

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : 07.10.2009

Pronounced on: 12.10.2009

+

CS (OS) NO. 1095/2008

SHRI DEEWAN ARORA

..... Plaintiff

Through : Mr. Jitender Kumar Singh, Advocate

Vs.

SMT. TARA DEVI SEN & ORS.

..... Defendants

Through : None.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

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.

HON'BLE MR. JUSTICE S.RAVINDRA BHAT

1. This suit for specific performance was filed by the plaintiff (hereafter, Deewan), against the first defendant (hereafter, Tara Devi) seeking a decree of specific performance in terms of the Agreement to Sell dated 14.02.2008 that was allegedly executed by her in respect of C-515, Avantika, Rohini, Sector-1, Delhi-110085 (hereafter "the suit property"), in Deewan's favour, along with a direction to the third defendant, GE Money Housing Finance (hereafter, GE Money), to hand over all the documents of the suit property on repayment of home loan taken by the defendant for the purchase of the suit property.

2. According to the suit averments Tara Devi is the owner of the suit property, which is a freehold property that she had purchased through a valid sale deed dated, 27.07.2007 from

one Tajinder Singh S/o Mahendra Singh, and had executed an agreement to sell on 14.02.2008 in Dewan's favour for a sale consideration of Rs. 23,50,000/-. It is alleged that a sum of Rs. 8,00,000/- was paid to her in cash on 14.02.2008 by Deewan, and it was agreed that she would handover vacant physical possession of the suit property to him by 10.04.2008, which condition was complied with. It is further alleged that it was agreed between the parties that the balance consideration of Rs. 15,50,000/- was to be paid by Deewan to her on or before 10.05.2008. Accordingly a sum of Rs. 9,30,000/- was again paid in cash on 02.05.2008. Deewan alleges further that, when on 03.05.2008 he visited Tara Devi and her husband (the second defendant) at their house to pay the balance of the consideration amount, they were not there and could not be traced. Later it was discovered that the property was mortgaged with GE Money against a home loan of Rs. 13,50,000/- , whereas in terms of the agreement to sell, the suit property was stated to be free from all encumbrances, such as sale, mortgage, gift, lien, lease, litigation dispute, notification, acquisition, attachment, etc.

3. It was also agreed that if it is proved otherwise, Tara Devi, shall indemnify Deewan in full, to the extent of loss sustained by him. It is stated that Deewan approached GE Money and volunteered to repay the pending loan amount in full requesting that the original documents pertaining to the suit property should be handed over to him, which request was declined.

4. The defendants were served through affixation of summons, and by publication; they did not, however appear in the proceedings. By order dated 09.02.2009 the first and the second defendants were proceeded *ex-parte* and the third defendant's right to file a written statement was closed, as it had failed to file it for almost six months. An *ad interim* injunction was also granted by the Court against GE money restraining it from creating any third party rights or parting with the possession of the suit property. Further, on 16.07.2009 GE Money was also proceeded *ex-parte*.

5. Two affidavits in evidence were filed in support of Deewan's case, his own (Ex. PW1/A) and that of one Ajay Pal (Ex. PW2/A), who allegedly is the witness to agreement to sell. The averments made in the plaint were affirmed in both the affidavits. The original of the

Agreement to Sell dated 14.02.2008 is exhibited as Ex. PW-1/1 and the original copy of the Sale deed dated, 27.07.2007 executed by Tajinder Singh in favour of Tara Devi is exhibited as Ex. PW-1/2. The plaintiff has also filed two receipts for advance cash payments on two occasions, for Rs. 2,00,000/- on 24.02.2008 and Rs. 9,30,000/- on 02.05.2008, both bearing endorsement of the second defendant, exhibited as Ex. PW-1/3 (Colly).

6. The Court has carefully considered the averments in the plaint and the documents produced in support of the suit. Deewan has, in the opinion of this Court, established the existence of the alleged agreement to sell dated 14.02.2008. However, it is noteworthy that the said agreement to sell is an unregistered document which purports to also convey possession to the vendee (Deewan). By the Registration and Other Related laws (Amendment) Act, 2001, Section 17 of the Registration Act, 1908 was amended, by inserting the following provision (requiring compulsory registration of certain instruments):

"(1A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53A of the Transfer of Property Act, 1882(4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related Laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said section 53A..."

The same amendment inserted Item 23A in the schedule to the Stamp Act, which required payment of 90% of stamp on the transaction value, at the stage of execution and registration of an agreement to sell, wherever the sale was to be in the Union Territory. The overall effect of these two amendments is that such documents which mention that possession is given, are to be appropriately stamped and registered. The agreement to sell, in this case, is not so stamped; it is also unregistered.

7. The above observations are, however, not dispositive, since the Court has to independently examine whether even otherwise the material on record entitles the plaintiff to the decree sought for by him. Two important considerations always weigh with the Court while adjudicating a claim for specific performance of an agreement to sell of an 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 vs. Ram Latha*, 2005 (7) SCC 534; *Suryanarian Upadhayay vs. Ram Roop Pandey*, AIR 1994 SC 105 and *Ouseph Verghese vs. Joseph Aley*, 1969 (2) SCC 539).

8. 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- evidence of PW- 1 for the contention that the plaintiff was always ready and willing to pay the balance amount, and continued to be so for the performance of his obligation under the agreement. Yet the plaintiff has failed to prove that he has always been ready and willing to perform his obligations under the terms of the agreement. Apart from merely stating that he is ready and willing to pay the balance loan amount to GE Money, the plaintiff has not substantiated his statement or put any documents in support, e.g. his bank account statement showing sufficient bank balance, etc. Further the plaintiff claims to be in possession of the said property since 10.04.2008 onwards, yet again this remains to be a mere assertion, as no documents have been produced in support of the said claim, nor any witnesses examined.

9. Section 16(c) of the Specific Relief Act, 1963 provides that the discretionary relief of specific performance of the contract can be granted only in the event the plaintiff not only makes necessary pleadings but also establishes that he was always been ready and willing to perform his part of contract. Such readiness and willingness on the part of the plaintiff is not confined only to the stage of filing of the plaint but also at the subsequent stage, viz., at the hearing. This was emphasized in *Umabai & Anr v. Nilkanth Dhondiba Chavan (Dead) By LRs. & Anr* [(2005) 6 SCC 243] in the following terms:

"30. It is now well settled that the conduct of the parties, with a view to arrive at a finding as to whether the plaintiff- respondents were all along and still are ready and willing to perform their part of contract as is mandatorily required under Section 16(c) of the Specific Relief Act must be determined having regard to the entire attending circumstances. A bare averment in the plaint or a statement made in the examination-in-chief would not suffice. The conduct of the plaintiff-respondents must be judged having regard to the entirety of the pleadings as also the evidences brought on records..."

The above observations were re-iterated by the Supreme Court, in *Inderchand Jain (D) through L.Rs-vs- Motilal (D) through L.Rs (CA 4584/2009*, decided on 21-7-2009)

10. In view of the above reasons, the plaintiffs are not entitled to claim a decree of specific performance of the agreement dated 14.02.2008. The plaintiff has not been able to establish how they can seek any relief against the bank, with which they have no privity of contract, nor were they able to establish how they could assert a right against it. It is now established that existence of an agreement to sell does not clothe the vendee with any lien, or property right, but merely entitles him to claim specific performance of the contract – if it is enforceable in law, on application of equitable principles. In the decision reported as *Bai Dosabai Vs. Mathurdas Govinddass* AIR 1980 SC 1334 it was thus held that a contract for the sale of immovable property does not, of itself, create any interest in or charge on such property, it merely creates an obligation annexed to the ownership of immoveable property, not amounting to an interest in the property,

11. In view of the above findings and reasons recorded above, this Suit has to fail; it accordingly dismissed. No costs.

**S. RAVINDRA BHAT
(JUDGE)**

OCTOBER 12, 2009