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HIGH COURT OF DELHI : NEW DELHI

Judgment reserved on : November 26, 2009

Judgment delivered on : December 04, 2009

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**R.F.A. (OS) No. 102/2009 &
C.M. No. 16423/2009**

% Sh. Ravindra Kishore Sinha ... Appellant

Through: Mr. Amarendra Sharan, Senior Advocate
with Mr. Ajit Kumar Singh, Mr. Amit Anand
Tiwari, Mr. Amon Sinha and Mr. Sanchit,
Advocates.

versus

Smt. Manjula Bhushan ... Respondent

Through: Mr. Arun Mohan, Senior Advocate with
Mr. Arvind Bhatt, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIKRAMAJIT SEN

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?

SUNIL GAUR, J.

1. Appellant's suit for specific performance of an Agreement of Sale of 31st March, 2005 in respect of second and third floor (including terrace) as well as servant quarters of Property bearing No.E-1, East of Kailash, New Delhi, has been held to be not maintainable by the learned Single Judge vide order of November 09, 2009, which is impugned in this appeal.

2. Upon completion of the pleadings, at the stage of framing of issues, learned Single Judge has taken note of the objection of the

Respondent regarding maintainability of the suit raised in the written statement, which is as follows:-

“15. Para 15 is denied. No cause of action accrued at any time. The suit is not maintainable.”

3. In substance, preliminary objections taken in the written statement were as under:-

“By taking back the earnest money – adjusting Rs.four lakhs meant for second and third floors in the sale deed of basement, ground and first floors – the agreement for second and third floor stood repudiated, abandoned and discharged. There was no earnest money left thereafter. It is also not that the Rs.four lakhs were paid back – replenished a week or so later.

Assuming the agreement (for the second and third floors, which continued to be occupied by the Df-owner) subsisted, provided – despite occupation of these floors by the Defendant – for payment of interest @ 6% per annum on the balance consideration (Rs.1.96 crores), which was to be paid at every six months’ intervals.

In other words, interest was to be paid not at the time of the intended sale, but on calendar dates, i.e., on 30.9.2005, 30.3.2006, 30.9.2006, 30.3.2007 and 30.3.2008. No such interest was paid – and not paid because the parties were clear that no agreement was subsisting.

In any case, the subsequent conduct – of not paying the six monthly interest – was also one which indicated that there was no agreement subsisting between the parties. It also amounted to expressing intention not to keep the agreement alive.”

4. The factual position as noticed by the learned Single Judge in paragraphs 8 and 9 of the impugned order is herein as under:-

“8. It is an undisputed fact that in this case at the time of entering into the agreement in respect of entire property, the parties had assessed the market value of the two portions of the property, one part consisting of basement, ground floor and first floor and the second part consisting of second floor and particularly built third floor with terrace. The agreement itself provides that the amount of Rs.4.15

crore was a reasonable market value of basement, ground and first floor and Rs.2 crore was proper value of second and third floor. Even in case of second floor and third floor, the value was put at Rs.1 crore for each floor since plaintiff had agreed, for convenience sake that in respect of these two floors he could get the sale deed executed either in his or in favour of his nominee for this value. Defendant who was the owner of the property had to remain in occupation of the second floor and third floor all along since she had agreed to receive the consideration of second and third floor within a period of three years. It is apparent that it was in the minds of the parties that the prices of the property keep on increasing. To compensate this, the parties had agreed that defendant will continue to receive 6% interest over the unpaid consideration on interval of every six months. Rs.4 lac was to remain as earnest money with her for second floor and third floor.

9. It is an undisputed fact that the plaintiff did not keep even that Rs.4 lac with the defendant as a token of his surviving interest for second floor and third floor. If the interest of the plaintiff had still been there after 11th October 2005 when he got the sale deed executed in respect of one portion, he would have at least kept that token amount of Rs.4 lac with defendant against the total sale consideration of Rs.2 crore. It cannot be presumed that a person who could spend Rs.4.15 crore on purchasing basement, ground floor and first floor would not spare Rs.4 lac to keep his interest surviving in rest of the property. It only shows that looking at the market situation at that time, plaintiff thought that the deal in respect of part of the property was good enough and he scrapped rest of the agreement and did not keep even Rs.4 lac with defendant. The agreement provided that the plaintiff had to pay every six months interest on balance consideration @ 6% per annum, which to my mind was a very moderate interest and six monthly interest on Rs.2 crore amounted to Rs. six lac. If the plaintiff had not abandoned the agreement he would have paid Rs.6 lac every six months to the defendant to show that his interest was surviving. The first payment of interest of the agreement had become due on 1st October, 2005 and the second payment of Rs.6 lac had become due on 1st April, 2006, third payment on 1st October 2006 and the 4th payment on 1st April, 2007. Plaintiff had not offered any of these dues on account of interest to defendant. No cheque or draft was sent and even in the letter written by plaintiff dated 28th March 2007, there is no talk of interest

payable by the plaintiff to the defendant after every six months. Plaintiff only talked of Rs.1.96 crore being ready with him although even Rs.4 lac was not lying with defendant and had already been adjusted. It is not mentioned in the letter that the defendant at any point of time refused to receive the interest or had asked for the adjustment of the interest. A subsequent reply given to the response of the defendant is not reflective of the true intention of plaintiff. If it had been agreed by defendant as is alleged in the subsequent reply of plaintiff that the accumulated interest was to be paid along with the consideration, then plaintiff in its letter dated 28th March 2007 would have made this offer to defendant. It only shows that the plaintiff, looking at the rise in real estate price wanted to revive an abandoned contract and wanted to drag defendant in unnecessary litigation thinking that under the coercion of litigation, defendant may come to some compromise."

5. After reverting to the relevant clauses of Agreement of Sale in question, learned Single Judge in the order impugned has reached to the following conclusion:-

"I consider that conduct of the parties at the time of execution of the sale deed of adjusting the entire earnest money lying with defendant towards the sale consideration of basement, ground floor and first floor and not leaving even Rs. four lac as earnest money for rest of the property and thereafter non-payment of six monthly interest as agreed, not writing any letter or communication by plaintiff to defendant and there being no correspondence between the parties for two years shows that the contract between the parties in respect of second floor and third floor was abandoned and no part of the contract survived which could be specifically enforced."

6. Learned senior counsel for the Appellant asserts that without there being an application under Order VII Rule 11 of the Code of Civil Procedure, learned Single Judge has summarily dismissed Appellant's suit, without affording any opportunity to the parties to lead evidence and a complete go-by to the procedure has been given, which is not permissible in law. It has been pointed out that the earnest money of

Rupees Eleven Lacs was adjusted in full towards part consideration of the Sale Deed of May 11, 2005, with the consent of the parties and the intention of the parties was not to abandon the Agreement of Sale in question after the execution of the aforesaid Sale Deed. Our attention was drawn to paragraph 9 of the reply of 4th March, 2008 of the Respondent to show that the Respondent had repeatedly requested for payment of the interest amount, particularly in view of the fact that she was an old lady with no regular source of income, but the Appellant had neglected to pay the same by resorting to one excuse or the other.

7. It is a matter of record that neither the Agreement of Sale in question, the Sale Deed of 11th May, 2005, nor the aforesaid reply is in dispute. Still, Appellant audaciously contends that in good faith, he had accepted the suggestion of the Respondent to pay the interest cumulatively alongwith balance sale consideration and there was never any demand for payment of interest from the Respondent and therefore, failure to pay the interest as per the Agreement cannot vitiate the Agreement in question.

8. The contention put forth on behalf of the Appellant is that non-payment of interest in time as such cannot be a ground of annulling the Agreement in question. During the course of arguments, learned senior counsel for the Appellant had drawn our attention to an ad-interim order of 26th March, 2008 of the learned Single Judge whereby Respondent has been restrained from creating third party interest in the subject property on the condition that the Appellant/Plaintiff deposits the sale consideration of Rupees Two Crores within stipulated

time. It has been emphasized by learned senior counsel for the Appellant that the aforesaid sale consideration has been deposited by the Appellant in the Court which indicates the bona fide of the Appellant, who is also ready to deposit the interest thereon at the stipulated rate. Thus, specific performance of the Agreement of Sale in question qua the subject property is sought by the Appellant.

9. Learned senior counsel for the Respondent contends that although the Appellant has not disclosed true and complete facts in the plaint, but in the face of the Written Statement filed by the Respondent, Appellant in the Replication has made vital admissions which are contained in paragraph 6 of the reply to the preliminary objection, which in verbatim, is as under:-

*“That the contents of para 6 are admitted to the extent that Rs. 11 lacs was adjusted towards part consideration of Rs.4.15 crores paid by the Plaintiff to the Defendant. **The said adjustment was done with mutual consent of the parties.** Rest of the contents is denied.”*

10. On the Interest aspect, what is said in paragraphs 2 to 5 of the Replication by the Appellant needs to be taken note of and is as under:-

*“That the contents of paras (2) to (5) are disputed and denied. It is submitted that the Plaintiff was always willing and ready to perform his part of obligation under the agreement to sale dated 31.3.2005 and accordingly had offered to pay the Defendant interest @ 6% p.a. on the balance sale consideration of Rs.2 crores on about expiry of first six months from the date of execution of the Agreement of Sale. **The Defendant refused to accept the interest amount and instead requested the Plaintiff to make onetime payment of the same alongwith the balance sale consideration at the time of execution of the sale deed. The Plaintiff in good faith accepted the said suggestion of the Defendant.***

Even otherwise, the Defendant has not put the Plaintiff to notice to pay the interest amount and as such, it is deemed that the Defendant has condoned such conduct of the Plaintiff and has signified by word and/or conduct the acquiescence in the agreement of sale's continuance. It is further submitted that the payment of interest on balance consideration is not essence of the contract and cannot be a ground for annulling the agreement of sale. The Plaintiff further in its reply reiterates the contents of the plaint and of the paras herein above, which are not being repeated herein for the sake of brevity."

11. After having heard learned senior counsel for the parties and upon scrutiny of the record of this case, we find that this case is entirely based on documentary evidence, which is in the shape of Agreement of Sale in question and the correspondence between the parties in the form of Notices (Annexure A-4 & Annexure A-6) and Replies thereto, (Annexure A-5 & Annexure A-7). The existence of these documents is not in dispute and in such a situation, where is the need to call upon the parties to lead any oral evidence.

12. A Division Bench of this Court in **"Parivar Seva Sansthan v. Dr.(Mrs.) Veena Kalra and Ors."**, AIR 2000 Delhi 349, has reiterated that any plea raised against the contents of the documents only for delaying trial being barred by the Section 91 and 92 of Evidence Act or other statutory provisions, can be ignored.

13. Section 92 of the Evidence Act prohibits adducing of oral evidence for the purpose of varying the contract as between the parties to it. It is not the case of the Appellant that his case falls in any of the six provisos to Section 92 of the Evidence Act. Apex Court in **"Roop Kumar vs. Mohan Thedani"**, AIR 2003 SC 2418 has dealt with this aspect, in the following words:-

“It is likewise a general and most inflexible rule that wherever written instrument are appointed, either by the requirement of law or by the contract of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict or alter them. This is a matter both of principle and policy. It is of principle because such instruments are in their own nature and origin, entitled to a much higher degree of credit than parol evidence. It is of policy because it would be attended with great mischief if those instruments, upon which men's rights depended, were liable to be impeached by loose collateral evidence.”

14. Undisputed facts on record are that as per the Agreement of Sale, Rupees Four Lac was an earnest money for the specific performance and the balance sale consideration of Rs.1.96 crores was to be paid at the time of execution and registration of the Sale Deed in respect of second and third floors, etc. of the property in question. Once the entire earnest money stands adjusted, towards the sale consideration of the basement, ground and first floor of the property in question, then in the absence of the earnest money, for the subject property, i.e., second and third floor etc., the Agreement of Sale does not survive and infact stands abandoned. There is irrefutable substance in the opinion of the learned Single Judge that once the earnest money of Rupees Four Lacs was adjusted, the agreement for purchase of the second and third floors would be reduced to an unenforceable contract for want of consideration. Although, it is the plea of the Appellant that the said adjustment of the entire earnest money was done with the mutual consent of the parties, but this is all oral and it does not stand reflected either in the aforesaid Notices or Replies thereto.

15. In view of the aforesaid bar of Section 92 of the Evidence Act to leading of the oral evidence, contrary to the documentary evidence,

Appellant cannot be permitted to orally depose in support of the aforesaid bald plea of adjustment of the earnest money being done with the consent of the parties. Once the earnest money for performance of the Agreement of Sale in question stands adjusted towards the sale consideration of basement, first ground floor and first floor of the property in question, the Agreement of Sale in respect of subject property, i.e., the second and third floor, etc., stands apparently abandoned. On this aspect, what has been said by a Division Bench of this Court in R.F.A. No.584/2002, **Harbans Lal vs. Daulat Ram**, decided on December 6, 2006, is as under:-

“As a matter of fact, the demand of the earnest money back from the seller may in itself constitute a repudiation of the agreement by the purchaser for such a demand would be inconsistent with his readiness and willingness to go ahead with the transaction. In other words, no sooner the purchaser demands the refund of the earnest money on the ground that the seller is unable to perform his part of the agreement, the demand must constitute a cancellation of the agreement at the instance of the purchaser.”

16. In terms of the Agreement of Sale, the balance of the sale consideration of the second and third floor etc., i.e., Rs.1.96 crores was to be paid by the Appellant to the Respondent within three years of the execution of the Agreement of Sale and during this period, Appellant was to pay interest on the balance of the sale consideration at the rate of 6% per annum after the interval of every six months, which he has failed to do so and the lame plea put forward by him is that the Respondent/Defendant had refused to accept the interest amount and had requested the Appellant/ Plaintiff to make one time payment alongwith the balance sale consideration and Appellant had accepted this position in good faith. Had it been so, the same would have been

reflected in the Notices (Annexure A-4 & Annexure A-6) sent by the Appellant to the Respondent but this vital fact is conspicuously absent and there is no whisper about it in the correspondence between the parties. As already said above, leading of oral evidence contrary to the documentary evidence is impermissible as none of the six provisos to Section 92 of the Evidence Act is invoked by the Appellant and the Appellant cannot be given an opportunity to lead inadmissible oral evidence. Reference to paragraph 9 of the Reply (Annexure A-7) of the Respondent by the Appellant is misplaced and is out of context. It was not incumbent upon the Respondent to demand the payment of interest. Rather, Appellant by defaulting to pay the interest as stipulated in the Agreement of Sale has rendered it unenforceable in law. Respondent was not under any obligation in law to put the Appellant to notice for demand of the interest amount in terms of the Agreement of Sale (Annexure A-2).

17. Rigmarole of a trial is not to be routinely undertaken. At every stage of the suit, Judges have to be vigilant to see as to whether cause of action to further proceed with the suit survives or not. At any stage of the suit, if the court finds that the cause of action no longer survives, then it ought not to await a formal application under Order VII Rule 11 of CPC and can “suo moto” exercise its inherent powers under Section 151 of CPC in the interest of justice, to do complete justice between the parties. We, therefore, do not find any substance in the contention of learned senior counsel for the Appellant of impugned order short-circuiting the trial.

18. Courts have to play proactive role as they are faced with overflowing dockets and the learned Single Judge has shown the way

by proceeding to examine as to whether Appellant's claim discloses the cause of action to proceed to a trial. Although the impugned order discloses that the issue of maintainability of a suit has been dealt with, but in fact, learned Single Judge has by detailed order, invoked clause (a) of Rule 11 of Order 7 of the Code of Civil Procedure, which provides for rejection of plaint if it is found to be lacking cause of action. It is really immaterial that in the impugned order, suit of the Appellant's has been held to be not maintainable. Without concentrating on the phraseology, true import of the order has to be seen. In fact, the purport of the impugned order is of rejection of the Appellant's plaint as it has been found in the impugned order that no part of the contract survives which could be specifically enforced. Infact, learned Single Judge has correctly found that there was no cause of action with Appellant to proceed with his suit.

19. On the plain reading of the pleadings of the parties, Agreement of Sale (Annexure A-2) and the Written Communication between the parties (Annexure A-4 to Annexure A-7), we find no illegality or infirmity in the impugned order and consequently no merit in this appeal. Accordingly, this appeal and pending application are dismissed while leaving the parties to bear their own costs.

Sunil Gaur, J.

Vikramajit Sen, J.

December 04, 2009

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