

A KALAWATI (D) THROUGH LRS. & ORS.

v.

RAKESH KUMAR & ORS.

(Civil Appeal No. 2244 of 2018)

B FEBRUARY 16, 2018

**[MADAN B. LOKUR AND DEEPAK GUPTA, JJ.]**

*Specific Performance – Specific performance of contract – Agreement to sell land between the appellant-vendor and respondent-vendee – Part payment towards the sale price paid by respondent but appellant failed to carry out their obligations of obtaining ‘no objection certificate’ from the appropriate authority – Suit for specific performance of the agreement by the respondent – Application also filed for injunction against alienation of the land in dispute – Grant of interim injunction subject to deposit of the balance sale consideration – However, balance sale consideration not deposited by the respondent – During pendency of the suit, appellant transferred the land to defendant – Thereafter, dismissal of the suit since respondent not ready and willing to perform his part of the contract – However, the High Court passed the decree for specific performance in favour of the respondent – On appeal, held: Material on record indicates that the respondent did not have the necessary funds to pay the balance consideration – Though respondent took loan but that was for his business and not for payment of balance consideration – Respondent could not pay the loan amount as also the balance consideration – Trial court rightly held that by necessary implication respondent was neither ready nor willing to perform his part of the agreement – Further, the nature and the purpose of no objection certificate that vendors were required to obtain and the authorities from whom it was to be obtained not clear – Also not clear about the nature of income tax clearance certificate required and for what purpose – Thus, the judgment and decree passed by the High Court is set aside.*

**Allowing the appeal, the Court**

**HELD: 1.1 In the instant appeal, the material on record clearly indicates that the respondent 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 the respondent 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 the respondent 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 the respondent was incapable of meeting both liabilities. [Para 21][489-D-E]

1.2 On the facts the trial judge was right in coming to the conclusion that the respondent was not in a position to pay the balance consideration to the appellant 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. [Para 22][489-F]

1.3 The agreement to sell is seen and the relevant clause of the contract is remarkably vague, that the vendors would obtain the no objection certificate from the authorities concerned and would inform the vendee by registered post after getting the income tax clearance certificate. 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 the vendors that the agreement to sell was ante-dated after the introduction of Section 260-UC in the Income Tax Act, 1961. However, it is not possible in view of the vague nature of the clause. [Paras 23, 24][489-G-H; 490-B-C]

1.4 On an overall consideration of the facts and in the circumstances of the case, the High Court was in error in setting aside the judgment and decree of the trial judge. Thus, the judgment and decree passed by the High Court is set aside. [Para 25][490-D]

- A *His Holiness Acharya Swami Ganesh Dassji v. Sita Ram Thapar* (1996) 4 SCC 526 : [1996] 2 Suppl. SCR 111; *I.S. Sikandar (Dead) by Lrs. v. K. Subramani &Ors.* (2013) 15 SCC 27 : [2013] 17 SCR 24 – referred to.

**Case Law Reference**

- B [1996] 2 Suppl. SCR 111 referred to Para 19  
[2013] 17 SCR 24 referred to Para 20

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2244 of 2018.

- C From the Judgment and Order dated 10.12.2013 of the High Court of Delhi at New Delhi in R.F.A. No.521 of 2004.

Rakesh Khanna, Sr. Adv., Dr. K.P.S. Dalal, S. Rohan, Shree Pal Singh, Praveen Swarup, Advs. for the Appellants.

- D Sumit Bansal, Ateev Mathur, Ritesh Khatri, Lalit Kumar, Pankaj Kumar Singh, Raj Singh Rana, Advs. for the Respondents.

The Judgment of the Court was delivered by

**MADAN B. LOKUR, J.** 1. Leave granted.

- E 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.

- F 3. The subject matter of the appeal is an agreement to sell dated 29<sup>th</sup> 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 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.

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

5. In the plaint filed by the respondent (Rakesh Kumar), it was averred that he had entered into an agreement to sell on 29<sup>th</sup> 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). B C

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 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 16<sup>th</sup> May, 1987 to the defendants to carry out their obligations but they failed to do so. D E

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 29<sup>th</sup> 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. F G

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 Nos.5, 6 and 7 and that is why the purchasers were impleaded as defendants in the suit. H

A 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  
B 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  
C (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,  
D 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 defendants from selling, mortgaging, alienating or otherwise  
parting with possession with the land in dispute. The balance sale  
E 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  
F 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  
G 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.

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13. Feeling aggrieved, Rakesh Kumar preferred a Regular First Appeal before the Delhi High Court. The High Court addressed itself only to the 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 16<sup>th</sup> 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 4<sup>th</sup> 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, 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 29<sup>th</sup> 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

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A to two decisions which are quite apposite to the facts of the case before us.

B 19. In *His Holiness Acharya Swami Ganesh Dassji v. Sita Ram Thapar*<sup>1</sup> this 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 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:

C “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 bid for the time which disentitles him as time is of the essence of the contract.”

F 20. In *I.S. Sikandar (Dead) by Lrs. v. K. Subramani & Ors.*<sup>2</sup> 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 arrangements for payment of the balance consideration. It was held in paragraph 45 and paragraph 47 of the Report:

G <sup>1</sup> (1996) 4 SCC 526

H <sup>2</sup> (2013) 15 SCC 27

“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.....”

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“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.....”

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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.

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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.

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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<sup>th</sup> May, 1986 and the relevant clause of the contract is remarkably vague and reads as follows:

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A “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 the vendors  
B 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.  
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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.  
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