

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

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Judgment reserved on: 27th August, 2015

Judgment delivered on: 07th January, 2016

RFA (OS) 116/2014 & CM No.12420/2014 (stay)

MS SHIKHA MISRA & ANR.

..... Appellants

versus

MR. S. KRISHNAMURTHY

.....Respondent

Advocates who appeared in this case:

For the Appellants : Mr D.N. Goburdhan, Mr Attin Shankar Rastogi and Ms Neha Rajpal.

For the Respondent: Mr Rajat Aneja, Advocate.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J

1. This Regular First Appeal arises out of Judgment dated 23.04.2014 whereby the learned Single Judge has decided the preliminary issues framed in the suit in favour of the defendant and dismissed the suit.

2. The appellants/plaintiffs had filed the suit for specific performance of an agreement to sell of immovable property and for

permanent injunction restraining the defendant from selling, assigning or mortgaging or creating any third party rights in the property allegedly agreed to be sold by the respondent/defendant.

3. The case set up by the appellants was that the appellant No.1 was a tenant, by virtue of an agreement dated 25.02.1987, of one Ms Manjula Krishnamurthy wife of the respondent, in Flat No. 128, Pocket –B, SFS DDA Flats, East of Kailash, New Delhi, w.e.f. January, 1987 at a monthly rent of Rs. 2000/-.

4. On Independence Day of 1989, it is alleged that Ms Manjula Krishnamurthy told the appellants that she wanted to sell the flat to the appellants and the appellants agreed to the said offer. Ms Manjula Krishnamurthy died in 1990 and on her death the respondent became the sole owner of the said flat.

5. It is alleged that the respondent informed the appellants that he would do the paper work for transfer of the said flat from the name of his wife to his own name and once the paper work was completed the flat would be sold to the appellants and during this period the appellants would pay a monthly/annual amount which would be adjusted towards the final sale price. It is alleged that on 19.04.1992, an agreement to sell was entered into between the parties whereby it was stated that the market rate, prevalent on the day the DDA/competent authorities changes the flat from the name of the wife

of the respondent to his name, would be treated as the sale consideration.

6. It is averred in the plaint that the respondent in the year 1998, 2000, 2003, 2004, 2005, 2006 and lastly in monsoon of 2007/late 2009 assured the appellants that the paper work for change of ownership was not complete and the respondent would abide by his commitment to sell the flat to the appellants. The appellants, on 20.12.2010, for the first time came to know that the mutation had taken place in favour of the respondent on 29.10.2009 and the property had been converted to freehold and a conveyance deed had been executed in favour of the respondent on 26.11.2009.

7. The appellants contend that the appellants were ready and willing to purchase the said flat and requested the respondent to sell the same as originally agreed and on the failure of the respondent to abide by the same, filed the present suit.

8. It is contended that all along the appellants had continued to pay a monthly sum to the respondents and till the date of the institution of the suit had paid a total sum of Rs. 18,81,000/-. It is contended that as per the circle rate fixed by the Government in the year 2009 for the locality in which the flat was situated, the total sale consideration would work out to Rs. 16,16,030/- and as per the circle

rate, as on February 2011, the value of the flat is stated to be Rs. 32,32,060/-.

9. The respondent contested the suit and denied that any agreement to sell was executed between the parties. It is contended that the appellants were tenants under the respondent and the respondent, on 01.07.2011, had instituted a suit for ejectment of the appellants and as counterblast to the same, the appellants had filed the suit based on false and fabricated documents. It is contended that it was for the first time by legal notice dated 09.04.2011 that the appellants had alleged an agreement to sell to which an appropriate reply dated 25.05.2011 was sent by the respondent denying any such agreement. It is contended that the respondent had supplied a copy of the documents to the appellants as the respondent wanted to inquire about the market price of the said flat. It is denied that there was any agreement executed on 19.04.1992 between the parties. It is further contended that even if the alleged agreement dated 19.04.1992 was assumed to have been executed between the parties, the same would not constitute a binding and an enforceable agreement to sell of which specific performance could be claimed.

10. On 27.03.2014, the following issues were framed in the suit:-

- “(i) Whether the signatures on the document dated 19th April, 1992 titled Agreement to Sell are of the defendant? OPP

- (ii) Even if the above issue were to be decided in favour of the plaintiffs, whether the document dated 19th April, 1992 constitutes a binding and enforceable Agreement to Sell of which specific performance can be claimed? OPP
- (iii) Even if the above issues are decided in favour of the plaintiffs whether the suit filed in the year 2011 for specific performance of the alleged Agreement to Sell dated 19th April, 1992 is within time? OPP
- (iv) Whether there was any agreement between the parties that amounts paid by the plaintiffs toward rent of the property shall be adjusted towards the sale consideration? OPP
- (v) If the above issues are decided in favour of the plaintiffs, on what terms and at what price is the defendant liable to sell the flat / property to the plaintiffs? OPP
- (vi) Relief"

11. Issue Nos. (ii) & (iii) above were ordered to be treated as preliminary issues. By the impugned judgment the learned single Judge has decided the issues in favour of the respondent and against the appellants and has dismissed the suit.

12. The learned counsel for the appellant has contended that the agreement dated 19.04.1992 constituted a valid and a binding contract between the parties and in terms of the same, the respondent was

liable to sell the property to the appellant at the market rate prevalent at the time when the property was mutated in favour of the respondent. It is further contended that the agreement to sell dated 19.04.1992 is fortified by the letter dated 20.12.2010 which has been admitted by the respondent and the same constitutes a valid and binding agreement between the parties. It is contended that even though the agreement dated 19.04.1992 did not specify any particular sale consideration, however, it was agreed that the property would be sold at a market price on the day when DDA converts or transfers the flat in favour of the respondent and the Court should not have non-suited the appellants summarily and the appellants should have been permitted to lead evidence to prove the market price. It is further contended that the findings returned by the learned Single Judge with regard to the falsehood of the case of the appellant could not have been recorded without a trial and without giving an opportunity to the appellants to lead evidence in the matter. Reliance has been placed on the judgment in the case **Alka Gupta v. Narender Kumar Gupta:** **(2010) 10 SCC 141** to contend that a suit cannot be dismissed without trial merely because the court feels dissatisfied with the conduct of the plaintiff.

13. Per contra, the learned counsel for the respondent has contended that there was no agreement executed between the parties and the appellants have forged and fabricated the alleged agreement

dated 19.04.1992. It is contended that even if the agreement dated 19.04.1992 was assumed to be an agreement executed by the respondent the agreement did not specify any sale consideration and was vague and, as such, could not be specifically enforced by the Court. It is contended that the appellants had concealed the issuance of notice by the appellants on 09.04.2011 wherein it was for the first time contended that the respondent had agreed to sell the property for Rs. 55,00,000/-. It is contended that the plaint on the other hand states that the sale consideration could only be Rs. 32,32,060/-. It is further contended that no amount was paid by the appellants to the respondent towards the alleged sale agreement and as the appellant No.1 was a tenant under the respondent, the amount paid by the appellant No.1 was only towards the rental of the said property. It is contended that it is unbelievable that an owner of a property would permit a tenant to reside in a property for over 20 years without payment of any rental and the entire amount received would be treated as payment towards the sale consideration. Reliance is placed on the judgment in the case of **Mayawanti v. Kaushalya Devi: (1990) 3 SCC 1** to contend that it is not permissible for the Court to make a contract for the parties where the terms of the contract are uncertain.

14. To resolve the dispute that arises in the present appeal, it would be necessary to advert to the two documents on which the appellants

primarily based their case. The first is the alleged document dated 19.04.1992 which reads as under:-

"Agreement to Sell

I S. Krishnamurthy son of Sh. Sita Raman resident of House No.A-1/273, Safdarjung Enclave New Delhi, taking into consideration the cordial relationship with Shikha and Santosh Misra, I agree to sell the D.D.A. Flat No.B-128, East of Kailash, New Delhi to Shikha and Santosh Misra at a market price on the day when D.D.A. converts or transfers the flat in my name as my wife has predeceased me, who was the owner of the flat.

Date: 19.04.1992

Sd/-

Delhi”

15. The important point to be noted in this alleged agreement to sell is that there is no sale consideration mentioned in the said document. The document merely recites that the respondent had agreed to sell the subject flat “at a market price on the day when DDA coverts or transfers the flat in my name”. What is pertinent is that there is no specific amount referred to in this agreement. There is further no mode or method specified in the agreement for arriving at the market price for the subject flat. Even the date when the transaction is to take place or the date relatable to which the market price is to be calculated is not certain.

16. The second document referred to by the appellants is letter dated 20.12.2010. The letter reads as under:-

*"Mr. Santosh Misra
of B-128 East of Kailash.*

Dec 20, 2010

Following documents are attached as per your requirements. Do acknowledge receipt and act now in regard to the purchase of house. Please keep me posted with the developments as and when you know. Sooner the better.

- (1) Letter of allotment by DDA-July 1985*
- (2) Request for the last and final payment as the fifth one dated Apr. 1985.*
- (3) A copy of the mutation document by Municipal Corporation of Delhi-March 2002.*
- (4) A copy of Death Certificate of Mrs. Manjula Krishnamurthy- 11 Oct. 1990*
- (5) Possession of Flat Slip- 28 Nov. 1985*
- (6) Physical possession of Flat on July 27 1985*
- (7) A copy of ground rent of B-128 East of Kailash from 1988-2002*
- (8) A copy of the mutation certificate by DDA dated 29-10-2009*
- (9) You are already in possession of freehold letter showing payment of stamp duty and conversion charges for free hold and also showing me as the owner of the property of B-128 East of Kailash*
- (10) A copy of DBA Payment Schedule*
- (11) A copy of Property tax receipt of 2010-2011*

*Sd/-
Mr. S. Krishnamurthy
20/12/2010"*

17. With regard to the letter dated 20.12.2010, the respondent in the written statement has averred as under:-

“... it is clarified that the answering Defendant supplied the said documents to the Plaintiffs since they were wanting to inquire the market price of the suit flat through certain acquaintances. It is further submitted that even at this juncture, i.e. 20.12.2010, there was no discussion with regard to the sale of the suit flat by the answering Defendant but since the Plaintiffs offered to purchase the same at the market value if it suited them, on their insistence, a photocopy of the documents of the suit flat were handed over to them. Apart from this, there was no other talk regarding the sale of the suit flat as the Plaintiffs themselves informed the Defendant subsequently that the purchase, of the suit flat in question was totally beyond their means in view of its high market value. Therefore, it is clearly apparent that the Plaintiffs are trying to twist and distort the true facts, on the basis of the letter dated 20.12.2010 by virtue of which only the copies of the ownership documents of the suit flat were supplied to the Plaintiffs....”

18. Perusal of the letter dated 20.12.2010 also shows that the same does not constitute a concluded contract between the parties. The letter does not talk of any agreement allegedly referred to between the parties. Even if the letter were to be taken on its face value, the letter shows that certain documents were supplied to the appellant and the respondent has requested the appellant to act in regard to the purchase of the house and keep the respondent posted with the developments as and when the appellants came to know of the same. It is pertinent to

note that the letter does not specify any offer or promise to sell or the terms or condition of such sale. It does not constitute a complete concluded discernible contract between the parties. Even the so called developments referred to in the said letter are not discernible.

19. The learned Single Judge has noted in the impugned judgment that the case set up by the appellants is contradictory and shifting stands have been taken qua the market rate. In the plaint it is stated that the market rate as per the agreement (i.e. the circle rate of the date on which the flat was transferred) translates to Rs. 16,16,030/-. However, specific performance has been sought treating the market rate to be the rate as on the date of institution of the suit i.e. Rs. 32,32,060/-. The learned Single Judge has noted that according to the plaintiffs themselves there are several versions of the market price. The agreement dated 19.04.1992 does not provide for any mode of determination of the market price. The appellants in their notice dated 09.04.2011 stated that the price that the flat would fetch in the market in October 2008 was Rs. 55,00,000/-. The learned Single Judge has noted that the appellants at the time of arguments on 31.03.2014 stated that the market price would not be the market price of Rs. 55,00,000/- as in October 2008 nor Rs. 16,16,030/- nor Rs. 32,32,060/- but the price which the respondent would fetch in the market as on that date. The learned Single Judge has accordingly held

that the alleged agreement to sell of which specific performance was sought is void for uncertainty and incapable of being made certain.

20. The Supreme Court in the case of *Mayawanti* (*supra*) held that in the case of specific performance, the jurisdiction to order specific performance can be exercised only based on the existence of a valid and enforceable contract. Where a valid and enforceable contract has not been made between the parties, the Court would not make a contract for them. Specific performance would not be ordered if the contract itself suffers from some defects, which would render the contract invalid or unenforceable. Specific performance of a contract is the actual execution of the contract according to its stipulations and terms and the Court merely directs the party in default to perform its obligations and to do what it contracted to do. The stipulations and terms of the contract thus have to be certain and the parties have to be at consensus *ad idem*. If the stipulations and the terms are uncertain and parties are not *ad idem* there can be no specific performance as there would be no valid and binding contract.

21. The alleged agreement to sell dated 19.04.1992, even if it were assumed to have been executed, is uncertain inasmuch as it does not specify the sale consideration or the mode and manner of determining the sale consideration. As per the appellants themselves there are different sale considerations/market price. The appellants themselves have demonstrated that there are several modes of determination of

the market price and the market price is not certain or ascertainable. Even the appellants are not certain about the same.

22. The learned Single Judge in the impugned judgment held that the whole case set up by the plaintiffs is preposterous and contrary to the grain of human behaviour. He held, and in our view rightly so, that it is inconceivable that the landlord while agreeing to sell his flat to the tenant would also agree that the rent paid till the completion of the sale would be adjusted in the price. This is highlighted from the fact that, the alleged agreement to sell is of the year 1992 and suit is filed in the year 2011 i.e. after a period of over 19 years, it is inconceivable that the landlord would permit a tenant to reside in a property for over 19 years without payment of any rent and the entire amount received during this period would be adjusted towards the purported sale consideration. The learned Single Judge has rightly held that the decree for specific performance in the facts and circumstances would also be inequitable within the meaning of Section 20(2)(c) of the Specific Relief Act, 1963.

23. We also do not find any infirmity in the findings returned by the learned Single Judge on the issue of limitation that the appellant had to approach the Court for specific performance within a reasonable time and could not wait endlessly. In the present case, the wait has been over 19 years and the suit has been rightly held to be barred by limitation. Further we agree with the finding of the learned

single judge that the document dated 19th April, 1992 does not constitute a binding or enforceable Agreement to Sell of which specific performance could be claimed.

24. The findings returned and the conclusions arrived at by the learned Single Judge on the preliminary issues (ii) & (iii) in our view do not call for any interference.

25. The Judgment in the case of Alka Gupta (Supra) relied upon by the counsel for the appellant is not applicable in the facts of the present case. In the said case, the suit was dismissed on the ground that the plaintiff therein had abused the process of the court, the plaintiff was an unscrupulous person and the suit was based on falsehoods, the partnership alleged therein was illegal and unenforceable and lastly the suit was barred by principles of constructive res-judicata under order 2 rule 2. The Supreme Court held that the suit could not be dismissed as barred by order 2 rule 2 in the absence of a plea by the defendant to that effect and in the absence of an issue thereon. Further, the Supreme Court held that the causes of action of both the suits were different and the second suit was not barred by constructive res-judicata. The Supreme Court further held that under the Code of Civil Procedure a suit could not be dismissed without trial merely because the court feels dissatisfied with the conduct of the plaintiff.

26. None of the above circumstances is applicable in the facts of the present case. The suit of the appellants has not been dismissed because of their conduct or because of the alleged falsehood of the case set up by the appellants. We, as also the learned single judge, have examined the case of the appellants on merits by assuming the alleged agreement to sell set up by appellants as having been entered into and hold the same to be uncertain and that it does not constitute a valid and binding contract and is thus not enforceable. The reliance placed by the counsel for the appellant on the case of Alka Gupta (Supra) is thus misplaced.

27. The appeal is accordingly dismissed, with costs quantified at Rs. 50,000/-.

SANJEEV SACHDEVA, J

BADAR DURREZ AHMED, J

January 07, 2016

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