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

% **Date of decision: 9th March, 2018.**

\+ **CS(COMM) 129/2016 & IA No. 2365/2016 (u/O XXXIX R 1 & 2 CPC), IA No.3741/2017 (u/S 151 CPC)**

JAI BHAGWAN ..... Plaintiff
Through: Mr. Badal Dayal, Adv.

Versus

RAKESH & ANR ..... Defendants
Through: Mr. Durgesh Kumar Pandey, Adv. for D-1.
Mr. Sudeep Yadav, Adv. for D-2.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff has instituted this suit for specific performance of Agreement to Sell dated 30th January, 2013 with respect to 2 bigha 2 biswas of Khasra No. 86/2 situated in the revenue estate of village Pooth Khurd, Delhi and in the alternative for recovery of Rs. 26 lacs with interest and for permanent injunction.

2. The suit was entertained and summons thereof issued, though no *ex parte* relief sought of restraining the two defendants, namely, Rakesh and Jitender Singh against whom the suit was filed, from dealing with the property, granted.

3. Pleadings in the suit have been completed and the suit is ripe for framing of issues and for hearing of the application for interim relief.

4. The counsel for the plaintiff on enquiry states; (i) that the Agreement of the plaintiff is with the defendant No.1; (ii) that the defendant No.1 after

the Agreement to Sell with the plaintiff, has sold a part of the property to the defendant No.2 Jitender Singh; (iii) that the total sale consideration of the Agreement to Sell was Rs.1,16,82,083/- and the plaintiff at the time of Agreement to Sell paid a sum of Rs. 13 lacs in cash as advance; (iv) that no date for performance of the said Agreement was fixed; (v) that the defendant No.1 is denying having entered into any Agreement to Sell or having received any amount of Rs. 13 lacs from the plaintiff.

5. A perusal of the Agreement to Sell, of which specific performance is claimed and of which only a photocopy has been filed before this Court shows the defendant No.1 to have entered into the Agreement to Sell with the plaintiff 'on behalf of Isshu, Tusar ss/o late Sh. Narender' and the Agreement further recites that the said Isshu and Tusar are the owners in absolute possession of land agreed to be sold and the time for completion of the bargain as having been fixed 'up to one month from the date of issue of guardian certificate in favour of Smt. Rakesh'.

6. The plaintiff has not impleaded the said Isshu and Tusar as defendants in the suit.

7. The counsel for the plaintiff, on enquiry states that the said Isshu and Tusar were/are minor sons of defendant No.1 Rakesh and since the plaintiff had entered into an agreement with the defendant No.1 only and not with the said Isshu and Tusar, the plaintiff has sued the defendant No.1 only and need to sue the said Isshu and Tusar is not felt.

8. Aforesaid stand of the plaintiff is totally contrary to law. Even if the defendant No.1, as the mother and guardian of the minors had entered into an agreement to sell with the plaintiff, it was incumbent upon the plaintiff,

seeking specific performance of the said Agreement, to sue the said Isshu and Tusar for specific performance and to file an application seeking appointment of their mother or anyone else as their guardian for the purposes of suit. The provisions of Order XXXII Rule 3(2) of the Code of Civil Procedure, 1908 (CPC) are clear in this regard and a suit against a guardian, for specific performance of an agreement to sell entered into by the guardian on behalf of the minor wards, would not lie and the decree if any therein would not bind the minors. For a decree binding the minors to be passed, the minors have to be a party to the suit and the suit has to be accompanied with an application for appointment of their guardian. If the minors are not impleaded as defendants, the question of this Court appointing their guardian for purposes of the suit, or satisfying itself that the interest of the guardian is not adverse to the minors, will not arise. Moreover, once the property belongs to minors, a decree for specific performance against mother of the minors, even if had entered into agreement to sell on behalf of minors, cannot be executed by transfer of property, admittedly of minors. Without the minors being parties, other safeguards provided in Order XXXII of CPC, to safeguard the interest of minors, would also not come into play. Moreover, if it was possible or permissible in law to sue the guardian for relief against minor, without impleading the minor, the occasion for incorporating Order XXXII in CPC would also not have arisen.

9. The counsel for the plaintiff at this stage states that the defendant No.1 is also owning 1/3rd share.

10. All that can be observed is that it is not so spelled out in the Agreement to Sell which describes the defendant No.1 to have entered into

the Agreement on behalf of the minors and there is no recital of the defendant No.1 having any share in the property.

11. Not only so, the present suit is found to have been instituted first on 29th January, 2016 but with defects and to have been re-filed successively on 12th February, 2016 and 16th February, 2016. The valuation of the suit for the purposes of court fees and jurisdiction, in para 21 of the plaint is Rs.1,16,82,083/-. Vide Delhi High Court Amendment Act which came into force on 11th August, 2015, that is prior to the institution of the present suit, the minimum pecuniary jurisdiction of this Court stood enhanced to above Rs. 2 crores. The suit is below the same and ought not to have been instituted in this Court.

12. However, it appears that the suit was entertained owing to the plaintiff having labelled the same as a 'Commercial Suit'.

13. I have enquired from the counsel for the plaintiff as to how the present suit qualifies as a Commercial Suit.

14. The counsel for the plaintiff states that since the dispute subject matter of the suit has arisen out of an Agreement, the suit would be a commercial suit.

15. The same is a layman's interpretation of law. The counsel for the plaintiff has been handed over the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 to show therefrom the Clause of Section 2(1)(c) thereof under which the suit would qualify as a commercial suit.

16. The counsel for the plaintiff has fairly stated that it does not fall in any of the said Clauses.

17. The suit thus is not a commercial suit and as an ordinary suit is below the minimum pecuniary jurisdiction of this Court.

18. The plaint in the suit along with original documents if any and the court fees is thus ordered to be returned to the plaintiff in accordance with law, for institution, if the plaintiff so desires, in the court of appropriate pecuniary jurisdiction.

19. The counsel for the plaintiff being raw, I refrain from imposing any costs.

RAJIV SAHAI ENDLAW, J

MARCH 09, 2018
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