

(2013) 11 DEL CK 0204

In the Delhi High Court

Case No : Regular First Appeal 232 of 2013 and C.M. No. 15440 of 2013

Rajiv Maira and Another

APPELLANT

Vs

M/s. Apex Apartments Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 18-11-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11(d)
Transfer of Property Act, 1882 — Section 52

Citation : (2013) 11 DEL CK 0204

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Sudhanshu Batra, Mr. Sushil Shukla, Selender Singh and Mr. Arjun Mahajan, for the Appellant; Harish Malhotra and Ms. Radhika Chandrasekher, for the Respondent

Final Decision : Allowed

Judgement

Rajiv Sahai Endlaw, J.—The appeal impugns the judgment and decree dated 23rd January, 2013 of the Court of the Addl. District Judge-04, South District, Saket Court Complex, New Delhi of in limine dismissal, of the CS. No. 366/12 filed by the two appellants for specific performance of an Agreement of Sale of immovable property being space No. S-4 on the second floor of plot No. E-480, Greater Kailash Part-II, New Delhi and for permanent injunction, on the ground of the claim of the appellants/plaintiffs being barred by time. The learned Addl. District Judge thus rejected the plaint under Order VII Rule 11(d) of the CPC. The senior counsel for the appellants/plaintiff on 30th August, 2013 contended, (a) that the appellants/plaintiffs had agreed to purchase apartment/space/unit No. S-4, admeasuring 1500 sq. ft., second floor of E-480, Greater Kailash-II, New Delhi proposed to be constructed by the respondents; (b) that though in the Agreement to Sell dated 14.10.1987, it was mentioned that the building was proposed to be completed by 30th September, 1989 but the construction was stalled for long and has recommenced "now" only and since the respondents refused to honour the Agreement, the suit was filed; (c) that the learned

Additional District Judge has been unduly swayed by the clause in the Agreement of the construction being proposed to be completed by 30th September, 1989; and, (d) that the purchase consideration was payable by the appellants/plaintiffs as per the stage of construction and since the construction was stalled, the question of the Agreement becoming enforceable on an earlier date did not arise.

2. On the aforesaid contentions, notice of the appeal was issued and even though the appeal was not accompanied with any application for interim relief but on the oral prayer, the respondents were till the next date of hearing restrained from alienating, encumbering or parting with possession of the apartment/space/unit agreed to be sold to the appellants/plaintiffs.

3. The respondents filed reply, but upon the appellants/plaintiffs on 27th September, 2013 seeking time for rejoinder, the senior counsel for the respondents/defendants expressed readiness to argue even without reference to the reply. However on request of the appellants/plaintiffs, hearing was adjourned.

4. During the hearing on 4th October, 2013 the issue between the parties was found to boil down to, whether the second floor of property No. E-480, Greater Kailash-II was constructed in the year 1988-89 as contended by the senior counsel for the respondents or in the year 2011-2012 as contended by the senior counsel for the appellants/plaintiffs. The senior counsel for the respondents/defendants on that date showed the House Tax Survey Report dated 1st December, 1988/January, 1989 showing the second floor in existence and Form-C and Form-D under the Building Bye-Laws having been issued on 5th January, 1988 and 7th December, 1988 respectively and which suggested that the construction activity had been completed by that time. The hearing was however again adjourned on the request of the senior counsel for the appellants/plaintiffs to enable the appellants/plaintiffs to enquire further into the matter, however cautioning the appellants/plaintiffs that if inspite of satisfactory proof of construction in the year 1988-89 being available the appellants/plaintiffs insist upon trial, the same would be on such terms as may be imposed by the Court.

5. The senior counsel for the appellants/plaintiffs has today handed over a list of documents dated 18th November, 2013 which is taken on record and has invited attention to the report dated 15th May, 1995 of a Local Commissioner appointed in a Court proceeding relating to ground floor of the property, at pages 66 to 68 and an order dated 19th November, 1991 of the MCD Appellate Tribunal pertaining to the said property at pages 44 to 47 thereof to contend that the construction was not complete even on the ground floor on that date. However the documents at pages 66 to 68 are only with respect to the ground floor and the documents at pages 44 to 47 clearly refer to the existence of a ground, first as well as second floor. The same are thus not found to support the case of the appellants/plaintiffs of the construction having been raised only in the year 2011-12.

6. The senior counsel for the appellants/plaintiffs faced therewith has contended

that as per the plans sanctioned in the year 1987 only a barsati comprising of two bed rooms, dining room, kitchen, lobby etc. could be constructed on the second floor.

7. However that is not the case with which the appellants/plaintiff have approached the Court; rather it is the case of the appellants/plaintiffs at page 74 in para 27 of the plaint that till the year 2009-10 only basement roof slab was constructed. The appellants/plaintiffs claim to have made the payment till stage no. 6 of the Agreement to Sell i.e. the payment due on the commencement of casting of the ground floor roof slab and have not paid the payment due w.e.f. commencement of casting of the first floor roof slab. The documents prima facie suggest that not only the first floor but even the second floor was in existence as on 12th August, 1991 when the MCD had issued notice for demolition, the order on appeal where against is at pages 44 to 47 supra of the compilation handed over today.

8. However this is not the stage to adjudicate the matter further. In the light of the aforesaid though the impugned judgment cannot be sustained but it has been enquired from the senior counsel for the appellants/plaintiffs that since the appellants/plaintiffs are insisting on trial when prima facie it appears that the appellants/plaintiffs did not make the requisite enquiries or did not perform their part of the Agreement (the contention of the senior counsel for the appellants/plaintiffs is that the appellants/plaintiffs were to perform their part only upon demand being made by the respondents/defendants and which was not made), why terms should not be imposed on the appellants/plaintiffs including of making it clear that the principles of lis pendens as enshrined in Section 52 of the Transfer of Property Act, 1882 would not apply to the transaction, as the Supreme Court in Vinod Seth Vs. Devinder Bajaj and Another, has held within the competence of the Court to do.

9. The senior counsel for the appellants/plaintiffs has contended that the appellants/plaintiffs may be denied interim relief but their right in law to applicability of lis pendens be not denied. It is contended that the appellants/plaintiffs have paid 60% of the agreed sale consideration and the documents do show that the property was under dispute in several litigations and the appellants/plaintiffs even if ultimately not found entitled to the relief of specific performance would be in any case entitled to the relief of damages against the respondents/defendants and would be severely prejudiced if the right in law of lis pendens is revoked.

10. The genesis of the judgment in Vinod Seth supra was the prejudice suffered by the defendant in a suit for specific performance even in the absence of any restraint order against him, due to applicability of the principle of lis pendens and which virtually made the property inalienable or innumerable at market rates and with no measure left to compensate the defendant in the event of the plaintiff in a suit for specific performance ultimately failing. The costs, as suggested by the senior counsel for the appellants/plaintiffs in the present case, also were not

found sufficient to compensate the defendant in such a situation. It has thus been put to the senior counsel that it is but fair that if the appellants/plaintiffs want to put a fetter on the property of the respondents/defendants, the appellants/plaintiffs, suit should agree to compensate the respondents/defendants in the specified amount, if ultimately losing in their case which, as per the procedure laid down in law has to be entertained even though found to be doubtful.

11. The senior counsel for the appellants/plaintiffs has contended that the said aspect be left to be adjudicated by the Trial Court.

12. I am not willing to agree. Once this Court has heard the counsels and is setting down a suit which has been dismissed by the Trial Court, for trial, inspite of availability of documents to show to the contrary to the case set up by the appellants/plaintiffs, this Court would be failing in its duty if does not settle the terms of the Trial.

13. The senior counsel for the appellants/plaintiffs on instructions states that the appellants/plaintiffs are not willing to agree to any compensation to the respondents/defendants in the event of ultimately failing in the suit.

14. In the circumstances, this Court is not left with any option but to make principles of lis pendens inapplicable to the suit which though will have to be put to trial.

15. The appeal therefore succeeds on aforesaid terms. The judgment and decree of dismissal of the suit as barred by time is set aside observing that the question of limitation cannot be decided without trial. The suit is remanded to the Trial Court for decision afresh. However the property is exempted from the operation of Section 52 of the Transfer of Property Act, 1882. The counsel for the respondents/defendants who are defendants in the suit accept notice of the suit and state that written statement shall be filed within 30 days. The parties to appear before the Addl. District Judge-04, South District, Saket Court Complex, New Delhi and if the said Court does not exist, before the District Judge (South) on 10th January, 2013.

16. Interim order is vacated.

17. The Trial Court record if had been requisitioned in this Court be returned forthwith.

18. No costs. Decree sheet be prepared.