(2015) 11 DEL CK 0080

In the Delhi High Court

Case No : CS (OS) No. 2697/2011

Keventer Agro Limited APPELLANT

Vs

Kalyan Vyapar Pvt. Ltd. and Others RESPONDENT

Date of Decision : 30-11-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 6, Order 14 Rule 1, Order 14 Rule 2, Order 7 Rule 11, 2(2)
Easements Act, 1882 — Section 59, 60(b)
Evidence Act, 1872 — Section 91, 92
Limitation Act, 1963 — Section 22

Citation : (2016) 154 DRJ 124

Hon'ble Judges : Valmiki J. Mehta, J.

Bench : Single Bench

Advocate : Ravi Gupta, Senior Advocate, P. Choudhary and Manmohan Gupta, Advocates, for the Appellant; Deepak Kumar Jewa, Jaladhar Das and Puja Barik, Advocates, for the Respondent

Judgement

Valmiki J. Mehta, J.—This suit is today listed for framing of issues and disposal of I.A. No. 17568/2014 filed by the defendant no.2 under Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC).

2. When a court has to frame issues, it has to be seen also as to whether issues at all arise because only when material propositions of facts and law are affirmed by one party and denied by the other party issues would arise. Putting it in other words, if from reading of the pleadings and documents which exist on record, at this stage of framing of issues, it is found that really no issue arises or certain issues do not arise, this Court need not frame some or all issues. In fact, at the stage of framing of issues, courts besides looking into Order VII Rule 11 CPC can also look into Order XII Rule 6 alongwith Section 2(2) CPC which defines a decree that by a decree even part of the claim in a suit can be decided.

3. The subject suit is a suit for permanent injunction and mandatory injunction, seeking reliefs of cancellation of the Sale Deed dated 4.8.2011 executed by the

defendant no.1 in favour of the defendant no.2 with respect to the suit property being 9, Masjid Moth, Commercial Complex, GK-II, New Delhi-110048, specific performance of an earlier Agreement to Sell dated 3.8.2010 of the suit property (i.e prior to the Sale Deed dated 4.8.2011) and to put the plaintiff in possession of the suit property, and finally for damages of Rs. 60,29,254/- on the basis of the averments made in para 28 of the plaint pertaining to damages to office equipments, loss of cash and loss of business etc. Following are the relief clauses as per the suit plaint:-

"It is, therefore, most respectfully prayed that this Hon''ble Court may be pleased to pass the following order/orders:-

A. Decree of permanent injunction restraining and prohibiting the defendants, their security guards, representatives employees, agents, servants, anyone else acting on their behalf or instruction, from creating any impediment or blocking the ingress and egress of the plaintiff and its employees entering the suit property being First Floor 9, Masjid Moth, Commercial Complex, Greater Kailash, Part-II, New Delhi- 110048 or creating any hindrance or hurdle in their peaceful possession of the suit property and conduct of business by the plaintiff from suit property.

B. Decree of mandatory injunction directing and ordering the defendants, their representatives, assigns, employees, servants, anyone acting on their behalf etc to comply with their obligations as are cast upon them.

C. Decree declaring the sale deed dated 04.08.2011 registered in favour of defendant no.2 vide registration No. 12535, additional book No. 1, volume 11375, pages 98 to 106 dated 09.08.2011 with respect to property being 9, Masjid Moth, Commercial Complex, Greater Kailash, Part-II, New Delhi-110048 as per Schedule-I is null and void.

D. Decree cancelling the sale deed dated 04.08.2011 registered in favour of defendant no.2, registration No. 12535, additional book No. 1, volume 11375, pages 96 to 106 dated 09.08.2011 with respect to property being 9, Masjid Moth, Commercial Complex, Greater Kailash- Part-II, New Delhi 110048 as per Schedule-I.

E. pass an order directing the defendants to deliver up all the documents, assets/ valuable etc. pertaining to the property as detailed in schedule-I and schedule-II of the plaint.

F. Decree for specific performance of oral and written agreement dated 03.10.2010 of property being 9, Masjid Moth, Commercial Complex, Greater Kailash-II, New Delhi-110048 and directing the defendant No. 1 to register sale deed in favour of the plaintiff to the suit property and to put the plaintiff in possession therein and the decree may further direct in case of refusal and non execution of registration of sale deed by the defendant within such time as may be directed by the decree, needful to be done by the official of this Hon''ble Court to do all acts necessary for putting the plaintiff in possession of suit premises thereof.

G. Restrain the defendants, its agents, representatives, assignees from dealing, encumbering, mortgaging, assigning, leasing letting out, renting or creating any third party rights in respect any part of suit property or the entire property No. 9, Masjid Moth, Commercial Complex, G.K. Part II, New Delhi-110048 and/or parting possession with the entire property No. 9, Masjid Moth, Commercial Complex, G.K. Part II, New Delhi-110048.

H. Decree for damages of Rs. 60,29,254.00 (Rupees sixty lacs twenty nine thousand and two hundred and fifty four only) as detailed in the plaint in favour of the plaintiff and against the defendants.

I. costs of suit be allowed in favour of the plaintiff and against the defendants.

J. Any other further order(s) or relief(s) which this Hon''ble Court deems fit and proper be also awarded to the plaintiff and against the Defendants in the peculiar facts and circumstances of this case."

4. In this suit a detailed Order was passed by a learned Single Judge of this Court on 24.5.2013 declining the interim reliefs as prayed for by the plaintiff. Various contentions of both the parties placing reliance upon the provisions of different enactments including the Indian Easements Act, 1882 and so on were considered by a learned Single Judge of this Court at the time of passing of the Order on 24.5.2013. Counsel for the defendant no.2/applicant in I.A. No. 17568/2014 has sought to place reliance on those observations contained in the Order dated 24.5.2013, however, observations made in an interim order do not bind the court at the time of disposing of the suit finally for one or more of the claims in the suit and therefore I am independently considering the issues argued today with regard to the claims in the suit being maintainable or not and as to whether the prayers as made in the suit reproduced above should or should not result in framing of the issues. Putting it in other words, it is the argument urged on behalf of the defendant no.2 that on the basis of the existing pleadings and documents on record, and taking such pleadings and documents as correct, the prayers of the suit have to be dismissed except the prayer with respect to seeking a money decree of damages.

5. The case of the plaintiff as per the plaint essentially is that the plaintiff had a right of pre-emption with respect to the suit property in terms of an Agreement to Sell dated 3.8.2010 pleaded to be entered into between the plaintiff and defendant no.1 for the suit property. Plaintiff in the plaint has accordingly made repeated assertions with respect to existence a right of pre-emption in favour of the plaintiff and hence the consequential prayers for cancellation of the subsequent sale deed executed by the defendant no.1/original owner in favour of the defendant no.2/purchaser in violation of the prior rights of pre-emption of the plaintiff under the Agreement to Sell dated 3.8.2010. Plaintiff no doubt makes averments of both oral and written agreements, however, a reading of

para 1 of the suit plaint shows that the oral agreement entered into in the year 2007 is even as per the case of the plaintiff given finality by the same being reduced into writing in terms of the Agreement to Sell dated 3.8.2010 (wrongly written as 3.10.2010).

6. Counsel for the defendant no.2 has argued for dismissal of the suit (except for the relief of money decree of damages as stated above) on the ground of lack of consensus ad idem qua the Agreement to Sell dated 3.8.2010 entered into between the plaintiff and the defendant no.1 with respect to the suit property by arguing that the Agreement to Sell dated 3.8.2010 lacked a specific price/ consideration of purchase by the plaintiff of the suit property, however, this aspect was rightly not pressed in view of the judgment of the learned Single Judge of this Court in the case of Kamal Chug & Ors. Vs. Narinder Kumar Gulati & Ors. 131 (2006) DLT 172 and which holds that with respect to an agreement of pre-emption the same is not void on account of price not being stated in the contract of pre-emption. Counsel for the defendant no.2 however argues for dismissal of the suit on the aspect that the plaintiff/Company which has filed this suit (and which is a company M/s. Keventer Agro Limited) is not a signatory to and thus has no rights under the Agreement to Sell dated 3.8.2010 and which Agreement to Sell dated 3.8.2010 is relied upon in the plaint for seeking all the reliefs in the suit except the prayer for money decree/damages.

7. In order to appreciate the argument urged on behalf of the defendant no.2 that the present plaintiff company/M/s. Keventer Agro Limited cannot file the subject suit because it has no rights in its favour in terms of the Agreement to Sell dated 3.8.2010, it is necessary to reproduce the Agreement to Sell dated 3.8.2010, and which reads as under:-

"The following has been agreed between Mr. M.K. Jalan and Mr. Vinay Maloo:

The Building No. 9 at Masjid Moth Commercial Complex Greater Kailash Part II is currently under the possession of Shri Moti Lal Bothra and Shri M.K. Jalan. Both of them would mutually agree on the market price of the property and if Mr. Jalan wants to buy the property at the agreed market price, he will have the first option on the same. Mr. K.L. Bothra''s (representative of Mr. Vinay Maloo) consent will be taken while determining the market price. 30% of the sale price will be given to Mr. M.K. Jalan (as mutually agreed between Mr. M.K. Jalan and Mr. Moti Lal Bothra) which will be kept in Escrow by Mr. M.K. Jalan for overall settlement of his account.

Mr. Vinay Maloo confirms that this understand is irrevocable.

Date: 3rd August 2010."

8. Before analyzing the agreement to sell and considering the respective arguments of the parties, it is also necessary to refer to Sections 91 and 92 of the Indian Evidence Act, 1872 (hereinafter referred to as ''the Act'') for the purpose of determination of the issue of lack of locus standi of the present

plaintiff to seek the reliefs claimed in the suit except the relief of damages/ money decree, and therefore these Sections 91 and 92 of the Act as a whole are reproduced as under:-

"Section 91 . Evidence of terms of contracts, grants and other dispositions of property reduced to form of documents.- When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Exception 1.-When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2.-Wills admitted to probate in India may be proved by the probate.

Explanation 1.-This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document and to cases in which they are contained in more documents than one.

Explanation 2.-Where there are more originals than one, one original only need be proved.

Explanation 3.-The statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

Section 92 . Exclusion of evidence of oral agreement.- When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Proviso (1).-Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, 1*[want or failure] of consideration, or mistake in fact or law:

Proviso (2).-The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document:

Proviso (3).-The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved:

Proviso (4).-The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents:

Proviso (5).-Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved: Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract:

Proviso (6).-Any fact may be proved which shows in what manner the language of a document is related to existing facts."

9. Section 91 of the Act states that a contract which is entered into in writing can only be proved by the written document itself and by no other evidence or means. Section 92 of the Act thereafter proceeds to state that once the contract is proved in terms of Section 91 of the Act, no evidence can be led to add or subtract or contradict or vary the terms contained in the written contract. There are of course certain exceptions to looking only into terms which are comprised in the written contract/document and which are contained in the proviso to Section 92 of the Act, and one of these provisos (proviso 2) will be considered subsequently in view of the argument urged relying upon the same by the plaintiff.

10. A reading of the aforesaid Agreement to Sell dated 3.8.2010 shows clearly that the said agreement is entered into between Mr. M.K. Jalan and Mr. Vinay Maloo as stated in the heading of the agreement. Agreement does not in any manner refer to the agreement having been entered into by Mr. M.K. Jalan for and on behalf of either the plaintiff or anybody else. Similarly when the agreement is signed by Mr. Vinay Maloo it is not mentioned that Mr. Vinay Maloo has signed the agreement on behalf of the defendant no.1/Company and all that is stated is that Mr. Vinay Maloo will also take consent of Mr. K.L. Bothra. It may be noted that neither Mr. Vinay Maloo nor Mr. K.L. Bothra are in any manner stated to be Directors of the defendant no.1/Company. Also, in the Agreement to Sell dated 3.8.2010, there is no reference to Mr. Vinay Maloo acting in terms of a particular Board of Director''s resolution of the defendant no.1/Company. In fact, it is the case of the plaintiff, as argued before this Court, that Mr. Vinay Maloo was acting as a power of attorney holder on behalf of the defendant no.1/ Company for signing of the Agreement to Sell dated 3.8.2010. In any case, I do not have to go on the aspect as to who has signed the agreement on behalf of the defendant no.1 or whether it was rightly or incorrectly signed on behalf of the defendant no.1 i.e whether Mr. Vinay Maloo or Mr. K.L. Bothra or each of them individually or jointly had power to enter into an agreement on behalf of the defendant no.1 in the suit property because this is not an issue which is

called for determination and what is in issue before this Court is whether the Agreement to Sell dated 3.8.2010 has been entered into by the present plaintiff/ Company/M/s. Keventer Agro Limited and that whether Mr. M.K. Jalan in terms of the Agreement to Sell dated 3.8.2010 has acted for and on behalf of the present plaintiff/Company/M/s. M/s. Keventer Agro Limited.

11. As already stated above, once the agreement is proved in terms of Section 91 of the Act; and in this case there does not arise an issue of proof because it is the case of the plaintiff itself of placing reliance on this Agreement to Sell dated 3.8.2010; therefore, the Agreement to Sell dated 3.8.2010 has to be looked into only in terms of what is contained in the said Agreement to Sell dated 3.8.2010 and no further evidence can be considered to decide what are the terms of the Agreement to Sell dated 3.8.2010. Also, in view of Section 92 of the Act no evidence can be led on behalf of the plaintiff to in any manner add or subtract or vary or contradict the terms contained in the Agreement to Sell dated 3.8.2010 subject of course to the case of the plaintiff falling within any of the exceptions contained in Section 92 of the Act.

12. A reading of the Agreement to Sell dated 3.8.2010 leaves no manner of doubt, once we read the agreement to sell only and no other document including any pleading or affidavit of the defendant no.1 in the present case in view of Sections 91 and 92 of the Act, that, the Agreement to Sell dated 3.8.2010 has been entered into only and only by Sh. M.K. Jalan in his individual capacity. The Agreement to Sell dated 3.8.2010 does not refer to Sh. M.K. Jalan acting for and on behalf of the plaintiff/Company or in any manner having been authorized by the plaintiff/Company for entering into of the Agreement to Sell dated 3.8.2010 on behalf of the plaintiff/Company. Applying Sections 91 and 92 of the Act, it is therefore clear that the plaintiff cannot set up a case that Sh. M.K. Jalan when he signed the Agreement to Sell dated 3.8.2010 was acting for and on behalf of the plaintiff/Company/M/s. Keventer Agro Limited.

13. (i) The related issue to be decided is the argument urged on behalf of the plaintiff, by applying the second proviso to Section 92 of the Act, that this Court can look into the pleadings which are filed by the defendant no.1 in this suit being the written statement as also an Affidavit dated 15.11.2011 (attested on 14.11.2011) and once these documents are read, these documents will show that Sh. M.K. Jalan was acting for and on behalf of the plaintiff/Company. Learned senior counsel for the plaintiff argues by placing reliance upon the second proviso to Section 92 of the Act that once a document is silent, courts can look into other evidence to hold that Sh. M.K. Jalan was acting for and on behalf of the plaintiff/Company i.e it is argued by the plaintiff that the Agreement to Sell dated 3.8.2010 is silent on who has a right of pre-emption under the same and thus pleadings of defendant no.1 can be looked into to decide that Sh. M.K. Jalan was acting for and on behalf of the plaintiff/Company.

(ii) I am completely unable to agree with this argument urged on behalf of the plaintiff because proviso (2) to Section 92 of the Act applies to a situation with respect to a matter where the document is silent and in the present case the document is not silent as to who is the person who had a right of pre-emption, inasmuch as, Sh. M.K. Jalan as per the Agreement to Sell dated 3.8.2010 is specifically written as the person who has a right of pre-emption. Therefore, it cannot be argued on behalf of the plaintiff that the document/ Agreement to Sell dated 3.8.2010 is silent with respect to the person who had a right of pre-emption. Once the document is not silent and Mr. M.K. Jalan is mentioned as a person who has a right of pre-emption, the argument urged on behalf of the plaintiff of applying proviso (2) to Section 92 of the Act is misconceived and is accordingly rejected.

14. In view of the aforesaid, the following conclusions emerge:-

(i) Admittedly, the plaintiff places reliance upon the Agreement to Sell dated 3.8.2010, and which agreement to sell is said to be the culmination of earlier discussions between the parties with respect to the suit property.

(ii) The Agreement to Sell dated 3.8.2010 is specifically entered into between Sh. M.K. Jalan only as the person who has a right of pre-emption i.e Sh. M.K. Jalan cannot be said to have acted for anybody else including the plaintiff/Company as is the case which is set up in the plaint.

(iii) Sh. M.K. Jalan is not a party/plaintiff in the present suit, and plaintiff/ Company is not seeking to enforce rights under the Agreement to Sell dated 3.8.2010 either as a nominee or for and on behalf of Sh.M.K. Jalan. Even if Sh. M.K. Jalan is now hereafter sought to be added as a plaintiff in the suit, the provision of Section 22 of the Limitation Act, 1963 will apply as per which the suit will be taken to have been filed by Sh. M.K. Jalan only when the application would have been filed to implead Sh. M.K. Jalan as the plaintiff. Of course, I must hasten to add that it is not the case of the plaintiff argued before this Court today that Sh. M.K. Jalan had individual and personal rights under the Agreement to Sell dated 3.8.2010 and the case of the plaintiff is that it is the plaintiff/Company which acted for taking benefit of the right of pre-emption of the suit property. Accordingly, no observations are made by this Court finally one way or the other with respect to whether the suit if filed by Sh. M.K. Jalan or if Sh. M.K. Jalan is said to be added in the present suit today, whether such claim of Sh. M.K. Jalan would be barred by limitation.

(iv) As per the averments in the plaint, it is not stated that Sh. M.K. Jalan entered into an Agreement to Sell dated 3.8.2010 for and on behalf of the present plaintiff/Company/M/s. Keventer Agro Limited.

(v) Once the Agreement to Sell dated 3.8.2010 is an admitted document and relied upon by the plaintiff itself, and this agreement to sell is to be taken as final for containing the terms and conditions of the right of pre- emption between Sh. M.K. Jalan and defendant no.1/Company acting through Sh. Vinay Maloo, it cannot be argued by the plaintiff in view of the provisions of Sections 91 and 92 of the Act that the Agreement to Sell dated 3.8.2010 signed by Sh. M.K. Jalan is not in his individual capacity and that Sh. M.K. Jalan was in fact acting for and on behalf of the plaintiff/Company in this case. Also, in the facts of the present case, there is no scope for applicability of the second proviso to Section 92 of the Act as there is no silence in the Agreement to Sell dated 3.8.2010 of the person who has the right of pre-emption as it is clearly mentioned in the Agreement to Sell dated 3.8.2010 that the right of pre-emption is of Sh. M.K. Jalan and not anybody else.

15. Accordingly, it is held that since the Agreement to Sell dated 3.8.2010 relied upon by the plaintiff was entered into by Sh. M.K. Jalan having a right of pre-emption of the suit property, the present suit which is filed by the plaintiff/M/s. Keventer Agro Limited is not maintainable as rights under the Agreement to Sell dated 3.8.2010 are only and only of Sh. M.K. Jalan and not the plaintiff/ Company. Accordingly, it is held that the plaintiff has no locus standi to seek the benefit of the Agreement to Sell dated 3.8.2010 and the suit in view of the provisions of Order XIV Rules 1 and 2 CPC, Order XII Rule 6 CPC and Section 2(2) CPC is dismissed with respect to all the reliefs claimed except the right of claiming of money decree on account of damages of Rs. 60,29,254/- and with respect to which the suit will proceed ahead.

16. (i) Learned senior counsel for the plaintiff has finally argued by placing reliance upon Section 60(b) of the Indian Easements Act that since the plaintiff had made works of permanent character upon the suit property which was licensed to the plaintiff, hence plaintiff is entitled to restoration of possession as the plaintiff has been illegally evicted from the suit property.

(ii) This argument of the plaintiff is liable to be rejected for various reasons. Firstly, Section 59 of the Indian Easements Act states that the guarantor/ transferee is not bound by a licence created, and since admittedly the suit property has already been transferred to the defendant no.2, hence defendant no.2 who has possession of the suit property being not bound by the licence created in favour of the plaintiff cannot be directed to restore possession of the suit property to the plaintiff. Of course, it also bears note that a licensee never gets legal possession of a property and a right of a licensee is only to enter and exit the licenced premises.

(iii) Secondly as per the full bench judgment of this Court in the case of Chandu Lal Vs. Municipal Corporation of Delhi, against a licensee who does not vacate after the termination of a licence, reasonable force can be used for eviction and therefore since licence in this case stands terminated on account of Section 59 of the Indian Easements Act, the plaintiff is not entitled to restoration of ''possession''.

(iv) Thirdly there is no cause of action pleaded in the plaint and no relief clause exists for restoration of ''possession'' on account of plaintiff being dispossessed without due process of law.

(v) Fourthly and finally merely because the plaintiff has alleged that it changed the flooring, this work done cannot be said to be a work of permanent character falling under Section 60(b) of the Indian Easements Act so that the plaintiff can claim benefit of Section 60(b) of the Indian Easements Act.

17. List for further proceedings on 11th March, 2016. Once the suit is dismissed with respect to all the prayers except the relief of money decree, any interim orders which have been passed with respect to the reliefs claimed in the suit which have been dismissed would also stand vacated in terms of the present judgment.

