

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

+ **RFA No.349/2018**

% **25th April, 2018**

GULSHAN KUMAR Appellant

Through: Mr. A.K. Sen, Advocate.

versus

SHYAM LAL THROUGH LR's Respondent

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. No.16410/2018 (exemption)

1. Exemption allowed subject to just exceptions.

C.M. stands disposed of.

RFA No.349/2018 and C.M. No.16409/2018 (stay)

2. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908(CPC) is filed by the plaintiff in the suit impugning the judgment of the Trial Court dated 23.12.2017 by which trial court has dismissed the suit for specific performance filed by the appellant/plaintiff with respect to the Agreement to Sell dated 24.5.2006 for 1/5th undivided share for land of the

respondent/defendant being 1/5th undivided share in the agricultural land measuring 14 bighas and 8 biswas (equal to 2 bighas 17 bishwas and 12 biswansis) bearing Mustatil No.85, Killa No.2(4-16), 3(4-16), and 4(4-16) situated in the revenue estate of Village Jonapur, New Delhi. Trial court however while dismissing the suit for specific performance has granted the money decree in favour of the appellant/plaintiff for a sum of Rs.12 lacs, which amount the appellant/plaintiff had paid to the respondent/defendant in terms of the subject Agreement to Sell. Total sale consideration was Rs.1,02,00,000/-

3. I may note that the original defendant expired during the pendency of the suit and thereafter he was represented by his legal heirs and reference in this judgment to the defendant will as per the context mean reference to the original defendant or his legal heirs.

4. From the facts, it is seen that Agreement to Sell entered into between the parties on 24.5.2006 is now a proved document but the issue arises as to whether the appellant/plaintiff has shown his financial capacity and which is required to be shown as per requirement of readiness and willingness as per Section 16(c) of the

Specific Relief Act, 1963. I would like to note that there was a dispute between the parties as to whether or not the Agreement to Sell was entered into by the appellant/plaintiff with the respondent/defendant inasmuch as the respondent/defendant claimed to have entered into the subject Agreement to Sell with one with M/s AMB Associate through Sh. Manoj Sethi, but this issue has been held in favour of the appellant/plaintiff and the trial court has held that it was the appellant/plaintiff who had entered into the subject Agreement to Sell with the respondent/defendant. On the aspect of whether the appellant/plaintiff was ready and willing issue no.2 was framed and this issue no.2 has been decided against the appellant/plaintiff by the trial court in terms of the observations made in para 6.41 of the impugned judgment and this para 6.41 reads as under:-

“6.41 Now the second aspect will be as to whether the plaintiff is entitled for specific performance of agreement to sell dated 24.05.2006. Section 16(c) of the Specific Relief Act 1963 requires every plaintiff in the suit for specific performance to ever and through readiness and willingness to perform his part of contract. Readiness means existence of financial capacity and willingness means intention to go ahead with the transaction. The plaintiff has not filed any bank account statement to show that he had money with him during that period and he has not filed his IT Returns and he has further not filed any document whatsoever to show that he had the financial capacity for making payment of the balance consideration. Merely stating in legal notice that plaintiff is ready to perform his part of contract is not sufficient to establish the readiness and willingness of the plaintiff to perform his part of obligations. The plaintiff has failed to comply with the requirement of Section 16(c) of the Specific Relief Act, 1963, therefore, the plaintiff is not entitled for the relief of specific

performance. However, considering the fact that the plaintiff has already paid Rs.12 Lacs as part consideration amount, the plaintiff is entitled for the recovery of said amount from the defendant.” (underlining added)

5. A reading of the aforesaid para shows that trial court held the appellant/plaintiff as not being ready and willing as required under Section 16(c) of the Specific Relief Act because appellant/plaintiff did not file any bank statement to show that he had with him moneys during the relevant period, appellant/plaintiff did not file any income tax return and nor did the appellant/plaintiff file any other document to show that he had financial capacity to pay the balance sale consideration of Rs.90 lacs. Trial court held that mere averring readiness and willingness in the legal notice sent could not show that the appellant/plaintiff had financial capacity to complete the sale transaction.

6. Counsel for the appellant/plaintiff has however drawn the attention of this Court to the document Ex.PW1/4 (colly) which contains a bank statement of the appellant/plaintiff, HDFC Bank, at East Patel Nagar Branch and it is argued that trial court has illegally failed to consider this document which showed appellant's/plaintiff's financial capacity to pay balance sale consideration of Rs. 90 lacs. It

is argued on behalf of the appellant/plaintiff that this bank statement shows that the appellant/plaintiff had an overdraft limit of Rs.7 crores with his bank and consequently 90 days time period prescribed for performance by the appellant/plaintiff of his obligation to complete the sale deed expiring on 24.8.2006 had financial capacity. It is argued that by virtue of the negative balance in the account of the appellant/plaintiff on 24.8.2006 the appellant/plaintiff had deposited Rs. 23 lacs in his account on 28.8.2006 resulting in earlier negative balance becoming the positive balance of Rs.6,36,863/- and consequently the appellant/plaintiff should be held to have the necessary funds to pay the balance amount of Rs.90 lacs inasmuch as the over draft limit in the HDFC Bank was Rs.7 crores.

7. I have put a specific query to the counsel for the appellant/plaintiff as to whether any document whatsoever has been filed by the appellant/plaintiff or any witness of the bank summoned to show what was the overdraft limit available to the appellant/plaintiff on 24.8.2006 but the counsel for the appellant/plaintiff concedes that there is no document filed on record proving the amount of the sanctioned limit available to the

appellant/plaintiff with HDFC Bank on 24.8.2006. In my opinion, merely because earlier at one point of time on 2.5.2006 there is a debit entry of Rs.7,96,85,963/- in his bank account would not mean that appellant/plaintiff would have with him such over draft limit of Rs.7 crores even on 24.8.2006. The requisite aspect of financial capacity had to be proved to the satisfaction of the judicial conscience of this Court and this Court fails to understand as to why the appellant/plaintiff could not have done so by easily getting a letter from his bank of the sanctioned limit available in his over draft account on 24.8.2006, but the same was not done with the fact that admittedly no witness was even summoned from the HDFC Bank with the record to show the limit available to the appellant/plaintiff on 24.8.2006. In my opinion, therefore, the statement of account which is relied upon by the appellant/plaintiff does not help the appellant/plaintiff to prove his financial capacity to pay the balance sale consideration of Rs. 90 lacs. It is also seen that admittedly the appellant/plaintiff has filed no other documentary evidence with respect to having any properties, movable or immovable, by which the balance sale consideration of Rs.90 lacs could be paid.

8. In view of the aforesaid discussion and which additional reasons this Court has given in exercise of powers under Order XLI Rule 24 CPC, it has to be held that appellant/plaintiff did not have the financial capacity at the relevant time, being within 90 days of entering into of the Agreement to Sell on 24.5.2006, to pay the balance sale consideration of Rs.90 lacs. Appellant/plaintiff therefore clearly failed to prove his readiness and willingness as required by Section 16(c) of the Specific Relief Act and therefore trial court has rightly declined the relief of specific performance. As already stated above, however, the appellant/plaintiff has already been granted a money decree of the sum of Rs.12 lacs paid by the appellant/plaintiff to the respondent/defendant which is ordered to be decreed with interest at 12% per annum from the date of decree.

9. Dismissed.

APRIL 25, 2018

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VALMIKI J. MEHTA, J