

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

+ **RFA No. 881/2018**

% **29th October, 2018**

SUMITA ROY Appellant

Through: Mr. Rajendra Prasad, Advocate
(Mobile No. 9568113936).

versus

GIANI RAM (DECEASED) THR LRS Respondents

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. Appl. No. 44923/2018 (for exemption)

1. Exemption allowed, subject to all just exceptions.

C.M. stands disposed of.

C.M. Appl. No. 44924/2018 (for delay in filing of 19 days) & C.M. Appl. No. 44925/2018 (for delay in re-filing of 5 days)

2. For the reasons stated in the applications, delays in filing and re-filing the appeal are condoned, subject to just exceptions.

C.Ms stand disposed of.

RFA No. 881/2018

3. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff in the suit impugning the Judgment of the Trial Court dated 18.05.2018. The suit which was filed by the appellant/plaintiff originally was a suit seeking specific performance of an Agreement to Sell dated 02.01.1989 wherein the case of the appellant/plaintiff was that the suit property comprising of 13 *Bighas* and 15 *Biswas* of land situated in the village and P.O. Pansali, District Delhi (approximately 14,000/- sq. yards of land) was agreed to be sold to the appellant/plaintiff by the defendant nos. 1 and 2 and the predecessors of defendant no. 3, now defendant nos. 3 and 4 in the suit, for a total sale consideration of Rs. 7,50,000/-. The original suit plaint was filed on 10.03.2006 and thereafter the suit plaint was amended in January, 2017 for claiming compensation granted by the Government for acquiring the suit land as the suit land was acquired under the Land Acquisition Act, 1894 in terms of a Notification under Section 4 of the Land Acquisition Act dated 27.10.1999 and with respect to which an *Award No. 4/2002-03* dated 03.04.2002 was passed. In essence, therefore, the suit after amendment became a suit for seeking compensation paid by the

government of the acquired land which was agreed to be purchased by the appellant/plaintiff under the Agreement to Sell dated 02.01.1989. The trial court has dismissed the suit by holding the suit to be time barred and the agreement to sell being incapable of specific performance as the suit land has been acquired. In fact, it was the appellant/plaintiff who is guilty of breach of contract and hence not entitled to specific performance.

4. The facts of the case are that appellant/plaintiff filed the subject suit for specific performance, and as amended to seek compensation paid by government with respect to the suit land which was acquired under the Land Acquisition Act, and this compensation is lying deposited in the Court, appellant/plaintiff pleads that the Agreement to Sell dated 02.01.1989 was entered into between the appellant/plaintiff and respondents/defendants for a total sale consideration of Rs. 7,50,000/-. Under the agreement to sell, a sum of Rs. 1,28,000/- was paid in cash and the balance Rs. 6,22,000/- was payable by 28.02.1990. The appellant/plaintiff claimed that she paid the balance amount of Rs. 6,22,000/- by 28.02.1990 and the defendants are pleaded to have executed a General Power of Attorney in favor of the appellant/plaintiff for the suit land. The

appellant/plaintiff filed a *Civil Writ Petition No. 4509/2000* questioning the acquisition, but this writ petition was dismissed as the Court found that the defendants never executed the alleged General Power of Attorney with respect to the suit land in favour of the appellant/plaintiff. The writ petition was dismissed on 21.11.2003 and even the review petition was dismissed on 26.03.2004. Thereafter, an SLP has been filed by the appellant/plaintiff before the Supreme Court which is said to be pending. The appellant/plaintiff, thus, claims an amount of Rs. 56,00,000/- lying deposited in Court being the amount paid by the government on account of acquisition of the suit land.

5. The respondents/defendants contested the suit and pleaded that there was an Agreement to Sell dated 02.01.1989 and an amount of Rs. 1,28,000/- was received, however, the agreement to sell relied upon by the appellant/plaintiff is not the correct agreement to sell because in the correct agreement to sell the sale price was mentioned as Rs. 13,28,000/-, and this was the real consideration and not a sum of Rs. 7,50,000/-. It was pleaded that the original Agreement dated 02.01.1989 was not witnessed by Sh. S.K. Roy, the husband of the plaintiff, and Sh. Givadan, because the actual agreement to sell was witnessed by Sh. Sukhbir Singh and

Shrikrishna. The respondents/defendants also denied that they have received the balance payment of Rs. 6,22,000/- from the appellant/plaintiff and had executed the General Power of Attorney for the suit land in favour of the appellant/plaintiff. It was pleaded that the appellant/plaintiff was guilty of breach of contract. The suit was therefore prayed to be dismissed.

6. Trial court framed the following issues:-

- “1. Whether the suit is within limitation? OPP
2. Whether the plaintiff is entitled to the relief claimed in the amended plaint? OPP
3. Whether the plaintiff was ready and willing to perform her part of contract? OPP
4. Whether the balance sale consideration as stated to be received by defendants is for some other transaction? OPD
5. Whether the plaintiff entered into an agreement to sell with the defendant for consideration amount of Rs. 7,50,000/-? OPP
6. Whether the defendant executed agreement to sell dated 02.01.1989 for sale consideration as Rs. 13,28,000/-? OPD
7. Whether in view of the admission of the defendant in Para 5 of Preliminary Objection of WS filed in suit No. 1486/89, suit is liable to be decreed? OPP
8. Whether this court ceased to have jurisdiction after the land having been acquired and it is the court under the Land Acquisition Act which has jurisdiction upon the dispute with respect to compensation? OPD
9. Whether prayer No. A and B of the plaint is no more available to the plaintiff? OPD

10. Relief”

7. Evidence was thereafter led by the parties and these aspects are recorded in paras 16 and 17 of the impugned judgment, which read as under:-

“16. In support of her case, plaintiff examined herself as PW-1 and tendered her affidavit in examination-in-chief as PW-1/A and relied upon copy of Agreement to Sell Ex. PW1/1, original Receipt dated 02.01.1989 Ex. PW1/2, No objection certificate dated 19.02.190 Ex. PW1/3, original General Power of Attorney dated 05.02.1990 Ex. PW1/4 and certified copy of written statement filed by the defendants in suit No. 1486/2009 Ex. PW1/5. She was cross examined by LR of defendant No. 1.

17. Defendants examined Sh. Vijay Kumar as DW-1 who tendered his affidavit in examination-in-chief as Ex. D-1 and relied upon certified copy of application under Section 340 Cr.P.C. filed in suit titled as Santosh Garg vs. Balram & ors. as Ex. DW1/1 and certified copy of the written statement filed in the year 1992 as Ex. DW1/2. He has not been cross examined by the plaintiff as and her Counsel for stopped appearing in the matter. Other defendants did not lead any evidence in the matter.”

8. In my opinion, the trial court has rightly dismissed the suit on various grounds including the same being barred by limitation, suit for specific performance did not lie once the suit land was acquired and that the appellant/plaintiff was guilty of breach of contract and was not ready and willing to perform her part of the contract.

9. So far as the aspect of limitation is concerned, it is seen that the Agreement to Sell is admittedly dated 02.01.1989 and the suit for specific performance as originally filed was filed on 10.03.2006 i.e. after around 17 years of entering into the Agreement to Sell. The suit land was subject matter of acquisition as per Notification issued under Section 4 of the Land Acquisition Act on 27.10.1999 which resulted in the Award dated 03.04.2002, and at best the suit could have been filed till 03.04.2005 and therefore the suit filed on 10.03.2006 was clearly barred by limitation. Also, it is noted that admittedly the balance payment was to be paid by 28.02.1990 and if after making payment the defendants had refused to execute the sale deed, then the suit had to be filed within three years from 28.02.1990 i.e. by 28.02.1993 and consequently the suit which has been filed on 10.03.2006 was *ex facie* barred by time. Looking at it from any angle, the suit was rightly dismissed by the trial court as barred by limitation.

10. The trial court, in my opinion, has also rightly dismissed the suit for specific performance as admittedly the subject matter of the Agreement to Sell had ceased to exist as the suit land has been admittedly acquired under the Land Acquisition Act. A suit for specific performance can only be filed or continued, if the property

which is the subject matter of agreement to sell continues to exist, and once the Agreement to Sell stood frustrated on account of acquisition of land, no suit for specific performance would lie.

11. Even assuming at best a suit could lie for recovery of moneys, the suit would lie not for recovery of the value of the land which is deposited in Court, being the amount of compensation, but the suit could have been filed for damages on account of breach of contract of the respondents/defendants not selling the suit land to the appellant/plaintiff. Damages are claimed being the difference of market value i.e. the higher price of the suit land as on the date fixed for performance, and which is the profit margin which would have been available to the appellant/plaintiff, and therefore the suit of the appellant/plaintiff either for specific performance or for claiming the value of the acquired land deposited in Court was not maintainable. The suit, therefore, has been rightly dismissed by the trial court.

12. The trial court has also rightly dismissed the suit as though the appellant/plaintiff claimed that he had paid the balance sale consideration of Rs. 6,22,000/-, however, no credible evidence being documentary evidence, was led by the appellant/plaintiff to show that

how, when and in what manner this balance amount of Rs. 6,22,000/- was paid. In the affidavit by way of evidence filed on behalf of the appellant/plaintiff except making a general statement in paragraph 5 of making payment of the balance amount of Rs. 6,22,000/-, no details whatsoever have been given as to how this amount stood paid by the appellant/plaintiff to the respondents/defendants. The trial court, therefore, was justified in dismissing the suit for specific performance by holding that it was the appellant/plaintiff who was guilty of breach of contract.

13. Looking at the issues from any angle whatsoever, the trial court has rightly dismissed the suit holding the suit to be clearly barred by time, suit relief with respect to specific performance incapable of being granted as the suit land already stands acquired and that the suit in fact could not have been for claiming compensation which is the value of the suit land and at best the appellant/plaintiff could have sued for damages being the difference of market price i.e. the higher price on the date fixed for performance, but such relief neither was claimed and in fact nor could have been granted because the Agreement to Sell stood frustrated on account of acquisition of the suit property by the Government and not on account of any fault of the

respondents/defendants. The trial court has also rightly held that the appellant/plaintiff miserably failed to prove that he paid the balance sale consideration of Rs. 6,22,000/- to the respondents/defendants.

14. In view of the aforesaid discussion, there is no merit in the appeal and the same is hereby dismissed.

OCTOBER 29, 2018

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VALMIKI J. MEHTA, J

