(2008) 11 DEL CK 0246

Delhi High Court

Case No: I.As. No''s. 9811 of 2005, 2375, 2376 and 2377 of 2006, 1060 and 1209 of 2007 and 965 of 2008 in CS (OS) No. 1653 of 2005

Shri Sunil Aggarwal	APPELLANT
Vs	
Shri M.C. Sharma and Others	RESPONDENT

Date of Decision: Nov. 4, 2008

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 4, Order 7 Rule 11
- Criminal Procedure Code, 1973 (CrPC) - Section 340
- Specific Relief Act, 1963 - Section 19
- Transfer of Property Act, 1882 - Section 52

Hon'ble Judges: Rajiv Sahai Endlaw, J

Bench: Single Bench

Advocate: Pankaj Vivek, for the Appellant; G.D. Chopra, for the Defendant No. 1, B.P. Gupta, for Defendants Nos. 2 and 6, N.K. Sharma, for Defendants Nos. 3 and 5, Ajay Jain, for Defendant No. 7 and R.K. Sinha, for Defendants Nos. 8 and 9, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.

This order in a suit for specific performance of Agreement of sale of immovable property and in the alternative for damages shall dispose of I.A. No. 9811/2005 of the plaintiff under Order 39 Rules 1 and 2 CPC, I.A. No. 2375/2006 of the Defendants No. 8 and 9 under Order 39 Rule 4 CPC for vacation of the ex parte ad interim order dated 5th December, 2005 and I.A. No. 2376/2006, also of the Defendants No. 8 and 9 under Order 7 Rule 11 CPC.

2. The plaintiff claims that the Defendants No. 1 to 3 through the property broker/Defendant No. 4 offered for sale to the plaintiff, the entire proposed construction of ground, 1st, 2nd and 3rd floor on adjoining plots of land bearing

Nos. C-2/15 and C-2/16, Sector 15, Rohini, Delhi-110085. It is further the case in the plaint that the Defendant No. 1 posed himself as a builder, the Defendant No. 2 posed himself as the owner of plot No. C-2/15 and the Defendant No. 3 as the owner of plot No. C-2/16; that it was represented that the Defendant No. 1 had been authorised to construct and sell the house to be built on the aforesaid 2 plots of land. The plaintiff claims that 4 Agreements to Sell for each of the aforesaid 4 floors respectively were executed by the Defendant No. 1 only in favour of the plaintiff on 20th and 23rd April, 2001 for a total sale consideration of Rs. 38,75,000/- out of which the plaintiff paid Rs. 12 lacs and the balance sale consideration of Rs. 26,75,000/- was agreed to be adjusted with respect to two other properties owned by the plaintiff and his mother Smt. Angoori Devi, respectively and with respect to which two properties, documents of transfer were executed by the plaintiff and his mother in favour of the Defendant No. 2, though possession thereof remained with the plaintiff, to be delivered upon completion of construction on the aforesaid 2 plots of land and delivery of possession thereof to the plaintiff. It is further the case in the plaint that construction on the said 2 plots was commenced by the Defendants No. 1 to 3 in July, 2001 but the work of construction was abandoned after a few days only and not resumed despite repeated requests of the plaintiff. The plaintiff claims to have subsequently learnt that the aforesaid 2 plots of land were not owned by the Defendant No. 1 and that the Defendant No. 1 alongwith the Defendants No. 2 to 4 had committed a fraud on the plaintiff. The plaintiff on 19th November, 2001 made a complaint to the police of the fraud and cheating committed by the Defendants No. 1 to 4. It is further pleaded that the plaintiff in the circumstances had no option but to presume that the Defendants No. 1 to 4 were resiling from the deal with respect to the said 2 plots of land and therefore, the plaintiff and his mother on 29th November, 2002 cancelled the documents executed with respect to the other two properties against the price/value whereof the balance sale consideration of Rs. 26,75,000/- was adjusted. FIR No. 668/2002 dated 10th November, 2002 of police station Prashant Vihar, Delhi is also stated to have been registered against the Defendants No. 1 to 4. The plaintiff during the investigation claims to have learnt that plot No. C-2/16 was owned by the Defendant No. 5 who is the brother of the Defendant No. 3; that the Defendant No. 5 has sold the said plot to the Defendant No. 7 who is stated to have purchased the same with the knowledge of the prior Agreement in favour of the plaintiff. The Defendant No. 7 is stated to have transferred the plot No. C- 2/16 to the Defendant No. 8. The Defendant No. 9 is the husband of the Defendant No. 8.

3. The plaintiff claims to have further learnt that plot No. C-2/15 was got registered by the Defendants No. 1 and 2 in favour of the Defendant No. 6 on 9th May, 2001 i.e. after the Agreement to Sell in favour of the plaintiff. In para 19 of the plaint it is stated 19. Thus the defendant Nos. 5, 6, 7 and 8 are subsequent purchasers of property who are liable to deliver the suit property to the plaintiff when a decree is passed against the other defendant. However these all are being impleaded herein

as all are necessary and proper parties and their presence is necessary to avoid multiplicity of suits.

4. The plaint further states that in September October, 2005, the plaintiff and his mother were served with copies of the suits filed by the Defendant No. 2 for specific performance and possession of the other two properties which were agreed to be transferred by the plaintiff and his mother in favour of the Defendant No. 2 towards balance sale consideration of Rs. 26,75,000/- payable by the plaintiff with respect to the 2 plots of land and construction thereon to be transferred in favour of the plaintiff.

5. Para 22 of the plaint is pivotal for the present and is set out herein below.

22. That in these facts and circumstances the plaintiff also has no option but to file the present suit for specific performance as the suit property is bonafidely required by the plaintiff for his self use and there is no other similar property available in the locality.

6. The plaint of course has the averments of the readiness and willingness of the plaintiff. The plaintiff has further stated that even though he was forced to get the documents with respect to the other two properties cancelled but he is ready and willing to pay the balance sale consideration of Rs. 26,75,000/- if the built-up property on the said 2 plots of land is delivered to him and minus the cost of construction assessed at Rs. 15 lacs if the plots as existing today with minimal construction thereon and photographs of which are on the file, are handed over. The plaintiff in the alternative has claimed damages in the sum of Rs. 24 lacs with interest till institution of the suit of Rs. 12,60,000/- and future interest from the Defendants jointly and severally.

7. On the application of the plaintiff for interim relief of restraining the Defendant from constructing, selling, altering or parting with possession of the aforesaid 2 plots of land vide ex parte order dated 5th December, 2005 as aforesaid, this court directed the defendants to maintain status quo in regard to possession and title as of then. The said order continues to be in force and for vacation whereof, the Defendants No. 8 and 9 have applied. The Defendants No. 8 and 9 also seek rejection of the plaint qua them for the reason of the plaint not disclosing any cause of action against the Defendants No. 8 and 9 and further for the reason of the plaint being full of falsehood and being vexatious.

8. The Defendant No. 1 in his written statement filed after the hearing of arguments and in terms of the order made on that date, has denied the transactions with the plaintiff or having any rights with respect to the 2 plots of land, subject matter of the suit.

9. Similarly, the Defendant No. 3 in his written statement has also denied the transaction. The Defendants No. 2 and 6 in their joint written statement have also

denied any transaction with the plaintiff with respect to the 2 plots of land, subject matter of the present suit and have referred to the suits filed by the Defendant No. 2 against the plaintiff and his mother for specific performance and pending before the district courts; It is denied that the transaction, subject matter of the other suits was part and parcel of the transaction with respect to the plot No. C-2/15 of which the Defendant No. 2 admits to be the owner and with respect to which he claims to have entered into an Agreement to Sell with the Defendant No. 6 on 21st May, 2001. The stand of the Defendants No. 8 and 9 relevant for the present purposes has already been noted above. The Defendant No. 4 i.e. the property broker has also denied being a broker to the transaction with respect to the 2 plots, between the plaintiff and the Defendants No. 1 to 3.

10. In the aforesaid scenario, it has to be decided whether during the pendency of the suit, the interim order restraining construction, alienation and parting with possession of the 2 plots of land aforesaid, is to be granted/continued. Even though the ex parte order was for maintenance of status quo qua title and possession only but it is the stand of the Defendants No. 8 and 9 that they have in deference to the same, not raised any construction also on the property.

11. Vis-a-vis the ingredient of prima facie case, I do not find the plaintiff entitled to the relief of specific performance of Agreement to Sell. For the plaintiff to be entitled to the relief of specific performance, the plaintiff has to plead and prove his readiness and willingness all throughout to perform his part of the Agreement. Though lip service to the said effect has been paid in the plaint but on the averments in the plaint itself, I do not find the plaintiff to have been ready and willing to perform his part of the Agreement.

12. The Agreement as per the plaintiff''s own showing was for payment of the sale consideration of Rs. 26,75,000/- by transfer by the plaintiff and his mother of two other properties in favour of the Defendant No. 2 and with respect to which the documents were admittedly executed by the plaintiff and his mother in favour of the Defendant No. 2. The plaintiff himself has in the plaint stated that in October November, 2002, he realised that the Defendants No. 1 to 4 had cheated him and the Defendant No. 1 had entered into an Agreement to Sell with the plaintiff without having any authority to do so. Though the plaintiff has in the plaint also stated that the Defendant No. 1 was having authority and photocopies of some documents to which effect have also been filed but the plaintiff in November, 2002 chose to treat the deal of sale of the said 2 plots with construction thereon in his favour to have come to an end and accordingly cancelled and made his mother cancel the documents executed with respect to the other two properties. There is thus an express admission of the plaintiff having treated the transaction to have come to an end and having acted accordingly. The plaintiff having done so is not entitled to change his mind and sue for specific performance. The plaintiff having once elected to have treated the sellers to have resiled from the Agreement to Sell in his favour,

would prima facie not be entitled to the relief of specific performance. The Division Bench of this court in Gopal Devi Vs. Kanta Bhatia, referring to (1) AIR 1928 208 (Privy Council) (2) K.S. Sundaramayyar Vs. K. Jagadeesan and Another, and (3 Ayissabi Vs. Gopala Konar, held that where plaintiff had prior to institution of suit for specific performance issued notice claiming double the amount of earnest money, the plaintiff is not entitled to the relief of specific performance. The action of the plaintiff in the present case of cancelling the documents of transfer of other two properties, agreed to be transferred in payment of part sale consideration for suit property, is akin to the plaintiff in the present case claiming, if not receiving refund of part sale consideration. The plaintiff having done so, is prima facie not entitled to the relief of specific performance.

13. The plaintiff at that time did not elect to sue for specific performance and in fact has expressly admitted to have instituted the present suit having been left with no option upon institution of the suits for specific performance by the Defendant No. 2 against the plaintiff and his mother. Further when the plaintiff himself claims that the Defendants No. 1 to 4 who had allegedly entered into the Agreement to Sell with the plaintiff had committed fraud by being not entitled to do so, the question of the plaintiff being entitled to the relief of specific performance prima facie does not arise.

14. There is yet another interesting aspect of the case. The Agreements of Sale relied upon by the plaintiff are executed by the Defendant No. 1 only and which disclose the Defendant No. 1 only to be the owner of the two plots of land. The plaintiff only subsequently under a list of documents dated 21st July, 2006 i.e. after the institution of the suit has filed photocopies of documents evidencing the Agreement to Sell in favour of the Defendant No. 1 with respect to the plots of land. This shows that the plaintiff, till the institution of the suit was not even aware of any title or right in favour of the Defendant No. 1 to execute the Agreement to Sell in favour of the plaintiff. It is for this reason only that FIR was lodged by the plaintiff against the Defendants No. 1 to 4.

15. The plaintiff being prima facie not entitled to the relief of specific performance of Agreement to Sell, no purpose would be served in restraining construction on the property or restraining alienation of the same by the Defendant No. 6 and the Defendant No. 8 who now claim to be entitled to the two plots respectively and whose predecessors also, admittedly have not executed any Agreement/document in favour of the plaintiff.

16. The plaintiff has in the plaint also not stated that in the event of specific performance he is willing to transfer the other two properties in favour of the Defendant No. 2 and which as per the plaintiff himself was the Agreement. The plaintiff and his mother appear to be contesting the suits for specific performance and possession instituted by the Defendant No. 2. Though the written statements filed by the plaintiff and his mother in those two suits have not been filed before this

court, it is nowhere the case of the plaintiff that the defence of the plaintiff and his mother in those two suits is that they are willing to transfer those two properties subject to the suit property being transferred in favour of the plaintiff. On the contrary, the plaintiff has pleaded that he is willing to pay Rs. 26,75,000/- to the Defendants. However, that was not the Agreement as per the plaintiff himself. Thus, the plaintiff while seeking specific performance has in the plaint itself not offered to perform his part by transfer of the aforesaid two properties but has attempted to change the Agreement and which is not permissible and which plea also prima facie would disentitle the plaintiff to the relief of specific performance.

17. I also do not to find a prima face case for specific performance in favour of the plaintiff for the reason that the agreement of which specific performance is sought is of transfer of built-up property which admittedly does not exist and the coming into existence whereof is also unlikely.

18. The plaintiff himself has in the plaint proposed adjustment of Rs. 15 lacs towards cost of construction out of the balance sale consideration of Rs. 26,75,000/-. This would again entail the court redrafting the Agreement and which will be replete with difficulties.

19. I have at this stage refrained from commenting on the prima facie with respect to the interlinking of the transaction with respect to the suit property and the other two properties lest the same affects the decision of the suits for specific performance pending before the district court.

20. There is also on record a certified copy of a judgment dated 31st August, 2006 in Suit No. 222/2005 of the court of Shri P.K. Saxena, Additional District Judge, Delhi in a suit filed by the plaintiff and his mother against the Defendants No. 1 to 4 herein. The plaintiff and his mother had instituted the said suit for declaration that the documents executed by them in favour of the Defendant No. 2 herein with respect to the other two properties are null and void and stand cancelled and for direction to the Defendant No. 2 herein to deliver the original documents. The preliminary issue qua limitation was framed in the said suit which was adjudicated by the said judgment. A reading of the said judgment also shows that the stand of the plaintiff in that suit also was of the documents with respect to the other two properties have become null and void for the reason of the sale with respect to the suit property being not possible in favour of the plaintiff.

21. Besides the ingredient of prima facie case, I do not find the ingredients of irreparable loss and balance of convenience also in favour of the plaintiff. The plaintiff had as far back as in the year 2002 formed an opinion that he is not entitled to the said 2 plots or construction thereon and acted accordingly. The plaintiff thus will not suffer any irreparable injury if the said plots are constructed upon or dealt by the persons who now claim to have right to the same. The plots have been lying unconstructed for the last over 7 years and there would be no justification for

depriving the said persons of enjoyment thereof any further. If the plaintiff ultimately fails, there would be way to compensate the said persons for the loss occasioned to them and attributable to the plaintiff. Notwithstanding the said position, I may add that the provisions of Section 52 of the Transfer of Property Act would in any case still be applicable and it is common knowledge that people hesitate to buy/invest in properties under litigation. The said persons would thus in any case, even in the absence of an injunction order, suffer if the plaintiff ultimately fails.

22. Thus, the application of the plaintiff for interim relief is dismissed and the application of the Defendants No. 8 and 9 for vacation of the ex parte order is allowed. The ex parte order shall stand vacated w.e. f 30 days of the date of this order.

23. As far as the application of the Defendants No. 8 and 9 for rejection of the plaint qua them is concerned, the plea of the averments in the plaint being false is no ground for rejection. The plea of the plaint not disclosing any cause of action against the Defendants No. 8 and 9 is also misconceived. The plaintiff has in the plaint stated that the Defendants No. 5 to 8 are subsequent purchasers. u/s 19 of the Specific Relief Act, a person who derives title to the property subsequent to the Agreement to Sell in favour of the plaintiff is a necessary and proper party in a suit for specific performance and specific performance can be ordered against such person. As far as the other preliminary objections raised by the Defendants No. 8 and 9 in their written statement as also by the other Defendants particularly qua limitation, the same will be dealt at an appropriate stage. The application of the Defendants No. 8 and 9 under Order 7 Rule 11 CPC is thus dismissed.

24. Nothing contained herein shall be deemed to be an expression on merits of the case.

25. Besides the aforesaid applications, I also find the following applications pending and though arguments were not expressly heard thereon, I find that in the light of the discussion above, the same can also be disposed of and need not remain pending. I.A. No. 2377/2006 (of the Defendants No. 8 and 9 u/s 340 of the Cr.P.C.

26. The plea of the Defendants that the plaintiff has falsely verified the plaint, cannot be adjudicated at this stage. The request of the Defendants No. 8 and 9 for prosecution of the plaintiff shall be considered at the time of final judgment in the suit. The application is disposed of. I.A. No. 1060/2007 (of the Defendants No. 8 and 9 for clarification of the interim order)

27. The Defendants No. 8 and 9 sought clarification that as per the ex parte order, they are entitled to raise construction on their plot of land. In view of the said ex parte order being vacated, this application does not survive and is dismissed as infructuous. I.A. No. 1209/2007 (of the Defendant No. 1 for placing the documents on record)

28. Since issues have not been framed in the suit as yet, the documents filed are taken on record and the application is disposed of. I.A. No. 965/2008 (of the Defendants No. 8 and 9 for early hearing of the applications for interim relief)

29. In the wake of the applications for interim relief being disposed of, this application does not survive and is disposed of as infructuous.