

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

+ **CS(OS) Nos.51/2006 & 2279/2006**

% **28th July, 2015**

1. **CS(OS) No.51/2006**

DR. S.P. JINDAL AND OTHERS Plaintiffs
Through: Ms. Manmeet Arora, Advocate
with Ms. Princy Poonan,
Advocate.

Versus

M/S FRIEDRICH EBERT STIFTUNG Defendant
Through: Mr. Abhishek Singh, Advocate
with Mr. Pankaj Sharma and
Mr. Chirojit Mukherji,
Advocates.

2. **CS(OS) No.2279/2006**

M/S FRIEDRICH EBERT STIFTUNG Plaintiff
Through: Mr. Abhishek Singh, Advocate
with Mr. Pankaj Sharma and
Mr. Chirojit Mukherji,
Advocates

Versus

DR. S.P. JINDAL AND OTHERS Defendants
Through: Ms. Manmeet Arora, Advocate
with Ms. Princy Poonan,
Advocate.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **Yes**

VALMIKI J. MEHTA, J (ORAL)

1(i). Two suits are being decided by the present judgment. The suits were consolidated by the Order of this Court dated 28.4.2009 in CS(OS) No.51/2006 when issues were framed. The first suit being CS(OS) No.51/2006 is a suit filed by the landlord/proposed seller under the Agreement to Sell dated 01.11.2004. By this suit, the landlord/proposed seller seeks back possession of the suit property bearing no. K-70B, Hauz Khas Enclave, New Delhi-110016 and also mesne profits at Rs.2.50 lacs per month from 1.7.2005. The suit is predicated on the cause of action that the Agreement to Sell dated 1.11.2004 no longer binds the landlord/proposed seller and consequently the proposed buyer/tenant having no rights of a lessee in the suit premises, should handover possession of the suit premises back. The landlord/proposed seller is Dr. Shiv Pal Jindal. The proposed buyer/tenant is a German NGO, M/s. Friedrich Ebert Stiftung. For completion of narration, it may be stated that though it was only Dr. Shiv Pal Jindal who was the owner of the suit property, landlords of the suit property

were three in number i.e Dr. Shiv Pal Jindal, his HUF and Dr. Ms. Vijya Laxmi Jindal (wife of Dr. Shiv Pal Jindal).

(ii) The second suit, CS(OS) No.2279/2006 is a suit for specific performance filed by the tenant/proposed buyer seeking specific performance of the Agreement to Sell dated 1.11.2004. Proposed buyer/tenant seeks the execution of sale deed in its favour of the suit property from Dr. Shiv Pal Jindal.

2. If the suit for specific performance filed by M/s Friedrich Ebert Stiftung is decreed, then, automatically the suit for possession filed by the proposed seller/landlord would have to be dismissed. Putting it in another way, landlords being the plaintiffs in CS(OS) No.51/2006 can only succeed if M/s Friedrich Ebert Stiftung fails in its suit for specific performance.

3. The Agreement to Sell between the parties, Ex. P1, is dated 1.11.2004 and is an admitted document i.e there is no dispute that the parties entered into the same. Under this Agreement to Sell, sale consideration was fixed at Rs.2.30 crores. A sum of Rs.1 lakh was given to the proposed seller at the time of entering into the Agreement to Sell and balance sale consideration of Rs.2.29 crores was to be payable at the time of execution and registration of the sale deed, and for which a period of two months was

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fixed. This period of two months was extendable for another period of two months. Within this period, the proposed buyer had to take permission of the requisite authorities to buy the suit property; essentially being the RBI/Government of India; inasmuch as proposed buyer is not an Indian national but is a German NGO. Some of the relevant clauses of this Agreement to Sell, and which would be material for determination of the suits are Clauses 1, 2, 3, 4, 5, 9 and 10 of the Agreement to Sell, and these clauses read as under:-

“1. The Vendor agrees to sell and subject to clear and marketable title being established to the satisfaction of the PURCHASER, and the other terms and conditions set out in this Agreement. The PURCHASER agrees to purchase the aforesaid schedule property for a total consideration of Rs.2,30,00,000/- (Rupees Two crore and thirty lakhs only) free from all encumbrances.

2. As part of the sale consideration, the Purchaser, has at the time of execution of this Agreement, paid to the Vendor a sum of Rs.100,000/- (Rupees one lakh). The Vendor has delivered to the Purchaser certified copies of the title documents of the Property to the Purchaser in consideration of the Purchaser entering into this agreement and paying a sum of Rs.100,000/- as stated above. The title documents comprise of the following:

Sale deed (Old, notarised photocopy)

Partition deed

Court order

Mutation Order

Sanction letters and plans (notarised photocopy)

3. The Purchaser agrees to pay the balance sale consideration of Rs.2,29,00,000/- (Rupees Two crore twenty nine lakhs only) to the vendor at the time of registration of the property in the name of the Purchaser by way of a sale deed or deeds as the case may be and execution of other documents as may be required by the Purchaser.

4. It is agreed by the parties that, the sale transaction shall be completed within a period of 2 months from the date of this Agreement and the Purchaser shall pay the above referred balance sale consideration of Rs.2,29,00,000/- (Rupees two crore twenty nine lakhs only) as agreed, and the VENDOR shall convey the said property by means of one or more sale deeds as required by the PURCHASER.

5. It is clearly understood that time shall be of the essence of the contract except for Delays occurring due to any Force Majeure Reasons, as under:

- Delay in grant of permission by the Government of India to the Purchaser for purchasing the said property from Vendor herein, upto a maximum of 4 months from the date of this agreement to sell.
- War and other hostilities, (whether war be declared or not), invasion, act of foreign enemies, mobilization, requisition or embargo;
- Ionizing radiation or other contamination by radio-activity from any nuclear fuel from any nuclear waste from the combustion of nuclear fuel, radio-active toxic explosive, or other hazardous properties or any explosive nuclear assembly or nuclear components thereof;
- Rebellion, revolution, insurrection, military or usurped power and civil war;
- Any riot commotion or disorder;
- Act of God.

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9. That in the event of the Purchaser's failure to complete the transaction within the stipulated time the Parties will examine the reasons for the same and to the extent that the delay is not attributable to any default on

the part of the Purchaser, the stipulated time may be suitably extended by mutual consent, upto a maximum of two months. If the Purchaser fails to pay the entire sale consideration within the time agreed as above, the advance of Rs.100,00 given by them will be refunded back, and the Vendor will be free to sell the property to anybody else without any notice to the purchaser by 31.12.2004, the purchaser shall continue to pay the full rent upto the payment of entire sale consideration and transfer of the property.

10. The rents and profits of the property, prior to the date of sale/transfer shall be received by or belong to the “Vendor” and all outgoing and rates and taxes shall be discharged by them up to the date of the sale.”

(underlining added)

4. A reading of the aforesaid clauses of the Agreement to Sell shows that the time of performance was made the essence and the maximum period of completion of the sale transaction was four months. Time is written as being the essence of the contract in the Agreement to Sell as per Clause 5 of the Agreement to Sell. Vide Clause 9 of the Agreement to Sell within the four months period the balance sale consideration was to be paid, and on the failure of which the proposed seller was free to sell the property to somebody else, but on the payment of the entire consideration the liability towards payment of rent was to cease.

5. After the Agreement to Sell was entered into, thereafter, the next agreed document is the receipt dated 28.2.2005 executed between the

parties whereby the proposed seller/landlord has received the entire balance sale consideration of Rs.2.29 crores. This receipt Ex.P2 reads as under:-

“I Shiv Pal Jindal, son of Late Shri Prem Nath Jindal, resident of No.5 Red Cross Flats, Kaka Nagar, New Delhi India do hereby confirm that I have received from M/s. Friedrich Ebert Stiftung-India Country Office, the Indian Office at Friedrich Ebert Stiftung an international development organization established in the Republic of Germany and having its office at K-70B Hauz Khas Enclave New Delhi 110016, a sum of Rs.2,30,00,000 (Rupees Two Crores and Thirty Lakhs Only) as full and final sale consideration in respect of the sale and handing over of possession of my unencumbered property (land and building) bearing number K-70B Hauz Khas Enclave New Delhi in terms of agreement to sell dated 1st November 2004.

Details of payments received

Cheque No.	Date	Amount
1. 663150	1/11/2004	Rs.1,00,000
2. 733758	28-02-2005	Rs.2,29,00,000
Total		Rs.2,30,00,000

Rupees Two Crore and Thirty Lakhs Only

In witness whereof the vendor has affixed his signatures hereto on the date and at the place mentioned below.

Sd/-

Shiv Pal Jindal
Vendor
5, Red Cross Flats
Kaka Nagar
New Delhi

Witnesses:

1. Sd/-

2. Sd/-

Date: 28/2/05

Place: Delhi”

(underlining added)

6. It is clear that as on 28.2.2005 the proposed seller had received the entire/complete sale consideration of Rs.2.30 crores and there remained no balance sale consideration due and payable by the proposed buyer to the proposed seller. At this stage a fact needs to be noted and which is that there is a disputed factual aspect of the proposed buyer having paid or not paid a sum of Rs.10 lacs to the proposed seller on 1.3.2005, and which disputed aspect, I will refer to in the later part of this judgment, however, simultaneously it is also noted that whatever be the decision on this disputed aspect, this aspect would not have any bearing whatsoever on the reliefs which are to be granted and the issues which have to be decided.

7. The case as argued by the proposed seller is that since the time of performance was the essence of the contract, and the proposed buyer failed to get the requisite permission from the Government of India/RBI within the period of four months of entering into the Agreement to Sell, i.e before 28.2.2005, the Agreement to Sell became unenforceable and lapsed and resultantly the proposed buyer could no longer claim any rights under the same. Accordingly and consequently, it is argued that the landlords are hence entitled to take possession back of the suit premises alongwith mesne profits. The defence of the proposed buyer is that within the period provided

under the Agreement to Sell it had applied to the requisite authority/RBI for permission to purchase the property, but delays were caused by the governmental authorities and only because of this reason the sale deed could not be executed and registered on or before 28.2.2005. It is argued that though no doubt time was of the essence of the contract in terms of the Agreement to Sell, however, once the entire sale consideration stood paid to the proposed seller on 28.2.2005, time of performance ceased to be of the essence because after all what can a proposed seller expect to receive under an agreement to sell except the total sale consideration, and thus on receipt of the total sale consideration, there does not remain any issue of any breach of contract by the proposed buyer. By placing reliance upon Clause 9 of the Agreement to Sell and the language of the receipt dated 28.2.2005 it is argued on behalf of the proposed buyer that on payment of the entire sale consideration its liability to pay rent specifically had been agreed to be brought to a halt and the proposed buyer had a right to retain possession without incurring liability to pay rent. As of date the governmental authorities have not finally decided (as discussed later) to deny permission to the proposed buyer to purchase the suit property and therefore the Agreement to Sell had not become void and cannot be said to have lapsed.

8. Common issues were framed in the two suits by the Order of a learned Single Judge of this Court dated 28.4.2009 in CS(OS) No.51/2006.

By the subsequent Order dated 13.2.2013, an additional issue was framed.

9(i). The issues framed on 28.4.2009 read as under:-

“Issues framed on 28.4.2009

1. Whether the defendant being German NGO could purchase an immovable property in India without prior permission of Reserve Bank of India and if not, what is its effect on agreement to sell dated 01.11.2004? O.P.D.

2. Whether the time was the essence of contract between the parties under the agreement to sell dated 01.11.2004? O.P.P.

3. Whether the parties had deleted clause 9 in the original agreement to sell dated 01.11.2004 by way of alleged amendment dated 01.03.2005? O.P.D.

4. Whether the purported signatures of plaintiff no.1 on document of amendment dated 01.03.2005 are forged and fabricated as alleged by the plaintiffs? O.P.P.

5. What is the effect of agreement to sell dated 01.11.2004/01.03.2005 on the termination of lease vide plaintiff's notice dated 30.05.2005? O.P. Parties

6. Whether the plaintiffs are entitled to possession of the suit premises from the defendant or whether the defendant is entitled to a decree of specific performance on the basis of agreement to sell dated 01.11.2004/01.03.2005 as prayed by him in connected suit being CS(OS) No.2279/2006? O.P. Parties

7. In case, it is held that the defendant is not entitled to a decree of specific performance whether the plaintiffs are entitled to recovery of rent/use and occupation charges in respect of the suit premises, and if so, what rate and for which period?

8. Relief.”

(ii) The additional issue framed on 13.2.2013 reads as under:-

“Additional issue framed on 13.2.2013

What is the effect if any, of the advice subsequently received by the defendant that no prior permission of Reserve Bank of India was required for purchasing the property? OPD”

10. Let me now take up the issues framed in the suits for decision, and deal with the arguments urged by the respective parties on these issues.

Issue Nos. 2, 3 and 4

“2. Whether the time was the essence of contract between the parties under the agreement to sell dated 01.11.2004? O.P.P.

3. Whether the parties had deleted clause 9 in the original agreement to sell dated 01.11.2004 by way of alleged amendment dated 01.03.2005? O.P.D.

4. Whether the purported signatures of plaintiff no.1 on document of amendment dated 01.03.2005 are forged and fabricated as alleged by the plaintiffs? O.P.P.”

11. In my opinion, these issues can be dealt with together and these issues are accordingly dealt with together inasmuch as these issues pertain to whether time was the essence of the contract, whether the time no longer remains the essence of the contract, and what is the effect of time originally being and thereafter not being the essence of the contract as respectively argued by the parties. Clause 9 of the Agreement to Sell, which is the *CS(OS) Nos.51/2006 & 2279/2006*

subject matter of issue no.3 is regards entitlement claimed by the proposed seller to cancel the Agreement to Sell after expiry of the four months period which is pleaded to be of the essence. Forgery of the Amendment Agreement dated 1.3.2005 is pleaded by the proposed seller because as per the proposed seller, Clause 9 of the Agreement to Sell was not deleted by the amendment and that time of performance continued to be of the essence.

12. In metropolitan cities, ordinarily prices do rise, and therefore, depending on the facts of the case, courts are inclined to consider time of performance as of the essence of the contract with respect to properties in metropolitan cities as held in the judgment of the Supreme Court in the case of *Saradamani Kandappan Vs. S. Rajalakshmi and Others (2011) 12 SCC 18*. I may note that this law that time of performance is of the essence has been held by the Supreme Court to be applicable to urban immovable properties as differentiated from the properties in rural areas or villages where prices of properties do not ordinarily rise within a short period, much less sharply.

13. I have already reproduced the relevant clauses of the Agreement to Sell and no doubt these clauses of the Agreement to Sell do say that time of performance was the essence of the contract inasmuch as a time period stated

specifically by Clause 5 of the Agreement to Sell to be of the essence and maximum period of four months from 1.11.2004 was given to the proposed buyer to take the necessary permission for completing the sale transaction. The original period for completion was of two months, and extendable to a maximum period of four months. While noting the aspect that time was of the essence, one cannot ignore the fact that time of performance being of the essence was necessarily linked to the aspect that the proposed seller under the Agreement to Sell had received only a nominal sum of Rs.1 lakh out of the sale consideration of Rs.2.30 crores, and it was only at the time of execution and registration of the sale deed that the proposed seller was to receive the balance consideration of Rs.2.29 crores, and therefore, the time of performance was made the essence of the contract because prices of properties rise and to a proposed seller there is no use of a sale transaction unless he receives the entire consideration of the transaction. Once the aspect that time of performance being of the essence is linked to the proposed seller having only received an amount of Rs.1 lakh under the Agreement to Sell and that the balance of Rs.2.29 crores, viz almost the entire sale consideration, was still remaining to be paid to the proposed seller, then surely on receipt of the total sale consideration the time of performance will pale into insignificance. That this was very much so because as per the last

lines of Clause 9 of the Agreement to Sell the liability to pay rent by the proposed buyer was to continue only till payment of the complete price. This aspect is buttressed by the fact that the admitted subsequent event is that by 28.2.2005, the proposed seller had received the balance consideration of Rs.2.29 crores and hence the total sale price of the suit property which was to be sold by the proposed seller to the proposed buyer. In such a scenario, in my opinion, time of performance, that is time of performance for execution of the sale deed, and which was the only balance obligation to be performed under the contract no longer remains the essence of the contract.

14. At this stage, let me deal with an argument urged on behalf of the proposed seller and which argument is that the proposed buyer is not entitled to specific performance in view of the ratios of the judgments of the Supreme Court in the cases of *Citadel Fine Pharmaceuticals Vs. Ramaniyam Real Estates Private Limited and Another* (2011) 9 SCC 147 and *K. Narendra Vs. Riviera Apartments (P) Ltd.,* (1999) 5 SCC 77. This argument as to the disentitlement of the proposed buyer to specific performance relying upon the aforesaid judgments is a misconceived argument because whether time of performance is or is not of the essence

depends on the facts of each case and I have already held that the time no longer remains the essence of the contract once the proposed seller received the entire sale consideration on 28.02.2005. In the judgments which are relied upon on behalf of the proposed seller, it is seen that the proposed buyer had not paid the entire sale consideration to the proposed seller, payment being nominal in one case and about 60% in the other. This is admittedly not the position in the present case where complete price stands paid. Therefore, each case depends upon its own facts and circumstances, and therefore in my opinion the proposed seller can take no benefit of the judgments of the Supreme Court on which reliance is placed upon. This argument urged on behalf of the proposed seller is hence rejected.

15. Not only, the time of performance of execution and registration of the sale deed no longer remained the essence of the contract because the proposed seller had received the entire sale consideration, the proposed seller as stated above was no longer entitled even to claim any rent or charges for use and occupation from the proposed buyer of the suit property. In fact to hold otherwise would mean that the proposed seller would enjoy the huge interest which the proposed seller would receive on *corpus* of the total sale consideration received, and yet claim that the

proposed buyer's liability continues for payment of rent/user charges. Obviously, in law there cannot be a double whammy upon a proposed buyer and in my opinion the original terms in the Agreement to Sell, including of continuation of tenancy stood duly modified on proposed seller receiving the entire sale consideration by 28.2.2005 i.e the possession of the proposed buyer was as a right to continue in possession without being burdened by continued liability to pay rent, and so specifically agreed between the parties by the last few lines of Clause 9 of the Agreement to Sell. Any doubt of ceasing of liability to pay rent is removed from the language of the receipt dated 28.2.2005 which categorically refers to possession henceforth being of the proposed buyer and which language of the receipt is to be read with and co-related to the last lines of Clause 9 of the Agreement to Sell. These aspects also thus leads one to conclude that time of performance no longer remains the essence of the contract.

16. There is another way of looking at the matter. A breach of contract is actionable only if the breach causes loss to an aggrieved party. The language of Section 73 of the Indian Contract Act, 1872 makes it clear that mere breach is not actionable but the loss which is caused on account

of breach results in a cause of action arising for the aggrieved party who is not guilty of breach to claim damages from the person who is guilty of breach. In the present case, the maximum entitlement of the proposed seller was to receive the total sale consideration and once admittedly the total sale consideration was received, really there were no further obligations to be performed by the proposed buyer in favour of the proposed seller, and that even assuming there is a breach of contract by the proposed buyer in not getting the permission from the requisite authorities, such a breach on behalf of the proposed buyer, which has not caused any loss to the proposed seller as the entire sale consideration is received by him, cannot create legally enforceable cause of action in favour of the proposed seller to claim cancellation of the Agreement to Sell and for this Court to hold that the Agreement to Sell was no longer enforceable. As already stated above, after receiving of the complete sale consideration, the only obligation which remains to be performed was not by the proposed buyer but only of the proposed seller under the Agreement to Sell towards the proposed buyer being the execution and registration of the sale deed after permission is given by the requisite authorities. Therefore, even if Clause 9 of the Agreement to Sell did not so provide, on the receipt of the entire sale consideration, time of

performance no longer remained of the essence and for the proposed seller to claim cancellation on the ground of delay in the proposed buyer getting permission from RBI/Government of India.

17(i). Another aspect to be noted and decided at this stage is that can it be said that the proposed seller suffered any prejudice or loss on account of the proposed buyer either not applying for permission from the requisite authorities before 31.12.2004 (when it was first applied by the proposed buyer) or not getting the permission from the requisite authorities within the period of four months prescribed under the Agreement to Sell. These arguments are raised to argue existence of prejudice/loss even though complete price is received.

(ii) The argument raised on behalf of the proposed seller that the proposed buyer only on the last date of the expiry of the first period of two months i.e on 31.12.2004 applied for the requisite permission and the proposed buyer is hence guilty of breach, however this aspect falls into insignificance inasmuch as it is not even the case of the proposed seller that the Agreement to Sell lapsed and became unenforceable or void w.e.f 1.1.2005 and before 28.2.2005, because, admittedly no legal notice was served after 1.1.2005 till 28.2.2005 by the proposed seller to the proposed

buyer cancelling the Agreement to Sell. Really therefore the argument urged of the proposed buyer only applying for the first time with RBI/Government of India on 31.12.2004 being allegedly a breach is neither here nor there. Also, the related argument urged on behalf of the proposed seller that as regards the letter of the proposed buyer to RBI/Government of India dated 31.12.2004 there is no proof that this letter was dispatched to RBI/Government of India, is a misconceived argument because the RBI in its counter affidavit filed in the W.P.(C) No.3498/2010 filed by the proposed buyer has admitted that this letter of the proposed buyer dated 31.12.2004 has been received by the RBI. The specific admission that RBI has received the letter of the proposed buyer dated 31.12.2004 is mentioned at internal page four of the counter affidavit and which is at running page 152 in Part-I of CS(OS) No.51/2006. The counter affidavit filed on behalf of the RBI in W.P.(C) No.3498/2010 has been proved and exhibited as Ex.DW1/23. It is not disputed before this Court on behalf of the proposed seller that actually this is indeed the counter affidavit of RBI. This document is therefore a proved document and in fact should not be a 'marked' document but should be taken as proved as exhibit Ex.DW1/23. Also, while on the counter affidavit filed by the RBI in the writ petition filed by the proposed buyer it needs to be further noted that the said counter affidavit also refers to the *CS(OS) Nos.51/2006 & 2279/2006*

subsequent letter of the proposed buyer dated 19.2.2005 to the RBI whereby RBI was reminded to give the necessary permission so that proposed buyer can purchase the property from the proposed seller.

18. Learned counsel for the proposed seller did try to make a vain attempt before this Court by arguing that the proposed seller has been prejudiced by the provisions of the Foreign Exchange Management Act, 1999 (in short 'the 1999 Act') along with the Foreign Exchange Management (Acquisition and Transfer of Immovable property in India) Regulations, 2000 (in short 'the 2000 Regulations'). It was argued that the proposed seller will be prejudiced because he can be subjected to imprisonment under these legislations. However, I note that in the Foreign Exchange Management Act there is no provision with respect to incarceration in a situation where a proposed seller is having to wait for execution of the sale deed because the proposed buyer's application for necessary permission remains pending with the requisite authorities. Also it needs to be noted that there is no blanket ban upon the proposed buyer to purchase any immovable property in India and a blanket ban for purchase of a property as per Regulation 7 of the 2000 Regulations is only with respect to nationals of certain countries with German nationals being not covered

under that Regulation 7 of the 2000 Regulations. The contention of the counsel for the proposed seller relying upon Section 14 of the 1999 Act that the same provides for imprisonment of a proposed seller, is very frankly not at all understood by this Court, inasmuch as, the provision of Section 14 read with the related provision of Section 13 of the 1999 Act nowhere provides that where a proposed seller has to wait for execution of sale deed because the proposed buyer has applied for and awaiting the requisite permission, merely, because of waiting, the proposed seller will incur a liability with respect to either monetary penalty or for his incarceration. This argument thus urged on behalf of the proposed seller is wholly misconceived and is rejected that the proposed seller will be prejudiced or he has suffered a loss on account of the proposed buyer yet not having got the necessary permission from RBI/Government of India.

19. In my opinion, all the arguments urged on behalf of the proposed seller as dealt with hereinabove are merely convenient arguments to somehow or the other wriggle out the Agreement to Sell under which the entire sale consideration has been received way back by February, 2005 inasmuch as the property value by now would have in the very minimum at least doubled or trebled. The stand of the proposed seller is a completely

dishonest stand to say the least and this Court finds that a proposed seller who has received the entire sale consideration is desperate to put forth some or the other argument so that the transaction must fail whereby a valuable property again comes back to the hands of the proposed seller.

20. At this stage, I take on record the copy of the Order dated 09.10.2014 passed by a learned Single Judge of this Court in W.P.(C) No. 3498/2010 whereby this Court has remanded the matter filed by the proposed buyer back to the RBI for a fresh decision by noting that no objection is given to this Court on behalf of the proposed seller for this Court to refer to this Order dated 09.10.2014 disposing of W.P.(C) No. 3498/2010.

21. I therefore hold that time of performance no longer remained of the essence once the proposed seller had received the entire sale consideration, and thereafter the proposed buyer had no other obligation to perform to the proposed seller, and it is only the proposed seller who had to perform the remaining obligation of the execution and registration of the sale deed. Also, as stated above, no prejudice or loss whatsoever has been caused on account of any delay if caused by the proposed buyer in not applying for permission to the requisite authorities or the requisite

authorities having delayed the matter and till date having not granted the requisite permission. Accordingly, issue no.2 is decided in favour of the proposed buyer and against the proposed seller holding that time of performance no longer remained the essence of the contract after the proposed seller received the entire sale consideration on 28.2.2005.

22(i). With respect to the related issues no.3 and 4, there is an issue as to whether the signatures of the proposed seller/landlord/Dr. Shiv Pal Jindal on the Amendment Agreement dated 01.03.2005 have been forged or not by the proposed buyer. The reason for framing of these issues is dealt with by me in para 11 above and once it is held that time of performance ceased to be of the essence, it has to be said that issue no. 3 will in effect stand decided against the proposed seller because this issue no. 3 was framed because Clause 9 of the Agreement to Sell which is talked of being deleted as per this issue was on the subject of time not remaining of the essence by deleting Clause 9 of the Agreement to Sell and the proposed seller being entitled to cancel the Agreement to Sell if transaction does not go through in the four month period. Since in deciding issue no. 2 it has been already held above that time of performance no longer remained to be of the essence, hence the issue of deletion or non-deletion of Clause 9 of the Agreement to Sell

becomes immaterial because even if Clause 9 of the Agreement to Sell is not deleted, time of performance still did not remain of the essence as held while deciding issue no. 2.

(ii) With respect to these two issues no.3 and 4, on behalf of the proposed seller, it is very strenuously argued that signatures of the proposed seller, Dr. Shiv Pal Jindal have been forged and fabricated by the proposed buyer on the Amendment Agreement dated 01.03.2005. In furtherance of this argument it is urged that the other person who is a signatory to this Amendment Agreement dated 01.03.2005 on behalf of the proposed buyer, namely one Mr. Manfred Hack, has not stepped into the witness box to confirm the existence of the document dated 1.3.2005. It is also argued that there is a suggestion given to this witness of the proposed buyer on behalf of the proposed seller that the signatures on the Amendment Agreement dated 01.03.2005 of Dr. Shiv Pal Jindal are forged and fabricated.

(iii) Even if still this Court has to decide the issue no.3, in spite of what is stated above in sub-para (i) of this main para, then, in my opinion the arguments and the issues with respect to existence of the Amendment Agreement dated 01.03.2005 or whether that is a forged document, can be looked into in two angles. Firstly, the proposed seller, Dr. Shiv Pal Jindal

had the best evidence with him which he under Section 106 of the Evidence Act, 1872 should have brought forth on record viz his other admitted signatures in various public documents such as Banks, Income Tax Department etc for comparing the disputed signatures on the Amendment Agreement dated 01.03.2005 with the unquestionable signatures from an expert, however, no evidence has been led on behalf of the proposed seller of any expert that the signatures existing on the Amendment Agreement dated 01.03.2005 of the proposed seller, Dr. Shiv Pal Jindal are forged and fabricated and do not match with the other admitted or unquestionable signatures of Dr. Shiv Pal Jindal.

(iv) The second way of looking at this issue is that nothing would turn upon the existence otherwise of this Amendment Agreement dated 01.03.2005 because this Amendment Agreement dated 01.03.2005 records that time of performance will be no longer of the essence by deleting Clause 9 of the Agreement to Sell in view of the proposed seller as per the Amendment Agreement dated 1.3.2005 receiving Rs.10 lacs in addition to the total sale price but since however a proposed seller can contractually or legally claim to receive only and only the sale price, and nothing more, and once the total sale price is received by the proposed seller, even if this Amendment

Agreement dated 01.03.2005 does not exist, and assuming it is forged and fabricated, nothing will turn on this point with respect to denying the proposed buyer specific performance of the subject Agreement to Sell. Therefore, though there is lack of individual credible evidence for this Court to decide in favour of the proposed seller that the Amendment Agreement dated 01.03.2005 is forged and fabricated, but even assuming that this issue is held in favour of the proposed seller, nothing will turn upon the same as stated above, because the amount of Rs.10 lacs which is purported to have been paid to the proposed seller under this Amendment Agreement dated 01.03.2005 was in addition to the sale consideration, and hence there was no entitlement of the proposed seller to receive this amount, with the legal consequence that after receipt of the entire sale consideration of Rs.2.30 crores, time of performance did not remain of the essence of the contract as already discussed in detail hereinabove.

23. Issue nos.3 and 4 are decided accordingly and against the proposed seller. It is held that there is no sufficient evidence for this Court to hold on a balance of probabilities that the Amendment Agreement dated 01.03.2005 is a forged and fabricated document and in any case nothing turns upon existence or otherwise of this Amendment Agreement dated

01.03.2005 as per the detailed discussion above. It is also held that once time of performance no longer remained of the essence in the facts of this case, whether Clause 9 of the Agreement to Sell was or was not deleted by the Amendment Agreement dated 1.3.2005 is immaterial because even if Clause 9 of the Agreement to Sell continued and was not deleted yet, time of performance had otherwise ceased to be of the essence, and the proposed seller had no right to cancel the Agreement to Sell.

24. **Issue No.1**

Whether the defendant being German NGO could purchase an immovable property in India without prior permission of Reserve Bank of India and if not, what is its effect on agreement to sell dated 01.11.2004? O.P.D.

Let me now take up issue no.1 for decision. On behalf of the proposed seller reliance has been placed upon Sections 13 and 14 of the 1999 Act and Regulation 5 of the 2000 Regulations to argue that the proposed buyer being a German NGO could not purchase an immovable property in India without prior permission of the RBI. On behalf of the proposed seller reliance is also placed upon Ex. X-1 being a document dated 09.06.1983 issued by the RBI addressed to the proposed buyer, and in para 4 of this letter dated 09.06.1983 it is stated that the proposed buyer should

obtain prior permission of RBI for acquiring an immovable property in India. On the basis of the relevant provisions of the 1999 Act and the 2000 Regulations and letter dated 09.06.1983, it is argued that without there existing today a permission from RBI, the Agreement to Sell stands lapsed after 30.04.2005 and the proposed seller was hence entitled to cancel the Agreement to Sell and this Court should hold that the Agreement to Sell had become void in the absence of the requisite permission existing of the RBI for the proposed buyer to purchase the suit property.

25. No doubt, Ex.X-1 dated 09.06.1983 states that the proposed buyer should take permission from the requisite authorities, however, in my opinion merely because permission has not been obtained till date, it cannot be said that the proposed buyer is responsible for this position and thus entitling the proposed seller to cancel the Agreement to Sell and have it declared as void. This is because the proposed buyer cannot be punished for no fault of its own.

26. I have already discussed above by reference to the counter affidavit filed by the RBI in the Writ Petition No.3498/2010 filed by the proposed buyer that the proposed buyer had already applied with RBI in December, 2004 and sent reminders to RBI in February, 2005 for getting

the requisite permission, but it is the RBI and the Ministry of Finance which did not give the requisite permission. In fact, as already stated above, the matter is still alive and in *limbo* because the issue has now been referred back to the RBI in terms of the Order of this court dated 09.10.2014 in W.P.(C) No.3498/2010. Therefore, till there is a specific refusal/denial of permission by the requisite authorities to the proposed buyer to purchase the suit property, it cannot today be held that the Agreement to Sell has become void and is liable to be cancelled.

27. In my opinion in the facts and circumstances of the case, the ratio of the judgment of the Supreme Court in the case of ***Mrs. Chandnee Widya Vati Madden Vs. C.L. Katial and Others AIR 1964 SC 978*** will squarely come into play. In this judgment it has been held by the Supreme Court that such contracts/agreements to sell are contingent contracts where before execution of a sale deed pursuant to an agreement to sell, permission is required to be taken of a government authority, and in such contingent contracts courts decree the suits and will direct the requisite permission to be taken by the person who has to take the same as per the contractual obligation in the agreement to sell. In this case, contractual obligation being on the proposed buyer, the proposed buyer will have to pursue its case with

the RBI for taking necessary permission and till it is finally decided against the proposed buyer of the RBI denying permission to purchase the property, and thereafter which aspect achieving finality in any litigation, today, it cannot be said and held that the contract/agreement to sell has become void or can be cancelled by the proposed seller. I may also refer to at this stage to the provision of Order XXI Rule 32 of the Code of Civil Procedure, 1908 (CPC) and which provides for a situation where if the person on whom after the decree there is an obligation to take the requisite permission, fails to take requisite permission, the court is given the power to appoint a Court Commissioner for taking the requisite permission and also to execute and register the sale deed. Though provisions of Order XXI Rule 32 CPC would not apply strictly in the present case because it is the proposed buyer here who has to take requisite permission, however, what is being stressed by this Court is that in case of a contingent contract, a decree directing specific performance has still to be passed as held by the Supreme Court in the judgment in the case of *Mrs. Chandnee Widya Vati Madden (supra)*, and that it is only after a decree is passed, then this issue arises of obtaining of a permission and thereafter of execution of a sale deed. It is only if the permission is not granted, and which issue achieves finality, only thereafter can it then be held that the sale deed would not be executed and the

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agreement to sell has to be cancelled. At this stage, in a suit for specific performance, however, the suit will have to be decreed by directing execution and registration of the sale deed and that the proposed buyer will be directed to take the requisite permission from the concerned authorities.

28. Issue no.1 is hence decided by holding that the suit for specific performance filed by the proposed buyer has to be decreed at this stage and it is only after passing of the decree that the issue will come up of whether the governmental authorities have finally decided against the proposed buyer and not given the permission to the proposed buyer to purchase the suit property and only at that stage the further proceedings will take place to decide that since the sale deed cannot be executed and registered, what further steps will be required to be taken. In fact, a decree which has to be passed in a case such as the present, the same has the elements of a preliminary decree (as distinguished from a final decree which is passed by the court) and reference in this regard can be made to Section 2(2) of the CPC which states that where something more is required to be done after passing of the decree, then the decree is a preliminary decree. Issue no.1 is decided accordingly.

29. **Issue Nos. 5, 6 & 7**

“5. What is the effect of agreement to sell dated 01.11.2004/01.03.2005 on the termination of lease vide plaintiff’s notice dated 30.05.2005? O.P. Parties

6. Whether the plaintiffs are entitled to possession of the suit premises from the defendant or whether the defendant is entitled to a decree of specific performance on the basis of agreement to sell dated 01.11.2004/01.03.2005 as prayed by him in connected suit being CS(OS) No.2279/2006? O.P. Parties

7. In case, it is held that the defendant is not entitled to a decree of specific performance whether the plaintiffs are entitled to recovery of rent/use and occupation charges in respect of the suit premises, and if so, what rate and for which period?”

30. These issues will have to be decided together because the effect of deciding these issues would be as to whether the proposed seller is entitled to possession and mesne profits by terminating the Agreement to Sell and that the proposed buyer is liable to pay mesne profits/use and occupation charges to the proposed seller.

31. As per the discussion of issues no. 1 to 4, these issue nos.5 to 7 will stand decided against the proposed seller. As already observed above on the suit for specific performance succeeding, the suit of the proposed seller seeking the reliefs of possession and mesne profits has to fail. I have already above pronounced upon and held that a decree of specific

performance will have to be passed at this stage because time of performance is no longer the essence of the contract. I have also held that the proposed seller having received the complete price, there cannot be any double jeopardy to the proposed buyer that besides paying the complete sale price it is still liable to continue to pay the rent/user charges, especially in view of Clause 9 of the Agreement to Sell taken with the language of the receipt dated 28.2.2005 which allows the proposed buyer to hold possession.

32. A legal argument is urged on behalf of the proposed seller relying upon Section 53-A of the Transfer of Property Act, 1882 amended w.e.f 24.09.2001 by the Act 48 of 2001, that the amended Section 53-A has to be considered along with the ratio of the judgment of the Supreme Court in the case of *Suraj Lamp and Industries Pvt. Ltd. Vs. State of Haryana and Anr., (2012) 1 SCC 656*, and if that is done, the proposed buyer cannot be held entitled to possession as such possession will be in the teeth of Section 53-A of the Transfer of Property Act. What is essentially argued on behalf of the proposed seller is that the proposed buyer in terms of its pleadings before this Court and its affidavit by way of evidence filed, claims ownership rights in the suit property and if such ownership rights are granted the same will effectively be under Section 53-A of the Transfer of Property

Act and hence these rights cannot be granted because the Agreement to Sell dated 01.11.2004 and the receipt dated 28.02.2005 are unstamped and unregistered documents in violation of Section 53-A of Transfer of Property Act and Article 23A of the Indian Stamp Act, 1899 as applicable to Delhi. As per the amended Article 23A of the Schedule I of the Indian Stamp Act, 1899 as applicable to Delhi for an agreement to sell falling under Section 53-A of the Transfer of Property Act, 1882, before any benefit is taken of such an agreement to sell in the nature of Section 53-A of the Transfer of Property Act, 1882, such an agreement to sell must necessarily be stamped at 90% of the value of the sale consideration for the sale deed and it should also be registered.

33. In my opinion argument urged on behalf of the proposed seller has some substance only in the first blush and not for the final conclusion. Firstly, in the pleadings filed by the proposed buyer no specific benefit is sought to be taken of Section 53-A of the Transfer of Property Act, 1882 of course though the proposed buyer does say it has ownership rights. Also, no issue has been framed for or against any of the party that the Agreement to Sell or the receipt dated 28.2.2005 are or are not in the nature of Section 53-A of the Transfer of Property Act, 1882. In my opinion, even if the

proposed buyer has been adventurous to call itself the owner and even if I take that the statement in the affidavit by way of evidence filed on behalf of the proposed buyer even beyond such pleadings of the proposed buyer is to be looked into, however, mere claim/statement cannot change the legal position and we will have to see the legal position alongwith the facts of this case as to whether at all the proposed buyer can be said to be the owner as per Section 53-A of the Transfer of Property Act and whether the Agreement to Sell or the receipt dated 28.2.2005 and documents are falling under Section 53-A of the Transfer of Property Act or whether the rights of the proposed buyer are only to hold possession without payment of rent and which right is not in violation of Section 53-A of the Transfer of Property Act.

34. On examining the facts of this case with the said legal provisions it is seen that under the Agreement to Sell no possession was delivered to the proposed buyer. The Agreement to Sell in question therefore is not being in the nature of Section 53-A of the Transfer of Property Act, 1882. Possession which is claimed by the proposed buyer already was with the proposed buyer as the tenant of the property and the only effect of the possession continuing with the proposed buyer in terms of the receipt dated 28.2.2005 is that the proposed buyer is entitled to hold the

same, not under Section 53-A of the Transfer of Property Act, but that the possession is of the nature of holding on to possession without payment of any rent or user charges on account of the entire sale consideration having already been paid to the proposed seller. This aspect has already been discussed in great detail while deciding issue nos. 2 and 3 and it has been held by reference to last few lines of Clause 9 of the Agreement to Sell that the possession continuing as per receipt dated 28.2.2005 is only that possession relatable to the last few lines of Clause 9 of the Agreement to Sell. Really therefore neither the Agreement to Sell dated 1.11.2004 nor the receipt dated 28.2.2005 can have the effect of Section 53-A of the Transfer of Property Act, 1882 and the only effect is that the possession continues to be with the proposed buyer without payment of rent or user charges on account of complete price having already paid to the proposed seller. The argument urged on behalf of the proposed seller is therefore rejected that anything turns on the fact that the proposed buyer has thought it fit, of course, most ambitiously, to call himself as the owner of the property.

35. It is therefore held that since the proposed buyer is entitled to hold possession of the property, not under Section 53-A of the Transfer of Property Act, 1882 but in terms of the Agreement to Sell on account of

having paid the complete price which is for stopping the liability of payment of rent and user charges. The proposed seller is therefore not entitled to cancel the Agreement to Sell or claim possession of the suit property or claim any mesne profits or user charges from the proposed buyer. Issue nos.5, 6 and 7 are therefore decided against the proposed seller/landlords.

General

36. Though there is no specific issue framed with respect to readiness, willingness and disentitlement of the proposed buyer to the discretionary relief of specific performance on behalf of the proposed seller, it is argued that the proposed buyer is not ready and willing because it has failed to obtain the necessary permission from the requisite authorities and once that is so, this aspect taken with the effect that time of performance was of the essence of the contract, specific performance should be denied to the proposed buyer. Once the complete price is received by the proposed seller then there is no reason to deny discretionary relief of specific performance to the proposed buyer. These arguments are nothing but a result of the other arguments of the proposed seller decided under issue nos. 2 and 3 and these arguments are meritless and hence rejected.

Additional issue framed on 13.2.2013

“What is the effect if any, of the advice subsequently received by the defendant that no prior permission of Reserve Bank of India was required for purchasing the property? OPD”

37. Learned counsel for the proposed buyer does not press this issue because no evidence has been led that any letter has been issued by the RBI stating that no prior permission is required from the RBI for purchasing of the suit property.

Relief

38. In view of the aforesaid discussion CS(OS) No. 2279/2006 is decreed and it is held that the proposed buyer, M/s Friedrich Ebert Stiftung, the German NGO, is entitled to specific performance of the Agreement to Sell dated 1.11.2005 as regards the property bearing no. K-70B, Hauz Khas Enclave, New Delhi-110016 by execution and registration of sale deed in its favour by the proposed seller, subject of course to the proposed buyer taking/obtaining the necessary permissions from the RBI or any other governmental authorities required for purchasing the suit property. In this regard directions are issued to the proposed buyer, M/s Friedrich Ebert Stiftung that it should pursue its case before the RBI/requisite authorities for

obtaining the necessary permission for the proposed buyer to purchase the suit property from the proposed seller. The present directions are in the nature of a preliminary decree under Section 2(2) CPC with what the further steps which are to be taken after the preliminary decree is passed will be decided as per law and depending on whether the proposed buyer is granted or denied the permission to purchase the suit property by the RBI/Government of India. CS(OS) No. 51/2006 filed by Dr. Shiv Pal Jindal, the proposed seller, and his co-landlords will stand dismissed and it is held that Dr. Shiv Pal Jindal is not entitled to either cancellation of the Agreement to Sell dated 1.11.2005 and that the landlords are not entitled to possession of the suit premises at this stage of passing of the preliminary decree of specific performance in favour of the proposed buyer. The proposed seller/landlords are not entitled to any mesne profits or user charges of the suit premises. Being a commercial matter the proposed buyer, M/s Friedrich Ebert Stiftung will be entitled to costs in its suit as calculated by the Taxing Officer of this Court and will also be entitled to costs with respect to the dismissal of CS(OS) No. 51/2006.

JULY 28, 2015
Ne/nm/ib/godara

VALMIKI J. MEHTA, J