

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

Reserved on: 17.02.2016
Pronounced on: 31.03.2016

+ **RFA (OS) 128/2015 & C.M. APPL.29882/2015**

DR. SHIV PAL JINDAL AND ORS.Appellants
Through: Sh. A.S. Chandhiok, Sr. Advocate with Ms.
Manmeet Arora, Ms. Princy Ponnann, Ms. Shweta and Ms.
Nidhi Parashar, Advocates.

Versus

M/S. FRIEDRICH EBERT STIFTUNGRespondent
Through: Sh. Arun Kathpalia, Sh. Abhishek Singh and
Sh. Angad Mehta, Advocates.

+ **RFA (OS) 131/2015 & C.M. APPL.29896/2015 & 31142/2015**

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CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT

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1. These two appeals involve common questions of fact and law. In one, the appellant was plaintiff, (CS(OS) 51/2006- hereafter "the possession suit"); he sought a decree of possession of the suit property (No. K-70B, Hauz Khas Enclave, New Delhi-110016) and *mesne profits* at ₹2.50 lakhs per month from 01.07.2005. In the second suit (CS(OS) 2279/2006 referred to hereafter as "the specific performance suit" or "the Purchaser's suit"), the appellant landlord (hereafter "Dr. Jindal" and also referred to as "Vendor") was arrayed as a defendant, by the plaintiff, proposed buyer/tenant, Friedrich Ebert Stiftung (hereafter "purchaser" or "tenant"); the plaintiff/Purchaser claimed a decree for specific performance. The landlord's suit was dismissed and that of the Purchaser was decreed. Therefore, these two appeals.

2. The two suits were consolidated by the order of Court dated 28.04.2009 in CS(OS) 51/2006. The possession suit was premised on the footing that an Agreement to Sell- dated 01.11.2004- between the parties- was no longer binding on the landlord/proposed seller and latter had no rights of a lessee in the suit premises. Dr. Shiv Pal Jindal was the owner of the suit property; however, landlords of the suit property were Dr. Shiv Pal Jindal, his Hindu Undivided Family (HUF) and Dr. Ms. Vijay Lakshmi Jindal (his wife). The specific performance suit filed by Purchaser sought specific performance of the Agreement to Sell dated 01.11.2004. The Purchaser sought the execution of sale deed in its favour of the suit property from the owner landlord.

3. The Agreement to Sell between the parties, dated 01.11.2004 (Ex. P1) was admitted during the trial. According to the document, sale consideration

was fixed at ₹ 2.30 crores. ₹1 lakh was given to the proposed seller at the time of entering into the Agreement to Sell and balance sale consideration (₹2.29 crores) was payable at the time of execution and registration of the sale deed, and for which a period of two months was fixed. The two months was extendable by a like two month period. During this time, the Purchaser had to secure permission of the concerned authorities (RBI/Government of India) to buy the suit property. This was because the Purchaser is not an Indian national but a German NGO. The relevant stipulations of Ex.P1 are extracted below:

"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."

5. On 28.02.2005 the vendor/landlord received the entire balance sale consideration of ₹ 2.29 crores. A receipt, (Ex.P2) was issued by the vendor, which was read follows:

"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

<i>Cheque No.</i>	<i>Date</i>	<i>Amount</i>
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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.

Date: 28/2/05 Place: Delhi
Vendor

Sd/- Shiv Pal Jindal

5, Red Cross Flats, Kaka Nagar, New Delhi

Witnesses:

1.xxxxxx

2. zzzzzzz"

6. Therefore, as on 28.02.2005 the Purchaser had paid and the Vendor had received the agreed sale consideration of ₹ 2.30 crores. No balance was payable by the Purchaser. A dispute, however, arose as to whether the Purchaser had paid ₹10 lakhs to the Vendor on 01.03.2005.

7. In the possession suit, the owner/vendor argued that since the time of performance was the essence of the contract, and the purchaser failed to get the requisite permission from the Central Government /RBI within the period of four months of entering into the Agreement to Sell, i.e before 28.02.2005, the said Agreement was rendered unenforceable and had lapsed. The owner, therefore, claimed entitlement to take possession back of the suit premises alongwith *mesne profits*. The purchaser/tenant denied this assertion; in its written statement, (and much in the same vein, in its specific performance suit) countered that in the period provided under Ex.P1 it applied to the requisite authority/RBI for permission to purchase the property, but due to

delays at official levels the sale deed could not be executed and registered on or before 28.02.2005. It was urged that though time was of the essence of the contract under Ex.P-1 nevertheless, once the entire sale consideration was paid to the Vendor on 28.02.2005, time of performance ceased to be of the essence. The Purchaser argued that Vendor could not expect to receive anything more under the agreement to sell over and above the agreed sale consideration. On receipt of that amount, no surviving issue of fulfilling or breach of contract remained by the Purchaser. It also relied on Clause 9 of Ex.P1 and also on Ex. P2 (dated 28.02.2005) to say that on payment of the full sale consideration its liability to pay rent specifically ceased and the said Purchaser had a right to retain possession without incurring liability to pay rent. Since neither the RBI nor other Central Government agencies had not finally decided to deny permission to the purchaser to acquire the suit property, the Agreement to Sell had not become void and cannot be said to have lapsed.

8. Common issues were framed in the two suits on 28.04.2009. Later by order-dated 13.02.2013, an additional issue was framed, as Issue No. 9(i). The issues framed on 28.04.2009 read as under:-

"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."*

The additional issue framed on 13.02.2013 reads as under:-

" 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"

9. Parties went to trial and led evidence in support of their respective claims and defenses. The impugned judgment decreed the Purchaser's specific performance suit and dismissed the Vendor's suit.

Impugned judgment

10. The learned Single Judge dealt with the second, third and fourth issues together. He noticed that the Courts are inclined to consider time of performance as of the essence of the contract with respect to properties in metropolitan cities in the light of the judgment of the Supreme Court in the case of *Saradamani Kandappan Vs. S. Rajalakshmi & Ors*¹. It was noted that by virtue of Clause 5 of the Agreement to Sell, time was to be of the essence of the contract; a maximum period of four months from 01.11.2004 was given to the purchaser to take the necessary permission for completing the sale transaction. The original period for completion was 31.12.2004; it was extended to 28.02.2005. Though at the initial stage, the Purchaser paid ₹ 1 lac, the entire balance amount of ₹ 2.29 crores was paid on 28.02.2005, within the time agreed. The learned Single Judge, therefore, held that since the purchaser had complied with what was required of it, time was no longer of the essence of the contract.

11. The impugned judgment distinguished the judgments reported as *Citadel Fine Pharmaceuticals Vs. Ramaniyam Real Estates Private Limited & Anr*² and *K. Narendra Vs. Riviera Apartments (P) Ltd*³ on the ground that the decision in each case is largely fact dependent- in those cases the proposed buyer had not paid the entire sale consideration to the seller, payment being nominal in one case and about 60% in the other. This was not the position in the present case, where the entire consideration was paid. The learned Single Judge held that the registration of the title documents could not be treated as of the essence of the contract, because the Seller had

¹ (2011) 12 SCC 18

² (2011) 9 SCC 147

³ (1999) 5 SCC 77

received the entire consideration. The buyer/purchaser having performed its part of the bargain, the seller was not prejudiced at all because it had the benefit of the entire amount and its enjoyment. In the circumstances, the Vendor/Dr. Jindal could not claim entitlement to rent, towards the property. The learned Single Judge relied on the language of the receipt dated 28.02.2005⁴ which referred to possession henceforth being that of the purchaser and that the language of the receipt is to be read with and correlated to the last lines of Clause 9 of the Agreement to Sell⁵. The learned Single Judge found that consequently, performance no longer remained the essence of the contract, so far as conveyance of title to the property was concerned.

12. The impugned judgment also held that with the receipt of the entire consideration, even *arguendo* if the Purchaser's obligation to obtain permission were essential, there was no actionable injury, since the Seller could claim no more than what was contracted for, i.e ₹ 2.30 crores which he admittedly received within the time stipulated. Thus, even under general principles of contract, Section 73 of the Contract Act, 1872, did not permit the Court to award any damage or compensation for the breach on the Purchaser's part in completing the process of transfer of title to the seller, for lack of permission by the RBI. A subsidiary issue, whether the Purchaser's inability to secure RBI permission within the first period (i.e before

⁴ Ex.P-1, which pertinently states that the Vendor received "*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..*"

⁵ Ex. P-1, to that extent reads as "*the purchaser shall continue to pay the full rent upto the payment of entire sale consideration..*"

31.12.2004) was rejected, on the ground that in the counter affidavit filed by the RBI (Ex.DW1/23) in a writ petition preferred by the Purchaser on the inaction to give clearance, it had admitted that permission had been sought before that date. The learned Single Judge also noted an order dated 09.10.2014 of this Court in W.P.(C) 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. The learned Single Judge was of the opinion that in view of the facts, the inability of the Purchaser to prove existence of the Amendment Agreement dated 01.03.2005, or whether signatures of the proposed seller, Dr. Shiv Pal Jindal had been allegedly forged and fabricated by the proposed buyer, was rendered academic. It was also held that the Vendor, Dr. Jindal did not produce any admitted signatures to enable a comparison of the signatures on the disputed document. This omission to produce the best evidence, under Section 106 of the Evidence Act, meant that such allegations were not proved.

13. The learned Single Judge further was of opinion and so held that nothing would turn upon the existence otherwise of this Amendment Agreement dated 01.03.2005 because it recorded that time of performance will be no longer of the essence by deleting Clause 9 of Ex.P1, as the Purchaser in terms of the Amendment Agreement dated 01.03.2005 received ₹10 lakhs in addition to the total sale price. A seller could, held the learned Single Judge- contractually or legally claim to receive only and only the sale price, and nothing more, and once the total sale price was received by the seller, even if the Amendment Agreement dated 01.03.2005 were held not to

exist, and assuming it to be forged and fabricated, nothing turned on that point. The lack of credible evidence for the Court to decide in favour of the purchaser that the Amendment Agreement dated 01.03.2005 was forged and fabricated, meant that even assuming that this issue is held in favour of the proposed seller, nothing turned on it, because the amount of ₹ 10 lakhs which is purported to have been paid to the proposed seller under the Amendment Agreement dated 01.03.2005 was in addition to the sale consideration, and, therefore, did not confer any entitlement of the Vendor to receive it. The legal consequence was that after receipt of the entire sale consideration of ₹ 2.30 crores, time of performance did not remain of the essence of the contract.

14. On the first issue, i.e whether Purchaser being German NGO could acquire 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, the Court considered Sections 13 and 14, of the Foreign Exchange Management Act, 1999 (FEMA) and Regulation 5 of the 2000 Regulations. These were relied on by the Seller to say that the purchaser, a German NGO could not acquire immovable property in India without prior permission of the RBI. Reliance was also placed upon Ex. X-1 being a document dated 09.06.1983 issued by the RBI addressed to the Purchaser, and in para 4 it was stated that the purchaser should obtain prior permission of RBI for acquiring immovable property in India. The lack of RBI permission, it was urged, rendered the Agreement to Sell, void and unenforceable. The Court noted that Ex. X-1 did contain a prohibition. The learned Single Judge relied on the order of the Court dated 09.10.2014 in

W.P.(C) 3498/2010 remitting the matter for fresh decision by RBI and held that till there was a specific refusal/denial of permission by the requisite authorities to the proposed buyer to purchase the suit property, it could not be held that the Agreement to Sell was rendered void and liable to be cancelled. The learned Single Judge also relied on the Supreme Court decision in *Mrs. Chandnee Widya Vati Madden Vs. C.L. Katial & Others*⁶ where it was ruled 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, the contractual obligation was of the purchaser, who had to pursue its case with the RBI for taking necessary permission. Till final decision on the issue and denial of permission by the RBI for purchase of the property, and finality in any litigation it could not be held that the contract/agreement to sell was rendered void. The learned Single Judge further referred to 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. The Court had yet to pass a decree for specific performance, as held in *Chandnee Widya Vati Madden (supra)*, and that it is only after a decree is passed, that the issue of

⁶ AIR 1964 SC 978

obtaining of a permission and thereafter of execution of a sale deed would arise. It was then held that 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 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.”

15. On the other issues, the learned Single Judge found that the Vendor, Dr. Jindal, could not say that the purchaser/tenant was disentitled to claim ownership rights. The owner/vendor had argued that since the Agreement to sell and other documents were unstamped and unregistered, no title could pass. However, the learned Single Judge rejected this contention, holding 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 53A 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 53A 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 53A 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 53A 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.”

As a result of the findings, the learned Single Judge decreed the specific performance suit and dismissed the Vendor/owner's suit claiming possession.

Contention of parties

16. The appellant/vendor argues that the learned Single Judge fell into error in not seeing that the purchaser had pleaded novation of Ex.P1, by another agreement dated 01.03.2005, which allegedly deleted the condition relating to time being of the essence of the contract in regard to obtaining permission (by the purchaser) for conveyance of title. It was argued firstly, that the purchaser relied on such novation in its pleading, furthermore, the

relevant pleadings in the specific performance suit [CS(OS) 2279/2006], are relied on.

17. Counsel also submitted that the Purchaser had sought specific performance of the novated contract. The alleged agreement – expressly pleaded, and even made the basis of the relief claimed – was denied by the vendor. The Court had framed Issue Nos. 2 to 4. The relief clause in the purchaser’s specific performance suit is extracted below:

“(a) Pass a decree of specific performance in favor of the plaintiff against the defendants directing the defendants to execute the sale deed and all other necessary documents of transfer of title of the suit property bearing no.K-70-B, Hauz Khas Enclave, New Delhi in terms of agreement to sell dated 01.11.2004 read with its amendment dated 01.03.2005 and receipt dated 28.02.2005.”

It was submitted that the allegation of payment of (₹10 lakhs) additional amount on 01.03.2005 was never established and DW-2 in cross-examination admitted that the amount was paid to maintain a “good relationship”. It was further contended that DW-1 had stated that the purchaser’s employee, Mr. Sushil Sharma, had encashed the cheques drawn in favor of the seller, Dr. Jindal. Even he deposed as DW-2, but was unable to prove the purchaser’s allegations. Also, the deposition in cross-examination of DW-1 (on behalf of purchaser) contradicted the examination-in-chief DW-1/A dated 23.03.2013.

18. The vendor argues that the purchaser applied for permission, for the first time to acquire the suit property- to the concerned authorities i.e. the Central Government and the RBI. In the written statement to the Vendor's suit the purchaser alleged that on 28.02.2005 the parties had agreed to do away with the condition regarding time being of the essence of the contract

and that a further consideration of ₹ 10 lakhs was agreed upon. The amendment extending the period was allegedly entered into. These were in fact materials produced in the suit – by way of Ex. DW1/18. The purchaser further alleged that ₹ 10 lakhs was paid to the vendor through three bearer cheques. The vendor denied execution and disputed the alleged amendment or novation and also denied receipt.

19. Learned counsel took the Court through the evidence and suggested that this contradicted the pleadings of the purchaser that an amendment took place to the original agreement to sell; on the contrary in cross-examination the amendment could not be proved. Thus the evidence – both oral and documentary, contradicted the pleadings. Having approached the Court in a suit for specific performance, which is an equitable relief, the purchaser could not have been given a decree on the basis of an entirely different agreement, which according to it did not exist at the time of the filing of the suit.

20. It is contended on behalf of the vendor-appellant that the learned Single Judge fell into error in holding that obtaining permission of the authorities by reason of prohibition in law was not required or was not mandatory. Various decisions of the Supreme Court was cited to contend that the vendor could not be compelled to part with the title to and possession of immovable property, when the purchaser is unable to fulfill an obligation expressly agreed to be undertaken by it. Specifically relied upon in this regard, for this proposition, were the decisions of the Supreme Court in *K. Narendra v Riviera Apartments (P) Ltd* 1999 (5) SCC 77; and *HPA International v Bhagwandas Fateh Chand Daswani* 2004 (6) SCC 537.

21. Counsel further argued that the learned Single Judge failed to see that the vendor had set out the suit property by virtue of lease deeds and an agreement for hire in renting of furniture and fittings. These were executed on 19.08. 1998. Upon expiry of these agreements the parties renewed the lease for a further term on 25.09.2001. When the lease term ended on 31.08.2004 the purchaser requested the Vendor for extension of lease until 28.02.2005. That agreement was oral. This was mentioned by the Vendor in its possession suit and was not denied but rather admitted by the purchaser in its written statement. On 01.11.2004 the purchaser desired to acquire the suit property and the parties, therefore, entered into the agreement to sell marked as Ex.P1. Since the purchaser failed to obtain the permission required of it by law as well as under the agreement to sell, the obligation to convey title failed. It was urged that the balance consideration of ₹ 2.29 crores was paid on 28.02.2005 with an express condition that in case permission were not obtained by 30.04.2005 the agreement to sell would stand cancelled and the total sale consideration would be returned. The receipt for the total amount was executed on 28.02.2005 and marked Ex.P2. The cancellation of the agreement to sell due to the inability of the purchaser of property to obtain the requisite permissions from the statutory authorities was effected through a legal notice on behalf of the seller/Vendor on 02.05.2005. This was produced as Ex. P-4. The letter also enclosed the owner's cheque for refund of sale consideration. Thereafter two notices of termination of the lease were issued by the landlord/Vendor on 30.05.2005 and 10.06.2005. These were marked as Ex.P5 and Ex.P6. The notice also demanded damages at the rate of ₹ 50,000 per day. It was in these circumstances that the suit for possession was filed.

22. In the suit for possession too the purchaser took an identical position as in the case of its suit for specific performance i.e. that the condition with regard to time being of the essence of the contract was agreed to be done away with through an alleged agreement of 01.03.2005. This agreement was sought to be proved but later abandoned. Despite these pleadings, the learned Single Judge accepted the purchaser's lien and dismissed the suit for possession.

23. Counsel for the vendor argues that the learned Single Judge fell into error in not considering that both the agreement to sell as well as the other documents relied upon by the purchaser could not have been exhibited because they were both unstamped and unregistered. In such event the claim for part-performance of the agreement under section 53A of the Transfer of Property Act was not feasible. Resultantly the purchaser had no defense in the possession suit. A decree for possession had to follow. The learned Single Judge clearly fell into error in holding that the suit for specific performance could be decreed and that the suit for possession had to be rejected.

24. Counsel for the Purchaser contended, on the other hand, that the letters dated 31.12.2004; 09.02.2005; 19.02.2005; 22.02.2005 (produced as Ex. DW-1/8 to Ex. DW-1/11) reveal that all that could be done was in fact done; even the Reserve Bank of India (RBI) which was approached for approval, responded to the request for permission but no further development took place. In these circumstances, the Purchaser had performed its part of the contract; the most important condition, i.e the payment of consideration agreed, was performed in full, before the date agreed, i.e 28.02.2005. In these circumstances, the judgments relied on by the Seller/Vendor, i.e *K.*

Narendra (supra), *HPA International (supra)* etc, did not apply *vis-à-vis* the facts of this case. The counter affidavit filed on behalf of the RBI in W.P.(C) 3498/2010 was proved and exhibited as Ex.DW1/23. These clearly showed the Purchaser's readiness and willingness to perform its part and secure the requisite permission.

25. It was further argued, on behalf of the Purchaser, that the impugned judgment correctly deduced that nothing turned on the Amendment Agreement dated 01.03.2005 because it stated that time of performance was no longer of the essence by deleting Clause 9 of the main Agreement to Sell because the Seller received, ₹10 lakhs in addition to the total sale price. However, the proposed seller could have legally claimed only the sale price, and nothing more and payment of the sale price was received by the seller in terms of the agreement, the inability of the Purchaser to prove the Amendment Agreement dated 01.03.2005 did not prejudice its claim to specific performance of the Agreement to Sell. Consequently, even if that issue were held in favour of the Seller, he was not entitled to anything more than what he agreed, and held out to be his entitlement, in his pleadings. The Seller in fact received the entire sale consideration of ₹ 2.30 crores, within the time stipulated. The performance of other conditions- on the part of the Purchaser, no longer remained of the essence of the contract.

26. Learned counsel also argued that the Purchaser could not be denied a decree for specific performance, because the agreement between the parties also provided for a contingency where it could nominate someone on its behalf in whose favour the Sale Deed could be executed. Moreover, submitted counsel, once the decree is issued, the question of execution of

conveyance would be seen; in the eventuality of the statutory authorities granting permission, based on the decree, the conveyance would be executed. It was also submitted that the payment of the entire amount agreed meant two irreversible facts: one that the Seller would not be entitled to rent for the period of occupation by the Purchaser who had acquired property rights and two, the commitment on the part of the Purchaser not to resile from the contract and seek refund of the amount.

Analysis and Findings

27. The essential facts cover a limited area; the terms of an undoubted agreement to sell (Ex.P1) show that time of performance was made the essence and the maximum period of completion of the sale transaction was four months. Time was the essence of the contract in the Agreement to Sell in terms of Clause 5 of Ex.P1. Clause 9 of the said document stipulated that a four month period for the balance sale consideration to be paid, and on the failure of the purchaser, the seller was free to sell the property to someone else. The first controversy, therefore, is, whether the learned Single Judge acted correctly in holding that the inability of the Purchaser to prove the alleged novation meant that it necessarily had to result in rejection of the claim for specific performance. The Seller's argument is that the purchaser set up a specific case of novation and sought specific performance of that contract; consequently, its inability to prove the novation meant that it could not claim the relief at all. The Purchaser argues to the contrary and says that novation was denied by the Seller; since there was no controversy about the main agreement, except interpretation of its terms, once the Court held that

its conditions were fulfilled by the Purchaser, a decree for specific performance was to follow.

28. The relevant pleadings in the specific performance suit (Paras 9,10 and 20 of the plaint and the first relief clause) are extracted below:

“9. That at the time of receiving the balance sale consideration the defendant orally agreed to waive the requirement of time being the essence of the contract. That in consideration for waiver of the said condition, the defendants demanded a further sum of Rs.10,00,000/- (Rupees Ten Lacs only) over and above the total sale consideration.

10. That the plaintiff agreed to the said condition and on the next date, i.e. on 01.03.2005, the agreement to sell dated 01.11.2004 was novated vide amendment clauses signed and executed between the parties herein. The contents of the said amendment are reproduced as under for ready reference.

“With reference to clause No.9 of the Agreement to Sell, both parties examined the situation at the end of the already extended stipulated time period for the completion of the transaction and decided unanimously not to annul the above named agreement but to add a reasonable compensation to the consideration according to clause 1 of the agreement to sell.

The Friedrich Ebert Stiftung, India Country Office, will pay a compensation of Rs.10,00,000/- to the VENDOR for meanwhile changed conditions at New Delhi's real estate market beyond the stipulated date of 28th February 2005.

Dr. Shiv Pal Jindal will waive the option of annulment according to clause 9 of the agreement to sell.”

11. That the plaintiff paid to the defendants the additional consideration amount of Rs.10,00,000/- (Rupees Ten lacs) in accordance with the terms of the Amendment dated 1.3.2005 to

the Agreement to Sell. The said additional consideration Rs.10,00,000/- (Rupees Ten lacs) was paid to the defendants through three bearer cheques in the following manner:

a) A sum of Rs.3,00,000/- vide cheque bearing no.733759 dated 01.03.2005 drawn on Deutsch Bank, Tolstoy House, New Delhi.

b) A further sum of Rs.5,00,000/- vide cheque no.733760 dated 03.03.2005 drawn on Deutsch Bank, Tolstoy House, New Delhi;

c) The balance amount of Rs.2,00,000/- vide cheque no.733761 dated 04.03.2005 drawn on Deutsch Bank, Tolstoy House, New Delhi.

The said cheques have been duly encashed and said additional consideration amount has been duly received by the defendants.

20. It is pertinent to mention that in the said suit no.51 of 2006, the defendants have concealed the fact of waiver of condition no.9 of agreement to sell by amendment dated 1.3.2005. The defendants have also concealed the receipt of a further sum of Rs.10 lacs under the said amendment dated 1.3.2005 over and above the entire sale consideration of Rs.2,30,00,000/-. It is further pertinent to mention that though the plaintiff has paid and the defendants have received a total sum of Rs.2,40,00,000/- as sale consideration, however, with malafide intentions and ulterior motives, the defendants had sent a cheque of only 2,30,00,000/- with letter/notice dated 2.5.2005 and had made no reference at all to the remaining sum of Rs.10 lacs paid by the plaintiff under the Amendment dated 1.3.2005. Thus, the defendants are clearly guilty of concealment and suppression of material facts and of making misrepresentation in that suit which is liable to be dismissed.”

“(a) Pass a decree of specific performance in favor of the plaintiff against the defendants directing the defendants to execute the sale deed and all other necessary documents of transfer of title of the suit property bearing no.K-70-B, Hauz Khas Enclave, New Delhi in terms of agreement to sell dated 01.11.2004 read with its amendment dated 01.03.2005 and receipt dated 28.02.2005.”

29. What is the true effect of the inability of the Purchaser to prove that the original agreement (which is admitted by the Vendor) had been amended? If one keeps in mind that the inability of the Purchaser was because its evidence was not conclusive that the novation had indeed been carried out and also, importantly that the Vendor/defendant also did not offer any evidence to show that the document relied on, was a forged one, the only consequence was that the novation was not proved. It cannot be that the inability of the party alleging the novation (Plaintiff/Purchaser) to prove that event obliterated the original agreement. This is to be also understood in the context of the other documents. The receipt (Ex. P2) executed by the Seller on receiving the entire agreed consideration acknowledges, *inter alia*, that:

“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”

was received, in accordance with the agreement. There is no doubt that in case parties agree to alter or amend the terms of a previously concluded contract, the freshly agreed terms would still bind them. This principle is the

basis for Section 62 of the Contract Act, which deals with novation of contracts. Now as to whether the amendment or alteration takes place in the circumstances of a given case, is entirely fact dependent. In case there is no controversy that such novation occurred, the parties would undoubtedly be governed by the new terms. However, if one party asserts that amendment took place and the other party denies it, the matter becomes a triable issue. If the party asserting the novation is able to prove it, the question of adherence to its terms or their breach has to be examined. However, if the allegation that a novation occurred is not proved, the matter ends. However, the issue whether the party asserting breach of contract (of the uncontroverted terms) has proved its case still survives. In other words, it is not in all cases that the inability of a party asserting novation, to prove it, results in rejection of its claim altogether. If the pleadings are such that the novation is in respect of some terms, but the larger question of compliance or breach of other terms survives, the Court has to proceed to determine. Therefore, the learned Single Judge, in our opinion, correctly held that in the circumstances, that the plaintiff Purchaser could not prove the novation (which talked of additional consideration of ₹10 lakhs and deletion of the reference to time being of essence of contract) meant only that the question to be decided was whether the admitted contract (Ex.P1) could be enforced through a decree for specific performance. This is because of the statutory compulsion for a plaintiff in an action for specific performance to prove that “...*he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.*” (Ref. Section 16 (c) Specific Relief Act).

30. The next question is whether the plaintiff/Purchaser had complied with its part of the bargain, since time was of the essence of the contract (by virtue of terms of Ex.P1) in that the permission from the requisite authorities had to be obtained. The defendant/Sellers mainstay for this argument was Clause 5 of the said document. A bare reading of Clauses 4 and 5 no doubt lead one to conclude that the time for performance of the obligations was to be two months from the date of the agreement (01.11.2004). However, Clause 9 read as follows:

“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.”

As noticed earlier, the entire consideration agreed for the suit property, i.e ₹ 2.30 crores was paid on 28.02.2005 (the last date stipulated, by virtue of Clause 9). The Vendor acknowledged receipt of “*full consideration.*” If the Vendor was of opinion that time was of the essence, it was clear that the last day of the 4 month period permitted under the contract, was 28.02.2005; it was open to the Vendor to reject the receipt of the payment, stating that the requisite approvals (receipt of which within the time stipulated, according to him was of the essence of the contract) had not been obtained. He not only did not state that there was no approval, but even accepted the entire

consideration. Most importantly, he waited till 02.05.2005 to state that the terms of the contract had been breached.

31. If indeed the Vendor's contentions were correct, the breach of the terms of the agreement (Ex.P1) should have been from 01.03.2005. Nothing prevented the Vendor from asserting that; on the other hand he retained the money for over two months. Interestingly, the Vendor's legal notice stated that the permission

"...from the Govt of India had to be obtained and registration of the sale deed was to be executed. You however, paid a sum of Rs. 2,30,00000/- on 28-2-2005 with a clear understanding that in case the requisite permission for effecting the sale in your favour is not received from the Govt of India latest by 30-4-2005, the transaction would stand cancelled/revoked and in that eventuality you would be entitled to receive back the total amount of consideration paid to our client.."

This allegation was repeated by the Vendors in the pleadings. However, apart from the legal notice and the pleadings, as well as such assertion in the affidavit, there is no documentary evidence in support of the contention that time to obtain the requisite permission was extended till 30.04.2005. If indeed that were the position, the Vendor would have been more forthcoming as to who had agreed to the extension on behalf of the Purchaser and proceeded to cross-examine its witness. However, no such attempt was made. Most importantly, once the Vendors asserted primacy of the terms of the Agreement and denied the novation set up by the Purchasers, they could not have set up an alternative oral agreement which detracted from its terms.

32. In *Chandnee Vidya Wati (supra)* the plaintiffs had entered into a contract of sale in respect of the defendant's house in Delhi. The property

was leasehold plot granted by the Government. The lease contained a term that the vendor was to obtain the necessary permission of the Government within 2 months from the date of the agreement and in absence of the permission within that time, it was kept open to the purchasers to extend the date or to treat the agreement as cancelled. The trial Court had held that the agreement was inchoate because the previous sanction of the Chief Commissioner to the proposed transfer had not been obtained, and no specific performance of the contract could be granted. The High Court reversed that finding, holding that the agreement was a completed contract for sale, subject to the sanction of the Chief Commissioner before the sale transaction could be completed. The Privy Council judgment in *Motilal v. Nanhela*⁷ was relied upon. The Court held that if ultimately the Chief Commissioner refused to grant the sanction to the sale, the plaintiffs may not be able to enforce the decree for specific performance of the contract, but that was *no bar to the court passing a decree for that relief*. The Supreme Court concurred with the High Court, observing that:

"On the findings that the plaintiffs have always been ready and willing to perform their part of the contract and that it was the defendant who wilfully refused to perform her part of the contract, and that time was not of the essence of the contract, the Court has got to enforce the terms of the contract and to enjoin upon the defendant-appellant to make the necessary application to the Chief Commissioner. It will be for the Chief Commissioner to decide whether or not to grant the necessary sanction."

⁷ AIR 1930 PC 287 (which ruled that there is an implied covenant on the part of the vendor to do all things necessary to effect transfer of the property regarding which he has agreed to sell the same to the vendee.)

In *Ramesh Chandra v Chuni Lal*⁸ the Purchaser agreed to purchase a plot from the seller on specified date; in respect of the property, the seller had not obtained lease deed from the Government. The receipt for earnest money provided that the balance of consideration was to be paid within a month at the time of the execution of the registered sale deed. Further the vendor was enjoined to obtain sanction of the Government before the transfer of leasehold plot to the Purchaser. Since the Vendor was aware of this condition that the execution of the sale deed was dependent upon prior sanction from the competent authority which he has undertaken to inform to the Purchaser and since he never took any steps till specified date to apply for sanction but informed that he was not willing to wait indefinitely for want of sanction, it was held on the facts and circumstances of the case that the vendee could not be non-suited for the reason of the vendee being unwilling to perform his part and the Purchaser was entitled to a decree for specific performance.

33. There is sufficient evidence on the record (Ex. DW-1/8 to DW-1/11) to show that contemporaneously, i.e in December 2004, the plaintiff/Purchaser had applied to the RBI for the required permission; RBI had also responded and sought particulars. Moreover, the Purchaser had produced Ex DW-1/23, the RBI's counter, which clearly acknowledged that permission had been sought, but not granted. This Court had directed RBI to consider the matter and take a final decision. Therefore, it is clear that the Purchaser performed its part of the bargain by paying the entire agreed consideration before the stipulated date; it had also applied to RBI for permission. Insofar as it could do something within its control, there can be

⁸ AIR 1971 SC 1238

no doubt that it did everything that it could, before the last date stipulated for performance.

34. It has been held that a Court, when considering an action for specific performance, has to consider the overall equities of the case in order to see whether a decree is to be made. The Supreme Court, in *Nirmal Anand v Advent Corporation*⁹ held as follows:-

"23. Specific performance being an equitable relief, balance of equities have also to be struck taking into account all these relevant aspects of the matter, including the lapses which occurred and parties respectively responsible therefor. Before decreeing specific performance, it is obligatory for courts to consider whether by doing so any unfair advantage would result for the plaintiff over the defendant, the extent of hardship that may be caused to the defendant and if it would render such enforcement inequitable, besides taking into (sic consideration) the totality of circumstances of each case...."

Taking into overall consideration all the facts, it is held that the learned Single Judge did not fall into error in concluding that the plaintiff/ Purchaser had proved that it was entitled to a decree for specific performance.

35. The Vendor had argued that if specific performance were to be granted, it would be essentially based on a claim under Section 53-A of the Transfer of Property Act. Such relief, according to the Vendor was barred, 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 53A of the Transfer of Property Act and Section 23A of the Indian

⁹ 2002 (5) SCC 481

Stamp Act, applicable to Delhi. Amended Section 23A of Schedule-I to the Indian Stamp Act, compels an agreement to sell under Section 53A to be stamped at 90% of the value of the sale consideration (for the sale deed) and it should also be registered. The learned Single Judge rejected this argument, saying that the Purchaser never urged that it was in possession pursuant to Section 53A; no issue was framed to that effect too. It was further held that *arguendo* if the Purchaser called itself the owner and such claim or statement “cannot change the legal position and we will have to see the legal position along with the facts of this case as to whether at all the proposed buyer can be said to be the owner as per Section 53A 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 53A 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 53A of the Transfer of Property Act.”

36. This Court is of the opinion that the learned Single Judge’s conclusions and findings are sound. The Agreement to Sell nowhere suggests that possession was delivered to the Purchaser in part-performance of the contract to sell the suit property. The Agreement to Sell was clearly not in the nature of Section 53A of the Transfer of Property Act, 1882; possession of the suit property was with the Purchaser as tenant of the property. The effect of the continued possession pursuant to the receipt dated 28.02.2005 is that said Purchaser is entitled to hold the property without paying any rent or user charges: because the entire sale consideration was paid to the Vendor. The Vendor could not by mere argument have converted an Agreement to Sell into one that also claimed part performance.

37. The result of the above discussion is that there is no infirmity with the judgment and decree of the learned Single Judge; the directions contained in the operative part of the impugned judgment, therefore, are affirmed. The dismissal of the suit for possession is also upheld. The appeals fail and are consequently dismissed.

**S. RAVINDRA BHAT
(JUDGE)**

MARCH 31, 2016

**DEEPA SHARMA
(JUDGE)**

