

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

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Date of decision: 17th September, 2013

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RFA 538/2002

BRAHM SINGH

..... Appellant

Through: Mr. Shahzad Khan, Adv.

versus

GULSHAN KUMAR GULATI & ANR.

..... Respondents

Through: None.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

CM Nos.5479/2013 & 5480/2013 (for restoration of appeal dismissed in default on 9th November, 2011 and for condonation of 478 days delay in applying therefor).

1. The respondents have been served by publication. None appears.
2. For the reasons stated, the delay of 478 days in applying for restoration is condoned and the order dated 9th November, 2011 of dismissal of the appeal in default is recalled and the appeal restored to its original position.
3. The applications are disposed of.

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4. The counsel for the appellant/plaintiff has been heard. Though the Trial Court record earlier requisitioned has been sent back but since the respondents/defendants before the Trial Court also were *ex parte* and further since the counsel for the appellant/plaintiff states that the copies of the Trial Court record have been filed along with the Memorandum of Appeal, need is

not felt to await the re-requisitioning of the Trial Court record for hearing of the appeal.

5. The appeal impugns the judgment and decree dated 22nd July, 2002 of the Court of the Addl. District Judge, Delhi in Suit No. 72/2000 of dismissal of a suit for specific performance of an Agreement of sale of immovable property filed by the appellant/plaintiff.

6. The appellant/plaintiff filed the suit from which this appeal arises, pleading:-

- (a). that the respondent/defendant no.1 was the recorded *bhumidhar* of agricultural land measuring 1 bigha out of Khasra No.731 situated in village Madan Pur Khadar, Kalkaji, New Delhi;
- (b). that the respondent/defendant no.2 Shri Rattan Bagri was the constituted attorney of the respondent/defendant no.1;
- (c). that the respondent/defendant no.1 on 8th July, 2000 agreed to sell his aforesaid land of which he was the *bhumidhar* to the appellant/plaintiff for a total consideration of Rs.3,75,000/- and received an earnest money of Rs.20,000/-;
- (d). that the respondent/defendant no.2 thereafter acting on behalf of the respondent/defendant no.1, as his attorney, received part payments of Rs.26,000/-, Rs.10,000/- and Rs.40,000/- on 10th July, 2000, 24th July, 2000 and 2nd August, 2000 respectively from the appellant/plaintiff;
- (e). that it was the agreement between the parties that the seller shall obtain the NOC from the competent authority within 30 days and execute and register the Sale Deed in favour of the appellant/plaintiff on receipt of balance sale consideration;

- (f). that the appellant/plaintiff has always been ready and willing and though the respondent/defendant no.2 got NOC forms duly filled and signed by the respondent/defendant no.1 as well as the appellant/plaintiff but the respondents/defendants have failed to obtain NOC and execute the Sale Deed; and,
- (g). that the respondents/defendants had turned dishonest and were attempting to sell the land elsewhere.

accordingly suit for specific performance and for permanent injunction restraining the respondents/defendants from selling, alienating or parting with the land was filed.

7. The impugned judgment records that the respondent/defendant no.1 failed to appear inspite of service through publication and was proceeded against *ex parte*; that though the respondent/defendant no.2 filed a written statement but was also subsequently proceeded against *ex parte*.

8. The appellant/plaintiff examined himself alone in evidence.

9. The learned Addl. District Judge, though the respondents/defendants were *ex parte*, has dismissed the suit of the appellant/plaintiff for the reason of the appellant/plaintiff having not placed on record the *jamabandi* or *khatuni* to show that the respondent/defendant no.1 was the *bhumidhar* in respect of the land and observing that without the respondent/defendant no.1 establishing so, no Sale Deed of the said land in favour of appellant / plaintiff could be ordered to be executed.

10. The appeal was admitted for hearing. Vide subsequent *ad interim* order dated 6th September, 2002 the respondents/defendants were restrained

from transferring, alienating, parting with possession of or creating any third party interest in the property.

11. The respondent/defendant no.1 failed to appear in this appeal also. The respondent/defendant no.2 appeared in person on 10th February, 2003 and stated that he would represent the respondent no.1 also; but he also failed to appear thereafter. Finding no formal order till now of proceeding *ex parte* against the respondents/defendants, the same is now made, proceeding *ex parte* against respondents/defendants.

12. The counsel for the appellant/plaintiff has argued that the only reason given in the impugned judgment for declining the relief of specific performance in favour of the appellant/plaintiff is, of the appellant/plaintiff having not established the respondent/defendant no.1 to be the owner/*bhumidhar* of the land agreed to be sold; he contends that not only is the ownership/*bhumidari* of the respondent/defendant no.1 admitted in the receipt dated 8th July, 2000 executed by the respondent/defendant no.1 but the respondent/defendant no.2 also in his written statement had admitted the said fact and there was thus no need for the appellant/plaintiff to in the face of such admissions establish by independent evidence the ownership/*bhumidari* rights of the respondent/defendant no.1 in the land agreed to be sold.

13. Before proceeding to discuss the aforesaid aspect, it is deemed appropriate to set-out herein below the four receipts, being the only documents relied on by the appellant/plaintiff in support of his claim. They are as under:-

I *“Received from Mr. Braham Singh S/o Late Sri Harshswaroop Singh R/o Madan Pur Khadar, New Delhi 110 044 a sum of Rs.20000/- (Rupees Twenty Thousand Only) against the sale of land (Agricultural) Khasra No.731 situated at village Madan Pur Khadar, Tehsil Kalkaji measuring 1 bigha at the total consideration settled Rs.3,75,000/- (Rupees Three Lac Seventy Five Thousand Only). Balance payment will have to be paid by Mr. Braham Singh before Registry of the land and getting the NOC of the land for the purpose of registry within a maximum period of 30 days. The deal is done through Sri S.R. Bagri of 16, Nehru Place, New Delhi 19.*

Dt. 08/07/2000

*Sd/-
(Gulshan Kumar Gulati)
S/o Late Tara Chand Gulati
C-4/85 Hauz Khas SFDA
New Delhi*

Witness:

*Sd/-
S.R. Bagri
16 Nehru Place
New Delhi 19*

P.S. The original document of Registry.

Paper with my identity paper will be given at the time of registry:

Enclosed: Signed Paper Form for obtaining NOC given to Sri Braham Singh.”

II

*“Aadharshila
Real Estate Services
A-67, Sarita Vihar
New Delhi-110 044
PH: 6831534, 6443400*

On 10.07.2000

*Received (Rupees Twenty Six Thousand Only) Rs.26,000/-
against sale of land A/C & behalf of Gulshan Kumar Gulati
land at Madan Pur Khadar 1 Bigha situated at Khasra No.731
from Sri Braham Singh of Madan Pur village against sale
agreed with you.*

*Sd/-
(Shree Ratan Bagri)
16 Nehru Place
New Delhi*

Witness:

*Sd/-
(Ashok Wadhawan) ”*

III

*“Aadharshila
Real Estate Services
A-67, Sarita Vihar
New Delhi-110 044
PH: 6831534, 6443400*

On 24.07.2000

Rs.10,000.00

*Recd. (Rupees Ten Thousand only) against Sale of Land A/c.
Gulshan Kumar Gulati, Land at Madanpur Khadar, 1 Bigha
situated at Khasra No.731, from Shri Braham Singh, of
Madanpur Village, against Sale agreed with you.*

*Sd/-
(Shree Ratan Bagri)
16, Nehru Place,
N-1, Kundan House,
New Delhi*

Witness:

*Sd/-
(Ashok Wadhawan) ”*

IV

*“Aadharshila
Real Estate Services
A-67, Sarita Vihar
New Delhi-110 044
PH: 6831534, 6443400*

On 02.08.2000

Rs.40,000.00

*Received (Rupees Forty Thousand only) Rs.40,000.00 against
Sale of Land A/c. Gulshan Kumar Gulati, Land at Madanpur
Khadar, 1 Bigha situated at Khasra No.731, from Shri Braham
Singh, of Madanpur Village, against Sale agreed with you.*

*Sd/-
(Shree Ratan Bagri)
16, Nehru Place,
N-1, Kundan House,
New Delhi*

Witness:

*Sd/-
(Gaj Raj Singh)*

Witness:

*Sd/-
(Ashok Wadhawan) ”*

14. A reading of the receipt dated 8th July, 2000 supra shows the agreement between the parties to be of, the appellant/plaintiff being liable to pay the balance sale consideration of Rs.3,55,000/- remaining after the payment of Rs.20,000/- acknowledged in the said receipt “before” “registry” of the land and getting the NOC of the land for the purpose of registry” “within a maximum period of 30 days”.

15. The said period of 30 days would lapse on 7th August, 2000.

16. The counsel for the appellant/plaintiff contends that the NOC was to be obtained by the respondents/defendants and for which purpose the signatures of the appellant/plaintiff were also taken on the requisite form.

17. However the same is not borne out from the language of the receipt supra dated 8th July, 2000 which is the sole repository of the terms settled between the parties. The appellant/plaintiff thereunder agreed to pay the balance sale consideration before the Sale Deed and before getting the NOC of the land, maximum within a period of 30 days. The appellant/plaintiff himself admits that the NOC had been signed by the respondent/defendant no.1 as transferor and copy whereof is also filed along with the appeal.

18. It has further been enquired from the counsel for the appellant/plaintiff that if his interpretation of the receipt dated 8th July, 2000 were to be correct then why the appellant/plaintiff made further payments of Rs.26,000, Rs.10,000/- and Rs.40,000/-, all within 30 days of the receipt dated 8th July, 2000, in as much as as per the version of the appellant/plaintiff the entire balance consideration of Rs.3,55,000/- was payable at the time of execution of the Sale Deed.

19. The counsel for the appellant/plaintiff states that though the balance sale consideration of Rs.3,55,000/- was payable only at the time of execution of the Sale Deed but the payments aforesaid were made as per the demand of the respondents/defendants and which is usual in transactions of immovable property.

20. However the counsel admits that neither has it been so pleaded nor deposed by the appellant/plaintiff in his evidence. Rather, the conduct of the appellant/plaintiff of making the payments aforesaid is in consonance with the literal interpretation of the receipt dated 8th July, 2000 as per which the appellant/plaintiff was to pay the entire balance consideration of Rs.3,55,000/- within 30 days i.e. on or before 7th August, 2000 and which

the appellant/plaintiff admittedly has not. Not only so, the conduct of the appellant/plaintiff of pleading the agreement to be something other than that which is borne out from the only document being the receipts evidencing the agreement, shows that the appellant/plaintiff was not ready and willing to perform his part of the agreement as contained in the receipt dated 8th July, 2000.

21. The counsel for the appellant/plaintiff at this stage states that the suit be remanded to the Trial Court to enable the appellant/plaintiff to amend his pleadings and to lead further evidence.

22. I am unable to accept the aforesaid proposition. The appellant/plaintiff, even though the respondents/defendants have been and are still *ex parte*, is not entitled in law to a second chance.

23. I also do not find the reasoning given by the learned Addl. District Judge for declining the relief of specific performance to the appellant/plaintiff and instead passing a decree in favour of the appellant/plaintiff for recovery of Rs.76,000/- paid by the appellant/plaintiff with interest at 12% per annum to be erroneous. The Trial Court has rightly held that when the defendant is *ex parte*, the onus is heavier on the

appellant/plaintiff. This is more so in a suit for specific performance. The hard reality of Sale Deeds, pursuant to *ex parte* decrees in such suits for specific performance filed against persons who have no right to the property, being used to disturb/challenge the title of real owners and/or for the purposes of securing financial assistance from banks etc. cannot be lost sight of. It is for this purpose only that the rules for registration have also been amended to require the Registrar of Assurances to, before registering a document, satisfy himself of the title of the person who is seeking to convey / transfer the same. The learned Addl. District Judge in the circumstances was correct in holding that it was incumbent upon the appellant/plaintiff, especially when the land is stated to be agricultural, produce revenue record showing title of the respondent/defendant no.1 against whom the decree was sought and who has chosen not to contest the matter.

24. The counsel for the appellant/plaintiff at this stage states that the total payment by the appellant/plaintiff to the respondents/defendants was of Rs.96,000/- and not of Rs.76,000/- and at least that part be corrected.

25. Though the Addl. District Judge has not given any finding in this regard but it appears that a decree for recovery of Rs.76,000/- in favour of

the appellant/plaintiff was passed treating the earnest money of Rs.20,000/- having been forfeited. Be that as it may, since the respondents/defendants have not contested, while upholding the judgment of the learned Addl. District Judge of declining the relief of specific performance of the Agreement of Sale of immovable property to the appellant/plaintiff, the decree for recovery of money is modified by making the same to be for recovery of Rs.96,000/- with interest as awarded instead of for recovery of Rs.76,000/-.

26. The appeal is allowed only to the aforesaid extent.

No costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

SEPTEMBER 17, 2013

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