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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: 29th January, 2018
+ **RFA 434/2016 & CM APPL. 24223/2016 (Stay)**
JAINAB Appellant
Through: Mr. Prakash Priyadarshi, Advocate.
(9810019309)
versus
JALALUDDIN Respondent
Through: Mr. Sanjay Sharma, Advocate.
CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present appeal arises out of the impugned judgement and decree dated 9th February, 2016 in the suit filed by the Respondent/Plaintiff (*hereinafter 'Plaintiff'*) seeking specific performance. The Trial Court by the impugned order had decreed the suit for specific performance. The Trial Court had also directed the Plaintiff to pay the balance sale consideration of Rs.3,75,000/- within 3 months and upon receipt of the consideration amount, the Defendant was directed to transfer the possession of the suit property to the Plaintiff.
2. The Agreement to Sell is dated 31st December, 2010. As per the said Agreement, the suit property bearing No. A-1112, Gali No.28, Sri Ram Colony, Rajiv Nagar, Delhi-94 (*hereinafter, 'suit property'*) was agreed to be transferred by the Defendant to the Plaintiff for a total sale consideration of Rs.4,00,000/-, out of which a sum of Rs.25,000/- was paid as the *Bayana*. As per the Agreement, the last date for execution of the sale deed and conclusion of the transaction was fixed as 31st May, 2011.
3. The Plaintiff submits that he went to the Sub-Registrar's office on 31st

May, 2011 however, the Defendant did not honour his commitment. Legal notice was issued by the Plaintiff to the Defendant on 1st December, 2011. The Defendant did not agree to execute the sale deed hence the suit came to be filed on 2nd May, 2013.

The prayer in the plaint is as under:

- “a) Pass a decree of specific performance of contract in favour of plaintiff & against the defendant, in regard to the suit property thereby direct the defendant to execute the sale deed of the suit property in favour of the plaintiff by receiving the balance sale consideration amount and deliver the vacant peaceful physical possession of the suit property to the plaintiff.
That in case, the defendant did not execute the sale deed in favour of the plaintiff please be issue directions to the Registrar concern, to execute the sale deed of the suit property in favour of plaintiff*
- b) Pass a decree of permanent injunction, in favour of plaintiff and against the defendant, thereby restrained the defendant, her agents, associates, legal heirs, successors & assignees etc. not to create any third party interest in the suit property or part with possession of the suit property, till the final disposal of the case.*
- c) Pass a decree of permanent injunction in favour of plaintiff & against the defendant, thereby direct the defendant, her agents, associates, legal heirs, successors & assignees etc. not to raise any construction upon the suit property with an intention to change the structure of the suit property by addition or alteration.*
- d) That in case of any unavoidable circumstances, if the decree of specific performance of contract could not be granted in favour of the plaintiff and against the defendant, then pass a decree in favour of plaintiff and against the defendant with a direction to the defendant, to return double of the amount of earnest money taken, with interest, damages and litigation charges to the plaintiff, to compensate the plaintiff as per the terms and conditions of agreement*

e) Any other and further relief which this Hon'ble Court may deem fit and proper be also awarded to the plaintiff."

4. In the written statement, the Defendant contended that the balance sale consideration was not to be given at the time of execution of the sale deed but the same was to be paid after the execution of the Agreement to Sell. The Defendant submits that at the request of the Plaintiff, he visited the Sub-Registrar's office on 29th March, 2011, however, the Plaintiff did not turn up. The Defendant again claims to have visited the Sub-Registrar's office on 01st April, 2011 but the Plaintiff did not come and after repeatedly contacting the Plaintiff there was no response and hence the balance consideration was not paid. It is the Defendant's case that he reached the Sub-Registrar's office again on 30th May, 2013. Copies of the various receipts issued by the Sub-Registrar's office are placed on record.

5. The following issues were framed in the suit:

*"(1) Whether plaintiff is entitled for decree of specific performance as prayed in the suit? OPP
(2) Whether the plaintiff is entitled for decree of permanent injunction as prayed in the suit? OPP
(3) Relief"*

6. Evidence was led by the parties. The Plaintiff stated in his cross-examination that he was ready and willing to pay the balance sale consideration. To this effect, the Plaintiff submitted as under:-

"The stamp paper was executed at the house of defendant. The earnest money paid was Rs.25,000/-. The money was at my house. At the time of making payment of earnest money, I was having Rs. 4,00,000/- in cash with me."

7. The Trial Court after going through the records and evidence held that there was no basis for the Defendant to appear before the Sub-Registrar on

30th May, 2011. The appearance of the Plaintiff on 31st May, 2011 was given credence by the Trial Court. The Trial Court also held that the receipts produced by the Defendants were photocopies. The Trial Court treated 31st May, 2011 as the date for execution of the documents. Thereafter, the Trial Court decreed the suit. The counsel for the Defendant submits that there are three errors in the Trial Court judgement which are as follows:

- (1) The Trial Court fails to consider that 31st May, 2011 is not the date for execution of the sale deed but in fact the last date for the execution of the sale deed. The Trial Court, thus, misinterpreted the said date as being the date for execution of the sale documents.
- (2) The Trial Court fails to take into consideration the fact that the Defendant was present on 29th March, 2011, 01st April 2011, and 30th May, 2011. These dates show that the Defendant was always willing to perform his obligation but the Plaintiff did not pay the balance sale consideration.
- (3) The present case does not show readiness and willingness of the Plaintiff and there is no evidence to show the availability of the funds with the Plaintiff. Even the legal notice was issued seven months after the last date for execution of the documents and the suit was filed two years later.

8. On the basis of the above submissions, counsel for the Defendant submits that the Trial Court erred in granting a decree of specific performance. The Counsel for the Defendant further submits that at the time of cross-examination, the Defendant had produced the original slips, as is evident from the cross-examination of DW-1 wherein he states as under.

“At this stage, the witness has produced the three original slips of Sub-Registrar office as EX.DW-1/1 to EX.DW-1/3.”

9. On the other hand, the counsel for the Plaintiff submits that in the cross-examination, the Plaintiff had categorically deposed that he had the entire sale consideration of Rs.4,00,000/- available in cash with him, at the time when the Agreement to Sell was executed. The counsel for the Plaintiff submits that there was no purpose in going to the Sub-Registrar's office prior to 31st May, 2011. In fact, the Plaintiff went to the Sub-Registrar's office on 31st May, 2011. The Plaintiff, thus, relies upon the receipt issued by the Sub-Registrar's office dated 31st May, 2011. Under these circumstances, counsel for the Plaintiff submits that the decree for specific performance has been rightly passed in favour of the Plaintiff.

10. The Court has perused the pleadings and the evidence on record. A perusal of the Agreement to Sell, which is in Hindi, shows that the Agreement does not fix the date of 31st May, 2011 as the date for execution of the documents. In fact, the agreement mentions that the '*antim tithi*' i.e. last date for execution would be 31st May, 2011.

11. The execution of the Agreement to sell is admitted. The total sale consideration is also not in dispute. Admittedly, the parties are neighbours. Oral communications between the parties have been relied upon by both sides which are contradictory in nature. The Defendant is residing in the suit property. The amount paid as *Bayana* is Rs.25,000/- out of the total consideration of Rs.4,00,000/-.

12. Production of the 3 receipts and appearance of the Defendant before the Sub-Registrar seems to support the submission of the Defendant that he repeatedly tried to conclude the sale transaction. There is, in fact, no

evidence, either in the form of bank statements or any other evidence, to show that the Plaintiff was ready and willing to pay the balance sale consideration of Rs.3,75,000/-. A mere statement in cross-examination that the amount was ready with the Plaintiff in cash is not sufficient to support the plea of readiness and willingness.

13. Without going into the controversy as to whether the Plaintiff and the Defendant visited the Sub-Registrar's office on various dates, it is sufficient to hold that this is not a case where specific performance deserves to be granted. The law on grant of specific performance is well settled. The Supreme Court in ***Parakunnan Veetil Joseph's Son Mathew v. Nedumbara Kuruvile's Son & Ors.*** AIR 1987 SC 238, held as under:

"14. Section 20 of the Specific Relief Act, 1963 preserves judicial discretion to Courts as to decreeing specific performance. The Court should meticulously consider all facts and circumstances of the case. The Court is not bound to grant specific performance merely because it is lawful to do so. The motive behind the litigation should also enter into the judicial verdict. The Court should take care to see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff."

14. This position was reiterated by the Supreme Court recently in ***Jayakantham v. Abhaykumar*** (2017) 5 SCC 178. While dealing with the scope of the Court's discretion under Section 20 of the Specific Relief Act, 1963, the Supreme Court in ***Zarina Siddiqui v. A. Ramalingam*** AIR 2015 SC 580, held as under:

"25. It is well settled that remedy for specific performance is an equitable remedy. The Court while granting decree of specific performance exercises its discretionary jurisdiction. Section 20 of the Specific Relief Act specifically provides that Court's discretion to

grant decree of specific performance is discretionary but not arbitrary. Discretion must be exercised in accordance with sound and reasonable judicial principles.”

15. Considering the facts narrated above and the conflicting nature of evidence as to oral communications, as also the lack of any evidence to show readiness and willingness on the part of the Plaintiff, this is not a case for grant of specific performance. However, that is not to say that the amount of Rs.25,000/- can be forfeited by the Defendant. Admittedly, the Defendant received the *Bayana* amount and the transaction did not go through.

16. In the facts and circumstances of this case, the judgement and decree passed by the trial court is set aside. The Defendant is directed to refund the amount of Rs.25,000/- paid by the Plaintiff with 10% interest per annum within a period of eight weeks from today. Until the payment of the said amount is made by the Defendant to the Plaintiff, there shall be an injunction restraining the Defendant from alienating or creating any third party interest in the suit property bearing No. A-1112, Gali No.28, Sri Ram Colony, Rajiv Nagar, Delhi-94.

17. The appeal is accordingly allowed in the above terms.

PRATHIBA M. SINGH
(Judge)

JANUARY 29, 2018
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