

(2008) 12 DEL CK 0163

Delhi High Court

Case No: Regular First Appeal 50 and 51 of 2008

Shivaji Sindhu

APPELLANT

Vs

Daulat Ram Deepani

and Another

Ashok Sindhu Vs

RESPONDENT

Versha Deepani and

Another

Date of Decision: Dec. 4, 2008

Hon'ble Judges: Pradeep Nandrajog, J; J.R. Midha, J

Bench: Division Bench

Advocate: Sunil Malhotra and Sonali Malhotra, for the Appellant; O.P. Aggarwal, for the Respondent

Final Decision: Dismissed

Judgement

Pradeep Nandrajog, J.

Heard learned Counsel for the parties.

2. The two appeals arise out of two suits having counter claims.

3. Suits filed by the appellants Shivaji Sindhu and Ashok Sindhu have been dismissed. Counter claim of the respective defendants in the two suits have been allowed.

4. The two suits sought enforcement of two agreements to sell both proved as Ex.PW-1/2 in each suit, as per which the defendant(s) of the two suits agreed to sell the two flats, one each forming subject matter of the two agreements to sell, being Flat No. 45-C (SF), Block No. BW, Category-2, Shalimar Bagh, Delhi and Flat No. 48-C (SF), Block No. BW, Category-2, Shalimar Bagh, Delhi.

5. The two agreements to sell record that the agreed sale price of the two flats is Rs. 3,20,000/- (Rupees Three Lac Twenty Thousand) and Rs. 3,60,000/- (Rupees Three Lac Sixty Thousand) respectively. In both agreements to sell it has been recorded

that the entire sale consideration has been tendered and received vide pay order issued by SBI, Azad Market, Delhi and that possession of the respective flat has been handed over to the buyers.

6. The two agreements to sell have been registered before the Sub-Registrar. A general power of attorney pertaining to both flats, being Ex.PW-1/5 (two documents) as also a separate receipt evidencing receipt of the pay order proved as Ex.PW-1/3, in both the suits as also a registered will executed by the seller in favour of the buyer being Ex.PW-1/4, was proved in each suit.

7. The defence taken by the defendants in both the suits was identical. They stated that on 14th July, 2003, the date on which the afore-noted documents were executed before the Sub-Registrar, they reached the office of the Sub-Registrar and were shown two pay orders. They executed the documents but that the pay orders were not handed over to them as the sellers stated that they would send the pay orders by post. They pleaded that the possession of the flat was with them and that said fact evidenced a false recital in the agreements to sell of possession being delivered.

8. Since original title documents were handed over to the buyers, counter claims were filed praying that a mandatory order be passed directing the return of their original title documents.

9. At the trial, the plaintiff(s) of the two suits stated that in the agreements to sell as also in the plaint it was inadvertently recorded that the respective payments were tendered by the pay orders. The plaintiffs said that actually two cheques in sum of Rs. 3,20,000/- and Rs. 3,60,000/- respectively were handed over and that the sellers, with a mala fide intent did not encash the cheques.

10. On behalf of the plaintiff, evidence was led by their constituted attorney.

11. The suits seeking specific performance of the agreements to sell have been dismissed. Counter claims have been allowed.

12. Two reasons have been given by the learned Trial Judge to do so.

13. The first reason is that the evidence of the plaintiffs has to be ignored because the constituted attorney could not depose facts on behalf of the plaintiffs. The second is that the agreement(s) to sell records payment by means of a pay-order(s) which was also the claim in the plaint but ultimately the plaintiff conceded that no pay orders were tendered but sought to prove payment being tendered by means of two cheques which were found unencashed. Learned Trial Judge has accordingly held that it stands established that nothing flowed from the coffers of the plaintiffs of the two suits to the defendants of the two suits.

14. We concur with the first submission made by learned Counsel for the appellant that the evidence of the attorney of the plaintiff could not be wished away, for the

reason the attorney depose of being present when the transaction was transacted; he spoke from personal knowledge.

15. We would like to clarify a misconception which we notice is repeatedly emanating in judicial pronouncements. The rule that a general attorney cannot depose to a fact is limited to facts which would be in the personal knowledge of the principal but does not relate to personal knowledge of the facts within the knowledge (personal) of the general attorney.

16. But, we do not agree with the second contention urged by learned Counsel for the appellants, viz., that in the agreement(s) to sell and in the plaint it inadvertently got recorded that the payment was made by pay orders; as a matter of fact payment was made by two cheques.

17. The principal factor which has weighed with us to disagree with the submissions made by learned Counsel for the appellants is the fact that if indeed, payments were made by cheques, the two cheques would have been tendered on 14.7.2003; the date of execution of the two agreements to sell. The suit has been filed in the month of January 2004. No evidence has been led that the plaintiffs have questioned the defendants as to why have the cheques have not been encashed. Further, if full payment was tendered by the buyers and flats were in possession of the sellers normal human conduct would require the buyers to insist upon possession being delivered. It be noted that the cheques allegedly given were never encashed.

18. We note that the agreement(s) to sell record that possession has been handed over to the buyer(s), a fact which is admittedly incorrect.

19. We find no infirmity with the view taken by the learned Trial Judge that the suit for specific performance has to be dismissed. The corollary thereof would be the entitlement of the defendants to a return of the original title documents which they handed over to the plaintiffs.

20. Finding of the learned Trial Judge pertaining to the counter claims is affirmed.

21. All appeals are dismissed.

22. There shall be no order as to costs.

23. At this stage, we note the statement made by learned Counsel for the appellants that the title documents have been deposited by the appellants in this Court. If be so, we direct the Registry to return the title documents to the sellers i.e. the defendants of the two suits.