

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

+ RFA 480/2007

JOGINDER KAUR Appellant
Through : Mr. M.Z. Chaudhary, Advocate
versus

SANDEEP KUMAR Respondent
Through : Mr. B.S. Maan, Advocate

CORAM:

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

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?

% **ORDER**
04.09.2008

PRADEEP NANDRAJOG,J(Oral)

1. Admit.
2. Printing of paper book is dispensed with.
3. Heard learned counsel for the parties.
4. Appellant was the defendant. The respondent was the

plaintiff. We shall be referring to the parties by their names i.e. Sandeep Kumar the plaintiff and Smt. Joginder Kaur the defendant.

5. Smt. Joginder Kaur owned a LIG flat bearing No.259 (GF), Block B, Hastal, Uttam Nagar, New Delhi. The flat in question has been demised by DDA under a perpetual lease hold tenure in the land on which the superstructure stand constructed. Ownership of the superstructure belongs to Joginder Kaur.

6. She is a house wife but her husband Dalip Singh is a property dealer.

7. With the intervention of Dalip Singh, an agreement to sell original copy Ex.PW1/1 and carbon copy Ex.PW1/D1 was executed on 20.01.2006 by Joginder Kaur whereunder she agreed to sell the flat to Sandeep Kumar for Rs.9,50,000/- (Nine lacs and fifty thousands). She received Rs.50,000/- as earnest money-cum- advance sale price.

8. We note that Ex.PW1/1 and its carbon copy Ex.PW1/D1 purports to be a receipt but we note that it has all the features of an agreement to sell. Parties do not dispute that Ex.PW.1/D1

is an agreement to sell.

9. Ex.PW1/1 records that the purchaser shall within three months pay the balance sale consideration. It records that in case the property continues to be lease hold, the period for sale would commence from the date when sale permission is granted by the lessor i.e. DDA.

10. Sandeep Kumar was constrained to file the suit seeking a decree of specific performance of the agreement of sale, Ex.PW1/1. The suit was filed on 22.4.2006. Sandeep Kumar stated that since he was entitled to have the sale deed executed in his favour within three months of the execution of the agreement to sell and that three months were coming to an end on 20.4.2006, he made repeated attempts to pay balance sale consideration to Joginder Kaur and have the sale deed executed but the same were frustrated due to Joginder Kaur avoiding meeting him. He stated that he had no option but to seek specific performance of the agreement. He pleaded that he made repeated attempts to contact Joginder Kaur on 18.4.2006.

11. Joginder Kaur took a defence that Sandeep Kumar was in

breach because he never tendered the balance sale consideration to her. She stated that on the last date by which she was to execute the sale deed i.e. 20.4.2006 she went to the office of the Sub Registrar and waited for Sandeep Kumar to make himself available with the money so that she could execute the sale deed but he never came.

12. A defence under the sale agreement Ex.PW1/1 was predicted, being that, it was recorded therein that in case the sale is not completed and she is at fault, she would be liable to return the advance at double of the market price.

13. In view of the afore noted pleadings 2 substantive issues were framed, being:-

- 1. Whether amount of double the earnest money mentioned in the agreement to sell was by way of penalty or liquidated damages or as substitute for performance of contract? OPP*
- 2. Whether the plaintiff is entitled to decree of specific performance of agreement to sell against the defendant pertaining to the suit property? OPP*

14. At the trial Sandeep Kumar examined only himself as his only witness. He was examined as PW-1. Joginder Kaur examined only one witness i.e. her son Harminster Singh as DW-

1.

15. At the trial Joginder Kaur, through her son, proved a bill of a PCO booth Ex.DW1/B evidencing a call made from the PCO booth on 20.4.2006 to the mobile phone of Sandeep Kumar namely telephone no.9811057558. She also proved Ex.DW1/D, through her son, being a receipt issued by the Registrar Office showing that Joginder Kaur was present in the office of the Sub Registrar on 20.4.2006. Third document proved was Ex.DW1/C being an affidavit deposed to by Joginder Kaur on 20.4.2006 before a Notary Public wherein she recorded that she remained present in the office of the Sub Registrar on 20.4.2006 from 9.30 am to 1.00 pm and Sandeep Kumar did not reach the office.

16. Sandeep Kumar deposed that he had made repeated attempts to contact Joginder Kaur on 18.4.2006. He stated in his deposition that he had Rs.3,00,000/- (rupees three lacs) in his bank account and that he had made the necessary arrangement for the balance amount.

17. The learned trial Judge has held on both issues against appellant Joginder Kaur.

18. Since at the hearing today, learned counsel for the appellant has pressed the appeal pertaining to issue no.2 we need not note the discussion on issue no.1 by the learned trial Judge save and except to record that the view taken by the learned trial Judge is absolutely correct, namely that, merely because a penalty clause is stipulated in an agreement to sell, it does not mean that the party wronged cannot seek specific performance. The issue is no longer res integra and stand concluded by the decision of the Hon'ble Supreme Court reported as JT 1999(8) SC 34 Manzoor Ahmed Margray Vs. Gulam Hasan Alam and others.

19. On the second issue we note that, while discussing the evidence the learned trial court has recorded as under:-

"30. Plaintiff in his testimony as PW1 deposed on oath the above mentioned contents of his pleadings and proved on record the agreement to sell/receipt as Ex.PW1/1 and identified signatures of the defendant as well as her husband and son, besides the property dealer and other witness on the same. He also placed on record as Ex.PW1/2 & 3 copies of receipts of deposit of conversion fee of the suit property by him with the DDA and stated that till date conversion has not been done. PW1 stated that he has always been ready and willing to perform his part of the agreement by paying the balance sale consideration of Rs.9,00,000/- but

the defendant has flatly refused on 18/04/06 to complete the sale transaction.

31. In his cross-examination PW-1 admitted that Ex.PW1/D1 is the carbon copy of agreement Ex.PW1/1 and explained that since the size of the carbon paper was small, signatures of all the witnesses do not appear on the carbon copy Ex.PW1/D1. He denied the suggestion that the balance sale consideration had to be arranged by him from his bank by way of loan and his loan request had been rejected. He explained that since on 18/04/06 itself the defendant had flatly refused to complete the sale transaction, he did not deposit the money in the treasury for purchase of stamp papers and filed the suit in urgency without issuing notice. He denied the suggestion that on 20/04/06 the defendant had called him up and requested to come for execution of sale deed. Presently he has Rs.3,00,000/- in his bank account but can arrange the balance amount within 3-4 days from his relatives.

32. Son of the defendant appeared as DW1 and stated that the agreement Ex.PW1/D1 had been entered into by the plaintiff by paying Rs.50,000/- towards earnest money out of the total sale consideration of Rs.9,50,000/- for the suit property. DW1 stated that the balance sale consideration of Rs.9,00,000/- had to be paid by the plaintiff within three months from the agreement dated 20/01/06 failing which the earnest money was liable to be forfeited. Till 20/04/06 plaintiff could not arrange the balance sale consideration and has falsely stated having met the defendant on 18/04/06 when she refused to execute the sale deed. DW1 stated that the defendant had contacted the plaintiff on his mobile phone on 20/04/06 and proved on record as Ex.DW1/B the PCO receipt thereof besides an

affidavit Ex.DW1/C and receipt of Sub Registrar office Ex.DW1/D to show defendant's visit to the Sub Registrar's office. DW1 stated that since plaintiff replied to the defendant on telephone that he had not been able to arrange the balance payment, the earnest money was forfeited.

33. In his cross examination DW1 admitted that he had no written authority of the defendant to appear and depose on her behalf in this case. He denied the suggestion that on 18/04/06 plaintiff contacted the defendant with the request to execute sale deed and she declined. Contrary to his chief examination, DW1 in cross examination stated that the telephone call on 20/04/06 had been made to the plaintiff by him only and not by the defendant. As per DW-1 when he responded to the call, saying "Hello", plaintiff straight away said "Paise nahin hain". He could not say as to for how long the phone call took. There is a telephone installed at his residence and the call to the plaintiff had been made from PCO outside office of Sub Registrar. DW1 stated that he does not know if the plaintiff is ready and willing to pay the balance sale consideration to complete the transaction.

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36. So far as readiness and willingness of plaintiff to perform his part of agreement and pay the balance sale consideration is concerned, I do not find any merit in the objection of the defendant. For, admittedly the plaintiff deposited a substantial amount of money with the DDA for conversion of the suit property to freehold and that too on the applications signed by the defendant only. Defendant herself did not come to the box to be confronted with the fact alleged by the plaintiff that the latter had contacted her on 18/04/06. Since the defendant had flatly refused

to complete the sale transaction on 18/04/06, there was no occasion for the plaintiff to visit the office of Sub Registrar on 20/04/06.

37. Defendant also failed to bring any evidence to show that plaintiff had been informed by her that she would visit the office of Sub Registrar on 20/04/06 for executing sale deed. Merely because the defendant visited the office of Sub Registrar on 20/04/06 as reflected from Ex.DW1/C&D, it cannot be said that the same was after due intimation to the plaintiff and for the purposes of completing sale transaction. It is very convenient to visit the office of Sub Registrar, obtain a receipt of visit and claim that the person had gone there with intent to complete the transaction. Such evidence lacs credence. Besides, as held in the case of VIDYADHAR (supra) failure on the part of defendant to step into the box and state her case on oath and subject herself to be cross examined raises a presumption against her.

38. A careful perusal of PCO receipt Ex.DW1/B would reveal that the telephonic call made thereunder lasted hardly for a second. Such a receipt is nothing but a concoction to somehow establish effort of the defendant to contact plaintiff. Above all, there is no evidence at all that the telephone number mentioned in the receipt is that of plaintiff. The receipt has been filed simply to mislead the court.

39. As such, it cannot be said that plaintiff himself was not ready and willing to perform his part of agreement. Plaintiff categorically deposed that he had arranged the money on 18.04/06 and there is no evidence to the contrary."

20. During arguments today, learned counsel for the appellant did not make any worth while submission to challenge the

finding recorded by the learned trial Judge. Learned counsel urged that the appellant is a house wife and that the flat in question is her only residence. Counsel urges that the appellant should be relieved of the obligation to perform her part of the contract and the respondent may be compensated by awarding damages.

21. We are afraid, Joginder Kaur, not having shown any special circumstance or equities before the learned trial Judge cannot try and make out a new case in appeal. Had she pleaded special circumstance and equities the learned trial Judge would have framed an issue to the effect whether inspite of proving being wronged whether Sandeep Kumar should be declined specific performance of the agreement and compensated by money.

22. Be that as it may, since we are deciding a first appeal, we have independently looked into the evidence to satisfy ourselves regarding the findings returned by the learned trial Judge. We are concur with the findings. We may briefly note that the defence of Joginder Kaur predicted on Ex.DW1/B shows her evil mind. Ex.DW1/B is a receipt issued by a PCO booth. It shows a call made to Sandeep Kumar on his mobile number with call

duration being 1 second. It is obvious that the call was made and the moment the recipient responded, the call was disconnected. It suggests that Joginder Kaur was creating false evidence.

23. We may note that when Harminder Singh, DW-1 son of Joginder Kaur was cross-examined on the time duration recorded in the receipt Ex.DW1/B he stated as under :-

"The telephone call on 20.4.2006 to the plaintiff had been done by me only, regarding which receipt Ex.DW1/B is on record. I had responded to the phone call saying "Hello" which followed the plaintiff straightaway saying "paisa nahin hain".

24. We note that normally the recipient of a call on receiving the call responds by saying "Hello" and thereafter the caller responds by either responding to the, greeting or commencing the conversation which the caller intended to make with the recipient of the call.

25. Obviously Harminder Singh was trying to get over the fact that the telephone call lasted only 1 second.

26. It would not be out of place to record that Sandeep Kumar

denied having received any call. We note that he was not cross examined on the nature of conversation which took place when the call was made. Obviously, since the call lasted for only 1 second, evidence probabilises that the moment Sandeep Kumar responded to the call by pressing button on the hand set, the caller, on hearing that the ring tone had stopped, disconnected the call. We may note that if a limited conversation as stated by Harminder Singh was made meaning thereby Harminder Singh said "*Hello*" and Sandeep Kumar said that "*Paisa nahin hain*", it would have at least taken 3 to 4 seconds. We also note that Haminder Singh or Joginder Kaur never served any notice upon Sandeep Kumar calling upon him to bring the money and have the sale deed executed in his favour.

27. Before concluding, we may note that no submissions have been made with respect to the readiness and willingness of Sandeep Kumar to comply with his obligations under the contract. We may also note that in addition to paying Rs.50,000/- to Joginder Kaur, Sandeep Kumar has paid Rs.27,933/- to DDA as conversion charges. We note that the lease hold tenure had not been converted into free hold. We

note that Joginder Kaur had not obtained any sale permission from DDA.

28. Learned counsel for the appellant does not dispute that a decree for the specific performance can be passed but conditionally upon DDA granting conversion of lease hold tenure to free hold tenure or permission being granted by DDA to complete the sale.

29. We find no infirmity in the impugned judgment and decree.

30. The appeal is dismissed with costs.

PRADEEP NANDRAJOG,J

SUNIL GAUR, J

SEPTEMBER 04, 2008

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