(2006) 02 CAL CK 0021

In the Calcutta High Court

Case No : F.M.A.T. No. 3789 of 2005

Vipin Bhimani and Another APPELLANT

Vs

Sunanda Das and Another RESPONDENT

Date of Decision : 24-02-2006

Acts Referred:

Contract Act, 1872 — Section 202, 203, 204
Specific Relief Act, 1963 — Section 14, 14(1), 14(3)
Transfer of Property Act, 1882 — Section 54

Citation : AIR 2006 Cal 209 : (2006) 2 CALLT 157 : (2006) 2 CHN 396

Hon'ble Judges : Pravendu Narayan Sinha, J;Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : S.P. Roy Chowdhury, Saptansu Basu and Sudeshna Bagehi, for the Appellant; Saktinath Mukherjee, Abhrajit Mitra, Kabita Mukherjee and Manas Das Gupta, for the Respondent

Final Decision : Dismissed

Judgement

Bhaskar Bhattacharya, J.—This first miscellaneous appeal is at the instance of the plaintiffs in a suit for specific performance of contract and injunction and is directed against Order No. 2 dated 20th September, 2005 passed by the Civil Judge (Senior Division), 4th Court, Alipore in Title Suit No. 69 of 2005 thereby refusing to grant an ad interim order of injunction in favour of the plaintiffs although the learned Trial Judge issued a notice to show-cause why the prayer of the plaintiffs for temporary injunction should not be granted.

2. The appellants herein filed the aforesaid suit being Title Suit No. 69 of 2005 in the 4th Court of learned Civil Judge (Senior Division), Alipore, thereby praying for the following relief:

a) Specific performance of the agreement made between the plaintiffs and the defendants as mentioned in paragraph 5 above;

b) Alternatively, specific performance of the agreement between the plaintiffs and the defendants recorded in Annexure ''A'' hereto;

c) A decree directing the defendants and each of them to specifically perform and/or comply their part of the agreement mentioned in paragraph 5 hereinabove;

d) Alternatively, a decree directing the defendant and each of them to perform and/or comply their part of the agreement as recorded in Annexure ''A'' hereof;

e) If default is committed by the defendants or any of them in complying with their obligations in terms of the agreement mentioned in the plaint, the Registrar of this learned Court be directed to sign, execute and register such paper document and/or deed as may be necessary or expedient for the purpose of specifically performing the said agreement;

f) Permanent injunction restraining the defendants and each of them from dealing and/or disposing of the said suit property in any manner whatsoever;

g) Receiver;

h) Costs of, and incidental to, the suit be paid by the defendants;

i) Such further order/orders as Your Honour may deem fit and proper.

3. The case made out by the plaintiffs may be summarised thus:

(a) The plaintiffs are engaged in construction and development of building projects. In the year 1990, the defendants, the owners of the suit property approached the plaintiffs to develop a part of the premises being 236B, Acharya Jagadish Chandra Bose Road, Kolkata containing an area of 27 cottahs as described in the schedule of the plaint. At that point of time, the property was partly under the occupation of one Balmer Lawrie and Company Ltd. and partly of one Associated Metal Works and the adjacent premises being 236A, Acharya Jagadish Chandra Bose Road, Kolkata were under the monthly tenancy of one Hindustan Petroleum Corporation Ltd.

(b) At that point of time, the appellants agreed to develop the suit property on the following terms:

(i) The plaintiffs would make arrangement for having the suit property vacated by the tenants and occupants through negotiation.

(ii) The plaintiffs would take all the responsibilities and the obligations to negotiation with the tenants and the occupants of suit property and the compensation to be paid and/or the alternative accommodation to be provided by the plaintiffs would be adjusted from the area to be allocated to the defendants upon development of the suit property.

(iii) The plaintiffs would make an advance of Rs. 50,00,000/- as an interest free security deposit to the defendants within six months from the date the Balmer Lawrie and Company would vacate the property and the plaintiffs would at their own costs and expenses obtain the necessary permissions and sanction of the building plan from the appropriate authority.

(iv) Out of the construction area of the new building, 58 per cent of such area together with the proportionate share in the land, common areas, roof and car parking space would be allotted to the defendants absolutely and the balance 42 per cent would be available for the plaintiffs.

(v) The said agreement was duly accepted and recognised by the defendants through their various letters and in the month of August, 1995, the defendants had in part performance of the agreement made over possession of one flat and the out-houses of the suit property to the plaintiffs and the same had been apparently shown as tenancy in favour of the plaintiff No. 2. In part performance of the said agreement, the defendant No. 1 had granted a registered Power-of-Attorney dated 1st August, 1990 in favour of plaintiff No. l. She had also granted a separate Power-of-Attorney on the same day, which was irrevocable.

(vi) Pursuant to the said agreement defendant No. 2 had also granted another Power-of-Attorney dated 15th January, 1995 in favour of the plaintiffs, which was also irrevocable.

(vii) Thereafter an agreement recording the aforesaid terms and conditions of development of the suit property was drafted and the same was approved by the defendants sometime in the year 1997. But, in spite of repeated requests and demands, the defendants have failed, neglected and refused to sign the said agreement till date. The plaintiffs had also paid a sum of Rs. 30,00,000/- to defendant No. 1 as part security payable by the plaintiffs under the said agreement.

(viii) Pursuant to the said agreement, the plaintiffs had also taken step for negotiation with Balmer Lawrie and Company and concluded a deal to have the two flats occupied by it vacated on the terms and conditions mutually agreed upon. The plaintiffs had finalised other flat vacated by Associated Metal Works and other tenant at a consideration and paid an advance sum. The plaintiffs had also got Soil Test Certificate from Urban Land Ceiling Clearance and Fire Service Clearance at their own cost and also appointed Architect for the proposed building.

(ix) Ultimately in the year 2002, it was further agreed between the parties that the defendants would have the option either to sell and/or transfer to the plaintiffs the suit property on FAR basis at the rate of Rs. 1,300/- per sq. ft. inclusive of sanction fees or go ahead with the joint development thereof. But ultimately, the defendants backed out from the said agreement and revoked the Power-of-Attorney. Hence the suit.

4. On the basis of the allegations made in the plaint, the appellants filed an application for temporary injunction for restraining the defendants from entering with any fresh agreement with any third party for development of the suit

property.

5. The learned Trial Judge on such application issued notice to show cause upon the defendants as to why the prayer of the plaintiffs should not be granted but refused to pass any ad interim order of injunction.

6. Being dissatisfied, the plaintiffs have come up with the present first miscellaneous appeal.

7. Mr. Shyama Prasanna Roy Chowdhury, the learned Senior Advocate appearing on the behalf of the appellants at the very outset has submitted that the learned Trial Judge erred in law in not granting the ad interim order of injunction by not following the well-settled principles which are required to be followed while considering the prayer for ad interim order of injunction. Mr. Roy Chowdhury contends that the finding of the learned Trial Judge that plaintiffs failed to establish a prima facie case was based on total misreading of the materials on record. He further submits that the learned Trial Judge further erred in law in refusing the prayer for ad interim order of injunction simply on the ground that although the fact of revocation of the Power-of-Attorney was communicated to the plaintiffs on 28th September, 2004, the delay of one year in filing the suit was a factor which stood in the way of granting the prayer of ad interim injunction. Mr. Roy Chowdhury submits that an irrevocable Power-of-Attorney cannot be revoked and if it is so revoked, the mere delay of one year in approaching the Court cannot be a ground for refusing an ad interim order of injunction. Mr. Roy Chowdhury further submits that his clients have spent huge amount of money on the basis of the transaction entered into by the parties and they were also put into possession and in such a case, it was the duty of the learned Trial Judge to pass an order of ad Interim injunction.

8. Mr. Saktinath Mukherjee, the learned Senior Advocate appearing on behalf of the respondents has opposed the aforesaid contentions advanced by Mr. Roy Chowdhury and has contended that even at this stage if we accept all the averments made in the plaint and in the application for injunction to be true, the relief of specific performance of contract cannot be granted in favour of the plaintiffs in view of the embargo created by Section 14(3)(c) of the Specific Relief Act and thus, there is no prima facie case to have an ad interim order of injunction. Mr. Mukherjee further contends that if prima facie case is not established, the question of balance of convenience and inconvenience and that of causing irreparable loss and injury to the plaintiffs are inconsequential. He, therefore, prays for dismissal of the appeal.

9. Therefore, the only question that arises for consideration in this appeal is whether on the basis of averments made in the plaint and in the application for injunction, the learned Trial Judge was justified in refusing to grant an ad interim order of injunction.

10. To appreciate the point raised by Mr. Mukherjee as regards maintainability of the suit for specific performance of contract at the instance of the developer, it

will be profitable to refer to the provisions contained in Section 14 of the Specific Relief Act and the same is quoted below:

Section. 14. Contracts not specifically enforceable.--(1) The following contracts cannot be specifically enforced, namely:

(a) a contract for the non-performance of which compensation in money is an adequate relief;

(b) a contract which runs into such minute or numerous details or which is so dependent on the personal qualification or violation of the parties, or otherwise from its nature is such, that the Court cannot enforce specific performance of its material terms;

(c) a contract which is in its nature determinable;

(d) a contract the performance of which involves, the performance of a continuous duty which the Court cannot supervise.

(2) Save as provided by the Arbitration Act, 1940 (10 of 1940), no contract to refer present or future differences to arbitration shall be specifically enforced; but if any person who has made such a contract (other than an arbitration agreement to which the provisions of the said Act apply) and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

(3) Notwithstanding anything contained in Clause (a) or Clause (c) or Clause (d) of Sub-section (1), the Court may enforce specific performance in the following cases:

(a) Where the suit is for the enforcement of a contract,--

(i) to execute a mortgage or furnish any other security for securing the repayment of any loan which the borrower is not willing to repay at once:

Provided that where only a part of the loan has been advanced the lender is willing to advance the remaining part of the loan in terms of the contract; or

(ii) to take up and pay for any debentures of a company.

(b) Where the suit is for,--

(i) the execution of a formal deed of partnership, the parties having commenced to carry on the business of the partnership; or

(ii) the purchase of share of a partner in a firm.

(c) Where the suit is for the enforcement of a contract for the construction of any building or the execution of any other work on land:

Provided that the following conditions are fulfilled, namely:

(i) the building or other work is described in the contract in terms of sufficiently precise to enable the Court to determine the exact nature of the building or work;

(ii) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief, and

(iii) the defendant has, in pursuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed.

11. From the provisions contained in Section 14(3)(c) of the Act, it is clear that a suit for specific performance of a development agreement at the instance of a developer is clearly hit by the provisions contained therein. However, a suit for specific performance of such agreement at the instance of the owner of the building would be maintainable if possession is already handed over to developer and Clauses (i) and (ii) of Section 14(3)(c) are complied with.

12. In the case before us, the suit is at the instance of the developer and as such, the formality required u/s 14(3)(c)(iii) is, on the face of it, absent.

13. We, therefore, find that on the face of plaint allegations, the relief of specific performance of contract cannot be granted in favour of the plaintiffs-appellants and as such, we find substance in the contention of Mr. Mukherjee that plaintiffs-appellants have no prima facie case so far the relief of specific performance is concerned.

14. Mr. Roy Chowdhury, in this connection, drew our attention to the fact that the plaint not only contained the relief of specific performance but also the prayer for permanent injunction. According to Mr. Roy Chowdhury, the owner of the building having executed an irrevocable Power-of-Attorney in favour of his client and on the basis of such irrevocable Power-of-Attorney, his client having invested huge amount of money, the Court can reasonably grant an order of injunction restraining the owner from entering into a fresh agreement with any other person. Mr. Roy Chowdhury in this connection relies upon the provisions contained in Sections 202 to 204 of the Contract Act and submits that there is no scope for revocation of an irrevocable Power-of-Attorney by which his client has been made agent of the owner. In support of such contentions, Mr. Roy Chowdhury relied upon the decision of the Supreme Court in the case of Seth Loon Karan Sethiya Vs. Ivan E. John and Others, .

15. After going through the averments made in the plaint, we find that the plaint not only contains a prayer for specific performance of contract but also a consequential prayer for permanent injunction. If we now take up the prayer of permanent injunction only, we find that the irrevocable Power-of-Attorney was granted for the purpose of giving effect to the alleged agreement for development and the said irrevocable Power-of-Attorney was not executed in favour of the plaintiffs for any other reason. If the relief for specific performance of agreement is barred, in our view, the plaintiffs cannot get a decree for

permanent injunction simply on the ground of revocation of Power-of-Attorney. If a person has granted irrevocable Power-of-Attorney in favour of another for the purpose of acting as his agent and on the basis of such Power-of-Attorney the agent incurs expenditure, in the event of revocation of such Power-of-Attorney without just reason, the agent is entitled to get damages.

16. We are not impressed by the submission of Mr. Roy Chowdhury that a so-called irrevocable Power-of-Attorney cannot be revoked in any circumstances. By virtue of such Power-of-Attorney if an owner of the building gives agency to a person to act on his behalf, the contract by itself is determinable at any point of time. The concept of irrevocable Power-of-Attorney thereby conferring agency for all time to come is unknown in jurisprudence unless such power is coupled with an interest, meaning thereby, the conferment of power to do some act conveyed to an agent along with an interest in the subject-matter of the power. When such power coupled with an interest is given, the holder of such power does not hold the same for the benefit of the principal but for his own benefit and for the above reason, such authority is not recognised as true "agency power" and is termed as "proprietary power". In the case before us, no such "propriety power" has been given to the developer. Section 202 of the Contract Act recognises such propriety power and as provided in Section 203 thereof, except in the cases covered by Section 202, all other agencies are revocable at the instance of the principal. After going through the Power-of-Attorney involved herein, we find that such agency was given only to give effect to the earlier agreement for development of the Immovable property which by itself does not create any interest over the property in view of the provisions contained in Section 54 of the Transfer of Property Act.

17. Therefore, by virtue of the so-called irrevocable Power-of-Attorney, no interest over the immovable property had been created in favour of Mr. Roy Chowdhury''s client so as to prevent the principal from revoking the said Power-of-Attorney.

18. We, therefore, find no substance in the second contention of Mr. Roy Chowdhury.

19. Mr. Roy Chowdhury lastly contended that the point taken by his client raises at least an arguable case to go for trial and in such a situation, it is a fit case for an ad interim order of injunction.

20. We have already pointed out that the provisions contained in Section 14(3)(c) are so clear that there is no scope of argument that a suit at the instance of a developer for specific performance is maintainable. Similarly the other point that in this case, by virtue of execution of the Power-of-Attorney, no interest in the land was created is also free from any doubt when even an agreement for sale does not create any interest in the land.

21. We, thus, find that the learned Trial Judge rightly refused to grant any ad interim order of injunction as even on the basis of averments made in the plaint,

the plaintiffs failed to make out a prima facie case to go for trial. It is needless to mention that balance of convenience and inconvenience is also in favour of refusing injunction as plaintiffs have adequate remedy of damages and such claim has already been made in the suit.

22. The appeal is, thus, devoid of any substance and is dismissed accordingly. In the facts and circumstances, there will be, however no order as to costs.

Pravendu Narayan Sinha, J.

23. I agree.

