

(2018) 01 DEL CK 0519

In the Delhi High Court

Case No : Regular First Appeal No. 73 Of 2018

M/S Madhan And Company & Ors

APPELLANT

Vs

Punjab & Sind Bank & Ors.

RESPONDENT

Date of Decision : 24-01-2018

Acts Referred:

Code Of Civil Procedure, 1908 — Section 35, 96, 151, Order 21 Rule 32
Indian Contract Act, 1872 — Section 10, 56

Citation : (2018) 01 DEL CK 0519

Hon'ble Judges : Valmiki J. Mehta, J

Bench : Single Bench

Advocate : Anil Sapra, Rama Shanker, S.Katyal, Seema Sharma, Saurabh, Harish Katyal, Pratyasha Kunj

Final Decision : Dismissed

Judgement

Valmiki J. Mehta, J

C.M. Appl. No. 2823/2018 (Exemption)

Exemption allowed subject to just exceptions.

CM stands disposed of.

C.M. Appl. No. 2824/2018 (delay in re-filing of 9 days)

For the reasons stated in the application, delay in re-filing the appeal is condoned subject to just exceptions.

CM stands disposed of.

RFA No. 73/2018 and C.M. Appl. No. 2822/2018 (for stay)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by defendant nos. 1 to 3 in the suit impugning the

judgment of the trial court dated 20.9.2017 by which the trial court has decreed

the suit for specific performance filed by the respondent no.

1/plaintiff/Punjab & Sind Bank with respect to the suit property being plot no. B, Safdarjung Community Centre, New Delhi, admeasuring 344.65 sq.

meters. I may straightway note that the trial court has decreed the suit for specific performance noting that the appellants/defendant nos. 1 to 3 way

back in the year 1977 had already received Rs.12,25,000/- out of the total sale consideration of Rs.12,50,000/- (balance of Rs. 25,000/- was payable at

the time of execution of the sale deed after getting permission to sell from the Delhi Development Authority (DDA) which was applied for and

awaited) and that the basic defence of the appellants/defendant nos. 1 to 3 to deny specific performance was alleged frustration of the agreement to

sell on the ground that the suit property could be transferred to the respondent no. 1/plaintiff only after permission was obtained from the DDA to

transfer the suit property to the respondent no. 1/plaintiff, and that inspite of applying for the permission DDA had not granted the requisite permission.

2. The facts of the case are that parties entered into an agreement to sell in terms of offer and acceptance letters exchanged between them. The

offer letters of the appellants/defendant nos. 1 to 3 to the respondent no. 1/plaintiff are dated 8.1.1977 and 15.3.1977. These offer letters of the

appellants/defendant nos. 1 to 3 were accepted by the respondent no. 1/plaintiff in terms of letter dated 30.3.1977. The total price payable to the

appellants/defendant nos. 1 to 3 under the agreement was a sum of Rs.12,50,000/-. Appellants/defendant nos. 1 to 3 had to give a constructed building

to the respondent no. 1/plaintiff in terms of the agreement entered into between the parties. Appellants/defendant nos. 1 to 3 constructed the building

and handed over possession of the same to the respondent no. 1/plaintiff, and which suit property is in possession of respondent no. 1/plaintiff since the

last now over thirty years. In the year 1977 itself appellants/defendant nos. 1 to 3 received Rs.12,25,000/- out of the total sale consideration of

Rs.12,50,000/- and the balance amount of Rs.25,000/- was payable only at the time of execution and registration of the sale deed and which could be

done after the permission was granted by the DDA, and which was required in terms of Clause 4(a) of the lease deed dated 2.6.1977 entered into

between DDA and the appellant no. 1/defendant no.1. Appellant no. 1, I may note is a partnership firm of which appellant nos. 2 and 3 are the

partners i.e defendant no. 1 was a partnership firm of which defendant nos. 2 and 3 were the partners.

3. In terms of Clause 4(a) of the lease deed dated 2.6.1977, and which provided that appellant no. 1/defendant no.1 will not sell or, transfer or, assign

or otherwise part with possession of the suit property except with the previous consent in writing of DDA, an application was submitted by the

appellant no. 1/defendant no.1 to DDA for seeking permission to transfer the suit property to the respondent no. 1/plaintiff. DDA did not process the

application for grant of permission to transfer the suit property on account of DDA raising two objections, and which as will be stated hereinafter had

no co-relation to the intent and purpose of Clause 4(a) of the lease deed dated 2.6.1977 entered into between the appellant no.1/defendant no.1 and

the DDA. The first objection which was raised was that in the suit property there was an excess construction of approximately 105 sq. feet i.e a

negligible covered area out of the total plot of 344.65 sq. meters (or approx 412 sq. yards) and the second objection was that the building constructed

on the suit plot did not have a completion certificate. The case of the appellants/defendant nos. 1 to 3 is that since DDA did not grant the necessary

permission therefore the sale deed in favour of the respondent no.1/plaintiff could not be executed and in fact the contract of the appellants/defendant

nos. 1 to 3 with the respondent no. 1/plaintiff thus stood frustrated on account of DDA not granting permission to sell the property as required by

Clause 4(a) of the lease deed dated 2.6.1977. At this stage, it is required to be noted, and which is an admitted position, that no formal order was ever

issued by the DDA rejecting the application filed by the appellants/defendant nos. 1 to 3 to transfer the suit property to the respondent no. 1/plaintiff

and that the DDA had never cancelled the lease deed executed by it in favour of the appellants/defendant nos. 1 to 3 allegedly because the suit

property was transferred to the respondent no. 1/plaintiff without permission being taken/granted as required under Clause 4(a) of the lease deed

dated 2.6.1977.

4. DDA was arrayed as the defendant no. 4 in the suit. It filed its written statement pleading that since no prior sale permission had been obtained,

consequently any sale made by the appellants/defendant nos. 1 to 3 in favour of the respondent no.1/plaintiff is illegal.

5. After pleadings were complete, the following issues were framed:-

1. Whether plaintiff is entitled for a relief of specific performance of the agreement to sell as prayed for? OPP

2. Whether the plaintiff is entitled for damages in the alternate? OPP

3. Relief.

6. Issue nos. 1 and 2 have been dealt with together by the trial court from para 87 of the impugned judgment with paras 27 to 86 discussing the

evidence and the cross-examinations of the witnesses who deposed on behalf of the parties.

7. Dealing with issue nos. 1 and 2 trial court has held that the letter dated 30.3.1977/Ex.PW1/4 sent by respondent no.1/plaintiff in response to the

letters dated 8.1.1977 and 15.3.1977 (Ex.PW1/3) of the appellants/defendant nos. 1 to 3 will result in a binding contract as all the contractual terms

are with clarity stated and therefore the ingredients of Section 10 of the Indian Contract Act, 1872 stood satisfied. Trial court has also noted that

undisputedly appellants/defendant nos. 1 to 3 have already received a sum of Rs.12,25,000/- out of the total sale consideration of Rs.12,50,000/-and

appellants/defendant nos. 1 to 3 have after construction handed over the building with the suit plot to the respondent no.1/plaintiff way back from thirty

years earlier. Trial court then notes that though application for permission was filed by the appellants/defendant nos. 1 to 3 with the DDA for seeking

transfer in terms of Clause 4(a) of the lease deed, but admittedly though DDA raised objections, however the application for transfer was never

specifically rejected nor was the lease deed executed by DDA in favour of the appellants/defendant nos. 1 to 3 cancelled at any point of time. Trial

court also notes that admittedly in terms of the auction sale proceedings conducted by DDA pursuant to which appellants/defendant nos. 1 to 3

purchased the suit property, the terms of the auction sale showed that the suit plot was to be used for banking purposes. Trial court then holds that in

view of the admitted facts which emerged on record the appellants/defendant nos. 1 to 3 had failed to prove any ingredient of Section 56 of the Indian

Contract Act dealing with frustration of the contract and therefore it has to be held that there is no frustration of the contract entered into between the

parties as per which the appellants/defendant nos. 1 to 3 had to sell the suit property to the respondent no. 1/plaintiff.

8. The stand of the DDA before the trial court was that the appellants/defendant nos. 1 to 3 and respondent no. 1/plaintiff have violated the terms of

lease deed dated 2.6.1977 because they entered into the agreement to sell in violation of the terms of Clause 4(a) of the lease deed because no prior

permission was taken for transfer of the suit property by the appellants/defendants nos. 1 to 3 to the respondent no.1/plaintiff. This stand of the DDA

was clearly wholly misconceived and baseless inasmuch as Clause 4(a) bars the execution of the sale deed or a transfer document or any document

of transferring ownership rights in the suit property and that this Clause 4(a) obviously does not prevent an agreement to sell being entered into. It is

trite that in case a seller refuses to perform a contract/agreement to sell for an immovable property, and a suit for specific performance is filed by the

proposed buyer, then a decree is passed that the proposed seller will execute the sale deed after taking the necessary permissions as required from the

competent authority, and which permissions are required as a prior event for transferring of the immovable property. Merely because there is required

a prior permission to sell the immovable property, and which is not taken prior to the filing of the suit for specific performance, does not mean that the

suit will not be maintainable because contract of such a nature is a contingent contract and that at the time of the passing of the decree in the suit for

specific performance the courts will direct taking of permission from the competent authority as held by the Supreme Court in the case of Mrs.

Chandnee Widya Vati Madden Vs. Dr. C.L. Katial and Others, AIR 1964 SC 978 T. herefore, DDA was completely unjustified in contending that

there took place any sale or that any sale deed was entered into between the appellants/defendant nos. 1 to 3 and respondent no. 1/plaintiff because

there is only an agreement to sell and there is no sale/conveyance/transfer document.

9.(i) It is also required to be noted at this stage that during the pendency of the suit the appellants/defendant nos. 1 to 3 were successful in getting the

suit property converted from leasehold to freehold by paying the conversion charges and today no permission will be required from the DDA for

transfer of the suit property by the appellants/defendant nos. 1 to 3 to the respondent no. 1/plaintiff. This is noted by the trial court in the operative

relief para of the judgment. Trial court has while decreeing the suit for specific performance rightly directed that the respondent no.1/plaintiff will be

liable to pay the conversion charges and all other charges which have been paid by the appellants/defendant nos. 1 to 3 to DDA for converting the property from leasehold to freehold.

(ii) Learned senior counsel for the appellants/defendant nos. 1 to 3 on instructions has stated that DDA has recently issued a notice to the

appellants/defendant nos. 1 to 3 for cancellation of the conveyance deed making the property freehold from leasehold, and with respect to which

appellants/defendant nos. 1 to 3 have initiated litigation and the impugned order of the DDA of cancellation of conveyance deed has been stayed. In

my opinion, however such facts would not make any difference so far as the present suit for specific performance is concerned because the

respondent no. 1/plaintiff will take the title as it is with any encumbrances or handicaps which may exist, and it will be for the respondent no. 1/plaintiff

to deal with such aspects qua the DDA.

10. I would like to refer now to the relief paras 103 to 106 of the impugned judgment, and which will show that the trial court has been very careful in

ensuring that the decree can be a decree for specific performance by directly execution of the sale deed by the appellants/defendant nos. 1 to 3 in

favour of the respondent no. 1/plaintiff or in any case if any permission is required to be taken then permission will be taken from DDA is in terms of

Clause 4(a) of the lease deed. Paras 103 to 106 of the impugned judgment read as under:-

ISSUE NO.3 (RELIEF)

103. On the basis of findings of issue nos. 1 and 2, the plaintiff is entitled to a decree of specific performance as understanding/oral agreement/Ex.

PW1/3 letter dated 15.03.1977 of defendant nos. 1 to 3 in regard to the suit land and property bearing Plot No. B, Safdurjang Community Centre, New

Delhi, ad-measuring 412 sq. yds. (344.05 sq. meter) including the constructed building. In the peculiar circumstances, the DDA has granted permission

for conversion of suit property from lease hold to freehold to defendant nos. 1 to 3 and already documents to this effect have been executed by

defendant no.4/DDA in favour of defendant no.2 Sh. Lalit Mohan Madan, therefore, now the bar of clause 4 (a) of the lease deed is no impediment.

The plaintiff bank is directed to pay the remaining part sale consideration of Rs.25,000/- within 15 days from the date of judgment to defendant nos. 1

to 3. Thereafter, within three months, the defendant nos. 1 to 3 are directed to execute sale deed in favour of plaintiff bank as property stands

converted into freehold. Further, the plaintiff bank is directed to pay all the conversion charges or any other due or charges which were paid by

defendant nos. 1 to 3 to the defendant no.4/DDA for conversion from leasehold to freehold or to be paid to DDA.

104. In alternative, I direct the defendant no.4 to levy all the charges and recover all the dues for issuance of completion certificate and any other

charges due in respect of suit property bearing Plot No. B, Safdurjang Community Centre, New Delhi, ad-measuring 412 sq. yds. including the

constructed building and grant the permission if required under clause 4(a) of the lease deed on payment of 50% unearned increased charges by the

plaintiff. Plaintiff bank shall pay the remaining sale consideration of Rs.25,000/- to the defendant nos. 1 to 3. Thereafter, DDA officials are directed to

execute lease deed in favour of the plaintiff bank within three months or DDA shall executed conveyance deed in favour of plaintiff bank and the

conversion charges already paid by defendant no.2 shall be paid by plaintiff bank to defendant no.2 because properties stand freehold as per stand of

DDA. The above all directions shall be completed within three months from the date of judgment. In alternative since the plaintiff bank is in well

settled possession and operating branch for the last 30 years is entitled for damages to the tune of present market value of the suit property along with

pendente lite and future interest till realization @ 8% per annum from the defendant nos. 1 to 3.

105. The plaintiff is entitled for a decree of perpetual injunction restraining the defendant nos. 1 to 3 from negotiating, selling, transferring, assigning or

parting with the suit property to anybody else other than the plaintiff bank or applying for permission to sell to anybody other than the plaintiff with the

defendant no.4. The plaintiff is also entitled for decree of mandatory injunction directing the DDA not to grant permission for sale of suit property to

anybody other than the plaintiff bank.

106. The plaintiff is also entitled for cost of Rs.10,000/- from the defendant nos. 1 to 3 and cost of Rs.10,000/- from the defendant no.4/ DDA.

11. This Court is forced to notice the fact that the DDA has taken a defence in the suit which not of substance but only of imaginary

handicap/technicality i.e DDA had contended that sale permission could not be given on account of the alleged extra coverage of 105 sq. ft. and that completion certificate was not obtained with respect to the building constructed on the suit plot. Surely DDA in view Clause 4(a) can only in terms of the intent of Clause 4(a) be interested in taking the necessary unearned increase or the conversion charges in terms of scheme for making the property from leasehold to freehold, and that any issue of extra coverage has nothing to do with DDA as that would be the subject matter to be taken note of by the local municipal authority being the MCD in this case. Also, there not being a completion certificate to a building can legally be no ground for DDA to refuse to give permission for transfer of the suit property because a buyer will take the suit property on 'as is where is' basis with the fact that there is no completion certificate, with the further fact that this issue will again pertain to the jurisdiction of the local municipal authority, but I fail to understand as to how DDA can use these completely misconceived defences for contending that the suit filed by the respondent no.1/plaintiff/Punjab & Sind Bank had to be dismissed.

12. As a result of the aforesaid discussion, the following conclusions can safely be drawn:-

- (i) There was a contract being an agreement to sell entered into between the appellants/defendant nos. 1 to 3 and the respondent no. 1/plaintiff when the respondent no. 1/plaintiff gave its acceptance letter Ex. PW1/4 dated 30.3.1977 accepting the offer terms of the appellants/defendant nos. 1 to 3 as contained in Ex.PW1/3 dated 8.1.1977 and 15.3.1977 for selling the suit property.
- (ii) Appellants/defendant nos. 1 to 3 have already received Rs. 12,25,000/- out of the total sale consideration of Rs. 12,50,000/- way back in around the year 1977-78 and appellants/defendant nos. 1 to 3 had acted pursuant to the agreement to sell by constructing a building on the suit plot and handing over the suit plot and the building there on to the respondent no. 1/plaintiff. The respondent no.1/plaintiff had done all that was required to be done on its part under the contract showing that it was ready and willing to go through with the agreement to sell.
- (iii) Permission was applied for by the appellants/defendant nos. 1 to 3 in terms of Clause 4(a) of the lease deed dated 2.6.1977 of DDA with the

appellants/defendant nos. 1 to 3, and that DDA though objected in giving permission yet at no point of time an order was ever passed refusing to grant permission.

(iv) Contracts which require grant of previous permission by an authority before sale of an immovable property, such contracts are contingent

contracts, and while decreeing suits for specific performance for such contracts, in addition to the direction of execution of sale deed directions are

issued that the proposed seller will take the necessary permission of the competent authority for selling of the property vide Mrs. Chandnee Widya

Vati Madden (*supra*). Additionally, I note that in case a proposed seller refuses to apply for permission, then after passing of a decree, in execution

proceedings there is a procedure provided in terms of Order XXI Rule 32 CPC whereby Courts appoint Court Commissioners to take necessary

permissions or do all other acts which are required for execution of the sale deed.

(v) Defence/objections raised by DDA have no co-relation to the intent and purpose of Clause 4(a) of the lease deed, for DDA to refuse to grant

permission to sell the suit property.

(vi) There cannot be frustration of the contract being the agreement to sell entered into by the appellants/defendant nos. 1 to 3 with the respondent no.

1/plaintiff, inasmuch as frustration would have been if there was an order passed by the DDA refusing to grant permission which legally had become

final, and admittedly there is no order passed by DDA refusing to grant permission.

(vii) Trial court by the impugned judgment has ensured that different situations and scenarios are taken care of whether it is required with respect to

decree for specific performance or for execution of the sale deed since now the property is freehold, and trial court has as required by law and equity

directed the respondent no.1/plaintiff payment of conversion charges and all other charges which have been paid by the appellants/defendant nos. 1 to

3 to DDA for converting the property from leasehold to freehold.

13. After the appeal was argued for some time, the matter was passed over for counsels for the appellants/defendant nos. 1 to 3 to take instructions if

the appellants/defendant nos. 1 to 3 were still pursuing the appeal in the facts of the present case inasmuch as it was clear that the

appellants/defendant nos. 1 to 3 were only arm-twisting the respondent no. 1/

plaintiff on account of phenomenal rise in the price of the suit property from the year 1977 to date. There was also an issue with respect to the aspect that if the appellants/defendant nos. 1 to 3 did not press the appeal then directions which have been issued vide para 107 of the impugned judgment for an inquiry to be conducted because of missing of original record of DDA can be deleted inasmuch as there was an innuendo as if the appellants/defendant nos. 1 to 3 were responsible for getting missing the original records of the suit property from DDA. After a pass-over counsel for the appellants/defendant nos. 1 to 3, on instructions state that the appellants/defendant nos. 1 to 3 insist that appeal be disposed of by passing a judgment.

14. In view of the aforesaid discussion the present appeal is an abuse of process of law. Appellants/defendant nos. 1 to 3 are endeavoring to blackmail and arm-twist the respondent no. 1/plaintiff/Punjab & Sind Bank although agreement in almost its entirety has been acted upon on account of the appellants/defendant nos. 1 to 3 having already received almost the entire sale consideration i.e having received Rs.12,25,000/- out of the total sale consideration of Rs.12,50,000/-.

15. In view of the aforesaid discussion and noting that the trial court has decreed the suit in favour of respondent no. 1/plaintiff with only awarding a sum of Rs.10,000/- as costs, accordingly while dismissing the appeal costs of Rs.5,00,000/- are imposed upon the appellants/defendant nos. 1 to 3 for the false and dishonest litigation which the appellants/defendant nos. 1 to 3 have forced the respondent no. 1/plaintiff to engage in. Out of the total sum of Rs.5,00,000/- a sum of Rs.2,50,000/- will be paid to the respondent no. 1/plaintiff being costs for the contest of the suit as also this appeal, and the balance amount of Rs.2,50,000/- will be deposited by the appellants/defendant nos. 1 to 3 within six weeks with the website www.bharatkeveer.gov.in. and an affidavit along with the receipt will be filed in this Court within two weeks thereafter. I may note that the power to impose costs in terms of Section 35 CPC is on account of costs incurred by a party, but there is no provision in CPC for imposition of costs for abusing the process of law and causing gross wastage of judicial time and the same would therefore be covered by Section 151 CPC under the inherent powers of this Court. Costs payable to the website are thus imposed in

exercise of powers by this Court under Section 151 CPC.

16. The appeal is dismissed and disposed of accordingly.