

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

+ **RFA No. 126/2018**

% **Reserved on: 9th February, 2018**
Pronounced on: 16th February, 2018

UMESH GAUR (DECEASED) THROUGH LRs Appellants

Through: Mr. Sunil Chauhan, Advocate.

versus

SHAMSHER RANA & ANR. Respondents

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

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

VALMIKI J. MEHTA, J

CM No. 5114/2018 (Exemption)

Exemption allowed subject to just exceptions.

CM stands disposed of.

Caveat No. 108/2018

Counsel for the caveator enters appearance.

Caveat stands discharged.

RFA No. 126/2018 and CM No. 5113/2018 (for stay)

1. This Regular First Appeal is filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) impugning the judgment of the trial court dated 10.1.2018 by which the trial court has decreed the suit

for specific performance filed by the respondents/plaintiffs with respect to the suit property admeasuring 16 Bighas and 15 Biswas of land comprised in Khasra nos. 505(4-16), 506 (4-16), 509 (4-16) and 511 (2-07) situated in Village Mukhmelpur, Delhi 110036.

2. The facts of the case are that with respect to the suit property parties entered into an agreement to sell dated 29.1.2006/Ex.P-1. The seller was the original defendant in the suit, namely, Sh. Umesh Gaur who died *pendente lite* and the present appellants being the legal heirs were substituted as defendants in place of Sh. Umesh Gaur. Total consideration under the agreement to sell was Rs.87,23,958/- and respondents/plaintiffs paid a sum of Rs.10,00,000/- to the appellants/defendants as earnest money under the agreement to sell. Balance amount was to be paid by the respondents/plaintiffs at the time of execution of the sale deed on or before a date fixed being 13.4.2006. For execution of the sale deed the appellants/defendants had to take the necessary No Objection Certificate (NOC) from the revenue authorities. Respondents/plaintiffs pleaded that they were always ready and willing to perform their part of the contract but appellants/defendants

failed to obtain the requisite NOC. Appellants/defendants assured the respondents/plaintiffs that after obtaining NOC the sale deed would be executed but the appellants/defendants did not obtain the necessary NOC before the date fixed of 13.4.2006. Respondents/plaintiffs pleaded that they therefore got two bank drafts prepared for the balance sale consideration bearing nos. 006669 and 006670 dated 12.4.2006 of Rs.38,61,979/- each i.e totaling the balance sale consideration of Rs.77,23,958/- drawn on Union Bank of India, Mukhmelpur Branch. Respondents/plaintiffs also purchased non-judicial stamp papers for Rs.6,97,950/- for execution of the sale deed and accordingly with the payment and the non-judicial stamp papers respondents/plaintiffs reached the office of the Sub-Registrar at 10:00 a.m. on 13.4.2006 but the appellants/defendants failed to come and execute the sale deed. When the respondents/plaintiffs then contacted the appellants/defendants, the appellants/defendants apologized and said that a fresh date will be fixed which will be informed to the respondents/plaintiffs. It is pleaded that though the respondents/plaintiffs kept on waiting the appellants/defendants instead of executing the sale deed sent a legal notice dated 24.4.2006

claiming that the respondents/plaintiffs have failed to perform their part of the contract and therefore the earnest money of Rs.10,00,000/- was forfeited. Respondents/plaintiffs replied to the legal notice and called upon the appellants/defendants to execute the sale deed but the appellants/defendants failed to do so and therefore the subject suit for specific performance was filed.

3. Suit was contested by the appellants/defendants who pleaded that the agreement to sell is void because it is hit by Section 33 of the Delhi Land Reforms Act, 1954 (hereinafter referred to as 'the Act'). It was pleaded that as per Section 33 of the Act if a seller after the sale of his land which is the subject matter of the agreement to sell has remaining with him less than 8 standard acres then the agreement has to be treated as illegal. It was pleaded that the appellants/defendants besides holding the subject land in Village Mukhmelpur also owned 9 Bighas and 12 Biswas of land situated in Village Khera Khurd and consequently the subject agreement to sell is hit by Section 33 of the Act. In the written statement appellants/defendants have denied being the exclusive owner of the agricultural land, which is the subject matter of the agreement to sell

and that the appellants/defendants in fact were only co-owners to the extent of 335 shares out of the total of 1800 shares and which becomes clear from the revenue record placed on record (Ex.D-1). Entering into the agreement to sell between the respondents/plaintiffs and the appellants/defendants was not denied and the appellants/defendants also did not deny receiving of Rs.10,00,000/- under the subject agreement to sell. Appellants/defendants pleaded that they were always ready and willing to complete their obligations and had in fact even applied for the NOC on 14.2.2006 itself within the time prescribed by the agreement and that it was the respondents/plaintiffs who had failed to arrange payment of the balance sale consideration resulting in frustration of the agreement to sell. The fixing of the date on 13.4.2006 for execution of the sale deed before the Sub-Registrar was denied and it was also denied that respondents/plaintiffs had got the bank drafts prepared for the balance sale consideration. Suit was hence prayed to be dismissed.

4. After pleadings were complete, the trial court framed the following issues:-

“1. Whether the suit is not maintainable in view of Section 33 of the Delhi Reforms Act? OPD

2. Whether the agreement between the parties is contrary to law and public policy on the ground that the defendant is only a co-bhumidar in respect of the suit property and the defendant is having only 335/1800 share in the land and that the land is unpartitioned? OPD
3. Whether the plaintiffs are entitled to a decree of specific performance of the agreement to sale dated 29.1.2003? OPP
4. Whether the plaintiffs are entitled to a decree of permanent injunction against the defendant as prayed for? OPP
5. Whether the plaintiffs are entitled to a decree for recovery towards damages of Rs. 10 lacs or any other lesser amount? OPP
6. If the previous issue answered in favour of the plaintiffs, whether the plaintiffs are entitled to grant of interest? If so, at what rate? OPP.
7. Relief.”

5. Parties led evidence and this aspect is recorded in para 7 of the impugned judgment and which para reads as under:-

“7. Thereafter parties were directed to file list of witnesses and examination of their respective witnesses. Accordingly, three witnesses have been examined by the plaintiffs i.e. plaintiff Mr. Shamsheer Rana examined himself as PW1 and filed his affidavit Ex. PW1/A. He relied upon the documents Ex. PW1/1 to Ex. PW1/4, PW2 Mr. Jai Chand and PW3 Mr. Rakesh Gupta, Special Assistant from Union Bank of India and PW3. Defendant Umesh Gaur tendered his evidence by way of affidavit Ex. DW1/A and relied upon the documents Ex. DW1/1 to Ex. DW1/3 and examined himself as DW1 and he was even partly cross examined by the plaintiffs. It is however matter of record that during the pendency of case, defendant Umesh Gaur expired and an application under Order 22 Rule 4 CPC was filed by the plaintiffs, being IA 23361/2012 for bringing LRs i.e. son of defendant, of which reply was filed by defendant inter alia stating that apart from the son of deceased defendant, there are other LRs also of deceased Umesh Gaur, and accordingly that application was withdrawn and fresh application being IA 14684/2013 was filed thereby giving complete description of the LRs of deceased Umesh Gaur and that application was allowed. However, Mr. Himanshu Gaur, son of the defendant Sh. Umesh Gaur (since deceased), examined himself alone, as DW2 and closed the DE.”

6. Trial court has held issue no. 1 in favour of the respondents/plaintiffs holding that the agreement to sell is not barred

because of Section 33 of the Act. Trial court held that the appellants/defendants have not filed the revenue record showing the ownership of the appellants/defendants of the other land in Village Khera Khurd.

7. Before this Court once again learned counsel for the appellants/defendants argued that the suit was barred because of Section 33 of the Act inasmuch as even after selling the suit land the appellants/defendants would have with them in Delhi in Village Khera Khurd 9 Bighas and 12 Biswas of land i.e less than 8 standard acres required under Section 33 of the Act, and it is accordingly argued that the trial court has erred in not dismissing the suit by holding the agreement to sell between the parties is hit by Section 33 of the Act. In order to appreciate the argument, Section 33 of the Act is reproduced as under:-

“S.33 – Restriction on transfers by a *Bhumidhar* – (1) No *Bhumidhar* shall have the right to transfer by sale or gift or otherwise any land to any person, other than a religious or charitable institution or any person in charge of any such *Bhoodan* movement, as the Chief Commissioner may, by notification in the Official Gazette, specify, where as a result of the transfer, the transferor shall be left with less than eight standard acres in the Union Territory of Delhi.

Provided that the Chief Commissioner may exempt from the operation of this section, the transfer of any land made before the 1st day of December, 1958, if the land covered by such transfer does not exceed

one acre in area and is used or intended to be used for purposes other than those mentioned in clause (13) of Section 3.

(2) Nothing contained in sub-section (1) shall preclude the transfer of land by a *Bhumidhar* who holds less than eight standard acres of land, if such transfer is of the entire land held by him:

Provided that such *Bhumidhar* may transfer a part of such land to any religious or charitable institution or other person referred to in sub-section (1).

Explanation – For the purposes of this section, a religious or charitable institution shall mean an institution established for a religious purpose or a charitable purpose, as the case may be.”

8. A reading of Section 33 of the Act shows that a person who owns a land and after selling the land he has remaining with him less than 8 acres, then the property which is the subject matter of a sale becomes illegal and void. Of course if a person has less than 8 standard acres and he transfers his entire land holding then there is no bar under Section 33 of the Act to transfer the land by the owner of the land under the Delhi Land Reforms Act.

9. Learned counsel for the appellants/defendants argued that the appellants/defendants had proved as Ex.DW1/2 the Khatoni of Village Khera Khurd showing ownership of the appellants/defendants in Village Khera Khurd and therefore once the suit land is sold to the respondents/plaintiffs then the appellants/defendants would have remaining with them less than 8 standard acres i.e an area of 9 Bhigas 12 Biswas in Village Khera Khurd and consequently the agreement to

sell should be held to be void. What is argued on behalf of the appellants/defendants is that it is not necessary that the 8 standard acres required by Section 33 of the Act should be only in one village of Delhi but a seller can own land in various villages of Delhi and if the total of all the lands in all the villages after selling the land under the agreement to sell is less than 8 standard acres then consequently the agreement to sell would be hit by Section 33 of the Act.

10.(i) I cannot agree with the arguments urged on behalf of the appellants/defendants though Section 33 of the Act is widely worded to show requirement of a minimum of 8 standard acres of land in entire Delhi, inasmuch as the object of Section 33 of the Act is to prevent fragmentation of holdings so that an owner of agricultural land does not have an uneconomic holding. Any holding less than 8 standard acres is said to be an uneconomic holding. This is the ratio of the judgment of the Division Bench of this Court in the case of ***Subhash Chand Aggarwal Vs. Union of India (UOI) & Ors. (2011) 8 AD (Delhi) 338***. Therefore, in the opinion of this Court it makes no difference if the seller under an agreement to sell has lands in other villages and which after selling of land under a subject agreement to

sell, is found to be less than 8 standard acres, because it is seen in the facts of the present case that the appellants/defendants agreed to sell the entire holding in the Village Mukhmelpur. Once therefore the entire holding of the village is sold by the *Bhumidar*/owner then there is no issue of any uneconomic holding remaining and which uneconomic holding necessarily has co-relation with land as a whole in one village only. Total lands in different villages belonging to the *Bhumidar*/owner is not and cannot be the subject matter of Section 33 of the Act, the object of which is to ensure that a *Bhumidar*/owner does not have an uneconomic holding which is less than 8 standard acres in a village.

(ii) I therefore reject the argument urged on behalf the appellants/defendants that the transaction encompassed in the subject agreement to sell is void as it is hit by Section 33 of the Act.

11.(i) Learned counsel for the appellants/defendants then argued that the appellants/defendants were only co-owners of the land and had only 335 shares out of the total of 1800 shares as is clear from the revenue record placed on record of Village Mukhmelpur (Ex.D-1) and it is argued that without partition the appellants/defendants could

not have agreed to sell specific lands under the subject agreement to sell.

(ii) This argument urged on behalf of the appellants/defendants is misconceived and liable to be rejected because firstly the appellants/defendants are estopped from contending that they are not the owner of the specific lands because the original defendant himself has under the agreement to sell written specific khasara numbers of the lands and that he is the owner of such khasara numbers. Appellants/defendants cannot therefore now contend that the original defendant was not the owner of the specific lands as mentioned in the agreement to sell. The other reason for holding that the original defendant was the owner of the land which is the subject matter of the agreement to sell, is because the appellants/defendants could well have led evidence of other co-owners of the land to show that partition had not taken place, however admittedly the appellants/defendants did not lead evidence of any other co-sharers to show that no partition has taken place. Therefore, this Court has to accept as correct the contents of the subject agreement to sell because entering into of agreement to sell with specific khasara numbers is not denied by the

appellants/defendants who entered into the agreement to sell with the respondents/plaintiffs. This argument of the appellants/defendants is therefore rejected.

12.(i) Learned counsel for the appellants/defendants then argued that the appellants/defendants had applied for the requisite NOC on 14.2.2006 and which admittedly was obtained on 20.4.2006 and therefore trial court has erred in holding that it was appellants/defendants who were guilty of breach of agreement to sell by not obtaining the NOC or not executing the sale deed. This NOC applied by the appellants/defendants from the office of the Tehshildar is dated 14.2.2006 has been proved and exhibited as Ex. DW2/4.

(ii) Even this argument urged on behalf of the appellants/defendants has no substance because no doubt the NOC was applied for on 14.2.2006 and obtained on 20.4.2006, however, the appellants/defendants failed to obtain the same before the date fixed for entering into the sale deed on 13.4.2006. Trial court in this regard has rightly observed that if the appellants/defendants were sincere in going through with the transaction then there was no reason why just within four days of obtaining of NOC the appellants/defendants sent a

legal notice dated 24.4.2006/Ex.DW1/3 cancelling the agreement to sell on alleged non-performance by the respondents/plaintiffs and thereby forfeiting the advance of Rs.10,00,000/-. Trial court holds that on obtaining of the NOC on 20.4.2006 the appellants/defendants in fact ought to have called upon the respondents/plaintiffs to perform the agreement to sell by sending of notice and only on failure of respondents/plaintiffs would there arise any issue of breach by the respondents/plaintiffs to perform their obligation under the agreement to sell. Trial court has further in this regard observed that the fact that the original defendant was ready to enter into sale deed as per market rates presently prevailing shows that it was the original defendant who had backed out from the agreement to sell on account of rise in the prices of the property.

13. In my opinion, the trial court has also rightly held that the respondents/plaintiffs have proved their readiness and willingness inasmuch as respondents/plaintiffs filed and proved the bank drafts with respect to the balance sale consideration as Ex.PW1/6 and EX.PW1/7. The receipt of appearance before the Sub-Registrar on 13.4.2006 has been proved as Ex.PW1/3. Therefore, in my opinion,

respondents/plaintiffs can be said to be ready and willing to perform their part of the contract and so rightly held by trial court.

14. For completion of narration, I may note that trial court in order to compensate the appellants/defendants besides directing payment of balance sale consideration trial court has also directed payment of interest on balance due at 9% per annum simple.

15. During the course of hearing I had put to the counsel for the appellants/defendants as to whether the appellants/defendants would be interested in taking increase at 18% per annum instead of at 9% per annum as granted by the trial court, to which counsel for the appellants/defendants said that appellants/defendants are not wanting enhanced interest or even enhanced consideration for the matter but they want the judgment of the trial court to be set aside as a whole as the suit for specific performance has to be dismissed more so because prices of the property in question have gone up many fold.

16. In view of the aforesaid discussion, there is no merit in the appeal and the same is hereby dismissed.

FEBRUARY 16, 2018

AK/godara

VALMIKI J. MEHTA, J