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* IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment Reserved on : May 07, 2012*
Judgment Pronounced on: May 15, 2012

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RFA(OS) 30/2009

SHAKUNTALA BHOLLA Appellant
Represented by: Mr.Rajat Aneja, Advocate.

versus

SHEEL CHAND JAIN Respondent
Represented by: Nemo

CORAM:

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

PRADEEP NANDRAJOG, J.

1. The appellant, Shakuntala Bholla has sued the respondent Sheel Chand Jain for specific performance of the agreement to sell Ex.PW-1/1 (also exhibited as Ex.PW-1/PX1) dated September 01, 2003, execution whereof is not in dispute between the parties. The said agreement envisages that for a consideration of ₹25,00,000/- (Rupees Twenty Five Lakhs only), Sheel Chand Jain would sell the third floor with roof rights of property bearing No.45/12, East Patel Nagar, New Delhi-110008, comprising three bed-rooms, drawing-cum-dining, kitchen, toilet and a bath-room. ₹2,00,000/- (Rupees Two lakhs) stands recorded as paid to Sheel Chand Jain by Shakuntala Bholla. The agreement records that further sum of ₹1,00,000/- (Rupees One lakh) would be paid within 30 days and the balance ₹22,00,000/-

(Rupees Twenty Two lakhs) would be paid on or before January 31, 2004, i.e. the date stipulated for sale to be completed.

2. Shakuntala Bholla paid further sum of ₹1,00,000/- (Rupees One lakh) to Sheel Chand Jain, and as per receipt Ex.PW-1/2 this payment was made on November 11, 2003, execution of which receipt is also not in dispute. The dispute arose with reference to Ex.PW-1/1 requiring the sale to be completed on or before January 31, 2004. It is the case of Shakuntala Bholla that she approached Sheel Chand Jain on January 28, 2004 and requested him to supply the title documents of the property so that a draft sale-deed could be prepared and got approved from Sheel Chand Jain, and it is her claim that she had made a similar request when she had paid ₹1,00,000/- (Rupees One lakh) to Sheel Chand Jain on November 11, 2003. As per her, Sheel Chand Jain was rude to her and refused to supply the title documents when she approached him on January 28, 2004 and this compelled her to approach a lawyer who issued the legal notice dated January 29, 2004, Ex.PW-1/3 and posted the same under Regd.A.D.Post to Sheel Chand Jain as per postal receipt Ex.PW-1/4 and additionally under Certificate of Posting, evidenced by the Postal Certificate, Ex.PW-1/5 and that the notice was received by Sheel Chand Jain, evidenced by the acknowledgment on the acknowledgment card Ex.PW-1/6. Alleging that she received the notice Ex.PW-1/7 dated February 02, 2004 sent by Sheel Chand Jain in which he alleged she being in default and hence Sheel Chand Jain forfeiting ₹3,00,000/- (Rupees Three lakhs) paid by her to him, suit was filed seeking a decree for specific performance of Ex.PW-1/1 and in the alternative damages in sum of ₹6,00,000/- (Rupees Six lakhs).

3. In the written statement filed by Sheel Chand Jain he did not dispute having executed Ex.PW-1/1 and having received ₹2,00,000/- (Rupees Two Lakhs) at said point of time, but denied that the persons whose signatures were to be found on the agreement to sell as witnesses had signed the same as witnesses. He refuted Shakuntala Bholla's assertion that she came to him on September 29, 2003 to offer further sum of ₹1,00,000/- (Rupees One Lakh), but admitted having received said amount on November 11, 2003. Denying having received the notice Ex.PW-1/3, he stated that even otherwise, the story set up by Shakuntala Bholla of her demanding and he refusing to give her title documents of his property was false as he had already supplied photocopies thereof to Shakuntala Bholla when Ex.PW-1/1 was executed. Highlighting that time was the essence of the contract, he justified the agreement being terminated by him vide Ex.PW-1/7.

4. Now, it hardly matters whether Ex.PW-1/1 was witnessed by the persons who have signed the same as witnesses, keeping in view the fact that Sheel Chand Jain had admitted having executed the same. Yet in spite thereof, while settling the issues as per order dated August 08, 2005, an issue got settled on said aspect. 9 issues settled, read as under:-

“1. Whether the agreement in question was not signed by the witness on 1.09.2003? If so, what effect. OPD

2. Whether the plaintiff had been ready and willing to perform her part of the said agreement? OPP

3. Whether the plaintiff had demanded the copies of the title documents of the suit property from the

defendant on 28.1.2004 and whether the defendant failed to supply the same? OPP

4. Whether the plaintiff served the notice dated 29.1.2003 on the defendant? OPP

5. Whether the defendant had terminated the said agreement vide notice dated 2.2.2004? OPD

6. Whether the suit for specific performance simplicitor is maintainable? OPP

7. Whether no cause of action has arisen to the plaintiff? OPD

8. Whether the suit has been verified as per Order 6 Rule 15 of CPC? OPP

9. Relief?"

5. At the trial, Shakuntala Bholla examined, besides herself, her sister Kavita and one Tirath Kumar as PW-1, PW-2 and PW-3 respectively.

6. As regards Kavita, she deposed of having agreed to lend ₹11,00,000/- (Rupees Eleven lakhs) to her sister and having issued cheque Ex.PW-1/9 to her and in respect of sufficiency of funds, the same being evidenced by Ex.PW-1/10, a statement pertaining to her account maintained with Oriental Bank of Commerce evidencing that she had a credit balance in sum of ₹19,89,373.71 (Rupees Nineteen Lakhs Eighty Nine Thousand and Three Hundred Seventy Three and Paise Seventy one) between March 31, 2003 till January 31, 2004. Tirath Kumar PW-3 deposed to be present and having witnessed execution of Ex.PW-1/1 in the presence of Mr.Motwani, the second person who has signed as a witness to Ex.PW-1/1 as also the receipt Ex.PW-1/2. As regards Shakuntala Bholla, she proved Ex.PW-1/1, Ex.PW-1/2

as also the postal documents Ex.PW-1/3 to Ex.PW-1/6 and having received from Sheel Chand Jain the notice Ex.PW-1/7. She proved the bank statement of account Ex.PW-1/8 as per which she had a sum of ₹11,50,000/- (Rupees Eleven Lakhs and Fifty Thousand) lying to her credit. She deposed facts in sync in the plaint.

7. Relevant would it be to note that on being cross-examined, Shakuntala Bholla admitted that Sheel Chand Jain had provided details of his title to the property prior to the execution of Ex.PW-1/1, but clarified that the same was without supplying documents. She clarified that the details were given to the property dealer Mr.Motwani. She admitted that sufficient details were available for drawing up the sale deed but volunteered that she wanted copies of the title deeds. She denied that photocopies of the title documents were supplied to her when Ex.PW-1/1 was executed, but admitted having received one page of the title document which contained particulars at the rear.

8. Sheel Chand Jain examined himself as DW-1 and deposed facts in sync with the defence taken by him.

9. Vide impugned decision dated January 29, 2009 the learned Single Judge has held that law does not require an agreement to sell to be witnessed and thus has decided the issue against the defendant; in respect of which finding we would only note that the issue ought not to have been settled for the reason, Sheel Chand Jain had admitted having executed Ex.PW-1/1.

10. Deciding issue No.3 before deciding issue No.2, the learned Single Judge has opined that since the deal was struck through a property dealer, and even otherwise it being difficult to believe that Shakuntala Bholla would not have verified the title of the seller, and has thus concluded that she would have been

supplied a copy of the title documents. Therefrom, the learned Single Judge has held issue No.3 to be decided against Shakuntala Bholla.

11. Now, we also have a problem on issue No.3 being settled. Issues are not settled with respect to relevant facts, but they are settled with respect to facts in issue. Whether or not Shakuntala Bholla had a photocopy of the title documents of Sheel Chand Jain was relevant for her to have drawn up the sale deed, inasmuch as particulars of the registration of the title document of Sheel Chand Jain had to be mentioned therein. If she had said particulars, it would be apparent that her taking the stand that to draw up the sale deed she required photocopy of the title documents of Sheel Chand Jain, and in the absence of the same with her she could not get the sale deed drawn up, would be a ruse to cover up her not coming forward to pay the balance sum. This was a relevant fact and ought to be, in law, a part of issue No.2.

12. Deciding issue No.2, the learned Single Judge has held that in view of the fact that Shakuntala Bholla's version of Sheel Chand Jain not supplying photocopies of the title documents to her was an impediment in her getting prepared a sale deed was not acceptable, said issue has been decided against Shakuntala Bholla.

13. On issue No.4 the learned Single Judge has held that nothing turns on this issue, and rightly so, but has proceeded to hold that without examining the postal department, the postal record pertaining to the notice dated January 29, 2004 could not be relied upon.

14. On the other issues the learned Single Judge has held that the suit for specific performance was maintainable and that a cause of action had accrued. That a defective verification was meaningless inasmuch as by amending the plaint the suit was correctly verified.

15. In a nutshell, it is issue No.2 which has resulted in a finding against Shakuntala Bholla and the impact thereof on the relief clause is the view taken by the learned Single Judge that Sheel Chand Jain would be entitled to forfeit the earnest money and not the further sum of ₹1,00,000/- (Rupees one lakh) received by him and thus Shakuntala Bholla's suit has been decreed in sum of ₹1,00,000/- together with interest @15% per annum from February 01, 2004 i.e. the date immediately next to January 31, 2004 fixed by the parties to complete the sale.

16. Our task is simple. If issue No.2 stands decided against Shakuntala Bholla and for which the decision of the learned Single Judge on issue No.3 contains the factual matrix, the appeal must fail, save and except to the question whether even the earnest money could be forfeited.

17. The learned Single Judge has incorrectly held that Ex.PW-1/3 could not be treated as being served upon Sheel Chand Jain inasmuch as the postal receipts Ex.PW-1/4 and Ex.PW-1/5 and the AD card Ex.PW-1/6 were not got proved through the postal department. This finding ignores the fact that Sheel Chand Jain admitted during cross-examination that Ex.PW-1/3 as also the AD Card Ex.PW-1/6 bears his correct address. A presumption would arise in favour of Shakuntala Bholla that Ex.PW-1/3 being posted by means of Regd.A.D.Post at the correct address of Sheel Chand Jain was delivered to him in view of Ex.PW-1/6, which may

not contain the signatures of Sheel Chand Jain, but it is a matter of common knowledge that any adult member of a family or even a domestic help of the addressee receives postal documents.

18. But, the view taken by the learned Single Judge with respect to Shakuntala Bholla's admission that she had the particulars of the title documents of Sheel Chand Jain and hence her stand that she was unable to get the sale deed drafted before the date fixed by the parties to complete the sale i.e. January 31, 2004 is a ruse is correct. Contradictory postures adopted by her on the issue have been noted by us in para 7 above.

19. We highlight that in the plaint Shakuntala Bholla has categorically stated that in the absence of photocopies of the title documents of Sheel Chand Jain, she not having the particulars thereof, was a handicap for her in getting the sale deed drafted. But, when she appeared as her witness she admitted that she had the necessary particulars with her, but maintained that only the photocopy of the first page of the title document of Sheel Chand Jain was given to her. The learned Single Judge has drawn a correct inference i.e. of a buyer verifying the title of the seller and therefore being supplied the photocopy of the seller's title document. We see no reason for Sheel Chand Jain to supply only the photocopy of the first page of his title document and not the rest when parties bargained before executing Ex.PW-1/1.

20. On the subject of relief, we find that there is no evidence of prices of property falling in the area and thus no loss being occasioned to Sheel Chand Jain. Notwithstanding Shakuntala Bholla being in default and breaching the time stipulated for the sale to be completed she would be entitled to a

refund of the earnest money inasmuch as her breach has caused no loss to Sheel Chand Jain.

21. We therefore dispose of the appeal modifying the impugned decree and decree the suit filed by Shakuntala Bholla by passing a decree in sum of ₹3,00,000/- (Rupees three lakhs) in her favour and against Sheel Chand Jain together with interest at the rate awarded by the learned Single Judge.

22. Parties shall bear their own costs all throughout.

(PRADEEP NANDRAJOG)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

MAY 15, 2012
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