

*

IN THE HIGH COURT OF DELHI

Judgment reserved on : December 10, 2008

%

Judgment delivered on : December 12, 2008

+

RFA No. 159/2003

IQBAL AHMED

..... Appellant

Through: Mr.Anis Suharwrdi, Advocate,
Mr.M.Y.Khan, Advocate and
Mr.M.Rais Farooqui, Advocate.

versus

ABID KHAN & ORS.

..... Respondent

Through: Mr.S.K.Bhaduri, Advocate for
respondent No.1

CORAM:

Hon'ble Mr.Justice Pradeep Nandrajog

Hon'ble Mr.Justice J.R. Midha

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether judgment should be reported in Digest?

: PRADEEP NANDRAJOG, J.

1. The appellant was the defendant No.3. Respondent No.1 was the plaintiff. The battle in the suit for specific performance was fought by the two. Defendant No.1, 2 and 2-A were proforma parties. Hence, they have no concern with the litigation.

2. Respondent No.1 filed a suit for specific performance basing his claim on an agreement to sell dated 28.12.1995, Ex.PW-1/5, wherein appellant was stated to have agreed to sell his property bearing No.33/127, Trilok Puri, Delhi

to him for a sale consideration of Rs.3,20,000/- (Rupees Three Lacs Twenty Thousand only) out of which, as recorded in the agreement, Rs.1,20,000/- (Rupees One Lac Twenty Thousand only) was received when agreement was executed and the sale had to be completed by 1.5.1996. A separate receipt, Ex.PW-1/6, issued by the appellant acknowledging receipt of Rs.1,20,000/- (Rupees One Lac Twenty Thousand only) was also relied upon. It was pleaded that the plaintiff was ready and willing to pay the balance sale consideration and that the appellant was not receiving the same.

3. In the written statement, the appellant described the agreement to sell as a forged document. He denied having executed the receipt. He pleaded that he had received Rs.1,20,000/- (Rupees One Lac Twenty Thousand only) by a bank draft drawn on the State Bank of India from one Sohan Lal Kukreti with whom he had an agreement to sell his house bearing No.34/89, Himmat Puri, Trilok Puri, Delhi.

4. Needless to state on the respective pleadings the material issues which arose for consideration at the trial were whether Ex.PW-1/5 was executed by the appellant and whether the respondent was ready and willing to perform his obligations under the contract.

5. The plaintiff stepped into the witness box as PW-1 and stated that he was desirous of purchasing the property.

That the appellant wanted a bankers cheque drawn on the State Bank of India and since he did not have an account with the bank, the bank refused to issue any bankers cheque. That he took the help of Sohan Lal Kukreti who had an account in the said bank. That he withdrew Rs.1,25,000/- (Rupees One Lac Twenty Five Thousand only) from his bank account maintained with Punjab National Bank, Trilok Puri; withdrawal entry being duly reflected in his pass book Ex.PW-1/1; and deposited Rs.1,20,100/- (Rupees One Lac Twenty Thousand One Hundred only) in the account of Sohan Lal Kukreti evidenced by the counterfoil of the deposit slip, Ex.PW-1/2, and a certificate issued by the banker to said effect, Ex.PW-1/3. That the withdrawal was further evidenced by the certificate issued by Punjab National Bank Ex.PW-1/4. He stated that thereafter State Bank of India prepared the bankers cheque by debiting the account of Sohan Lal Kukreti which he paid to the appellant when the agreement Ex.PW-1/5 was executed and the receipt Ex.PW-1/6 was also executed. He identified the signatures of the appellant on the two documents at point 'A'. He identified the signatures of the witnesses at points 'C', 'D', 'E, and 'F'. He deposed that in April 1996 he got prepared two bank drafts in sum of Rs.1,80,000/- (Rupees One Lac Eighty Thousand only) and Rs.20,000/- (Rupees Twenty Thousand only) respectively in the

name of appellant, but since the appellant did not receive the money he got the two drafts cancelled evidenced by Ex.PW-1/7, a certificate dated 15.3.1999 was issued by the State Bank of India certifying that two bankers cheques issued in favour of the appellant were got cancelled at the request of the respondent at whose instance the drafts were prepared.

6. The respondent examined three other witnesses being Bundu Khan as PW-2, Mehfooz Ali as PW-3 and Habib Khan as PW-4 all of whom claimed to be witnesses to the agreement Ex.PW-1/5. They affirmed the stand of the respondent.

7. Appellant examined himself as DW-1 and as against the stand pleaded in the written statement that Ex.PW-1/5 was a forged document deposed somewhat at a variance viz-a-viz his pleadings, by stating that the last page thereof bore his signatures but that the first two pages were not a part of the agreement. He deposed that he had entered into an agreement with Mr.Sohan Lal Kukreti to sell property bearing No.34/89, Himmat Puri, Trilok Puri, Delhi to him and that he had received Rs.1,20,000/- (Rupees One Lac Twenty Thousand only) from said Sohan Lal Kukreti as part sale consideration. The appellant examined DW-2, Shamil Ahmed, who also deposed in lines of the appellant pertaining to the appellant having executed an agreement with Sohan Lal Kukreti.

8. Vide impugned judgment and decree dated 1.11.2002, the suit for specific performance has been decreed. Finding returned is that the appellant has failed to prove his ownership qua property No.34/89, Himmat Puri, Trilok Puri, Delhi and hence his deposition that he had entered into an agreement to sell the said house to Sohan Lal Kukreti was false; additionally for the reason Sohan Lal Kukreti never filed any claim against the appellant. With reference to Ex.PW-1/1 to Ex.PW-1/4, the learned Trial Judge has returned a finding that the bankers cheque in sum of Rs.1,20,000/- (Rupees One Lac Twenty Thousand only) was issued by debiting the account of Sohan Lal Kukreti but money was credited in the said account when respondent withdrew money from his account with the Punjab National Bank and deposited the same in the account of Sohan Lal Kukreti with the State Bank of India. Learned Trial Judge has disbelieved the appellant that the agreement in question was executed by him with Sohan Lal Kukreti and that the first two pages thereof have been changed.

9. At the hearing held on 10.12.2008, learned counsel for the appellant sought to draw variations here and there in the testimony of the witnesses of the appellant, some of whom did not depose about the appellant having executed any receipt and the others deposing about the appellant having

executed the agreement to sell and the receipt and that the respondent stated that the appellant had signed each page of the agreement to sell but the fact was that the first two pages thereof did not bear the signatures of the appellant.

10. It is settled law that minor variations in the testimony of witnesses of a party are not fatal. Material contradictions alone jeopardize the testimony of witnesses.

11. In the instant case, to succeed on the defence urged, the appellant had to establish that he had entered into an agreement to sell with Sohan Lal Kukreti and that Rs.1,20,000/- (Rupees One Lac Twenty Thousand only) received by him pertained to the said agreement. The appellant also had to establish that the said agreement related to property No.34/89, Himmat Puri, Trilok Puri, Delhi; of which he was the owner.

12. As noted above the appellant examined himself as DW-1. He was cross-examined qua the ownership of property No.34/89, Himmat Puri, Trilok Puri, Delhi. It was put to him that one Anwari Begum is the owner of the property.

13. Being relevant, we quote from the testimony of the appellant when he was cross examined:-

"I do not know whether property No.34/89 belongs to Smt. Anwari Begum or not. It might be hers..... I have entered into an agreement with one Mr.Ahmad Ulah on an unstamped paper in respect of property No.34/89, Himmat Puri..... I did not check the papers of ownership in favour of Ahmad Ulah..... At present

one person known to me is residing in property No.34/89 but I do not know the name of the said person. He has shifted into the said property for the last one or two day..... Till date I have not paid any further amount to Ahmad Ulah..... I am not aware if the monthly installment of premises No.34/89 is Rs.63.20 and the same is being paid to the DDA by Anwari Begum in her name. I am not aware as to in whose name is the electricity and water connection of property No.34/89."

14. It is not in dispute that property No.34/89, Himmat Puri, Trilok Puri has been allotted by DDA under a hire purchase. The appellant had thus to establish title to the said property through the person to whom DDA had allotted the said property on hire purchase. As noted above, the appellant claimed title through Ahmad Ulah and admitted that the only document of title was an agreement on an unstamped paper. It is of importance to note that Ahmad Ulah was not examined by the appellant. Further, the unstamped paper on which the alleged agreement was purportedly executed by Ahmad Ulah can be created at any point of time and hence would be a suspicious document. That apart, if the appellant had purchased the same from Ahmad Ulah normal conduct would have been that of the owner of the property; who would know as to in whose name the water and electricity connection has been sanctioned and as to who is in possession of the property. The appellant knew nothing about said facts which lead us to infer that the appellant has no concern with the said property.

15. It has to be noted that as against the stand in the pleading that Ex.PW-1/5 was a forged document, evidence sought to be led by the appellant was at variance; in the evidence the appellant sought to prove that the first two pages of the agreement were changed and only the last page was retained.

16. We are satisfied with the view taken by the learned Trial Judge that the appellant has failed to prove ownership of property No.34/89, Himmat Puri, Trilok Puri, Delhi and thus there was no occasion for him to enter into an agreement for sale of the said property.

17. The said finding knocks of the very foundation of the defence of the appellant. That apart, the appellant had to examine Sohan Lal Kukreti to prove that he had entered into an agreement with Sohan Lal Kukreti. If indeed, Sohan Lal Kukreti had paid Rs.1,20,000/- (Rupees One Lac Twenty Thousand Only) to the appellant for purchase of a property by him, normal human conduct would have been for Sohan Lal Kukreti to lay a claim under the said agreement.

18. Ex.PW-1/1 to Ex.PW-1/4 conclusively prove that the funds utilized when the draft in sum of Rs.1,20,000/- (Rupees One Lac Twenty Thousand Only) was issued by the State Bank of India in favour of the appellant came from the respondent.

19. Pertaining to the readiness and willingness of the

respondent, Ex.PW-1/7 concludes the issue inasmuch as the respondent has proved having the requisite funds, and in fact having got prepared two drafts payable in the name of the appellant for the balance sale consideration before the date specified in the agreement for the sale to be completed had lapsed.

20. A last submission made by counsel for the appellant may be noted. With reference to the clause in Ex.PW-1/5 that in case of default by the seller, the buyer would be entitled to double the amount of earnest as recompense requires monetary compensation to be paid to the respondent and not the specific performance of the agreement to sell.

21. The issue pertaining to such clauses in the agreement to sell stands concluded by the decision of the Supreme Court reported as AIR 2004 SC 4472 P. D'Souza Vs. Shondrilo Naidu.

22. It was held that such a clause does not prohibit a claim for specific performance.

23. We find no merits in the appeal.

24. The same is dismissed with costs.

PRADEEP NANDRAJOG, J.

J.R. MIDHA, J.

December 12, 2008
rk