

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

Judgment Reserved on: January 21, 2016

% *Judgment Delivered on: January 28, 2016*

+ **FAO(OS) 391/2015**

M/S RIDGEVIEW CONSTRUCTION

PVT LTD & ANR

..... Appellants

Represented by: Mr.Anil Sapra, Sr.Advocate
instructed by Ms.Ashna Abrol and
Ms.Deepika Shrivastav, Advocates.

versus

M/S SKYHIGH PROPERTIES PVT LTD

..... Respondent

Represented by: Mr.J.P.Sengh, Sr.Advocate instructed
by Mr.Somesh Arora, Mr.Gulshan
Sharma and Ms.Vanessa Singh,
Advocates.

+ **FAO(OS) 392/2015**

M/S RIDGEVIEW CONSTRUCTION

PVT LTD & ANR

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versus

M/S SKYHIGH PROPERTIES PVT LTD

..... Respondent

Represented by: Mr.J.P.Sengh, Sr.Advocate instructed
by Mr.Somesh Arora, Mr.Gulshan
Sharma and Ms.Vanessa Singh,
Advocates.

+ **FAO(OS) 452/2015**

M/S RIDGEVIEW CONSTRUCTION

PVT LTD & ANR

..... Appellants

Represented by: Mr.Anil Sapra, Sr.Advocate

instructed by Ms.Ashna Abrol and
Ms.Deepika Shrivastav, Advocates.

versus

M/S SKYHIGH PROPERTIES PVT LTD Respondent

Represented by: Mr.J.P.Sengh, Sr.Advocate instructed
by Mr.Somesh Arora, Mr.Gulshan
Sharma and Ms.Vanessa Singh,
Advocates.

+ FAO(OS) 395/2015

M/S RIDGEVIEW CONSTRUCTION

PVT LTD & ANR

..... Appellants

Represented by: Mr.Anil Sapra, Sr.Advocate
instructed by Ms.Ashna Abrol and
Ms.Deepika Shrivastav, Advocates.

versus

M/S SKYHIGH PROPERTIES PVT LTD Respondent

Represented by: Mr.J.P.Sengh, Sr.Advocate instructed
by Mr.Somesh Arora, Mr.Gulshan
Sharma and Ms.Vanessa Singh,
Advocates.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. Brief background of the matter is that M/s Ridgeview Construction Pvt. Ltd. the appellant No.1 herein (in short 'Ridgeview') on allotment of property bearing No.D-2, Saket District Centre, Saket Place, Saket, New Delhi by DDA on a perpetual-lease-hold tenure raised commercial building

known as 'Southern Park'. A joint Purchase Agreement was entered into between M/s South Lake Properties Pvt. Ltd. (in short 'South Lake'), M/s Pushp Vihar Properties Pvt. Ltd. (in short 'Pushp Vihar'), M/s Koshika Properties Pvt. Ltd. (in short 'Koshika') and M/s Wales Properties Pvt. Ltd., (in short 'Wales') with Ridgeview for purchase of the entire 5th floor of the said commercial property. Thus Joint Purchase Agreement dated February 09, 2005 was executed between Ridgeview and the predecessors-in-interest of the respondent Skyhigh Properties Ltd. (in short 'Skyhigh') i.e. South Lake, Pushp Vihar, Koshika and Wales. Further a bifurcation agreement was executed amongst the four predecessors-in-interest of Skyhigh on March 06, 2006 whereafter by virtue of agreement to sell dated April 16, 2007 Ridgeview agreed to sell office space of 5th floor of Southern Park having a total gross area of 9235.96 sq.ft. along with proportionate 4.76% undivided, indivisible and impartible share in and underneath the land to the predecessors-in-interest of the respondent. In terms of the Agreement to Sell dated April 16, 2007 it was agreed that Ridgeview shall have the leasehold tenure converted into free-hold within three months of the date of the said Agreement to Sell subject to South Lake, Koshika, Pushp Vihar and Wales bearing the conversion charges on pro-rata basis inspite of the premises purchased by it. Relevant clause of the Agreements to Sell being para CC(v) reads as under:

“(v) As per the present guidelines of the DDA, it is permissible to have lease-hold rights in the said Commercial Plot converted into Free-hold and that there is no impediment or bar in this regard and the FIRST PARTY shall have its lease-hold rights in the said Commercial Plot converted into Free-hold within 3 (Three) months from the date of this Agreement

provided that the SECOND PARTY bears the conversion charges on pro-rata basis in respect of the PREMISES. The FIRST PARTY shall be responsible for ensuring that the conversion charges are paid on pro-rata basis by all the other buyers/owners /occupants of all the portions of the said Commercial Building (viz. 'SOUTHERN PARK') other than the PREMISES and in case of non-payment of pro-rata conversion charges by any of such other buyers/ owners/ occupants, the FIRST PARTY shall itself pay the same without any delay and ensure that its lease-hold rights in the said Commercial Plot are converted into within 3 (Three) months from the date of this Agreement."

2. Further Clause 30 of the Agreement to Sell dated April 16, 2007 provided-

"....30. The parties to this Agreement understand that this is an agreement for the purchase of constructed floor space i.e., the PREMISES and that the FIRST PARTY hereby makes the unconditional commitment in all events to execute and register the sale deed in respect of the PREMISES as provided for hereinabove in favour of the SECOND PARTY or its nominee(s) within 3(Three) months from the date of this Agreement and after getting the lease-hold rights in respect of the said commercial Plot converted into free-hold and also on payment of conversion charges by the SECOND PARTY on pro-rata basis in respect of the PREMISES....."

3. In terms of the Agreement to Sell the following payments were made to Ridgeview: -

Name of the company	Office space agreed to be sold (sq.fts.)	Total consideration (₹)	Amount Paid (₹)	Amount to be paid at the time of execution of the sale deed (₹)	Amount paid for conversion of the property to free-

					hold (₹)
M/s Wales Properties Pvt.Ltd. Ref. DAC/114/02/12	1643.49 Sq.Fts.	83,81,799/-	76,99,439	6,82,359.80 p	3,64,786/-
Koshika Properties Pvt. Ltd. Ref.DAC/115/02-12	4780.07 Sq.Fts.	2,43,78,357/-	2,23,94,685.60 p	19,83,671.40 p	10,60,976/-
Pushp Vihar Properties Pvt.Ltd. Ref.DAC/116/02/12	9235.96 Sq.Fts.	4,71,03,396/-	432,68,716.80 p	38,34,697.20 p	20,49,997/-
South Lake Properties Pvt.Ltd. Ref.DAC/117/02/12	17,403.66 Sq.Ft.	8,87,57,748/-	8,15,34,198.40 p	72,23,549.60	38,62,886/-
Total	1756025.52 Sq.Fts.	₹16,86,21,300/-	₹15,48,97,040/-	₹1,37,24,278	₹7338,645

4. Despite having made payments of ₹15,48,97,040/- (Rupees Fifteen Crore Forty Eight Lakhs Ninety Seven Thousand Forty only) out of ₹16,86,21,300/- (Rupees Sixteen Crores Eighty Six Lakhs Twenty One Thousand Three Hundred only) towards sale consideration and a sum of ₹73,38,645/- towards conversion charges since no further steps were taken by Ridgeview, the predecessors-in-interest of Skyhigh invoked the arbitration clause and appointed a sole arbitrator under intimation to Ridgeview to which it failed to give any consent.

5. On application under Section 11 of the Arbitration and Conciliation Act, 1996 (in short 'the Act') being filed before this Court, the learned Arbitrator was appointed. In arbitration, the predecessors-in-interest of Skyhigh *inter alia* sought following directions to the Ridgeview: -

“(a) direction to the Respondent to get conversion of the property to lease-hold property; (b) to execute the sale deed; (c) a direction to the respondent to pay the ground rent, lease rent, free-hold charges, penalty and interest etc. to the DDA; (d) to pay a compensation of ₹25,00,000/- for breach of the terms of the Agreement for completing and perfecting the title of the Claimant; and (e) to pay interest @ 18% on the amount of free-hold charges deposited by the Claimant; and (f) cost of application and arbitration

amounting to ₹5,00,000/- in the each of the four case mentioned in the title.”

6. Response of Ridgeview in the written statement was that the claims of the predecessors-in-interest of Skyhigh were barred by limitation and thus liable to be rejected. It was further claimed that the Agreement to Sell dated April 16, 2007 was entered into on the basis of the prevalent policy of the DDA permitting the conversion of the entire building only however, since now individual flats/spaces were permitted to be converted to free-hold the term of the agreement has lost its meaning and significance. The predecessors-in-interest of Skyhigh/respondent had failed and neglected to pay their proportionate share of the ground rent charges after taking possession of the property and thus breached the major obligation on their part and having defaulted in fulfilling the obligation they were not entitled to seek enforcement of any obligation from Ridgeview . The liability to get the property converted from lease-hold to free-hold was denied in terms of the Agreement to Sell.

7. The learned Arbitrator held that the predecessors-in-interest of Skyhigh had not failed in discharging their obligation. In terms of Clause 16 (g) read with Clause ‘CC’ the predecessors-in-interest of Skyhigh were supposed to pay conversion charges of the property in question and on payment of conversion charges, Ridgeview was required to get the properties converted. Thus the ground rent becoming payable was due to the fault of Ridgeview and it was liable to pay the ground rent or any other charges payable to DDA in favour of the property. Further the change in the policy of the DDA would not have any material effect on the Agreement

dated April 16, 2007. The plea of Ridgeview that the predecessors-in-interest of the respondent were not entitled to the relief of specific performance of the contract in terms of Clause O(vi) was also declined. In view of the four cheques given by the predecessors-in-interest of the respondent, the learned Arbitrator held that they had shown their readiness and willingness to comply with the obligations under the Agreement however, Ridgeview failed to perform its part of the obligation.

8. Against the common award four petitions were filed by the Ridgeview before the learned Single Judge being OMP Nos.164/2013, 166/2013, 167/2013 and 168/2013 which have been dismissed by the common impugned order.

9. Learned counsel for Ridgeview pressing Article 54 of the Limitation Act reiterates that the claims were barred by limitation and thus required to be rejected. It is contended that to enforce specific performance of a sale transaction where time is not the essence of the contract, the time period does not get stretched indefinitely for the parties seeking specific performance to approach the Court or Arbitrator beyond what is fixed in the Limitation Act. The learned Arbitrator had no power to accede and go beyond the terms of the Contract. In view of the change in the policy of the DDA, Ridgeview is not required to get the conversion done and same can be done by the predecessors-in-interest of Skyhigh for their individual portions. It is lastly urged that since the appellant No.2, that is, the Managing Director of Ridgeview was not a party to the agreement, he could not be held personally liable.

10. The issue of limitation was decided by the learned Arbitrator in favour of the Skyhigh and we note the same in the words of the learned

Arbitrator.

“According to Clause 30 at internal page 62 of the Agreement the Respondent has made “the unconditional commitment in all events to execute and register the sale deed in respect of the PREMISES as provided hereinabove in favour of the SECOND PARTY or its nominee(s) within 3 (Three) months from the date of this Agreement and after getting the lease-hold rights in respect of the said Commercial Plot converted into free-hold and also on payment of conversion charges by the SECOND PARTY on pro-rata basis in respect of the PREMISES.”

Besides in the light of the circumstances of the matter, it was failure on the part of the Respondents to fulfil the condition of getting the property converted into free-hold property and execute the sale deed and to collect the very small part of the sale consideration at the time of execution of sale deed. It would be highly inequitable to allow the Respondent to take advantage of their own wrong.

In the present case if Clause 30 is read with Clause 28 (b), the date 16.07.2007 is not fixed; it is tentative and variable. The Respondent by sending letter demanding ground rent even after exchange of notices, and expressing willingness to get the property converted into free-hold and by applying for conversion has confirmed that the time was not essence of the contract and the date fixed was tentative and variable. Consequently, since the time was not the essence of the contract and the date fixed was not definite but variable and was varied by conduct, without fixing any specific date for performance, the first part of Article 54 of the Limitation Act is not attracted. Since the contract has not been repudiated so far, the cause of action is still subsisting and continuing, the claims of the Claimant could not be said to be barred. This point is decided accordingly.

In so far as the question of continuing cause of action is concerned it would be relevant to produce here Section

22 of the Limitation Act, it reads as under:

“22.Continuing breaches and torts.- In the case of a continuing breach of contract or in the case of a continuing tort, a fresh period of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues.”

The answer to the question of applicability of Section 22 of the Limitation Act depends upon whether failure of the Respondent to apply for conversion and get the property converted into free-hold property, is as continuing breach of terms of the contract requiring the Respondent to continue to do it till completion of the task.

In the present case the claim petition primarily relates to specific performance of the contract by execution of the sale deed, of course after conversion of the property from lease-hold to free-hold. The Claimant side has admittedly paid in respect of four flats ₹15,48,97,040/- out of total sale consideration of ₹16,86,21,300/- in respect of four properties located in “Southern Park” on the date of the execution of the Agreements dated 16.04.2007. The remaining amount of ₹1,37,24,278/- is to be paid at the time of execution of the sale deeds. Conversion charges of ₹73,38,645/- have also been paid by the Claimant to the Respondent on 15.05.2007 through 4 cheques. This amount has neither been deposited by the Respondent with the DDA nor the Respondent had applied for conversion of the plot into free-hold property before proceedings under Section 11 Arbitration and Reconciliation Act. However, before the High Court of Delhi in Arbitration Petition Nos.187-190 of 2011 the Respondents have claimed that “the respondents have never refused to honour the terms & conditions of the Agreement to Sell dated 16.04.2007 and is still ready and willing to perform all the conditions to be performed for and on behalf of the respondent....” Admittedly, the respondent

applied for the conversion of the said Commercial Plot from lease-hold to free-hold only on 08.12.2011 for the first time allegedly in clear violation and breach of the terms and conditions agreed upon in between the parties vide Agreement to Sell dated 16.04.2007. A copy of the Reply filed by the respondent in Arbitration Petition is ANNEXURE A-2. It is not disputed that so far the property has not yet been converted from lease-hold to free-hold.

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In so far as the question of continuing inquiry is concerned, in terms of judgment mentioned hereinabove the injury related to continuous breach of the agreement leading to continuing injury of continuous defect in title arising at every moment and it could not be said that injury was complete on 16.07.2007. The things are different for after handing over possession, cause of action did relate to the continuing question of defective title of the Claimant over properties purchased by the Claimants' side and the defendant had committed default in fulfilling his commitment, undertakings and obligations in terms of the Agreement. Cause of action, in view of continuous injury which is arising every moment in respect of property in possession of the Claimant for the Claimant side was and is unable to use the property the way he would have enjoyed say in raising finances due to defective / or incomplete title as claimed by the Claimant. The injury is not complete, but continuing, due to continuing defect and short coming in the complete title.

As has already been mentioned, undisputedly the conversion charges has been received by the Respondent by Cheques dated 15.05.2007, on 25.05.2007.

It may further be noted that in terms of Clause 30 Respondents have made the unconditional commitment in all events to execute and register the sale deed in respect of

*the Premises in favour of the Claimant or their nominee
“within three months from the date of the Agreement and*

*(i) after getting the lease-hold rights in respect
of the said Commercial Plots converted into free-
hold; and*

*(ii) also on payment of conversion charges by
the Claimant on pro-rata basis in respect of the
Premises”*

It may be mentioned that the Claimant side was admittedly forcing the Respondent “to get the property free-hold on the pretext that the amount for getting the property free-hold on the pretext that the amount for getting the property free-hold has been paid” as per Reply of the Respondent dated 10.01.2011. The letters sent by the Respondent from time to time referred to earlier, would indicate that despite the expiry of three months period from 16.04.2007, neither the Claimant nor the Respondent avoided the contract. Though Claimant side continued to force the Respondent, yet the Respondent in all probability failed to take effective steps to collect conversion charges from other occupier/ owners of flats in Southern Park and it still remains unpaid. This indicated again that none of the parties wanted to get rid of the contract for one or the other reason. It may also be mentioned that the Respondent after executing the Agreement to Sell has taken huge sum of the sale consideration as well as conversion charges. The Respondent has not refused to perform the Agreement to Sell. Instead of refusing to perform the contract, the Respondent sent the above said letters to the predecessors-in-interest of the Claimant to pay ground rent. In view of the conduct of the parties it can be inferred that though a tentative date was fixed but none of the parties took it seriously. Letters of this kind did indicate that the Respondent itself did not treat 16.07.2007 as final and fixed date for execution of the sale deed by their conduct.

In similar circumstances, in Panchanan Dhara v. Manmatha Nath Maity, 2006 AIR (SC) 2281; 2006 (5) SCC 340: the Supreme Court took the view that the case of the first respondent vendee was to offer balance amount to the vendor company which would be subject to its showing that it had a perfect title over the property. Whether extension of time for performance was not necessarily to be inferred from the written documents, it may be inferred from the conduct of the parties. Once a finding of fact, has been arrived at that the time to file the suit should be deemed to have started running when the plaintiff had notice that the defendant company refused to perform the contract. That took place on 21.8.1985. The suit was filed soon thereafter. Hence the suit is not barred by limitation.

In view of the aforesaid discussion, neither the time was essence of the contract, nor there was any fixed, definite and invariable date fixed for performance of the contract, nor the parties treated the alleged date as fixed and definite date for conversion of the plot to free-hold and to execute the sale deeds. Besides, in any case in terms of Clause 28 (b) read with Clause 30 the time could be extended and has been extended by the conduct of the Respondent and as well as by forbearance of the Claimant not to rush to seek legal remedies immediately.

In aforementioned circumstances, the first part of the Article 54 is not attracted and the claims of the Claimants in these four cases are not barred by time.

Moreover, in absence of any refusal to perform the contract so far, time has not started to run even for the purpose of 2nd part of the Article 54 of the Limitation Act.

Besides, injury which is being caused due to continuous breach of agreement, cause of action is subsisting and continuing in terms of Section 22 of the

Limitation Act.

Accordingly, the plea that the case of the Claimant is barred by time has to be rejected and it is rejected accordingly.”

11. The learned Single Judge vide the impugned order upheld the finding of the learned Arbitrator that the claims were not barred by limitation for the reason -

“9.3 The question, therefore, is: Was the period of three months provided for conversion of the subject property from free-hold to lease-hold, to be construed as the date fixed for “performance” as contemplated under Article 54 of the Limitation Act. In my view, as correctly argued on behalf of the respondent, the performance sought, was that, petitioner no.1 should execute the “sale deed” in respect of the subject property in its favour, or in favour of its nominees. The period of three months provided in clause CC (v) for conversion of the subject property from lease-hold to free-hold was not the period for “performance” as contemplated under Article 54 of the Limitation Act.

9.4 As a precursor to the performance, as envisaged in Article 54, OMP Nos. 164/2013, 166/2013, 167/2013 & 168/2013 Page 15 of 20 petitioner no.1 was required to obtain conversion of the said subject property. The period of three months, which was fixed both in clause O(vi) and CC(v) was for conversion and not for execution of the sale deed. The limitation of three months for execution of the sale deed would commence only after petitioner no.1 had obtained conversion of the subject property. This is clear on a bare perusal of the expression which provides for unconditional commitment by petitioner no.1 that it would execute and register the sale deed within three months of the agreement to sell “and after” its conversion. As is undisputed, conversion of the subject property had to

precede execution of sale deed. Therefore, period for “performance” which was execution of sale deed, could commence only thereafter. Quite obviously, the respondent expected expedition, and therefore, the provision of three months in both clause CC(v) and 30 of the agreement to sell. The intent being that immediately on conversion, the sale deed would be executed. Having said so, the obligation of conversion cast on petitioner no.1 under clause CC(v) was not the “performance” as envisaged under Article 54 though, it was a step-in aid of the said performance. A careful perusal of clause 30 of the agreement to sell makes this aspect quite clear. The emphasis in this behalf is on the words “and after” in the underlined portion of clause 30. For the sake of convenience the said clause is extracted below:

*“....30. The parties to this Agreement understand that this is an agreement for the purchase of constructed floor space i.e., the PREMISES and that the FIRST PARTY hereby makes the unconditional commitment in all events to execute and register the sale deed in respect of the PREMISES as provided for hereinabove in favour of the SECOND PARTY or its nominee(s) within 3 (Three) months from the date of this Agreement and after getting the lease-hold rights in respect of the said Commercial Plot converted into free-hold OMP Nos. 164/2013, 166/2013, 167/2013 & 168/2013 Page 16 of 20 and also on payment of conversion charges by the SECOND PARTY on pro-rata basis in respect of the PREMISES....”
(emphasis is mine)*

10. Therefore, as correctly argued on behalf of the respondent, time for performance, under Article 54 of the Limitation Act, would start running only after petitioner no.1 had obtained conversion of the subject property into free-hold. The word “performance” in Article 54 has to be

read and understood keeping the provisions obtaining in the agreement to sell in mind. An action for specific performance seeks, via the intervention of the court, fulfilment of obligations entered into between the parties. In an agreement to sell, there would be several intermittent obligations which would lead up to a fundamental obligation, which, in this case, is the execution of a “sale deed”. The intention being to seek, conferment of legal title to the immovable property. Looked at from this angle, time for the purpose of limitation would commence under Article 54 only after conversion is obtained by petitioner no.1.

11. It is in this sense, that the learned arbitrator has stated that time was not of the essence. In other words, that the time fixed for conversion had attached to it several variables, including the delay which could occur at the end of DDA, even if the petitioners had taken all relevant steps within the period of three months provided for in clause CC(v) of the agreement to sell.’

12. Article 54 of the Limitation Act prescribes the period of limitation of three years for a suit for specific performance of a contract and further provides the time from which the period begins to run to be the date fixed for the performance or if no such date is fixed, when the plaintiff has notice that performance is refused. Thus, two things are to be borne in mind for applying Article 54 of the Limitation Act; firstly what is the period of limitation and secondly when the cause of action to sue accrues.

13. The expression “date fixed” could mean either the date expressly fixed or the date which can be fixed with reference to a future event, which is certain to happen. When the event is not one which is certain to happen, time for specific performance of Agreement to Sell will be deemed to run from a date when the performance was refused.

14. In the present case, Clause CC(V) of the Agreement to Sell provides that the first party shall have its lease-hold tenure in the said commercial plot converted into free-hold within three months from the date of the agreement provided that the second party bears the conversion charges on pro-rata basis in respect of the premises. It further provides that the first party shall be responsible for ensuring that the conversion charges are paid on pro-rata basis by all the other buyers/owners/occupants of all the portions of the said commercial building (viz. 'Southern Park') other than the premises and in case of non-payment of pro-rata conversion charges by any of such other buyers/owners/occupants, the first party shall itself pay the same without any delay and ensure that its lease-hold tenure in the said commercial plot are converted to free-hold within three months from the date of the agreement. Thus, the sale deed could be executed only after the commercial plot was converted from lease-hold to free-hold which obligation was on Ridgeview. Ridgeview having not performed its part of the obligation, the date fixed for performance had not arrived and thus the suit for specific performance of the agreement could not be held to be barred by limitation.

15. As regards the contention of learned counsel for the appellant that since the respondent was in breach of its obligation under the Agreement to Sell, thus no specific performance of the agreement could have been directed by the Arbitrator in view of its failure to pay the ground rent, both the learned Arbitrator and the learned Single Judge strike the same chord and we agree with their views. A perusal of Clauses 13, 16(g) and CC(v) of the Agreement to Sell and the perpetual-lease deed dated July 01, 2004 lead to the irresistible conclusion that it was the obligation of the appellant to pay

the ground rent and not that of the predecessors-in-interest of the respondents.

16. In view of the discussion aforesaid, the appeals are dismissed.

(MUKTA GUPTA)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

JANUARY 28, 2016
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