

*

HIGH COURT OF DELHI : NEW DELHI

Judgment reserved on: March 16, 2011
Judgment pronounced on: April 04, 2011

+

CS (OS) No. 280/2005

% Shri D.P. Singh ... Plaintiff
Through: Mr. Sushil Kumar Pandey, Advocate.

versus

Shri Gagan Deep Singh ... Defendant
Through: Nemo.

CORAM:
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?
- No.

SUNIL GAUR, J.

1. What is sought in this suit is the specific performance of Agreement to Sell of 19th August, 2004 in respect of first floor in flat No. 97 in HIG Category, in Mahabhadra Kali, CGHS Limited, Plot No.6, Sector 13, Dwarka, New Delhi (hereinafter referred to as the 'suit property'). Plaintiff claims that at the time of execution of the aforesaid Agreement, he had paid earnest money of Rupees Two Lacs and the balance sale consideration of Rs.19,15,000/- was to be paid by the plaintiff to the defendant on or before 9th November, 2004 at the time of execution of the sale deed but before that defendant was required to obtain 'No Dues

Certificate' and 'No Objection Certificate' for sale of the aforesaid flat from Mahabhadra Kali, CGHS Limited Society and the said sale transaction was required to be completed on 9th November, 2004 before Sub-Registrar's office in Janakpuri, New Delhi. Plaintiff was to arrange for non-judicial stamp paper of Rs.1,69,200/- for execution of the Sale Deed and as per the plaintiff, a day before i.e. on 8th November, 2004, plaintiff had sent a telegram to the defendant informing that the stamp papers and the balance sale consideration are ready and the balance money would be paid to the defendant i.e. on 9th November, 2004 before the Sub-Registrar concerned at 12 noon upon defendant furnishing 'No Dues Certificate' & 'No Objection Certificate', as aforesaid and the keys of the vacant suit property be given to the plaintiff. It is specific assertion of the plaintiff that on the due date, i.e. on 9th November, 2004, he had reached the office of the Sub-Registrar concerned along with banker's Cheque of Rs.19,15,000/- drawn in favour of the defendant from the ICICI Bank and non-judicial paper of Rs.1,69,200/- for execution and registration of the Sale Deed in respect of the suit property.

2. The plaintiff asserts that on the appointed day i.e. 9th November, 2004, he had waited till 5:00 p.m. in the office of the Sub-Registrar concerned and had tried to contact the defendant on phone many times but to no avail and the defendant had not turned up for the execution of the Sale Deed and so, plaintiff was constrained to send a telegram at about 5:40 p.m. on that day informing the defendant about the breach of the aforesaid Agreement by him. Not satisfied with the Defendants' reply of 23rd November 2004, to Plaintiff's notices of 11th November and 17th

November 2004, the instant suit has been instituted, which was strongly contested by the Defendant, who has not only denied the Plaintiff's case but has also asserted that on appointed day, i.e., on 9th November 2004, he had gone to the Office of the Sub-Registrar concerned and had waited for the Plaintiff there, till 5 p.m. and thereafter had sent telegram at 5.45 pm on that day to the Plaintiff and since there was a failure on the part of the Plaintiff to specifically perform the Agreement in question therefore, the earnest money was rightly forfeited and so, this suit deserves dismissal.

3. On the aforesaid pleadings, the Issues claimed are as under:-

1. *Is the suit not maintainable?*
2. *Has the plaintiff been always ready and willing to perform his part of the agreement dated 19.8.2004?*
3. *Is the plaintiff entitled to a decree for specific performance?*
4. *Relief?*

4. Parties went to trial. Plaintiff had deposed as PW-1 and had got the introducer - Mr. Surjeet Singh, (PW-2) examined to corroborate the Plaintiff's plea of reaching the office of the Sub-Registrar concerned on the appointed day for specific performance of the Agreement in question. The Defendant had stepped into the witness box as DW-1 and had got his brother Mr. Harjinder Singh (DW-2) examined, who corroborates the stand of the Defendant and of his accompanying the Defendant to the Office of the Sub-Registrar concerned for execution of the Sale Deed in pursuance to the Agreement in question. The remaining evidence is of the concerned official, Mr. Amarpal Singh (DW-3) from the Treasury office, who has deposed on the basis of the record that on 11th November 2004, the non-

judicial stamp paper worth Rs.1,58,650/- was given to one Raj Kumar who had applied for the same on 9th November 2004 by making a cash deposit of the said amount.

5. At the final hearing, submissions were advanced by Plaintiff's counsel who had referred to the evidence on record and has relied upon decisions in *Rachakonda Narayana vs. Ponthala Parvathamma and anr.*, AIR 2001 SC 3353, *Siley and others vs. Arun Varghese and anr.*, (2008) 11 SCC 45, but there was no assistance forthcoming from the side of the Defendant. However, upon scrutiny of evidence on record and upon consideration of the submissions advanced and the decisions cited, I proceed to deal with this matter, in the light of the reiteration of the legal position governing the grant of specific performance of an Agreement, as highlighted by the Apex Court in ***Bal Krishna and Anr. vs. Bhagwan Das (Dead) and Ors.***, (2008) 12 SCC 145, in the following words:-

13. Section 16 of the Specific Relief Act, 1963 (hereinafter referred to as "the Act") corresponds with Section 24 of the old Act of 1877 which lays down that the person seeking specific performance of the contract, must file a suit wherein he must allege and prove that he has performed or has been ready and willing to perform the essential terms of the contract, which are to be performed by him. The specific performance of the contract cannot be enforced in favour of the person who fails to aver and prove his readiness and willingness to perform essential terms of the contract. Explanation (ii) to clause (c) of Section 16 further makes it clear that the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true

construction. The compliance with the requirement of Section 16(c) is mandatory and in the absence of proof of the same that the plaintiff has been ready and willing to perform his part of the contract suit cannot succeed. The first requirement is that he must aver in plaint and thereafter prove those averments made in the plaint. The plaintiff's readiness and willingness must be in accordance with the terms of the agreement. The readiness and willingness of the plaintiff to perform the essential part of the contract would be required to be demonstrated by him from the institution of the suit till it is culminated into decree of the court.

14. It is also settled by various decisions of this Court that by virtue of Section 20 of the Act, the relief for specific performance lies in the discretion of the court and the court is not bound to grant such relief merely because it is lawful to do so. The exercise of the discretion to order specific performance would require the court to satisfy itself that the circumstances are such that it is equitable to grant decree for specific performance of the contract. While exercising the discretion, the court would take into consideration the circumstances of the case, the conduct of parties, and their respective interests under the contract. No specific performance of a contract, though it is not vitiated by fraud or misrepresentation, can be granted if it would give an unfair advantage to the plaintiff and where the performance of the contract would involve some hardship on the defendant, which he did not foresee. In other words, the court's discretion to grant specific performance is not exercised if the contract is not equal and fair, although the contract is not void."

Issue No.: (i)

6. This Issue of maintainability of this suit was framed on the objection taken by the Defendant in the written statement, but I find that it is not disclosed by the Defendant in the written statement as to how this suit is not maintainable. On perusal of the record of this case, I find that this suit is very much maintainable in its present form. This Issue is accordingly answered.

Issue No.: (ii)

7. Readiness and willingness to perform an Agreement, which is sought to be enforced is an essential ingredient of Section 16 of Specific Relief Act, on the strength of which this suit has been filed. According to the Plaintiff, he was in possession of the Banker's cheque for the balance sale consideration on the due date for performance of the Agreement in question and he had gone to the Office of the Sub-Registrar concerned alongwith the introducer – Mr. Surjeet Singh (PW-2) for performance of the Agreement in question with the balance sale consideration as well as the requisite stamp papers, but the Defendant did not turn up. Even the Defendant claims that he had gone to the Office of the Sub-Registrar concerned with his brother Mr. Harjinder Singh (DW-2) but the Plaintiff did not turn up.

8. Surprisingly, neither the Plaintiff nor the Defendant had been vigilant in getting their presence recorded in the Office of the Sub-Registrar concerned by moving an application there to establish the presence at the Office of the Sub-Registrar concerned and both sides are relying upon their oral evidence as well as of their companions and upon scrutiny of the

same, I find that it is just not possible to reasonably conclude that either of them was present in the Office of the Sub-Registrar on the appointed date for execution of the Sale Deed in pursuance to the Agreement in question. The best evidence has been withheld by the Plaintiff. He claims to be in possession of the banker's cheque for the balance sale consideration, but he fails to place on record its copy and has not even placed on record any proof regarding his giving phone calls to the Defendant by disclosing the phone number of the Defendant. Even the assertion of the Plaintiff that he was in possession of the stamp paper and the banker's cheque on 8th November 2004, i.e., a day before the appointed date, remains unsubstantiated. Rather, the Plaintiff stands contradicted in cross-examination where he admits that in anticipation of collection of stamp papers as well as bank draft, he had given a telegram on 8th November 2004 that he was in possession of the same, though on that day, he neither had the banker's cheque/bank draft nor the stamp papers with him. This shows the Plaintiff has not come with clean hands before the Court and is thus, disentitled to seek discretionary relief of Specific Performance of Agreement to Sell. More so, when Plaintiff stands falsified from the deposition of Mr. Amarpal Singh (DW-3) from the Treasury Office, who has given the date of delivery of the stamp papers as 11th November 2004, whereas, Plaintiff claims that with the requisite stamp papers, he was in the Office of the Sub-Registrar concerned on 9th November, 2004 for the execution of the Sale Deed on those stamp papers. It is so said, as there is unchallenged evidence of Amarpal Singh (DW-3) to the effect that the cash for the purchase of stamp papers was deposited on 9th November 2004

and the challan for the same was deposited with the Treasury on 10th November 2004 and so, non-judicial stamp papers could be made available for delivery on 11th November 2004 only. Another pertinent aspect is that as per the deposition of Amarpal Singh (DW-3) the aforesaid stamp papers were not delivered to the Plaintiff but to one Mr. Raj Kumar, with whom, Plaintiff fails to establish any connection. In the face of aforesaid fundamental contradiction in the Plaintiff's case, I find that reliance placed by Plaintiff's counsel upon decisions in *Rachakonda Narayana vs. Ponthala Parvathamma and anr.*, AIR 2001 SC 3353, *Siley and others vs. Arun Varghese and anr.*, (2008) 11 SCC 45, is clearly misplaced.

9. Had the Plaintiff been in possession of the bankers cheque of the balance sale consideration, then, as a prudent person, he would have placed on record its copy. Having failed to do so, the Plaintiff cannot be heard to say that he was in a position to perform his part of the Agreement in question by tendering the balance sale consideration on the appointed date, i.e., 9th November 2004. There is no convincing evidence on record to establish that Plaintiff was in possession of the requisite stamp papers on the aforesaid appointed date. As already observed, the oral evidence led by the Plaintiff to prove the essential ingredient, i.e., of readiness and willingness to perform the Agreement in question, cannot be accepted on the face of it, in view of the following deposition of the Plaintiff:-

"I cannot explain it false or true, if the stamp papers were in fact released from Treasury on 9th November 2004 at 4 PM. (Volunteered) I had collected these papers from the Rohilla Documentation Center, at 11 or

12 Noon or that the amount for issuance of these stamp papers was deposited on 9th November 2004 at around 11 to 12 PM.”

10. On one hand, Plaintiff had asserted that he had asked the Defendant to reach the Office of the Sub-Registrar concerned in the morning on the appointed date, i.e., 9th November 2004, whereas, he claims to have reached the Office of the Sub-Registrar concerned at 12 Noon. Non only this, it is the positive assertion of the Plaintiff that he had filed the documentary proof of his presence on the appointed date, in the Office of the Sub-Registrar concerned by way of a receipt got issued for deposit of the amount for registration of a document but no such document has been placed on record. The evidence led by the Plaintiff is not only unsatisfactory but is contradictory, and so, I have no hesitation in holding that the Plaintiff fails to prove the readiness and willingness to perform his part of the Agreement in question. This Issue is accordingly answered against the Plaintiff.

Issue No.: (iii)

11. Consequential to the findings returned on Issue No.(ii), it is held that the Plaintiff is not entitled to the decree for specific performance. However, what is required to be considered is whether the Defendant was justified in forfeiting the earnest money. Since the Defendant has admitted in evidence that on the appointed date, i.e., 9th November 2004, he was not in possession of No Dues Certificate from the society, where the suit property is situated, therefore, it cannot be said that on the due date, the suit property was free from encumbrances, therefore, the Defendant was in breach of the Agreement to the aforesaid extent and is not justified in

forfeiting the earnest money amount. More so, when the Defendant fails to establish that he was present in the Office of the Sub-Registrar concerned for performance of Agreement to Sell. The Receipt (Ex.DW-1/8) indicating deposit of an inspection fee by the Plaintiff on the appointed date is not duly proved on record and it does not establish the presence of the Defendant at the Office of the Sub-Registrar concerned. Even application for inspection (Ex.DW-1/9) is not duly proved on record. Telegram receipt (Ex.DW-1/10) fails to prove that to whom the purported telegram was sent and by whom. Accordingly it is held that though the Plaintiff is not entitled to the relief of the specific performance of the Agreement in question but he is entitled to refund of earnest money of Rs.2 lakhs with reasonable rate of interest @ 6% per annum w.e.f. 9th November 2004 till realization. This Issue is accordingly answered.

Issue No.: (iv)

12. In view of the findings returned on Issue No.(iii), though the suit for specific performance of Agreement in question fails but, the Plaintiff is held entitled to refund of earnest money of Rs.2 lakhs with interest @ 6% per annum, w.e.f., 9th November 2004 till realization. Decree sheet be accordingly drawn.

13. This suit is accordingly disposed of.

Sunil Gaur, J.

April 04, 2011
pkb/rs