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Pawan Properties Vs Narayani Devi Dhanania

E.C. No. 127 of 2011; C.S. No. 619 of 1985

Court: Calcutta High Court

Date of Decision: Dec. 21, 2012

Acts Referred:
Civil Procedure Code, 1908 (CPC) â€" Section 47

Citation: (2013) 2 CHN 77

Hon'ble Judges: I.P. Mukerji, J

Bench: Single Bench

Advocate: P.S. Sengupta, Sabyasachi Choudhury and Sreetama Manna, for the Appellant; Pradip Kr. Ghosh and Pramit Ray for the Judgment Debtor of E.C. 128 of 2011 and Raja Basu Choudhury for the Judgment Debtor of E.C. 128 of 2011, for the Respondent

Judgement

I.P. Mukerji, J.
Two execution applications were heard by me. One was E.C. 127 of 2011, which was against the heirs of Dina Nath

Agarwal who at one point of time was the third defendant. The other application is E.C. 128 of 2011 against the heirs of Harikishan Das Agarwala

who at one point of time was the fourth defendant in the suit. Each of these execution applications prayed of an order for transfer of a 1/4th share

in the property numbered as premises No. 46A and 46B, Shakespeare Sarani, Kolkata-700 017 in favour of the plaintiff decree-holder. Mr.

Pradip Kumar Ghosh, learned Senior Advocate represented the heirs of Harikishan Das Agarwala, while Mr. Raja Basu Choudhury represented

the heirs of Dina Nath Agarwal. Each of the above applications was opposed by the above respective heirs. But these two applications can be

disposed of by this common judgment. The genesis of the dispute between the parties was an agreement dated 13th October, 1982 between the

plaintiff decree-holder and inter alia, Dina Nath Agarwal and Harikishan Das Agarwala for development of the above property which was of

substantial area and measured more than two bighas. In a suit between the parities to the agreement and or their heirs being C.S. No. 619 of

1985, the parties to the suit at that point of time, on 25th November, 2003 executed a Terms of Settlement. In Clause 4 of these terms it was

recorded that the third and fourth defendants had 1/4th share each. Clause 5 provided that in consideration of the plaintiff decree-holder paying the

sums mentioned in Schedule X to the agreement these defendants would transfer their interest in the property to them. Part-II of Schedule X, inter

alia, provided that each of the above two defendants would be paid Rs. 40 lacs. The last sentence of Clause 5 stated that cheques for the said

amount had been handed over to the defendants. The total consideration as mentioned in Part-I of the Schedule was 80 lacs to be paid to each of

the said defendants. The above 40 lacs was to be paid at the time of signing of the terms, which undisputedly was paid and the balance was

payable immediately upon passing of the decree as provided in Part-III of the Terms of Settlement. Therefore, the total monetary consideration

receivable by either of them was Rs. 85 lacs.

2. Moreover, each of these defendants would be provided a constructed area of 4000 sq. ft. super built up along with three car parking spaces in

the above property. I reproduce Clause 8 and 9 and 1(e) of Part-I:

8. Mrs. Moumita Chatterjee, Advocate is appointed Receiver over and in respect of the undivided share of the consenting defendants without

security and without remuneration for the purpose of executing the deeds of conveyances in favour of the plaintiff or its nominee or nominees upon

the plaintiff or its nominee or nominees making payment of the entire purchase consideration to the consenting defendants as mentioned in Schedule

X"" and the Receiver shall also be entitled to admit execution and present such deed of conveyance or deeds of conveyances for registration

before the appropriate registration authority.

9. For the sake of clarity, it is recorded that by reason of the aforesaid arrangements the plaintiff would now be entitled, as owner of the undivided

26/33th share of the said property, to proceed with the development of the said premises in the manner referred to in the said Development

Agreement dated 13th October, 1982 and deal with all authorities concerned and finally sell transfer and/or deal with the constructed area

attributable to the said undivided share under the said development agreement which has vested in the plaintiff.

1(e). The share of the Defendant No. 3 and 4 in the suit property being 1/4th share each at and for an agreed consideration of Rs. 85.00 lacs each

and constructed area of 4000 sq. ft. super built up along with three car parking space to each of them. The earmarking of the area shall be done by

Syam Sundar Nangalia and Raj Kumar Dhanania mutually.

3. Clauses 8 and 9 of the Terms and 1(e) of Schedule X are most important and have been given different interpretations by the learned counsel

appearing for the decree-holder and the judgment-debtors. Therefore, it is imperative that this Court makes a proper interpretation of the above

clauses for a correct resolution of the disputes between the parties. It is also important to note that according to Clause 10 of the terms possession

of the vacant portion of the premises as recorded by an earlier receiver had been made over to the plaintiff decree-holder. This possession is now

disputed by the plaintiff decree-holder but this dispute does not lie at the heart of the controversy.

4. An application was made for recording the above compromise as a decree of this Court being G.A. No. 4027 of 2003 connected with C.S.

219 of 1985. This application was resisted by some defendants. The record shows that the fourth defendant had also supported these defendants.

These parties objected to a decree being passed. However, the application was allowed and a decree in terms of the settlement was passed on

29th July, 2004 by Pradip Kumar Biswas, J.

5. Now, it is important to examine the grounds on which the execution of the decree as claimed by the plaintiff is being resisted by the heirs of the

above defendants. Their stand is that unless the above built up area together with the car parking space is handed over to them, they would not

execute the conveyance. According to them that is the meaning that it is to be attributed to Clauses 8 and 9 of the terms of settlement read with

Clause 1 (e) of the Schedule.

6. Mr. Pradip Kr. Ghosh, learned Senior Advocate for the judgment-debtor cited the case of White vs. Elmdene Estates Ltd. reported in 1959 2

ALL. E.R. 605. He says that the word ""payment"" has a wide meaning and also includes payment in kind.

7. Clause 8 stipulates that upon making payment of the entire consideration the receiver would execute the conveyance in favour of the plaintiff.

The entire consideration has been defined in Part-I of Schedule X and in Clause 1(e) of Schedule X as 85 lacs and the constructed area.

Therefore, although the plaintiff has paid Rs. 85 lacs, it could not be said that they have paid the entirety of the said consideration. They would only

have paid the whole consideration if they constructed and handed over the above constructed area. Mr. Ghosh submitted that the above

compromise decree was not unilateral in its terms but contained reciprocal promises. The obligation of the judgment-debtors to execute the

conveyance would arise after making over to them of the constructed area. So unless the prior obligation was fulfilled by the plaintiff there was no

obligation on the part of the defendants to execute the conveyance. He relied on the case of Jai Narain Ram Lundia vs. Kedar Nath Khetan and

others reported in AIR 1956 SC 359. He also added that the Court had full powers to investigate the fulfilment of reciprocal promises at the

execution stage u/s 47 of the Code of Civil Procedure.

8. Mr. P.S. Sengupta, learned Senior Advocate for the decree-holder interpreted the terms of the compromise as meaning that after payment of

Rs. 85 lacs the judgment-debtors would have to execute the conveyance. Only, thereafter could the plaintiff decree-holder make construction and

hand over possession of the constructed portion within three years of sanction of the plan as provided in Clause 4 of the above development

agreement. He cited the building rules and the attending forms and schedules relating to Kolkata Municipal Corporation Building Rules, 2009. He

relied mainly the Rules and Schedule 1. In an application for sanction of a plan it has to be specifically mentioned under what capacity an applicant

was applying. Such an application for construction can only be signed by the owner. Therefore, it is logical that the conveyance is executed in

favour of the plaintiff. The plaintiff becomes the owner and takes steps for making construction in terms of the agreement. Only then can the

judgment-debtors claim the built up area within three years of sanction of the said plan.

FINDINGS:

9. In White vs. Elmdene Estates Ltd. decided by the Court of Appeal of England and Wales and reported in 1959 (2) ALL ER 605, the tenants

sold their property at an undervalue to the landlord''s nominee in consideration of the landlord granting tenancy to them. Was the difference in value

to be considered as the premium paid by the tenants under the relevant Rent Act was the question before the Court: In that context Lord Evershed

M.R. held that it was and went on to hold that payment could be in cash or in kind. I read the relevant part from the judgment:

I therefore, conclude that, where a specific sum is to be deducted from a known or assumed sale price as a condition of the grant of a tenancy, that

is a ""pecuniary consideration"" within the scope of the definition, and amounts, therefore, to a premium. If I am right, it must follow that the exaction

of such a deduction must amount to a ""payment""; and I find, indeed, no difficulty in so concluding: for the word ""payment"" in itself is one which, in

an appropriate context, may cover many ways of discharging obligations. It may ever (as is well known, although it does not arise in this case)

include a discharge, not by money payment at all, but by what is called ""payment in kind"". It follows, therefore, that if, in the present case, the

defendant company had required, as a condition of the grant of a tenancy, that the plaintiff should sell to the defendant company his own house,

174. The Heights, for....500 less than the known or assured value of....2,300, that would have been the requiring of the payment of a premium,

within the scope of s. 2(1) of the Act of 1949.

10. Now, under the terms of settlement the consideration, as I have said before was payment by the plaintiff to each of the third and fourth

defendants, Rs. 85 lacs together with making over a constructed area of 4000 Sq. ft. (super built up) and three car parking spaces. On the basis of

the above judgment of the Court of Appeal I have no hesitation in holding that making over of the constructed area could be termed as ""payments"".

11. Now, one has to see how far this takes the judgment-debtors.

12. Clause 8 of the agreement states that upon payment of the ""entire purchase consideration""...""as mentioned in Schedule X"", the receiver would

execute the conveyance. If the deed of conveyance had stopped there, I would have been at once with Mr. Ghosh that upon payment of cash and

making over of the constructed part, the receiver would execute the conveyance. But Clause 9 expresses a different intention. It stipulates that the

plaintiff would ""now be entitled as owner"" to proceed with ""development of the said premises"". Therefore, it is plain from reading of these two

Clauses that the plaintiff could proceed to make construction after execution of conveyance in their favour and that the consideration mentioned in

Clause 8 is only the monetary consideration. Therefore, upon receipt of the monetary consideration the receiver would execute the conveyance

and the plaintiff would proceed towards development. If Mr. Ghosh''s argument was true there would not have been any scope for the insertion of

paragraph 9.

13. In view of my above interpretation of the terms of settlement the judgment of the Supreme Court in the case of Jai Narain Ram Lundia Vs.

Kedar Nath Khetan and Others, falls into place. Bose J. delivering the judgment for the Supreme Court opined paragraph 18 and 19:

18. ...When a decree imposes obligations on both sides which are so conditioned that performance by one is conditional on performance by the

other execution will not be ordered unless the party seeking execution not only offers to perform his side, but, when objection is raised, satisfies the

executing Court that he is in a position to do so. Any other rule would have the effect of varying the conditions of the decree: a thing that an

executing Court cannot do.

There may of course be decrees where the obligations imposed on each side are distinct and severable and in such a case each party might well be

left to its own execution. But when the obligations are reciprocal and are interlinked so that they cannot be separated, any attempt to enforce

performance unilaterally would be to defeat the directions in the decree and to go behind them which, of course, an executing Court cannot do.

The only question therefore is whether the decree in the present case is of this nature. WE are clear that if is.

19. ...This is not a case of two independent and severable directions in the same decree but of one set of reciprocal conditions indissolubly linked

together so that they cannot exist without each other. The fact that it is a decree for specific performance where the decree itself cannot be given

unless the side seeking performance is ready and willing to perform his side of the bargain ''and is in a position to do so'', only strengthens the

conclusion that was the meaning and intendment of the language used.

But the principle on which we are founding is not confined to cases of specific performance. It will apply whenever a decree is so conditioned that

the right of one party to seek performance from the other is conditional on his readiness and ''ability'' to perform his own obligations....

14. The ratio of the judgment was followed by the judgment in the case of Chen Shen Ling Vs. Nand Kishore Jhajharia, .

15. The terms of settlement spell out the order in which the obligations have to be performed. The plaintiff has made payment of Rs. 85 lacs to

each of the said predecessors of the judgment-debtors. Hence, now in terms of Clause 8 and 9 of the terms of settlement, it is for the heirs of those

defendants, i.e. the present judgment-debtors to allow the Receiver to execute and register the conveyance. Thereafter, it is the obligation of the

plaintiff to complete the construction of the commercial complex within three years from the date of sanction of the plan by the Kolkata Municipal

Corporation.

16. I observe with considerable regret that the judgment-debtors stood in the way of performance of the terms of the consent decree.

17. Therefore, each of the execution applications is allowed by passing orders in terms of prayers (i), (ii) and (iii) of the Tabular Statement. The

judgment-debtor No. 2 is to deliver possession of the property mentioned in the schedule to the tabular statements by 31st March, 2013 to the

plaintiff decree holder failing which the Officer-in-Charge of the local police station will evict the judgment debtor No. 2 from the premises.

18. I direct the plaintiff to obtain sanction of the building plan from the Kolkata Municipal Corporation and direct the Kolkata Municipal

Corporation to accord sanction to the plan prepared by the plaintiff in accordance with law within three months of its presentation with them. I

further direct the plaintiff to complete construction within three years of sanction of the plan. If there is failure on the part of the plaintiff to obtain

sanction of the building plan or to deliver possession of the constructed area in accordance with the compromise decree within three years of

sanction of such plan, the plaintiff will be deemed to be in breach of their reciprocal obligation as held in the case of Jai Narain Ram Lundia Vs.

Kedar Nath Khetan and Others,) the ratio of which was followed in the case of Chen Shen Ling Vs. Nand Kishore Jhajharia, . The judgment-

debtors will then be entitled to restitution, in accordance with law. Urgent certified photocopy of this judgment/order, if applied for, be supplied to

the parties subject to compliance with all requisite formalities.

Later:

Considering the circumstances, the Receiver will stay her hands till 15th January, 2013, to enable the judgment-debtors to approach the Appeal

Court.

Urgent Xerox certified copy.