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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve : 30.07.2009

Pronounced on : 11.08.2009

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CS (OS) 1793/1999

S.K. MITTAL

..... PLAINTIFF

Through : Mr. Jagjit Singh, Advocate

Vs.

KALINGA ESTATE (P) LTD. & ORS.

..... DEFENDANT

Through : Nemo

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

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

S.RAVINDRA BHAT, J.

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1. The plaintiff sues the defendant for specific performance of an agreement to sell immovable property, being Ground Floor of B-31, Panchsheel Enclave, New Delhi (hereafter “the suit property”).

2. The suit averments are that the plaintiff entered into an agreement with the defendants, on 21st July 1996, whereby the former agreed to purchase the suit property. The Plaintiff alleges having agreed to purchase the suit property for a consideration of Rs. 1,00,17,000/- (Rupees one crore, seventeen thousand only). The agreement has been marked

as Ex. PW-1/1-A. It is submitted that, a sum of Rs. ten lakhs seventy thousand (Rs. 10,70,000/-) was paid in cash, and Rs. One lakh (Rs. 1,00,000/-) was paid through pay order, drawn on Karnataka Bank, Chandni Chowk, New Delhi, at the time of signing of the agreement to sell. Copy of the receipt has been marked as Ex. PW-1/2. The terms of this agreement, also stipulated that the balance amount was to be paid by the plaintiff, by 5th August 1996, subject to the defendants securing permissions under Section 37-I and Section 34 of the Income Tax Act, which were mandatory at that point in time. The plaintiff adverts to reminding the defendants to comply with these requirements, through letters dated 26th July, 1996 and 31st July, 1996; true copies of those letters are marked as Ex. PW-1/3 and Ex. PW-1/4. Postal receipts have been marked as Ex. PW-1/5 and Ex. PW-1/5A.

3. It is contended that the defendants, despite their obligations to apply and obtain the Income Tax clearances, did not do so. The second defendant, according to the plaintiff, stated that some more time was required for obtaining the necessary clearances. The plaintiff, therefore, extended the time for performance through letter dated 03.08.1996, by five months. A true copy of that letter is produced as Ex. PW-1/6. The plaintiff contends that despite the extension, the clearances to enable parties to complete the sale transactions were not obtained for at least ten months.

4. The plaintiff says that by registered letter dated 04.01.1997 (Ex. PW-1/7) he extended the time for performance of the agreement to sell, by a further ten months, from January, 1997. He alleges that even at the end of the ten-month period, the defendants did nothing to pursue the matter, and instead, sought more time, in October, 1998. The plaintiff contends that he agreed to extend the time (for performance) by 10 months, provided the defendants handed over the original conveyance and sale deed in respect of the suit property to him. These were handed over; the plaintiff has produced them as Ex. PW-1/9 and Ex. PW-1/10.

The plaintiff refers to a letter dated 23.10.1997 sent to the defendants confirming the said facts (Ex. PW-1/11 and postal receipt as Ex. PW-1/12).

5. It is contended that the plaintiff was in touch with the defendant's representative, Piyush Kumar, who allegedly kept assuring him that the sale deed would be executed, according to the agreement, however, nothing happened. In April, 1998 the plaintiff, therefore, went to meet the defendants' representative, along with his property dealer, Shri. H.R. Ahuja; however, the defendants' representative demanded an additional amount for completion of the transaction. The plaintiff submits that such a demand was rejected; he relies on a letter written on 13th April, 1998, (Ex PW-1/13) to the defendant, and later, a legal notice, dated 25.09.1998 (marked as EX. PW-1/14). It is submitted that the registered A/D card was received back, duly signed by the defendant; it has been produced as Ex. PW-1/16. The plaintiff, therefore, seeks decree for specific performance, as prayed.

6. The defendants were served in the suit. The order sheet reveals that they were represented by counsel from 18.10.2000 to 06.04.2004. The defendants sought, and were given several opportunities to file its written statement. They were not appearing in the court, for a long time. In these circumstances, on 06.04.2004, they were set down *ex-parte*.

7. To prove his case, the plaintiff examined himself, through affidavit dated 24th January, 2004. He deposed generally, in support of the suit, and contended having paid the consideration amount, agreed to be an advance under the agreement to sell, entered into by the parties, on 21.07.1996. It was deposed that the defendants were to secure Income tax clearances, and obtain certificates, in accordance with law, before 05.08.1996. They could not do so; the time for performance, was extended initially to October, and later to April, 1998. Yet, the defendants could not comply with their commitment. Letters and copies of the correspondence, relied on by the plaintiff, were also exhibited through the plaintiff, PW-1. In

these circumstances, it was argued, by the plaintiff that the court should issue a decree for specific performance.

8. Mr. Jagjit Singh, learned counsel re-iterated the suit averments, and also relied on the exhibits produced by PW-1. He stated that the averments in the suit and the deposition (through the plaintiff's affidavit) sufficiently prove all the ingredients necessary in a claim for specific performance, and, therefore, the suit should be decreed. It was argued, based on the suit averments, that the plaintiff is ready and willing to perform his part of the bargain, and was at all relevant times, ready and willing to do so. It was emphasized that the suit is categorical that the plaintiff possesses means, and owns agricultural lands.

9. The terms of the contract (Ex PW-1/1A) recite that Bhushan Kumar Uppal had secured lease in respect of the suit property, which was registered on 29th January, 1975 and that the property was converted into freehold, on 05.05.1995, through a registered conveyance deed. The agreement states that the ground floor, or the suit property would be sold to the plaintiff, for a consideration of Rs. 1.17 crores, of which the sum of Rs. 11, 70,000/- was paid on the date of the execution of the agreement. The time given for payment was by 05.08.1996; by clause 9, the vendor agreed to apply for income tax clearance.

10. The letters produced by the plaintiff (Ex. PW-1/6, Ex. PW-1/7) show that the time for performance of the obligations was extended, after January, 1997. The plaintiff's version, through his affidavit, is that even at the end of the ten-month period, the defendants did nothing to pursue the matter, and instead, sought more time, in October, 1998. The plaintiff deposes agreeing to extend the time (for performance) by 10 months, on condition that the defendants handed over the original conveyance and sale deed in respect of the suit property, to him. The plaintiff has produced them as Ex. PW-1/9 and Ex. PW-1/10. The plaintiff has

also proved that demands were made on the defendants through letters and legal notices; they were also received by the defendants.

11. The above materials, along with the pleadings, in this court's opinion, are sufficient to show that the plaintiff proved existence of an agreement to purchase the suit property; though it was conditional on the defendant obtaining income tax clearance, particularly under Section 37-I of the Income Tax Act, that stipulation is no longer relevant. The agreement proved, and placed on record, is certain about the total consideration, about the property, and the parties' willingness that it should be conveyed to the plaintiff.

12. Besides the above consideration, the Court has to, independently examine whether the material on record entitles the plaintiff to the decree sought for. Two important considerations always weigh with the Court while adjudicating a claim for specific performance of a contract of sale of immovable property. One, whether the plaintiff had pleaded and proved readiness and willingness to perform his part of the contract and two, whether the equities of the case demand that such a decree be made. (see *Yohanan v. Ram Latha*, 2005 (7) SCC 534; *Suryanarian Upadhayay v. Ram Roop Pandey*, AIR 1994 SC 105 and *Ouseph Verghese v. Joseph Aley*, 1969 (2) SCC 539).

13. Learned counsel for the plaintiff was able to point out the averment in the suit to submit that the necessary pleadings had been made. He also referred to the affidavit of evidence of PW-1 for the contention that the plaintiff was ready and willing and continued to be so for the performance of his part of the obligation. It is now an established law (refer *Chand Rani v. Kamal Rani*, 1993 (1) SCC 519) that there is no presumption that the time is of the essence of the contract, in the case of an agreement to sell immovable property yet at the same time absence of any stipulation does not relieve the parties concerned from the

obligation to perform it within reasonable time. As to what is reasonable time would vary from case to case having regard to attendant facts and circumstances.

14. In this case, the agreement did advert to time; the obligations were to be performed by 05.08.1996. It is a matter of record, however, that this period was specifically extended from time to time, the last extension, ending in April, 1998. The agreement, by clause 8, visualized that in the event of the defendants' failure or neglect to convey the property, the plaintiff could have the contract enforced through the legal process. The question is, whether all these ingredients having been proved, the plaintiff has discharged the obligation to prove readiness and willingness to perform the contract.

15. Section 16(c), of the Specific Relief Act, which is relevant for the purpose of this case, to the extent it is material, is reproduced below:

"16. Personal bars to relief:

(a)

(b)

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms of the performance of which has been prevented or waived by the defendant.

Explanation—For the purpose of Clause (c)—

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in Court any money except when so directed by the Court;

(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract accordingly to its true construction."

16. In *Ardeshir H. Mama v. Flora Sassoon*, AIR 1928 PC 208, the Privy Council observed that unlike in the case of a contractual breach, (where the injured party sued at law,

he thereby elected to treat the contract as at an end himself and as discharged from the obligations, where no further performance by him was either contemplated or had to be tendered), in a suit for specific performance on the other hand, he treated and was required by the Court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, also required to prove a continuous readiness and willingness from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment brings with it and leads to the dismissal of the suit. The observations were affirmed in *Prem Raj v. The D.L.F. Housing and Construction (Private) Ltd. and Anr.*, AIR 1968 SC 1355. The Supreme Court, in *Syed Dastagir v. T.R. Gopalakrishna Setty*, 1999 (6) SCC 337, noted that:

“So the whole gamut of the issue raised is, how to construe a plea specially with reference to Section 16(c) and what are the obligations which the plaintiff has to comply with in reference to his plea and whether the plea of the plaintiff could not be construed to conform to the requirement of the aforesaid section, or does this section require specific words to be pleaded that he has performed or has always been ready and is willing to perform his part of the contract. In construing a plea in any pleading, Courts must keep in mind that a plea is not an expression of art and science but an expression through words to place fact and law of one’s case for a relief. Such an expression may be pointed, precise, sometimes vague but still it could be gathered what he wants to convey through only by reading the whole pleading, depending on the person drafting a plea. In India most of the pleas are drafted by Counsel hence the aforesaid difference of pleas which inevitably differ from one to the other. Thus, to gather true spirit behind a plea it should be read as a whole. This does not distract one from performing his obligations as required under a statute. But to test whether he has performed his obligations, one has to see the pith and substance of a plea. Where a statute requires any fact to be pleaded then that has to be pleaded may be in any form. The same plea may be stated by different persons through different words; then how could it be constricted to be only in any particular nomenclature or word. Unless a statute specifically requires a plea to be in any particular form, it can be in any form. No specific phraseology or language is required to take such a plea. The language in Section 16(c) does not require any specific phraseology but only that the plaintiff must aver that he has performed or has always been and is willing to perform his part of the contract. So the compliance of “readiness and willingness” has to be in spirit and substance and not in letter and form. So to insist for a mechanical production of the exact words of a statute is to insist for the form rather than the essence. So the absence of form cannot dissolve an essence if already pleaded.”

In *Motilal Jain v. Ramdasi Devi (Smt.) and Ors.* 2000 (6) SCC 420, it was held that readiness and willingness could not be treated as a straitjacket formula and that had to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the party concerned. *Syed Dastgir* (supra) is also an authority that since there is no specific form for deciding whether a party was ready and willing to perform his part of the contract, the court would have to see the overall circumstances, and that the proof of such readiness and willingness “*has to be in spirit and substance and not in letter and form.*”

17. The idea behind Section 16(c) read with Explanation (ii) is that any person seeking benefit of the specific performance of contract must manifest that his conduct has been blemishless throughout entitling him to the specific relief. Since the relief sought is equitable and discretionary, the Court can grant the relief on the basis of the person who seeks it.

18. Section 16(c) of the Act mandates the plaintiff to aver in the plaint and establish *as the fact by evidence* that he has always been ready and willing to perform his part of the contract. These were declared, as essential considerations, in *Surya Narain Upadhyaya v. Ram Roop Pandey and Ors.*, AIR 1994 SC 105 and *Aniglase Yohannan v. Ramlatha and Others*, 2005 (7) SCC 534).

19. In this case, apart from making bald and general allegations about the plaintiff's willingness and readiness to perform his part of the bargain, no evidence – in the form of bank account statement (of the plaintiff) for the relevant periods, i.e. date of filing the suit, and the date when the plaintiff produced his evidence- has been placed on the record. No evidence of the means, claimed in the plaint, to be useful for establishing readiness and willingness. That requirement is not a ritualistic incantation of what is prescribed under the Act, but determines the claimant's ability to perform the contract. Here, no proof to that effect has been offered.

20. The plaintiff has, in the alternative, sought for a decree for Rs. 52,21,000/- being the refund of the amount paid as advance, and Rs. 30,00,000/- towards damages, and further claims 24% interest. The evidence and materials show that the plaintiff's claim for refund of the advance amount of Rs. 11, 70,000/- has been proved. However, there is no evidence to prove the claim for Rs. 30 lakh. The plaintiff has not revealed the basis of that claim; he does not say that a comparable property was acquired by him, and that the amount of difference in cost of the suit property and such property, acquired later, was Rs. 30 lakhs. In these circumstances, the plaintiff has failed to establish that claim.

21. In view of the above discussion, the plaintiff, in the opinion of the court, has been able to prove his alternative money claim, to the extent of Rs. 11,70,000/- towards refund of security. Although 24% interest, *pendent lite* and future has been prayed, that, in the opinion of the court cannot be allowed. The court therefore, awards 10% interest, *pendent lite*, and future, from the date of filing of the suit.

22. The suit, therefore, succeeds in part; it is decreed to the extent of Rs. 11, 70,000/- with 10% interest from the date of filing (of the suit) till realization. The suit is decreed, with costs, to the above extent; counsel's fee is quantified at Rs. 75,000/-.

August 11, 2009

(S. RAVINDRABHAT)
JUDGE