

**Yogesh Tyagi Vs. Kela Devi**

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**SooperKanoon Citation :** [sooperkanoon.com/708590](http://sooperkanoon.com/708590)

**Court :** Delhi

**Decided On :** Nov-26-2008

**Reported in :** 156(2009)DLT717

**Judge :** Pradeep Nandrajog and; J.R. Midha, JJ.

**Appeal No. :** RFA 192/2007

**Appellant :** Yogesh Tyagi

**Respondent :** Kela Devi

**Advocate for Def. :** R.C. Nangia, Adv.

**Advocate for Pet/Ap. :** Anil Kumar Gupta, Adv

**Disposition :** Appeal allowed

**Judgement :**

**Pradeep Nandrajog, J.**

1. Appellant who was the plaintiff, had filed a suit for specific performance of an agreement to sell, Ex.PW-1/1, stated to have been executed by the defendant i.e. the respondent in the appeal on 19.10.2004, agreeing to sell to him the property referred to in the agreement, for a total sale consideration of Rs. 16,50,000/- (Rupees Sixteen Lakhs Fifty Thousand only), out of which Rs. 3,00,000/- (Rupees

Three Lakhs only), was stated to have been paid, as recorded in the agreement, as part sale consideration when Ex.PW-1/1 was executed. It was pleaded that the agreement recorded that the respondent would execute the sale deed by 15.2.2005 and that the appellant made an attempt twice to tender the balance sale consideration of Rs. 13,50,000/- on 24.2.2005 and 10.3.2005; receiving no response from the respondent when she did not even respond to a legal notice dated 24.3.2005, Ex.PW-1/3, the appellant had no option but to file the suit.

2. First prayer made in the suit was to specifically enforce the contract between the parties. Alternate prayer was that if specific performance was not granted, as per Clause 1 of the agreement, which stipulated that if respondent did not comply with her obligations she would pay double the amount of part sale consideration received, a decree in sum of Rs. 6,00,000/- (Rupees Six Lakhs only) be granted in his favour.

3. Defence taken in the written statement was of a complete denial. The respondent denied having executed any agreement to sell, much less Ex.PW-1/1. It was pleaded that the appellant was a tenant under the respondent in respect of one room in the subject property and had earned the confidence of the respondent who required a separate electricity connection, for which, the appellant obtained signatures of the respondent on blank papers. It was pleaded that Ex.PW-1/1 was created by using the blank stamp paper on which the respondent had affixed her signatures.

4. On the pleadings of the parties following issues were settled on 19.1.2006:-

1. Whether there is no cause of action for filing the present suit as claimed for by the defendant in Preliminary Objection No. 5 of her written statement? OPD.

2. Whether plaintiff is tenant under the defendant as claimed for by her in Preliminary Objection No. 2 of her written statement? OPD.

3. Whether Plaintiff is entitled to relief of specific performance as claimed for by her or in alternative plaintiff is entitled to recover a sum of Rs. 6.00 lakhs from the defendant as claimed for by him? OPP.

4. Whether Plaintiff is entitled to relief of permanent injunction as sought for by him? OPP.

5. Relief.

5. At the trial, the appellant examined himself as PW-1 and Ram Kumar and Mohd. Iqbal as PW-2 and PW-3 respectively.

6. Appellant deposed that he had purchased the stamp paper on which PW-1/1 was drawn from the courts at Seelampur and withdrew Rs. 90,000/- from his account maintained with Vijaya Bank, Loni Road, Shahdara and borrowed the balance sum from his father when he paid Rs. 3,00,000/- to the respondent and that when he paid the money to the respondent, Mukesh Sharma, Dhiraj Sharma, Mohd. Iqbal, Ram Kumar and Chhotey Lal were also present. He stated that time was extended for completion of the transactions firstly on 4.2.2005 and secondly on 24.2.2005. He stated that he got issued the legal notice, Ex.PW-1/3, dated 24.3.2005, since on 10.3.2005 the respondent did not appear before the Sub-Registrar for execution of the sale documents. He stated that the postal envelop, Ex.PW-1/7, in which the notice Ex.PW-1/3 was sent was returned back to him with the report of the postman that the respondent had refused to accept the docket. Appellant also tendered certified copy of a plaint dated 14.12.2004, Ex.PW-1/9, and a decision thereon, Ex.PW-1/8.

7. The plaint and the decision evidence that the grandsons of the respondent, acting through their mother, instituted a suit for injunction against the respondent alleging that the property which formed the subject matter of the agreement to sell was an ancestral property belonging to their father and that they had learnt that their grandmother had received Rs. 3,00,000/- as earnest money in collusion with Mr. Mukesh Kumar Sharma and was intending to sell the property.

8. The decision, Ex.PW-1/8, is the judgment dated 27.5.2005 dismissing the said suit as not maintainable, on being opposed by the respondent.

9. The appellant identified the signatures of the respondent on the agreement to sell, Ex.PW-1/1.

10. PW-3, Mohd. Iqbal, deposed that he was present when Ex.PW-1/1 was executed. He identified the signatures of the respondent on the same and identified the point where he had appended his signatures as an attesting witness. He deposed in harmony with the deposition of the appellant of the respondent receiving Rs. 3,00,000/- when Ex.PW-1/1 was executed.

11. Ram Kumar, PW-2, deposed that he was present, though has not witnessed the same, when Ex.PW-1/1 was executed and further deposed that Mukesh and Dhiraj, sons of the respondent, were also present when the transactions took place and had signed the agreement as witnesses, apart from Mohd. Iqbal.

12. The respondent led no evidence, as 4.12.2006 was the second date notified for leading defence evidence. None appeared for the respondent on said date and hence she was proceeded against ex-parte.

13. The suit has been dismissed by returning a finding on Issue No. 2 that the appellant was a tenant under the respondent, an issue which we find is totally redundant, since the suit sought a decree for specific performance of the agreement to sell and it hardly mattered whether the appellant i.e. the plaintiff was a tenant under the respondent or not.

14. The first reason given by the learned Trial Judge to non-suit the appellant on issues No. 1, 3 and 4 which have been decided together is as per finding returned in para 11 of the impugned judgment wherein it has been held that since Clause 1 of the agreement, Ex.PW-1/1, recorded that in case the seller defaulted she would pay double the earnest money as penalty, the suit for specific performance was not maintainable.

15. The second reason given by the learned Trial Judge is that there was variance in the pleadings and proof by the appellant on the question whether the appellant sought time to be extended for execution of the sale deed on 15.2.2005 and 24.2.2005 or whether the time was extended at the asking of the respondent.

16. Noting that in the plaint, the appellant had stated that time was extended on two dates at the asking of the respondent, but in his deposition, during cross-

examination, stated that he got the time extended on said dates, the learned Trial Judge has returned a finding that this shows that the appellant was not ready and willing to comply with his obligations to pay Rs. 13,50,000/- (Rupees Thirteen Lakhs and Fifty Thousand only) being the balance sale consideration. Holding that the appellant was in breach of the agreement, learned Trial Judge has held that as per the agreement the earnest money was liable to be forfeited.

17. The result is that the claim in the suit for specific performance and alternatively for damages has been rejected.

18. We note that the learned Trial Judge has not discussed the evidence with respect to the defence that the respondent never executed Ex.PW-1/1 and that her signatures were obtained on a blank paper.

19. Learned Counsel for the appellant urged that the defendant i.e. the respondent led no evidence. She never stepped into witness box. Statements made by the appellant and the witnesses of the appellant to the effect that Mukesh Kumar and Dhiraj, sons of the respondent, witnessed the execution of the agreement to sell, apart from Mohd. Iqbal were never challenged. Thus, Counsel urged that notwithstanding there being no discussion in the impugned judgment, there is sufficient evidence to establish the due execution of the agreement to sell, Ex.PW-1/1, and receipt of Rs. 3,00,000/- there under by the respondent.

20. Pertaining to time being extended on two dates i.e. 15.2.2005 and 24.2.2005, learned Counsel pointed out that at the rear of Ex.PW-1/1, there are two writings duly signed by the respondent and the appellant recording therein that by mutual consent time for execution of the sale deed was extended firstly up to 24.2.2005 and there after up to 10.3.2005. Learned Counsel urged that the said writings were sufficient to hold that the time was extended twice by mutual consent, thus, the finding returned by the learned Trial Judge of there being a variance in the deposition of the appellant vis--vis his pleadings is incorrect.

21. Lastly, Counsel urged that in view of the defence taken by the respondent, being of a complete denial of the agreement to sell, where was the occasion for said respondent to urge that the appellant was not ready and willing to pay the

balance sale consideration?

22. Learned Counsel for the respondent conceded that in view of the fact that the respondent had admitted, in her pleadings, that the agreement to sell bore her signatures, her defence of the same being blank when she affixed her signatures required to be established by the respondent by leading evidence to said effect and that since she had led no evidence the presumption that the document, Ex.PW-1/1 was properly drawn up before it was executed remains and hence it stands established that the respondent had duly executed the agreement to sell, Ex.PW-1/1 and had received Rs. 3,00,000/- as part sale consideration.

23. We may note that the agreement to sell, Ex.PW-1/1, has not only been signed by the respondent but has even been witnessed by her two sons, Mukesh Kumar and Dhiraj who are literate persons, which is evidenced by the fact that Dhiraj has affixed his signatures in English. They would presumably not sign a document as witnesses if the same was not scribed before they witnessed due execution thereof. We additionally note that the respondent never produced, for cross-examination, her two sons.

24. The suit filed by the grandsons of the respondent against her, certified copy whereof is Ex.PW-1/9, lends assurance to the fact that the respondent received Rs. 3,00,000/- from the appellant and had executed the agreement to sell. Obviously, the factum of her attempting to sell the suit property came to be known within the family and her daughter-in-law used her sons i.e. the grandsons of the respondent to thwart the sale. It is interesting to note that in the plaint filed by the grand-sons of the respondent, they stated that their grand-mother had received Rs. 3,00,000/- as part sale consideration.

25. The reasoning of the learned Trial Judge that merely because there exists a Clause of liquidated damages or a penalty Clause in Ex.PW-1/1 disentitles the appellant to specifically enforce the contract, is a wrong view. The issue stands settled by the decision of the Supreme Court reported as : (2004)6SCC649 P. D'Souza v. Shondrilo Naidu. The view to the contrary expressed in the decision reported as : (1999)8SCC416 Dada Rao v. Ram Rao was held to be per incurium.

26. Indeed, the reasons given by the learned Trial Judge to hold that the appellant has failed to establish his readiness and willingness to comply with the contract i.e. the agreement to sell, are patently erroneous and proceed in the teeth of the written acknowledgements duly signed by the respondent, recorded at the rear of the agreement to sell Ex.PW-1/1. The respondent and the appellant have affixed their signatures at two places by recording as under:

Sale document execution time will be extended by the mutual consent of both parties on or before 24.2.2005, both parties have also signed this agreement before the marginal witnesses.

XXXXXXXXXXXXXXXXXX

Sale document execution time further will be extended by the mutual consent of both parties on or before 10.3.2005, both parties have also signed this agreement before the marginal witnesses.

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27. The witnesses to the said writings being executed by the appellant and the respondent are Mukesh Sharma, the son of the respondent and Mohd. Iqbal.

28. The learned Trial Judge has ignored that in his examination-in-chief Mohd. Iqbal had deposed that he was present when the first extension was recorded at the rear of Ex.PW-1/1 for completion of the sale document and that the appellant and the respondent had signed the same in his presence. He further stated that he was present when the second extension by mutual consent was recorded and had witnessed the same when appellant and respondent signed beneath the writing recording the second extension for completion of the sale by 10.3.2005. The learned Trial Judge has further ignored that the testimony of Mohd. Iqbal on said point was not challenged in cross-examination.

29. It is evidently a case where the learned Trial Judge has ignored the decision of the Supreme Court in P. D'Souza v. Shondrilo Naidu (supra). Further, the learned Trial Judge has ignored material evidence to which we have referred to herein above. The learned Trial Judge failed to appreciate that the respondent led no

evidence. The learned Trial Judge failed to appreciate that on material particulars, the witnesses of the appellant were not even cross-examined. Learned Trial Judge has ignored that the parties recorded, in writing, the factum of time being extended for execution of the sale deed by mutual consent. The learned Trial Judge has ignored the testimony of the appellant that he had thrice attempted to pay the balance sale consideration and get executed the sale deed and that the same has not even been challenged in cross-examination. Lastly, the learned Trial Judge has failed to appreciate that the respondent refused to accept the legal notice dated 24.3.2005, Ex.PW-1/3, evidenced by the remarks of the postal authorities on the registered envelop, Ex.PW-1/7, that the respondent had refused to accept the same.

30. We accordingly hold that the appellant has successfully established his readiness and willingness to pay the balance sale consideration. We allow the appeal and set aside the impugned judgment and decree dated 27.5.2005. Suit filed by the appellant seeking a decree for specific performance of Ex.PW-1/1 is decreed with a direction to the respondent that she would execute the sale deed to convey the property which is the subject matter of Ex.PW-1/1 in favour of the appellant within three months from today. Of course, within said period the appellant shall deposit Rs. 13,50,000/- with the learned Trial Judge which the respondent shall be permitted to withdraw after she executes the sale deed. Needless to state, if the respondent does not execute the sale deed, the learned Trial Judge would appoint a Court Officer to do so.

31. The appellant is held entitled to costs all through-out.