

Shri Anisuddln and anr. Vs. Mrs. Vimla Sethi and ors.

Shri Anisuddln and anr. Vs. Mrs. Vimla Sethi and ors.

SooperKanoon Citation : sooperkanoon.com/701619

Court : Delhi

Decided On : Jul-02-2008

Reported in : 152(2008)DLT342; 2008(105)DRJ469

Judge : Badar Durrez Ahmed, J.

Acts : [Limitation Act, 1963](#) - Schedule - Article 54; [Code of Civil Procedure \(CPC\), 1908](#) - Order 8, Rules 3 and 6

Appeal No. : CS (OS) 313/1992

Appellant : Shri Anisuddln and anr.

Respondent : Mrs. Vimla Sethi and ors.

Advocate for Def. : Sanjay Jain, Sr. Adv., ; Deepak Dewan, ; Arjun Mitra an

Advocate for Pet/Ap. : J.K. Seth, Sr. Adv. and; Rakesh Saini, Adv

Judgement :

Badar Durrez Ahmed, J.

1. This is a suit claiming a decree for specific performance of the agreement to sell dated 23.04.1981 / 05.05.1981 and for directing the defendant No. 1 to execute the sale deed in respect of plot No. 226, Block-A, New Friends Colony, New Delhi (hereinafter referred to as 'the said plot') in favor of the plaintiffs. The plaintiffs

have also sought a decree declaring that the plaintiffs are the absolute owners in possession of the super-structure standing on the said plot.

2. The plaintiffs, who are brothers, have pleaded that the defendant No. 1 (Smt Vimla Sethi) was the original allottee in respect of the said plot. The perpetual sub-lease dated 24.03.1973 (Exhibit DW-1/P-16) was in favor of the defendant No. 1: The President of India being the lessor, The New Friends Cooperative House Building Society Ltd being the lessee and the defendant No. 1 being the sub-lessee. Clause II(5) of the said sub-lease required the sub-lessee (defendant No. 1) to construct a residential building for private dwelling on the said plot within a period of two years. It is further pleaded that because the defendant No. 1 was not possessed with sufficient funds and was unable to erect the building, the defendant No. 1 entered into negotiations for the sale of the plot to the plaintiffs in consideration of payment of Rs 1,80,000/-. It is further pleaded that the agreement to sell dated 23.04.1981 / 05.05.1981 was executed between the parties, i.e., by defendant No. 1 as owner / vendor and the plaintiffs as purchasers / vendees for the sale of the said plot measuring 481.5 sq. yds. It is stated that though the agreement was completed on 05.05.1981, the same was dated as of the date of original oral agreement, i.e., 23.04.1981.

3. The plaintiffs further averred in the plaint that the total consideration of Rs 1,80,000/- was paid to the defendant No. 1 through bank drafts, against receipts, as follows:

- 1) D.D. No. 065236 for Rs 90,000/- dated 04.05.1981;
- 2) D.D. No. 007967 for Rs 10,000/- dated 21.04.1981;
- 3) D.D. No. 065235 for Rs 45,000/- dated 04.05.1981;
- 4) D.D. No. 065237 for Rs 35,000/- dated 04.05.1981.

It is further stated that the said demand drafts were drawn on Mercantile Bank Ltd., Calcutta in favor of the defendant No. 1 and were encased by her.

4. It is further averred in the plaint that as per the said agreement to sell, it was agreed that the sale deed would be executed and registered in favor of the plaintiffs in terms laid down by the Delhi Development Authority (DDA) or the Government and at such time as was permissible by the DDA or any other authority, after construction of the building on the plot. The plaintiffs have stated that besides the said agreement to sell, the defendant No. 1 also executed other documents which were generally in vogue at that point of time, such as, receipts, agreement of building construction dated 23.04.1981 authorising the plaintiffs to construct the building, three general powers of attorney in favor of Mr Riazuddin, father of the plaintiffs, two special powers of attorney, again in favor of Mr Riazuddin, four affidavits, one Indemnity Bond, a will dated 05.05.1981 and other documents. It is further pleaded that the plaintiffs got the plans for the construction prepared and the same were signed by the defendant No. 1 and were submitted for sanction. The construction of the building was raised by the plaintiffs entirely at their own costs and as per the sanctioned plans. It is further submitted that the completion certificate was obtained on 21.08.1984. It is further averred that the defendant No. 1 simultaneously signed a document stating that she was unable to make the payment of cost of construction and stating that the plaintiffs should get the sale deed registered in their name. It is further averred that no date was specified in the said agreement to sell as to when the sale deed was to be executed and the defendant No. 1 was under an obligation to execute the sale deed whenever required to do so by the plaintiffs. It is alleged that the plaintiffs on various dates and lastly by letters dated 27.09.1991 and 23.11.1991 required the defendant No. 1 to apply for and obtain the income tax clearance certificate and other necessary permissions from the competent authorities for execution of the sale deed in consideration of the amount already received by her. It is alleged that the defendant No. 1, through her lawyer's letter dated 04.12.1991, has taken an evasive attitude which may be construed as repudiation of the agreement to sell. Consequently, it is averred that the commencement of limitation for the filing of the present suit would be the date of the said letter dated 04.12.1991 and the suit having been filed within three years, is within time.

5. Alternatively, it was pleaded that from time to time, the defendant No. 1 either by herself or through her husband as also through the general power of attorney

holder acknowledged the agreement to sell and promised to complete the transaction. Various letters were addressed to one Mr Mohd. Zaki, the uncle of the plaintiffs, who was acting as an authorised representative of the plaintiffs and some letters were also addressed to the plaintiffs. It was, therefore, pleaded in the alternative that the time of the performance of the agreement to sell by execution of the sale deed stood extended by the acknowledgements made by the defendant No. 1 and or by her husband, who acted as her agent and / or by the advocate in various letters dated 08.12.1981, 13.10.1982, 18.08.1983, 24.05.1986, 10.06.1986 (two letters), 25.09.1989, 23.11.1989, 03.08.1991, 04.09.1991, 19.10.1991 and 04.12.1991 as also the acknowledgements by the general power of attorney holder of the defendant No. 1 dated 31.03.1984, 30.03.1987 and 29.03.1990. The plaintiffs have also pleaded in paragraph 5 of the plaint that they did not agree to the defendant No. 1's lawyer's suggestion to execute a new agreement, but insisted on the completion of the transaction on the basis of the old agreement and informed the defendant No. 1 by a letter dated 23.11.1991 that she should obtain the permission of the DDA and clearance certificate from the income tax officer inasmuch as these were the only two matters which remained to be completed by the defendant No. 1 and thereafter the sale deed could be executed. The plaintiffs pleaded that the entire consideration of the plot had been paid, possession of the plot had been handed over by the defendant No. 1 to the plaintiffs, the building had been constructed by the plaintiffs at their own costs and that they were being assessed by the income tax authorities as the owners in possession of the building. It is further averred in paragraph 6 of the plaint that the defendant No. 1 was under an obligation to execute the sale deed in favor of the plaintiffs whenever called upon to do so and that the plaintiffs by their letter dated 23.11.1991 called upon the defendant No. 1 to execute the necessary sale deed. The defendant No. 1 had failed to comply with this request. It is alleged that the defendant No. 1 is avoiding execution of the sale deed on account of her own difficulties with the income tax department.

6. It is also pleaded by the plaintiffs that they were, at all times and are still, ready and willing to complete the agreement to sell in respect of the suit property (No. A-226, New Friends Colony, New Delhi), but the defendant No. 1 has not obtained the income tax clearance certificate nor has she applied to the competent authority

for requisite permission nor has she executed the sale deed. The present suit has been filed in these circumstances.

7. In the written statement filed by the defendant No. 1, it is submitted that the alleged agreement to sell dated 23.04.1981 / 05.05.1981 was only meant as draft paper for discussion and nothing else and no formal agreement in any legal or moral sense of the term had been arrived at. It was also submitted that the alleged agreement to sell dated 23.04.1981 / 05.05.1981 was ab initio void as it was signed by the plaintiffs at New Delhi on 23.04.1981 and by the defendant No. 1 at Calcutta on 05.05.1981. It is also alleged that the said agreement to sell dated 23.04.1981 / 05.05.1981 does not bear any attestation of the signatures of the plaintiffs by any witness. It is alleged that since a document relating to immovable property requires signatures to be attested by two witnesses, this requirement is not fulfilled in respect of the agreement to sell dated 23.04.1981 / 05.05.1981 inasmuch as the plaintiffs' signatures are not properly attested. It is also submitted that the signature of the defendant No. 1 is also attested by only one witness, which, according to the defendant No. 1 is, irregular and the said agreement suffers from fatal infirmities and is suggestive of the fact that the same was merely a record of the broad points for discussion and was not meant as a legal and enforceable document. It is also submitted that the agreement to sell has blanks in paragraph 16 where the boundaries of the property are described.

8. It was also stated in the written statement that 'the possession of the plot detailed herein below has been given to the purchaser as contractor for construction under a contract for construction executed between the parties..' It is further averred that the alleged agreement for building construction dated 23.04.1981 / 05.05.1981 was void ab initio and that, therefore, possession of the said plot had been illegally taken by the plaintiffs and they continue to be in illegal occupation thereof. It is also stated in the written statement of the defendant No. 1 that the said agreement to sell and the alleged agreement for building construction were repudiated by the defendant No. 1 through the legal notice of her advocate Mr Gopendra Nath Dutta dated 03.11.1988 and, as such, the present suit, which was filed on 13.01.1992, was barred by limitation inasmuch as the three-year period taken from 03.11.1988 expired on 03.11.1991. It is stated that the

confirmations / acknowledgments dated 31.03.1984, 30.03.1987 and 29.03.1990 issued by Mr Riazuddin, father of the plaintiffs, as alleged power of attorney holder of the defendant No. 1, are collusive and in a set pattern and the same appeared to have been back dated at the instance of the plaintiffs. It has also been averred that the alleged power of attorney in favor of Mr Riazuddin was ab initio void because it related to the said agreement to sell and the alleged agreement of building construction which were also ab initio illegal and void. The defendant No. 1 also alleged that the building construction agreement was void because the same was executed in Calcutta, whereas the stamp paper was purchased at New Delhi as also because there was no meeting of minds and as indicated by the several blanks left in the agreement in respect of material aspects.

9. On the basis of the aforesaid pleadings and the documents filed by the parties, the following issues were framed on 07.01.1994:

1. Whether the alleged agreement to sell dated 23.4.81/5.5.81 was never meant to be acted upon and as such, it is completely void ab initio for the reasons stated in paras 1(a) to 1 (h), (on pages 1 to 6) of the written statement ?
2. Whether the agreement with regard to the building construction is illegal for the reasons stated in paras 1 & 2, (on page 7) of the written statement? If so, its effect ?
3. Whether the agreement for building construction is void for lack of consideration as alleged in para 4 (on page 8) of the written statement ?
4. Whether the alleged agreement with regard to the building construction was repudiated through the notice of Mr. Gopender Nath Datta dated November 3, 1988 as alleged in para 5 (on page 9) of the written statement? If so, its effect ?
5. Whether the general power of attorney executed in favor of Shri Riaz-ud-din is illegal and invalid for the reasons stated in para 6 (on page 9) of the written statement? If so, its effect ?
6. Whether the plaintiff No. 1 and plaintiff No. 2 are in illegal occupation of property bearing No. A-226, New Friends Colony, New Delhi, for the reasons stated in para

7 (on page 10) of the written statement?

7. Whether the suit is barred by limitation as alleged (on pages 10 & 11) in the written statement ?

8. Whether this Court has got no territorial jurisdiction to hear the present suit as alleged in para entitled 'Jurisdiction' (on page 11 of the written statement) ?

9. To what relief, if any, are the plaintiffs entitled ?

An additional issue was also framed on 12.12.2007 with regard to the valuation of the suit and the same reads as under:-

Whether suit is not properly valued for the purposes of court fees and jurisdiction?
OPD

10. Issue Nos. 5 and 8 which were raised at the instance of the defendant No. 1 were not pressed by the learned Counsel for the defendant No. 1 at the time of arguments.

Issue No. 1

11. The agreement to sell dated 23.04.1981 / 05.05.1981 (Exhibit DW-1/P-1) is an admitted document. In her cross-examination, the defendant No. 1 as DW-1 has stated as under:

I have seen the original agreement of sale. The same has been signed by me. It is exhibited as DW-1/P-1. This document has been witnessed by my husband. This has been signed by me on each page. Plaintiffs had not signed this document in my presence. I do not remember if besides the document exhibit DW-1/P-1, any other agreement to sell was executed by me.

12. In her cross-examination, the said witness has also admitted the receipt of sum of Rs 1,80,000/- by means of four bank drafts. The original receipts dated 05.05.1981 which are marked as exhibits P-3 and P-4 have been admitted to have been signed by her. She has also acknowledged that these receipts (Exhibit P-3 and Exhibit P-4) were witnessed by her husband and Mr K.K. Mehta. She also

stated that she had executed the power of attorney in favor of Mr Riazuddin (Exhibit P-5). She stated that she has seen the original will and that the same was executed by her. She stated that Exhibit P-6 is a copy of the said will. She stated that the original will was duly registered before the Sub-Registrar. The said document also bears her thumb impression. She has also stated that the three undated powers of attorney had been signed by her though they had not been attested by anyone. The said powers of attorney are exhibited as Exhibit DW-1/P-2 to DW-1/P-4. She also admitted to have seen the documents which have been described as affidavits and that they had all been signed by her. Though, she stated that they did not bear any date and they contained several blanks. The said documents have been exhibited as Exhibit DW-1/P-5 to DW-1/P-8. The document which purports to be an indemnity bond was also admitted to have been signed by her. The same is exhibited as Exhibit DW-1/P-12. She has, however, stated that she did not object to these documents at the time of signing, as according to her, these documents did not have any validity till such time the final agreement was arrived at in respect of the property in question. She also admitted to signing the building construction agreement, a copy whereof was exhibited as Exhibit D-1. The original document has been exhibited as Exhibit DW-1/P-13. She admitted that the letters dated 25.09.1989 and 03.08.1989 which have been exhibited as Exhibit DW-1/P-14 and DW-1/P-15 appear to have been written by her and she could not give any Explanation as to why she had written these letters.

13. From the aforesaid, it is apparent that the agreement to sell dated 23.04.1981 (Exhibit DW-1/P-1) was, in fact, signed by the parties, though the plaintiffs had signed the said agreement in Delhi and the defendant No. 1 had signed it on 05.05.1981 at Calcutta. The two receipts dated 05.05.1981 (Exhibit P-3 and Exhibit P-4) for the amounts of Rs 90,000/- each received from plaintiff No. 2 and Plaintiff No. 1 respectively have been admitted by the defendant No. 1. The defendant No. 1 has also admitted Exhibit P-5 which is a registered general power of attorney in favor of Mr Riazuddin. She has also admitted the registered will (Exhibit P-6) executed by her as also Exhibit D-1 which is the agreement for building construction, Exhibit DW-1/P-3 which is a one page general power of attorney and Exhibit P-7 which is a registered special power of attorney in favor of Mr Riazuddin, inter alia, authorizing him to apply for permission to sell and to

execute the sale deed.

14. PW-1 (Mr Mohd. Zaki) in his examination-in-chief, inter alia, stated that the plaintiffs were his nephews being the sons of his brother Mr Riazuddin. He stated that he is a resident of A-177, New Friends Colony, New Delhi. The plaintiffs were also interested to acquire a plot in New Friends Colony and that they had asked him to get them one such plot. He stated that there was one plot bearing No. A-226 which was available for sale but on the same terms and conditions of execution of documents, such as power of attorney, etc. He stated that Mr K.K. Mehta introduced one property broker by the name of Mr Gulshan Kumar. The plot was informed to be owned by Smt. Vimla Sethi (Defendant No. 1) of Calcutta. The witness further stated that the plaintiffs saw the plot in question and approved the same. They had agreed to purchase the said plot for a sum of Rs 1,80,000/- in 1981 and the payment was desired to be made by way of bank drafts on 05.05.1981. The plaintiffs had got the drafts made on 04.05.1981. He further stated that on the evening of 04.05.1981, he was given four bank drafts by Mr Anisuddin (plaintiff No. 1) and on 05.05.1981, he (Mr Zaki) and Mr Mehta flew to Calcutta and went to the residence of Mrs Vimla Sethi (defendant No. 1). There, Mrs Vimla Sethi and her husband (Mr S.P. Sethi) were present. The said bank drafts were given to Mr S.P. Sethi. Some of the documents duly prepared at Delhi were taken there and some other documents were to be prepared at Calcutta. Those documents were shown to Mrs Vimla Sethi and her husband. They approved the already prepared documents and also the format of those documents which were to be prepared there. Thereupon, the remaining documents were prepared at Calcutta. All the documents were signed by Mrs Vimla Sethi and at that time her husband (Mr S.P. Sethi) and Anr. person by the name of Tony or Tomy, who was probably their employee, was also present. The said witness stated that he was acting on the deal on the implied authority of his nephews and also because he had experience of dealing with such a property as he had already purchased one such plot and also knew Mr Mehta.

15. In his cross-examination, the said Mr Zaki (PW-1) stated that Exhibit DW-1/P-1 was signed by Mrs Sethi at point 'X-1' at Calcutta. The same was signed by Mr Anisuddin and Mr Khalid Riaz at point 'X-2' at Delhi on his return from Calcutta. Mr

Sethi had signed the same as a witness at point 'X-3' in Calcutta at the time of signature of Mrs Sethi. Exhibit DW-1/P-13 (Agreement of building construction) was also stated to have been signed by Mrs Sethi and her husband at Calcutta by the said witness. He stated that the place at point X-1 in the said document which was meant for the signature of the contractor was left blank.

16. The plaintiff No. 1 (Mr Anisuddin) deposed as PW-2. In his cross-examination, he stated that the said documents had been signed on the return of the same from Calcutta. He also stated that the possession of the plot in question was given to the plaintiffs by the society after the finalisation of the deal and the same was taken immediately after the deal though the exact date could not be recalled. The said witness also stated that they constructed on the plot as per the documents executed by the defendant No. 1.

17. Mr Riazuddin, the father of the plaintiffs deposed as PW-3. In his examination-in-chief, he stated that two general powers of attorney and one special power of attorney were executed by Mrs Vimla Sethi in his favor in respect of the said plot. The said powers of attorney were exhibited as Exhibits DW-1/P-2, DW-1/P-3 and DW-1/P-4 respectively. He stated that he had been acting as per these powers of attorney in respect of the premises in question and that none of the powers of attorney were ever revoked or cancelled by Mrs Vimla Sethi. In his cross-examination, the said witness [Riazuddin (PW-3)] stated that the powers of attorney were executed by Mrs Vimla Sethi in his favor at the time of the deal of the plot in question and on receipt of the payment. He further stated that the payments were made by his sons Anisuddin and Khalid Riaz from their accounts. He also stated that it is wrong that a notice dated 03.11.1988 was issued by Mrs Sethi invoking / cancelling the powers of attorney in his favour. He never received any such notice. PW-3 had been recalled for further statement when he stated that the confirmation / acknowledgement letters dated 31.03.1984, 30.03.1987 and 29.03.1990 were signed by him on the revenue receipts and he identified the signatures on these three documents being Exhibits PX-1 to PX-3. He stated that he signed these documents as attorney of Smt Vimla Sethi and that he gave these three documents to the plaintiffs. In his further cross-examination, the said witness denied that Exhibit PX-1 and Exhibit PX-2 were executed after 03.11.1988 or that

they were ante dated and volunteered that, in fact, the documents were executed on the dates mentioned on them.

18. The agreement to sell (Exhibit DW-1/P-1) clearly showed the defendant No. 1 as the owner / vendor and the plaintiffs as the purchasers / vendees in respect of the leasehold rights in the plot No. A-226, New Friends, Colony, New Delhi measuring 481.5 sq. yds. The recitals in the said agreement to sell clearly indicate that the vendor had agreed to sell, convey and transfer her rights, title and interest in the said plot of land for the total consideration of Rs 1,80,000/- in favor of the purchasers and that the purchasers had also agreed to purchase the right, title and interest of the owner for the said consideration. Clause 1 of the said agreement stipulated that in consideration of the said sum of Rs 1,80,000/-, the defendant No. 1 thereby agreed to transfer the plot as well as the building structure to be put on the plot of land in question in favor of the purchasers (plaintiffs). By virtue of clause 2 of the said agreement, it was acknowledged by the defendant No. 1 that the plaintiffs had paid the sum of Rs 1,80,000/- through four bank drafts dated 21.04.1981, 04.05.1981, 04.05.1981 and 04.05.1981 for which separate receipts had also been issued as full payment of the sale consideration.

19. Clause 4 of the agreement to sell indicates that the possession of the plot detailed therein had been given to the plaintiffs as contractors for construction under a contract for construction executed between the parties and the plaintiffs had been fully authorised to raise / construct the building and further to use the building for themselves or the plaintiffs could let out the same to anybody in part or whole as they liked and they would be entitled to get the rent from the tenants and the defendant No. 1 would not be entitled to charge anything as rent and that the house tax, property tax and lease money or any other tax or levy would also be payable by the purchasers (plaintiffs). Clauses 6 and 7 of the said agreement to sell carry the expression - 'the plot hereby agreed to be sold'. Clause 8 stipulates that the ground rent from the date of the agreement would be payable by the purchasers, but shall be paid in the name of the owner till such time as the sub-lease is not transferred in favor of the purchasers. Clause 10 of the agreement specifically provides that the unearned increase would be payable by the

purchasers to the DDA or L&DO; or the Delhi Administration and that the purchasers alone shall have the liability to make this payment. Clause 11 provides that the expenses for the transfer, stamp duty and the corporation tax shall be payable by the purchasers from the date of the agreement. Clause 14 stipulated that the owner would execute a general power of attorney in the name of the purchasers or their nominee / nominees in respect of the said plot which would be irrevocable till the said plot is not transferred, registered, complete vacant possession given and the property mutated in the name of the purchasers or their nominees in the records of the DDA.

20. From the pleadings, documents and evidence on record, it is apparent that the agreement to sell (Exhibit DW-1/P-1) was executed by the parties. It is, of course, true that the said agreement was signed by the defendant No. 1 in Calcutta on 05.05.1981 and subsequently, by the plaintiffs in Delhi. But this does not enable the defendant No. 1 to detract from the position that the said agreement to sell had been executed by the parties. Under the said agreement to sell, the defendant No. 1 had agreed to sell the plot in question to the plaintiffs for a total consideration of Rs 1,80,000/-. It is an admitted position that the entire amount of Rs 1,80,000/- stood paid to the defendant No. 1 by the plaintiffs on 05.05.1981 itself through the four bank drafts referred to above and the receipts acknowledging such payments had been issued by the defendant No. 1. It has also been established through evidence that the plaintiffs were put into possession of the plot in question in 1981 itself.

21. The defendant No. 1 has attempted to raise several pleas as set out in paragraphs 1 (a) to 1(h) of the written statement to indicate that the agreement to sell was never meant to be acted upon as such. Once having admitted the execution of the agreement to sell, there was a heavy burden on the said defendant No. 1 to establish that the agreement to sell was not meant to be acted upon and was void ab initio. The reasons indicated in the written statement for claiming the agreement to sell to be void ab initio are untenable. The defendant No. 1 has not been able to discharge this heavy burden of showing that the agreement to sell was not meant to be acted upon. On the contrary, the plaintiffs have been able to establish conclusively that the agreement to sell had been

executed by the parties. They have also been able to establish that the entire sale consideration of Rs 1,80,000/- had been paid on 05.05.1981 itself and even possession in respect of the plot was with the plaintiffs.

22. As stated above, the defendant No. 1 had sought to suggest that the possession was taken illegally by the plaintiffs, however, there is nothing to show that for all the years between 1981 and 1992, when the present suit came to be filed, the defendant No. 1 ever protested with regard to the possession of the plaintiffs. The argument with regard to the defendant No. 1 having signed the documents in Calcutta and the plaintiffs having signed it in Delhi and, therefore, the same being void, is clearly untenable. Once the parties have admitted that they executed the documents and affixed their signatures thereto, it is immaterial as to whether they signed the said documents at the same place or at different places. The significance of signing the document is that they accept the terms and conditions set out therein. Both the plaintiffs as well as the defendant No. 1 having signed the agreement to sell (Exhibit DW-1/P-1) are bound by it. It must also be noted that the intention of the parties was to enter into the agreement to sell and for the defendant No. 1 to ultimately convey the said property to the plaintiffs by executing a sale deed. This can easily be discerned not only from the clear and express terms of the agreement to sell (Exhibit DW-1/P-1) as well as from the other documents executed by the defendant No. 1. The defendant No. 1 executed the receipts dated 05.05.1981 (Exhibit P-3 and Exhibit P-4) in respect of Rs 90,000/- each. She executed the registered general power of attorney (Exhibit P-5), the registered will (Exhibit P-6), General Power of Attorney (Exhibit DW-1/P-3), registered special power of attorney (Exhibit P-7). All these documents clearly go to show the clear intention of the parties that the agreement to sell was binding on them and that it was meant to be acted upon. The agreement to sell (Exhibit DW-1/P-1) dated 23.04.1981 / 05.05.1981 was a valid and binding agreement which had been entered into after a clear meeting of minds.

23. Consequently, Issue No. 1 is decided against the defendant No. 1 and in favor of the plaintiffs.

Issue Nos. 2, 3 and 4

24. These issues relate to the building construction agreement and have been raised at the instance of the defendant No. 1. The present suit is concerned with the specific performance of the agreement to sell dated 23.04.1981 / 05.05.1981 and is not seeking the specific performance of the building construction agreement. In any event, from the discussion of the documents and evidence under Issue No. 1, it is apparent that the construction agreement was entered into by and between the parties to permit the plaintiffs to construct on the plot in question even prior to the same being formally transferred to them through a registered sale deed. Since there were various obstacles for the conveyance of the property to the plaintiffs, signatures on the construction agreement had been obtained from the defendant No. 1. The fact of the matter is that the defendant No. 1 had agreed to sell the plot in question to the plaintiffs and the plaintiffs, in turn, had paid the entire sale consideration as well as obtained possession of the said plot. Thereafter, the plaintiffs constructed the residential building standing thereon at their own expense and have been residing in the same since its completion in 1984. Whether the building construction agreement was legal or not or was repudiated through the notice of Mr Gopendra Nath Dutta dated 03.11.1988 is not at all material for the purposes of coming to a conclusion with regard to the reliefs prayed for by the plaintiffs. Even if it is assumed that there was no agreement with regard to building construction, this does not, in any way, advance the cause of the defendant No. 1. She cannot resile from the position that she entered into the agreement to sell, that she received the entire sale consideration, that possession was handed over to the plaintiffs, that the plaintiffs constructed the residential building thereon at their own expenses, and that the plaintiffs have been residing in the said building since its completion in 1984 without any hindrance from the defendant No. 1.

25. As such, I hold that Issue Nos. 2, 3 and 4 are irrelevant for the purposes of the present suit.

Issue No. 6

26. This issue pertains to the occupation of the suit property by the plaintiffs. While discussing Issue No. 1, I have already found that the plaintiffs' occupation of the

property in question is entirely legal. This issue is also decided in favor of the plaintiffs and against the defendant No. 1.

Issue No. 7

27. It has been contended on behalf of the defendant No. 1 that the present suit is barred by limitation. According to the defendant No. 1, Article 54 of the Schedule to the [Limitation Act, 1963](#) needs to be considered for computing the period of limitation. The said Article 54 stipulates that the period of limitation for a suit for specific performance of a contract is three years and the time from which the period begins to run is - 'the date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused'. It was contended on behalf of the defendant No. 1 that in the plaint, it has been averred that the plans were prepared and the construction was raised and the completion certificate was issued on 21.08.1984 and that the defendant No. 1 had signed the documents indicating that she was unable to pay cost of construction and that the plaintiffs should get the sale deed registered in their names. It was, therefore, contended on behalf of the defendant No. 1 that even as per the plaintiffs' case, the refusal on the part of the defendant No. 1 was on 21.08.1984 and that should be construed as the starting point of limitation. Three years from that date would expire on 20.08.1987, whereas the suit was filed on 13.01.1992 and, therefore, the same is time barred.

28. The reference to the document signed by the defendant No. 1 indicating her inability to pay the cost of construction is to Exhibit PW-1/7. This is a document which has several blanks at marks X-1 to X-7. This document had been signed by the defendant No. 1 in 1984. This document also lends support to the conclusion that the building construction agreement was only sought to be a device to enable the plaintiffs to construct on the said plot even prior to the registration of the sale deed in their favour. Nothing turns on this document and the same cannot be regarded as a refusal of performance on the part of the defendant No. 1. This argument of the defendant No. 1 is, therefore, rejected.

29. It has then been contended on behalf of the defendant No. 1 that by the defendant No. 1's lawyer's notice dated 03.11.1988 (Exhibit D-2), it had been

indicated to the plaintiffs that the agreement to sell and agreement to build would not be binding unless these were re-negotiated and in particular the agreement to sell. It was also indicated in the said notice that the agreement to build would be deemed to be void so far as the defendant No. 1 was concerned till the said agreements are re-negotiated. It was, therefore, contended on behalf of the defendant No. 1 that the letter dated 03.11.1988 constituted a refusal of the performance of the agreement between the parties and would, therefore, be the starting point of limitation. Three years from that date would expire on 03.11.1991, whereas the suit has been filed on 13.01.1992 and, therefore, would be barred by limitation.

30. This argument, though appearing to be attractive, is not acceptable. The learned Counsel for the defendant No. 1 failed to refer to various letters and more importantly the letter dated 03.08.1991 (Exhibit DW-1/P-15) issued by the defendant No. 1 to the plaintiffs. In the said letter, there is a reference to the agreements entered into on or about 23.04.1981 and in that context, the defendant No. 1 has stated:

While in equity, justice and law, all those agreements signed on or about 23rd April, 1981 are fast losing relevance because of having not been acted upon for over a decade, I am still willing to cooperate with you and your brother in the above matter so that whatever was agreed upon between us can be acted at least in the spirit in which it was agreed upon but without any loss to me materially or otherwise. Since most of the items in the agreement have become out-dated because of not having been acted upon, I am ready to sign any new agreements also to give effect to our understandings, provided I do not suffer any loss in the process.

xxxx xxxx xxxx xxxx xxxxl am ready to cooperate with you in every way still so that the spirit of the agreement can be honoured but it does look to me that you are least appreciative of my difficulties created solely by your inaction over the agreements for the last ten years continuing with your disregard of my problems.

31. This letter clearly establishes that it is the defendant No. 1 who has been attempting to resile from the original agreement of 23.04.1981/05.05.1981.

Perhaps because the property prices had gone up in the meanwhile, the defendant No. 1 was trying to re-negotiate a better deal for herself, forgetting that she had accepted the entire sale consideration upon a solemn promise to execute the sale deed when the plaintiffs required her to do so. This letter also clearly indicates that the story of repudiation / refusal was not tenable because the defendant No. 1 clearly indicated that she was still willing to cooperate with the plaintiffs so that whatever was agreed upon between them could be acted upon at least in the spirit in which it was agreed upon. The expression 'but without any loss to me materially or otherwise', is clearly indicative of the fact that the defendant No. 1 wanted to make some extra money out of the transaction which had been concluded. This letter clearly indicates that on 03.11.1988, there was no refusal to perform the contract, but only a desire to re-negotiate so as to enable the defendant No. 1 to receive something more than what had been agreed upon. The same sentiment is discernible from this letter dated 03.08.1991 (Exhibit DW-1/P-15).

32. thereforee, I hold that the starting point of limitation for the purposes of filing of the present suit would not be 03.11.1988 as alleged by the defendant No. 1. On the other hand, the plaintiffs have averred in paragraphs 5 and 6 of the plaint that they insisted on sticking to the old agreements and informed the defendant No. 1 by their letter dated 23.11.1991 that she should obtain permission of the DDA and the clearance certificate from the income tax department for executing the necessary sale deed which were the only two matters which remained to be completed. The plaintiffs averred that by their letter dated 23.11.1991 they called upon the defendant No. 1 to execute the necessary sale deed. The defendant No. 1 has failed to do so and, thereforee, the plaintiffs were compelled to file the present suit. In the written statement, there is no denial by the defendant No. 1 of the receipt of the letter dated 23.11.1991 calling upon the defendant No. 1 to execute the sale deed after obtaining permission from the DDA and the clearance certificate from the income tax department. In view of the provisions of Order 8 Rule 3 of the Code of Civil Procedure, 1908, every denial has to be specific. Order 8 Rule 6 thereof provides that every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a

person under disability. A specific allegation has been made by the plaintiffs with regard to the letter dated 23.11.1991 and the demand raised therein for executing the necessary sale deed. This has not been denied by the defendant No. 1. Consequently, the same would have to be construed as having been admitted by the defendant No. 1. The position, therefore, is that the plaintiffs requested for execution of the sale deed by their letter dated 23.11.1991 which has not been complied with by the defendant No. 1. The starting point of limitation, if at all, would be subsequent to 23.11.1991 when the defendant No. 1 received the said letter of 23.11.1991 and failed to act thereupon thereby constituting refusal to perform her part of the agreement by her conduct. The suit was filed on 13.01.1992 and would, therefore, clearly be within time. The suit is, therefore, not barred by limitation and this issue is also decided in favor of the plaintiffs and against the defendant No. 1.

Additional Issue

33. The learned Counsel for the defendant No. 1 raised this issue with regard to the suit being improperly valued for the purposes of court fee and jurisdiction. Though this issue was not seriously agitated, it was contended on behalf of the defendant No. 1 that the suit was actually one for declaration and consequential relief and, therefore, ad valorem court fee on the value of the plot on the date on which the suit had been filed ought to have been paid. However, I find that the suit is actually one for specific performance of the agreement to sell dated 23.04.1981/05.05.1981 and it has been properly styled as a suit for specific performance. Consequently, this issue is also decided in favor of the plaintiffs and against the defendant No. 1.

Issue No. 9 (Relief)

34. It is an admitted position that the plaintiffs are in possession of the suit property. They are, therefore, entitled to a declaration that they are in possession thereof. The plaintiffs have clearly established the execution of the agreement to sell (Exhibit DW-1/P-1) dated 23.04.1981 / 05.05.1981. It has also been established that the plaintiffs have paid the entire sale consideration of Rs 1,80,000/- to the defendant No. 1. Possession of the said suit property was also

handed over the plaintiffs. The plaintiffs had applied to the defendant No. 1 specifically to perform the agreement on her part, but the defendant No. 1 has not done so. The plaintiffs have also demonstrated that they have been and still are ready and willing to specifically perform the agreement on their part of which the defendant No. 1 has had notice. Despite this, the defendant No. 1 has not executed the sale deed. The plaintiffs have already performed their part of the contract and nothing more is required of them. It is only the defendant No. 1 who has to execute the sale deed and complete the transaction. Accordingly, the plaintiffs are entitled to the reliefs prayed for in sub-paragraphs 'a' and 'b' of paragraph 12 of the plaint. The suit is decreed accordingly with costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com