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IN THE HIGH COURT OF DELHI AT NEW DELHI

RESERVED ON: 20.10.2010

DECIDED ON: 24.11.2010

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CS (OS) 403/2006

IQBAL PROPERTIES PVT. LTD. AND ANR.

..... Plaintiffs

Through: Shri Sunil Mund, Advocate.

versus

ATAR SINGH

..... Defendant

Through: Nemo.

CORAM:

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 |

MR. JUSTICE S.RAVINDRA BHAT

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1. The present suit is filed by the first plaintiff (a company duly registered under the companies act, 1956 under the name of M/S Iqbal Properties Pvt. Ltd.) through its director Sh. Kiranjit Singh, the second defendant herein, having their registered office at A-13, Neeti Bagh, New Delhi. The plaintiffs seek specific performance of the agreement to sell dated 10.01.2006 and grant of permanent injunction to restrain the defendants from selling

the land to others; or in case the decree of specific performance may not or cannot be granted then in alternative, decree of recovery of damages to the extent of ₹60,12,500/-

2. The first plaintiff contends that the defendants are joint owners of the immovable property/agricultural land admeasuring 23 bighas and 8 biswas in khasra no. 49 (0-14), 50(4-0), 75(0-5), 76(0-17), 77(0-17), 78(2-10), 80(4-16), 81(4-16), 298/81(0-14) situated in the revenue estate of Village Ghitorni, Tehsil Vasant vihar, New Delhi (hereafter “the suit properties”) having succeeded to them from their ancestor under the Hindu Succession Act, 1956. The suit also contends that the defendants approached the plaintiff in the first week of January, 2006 offering to sell the suit property. The first defendant stated that he was acting for himself and under the authority of all the remaining defendants for selling the above mentioned land. The defendants’ offer to purchase the suit property was accepted by the plaintiffs.

3. The plaintiffs contend that thereafter an agreement to sell, dated 10.01.2006 was executed between the parties in respect of the suit land. The first defendant acted on behalf of the other remaining defendants. It was specifically stated in the agreement to sell that the first defendant and his entire family were selling the entire land measuring 23 bighas and 8 biswas at the rate of ₹1,85,00,000/- per kila.

4. The first plaintiff paid a sum of ₹5,00,000/- to the first defendant, as token money, which was duly accepted by him. It was further stated in the agreement that the first defendant is responsible to the other remaining defendants (no. 2 to 16) and that the plaintiffs would be paying 10% of the consideration on 14.01.2006. The agreement to sell dated 10.01.2006 was executed in the presence of two witnesses who also signed on it as witnesses. It is stated that when the plaintiffs approached the defendants on 14.01.2006 for the payment of the 10% of the consideration, as agreed, they refused to accept the same. Thereafter, plaintiffs sent a legal notice dated 16.01.2006 to the defendants for complying with the agreement to sell dated 10.01.2006, as the plaintiffs are willing to comply with their part of the agreement and pay the promised 10%. The defendants sent their reply dated 21.01.2006 rejecting/refusing to comply with their part of performance. Based on the above pleadings, the plaintiffs claim the reliefs.

5. The defendants argue that the plaintiffs have not paid the prescribed court fees in the present suit. In the legal notice dated 16.01.2006, the plaintiffs alleged that the defendants had allegedly agreed to sell the suit property to them for a sum of ₹9,01,87,500/-. However, the plaintiffs have valued the present suit at ₹20,05,000/- and on that paid a fixed court fee of ₹21,913/-, whereas, as per section 7(x) of the Court Fees Act, 1870, the plaintiffs are required to pay court fee on the alleged sale consideration, i.e. ₹9,01,87,500/-. As such, the present suit is liable to be dismissed for non-payment of proper court fee and for under-valuation. Most importantly, defendants further argue that the plaintiffs were aware that the first defendant had no authority to act on behalf of the answering defendants. Furthermore, first defendant, without prejudice to his rights and contentions, pursuant to the order dated 06.03.2006 of this Court, has paid a sum of ₹5 lakhs to the plaintiffs, which they had allegedly paid by them to the first defendant as token money under the alleged agreement to sell dated 10.01.2006. The defendants stopped appearing before the Court; they were set down *ex-parte* by order dated 27.04.2010.

6. The main questions to be decided in the present case are:-

- i. Whether the plaintiff is entitled to a decree for specific performance of the contract?
- ii. Whether the first defendant had the authority to sell the above mentioned property?
- iii. Whether the plaintiff entitled to the damages as an alternative against the first defendant?

Section 12 of the Specific Relief Act, 1963 states:-

“Specific performance of part of contract.-

(1) Except as otherwise hereinafter provided in this section, the court shall not direct the specific performance of a part of a contract.

(2) Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

(3) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either-

(a) forms a considerable part of the whole, though admitting of compensation in money; or

(b) does not admit of compensation in money;

he is not entitled to obtain a decree for specific performance; but the court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the other party-

(i) in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and in a case falling under clause (b), 1[pays or has paid] the consideration for the whole of the contract without any abatement; and

(ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

(4) When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part.

Explanation.- For the purposes of this section, a party to a contract shall be deemed to be unable to perform the whole of his part of it if a portion of its subject- matter existing at the date of the contract has ceased to exist at the time of its performance."

In *Mayavanti v. Kaushalya Devi*, 1990 (3) SCC 1, the Court held as follows:-

"In a case of specific performance it is settled law, and indeed it cannot be doubted, that the jurisdiction to order specific performance of a contract is based on the existence of a valid and enforceable contract. The Law of Contract is based on the ideal of freedom of contract and it provides the limiting principles within which the parties are free to make their own contracts. Where a valid and enforceable contract has not been made, the Court will not make a contract for them. Specific performance will not be ordered if the contract itself suffers from some defect which makes the contract invalid or unenforceable. The discretion of the Court will be there even though the contract is otherwise valid and enforceable and it can pass a decree of specific performance even before there has been any breach of the contract. It is, therefore, necessary first to see whether there has been a valid and enforceable contract and then to see the nature and obligation arising out of it. The contract being the foundation of the obligation the order of specific performance is to enforce that obligation"

The Court, on the facts of that case held that the stipulations in the agreement, which were sought to be enforced were vague, uncertain and ambiguous. The Court further observed that, as the parties themselves were not *ad idem* to the subject matter of the contract, the Court cannot order specific performance. Regarding acceptance, the Court observed that the rule is that the acceptance must be absolute and must correspond with the terms of the offer. The Court also observed that specific performance of a contract is the actual execution of the contract according to its stipulations and terms, and the Courts directed the party in default to do the very thing which he contracted to do. The stipulations and terms of the contract have, therefore, to be certain and the parties must have consensus *ad idem*. The burden to show that is on the plaintiff.

7. In *Makati Nanchand Kakaldas and Ors. v. Champaklal Chhotalal Kapadia*, [(1978) 19 GLR 945], the Court observed as follows:-

“Section 12(1) of the present Specific Relief Act analogous to Section 16 of the 1877 Act lays down as a normal policy of Legislature regarding non-granting of part performance subject to the two exceptions contained in Sections 12(2) and 12(3) of the Act. Section 12(2) provides that if the party liable to perform the whole of his contract is unable to perform the whole he could still be compelled by the court to perform the part or it can call upon the other side to stand by the contract, if the part which must be left unperformed bears only a small proportion to the whole in value and Secondly the unperformed part admits of compensation in money.

8. In the present case, the following are a matter of record- the plaintiffs not disputing the position at any time, that all co-owners other than the first defendant were not parties to the agreement. The slender thread by which the co-owners are sought to be involved is the alleged assurance by the first defendant and that he had authority to act on their behalf. No evidence is forthcoming in this regard. Consequently, in the absence of all other co-owners, and having regard to the fact that the first defendant was a fractional co-owner, the Court is of the view that the principles underlying Section 12 of the Specific Relief Act, clearly operates in this case. The claim for a decree for specific performance has to fail.

9. As far as the question of damages is concerned, the plaintiff has not led any evidence, but argues that the Court has to take into consideration the reasonable market value, having regard to the advance paid by him, to the first defendant, which binds the latter and that the same is the pre-estimate of the likely market value, of the land, which should be applied as a standard, while assessing damages. The plaintiff has, however, not led any evidence about the value of comparable properties, or produced certified copies of sale deeds, or any such documents. In this context, the Court notes that the principles applicable in this case are those embodied in Section 73, Indian Contract Act, 1872, which states, *inter alia*, as follows:-

“73. Compensation for loss or damage caused by breach of contract.-

When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach. Compensation for failure to

discharge obligation those created by contract.- When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation.- In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non- performance of the contract must be taken into account.

10. In *M/S. Murlidhar Chiranjilal v. M/S. Harishchandra Dwarkadas*, AIR 1962 SC 366, the Supreme Court held that it is well settled that the two principles relating to compensation for loss or damage caused by breach of contract as laid down in Section 73 of the Indian Contract Act, 1872, read with the Explanation thereof, are:

- i. *that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed;*

but this principle is qualified by a second principle

- ii. *that there is a duty on the plaintiff of taking all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming any part of the damage which is due to his neglect to take such steps.*

It has been consistently held that the onus of proving the loss, and the entitlement to damages, with reference to the market price always lies with the plaintiff (See *British Westinghouse Electric and Manufacturing Company, Limited v. Underground Electric Railway Company of London*, [1912] A.C. 673; *Chao and others v. British Traders and Shippers Ltd.*, [1954] 1 All E.R. 779; *Thyssen Stahlunion Gmbh v. The Steel Authority of India*, [AIR 2002 Delhi 255] and *Maharashtra State Electricity Board, Bombay v. Sterlite Industries (India) Ltd.*, AIR 2000 Bom 204].

11. In this case, the plaintiff has made no attempt to prove how the defendant's conduct caused him any damage, which can be calculated in monetary terms, to recompense him. No documents, contemporaneous to the alleged date of breach of the agreement, nor evidence of third party transactions at that time, to disclose market value, are relied on. Mere reliance on the advance amount, to suggest a damages calculation standard is impermissible, because the Court

would be deviating from the conditions for awarding damages, prescribed by law. The claim for damages cannot, therefore, succeed.

12. In the light of the above discussion, it is held that the suit claim cannot succeed; it fails. The suit is therefore, dismissed. There shall be no order as to costs.

**S. RAVINDRA BHAT
(JUDGE)**

NOVEMBER 24, 2010