

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA No.91/2012**

% **17th April, 2012**

NEHA ARYA Appellant
Through : Mr. Sunil K. Mittal, Adv.

versus

VEENA GUPTA Respondent
Through : Mr. Samrat K. Nigam with
Mr. Kartikey Mahajan, Advs.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? Yes.

VALMIKI J. MEHTA, J (ORAL)

1. In view of the fact that a new counsel appears for the appellant the earlier counsel Mr. Sanjeev Anand, Advocate stands discharged.

2. This appeal came up for the first time on 17.2.2012 when in the facts of the present case interim orders were not prayed for. The order dated 17.2.2012 also records that husband of the appellant is also an Advocate who is present in Court. Trial Court records were summoned by special messenger and the case was listed for arguments on 15.3.2012. On 15.3.2012 after some arguments, it was said that there is a possibility of

settlement, and therefore, an adjournment was prayed. Order dated 15.3.2012 however makes it clear that in case there is no compromise, the appeal will be argued on the next date of hearing and no adjournment shall be granted.

3. Today the new counsel who appears for the appellant again prays for adjournment. In my opinion, there are no grounds for seeking an adjournment on the ground that the appellant seeks to further challenge in the Supreme Court an order dismissing his application for leading evidence, and which order on being challenged in this Court, the challenge was declined by an order dated 17.2.2012 passed in a CM(M) petition. I may note that the dismissal of the challenge in this Court on 17.2.2012 was in fact a second round of litigation inasmuch as the evidence of the appellant was closed much earlier vide an order dated 05.03.2011, and against which a challenge was laid to this Court which was dismissed on 06.05.2011. I, therefore, do not find any reason to grant any adjournment. Since the counsel for the appellant refuses to argue, I have heard counsel for the respondent and after perusing the record, am proceeding to dispose of the appeal.

4. The challenge by means of this Regular First Appeal filed under Section 96 of the Code of Civil Procedure, 1908 is to the impugned

judgment of the Trial Court dated 23.12.2011 decreeing the suit of the respondent/plaintiff for specific performance of an agreement to sell dated 5.12.2008 pertaining to suit property bearing no.20/5, First Floor, West Patel Nagar, New Delhi-110008.

5. The facts of the case are that the respondent/plaintiff filed the subject suit for specific performance relying on the agreement to sell/ Memorandum of Understanding dated 5.12.2008 with respect to the suit property and under which the suit property was agreed to be sold for a consideration of ₹10,00,000/- of which a sum of ₹7,50,000/-(i.e.75% of the price) was paid on the date of entering into the agreement to sell. The balance amount of ₹2,50,000/- was payable at the time of execution of the sale documents. It was also agreed that the appellant/defendant would hand over physical vacant possession of the suit property within one week of signing of the agreement. On entering into the agreement to sell dated 5.12.2008, the original title documents of the suit property were delivered to the respondent/plaintiff. The respondent/plaintiff pleaded that the appellant/defendant in spite of requests, avoided to execute the sale documents. It was pleaded that a bank draft for a sum of ₹2,50,000/- was prepared in the name of the appellant/defendant on 11.8.2009 , and the respondent/plaintiff wrote a letter to the appellant/defendant to accept the

demand draft by a registered post dated 13.8.2009. The husband of the appellant/defendant and who is an Advocate, as already stated above, gave a telephonic call to the husband of the respondent/plaintiff and agreed to meet the respondent/plaintiff in the office of the sub-Registrar on 20.8.2009 at 10.00 A.M. for execution of the sale documents, however, the appellant/defendant failed to appear resulting in filing of the subject suit for specific performance.

6. The appellant/defendant appeared and contested the suit. Execution of the agreement dated 5.12.2008 was admitted by the appellant/defendant. It was pleaded that the respondent/plaintiff was guilty of breach of contract as despite repeated requests and reminders the balance amount was not paid and therefore amount paid under the agreement to sell was forfeited. It was, therefore, prayed that the suit be dismissed.

7. After completion of pleadings, Trial Court framed the following issues:

- “1. Whether the plaint has been properly verified as per the provisions of law? OPP.
2. Whether the plaintiff is entitled for a decree of specific performance as prayed in the plaint? OPP
3. Whether the plaintiff is entitled for a decree of permanent injunction as prayed in the plaint? OPP
4. Relief.”

8. The appellant/defendant failed to fully cross-examine the witness of the respondent/plaintiff namely Sh. D.P.Arya, husband of the respondent/plaintiff, appeared as PW1 and thus after granting a number of opportunities, the right of cross-examination was closed. The appellant/defendant also did not lead any evidence. As already stated hereinbefore, his right of leading evidence was also closed and the order closing the right of the appellant/defendant to lead evidence was challenged in this Court in CM(M) No.543/2011, and which petition was dismissed by a learned single Judge of this Court on 6.5.2011. A Review Petition was also filed and which was also dismissed on 17.2.2012.

9. Counsel for the appellant/defendant states that as on date there is no further challenge laid to the order dated 6.5.2011 passed in CM(M) No.543/2011.

10. Trial Court has decided the relevant issues being issue nos. 2 and 3 in paragraphs 14 to 23 of the impugned judgment and these paras read as under:-

“14. **ISSUE NOS. 2 AND 3:-**

2. Whether the plaintiff is entitled for a decree of specific performance as prayed in the plaint? OPP

3. Whether the plaintiff is entitled for a decree of permanent injunction as prayed in the plaint? OPP

15. Onus of proof of both these issues lies upon the plaintiff and since both these issues are interconnected, I deem it appropriate to decide both these issues together.

16. In support of the contentions of the plaintiff, PW1 Sh.D.P.Arya, the husband of the plaintiff has categorically stated that he is well conversant with the facts of the present case as he has been actively involved in the talks during the transaction with the defendant and he was having dealings with the husband of the defendant on behalf of his wife. He has filed his affidavit and the same is proved on record as Ex.PW1/8. This witness has categorically stated that the plaintiff had entered into an 'Agreement to Sell' (Memo of Understanding) dated 5.12.2008, in respect of the property bearing no. 20/5, First Floor, West Patel Nagar, New Delhi-110008, for a total sale consideration of ₹10 lakhs, out of which, a sum of ₹7.5 lakhs was paid to the plaintiff on the same day and it was agreed between the parties that the remaining amount of ₹2.5 lakhs shall be paid to the plaintiff at the time of execution of the sale documents. Execution of Agreement to Sell (Memorandum of Understanding) is not in dispute. It is further stated by this witness that the original documents (including the original chain of documents showing the title of respective owners) were delivered to the plaintiff on the date of execution of 'Memorandum of Understanding' and the possession of the suit property was to be delivered within a period of one week, but, despite repeated demands, the defendant refused to hand over the possession of the property and despite repeated requests, reminders and service of demand notice, the defendant has not executed the sale documents. It is further stated that on 11.8.2009, the plaintiff again tried to contact the defendant by writing a letter but despite service of the said letter, the defendant has failed to execute the sale documents. The letter dated 11.8.2009 has been proved on record as Ex.PW1/3 and the speed post and courier receipts have been proved as Ex.PW1/5 and Ex.PW1/6 respectively. It is further stated by this witness that he plaintiff even got prepared a bank draft of ₹2.5 lakhs for the remaining sale

consideration and the defendant agreed for execution of the sale documents but despite her promises, she failed to appear at the office of the Sub Registrar, Janak Puri to execute the sale documents. The plaintiff has also filed on record, the receipt of her presence at the office of the Sub Registrar, Janak Puri as Ex.PW1/7 and the original stamp papers and draft sale deed as Ex.PW1/8. This witness has further deposed that on 22.8.2009, he got a public notice published in two daily newspapers in respect of the Agreement to Sell (Memorandum of Understanding). These two newspapers have been placed on record as Ex.PW1/9 and Ex.PW1/10. This witness has been cross-examined at length but no incriminating evidence has come on record to discard his testimony. The execution of the 'Memorandum of Understanding' Ex.PW1/1 is not in dispute. No evidence has been led by the defendant to rebut the evidence of the plaintiff despite ample opportunities.

17. During the final arguments, the main contention of learned Counsel for the defendant has remained that the sale consideration of ₹2.5 lakhs was to be paid by the plaintiff to the defendant within a period of one week and thereafter, possession of the suit property was to be handed over by the defendant. Execution of 'Memorandum of Understanding' Ex.PW1/2 has been duly admitted by the defendant and his Counsel. Learned counsel for the defendant has submitted that the time was the essence of the 'Memorandum of Understanding' and, therefore, the suit of the plaintiff be dismissed. The relevant portion of the 'Memorandum of Understanding', Ex.PW1/2, is reproduced below:-

“Whereas the first party hereby agreed to sell the said flat to the Second Party. The total amount of the said flat is fixed between the parties is comes to ₹10 lacs. In which the first party have received a sum of ₹7.5 lac from the second party.

And Whereas the balance amount of ₹2.5 lac will be paid by the second party to the first party at the time of registration of the said flat in favour of the second party or his nominee/s.

And Whereas the first party hereby agreed that she

will deliver the peaceful and vacant possession of the said flat within one week from the date of commencement of this MOU.

And Whereas the first party hereby deliver the original papers relating to the said to the second arty with her own free will.”

18. Perusal of the above contents clearly indicates that there was no time frame prescribed for registration of the sale documents. However, it was agreed between the parties that the defendant shall hand over the vacant and peaceful possession of the suit property within one week of execution of the ‘Memorandum of Understanding’ Ex.PW1/2.

19. It has been held by the Hon’ble Supreme Court of India in case titled as ***Gurdial Kaur (D) through LRs. Vs. Piara Singh (D) through LRs*** as follows:

“
.....
13. A suit for specific performance of contract provides for a discretionary remedy. The Court in terms of Section 20 of the said Act may for sufficient and cogent reasons refuse to grant a decree for specific performance of contract. In a case of this nature, the Court essentially would be concerned with the identity of the land which was the subject matter of agreement. Like any other suit, the Court in terms of Order 7 Rule 7 of the Code of Civil Procedure may, however, take into consideration the subsequent events including the change in the revenue survey numbers in respect of a particular land. In other words, if the land in suit remains the same which was the subject manner of an Agreement of Sale, a decree for specific performance can be granted.
.....
19.....

The rigours of Section 16(c) of the Act, however, are not such which would for all intent and purport to be strictly construed. Indisputably, it is necessary to make averments in regard to the readiness and

willingness as is required under Section 16(c) of the Act in terms of Form 47 appended to the Code of Civil Procedure.”

20. It is also held by The Hon’ble High Court of Punjab and Haryana in case titled as *Shri Ram vs. Puran Mal*, reported as (2000) 125 PLR 16 as under:

“9. No doubt, the relief of specific performance is discretionary, but discretion has to be exercised according to the judicial principles. It is a case of agreement of sale immovable property. As per Explanation (i) of Section 10, the Court has to presume unless and until the contrary is proved, that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money.

.....
Also my attention was drawn to Section 20 of the Act which shows that the jurisdiction of the civil Court to grant decree for specific performance is discretionary and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of Appeal. Explanation I added to Section 20 also makes it abundantly clear that mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of Clause (a) or hardship within the meaning of Clause (b) of Sub-section (2) of Section 20.
.....”

21. It is also held by the Hon’ble Supreme Court of India in case titled as *Prakash Chandra Vs. Angadial and Ors.*, reported as AIR 1979 SC 1241, as under:

“8. The next question is whether the relief for specific performance being a discretionary relief granted in equity should be refused to the appellant.

9. The ordinary rule is that specific performance should be granted. It ought to be denied only when equitable considerations point to its refusal and the circumstances show that damages would constitute an adequate relief. In the present case the conduct of the appellant has not been such as to disentitle him to the relief of specific performance. He has acted fairly throughout, and there is nothing to show that by any act of omission or commission he encouraged Mohsinali and Qurban Hussain to enter into the sale with the first and second respondents. There is no evidence that the appellant secured an unfair advantage over Mnhsia and Qurban Hussain when he entered into the agreement. Nor is there anything to prove that the performance of the contract would involve the respondents in some hardship which they did not foreses. In our opinion, there is no reason why the appellant should not be granted be relief of specific performance.”

22. Similar view is taken by The Hon’ble Supreme Court of India in case titled as ***P.D’souza Vs. Shondrilo Naidu, 2005 (5) ALLMR(SC) 15.***

23. In view of the legal proposition, as discussed above, and the facts and circumstances of the present case, these issues are decided in favour of the plaintiff and against the defendant.” (underlining added)

11. A reading of the aforesaid paras shows that the Trial Court has referred to the agreement entered into between the parties, which was

proved and exhibited as Ex.PW1/2. The trial Court also adverts to the factum that 3/4th of the sale consideration of ₹7,50,000/- was paid pursuant to the agreement to sell. There is further noting of the fact that a letter was sent by the respondent/plaintiff dated 11.8.2009 showing the preparation of the bank draft of ₹2,50,000/- being the balance consideration and request to the appellant/defendant to execute the sale documents which was proved as Ex.PW1/3, and the speed post and courier receipts thereof were exhibited and proved as Ex.PW1/5 and Ex.PW1/6. The presence of the respondent/plaintiff before sub-Registrar at Janakpuri was proved by means of a receipt before the sub-Registrar as Ex.PW1/7. The original stamp papers purchased for the sale deed and the draft sale deed were proved and exhibited as Ex.PW1/8. An important fact noted is that the original title deeds of the suit property were handed over by the appellant/defendant to the respondent/plaintiff at the time of entering into of the Agreement to Sell.

12. In my opinion, once the agreement between the parties is admitted, and the respondent/plaintiff is proved to have paid a very substantial amount, i.e. 75% of the sale consideration, and also has with him possession of the original title documents of the property, the Trial Court rightly decreed the suit for specific performance inasmuch as

readiness and willingness was proved by preparation of the bank draft of sale consideration of ₹2,50,000/- and with respect to which notice dated 11.8.2009, Ex.PW1/3 was given to the appellant/defendant.

13. I may note that the Trial Court has rightly arrived at a finding that there is nothing in the agreement, Ex.PW1/2 dated 5.12.2008 that the balance sale consideration of ₹2,50,000/- has to be paid by the respondent/plaintiff to the appellant/defendant within one week of the entering into the MoU, and, on the contrary the MoU recites the fact that the appellant/defendant had to hand over the possession within one week which he failed to do.

14. The Supreme Court in the recent judgment of *Mrs. Saradamani Kandappan vs. Mrs. S. Rajalakshmi & Ors., 2011 (12) SCC 18* has held that once substantial consideration is paid under an agreement to sell, ordinarily, Courts can rightly exercise the discretion to grant specific performance. Similar is the view of the Supreme Court in the judgment in the case of *Nirmala Anand Vs. Advent Corporation (P) Ltd. (2002) 8 SCC 146* and in which judgment the Supreme Court holds that once substantial consideration is paid and the seller is found guilty of breach the Court acts rightly when it exercises discretion to decree the suit for specific performance. Considering the fact that in this case 75% of the

sale consideration was paid, and the balance sale consideration was not received by the appellant/defendant due to his own refusal, I do not find any fault in the impugned judgment decreeing the suit for specific performance. However, in order to balance the equities, in terms of the judgment of the Supreme Court in the case of the *Nirmala Anand (supra)*, I direct that the respondent/plaintiff in addition to ₹2,50,000/- towards balance consideration, will also be liable to pay interest at the rate of 18% per annum from 5.12.2008 till the passing of today's judgment, and which balance sale consideration be deposited in the Trial Court within a period of two months from today. On deposit of the balance sale consideration, Trial Court will take necessary steps, on the execution petition being filed, for execution of the sale documents of the suit property in favour of the respondent/plaintiff. Of course, at the first blush interest at 18% per annum against the respondent/plaintiff may be seen as excessive as per the today's scenario where rates of interest have fallen down but I am awarding the high rate of interest considering that the transaction pertains to immovable property and the payment of interest is to partly compensate the appellant/defendant, for the balance price payable with respect to the suit property. I have given the benefit of interest to the appellant/defendant, although this issue has not been argued before me, only as a matter of

equity and justice so as to reasonably compensate the appellant/defendant, although, the appellant/defendant is himself guilty of bringing the position to the present from pasts.

15. In view of the above, there is no merit in the appeal which is accordingly dismissed, leaving the parties to bear their own costs.

VALMIKI J. MEHTA, J.

APRIL 17, 2012

ak