
(2012) 05 DEL CK 0294

In the Delhi High Court

Case No : Regular First Appeal (OS) 47 of 2009

K.L. Rajgarhia

APPELLANT

Vs

Canara Bank

RESPONDENT

Date of Decision : 08-05-2012

Acts Referred:

Income Tax Act, 1961 — Section 269

Specific Relief Act, 1963 — Section 10, 12, 14, 20

Citation : (2012) 05 DEL CK 0294

Hon'ble Judges : Siddharth Mridul, J;Pradeep Nandrajog, J

Bench : Division Bench

Advocate : T.K. Ganju, instructed by Mr. A.K. Thakur and Mr. Aditya Ganju, for the Appellant; Pradeep Dewan instructed by Ms. Anupam Dhingra, for the Respondent

Judgement

Pradeep Nandrajog, J.—Vide a written memorandum captioned: "AGREEMENT", Ex.P-1, dated December 07, 1984, appellant and Canara Bank, a body corporate, constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act 1970 recorded the terms to which they had agreed. The recitals record that the appellant held, under the President of India, perpetual lease-hold right with respect to Plot No. 9, Block B, East of Kailash and was desirous of constructing residential flats on the land. Vide recital No. 5 it stands recorded as under:-

5. The Vendor has proposed that he will construct residential flats on the said plot of land in accordance with the plan annexed hereto and of the area as specified in Schedule-I hereto, at his own cost for the use of purchaser as residential premises and further agree to sell to the purchaser the said flats alongwith the lease hold rights over the said plot of land and the purchaser herein agrees to purchase the same on the following terms and conditions:-

2. It be highlighted, that no plan, referred to in recital No. 5 as an annexure, has been annexed to the plan.

3. Schedule-I, to which reference has been made in recital No. 5, annexed to the agreement, reads as under:

SCHEDULE-I

(A) 2(Two) Flats of approximately 1000 sq. ft. in Ground floor.

1(One) Flat of approximately 1000 sq. ft. in Mezannine floor.

2(Two) Flats of approximately 1000 sq. ft. in First Floor.

2(Two) Flats of approximately 1000 sq. ft. in Second floor.

1(One) Flat of approximately 1000 sq. ft. in Third/Barsati Floor.

(B) Basement of approximately 1950 sq. ft.

The actual covered area will be determined after the construction is completed in all respects and the flats are ready for

occupation legally.

4. The operative terms of the agreement, vide term No. 1, record that the respondent would pay to the appellant a total sum of Rs. 32,07,500/- (Rupees Thirty Two Lakhs Seven Thousand Five Hundred only) in installments towards consideration for sale of the flats, being 8 in number, each ad-measuring approximately 1000 sq.ft. Term No. 1 records that this consideration would include a transfer of the lease-hold rights in the land.

5. Term No. 5 of the agreement reads as under:

5. It shall be the duty of the Vendor to obtain all the necessary permissions from the Delhi Development Authority or other governmental authorities for transferring and conveying all the rights, title and interest in respect of the land and the flats to the purchaser. If for whatever reason, the Vendor is not able to convey and transfer the right, title, and interest as mentioned hereinabove to the purchaser, the entire amount paid by the purchaser to the Vendor shall be treated as a loan advanced by the purchaser to the Vendor and will be repayable on demand with interest at 18% per annum compounded quarterly from the date on which the flats are to be handed over under this agreement. It is specifically agreed that all expenses, charges in connection with transfer including the payment of any statutory dues or amount by way of unearned increase in the value of the plot to the Delhi Development Authority or any other authority shall be borne by the Vendor.

6. We highlight that as per term No. 5, it stands recorded that it is the duty of the appellant to obtain the necessary permission from DDA and other government authorities to transfer and convey the title in the land and the flats, and if for whatever reasons the appellant is not able to convey or transfer the right, title and interest in the flats, amount paid by the respondent to the appellant would be treated as a loan advanced; repayable on demand with

interest @18% per annum compounded quarterly from the date on which the flats were to be handed over.

7. Term No. 6 of the agreement specifically records that the agreement contemplates transfer of title, not only with respect to the flats, but with respect to the land also.

8. Now, in the year 1984, the Master Plan for Delhi in force and the applicable Building Bye-Laws, 1983, in force, relating to plot size ad-measuring 300 sq.yd. permitted a building to be constructed having a basement in area equal to the ground floor, a ground floor and a first floor, each of the same area and a barsati floor having 1/4 covered area of the ground floor. Thus, when the agreement was entered into, it was incapable of being performed inasmuch as on the plot only two residential units, one on the ground floor and one on the first floor could be constructed with a barsati floor of 309 sq.ft. It was impermissible to construct 8 flats. The basement which could be constructed could not be used for residence, but only for domestic storage purpose.

9. The appellant could thus obtain a sanction from the Municipal Authorities limiting the construction to, as afore-noted.

10. Accordingly, the sanction granted by the Municipal Corporation of Delhi vide File No. 20(4)83 dated April 23, 1983, which had already been obtained by the appellant when the agreement Ex.P-1 was executed on December 07, 1984 had sanctioned a ground floor and a first floor having covered area 1699 sq.ft.; a basement of equal area and a barsati floor ad-measuring 307.27sq. ft.

11. The appellant received various amounts in installments from the respondent commencing from April 08, 1986 till August 31, 1988 and in all received Rs. 28,86,750/-.

12. Vide Ex.PW-2/10 dated August 31, 1988, Ex.PW-4 dated October 29, 1988 and Ex.P-5 dated May 13, 1989, the appellant wrote to the respondent stating that the money received by the appellant was to be treated by way of a loan and requested respondent to receive, from the appellant, the amount received by the appellant together with interest @18% per annum. The respondent refused.

13. It needs hardly to be emphasized that this offer was made by the appellant in terms of term No. 5 of the agreement Ex.P-1, which term stipulates that if for whatever reasons, the appellant is not able to convey and transfer the right, title and interest in the 8 flats to be constructed as also the basement, the money received by the appellant would be treated as a loan advanced, to be repaid with interest @18% per annum compounded quarterly.

14. Canara Bank instituted a suit seeking specific performance of the agreement Ex.P-1, pleading that the same was an agreement to sell whereunder the appellant had agreed to construct a basement, 8 flats (each having 1000 sq.ft. covered area); it was pleaded that the bank had advanced payment in sum of Rs. 28,86,750/- constituting 90% of the sale price. It was pleaded that the bank

was ready and willing to pay the balance consideration.

15. Upon being served with the summons for settlement of issues, the appellant raised, by way of preliminary objection No. 1, the defence that the agreement Ex.P-1 was a loan transaction; camouflaged in the language as desired by the officers of the respondent. To bring home the point of the same being camouflaged, it was pleaded that the construction envisaged under the agreement could never have been constructed. Pleas were advanced with respect to the inadequacy of the consideration. Various other defences were raised, with respect to which we are not concerned in the instant appeal since neither counsel advanced any submissions based thereon.

16. On the pleadings of the parties the following issues were settled:

1. Whether the plaint has been signed and verified and suit instituted by a person duly authorized? (OPP)

2. Whether the agreement dated 27th December, 1984 was intended to be and is in fact a loan transaction? (OPD)

3. Whether the agreement dated 27th December, 1984 is vitiated by undue influence and coercion exercised by the plaintiff and is against public policy? (OPD)

4. Whether the suit is not maintainable and the plaintiff is not entitled to specific performance of the contract u/s 20 of the Specific Relief Act? OPD

5. Whether the refund to the plaintiff of total amount received by defendant along with interest 18% p.a. as per agreement disentitles plaintiff for specific performance of agreement u/s 14 of the Specific Relief Act? OPD

6. Whether the stipulation regarding refund of the total amount to the plaintiff along with interest @18% p.a. as per clause 5 of the said agreement amounts to an alternative contract, the performance of which discharges the defendant from specific performance of agreement dated 27th December, 1984? OPD

7. Whether the agreement dated 27th December, 1984 is unenforceable, illegal and void under chapter XXC and U/Section 269 UC of the Income Tax Act? OPD

8. Whether the plaintiff has been ready and willing to perform his part of the contract? OPP

9. Relief.

17. Vide impugned judgment and decree dated February 12, 2009 the suit has been decreed.

18. Since an issue has arisen before us of the appellant giving up all defences and restricting arguments on a defence not pleaded, being: the agreement being illegal, in that, the object of the agreement was to construct a building in violation of the Master Plan for Delhi and the Building Bye-Laws, we need to

quote certain paragraphs of the impugned decision.

19. In para 21 of the impugned decision it stands penned as under:

21. These issues being interconnected are taken up together. No arguments were advanced on these. However, since the plea on which these issues were framed were not given up, they have to be adjudicated. The agreement dated 27th December, 1984 which is not disputed and has been proved as Exhibit P1 is of transfer of immovable property. The same is not challenged in the written statement. The only challenge, as aforesaid, was that it was, in fact, not an agreement of transfer of immovable property but a loan transaction and which plea has now been withdrawn. Under the explanation to Section 10 of the Specific Relief Act, until the contrary is proved there is a presumption that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money.

20. Suffice would it be to state that in appeal it is urged by the respondent, that as recorded by the learned Single Judge in paragraph 21 of the impugned decision, the plea that the agreement was in fact a loan agreement was withdrawn. It is thus urged that the appellant cannot urge in appeal any argument on the strength of the said plea to challenge the impugned judgment.

21. It is true that in paragraph 21 it is recorded that the plea of the agreement being a loan transaction stands withdrawn, but immediately after penning paragraph 21, in paragraph 22, the learned Single Judge has penned as under:

22. The plea is that clause 5 of the agreement, while providing that it is the duty of the defendant to obtain all the necessary permissions for transferring and conveying all rights in respect of the land and the flats to the plaintiff, further provides that if for whatever reason the defendant is not able to convey and transfer the right title and interest as mentioned hereinabove to the plaintiff, the entire amount paid by the plaintiff to the defendant shall be treated as a loan advanced by the plaintiff to the defendant repayable with interest at 18% per annum compounded quarterly. The case appears to be that since the parties have so agreed, the plaintiff, as purchaser, is not entitled to specific performance but is only entitled to money.

22. Thereafter, in paragraphs 23, 25 and 26, the learned Single Judge has penned as under:

23. Undoubtedly if the parties agree that in the event of breach by the seller, a specified amount shall be paid to the purchaser, in my view, the agreement would be not specifically enforceable. The Apex Court as well as Division Bench of this court has in Dadarao and Another Vs. Ramrao and Others, and Ashok Kumar Batra Vs. Simi Katyal 91 (2001) DLT 82 (DB) has taken the same view. This is so because a party claiming specific performance of the contract is bound by the terms of the contract and cannot plead at variance therewith. But that is not the contract in the present case. Clause 5 pleaded by the defendant in this

regard in his written statement relates to permissions from DDA or other governmental authorities for transferring and conveying the rights, title and interest in respect to the land and the flats to the purchaser. In that context, it is provided that if such conveyance and transfer is not possible then the monies would be refunded. It is neither pleaded nor argued that such conveyance or transfer is not possible. Thus clause 5 would not be attracted.

24. xxx xxx

25. Thus, while clause 5 (supra) of the agreement is not attracted, there are other specific clauses of the agreement dealing with these contingencies. Clause 8 provides for payment of damages by the defendant/seller at the rate of Rs 1000/- per day for failing to complete the construction and put the plaintiff / purchaser into possession within the agreed time. Clause 8(a) (supra) provides for the contingencies of the defendant/ vendor abandoning the building project and entitled the plaintiff / purchaser to demand repayment of the advance sale consideration paid with interest in such contingency. This was, however, the option of the plaintiff. The words are "it shall be open to the purchaser...." Thus it cannot be argued that upon abandonment of work by the defendant, the said consequence automatically follows. Clause 10 entitles the plaintiff in the event of the defendant failing to complete the work of construction to enter into possession and complete the works itself. Clause 13 entitles the plaintiff to the relief of specific performance in its discretion.

26. On a reading of all the aforesaid clauses, what follows is that upon the defendant not completing the work of construction as is the present situation, the plaintiff had a choice of either cancelling the agreement and demanding refund with interest or seeking a specific performance of the agreement alongwith agreed damages or to enter into possession of the property and to complete the remaining works itself. It thus cannot be said that it was the agreement of the parties that upon the defendant not completing the works of construction, the plaintiff will only be entitled to refund of advance sale consideration with interest. The Apex Court in P. D'Souza Vs. Shondriilo Naidu, has held that where such a choice has been vested in the purchaser, the claim for specific performance cannot be defeated for the reason of other monetary choice being also available under the agreement to the purchaser.

23. Noting two decisions, one pronounced by the Supreme Court and the other by a Division Bench of this Court, in paragraph 23, the learned Single Judge has noted another decision of the Supreme Court reported as P. D'Souza Vs. Shondriilo Naidu, , to bring home the point that where the consequence of a default in an agreement to sell is provided, to recompense the proposed buyer with a monetary consideration, that would not mean that the prospective buyer cannot seek to sue for specific performance.

24. Now, what would be the need for the learned Single Judge to so discuss if the defence predicated on term No. 5 of the agreement was given up.

25. Whether it would be a case of it being a loan transaction or if it being a case of the appellant not being in a position to sell the land and the flats, the recompense would have to be as contemplated by term No. 5 of the agreement and thus it is clear that the discussion by the learned Single Judge makes it obviously clear that what was intended to be given up by the appellant, as rightly urged by learned senior counsel for the appellant, was the plea resulting in issue No. 3 being settled i.e. the agreement being the result of undue influence or coercion.

26. Suffice would it be to state that the respondent is a public sector bank and it is not expected from the State or its instrumentalities to enter into camouflage agreements and especially where the object of the agreement would result in law being violated.

27. Master Plan for Delhi is a statutory plan and therefore has the force of law. Master Plan for Delhi regulates the FAR i.e. the covered area. It relates to how many dwelling units can be constructed on a floor in a building.

28. Master Plan for Delhi which found its reflection in the Building Bye-Laws 1983 made it impermissible to construct eight dwelling units on a plot of land ad-measuring 300 sq.yd. As of the year 1984, when Ex.P-1 was executed, only two dwelling units, one each on the ground floor and the first floor, having 1690 sq.ft. covered area and a barsati floor having 309 sq.ft. covered area was permissible.

29. It may be true that the Schedule to the agreement Ex.P-1 refers to 8 flats being constructed, but that is merely playing with words. The flats are referred to as residential flats and we cannot think of a residential flat without a kitchen and having a living and a drawing room. It does not need much intelligence to read the agreement. Reference to 8 flats is clearly a reference to 8 dwelling units, an object of the agreement, which was clearly prohibited by the law.

30. The bank knew it. This explains term No. 5 of the agreement, wherein it is stipulated, that if for any reason the appellant is unable to comply with the terms of the agreement the money received by the appellant would be treated as a loan, requiring the same to be refunded with interest @18% per annum compounded quarterly.

31. The impugned judgment has ignored the afore-noted facts and thus corrective action is required.

32. The learned Single Judge has dealt with the applicability of Section 12 of the Specific Relief Act 1963 for the reason the learned Single Judge realized that the agreement in question could not be directed to be specifically enforced inasmuch as 8 residential flats, having covered area of 8000 sq.ft. and a basement having covered area of 1950 sq.ft. was an impossibility, in that, the Municipal Law did not sanction the same.

33. Applying Section 12 of the Specific Relief Act 1963, the learned Single Judge has held that the same envisages a contract which is not capable of being

specifically performed in its entirety and thus in relation to that part of the contract which can be performed, compensating for the remainder, specific performance can be ordered.

34. Learned counsel for the appellant would submit that the words: "Where a party to a contract is unable to perform", in Section 12 would mean that the contract is capable of being performed, but for some disability a party to a contract is unable to perform the whole of the contract. Counsel highlights that said Section would have no application, if by its very nature the contract is not capable of being performed.

35. We concur with the submission urged by learned counsel for the appellant for the reason Section 12 of the Specific Relief Act 1963 relates to a contract, which on its terms is capable of being performed; but due to some disability personal to a party to the contract, the party is unable to perform the whole of the contract.

36. In sync with the defence taken by the appellant, it not being in dispute that the appellant received Rs. 28,86,750/- from the respondent on various dates; it also not being in dispute that the appellant would be required to pay interest on the said sum, noting further that term No. 5 of Ex.P-1 records rate of interest agreed between the parties to be @18% per annum compounded with quarterly rests; noting that vide Ex.P-2/10 on August 31, 1988 appellant had offered to return the said sum together with interest and the respondent had declined receipt, we hold that effective from April 08, 1986 to August 31, 1988 the appellant would be liable to pay interest as agreed and thereafter @12% per annum (simple).

37. We clarify, interest @18% per annum compounded quarterly would be paid effective from April 08, 1986 till August 31, 1988 on the sum of Rs. 28,86,750/-, and thereafter on the said sum of Rs. 28,86,750/- interest with effect from September 01, 1988 till date of payment would be @12% per annum (simple).

38. Appeal stands disposed of setting aside the impugned judgment and decree and decreeing respondent's suit in sum of Rs. 28,86,750/- together with interest as directed to be paid in paragraphs 37 and 38 above by requiring appellant to pay as aforesaid.

39. Parties shall bear their own costs all throughout.

40. As requested by learned counsel for the respondent, to enable the respondent to approach the Supreme Court, and in the interregnum to protect the right of the respondent, we restrain the appellant from transferring, selling or encumbering property No. B-9, East of Kailash, New Delhi for a period of 12 weeks from today. Copy of this decision be given dasti to learned counsel for the parties.