlal Amrit Raj Jain Market, Pali* AIR 1994 Rajasthan 259 to contend that the purchaser is required to show his readiness and willingness to pay the balance sale consideration only as and when the occasion therefor arises i.e. when the seller has obtained permission and not prior thereto;
- (L) that the appellants/plaintiffs were not required to plead what was deposed as a reason/explanation for non-mentioning of the sale consideration in the receipt; and,

15. The counsel for the subsequent purchaser in his written submissions has contended:-

- (i) for specific performance to be ordered, the terms & conditions agreed upon between the parties must be certain and specific; reliance in this regard is placed on *M/s Mirahul Enterprises Vs. Mrs. Vijaya Sirivastava* AIR 2003 Delhi 15 and *M/s Trimurthy Constructions Vs. Vijaya Laxmi Gadgil* AIR 1993 Andhra Pradesh 95;

- (ii) that the receipt proved in the present case is not an enforceable agreement and is at best an agreement for entering into an Agreement to Sell;
- (iii) inconsistencies in the version of the transaction, given in the testimonies of the four witnesses examined by the appellants/plaintiffs are pointed out;
- (iv) that from the testimony of all the witnesses, it is established that a regular agreement for sale was agreed to be executed later on between the parties and which admittedly was not executed and there is thus no concluded contract between the parties; reliance in this regard is placed on *Mayawanti Vs. Kaushalya Devi* (1990) 3 SCC 1 and *Ganesh Shet Vs. Dr. C.S.G.K. Setty* (1998) 5 SCC 381 and on *Rabindra Nath Sahu Vs. Mrs. Maya Devi* AIR 1991 Patna 192;
- (v) non-mentioning of the total sale consideration on the receipt can lead to only one conclusion that on the date of execution of the receipt, the same had not been agreed upon;

- (vi) that the evidence of the property broker being beyond pleadings cannot be looked at;
- (vii) that the learned Addl. District Judge has erred in holding the appellants/plaintiffs to be financially capable even though the appellants/plaintiffs had not led any evidence in this regard and the finding of the learned Addl. District Judge is based on mere oral assertions of the appellants/plaintiffs appearing as witnesses; and,
- (viii) that from the facts it is clear that the defendant had abandoned the agreement.

16. The counsel for the respondent No.3 in the list of cases on relevant propositions of law has referred to a large number of other judgments than which were cited at the time of hearing but the same cannot be permitted; thus no cognizance thereof is being taken. Mention may however be made of ***Brij Mohan Vs. Sugra Begum*** (1990) 4 SCC 147 and ***V.R. Sudhakra Rao Vs. T.V. Kameswari*** (2007) 6 SCC 650 laying down the tests to be applied in specific performance of an oral agreement. Reference may also be made to ***Pelikan Estates Pvt. Ltd. Vs. Shri Kamal Pal Singh*** 2004 VI AD (Delhi)

185 though concerned with the grant of interlocutory relief in suits for specific performance of an oral agreement to sell.

17. I have considered the rival contentions.

18. I had during the hearing enquired from the senior counsel for the appellants/plaintiffs whether not the application for permission under ULCR Act which according to the appellants/plaintiffs was agreed to be obtained in a time span of six months between the date of the oral Agreement to Sell i.e. 13th April, 1978 and the date fixed for completion of sale, was required to be signed by the purchaser also in as much as the said permission could not have been granted without the authority granting the said permission being satisfied that the purchaser was eligible to acquire the property. Though the senior counsel for the appellants/plaintiffs had stated that he will revert to the said aspect in his rejoinder, but no answer has been given.

19. My own study shows that 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 signed 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 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.

20. That being the position, even if the version of the appellants/plaintiffs as set out hereinabove were to be believed, the appellants/plaintiffs do not claim that they took any steps for preparation/drafting of the document to be

executed in regard to the transfer and copy of which was to be attached to the application for permission under the ULCR Act. Also it is not the case of the appellants/plaintiffs that they prepared the statement required to be furnished by them under Form-VIII supra or the declaration required to be made by them of the purpose for which they intended to use the property or handover the same to the defendant for submission as part of the application to the Competent Authority under the ULCR Act. The only inference can be, of the appellants/plaintiffs having not pursued the Agreement to Sell and having not done what they were required to do.

21. In the light of the deemed permission within 60 days as provided under Section 27(4), a doubt also arises as to why the parties had agreed to a time of six months for execution of the Sale Deed. If the agreement of the parties, as set up by the appellants/plaintiffs was of the said period of six months having been stipulated for obtaining the permission under the ULCR Act, a period of say about three months was sufficient. The fixation of a period of six months as borne out from the receipt thus does not appear to be in consonance with the agreement pleaded by the appellants/plaintiffs, of being for the purpose of permission under the ULCR Act.

22. The matter can be looked from another aspect also. From the absence of any pleading or deposition by the appellants/plaintiffs of the appellants/plaintiffs being eligible for permission under Section 27 of the ULCR Act or of the appellants/plaintiffs having not taken any steps for submission of the said application to the Competent Authority under the said Act and which application could not have been submitted by the defendant on his own, a doubt also arises whether an agreement as pleaded by the appellants/plaintiffs was at all reached. If such an agreement had been reached, the appellants/plaintiffs certainly in accordance therewith would have taken steps for submission of application in Form VIII for permission under the ULCR Act.

23. Thus whichever way one looks at, the conclusion is inescapable that either the terms of the oral Agreement to Sell pleaded by the appellants/plaintiffs are false or if they are true, the appellants/plaintiffs are guilty of non-performance thereof.

24. I may add that 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 a restriction on transfer of any urban land with building which was within the ceiling area. However the

subsequent declaration of 27(1) as unconstitutional to the said extent would have no bearing on the transaction of the year 1978 when the parties were required to act in accordance therewith. It may also be mentioned that the ULCR Act was finally repealed in the year 1999.

25. I am also unable to accept the contention of the senior counsel for the appellants/plaintiffs, that of the two versions of the terms & conditions of the Agreement to Sell put up by the contesting parties, this Court is bound to accept one or that since the witnesses material to the version of the defendant had not been examined and the said version is to be disbelieved for the said reason, the version of the appellants/plaintiffs is bound to be accepted. Though the counsel for the subsequent purchaser cited ***Ganesh Shet*** supra on the aspect of grant of the relief of specific performance being discretionary but I find the Supreme Court in the said judgment to have also held:-

- a. 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 examine whether a completed agreement may or may not be spelt out of the antecedent correspondence;

- b. that the Court would not permit the plaintiff to depart from the case made in the plaint as the Court discourages as a rule, variance between pleading and proof;
- c. that when the plaintiff alleged a contract of which he sought specific performance and failed to establish the same, the Court would not make a decree for specific performance of a different contract;
- d. that a plaintiff who has sought specific performance of a contract reached in the month of August cannot get a decree on the basis of evidence of a contract having been reached in May;
- e. that the plaintiff having failed to prove an agreement which he had set up will be refused specific performance of a different agreement admitted by the defendant; and,
- f. that the contract sought to be enforced by the plaintiff must be established.

26. It thus follows that merely because this Court may not find the defendant to have proved his version of the transaction, is no reason for this

Court to believe the appellants/plaintiffs, unless the appellants/plaintiffs have proved the oral contract pleaded by him.

27. I otherwise agree in entirety with the reasoning given by the learned Addl. District Judge on a correct appreciation of the evidence recorded in the suit and thus do not feel the need to reiterate the same.

28. I may only add that though the appellants/plaintiffs had not pleaded the agreement having been arrived at through a broker as was deposed in evidence but even if that were so, it belies any logic as to why the said broker Shri Dharamvir Verma who was examined as PW2 did not follow up the matter of obtaining permission under the ULCR Act. The said broker in his deposition has not deposed having taken any such steps as the brokers in the transactions, are expected to and normally do.

29. I also find merit in the contention of the counsel for the respondent/defendant no.3 that ordinarily the first missive from a party to an agreement to the other is not a legal notice unless some altercations have taken place between the parties. No such altercation is pleaded; rather the appellants/plaintiffs have built up a case of intimacy with the defendant. In the ordinary course of human behavior, if any oral agreement as pleaded by

the appellants/plaintiffs had been reached, the appellants/plaintiffs would have definitely written to the defendant enquiring about the status of the permissions which had been agreed to be taken or offering to assist in the same. Nothing of the sort was done. The only inference is of no such agreement having been reached.

30. The relief of specific performance is undoubtedly a discretionary one. The facts of the present case are such which also require the discretion to be not exercised in favour of the appellants/plaintiffs. The agreement pleaded by the appellants/plaintiffs is of 13th April, 1978 with a date of completion thereof within six months i.e. by 12th October, 1978. The first missive as aforesaid from the appellants/plaintiffs is dated 29th January, 1980 i.e. after nearly one year and three months of the date stipulated for completion. The Supreme Court in ***K.S. Vidyanadam Vs. Vairavan*** (1997) 3 SCC 1 reiterated in ***Sardamani Kandappan Vs. S. Rajalakshmi*** (2011) 12 SCC 18 has held that the 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 the three year period is provided to assist the purchasers 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 appellants/plaintiffs of having approached the defendant from time to time would not suffice. The appellants/plaintiffs as aforesaid were also required to join in making the application for permission under the ULCR Act and had the appellants/plaintiffs been following up the matter as claimed by them, the question of the appellants/plaintiffs joining in the same would also have arisen. The Supreme Court in *Umabai Vs. Nilkanth Dhondiba Chavan* (2005) 6 SCC 243 has held that mere bare statement in the plaint or in the examination-in-chief of readiness and willingness would not suffice and the Court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances.

31. There is yet another aspect of the matter. Admittedly the property was inundated with flood waters, towards the end of the six months time for completion of the sale according to the oral agreement pleaded by appellants/plaintiffs. It is axiomatic that the prices of such a property would fall and there would be few takers thereof. Even if the entire story set up by the appellants/plaintiffs is to be believed, the waking up of the appellants/plaintiffs after one year and three years of the date fixed for the

sale, has necessarily to be seen in the said context and which is sufficient to exercise the discretion against the appellants/plaintiffs.

32. No merit is thus found in the appeal which is dismissed. I however refrain from imposing any costs on the appellants/plaintiffs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

DECEMBER 06, 2013

pp