

(2010) 12 DEL CK 0130

In the Delhi High Court

Case No : Regular First Appeal No. 284 of 1989

Shri Devi Dayal Mehta

APPELLANT

Vs

Madhu Bala Jain and Another

RESPONDENT

Date of Decision : 08-12-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96

Citation : (2010) 12 DEL CK 0130

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Suman Kapoor, Ads, for the Appellant; B.B. Gupta, for Respondent Nos. 1 and 2 and Asheesh Jain, for the Respondent No. 3, for the Respondent

Final Decision : Dismissed

Judgement

Valmiki J Mehta, J.—By the present appeal u/s 96 of the Code of Civil Procedure, 1908 (CPC) the Appellant seeks to challenge the judgment and decree dated 1.2.1989 passed by the trial Court decreeing the suit of the Respondents/plaintiffs for specific performance against the Appellant/Defendant in respect to the property No. XIII/3578-80 Gali Sangtrashan, Bara Hindu Rao Delhi.

2. The facts of the case are that the Appellant as the seller and the Respondents as the buyer entered into an Agreement to Sell in respect of the subject property on 11.11.1981. The total sale consideration was of Rs. 45,000/- and of which a sum of Rs. 20,000/- was already received by the Appellant prior to the Agreement to Sell. The balance sale consideration of Rs. 25,000/- was to be paid to the Appellant at the time of registration of the sale deed. On account of the Appellant failing to execute the sale deed, the Respondents filed the suit for specific performance and which has been decreed by the impugned judgment and decree.

3. Following issues were framed by the trial Court:

1. Whether the agreement to sell in question was contingent contract and not

enforceable under the rule ? OPD

2. Whether the agreement to sell was determined and treated as cancelled, as pleaded in para 2 of the W.S.? OPD

3. Whether plaintiffs are entitled to the relief of specific performance? OPP

4. Relief.

4. So far as the issue No. 1 is concerned, it has been held by the trial Court that even if the contract was of a contingent nature it did not absolve the Appellant to execute the sale deed in favour of the Respondents because the contingency was that a sale certificate had to be executed in favour of the Appellant in terms of a decree in his favour by the Civil Judge (then sub Judge Ist Class) in suit No. 391/1995 decided on 11.9.1980. The issue is that merely because the performance of the contract is contingent upon the Appellant/seller getting a sale certificate executed in his favour, can the same frustrate the Agreement to Sell. Surely, no one can take advantage of his own wrong because if the execution of the sale deed by the Appellant/seller in favour of the Respondents/buyers was on a contingent/condition that a sale certificate was to be issued in favour of the Appellant, then the Appellant was bound to take steps to get the sale certificate executed in his favour. Though this issue is really academic because before the suit was filed the sale certificate was in fact issued in favour of the Appellant on 2.3.1982, however, even assuming the sale certificate was not issued, yet, the law is well settled that in such a case the decree of specific performance would have been passed directing the Appellant/seller to get the necessary sale certificate issued in his favour. This issue is no longer res integra and a direct judgment on this point is the judgment of the Supreme Court reported as Mrs. Chandnee Widya Vati Madden Vs. Dr. C.L. Katial and Others, and which holds that it is the duty of the seller in case of a contingent contract to take steps to ensure that he is in a position to perform the agreement to sell by getting the necessary permission for executing the sale deed.

5. Para Nos. 3 to 5 of this judgment are relevant and the same read as under:

3. The High Court on appeal came to the conclusion that the agreement was a completed contract for sale of the house in question, subject to the sanction of the Chief Commissioner before the sale transaction could be concluded, but that the trial court was in error in holding that the agreement was inchoate, and that, therefore, no decree for specific performance of the contract could be granted. The High Court relied mainly on the decision of Their Lordships of the Judicial Committee of the Privy Council in Motilal v. Nanhelal for coming to the conclusion that there was a completed contract between the parties and that the condition in the agreement that the vendor would obtain the sanction of the Chief Commissioner to the transaction of sale did not render the contract incomplete. In pursuance of that term in the agreement, the vendor had to obtain the sanction of the Chief Commissioner and as she had withdrawn her application for the necessary sanction, she was to blame for not having carried out her part of

the contract. She had to make an application for the necessary permission. The High Court also pointed out that if the Chief Commissioner ultimately refused to grant the sanction to the sale, the plaintiff may not be able to enforce the decree for specific performance of the contract but that was no bar to the court passing a decree for that relief. Though it was not necessary in the view the High Court took of the rights of the parties, it recorded a finding that a sum of Rs 5775 would be the appropriate amount of damages in the event of the plaintiffs not succeeding in getting their main relief for specific performance of the contract.

4. The main ground of attack on this appeal is that the contract is not enforceable being of a contingent nature and the contingency not having been fulfilled. In our opinion, there is no substance in this contention. So far as the parties to the contract are concerned, they had agreed to bind themselves by the terms of the document executed between them. Under that document it was for the Defendant-vendor to make the necessary application for the permission to the Chief Commissioner. She had as a matter of fact made such an application but for reasons of her own decided to withdraw the same. On the findings that the plaintiffs have always been ready and willing to perform the part of the contract, and that it was the Defendant who wilfully refused to perform her part of the contract, and that time was not of the essence of the contract, the court has got to enforce the terms of the contract and to enjoy upon the Defendant-Appellant to make the necessary application to the Chief Commissioner. It will be for the Chief Commissioner to decide whether or not to grant the necessary sanction.

5. In this view of the matter, the High Court was entirely correct in decreeing the suit for specific performance of the contract. The High Court should have further directed the Defendant to make the necessary application for permission to the Chief Commissioner, which was implied in the contract between the parties. As the Defendant-vendor, without any sufficient reasons withdrew the application already made to the Chief Commissioner, the decree to be prepared by this Court will add the clause that the Defendant, within one month from today, shall make the necessary application to the Chief Commissioner or to such other competent authority as may have been empowered to grant the necessary sanction to transfers like the one in question, and further that within one month of the receipt of that sanction she shall convey to the plaintiffs the property in suit. In the event of the sanction being refused, the plaintiffs shall be entitled to the damages as decreed by the High Court. The Appellant sought to raise certain other pleas which had not been raised in the High Court; for example, that this was not a fit case in which specific performance of contract should be enforced by the court. This plea was not specifically raised in the High Court and the necessary facts were not pleaded in the pleadings. It is manifest that this Court should not allow such a plea to be raised here for the first time.

6. In fact, I am a trifle surprised that this judgment was sought to be relied upon by the Appellant in the trial Court whereas this judgment in fact directly goes

against the Appellant himself. The learned Trial Court has in any case exhaustively dealt with this matter and held that the suit for specific performance cannot be defeated on alleged ground that the contract is a contingent contract and which I totally agree with. The relevant portion of the judgment of the trial court in this regard reads as under:

8. xxx

As in the present case, admittedly the deed of sale has been executed in favour of the Defendant by the court of Shri M.S. Rohilla, Sub Judge, Delhi so I am of the considered view that the agreement in question is fully enforceable in law. Moreover it has been held in the judgment reported at 1932 PLR 207 that the contingent contract is enforceable in law after the event upon which it was contingent has happened. The mere fact that the Defendant was having an imperfect title at the time of entering into agreement of sale and that the property in dispute is lease-hold site is no ground to refuse the enforcement of the contract. For this I am duly supported by the judgments reported at Nathulal Vs. Phoolchand, . The authorities relied upon by Id. counsel for the Defendant reported at Durga Prasad and Another Vs. Smt. Lilawati and Another, and Mrs. Chandnee Widya Vati Madden Vs. Dr. C.L. Katial and Others, are not applicable to the facts and circumstances of the present case specially in view of the law laid down by Hon''ble Supreme Court of India in the rulings referred to above. In view of my above discussions I hold that the contract entered into between the parties is enforceable under the law and this issue is accordingly decided in favour of the plaintiffs and against the Defendant.

7. In fact, since not only the law is well settled and the judgment of the trial Court gives a clear cut finding with regard to facts and law on this issue, the counsel for the Appellant could not raise arguments with any great stress on this aspect. In any case, sitting as an appellate Court, this Court would be entitled to interfere with the decision of the trial Court only if the same is illegal or perverse. The findings with regard to issue No. 1 are not only not illegal i.e. the same are perfectly legal and are the only findings which could have been arrived at in the facts and circumstances of the present case, also, there is no perversity in the findings. The findings of the trial Court on issue No. 1 are accordingly upheld.

8. Issue No. 2 was the issue of which onus was placed upon the Appellant/Defendant to show as to whether the agreement to sell was to be treated as cancelled. The contention of the Appellant before the trial Court was that the sale was to take place for the benefit of the father of the Respondent and since father of the Respondent had expired, the agreement was cancelled. This aspect has also been dealt with in detail by the trial Court by observing that except the oral statements made by the witnesses of the Appellant/Defendant, nothing was brought on record to substantiate this aspect. I agree with the findings because if cancellation of the agreement, and which is indeed a very serious matter, is permitted to be held in favour of the seller on the ground of oral testimonies of the witnesses, then, ordinarily no agreement to sell would be capable of being

specifically enforced. The learned trial Court has dealt with this issue in para 9 of the impugned judgment and the relevant portion of which reads as under:

9. xxx

In support of the facts pleaded by the Defendant he has examined 3 witnesses and all of them have stated that the plaintiffs were not to possession of sufficient funds and that the agreement in dispute was treated to be cancelled at the instance of the plaintiffs because of the death of father of plaintiff No. 1. The Defendant has not placed any document on record to show that the plaintiffs ever agreed to told the Defendant for the cancellation of the agreement. On the other hand, plaintiffs have stated that they have always been ready and willing to purchase the property. The plaintiffs have also proved on record that they were in possession of sufficient funds through Ex.PW5/D1 & 2 and the statements of PW1 to PW5. The Defendant has not even cared to serve any notice upon the plaintiffs to the effect that they have been avoiding to get the deed of sale registered in their favour or that they were not in possession of sufficient funds. The Defendant has also failed to prove on record that infact the plaintiffs agreed to purchase the property for the father of the plaintiff No. 1. Moreover, the allegations made by the Defendant himself in para 4 of the W.S. shows that the plaintiffs did not agree to the proposal of the Defendant to execute the document for cancellation of the agreement and this fact clearly shows that the plaintiffs have not told or asked the Defendant that the agreement in dispute may be treated as cancelled. Moreover, DW1 Defendant himself made contradictory statement as somewhere he has stated that the husband of the plaintiff No. 1 has come to his factory for cancellation of the agreement and somewhere he has stated that the plaintiff No. 2 herself had come to the factory for the said purpose. In the entire W.S. the Defendant has nowhere stated that the husband of the plaintiff No. 1 has told him about the non availability of the funds or that father of the plaintiff No. 1 was to purchase the property. All the witnesses of the Defendant have stated in their statements that all talks took place between the Defendant and husband of plaintiff No. 1 and this fact was not however pleaded by the Defendant in the W.S.

Moreover the Defendant has failed to show that the property in dispute was infact to be purchased for the father of that the same was executed with the plaintiffs Rs. 20,000/- to the Defendant and the possession of the ground floor portion of the property was delivered to the plaintiffs and the plaintiffs were to pay the balance sale price to the Defendant. In these circumstances, it stands established on record that the property in dispute was to be purchased by the plaintiffs for themselves and the Defendant has failed to prove that the agreement to sell was ever determined or treated as cancelled. The oral testimony of the D Ws cannot be believed. The counsel for the Defendant has argued that the word nominee has been mentioned in the plaint and that the same clearly indicates that the property was to be purchased by the plaintiffs for the father of the plaintiff No. 1. This argument of Id. Counsel for the Defendant is

devoid of any force because of the property in dispute was to be purchased for the father of the plaintiff No. 1 then his name could very easily be mentioned in the agreement. Moreover the mere fact that the word nominee has been mentioned in the agreement it cannot be presumed that the property in dispute was to be purchased by the plaintiffs for the father of the plaintiff No. 1. Accordingly, this issue is decided in favour of the plaintiffs and against the Defendant.

Once again the learned trial Court has exhaustively and thoroughly dealt with this issue and held that oral testimony cannot be believed to frustrate a suit for specific performance and with which I am in agreement with. The other arguments of the Appellant in this regard of "nominee" issue has also been rightly rejected by the Court below. I do not find any reason, sitting as an appellate Court, to hold that the findings with respect to issue No. 2 are in any manner perverse or illegal calling for interference by this Court.

9. The next issue was the issue of readiness and willingness on behalf of the Respondents. The trial Court has considered the testimonies of the different witnesses of the Respondents-plaintiffs including the witnesses of the plaintiffs from the banks and partnership concerns where the plaintiffs had deposited an amount totaling to Rs. 37,500/- and which was therefore available in liquid cash. The balance amount payable under the agreement to sell was only a sum of Rs. 25,000/- and therefore clearly the plaintiffs had the necessary financial capacity to make the payment of the balance amount of Rs. 25,000/- to the Appellant. PW-1 was the witness from the State Bank of India who proved the fixed deposit of Rs. 5,000/- in favour of the plaintiff No. 1/Respondent No. 1. PW-2 was the witness from the partnership firm of M/s. Plastic Craft with whom the plaintiff No. 1 had a deposit of Rs. 15,000/- and which witness said that he had brought with him a sum of Rs. 15,000/-. PW-3 was the witness from another partnership concern M/s. Sumer Sons and who said that plaintiff No. 2 had deposited with firm a sum of Rs. 5,000/- and which was still lying with it. The other witness was from syndicate bank who proved that an amount of Rs. 17,500/- was lying in the fixed deposit in the name of Sh. Jagdish Gupta, husband of the plaintiff No. 2.

The receipts with respect to the amount deposited with the partnership concern were also duly exhibited as Ex.PW5/D1 and PW5/D2.

10. It is therefore clear that the Respondents/plaintiffs were always ready and willing to perform their part of the contract and there was no reason for them for not seeking and being granted specific performance. In fact once it is held while dealing with issue No. 2 that the agreement was not cancelled, then, nothing further will survive because the defence of the Appellant stands disbelieved that the agreement was cancelled and really there is hardly much dispute as to the financial capacity of the Respondents.

11. There is an important aspect which I must note which persuades this Court to uphold the findings as contained in the impugned judgment and decree. This

aspect pertains to the conduct of the Appellant. This fact is that the Appellant after the agreement to sell gave a portion of the property i.e. practically the entire first floor to one Sh. Mohd. Aklakh. This tenancy is under the Delhi Rent Control Act and therefore it would be upon the Respondents to evict the tenant through investment of a lot of time and expenditure. The Appellant is not in a position to deliver possession of this portion to the Respondents. This conduct of the Appellant speaks volumes of the unfair attitude adopted so as to cause unnecessary loss to the Respondents/plaintiffs.

12. No doubt, the relief of specific performance, even after proof of agreement to sell and the readiness and willingness in certain circumstances, may be denied as the same is a discretionary relief to be granted by the Court considering all the facts and circumstances of the case, however, I find that no such ground is found in the facts and circumstances of the present case which can deny the Respondents specific performance of the agreement to sell especially inasmuch as about 40% of the amount was already paid at the time of agreement to sell and it is on account of the default of the Appellant that he could not receive the balance amount of Rs. 25,000/- which the Respondents were always ready and willing to pay. Not only that as stated above, the Appellant has acted unfairly in letting out part of the property even after agreement to sell and the Respondents would have to make great efforts and investments of both time and money if it wants to evict the tenant and otherwise to which portion the Respondents would have got actual physical possession on being successful in the suit.

In view of the above, I do not find any reason to interfere with the well reasoned and detailed judgment of the Court below. The appeal is, therefore, dismissed, leaving the parties to bear their own costs.

C.M. No. 16880/2009 in RFA No. 284/1989

Since the main matter has been disposed of, this application does not survive as no arguments on the same were addressed on behalf of the Appellant. Application stands disposed of.