

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on: May 08, 2012
Judgment Pronounced on: May 15, 2012

+ RFA(OS) 36/2011 & CM No.8376/2012

SONIA ASSOCIATES Appellant
Represented by: Mr. Sanjay Jain, Senior Advocate
instructed by Mr. Deepak Khadaria
and Ms. Ruchi Jain, Advocates.

versus

B.B. SABHARWAL & ANR. Respondents
Represented by: Mr. Ashok Bhasin, Senior Advocate
instructed by Mr. Sunklan Porwal
and Mr. Shahid Ali, Advocates.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

PRADEEP NANDRAJOG, J.

1. Having heard arguments on May 08, 2012 in RFA(OS) No.36/2011 which lays a challenge to the impugned judgment and decree dated January 14, 2011 as also in CM No.8376/2012 which is the Cross-Objection filed by the respondents challenging the same judgment and decree, we are deciding the appeal and the cross objection, noting at the outset that suit seeking specific performance of the agreement to sell Ex.P-1 dated June 20, 1997 has been disposed of under the impugned decree, denying relief of specific performance but granting damages in sum of ₹10,00,000/- (Rupees Ten lakhs) i.e. double the amount of the earnest money paid by the respondents to the appellant when agreement Ex.P-1 was

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executed.

2. As per Ex.P-1, appellant Sonia Associates, the sole proprietary firm of Ms.Sonia Ahuja wife of Dinesh Ahuja had agreed to sell to the respondents the first floor with roof rights of the property bearing Municipal No.D-144, New Rajinder Nagar for a sale consideration of ₹40,00,000/- (Rupees Forty lakhs) and had received ₹5,00,000/- (Rupees Five lakhs) towards earnest money-cum-part sale consideration, requiring appellant to obtain the necessary No Objection Certificate from the Land & Development Office as also the necessary Income Tax clearance from the Income Tax Authorities within 15 days and thereafter requiring the respondents to tender the balance sale consideration and simultaneously the appellant executing the sale deed.

3. The agreement was not honoured, resulting in the respondents seeking a decree for specific performance of the agreement and in the alternative, damages in sum of ₹40,00,000/- (Rupees Forty lakhs).

4. As pleaded in the plaint by the respondents, after the agreement was entered into between the parties the appellant expressed a need to purchase the shop at Ajmal Khan Road wherein she was carrying on business under the name and style M/s.Tilak Exclusif and thus the respondents paid appellant ₹15,00,000/- (Rupees Fifteen lakhs) in cash on June 25, 1997 to purchase the shop and in this manner they had paid appellant ₹20,00,000/- (Rupees Twenty lakhs) requiring them to pay a further sum of ₹20,00,000/- (Rupees Twenty lakhs). Case pleaded was that the appellant neither

obtained the necessary permission from the Land & Development Office to sell the property nor obtained the necessary income tax clearance. Averring that they were always ready and willing to pay balance sale consideration in sum of ₹20,00,000/- (Rupees Twenty lakhs), the suit was instituted seeking specific performance of agreement Ex.P-1 or in the alternative damages in sum of ₹40,00,000/- (Rupees Forty lakhs).

5. Defence taken by the appellant was that the land comprising the subject property was a free-hold land and thus no sanction or permission was required from the Land & Development Office, and to said extent the requirement under Ex.P-1 to obtain a No Objection Certificate from the Land & Development Office was a surplusage. Pleading that simultaneous to the execution of Ex.P-1, on the same date i.e. June 20, 1997, another agreement was entered into by the appellant with the daughter of respondent No.1 under which appellant had to sell the basement of the property to the daughters of respondent No.1, it was pleaded that pursuant thereto a sale-deed was executed by the appellant on July 04, 1997 selling the basement to the daughters of respondent No.1 and at that time the respondents agreed to abandon their right under Ex.P-1 for a consideration of the appellant charging a lesser amount from the daughters of respondent No.1; meaningfully read, to mean that ₹5,00,000/- (Rupees Five lakhs) received by the appellant from the respondents under Ex.P-1 was adjusted against sale of the basement. Denying that the appellant received ₹15 lakhs from the respondents on

any date, much less June 25, 1997, and further denying that the appellant invested said money to purchase the shop wherefrom business of M/s.Tilak Exclusif was being conducted, appellant pleaded that her husband was a tenant of the shop in question since the year 1984. Asserting that a decree for specific performance could not be passed in favour of the respondents, an alternative plea was taken: Since it was recorded in clause-4 of the agreement that failure of the appellant to execute the sale deed would entitle the respondents to a refund of the earnest money with penalty in same amount, at best the respondents would be entitled to refund of the earnest money and award of penalty i.e. only ₹10 lakhs.

6. On the rival pleadings of the parties, vide order dated December 17, 2002, six issues were settled as under:-

“1. Whether the plaintiff is entitled to a decree for specific performance of the agreement dated 20.06.1997, directing the defendant to execute the sale deed in respect of first floor and the roof rights of the first floor of the property bearing No.D-144, New Rajinder Nagar, New Delhi as prayed in the suit? OPP

2. Whether the plaintiff was always ready and willing to perform his obligations under the agreement? OPP

3. Whether the defendant purchased the shop “Tilak Exclusif” for ₹15 lakh paid by the plaintiff to the defendant on 25.06.1997? OPP

4. Whether in the alternative plaintiff is entitled to the damages of ₹40 lakh due to non-performance of the agreement dated 20.06.1997 by the defendant? OPP

5. Whether the plaintiff failed to pay the balance consideration, as per the agreement and defendant was entitled to forfeit the earnest money? OPD

6. Relief.”

7. Respondents examined six witnesses and it would be sufficient for us to summarize that respondent No.1 who appeared as PW-1, deposed facts in sync with the averments made in the plaint. On being cross-examined he admitted the basement of the property in question being sold to his daughters. He denied that at that time it was agreed that the earnest money paid to the appellant when Ex.P-1 was executed was agreed by the respondents to be adjusted against the sale price of the basement. He admitted the signatures of his daughter on the agreement to sell Ex.PW-1/D-1 recording that the basement would be sold for ₹2.45 lakhs. With respect to his assertion that ₹15,00,000/- (Rupees Fifteen lakhs) was paid to the appellant on June 25, 1997, he stated that he had sold his property at Noida to one Mr.Kapoor for ₹30,00,000/- (Rupees Thirty lakhs) and asserted the source of his funds being the money received from said Mr.Kapoor.

8. Suffice would it be to state that respondent No.1 led no proof of having sold any property in Noida or his having with him ₹15,00,000/- (Rupees Fifteen lakhs) as of June 25, 1997. At variance with the pleading in the plaint that Sonia Ahuja took ₹15,00,000/- (Rupees Fifteen lakhs) from him and invested the same to purchase a shop on Ajmal Khan Road, he took a stand while deposing that Sonia Ahuja used said money

to refurbish the shop.

9. PW-2 Mr.Sudhir Bathla proved that the company M/s.Bathla & Co. of which he was a director had agreed to loan money to the respondents.

10. PW-3 Ms.Heena Sabharwal and PW-4 Ms.Jolly Sabharwal, daughters of respondent No.1 deposed that no concession was given to them by the appellant when the basement was sold to them.

11. Relevant would it be to note that in cross-examination Heena Sabharwal stated that she did not remember the date when she purchased the basement. She admitted that the transaction was completed under the guidance of her father.

12. Ratna Sabharwal PW-5 the wife of respondent No.1 deposed owning jewellery worth ₹4,24,000/- (Rupees Four lakhs Twenty Four thousand). The purpose of her deposition is obviously to prove the capacity of the respondents to generate funds and pay the balance sale consideration to the appellant.

13. PW-6 Ramesh Chander, a clerk from Punjab National Bank, New Rajinder Nagar proved Ex.PW-6/1, a certificate recording that a MBFD Account No.3975 in the name of respondent No.1 and his daughter Jolly Sabharwal (PW-4) remained operative with the bank from November 23, 1978 to March 27, 2001 and as of March 28, 2001 a sum of rupees (*illegible*, 'paper being torn') was lying credited therein.

14. Sonia Ahuja, the sole proprietor of the appellant examined, besides herself as DW-1, her husband Dinesh Ahuja as DW-2 and suffice would it be to state that Sonia Ahuja

deposed facts in sync with her written statement and so did her husband. DW-2 proved Ex.DW-2/1 and Ex.DW-2/2 which evidence that he was a partner of M/s.Dinesh & Associates which had in the year 1984 taken on rent the premises at Ajmal Khan Road, asserted by the respondents as the one which was purchased by his wife when she allegedly received ₹15,00,000/- (Rupees Fifteen lakhs) on June 25, 1997, and that the said shop was purchased by the said firm as per sale deed Ex.DW-2/2 on March 22, 1996.

15. Deciding issue No.1, which though very widely worded, but as reflected in the impugned judgment was decided with reference to the defence predicated in the written statement that in view of the clause-4 in Ex.P-1 the suit for specific performance was not maintainable, in paragraphs 7 to 10, the learned Single Judge has noted the decisions reported as 1973 (2) SCC 515 M.L.Devender Singh & Ors. v. Syed, 1997 (7) SCC 703 Manzoor Ahmed Margray v. Ghulam Hasan Aram & Ors., 2004 (6) SCC 649 P.D'Souza v. Shondrilo Naidu and 2010 (9) UJ 4569 (SC) Man Kaur (dead) by LRs v. Hartar Singh Sangha and has highlighted that as per ratio of law contained in the said decisions, an agreement to sell stipulating liquidated damages could be classified in three categories : (i) Where the sum mentioned is a penalty, (ii) Where the sum mentioned is liquidated damages for breach of contract, and (iii) The sum mentioned is the amount payable as a substitute for performance of the act at the election of the person by whom money is to be paid i.e. the seller; and that the terms falling in category (i) and category (ii) did not bar a

suit for specific performance to be filed and it was only a term which fell in category (iii) barred a suit for specific performance.

16. Clause-4 of Ex.P-1 has been interpreted not to be falling in category (iii) and thus a suit seeking decree for specific performance has been held to be maintainable. In view of the inappropriate language in which issue No.1 has been settled, the learned Single Judge has rightly observed while deciding issue No.1 in favour of the respondents that his findings pertaining to said issue would be subject to the respondents proving their readiness and willingness to perform their obligations under Ex.P-1.

17. The learned Single Judge has thereafter proceeded to discuss issue No.3 i.e. : Whether the defendant purchased the shop 'Tilak Exclusif' for ₹15 lakhs paid by the plaintiff to the defendant on 25.06.1997.

18. Before analyzing the impugned decision with respect to issue No.3, we would highlight that there was no need to settle the said issue inasmuch as at a trial, evidence is led of the facts in issue and of facts which are relevant to prove or disprove a fact in issue, meaning thereby, issues have not to be settled with respect to relevant facts; which would be the evidence to prove or disprove a fact in issue.

19. From the pleadings of the parties, the point of variance, on a matter of fact, was whether the respondents had paid a further sum of ₹15,00,000/- (Rupees Fifteen lakhs) to the appellant on June 25, 1997 and this matter of fact had a bearing on whether the respondents were ready and willing to

comply with their obligations under Ex.P-1 when they offered to pay further sum of ₹20,00,000/- (Rupees Twenty lakhs) to the appellant, for if it was established that they did pay ₹15,00,000/- (Rupees Fifteen lakhs), the respondents would be justified to tender further sum of ₹20,00,000/- (Rupees Twenty lakhs) only. If they had not paid ₹15,00,000/- (Rupees Fifteen lakhs) as asserted by them, they offering to pay ₹20,00,000/- (Rupees Twenty lakhs) more, would obviously be not in compliance with their obligation to pay the balance sale consideration in sum of ₹35,00,000/- (Rupees Thirty five lakhs).

20. We pose a question : What if it was proved that the respondents had paid appellant ₹15,00,000/- (Rupees Fifteen lakhs), but could not prove that said amount was utilized by the appellant to buy the shop in question? Would the finding, which had to be that there was no evidence of the appellant purchasing the shop in question from out of ₹15,00,000/- (Rupees Fifteen lakhs) received from the respondents resulted in there being an impact on the other issues. The answer is a plain 'No'. But what has happened is, that in view of the issues settled, useless and irrelevant evidence pertaining to the acquisition of the shop in question been led; precious judicial time has been wasted.

21. The learned Single Judge has returned a finding that in view of the testimony of DW-2 and in view of Ex.DW-2/1 and Ex.DW-2/2 it stood established that the shop in question came under the tenancy of the partnership firm of the husband of Sonia Ahuja in the year 1984 and that the shop was purchased by the said partnership firm, as per Ex.DW-2/1 on March 22,

1996. The learned Single Judge has therefrom concluded that the case pleaded by the respondents that the appellant purchased the shop by utilizing ₹15,00,000/- (Rupees Fifteen lakhs) was obviously false. But, for the purposes of the instant appeal, it assumes importance to note that since there was no receipt evidencing said payment being made by the respondents to the appellant, the learned Single Judge has highlighted that the respondents had led no evidence to prove of being possessed of ₹15,00,000/- (Rupees Fifteen lakhs) which they could pay to the appellant on June 25, 1997.

22. We have already noted that respondent No.1, who appeared as PW-1, stated that he had sold his property at Noida to one Mr.Kapoor for ₹30,00,000/- (Rupees Thirty lakhs) and having received ₹15,00,000/- (Rupees Fifteen lakhs) in cash from said Mr.Kapoor had paid said sum to the appellant, but led no evidence of being the owner of a property at Noida, much less having sold the same, much less to Mr.Kapoor i.e. there was no evidence to support the assertion of the respondents. Being a word of mouth versus a word of mouth situation, the issue of fact has been rightly decided in favour of the appellant. We concur with the finding returned that the respondents have miserably failed to prove that they paid ₹15,00,000/- (Rupees Fifteen lakhs) to the appellant on June 25, 1997 or on any other date.

23. The decision of the learned Single Judge has thereafter proceeded to decide issue No.5 : *Whether the plaintiff failed to pay the balance consideration, as per the agreement and defendant was entitled to forfeit the earnest*

money. And has returned a finding against the appellant and has thereafter proceeded to discuss issue No.2 : Whether the plaintiff was always ready and willing to perform his obligations under the agreement. And has returned a finding against the respondents.

24. We need to speak a word on the subject by highlighting that the truncated manner in which the two issues have been decided has resulted in a decision, which, as would be noted hereinafter, is ex-facie self-contradictory.

25. On issue No.2, with reference to the testimony of PW-1 i.e. respondent No.1 and the testimony of PW-2 to PW-6, the learned Single Judge has rightly concluded that the respondents had proved they being possessed of sufficient funds to pay ₹20,00,000/- (Rupees Twenty lakhs) to the appellant, a finding of fact which learned senior counsel for the appellant conceded as being supported with reference to the documentary evidence proved to establish the respondents being in a position to muster ₹20,00,000/- (Rupees Twenty lakhs) to be paid to the appellant. But in view of the decision with respect to issue No.1, noting the law laid down in the decisions reported as AIR 1928 PC 208 Ardeshir H Mama Flora Sasoon, AIR 1952 Nagpur 224 Shobharam v. Totaram, 45 CWN 837 Rustomoli v. Ahoider Rahaman, 1937 Mad.WN 1158 Subarayudu v. Tatayya, AIR 1967 AP 69 Butchiraju v. Sri Ranga, AIR 1978 Pat. 190 Bishwanath Mahto v. Smt.Janki Devi, AIR 1967 SC 868 Gomathinayagam Pillai v. Pallanishwami Nagar, AIR 1971 AP 279 Kommisetti Venkatasubbayya v. Karamesetti Venkateswarlu, and AIR 2002 NOC 87 (Kar.)

Makbool Khan v. Smt.Shamsunnissa & Ors. wherein it was held that where a party falsely alleges or is not able to prove, having paid part sale consideration as alleged, the evidence of the party being ready and willing to pay the balance remainder sale consideration would be a case of it requiring to be held that the party concerned was not ready and willing to discharge its obligations under a contract for sale, the learned Single Judge has returned a finding with respect to issue No.2 that the plaintiffs i.e. the respondents have failed to prove that they were ready and willing to perform their obligations under Ex.P-1 and has held that they are not entitled to a decree for specific performance. But while discussing issue No.5, the learned Single Judge has noted that whereas the land being free-hold, there was no need to obtain a No Objection from the Land & Development Office, but keeping in view the sale consideration settled, a permission was required under Chapter-XXII of the Income Tax Act from the Income Tax Authorities and there being no proof of the appellant having even applied to obtain a sale permission has returned a finding against the appellant.

26. Now, everything has got rolled over. There is no evidence to prove that the appellant applied for the necessary permission from the Income Tax Authorities and thus it has to be held that to said extent the appellant is in default. The plea of the respondents of having paid further ₹15,00,000/- (Rupees Fifteen lakhs) to the appellant being not proved and it being useless for them to tender only ₹20,00,000/- (Rupees Twenty lakhs), it has to be held that even the respondents were in

default. Where both parties to a contract are in equal default, neither can enforce the contract against the other and the logical corollary of the impugned decision has to be, that both parties being in default, the respondents were not entitled to a decree for specific performance nor was the appellant entitled to forfeit the earnest money received by her, nor would the respondents be entitled to any damages for breach of contract.

27. Both learned Senior Counsels for the parties did not dispute the correctness of the findings returned by the learned Single Judge that from the evidence led it had to be held that appellant failed to prove that she applied for an Income Tax Clearance and thus was not in a position to sell the property and the respondents had not proved paying ₹15,00,000 (Rupees Fifteen Lakhs) to the appellant.

28. Mr.Ashok Bhasin, learned Senior Counsel for the respondents urged that the Court can direct respondents to pay ₹35,00,000 (Rupees Thirty Five Lakhs) to the appellant and require appellant to execute the sale-deed. The argument ignore the point that law requires a buyer to prove being not only ready but even willing to pay the full sale consideration and it is not for the Court to so direct.

29. How has this issue been resolved by the learned Single Judge?

30. This takes us to the terminal reasoning of the learned Single Judge where issues No.4 and 6 are decided together. Issue No.4 reads : *Whether in the alternative plaintiff is entitled to the damages of ₹40 lakh due to non-*

performance of the agreement dated 20.06.1997 by the defendant? Issue No.6 reads : *Relief.*

31. Influenced by the fact that the appellant was in default inasmuch as Sonia Ahuja had failed to prove having even applied to obtain the No Objection clearance from the Income Tax Authorities, and there was no evidence to establish that when she sold the basement to the daughters of respondent No.1 it was agreed that she would adjust ₹5,00,000/- (Rupees Five lakhs) received by her when Ex.P-1 was executed, ignoring the finding returned on issue No.2, of the respondents being not willing to comply with their obligations under Ex.P-1, the learned Single Judge has held the respondents entitled to a decree for not only refund of the earnest money paid by them to the appellant, but even penalty in sum of ₹5,00,000/- (Rupees Five lakhs), for which the learned Single Judge has relied upon clause-4 of the agreement to sell Ex.P-1.

32. The finding returned by the learned Single Judge is patently erroneous inasmuch as, to be entitled to damages, whether by way of penalty or as recompense in the alternative to a decree for specific performance of the contract, the qua non is, for the buyer to establish being ready and willing to comply with the buyer's obligations under the agreement to sell, and upon the Court finding that the buyer has so proved but there being equities in favour of the seller, requiring the seller to be relieved of the obligation to sell; the buyer being recompensed by way of monetary compensation. Once the finding was returned against the respondents of they not

proving being willing to discharge their obligations under Ex.P-1, the corollary would be they not being entitled to any monetary compensation for breach by the seller, of the seller's obligation under Ex.P-1.

33. Learned counsel for the respondents could show us no evidence, other than the bald testimony of PW-1 that he paid ₹15,00,000/- (Rupees Fifteen lakhs) to the appellant four or five days after Ex.P-1 was executed. There being no evidence of PW-1 being possessed of ₹15,00,000/- (Rupees Fifteen lakhs) and there being no receipt evidencing Sonia Ahuja having acknowledged receiving ₹15,00,000/- (Rupees Fifteen Lakhs) from respondent No.1, in view of the decisions noted by the learned Single Judge, and re-noted by us in para 25 above, the decision returned by the learned Single Judge on the core issue is correct and affirmed by us i.e. that the respondents have failed to prove they being willing to perform their obligations under Ex.P-1. Similarly, the appellant not having proved to have applied to the Income Tax Authorities to obtain an income tax clearance pertaining to the property, the finding returned by the learned Single Judge that even the appellant is in default of the agreement Ex.P-1 is affirmed. Needless to state, the consequence has to be that both parties being in default, neither can the respondents be granted specific performance nor damages. The appellant having failed to prove the earnest money being adjusted as alleged by her and there being no evidence of price of property falling, and even otherwise she also being in default, she cannot retain ₹5,00,000/- (Rupees Five lakhs) received by her as

earnest money when Ex.P-1 was executed.

34. A reasonable rate of interest at which said money should be returned by her to the respondents is settled by us at 10% (simple) per annum, since scheduled banks were offering interest @11% per annum (simple) in the year 1996; the rate of interest fell and fluctuated; currently it is 9.5% per annum (simple).

35. The appeal and the cross objection stand disposed of modifying the impugned judgment and decree dated January 14, 2011. Suit filed by the respondents stands decreed in sum of ₹5,00,000/- (Rupees Five lakhs) together with interest @10% per annum (simple) reckoned from June 20, 1997 i.e. the date of the execution of Ex.P-1 till the amount is paid.

36. We would like to speak a word on the instant litigation between the parties and indeed in virtually every other case relating to agreements to sell. A large part of the sale consideration is ultimately paid in what is called : '*Black Money*'. It is for this reason that Income Tax clearance permissions are not applied for. What the parties do is: record the sale consideration in the agreement to sell and while executing the sale deed, record a much lower sale consideration, so low, that the requirement of income tax clearance is avoided. Instant case appears to be of one such category and the proof which strikes us is that the basement of the house has been sold for a paltry sum of ₹2,45,000/- (Rupees Two lakhs forty five thousand) and if we contrast this price to the sale price of the first floor with roof rights at

₹40,00,000/- (Rupees Forty lakhs), it would be a striking difference, which contrast becomes even more jarring in view of the statements of the parties that the basement was being used for a shop i.e. had a commercial value.

37. In view of the facts that both parties are at fault, there shall be no order as to costs all throughout i.e. both parties shall bear their own costs.

(PRADEEP NANDRAJOG)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

MAY 15, 2012
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