

(2012) 05 DEL CK 0673

Delhi High Court

Case No: Regular First Appeal (OS) 60 of 2008

Chandra Estate Ltd.

APPELLANT

Vs

Tej Properties and Others

RESPONDENT

Date of Decision: May 7, 2012

Acts Referred:

- Income Tax Act, 1961 - Section 230A
- Income Tax Act, 1963 - Section 269AB
- Limitation Act, 1963 - Section 4
- Specific Relief Act, 1963 - Section 20, 20(1), 20(2)

Citation: (2013) 1 AD 363 : (2012) 190 DLT 676

Hon'ble Judges: Siddharth Mridul, J; Pradeep Nandrajog, J

Bench: Division Bench

Advocate: Kamal Mehta and Mr. Satish Singh, for the Appellant; Rajiv Dutta instructed by Mr. Rajinder Wali, Advocate for R-3/Punjab and Sind Bank, for the Respondent

Final Decision: Dismissed

Judgement

Pradeep Nandrajog, J.

Appellant, a Limited Company, entered into an agreement to sell (Ex. PW-1/2) dated 01.01.1983 with respondent No. 1, a Private Limited Company for sale of property bearing Municipal No. 23 Plot No. 172 Jor Bagh, New Delhi comprising a lease-hold tenure in the land and a building constructed thereon at a sale price of Rs. 41,50,000/- acknowledging having received Rs. 50,000/- on the date of the agreement towards sale consideration, also recording that by means of cheques the appellant had paid to respondent No. 1 a total sum of Rs. 11 lakhs towards earnest money-cum-part sale consideration on September 02, 1982 and November 08, 1982. It stands recorded in the agreement that respondent No. 1 had obtained a loan in sum of Rs. 20 lakhs from Punjab & Sind Bank and by way of equitable mortgage had pledged the title deed of the property with the bank and that as on the date of the

agreement the amount outstanding and payable to the bank was Rs. 24,50,000/- . The agreement records that the appellant would clear the liability of the bank. The agreement records that respondent No. 1 would obtain the necessary permissions from Land & Development Office and the Income Tax Authorities as required by Section 230A and Section 269AB of the Income Tax Act. It records that if any other permission was required, the same would be obtained. The agreement records that all permissions would be obtained within 6 months and thereafter the sale deed would be executed upon appellant paying to respondent No. 1 the balance sale consideration. Possession of the property was handed over to the appellant. Before the six months time expired, on February 01, 1983, at the asking of respondent No. 1 the appellant gave Rs. 5 lakhs to respondent No. 1 to be paid to Punjab & Sind Bank and on February 10, 1983, once again, at the asking of respondent No. 1 the appellant gave Rs. 2.5 lakhs to respondent No. 1 to be paid to Punjab & Sind Bank. Needless to state, these payments had not to be adjusted against the sale consideration since appellant had to clear the mortgage as per Ex. PW-1/2.

2. On May 26, 1983 appellant issued a legal notice Ex. PW-1/15 calling upon respondent No. 1 to produce, after obtaining, the sale permissions envisaged by the agreement to sell and receive balance sale consideration and simultaneously execute the sale deed. Vide letter dated June 30, 1983, Ex. PW-1/16, respondent No. 2 wrote on behalf of respondent No. 1 being its Director, that further time be granted to it to obtain the necessary permissions. Vide supplementary agreement Ex. PW-1/17 dated July 07, 1983 the parties mutually extended time for completion of the sale transaction till October 31, 1983. The said date lapsed. Neither respondent No. 1 obtained the necessary sale permissions; and nor there is any evidence that it ever applied for any sale permission and the parties executed another extension agreement dated November 17, 1983, Ex. PW-1/18, extending time till January 31, 1984 to complete the sale. Even said date lapsed. Another agreement dated February 06, 1984, Ex. PW-1/19, was executed extending time to complete the sale till April 07, 1984. Even said date lapsed and the parties executed yet another agreement dated April 16, 1984, Ex. PW-1/20, extending time to complete the sale by September 30, 1984. Even said date reached and on September 30, 1984, Ex. PW-1/21 was executed extending time to complete the sale by December 31, 1984 and three days prior thereto on December 28, 1984, the parties executed Ex. PW-1/22 extending time to complete the sale by March 31, 1985. Said date reached and on March 31, 1985 vide Ex. PW-1/23 the parties extended the time to complete the sale by September 30, 1985. Six days prior, on September 24, 1985, parties executed Ex. PW-1/24 recording that the sale would be completed by March 31, 1986 and three days prior thereto on March 28, 1986, parties executed Ex. PW-1/25 recording time being extended till September 30, 1986. Four days prior on September 26, 1986, vide Ex. PW-1/26, the time was extended till September 30, 1987 and in the meanwhile a further sum of Rs. 2.5 lakhs was paid by the appellant to Punjab & Sind Bank to be adjusted against the amount overdue and payable by

respondent No. 1.

3. No further agreement extending time was executed between the appellant and respondent No. 1. On October 06, 1990 the appellant filed a suit seeking specific performance of Ex. PW-1/2 and impleaded Punjab & Sind Bank as defendant No. 3. It was asserted in the plaint by the appellant that whereas all along it was ready and willing to pay the balance sale consideration, the respondent No. 1 was in breach by not obtaining the necessary permissions. Respondents No. 1 and 2 did not enter appearance in spite of summons for settlement of issues being served upon them and preferred to remain ex-parte. Punjab & Sind Bank filed a written statement stating that pertaining to the equitable mortgage in its favour dues payable by respondent No. 1 had accumulated to a sum of approximately Rs. 2 crores and that it had filed two suits registered as Suit No. 2284/1988 and 2104/1988 against respondent No. 1 and 2 pertaining to dues in other accounts wherein amount payable was approximately Rs. 1.3 crores. It was pleaded that the agreement to sell is a sham document intended to defraud the creditors of respondent No. 1.

4. On the pleadings of the parties following issues were settled:

1. Whether the suit is barred by limitation? OPD

2. Whether Plaintiff can claim any relief in view of the mortgage subsisting in favour of the third defendant on the date of the agreement to sell? OPP

3. Whether the plaintiff is entitled to a decree for specific performance or any other relief? OPP

5. On the first issue whereas appellant urged that the cause of action would accrue when legal notice Ex. PW-1/27 issued by it on May 24, 1988 was not responded to, respondent No. 3 urged that the cause of action would accrue when the period last extended expired on September 30, 1987 as per Ex. PW 1/26 and thus the suit which was filed on October 06, 1990 was barred by limitation. The bank urged that though under an agreement to sell immovable property ordinarily time is not the essence of the contract but that would not mean that parties could extend the time indefinitely to defraud the creditors. The bank asserted that under an agreement to sell executed on January 01, 1983 it was impermissible to extend the time up to September 30, 1987 i.e. by three years and nine months. In rejoinder, the appellant took the stand that this defence was not available to the bank because nothing prevented parties to an agreement, by consent, extending the time for whatever period they desired.

6. The learned Single Judge has taken a view that the right to sue accrued when the extended time as per Ex. PW-1/26 expired on September 30, 1987 and thus held the suit to be barred by limitation.

7. Unfortunately, the attention of the learned Single Judge was not drawn to the fact that September 28, 1990 was the last working day in the Delhi High Court.

Commencing from September 29, 1990 till October 05, 1990 the Delhi High Court was closed during Dusshera break and the Registry being closed, for such actions where limitation expired between September 29, 1990 till October 05, 1990, as per the mandate of Section 4 of the Limitation Act 1963, the proceeding could be initiated on the next working day i.e. October 06, 1990. It has thus to be held that the finding of the learned Single Judge on issue No. 1 is liable to be corrected and it has to be held that the suit was instituted within limitation.

8. With respect to issue No. 2, we do not find a meaningful discussion in the impugned decision, and suffice would it be to state that an agreement to sell an immovable property is not

void if the subject property is mortgaged; the purchaser acquires title subject to the charge and the sale does not affect in any manner the right of the mortgagee.

9. It was issue No. 3 which was debated with reference to the fact, not normally witnessed in Courts, of a seller receiving a paltry sum of Rs. 11.5 lakhs with respect to a sale consideration of Rs. 41.5 lakhs and puts the purchaser in possession of the property and thereafter keeps on according consent to time being extended for completion of the sale by three years and nine months. Further facts which surfaced were that S.Tejwant Singh, respondent No. 2, the Director of respondent No. 1 and his associates, through the company M/s.Tej Properties Pvt. Ltd. i.e. respondent No. 1 and other group companies such as Skipper Construction Co. Pvt. Ltd. had perpetuated mass fraud and cheated innocent people and piercing the corporate veil, in the decision reported as [Delhi Development Authority Vs. Skipper Construction Company \(P\) Ltd. and another](#), the Supreme Court held all group companies and S. Tejwant Singh being liable to clear the dues of these innocent people and as a result properties held in the name of S.Tejwant Singh and the group companies were attached, and the position is not very clear whether the Commissioner appointed by the Supreme Court, attached the suit property.

10. The learned Single Judge has noted as aforesaid and also the fact that though appellant claimed to have deposited Rs. 37 lakhs in a no lien account with the respondent No. 3 bank, there was no evidence to establish the same. The conclusion arrived at is that the appellant has failed to prove it being ready and willing, in the form of having the requisite funds, to pay the balance sale consideration and thus not being entitled on said count to a decree for specific performance.

11. With reference to Section 20 of the Specific Relief Act 1963 which confers discretionary jurisdiction in a Court to grant a decree for specific performance of an agreement to sell immovable property and noting the decisions reported as [K.S. Vidyanadam and Others Vs. Vairavan](#), and the decision reported as [M. Meenakshi and Others Vs. Metadin Agarwal \(D\) by LRs. and Others](#), the learned Single Judge has opined that the discretion was even otherwise not liable to be exercised in favour of the appellant for the reason it would be inequitable to third parties if specific

performance was allowed.

12. Suffice would it be to state that there is no evidence of the appellant having the requisite funds to pay the balance sale consideration and its claim of having deposited Rs. 37 lakhs in a no lien account with respondent No. 3 has remained a mere claim without any proof and thus we concur with the reasoning of the learned Single Judge that on said count alone, the suit merits dismissal.

13. But the larger question would be, can a suit for specific performance be defeated on the strength of equity being defeated qua third parties.

14. Section 20 of the Specific Relief Act 1963 reads as under:

20. Discretion as to decreeing specific performance. - (1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

(2) The following are cases in which the court may properly exercise discretion not to decree specific performance:

(a) Where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the -contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) Where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or

(c) Where the defendant entered into the contract under circumstances, which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation 1.-

Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b).

Explanation 2.-

The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

(3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the party.

15. A perusal of sub-section 1 of Section 20 would reveal that the jurisdiction to decree specific performance is discretionary and a Court is not bound to grant such relief merely because it is lawful to do so; but with respect to the discretion to be exercised, a caveat is lodged: that the discretion should not be exercised arbitrarily, but should be sound and reasonable -guided by Judicial Principles which are capable of being corrected by a Court of Appeal.

16. Sub-section 2, vide clauses (a), (b) and (c) illustrate three circumstances where the Court may properly exercise discretion not to decree specific performance, and suffice would it be to state that all three pertain to the defendant with respect to the plaintiff acquiring an unfair advantage over the defendant or a hardship being caused to the defendant or the circumstances making it inequitable to enforce specific performance.

17. The three illustrations under clauses (a), (b) and (c) of sub-section 2 can by no argument be stretched to be exhaustive of the circumstances under which the Court may properly exercise discretion not to decree specific performance. Sub-section 1 of Section 20 does not limit itself with respect to the discretion of the Court being exercised not to grant specific performance. It only highlights that the discretion should not be arbitrary. It requires the discretion to be exercised on Judicial Principles which are sound and reasonable and capable of correction by a Court of Appeal.

18. Sub-section 1 of Section 20 embodies the Common Law Principle of every Court action being guided by reason and informed by precedent i.e. a judicial principle.

19. The inherent power of a Court of Record cannot be limited by a statute for the reason the inherent power is essential to the existence of the Court and the orderly and efficient exercise of the administration of justice. It is a plenary power, as indeed would be the power, within its branch, of the other three limbs of the State i.e. the Legislature and the Executive. Indeed, as was observed in 67 ND 560 Murphy v. Townley : "The Court would be derelict in its duty and falls to the defence of the judicial power vested in it by the Constitution if it did not exercise the inherent power on all proper occasions."

20. this Court is therefore obliged to see whether the agreement to sell in question is a smoke screen.

21. Agreements pertaining to fraud, are nothing but conspiracies; they are hatched in the darkness of secrecy and more often than not it is conduct of the parties and

prudence to infer, from the conduct, which helps in determining where the truth lies.

22. Where a right is not exercised within a reasonable time, it is natural for the eyebrows to be raised. That a seller receives one-fourth sale consideration and puts the prospective buyer in possession of a property and shows no keenness to receive the balance sale consideration and keeps on granting extension of time to complete the sale by nearly four years and that too without even asking for interest to be paid on the balance sale consideration; innocently overlooking that the prospective buyer is enjoying the use of the property, makes us lift the eyebrow even higher. Unless the suspicion is put to rest by showing us a course of conduct or a piece of evidence, our eyebrows would remain raised.

23. The transaction smacks of an attempt to remove a property from out of the reach of the creditors. This is the view taken by the learned Single Judge. We respectfully agree.

24. The argument that discretion to refuse specific performance would be with reference to equities only in favour of the defendant and not third parties is rejected by us not only on the language of sub-section 1 of Section 20 of the Specific Relief Act 1963 but additionally by placing reliance upon the inherent powers of a Court of Record. The public fraud committed S.Tejwant Singh through the cloak of his group companies and innocent parties being cheated of hundreds of crores is documented in the decision of the Supreme Court which we have noted herein above.

25. At the hearing of the appeal we were informed by learned senior counsel for respondent No. 3 that the current dues of respondent No. 3 bank of S. Tejwant Singh and his group companies have crossed Rs. 55 crores. We dismiss the appeal with costs to be paid to respondent No. 3.