
(2008) 08 DEL CK 0025

In the Delhi High Court

Case No : IA. No"s. 12636 and 12637 of 2007 in CS (OS) 2183 of 2007

Madan Lal Bansal

APPELLANT

Vs

Roshan Lal Singla and Another

RESPONDENT

Date of Decision : 05-08-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, 52
Evidence Act, 1872 — Section 91, 92
Specific Relief Act, 1963 — Section 16

Citation : (2008) 153 DLT 278

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : H.C. Mittal, for the Appellant; R.S. Rana, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J.—The plaintiff has, in this suit for specific performance of an agreement of sale of immovable property, filed these applications for relief of restraining the defendants from alienating, selling or creating third party rights or parting with possession of property No. 29, Block B-2 Paschim Vihar, New Delhi subject matter of Agreement of Sale and also for directing the defendants to furnish security to secure the alternative relief of recovery of double the earnest money, claimed in the suit.

2. It is the admitted position that an Agreement to Sell dated 16th January, 2006 with respect to the aforesaid property was executed by the defendants as owner in favour of the plaintiff. The terms of the said agreement relevant for the present were as under:

(i) The total sale consideration was Rs 1,11,21,000/-;

(ii) The defendants had raised a loan of Rs 47 lacs from the Citi Financial Bank by equitable mortgage of the said property;

(iii) The plaintiff paid Rs 11 lacs prior to / at the time of agreement to sell by way

of earnest money and the balance sum of Rs 1,00,21,000/- was payable as under:

(i) Rs 20 lacs on or before 7th February, 2006 which was to be used for reimbursement of the loan aforesaid.

(ii) Another sum of Rs 27 lacs paid in the first week of March, 2006 to be also used by the defendants for reimbursement of the balance loan aforesaid

(iii) The balance Rs 53,21,000/- was payable on or before 10th April, 2006 at the time of execution and registration of transfer documents.

(iv) That upon payment of total consideration of Rs 58 lacs by the second week of March, 2006, the defendants were to hand over the vacant possession of the ground floor to the plaintiff and within 15 days thereof also hand over the original documents of the property to the plaintiff after getting the same released from the bank aforesaid. The physical possession of the remaining property was to be handed over by the defendants to the plaintiff only on receipt of entire sale consideration.

(v) The defendants had assured the plaintiff that the property was free from all sorts of encumbrances, charge or lien such as sale, gift, court decree, attachment etc (except the above mentioned mortgage with Citi Financial Bank).

(vi) That if the defendants were to infringe any of the terms of the agreement, the plaintiff was entitled either to sue for specific performance at the costs and expenses of the defendants or to get refunded double the amount of earnest money alongwith part payment, if any, made.

3. It is further the admitted position that the defendants got issued a legal notice dated 13th April, 2006 to the plaintiff alleging that the plaintiff had failed to make any payment after the Agreement to Sell; in spite of repeated reminders of the defendants and informing the plaintiff that the earnest money paid of Rs 11 lacs had been forfeited. The plaintiff replied to this legal notice on 20.04.2006 stating that the plaintiff was induced to enter into the agreement on the specific assurance that the construction of the demised property was within the parameters of law and the defendants had undertaken to produce within a week the supporting and title documents but had failed to do so; the High Court of Delhi had taken cognizance of large scale illegal construction in Delhi which cautioned the plaintiff and the plaintiff had insisted upon production of sanctioned plan and completion certificate, which the defendants had failed to produce. The plaintiff in the said reply further alleged that the plaintiff had in first week of March, 2006 come across the fact that the property was covered to the extent of 95% in contravention of the building bye laws and was liable to be demolished. The plaintiff thus alleged the defendants to be in breach of the agreement and called upon the defendants to perform the agreement by producing and substantiating the legality of the construction.

4. The plaintiff, thereafter, on or about 1st June, 2006 instituted a suit before the

court of the District Judge, Delhi for recovery of Rs 19 lacs from the defendants. The plaintiff in the said suit averred that the construction of the property was unauthorized and the property was liable to demolition and was non-transferable. The plaintiff further averred that the time was the essence of the contract and the defendants having failed to perform their part of the agreement, the plaintiff had become entitled to double the earnest money i.e., to Rs 22 lacs but was confining his claim Rs 19 lacs only.

5. The record reveals that in the aforesaid suit for recovery before the learned Additional District Judge, Junior Engineer (Building), West Zone of the MCD was appointed as the Local Commissioner with the direction to submit a report with respect to the construction of the property. The report dated 27th February, 2007 was filed stating that the defendants had not produced any sanctioned building plan and thus the entire construction on the property was unauthorized. However, at the end of the said report, it was stated that as per current policy, in this building 100% coverage with 300 FAR could be regularized.

6. The plaintiff, thereafter, applied for amendment of the plaint to convert the suit for the relief of specific performance. The said application came to be allowed by an order dated 5th September, 2007 of the learned Additional District Judge and the valuation of the suit pursuant to amendment being in excess of the pecuniary jurisdiction of the learned Additional District Judge, the plaint was ordered to be returned to the plaintiff for filing in the appropriate court. It was, thereafter, that the suit for the relief of specific performance and with the alternate relief of recovery of Rs 22 lacs came to be filed before this Court. The plaintiff has in the plaint stated that now it had come to the notice of the plaintiff that the legal status of illegal constructions in Delhi had changed and the claim of the plaintiff for specific performance being within limitation, the plaintiff was suing for specific performance.

7. The defendants in their written statement have denied the readiness and willingness of the plaintiff; averred that the plaintiff had entered into the agreement after seeing the property and being satisfied with respect to the title of the defendants thereto; and have denied that they had agreed to show any documents as alleged by the plaintiff. The defendants have also filed before the court the photocopy of the conveyance deed of freehold rights in land underneath the property in their favour.

8. That in the aforesaid facts and circumstances it has to be determined at this stage whether the defendants during the pendency of the suit ought to be restrained from creating third party interest or parting with possession of the property or if any case for calling upon the defendant to furnish security for alternate relief of recovery of money is made out

9. To be entitled to the relief of specific performance, it is statutorily (Section 16(c) Specific Relief Act) incumbent upon the plaintiff to plead and prove that the plaintiff was always and is ready and willing to perform the essential terms of the

contract to be performed by him. The plaintiff in the present case admits that the plaintiff at one stage did not want to purchase the property and, in fact, had exercised the option available to him in the agreement of suing for double the earnest money instead of specific performance. The plaintiff has, of course, ascribed reasons for the same and on basis thereof wants to change his mind. To, prima facie, determine whether the said reasons are correct or not, one has to go to the agreement in writing dated 16th January, 2006 between the parties. The terms and conditions between the parties having been reduced into writing, under Sections 91 and 92 of the Indian Evidence Act, it is not permissible to add to or subtract from or plead contrary to the terms of the said documents. Ordinarily when a writing is made, the same is deemed to be a sole repository of the agreement between the parties.

10. The plaintiff in the present case has averred that the defendants had assured him that the property had been constructed as per the sanctioned building plan and completion certificate thereof had been obtained and no floor/portion of it was unauthorized and had further undertaken to show supporting documents in this regard to the plaintiff within a week of the agreement. However, though the writing between the parties contains several other representations/assurances made by the defendants with respect to the property, there is no such assurance/representation contained therein. Ordinarily, one would expect all the assurances/representations made, to be contained in the writing made by the parties. Even otherwise, it is inconceivable that the plaintiff prior to entering into the agreement and paying the earnest money would not have seen the property and or would not have satisfied himself with respect to the same. The plaint as well as the report of the Local Commissioner (supra) show that there is 100% coverage of the plot area. The plaintiff is, prima facie, presumed to have known at the time of entering into the agreement only that there was unauthorized construction on the property. The plaintiff at that time appears to have been interested in having the maximum possible covered area in the property. The plaintiff admits to have changed his mind when the drive for demolition of unauthorized constructions in the city was commenced. The plaintiff, rightly or wrongly treated the unauthorized construction as a breach of the agreement by the defendant. The plaintiff then had two options under the agreement; either to seek specific performance of the agreement or to recover double the earnest money from the defendant. The plaintiff elected for recovery of double the earnest money. The plaintiff, however, on receipt of report of the Local Commissioner which suggested that construction on the property though unauthorized was regularisable again changed his mind and sued for a specific performance. The plaintiff cannot be permitted to so change his mind and having once elected to abandon the agreement and to sue for refund of money and penalty, prima facie, would not be entitled to the relief of specific performance. The Division Bench of this Court in Gopal Devi Vs. Kanta Bhatia, referring to (1) AIR 1928 208 (Privy Council) ; (2) K.S. Sundaramayyar Vs. K. Jagadeesan and Another, and (3) Ayissabi Vs. Gopala Konar, held that where plaintiff had prior to

institution of suit for specific performance issued notice claiming double the amount of earnest money, the plaintiff is not entitled to the relief of specific performance.

11. There is yet another factor against the plaintiff; as noticed above in terms of the agreement, the plaintiff was to pay further installment towards sale consideration, to enable the defendants to pay up their dues to the bank and to have the title documents of the property released. The plaintiff admittedly did not pay the said installments of sale consideration. There is not a single letter of the contemporaneous time placed by the plaintiff on the record expressing his willingness to pay the balance sale consideration. Thus, prima facie, the plaintiff is also in default of his obligations under the Agreement to Sell. As far as the ingredients of irreparable loss and injury is concerned, notwithstanding the plaintiff being not entitled to the relief of interim injunction claimed, in the event of the plaintiff ultimately succeeding, the provisions of Section 52 of the CPC would still apply and the plaintiff would be entitled to execute the decree for specific performance, if any, in his favour against whomsoever the defendants may have transferred the property to. Thus, it cannot be said that the plaintiff will suffer any irreparable loss and injury. The balance of convenience is also not in favour of the plaintiff. The defendants have admittedly taken loans from the bank which the defendants wanted to repay by sale of the said property. Any order restraining the defendants from selling the property may lead to the defendants not being able to repay the loans and the interest continuing to run against the defendants while there may not be a corresponding increase in the price of the property. In my view, therefore, the plaintiff has not satisfied any of the ingredients of Order 39 Rules 1 and 2 CPC in the present case and is not entitled to the interim relief. The application is dismissed, however, with no order as to costs. It is clarified that the ex parte order dated 5th November, 2007 directing the defendants to maintain status quo in respect of rights and possession of the property stands vacated.

12. The plaintiff has also not made any specific pleadings for attachment before judgment. Merely because a money claim is made, does not entitle the plaintiff to an order of attachment. The plaintiff has paid an earnest money of Rs 11 lacs. It has been held above that the plaintiff does not have a prima facie case. Earnest money by its very nature is forfeitable and in the present case the parties had also expressly agreed so. It is yet to be decided as to whether the defendant was in breach of the agreement or not. If the defendant was not in breach, then the defendant in law would be entitled to retain the sum of Rs 11 lacs paid by the plaintiff and would also not be liable for paying to the plaintiff double of the earnest money. Thus, the plaintiff has no case for attachment before judgment also and the said application is also dismissed.

13. Nothing contained herein shall, however, be deemed to be any expression of views at the time of final adjudication of the matter.