

(2009) 07 DEL CK 0545
In the Delhi High Court
Case No : OMP 115 of 2009

Shri Gurvinder Singh and Others

APPELLANT

Vs

Mr. Maninder Pal Singh and Others

RESPONDENT

Date of Decision : 09-07-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2
Specific Relief Act, 1963 — Section 16, 34

Citation : (2009) 07 DEL CK 0545

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Rakesh Kumar and Jitendra Kumar, for the Appellant; Satish Kumar, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.—The counsel for the respondents states that the reply has been filed. However the same is not on record. The counsel for the petitioners confirms that advance copy of the reply had been received by him. For the sake of expediency, a photocopy of the reply filed by the respondents has been taken from the counsel for the respondents in the Court, perused and kept on record.

2. The respondents had vide Agreement to Sell dated 1st May, 2007 agreed to sell and transfer property No. 7/64, South Patel Nagar, New Delhi to the petitioners. During course of hearing it has transpired that the typed copy of the said Agreement to Sell filed as Annexure A-1 to the petition has certain typographical errors particularly in Clause 10 thereof relevant for the present purposes. The counsel for the petitioners has handed over in Court a photocopy of the said Agreement which is also taken on record. The said photocopy also obliterates the sale consideration but is stated to be otherwise complete. The Agreement to Sell aforesaid in Clause No. 11 thereof provides for reference of disputes between the parties on any matter relating to the Agreement or any matter incidental thereto to an arbitrator appointed mutually by the parties. On enquiry the counsel for the petitioners states that subsequent to the filing of this

petition notice dated 6th April, 2009 was issued to the respondents to agree on an arbitrator but the respondents have vide their reply dated 11th April, 2009 refused to consent to the name suggested by the petitioners; hence an application u/s 11(6) will be necessitated.

3. The petitioners have filed this petition contending that the respondents have refused to sell the property to the petitioners in spite of the respondents themselves having not complied with their obligations under the Agreement; it is further contended that the respondents are threatening to sell or alienate the property to another. The petitioners claim to be entitled to enforce the Agreement and to purchase the property and have thus sought interim measures u/s 9 of the Arbitration Act, 1996 of restraining the respondents from selling, alienating, encumbering or parting with possession of the said property.

4. The petition itself states that on failure of the respondents to, within the stipulated time fulfill their obligations under the Agreement the petitioners had in terms of the agreement demanded from the respondents double the amount of earnest money paid to the respondents. In view of the said statement in the petition itself and further in view of the dicta of this Court in *Gopal Devi Vs. Kanta Bhatia*, referring to AIR 1928 208 (Privy Council) *K.S. Sundaramayyar Vs. K. Jagadeesan and Another*, and *Ayissabi Vs. Gopala Konar*, and *Madan Lal Bansal Vs. Roshan Lal Singla and Another*, holding 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, it was put to the counsel for the petitioners at the outset as to how the petitioners could be said to be having a prima facie case for specific performance and for the reason whereof the respondents should be restrained from dealing with the property. It was felt that if the petitioners do not have a prima facie case for specific performance, as held in the judgments aforesaid, they are not entitled to the relief of injuncting the respondents from selling or dealing with the property; the only claim of the petitioners then would be for recovery of double the amount of earnest money.

5. The counsel for the petitioners has contended that (i) the respondents have in their reply dated 24th February, 2009 contended that no agreement exists between the parties and the earnest money stands forfeited. The said matter has to be adjudicated by the arbitrator and the respondents are entitled to the relief of declaration u/s 34 of the Specific Relief Act from the arbitrator that the agreement subsists; (ii) the petition u/s 9 can be filed either during pendency of the proceedings or even after the award in the event of the petitioners succeed in obtaining the declaration that the agreement subsists, they would be entitled to purchase the property and if the property is sold by the respondents the claim of the petitioners before the arbitrator for the aforesaid declaration would be prejudiced; (iii) the petitioners had while making a claim for double the amount of earnest money had in the alternative also stated that they were entitled to the relief of specific performance also.

6. For appreciation of the aforesaid contentions of the counsel for the petitioners it is necessary to set out Clause 1, 9 (relied upon by the counsel for the respondents) and 10 of the Agreement.

1. That the total sale consideration has been fixed by both the parties at a sum of Rs. 1,95,00,000/- (Rupees one Crore and Ninety Five Lakhs Only). That the FIRST PARTY has received a sum of Rs. 20,00,000/- (Rupees Twenty Lakhs Only) from the SECOND PARTY as an Earnest Money on 1st May, 2007 for which separate Receipt has been executed and the balance amount of Rs. 1,75,00,000/- (Rupees One Crore and Seventy Five Lakhs Only) will be paid by the SECOND PARTY to the FIRST PARTY within 60 (Sixty) days of this Agreement subject to free holding of property by L&DO, New Delhi within thirty days.

9. That uptill making full and final payment the SECOND Party shall not claim any right, title or interest in the property and shall not demand possession of any part or portion of the property from the FIRST PARTY.

10. That if the FIRST PARTY infringes the terms and conditions of this agreement then FIRST PARTY will be liable to pay the double amount of the earnest money to the second party and if the balance payment as agreed above is not paid by the SECOND PARTY within scheduled time then the amount paid as Earnest Money will be treated as forfeited and the agreement shall stand cancelled.

7. At this stage, the contention in the reply of the counsel for the respondents, of the respondents having taken steps for conversion of the leasehold rights in the land underneath the property into freehold and of the same having not taken place in spite of the best efforts of the respondents and of the Agreement having become unenforceable upon freehold conversion having not happened, may also be noticed. It has also been contended by the counsel for the respondents in the Court that the petitioners in terms of Clause 9 (supra) of the Agreement without making the entire payment cannot claim any right or interest in the property.

8. As far as the contention of the counsel for the petitioners of the petitioners having while, claiming double the amount of earnest money, also claimed the right of specific performance is concerned, the same is not in terms of the letter dated 10th July, 2007 of the petitioners annexure A-5 to the petition. The said letter is as under:

To Sh. Maninder Pal Singh Sh. Jivanjyot Singh Sh. Jawahar Jyoti Singh Smt. Sweety Singh 7/64, South Patel Nagar New Delhi AR-110008. Sir, As per Agreement dated 01.05.2007, you were suppose to handover the free hold papers of Property No. 7/64, South Patel Nagar, New Delhi-110008, within 30 days from the Agreement i.e. 01.07.2007 and we were suppose to make payment within 60 days i.e. 01.07.2007, subject to receiving of free hold papers till 01.06.2007.

But till today you have not handed over the free hold papers and came forward to complete the deal. Even we reminded you vide speed post letter dated

21.06.2007.

Since you have failed to honour the Agreement, you are requested to pay the Double amount of earnest money i.e. Rs. 40,00,000 (Forty Lakhs) at the earliest, in orders to avoid moving to Court.

Thanks S/d 1. Gurvinder Singh S/d 2. Puran Chand Ahuja

9. The counsel for the petitioners has contended that since the petitioners have in the said letter while claiming double the amount of earnest money amounting to Rs. 40 lacs also stated that the said amount be paid "in order to avoid moving the Court", the said words mean that if the amount of Rs. 40 lacs was not paid the petitioners would sue for specific performance.

10. That does not appear to be the literal meaning of the letter. The petitioners have in the said letter unequivocally demanded double the amount of earnest money and the reference therein to, else the petitioners moving the Court can only be for the purposes of recovery of the said amount.

11. I may notice that Clause 10 of the Agreement also does not vest the discretion in the petitioners to, upon infringement by the respondents of the terms and conditions of the Agreement either to claim double the amount of earnest money or to claim the relief of specific performance. The same only provides for the liability of the respondents to pay double the amount of earnest money in the event of breach of the agreement by the respondents. This Court in Sh. Suresh Aggarwal Vs. Sh. Satinder Jain, has held that when the agreement is such, no interim relief restraining sellers from dealing with the property can be granted. The petitioners having taken a categorical stand in the said letter of the respondents being in breach and of demanding the double amount of earnest money in terms of the agreement, in view of the law aforesaid are not entitled to injunct the respondents from selling the property.

12. The counsel for the petitioners has also drawn attention to the reply dated 12th July, 2007 of the respondents to the aforesaid letter dated 10th July, 2007. In the said reply the respondents apologized for the delay and assured the petitioners of having taken and still willing to take all steps for freehold conversion and also requested the petitioners not to move the Court.

13. The subsequent correspondence i.e. the letter dated 14th October, 2008 of the petitioners and the legal notice dated 11th February, 2009 got sent by the petitioners may also be noticed. In the letter dated 14th October, 2008 the petitioners communicated to the respondents that the respondents had been unable to complete the deal in spite of their assurances and proposed that the respondents take the balance amount as per the Agreement and hand over vacant physical possession without freehold conversion. The petitioners in the legal notice dated 11th February, 2009 in para 8 reiterated that the respondents upon breach of agreement had become liable to pay double the amount of earnest money to the petitioners together with the damages suffered by the

petitioners for breach of contract by the respondents but in subsequent para 9 asserted their right to purchase the property.

14. Section 16 of the Specific Relief Act requires the claimant of the relief of specific performance to aver and prove that he has always been ready and willing to perform his part of the agreement. From the conduct aforesaid of the petitioners of demanding double the amount of earnest money, it transpires that the petitioners at least at one point of time were not interested in the relief of specific performance and were interested only in claiming double the amount of earnest money in terms of the Agreement and prima facie the same shows the petitioners not to be satisfying the requirement of Section 16 of the Act.

15. As far as the contention of the counsel for the petitioners of being entitled to the relief of declaration is concerned, the alternative efficacious remedy of specific performance being available to the petitioners, the petitioners cannot get the relief of declaration if they are not found to be entitled to the relief of specific performance.

16. The ingredients required to be satisfied u/s 9 of the Act are the same as in Order 39 Rules 1 & 2 of the CPC and the same parameters apply. The petitioners having not found to be having a prima facie case for specific performance are not found entitled to the interim relief claimed. In the circumstances, no case of irreparable injury to petitioners, also arises. The balance of convenience is also in not injuncting the respondents from selling the property, in as much as if the petitioners have no right to purchase the same, the respondents will suffer more of restrained from dealing with the property.

17. Since the parties are still to arbitrate, it is not felt necessary to deal with the contention of respondents of the Agreement having become infructuous or unenforceable on freehold conversion having not happened within thirty days thereof.

18. The petition is dismissed, however with no orders as to costs. It is clarified that any observation herein shall not affect the final adjudication of the matter by the arbitrator.

IA No. 3217/2009

The petition having been disposed of, this application has become infructuous and is dismissed.