

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

+ **RFA No.675/2017 and C.M. No.27160/2017 (stay)**

% **1st August, 2017**

SH. BHULE SINGH Appellant

Through: Mr. R.K. Shukla, Advocate.

versus

SH. RAM SARUP (DECEASED) NOW REPRESENTED BY HIS
LRs SMT. SARWATI & ORS. Respondents

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal under Section 96 of Code of Civil Procedure, 1908 (CPC) is filed by the appellant/plaintiff no.1 impugning the judgment of the Trial Court dated 4.5.2017 whereby the trial court has dismissed the suit for specific performance as also for recovery of Rs.10 lacs being double the amount of earnest money of Rs.5 lacs which is said to have been paid under the agreement to sell.

2. The facts of the case are that the appellant/plaintiff no.1 pleaded that he along with the respondent no.2/plaintiff no.2 entered

into an agreement to sell on 19.7.1999 with respondents/defendant for purchase of 1/3rd share of the respondents/defendant in 2400 sq. yds. forming part of Killa No.17, 24, 25 of Rectangle No. 40 situated in Village Karawal Nagar, Delhi.

3. I may note that the defendant has since died *pendente lite* and is represented by his legal heirs and who are the respondents in this appeal. Reference therefore in this judgment to the respondents will, depending on context, mean reference either to the original defendant or his legal heirs who are now the respondent nos. 1(i) to 1(vi). Also it is required to be noted that there were two plaintiffs in the suit. Plaintiff no.1 is the appellant in this appeal. Plaintiff no.2 is the respondent no.2 and obviously since he has not filed this appeal, he/respondent no.2/plaintiff no.2 is not challenging the impugned judgment.

4. The plaintiffs in the suit claimed to have paid a sum of Rs.5 lacs as earnest money under the agreement to sell out of the sale consideration of Rs.23,04,000/-. The plaintiffs pleaded that they were misled by the defendant that there was a stay order and therefore they did not approach the defendant for executing the sale deed. The

plaintiffs later came to know that there was no stay order and therefore a legal notice dated 1.12.2004 was sent and thereafter the subject suit was filed seeking specific performance or in the alternative for return of Rs.10 lacs being double of the earnest money of Rs.5 lacs.

5. The respondents/defendant as per his written statement completely denied entering into the agreement to sell or receiving of the amount of Rs.5 lacs. It was pleaded by the respondents/defendant that he was aged 84 years in the year 1999 when the agreement to sell was entered into and he was taken by the plaintiffs to the court of SDM for standing as a surety where his thumb impressions were taken on some papers. Respondents/defendant besides being of the age of 84 years was admittedly a completely illiterate person. Suit was accordingly prayed to be dismissed.

6. After pleadings were complete, the trial court framed the following issues:-

“1. Whether the plaintiff is entitled for a decree of specific performance of agreement to sell dated 19th July, 1999 in respect of the land measuring 2400 sq. yards approximately as detailed in the plaint? OPP

2. Whether the plaintiff has always been ready and willing to perform his part of agreement? OPP

3. Whether the plaintiff is entitled for recovery of Rs.10.00 lakhs in the alternative in case the plaintiff is not entitled for specific performance of agreement to sell dated 19th July, 1999? OPP

4. Relief.”

7. All the issues were taken together for discussion by the trial court. Trial court has arrived at a finding that the agreement to sell itself is incapable of specific performance for the reason that the respondents/defendant was only 1/3rd co-sharer of the total land and no partition was proved to have taken place between the respondents/defendant and other co-sharers for the respondents/defendant to be the owner of the specific area of 2400 sq. yds. out of the total larger area of the land. To the aforesaid findings of the trial court, I would like to add that agreement to sell Ex.PW1/1 talks of the appellant/plaintiff no.1 taking over possession, and obviously since no partition had taken place there cannot be handing over of possession of any specific portion of a joint property on the ground that respondents/defendant was the owner of that specific plot of 2400 sq. yds. Trial court has also held that PW-3 who was the attesting witness of the agreement completely denied the contents of his affidavit by way of evidence and therefore evidence of PW-3 cannot help the plaintiffs. Trial court has also held that it is established

on record that the respondents/defendant was 84 years of age in the year 1999 when the alleged agreement to sell was entered into and he was admittedly an illiterate person. Trial court further held that actually as per the revenue record Ex.PW1/6 issued on 21.6.1999, the suit property is shown to have been already vested with the Gaon Sabha w.e.f 25.1.1988 indicating that no agreement to sell could have been entered into with respect to the suit land of which the respondents/defendant was not the owner. Trial court has further held that the plaintiffs failed to prove the amount of Rs.5 lacs was paid to the respondents/defendant under the agreement to sell and which amount was admittedly paid in 'cash'. Trial court held that though the PW-1 in his statement said that he sold the two plots and received Rs.1.60 lacs and Rs.1.62 lacs through drafts and from which amount he paid earnest money of Rs.5 lacs, however, neither the buyers of the plot sold by the plaintiffs were examined nor was the bank account of the appellant/plaintiff no.1 proved and in which money was credited and subsequently withdrawn for being paid as earnest money to the respondents/defendant. Trial court has also held that the plaintiffs failed to prove readiness and willingness because no financial capacity

was shown of the plaintiffs to pay the balance sale consideration from the time of entering into the agreement to sell or till the time of filing of the suit and even thereafter.

8. In my opinion, no fault whatsoever can be found with the findings and conclusions of the trial court. Once the payment under the agreement to sell was found to be in 'cash' to the respondents/defendant who was 84 years of age and an illiterate person, onus was upon the plaintiffs to show that actual amount of Rs.5 lacs was paid under the agreement to sell and mere oral statements cannot be held to be discharge of onus of proof of having paid the amount once the plaintiffs failed to prove any money with them either in their bank accounts or otherwise for paying the amount of Rs.5 lacs as earnest money under the subject agreement to sell Ex.PW1/1 to the respondents/defendant. Further the attesting witness to the agreement to sell himself deposed against the plaintiffs and denied that he was the attesting witness to the agreement to sell and completely denied his affidavit filed. Also, court below has rightly held that the plaintiffs failed to prove readiness and willingness because admittedly there is no financial capacity shown at any point of

time after entering into the agreement to sell till the filing of the suit and even thereafter and proof of which is a *sine qua non* for grant of the relief of specific performance.

9. The relevant observations of the trial court arrived at are as under:-

“DW-1 stated in his examination that no partition had taken place between the co-sharer of the suit property though in his cross examination at one stage, he stated that all the parties were in physical possession of their respective shares. Mere this admission of the defendant DW-1 itself is not sufficient to hold that the joint holding was at any time partitioned and any separate specified portion came to share of deceased defendant. Deceased defendant alone could not sell the entire suit property which was having share of others also. Thus, the agreement Ex. PW1/1 entered into by the defendant alone cannot be enforced. Furthermore, the agreement does not specify which particular portion of the entire suit property belonging to defendant and other three co-owners was sold. The dimensions and boundaries of the subject matter of the agreement is not specified. It is also not clear from the agreement that the portion which was intended to be sold exclusively belong to the deceased defendant only. Since, nothing is disclosed or came on record that any time partition of the property took place between the deceased defendant and other co-sharers so the deceased defendant could not sell any specific portion of the suit property and accordingly, the agreement Ex. PW1/1 cannot be given any effect. The agreement on the other hand is describing that deceased defendant was absolute owner and in possession of the suit property which fact is not correct. The averments made in the agreement and in the plaint regarding title and possession of the defendant are contradictory to each other. The agreement is also not giving any specific boundaries and measurement of each khasra number which was allegedly sold to the plaintiffs. From the cross examination of PW-1 and PW-3, it has also come on record that there were houses built on all sides of the land in question of different sizes. In that situation, giving of specific boundaries and dimensions of the property to be sold was necessary even by describing in detail the adjacent houses to identify the property. In absence of such exact identification of the property, the giving of any effect to the agreement Ex. PW1/1 is not possible because it is not

ascertainable which specific particular portion is to be sold with which specific boundaries.

The defence of the defendant is that his thumb impression was taken on some papers on the pretext of giving surety for plaintiff no. 1 before SDM/SEM and that papers have been converted into an agreement to sell. It means the defendant is admitting his thumb impressions on the agreement but it does not mean that he is also admitting the due execution of the same. The deceased defendant was aged about 84 years in the year 1999 and was admittedly an illiterate person. Plaintiffs have to show that deceased defendant was mentally fit to transfer the property as well as he entered into the agreement after understanding its contents. The heavy burden to prove this fact lies upon the plaintiffs and mere existence of the thumb impression of the defendant on agreement will not be sufficient to hold that the agreement was executed genuinely.

DW-1 failed to give any date, time and month when his father was allegedly taken to the office of SDM/SEM nor any detail of the case is given in which defendant had to give surety. Even deceased defendant did not make any complaint to any authority regarding the forgery of the agreement till the date of filing of the suit by misusing the blank signed document so in this regard the oral evidence led by the plaintiffs have to be taken into consideration.

Plaintiff no.1 in his affidavit of evidence repeated the same averments as stated in the plaint. However, PW-3 who is one of the attesting witness of the agreement totally denied the contents of his affidavit of evidence and even alleged to an extent that his affidavit was not read over and explained to him. Thus, the statement of PW-3 is of no use for the plaintiffs. The statement of the plaintiff PW-1 and of attesting witness PW-2 are contradictory to some extent which makes the job of the court difficult to hold who is speaking correct facts. PW-1 stated in his cross examination that the possession of the suit property was not given to him at any time by the defendant whereas the agreement Ex. PW1/1 says that the vacant possession of the property was given.

The agreement was executed on 19.07.1999. Plaintiffs did not try to make any inquiry in which case the right or title of the defendant was in dispute and when and by which court the alleged stay was granted. It clearly indicates that no proper inquiries were made by the plaintiffs before entering into an agreement and they cannot be treated as a bonafide intended purchasers. Moreover, Ex. PW1/6 is a Khatauni issued on 21.06.1999 pertaining to the suit property which shows that the suit property had already been vested with the Gaon Sabha w.e.f. 25.01.1988. Plaintiffs clearly had the knowledge from this Khatauni even prior to the date of entering into an agreement on 19.07.1999 that suit property did not belong to the defendant being already vested with the Gaon Sabha. They had not made any inquiry from anyone prior to entering into an agreement which case pertaining to

the suit property was going on and when the stay order was obtained because the sale transaction was to be completed after the vacation of the stay. Plaintiffs allegedly had entered into an agreement with the defendant in respect of the property which was not owned by him. This is an additional ground where the specific performance of the agreement can be declined.

Counsel for the plaintiffs relied upon one circular dated 12.12.2007 issued by Urban Development Department to the effect that Gaon Sabha lands where physical possession is with the original owners will be treated as a private land and not government land. On the other hand counsel for the defendant cited case law **Khatri Hotels Pvt. Ltd. Vs Union of India (2011) 9 SCC 126** and argued that without challenging the order of the concerned SDM regarding vesting of the land in the Gaon Sabha, no relief can be granted to the plaintiffs. Even if for the sake of arguments, it is held that the subject matter of the agreement still belonged to the original land owners including the defendant, then also the decree for specific performance cannot be allowed as firstly it is not established that he entered into an agreement after knowing the consequences of the same as well as he was also not competent to transfer whole of the property in which he was only having 1/3rd share. Plaintiffs are, thus, cannot take any benefit of above mentioned circular in these situations.

PW-1 in his statement alleged that he sold two plots situated in Karawal Nagar to one Mr. Anmol and got Rs.1,60,000/- and Rs.1,62,000/- from him through drafts. He also stated that Rs.1.67 Lakhs were contributed by plaintiff no. 2 and accordingly the earnest money of Rs. 5 Lakhs was given to deceased defendant. However, neither Mr. Anmol is examined by the plaintiffs nor any bank account is proved in which the money was credited as given by Mr. Anmol to the plaintiff no. 1 who subsequently withdrawn the same and handed over to the defendant. No detail is given of the plots which were allegedly sold to Sh. Anmol. Even plaintiff no. 2 has not stepped into the witness box to prove that he contributed anything in the earnest money amount. In such circumstances, the making of payment of earnest money of Rs. 5 Lakhs by the plaintiffs to the deceased defendant is also not proved.

In the cross examination PW-1 stated that the payment of the earnest money was made on the date of execution of the agreement Ex. PW1/1 but if the contents of agreement is read, then it shows that the payment was given in advance before the date of agreement. This contradiction is also material one and create doubt about making of any payment of the earnest money.

The agreement Ex. PW1/1 is bearing the thumb impression of the defendant whereas suggestions were given to PW-1 again and again that blank signed papers were misused and the plaintiffs have

taken signatures of the deceased defendant on the pretext of giving surety. However, this contradictory suggestion given will not itself prove the case of the plaintiffs as they have to stand upon their own legs to establish their case.

Plaintiffs have also not brought on record any evidence to show that they were having the balance sale consideration of Rs.18,04,000/- with them to complete the sale transaction either on 18.10.1999 date fixed in the agreement for execution of the documents or at any time till the filing of this suit. Their willingness and readiness to perform their part of agreement becomes highly doubtful in such circumstances. Because of this reason also the relief of specific performance as claimed can be declined.” (underlining added)

10. I do not find any illegality whatsoever in the conclusions and discussion of the trial court that there was no agreement to sell, no amount was received by the respondents/defendant of Rs.5 lacs, there could not take place any agreement to sell by a co-sharer of a specific portion of land (especially without identification of a specific area/plot) although there was no partition which had taken place whereby the respondents/defendant would be owner of the specific portion which was agreed to be sold as per the agreement to sell, and finally that the plaintiffs had failed to prove their financial capacity and hence failed to show readiness and willingness for being entitled to the relief claimed of specific performance.

11. There is no merit in the appeal. Dismissed.

AUGUST 01, 2017/ Ne

VALMIKI J. MEHTA, J