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**IN THE HIGH COURT OF DELHI AT NEW DELHI**

Pronounced on: 09.08.2010

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**CS (OS) 732/2007, I.A.Nos.4600/2007,  
10981/2008 and 5149/2010**

SHRI PRAVEEN KUMAR JAIN . . . . . Plaintiff

Through: Mr. K.S. Singh, Advocate.

versus

SHRI PANKAJ KUMAR JAIN . . . . . Defendant

Through: Mr. Pankaj Kumar Jain, defendant in person

**CORAM:**

**MR. JUSTICE S. RAVINDRA BHAT**

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|----|---|-----|
| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to Reporter or not?  | YES |
| 3. | Whether the judgment should be reported in the Digest?                    | YES |

**MR. JUSTICE S.RAVINDRA BHAT**

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1. This suit claims a decree for specific performance of an agreement arrived at on 31st of March 2005, in respect of Shop No. 3, Savitri Sadan, Plot No. 11, Preet Community Centre, Delhi (hereafter referred to as “ the suit property”). A decree for possession of the suit property is also claimed. The suit was listed before the court for consideration of an application to implead a third party, claiming that she is necessary for the adjudication in the proceeding. At that stage, the court considered the pleadings and documents with a view to decide whether such an application is necessary and whether the suit could be disposed of on the basis of the existing materials. The parties are accordingly heard on the previous date of hearing i.e. 14-07-2010 and

the case was kept for orders today. This order proposes to dispose of the pending applications and the suit.

2. The plaintiff contends to having engaged himself in the business and style M/s Jainco Properties. According to the suit averments, the defendant (owner of the suit property) entered into an agreement with one Ms. Neelu Khandari (hereafter called “the purchaser”) on 31-03-2005 for the sale of the suit property for a total consideration of Rs. 22, 31,000/-, out of which Rs.1,00,000/- was paid to that owner as advance money. The suit describes the terms of the written agreement cum money receipt executed between the owner and the defendant. That document has been filed along with the suit; it reads as follows:

*“ Received a sum of Rs. 1,00,000/- (Rupees one lakh only) in cash as advance from Smt. Neelu Kandhari w/o Sh. Pradeep Kandhari, r/o D-8, Krishna Nagar, Delhi -- 51, for the sale of entire built-up Shop No. 3, Savitri Sadan, Plot No.11, Community Centre, Preet Vihar, Delhi, measuring 170 sq. feet, as per details given below:*

- 1. That the rate settled is Rs. 22, 31,000/- (Rupees Twenty two lakh thirty one thousand only) lump sum.*
- 2. That the last date for making the balance full and final payment is settled for 30-04-2005 another part payment of Rs. 4,00,000/- (Rupees four lakh only) shall be paid within one week.*
- 3. That in case the above Purchaser(s) or his/her/their nominee(s) broker (s) failed to make the payment within the stipulated period, the above advance amount shall stand forfeited by the Seller(s) provided the Seller fulfils his part of the agreement before the date of final payment.*
- 4. That in case the Seller backs out from the commitment and do/does not fulfil the terms of this agreement, the above advance shall be refunded by the Seller(s) to the purchaser(s) in full along with a penalty of Rs. 1,00,000/- (Rupees one lakh only) which is equal to the above advance. That the purchaser can file suit. The performance against the Seller.*
- 5. It is very clear that the Seller(s) will clear the electricity bills (since dismantled of the electric meter) up to date and ground rent, and house tax of the property should be paid by the purchaser.*
- 6. That the Seller(s) agree(s) to sign any and all documents in favour of the purchaser(s) or any office nominee(s) at the time of receiving the final payment.*
- 7. That the seller(s) assure (s) the purchaser(s) that the property is free from all encumbrances/charges/mortgage/lien/litigation/acquisitions/notification and also has not been sold to any other person/firm/company earlier ...”*

3. It is further alleged that the purchaser in performance of the agreement, with the plaintiff visited the defendant several times along with the cash element of Rs. 4,00,000/- (Rupees four lakh only) but each time he i.e. the defendant, evaded to receive that amount and also failed to furnish the original title documents relating to the suit property despite demands and requests of the said purchaser. The suit alleges that the defendant sent a frivolous and baseless notice to the purchaser, to which he was asked to perform his part of the agreement in the reply sent on behalf of the purchaser on 20-04-2005. It is alleged that despite receiving this reply the defendant intentionally did not perform his part of the bargain. The suit next describes a memorandum of understanding entered into between the purchaser and the plaintiff as a consequence of which, it is contended, all rights and interest in respect of the suit property devolved upon the plaintiff. The Memorandum of Understanding has been filed along with the suit. It is extracted below:

“MEMORANDUM OF UNDERSTANDING

*This Memorandum of Understanding made on this 2.6.2005, between Shri Parveen Kumar Jain, S/o Late Shri N.R. Jain, R/o Dayanand Vihar, Delhi – 92, (hereinafter called the First Party)*

*Smt. Neelu Kandhari W/o Sh. Pradeep Kandhari R/o D-8, Krishna Nagar, Delhi - 51, (hereafter called the Second Party)*

*Entire Built-up Shop No.3, Savitri Sadan, Plot No.11, Community Centre, Preet Vihar, Delhi - 92, measuring area 170 sq. ft. (hereinafter will be called shop)*

*“The expression all the parties shall mean and include, unless repugnant to the context their respective legal heirs, executors, administrators, legal representatives, nominees and assigns.”*

*Second Party purchased aforementioned shop from Sh. Pankaj Kumar Jain, S/o Sh. Chote Lal, R/o 190, Saini Enclave, Delhi - 92, vide Money Receipt & Agreement to Sell 31.3.2005, and Second Party gave Rs.1,00,000/- (Rs. One Lakh only) as advance to the aforementioned person.*

*But due to some reason Second Party is not interested in purchase of aforementioned shop and is giving all his purchasing rights regarding aforementioned shop to First Party.*

*Second Party has taken back all his paid advance i.e. Rs.1,00,000/- (Rs. One Lakh only) from First Party & now both the parties have no give & take from each other regarding abovesaid shop.*

*From Now the First Party will be fully authorized to purchase the abovesaid shop on same terms & conditions (which are already mentioned in aforementioned Money Receipt & Agreement to Sell). Along with his First Party will be fully authorized to sell/rent out the said shop to any person at any rate & the Second Party will have no right & claim in the aforementioned shop in any manner.*

*IN WITNESS WHEREOF parties have put their respective signatures on the date mentioned above.*

*Witnesses:*

*First Party*

*Second Party”*

4. The plaintiff contends that with his having entered into the Memorandum of Understanding with the purchaser, he became exclusively entitled to deal with and acquire the suit property. It is submitted that despite repeated attempts to persuade the defendant to fulfil his obligations and convey the property, he failed to do so for some reason or the other and, on the other hand kept pleading with the plaintiff not institute any suit or litigation against him. The suit alleges that under the circumstances, a legal notice was served upon the defendant on 11-07-2005; a copy of the same has been filed along with the suit. It is extracted below:

“Regd. A.D./UPC

*To  
Sh. Pankaj Kumar Jain  
S/o Sh. Chhote Lal Jain  
r/o 190, Sainik Enclave  
Delhi – 110 092.*

*Sir,*

*We have been retained by Sh. Parveen Kumar Jain, S/o Late Sh. N.R. Jain, R/o 12, Dayanand Vihar, Delhi - 110 092, the assignee and nominee of Smt. Neelu Kandhari, w/o Sh. Pradeep Kandhari, R/o D-8, Krishna Nagar, Delhi – 110 051, hereinafter referred to as our Client to serve upon you this legal notice to the following effect: -*

1. *That you noticee on 31.03.2005 entered into an Agreement for Sale of entire built up shop No.3 (measuring 170 sq. ft.) Savitri Sadan, Plot No.11, Community Centre, Preet Vihar, Delhi – 92.*
2. *That you noticee also received Rs.1.00 lacs as earnest money out of total sale consideration of Rs.22,32,000/- (Rupees Twenty lacs thirty two thousand only) and you notice executed an Agreement and money receipt as per terms and conditions mentioned in the agreement dated 25.3.2005.*
3. *That in furtherance of your mala fide intentions, you sent a frivolous notice to Smt. Neelu Kandhari.*
4. *That a reply dated 20.4.2005 to the aforesaid frivolous notice was served upon you whereby you were called upon to perform your part of agreement dated 31.3.2005. The contents of the reply dated 20.4.2005 are being relied upon as part and parcel of this notice. Though a copy of the reply has already been served upon you, even then, a true copy of the aforesaid reply is being annexed to this notice for ready reference.*
5. *That after receiving the reply dated 20.04.2005, you noticee on 27.4.2005 contacted Smt. Neelu Kandhari as well as the brokers M/s JAINCO PROPERTIES, Shop No.4, Aditya Complex, Preet Vihar, Delhi-92, with a request not to initiate any legal proceedings against you and you also assured to perform your part of the agreement within a fortnight on the pretext that the original documents with respect to your title over the aforesaid shop, were not available with you.*
6. *That thereafter, you noticee kept on requesting Smt. Neelu Kandhari through the Broker M/s JAINCO PROPERTIES to grant you some more time for the aforesaid purpose.*
7. *That on 2.6.2005, you noticee visited the office of the brokers M/S JAINCO PROPERTIES and in presence of friends and relations, requested that you would be ready to perform your part of the contract after a week but not later than 25.6.2005. That you noticee was also given a copy of memorandum of Understanding of the even date, executed between Smt. Neelu Kandhari and Sh. Parveen Kumar Jain, whereby Smt. Neelu Kandhari has relinquished her rights with respect to the aforesaid shop, in favour of Sh. Parveen Kumar Jain, and has also assigned her rights of a bonafide purchaser of the aforesaid shop from you noticee.*
8. *That you noticee assured Sh. Parveen Kumar Jain that you would contract him with respect to the performance of your part of agreement dated 31.3.2005, within the aforesaid period but you have failed to do so.*

9. *That from your acts and conduct it is manifest that your intentions, throughout have been to cheat and defraud our Client for that purpose you are liable to be prosecuted under Section 406/420 IPC.*

10. *That your clients have always been ready and are ready and willing to perform their part of the agreement dated 31.3.2005. It is made clear that the aforesaid shop is subject matter of agreement dated 31.3.2005 and Memorandum of Understanding dated 2.6.2005 and you are not entitled to sell it to any other person except Sh. Parveen Kumar Jain.*

*I hereby call upon you to perform your part of the agreement dated 31.3.2005 within 07 days of the receipt of this notice, failing which our client shall be constrained to initiate civil as well as criminal proceedings against you at your risks and costs. You are also liable to pay Rs.5,500/- as the cost of sending this notice to you.*

*Copy of this is being kept in our office for further reference.*

*Yours truly*

*K.S. Singh & Co.  
Advocates*

*Dated 11.7.2005  
Encl: as above."*

5. The plaintiff contends through his counsel that the purchaser parted with all the rights to deal with the property, in his favour and received the sum of Rs. 1,00,000/-. It is submitted that being the nominee of the purchaser, the plaintiff is entitled to maintain the suit and claim specific performance from the defendant, owner of the suit property who too, it is alleged, is a property broker. It is submitted that in terms of the Receipt-cum-Agreement of 31-03-2005, the defendant was obliged to convey the property to the purchaser and receive the balance agreed consideration. It is argued that the materials on record clearly suggests that despite repeated requests, within the time agreed the defendant sought to resile from his obligations and deliberately evaded from receiving the amount with the intention of selling the suit property for a higher amount later on. It is submitted that the legal notice issued to the defendant in reply to his letter clarifies that the plaintiff and before him, the purchaser was always ready and willing to perform her part of the bargain. Under these circumstances, says the plaintiff, the court should allow the purchaser who was not originally impleaded in the suit, due to oversight, to be added as a party defendant and ensure that justice is done by granting the decree claimed.

6. The defendant generally denies the suit averments in the claim, contending that the plaintiff has no right or interest to claim any decree reliefs against him i.e. the defendant. The defendant denies the memorandum of understanding dated the 02-06-2005 is not binding and unauthentic. The defendant also states that he has no relationship with the plaintiff to enable the latter to claim relief of specific performance in respect of the suit property and asserts that the suit itself is misconceived and therefore liable to be dismissed.

7. Is contended by the defendant that he entered into an agreement to sell the suit property to the purchaser on 31st of March 2005 for which he received Rs. 1,00,000/- from her. He also does not deny that she had agreed to pay a further Rs. 4,00,000/- within a week after that date. He agrees that the last date by which the purchaser had to make the balance payment of consideration was the 30 April 2005. He however alleges that the plaintiff was merely a broker who facilitated the transaction and was therefore disentitled to file the present suit. The defendant highlights the third clause of the 31 March 2005 agreement with the purchaser, which states that in the event of her defaulting on payment within the stipulated period the advance amount received by the defendant would be forfeited. It is argued that the purchaser completely breached the said term as she did not make payment of Rs. 4,00,000/- within a week after the date of the agreement. He mentions about having a notice to the purchaser on 11-04-2005 pointing out that the sum of Rs. 4,00,000/- payable within a week, had, in fact not been received by him. The defendant also submits that he did not receive the balance amount despite which he presented himself before the Sub Registrar on 02-05-2005 for execution of sale documents in favour of the purchaser who, despite repeated and several telephone calls did not breach there. The defendant relies upon the receipt of that date to evidence his having visited the concerned Sub-Registrar's office.

8. The defendant opposes the request for impleading the purchaser as a party to the proceeding, contending that the plaintiff deliberately did not choose to make a party and cannot do so at this late stage. It is further submitted that adding the purchaser as a party defendant essentially to support the plaintiff now, would prejudice the defendant in his prosecution of the case. It is argued that if the purchaser had indeed parted with all the rights in the plaintiffs favour, she cannot be made a party and has no interest in the suit property, which is itself contrary to the suit averments. It is lastly argued that the plaintiff cannot approbate and reprobate in this regard. The defendant argues that taken as a whole the suit, and the documentary material

is sufficient for the court to conclude that the decree dismissing the claim can be conveniently made at this stage. The provisions of Order XII Rule 6. Code of Civil Procedure (“CPC”) are relied upon to say that the court can at any stage and of its own motion, having regard to the materials on the judicial record, decree or dismiss the suit.

9. From the above narration, what can be discerned is that the purchaser entered into an agreement on 31 March 2005, with the defendant, who owns the suit property, for its purchase. The agreement stipulated that the total consideration payable was Rs. 22, 31,000/- (Rupees Twenty two lakh thirty one thousand only) “lump sum”. Rs. 1,00,000/- was concededly received by the defendant on that date; Rs. 4,00,000/- was payable by the purchaser within a week thereafter. The third clause of the agreement stipulated that if the payments agreed were not made within the time, the defendant could forfeit the amount received by him as advance; the entire consideration was payable on or before 30-04-2005. The plaintiff claims to have entered into the picture, through an assignment as it were, by the purchaser, effected through a document called as “the memorandum of understanding” dated 02-06-2005. It is argued that the plaintiff is entitled to maintain the present suit claim, since the defendants original agreement with the purchaser, dated 31 March 2005, entitled her to nominate someone else as the purchaser which she did through the memorandum of understanding. The plaintiff further argues that even before the memorandum of understanding, the purchaser had repeatedly sought to pay the balance amount to the defendant which refuse to receive and evaded from fulfilling its obligations on one pretext or the other. However there is no documentary material in this regard; there is no evidence of any notice that the purchaser had tendered the sum of Rs. 4,00,000/- within a week after entering into the original agreement to sell. Reliance is placed merely upon two letters - one, a reply written on behalf of the purchaser in response to the defendants legal notice; and two, the plaintiff's notice to the defendants calling upon him to execute a sale conveyance deed.

10. What is immediately apparent from the above discussion is that the purchaser was under an obligation to pay a further amount of Rs. 4,00,000/- within a week after the agreement of 31-03-2005; there is no evidence that she did or was in a position to do so. She did not cause any legal notice to be issued within that or any contemporaneous period; nor has the plaintiff pointed to, or produced material showing that the purchaser was able to fulfil that obligation. Furthermore, the agreement clearly stipulated that the last date for paying the entire consideration was 30-04-2005. There is no material to show that the purchaser tendered the



entire balance consideration or offered to do so was even able to do so as of that period of time. The balance consideration -after adjusting the initial advance paid to the defendant- was Rs.21,32,000/- (Rupees Twenty one lakhs thirty two thousand only). This aspect is extremely important, because anyone claiming a decree for specific performance of an agreement to purchase immovable property must be in position to plead and prove that at the material time of the designated performance, as well as on the date of filing of the suit he or she was ready and willing to perform his part or her part of the bargain which essentially means that such purchaser possessed the financial or economic means to pay within the time stipulated, the agreed amount, to the owner. It is well known that a decree for specific performance is issued by a court after taking into all facts and attendant circumstances and weighing the equities of the case in totality. In this case there is no whisper or any material suggestive of the purchaser's ability, and willingness to fulfil this part of the bargain within the stipulated time. Though in an agreement for purchase of immovable property, time is not deemed of the essence, yet the court cannot disregard the time fixed by the parties themselves, as a specific term, designating it as the duration of the bargain. So viewed, it has to be concluded that the plaintiff's inability to disclose or demonstrate the purchaser's willingness to pay the amounts within the overall time, is fatal to the suit claim. The silence about payment to be made within a week of the date of the agreement is also significant, in this context. This is an extremely important factor which would weigh with the court while considering the most equitable order to be made in this case.

11. The most singular feature in this case is that the plaintiff clearly did not have any privity of contract with the owner of the property i.e. the defendant. He however seeks to obviate this with his argument that under the original Agreement of 31-03-2005, the purchaser was entitled to nominate someone else in her stead, who could complete the transaction. The plaintiff therefore relies upon this stipulation - which is the implicit premise of Clause 3 of the agreement, to establish his right or *locus standi* to maintain the present suit. Now even if this argument were to be taken in the face value, the plaintiff has certain obstacles in his way for claiming the reliefs that he does in the suit. He more than anyone else has to establish that the other part of that very stipulation i.e. payment within the stipulated time, had been complied with by the purchaser. As held in the preceding paragraph of this judgment, the materials and the pleadings, taken as a whole point to the contrary i.e. that the purchaser was neither able nor willing to perform her part of the bargain and pay the amount. There is no, much less substantial material showing financial

capacity of the purchaser as of 30<sup>th</sup> April 2005 to pay Rs.21,32,000/- (Rupees Twenty one lakhs thirty two thousand only). In the circumstances the implicit premise of the purchaser's choice of designating a nominee to act in her stead or to take her place as the purchaser, could not have arisen at all. In other words the conditions requisite for the purchaser to enable a nominee to step into her shoes, were left unfulfilled; there could have been therefore no nominee, entitled to assert a claim for specific performance of an agreement which had, in effect lapsed after the first week of May, 2005 (in fact, after 30<sup>th</sup> April, 2005). The plaintiff concededly claims his rights as flowing from the Memorandum of Understanding dated 02-06-2005 i.e. a document executed *after* the purchaser lost her right seek specific performance against the defendant. That apart, the court discerns in this case at least, and untenable element in the plaintiffs claim. He seems to be treating the right to claim specific performance as an assignable one, virtually on par with a tradable commodity or even a negotiable instrument. Granted, there can be circumstances where the potential purchaser who enters into an agreement to acquire immovable property, visualises a contingency where his place can be taken by nominee, provided the requisite conditions are fulfilled. Normally in such circumstances, the vendor or seller should also have the choice of at least awareness of such nominee or else he would be left at the mercy of a stranger who might not fulfil his part of the bargain, thus defeating the seller's purpose of entering into the agreement. Also a contract for purchase or sale of immovable property is based on mutuality which presupposes awareness and willingness to enter into contract. If like in this case, the owner is asked to perform his part of the bargain or convey the property much after the date agreed and in favour of a complete stranger, it would result in inequity.

12. As far as the interlocutory application for adding the purchaser is concerned, the court notices that in normal circumstances, there could have been no objection to such a proposal. However, here the plaintiff consciously chose to keep the said purchaser away from the picture, for the last 5 years, and now, realizing that the claim perhaps could be asserted through her, is seeking to add her as party. This would be followed with the inevitable application for amendment of the suit; in that event the whole character of the claim would be changed, since the plaintiff has all along asserted that he possesses exclusive rights in respect of the suit property, at least to compel the defendant to specifically perform the agreement after 30<sup>th</sup> April 2005. The addition of this party would amount to permitting an inconsistent plea, and also potentially allowing a claim to be asserted, after the lapse of the period of limitation. The

limitation period of three years commenced from end of July, 2005, in which month the plaintiff sought for execution of sale deed from the defendant. The inclusion of the purchaser as a party in support of the claim can only be allowed in terms of Section 21 of the Limitation Act, which means that she can at best be allowed to join the proceeding with effect from the date the court permits it, and not with effect from the date the suit was filed. The claim, on that score would be clearly time barred. Therefore, the application cannot succeed, and must fail.

13. It has been often held that the courts are under an obligation to scrutinise the effect of documents and pleadings in each case at different stages with a view to ensure that claims that are untenable or defences which are frivolous, can be summarily dealt with. This includes the courts' scrutiny under Order XII Rule 6, CPC, which empowers it to draw a decree as the circumstances may warrant -- including if so required, a decree dismissing the suit. As a result of the previous discussion this court is of the opinion that taken together, the documents and pleadings in the case clearly point to the suit claim being untenable and not warranting trial but a decree of dismissal. Under the circumstances the plaintiff is directed to bear the costs to be paid to the defendant is quantified at Rs. 50,000/-. It shall be paid to the defendant within four weeks. Resultantly the suit is dismissed, in the above terms.

9<sup>th</sup> August, 2010

**(S.RAVINDRA BHAT)**

**JUDGE**