

SUPREME COURT OF INDIA

Rattan Lal

Vs.

S.N. Bhalla

C.A.No.5787 of 2012

(Altamas Kabir and J.Chelameswar,JJ.)

08.08.2012

JUDGMENT

Altamas Kabir,J.

1. Leave granted.

2. The Respondents are perpetual Sub-lessees of Plot No.C-2/13, Vasant Vihar, New Delhi, measuring 600 sq. yards, allotted to them through the Government Servants Co-operative House Building Society Limited. They erected a single- storeyed structure on the said land and vide Agreement dated 8th September, 1978, they agreed to sell the said property to the Appellant together with the building erected thereon for a consideration of Rs.5,90,000/-. The Appellant paid a sum of Rs.50,000/- to the Respondents in advance to enable them to apply for necessary permission for transfer and to obtain Clearance Certificate from the Tax authorities. The Agreement stipulated that on receipt of the said Clearance, the Respondents were to inform the Appellant of its receipt, and, thereafter, the Appellant was required to complete the sale within 60 days by paying the balance consideration agreed to between the parties. In case the Respondents failed to apply for permission to sell within 15 days from the date of the Agreement, the Appellant had the option to determine the Agreement whereupon the Respondents were required to refund the earnest money and to pay damages to the Appellant assessed at Rs.50,000/-.

3. The provision in the Agreement which is crucial for a decision in this Appeal is Clause 9, which is extracted herein below:

“That if the Seller applies for sale permission within the time stipulated in clause 8 above, but does not get it within 6 months, the Seller may determine this Agreement and the Seller shall refund to the Purchaser the earnest money received by him

without any damages or interest, within a period of 15 days from the date of determination of the Agreement.”

4. Inasmuch as, the sale was not being completed by the Respondents, the Appellant filed Suit No.278 of 2003, in the Court of Additional District Judge, Delhi, for specific performance of the contract.

5. Clause 2 of the Agreement to Sell stipulates that upon execution of the Agreement, the Respondents would immediately apply to the Delhi Development Authority (DDA) and the Competent Authority under the Urban Land (Ceiling and Regulation) Act, 1976, for permission to transfer the said property to the Purchaser/Appellant free from all encumbrances, after obtaining requisite permissions from any other Body or Authority. In Clause 3 of the Agreement, the Respondents also undertook to obtain the Income Tax Clearance Certificate immediately on obtaining the sale permission from the concerned authorities and to inform the Purchaser/Appellant by Registered Post with Acknowledgment Due accordingly. As indicated hereinabove, Clause 4 of the Agreement stipulates that on being informed of the receipt of the requisite permission from the Respondents, the Appellant would have to complete the sale within a period of 60 days from the date of receipt of such intimation and on being furnished with the copies of the permission and the Income Tax Clearance Certificate.

6. Clause 8 of the Agreement to Sell is of special significance to the facts of this case and is, accordingly, extracted hereinbelow:

“8. That if for any reason the Seller fails to apply for permission to sell the said property to the Purchaser within a period of 15 days from the date of signing this Agreement, the Purchaser shall have the option to determine this Agreement and in that event the Seller shall refund the earnest money of Rs.50,000/- (Rupees Fifty Thousand only) as received by him and pay to the Purchaser damages which are assessed as the sum of Rs.50,000/- (Rupees Fifty Thousand only).”

7. As will be evident from the aforesaid Clause, the Purchaser was given the option to exit from the Agreement in case the Seller failed to apply for permission for sale of the property within a period of 15 days from the date of signing of the Agreement. Clause 9 of the Agreement which is crucial for a decision in this appeal contains the right of the Seller to determine the Agreement and is extracted here in below:

“9. That if the Seller applies for sale permission within the time stipulated in clause 8 above, but does not get it within 6 months, the Seller may determine this Agreement and the Seller shall refund to the Purchaser the earnest money received by him

without any damages or interest, within a period of 15 days from the date of determination of the Agreement.”

8. In terms of Clause 9 of the Agreement extracted hereinabove, the Respondents submitted a request application in terms of Clause 2 of the said Agreement dated 12th September, 1978, i.e., well-within the period of 15 days contemplated in the said Clause. In response to the said application made to the Delhi Development Authority (DDA) for grant of sale permission, a letter dated 23rd/27th November, 1978, was addressed by DDA to the Respondents asking for certain documents to be filed. Interestingly, although, the said letter was addressed to the Respondents, it was responded to by the Appellant. The said letter sent by the Appellant has been marked as Ex.PW-1/3. On 7th March, 1979, the DDA informed the Respondents of the decision not to grant sale permission on the ground that the affidavit filed by Shri S.N. Bhalla, one of the two vendors was defective. On receiving the said intimation from the DDA, the Respondents sent a telegram to the Appellant on 8th March, 1979, determining the Agreement to Sell in terms of Clause 9 of the Agreement, on the expiry of the 6 months' period for completion of the sale on 7th March, 1979. The Appellant was also informed that the earnest money paid by him would be refunded within 15 days. Pursuant to such intimation, on 12th March, 1979, the Respondents sent a Bank Draft of Rs.50,000/- to the Appellant, being the earnest money received in terms of Clause 9 of the Agreement to Sell dated 8th September, 1978.

9. Coincidentally, on 8th March, 1979 itself, the Appellant also addressed a letter to the Respondents stating that the Lieutenant Governor, Delhi, had granted permission for sale of House No.C-2/13, Vasant Vihar, New Delhi (the property in question), in favour of the Appellant. However, the same could not be communicated since the affidavit filed by Shri S.N. Bhalla, the Respondent No.1 herein, was found to be defective and such permission could be conveyed only on production of the correct affidavit as required by the DDA. The Respondents were, accordingly requested by the Appellant to file a proper affidavit in the Department and to file all the necessary documents with the DDA to enable them to convey the required sale permission. It was also mentioned that the failure to do so would make the Respondents responsible for all costs and consequences thereof. The original letter No F.H.(199)78-CS/DDA dated 7th March, 1979, was attached with the notice sent on behalf of the Appellant. The said letter was followed up by a telegram sent by the Appellant indicating that time was not the essence of the Agreement and that he was prepared to purchase the house of the Respondents even beyond the period of 6 months since, although, DDA was ready to give permission, the Respondents had defaulted in filing the correct affidavit to enable DDA to grant permission.

10. Inasmuch as, no positive response was received by the Appellant from the Respondents to his communications, he sent a legal notice to the Respondents informing them that he was ready and willing to complete the transaction and to have the Sale Deed executed in his favour for the property in question by paying the balance price. The Respondents were asked to inform the Appellant as to how the transaction could be completed so that he could tender the sale consideration by Bank Draft. It was also indicated in the notice that the Bank Draft sent by the Respondents refunding the earnest money, had been encashed under protest, but it did not mean that the contract was repudiated. The contract continued to subsist and the Appellant was always ready and willing to perform his part of the contract.

11. In the absence of a positive response to the said notice, the Appellant filed Suit No.278 of 2003, on 8th March, 1982, for specific performance of the Agreement to Sell dated 8th September, 1978. On the pleadings of the parties, the following issues were settled by orders dated 1st November, 1983 and 19th February, 1991:

“1) Whether the Plaintiff has been ready and willing to perform his part of agreement dated 08.09.1978?

2) Whether the Defendant has committed breach of the said Agreement?

3) Whether the agreement dated 08.09.1978 stands terminated or frustrated as alleged by the defendant and there is no subsisting agreement to sell?

4) Whether the plaintiff is to be granted relief of specific performance in the facts and circumstances of the present case?

5) Whether the agreement dated 08.09.1978 is void for uncertainty?

6) Whether the time was the essence of the contract and whether the agreement dated 08.09.1978 was rightly terminated. The last issue was an additional issue settled vide order dated 19th February, 1991.”

12. Considering Clauses 2, 8 and 9 of the Agreement to Sell dated 8th September, 1978, the Trial Court dismissed the suit, inter alia, upon holding that the Appellant had intentionally and without demur accepted refund of the earnest money sent to him by Bank Draft and, thereafter, he sent the lawyer's notice on 26th April, 1979, stating that the said Draft was encashed without prejudice to his rights and contentions in the Suit. The learned Trial Court held that encashing the Bank Draft amounted to acceptance of the contract being determined. The learned Trial Court also was of the view that in view of his conduct it would be clear that the Appellant had abandoned his claim under the contract and he was no longer ready and willing to pursue his remedies under the contract. The Trial Court also took note of the fact

that although the Agreement contemplated that the Respondents would take steps to obtain the necessary sale permission and the Income Tax Clearance Certificate, the same was pursued by the Appellant and that it was the Appellant who was in default in complying with the requests made by DDA, which had resulted in the sale permission not being granted. The Trial Court categorically held that there was deficiency in respect of the documents to be filed. Even on the question of the Suit being filed on the last date of limitation, the same was construed to mean that the Appellant was not ready and willing to complete the sale transaction.

13. Aggrieved by the judgment and decree passed by the learned Additional District Judge on 10th February, 2004, the Appellant filed a Regular First Appeal before the Delhi High Court, being RFA No.272 of 2004, which was dismissed by the impugned judgment.

14. The Division Bench of the Delhi High Court in effect, accepted the reasoning of the Trial Court and indicated further that a contract, which is by its nature determinable, is incapable of being specifically enforced under Section 14(1)(c) of the Specific Relief Act, 1963. The Division Bench held that in terms of Clause 9 of the Agreement to Sell, the contract was determinable if the sale permission was not forthcoming within a period of 6 months from the date of execution of the Agreement. The Division Bench also referred to Section 20 of the aforesaid Act to indicate that relief of specific performance is discretionary and in the instant case, such discretion should not be exercised in favour of the Appellant who had approached the Court on the last date of limitation, i.e., within 3 years from the date when cause of action for the suit had accrued. Observing that it was a matter of common knowledge that between 1979 and 1982 the price of property had risen very sharply in Delhi, the Division Bench also observed that it could not also be lost sight of that the Appellant had accepted the refund of Rs.50,000/-, which had been paid by him to the Respondents as earnest money-cum-part Sale consideration. It is on the basis of such reasoning that the appeal was dismissed by the Division Bench of the Delhi High Court.

15. Mr. Altaf Ahmad, learned Senior Advocate, who appeared in support of the Appeal, contended that in terms of Clause 2 of the Agreement to Sell, the Sellers were under an obligation to apply to the DDA and the Competent Authority under the Urban Land (Ceiling and Regulation) Act, 1976, to obtain the requisite permission to transfer the property to the Appellant, free from all encumbrances. Mr. Ahmad submitted that the liberty given to the Respondents/Sellers under Clause 9 of the Agreement to exit therefrom could not be taken advantage of by the Sellers in case they were in default in obtaining the said permission within the stipulated time, without making serious and conscientious efforts to obtain the same. Mr. Ahmad submitted that in the instant case, the Respondents had been informed by the DDA of the deficiencies in the affidavit filed by them, but they did not take any step to

remove the deficiencies. Mr. Ahmad submitted that it is no doubt true that the Appellant/Purchaser had taken upon himself the burden of acquiring the sale permission and Income Tax Clearance Certificate, but it was only to assist the Respondents and the same did not absolve the Respondents of their responsibility of performing the tasks that they were required to perform under the Agreement. Mr. Ahmad contended that the role played by the Appellant in the entire episode was at best that of a facilitator in his own interest.

16. Mr. Ahmad submitted that both the Trial Court, as well as the High Court, had erred in holding that the Appellant was not ready and willing to complete the sale transaction and the same would be evident from the fact that he filed the suit for specific performance on the last date of limitation. Mr. Ahmad submitted that the very fact that the Appellant took on himself the burden of assisting the Respondents to procure the necessary sale permission and Income Tax Clearance Certificate, indicated his willingness and anxiety to complete the transaction. Learned counsel submitted that despite the Appellant's readiness and willingness to complete the sale transaction, he was unable to do so on account of the deficiencies on the part of the Respondents in complying with the instructions of the DDA. Learned counsel submitted that both the Courts below had dealt with the issues in the suit without properly understanding the case made out by the Appellant vis-a-vis the terms and conditions of the Agreement to Sell dated 8th September, 1978, and the judgment and decree of the Trial Court as well as the judgment of the High Court were liable to be set aside.

17. On the other hand, appearing for the Respondents, Mr. Mukul Rohatgi, learned Senior Advocate, contended that despite the obligation cast upon the Respondents to obtain the necessary sale permission and Income Tax Clearance Certificate, the Appellant had taken upon himself the responsibility to obtain the same and the Respondents could not be made responsible for the Appellant's failure to obtain the same. Mr. Rohatgi submitted that the Respondents/Sellers were fully justified in invoking Clause 9 of the Agreement to Sell and to terminate the same.

18. In order to drive home his point, Mr. Rohatgi submitted that the letters dated 27th November, 1978 and 7th March, 1979, which had been addressed to the Respondents by the Executive Officer, DDA, requesting that a proper affidavit be filed in the department to enable the DDA to take further steps in the matter, had been received by the Appellant and forwarded to the Respondents in original with his letter dated 8th March, 1979.

19. Mr. Rohatgi urged that from his conduct it would be clear that the Appellant was not ready and willing to complete the sale and both the Courts had rightly dismissed the Appellant's suit.

20. Mr. Rohatgi referred to various decisions on Section 20 of the Specific Relief Act, 1963, to bolster his submissions, but the same are all peculiar to the facts of each case. Relying on the Constitution Bench decision of this Court in *Shri Balwantrai Chimanlal Trivedi Vs. M.N. Nagrashna and Others*¹ Mr. Rohatgi lastly submitted that the Supreme Court is not bound to interfere under Article 136 of the Constitution when dealing with an appeal where there is no failure of justice.

21. What emerges from the submissions made on behalf of the respective parties is that the Appellant's suit was dismissed by the Trial Court on the finding that he had intentionally and without demand, accepted refund of the earnest money, though, without prejudice to his rights and contentions in the suit. The learned Trial Court also found that by encashing the Bank Draft, the Appellant had clearly indicated that he was no longer interested in completing the sale transaction. The Trial Court also took note of the fact that although under the Agreement it was for the Respondents to obtain the sale permission and Income Tax Clearance Certificate, it was the Appellant who had elected to pursue the matter and was, therefore, responsible for the failure to obtain the same within the stipulated period of six months, which entitled the Respondents/Sellers to terminate the Agreement under Clause 9 thereof.

22. The High Court approved the view taken by the Trial Court, but adding that in view of Section 14(1)(c) of the Specific Relief Act, 1963, the contract, which was by its very nature determinable, was incapable of being specifically enforced. The High Court, for abundant caution, also referred to Section 20 of the aforesaid Act to indicate that the relief of specific performance was purely discretionary and dependent on the facts of each case. The High Court also took note of the steep rise in the prices of real estate while dismissing the Appellant's suit for specific performance.

23. In our view, the reasoning of both the Trial Court and the High Court, cannot be supported on several grounds. Firstly, the acceptance of refund of the earnest money paid by the Appellant to the Respondents was not considered by the Trial Court as also the High Court in its proper perspective, as both the Courts appeared to have ignored the fact that such refund had been accepted by the Appellant, without prejudice to his rights and contentions in the suit. That the said amount was received under protest has not been considered either by the Trial Court or by the High Court, which had relied mainly on the provisions of Clauses 2 and 9 of the Agreement to Sell in dismissing the Appellant's suit for specific performance. We do not find from the materials on record that the Appellant had ever given up his claim under the Agreement or that he was not ready and willing to perform his part of the contract.

24. Secondly, the Trial Court also quite erroneously absolved the Respondents of their obligation under the Agreement to obtain sale permission and Income Tax Clearance Certificate, which were required for completion of the sale. We reiterate that the role of the Appellant was merely that of a facilitator and the primary responsibility for obtaining permission and clearance from the Income Tax Authorities remained with the Respondents. In fact, there is nothing on record to indicate that by his acts, the Appellant ever agreed to play a role other than that of a supportive role and that too in his own interest, in obtaining the necessary clearances.

25. The other point raised on behalf of the Respondents regarding the import of Clause 9 of the Agreement to sell is also not of much substance. In our view Clause 9 was never meant to provide the Respondents with an escape route if they themselves failed to discharge their responsibility of not only applying for sale permission, but to also follow up the matter with the authorities in order to obtain the same within the stipulated period of six months. In the absence of any material on record to show that the Respondents had made positive efforts for procuring the necessary sale permission and clearance certificates, they were not entitled to determine the Agreement in terms of Clause 9.

26. The last point, and, in our view the most substantive point, is the steep hike in the value of real estate which has been taken note of by the High Court. However, in the absence of definite evidence to show that the Appellant/purchaser was not ready and willing to conclude the sale transaction, the Respondents cannot be given the benefit of the delay in concluding the same.

27. Both the Courts below have attached a good deal of importance to the fact that the Appellant filed the suit for specific performance on the last day of limitation, which, according to the learned Judges, indicated that the Appellant was not ready and willing to complete the sale transaction, as otherwise he would have filed the suit earlier. We have no hesitation in rejecting the said contention, since the Appellant filed the suit within the period of limitation and his readiness and willingness to conclude the sale transaction was quite obvious from the fact that he had taken upon himself the burden of pursuing the matter with the authorities for obtaining sale permission and Income Tax Clearance Certificate. The role played by the Appellant in this regard cannot, therefore, be applied to his disadvantage. In our view, the approach of both the Courts below to the problem was coloured by the fact that the Appellant had actively involved himself in the matter of obtaining the sale permission as well as Income Tax Clearance Certificate. The fact that the Appellant had made several requests to the Respondents to file a proper affidavit, as requested by the DDA, is another indication that the Appellant was ready and willing to complete the sale transaction. Both the Courts below dealt with the suit filed by the Appellant, as though the Respondents had no

obligation under the agreement for completing the sale and this appears to have influenced their judgment in dismissing the Appellant's suit for specific performance.

28. Issue Nos.1, 3 and 4 as settled by the Trial Court on 1st November, 1983 and 19th February, 1991, are, therefore, answered in favour of the Appellant and the remaining issues are answered against the Respondents. In the light of what has been indicated hereinabove, we are of the view that the Agreement to Sell dated 8th September, 1978, has been wrongly terminated.

29. This, however, brings us face to face with a rather difficult situation having regard to the fact that the Agreement to Sell was executed 34 years ago on 8th September, 1978, in respect of the suit property. We cannot shut our eyes to the fact that during this period the price of real estate has escalated sharply. In addition to the above, the Appellant has not suffered any material loss, since only the earnest money of Rs.50,000/- had been paid by him to the Respondents and the balance consideration was yet to be paid when the agreement came to be terminated. Even the said sum of Rs.50,000/- was returned to the Appellant immediately upon termination of the Agreement and the said amount was duly accepted by the Appellant, though by recording his objections subsequently. The Appellant, therefore, has not suffered any monetary loss, and, on the other hand, the value of the property must have sky-rocketed during the period between the execution of the Agreement till date. In fact, that is why there is no prayer in the alternative for return of any sums advanced, which is one of the usual prayers in suits for specific performance.

30. However, we are also of the view that the Appellant should be compensated for the time spent by him in pursuing his remedy in respect of the Agreement to Sell. Accordingly, we decree the suit, but instead of decreeing the suit for specific performance of the Agreement, we direct that the Respondents shall pay the Appellant costs for the litigation right throughout, assessed at Rs.25,00,000/-, to be paid by the Respondents to the Appellant within one month from date, without the Appellant having to proceed in execution for recovery of the same. In the event, the Respondents fail to pay the said amount to the Appellant within the aforesaid period, the Appellant will be entitled to put this decree for costs into execution before the Trial Court and the said amount will carry simple interest at the rate of 18% per annum from one month after the date of the decree till its realization.

31. The Appeal is disposed of, accordingly.

Judgment Referred

1(1961) 1 SCR 0113

