

Kalawati (D) Thr.Lrs. vs Rakesh Kumar . on 16 February, 2018

Equivalent citations: AIR 2018 SUPREME COURT 960, (2018) 1 WLC(SC)CVL 576, (2018) 1 ORISSA LR 803, (2018) 140 REVDEC 527, AIR 2018 SC (CIV) 1884, (2018) 3 MAD LJ 696, (2018) 3 RAJ LW 1957, (2018) 2 RECCIVR 125, (2018) 3 MAD LW 978, (2018) 1 UC 639, (2018) 3 SCALE 32, (2018) 3 CIVLJ 924, (2018) 125 CUT LT 1090, (2018) 128 ALL LR 730, (2018) 3 ANDHLD 63, (2018) 2 CURCC 221, (2018) 4 CAL HN 158, (2018) 4 CALLT 67, (2018) 2 CIVILCOURTC 503, (2018) 1 ALL RENTCAS 687, (2018) 185 ALLINDCAS 89 (SC), 2018 (3) SCC 658, (2018) 2 ICC 562, 2018 (2) KCCR SN 184 (SC)

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Bench: Deepak Gupta, Madan B. Lokur

REPORTA

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2244 OF 2018
(Arising out of Special Leave Petition (C) No.28275 of 2018)

Kalawati (D) Through LRs. & Ors.

...App

versus

Rakesh Kumar & Ors.

...Respo

JUDGMENT

Madan B. Lokur, J.

1. Leave granted.

2. “Ease of business” and “enforcement of contract” are the two new buzzwords and rightly so. For ease of doing business insofar as justice delivery is concerned, it is time to introspect and introduce case management programmes to streamline the system so that suits and appeals can be decided more efficiently. The present appeal exemplifies the need for case management system.

May, 1986. A suit was filed by the plaintiff (Rakesh Kumar) in the Delhi High Court being Suit No.1193 of 1987 for specific performance of the C.A No. _____ of 2018 (@ out of SLP (C) No.28275 of 2014) Page 1 agreement to sell. It appears that due to a change in pecuniary jurisdiction, the suit was transferred to the District Courts and was re-numbered as Suit No.642 of 2001. A disturbing feature of the appeal is that even about 31 years later, the parties are not quite sure about the fate of the agreement to sell entered into in 1986. The period is extremely long and such a lapse of time for the enforcement (or otherwise) of a contract is good reason to re-think the procedures.

4. The appellants (Kalawati and others) are aggrieved by the judgment and decree dated 10th December, 2013 passed by a learned Single Judge of the Delhi High Court in R.F.A. No.521 of 2004.

5. In the plaint filed by the respondent (Rakesh Kumar), it was averred that he had entered into an agreement to sell on 29 th May, 1986 in respect of land in Rectangle No.81, Killa Nos.21/1 (1-2), 22/1 (4-5), 19/2 (4-0), 19/1 (0-12), 20/2 (1-2) in all measuring 11 bighas and 1 biswa situated in Village Mehrauli, Tehsil Mehrauli, New Delhi. A part of the land was under the absolute ownership/bhumidari of Kalawati while the rest of the land was in the absolute ownership/bhumidari of defendant Nos.2 to 4 (Bishan Prakash, Om Prakash and Ved Prakash).

6. As per the agreement to sell, the sale price of the land in dispute was Rs.1,32,000/- per acre. An amount of Rs.30,000/- was paid by Rakesh Kumar to the defendants as advance payment and part payment C.A No. _____ of 2018 (@ out of SLP (C) No.28275 of 2014) Page 2 towards the sale price for which a receipt was given to him.

7. According to Rakesh Kumar, the defendants were obliged to obtain a certain 'no objection certificate' from the appropriate authority for sale of the disputed land and also permissions and clearances but they failed to take any interest in this regard. Accordingly, Rakesh Kumar issued a lawyer's notice dated 16th May, 1987 to the defendants to carry out their obligations but they failed to do so.

8. Faced with this situation, Rakesh Kumar filed a suit before the High Court being Suit No. 1193 of 1987. As mentioned above, the suit was transferred to the District Courts and renumbered as Suit No.642 of 2001. The prayer in the suit was for specific performance for the agreement to sell dated 29th May, 1986 and for possession of the land in dispute. Along with the plaint, an application was filed by Rakesh Kumar under Order XXXIX of the Code of Civil Procedure for an injunction against alienation of the land in dispute, in which notice was issued to the defendants therein. Rakesh Kumar was granted an interim injunction subject to his depositing the balance sale consideration for restraining the defendants from alienating the land in dispute. It has come on record that Rakesh Kumar did not deposit the balance sale consideration.

9. At this stage, it may be mentioned that during the pendency of the suit, the defendants transferred the land in dispute in 1995 to defendant C.A No. _____ of 2018 (@ out of SLP (C) No.28275 of 2014) Page 3 Nos.5, 6 and 7 and that is why the purchasers were impleaded as defendants in the suit.

10. The parties filed their written statements to the plaint and the stand taken by the defendants was that the sale consideration of Rs.1,32,000/- per acre was ridiculously low and illusory. Additionally, Rakesh Kumar himself was not ready and willing to perform his part of agreement and therefore no relief could be granted to him. It was also averred that Rakesh Kumar did not have the necessary finances to pay the consideration amount and so was not prepared to have the sale deed executed in his favour.

11. On the pleadings before him, the Trial Judge framed several issues but we are only concerned with the issue whether the plaintiff (Rakesh Kumar) was at all times ready and willing to perform his part of the agreement. This issue was answered in the negative by the Trial Judge and against Rakesh Kumar resulting in the dismissal of the suit. Among the reasons given by the Trial Judge for coming to the conclusion that Rakesh Kumar was not ready and willing to execute the contract, at all times, was that at the time of grant of interim injunction prayed for by Rakesh Kumar in an application under Order XXXIX of Code of Civil Procedure while the suit was pending in the High Court, he was required to deposit the balance consideration as a pre-condition for restraining the C.A No. _____ of 2018 (@ out of SLP (C) No.28275 of 2014) Page 4 defendants from selling, mortgaging, alienating or otherwise parting with possession with the land in dispute. The balance sale consideration was not deposited by Rakesh Kumar and therefore, the interim injunction prayed for by him was not granted. In the absence of any injunction against alienating the land in dispute, the defendants transferred it to defendant Nos.5, 6 and 7 in 1995.

12. The Trial Judge also noted that from his cross-examination it was evident that Rakesh Kumar did not have the resources and sufficient money to purchase the disputed land. He was in possession of only one truck and was earning Rs.10,000/- per month. He was not assessed to income tax and he filed his income tax return for the first time in 1994. Earlier in 1988-89, he had opened a bank account but never had a balance of more than Rs.52,000/- in his bank account. Sometime in July, 2002 Rakesh Kumar took a loan of Rs.3.15 lakhs for the purpose of his business from his cousin but the loan was not taken for the purpose of buying the land in dispute. Taking all these factors into consideration, the Trial Judge held that Rakesh Kumar did not have the means to pay the balance consideration and was not ready and willing to perform his part of the contract at all times.

13. Feeling aggrieved, Rakesh Kumar preferred a Regular First Appeal before the Delhi High Court. The High Court addressed itself only to the C.A No. _____ of 2018 (@ out of SLP (C) No.28275 of 2014) Page 5 question whether Rakesh Kumar was ready and willing to execute his part of the agreement to sell, at all times. The High Court took the view that rather than Rakesh Kumar, it was the defendants who were not willing to execute the sale deed. The High Court came to this conclusion on the basis of the requirement in terms of the agreement to sell that the defendants were obliged to obtain a 'no objection certificate' for executing the sale deed but they had not taken any steps in that regard. The High Court also relied on the affidavit by way of evidence filed by Rakesh Kumar about his capacity to pay the balance sale consideration. It was also noted by the High Court that the lawyer's notice sent by him on 16th May, 1987 had not been responded to by the defendants. On a consideration of these factors, it was clear that the defendants were not interested in executing the sale deed.

14. On the other hand, as far as Rakesh Kumar's readiness and willingness to execute the sale deed is concerned, the High Court noted that in his cross-examination recorded on 4th October, 2002 he explained that just prior to the date of entering into the agreement to sell, he had disposed of his house. Thus, he had sufficient funds available for investing and on this basis, he had agreed to purchase the land in dispute.

15. The High Court noted that even though Rakesh Kumar did not deposit the balance consideration for the grant of injunction in his favour, C.A No. _____ of 2018 (@ out of SLP (C) No.28275 of 2014) Page 6 that was of no consequence and could not be held against him. We agree with the High Court only to this limited extent.

16. Taking all these factors into consideration, the High Court reversed the view of the Trial Judge and concluded that Rakesh Kumar was entitled to a decree for specific performance of the agreement to sell dated 29th May, 1986 and for delivery of vacant, peaceful and physical possession of the land in dispute.

17. Having heard learned counsel for the parties, we are not in favour of the view expressed by the High Court but subscribe to the view of the Trial Judge.

18. The law on the subject of specific performance of contracts is quite clear and it is not necessary to cite the dozens of judgments delivered by this Court on the issue. However, it is necessary to refer to two decisions which are quite apposite to the facts of the case before us.

19. In His Holiness Acharya Swami Ganesh Dassji v. Sita Ram Thapar¹this Court drew a distinction between readiness to perform the contract and willingness to perform the contract. It was observed that by readiness it may be meant the capacity of the plaintiff to perform the contract which would include the financial position to pay the purchase price. As far as the willingness to perform the contract is concerned, the 1 (1996) 4 SCC 526 C.A No. _____ of 2018 (@ out of SLP (C) No.28275 of 2014) Page 7 conduct of the plaintiff has to be properly scrutinised along with attendant circumstances. On the facts available, the Court may infer whether or not the plaintiff was always ready and willing to perform his part of the contract. It was held in paragraph 2 of the Report:

“There is a distinction between readiness to perform the contract and willingness to perform the contract. By readiness may be meant the capacity of the plaintiff to perform the contract which includes his financial position to pay the purchase price. For determining his willingness to perform his part of the contract, the conduct has to be properly scrutinised..... The factum of readiness and willingness to perform plaintiff's part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract. The facts of this case would amply demonstrate that the petitioner/plaintiff was not ready nor had the capacity to perform his part of the contract as he had no financial capacity to pay the consideration in cash as contracted

and intended to bide for the time which disentitles him as time is of the essence of the contract.”

20. In I.S. Sikandar (Dead) by Lrs. v. K. Subramani &Ors.² this Court noted that the plaintiff is required to prove that from the date of execution of the agreement of sale till the date of the decree, he was always ready and willing to perform his part of the contract. In this case, looking the attendant facts and circumstances, the Court upheld the view of the Trial Judge that the plaintiff had no money to pay the balance sale consideration and was apparently not capable of making necessary

2 (2013) 15 SCC 27 C.A No. _____ of 2018 (@ out of SLP (C) No.28275 of 2014) Page 8 arrangements for payment of the balance consideration. It was held in paragraph 45 and paragraph 47 of the Report:

“45.....Further, the plaintiff is required to prove the fact that right from the date of execution of the agreement of sale till the date of passing the decree he must prove that he is ready and has always been willing to perform his part of the contract as per the agreement.....” “47. Further, there is nothing on record to show that the plaintiff could have made arrangement for payment of the balance consideration amount to them. But, on the other hand the trial court has recorded the finding of fact to the effect that the correspondence between the parties and other circumstances would establish the fact that the plaintiff had no money for payment of balance sale consideration.....”

21. In so far as the present appeal is concerned, the material on record clearly indicates that Rakesh Kumar did not have the necessary funds available with him to pay the balance consideration. His low income and low bank balance indicated his incapacity to make the balance payment.

As far as his capacity to arrange for funds is concerned, it has come on record that Rakesh Kumar did take a loan from his cousin but that was only for his business and not for paying the balance consideration for the land in dispute. There is nothing on record to indicate that Rakesh Kumar could have not only repaid the loan taken from his cousin, but additionally, could have arranged sufficient funds to pay the balance consideration. It is very doubtful, and it is easy and reasonable to infer this, that Rakesh Kumar was incapable of meeting both liabilities. C.A No. _____ of 2018 (@ out of SLP (C) No.28275 of 2014) Page 9

22. On the facts placed before us, we are satisfied that the Trial Judge was right in coming to the conclusion that Rakesh Kumar was not in a position to pay the balance consideration to Kalawati and the other vendors, and by necessary implication, it must be held that he was neither ready nor willing to perform his part of the agreement.

23. It was submitted that Kalawati and the other vendors did not perform their part of the agreement despite Rakesh Kumar requesting them to do so. The contention of Rakesh Kumar was

that the vendors did not obtain a “no objection certificate” from the authorities concerned. We have gone through the agreement to sell dated 29 th May, 1986 and the relevant clause of the contract is remarkably vague and reads as follows:

“That the vendors will obtain the no objection certificate from the authorities concerned and will inform the vendee by registered post after getting the income tax clearance certificate.”

24. There is nothing to indicate the nature of the “no objection certificate” that the vendors were required to obtain and who were the authorities from whom the “no objection certificate” was required, nor is there any indication of the purpose for which the “no objection certificate” was required. Similarly, there is no indication about the nature of the income tax clearance certificate required and for what purpose. This clause appears to have been inserted in the agreement to sell without any application of mind and it is quite possible, as alleged by C.A No. _____ of 2018 (@ out of SLP (C) No.28275 of 2014) Page 10 the vendors that the agreement to sell was ante-dated after the introduction of Section 260-UC in the Income Tax Act, 1961. However, we need not go into this possibility in view of the vague nature of the clause.

25. On an overall consideration of the facts and in the circumstances of the case, in our opinion, the High Court was in error in setting aside the judgment and decree of the Trial Judge. Accordingly, the appeal is allowed and the judgment and decree passed by the High Court is set aside. No costs.

.....J
(Madan B. Lokur)

New Delhi;
February 16, 2018

.J
(Deepak Gupta)

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