

(2009) 11 DEL CK 0323
In the Delhi High Court
Case No : C.S. (SO) 1026 of 2007

Indglonal Investment and Finance Ltd.	APPELLANT
Vs	
Suresh Kumar Gupta and Others	RESPONDENT

Date of Decision : 27-11-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Limitation Act, 1963 — Article 54

Citation : (2009) 11 DEL CK 0323

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : Jagjit Singh, for the Appellant; Raman Duggal, for Defendant Nos. 1 and 2, for the Respondent

Final Decision : Dismissed

Judgement

S. Ravindra Bhat, J.—This order will dispose of the arguments addressed on the question of maintainability of the present suit, as well as the submissions made in the application by the defendants, for vacation of a temporary injunction granted by the court, in an earlier stage of the proceedings.

2. The plaintiff seeks specific performance of three Agreements to Sell property described fully in Para 44 (a) of the suit, situated at Village Kanganheri, Delhi. The plaintiff relies on three separate Agreements to Sell entered into for the purpose, with the defendants, for a total consideration of Rs. 1,10,00,000/- (Rupees one crore, ten lakhs only) on 27th April, 1995. It is contended, in the alternative, that if, for any reason, a decree for specific performance cannot be granted, the plaintiff should be granted a mortgage foreclosure decree, for the sum of Rs. 3.16 crores, with interest at 18% per annum.

3. According to the suit allegations, one Profile Holdings (Pvt) Ltd (hereafter "PHPL") had entered into the said agreements to sell, along with a memorandum of understanding (MOU) with the defendants, on 27.03.1995; the said company was amalgamated under orders of the Company Court, with the plaintiff

company, on 22.08.1995. PPHL had, contends the plaintiff, entered into transactions with the first defendant, for purchase of 1,00,000 debentures of one Asia Consolidated for which it paid Rs. One crore, ten lakhs, to the latter. Disputes arose thereafter, resulting in the initiation of criminal proceedings, registered as a first information report (FIR) No. 17/95 before the Hauz Khas Police Station. In the course of investigation, the first defendant was arrested, and enlarged on bail on condition that he was to deposit considerable amount of money. It is contended that the first defendant, therefore, approached the plaintiff and admitted the liability for Rs. 1.1 crores in respect of the said transaction, and expressed the desire to settle all dispute. Accordingly, the disputes were settled, through the MOU, where the liability for Rs. 1.1 crore was admitted; besides the defendants also entered into three Agreements to Sell, the suit properties, in the event the amounts were not paid to the plaintiff, within three months from the date when the criminal prosecution was quashed. It is submitted that the liability admitted by the first defendant was Rs. 1.1 crore, out of which the sum of Rs. 10 lakh was paid to PHPL by pay order dated 16.01.1995. The balance Rs. One crore, therefore had to be repaid within three months from the date of quashing of criminal proceeding, failing which, it was to be adjusted as consideration for the sale of the suit properties.

4. It is submitted that the criminal proceedings were quashed by this Court, on 03.05.1995. Despite that, the first defendant did not pay the money, agreed upon under the MOU. It is stated since the first defendant failed to perform his obligation of payment of Rs. 1 Crore within three months from 3.5.95 (the date of quashing of the FIR and the criminal proceedings by the Delhi High Court), therefore, in terms of the Memorandum of Understanding dated 27.4.1995, plaintiff became entitled to enforce the Agreements to Sell dated 27.4.1995 executed by Defendants in his favour. The plaintiff says that a legal notice was issued on 1-2-2001 to the defendants, to comply with the terms of the MOU, to which there was no response. In these circumstances, the plaintiff claims a decree for specific performance.

5. It is contended that simultaneously with the MOU, the defendants deposited the title deeds of the suit property, as security and equitable mortgage, to ensure that the amounts agreed upon would be repaid. These, according to the plaintiff, constituted equitable mortgage, of the suit property. According to the plaintiff, the intention of the parties was that with deposit of title deeds, the mortgage stood created; the defendants were to repay the principal amount, along with interest at 18% p.a. The plaintiff alleges that recently, in 2007, it became aware that the defendants had obtained a no objection certificate for the purpose of selling the suit lands. In these circumstances, the reliefs are sought.

6. The defendants had moved an application for rejection of the plaint, on the ground of its being time barred. During the course of proceedings, the court allowed that application to be withdrawn. In opposition to the plaintiff's application for temporary injunction, the defendants had moved another

application for vacation of the ex-parte order. The said applications were heard by the Court, as well as the question of maintainability of the suit, since issues were to be framed.

7. It is submitted that the suit, so far as it concerns the claim for specific performance, is within the period of limitation, because the defendants obtained permission to sell dated 22/23.3.07 and gave copies of the same dated on 27.3.07 of the suit land but wrongly obtained permission from the competent authority in the name of PPHL and later refused the plaintiff to get the permission amended in the name of plaintiff company and rather demanded more money for transferring the suit properties in favour. The plaintiff also contends that the cause of action further arose when it recently visited the area and met the local property dealers and it came to its (the plaintiff's) notice that the defendants are negotiating for sale of the suit properties. Counsel argues that in a suit for specific performance of agreement to sell of immovable property, time is never of the essence of the contract, and the time for suing starts when the defendant refuses or denies the demand for execution of the sale deed. It is contended that so far as the money claim, in terms of the mortgage is concerned, the suit is within the period of limitation.

8. The defendants' position is that the suit is time barred, for the relief of specific performance, as the MOU itself fixes the date for performance, i.e. three months from the date of quashing of criminal proceedings, which actually was 02.08.1995 (the date of quashing being 03.05.1995). The plaintiff always had knowledge about the defendants' denial, after 02.08.1995, and therefore, could not claim that denial took place only in 2007. It is contended that even otherwise, the plaintiff, in the suit averments, refers to a legal notice issued on 01.02.2001, asking for performance of the Agreements to Sell, which was not complied with. Even if the said latter date is considered, the suit is time barred, since it was filed well after three years from the refusal, or deemed refusal, in 2001. Contending next that the suit claim is inadmissible as regards the mortgage decree, it is submitted that a plain reading of the document (MOU) nowhere reflects any intention to create a mortgage. Besides, say the defendants, if the document is read as one creating a mortgage, it is inadmissible, since it is unregistered and inadequately stamped.

9. Before proceeding to analyze the rival contentions, it would be necessary to extract the relevant portions of the suit, dealing with the cause of action:

14. That since the Defendant No. 1 failed to perform his obligation of payment of Rs. 1 Crore within three months from 3.5.95 (the date of quashing of the FIR and the criminal proceedings by the Delhi High Court) consequently as per the Memorandum of Understanding dated 27.4.1995, plaintiff became entitled to enforce the Agreements to Sell dated 27.4.1995 executed by Defendants in favour of the plaintiff.

.... ..

25. That the plaintiff in the month of February, 2001 sent a legal notice through his Counsel dated 1st February, 2001, however, the Defendant did not respond to the same.

....

41. That the cause of action arose on 27.4.1995 when Shri Suresh Kumar Gupta entered into a MOU with the plaintiff. The cause of action further arose when the Defendants respectively pursuant to the aforesaid MOU executed three agreements to sell of the properties mentioned above and the said defendants handed over the 3 original sale deeds of respective properties to the plaintiff as collateral security. The cause of action further arose when the Defendants failed to pay the amount from 3.5.1995 and in pursuance thereof they failed to transfer the said property in favour of the plaintiff. The cause of action further arose when in sometimes February 1998, the Defendants acknowledged to the plaintiff about their liability to execute the sale deed in respect of the aforesaid land in plaintiff's favour or in alternative to return the said sum of Rs. 1 Crore with interest at the rate of 18% per annum. The cause of action further arose when the plaintiff sent a legal notice through counsel to the defendants in February, 2001, however of no avail. The cause of action further arose when the Defendants obtained permission to sell dated 22/23.3.07 and gave copies of the same dated on 27.3.07 of the suit land but wrongly obtained permission from the competent authority in the name of erstwhile company M/S Profile Holdings Pvt. Ltd instead of Indglonal Investment and Finance Ltd. but later refused the plaintiff to get the permission amended in the name of plaintiff company and rather demanded more money for transferring the suit properties in favour. The cause of action further arose when the plaintiff recently visited the area and met the local property dealers and it came to notice of the plaintiff that the defendants are negotiating for sale of the properties in question.

10. The material portions of the MOU read as follows:

3. That the first party hereby agrees that a sum of Rupees 110 lacs (Rupees One Crore and Ten lacs only) is due from them to the Second Party in respect of the above transactions of sale/purchase and delivery of debentures in full and final settlement of all the claims of the Second Party with the first party and the second party agrees to the same.

4. That out of the above outstanding amount of Rupees One Crore and Ten lacs, the first party had already paid a sum of Rs. 10,00,000/- (Rupees Ten lacs only) to the Second party by way of Pay Order dated 16.1.1995 drawn on Corporation Bank, Connaught Circus Branch, New Delhi as part payment of the above settled amount as a gesture of goodwill.

5. That the first party shall pay the balance amount of Rs. 1,00,000,00/- (Rupees One Crore only) to the Second Party within a period of three months from the date of the order of the Hon'ble High Court of Delhi quashing the FIR and proceedings arising out of the above case against the first party filed by the

Second Party. However, on or before filing the requisite petition u/s 482 of the Code of Criminal Procedure 1973 for quashing the FIR and the proceedings of the above case, the first party shall execute Agreement of Sale of some of his unencumbered property showing the sale of the said property to the Second Party towards discharge of their liability of Rupees One Crore in the event of failure of the first party to pay the aforesaid sum of Rs. One Crore.

6. It is hereby agreed that all the documents of Sale so executed between the parties hereto shall remain in the safe custody of Shri Lalit Bhasin, Advocate till the time of passing of the order of the quashing of the FIR and proceedings of this case. Immediately, on the passing/obtaining of the order of quashing of the FIR and proceedings of this case all the documents executed above by the first party in favour of the Second Party shall be handed over to the Second Party by Shri Lalit Bhasin, Advocate.

7. That if any amount out of the above said settled sum of Rs. One Crore remains unpaid by the first party to the Second Party on the expiry of three months from the date of the quashing of the FIR and proceedings of the case, the first party shall pay interests @ 18% per annum on the unpaid amount due to the Second Party and interest shall accrue on the unpaid amount with effect from the date of quashing of the FIR and proceedings by the Hon"ble High Court of Delhi.

8. That if the first party is able to pay to the second party the above said Rs. One Crore within the stipulated period, the second party shall have no lien of whatsoever nature on the property of the First Party about which Agreement of Sale have been executed between the parties. The said Agreement of Sale will become null and void and second party shall return all the original documents to the first party.

9. That in case the first party is unable to pay the entire abovesaid Rs. One Crore to the second party within the stipulated period as aforesaid the second party shall be entitled to get the sale deed (s) of the said properties registered in their name to recover the amount and discharge the second party from their liability. In case the first party is unable to pay some part of the aforesaid sum, the right of the second party in the above said properties shall be only to the extent of the amount which remains unpaid from the first party.

10. It is hereby agreed that for all purposes this memorandum of understanding shall be effective from the date of quashing of the FIR and proceedings connected therewith by the Hon"ble High Court.

11. Article 54 of the Schedule to the Limitation Act, 1963 reads as follows:

Schedule - Div 1 - Part 2 - Suits Relating To Contracts

54. For specific performance of a contract.... Three years.... The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.

In the decision reported as Ahmmadsahab Abdul Milla (dead) by proposed Lrs. Vs. Bibijan and Others, , the question of what is meant by date fixed, in Article 54, was considered, and explained, in the following terms:

the expression "date fixed for the performance" is a crystallised notion. This is clear from the fact that the second part "time from which period begins to run" refers to a case where no such date is fixed. To put it differently, when date is fixed it means that there is a definite date fixed for doing a particular act. Even in the second part the stress is on "when the plaintiff has notice that performance is refused". Here again, there is a definite point of time, when the plaintiff notices the refusal. In that sense both the parts refer to definite dates. So, there is no question of finding out an intention from other circumstances.

12. In this case, the date fixed for performance is neither a matter of speculation nor conjecture; it is clear, i.e. within three months from the date of quashing of criminal proceedings. That such event occurred on 03.05.1995, is also apparent from the suit. The last date, therefore, was 02.08.1995. The suit therefore, had to be filed within three years from that date. Even if that reckoning were, for some reason, not to be adopted, the plaintiff issued a legal notice on 01.02.2001, for securing performance of the contracts for Agreement to Sell. The defendants did not comply. The period therefore, commenced sometime in February or March, 2001, and ended three years later, in February or March, 2004. The claim for specific performance is therefore, clearly time barred.

13. Now, the issue of the mortgage claim. The plaintiff's case hinges on the deposit of title deeds, said to have been made by the defendant. There is no dispute that the defendants did not execute any mortgage deed. The question is whether the defendants intended to create mortgage security, and for that purpose, deposited the title deeds in relation to the suit property. It is settled law that equitable mortgage can be created by deposit of title deeds, by the owner - mortgagor. In such circumstances, arguably the matter is one of inference to be drawn on the basis of all surrounding circumstances as to whether the deposit of title deeds was with intent to create mortgage. Here, the MOU is the best evidence which the plaintiff can rely on. Clause 6 of the said document evinces an unequivocal intention that the title documents were handed over to the agreed counsel as security for the performance of a specific term, i.e. quashing of FIR. The arrangement was by way of an "escrow" rather than creation of a mortgage security. If the intention was indeed one to create a mortgage, the document would have suitably recorded it. That was not clearly, the parties intent. It is therefore held that no equitable mortgage was created, by the defendants, entitling the plaintiff to seek relief on such basis.

14. For the above reasons, it is held that the suit is not maintainable, both on account of its being time barred, as well as not disclosing a cause of action. The suit is therefore, rejected. All pending applications too, are therefore, disposed of.