

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

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Judgment Reserved on: 29th July, 2015
Judgment Delivered on: 11th August, 2015

+ FAO No. 407/2015

ANIL SHANDILYA

.....Appellant

Versus

B K GUPTA (HUF)

...Respondent

Advocates who appeared in this case:

For the Appellant: Mr Anuj Kumar Ranjan, Advocate

For the Respondent: None.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J

FAO No. 407/2015

1. The present appeal has been filed by the appellant (plaintiff in the suit) impugning orders dated 10.02.2015 and 22.04.2015. By order dated 10.02.2015, the application of the appellant under Order 9 Rule 4 for restoration of the suit has been dismissed and by order dated 22.04.2015 the application seeking modification of order dated 10.02.2015 has also been dismissed. The said applications have been dismissed on the ground that the appellant was not ready and willing to perform his part of the contract and as

such there was no ground made out to recall the order dismissing the suit on the account of non – prosecution.

2. On 04.07.2012, the plaintiff (appellant herein) filed a suit for specific performance of agreement dated 24.12.2011 alleging that the plaintiff was ready and willing to perform his part of the contract and the defendant had not come forward to register the sale deed on being offered the balance sale consideration. The defendant entered appearance in the suit and submitted on 26.07.2012, that on payment of the balance sale consideration of Rs. 51,50,000/-, the defendant was ready and willing to execute the sale deed in favour of the plaintiff. On the said contention of the defendant the Court directed the plaintiff to bring a pay order in favour of the defendant in the sum of Rs. 51,50,000/- by 01.08.2012.

3. As per the appellant (plaintiff) on 01.08.2012 the appellant took an adjournment on the ground that the counsel was not available. The case was adjourned for 07.08.2012 on which date the parties had submitted that a settlement was not possible. Accordingly, the defendant was directed to file the written statement and plaintiff was directed to furnish a bank guarantee in the sum of Rs. 51,50,000/- in favour of the Registrar General of this Court and subject to furnishing the bank guarantee, the defendant was restrained from creating any third party interest in the suit property and was further restrained from making any addition/alteration without the prior permission of the court.

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4. The record reveals that the above orders were not complied with. Neither did the plaintiff bring the amount of Rs. 51,50,000/- by way of a pay order favouring the defendant for execution of the sale deed nor did the plaintiff furnishing a bank guarantee favouring the Registrar General which was the pre condition for the grant of the interim order.

5. On 14.02.2013, the learned single judge was constrained to dismiss the suit for non prosecution by recording that the plaintiff had failed to bring the pay order in favour of the defendant and even failed to furnish the bank guarantee. None had appeared on behalf of the plaintiff on the said date. Accordingly, the suit was dismissed for non prosecution.

6. The plaintiff thereafter filed an application under Order 9 Rule 4 CPC. The application was filed on 24.11.2014. The said application was filed after approximately 21 months of the suit being dismissed for non prosecution. In the application the plaintiff has submitted that the Court had given him various opportunities to pay the balance sale consideration or furnish a bank guarantee which the plaintiff could not arrange as the plaintiff had paid substantial amount for execution of the sale deed of another property.

7. It is contended that the plaintiff also had an overdraft facility from a bank against fixed deposits but the said money was spent in execution of the sale deed of another property. It is further contended that on 21.11.2014 the plaintiff had mortgaged his office and got Rs. 15 lacs which he was ready to pay to the defendant. The plaintiff in the said application has contended that

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the plaintiff would thereafter pay the balance sum of Rs. 36,50,000/- by paying Rs. 18 lacs on or before 31.03.2015 and the remaining Rs. 18,50,000/- on or before 30.06.2015.

8. On 10.02.2015 the application of the plaintiff for restoration of the suit was dismissed by the Court. By the impugned order, the court has recorded that the plaintiff has himself in the application admitted that he could not arrange the finances for making the payment to the defendant for execution of the sale deed as he had paid a substantial amount for execution of sale deed of another property. The court held that the excuse given by the plaintiff for not complying with the earlier order passed by the court, besides being lame, is not even reflected in the application filed by him. Even before the court on 10.02.2015, the plaintiff prayed for further time upto 30.06.2015 for making the payment of the balance sale consideration or for deposit of the bank guarantee. The learned Single Judge was of the view that offer given by the plaintiff could not be considered to be readiness and willingness on his part to deposit the sale consideration. No ground was made out for recall of the said order and the application was accordingly dismissed.

9. After dismissal of the said application by the order dated 10.02.2015 the plaintiff filed an application for modification of the said order contending that on 10.02.2015 the court has asked the plaintiff as to whether he was ready to make the payment of the balance sale consideration and the plaintiff had asked time till 30.06.2015 which was not considered by the

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court, hence the application was dismissed. The plaintiff further contends in the application that the plaintiff had made the arrangement of balance sale consideration amount of Rs. 51,50,000/- and was ready and willing to pay the same on or before the date of registration of the sale deed.

10. By the order dated 22.04.2015, the application for modification has been dismissed by the court recording the contention of the plaintiff that the plaintiff had made arrangement for the balance sale consideration and was ready and willing to pay to the defendant on or before the date of the registration of the sale deed the balance amount. The said application has been dismissed by the court holding that one cannot be ready and willing to pay when able. The mandate of Section 16 (c) of Specific Relief Act, 1963 is that the plaintiff should be ready and willing at all times to pay in accordance with the terms of the agreement to sell. The learned Single Judge referring to the orders dated 07.08.2012, 14.02.2013 and 10.02.2015 held that it is apparent that the plaintiff was not ready and willing to perform his obligation under the agreement to sell on the prior dates. Consequently, the application for modification has been dismissed. The learned Single Judge, however, granted liberty to the plaintiff to file a suit for recovery of the amount in accordance with law and the rights and contentions of all the parties have been left open.

11. Before us also similar contentions have been made by the learned counsel for the appellant that the appellant has now made the arrangement to make the payment of the balance sale consideration. We are unable to accept

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the contentions of the counsel for the appellant, first of all, on account of the fact that the appellant was given several opportunities to pay the balance sale consideration to the respondent and, secondly, the respondent/defendant had on the very first instance contended before the court that the defendant was ready to execute the sale deed on payment of the balance sale consideration. The plaintiff who had filed the suit for specific performance had to show that the plaintiff was ready and willing to perform his part of the contract not only at the time when the agreement was entered into but also throughout.

12. The plaintiff in the present case admittedly did not have the funds to make the balance payment to the defendant. Several opportunities were granted to the plaintiff to pay the balance sale consideration or in the alternative to furnish the bank guarantee. The plaintiff did not avail of either of the options. Opportunity was granted on 26.07.2012 to pay the amount, when the defendant himself had said that he was ready and willing to execute the sale deed on payment of the balance sale consideration.. It is only in March, 2015 that the plaintiff has, for the first time, come before the court to contend that the plaintiff has made the arrangement for the funds and was ready to pay the same to the defendant. Even then time was sought till 30.06.2015 to complete the payment.

13. The plaintiff has failed to pay the said amount for approximately three years despite the defendant himself coming forward at the first opportune moment contending that he was ready to execute the sale deed.

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14. In our view the plaintiff has not brought forward any facts to show that the orders passed by the learned Single Judge, in dismissing the suit for non prosecution, the application under Order 9 Rule 4 CPC and the application seeking modification, suffer from any infirmity. Looked at from any angle, there is no infirmity in the orders impugned by the plaintiff. The plaintiff admittedly did not have the funds to pay to the defendant for execution of the sale deed. The plaintiff was never ready and willing to perform his part of the contract. It is only when the suit has been dismissed that the plaintiff is coming forward with the contention that he has made arrangement for making the payment. We find no merit in the appeal. The appeal is accordingly dismissed.

CM No. 13275/2015 (condonation of delay)

The appeal has been filed with a delay of 109 days in impugning the order dated 10.02.2015. The only contention raised is that the appellant had filed an application seeking modification of order dated 10.02.2015 and as such was awaiting the decision on the said application. The application for modification was not the appropriate remedy against the dismissal of the application under Order 9 Rule 4 of the CPC. We do not find that there is sufficient cause for the delay in the filing of the appeal against the order dated 10.02.2015.

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In view of the above, we are not inclined to condone the delay. The application for condonation of delay is dismissed despite the fact that we have considered the appeal on merits and also found no merit in the same.

SANJEEV SACHDEVA, J.

AUGUST 11, 2015
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BADAR DURREZ AHMED, J.

