
(2012) 01 DEL CK 0241

In the Delhi High Court

Case No : Regular First Appeal (OS) No. 37 of 2002

Dipankar Sen

APPELLANT

Vs

Anita Phalpher

RESPONDENT

Date of Decision : 16-01-2012

Acts Referred:

Citation : (2012) 01 DEL CK 0241

Hon'ble Judges : Pratibha Rani, J;Pradeep Nandrajog, J

Bench : Division Bench

Advocate : Kirti Uppal, with Mr. Pushkar Sood and Mr. Subhash, for the Appellant; Sanjeev Anand with Mr. Nimit Mathur and Mr. Murari Kumar, for the Respondent

Judgement

Pradeep Nandrajog, J.—In the judgment reported as S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, , quoting Chief Justice Edward Coke of England: "fraud-avoids all judicial acts, ecclesiastical or temporal", the Supreme Court highlighted that Courts of Law are meant for imparting justice between the parties and one who comes to the Court must come with clean hands. The Court noted with distress that instances of process of the Court being abused were occurring with great frequency and that property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life were finding the Court process a convenient lever to retain illegal gains indefinitely. The Court expressed in no uncertain terms that Judges should not hesitate to even summarily throw out litigations based on falsehood.

2. Suffice would it be to state that a fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. Thus, a litigating party has a duty to place all relevant materials in its possession.

3. With the preamble statement aforesaid and with a pinch of regret at the inadequacy of the pleadings in the application seeking leave to defend filed on

behalf of the appellant in the Summary Suit filed by the respondent, we proceed to note the relevant facts and the admitted documents; noting that vide impugned order dated July 30, 2002, the appellant has been declined leave to defend the suit filed by the respondent. The learned Single Judge has observed that the defence raised appears to be moonshine.

4. Our journey must commence by noting the averments made in the suit filed by the respondent.

5. Anita Phalpher wife of Vikram Kumar, as plaintiff, alleged that she and the appellant had entered into a construction agreement dated September 23, 1999, as per which she had to complete the finishing work in the flat purchased by the defendant from M/s.Civcon Engineers, the sole proprietary firm of her husband Vikram Kumar. The work had to be executed on the flat which was at the rear of the second floor of property No.B-111, Greater Kailash, Part-I, New Delhi. She pleaded that she had to be paid Rs. 38.50 lakhs for the works to be executed and that she completed the work and handed over possession of the flat to the appellant on October 11, 1999, but did not receive any payment. She pleaded that the appellant issued four cheques, dated April 04, 2000 totalling Rs. 38.50 lakhs drawn on HDFC bank and six cheques each in sum of Rs. 77,000/-drawn on HDFC bank, the cheques being dated 15.10.1999, 15.11.1999, 15.12.1999, 15.01.2000, 15.02.2000 and 15.03.2000 towards interest; all of which were dishonoured by the banker on whom the cheques were drawn. She alleged that she presented the cheques for payment on August 22, 2000 since appellant requested her to delay presenting the cheques. Alleging that under the agreement she was entitled to interest @ 2.5% per month, suit was filed claiming decree in sum of Rs. 46,50,875/-.

6. Before noting the grounds on which the appellant sought leave to defend, certain admitted facts, based on the documents relied upon by the respondent need to be noted. They would have a bearing with reference to the law which we have noted in the first two paragraphs of our decision.

7. Property No.B-111, Greater Kailash, Part-I, New Delhi, in which the flat on the second floor whereof is the subject matter of the dispute, admittedly belonged to one Puran Singh Sethi with whom M/s.Civcon Engineers, the sole proprietary firm of Vikram Kumar, the husband of the respondent, had entered into a collaboration agreement to construct a building on the plot of land and as consideration, M/s.Civcon Engineers were to be the owners of the first and the second floor of the building to be constructed.

8. Only the shell of the second floor was constructed. Vide agreement dated October 01, 1999, (highlighting that the said date is 8 days after the construction agreement dated September 23, 1999 relied upon by the respondent) M/s.Civcon Engineers agreed to sell the second floor rear portion to the appellant for a consideration of Rs. 28 lakhs and received under the agreement Rs. 8 lakhs. (The said agreement does not record that the flat to be sold is an incomplete

flat).

9. The word spread that the husband of the respondent had sold the second floor rear flat and this reached the ear of Rajender Kumar, brother of Vikram Kumar. He visited the property. The appellant got information that Rajender Kumar was claiming an interest in the property, but what was the nature thereof was not known to the appellant. As any buyer would do, he marched straight to Vikram Kumar who assured him that his brother Rajender Kumar had no interest in the property and to satisfy the appellant, impleading appellant as plaintiff No.2, acting as the sole proprietor of M/s.Civcon Engineers, Suit No.2265/1999 was filed by him seeking permanent injunction against Rajender Kumar alleging that he was threatening, without any valid cause, to disturb the possession of the appellant in the property.

10. We shall highlight the relevance of the aforesaid a little later, but now note the documents filed by the respondent in the Summary Suit filed by her. The original construction agreement relied upon by her dated September 23, 1999 has not been filed. Photocopy thereof filed shows that only appellant has signed the same. Interestingly, the agreement dated September 23, 1999, records in paragraph 2 as under:

2. The first party shall pay following sums to the second party:-

Advance as cash advance

Rs. 10,00,000/-by 10.08.99

Rs. 10,00,000/-by 25.08.99

Rs. 10,00,000/-by 10.09.99

Rs. 8,50,000/-by 15.09.99

11. We make a comment on the document. It precedes the agreement to sell which respondent's husband entered into with the appellant by 8 days. Being executed only by the appellant and not by the respondent, it records that the appellant shall pay the sums mentioned in the agreement, but while referring to the sums to be paid in cash, it records dates of the past and not in the future. Thus, it is strange that the agreement signed on September 23, 1999 would record futuristic payments to be paid by 10.08.1999, 25.08.1999, 10.09.1999 and 15.09.1999. The construction agreement does not fill up the blank spaces pertaining to the date when work will commence and will be completed.

12. The next document relied upon by the respondent is a "FULL AND FINAL DISCHARGE CERTIFICATE", signed by the respondent which records as under:

This is to certify that we the undersigned are fully satisfied of the work carried out by Mrs.Anita Phalpher wife of Sh.Vikram Kumar R/o W-48A, Greater Kailash-II, New Delhi completed by them in accordance with out (sic) construction agreement dated (blank). However, we are unable to make the balance payment

of Rs. 38.50 lakhs and we confirm that we shall be able to release the same by 15.09.1999.

Rs. 10,00,000/-by 10.08.99

Rs. 10,00,000/-by 25.08.99

Rs. 10,00,000/-by 10.09.99

Rs. 8,50,000/-by 15.09.99

Accordingly we have no objection if Mrs.Anita Phalpher is in the possession of our second floor (rear) apartment till such time all their outstanding dues are cleared by us. We know that we are liable to pay interest 24% pa in case of delayed payments. In case we are unable to pay the said dues even by 15.10.1999, then Mrs.Anita Phalpher has the right to sell out said apartment in part or full in the open market to recover their dues.

13. Let us comment upon this document. It bears no date but refers to that the work has been carried out by the respondent and that the appellant confirms that he will release the full amount by 15.09.1999, a date which is 8 days prior to 23.09.1999, the alleged construction agreement.

14. Let us also highlight the alleged works to be completed as per the stated construction agreement dated September 23, 1999. They read as under:

Bill of Quantity

B-111, Greater Kailash-I, New Delhi

(Second Floor Rear)

Sl. No.

Description

Qty.

Rate

Amount (Rs.)

1.

Brick work

500 cuft.

65/-

32,500.00

2.

Marble/Granite Flooring i/c skirting

3500 sqft.

400/-

14,00,000.00

3.

Plastering

5000 sqft.

25/-

1,25,000.00

4.

Painting

5000 sft.

40/-

2,00,000.00

5.

Wardrobe

350 sft.

1200/-

4,20,000.00

6.

Kitchen counter

50 sft.

1000/-

50,000.00

7.

Ceramic Tiles in Toilets

1000 sft.

300/-

3,00,000.00

8.

Wood work doors i/c grills

300 sft.

800/-

2,40,000.00

9.

Windows i/c grills

160 ft.

750/-

1,20,000.00

10.

Kitchen cabinets

100 sft.

800/-

80,000.00

Rs. 29,67,500.00

11.

Electrical work including fittings and fans 15% of Rs. 29,67,500/-

4,55,125.00

12.

Toilet fittings including bath tubs Geyser etc. 12.5% of Rs. 29,67,500/-

3,70,937.50

13.

External sewerage and water supply work 75% of Rs. 29,67,500/-

2,22,562.50

(Amount say Rs. 40.00 Lacs)

Rs. 40,06,125.00

15. We would simply highlight that the extent of work is such that the best of builder cannot complete the same in less than six months and yet Anita Phalpher claims that she completed the work by October 11, 1999 i.e. within 18 days of the execution of the agreement dated September 23, 1999.

16. For reasons, which neither party could explain to us, Rajender, the brother of Vikram Kumar, husband of Anita Phalpher did not contest the suit filed against

him but surfaced when he filed CM No.3432/2010 in a connected appeal being EFA(OS) No.7/2008 and disclosed therein that his brother Vikram Kumar had taken a loan from him and had executed a mortgage deed in his favour pertaining to the portions of the property which would have come to the share of M/s.Civcon Engineers as per the collaboration agreement with the said firm with Puran Singh Sethi. Its relevance would be discussed later.

17. There is a complete mismatch in the documents relied upon by Anita Phalpher and a lot is amiss. We have highlighted herein above the inherent contradictions in the documents and would simply highlight that the same are suggestive of the documents being created for a purpose other than they express to state on their language.

18. But, what did the counsel for the appellant do, when he filed the leave to defend. We reproduce the averments in full. They read as under:

1. That I am the defendant in the said suit and as such am in a position to depose herein.

2. That I have received the summons for judgment on 29.1.2001 in the evening.

3. That I have gone through the accompanying application, facts stated therein are true to my knowledge.

4. That I apply for leave to defend the said suit before this Hon"ble Court inasmuch as the plaintiff has approached this Hon"ble Court by concealing material facts and she is not entitled for any relief under O.37 CPC inasmuch as the present suit involve various triable issues.

5. That in fact the defendant engaged the plaintiff for renovation of his flat.

6. That the plaintiff has not executed the work to the satisfaction of the defendant and as assured by her.

7. That the material used by the plaintiff is of very poor quality and is substandard therefore, the plaintiff is not entitled to any relief.

8. That the defendant got possession of the said flat after paying full sale consideration to the seller.

9. That the plaintiff has not completed the work in the stipulated time and the defendant has already paid the entire amount agreed for the renovation to the plaintiff and no amount is left due from the defendant.

10. That the defendant was, in fact, cheated by the plaintiff and got several plain paper and some documents signed from the defendant in her counsel's office, when the defendant and husband of the plaintiff filed the suit against the brother of husband of the plaintiff.

11. That the defendant issued post-dated cheques to the plaintiff before getting the possession of the said flat but before getting the possession from the

plaintiff, the defendant has paid the entire dues of the plaintiff. In other words, the plaintiff received the entire amount from the defendant before giving the possession of the suit flat, but even after having received the entire amount, she has not returned the post-dated cheques, under the pretext that the same are lying in the office of her counsel and on the very next day, the defendant can come and collect the same. But the defendant has been never returned those cheques, on one pretext or the other and now with malafide intentions plaintiff has used the said cheques making the basis of this suit.

12. That the plaintiff has also misused the blank-papers, got signed from the defendant under force, against which the defendant has already lodged a police complaint.

13. That the defendant has raised triable issues and has substantial defence in his favour and as such entitled to defend the present suit.

14. That the plaintiff has filed the present suit before this Hon''ble Court with malafide intentions and to harass the defendant.

15. That the plaintiff's suit cannot be tried as summary suit, in view of the above facts and circumstances.

19. A reader of our decision can understand as to why leave to defend was declined. The counsel for the appellant allowed a walkover. At an adversarial trial, where the standard of legal assistance falls below minimum acceptable limits, it would obviously be a case of a walkover. But justice is not granted on technical victories. Success has to be earned by the dint of hard-work and based on the strength of one's case.

20. It is apparent that the ill drafted application seeking leave to defend resulted in the same being dismissed and we find no fault with the learned Single Judge who records that the defence appears to be a moonshine.

21. Unfortunately, the inherent contrivance in the documents, writ large on their face, was neither pleaded nor brought to the notice of the learned Single Judge. We need not re-pen the same as we have made our comments herein above as and when we have referred to a document.

22. We would simply highlight that in the appeal filed, the appellant has explained that when he filed the suit against Rajender Kumar in which husband of the respondent was a co-plaintiff, the counsel engaged had obtained his signatures on blank papers and that the same counsel had connived with the respondent to file the suit against him. The appellant has also relied upon receipts in sum of Rs. 25 lakhs executed by Vikram Kumar acknowledging said sum received by him. In para 10 of the application seeking leave to defend, the appellant has pleaded having signed blank papers. Thus the foundation of a defence was raised.

23. These, receipts, would belie the stand taken by the respondent that her

husband received only Rs. 8 lakhs when the agreement to sell dated 10.01.1999 was executed.

24. To summarize, the position would be that the agreement to sell which appellant has executed with the husband of the respondent is dated October 01, 1999 and surprisingly 8 days prior we have a construction agreement relied upon by the respondent. The absurdities in the same have been noted by us in para 10 above and qua which we have made our comments in para 11 above. Similarly, the full and final discharge certificate acknowledging the work being completed has been noted in para 12 above qua which we have made our comments in the next succeeding paragraph. That the brother of the husband of the respondent has sprung up on the strength of a registered mortgaged deed, a fact never disclosed to the appellant by the respondent and her husband cannot be ignored.

25. It is not that the application seeking leave to defend lays no traces of a defence, inasmuch as in para 10 it has been pleaded that the appellant had signed several blank papers.

26. Everything is shrouded in mystery. It is apparent that the appellant and the respondent and the husband of the respondent have been dealing in what is popularly called "black money". It would be a nightmare to unearth the truth, unless either party makes a voluntary disclosure. But, it cannot be said that keeping in view the documents produced by the respondent in support of her case, which we note are only photocopies and the originals have been withheld, no case is made out to grant, at least a conditional leave to defend.

27. Before passing the final direction, we would highlight that learned counsel for the respondent, on the strength of the order dated 17.07.2009 passed in the present appeal urged that the appellant had agreed, as recorded therein, to deposit Rs. 1.5 crores in this Court after selling the second floor rear flat and thus urged that this should be the amount which should be paid to the respondent in the least. Learned counsel for the appellant highlighted that after this offer was made, Rajender Kumar the brother of the husband of the respondent filed CM No.3432/2010 in EFA(OS) No.7/2008 and therein for the first time it surfaced that the husband of the respondent had mortgaged the flat to his brother whose dues had swelled to over Rs. 2 crores and thus the property could not be sold and as a result the offer made by the appellant could be withdrawn by him as it was based upon the premise that the flat could be freely sold. The fact which emerged was that there is an encumbrance on the flat.

28. We dispose of the appeal and set aside the impugned order dated July 30, 2002 and dispose of IA No.7898/2008 filed by the appellant seeking leave to defend granting appellant leave to defend, but upon a condition. Upon the appellant depositing Rs. 15,00,000/- (Rupees Fifteen Lakhs) in the name of the Registrar General of this Court within a period of eight weeks from today, the appellant shall be entitled to defend the suit filed by the respondent, which suit would be restored upon an application filed by the appellant within 8 weeks from

today enclosing there with a banker's cheque in sum of Rs. 15 lakhs payable in the name of the Registrar General of this Court. The said sum shall be invested in a fixed deposit. The respondent would be permitted to withdraw the sum deposited with such interest which may accrue thereon till she withdraws the amount; but upon furnishing a bank guarantee to the satisfaction of the Registrar General of this Court.

29. We leave the parties to bear their own costs in the appeal.