

\$~

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Pronounced on: July 09, 2012

+ RFA(OS) 52/2010

SHIV SHANKAR SINGHAL Appellant
Represented by: Mr.S.C.Singhal, Advocate.

versus

BALBIR SINGH Respondent
Represented by: None

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE MANMOHAN SINGH

PRADEEP NANDRAJOG, J. (ORAL)

1. Holding in favour of the appellant with respect to the agreement to sell dated September 29, 2006, Ex.P-1, in the suit seeking decree for specific performance of the same, the learned Single Judge has held in para 13 of the impugned judgment dated April 16, 2010 as under:-

“Thus, in the light of the aforesaid, there cannot be any strait jacket formula and from the entirety of facts and circumstances of each case, relevant intention and conduct of the parties concerned is to be determined. Evidently, grant of relief of specific performance is discretionary one. In lieu thereof, grant of damages is the appropriate remedy in a case like the present one. In the instant case, while refusing to grant specific performance of Agreement to Sell (Ex.P-1), this court deems it appropriate to grant damages equivalent to the sum paid by the plaintiff to the defendant, i.e. to the tune of ₹6,50,000/- (Rupees six lacs fifty thousand only) with interest @ 6% per annum from the date of

entertaining of the suit, i.e. with effect from 2nd March, 2007, till realization.”

2. The impugned judgment accepts and recognizes that under the sell to agreement Ex.P-1, the respondent had agreed to sell to the appellant his 1/8th undivided share in 37 bigha and 8 biswa land comprised in khasra No.12/21 situated in the revenue estate of village Malakpur Jer, Delhi and evidenced by the receipt Ex.P-2 had received ₹3.5 lakhs towards earnest money cum part sale consideration when Ex.P-1 was executed by him and that as per Ex.P-1 the agreed sale consideration was ₹32 lakhs. The impugned judgment further accepts and recognizes that thereafter, on October 16, 2006, evidence by the receipt Ex.P-3, the respondent had received further sum of ₹3 lakhs towards sale consideration and in this manner had received a total sum of ₹6.5 lakhs towards sale consideration and only ₹25.5 lakhs remained to be paid.

3. The learned Single Judge, as per the impugned decision, has recognized the fact that it was agreed between the parties that the sale would be completed by December 20, 2006, on which date the appellant went to the office of the Sub-Registrar evidence by Ex.P-4 but the respondent did not turn up to execute the sale-deed.

4. Noting the defence taken by the respondent that the appellant was in default inasmuch as it was the case of the respondent that the appellant would obtain a No Objection Certificate from the Competent Authorities, the learned Single Judge has opined in para 8 of the impugned decision that the said stand of the respondent was not controverted by the plaintiff in his evidence, but we find the effect of said finding

not being crystallized with respect to the resultant effect thereof.

5. Be that as it may, as per law it is the seller who has to obtain the necessary sale permissions and not the buyer. The learned Single Judge has ignored the fact that the agreement to sell Ex.P-1, as per Clause 8 thereof, clearly records that the respondent (referred to as the first party) shall obtain the necessary No Objection Certificates from the competent authorities and shall intimate the appellant (referred to as the second party). In the teeth of Ex.P-1 and Clause 8 thereof, the finding returned by the learned Single Judge in para 8 of the impugned judgment is patently erroneous. The defence taken was patently contrary to the written document and suffice would it be to state that law prohibits an oral plea being raised in conflict with a written document. That apart, proof has to be in the positive and not the negative. Thus, onus to prove the negative was on the defendant.

6. Noting the decisions reported as AIR 2000 SC 3106 Gobind Ram vs. Gyan Chand and 2006 (9) SCALE 554 Faquir Chand & Anr. vs. Sudesh Kumari, the learned Single Judge has opined that decree for specific performance of a contract is not automatic and is one of the discretion of the Court and thereafter the decision terminates as per para 13 herein above noted.

7. It stares us in the face that the learned Single Judge has given no reason whatsoever as to why in lieu of specific performance damages were given awarded. It stares us in the face that no damages have been awarded for the reason what

has been decreed is the sum of ₹6.5 lakhs paid by the appellant to the respondent towards sale consideration.

8. It is no doubt true that as per Section 20 of the Specific Relief Act, 1963 the jurisdiction to decree specific performance is discretionary, but as provided in the Section, the discretion of the Court is not arbitrary and has to be on sound and reasonable judicial principles which are capable of correction by a Court of Appeal. Unfortunately, in the instant case, we find no reasons whatsoever stated by the learned Single Judge which have guided the learned Single Judge and thus we are left wondering as to what should we look at, as a Court of Appeal, to consider whether the judicial principals which have guided the learned Single Judge are or are not capable of correction by us.

9. As regards the decisions referred to by the learned Single Judge; in Faquir Chand's case (supra), the Supreme Court noted that the sale agreement was executed in the year 1985 and was extended in the year 1987 and that the proceedings in the suit lasted till the year 1999 and that in the interregnum, as asserted by the seller, the price of the property had risen phenomenally. But, the decision to award damages in lieu of specific performance was fundamentally on the ground, noted in para 5 of the opinion, that *to some extent the delay was also attributable to the buyer*. In Gobind Ram's case (supra), the Court upheld the decree for specific performance for keeping in view the increase in the price of the land directed the buyer to pay a further sum of ₹3 lakhs.

10. Suffice would it be to state that in a case seeking specific performance of an agreement to sell immovable property, each case would have its own story to tell and on the

facts of each case the guiding judicial principles on which the Court has based its decision, while exercising discretion, would be required to be culled out.

11. As regards the facts of the instant case, it stands out that the appellant was all along ready and willing to perform his obligations. The suit was filed promptly on February 22, 2007; the date of completion of the sale contemplated being December 20, 2006, was resisted on a false plea taken that the appellant had to obtain the necessary No Objection Certificate; a plea which runs in the teeth of Clause 8 of the agreement to sell Ex.P-1 and was thus even not permissible in law to be urged, requiring a trial. The order sheet would reveal that the respondent avoided receiving the summons issued and probably bribed the process server, till when vide order dated August 07, 2007, it was directed that dasti summons be served and only when the appellant accompanied the process server that respondent could be served. Written statement was filed belatedly and for which respondent had to file an application under Order 8 Rule 1 CPC for time to be extended resulting in order dated April 04, 2008 being passed. After issues were settled the appellant promptly filed affidavit by way evidence and the respondent sought for and was granted an adjournment as recorded in the order dated December 04, 2008 to cross-examine the witness of the appellant as also the appellant. Cross-examination was ultimately conducted on April 22, 2009. Thereafter, the respondent led no evidence inspite of two opportunities granted. No evidence was led by the respondent and thus the learned Single Judge heard arguments. It is apparent that the respondent was simply interest in prolonging the matter.

There is no evidence that between the dates of the agreement to sell being executed and the decree there was any price rise, much less phenomenal. The respondent has not brought forth any fact on which the discretion not to grant specific performance could be rested in his favour.

12. The appeal is accordingly allowed. Impugned judgment and decree dated April 16, 2010 is set aside and suit filed by the appellant seeking specific performance of Ex.P-1 is decreed. It is hereby directed that within four weeks from today the appellant shall deposit the balance sale consideration by means of a banker's cheque drawn in the name of the Registrar General of this Court and would simultaneously move an application in the suit stating said fact; prior notice of which application shall be sent by Registered AD post to the respondent at his address as per the memo of parties. The respondent would be permitted to receive said sum upon simultaneously signing the sale-deed, failing which a Court Officer would be appointed to do the needful; and as regards the No Objection Certificate to be obtained, the learned Executing Court would be authorized to appoint a Court Officer to do the needful.

13. The appellant shall be entitled to costs throughout.

(PRADEEP NANDRAJOG)
JUDGE

(MANMOHAN SINGH)
JUDGE

JULY 09, 2012
KA