

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

+ **RFA No. 556/2011**

Reserved on: 23rd April, 2012

% **Pronounced on: 1st May, 2012**

SMT. LAXMI DEVI

..... Appellant

Through: Mr. R.P. Shukla, Advocate with Mr.
P.K. Dixit, Advocate.

versus

SHRI MAHAVIR SINGH

..... Respondent

Through: Mr. Sudhir Kumar Sharma,
Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

Yes.

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment of the trial Court dated 20.4.2011 decreeing the suit of the respondent/plaintiff filed for specific performance of the agreement dated 20.9.2007 with respect to the property admeasuring 200 sq. yds. situated in Khasra No.32, Janta Vihar-II, village Mukand Pur, Delhi-42 (hereinafter referred to as the 'suit property').

2. The facts of the case are that the parties, the

appellant/defendant as the proposed seller and the respondent/plaintiff (a property dealer by profession) as the proposed buyer entered into an agreement to sell dated 20.9.2007 with respect to the suit property. The total sale consideration was fixed at ₹5,60,000/- of which a sum of ₹ 1 lakh was paid in cash to the appellant/defendant. The respondent/plaintiff claimed that the balance consideration was to be paid by 20.12.2007 but the appellant/defendant failed to receive the sale consideration and did not obtain an NOC for sale of the property. It was pleaded that there appeared to be some disputes with respect to the suit property because of which the appellant/defendant was not executing the transfer documents in favour of the respondent/plaintiff. A legal notice dated 18.12.2007 was sent by the respondent/plaintiff to the appellant/defendant to which a reply was given by the appellant/defendant disputing the case set up by the respondent/plaintiff and in reply it was contended that it was the respondent/plaintiff who was guilty of breach of contract in failing to make the payment of the balance consideration. The subject suit thereafter came to be filed.

3. The appellant/defendant in her written statement did not dispute entering into the subject agreement to sell and the total sale consideration of ₹ 5,60,000/-. The receipt of ₹ 1 lakh was also not denied.

What was however contended on behalf of the appellant/defendant was that it was the respondent/plaintiff who was guilty of breach of contract in failing to make the payment of the balance sale consideration. It was pleaded that the appellant/defendant visited the office of the sub-Registrar on 20.12.2007 and remained there till 4.00 P.M. but the respondent/plaintiff did not turn up to pay the balance sale consideration and execution of the documents resulting in the earnest money being forfeited. It was pleaded that forfeiture was justified because the appellant/defendant was unable to purchase another property with respect to which an agreement was entered into with one Sh. Gulab Singh of Village Bharola to whom earnest money of ₹ 2 lacs was paid. It was pleaded that on account of lapses of the respondent/plaintiff, the agreement with Sh. Gulab Singh could not go through and the appellant/defendant was forced to sell the suit property to Sh. Gulab Singh for a sale consideration of ₹ 5,60,000/- on 29.1.2008. It was prayed that the respondent/plaintiff was not entitled to specific performance and the suit was prayed to be dismissed.

4. After completion of pleadings, the trial Court framed the following issues:-

- “1. Whether the suit is barred U/s 16 Specific Relief Act as claimed in the Written Statement? OPD
2. Whether the defendant has sold the suit property, if so, to what effect? OPD

3. Whether the plaintiff is entitled to the relief of specific performance as claimed? OPP
4. Whether the plaintiff is entitled to the injunction as prayed for? OPP
5. Whether the plaintiff is entitled to any other relief in the event issue no.2 is answered in favour of the defendant? OPP
6. Relief.”

5. The main issues which were canvassed before this Court pertain to (i) who was guilty of breach of the contract i.e. whether the appellant or the respondent, (ii) whether the respondent/plaintiff was ready and willing to perform his part of the contract and (iii) as to whether the respondent/plaintiff is entitled to the discretionary relief of specific performance in the facts of the present case.

6. The relevant issue as to who is guilty of breach of contract is intertwined with the issue of readiness and willingness and the capacity of the respondent/plaintiff to pay the balance sale consideration of ₹ 4,60,000/-.

7. The trial Court has held that the appellant/defendant was guilty of breach of contract in not receiving the balance sale consideration. The findings, in this regard, of the trial Court, in my opinion, are clearly sketchy and do not discuss the relevant issues and evidence. The findings of the trial Court, in this regard, read as under:-

“ISSUE NO. 3.

3. Whether the plaintiff is entitled to the relief of specific performance as claimed? OPP

13. The onus of proof of this issue lies upon the plaintiff and in support of his contention the plaintiff has categorically stated that the Bayana receipt dated 20.09.2007 was duly executed by the defendant in respect of the suit property, in pursuance to the agreement for sale of the suit property, by the defendant to the plaintiff. He has further stated that the total sale consideration was settled at Rs. 5,60,000/out of which, an amount of Rs. 1 lakh was paid as earnest money, on 20.09.07 and, therefore, the bayana receipt Ex.PW1/1 was executed by the defendant. He has also stated that the defendant was required to execute the other sale documents after receiving the balance sale consideration till 20.12.2007, but, despite repeated requests, the defendant had failed to received the balance sale consideration. He has further deposed that the legal notice dated 18.12.2007, Ex.PW1/2, was also served upon the defendant, but despite

service of the legal notice, the defendant has failed to perform her part of the agreement. The plaintiff has proved the bayana receipt as Ex.PW1/1 and has proved the legal notice, along with UPC and Registry receipts as Ex.PW1/2 (collectively). The receipt of the legal notice dated 18.12.07 has been denied by the defendant. The perusal of the legal notice dated 18.12.07 shows that the same bears the correct address of the defendant. Further more, the defendant had also sent a legal notice dated 22.12.07 to the plaintiff and in the said legal notice, fact of the execution of bayana receipt Ex.PW1/1 and receipt of sum of Rs. 1 lakh as earnest money, out of the total sale consideration of Rs.5,60,000/- has been admitted. The legal notice dated 22.12.07 has been proved on record, and it has been admitted that the parties have entered into an agreement for sale purchase of the suit property for a total sale consideration of Rs. 5,60,000/- and the balance sale consideration of Rs, 4,60,000/- was to be made by the plaintiff on or before 20.12.2007. During the trial no explanation has come from the defendant as to why she failed to accept the remaining sale consideration from the plaintiff. On the contrary she has stated that the plaintiff had never approached her to make the remaining sale consideration and the plaintiff asked her to appear before the office of the Sub Registrar on 20.12.07 with the assurance that the

balance sale consideration shall be made by the plaintiff to her on 20.12.2007 at the said office. She has deposed in her affidavit that on 20.12.2007 she appeared before the Sub Registrar and a receipt was also executed in her name for her appearance before the Sub Registrar, but no such receipt has been placed on record during the trial and, therefore, all these facts have remained not proved.

14. Perusal of the record further indicates that the plaintiff has served the legal notice on 18.12.2007, prior to the expiry of the period for making the payment of the remaining sale consideration to the defendant but the same was not accepted by the defendant, for the reasons best known to her.

15. During the course of trial, it has also come in the evidence, in deposition of the plaintiff, that there was some dispute between the defendant and the previous owner of the suit property and, therefore, the defendant kept on delaying the receipt of balance sale consideration from the plaintiff. It is also stated by the plaintiff that the balance sale consideration was not accepted by the defendant on the ground that the 'NOC' was not received by her from the concerned authorities.

16. Testimony of the plaintiff clearly indicate that the defendant had deliberately not performed her part of the agreement and has failed to accept the balance sale consideration from the plaintiff despite repeated requests and service of legal notice and therefore, this issue is decided in favour of the plaintiff and against the defendant.”

8. In my opinion, the trial Court has committed a clear-cut error in holding that the appellant/defendant was guilty of breach of her performance. In my opinion, it is writ large on the face of the record that it was the respondent/plaintiff i.e. the property dealer who was guilty of breach of contract. The factum with respect to breach of contract is proved from the fact that even before the suit was filed, the appellant/defendant in

her legal notice dated 27.12.2007 (Ex.PW1/3), and which was sent in reply to the legal notice dated 18.12.2007 (Ex.PW1/2) sent by the respondent/plaintiff, specifically mentioned that the appellant/defendant had reached the office of the sub-Registrar, Kashmiri Gate, Delhi on 20.12.2007 and waited the whole day till 4.00 P.M. and which was confirmed from the receipt No.133160, book No.866 dated 20.12.2007. This aspect of presence before the sub-Registrar to receive the balance sale consideration and execute the necessary documents in favour of the respondent/plaintiff was also stated in paragraph 3 of the preliminary objections in the written statement. Neither to the notice, Ex.PW1/3 was any reply given by the respondent/plaintiff and nor did the respondent/plaintiff in spite of opportunities, file any replication to the written statement of the appellant/defendant. Therefore, the contents of the written statement with respect to presence of the appellant/defendant before the sub-Registrar on 20.12.2007 are deemed to be admitted as also similar averments of appellant/defendant in the notice dated 27.12.2007. In fact, it is also proved that the appellant/defendant was present in the office of sub-Registrar on 20.12.2007 inasmuch as a specific receipt number showing the presence of the appellant before the sub-Registrar was given both in the notice, Ex.PW1/3 and in the written statement and which could not be

unless such specific document did exist. The appellant/defendant was not bound to file and prove such receipt in view of the fact that there was no replication which was filed by the respondent/plaintiff to the written statement filed by the appellant/defendant and the contents in this regard of the appellant/defendant being present before the sub-Registrar on 20.12.2007 being deemed to be admitted. Once there are specific directions to file a replication, and the replication is not filed by the respondent/plaintiff, I have no hesitation to come to the conclusion that the presence of the appellant/defendant before the sub-Registrar on 20.12.2007 for execution of the agreement to sell is proved as also the failure of the respondent/plaintiff to appear before the sub-Registrar for making payment of the balance sale consideration so that the title documents could have been executed in favour of the respondent/plaintiff.

9. I am of the opinion that the respondent/plaintiff is also not entitled to specific performance because pleading and proving of readiness and willingness is a *sine qua non* in a suit for specific performance. Readiness and willingness is by means of showing capacity to pay balance sale consideration. Of course, depending on facts of each case, it may not be necessary for amounts being immediately available to be shown, however, the financial capacity of the buyer (i.e. the respondent/plaintiff)

has necessarily to be established on record and in the absence of financial capacity to pay the balance consideration it cannot be said that respondent/plaintiff was always ready and willing to perform his part of the contract. In the present case, there is no dispute that the respondent/plaintiff filed absolutely no document whatsoever of his financial capacity to pay the balance sale consideration. No bank account was filed, no income tax returns were filed and no details of any properties or other means by which the respondent/plaintiff had to pay the balance sale consideration, were filed. I therefore, hold that the respondent/plaintiff was not ready and willing to perform his part of the contract being not in a position to pay the balance sale consideration and was thus not entitled to the relief of specific performance.

10. Learned counsel for the respondent/plaintiff sought to place reliance upon the judgment of the Supreme Court in the case of *Azhar Sultana Vs. B. Rajamani and Ors. 2009 (17) SCC 27* to argue that there is no requirement to file proof with respect to the balance consideration. Attention of this Court is drawn to para 31 of the judgment which reads as under:-

“31. We are, however, in agreement with Mr. Lalit that for the aforementioned purpose it was not necessary that the entire amount of consideration should be kept ready and the plaintiff must file proof in respect thereof. It may also be correct to

contend that only because the plaintiff who is a Muslim lady, did not examine herself and got examined on her behalf, her husband, the same by itself would not lead to a conclusion that she was not ready and willing to perform her part of contract. If the plaintiff has failed to establish that she had all along been ready and willing to perform her part of contract, in our opinion, it would not be necessary to enter into the question as to whether Defendants 5 and 6 were bona fide subsequent purchasers for value without notice or not.”

In my opinion, the argument raised on behalf of the respondent/plaintiff by reference to para 31 of the judgment in the case of *Azhar Sultana (supra)* is misconceived inasmuch as the observations in para 31 have to be read in the light of the arguments which were urged on behalf of the buyer in the said case and which are contained in para 19(2) of the said judgment and which reads as under:-

“19(1) xxxx xxxx xxxx
 (19)2 For the purpose of establishing the plea of readiness and willingness on the part of the vendee, it was not necessary to prove that she had enough liquid cash in her hand inasmuch as for the said purpose it would be sufficient to show that she could arrange such an amount for payment of consideration at the appropriate stage.
 xxxx xxxx xxxx xxxx”
 (underlining is added)

Therefore, it is clear that what was argued on behalf of the buyer in that case was that there may not be required liquid cash and it was enough if the buyer could arrange for the payment of the balance sale consideration i.e. the buyer did have a financial capacity. It is in this context that the observations were made by the Supreme Court in para 31

that the entire amount of consideration need not be kept ready i.e. the entire amount of balance consideration need not be kept ready in cash/liquid form and it is enough if the proposed buyer has a capacity to arrange for payment of the balance consideration.

I therefore reject the argument that it is the law that a buyer in a suit for specific performance need not prove his financial capacity to pay the balance sale consideration.

11. Besides the fact that respondent/plaintiff was guilty of breach of contract and was not ready and willing to perform his part of the contract lacking in financial capacity to pay the balance consideration, in my opinion, the facts of the present case also disentitle the respondent/plaintiff to the discretionary relief of specific performance. There are two reasons for declining the discretionary relief of specific performance. The first reason is that the Supreme Court has now on repeated occasions held that unless substantial consideration is paid out of the total amount of consideration, the Courts would lean against granting the specific performance inasmuch as by the loss of time, the balance sale consideration which is granted at a much later date, is not sufficient to enable the proposed seller to buy an equivalent property which could have been bought from the balance sale consideration if the same was paid on the due

date. In the present case, out of the total sale consideration of ₹ 5,60,000/-, only a sum of ₹ 1 lakh has been paid i.e. the sale consideration which is paid is only around 17% or so. In my opinion, by mere payment of 17% of the sale consideration, it cannot be said that the respondent/plaintiff has made out a case for grant of discretionary relief of specific performance. The second reason for the respondent/plaintiff not being entitled to specific performance is that in the only legal notice dated 18.12.2007, Ex.PW1/2 issued on behalf of the respondent/plaintiff, there was no claim seeking specific performance, but the respondent/plaintiff only sought return of double the amount of earnest money alongwith interest. Obviously, the respondent/plaintiff himself, and who is a property dealer, only wanted double the amount of earnest money paid and not specific performance of the contract. As already stated, the respondent/plaintiff had failed to prove his financial capacity and when we take this fact with averment of only seeking return of money and not specific performance, in my opinion, the respondent/plaintiff cannot be held entitled to specific performance. This aspect also has to be considered with the issue of readiness and willingness inasmuch as readiness and willingness has to be continuous for seeking specific performance and once the respondent/plaintiff by issuing his legal notice dated 18.12.2007, Ex.PW1/2 only asked for payment of double the

amount of earnest money and not specific performance, it cannot be said that respondent/plaintiff at all times was and always continued to be ready and willing for specific performance.

12. The Supreme Court in the judgment reported as ***K.S. Vidyanadam and Ors. Vs. Vairavan 1997 (3) SCC 1*** has held that in urban areas these days property prices remaining stable for a long period of time is very much a thing of past. In urban areas, more so in the metropolitan cities and further more so in the capital of the country i.e. Delhi, prices of immovable properties rise in a sharp manner and that too regularly. The Supreme Court in the judgment of ***K.S. Vidyanadam (supra)*** has observed that delays caused in specific performance is a good ground for declining the specific performance with respect to urban immovable properties. The ratio of the Supreme Court in the case of ***K.S. Vidyanadam (supra)*** has been recently reiterated by the Supreme Court in the judgment reported as ***Saradamani Kandappan Vs. S. Rajalakshmi and Ors. (2011) 12 SCC 18.***

13. In my opinion, the following conclusions can therefore be arrived at:-

(i) It is the respondent/plaintiff and not the appellant/defendant who was guilty of breach of contract inasmuch as the respondent/plaintiff failed to appear before the sub-Registrar on 20.12.2007 for making

payment of the balance sale consideration.

(ii) The respondent/plaintiff had no financial capacity and therefore cannot be said to have been always ready and willing to perform his part of the contract.

(iii) The respondent/plaintiff is disentitled to discretionary relief of specific performance having paid only 17% of the sale consideration, and also because in his notice, Ex.PW1/2 dated 18.12.007 he had only asked for return of the amount of money paid alongwith 100% penalty, and had not claimed specific performance showing that he was not interested in the relief of specific performance and was in fact therefore not ready and willing qua the relief of specific performance.

(iv) Discretion is also exercised against grant of specific performance inasmuch today in the year 2012, or in April 2011 when the impugned judgment and decree was passed, the appellant/defendant would not be able to buy an equivalent property for the price prevailing as on the date of the agreement to sell i.e. 20.9.2007 considering that only 17% of the price had been paid initially.

14. In view of the above, the trial Court has committed an illegality in decreeing the suit for specific performance. In my opinion, in the facts of the present case, therefore, the respondent/plaintiff will only be

entitled to return of the amount of ₹ 1 lakh paid as advance/earnest money alongwith interest @ 12% per annum from 20.9.2007 i.e. the date of the agreement to sell. The interest which will be payable by the appellant/defendant to the respondent/plaintiff @ 12% per annum simple will be the interest for the pre-suit period, pendente lite period as also future till payment is made by the appellant/defendant to the respondent/plaintiff.

15. In view of the above, the appeal is allowed. Impugned judgment and decree dated 20.4.2011 is set aside. Suit of the respondent/plaintiff seeking specific performance shall stand dismissed and the respondent/plaintiff will only be entitled to a money decree for a sum of ₹ 1 lakh alongwith interest @ 12% per annum simple from 20.9.2007 till payment as against the appellant/defendant. Parties are left to bear their own costs. Decree sheet be prepared. Trial Court record be sent back.

VALMIKI J. MEHTA, J.

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