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**(2013) 07 DEL CK 0067**

**Delhi High Court**

**Case No:** CS (OS) No. 1869 of 2008

Pradeep Jain

APPELLANT

Vs

Ameena Begum and Another

RESPONDENT

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Date of Decision: July 1, 2013

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 10 Rule 2

Hon'ble Judges: Rajiv Sahai Endlaw, J

Bench: Single Bench

**Advocate:** Rakhsar Ahmed, for the Respondent

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### **Judgement**

Rajiv Sahai Endlaw, J.

The plaintiff has sued for specific performance of an Agreement dated 27th May, 2008 of sale of property bearing No. RZ-502/21-22 ad measuring 60 sq. yds. comprised in Khasra No. 450, Tuglakabad Extension, New Delhi pleading:-

(a). that the defendants No. 1 & 2 as owners in possession had agreed to sell the same to the plaintiff for a total consideration of Rs. 22,10,000/- out of which the plaintiff paid a sum of Rs. 2 lacs at the time of Agreement to Sell and the balance Rs. 20,10,000/- was payable at the time of execution of sale documents and delivery of possession on or before 1st August, 2008;

(b). that the plaintiff since 24th July, 2008 continuously approached the defendants for making the balance payment but the defendants avoided for some reason or the other;

(c). the plaintiff, his brother and Shri Satbir Singh visited the residence of the defendants at 7.30 a.m. on the morning of 1st August, 2008 with the entire balance payment but the defendant No. 2 Shri Shakil Ahmed Alvi being the husband of the defendant No. 1 Smt. Ameena Begum told the plaintiff that he was going to the hospital with his daughter and will return back immediately but did not return till

1745 hours;

(d). that the defendant No. 1 sent a legal notice dated 1st August, 2008 to the plaintiff alleging default of the plaintiff in paying the balance sale consideration and forfeiting the amount of Rs. 2 lacs already paid by the plaintiff; and,

(e). that the plaintiff immediately contacted his Advocate on 2nd August, 2008 and posted a legal notice on 4th August, 2008 (3rd August, 2008 being a holiday), requesting the defendants to receive the balance amount of Rs. 20,10,000/- but even then the defendants failed to receive the same or execute the Sale Deed in favour of the plaintiff.

Summons of the suit and notice of the application for interim relief were issued and vide ex parte ad interim order dated 8th September, 2008 on statement of the plaintiff that he on his own accord is ready and willing to deposit Rs. 5 lacs within two weeks, the defendants were restrained from alienating, encumbering or parting with possession or creating any third party interest in the said property. The plaintiff was also directed to deposit Rs. 5 lacs in this Court within two weeks and which was deposited.

2. The defendants filed a written statement pleading:-

(i). that the plaintiff failed to pay the balance sale consideration or have the documents executed before the Registrar before 1st August, 2008;

(ii). that the defendants were waiting before the Office of the Registrar, Mehrauli as per the assurance of the plaintiff on 1st August, 2008 till evening but the plaintiff did not appear there;

(iii). that the plaintiff had never approached the defendants to make the payment of the balance sale consideration and had upon the defendants approaching the plaintiff on 30th July, 2008 assured that he will make the payment on 1st August, 2008 before the Registrar but failed to appear before the Registrar; and,

(iv). that notice dated 1st August, 2008 sent by the defendants was received by the plaintiff on 4th August, 2008 and it is thereafter only that the plaintiff has cooked up the story of the defendants being in default.

3. The plaintiff filed a replication controverting the contents of the written statement and reiterating the version in the plaint.

4. Though vide order dated 23rd October, 2008 the parties were directed to appear for recording of their statement under Order X Rule 2 of the CPC but the same never got recorded. It may also be mentioned that though the ex parte ad interim injunction was to continue till the next date of hearing but there is no order thereafter continuing the same or confirming the same. However, it is safe to assume that the said order has continued to be in force.

5. On the pleadings of the parties, the following issues were framed on 2nd February, 2009:-

1. Whether the plaintiff has always been ready and willing to perform his part of the contract under agreement dated 27th May, 2008 (Ex. P1)?-OPP

2. Whether the plaintiff is entitled to a decree of specific performance as claimed in the suit?-OPP

3. Whether the plaintiff is entitled to relief of injunction as claimed?-OPP

4. Relief.

6. The plaintiff besides examining himself has examined four other witnesses. The defendants besides examining themselves have led evidence of one other witness. No evidence has been led by the plaintiff in rebuttal.

7. Neither the counsel for the plaintiff nor the counsel for the defendants chose to address oral arguments and orders were reserved finding their written submissions on record.

8. It may at the outset be mentioned that though the Agreement to Sell dated 27th May, 2008 of which performance is sought is between the defendant No. 2 Shri Shakil Ahmed Alvi and the plaintiff and to which defendant No. 1 is not a party but both the defendants appearing as DW1 and DW2, in their affidavits Ex. DW1/A and Ex. DW2/A by way of examination-in-chief have stated that they both are the owners in possession of the property though the Agreement was entered into by the defendant No. 2 Shri Shakil Ahmed Alvi only. However the defendants having not taken a defence about the authority of the defendant No. 2 to enter into the Agreement to Sell on behalf of the defendant No. 1, the said aspect has no relevance.

9. The Agreement to Sell, proved as Ex. P1, in clause 11 thereof provides that upon the failure of the plaintiff to pay the balance sale consideration within the stipulated time i.e. on or before 1st August, 2008, the advance amount paid by him will be "forfeited" in favour of the defendant No. 2 and if the defendant No. 2 fails to perform the Agreement he will be liable to pay the double of the said amount to the plaintiff, though the said clause is disjointed and not very clear.

10. The plaintiff under the Agreement to Sell had agreed to pay the balance sale consideration to the defendants on or before 1st August, 2008 and had further agreed that upon his failure to pay the same the defendants will forfeit the advance/earnest money paid of Rs. 2 lacs. The defendants on 1st August, 2008 itself issued notice to the plaintiff of the plaintiff having defaulted. The plaintiff also immediately on receipt of the said legal notice, on 4th August, 2008 itself averred the defendants to be in default. This suit was first filed on 26th August, 2008. Unfortunately, inspite of the defendants having appeared before this Court soon

thereafter on 23rd October, 2008, no effort was made to ask the plaintiff to pay the balance sale consideration to the defendants.

11. Ordinarily time is not of the essence in agreements of sale/purchase of immovable property. However, this aspect also appears to have been ignored by both parties. Neither has the plaintiff pleaded so nor have the defendants pleaded any circumstances to show the time being of the essence. In the absence thereof, I have no option but to decide on the basis of the pleas with which the parties went on trial i.e. whether it was the plaintiff or the defendants who were in default on 1st August, 2008.

12. On a review of the pleadings, documents and evidence led, I find the plaintiff to be in default for the reason of the plaintiff having not produced any evidence whatsoever before this Court of his being possessed of the entire balance sale consideration of Rs. 20,10,000/- on or before 1st August, 2008 and which was incumbent upon the plaintiff to do in the face of the issue No. 1 framed in the suit. The plaintiff has not produced any evidence whatsoever in this regard. All the witnesses produced by the plaintiff are only on the aspect of the plaintiff having approached the defendants to fulfill the Agreement to Sell and not on the aspect of the plaintiff being possessed of or being in a position to arrange the money. Even when the plaintiff came before this Court, as aforesaid within less than a month of the date fixed for performance, the plaintiff did not offer to deposit the entire balance sale consideration of Rs. 20,10,000/-; rather the plaintiff only offered to deposit Rs. 5 lacs. It is inexplicable as to why the plaintiff within one month of the date fixed for performance offered to deposit only about 1/4th of the balance sale consideration and not the entire amount. The only inference can be that the plaintiff even then was not possessed of the entire balance sale consideration but of only Rs. 5 lacs. Not only so, the plaintiff inspite of having approached the Court immediately and inspite of the defendants also having appeared before this Court, appears to have been interested only in contesting the suit and did not make any application even at that time or request the Court to call upon the defendants to execute the Sale Deed against receipt of the balance sale consideration.

13. As against this, the conduct of the defendants appears to be in consonance with the Agreement. As aforesaid, even though the Agreement to Sell was not signed by the defendant No. 1 and the defendant No. 2 in the Agreement to Sell had not made any representation of being authorized to sign on behalf of the defendant No. 1, the defendant No. 2 did not set up that plea in defence to the claim of the plaintiff and which would have been the case had the defendants wanted to wriggle out of the Agreement with the plaintiff. Not only so, the defendants acted with promptitude in having the notice of default issued to the plaintiff on 1st August, 2008 itself. The same is in-fact reflective of the time for performance being of the essence of the Agreement.

14. Even otherwise the principle of law is of the plaintiff failing in a case of no evidence. (See [Varada Bhavanarayana Rao Vs. State of Andhra Pradesh and Others,](#) ) Here as aforesaid there is no evidence of the plaintiff being in a position to perform his part of the Agreement to Sell and the plaintiff has to thus fail.

15. I accordingly decide issue No. 1 in favour of the defendants and against the plaintiff by holding the plaintiff to have been not ready and willing to perform his part of the Agreement to Sell. Axiomatically, issue No. 2 is also decided in favour of the defendants and against the plaintiff with the plaintiff being held not entitled to the decree for specific performance. Once the plaintiff is found to be not entitled to the decree for specific performance, the plaintiff cannot seek to injunct the defendants from dealing with the property. Resultantly, issue No. 3 is also decided in favour of the defendants and against the plaintiff.

16. Lastly, on issues No. 4 as a consequence of the above, the suit is dismissed; however in the circumstances no costs.

17. Decree sheet be drawn up. The sum of Rs. 5 lacs deposited by the plaintiff in this Court in terms of order dated 8th September, 2008, together with interest accrued thereon be refunded by the Registry to the plaintiff.