

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

+ **RFA No.107/2017**

% **Reserved on: 9th August, 2018**
Pronounced on: 14th August, 2018

SMT. POONAM (NOW DECEASED) THROUGH LRS

..... Appellants

Through: Mr. K. Singhal, Advocate.

versus

SH. PRADEEP TYAGI

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908(CPC) is filed by the defendants in the suit (legal heirs of the original defendant Smt. Poonam, who was the wife and mother of the present appellants) impugning the Judgment of the Trial Court dated 17.12.2016 by which trial court has decreed the suit for specific performance filed by the respondent/plaintiff with respect to the Agreement to Sell dated 4.12.2007 for the suit property being the first floor of property no.A-3/60, khasra no.76/10, in the

revenue estate of Village Hastal, Delhi abadi now known as Uttam Nagar on a plot of land of 100 sq yds.

2. The facts of the case are that the respondent/plaintiff filed the subject suit for specific performance pleading that the Agreement to Sell dated 4.12.2007 was entered into between the parties with respect to the suit property for a total sale consideration of Rs.12 lacs out of which the respondent/plaintiff paid an amount of Rs.8 lacs to Smt. Poonam. The balance amount of Rs.4 lacs was payable on or before 4.6.2008 when the sale documents were to be executed. On the failure of Smt. Poonam to execute the sale documents, after serving a Legal Notice dated 27.10.2008 the subject suit for specific performance was filed.

3. In the written statement filed by Smt. Poonam, predecessor-in-interest of the appellants/defendants, execution of the Agreement to Sell was denied. It was stated that the respondent/plaintiff was a complete stranger to Smt. Poonam and that Smt. Poonam never signed any Agreement to Sell with the respondent/plaintiff. Documents relied upon by the respondent/plaintiff were pleaded to be fabricated documents. Smt.

Poonam contended that in fact the Agreement to Sell document is a document which is another document executed for 'another person'. The suit was prayed to be dismissed.

4. After pleadings were complete, trial court framed issues and parties led evidence and these aspects are stated in paras 4 and 5 of the impugned judgment and which paras read as under:-

“4. From the pleadings of the parties following issues were framed on 07.04.2010:-

(i) Whether no agreement to sell dated 04.12.2007 was executed between plaintiff and defendant and same is forged and fabricated? OPD

(ii) Whether no amount of Rs.8,00,000/- was received by the defendant? OPD

(iii) Whether the plaintiff has always been ready and willing to perform his part of agreement? OPP

(iv) Whether the plaintiff is entitled to a decree of specific performance and possession of suit property? OPP

(v) Whether plaintiff is entitled to a decree of permanent injunction as prayed for? OPP

(vi) Relief

5. To prove his case plaintiff examined himself as PW-1 who relied upon following documents:-

1. Ex.PW-1/A is agreement to sell dated 04.12.2007.
2. Ex.PW-1/B is receipt dated 04.06.2008.
3. Ex.PW-1/C is legal notice dated 27.10.2008.
4. Ex.PW-1/D is postal receipt.
5. Ex.PW-1/E are two acknowledgement cards.

6. Ex.PW-1/F is plaint of the suit.

Sh. Shyam Sunder husband of deceased defendant was examined as DW-1.”

5. The first issue to be examined by this Court is as to whether or not there was an Agreement to Sell dated 4.12.2007 between the parties. In this regard, the respondent/plaintiff filed and proved on record the Agreement to Sell dated 4.12.2007 as Ex.PW1/A. Smt. Poonam filed her affidavit by way of evidence but she died before her cross-examination could take place, and therefore, affidavit by way of evidence on behalf of the appellants/defendants was filed by the husband of Smt. Poonam, namely Sh. Shyam Sunder, appellant no.1 herein and who was examined as DW-1. Though the affidavit by way of evidence filed by Sh. Shyam Sunder, husband of Smt. Poonam was on the lines as per the written statement, however in the cross-examination Sh. Shyam Sunder he admitted that his signatures do appear as a witness on the Agreement to Sell dated 4.12.2007. Even with respect to signatures of his wife, Sh. Shyam Sunder did not categorically deny that the signatures of Smt. Poonam were appearing on the Agreement to Sell because in the cross-examination Sh. Shyam Sunder stated that signatures appearing on the

Agreement to Sell could be that of his wife Smt. Poonam. These are admissions contained in the cross-examination of Sh. Shyam Sunder on 2.9.2016. Trial court therefore in my opinion has rightly held that the respondent/plaintiff was successful in proving the subject Agreement to Sell and which document the appellant/defendant had illegally contended was a fabricated document.

6. The issue then arises is that whether the respondent/plaintiff is entitled to the relief of specific performance. In this regard it is seen that except making self-serving averments of existence of financial capacity, the respondent/plaintiff has led no credible evidence in the form of documentary evidence. It has been held by the Courts that when the aspect of financial capacity i.e readiness to go ahead with the agreement to sell as required by Section 16(c) of the Specific Relief Act, 1963 is to be proved, then such onus has to be categorically discharged by credible documentary evidence and that self-serving oral averments of existence of financial capacity cannot be taken as discharge of proof under the agreement to sell of having requisite financial capacity. This is so observed by this Court in the case of ***Baldev Behl & Ors. Vs. Bhule & Ors. (2012) 132 DRJ***

247 and the relevant paras of which judgment are 26(i) and 26(ii) and

these paras read as under:-

"26(i). This issue pertains to plaintiff No.1 being ready and willing to perform his part of the agreement to sell. As per Section 16(c) of the Act, every plaintiff in a suit for specific performance must aver and prove that the plaintiff has always been and continues to be ready and willing to perform his part of the contract/agreement to sell. Readiness is financial capacity to go ahead with the agreement to sell and willingness is the intention. I may, at this stage, specifically invite attention to the observations of the Supreme Court in the case of *Balraj Taneja and Anr. (supra)*, and relevant paras have been reproduced above, and which show that in a suit for specific performance even if there is no defence of the defendant, yet, the aspect of readiness and willingness has to be specifically proved by the plaintiff. This is stated by the Supreme Court in para 30 of the said judgment. The question is whether the plaintiff No.1 has proved his readiness and willingness at the relevant time and also continues to be ready and willing to perform his part of the contract/agreement to sell.

(ii) **Readiness to perform the obligations by a proposed purchaser is a very important aspect and it has to be proved by categorical evidence. Mere oral evidence and self-serving depositions cannot be a substitute for categorical evidence on the specific statutory requirement of Section 16(c).** It is not disputed on behalf of the plaintiff No.1 that plaintiff No.1 has not filed any income tax returns or any bank account or proof of any other assets/properties or any other evidence to show the financial capacity of the plaintiff No.1 to pay the balance sale consideration. As per the case of the plaintiff No.1, the balance sale consideration would be approximately Rs.19.5 lacs and there is no evidence worth the name in the record to show the plaintiff No.1's financial capacity for this amount. Of course, while on this argument, I am assuming that there is a certainty as to consideration because in reality there is no certainty as to balance sale consideration inasmuch as the plaintiff No.1 has failed to exercise the option in terms of the agreement to sell as to which area of the balance land less the hutment/portion the plaintiff No.1 seeks specific performance of. Also, as already stated above, this area claimed by the plaintiff No.1 has to be further conditioned by an area of 12 bighas which has already been sold to be defendant No.3 under the sale deed dated 8.4.1988. In any case, I need not state anything further inasmuch as there is not a single piece of paper on record or any credible evidence which proves the financial capacity of the plaintiff No.1. I accordingly hold that plaintiff No.1 has miserably failed to prove his

readiness to perform his obligations under the agreement to sell dated 27.8.1988. In fact, even willingness on the part of the plaintiff No.1 is absent inasmuch as there is no certainty of any option exercised by the plaintiff No.1 as to specific area which the plaintiff No.1 seeks to purchase, and which specific area had necessarily to be clear inasmuch as there is the issue of lessening the area whether on account of hutments or on account of 12 bighas of land already purchased by the defendant No.3 vide sale deed dated 8.4.1988 and hence of clarity as to for what area and for what price the agreement to sell has to go ahead."

7. In my opinion therefore though the Agreement to Sell stands proved between the parties, the respondent/plaintiff has failed to prove his readiness as required by Section 16(c) of the Specific Relief Act, and therefore the suit for specific performance could not have been decreed by the trial court. Trial court has erred in holding that the respondent/plaintiff was ready and willing simply because respondent/plaintiff appeared before the sub-Registrar inasmuch as appearance before the sub-Registrar for seeking execution of the sale deed is not the same thing as proving financial capacity. Supreme Court in the judgment in the case of *N.P. Thirugnanam (Dead) by LRs Vs. Dr. R. Jagan Mohan Rao and Others (1995) 5 SCC 115* has held that readiness has to be proved right from the date of Agreement to Sell till the conclusion of the suit and it is seen that therefore respondent/plaintiff failed as required in law to prove his readiness,

and hence the trial court has erred in decreeing the suit for specific performance.

8. In view of the aforesaid discussion, the impugned judgment of the trial court is required to be and is accordingly set aside, and the suit for specific performance of the respondent/plaintiff is dismissed. However the matter does not stop here because in the opinion of this Court appellants/defendants are liable to return a sum of Rs.8 lacs received by Smt. Poonam under the Agreement to Sell Ex.PW1/A and a money decree being accordingly passed in favour of respondent/plaintiff and against the appellants/defendants.

9. As already discussed above, the Agreement to Sell stands proved as the appellants/defendants are found to be lying that the Agreement To Sell dated 4.12.2007 is a fabricated document (Agreement to sell mentioning the receipt of Rs 8 lacs by the appellant/defendant)inasmuch as signatures of the husband of Smt. Poonam, Sh. Shyam Sunder (appellant no.1) has signed as a witness to the Agreement to Sell with the fact that there is no specific denial by Sh. Shyam Sunder/husband of the signatures of his wife Smt. Poonam on the Agreement to Sell. Once an Agreement to Sell cannot

go through by specific performance of the same, the proposed buyer is entitled to refund of his earnest money or part price paid, and which moneys cannot be forfeited even assuming the buyer is found guilty of breach of contract. This is so held by this Court in the case of ***M.C. Luthra Vs. Ashok Kumar Khanna 2018 (248) DLT 161***. that unless loss being suffered is not pleaded and proved by a seller, the seller cannot appropriate or forfeit the amount received by him under an agreement to sell. I may note that an SLP was filed in the Supreme Court against the judgment of this Court in the case of ***M.C. Luthra (supra)*** and this SLP(C) No.11702/2018 was dismissed by the Supreme Court on 15.5.2018. Therefore I hold that the respondent/plaintiff is entitled to a money decree for a sum of Rs.8 lacs along with interest @ 12% per annum from 4.12.2007, the date of subject Agreement to Sell, and on which date a sum of Rs.8 lacs was received by Smt. Poonam from the respondent/plaintiff as recorded in the subject agreement to sell.

10. Learned counsel for the appellants/defendants argued that Agreement to Sell dated 4.12.2007 is clearly fabricated because in the narration para above main para 1 of the agreement to sell the date of

payment made is written as 5.12.2007 i.e it cannot be that on 4.12.2007 it can be written that payment has already been made on next day which has to come, however this argument is misconceived as writing of 5.12.2007 is only a typing mistake for the date of 4.12.2007.

11. I would like to note that even assuming for the sake of arguments the contention of the appellants/defendants is accepted that there was only a loan transaction and not an Agreement to Sell, admittedly there is no averment in the written statement nor in the affidavit by way of evidence filed by Sh. Shyam Sunder, DW1 that the loan amount has been repaid. In the written statement, it was pleaded by Smt. Poonam that the subject transaction is not an Agreement to Sell but a fabricated document, and that the document was really executed in favour of some other person (preliminary objection no.7 of the written statement), and such pleading was expounded as per the evidence of the DW1 Sh. Shyam Sunder that the document was in fact for loan obtained from one Sh. Jitender Tyagi, (who is none other but the brother-in-law of the respondent/plaintiff), and therefore effectively it is the case of the appellants/defendants that the subject

Agreement to Sell in fact is a document which ought to have been a document of a loan transaction but the same has been fabricated for an agreement to sell. Not only the factum with respect to the document being executed for the purpose of loan has been introduced for the first time in the affidavit by way of evidence of the DW1 Sh. Shyam Sunder without there being any such pleading in the written statement of the loan transaction, inasmuch as in the written statement the subject Agreement to Sell was pleaded to be a fabricated document and respondent/plaintiff pleaded to be a complete stranger to Smt. Poonam, the name introduced of Sh. Jitender Tyagi has been done for the first time in the affidavit by way of evidence because in the preliminary objection no.7 of the written-statement it was only vaguely stated that document was executed in favour of "one another person". Therefore, it is seen that loan has been taken of Rs.8 lacs and there is no pleading or evidence that loan has been repaid. In my opinion therefore even though the Agreement to Sell dated 4.12.2007 stands proved, and once no specific performance is granted, the price paid of Rs.8 lacs under the Agreement to Sell Ex.PW1/A has to be refunded to the respondent/plaintiff, but even if the transaction is

taken as a loan, since the loan is not repaid (and loan being received from Sh. Jitender Tyagi has been brought for the first time *dehors* the pleadings in the evidence of the DW1, and no evidence beyond pleadings can be looked into), therefore, the appellants/defendants are liable to return the amount of Rs.8 lacs along with interest to the respondent/plaintiff.

12. In view of the above, this appeal is allowed. Impugned Judgment of the Trial Court dated 17.12.2016 is set aside. Suit for specific performance of the respondent/plaintiff will stand dismissed. However in favour of the respondent/plaintiff and against the appellants/defendants a money decree is passed for a sum of Rs.8 lacs along with interest @ 12% per annum simple from 4.12.2007 till the date of payment. Parties are left to bear their own costs.

AUGUST 14,2018

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VALMIKI J. MEHTA, J