

## THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on: 13.01.2011  
Judgment Pronounced on: 04.02.2011

**+ IA No. 13424/2010 & IA No.....(under  
Order 39 Rule 4 of CPC) CS(OS) No. 2051/2010**

**TARUN SAWHNEY** .....Plaintiff

**- versus -**

**UMA LAL AND OTHERS** .....Defendants

**Advocates who appeared in this case:**

For the Plaintiff: Mr. Sandeep Sethi, Sr. Adv. with  
Mr. Harpreet Singh and Mr.  
Rajesh Gupta, Advs.

For the Defendant: Mr. Arun Batta, Adv. for D-1, 2 & 4, Mr. J.P. Sengh, Sr. Adv. with Ms. Zubeda Begum, Mr. Sumeet Batra and Mr. Gaurav Bhardwaj, Advs. for D-3 & 5 and D-5 in person.

**CORAM:-**

**HON'BLE MR JUSTICE V.K. JAIN**

- |                                                                          |     |
|--------------------------------------------------------------------------|-----|
| 1. Whether Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to the Reporter or not?                                | Yes |
| 3. Whether the judgment should be reported in Digest?                    | Yes |

**V.K. JAIN, J**

1. This is a suit for specific performance of the two agreements to sell both dated 16<sup>th</sup> September, 2009,

perpetual injunction and mandatory injunction. The plaintiff has also made an alternative prayer for damages in case specific performance of the agreement to sell is not granted.

2. Property bearing BP No. 32, Nizamuddin East, New Delhi, admeasuring 1021 sq. metres was owned by Ms. Usha Bhagat. Vide agreement to sell dated 14<sup>th</sup> August, 1969, she agreed to sell her half undivided share in the property to her brother defendant No. 5 Mr. Venoo Bhagat. In a suit filed by Ms. Veenu, a decree for specific performance of the agreement to sell dated 14<sup>th</sup> August, 1969 was passed against Ms. Usha Bhagat, which led to execution of a sale deed/transfer deed dated 11<sup>th</sup> September, 2008 in his favour, in respect of half undivided portion of the suit property. During her lifetime, Ms. Usha Bhagat had also executed a Will dated 10<sup>th</sup> April, 2003 in respect of the suit property. In a petition, filed by the Executor of the aforesaid Will dated 10th April, 2003, Letter of Administration was granted by the Court in favour of defendants 1 and 2, who were the Executors of the Will. The defendants, who are also the legal heirs of Ms. Usha Bhagat later agreed that all of them would equally share one

half undivided share in the suit property, while the remaining undivided share would be owned exclusively by defendant No. 5 in terms of the decree passed in his favour. They also agreed to sell the suit property on or before 31st December, 2008. The defendants vide two agreements both dated 16th September, 2009 agreed to sell the suit property to the plaintiff. One agreement was executed only by defendant No.5, whereas the other agreement was executed by all the five defendants together and both the agreements contained reference to each other. Initially, the sale consideration in respect of half undivided share owned exclusively by defendant No.5 was fixed at Rs 12.90 crores, but it was later revised to Rs 15.90 crores vide Supplementary Agreement dated 16th September, 2009. A sum of Rs 90 lakhs was paid by the plaintiff to defendant Nos. 1 to 5 as advance money and the balance consideration was to be paid in terms of clause 5 of the agreement. A sum of Rs 10 lakhs was paid to defendant No. 5 in respect of the second agreement and the remaining amount was payable in terms of clause 3 of the said agreement.

3. At the time of execution of the agreements, the suit property was yet to be mutated in the names of defendant

Nos. 1 to 5 and it was also required to be converted from lease-hold to free-hold, the mutation and conversion being pre-requisite conditions for the sale of the suit property. The plaintiff paid a sum of Rs 11,76,000/- on 28th June, 2010 and another sum of Rs 2,10,000/- on 26th July, 2010 towards payment of conversion charges and misuse charges/ground rent respectively. It was agreed between the parties that if conversion of lease-hold rights into free-hold rights is granted by L&DO in the name of the plaintiff, he would intimate the defendants in this regard who would then hand over the possession of the suit property to the plaintiff on his making payment of the balance consideration. In case of conversion being granted in the name of the defendants, they were required to execute and register a sale deed in favour of the plaintiff.

4. Both the Agreements provided for specific performance in case the defendants/vendors refused to complete the sale transaction and also provided for fixing a convenient time and date for execution and registration of sale deed and handing over the possession to the vendee.

5. Clause 20 of the first agreement and clause 17 of the second agreement, which are identical clauses, provided

that if the agreement was not implemented within twelve calendar months, it shall stand terminated and extinguished automatically without any further act of parties and the vendors shall be at liberty to sell the property subject matter of the agreement to any other person after refund of earnest money and other lawful charges, if any, paid by the vendee.

6. It is alleged in the plaint that after execution of the Agreements and in terms of the understandings between the parties, the plaintiff and his representatives pursued the case for mutation of the suit property in names of defendants and for conversion of the suit property from leasehold to freehold, in the office of L&DO and also deposited all the requisite charges in this regard. The processing of the mutation however, took time, firstly for want of some basic documents such as certified copies of Court Order and proceedings, secondly due to delay caused by the defendants in agreeing upon a convenient time to collectively come forward and sign the requisite documents and thirdly on account of certain objections raised by L&DO regarding mutation of the property in the name of the defendants. This is also the case of the plaintiff that the

objections of L&DO came to be raised due to a mistake on the part of the defendants in submitting an incomplete/defective mutation application dated 27.3.2009 which they had submitted before executing the Agreements to Sell in his favour. It is further alleged that it was with the assistance and persuasion of the plaintiff that the objections could be remedied by moving fresh application dated 19.4.2010 by the executors named in the Will dated 10.4.2003 and later supporting it with “Memorandum Recording Family Settlement” of June, 2010 incorporating the terms of the family settlement between the parties. It is claimed that the plaintiff had also requested the defendants to file conversion application dated 5.7.2010 in order to convert the suit property to freehold. It is further claimed that in August, 2010, the plaintiff came to know that the case was ripe for conversion from leasehold to freehold and would be completed by August, 2010 but then certain questions emerged regarding payment of composition fee by the defendants and the plaintiff had to make strenuous efforts for his settlement.

7. It is alleged in the plaint that the plaintiff had been diligently performing all his obligations under the

agreements and had always been willing, ready and financially capable to perform all his obligations including payment of the balance sale consideration, for which he possesses ready and sufficient means. Vide letter dated 4.9.2010, the plaintiff informed the defendants that he was ready with funds and was keen to conclude the transaction. Defendants 1, 2 & 4 appreciated his efforts and agreed to execute the sale deed at a mutually convenient date. Defendants No.3 & 5, however, turned dishonest and started blaming the plaintiff for the delay in obtaining mutation and conversion. It is also alleged that time was not the essence of the contract between the parties and they did not intend with the sale deed shall be executed within one year of the execution of the Agreement.

8. The plaintiff, besides seeking specific performance of the Agreement to Sell dated 16.9.2009 executed in his favour, is also seeking a permanent injunction restraining the defendants from selling, alienating or parting with possession of the suit property. In case of refusal of specific performance of the Agreements, they have sought damages, from the defendants.

9. IA 13424/2010 has been filed by the plaintiff

seeking interim injunction restraining the defendants from selling, alienating or parting with possession of the suit property and creating any third party interest therein during pendency of the suit.

10. In their written statement, defendants No.3 & 5 have taken a preliminary objection that the plaint does not disclose a cause of action since the suit is based on the agreements which stood terminated on expiry of twelve months from the date of their execution. Relying upon clause 20 of the first Agreement and clause 17 of the second Agreement, the defendants No.3 & 5 have claimed that the time was made essence of the contract and since 12 months from the date of the Agreement expired on 15.9.2010, the agreements stood extinguished and the parties stand restored to their position if the agreements had never been entered into, the plaintiff would be entitled to refund of the charges deposited by him whereas the defendants are free to sell the property to anyone. It is further alleged that the value of the suit property has since increased to Rs 40-50 crores and on account of change of circumstances renovation of the property is now possible in view of recent amendments made in Ancient Monuments Act, 1958.

11. On merits, it has been admitted that defendants 1 to 5 are the owners of undivided one half of land and building on property No. BP-32, Nizamuddin East, New Delhi, whereas defendant No.5 is the sole owner of the remaining undivided one half of the property. The execution of two agreements to sell both dated 16<sup>th</sup> September, 2009 has been admitted. It is claimed in the written statement that the first agreement became impossible of performance because the plaintiff got one half of the property mutated by L&DO as if defendant Nos. 1 to 2 were its owners on the basis of a Will, which was contrary to the statement made in the application that the Will had been adeemed as stated in the supporting affidavits. The Mutation Letter also purported to wipe out defendant No.'s 5 rights in one half of the suit property covered by the first agreement that were granted to him by Letter of Administration. It is alleged that the plaintiff was solely responsible for the wrong mutation and was informed that it was not acceptable. It is claimed that the second agreement to sell had ceased to exist when the suit was filed on 1<sup>st</sup> October, 2010 since it did not provide for sale of an undivided one half share in the suit property and the residential unit in the rear portion. It is

alleged that though defendant No. 5 had informed the plaintiff that the mutation was unacceptable, he went ahead with conversion into free-hold based on wrong mutation. It is claimed that the plaintiff wrongly forced the defendants to withdraw their correct application and make a wrong application, obtained wrong mutation and got conversion letter based on a wrong mutation.

12. In their written statement, defendants 1, 2 and 4, have admitted that they had agreed to extend the time for a further period of three months from 13<sup>th</sup> September, 2010 for conclusion of the sale deed on the terms and conditions contained in the agreement to sell dated 16<sup>th</sup> September, 2009, making it clear that no further extension will be granted for any reason whatsoever. They also have claimed that the agreement to sell was to be implemented within 12 calendar months from its date and in case the sale deed was not executed within that period, the agreement was to stand terminated/extinguished automatically and the vendors were at liberty to sale the suit property to another person after refund of the earnest money. It is also stated that the vendee was required to get the suit property mutated and converted into free-hold on behalf of the vendors and the

charges to be paid by him to L&DO in this regard were to be deducted from the sale consideration. It is further alleged that on 17/18<sup>th</sup> October, 2010, they had received a call from the office of the plaintiff, informing him that L&DO fixed 19<sup>th</sup> October, 2010 as the date for execution of the Conveyance Deed. When they went to the office of L&DO on 19<sup>th</sup> October, 2010, neither defendant No. 3 nor defendant 5 was present there. Thereafter, they received a letter dated 1<sup>st</sup> November, 2010 from L&DO asking the defendants to appear before it on 10<sup>th</sup> November, 2010. Since defendant No. 1 was going out of station, L&DO was informed about his non-availability on that date and requested to fix a date in the first week of December, 2010 for that purpose.

13. In the replication, the plaintiff has stated that as on 15<sup>th</sup> September, 2010, he had not only obtained the mutation of the property in favour of the defendants, but had also obtained a letter confirming its conversion from lease hold to free-hold. Vide that letter, L&DO had called upon the defendants to appear before it and complete the formalities in respect of execution of the Conveyance Deed in their favour.

14. IA No.....has been filed by defendants 3 and 5 for vacation of the interim order of this Court dated 4<sup>th</sup> October, 2010, whereby defendants were restrained from creating any third interest in the suit property.

15. The following undisputed facts emerge from the pleadings of the parties and the documents filed by them:-

- (i) Property No.BP-32, Nizamuddin East, was owned by late Ms. Usha Bhagat, the land underneath the building having been leased to her by the Land and Development Office.
- (ii) Ms. Usha Bhagat had entered into an agreement into an agreement dated 14<sup>th</sup> August, 1969 to sale half of the suit property to defendant No.5 Mr. Venoo Bhagat.
- (iii) Ms. Usha Bhagat executed a WILL dated 10<sup>th</sup> April, 2003 thereby bequeathing different portions of the entire suit property to defendant No.1 Ms. Uma Lall, defendant No.2 Ms. Urmila Kapur and defendant No.5 Mr. Venoo Bhagat, without referring to the agreement dated 14<sup>th</sup> August, 1969 executed by her in favour of defendant No.5 Mr. Venoo Bhagat.
- (iv) A civil suit, which defendant No.5 Mr. Venoo Bhagat had filed seeking specific performance of the agreement dated 14<sup>th</sup> August, 1969, was decreed by the Court on 19<sup>th</sup> February, 2005 and pursuant thereto, a transfer deed dated 11<sup>th</sup> September, 2008

was executed by the Court in favour of Mr. Venoo Bhagat transferring undivided half share in the suit property to him.

- (v) Defendant No.1 Ms. Uma Lall and defendant No.2 Ms. Urmila Kapur being Executor of the WILL were granted Letter of Administration dated 24<sup>th</sup> October, 2008 executed by Ms. Usha Bhagat without the WILL annexed to it.
- (vi) Vide Agreement to Sell dated 16<sup>th</sup> September, 2009 hereinafter referred to as the first agreement, all the five defendants, agreed to sell undivided one half of plot bearing No.BP-32, Nizamuddin East, New Delhi to the plaintiff for a consideration of Rs.15,90,00,000/- and received a sum of Rs.90,00,000/- from him as earnest money. This agreement contained a reference to the agreement which defendant No.5 Mr. Venoo Bhagat executed on the same date in favour of the plaintiff, agreeing to sell the remaining one half of the property to the plaintiff.
- (vii) Defendant No.5, Mr. Venoo Bhagat, vide second agreement to sell executed in favour of the plaintiff, agreed to sell undivided one half share in Plot No.BP-32, Nizamuddin East to the plaintiff for a consideration of Rs.12,90,00,000/- and received a sum of Rs.10,00,000/- from him as earnest money. The amount of sale consideration was increased to Rs.15,90,00,000/- vide supplementary agreement

executed on the same date. This agreement also had a reference to the first agreement.

- (viii) Vide application for mutation dated 3<sup>rd</sup> February, 2009, defendant No.5, Mr. Venoo Bhagat applied to the Land and Development Office for mutation of one half of the plot bearing No.BP-32, Nizamuddin East in his name on the basis of the transfer deed executed by the Court in his favour.
- (ix) Another application was submitted by all the five defendants to the Land and Development Office in February, 2009 for mutation of the remaining one half of the plot in their name, on the basis of the WILL executed by Ms. Usha Bhagat in their favour.
- (x) Vide application dated 19<sup>th</sup> April, 2010, Defendant No.1, Ms. Uma Lall and defendant No.2 Ms. Urmila Kapur applied to the Land and Development Office for mutation of plot bearing No.32, Nizamuddin East, New Delhi in their favour on the basis of WILL executed by Ms. Usha Bhagat. Along with this application, no objection affidavit of defendant No.3, Ms. Upma Khanna, defendant No.4, Mr. Kapil Bhagat and defendant No.5, Mr. Vinoo Bhagat were filed with the Land and Development Office. In these affidavits, it was specifically stated that the clause in the WILL dated 10<sup>th</sup> March, 2003 concerning the suit property stood adeemed vide a subsequent Court judgment decreeing one half of the said property in favour of Mr. Venoo Bhagat,

thereby leaving Ms. Usha Bhagat owner of an undivided one half share thereof. They also stated that they had no objection if undivided one half of the property was mutated in the name of Ms. Uma Lall an Ms. Urmila Kapur. Defendant No.5, Mr. Venoo Bhagat further stated that this will not affect the rights of the legal heirs of the deceased in her undivided one half share.

- (xi) Vide Memorandum of Family Settlement executed in June, 2010, the defendants, after recording the above referred chain of facts and events, agreed that the bequest in Ms. Usha Bhagat's WILL to the entire property was adeemed and rendered in capable of implementation in respect of her remaining one half share in the said property. They further agreed that her undivided one half share in the property devolved by intestate succession upon all the five defendants, who were her legal heirs. Clauses XIII, XIV and XV of the preamble to this document are important and reads as under:-

*"XIII) The parties hereto have been advised that the L&DO would effect mutation in the joint names of parties Nos. 1 and 2 treating them as executors of Usha Bhagat's will. The alternative would be to file a writ petition for a court direction to the L&DO to carry out the mutation, but this may take considerable time. As a measure of expediency and to avoid more delay the parties have agreed to fill out the mutation papers as insisted upon by the L&DO, but with the alteration described in the succeeding paragraph.*

*XIV) Accordingly, the application already made by all parties for mutation of Usha Bhagat's one-half of the said property was withdrawn and replaced by a fresh application for mutation in the names of parties Nos. 1 and 2. In accordance with the family settlement that Usha Bhagat's one – half devolved on allo five parties hereto as her heirs, the affidavits by all the parties in support of the second application stated, amongst other things, that the clause in Usha Bhagat's will relating to the said property was adeemed, making clear that her will does not govern succession to her one-half of the said property.*

*XV) The parties agree that mutation and conversion to freehold of Usha Bhagat's aforesaid one-half of the said property if and when made in the names of Parties Nos. 1 and 2 will be on behalf of all five parties hereto and only as an expedient (mutation will not affect title)."*

- (xii) Vide application No.104872, defendant No.1 Uma Lall, defendant No.2 Urmila Kapur and Defendant No.5 Mr. Venoo Bhagat applied to Land and Development Office for conversion of lease hold rights in respect of the plot No.BP-32, Nizamuddin East, New Delhi into free hold.
- (xiii) Vide letter dated 27<sup>th</sup> July, 2010 the Land & Development Office, referring to applications of defendant Nos. 1, 2 and 5 regarding mutation-cum-substitution in respect of property bearing No.BP-32, Nizamuddin East, New Delhi informed them that in accordance with the Court Order, the lease hold

rights in respect of undivided rear portion of property No.BP-32, Nizamuddin East, New Delhi had been mutated in the name of Mr. Venoo Bhagat and on the basis of the WILL dated 10<sup>th</sup> April, 2003 left behind by deceased Ms. Usha Bhagat in favour of Ms. Uma Lall and Ms. Urmila Kapur and a disclaimer deed executed by Smt. Upma Khanna, the lease hold rights in undivided front portion of aforesaid property had been substituted in the name of Ms. Uma Lall and Ms. Urmila Kapur as executors of the WILL of Ms. Usha Bhagat.

- (xiv) Vide letter dated 4<sup>th</sup> September, 2010, the plaintiff wrote to defendant No.2 Urmila Kapur that as she was aware, their initial application filed for mutation was not in proper order and necessitated filing of fresh application, which was submitted only on 19<sup>th</sup> April, 2010, and substantial time was lost in the process of completing the necessary formalities pre and post filing the revised application. Informing her that he was ready with funds, he requested that the period of execution of sale deed be extended by excluding the time spent in pursuing the defective application or in the alternative, a period of 30 days be given to him from the date the conveyance deed is executed and registered in their favour.
- (xv) Vide letter dated 10<sup>th</sup> September, 2010 written to all the defendants, the plaintiff again claimed that application which they had filed earlier was defective

and the process of withdrawal of their earlier application and submission of fresh application was thereby delayed for 9 months. He also informed them that Form-C and Form-D and/or sanctioned building plan and/or house tax receipts etc., which could confirm that the property was constructed with the period stipulated in the lease deed were not provided to the L&DO, as a result of which he had to make efforts to obtain old records from the office of the MCD so that instead of depositing the composition fee of about 15 lakhs, the seller would receive a waiver and this process resulted in further delay. He also informed that there was delay in furnishing other documents such as Deed of Disclaimer, which was to be executed by defendant No.3 Ms. Upma Khanna. He sought confirmation that the period of about 9 months wasted without any fault on his part has to be excluded from the time period. In the alternative, he requested that the period for execution of the sale deed be extended by 30 days from the date the conveyance deed is executed and registered in their favour. He also offered to deposit the balance sale consideration in an escrow account from where it could be withdrawn automatically by the seller, immediately on execution of the documents specified in the letter and/or sale deed in his favour and handing over of peaceful possession. Another offer given by him was to issue post dated cheques/demand drafts, which

could be encashed after execution of those documents and/or sale deed in his favour. The documents sought by the plaintiff, as a pre condition to deposit the balance sale consideration in an escrow account were:-

- (a) A Special Power of Attorney in favour of his nominee authorizing him to execute, register the conveyance deed and also the sale deed in his favour after conversion of the property is intimated by the L&DO.
  - (b) A General Power of Attorney in his favour and simultaneous Agreement to Sell in his favour for which he was ready and willing to pay the requisite stamp duty.
  - (c) Confirmation of the date of handing over the possession.
  - (d) Handing over the original letter of mutation and original lease deed against a proper acknowledgement.
- (xvi) In reply to the letter dated 10<sup>th</sup> September, 2010 written by the plaintiff, defendant No.1 Ms. Uma Lall and defendant No.2 Ms. Urmila Kapur agreed to extend the time for further period of three months, without going into the controversy and reason for delay in executing the sale deed within the time stipulated in the agreement dated 16<sup>th</sup> September, 2009. Defendant No.5, Mr. Venoo Bhagat, writing for himself and on behalf of defendant No.3. Ms.

Upma Khanna controverted the allegation imputing delays to them and stated that they have always been ready and willing to perform their part under the agreement in accordance with the terms and conditions during the period of their validity as written in the said agreement. He, however, did not accept the offer made by the plaintiff vide letter dated 09<sup>th</sup> September, 2010.

16. The first plea taken by defendants No. 3 and 5, who are the main contesting defendants, is that though defendant No.5 Vinoo Bhagat owned 50% undivided share in the suit property, in terms of the transfer deed executed in his favour on 11<sup>th</sup> September 2008 and the remaining half undivided share was jointly owned by all the five defendants as legal heirs of late Ms. Usha Bhagat, the mutation made by L&DO vide its letter dated 27<sup>th</sup> July 2010 envisaged mutation of the undivided rear portion of the property in favour of defendant No.5 Sh. Vinoo Bhagat in terms of the transfer deed dated 11<sup>th</sup> September 2008 and mutation of the lease hold rights in respect of undivided front portion of the suit property, in favour of defendant No.1 Uma Lal and defendant No.2 Urmila Kapur in terms of the Will executed by Ms. Usha Bhagat on 10<sup>th</sup> April 2003

and the mutation made by L&DO being contrary to the legal rights of the defendants, was not acceptable to them and since the conversion of lease hold rights into free hold rights was also bound to be in conformity with the mutation, they could not have accepted the conversion deed in terms of the mutation and consequently could not have executed a sale deed in favour of the plaintiff.

17. As noted earlier, vide application dated 19<sup>th</sup> April 2010, defendants No.1 and 2 had applied to L&DO for mutation of the suit property in their name. Admittedly, NOC Affidavits by all the five defendants were submitted to the L&DO along with this application. Vide her affidavit dated 16<sup>th</sup> April 2010, defendant No.3 Upma Khanna stated that she had no objection if the deceased's undivided one half of the property (front/rear portion) was mutated in the name of defendant No.1 Uma Lal and defendant No.2 Urmila Kapoor as the executors named in the Will. By saying so, defendant No.3 Ms. Upma Khanna consented to conversion of leasehold rights either in front portion or in rear portion, in favour of defendant Nos. 1 and 2 without insisting on conversion of half undivided share in the

leasehold in respect of the whole, without specifying any particular portion in this regard. Defendant No.5 Sh. Vinoo Bhagat, in his affidavit dated 16<sup>th</sup> April 2010, however, stated that he had no objection if the deceased's undivided one half of the property was mutated in the name of Uma Lal and Smt. Urmila Kapur. He added that this will not affect the rights of the heirs of the deceased in her undivided one half of the property. Thus, all the defendants, including the main contesting defendant, had agreed to mutation of half share of late Ms. Usha Bhagat in the suit property in favour of defendants No.1 and 2 and did not insist upon it being mutated in the joint names of all the five defendants. This obviously was done pursuant to an agreement amongst the defendants as was recorded in the family settlement recorded in June 2010. In para 12 of the family settlement it was acknowledged that because of inclusion of Usha Bhagat's Will amongst the papers, L&DO had raised several objections which in the opinion of the parties to the family settlement were untenable in law. They further noted that it had been advised that L&DO would effect mutation in the joint name of defendant No.1 and 2 treating them as executors of Usha Bhagat's Will. They

acknowledged that the alternative to this course would be to file writ petition seeking a direction to the L&DO to carry out mutation in terms of the application of the parties, but that was likely to take considerable time. They accordingly decided to fill out the mutation papers as insisted upon by L&DO. They also acknowledged that the application made earlier by them for mutation of Usha Bhagat's one half of the suit property was withdrawn and replaced by a fresh application for mutation in the name of defendants 1 and 2 and that mutation and conversion to free hold of Usha Bhagat's one half of the property, if and when made in the name of defendants 1 and 2, will be on behalf of all five parties and was only an expedient, which would not affect their title. They also agreed that if it becomes necessary for defendants 1 and 2 to execute a fresh agreement to sell Usha Bhagat's one half of the said property with Mr. Tarun Sawhney, they will enter into such agreement as representatives and on behalf of all five defendants and the agreement will be framed in such a way that the buyer would be required to pay the price payable for Usha Bhagat's one half of the property separately in equal shares directly to all five of the parties as owners of one fifth share

therein. They decided that all of them will continue to have legal title to one fifth share each in Usha Bhagat's undivided one half share of the property by succession under the Hindu Succession Act even if the L&DO mutates and converts to freehold the said one half in the name defendants No.1 and 2 alone. They further decided that all acts, documents and things done for obtaining mutation, converting the said property into freehold and for selling it shall mutatis mutandis be done in a manner so as to be in accord with the family settlement and the agreement.

18. Having expressly agreed to, applied for and obtained mutation as also conversion from leasehold rights to freehold rights in respect of half share of Usha Bhagat in the suit property in the name of defendants 1 and 2 alone, it is not open to defendants 3 and 5 or any other defendant to claim that the mutation was bad in law and, therefore, was not binding on him. In any case, since defendants had adequately safeguarded their interests by documentary evidence that despite mutation and/or conversion of half of the leasehold rights in the name of defendants 1 and 2, all the five defendants, who are also the legal heirs of late Smt.

Usha Bhagat, will continue to have one fifth share each in the one half owned by Usha Bhagat and the conversion/mutation in the name of defendant No.1 and 2 alone will not affect their title in any manner, it is not open to them to refuse to abide by their agreement with the plaintiff, on the ground that the mutation granted by L&DO was defective or was not in accordance with their legal rights in the one half owned by Usha Bhagat. It would be worthwhile to note here that the no objection was raised by any of the defendants at any point of time of the mutation granted by L&DO vide its letter dated 27<sup>th</sup> July 2010, which in any case was based on the application submitted by defendants 1 and 2 along with No Objection affidavit from the other defendants. This clearly shows that mutation allowed by L&DO in terms of its letter dated 27<sup>th</sup> July 2010 was acceptable to all the defendants, including defendants No. 3 and 5. Consequently, they could not have disputed the conversion from leasehold to freehold, allowed by L&DO in terms of the mutation.

19. What is more important in this regard is that the defendants had agreed to sell whole of the suit property to

the plaintiff and there was reference to the second agreement in the first agreement and to the first agreement in the second agreement, thereby making the transaction as one composite transaction for the sale of property bearing BP No.32, Nizamuddin East, New Delhi to the plaintiff, though vide two separate agreements executed on the same date. The defendants had nothing to lose by executing a sale deed in favour of the plaintiff in terms of the mutation granted by L&DO on 27<sup>th</sup> July 2010 and the conversion of leasehold rights into freehold rights which it had later agreed to allow. If the mutation allowed by L&DO was acceptable to the purchaser, there was no reason for the sellers not agreeing to it particularly when it was pursuant to an application submitted with their consent and along with No Objection from them. The only concern of the defendants in the transaction was the receipt of the balance sale consideration and since the plaintiff was willing to pay the balance sale consideration in terms of the agreements dated 16<sup>th</sup> September 2009 to the defendants, without insisting upon any correction/modification in the mutation granted by L&DO, the defendants had no justification in law to back-out of their contractual obligation on the ground

that the mutation was defective or was not in accordance with their legal rights.

20. It would also be pertinent to note here that vide his letter dated 10<sup>th</sup> September 2010 the plaintiff had offered to deposit the entire balance sale consideration in an escrow account which the defendants could withdraw on execution of the sale deed and handing over possession of the suit property to the plaintiff. The defendants could well have secured their interests by accepting the offer made by the plaintiff and could then have executed the sale deed in favour of the plaintiff after obtaining conversion of leasehold rights into freehold rights.

21. It was contended by defendant No.5 that defendants No.3 and 5 were not in favour of the leasehold rights in respect of one half share owned by Usha Bhagat being mutated in the sole name of defendants No.1 and 2 as would be evident from the mails exchanged between the parties, but they agreed to it on account of continuous pressure from the plaintiff. Be that as it may, the fact remains that all the five defendants agreed to the mutation of leasehold rights in respect of one half share of Usha

Bhagat in the sole name of defendants No.1 and 2 as executors of her Will and having done so, they are now stopped from saying that the mutation was defective and could not have been accepted by them.

22. The second and main plea taken by the defendants is that since, in terms of Clause 20 of the first agreement, which is identical to Clause 17 of the second agreement, since the agreements were not implemented within 12 months from their dates, the agreements stood terminated and extinguished and the plaintiff is now entitled only to refund of the earnest money and the charges deposited by him with L&DO on behalf of the defendants.

23. The above referred Clause reads as under:

“If this Agreement is not implemented within twelve calendar months from the date hereof this Agreement shall stand terminated and extinguished automatically without any further act of parties and the Vendor shall be at liberty to sell the said property to any other person after refunding the earnest money to the Vendee, as also other lawful charges hereinabove mentioned if paid for by the Vendee on behalf of Vendor: the intention of the parties is that they shall be restored to the same position as at the date hereof and as if this

Agreement had not been executed.”

Clause 13 of the First Agreement and clause 11 of the Second Agreement read as under:

“13. If the Vendee is ready and willing to perform his part of the obligation hereunder but any one or more of the Vendors defaults in performing his/their obligations hereunder the Vendee shall have the following options independently of each other:-

a) To seek specific performance and relief ancillary thereto.

b) To purchase that part of the said property from those Vendors who are ready and willing to sell their shares, without reference to defaults by any other vendor(s)

c) To seek refund of earnest money from all vendors and all money lawfully paid by the Vendee to the L&DO on their behalf on account of mutation, conversion to freehold and other lawful charges. In addition to the above, each Vendor shall pay a sum of Rs 4 lac to the Vendee if any Vendor defaults after mutation has been carried out. The defaulting Vendor(s) shall be liable to pay double the amount of earnest money in addition to the aforesaid charges.

11. If the Vendor refuses and/or fails to perform his part of this agreement without good cause then the Vendee shall have all rights

available in law to seek specific performance hereof and relief ancillary thereto, or in the alternative the Vendee may demand that the Vendor refund to the Vendee double the amount of earnest money paid to him along with his proportionate share of lawful freehold conversion and related charges if these shall have been paid by the Vendee.

24. One possible interpretation of the terms of the agreement, particularly if the above referred first Clause is read in isolation and without adverting to the surrounding facts and circumstances, can be that since the conveyance deed converting the leasehold rights into freehold rights was not executed by 15<sup>th</sup> September 2010 when the term stipulated for implementation of the term expired, time being essence of the contract, the defendants are not bound to fulfil their obligation under the agreements by executing sale deeds in favour of the plaintiff and their obligation is confined only to the return of the earnest money received from the plaintiff and the charges deposited by him with L&DO on their behalf. The expression used in above referred Clause of the agreements and the preemptory consequences acknowledged therein do tend to support the case setup by

defendants 3 and 5 in this regard and indicates that though the agreement does say it in so many words, that the parties intended the time to be essence of the contract and that is why they agreed that on expiry of 12 months from the date of agreement, the rights of the parties under the agreement shall stand extinguished, the agreement shall stand terminated and the defendants would be at liberty to sell the property to any person of their choice.

25. However, it is difficult to dispute that Clause 20 of the first agreement, which is identical to Clause 17 of the second agreement, cannot be read divorced from other terms of the agreements and the facts and circumstances in which the agreements were executed cannot be excluded from consideration, while deciding whether the parties intended to treat the time as essence of the contract or not. Admittedly, there is no express stipulation that time would be essence of the contract in all circumstances and irrespective of what the cause for the delay in implementation of the agreement was and whosoever was responsible for the delay. It is important to note here that though the plaintiff had agreed to deposit requisite charges

for mutation and conversion with L&DO for and on behalf of the defendants and he was also pursuing the matter of mutation and conversion with L&DO, primarily it was the responsibility of the defendants, they being the vendors to obtain mutation of the suit property in their names as also to get its leasehold rights converted into freehold rights though nothing in law prevented the plaintiff to agree to undertake this obligation on their behalf. It cannot be disputed that the mutation and conversion could not have been allowed unless all the requisite documents were submitted to L&DO and the formalities prescribed by it for the purpose duly complied. This was acknowledged by the defendants when they agreed, vide Clause 12 of the first agreement, which is identical to Clause 10 of the second agreement, to do all acts and execute all documents including application, affidavits, power of attorney, etc. to enable the plaintiff to get mutation and conversion to freehold of the suit property effected. They further agreed to furnish the documents to the plaintiff within seven working days of his making a request in this regard. They also agreed to carry out further correspondence with L&DO with the concurrence of the plaintiff. The case of the plaintiff, as

set-out not only in the plaint but also in the letter which he had written to the defendants before filing this suit, is that the applications which the defendants had earlier submitted to L&DO were defective, Form C and Form D and/or sanctioned building plan and/or house tax receipts which could confirm that the property was constructed within the time stipulated in the lease deed were not provided, the plaintiff had to make efforts to obtain old record from the office of MCD so that payment of composition fee of about Rs.15 Lacs by the defendants could be avoided and there was delay in furnishing documents such as Deed of Disclaimer to be executed by defendant No.3 Smt. Upma Khanna. At this stage, the Court cannot go into the truthfulness or otherwise of the allegations made by the plaintiff in this regard. If, however, the allegations are correct and processing of the matter with L&DO office was delayed on account of any default/lapse on the part of one or more of the defendants, it would be difficult to dispute that for the purpose of calculating the time of 12 months envisaged in the agreements for their implementation, the period of delay attributable to the defendants will not be excluded. No person can be allowed to take advantage of

his own fault or inaction, whether deliberate or otherwise. Hence, a person who causes delay in implementation of the agreement or is guilty of contributing to the delay, cannot be allowed to bereft from his own act or omission, by avoiding the implementation of the agreement on the ground of delay. This also was the view taken by Supreme Court in **Nirmala Anand vs. Advent Corporn (P). Ltd.** (2002) 5 SCC 481.

26. Another important aspect in this regard is that mutation and/or conversion of leasehold rights into freehold rights was not in the hands of the plaintiff. He could at best have pursued the matter sincerely and honestly on behalf the defendants. There is no material on record to show that there was any delay/default on the part of the plaintiff in pursuing the matter with L&DO. If despite best efforts made by him, the plaintiff could not obtain conversion of leasehold rights into freehold before 15<sup>th</sup> September 2010, it would be difficult to blame the plaintiff for the delay and deny the specific performance of the agreement executed by the defendants in his favour. While entering into agreements with the plaintiff, the defendants knew it very

well that the grant of mutation and conversion was not in his hands and he could at best make sincere efforts to obtain them from L&DO at the earliest possible. They knew that the plaintiff might or might not succeed in obtaining mutation and/or conversion from L&DO on or before 15<sup>th</sup> September 2010. When the parties enter into an agreement, which cannot be implemented in the absence of an act required to be done by a third party, it is very much possible that the parties did not intend to make the time for implementation of the agreement as the essence of the contract and the stipulation requiring the implementation of the agreement within the time stipulated in the agreement was intended just to keep the vendee on his tender hooks and to maintain pressure on him to make sincere and bona fide efforts to obtain clearance from the third party at the earliest possible. Such a stipulation in my view can be termed as a stipulation *in terrorem*, which is not intended to be taken literally. Yet another peculiar feature of the agreements between the parties is that in the event of the agreements getting terminated in terms of clause 20 of the first agreement and clause 17 of the second agreement, compensating the plaintiff by payment of liquidated

damages or otherwise, for the time spent, efforts made and money invested and arranged by him. The contracts which can be implemented without an act to be performed by an outsider in my view are to be treated differently, while considering whether time was essence of the contract or not, from the agreements which required no act to be performed by a third party for their implementation. If for example, the agreement between the parties stipulates that in case the balance payment is not made by the vendee within the time stipulated in the agreement in this regard, the agreement would stand terminated and the vendor shall be at liberty to sell the property to any person of his choice, the vendor or the vendee as the case may be, may possibly for a good case to say that since the express stipulation contained in the agreements clearly expressed the intention of the parties to treat the time as essence of the contract, the agreement stood terminated on account of the default on the part of the opposite party and, therefore, he was not bound to honour his part of the agreement. But, it would be difficult to appreciate such a contention where the implementation of the agreement is delayed on account of an act, which the parties knew, at the time of entering into

an agreement, was required to be performed by a third party and there would be no guarantee that it would be possible within a fixed time frame.

27. In his additional affidavit dated 6<sup>th</sup> January, 2011, the plaintiff has stated that the application dated 6<sup>th</sup> July, 2010 which the defendant Nos. 1, 2 and 5 had filed with the Land and Development Office for conversion of the suit property from lease hold to free hold was accepted by the Land and Development Office, which sent a letter dated 15<sup>th</sup> September, 2010 confirming that the application on examination was found to be in order and called upon the addressees to attend its office on 27<sup>th</sup> September, 2010 with the documents specified in the letter along with purchaser and two witnesses in order to complete formalities for execution of the conveyance deed. He has further stated that on 27<sup>th</sup> September, 2010 only defendant No.5 attended the Land and Development Office, though defendant Nos. 1, 2 and 5 were supposed to attend the office on that date. He has further stated that on the request of defendant No.5, the date and time for execution of the conveyance deed was deferred for 19<sup>th</sup> October, 2010 but on that date, none of

these three defendants were present for execution of the conveyance deed. His affidavit further shows that on 10<sup>th</sup> November, 2010, which the Land and Development Office had fixed for execution of conveyance deed, defendant Nos. 1, 2 and 5 did not attend his office.

28. In their reply to the affidavit of the plaintiff, defendant Nos. 3 and 5 have not denied the averments made in the additional affidavit of the plaintiff dated 6<sup>th</sup> January, 2011 nor have they disputed the contents of the letter of Land and Development Office dated 15<sup>th</sup> September, 2010 as reproduced in the affidavit. They only claimed that the mutation was unacceptable to them and the conversion from lease hold to free hold also would necessarily have been on the basis of the mutation, thereby depriving defendant Nos. 3 to 5 of title. They further stated that the Land and Development Office's letter for free hold conversion was based on wrong mutation and was not acceptable to them. In her affidavit, defendant No.1 Ms. Uma Lall has stated that neither she nor defendant No.2 Ms. Urmila Kapur received the communication dated 15<sup>th</sup> September, 2010 from the Land and Development Office

and that is why they did not appear in his office on 27<sup>th</sup> September, 2010. She further stated that the representative of the plaintiff informed them that the next date for execution of the conveyance deed has been fixed as 19<sup>th</sup> October, 2010 by the Land and Development Office. On that date, defendant Nos. 1 and 2, accompanied by another representative of the plaintiff, visited the Land and Development Office. However, no conveyance deed could be executed as defendant No.5 was not present on that date. On that date they also came to know that the communication dated 15<sup>th</sup> September, 2010 was issued by the Land and Development Office only to defendant No.5 and, therefore, they gave a letter to the concerned official of the Land and Development Office requesting that in future all communications should be sent to them as well. Thereafter, they received a letter dated 1<sup>st</sup> November, 2010 from the Land and Development Office calling them to appear before him on 10<sup>th</sup> November, 2010. Since at that point of time, defendant No.1 was expecting to travel abroad, she informed the Land and Development Office accordingly and requested that execution of the conveyance deed may be fixed after 5<sup>th</sup> December, 2010. However, in

the meantime, the husband of defendant No.2 fell seriously ill and expired on 19<sup>th</sup> November, 2010 and, therefore, she (defendant No.1) had to cancel her plan to go abroad. Copies of letter dated 1<sup>st</sup> November, 2010 received by them from the Land and Development Office as also the copy of the letter dated 8<sup>th</sup> November, 2010 written by her to the Land and Development Office have been annexed to the affidavit. Similar averments have been made in the affidavit of defendant No.2 Ms. Urmila Kapur.

29. It is, thus, quite clear that by 15<sup>th</sup> September, 2010, which, according to the contesting defendants, was the last date for implementation of the agreements dated 16<sup>th</sup> September, 2009, the Land and Development Office had accepted the request made by defendant Nos. 1, 2 and 5 for conversion of free hold rights in respect of the suit property into free hold rights. Once the application of defendant Nos. 1, 2 and 5 for conversion of lease hold rights into free hold rights was accepted, what remained to be done was completion of formalities in connection with execution of conveyance deed and execution of sale deed in favour of the plaintiff, which were the acts to be done by the

defendants, without the plaintiff having to play any further role in the matter. It is difficult to accept that the deadline stipulated in the agreements dated 16<sup>th</sup> September, 2010 cannot be said to have been met despite the Land and Development Office having accepted the application for conversion of lease hold rights into free hold rights and having communicated its decision to defendant No.5 vide its letter dated 15<sup>th</sup> September, 2010. The defendants could have requested L&DO to prepone the date for extension of conveyance deed, but, they chose not to adopt such a course of action. The time lag of a few days between issue of communication dated 15<sup>th</sup> September, 2010 by the Land and Development Office and execution of the sale deed by the defendants would in any case be of no significance and would not frustrate the agreement between the parties, particularly when the plaintiff had made an unequivocal offer to the defendants on 10<sup>th</sup> September, 2010, well before expiry of the time stipulated in the agreements dated 16<sup>th</sup> September, 2009, to deposit the balance sale consideration into an escrow account. Once the defendants had received intimation from the Land and Development Office about acceptance of their application for conversion of lease hold

rights into free hold rights, they could easily have written to the plaintiff requiring him to deposit the balance consideration in an escrow account in terms of his letter dated 10<sup>th</sup> September, 2010. The conduct of the main contesting defendants in not honouring their contractual obligations despite receipt of communication dated 15<sup>th</sup> September, 2010 from the Land and Development Office indicates that they had decided not to perform their part of the contract by executing the sale deed in favour of the plaintiff, much before the deadline stipulated in the agreement dated 16<sup>th</sup> September, 2010 expired. This inference finds ample support from the conduct of the defendants in not accepting the offer made by the plaintiff vide his communication dated 10<sup>th</sup> September, 2010. The first document, which the plaintiff wanted the defendants to execute in his favour as a condition for depositing the balance sale consideration in an escrow account, was a special power of attorney in favour of his nominee, who would be authorized to execute, register the conveyance deed as also the sale deed in his favour after conversion of the property was intimated by the Land and Development Office. Since the defendants had agreed to sell whole of the

property to the plaintiff, they could have no valid reason for refusing to execute such a power of attorney in favour of his nominee when the plaintiff was offering to deposit the balance sale consideration in an escrow account and that amount could have been withdrawn by the defendants immediately on the execution of the documents mentioned in the letter and handing over possession of the suit property to him. The second document sought by the plaintiff was a general power of attorney in his favour along with an agreement to sell for which he was ready and willing to pay the requisite stamp duty. I find no valid objection to the defendants executing such a document when the plaintiff was willing not only to pay the requisite stamp duty but also to deposit the balance sale consideration in an escrow account. The third requirement of the plaintiff was a confirm date for handing over possession of the suit property and the fourth requirement was to hand over the original letter of mutation and original lease deed against the proper acknowledgement along with other original documents. Since the plaintiff was offering to deposit the balance sale consideration in an escrow account and defendants could have withdrawn that amount on executing

the above referred documents in respect of the suit property, their refusal to accept this very fair offer made by the plaintiff is a clear indicator that by that time they had already decided not to honour their contractual obligation and that is why this offer was not accepted by them.

30. It was contended by defendant No.5 that had he accepted wrong mutation and wrong conversion of lease hold rights into free hold rights, in the event of plaintiff backing out of his contractual obligation, they would have been saddled with a wrong document of title and that is why they could not have accepted the wrong mutation/conversion allowed by the Land and Development Office. I, however, find no merit in this contention. As noted earlier, the mutation by the Land and Development Office was based on an application submitted by defendant Nos. 1 and 2 along with no objection affidavit from all the defendants and no objection to the mutation letter dated 27<sup>th</sup> July, 2010 was raised by the defendant at any point of time. It is, therefore, not open to them to dispute the mutation/conversion allowed by the Land and Development Office. Moreover, when the plaintiff had offered to deposit

the balance sale consideration in an escrow account on the defendants executing the documents mentioned in his letter dated 10<sup>th</sup> September, 2010, there was no reasonable possibility of the plaintiff not honouring his contractual obligation by paying the balance sale consideration to the defendants. The only concern of the defendants was with the balance sale consideration and in case they were getting that amount merely on execution of documents sought by the plaintiff, the mutation/conversion even if defective could not have been prejudicial to their interest in any manner. In any case, if the defendants were so particular, after correctness of the mutation letter/conversion, nothing prevented them from filing objections before the L&DO and seeking appropriate modification of the letters issued by it after accepting the offer made by the plaintiff vide letter dated 10<sup>th</sup> September, 2010.

31. In support of his contention that the time was not the essence of the contract, learned senior counsel for the plaintiff has relied upon ***Jamshed Khodaram Irani v. Burjoji Dhunjibhai, AIR 1915 PC 83, Smt. Swarnam Ramachandran and Anr v. Arvacode Chakungal***

***Jayapalan (2004) 8 SCC 689, Gomathinayagam Pillai & Ors v. Pallaniswami Nadar AIR 1967 SC 686 and Chand Rani (D) by Lrs. v. Smt. Kamal Rani (D) by Lrs., (1993)1SCC 519.***

32. The learned counsel for defendant Nos. 3 and 5 as also the defendant No.5, who himself is an advocate, have on the other hand relied upon ***Chand Rani (D) by Lrs.*** (supra), ***Steedam v. Drinkle, 1914-1915 All ER 298, K.S. Vidyanadam & Ors. v. Vairavan, (1997)3 SCC1*** and ***Man Kaur v. Hartar Singh, (2010) 10 SCC 512***

33. In the case of ***Jamshed Khodaram Irani*** (supra), the respondent agreed in writing to sell the lease hold interest in his property to the appellant for a consideration of Rs.85,000/- and had received a sum of Rs.4000/- from him as earnest money. The conveyance was to be prepared and received within two months from the date of the agreement. Rs.80,500/- were to be paid on signing the document of sale and the remaining Rs.500/- were to be paid after its registration. Clause 5 of the agreement provided that in the event of purchaser not paying the amount within the fixed period, he was to have no right to

the earnest money paid by him, any claim of his was to be void and the vender was after that date at liberty to resell the property. During the course of judgment, the Privy Council referred to the following observations made by Lord Cairns in *Tilley v. Thomas* L.R. 3 Ch. 61:-

*“The construction is and must be in equity the same as in a Court of Law. A Court of Equity will indeed relieve against and enforce specific performance, notwithstanding a failure to keep the dates assigned by the contract; either for completion or for the steps towards completion, if it can do justice between the parties, and if (as Lord Justice Turner said in *Roberts v. Berry* 3 D. M. & G. 284, at p. 289) there is nothing in the ‘express stipulations between the parties, the nature of the property, or the surrounding circumstances, which would make it inequitable to interfere with and modify the legal right. That is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract. Of the three grounds mentioned by Lord Justice Turner ‘express stipulations’ requires no comment. The ‘nature of the property’ is illustrated by the case of reversions, trusts, or trades. The ‘surrounding circumstances’ must depend on the facts of each particular case.”*

The Privy Council, inter alia, further observed as

under:-

“The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance may be excluded by any plainly expressed stipulation. But to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time limits prescribed in a fashion which is unmistakable. The language will have this effect if it plainly excludes the notion that these time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay at its foundation. Prima facie, equity treats the importance of such time limits as being subordinate to the main purpose of the parties, and it will enjoin specific performance notwithstanding that from the point of view of a Court of law the contract has not been literally performed by the plaintiff as regards the time limit specified. This is merely an illustration of the general principle of disregarding the letter for the substance which Courts of Equity apply, when, for instance, they decree specific performance with compensation for a nonessential deficiency in subject-matter.”

10. But equity will not assist where there has been undue delay on the

part of one party to the contract, and the other has given him reasonable notice that he must complete within a definite time. Nor will it exercise its jurisdiction when the character of the property or other circumstances would render such exercise likely to result in injustice. In such cases the circumstances themselves, apart from any question of expressed intention, exclude the jurisdiction. Equity will further infer an intention that time should be of the essence from what has passed between the parties prior to the signing of the contract...”

Applying the aforesaid principles to the agreement before it, the Privy Council was of the view that there was nothing in the language or in the subject matter to displace the presumption that for the purposes of specific performance, time was not of the essence of the bargain.

34. Applying the above-referred decision to this case, time will not be essence of the contract, despite stipulations contained in Clause 20 of the first agreement and Clause 17 of the Second agreement, particularly when there was no default on the part of the plaintiff is pursuing the matter with L&DO.

35. In the case of **Gomathinayagam Pillai and**

**Others** (supra), initially no time was fixed for completion of the sale. However, after receipt of advance, another agreement dated 15<sup>th</sup> April, 1959 was executed wherein it was stated that parties have decided to consult the Vakil so as to settle the sale within 30<sup>th</sup> April, 1959 and to bind themselves as per the conditions mentioned in the previous agreement should whomsoever fail to finalise the sale. The sale did not materialize by 30<sup>th</sup> April, 1959. The trial Court held the time to be the essence of the contract and also held that the respondent was never ready and willing to perform his part of the contract. This finding was reversed by the High Court. The questions, which came up before the Supreme Court, were (i) as to whether the time was essence of the contract and (ii) whether the respondent was ready and willing to perform their part of the contract. Referring to Section 55 of the Contract Act, the Court inter-alia observed as under:-

“6. It is not merely because of specification of time at or before which the thing to be done under the contract is promised to be done and default in compliance therewith, that the other party may avoid the contract. Such an option arises only if it is intended by the parties that time is of the essence of the contract. Intention to make time of the essence, if expressed in writing, must be in language which is

unmistakable: it may also be inferred from the nature of the property agreed to be sold, conduct of the parties and the surrounding circumstances at or before the contract. Specific performance of a contract will ordinarily be granted, notwithstanding default in carrying out the contract within the specified period, if having regard to the express stipulations of the parties, nature of the property and the surrounding circumstances, it is not inequitable to grant the relief. If the contract relates to sale of immovable property, it would normally be presumed that time was not of the essence of the contract. Mere incorporation in the written agreement of a clause imposing penalty in case of default does not by itself evidence an intention to make time of the essence...”

It was further observed that intention to make time of the essence of the contract may be evidenced by either express stipulations or by circumstances which are sufficiently strong to displace the ordinary presumption that in a contract of sale of land stipulations as to time are not of the essence. In that case, there was no express stipulation, and the circumstances were not such as to indicate that it was the intention of the parties that time was intended to be of the essence of the contract.

36. In **Chand Rani (Smt.) (Dead) by LRs.** (supra), a Constitution Bench of the Supreme Court during the course of the judgment, the Court, inter alia, observed as under:-

“19. It is well-accepted principle that in the case of sale of immovable property, time is never regarded as

the essence of the contract. In fact, there is a presumption against time being the essence of the contract. This principle is not in any way different from that obtainable in England. Under the law of equity which governs the rights of the parties in the case of specific performance of contract to sell real estate, law looks not at the letter but at the substance of the agreement. It has to be ascertained whether under the terms of the contract the parties named a specific time within which completion was to take place, really and in substance it was intended that it should be completed within a reasonable time. An intention to make time the essence of the contract must be expressed in unequivocal language.

After considering the case law on the subject matter, the Court summed up the legal proposition as under:-

“25. From an analysis of the above case law it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract the Court may infer that it is to be performed in a reasonable time if the conditions are:

1. from the express terms of the contract;
2. from the nature of the property; and
3. from the surrounding circumstances, for example: the object of making the contract.”

37. However, in the facts of the case before it, the Court found that the purchaser was not willing to pay the balance sale consideration of Rs.98,000/- unless vacant delivery of possession of one of the rooms on the ground floor was given to him and this, the Court felt, could not have been insisted upon by the purchaser.

38. In the case of **Smt. Swarnam Ramachandran and Another** (supra), the key issue before the Court was whether time was the essence for payment of the balance sale consideration of Rs.75,000/- on or before 30<sup>th</sup> September, 1981 and whether the said term was breached. The Court was of the view that this question does not depend only upon express stipulation made by the parties, but it also depends upon the intention of the parties. It was observed that notwithstanding that a specific date was mentioned in the agreement, one has not only to look at the letter but also at the substance of the contract. Whether time is of essence is a question of fact and the real test is intention of the parties. It depends upon facts and circumstances of each case. It was further observed that in

cases where notice is given making time the essence, it is duty of the Court to examine the real intention of the party giving such notice by looking at the facts and circumstances of each case and that a vendor has no right to make time the essence, unless he is ready and willing to proceed to completion and secondly, when the vendor purports to make time of the essence, the purchaser must be guilty of such gross default as to entitle the vendor to rescind the contract.

Applying the proposition of law laid down in this case, the Court needs to see not only the terms contained in Clause 20 of the first agreement and clause 17 of the second agreement was also needs to consider the matter in the backdrop of the facts and circumstances in which the agreements were executed, as also the subsequent conduct of the parties, to determine whether they actually intended to make the time essence of the contract or not. In the facts and circumstances of a given case, despite a specific date fixed in the agreement for conclusion of transaction, the Court may, on considering the other terms contained in the agreement as also the other facts and circumstances of the

case come to the conclusion that parties did not intend to treat the time as essence of the contract and the expression stipulation made in this regard was, in fact, intended to impress upon the parties to conclude the transaction, to the extent it is possible, within the time frame stipulated in the agreement between them. Admittedly, defendants 1 and 2 had agreed to extend the time for completion of the transaction by three months. This is yet another indicator that either the parties did not intend to treat the time as essence of the contract or they felt that the delay in completion of the transaction was not attributable to the plaintiff and that is why two of the five vendors, extended the time stipulated for completion of the transactions.

39. In **Steedman** (supra), it was agreed between the parties that in case the purchaser made default, in payment to be made to the vendor, the vendor would be at liberty without notice to cancel the agreement and declare it void and to retain payment on account of it by way of liquidated damages and to retail all improvements made on the premises or else to proceed to another sale. The Supreme Court of Saskatchewan in that case reversed the judgment

of NEWLANDS, J., who had dismissed the action for specific performance. The Privy Council was of the view that the Supreme Court was wrong in reversing the judgment of NEWLANDS, J. During the course of judgment, the Privy Council, inter alia, observed as under:-

*“...Courts of Equity, which look at the substance as distinguished from the letter of agreements, no doubt exercise an extensive jurisdiction which enables them to decree specific performance in cases where justice requires it, even through literal terms of stipulations as to time have not been observed, But they never exercised this jurisdiction where the parties have expressly intimated in their agreement that it is not to apply, by providing that time is to be of the essence of their bargain. If, indeed, the parties, having originally so provided, have expressly or by implication waived the provisions made, the jurisdiction will again attach. In the case referred to this appears to have been what happened.”*

However, this suit is at the initial stage and the Court at this stage is only required to take a prima facie view of the matter. The plaintiff has in the facts and circumstances of the case been able to make out a prima facie case and the facts and circumstances of the case do

not necessarily indicate that the parties intended the time to be essence of the contract. Another noteworthy distinguishing feature is that in the case before the Privy Council, the purchaser could easily have avoided the default by making payment to the vendor within the time stipulated in this regard, whereas in the case before this court grant of mutation/conversion was in the hands of a third party and there is no material to indicate that there was any default on the part of the plaintiff in pursuing the matter with the Land and Development Office. Moreover, the plaintiff has always been ready and willing to perform his part of the contract as is evident, particularly from the letter dated 10<sup>th</sup> September, 2010 sent by him to all the defendants offering to deposit the balance sale consideration in an escrow account from where the defendants could withdraw the same on executing the documents specified therein.

40. In the case of ***K.S. Vidyanadam and Others v. Vairavan*** (supra), one of the issues before the Court was whether mere rise in price of the immovable property, subject matter of agreement to sell is a ground for denying the specific performance. During the course of the

judgment, the Court, inter alia, observed as under:-

“We cannot be oblivious to the reality - and the reality is constant and continuous rise in the values of urban properties - fuelled by larger-scale migration of people from rural areas to urban centers and by inflation. Take this very case. The plaintiff had agreed to pay the balance consideration, purchase the stamp papers and ask for the execution of sale deed and delivery of possession within six months. He did nothing of the sort. The agreement expressly provides that if the plaintiff fails in performing his part of the contract, the defendants are entitled to forfeit the earnest money of Rs. 5,000/- and that if the defendants fail to perform their part of the contract, they are liable to pay double the said amount. Except paying the small amount of Rs. 5,000/- [as against the total consideration of Rs. 60,000/-] the plaintiff did nothing until he issued the suit notice 2 1/2 years after the agreement. Indeed, we are inclined to think that the rigor of the rule evolved by courts that time is not of the essence of the contract in the case of immovable properties - evolved in times when prices and values were stable and inflation was unknown - requires to be relaxed, if not modified, particularly in the case of urban immovable properties. It is high time, we do so.

The learned Counsel for the plaintiff says that when the parties entered

into the contract, they knew that prices are rising; hence, he says, rise in prices cannot be a ground for denying specific performance. Maybe, the parties knew of the said circumstance but they have also specified six months as the period within which the transaction should be completed. The said time-limit may not amount to making time the essence of the contract but it must yet have some meaning. Not for nothing could such time-limit would have been prescribed. Can it be stated as a rule of law or rule of prudence that where time is not made the essence of the contract, all stipulations of time provided in the contract have no significance or meaning or that they are as good as non-existent?

All this only means that while exercising its discretion, the court should also bear in mind that when the parties prescribes certain time-limits for taking steps by one or the other party, it must have some significance and that the said time-limits cannot be ignored altogether on the ground that time has not been made the essence of the contract (relating to immovable properties)."

Applying the view taken by the Supreme Court in this case, it cannot be said that the time limit laid down in Clause 20 of the first agreement and Clause 17 of the second agreement by itself amounts to making the time

essence of the contract though, it is difficult to say that the time limit stipulated by the parties will be of no consequence in every case and despite express stipulation made in the contract in this regard, the time would never be an essence of the contract in any agreement for sale of an immovable property. As observed by the Supreme Court, while exercising its discretion whether to direct specific performance of the agreement or not, the Court needs to bear in mind all the relevant factors including the time limit laid down by the parties for completion of the contract but, this time limit cannot be the sole factor, particularly when the facts and circumstances of the case indicate an intention to the contrary. Moreover, in the case before Supreme court there was delay of 2½ years even in issuing notice to the seller whereas in the case before this Court, the plaintiff has invoked jurisdiction of the Court within a month of the time stipulated in the agreements and there is no default or inaction on the part of the plaintiff in pursuing the matter with L&DO.

41. In the case of **Man Kaur** (supra), the Supreme Court reiterated the principles that to succeed in a suit for

specific performance, the plaintiff has to prove : (a) that the valid agreement of sale was entered into by the defendant in his favour and the terms thereof; (b) that the defendant committed breach of the contract; and (c) that he was always ready and willing to perform his part of the obligations in terms of the contract.

Yet another contention of contesting defendants is that since the plaintiff wanted execution of another agreement solely with defendant Nos. 1 and 2 so as to obtain a loan from the bank, he was not ready and willing to perform the agreement executed on 16<sup>th</sup> September, 2009. There is no document of the plaintiff which would indicate he wanted execution of another agreement, with a view to obtain loan from his bank, though the mails written by defendant No.5 to the plaintiff on 10<sup>th</sup> May, 2010 and 6<sup>th</sup> July, 2010 do indicate that a new agreement to sell only with the sisters was proposed by the plaintiff as a formality for his bank though the sale deed was to be executed as per the agreement dated 16<sup>th</sup> September, 2009, which were to continue to operate, subject to the names of the vendors being changed in the new agreement to sell. In my view,

nothing really turns on this document for the simple reason that the plaintiff never backed out of his obligations as contained in the agreements dated 16<sup>th</sup> September, 2009 and there is no material on record to show that he was insisting on execution of a fresh agreement to sell only with defendant Nos. 1 and 2 despite the fact that the family settlement recorded in June, 2010, did provide for an agreement only with defendant Nos. 1 and 2. Probably, the intention was to expedite the clearance by L&DO, which might be insisting on mutation/conversion of one half in the name of defendant Nos. 1 and 2 alone. That the plaintiff was always ready and willing to perform his part of the contract is more than evident from the fact that even without execution of a fresh agreement to sell, he pursued the matter with the Land and Development Office on the basis of the application for mutation and conversion, which were submitted by the defendants to the Land and Development Office, obtained mutation letter dated 27<sup>th</sup> July, 2010 from the Land and Development Office and offered the balance sale consideration to the defendants vide his letters dated 4<sup>th</sup> September, 2010 and 10<sup>th</sup> September, 2010.

A perusal of the certificate dated 25<sup>th</sup> September, 2010 issued by the Chartered Accountant of the plaintiff along with copy of his portfolio statement and portfolio report which the plaintiff has filed in the Court would show that the market value of the securities held in the portfolio of the plaintiff was Rs.166.65 crores as on 24<sup>th</sup> September, 2010 and none of the securities was pledged. Therefore, it cannot be said that the plaintiff was not ready and willing to perform his part of the contract. In any case, this is a matter on which a final view can be taken by the Court only after recording evidence. Prima facie, the material placed on record does not indicate any attempt by the plaintiff to wriggle out of his contractual obligation as contained in the agreements dated 16<sup>th</sup> September, 2009.

42. Now, I come to the contention of the defendants that since there has been steep escalation in the market value of the suit property during pendency of the suit, it will be unjust and unfair to compel them to accept the price agreed in September, 2009, despite failure of the plaintiff to get it implemented within the time agreed in this regard. In the case of **Nirmala Anand (supra)**, Supreme Court (Hon'ble

Mr. Justice D. Raju) observing that entire fault for the delay or default could not be squarely attributed solely to first and second respondent and considered the escalation in the value of the property while directing specific performance of the agreement directed the appellant to pay a sum of Rs 40 lakhs to respondents 1 and 2 in addition to the amount already paid. In passing this order, the Court felt that it would be not only unreasonable, but also inequitable for the Courts to make the appellant the sole beneficiary of the escalation of the real estate prices and the enhanced value of the flat in question which respondents 1 and 2 had preserved all along by keeping alive the issues pending with the authorities of the Government and the municipal bodies. The Court was of the view that before dealing the specific performance, it is obligatory for the 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 consideration, the totality of the circumstances of each case. The view taken by Hon'ble Mr Justice Ashok Bhan in this case was that per se the delay or escalation of price is not a ground of

denying the relief of specific performance though in certain cases, the Court in equity and to mitigate the hardship to the vendor, may direct the vendee to pay further compensatory amount though this is not a principle of universal application and would depend upon the facts and circumstances of each case. While deciding this case, Supreme Court had also considered a number of its earlier decisions, including **K.S. Vidyanadam (supra)** and Hon'ble Mr Justice Ashok Bhan, who was not in favour of directing payment of any additional amount by the vendee to the vendor, was of the view that none of those cases laid down an absolute rule that the proposed vendee would be required to compensate the proposed vendor for the escalation of the price of land and building during the pendency of the proceedings in Courts at different levels.

In **P.D' Souza vs. Shoundrilo Naidu**, (2004) 6 SCC 649, Supreme Court was of the view that there was no binding precedent to the effect that in all cases where there had been an escalation of prices, the Court should either refuse to pass a decree for specific performance of the contract or direct the plaintiff to pay a higher sum. Similar

view was taken in **P.S. Ranakrishna Reddy vs. M.K. Bhagyalakshmi and Anr.** (2007) 10 SCC 231.

In **Faquir Chand and Anr. vs. Sudesh Kumari** (2006) 12 SCC 146, when it was submitted before the Court that the property value had gone up several times, the Court, without going into correctness of this submission and noticing that to some extent the delay was also attributable to the respondent/vendee directed him to pay a sum of Rs 1 lakh to the appellant/vendor, failing which the suit filed by the vendee/respondent for specific performance was to stand dismissed. In case of payment of the aforesaid sum of Rs 1 lakh, the appellant/vendor was to execute the sale deed in favour of the respondent/vendee without any further delay and was also to hand over the vacant possession of the suit property to him.

43. As noted earlier, in the case before this Court, there is no material on record which would attribute any part of the delay which occurred in obtaining mutation/conversion from L&DO to the plaintiff. The last date for completion of the contract was 15<sup>th</sup> September, 2010. Application for conversion of leasehold rights into

freehold rights had been accepted by L&DO by that time and, therefore, the sale deed in favour of the plaintiff could have been executed by the defendants within a few days thereafter. This suit itself has been filed on 1<sup>st</sup> October, 2010, i.e., within 16 days of the last date stipulated for completion of the transaction. If the Court, after trial, comes to the conclusion, that the delay in completion of the transaction was attributable wholly or partly to the plaintiff, and there has been steep escalation in the value of the suit property in the meanwhile, it may in the event of granting specific performance of the agreements dated 16<sup>th</sup> September, 2009 direct the plaintiff to pay an appropriate amount to the defendants as a pre-condition for execution of the sale deed by them in his favour. The defendants in that case would have no grievance that they have suffered monetary loss on account of escalation in the value of the property, without any default in their part in meeting their contractual obligations.

44. For the reasons given in the preceding paragraphs, I am of the view that the plaintiff has been able to make out a rather strong prima facie case for specific performance of

the Agreements to sell dated 16<sup>th</sup> September, 2009.

45. In support of his contention that the suit property needs to be preserved during pendency of the suit and if injunction is not granted that would render the suit infructuous thereby causing irreparable loss to the plaintiff, the learned senior counsel for the plaintiff has placed reliance on ***N. Srinivasa v. Kuttukaran Machine Tools Ltd., (2009) 5 SCC 182.*** In that case noticing that the only ground taken by the respondent was that since time was the essence of the contract and the appellant had failed to perform his part of the contract within the time specified in the agreement and, therefore, the question of grant of injunction against transfer or alienation of the suit property did not arise at all, the Supreme Court observed that it must be kept in mind that it would be open to the respondent to transfer, alienate or create any third party interest in respect of property in dispute before passing the award in which one of the main issues would be whether time was essence of the contract or not. The Court was of the view that if at the stage when application of the appellant under Section 9 of the Arbitration and

Conciliation Act was pending, if the respondent is permitted to transfer, alienate or create any third party interest in respect of the property in dispute then the award, if any, which may be passed in his favour would get nugatory and it would be difficult for him to ask the respondent to execute a sale deed when a third party interest has already been created by sale of property in dispute and delivering the possession to the third party. In the case before this Court since the plaintiff has made out at least prima facie case for specific performance of the agreements dated 16<sup>th</sup> September, 2009, the suit property needs to be protected against creation of any third party interest so that in the event of the Court ultimately coming to the conclusion that time was not the essence of the contract, the decree passed in his favour may not turn nugatory and the Court may be able to execute it by directing the defendant to execute the sale deed in favour of the plaintiff and deliver the possession of the suit property to him.

46. For the reasons given in the preceding paragraphs, I am of the considered view that the suit property needs to be preserved against any sale, transfer,

assignment or creation of any third party interest therein during pendency of the suit, so that in the event of the Court ultimately holding that the time was not the essence of the contract or that the plaintiff had fulfilled all his obligations under the agreements and had met the deadline stipulated in the agreements, by obtaining letter dated 15<sup>th</sup> September, 2010 from L&DO or that the delay in completion of the transaction was attributable to the defendants as claimed by the plaintiffs, the Court may be in a position to pass an effective and meaningful decree which does not carry with it the burden of a third part interest in the suit property created during pendency of the suit. In case interim order already granted to the plaintiff is not confirmed, the defendants may dispose of the suit property or may create third party interest therein, thereby defeating the very object behind filing of the suit. On the other hand, the defendants are not likely to suffer any irreparable loss in case they are restrained from selling, assigning or transferring the suit property and from creating any third party interest therein during pendency of the suit. They will continue to enjoy the suit property as they are doing at present. The balance of convenience thus lies in favour of

maintaining status quo during pendency of the suit. However, in view of the decision of a Division Bench of this Court in **Mohan Overseas P. Ltd vs. Goyal Tin & General Industries** 169 (2010) DLT 487 (DB), it would be appropriate if the plaintiff is directed to deposit the balance sale consideration in this Court by way of an FDR in the name of Registrar General of this Court initially for a period of one year. Such a condition will also ensure that having obtained an interim order, the plaintiff does not protract the trial of the case and the final decision can be rendered at an early date.

47. In view of the above discussions, the defendants are hereby restrained from selling, transferring, assigning, mortgaging or parting with possession of the suit property or any part thereof in any manner including letting it out and from creating any third party interest therein during pendency of the suit, without prior permission of the Court, subject to the plaintiff depositing an amount of Rs 30.68 crores by way of an FDR initially for a period of one year in the name of Registrar General of this Court within four weeks from the date of this order. This amount has been

arrived at by deducting the amount of Rs 1 crore which the plaintiff paid as earnest money and the amount of about Rs 12 lakhs which he claims to have spent in obtaining conversion of leasehold rights into freehold for and on behalf of defendants. In the event of the plaintiff failing to deposit the aforesaid amount of Rs 30.68 crores within a period of four weeks, the interim order granted by this Court shall stand automatically vacated, without any further order and the defendants shall be at liberty to deal with the property any manner they like. The observations made in this order being tentative, and necessary for the purpose of deciding on interim relief, will not affect the decision of the suit on merits. Both the IAs stand disposed of in terms of this order.

**(V.K. JAIN)**  
**JUDGE**

**FEBRUARY 04, 2011**  
**Vk/bg**