

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

% **Date of decision: 21st August, 2018.**

+ **RSA No.117/2018**

BEERMATI DEVI

..... Appellant

Through: Mr. Mukesh M. Goel and Ms. Arti
Rawat, Advs.

Versus

CHANDAN SINGH & ORS

..... Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

CM No.33677/2018 (for exemption)

1. Allowed, subject to just exceptions.
2. The application is disposed of.

**RSA No.117/2018 & CMs No.33678/2018 & 33679/2018 (for
condonation of delay of 324 days in filing and 53 days in re-filing the
appeal respectively)**

3. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree [dated 28th March, 2017 in RCA DJ No.60903/2016 of the Court of Additional District Judge-08 (West)] in First Appeal under Section 96 of the CPC preferred by the appellant against the judgment and decree [dated 4th October, 2013 in Suit Old No.678/2000 and New No.406/2011/02 of the Court of Senior Civil Judge (West)] of dismissal of the suit filed by the appellant/plaintiff against the eight respondents/defendants.

4. The appeal is accompanied with applications for condonation of delay of 324 days in filing thereof and 53 days in re-filing thereof.

5. However, the question of considering the condonation of delay would arise only if there were to be any merit, worth entertaining this Regular Second Appeal which can be entertained only if raises a substantial question of law. Else, if there were to be no merit, notice cannot be issued only to consider the applications for condonation of delay and thereby conduct a fruitless exercise.

6. The counsel for the appellant/plaintiff has thus been heard and the copies of the relevant Trial Court record annexed to the memorandum of appeal perused.

7. The appellant/plaintiff instituted the suit, from which this appeal arises, for specific performance, possession, *mesne* profits and injunction, pleading (i) that the respondent/defendant No.8, vide Agreement to Sell dated 20th December, 1988, agreed to sell a plot of land admeasuring 250 sq. yds. in Khasra No.599/92 situated in Village Tehkhand Area, Delhi now known as 33-C, Gali No.1, Govindpuri, New Delhi to the appellant/plaintiff; (ii) that the respondent/defendant No.8, besides the Agreement to Sell, also executed Will, Affidavit, Receipt, Power of Attorney, Possession Letter etc. in favour of the appellant/plaintiff/ (iii) that the respondent/defendant No.8 was the owner of the aforesaid plot of land vide registered Sale Deed dated 22nd July, 1966 executed in her favour by one Smt. Raj Karni wife of Moti Ram; (iv) that the respondent/defendant No.8, on 20th December, 1980, also put the appellant/plaintiff into vacant, peaceful physical possession of the land agreed to be sold and received the

entire sale consideration of Rs.30,000/- from the appellant/plaintiff; (v) that the appellant/plaintiff constructed a boundary wall and a gate around the aforesaid plot of land; (vi) that the respondent/defendant No.1 and his wife, with a *mala fide* intention to grab the aforesaid property, instituted a suit for permanent injunction against the appellant/plaintiff with respect to the aforesaid property, claiming to be the owner thereof; (vii) that the appellant/plaintiff contested the said suit; (viii) that the said suit was however decided against the appellant/plaintiff on 8th September, 1988; (ix) that the appellant/plaintiff preferred a First Appeal against the aforesaid judgment and which appeal was pending consideration; (x) that the respondent/defendant No.1 and his wife, under the garb of the interim order in the suit filed by them, forcibly dispossessed the appellant/plaintiff from possession of the aforesaid property; (xi) that the wife of respondent/defendant No.1 had since died leaving the respondents/defendants No.1 to 7 as her heirs; (xii) that the respondent/defendant No.8, though earlier had been assuring the appellant/plaintiff that she will, in pursuance to the Agreement to Sell, execute the sale deed in favour of the appellant/plaintiff, but did not execute the sale deed and it was found that the respondent/defendant No.8 had moved to California, USA. Hence the suit for specific performance, recovery of possession, *mesne* profits and injunction restraining the respondents/defendants No.1 to 7 from dealing with the property.

8. The respondent/defendant No.8 did not contest the suit.

9. The respondents/defendants No.1 to 7 contested the suit by filing a written statement, pleading (a) that the respondent/defendant No.8 was not

entitled to execute Agreement to Sell with respect to any part of Khasra No.599/92 as the respondent/defendant No.8 was not the recorded *bhumidar* of the said Khasra; (b) that the Agreement to Sell, Power of Attorney etc. claimed to have been executed by respondent/defendant No.8 were forged and fabricated; (c) that the respondent/defendant No.1 was having a share in Khasra No.599/92 admeasuring 32 bighas and 17 biswas and as shareholder in the said land had raised construction over the suit property bearing No.C-33/1, Govindpuri, New Delhi; (d) that the suit earlier filed by respondent/defendant No.1 and his wife against the appellant/plaintiff had already been decided in favour of the respondent/defendant No.1 and his wife who had been held to be the owner of the subject property; (e) that the respondent/defendant No.1 was in possession of the property as owner thereof and there was no need for him to take forcible possession as falsely claimed by the appellant/plaintiff; (f) that since the respondent/defendant No.8 who was claimed to have executed Agreement to Sell in favour of the appellant/plaintiff was not the owner of the property, no relief of specific performance could be granted to the appellant/plaintiff.

10. On the pleadings aforesaid of the parties, the following issues were framed in the suit on 3rd September, 2007:

*“(1) Whether the suit is barred by Law of Limitation?
(OPD)*

*(2) Whether the plaintiff has no locus standi to file the
present suit? (OPD)*

*(3) Whether the suit is barred by principle of resjudicata?
(OPD)*

- (4) *Whether the suit is bad in the present form for want of non filing of site plan as alleged? (OPD)*
- (5) *Whether the suit is liable to be rejected under Order 7 Rule 11 CPC? (OPD)*
- (6) *Whether the suit is not properly valued for the purpose of court fees and jurisdiction? (OPD)*
- (7) *Whether the plaintiff is entitled to a decree of specific performance as prayed for? (OPP)*
- (8) *Whether the plaintiff is entitled for decree of possession as prayed for? (OPP)*
- (9) *Whether the plaintiff is entitled to mesne profits/damages as prayed for, if so, at what rate and for which period? (OPP)*
- (10) *Whether the plaintiff is entitled for decree of permanent injunction as prayed for? (OPP)*
- (11) *Relief.”*

and Issues No.(1) & (3) were ordered to be treated as preliminary issues. However subsequently, finding that Issue No.(1) was a mixed question of law and fact, the same was ordered to be decided along with the remaining issues.

11. The respondents/defendants No.1 to 7 did not lead any evidence and stopped appearing.

12. The Suit Court, vide *ex-parte* judgment dated 4th October, 2013 supra dismissed the suit, finding/observing/reasoning (I) that as per the Agreement to Sell dated 20th December, 1980 set up by the appellant/plaintiff, the sale deed was to be executed within one month from

the date of receipt of the sale permission; (II) that the appellant/plaintiff had not pleaded or proved that the respondent/defendant No.8 applied for the sale permission; (III) on the contrary, it was the case of the appellant/plaintiff that the appellant/plaintiff in the first week of December, 1999 visited the house of the relative of respondent/defendant No.8, when it was learnt that the respondent/defendant No.8 had gone to California; (IV) that the appellant/plaintiff, since 20th December, 1980 till 1999, did not write a single letter to the respondent/defendant No.8 to execute the sale deed or to find out the status of the sale permission; (V) that the suit filed on 7th September, 2000 was therefore barred by time; (VI) that the appellant/plaintiff had also not proved that the respondent/defendant No.8 was in India on 20th December, 1980 or at any point thereafter; and, (VII) that the appellant/plaintiff had also not proved being in possession of the property at any point of time.

13. The counsel for the appellant/plaintiff has informed (A) that the First Appeal preferred by the appellant/plaintiff against the judgment in favour of the respondent/defendant No.1 and his wife in the suit filed by the respondent/defendant No.1 and his wife was also dismissed; and, (B) that the appellant/plaintiff preferred a Regular Second Appeal being RSA No.189/2001 thereagainst to this Court and which was disposed of vide order dated 1st December, 2010 as under:

“This second appeal has impugned the judgment and decree dated 15.9.2009 which had endorsed the finding of the trial judge whereby the suit of the plaintiff/respondent for permanent injunction had been decreed in her favour. It is pointed out by learned counsel for the parties that the

documents of title which were the subject matter qua the disputed property are the subject of a suit for specific performance which had been filed by the appellant herein i.e. Kapoor Singh against Baleshwari Devi. The said suit has been adjourned sine die for the reason that this RSA is pending before this Court. It has been agreed between the parties that the documents of title i.e. the agreement to sell, receipt, will and GPA on the basis of which the respondent is claiming title to the suit property are now the subject matter of this suit which had been adjourned sine die. Counsel for the appellant seeks permission of this Court to withdraw this appeal with a direction that the suit which is pending before the Civil Judge i.e. suit for specific performance and declaration shall be decided independently of the observations made in this impugned judgment qua the title in the suit property. Ordered accordingly.

With these directions and observations this second appeal is dismissed as withdrawn.”

14. On First Appeal from which this Regular Second Appeal arises being preferred by the appellant/plaintiff against the judgment and decree of dismissal of the suit for specific performance, possession, *mesne* profits and injunction, the First Appellate Court has reasoned, (i) that from a perusal of the order dated 1st December, 2010 of this Court in RSA No.189/2001 it appeared that the question of title of the suit property was kept open; however, other observations made in the judgment and decree dated 8th September, 1988 in the suit filed by the respondent/defendant No.1 and his wife were not set aside; (ii) that the cause of action to seek specific performance of the Agreement to Sell dated 20th December, 1980 did not

arise as the respondent/defendant No.8 was to get the sale permission and which was not obtained by the respondent/defendant No.8; (iii) that the respondent/defendant No.8 having been proceeded *ex-parte*, did not plead or prove that she had at any point of time showed refusal to perform her part of the Agreement to Sell; (iv) therefore, the period of limitation prescribed in Article 54 of the Schedule to the Limitation Act, 1963 did not commence to run; (v) that since the respondents/defendants No.1 to 7 also had been proceeded *ex-parte* in the suit for specific performance etc. filed by the appellant/plaintiff, there was no challenge to the title of the respondent/defendant No.8; (vi) that as per Section 20 of the Specific Relief Act, 1963, the relief of specific performance is a discretionary relief and is to be granted taking into consideration the circumstances of the case and the conduct of the parties; (vii) that the appellant/plaintiff had filed the suit for specific performance of the Agreement to Sell dated 20th December, 1980 only in September, 2000, inspite of the respondent/defendant No.1 and his wife having instituted this suit against the appellant/plaintiff as far back as in the year 1981 and in which suit, the following issue was also framed:

“3. Whether the defendants are the bonafide purchaser of the suit land as alleged in the W.S., If so its effect? OPD”;

(viii) that the framing of the aforesaid issue showed that the appellant/plaintiff, as far back as on 6th February, 1981, had knowledge of the dispute raised by the respondent/defendant No.1 and his wife about the title of the respondent/defendant No.8; (ix) that the judgment in the suit filed by the respondent/defendant No.1 and his wife records that respondent/defendant No.8 claimed to have been dispossessed by the

respondent/defendant No.1 and his wife in the year 1978 and had lodged FIR No.1730 in this regard; though the appellant/plaintiff was acquitted in the said prosecution on 19th July, 1982 but that there was nothing to show as to when the respondent/defendant No.8 came back in possession after 1978 and how she transferred the property in favour of the appellant/plaintiff on 20th December, 1980; (xi) that thus the issue of possession was decided against the appellant/plaintiff in the judgment in the suit filed by the respondent/defendant No.1 and his wife and which issue had attained finality; (xii) that this Court, in order dated 1st December, 2010 in RSA No.189/2001, though had kept the issue of title open, had not set aside the findings in the judgment in the suit filed by the respondent/defendant No.1 and his wife, including the finding of the respondent/defendant No.1 and his wife being in possession from 1978; (xiii) that the appellant/plaintiff had also alleged contempt of the order of *status-quo* during the pendency of the First Appeal against the judgment in the suit filed by the respondent/defendant No.1 and his wife and which contempt petition was dismissed holding the construction on the property to be old; the said judgment of dismissal of contempt petition had also attained finality; (xiv) that there was no explanation, as to why the appellant/plaintiff did not sue for specific performance immediately after issues were framed on 6th February, 1981 in the suit filed by the respondent/defendant No.1 and his wife and waited for 20 years to file the suit for specific performance; (xv) that the respondent/defendant No.8 could not pass a better title to the appellant/plaintiff than what she herself had; (xvi) that for all the aforesaid reasons, it was not a fit case for grant of relief of specific performance. However, the First Appellate Court passed a decree in favour of the

appellant/plaintiff and against the respondent/defendant No.8, of recovery of Rs.30,000/- with interest @ 7% per annum.

15. The judgment of the First Appellate Court is a very well-reasoned judgment and the First Appellate Court has given all possible reasons which could have been given in the facts and circumstances of the case.

16. The counsel for the appellant/plaintiff, on being asked to show the evidence led of possession, has only drawn attention to page 114 of the paper book, being the affidavit by way of examination-in-chief of the appellant/plaintiff, where certified copies of bills of building material and photographs of the property were tendered in evidence. However, the appellant/plaintiff has not deemed it appropriate to file the said documents on record. Obviously, according to the appellant/plaintiff also, the said documents do not prove possession of the appellant/plaintiff of the property at any point of time.

17. Rather, I had also enquired from the counsel for the appellant/plaintiff, whether not the order dated 1st December, 2010 in RSA No.189/2001 reproduced hereinabove does not set aside the judgment against which that Regular Second Appeal was preferred and is a case of withdrawal simpliciter by the appellant/plaintiff of the appeal.

18. I may also mention that it has been held by this Court in (a) **Shikha Misra Vs. S. Krishnamurthy** 2014 SCC OnLine Del 1565, appeal whereagainst was dismissed vide judgment reported in **Shikha Misra Vs. S. Krishnamurthy** (2016) 227 DLT 66 and SLP(C) No.24899/2016 preferred whereagainst was dismissed on 5th September, 2016; (b) **Sushila Devi Vs. Adeline D. Lall** 2013 SCC OnLine Del 4991, SLP(C) No.5254/2014

preferred whereagainst was dismissed on 14th March, 2014 and Review Petition (Civil) No.1297/2014 preferred whereagainst was also dismissed on 31st July, 2014; (c) *Ansal Properties and Industries Pvt. Ltd. Vs. Ratnu* 2013 SCC OnLine Del 4532, SLP(C) No.4820/2014 preferred whereagainst was dismissed on 10th March, 2014; and, (d) *Surinder Singh Vs. Surbir Singh* 2014 SCC OnLine Del 550, that even where under an Agreement to Sell no time for performance is fixed, the purchaser is required to act diligently and seek specific performance within reasonable time and cannot afford to, inspite of such challenges as being made to his possession in pursuance to Agreement to Sell, sit quietly and choose the date for approaching the agreement seller for the first time. For that reason alone, in my opinion, the appellant/plaintiff has rightly been held to be disentitled from claiming the relief of specific performance.

19. It is also the contention of the counsel for the appellant/plaintiff that the learned First Appellate Court has wrongly applied Section 20 of the Specific Relief Act. It is argued that under Section 20 of the Specific Relief Act, the factors between the agreement purchaser and agreement seller are to be waived and in the present case extraneous factors have been considered.

20. No merit is found in the aforesaid contention. Clause (a) of Section 20(2) entitles the Court not to decree specific performance where other circumstances in which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant. Similarly, Clause (c) of Section 20(2) also requires the Court not to decree specific performance where the defendant entered into the

contract under circumstances which make it inequitable to enforce specific performance.

21. Here obviously, there was a title dispute between the respondent/defendant No.1 and his wife and the respondent/defendant No.8 with respect to the property of which Agreement to Sell is claimed and as rightly held by the First Appellate Court, it has been conclusively held in the judgment in the suit filed by the respondent/defendant No.1 and his wife that the said respondent/defendant No.1 and his wife were in possession of the property since 1978. The same casts a cloud of doubt over the Agreement to Sell dated of 20th December, 1980 under which the respondent/defendant No.8 has purported to hand over possession of the property to the appellant/plaintiff.

22. No other argument has been raised.

23. No substantial question of law arises.

24. Dismissed.

No costs.

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RAJIV SAHAI ENDLAW, J.

AUGUST 21, 2018

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