
(2010) 09 DEL CK 0012

In the Delhi High Court

Case No : I.A. No"s. 13061 of 2009 and 3108 of 2010 in C.S. (OS) No. 1907 of 2009

Smt. Pushpa Devi

APPELLANT

Vs

Late Sh. Maharaj Kumar Mehta and Another (through his legal heirs)

RESPONDENT

Date of Decision : 27-09-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10(2), Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 4, Order 6 Rule 17
Specific Relief Act, 1963 — Section 15, 19

Citation : (2010) 173 DLT 221

Hon'ble Judges : Rajiv Shakdher, J

Bench : Single Bench

Advocate : I.S. Alag, for the Appellant; S.D. Singh, for the Respondent

Final Decision : Allowed

Judgement

Rajiv Shakdher, J.

IA No. 13061/2009 (Order 39 Rule 1 & 2 of CPC by Pltf.)

IA No. 3108/2010 [Order 39 Rule 4 of CPC by Defendant Nos. 1(a) to (e)]

1. By this order I propose to dispose of the captioned interlocutory applications (hereinafter referred to as "IAs"). The first, IA being: IA No. 13061/2009; has been filed by the plaintiff under the provisions of Order 39 Rule 1 & 2 of the Code of Civil Procedure, 1908 (hereinafter referred to as "CPC"); while the second, IA being: IA No. 3108/2010; has been filed by the defendant Nos. 1 (a) to (e) to seek vacation of the interim order dated 12.10.2009.

2. The case set up by the plaintiff is as follows: The plaintiff in the suit has sought specific performance of her receipt-cum-memorandum of understanding dated 13.04.2007, by virtue of which she claims a right in 50% undivided share in the property situate at A-16, Rana Pratap Bagh, Delhi (hereinafter referred to

as the "suit property"). It is the case of the plaintiff that she is already an owner of the other half of A-16, Rana Pratap Bagh, Delhi property. The ownership, with respect to the said 50% undivided share, is claimed by virtue of a registered sale deed dated 16.05.2009, which evidently has been executed in favour of the plaintiff by one Satish K. Mehta.

3. The background in which the plaintiff has instituted the present suit is, as follows:

The property situate at A-16, Rana Pratap Bagh, Delhi (hereinafter referred to as the "Rana Pratap Bagh property") was evidently owned by one late Sh. Laxman Dass and his wife Dhanwati Devi. It appears that Laxman Dass predeceased his wife Dhanwati Devi. After the death of Dhanwati Devi, disputes arose between her nephew Harbanslal Mehta and his children Maharaj Kr. Mehta and Satish Kr. Mehta. A suit for perpetual injunction was filed by Maharaj Kr. Mehta, who claimed to be the adopted son of late Laxman Dass, before the Senior Sub-Judge, Delhi. This suit was registered as suit No. 780/1982. In the said suit, Harbans Lal Mehta along with his wife Padam Piari and Satish Kr. Mehta, amongst others, were impleaded as defendants. In the said suit parties arrived at a settlement. The settlement was recorded in the court's order dated 13.02.1984. Broadly, by virtue of this settlement, it was agreed that during their life time, late Harbanslal Mehta and his wife late Padam Piari Mehta would remain the absolute owners of the Rana Pratap Bagh property. After the death of their parents, late Maharaj Kr. Mehta and Satish Kr. Mehta each would own 50% undivided share in the Rana Paratap Bagh property. The plaintiff claims, as indicated above, that she has purchased 50% undivided share of Satish Kr. Mehta by virtue of registered sale deed dated 16.05.2009. As regards the remaining 50% undivided share in the Rana Pratap Bagh property, owned by late Maharaj Kr. Mehta; the plaintiff claims rights by virtue of a receipt-cum-agreement dated 07.09.2008, executed in her favour by defendant No. 2, i.e., one Shri Raj Kr. Gupta. It is averred that Shri Raj Kr. Gupta, by virtue of the said receipt-cum-agreement dated 07.09.2008 has assigned his rights and interest in the other 50% share in the Rana Pratap Bagh property in favour of the plaintiff. In so far as Shri Raj Kr. Gupta is concerned, he acquired the rights of late Maharaj Kr. Mehta share in the suit property by virtue of receipt-cum-memorandum of understanding dated 13.04.2007. It is averred that the legal heirs of Maharaj Kr. Mehta, despite repeated requests, have declined to consummate the sale. It is also averred that both defendant No. 2 earlier, as well as the plaintiff now, in her capacity as the assignee, is ready and willing to perform her part of the agreement. The plaintiff claims that she has sufficient funds to pay balance consideration which, according to her, is a sum of Rs 27.50 lacs. It is further averred that there is an apprehension that the legal heirs of Maharaj Kr. Mehta may create third party interest in the suit property. The apprehension, it appears, stems from the fact that the Rana Pratap Bagh property, wherein a shop is evidently located on the ground floor, has fallen vacant which, the legal heirs may attempt to sell and, thereby, compromise the

interest of the plaintiff.

4. The defendant, on the other hand, has refuted the stand taken by the plaintiff. Objections have been taken as to the maintainability of the suit on the ground that it has been filed against a dead person, i.e., Maharaj Kr. Mehta. It is also averred that the receipt-cum-memorandum of understanding dated 13.04.2007 is a forged document, and hence ought not to be acted upon. In alternative it is submitted that, even if one were to assume, that a receipt-cum-memorandum of understanding dated 13.04.2007 subsists; no rights would flow in favour of the plaintiff since, the plaintiff is not a party to said agreement. It is sought to be pointed out that the said agreement does not confer any right of assignment, as alleged by the plaintiff.

5. On behalf of the plaintiff arguments were addressed by Mr Alag, while on behalf of the defendant Nos. 1(a) to (e) submissions were made by Mr S.D. Singh. The submissions made by both counsels proceeded on the lines on which averments have been made in the pleadings filed by them. I may only add that Mr Singh, in support of the stand taken in the pleadings that the plaintiff is not a party to the receipt-cum-memorandum of understanding dated 13.04.2007, relied upon a judgment of the Supreme Court in the case of Bharat Karsondas Thakkar Vs. Kiran Construction Co. and Others, It was the contention of Mr. Singh that the plaintiff not being a party to the receipt-cum-memorandum of understanding dated 13.04.2007, no suit can be maintained by the plaintiff by virtue of the provisions of Section 15 and 19 of the Specific Relief Act, 1963 (hereinafter referred to as "Specific Relief Act").

6. I have heard the learned Counsels for the parties. The case set up by the plaintiff has been noted by me hereinabove. Briefly, the plaintiff claims ownership of 50% undivided share in the Rana Pratap Bagh property by virtue of the registered sale deed dated 16.05.2009 executed by Satish Kr. Mehta. Defendant Nos. 1(a) to (e) evidently, are not concerned with this half of, the Rana Pratap Bagh property. In so far as the other half of the Rana Pratap Bagh property is concerned, which is the suit property, the plaintiff claims right based on a receipt-cum-agreement dated 07.09.2008 executed in her favour for a consideration by defendant No. 2, i.e., Raj Kr. Gupta. A perusal of the receipt-cum-agreement dated 07.09.2008 shows that Raj Kr. Gupta has assigned his rights in receipt-cum-memorandum of understanding dated 13.04.2007, executed in his favour by late Maharaj Kr. Mehta, for a valuable consideration, i.e., a sum of Rs 2.50 lacs. This is the very amount which defendant No. 2, i.e., Raj Kr. Gupta paid to late Maharaj Kr. Mehta to obtain an interest in the receipt-cum-memorandum of understanding dated 13.04.2007.

6.1 A perusal of the receipt-cum-memorandum of understanding dated 13.04.2007 would show that the total consideration agreed to, with regard to the suit property was a sum of Rs 30 lacs, out of which 2.50 lacs was received, as noticed above, evidently by late Maharaj Kr. Gupta from defendant No. 2. The balance consideration was to be paid by defendant No. 2 to Maharaj Kr. Mehta in

the following manner: Rs 10 lacs was to be paid within seven days of receipt of intimation by defendant No. 2 that mutation had been obtained in respect of the suit property by Maharaj Kr. Mehta; while the balance sum of Rs 17.50 lacs was to be paid by defendant No. 2, within 45 days from the date of execution of the said receipt-cum-memorandum of understanding, i.e., on or before 28.05.2007.

6.2 Clause 5 of the receipt-cum-memorandum of understanding dated 13.04.2007, confers a right on the purchaser, i.e., defendant No. 2/Raj Kr. Gupta to obtain specific performance of the agreement or damages in the event of a default.

6.3 Clause 6 specifically provides that on demise of the seller, i.e., Maharaj Kr. Mehta the sale will be completed by his legal heirs. Clause 8 provides for forfeiture of the amount paid as earnest money on failure of the vendee to consummate the sale. A somewhat similar obligation binds the vendor. Clause 4, inter alia, makes a provision for return of earnest money and damages of an equivalent amount. It is pertinent to note that there is no clause which prohibits assignment of right by the vendee. Therefore, in view of the aforesaid clauses, it cannot be said that the plaintiff has no right to maintain a suit for specific performance. The plaintiff claims a right and interest in the receipt-cum-memorandum of understanding dated 13.04.2007 by virtue of receipt-cum-agreement dated 07.09.2008. By the latter instrument, defendant No. 2 has assigned his rights in receipt-cum-memorandum of understanding dated 13.04.2007 in favour of the plaintiff. While the defendants have pleaded forgery, they have not made any submission as to whether the signatures of Maharaj Kr. Mehta on the receipt-cum-memorandum of understanding dated 13.04.2007 are forged or that the contents thereof are in dispute. The plea of forgery is vague. Therefore, at this juncture, the plaintiff cannot be non-suited.

7. The submission of the learned Counsel for the defendants that a suit against a dead person cannot be maintained cannot be found fault with as a matter of law. Decidedly, to say the least, requisite care has not been conferred in drafting the plaint. However, fortiously for the plaintiff the legal heirs of late Maharaj Kr. Mehta were arrayed as defendants in the very first instance in the suit. A perusal of the plaint and the documents appended thereto, set out the case of the plaintiff, as noticed by me hereinabove. Therefore, looking at the substance rather than the form, this objection cannot be used as a plank to oust the plaintiff.

8. The submission of Mr. Singh that provisions of Section 15 and 19 of the Specific Relief Act would come in the way of the plaintiff is, also untenable. At the outset, I may only point out that there is no such reference to the said provision of law in the pleadings filed by the defendant. As a matter of fact, the written statement is not on record. It is still lying in the objection. The application filed on behalf of defendant Nos. 1(a) to (e) under Order 39 Rule 4 of the CPC, and the reply to the application under Order 39 Rule 1 & 2 of the CPC filed by the plaintiff; do not advert to the said provisions. Nevertheless, in my view the

Section 15 and 19 of the Specific Relief Act do not come in the way of the plaintiff. Section 15 states that except as otherwise provided by this chapter, the specific performance of a contract may be obtained, inter alia, by: (a) any party thereto; (b) representative-in-interest or the principal, of any party thereto. plaintiff in sum and substance claims to be the "representative in interest" of the defendant No. 2; being an assignee of defendant No. 2. It is well settled that an assignee can institute a suit for specific performance unless there is a express or implied bar or, where an agreement involves personal service. An assignee falls within the scope of expression "representative-in-interest" found in Section 15(b) of the Specific Relief Act. (See Shyam Singh Vs. Daryao Singh (dead) by Lrs. and Others,

8.1 On this aspect of the matter, the observations of the Supreme Court in the case of Shyam Singh (supra) are apposite. In this case the Supreme Court was called upon to adjudicate upon an appeal against the judgment of the High Court of Allahabad, wherein on an interpretation of the agreement for re-conveyance the Division Bench of the High court had come to the conclusion that the right conveyed was personal in nature, and hence not assignable. The Supreme Court, while disagreeing with the Division Bench, encapsulated the law on the issue. The Supreme Court went on to say that merely because there was no express provision for assignment an implied bar could not be read into the agreement only for the reason that the agreement referred to only the heirs of the contracting parties, and not their assigns or transferees. The relevant observations are extracted hereinafter:

7. ...The High Court by the impugned judgment passed in second appeal re-examined the terms of the document in question dated 4.2.1971 (exhibit 4) to arrive at a conclusion that the right of repurchase was available personally to the contracting parties defendant Nos. 2 to 4 and to their heirs. It held that as under the terms of the said document there is no clear stipulation permitting respondents 2 to 4 to transfer the right of purchase to anybody else, the said right was not assignable. The relevant finding of the High Court reads thus:

It is true that there is no negative clause that the said right of repurchase cannot be transferred to a stranger but the deed dated 4.2.1971 (exhibit 4) is specific that it is binding upon the parties and their heirs. The said clause does not permit respondents 2 to 4 to transfer the right of repurchase to anybody else including the appellant

8. ...As has been noted by the High Court and the courts below, it contains no express prohibition on transfer or assignment of right by the original contracting parties to third party. The only question is whether such prohibition against assignment or transfer can be read into the document by implication.

10. As is to be seen from the, provisions of Section 15(b) of the Specific Relief Act, 1963, specific performance of the contract may be obtained by "any party thereto" or "their representative in interest". This expression clearly includes the

transferees and assignees from the contracting party in whose favour the right exists. Such right of seeking specific performance would, however, be not available in terms of proviso below Clause (b) where "the contract provides that the "interest shall not be assigned".

12. We find it difficult to accept this proposition. True, it is that there is no clear stipulation permitting assignment or transfer of right of the purchaser by original party in favour of the third party but both contracting parties would be presumed to have been alive to the legal provisions contained in Section 15(b) of the Specific Relief Act....

13. In our considered opinion, in the absence of any words or expressions in the documents indicating prohibition on assignment or transfer of right of repurchase and in the face of clear provisions of Section 15(b) of the Specific Relief Act, 1963, an implied prohibition cannot be read into the terms of the documents. Merely because in the documents, there is mention of "heirs" of the contracting parties but not their "assignees" or "transferees", the legal right of assignment available to the benefit of original contracting party u/s 15(b) of the Act cannot be denied to it.

14. We are fortified in our view by two direct decisions of this Court rendered in somewhat similar circumstances with documents contemporaneously executed for sale and repurchase with comparable stipulations. See T.M. Balakrishna Mudaliar v. M. Satyanarayana Rao and Ors. [1993] 2 SCC 740 and Habiba Khatoon Vs. Ubaidul Huq and Others,

8.2 As noticed above, there is no explicit bar in the receipt-cum-memorandum of understanding dated 13.04.2007. If the plaintiff were to claim that there is an implied bar, which prima facie is absent, in my view, then, perhaps evidence would have to led.

9. In so far as Section 19 is concerned it provides as to the persons against whom specific performance can be enforced. Since late Maharaj Kr. Mehta was a party to the receipt-cum-memorandum of understanding dated 13.04.2007, and on his death defendants, by operation of law, had acquired a title to the suit property then, certainly under Clause (b) of Section 19 of the specific performance can be enforced against them.

10. The submission of Mr Singh, based on the observations made in the judgment of the Supreme Court in Bharat Karsondas Thakkar (supra), are misconceived. The ratio of the judgment is not applicable to the facts obtaining in the present case. The Supreme Court was, in the appeal before it examining the legal efficacy of an order passed by a Division Bench of the Bombay High Court, whereby an amendment had been allowed under the provisions of Order 6 Rule 17 read with Order 1 Rule 10(2) of the CPC. By virtue of the said order, a person who was not party to the agreement was sought to be arrayed as a party. The Supreme Court came to the conclusion that in the facts of the said case by allowing the amendment, the High Court had completely changed the nature and

character of the suit from being a suit for specific performance of the agreement to one for declaration of title and possession followed by a prayer for specific performance of an agreement of sale entered into between its assignee and the vendors of the assignees. In the instant case no such declaratory relief has been sought by the plaintiff.

11. In view of the discussion above, I confirm the order dated 12.10.2009. It is clarified that the said order pertains to only the suit property, which is 50% of the undivided share of late Maharaj Kr. Mehta. As regards the other, one-half share of the Rana Pratap Bagh property, the plaintiff has already claimed right, title and interest by virtue of a registered sale deed dated 16.05.2009. Consequently, IA No. 13061/2009 filed by the plaintiff under Order 39 Rule 1 & 2 of CPC is allowed; while IA No. 3108/2010 filed by the defendant Nos. 1(a) to (e) under Order 39 Rule 4 of CPC is dismissed.

12. Needless to say observations made by me above are prima facie in nature, and shall not impact the merits of the case at the stage of final adjudication.