

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

+ RFA No.498/2007

% Date of decision : 20th January, 2012

NEHA KHALXO Appellant

Through : Mr. N.N. Aggarwal,
Mr. Ashish Mohan and
Mr. Rohit Gandhi, Advs.

versus

SARAMMA KURIAKOSE Respondent

Through : Mr. Manoj V. George and
Ms. Shilpa M. George, Advs.

**CORAM :-
THE HON'BLE MR. JUSTICE J.R. MIDHA**

JUDGMENT

1. The appellant has challenged the judgment and decree passed by the learned Trial Court whereby her suit for specific performance has been dismissed.

2. The appellant instituted a suit for specific performance and permanent injunction against the defendant in respect of property bearing plot No.A-32 & 33 measuring 200 sq. yds. out of Khasra No.1678, Village Aya Nagar, Tehsil Mehrauli, New Delhi, hereinafter referred to as “the suit property”. For convenience, the appellant and the respondents are referred by their ranks in the suit as “plaintiff” and “defendant” respectively.

3. On 9th September, 2004, the defendant agreed to sell the

suit property to the plaintiff for total sale consideration of ₹13,00,000/- out of which the plaintiff paid earnest money of ₹1,00,000/- to the defendant at the time of the sale agreement and agreed to pay the remaining sale consideration of ₹12,00,000/- within 30 days.

4. Vide legal notice dated 26th October, 2004, the defendant notified the plaintiff that the plaintiff had failed to make the payment of ₹12,00,000/- within 30 days of the agreement which expired on 8th October, 2004. The defendant further notified that she was still ready and willing to perform the agreement and, therefore, she granted 15 days extension to the plaintiff to make the payment of the balance sale consideration of ₹12,00,000/- on or before 15th November, 2004. The defendant notified the plaintiff to remain present in the Office of Sub-Registrar on 15th November, 2004 failing which the agreement would stand cancelled and the earnest money of ₹1,00,000/- would stand forfeited.

5. Vide reply dated 8th November, 2004, the plaintiff stated that she had approached the defendant before the expiry of 30 days and repeatedly thereafter along with the balance sale consideration of ₹12,00,000/- but the defendant delayed the matter on the pretext that the sale permission from the concerned authorities for execution and registration of the sale

deed could not been obtained by her.

6. On 23rd May, 2005, the plaintiff instituted the suit for specific performance and permanent injunction against the defendant. The defendant contested the suit on various grounds inter alia : (i) The defendant had purchased the suit property from Vijay Kumar on the basis of sale agreement dated 31st December, 1992; all the documents relating to the title of the defendant in respect of the suit property were shown by the defendant to the plaintiff and the photocopies thereof were given to the plaintiff much before the execution of the sale agreement dated 9th September, 2004 and the plaintiff executed the sale agreement after satisfying herself with respect to the same; and the defendant agreed to sell the suit property to the plaintiff on 'as it is basis' i.e. whatever documents the defendant had from the previous owner, same set of documents would be executed in favour of the plaintiff and the original documents as held by the defendant would be handed over to the plaintiff. The suit property was agreed to be sold on the basis of sale agreement, General Power of Attorney, receipt, etc. and no sale permission was agreed to be obtained by the defendant in respect of the suit property; (ii) The plaintiff never approached the defendant within the period of 30 days stipulated under the agreement dated 9th

September, 2004 as alleged by the plaintiff; (iii) The plaintiff was never ready and willing to perform her part of the contract as she could not arrange the balance sale consideration of ₹12,00,000/-; and (iv) The plaintiff committed breach of the sale agreement by defaulting in making the payment of balance sale consideration of ₹12,00,000/- to the defendant in terms of the sale agreement within 30 days of the sale agreement or within even the extended period in terms of the legal notice dated 26th October, 2004 and, therefore, the sale consideration stood forfeited.

7. The plaintiff examined one witness to prove her case, namely, Mr. Jayant Ghadia, PW-1 who appeared as a special attorney of the plaintiff. PW-1 reiterated the plaintiff's case in the plaint and proved the sale agreement as Ex.PW1/1, Special Power of Attorney as Ex.PW1/2, legal notice dated 26th October, 2004 as Ex.PW1/3 and the reply dated 8th November, 2004 as Ex.PW1/4. PW-1 had deposed that the suit property was originally owned by Vijay Kumar who sold the same to the defendant vide sale agreement dated 31st December, 1992. PW-1 deposed that he approached the defendant before the expiry of 30 days of the sale agreement and repeatedly thereafter along with the balance sale consideration of ₹12,00,000/- but the defendant kept on delaying the matter on

the pretext that the sale permission for execution of the sale deed could not be obtained. PW-1, in the cross-examination, stated that he was engaged in real estate business. He however, denied the knowledge of the fact that no registration for transfer was permissible in respect of the suit property. No proof of the availability of ₹12,00,000/- with the plaintiff was placed on record by the plaintiff. Specific suggestion was given to PW-1 that the plaintiff was not having ₹12,00,000/- in her account and the same was never tendered to the defendant and the cheque was not placed on record because no cheque was drawn or tendered to the defendant within the stipulated time. PW-1 chose not to place on record the cheque or the proof of availability of ₹12,00,000/- in her account.

8. The defendant appeared in the witness box as DW-1 and deposed the defence as set up by her in the written statement. DW-1 deposed that she had agreed to sell the suit property on 'as it is basis' i.e. whatever documents the defendant had from the previous owner, the same type of documents would be executed in favour of the plaintiff. All the documents, on the basis of which the defendant had become the owner of the suit property, were shown to the plaintiff and the photocopies were given to the plaintiff. The plaintiff had satisfied herself about the documents before execution of the sale agreement. DW-1

further deposed that the plaintiff could not arrange balance sale consideration of ₹12,00,000/- and sought more time and, therefore, the defendant issued a notice dated 26th October, 2004 granting extension of 15 days to the plaintiff. The defendant forfeited the earnest money of ₹1,00,000/- on account of the failure of the plaintiff to pay the balance sale consideration of ₹12,00,000/- within the stipulated time. In cross-examination, DW-1 deposed that the NOC was necessary for registration of the sale deed but since the suit property was agreed to be sold through sale agreement/General Power of Attorney, no NOC was required and, therefore, the defendant did not make any attempt to obtain the NOC. DW-1 denied that the defendant offered balance sale consideration of ₹12,00,000/- to her at any stage.

9. The learned Trial Court dismissed the suit on the ground that the plaintiff failed to prove that she was always ready and willing to perform her part of contract; she was having ₹12,00,000/- ready with her; and that she offered the same to the defendant. The plaintiff was required to make the payment of ₹12,00,000/- to defendant within 30 days of the agreement which expired on 8th October, 2004. Since the defendant disputed the plaintiff's claim that she approached the defendant before expiry of 30 days along with a cheque of

₹12,00,000/-, the plaintiff was required to place on record the cheque for ₹12,00,000/- offered by her and the statement of her saving bank account in which she had ₹12,00,000/- available with her before the expiry of 30 days of the sale agreement. In the absence of any evidence having been placed on record, the learned Trial Court held that the plaintiff did not have the balance sale consideration of ₹12,00,000/- available with her. The learned Trial Court also drew adverse inference against the plaintiff for not entering into the witness box. The learned Trial Court also noted that the defendant was first to issue legal notice to the plaintiff on 26th October, 2004 notifying that the plaintiff has committed breach of the sale agreement by failing to make the payment of balance sale consideration of ₹12,00,000/- within 30 days of the sale agreement and granted further 15 days time to the plaintiff to make the payment of balance sale consideration of ₹12,00,000/-.

10. The plaintiff has challenged the impugned judgment on the ground that the plaintiff was always ready and willing to perform her part of contract and had ₹12,00,000/- available with her which she offered to the defendant before the expiry of 30 days and repeatedly thereafter; the defendant committed the breach of the sale agreement by not obtaining

the sale permission for execution of the sale deed from the concerned authorities; and no adverse inference can be drawn against the plaintiff for failing to appear in the witness box. The learned counsel for the plaintiff submitted that it was not necessary for the plaintiff to place the proof of availability of ₹12,00,000/- on record and the statement of PW-1 that the plaintiff had ₹12,00,000/- available with her was sufficient to prove the availability of ₹12,00,000/- with the plaintiff.

11. The learned counsel for the defendant submitted that the plaintiff committed breach of the agreement by failing to make the payment of balance sale consideration by 8th October, 2004 or within the extended period 15th November, 2004; the balance sale consideration of ₹12,00,000/- was not available with the plaintiff; the suit property is situated in an unauthorized colony and the execution of the sale agreement/General Power of Attorney and receipt were the agreed mode of transfer and, therefore, the plea of obtaining the NOC set up by the plaintiff is false and dishonest; and the plaintiff did not appear in the witness box. The case before the learned Trial Court as well as this Court was prosecuted by the attorney who being a property dealer, was well aware of the mode of transfer of the properties in the area in which the suit property is situated. It was further submitted that the plaintiff

has made false statement on oath and is liable to be prosecuted for perjury.

12. This Court vide order dated 6th September, 2011 directed the plaintiff as well as her attorney to remain present in Court. On 12th September, 2011, the plaintiff as well as her attorney were examined on oath and their statement was recorded under Section 165 of the Indian Evidence Act and they were directed to produce the copies of their bank statements as well as Income Tax Returns from the period 2004 onwards up to date. On 14th September, 2011, the plaintiff placed on record the copy of their passbook for the period 25th May, 2009 onwards which is not relevant. The plaintiff was given further opportunity to produce the relevant documents on 19th September, 2011 when the plaintiff made a statement that she could not obtain the statement of her bank account for the period 2004 to 24th May, 2009. The plaintiff did not produce the statement of account for the relevant period despite number of opportunities granted.

13. On a careful consideration of the rival contentions of both the parties, record of the learned Trial Court, statement of the plaintiff recorded by this Court on 12th September, 2011 and the documents produced by the plaintiff on 14th September, 2011, this Court is of the considered opinion that the plaintiff

has miserably failed to prove that she had the availability of ₹12,00,000/- with her on 8th October, 2004. The plaintiff herself did not enter into the witness box before the Trial Court. Her attorney who appeared as PW-1 made a false statement on oath that the plaintiff went to the defendant along with the cheque for ₹12,00,000/- before the expiry of 30 days of the agreement dated 20th September, 2004 and many times thereafter. The plaintiff neither produced the statement of her bank account before the learned Trial Court or even before this Court. DW-1 deposed that the plaintiff told her that she could not arrange balance amount of ₹12,00,000/- as she has no specific and specified sources of income and sought more time to arrange for the same. A specific suggestion was given to PW-1 in cross-examination that the plaintiff was not having ₹12,00,000/- in her account and she never tendered the same and, therefore, the same has not been placed on record. In that view of the matter, the onus was on the plaintiff to place on record the cheque alleged to have been tendered by her to the defendant as well as the statement of account from which the said cheque was drawn. However, the plaintiff failed to discharge the onus and did not produce the cheque for ₹12,00,000/- alleged to have been tendered by her as well as the statement of account from which the alleged cheque was

drawn. An adverse presumption can safely be drawn under Section 114 Illustration (g) of the Indian Evidence Act that the plaintiff was not having ₹12,00,000/- in her account and she committed breach of the sale agreement by failing to make the payment of ₹12,00,000/- to the defendant within the stipulated period. The version and stand of the defendant appears to be more probable. The findings of the learned Trial Court that the plaintiff did not have the balance sale consideration of ₹12,00,000/- are, therefore, correct. With respect to the second contention of the plaintiff that the defendant has committed breach of agreement by failing to obtain the sale permission from the concerned authorities, it is clear from the conduct of the parties that the parties had agreed to complete the transaction by means of a sale agreement/general power of attorney and the plaintiff raised a frivolous plea of NOC. The suit property is situated in an unauthorized colony in which the sale transactions are completed by means of sale agreement, General Power of Attorney and receipt. The defendant had the title on the basis of sale agreement from the previous owner Vijay Kumar, documents regarding which she showed to the plaintiff who agreed for execution of similar set of documents in favour of the plaintiff. PW-1 is a property dealer and well aware of the nature of documents executed for sale of the suit

property. The deal appears to be speculative in nature as the plaintiff was without means to purchase the same. PW-1 has made false statement on oath before the learned Trial Court as well as before this Court in this regard.

14. This case is squarely covered by the principles of law laid down by the Supreme Court in the following cases:-

14.1 **His Holiness Acharya Swami Ganesh Dassji v. Sita Ram Thapar, (1996) 4 SCC 526** – The Supreme Court held as under:-

“2. There is a distinction between readiness to perform the contract and willingness to perform the contract. By readiness may be meant the capacity of the plaintiff to perform the contract which includes his financial position to pay the purchase price. For determining his willingness to perform his part of the contract, the conduct has to be properly scrutinised. **There is no documentary proof that the plaintiff had ever funds to pay the balance of consideration.** Assuming that he had the funds, he has to prove his willingness to perform his part of the contract. According to the terms of the agreement, the plaintiff was to supply the draft sale deed to the defendant within 7 days of the execution of the agreement, i.e., by 27.2.1975. The draft sale deed was not returned after being duly approved by the petitioner. The factum of readiness and willingness to perform plaintiffs part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract. **The facts of this case would amply demonstrate that the petitioner/plaintiff**

was not ready nor had the capacity to perform his part of the contract as he had no financial capacity to pay the consideration in cash as contracted and intended to bide for the time which disentitles him as time is of the essence of the contract.”

(Emphasis supplied)

14.2 N.P. Thirugnanam v. R. Jagan Mohan Rao, AIR 1996

SC 116 - The Supreme Court held that to adjudge whether the plaintiff was ready and willing to perform his part of the contract, the Court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of balance sale consideration must be proved to be available with the purchaser right from the date of execution till the date of decree. The Court upheld the dismissal of the suit for specific performance on various grounds inter alia that the plaintiff was dabbling in real estate business without means to purchase the suit property and the very contract was speculative in nature.

The relevant findings are reproduced hereunder:-

“5. ...Section 16(c) of the Act envisages that plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. **The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance.** This circumstance

is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. **To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit alongwith other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available.** Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was always ready and willing to perform his part of the contract.”

(Emphasis supplied)

15. **Conduct of the plaintiff**

15.1 In **Dalip Singh v. State of U.P., (2010) 2 SCC 114,**

the Supreme Court noted as under:-

“1. For many centuries, Indian society cherished two basic values of life i.e. ‘Satya’ (truth) and ‘Ahimsa’ (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in pre-Independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-Independence period has seen drastic changes in our value system. The materialism

has over-shadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings. In the last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final.”

15.2 In **Padmawati and Ors. v. Harijan Sewak Sangh, 154**

(2008) DLT 411, this Court noted as under:

“6. The case at hand shows that frivolous defences and frivolous litigation is a calculated venture involving no risks situation. You have only to engage professionals to prolong the litigation so as to deprive the rights of a person and enjoy the fruits of illegalities. I consider that in such cases where Court finds that using the Courts as a tool, a litigant has perpetuated illegalities or has perpetuated an illegal possession, the Court must impose costs on such litigants which should be equal to the benefits derived by the litigant and harm and deprivation suffered by the rightful person so as to check the frivolous litigation and prevent the people from reaping a rich harvest of illegal acts through the Courts. One of the aim of every judicial system has to be to discourage unjust enrichment using Courts as a tool. The costs imposed by the Courts must in all cases should be the real costs equal to deprivation suffered by the rightful person.”

“9. Before parting with this case, I consider it necessary to pen down that one of the reasons for over-flowing of court dockets is the frivolous litigation in which the Courts

are engaged by the litigants and which is dragged as long as possible. Even if these litigants ultimately loose the lis, they become the real victors and have the last laugh. This class of people who perpetuate illegal acts by obtaining stays and injunctions from the Courts must be made to pay the sufferer not only the entire illegal gains made by them as costs to the person deprived of his right and also must be burdened with exemplary costs. Faith of people in judiciary can only be sustained if the persons on the right side of the law do not feel that even if they keep fighting for justice in the Court and ultimately win, they would turn out to be a fool since winning a case after 20 or 30 years would make wrong doer as real gainer, who had reaped the benefits for all those years. Thus, it becomes the duty of the Courts to see that such wrong doers are discouraged at every step and even if they succeed in prolonging the litigation due to their money power, ultimately they must suffer the costs of all these years long litigation. Despite settled legal positions, the obvious wrong doers, use one after another tier of judicial review mechanism as a gamble, knowing fully well that dice is always loaded in their favour, since even if they lose, the time gained is the real gain. This situation must be redeemed by the Courts."

(Emphasis supplied)

15.3 I agree with the findings by the learned Judge in **Padmawati's case** (supra) and wish to add a few words.

There is another feature which has been observed and it is of unscrupulous persons filing false claims or defences with a view that the other person would get tired and would then agree to compromise with him by giving up some right or

paying some money. If the other party is not able to continue contesting the case or the Court by reason of falsehood falls into an error, the wrong succeeds. Many times, the other party compromises, or at other times, he may continue to fight it out. But as far as the party in the wrong is concerned, as this Court noted in **Padmawati's case** (supra), even if these litigants ultimately lose the lis, they become the real victors and have the last laugh.

15.4 In the present case, the conduct of the plaintiff does not appear to be honest. The plaintiff has raised a false plea with the hope that the plaintiff can, with the Court delays, drag the case for years and the other side would succumb to buy peace. If the other side does not so settle in the end, they are hardly compensated and remains a loser.

16. Conclusion

In the facts and circumstances of this case, the appeal is dismissed with costs. The amount deposited by the plaintiff with the Registrar General of this Court in terms of the order dated 25th September, 2007 along with interest thereon be released to the plaintiff within four weeks.

J.R. MIDHA, J

JANUARY 20, 2012

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