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

Date of Decision: 04.02.2015

\+ CS(OS) 554/2011

M/S FINE PROPERTIES (P) LTD ..... Plaintiff

Through: Mr. Sanat Kumar, Adv.

Versus

VISHNU BHATNAGAR ..... Defendant

Through: Mr. Rajesh Bansal, Mr. Vijay K. Gupta, Mr. Deepak Dewan, Advs.

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J. (Oral)

1. On 09.05.2014, the following order was passed by this Court: *"List on 9th September, 2014 for arguments on the question of maintainability of the suit, in view of order dated 10th March, 2014."*

2. On 10th March, 2014, the following order was passed by this Court:

> *"IA No.610/2014*
>
> *This is a suit for specific performance filed by the plaintiff seeking specific performance of the agreement dated 26.12.2007. The suit was filed on 28.01.2011.*
>
> *By order dated 21.03.2011, the plaintiff was directed to deposit the balance sale consideration of Rs.2,70,00,000/- within 60 days (Rs.50,00,000/- within ten days and Rs.2,20,00,000/- within 60 days). The plaintiff deposited Rs.97,00,000/- by way of an FDR in the name of the Registrar General, the said fixed*

deposit receipt was returned on 31.10.2012 to the plaintiff for the purpose of renewal , however, the said fixed deposit was never returned to Court after renewal. Though the defendant dispute the balance sale consideration, the plaintiff has not even deposited in the Court the amount claimed by the plaintiff to be due towards balance sale consideration.

Learned counsel for defendant submits that this being a suit for specific performance, in view of the default of the plaintiff in complying with the interim order passed by this Court, it is apparent that the plaintiff is not ready and willing to perform his part of the transaction and as such the plaintiff is disentitled from seeking the relief of the specific performance.

Learned counsel for the plaintiff prays for some time to examine this position and make submissions.

At request, adjourned to 9th May, 2014.

Learned counsel for the plaintiff submits that the plaintiff is now ready and willing to comply with the directions passed by order dated 21.03.2011.

By order dated 13.01.2014, the interim order was specifically vacated in view of the above default. The submission of the plaintiff is noted, however, at this stage the plaintiff cannot be permitted to deposit the said amount in Court. The statement of the plaintiff shall be taken into account at the time of consideration of the plea of the defendant that the plaintiff is disentitled for grant of specific performance."

3. The learned counsel for the defendant submits that the relief sought by the plaintiff under the Specific Relief Act, 1963 is a discretionary relief for which the conduct of the plaintiff has to be seen, particularly, since on the day the suit was filed, the plaintiff's stand was that it was ready and willing to perform its part of the contract. He further submits that the ex-

parte injunction granted by this Court on 21.03.2011, by which the defendant was restrained, till further orders, from creating any third party interest in respect of his rights in property No. 4, Atta-ur-Rehman Lane, Under Hill Road, Civil Lines, Delhi-54, was conditional upon the plaintiff giving an undertaking to deposit an amount of Rs.50.00 lacs within ten days and the balance sale consideration within 60 days therefrom by way of an FDR in the name of the Registrar General of this Court. But, the said order was not complied with by the plaintiff, either in letter or spirit.

4. On 30.05.2011, the Registry was directed to accept FDR(s) amounting to a sum of Rs.47.00 lakhs and the learned counsel for the plaintiff had assured the Court that he would deposit FDR(s) for the balance amount by 15.07.2011.

5. I.A. 9153/2011 was moved by the plaintiff, seeking extension of time to comply with the order dated 21st March, 2011. On 29.09.2011, it was noted that the plaintiff had deposited an FDR of Rs.47.00 lacs on 02.06.2011 but the FDR for the balance amount had not been deposited. The plaintiff was directed to deposit the balance amount of Rs.1.73 crores by 15th November, 2011.

6. On 21.11.2011, the learned counsel for the plaintiff submitted that the Registry did not accept the two FDRs for a sum of Rs.60.00 lacs and Rs.15.00 lacs on the ground that FDR(s) for a total sum of Rs.1.73 crore were to be deposited. Logically then it would be for the plaintiff to seek appropriate orders from the Court with respect to the deposits earlier ordered to be made with the Registrar General.

7. The case was thereafter, listed on 21.02.2012, 28.03.2012, 09.04.2012, 13.08.2012, 14.08.2012, 17.08.2012, 05.11.2012, 16.11.2012,

06.03.2013, 17.07.2013, 06.09.2013, 13.12.2013, 19.12.2013, 13.01.2014, 10.03.2014, 09.05.2014 and 09.09.2014, but no application was moved by the plaintiff seeking extension of time for the deposit of the remainder sale consideration as had been directed by this Court vide order dated 21st March, 2011. The case was listed before the Joint Registrar, the Mediation Centre as well as this Court.

8. It is to be noted that on 05.11.2012, two FDRs each for an amount of Rs.25.00 lacs were permitted to be renewed for a further period of one year. Earlier, on 14.08.2012, FDR of Rs.47.00 lacs was directed to be renewed. However, as noted on 13.01.2014 as well as on 10.03.2014, the FDRs of Rs.97.00 lacs which were to be deposited back with the Registry after their renewal, was never deposited back. He defaulted. It was expected and incumbent upon the plaintiff that the FDRs would be renewed and re-deposited with the Registry. Effectively, the plaintiff had appropriated the said amount without prior permission of the Court. The plaintiff had no right or authority to use the said amount without the permission of the Court.

9. The learned counsel for the plaintiff states that the aforesaid deposit was only for the purposes of securing an interim injunction; that even if the deposit was not made, all that could happen was the vacation of the injunction order. He submits that the plaintiff would definitely have a case against the defendant for specific performance of the agreement to sell. He further submits that the aforesaid amount was not in the nature of a pre-deposit of money for the suit but it was only for the purpose of interim relief. Therefore, he submits that even if the interim injunction was to be done away with, a pre-deposit for a suit for specific performance would not be necessary. He relies upon on the following judgments of this Court:

(i) ***Ansal Properties and Industries (Pvt.) Ltd. v. Rajinder Singh and Anr.* 41 (1990) DLT 510;**

(ii) ***Mahesh Singhal v. Bhupinder Narain Bhatnagar, 2014 (140) DRJ 540; and***

(iii) ***Rakesh Kumar v. Kalawati (Deceased) through LRs & Ors.* 206 (2014) DLT 363**

10. The learned counsel for the plaintiff states that (i) in ***Rakesh Kumar(supra)*,** even the pre-deposit was permitted to be withdrawn by the plaintiff; (ii) that pre-deposit of money is to be ordered by the Court only rarely; that it can be done only to bind the plaintiff or for the satisfaction of the Court about the truthfulness of the plaintiff's averments; (iii) that although the FDRs of Rs.97 lacs was to be deposited back in this Court after its renewal, it could not be done so due to financial crunch faced by the plaintiff pursuant to proceedings before the DRT; (iv) that if the financial requirements apropos the DRT proceedings had not been honoured, the plaintiff would have suffered serious consequences as regards its other business interests, and (v) that on 10th March, 2014, he had stated upon instructions that the plaintiff was ready and willing to perform its part of the contract and this statement has to be seen for the purposes of the suit.

11. In response, the learned counsel for the defendant states that the conduct of the plaintiff itself shows that it was never ready and willing to perform its part of the contract; that the order of 21.03.2011 required the plaintiff to deposit the entire amount within 60 days therefrom (Rs. 50 lacs within 10 days and the rest of the sale consideration within 60 days); that the said order has not been complied with even after several extensions being granted by this Court. He further submits, that on the contrary the plaintiff

had withdrawn and appropriated the amount of Rs.97.00 lacs without prior permission of the Court; that this is clear evidence that the plaintiff was neither ready nor willing to perform its part of the contract either on the date when the interim injunction was granted or any time thereafter, i.e., during the last four years since the suit has been pending. He relies on a judgment of this Court in ***Sukhbir Shoken v. Parmeet Singh and Ors.***, **I.A. 7807/2007 in CS(OS) 2397/2006,** decided on 06.11.2007**.**

12. Having heard the learned counsel for the parties, this Court is of the view that the conduct of the plaintiff has been far from fair. The FDRs of Rs.97.00 lakhs which were returned to the plaintiff for their renewal were never returned back and the amount was appropriated by the plaintiff without the permission of the Court. It was admittedly used because of the financial crunch faced by the plaintiff in a proceeding before the DRT. No application was moved before this Court, seeking permission for using the said amount for the DRT proceedings. In any case, the said contention is made for the first time before this Court and there is nothing on record to substantiate that the money was used before the DRT proceedings. It is noteworthy that the money was withdrawn on 31.10.2012 and it was always open to the plaintiff to have so disclosed to the Court either by way of an affidavit or an application. Neither of the two courses was adopted. The explanation sought to be given now cannot be taken cognizance of.

13. The subsequent conduct of the plaintiff shows that right from the date the ex-parte injunction order was passed, the plaintiff did not have the money to perform its part of the contract/transaction. It never showed that it had enough money to complete the transaction. The lack of compliance of the order dated 21st March, 2011 is adequate proof in this regard. Finally, the

plaintiff by its own admission had used the amount of Rs.97.00 lakhs, which was initially lying deposited in this Court because they were facing a financial crunch. This clearly shows that the plaintiff never had the money and that was the reason, they were unable to pay the sale consideration amount. The Court has to see that the plaintiff is always ready and willing to perform its part of the contract.

14. On 10th March, 2014, Mr. Sanat Kumar, the learned counsel for the plaintiff had stated that the plaintiff was willing to comply with the order dated 21.03.2011 but was not permitted by this Court. Today, he submits that the plaintiff is ready and willing to perform its part of the contract. However, it is immaterial and irrelevant because the performance of the contract is not to be seen from the date when it is suitable to the plaintiff. This Court cannot be oblivious to the fact that over the years property prices in Delhi have increased, and continue to increase exponentially especially in the urban. The relief of specific performance sought in the present suit is equitable in nature and courts are required their discretion in this regard on the basis of settled principles of law. It is settled law that discretion has to be exercised on the basis of the conduct of the plaintiff. In the present case, the plaintiff has failed to show its readiness and willingness to perform its part of the contract consistently.

15. This Court is also of the view that the judgments relied upon the learned counsel for the plaintiff are distinguishable on facts. In ***Ansal Properties and Industries (Pvt.) Ltd. (supra),*** the Division Bench had aside the order of the learned Single Judge who held that a suit under Section 12 of the Specific Relief Act was not maintainable unless and until the sale consideration was paid or deposited in the Court. In ***Mahesh Singhal***

(supra), the plaintiff therein was permitted to withdraw the amount deposited in the Court since the final disposal of the suit was likely to take considerable time. In ***Rakesh Kumar (supra),*** the appellant/plaintiff therein had been not been informed that it was essential for him to deposit the amount in Court to show his readiness and willingness within the meaning of Section 16(c) of the Act or that an inference of non readiness or willingness shall be drawn from the non deposit.

16. At this juncture, it would be apposite to refer to the judgment of the Supreme Court in ***N.P. Thirugnanam (D) by L.Rs v. Dr. R. Jagan Mohan Rao and Ors.*** **AIR 1996 SC 116,** wherein it was held as under:

> *"It is settled law that remedy for specific performance is an equitable remedy and is in the discretion of the court, which discretion requires to be exercised according to settled principles of law and not arbitrarily as adumbrated under Section 20 of the Specific Relief Act 1963 (for short, 'the Act'). Under Section 20, the court is not bound to grant the relief just because there was valid agreement of sale. Section 16(c) of the Act envisages that plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit alongwith other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be*

available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was always ready and willing to perform his part of the contract."

17. It would also be relevant to refer to the judgment in ***Umabai & Anr. v. Nilkanth Dhondiba Chavan (Dead) by LRs. & Anr.,*** **(2005) 6 SCC 243**, wherein the Supreme Court held as under:

> "***30.*** *It is now well settled that the conduct of the parties, with a view to arrive at a finding as to whether the plaintiff-respondents were all along and still are ready and willing to perform their part of contract as is mandatorily required under Section 16(c) of the Specific Relief Act must be determined having regard to the entire attending circumstances. A bare averment in the plaint or a statement made in the examination-in-chief would not suffice. The conduct of the plaintiff-respondents must be judged having regard to the entirety of the pleadings as also the evidences brought on records.*"

18. Furthermore, in ***J.P. Builders & Anr. v. A.Ramadas Rao & Anr.,*** **(2011) 1 SCC 429**, the Supreme Court held as under:

> "*22.The words "ready" and "willing" imply that the person was prepared to carry out the terms of the contract. The distinction between "readiness" and "willingness" is that the former refers to financial capacity and the latter to the conduct of the plaintiff wanting performance. Generally, readiness is backed by*

willingness.

27. It is settled law that even in the absence of specific plea by the opposite party, it is the mandate of the statute that the plaintiff has to comply with Section 16(c) of the Specific Relief Act and when there is non-compliance with this statutory mandate, the court is not bound to grant specific performance and is left with no other alternative but to dismiss the suit. It is also clear that readiness to perform must be established throughout the relevant points of time. "Readiness and willingness" to perform the part of the contract has to be determined/ascertained from the conduct of the parties."

19. In view of the preceding discussion, this Court is of the view that the plaintiff has failed to make out a case for the grant of any relief since its conduct amply shows that it was never ready nor willing to perform its part of the contract: neither (i) when the suit was filed; (ii) nor when the interim injunction was granted; (iii) nor throughout pendency of these proceedings. The plaintiff never sought leave of this Court to appropriate Rs.97.00 lacs when the FDRs were returned to it for renewal and were required to be deposited back into the Court. The fact that the amount of Rs.97.00 lacs was appropriated by the plaintiff due to financial crunch faced by it in a proceeding before the DRT itself shows that the plaintiff was never ready to perform its part of the contract.

20. The requisite monies as directed by this Court on 21.03.2011 were never deposited. Instead, the amount deposited was also taken back b y the plaintiff, even without the Court's permission. For the plaintiff to say in 2014, i.e., three years after filing of the suit, that he was ready and willing to perform his part of the contract, is meaningless. Readiness and willingness

of the plaintiff to perform his part of the contract has to be at all times. The relief of specific performance is an equitable one and the Court is required to exercise its discretion in the facts and circumstances of the case. The conduct of the plaintiff does not warrant the grant of relief of specific performance. When the final relief cannot be granted, the suit will not be maintainable. Accordingly, the suit cannot be allowed to proceed any further as it will be a fruitless exercise. It is accordingly dismissed.

NAJMI WAZIRI, J

FEBRUARY 04, 2015/acm