
(2008) 01 DEL CK 0060
In the Delhi High Court
Case No : CS (OS) No. 2477 of 2007

Mr. Vivek Ahuja APPELLANT
Vs
Mr. Shyam Sunder and Others RESPONDENT

Date of Decision : 30-01-2008

Acts Referred:

Citation : (2008) 149 DLT 667

Hon'ble Judges : S.N. Dhingra, J

Bench : Single Bench

Advocate : K.C. Mittal and Laxman Singh, for the Appellant; Nemo, for the Respondent

Final Decision : Dismissed

Judgement

Shiv Narayan Dhingra, J.—By this suit the plaintiff sought relief of specific performance of the agreement dated 7th June 2004 in respect of the property bearing number 61, Block V-I, Rajouri Garden, New Delhi. It is stated by the plaintiff that the total consideration agreed between the parties was Rs. 66 lac. The plaintiff, at the time of execution of the agreement dated 7th June, 2004 had paid a sum of Rs. 10 lac, Rs. 5 lac in cash and Rs. 5 lac through cheque. The time of execution of the sale deed was extended by mutual consent of parties up to 25th November 2004. It is alleged that defendant did not turn up at the Sub Registrar's office for registration of the sale deed on 25.11.2004. In terms of the agreement, in case the defendant backed out, the defendant was to pay double the amount of earnest money and in case the plaintiff backed out, the earnest money was to be forfeited. The plaintiff sent a legal notice to the defendant on 2nd December 2004 asking for payment of Rs. 20 lac i.e. double the earnest money along with 12% interest. Since the amount was not paid, the plaintiff filed a suit for recovery of Rs. 20 lac alleging a breach of agreement to sell on part of defendant, before the learned District Judge being Suit No. 45 of 2005. The plaintiff did not claim the relief of specific performance of the agreement to sell in that suit.

2. The defendant in the written statement took a stand that initially 9th September 2004 was the date fixed for execution of the sale deed before the Sub Registrar's office but the plaintiff was not able to arrange the balance money and he approached the defendant for extension of time. The defendant accommodated the plaintiff and extended the time up to 25th September 2004 i.e. up to 25th October 2004, still the plaintiff could not arrange money and again defendant agreed to extend the time lastly up to 25th November 2004 but the plaintiff could not make arrangement for paying the balance payment and avoided the deal.

3. During the pendency of the suit filed before the learned District Judge, the plaintiff made an application on 26th May 2006 under Order 6 Rule 17 CPC seeking leave to amend the suit so as to include the relief of specific performance of the agreement. The plaintiff also sought amendment of the plaint so as to take the plea that the plaintiff has always been ready and willing to perform his part of the contract. This application was contested by the defendant and vide order dated 5th August 2006, the application was dismissed by the learned District Judge holding that relief of specific performance was available to the plaintiff when he filed the suit, but he omitted to include that relief. Even after filing of the suit, he did not move an application till trial started which shows that he was not diligent enough and he moved the application only when the case was fixed for plaintiff's evidence. Against this order, the plaintiff preferred a Civil Misc. Petition being No. 1929 of 2006, before this Court. The plaintiff thereafter filed an application under Order 23 Rule 1 CPC before the learned District Court on 1st August 2007 seeking leave of the Court to withdraw the suit with permission to file a fresh suit. This application was dismissed by the learned trial court vide a detailed order dated 12th July 2007 with cost of Rs. 1000/-. The plaintiff preferred a Civil Misc. Petition before this Court being number 1047 of 2007 against this order which is stated to be pending. It is further submitted by the plaintiff that he withdrew Civil Misc 1929 of 2006, the one by which he challenged the order dated 5th August 2007 passed by learned trial court declining the leave to amend the suit. Thus, the order, declining the leave to amend the suit has become final.

4. It is argued by the plaintiff that the cause of action for filing the present suit arose on 21st August 2007 when defendant No. 1 executed a sale deed in favor of defendants No. 2 and 3 in respect of the same property and sold the property to defendants No. 2 and 3. It again arose when plaintiff again issued a notice dated 17th November 2007 to the defendant No. 1 for performing his part of the agreement. It is stated that the three years period for filing the suit was to expire on 25th November 2007. The plaintiff, Therefore, filed the instant suit on 26th November 2007, just on the last day of expiry.

5. It is undisputed that the first suit filed by the plaintiff is pending adjudication. The earlier suit was filed by the plaintiff on the ground of breach of agreement to sell dated 7th June 2004 During the pendency of one suit, on the same cause of

action, another suit cannot be filed. The plaintiff's application under Order 23 Rule 1 CPC seeking leave to withdraw the suit with permission to file another suit has been dismissed by the learned Additional District Judge and the instant suit has been filed after dismissal of the application during pendency of the Civil Misc Main petition filed by the plaintiff. Learned Counsel for the plaintiff relied upon AIR 1998 AP 414 M.A. Faiz Khan v. Municipal Corporation of Hyderabad wherein the Andhra Pradesh High court held that the procedural rigour cannot be allowed to come in the way of substantive justice. Filing of the second suit without obtaining permission to withdraw the first suit should only be treated as a procedural irregularity, which is curable. The permission to withdraw the first suit to file fresh suit being pending when such permission is granted, the suit already instituted should not fail. The permission takes away the bar of res judicata.

6. The facts of the present case are altogether different from the facts considered by the High Court of Andhra Pradesh. In the present case, the plaintiff had filed the suit based on the breach of agreement to sell claiming double the amount of the earnest money. The plaintiff, at the time of filing the suit had a right to claim the specific performance of the agreement. He omitted the relief of specific performance of the agreement and claimed only double the earnest money which was one of the reliefs available to him. The suit filed by the plaintiff on the basis of breach of agreement to sell, is pending before the District court wherein the relief of specific performance has been expressly denied by dismissing the application under Order 6 Rule 17 CPC. The plaintiff now wants to file another suit before this Court on the basis of same cause of action claiming relief of specific performance. The substantive justice in this case in fact lies in the dismissal of the instant suit. Order 23 Rule 1 CPC reads as under:

Order XXIII

Withdrawal and adjustment of suits.

Withdrawal of suit or abandonment of part of claim.

1.(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in Rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An application for leave under the proviso to Sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(3) Where the Court is satisfied,-

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

7. It is thus apparent that no one is allowed to file another suit on the same cause of action if the earlier suit for the same cause of action is already pending. Ban on filing fresh suit under the provisions of Order 23 Rule 1(3) CPC is based on public policy. A person cannot be vexed twice for the same cause of action. The public policy also requires that the plaintiff should consolidate all his claims in respect of one cause of action in one suit to avoid multiplicity of litigation. Withdrawal of the suit can be allowed only where the suit must fail for technical reasons or some formal defect is there or there are other sufficient grounds for allowing the plaintiff to institute a fresh suit on the same subject matter. Moreover, in this case because of plaintiffs not claiming specific performance defendant changed his position. There was no injunction against sale of the property in question nor any fetters were put on the defendant in disposing of his property, since plaintiff did not claim that he was ready and willing to purchase the property. In view of this position, the defendant had a right to sell his property and sold the property to third parties. After the property is sold to third party, now the plaintiff wants to file another suit claiming relief of specific performance, making third party as defendants. I consider if filing of such suit is allowed, this would amount to gross misuse of the judicial process.

8. Sale of his property by defendant or serving another notice does not give rise to a new cause of action. The plaintiff cannot now be allowed to file another suit claiming specific performance of the same agreement to sell and challenging the sale deed made by the defendant in favor of the third party. The Supreme Court in *Shiv Kumar Sharma v. Santosh Kumari* 2007 (4) CCC 46 (SC) 46 held:

If the respondent intended to claim damages and/or mesne profit, in view of Order II, Rule 2 of the Code itself, he could have done so, but he chose not to do so. For one reason or the other, he, Therefore, had full knowledge about his right. Having omitted to make any claim for damages, in our opinion, the plaintiff cannot be permitted to get the same indirectly.

9. In view of my foregoing discussion, the instant suit is hereby dismissed being not maintainable.