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HIGH COURT OF DELHI : NEW DELHI

Judgment reserved on: April 07, 2011
Judgment pronounced on: May 11, 2011

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C.S. (OS) No. 501/2005

% Sanjay Bhardwaj ... Plaintiff

Through: Mr. Manish Kaushik, Advocate.
versus

Arvind Kumar Lalit Gulati ... Defendants

Through: None.

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. A portion (50 sq. yards, as shown in red in the site plan) of residential Property No.F-2/9, Krishna Nagar, Delhi, (hereinafter referred to as the suit property) is the subject matter of this suit for specific performance of the Agreement to Sell of 27th July, 2004. The plaintiff, who by virtue of the aforesaid Agreement to Sell, is said to have entered into a transaction for the purchase of 50 sq. yards of the suit property for a total

consideration of Rs.27 lacs and plaintiff claims to have paid earnest money of Rs.11 lacs to the defendant in respect of this transaction. Balance sale consideration of Rs.16 lacs was payable to the defendant on or before 1st March, 2005, upon execution of the necessary documents i.e. Sale Deed etc. and in the event of default by the defendant, he would be liable to pay double the amount of the part sale consideration received i.e. Rs.22 lacs. As per the plaintiff, the defendant at the time of entering into the aforesaid Agreement to Sell had handed over the certified copies of title documents of the suit property to the plaintiff, upon receiving a sum of Rs.5,40,000/- in cash and Rs.10000/- by cheque, purportedly given by the plaintiff to the defendant on 7th April, 2004, and on the same day, a further sum of Rs.5,50,000/- in cash against receipt is said to have been paid by the plaintiff to the defendant. The execution of the aforesaid Agreement to Sell, Special Power of Attorney, Will etc. is said to have been witnessed by Shri Manoj Mudgal and Shri Rohit Kumar. Plaintiff avers that in the first week of February, 2005, and thereafter on various dates, he had been requesting the defendant to receive the balance sale consideration of Rs.16 lacs and to execute the Sale Deed before the concerned Sub Registrar, but the defendant had resorted to dilatory tactics.

2. It is also plaintiff's case that despite legal notice of 29th March, 2005, no positive response was received from the defendant and when the

plaintiff had apprehended that the defendant is proceeding to create third party interest in the suit property, the instant suit was instituted. While entertaining this suit, defendant was directed not to create any third party interest in the suit property.

3. In the written statement, defendant has altogether denied the plaintiff's case and has taken the stand that the plaintiff had introduced himself to the defendant, as proprietor of M/s. Krishna Super Service having the business of providing sim cards for mobile phones and in order to provide sim cards to the defendant, got certain blank documents signed from the defendant, as the defendant does not know how to write in English, therefore, the defendant agreed to sign on the blank papers under the bonafide belief that the plaintiff needs the said documents for providing sim card. Defendant asserts that plaintiff had obtained two cheques of Rs.1000/- towards payment of providing the sim cards and since the defendant did not know how to write the name of the plaintiff's Company in English, therefore he had signed the blank cheques in good faith and the other details therein were lateron filled up by the plaintiff. However, as per the defendant it was subsequently learnt that the plaintiff had committed forgery by changing the amount in the aforesaid two cheques i.e. from Rs.1000/- to Rs.41000/- and from Rs.1000/- to Rs.61000/- and had withdrawn aforesaid amounts from the defendant's bank and in this regard

a criminal complaint was filed by the defendant against the plaintiff on 23rd March, 2005. Defendant denies having received any money purportedly in respect of the sale transaction of a portion of the suit property from the plaintiff. There is a reiteration of the plaintiff's version in the replication filed to the written statement of the defendant.

4. Upon completion of pleadings, issues claimed by the parties to the suit are as under:-

- (i) *Whether the parties have entered into an agreement dated 27th July, 2004, in respect of 50 square yards of property bearing No.F-2/9, Krishna Nagar, Delhi-110051?*
- (ii) *Whether the plaintiff is entitled to specific performance of the agreement dated 27th July, 2004, in respect of 50 square yards of property bearing No.F-2/9, Krishna Nagar, Delhi-110051?*
- (iii) *Whether the plaintiff is ready and willing to perform his part of the agreement dated 27th July, 2004?*
- (iv) *Relief.*

5. Plaintiff's evidence comprises of his deposition as PW-1 and the deposition of the Shri Rohit Kumar (PW-2), who claims to have witnessed payment of earnest money, Agreement to Sell (Ex.PW.1/13, Mark 'A'), Special Power of Attorney (Ex.PW.1/15, Mark 'B'), Will (Ex.PW.1/14, Mark

‘C’) and Receipts (Ex.PW.1/1 and Ex.PW.1/1-A.). To assert that a cheque of Rs.10,000/- was encashed on 29th April, 2004, plaintiff has got examined his banker’s Senior Assistant Shri Sanjiv Sharma as PW-3. The last witness of the plaintiff is Shri Naveen Puri (PW-4), a stamp vendor, who has deposed that stamp paper worth Rs.50/- were sold by him to the defendant on 16th April, 2004. Solitary evidence of the defendant is his own deposition as DW-1.

6. At the conclusion of the trial, plaintiff’s counsel alone had come forward to address this court and with the assistance of the learned counsel for the plaintiff, the evidence on record has been analysed and, thereafter, the findings returned on the issues framed, are as follows:-

Issue Nos.(i) & (ii)

7. These two issues are interlinked and are being taken up together. To prove that in Agreement to Sell in respect of a portion of the suit property was entered into between the parties on 27th July, 2004, the plaintiff has himself deposed as PW-1 and has also got examined Shri Rohit Kumar as PW-2, who is said to have witnessed the execution of this Agreement to Sell (Ex.PW.1/13/ Mark ‘A’).

8. The legal position regarding enforcement of specific Performance of Agreements like the one in question, as summed up by the Apex Court in

Bal Krishna and Anr. Vs. Bhagwan Das (Dead) by Lrs and Ors. AIR

2008 SC 1786, is as under:-

“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.”

9. Plaintiff relies upon a photo copy of the aforesaid Agreement to Sell of 27th July, 2004, (Ex.PW.1/13, Mark 'A'). Initially, this document was a marked document and was sought to be exhibited before the Joint Registrar, who had not exhibited it, but it is in the plaintiff's deposition by way of Affidavit, it has been exhibited as Ex.PW.1/13. Merely because an exhibit is put on a document, it does not become admissible in evidence. No secondary evidence has been led by the plaintiff in respect of the aforesaid Agreement to Sell, marked as Ex.PW.1/13. Plaintiff in his evidence is conspicuously silent about the original of the Agreement to Sell marked Ex.PW.1/13. Even the plaintiff's witness Shri Rohit Kumar (PW-2) has conveniently identified his signatures on the photo copy of the

Agreement to Sell (Ex.PW.1/13) in question. When the plaintiff had tendered himself for cross-examination, Agreement to Sell marked Ex.PW.1/13 was de-exhibited, being a photo copy and the same was marked 'A' and the accompanying Special Power of Attorney, Will etc. were marked 'B' and 'C'. Question about the admissibility of the aforesaid Agreement to Sell mark 'A' was raised at the time of cross-examination of the plaintiff, but it was left open to be considered by this Court.

10. At the hearing, learned counsel for the plaintiff has rightly not placed any reliance upon the photo copy of the Agreement to Sell mark 'A', but instead thereof had chosen to rely upon two Receipts of 27th July, 2004, Ex.PW.1/7 and Ex.PW.1/7A, to assert that these two Receipts contain an Agreement in respect of the suit property.

11. Before I proceed to deal with the aforesaid two Receipts, I find no hesitation in returning the finding on issue No: 1 against the plaintiff, while holding that the Agreement to Sell of 27th July, 2004 (mark-A) is inadmissible in evidence and hence is excluded from consideration.

12. Though, it is the case of the plaintiff and his witness Shri Rohit Kumar (PW-2) that the Receipts Ex.PW.1/7 and Ex.PW.1/7A, were executed in their presence, but the defendant has denied his signatures on these two receipts, which are typed ones on plain paper, which bear a

revenue stamp on it, but the signatures of the defendant are not on any portion of the revenue stamp. Normally, when such Receipts are executed, care is taken to ensure that the signatures of the person concerned do come on the revenue stamp fixed on such like document. Since the stand of the defendant is of denial, there is onerous burden upon the plaintiff to prove the existence of the Receipts Ex.PW.1/7 and Ex.PW.1/7A. Simply by getting these two Receipts notarized, the plaintiff does not succeed in proving the existence of these two Receipts, more so, when the plaintiff has not got examined the Notary Public, in whose presence these two Receipts Ex.PW.1/7 and Ex.PW.1/7A were purportedly executed. Right from the beginning, the stand of the defendant is that his signatures were obtained on blank papers to obtain a sim card and in that regard he had issued two cheques of Rs.1000/- each, which were interpolated and a criminal case in that regard is said to be pending. Pertinently, the plaintiff in his deposition has admitted that he is facing criminal proceedings in a cheating case in a FIR registered against him at Police Station Pahar Ganj, Delhi.

13. In this background, the self-serving statement of the plaintiff and his witness alone is not sufficient to establish the authenticity of Receipts Ex.PW.1/7 and Ex.PW.1/7A, upon which no reliance can be placed, for the reason that though it is plaintiff's case that the stamp papers were

purchased by the defendant, but these two Receipts are not on the stamp papers and in the absence of the deposition of the Notary Public, who purportedly is a witness to these two Receipts, I hold that the plaintiff fails to satisfactorily prove that an amount of Rs.5,40,000/- and Rs.5,50,000/- was paid by the plaintiff to the defendant vide these two Receipts. As regards the payment of Rs.10,000/- by cheque is concerned, all that which stands proved from the deposition of plaintiff's banker Shri Sanjiv Sharma (PW-3), is that Rs.10,000/- was debited from the account of the plaintiff on 29th April, 2004, which is not of any consequence, for the reason that it does not stand established from the deposition of this witness that this amount was paid to whom. Furthermore, this payment of Rs.10,000/- by the plaintiff is not proved to be made to the defendant and is also of a period prior to the Agreement in question and it remains un-explained, as to why few months prior to the execution of the purported Agreement in question, the said amount of Rs.10,000/- was paid by the plaintiff to the defendant. Even the defendant's banker has not been got examined to establish that the said amount of Rs.10,000/- was credited into the account of the defendant in April, 2004. In any case, this is not of much consequence. Once this payment of Rs.10,000/- is excluded from consideration, plaintiff's case of having paid Rs.11 lacs to the defendant falls to the ground. Consequently, it is held that the plaintiff fails to

establish the existence of any Agreement to Sell and the so called Agreement-cum-receipt Ex.PW.1/7 and Ex.PW.1/7A is not duly proved on record. Accordingly, findings on these two issues are returned against the plaintiff.

Issue No.(iii)

14. Consequent upon the aforesaid findings, not much remains to be said. However, I find that by merely asserting that the plaintiff was ready and willing to perform his part of Agreement is not sufficient. This has to be proved by leading evidence. Plaintiff claims that he had arranged part of the earnest money of Rs.5,40,000/- in cash from his own resources and had taken some part of this amount on credit from one Bobby, having an electrical shop. Plaintiff also claims to possess a PAN card, but he is not placed on record its copy. Plaintiff being in possession of certified copies of the title documents of the suit property, is inconsequential especially when the Agreement to Sell, Receipts etc. are not duly proved on record. Annual income of the plaintiff was allegedly about Rs.1.5 lacs to Rs.2 lacs per annum, but copy of the Income Tax Return of the plaintiff for the year 2004-05, indicates that the annual income of the plaintiff was just little more than Rs.1 lac and the said payments of Rs.5,40,000/- and Rs.5,50,000/- are not reflected therein. Though plaintiff claims that he had

three bank accounts in the year 2004, but he has not been able to establish that, he was in position of making the payment of the balance sale consideration of Rs.16 lacs, at any point of time during the period in question. Rather the plaintiff had admitted in evidence that in none of his bank accounts more than Rs.10 lacs was available in March, 2005.

15. In view of the aforesaid infirmities in plaintiff's evidence and abovesaid categorical admission, the finding on this Issue has to be returned against the plaintiff. Accordingly, it is held that the plaintiff was not in a position to perform his part of the Agreement, i.e. to pay the balance sale consideration of Rs.16 lacs at any point of time. This issue is accordingly decided against the plaintiff.

Issue No.(iv)

16. In the light of the findings returned, as aforesaid, suit of the plaintiff is dismissed, while leaving the parties to bear their own costs. This suit is accordingly disposed of.

Sunil Gaur, J.

May 11, 2011
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