
(2012) 08 RAJ CK 0145

In the Rajasthan High Court

Case No : Civil Miscellaneous Appeal No. 481 of 2012

Jugal Kishore Garg

APPELLANT

Vs

Shri Anand Srivastava and Others

RESPONDENT

Date of Decision : 23-08-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 43 Rule 1(r)

Registration Act, 1908 — Section 49

Citation : AIR 2013 Raj 56 : (2013) 1 CDR 112 : (2013) 4 RLW 3396 : (2013) 4 RLW 2983

Hon'ble Judges : Bela M. Trivedi, J

Bench : Single Bench

Advocate : M.M. Ranjan for Mr. Amit Gupta, for the Appellant; R.P. Singh along with Mr. Arindam Mukherjee and Mr. Madho Swami, for the Respondent

Final Decision : Allowed

Judgement

Hon"ble Ms. Justice Bela M. Trivedi

1. The present appeal filed under Order XLIII Rule 1(r) of CPC arises out of the order dated 4.1.2012 passed by the Addl. District Judge, Behror, Alwar (hereinafter referred as the "trial court") in Civil Misc.(T.I) Application No. 151 of 2011, whereby the trial court has dismissed the said application of the appellant-plaintiff filed under Order XXXIX Rules 1 & 2 of CPC. The case of the appellant-plaintiff in nutshell is that the respondents defendants executed an agreement/Memorandum of Understanding (for short "MoU") dated 17.8.2011 to sell the suit land situated at village Hamejapur and Dhundera Tehsil-Behror District-Alwar, admeasuring about 150 bighas, for total sale consideration of Rs. 37 lac per bigha. As per the terms of the agreement, the appellant-plaintiff had to make payment of Rs. 5 crores at the time of signing the MoU, Rs. 16 crores on or before 30th August,2011,Rs.6.5 crores on or before the expiry of three months from the date of MoU i.e. on or before 16.11.2011 and the balance of

consideration on or before the expiry of six months from the date of MoU i.e. 16.2.2012. It was further mentioned in the said MoU that registration of the sale deed in favour of the vendee or his associates shall take place on the receipt of Rs.21 crores (i.e. on the receipt of 1st and 2nd installments of Rs.5 crores and Rs.16 crores respectively) and on the receipt of the post dated cheques of Rs.6.5 crores and the balance consideration. It is further case of the appellant-plaintiff that on 4.9.2011, the appellant had served a notice to the respondents-defendants showing his readiness and willingness to perform his part of contract and requested the respondents-defendants to abide by the terms of MoU to be performed on his part. The said notice was replied to by the respondents defendants vide the reply dated 7.9.2011 stating interalia that the appellant had failed to make payment of Rs.16 crores by 30.8.2011 and therefore had committed the breach of condition mentioned in MoU and therefore the respondents had terminated the said MoU dated 17.8.2011. Appellant- plaintiff therefore filed the suit against the respondents-defendants seeking specific performance of the agreement dated 17.8.2011 and also filed the application being no. 151 of 2011 seeking temporary injunction restraining the respondents defendants from alienating, transferring or creating any third party interest in the suit land during the Pendency of the suit. The said application was resisted by the respondents-defendants by filing the reply. The trial court after hearing learned counsels for the parties, dismissed the said application of the appellant-plaintiff vide the impugned order dated 4.1.2012. Being aggrieved by the said order, the present appeal has been filed.

2. This court initially had issued notice to the respondents and restrained them from alienating the property in question vide the order dated 1.2.2012. Thereafter, the court vide the order dated 22.5.2012 had called for the record of T.I. Application from the trial court, and further ordered to finally dispose the present appeal at the admission stage. Accordingly, the record having been sent, with the consent of the learned counsels for the parties, the appeal has been heard finally at the admission stage.

3. The learned Sr. counsel Mr. MM Ranjan for the appellant, taking the court to the terms of the agreement/MoU dated 17.8.2011, the notice and the documents, from the record of the TI application, submitted that the appellant-plaintiff was always ready and willing to perform his part of contract and is still ready and willing to pay Rs.21 crores within one week and the balance amount within one month to the respondents towards the said agreement. According to Mr. Ranjan, on 29.8.2011, the time for registration of sale deed was mutually extended upto 8.9.2011 instead of 30.8.2011 and therefore the plaintiff was required to make the payment of Rs.16 crores on or before 8.9.2011 instead of 30.8.2011. However, having apprehended that the respondents will not fulfill their part of contract, the appellant had served the notice to the respondents on 4.9.2011, reassuring the respondents that the appellant was ready and willing to perform his part of contract. Thereafter, also the appellant had got prepared and tendered the cheques and drafts dated 6th September 2011 and 8th September,

2011 towards the sale consideration to be paid to the respondents on 8.9.2011, however the respondents refused to accept the same. Mr. Ranjan also submitted that the appellant-plaintiff having shown his readiness and willingness to perform his part of agreement right from the beginning till the filing of the suit and having also parted with the substantial amount as per the terms of the agreement, had established a strong prima facie case in his favour, however, the trial court has materially erred in law in not granting the temporary injunction on the ground that the agreement was not registered one.

4. Mr. R.P. Singh Sr. counsel for the respondents relying upon the terms of the MoU dated 17.8.2011 and the writing dated 29.8.2011 submitted that the appellant was required to make payment of Rs.16 crores on or before 30.8.2011, though the period for registration of sale deed was extended upto 8.9.2011, as the other terms of MoU were kept as they were, while executing the writing on 29.8.2011. Since the appellant did not pay Rs.16 crores on 30.8.2011, it could not be said that he was ready and willing to perform his part of contract. Mr. Singh has also submitted that the time limit having been fixed in the MoU for making payment towards the sale consideration, it was required to be inferred that the parties had intended to make the time essence of the contract. Mr. Singh relied upon the judgment of Apex court in the case of Mrs. Saradamani Kandappan Vs. Mrs. S. Rajalakshmi and Others, to submit that in a contract relating to immovable property, if time is specified for payment of sale price, but not in regard to the execution of the sale deed, time will become the essence only with reference to payment of sale price and not in regard to the execution of sale deed. He also relied upon the decisions in the case of M/s Best Sellers Retail (India) Pvt. Ltd. vs M/s Aditya Birla Nuvo Ltd. and ors, JT 2012 (5) SC 357 and in the case of Skyline Education Institute (Pvt.) Ltd. Vs. S.L. Vaswani and Another, to submit that no irreparable loss which could not be compensated in terms of money was going to be caused to appellant if the injunction was not granted. He also submitted that the impugned order passed by the court being discretionary in nature, just and proper, no interference of this court is called for.

5. In the instant case, there are certain undisputed facts. It is not disputed that the appellant-plaintiff agreed to purchase and the respondents-defendants agreed to sell the lands in question as per the agreements/MoU entered into by them on 17.8.2011. The terms of agreement are also not disputed. The payment of Rs.5 crores made by the appellant to the respondents on 17.8.2011 is also not disputed. It has also not been disputed that on 29.8.2011, the period for registration of sale deed was extended from 30.8.2011 to 8.9.2011 by mutual consent of the parties. It is also not disputed that the appellant-plaintiff had served the notice dated 4.9.2011 to the respondents reassuring them that he was ready to perform his part of contract. The said notice was replied to by the respondents vide the reply dated 7.9.2011 stating inter alia that the appellant had not adhered to the terms of MoU and hence the said MoU had stood terminated.

6. Now, though it has been contended by learned counsel Mr. Singh for the respondents that the time was intended to be the essence of contract in the instant case, it is required to be noted that as per the terms and conditions contained in the MoU, the registration of sale deed was to take place on happening of two events, firstly on the receipt of Rs.21 crores i.e., 5 crores at the time of signing of MoU and Rs.16 crores on or before 30.8.2011 and secondly on the receipt of the post dated cheques of Rs.6.5 crores and the balance amount. The said date of registration of sale deed was mutually extended from 30.8.2011 to 8.9.2011 as per the writing executed on 29.8.2011. From such terms of agreement and the subsequent writing, the court does not find substance in the submission of Mr. Singh that by the said writing dated 29.8.2011 only date of registration of sale deed was extended from 30.8.2011 to 8.9.2011, otherwise the time was intended to be the essence of contract. It is also significant to note that the respondents themselves had permitted the appellant-plaintiff to defer the payment of Rs.6.5 crores by permitting him to give the post dated cheques on or before 16.11.2011 and balance amount on or before 16.2.2012. In the entire MoU, there was no mention whatsoever that the time was to be treated as the essence of contract. Apart from the terms of MoU, the very fact that the parties agreed to extend the period for registration of sale deed from 30.8.2011 to 8.9.2011 clearly implied that time was not the essence of the contract. Even as per the settled legal position, in case of sale of immovable property, the time is not considered to be the essence of contract, unless such an intention is gathered either from the express terms of the contract or impliedly from the intention of the parties as expressed by the terms of the contract.

7. The constitutional Bench of the Apex Court in case of Smt. Chand Rani (dead) by LRs. Vs. Smt. Kamal Rani (dead) by LRs., has made the position clear as under:

It is a well-accepted principle that in the case of sale of immovable property, time is never regarded as the essence of the contract. In fact, there is a presumption against time being the essence of the contract. This principle is not in any way different from that obtainable in England. Under the law of equity which governs the rights of the parties in the case of specific performance of contract to sell real estate, law looks not at the letter but at the substance of the agreement. It has to be ascertained whether under the terms of the contract the parties named a specific time within which completion was to take place, really and in substance it was intended that it should be completed within a reasonable time. An intention to make time the essence of the contract must be expressed in unequivocal language.

8. The Apex Court making analysis of the earlier judgments observed in para-24 thereof as under:

From an analysis of the above case law it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the

contract. Even if it is not of the essence of the contract the Court may infer that it is to be performed in a reasonable time if the conditions are:

1. from the express terms of the contract;
2. from the nature of the property; and
3. from the surrounding circumstances, for example: the object of making the contract.

9. Learned counsel Mr. Singh for the respondents while agreeing to the said ratio laid down by the Apex Court, however submitted relying heavily upon the observations made by the Apex Court in the recent decision, in case of Mrs Saradamani Kandappan (*supra*), that considering the current position of steep rise in the prices of immovable properties the Apex Court has also observed that there is an urgent need to revisit the principle that time is not the essence in contract relating to immovable properties. Since the Apex Court after making the said observations did not propose to refer the matter to the larger Bench as mentioned in para 27 thereof the ratio laid down in the case of Smt. Chand Rani (*supra*) still holds the field.

10. Even in the light of the above stated legal position, the facts of this case are examined, it *prima facie* appears that the time was not made the essence of the contract and that the appellant was always ready and willing to perform his part of contract. Of Course, it will be a matter of evidence to be led by both the parties at the time of trial as to whether the time was to be considered as the essence of contract or not having regard to the terms of contract, and whether the appellant was ready and willing to perform his part of contract or not. However, the appellant-plaintiff has *prima facie* established that he had not only shown his willingness to make the payment of Rs.16 crores prior to filing of suit by issuing notice on 4.9.2011 but also subsequently keeping the cheques and drafts dated 6.9.2011 to 8.9.2011 ready for making the payment to the respondents, as the date of registration of sale deed was mutually agreed to be extended till 8.9.2011 as per the writing dated 29.8.2011. During the course of arguments, the learned counsel for the appellant has also stated that to show the bonafides, the appellant is ready to deposit the said amount of Rs. 16 crores plus additional amount of Rs.5 crores i.e 21 crores within a period of one week from today and balance amount within a period of one month.

11. It is also required to be noted that the trial court has erroneously not granted the injunction by observing the agreement in question was not registered. It is needless to say that the agreement that required registration is admissible in evidence in a suit of specific performance of contract, in view of proviso to section 49 of the Registration Act. Even otherwise, the *prima facie* findings of the trial court being perverse, the same deserve to be quashed and set aside.

12. Considering the facts and circumstances of the case and considering the willingness on the part of the appellant to deposit the money as per the terms of

contract, this court is of the opinion that the interest of the appellant in the suit property is required to be protected during the Pendency of suit, in order to avoid further multiplicity of proceedings, subject to his depositing Rs.21 crores in the trial court within one week. In that view of the matter, the respondents-defendants are restrained from transferring, alienating, developing or putting up any construction or creating any third party interest in the suit lands during the Pendency of the suit. The appellant shall deposit Rs.21 crores before the trial court within one week from today. On such deposit being made, the said amount shall be invested in the fixed deposits of any nationalized bank for a period of five years which shall be renewed from time to time during the Pendency of suit. The appeal stands allowed accordingly.