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IN THE HIGH COURT OF DELHI AT NEW DELHI

CS(OS) 1840/1997

Reserved on : January 17, 2008

Pronounced on : January 28, 2008

RAM KISHAN GUPTA & ORS.

... Plaintiffs

Through : Mr. Hemant Malhotra, Advocate

Vs.

SMT. RAJWATI AND ORS.

... Defendants

Through : Defendants are Ex-parte

CORAM

Mr. Justice S. Ravindra Bhat :

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| 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 the Digest? | YES |

MR. JUSTICE S. RAVINDRA BHAT:

1. In this suit, the plaintiffs seek a decree for specific performance against the defendants, to enforce an agreement to sell, dated 23.5.1996, and dated 22.7.1996 (hereafter called “the first agreement” and “the second agreement” respectively). The property in question is RZ-74/4D, JNU Road, Kishan Garh, Vasant Kunj (hereafter called “the suit property”).

2. According to the averments in the plaint, in terms of the first agreement, the suit property, measuring 800 square yards was agreed to be sold for a consideration of Rs. 4,000/- per square yards for 200 square yards, forming the front part of the plot and the balance i.e. 600 square yards at the rate of Rs. 2500/- per square yards. On the same day i.e. 23.5.1996, defendants 1 to 3 received Rs. 50,000/- and executed the agreement-cum-receipt. They agreed to persuade the forth defendant to sign the agreement. It is further alleged that later the defendants wanted to sell only 700 square yards and not 800 square yards which let to execution of the second agreement between the plaintiffs and defendants 1 to 3. In that agreement, in addition to Rs. 50,000/- paid earlier, the sum of Rs. 70,000/- was paid by a cheque issued the same day was reflected.

3. It is alleged that in stead the possession of the whole plot, possession of only one shop was given by the defendants 1 to 3 to the plaintiffs. The said defendants agreed to persuade the fourth defendant to concur with the contract. It is also averred that all the defendants received payments towards sale consideration, including the fourth defendant. This signified his agreement to sell the property to the plaintiff, along with the other defendants. The defendants are alleged to have received Rs. 3,39,200/- from the plaintiffs as against the total sale consideration of Rs. 20,50,000/-. According to the plaintiffs, the defendants later played a fraud on them because on 4th/5th June, 1997, they saw that

defendants were planning to construct a partition wall in the plot. On being asked the defendants alleged that they would not execute the agreement. It is further averred that the defendants are under contractual obligations to sell and transfer the property only to the plaintiffs and execute a proper sale/transfer deed and complete all necessary formalities. The plaintiffs express readiness and willingness to perform their part of the agreement and pay the balance consideration.

4. The defendants filed a common written statement . In this it is alleged that the first agreement stood frustrated when the cheque for Rs. 40,000/- issued by the plaintiffs was dishonoured due to insufficiency of funds. The defendants also deny that the fourth respondent was a party to either agreement at any time. It is alleged that the agreements are incapable of performance and are vague. Defendants further aver that the plaintiffs failed to perform their part of the contract and that the agreement is indefinite. The allegations that the fourth defendant ratified the agreements and agreed to execute a sale deed or part with the property is denied. In the preliminary objection taken it is alleged that the two agreements are independent and separate and one suit is not maintainable for the purpose. It is also averred that the agreement was conditional and, therefore, not capable of performance.

5. The plaintiffs have in support of their case, relied upon the agreement-cum-receipt dated 23.5.1996 (Ex. 'P-1'); Agreement to Sell dated 22.7.1996 (Ex. 'PW-1/3') and receipts Ex. 'PW-1/4' to 'PW-1/32'). The plaintiffs have also relied on the site plan of the suit property (Ex. 'PW-1/1'). The defendants, who were initially represented and had participated in the proceedings, were un-represented for more than a year. In the meanwhile, their written statements had been placed on record. The affidavit of evidence of the plaintiffs was filed. In these circumstances, the defendants were set down ex-parte on 5.10.2007.

6. PW-1 Sh. Ramesh Chander Gupta tendered his affidavit dated 15.9.2004; he is the second plaintiff. He supported the averments in the plaint and alleged that as on 22.7.1996 the defendants had received a sum of Rs. 1,70,500/- while the remaining amount was agreed to be paid to the defendants at the time of the execution of the sale deed. According to his deposition defendants 1 & 2 agreed and assure that they would obtain the necessary no objection certificate or relinquishment deed from the fourth defendant. He also testified as to the contents of the exhibits filed in support of the suit and stated that the plaintiffs are ready and willing to pay the balance of Rs. 17,10,800/- towards the fulfilling their part of the bargain.

7. PW-2 Sh. Naresh Kumar, whose statement was tendered in evidence on

23.9.2005, deposited to his affidavit dated 16th September, 2004. That affidavit supports the version of PW-1.

8. This Court, by its order dated 27th September, 2002 had framed the following issues:

- i) Whether the suit filed by the plaintiffs is not maintainable in view of the preliminary objection No.1 raised in the written statement? OPD
- ii) Whether the suit is bad for mis-joinder of defendant No.4? OPD
- iii) Whether the plaintiffs are entitled to a decree of specific performance of agreements dated 23.5.1996 and 22.7.1996 as prayed? OPP
- iv) Whether the agreements dated 23.5.1996 and 22.7.1996 are not enforceable against the defendants on the ground mentioned in the written statement? OPD
- v) Relief.

9. After considering the pleadings and arguments of the counsel for the plaintiffs and examining the evidence on record, the findings of this Court are as follows:-

Issue No.1	: No
Issue No.2	: No.
Issue No.3	: No
Issue No. 4	: Yes
Issue No. 5	: Nil

REASONS

Issue No.1

10. The preliminary objection of the defendants is that the plaintiffs are pleading to separate and independent agreement and also seeking their enforcement through one common suit. The objection is that a common action in this regard is not maintainable.

11. The averments in the plaint reflect that the parties initially entered into an agreement on 23.5.1996 for sale of 800 square yards plot. The further averments are that the agreement showed fixation of differential rate of front and rear side of the suit property; the subject matter was sale of the suit property to the extent of 800 square yards. The second agreement, however, reduced the area; in stead of 800 square yards, the defendants were alleged to have agreed to sell 700 square yards. While no doubt the claim in the relief clause is for specific performance of both the agreements, what is in effect sought for is the enforcement of the latter agreement for sale of the area of 700 square yards. If one were to strictly construe the averments in the plaint it would appear that the agreements are in a sense treated as a separate. Yet there is no denying that an overall reading of the averments disclose that the plaintiffs are treating both the agreements as part of one transaction. In view of this, the argument about mis-joinder of

causes of action, in the opinion of the Court, is mis-placed. This issue is, therefore, answered in the negative.

Issue Nos 2

12. The question is whether the suit is bad for mis-joinder of the fourth defendant. This is for the reason that the said defendant is undisputedly not a party to either of the two agreements, adverted to by the plaintiff, and for which specific performance has been claimed. The plaint averments do not anywhere mention that the said defendant was present during the transaction. The averments do, however allege that the other defendants agreed to convince or persuade him to issue a no objection for the agreements, and join in it.

13. It was argued by Mr. Hemant Malhotra on behalf of the plaintiff that although the fourth defendant was not a party to the agreements, his concurrence and ratification of the same is a matter of inference; the plaintiff specifically averred about his having received amounts, thus implying to be party to the transaction.

14. The averments in the plaint and the documents relied upon show that the suit property was jointly owned by all the defendants. Yet, the fourth defendant chose not to be a part of the agreement. There are some averments in the suit about his having

accepted some amounts and the allegation that he therefore ratified it. Yet, those averments are imprecise as to the dates, amounts paid and whether the amounts received by him were in fact towards the two agreements for which specific performance has been sought. In the absence of these vital facts it is not possible to conclude that he was a party to the transaction, or had any dealing with the plaintiffs on the subject matter of these proceedings. The plaintiffs have relied upon documents, being Exh.PW-1/6 dated 31-8-1996, for Rs. 10,000/-; Exh.PW-1/7 dated 20-10-1996, for Rs. 20,000/-; Exh.PW-1/19 dated 24-12-1996, for Rs. 1,000/- ; Exh.PW-1/21 dated 26-12-1996, for Rs. 5,000/- ; and Exh.PW-1/23 dated 9-1-1997, for Rs. 2,000/-, for the argument that defendant No. 4 had received certain amounts towards the transactions. Yet, particulars of these are absent in the plaint. Moreover, a look at these, documents reveal that the said defendant mentioned consistently about sale of a 100 square yard plot. The documents do not advert to any other transaction, certainly not to the agreements between the plaintiffs and the other defendants. For these reasons, the court is of the opinion that the inclusion of the Defendant No. 4 amounts to mis-joinder. However, the second issue in this regard cannot be held against the plaintiffs, in view of the express provision of Order 1, Rule 9 of the Civil Procedure Code, 1908 ("the Code") which enacts that no suit can be defeated on the ground of mis-joinder or non-joinder of a party and the court has to proceed with the matters at controversy; the caveat enacted in the proviso is that non-joinder of a necessary

party would be fatal to the proceedings. Therefore, issue No. 2 also has to be answered in the negative.

Issue Nos. 3 and 4:

15. These issues can be taken up together conveniently, since the facts and pleadings concerning a trial on them overlap; they go into the root of the claim for specific performance. The first agreement is in the form of a receipt cum agreement. After the recital, it provides that the sellers, i.e the Defendant Nos 1-3 agree to sell the suit property comprising of the front portion 200 square yards, @ Rs. 4000/- per square yard and the balance, rear portion @ Rs. 2500/- per square yard. Receipt of Rs. 50,000/- (Rs. 40,000/- by cheque and Rs. 10000/- in cash) was acknowledged. The sellers reserved the right to sell the land to anyone else if 10% of the total consideration was not paid by the plaintiffs within 60 days.

16. The second agreement, Exh. PW-1/2 dated 22-6-1996 recites about the first agreement and that Rs. 50,500/- was paid towards consideration pursuant to it; Rs. 500/- was paid on 18-5-1996 to D-2 Nepal Singh and D-3 Karamveer Singh. It also states that later, the parties agreed that only 700 square yards would be sold. It acknowledges receipt of Rs. 1,20,000/- by defendant Nos. 1-3. Clause 3 mentions that the consideration for the front portion would be at the rate of Rs. 4,000/- per square yard and the balance, rear

portion (500 square yards) @ Rs. 2500/- per square yard. Clause 4 obliged the first three defendants to secure a no-objection certificate from the fourth defendant, Jaipal Singh. The total amount was payable upon construction on the plot. This condition, i.e clause 5 is incomplete, as it originally referred to some time period i.e *“the completion of construction xxxxxxxxxxxx from today whichever is earlier.”* The *“xxxxxx”* appearing in the agreement has been struck off; thus clause 5 has been rendered inchoate. Clause 6, states

“That on receipt of the total amount, the Vendors shall execute a proper transfer deed, “ and if they fail to execute the proper Sale deed or transfer deed as required within a period of five months thereafter the Vendee shall be entitled to get the same executed through court of law”.

17. It is thus clear that the agreement did not fix any time frame; though it did mention a period originally. The reference to such period was deleted. The obligation of the vendee i.e the Defendant Nos. 1-3 was to arise on the completion of payment of the entire amount by the plaintiffs; the latter could call upon the defendants to execute the sale deed. The plaintiffs expressly say that an amount of Rs. 3,39,000/- was paid to Defendants; they rely upon receipts being Exh. PW-1/4 to PW-1/32 series; the last, PW-1/32 is dated 10-3-1997. They aver, and their counsel contends, about their readiness and willingness to pay the balance amount, to get the sale deed registered.

18. An overall conspectus of the pleadings and the evidence, documentary as well as oral show that the total consideration agreed upon for the execution of sale deed was in excess of Rs. 20 lakh. This is on the assumption that what in essence the plaintiffs seek from this Court is the specific performance of the second agreement and the reference to the first agreement is only for the sake of completeness. Undeniably, the plaintiffs and defendants 1 to 3 executed the second agreement in June 1996. The evidence on record shows that according to the plaintiffs, a total sum of Rs. 3,39,200/- was paid. The reference to the fourth defendant in the agreement was necessary because he is a joint owner and in undivided possession of the property along with the defendants 1 to 3. In the earlier part of this judgment the Court had concluded that no clear agreement between the plaintiffs and said fourth defendants had been established.

19. Section 12 of the Specific Relief Act 1963 enacts that part of an agreement cannot be subject matter to a decree for specific performance. The question therefore is whether in the absence of the fourth defendant, the plaintiffs can nevertheless seeks enforcement of the agreement to sell, so far as it concerns the undivided right, title and interest of the defendants 1 to 3. In a decision of the Supreme Court reported as *Shanmughasundaram vs. Diravia Nadar*, 2005 (1) Arb. L.R. 401, it was held that the absence of one party to an agreement, for sale of joint property would be a bar for its specific performance under

Section 12.

20. Quite apart from the above consideration, the Court has to independently examined whether even otherwise the material on record entitle the plaintiffs to the decree sought for them. Two important considerations always weigh with the Court while adjudicating a claim for specific performance of a contract of sale of immovable property. One, whether the plaintiff had pleaded and proved readiness and willingness to perform his part of the contract and two, whether the equities of the case demand that such a decree be made. (see *Yohanan vs. Ram Latha*, 2005 (7) SCC 534; *Suryanarian Upadhayay vs. Ram Roop Pandey*, AIR 1994 SC 105 and *Ouseph Verghese vs. Joseph Aley*, 1969 (2) SCC 539).

21. Learned counsel for the plaintiff was able to point out the averment in the suit to submit that the necessary pleadings had been made. He also referred to the affidavit of evidence of PW-1 and PW-2 for the contention that the plaintiffs always ready and willing and continued to be so for the performance of their. It is now established law (refer *Chand Rani vs. Kamal Rani*, 1993 (1) SCC 519) that there is no presumption that the time is not of the essence of the contract, in the case of an agreement to sell immovable property yet at the same time absence of any stipulation does not relieve the parties concerned from the obligation to perform it within reasonable time. As to what is

reasonable time would vary from case to case having regard to attendant facts and circumstances. In this case, the first agreement did not advert to any time. It, however, specifically referred to the obligation of the plaintiff to pay 10% of the total consideration within 60 days failing which the defendants 1 to 3 were free to sell the property to anyone else; the second agreement does not contain such a condition. It casts an obligation upon the sellers/ defendants 1 to 3 to execute the sale deed after receiving the total amounts and upon demand by the plaintiffs. In the event of their failure within five months of fulfillment of such condition, the plaintiffs were free to have the contract enforced through the legal process. The materials on record relied upon by the plaintiffs show that payment of Rs. 3,39,200/- was made to defendants over a period of nine months. However, nothing is mentioned as to when the plaintiffs approached the defendants with the balance amount or called upon to them to execute the sale deed. A vague averment about the defendants having constructed a partition wall on the suit property is pleaded. The plaintiffs' witnesses have not spoken about any specific date or incident when the defendants, though offered the full balance consideration, refused to perform the contract or refused to execute the sale deed. Similarly, no demand or legal notice issued to the defendant was relied upon or placed on the record. In view of these, this Court concludes, that the plaintiff has failed to prove readiness and willingness to perform its part of the contract.

22. In view of the above reasons, the plaintiffs are not entitled to claim a decree of specific performance of the agreements dated 23.5.1996 and 22.9.1996. For the same reasons, the said agreements are not enforceable against the defendants.

Issue No.5:

23. In view of the findings and reasons recorded for issues No. 3 and 4, no relief can be granted in the suit.

24. In view of the above findings and reasons recorded above, this Suit has to fail; it is accordingly dismissed. No costs.

JANUARY 28, 2008

(S. RAVINDRA BHAT)
JUDGE