

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

Decided on: 04.01.2013

+ **RFA (OS) 135/2012, C.M. NO. 21042/2012 (for stay) & 21044/2012 (for placing on record additional documents), C.M. NO. 114/2013 (for taking on record amended memo of parties)**

SUNDEEP KHANNA

.....Appellant

Through: Sh. Sanjeev Sachdeva, Sr. Advocate
with Sh. Abhimanyu Mahajan, Ms. Priyam Mehta
and Sh. Abhimanyu Chopra, Advocates.

versus

A. DAS GUPTA & ORS. Respondents

Through: Appearance not given.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. SUDERSHAN KUMAR MISRA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. In this appeal, the unsuccessful plaintiff impugns the judgment and decree dated 17.10.2012 of a learned Single Judge dismissing his suit [CS(OS) 576/2005] which claimed a decree of specific performance.

2. The plaintiff's case was that the first defendant, representing himself as the sole owner of the property bearing no 186, Golf Links, New Delhi (suit property), entered into an Agreement to Sell dated

29.01.2005 to sell ground floor of that property, along with basement rights and 40% undivided interest in the land. It was stated that the right of first refusal in case of sale of first and second floors was also agreed upon. The consideration agreed was Rs. 3.30 crores; a cheque for Rs 10 lakh was paid as advance by the plaintiff. The plaintiff further alleged while reviewing a draft Sale Deed dated 12.02.2005, it came to his knowledge that the first defendant was not the sole owner of the property, which was a HUF (Hindu undivided family) property. Upon negotiation, the defendant agreed that he would get the second and third defendants (other members of the HUF) to sign the Sale Deed. The plaintiff further corresponded through letter dated 17.02.2005 asking the first defendant to expedite matters. The broker, Shri Ashok Narang, sent, on behalf of the defendant, two drafts, one of a Sale Agreement and the other – a Fittings and Fixtures Agreement, which were not in accordance with the terms of the Agreement dated 29.01.2005. There was further exchange of correspondence between the parties. It was also alleged that the first defendant had met the plaintiff on 17.03.2005 and agreed to the draft proposed by the latter subject to his lawyer confirming the making of endorsement on the original title deed. The first defendant, however, sent a draft on 21.03.2005 which was virtually same as one that had already been rejected by the plaintiff. The plaintiff then sent a draft sale deed, along with a letter dated 21.03.2005. However, the first defendant returned the cheque, with a letter, stating that the transaction stood cancelled. The plaintiff, therefore, sought specific performance of the Agreement to Sell dated 29.01.2005, and in the

alternative claimed damages amounting to Rs. 3.3 crores (originally, prior to amendment of the plaint, the damages sought were Rs. 1 crore).

3. The defendants contested the suit jointly, alleging, as a preliminary objection that there existed no concluded contract between the parties. It was stated that the suit was bad for misjoinder. It was asserted that the first defendant was the sole owner of the property. The defendants did not deny receipt of the cheque amounting to Rs. 10 lakhs, but stated that the same was never to be, and never was, encashed as it was given in trust by the plaintiff, till such time as the final terms of the sale were decided. It was further asserted that the terms and conditions for the sale deed, after being altered suitably by both parties, were not mutually agreeable, and thus, there was no enforceable agreement. The defendants denied agreement to various terms, which the plaintiff contended had been mutually agreed to.

4. Based on the pleadings and other materials, the following issues were framed for trial:

“i) Whether there was concluded contract between the parties and the receipt dated January, 29, 2005 acknowledging the receipt of cheque for a sum of Rs 10.00 lakh is a concluded agreement between the parties which can be enforced? OPP

ii) If issue No. 1 is decided in favour of the plaintiff then whether the plaintiff is entitled for a specific performance of agreement? OPP

iii) Whether the plaintiff had always been ready and willing to perform his part of the agreement? OPP

iv) Whether the defendant No. 1 was the sole owner of the property and could enter into the agreement to sell with the plaintiff? OPP

v) Whether suit is bad for mis-joinder of parties? OPD

5. The learned Single Judge, after considering the materials on record, held that:

- i. There existed a concluded contract between the parties in form of the Receipt dated 29.01.2005 which was an agreement to sell immovable property.
- ii. Both the parties had sought addition of terms in the sale deed which were not present in the Agreement/Receipt dated 29.01.2005, and such addition was not mutually agreeable. Therefore, the plaintiff, who sought specific performance, could not be said to be ready and willing to perform his part of the contract. The plaintiff, thus, was barred from getting the relief of specific performance under section 16(c) of the Specific Relief Act, 1963.
- iii. It was held that the suit was bad for misjoinder, since the Agreement dated 29.01.2005 was executed by the first defendant in his personal capacity, and not in his capacity as the Karta of the HUF, and only parties to an Agreement to Sell can be made parties to a suit for the specific performance of the same.

iv. The plaintiff was disentitled to an award of damages, because he was in breach of the contract, by not proving readiness and willingness to complete the transaction contemplated in the Agreement dated 29.01.2005; and that there was no credible evidence that he suffered loss on account of the transaction not being completed.

6. Learned counsel contended the Trial Court's finding that the plaintiff was not ready and willing to conclude the transaction was incorrect. He stressed that mere exchange of documents, and insistence on certain terms did not translate into unwillingness to conclude the transaction. Furthermore, counsel pointed out that the parties had agreed on various issues in other drafts, and, therefore, to infer disagreements/differences between them by comparing just two documents (viz. draft dated 12.02.2005, sent by the defendants to the plaintiff, and draft dated 21.03.2005, sent by the plaintiff to the defendants) was wrong. It was also urged that the defendants had never, during the suit, argued that the plaintiff had not been ready and willing to perform his obligations under the Agreement dated 29.01.2005. The only defence taken was that there was no concluded contract. Thus, once the learned Single Judge found the agreement to be enforceable, he ought to have granted the relief of specific performance.

7. The defendants have not filed any cross-objections under Order 41, Rule 22. Thus, the finding by the learned Single Judge that the Receipt/Agreement dated 29.01.2005 amounted to a concluded

contract is not under challenge. They endorse the finding that the plaintiff was not ready and willing to complete the transaction of transfer of the immovable property. It was emphasized that the plaintiff had sought introduction of terms and conditions, which had not been mutually agreed under the Agreement/Receipt dated 29.01.2005.

8. The only issue that this Court has to decide is whether the plaintiff was entitled to a decree for specific performance of the Receipt dated 29.01.2005, or in the alternative to an award of damages. At the very outset, this Court is unconvinced by the plaintiff's argument that the defence set up during trial regarding inconclusiveness of any contract, having failed, the relief of specific performance ought to have been granted. It is settled law that specific performance is not an automatic relief if a contract is found to exist. It can only be granted in accordance with law, where all the requirements are fulfilled and the Court is satisfied that such decree is necessary under the circumstances.

9. The Receipt (Ex. PW-1/1) is reproduced hereunder:

“Receipt

I, Mr. A. Das Gupta currently r/o 186, Gold Links, New Delhi 110003 hereby confirm receipt of Rs. 10,00,000/- (Rs. Ten Lakhs) vide Cheque No. 649609 dated 27th January, 2005 as advance payment from Mr. S. Khanna for the sale to him of the Ground floor along with lawns, basement rights and fixtures and fittings of the undivided share of the land ownership in my freehold property no.

186, Golf Links, New Delhi - 110 003 of which I am the sole owner.

The total agreed payment is Rs. 3.30 crores and the balance amount will be paid within 21 days of the due diligence and ownership verification and at the time of execution of a Sale Deed which will be registered with the Sub-Registrar of Properties.

I shall have no objection to any renovation, repairs, reconstruction that may be done as per law.

I shall give right of first refusal as and when I wish to sell/ transfer the rights of the First and Second Floor.

29.01.2005”

10. It is clear that the Agreement/Receipt had the following features:

- i. The first defendant was to sell the property as its sole owner to the plaintiff.
- ii. The subject matter of the transaction, i.e. the property, was Ground floor along with lawn, basement rights and fixtures and fittings of the undivided share of the land ownership in the freehold property no. 186, Golf Links, New Delhi - 110 003.
- iii. The consideration for sale was fixed at Rs. 3.3. crores, out of which a cheque for an amount of Rs. 10 lakhs was issued by the plaintiff, and received by the first defendant.
- iv. Right to first refusal with respect to the First and the Second Floors was to vest with the plaintiff.

11. As noted by the learned Single Judge, based on the materials on record – i.e. the letters and the drafts of the Sale Deed – the following additions were sought to be introduced by the plaintiff, over and above the terms agreed to under the Receipt/Agreement dated 29.01.2005:

i. Even though the Agreement did not state that 40 per cent of the undivided share in the land rights would vest with the plaintiff, the latter, through Ex.PW-1/3 (Draft sale deed sent by first defendant to the plaintiff on 12.02.2005), sought introduction of such a term. The fact that this was not acceptable to the defendant is clear from the striking off of 40% and replacing it with the term “proportionate” in both the draft sale deed (Ex.PW-1/3) and the Agreement in question. The unwillingness of the plaintiff to continue with the term agreed in the Agreement is further evidenced by the term contained in the last proposed (by the plaintiff) sale deed dated 21.03.2005 (Ex. PW-1/10), and by the plaint and plaintiff’s affidavit, where his stand was that as per the Agreement, 40 per cent of the undivided share in the land was to vest in him.

ii. The Agreement was entered into between the plaintiff and the first defendant only. The first defendant represented himself to be the sole owner of the property. However, plaintiff after conducting due diligence, (after the Agreement dated 29.01.2005), found that the suit property had been shown as HUF property for income tax purposes. After negotiation, even when the first defendant proposed that he would attach affidavits from the other coparceners in the HUF to the

effect that he was the sole owner of the property, the plaintiff yet insisted that the conveyance be executed by the HUF, and not the first defendant alone, as is evident from the draft sale deed dated 21.03.2005 (Ex.PW-1/10). E-mail dated 18.02.2005 (Ex.PW-1/5) and the legal notice served by the plaintiff (Ex.PW-1/12) also indicate that the plaintiff further demanded, probably in the alternative, that there be obtained a GPA from second defendant in favour of the first defendant.

iii. The Agreement did not contain any stipulation about who would pay the stamp duty etc. Initially, after the Agreement in question, upon the plaintiff's proposal it was agreed that the transaction (of consideration Rs. 3.3. crores) would be completed by execution of two documents – one, a Sale Deed and second, a fittings and fixtures agreement (reducing the stamp duty). The first defendant later changed his mind. The plaintiff, however, insisted that the incremental stamp duty (due to there being just one document for the entire sale consideration) should be paid by the defendants.

iv. The final draft sale deed dated (Ex.PW-1/10) contained a stipulation that the existing structure on the ground floor was confined to an FAR of 50 %. It also obligated the defendants to provide a completion certificate to the plaintiff, and to install a lift. However, none of these were agreed to under the Agreement dated 29.01.2005.

v. Ex.PW-1/10 provided that the construction on the upper floors could be carried out only if it did not adversely affect or cause inconvenience to the plaintiff. Such a clause was also never agreed to.

vi. The draft sale deed (Ex.PW-1/10) showed the plaintiff sought from the first defendant an endorsement on original title deeds with respect to the sale of the ground floor to him. This also was an addition, not agreed to earlier.

12. As noticed earlier, the contents (i) and (ii) of the previous paragraph seem to be contrary to the express terms of the Agreement. The rest were additions that the plaintiff sought to effect to the sale deed. The learned Single Judge mostly relied on the last proposed Sale Deed (Ex.PW-1/10) and the stand of the parties as to the terms and clauses stated in that. It was argued by plaintiff's counsel that such an approach was erroneous; that the learned Single Judge ought to have considered all the documents on record collectively to reach its inferences. On this, the Court further notices the last draft proposed by the defendant to the plaintiff, was also dated 21.03.2005, and is part of the record as Ex.PW-1/8. There, the vendor (seller) is only the first defendant, and the other members of the HUF are confirming parties to the deed made in favour of the plaintiff. It further shows as having been cancelled/struck through the figure "40%" appearing in context of the extent to which land rights in the plot would vest in the plaintiff. Instead of 40%, "proportionate" was written. This change must not have been made by the plaintiff, as he had a contrary demand. Thus, the cancellation seems to have been done by the first defendant to point out his disagreement with the stipulation proposed by the plaintiff. Thus, this Court notices that from amongst the points stated above, the last proposed draft by the defendant also exhibited

the same picture, as did the last proposed draft by the plaintiff (Ex.PW-1/10), at least with respect to point (i) and (ii). It is further noticed that “40%” was cancelled and replaced with “proportionate” even in the draft dated 12.02.2005 (Ex.PW-1/3). The letters/e-mails dated 18.02.2005 (Ex.PW-1/5), 28.02.2005 (Ex.PW-1/6), 09.03.2005 (Ex.PW-1/7), 11.03.2005 (Ex.PW-1/8) and 21.03.2005 (Ex.PW-1/9) all convey that there continuously remained differences between the parties; all the draft sale deeds also are clear indicators of the differences between the parties, including the ones pointed out above, where it was the plaintiff which was seeking modification contrary to the Agreement dated 29.01.2005 or addition of new terms to it. The learned Single Judge further observed that even the defendant had sought to introduce new terms. There is no dispute to this in this appeal.

13. Having considered the material on record, this Court is of the view that the learned Single Judge was correct in holding that the plaintiff had sought to introduce new terms and also for modification of existing terms, contrary to the Agreement. This, no doubt, in the circumstances shows lack of willingness on his part to perform the essential terms of the contract (Agreement dated 29.01.2005). The question of willingness depends on the mental process. Since there was lack of agreement, partly due to the plaintiff's insistence on certain terms, he cannot be said to be willing to perform his part of the contract. The bar stipulated under Section 16(3) of the Specific Relief

Act, 1963 is thus applicable, disentitling the plaintiff from specific performance in the present case.

14. As regards any award of damages, the primary reasoning of the learned Single Judge was that since both the parties (including the plaintiff) did not comply with the terms of the Agreement, no relief could be given to the plaintiff. In this regard, this Court notices Section 21(2) of the Specific Relief Act, 1963; it does not help the case of the plaintiff for award of damages. The provision reads as:

“Power to award compensation in certain cases.

(2) If, in any such suit, the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award him such compensation accordingly.”

In the present case, the finding is that the contract was breached by both the plaintiff and the defendant. The section, as is clear, obligates the Court to award damages to the plaintiff, when in a suit for specific performance where that primary relief is not granted, but the court, nevertheless finds that the defendant had breached the contract.

15. Also, the record does not indicate, as the learned Single Judge observed, that the plaintiff had blocked the consideration for the transaction, and thereby could not use it. The requirement under law for readiness [under Section 16(c), Specific Relief Act, 1963] is that the plaintiff should have the necessary capacity of raising the funds; it is not necessary for the plaintiff to keep ready the money on

hand [*N.P. Thirugnanam (Dead) by LRs v Dr. R. Jaganohan Rao and Ors.*, (1995) 5 SCC 115]. There exists no reliable evidence that the plaintiff incurred any loss due to the non-completion of the transaction. In any case, the cheque for Rs. 10 lakhs had been returned by the first defendant to the plaintiff, along with a communication cancelling the proposed transaction. This Court, thus, concurs with the view taken by the learned Single Judge that nothing prevented the plaintiff from putting to use the money, if at all he had kept it aside/blocked for the purposes of the transaction. For the foregoing reasons, he is not even entitled to an award for damages.

In view of the above discussion, the appeal must fail. It is accordingly dismissed. All pending applications are also disposed of accordingly.

S. RAVINDRA BHAT
(JUDGE)

SUDERSHAN KUMAR MISRA
(JUDGE)

JANUARY 04, 2013