

* **HIGH COURT OF DELHI : NEW DELHI**

+ **FAO (OS) No.267/2008**

Judgment reserved on : 30th May, 2008

% Judgment delivered on: 11th July, 2008

Shri Sanjeev Narang
S/o Sh. K.K. Narang,
R/o B 26, First Floor,
South Extension Part-1
New Delhi-110049

...Appellant

Through : Mr. Amit Sibal, Adv. with
Mr. Rajneesh Chopra and
Ms. Divya Jain, Advocates

Vs.

M/s Prism Buildcon Pvt. Ltd.
Having its registered office at :
A-10, Vaishali Nagar,
Jaipur, Rajasthan
Through its Director,
Sh. Mahipal Choudhary

....Respondent

Through : Mr. Sudhanshu Batra,
Adv. with Mr. Bhuvan
Gugnani, Adv.

Coram:

HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MR. JUSTICE MANMOHAN SINGH

1. Whether the Reporters of local papers may
be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported
in the Digest? Yes

MANMOHAN SINGH, J

1. This is an appeal under Order XLIII Rule 1 read with Section
151 of the Code of Civil Procedure, 1908 against an order dated
24th April, 2008 passed by the learned Single Judge of this Court in IA

No.1475/2008 and I.A. No.4010/2008 in CS (OS) No.220/2008 whereby the Appellant's application for restraining the defendants from selling, transferring, alienating, encumbering, executing/ registering or otherwise parting with possession of property bearing Khewat/Khata/Khasra No.66, 67, 70, 71, 115, 116, 149 which is approximately 03.02 bighas and Khewat/Khata/Khasra No.113/465, 134, 135, 138, 139, 140, 141, 142/463, 257/464 total admeasuring 19.78 bighas situated in the Revenue Estate of Village: Lamaye Meval, Patwar Area: Sirohi, Tehsil: Ajmer, District: Jaipur (Rajasthan) (hereinafter referred to as the "suit property") was dismissed and Respondents application under Order XXXIX Rule 4 for vacation of ad interim injunction was allowed.

2. In the plaint, it was submitted by the Appellant (Plaintiff in Suit No.220/2008) that under assurances and representations made by the Respondent regarding the suit property, the Appellant vide an agreement to sell dated 9th January, 2008 agreed to buy the suit property for a total consideration of Rs.53,40,600/- (Rupees Fifty Three Lakh Forty Thousand and Six Hundred only) at the rate of Rs.2,70,000/- (Rupees Two Lakh Seventy Thousand only) per bigha. It was stated that in part payment of total sale consideration, Rs.11 lacs was paid by the Appellant to the Respondent by two cheques bearing Nos. 265152 and 265153, both dated 7th January, 2008 of Rs.50,000/- each which stood encashed and credited in the account of the Respondent and Rs.10 lac was paid in cash. The said agreement

contains the stipulation under Clause 4 and 10 that if the Respondent fails to get the Deed of Conveyance/Sale Deed registered within the period stipulated in the said Agreement that is valid till 30th June, 2008, then in such an event the Appellant shall be entitled to get the Deed of Conveyance/Sale Deed registered through the court of law by specific performance of the said agreement. When on 11th January, 2008, the Appellant went to execute the Deed of Conveyance and to pay the remaining sale consideration, the Respondent refused to execute the same and informed him that he has got a higher offer. Thus the Appellant instituted a suit for specific performance of this agreement. He also filed an application under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure on the same facts as given in the plaint praying for an ex parte order restraining the Respondent to sell or otherwise interfere in the property which was issued on 8th February, 2008.

3. The Respondent in the written statement raised a preliminary objection that the alleged agreement dated 9th January, 2008 is a forged and fabricated document. It was submitted that the Respondent company has never received any payment as alleged in the said agreement or in the suit. The Appellant mischievously deposited two cheques of Rs.50,000/- each in the bank account of the Respondent at HDFC Bank at Delhi although the account of the Respondent with HDFC Bank was at Jaipur. The Appellant approached the Respondent on or about 31st October, 2007 for purchase of the suit land at the rate

of Rs.6,50,000/- per bigha but on refusal from the Respondent to sell the same, left the agreement signed by the Appellant but not signed by Respondent and a cheque of Rs.9 lac. It is denied that Respondent had entered into any agreement to sell dated 9th January, 2008. The signature on this agreement of Sh. Mahipal Chaudhary, Director is stated to be a forged signature. It was further stated in the written statement that when the Respondent did not agree to sell the suit property at the rate of Rs.6,50,000/- per bigha, how can it after around two months agree to sell the same property at a much lower price at the rate of Rs.2,70,000/- per bigha. The Respondent filed an application under Order XXXIX Rule 4 of the Code of Civil Procedure praying for vacating the ex-parte order dated 8th February, 2008 passed in favour of the Appellant restraining the Respondent from selling and alienating the suit property.

4. In reply to the application filed by the Respondent under Order XXXIX Rule 4 of the Code of Civil Procedure, the Appellant submitted that the Respondent company acting through its Director approached the Plaintiff offering to sell the suit property on or before 31st October, 2007 representing that the suit land was situated adjacent to NH-8. The plaintiff found the location of the suit property well suited to his needs and thus he immediately agreed to purchase the same. During the course of negotiations, the defendant represented to the plaintiff that it had clear title of the suit property. The defendant handed over to the plaintiff a copy of the deed of one of the khasra

number of the suit property which was registered in the name of sister concerns of the defendant. The plaintiff, believing the representations made by the defendant to be true, and the Respondent mutually finalized the total sale consideration of Rs.21,00,000/-for the suit property. The plaintiff on request of the defendant drafted an agreement to sell on the basis of the land specifications provided by the defendant at the rate of Rs.6,50,000/- per bigha and approached the defendant with the said agreement to sell and cheque bearing No.517971 dated 31st October 2007 for Rs.9,00,000/- as earnest money but left the said agreement signed by him and the cheque with the payee name blank. However, on enquiry from the Patwari of the region it was found that the property was not located adjacent to NH-8 as represented to him by the defendant but 5 kms away from NH-8 and also the defendant company did not have clear title on the land as represented by the defendant. The plaintiff immediately approached and confronted the defendant with these facts. The defendant admitted his fault and offered to sell the land at actual prevailing market price. The plaintiff declined to accept this representation and cancelled the earlier agreement to sell and instructed his banker to stop payment of the cheque for Rs.9,00,000/-. On continuous persuasion by the defendant to buy the suit property the plaintiff around the end of December, 2007 after conducting extensive enquiries, exercising due diligence and finding the prevailing market rates, agreed to purchase the property in question at Rs.2,70,000/- per bigha for a total

consideration of Rs.53,40,600/- with the same terms and conditions as contained in the earlier agreement.

5. After taking note of the pleadings of the parties, the learned Single Judge vacated the ex-parte ad interim order and dismissed the application of the Appellant under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure. The learned Single Judge while vacating the order held that it is not denied by the Appellant that the two cheques were deposited by the Appellant in the account of the Respondent at Delhi. If the Appellant deposited these cheques in the account of the Respondent in Delhi, there is no reason why the Appellant did not deposit the cash amount in the account of the Respondent at Delhi using its account numbers etc. If the Respondent had been handed over the cash amount as alleged, there is no reason why the bank cheques would not have been handed over along with the cash to the Respondent. Moreover, the learned Single Judge has also not accepted the explanation given by the Appellant regarding his purchase of stamp papers and has accepted the version of the Respondent as mentioned in the written statement regarding the execution of the agreement. The learned Single Judge has also held that the plea of the Appellant that he had come prepared with the draft agreement at instructions of the Respondent and handed over the cheque to the Respondent and signed the agreement did not inspire confidence. It is also held that if the market value of the land was much below Rs.6,50,000/- per bigha, the Respondent would have happily signed the agreement to sell

immediately and received part consideration and created contractual obligation on the Appellant. It is also held by the learned Single Judge that the earlier story of the Appellant does not match with the subsequent facts stated by the Appellant inasmuch as the Appellant had stated that initially he had agreed to purchase this land at Rs.6,50,000/- per bigha on the representation that the land was situated near NH-8, but later on, on investigation, he found that the land was about 5 kilometers away from NH-8 and its true market price was Rs.2,70,000/- per bigha as agreed between the parties. It is also held that if the true market price on 9th January, 2008 had been what has been stated by the Appellant, there would have been no reason for the Respondent to turn down the receipt of entire balance consideration on 11th January, 2008. Hence, the learned Single Judge held that the case set up by the Appellant seems to be doubtful and dismissed the application of the Appellant.

6. The Appellant has now impugned the order of the learned Single Judge on the grounds stated in the appeal, inter alia, contending that the question of validity of the said agreement was to be decided at the stage of trial, that is, at the stage of leading evidence and not at the stage of hearing of the application under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure.

7. We have considered the pleadings, interim order and documents and find that the crux of the matter is that the suit filed by the Appellant before the learned Single Judge is a suit for specific performance and

permanent injunction on the basis of alleged agreement to sell dated 9th January, 2008. The Respondent has denied its signature and execution of the said agreement. The Appellant has also not produced the receipt of cash amount of Rs. 10 lakhs allegedly paid by him to the Respondent on 7th January, 2008. The factum of earlier agreement was not disclosed to the Court at the time of institution of the suit and so also some of the other facts as mentioned in para 4 of our judgment. The said facts have yet to be determined at the trial.

It appears that when the Respondent came to know that the Appellant has deposited two cheques of Rs. 50,000/- each in its bank account through the HDFC Bank at Delhi, and when the Appellant left the written agreement to sell on a stamp paper duly signed by him along with a cheque bearing no. 517971 dated 31st October, 2007 for Rs. 9 lakhs with a view to purchase the suit land at the rate of Rs. 6,50,000/- per bigha, it did not take any steps or make any protest of the said alleged act of the appellant.

8. Be that as it may, it is settled law that in the case of specific performance, the agreement is the most crucial and vital document in order to determine the real dispute between the parties which has been denied by the Respondent as well as its signatures appearing on the said agreement. Hence, we are of the view that in the present facts and circumstances of the case, unless the trial in the matter is concluded, it is not possible for the Court to grant permanent injunction at this stage.

9. But, we are making no observation regarding the validity or invalidity of the two alleged agreements for sale. The whole controversy rests on the enormous difference between the prices agreed under the earlier and later agreement, that is, Rs. 6,50,000/- per bigha and Rs. 2,70,000/- per bigha.

10. Even otherwise, the scope and extent of the power enjoyed by the Appellate Court in interfering with a detailed order passed in exercise of discretion by the learned Trial Judge are limited and the circumstances in which the discretion exercised by the learned Single Judge require consideration have been discussed by the Apex Court in the case of ***Wander Ltd. vs. Antox India Pvt. Ltd.; 1990 (Suppl.) SCC 727 at page 733*** wherein the Apex Court has held that in an appeal against the exercise of discretion by the learned Single Judge, the Appellate Court will not interfere with the exercise of discretion by the first Court except under some limited circumstances. The relevant observation of the Apex Court is extracted as under:

“14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the Appellate Court will not interfere with the exercise of discretion of the Court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the Court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the Court below if the one reached by that Court was reasonably possible on the material. The Appellate Court would normally

not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the facts that the Appellate Court would have taken a different view may not justify interference with the trial court's exercise of discretion.”

11. We are conscious of the fact that under Section 52 of the Transfer of Property Act, 1882, in case of pending suit in which right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein except under the authority of the Court and on such terms as it may impose. Therefore, in order to strike a balance between the parties, the Respondent is directed to inform the purchaser about the litigation pending between the parties in case the respondent wishes to dispose of the property during the pendency of the suit so that innocent purchaser may be aware about the pending litigation of the parties.

12. In view of the above, we are left with no option but to affirm the order passed by the learned Single Judge vacating the interim injunction.

13. We make it clear that any observation made herein shall be treated as tentative in nature and shall not constitute any expression of final opinion on the issues involved in Appellant's suit and shall have no bearing on the final merit of case and submissions of the parties in the suit.

14. Consequently, the appeal is dismissed and the parties are left to bear their own costs.

MANMOHAN SINGH, J

MADAN B. LOKUR, J

JULY 11, 2008
sa/sd