

HIGH COURT OF DELHI : NEW DELHI

RFA(OS) No. 16/2008

Judgment reserved on : 14th July 2008

Pronounced on : 8th August, 2008

MRS. SANGEETA GARG Appellant
Through Mr.Sandeep Sharma, Adv.

Vs

SH. DEEPAK BANSAL & ANR Respondents
Through Mr. Rajesh Gupta, Adv.

Coram:

HON'BLE MR.JUSTICE A.K.SIKRI
HON'BLE MR.JUSTICE MANMOHAN SINGH

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

MANMOHAN SINGH, J.

1. This is an appeal filed by the Appellant (hereinafter referred to as Plaintiff) against the order dated 19th July 2007 passed in I.A. No. 7904/2006 in CS(OS) No.558/2006 allowing the application under Order VII Rule 11 CPC filed by the Respondents (hereinafter referred to as Defendants) for rejection of the plaint on the ground that it does not disclose a cause of action.
2. The case of the Plaintiff in the trial court was that the Plaintiff filed a suit seeking relief of a decree of specific

performance of an agreement to sell dated 19th December 2004 in respect of HIG/Ground Floor Flat No.1, Akash Kunj Apartment, Sector-9, Rohini, Delhi (hereinafter referred to as “suit property”).

3. The sale consideration of Rs. 27,75,000/- was agreed between the parties for the suit property.
4. The Plaintiff paid Rs.4 lac to the Defendant No.1 as earnest money, Rs.2 lac by cash and Rs.2 lac vide cheque bearing No. 458943 dated 19th December 2004 drawn on Punjab National Bank, Ashok Vihar Branch, Delhi favouring Mr. Deepak Bansal against receipt-cum-agreement which is dated 19th December 2004 and filed on the trial court record.
5. It was stated in the plaint that the Defendants informed the husband of the Plaintiff that the property was mortgaged with ICICI Home Finance Company Ltd and requested the Plaintiff to take loan from the same very bank so that the mortgaged amount can be adjusted and title deeds can be obtained from the bank directly by the Plaintiff in order to save the commission money.
6. The Plaintiff applied for a loan in the said Bank on 26th December 2004 which was sanctioned for Rs. 7,36,000/- on 7th January 2005 in favour of the Plaintiff and the sale deed between the parties was to be executed by 20th January 2005.

7. The Plaintiff on 10th January 2005 purchased the stamp paper of the value of Rs. 1,23,000/- which was the agreed price of the suit property.
8. It is averred in the plaint that the Defendants were insisting for some amount before execution of the sale deed so on 12th January 2005 two cheques i.e cheque bearing No.458946 dated 12th January 2005 for Rs. 11,25,000/- and cheque bearing No.458947 dated 12th January 2005 for Rs. 2,50,000/- both drawn on Punjab National Bank, Ashok Vihar, Delhi were given to Defendant No.1 being the part payment against the total sale consideration of Rs.27,75,000/-. The Plaintiff also requested the Defendants to give the necessary consent letter to ICICI Home Finance Co.Ltd for facilitating the transfer of the original title deed documents. Defendants were also requested to execute the necessary agreement to sell as required by the aforesaid bank but the Defendants did not do the needful and attempted to avoid the same inspite of the assurance given by the Defendants that the Defendants would clear the loan taken by them against the suit property.
9. The case of the Plaintiff is that in view of the above the Plaintiff became apprehensive about the conduct of the Defendants as is evident from the fact that even after adjusting the amount of Rs. 7, 36,000/- taken by the

Plaintiff from the bank as advised by the Defendants, still an amount of Rs.13,14,000/- was payable by the Defendants to the bank because the loan amount due from the Defendants was Rs. 20,50,000/-. The Plaintiff left with no option sent a registered letter dated 14th January 2005 to the Defendants to do the needful. The husband of the Plaintiff called the Defendant No.1 on 15th January 2005 in order to remind the Defendants of their obligation but the Defendants did not cooperate. The Plaintiff also wrote a letter dated 15th January 2005 to ICICI Home Finance Co. Ltd informing that all the requirements of the bank had been intimated to the Defendants and they were requested to clear the entire loan amount so that the deal can be completed within time and the bank was also requested to disburse the loan amount sanctioned in favour of the Plaintiff.

10. On 20th January 2005 the Plaintiff also prepared two pay orders for a sum of Rs.13,25,000/- (pay order No.664711 dated 20th January 2005) and another for Rs.5,25,000/- (pay order No.66710 dated 20th January 2005) and informed the Defendant No.1 about the preparation of the two pay orders amounting to Rs.18,50,000/- in his name. Defendants were informed of the stoppage of payment of the earlier three cheques issued by the Plaintiff. The husband of the Plaintiff also contacted the property dealer

and the Home Finance Counsellor of ICICI Home Finance Co.Ltd and requested them to depute their representative at the time of execution of the sale deed in favour of the Plaintiff and the entire sale consideration was ready with the Plaintiff on 20th January 2005.

11. Despite the above the Defendants did not turn up for getting the necessary documents and presenting them for registration of the sale deed in favour of the Plaintiff. The Defendant No.1 was also contacted on his Mobile No. 9810107101 by the husband of the Plaintiff in the morning but nobody turned up till 1 PM. When contacted second time the Defendant No.1 gave the excuse that Defendant No.2 was not feeling well since morning and, therefore, requested for time.
12. A legal notice dated 17th April 2005 was sent to the Defendants to execute and register the sale deed in favour of the Plaintiff which was received back as undelivered. Due to the said conduct of the Defendant and on the basis of legal advise a complaint dated 16th May 2005 was lodged by the Plaintiff with the Police Station Rohini against Defendant No.1 and his brother Sh. Atul Bansal as the deal was settled in his presence. The complaint against Defendant No.2 was not lodged on humanitarian grounds being an old lady of more than 62 years.

13. Instead of showing his readiness and willingness to complete the transaction the Defendant No.1 as a counter blast sent a legal notice dated 13th June 2005 alleging therein that the cheque bearing No.458943 dated 19th December 2004 for Rs. 2 lac as part payment (Bayana) issued by the Plaintiff in favour of Defendant No.1 was dishonoured and, therefore, the Plaintiff was guilty under Section 420 IPC and Section 138 of the Negotiable Instrument Act. It is also a matter of fact that after sending the said legal notice the cheque of Rs.2 lac was also encashed by the Defendants.
14. In Para 22 of the plaint the Plaintiff has averred that thereafter before the Sub Inspector Rohini Police Station, Delhi, during the course of investigation the Defendant No.1 agreed and admitted the facts stated and entered into a settlement-cum-agreement dated 19th October 2005 whereby it was agreed that the Defendants would execute the sale deed in favour of the Plaintiff, subject to enhancing the sale consideration by Rs. 3 lac over and above the amount of Rs.27,75,000/- which was the original sale consideration and it was agreed between the parties that the sale deed would be executed by the Defendants in favour of the Plaintiff by the end of December 2005.
15. In view of the above said settlement-cum-agreement dated 19th October 2005 the Plaintiff again applied for loan from

ICICI Home Finance Co. Ltd in the last week of October 2005 and an amount of Rs.8,13,000/- was sanctioned in her favour on 6th November 2005. However, the Defendants again avoided the execution and registration of the sale deed of the suit property through from 19th October 2005 till February 2006 the Defendant No.1 was in regular touch with the husband of Plaintiff via SMS on his Mobile No. 9312214189 and Defendant No.'s Mobile No.9810107101. The details of the SMS were also given in Para 24 of the plaint.

16. A registered legal notice dated 20th February 2006 was sent to the Defendants for performance of the agreement but the Defendants never took any step in furtherance of the agreement. The Plaintiff thus filed the suit for specific performance of the agreement to sell regarding the suit property.
17. That thereafter the Defendants filed an application under Order 7 Rule 11 read with Section 151 CPC on many grounds for rejection of the suit of the Plaintiff mainly on the ground that the suit is absolutely barred by law as the agreement itself provides for liquidated damages, if any, that the suit was also bad on account of non-payment of stamp duty and registration of the impugned agreement. Another ground was taken by the Defendant that the plaint has no cause of action as the payment of Bayana amount

itself was stopped by the Plaintiff and thereafter the payment of the cheque issued towards the part payment was also stopped. Therefore, there was no concluded contract between the parties and no cause of action arose in favour of the Plaintiff. It was further alleged that the second document i.e. agreement-cum-settlement dated 19th October 2005 executed in the Police Station was under coercion, undue influence and duress and prayer was made for rejection of the plaint.

18. Learned Single Judge while allowing the application of the Defendants under Order VII Rule 11 CPC rejected the plaint of the Plaintiff and observed that the Plaintiff's plaint failed to disclose any cause of action against the Defendant to seek the relief of specific performance of the agreement to sell dated 19th December, 2004 as novated / modified on 19th October 2005. It was observed that "it is evident from the pleadings in the plaint and the Plaintiff's documents that the Plaintiff was made aware upfront that the suit property was mortgaged with ICICI Home Finance. Order VI Rule 6 provides and reads as follows:

"R.6.Condition precedent – Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleadings by the plaintiff or defendant, as the case may be; and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the

plaintiff or defendant shall be implied in his pleadings.”

Since the Plaintiff had not pleaded the condition and its non performance, it would imply failure to disclose cause of action. The Plaintiff failed to show her readiness and willingness to fulfill her own obligations under the agreement to complete the sale transaction and there was no reasonable and acceptable approach on the part of the Plaintiff.

19. The Plaintiff thereafter filed an application under Order 47 Rule 1 read with Section 151 CPC for reviewing/recalling of the order dated 19th July 2007. The said application was also dismissed by the learned single Judge vide order dated 6th November 2007.
20. After the dismissal of the review petition on 6th November 2007 the Plaintiff has filed the present appeal on various grounds.
21. We have considered the submission and have also gone through the material on record including the documents.
22. It is well settled law that rejection of the plaint is a serious matter as it takes away the very basis of the suit rendering as if there was no suit at all or that no suit was instituted. Bare allegations made in the plaint and documents filed therewith are required to be looked into to determine whether the plaint discloses the cause of action. In the suit

for specific performance of the contract if the facts averred in the plaint clearly show that the Plaintiff had performed all essential terms of contract, mere failure on his or her part to reproduce the exact words of Statute is not fatal. Only when the entire plaint does not disclose any cause of action the plaint is liable to be rejected.

23. It is also well settled law that the pleas taken by the defendants in the written statement would be wholly irrelevant at that stage. The correctness of allegations made in the plaint or otherwise is not to be considered at the stage of consideration of question as to whether the plaint is liable to be rejected under Order VII Rule 11 on the ground that it does not disclose cause of action. The power to reject a plaint under this clause must be exercised only if the court comes to the conclusion that even if at all the allegations are proved the Plaintiff would not be entitled to any relief whatever. So long as the plaint discloses some cause of action or raises some question fit to be decided by the Court, mere fact that the case is weak and not likely to succeed is no ground for striking it out.

24. In *Mayar (H.K.) Ltd vs. Owners & Parties, Vessel M.V. Fortune Express (2006 AIR (SC) 1828)*, Apex Court observed that:

“It is apparent that the plaint cannot be rejected on the basis of the allegations made by the defendant in his written statement or in an application for

rejection of the plaint. The court has to read the entire plaint as a whole to find out whether it discloses a cause of action and if it does, then the plaint cannot be rejected by the Court exercising the powers under Order VII, Rule 11 of the Code. Essentially, whether the plaint discloses a cause of action, is a question of fact which has to be gathered on the basis of the averments made in the plaint in its entirety taking those averments to be correct. A cause of action is a bundle of facts which are required to be proved for obtaining relief and for said purpose, the material facts are required to be stated but not the evidence except in certain cases where the pleadings relied on are in regard to misrepresentation, fraud, willful default, undue influence or of the same nature. So long as the plaint discloses some cause of action which requires determination by the court, mere fact that in the opinion of the Judge the plaintiff may not succeed cannot be a ground for rejection of the plaint.”

25. In *Vijai Pratap Singh vs. Dukh Haran Nath Singh* (AIR 1962 SC 941) the Supreme Court held as under (AIR pp.943-44, para 9):

“the court has not to see whether the claim made by the petitioner is likely to succeed; it has merely to satisfy itself that the allegations made in the petition, if accepted as true, would entitle the petitioner to the relief he claims. If accepting those allegations as true no case is made out or granting relief no cause of action would be shown and the petition must be rejected. But in ascertaining whether the petition shows a cause of action the court does not enter upon a trial of the issues affecting the merits of the claim made by the petitioner. It cannot take into consideration the defences which the defendant may raise upon the merits; nor has the court competent to make and elaborate enquiry into doubtful or complicated questions of law or fact.”

26. In *Popat and Kotecha Property vs. State Bank of India Staff Association* the Supreme Court held as under (2005(7) Scale, page 3 para 10):

“10. Clause (d) of Order VII Rule 7 speaks of suit, as appears from the statement in the plaint to be barred by any law. Disputed questions cannot be decided at the time of considering an application filed under Order VII Rule 11 CPC. Clause (d) of Rule 11 of Order VII applies in those cases only where the statement made by the plaintiff in the plaint, without any doubt or dispute shows that the suit is barred by any law in force.”

27. We have carefully gone through the impugned order, pleadings and documents. It appears from the plaint and documents that Defendant No.1 has not denied the execution of the receipt-cum-agreement dated 19th December, 2004. The Defendant No.1 has also admitted the total sale consideration of the property and also having received Rs.4 lac as bayana. The Defendant has not denied that the property in question was mortgaged with ICICI Home Finance Co. Ltd. and required the Plaintiff to take loan from the bank. The Defendant No.1 has not denied the fact that the Plaintiff had applied for loan with some other bank on 26th December, 2005 i.e. within one week of the date of receipt-cum-agreement as well as sanctioning of the loan. It is also a matter of fact that part bayana amount of Rs.2 lac which was given to the Defendant by the Plaintiff by way of cheque was subsequently got encashed by the Defendants. It is not denied by the Defendants that the Plaintiff prepared two pay orders for a sum of Rs.13,25,000/- (pay order No.664711 dated 20th

January, 2005) and another for Rs.5,25,000/-), total amounting to Rs.18,50,000/- in the name of Defendant No.1.

The Defendant has not disputed the execution of another document i.e. settlement-cum-sale agreement dated 19th October, 2005 which was executed between the husband of the Plaintiff and Defendant No.1 in which it was agreed by the Defendant No.1 that he would execute a sale deed in favour of the Plaintiff subject to enhancement of sale consideration of Rs.3 lac over and above the amount of Rs.27,75,000/-which was the original sale consideration. Although, the plea of the Defendant No.1 that the agreement as novated/modified on 19th October,2005 was executed under the undue influence, coercion or duress on the complaint filed by the Plaintiff against the Defendant in the police station cannot be determined at this stage and particularly in the application filed by the Defendant under Order 7 Rule 11 of CPC when the disputed questions are involved in the matter.

28. That in view of the abovesaid facts and well settled law, we feel that the plaint prima facie discloses cause of action and there are trial issues which require trial of the suit. Further, at this stage the court is not deciding the matter on merit of the case and we are unable to agree with the finding of the learned single Judge about rejection of the

plaint for non-disclosure of cause of action. The Appeal is, therefore, allowed and the impugned order dated 19th July 2007 challenged under appeal is set aside. In view of this the application of defendant under Order 7 Rule 11 CPC is therefore dismissed. Now the matter CS (OS) No.558/2006 be listed before Joint Registrar on 16th September, 2008.

29. We make it clear that any observations made herein shall be treated as tentative in nature and shall not constitute any expression of final opinion on the issues involved in the matter and shall have no bearing on the outcome of the case. There will be no order as to costs.

MANMOHAN SINGH, J.

A.K. SIKRI, J.

August 08, 2008
sa/sd