

(2017) 09 DEL CK 0005

In the Delhi High Court

Case No : 763 of 2017 & CM Nos 32095 of 2017

SARDAR NIRMALJEET SINGH

APPELLANT

Vs

SMT. ANUPAMA MOTWANI

RESPONDENT

Date of Decision : 04-09-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Section 96](#),
[Order IX Rule 7](#) - Appeal from original
decree

Citation : (2017) 09 DEL CK 0005

Hon'ble Judges : Valmiki J.Mehta

Bench : SINGLE BENCH

Advocate : Rajat Aneja, ?Chandrika Gupta, Nisha? Sharma

Final Decision : Dismissed

Judgement

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant in the suit impugning the judgment of the Trial Court dated 17.4.2017, by which the trial court has decreed the suit for specific performance filed by the respondent/plaintiff with respect to 1/8th share in the suit property bearing no.17/6, West Patel Nagar, New Delhi.

2. At the outset, it is required to be stated that scope of hearing of this appeal is limited because the appellant/defendant in spite of service failed to appear and contest the suit. Appellant/defendant was proceeded ex-parte vide order dated 29.7.2009. Appellant/defendant thereafter moved an application under Order IX Rule 7 CPC, but the

same was also dismissed. There is therefore neither any written statement of the appellant/defendant in the trial court nor was any evidence led on behalf of the appellant/defendant.

Appellant/defendant has not even cared to cross-examine the PW-1/respondent/plaintiff.

3. The subject suit for specific performance was filed by the respondent/plaintiff pleading that parties entered into an agreement to sell dated 25.5.2005 whereby respondent/plaintiff agreed to purchase from the appellant/defendant the latter's 1/8th undivided share in the property bearing no.17/6, West Patel Nagar, New Delhi for a total sale consideration of Rs.38.22 lacs. Respondent/plaintiff pleaded to have initially paid a sum of Rs.2 lacs and thereafter a sum of Rs.5 lacs in cash. Balance payment was to be made within 15 days of converting the property from leasehold to freehold. Respondent/plaintiff also pleaded that she had already purchased the remaining share of the suit property from other co-owners except 3/4th share owned by Sardar Guljeet Singh and with respect to which share also respondent/plaintiff pleads to have in her favour an agreement to sell. Respondent/plaintiff pleaded that since 2008, the appellant/defendant in spite of requests was not getting converted the property into freehold and therefore after serving the legal notice dated 18.6.2008 the subject suit was filed.

4. Respondent/plaintiff appeared in the witness box as PW-1 and filed her affidavit by way of evidence. The agreement to sell dated 25.5.2005 was proved as Ex.PW1/A. The site plan was proved as Ex.PW1/B. Receipt acknowledging the payment of Rs.2 lacs was proved as Ex.PW1/C. Legal notice and postal receipts were proved as Ex.PW1/D and Ex.PW1/E. As already stated above, PW-1 was not cross-examined by the appellant/defendant and nor the appellant/defendant has led any evidence.

5. Trial court has accordingly decreed the subject suit directing specific performance of the agreement to sell of 1/8 th share of the appellant/defendant and the trial court has further directed the appellant/defendant to apply with other co-sharers for converting the suit property from leasehold to freehold.

6. In my opinion, in view of the fact that respondent/plaintiff proved her case, and the appellant/defendant failed to contest the suit and failed to lead any evidence, no illegality can be found in the judgment of the court below decreeing the suit.

7. Learned counsel for the appellant/defendant argued that a suit for specific performance is not bound to be decreed even assuming the appellant/defendant had not contested the suit, and it is further argued that respondent/plaintiff has failed to prove her readiness and willingness inasmuch as no proof has been filed with respect to financial capacity. It is also argued by the appellant/defendant that respondent/plaintiff failed to file any proof of having made further payment in cash of Rs. 5 lacs, and therefore, the suit was bound to be dismissed.

8. No doubt, grant of relief of specific performance is discretionary, and is granted by showing performance of acts under an agreement to sell, however such a doctrine equally does not give a license to a proposed seller to become dishonest in spite of entering into an agreement to sell. In the present case, balance consideration was only payable after converting the property from leasehold to freehold and therefore no further act had to be done by the respondent/plaintiff. Also it is to be noted that the doctrine of specific performance being discretionary is not for being used by parties such as the present appellant/defendant who in spite of opportunity failed to appear and contest by filing a written statement, failed to cross-examine the witness of the respondent/plaintiff and also failed to lead

any evidence. If a person has strength/conviction in his case, then he must come into the witness box, be ready to stand the test of cross-examination and by firstly at least filing a detailed pleading of defence. Failing to contest a case can hardly be a basis for a defendant in the suit to argue that though the defendant will not do what is required and expected for him in law by defending the case, the court should become a prosecutor for such a negligent party for dismissing a suit which is otherwise proved by the plaintiff by leading evidence.

9. There is no merit in the appeal. Dismissed.