

Bimla Devi vs.nissar Ahmed

Bimla Devi vs.nissar Ahmed

SooperKanoon Citation : sooperkanoon.com/1202977

Court : Delhi

Decided On : Jan-24-2017

Appellant : Bimla Devi

Respondent : Nissar Ahmed

Advocate for Pet/Ap. : Mr. R.N. Dubey

Judgement :

\$~1 * IN THE HIGH COURT OF DELHI AT NEW DELHI % + Date of Decision:

24. h January, 2017 FAO1712013 & CM250182015 BIMLA DEVI Appellants
Through: Mr. R.N. Dubey, Advocate versus NISSAR AHMED Respondent
Through: Mr.G.M. Farooqui, Adv. CORAM: HON'BLE MR. JUSTICE J.R. MIDHA
JUDGMENT (ORAL) 1. The appellant has challenged the order dated 1st March, 2013 whereby her application under Order IX Rule 13 of the Code of Civil Procedure for setting aside of the ex parte decree has been dismissed by the learned Trial Court.

2. The respondent instituted a suit for recovery of Rs.8 lakh against the appellant on the ground that the appellant agreed to sell property bearing No.B-92, measuring 55 square yards, Gali No.6, Brahampuri, Delhi-110053 to the respondent for total consideration of Rs.9,80,000/- vide agreement to sell dated 12th February, 2007; the respondent paid Rs.4 lakh to the appellant as earnest money at the time of the agreement and the balance sale consideration was

agreed to be paid on or before 30th July, 2007 at the time of the execution of the sale deed; the respondent requested the appellant to visit the office of the Sub-Registrar on 30th July, 2007 and waited there upto 4.00 pm with the balance sale consideration but the appellant did not turn up; the respondent issued a legal notice dated 31st July, 2007; the FAO1712013 Page 1 of 8 respondent made criminal complaints dated 14th September, 2007, 30th August, 2007, 13th September, 2007 and 9th September, 2009 against the appellant to the police, the respondent issued a legal notice dated 21st January, 2010 and thereafter, instituted the suit for recovery.

3. The respondent filed his affidavit by way of evidence dated 7th December, 2010 which was taken on record by the Trial Court on 9th December, 2010. The Trial Court record reveals that the respondent did not file any original document before the Trial Court. The photocopies of the documents were exhibited by the Trial Court as Ex.PW-

to Ex.PW-1/14 on 09th March, 2011 although the order dated 9th March, 2011 does not mention that about any document having being tendered in evidence or exhibited by the learned Trial Court.

4. The learned counsel for the appellant submits that no original document was produced, filed or tendered by the respondent before the learned Trial Court. The Trial Court exhibited the photocopies without the original being produced or perused by the learned Trial Court. The respondent claimed to have sent the legal notice dated 31st July, 2007 by Regd. AD Post as well as UPC and claimed to have duly served on the appellant (para 5 of the evidence by way of affidavit). However, neither the Regd. AD receipt nor the AD card was produced by the respondent. No evidence was led by the respondent to prove the availability of Rs.5,80,000/- with the respondent on 31st July, 2007 as claimed in the affidavit by way of evidence.

5. The law with respect to the breach of agreement to sell is well settled. Reference be made to the judgment of this Court in Ved Prakash Kharbanda v. Vimal Bindal, 198 (2013) DLT555 The relevant portion of the judgment is reproduced hereunder: FAO1712013 Page 2 of 8 19. Section 16(c) of the Specific

Relief Act, 1963 19.1 In a suit for specific performance, the plaintiff has to prove a valid sale agreement; the breach of the contract by the defendant; and readiness and willingness of the plaintiff to perform his part of the contract. 19.2 the Specific Relief Act mandates readiness and willingness on the part of the plaintiff as a condition precedent to seek specific performance. Section 16 (c) is reproduced hereunder:-

"Section 16. Personal bars to relief.- Specific performance of a contract cannot be enforced in favour of a person- Section 16(c) of xxx xxx xxx (c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant. Explanation.- For the purposes of clause (c),- (i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court; (ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction. The readiness and willingness are two 19.3 separate the availability of requisite funds whereas the latter depends on the intention of the purchaser. The readiness has to be proved by the 19.4 purchaser by the availability of the funds whereas the intention has to be inferred from the various circumstances on record. 19.5 If there is no availability of funds with the purchaser, he can be non-suited on the ground of non- readiness alone. 19.6 If the plaintiff is able to prove the availability leading evidence relating to issues. The former depends on FAO1712013 Page 3 of 8 of the balance sale consideration with him at the time fixed for performance in the agreement, it is an indication of his readiness but his willingness/intention to perform cannot be inferred from readiness alone. 19.7 When the parties enter into an agreement relating to an immovable property, they amicably agree on the sale consideration, earnest money as well as the payment of the balance sale consideration. If both the parties are ready and willing, they usually complete the transaction within the stipulated time in the following manner:-

"19.7.1 The purchaser makes arrangement for the balance sale consideration within the stipulated time. 19.7.2 The purchaser informs the seller about the

arrangement having been made. 19.7.3 The purchaser drafts the sale deed and sends the draft sale deed to the seller for approval. 19.7.4 The seller approves the draft sale deed and returns it back to the purchaser. 19.7.5 The purchaser purchases the requisite stamp duty for the sale deed. 19.7.6 The purchaser prepares the sale deed on the requisite stamp papers. 19.7.7 Both the parties fix the date, time and place for payment of balance sale consideration, execution of sale deed, registration of the sale deed and handing over of the possession. 19.7.8 The parties complete the sale transaction on the agreed date, time and place. 19.7.9 In normal parlance, both the parties remain in touch either personally or through the property dealer. 19.8 The problem arises when one of the two parties turn dishonest. However, the party in breach purports to be ready and willing and creates evidence to that effect. At times, both the parties visit the office of Sub- Registrar on the last day of performance for obtaining a receipt of having attended the office of the Sub- Registrar to later on contend that they were ready and willing to perform and were waiting for other party. If the seller is in breach, he creates false evidence of readiness to avoid specific performance by

FAO1712013 Page 4 of 8 It is the duty of the Court to find out which purchaser and to illegally forfeit the earnest money. On the other hand, if the purchaser is in breach, he creates false evidence of readiness and willingness to file a case of specific performance. 19.9 party has not performed and is trying to wriggle out. 19.10 The Court has to take into consideration the human probabilities, ordinary course of human conduct and common sense to draw necessary inference. Drawing presumptions is the backbone of the judicial process. 19.11 The silence or absence of correspondence by any party may be indicative of his dishonest intention. The dishonest intention of the seller can be inferred where the purchaser repeatedly contacts the seller for providing copies of the title documents or approval of the draft sale deed or fixing time for payment of balance sale consideration or execution/ registration of the sale deed but the seller does not respond or avoids contact. On the other hand, the dishonest intention of the purchaser can be inferred where the purchaser does not contact the seller for approval of the sale deed and fixing date, time and place for payment of balance sale consideration and execution/registration of the sale deed and unilaterally visits the office of the Sub- Registrar to prepare a false ground that he was ready

and willing to complete the sale. By the time the suit is finally decreed, the purchaser would get the property at the price fixed in the agreement although the prices would have increased manifold. The Court has to minutely examine the conduct of the parties in order to ascertain the truth. The purchaser would not be entitled to a decree merely because he had the sale consideration with him and had visited the office of the Sub-Registrar before the time fixed in the agreement.

19.12 Upon refusal of the seller to complete the sale in terms of the agreement, the purchaser is expected to issue a notice to place on record the refusal on the part of the seller to furnish copies of the documents or giving a response to the draft sale deed or fixing the schedule for execution and registration of sale deed. The purchaser can also notify the date and time for visiting the office of the Sub-Registrar along with the proof of the balance sale consideration to the seller. The purchaser is also expected to immediately file a suit for specific performance. Any delay in this regard may indicate his intention that he was not ready and willing and the Court may refuse to grant specific performance.

19.13 In a rising market, the purchaser makes a profit by the delay. He may tie down a seller by creating false excuses and use the money for buying some other property. If the purchaser is in a property trade, he may tie down several properties and then decide on which one he can make more profit on. These factors have to be taken into consideration by the Court readiness and willingness.

19.14 Once a seller has entered into an agreement to sell an immovable property, he is looking for the sale consideration within the period stipulated in the agreement. If he does not get the money within the stipulated period, his plan to use the money for whatever purpose he has intended would get frustrated. He may have a plan to buy some other property or for some other purpose. Secondly, the delay in completion of sale also causes injustice to the seller as the property prices keep on increasing in normal parlance. As such more the delay, the seller may suffer loss due to rise in property price and greater is the profit which the purchaser would derive by tying down a property and not paying the sale consideration within the stipulated period.

19.15 The relevant judgments relating to Section 16(c) of the Specific Relief Act, 1963 are as under:-

"19.15.1 In *J.P. Builders v. A. Ramadas Rao*, (2011) 1 SCC429 the Supreme Court explained the distinction between readiness and willingness. The former

refers to financial capacity and the latter to the conduct of the plaintiff wanting performance. 19.15.2 In N.P. Thirugnanam v. Dr. R. Jagan Mohan Rao, (1995) 5 SCC115 the Supreme Court held that the Court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the FAO1712013 Page 6 of 8 suit along with other attending circumstances to adjudge the readiness and willingness of the plaintiff. The amount of balance sale consideration must be proved to be available with the purchaser right from the date of execution till the date of decree. The Court upheld the dismissal of the suit for specific performance on various grounds inter alia that the plaintiff was dabbling in real estate business without means to purchase the suit property and the very contract was speculative in nature. 19.15.3 In R.C. Chandiok v. Chuni Lal Sabharwal, (1970) 3 SCC140 the Supreme Court held that readiness and willingness cannot be treated as a straitjacket formula. It has to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the party concerned. This Court is of the view that the learned Trial Court has passed 6. the impugned judgment and decree without applying the well settled principles of law to the present case.

7. The impugned judgment and decree passed by the learned Trial Court does not satisfy the judicial conscience of this Court. This Court is of the view that the learned Trial Court ought to have allowed the appellants application under Order IX Rule 13 of the Code of Civil Procedure by setting aside the ex parte decree.

8. The appeal is allowed, and the impugned order dated 1st March, 2013 is set aside. The appellants application for setting aside of the ex parte decree dated 15th December, 2011 is allowed. Consequently, the ex parte judgment and decree dated 15th December, 2011 is set aside.

9. The parties shall appear before the learned Trial Court on 28th March, 2017 when learned Trial Court shall fix the case for recording of the respondents evidence. The parties are permitted to file the original documents before the learned Trial Court. FAO1712013 Page 7 of 8 10. The Trial Court shall expedite the hearing of the suit and endeavour to decide the same within a period of eight months from today.

11. The appellant has deposited a sum of Rs.6 lakh with the Registrar General of this Court in terms of the order dated 1st November, 2013 and the said amount is lying in fixed deposit. The Registrar General shall retain the said amount in fixed deposit till the decision of the suit by the Trial Court and thereafter, the Registrar General shall disburse the amount in terms of the judgment of the Trial Court.

12. At this stage, learned counsel for the parties express their willingness to make an endeavour to resolve the matter through mediation.

13. List before Delhi High Court Mediation and Conciliation Centre on 1st February, 2017 at 4.00 pm. The Delhi High Court Mediation and Conciliation Centre shall send the report of mediation directly to the Trial Court.

14. The Trial Court record be sent back forthwith along with the copy of this judgment.

15. Copy of this judgment be given dasti to counsels for the parties under signatures of the Court Master. JANUARY24 2017 dk J.R. MIDHA, J.

FAO1712013 Page 8 of 8

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com