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

Date of Decision : 9th May, 2016.

+ **FAO(OS) 77/2016**

RAMESH CHANDER ARORA THR KALAM SINGH (SPA)

..... Appellant

Through : **Mr. Vivek Narayan Sharma,**
Advocate.

versus

RAJ KUMAR DHINGRA & ANR

..... Respondents

Through : **None.**

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MR. JUSTICE I.S.MEHTA

GITA MITTAL, J (ORAL)

1. This appeal has been filed assailing an order dated 14th January, 2016, whereby, the IA No. 622/2016 filed by the appellant under Order VII Rule 11 of CPC has been dismissed.

2. The facts on which the appeal is premised are within a narrow compass. The respondents herein filed CS (OS) 896/2012 seeking specific performance of agreement to sell dated 15th June, 2009 *inter alia* on the plea that they had made part payment and were always ready and willing to make payment of the balance sale consideration.

The transaction could not be completed as the appellant/defendant was in breach of the contract.

3. For the sake of convenience, we propose to refer to the parties by their positioning in the suit and shall refer to the appellant as ‘defendant’ while the respondents shall be referred to as the ‘plaintiffs’.

4. In his written statement, the defendant set up his defence that it was the plaintiffs, who were in breach of the contract for the reason that they did not have the funds to perform the contract within the stipulated period of 90 days as per the terms of the agreement.

5. On the pleadings of the parties, on 7th November, 2014, the following issues were framed:-

“(i) Whether the plaintiffs are entitled for Specific Performance of Agreement to Sell dated 15.06.2009 regarding the suit premises? OPP

(ii) Whether the plaintiffs were ready and willing or are ready and willing to perform their part of the contract/agreement? OPP

(iii) Whether the defendant is entitled to forfeit 20 lacs by the plaintiff pursuant to execution of the Agreement to Sell dated 15.06.2009? OPD

(iv) Whether the plaintiff (in the alternative) is entitled for the decree of Rs.40 lacs ? OPP

(v) Whether the plaintiff is entitled for interest, if so, at what rate and for what period? OPP

(vi) Whether the suit is barred by delay and laches? OPD

(vii) Whether the plaintiffs are entitled for the injunction prayed for? OPP

(viii) Relief.”

6. The suit proceeded to evidence and the PW 1 was examined on 28th July, 2015. However, on request of learned counsel for the defendant, his

cross-examination was deferred. Six months' later, on the next date of hearing i.e. on 8th January, 2016, this witness was tendered for cross-examination. However, a new counsel appeared for the defendant and stated that he would not cross-examine the witness for the reason that he had filed an application under Order VII Rule 11 of CPC. The Joint Registrar, before whom, the case was listed, consequently adjourned the case to 21st March, 2016 for cross-examination of the PW1.

7. This application filed by the appellant under Order VII Rule 11 of the CPC came to be listed before the learned Single Judge on 14th January, 2016 and after a detailed consideration, the same was dismissed on that date *inter alia* for the following reasons:

- (i) The issues set out above clearly reflect that they were disputed questions of facts which required trial.
- (ii) The parties have to lead evidence to establish as to which of them was actually guilty of breach of the contract. This aspect was clearly encapsulated in the Issue No. 1.
- (iii) The plaintiffs have to establish their readiness and willingness to perform their contract, which aspect would include possession of the necessary funds to do so. This was the subject matter of Issue No. 2.
- (iv) The matter as to whether, the plaintiff were entitled to discretionary relief also necessitated evidence, which was the subject matter of the issue Nos. 3 to 7.
- (v) The well established principles on which the prayer of rejection of the plaint under Order VII Rule 11 of the CPC has to be tested are

well established. Such an application must be examined on a deemed admission of the contents of the plaint on merits, in other words, on demurrer.

(vi) In the instant case, the defendant's application was premised on his defence in the written statement, which is impermissible under Order VII Rule 11 of the CPC. The plea of the defendant that the plaintiffs were not ready, willing or able at all point of time to comply with their contractual obligation was a disputed question of fact; a subject matter of his defence and which required evidence to be led by both the parties.

(vii) The defendant had set up a plea that the plaintiffs must file prima facie evidence/proof in the suit otherwise the plaint has to be rejected under Order VII Rule 11 of the CPC. The learned Single Judge has concluded that this submission was contrary to law and that the merits of the matter could not be gone into nor the defence of the defendants looked at for deciding an application under Order VII Rule 11 of the CPC.

(viii) It is well settled law that the pleadings are different than proof and that the proof comes at the stage of evidence and not at the stage of deciding an application under Order VII Rule 11 of CPC. The reference to "*cause of action*" in Rule 11 of Order VII of the CPC pertains to pleadings and not proof. The learned Single Judge was, therefore, of the view that the submissions on behalf of the defendant were completely mis-conceived.

8. The above position set out by the learned Single Judge is in consonance with the well settled principles of law and cannot be assailed on

any legally tenable grounds. It is noteworthy that the defendant had not permitted the plaintiffs to complete their evidence. On account of adjournment on his behalf, the defendant had caused delay of 8 months in the completion of the evidence of PW1. Therefore, while dismissing the application, cost of Rs.25,000/- was imposed upon the defendant.

9. We are informed by learned counsel for the appellant that though the appellant is shown on the memo of parties as the resident of the Panch Sheel Colony, New Delhi, while actually, he is a non-resident Indian, who is living in United States of America.

10. We are of the view that the present appeal is also hopelessly misconceived and without any factual or legal merit. The appellant has unnecessarily wasted valuable judicial time.

11. For the above reasons, this appeal is dismissed with costs which are quantified at Rs.50,000/- (Rupees Fifty Thousands). The costs shall be paid to the plaintiffs before the learned Single Judge on the next date of hearing.

12. The instant appeal is dismissed on the above terms.

GITA MITTAL
(JUDGE)

I.S.MEHTA
(JUDGE)

MAY 09, 2016

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