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

Reserved on: 18.11.2013
Decided on: 25.11.2013

\+   **RFA (OS) 140/2013, C.M. NO. 18040/2013 & 18041/2013**

KAILASH CHAND ..... Appellant
Through: Ms. Neha Kapoor, Advocate.

versus

GANESH ..... Respondent
Through: Nemo.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S. RAVINDRA BHAT

%

C.M. NO. 18040/2013 (for exemption)

Allowed, subject to all just exceptions.

RFA (OS) 140/2013, C.M. NO. 18041/2013 (for stay)

1. This is an appeal against an order of the learned Single Judge decreeing the suit, CS(OS) 1445/2005, for specific performance. The plaintiff in the suit sued the present appellant Kailash Chand (hereafter "the defendant") seeking specific performance of two agreements dated 18.06.2004 and 14.09.2004 in respect of the defendant's 1/3rd share (2 bigha, 8 biswas) out of Khasra No. 28/11, Village Kakrola, New Delhi (hereafter 'the suit property'). A decree for vacant possession of the property with title, was sought by the

plaintiff; (and in the alternative, payment of ₹16 lakhs, i.e. double the advance amount paid by for the suit property originally) was claimed.

2. Under the agreement dated 18.06.2004, the vendor/defendant agreed to sell the suit property to the plaintiff for a total consideration of ₹ 20,00,000/-. Though the transaction of sale was to be completed by 15th September, 2004, a mutual agreement was entered into between the parties on 15th September, 2004, whereby the final date for payment of the balance consideration and execution of the documents was to be 4th October, 2004. Under this agreement, The defendant also acknowledged payment of ₹8,00,000/- till the date of the agreement.

3. At trial, the following issues were framed by the learned Single Judge:

> "*(i) Whether the suit of the plaintiff is barred by Sections 4 and 5 of the Delhi Land (Restriction on Transfer) Act, 1972?*
>
> *(ii)Whether the plaintiff was ready and willing to perform his obligations under the Agreements dated 18.06.2004 and 14.09.2004 in respect of the suit property?*
>
> *(iii) Whether the Plaintiff is entitled to specific performance of the two Agreements?*
>
> *(iv) If Issue No. 3 is decided against the plaintiff; whether the plaintiff is entitled to the alternative relief of damages? If so, the extent thereof?*
>
> *(v) Whether the plaintiff is entitled to any interest? If so, at what rate, on what amount and for which period?*

(vi) Relief."

4. The learned Single Judge held that the suit was not barred by Sections 4 and 5 of the Delhi Land (Restrictions on Transfer) Act, 1972 in view of the defendant's admission during cross-examination that "*no sale permission was required to be obtained from any authority*", but that, a mutation of the land in his favour was sufficient. Further, the learned Single Judge held that the plaintiff was ready and willing to perform his obligations under the two agreements, and was, consequentially, entitled to specific performance.

5. Learned counsel for the defendant/appellant impugns the judgment of the learned Single Judge on three grounds: *first*, it is argued that the agreements in question relate back to 2004, and given the increase in property prices in the interim, a decree for specific performance of the agreements is inequitable. For this, reliance was placed on the decisions of the Supreme Court in *K.S. Vidyanadam and Ors.* v. *Vairavan*, 1997 (3) SCC 1, and *Mrs. Saradamani Kandappan* v. *Mrs. S. Rajalakshmi and Others*, (2011) 12 SCC 18. Due to manifold increase in the property prices, it is argued that the learned Single Judge should, in fact, have awarded damages instead of a decree for specific performance. In addition, it was argued that the relief of specific performance cannot be claimed as a matter of right, but is a matter of discretion to be exercised by the Court in view of the possible inequitable consequences of grant of such relief. The fact that the plaintiff approached this Court approximately one year after

the alleged breach was also a factor militating against specific performance, argued counsel.

6. *Secondly*, learned counsel argues that the plaintiff was not ready and willing to perform his obligations under the contract on the stipulated date. It is argued that the plaintiff did not prove this fact – while the plaint states that the pay orders were prepared on 14.09.2004, the plaintiff, in his cross-examination, stated that these were prepared on 12.09.2004. Further, it is argued that the plaintiff was unable to prove that he had purchased stamp papers, as merely going to the Office of the Sub-Registrar, which was proven, was insufficient by itself. Moreover, it is argued that the testimony of DW-3, a bank clerk at Syndicate Bank, New Delhi, who stated that one draft dated 14.09.2004 for a sum of ₹1 lakh was cancelled on 15.09.2004, despite execution of agreement dated 14.09.2004, extending the time for execution of the sale deed till 04.10.2004, clearly shows the *mala fide* intention of the plaintiff to not perform the contract in question.

7. *Finally*, learned counsel argued that unless the property for which the relief of specific performance has been sought is identifiable, no decree can be granted in respect of the same. Given that the suit property in this case is undivided land, it is argued that this bar applies. For this, reliance is placed on the decision of the Supreme Court in *Nahar Singh* v. *Harnak Singh and Others*, 1996 (6) SCC 699.

8. Thus, the defendant impugns the findings of the learned Single Judge on the second and third issues framed in the suit. In the reasoning given by the learned Single Judge, the payment of ₹8,00,000/- in instalments by the plaintiff to the defendant was considered to be supported by ample evidence, including, crucially, the admission in the second agreement of 14.09.2004 itself. This agreement is admitted by the defendant, and in the present appeal proceedings, no argument has been made on the issue of doubting this payment. As to the payment of the remainder of the amount due, the learned Single Judge relies on the plaintiff's presence being recorded at the Sub-Registrar's office (which, again, has not been contested) for execution and registration of the sale deed, as also his statement in cross-examination that he had obtained pay orders from the Syndicate Bank and the State Bank of Bikaner and Jaipur for the balance sum. In fact, the testimonies of DW-2 and DW-3, officials from these banks, confirm that banker's cheques dated 14.09.2004, for ₹1,00,000/-, ₹1,70,000/- and ₹6,00,000/- (from the State Bank), and a pay order for ₹2,00,000/- and two other drafts for ₹1,30,000/- each, were in fact prepared, and later cancelled given the extension of time by mutual agreement. As the learned Single Judge rightly notes, all these were in favour of the defendant, and indeed, the issuance of these pay orders/banker's cheques, have not been contradicted by the defendant. Accordingly, the finding of the learned Single Judge that the plaintiff was ready and willing to perform the contract, being physically present in the Sub-Registrar's office on the stipulated day, and having

gathered the necessary money, is appropriate and not liable to be interfered with.

9. On the third issue of whether the Court ought to exercise its discretion to grant specific performance in this case, rather than award damages, given the inequitable consequences that would result, the learned Single Judge considered the equity to be in favour of the plaintiff. While admittedly the plaintiff approached the Court almost one year after the breach in question, this period cannot by itself disentitle the relief of specific performance – rather, given the relationship between the two parties in question, the plaintiff's wait for this period before filing the suit immediately on discovering that the defendant was attempting to sell the property to a third party on 01.10.2005, is understandable. As the Allahabad High Court recognized in *Brij Ballab Das and Ors.* v. *Mahabir Prasad*, AIR 1924 All 529, persons entering into contracts for the sale of immovable property cannot be allowed to escape from them to suit their own convenience by alleging that the person in whose favour the contract was made can be compensated in money. Thus, the explanation to Section 10, Specific Relief Act, 1963 recognizes that "*[u]nless and until the contrary is proved, the court shall presume – (i) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money;………...*" Indeed, neither argument nor evidence has been led on rebutting this statutory presumption. Accordingly, given the finding that the plaintiff was ready and willing to perform the contract, the learned Single Judge's

direction that the agreement is to be specifically enforced is correct. The reliance on *K.S. Vidyanadam* (supra), here, is incorrect, as although specific performance was refused in that case due to the inequitable nature of the relief, the facts lay at the other end of the factual spectrum. As the Court itself noted:

> "*13. In the case before us, it is not mere delay. It is a case of total inaction on the part of the plaintiff for 2 ½ years in clear violation of the term of agreement which required him to pay the balance, purchase the stamp papers and then ask for execution of sale deed within six months. Further, the delay is coupled with substantial rise in prices - according to the defendants, three times - between the date of agreement and the date of suit notice. The delay has brought about a situation where it would be inequitable to give the relief of specific performance to the plaintiff.*
>
> *XXXXXX XXXXXX XXXXXX*"

Quite to the contrary, in this case, the plaintiff was ready and willing to perform the contract, and did not engage in such substantial delay so as to render specific performance oppressive on the seller, the defendant. Similarly, in *Kandappan (supra)*, the fact situation, and the Court's *dictum*, involved delay and non-performance on the part of the purchaser, which, however, is not the case here. The Court noted there:

> "*25. The reality arising from this economic change cannot continue to be ignored in deciding cases relating to specific performance. The steep increase in prices is a circumstance which makes it inequitable to grant the relief of specific performance where the purchaser does not take steps to complete the sale within the agreed*

period, and the vendor has not been responsible for any delay or non-performance. A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to cover his delays, laches, breaches and 'non-readiness'………………………."

10. Finally, learned counsel's argument that the defendant did not possess title to the suit property and thus, could not execute a sale deed is incorrect, given the admission by the defendant in cross-examination that a simple mutation would have triggered his ability to sale, without engaging any questions of absence of ownership of the property.

11. For these reasons, the Court finds that there is no infirmity with the order of the learned Single Judge. The judgment and decree of the learned Single Judge is consequently affirmed. The appeal and pending application are, therefore, dismissed.

S. RAVINDRA BHAT
(JUDGE)

NAJMI WAZIRI
(JUDGE)

NOVEMBER 25, 2013