

30-08-2023
ct no. 13
sl. no. 25
sp

F. A. No. 81 of 2008

**Chinmoy Das and another
-Versus-
Sanjay Das and others**

Mr. Saptangshu Basu, Sr. Advocate
Mr. Kushal Chatterjee,
Mr. Sunil Kumar Singhania,
Ms. Kalpana Singhania

...for the appellants.

1. The instant appeal is directed against the judgement and order dated June 29, 2007 passed by the learned Civil Judge (Sr. Division), 3rd Court at Alipore in T.S. 70 of 1991. By the impugned judgement, the Court below dismissed the suit of the appellants/plaintiffs for specific performance of contract.

Facts of the Case

2. The brief facts relevant to the instant case are that by registered deed of lease, the Government of West Bengal conveyed into the suit land to respondent nos. 1 and 2 (substituted) for the period of 999 years, the suit plot being No. 1 at 131, Netaji Subhas Chandra Bose Road, Tollygunj, P.S. Regent Park, Kolkata 700040.
3. By an agreement in writing dated September 11, 1988, the respondent no. 3, promoter and the

respondent nos. 1 and 2, the former agreed to the respondent nos. 1 and 2 to construct a 3 storied building with two garages on the suit land and deliver possession of the second and third floor to certain third parties.

4. On the basis of the said agreement, the respondent nos. 1 and 2 entered into an agreement dated September 11, 1988 to transfer by lease for a period of 900 years to the appellants and deliver the constructed first floor of the suit premises along with a garage on payment of the sums agreed thereunder.
5. The appellants paid a total sum of US dollar 51,000 and/or part thereof in Indian currency. The 3rd respondent duly received the said sum of money and appropriated the same to his use and benefit. The building was constructed. The appellant took possession of the first floor along with one garage on 26th May 1990 till date. Despite repeated requests, the respondents failed and neglected to register the lease for 900 years in favour of the appellants, and hence the suit.

Proceedings in and the findings of the court below.

6. The defendants No. 1 and 2 contested the suit and filed a written statement. They contended that the agreement dated September 11, 1988

was in violation of Section 31(1) of the Foreign Exchange Regulation Act, 1973 (since repealed in 1999). It was also contended that the agreement was unenforceable since the appropriate amount of stamp duty under the Indian Stamp Act, 1899 was not paid thereunder. The 3rd defendant also contested the suit and filed a written statement and counter claim for 12059 US Dollars against the plaintiffs. The Court below framed five issues initially. Eight other issues were added later. The defendant nos. 2 and 3 deposed evidence as DW-1 and 2 in the suit.

7. The said agreement dated 11th September 1988 was exhibited and impounded in the court below. The appellants paid the assessed stamp duty for the same in the court below.
8. The Court did not find favour with the counter claim of the 3rd defendant and did not pronounce thereupon. The said counter claim must be deemed to have been rejected. The 3rd defendant has not challenged the said decree.
9. The Court below, however, found that the agreement dated 11th September 1988, unenforceable in law since prior permission of the Reserve Bank of India under Section 31 of

the Foreign Exchange Regulation Act, 1973, has not been obtained. The suit was dismissed.

Arguments of Counsel in this Appeal

10. The respondents have not contested the appeal despite notice and due service.
11. Mr. Saptangsu Basu, learned Senior Counsel would assail the decree on the ground that firstly, Section 31 of the Foreign Exchange Regulation Act, 1973 is not a bar on the plaintiffs from acquiring any immovable property in India even in foreign exchange, since they were admittedly Indian citizens in 1988 and even as on date. It is submitted that the appellants, as of date, are holding dual citizenship, i.e., of the United States of America and India as Overseas Citizens of India (OCI). There was, therefore, no bar in 1988 to an Indian citizen purchasing property in India either under Section 31 of the Foreign Exchange Regulation Act, 1973 or under replaced law, i.e., the Foreign Exchange Management Act, 1999.
12. It is next submitted by Mr. Basu that the learned Court below even otherwise committed error in refusing specific performance of contract. It is submitted that even if there was any statutory permission or consent required from any authority in India, including the

Reserve Bank of India, specific performance of the agreement dated 11th September 1988 could have been ordered by the Court below subject to such leave and/or permission. Reliance in this regard is placed on the decision of the Supreme Court in the Case of ***Mrs. Chandnee Widya Vati Madden Vs. Dr. C.L. Katial and others*** reported in **1964 SC 978**, particularly paragraph 4 and 5 thereof.

Analysis and Findings of this Court

13. This Court has carefully considered the arguments of the appellants. The respondents admittedly have not been represented in any point of time in the appeal despite due service.
14. This Court notices firstly, that the Court below has committed error in dismissing the suit for specific performance on the ground that the Reserve Bank of India has refused permission under Section 31(1) of the erstwhile FERA Act, 1973. It appears clearly from Exhibit-A that the Reserve Bank has merely said that the application submitted by the appellants was in an incorrect format. There has been no refusal on the part of the Reserve Bank of India noticed by this Court.
15. In any event, it prima facie appears to this Court Section 31 of the FERA Act, 1973 applies to

persons who are not citizens of India. There is doubt in the mind of this Court as to whether the appellants who were admittedly citizens of India in 1988 at all had any restriction on them to acquire any property in India even by paying in foreign currency.

16. The applicable FEMA Act of 1999 as on date does not conceive of any such restriction.
17. As on date, the appellants hold dual citizenship and are admittedly Overseas Citizens of India.
18. It is now well-settled that specific performance of a contract cannot be refused for non-compliance of any statutory provisions, unless the agreement itself is found to be void under Indian law.
19. Admittedly, the agreement dated September 11, 1988 was only found insufficiently stamped. It has been exhibited in the Court below. The agreement was impounded and due and appropriate stamp thereon has been paid by the appellants.
20. The said agreement dated 11th September 1988 was, therefore, valid and enforceable in law. There was no impediment under the C.P.C. against the agreement having been relied upon by the parties. In any event, the same is duly exhibited in the Court below.

21. Useful reference may be made the dicta of the Supreme Court in the **Madden case (supra)** at paragraph 4 and 5, which are set out hereinbelow.

Para 4: The main ground of attack on this appeal is that the contract is not enforceable being of a contingent nature and the contingency not having been fulfilled. In our opinion there is no substance in this contention. So far as the parties to the contract are concerned, they had agreed to bind themselves by the terms of the document executed between them. Under that document it was for the defendant-vendor to make the necessary application for the permission to the Chief Commissioner. She had as a matter of fact made such an application but for reasons of her own decided to withdraw the same. On the findings that the plaintiffs have always been ready and willing to perform the part of the contract, and that it was the defendant who wilfully refused to perform her part of the contract, and that time was not of the essence of the contract, the court has got to enforce the terms of the contract and to enjoy upon the defendant-appellant to make the necessary application to the Chief Commissioner. It will be for the Chief Commissioner to decide whether or not to grant the necessary sanction.

Para 5: In this view of the matter, the High Court was entirely correct in decreeing the suit for specific performance of the contract. The High Court should have further directed the defendant to make the necessary application for permission to the Chief Commissioner, which was implied in the contract between the parties. As the defendant-vendor, without any sufficient reasons withdrew the application already made to the Chief Commissioner, the decree to be prepared by this Court will add the clause that the defendant, within one month from today, shall make the necessary sanction to transfers like the one in question, and further that within one month of the receipt of that sanction she shall convey to the plaintiffs the property in suit. In the event of the sanction being refused, the plaintiffs shall be entitled to the damages as decreed by the High Court. The appellant sought to raise

certain other pleas which had not been raised in the High Court; for example, that this was not a fit case in which specific performance of contract should be enforced by the court. This plea was not specifically raised in the High Court and the necessary facts were not pleaded in the pleadings. It is manifest that this Court should not allow such a plea to be raised here for the first time.

22. In view of the clear position of law as expounded in the aforesaid decision and a number of decisions which have followed this aforesaid dicta even as on date, this Court is of the clear view that the appellants were entitled to a decree for specific performance of the agreement dated 11th September 1988.

Conclusion

23. The impugned judgement and decree dated June 29, 2007 passed in T.S. 70 of 1991 shall, therefore, stand set aside.
24. T.S. 70 of 1991 shall stand decreed in favour of the appellants. The defendants/respondents shall execute and register a lease in respect of the first floor of the suit property together with garage and proportionate undivided share in the land in question for a period of 900 years commencing from 26th May 1990, within a period of one month from date. The appellants shall be liable for paying any additional stamp duty as on date and all registration charges.

The appellants shall also be liable to obtain statutory clearances if any required.

25. The stamp duty paid in the Court below upon the agreement dated 11th September 1988 being impounded, shall stand transferred to the collectorate at Kolkata. The appellants shall be entitled to rely thereupon towards assessment of stamp duty.
26. In default of the respondents complying with the above, this Court appoints Mr. Rudrajyoti Bhattacharya, An Advocate of this Court, (Mob-9831123910) as Receiver to execute the aforesaid lease in favour of the appellants. The remuneration payable to the Receiver is fixed at Rs. 17,000/-.
27. Let the decree be drawn up expeditiously.
28. With the aforesaid directions, F.A. 81 of 2008 shall stand disposed of.
29. There shall be no order as to costs.
30. All parties shall act on the server copy of this order duly downloaded from the official website of this Court.

(Rajasekhar Mantha, J.)

(Supratim Bhattacharya, J.)

