

(2008) 12 DEL CK 0118

In the Delhi High Court

Case No : Regular First Appeal 272 of 2004

Rattan Lal (Since Deceased)

APPELLANT

Vs

S.N. Bhalla and Another

RESPONDENT

Date of Decision : 18-12-2008

Acts Referred:

Evidence Act, 1872 — Section 92
Specific Relief Act, 1963 — Section 14, 20

Citation : (2008) 12 DEL CK 0118

Hon'ble Judges : Pradeep Nandrajog, J;J.R. Midha, J

Bench : Division Bench

Advocate : Vinay Bhasin, with Mr. Kapil Kher, for the Appellant; A.S. Chandhiok with Mr. Raman Kapoor, J.N. Patel, Ms. Geetika Panwar and Ms. Benu Sodhi, for the Respondent

Final Decision : Dismissed

Judgement

Pradeep Nandrajog, J.—Heard learned counsel for the parties. The appellant, as plaintiff, has unsuccessfully fought a litigation, seeking specific performance of an agreement to sell dated 8.9.1978, Ex. P-5.

2. The suit was filed on 8.3.1982, admittedly the last date on which the suit could have been filed, for the reason, the agreement in question stipulated that if within six months of its execution the transaction could not be completed, the agreement could be terminated.

3. The case of the appellant was that the subject property was held by the sellers under a lease hold tenure conveyed by DDA on account of the respondents being a member of the Government Servants Cooperative Housing Society and that the lease hold tenure could not be assigned without the prior permission of DDA and that under the agreement to sell, vide clause 2 thereof, the sellers i.e. the respondents had to apply to DDA and other authorities to obtain the requisite sale permission. It was pleaded that the agreed sale consideration was Rs. 5,90,000/- (Rupees Five Lac Ninety Thousand Only) out of which Rs. 50,000/-

(Rupees Fifty Thousand Only) was paid as earnest money cum part sale consideration as recorded in the agreement to sell when the same was executed. Alleging that the respondents did not furnish documents as required by DDA, resulting in sale permission being not granted and stating that the respondents could not rely upon the clause in the agreement, being clause 9, which stipulated that if within six months, the requisite sale permission was not obtained the agreement would be determined and the respondents would refund to the appellant the earnest money cum part sale consideration received; stating that the appellant was always ready and willing to pay the balance sale consideration, specific performance of the agreement to sell was prayed for.

4. The defence projected was that the appellant had under taken the requisite job to obtain the necessary sale permission from DDA. It was pleaded that in any case, the exit clause, being clause No. 9 of the agreement was not hedged with any condition and that as long as, for any reasons whatsoever, sale permission was not granted by DDA within six months, the agreement stood determined under the clause. It was also pleaded that time was of the essence of the contract evidenced by the fact that an exit clause was incorporated in the agreement, being clause No. 9. It was further asserted that on expiry of the period of six months, no sale permission being obtained, after determining the agreement, under cover of a letter dated 12.3.1979, Ex. P-2, sum of Rs. 50,000/- (Rupees Fifty Thousand Only) received as earnest money was returned to the appellant who encashed the same unconditionally and without demur, meaning thereby, he accepted the determination of the contract. It was further pleaded that the suit being filed on the last date of limitation, notwithstanding suit being within limitation, discretionary remedy of specific performance be not exercised in favour of the appellant, if the appellant were to succeed otherwise.

5. On the pleadings of the parties, five issues were settled vide order dated 1.11.1983. An additional issue was settled vide order dated 19.2.1991. Issues settled vide order dated 1.11.1983 read as under:-

- 1) Whether the plaintiff has been ready and willing to perform his part of agreement dated 8th September, 1978?
- 2) Whether the defendant has committed breach of the said agreement?
- 3) Whether the agreement dated 8th September, 1978 stands terminated or frustrated as alleged by the defendant and there is no subsisting agreement to sell?
- 4) Whether the plaintiff is to be granted relief of specific performance in the facts and circumstances of the present case?
- 5) Whether the agreement dated 8th September, 1978 is void for uncertainty?

6. Additional issue settled vide order dated 19.2.1991 reads as under:-

1. Whether the time was the essence of the contract and whether the agreement

dated 8.9.1978 was rightly terminated?

7. Many documents were exhibited at the trial. Most of them were documents of no use. Indeed, learned Trial Judge has not referred to them. No reference thereto has been made by learned counsel for the parties during arguments of the appeal and hence while noting the evidence we shall note only the relevant documents which are material for adjudication of the controversy.

8. Ex. P-5, needless to state, the agreement to sell, is a material document and is an admitted document between the parties. The applicable clauses thereof being relied by the parties are clause No. 2, 8 and 9. The same reads as under:-

2. That the Seller shall immediately apply to the Delhi Development authority and the competent authority under the Urban Land (Ceiling and Regulation) act, 1976, to obtain the requisite permission to transfer the said property to the Purchaser and convey the said property to the Purchaser free from all encumbrances after obtaining the said permission and other requisite permissions from any other body or authority.

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8. That if for any reason the Seller fails to apply for permission to sell the said property to the Purchaser within a period of 15 days from the date of signing this Agreement, the Purchaser shall have the option to determine this Agreement and in that event the Seller shall refund the earnest money of Rs. 50,000/- (Rupees fifty thousand only) as received by him and pay to the Purchaser damages which are assessed as the sum of Rs. 50,000/- (Rupees fifty thousand only).

9. That if the Seller applies for sale permission within the time stipulated in clause 8 above, but does not get it within 6 months, the Seller may determine this Agreement and the Seller shall refund to the Purchaser the earnest money received by him without any damages or interest, within a period of 15 days from the date of determination of the Agreement.

9. It is apparent that the parties contemplated finalization of the sale within six months of entering into the agreement to sell. It is not in dispute that the respondents promptly submitted the requisite application within 15 days of the agreement to sell vide their request dated 12.9.1978. The appellant applied to the Central Government Cooperative Housing Society for being enrolled as a member because he could not have got the lease hold rights transferred in his favour unless he became a member of the society and for said purpose he deposited Rs. 3,000/- (Rupees Three Thousand Only) with the society. In response to the request made to DDA for grant of sale permission, vide Ex. PX-1, a letter dated 23/27.11.1978 addressed by DDA to the respondents, DDA sought certain documents to be filed. The said letter was responded by the appellant vide Ex. PX-3. The letter is undated. Two affidavits, Ex. PW-1/5 and Ex. PW-1/6, deposed to by the respondents, with respect to the sale permission were furnished to DDA.

10. On 7.3.1979, vide Ex. PW-1/3, DDA informed the refusal to grant the sale permission recording therein that the same was declined in view of the defective affidavit filed by Sh. S.B. Bhalla, one out of the two sellers.

11. Immediately on receipt of Ex. PW-1/3, the respondents sent, Ex. P-3, a telegram informing the appellant that since six months' time contemplated by the agreement to sell was expiring and DDA had not granted the necessary sale permission, the agreement stood determined and that earnest money would be refunded and that by way of the telegram an advance intimation was being sent that the agreement stood determined in terms of clause 9 thereof. The telegram was replied to by the appellant vide Ex. P-4 alleging that the respondents were at default and could not take advantage of their own wrong.

12. Thereafter, the respondents wrote a letter dated 8.3.1979, Ex. P-7, informing that under clause 9 of the agreement, since six months were over and necessary sale permission had not been obtained, the agreement stood determined. It was stated therein that the earnest money in sum of Rs. 50,000/- (Rupees Fifty Thousand Only) would be returned.

13. Under cover of letter dated 12.3.1979, Ex. P-2, the sum of Rs. 50,000/- (Rupees Fifty Thousand Only) was returned by a bank draft.

14. The letter along with the bank draft was received by the appellant on 14.3.1979. The draft was encashed on 15.4.1979. On 26.4.1979, vide Ex. P-1, a lawyers' notice was served by the appellant upon the respondents intimating that the action of the respondents in terminating the agreement was void and that the bank draft was being encashed under protest. On 17.7.1980, vide Ex. D-2, the appellant applied for and obtained refund of Rs. 3,000/- (Rupees Three Thousand Only) from the Central Government Cooperative House Building Society and abandoned the request for being enrolled as a member of the society.

15. In respect of the issues which were framed, in light of the aforementioned documentary evidence, finding returned by the learned Trial Judge pertaining to issue No. 1 is that the appellant accepted unconditionally and without demur, the return of the earnest money sent to him vide Ex. P-2 on 12.3.1979; he encashed the bankers' draft on 15.4.1979 and thereafter sent the lawyers' notice Ex. P-1 on 26.4.1979 stating therein that the bankers' draft is being encashed; the fact being that the bankers' draft in question was encashed much prior. Finding returned is that this evidences the acceptance of the contract being determined.

16. From the fact that the plot of land was held by the respondents under a lease hold tenure being members of the Government Servants' Cooperative House Building Society and no person could acquire the perpetual lease hold rights in the land if he was not a member of the society and that after the respondents informed the appellant that the agreement stood determined and returned the earnest money received which was accepted by the appellant, he chose to obtain refund of Rs. 3,000/- (Rupees Three Thousand Only) paid by him to the society for being enrolled as a member, learned Trial Judge has concluded that this

evidenced the intention of the appellant to abandon his claim under the agreement to sell.

17. The conclusion drawn by the learned Trial Judge is that afore said conduct of the appellant showed his acceptance of the contract being terminated or to put it differently, he abandoned the claim under the contract, meaning thereby that he was no longer ready and willing to pursue his remedies under the contract. Issue No. 1 has been held against the appellant.

18. Pertaining to issue No. 2, needless to state, the parties debated as to who was responsible for DDA not granting the necessary sanction. It be noted that DDA refused the necessary sanction on account of deficiency in the documents filed. Whereas the appellant projected the claim under clause 2 of the agreement which stipulated that the sellers had to apply for and obtain the necessary permissions, which necessarily included the obligation to submit the requisite documents; the respondents asserted to the contrary and referred to Ex. PX-1 and the response thereto by the appellant vide Ex. PX-3, as also the affidavits, Ex. PW-1/5 and Ex. PW-1/6.

19. The learned Trial Judge has noted that vide Ex. PX-1, on 23/27.11.1978, DDA had required three documents to be submitted by the sellers to process the application seeking the necessary sale permission. Response thereto was not given by the sellers but was given by the buyer i.e. the appellant vide Ex. PX-3. The two affidavits deposed to by the sellers and submitted to DDA, while seeking the necessary sale permissions, were on a stamp paper of Rs. 2/- each. The endorsement on the stamp paper by the vendor evidences that the two stamp papers were purchased by the buyer i.e. the appellant.

20. Conclusion drawn by the learned Trial Judge is that the afore said evidence probablizes that the buyer i.e. the appellant was pursuing the matter with DDA pertaining to the sale permission to be granted by DDA for the sale to be completed and hence was under an obligation to ensure a timely approval being granted by DDA.

21. The finding returned by the learned Trial Judge on issue No. 2 is that the buyer i.e. the appellant was in default which resulted in the sale permission not being granted for the reason the relevant documents established that the appellant was pursuing the matter with DDA. It has been held that if there was any deficiency in the documents the same had to be to the account of the appellant.

22. Issue No. 3 and additional issue No. 1 were decided together. Needless to state, as a sequel to the decision pertaining to issue No. 1 and 2; with reference to clause 9 of the agreement to sell, the learned Trial Judge has opined that on expiry of the six months period, sale permission not being granted, the sellers could exit the agreement. An additional reason has been given by the learned Trial Judge to disentitle the plaintiff to any claim, being that the suit was filed on the last date of limitation. It has been held that the agreement to sell giving an

option clause to terminate the same if sale permission was not received within six months, evidences the intention of the parties to treat time as essence of the contract.

23. In view of the afore said findings pertaining to issues No. 1, 2 and 3 and additional issue No. 1, needless to state, issue No. 4 had to be decided against the appellant.

24. Issue No. 5 whether the agreement was void on account of it not being recorded therein as to who would pay the unearned increase to DDA, finding returned is that the agreement is not void.

25. This finding in favour of the appellant is not in challenge in the instant appeal as no cross objections have been filed and hence we need not note the reasoning of the learned Trial Judge pertaining thereto.

26. The thrust in the appeal during arguments today by learned senior counsel for the appellant is that in the teeth of clause 2 of the agreement to sell wherein, in writing, it is recorded that the sellers shall obtain the necessary sale permission from DDA, the learned Trial Judge has committed serious irregularity by permitting parole evidence to be led and thereafter consider the same. Counsel urges that once parties have recorded their bargain in writing, the terms of the bargain has to be culled out from the writing. Learned senior counsel urges that if this be so, since sale permission was declined on account of deficiency in the documents, the defaulting party has to be the sellers i.e. the respondents. Learned senior counsel urges with reference to Ex. P-1, that though written on 26.4.1979 after the bankers' cheque refunding earnest money was encashed (encashment being on 15.4.1979), the appellant duly informed the respondents that the same was under protest and hence the learned Trial Judge could not have returned a finding that the appellant accepted the refund without demur. Learned senior counsel urges that clause 9 of the agreement could not be treated as an escape route by the defaulting party to avoid the obligation under the agreement to sell. Learned senior counsel further urges that the six months period would have been over on 11.3.1978 and under no circumstances could the contract be terminated on 8.3.1979 as was sought to be done under cover of letter Ex. P-7.

27. We find no force in either submission made by learned senior counsel for the appellant.

28. Suffice would it be to state that under proviso 4 to Section 92 of the Indian Evidence Act 1872, the existence of a distinct subsequent oral agreement to rescind or modify any contract in writing is permissible to be shown provided the contract is not one of an account which requires registration in law.

29. Thus, notwithstanding clause 2 of the agreement to sell which records that the sellers shall apply and obtain the necessary sale permission, it was permissible for the sellers to lead evidence of a distinct agreement to modify or

rescind the said clause.

30. The evidence of the said distinct agreement has come in the form of Ex. PX-1, Ex. PX-3, Ex. PW-1/5 and Ex. PW-1/6. The nature of the documents and the contours of the evidence flowing therefrom has been noted by us while narrating the evidence. Ex. PX-1 was addressed by DDA to the respondents on 23/27.11.1978 asking for certain documents to be submitted. Response thereto was given by the appellant vide an undated letter Ex. PX-3. This shows that the appellant was pursuing the matter with DDA. Further, Ex. PW-1/5 and Ex. PW-1/6 show that the stamp papers on which the affidavits were deposed by the respondents, which affidavits were submitted to DDA to process the application for sale permission to be granted, were purchased by the appellant. This also evidences that it was the appellant who was doing the needful pertaining to sale permission being obtained.

31. Clause 9 of the agreement is not hedged with any condition of default. Clause 9 stipulates that if within 6 months the necessary sale permissions are not obtained, the sellers shall have an option to refund to the purchaser the earnest money within a period of 15 days thereof. Be that as it may, we need not expound on the arguments advanced by learned senior counsel for the appellant pertaining to the default liability to be read in clause 9 for the reason we have concurred with the view taken by the learned Trial Judge that Ex. PX-1, Ex. PX-3, Ex. PW-1/5 and Ex. PW-1/6 evidence that the appellant was to pursue the matter with DDA; thus, any default committed, resulting in sale permission being refused has to be to the account of the appellant.

32. Pertaining to the plea that the respondents could not exit the agreement on 8.3.1979 as six months time was yet to be over, suffice would it be to state that the agreement to sell is not a statute. Principles applicable to the date when limitation commences relatable to statutes would not apply to the agreement. A layman would understand six months' time to be over reckoned with effect from 8.9.1978. So understood by a common man, the same would be over on 8.3.1979.

33. In any case, the final parting of company was when under Ex. P-2, sellers' letter dated 12.3.1979, the sum of Rs. 50,000/- (Rupees Fifty Thousand Only) was refunded to the appellant. We note that in the instant case the sale permission was applied on 12.9.1978 and the said letter dated 12.3.1979 is exactly six months thereafter.

34. It is not in dispute between the parties that the necessary sale permission never came within the period of six months envisaged under the agreement.

35. We note that under clause c of the sub-Section 1 of Section 14 of the Specific Relief Act 1963, a contract which in its nature is determinable is incapable of being specifically enforced. Instant contract was capable of being determined on the non-happening of an event within six months i.e. non-grant of the necessary sale permission.

36. Before concluding we would refer to Section 20 of the Specific Relief Act 1963. Relief of specific performance is discretionary. In the instant case the discretion cannot be exercised in favour of the appellant who approached the Court on the last date of limitation i.e. three years when cause of action accrued. It is a matter of common knowledge that in the interregnum i.e. between 1979 till 1982 price of property rose very sharply in Delhi. It has also not to be lost sight of that the buyer took back Rs. 50,000/- which was paid by him to the respondents as earnest money cum part sale consideration.

37. We find no merits in the appeal. The same is dismissed with costs.