

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

% Judgment delivered on: 09.07.2015

+ **RFA 554/2014**

RAJESH KUMAR & ANR.Appellants

Versus

HARISH KATARIA & ORS.Respondents

ADVOCATES WHO APPEARED IN THIS CASE:

For the Appellant : Mr Sanjeev Sindhvani, Sr. Advocate with Mr Vijay Zaveri,
Adv.

For the Respondents : Mr Chaitanya Siddarth, Adv. for R-2.

CORAM :-

HON'BLE MR JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J

1. This is an appeal directed against the judgement and decree dated 14.08.2014, passed by learned Additional District Judge, Tis Hazari (Central), Delhi.

1.1 The appellants herein were the original plaintiffs in the suit filed by them for specific performance and permanent injunction.

1.2 By virtue of the impugned judgement, the learned ADJ has dismissed the suit filed by the appellants.

2. In order to appreciate the challenge laid by the appellants, the following broad facts need to be noticed.

2.1 Respondent no.1/ original defendant no.1 had entered into an agreement to sell dated 27.07.1988 (hereafter referred to as the 1988 agreement) with, one, Dayal Singh, via his constituted attorney and daughter

Ms. Usha Devi Swami. The 1988 agreement was, admittedly, registered, and pertained to an immovable property, described as : D-207, Defence Colony, New Delhi (hereafter referred to as the suit property).

2.2 Under the 1988 agreement respondent no.1, had agreed to purchase the suit property for a total sum of Rs. 9 lacs. At the stage of execution of the 1988 agreement, respondent no.1, paid a sum of Rs. 3.11 lacs to Dayal Singh via his constituted attorney ie. Ms Usha Devi Swami. The balance consideration, in the sum of Rs. 5.89 lacs was required to be paid, as per respondent no.1, after the necessary permission for sale was obtained from the L&DO i.e. respondent no.4, and the Income Tax authorities, under the then subsisting provision of law.

2.3 It appears that respondent no.1 assigned his rights in the 1988 agreement in favour of the appellants herein vide registered assignment deed dated 17.11.1995 (hereafter referred to as the assignment deed).

2.4 The total consideration crystallized under the assignment deed, was a sum of Rs. 18.89 lacs. Out of the total consideration, a sum of Rs. 4 lacs was paid at the stage of execution of the assignment deed, while the sum of Rs. 9 lacs was agreed to be paid at the stage when, the sale deed was registered and requisite statutory approvals were obtained qua the suit property. In so far as the balance sum of Rs. 5.89 lacs was concerned, the appellants were required to pay the said sum to the owner of the suit property.

2.5 It may be noted that by the time the assignment deed was executed, Dayal Singh had expired. Dayal Singh died on 10.10.1988. It is the stand of the appellants that Dayal Singh had executed a Will dated 09.05.1974, whereby the suit property was bequeathed in favour of Ms Usha Devi

Swami and, one, Mr Ravinder Kumar. Since, Mr Ravinder Kumar, died on 12.05.1977, that is, pre-deceased Dayal Singh, the suit property devolved on Ms Usha Devi Swami. The suit property, in fact, was mutated by respondent no.4, in favour of Usha Devi Swami, on 16.07.1990.

2.6 Ms Usha Devi Swami though, passed away on 28.02.1994, leaving behind her only legal heir, that is, her son, who is arrayed in the present proceedings as respondent no.2 (i.e., original defendant no.2).

2.7 Pertinently, just prior to the institution of the suit in 1997, the appellants had paid a sum of Rs. 5 lacs via five (5) bank drafts in the sum of Rs. 1 lac each, which were dated: 11.04.1996, 25.07.1996, 14.08.1996, 25.10.1996 and 05.11.1996.

2.8 The appellants thus, approached the court with an action pivoted on the plea that while they were ready and willing to perform their part of the obligation, defendant no.1/respondent no.1 had prevented the consummation of the transaction reflected in the 1988 agreement.

3. It is in these circumstances, that the pleadings got concluded and issues were struck. I may only note that the appellants sought amendment of the plaint which was permitted by the trial court vide order dated 04.09.2000. The trial court based on the pleadings filed and material placed on record, framed the following issues in the matter.

“....i. Whether the plaintiff has no locus standi to file the suit? (OPD2)

ii. Whether the suit is time barred? (OPD2)

iii. Whether the defendant no.1 is discharged due to deemed cancellation of deed of assignment dated 17-11-95 because of non-performance of its terms and conditions by plaintiff? (OPD1)

iv. Whether the plaintiff was always willing and ready to perform his part of assignment deed? (OPP)

- v. Whether the plaintiff is entitled for a decree of specific performance or alternative reliefs as claimed in relief para no. (d) and (e) of plaint? (OPP)
- vi. Whether the plaintiff is entitled for a decree of injunction as prayed in relief para no. (a) to (c) as prayed for? (OPP)
- vii. Relief....”

3.1 After allowing parties to lead evidence, the trial court proceeded to pass the impugned judgement. In the impugned judgement the trial court found issue no. (i) to (iii) in favour of the appellant, while issue no. (iv) was decided against the appellants. Since, issue no. (iv) was decided against the appellants, the remaining issues [i.e. issue no. (v) to (vii)], which were in a sense, dependent upon issue no. (iv), were also decided against the appellants.

SUBMISSIONS OF COUNSELS

4. Based on the aforesaid facts, arguments were addressed on behalf of the appellants by Mr Sindhwani, learned senior counsel, while on behalf of respondent no.2 arguments were advanced by Mr Siddharth. Pertinently, though the remaining respondents were served, none of them were represented before me, at the hearing held today. I may only note that in so far as respondent no.3 is concerned, he was deleted from the array of parties vide order dated 19.01.2015. In the very same order, it stands reflected that respondents 1, 2 and 4, were either present in person or were represented by their advocates. It appears, as of today, only respondent no.2 is contesting the proceedings.

4.1 Mr Sindhwani, broadly, argued that the impugned judgement is erroneous for the reason that the trial court wrongly came to the conclusion that the appellants were not ready and willing to perform their part of the

obligation. Learned counsel submitted that this conclusion was reached without appreciating the fact that the appellants' obligation to pay the balance consideration of Rs.4 lacs to respondent no.1, would get triggered only upon the necessary approvals being obtained from the L&DO i.e. respondent no.4 and the income tax authorities; as was the requirement at the relevant point in time. Furthermore, stress was laid on the fact that respondent no.2 was to receive the balance consideration only at the time of registration of the sale deed. In support of these contentions reliance was placed by the learned counsel on the following clauses i.e. clause 5, 6 and 1(b) of the 1988 agreement, read with the recitals, as well as, clause 8 and 9 of the assignment deed.

4.2 It was also the contention of Mr Sindhwani, that in order of priority the appellants' obligation to pay the balance sum of Rs. 4 lacs to respondent no.1 i.e. the assignor and Rs. 5.89 lacs to respondent no.2 i.e. the owner, would arise only after they had discharged their obligations to obtain the necessary statutory permissions. For this purpose, learned counsel relied upon Section 52 of the Indian Contract Act, 1872 and the judgement of the Supreme Court in the case of : *Nathulal vs Phoolchand, 1969 (3) SCC 120*.

5. On the other hand, Mr Siddharth, learned counsel for respondent no.2 relied upon the impugned judgement and contended that clearly the appellants were neither ready nor willing to perform their part of the obligation as, despite the fact that the assignment deed had been executed as far back as in November, 1995, the balance consideration, both to respondent no.2 and respondent no.1, was not paid till the institution of the suit in February, 1997; a position which continues to obtain till today.

5.1 Mr Siddharth further contended that, in view of a huge lapse in time, in any event, specific performance of the 1988 agreement could not have been directed and, therefore, the suit was rightly dismissed by the trial court.

REASONS

6. I have heard the learned counsels for the parties and perused the record. What has emerged from the record (and these are facts which are not in dispute) is as follows:

- (i) The 1988 agreement was executed between respondent no.1 and Mr Dayal Singh via his daughter and constituted attorney, Ms Usha Devi Swami.
- (ii) Both Dayal Singh and Ms Usha Devi Swami have expired. Respondent no.2, evidently, is the only legal heir of Ms Usha Devi Swami.
- (iii) Under the 1988 agreement, qua the suit property, respondent no.1 was required to pay the owner a total consideration of Rs. 9 lacs, out of which Rs. 3.11 lacs was paid at the stage of execution of the 1988 agreement. The balance consideration was to be paid to Mr Dayal Singh (and now to respondent no.2), at the time of registration of the sale deed. This aspect comes through upon perusal of clause 1(b) of the 1988 agreement.
- (iv) The sale of the suit property was dependent on Mr Dayal Singh (and now respondent no.2) obtaining the necessary approval from the L&DO i.e. respondent no.4. At the relevant time approval of the Income Tax authorities was also required under the provisions of Section 230A-(1) of the Income Tax Act, 1961. Obligations undertaken by late Mr Dayal Singh are reflected in clause 5¹ and 6² of the 1988 agreement.

¹ 5. That the first party shall apply and obtain the permission to sell the said property from the L&DO, Nirman Bhawan, N. Delhi, or any other concerned authority in favour of the second party or the nominee.

(v) Upon obtaining the necessary permission, late Mr Dayal Singh was required to intimate respondent no.1, by dispatching a notice via registered A.D, that statutory approvals had been obtained whereupon, respondent no.1, was obliged to pay the balance consideration within a period of thirty (30) days. This aspect is discernable upon perusal of clause 7³ of the 1988 agreement.

(vi) Admittedly, no approval of the L&DO i.e. respondent no.4, qua sale of the suit property has been obtained till today.

(vii) The assignment deed envisaged, upon payment of a total consideration of Rs. 13 lacs to respondent no.1, in addition to payment of a sum of Rs. 5.89 lacs to the owner, the rights enuring in respondent no.1 under the 1988 agreement would stand transferred in favour of the appellants.

(viii) Admittedly, out of the Rs. 13 lacs, respondent no.1 has received a sum of Rs. 9 lacs, pursuant to execution of the assignment deed. The balance sum payable to respondent no.1 under the assignment deed is Rs. 4 lacs, which is apart from Rs. 5.89 lacs which is to be paid by the appellants to respondent no.2; the representative of the owner.

7. Therefore, having regard to the aforesaid facts, the issue which required to be addressed is : whether the trial court was right in reaching a conclusion

² 6. That the first party shall apply and obtain the Income-tax Clearance Certificate in Form 34-A, under the provisions of Section 230-A(1), of the Income-Tax Act, 1961, to sell the said property in favour of the second party or the nominee/s.

³ 7. That whenever the sale-permission ITC or any other concerned formality for registration are completed, the first party shall inform the second party by regd. A.D. The second party shall pay the balance amount within thirty days from the receipt of the notice, to the first party and will get the sale-deed executed and registered. In case the first party fails to execute and register the sale-deed, in favour of the second party or the nominee/s, then the second party or the nominee/s shall be fully competent to get the sale-deed, executed and registered, through the Court of law by filing a suit for specific performance at the cost and expenses of the first party.

vis-à-vis issue no. (iv) that the appellants were neither ready nor willing to perform the obligation cast on them? According to me, conclusion reached by the trial court is erroneous for two reasons. First, the assignment deed is inextricably linked to the 1988 agreement. The appellants, upon execution of the assignment deed, acquired all rights and obligations which enured in favour of respondent no.1 under the 1988 agreement.

7.1 Second, the 1988 agreement clearly postulated that the owner (now represented by respondent no.2) will get the balance consideration of Rs. 5.89 lacs at the time of registration of the sale deed and that eventuality would occur only upon the owner (i.e. respondent no.2) obtaining the approval of the L&DO/ respondent no.4. As a matter of fact, the owner was required to issue a notice to that effect to respondent no.1, whereupon his obligation to pay the balance consideration was to arise and, that sum, was required to be paid within thirty (30) days of receipt of such a notice.

7.2 As indicated above, no such eventuality arose, and consequently, no notice was issued by the owner i.e. respondent no.2.

7.3 The trial court, however, has overlooked this aspect of the matter and focused its attention on the fact that the appellants have not paid respondent no.1 the balance sum of Rs.4 lacs under the assignment deed. This observation of the trial court, in my view, obfuscates the fact that the appellants' had secured rights under the assignment deed so that they could effectively step into the shoes of respondent no.1, and thereby, secure the right, title and interest in the suit property. Therefore, the trial court's conclusion that the appellants were not ready and willing to perform their part of the obligation is, in my view, flawed.

8. Accordingly, the finding reached by the trial court in respect of issue no. (iv) is reversed. The necessary effect of the same will be that the trial court's finding vis-à-vis issue no. (v) and (vi) would also have to be reversed. Issue no. (vii), essentially, deals with relief which is to be finally accorded in the matter.

9. Before I conclude, I must note that having regard to the huge lapse of time between the execution of the 1988 agreement and now, the trial court, if persuaded to grant relief to the appellants in their suit, would have regard to this aspect of the matter as well. In other words, the trial court, as an alternative to specific performance, has options to grant of other reliefs as well. However, this is an aspect which falls squarely in the domain of the trial court, which I am sure it will consider.

10. In these circumstances, the impugned judgement is set aside vis-à-vis issue no. (iv), (v), (vi) & (vii). The matter is remanded to the trial court for fresh adjudication qua the said issues.

10.1 For this purpose, parties and their counsel shall remain present in the trial court on 31.07.2015.

11. Parties shall, however, bear their own cost. The appeal is disposed of in the terms indicated above.

RAJIV SHAKDHER, J

JULY 09, 2015

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