* **HIGH COURT OF DELHI AT NEW DELHI**

\+ **F.A.O. No.162/2007**

Decided on : 31st May, 2013

SATISH KUMAR & ANR. …… Appellants
Through: Mr. Rajesh Yadav, Advocate.

Versus

PRAKASH …… Respondent
Through: Mr. B.L.Madhukar, Adv.

CORAM:
HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J.

1. This order shall dispose of FAO No.162/2007 titled *Satish Kumar & Anr. Vs. Prakash*.

2. Vide order dated 21.2.2007, the learned ADJ, Delhi dismissed the application u/O 39 Rule 1 and 2 CPC of the appellants/plaintiffs.

3. Briefly stated the facts leading to the filing of the present appeal are that the appellant filed a suit for specific performance with consequential relief for permanent injunction against the respondent. It was alleged that in the month of May, 2005, the respondent had approached the appellants to sell their agricultural

land bearing Khata No.25/21, Khasra No.16/26 (0-3), (1/2 share) and Khata No.24/10, in Khasra No.16/12/2 (1-6) total area measuring 3 bighas 15 biswas and 10 biswansi situated in the revenue estate of Village Kazipur, Tehsil Najafgarh, New Delhi for a total consideration of ₹6,70,000/-. The rate on which this amount was arrived was @₹8,50,000/- per acre. It was alleged that an agreement to sell and purchase/Bayana agreement dated 20.6.2006 was reduced into writing between the parties. It was alleged that the respondent had agreed to hand over the documents of ownership in due course of time and a sum of ₹70,000/- was paid to the respondent/defendant by way of cheque dated 20.5.2005 drawn on Corporation Bank, Nangloi as an advance money and the balance amount of ₹1,80,000/- was paid to the respondent by way of cash on 20.6.2005 as a part payment towards the consideration for which a separate receipt dated 20.6.05 acknowledging the receipt of total sum of ₹2,50,000/- was issued. It was alleged in the plaint that the appellants approached the respondent to perfect the title of the appellant as they were ready and willing to perform their part of the contract for all times, however, the respondent kept on

postponing the same on one pretext or the other. It was alleged that the appellants got record of the Revenue Department inspected and found to his utter surprise that the respondent had mortgaged the land in dispute with the Corporation Bank, Nagloi. This resulted in issuance of legal notice dated 28.12.2005, which was sent to the respondent/defendant calling upon him to perform his part of the contract but this did not bring any fruitful result. This resulted in filing the suit for specific performance along with an application seeking ad interim injunction that the respondent be restraint from selling, alienating or otherwise parting with possession of the suit property or creating any third party interest.

4. The respondent filed his written statement as well as reply to the application and contested the claim of the appellants. It was stated by him that the respondent in good faith paid an amount of ₹70,000/- to the appellants in the month of March, 2005. The appellant had obtained the signatures of the respondent on some papers. The respondent has stated that he is an illiterate person and since he had requested the appellant to refund the amount of ₹70,000/- to him, the appellant got a receipt signed from the

respondent indicating that a sum of ₹1,80,000/- was received by him by way of cash. It was alleged by him that the said cash receipt is actually a forged document. It is further stated that the price of the land which is stated to be @ ₹8,50,000/- per acre is in fact ₹20,000/- per acre. The respondent denied having received any notice from the appellant.

5. The trial court after hearing arguments on the injunction application referred to the case of *Dadarao & Anr. Vs. Ramrao & Ors.* *1999 IX AD (SC) 298* and denied the ad interim injunction for restraining the respondent from creating any third party interest in respect of the suit property. The reason for arriving at such a conclusion was the language used in the agreement to sell/bayana agreement dated 20.6.2005 in which there was a clause which read as under:-

> *"(1) that if the first party fails to execute the sale papers in favour of the second party she/he shall pay double amount of the earnest money/biana to the second party as a default. Likewise if the second party failed to pay the balance amount to the first party with the above mentioned stipulated date his/her/their earnest money shall be forfeited as default and second party will not have any right to approach any court etc."*

6. A perusal of the aforesaid clause would show that in the event of the respondent, which was the first party in the bayana agreement defaulting the appellant, was entitled to receive double the amount of earnest money purported to have been given by him. The trial court held since an alternative relief of double the amount was prescribed under bayana agreement and the relief of specific performance was only a discretionary relief, therefore, the appellant could not be deemed to have made out a *prima facie* case warranting the grant of injunction. It was also observed by the trial court that the respondent had mortgaged the property with the Corporation Bank and that being the position, it was very unlikely that the respondent could transact the property. This application was rejected on 21.2.2007 whereafter the present appeal was filed.

7. The appeal has been pending in this Court for the last more than six years without any sincere effort on the part of the appellant to get the appeal disposed of. In the meantime, there was an ad interim order which was passed by this Court at the time of admission

directing the party to maintain the status quo with regard to the suit property.

8. I have heard the learned counsel for the appellant as well as the respondent and also gone through the impugned judgment.

9. The main contention of the learned counsel for the appellants has been that the judgment of the Apex Court in *Dadarao* (supra) on which reliance has been placed by the trial court while dismissing his application under order 39 Rules 1 and 2 CPC was observed to be a judgment in *per curium* in the case titled *P.D.S'ouza Vs. Shondrilo Naidu; (2004) 6 SCC 649*.

10. The learned counsel for the appellant has also placed reliance in *P.D.'Souza Vs. Shondrilo Naidu; (2004) 6 SCC 649* as well as *Tanu Goel & Anr. Vs. Girish Chopra & Ors.; 179 (2011) DLT 479* and contended that both these judgments clearly laid down that a suit for specific performance by the appellants was maintainable and since the suit itself was maintainable notwithstanding the fact that the appellants were entitled to double the earnest amount paid by him, the trial court has grossly erred by denying the ad interim injunction to the appellants.

11. As against this, the counsel for the respondent has contested the submissions made by the counsel for the appellant. He has submitted that the very fact that the appeal is pending for the last more than seven years and the suit has not been permitted to proceed and is still at the threshold, the entire purpose of filing the appeal and keeping the suit pending has been to force the respondent to sell the suit property to the appellants at a price which was much lower than the market price. Accordingly, it has been stated since in the bayana agreement itself, in the event of the respondent having defaulted to conform to the agreement or perfect the title of the appellant, he was entitled to double the amount of the earnest money paid by him, the specific performance could not be prayed for.

12. I have carefully considered the submissions made by the respective sides and gone through the impugned judgment. No doubt, the apex Court in Dadarao's case (supra) held that in the event of default double the amount of money will be paid by way of liquidated, damages is an observation passed in *per curium* still the question which would arise for consideration is whether in the

instant case, the plaintiff has been able to make out a *prima facie* case so as to grant ad interim injunction in his favour.

13. There is no dispute about the fact that the grant of specific performance of an agreement is a discretionary relief which is essentially to be exercised by the trial court. In the instant case, the plaintiff has not been able to show that in the event of the respondent i.e. first party defaulting, the appellant was given liberty to sue the respondent for specific performance and alternatively to claim double the amount of earnest money by way of damages or liquidated damages. The said clause which has been referred to and relied upon by the court, gives an impression that in the event of the respondent fails to execute the sale agreement in favour of the second party namely the appellant, the first party was liable to pay double the amount of earnest money only and similarly a sanction was placed on the second party i.e. the appellant, that in case he fails to perform his part of the contract then the earnest money could have been forfeited. This does not mean that on account of this clause, a suit for specific performance would not be maintainable. The suit for specific performance will be

maintainable but the question which is to be considered at this stage is as to whether it was incumbent or necessary for the trial court to have passed an ad interim injunction in favour of the appellant so as to tie down the property of the respondent by restraining him to create third party interest. This discretion having been exercised by the trial court against the appellant, in my considered opinion, cannot be set aside by the appellate Court merely because it holds a different view point. Whenever, a question of exercise of discretion arises, it is essentially for the trial court or the court of first instance to do so and unless and until it is shown that the discretion has been exercised on erroneous principles of law or in an arbitrary manner, I feel that the appellate Court should be loath to interfere with such discretion. More so, in a case of the present nature, where the specific performance cannot be claimed by the appellant as a matter of right, it can only be as a matter of discretion of the trial court. The trial court, instead of directing specific performance of the agreement, may only grant double the amount of earnest money given by him.

14. Further the very fact that the appellant has permitted to linger on the appeal for almost six years and has not made sincere effort to get the appeal decided in his favour, clearly shows that he wants to tie down the property of the respondent so as to force him to sell it to the appellant himself and not to any other person. It has been a common knowledge that in the present times, when the price of the properties is rising every day, there is a class of people who obtain ex parte ad interim orders against the sale of the property and continue the same so as to exhaust the patience of the party and compel it to sell the property to them only.

15. I have been also informed that in the trial court, the matter has not been substantially progressed for lack of interest on the part of the appellants. In such a contingency, allowing of the appeal and the grant of stay will be only putting premium on their delinquent conduct.

16. The appellants referred to the two judgments in support of his point for grant of ad interim injunction. The judgment of P.D.'Souza is distinguishable from the present case as it was decided on merits after the parties had adduced evidence. Therefore, the parameters

which the Court had applied while granting an ad interim injunction are slightly different from the parameters which the Court has to keep in mind while deciding the suit for specific performance on merits. To that extent, I feel that the judgment of P.D'Souza's case is distinguishable.

17. So far as Tanu Goel's case is concerned that was also a case where the learned Single Judge while sitting on the Original Side just as the trial court in the instant case, has chosen to exercise discretion in favour of the plaintiffs/appellants by granting an ex parte ad interim injunction. While as, in the instant case, the trial court has appreciated the facts and not exercised the discretion in favour of the appellants/plaintiffs. Merely, because the appellants/plaintiffs in the given case has been granted injunction by the trial court in one case, does not mean that such a discretion has to be exercised as a matter of course in all the cases. No facts of two cases are similar or same so as to warrant the exercise of discretion on same lines. If that would have been the purpose then the court would be acting in a most mechanical manner.

18. I am of the view that the two judgments cited by the counsel for the appellants do not help the appellant. On the contrary, it has come on record that the suit property already stands mortgaged with the Corporation Bank, according to the averments made by the appellants themselves. I accordingly, feel that there is no *prima facie* case made out by the appellants which would warrant the grant of injunction in his favour, accordingly, the appeal of the appellants is dismissed.

V.K. SHALI, J.

MAY 31, 2013
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