

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

+ R.S.A. NO.219 OF 2014

% Date of decision : 20th February, 2015

RATTAN LAL @ PINKI Appellant
Through: Mr. Amit Punj, Advocate

versus

VASDEV Respondent
Through: Mr. Gurbaksh Singh and Ms. Richa,
Advocates

**CORAM:
HON'BLE MR. JUSTICE J.R. MIDHA**

JUDGMENT

1. The appellant filed a suit for specific performance against the respondent, which was decreed by the learned Trial Court. The respondent's appeal against the decree of specific performance was allowed by the learned Additional District Judge resulting in the setting aside of the decree. The learned first appellate Court while dismissing the plaintiff's suit for specific performance directed the defendant to refund Rs.1,00,000/- along with interest @ 6% per annum to the plaintiff. The appellant has approached this Court in second appeal. For the sake of convenience, the appellant and the respondent are referred to as per their ranks in the plaint as 'plaintiff' and 'defendant', respectively.

2. The plaintiff and the defendant are real brothers. On 10th November, 2005, the plaintiff agreed to purchase second floor of property No.A-24,

Gali No.8, Pratap Nagar, Mayur Vihar Phase-I, Delhi – 110092 from the defendant for a total consideration of Rs.2,50,000/- out of which Rs.1,00,000/- was paid on 10th November, 2005 and the balance sale consideration of Rs.1,50,000/- was agreed to be paid on or before 15th December, 2005. The terms of the agreement were recorded in receipt Ex.PW1/2, which is reproduced hereinbelow: -

“RECEIPT

Received a sum of Rs.1,00,000/- (Rupees One Lac only) from Shri Pinki, son of Shri Bhawan Dass, resident of A-24, Gali No.8, Pratap Nagar, Mayur Vihar, Phase-I, Delhi, as an advance money out of Rs.2,50,000/- (Rupees Two Lacs Fifty thousand only) as full and final settlement and total sale consideration amount towards the sale of entire Second Floor of the Property bearing No.A-24, Gali No.8, Pratap Nagar, Mayur Vihar, Phase-I, Delhi.

And balance amount of Rs.1,50,000/- (Rupees One Lac Fifty Thousand only) shall be received by me, from the above said purchaser, at the time of handing over the vacant and physical possession of the said property to the above said purchaser, on or before 15-12-2005. At the same time I will also sign and execute all relevant documents such as General Power of Attorney, Special Power of Attorney, Agreement to Sell, Will, Affidavits, Receipts, Possession Letter etc., or Sale Deed in favour of the above said purchaser or his nominee(s), in the office of the Sub-Registrar, Delhi.

IN WITNESS WHEREOF I, Vasdev, son of Shri Bhawan Dass, resident of House No.5, (First Floor), Gurunanak Market, Lajpat Nagar, New Delhi-110024, have signed this Receipt at New Delhi on this 10 day of November 2005, in the presence of the following witnesses...

(Emphasis Supplied)

3. The plaintiff, admittedly, did not pay the balance sale consideration of Rs.1,50,000/- to the defendant on or before 15th December, 2005. There was no written communication between the parties between 10th November, 2005 and 15th December, 2005.

4. The first written communication between the parties is the legal notice dated 26th June, 2008 (Ex.PW1/3), whereby the plaintiff called upon the defendant to execute the title documents in favour of the plaintiff within 15 days. There was no communication between the parties after this legal notice.

5. On 31st October, 2008, the plaintiff instituted the suit for specific performance in which he pleaded that he visited the office of Sub-Registrar on 11th September, 2008 along with the balance sale consideration of Rs.1,50,000/- for execution of the sale documents but the defendant did not turn up.

6. The defendant contested the suit on various grounds, inter alia, that the alleged sale agreement was to be completed on or before 15th December, 2005 and was, therefore, not enforceable. According to the defendant, the plaintiff was never ready and willing to perform his part of the contract and did not have the balance sale consideration of Rs.1,50,000/- available with him. The defendant also denied having handed over the possession of the suit property to the plaintiff. The defendant further denied having any intimation of the plaintiff's visit to the Sub-Registrar office on 11th September, 2008.

7. The plaintiff appeared in the witness box as PW-1 and reiterated the

averments made in the plaint. The plaintiff proved the agreement contained in the receipt as Ex. PW-1/2, copy of legal notice dated 26th June, 2008 and AD Card as Ex. PW-1/3 and 1/4. The plaintiff also proved the receipt of his appearance before the Sub-Registrar on 11th September, 2008 as Ex. PW-1/5. In cross-examination, plaintiff admitted that as per receipt Ex. PW-1/2, he was required to make the payment of Rs.1,50,000/- by 15th December, 2005. PW-1 further admitted that as per Ex. PW-1/2, the possession of the suit property was to be handed over to him on payment of Rs.1,50,000/-. PW-1 further admitted that no intimation was given by him to the Sub-Registrar's Office or any other authority on 15th December, 2005 that he had brought Rs.1,50,000/-. PW-1 further admitted that no legal notice was issued in the year 2005. The plaintiff examined his brother Kanhaiya Lal as PW-2, who supported the plaintiff.

8. Learned counsel for the appellant urged at the time of hearing of the appeal that the plaintiff has always been ready and willing to perform his part of the agreement. It is further submitted that the plaintiff offered balance sale consideration of Rs.1,50,000/- by means of a demand draft to the defendant before the Trial Court on 10th November, 2010, which was rejected by the defendant and was recorded by the Trial Court in the order dated 10th November, 2010. Even after the passing of the decree by the Trial Court, the plaintiff, promptly prepared the demand draft for Rs.1,50,000/- and sent the same to the defendant with the legal notice. It is further submitted that the plaintiff is in actual physical possession of the suit property, which is protected under Section 53A of the Transfer of Property Act. Learned counsel further submitted that the defendant handed over the

vacant and peaceful possession of the suit property to the plaintiff in November, 2005, which impliedly extended the time of performance of the respective applications and time was not the essence of the contract.

9. The law with respect to specific performance of an agreement relating to an immovable property is well settled. Reference may be made to the judgment of this Court in ***Ved Prakash Kharbanda v. Vimal Bindal***, (2013) 198 DLT 555 in which this Court examined all the relevant judgments and summarised the principles as under: -

“21.8 Section 16 (c) of the Specific Relief Act, 1963

- *In a suit for specific performance, the plaintiff has to prove a valid agreement of sale; the breach of the contract by the defendant; and readiness and willingness of the plaintiff to perform his part of the contract.*
- *Section 16(c) of the Specific Relief Act mandates “readiness” and “willingness” on the part of the plaintiff as a condition precedent to seek specific performance.*
- *The “readiness” and “willingness” are two separate issues. The former refers to financial capacity whereas the latter depends upon the intention of the purchaser.*
- *“Readiness” and “willingness” cannot be treated as a straitjacket formula. It has to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the party concerned.*
- *The Court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances to adjudge the “readiness” and “willingness” of the plaintiff.*
- *When the parties enter into an agreement relating to an immovable property, they amicably agree on the total sale consideration, earnest money as well as the payment of the*

balance sale consideration. If both the parties are ready and willing, they usually complete the transaction within the stipulated time in the following manner:-

- The purchaser makes arrangement for the balance sale consideration within the stipulated time.*
- The purchaser informs the seller about the arrangement having been made.*
- The purchaser drafts the sale deed and sends the draft sale deed to the seller for approval.*
- The seller approves the draft sale deed and returns it back to the purchaser.*
- The purchaser prepares the sale deed on the requisite stamp papers.*
- Both the parties fix the date, time and place for payment of balance sale consideration, execution of sale deed, registration of the sale deed and handing over of the possession.*
- The parties complete the sale transaction on the agreed date, time and place.*
- In normal parlance, both the parties remain in touch either personally or through the property dealer.*
- The problem arises when one of the two parties turn dishonest. However, the party in breach purports to be ready and willing and creates evidence to that effect. At times, both the parties visit the office of Sub-Registrar on the last day of performance for obtaining a receipt of having attended the office of the Sub-Registrar to later on contend that they were ready and willing to perform and were waiting for other party. If the seller is in breach, he creates false evidence of readiness to avoid specific performance by the purchaser and to illegally forfeit the earnest money. On the other hand, if the purchaser is in breach, he creates false evidence of readiness and willingness to file a case of specific performance.*
- It is the duty of the court to find out which party has not performed and is trying to wriggle out.*

- The Court has to take into consideration the human probabilities, ordinary course of human conduct and common sense to draw necessary inference. Drawing presumptions is the backbone of the judicial process.*

- The silence or absence of correspondence by any party may be indicative of his dishonest intention. The dishonest intention of the seller can be inferred where the purchaser repeatedly contacts the seller for approval of the draft sale deed and for fixing time for payment of balance sale consideration and execution/registration of the sale deed but the seller does not respond or avoids contact. On the other hand, the dishonest intention of the purchaser can be inferred where the purchaser does not contact the seller for approval of the sale deed and fixing date, time and place for payment of balance sale consideration and execution/registration of the sale deed.*

- Upon refusal of the seller to complete the agreement, the purchaser is expected to issue a notice and immediately file a suit for specific performance. Any delay in this regard may indicate his intention that he was not ready and willing and the Court may refuse to grant specific performance.*

21.9 Section 20 of the Specific Relief Act, 1963

- The specific performance is an equitable relief. Section 20 of the Specific Relief Act preserves judicial discretion. The Court is not bound to grant specific relief merely because it is lawful to do so. The relief sought under Section 20 is not automatic as the Court is required to see the totality of the circumstances which are to be assessed by the Court in the light of facts and circumstances of each case.*

- The specific performance is usually granted where substantial sale consideration has been paid and the possession of the property has been delivered to the purchaser.*

•*In the event of any delay/inaction on the part of the purchaser, it would be inequitable to give the relief of specific performance to the purchaser. The rationale behind refusal of the Court to grant the specific performance where long time has gone by is that the prices of the property may have increased many times with the passage of time and it would be injustice to a person who has not received the sale consideration within the time stipulated in the agreement.*

•*If under the terms of the contract, the plaintiff gets an unfair advantage over the defendant, the Court may not exercise its discretion in favour of the plaintiff. So also specific relief may not be granted if the defendant would be put to undue hardship which he did not foresee at the time of agreement. If it is inequitable to grant specific relief, then also the Court would desist from granting a decree to the plaintiff.*

•*The party who seeks specific performance being an equitable relief must come to the Court with clean hands. In other words, the party who makes false allegations does not come with clean hands and is not entitled to the equitable relief.*

•*The Court has to consider whether it would be fair, just and equitable. The Court is guided by the principles of justice, equity and good conscience.*

•*While exercising the discretion, the Court would take into consideration the circumstances of the case, the conduct of parties, and the motive behind the litigation.”*

10. **Findings**

10.1 The Plaintiff paid Rs.1,00,000/- to the defendant at the time of the agreement on 10th November, 2005. The balance sale consideration of Rs.1,50,000/- was to be paid by the plaintiff to the defendant on or before 15th December, 2005. However, admittedly, the plaintiff neither offered nor paid the balance sale consideration of Rs.1,50,000/- to the defendant on or

before 15th December, 2005.

10.2 The plaintiff neither pleaded nor proved that balance sale consideration of Rs.1,50,000/- was available with him on 15th December, 2005.

10.3 The plaintiff was never ready and willing to perform his part of the agreement on 15th December, 2005, which is clear from the fact that the plaintiff did not communicate with the defendant between 10th November, 2005 to 15th December, 2005. If the plaintiff would have been ready and willing to perform his part of the contract, he would have approached the defendant along with the balance sale consideration on or before 15th December, 2005.

10.4 The first communication by the plaintiff with the defendant is by legal notice dated 26th June, 2008 which is after more than 2½ years of the agreement and that notice was not followed up by any communication till the filing of the suit on 31st October, 2008.

10.5 The plaintiff claims to have visited the office of Sub-Registrar on 11th September, 2008. The plaintiff's visit to the office of Sub-Registrar on 11th September, 2008 is of no avail as the period for performance of the agreement had expired as back as on 15th December, 2005. That apart the plaintiff's statement that he intimated the defendant about the visit to the Sub-Registrar office does not appear to be true. Since there was no communication or meeting between the parties before 11th September, 2008, there was no occasion for the defendant to agree to visit the office of the Sub-Registrar on 11th September, 2008. Secondly, had the defendant agreed to visit the Sub-Registrar office on 11th September, 2008, the plaintiff would

have certainly contacted the defendant to find out why the defendant had not visited and followed up with a telegram or notice in the evening of 11th September, 2008 informing the breach to the defendant. However, there was no such communication by the plaintiff to the defendant till the filing of the suit i.e. 31st October, 2008. Applying the test of common course of natural events and human conduct provided under Section 114 of the Indian Evidence Act, it can be presumed that the plaintiff had unilaterally visited the office of Sub-Registrar on 11th September, 2008 without informing the defendant to create a false evidence of willingness.

10.6 The plaintiff further claims that the defendant handed over the vacant and peaceful possession of the suit property to him in November, 2005 which is denied by the defendant. The defendant referred to the terms of the agreement Ex.PW1/2, according to which the possession had to be handed over to the plaintiff after the payment of the balance sale consideration. In view of the denial, the onus of having received the vacant and peaceful possession from the defendant was on the plaintiff, who could not discharge the same. The plaintiff could not even give the date of taking over of the possession. Secondly, the defendant having agreed to the handing over the possession only after receipt of the aforesaid balance sale consideration, the plaintiff could not explain how he took over the possession without making the said payment. The plaintiff has not pleaded or proved any fresh agreement between the parties.

10.7 There is no merit in the appellant's contention that time was not the essence of the contract in view of the aforesaid findings.

10.8 The plaintiff's offer to pay Rs.1,50,000/- to the defendant before the

Trial Court on 10th November, 2010 and again after the decree of the Trial Court is of no avail as the balance consideration had to be paid on or before 15th December, 2005, which admittedly was not done by the plaintiff.

10.9 There is no infirmity in the findings of the first appellate Court.

10.10 No substantial question of law arises for consideration in this appeal.

Conclusion

11. On careful consideration of the rival contentions of the parties and applying the well settled principles, this Court is of the view that the plaintiff has committed the breach of the agreement Ex. PW-1/2 by failing to pay the balance sale consideration of Rs.1,50,000/- to the defendant on or before 15th December, 2005. Admittedly, the plaintiff neither offered nor paid the balance consideration of the Rs.1,50,000/- to the defendant. Secondly, the plaintiff neither pleaded nor proved that the balance sale consideration of Rs.1,50,000/- was available with him on 15th December, 2005. There was no written communication whatsoever between the parties between 10th November, 2005 and 15th December, 2005. The plaintiff issued the legal notice after two-and-a-half years on 26th June, 2008 and the suit has been instituted on 31st October, 2008. Therefore, it is clear beyond doubt that the plaintiff was never willing to perform his part of the agreement and therefore, the plaintiff is not entitled to the specific performance.

12. There is no merit whatsoever in the appeal which is hereby dismissed.

J.R. MIDHA, J.

FEBRUARY 20, 2015/rsk