

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

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Date of decision: 16th May, 2014

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FAO(OS) 239/2014

SHRI BAL KRISHAN GUPTA & ANR.

..... Appellants

Through: Mr. P.D. Gupta & Mr. Abhishek
Gupta, Adv.

Versus

SHRI VIKAS AGGARWAL & ANR

..... Respondents

Through: Mr. Arvind Nayar, Adv. with Mr.
Anwesh Madhukar & Mr. Suryajyoti
Singh Paul, Advs. for R-1.

CORAM :-

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

Caveat No.433/2014

1. The counsel for the respondent no.1 caveator has appeared.
2. The caveat stands discharged.

C.M.No.8541-42/2014 (exemptions)

3. Allowed, subject to just exceptions.
4. The applications are disposed of.

FAO(OS) No.239/2014 & CM No.8540/2014 (for stay)

5. The appeal impugns the order dated 02.05.2014 of the learned Single Judge of this Court (exercising original civil jurisdiction in CS(OS) 2353/2013) of allowing the application being IA No.4955/2014 of the respondent no.1 / plaintiff and permitting to the respondent no.1 / plaintiff return of Rs.6.24 crores deposited by the respondent no.1 / plaintiff in this Court together with interest accrued thereon.

6. We have, with consent, heard the counsels finally at the stage of admission.

7. The respondent no.1 / plaintiff instituted the suit from which this appeal arises, for a decree for specific performance of an agreement dated 01.02.2013 of sale by the appellants/defendants to the respondent no.1 / plaintiff of land situated within the revenue estate of village Bakhtawar Pur, New Delhi, for a total sale consideration of Rs.9.24 crores out of which a sum of Rs.3 crores was stated to have been paid.

8. The suit and the application for interim relief came up before the learned Single Judge first on 06.12.2013 when the counsel for the respondent no.1 / plaintiff offered to deposit the balance sale consideration of Rs.6.24 crores in

this Court to show the readiness and willingness of the respondent no.1 / plaintiff. Accordingly, while issuing summons of the suit and notice of the application for interim relief and directing *status quo* to be maintained qua the title and possession of the land, the respondent no.1 / plaintiff was also directed to deposit Rs.6.24 crores in the Court.

9. The respondent no.1 / plaintiff however sought variation of the order, by offering to furnish a bank guarantee for the sum of Rs.6.24 crores instead of depositing the said amount in this Court. The same was not acceded to by the learned Single Judge and which led to the filing of FAO(OS) No.23/2014 by the respondent no.1 / plaintiff. During the pendency of the appeal, the respondent no.1 / plaintiff deposited the sum of Rs.6.24 crores in this Court.

10. The aforesaid appeal was finally disposed of vide order dated 20.02.2014 of the Division Bench, vide which the appellants / defendants were directed to maintain *status quo* as regards to title and possession of the land aforesaid during the pendency of the suit and giving liberty to the respondent no.1/plaintiff to move an application before the learned Single Judge for withdrawal of the deposited amount and it was further directed that if such an

application is made, the learned Single Judge would decide the same in accordance with law.

11. It is in the aforesaid background that IA No.4955/2014 (supra) came to be filed by the respondent no.1 / plaintiff and which has been allowed.

12. The learned Single Judge has in the impugned order, found/observed/held:

- (i) that the respondent no.1 / plaintiff out of the total agreed sale consideration of Rs.9.24 crores had already paid a sum of Rs.3 crores to the appellants / defendants;
- (ii) that as per the agreement to sell, the appellants / defendants were to receive the No Objection Certificate (NOC) from the Government authorities for execution of sale deed of the land in favour of the respondent no.1 / plaintiff;
- (iii) there was no material on record to show that the appellants / defendants had ever informed the respondent no.1 / plaintiff of having received the said NOC;

- (iv) that the appellants / defendants should have informed the respondent no.1 / plaintiff in writing that NOC has been received and the respondent no.1 / plaintiff should pay the balance sale consideration against execution of sale deed; and,
- (v) no notice, telegram, e-mail or SMS was sent by the appellants / defendants to the respondent no.1/plaintiff calling upon the respondent no.1 / plaintiff to pay the balance sale consideration.
- (vi) that *prima facie*, the respondent no.1 / plaintiff could not be said to be in default of his obligations under the agreement to sell;
- (vii) that the Division Bench of this Court vide order dated 20.02.2014 in the appeal earlier preferred by the respondent no.1 / plaintiff has expressly permitted the respondent no.1 / plaintiff to apply for refund;
- (viii) that as per explanation (1) to Section 16(c) of the Specific Relief Act, 1963, it is not essential for plaintiff in a suit for specific performance to actually deposit any amount in the Court; therefrom, it follows that the deposit of balance sale consideration is not a mandatory requirement;

(ix) the judgment of the Division Bench of this Court in ***Mohan Overseas P. Ltd. Vs. Goyal Tin & General Industries*** 169 (2010) DLT 487 relied upon by the counsel for the appellants / defendants is not applicable to the facts of the present case;

13. The counsel for the appellants / defendants has drawn our attention to paras 35 & 40 of ***Mohan Overseas P. Ltd.*** (supra) to contend that it was for the respondent no.1 / plaintiff to tender the balance sale consideration to the appellants / defendants and that once the balance sale consideration had been deposited in this Court and on the basis whereof the appellants / defendants had been directed to maintain *status quo* qua title and possession of the land, the said amount could not be permitted to be withdrawn without the circumstances having drastically and significantly changed and from which it could be said that continuing with the prevailing interim order would be inappropriate. Attention in this regard is invited to para 11 of the application for withdrawal of the deposited monies to contend that the only ground pleaded in the application is of the long time which the adjudication of the suit will take.

14. One of us (Rajiv Sahai Endlaw, J.) recently in ***Rakesh Kumar Vs. Kalawati*** 206 (2014) DLT 363 had an occasion to consider the aspect of

issuance of direction to the plaintiff in suits for specific performance of agreements of sale of property to deposit the balance sale consideration, and it was *inter alia* held as under:

“14. 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.

*15. 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.”

15. We may mention that besides ***Ansal Properties*** supra, another Division Bench of this Court in ***R.K. Goel Vs. Amrit Singh*** 80 (1999) DLT 331 held that where the three conditions of *prima facie* case, irreparable injury and balance of convenience which are the pre-requisites for the grant of ad-interim injunction in favour of the plaintiff are found to exist, there is absolutely no occasion to burden the plaintiff with the onerous condition of deposit of the balance sale consideration in the Court. The Division Bench accordingly set aside the direction of the learned Single Judge of this Court to the said effect as a condition for the grant of the interim relief in a suit for specific performance of an agreement of sale of immovable property.

16. To the same effect is the judgment of another Single Judge of this Court in ***Rajesh Kumar Vs. Manoj Jain*** MANU/DE/1183/1998, allowing refund of the balance sale consideration deposited in the Court, by observing that the plaintiff by making the said deposit had *prima facie* shown his financial position and capacity to finance the project and his readiness and willingness but since the defendant was not ready and willing to complete the sale, the

plaintiff should not be burdened with the condition that he should part with the balance sale price at that stage only. It was further held that the course of deposit is normally not necessary and should be adopted only when the Court is of the opinion that the averment, of the plaintiff being ready and willing to perform the contract, may not be quite true. Finding that it was not so in the facts of that case and further finding that the suit was likely to take time to reach its finality and holding that the plaintiff in the meanwhile cannot be deprived of the use of his money as well as the enjoyment of his property, the refund was allowed.

17. Undoubtedly, the Division Bench of this Court in ***Mohan Overseas P. Ltd.*** (supra) struck a different note and held; i) that specific performance orders being essentially equitable reliefs, the Court will not allow the pendency of a suit to work inequities against the owners of the property and that mere rejection of a temporary injunction does not remove this imbalance since the very pendency of the suit has the effect of jeopardizing the title of the defendant / owner; ii) that in most cases directing the plaintiff to deposit the sale consideration in the Court would have the effect of placing the parties on equal footing; iii) that wherever the Court, at the pre-trial stage, comes to a *prima facie* conclusion that there is no concluded contract or that it would be

appropriate to decline the grant of equitable relief of specific performance, the Court should decline the same at that stage itself, leaving it to the trial to determine whether any damages should be awarded; and, iv) that though the direction for deposit of the entire sale consideration is onerous one, it is as onerous as the freezing of the ownership of the property in the hands of the defendant / owner.

18. But it has to be remembered that the Division Bench in ***Mohan Overseas P. Ltd.*** (supra) was concerned with a number of appeals against interim orders in suits for specific performance of agreements of sale of immovable property and with the issue of, the very pendency of a suit for specific performance, even if there were to be no order restraining the defendant from alienating, encumbering or selling the property, attracting the clog imposed by Section 52 of the Transfer of Property Act, 1882 on the property, in effect preventing the defendant from dealing with the property, causing grave prejudice to the defendant. It was in this context that the Division Bench held that the relief of specific performance can be declined on a *prima facie* view of the matter itself and the suit to be continued only for the relief of damages. The observations aforesaid of the Division Bench have thus to be considered in the said context.

19. It is also worth mentioning that the issue aforesaid, in the context of which the aforesaid observations on which the counsel for the appellants / defendants relies were made, ultimately reached the Supreme Court in ***Vinod Seth Vs. Devinder Bajaj*** (2010) 8 SCC 1. The Supreme Court though did not hold that the relief of specific performance can be declined on a *prima facie* view of the matter, held that the operation of the bar under Section 52 supra is subject to the power of the Court to exempt the suit property from the operation of Section 52. Thus the observations in ***Mohan Overseas P. Ltd.*** to the effect that since pendency of a suit for specific performance works inequities for the seller, the direction for deposit by the purchaser, of the balance sale consideration in the Court acts as a balancing feature, is no longer a relevant factor in as much as wherever the Court finds the mere pendency of suit to be iniquitous to seller, the Court can direct that Section 52 will not apply.

20. This becomes quite evident from another judgment of the Division Bench of this Court in ***Sanjay Passi Vs. Iqbal Chand Khurana*** MANU/DE/2089/2010 authored by the same Hon'ble Judge who authored ***Mohan Overseas P. Ltd.***, where it is explained that the original side of this Court has seen an explosion of dockets pertaining to actions for specific performance of contracts for sale of immovable property and that keeping in

perspective the application of the principle of *lis pendens*, it would be in the interest of justice and equity that the purchaser should be asked to deposit the entire sale consideration. Nevertheless, finding that the purchaser was not pressing for interim injunction restraining the seller from selling the property to others, it was held that no direction for deposit of entire sale consideration in Court could have been issued as a *sine-qua-non* for considering the relief for specific performance. It thus appears that direction for such deposit, as per the said Division Bench also, can be made only as a condition for grant of interim relief restraining the defendant / seller from dealing with the property and not to test the readiness and willingness of the plaintiff / purchaser.

21. It is not as if the Division Bench in ***Mohan Overseas P. Ltd.*** was oblivious of ***Ansal Properties*** supra. The Division Bench noticed the earlier judgment in ***Ansal Properties*** (supra) which is categorical on the question before us and did not express any difference of opinion from that. ***Mohan Overseas P. Ltd.*** cannot thus be said to have taken any view different from that taken by the earlier Division Bench in ***Ansal Properties*** and ***R.K. Goel*** (supra).

22. We will however be failing in our duty if do not mention another judgment of Division Bench of this Court in ***Sabh Infrastructures Ltd. Vs. Jayshree Bagley*** MANU/DE/3377/2009 authored by the same Hon'ble Judge

who authored the judgment in *Mohan Overseas P. Ltd.* The judgment of the Bombay High Court in *Gaurishankar Govardhandas Todi Vs. Evershine Homes Pvt. Ltd.* MANU/MH/1473/2008 to the effect that if the plaintiff is to deposit the balance sale consideration he would, in effect have performed all his obligations without receiving the benefits of the Agreement was disagreed with and *Mohan Overseas P. Ltd.* reiterated. Unfortunately *Ansal Properties* supra was not noticed, though another judgment by the same name was noticed but which was on another aspect.

23. Though it may appear that there is a inconsistency in the views of the Division Benches of this Court in *Ansal Properties* supra and *Sabh Infrastructure Ltd.* supra but it is not so. While *Ansal Properties* supra deals with a direction to the plaintiff / purchaser to deposit the balance sale consideration as a condition to the maintainability of a suit for specific performance, *Sabh Infrastructures Ltd.* supra deals with the issuance of a direction to the plaintiff / purchaser to deposit the balance sale consideration as a condition for grant of interim order restraining the defendant / seller from, during the pendency of the suit, dealing with the property or as a condition for applicability of Section 52 of the Transfer of Property Act.

24. As far as the view in *Ansal Properties* is concerned, the same finds support from the judgment of the Supreme Court in *Boramma Vs. Krishna Gowda* (2000) 9 SCC 214. The Supreme Court, in the said judgment though was not directly concerned with the issue, but repelled the challenge to a decree for specific performance on the ground of the finding returned of the purchaser being ready and willing to perform his part of the contract being erroneous for the reason of having admitted in cross examination that the balance sale consideration had not been deposited in the Court and being not in a position to then deposit the balance sale consideration in the Court, holding that in view of Section 16(c) supra, no inference of being not ready and willing can be drawn from such admissions in cross-examination.

25. It may further be stated that in *R.K.Goel and Rajesh Kumar* supra, the principle laid down in *Ansal Properties* in the context of deposit of balance sale consideration as a condition for maintainability of a suit for specific performance was extended to direction for such deposit as a condition for the grant of interim relief. However, in subsequent judgments in *Mohan Overseas P. Ltd., Sabh Infrastructures Ltd.* and *Sanjay Passi* supra, all concerned with direction for deposit of balance sale consideration as a condition for grant of interim relief, *Ansal Properties* was not followed;

however for the reasons aforesaid which, in view of ***Vinod Seth*** supra have seized to exist.

26. We have considered whether such a direction for deposit of balance sale consideration can be made routinely as a condition for grant of interim relief or for continued application of Section 52 in suits for specific performance. In our opinion, no. The reasoning given in ***Ansal Properties*** of the same amounting to making a new contract for the parties would apply. To ask a plaintiff / purchaser who on a *prima facie* view of the matter has been ready and willing to perform his part of the Agreement to Sell, to as a condition for grant of interim relief restraining the defendant / seller from dealing with the property deposit the balance sale consideration would indeed amount to asking him to do something which he under the Agreement to Sell was not required to do. It cannot be lost sight of that the applicability of the principle of *lis pendens* is a creation of law and not of the own making of the parties. The law, while putting a clog of Section 52 on the property has not required the purchaser seeking specific performance to as a condition therefor deposit the balance sale consideration in the Court. The law having placed the two in such a position, the Courts would interfere therewith only in exceptional cases where the plaintiff / purchaser on a

prima facie view of the matter is in default and / or where the averments though made of readiness and willingness have an echo of hollowness. To hold otherwise would mean doing in the guise of a condition for grant of interim relief i.e. indirectly what Section 16(c) prohibits to be done and which in our opinion would not be correct.

27. The position in law, on the subject of issuance of direction to a plaintiff / purchaser in a suit for specific performance of an Agreement to Sale of immovable property to deposit the balance sale consideration in Court can thus be culled out as under:-

- (i) Section 16(c) of the Specific Relief Act, 1963 provides that specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him. It is thus necessary for a plaintiff in a suit for specific performance, to aver and prove that he, on the stipulated date, was in a position to pay the balance sale consideration and had tendered or was ready and willing to tender the same to the seller;

- (ii) however the Explanation (i) of Section 16(c) supra provides that where the contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in the Court any money except when so directed by the Court. Thus the plaintiff in a suit for specific performance, is not required to as a matter of routine and as a condition to the maintainability of the suit, deposit the balance sale consideration in the Court, though the Court is empowered to direct the plaintiff to do so;
- (iii) if as per the agreement of which specific performance is sought, the plaintiff / purchaser was required to part with the balance sale consideration only against delivery of title and physical possession of the property, to make such a plaintiff / purchaser part with the balance sale consideration without delivery of title and possession to him would be contrary to the agreement and the jurisdiction of specific performance thereof;
- (iv) to hold that though as per the agreement the plaintiff / purchaser 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;

- (v) a direction to the plaintiff / purchaser to deposit balance sale consideration in the Court as a condition to maintainability of the suit for specific performance can be made only where the Court, for reasons to be recorded, entertains a doubt about the readiness and willingness of the plaintiff / purchaser. Only where the Court feels that though an averment as postulated in Section 16(c) is made, but the plaintiff may not have the money to pay the balance consideration, can the Court, to satisfy itself about the truthfulness about the averment, direct to deposit the money in Court. This course is however to be adopted rarely;
- (vi) the question of payment otherwise would arise only after the trial of the suit and when the rights of the parties are determined and such a direction should be issued when the final decree is passed and not at an earlier point of time; and

(vii) direction to the plaintiff / purchaser to deposit the balance sale consideration in the Court can also be made as a condition for granting interim relief sought of restraining the defendant / seller from, during the pendency of the suit, dealing with the property agreed to be sold or to balance the equities in appropriate cases but again, not as a matter of routine i.e. only where the readiness and willingness of the plaintiff / purchaser is in doubt and again, rarely; the effect of non-deposit inspite of such direction in such cases will only be vacation of the interim order or applicability of Section 52 supra and not to ipso-facto presume the plaintiff / purchaser to have been not ready and willing.

28. Applying the aforesaid principles, neither any error can be found in the impugned order nor has any error been argued by the counsel for the appellants / defendants. The learned Single Judge on consideration of the facts of the case has held that it *prima facie* cannot be said that the plea of the respondent no.1 / plaintiff having been ready and willing is unbelievable and has not found any reason to test the respondent no.1 / plaintiff to the said extent.

29. As far as the argument of the counsel for the appellants / defendants of there being no change in circumstance is concerned, the said observation came

to be made in the peculiar facts of *Mohan Overseas P. Ltd.* (supra). In that case, the direction for deposit had been issued finding the plaintiff to be *prima facie* in default of his obligations under the agreement to sell.

30. That being the position, the occasion for directing the respondent no.1 / plaintiff to deposit the balance sale consideration in the Court or for continuing with the deposit so made in the Court and which is an exception to the general principle of such deposit being not required enshrined in Section 16(c) of the Act, does not arise.

31. There is thus no merit in the appeal which is dismissed. However no costs.

32. Both counsels request for expeditious disposal of the suit. We request the learned Single Judge accordingly. We may notice that though we suggested recording of the evidence on commission and to which the counsel for the respondent no.1 / plaintiff is agreeable but the counsel for the appellants / defendants is not.

RAJIV SAHAI ENDLAW, J.

CHIEF JUSTICE

MAY 16, 2014/‘gsr’