

CASE NO.:
Appeal (civil) 6700 of 2004

PETITIONER:
Shri Vishwa Nath Sharma

RESPONDENT:
Shyam Shanker Goela & Anr

DATE OF JUDGMENT: 26/02/2007

BENCH:
Dr. ARIJIT PASAYAT & TARUN CHATTERJEE

JUDGMENT:
J U D G M E N T

Dr. ARIJIT PASAYAT, J.

Challenge in this appeal is to the judgment rendered by a Division Bench of the Delhi High Court dismissing the First Appeal filed by the appellants who were defendants in the suit filed by the respondents. The regular first appeal under Section 96 of the Code of Civil Procedure, 1908 (in short 'the Code') was directed against the judgment and decree passed by the Additional District Judge, Delhi, in Civil Suit no. 129/80. The trial court had decreed the suit of the plaintiff for specific performance of the agreement to sale directing the defendant-appellant to execute necessary sale-deed within a particular period. Defendants were asked to take necessary steps for completing necessary formalities towards execution of the sale-deed.

Background facts in a nutshell are as follows:

On 12.12.1979 plaintiff filed the suit claiming decree for specific performance of agreement to sell dated 24th March, inter alia, alleging that Delhi Development Authority had granted a lease of a big plot of land in favour of New Friends Cooperative House Building Society and the Society had granted sub lease in favour of its members. Durga Nath Sharma, defendant No.1 being one of the members of the Society was granted a sub lease with respect to plot No. 334 measuring 524 Sq. yards under sub lease dated 2.7.1974. The said defendant with a view to sell the said plot entered into an agreement with the plaintiff on 24.3.1978 at a fixed price of Rs.85,000/-. A sum of Rs.8,500/- was received by him towards part payment of the price, the balance was payable within 15 days after receipt of approval of building plan by Delhi Development Authority. The said defendant also agreed to execute necessary documents in favour of the plaintiff such as, (a) construction agreement (b) General and Special Power of Attorney, (c) Will, (d) Agreement to Sell and (e) any other necessary document. These documents were to be executed by the defendant no.1 in order to avoid possibility of complication in transfer of the plot to the plaintiff, although the intention of the defendant no.1 was to sell the plot to the plaintiff for which the necessary deal was struck. The plaintiff further alleged that he got a building plan prepared from an architect to suit his requirements, which was sent alongwith draft of the other documents with a covering letter dated 17.5.1978 to the defendant no.1. More documents were sent with another letter

of the same date for signatures of defendant No.1. Both the letters were sent under registered cover and were duly received by the defendant no.1 but no reply was received. On 17.8.1978 another letter under registered cover was sent to the defendant no.1, which though received was not replied to by the said defendant. The plaintiff further alleged that the defendant no.1 appears to have changed his mind later on and in an attempt to wriggle out of the deal had fraudulently transferred the plot by way of gift in favour of his son (defendant No.2)/ appellant No.2 which the plaintiff alleged was not binding on him and for that reason appellant No.2 was impleaded in the suit. It is further alleged that on 29.8.1978 defendant no.1 wrote a letter to the plaintiff cancelling the agreement to sell and returned the amount of Rs.8,510/- by cheque which included bank collection charges. Since defendant No.1 could not have unilaterally cancelled the agreement which still subsisted, the plaintiff declined to accept the cheque and did not encash it. The plaintiff had always been ready and willing to perform his part of the contract and is still ready and willing to purchase the plot on payment of the balance price but defendant No.1 had unilaterally backed out. Therefore, plaintiff was left with no option except to send a notice on 17.8.1978 calling upon defendants to execute necessary sale deed. No steps were taken by the defendants and, therefore, the suit was filed.

The defendants contested the suit by filing a joint written statement alleging that the suit was false and frivolous based upon incorrect allegations. Defendant No.1 never agreed to sell his plot to the plaintiff. The plot was not saleable and even if there was an agreement to sell, the same was void since there was no contract to sell the said plot, transfer of which was prohibited under Clause II Sub Clause (6)(a) and (6)(b) of the lease deed executed between President of India and the New Friends Cooperative House Building Society and of the sub lease executed between the Society and the defendant no.1. The defendant no.1 gave his own explanation about the receipt of the amount and of the nature of transaction with the plaintiff stating that at one point of time the defendant no.1 was interested in sale of the plot, if he could get a reasonable price and in case there was no legal implication, for which purpose he contacted Pandit Brothers Estate Agency, Lajpat Nagar, a broker. When on his visit from Jamshedpur to Delhi, he consulted the Society officials and was informed that he could not sell, transfer or mortgage the plot, at that time, the defendant no.1 thought of constructing a house on the plot. Since he was residing at Jamshedpur the said broker informed him that he could get the services of a building contractor, who could construct the building. The plaintiff agreed to construct a house on the plot according to the plan sanctioned by the authorities in favour of defendant No.1. The plaintiff asked defendant No.1 to execute an agreement for building construction. The plaintiff also deposited with defendant No.1 a sum of Rs.8,500/- as part security for carrying out the construction, as per the desire of the defendant no.1 within the stipulated time. The plaintiff promised to send draft of the agreement. Some rough drafts were sent by the plaintiff in May, 1978, which were not acceptable to defendant no.1. Therefore, he wrote back to the plaintiff that he was not prepared to accept the same. Defendant No.1 further alleged that he came to Delhi with a draft of Rs.8500/-. The plaintiff refused to accept the same. It was specifically pleaded that the defendant no.1 never agreed to sell or transfer or convey the plot. There was a complete prohibition in a sub lease to transfer the plot to anybody who was not a member of the

Society. Therefore, the suit was liable to be dismissed. The defendant no.1 denied the allegations of plaintiff that there was an agreement to sell or that he ever agreed to sell the plot. He stated that bona fide and in good faith he made an application to Delhi Development Authority for permission to gift the plot to his son, defendant No.2 and accordingly, after obtaining necessary permission gift deed dated 18.7.1978 was executed, which was accepted by the donee and possession of the plot had also been handed over to defendant No.2.

The plaintiff filed replication denying the defendants' version. Learned trial court framed the following issues :-

1. Whether defendant No.1 on 24.3.78 agreed to sell the plot in dispute to the plaintiff at Rs. 85.000/-.
2. If issue No.1 is proved, whether this agreement of sale is void being not permissible by law? OPD
3. If issue No.2 is not proved, in favour of the defendant whether the plaintiff was ready and willing to perform his part of the contract?
4. Whether Rs.8500/- was received by defendant No.1 as security for carrying out the construction on the plot in dispute by the plaintiff on behalf of defendant No.1 as alleged in para 4 of the written statement ? OPD
5. Whether defendant No.2 is not bound by any agreement to sell in between the plaintiff and defendant No.1 if issue No.1 is proved? OPD-2
6. Relief.

Considering the evidence led, the Trial Court held that the plaintiff must succeed. In appeal, the High Court after considering the rival submissions came to hold that there were several documents which tend to suggest that defendant no.1 was aware of the fact that there was an embargo in the lease deed that transfer could not take place without permission. It appears that he was also aware of the fact that permission, if accorded, by the Delhi Development Authority for affecting transfer, would be subject to payment of unearned increase and for that reason alone, in one of the letters defendant no.1 had specifically informed the property dealer that while making offers that aspect was to be kept in view i.e. 50% of the unearned increase should be paid by the transferee. The High Court made reference to the lease deed dated 2.7.1974 (Exhibit P-4), letter dated 27.9.77 addressed by defendant no.1 to the property dealer indicating his intention to sell if the value would be reasonable and there was no implication in future; Exhibit P-5, i.e. letter dated 16.10.1977 by which the defendant no.1 asked the property dealer that buyer shall have to pay 50% of the difference between original cost and the market value; Exhibit P-6 i.e. the letter dated 10.1.78 exchanged by defendant no.1 and the property dealer to show that the amount which the prospective buyer was willing to pay was less according to defendant no.1; Exhibit P-7 i.e. letter dated 1.2.78 by defendant no.1 with reference to previous letter asking for more amount from the prospective purchaser. Similar was the situation in several other letters addressed by defendant no.1 to the property dealer. The High Court was of the view that instead of performing his part of the agreement, defendant no.1 being conscious of the fact that property prices were rising resiled from his commitment and transferred by way of gift in favour of his son after obtaining the permission for transfer. The High Court also noticed that the plaintiff was ready and willing to perform his part of the contract.

The High Court did not accept the contention that since

there was some restriction on transfer, that disentitled the plaintiff from obtaining a decree for specific performance of the contract.

The appeal was dismissed observing, inter alia, as follows:

"Consequently, we find no force in the appeal which is hereby dismissed with costs. We make it clear that the learned trial court rightly directed the defendants/appellants to apply for necessary permissions within the period specified therein. In case permissions are not applied for, it will be permissible for the plaintiff to make such an application and in case requisite permission is accorded, on receipt thereof, the plaintiff will call upon the defendants/appellants to execute requisite sale deed in accordance with law and on failure to do so execution and resignation of the sale deed will be as per law."

Learned counsel for the appellants submitted that the trial Court and the High Court failed to appreciate that there was an impediment on the transfer. There could not have a valid agreement. In the background noticed by the Trial Court and the High Court if the transfer was prohibited by DDA, agreement could not have been enforced by a decree in a suit for specific performance.

Learned counsel for the respondent on the other hand submitted that the lack of permission, if any, cannot act as absolute bar on a decree being passed. The decree may not be executable. As noticed by the High Court it was submitted that the price rise is not a ground to deny specific performance.

In this case the trial Court as well as the High Court have categorically found that the plaintiff was ready and willing to perform his part of the arrangement. In fact, if DDA refused to grant permission a suit for damages can be filed.

The plea of hardship which is presently being raised was never raised before the Courts below and was not also pleaded. The conditions 6A and 6B to the reference has been made by learned counsel for the appellant does not create an absolute bar. The plea that the plaintiff was merely a contractor was also not accepted and it was found that the finding of fact that the plaintiff was not a contractor as claimed by the appellant.

The Privy council in *Motilal v. Nanhelal*, AIR 1930 P.C. 287, laid down that if the vendor had agreed to sell the property which can be transferred only with the sanction of some government authority, the court has jurisdiction to order the vendor to apply to the authority within a specified period, and if the sanction is forthcoming, to convey to the purchaser within a certain time. This proposition of law was followed in *Mrs. Chandnee Widya Wati Madden v. C.L. Katial*, (AIR 1964 SC 978), and *R.C. Chandiook v. Chuni Lal Sabharwal* (AIR 1971 SC 1238). The Privy Council in *Motilal's case* (supra) also laid down that there is always an implied covenant on the part of the vendor to do all things necessary to effect transfer of the property regarding which he has agreed to sell the same to the Vendee. Permission from the Land and Development Officer is not a condition precedent for grant of decree for specific

performance. High Court relied upon its decision in Mrs. Chandnee Widya Madden v. Dr. C.L. Katil (supra) and Maharo Sahab Shri Bhim Singhji v. Union of India (AIR 1961 SC 234) to substantiate the conclusive. In Mrs. Chandnee Widya (supra) this Court confirmed the decision of the Punjab and Haryana High Court holding that if the Chief Commissioner ultimately refused to grant the sanction to the sale, the plaintiff may not be able to enforce the decree for specific performance of the contract but that was not a bar to the Court passing a decree for that relief. The same is the position in the recent case. If after the grant of the decree of specific performance of the contract, the Land and Development Officer refused to grant permission for sale the decree holder may not be in a position to enforce the decree but it cannot be held that such a permission is a condition precedent for passing a decree for specific performance of the contract.

In Ramesh Chandra Chandiook and Anr. v. Chuni Lal Sabharwal (dead) by his legal representatives and Ors. (AIR 1971 SC 1238) it was held that proper form of decree in a case like the instant one would be to direct specific performance of the contract between defendant and the plaintiff and to direct the subsequent transferee to join in the conveyance so as to pass on the title residing in him. This is because defendant no.2 son of defendant no.1 cannot take the stand that he was a transferee without notice. Admittedly, he is son of defendant no.1. The view in Ramesh Chandra's case (supra) was a reiteration of earlier view, in Durga Prasad and Anr. v. Deep Chand and Ors. (AIR 1954 SC 75). This Court has repeatedly held that the decree can be passed and the sanction can be obtained for transfer of immovable property and the decree in such would be in the way the High Court has directed. (See: Motilal Jain v. Ramsai Devi (Smt.) and Ors. (2000 (6) SCC 420), Nirmala Anand v. Advent Corporation (P) Ltd. and Ors. (2002 (5) SCC 481), (2004 (6) SCC 537), Aniglase Yohanna v. Ramlatha and Ors. (2005 (7) SCC 534)].

Above being the position we find no merit in this appeal. However, considering the long passage of time it was suggested to respondent no.1 that he could pay an additional sum to the appellant. Learned counsel for the respondent left the quantum to be decided by this Court. To a similar effect was the suggestion of learned counsel for the appellant. Considering the background facts, we direct that as a matter of good gesture, let the respondent pay a sum of rupees five lakhs to the appellant within a period of four months from today.

The appeal is dismissed subject to the aforesaid observations.