

(2016) 02 DEL CK 0292
In the Delhi High Court
Case No : CS (OS) No. 325/2007

Shree Aadhiya Build Well Pvt. Ltd.

APPELLANT

Vs

Kartar Singh and Others

RESPONDENT

Date of Decision : 09-02-2016

Acts Referred:

Evidence Act, 1872 — Section 91, Section 92

Penal Code, 1860 (IPC) — Section 73

Specific Relief Act, 1963 — Section 12, Section 16(c), Section 20

Citation : (2016) 228 DLT 10

Hon'ble Judges : Valmiki J. Mehta, J.

Bench : Single Bench

Advocate : B.S. Maan, Vishal Maan and Paritosh Tomar, Advocates., for the Appellant; Jagat Rana and Yashvardhan Singh Rathore, Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

Valmiki J. Mehta, J.—1. This suit for specific performance is filed by the plaintiff/ Company Shree Aadhiya Build Well Pvt. Ltd. Plaintiff is the proposed purchaser under the Agreement to Sell dated 4.11.2006. Four defendants to the suit are the proposed sellers under the Agreement to Sell dated 4.11.2006 (defendant no. 4 is the mother who had 50% share and who expired during the pendency of the suit and is now represented by defendant nos. 1 to 3 who are three sons). The land which is the subject matter of the Agreement to Sell dated 4.11.2006 comprises of 41 bighas and 16 biswas of land bearing Khasra no. 19//19 (6-16) (wrongly recorded as 0-16 in the agreement), 22 (4-16), 23 (6-16), 24(2-1), 21//11 (4-16), 19/3 (2-6), 20 (4-16), 21 (4-16) and 22 (4-13) situated in the Revenue Estate of Village Baprola, New Delhi-110043.

2. The total sale consideration as per the agreement to sell was Rs. 7 crores. A sum of Rs. 72 lacs was paid in terms of the Agreement to Sell dated 4.11.2006. Whereas defendant nos. 1 to 3 were paid a sum of Rs. 12 lacs each, defendant

no. 4 was paid a sum of Rs. 36 lacs. These payments were made by means of cheques drawn on ABN Amro Bank and as stated in para 2 of the agreement to sell.

3. The case of the plaintiff is that defendants became dishonest after entering into of the agreement to sell and they did not apply and take the necessary NOC under the Delhi Land (Restrictions on Transfer) Act, 1972 (in short the Act of 1972), and which was the duty of the respondents in terms of para 10 of the agreement to sell. Plaintiff has further pleaded that plaintiff regularly contacted the defendants, who either dilly-dallied or avoided to give details of applying of the NOC. Plaintiff further pleads in the plaint that suddenly the plaintiff received a legal notice from the defendants dated 6.2.2007 alleging that the last date of payment under the agreement to sell was 3.2.2007 and since the plaintiff did not make the payment of the balance amount by 3.2.2007, the amount of Rs. 72 lacs already paid by the petitioner stands forfeited by cancelling the agreement to sell. The legal notice dated 6.2.2007 also asserted that there was no final agreement to sell, inasmuch as, the name of the proposed buyer in the Agreement to Sell dated 4.11.2006 was left blank and thus the defendants did not know that as to in whose name the NOC was to be applied for. Plaintiff pleads that it is the defendants who are guilty of breach of contract as they want to back out of the agreement to sell. The subject suit for specific performance accordingly came to be filed on 17.2.2007.

4. The defendants in their joint written statement have essentially taken up three defences. First is that there is no final agreement to sell as the name of the proposed purchaser was never mentioned in the agreement to sell and which name was never informed to the defendants till 3.2.2007, and which was the last date for making payment under the agreement to sell. The second defence is that on account of the defendants not knowing the name of the proposed purchaser, and which was to be told to them by the property brokers who had brokered the transactions namely Sh. Kuldeep, Sh. Bharthu and Sh. Joginder Singh, NOC could not be applied for and obtained by the defendants. The defendants have also denied that the plaintiff has been and continues to be ready and willing to perform its part of the contract.

5. In the suit following issues were framed on 18.9.2007:-

"1. Whether the plaintiff is entitled for a decree of specific performance of agreement to sell dated 4th November, 2007 in respect of total land measuring 41 bighas 16 biswas situated in the Revenue Estate of village Baprola, New Delhi, if so, on what terms and conditions? OPP

2. Whether the plaintiff is entitled for a decree of permanent injunction as prayed by the plaintiff? OPP

3. In case, the plaintiff is not entitled for a decree of specific performance, whether the plaintiff is entitled for recovery of damages, if so, how much and from which of the defendants? OPP

4. Whether the plaintiff has always been ready and willing to perform his part of agreement dated 4th November, 2006? OPP

5. Whether the name of the purchaser (plaintiff) was not disclosed to the defendants while agreement to sell dated 4th November, 2006 was executed, as alleged by the defendants, if so, to what effect? OPD

6. Whether there was no legal and binding agreement between the parties, as alleged by the defendants? OPD

7. Relief."

6. The following documents have been proved by the plaintiff:-

(i) The Agreement to Sell dated 4.11.2006, Ex.P-1

(ii) Receipt dated 4.11.2006, Ex.P-2;

(iii) Photocopies of the four cheques bearing the original signatures of each of the defendants qua each separate cheque given to each of the defendants, Ex.PW1/3 to Ex.PW1/6;

(iv) Certificate of ABN Amro Bank showing clearing of cheques issued by the plaintiff company given at the time of agreement to sell totaling to Rs. 72 lacs, Ex. PW1/7;

(v) Legal Notice sent by the defendants to the plaintiff dated 6.2.2007 as Ex. PW1/8.

(vi) Certificate of the bank of the plaintiff ABN Amro Bank showing that plaintiff had in the bank account a sum of Rs. 6,45,37,122/- on 6.2.2007 as Ex.PW1/9.

Other documents have not been proved and exhibited and I therefore need not refer to the same.

Issue Nos. 5 & 6

7. Issue nos. 5 and 6 are the issues which are required to be firstly considered by this Court, inasmuch as, only if there exists a complete Agreement to Sell dated 4.11.2006, would then arise the necessity of deciding other issues as to whether the plaintiff is entitled to specific performance and as to whether the plaintiff was and has been ready and willing to perform its part of the Agreement to Sell dated 4.11.2006.

8. Though the stand of the defendants is that space containing the name of the proposed purchaser was blank in the Agreement to Sell dated 4.11.2006 and that the defendants never knew who was the proposed purchaser, I find the defence of the defendants not believable and acceptable by this Court inasmuch as defendants admit that they received the four cheques exhibited as Ex.PW1/3 to Ex.PW1/6 for a sum of Rs. 12 lacs each (three cheques) and one for a sum of Rs. 36 lacs, and these cheques were issued by the plaintiff/Company. Therefore,

I cannot believe the defendants that space where the name of the proposed purchaser was to be stated in the agreement to sell was left blank. No doubt, space as originally typed was blank, however, in the blank space by handwriting, the name of the plaintiff is stated, and which aspect is to be taken along with the fact that the photocopies of the four cheques issued by the plaintiff have been exhibited as Ex.PW1/3 to Ex.PW1/6 (bearing the original signatures of the four defendants) and their clearance proved by the bank certificate Ex.PW1/7. It is therefore held that issue nos. 5 and 6 have to be decided in favour of the plaintiff and against the defendants holding that the Agreement to Sell dated 4.11.2006 is not invalid or unenforceable allegedly on account of the name of the proposed purchaser, viz the plaintiff, being not stated in the agreement to sell.

Issue nos. 1, 3 and 4.

9. The next issues which are required to be discussed are issue nos. 1, 3 and 4 as to whether the plaintiff has always been ready and willing to perform its part of the Agreement to Sell dated 4.11.2006. Onus of this issue was on the plaintiff on account of the provision of Section 16(c) of the Specific Relief Act, 1963. This provision requires that a proposed purchaser has always to be and continues to be ready and willing to perform its part of the agreement to sell. It is settled law that the expressions "readiness" and "willingness" refer to the capacity to pay so far as the expression "readiness" is concerned and the intention to go through with the transaction as reflected in the expression "willingness". These are the meanings of the expressions "readiness" and "willingness" as held in various judgments of the Supreme Court and one such judgment of the Supreme Court in this regard is in the case of J.P. Builders and Another Vs. A. Ramadas Rao and Another , (2011) 1 SCC 429. We will therefore have to examine as to whether the plaintiff was always ready and willing to enter into the sale deed till the time of the present final arguments and from the date of entering into the agreement to sell. At the time of considering this issue, no doubt, it is borne in mind that the plaintiff has to be willing to perform its part of the contract only when the defendants have obtained the NOC, however, Section 16(c) of the Specific Relief Act requires not one but two aspects to be proved by the plaintiff ie both readiness and willingness. In law the aspect of willingness being there is one which is to be acted upon by making the payment when the defendants make themselves capable of performing the agreement to sell by taking the necessary NOC, however, as contrasted from willingness, readiness is an aspect which has to be independently proved. Readiness pertains to the financial capacity of a proposed purchaser to make payment of the balance consideration under the agreement to sell. The issue with respect to readiness and willingness is overlapping with the issue of defendants being guilty of breach of contract, but, the expression "has always been ready and willing" is an expansive expression not only encompassing therein that it has to be shown that the defendants are guilty of breach of contract, but also that it has to be shown that plaintiff had necessary financial capacity to pay the balance sale consideration at all points of time after the agreement to sell was entered into. The aspect of a plaintiff/

proposed purchaser always being ready to perform its part of the contract i.e having the necessary capacity to pay the sale consideration is because specific performance is a discretionary relief and an alternative to the relief of grant of damages. A suit for specific performance is filed because the plaintiff/proposed purchaser alleges breach of contract by defendants/proposed sellers and ordinarily a breach of contract gives right to remedy and relief of damages under Section 73 of the Indian Contract Act, 1872. Specific performance is the alternative to the relief of damages and courts have in view of Section 20 of the Specific Relief Act held that even if the proposed sellers are guilty of breach of contract, it is not necessary that a suit for specific performance has to be decreed, and that a proposed purchaser can always be granted an alternative relief of damages, of course depending upon the facts and circumstances of each case and the evidence which is led in the case on relevant aspects.

10. Therefore, even after deciding the issue as to whether the defendants are guilty of breach of contract in not taking NOC as required of the defendants in para 10 of the agreement to sell, yet, plaintiff cannot claim specific performance unless and until plaintiff has proved its capacity to pay right from the time of entering into an agreement to sell till the time of the present final arguments.

11. So far as the fact of breach of contract is concerned, undoubtedly, para 10 of the agreement to sell does state that it is the obligation of the defendants to obtain the necessary NOC and thus as per Sections 91 and 92 of the Indian Evidence Act, 1872 once the agreement to sell is proved; and it has been proved in this case; defendants cannot in any manner argue anything to the contrary or in violation of the terms contained in the written agreement to sell being para 10 which requires the defendants to obtain the NOC. It is not the case of the defendants that after entering into the agreement to sell there was a subsequent oral agreement to shift the obligation of obtaining the NOC upon the plaintiff. Therefore, it is held that since the defendants did not obtain the necessary NOC under the Act of 1972, hence the defendants are guilty of breach of contract.

12. As already stated above, however, the issue of breach of contract by the defendants is not determinative of the entitlement of the plaintiff to the grant of specific performance in its favour because grant of specific performance is not an automatic consequence on proving breach of agreement to sell by the defendants, but, grant of specific performance is an alternative benefit to the proposed purchaser on the proposed purchaser proving that the defendants/proposed sellers are guilty of breach of contract. As already stated above, plaintiff has to prove to the satisfaction of the Court his readiness i.e capacity to pay at all points of time and which is implicit in the expression "has always been ready and willing" as found in Section 16(c) of the Specific Relief Act and therefore, plaintiff has to prove his capacity from 4.11.2006 till date in the year 2016. Has the plaintiff proved so? The answer to this has to be in an emphatic no, and the reasons for the same are given hereinafter.

13. The only document sought to be relied upon and proved by the plaintiff as

regards plaintiff's financial capacity to be always ready and willing is the statement of account of the plaintiff/Company in ABN Amro Bank showing an entry of an amount of Rs. 6,45,37,122/- as on 6.2.2007. This document is alleged to be proved and exhibited as Ex.PW1/9, however, it is noted that exhibition of this document was objected to by the defendants at the time of leading of evidence by the plaintiff. In my opinion, the defendants rightly raised this objection and it cannot be held that this document is proved because this bank account is not certified under the Bankers' Books Evidence Act, 1891. Once the certificate is not certified under the Bankers' Books Evidence Act, it was necessary for the plaintiff to summon the record of the bank to prove the balance lying in the account of the plaintiff on 6.2.2007 as Rs. 6,45,37,122/- but the plaintiff has failed to do so. Therefore, there is absolutely no credible evidence whatsoever led by the plaintiff of plaintiff's financial capacity except a self serving statement of the plaintiff and which cannot be believed by the Court as proof that the plaintiff had with it the necessary funds.

14. Even for the sake of arguments, if we take the certificate Ex.PW1/9 as proved, this certificate still will not help the plaintiff to prove that the plaintiff has always been and continues to be ready and willing to perform its part of the contract ie plaintiff always right from entering into of the agreement to sell till date had the financial capacity to pay to the proposed sellers/defendants. This I say so because there is no evidence led by the plaintiff as to the amounts available with the plaintiff/Company to pay the balance sale consideration finally between 4.11.2006 and 6.2.2007, inasmuch as, even as per the statement of account Ex.PW1/9, the first entry in this account of 1.2.2007 only shows a balance of Rs. 19,37,122/-. Therefore between the date of entering into of the agreement to sell on 4.11.2006 and till the last date fixed for balance payment on 3.2.2007, plaintiff did not have and has failed to prove its necessary financial capacity to pay the balance sale consideration of Rs. 6,28,00,000/-. Therefore, once the plaintiff has failed to prove that the plaintiff had the necessary financial capacity from 4.11.2006 till 6.2.2007, plaintiff cannot be said to have proved its capacity to pay and hence readiness from 4.11.2006 to 6.2.2007.

15. At this stage it is required to be noted that the bank account Ex.PW1/9 filed by the plaintiff is very curious because it has just two entries one of 1.2.2007 of Rs. 19,37,122/- and second of 6.2.2007 of Rs. Rs. 6,45,37,122/-. This statement of account is curious because obviously the entry of 6.2.2007 has been made to show its coming into existence only for the plaintiff's capacity just before the filing of the suit. Also, the statement of account entry on 6.2.2007 obviously conceals more than it reveals because it shows that the plaintiff is guilty of concealment of material facts because this amount of Rs. 6,45,37,122/- has not been shown to be continued to remain existing in the credit of the plaintiff/Company after 6.2.2007 for most or almost the entire period from 6.2.2007 till date in the year 2016. The above facts obviously show that the plaintiff is speculating in litigation and plaintiff is therefore not entitled to the discretionary relief of specific performance. Therefore and in any case even if the issue has to

be looked de hors the aspect of discretionary nature of the relief of specific performance, yet the plaintiff has miserably failed to prove the plaintiff's capacity to pay even from February, 2007 till the present date in February, 2016, as required from the word "always" in Section 16(c) of the Specific Relief Act, and onus to discharge which was a sine qua non upon the plaintiff in terms of Section 16(c) of the Specific Relief Act, hence I hold that the plaintiff has miserably failed to prove issue no. 4 that plaintiff has always been ready and willing to perform its part of the Agreement to Sell dated 4.11.2006. This discussion with respect to issue no. 4 will also have to overlap with the decision of issue nos. 1 and 2 with respect to whether the plaintiff is entitled to the discretionary relief for specific performance.

16. There is another reason for deciding issue no. 1 against the plaintiff and in favour of the defendants in the facts of the present case where it is found that the plaintiff has just paid 10% of the total sale consideration initially.

17. There is also an aspect of what the additional amount is paid and yet to be paid to the defendant nos. 2 and 3, inasmuch as, there is an Order of this Court dated 21.3.2007 which shows that defendant nos. 2 and 3 have received the entire amounts payable to them under the agreement to sell (and which defendant nos. 2 and 3 have thereafter not appeared and contested the suit and not filed their written statements), but, the same order also notes the statements of the defendant nos. 2 and 3 that further amounts have to be recovered by them, and which obviously must be for the defendant nos. 2 and 3 to compromise the suit with the plaintiff. The plaintiff however has led no evidence as to what was this additional amount and how it stands paid to the defendant nos. 2 and 3.

18. It is also noted that on a specific query being put to the counsel for the plaintiff, counsel for the plaintiff on instructions states that plaintiff is not interested in receiving the amounts which are paid under the agreement to sell to the defendant nos. 2 and 3 and plaintiff in fact wants specific performance against defendant nos. 2 and 3 with respect to their shares in the land. At this stage, therefore, attention of the counsel for the plaintiff was drawn to the provision of Section 12 of the Specific Relief Act which disentitles a proposed purchaser to seek specific performance of part of the contract; part of the contract being of the defendant nos. 2 and 3 not only for the reason that defendant no. 1 is opposing the grant of specific performance but also that the original share of the defendant nos. 1 to 3 has undergone a change on account of the death of the mother being defendant no. 4, and thus the shares of the defendant nos. 1 to 3 which were originally jointly 50% have, on account of the death of the defendant no. 4 during the pendency of the suit, got transformed to 1/3rd share each in the suit land. Section 12 of the Specific Relief Act, 1963 reads as under:

"12. Specific performance of part of contract.- (1) Except as otherwise hereinafter provided in this section, the court shall not direct the specific

performance of a part of a contract.

(2) Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

(3) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either-

(a) forms a considerable part of the whole, though admitting of compensation in money; or

(b) does not admit of compensation in money;

he is not entitled to obtain a decree for specific performance; but the court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the other party-

(i) in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and in a case falling under clause (b), [pays or has paid] the consideration for the whole of the contract without any abatement; and

(ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

(4) When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part.

Explanation.-For the purposes of this section, a party to a contract shall be deemed to be unable to perform the whole of his part of it if a portion of its subject-matter existing at the date of the contract has ceased to exist at the time of its performance."

19. It is clear from a reading of different sub-Sections of Section 12 of the Specific Relief Act that court cannot enforce specific performance of part of the contract. Of course, court can enforce specific performance in part in the sense that an entire share of a particular person can be ordered to be sold by means of decreeing of the suit for specific performance, however, that can be done if the agreement to sell in question (i.e Agreement to Sell dated 4.11.2006) treated the agreement to sell as agreement to sell of individual specific share and ownership interest of a particular percentage of each of the defendants in the suit property. Putting it differently, the Agreement to Sell dated 4.11.2006 if it has stated that each of the defendants is selling his specific undivided interest and effectively each defendant individually has entered into a separate

agreement of his share, then in such circumstances, the agreement to sell could have been enforced with respect to the share of any one of the defendants, but, reference to the agreement to sell shows that all the four original defendants are jointly shown as one seller and there is no demarcation or bifurcation in the agreement to sell with respect to selling by each of the defendants of his specific percentage share in the suit land to the plaintiff. Therefore, considering the language of the agreement to sell, the agreement to sell cannot be interpreted as sale by each of the defendants of his each specific percentage share in the suit land. Since the specific performance cannot be granted of part of the agreement to sell, even if defendant nos. 2 and 3 have received the entire sale consideration as noted in the Order dated 21.3.2007, this Court cannot grant specific performance with respect to shares of defendant nos. 2 and 3 while simultaneously noting that counsel for the plaintiff concedes that plaintiff is not asking for the relief of recovery of moneys paid by the plaintiff to the defendant nos. 1 to 3 of the entire consideration under the Agreement to Sell dated 4.11.2006. I have already noted above that while defendant nos. 2 and 3 in their statement recorded on 21.3.2007 stated that they have received the entire amounts under the agreement to sell, however, the Order dated 21.3.2007 also records that they had to receive additional consideration from the plaintiff and which is an indication that possibly the original agreement to sell so far as the amounts of consideration are concerned underwent a change. On that aspect however I need not finally pronounce one way or the other on account of the fact that even if we take that complete consideration has been received by defendant nos. 2 and 3, but by virtue of the Section 12 of the Specific Relief Act, plaintiff is legally not entitled to specific performance of part of the agreement to sell. Accordingly issue nos. 1, 3 & 4 are decided in favour of the defendants holding that plaintiff is not entitled to the specific performance of the Agreement to Sell dated 4.11.2007 and no money decree for amounts paid by plaintiff is passed as plaintiff is not seeking through this Court the recovery of moneys paid by the plaintiff as consideration to either of the defendants under the agreement to sell.

Issue No. 2

20. In view of the decision of issue nos. 1, 3 and 4 against the plaintiff, issue no. 2 will stand decided against the plaintiff.

General

21. In view of the decision of the issues no. 1 to 4 in favour of defendants and against the plaintiff, it is held that the plaintiff is not entitled to the specific performance of the Agreement to Sell dated 4.11.2006. Plaintiff as already stated above does not seek any relief of money decree being the consideration paid by the plaintiff to the defendants under the agreement to sell. Also plaintiff has not led any evidence to show what are the amount of damages which the plaintiff will be entitled to, inasmuch as, plaintiff had to prove damages by leading evidence as to how there was an increase in the prices of the property for the difference in the prices of property on the date of breach being the

amount which the plaintiff would be entitled to as damages.

Relief

22. Accordingly, the suit for specific performance and/or damages of the plaintiff is dismissed with actual costs. Defendant no. 1 will file certificate of fees of his lawyers within a period of one month from today with respect to the entire costs actually incurred by the defendant no. 1 being the fees paid by the defendant no. 1 to his lawyers, and such fees paid by the defendant no. 1 will be the costs in favour of the defendant no. 1 and against the plaintiff. Decree sheet be drawn accordingly. Suit is dismissed and disposed of accordingly.