

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **R.F.A. No. 623/2004**

RAJENDER KUMAR MEENA Appellant
Through: Mr. K.N.Popli, Advocate

VERSUS

SMT. VIMLA DEVI Respondents
Through: Mr. Rakesh Dhingra, Adv. for R-3

RESERVED ON:
26.08.2008

% DATE OF DECISION:
04.09.2008

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SUNIL GAUR

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. Appellant was the plaintiff. He had sought specific performance of an agreement to sell dated 24.9.1999, Ex.PW-1/1. Appellant has suffered a dismissal of the suit and hence is in appeal.

2. Claim of the appellant was that pursuant to the agreement to sell dated 24.9.1999, Ex.PW-1/1, the defendant had agreed to sell flat bearing No.B-54, Sector 1, Avantika,

Rohini, Delhi – 85 to him for a consideration of Rs.4,50,000/- and that, as recorded in the agreement to sell, he had paid Rs.1,50,000/- to the defendant. It was claimed that under the agreement to sell the period prescribed for completion of the sale was 15 months and that before said period expired he had arranged the balance sale consideration in sum of Rs.3,00,000/-. It was claimed that since respondent avoiding to execute the sale deed after accepting balance sale consideration, on 17.11.2000, he had issued a notice requiring defendant to execute the sale documents and receive the balance sale consideration. The respondent took the defence that her son, Pawan, had taken a loan from the plaintiff and that the plaintiff had obtained signatures of Pawan and her thumb impression on a blank stamp paper which was used to create the agreement to sell Ex.PW-1/1. Receipt of Rs.1,50,000/- as recorded in the agreement to sell was denied.

3. It is thus apparent that on the respective pleadings of the parties the main issue which was debated was whether defendant had indeed entered into an agreement to sell as alleged by the appellant and whether terms thereof were as recorded in Ex.PW-1/1.

4. The appellant produced his father Puran Chand as PW-2 and sought to prove the due execution of Ex.PW-1/1.

Puran Chand stated that he was a witness to the agreement to sell. The appellant also examined himself as PW-1. The respondent examined, besides herself as DW-1, her son Pawan as DW-2 as also four other witnesses being B.D.Jain, DW-3, P.C.Bhutani, DW-4, Pramod, DW-5 and Ashok Kumar, DW-6.

5. DW-3 to DW-6 being witnesses who spoke nothing about the execution of the agreement to sell and hence nothing turning on their testimony, their testimony finds no discussion in the judgment and decree passed by the learned Trial Judge.

6. After trial the finding returned by the learned Trial Judge pertaining to the agreement to sell, Ex.PW-1/1 is as under:-

“Ex.PW-1/1, the alleged agreement to sell, has been typed on a single stamp paper of Rs.10/-. The manner in which this document is typed shows that an attempt has been made to write all the typed material on a single page. The spacing between the paragraphs is not made. Neither sufficient space is made for obtaining the signatures of the parties as well as witnesses. Normally, while executing any legal document which requires to be witnessed the name of the witnesses appear on the left hand side of the documents whereas name and signatures of the first party and the second party are mentioned and obtained on the right hand side of the document. But it is very peculiar that on Ex.PW-1/1, the signatures of the first party and the second party are obtained on the left hand side and the name of the witnesses are mentioned just next to it. No space is left between the last paragraph and for

typing "Signatures of first party, witness number 1. The mere formatting of the whole document clearly shows that an attempt has been made to squeeze all the written material on one page, instead of continuing on the second page. In that case the parties and witnesses would have signed on the subsequent page. This shows that signatures and thumb impressions were already existing on the document and thereafter the matter was typed in squeezing manner to accommodate the signatures and thumb impressions at the places where it existed on the said document. Hence the genuinity of Ex.PW-1/1 cannot be believed.

Moreover, plaintiff has only made bald assertions that he was willing to purchase the suit property for Rs.4,50,000/-. During cross-examination as PW1 he deposed that his annual income was between Rs.60,000/- to 75,000/-. He also deposed that he did not withdraw either the amount of Rs.1,50,000/- paid to the defendant or Rs.3,00,000/- which he intended to pay to the defendant from his bank account. He rather testified that he got this amount arranged from his parent-in-law.

He deposed that his mother-in-law collected Rs.1,00,000/- from her daughter and Rs.50,000/- were taken from his brother-in-law. However, the plaintiff has not examined either his mother-in-law, father-in-law or brother-in-law to prove these contentions."

7. The agreement to sell Ex.PW-1/1 has a covenant that in case the respondent fails to execute the sale she would be liable to pay double the earnest money i.e. Rs.3 lacs. The same reads as under:-

"3. That if the first party does not perform her part of contract within the stipulated period, then the second party shall be entitled to get the said

transaction completed through the Court of law at the cost and expenses of the first party or the second party can take double of the earnest money i.e. Rs. Three Lacs only.”

8. Learned Trial Judge has also held that under the agreement to sell, at best, the appellant could have claimed Rs.3 lacs and not specific performance of the agreement to sell.

9. We are in agreement with the submissions made by learned counsel for the appellant that the alternative view taken by the learned Trial Judge to decline a decree for specific performance is incorrect, in view of the decision of the Hon'ble Supreme Court reported as JT 1999(8) SC 34 Manzoor Ahmed Margray Vs. Gulam Hassan Aram & Ors. wherein it was observed as under:-

“7. From a reading of the aforesaid clause in the agreement, it can be stated that it is strictly a penalty clause for securing the performance of the contract. It only provides that if any party violates the terms and conditions of the agreement, he would be liable to pay a penalty of Rs.10,000/-. This would not mean that contract is not to be performed. It would only mean that if there is breach of some terms and conditions of the contract, the defaulting party has to pay the penalty specified therein. The said clause, also, does not provide that in case a sale deed is not executed, damages to the tune of Rs.10,000/- are to be awarded. While dealing with a similar contention and a clause in the contract providing that in case of failure of compliance of terms of agreement, vendor will be liable to refund security deposit and to pay

damages equal to the security, this Court in **M.L.Devender Singh v. Syed Khaji** [1973 (2) SCC 515] held that there was no mention anywhere in the contract that the party to it will have the option to either fulfil the contract to buy or sell or to pay the liquidated damages or penalty of Rs.20,000/- stipulated for a breach as an alternative to performance of the contract to buy or sell. The Court considered the provisions of Specific Relief Act, 1963, particularly Section 23 (which is similar to Section 20 of the Act of 1877) and held that Section 23 of the Act of 1963 contains a comprehensive statement of the principles on which, even before the Act of 1963, the presence of a term in a contract specifying a sum of money to be paid for a breach of the contract is to be construed.”

10. Thus, we concentrate on the first issue, namely whether the defendant executed Ex.PW-1/1.

11. As has been done by the learned Trial Judge, even we have perused Ex.PW-1/1. Indeed, to a reader it would be apparent that the contents of the document have been squeezed in a manner which is suggestive of somebody trying to squeeze the entire writing knowing that he has only one paper to record the entire document. Further, the thumb impression of the respondent and signature of her son find appended side by side at the bottom of the paper and under the thumb impression of the respondent, the notation, *“Signatures of second party”* has been typed. Similarly, under the signatures of Pawan, the notation *“Witness No.2”* has been typed.

12. This is suggestive of the version of the respondent that she and her son were made to affix the thumb impression and signatures respectively when the document was blank. The learned Trial Judge is fully justified in relying upon judicial experience in relation to manner of execution of agreements to sell where normally it is to be seen that the witnesses append their signatures to record they having witnessed the execution of the document by penning the signatures on the left side of the document and the signatures of the executants normally found on the right side of the document.

13. Normally, space is given in between the paragraphs in a document. Ex.PW-1/1 has no space in between the paragraphs.

14. There is one more feature, not noted by the learned Trial Judge, which is also reflective of thumb impression of the respondent being appended and signature of her son obtained thereon on a blank stamp paper. The same is evidenced from two facets evident on the face of the document.

15. The notation "*Witness No.1*" is found typed just above the letter 'P' forming the first letter of the signature of the son of the respondent i.e. Pawan. The bottom curve of the letter 't' forming part of the word "*Witness*" is clearly printed above the loop of the letter "P" where Pawan has signed.

Similarly, the thumb impression of the respondent, on the left margin of Ex.PW-1/1 shows that the letters 'N' and 'O' of the word "*Now*" and the numeral '(I)' being the first serial number of the covenant below the word "*Now*" and the letters "b" and "e" forming part of the word "*Between*" immediately below serial No.1 have again been printed above the thumb impression of the respondent, suggestive of the thumb impression being on the paper before afore-noted letters were printed thereon. To give clarity to what we are intending to convey, it may be recorded, that after typing the recitals the agreement to sell records:

"NOW THIS DEED OF AGREEMENT WITNESSED AS UNDER:

(I) That the period for the completion of the said transaction between the parties is fixed up to 15 months from the date of execution of this agreement i.e. 24.9.1999."

16. The thumb impression is where the word "*Now*", the numeral '(I)' and the letters "b" and "e" forming the word "*between*" are printed.

17. It would not be out of place to note that the appellant failed to produce any written receipt evidencing payment of Rs.1,50,000/- to the respondent save and except the said fact being recorded in the agreement to sell, Ex.PW-1/1. When questioned as to where from appellant got Rs.1,50,000/-, inasmuch as no document was filed by the

appellant to prove that the appellant was having said sum with him, during cross examination, he responded that he took the money from his brother-in-law and mother-in-law.

18. We note that neither the brother-in-law nor the mother-in-law of the appellant were produced as witnesses to establish that they were persons of means and/or they lent any money to the appellant.

19. That the son of the respondent had obtained a loan from the appellant and had issued cheques to repay the same is evident from Ex.DW-6/3, being the certified copy of a complaint lodged by the appellant under Section 138 of the NI Act, alleging dishonour of cheques issued to the appellant by Pawan, the son of the respondent, and no payment tendered for the cheques when statutory notice was served upon Pawan upon dishonour of the cheques.

20. We may record that the learned counsel for the appellant urged before us that a presumption arises that a document was duly drawn up before it was executed and that the respondent has led no evidence to prove to the contrary. Learned counsel urged that PW-2, Puran Chand, a witness to Ex.PW-1/1 had supported the case of the appellant. These two were the only submissions made at the hearing of the appeal.

21. We note that Puran Chand is the father of the

appellant and hence is an interested witness.

22. What the eyes can see, the ears may miss. We have noted hereinabove the inherent features of the disputed document i.e. Ex.PW-1/1 which features probablizes the version of the respondent. What is crucial in our opinion is the fact that certain letters of the document are clearly printed above the thumb impression of the respondent and pertaining to Pawan's signatures, as noted above we have noted certain letters being printed above the signatures of Pawan. They reveal that the document was typed after thumb impression and signatures were obtained at a prior point of time.

23. It is settled law that a fact is disproved, when after considering the evidence before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

24. We have satisfied ourselves independently by re-appreciating the evidence as also by having a visual look at the disputed document. We are satisfied that the view taken by the learned Trial Judge is correct.

25. We find no merits in the appeal.

26. The appeal is dismissed.

27. The respondent shall be entitled to cost all throughout.

PRADEEP NANDRAJOG, J.

SUNIL GAUR, J.

**September 4, 2008
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