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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : 6th March, 2018

Date of decision : 1st June, 2018

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RFA 734/2016 & CM APPL.34582/2016

RADHEY SHYAM

..... Appellant

Through: Mr. Rohit Gandhi, Advocate.
(M-9818610321)

versus

VARSHA YADAV

..... Respondent

Through: Mr. Satya Narayan, Advocate.
(M-9810532043)

CORAM:

JUSTICE PRATHIBA M. SINGH
JUDGMENT

Prathiba M. Singh, J.

1. Shri Radhey Shyam, Appellant/Plaintiff (*hereinafter 'Plaintiff'*) entered into an Agreement to Sell dated 16th January, 2011 with the Respondent/Defendant Smt. Varsha Yadav (*hereinafter 'Defendant'*) for sale of property admeasuring 300 square yards (60 ft. x 45 ft.) in Khasra No. 559 which is situated in the area of village Bhalswa, Jahangirpuri, Delhi, known as Rajiv Nagar Extension Delhi (*hereinafter 'Suit Property'*) for a total sale consideration of Rs.29,50,000/-.

2. The document executed was called as *Bayana (Ikrar Nama)*. The same is admitted by parties and is exhibited as Exhibit-P-1. It is claimed that that the Defendant had also handed over the survey plan of the area identifying the suit property which was marked as Exhibit PW-1/1. The

background link documents by which Smt. Varsha Yadav had purchased the suit property i.e. the General Power of Attorney, Agreement to Sell, Deed of Will, receipt of possession letter executed by one Shri Laxmi Narain were also handed over to the Plaintiff and were marked as Exhibit P-3 to P-8.

3. The payment of Rs.3,00,000/- is admitted. As per the Agreement, the balance sale consideration of Rs.26,50,000/- was to be given to the Defendant at the time of the execution of the sale deed and other documents. The last date for the execution of sale deed was fixed as 16th April 2011. However, in February, the Defendant contacted the Plaintiff and requested that a sum of Rs.8,00,000/- be paid by 25th February, 2011. This request of the Defendant was acceded to, by the Plaintiff, and a sentence was added to the Agreement to the following effect (*Aath lakh rupye 25.02.2011 ko dene hai*). Thus far the facts are not disputed.

4. The plaintiff then claims that on 25th February, 2011, since he had to arrange for the funds urgently one Mrs. Vijay Laxmi gave a sum of Rs.8,00,000/- from her bank account which was duly withdrawn by him and when he went to pay the same to the Defendant, she refused to accept the same. To his surprise, after not accepting the tender of Rs.8,00,000/-, the Defendant got issued legal notice dated 9th March 2011 on the ground of non-payment of Rs.8,00,000/-. She informed the Plaintiff that she is ready to return the sum of Rs.3,00,000/-. The relevant part of the legal notice is set out below:-

“3. That as per the terms of the Bayana receipt you have undertaken to pay Rs.8,00,000/- (Rupees Eight Lac only) on 25.02.2011 and balance sale consideration was agreed to paid by or before 16.04.2011.

4. That you have failed to make payment of Rs.8,00,000/- (Rupees Eight Lac only) by or before 25.02.2011 and by virtue of agreed terms and conditions of clause 2 of the agreement, Rs.3,00,000/- paid by you stand forfeited.

5. That my clientess has meanwhile came to know that said agreement is in violation of Section 33 of the Delhi Land Reforms Act and sale is prohibited by law, however, my clientess being a law abiding citizen and without prejudice to rights and contention of my clientess, my clientess is ready to return Rs.3,00,000 (Rupees Three Lac) to you, however, same is without admission of liability. Said agreement is not even valid as not being registered and properly stamped.

6. That though Rs.3,00,000/- paid by you stands forfeited as per the terms of the agreement for non-payment of Rs.8,00,000/- (Rupees Eight Lac only), however, as a good gesture on the part of my clientess, your money is being offered to you and you may contact my clientess and collect the amount against receipt and on handing over original agreement dated 16.01.2011, written on stamp paper of Rs.10/- (Rupees Ten only).

I, therefore, call upon you to receive payment of Rs.3,00,000/- (Rupees Three Lac only) on handing over original agreement and executing the receipt of the payment within 15 days of the receipt of this notice, failing which it shall be deemed that your money has been forfeited and my clientess shall be at liberty to deal with her property as she wishes to and permissible by law.”

5. Immediately upon receiving this letter, even before the last date fixed for execution of the sale deed i.e., 30th April 2011, the subject suit came to

be filed by the Plaintiff. On 23rd March, 2011, summons was issued in the suit and on 30th April 2012, the entire balance sale consideration was directed to be deposited and the Ld. single Judge of this Court passed an order of status quo qua the suit property. The operative part of the said order dated 30th April 2012 reads as under:

“Accordingly, this application is disposed of with the direction to the defendant to maintain the status quo with regard to title of the suit property, subject to, however, plaintiff depositing balance sale consideration with the Registrar General of this Court within four months. On such deposit being made, the amount be kept in FDR initially for a period of one year with automatic renewals.”

6. The amount of Rs.29,50,000/- is lying deposited in this Court in an interest-bearing account.

7. The case of the Defendant in the written statement is that the Plaintiff was not ready and willing to perform the Agreement as he did not have the requisite funds to make the entire payment. The case of the Defendant is that the Plaintiff never approached the Defendant with the sum of Rs.8,00,000/- and it is only after waiting for a period of 12 days that the Defendant got issued the legal notice and terminated the contract. The Defendant denied that the amount of Rs.8,00,000/- was added in the *Bayana* receipt after the execution of the Agreement. The Trial Court framed the following issues for consideration: -

- “1) *Whether the suit is without any cause of action?*
OPD
- 2) *Whether the plaintiff was ready and willing to perform his part of contract? OPP*

- 3) *Whether the plaintiff is entitled to decree of specific performance? OPP*
- 4) *In case issue No.3 is answered in negative, whether the plaintiff is entitled to money decree as prayed for? OPP*
- 5) *Relief.”*

8. The Plaintiff led the evidence of the following witnesses: -

PW-1, Shri Gurmeet Singh

PW-2 Shri R.P. Taneja

PW-3 Shri Martand Dev Divedi

PW-4 Shri Radhey Shyam

PW-5 Shri Suresh Jain

PW-6 Smt. Vijay Lakshmi

PW-7 Shri Laxmi Narain

9. The Defendant, Smt. Varsha Yadav, appeared as DW-1 and her husband appeared as DW-2.

10. The Trial Court thereafter dismissed the suit primarily on the ground that the Plaintiff had not established readiness and willingness.

Summary of the evidence on record

11. PW-1 has placed on record the Regularization Survey Plan of Rajiv Nagar Extension as per which Plot No. 261 was clearly identifiable. PW-2 from Punjab National Bank produced the statement of account of Shri Radhey Shyam to show that as on 13th April 2011 he had a sum of Rs.26,53,860/- in his bank account. PW-3, the Sale Officer of the ICICI Bank produced the statement of account of Smt. Vijay Laxmi which has established that as on 25th February, 2011 she had a sum of Rs.8,21,650/- in

her bank account.

12. PW-5, Shri Suresh Jain confirmed that he and another broker Shri Laxmi Narain had discussions with the Plaintiff who had agreed to purchase the suit property for a consideration of Rs.29,50,000/-. He confirmed that the amount of Rs.3,00,000/- was paid as earnest money and that after a few days, the Defendant requested the additional sum of Rs.8,00,000/- to be paid on 25th February, 2011. He categorically deposed that he along with Shri Laxmi Narain and the Plaintiff went to the house of the Defendant to tender the sum of Rs.8,00,000/-. He further stated that he and Shri Laxmi Narain tried extremely hard to convince the Defendant to stick to the bargain which she refused. He confirmed that the handwriting in the Agreement to Sell was his. He further stated that the discussion of the payment of Rs.8,00,000/- did not take place when the execution agreement was executed but happened three or four days later. He confirmed that the addition of the sentence on the top of the second page of the agreement for payment of Rs.8,00,000/- was in his handwriting.

13. Mrs. Vijay Laxmi, PW-6 confirmed that the Plaintiff is her husband's friend and that in the end of January, 2011 he had sought help for payment of Rs.8,00,000/- which was suddenly demanded by the Defendant. She further confirmed that she had less than Rs.8,00,000/- in her account and Shri Radhey Shyam deposited Rs.1,50,000/- in her account and thereafter withdrew Rs.8,00,000/-.

14. PW-7, Shri Laxmi Narain, the second broker, who was known to the Defendant confirmed that the Defendant was known to him through another property dealer and that the Defendant and her husband had visited his house and to requested him to get the plot sold. He then contacted Mr.

Suresh Jain and met the Plaintiff. He confirmed that the Agreement was filled by Mr. Suresh Jain though he did not sign it. He further confirmed that 2 or 3 days, after the agreement was entered into, the Defendant wanted Rs.8,00,000/- by the end of February. He also stated that he along with the Plaintiff had gone to the Defendant to give the Rs.8,00,000/- amount and that she did not accept the money. He confirmed that the plot is located in an authorized colony and it is not an agricultural land. He stated that the discussions for the sale of the suit property commenced around December, 2010.

15. The Plaintiff appeared as PW-4 and reiterated the case in the plaint. He specifically stated that the notation in respect of Rs.8,00,000/- was made by Mr. Suresh Jain and he also confirmed that he had borrowed the money from Mrs. Vijay Laxmi. He candidly states:

“..... I did not object to make the payment on 25.2.2011 because I had to give the money in any case.....”

16. He confirmed that he had gone with Mr. Suresh Jain and Mr. Laxmi Narain to give the money to the Defendant. He confirmed that he did not have Rs.8,00,000/- in his accounts as on 25th February, 2011. He further confirmed that he deposited Rs.1,50,000/- in the account of Mrs. Vijay Laxmi. She further stated that on 16th April 2011 she had gone to the office of Sub-Registrar after talking to both the brokers.

17. The Defendant Smt. Varsha Yadav appeared as DW-1. She deposed that the property broker, Mr. Laxmi Narain has threatened her and hence she got the legal notice after the Agreement to Sell was executed and the Plaintiff failed to make payment of Rs.8,00,000/-. She claimed that the Plaintiff has got the Defendant involved in the litigation due to non-

availability of funds. She admitted in her cross-examination that on the suit property a *Jhuggi* exists, from which she is earning rent. She admitted that she knew that the Plaintiff had deposited the entire sum. She categorically stated that “..... *I know that Radhey Shyam has now deposited the entire balance amount. It is wrong to suggest that Radhey Shyam was always ready and willing to make the entire payment but we refused to accept the money.....*” and she denied the suggestion that he backed out from the transaction as it was fetching a higher prices.

18. The Defendant, Shri Yudhvair Singh Yadav stated in his cross-examination that the plot/suit property falls in Khasra No.1559. He denied that the Plaintiff had come with the two property brokers to tender the sum of Rs.8,00,000/-. He stated that there was no occasion to go to the Sub-Registrar’s office on 16th April, 2011 and has also sent the notice.

Analysis and Findings

19. A perusal and analysis of the documentary and oral evidence on record clearly points to the fact that the consideration agreed was Rs.29,50,000/- however, only Rs.3,00,000/- was agreed as the earnest money. The original Agreement to Sell is on the record of the Trial Court which was summoned in the appeal. It is clear from a perusal of the same that the notation in respect of Rs.8,00,000/- has been added as a separate sentence in the top margin of the Agreement to Sell and is not within the text of the Agreement. It is clear that the same has been added subsequent to the execution of the Agreement between the parties. Going by the evidence of the two property brokers who have admittedly brokered the entire transaction, it is clear that the note for payment of Rs.8,00,000/- did not exist

at the time when the Agreement to Sell was executed.

20. The Plaintiff clearly agreed to pay the said sum upon demand by the Defendant and the fact that he may have borrowed the said amount from his relatives/friend's wife by itself does not mean that he did not have the resources to pay the said money. The bank statement filed on record of both Mrs. Vijay Laxmi and of the Plaintiff clearly show that he quickly arranged for funds on the eve of the payment. This lends credence to the testimony of the Plaintiff and the two property brokers that they had together visited the premises of the Defendant to tender the sum of Rs.8,00,000/-. There is no reason not to believe the two bank statements which corroborate this fact beyond any doubt. The notice issued merely 11 days after 26th February, 2011 which is prior to the last date to close the transaction i.e., 30th April 2011, also goes to show that the Defendant was trying to make some excuses not to honour the Agreement to Sell.

21. A perusal of the notice reveals that one of the reasons stated in the said notice, is that the sale would be barred under the provisions of the Delhi Rent Reforms Act. This fact could not have come to the knowledge of the Defendant only after the execution of the Agreement to Sell, inasmuch as she also acquired ownership in the property not on the basis of a registered Sale Deed, General Power of Attorney/Agreement to Sell/ Power of Attorney and Will. Thus a reading of the notice leads one to the conclusion that the Defendant was finding excuses not to honour the Agreement to Sell.

22. The testimony of the two brokers are completely consistent with each other. Even the Plaintiff's testimony is consistent with the evidence given by the two brokers inasmuch as they appear to be in no doubt that Rs.8,00,000/- was tendered by the Plaintiff. On the other hand, the

Defendant's own broker Shri Laxmi Narain has testified against the Defendant. Though the Defendant and her husband admit that Shri Laxmi Narain was responsible to find the Plaintiff to enter into this transaction, except for the Defendant and her husband, no independent evidence has been led by the Defendants, which lends greater credence to the evidence of the Plaintiff and witnesses produced by the Plaintiff.

23. The Trial Court appears to have dealt with the case in a rather cavalier manner. The evidence which was brought on record has been clearly ignored by the Trial Court. The biggest fact that goes in favour of the Plaintiff is that the suit for specific performance was filed prior to the expiry of the date by when the sale transaction was to be concluded. The readiness and willingness of the Plaintiff is established by this fact itself. Moreover, the deposits made by the Plaintiff of the entire sale consideration under orders of the Court also show that the Plaintiff was ready and willing to perform his part of the contract. On the other hand, the legal notice dated 9th March, 2011 given within the time period i.e. prior to 16th April, 2011 goes to show that the Defendant did not intend to honour her part of the commitment. These two facts have been completely ignored by the Trial Court which has summarily dismissed the suit.

24. The Plaintiff made efforts of producing several relevant and important witnesses who gave evidence in support of his case. On the other hand, the Defendant failed to establish her defence either through independent evidence or any document. Moreover, it appears that the Defendant also concealed from the Plaintiff that a *Jhuggi* was existing on the suit property and that she was even earning rent from the said suit property. In the evidence of both witnesses i.e. the Defendant and her husband wild

allegations have been made against the Plaintiff and the two property brokers without any independent corroborative evidence to establish the same. No police records have been produced nor any complaint has been produced to make good the allegations against the Plaintiff. Both the Defendant's witnesses admit that plots in the neighbourhood have been sold by DW-2 and his brother. Thus, sale transactions were happening in the said colony and completely untenable grounds have been raised to resile from the transaction.

25. PW-1 who appeared from the Urban Development Department has established that Rajiv Nagar Extension has a Regularization Survey Plan. This also proves that sale transactions can take place in the area in question. The bank statement of Shri Radhey Shyam clearly shows that in April, 2011 he had sufficient amount to pay the entire sale consideration.

26. It is the settled position in law that a party, in order to establish readiness and willingness does not have to come about brandishing his bank statement. It is sufficient if the party can show that he had the resources to arrange for the funds. The evidence on record clearly shows that the Plaintiff had the resources to arrange for the funds both on the basis of his bank statement and also the bank statement of Mrs. Vijay Laxmi and finally the deposit of the entire balance sale consideration in the Court itself. This is sufficient to prove readiness and willingness as held in ***Pandurang Ganpat Tanawade v. Ganpat Bhairu Kadam (1996) 10 SCC 51***

27. The conduct of the Plaintiff as described above clearly establishes that he was more than ready and willing to conclude the transaction. The manner in which the Plaintiff agreed to pay Rs. 8 lakhs before it was due, thereafter took the effort of arranging the said amount, tendering the same to the

Defendant while being accompanied with the two brokers, thereafter filing the suit and finally depositing the money with the Court is evidence of the readiness and willingness. There was nothing more that the Plaintiff could have done. The conduct of the Plaintiff, on the basis of the evidence is quite bonafide.

28. In the present case, the question as to whether time was of the essence of the contract does not arise inasmuch as the entire transaction between January to April, 2011 has swung like a pendulum from one end to other. In January, the Agreement to Sell was entered into and earnest money was paid. In February, additional Rs.8,00,000/- were demanded which was tendered and refused, a legal notice was issued in March and before the last date for conclusion of the transaction, the suit was filed on 23rd March, 2011. Thus the authorities cited by the Appellant in respect of time being the essence of the contract, are not relevant. The Plaintiff has moved with utmost alacrity and was conscious of the time that was fixed for conclusion of the transaction.

29. Coming to the issue of the suit being barred under Section 33 of the Delhi Rent Reforms Act, this plea was raised for the first time in the notice issued by the Defendant. The colony appears to have a Regularization Survey Plan, though not approved by a Government agency as on the date of testimony of PW-1. By contrast there is no evidence which has been brought on record to support that this land is an agricultural land. From the plan placed on record, it is clear that more than 700 plots have been carved out in the colony which is now a residential colony where sale transactions are taking place. Thus the objection under Section 33 of the Delhi Land Reforms Act is not tenable. The Respondent has also relied upon the clause

in the Agreement that in case the transaction does not go through double of the earnest money can be paid. The Defendant has repeatedly stated in the Court that he is willing to refund the amount of the earnest money.

30. However, this cannot be a solution in a case where for so many years, the Plaintiff's funds have remained blocked. There is a huge opportunity cost to the Plaintiff who established his readiness and willingness and has also deposited the entire amount. On the other hand, the Defendant has enjoyed the earnest money, enjoyed the rent from the suit property, rescinded from the contract without any basis and has unreasonably contested this litigation on the basis of the defences which are completely untenable. The Trial Court completely erred in holding that the relief of specific performance is not liable to be granted.

31. The Defendant has relied upon the judgment in ***I.S. Sikandar (Dead) by LRs. vs. K. Subramani and Others (2013) 15 SCC 27*** to argue that since the Agreement to Sell was terminated, the Plaintiff was obliged to seek a declaration that the termination is bad in law and, therefore, the suit for specific performance and injunction is not maintainable. The observations relied upon by the Defendants from ***I.S. Sikandar (Supra)*** as under: -

“37. As could be seen from the prayer sought for in the original suit, the plaintiff has not sought for declaratory relief to declare the termination of agreement of sale as bad in law. In the absence of such prayer by the plaintiff the original suit filed by him before the trial court for grant of decree for specific performance in respect of the suit schedule property on the basis of agreement of sale and consequential relief of decree for permanent injunction is not maintainable in law.

38. *Therefore, we have to hold that the relief sought for by the plaintiff for grant of decree for specific performance of execution of sale deed in respect of the suit schedule property in his favour on the basis of non-existing agreement of sale is wholly unsustainable in law. Accordingly, Point (i) is answered in favour of the Defendant 5.”*

32. In response, the counsel for the Plaintiff has relied upon ***Mrs. A. Kanthamani vs. Mrs. Nasreen Ahmed 2017 (3) SCALE 331*** wherein the Supreme Court, while dealing with the ***I.S. Sikandar (Supra)*** held as under:

“34. Coming first to the submission of the learned counsel for the appellant about the maintainability of suit, in our considered view, it has no merit for more than one reason.

35. First, as rightly argued by learned counsel for the respondent, the objection regarding the maintainability of the Suit was neither raised by the defendant in the written statement nor in first appeal before the High Court and nor in grounds of appeal in this Court.

36. Second, since no plea was raised in the written statement, a fortiori, no issue was framed and, in consequence, neither the Trial Court nor the High Court Could render and finding on the plea.

37. Third, it is a well-settled principle of law that the plea regarding the maintainability of suit is required to be raised in the first instance in the pleading (written statement) then only such plea can be adjudicated by the Trial Court on its merits as a preliminary issue under Order 14 Rule 2 of the CPC. Once a finding is rendered on the plea, the same can then be examined by the first or/and second appellate Court.

38. It is only in appropriate cases, where the Court prima facie finds by mere perusal of plaint allegations that the suit is barred by any express provision of law or is not legally maintainable due to any legal provision; a judicial notice can be taken to avoid abuse

of judicial process in prosecuting such suit. Such is, however, not the case here.

39. Fourth, the decision relied on by the learned counsel for the appellant in the case of I.S. Sikander (supra) turns on the facts involved therein and is thus distinguishable.”

33. The Defendant had not raised the defence that since the Plaintiff had failed to seek a declaration that the termination of the agreement was invalid, the suit is not maintainable. Such a defence ought to be raised in pleadings and not at the Appellate stage. In view of the same, no issue regarding the validity of the termination was framed. As held in **Kanthamani (supra)**, it cannot be permitted to be raised at the appellate stage.

34. During the hearing of the appeal, parties were not clear as to the status of the property. The statement of the Defendant Mrs. Varsha Yadav, was recorded. She confirmed that the suit property is in her possession and accordingly status quo order was passed on 18th October, 2016.

35. The final question then arises as to whether Specific performance ought to be granted or should the Plaintiff be granted compensation. The Supreme Court in **Zarina Siddiqui v. A. Ramalingam @ R. Amarnathan, (2015) 1 SCC 705** has held as under:

“24. 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 the 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.”

The Plaintiff having parted with the entire amount and having established readiness and willingness is entitled to the discretionary relief.

36. In the facts and circumstances of the present case, the Plaintiff is entitled to decree for specific performance. Accordingly, the suit is decree as under:-

- (i) A decree for specific performance is passed in favour of the Plaintiff against the Defendant directing the Defendant to execute the sale deed / other documents in respect of the suit property i.e. Khasra No. 559 which is situated in the area of village Bhalswa, Jahangirpuri, Delhi, known as Rajiv Nagar Extension Delhi, transferring the ownership rights to the Plaintiff.
- (ii) Upon the execution of the said documents in favour of the Plaintiff, the entire amount lying deposited in this Court along with interest accrued thereon shall be released to the Defendant within a period of one week.
- (iii) The sale deed and other documents be executed in favour of the Plaintiff within a period of four weeks.
- (iv) Costs of litigation of Rs.1,00,000/- (Rupees One Lakh) are awarded in favour of the Plaintiff.

37. The Trial Court judgment is set aside. The appeal is allowed. The Defendant is restrained in the meantime from parting with the title or possession of the suit property. Miscellaneous application also stands disposed of.

PRATHIBA M. SINGH
Judge

JUNE 01, 2018/Rekha