

(2012) 07 CAL CK 0187

Calcutta High Court

Case No: F.A. No. 173 of 1996

Somendra Nath Mitra and
Another

APPELLANT

Vs

Arindam Ganguly and Others

RESPONDENT

Date of Decision: July 31, 2012

Hon'ble Judges: Subhro Kamal Mukherjee, J; Harish Tandon, J

Bench: Division Bench

Advocate: Asish Chandra Bagchi and Mr. Rabi Shankar Banerjee, for the Appellant;

Judgement

Subhro Kamal Mukherjee, J.

None appears for the respondents when the appeal is taken up for hearing. This is an appeal against judgment and decree dated October 26, 1995 passed by the learned Civil Judge(Senior Division), Fourth Court, Alipore, District- South 24-Parganas, in Title Suit No. 147 of 1992.

2. The suit was, in substance, for specific performance of contract.

3. Admittedly, the defendant No. 1 was the developer and the defendant No. 2 was the owner of the property-in suit. There was an agreement by and between the owner and the developer for development of the premises at 118A, Harish Mukherjee, Road, Calcutta-700 025.

4. The plaintiffs intended to acquire a flat in the newly constructed building. Therefore, they have entered with an agreement with the owner and the developer.

5. The owner conveyed the proportionate area of land in favour of the plaintiffs at a consideration of Rs. 64,050/-(Rupees sixty four thousand and fifty) only. The developer agreed to convey flat No. 31 in the newly constructed building at a total consideration of Rs. 2,33,324/-(Rupees two lakh thirty three thousand three hundred and twenty four) only, being Rs. 1,16,662/- (Rupees one lakh sixteen thousand six hundred and sixty two) only each by the plaintiffs. The receipts have been exhibited. From the receipts it appears that payment of Rs. 2,33,324/-(Rupees two lakh thirty

three thousand three hundred and twenty four) only was accepted by the developer in full and final settlement towards consideration of the flat-in-question.

6. The building was constructed according to the sanctioned building plan. The possession of the flat was delivered to the plaintiffs. The defendants, particularly, the defendant No. 1, contended that 264.15 square feet excess area was delivered to the plaintiffs.

7. There was some deliberation between the purchasers and the developers.

8. The plaintiff No. 2, who deposed as plaintiff's witness No. 1 at one stage stated that probably Rs. 350/- (Rupees three hundred fifty) only was fixed as rate per square feet of the flat.

9. There was no measurement of the flat during the trial.

10. The developer deposed as defendant's witness No. 1. He could not prove that he had delivered excess area to the plaintiffs nor there was any agreement for payment of excess amount for excess area.

11. Mr. Asish Chandra Bagchi, learned advocate appearing for the appellants, strenuously argues that the learned trial judge was wrong in passing the direction for payment of Rs. 85,800/- (Rupees eighty five thousand eight hundred) only by the plaintiffs as condition for execution of the deed by the defendants.

12. We are of the opinion that the learned trial judge exceeded his jurisdiction in applying the principle of equity in directing payment of said sum of Rs. 85,800/- (Rupees eighty five thousand eight hundred) only to the defendant No. 1 when the defendants miserably failed to establish that there was ever any agreement for payment for any excess area in the flat, particularly, when the defendant No. 1 accepted a lump sum of Rs. 2,33,324/- (Rupees two lakh thirty three thousand three hundred and twenty four) only towards full and final settlement towards the costs of the flat.

13. We, therefore, feel that the order impugned directing payment of Rs. 85,800/- (Rupees eighty five thousand eight hundred) only cannot be sustained.

14. We hold that the plaintiffs are not liable to pay nor the defendants are entitled to receive any payment towards alleged excess area of the flat when the agreement was for conveying a flat on lump sum payment.

15. The order impugned stands modified. The direction for payment of Rs. 85,800/- (Rupees eighty five thousand eight hundred) only by the plaintiffs to the defendants is set aside.

16. The defendants are directed to execute the deed in favour of the plaintiffs within a month from this date.

17. In default, it will be open to the plaintiffs to approach the learned trial judge for execution of the deed in accordance with law.

18. The appeal is, thus, allowed-in-part. We make no order as to costs.

Harish Tandon, J.

I agree.