

IN THE HIGH COURT OF DELHI AT NEW DELHI

CS (OS) No. 422 of 2006

Reserved on: July 25, 2013

Decision on: August 14, 2013

SUSHIL CHOUDHARY

..... Plaintiff

Through: Mr. Navin Chawla with
Mr. Ninad Dogra and Mr. Praveen
Sarathi, Advocates.

versus

BAL KRISHNA AGARWAL

.....Defendant

Through: Ms. Jyoti Singh, Senior Advocate
with Mr. T.N. Saxena, Mr. H.C. Kharbanda,
Mr. S.K. Gupta and Mr. Sunil Saxena,
Advocates.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

14.08.2013

CS (OS) No. 422 of 2006 & I A No. 5377 of 2012

1. This suit is for specific performance of an advance receipt-cum-agreement to sell and purchase dated 2nd March 2005 in respect of Industrial Shed No. C-50, Okhla Industrial Area, Phase-I, New Delhi-110020 measuring 97.53 sq.mtrs. (hereafter 'the suit property') and in the alternative award damages in the sum of Rs.5 lakhs.

2. While directing summons to be issued in the suit on 8th March 2006, the Court also directed notice to be issued in IA No. 2758 of

2006 under Order XXXIX Rules 1 and 2 CPC and restrained the Defendant from creating any third party interest in the suit property. The following issues were framed by the Court after completion of pleadings on 30th October 2007:

“1. Whether the Plaintiff is entitled to a decree of specific performance of agreement to sell dated 2nd March 2005 in respect of the suit property? **OPP**

2. Whether the Plaintiff is entitled to any damages in respect of the suit property and if so, at what rate and for which period? **OPP**

3. Relief.”

3. The interim order was made absolute by an order dated 8th January 2008. The order was modified on 8th September 2008 to direct that in case the Defendant during the pendency of the suit property decides to sell his property he would file an application for that purpose.

4. Affidavits by way of examination-in-chief on behalf of the Plaintiff have been filed by Mr. Ravinder Kumar Bhatia and Mr. Sushil Choudhary, the Plaintiff himself. The exhibits were also marked. On behalf of the Defendant, Mr. Bal Kishan Agarwal examined himself as DW-1 by filing an affidavit by way of examination-in-chief.

5. The case of the Plaintiff is that under the agreement to sell (exhibit P-1) the sale consideration of Rs.23,24,000 was payable on or before 30-45 days and the Defendant was to deliver vacant physical possession of the suit property to the Plaintiff. Under Clause 2(2) the

seller (the Defendant) was to execute and hand over all relevant documents to the Plaintiff for conversion of the suit property into freehold at the time of part payment of Rs.23,24,000. The Defendant (seller) was to get a no dues certificate from the statutory departments till 31st March 2005 and hand them over to the Plaintiff before the final payment was made at the time of registration. Clause 8 further provided that if any of the parties failed to complete the transaction, the aggrieved party shall get it enforced through a court of law and the defaulting party would be liable to pay costs. According to the Plaintiff, time was never the essence of the contract. Reliance is placed on the decisions in *Govind Prasad v. Hari Dutt Shastri AIR 1997 SC 1005*, *Swarnam Ramachandran v. Aravacode Chakungal Jayapain 2004 (8) SCC 689* and *Balasaheb Dayandeo Naik v. Appasaheb Dattatraya Pawar 2008 (4) SCC 464* to contend that in a transaction of sale of immovable property, time is not the essence of the contract.

6. The further case of the Plaintiff is that the Plaintiff has always been ready and willing to perform his part of the contract. He visited the Defendant on 29th March 2005 at Vikram Hotel further to pay the second instalment of Rs. 23,24,000 which the Defendant refused to accept on the pretext of some superstition since he did not consider it to be a good day to accept the payment. The Plaintiff thereafter sent letters through certificate of posting on 30th March and 15th April 2005 calling upon the Defendant to complete the sale transaction. A reference is made to the question put to the Plaintiff in his cross-

examination in regard to the above letters as well as to PW-2 and it is submitted that the Defendant did not emphatically deny the receipt of these letters. The letter dated 20th May 2005 from the Plaintiff to the Defendant asking him to complete the transaction has not been denied by the Defendant. But in reply thereto, the Defendant in his letter dated 6th June 2005 took the stand that the last date of payment was 17th April 2005 and, therefore, the agreement stood terminated. In reply to the legal notice dated 2nd August 2005 sent by the Plaintiff the Defendant took the stand that the agreement was void for lack of registration and stamp duty. It is contended that the above stand was unsustainable since under Section 17(1)(a) of the Registration Act, 1908 registration is required only where agreement was for transfer of immovable property with possession. Clause 23A of Schedule 1A of the Stamp Act as applicable to Delhi also provided that an agreement would have to be stamped where conveyance is in the nature of part performance. Since in the instant case possession was not handed over to the Plaintiff, the agreement was neither required to be registered nor stamped ad-valorem. According to the Plaintiff, the Defendant had, till the filing of the suit, been assuring the Plaintiff that there were some issues with the Delhi Development Authority ('DDA') and, therefore, he needed some time to perform his part of the contract. It is stated that there has been no specific denial of this assertion by the Plaintiff. It is submitted that till the time the DDA received the entire payment of ground rent, it would not have granted conversion from leasehold to freehold. The answers to the Defendant's cross-examination showed that the payment to DDA was cleared only

in 2005 and, therefore, the Defendant was not in a position to perform his obligation even till 20th May 2005. Lastly, it is submitted that the plea that the Defendant had entered into an agreement to sell dated 18th May 2005 with one Mr. Govind Prasad was false. Clause 2 of the said agreement stated that out of the balance sale consideration of Rs.53 lakhs the purchaser would be obliged to pay not more than Rs.5 lakhs at a time and that too within 30 days of the payment. It is stated that the said agreement was a sham document and was meant to defeat the rights of the Plaintiff.

7. The case of the Defendant, on the other hand, is that time was the essence of the contract. It is stated that the second instalment of Rs.23,24,000 had to be paid “on or before 30-45 days”. The final instalment of Rs.5 lakhs was to be paid at the time of execution for which there was no time limit as such since that hinged on conversion of property into freehold by the DDA. However, the failure to pay Rs.23,24,000 on or before 30 to 45 days would result in the agreement being terminated. It is submitted by the Defendant that the word ‘irrecoverable’ in Para 8 of the agreement should be understood in the context of the whole agreement. The word ‘irrecoverable’ should be replaced with the word ‘irrevocable’ to make it workable and meaningful. It is pointed out that in response to a specific question to the Plaintiff as to whether he had visited the Defendant on 29th March 2005, he answered in the negative. He, however, added that he had visited the Defendant at Vikram Hotel although he made no mention of such visit in his plaint. It is pointed out that these

discrepancies showed that in fact the Plaintiff was not ready or willing to make payment of the second instalment. It is submitted that there was a willful default on the part of the Plaintiff to make payment of the second instalment and, therefore, the agreement stood terminated and the amount of Rs.5.51 lakhs forfeited. It is stated that Defendant was expected to clear dues on the property up to 31st March 2005 at the time of the final payment of Rs.5 lakhs and execution of the sale deed for which there was no time frame. The Defendant in fact had deposited the house tax and water charges on 29th March 2005. Electricity charges were to be paid at the time of restoration of electricity on receiving of the final payment. It is contended that the letters dated 30th March and 15th April 2005 were never received by the Defendant and "Plaintiff must have forged the same". Reliance is place on the decisions in *Nalamathu Venkaiya v. B.S. Neelkanta AIR 2005 AP 535*, *Kamal Rani v. Chand Rani AIR 1980 Del 188* and *M.K. Watts v. Usha Sharma AIR 2004 P&H295* to urge that if the Plaintiff was not ready and willing to pay the consideration within the agreed time, he was obviously not ready and willing to perform his part of the contract. On the evidentiary value of the certificate of posting, reliance was placed on the decision in *State of Maharashtra v. Rashid B. Mulani (2006) 1 SCC 407*. Reliance is placed on the decision in *Saradamani Kandappan v. S. Rajalakshmi (2011) 12 SCC 18* to submit that the question whether the time is of the essence of performance can be considered either with reference to the contract as a whole or with reference to the particular term of the contract which is breached. It is submitted that

the Plaintiff has not made out any case for grant of the relief of specific performance or the alternate relief of damages.

8. The above submissions have been considered. The agreement in question requires to be referred to in some detail. It is titled as 'Advance receipt-cum-agreement to sell and purchase' and is drawn on a stamp paper of Rs.100. The signatures of the parties on the agreement have not been denied. Also, the Defendant has on the last page of the agreement acknowledged in his handwriting that he received Rs.3,51,000 as cash and Rs.2 lakhs by cheque dated 2nd March 2005. Therefore the payment of the advance sum of Rs.5,51,000 is admitted by the Defendant. The consideration amount of Rs.33,75,000 as set out in Para 1 is not in dispute. As regards the payment of the balance sum, Clauses 2 and 2A of the agreement read as under:

"2. That the balance amount of Rs. 28,24,000/- (Rupees Twenty Eight Lakhs and Twenty Four Thousand Only) will be paid by the Second Party to the First Party as under:

(i) Rs.23,24,000/- (Rupees Twenty Three Lakhs and Twenty Four Thousand Only) on or before 30-45 days and the First Party will deliver the vacant physical possession of the said shed to the Second Party. If the Second Party fails to pay this amount of Rs.23,24,000/- till 30-45 days from today, the advance amount paid shall stand forfeited and this agreement shall become terminated consequently. Time is essence of contract.

(ii) Rs.5,00,000/- (Rupees Five Lakh Only) after First Party gets the said shed converted into Free Hold in his

name from the office of DDA and at the time of getting the final payment the First Party execute the required document (s)/Sale Deed in favour of the Second Party.

2A. That it has been agreed between the parties that at the time of aforesaid part payment of Rs.23,24,000/- by the second party to the first party, the first party shall execute/sign and hand over all relevant documents to the second party for the conversion of the said shed into freehold in DDA. The second party shall follow up with the authorities for the conversion of the said shed into freehold. The first party assures/undertakes the second party that he will appear in the office of DDA as and when required and called by them to do so. All charges for conversion charges as required for the purpose of the conversion of said shed into freehold shall be borne by the second party”.

9. A careful reading of the above two clauses show that there was an agreement between the parties that the balance sum of Rs.28.24 lakhs would be split into two parts. Rs.23,24,000 would be paid “on or before 30 to 45 days” and that the failure to pay the said amount within 30 to 45 days would result in forfeiture of the advance amount and termination of the agreement itself. It was emphasized that “time is essence of the contract”. The consideration for the above payment was simultaneous with handing over of “physical peaceful possession of the Shed” to the Plaintiff. The above clause did not hinge upon the Defendant having to perform any further act other than giving vacant physical possession to the Plaintiff. The balance amount of Rs.5 lakhs was payable “after first party agrees to Shed converted freehold from the office of the DDA and at the time of getting the final payment, the

first party would execute the required sale deed in favour of the second party”. Therefore the payment of the balance Rs.5 lakhs was postponed to a stage after conversion of the property into freehold. It was only then that the sale deed had to be executed. There was, therefore, no time limit for this conversion. Clause 2A appears to have been inserted to make sure that the process for conversion of property into freehold was started rightaway. Therefore it was agreed that “at the time of aforesaid part payment of Rs.23,24,000” by the Plaintiff to the Defendant, the Defendant “shall execute/sign and handover all relevant documents to the second party for conversion of the said Shed into freehold from DDA”. It was for the Plaintiff to follow up the matter with the DDA.

10. The facts of the present case are very similar to the facts in *Saradamani Kandappan*. There were two distinct clauses in the agreement to sell the immovable property in that case. The terms of the contract thereby made it clear that the payment of the sale price did not depend on execution of sale deed. Just as in the present case, the agreement to sell did not stipulate that the sale deed had to be executed within any specific time period. However, the purchaser there had an obligation to pay the price in terms of Clause 4 of that agreement within a definite time period. It was only thereafter that the vendors were required to perform their reciprocal promise to execute the sale deed. It was held by the Supreme Court that the failure by the purchaser to pay the balance consideration before the time stipulated amounted to breach “as time for such payment was the essence of the

contract”. The Supreme Court discussed the previous decisions in *N. Srinivasa v. Kuttukaran Machine Tools Ltd. (2009) 5 SCC 182*, *Chand Rani v. Kamal Rani (1993) 1 SCC 519*, *K.S.Vidyanadam v. Vairvan (1997) 3 SCC 1*, and summarized the legal position as under:

“43. Till the issue is considered in an appropriate case, we can only reiterate what has been suggested in *K.S. Vidyanadam*:

(i) The Courts, while exercising discretion in suits for specific performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps or for completion of the transaction, that must have some significance and therefore time/period prescribed cannot be ignored.

(ii) The Courts will apply greater scrutiny and strictness when considering whether the purchaser was 'ready and willing' to perform his part of the contract.

(iii) Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. Courts will also 'frown' upon suits which are not filed immediately after the breach/refusal. The fact that limitation is three years does not mean a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The three year period is intended to assist purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in part performance, where equity shifts in favour of the purchaser.

11. The Supreme Court in *Saradamani Kandappan* discussed Sections 51 to 55 of the Contract Act, 1872. It explained the law in

relation to reciprocal promises and in applying it to the facts of the case held as under:

“57. The terms of the contract makes it clear that payment of sale price did not depend on execution of the sale deed. The sale deed was not required to be executed within any specific period. The purchaser had to fulfil her obligation in regard to payment of price as provided in Clause 4 and thereafter vendors were required to perform their reciprocal promise of executing the sale deed, whenever required by the purchaser, either in her name or in the names of her nominees. The sale deed had to be executed only after payment of complete sale consideration within the time stipulated. In these circumstances, Section 52 of the Contract Act does not help the Appellant but actually supports the vendors-Respondents.”

12. The above decision is also relevant in the context of the purchaser being aware of the further requirements that had to be completed for completion of the sale. It was noted that it was possible for the parties to agree that the consideration would be paid notwithstanding such encumbrances. The fact that the sale deed was to be executed only at a subsequent point of time after completion of all formalities, did not relieve the purchaser of complying with the time limits for making payment of the sale consideration. In the considered view of the Court, the decision in *Saradamani Kandappan* applies to the present case on all fours.

13. The Plaintiff's case is that he wrote two letters to the Defendant offering to make the payment. The dates of these letters are 30th

March 2005 and 15th April 2005. It is strange that while he chose to send the subsequent letter dated 20th May 2005 by registered post, the Plaintiff sent the above letters under certificate of posting. Also, in the plaint itself, there is no averment about the Plaintiff meeting the Defendant at Vikram Hotel on 29th March 2005. In Para 7 it states as under:

“7. That in terms of the said Agreement, the Plaintiff made arrangement for making the required further payment and visited the Defendant on 29th March 2005 with the request for handing him over the possession of the said Shed to him. However, the Defendant refused to accept the said payment on the pretext that due to some superstitions he did not consider it a good day to accept the payment.”

14. In the letter dated 30th March 2005 addressed to the Defendant, the Plaintiff seeks to introduce the fact regarding his visiting the Defendant at Vikram Hotel. Without getting into the controversy as to whether the said letter could be forged and fabricated as alleged by the Defendant, it does appear to the Court that this was perhaps an afterthought. The Plaintiff has been unable to prove that he actually met the Defendant on 29th March 2005 to make the offer of payment of the second instalment. He has also not been able to conclusively prove that the letters 30th March 2005 and 15th April 2005 were received by the Defendant.

15. In other words, there is nothing to show that prior to his writing the letter dated 20th May 2005 to the Defendant, the Plaintiff offered to make payment of the second instalment. In his cross-examination,

in response to the question whether he visited the house of the Defendant on 29th March 2005, the Plaintiff answered in the negative. The explanation that he sent the two letters by UPC “just to save relations with the Defendant” is really unsatisfactory. He admits that he has not mentioned in the plaint the fact of a meeting having taken place at the Vikram Hotel on 29th March 2005.

16. The Court is unable to find any answer in the cross-examination of the Defendant that dilutes the requirement of the Plaintiff having to make the payment of the second instalment on or before 30 to 45 days from the date of the agreement. In his cross-examination the Plaintiff’s witness accepted that the dues of the various departments had to be paid “till 31st March 2005” and that the clearance receipts “were to be given at the time of second payment”. The answer given by the Defendant in his cross-examination that the DDA does not covert the property to freehold till it receives entire payment of ground rent does not quite help the Plaintiff since that was not a pre-condition for the second instalment to be paid by the Plaintiff.

17. The agreement is categorical that as far as the second instalment is concerned it had to be paid simultaneous with the possession being handed over to the Plaintiff and relevant signed documentation being given to him to follow up with the DDA about the conversion into freehold. The fact remains that the Plaintiff did not make the payment of the second instalment within 30 to 45 days of the agreement. That requirement not being satisfied, there was indeed a breach of the

agreement by the Plaintiff leading to the cancellation of the agreement.

18. The decisions in *Govind Prasad* and *Balasaheb Dayandeo* explain the settled law concerning the sale of immovable property and time generally not being of the essence in such contracts. However, as explained by the Supreme Court in *Saradamani Kandappan*, the agreement has to be examined carefully to determine the intention of the parties in making time the essence of the contract.

19. The Court accordingly answers the issues as under:

Issue No.1: Whether the Plaintiff is entitled to a decree of specific performance of agreement to sell dated 2nd March 2005 in respect of the suit property?

This issue is answered in the negative by holding that the Plaintiff is not entitled to a decree of specific performance of the advance receipt-cum-agreement to sell and purchase dated 2nd March 2005.

Issue No.2: Whether the Plaintiff is entitled to any damages in respect of the suit property and if so, at what rate and for which period?

The issue is answered in the negative by holding that the alternative relief of damages also cannot be granted to the Plaintiff.

20. The suit is accordingly dismissed with costs of Rs.10,000 which

will be paid by the Plaintiff to the Defendant within four weeks. All pending applications are dismissed and the interim order dated 8th March 2006 is vacated.

S. MURALIDHAR, J.

AUGUST 14, 2013

dn

