

(2009) 02 DEL CK 0033

In the Delhi High Court

Case No : Regular First Appeal (OS) No. 8 of 1986

Smt. Sudershan Kumari Jain

APPELLANT

Vs

Sh. Pran Nath Jain and Others

RESPONDENT

Date of Decision : 11-02-2009

Acts Referred:

Citation : (2009) 157 DLT 626 : (2010) 8 RCR(Civil) 1393

Hon'ble Judges : Sudershan Kumar Misra, J;Sanjay Kishan Kaul, J

Bench : Division Bench

Advocate : Arvind K. Nigam, S.K. Sharma, Raghu and Dhruv, for the Appellant;
Arun Kumar, for R-1, for the Respondent

Final Decision : Allowed

Judgement

Sanjay Kishan Kaul, J.—The appellant filed a suit for specific performance of the Agreement to Sell and for possession in respect of property bearing No. 135 Block H, Vir Nagar Colony, G.T. Road, Gur Mandi, Delhi measuring 250 square yards for a total consideration of Rs. 1,50,000/-.

2. It is the case of the appellant that a written Agreement of Sale was executed on 03.08.1977, a copy of which was filed along with the plaint, but the original was alleged to be in the custody of respondent No. 1.

3. The respondent No. 1 is stated to be a perpetual sub lessee of the property in question having acquired the said rights in pursuance to a deed dated 30.09.1967 by the Land and Housing Department, Delhi of the Delhi Administration in favour of respondent No. 1 duly registered on 16.01.1968. In view of the Agreement to Sell, the respondent No. 1 (original defendant) is stated to have applied for sale permission of the suit property to the Delhi Development Authority as in terms of the sub lease deed fifty per cent of the unearned increase was payable to the said authority on transfer of the property. In pursuance to the request of respondent No. 1, the permission was accorded by the DDA vide letter dated 05.10.1977. The defendant is also stated to have

applied to the Income Tax Department on 18.01.1979 for grant of a certificate u/s 230A(1) of the Income Tax Act, 1961 ("the said Act" for short) which was also issued and filed along with the plaint.

4. The appellant claims to have deposited a sum of Rs. 30,000/- with the DDA towards fifty per cent of the unearned increase in the value of the plot. A further sum of Rs. 13,304.48 was paid by the appellant to the Loan Department of the Delhi Administration on account of the fact that a loan had been raised by the respondent No. 1 for a sum of Rs. 12,500/- for construction on the plot. The original documents were stated to be in the custody of the appellant. The appellant thus claims to have paid a sum of Rs. 43,304.48 to the respondent No. 1 out of a total sale price of Rs. 1,50,000/- since the burden of unearned increase was to fall on the respondent No. 1.

5. The grievance of the appellant is that the intention of the respondent No. 1 became dishonest and he did not come forth to execute the sale deed despite a legal notice dated 29.11.1979. The suit was consequently filed.

6. Respondent No. 1 was originally the sole defendant in the suit. In the written statement, an objection was taken by the respondent No. 1 that he was not the sole owner of the entire property and did not have the authority to sell the entire house. The factum of the perpetual sub lease deed being in favour of the respondent No. 1 was, however, not denied. The respondent No. 1 claimed that he was the owner of only 1/3rd share and his two brothers owned the remaining 1/3rd share each. These two brothers were subsequently impleaded as the defendants in the suit being respondent Nos. 2 and 3 herein.

7. The story set up by the respondent No. 1 is that his father was a member of the Jain Cooperative House Building Society Limited though the share was obtained in the name of the said respondent No. 1 being the eldest son. The plot was also consequently registered in his name. A loan was taken by respondent No. 1 from the DDA and amounts were contributed by the other two brothers as well. The property is stated to be assessed in the name of the three brothers in 1/3rd share each in the income tax returns. Respondent No. 1 claims that the appellant was in the full know of the facts as her husband and son had approached the respondent No. 1 for negotiating the sale of the property. The sale of the property was to be concluded only if the other two brothers agreed to sell their shares and thus no written agreement was ever executed. Respondent No. 1 did admit to applying for permission to sell the property to the DDA but since leasehold rights were in the name of respondent No. 1, the application was so made. The amount deposited by the appellant for clearance of the loan was also not disputed though the original documents are stated to have been acquired fraudulently. Since the respondents did not agree to sell the property, there is stated to be no concluded agreement between the parties.

8. On the pleadings of the parties, following issues were framed on 11.5.1981:

1. Was there no concluded agreement to sell the entire house in dispute - OPD

2. Did the defendant not agree to sell to the plaintiff the entire house for Rs. 1,50,000/- and did he not receive Rs. 43,304.48 in part performance of the contract of sale - OPD

3. Did the defendant obtain sale permission from DDA and Income Tax clearance from Income Tax Department in part performance of the agreement to sell - OPP

4. Whether the plaintiff is entitled to specific performance of the contract of sale - OPP

5. Relief.

9. Two additional issues were framed on 24.09.1984:

1. Whether the judgment and decree dated 16.05.1983 in suit Nos. 740/1980 and 287-A/83 is collusive between the defendant and his two brothers and is binding on the plaintiff? If so, what is its effect regarding relief qua defendants 2 and 3.

2. Whether the suit is barred by limitation?

10. The appellant entered into the witness box as PW1 to support her case. An Assistant from the DDA appeared as PW3 and proved the factum of the property standing in the name of the respondent No. 1 as well as the sale permission granted on 05.10.1977 (ExPW3/1). The letter dated 22.01.1977 asking for documents prior to sale permission was proved as ExPW3/2. The witness affirmed that the registration remained in the name of respondent No. 1. An Inspector from the Income Tax Office appeared as PW4 and proved the issuance of the no objection in Form 34A u/s 230A(1) of the said Act. The permission, as had been sought, was granted for 1/3rd share of respondent No. 1 in the suit property. The witness also stated that there was no document on record which showed the title of the respondent No. 1 in the property either in whole or in part. The witness further deposed that respondent No. 3 had not shown himself as the owner of 1/3rd share in the suit property in 1972-73, but in the assessment year 1973-74 had declared himself to be the owner of 1/3rd share in the suit property. The position was the same for respondent No. 2 and that all the three respondents had shown 1/3rd income from the property up to the assessment year 1981-82. He affirmed that there was no document on record to show the title of respondent No. 2 and respondent No. 3 in the property. Respondent No. 1 appeared in the witness box as DW1, respondent No. 3 as DW2 and respondent No. 2 as DW3. Two other witnesses also appeared and supported the case of the respondents.

11. On completion of trial and hearing of arguments, the learned Single Judge passed a judgment and decree dated 04.10.1985. Issue Nos. 1 to 3, as also issue No. 5, were found in favour of the appellant. Additional issue No. 2 was given up by the respondents. However, issue No. 4 was found against the appellant. As a consequence thereof, the appellant was held to be not entitled to a decree of specific performance on account of interest of respondent Nos. 2 and

3 in the suit property as reflected in the income tax returns and thus the decree was passed in favour of the appellant and against respondent No. 1 for a sum of Rs. 43,304.48 along with interest at the rate of 12 per cent per annum from the date when deposits were made till the date of payment. It is this judgment which is assailed by the appellant.

12. The learned Single Judge (as he then was) took note of the fact that the appellant having alleged that the original agreement to sell was in possession of respondent No. 1 took no steps to prove the document on record. The document was denied in toto by the respondent No. 1 and consequently also denied possession of any original document in that behalf. Thus no written agreement to sell could be proved.

13. The learned Single Judge, however, took into consideration the plea of the appellant that in any case there was ample evidence on record to prove the existence of an oral agreement to sell. The plea was found to be taken in the plaint as the averment in the plaint was to the effect that "the defendant also entered into a written agreement of sale dated 03.08.1977" which was wide enough to permit a plea of an antecedent oral agreement. The factum of respondent No. 1 seeking permission for sale of the property from the DDA was proved on record as also the factum of the appellant having deposited an amount of Rs. 30,000/- towards unearned increase in pursuance to the permission granted by the DDA. The sale permission sought by respondent No. 1 was specifically in favour of the appellant and the permission from the competent authority under the Urban Land (Ceiling and Regulation) Act had already been obtained. These documents were found to be sufficient to show the intent to sell the property to the appellant as also the agreed consideration which was set out in the application which formed the basis of the calculation of the unearned increase. The manner of applying for the sale permission also negated the stand of the respondent No. 1 that he had applied only to sell 1/3rd share in the property or that the consideration of Rs. 1,50,000/- was only for his share as it was contrary to the application made by respondent No. 1 to the concerned authority of DDA. The finding recorded is also that the appellant got the loan, which was taken against the property, cleared and paid for the same which was in furtherance of the agreement to sell.

14. The only document establishing the claim of 1/3rd share each of the three respondents is the application made by respondent No. 1 to the income tax authorities resulting in issuance of a certificate u/s 230A(1) of the said Act. However, the said document also established that the agreed price for the whole property was Rs. 1,50,000/-. This document, however, was after the agreement/ understanding entered into between the parties.

15. Respondent No. 1 failed to prove any receipt of title in favour of his father in the Society and the finding was of respondent No. 1 alone being a member of the cooperative society who had paid for the same and had the registered document in his favour. Nothing was brought on record other than the oral testimony that

respondent Nos. 2 and 3 contributed towards the construction. The learned Single Judge, however, found that the assessment orders prior to the date of the agreement itself showed that the income was shared and the respondent Nos. 2 and 3 had claimed share in the property in their income tax returns though there was no document of title in their favour filed with the income tax authorities. It is thus the returns of the income tax which are the sole basis of the finding of the learned Single Judge in favour of the respondents that the same being prior to the agreement to sell, specific performance could not be granted as respondent Nos. 2 and 3 were not agreeable to sale of the property in question.

16. It may also be noticed that respondent Nos. 2 and 3 had filed a suit against respondent No. 1 in pursuance to an award and obtained a decree. The suit was practically uncontested and was found to be a collusive one. In fact, the stand of respondent Nos. 2 and 3 that the suit was filed by them after the filing of the suit for specific performance and it is the suit of specific performance which had caused the respondent Nos. 2 and 3 to file a suit to get declaration of their shares in the property in question.

17. It would be appropriate at this stage to discuss the testimony of the appellant and the three respondents. The appellant more or less affirmed the stand as set out in the plaint. It was categorically denied that there was any prior information available with the appellant about there being three owners of the property. There is, in fact, not much of meaningful cross examination from which anything further can be deciphered. Respondent No. 1 affirmed on oath that he was the owner of only 1/3rd share and his understanding with the husband and son of the appellant was for sale of only 1/3rd share for Rs. 1,50,000/- while the appellant had to have independent discussions for purchase of the remaining 2/3rd share. The understanding for sale 1/3rd share was stated to be conditional on the other two respondents agreeing to the sale. In cross examination, it was admitted that the respondent Nos. 2 and 3 were not members of the cooperative society nor was any permission sought in their name. Respondent No. 1 has admitted to have never informed the DDA or any other civic authority that he was the owner of only 1/3rd share. Respondent No. 1 also affirmed that the property was constructed by him in 1969 and the completion certificate stood in his name.

18. The stand of the respondent Nos. 2 and 3 (DW3 and DW2 respectively) respectively was that the property belonged to all the three brothers though the title documents were in favour of one brother alone. There was stated to be no tenant in the property in the year 1977. The tenant was inducted thereafter, but the claim of the respondents was that they were unaware of any transaction between the appellant and the respondent No. 1. There is contradiction in the stand of the said respondents inasmuch they claimed to have equally contributed to the property while respondent No. 1 in his deposition stated that he alone had spent for the same. DW3 had clearly stated that the claim for partition was made in view of the suit for specific performance having being filed.

19. On hearing learned Counsel for the parties, we find that learned Counsel for respondent No. 1 has not been able to displace the findings arrived at in favour of the appellant on various issues. Learned Counsel for respondent No. 1 sought to challenge those findings though no cross objections were filed in view of the fact that if the appeal of the appellant was to succeed, the relief would go against the respondent No. 1 and thus he was entitled to once again argue those aspects without there being any cross objections. Learned Counsel for respondent No. 1 has referred to the judgment in *Shri Ravinder Kumar Sharma Vs. The State of Assam and Others*, where it was held that for purposes of sustaining the impugned part of the decree, the respondent, without filing of appeal/cross objections, can attack the findings on which the part of decree passed against him was based.

20. Pleadings and the evidence on record make it abundantly clear that there was some understanding arrived at between the appellant and respondent No. 1 in respect of the suit property. The written agreement in pursuance to the understanding sought to be put forth by the appellant could not be proved by him. However, the plea of oral understanding preceding such written document was established by way of contemporaneous documents. It is not in dispute that the registered sub lease stands in favour of respondent No. 1 and he alone was the member of the Society and all payments were made by him. The sub lease deed itself provided for payment of unearned increase to DDA in case of transfer of the property and the respondent No. 1 did file an application seeking permission to transfer the property in favour of the appellant for a total consideration of Rs. 1,50,000/-. The total consideration is clearly mentioned and thus it is not permissible for the respondent No. 1 to plead that the sum of Rs. 1,50,000/- was not the total consideration of the property but was only in respect of his 1/3rd share in the property.

21. It is not in dispute that in the records of the DDA, respondent No. 1 is the only recorded owner. There could thus be no question of respondent No. 1 moving an application in respect of his 1/3rd share in the suit property. In any case, the same is contrary to the letters sent by respondent No. 1. Thus, there is certainty both about the property and about the total consideration. The aforesaid understanding has been acted upon as it has been established on record that the appellant paid the unearned increase of Rs. 30,000/- to the DDA. Not only that, the loan availed of by the respondent No. 1 for construction on the property was cleared by the appellant by payment of the amount so that the property became unencumbered and ready for transfer. In such a situation, the only thing to be done by the appellant was to pay the balance amount for which the appellant was ready and willing, but respondent No. 1 backed out of the transaction. The learned Single Judge also rightly analyzed the effect of the legal proceedings initiated inter se the respondents post the specific performance suit being filed. Respondent No. 2 as DW3 has categorically stated that the suit was filed only because the suit for specific performance was filed by the appellant. This was clearly an endeavour by the respondents inter se to give a legal cloak of

sanctity to what they had pleaded in the written statement of there being 1/3rd share each of the three respondents. Such a collusive suit could not establish the title of respondent Nos. 2 and 3 much less stand as an obstruction to the claim of the appellant.

22. In view of the aforesaid, the only aspect to be considered in the present appeal is the challenge by the appellant to the findings of the learned Single Judge based on the income tax assessment orders of the respondents.

23. It is not in dispute that there is no registered document or any other writing evidencing the intent of the respondent Nos. 2 and 3 to share the property equally. No such application was made either to the Society or to the perpetual lessor being the DDA showing such an intent. Thus, for all practical purposes, respondent Nos. 2 and 3 permitted respondent No. 1 to proclaim his title to the outside world as the sole owner in pursuance to a registered document and the appellant dealt with respondent No. 1 in that capacity. Learned Counsel for respondent No. 1 sought to strenuously argue that the appellant was aware of the nature of ownership by solely relying upon the certificate issued u/s 230A(1) of the said Act. No doubt, the share of the respondent No. 1 is stated to be 1/3rd in the same, but that document is not a contemporaneous document with the understanding between the appellant and respondent No. 1 and is post the agreement/understanding. The application is not a joint one for this certificate, but by respondent No. 1 alone as per law. Nothing has been brought in evidence as to at what stage was this document handed over to the appellant. In any case, it was handed over much subsequent to the agreement/understanding. The witness from the income tax authorities has stated that there is no document filed with the authorities to establish the title of respondent Nos. 2 and 3. Respondent No. 1 has not even filed anything to show that he restricted his claim to 1/3rd share in the suit property. Such a claim was made by respondent Nos. 2 and 3 prior to the agreement to sell and for sharing the rent and/or earnings but it will have to be considered as to what is the effect of such an understanding on the claim of the appellant. The learned Single Judge has taken a view that the first respondent would not have risked showing the other two respondents as the co-owners in the suit property just to avoid any tax liability. The presumption of the property being owned by respondent No. 1 is stated to be displaced on account of the claims of all the three respondents before the income tax authorities. There is stated to be absence of evidence on the part of the appellant to rebut this position.

24. Learned Counsel for the appellant has referred to the judgment of a Division Bench of this Court in *S. Kartar Singh Vs. Commissioner of Income Tax*, to canvass the plea that the treatment of income for purposes of tax does not affect title. Learned Counsel also referred to the observations of the Supreme Court in *Commissioner of Income Tax, Bombay etc. Vs. M/s. Podar Cement Pvt. Ltd. etc.*, to emphasize the distinction between a "registered owner" and "owner" for purposes of income tax when the following observations were made:

We are conscious of the settled position that under the common law, "owner" means a person who has got valid title legally conveyed to him after complying with the requirements of law such as the Transfer of Property Act, Registration Act, etc. But, in the context of Section 22 of the Income Tax Act, having regard to the ground realities and further having regard to the object of the Income Tax, namely, "to tax the income", we are of the view, "owner" is a person who is entitled to receive income from the property in his own right.

25. At this stage a reference can also be made to Section 27(iii) of the said Act which states as under:

Section 27. "Owner of house property", "annual charge", etc. defined (iii) a member of a cooperative society, company or other association of persons to whom a building or part thereof is allotted or leased under a house- building scheme of the society, company or association, as the case may be, shall be deemed to be the owner of that building or part thereof; This definition clearly states that for the purposes of Section 22-26 an owner of house property will be deemed to be the person in whose name the allotment has been made. In the present case, the allotment has been made in favour of respondent No. 1. He would thus be the deemed to be owner of the property.

26. Learned Counsel also referred to the Halsbury's Laws of England; Fourth Edition Volume 42. The relevant extract is under the heading "Disclosure of Material Facts". This part deals with the consequences of consent being given and ignorance of material facts as also the consequences of misrepresentation. In para 46, it has been observed as under:

However, any active concealment by the vendor of defects which would otherwise be patent is treated as fraudulent, and the contract is voidable by the purchaser if he has been deceived by it.

In para 50, while dealing with "Disclosure by the Vendor", it is observed as under:

Disclosure by the Vendor: In special circumstances it may be the duty of the vendor to disclose matters which are known to himself, but which the purchaser has no means of discovering, such as a defect which will render the property useless to the purchaser for the purpose for which, to the vendor's knowledge, he wishes to acquire it; or a notice served in respect of the property, knowledge of which is essential to enable a purchaser to estimate the value. If the vendor fails to make disclosure, he cannot obtain specific performance and may be ordered to return the deposit.

27. Learned Counsel for the appellant thus contended that the vendor cannot obtain specific performance if he fails to disclose relevant material but the converse of that is not true if the vendee is to go ahead with the transaction since it would imply that the vendee would be able to take advantage of his own non disclosure. A duty is cast on the vendor to disclose any defect of title. Learned Counsel also sought to draw strength from para 248 dealing with a

situation where specific performance would be refused. A claimant is not entitled to the remedy of specific performance if there has been conduct on his part, such as misrepresentation, disentitling him to the relief in equity, and the remedy may be refused if it would impose great hardship on an innocent vendor like in a case of mistake.

28. Learned Counsel for the appellant referred to the Treatise on the Specific Performance of Contracts by The Rt.Hon. Sir Edward Fry, Sixth Edition, where on page 328 the following observations have been made:

A man may with impunity, said North J., in *Archer v. Stone*, "tell a lie in gross in the course of negotiations for a contract. But he cannot, in my opinion, tell a lie appurtenant. That is to say, if he tells a lie relating to any part of the contract or its subject matter, which induces another person to contract to deal with his property in a way which he would not do if he knew the truth, the man who tells the lie cannot enforce the contract.

29. We have given our thought to the rival contentions advanced by the parties. We find that the appellant cannot be non suited merely on account of the respondents claim to have filed returns with the income tax authorities stating that they had equal share in the property.

30. The first aspect to be noticed is that there is no documents filed with the income tax authorities evidencing such an arrangement. The subject matter is an immovable property and rights and interests can only be created by a registered document. Leave aside a registered document, there is no document evidencing such an arrangement.

31. Income tax returns are intrinsically confidential in nature and only the respondents are privy to them. The appellant is not expected to carry out a search and cannot carry out a search of the income tax returns of the respondents. It is in these circumstances that the significance of a distinction between an owner of a property in respect of the title as against the purpose of income tax becomes significant as per the observations made in *Commissioner of Income Tax. v. Podar Cement Pvt. Ltd and Ors.*'s case (supra) and *S. Kartar Singh v. Commissioner of Income Tax*'s case (supra). The mere reflection of such an ownership by the respondents with the Income Tax Department, albeit prior to the agreement to sell, thus itself cannot come to the aid of the respondents. It cannot be lost sight of that insofar as respondent No. 1 is concerned there can be really no defence. Respondent Nos. 2 and 3 appear to have colluded with respondent No. 1 to defeat the rights of the appellant. These two respondents had taken no steps from the inception of title of the property in favour of respondent No. 1 till the agreement and filing of the suit for specific performance to establish any right in the property. That being the position, respondent Nos. 2 and 3 cannot claim a right in the property to avoid the transfer of the property in favour of the appellant. The transfer of the property in favour of the appellant really does not require any consent of respondent Nos. 2 and 3 for the reason

that the registered owner remains respondent No. 1. The permissions have been granted in favour of respondent No. 1 and he alone is to be called upon to execute the sale deed in favour of the appellant. Thus there is no impediment in the execution of the sale deed in favour of the appellant.

32. If the appellant was apprehensive of the title or of any defect, which was not disclosed by respondent No. 1, it is the appellant who could have avoided the transaction. The appellant is seeking enforcement of his rights through specific performance and the defaulting party being respondent No. 1 cannot be permitted to plead that the transaction should be avoided. Respondent No. 1 failed to disclose to the appellant any interest of respondent Nos. 2 and 3 and the appellant could not have deciphered such an interest despite due diligence. The acts carried out by the appellant and respondent No. 1 in furtherance to the agreement/understanding also support such a conclusion. It is the appellant who has deposited the unearned increase and has also cleared the loan. The only thing which now remains to be done is for the appellant to pay the balance price and the sale deed to be executed in her favour. Respondent Nos. 2 and 3 really cannot raise any objection as they have failed to make out a claim of title in the property other than for purposes of income tax. If the respondent Nos. 2 and 3 have been negligent in establishing their title, they cannot defeat the claim of decree for specific performance by the appellant, and, if at all, their claims would be against the respondent No. 1, if any.

33. We are thus of the considered view that the appellant is entitled to a decree of specific performance of the agreement/understanding and the suit property is liable to be transferred and registered in the name of the appellant on payment of the balance consideration. The balance consideration i.e. Rs. 1,50,000/- less the amount paid of Rs. 43,304.48 amounting to Rs. 1,06,695.52 is directed to be deposited in the court within a period of one month from today whereafter the respondent No. 1 will execute the sale deed in favour of the appellant within one month thereafter and on such execution collect the amount from the Court. In case of failure of respondent No. 1 to execute the sale deed within one month of such deposit, the sale deed would be executed through an officer appointed by this Court to carry out the necessary task.

34. We did consider the aspect of passage of time and the consequent increase in real estate prices. This was with the object of examining whether an enhanced amount is liable to be paid to respondent No. 1. We are, however, not inclined to favourably consider this aspect for the respondents as since 80 the respondents have put the property on rent and enjoyed the rental income from the same. Thus, the respondents have been enjoying the rentals from the property for quite a long period of time though the appellant has been deprived of its enjoyment.

35. The appeal is accordingly allowed leaving the parties to bear their own costs in the peculiar facts of the case.