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

Reserved on : 23rd March, 2018
Date of decision: 4th July, 2018

\+ **RFA 902/2016 & CM APPL. 19098/2017**

ASHA ROHILLA ..... Appellant

Through: Appellant in person.

versus

PARAMPREET SINGH & ANR ..... Respondents:

Through: Mr. S.S. Bhatia & Mr. Naveen Arya, Advocates (M-9899919222).

CORAM:
JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. In this appeal, the Plaintiff/Appellant *(hereinafter 'Plaintiff')* challenges the judgment/decree dated 9th September, 2016 by which the suit for specific performance filed by her was dismissed and a decree of refund of the earnest money paid has been granted in the following terms:

> *"35. Admittedly, defendants have received a sum of Rs. 8 lacs from the plaintiff. Admittedly, sum of Rs. 5 lacs was received by defendants on 01.01.2005. Further, a sum of Rs. 3 lacs was received by defendants from the plaintiff on 07.09.2005.*
>
> *36. As noted in decision on issue no. 4, it has been submitted by defendants in written submissions that defendants are willing to refund the said advance/earnest money to plaintiff, on such terms as the Court may deem proper. In view of this stand of defendants, they are directed to refund the sum of Rs. 8 lacs to the plaintiff.*
>
> *Plaintiff is entitled to interest @ 18% per annum on the amount of Rs.8 lacs i.e. w.e.f. 01.01.2005 on Rs. 5 lacs and w.e.f. 07.09.2005 on Rs.3 lacs, till*

realization."

2. The case in brief of the Plaintiff is that she entered into an Agreement to Sell dated 1st January, 2005 in respect of property bearing no.226, Raja Garden, New Delhi including the entire Ground Floor without roof rights along with proportionate rights of the land beneath the building with common rights for use of stair case, passage and gate and other common facilities (*hereinafter 'suit property'*). The total consideration agreed was ₹31 lakhs. The salient terms and conditions of the agreement are as under:

> *"AND WHEREAS first party have agreed to sell and the second party has agreed to purchase the above said ENTIRE GROUND FLOOR WITHOUT ROOF/TERRACE RIGHTS, out of built up property bearing No.226, situated at Raja Garden, New Delhi, along with proportionate rights of the land measuring 221.2/9sq.yds., beneath the said building, with common rights of staircase passage, and gate, and all other common facilities of the said building, with all rights and titles thereto, for a sum of Rs.31,00,000/- (Rs. Thirty One Lacs Only), out of which the first party have received a sum of Rs.5,00,000/- (Rs. Five Lacs Only) from the second party being the earnest money of sale proceeds and the receipt of which the first party hereby acknowledges.*
>
> *That within one hundred fifty days from the date of execution of this agreement, the first party shall execute sale document and to have the same registered in favour of the second party or his nominees on receipt of the balance consideration amount of Rs.26,00,000/-(Rs. Twenty Six Only), before the Sub-Registrar Delhi.*
>
> *That the first party shall deliver the vacant physical possession of the said property at the time of execution of this agreement.*
>
> *That all the expenses of stamp papers,*

registration fee etc. shall be paid by the second party.

...

That the said property is mortgaged to the bank and its original documents are in the bank. Before the registration of the sale deed the first party shall hand over the documents to the second party after clearance from the bank.

...

That in case the first party backs out from the said transaction on any grounds then they will pay the double amount of earnest money to the second party or second party will get the transaction completed through court of law by specific performance of suit.

That in case the second party backs out from the said transaction, on any ground, then his earnest money shall stand forfeited in favour of the first party.

That this deal has been done through Arora Properties at Bali Nagar, New Delhi, each party will 2% commission to the property dealer and defaulter will pay both side commission."

3. The Plaintiff paid a sum of ₹5 lakhs as earnest money on 1st January, 2005. The parties further agreed that the sale deed would be executed within three months. The Plaintiff's case is that the property was mortgaged with HSBC bank and Defendants had assured the Plaintiff that the original title deeds which were lying with the bank would be got released by them.

4. According to the Plaintiff, after execution of the Agreement to Sell, she applied for housing loan from various banks including UTI Bank in the name of her son and loan amounts of ₹8 lakhs and ₹10 lakhs from ICICI Bank were also sanctioned. Thus, the Plaintiff had the means to pay the entire sale consideration. The Plaintiff further pleaded that, on 1st April, 2005, the Defendants requested the Plaintiff for extension of time for

execution of the sale deed up to 29th May, 2005 as their pending issues with HSBC Bank were yet to be resolved. Thus, the agreement was corrected and instead of three months, 150 days was written. According to the Plaintiff, the Defendant No.2-Raghuvinder Singh asked the Plaintiff to purchase the stamp paper for ₹36,000/- which she purchased. Thereafter, the Defendants again requested for an extension on two occasions and the agreement was extended till 11th July, 2005 and thereafter till 31st August, 2005. The Plaintiff along with her husband again visited the Defendants for execution of the sale deed but the Defendants requested for time, up to 5th November, 2005 to complete the transaction. The Plaintiff avers in the plaint that the Defendants, apart from seeking extension till 5th November, 2005, again sought a sum of ₹3 lakhs as they were in need of money. Accordingly, the Plaintiff paid a sum of ₹3 lakhs on 7th September, 2005. Thereafter, despite repeated reminders, the Defendants did not execute the sale deed, because of which the Plaintiff got issued notice dated 18th September, 2006. The Plaintiff placed on record the passbook relating to her bank account as also of her son and husband's. She also made a statement in the plaint that she had an amount of ₹9 lakhs always lying in the house with her. Despite the service of the legal notice, the Defendants did not take any steps to execute the sale deed nor did they reply to the legal notice. Accordingly, the Plaintiff sought the decree for specific performance in the following terms:

> *"a . Pass a decree of Specific Performance in favour of the plaintiff and against the defendants thereby directing the defendants to execute the sale deed of property in question i.e. the entire portion of ground floor without roof/terrace rights of the built up property bearing No.226, Raja Garden, New Delhi along with proportionate rights of the land beneath*

under the said building in favour of the plaintiff and receive the balance sale consideration thereof and the defendants should be directed to handover the possession of the property in question.
b. cost of the suit may also be awarded to the plaintiff along with damages and litigation expenses against the defendants.
c. Any other relief which this Hon'ble Court may deem fit and proper also be granted in favour of the plaintiff and against the defendant."

5. In the written statement, the Defendants admitted the agreement dated 1st January, 2005, the payment of ₹5 lakhs and various extensions, however, the Defendants pleaded that the extensions were granted at the request of the Plaintiff who did not have sufficient funds. The payment of ₹3 lakhs is also admitted. The Defendants further claimed that the litigation with HSBC Bank had come to an end on 12th May, 2006. The Defendants further claimed that in June, 2006, the Plaintiff had informed the Defendants that they could not arrange the balance of ₹23 lakhs. The Defendants pleaded that they suffered huge losses. The main plank of the Defendants' case is that the Plaintiff only purchased stamp papers of ₹36,000/- to show the sale consideration for the property as ₹6 lakhs and not ₹31lakhs. This was not acceptable to the Defendants. The Defendants submitted that they sent a reply to the legal notice that the earnest money stood forfeited. The Defendants thus argued that the Plaintiff was never ready and willing to perform her side of the contract. The following issues were framed in the suit:

"1. Whether the time was the essence of the contract of agreement to sell dated 01.01.2005 in respect of suit property? OPP

2. Which party to the agreement was guilty of breach of terms and conditions of contract of agreement to sell dated 01.01.2005 and to what consequences? OP Parties.
3. Whether the plaintiff was and is still ready and willing to perform her part of the contract in terms of agreement to sell dated 01.01.2005? OPP.
4. Whether the defendants were entitled to forfeit the advance/earnest money given by the plaintiff to them under the agreement to sell dated 01.01.2005? OPD.
5. Whether the plaintiff is entitled to a decree of specific performance of agreement to sell dated 01.01.2005 in respect of the suit property? OPP.
6. Relief."

6. The Plaintiff appeared as PW-1 and her husband, Mr. R.K. Rohilla appeared as PW-2. Mr. Subhash Arora who was the property dealer who negotiated the transaction appeared as PW-3. Defendant No.1-Mr. Raghuvinder Singh appeared as DW-1. The following documents were exhibited on behalf of the Plaintiff:

- Ex.PW-1/1 and Ex.PW-1/A- Agreement to Sell dated 1st January, 2005 and the change of period to 150 days reflected therein.
- Ex.PW-1/2 and Ex.P-1 – Receipt of ₹5 lakhs.
- Ex.PW-1/3 – Extension of the Agreement to Sell till 11th July, 2005.
- Ex.PW-1/4 – Extension up to 31st August, 2005.
- Ex.PW-1/5 – Extension up to 5th November, 2005.
- Ex.PW-1/3A – copies of stamp papers for a sum of ₹36,000/-.
- Ex.PW-1/6 – Receipt for the sum of ₹3 lakhs.
- Ex.PW-1/7 – Collectively bank statements of HDFC Bank, ABN Amro Bank, Bank of Punjab and Standard Chartered Bank.

- Ex.PW-1/D1 – Sanction of loan letter issued by UTI Bank for ₹10 lakhs.
- Ex.PW-1/D6 – Sanction of loan letter issued by ICICI Bank for home finance for ₹8 lakhs.
- Ex.PW-2 and Ex.PW-1/8 – Legal notice dated 18th September, 2006.
- Ex.PW-3 – Reply dated 23rd September, 2006.
- Ex.PW-1/D5 – Portfolio statement of ABN Amro Bank.

7. A perusal of the documentary and oral evidence shows that the dispute is in a very narrow compass i.e. as to whether the Plaintiff has demonstrated readiness and willingness and whether she had adequate funds to conclude the transactions. Firstly, it is important to note that though the Agreement to Sell stipulates that the possession has been handed over to the Plaintiff, in fact no possession was handed over and the Defendants continued to remain in the possession of the property.

8. The Agreement to Sell and the various extensions thereof are clearly admitted. A perusal of the loans which were sanctioned in favour of the Plaintiff's family show that the same are dated 3rd June, 2005 and 26th August, 2004. The same were for a total amount of ₹18 lakhs. Out of the total sale consideration, ₹31 lakhs, the Plaintiff had paid ₹8 lakhs and had loans sanctioned for ₹18 lakhs i.e. total of ₹26 lakhs. The total sale consideration being ₹31 lakhs, it is clear that the Plaintiff had the wherewithal to pay the sale consideration. The various banks' statements placed on record also show that the Plaintiff and her family have had adequate sums in their various bank accounts and would have been easily able to arrange the balance sale consideration.

9. The repeated extensions of the Agreement to Sell are admitted by the

parties. Thus, the period till 5th November, 2005 has been mutually agreed. There is no dispute that the suit property was mortgaged with the HSBC Bank. As per the documents on record, the dispute with HSBC got settled only in May, 2006. There is no notice given in writing by the Defendants informing the Plaintiff that the dispute with HSBC Bank has been settled, except in the evidence by way of affidavit. There is nothing on record to show that the settlement was actually communicated in any manner whatsoever. In cross-examination, DW-1 admits *"The request as referred to in Para no.6 of my affidavit was made orally and not in writing. It is incorrect to suggest that no such request was ever made. (Vol. The same was made sometime in May, 2006)"*. It is thus clear that the Defendants' stand that the dispute with HSBC stood resolved and they were willing to go ahead with the transaction is not borne out from the record. They took no steps to inform the Plaintiff, after having taken repeated extensions, that the dispute was resolved.

10. The Defendants have also raised an issue that the Plaintiff purchased stamp papers of a value of ₹36,000/- which shows that the Plaintiff wished to under-value the transaction. The Plaintiff has explained that the said stamp paper was purchased at the behest of the property broker and the Plaintiff herself was not aware of the actual stamp duty payable. The Plaintiff deposes that she was ready to purchase the remaining stamp papers, however, at no point the Defendants were willing to execute the sale deed. She has also categorically deposed that she was never informed about the settlement with HSBC Bank. Moreover, the Plaintiff sought to establish her readiness to conclude the transaction on the basis that there was a property at Mansarovar Garden which was jointly owned by her sister and herself and

she had received an amount of ₹20 lakhs from the sale of the said property which was sold in the year 2004. It was in lieu of the sale of the property that she intended to purchase the suit property. If the stamp paper was the only issue, the Defendants ought to have put the Plaintiff to notice that they were willing to execute the sale deed and calling upon the Plaintiff to purchase the stamp papers, however, the same was not done. To a specific suggestion put by the Defendants, the Plaintiff deposed that she had sufficient amount to pay the balance sale consideration.

11. The Plaintiff denied that she knew of the settlement between the Defendant and HSBC Bank in May, 2006. The stamp paper was purchased on 11th April, 2005 and in respect of the stamp papers, the Plaintiff stated in her cross-examination as under:

> *"Q. Is it correct that the stamp paper worth Rs. 36,000/- were purchased by you on 11.04.2005, as per your version in the affidavit?*
> *Ans. It is correct that the stamp papers worth Rs. 36,000/- were purchased in April, 2005. (Vol. as the defendants as well as the broker were insisting that the defendants be paid substantially in cash, stamp papers worth Rs. 36,000/- alone were purchased).*
> *Q. On what basis and reasons, the stamp papers were purchased on 11.04.2005, especially when the agreement stood extended for 150 days from 01.01.2005?*
> *Ans. The stamp papers were purchased after consultation with the defendants as well as the property dealer. (Vol. as we had asked them for the execution of the sale deed)."*

12. On the availability of funds, the Plaintiff repeatedly stated in her cross-examination that she had sufficient funds in her and her family's bank

accounts. The Plaintiff admitted that the ICICI Bank loan was not in respect of the suit property but only the UTI Bank loan was only in respect of the suit property. But in her cross-examination, she stated that even without the ICICI Bank loan, she had sufficient funds in the form of shares and investments. The property broker-Mr. Subhash Arora who appeared as PW-3 stated that he did not recall as to what exactly was the stamp duty in respect of female purchasers of immovable property. He stated in his affidavit that he had brokered the deal between the parties.

13. DW-1 in his evidence admitted that the property was lying mortgaged with HSBC Bank. His testimony is quite vague as to when and where he learnt of the Plaintiff's inability to pay the remaining sale consideration. He admitted that around 2005/2006, some construction was also raised over the property and the property was raised over the Second Floor along with staircase. The DW-1 also admitted that they purchased the property in Shalimar Bagh around the same time. He admitted that till 12^{th} May, 2006 the title deeds of the property were lying with HSBC Bank and the Defendants had to pay more than ₹22 lakhs to get the same released from the bank. He admitted that in one of the extensions, it was recorded that the same was at the request of the Defendants but considered that the terminology that the extension was *"On request of the first party Sh. Raghvinder Singh and Sh. Parampreet Singh"* was *"trivial"* as it was executed by mutual consent. In effect DW-1 admitted that the extension was at their request though it was repeatedly urged by them that the extension was at the extension was at the Plaintiff's request. DW-1 admitted that ₹8 lakhs were paid by the Plaintiff in cash. The various bank balances of the Plaintiff were put to the Defendants who denied the same.

14. On an analysis of the evidence, it is clear that the Plaintiff had sufficient funds in her various bank accounts. She had paid ₹8 lakhs out of ₹31 lakhs. A loan had also been sanctioned by the UTI Bank for purchase of the property. The repeated extensions were clearly at the behest of the Defendants. The extensions acceded to by the Plaintiff also shows that the Plaintiff was extremely keen to purchase the property and go ahead with the transaction. Even the contemporaneous events relating to sale of the jointly owned property with her sister at Mansarovar Garden evidences the interest of the Plaintiff to invest in another immovable property. In her testimony, she had stated that she had received ₹20 lakhs from the sale of the said property. Thus, the readiness and willingness of the Plaintiff is not in doubt. On the other hand, the Defendants did not at any point intimate the Plaintiff that the settlement with HSBC Bank had concluded, despite having taken repeated extensions. The Defendants have raised a baseless plea as to the stamp papers. It is clear from the testimony of the broker that the Plaintiff was informed that female purchasers had to pay lesser stamp duty. The Defendants never called upon the Plaintiff that they are ready to proceed with the sale transaction. The extensions are at the behest of the Defendants and the first notice was also issued by the Plaintiff. From 1st January, 2005 till the issuance of the notice the Defendants neither called upon the Plaintiff to take refund of the earnest money nor to execute the sale deed. The Agreement to Sell itself records that the property was mortgaged with the Bank. Possession of the property was also not handed over with the Agreement to Sell, though, it is recorded in the agreement. On an overall analysis and appreciation of the evidence, it is clear that the Defendants did not intend to perform their part of the transaction.

15. It is the settled position in law that readiness and willingness does not imply complete demonstration of availability of exact amounts in the bank accounts. The conduct of the party has to be seen to demonstrate readiness and willingness. In ***J.P. Builders and Anr v. A. Ramadas and Anr (2011) 1 SCC 429*** it has been held as under:

> *"…"Readiness and willingness" to perform the part of the contract has to be determined/ascertained from the conduct of the parties."*

16. The very act of the Plaintiff applying for a loan with UTI Bank for ₹8 lakhs itself shows that the Plaintiff never intended to have the property registered for a sale consideration of ₹6 lakhs. The UTI Bank loan was as per the testimony of the Plaintiff obtained only in respect of the suit property. Thus, it cannot be said that the Plaintiff intended to register the property for ₹6 lakhs.

17. The Defendants have clearly utilized the sum of ₹8 lakhs and have failed to prove the lack of readiness and willingness on behalf of the Plaintiff. The fact that time was not the essence of the contract is clear from the repeated extensions which were agreed to. Since the Plaintiff has established readiness and willingness, the Defendants have no right to forfeit the amount. Moreover, until the issuance of the legal notice by the Plaintiff, the Defendant never communicated that they had forfeited the amount. Their complete silence is quite telling of their lack of bonafides. The Defendants have not only enjoyed the amount of ₹8 lakhs but have also enjoyed the suit property, built upon it and may have even utilised the same to purchase some other property. Either way the Defendants have derived considerable advantage at the cost of the Plaintiff. The Agreement to Sell clearly provides

for a consequence in case the Defendants back out from the transaction. The Plaintiff is entitled to relief. The Trial Court has wrongly concluded that the Plaintiff was in breach of the terms and conditions of the Agreement to Sell and that the Plaintiff was not ready and willing to perform the contract.

18. The Trial Court judgment is accordingly set aside. It is held that the Defendants are in breach of the Agreement to Sell and Plaintiff was ready and willing to perform her part of the contract. The Agreement to Sell provides that the Defendants would be liable to pay double the amount of earnest money in case they back out of the transaction. Accordingly, the suit of the Plaintiff is decreed for a sum of ₹16 lakhs along with interest @ 12% to be paid w.e.f from the date of the issuance of legal notice i.e. 18th September, 2006 till the date of payment. The payment shall be made by the Defendants within a period of 8 weeks. The appeal is allowed in the above terms.

19. Till the payment is made, status quo shall be maintained in respect of the suit property as to title and possession. The Defendants shall not create any third-party interest in the suit property till the payment of the entire amount is made to the Plaintiff.

20. The cross objections filed by the Defendants are disposed of in the above terms.

PRATHIBA M. SINGH, J.
Judge

JUNE 04, 2018/*Rahul*