

SUPREME COURT OF INDIA

Ritu Saxena

Vs.

J.S.Grover

C.A.No.7268-7269 of 2019

(L.Nageswara Rao and Hemant Gupta,JJ.,)

17.09.2019

JUDGMENT

Hemant Gupta,J.,

SLP (Civil)No.29133-29134 of 2018

1. The unsuccessful plaintiff is in appeals before this Court arising out of a suit for specific performance of an Agreement dated July 18, 2004 in respect of Flat No. 272, Ground Floor, Gulmohar Enclave, New Delhi.

2. The husband of the appellant, who as an employee of M/s. GE Capital Services India Ltd., was in occupation of the said residential premises on a monthly rent of Rs.13,000/- to be paid by the tenant i.e. M/s. GE Capital Services India Ltd. since September 2002 to the landlord. On the expiry of the existing lease, the Agreement of Lease was extended for 11 months from September 01, 2004 but before the expiry of the lease, the appellant claims to have entered into an Agreement of Purchase the said property for a total sum of Rs.50 lakhs. A sum of Rs.1 lakh by cheque was paid to the defendants. It was agreed that all further relevant documents such as Agreement to Sell, Sale Deed, Will, Possession Certificate and No Objection Certificate for the purpose of transferring the said property shall be executed. The Agreement reads thus:

"I, J. S. Grover S/o G. S. Grover, resident of M-12 (First Floor) Kailash Colony, New Delhi 48 have agreed in principle and in terms to sell my house (for a consideration of Rs. 50 lacs) which is a freehold joint property in my name and in my wife's name Smt. Veena Grover, known as house bearing no.272, Gulmohar Enclave New Delhi 1100049. In this transaction I acknowledge the receipt of Rs. 1 lac as advance money by cheque number 044386 dt. 18.7.2004 issued from ICICI Bank Vasant Vihar New Delhi and agree to furnish all the further relevant document such as Agreement to Sale, Sale Deed, Will, Possession Certificate, NOCs etc. for the purpose of transferring the above said property in the name of Ritu Saxena at present residing at 272, Gulmohar Enclave New Delhi 110049 and a

permanent resident of B-377 Indira Nagar Lucknow, U.P. -sd- 18.7.2004 (J. S. Grover)"

3. The appellant relies upon communication dated July 30, 2004 that a loan of Rs.50 lakhs has been approved by the ICICI Home Finance Company Limited but the disbursement of the loan was only after the bank receives all income tax and property documents as discussed with her husband. The appellant is said to have written a letter to the defendants on September 14, 2004 to fix the date to complete the pending documentation and other formalities followed by another letter dated December 21, 2004. A legal notice dated April 19, 2005 was also served. In reply dated April 27, 2005, it was asserted that a formal Agreement to Sell was to be executed on or before July 21, 2004 and the appellant was to pay 25% of the total consideration. Since the appellant has failed to pay 25% of the total consideration amount, therefore, the Agreement is not enforceable. It is thereafter on May 25, 2005, suit for specific performance was filed.

4. The respondents denied the claim of the appellant to seek specific performance of the Agreement dated July 18, 2004. The parties led the evidence. The learned Trial Court dismissed the suit on February 28, 2018, inter alia, holding that though the Agreement to Sell was executed but appellant has failed to prove her readiness and willingness to perform her part of the contract. However, the appellant was found entitled to Rs.1 lakh and interest thereon. A decree to this effect was passed by the learned Trial Court. The first appeal was dismissed by the High Court on July 17, 2018 affirming the findings recorded by the Trial Court. Still aggrieved, the appellant is before this Court.

5. Learned counsel for the appellant vehemently argued that the appellant has earlier availed the loan of Rs.13 lakhs for purchase of a flat in Ghaziabad. At that time, Rs.90 lakhs were assessed as the capacity to avail loan by ICICI. Later, the appellant applied for loan to purchase the property in question. The Bank has approved the loan of Rs.50 lakhs but same was not disbursed since an Agreement on a stamp paper of Rs.50/- was not executed by the defendants. Therefore, the appellant has proved her readiness and willingness to perform her part of the contract and the finding recorded by the High Court is not sustainable.

6. In support of her claim, the appellant tendered her evidence on affidavit and made herself available for cross-examination as PW-1. PW-2 is her husband whereas PW-3 is the official from the ICICI who has deposed regarding the loan sought by the appellant and/or her husband. The appellant relied upon sanction letter dated July 30, 2004 (Ex.PW3/1) issued by ICICI. She stated that she had sufficient funds and resources which she can draw and is in a position to complete the transaction in her favour. She also stated that the combined annual income of her and her husband is about Rs.80 lakhs per annum and they can easily avail a loan of upto Rs.1 crore from any bank and a sum of Rs.50 lakhs is very easy to muster. Similar is the affidavit of PW-2 Vishnu Kant, husband of the appellant. PW-3 is Anil Kumar Shrivastava, Zonal Head (North), ICICI who confirmed that the letter dated July 30, 2004 shown to him from judicial file was issued by his Company though, his Company does not have any copy of this letter in the record. In cross-examination, he

stated that 2-3 months prior to the said approval, Vishnu Kant and the appellant were sanctioned home loan to the tune of Rs.13 lakhs though they were entitled for the loan to the extent of Rs.90 lakhs keeping in view their solvency. They had applied for a loan of Rs.60 lakhs but later on, down sized their requirement to about Rs.13 lakhs for purchasing the property other than the suit property and that they have never received the papers related to Flat No. 272, Ground Floor, Gulmohar Enclave, New Delhi.

7. The document of availing loan of Rs.13 lakhs shows that the loan has been sanctioned in respect of application No. 777-2415523. It is the same application number which is relied upon by the appellant for approval of Rs.50 lakhs as home loan to purchase the property in question.

8. The learned Trial Court in respect of issue no. 2 as to whether the plaintiff was ready and willing to perform her part of the Agreement to Sell, returned the following finding:

"However, both the plaintiff - PW-1 and her husband - PW-2 have throughout the cross-examination deposed that they were having funds/financial capacity to purchase the property. PW-1 has deposed that on 09.04.2005 when they went to the defendants house they were carrying a banker's cheque with them. But has neither given any details of the banker's cheque nor has placed on record a copy of the banker's cheque. Further, even copy of the passbook/bank statement of the account from which the banker's cheque was got prepared, has been filed in support of her averment and to show that the banker's cheque was actually got prepared. Further, PW-1 deposed that they had a property worth Rs.80 lakhs but again neither any details of the said property have been stated nor a copy of those property documents has been placed on record in support of this version. Thus, not even a single document has been filed to show that the plaintiff at any point of time from 18.07.2004 till filing of the suit, owned other property or had money in her bank account or in the account of her husband or any other source of fund for payment of the balance sale consideration of Rs.49 lakhs. In absence thereof, the statements of PW-1 and PW-2 are nothing more than bald averments carrying no weight."

9. The Trial Court, thus, held that the appellant is not entitled to the specific performance of the Agreement to Sell but granted a decree of recovery of Rs.1 lakh with 15% interest per annum from the date of Agreement till recovery thereof.

10. In appeal, the High Court initially has taken into consideration that only loan of Rs.13 lakhs were sanctioned as against the balance sale consideration of Rs.49 lakhs but subsequently, the said aspect was corrected finding error in view of the fact that a loan of Rs.13 lakhs was sanctioned in respect of the another property. The High Court held that self-serving averments in the affidavit of the appellant and her husband cannot be taken as discharge of onus of proof of having financial capacity. What is the evidence and what is the weight to be attached to the evidence are two separate aspects and oral statements on important aspects of financial capacity cannot be accepted by the courts as proof of financial capacity. The High Court did not find any favour with the argument that there is

no cross-examination in respect of financial capacity of the appellant and her husband. It was found that suggestion, that the appellant and her husband have deposed falsely, was considered sufficient so as to dispute her financial capacity and to disprove her readiness and willingness to perform her part of the agreement. The High Court also took the fact that the appellant is not entitled to discretionary specific performance as the appellant has paid Rs.1 lakh which is 2% of the total sale consideration of Rs.50 lakhs. The High Court also took notice of the fact that the defendants have filed a suit for possession against the tenant that is the employer of her husband as they failed to vacate the suit property after the expiry of the lease period. The decree of possession has attained finality and that the defendants have taken possession of the property as well.

11. Learned counsel for the appellant refers to judgment of this Court in *A. Kanthamani v. Nasreen'* Ahmed to contend that readiness and willingness is not as if the appellant is to carry hard cash or the amount in Bank but it is financial capacity to pay. The appellant has proved her capacity to pay the balance sale consideration. This Court in the cited case held as under:

"26. This Court in *Sukhbir Singh v. Brij Pal Singh [Sukhbir Singh v. Brij Pal Singh, (1997) 2 SCC 200 : AIR 1996 SC 2510]* followed the aforesaid principle with these words: (SCC p. 202, para 5)

"5. Law is not in doubt and it is not a condition that the respondents should have ready cash with them. The fact that they attended the Sub-Registrar's office to have the sale deed executed and waited for the petitioners to attend the office of the Sub-Registrar is a positive fact to prove that they had necessary funds to pass on consideration and had with them the needed money with them for payment at the time of registration. It is sufficient for the respondents to establish that they had the capacity to pay the sale consideration. It is not necessary that they should always carry the money with them from the date of the suit till the date of the decree. It would, therefore, be clear that the courts below have appropriately exercised their discretion for granting the relief of specific performance to the respondents on sound principles of law."

28. At the outset, we may observe that this Court is loath to undertake the task of appreciating the evidence in an appeal filed under Article 136 of the Constitution of India. It is more so when such appeal arises out of the judgment, which has recorded concurrent findings of fact."

12. The argument of the appellant that the capacity to pay is proved by the approval of loan by ICICI and the fact that the appellant and her husband have substantial income of Rs.80 lakhs per annum, therefore, the findings recorded by both the Courts below are not sustainable.

13. On the other hand, Mr. Narender Hooda, learned senior counsel for the respondents, submitted that the appellant is seeking reappraisal of evidence in the present appeal

under Article 136 of the Constitution of India. There is no substantial question of law of general importance which is arising for consideration of this Court. It is also argued that relief for specific performance is a discretionary relief. Both the courts have declined discretionary relief, therefore, no case is made out for interference in the present appeals.

14. We do not find any merit in the present appeals. The judgment in A. Kanthamani was in an appeal filed by the defendant against the concurrent finding of fact recorded by the courts below granting decree of specific performance of the Agreement. This Court has not interfered with the findings of fact recorded even after reappraisal of evidence.

15. Coming to the facts of the present case, the sole document relied upon by the appellant to prove her readiness and willingness is the approval of loan on July 30, 2004 by the ICICI. Such approval was subject to two conditions, viz., furnishing of income tax documents of the appellant and the property documents. M/s. ICICI has sent an Email on May 12, 2005 to the husband of the appellant requiring an Agreement to Sell on a stamp paper of Rs.50/- to be executed between the parties, as per the legal opinion sought from the empaneled lawyer, without which ICICI will not be able to disburse the loan. Admittedly, no agreement was executed on stamp paper, therefore, the appellant could not avail loan of Rs.50 lakhs from ICICI. Independent of such loan, there is mere statement that appellant and her husband have income of Rs.80 lakhs per annum unsupported by any documentary evidence. Such statement will be in the nature of ipsi dixit of the appellant and/or her husband and is without any corroborating evidence. Such self-serving statements without any proof of financial resources cannot be relied upon to return a finding that the appellant was ready and willing to perform her part of the contract. The appellant has not produced any income tax record or the bank statement in support of her plea of financial capacity so as to be ready and willing to perform the contract. Therefore, mere fact that the bank has assessed the financial capacity of the appellant while granting loan earlier in respect of another property is not sufficient to discharge of proof of financial capacity in the facts of the present case to hold that the appellant was ready and willing to perform her part of the contract. Such is the finding recorded by both the courts below as well.

16. In view of the said fact, we do not find, even on reappraisal of evidence, that the finding recorded by the High Court suffers from any illegality which may warrant interference in the present appeals. Consequently, the appeals are dismissed.

17. The amount of Rs. 3.5 crores deposited by the appellant in terms of order dated November 19, 2018 of this Court, which has been invested in the FDR, may be returned to her, along with the interest accrued thereon, as per rules.