

Shri Virender Aran Vs. Shri Devinder Singh

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Court : Delhi

Decided On : Dec-10-2013

Judge : Najmi Waziri

Appellant : Shri Virender Aran

Respondent : Shri Devinder Singh

Advocate for Def. : Mr. Vijay K.Gupta, Mr. Mehul Gupta

Advocate for Pet/Ap. : Mr. Sunil Fernandez, Mr. Deepak Pathak, Mr. Virender

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on:

28. 11.2013 Decided on:

10. 12.2013 + RFA(OS) 113/2013, CM APPL.13749/2013 SHRI VIRENDER ARAN Appellant Through: Mr. Sunil Fernandez with Mr. Deepak Pathak & Mr. Virender, Advs. versus SHRI DEVINDER SINGH Respondent Through: Mr. Vijay K.Gupta with Mr. Mehul Gupta, Advs. CORAM: HON'BLE MR. JUSTICE S. RAVINDRA BHAT HON'BLE MR. JUSTICE NAJMI WAZIRI % 1. MR. JUSTICE NAJMI WAZIRI The question which arises in the present appeal is whether for rescission of a contract the mere communication to rescind would be sufficient or would the said communication need to be accompanied with the liquidated amount/damages mentioned in the contract where no time has been specified for

such payment. The facts of the case are that the appellant (seller) agreed to sell a flat bearing No.C-8/54A, Keshav Puram, Delhi-35 to the respondent (purchaser) for a sale consideration of Rs.29,50,000/-, through an agreement dated 4th March, 2011. The entire monies were to be paid on or before 5th June, 2011. Earnest money/bayana of Rs.3,00,000/- was received in cash by the appellant/seller at the time of the agreement. Both parties had the freedom to rescind the contract. However if the purchaser/respondent was to walk away from it, he would have to forfeit the earnest money paid, whereas if the seller was to rescind the contract he would be required to pay twice the amount of earnest money received by him. By a letter dated 24 th May, 2011, the seller conveyed to the purchaser that he would not like to sell his property and offered to repay the earnest money. In reply, the purchaser through his lawyers notice of 31st May, 2011 stated that he was ready and willing to honour his part of agreement, however should the seller persist with his stand to rescind or not honour the agreement, he would be liable to pay the seller double the amount of bayana, i.e. (Rs.3,00,000/- x

2) Rs.6,00,000/-. The said legal notice called upon the seller/appellant:

...to withdraw your letter dated 24.5.2011 and further to get the documentation done to transfer the property bearing No.C-8/54-A, 1st floor, Lawrence Road, Keshav Pura, Delhi110035 in favour of my client or you are liable to pay double the amount of Bayana of Rs.3,00,000/- which comes to Rs.6,00,000/- to my client as per Bayana Agreement dated 4.3.2011 on or before 5.6.2011 failing which my client reserve his rights to initiate legal proceedings under the provisions of law, against you with the competent courts of law, entirely at your costs and consequences, which please note. The purchaser/respondent eventually filed a suit for specific performance which was decreed by the learned Single Judge vide his order dated 29 th July, 2013; the said order is impugned in this appeal.

2. Counsel for the seller/appellant contends that for rescission of the agreement all that the seller was required to do was to intimate the purchaser/respondent that he was not willing to proceed with the agreement to sell and that the earnest money would be repaid. He relies on Clause 5 of the said agreement which reads as under:

5. That if the first party refuses to sell the said property within stipulated period as mentioned above then the first party shall be liable to pay the earnest money as double to the second party, in case if the second party refuses to purchase the said property within same time then her/his earnest money shall be forfeited by the first party and after it the first party shall have full right to resell the said property to any person at any rate.

He had also sought to demonstrate the sellers readiness and willingness to repay the amount by having a demand draft for Rs.3,00,000/- i.e. earnest money amount received, prepared in the name of the purchaser on 3rd June, 2011 i.e. before the expiry of the time by when the purchaser/respondent was enjoined to pay the entire sale consideration. However, the said draft could not be delivered to the respondent due to confusion with respect to delivery of the same to and through his lawyer. He stated that the reason for cancellation of the agreement to sell and his inability to transfer the flat to the purchaser was a personal one i.e. (i) the emotional attachment of his mother - who was ailing from cancer - with the flat, (ii) she did not want their only home to be sold out, and (iii) in deference to her wishes and in such a delicate phase in her life, he decided to resile from the contract. He further submitted that the reason for cancellation/resiling is not relevant in law when all that was required to for the seller walk away from the contract was to intimate the purchaser/respondent of his decision as per Clause 5.

3. Learned counsel further contended that the way the agreement was structured casts an obligation only upon the purchaser to pay the entire consideration amount within the stipulated period i.e. on or before 5th June, 2011. However, no such time limit was fastened upon the seller in case he was to resile from the agreement. In any case, the seller had offered, within one week of the agreement i.e. on 10th March, 2011 and yet again on 24th May, 2011, to refund to the purchaser the earnest money, but allegedly the purchaser refused to accept the monies. His bona fides was further established by the fact that the demand draft of Rs.3,00,000/-, equivalent to the earnest money received had already been prepared in favour of the purchaser by HDFC bank on 3rd June, 2011, however it could not be delivered through his lawyer to the purchaser due to some confusion. Therefore, contended counsel the learned Single Judge had erred in holding that

the defendant could not lawfully cancel the agreement to sell any further proceedings in decreeing the suit for specific performance of the agreement to sell.

4. Learned counsel for the respondent contends that there was no error in the impugned judgment and the seller could not have resiled from the contract as the intention of the seller was doubtful. The reasons such as the sellers mother having an emotional attachment with the property is a ploy to evoke sympathy; the allegation that the purchaser was a property dealer is an irrelevant issue. Both ought to be rejected. He contended that the purchaser was always ready and willing to perform his part of the agreement. According to him, the sellers greed to procure a higher sale price for the property from another purchaser had gotten the better of him. He contends that the respondent/purchaser had got a bank draft of Rs.6,50,000/- prepared in the name of the seller (and monies for the said drafts were arranged by one Sh. Rajneesh Sharma from his joint account). That on 5th June, 2011, which was a Sunday, the purchaser requested the appellant/seller to accept the said amount towards balance consideration in the office of the Sub-Registrar on the very next day. The purchaser claims to have gone on 6th June, 2011 and marked his presence there and to have informed the appellant/seller of his presence in the office of Sub-Registrar on 6th June, 2011. In his evidence (through affidavit), the purchaser/respondent states that:

I say that I have always been ready and willing till the filing of the suit to perform my part of the contract/agreement (Ext.PW1/1). In furtherance of such intention, I got 7 bank drafts for a total value of Rs.26,50,000/- i.e. the total balance sale consideration, prepared from various banks payable to defendant on 4th June 2011 from Karur Vysya Bank Ltd. and from State Bank of India and HDFC Bank, on 6th June 2011. Copies of said bank drafts are Mark A to Mark G. The amount of said bank drafts was arranged by Mr. Rajneesh Sharma s/o. Shri Shiv Shakti Dutt Sharma R/o. Flat No.C-8/52A, Lawrence Road, Keshav Puram, Delhi-110035. In these circumstances, the entire balance sale consideration was ready in terms of Ext.PW1/1 as on 6th June 2011 for completing the sale transaction.

5. The appellant had relied upon the principles in *Manzoor Ahmed Magray vs. Ghulam Hassan Aram & Ors.*, AIR 2000 SC191 to contend that simply because an agreement provides for liquidated damages it cannot operate as a bar for the grant of specific performance.

6. The learned Single Judge considered the arguments of the parties including the precedent of the sellers/appellants counsel i.e. *Man Kaur. vs. Hartar Singh Sangha*, (2010) 10 SCC512. He then concluded that the provision of damages would not preclude the decree for specific performance. He further reasoned that the contention of hardship being caused to a party if the contract was to be enforced would also not be available for the purpose of resiling from a contract and a decree for specific performance would be granted in such circumstances. He relied upon *Yohannan and Anr. vs. Harikrishnan Nair and Ors.*, AIR1992 Ker 49 and *Baijnath vs. Kshetrahari Sarkar & Ors.*, AIR1955 Cal 210. Finally, the learned Single Judge, conscious of the principle contained in the judgment of the Supreme Court in *Rajeshwari vs. Puran Indoria*, (2005) 7 SCC60 held as under:-

5. Normally, a suit for specific performance of an agreement for sale of immovable property involves the question whether the plaintiff was ready and willing to perform his part of the contract in terms of Section 16 of the Specific Relief Act, whether it was a case for exercise of discretion by the court to decree specific performance in terms of Section 20 of the Specific Relief Act and whether there were laches on the part of the plaintiff in approaching the court to enforce specific performance of the contract. In some cases, a question of limitation may also arise in the context of Article 54 of the Limitation Act on the terms of the agreement for sale. Other questions like the genuineness of the agreement, abandoning of the right to specific performance, a novation and so on, may also arise in some cases. No doubt, a finding on the three primary aspect indicated earlier would depend upon the appreciation of the pleadings and the evidence in the case in the light of the surrounding circumstances.....

7. The learned Single Judge held that the contention of hardship being caused to the appellant/defendant/seller was untenable in view of the fact that the purchaser/respondent was ready and willing to perform his part of the contract and

mere provision for refund of the earnest money could not preclude the grant of decree of specific performance. This Court has considered the contentions of the parties. The stipulation in Clause 5 of the agreement is clear. The option to resile from the agreement was not premised upon or qualified by any condition; it was a clear and unhindered prerogative available to the seller. He exercised the option and conveyed his decision within the period of the agreement i.e., 5th June, 2011. This Court cannot also lose sight of the fact that the demand draft got prepared towards refund of the earnest money on 3rd June, 2011; keeping in view that the refund of the earnest money was not specified to be made on a fixed date or within a particular period, it would nonetheless be expected of the seller to repay the same within a reasonable period and in default pay interest on double the amount of the earnest money. The purchaser had issued a legal notice wherein he had accepted that the invocation of the Clause 5 for rescinding the contract would make the seller liable to pay Rs. 6,00,000/- on or before 5th June, 2011 failing which the purchaser could take recourse to law. In other words, the purchaser was willing to accept the damages amounting to double the earnest money paid i.e. Rs.6,00,000/- and in the event of same having not been paid, it would logically be inferred that the interest would be payable thereon. During the course of hearing on 28th November, 2013 counsel for the appellant offered to pay a sum of Rs.6,00,000/- along with 18% interest effective from 24.5.2011 and any other incidental amount and expenses of costs as may be appropriate.

8. This Court is of the opinion that for rescinding the contract, only invocation of Clause 5 and due communication of the same was required; which was duly done, hence the agreement stood rescinded on 24.05.2011. Consequently, twice the amount of the earnest money i.e. Rs.6,00,000/- was payable to the purchaser. The seller had got the demand draft of Rs.3,00,000/ prepared on 3rd June, 2011. Although the time frame for refund was not mentioned in the agreement, he has nevertheless shown his readiness and willingness to repay the money. The offer to repay Rs.6,00,000/- along with 18% interest thereon is, in the opinion of this Court, fair and adequate. In view of the preceding discussion, the impugned order is set aside, the appellant is directed to pay Rs.6,00,000/- with interest thereon at the rate of 18% per annum from 24.5.2011 and costs of Rs.1,00,000/- to the respondent within 4 weeks from today.

9. The appeal and the application for stay are disposed off in the above terms.
NAJMI WAZIRI (JUDGE) S. RAVINDRA BHAT (JUDGE) DECEMBER 10 2013 ak

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