

(2013) 05 DEL CK 0467

Delhi High Court

Case No: Regular First Appeal 413 of 2010 and CM Application No. 11325 of 2010

Anant Kaushal DECD Vatsala
Khurana

APPELLANT

Vs

Krishna Sharma and Ors

RESPONDENT

Date of Decision: May 10, 2013

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 2 Rule 1, Order 2 Rule 2(1), Order 6 Rule 2(1), Order 7 Rule 11

Citation: (2013) 136 DRJ 57

Hon'ble Judges: Sudershan Kumar Misra, J

Bench: Single Bench

Advocate: R.S. Kela, for the Appellant; T.K. Ganju with Mr. B.L. Wali and Mr. Anuj Dhir, Advocates for Respondent No. 1 and 2, for the Respondent

Final Decision: Dismissed

Judgement

Sudershan Kumar Misra, J.

This appeal has been instituted by an unsuccessful plaintiff whose suit for specific performance of an agreement to sell a flat on the front portion of the second floor of house bearing No. E-14/7, Vasant Vihar, New Delhi, has been dismissed on an application moved by the defendant Nos. 1 and 2 (respondent Nos. 1 and 2 herein) under Order VII Rule 11 Civil Procedure Code. The respondent Nos. 1 and 2 had premised their application under Order VII Rule 11 on two principal factors. Firstly, it was contended that by his own pleading in paragraph 14 of the suit, the plaintiff/appellant has specifically alleged that the owner Shri K.M. Sharma, who was the predecessor in interest of the applicants, had tried to, "block the entry of the plaintiff" on or about 14.07.1989 because of which, he was constrained to file FIR No. 149/89 with the Police Station Vasant Vihar. At the same time, it is also contended by the plaintiff in, inter alia, paras 8 & 11 of his plaint that possession of the said premises had already been handed over by the owner's Attorney to him

under an Agreement to Sell executed by the Attorney on the owner's behalf which, inter alia, also obliged the owner to approbate and ratify the Attorney's acts and to sign the transfer documents in due course; and therefore, in terms of Article 54 of the Limitation Act, the cause of action in the matter arose on 14.07.1989. Secondly, even if it is assumed that the mere act of blocking the plaintiff's entry to the suit premises by the owner, as aforesaid, cannot be taken to suggest that performance of the contract was refused by the owner, Shri K.M. Sharma; the notice of refusal of performance by the owner can certainly be attributed to the appellant/plaintiff on 6.2.1990 when the appellant/plaintiff had filed a criminal complaint against the Attorney of the owner before the Court of the metropolitan magistrate. Since the suit was filed on 28.11.1994, and limitation for filing such a suit was admittedly prescribed by the second limb of Article 54 of the Limitation Act, which requires such a suit to be filed within three years after the plaintiff/appellant had notice that performance was refused, therefore, even if knowledge of refusal of performance can be attributed to the date of filing of the complaint i.e. 6.2.1990, the suit was barred by limitation. Of course, if knowledge can be attributed to the earlier date of 14.07.1989 when the plaintiff has pleaded that the owner, Shri K.M. Sharma himself blocked the entry of the plaintiff to the said premises, the same result would follow.

2. Although the court below has chosen to accept the contention of the defendants/respondent Nos. 1 and 2 to the effect that the filing of the aforesaid complaint on 6.2.1990 demonstrates clearly that the appellant/plaintiff had notice of repudiation by that date; the other contention that the plaintiff/appellant, in fact, had notice of repudiation by the owner on 14.07.1989 itself, has not been examined further by the trial court.

3. The appellants contention to the effect that for the purpose of Order VII Rule 11 CPC, any of the documents or pleading apart from the suit or other documents filed and relied upon by the plaintiff himself, cannot be relied upon was repelled by the court below, inter alia, on the ground that the aforesaid criminal complaint dated 6.2.1990 was, in fact, a complaint filed by the plaintiff/appellant himself; and that even in reply to the defendants' application under Order VII Rule 11 where this document was mentioned and a copy thereof was annexed, the appellant/plaintiff did not deny the same. The court below concluded that the plaintiff had deliberately suppressed those facts as well as that document with a view to claiming that the cause of action for the suit had arisen at a later date, i.e., on 28.11.1991; and that if such tactics are allowed to continue, "it will amount to playing into the hands of the plaintiff". Dissatisfied, the plaintiff has appealed.

4. Before this Court, the principal argument of counsel for the appellant is that the court below was in error in relying upon the contents of his client's complaint filed before the Magistrate on 6.2.1990 solely on the ground that the said document was not annexed by him along with the plaint nor was there any mention of the said complaint in the plaint, and therefore, although it might be open to the

respondents/defendants to plead the bar of limitation in their written statement; and to even have an appropriate issue framed in this regard; the question whether the suit was barred by limitation would, under such circumstances, be one that must necessarily be decided after trial, and his suit could not be thrown out under Order VII Rule 11.

As regards the second ground that the plaintiff/appellant had notice of repudiation on 14.07.1989 itself, counsel for the appellant contends that the incident of 14.07.1989 as pleaded in paragraph 14 of the plaint cannot be construed as conveying notice of refusal to perform on the part of the owner, Shri K.M. Sharma.

5. To my mind, even without going into the question as to whether the aforesaid criminal complaint filed by the appellant/plaintiff on 6.2.1990 before the Magistrate could have been looked at by the court below while exercising jurisdiction under Order VII Rule 11 since the same was brought on record only as an annexure to the defendants' application under Order VII Rule 11 CPC; for the reasons that follow, the impugned order deserves to be maintained on the basis of the first ground itself, which is, that the appellant/plaintiff had notice of refusal to perform by the owner, Shri K.M. Sharma, on 14.07.1989.

6. It is the plaintiff's case in the suit that late Shri K.M. Sharma was the owner of the property bearing No. E-14/7, Vasant Vihar, New Delhi. On 5.9.1988, he entered into a collaboration agreement with the firm, Saraswati Builders, through its proprietor, Shri Satish Seth, to construct six flats on the property. It is also alleged in para 3 of the suit that the owner, Shri K.M. Sharma, undertook to transfer and sell three of those flats to Shri Satish Seth or his nominee and that with a view to facilitating the sale of those three flats by Shri Satish Seth, the owner also executed an irrevocable power of attorney in his favour. Thereafter, whilst the building was under construction, the said Shri Satish Seth offered to sell one of those flats, i.e. the suit property, to the appellant/plaintiff, to which he agreed and entered into the aforesaid agreement to sell dated 31.03.1989. It is also pleaded in suit that the owner's attorney had also handed over possession to the appellant in terms thereof.

7. In paragraph 8 of the suit, it was further stated by the appellant, inter alia, that the owner, Shri K.M. Sharma, "would be ultimately executing all the necessary transfer documents as may be necessary for negotiating complete legal and valid transfer of the flats in favour of the intending buyers". In other words, the owner, Shri K.M. Sharma, was also bound to execute necessary transfer documents to give effect to the aforesaid sale. It is also the case of the appellant that, as represented to him by the said Shri Satish Seth, even the receipt for the sum of Rs. 11 Lacs paid by the appellant/plaintiff in cash to Shri Satish Seth would be signed by Shri K.M. Sharma, "later on with the signing of transfer documents by Shri K.M. Sharma". Further, it is alleged in paragraph 13 of the plaint that a balance amount of Rs. 1 Lac was to be paid by the appellant/plaintiff, "on the signing of the final

transfer/conveyance documents by Shri K.M. Sharma". It is also the specific case of the plaintiff in paragraph 26 of the suit that he is entitled to, "the execution and registration of the sale deed from the defendants in favour of the plaintiff with physical possession of the property".

8. Significantly, whilst avowing his awareness that the owner, Shri K.M. Sharma, was obliged to take a number of steps towards the completion of his obligations, to the performance of which the appellant/plaintiff had become entitled under the facts and circumstances mentioned by him; the appellant/plaintiff stated that thereafter on or about 14.07.1989, when he visited the premises, the owner, Shri K.M. Sharma, "tried to block" his entry. As a result of which, the appellant/plaintiff filed an FIR No. 149/89 with the Police Station Vasant Vihar. He then submits in the suit that he, thereafter, came to know that a fraud had been played upon him by both Shri K.M. Sharma, the owner, and Shri Satish Seth, the builder and Attorney of Shri K.M. Sharma; and further that, in fact, Shri Satish Seth had forged and changed certain clauses in the copy of the collaboration agreement between himself and Shri K.M. Sharma that was furnished to him to persuade him to enter into the agreement to purchase the suit property. In the same paragraph, the plaintiff also avers specifically that, ".... Shri K.M. Sharma knew fully well that the said Shri Satish Seth have negotiated the sale transaction with the plaintiff for... Rs. 18,50,000/-... out of which a sum of Rs. 17,50,000/- as already been received by them.....". The appellant/plaintiff also averred in paragraph 26 of the suit that although he is entitled to execution and registration of the sale deed in his favour with regard to the suit property, "the same has now been put in dispute by the said Shri K.M. Sharma.....".

9. In paragraph 30 of the plaint, dealing with the cause of action, the appellant/plaintiff also avers that, in fact, the cause of action in his favour arose on or after 28.11.1991, when Shri K.M. Sharma, the owner, got a receiver appointed for the flat in question in suit No. 2525/1986 brought by Syndicate Bank against Shri K.M. Sharma. Counsel further submitted that Shri K.M. Sharma had no right of revocation with regard to the Agreement entered into between the appellant/plaintiff and the builder. To my mind, what is relevant is not whether Shri K.M. Sharma had the right to revoke the Agreement to Sell but rather whether, according to the averments in suit, Shri K.M. Sharma was under any obligation to perform. A reading of the plaint leaves no doubt that according to the plaintiff, Shri K.M. Sharma was indeed placed under an obligation to perform. Once it is accepted that an obligation to perform exists on the part of K.M. Sharma then the only question is whether Shri K.M. Sharma had repudiated that obligation on a particular date giving rise to cause of action and the consequent commencement of period of limitation in terms of Article 54 of the Limitation Act. For that purpose, obviously, the actions attributed to Shri K.M. Sharma on 14th July, 1989 have to be examined in the light of all the other allegations made in the plaint, the whole matter being read holistically, with a view to determining whether there was sufficient ground enabling

the trial court to reach the conclusion and to pass the order that it did on the said application.

10. In the light of the above facts pleaded in the suit, there is no gainsaying the fact that, according to the plaintiff himself, Shri K.M. Sharma was clearly obliged to perform a number of acts to secure the title of the plaintiff to the suit property. Even the relief sought is a decree for specific performance of the aforesaid agreement to sell being granted "against the defendants both jointly and severally...". That is to say, he was undoubtedly seeking a relief against Shri K.M. Sharma. It is the successors in interest of Shri K.M. Sharma who, after being duly impleaded as defendant Nos. 1 and 2 in the suit instituted by him, had moved the application in question under Order VII Rule 11 CPC praying that the suit be dismissed. It is settled law that in considering an application under Order VII Rule 11 Civil Procedure Code, the court is not expected to act mechanically as a mere automaton and to merely go by the literal meaning of the words and expressions used by the plaintiff in the suit. It is expected to take a holistic view of the pleadings and to consider whether, after taking the pleadings as a whole and reading the plaint in a realistic manner, it can be said that the plaintiff indeed had knowledge of the defendant's refusal to perform at an earlier point of time, even though he may have mentioned a later date as giving rise to a cause of action in his favour.

11. For this proposition, counsel for the respondent Nos. 1 and 2 relies on a decision of the Supreme Court in [T. Arivandandam Vs. T.V. Satyapal and Another](#), which holds, inter alia, that;

.... if on a meaningful - not formal - reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Order 7, Rule 11 CPC taking care to see that the ground mentioned therein is fulfilled. And if clever drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order 10, CPC. An activist Judge is the answer to irresponsible law suits.

12. Similarly, in [Manick Lal Seal and Another Vs. K.P. Chowdhury](#), where also the question of the scope of the expression "notice" used in Article 54 of the Limitation Act was considered, it was held as follows:

... "Notice" means intimation, information, cognizance, or observance. "Notice" implies knowledge and this knowledge comes from direct perception or from inference reasonably arising out of several facts and circumstances.

In this case, it is difficult to believe that having had full knowledge of the obligations of the owner, Shri K.M. Sharma, in securing the ownership and title of the suit premises to the appellant/plaintiff, Shri K.M. Sharma's actions on 14.07.1989 blocking his access to the premises would not have brought home the message to him that Shri K.M. Sharma is now refusing to perform his obligations. After all, the sole justification for the appellant's presence there, and his desire to enter the

property, was that very agreement to sell which he was convinced obliged Shri K.M. Sharma to facilitate and complete the sale.

13. Furthermore, the very purpose of the inclusion, by the plaintiff, of the fact that Shri K.M. Sharma had blocked his access to the premises on 14.07.1989 and that this led to his filing FIR No. 149/89, in his pleadings, would have to be the compliance of the requirement of Order II Rule 1 of the CPC which postulates that the suit has to be framed in a manner that affords grounds for final decision upon the subjects in dispute. One of the subjects in dispute, of course, was whether or not there was refusal by the defendants to perform their obligations under the aforesaid agreement to sell under which the appellant was asserting his right; or, to put it differently, this averment, when read in the light of order II Rule I could only mean that according to the plaintiff himself, the action of Shri K.M. Sharma on 14.07.1989 amounted to notice to the plaintiff, that performance of what the plaintiff considered were binding obligations, was being refused by the owner, Shri K.M. Sharma. In this context, the decision of the Supreme Court in [Swamy Atmananda and Others Vs. Sri Ramakrishna Tapovanam and Others](#), defining the scope of the expression, "cause of action" in the context of Order II Rule 2(1) clearly brings out the purpose which the plaintiff/appellant intended by mentioning the aforesaid facts in paragraph 14 of the plaint. The said judgment holds, inter alia;

A cause of action, thus, means every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded.

In that view of the matter, therefore, there can be no doubt that what was intended to be demonstrated by insertion of the aforesaid facts in paragraph 14 of the suit was that they afforded the plaintiff grounds for a final decision on the subject in dispute, and also gave rise to a cause of action in favour of the plaintiff/appellant against the defendants.

14. Under Order 6 Rule 2(1) of the Code of Civil Procedure, the plaintiff was bound to restrict his pleadings to a concise statement of the, "material facts", on which he was relying for his claim. The Supreme Court in the case of [Sopan Sukhdeo Sable and Others Vs. Assistant Charity Commissioner and Others](#), has held in paragraph 20 thereof that, "the words, "material facts" show that the facts necessary to formulate a complete cause of action must be stated". In a suit for specific performance, such as the one at hand, the plaintiff is therefore only required to plead facts first with regard to the identity of the parties; then facts that led to the formation of the contract; then any facts that would go to demonstrate approbation of the terms of that contract; and finally all relevant facts demonstrating repudiation or refusal to

perform by the defendants, besides the facts necessary for determining jurisdiction and court fees. The aforesaid facts mentioned in paragraph 14 of the plaint certainly have nothing to do with either the identity of the parties, jurisdiction or court fee, or even formation of the contract or the approbation thereof by the defendant. Their insertion in the plaint could, therefore, have been warranted only if the plaintiff himself considered these facts as constituting repudiation or refusal to perform. After all, the appellant/plaintiff has pleaded that there was a binding agreement executed between the attorney of Shri K.M. Sharma and himself, which clearly obliged Shri K.M. Sharma to duly perform, and further that under the same agreement, the attorney had allegedly put him in possession of the suit property. Obviously, till this stage, the plaintiff was clearly of the mind that the owner, Shri K.M. Sharma was bound and indeed intended, to honour all the terms of the said agreement; and any refusal or denial of a right of access to the premises, to which the plaintiff felt he was entitled in terms of an agreement which was also binding on the said Shri K.M. Sharma, could only have meant one thing to the appellant, which was that Shri K.M. Sharma does not now intend to perform his obligations under that agreement, and that he is repudiating the same.

15. Significantly, in paragraph 30 of the plaint which deals with the cause of action, the plaintiff has clearly mentioned three factors when, according to him, the cause of action arose in his favour. He first says that the cause of action arose in his favour after 28.11.1991 when a receiver was appointed for the flat in question at the behest of Shri K.M. Sharma. Secondly, that it arose thereafter on 1.12.1991, when the receiver locked the flat in question. It is, however, the manner in which the third factor, setting out further particulars with regard to accrual of the cause of action in favour of the plaintiff, that is the most significant for our purpose. There, the plaintiff has stated as follows; ".... The cause of action further arose when the said Shri K.M. Sharma raised disputes with regard to his obligations for performance of the contract towards plaintiff....". In this context, the plaintiff/appellant has not mentioned any date. Clearly, the use of the expression, "further arose" at this juncture is not without purpose. It is delightfully vague and is obviously a ruse to extract the maximum benefit whilst keeping the actual particulars undetermined. Even so, its intent, and the acts to which it pertains is not difficult to ascertain. Firstly, it is quite clear that this third factor mentioned by him, as giving rise to the cause of action, is an addition to the first two factors already mentioned in the same paragraph. Secondly, Shri K.M. Sharma's actions; insofar as they were directly infringing upon the rights of the plaintiff; have been mentioned at only three places in the plaint. One was with regard to the appointment of receiver at his instance on 28.11.1991. The second was obviously the attachment of the property by that receiver on 1.12.1991; and the third is the incident of 14.07.1989 mentioned in paragraph 14 of the plaint. From this, one can deduce that although no date is given against the aforesaid third factor giving rise to the cause of action mentioned later on in paragraph 30 of the plaint, the circumstances as narrated in the plaint, if read

purposely and in a holistic manner, can only lead to the conclusion that the relevant date for the accrual of the third factor which, according to the plaintiff himself, also gave rise to the cause of action, was none other than 14.07.1989, which the plaintiff has tried to suppress by some clever drafting.

16. As to the plaint being cleverly drafted with a view to get over the bar of limitation, the Supreme Court has made it clear in [N.V. Srinivasa Murthy and Others Vs. Mariyamma \(dead\) by Proposed LRs. and Others](#), that a party should be discouraged from prosecuting and prolonging litigations in matters which are hopelessly barred by limitation. In the instant case also, in the light of the above analysis, it is obvious that the suit has been cleverly drafted by emitting the dated 14.7.1989 in the cause of action paragraph while only making a passing reference to the incident of 14.07.1989 elsewhere without any further particulars; and also avoiding any mention of the criminal complaint dated 6.2.1990; with a view to claiming that the cause of action, in fact, arose much later on 28.11.1991 thereby bringing the suit within limitation. I do not think such a practice should be encouraged.

17. For all these reasons, therefore, I do not agree with the contention of learned counsel for the appellant that the mention of the incident of 14.07.1989, as well as of the act of filing of an FIR in that regard, as mentioned in paragraph 14 of the plaint, cannot be read to be a repudiation of his obligations to perform the contract on the part of the owner, Shri K.M. Sharma. There can be no doubt that in substance, the suit itself postulates that performance was refused by Shri K.M. Sharma on or about 14.07.1989 and therefore, the suit was clearly barred by limitation. Under the circumstances, there was no need for the trial court to await a decision with regard to the bar of limitation after formal proof of the plaintiff's own complaint dated 6.2.1990 where, of course, he had clearly demonstrated his knowledge of Shri K.M. Sharma's refusal to perform, which document was not denied by the appellant/plaintiff even in his reply to the application under Order VII Rule 11 CPC. The appeal is therefore dismissed. All interim orders stand vacated and all pending applications are also disposed off accordingly.