

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

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Date of decision: 10th December, 2013

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RFA No.521/2004

RAKESH KUMAR

..... Petitioner

Through: Mr. Sumit Bansal & Mr. Ateev
Mathur, Advs.

Versus

KALAWATI (DECEASED) THROUGH LRS & ORS... Respondents

Through: None.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The appeal impugns the judgment and decree dated 17.03.2004 of the Court of the Additional District Judge (ADJ), Delhi in suit No.642/2001, declining the relief of specific performance of an agreement dated 29.05.1986 of sale of immovable property as well as alternative relief claimed of recovery of damages of Rs.3,00,000/- but directing the respondents / defendants No.1 to 4 to refund to the appellant / plaintiff Rs.30,000/- paid as advance under the said Agreement to Sell together with interest thereon at 12% per annum from the date of filing of the suit till realization.

2. Notice of the appeal was issued and the Trial Court record requisitioned. Vide subsequent order dated 19.01.2005, the appeal was admitted for hearing. Vide order dated 04.03.2005, the respondents were directed to maintain *status quo* with regard to the nature, title and possession of the subject land subject to the appellant / plaintiff depositing the total consideration payable in terms of Agreement to Sell dated 29.05.1986 in this Court. In compliance therewith a sum of Rs.2,73,875/- was deposited. Vide order dated 26.07.2006, the interim order already granted was ordered to continue pending further orders. The respondents were served with the notice of the appeal but only the counsel for the respondents No.1 to 4 appeared and none appeared for the respondents/defendants No.5 to 7. The respondent No.2 was stated to have died and amended memo of parties was filed and his legal heirs were served. The counsel earlier appearing for the respondents No.1 to 4 also stopped appearing after 26.07.2006 inspite of appeal being repeatedly listed for hearing. Vide order dated 31.07.2013, the appeal was directed to be listed with notation in the cause list of notice of default to the counsel for the respondents / defendants but inspite thereof, none appeared for the respondents / defendants. The counsel who had earlier appeared for the respondents No.1 to 4 upon being contacted

telephonically stated that he is not the counsel in the matter. In the circumstances, the respondents were proceeded against *ex parte* and the counsel for the appellant / plaintiff was heard and the judgment reserved.

3. The Ld. ADJ has in the impugned judgment and decree:

- (a) decided the Issue No.(i) “Whether the agreement to sell dated 29.05.1986 was brought about by misrepresentation and fraud?” against the respondents / defendants No.1 to 4 sellers;
- (b) decided the Issue No.(ii) “Whether the agreement to sell in question (is) unconscionable? If so, its effect?” also against the respondents / defendants No.1 to 4;
- (c) decided the Issue No.(iii) “Whether the plaintiff was at all relevant times ready and willing to perform his part of the contract?” against the appellant / plaintiff;
- (d) decided the Issue No.(iv) “Whether the defendants did not commit default in the performance of the contract to sell in

question?” against the respondents / defendants and held that the respondents / defendants No.1 to 4 sellers did commit default in performance of the contract in question;

- (e) decided the Issue No.(v) “Whether the plaintiff is not entitled to relief of specific performance?” against the appellant / plaintiff for the reason of having held under Issue No.3 that the appellant / plaintiff was not ready and willing at all relevant times to perform his part of the contract;
- (f) decided the Issue No.(vi) “To what amount of damage is the plaintiff entitled?” against the appellant / plaintiff for the reason of there being nothing to show that the appellant / plaintiff had actually suffered any loss of Rs.3,00,000/- for non performance of contract by the respondents / defendants No.1 to 4;
- (g) decided the Issue No.(vii) “Whether the defendants No.5 to 7 are bona fide purchasers of the suit property for valuable

consideration and without notice of the prior agreement of sale and pendency of suit between the defendants No.1 to 4 and the plaintiff?” against respondents / defendants No.5 to 7 and held the respondents / defendants No.5 to 7 to have not acted in good faith and not being capable to being termed as *bona fide* purchasers and further held the respondents / defendants No.5 to 7 to have acted in collusion with the respondents / defendants No.1 to 4; and,

- (h) held that the amount of Rs.30,000/- paid by the appellant / plaintiff under the Agreement to Sell to the respondents / defendants No.1 to 4 was not liable to forfeiture in the absence of any clause to the said effect in the Agreement to Sell and the same being not by way of earnest money and accordingly directed refund thereof with interest.

4. No cross-objections / counter appeal is reported to have been filed by the respondents / defendants. The respondents / defendants having chosen to be proceeded against *ex parte* and having not opposed this appeal, need is not felt to go into the findings of the learned ADJ in the impugned judgment

in favour of the appellant / plaintiff and against the respondents / defendants No.1 to 7. The learned ADJ having declined the relief of specific performance and in the alternative for damages to the appellant / plaintiff only for the reason of finding the appellant / plaintiff to have been not ready and willing to perform his part of the Agreement to Sell at all relevant times, it is deemed expedient to examine the correctness only of the said finding of the learned ADJ.

5. The learned ADJ has held so for the following reasons.

- (i) that at the time of issuance of summons of the suit, vide order dated 06.07.1987 on the application of the appellant / plaintiff for interim relief, the respondents / defendants were restrained from selling, mortgaging, alienating or otherwise parting with possession of the property agreed to be sold on the condition that the appellant / plaintiff deposits within two weeks, the balance sale consideration of Rs.2,73, 875/- in the Court for a period of one year;

- (ii) this condition was not complied with by the appellant / plaintiff as noted in the order dated 07.09.1987 in the suit and owing to non compliance of which condition, the stay order granted was vacated;
- (iii) however vide subsequent order dated 09.08.1988, upon the failure of the respondents / defendants to file any reply to the stay application, the stay granted on 06.07.1987 was confirmed till the decision of the suit;
- (iv) that sometimes in 1999, the respondents / defendants No.1 to 4 filed application for clarification of the order dated 09.08.1988 and vide order dated 24.02.1999 thereon, it was observed that the injunction granted on 06.07.1987 was a conditional one i.e. subject to deposit of the amount in the Court; that the appellant / plaintiff had not deposited the amount in the Court then also and accordingly it was clarified that there was no stay;

- (v) the aforesaid order showed that the appellant / plaintiff had failed to deposit the balance sale consideration in terms of the orders passed by the Court; in other words, the appellant / plaintiff was not ready with the amount and also did not seemingly show his willingness to comply with the order by depositing the balance sale consideration;
- (vi) that though the appellant / plaintiff had prior to the institution of the suit given a notice dated 16.05.1987 calling upon the respondents / defendants No.1 to 4 for specific performance but it appeared that thereafter the appellant / plaintiff was not ready and willing to perform his part of the contract;
- (vii) that the law requires the readiness and willingness of the appellant / plaintiff at all stages;
- (viii) that even if the stay order was vacated for non deposit of the amount in the Court, the appellant / plaintiff had not been able to show his readiness with the balance consideration;

(ix) that the appellant / plaintiff did not have proper resources and sufficient money to purchase the suit property. The appellant / plaintiff had only one truck; he was earning Rs.10,000/- per month; he was not even assessed to income tax; he filed his income tax return first time in 1994; he opened his bank account in 1988-89; he is said to have taken loan of Rs.3,15,000/- in July, 2002 from his cousin's company for the purpose of his business and not for purchasing the suit property. Though the appellant / plaintiff stated having sold his house to make money available but price of the sale amount received were not disclosed; the statement of account filed by the appellant / plaintiff showed that the appellant / plaintiff never carried a balance of more than Rs.52,000/- except on 23.07.2002 when he took loan of Rs.3,15,000/-; and,

(x) it was thus clear that the appellant / plaintiff was not possessed of sufficient means to pay the balance

consideration and was not ready to perform his part of the contract.

6. The counsel for the appellant / plaintiff, (a) has invited attention to Section 52 of the Indian Contract Act, 1972 providing for performance of a contract with reciprocal obligations / promises and has contended that the balance sale consideration was payable by the appellant / plaintiff purchaser to the respondents / defendants No.1 to 4 sellers only after the respondents / defendants No.1 to 4 sellers had obtained the No Objection Certificate (NOC) required for execution of the sale deed and at the time of registration of the sale deed and the appellant / plaintiff could not be said to be not ready and willing for the reason of having not deposited the money in the Court; (b) has contended that the only effect of non deposit by the appellant / plaintiff of the sale consideration in the Court as directed could be of there being no order restraining the respondent / defendants from dealing with the property; however, the principle of *lis pendens* as provided in Section 52 of the Transfer of Property Act, 1882 would still apply; (c) has further contended that the appellant / plaintiff under the Agreement was to pay the balance sale consideration against sale deed and delivery of possession of

the land and could not have been directed to deposit the entire sale consideration in this Court without being entitled to any benefit therefrom; (d) has yet further contended that the order dated 26.07.1999 in the suit again restraining the respondents / defendants from selling, encumbering, parting with possession or creating any third party interest in the property escaped the attention of the learned ADJ; (e) has argued that the appellant / plaintiff could have arranged for the funds at the time of execution of the sale deed; (f) invited attention in this regard to the affidavit dated 08.08.2002 by way of examination-in-chief of the appellant / plaintiff at pages 231 to 235 of the Trial Court record wherein the appellant / plaintiff has deposed about his capability to pay the balance sale consideration; (g) has relying on *Silvey Vs. Arun Varghese* (2008) 11 SCC 45 contended that while judging readiness and willingness of the plaintiff, the conduct of the defendant cannot be ignored; (h) has argued that from the conduct of the respondents / defendants in the present case taking false pleas in their pleadings on which issues were framed and findings whereon had been returned against the respondents / defendants, it ought to have been held that the Agreement remained to be performed for reasons attributable to the respondents / defendants and not attributable to the appellant / plaintiff; (i) reliance in

this regard is placed on *P.D'Souza Vs. Shondrilo Naidu* (2004) 6 SCC 649 holding that the readiness and willingness on the part of the plaintiff to perform his part of the contract would also depend upon the question as to whether the defendant did everything which was required by him to be done in terms of the Agreement to Sell and that where owing to the default of the defendant, the sale deed could not have been executed, the question of the plaintiff's readiness and willingness would not arise; (j) reference is also made to Paras No. 48 and 50 of *Saradamani Kandappan Vs. S. Rajalakshmi* (2011) 12 SCC 18 on the aspect of performance of reciprocal promise.

7. I have looked at the written Agreement to Sell between the respondents / defendants No.1 to 4 as sellers and the appellant / plaintiff as purchaser and find:

- (A) that the respondent / defendant No.1 Smt. Kalawati had represented herself as to be the absolute owner / bhumidar in possession of agricultural land measuring 9 bighas 7 biswas, Mustatil No.81, Killa Nos.21/1 (1-2), 22/1 (4-5), 19/2 (4-0) and the respondent No.2 Sh. Bhisham Prakash, respondent

No.3 Om Parkash and respondent No.4 Ved Parkash had represented themselves to be the absolute owners in possession of the remaining agricultural land measuring 1 bigha and 14 biswas, Mustatil No.81, Killa No.19/1(0-12), 20/2 (1-2), situated in village Mehrauli, Tehsil Mehrauli, New Delhi;

- (B) respondents / defendants No.1 to 4 had agreed to sell and the appellant / plaintiff had agreed to purchase the said land at the rate of Rs.1,32,000/- per acre and advance money of Rs.30,000/- was paid at the time of Agreement to Sell and the balance consideration was agreed to be received by the respondents / defendants No.1 to 4 from the appellant / plaintiff at the time of registration of the sale deed;
- (C) that the actual physical possession of the said land was agreed to be delivered by the respondents / defendants No.1 to 4 vendors to the appellant / plaintiff / purchaser at the time of registration of the sale deed;

(D) that the respondents / defendants No.1 to 4 sellers had agreed to obtain the NOC from the authorities concerned and to inform the appellant / plaintiff / purchaser by registered post after getting the income tax clearance certificate;

(E) the respondents / defendants No.1 to 4 had agreed to execute the sale deed in favour of the appellant / plaintiff or his nominee upto 08.08.1986 failing which the appellant / plaintiff was to be entitled to get the sale deed registered through the Court of law; and,

8. A perusal of the Trial Court record shows the appellant / plaintiff to have in his examination-in-chief deposed, (i) that the respondents / defendants No.1 to 4 put off performing their part of the agreement on one pretext or the other; (ii) that he finally got sent a legal notice dated 16.05.1987 to the respondents / defendants No.1 to 4 to execute and get registered the sale deed in favour of the appellant / plaintiff; (iii) that the respondents / defendants No.1 to 4 still did not comply with the demand in the notice; (iv) that the respondents / defendants No.1 to 4 disclosed during the pendency of the suit that they had sold / transferred the suit

property to the respondents / defendants No.5 to 7 who were impleaded as defendants to the suit; (v) that he was of sound financial means and capacity to pay the balance sale price and as on that day i.e. 08.08.2002 had more than the amount of the balance sale consideration in his bank account; (vi) certified copy of the statement of account was proved as Ex.PW1/4; and, (vii) that he was always and was even then willing to perform his part of the contract.

9. The appellant / plaintiff in his cross-examination recorded on 04.10.2002 by the counsel for the respondent / defendants No.1 to 4 explained that he had just prior to the date of entering into the Agreement to Sell disposed of his house and thus money was available with him and for investing which he had agreed to purchase the subject land. No further questions on the said aspect were put by the counsel for the respondents/ defendants No.1 to 4. The only inference can thus be of the respondents / defendants No.1 to 4 being satisfied with the said statement of the appellant / plaintiff and being of the view that any further questioning on the said aspect would be counterproductive to the respondents/defendants no.1 to 4. However in response to yet another question in cross-examination as to why

he had not deposited the money in this Court, he explained that the respondents / defendants No.1 to 4 had approached him at about that time and had offered to get the sale deed registered in his favour after obtaining NOC and had represented that if the money was deposited in the Court, it would unnecessarily linger the matter.

10. The appellant / plaintiff in his cross examination on the same day by the counsel for the respondents / defendants No.5 to 7 also stated that he was in business and had taken the loan of Rs.3,15,000/- on 23.07.2002 for the purpose of his business.

11. The witnesses of the respondents / defendants admitted that the respondents / defendants had in fact not applied for NOC in terms of the Agreement to Sell and did not make any deposition about the non availability of funds with the appellant / plaintiff.

12. The learned ADJ has not held the appellant / plaintiff to be not ready and willing to perform his part of the Agreement to Sell till the filing of the suit from which this appeal arises. The learned ADJ has held the appellant / plaintiff to be not ready and willing only for the reason of his having, in

compliance of the order of the Court not deposited the balance sale consideration in the Court.

13. I have perused the order sheet of the Suit Court. The condition of deposit by the appellant / plaintiff of the balance sale consideration was imposed by the suit Court to balance the equities arising from restraining the respondents / defendants from dealing with their property. The appellant / plaintiff was nowhere informed that it was essential for him to deposit the said amount in the Court to show his readiness and willingness within the meaning of Section 16(c) of the Specific Relief Act, 1963 or that inference of non readiness and willingness shall be drawn from non deposit. Even if the appellant / plaintiff had failed to deposit, the only consequence thereof would have been of vacation of stay and not dismissal of the suit for specific performance. Had the purport for imposing such a condition been to test the readiness and willingness of the appellant / plaintiff, the natural corollary, of default in deposit, would have been of the appellant / plaintiff being not ready and willing and dismissal of the suit. The same was not done.

14. I am therefore, in the facts and circumstances of the case, not able to agree with the learned ADJ that the penalty with which the appellant /

plaintiff could be punished for non deposit, extended beyond the vacation of the stay and to strike at the very root of the suit. To hold so now would in my opinion be contrary to the principles of natural justice and fair play.

15. Otherwise merit is found in the contention of the counsel for the appellant / plaintiff that as per the Agreement to Sell, the appellant / plaintiff was entitled to part with the balance sale consideration only against delivery of title and physical possession of the land to him. To make the appellant / plaintiff part with the balance sale consideration without delivery of title and possession of the land to him, would be contrary to the agreement and the jurisdiction of specific performance thereof. To hold, that though as per the Agreement, the appellant / plaintiff is liable to part with the balance sale consideration only against the delivery of title and possession, but to test his readiness and willingness he can be directed to part therewith even without delivery of title and possession would amount to the Court making a new contract and which is beyond the scope of jurisdiction of specific performance. I may however add that in a given case where the Court entertains doubts about the readiness and willingness of the appellant / plaintiff till the date of institution of the suit itself, the Court may to test the

readiness and willingness, direct such deposit. However in the present case, finding of the learned ADJ is of the appellant / plaintiff being ready and willing till coming to the Court.

16. The Division Bench of this Court in ***Ansal Properties Vs. Rajinder Singh*** 41 (1990) DLT 510, referring to the Explanation to Section 16(c) of the Specific Relief Act held that normally no money is to be tendered and it is only in cases where the Court feels that though an averment as postulated in Section 16 is made but the plaintiff may not actually have the money to pay the consideration, can the Court to satisfy itself about the truthfulness of the averment, direct to deposit money in Court. It was however held that this course should be adopted rarely. It was yet further held that the question of payment would arise only after the trial of the suit and when the rights of parties are determined and such a direction should be issued when the final decree is passed and not at an earlier point of time. The said view has been consistently followed in ***R.N. Bakshi Vs. Varun Kumar Datt*** MANU/DE/1385/2000 and the Division Bench of this Court in ***Mohan Overseas P. Ltd. Vs. Goyal Tin & General Industries*** MANU/DE/3071/2009 held that the question of payment of consideration

would ordinarily arise only when the Court directs the purchaser to do so and which directions will be issued only after the trial of the suit and at the time when the rights of the parties are being determined. To the same effect is the judgment of another Division Bench in ***R.K. Goel Vs. Amrit Singh*** 80 (1999) DLT 331. It cannot also be lost sight of that the balance sale consideration is lying deposited in this Court for the last nearly eight years without the appellant / plaintiff reaping any benefit therefrom. Unfortunately, the learned ADJ, inspite of noticing the dicta of the Division Bench of this Court, has not applied the same. Notice may however be taken of ***N.P. Thirugnanam Vs. Dr. R. Jagan Mohan Rao*** (1995) 5 SCC 115 where the inference drawn by the High Court of non readiness and willingness of the plaintiff, from non deposit of the amount of the sale consideration or furnishing of the bank guarantee therefor, was held to be justified. However a reading of the judgment shows that the plaintiff in that case was directed to deposit the balance sale consideration or furnish bank guarantee therefor on the application of the defendant of the plaintiff being even then not able to pay the balance sale consideration. That is not the case here.

17. The appeal thus succeeds. The impugned judgment and decree of dismissal of the suit filed by the appellant / plaintiff is set aside and a decree for specific performance of the Agreement to Sell dated 29.05.1986 is passed by directing the respondents / defendants No.1 to 4 as well as the respondents No.5 to 7 claiming under the respondents / defendants No.1 to 4 by a title arising, subsequent to the contract / Agreement to Sell with the appellant / plaintiff, to within one month of the communication of the order obtain the requisite permission / NOC, if still required, for execution of the sale deed in favour of the appellant / plaintiff and within one month thereof execute and register a Deed of Conveyance/Transfer in favour of appellant / plaintiff in terms of the Agreement to Sell dated 29th May, 1986 and deliver vacant peaceful physical possession of the subject land to the appellant / plaintiff. The respondents / defendants No.1 to 7 or such of them who may be entitled shall thereafter be entitled to withdraw the balance sale consideration lying deposited in this Court. Though the respondents / defendants No.1 to 7 having been found to be in default are not entitled to interest which may have accrued on the balance sale consideration while the same was deposited in this Court, but are permitted to withdraw the said interest also.

18. However the respondents / defendants having not contested the appeal, no costs.

Decree sheet be drawn up.

DECEMBER 10th, 2013
'gsr'..

RAJIV SAHAI ENDLAW, J