

(2013) 07 DEL CK 0619

Delhi High Court

Case No: CS (OS) 1945 of 2006

Sh. Jaswant Singh

APPELLANT

Vs

Atma Singh

RESPONDENT

Date of Decision: July 10, 2013

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 23 Rule 3, Order 7 Rule 7

Hon'ble Judges: Rajiv Sahai Endlaw, J

Bench: Single Bench

Advocate: R.S. Sasan and Mr. H.S. Sasan, for the Appellant; P.S. Mahendru, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.

The plaintiff has sued for specific performance of the Agreement dated 14th May, 2005 of sale of property No. J-3/37, Rajouri Garden, New Delhi and for permanent injunction restraining the defendant from dealing with the said property in contravention of the said Agreement, pleading:-

(i). that the defendant had vide Agreement to Sell dated 14th May, 2005 agreed to sell the property to the plaintiff for a total sale consideration of Rs. 30 lacs out of which Rs. 6 lacs was paid as earnest money at the time of execution of the Agreement to Sell and another Rs. 4 lacs was paid on the asking of the defendant on 19th May, 2005;

(ii). that at the time of the agreement, a portion of the property agreed to be sold was occupied by the two brothers of the defendant who had in the year 1982 filed a suit with respect thereto against the defendant and which was at the time of Agreement to Sell still pending consideration;

(iii). that the said suit filed by the brothers of the defendant was withdrawn on 1st August, 2005 by filing an application under Order 23 Rule 3 of the CPC and the said brothers of the defendant vacated the property and the defendant came into

possession of the entire property;

(iv). that the defendant however vide legal notice dated 22nd August, 2005 revoked the Agreement to Sell;

(v). that upon the plaintiff approaching the defendant, the defendant further demanded Rs. 4 lacs which was paid by the plaintiff on 31st August, 2005 and the defendant waived the notice dated 22nd August, 2005;

(vi). that the plaintiff on 31st August, 2005 also purchased non-judicial stamp paper worth Rs. 40,000/- for execution of the Sale Deed;

(vii). that the plaintiff in anticipation of the Sale Deed to be executed by the defendant in his favour, approached M/s. Janak Properties property dealers/builders who proposed to build the suit property; the said property dealer/builder asked the plaintiff to bring the original documents before they undertook construction and the plaintiff on 30th October, 2005 took the defendant with him to the said property dealer / builder and handed over all the original documents as required by the property dealer/builder and the plaintiff, defendant and the said property dealer / builder also signed a Memorandum of Understanding (MoU) dated 30th October, 2005;

(viii). that the defendant however wanted the sale consideration to be increased to Rs. 50 lacs;

(ix). that the plaintiff applied for and obtained refund of the non-judicial stamp papers on 7th December, 2005;

(x). that upon the plaintiff again approaching the defendant the defendant agreed to execute the documents provided he is paid Rs. 10 lacs and the said amount was paid on 26th May, 2006 and the defendant promised to execute the documents on 7th August, 2006;

(xi). the defendant however failed to execute the documents; and,

(xii). that on 22nd September, 2006 the plaintiff received summons of the suit for permanent injunction filed by the defendant in the Court of the Civil Judge, Delhi to restrain the plaintiff from dispossessing the defendant from the said property;

Hence this suit.

Summons of the suit and notice of the application for interim relief were issued and vide ex parte ad interim order dated 13th October, 2006 which was subsequently confirmed the defendant was restrained from creating any third party interest in the property.

2. The defendant has contested the suit by filing a written statement pleading:-

(a). that the plaintiff failed to pay the balance sale consideration and get the Sale Deed registered in terms of the Agreement dated 14th May, 2005 which was cancelled by the defendant through Notice dated 22nd August, 2005 and to which no reply was given by the plaintiff;

(b). that the plaintiff has paid advance sale consideration of Rs. 6 lacs and Rs. 4 lacs i.e. total Rs. 10 lacs only and no payments as alleged of Rs. 4 lacs on 31st August, 2005 or of Rs. 10 lacs on 26th May, 2006 were made by the plaintiff to the defendant;

(c). that one Shri Ashwani Suri (property dealer / builder) offered to intervene between the parties for bringing about reconciliation with a pre-condition that the parties deposit the original documents in their respective possession with him; however no compromise was arrived at though the original documents continued to be in possession of Shri Ashwani Suri;

(d). that be that as it may, the MoU signed between the plaintiff, defendant and the said Shri Ashwani Suri confirms that the Agreement to Sell dated 14th May, 2005 stood revoked, cancelled and annulled;

(e). that one Shri Jagmohan Singh had filed a civil suit in the year 2006 impleading the plaintiff and certain other family members of the defendant as defendants thereto and pleading that the plaintiff herein had agreed to sell the said property to him and had delivered possession of the property to him and to restrain the defendants in that suit from dispossessing the said Shri Jagmohan Singh from the said property; that the defendant on coming to know of the said suit applied for impleadment therein but the said suit was withdrawn on 25th May, 2006;

(f). that it was owing to the aforesaid suit that the defendant filed the suit for permanent injunction in the Court of the Civil Judge to restrain the plaintiff herein and the said Shri Jagmohan Singh from interfering with the possession of the defendant of the property; and,

(g). that the plaintiff has not been ready and willing to perform his part of the Agreement;

3. The plaintiff has filed a replication denying that by the MoU dated 30th October, 2005 the Agreement dated 14th May, 2005 stood revoked and pleading that Shri Jagmohan Singh had entered into some arrangement with the brothers of the defendant and had also paid consideration to the brothers of the defendant and for this reason the plaintiff had to execute an Agreement with Shri Jagmohan Singh to gain his trust and in fact Shri Jagmohan Singh was delivered the possession of the portion earlier in occupation of the brothers of the defendant but the defendant forcefully took the said possession.

4. In the aforesaid state of pleadings, the following issues were framed on 10th August, 2007:-

1. Whether the plaintiff is entitled for decree of specific performance of the Agreement to Sell dated 14.5.2005 in respect of the property bearing No. J-3/37, Rajouri Garden, New Delhi? If so, on what terms and conditions? OPP
2. Whether the plaintiff is entitled for decree of permanent injunction against the defendants in respect of suit property bearing No. J-3/37, Rajouri Garden, New Delhi? OPP
3. Whether the suit has not been properly valued for purposes of court fee and jurisdiction? If so, to what effect? OPD
4. Whether the entire property was in possession of the plaintiff at the time of signing Memorandum of Understanding dated 30.10.2005? If so, to what effect? OPP
5. Whether the plaintiff has paid a sum of Rs. 24,00,000/- in all towards the consideration for the Agreement to Sell dated 14.5.2005? OPP
6. Relief.
5. The plaintiff besides himself, has examined Shri Ashwani Suri and two other witnesses. The defendant had examined himself only in support of his defence.
6. My issues-wise findings are as under.

Re. Issue No. 3 - Whether the suit has not been properly valued for purposes of court fee and jurisdiction? If so, to what effect? OPD

7. The counsel for the defendant had not addressed any arguments on this issue. The suit is valued for the purposes of Court Fees and jurisdiction for the relief of specific performance at Rs. 30 lacs as per sale consideration disclosed in the Agreement of which specific performance is claimed and for the relief of permanent injunction at Rs. 130/- and which valuation is found to be in accordance with law and issues No. 3 is accordingly decided in favour of the plaintiff and against the defendant.

Re. Issue No. 2 - Whether the plaintiff is entitled for decree of permanent injunction against the defendants in respect of suit property bearing No. J-3/37, Rajouri Garden, New Delhi? OPP

8. The said issue, in my opinion is redundant. If the plaintiff is found entitled to a decree for specific performance, the defendant would be required to convey the property to the plaintiff in accordance with the Agreement dated 14th May, 2005; however if the plaintiff is not found entitled to the relief of specific performance, the plaintiff would not be entitled to restrain the defendant from dealing with the property. During the pendency of the suit, to protect the rights of the plaintiff, interim relief to the said effect was granted. The issue is decided accordingly.

Re. Issue No. 4 - Whether the entire property was in possession of the plaintiff at the time of signing Memorandum of Understanding dated 30.10.2005? If so, to what effect? OPP

9. I am unable to decipher the necessity of the said issue in as much as the grant of the relief of specific performance is not dependent upon possession at the time of MoU dated 30th October, 2005. At the time of filing of the suit, admittedly the defendant was in possession and the plaintiff has claimed specific performance inter alia by directing the defendant to deliver possession of the property to the plaintiff. The said issue is also found to be misconceived and is disposed of accordingly.

Re. Issue No. 1 - Whether the plaintiff is entitled for decree of specific performance of the Agreement to Sell dated 14.5.2005 in respect of the property bearing No. J-3/37, Rajouri Garden, New Delhi? If so, on what terms and conditions? OPP;

and

Re. Issue No. 5 - Whether the plaintiff has paid a sum of Rs. 24,00,000/- in all towards the consideration for the Agreement to Sell dated 14.5.2005? OPP

10. These issues being intertwined are taken up together.

11. The Agreement to Sell dated 14th May, 2005 proved as Ex. PW 2/D which is not in dispute, was for a total sale consideration of Rs. 30 lacs and out of which the plaintiff paid and the defendant received Rs. 6 lacs as earnest money and stipulated execution of Sale Deed by the defendant in favour of the plaintiff "within 15 days" on receipt of balance sale consideration amount of Rs. 24 lacs and delivery of vacant possession of the portion of the property then in possession of the defendant to the plaintiff. The said Agreement in which the defendant is described as the first party and/or in first tense and the plaintiff as the second party, also provides as under:-

That the first party is going for the bargain of property of area in his possession of J-3/37, first Party is not responsible for getting it vacated by other two occupant of J-3/37. I am not responsible for any settlement with other claimants. This agreement relates to the area occupied by me only.

Although I am the sole owner of this property through the said Will but my brothers have made it a disputed property and the case at present in the court of Manish Gupta Civil Judge, Delhi Suit No. 312/2002, this case is lingering on since 1979 and 1982.

At the time of settlement of all cases the first party will execute sale deed in respect of the said property in favour of the second party.

That in case the first party backs out from the said transaction on any grounds then they will pay the double amount of earnest money to the second party or second party will get the transaction completed through court of law by specific performance of suit.

That in case the second party backs out from the said transaction, on any ground, then his earnest money shall stand forfeited in favour of the first party.

The defendant, besides the Agreement to Sell, also executed a receipt Ex. PW2/E of the earnest money of Rs. 6 lacs.

12. Though the balance sale consideration of Rs. 24 lacs was payable within 15 days i.e. by 30th May, 2005 but the receipt Ex. PW2/E contains endorsement in hand dated 19th May, 2005 proved as Ex. PW2/F, of receipt of further sum of Rs. 4 lacs, leaving the balance sale consideration as Rs. 20 lacs.

13. The defendant, vide legal Notice dated 22nd August, 2005 proved as Ex. PW 1/P1, accused the plaintiff of failure to pay the balance sale consideration as agreed within 15 days of the Agreement to Sell inspite of the brothers of the defendant having withdrawn the suit filed by them on 1st August, 2005 and hence revoked the Agreement and notified the defendant of forfeiture of the earnest money.

14. The MoU dated 30th October, 2005 between the plaintiff, defendant and Shri Ashwani Suri and execution whereof is also not disputed which is proved as Ex. PW1/D2 records the plaintiff and the defendant, while depositing their original documents in the custody of Shri Ashwani Suri of M/s. Janak Properties, to have agreed to, (a) execution of the Sale Deed of the ground and first floors of the property by defendant in favour of the plaintiff; (b) to the execution of a builder agreement in favour of the defendant to construct the second floor of the above said property within eight months of execution of proper Sale Deed and handing over of possession of the property in favour of the plaintiff; and, (c) the plaintiff handing over actual vacant, peaceful possession of the portion of the property earlier in occupation of the brothers of the defendant. The MoU further records, that the plaintiff had deposited with Sh. Ashwani Suri, (i) the Agreement to Sell executed by the defendant in favour of plaintiff, (ii) Relinquishment and three agreements of remaining heirs of the property; and, (iii) two possession letters of two brothers of the defendant. Similarly, the documents deposited by the defendant with Sh. Ashwani Suri are recorded as; (i) original Conveyance/Sale Deed of the property in favour of father of the defendant; and (ii) copy of compromise order in suit filed by brothers of the defendant.

15. Though the aforesaid admitted document undoubtedly suggests that it was the plaintiff who had taken over possession of the portion of the property earlier in occupation of the brothers of the defendant and had delivered the said possession to the defendant to enable the defendant to raise construction of the second floor above the property but the plaintiff has neither pleaded the said case nor approached this Court for specific performance of the MoU dated 30th October, 2005 and it is for this reason that it has been observed under issue No. 4 above that the same is redundant.

16. What further immediately comes to fore from the aforesaid MoU dated 30th October, 2005 is that while the Agreement to Sell dated 14th May, 2005 of which specific performance is claimed was for sale of the entire property on "as is where is basis" by the defendant to the plaintiff and which Agreement rightly or wrongly was terminated by the defendant vide notice dated 22nd August, 2005 averring breach on the part of the plaintiff, the parties on 30th October, 2005 modified the Agreement dated 14th May, 2005 and agreed that the defendant would sell only the ground and first floors of the property to the plaintiff for the sale consideration of Rs. 30 lacs and the second floor of the property to be constructed by the defendant would belong to the defendant. In the face of the said admitted position, though no specific issue has been framed in this respect, I have wondered as to how, even if the plaintiff is to be found to be ready and willing to perform his part of the Agreement, can specific performance be ordered of the Agreement dated 14th May, 2005 which admittedly stands modified/superseded by the MoU dated 30th October, 2005.

17. No arguments also have been addressed by the counsels on the said aspect. Be that as it may, it having come in evidence that the Agreement dated 14th May, 2005 stood modified; no specific performance thereof can be ordered. Where there has been a variation of contract, there can be no decree for specific performance without variation. The plaintiff having not claimed specific performance of the modified Agreement, the same cannot be ordered even in exercise of the power of the Court under Order 7 Rule 7 to modify the relief. Though the plaintiff has not claimed the specific performance of the modified Agreement but the plaintiff inspite of the said modification having claimed the relief of specific performance of the original Agreement has but to be held to be not ready and willing for performance of the Agreement as modified and thus cannot be granted the relief of specific performance of that also.

18. Not only so, the case set up by the plaintiff in the plaint of having approached M/s. Janta Properties property dealers/builders for building the property after the defendant had conveyed the same to the plaintiff, is clearly contrary to the MoU dated 30th October, 2005 itself. The said document nowhere provides for the said property dealer / builder constructing the property but clearly provides for the defendant constructing the property. The plaintiff examined Mr. Ashwani Suri of M/s. Janta Properties property dealers/builders as PW 2; he also did not depose that he was approached by the plaintiff for raising construction on the property. Rather he has deposed that the parties had approached him because they had some dispute and he had prepared the MoU aforesaid after discussion with the parties. The plaintiff's version on this aspect also thus stands falsified.

19. The plaintiff is not found entitled to the relief of specific performance for another reason also. The plaintiff, in the plaint, did not disclose having entered into any Agreement with Sh. Jagmohan Singh. Upon the defendant in the written statement

pleading the suit filed by Sh. Jagmohan Singh, claiming to have purchased the property from the plaintiff, the plaintiff in the replication took a stand of the brothers of the defendant in occupation of property having dealt with Sh. Jagmohan Singh. The plaintiff in his cross examination however admitted to having entered into the Agreement with Shri Jagmohan Singh. Though the plaintiff did not produce the said Agreement but a certified copy thereof filed by Shri Jagmohan Singh in the suit filed by him has been filed by the defendant and plaintiff in his cross examination has admitted the execution thereof. The same, even though not exhibited, can thus be read in evidence. Vide said Agreement dated 29th December, 2005, the plaintiff had agreed to sell the entire property to the said Shri Jagmohan Singh for Rs. 10 lacs only, receipt of which sale consideration was also admitted in the said agreement. The plaintiff having already agreed to sell the property, i.e. assigning all his rights therein, cannot be entitled to the relief of specific performance of the Agreement to Sell in his own favour in as much as an Agreement is specifically enforceable only when there is no standard for ascertaining the damage caused by non-performance thereof. Here the plaintiff having agreed to transfer his rights in the property to Shri Jagmohan Singh for consideration of Rs. 10 lacs and having already received the entire consideration, has no right to enforce performance against the defendant.

20. From the facts aforesaid, the plaintiff is also not found entitled to the discretion implicit in the grant of the relief of specific performance in his favour for the reason that the Agreement to Sell dated 14th May, 2005 itself provides that the defendant had agreed to the "bargain sale" of the property to the plaintiff for Rs. 30 lacs only owing to the property being then embroiled in litigation between the defendant and his brothers. The Agreement provided for the entire sale consideration of Rs. 30 lacs to be paid by the plaintiff to the defendant within 15 days of the Agreement to Sell and which admittedly was not paid by the plaintiff. Thus the circumstances under which the contract was entered into were such which gave the plaintiff an unfair advantage over the defendant and make it inequitable to enforce specific performance. Not only so the conduct of the plaintiff subsequently assigning his rights under the Agreement to Shri Jagmohan Singh and of having a suit filed through Shri Jagmohan Singh without impleading the defendant though the threat if any to Shri Jagmohan Singh was from the plaintiff, also disentitle the plaintiff from the relief of specific performance.

21. The plaintiff has also been unable to prove the payments pleaded of Rs. 4 lacs on 31st August, 2005 and of Rs. 10 lacs on 26th May, 2006 and which have been denied by the defendant. The plaintiff in his examination-in-chief put exhibit marks Ex. PW1/D and Ex. PW1/G on the receipts for the said payments in cash. The plaintiff in his cross examination deposed that he had not shown the payments made to the defendant in his Income Tax return though he is an Income Tax assessee. On further questioning he stated that the cash for making the said payments had not been withdrawn by him from his bank. Though the plaintiff also examined as PW 4

Shri Jagjeet Singh, witness to the said receipts of Rs. 4 lacs and Rs. 10 lacs and who besides identifying his signatures as witness on the said receipts has also identified the signatures thereon of the defendant as well as of the other witness Mr. K.L. Sharma and further deposed of the payments thereunder having been made in cash in his presence but in my view the payments still do not stand proved. According to the plaint, the payment for Rs. 4 lakhs on 31st August, 2005 was not due but was made in consideration of defendant agreeing to withdraw the notice dated 22nd August, 2005. However in receipt Ex. PW1/D of the said payment and which PW-4 has deposed was typed in his presence, it is not recorded so, as would have been done in ordinary course of human behaviour. The defendant in his examination-in-chief has denied the said payments and in cross examination has denied his signatures on Ex. PW1/D and Ex. PW1/G. Not only so, in the subsequent admitted MoU dated 30th October, 2005, no mention was made thereof. The receipt Ex. PW1/D was also not kept with Mr. Ashwani Suri of M/s. Janak Properties, though all other documents were being kept/deposited with him. The only inference can be that it was not in existence then and has been fabricated subsequently. Yet further, if the plaintiff had paid the said sum of Rs. 4 lakhs on 31st August, 2005, the consideration under the Agreement executed by plaintiff on 29th December, 2005 would have been Rs. 14 lakhs and not Rs. 10 lakhs. Similarly, the receipt of Rs. 10 lacs records the date of Agreement to Sell as 26th May, 2006 when there is no Agreement to Sell pleaded of the said date. Owing to the said inconsistencies and further owing to the plaintiff having failed to prove availability with him of the said sum of Rs. 14 lacs in cash, there is no option but to hold that the plaintiff has failed to prove the said payments.

22. The plaintiff, though has also examined as PW 3 Smt. Surinderjeet Kaur wife of the brother of the defendant and who deposed that the plaintiff and Shri Jagmohan Singh had paid Rs. 27 lacs to the brothers of the defendant in occupation of the property but all this is beyond pleadings and thus need is not felt to elaborate thereon.

23. Issues No. 1&5 are accordingly decided against the plaintiff and in favour of the defendant. Axiomatically, the suit fails and is dismissed. However in the facts, no costs.

Decree sheet be drawn up.