

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ F.A.O. (OS) no. 292/2009 with CMs 9685-86 of 2009

Reserved on: 20th July, 2009

Pronounced on: 27th July, 2009.

RAJESH KUMAR Petitioner

! Through: Mr. N.N. Aggarwal, Advocate
With Mr. Kapil Gupta, Advocate,

VERSUS

\$ GOPAL KRISHAN KAPOOR & ORS.....Respondents

^ Through: Mr. Sanjeev Sachdeva, Advocate
with Mr. Preet Pal Singh, Advocate

CORAM:-

THE HON'BLE MR. JUSTICE VIKRAMAJIT SEN
THE HON'BLE MR. JUSTICE V.K.JAIN

- 1. Whether Reporters of Local newspapers may be allowed to see the Judgment? Yes.**
- 2. To be referred to the Reporter or not? Yes.**
- 3. Whether the Judgment should be reported in the Digest? Yes.**

V.K.Jain, J.

1. This is an appeal against the order of the learned Single Judge dated 29th April, 2009, passed in Suit No.691/2007, whereby he has dismissed the application of the appellant/defendant No.2 under Order XXXIX Rule 1 and 2 of CPC.

2. The facts giving rise to the filing of the appeal are briefly as follows: The appellant, vide a Memorandum of Understanding dated 28th February, 2005, entered into an agreement to purchase property No.14-B/14-C, Bazar Marg, Old Rajinder Nagar, New Delhi-110060 from respondents No. 1 to 4 and late Smt. Sanjogta Kapoor, deceased mother of respondents No. 6 to 9 (hereinafter referred to as 'Sellers'), for a total sale consideration of Rs. 5.2 crores and paid a sum of Rs. 55 lakhs to them as earnest money. A second payment of Rs. 25.00 lacs was made to them on March 13, 2005 followed by another payment of Rs. 20.00 lacs.

3. On April 20, 2005, the appellant entered into a Memorandum of Understanding with respondent No. 5 Shri R.S. Chhabra, agreeing to sell, transfer, convey and assign the aforesaid property to Shri R.S. Chhabra for a total consideration of Rs. 5.20 crores on the terms and conditions as contained in the

Memorandum of Understanding dated 28th April, 2005. Respondent No. 5 Shri R.S. Chhabra paid a sum of Rs. 80.00 lacs to the appellant. The balance amount of Rs. 20.00 lacs was agreed to be paid at the time of assignment of agreement by the sellers in favour of Shri R.S. Chhabra. He also undertook to make efforts so as to assign the agreement within a period of 10 days. No right was to be left with the appellant, in the aforesaid property, after receiving the balance amount of Rs. 20.00 lacs and all his rights under the Memorandum of Understanding were to be transferred to Shri R.S. Chhabra. The balance payment of Rs. 4.20 crores was to be made by respondent No. 5 Shri R.S. Chhabra directly to the sellers, before the Sub Registrar, after mutation of the property in their name and its conversion from leasehold into freehold. Under the Memorandum of Understanding, Shri R.S. Chhabra was entitled to get the sale deed executed from the sellers in his favour. The possession of the property was to be handed over, by the sellers, to Shri R.S. Chhabra, after receipt of the sale consideration and at the time of execution and registration of the sale deed.

4. A civil suit, being CS (OS) No. 353/06, was filed by respondent No. 5 against the sellers as well as the appellant, claiming assignment of rights in his favour by virtue of

Memorandum of Understanding dated 20th April, 2005 executed by the appellant in his favour. After issue of summons to the defendants in that suit, the matter was compromised between the sellers and respondent No. 5 who filed the compromise, in the court, vide I.A. No. 3182/2006. The suit was decreed, in terms of the compromise, on March 20, 2006. After receipt of court summons, the appellant filed an application on May 18, 2006 for setting aside the compromise decree dated 20th March, 2006. Later, the sellers also filed a civil suit, being CS (OS) No. 91/2007 seeking a decree for declaring the compromise decree dated 20th March, 2006 as void. The application filed by the appellant for setting aside the compromise decree dated 20th March, 2006 was disposed of vide order dated February 5, 2008 holding that since the applicant was also a party in CS (OS) No. 691/2007, the application did not survive for any order.

5. A counter claim seeking declaration that the decree dated 20th March, 2006 passed in CS (Os) No. 3503 of 2006 was invalid and unenforceable, as well as a decree for specific performance of the agreement to sell/Memorandum of Understanding dated 28.2.2005 and registration of conveyance deed of the suit property in his favour or in the alternative, a decree for damages amounting to Rs. 3.50 crores has been filed by the appellant, who is

defendant No. 2 in civil suit No. 691 of 2007. The plaintiff in suit No. CS (OS) 691 / 2007 sought an interim injunction against the execution of the compromise decree dated 20.3.06, whereas the appellant sought an ad interim injunction restraining the sellers from selling or transferring the property in question during pendency of the suit. The learned Single Judge vide impugned order dated 29.04.2009, dismissed both the applications.

6. Clause VII of the Memorandum of Understanding dated 28th February, 2005 executed between the appellant on the one hand and respondent No. 1 to 4 and late Smt. Sanjogta Kapoor on the other hand, shows that the appellant was specifically granted right to nominate and assign the Memorandum of Understanding in favour of any nominee(s) or assignee(s). Therefore, it cannot be disputed that the appellant could have assigned his rights under the Memorandum of Understanding, dated 28.02.2005 to respondent No. 5.

7. A perusal of the Memorandum of Understanding dated 20th April, 2005 executed between the appellant and respondent No. 5, which is an admitted document, would show that vide this document, the appellant had agreed to transfer, convey and assign and respondent No. 5 agreed to purchase the property in question for a total consideration of Rs. 5.20 lacs on the same terms and

conditions which were stipulated in the Memorandum of Understanding dated 28th February, 2005 executed between the appellant as the First Party and respondent No. 5 and late Smt. Sanjogta Kapoor as the Second Party. The only obligation cast upon respondent No. 5 under the agreement was to pay Rs. 1.00 crore to the appellant out of which Rs. 80.00 lacs were paid at the time of signing of Memorandum of Understanding as acknowledged in the documents, and the balance amount of Rs. 20.00 lacs at the time of assignment of agreement by the sellers i.e. respondent NO. 1 to 5 and late Smt. Sanjogta Kapoor in favour of respondent No. 5. On receipt of the balance amount of Rs. 20.00 lacs, no right in the property was to be left with the appellant. The appellant is bound by the terms and conditions contained in the Memorandum of Understanding dated 20th April, 2005 the same remains valid, operational and binding upon him unless he can show that on account of some breach, committed by respondent No. 5, the Memorandum of Understanding stands annulled or cancelled. During the course of hearing before the Learned Single Judge, the appellant could not point out any such breach of Memorandum of Understanding dated 20th April, 2005 by respondent No. 5 as would result in cancellation of the Memorandum of Understanding and would discharge the appellant

from his obligation under the Memorandum of Understanding. During arguments before us also, the appellant could not point out any breach of the terms and conditions of the Memorandum of Understanding dated 20th April, 2005, by respondent No 5. He merely claimed that since the balance amount of Rs. 20.00 lacs has not been paid to him, no right accrued in favour of Respondent No. 5 to get the sale deed executed in his favour and resultantly the sellers was obliged to sell the property in question to him, instead of selling it to the Respondent No. 5. As noted earlier, the balance amount of Rs. 20.00 lacs was payable to the appellant only on “assignment” of the agreement by the seller i.e. respondent No. 1 to 4 and late Smt. Sanjogta Kapoor in favour of respondent No. 5. The Respondent No. 5 could not have compelled the sellers to assign the agreement in his favour. In fact, under the Memorandum of Understanding dated 20th April, 2005, it was for the appellant to make efforts to get the agreement assigned in favour of Respondent No. 5 within 10 days. This is not the case of the appellant that though efforts were made by him for assignment of agreement in favour of Respondent No. 5, he could not succeed on account of non cooperation or refusal on the part of Respondent No. 5. If the appellant did not try to persuade the sellers to assign the agreement in favour of respondent No. 5 or the sellers did not

assign the agreement in his favour, the blame for this cannot be put on Respondent No. 5 and it cannot be said that he had committed breach of the terms and conditions of the Memorandum of Understanding dated 20th April, 2005 resulting in its cancellation or termination. Since there was no assignment by the purchasers in favour of respondent No. 5, there was no occasion for payment of Rs. 20.00 lacs by respondent No. 5 to the appellant. Had the sellers assigned the agreement in favour of respondent No. 5, the appellant would have got Rs. 20.00 lacs from respondent No. 5 at the time of assignment. But, having executed Memorandum of Understanding dated 20.4.05, the appellant was not entitled to sale of the property in question by respondent No. 1 to 5 and late Smt. Sanjogta Kapoor to him. As noted earlier, under the Memorandum of Understanding dated 20th April, 2005, the sellers were required to take the balance sale consideration only from Respondent No. 5, handover vacant possession of property to him and execute the sale deed in his favour alone. The right to get the sale deed executed, therefore, came to be vested in respondent No. 5, and the only right left with the appellant was to get Rs. 20.00 lacs from him.

8. The Memorandum of Understanding did not stipulate payment of Rs. 20.00 lacs to the appellant by a particular date.

This was not the term of Memorandum of Understanding dated 20.4.05 that if the balance amount of Rs. 20.00 lacs was not paid to the appellant by respondent No. 5 within a particular time, the Memorandum of Understanding would stand cancelled or terminated. The appellant specifically agreed to get balance payment of Rs. 20.00 lacs only at the time of assignment of agreement by the sellers in favour of respondent No. 5 and since the stage of assignment of the agreement in favour of respondent No.5 never came, there was no occasion for respondent No. 5 to make the balance payment of Rs. 20.00 lacs to him.

9. The appellant chose to enter into a Memorandum of Understanding with respondent No. 5, without making the sellers a party to it and also agreed to receive the balance amount of Rs. 20.00 lacs, on the happening of an event, which was not in control of respondent No. 5, but, was in the control of the sellers. Therefore, if the sellers did not come forward to assign the agreement to sell in favour of respondent No. 5, the appellant has to abide by the consequences of the term agreed to by him and respondent No. 5 cannot be made to suffer for this.

10. It was pointed out by learned counsel for the appellant that the compromise decree was passed without waiting for the suit summons to be served upon the appellant. In our opinion, nothing

turns on the compromise decree between the sellers and respondent No. 5 being passed without service of suit summons upon the appellant. Obviously, the compromise decree between the sellers and respondent No. 5 does not bind the appellant. There was no prohibition in law against the appellant entering into a compromise only with the sellers, without making the appellant a party to it, if he felt that compromise between him and the sellers would serve his purpose. Passing of compromise decree, between respondent No. 5 and the sellers, amounts to respondent No. 5 abandoning the suit as against the appellant. But, it cannot be said that the compromise decree got vitiated only because the appellant was not made a party to it.

11. In order to claim injunction against execution of sale deed in favour of respondent No. 5, despite there being a decree of specific performance of contract in his favour, the appellant is required to show, at least, a reasonable prima facie case in his favour. Since the appellant divested all his rights in favour of respondent No. 5, the Memorandum of Understanding dated 20th April, 2005 is specifically stipulated that respondent No. 5 shall be entitled to get sale deed executed in his favour from respondent No. 1 to 5 and late Smt. Sanjogta Kapoor, the balance payment was to be made directly by respondent No. 5 to the sellers and the

possession was also to be handed over by them to respondent No. 5, and more importantly there was no breach of the terms of Memorandum of Understanding dated 20.4.05 by respondent No. 5, the appellant, in our opinion, is not entitled, either in law or in equity, to get the suit property sold to him under the Memorandum of Understanding dated 28.2.2005 executed in his favour.

12. The sellers having already entered into a compromise with respondent No. 5, the appellant having already received Rs. 80.00 lacs from respondent No. 5 and having not made any payment to the sellers, after executing of the Memorandum of Understanding dated 20.4.05, the balance of convenience is also not in his favour.

13. The relief of injunction is an equitable relief. The party seeking injunction must show equity in his favour. The appellant having divested all his rights in favour of respondent No. 5, and having agreed to accept the balance amount of Rs. 20.00 lacs only at the time of assignment of the agreement in favour of respondent No. 5 and the stage for payment of Rs. 20.00 lacs to him by respondent No. 5 having not come as yet, there is no equity in favour of the appellant, to get the property sold to him and not to respondent No. 5. On the other hand, respondent No. 5 having already paid Rs. 80.00 lacs to the appellant and there being no

default of the terms of Memorandum of Understanding dated 20.4.05 by him, followed by a compromise decree between him and the sellers, we feel that the equity is rather in favour of respondent No. 5 getting the sale deed executed in his favour, though, of course, after payment of balance amount of Rs. 20.00 lacs to the appellant.

14. There is yet another reason why we would not like to interfere with the order passed by learned Single Judge; as held by hon'ble Supreme Court in *Wander Ltd & Anr. -vs- Antox India Private Limited*; 1990 (Suppl) SCC 727; in appeal before the Division Bench against the exercise of discretion by Single Judge; Appellate Court will not interfere with the exercise of discretion of the court in the 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 has ignored the settled principle of law. The view taken by learned Single Judge in refusing the injunction sought by the appellant cannot be said to be arbitrary or perverse and has, in fact, been arrived at, applying settled principles of law in the matter of grant of interim injunction.

15. However, in all fairness, the appellant must get the amount of Rs. 20.00 lacs before the sale deed is executed in favour of

respondent No. 5. During the course of arguments the learned counsel for the respondent had offered to pay Rs. 20.00 lacs to the appellant. The respondent shall remain bound by the offer.

The Appeal stands dismissed accordingly. Trial court records be sent back forthwith.

(V.K. JAIN)
JUDGE

(VIKRAMAJIT SEN)
JUDGE

July 27, 2009.
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