

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

+ **CS(OS) 2238/2015**

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31st July, 2015

SH. PARVEEN KHATRI

..... Plaintiff

Through: None.

versus

SMT. RANI

..... Defendant

Through: None.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

CS(OS) 2238/2015 & I.A. No.15282/2015 (Stay)

1. This suit was called out for the first time in its normal turn in the supplementary list. Since no one was present for the plaintiff, matter was passed over. Even on the second call no one appears for the plaintiff.

2. The subject suit is a suit for specific performance of an Agreement to Sell dated 28.02.2015. There is one defendant in the suit Smt. Rani. The suit plaintiff admits that the Agreement to Sell dated 28.02.2015 was to be entered into not only with the sole defendant in the suit Smt. Rani but also with another person Smt. Kamlesh. The suit property agreed to be sold was a
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land measuring 03 Bighas 01 Biswa out of Khasra no.15/21/2 Min (1-03), 2/2 Min (1-18), situated at Main Safiabab Road, Opposite Joni Farm House and Swami Vivekanand School, Shiv Mandir Colony, Narela, Delhi-110040.

3. I have gone through the subject Agreement to Sell dated 28.02.2015 and the same shows that the plaintiff was to enter into the Agreement to Sell not only with the existing sole defendant Smt. Rani but also with Smt. Kamlesh w/o Sh. Naresh. The Agreement to Sell does not show that the same could be severed, in that if only one party has signed the Agreement to Sell viz the existing defendant Smt. Rani, then her share will be sold separately than that of Smt. Kamlesh. Agreement is a joint Agreement to Sell whereby the two proposed sellers have agreed to sell the suit property. Admittedly, as per the suit plaint, Smt. Kamlesh never signed the Agreement to Sell. In fact, it is for this reason that the plaintiff is said to have continued to pursue Smt. Kamlesh to sign the Agreement to Sell but Smt. Kamlesh did not sign the Agreement to Sell.

4. In view of the aforesaid facts, in my opinion, there is in fact no Agreement to Sell in the eyes of law having *consensus ad litem* inasmuch as only one of the proposed sellers has signed the Agreement to Sell and not both the proposed sellers. Also, as stated above, it is not written in the

Agreement to Sell that the agreement will come into force even if only one party signs the same. It is not stated in the Agreement to Sell that if the second party, Smt. Kamlesh does not sign the Agreement to Sell, then the Agreement to Sell will operate for the half share of Smt. Rani, the existing sole defendant. Clearly therefore there is no contract between the parties i.e there is no Agreement to Sell enforceable by law because the Agreement to Sell as a whole which was to be signed by the two proposed sellers was never entered into because one of the proposed sellers refused to sign the Agreement to Sell. As such, there is no final and concluded Agreement to Sell capable of being enforced by law as per Section 2(h) of the Indian Contract Act, 1872.

5. There is another reason why the suit cannot be entertained and which is because of Section 12(1) of the Specific Relief Act, 1963 (hereinafter referred to as 'the Act'). Section 12 of the Act reads as under:-

“12. Specific performance of part of contract—(1) Except as otherwise hereinafter provided in this section the court shall not direct the specific performance of a part of a contract.

(2) Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed by only a small proportion to the whole in value and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

(3) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either-

(a) forms a considerable part of the whole, though admitting of compensation in money; or

(b) does not admit of compensation in money,

he is not entitled to obtain a decree for specific performance; but the court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the other party—

(i) in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and a case falling under clause (b), pays or had paid the consideration for the whole of the contract without any abatement; and

(ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

(4) When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part.

Explanation.-For the purposes of this section, a party to a contract shall be deemed to be unable to perform the whole of his part of it if a portion of its subject matter existing at the date of the contract has ceased to exist at the time of its performance.”

6. The provision of Section 12(1) of the Act states that there cannot be specific performance of a part of a contract unless the case is covered under different sub-Sections of Section 12 of the Act. In the present case with respect to even part performance the sub-Section which will be applicable

will be Section 12(3)(b)(ii) of the Act and which requires a positive statement to be made on behalf of the plaintiff seeking specific performance that the plaintiff relinquishes all claims of the performance of the remaining part of the contract and all rights to compensation either for the deficiency or for the loss or damages sustained by him. This statement is not found in the existing suit plaint, and which is another reason why the suit is not maintainable because of Section 12 of the Act.

7. In view of the above, there is no Agreement to Sell enforceable by law for the reasons as stated above. Even assuming there is an Agreement to Sell enforceable under the law, the provision of Section 12(1) of the Act bars the filing of the present suit without there being existing the necessary averments required to be made by the plaintiff under Section 12(3)(b)(ii) of the Act.

8. The suit is therefore dismissed in view of the above discussion. All pending applications also stand dismissed. Liberty is however given to the plaintiff to sue for the recovery of the amount paid under the subject Agreement to Sell.

JULY 31, 2015

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VALMIKI J. MEHTA, J.