

(2017) 02 DEL CK 0368

In the Delhi High Court

Case No : 320 of 2006

DHARAMPAL SATYAPAL LTD.

APPELLANT

Vs

SANMATI TRADING AND INVESTMENT LTD. AND ANR.

RESPONDENT

Date of Decision : 23-02-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 41 Rule 5](#) -

[Contract Act, 1872](#), [Section 55](#) - Effect of failure to perform at fixed time, In contract In which time Is

Citation : (2017) 02 DEL CK 0368

Hon'ble Judges : Rajiv Sahai Endlaw

Bench : SINGLE BENCH

Advocate : Deepak Dhingra, Shivangi Singh, Sumit Kr. Vats, Yakesh Anand, Nimit Mathur, Sonam Anand, Rohit K. Naagpal

Judgement

1. The suit is listed for hearing arguments on issue no.(i) ordered to be treated as a preliminary issue vide order dated 5th October, 2016.
2. The counsel for the plaintiff states that FAO(OS) No.219/2016 and FAO(OS) No.373/2016 arising from the order dated 2nd May, 2016 partly allowing amendments of the plaint and order dated 5th October, 2016 closing the right to carry out amendments allowed on 2nd May, 2016 are pending consideration before the Division Bench of this Court.
3. The counsel however admits that there is no stay of proceedings in the present suit.
4. The counsel for the plaintiff though agrees that the orders aforesaid from which the appeals aforesaid are pending have no bearing on the preliminary issue but states that for decision of the preliminary issue, there has to be a validly constituted plaint before this Court.
5. As far as this Bench is concerned, there is a plaint before this Court in terms

of the orders which though are in appeal before the Division Bench. It thus cannot be said that there is no validly constituted plaint before this Court. Per Order XLI Rule 5(1) of the CPC, an appeal shall not operate as a stay of proceedings under a decree or order.

6. The plaintiff instituted this suit seeking the relief of specific performance of an Agreement of sale of property no.3, Friends Colony (West), New Delhi, pleading (i) that the defendant no.1 Sanmati Trading & Investment Ltd. (STIL) is registered with the Reserve Bank of India (RBI) to carry on the business as Non-Banking Financial Institution and defendant no.2 Shri K. Sundaram is the Managing Director and his wife Smt. R. Sundaram (defendant no.3) is the Director of the defendant no.1 STIL; the defendant no.1 STIL is a closely held Company; (ii) that sometimes in January-February, 2004 negotiations commenced between the plaintiff and the defendants in respect of the said property; (iii) it was represented to the plaintiff that the defendant no.1 STIL was the absolute and exclusive owner of the said property and the property was free from any kind of encumbrances; it was however informed that the original title documents of the property were in the custody of the erstwhile Directors but the defendants had filed a suit for declaration and recovery thereof and the same was pending adjudication; the defendants promised to make available the original title deeds of the property at the earliest possible date whereafter the Sale Deed would be executed by them; (iv) it was further offered to the plaintiff that if the defendants were unable to make available the original title documents of the property, the parties may at the sole option of the plaintiff agree to reach some alternative arrangement to convey a valid title in the property from the defendant no.1 STIL to the plaintiff; (v) that on the basis of the said assurances and promise of the defendants, the plaintiff agreed to purchase the property and a concluded contract of sale of property for a total sale consideration of Rs.16,29,00,000/- was made on 20th March, 2004; the agreement was oral; (vi) the plaintiff paid a sum of Rs.11,00,000/- by account payee cheque and the said cheque was duly received and encashed by the defendants; (vii) that after the said oral agreement, a Memorandum of Understanding (MoU) (Agreement to Sell) was also executed between the parties on 17th June, 2004 confirming the sale transaction and as per agreement between the parties, was placed in a sealed cover and the sealed cover was signed from outside and is duly taped and is in possession of the plaintiff; a copy of the MoU without signatures was being filed as Annexure-A to the plaint; (viii) the defendants, inspite of repeated reminders of the plaintiff to complete the sale, kept on deferring the same; and, (xi) in paras 23 to 26:- "23. That defendant no.1 Company (under the signature of defendant no.2), instead of answering the queries of the plaintiffs and out of mala fides wrote a letter dated 1st March, 2005 and sent cheque no.605337 drawn on Bank of Baroda, Bhikaji Cama Place, New Delhi dated 1st March, 2005 for Rs.11,00,000/- in favour of the plaintiff stating that the amount was refund of the amount paid by the plaintiff earlier and that the agreement signed by the parties and kept in a sealed cover be cancelled and returned to them. Copy of

the said letter is Annexure-B hereto;

24. That in response, the plaintiff sent Registered Letter dated 14th March, 2005 stating the factual position and expressed serious protest and further vehemently denied its contents. It was specifically pointed out that the communication dated 1st March, 2005 was plainly motivated and false. It was also stated that the plaintiff had always been and still was ready and willing to pay the balance sale consideration and was eager to have a meeting with the defendants at their (defendants") convenience to draw and execute the necessary documents so that sale transaction was completed without further delay at one go. The plaintiff also returned the original cheque no.605337 dated 1st March, 2005 for Rs.11,00,000/-. Copy of the said letter is Annexure-C hereto;

25. That instead of taking any corrective measures, the defendant no.1 Company (under the signature of defendant no.2) wrote letter dated 22nd March, 2005 making false and dishonest contentions therein that the cheque returned by the plaintiff with its letter dated 14th March, 2005 was not found enclosed. Copy of the said letter is Annexure-D hereto. In response, the plaintiff sent letter dated 28th March, 2005 and demanded that the defendants take immediate steps for execution and registration of the Sale Deed. Plaintiff further reiterated that it was willing to have an extended meeting as suggested in its letter dated 14th March, 2005 to resolve any impediments in completion of the agreed sale transaction. Copy of the letter is Annexure-E hereto;

26. Thereafter the matter was also discussed on telephone but did not bring any positive results. Therefore, a legal notice dated 6th May, 2005 was sent by the plaintiff through its Advocate. Copy of the said notice is Annexure-F hereto. No reply to this notice has been received."

7. On the aforesaid averments, the following reliefs were claimed in the plaint:-
"1. A decree for specific performance of the Agreement to Sell in respect of property commonly known as 3 Friends Colony (West), New Delhi, measuring 3,520.93 sq.mtrs. (4,211 sq. yds.), as detailed above, be passed in favour of the plaintiff and against the defendants and the defendants be directed to specifically perform the agreement i.e. accept the balance price (Rs.16.18 Crores) and transfer the said land and built-up property by means of a sufficient instrument along with vacant physical possession to the plaintiff.

2. In case the defendants fail to do the needful, an officer of the Court may be appointed to receive the balance money on their behalf - or these be allowed to be deposited in Court - and execute and register the necessary documents and to deliver the actual, vacant, physical possession of the property in suit to the plaintiff for which warrants may kindly be issued."

8. The counsel for the plaintiff states that defendants no.2&3 Shri K. Sundaram and Smt. R. Sundaram have since been deleted (vide order dated 6th March, 2014) from the array of defendants and the subsequent purchaser of the property namely Veejay Buildwell Pvt. Ltd. impleaded (vide order dated 18th

March, 2014) as defendant no.2.

9. The suit came up for framing of issues on 5th October, 2016 when in the light of submissions contained in paras 23 to 26 of the plaint re-produced hereinabove and in the light of the prayer paragraph also re-produced above of the plaint and yet further in the light of the law laid down by the Supreme Court in I.S. Sikandar Vs. K. Subramani (2013) 15 SCC 27, the following issue no.(i) framed on that date was ordered to be treated as a preliminary issue:- "(i) Whether the plaintiff is not entitled to the relief of specific performance for the reason of having not claimed the relief of declaration of the termination admittedly effected by the defendant no.1 vide letters dated 1st March, 2005 and 22nd March, 2005 of the Agreement to Sell, as void? OPPr"

10. The counsel for the defendant in his arguments of course has referred only to I.S. Sikandar supra.

11. The counsel for the plaintiff has argued (i) that a suit for declaration under Section 34 of the Specific Relief Act, 1963 is not required to be filed in a case of specific performance of an Agreement of Sale of immoveable property; (ii) that in every suit for specific performance, the relief of declaration is not required to be claimed; it is required to be claimed when the document is covered by Section 34 of the Specific Relief Act; on being further asked to specify, the counsel states that a document would be covered by Section 34 of the Specific Relief Act when it is covered by Section 55 of the Indian Contract Act, 1872 or like provisions; (iii) reliance is placed on Sanjay Kaushish Vs. D.C. Kaushish AIR 1992 Delhi 118 where a Single Judge of this Court held that "the well settled principle of law is that if a particular document or decree is void the person affected by the said document or decree can very well ignore the same and file a suit seeking substantive relief which may be available to him without seeking any declaration that the said decree or document is void or any consequential relief of cancellation of the same" and on Sushila Kumari Vs. Rama Stores AIR 2005 Delhi 401 also of another Single Judge following the earlier judgment in the context of a suit for recovery of possession of property; and, (iv) that the document dated 1st March, 2005 by which the Agreement to Sell in the present case has been cancelled is not such for which relief of declaration needs to be claimed.

12. After the attention of the plaintiff has been drawn to I.S. Sikandar supra, the counsel for the plaintiff has further argued (i) that the document of which Supreme Court held cancellation or declaration was required was different from the document dated 1st March, 2005 in the present case; (ii) that the Supreme Court in that case was concerned with an Agreement to Sell of which time was held by the Supreme Court to be the essence of the Agreement and which time had expired and which is not so in the present case; and, (iii) in the document before the Supreme Court, the purchaser had been called upon to pay the sale consideration and which is not so in the present case.

13. Before proceeding to adjudicate, it is deemed appropriate to set-out

hereinbelow the letter dated 1st March, 2005 supra:-

"K. Sundaram

3, Friends Colony West

New Dehli - 110065

1st March, 2005.

Shri Ashok Agarwal,

Dharampal Satyapal Ltd.

NOIDA.

This is in continuation of the discussion I had with you and Shri Rajiv Gupta yesterday in your office in the presence of Mrs. R. Sundaram and Shri Vishal Sood of Richard Ellis concerning the sale of property No.3, Friends Colony West, New Delhi - 110 065.

For close to one year now your representatives either directly by themselves or through Shri Vishal Sood were collecting documents/information from me about the property and the deal. You yourself had 3-4 meetings with me and Mrs. R. Sundaram. Your lawyer Shri Harish and Shri S.K. Agarwal, lawyer of Richard Ellis had also one meeting each with me. I have fully co-operated in these meetings and in handing over documents/information demanded and nothing whatsoever has been concealed. You have taken unusually long time for due diligence and have not completed your part of the deal by paying sale consideration despite of several requests made to you. In yesterday's meeting you said that you are not satisfied with the documents/information. I have no more document/information to give to you. In this background I have no legal or moral right to keep the sum of Rs.11 lakhs paid by you in February 2004. Accordingly, a refund cheque no.605337 dated 1st March, 2005 for Rs.11 lakhs is sent herewith. It is requested that the agreement signed by me and you and kept sealed in locker be cancelled and returned to me.

Thanking you,

Yours faithfully,

(K. Sundaram)"

14. The only question for consideration is whether the answer to the preliminary issue, in the facts of the present case is covered by I.S. Sikandar supra.

15. A reading of I.S. Sikandar supra particularly of paragraphs 1 to 31 thereof does not show that till the suit for specific performance subject matter thereof travelled to the Supreme Court, the question, whether the relief of declaration with respect to notice/letter of termination of the Agreement to Sell is required to be claimed as a pre-condition for claiming the relief of specific performance was

not raised. Rather, Supreme Court in para 32 of the judgment has observed that "after perusal of the impugned judgment of the High Court" and "the questions of law framed by the defendant No.5 in this appeal, the following points would arise for determination of this Court":- "32.1 (i) Whether the original suit filed by the plaintiff seeking a decree for specific performance against the defendant Nos. 1-4 in respect of the suit schedule property without seeking the declaratory relief with respect to termination of the Agreement of Sale vide notice dated 28.3.1985, rescinding the contract, is maintainable in law?

32.2 (ii) Whether the reversal of the findings of the trial court on the issue Nos. 3, 4 and 5 by the High Court and answering the same in favour of the plaintiff in the impugned judgment and granting the decree for specific performance in favour of the plaintiff in respect of the schedule property is legal and valid?

32.3 (iii) Whether the grant of decree of specific performance in favour of the plaintiff despite Clause 12 of the Agreement of Sale dated 25.12.1983 is legal and valid?

32.4 (iv) Whether the grant of the decree is in conformity with sub-sections (1) and (2) of Section 20 of the Specific Relief Act and whether the learned Judge of the High Court has exercised his discretionary power reasonably in granting the same in favour of the plaintiff?

32.5 (v) What decree or order to be passed?"

16. The judgment thereafter, under the heading "Answer to Point (i)", in paras 33 to 38 is as under:- "33. The first point is answered in favour of Defendant 5 by assigning the following reasons: it is an undisputed fact that there is an agreement of sale executed by Defendants 1-4 dated 25-12-1983 in favour of the plaintiff agreeing to sell the schedule property in his favour for a sum of Rs 45,000 by receiving an advance sale consideration of Rs 5000 and the plaintiff had further agreed that the remaining sale consideration will be paid to them at the time of execution of the sale deed. As per Clause 6 of the agreement of sale, the time to get the sale deed executed was specified as 5 months in favour of the plaintiff by Defendants 1-4, after obtaining necessary permission from the competent authorities such as the Urban Land Ceiling Authority and the Income Tax Department for execution and registration of the sale deed at the cost and expenses of the plaintiff. If there is any delay in obtaining necessary permission from the above authorities and the payment of layout charges, the time for due performance of agreement shall further be extended for a period of two months from the date of grant of such permission.

34. In the instant case, permission from the above authorities was not obtained by Defendants 1-4. The period of five months stipulated under Clause 6 of the agreement of sale for execution and registration of the sale deed in favour of the plaintiff had expired. Despite the same, Defendants 1-4 got issued a legal notice dated 6-3-1985 to the plaintiff pointing out that he has failed to perform his part of the contract in terms of the agreement of sale by not paying the balance sale

consideration to them and getting the sale deed executed in his favour and called upon him to pay the balance sale consideration and get the sale deed executed on or before 18-3-1985.

35. The plaintiff had issued reply letter dated 16-3-1985 to the advocates of Defendants 1-4, in which he had admitted his default in performing his part of contract and prayed time till 23-5-1985 to get the sale deed executed in his favour. Another legal notice dated 28-3-1985 was sent by the first defendant to the plaintiff extending time to the plaintiff asking him to pay the sale consideration amount and get the sale deed executed on or before 10-4-1985, and on failure to comply with the same, the agreement of sale dated 25-12-1983 would be terminated since the plaintiff did not avail of the time extended to him by Defendants 1-4.

36. Since the plaintiff did not perform his part of contract within the extended period in the legal notice referred to supra, the agreement of sale was terminated as per notice dated 28-3-1985 and thus, there is termination of the agreement of sale between the plaintiff and Defendants 1-4 w.e.f. 10-4-1985.

37. As could be seen from the prayer sought for in the original suit, the plaintiff has not sought for declaratory relief to declare the termination of agreement of sale as bad in law. In the absence of such prayer by the plaintiff the original suit filed by him before the trial court for grant of decree for specific performance in respect of the suit schedule property on the basis of agreement of sale and consequential relief of decree for permanent injunction is not maintainable in law.

38. Therefore, we have to hold that the relief sought for by the plaintiff for grant of decree for specific performance of execution of sale deed in respect of the suit schedule property in his favour on the basis of non-existing agreement of sale is wholly unsustainable in law. Accordingly, Point (i) (see para 32.1) is answered in favour of Defendant 5."

17. Thereafter under the heading "Answer to Point (ii)", in paras 39 to 43 and under the heading "Answer to Point (iii)", in paras 44 to 52, the other questions as recorded to be arising for decision were dealt with.

18. The counsel for the plaintiff refers to paras 42,43,49 and 55 but which are on the issues of readiness and willingness framed by the Trial Court and of time being of the essence of the contract.

19. The conclusion reached by the Supreme Court in "Answer to Point (i)" in paragraphs 37 to 38 is nowhere dependent on, whether the plaintiff in that case was ready or willing or not and whether the time for performance or for payment of balance sale consideration was of the essence of the agreement or not. All that the Supreme Court has held is that since the Agreement to Sell had been terminated, on the date of institution of the suit for specific performance there was no Agreement to Sell in existence of which the relief of specific performance could have been claimed. The Supreme Court did not ascribe the said reasoning

to the aspect of readiness and willingness or of time being of the essence of the contract.

20. As far as the contentions of the counsel for the plaintiff, that in the present case the time for performance had not reached, and that it was dependent upon future events, is concerned, a perusal of the letter dated 1st March, 2005 shows that the defendants thereby purported to refund the sum of Rs.11,00,000/- paid by the plaintiff and also sought cancellation and return of the Agreement signed by the parties and kept sealed in a locker. Though the counsel for the plaintiff has sought to also carve out a distinction by stating that the defendants had only called upon the plaintiff to cancel and return the document and had not cancelled the Agreement to Sell but in my opinion the language would not make any difference. A perusal of the judgment aforesaid of the Supreme Court would show that the letter of cancellation dated 28th March, 1985 in that case also demanded the balance sale consideration on or before 10th April, 1985 and on failure thereof the Agreement to Sell was to stand terminated. It is thus not as if the cancellation in that case also was in any more equivocal terms than in the letter dated 1st March, 2005 in the present case. I therefore do not find anything in the present case to distinguish the same from I.S. Sikandar supra .

21. Following I.S. Sikandar supra, it has but to be held that the plaintiff cannot be held to be entitled to the relief of specific performance of the Agreement of Sale.

22. The preliminary issue no.(i) is thus decided in favour of the defendants and against the plaintiff.

23. It is however deemed appropriate to defer dismissal of the suit awaiting the outcome of the appeals aforesaid pending before the Division Bench.

24. List on 24th July, 2017.