

Rajesh Kumar Vs. Manoj Jain

Rajesh Kumar Vs. Manoj Jain

SooperKanoon Citation : sooperkanoon.com/704666

Court : Delhi

Decided On : Jun-02-1998

Reported in : 1998(47)DRJ353

Judge : J.B. Goel, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 151 - Order 39, Rules 1 and 2

Appeal No. : IA Nos. 7076/96 and 4916/97 in S. No. 1847/96

Appellant : Rajesh Kumar

Respondent : Manoj Jain

Advocate for Def. : P. Nandrajog and ; Sanjay Poddar, Advs.

Advocate for Pet/Ap. : V.K. Shalli and; B.L. Anand, Advs

Disposition : Application allowed

Judgement :

J.B. Goel, J.

1. By this order I shall dispose of is No. 7076/96 under Order 39 Rules 1 and 2 and is No. 4916/97 under Section 151 CPC filed by the plaintiff. The first application is for ad interim injunction and the second for release of his two FDR's

deposited by the plaintiff in pursuance of the interim order.

2. The plaintiff has filed this suit for specific performance of an agreement to sell dated 3.3.1996 which defendant had entered into with him for sale of his house No. 107, Block-A, Lok Vihar, Pitampura, Delhi for a sum of Rs. 37,89,000/-, a sum of Rs. one lakh was paid on that day; the balance amount was payable by 3.6.96 at the time of execution and registration of relevant documents of sale by the defendant. Another cheque of Rs. 3 lakhs was also sent on 7.3.96 but defendant did not encash it; the plaintiff had called upon the defendant by legal notice dated 24.4.96 to complete the sale, after obtaining requisite clearance from income-tax authorities. No reply to it was sent; but vide letter dated 3.6.1996 the defendant informed him that he had committed breach and the amount of earnest money was forfeited. The plaintiff has alleged that he has always been ready and willing to perform his part of the contract but the defendant failed to execute the sale deed and vide his letter dated 3.6.96 wrongfully cancelled the agreement on false grounds. Hence this suit, for specific performance. Along with the suit is No. 7076/96 under Order 39 Rules 1 and 2 was filed on which an ex parte interim order dated August 6, 1996 was passed restraining the defendant from selling, alienating or creating third party interest in the said property and that injunction has been extended. This court also simultaneously directed the plaintiff to deposit the balance sale consideration of Rs. 36,89,000/- within two weeks in FOR account and to deposit the FDR in the Registry. That was done by the plaintiff. The defendant has filed written statement disputing the claim of the plaintiff for specific performance. It is alleged that the plaintiff committed breach of the contract and failed to pay the balance amount as agreed within the agreed period, the time was of essence of the sale, and the defendant has forfeited the earnest money of Rs. 1.00 lakh.

3. The plaintiff has also later on filed an application being I.A. 4916/97 claiming release of his amount of Rs. 36,89,000/- lying in two FDR's. This application is also being opposed by the defendant.

I have heard learned counsel for the parties.

4. Learned counsel for the plaintiff has contended that it is admitted that the defendant has entered into agreement to sell the suit property for Rs. 37,89,000/-, and that earnest money of Rs. 1.00 lakh was paid to him at the time of executing the agreement to sell. To show his bona fides, another sum of Rs. 3.00 lakhs was sent by him by means of a cheque by registered post on 6.3.1996 and asked defendant to complete the sale. But the defendant neither encased it nor sent any reply, and failed to complete the sale in spite of another letter dated 24.4.1996; sent to him, and has wrongfully repudiated the agreement while the plaintiff has been ready and willing to complete his part of the agreement; the defendant has thereby committed the breach of the agreement and in the facts and circumstances it is just and proper that the property is preserved by appropriate order and also it is causing great injury and loss to him by depriving him of his money, plaintiff is not required at this stage to pay the sale consideration when the defendant has refused to complete the sale. He could be called upon to deposit the balance amount when the decree for specific performance is passed. He has prima facie shown his willingness and readiness and that he had means to complete the sale. In the circumstances, the amount may be released to him.

5. Whereas learned counsel for the defendant has contended that the plaintiff has come to the court for specific performance and according to him the balance amount is payable by him. There is no reason that he should be allowed to withdraw the same. Moreover, if the defendant is to be put to the condition of restraining him from transferring the property, the plaintiff should also be put to corresponding condition. It is also contended that the plaintiff has committed the breach of the agreement to sell by not completing the sale within the stipulated period, time was of essence and as such he is not entitled to the decree of specific performance and the earnest money paid has been lawfully forfeited. No injunction could be granted in the facts and circumstances. He has relied on some case law.

6. Thus the defendant has disputed the claim for specific performance alleging that the plaintiff has committed breach of the agreement and the earnest money has been forfeited. The receipt-cum-agreement to sell placed on record which is not disputed shows that the parties have entered into agreement to sell the property for Rs. 37,89,000/- and toward this Rs. 1.00 lakh was paid. Besides this, the

plaintiff had also sent a cheque of Rs. 3.00 lakhs by registered post. There is no Explanationn of the defendant as to why this cheque was not encased or no reply to plaintiffs letter dated 7.3.1996 was sent. The plaintiff further in his letter dated 24.4.1996 reminded the defendant of his obligation and to complete the sale. No reply to it was also sent. On the other hand, all of a sudden, defendant sent a letter dated 3.6.1996 complaining of default on the part of the plaintiff, repudiating the agreement and forfeiting the earnest money. Thus there is a dispute as to who has committed the breach. The question who has committed the breach and whether the plaintiff will be entitled to the decree for specific performance would be determined after trial.

7. The learned counsel for the defendant has contended that it was agreed between the parties that in case of breach on the part of the plaintiff, the earnest money will be forfeited whereas the seller is liable to pay an amount double the earnest money in case of breach on his part. As such the relief of specific performance would not be granted. The suit for specific performance is thus not maintainable and no injunction could also be granted. This contention prima facie has no force because there is no specific term in the agreement between the parties that in case of default by the defendant-seller, the plaintiff will not be entitled to seek specific performance. The Supreme Court in *M.L. Devender Singh and Ors. v. Syed Khaja* : [1974]1SCR312 has held that in view of Section 20 of the old Act (corresponding to Section 23 of the Act of 1963), mere specification of a sum of money to be paid in case of the breach of the agreement by the seller does not take away the right of the vendee and the jurisdiction of the court to grant specific performance of the agreement notwithstanding such clause in the agreement. The question will be whether such a stipulation is by way of substitution for the performance of the agreement for specific performance and whether the Court ought to grant or not specific performance could be determined after trial. At this stage thus, it cannot be said that because of this condition alone the plaintiff would not be entitled to specific performance. Such a plea had also been taken and was not accepted at this stage in *Radhe Krishan Aggarwal v. Smt. Chandrawati and Ors.* : 60(1995)DLT59 .

8. In Radhe Krishan Aggarwal (supra), interim injunction was refused because it was found that defendant No. 2 who was the husband of defendant No. 1 had entered into agreement to sell on her behalf without any power of attorney on her behalf to do so. Defendant No. 1 denied that she had agreed to or entered into any such agreement. Interim injunction from transferring etc. her property in question was refused, obviously as prima facie case was not made out.

9. In Vinod Saluja and Anr. v. Smt. Sita Rani : 61(1996)DLT790 , the plaintiffs filed a suit for specific performance alleging that defendant on 15th September 1994 had entered into an agreement to sell the terrace rights of her property No. N-1, Green Park Extension, New Delhi to the plaintiffs for a consideration of Rs. 48.00 lakhs and a sum of Rs. 21,000/- was alleged to have been given as advance. The son of the defendant expired within 20 days of execution of this agreement. In the suit for specific performance the defendant alleged that she had no male member to look after her; she was illiterate widow and her husband and her elder son had died earlier and her younger son fell into bad company and he has been pestering her for money all the time; pressurized her to enter into a collaboration agreement with the firm of the plaintiffs and it was under threat of her son that she had entered into an agreement and a sum of Rs. 21,000/- was paid to her by her son towards the said collaboration agreement and she was made to sign those papers on the clear understanding that the said papers were required for the collaboration agreement. In the meantime her said second son also died after about 15 days and the deed of collaboration could not be finalised. The court noticed that against the value of the property of about Rs. 48.00 lakhs only, a paltry sum of Rs. 21,000/- was received by the defendant; she denied the execution of agreement to sell and took the plea that her signatures had been obtained on blank paper which was used as an agreement to sell and the parties had not signed and made application for permission under Section 269UC of the Income Tax Act. The Court, in the circumstances, held that it would not be in the interest of justice to restrain the defendant from enjoying the property and interim injunction was declined. Obviously, on facts the Court did not find it a fit case to exercise its discretion in granting interim injunction.

10. In Aggarwal Hotels (P) Ltd. v. Focus Properties (P) Ltd. : 63(1996)DLT52 , the suit for specific performance of an agreement to sell, whereby the defendant No. 2 had agreed to transfer the defendant No. 1 company along with its assets in favor of the plaintiffs. Only asset of the company was land measuring 13 Bighas and 2 bids was in village Bijwasan and defendant Nos.2 and 3 were holding the total equity capital of the company. Defendant No. 2 alone had entered into agreement to sell for a consideration of Rs. 34.00 lakhs and a sum of Rs. 1.00 lakh had been paid by the plaintiff in cash to defendant No. 2 against receipt and it was agreed that a formal agreement as required under Section 269 of the Income Tax Act would be executed and submitted, it appears that the deal could not come through. Prima facie, the Court found that there was uncertainty about relevant considerations about agreement to sell on showing that the parties were still negotiating to arrive at certain terms but they could not enter into an agreement to sell. Even otherwise, the share or interest of the company could not be sold by defendant No. 2 alone without the consent of defendant No. 3 and defendants No. 1 and 3 were thus not bound by the agreement entered into by defendant No. 2. Interim injunction was declined in the circumstances, obviously as prima facie case was not found in favor of the plaintiff.

11. In K.L. Bhatia v. Gurmit Singh 1996 (37) DRJ 542, the facts were that the alleged agreement to sell was entered into by defendant No. 2 whereas the defendant No. 1 was the owner of the property and he had neither received any money nor signed the agreement to sell. The plea of the plaintiff was that defendant No. 1 being the son of defendant No. 2 was bound by the said agreement as defendant No. 2 was deemed to be the agent of defendant No. 1. This however was not corroborated from the other material inasmuch as the plaintiff had filed a criminal complaint of offence under Section 420 IPC alleging that the defendant No. 2 had misrepresented himself to be the owner of the property and on that representation made plaintiff to part with Rs. 20,000/-and the relevant document handed over to plaintiff were also sufficient to show that defendant No. 1 and not defendant No. 2 was the owner of the property. Some interpolations in the receipt also noticed. Prima facie, case against defendant No. 1, was not made out and the discretionary relief of interim injunction was declined.

Each case depends upon its peculiar facts.

12. Learned counsel for the defendant has relied on the following clause of the agreement in support of his contention (i) that the time is of the essence of the contract which has been breached; (ii) the parties have agreed the quantum of damages to be paid in case of breach of agreement by the seller and such suit for specific performance is not maintainable. He has relied on Trailakyanath Maity and Anr. v. Pravabati Santra and Ors. : AIR1974 Cal261 .

'..... the balance consideration shall be paid to me by the said purchaser or

his/their Nominee/s within 3.6.96 at the time of Registration/execution of all the relevant documents pertaining to the above said Plot in the name of the said purchaser or his/their Nominee's, in the office of Sub Registrar Delhi.

If the Purchaser fails to pay the balance money to comply with the bargain, the earnest money shall be forfeited in favor of the seller. And if the seller fails to get the papers executed in the name of the said purchases, or his/their Nominees then the seller shall be liable to pay the amount double the earnest money to the purchaser or his/their nominee's.'

13. In this agreement defendant had also agreed and represented as under :-

'Received a sum of Rs. 1,00,000 (one lac only) in cash on this day of 3.3.96 from Rajesh Kumar as an earnest money and in the part payment

of the sale of my house No. 107, Block No. A measuring about 200 Sq. Yds/mts, in the area situated at Lok Vihar known as Pitam Pura.

The said property with its vacant possession has been agreed to be sold to the said purchaser or his/their Nominees for the total consideration of Rs. 37,89,000/- (Thirty seven lacs eighty nine thousand only). I assure the purchaser that I am sole and absolute owner of the said property and have full right, to sell the same. I further assure that the said property is free from all encumbrances, sales, mortgages, decree or gift etc. and have full and unrestricted right to sell it.'

14. This document is written in and signed by Manoj Jain in English and in an accomplished handwriting. He had obviously signed it consciously and after understanding its contents and what he was conveying.

15. In Govind Prasad Chaturvedi v. Hari Dutt Shastri : [1977]2SCR877 after referring to the legal position as noticed in : [1967]1SCR227 and AIR 1915 PC 83, it has been observed as under :-

'It is settled law that the fixation of the period within which the contract has to be performed does not make the stipulation as to time the essence of the contract. When a contract relates to sale of immovable property it will normally be presumed that the time is not the essence of the contract. (Vide Gomalthinayagam Pillai v. Pallaniswami Nadar, : [1967]1SCR227) : : [1967]1SCR227 The intention to treat time as the essence of the contract may be evidenced by circumstances which are sufficiently strong to displace the normal presumption that in a contract of sale of land stipulation as to time is not the essence of the contract.'

16. Again in Smt. Indira Kaur v. Shri Sheo Lal Kapoor, : AIR 1988 SC1074 , also it was held that 'the law is well-settled that in transactions of sale of immovable property, time is not of the essence of the contract.'

17. The same legal position has also been noticed and reiterated by the Constitution Bench in Smt. Chand Rani (dead) by Lrs. v. Smt. Kamal Rani (dead) by Lrs. : AIR 1993 SC1742 .

And in Gomathinayagam Pillai v. Pallaniswami Nadar : [1967]1SCR227 it was laid down that mere incorporation in the written agreement of a clause imposing penalty in case of default does not by itself evidence an intention to make time of the essence.

18. Besides payment of Rs. one lac at the time the agreement to sell was entered into, the plaintiff had also sent a cheque of Rs. 3 lakhs by registered post as per letter dated 7.3.96 though there was no such term in the agreement. This cheque was not encased by defendant, for which no reasons are disclosed. The plaintiff pursued the matter and sent another letter dated 24.4.96 by Registered post to

defendant asking him for not encashing the cheque and requiring him to obtain Income-Tax clearance certificate' and execute the sale deed. He also notified that on his failure he will file suit for specific performance. A postal acknowledgement signed by 'Sunita Jain' is placed on record. A notice sent by registered post carries presumption of its service on the addressee as correctness of the address given in the notice is not disputed. No reply was sent to this notice and the silence on the part of the defendant remains unexplained.

19. The defendant for the first time wrote letter dated 3.6.96 to the plaintiff informing the plaintiff as under :-

'1. That my client Shri Manoj Jain son of Late Shri D.R. Jain is the registered General Attorney of Shri Dev Datta son of Late Shri A.N. Datta in respect of built up property No. A-107, situated in the layout plan of C.P.W.D., Government Servants Cooperative House Building Society Ltd., Delhi, now known as Lok Vihar, Pitam Pura, Delhi-110 034.

3. That the sale documents was to be executed on or before 03.06.1996, but today i.e. 03.06.1996, Monday, till 01.00 P.M., you did not turn up/come on so far up to the time of normal course of business and office hours of the Sub-Registrar, Sub-District No. VI, RU - Block, Pitam Pura, Delhi-110 034, which is a place which was fixed by you to pay the balance amount and get the sale documents registered in respect of the said property in your own favour.

4. That in future you shall remain liable and responsible for the result arising out of his failure in respect of the said property and against the said transactions.

5. That the said Agreement mentioned above stands cancelled and the amount stands forfeited.

6. That your entire earnest money of Rs. 1,00,000/- (Rs. One Lac Only) stands forfeited with immediate effect and no further communication shall be entertained in future in this connection.'

The statement made in this notice is obviously against representation made by him in the agreement to sell wherein in no uncertain terms he had represented

himself to be absolute owner of the property. Now, he claims himself only to be the registered general attorney of Shri Dev Dutta. It makes no sense and does not indicate how Shri Dev Dutta is concerned. It is also not the case that the relevant documents of title of the property had been supplied to the plaintiff at any time. It is even not disclosed in clear terms that he is not the owner of the property or who is the owner of the property?

Now, for the first time in the written statement it is stated that the property in question was purchased by his brother Shri Bharat Bhushan Jain from Shri Dev Dutt on 5.1.96 and an agreement to sell was entered into and to complete the sale a power of attorney was executed by Dev Dutta in favor of defendant. He further states 'the power of attorney given in favor of the answering defendant by Shri Dev Dutt is confined only to complete the sale transaction in favor of Shri Bharat Bhushan Jain.'

20. In para 2.6 of the written statement, it is further pleaded as under :

'..... It is submitted that Shri Bharat Bhushan Jain has purchased the property in question on the basis of agreement to sell, power of attorney, Will etc., he could sell the property in question only by executing further agreement to sell and power of attorney etc. He could not execute a regular Sale Deed on the basis of the documents in his favour. In these circumstances and otherwise, any agreement to sell to be executed would have been the final document in favor of the plaintiff. Shri Bharat Bhushan Jain could execute these documents only when full consideration was paid to him by the plaintiff. To overcome this difficulty the plaintiff suggested that the answering defendant can execute a receipt-cum-agreement evidencing the payment made by him to the tune of Rs. one lakh and on final payment of the full consideration within a period of 30 days but not later than three months, Shri Bharat Bhushan Jain may execute the necessary documents viz. agreement to sell and power of attorney etc. in favor of the plaintiff. This receipt-cum-agreement dated 3.3.1996 was got prepared by the said property dealer, namely, Sapra Property and got signed from the defendant.'

21. Apparently, this agreement has been entered into with the consent and approval and possibly in collusion with his brother Shri Bharat Bhushan Jain,

without both having valid title in the property when this agreement was entered into. Apparently, a false misrepresentation has been made by defendant that he was absolute owner of the property and on this misrepresentation he made the plaintiff to part with a substantial amount of Rs. one lac as earnest money. It cannot be said in these circumstances that the defendant was in a position to execute a valid sale deed as represented and undertaken by him under the agreement to sell dated 3.3.96 as notified by him in his notice dated 3.6.96. Can it be said prima facie that this notice represents the bonafides and truthfulness of the defendant to be in a position to execute a proper and valid sale deed in favor of the plaintiff. Apparently the agreement to sell executed by him was to defraud and cheat the plaintiff and the notice dated 3.6.96 a ruse to swallow Rs. one lac taken from him fraudulently

22. Two things at least are not in dispute (i) that defendant had entered into an agreement to sell the plot in question and (ii) He had taken a sum of Rs. one lac as earnest money in pursuance of this agreement.

23. It is also prima facie clear that on 3.6.96, assuming time was of essence of the agreement of sale, he was not the owner of the property and as such he could not have executed a valid sale deed conveying a valid and lawful title in the property. There is no material placed on record that the defendant had disclosed the relevant facts that he was really not the owner or that he had a valid and lawful authority from the legal owner to convey a valid title on his behalf.

24. Assuming that no Income Tax clearance certificate was required, the plaintiff perhaps may be labouring under some misinformation in insisting on production of such a certificate. The defendant kept silence, obviously to take undue benefit of his ignorance about this and obviously to entrap him on the last day on 3.6.96, to claim that he was ready but plaintiff was not ready to complete the sale. No letter was written by him to the plaintiff earlier asking him to send a draft of the sale deed for his approval nor asked him to reach the office of the Sub Registrar on 3.6.1996 to get the sale deed executed and registered. It is only now in the written statement that it is pleaded that no sale deed was to be executed. Where was the occasion for the plaintiff going to the office of the Sub Registrar on 3.6.96 when he

had no notice from the defendant and for what purpose

25. These facts have been noticed in detail to understand the case of each party to see their bonafides and to see what proper interim order should be passed or interim measures taken

The grant of interim relief of injunction both prohibitory and mandatory are discretionary though discretion has to be exercised by the court on sound judicial principles in the light of facts and circumstances in each case and such discretion has to be moulded where there may be exceptional circumstances needing action.

26. The object of interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favor at the trial.

27. The first thing is that the court should be satisfied prima facie that the claim of the plaintiff is not frivolous or vexatious or in other words that there is a serious question to be tried and at this stage of litigation the court is not to try to resolve the conflicts as to facts on which the claims of either party may ultimately depend, nor to decide the difficult questions of law. It has been judicially noticed that where other factors appear to be evenly balanced it is a counsel of prudence to take such steps as are calculated to preserve the status quo. The principles for grant of interlocutory injunction are well established. Recently, in the case of Gujarat Bottling Company Ltd. and Ors. v. Coca Cola Company and Ors. : AIR 1995 SC2372 it has been observed as under :-

'The grant of an interlocutory injunction during the pendency of legal proceedings is a matter requiring the exercise of discretion of the Court. While exercising the discretion the Court applies the following tests - (1) whether the plaintiff has a prima facie case; (2) whether the balance of convenience is in favor of the plaintiff; and (3) whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed. The decision whether or not to grant an interlocutory injunction has to be taken at a time when the existence of the legal right asserted by the plaintiff and its alleged violation are both contested and

uncertain and remain uncertain till they are established at the trial on evidence. Relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favor at the trial. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The Court must weigh one need against another and determine where the balance of convenience lies.'

28. The principles for grant of mandatory injunction are also not different. In *Dorab Cawasji Warden v. Coomi Sorab Warden* : [1990]1SCR332 these have been summarised as under :-

'14. The relief of interlocutory mandatory injunction are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are :

- (1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.
- (2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.
- (3) The balance of convenience is in favor of the one seeking such relief.

15. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the Court to be exercised in the light of the facts and circumstances of each case. Though the above guidelines are neither exhaustive or complete or absolute rules, and there may be exceptional circumstances needing action, applying them as pre-requisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion.'

29. So far as the plaintiff is concerned he had paid to the defendant Rs. one lac in pursuance of the agreement to sell, sent another cheque of Rs. 3.00 lakhs on 7.3.96 without any formal demand, wrote two letters dated 7.3.96 and 24.4.96 requiring the defendant to complete the sale to which he received no reply. And on receipt of letter of repudiation dated 3.6.96 from the defendant, he filed the present suit for specific performance without any unnecessary delay on 2nd August, 1996. He has pleaded in the plaint that he has been and is ready and willing to complete the sale. On being directed at the time of admission, he has deposited the balance sale consideration of Rs. 36,89,000/- within short period in fixed deposit receipts (FDR's) the FDR's have been deposited in the Registry of this Court and have been got renewed and are still valid. He has no other role to play for completing the sale.

30. The full sale consideration has thus been made available by the plaintiff. But the defendant is not prepared to complete the sale and transfer a valid title. It cannot be said at this stage that it would not be possible to enforce specific performance especially when B.B. Jain and Dev Dutt who perhaps may have some interest have since been impleaded as parties. Strong prima facie is made out in favor of the plaintiff.

31. Explanationn (i) to Section 10 of the Specific Relief Act, 1963 contains statutory presumption, though rebuttable, that: (i) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money;' Balance of convenience also is in maintaining status quo. Otherwise it may result in multiplicity of proceedings; if the property is transferred in any form and thereby resulting in irreparable loss to the plaintiff.

And no less relevant and important circumstance is the conduct of the defendant as noticed above which apparently appears to be fraudulent and may amount to a criminal offence.

The property needs to be protected and preserved. The defendant appears to be in collusion with his brother Bharat Bhushan Jain and possibly also with Mr. Dev Dutta, who have now been imp leaded as defendants. Immediate order of preserving the property is very necessary in the circumstances. The plaintiff in the application for interim injunction is No. 7076/96 besides claiming interim injunction has also prayed' (c) to pass such other order or direction as this Hon'ble Court deems fit under the facts and circumstances of the case.'

32. In view of the above discussion and in the circumstances the interim order dated 6.8.96 restraining the defendant from selling, alienating or in any manner creating any third party interest in the suit property is hereby confirmed. This order shall also be binding on defendants No. 2 and 3, namely, Shri Bharat Bhushan Jain and Dev Dutta who have been imp leaded as defendants Nos. 2 and 3 till further orders.

33. There is one more question. Admittedly, defendant No. 1 had taken a sum of Rs. 1.00 lakh in pursuance of the agreement to sell. As at present, he is not the owner and he has not only repudiated the agreement to sell but he also does not seem to be in a position to convey legal and valid title. In my view, in the circumstances, he should not be allowed to retain this amount of Rs.1.00 lakh which apparently he had obtained by fraud and cheating. If not so done, the amount may be filtered away or otherwise disposed of and thereby making its recovery difficult later on. Defendant No. 1 is, accordingly, hereby directed to deposit the amount of Rs. 1.00 lakh in this court within one week. On being so deposited, the said amount be kept in fixed deposit in the name of the Registrar of this Court in a Scheduled Bank for a period of one year in the first instance.

I.A. 4916/97

34. The plaintiff has also filed this application for refund/release of the two FDR's of Rs. 36,89,000/- which he had deposited in pursuance of the interim order dated

6.8.1996. The plaintiff has shown his bona fides and because of the pleas taken by the defendant, it is likely to take time to dispose of this suit. If he is deprived of the use of this money and at the same time deprived of the use of the property thereby great loss, harm and injury will be caused to him. It is only if he succeeds that he could be called upon to pay or deposit this amount in court.

Even this request for refund has been strongly opposed on behalf of the defendant.

35. The question is whether it is necessary for the plaintiff in a suit for specific performance either to deposit in Court or prove at this stage that he has got ready cash with him to show his readiness and willingness to do his part of the agreement to sell. Under Section 16(c) of the Specific Relief Act, the plaintiff seeking specific performance is to plead and prove during trial that he had performed or has always been ready and willing to perform essential terms of the contract which are to be performed by him continuously between the date of the contract and the date of the hearing of the suit (*Gomathinayagam Pillai and Ors v. Pallaniswami Nadar* : [1967]1SCR227 and *Ardashir M. Mama v. Flora Sasson* AIR 1928 PC 208).

36. In order to prove himself to be ready and willing to perform his obligation under a contract to purchase, the purchaser has not necessarily to produce the money or to vouch a concluded scheme for financing the transaction. (*Bank of India Ltd. v. Jameshjeet A.H. Chinoy and Ors.* AIR 1950 PC 90).

37. In *Sukhbir Singh and Ors. v. Brijpal Singh* : AIR 1996 SC2510 also it has been held that law is not in doubt that it is not a condition that respondent should have ready cash with him.

38. In any case, by depositing the balance sale consideration, the plaintiff has prima facie shown his financial position, capacity to finance the purchase and his readiness and willingness. Since the defendant is not ready and willing as at present to complete the sale, the plaintiff should not be burdened with the condition that he should part with the balance sale price at this stage.

39. In *Ansal Properties & Industries (P) Ltd. v. Rajender Singh and Anr.*, (1990) DLJ 510, also a Division Bench of this Court held that it is not essential for the plaintiff to actually lender to the defendant or to deposit the money at the time of filing the suit. Section 12 of the Specific Relief Act which requires money to be paid to the defendant comes into play only at the lime when the Court is passing the decree and is deciding the rights of the parties. Course to deposit is normally not necessary and should be adopted only when the Court is of the opinion that the averment of the plaintiff being ready and willing to perform the contract may not be quite true which is not the case here.

40. The suit is likely to take time to reach its finality. In the meantime, he cannot be deprived the use of his money as well as the enjoyment of the properly. Equity helps honest plaintiff against defendant who breaches solemnly given undertaking.

41. This application is allowed. The two FDR's of Rs. 36,89,000/- deposited by the plaintiff in this Court are released and be returned to the plaintiff forthwith.

42. In the circumstances, defendant No. 1 shall pay costs of these proceedings. Costs assessed at Rs. 5,000/-.

Both is No. 7076/96 and is No. 4916/97 are allowed and are disposed of accordingly.

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