

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 31st March, 2014

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CS(OS) No.1738/2005

RAJ RATTAN SAMDARIA

..... Plaintiff

Through: Mr. Mir Akhtar Hussain, Adv.

Versus

BALWANT SINGH AND ANR

..... Defendants

Through: None.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff seeks, (i) specific performance of an Agreement dated 7th April, 2004 by the defendant no.1 for sale / transfer of property bearing No.157, Gali No.4, Bhagat Singh Market near Gole Market, New Delhi; and, (ii) a direction to the defendants to pay appropriate compensation for illegally and unauthorizedly delaying the transfer, pleading:-

- (i) that the defendant no.1 is the owner of Shop No.157 measuring 385 sq. fts. situated at Bhagat Singh Market, New Delhi;
- (ii) that in or around the month of January, 2004, the defendants no.1&2 negotiated for sale of the said shop to the plaintiff and ultimately it was decided that the plaintiff will purchase the said shop for an amount of Rs.35 lacs;

- (iii) that an Agreement to Sell dated 7th April, 2004 was executed by the defendant no.1 as the seller and by the plaintiff as the purchaser and the said Agreement was also witnessed by the defendant no.2 Shri Tajinder Singh who is the son of the defendant no.1;
- (iv) that the plaintiff at the time of Agreement to Sell, paid Rs.2 lacs in cash and Rs.1,50,000/- vide cheque i.e. total Rs.3,50,000/- and payment whereof is acknowledged in the Agreement to Sell;
- (v) that since as per the Agreement to Sell the expenses on conversion of the leasehold rights into freehold were to be borne by the plaintiff, the plaintiff also delivered to the defendants cheque dated 30th April, 2004 for Rs.89,550/- in favour of the Land and Development Office and on the request of the defendants paid a further sum of Rs.15,000/- towards expenses for execution of a Conveyance Deed of freehold rights in the property;

- (vi) that the plaintiff on the request of the defendant no.2, on 22nd December, 2004, paid a further sum of Rs.1 lacs in cash towards sale consideration;
- (vii) that though the leasehold rights in the shop were converted into freehold on 9th December, 2004 and further though the defendants were to execute Sale deed in favour of the plaintiff within 15 days thereof, but did not do so inspite of repeated requests and reminders, leading the plaintiff to ultimately issue a legal notice dated 4th January, 2005;
- (viii) that the defendants, in reply dated 14th January, 2005 to the legal notice denied the receipt of Rs.1 lacs and showed willingness to execute the Sale Deed upon the plaintiff paying the balance sale consideration of Rs.31,50,000/- and Rs.15,000/- towards expenses for execution of conveyance deed of freehold rights and further stated that upon the plaintiff not paying the said balance sale consideration within 15 days, the Agreement to Sell shall stand cancelled and the sum of Rs.3,50,000/- and Rs.89,550/- paid by the plaintiff will stand forfeited;

- (ix) that the plaintiff got sent a rejoinder notice dated 22nd January, 2005 to the defendants enclosing the draft Sale Deed and contending that the balance sum of Rs.30,50,000/- only was payable; and,
- (x) that the defendants however stuck to their demand for the balance sale consideration of Rs.31,50,000/-.

accordingly, on 17th December, 2005 this suit was filed for the reliefs aforesaid.

2. Summons of the aforesaid were issued and vide *ex parte ad interim* order dated 19th December, 2005, the defendants restrained from transferring, selling, alienating, parting with possession of or creating third party interest in the shop aforesaid.

3. The plaintiff was lax in effecting service of the summons, requiring repeated orders dated 3rd April, 2006, 26th July, 2006, 25th September, 2006, 16th November, 2006, 25th January, 2007 & 21st March, 2007 for the plaintiff to take steps for service of the defendants. The order dated 31st May, 2007 records that the defendant no.1 had expressed inability to accept summons; he was deemed to be served and since none appeared on his behalf, he was

proceeded against *ex parte*. The defendant no.2 was not served for that date also and the plaintiff was directed to take steps for his service.

4. The plaintiff again did not take steps for service of the defendant no.2, requiring further orders dated 30th July, 2007, 24th October, 2007, 11th January, 2008 and 5th February, 2008 for the plaintiff to serve the defendant no.2.

5. Vide order dated 29th February, 2008, on oral prayer of the plaintiff, the defendant no.2 was permitted to be served by publication. Again the plaintiff did not take steps for publication and further opportunities were given on 28th May, 2008 and 16th September, 2008.

6. Ultimately publication was effected and the defendant no.2 appeared in person on 29th January, 2009 and 19th February, 2009.

7. The defendant no.2 appearing in person, on 20th May, 2009 informed that the defendant no.1 had expired on 27th December, 2007.

8. Thereafter the defendant no.2 also stopped appearing. The plaintiff also did not take any steps for substitution of the legal representatives of the deceased defendant no.1. Accordingly, vide order dated 28th August, 2009, the suit against the defendant no.1 was recorded as having abated.

9. The defendant no.2 again appeared before this Court on 2nd February, 2010 and without noticing that the suit against the defendant no.1 had already stood abated, was directed to supply relevant information with regard to legal heirs of the defendant no.1. The order dated 18th May, 2010 records that the defendant no.2 had supplied the particulars of the legal representatives of the defendant no.1 to the counsel for the plaintiff. Though the counsel for the plaintiff stated that steps will be taken for bringing on record the legal heirs of the defendant no.1 but again no such steps were taken.

10. The defendant no.2 did not file written statement and his right to file written statement was closed on 12th January, 2011, but filed IA No.1849/2011 for his deletion contending that he was not privy to the contract of which specific performance was sought and the suit against the defendant no.1 had already stood abated on 28th August, 2009.

11. The plaintiff filed reply to IA No.1849/2011 of the defendant no.2 contending that the defendant no.2 had failed to supply the particulars of the legal representatives of the defendant no.1 and for which reason application for substitution of his legal heirs could not be filed. No mention was made in the said reply, to the order dated 18th May, 2010 supra which records that the

particulars of the legal representatives had been supplied. It was also stated in the said reply that the defendant no.2, after the death of the defendant no.1, being the son and legal heir of the defendant no.1 had become a necessary party.

12. The counsel for the plaintiff, on 25th July, 2011, upon being confronted with the fact that no steps have been taken for substitution of the legal representatives of the defendant no.1 and the *ex parte ad interim* order granted on 19th December, 2005 was continuing, offered to deposit Rs.30 lacs in this Court to show his *bona fide*, as a condition for continuance of the stay order. The said amount is reported to have been deposited and has been kept in a fixed deposit and vide order dated 16th November, 2011 the *ex parte ad interim* order dated 19th December, 2005 was made absolute till the decision of the suit.

13. The defendant no.2 again stopped appearing and was proceeded against *ex parte* and the plaintiff directed to file his *ex parte* evidence.

14. The plaintiff again took adjournments on 11th July, 2012, 14th August, 2012, 21st August, 2012 and 14th December, 2012 for leading *ex parte* evidence.

15. Ultimately affidavits by way of examination-in-chief of the plaintiff and of one Mr. Bikas Patra were filed and which were tendered into evidence on 2nd May, 2013 and the plaintiff closed his *ex parte* evidence.

16. The plaintiff took adjournments on 5th August, 2013, 10th October, 2013 and 3rd February, 2014 for *ex parte* arguments.

17. The counsel for the plaintiff was heard on 31st March, 2014 and it was directed that orders will be passed in Chamber. However on perusal of file it was realized that the suit against the defendant no.1, against whom only, it could have been decreed for specific performance, already stood abated, message was sent to the counsel for the plaintiff to clarify the said aspect.

18. The counsel for the plaintiff who himself was not aware of the suit against the defendant no.1 having abated, stated that he has been recently engaged (which also does not appear to be correct as the suit was filed by him only) and has relied on ***Mahabir Prasad Vs. Jage Ram*** AIR 1971 SC 742 to contend that when one of the legal representatives is already on record in another capacity, the proceeding does not abate even though no application is made to bring the legal representative on record.

19. However the position here is different. Here, as aforesaid, there is already an order dated 28th August, 2009 of dismissal of the suit against the

defendant no.1 as abated. It is not as if the plaintiff was oblivious of the said order. Attention of the plaintiff to the said order was invited in IA No.1849/2011 supra filed by the defendant no.2 for his deletion. Though the plaintiff in reply to the said application opposed the plea of the defendant no.2 for deletion *inter alia* contending that the defendant no.2 had become a necessary party after the demise of the defendant no.1 and being the legal heir of the defendant no.1, but still did not seek the substitution of the defendant no.2 as legal heir of the deceased defendant no.1. Even in the judgment aforesaid of the Supreme Court, it has been held that “where in a proceeding a party dies and one of the legal representatives is already on the record in another capacity, it is only necessary that he should be described by an appropriate application made in that behalf that he is also on record, as an heir and legal representative”. No such step also has been taken by the plaintiff. Moreover I am not to review or revisit the order dated 28th August, 2009 in this suit, holding the suit to have stood abated against the defendant no.1, and which order has attained finality.

20. Of course the counsel for the plaintiff upon being confronted therewith again sought adjournment to make amendments. It is also stated that valuable property rights are at stake and the sum of Rs.30 lacs of the

plaintiff is lying deposited in this Court since about the latter half of the year 2011.

21. Though I am not inclined to condone such lapses, especially when the conduct of the plaintiff throughout nearly nine years when the suit has remained pending has been lackadaisical, but still, to satisfy my judicial conscience, I have also perused the *ex parte* evidence led by the plaintiff.

22. The plaintiff has not proved any document to show payment of Rs.15,000/- towards expenses for freehold conversion and Rs.1 lacs towards sale consideration claimed to have been paid in cash and receipt whereof was denied by the defendants in the reply dated 14th January, 2005 proved as Ex.PW1/D to the legal notice dated 4th January, 2005 proved as Ex.PW1/C preceding the suit.

23. The defendants in the said reply dated 14th January, 2005 stated that though the plaintiff was fully involved in the freehold conversion and was aware of the Conveyance Deed of freehold rights having been executed in favour of the defendant no.1 and a copy whereof had also been given to the plaintiff, having delayed the payment of the balance sale consideration. The defendants by the said notice called upon the plaintiff to pay the balance sale

consideration of Rs.31,50,000/- along with conversion expenses of Rs.15,000/- within 15 days.

24. The plaintiff, in the response dated 22nd January, 2005 proved as Ex.PW1/E, stated that it was not possible for the plaintiff to pay Rs.30,50,000/- or any other amount in cash as the same was against the RBI Regulations. However the said response is not understandable as the defendants in their reply dated 14th January, 2005 had nowhere called upon the plaintiff to pay Rs.30,50,000/- in cash. Rather, the defendants, had called upon the plaintiff to pay the balance sale consideration of Rs.31,50,000/- and Rs.15,000/- towards conversion expenses. From such conduct it is apparent that it was the plaintiff who was avoiding payment. The defendants, vide their further response dated 28th January, 2005 proved as Ex.PW1/J, yet again gave an opportunity to the plaintiff to pay the balance sale consideration.

25. Not only did the plaintiff maintained a stoic silence thereafter but waited for full eleven months i.e. till December, 2005, to file this suit.

26. The plaintiff in his affidavit by way of examination-in-chief also has not given any explanation as to why the plaintiff did not take any action from January, 2005 till December, 2005. Also, save for a bare statement of

payment of Rs.1 lacs and Rs.15,000/- supra in cash, it has not been stated as to from where the said amount was withdrawn and / or how the same was available.

27. Not only so, the conduct by the plaintiff of the suit, as noted hereinabove, has been lackadaisical and the plaintiff has even after the filing of the suit not shown any urgency in the matter.

28. In the face of the said conduct of the plaintiff, the deposit by the plaintiff of Rs.30 lacs in this Court, after nearly six years from the date stipulated for completion of sale, is of no avail.

29. The other witness Mr. Bikas Patra examined by the plaintiff is a witness to the Agreement to Sell and does not advance the case of the plaintiff any further. The Agreement to Sell was never denied by the defendants in the responses aforesaid to the legal notice.

30. What emerges therefore is that though the plaintiff had agreed to pay the balance sale consideration and have the Sale Deed executed within 15 days of the conversion of the leasehold rights in the shop into freehold and though the plaintiff, if not on 9th December, 2004 when the said leasehold rights were converted into freehold, at least on 4th January, 2005 became aware of the same and though the defendants on 14th January, 2005 and 28th

January, 2005 gave the plaintiff an opportunity to pay the balance sale consideration and have the Sale Deed executed, but the plaintiff did not do so and approached the Court after a delay of 11 months.

31. The Supreme Court in ***Saradamani Kandappan Vs S. Rajalakshmi*** (2011) 12 SCC 18 and which judgment has been followed by me in and ***Ansal Properties and Industries Pvt. Ltd. Vs. Ratnu*** MANU/DE/4293/2013 and ***Matadin Yadav Vs. Midas Lids P. Ltd.*** 205 (2013) DLT 484 has held that in the present day times of galloping inflation and rapid increase in prices of immovable properties, such delays on the part of the purchaser in performance of the contract and / or in payment of the balance sale consideration deprive the purchaser of the relief of specific performance.

32. I am therefore, even on merits, of the view that the plaintiff has not made out any case for specific performance.

33. Not only so, the plaintiff having failed to establish payment in cash of Rs.15,000/- and Rs.1 lac and having thus been found to have taken a false stand, is not entitled to the relief of specific performance on this ground also, as held in ***Lourdu Mari David Vs. Louis Chinnaya Arogiaswamy*** (1996) 5 SCC 589.

34. The plaintiff has not sought refund of the amounts paid. Moreover the plaintiff having been found to be in default of performance and the amount paid being only 10% of the sale consideration and which the plaintiff was informed will be forfeited on his failure to perform, the plaintiff is not entitled to the relief of refund of the said amount also.

35. The suit is accordingly dismissed.

36. Though the plaintiff in the facts aforesaid is found to have abused the process of this Court and thereby taken time of this Court but I refrain from imposing any costs on the plaintiff.

37. Decree sheet be drawn up.

38. The amount of Rs.30 lacs deposited by the plaintiff in this Court together with interest accrued thereon be refunded to the plaintiff.

RAJIV SAHAI ENDLAW, J.

MARCH 31, 2014

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