(2013) 07 DEL CK 0469

Delhi High Court

Case No: CS (OS) 2731 of 2011, I.A. No''s. 2634, 5675 of 2012 and 17516 of 2011

Parshottam Parkash and Another		APPELLANT
	Vs	
Swati Bharara and Others		RESPONDENT

Date of Decision: July 8, 2013

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 8
- Evidence Act, 1872 - Section 21, 91
- Registration Act, 1908 - Section 17, 50
- Transfer of Property Act, 1882 - Section 55(4)

Citation: (2014) 140 DRJ 474

Hon'ble Judges: Rajiv Sahai Endlaw, J

Bench: Single Bench

Advocate: Jos Chiramel, for the Appellant; Amrit Kaur Oberai, Ms. Jesica Gill, Ms. Neha Mishra, Advocates for D-1 and Mr. Vivek Ojha, for Mr. Prakash Gautam, for D-2 and 3, D-4 in Person, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.

Though hearing on 9th May, 2013 was commenced on IA No. 2634/2012 of the defendant no. 1 u/s 8 of the Arbitration & Conciliation Act, 1996 but during the course of hearing a doubt was raised as to the very maintainability of the suit and arguments on that aspect also were heard and orders reserved. The two plaintiffs i.e. Shri Parshottam Parkash and his wife Smt. Sita Devi have instituted this suit for recovery of balance sale consideration of Rs. 1,03,80,000/- together with interest thereon i.e. total Rs. 1,38,05,400/- and in the alternative for declaration of the Agreement to Sell (recovery of balance sale consideration whereunder is claimed as aforesaid) as illegal, fraudulent, sham and bogus and for cancellation of the General Power of Attorney also executed in pursuance thereto and for recovery of

possession of HIG flat No. 407, Savera Apartments, Sector-13, Rohini, Delhi - 110 085 and for permanent injunction restraining the defendants from dealing with or parting with possession thereof.

2. It is the case in the plaint:-

(a). that the plaintiffs are the joint owners of HIG flat No. 407, Savera Apartments, Sector-13, Rohini, Delhi - 110 085;

(b). that the defendant no. 2 Shri Vikram Prakash is the son and the defendant no. 3 Smt. Ritu Prakash is the daughter-in-law of the plaintiffs;

(c). that the defendants no. 2 & 3 though carrying on their business as a Cable Operator from elsewhere, gave the address thereof as of the aforesaid flat of the plaintiffs;

(d). that on 10th August, 2005 a raid was conducted by the Service Tax authorities in connection with the aforesaid business of the defendants no. 2 & 3 and a demand for recovery of Rs. 46,04,477/- along with interest and penalty raised against the plaintiff no. 1 described as the proprietor of the said business for the reason of the said business being at his address;

(e). similar demands were also raised by the Entertainment Tax authorities;

(f). the defendants no. 2 & 3 agreed to arrange funds for the plaintiffs on a condition that the plaintiffs immediately sell their flat aforesaid;

(g). that the plaintiffs had no choice since they were knee deep in debt and hence agreed to the said proposal to sell the said flat;

(h). that the defendants no. 2 & 3 introduced the defendant no. 1 as the proposed purchaser and each of the plaintiffs was handed over a cheque for Rs. 10,60,000/- in their individual names total Rs. 21,20,000/-, while all other amounts received in cash were retained by the defendants no. 2 & 3 on the pretext that they had to bear the tax burden of approximately Rs. 1,50,00,000/- in connection with the business of which the plaintiff no. 1 was the sole proprietor;

(i). that the defendant no. 4 Shri Deepak Lamba is a property dealer and an acquaintance of the defendant no. 2;

(j). that the plaintiffs were thereafter in November, 2009 forced to deliver possession of the flat to the defendant no. 1 and handed over an Agreement dated 14th November, 2009 recording that the plaintiffs had sold the flat to the defendant no. 1 against receipt of full sale consideration; however the sale consideration was not mentioned; it was further stated therein that if any liabilities/penalties regarding Department of Service Tax & Entertainment Tax of the business running from the said flat became payable against the said flat then the plaintiffs shall clear the same and in lieu thereof, the defendant no. 1 had retained a sum of Rs. 15 lacs for a

period of one year;

(k). that from a complaint dated 5th October, 2010 lodged by the defendant no. 3 with the Crime Against Women Cell of Delhi Police, it was revealed that the said flat was sold for Rs. 1,25,00,000/-;

(l). that the plaintiffs thereafter got the records of the Sub Registrar, Rohini, Delhi searched and obtained certified copy of the Agreement to Sell registered on 21st December, 2009 which revealed that the defendants no. 2 & 3 had pocketed huge sale consideration and the sum of Rs. 15 lacs promised by the defendant no. 1 to be paid after one year had also not been paid; it was further learnt that the Agreement to Sell though registered on 21st December, 2009 remained undated and had been presented for registration at home on medical grounds; and,

(m). that the Agreement to Sell is a sham and bogus document as the same was procured fraudulently and in a mala fide manner from the plaintiffs by the defendant no. 1 in collusion with defendants no. 2 to 4.

3. Summons of the suit and notice of the application for interim relief were issued, though no interim relief granted. The defendants no. 2 & 3 and the defendant no. 4 have filed written statements. The defendant no. 1 as aforesaid has applied u/s 8 of the Arbitration & Conciliation Act, 1996.

4. The defendants no. 2 & 3 in their written statement have pleaded that they were not parties to the agreement and are not in possession of the property and the suit in so far as against them is misconceived; that the relations between the plaintiffs and the said defendants have not been cordial and thus the question of the defendants persuading the plaintiffs to enter into the Agreement to Sell did not arise; that the plaintiffs are in control of their daughter and son-in-law.

5. The defendant no. 4 in his written statement has also denied any role in the transaction save as a witness to the Agreement to Sell.

6. The defendant no. 1 seeks reference of the disputes in the suit to arbitration on the basis of an ''Agreement to appoint Arbitrator'' dated 13th November, 2009 between the two plaintiffs on the one hand and the defendant no. 1 on the other hand and which provides for reference, of any dispute at any stage between the parties thereto of any matter relating to the said flat/transaction or agreement or any matter incidental thereto to the sole arbitration of Shri Darshan Kumar Singh, S/o Shri Luda Ram, R/o 7/17 Double Storey, Vijay Nagar, Delhi.

7. The plaintiffs in their reply to the application of the defendant no. 1 u/s 8, have though not denied their signatures on the ''Agreement to appoint Arbitration'' but have pleaded that while under the Agreement to Sell, the arbitration provided is of an arbitrator to be mutually appointed by the parties, the Agreement on the basis whereof the application u/s 8 has been filed is of arbitration of a named arbitrator who is not even known to the plaintiffs. Reference is made to S.B.P. and Co. Vs. Patel

Engineering Ltd. and Another, and other judgments mentioned in paras 7 & 8 of the reply to contend that when there is a doubt as to the authenticity and genuineness of the Agreement, no reference to arbitration is to be made.

8. The counsel for the plaintiffs has at the outset referred to Section 17 and Section 50 of the Registration Act, 1908 providing for documents compulsorily registrable and registered documents to take effect against unregistered documents. He has next referred to Section 21 of the Indian Evidence Act, 1872 dealing with proof of admissions against persons making them. Reference is next made to the dicta of the Supreme Court in Suraj Lamp and Industries Pvt. Ltd. Vs. State of Haryana and Another, and to the recent judgment of Justice Shakdher in Pace Developers and Promoters Pvt. Ltd. Vs. Govt. of NCT and Others, dealing with Notification of the Delhi Government prohibiting registration of Power of Attorney. It is contended that the plaintiffs were compelled to execute the various documents and which is evident from the dates in the agreement having been left blank and having been written in hand in the original agreement/documents. The validity of the Arbitration Agreement is contested on the basis of inconsistency in the arbitration clause contained in the registered Agreement to Sell and in the Agreement to appoint Arbitrator on the basis whereof the application is made. Validity of the documents is also challenged on the ground of the same containing the address of the plaintiffs of the same premises which was sold; it is argued that if the possession of the premises was being given in pursuance to the documents executed, the address of the plaintiffs could not be the same. It is further contended that the judgment of the Division Bench of this Court in Asha M. Jain Vs. The Canara Bank and Others, which was overruled in Suraj Lamp dealt with cases in which entire sale consideration was paid and would have no application to the present case where the entire sale consideration has not been paid.

9. Since the registered Agreement to Sell shows the sale consideration as Rs. 21,20,000/- only and which admittedly has been paid, the basis of the plea, of the entire sale consideration having not been paid, was enquired.

10. The counsel refers to the complaint dated 5th October, 2010 stated to have been made by the defendant no. 3 Smt. Ritu Prakash against the plaintiffs with the ACP, Crime Against Women Cell in which she has stated that the said flat was sold by the plaintiffs for Rs. 1,25,00,000/- to contend that payment of Rs. 21,20,000/- is only in part. Attention is also invited to the Agreement dated 14th November, 2009 between the plaintiffs and the defendant No. 1 about retention of Rs. 15 lacs for a period of one year to contend that there is no arbitration clause therein. Attention is next invited to para 4 of the rejoinder by the defendant no. 1 to the reply of the plaintiffs to Section 8 application whereunder the defendant no. 1 has admitted liability to pay Rs. 15 lacs separately towards the interior work and modern electrical and sanitary fittings and kitchen. It is contended that u/s 91 of the Evidence Act, 1872 the defendant no. 1 is not entitled to set up a new plea inconsistent with the

agreement with respect to the reason for payment of the said amount of Rs. 15 lacs.

11. I, herein below, consider the matter under two separate heads i.e. on the plea of the defendant no. 1 u/s 8 of the Arbitration Act and on the maintainability of the suit of the plaintiffs in so far as the defendants no. 2 to 4 are concerned.

12. As far as the application of the defendant no. 1 u/s 8 of the Arbitration Act is concerned, the plea of the plaintiffs of the same being not maintainable for the reason of the very validity of the agreements containing the arbitration clause having been challenged, has no merit. It cannot be lost sight of that the primary relief claimed in the suit is for recovery of balance sale consideration stated to be due under the documents. The plaintiffs by doing so are seeking enforcement or implementation of the agreement which is claimed to have been arrived at with the defendant no. 1. If there were to be no agreement of sale of the flat by the plaintiffs to the defendant no. 1, the question of the plaintiffs recovering the balance amount thereunder would not arise. The relief sought in the alternative, of declaration of the sale documents to be illegal, fraudulent, sham and bogus is made, I reiterate, only in the alternative to the primary relief of recovery of money in enforcement of the agreement. The basis, for the said relief claimed in the alternative, of cancellation of sale documents is non-payment of the balance sale consideration. Section 55(4) of the Transfer of Property Act, 1882 provides that where the ownership of the property has passed to the buyer before payment of the whole of the purchase money, the seller is entitled to a charge upon the property in the hands of the buyer for the amount of the purchase money remaining unpaid and for interest thereon from the date possession is delivered. The principles of law thus is that the right of an unpaid seller of immovable property is only to recover the unpaid sale consideration and not to cancel the sale. The plaintiffs thus, even if their version were to be believed, are only entitled to, recover the balance sale consideration and not to seek cancellation of the sale documents. The plaintiffs, during the said recovery proceedings, can claim the security of the title which has passed onto the defendant no. 1 but no more.

13. The Agreement to Sell registered on 21st December, 2009 admittedly has the following clause:-

24. That in case any dispute arises between the parties regarding the terms and conditions of this agreement in future, then both parties or their nominee(s), or attorneys shall mutually appoint sole ARBITRATOR, who will decide the disputed matter, and the award of the said Arbitrator shall be final and binding on both the parties as per provision of Indian Arbitration Act.

14. The Agreement dated 13th November, 2009 on the basis of which the application u/s 8 has been filed is as under:-

1. That in the parties hereto mutually agree that in the eventuality of any dispute at any stage, in between the parties an any matter relating to said

flat/transaction/agreement or any matter incidental thereto, shall be referred to sole ARBITRATION of Sh. Darshan Kumar S/o Lt. Sh. Luda Ram R/o 7/17 Double Story, Vijay Nagar, Delhi whose decision shall be final and binding in between the parties thereto.

15. Though undoubtedly, while in the registered Agreement to Sell the parties had agreed to mutual appointment of a sole Arbitrator and in another agreement of the same date the parties have agreed to appoint Shri Darshan Kumar aforesaid as sole Arbitrator but the inconsistency if any to the said extent in my view is no ground to defeat Section 8 of the Arbitration Act. The fact remains that the parties had agreed to the arbitration of disputes arising between them relating to the transaction of sale/purchase of the subject flat. Whether the said arbitration is to be of Shri Darshan Kumar or of any other Arbitrator to be mutually agreed by the parties is not in the domain of Section 8. u/s 8, the Court is only required to see whether the action brought before it is subject of an arbitration clause or not and if it is found to be so, to refer the parties to Arbitration. Reliance in this regard can be placed on Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums, and P. Anand Gajapathi Raju and Others Vs. P.V.G. Raju (Died) and Others, .

16. The challenge to the documents, on the basis of the certified copies not bearing the dates or certain columns therein being blank is found to have no merit and such pleas appear to have been taken in ignorance of the procedure for registration. A document is required to be presented for registration in duplicate and of which the original after endorsement of registration having been made is returned to the presenter and the duplicate copy thereof retained in the record of the Registrar''s office and certified copies issued therefrom. It is well nigh possible that some blanks left in the document at the time of preparation, as is often the practice, to be filled in on the date of execution or registration may be filled in the original and may be remained unfilled in the duplicate and owing whereto the same are not shown in the certified copies issued from the said duplicate also. However the same does not in any manner affect the registration of the document.

17. As far as the claim of the plaintiffs for recovery of balance sale consideration from the defendants no. 2 to 4 is concerned, the plaintiffs have been unable to show the liability of the defendants no. 2 to 4 to pay the sale consideration to the plaintiffs. The only plea of the plaintiffs is of the defendants no. 2 to 3 having pocketed the sale consideration received in cash. However the plaintiffs have admitted, (a) the sale of the property, whatsoever may be the reasons or circumstances therefor; (b) of the plaintiffs having shifted from the said flat to another flat belonging to their acquaintances; and, (c) the plaintiffs having so remained in the other flat for at least two years prior to the institution of the present suit. The only basis for the plaintiffs to allege the sale consideration to be different from that as reflected in the registered document (and which the plaintiffs admit to have received) is the complaint filed by the defendant no. 3 against the plaintiffs

before the Crime Against Women Cell.

18. The Registration Act has provided for compulsory registration of certain documents to give legal sanctity thereto and to prevent pleas inconsistent thereto being taken. The plaintiffs in the present case thus cannot be permitted to aver contrary to the registered document. The factum of the defendant no. 3 having been shown as a witness in the Agreement to Sell is also not such which would require the claim of the plaintiffs against the defendants no. 2 to 4 to be put to trial. The defendants no. 2 to 4 else are admittedly not claiming any title to the property and the reliefs against them of cancellation of documents and of possession are in any case not tenable. The only relief against them could have been recovery of monies but which as aforesaid, is in contravention of a registered document and not tenable in law. The suit in so far as the defendant no. 1 is concerned, is thus disposed of by reference to arbitration u/s 8 of the Arbitration & Conciliation Act, 1996 and in so far as against the defendants no. 2 to 4, is dismissed as not maintainable. No costs.

Decree sheet be drawn up.