
(2005) 12 DEL CK 0012

In the Delhi High Court

Case No : IA 5929 of 2004 in CS (OS) 980 of 2004

Anant Raj Agencies Pvt. Ltd.

APPELLANT

Vs

Shri Sudershan Soni and Others

RESPONDENT

Date of Decision : 20-12-2005

Acts Referred:

Citation : (2005) 12 DEL CK 0012

Hon'ble Judges : Anil Kumar, J

Bench : Single Bench

Advocate : Harish Malhotra and Nitin Aggarwal, for the Appellant; Anil Airi and Amit Saxena, for the Respondent

Judgement

Anil Kumar, J.—This order shall dispose of plaintiff's application under Order 39 Rules 1 and 2 of Code of Civil Procedure. The plaintiff has filed this application in a suit for the specific performance of the contract and permanent injunction seeking restrain against the defendants from selling, transferring, disposing of or parting with the possession of the land admeasuring 22 bighas 5 bids was (4.634 acres) in Khasra No. 12 (2-4), 13 (4-16), 14(3-11), 15(4-16), 17(0-6), 78/1(0-11), 78/1(1-2), 78/3(0-3) situated in revenues State of village Shah Pur, Hauz Khas, District south in the National capital Territory of Delhi pursuant to an oral agreement to sell dated 10.05.2004 for a total sale consideration of Rs. 6,76,50,400.00 in favor of plaintiff. By an ex-parte interim order dated 13th September, 2004 the defendants were restrained from selling, transferring, disposing of or parting with the possession of the said land in favor of any third-party except the plaintiff till further orders.

2. In the suit for specific performance filed by the plaintiff, it was contended that the plaintiff paid a sum of Rs. five lakhs to defendant No. 1 and another sum of Rs. five lakhs to defendant No. 2 in cash towards part consideration of oral agreement to sell. After the oral agreement, a memorandum of understanding was reduced into writing on 13th June, 2004 incorporating the terms and conditions in regard to sale of the said property. plaintiff asserted that the terms

and conditions reduced into writing were unequivocal and agreed and understood between the parties and concluded the agreement. The defendants acknowledged the receipt of Rs. 10 lakhs from the plaintiff in the said memorandum of understanding in which it was also acknowledged that an agreement to sell shall also be executed between the parties within three days of the execution of said memorandum of understanding and at the time of execution of the agreement to sell, the plaintiff would pay another sum of Rs one crore and 60 lakhs to defendants No. 1 and 2 in the manner and mode as stipulated in the memorandum of understanding. The plaintiff stated that at the time of arriving of oral settlement and execution of memorandum of settlement though it was disclosed that a writ petition challenging the acquisition notice is pending but it was never disclosed that there was any stay against the defendants from alienating or transferring the said land. After executing the memorandum of understanding on 13th June, 2004, the plaintiff came to know through a broker that there was a stay against the defendants restraining them from alienating the land in any manner and making construction thereon. The plaintiff, Therefore, wrote letters to the defendants seeking Explanation whether any construction was carried out on the land after the order dated 16th January, 1987 though the land had a complete building on it. The plaintiff contended that he sought information from the defendants whether there is any injunction order which would prevent the defendants from transferring the said property in favor of the plaintiff and whether the construction on the property was done before or prior to order dated 16th January, 1987 and whether the defendants are holding any sanction plan and completion certificate for the building existing on the said land. Since the defendants did not reply to the queries raised and the plaintiff got rumors that the defendants were contemplating sale of the said property to other persons, a public notice was given and thereafter, the suit for specific performance was filed. The plaintiff declared that he had always been ready and willing to perform his part of the agreement. In the suit the plaintiff has sought relief of specific performance and perpetual injunction against the defendants.

3. The plaintiff has relied on Kollipara Sriramulu Vs. T. Aswathanarayana and Others, and Durga Nath Sharma and Another Vs. Shyam Shanker Goela, to contend that after concluded oral agreement to sell and execution of Memorandum of Settlement, execution of a written Agreement to sell was a mere formality, as a concluded agreement to sell was already arrived at between the parties.

4. The defendants have countered the allegations made by the plaintiff by contending that no concluded oral agreement to sell was arrived at between the parties and since no agreement to sell was executed between the parties, no binding contract has come into existence between the parties which can be specifically enforced. The parties had agreed to enter into a written agreement to sell and payment of a substantial part of tentative consideration of Rs. 1,60,00,000 from the total consideration which was not a mere formality. Execution and signing of agreement to sell and payment of Rs. 1,60,00,000/-, a

part of the consideration, was essential to the bargain and in the absence of any written agreement to sell and payment of Rs. 1,60,00,000/-, a part of the tentative consideration, there is no concluded contract which can be enforced. Alleging malafide against the plaintiff it was stated that the family of 'Sarin"s" who controls the plaintiff and defendants are neighbors since 1975. Defendants stated that everything pertaining to land including the injunction order was conveyed to the plaintiff who had represented that they are aware of notifications and proceedings as they are holding adjoining lands and have sufficient manpower and infrastructure to get all the proceedings settled.

5. The defendants also asserted that no agreement to sell could be executed for the sale of the property because of injunction order dated 16th January, 1987 passed by High court in Civil Writ petition No. 130 of 1987 whereby the defendants were restrained from alienating the property. The defendants also asserted that no agreement to sell could be executed because of notifications u/s 4 and 6 of the Land Acquisition Act had been issued for the said land and Therefore memorandum of understanding was executed between the parties. It was also stated that the suit is barred under the provisions of Delhi Lands (Restrictions of Transfer) Act, 1972. The suit was also held to be not maintainable and barred u/s 23 of the Indian contract act, 1872 on account of alleged agreement forbidden by law. Defendants pleaded that it will be against preponderance of all probability that they will enter into an agreement to sell for the value of Rs. 6,76,50,400 by receiving a meager sum of Rs 10 lakhs as alleged against all the market norms of 20-25% of payment on execution of agreement to sell. Even according to memorandum of understanding, a sum of Rs. 1,60,00,000/-was payable within three days of execution of memorandum of understanding and on failure the amount paid by the plaintiff was to be forfeited and instead of paying the said amount in terms of understanding, within thirty days the present suit for a specific performance and injunction has been filed by the plaintiff. In the circumstances it was contended that there is no prima facie case and even the balance of convenience is not in favor of the plaintiff and consequently the vacation of ex-parte interim order and dismissal of application under Order 39 Rules 1 and 2 of CPC is prayed.

6. The learned Counsel Mr. Anil Airy for the defendants has relied on Mayawanti Vs. Kaushalya Devi, ; 113 (2004) DLT 675 , Pelikan Estate Pvt. Ltd. v. Kamal Pal Singh and Ors; High Way Farms Vs. Sh. Chinta Ram and Others, ; K.G. Khosla and Another Vs. Rahul C. Kirloskar and Others, ; H.G. Krishna Reddy and Co. Vs. M.M. Thimmaiah and Another, ; The Chairman-cum-Managing Director, Tamil Nadu Tea Plantation Corporation Limited, Essex Lodge, Orange Grove Road, Coonoor and other Vs. M/S. Srinivasa Timbers and others, ; The Andhra Pradesh State Electricity Board, Hyderabad Vs. K. Ramachandra Reddy, ; Vinod Saluja Vs. Sita Rani, and Kollipara Sriramulu Vs. T. Aswathanarayana and Others, to contend that the execution of agreement to sell was not a mere formality and the parties were not at ad-idem and there was no concluded agreement between the parties and the specific performance is a discretionary relief and it will not be

ordered if the contract itself suffers from some defect which makes the contract invalid or unenforceable.

7. It is well settled that it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed will in fact go through. By a memorandum of understanding dated 13th May, 2004, arrived at between the parties, the terms and conditions of the oral agreement dated 10th May, 2004 were reduced into writing which contemplated execution of an agreement to sell and payment of Rs. 1,60,00,000/-. The balance payment was to be made within 30 days of the second payment i.e. the payment of Rs. 1,60,00,000/- against registration of the sale deed or General Power of attorney/receipt/will etc. and to deliver physical vacant possession of the land in dispute.

8. The location of the land which was agreed to be sold was though identified but was not exactly measured. The exact area to be sold was not settled though the khasra numbers were given. The price for the purchase of land by the plaintiff was estimated with agreed rate for reducing or enhancing the tentative price according to the exact area of the land. However, the exact consideration was not calculated as the exact area was not measured. A part of the tentative consideration was also agreed to be paid in two stages, a token amount of Rupees ten lakhs at the time of execution of memorandum of understanding and a substantial amount of Rs. 1.60 crores was payable at the time of execution of agreement to sell. The memorandum of understanding dated 13th June, 2004 also stipulated that the land proposed to be sold is subject matter of issuance of acquisition proceedings, notice of which has been challenged by the defendants by means of a writ petition pending in the High Court of Delhi at New Delhi and it was contented that the plaintiff had verified and satisfied themselves about the present position of the land as the persons who controlled the plaintiff, hold adjoining lands.

9. Whether the land could be sold despite the order of the Court in acquisition proceedings, was not settled between the parties, as the plaintiff had been seeking information regarding right of the defendant to sell the land and building constructed thereon and whether the building was constructed prior to injunction order granted by the Court or afterwards and whether the defendant had completion certificate and sanctioned plans in respect of construction whereas the defendant has been contending that the persons who control the plaintiff, hold adjoining lands and they had agreed to purchase the lands on as is where is basis. In *Pelican Estates Pvt. Ltd v. Kamal Pal Singh and Ors.* 113 (2004) DLT 675 it was held that whether the alleged negotiations had remained inchoate or had fructified into consensus ad idem on all the ingredients necessary for the formation of a contract depends upon the intention of the parties and the special circumstances of each particular case. In the circumstance, can an inference be drawn that the parties were ad-idem in respect of all the terms and conditions

between them and there is a concluded contract between the parties which can be specifically enforced.

10. The plaintiff has relied on Kollipara Sriramulu (supra) and Durga Nath Sharma (supra) to contend that a concluded oral agreement to sell, settling essential terms of agreement were concluded and a written agreement to sell was a mere formality. In Kollipara (supra) it was held that whether there is a binding contract between the parties or not depends upon the intention of the parties and the special circumstances of each particular case. It was held by the Apex Court:

It appears to be well settled by the authorities that if the documents or letters relied on as Constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the later case there is a binding contract and the reference to the more formal document may be ignored. In other words, there may be a case where the signing of a further formal agreement is made a condition or term of the bargain, and if the formal agreement is not approved and signed there is no concluded contract.

11. Whether there was a concluded oral agreement to sell, Therefore, has to be assessed from the facts of the case. Relying on Kollipara (supra) it can not be inferred that the plaintiff had arrived at a concluded oral agreement to sell. Similarly the case of Durga Nath Sharma (supra) relied on by the plaintiff does not supports the pleas raised by the plaintiff that there was a concluded contract and execution of written agreement to sell and payment of substantial part of tentative consideration was a mere formality. In Durga Nath Sharma (supra) an amount of Rs. 8500 was received by the seller and the balance amount of Rs. 76,500 was payable within 15 days from the date of approval of building plan by the D.D.A. In the circumstances execution of construction agreement, will, General Power of attorney, special power of attorney, affidavits, agreement to sell and other relevant documents regarding the property were held to be a formality as the earnest money was paid and payment of balance consideration was also settled. Restriction on sale, transfer or assignment or parting with possession to a person not a member of the society except with the previous consent in writing was held not to be detrimental on account of specific statement of an official of D.D.A about granting of consent by D.D.A on receipt of unearned increase.

12. It is settled law that if a contract is to be made, the intention of the offeree to accept the offer must be express without leaving room to the doubt as to the fact of acceptance or to the co-incidence of the terms of the contract with those of the offer. There is also not doubt that the existence must be absolute, must

correspond with the terms of the offer. If the two minds are not ad idem in respect of the property to be sold, there cannot be a contract for specific performance.

13. In *Rossiter v. Miller* (1878) 3 AC 1124 Lord Cairns said:

If you find not an unqualified acceptance subject to the condition that an agreement is to be prepared and agreed upon between the parties, and until that condition is fulfilled no contract is to arise then you cannot find a concluded contract.

A concluded contract is one which settles everything and leaves nothing to be settled between the parties. In (1934) 2 KB 7, *May and Butcher v. The King*, it was held:

Lord Dunedin told that to be a good contract there must be a concluded contract and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties.

14. Where a concluded agreement to sell is being set up there must be no possibility of doubt on any essential concomitants of the contract. A contract of sale does not create any right in the property and can not bind the Estate as is the position in the case of a mortgage or lease. Though personal rights created against the vendor to obtain specific performance can ultimately bind any subsequent transferee who obtains transfer of the property with notice of the agreement to sell. Under the provisions of Transfer of Property Act in India an agreement to sell specially does not create an equitable estate in the purchaser. Reliance for this can be placed on the decision of this Court in *Jiwan Das Vs. Narain Das*, where it was observed:

Adverting, Therefore, to the merits of the controversy, it may at the outset be taken note that unlike the law in England where an agreement of sale creates an equitable estate in the purchaser, the law in India does not recognize any such estate. Section 54 of the Transfer of Property Act in specific terms provides that a contract for sale does not, of itself, create any interest in or charge on such property. Such contract is merely a document creating a right to obtain another document in form of sale deed to be registered in accordance with law. In other words, a contract for sale is a right created in personam and not in estate. No privity in estate can be deduced there from which can bind the estate, as is the position in cases mortgage, charge or lease. Of course, such personal right created against the vendor to obtain specific performance can ultimately bind any subsequent transferee who obtains transfer of the property with notice of the agreement of sale.

15. The Apex Court in *Mayawati* (supra) had held that the jurisdiction to order specific performance of a contract is based on the existence of a valid and enforceable contract. Where a valid and enforceable contract has not been made, the Court will not make a contract for them and the specific performance will not

be ordered if the contract itself suffers from some defect which makes the contract invalid or unenforceable. It was rather held that even if the contract is valid and enforceable, the discretion of the Court will be there to pass or not to pass a decree of specific performance but if the stipulation and terms are uncertain, and the parties are not ad idem, there can be no specific performance, for there was no contract at all. Where there are negotiations, the Court has to determine at what point, if at all, the parties have reached. It was observed by the Supreme Court:

8...The jurisdiction to order a specific performance of a contract is based on the existence of a valid and enforceable contract. The law of contract is based on the ideal of freedom of contract and it provides the limiting principles within which the parties are free to make their own contracts. Where a valid and enforceable contract has not been made, the court will not make a contract for them. Specific performance will not be ordered if the contract itself suffers from some defect which makes the contract invalid or unenforceable. The discretion of the court will be there even though the contract is otherwise valid and enforceable and it can pass a decree of specific performance even before there has been any breach of the contract. It is, Therefore, necessary first to see whether there has been a valid and enforceable contract and then to see the nature and obligations arising out of it. The contract being the foundation of the obligation the order of specific performance is to enforce that obligation.

11. It is settled law that if a contract is to be made, the intention of the offeree to accept the offer must be expressed without leaving room for doubt as to the fact of acceptance or to the coincidence of the terms of acceptance with those of the offer. The rule is that the acceptance must be absolute, and must correspond with the terms of the offer. If the two minds were not ad idem in respect of the property to be sold, there cannot be said to have been a contract for specific performance. If the parties themselves were not ad idem as to the subject matter of the contract the Court cannot order specific performance.

18. The specific performance of a contract is the actual execution of the contract according to its stipulations and terms, and the courts direct the party in default to do the very thing which he contracted to do. The stipulations and the terms of the contract have, Therefore, to be certain and the parties must have been consensus ad idem. The burden of showing the stipulations and terms of the contract and that the minds were ad idem is, of course, on the plaintiff. If the stipulations and the terms are uncertain, and the parties are not ad idem, there can be no specific performance, for there was no contract at all. Where there are negotiations, the Court has to determine at what point, if at all, the parties have reached agreement. Negotiation thereafter would also be material if the agreement is rescinded.

16. In the present case, the exact area with the boundaries had not been measured and specified though the tentative area with the khasra numbers. were agreed. Though the rate at which the land was to be sold was specified, however,

the exact consideration was not computed. Whether the defendants had the competence to sell the land despite an order of restraint was also in dispute as the defendants have, in the memorandum of understanding, stipulated that the defendants are agreeing to sell on as is where basis after plaintiff satisfying himself about the orders passed in the pending writ petition and has satisfied himself about the present position of the land, however, the plaintiff raised his doubts regarding the competence of the defendants to sell the land. This leaves no doubt for prima facie inference that there was no concluded agreement between the parties and the execution of agreement to sell and payment of Rs. 1,60,00,000 at the time of execution of agreement to sell was not a mere formality.

17. It is no doubt true that in case the proposed vendor is not restrained from transferring or alienating the property till the decision of the suit for a specific performance of the agreement to sell, the plaintiff in case of success may have to resort to proceedings against the person who with notice of the suit has purchased the property. In the case of plaintiff, prima facie there is not even concluded agreement to sell though the plaintiff contention is that an oral agreement to sell was concluded incorporated into a memorandum of understanding which is the concluded contract and a formal agreement to sell was a mere formality. Though I have inferred that prima facie there was no concluded agreement to sell as execution of agreement to sell and payment of Rs. 1,60,00,000 in view of the restrain order already passed against the defendants was not a mere formality, however, even if it is assumed that execution of agreement to sell was a mere formality, can this be a ground for grant of an injunction in this case or in such similar cases.

18. Admittedly the tentative consideration as agreed between the parties is Rs. 6,75,50,400/-. The defendants have been paid a paltry sum of Rs 10 lakhs. The plaintiff himself is doubting the capability and competence of the defendants to transfer the rights in the property on account of restrain order against the defendants in the proceedings initiated by them challenging the acquisition proceedings. In the circumstances can the defendants be restrained on merely receiving a sum of Rs 10 lakhs to deal with their property to sell, alienate or transfer, if they can, especially since the interest of the plaintiff in any case is protected by the doctrine of lis pendence as contemplated in section 52 of Transfer of Property Act. Reliance can be placed on an order of a single Judge in Vinod Saluja Vs. Sita Rani, . In this case a sum of Rs. 21,000 was allegedly received against the value of the property being not less than Rs 48 lakhs and single Judge had declined to restrain the vendor from transferring, selling, alienating or creating third-party interest in the property.

19. Consequently in the facts and in totality of circumstances, prima facie, the execution of agreement to sell after the execution of memorandum of understanding and payment of Rs. 1,60,00,000/-was not a mere formality. In view of the restrain against the defendants, they could not transfer the

possession of the land and the property constructed thereon to the plaintiff. When the plaintiff himself has raised doubts about the competence of the defendants to sell their land, the plaintiff can not contend that there was a concluded agreement between plaintiff and the defendants. For all these reasons, I am of the view that the plaintiff is unable to make out a prima facie case and is not entitle for a restrain order in his favor and against the defendants restraining them from selling, transferring, alienating or creating third-party interest in favor of anyone. Therefore the ex parte dated 13th September, 2004 is vacated and the application of the plaintiff is dismissed. The parties are however, left to bear their own costs. It is also observed that any thing stated hereinabove is not the expression of final opinion on the merits of the case.