
(2004) 09 DEL CK 0157

In the Delhi High Court

Case No : Writ Petition (C) 1513 of 1999

Capital Hotel and Developers Ltd.

APPELLANT

Vs

Delhi Development Authority

RESPONDENT

Date of Decision : 22-09-2004

Acts Referred:

Constitution of India, 1950 — Article 226
Contract Act, 1872 — Section 17, 18, 19
Income Tax Act, 1961 — Section 269
Transfer of Property Act, 1882 — Section 55, 55(1)

Citation : (2004) 09 DEL CK 0157

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : Ravinder Sethi and Ajay Kumar, for the Appellant; K.K. Bhuchar, for the Respondent

Final Decision : Allowed

Judgement

Sanjay Kishan Kaul, J.—An advertisement was published by DDA on 22.07.1998 in various newspapers for an auction to be held for allotment of various sites including plot No. 51, Basant Lok, Vasant Vihar, New Delhi. The auction was held on 24.08.1998 and the petitioner was the highest bidder for the said plot measuring 127.46 sq. mtrs. for a total sum of Rs. 3.65 crores. It may be noticed that the reserve price for the said plot was Rs. 67 lakhs. The petitioner deposited a sum of Rs. 91,85,000/- on the same date itself at the all of the hammer as earnest money.

2. The petitioner was issued a communication dated 02.09.1998 accepting the bid of the petitioner and calling upon the petitioner to deposit the balance amount on or before 30.11.1998. In pursuance to the successful bid of the petitioner, the petitioner requested Deputy Director of the respondent to grant permission for opening a restaurant in the plot and also made an application on 30.10.1998 to the appropriate authority for permission u/s 269 of the Income Tax Act.

3. The petitioner received a notice on 7/8.11.1998 from a lawyer alleging that the said plot was subject matter of dispute in CWP No. 198/1998 and, thus, the petitioner issued a communication dated 09.11.1998 to DDA to verify the said fact and it was for the DDA to confirm that there was clear title. Since there was no response, the petitioner sent a letter dated 20.11.1998 as a reminder and requested for extension of time by about three months for making the payment subject to the said clarification.

4. The petitioner claims that soon after on 20.11.1998, the petitioner was served with notices in two FAOs No. 50/1998 and 51/1998 stated to be pending in respect of the plot and in which the petitioner was apparently imp leaded as a party. The petitioner received a communication dated 03.12.1998 in response to the letter dated 09.11.1998 stating that CWP No. 198/1998 was filed by a person who had no right for restoration of his earlier application as he did not have any rights in the plot and that another application had been dismissed though application filed by Shri Vishwant Kumar of which the petitioner had been informed was pending and was likely to meet the same fate. The petitioner was further informed that the plot has been fenced and possession of the plot was with DDA.

5. The petitioner on making enquiries found that full information had not been furnished by DDA since RFA No. 317/1985 was pending in which, however, the prayer for interim relief had been rejected vide Order dated 21.08.1988. The petitioner informed DDA vide letter dated 19.12.1998 about two FAOs and expressed apprehension about the title of the property. The present writ petition was thereafter filed seeking a direction against the respondent to transfer the possession as well as clear title of the plot and for restraint order against cancelling on account of non-payment.

6. The stand of the respondent in the counter affidavit is based on the Order of the Division Bench dated 21.08.1998 in RFA No. 317/1985. This order disposed of the interim applications filed in respect of the plot in question. The applicant in those applications was the successful bidder of the plot in an auction held on 02.01.1971, but failed to deposit the amount within time. The suit emanated from the litigation filed by the father of the successful bidder since the successful bidder had since passed away. The Division Bench noted that in view of the failure of the bidder to pay balance amount, as per terms and conditions of the bid, the bid was liable to be cancelled. The application was, thus, disposed of especially taking into consideration the said fact and the long period of time which had since passed from the date of the auction. It is, thus, stated that there was no impediment in transfer of the plot, the possession of which was with the respondent and the petitioner ought to have paid the full amount.

7. The limited question which, thus, arises for consideration is whether there was a duty caste on the respondent to disclose the factum of pendency of the litigation and the consequences of the failure to disclose the said facts.

8. There have been subsequent developments during pendency of the petition in as much as at the stage of the final arguments, learned senior counsel for the petitioner had submitted that if the disputes were still pending in the form of the appeal, an alternative relief in the form of refund of the amount paid as earnest money with interest be entertained. This was objected to by learned counsel for the respondent on the ground that there was no relief to that effect. The petitioner, thus, moved an application for amendment to incorporate the said relief of refund with interest which was allowed. It is, thus, to be noticed that in view of the Order dated 12.12.2003 whereby learned senior counsel for the petitioner on instructions had stated that in the given facts of the case, the alternative relief be granted, it is that the relief which will have to be really considered.

9. The contention advanced by learned senior counsel for the petitioner was that pendency of the litigation was a material fact which had not been disclosed to the petitioner. The fact that the interim application was dismissed would only facilitate in holding of the auction, but that cannot imply that all clouds have been cleared over the title. In any case, it was to be a judgment of the auction purchaser having come to know of the facts as to the quantum of the bid to be made or whether to bid or not. It was, thus, contended that the respondents could not have kept this information to itself. The aforesaid plea was further reinforced by the fact that the advertisement for auction was published on 22.07.1998 and the applications for interim relief were dismissed on 21.08.1998 just before the date of auction on 24.08.1998. Thus, at least at the stage of the auction, these details ought to have been disclosed.

10. Learned senior counsel has referred to the provisions of Section 55 of the Transfer of Property Act, 1882, which provides for the rights and liabilities of a buyer and a seller. In terms of Section 55(1)(a), the seller is bound to disclose to the buy or any material defect in the property or in the seller's title thereto of which the seller is aware and the buyer is not aware and which the buyer could not with ordinary care discover. It is, thus, submitted that the omission to make such disclosure is fraudulent and in view of the provisions of Section 19 of the Indian Contract Act, 1872, the consent obtained from the petitioner, which is caused by such fraud or misrepresentation, would make the contract voidable at the option of the party whose consent was so caused.

11. Learned senior counsel referred to judgment of learned Single Judge of this Court in *Jaswant Rai v. Abnash Kaur*, (1974) 1 Delhi 689 wherein it was observed at pages 699-700 as under:

"" In the present case buying the property meant buying a law suit. Litigation was already on. Its end is not in sight even now. The vendor cannot say to the purchaser, "" You are bound to go forward with the transaction"". The purchaser is entitled to say, ""The non-disclosure of these facts is a material defect in the property and I am entitled to annul the transaction"".

The last paragraph of section 55 of the Transfer of Property Act says that an omission to make such disclosure as is mentioned in paragraph 1 clause (a) is fraudulent.

Section 17 of the Contract Act defines fraud in these terms :-

"" `Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce to enter into the contract:-

... ..

(5) Any such act or omission as the Law specially declares to be fraudulent"".

I need not read the Explanation to the section which is not material.

The last paragraph of Section 55 of the Transfer of Property Act read with Section 17 of the Contract Act would clearly show that the failure of disclose the facts relating to litigation and attachment constituted a fraud. This would also amount to misrepresentation u/s 18 of the Contract Act.

Under Section 19, the purchaser has the option to rescind the agreement and this is what the purchase has done in this case. I think, he was entitled to do so.""

In view of the aforesaid position, it was held at page 705 as under:

"" I, Therefore, hold that the non-disclosure of the pending litigation and the attachment was fraudulent and that the purchaser was entitled to rescind and claim refund of the earnest money. The vendor was not able to deduce a marketable title which she was bound to deduce.""

12. Learned senior counsel also referred to the judgment of Munnalal Bhagirath v. Zamaklal Gumchandji and Anr. AIR 1952 MB 145 where it was held that where the seller's title would be doubtful and there is a reasonable probability of litigation in respect of the property agreed to be purchased, the buyer would be quite correct in declining to carry out the transaction of purchase and declining of acceptance of delivery.

13. In Khemchand Ratanchand and Anr. v. Dhalimal and Anr. AIR 1922 Sind 33, it was observed as under:

"" The equitable rights of the parties whether under the general law or under the agreement can only be construed and given effect to, by the Court in a spirit of fairness to both parties. The phrase "" Marketable title free from reasonable doubt"" may be incapable of legal definition; but the purchaser, while he is not on the one hand at liberty to raise doubts which are not considerable or rational, cannot be compelled on the other hand, to take a title which will expose him to litigation or hazard. Prke v. Waddingham (1852) 10 Harel : 68 E.R. 1""

14. The petitioner along with written synopsis has also filed various documents

for the first time to show the prevalent rate of interest and the interest being paid by the petitioner to PICUP and other authorities to claim that the petitioner is entitled to those interest rates ranging from 16.84 per cent to 21 per cent. Reliance has also been placed on a judgment of the Division Bench of this Court in RFA (OS) No. 10/1987 titled 'M/s. Lucky Star Estates (India) Pvt. Ltd. v. The Delhi Development Authority Through Vice Chairman' decided on 03.09.2004 where 17% p.a. interest was granted on the amount detained in respect of an auction.

15. Learned counsel for the respondent on the other hand, has relied on the failure of the petitioner to remit the balance amount and on the Order dated 21.08.1998 of the Division Bench dismissing the challenge to the auction. In so far as the claim for refund is concerned, it has been stated that the same is barred by time since it was sought only in January, 2004 Reliance has been placed on the decision of the Supreme Court in Civil Appeal No. 2314/1998 titled 'M/s. Aggarwal Associates (Promoters) Ltd. v. Delhi Development Authority and Anr.' decided on 28.07.2004 that an auction purchaser must comply with the requirements of the bid first and cannot ask DDA to honour commitments before complying with its own obligations.

16. I have considered the submissions advanced by learned counsel for the parties.

17. There is no doubt that there was no impediment to the auction being held on 24.08.1998 in view of the Order dated 21.08.1998 of the Division Bench. It may, however, be noted that this was not the position at the stage of the advertisement. However, it has to be appreciated that it is only the interim applications which were dismissed against the auction and the appeal is still pending.

18. In my considered view, the respondent owed it a duty to inform the auction bidders about pendency of the litigation as well as vacation of the Order. This duty would be cast on any such auction seller and more so on DDA, which is a public authority.

It was for the auction purchaser to consider whether there is/was any cloud on the title or not after the Order of the Division Bench. However, this information cannot be hidden because the appeal itself had not been dismissed. As to what effect the pendency of the appeal could have, after the interim applications are dismissed, on the bid to be made by a purchaser is a moot point, but that is a decision to be taken by the bidder / purchaser.

19. In Jaswant Rai's case (supra), it has been very succinctly pointed out that if buying a property means buying a law suit, the vendor cannot compel the purchaser to go forward with the transaction and it is open to the purchaser to say that the non-disclosure of these facts is a material defect and that he was entitled to annul the transaction. The reliance was, thus, rightly placed on the provisions of Section 55 of the Transfer of Property Act. Even if there was no

impediment to the transfer, the cloud arising from pendency of the appeal entitle the purchaser for disclosure of such information and the non-disclosure would give a right to the purchaser to back out of the transaction.

20. In Munnalal Bhagirath's case (supra), the Court went as far as to say that even the possibility of a litigation ought to have been disclosed. It was in these circumstances in Khemchand Ratanchand's case (supra) that it was observed that a party cannot be compelled to take title, which may expose him to litigation though he cannot raise doubts which are not considerable and rational.

21. In view of the aforesaid position, I am of the considered view that the petitioner is entitled to the alternative relief arising from backing out of the transaction and for refund of the amount.

22. In so far as the plea of limitation is concerned, strictly speaking, the Limitation Act as such would not apply in the present case and while exercising jurisdiction under Article 226 of the Constitution of India, it has to be considered whether there is any unexplained delay in filing the writ petition after expiry of the period of limitation prescribed for filing a suit. Thus, the claim is not to be rejected on that account, but has to be considered in the said parameters of there being grounds to overlook or condone the delay. This view has been expressed by the Supreme Court in Shri Vallabh Glass Works Ltd. and Another Vs. Union of India (UOI) and Others, and The Municipal Council, Ahmednagar and Another Vs. Shah Hyder Beig and Others, .

23. In State of Madhya Pradesh v. Bhailal Bhai and Ors. (1964) 6 SCR 260, it was observed at page 273 as under:-

""Mr. Andley has argued that the delay in these cases even is not such as would justify refusal of the order for refund. He argued that assuming that the remedy of recovery by action in a civil court stood barred on the date these applications were made that would be no reason to refuse relief under Article 226 of the Constitution. Learned counsel is right in his submission that the provisions of the Limitation Act do not as such apply to the granting of relief under Article 226. It appears to us however that the maximum period fixed by the legislature as the time within which the relief by a suit in a civil court must be brought may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Article 226 can be measured. The Court may consider the delay unreasonable even if it is less than the period of limitation prescribed for a civil action for the remedy but where the delay for more than this period, it will almost always be proper for the court to hold that it is unreasonable.""

24. The aforesaid judgments have been referred to and followed in Smt. Krishna Chaubey and Others Vs. The Govt. of NCT of Delhi and Others, .

25. If the aforesaid parameters are applied, it will be seen that the petitioner was prosecuting this remedy for enforcing the rights in respect of the plot. However, the litigation did not end and it was in these circumstances on a query being put

by the Court that the counsel for the petitioner took instructions that a solution could be refund of the amount of earnest money with interest. On objection of the respondent an amendment application was filed which has been allowed. I am of the considered view that this is a fit case where the delay, if any, is liable to be condoned in this behalf in seeking the remedy in the present petition.

26. The last question, which arises for consideration, is the quantification of interest. There is no doubt that the amount has been enjoyed by the respondent. However, it is only with the written synopsis that the petitioner has filed documents to show the rate of interest which he is paying to different authorities which has given no opportunity to the respondent to file any rebuttal affidavit. Thus, I am not inclined to grant the rates of interest as are being sought by the petitioner on account of the rates of interest being paid to different loaning entities. Taking all the facts into consideration, I am of the considered view that the petitioner is entitled to 7% p.a. simple interest from the date of deposit till the date of refund by the respondent as this is also the rate of interest paid by the respondent to allottees where moneys are retained without possession being handed over.

27. A writ of mandamus is, thus, issued directing the respondent to refund the earnest money deposited by the petitioner of Rs. 91.85,000/- along with simple interest @ 7% p.a. from the date of deposit till the date of payment and the needful be done within a maximum period of two months from today. In case of failure of the respondent to do so, apart from any other remedy, the petitioner shall be entitled to interest @ 15% p.a. on the period of delay.

28. The writ petition is allowed in the aforesaid terms with cost of Rs. 7,500/-.