

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

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Date of decision: 5th February, 2014

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RFA 115/2013 & CM No.3539/2013 (for stay)

SURINDER SINGH (NOW DECEASED)

THROUGH LRS

....Appellant

Through: Mr. Pramod Ahuja, Adv.

Versus

SURBIR SINGH & ANR.

..... Respondents

Through: Mr. Deepak Khadaria, Adv.

AND

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RFA 118/2013 & CM No.3562/2013 (for stay)

SURINDER SINGH (NOW DECEASED)

THROUGH LRS

....Appellant

Through: Mr. Pramod Ahuja, Adv.

Versus

SURBIR SINGH & ORS.

..... Respondents

Through: Mr. Deepak Khadaria, Adv.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. RFA No.115/2013 impugns the judgment and decree (dated 31st January, 2013 of the Court of the Addl. District Judge (North)-01, Tis Hazari Courts, Delhi in CS No.54/2009 filed by the respondent no.1 therein Shri

Surbir Singh against the deceased appellant Shri Surinder Singh and the respondent no.2 therein Shri Rama Murthy) of recovery of possession from the appellants and the respondent no.2 of Plot No.D-121, Mayapuri, Phase-II, New Delhi.

2. RFA No.118/2013 impugns the judgment and decree also dated 31st January, 2013 of the same Addl. District Judge (North)-01, Tis Hazari Courts, Delhi of dismissal of CS No.53/2009 filed by the deceased appellant Shri Surinder Singh and Sh. Padam Singh, predecessor in interest of respondents No.4 to 8 therein against the respondent No.1 Surbir Singh and respondent No.2 (Bhupinder Singh) & respondent No.3 (Sh. Rama Murthy) therein for specific performance of an Agreement of Sale by the respondents Surbir Singh and Bhupinder Singh, of property No.D-121, Mayapuri, Phase-II, New Delhi to the deceased appellant Shri Surinder Singh and predecessor of respondents no. 4 to 8.

3. Notice of both the appeals was issued and the counsel for the respondent/decreed holder Shri Surbir Singh made a statement that the decree for possession shall not be executed. Though the parties were referred to mediation but the same remained unsuccessful. The appeals were admitted

for hearing and the Trial Court records requisitioned. The counsels have been heard and the Trial Court record perused.

4. Shri Surbir Singh/respondent no.1 in both the appeals, on 11th July, 1989 instituted the suit from which RFA No.115/2013 arises, pleading:-

- (a) that he along with his brother Shri Bhupinder Singh was the owner of Plot No.D-121, Mayapuri, Phase-II, New Delhi, having inherited the same on demise of the father Shri Uttam Singh;
- (b) that he was duly authorized by his brother Shri Bhupinder Singh also to institute the suit;
- (c) that their father Sardar Uttam Singh was carrying on business of a dealer in second hand motor parts from the said plot till his demise on 3rd June,1988;
- (d) that the deceased appellant Shri Surinder Singh was also a dealer in second hand motor parts, carrying on his business from adjoining Plot No.D-122, Mayapuri, Phase-II, New Delhi;
- (e) that Shri Rama Murthy/respondent no.2 in RFA No.115/2013 and respondent no.3 in RFA No.118/2013 was also a dealer in old tyres and tubes and Shri Uttam Singh gave permission to

him to conduct his business outside property No.D-121, Mayapuri, Phase-II, New Delhi and the said Shri Rama Murthy was also permitted to, in the night, keep his goods in the said property;

- (f) that Shri Surinder Singh in or about November/December, 1988 offered to purchase property No.D-121, Mayapuri, Phase-II, New Delhi for a sale consideration of Rs.10 lacs;
- (g) that on 21st January, 1989 it was agreed that the Shri Surinder Singh will make the full payment of Rs.10 lacs within one month thereof and Shri Surbir Singh received Rs.1.75 lacs as earnest money and for which a receipt was issued as under:-

“Received Rs.1,75,000/- as advance for the sale of Shop D-121, Mayapuri with the total Amt. of sale is Rs.10,00,000/- only (Rs. Ten Lakh only). Balance payment will be made within One Month (30 days) from todays date. Sale Amt. is net and I will not be responsible for any other charges occurred on it and the party named as Surinder Singh Padam Singh will be responsible for all other (previous or after) charges.

Received Rs. One Lakh and seventy five thousand only.

*Sd-
(Surbir Singh)
21.1.89”*

- (h) that as per the oral Agreement, Shri Surbir Singh was to execute an Agreement to Sell, General Power of Attorney, Receipt of Rs.10 lacs, Will and other accompanying documents such as affidavit etc. on payment of the balance amount of Rs.8.25 lacs within one month of 21st January, 1989; time was the essence of the contract as stated in the earnest money receipt also;
- (i) that the name of Sardar Padam Singh (predecessor of respondents No. 4 to 8 in RFA No.118/2013) was added as purchaser in the receipt aforesaid at the instance of Shri Surinder Singh;
- (j) that Shri Surinder Singh/Shri Padam Singh did not tender any amount towards balance agreed sale consideration within the agreed period of one month from 21st January, 1989 inspite of repeated requests and reminders;
- (k) that Shri Surinder Singh broke open the lock of the property No.D-121, Mayapuri, Phase-II, New Delhi sometime in the middle of March, 1989;

- (l) however Shri Surbir Singh learnt of the same only on 3rd April, 1989 when he was served with a notice of a suit for permanent injunction filed by Shri Surinder Singh and Shri Rama Murthy;
- (m) that Shri Surinder Singh in the plaint in the said suit for permanent injunction alleged that he and Shri Rama Murthy were partners for the last two years and were tenants on the said plot for more than four years though had no rent receipt or other document to prove their legal possession and sought to restrain Shri Surbir Singh from forcibly dispossessing them from the property; and,
- (n) that Shri Surbir Singh on 4th April, 1989 lodged a complaint with the Mayapuri Police Station of Shri Surinder Singh having broken open the locks and having committed criminal trespass.

accordingly, the suit for recovery of possession of the property and for *mesne* profits/damages for use and occupation and for injunction restraining Shri Surinder Singh and Shri Rama Murthy from further parting with possession of the property and for declaration that the Agreement to Sell had come to an end, was filed.

5. Shri Surinder Singh and Shri Padam Singh, on 24th July, 1990, i.e. after nearly one year of the institution of the suit for possession aforesaid by Shri Surbir Singh, instituted the suit for specific performance, from the dismissal whereof RFA No.118/2013 arises, pleading:-

- (I) that Shri Surinder Singh and Shri Rama Murthy were tenants in possession of property No.D-121, Mayapuri, Phase-II, New Delhi, individually in their respective portion, and later entered into a partnership;
- (II) that Shri Surinder Singh was a tenant at a monthly rent of Rs.500/- under Shri Uttam Singh being the father of Shri Surbir Singh; that after the death of his father Shri Surbir Singh approached Shri Surinder Singh for sale of the property for a sum of Rs.10 lacs and executed the receipt aforesaid of earnest money;
- (III) that Shri Surbir Singh subsequently also demanded and received a further sum of Rs.25,000/- in cash without receipt from Shri Surinder Singh/Shri Padam Singh;
- (IV) that Shri Surbir Singh however became dishonest and demanded a sum of Rs.5 lacs/- more than the agreed

consideration of Rs.10 lacs and upon refusal of Shri Surinder Singh/Shri Padam Singh, threatened to dispossess the appellants/defendants from the property;

(V) that Shri Surbir Singh also failed to get 'No Objection' from the DDA;

(VI) that Shri Surinder Singh and Shri Rama Murthy were thus compelled to institute the suit aforesaid for permanent injunction to restrain Shri Surbir Singh from dispossessing them from the property and vide interim order in which suit the parties were directed to maintain *status quo*;

(VII) that Shri Surinder Singh had been ready and willing to perform his part of the agreement and to pay Rs.8 lacs towards balance sale consideration to Shri Surbir Singh; and,

(VIII) that from Shri Surbir Singh filing the suit for possession, it was evident that Shri Surbir Singh was backing out of the Agreement.

accordingly, the relief of specific performance of the Agreement to Sell was claimed.

6. Needless to state, Shri Surbir Singh denied the tenancy claimed by the appellants/defendants.

7. The following issues were framed in the suit for possession on 29th July, 2004:-

- “(i) Whether the suit is liable to be dismissed in view of preliminary objection No.1 in written statement?.... OPD*
- (ii) Whether the suit is bad for non joinder of necessary parties?.... OPD*
- (iii) Whether the suit is not properly framed in view of preliminary objection No.3 in written statement? If so, its effects?....OPD*
- (iv) Whether the suit has not been properly valued for the purpose of court fee and jurisdiction?....OPD*
- (v) Whether the suit is barred by the provision of Section 50 of Delhi Rent Control Act?....OPD*
- (vi) Whether the plaintiff is entitled for the relief claimed?*
- (vii) Relief.?*

8. The following issues were framed in the suit for specific performance on 22nd January, 2001:-

- “(i) Whether the plaintiff No.1 and defendant No.3 are partners of a firm and tenants in the suit property bearing No.D-121, Mayapuri, Phase-II, New Delhi?....OPP*
- (ii) Whether the plaintiffs and defendants No.1 and 2 have entered into an agreement to sell the suit property No.D-121, Mayapuri Phase-II, New Delhi*

- on 21st January, 1989 and if so to what effect?....OPP*
- (iii) Whether the plaintiffs are ready and willing to perform the alleged agreement dated 21st January, 1989?....OPP*
 - (iv) Whether the defendants No.1 and 2 have committed any breach of the alleged agreement dated 21st January, 1989?....OPP*
 - (v) Whether the plaintiffs and defendants No.1 and 2 are bound to perform the alleged agreement dated 21st January, 1989?....OPP*
 - (vi) Relief.”*

9. Both suits were consolidated for recording evidence. The learned Addl. District Judge however, instead of consolidated, rendered separate judgments in the two suits.

10. The learned Addl. District Judge has decreed the suit for recovery of possession filed by Shri Surbir Singh against Shri Surinder Singh and Shri Rama Murthy, finding/observing/holding:-

- A. that Shri Surbir Singh being one of the co-owners was entitled to maintain the suit for possession against a trespasser without impleading the other co-owner Shri Bhupinder Singh;
- B. that there was no merit in the preliminary objection no. 1 in the written statement;

- C. that Shri Surinder Singh and Shri Rama Murthy had failed to prove that they at any time were tenants in the property and had rather admitted that they were not in possession of any documents to show such tenancy;
- D. that there were contradictions in the stand from time to time of Shri Surinder Singh and Shri Rama Murthy with regard to the time, mode and manner of creation of tenancy;
- E. that though Shri Surinder Singh and Shri Rama Murthy claimed to be joint tenants but pleaded paying rent separately;
- F. that no document showing carrying on of any business by Shri Surinder Singh or Shri Rama Murthy in the property, had also been proved;
- G. per contra, Shri Surbir Singh had proved documents to show that his father was carrying on business from the said property and which documents were admitted by Shri Surinder Singh and Shri Rama Murthy;
- H. that Shri Surinder Singh and Shri Rama Murthy had no other claim to possession save as a tenant and once they had failed to

prove tenancy they were liable to deliver possession to Shri Surbir Singh who was admittedly the owner of the property;

- I. that the suit had been correctly valued for the purpose of Court Fees and jurisdiction; and,
- J. that since Shri Surinder Singh and Shri Rama Murthy had failed to prove tenancy, the jurisdiction of the Court was not barred by Section 50 of the Delhi Rent Control Act, 1958.

accordingly, a decree for possession, in favour of the Shri Surbir Singh and against Shri Surinder Singh and Shri Rama Murthy, was passed.

11. As far as the claim of Shri Surbir Singh for *mesne* profits was concerned, since during the pendency of the proceedings Shri Surinder Singh had been directed to deposit Rs.8 lacs in the Court and Shri Surbir Singh permitted to withdraw the interest thereon and further since Shri Surbir Singh had also retained the sum of Rs.1,75,000/- received by him as earnest money, he was held not entitled to any additional amount towards *mesne* profits.

12. Shri Rama Murthy has not challenged the decree for possession against him.

13. The learned Addl. District Judge, dismissed the suit filed by Shri Surinder Singh / Shri Padam Singh for specific performance of agreement to sell, finding/observing/holding:-

- a. that Shri Surinder Singh had failed to prove that he was a tenant in the property or was carrying on business in partnership therein with Shri Rama Murthy;
- b. that Shri Surinder Singh had trespassed into the property in March, 1989;
- c. that the receipt dated 21st January, 1989 supra was a valid and enforceable Agreement to Sell between the parties;
- d. that Shri Surinder Singh/Shri Padam Singh had failed to prove having paid a further sum of Rs.25,000/- towards sale consideration to Shri Surbir Singh;
- e. that Shri Surinder Singh/Shri Padam Singh had also failed to prove that Shri Surbir Singh had demanded further amount of Rs.5 lacs over and above the agreed sale consideration of Rs.10 lacs;
- f. that Shri Surinder Singh/Shri Padam Singh, instead of paying the balance sale consideration of Rs.8.25 lacs within one

month, had trespassed into the property falsely claiming to be a tenant therein;

- g. the said conduct of Shri Surinder Singh showed that he was not ready and willing to perform his part of the Agreement to Sell;
- h. that there was no breach of the Agreement to Sell on the part of Shri Surbir Singh; and,
- i. the conduct of Shri Surinder Singh of trespassing into the property agreed to be purchased by him, disentitled him from the equitable relief of specific performance.

14. The respondents no. 4 to 8 in RFA No. 118/2013, being the heirs of Shri Padam Singh have not challenged the decree of dismissal of suit for specific performance filed by them.

15. The counsel for legal heirs of Shri Surinder Singh has argued:-

- i. that Shri Surinder Singh, in pursuance to the interim orders in the suit, deposited the balance sale consideration of Rs.8 lacs in the Court and which has remained deposited for the last over 20 years and interest whereof is being enjoyed by Shri Surbir Singh;

- ii. that Shri Surbir Singh has also enjoyed the earnest money of Rs.1,75,000/- admittedly paid by Shri Surinder Singh/Shri Padam Singh nearly 24 years ago;
- iii. that Shri Surinder Singh/Shri Padam Singh could not have been expected to pay the balance sale consideration of Rs.8 lacs without execution of Sale Deed in their favour;
- iv. that Shri Surbir Singh did not take any steps whatsoever for obtaining NOC/permission of the DDA to execute the Sale Deed in favour of Shri Surinder Singh/Shri Padam Singh;
- v. that the readiness and willingness of Shri Surinder Singh/Shri Padam Singh is evident from their being out of pocket with the entire sale consideration for the last so many years; and,
- vi. that the condition in the earnest money receipt, of payment of balance sale consideration within one month, could not have bound Shri Surinder Singh / Shri Padam Singh as they could not be expected in law to pay the same without corresponding transfer of title in the property in their favour.

16. Per contra, the counsel for Shri Surbir Singh has argued:-

- (A) that the counsel for legal heirs of Shri Surinder Singh has not pointed out a single infirmity in the impugned judgments;
- (B) that Shri Surinder Singh did not pay the balance sale consideration within the stipulated time and instead trespassed into the property and instituted a suit for injunction;
- (C) on enquiry it is informed that the suit for injunction was subsequently dismissed;
- (D) that the suit for specific performance was filed after one year of the institution of the suit for possession by Shri Surbir Singh;
- (E) that though Shri Surinder Singh, in the pleadings had claimed possession as tenant, but in the cross examination admitted that there was no document of tenancy;
- (F) that Shri Rama Murthy who was alleged to be a tenant in possession along with Shri Surinder Singh, did not even appear in the witness box; and,
- (G) that the learned Addl. District Judge has rightly held that Shri Surinder Singh, from time to time has been taking inconsistent stand with respect to tenancy and possession of the property.

17. The counsel for the legal heirs of Shri Surinder Singh in rejoinder has argued that the learned Addl. District Judge did not consider the documents filed as Annexure 'L' to RFA No.118/2013. However on enquiry whether the said documents were proved, no answer is forthcoming. Perusal of the Trial Court record discloses the documents to have been not proved as per law. The same thus cannot be looked at.

18. I have considered the rival contentions. Two questions fall for consideration. Firstly, whether Shri Surinder Singh has proved tenancy of the premises and secondly, whether there is any error in the finding of the learned Addl. District Judge, of Shri Surinder Singh having been not ready and willing to perform his part of the Agreement to Sell and being otherwise not entitled to the equitable relief of specific performance.

19. The counsel for Shri Surbir Singh is correct in his contention that the counsel for the legal heirs of Shri Surinder Singh in his arguments, has not pointed out any of the findings of the learned Addl. District Judge to be contrary to the evidence on record or being on an erroneous appreciation of evidence on record. Though in the absence of any such argument by the counsel for the appellants, no investigation by this Court is required but to satisfy the judicial conscience I have gone through the evidence recorded

and I am unable to find any evidence lest cogent evidence having been led by Shri Surinder Singh, of having been inducted as a tenant in the property at any point of time or of being in occupation of the property during the time he claimed to be tenant thereof. Significantly, Shri Rama Murthy, who according to Shri Surinder Singh was the other tenant in the property, has also not supported the case of Shri Surinder Singh. So much so, Shri Rama Murthy has not even preferred an appeal against the decree for possession against him and though impleaded as respondent in these appeals, has not even chosen to appear. The only inference is that he had /has no interest as tenant or otherwise in the property, though had earlier joined Shri Surinder Singh in filing the suit for injunction and which was dismissed in default.

20. From a reading of the oral evidence led by the parties on both the aforesaid aspects, the following may be highlighted:-

- (a) The counsel of Shri Surinder Singh in cross examination recorded on 13th October, 2008 of Shri Surbir Singh admitted that Shri Uttam Singh father of Shri Surbir Singh had taken Sales Tax number at the address of Plot No.121, Mayapuri, Phase-II, New Delhi, though suggested that Shri Uttam Singh was not carrying on any business therefrom and which suggestion was denied by Shri

Surbir Singh. In my opinion, had Shri Uttam Singh not been carrying on business from the subject property, he, in the ordinary course of human behaviour would not have obtained Sales Tax number at the said address. Once it is the admitted position that Shri Uttam Singh was having Sales Tax number at the address of the subject property, it necessarily follows that he was carrying on business therefrom. It is not the case of Shri Surinder Singh that Shri Uttam Singh was also in possession of part of the property or carrying on business therefrom and Shri Surinder Singh and Shri Rama Murthy were tenants in remaining part of the property. The presence of Shri Uttam Singh on the property, as can safely be inferred from the Sales Tax number having been obtained by him at the address of the said property, necessarily belies the claim of Shri Surinder Singh of being tenant in the property;

- (b) the legal heir of Shri Surinder Singh in his cross examination recorded on 23rd April, 2008 though admitted that the balance sale consideration of Rs.8,25,000/- was payable to Shri Surbir Singh within a period of 30 days of the earnest money receipt aforesaid and that the same was not paid, deposed that the payment was to

be made after mutation in favour of Shri Surbir Singh. He however further admitted that it was not so mentioned in the earnest money receipt but was orally agreed; the said oral evidence is contrary to the terms of the written document and not admissible;

- (c) the legal heir of Shri Surinder Singh in his cross examination recorded on 23rd April, 2008 further admitted that as per the oral agreement at the time of payment of balance sale consideration, General Power of Attorney, Special Power of Attorney, Agreement to Sell, Will etc. were to be executed by Shri Surbir Singh at the time of receipt of balance sale consideration, falsifying the stand in the pleadings that the balance sale consideration was payable only against execution of Sale Deed;
- (d) the heir of Shri Surinder Singh in his cross examination recorded on 23rd April, 2008 further admitted being not in possession of any document to show that Shri Surinder Singh was the tenant or that the property was in the tenancy of Shri Surinder Singh;
- (e) the heir of Shri Surinder Singh in his cross examination recorded on 23rd April, 2008 though claimed that Shri Surinder Singh and

Shri Rama Murthy used to pay the rent separately to Shri Uttam Singh but could not tell the rent payable by Shri Rama Murthy;

- (f) the legal heir of Shri Surinder Singh in his cross examination recorded on 23rd April, 2008 further deposed that he was not in possession of any document of partnership between Shri Surinder Singh and Shri Rama Murthy; he could not even tell in which portion of the plot Shri Surinder Singh was the tenant and in which portion Shri Rama Murthy was the tenant;
- (g) the heir of Shri Surinder Singh in his cross examination recorded on 23rd April, 2008 admitted that he was not in possession of any document to show any business having been carried on by Shri Surinder Singh from the subject property and,
- (h) the legal heir of Shri Surinder Singh in cross examination admitted documents of trade transactions between Shri Uttam Singh from the address of the subject property and Shri Surinder Singh from his adjoining property No.D-121, Mayapuri, Phase-II, New Delhi again admitting possession of Shri Uttam Singh of the subject property during the time when Shri Surinder Singh claimed

himself to be tenant with Shri Rama Murthy thereof and thereby falsifying the claim of such tenancy.

21. I am therefore satisfied that there is no error in the impugned judgments, to the extent they hold that Shri Surinder Singh has failed to prove the case set up by him of himself and Shri Rama Murthy being tenants in possession of the property under Shri Uttam Singh. Shri Shri Surinder Singh in fact could not prove a single document of carrying on business from the subject property, as he claimed to be doing. Had Shri Surinder Singh been a tenant in possession of the property since four years prior to the Agreement to Sell in January, 1989, it is inconceivable that he would have no proof thereof. Axiomatically, it has but to be held that Shri Surinder Singh had in March, 1989 illegally trespassed onto the property and no interference in the decree for possession is called for.

22. As far as the findings of the learned Addl. District Judge on the aspect of specific performance are concerned, as per the earnest money receipt aforesaid, the balance sale consideration was to be paid within one month (30 days) from the date thereof i.e. 21st January, 1989. The heir of Shri Surinder Singh in his cross examination has accepted that the balance sale consideration was not tendered within the said period of 30 days. The reason given by him is that the

said balance sale consideration was payable only after mutation of the property from the name of Shri Uttam Singh to the name of Shri Surbir Singh. He has however further admitted that it is not so mentioned in the earnest money receipt. The argument is that a purchaser of immovable property, even if has contracted to pay the balance sale consideration within certain time, is not bound to do so without the seller within the said time being in a position to transfer title, even if it is not so agreed and even if payment of balance sale consideration, in the contract, is not linked to transfer of title.

23. The Supreme Court in *Saradamani Kandappan Vs. S. Rajalakshmi* (2011) 12 SCC 18 has held:-

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

24. From the aforesaid it follows that the argument of the counsel for the appellants that notwithstanding the stipulation in the earnest money receipt for payment of balance sale consideration within 30 days thereof, the same

was not payable unless seller Shri Surbir Singh was within the said 30 days able to transfer title, is not per se acceptable. The Supreme Court in judgment supra has held that the parties are free to delink the terms relating to payment of balance sale price from the term relating to execution of sale deed.

25. The next question is, whether the parties in the present case had done so.

26. From the pleadings of Shri Surinder Singh, including the suit for injunction filed within 2-3 months of the agreement to sell, it is evident that Shri Surinder Singh was aware that the property had not been mutated from the name of Shri Uttam Singh to the name of Shri Surbir Singh and that no sale/transfer deed of the property could be registered without “NOC” from the DDA. It cannot also be lost sight of that Shri Surinder Singh was the owner of adjoining property. He was thus fully aware of the impediments in execution and registration of sale/transfer deed of the property. Still, he agreed to pay the balance sale consideration of Rs.8.25 lacs within 30 days, without stipulating that the same was to be against execution of sale/transfer deed. Shri Surinder Singh and Shri Surbir Singh as prudent trade persons

owning property, can safely be attributed knowledge that ordinarily mutation and obtaining NOC from DDA take much longer than 30 days.

27. Not only so, from the stipulation in the earnest money receipt that the “sale amount is net and I will not be responsible for any further charges occurred on it and the party named as Surinder Singh Padam Singh will be responsible for all other (previous or after) charges”, it is evident that the sale was on “as is where is” basis, with Shri Surbir Singh, on receipt of balance sale consideration transferring/assigning all his rights as on that day to Shri Surinder Singh and further, that time of 30 days for payment of balance sale consideration was of the essence of the agreement. The language of the earnest money receipt is indicative of the seller Shri Surbir Singh having agreed to receive a lump sum amount of Rs.10 lacs as consideration for the property and being not concerned with any liabilities over the property. The language of the earnest money receipt belies the case set-up by Shri Surinder Singh of the balance sale consideration of Rs.8,25,000/- being payable only against execution of Sale Deed or upon mutation of the property from the name of Shri Uttam Singh to the name of Shri Surbir Singh. Had that been the agreement between the parties, nothing prevented them from stipulating so in the earnest money receipt. The Supreme Court in the judgment supra has laid down that

the time for payment and the time for execution of the Sale Deed are two distinct matters and that it is possible that the time may be of essence for the purpose of paying the balance sale consideration and may not be of essence in regard to execution of Sale Deed.

28. There is another aspect of the matter. Even if it were to be believed that Shri Surbir Singh had agreed to receive the balance sale consideration of Rs.8,25,000/- though within 30 days of 21st January, 1989 but against the execution of the Sale deed or by furnishing letter of mutation of the property from the name of his father Shri Uttam Singh to his name, though admittedly Shri Surbir Singh did not furnish such letter of mutation and/or was not in a position to execute the Sale Deed, there is not a single communication from Shri Surinder Singh to Shri Surbir Singh calling upon him to execute the Sale Deed or to furnish the mutation letter. The only inference is that there was no such agreement.

29. Not only so, though Shri Surbir Singh on 11th July, 1989 instituted the suit for possession, clearly indicating that he was no longer bound by the Agreement to Sell, Shri Surinder Singh still did not take any immediate action to sue for specific performance and filed for the said relief only on 24th July,

1990 i.e. after nearly 1½ years of the date fixed for payment of balance sale consideration. The Supreme Court in ***K.S. Vidyadnam 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 the 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. Such is not the case here. Shri Surinder Singh was/is thus not entitled to the relief of specific performance on this account also.

30. As far as the argument raised in this appeal, of Shri Surinder Singh having deposited the balance sale consideration in the Court in pursuance to the interim Order in the suit, is concerned, it may be pointed out that the same was done only in pursuance to the order dated 21st May, 1996 i.e. after nearly seven years from 21st February, 1989 by which date the balance sale consideration was to be paid. 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. There is thus a distinction between having the financial capacity to pay the balance sale consideration and willingness to pay the balance sale consideration. The deposit by Shri Surinder Singh of Rs.8 lacs in this Court can at best be indicative of his then financial capacity and can by no stretch of imagination be indicative of his willingness. This Court recently in *Asman Investments Ltd. Vs. K.L. Suneja* 181 (2011) DLT 156 also has held that the purchaser therein never displayed its willingness by tendering the amount at any time. 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. In the present case, as aforesaid not only did Shri Surinder Singh not tender the balance sale consideration within 30 days but the reason given by him for not doing so is not found to be in consonance with his contemporaneous conduct. Had his version been correct and the balance sale consideration was payable against execution of Sale Deed or against delivery of mutation letter, Shri Surinder Singh would have

before the expiry of the said 30 days asked Shri Surbir Singh for the same and which was admittedly not done.

31. No advantage can be derived by Shri Surinder Singh of the said deposit of Rs.8 lacs also for the reason that on account thereof Shri Surbir Singh has not been awarded any *mesne* profits/damages for use and occupation to which he was otherwise entitled on account of Shri Surinder Singh having illegally trespassed on to the property.

32. I am also in agreement with the finding of the learned Addl. District Judge that the conduct of Shri Surinder Singh in the present case, of trespassing into the property, of setting up a case of being a tenant therein and which he has failed to establish, disentitles him from the equitable relief of specific performance. The grant of the relief of specific performance is a discretionary one. The Supreme Court as far back as in ***Madamsetty Satyanarayana Vs. G. Yelloji Rao*** AIR 1965 SC 1405 held that under Section 20 of the Specific Relief Act, 1963, relief of specific performance is discretionary, though not arbitrary and discretion must be exercised in accordance with sound and reasonable judicial principles; diverse situations may arise which may induce a Court not to exercise the discretion in favour

of the plaintiff. The said situations were left undefined with the reiteration that the discretion is not arbitrary but has to be sound and reasonable and to be guided by judicial principles. The same principle was reiterated in ***R.C. Chandiok Vs. Chuni Lal Sabharwal*** (1970) 3 SCC 140 where it was however observed that the conduct of the plaintiff is an important element for consideration in exercise of discretion. Similarly in ***Lourdu Mari David Vs. Louis Chinnaya Arogiaswamy*** (1996) 5 SCC 589, the Supreme Court, finding the plaintiff in a suit for specific performance to have in the plaint set up a false case of possession of the property having been delivered to him in pursuance to the Agreement of Sale and further finding the plaintiff to have in the plaint set up a plea of having informed the subsequent purchaser of the prior Agreement to Sell and which plea was not proved and yet further having claimed a payment which was not made and which plea was also found to be false held that a party who seeks to avail of the equitable jurisdiction of the Court and specific performance being equitable relief, must come to the Court with clean hands and a party who makes false allegations does not come with clean hands and is not entitled to the equitable relief.

33. Outside of the suits for specific performance also, it is the settled principle in law, that a party guilty of suppression of material facts (*Hanamantha Ranoji Vs. Sri Mahadev Channabasappa* (2000) 6 SCC 120), a party who approaches the Court with a pair of dirty hands (*Mohammedia Coop. Building Society Ltd. Vs. Lakshmi S. Coop Building Society Ltd.* (2008) 7 SCC 310) is not entitled to a relief which is discretionary and equitable. Reference may also be made to the celebrated case of *S.P. Chengalvaraya Naidu Vs. Jagannath* AIR 1994 SC 853 laying down that a person whose case is based on falsehood has no right to approach the Court and can be thrown out summarily; non-production and even non-mentioning of a material document was held to be tantamounting to playing a fraud on the Court.

34. *Mulla* in his commentary on Indian Contract and Specific Relief Act, 12th Edition also under Section 20 of the Specific Relief Act opines that the Court can take into consideration the conduct of the person who asks for specific performance; the plaintiff must come to Court with clean hands and when the plaintiff does not come with clean hands, as where he is guilty of fraud or some other practice, he may ordinarily get no relief by way of specific performance. Halsbury's Laws of England, 4th Edition, Reissue,

Volume 44 (1), para 891 opining that “if the conduct of the plaintiff in a suit for specific performance is wanting in good faith, honesty or righteous dealing, discretion in his favour will not be exercised and the relief of specific performance will be refused”.

35. No merit is thus found in either of the appeals which are dismissed with costs. The counsel’s fee assessed at Rs.15,000/- in each appeal.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

FEBRUARY 5th 2014

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