

(2001) 08 DEL CK 0202

In the Delhi High Court

Case No : IAs. 8683/96, 12345/99 and 7071 of 2001 in Suit No. 2303 of 1996

Smt. Sita Rani Sharma

APPELLANT

Vs

Manchanda Properties (P) Ltd. and Others

RESPONDENT

Date of Decision : 13-08-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 10 Rule 1, Order 12 Rule 6, Order 39 Rule 3(a), Order 39 Rule 4, Order 7 Rule 11

Citation : (2001) 08 DEL CK 0202

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : Mr. Anil K. Kher, for the Appellant; Mr. I.J. Singh and Mr. S.C. Nigam, for the Respondent

Final Decision : Allowed

Judgement

A.K.Sikri, J.—The plaintiff has filed the instant suit for declaration, specific performance of contract with respect to property at C-471, defense Colony, New Delhi (for short "suit property"), recovery of mesne profits/damages and for permanent injunction. Facts can be stated in capsulated form as that would serve the purpose. Husband of the plaintiff, Major Siriram Sharma was the owner of the property. He died on 10th September, 1975. After his death property was mutated in the name of plaintiff in the records of L& DO/defendant No. in September, 1986. Thereafter, the plaintiff went to toronto, Canada and settled there. In 1989 she came to India. Her case is that the defendant No.2 approached the plaintiff and gave an offer for development of the aforesaid property. The plaintiff and defendant No.1, of which defendant No.2 is the Managing Director, agreed on terms and conditions on which builder's Agreement was to be arrived at, on 7th August, 1989. However written documents could not be executed. As per these terms, defendant No.1 was to develop and construct the property at its own cost and was to pay a sum of Rs.9 lacs towards security deposit. After the construction the plaintiff and the defendant No.1 were to share 50 per cent each of the constructed portion. The

defendant No.1 paid a sum of Rs.4,55,000/-. The details of this payment as per the plaintiff, are as under:

S.No. Date Amount/Rs. 1. 09.09.1989 2,00,000/- 2. 03.10.1989 1,00,000/- 3. 31.10.1989 55,000/- 4. 13.07.1992 1,00,000/-

2. The case of the plaintiff further is that after the signing of the agreement, it was mutually agreed between the plaintiff and the defendant No.1 that the plaintiff would get Ground Floor and Second Floor of the property with rights of terrace and the defendant No. 1 would take the other portion of the building constructed over the said plot of land. In the year 1992 it was further agreed between the parties that the defendant No.1 would provide an additional room measuring 10" x 12" along with bathroom including all fittings on the top floor. The defendants 1-2 however did not perform their obligation under the agreement. During her visits to India, she came to know that the defendants 1-2 were forging the signatures of the plaintiff and had been filing petitions in the courts. Again in August, 1994 the plaintiff came to India and noticed that necessary modifications were made and the building was complete. The plaintiff got in touch with the defendant No.2 who asked the plaintiff to execute the General Power of Attorney (for short "GPA") in favor of his daughter i.e. defendant No.3 which was required for getting the property freehold as well as for the purpose of getting the completion certificate. The plaintiff executed the GPA. In May, 1996 the plaintiff again came to India to resolve the matter but the defendants 1-2 failed to recognise the plaintiff. She visited the office of Sub-Registrar, got the record inspected and cancelled the GPA given by her in favor of defendant No.3 on 10th May, 1996. She also got a public notice issued to this effect. The suit is filed for specific performance of agreement dated 7th August, 1989 and direction is sought against the defendants 1 and 2 to hand over and deliver to the plaintiff vacant and peaceful possession of Ground Floor and Second Floor with terrace sides of the building constructed with additional room of 10"x12" with attached bathroom on the top floor of the suit property. Declaration is sought to the effect that action taken by defendant No.3 on the basis of GPA dated 19th August, 1984 be declared null and void. Further decree for Rs.18 lacs towards damages for non-handing over the possession of the plaintiff's share is sought. Decree of Rs.1,50,000/- as mesne profits for the month of August, 1996 and also future mesne profits at the rate of Rs.1,50,000 per month is also prayed for. There is also a prayer for decree of permanent injunction against the defendants 1 to 3 not to encumber, mortgage or sell the suit property and against the defendant No.4 not to grant any permission/sanction for sale of the suit property.

3. The case set up by the defendants 1 and 2 in the written statement is that no such builders' Agreement dated 7th August, 1989 was executed between the parties. It is further stated in fact agreement to sell dated 31st October, 1989 was entered into between the plaintiff and the defendant No.2 for a consideration of Rs. 4,55,000/- as per which the plaintiff was agreed to sell the suit property to

the defendant No.2. Full consideration was paid. Possession was given to the defendant No.2. Pursuant thereto GPA was also executed in favor of the defendant NO.3. The defendant No.2 has Therefore, become the owner of the suit property which he purchased for consideration from the plaintiff and the plaintiff has no interest or title left in the suit property. Various allegations made in the plaint are denied. Various preliminary objections are also raised to the maintainability of such a suit which according to the defendants 1 and 2 has been filed with malafide intention to blackmail the defendants 1 and 2. It is also stated that the suit is time barred as well. The defendant No.3 has filed separate written statement, albeit on same lines.

4. Along with the suit, the plaintiff has filed is No.8683/96 for ad interim injunction. By order dated 20th September, 1996 ex-parte injunction was granted restraining the defendants from selling, parting with possession or creating any encumbrance in the suit property. The order was also passed to the effect that the defendant shall not use the GPA dated 19th August, 1984 executed by the plaintiff in favor of the defendant No.3 which is alleged to have been cancelled on 10th May, 1996. The defendants have filed reply to this application.

5. The defendant No.2 has also filed is No. 12345/99 under Order XII Rule 6 read with Section 151 CPC alleging that there is no cause for filing the present suit which should be dismissed. Along with that another is is filed on behalf of the defendants 1 and 2 under Order XXXIX Rule 3(A) and 4 read with Section 151 CPC with the prayer that the is No. 8683/96 filed by the plaintiff be heard and dismissed with costs. This is was not numbered earlier due to inadvertence of the registry and is now numbered as is No. 7071/2001. All the there IAs are Therefore interconnected. They were heard together and are being disposed of by this common order.

6. It may be stated at this stage that the parties have filed original documents in support of their respective cases and admission/denial of documents was conducted on 29th November, 1999.

7. The case of the defendants 1 and 2 is that :a) the plaintiff has accepted that alleged document dated 7th August, 1989 was not executed. The defendants 1 and 2, on the other hand, have denied the said document. In the absence of there being any written agreement dated 7th August, 1989 the question of its specific performance does not arise, and Therefore, this claim is liable to be dismissed on this ground. b) GPA dated 19th August, 1984 is admitted by the plaintiff i.e. she has admitted her signatures while denying its content. Similarly, she has admitted her signatures on agreement to sell dated 31st October, 1989. c) Although the plaintiff has denied the original receipt dated 31st October, 1989 which is thumb mark and signed by her, she has acknowledged that she has received Rs.4,55,000/- and also admitted her signatures on the receipt.

8. Although she has denied receipt dated 31st October, 1989 and affidavit dated 30th August, 1994 these documents stand admitted in view of the following:

i) The plaintiff in paragraph 8 of the plaint has admitted the collection of a sum of Rs.4,55,000/- which she has dishonestly explained otherwise while the circumstances and purpose for which the said amount has been collected stands established by the agreement to sell the receipt both dated 31st October, 1989.

ii) All the documents except the affidavit have been witnessed by her son, Major S.K.Sharma, which signatures cannot be denied, The son, Major S.K.Sharma had been Class I Gazetted Officer in the Army besides he himself has filed the above noted suit as the attorney on behalf of the plaintiff and his signatures on the said documents can be compared with the acknowledged signatures which faithfully tallies.

iii) The plaintiff admits the execution of the registered power of attorney dated 19th August, 1994 in favor of the defendant No.3 whereas she has dishonestly denied the contents while admitting the signatures; this power of attorney has been admitted in paragraph 14 of the plaint.

9. The conveyance deed dated 8th February, 1995 in respect of suit property in question stands executed in favor of the defendant NO.2 by defendant No.3 on the strength of registered GPA which is irrevocable.

10. Thus according to the defendants 1 and 2 nothing further is to be investigated and the suit filed by the plaintiff is liable to be dismissed on this score alone. At the time of arguments, learned counsel for the defendants 1 and 2 submitted that although heading of is No. 12345/99 mentions that it is filed under Order XII Rule 6 CPC, it may be treated as application under Order VII Rule 11 CPC. There being no cause for filing the suit, the same be dismissed and in support reliance is placed on the judgment of the Supreme Court in the case of T. Arivandandam Vs. T.V. Satyapal and Another, .

11. On the other hand, emphasising the averments made in the plaint, learned counsel for the plaintiff submitted that the plaintiff has been duped by the defendants 1 to 3. The agreement between the parties was in fact the builders' agreement the terms of which were agreed on 7th August, 1989 but could not be reduced into writing. It was further submitted that the story put forth by the defendants 1 to 3 could not be believed because of the following:

1) the statement of the defendant No.2 was recorded under Order x Rule 1 CPC on 7th September, 2000 as per which the defendant No.2 agreed that Mark-"A" the alleged Builder's Agreement bears the handwriting of Sh.S.K.Sharma, son of the plaintiff. The portions encircled in blue at points 1 to 14 are in the handwriting of Sh.S.K.Sharma, son of the plaintiff. The portions encircled in blue at points 1 to 14 are in the handwriting of the defendant No.2, Therefore, the defendant No.2 admits that the said agreement was arrived at between the parties although it could not be formally signed. As per this agreement, the plaintiff was to get Rs.9 lacs Along with two floors and one room on the top floor. How the plaintiff could agree to sell the entire property by alleged agreement to sell dated 31st October, 1989 for Rs.4,55,000/-?

2) If the parties had entered into agreement to sell dated 31st October, 1989 as per which had agreed to sell the property in question to defendant No.2, why the defendant No.2 would write a letter in the year 1992 thereby agreeing to give additional room measuring 10"x12" on the top floor? This shows that the agreement in question was the builder's agreement dated 7th August, 1989 which was arrived at between the parties.

3) When the agreement to sell was arrived at between the parties as alleged by the defendant No.2 only on 31st October, 1989 why the defendant No.2 made the payment of Rs. 4 lacs before the said dated i.e. by two cheques of Rs. 2 lacs and Rs. 1 lac on 9th September, 1989 and again Rs.1 lac on 3rd October, 1989?

4) Once, according to the defendant No.2, on 31st October, 1989 the entire sale consideration of Rs. 44,55,000/- stood paid, why the defendant No.2 would make further payment of Rs.1 lac on 13th July, 1992 which payment is admitted by the defendant No.2?

12. Learned counsel for the plaintiff further submitted that in the written statement filed on behalf of the defendants 1 and 2, Explanation for the aforesaid points was not only unconvincing, the learned counsel for defendants 1-2 sought to give totally contrary Explanation at the time of arguments.

13. On going through the pleadings and various submissions made by counsel for both the sides and noted above, I am of the view that there are certain disputed facts which will have bearing on the outcome of the case and these disputed facts will have to be thrashed after the evidence of both the parties is recorded. No doubt the plaintiff is admitting her signatures on agreement to sell, receipt and GPA etc. However, she has denied the contents of these documents and has made certain allegations in the plaint giving her own version of the circumstances under which these documents were signed by her. Of course, burden would be heavy upon her to prove that she did not agree to what is stated in these documents and simply signed these documents out of ignorance and/or being duped by the defendants 1 and 2. Be as it may, she cannot be non-suited at this stage and an opportunity has to be given to her to prove her case. While dealing with application has to be given to her to prove her case. While dealing with application under Order XII Rule 6 (or for that matter under Order VII Rule 11 CPC filed by the defendants 1 and 2 as stated by the learned counsel for the defendant no.2), one has to look into the plaint to see whether it disclose any cause of action or not. Plaint as read does disclose cause of action and if the plaintiff ultimately proves the averments made in the plaint, she may be successful in the suit. Moreover, it is not a case where admitted facts are sufficient to dismiss the case or reject the plaint. The queries/points raised by learned counsel for the plaintiff and stated above, raised some plea of substance. It is for the defendants 1 and 2 to explain and clarify these aspects for which, again, trial is required. It may not be out of place to mention at this stage that the defendant No.2 has also raised the plea of limitation. This may be taken care of while framing of the issues and at that stage, it would be examined as to

whether this issue needs evidence or can be argued on the basis of admitted facts on record. If latter is true, it can be treated as preliminary issue decided in the first instance. Therefore, no opinion at this stage is expressed on this aspect nor was it seriously argued at this juncture.

14. is No.12345/99 filed by the defendant No.2 is accordingly dismissed.

15. While examining the merits of is No. 8383/96 filed by the plaintiff, one has to look into the pleadings and the material which has been placed on record as to today. The entire case of the plaintiff is based upon alleged agreement dated 7th August, 1989. Admittedly what is produced is only a draft with corrections in the hands of son of the plaintiff as well as defendant No.2. No formal document was reduced into writing and it is not signed by any of the parties. It is difficult to state at this stage that prima facie whether any such agreement was arrived at. On the other hand, defendants 1 and 2 have produced agreement to sell showing that the plaintiff agreed to the sell the property for Rs.4,55,000/-, receipt showing the entire amount having been paid, GPA executed by the plaintiff in favor of the defendant No.3. The plaintiff has admitted her signatures on all these documents although contents are denied. As already mentioned above, it would be a onerous and burdensome task for the plaintiff to prove her version about the denial of contents while accepting having signed these documents. The sale deed of the property in question has also been executed in favor of the defendant No.2. Therefore, prima facie, it appears that the plaintiff had agreed to sell the property in question to the defendant No.2 with consideration and even allowed him to construct the property. The money spent on construction is that of defendant No.2. After all, the suit filed by the plaintiff is for specific performance of the agreement dated 7th August, 1989, existence of which itself is in doubt and as of today it is difficult to comprehend that such an agreement was arrived at in the absence of any written agreement to this affect and on the other hand, agreement to sell etc. signed by the plaintiff and also admitting having received Rs. 4,55,000/- from the defendant No.2. Therefore, I am of the opinion that prime facie the plaintiff has not been able to establish the existence of agreement dated 7th August, 1989. The suit property is in possession of the defendant No.2 who has constructed the same from his own funds. It may also be mentioned here that the possession of the plot of land was given in 1989. In paras 11 and 12 the plaintiff alleges that defendants 1 and 2 were not performing their obligations under the agreement and whenever she would come to India she would make frantic efforts to get in touch with defendant No.2 but he was avoiding contact. However, no steps were taken at that time. On the contrary she allowed the defendant No. 2 to carry out the construction. it is stated in para 13 of the plaint that during her visits to India, the plaintiff came to know that the defendants were forging the signatures and have been filing petitions in courts though the plaintiff was never in India during that period. However, the plaintiff did not take any steps to curb such alleged activities of the defendant No.2. In para 14 of the plaint the plaintiff has alleged that when she came to India in August, 1994 she noticed that necessary modifications were

made and the buildings was complete. She then got in touch with the defendant No.2 and even executed GPA. So at this stage also she did not take steps to get possession of the portions of the property or balance amount as per alleged agreement dated 7th August, 1989 and on the contrary executed another document viz.GPA in favor of defendant No.3. This shows carelessness and negligence on her part as well. Therefore, the plaintiff has not been able to make out a prima facie case, strong enough to entitle her to get the injunction. Even balance of convenience is also not in favor of the plaintiff. The deal, as per agreement to sell, was in respect of land for which full consideration stands paid which was settled as per the agreement to sell. After taking possession of the land, the defendant No.2 has incurred substantial expenditure in constructing the building. The defendant No.2 is also in possession of the suit property and is enjoying ever since its construction. Therefore, it would not be appropriate to put an embargo upon his right to deal with the property merely because the plaintiff has filed the present case and has come out with the allegations relating to so-called agreement dated 7th August, 1989 which as on date does not stand substantiated. It may be mentioned that since such averments are made in the plaint, and Therefore, the plaintiff is to be given a chance to prove the same and that is why the suit is not dismissed at this stage but it would be altogether different considerations that will have to be borne in mind while considering injunction application and deciding as to whether the plaintiff is entitled to injunction or not. For this, the plaintiff is to satisfy triple test of prima facie case, balance of convenience and irreparable injury. Here the plaintiff has failed miserably.

16. This is NO. 8683/96 filed by the plaintiff is accordingly dismissed and is NO. 7071/2001 is hereby allowed. Ex-parte injunction dated 20th September, 1996 stands vacated.

17. However, if the defendant No.2 intends to encumber or dispose of the property in question, he shall give prior intimation thereof to this court and also bring on record the necessary particulars in this respect.

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