
(2002) 03 DEL CK 0022

In the Delhi High Court

Case No : OMP 384 of 2001 and IAs 1388, 1518 and 2380 of 2002

Andaz Securities Private Ltd. and Others

APPELLANT

Vs

Ghanshyamdas Kedia and Others

RESPONDENT

Date of Decision : 06-03-2002

Acts Referred:

Citation : (2002) 3 AD 585 : (2002) 2 ARBLR 60 : (2002) 97 DLT 200

Hon'ble Judges : Jiwan Dass Kapoor, J

Bench : Single Bench

Advocate : Neeraj Krishan Kaul, Malini Sood, Veronica Mohan and Ashutosh Khaitan, for the Appellant; M.C. Bhandare and N.M. Sharma, for the Respondent

Final Decision : Dismissed

Judgement

J.D. Kapoor, J.—Admittedly disputes arising out of agreement to sell executed between the parties are pending adjudication before the Arbitrator. The petitioners have through this application u/s 9 of the Arbitration and Conciliation Act, 1996 sought interim protection by way of restraining the respondents from selling, transferring, disposing of and/or parting with possession and/or creating any encumbrance and/or charge in any manner in respect of the suit land.

2. The facts germane for deciding the controversy in short are as under:-

3. The respondents and/or their predecessors-in-title were employee of M/s. Birla Cotton Spinning Weaving Mills Limited, Delhi and had purchased from the said company, 19 plots of land measuring 3 acres. At that point of time, the Master Plan showed it as an institutional area and no residential construction was permitted as per the Delhi Development Act and the Master Plan. While acquisition proceedings were pending, agreement of sell in question was executed. Till then, Master Plan did not permit use of the suit land for residential purposes.

4. As per Clause 11 of agreement to sell dated 1.4.1995. parties agreed to conclude the transaction by executing and registering the sale deed within a

period of six months from 1.4.1995 or within such extended time as may be agreed upon between the parties in writing. Only once time was executed by way of independent document in the form of supplementary agreement dated 1.10.1995. The relevant excerpt of the document is as under:-

"We are desirous of extending the validity of the agreement for sale. We have to state that we do hereby extend the validity of the Agreement in terms of Clause 11(a) of the said Agreement for sale for another period of three months from 1.10.95. The transaction shall now be concluded by execution and registration of the sale deeds within a period of three months from 1.10.95 or within such extended period as may be agreed upon between the parties in writing. All the other terms and conditions of the Agreement for sale shall remain the same and shall be binding on us as well as on you."

5. Admittedly the said period was not extended further either orally or in writing. However, at the same time, respondents had challenged acquisition proceedings before the Supreme Court and ultimately succeeded in getting order of the Supreme Court whereby Supreme Court vide order dated 12.12.1995 maintained acquisition proceedings and observed that "it is not in dispute that 19 persons now want construction of their houses in this area. Though some of them had purchased more than 330 sq. yds, uniformly everyone should have 330 sq. yds. It is appropriate for the appellant Union of India to change user of land in the Master and Zonal Plans to the above extent and direct the Lt. Governor to carve out the above land as part of the residential purposes which is adjacent to already existing residential apartment. The appropriate Government would suitably consider withdrawal from acquisition to the above extent only and allow use for residential purposes". It was specifically mentioned that the direction for release of the land should not be treated as a precedence in any case. It would be confined to the special facts of this case.

6. Pursuant to this order, Government of India changed the user of the aforesaid area of land. Again the Supreme Court on 7.4.1997 ordered that residential flats were required to be constructed for the said petitioners to an extent of one acre of the land and the area with the DDA would be 2 acres and Therefore there was no need to cut the existing trees growth. The Supreme Court suggested that the petitioners themselves would make the construction under the direction and supervision of the DDA. The DDA was directed to give necessary sanction to the plans and supervise the construction. The UOI was directed to change the user of the land within two months.

7. As is apparent from the aforesaid orders of the Supreme Court, the original area in respect of which agreement to sell was executed was 3 acres but it was reduced to 1 acre.

8. It is in the light of aforesaid conspectus of facts, Mr. M.C. Bhandare, learned senior counsel for the respondents has resisted the restraint order on the ground that with the orders of the Supreme Court that the petitioners would make the

construction under the direction and supervision of the DDA, agreement to sell had not only become non-existent but also by operation of law and in this context Clause 4 of agreement to sell executed between the parties attains utmost significance whereby respondents' responsibility was only to obtain Income Tax Clearance Certificate u/s 230A for the transfer of said plots in favor of the Second Party whereas all other permissions, clearances which were necessary for execution and registration of the Sale Deeds were to be arranged by the Vendees i.e. the petitioners.

9. Apart from this, Mr. Bhandare has also contended with vehemence that after the expiry of time to execute and register the sale deed within three months from 1.10.1995, the respondents are relived from their obligations to execute and register the sale deed as per the supplementary agreement dated 1.10.1995 whereby period of 6 months was extended by another period of three months for executing and registering the sale deed. The extended period expired on 31.12.1995.

10. Vide letter dated 7.3.1996 respondents informed the petitioners that they have not received the original sale deeds and some other documents which were given in joint custody of Shri M.D. Dalmia and Mr. U.K. Khaitan and for which they had granted a receipt and these documents should have been returned after the expiration of the agreement. Through this letter, the respondents requested the petitioners to send the aforesaid documents without further delay to enable them to return the earnest money amounting to Rs. 215490/- by cheques in favor of each of the 28 companies as per Clause 11(b) of the said agreement.

11. Mr. Bhandare has further urged that since there is no existing and subsisting agreement, the instant petition u/s 9 of the Arbitration and Conciliation Act, 1996 is not maintainable. Pre-requisite of Section 9 is that there should be an existing agreement. In support of this proposition, Mr. Bhandare has placed reliance upon M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd., wherein it was held that When a party applies u/s 9 of the 1996 Act, it is implicit that it accepts that there is a final and binding arbitration agreement in existence. It is also implicit that a dispute must have arisen which is referable to the Arbitral Tribunal.

12. It is further contended by Mr. Bhandare that even if it is assumed that the agreement is in existence, Clause 10 of the agreement prohibits the petitioners as it was agreed to seek any remedy if the vendors infringe the terms by way of filing a suit in the court under specific performance Act. Clause 10 reads as under:-

10. That if the Vendors infringe the terms/conditions of this Agreement to sell and fails to act as per the terms/conditions detailed hereinbefore then the Vendee shall be free, entitled empowered, authorised to get execution of proper sale deeds of said plots along with the right to use the common areas of internal road and parks etc. either in its own name or in the name of its nominee/s, through the Court of law at the costs, expenses of the Vendee under specific Act

on the basis of this Agreement to sell and purchase, after depositing the entire balance sale consideration in the Court in the name of the Vendors herein.

13. Admittedly the petitioners till date have paid Rs. 60 lakhs and furnished a bank guarantee of Rs. 1.35 crores on 4.3.2002 against consideration amount of Rs. 6,03,37,300/-. It is in view of aforesaid premise as well as non performance of the obligation by the respondents, Mr. Neeraj Kaul, learned counsel for the petitioners has sought restraint order by invoking equities in their favor and the balance of convenience particularly in view of the fact that respondents have stated that contract stands repudiated and in their reply have also stated that they are negotiating economic terms with third parties for the same purpose for the same property/land.

14. It is vehemently contended by Mr. Kaul that it is not the petitioners alone whose readiness and willingness to perform the contract is to be seen but the readiness and willingness of the respondents to perform the contract is also a factor to be taken into consideration. In support of this contention, Mr. Kaul relied upon Indira Kaur and Anr. v. Sheo Lal Kapoor JT 1988 1 SC 652 wherein it was held that:-

A second serious error which has crept into the judgment of the Courts below is shutting their eyes to the question whether the defendant was ready and willing to perform his part of the contract and whether he had remained present at the Sub Registrar's office on the appointed day. On the other day the Courts have been obsessed by the issue as regards the income of the plaintiff and the question as to whether and how the plaintiff could have effected a saving as stated by him on oath.

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In fact the lower Courts ought to have considered whether the defendant himself was willing and ready to perform his part of the contract by executing the sale deed in favor of the plaintiff in discharge of the obligation undertaken under the agreement of sale executed in 1967 in favor of the plaintiff. The plaintiff had sent a notice through his Advocate on 11th August, 1967."

15. While taking refuge under the aforesaid observations of the Supreme Court that the element of readiness of the respondents is one of the governing criteria, Mr. Kaul has contended that the petitioners have already deposited either by way of cash or bank guarantee 33% of the sale consideration and within 45 days of the respondents agreeing to sell the property the balance sale consideration would also be paid. Mr. Kaul further contended that it was not possible to keep the entire transaction amount ready to be paid to the respondents for seven years when respondents are not ready to perform their part of agreement.

16. Last but not the least, Mr. Kaul has contended that time has never been the essence of the contract with regard to the sale of immovable property/land. In this regard, Mr. Kaul has again drawn attention to the observation of the

Supreme Court in the aforesaid judgment which is as under:-

"The law is well settled that in transactions of sale of immovable properties, time is not the essence of the contract.

17. Mr. Kaul has also referred to Section 10 of Specific Relief Act which provides that normally compensation in money is not adequate relief for breach of contract to transfer immovable property.

18. After giving careful consideration to the rival contentions of the counsel for the parties and the nature of disputes referred to the Arbitrator which particularly are confined to the point whether there is a subsisting and existing valid agreement the parties or not and whether the respondents have infringed any terms and conditions of the agreement or not, the remedy available to the petitioner in the first instance is through the forum of the Arbitrator. Clause 10 of the agreement to sell specifically includes remedy of getting execution of the sale deeds and pleadings in question by way of arbitration.

19. For the purpose of Section 9, a party is entitled to interim protection if he succeeds in not only making a prima facie case but also balance of convenience in his favor and element of irreparable loss and injury in case injunction is declined. So far as agreement to sell is concerned, the predominant requirement is the readiness of the Vendee though the factum of readiness of the vendor is also to be taken into consideration and the stage of readiness of the vendor reaches after vendee established his readiness and willingness. The judgment relied upon by the learned counsel for the petitioner reflects that on the appointed date when the parties were to appear before the Sub-Registrar, the vendee was not present and Therefore it was held that vendee was not ready to perform his part of the agreement. In the instant case, vendors have been granted opportunities after opportunities to show their willingness by way of depositing the consideration amount or furnishing a bank guarantee but till date they have failed to deposit the amount of consideration. In such a situation readiness of the vendor becomes a secondary consideration.

20. Apart from this, the element of expiry of extended period agreed between the parties vide subsequent agreement dated 1.10.1995 cannot be lost sight of. Ordinarily for the sale of immovable properties, time is not an essence but where the parties by way of agreement to sell make time an essence as an imperative factor, agreement has to be taken to be of the nature that time is essence. It all depends upon the facts of each case. Had time been not the essence, there was no purpose for the parties to execute subsequent agreement dated 1.10.1995 for extending the time up to December, 1995 and at the same time agree that unless and until time is further extended in writing, the agreement will not subsist.

21. Taking overall view of the above facts and circumstances, I find that the petitioners have failed to make out a prima facie case for the injunction as prayed for. Petition has no merit and is dismissed.