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IN THE HIGH COURT OF DELHI

Judgment reserved on : September 30, 2008

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Judgment delivered on : November 04, 2008

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RFA 25/2004

ARCHANA BHUTANI

..... Appellant

Through: Mr. Sudip Kumar Shrotria, Advocate

VERSUS

MANJU JAIN

..... Respondent

Through: Nemo

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. On 26.8.1998 an agreement to sell, Ex.PW-1/2, was executed by Ms.Archana Bhutani, the appellant, in favour of Ms.Manju Jain, the respondent, pertaining to a portion on the ground floor together with mezzanine thereon forming part of plot No.40, Block No.7, G.B.Road, Delhi – 110006. The sale consideration recorded was Rs.3,00,000/- (Rupees Three Lacs Only). The agreement records that Ms.Archana Bhutani had

received Rs.1,00,000/- (Rupees One Lac Only) by means of a cheque and that the balance sum of Rs.2,00,000/- (Rupees Two Lacs Only) was payable after Ms.Archana Bhutani obtained a certificate of probate in respect of a will dated 13.4.1990 stated to have been executed by her father bequeathing the subject property to her and based thereon the property being mutated in her name in the municipal records.

2. On 9.2.2000, vide Ex.PW-1/5, proved to be served upon Ms.Archana Bhutani vide A.D.Card Ex.PWQ-1/7 and postal receipt in respect thereof being Ex.PW-1/6, Ms.Manju Jain called upon Ms.Archana Bhutani to obtain a certificate of probate of the will executed by her father and after completing the formalities of having the property mutated in her name, to execute the sale deed.

3. Since Ms.Archana Bhutani did not execute the sale deed, Ms.Manju Jain filed the suit in question for specific performance alleging that she was always ready and willing to pay the balance sale consideration in sum of Rs.2,00,000/- (Rupees Two Lacs Only) provided Ms.Manju Jain obtained the certificate of probate and have the property mutated in her name in the municipal records. Ms.Archana Bhutani responded to the plaint. She admitted having executed the agreement to sell, Ex.PW-1/2, but stated that the same was got prepared by Ms.Manju Jain and she merely signed the

same. She pleaded that the sale consideration agreed to was Rs.30,00,000/- (Rupees Thirty Lacs Only) and that it was wrongly mentioned in the agreement to sell that the sale price was Rs.3,00,000/- (Rupees Three Lacs Only). Thus, she denied an obligation to sell the subject property for Rs.3,00,000/- (Rupees Three Lacs Only). She challenged the legality of the agreement to sell on the plea that the same required compulsory registration. She also challenged the same on the plea that she had yet to perfect her title to the property inasmuch as she had yet to be granted the certificate of probate and hence pleaded her disability to sell the property by entering into an agreement to sell.

4. On the pleadings of the parties following 3 issues were settled on 21.9.2002:-

“(i) Whether the agreement dated 26.8.1998 is non-est in the eyes of law as alleged in para 4 and 8 of the preliminary objections of the written statement? OPD

(ii) Whether the plaintiff is entitled to the relief of specific performance? OPP

(iii) Whether the plaintiff is entitled for permanent injunction? OPP

(iv) Relief.”

5. At the trial, Ms.Manju Jain successfully proved that she was always ready and willing to pay the balance sale consideration and acquire title to the suit property and that

Ms.Archana Bhutani was in default by not obtaining the certificate of probate and getting mutation effected in her name, the twin condition precedents for the sale to materialize. Ms.Archana Bhutani failed to sustain the three pleas raised by her challenging the agreement to sell with the result the suit filed by Ms.Manju Jain stood decreed vide judgment and decree dated 7.8.2003.

6. Needless to state, if Ms.Manju Jain proved that she was ready and willing to perform her obligations under the contract; namely that she had the means and was willing to pay Rs.2,00,000/- (Rupees Two Lacs Only) the suit had to be decreed unless the defence succeeded in respect of issue No.1.

7. As noted above, the agreement to sell was questioned on three counts.

8. In respect of the plea raised by Ms.Archana Bhutani that the sale consideration agreed to was Rs.30,00,000/- (Rupees Thirty Lacs Only) and that it was wrongly typed in the agreement to sell that the same was Rs.3,00,000/- (Rupees Three Lacs Only) and that Ms.Manju Jain had got typed the agreement to sell, the learned Trial Judge has noted that the stamp paper on which the agreement to sell was scribed was purchased in the name of Ms.Archana Bhutani and since she did not summon stamp vender who sold the stamp paper to prove that as per his record the same was sold to Ms.Manju

Jain the presumption would be that Ms.Archana Bhutani had purchased the stamp paper and that Ms.Archana Bhutani had got scribed the agreement to sell.

9. To prove that the sale consideration was wrongly recorded in the agreement to sell, Ms.Archana Bhutani cited her brother, Mr.Arun Bhutani, as her witness who was examined as DW-1. In his deposition Mr.Arun Bhutani stated that before his sister signed the agreement to sell it was read over and while so doing it was noted that the sale consideration was wrongly mentioned at Rs.3,00,000/- (Rupees Three Lacs Only) whereas the same was Rs.30,00,000/- (Rupees Thirty Lacs Only). No satisfactory explanation being given by Mr.Arun Bhutani as to why the agreement to sell was not corrected there and then, conclusion drawn by the learned Trial Judge is that the agreement to sell correctly records the sale consideration at Rs.3,00,000/- (Rupees Three Lacs Only). The learned Trial Judge has also brought into aid Sections 91 and 92 of the Evidence Act to hold that no oral evidence can be led to contradict the terms of a written agreement.

10. Qua the plea that the agreement to sell was void as the same required compulsory registration the learned Trial Judge has noted that the agreement to sell is dated 28.6.1998 and that amendments were incorporated in the Stamp Act as in force in Delhi and relatable provisions requiring registration of agreements to sell where possession was handed over

having come into effect on 28.3.2001; it has accordingly been held that at the time the agreement to sell was executed there was no requirement of the same being compulsorily registered.

11. The plea that Ms.Archana Bhutani had not acquired title to the property and hence could not sell the same has been repelled by the learned Trial Judge holding that on his death, father of Ms.Archana Bhutani was survived by his wife Ms.Sujata Bhutani, his daughter Ms.Archana Bhutani and his son Mr.Arun Bhutani. Noting that the mother and the brother had witnessed the agreement to sell, Ex.PW-1/2 conclusion drawn is that the mother and brother acknowledged the sale, meaning thereby that there was no dispute qua the title to the suit property and hence Ms.Archana Bhutani was authorized to represent herself as the owner thereof.

12. Learned counsel for the appellant urged at the hearing of the appeal that the findings of the learned Trial Judge pertaining to the issue that the agreed sale consideration was Rs.3,00,000/- (Rupees Three Lacs Only) and not Rs.30,00,000/- (Rupees Thirty Lacs Only) counsel urged that the learned Trial Judge has ignored the explanation furnished by Mr.Arun Bhutani who stated in his deposition that when the same was detected before execution it was agreed that necessary correction would be made but Ms.Manju Jain, with mala fide intent did not do so. Hence, counsel urged that

it has to be held that the stated sale consideration as recorded was not the agreed sale consideration. Secondly, counsel urged that admittedly Ms.Archana Bhutani did not obtain a certificate of probate of the will of her father and hence it has to be held that she was not the owner of the subject property. It was urged that there was no evidence to sustain the finding that Ms.Manju Jain was ready and willing to pay the balance sale consideration. Lastly, counsel urged that the agreement to sell is dated 26.8.1998, notice issued by Ms.Manju Jain, Ex.PW-1/5 is dated 9.2.2000 and that the suit was filed on 20.9.2001; in the interregnum prices rose and therefore discretion should not be exercised in favour of Ms.Manju Jain compelling Ms.Archana Bhutani to execute the sale deed.

13. On the plea of Ms.Manju Jain being ready and willing to pay the balance sale consideration it would be enough for us to record that said obligation of Ms.Manju Jain was contingent upon Ms.Archana Bhutani obtaining a certificate of probate pertaining to the will 13.4.1990 executed by her father and based thereon to have the property mutated in her name. Admittedly, Ms.Archana Bhutani has not done so till the suit was filed. The fact that Ms.Manju Jain required Ms.Archana Bhutani to obtain the necessary certificate of probate and have the property mutated in her name and thereupon receive the balance sale consideration is good evidence of Ms.Manju Jain being willing to comply with her

obligations. On the issue of readiness it may be noted that law does not require the prospective purchaser to prove that he/she had money jingling in his/her pocket. It is enough to prove that the party could muster the requisite resources. We thus hold that the learned Trial Judge is correct in returning a finding that Ms.Manju Jain has proved her readiness and willingness to proceed ahead with the sale.

14. The plea that the agreed sale consideration was Rs.30,00,000/- (Rupees Thirty Lacs Only) and not Rs.3,00,000/- (Rupees Three Lacs Only) has to be noted and rejected for the reason the agreement to sell Ex.PW-1/2 records the same as Rs.3,00,000/- (Rupees Three Lacs Only). That the document was read over before it was signed by Ms.Archana Bhutani has been admitted by Mr.Arun Bhutani in his cross examination. To quote he stated: *the defendant came to know about the discrepancy in Ex.PW-1/2 when she signed the same. The discrepancy was the value mentioned in the agreement Ex.PW-1/2 was written as Rs.3 Lakhs (Three Lakhs) instead of Rs.30 Lakhs (Thirty Lakhs). I cannot give the answer on behalf of my sister (illegible) had made any correction in Ex.PW-1/2 after she came to know that the sale consideration has been wrongly mentioned.*

15. It has to be noted that Mr.Arun Bhutani never explained that the correction was not made as Ms.Manju Jain had agreed to make the necessary corrections and by not

doing so had played a fraud on his sister. Thus, the argument of learned counsel for the appellant that Mr.Arun Bhutani had given an explanation is incorrect. Further, it does not stand to logic and reasoning that a person would not correct a document if a discrepancy is noted before the same is executed.

16. The plea that Ms.Archana Bhutani could not have entered into the agreement to sell as she was not declared to be the owner of the subject property has to be noted and rejected for the reason when the agreement to sell dated 26.8.1998 was executed, the probate sought by Ms.Archana Bhutani of her father's will dated 13.4.1990 had been disposed of and allowed vide order dated 27.1.1995. The only formality which was required to be completed by her was to file a certificate of valuation of the property and deposit stamp papers of adequate value for the instrument of probate to be drawn up formally by the Court.

17. Thus, not for the reason given by the learned Trial Judge we hold that Ms.Archana Bhutani had title to the suit property.

18. In respect of the reasons given by the learned Trial Judge, suffice would it be to state that where a person signs as a witness on a document, it does not mean that he acknowledges the contents of the document. Animus Attestendi is different than the animus while executing a

document. Though, on the facts of this case it may be urged that when Mr.Arun Bhutani and Ms.Sujata Bhutani, the brother and mother of Ms.Archana Bhutani witnessed the execution of the agreement to sell they were aware of its contents and hence acquiesced in Ms.Archana Bhutani acting as the owner of the property. The reason is, that in his testimony Mr.Arun Bhutani the brother of Ms.Archana Bhutani has stated that before the agreement to sell was executed the contents thereof were read meaning thereby everybody present knew the contents of the document.

19. The plea that this Court should not exercise discretion in favour of Ms.Manju Jain was urged on the fact that the suit was filed at the fag end of the period of limitation and in the interregnum there was a rise in the price of the property. Suffice would it be to state that there is no evidence on record to show that in the interregnum the price of the property rose. At this stage it may be noted that Ms.Archana Bhutani had examined as PW-4, a valuer, and attempted to prove that the value of the subject property was Rs.30,00,000/- (Rupees Thirty Lacs Only). Said evidence has to be discounted for the reason once it is held that the agreement to sell correctly recorded the sale consideration, no evidence can be led to contradict or vary the same. Secondly, the valuer sought to justify the valuation with reference to the property being vacant. The instant property is admittedly

under the tenancy of the husband of Ms.Manju Jain and the protection of the Delhi Rent Control Act 1957 is available to the property. Thus, said property would fetch a much lesser value when sold. Thus, even on said account the valuation report sought to be proved by PW-4 is of no use.

20. In the decision reported as AIR 1993 SC 1742, (1993) 1 SCC 537 Smt. Chand Rani by LRs. Vs. Smt. Kamal Rani (Deceased) by LRs in para 19, it was observed as under:-

“19. It is a well-accepted principle that in the case of sale of immovable property, time is never regarded as the essence of the contract. In fact, there is a presumption against time being the essence of the contract. This principle is not in any way different from that obtainable in England. Under the law of equity which governs the rights of the parties in the case of specific performance of contract to sell real estate, law looks not at the letter but at the substance of the agreement. It has to be ascertained whether under the terms of the contract the parties named a specific time within which completion was to take place, really and in substance it was intended that it should be completed within a reasonable time. An intention to make time the essence of the contract must be expressed in unequivocal language.”

21. In the decision reported as AIR 2000 SC 2408, (2000) 6 SCC 420 Motilal Jain Vs. Smt. Ramdasi Devi & Ors. In para 6, it was observed as under:-

“It may be apt to bear in mind the following aspects of delay which are relevant in a case of specific performance of contract for sale of immovable property: (i) Delay running beyond the period prescribed under the Limitation Act; (ii) Delay in cases where though the suit is within the period of limitation, yet: (a) due to delay the third parties have acquired rights in the subject-matter of suit; (b) in the facts and circumstances of the case, delay may give rise to plea of waiver or otherwise it will be inequitable assumption with regard to cause of action.

Ext. 2 was executed on February 20, 1977 and under it the sale deed was to be executed on or before July, 19, 1977. The last notice was issued on November 26, 1978 and from that date the suit was filed only after nine months and not after more than a year as noted by the High Court. Therefore on the facts of this case the ground of delay cannot be invoked to deny relief to the plaintiff."

22. We are thus not impressed that case has been made out not to exercise discretion in favour of Ms.Manju Jain.

23. We find no merits in the appeal.

24. The appeal is dismissed with costs.

PRADEEP NANDRAJOG, J.

J.R. MIDHA, J.

November 04, 2008
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