

SUPREME COURT OF INDIA

Pramod Building & Developers

Vs.

Shanta Chopra

C.A.No.1535 of 2011

(R.V. Raveendran and A.K.Patnaik,JJ.,)

09.02.2011

ORDER

SLP(Civil) No.27198 of 2008

1. Leave granted. Heard.

2. The respondent entered into an agreement of sale dated 26.10.1988 agreeing to sell her property to the appellant for consideration of Rs.43,50,000/- and received Rs.9,50,000/- as advance. The agreement required the sale to be completed by the intending purchaser by paying the full balance consideration of Rs.34 lakhs within 30 days from the date of issue of a letter/telegram by the intending vendor informing the intending vendee that necessary NOC under Section 269 (UL) of the Income Tax Act, 1961 and Income Tax Clearance Certificate had been received. The agreement further provided that the time was the essence of the contract and it will not be extendable and if the intending vendee fails to pay the balance of Rs.34 lakhs, the entire earnest money of Rs.9.5 lakhs shall stand forfeited. Clause 5 related to property tax and is extracted below:-

"5. That any liability whatsoever regarding the plot including the property tax payable in respect of the aforesaid plot shall be paid and be payable by the intending vendor till the sale deed is executed and vacant possession is delivered to the intending vendee."

3. The respondent cancelled the said agreement by notice dated 27.2.1989. However, subsequently the parties entered into a fresh agreement dated 2.5.1989 under which the cancellation was treated as withdrawn and the respondent undertook to execute the sale deed in terms of the agreement dated 26.10.1988 without any change in its terms. The said agreement recorded that the NOC (in Form 371) from the Income Tax authorities had been received. The agreement dated 2.5.1989 provided that on obtaining the Income Tax Clearance Certificate, the vendor should inform the purchaser within one week and within one month thereafter, the sale should be completed by execution of the sale deed and the purchaser should pay the balance amount in the presence of the Sub Registrar. On 16.5.1989,

the respondent informed the appellant that the NOC in Form No.37-I and Clearance Certificate in Form No.34-A have been obtained and, therefore, the appellant should pay the balance consideration of Rs. 34,00,000/- within one month from the date of receipt of the said letter and get the sale deed registered. It is not in dispute that in terms of the supplemental agreement dated 2.5.1989, the sale had to be completed by 17.6.1989. It is not disputed that as 17.6.1989 and 18.6.1989 were holidays, the sale had to be completed by 19.6.1989. As the sale was not completed, the respondent alleged that the appellant was in breach and terminated the agreement, by notice dated 22.6.1989. This led to the filing of a suit for specific performance (Suit No.1660/1989) by the appellant in the High Court of Delhi. The main reliefs sought in the said plaint are relevant and extracted below:

"(a) for specific performance of the agreement to sell dated 26.10.1988 directing the defendant to execute the sale deed in respect of the plot bearing No.E-47, measuring 300 sq. yards, situate in Greater Kailash, Part-I, New Delhi and deliver vacant and peaceful possession of the said plot to the plaintiff.

(b) directing the defendant to pay and discharge all the arrears of property tax due and payable in respect of the said plot till the date of execution of the sale deed and any other liability or encumbrance, if any, in respect of the aforesaid plot prior to the execution of the sale deed and or to get settled the alleged dispute with Municipal Corporation of Delhi, if any, and pay all the property tax dues before the execution of the sale deed.

(c) for recovery of Rs. 1,02,600/- as interest for the period from 10.1.1989 till 03.07.1989 on the amount of Rs.9.5 lacs and Rs.45,333/- on Rs. 34 lacs from 13th June to 2nd July, 1989 together with interest pendente lite and future @ 24% per annum till the sale deed is executed and Rs. 13.5 lacs as damages being loss of profits, general and special, thus total amount of Rs.15 lacs."

There was also alternative prayer for return of the earnest money amount with interest.

4. The respondent contested the suit. She admitted the agreement and the terms thereof. She, however, contended that the appellant committed breach by not tendering the entire balance sale consideration of Rs.34,00,000/- and getting the sale completed by 19.6.1989. Required issues were framed and the parties went to trial and let in oral and documentary evidence. Issues (3) and (4), which are crucial, are extracted below:

"(3) Whether the plaintiff has been still ready and willing to perform its part of the contract, as alleged?

(4) Whether the plaintiff is entitled to damages if so it to what extent?"

After considering the pleadings, the evidence and the arguments, a learned single Judge of the High Court, by judgment dated 8.1.2008, dismissed the suit. He held that the plaintiff-appellant was not ready and willing to perform the contract in terms of

the agreement and had failed to tender Rs.34,00,000/- within the stipulated date. However with reference to the alternative prayer, the court granted a decree for refund of Rs.9,50,000/- with interest at 10% per annum from the date of payment till the date of repayment was granted. Feeling aggrieved, the appellant filed an intra- court appeal and a Division Bench of the High Court, by the impugned judgment dated 2.7.2008 affirmed the decision of the learned Single Judge and dismissed the appeal with costs of Rs.10,000/-. The said judgment is challenged in this appeal by special leave.

5. The suit has been dismissed on the basis of concurrent findings of fact that the appellant was in breach and not the respondent. We may refer to the controversy between the parties.

“5.1) The appellant's case is as under: It is a builder. It agreed to purchase the property for construction of a residential apartment building. The respondent failed to furnish the mutation certificate showing that the property was registered in her name in the records of the Municipal Corporation and failed to produce the up to date tax paid receipts. Appellant therefore demanded that the respondent should give an affidavit and bank guarantee confirming that all municipal taxes had been paid and there were no arrears of municipal taxes. Subsequently, it did not even insist upon the affidavit and required the respondent to give a letter of undertaking and indemnity bond to that effect. Respondent did not comply with the said reasonable demand and refused to clear the tax dues. The respondent was duty bound to make out a good and satisfactory title and that meant that she had to satisfy the appellant that all municipal taxes had been paid in regard to the property. The respondent failed to discharge this basic obligation and thereby committed breach. 5.2) The case of the respondent is as under: There was an arbitrary assessment of tax by the Municipal authorities in regard to the property and therefore, she had filed a suit (Suit No.712/1976 on the file of the Sub Judge, First Class, Delhi). The Court had decreed the said suit and directed the Municipal authorities to make a fresh assessment in the light of its observations. There was no fresh assessment or demand by the Municipal Corporation for payment of tax. Therefore, she could not pay the municipal taxes and produce receipts. She had informed the appellant about the said dispute and had confirmed that in terms of the agreement, if and when the municipal authorities made the final assessment and made a demand in terms of such assessment, she would bear and pay the said taxes up to the date of sale. In this background, the question of her giving any affidavit or other document confirming that all taxes up to date were paid did not arise, as the sale agreement itself contained appropriate provision in that behalf. When matters stood thus, though the appellant had secured a demand draft towards the balance price of Rs.34,00,000/- and she was ready to attend the Sub- Registrar's Office and execute the sale deed by receiving the said sum, the appellant insisted that she should either pay Rs.5,00,000/- to it towards municipal taxes or clear all municipal taxes due before the sale, as he apprehended that his construction project was likely to be affected. As she was not agreeable to meet the said illegal demand and pay Rs.5,00,000/-, the appellant was not ready to proceed with the sale. As the appellant refused to pay the

entire balance consideration of Rs.34,00,000/- in terms of the agreement and get the sale completed, she had no alternative but to terminate the contract on 22.6.1989.”

6. The following averments in the appellant's notice dated 24.6.1989 (Ex.P31) proves the version put forth by the respondent :

"You further stated that you would neither make any payment of the property tax and nor you would get your dispute with the Municipal Corporation of Delhi settled regarding the assessment, and finalization of the liability towards the property tax as you were not in any hurry. The company was then constrained to say that if your dispute remained pending for ten years and you did not make the payment and get your dispute settled, the Corporation would not effect mutation and nor it would sanction the building plans so long as the dispute was pending and or that the entire arrears of taxes as demanded by it (the Corporation) up to date, were paid, which would remit into huge losses to the company and the company in that event would be compelled to pay the entire arrears demanded by the Corporation and only thereupon would be able to get the mutation effected and the building plans sanctioned to complete its project, which would cause loss to the company and the company would be unnecessarily burdened with the liability which was yours. The appellant also admitted in the said notice (Ex.P31) that the respondent had attended the Sub-Registrar's Office on 14.6.1989 and 19.6.1989 and had her presence recorded. The averments in the said notice also confirmed the version of respondent as what transpired on 19.6.1989, that is the respondent was not willing to pay any amount until the pending dispute with Municipal Corporation was decided and the appellant was not willing to buy unless the respondent paid the up to date taxes or gave a bank guarantee/security for the likely tax dues.

7. After considering the pleadings and the evidence in detail, the learned Single Judge recorded the following findings on Issues (3) and (4):

"The admitted correspondence between the parties showed that the defendant had in clear cut words stated that she would be liable for paying the property tax in respect of property as and when determined in future for the period when the property remained under her ownership. If this entire correspondence between the parties and the covenants to this effect in proposed sale deed were not sufficient to ensure the plaintiff, no affidavit or writing by the defendant would have secured the interest of the plaintiff but, it seems that plaintiff was adamant in getting a writing from the defendant to the extent mentioned above. I consider that there was no fault of the defendant. The defendant all along was ready and willing to execute the sale deed and it was plaintiff who because of his adamant behaviour of obtaining an extra writing from the defendant, did not execute the sale deed. This fact is further proved from the fact that Defendant admittedly signed the copies of the sale deed handed over to her. The original sale deed obviously was to be signed before the Sub-Registrar only and she could have signed the original only if plaintiff had accompanied her to Sub-

Registrar. It is not proved from the evidence of the plaintiff that she had refused to go to Sub-Registrar's office. Rather the evidence abundantly shows that she had gone to Sub-Registrar's office and was prepared to appear before the Sub-Registrar and it was plaintiff who insisted upon additional security from the defendant qua property tax. The plaintiff could have recovered the amount which the plaintiff was made to pay qua the property for period before execution of the sale deed. The sale agreement and proposed sale deed were sufficient security for the plaintiff. The distrust between plaintiff and defendant was result of bitterness which crept in between them due to exchange of letters and notices before the execution of the sale deed. In view of above premise, I therefore, decide both these issues in favour defendant and against the plaintiff. The plaintiff is not entitled to a decree of specific performance of agreement to sell."

This finding of fact that the appellant was in breach has been affirmed in appeal, by the Division Bench. As the judgments of the courts below were based upon the said pure finding of fact based on appreciation of evidence, it does not call for interference in exercise of power under Article 136 of the Constitution of India.

8. The only legal issue that was urged by the appellant was that the defendant did not step in to the witness box and evidence was given only by her husband and that was insufficient. The said contention was considered and negatived both by the single Judge and the Division Bench. Reliance was placed on the judgment of this Court in *Man Kaur (Dead) By Lrs. Vs. Hartar Singh Sangha*¹. The said decision has no bearing on the facts of this case. As rightly held by the High Court, it was for the plaintiff who approached the Court to prove that he was ready and willing to perform the contract. The plaintiff in a suit for specific performance, cannot obviously succeed unless he proved that he was ready and willing to perform the contract. The exhaustive correspondence between the parties clearly discloses the respective stands of the parties. Even the prayer in the plaint shows that the appellant was not ready to pay the entire balance of Rs.34,00,000/- as agreed under the agreement of sale but that the plaintiff insisted upon the appellant to pay the municipal taxes before the sale, as a condition for sale. If appellant was not willing to pay Rs.34 lakhs at the time of sale, as specifically agreed under the agreement of sale, the appellant could not claim that it was ready and willing to perform its obligations. As noticed above, after appreciating the entire evidence, learned Single Judge and Division Bench of the High Court have recorded a finding that the appellant was not ready and willing and consequently dismissed the suit.

9. We find no reason to interfere with the decision of the High Court. The appeal is, therefore, dismissed.

Judgment Referred.

¹(2010) 10 SCC 0512