

**(1998) 09 DEL CK 0069**  
**In the Delhi High Court**  
**Case No : FAO (OS) No. 270/94**

R.K. Apartments Pvt. Ltd. and Another APPELLANT  
Vs  
Smt. Aruna Bahree and Others RESPONDENT

**Date of Decision :** 14-09-1998

**Acts Referred:**

**Citation :** (1998) 6 AD 513 : (1998) 1 CLT 338 : (1999) 77 DLT 193 : (1999) 48 DRJ 603 : (1998) 2 ILR Delhi 727 : (1998) 4 RCR(Civil) 663

**Hon'ble Judges :** Y.K. Sabharwal, J;Kripa Shankar Gupta, J

**Bench :** Division Bench

**Advocate :** Mr. Arun Jaitley, Mr. M.R. Chawla and Mr. Navin Chawla, for the Appellant; Mr. Ravinder Sethi Ms. Nandini Sahni, Mr. N.K. Kaul and Mr. S.K. Khanna, for the Respondent

## **Judgement**

K.S. Gupta, J. 1. This appeal by defendants 1 to 2 is directed against an order dated November 17, 1994 of the learned Single Judge allowing is 967/93, dismissing is 2127/93 and confirming the ex-parte injunction order passed in is No. 967/93 on January 27, 1993.

2. Suit was filed, inter alia, alleging that the land measuring 11 Bighas and 10 bids was in Village Kharera now forming part of Hauz Khas was purchased by plaintiffs 2,3,7 and Mrs. Prakash Bhandari, predecessor-in-interest of plaintiff No.1 from Mirza Ayub Beg under separate sale deeds, all dated March 22, 1957. Sale deeds in favor of plaintiffs 2 & 7 were for 2 Bighas and 17 bids was each while favouring plaintiff No.3 and Mrs. Prakash Bhandari for 2 Bighas and 18 bids was each. Mrs. Prakash Bhandari gifted her share in the land to her daughter, plaintiff No.1 under a registered gift deed dated January 28, 1970. There had been dispute between the plaintiff No.1, her son Vidur Bahree, defendant No.3 and her brother Deepak Bhandari, defendant No.4 about the land and that was referred to arbitration under the agreement dated March 27, 1989. By the award dated March 31, 1990, plaintiff No.1, defendants 3 & 4 were held to be entitled to one-third share each in the land purchased by said Mrs. Prakash Bhandari. It

is further alleged that plaintiff No. 3 gifted one-fifth share each of the land purchased, to her sons Anand Kumar Chopra, Satish Kumar Chopra, plaintiff No.4 and Ajit Kumar Chopra, plaintiff No. 5 under three separate registered gift deeds, all dated April 27, 1968. Remaining 2/5th share was later on gifted under a registered gift deed dated March 6, 1985 by plaintiff No.3 in favor of her two daughters Dr. (Ms.) Kusum Chopra, plaintiff No. 6 and Mrs. Malti Anand, defendant No.5. It is stated that the aforesaid land was sought to be acquired by Delhi Administration and the proceedings for quashing the acquisition were pending in the High Court. Defendants 1 & 2 approached the plaintiffs and defendant No.5 through a common friend to enter into joint venture agreement(s). plaintiffs 1 & 7 as also plaintiffs 4 & 5 (jointly) entered into three separate joint venture agreements, all dated 1st March, 1985 with defendant No.1. Two identical joint venture agreements were executed by plaintiff No.2 and plaintiffs 3 & 6 & defendant No.5 jointly with defendants 1 & 2 dated March 11, 1985. Under the joint venture agreements dated 1st/11th March, 1985, defendant No.1 agreed to develop and construct commercial and residential complexes on the said land at its own cost and with its resources and in consideration thereof it was entitled to execute transferable rights to the extent of 65% of the total built up and parking area etc. This ratio was subsequently reduced to 63% on March 15, 1985. It is alleged that defendants 1 & 2 made payments of Rs. 25,000/- in respect of each of the aforesaid joint venture agreements at the time of their execution and Rs. 75,000/- each were to be paid at the time the land became free from acquisition and clearance obtained under the Urban Land (Ceiling & Regulation) Act, 1976 (for short "the Act"). The acquisition proceedings in respect of the said land were quashed by the judgment dated August 14, 1987. Clause 20 of the aforesaid joint venture agreements provide as under:-

"That in case inspire of the best efforts on the part of the builders, the plot of land in question and the clearance is not obtained under Urban Land & Ceiling Act and all impediments to construction not removed within a period of five years from the date of this agreement, this agreement would become null and void and the builders would be entitled to get back only their security deposit and no other expense incurred by the builders will be reimbursed by the owners."

3. It is pleaded that within the stipulated period of five years the defendants 1 & 2 had not been able to obtain the necessary clearance under the Act for the entire land nor did they get the plan finalised seeking permission for construction of the building on the land in suit. Said agreements thus have become null and void. Suit land continues to be in possession of the plaintiffs and defendants 3 to 5. It was prayed that it be declared that the joint venture agreements dated 1st/11th March, 1985 have become null and void and defendants 1 & 2 be permanently restrained from interfering with the possession, use and enjoyment of the suit land by the plaintiffs and defendants 3 to 5. Defendants 1 & 2 are further sought to be restrained from using or having access to the land in suit.

4. Along with the suit, aforesaid is No. 967/93 under Order XXXIX Rules 1 & 2 with Section 151 CPC was filed by the plaintiffs and by the order dated January 27, 1993 defendants 1 & 2 were restrained from interfering with the possession, use and enjoyment of the land in suit by the plaintiffs besides being restrained from holding out threat or removing the chowkidar of the plaintiffs there from.

5. Defendants 1 & 2 contested that suit by filing written statement. Aforesaid is No. 2127/93 under Order XXXIX Rule 4 read with Section 151 CPC was further filed by them for vacation of the ex parte order dated January 27, 1993. In the written statement and the IA, execution of the five joint venture agreements dated 1st/11th March 1985 is admitted by defendants 1 & 2. However, it is stated that under these agreements following impediments were to be removed by them:-

- (a) suit land had to be denotified from acquisition under the Land Acquisition Act;
- (b) suit land had to be got cleared under the Urban Land (Ceiling & Regulation) Act, 1976 ; and
- (c) unauthorised occupants had to be removed from the suit land.

6. Defendants 1 & 2 got the land denotified from the acquisition by constantly following the legal proceedings. They got the suit land vacated from the encroachers after paying compensation to them. They further got the land leveled and boundary wall constructed around it. Simultaneously defendants 1 & 2 took steps for getting the suit land cleared under the Act. Statements as prescribed by sub-section (1) of Section 6 of the Act were filed with the Competent Authority and clearance obtained in respect of 4000 metres of land standing in the names of plaintiffs 1,2,3 & 7. Suit land was, thus, free from the three impediments by 1987. It is pleaded that at this stage the plaintiffs through their Power of Attorney, defendant No. 5, insisted that defendants 1 & 2 try for obtaining exemption for the excess vacant land and get permission for group housing scheme. Defendants 1 & 2 though not required under the said agreements to obtain such exemption u/s 20 of the said Act but for the mutual benefit accepted to do so at the plaintiff's instance. They applied for exemption of the excess land for group housing scheme. plaintiffs assured defendants 1 & 2 that the time stipulated in the aforesaid agreements stand suitably extended. It is claimed that the time was not the essence of the contract. It was only in July 1992 that Delhi Administration formulated a new scheme known a Shelter Fund Policy for the purpose of grant of exemption of excess vacant land under the Act. Thereafter applications u/s 20 of the Act were taken up and when the plaintiffs were about to get the exemption they became dishonest and filed the present suit. It is alleged that the relationship between the plaintiff & defendants 1 & 2 is that of the owner and builder under the aforesaid joint venture agreements. Immediately after execution of these agreements plaintiffs had put the defendants 1 & 2 into the possession of the suit land and the suit is not maintainable the plaintiffs being out of possession of the land in suit. Power of

Attorneys given by the plaintiffs and defendant No.5 in favor of defendant No.2 pursuant to the aforesaid joint venture agreements were irrevocable. Had the plaintiffs and defendants 3 to 5 not entrusted the job of seeking exemption u/s 20 of the Act to defendants 1 & 2, the building would have been completed long back. It is emphatically denied that the aforesaid joint venture agreements have lapsed by efflux of time, as alleged. It is stated that the order dated January 27, 1993 deserves to be vacated.

7. In this appeal main contest is between defendants 1 & 2, on the one hand, and the plaintiffs, on the other hand. We have heard Sh. Arun Jaitley, Senior Advocate, appearing for defendants 1 & 2 and Sh. Ravinder Sethi, Sr. Advocate, for the plaintiffs and have also been taken through the record.

8. One of the submissions made by Sh. Jaitley was that all the three impediments referred to in para 20 of the joint venture agreements dated 1st/11th March, 1985 were removed within 2-1/2 years of the execution of these agreements by the appellant/defendants 1 & 2. It was on the insistence of the plaintiffs and defendants 3 to 5 respondents who did not want to surrender the excess vacant land, that the defendants 1 & 2 though not required under the aforesaid agreements accepted to develop the land under group housing scheme and seek exemption u/s 20 of the Act. Shelter Fund Policy for grant of exemption came to be formulated by Delhi Administration only in July 1992. Therefore, assuming that the period of five year as stipulated in Clause 20 of the agreements in question was the essence of the contract, it ceased to be so by reason of the said additional work entrusted to defendants 1 & 2. While refuting the above submission, the argument advanced by Sh. Sethi was that the development of the land under the group housing scheme was envisaged at the time of the execution of the agreements dated 1st/11th March, 1985 itself and the plea of alleged entrustment of additional work to defendants 1 & 2 is an afterthought. In support of the submission our attention was drawn to the General Power of Attorney executed by Smt. Savitri Devi Chopra (plaintiff No.3), Dr.(Ms.) Kusum Chopra (plaintiff No.6) and Mrs. Malti Anand (defendant No.5) dated 11th March, 1985 (photostat copy at pages 1 to 5 of the documents filed on 13th August, 1998). Identical power of attorneys are stated to have been executed by the executants of the remaining four joint venture agreements in favor of R.K. Dhawan, defendant No.2. These power of attorneys seem to have been executed simultaneously with the execution of the joint venture agreements dated 1st/11th March, 1985. Sub-clause (i) of Clause 1 of the aforesaid power of attorney which is relevant reads thus:-

"The Power of Attorney holder, Shri R.K. Dhawan is authorised to assist and expedite construction process by

(i) obtaining sanction for group housing scheme under the Urban Land & Ceiling Act;

....."

9. If the land covered by the five joint venture agreements was not to be developed under the group housing scheme, there was absolutely no occasion to have inserted above clause 1(i) in the power of attorneys. Said clause 1(i) thus improbabilises the stand about entrustment of additional work of seeking exemption u/s 20 of the Act now taken by defendants 1 & 2. Decision in State of Karnataka Vs. M/s. Coimbatore Premier Constructions, 1988 (1) Karn L.J. 249 and the statement made in Article 22-035 of the Chitty on Contracts (Twenty Seventh Edn.) (Venture I) on page 1086 relied of behalf of defendants 1 & 2 have no applicability to the facts of the instant case.

10. Relying on the decisions in Shambhulal Panalal Vaish Vs. Secretary of State, AIR 1940 Sing 1, Hind Construction Contractors by its Sole Proprietor Bhikamchand Mulchand Jain (Dead) by Lrs Vs. State of Maharashtra, & K. Abdulkhadar Vs. The Plantation Corporation of Kerala Ltd., Kottayam, , it was further submitted by Sh. Jaitley that the point whether time is essence of the contract, is a question of intention of the parties to be gathered from the terms of the contract and the provision for imposition of penalty and extension of time militate against such an inference. According to him, since clause 5 of the agreements dated 1st/11th March, 1985 provide for imposition of damages @ 10,000/- per month on defendants 1 & 2 in the event of their stopping or delaying the construction work, the period of five years could not have been the essence of contract in this case. As a part of this submission relying on the decisions in Govind Lal Chawla Vs. C.K. Sharma and Others, , it was also contended by him that in cases involving immovable properties, time can never be the essence of the contract. There cannot be any quarrel in regard to the proposition of law as laid down in the decisions in M/s. Hind Construction Contractors", Shambhulal Panalal"s & K. Abdulkhadar"s cases (supra) but in all these cases the construction work had began but was not completed within the time allowed which is not the situation here. In the present case by the time the suit came to be filed on 27th January, 1993 admittedly defendants 1 & 2 had not even submitted the building plans for sanction by the appropriate authorities nor the exemption as required by Section 20 of the Act for developing the suit land under group housing scheme was obtained. Decision in Govind Lal Chawla"s case (supra) was rendered with reference to contract for sale of land u/s 55 of the Contract Act. Obviously, this decision has little relevance on the issue at hand. Since this appeal is to be decided taking a prima facie view of the matter, we refrain from further examining in depth the merits of the submission referred to above advanced by Sh. Jaitley.

11. It was further urged on behalf of defendants 1 & 2 that under subsection 3(c) of Section 14 of the Specific Relief Act, 1963, joint venture agreements in question being for construction of building can be legally enforced against the plaintiffs and for that reason the reliefs granted in terms of the impugned order ought not to have been given to them. Said sub-section 3(c) of Section 14 which was inserted in 1967 and is relevant provides as under:-

"Notwithstanding anything contained in clause (a) or clause (c) or clause (d), of sub-section (1), the Court may enforce specific performance in the following cases:

.....

(c) where the suit is for the enforcement of a contract for the construction of any building or the execution of any other work on land:

Provided that the following conditions are fulfilled, namely.....

(i) the building or other work is described in the contract in terms sufficiently precise to enable the Court to determine the exact nature of the building or work;

(ii) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief; and

(iii) the defendant has, in pursuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed."

12. On a bare perusal of the above provision it is manifest that for applicability thereof there should be a suit for specific performance of the contract for construction of building or the execution of any other work on land. At the cost of repetition it may be stated that the present suit is for declaring the joint venture agreement dated 1st/11th March, 1985 as null and void and for permanent injunction. Defendants 1 & 2 have not filed any suit for specific performance of the said agreements so far. They can be compensated in terms of money. Therefore, apparently no help can be sought from the said provision by defendants 1 & 2.

13. This brings us to yet another important submission advanced by Sh. Jaitley that defendants 1 & 2 were put in possession over the suit land under the agreements dated 1st/11th March, 1985 in part performance thereof and, Therefore, they are entitled to protect their possession by virtue of the provision contained in Section 53A of the Transfer of Property Act. Additionally, it was urged that defendants 1 & 2 had an implied irrevocable license to occupy the suit land until completion of the construction and in support of this submission strong reliance was placed on the decisions in Hounslow London Borough Council Vs. Twickenham Garden Developments, (1970) 3 All E.R. 326. On the contrary, it was point out by Sh. Sethi, Senior Advocate that the said decision did not lay down the correct law and was even doubted in England. He referred particularly to Articles 4.145 at page 572 and 4.305 at page 679 of the Hudson's Building and Engineering Contracts, (Eleventh Edition) (Volume I)

14. Statement made in said Article 4.145 reads thus:-

"Although the word "possession" is almost invariably used in the express provisions of main contracts and in the terminology of the industry, it is clear

that this does not mean exclusive possession in the legal sense (as would be the case in the tenancy, for example) but merely a temporary and revocable right of occupation incidental to, and only to the extent reasonably required by, the work undertaken by the contractor in his contract. In England in 1971, however, the contractor, under an ordinary standard form of main contract, was held to have an implied irrevocable license to occupy the site until completion (that is, revocable only in accordance with the terms of the contract and so, in an appropriate case, enforceable by injunction against the owner). This decision seemed obviously wrong, for compelling consensual reasons as well as of business practicality, and was almost immediately analysed and doubted in 1972 in the Law Quarterly Review and shortly after powerfully disapproved in well-reasoned decisions in New South Wales and New Zealand, which are clearly to be preferred as a statement of the law, it is submitted....."

15. Statement made in said Article 4.305 which too is relevant reads as under:-

"One converse situation, in which it has been argued that contractors have a right to enforce a building contract as against the owner, should be mentioned. This stems from the single decision in England in 1971 of Hounslow London Borough Council Vs. Twickenham Garden Developments, where Megarry J. refused to grant an injunction requiring a builder to vacate the site to an owner who had terminated a building contract under Clause 25 of the RIBA/JCT conditions, on the ground that there was an implied negative obligation of the owner not to revoke the builder's license wrongly, and until the validity of the determination, which was disputed, had been satisfactorily established in arbitration or litigation no injunction should issue. The case is analysed and heavily criticised as being inconsistent with both consensual and practical considerations in a construction context. It has been expressly not followed in a number of powerful judgments independently arrived at in Victoria, New South Wales and New Zealand. It has been more recently doubted in England....."

16. From the aforesaid statements made in both the Articles it is manifest that the legal position enunciated in Hounslow London Borough's case (supra), is no more a good law. Possession of the suit land delivered to defendants 1 & 2 at the time of the execution of the agreements dated 1st/11th March, 1985 was only by way of temporary measure for undertaking the construction work by them and the exclusive possession thereof in legal sense remained with the executants of the said agreements. Thus, defendants 1 & 2 prima facie are not entitled to protect their possession over the suit land under said Section 52-A of the Transfer of Property Act.

17. Lastly, it was canvassed on behalf of defendants 1 & 2 that Deepak Bhandari, defendant No. 5 much after the lapse of the period of five years, on 20th June, 1991 had executed a General Power of Attorney in favor of Lalit Mittal, one of the directors of defendant No.1 and the executants of the five agreements in question. Therefore, by their conduct had waived the requirement of the completion of work within the time stipulated in the agreements. It is not in

dispute that said defendant No.5 did execute that power of attorney which was revoked after the filing of the present suit by him. Waiver of a right is essentially a question fact and it has to be conscious, deliberate and intentional. (See : Boota Ram Vs. Balmukand, (1971) 7 DLY, 299 and Basheshar Nath Vs. The Commissioner of Income Tax, Delhi and Rajasthan and Another, ). Mere execution of the said power of attorney by defendant No. 5 prima facie thus cannot operate as a waiver of the rights of the plaintiffs under agreements dated 1st/11th March, 1985.

18. After the conclusion of the arguments defendants 1 & 2 have placed on record the copies of the order in FAO(OS) No. 122 & 124/96 - Vijay Dixit Vs. Shiela Khanna passed by a Division Bench of this Court on 27th March, 1996 and the order dated 17th February, 1997 passed by the Supreme Court in Civil Appeal No. 1327 and 1540/97 arising out of SLP (C) No. 16275/96 in the said case. As is manifest from both these orders, order passed by the learned Single Judge dismissing the applications under Order 39 Rules 1 & 2 in suit for specific performance, was upheld by the Division Bench and in the Supreme Court statement made by the learned counsel of Shiela Khanna that she has agreed that the portion which she got in respect of the disputed premises by arrangement with Ajit Singh will not be transferred or alienated in any manner until the disposal of the suit or without the leave of the Court where the suit is pending, was taken on record with the observation that the trial court while disposing of the suit will not be influenced by any observation made in disposing of the interlocutory application. In the preceding paras of this order, we have specifically dealt with points raised on behalf of the appellants and both the aforesaid orders seem to have no direct bearing on those points.

19. For the foregoing discussion, the appeal deserves to be dismissed.

20. Consequently, the appeal is dismissed. No order as to costs.