

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ FAO(OS) No.583/09 & CM No.16992/09

SABH INFRASTRUCTURES LTD. Appellant through
Mr. Sandeep Sethi, Sr. Adv. with
Mr. Ajay Mehrotra, Ms. Sindh
Sinha & Mr. Nikhil Bhalla, Advs.

versus

M/S. JAY SHREE BAGLEY & ANR. Respondent through
Mr. D.S. Narula with Mr. Rajesh
Kumar, Avs.

% Date of Hearing : November 25, 2009

Date of Decision : December 23, 2009

CORAM:

* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE SUNIL GAUR

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| 1. Whether reporters of local papers may be
allowed to see the Judgment? | No |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the Judgment should be reported
in the Digest? | Yes |

VIKRAMAJIT SEN, J.

1. The Plaintiff has filed CS(OS) No.2169/2009 praying for Specific Performance and injunction pertaining to immovable property bearing No.B-35, Friends Colony(West), New Delhi by virtue of a Collaboration Agreement and the Memorandum of Understanding (MoU) entered into between the parties on 11.9.2007. In terms of this Agreement, a sum of Rupees 21,00,000/- had been paid by the Plaintiff/Appellant to the Defendant/Respondent. The Collaboration Agreement envisaged

that upon completion of construction on the plot of land, the Plaintiff would be owners of the Basement, Ground Floor with Front Lawn and Rear Courtyard, Second Floor along with Terrace over the entire Second Floor, two servant quarters with common W.C. on the top terrace, two car parking spaces in the driveway, use of common areas, facilities and services. The Defendants were entitled to the title and possession of the First Floor together with a sum of Rupees 2.25 crores. The Plaintiff asserts that the Defendant has committed willful breach of the Collaboration Agreement and the MoU. The Plaintiff has quantified the damages at Rupees 3.5 crores.

2. The Plaintiff discloses that the property has not been converted from leasehold to freehold and possession thereof has not been handed-over to the Plaintiff. In other words, the construction has not progressed beyond the initial payment/receipt of Rupees 21,00,000/-.

3. Mr. Sethi, learned Senior Counsel appearing on behalf of the Appellant, had pressed the interim injunction prayed for which was for restraining the Defendant from transferring, selling, disposing off, alienating, encumbering or parting with possession or creating any third party interest in the suit property. The learned Single Judge has also noted the argument of learned counsel for the Defendant that the suit was not

maintainable inasmuch as a collaboration or building of agreement or MoU is not enforceable and, therefore, the suit itself was not maintainable. Nevertheless, even in the face of this submission made by learned counsel for the Defendant, the learned Single Judge has directed the Defendant not to create any third party interest in the suit property, subject, however, to the Plaintiff depositing the remaining consideration of Rupees 1,74,00,000/-.

4. Mr.Sethi contends that the direction for deposit of the balance sale consideration is beyond the powers of the learned Single Judge.

5. In the conspectus of the case, Section 20 of the Specific Relief Act, 1963 ('SR Act' for short) assumes grave proportions. The first sub-section declares that the Court is not bound to grant such relief which is inherently discretionary in nature. Interference by the Appellate Court is justified only if this exercise manifests perversity. Section 14 of the SR Act mentions contracts which cannot be specifically enforced. It states that where the suit is for enforcement of a contract for the construction of any building or the execution of any work, the Courts are not obliged to grant Specific Performance of contract. However, the situation becomes flexible if the Plaintiff has a substantial interest in the performance of the contract and

the interest is of such a nature that compensation for money for non-performance of the contract is not an adequate relief. The payments made by the Plaintiff to the Defendant are approximately five percent. This would not reflect "substantial interest". Furthermore, the Plaintiff has already made a claim for Rupees 3.5 crores by way of damages.

6. Speaking for the Division Bench of this Court, one of us (Vikramajit Sen, J.) had considered all the complexities of a claim for specific performance of a contract in a batch of matters in which the lead case was **FAO(OS) No.252/2008** entitled **Mohan Overseas P. Ltd. -vs- Goyal Tin & General Industries**. Mr. Sethi has placed reliance in *Ansal Properties & Industries Pvt. Ltd. -vs- Anand Nath*, ILR 1992 Delhi 540. We must straightaway mention that the Plaintiff in that case was already in physical possession of the property. It was on the facts of the case that our learned Brother had concluded that the contract in question could be specifically enforced. We are unable to subscribe to the view of the learned Single Judge in *Gaurishankar Govardhandas Todi -vs- Evershine Homes Pvt. Ltd.*, 2009(3) BomCR 330 which is to the effect that if the Plaintiff is to deposit the balance consideration he would, in effect, have performed all his obligations without receiving the benefits of the Agreement. The obverse has not been

considered, namely, whether it is equitable that on payment of a meager sum which represents less than five per cent of the consideration a plaintiff would be entitled to freeze transactions on a property for a substantial period of time. Where property prices are volatile and ascendant, it would always be the interest and endeavour of a speculator to file a suit for specific performance by creating the illusion of disputes. This is what has prevailed upon us in the case in hand to balance the equities by directing the deposit of the sale consideration and thereupon to restrain the owner of the property from creating any third party interest. *Yusuf Mohamed Lakdawala -vs- Sudhakar Kashinath Bokade*, 2008(2) MhLj.682 turns on the facts of that case and does not lay down any general proposition.

7. We find no reason to question or depart from the view taken by the Division Bench in **Mohan Overseas**. The Explanation to Section 16 of S.R. Act cannot be overemphasized, inasmuch as it postulates the depositing in Court the unpaid sale consideration if and when so ordered by the Court so to do.

8. The Plaint discloses that the Plaintiff has invested a sum of Rupees 21,00,000/- in a property transaction, the total value of which is Rupees 7.40 crores. If the interim Orders prayed for by the Appellant/Plaintiff are granted, the Plaintiff would be able to multiply his investment manifold, whereas the owner

would have to defend the litigation and be bound by the contractual price, *albeit* with interest thereon. This places the parties in an unfair position, especially since the litigation languishes for decades.

9. The relief of temporary injunction is essentially discretionary. In **Mohan Overseas**, the scope of the Appellate Court to interfere in discretionary order has been discussed threadbare by applying ***Wander Ltd. -vs- Antox India P. Ltd.***, 1990(Supp) SCC 727 and ***Ramdev Food Products (P) Ltd. -vs- Arvinbhai Rambhai Patel***, (2006) 8 SCC 726. In ***Wander Ltd.*** their Lordships had analysed the powers of the Appellate Court in suchlike matters as follows - "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 fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion". This decision has been followed very recently in ***Seema Arshad Zaheer -vs- Municipal Corpn. of Greater Mumbai***, (2006) 5 SCC 282. The City Civil Court had granted a temporary injunction against the Corporation which was challenged before the Bombay High Court. Speaking for the Bench His Lordship R.V. Raveendran made the following pithy observations:-

32. Where the lower court acts arbitrarily, capriciously or perversely in the exercise of its discretion, the appellate court will interfere. Exercise of discretion by granting a temporary injunction when there is "no material", or refusing to grant a temporary injunction by ignoring the relevant documents produced, are instances of action which are termed as arbitrary, capricious or perverse. When we refer to acting on "no material" (similar to "no evidence"), we refer not only to cases where there is total dearth of material, but also to cases where there is no relevant material or where the material, taken as a whole, it is not reasonably capable of supporting the exercise of discretion. In this case,

there was “no material” to make out a prima facie case and therefore, the High Court in its appellate jurisdiction, was justified in interfering in the matter and vacating the temporary injunction granted by the trial court.

10. In ***Ramdev*** the Supreme Court has taken into consideration both ***Wander Ltd.*** and ***Seema Arshad Zaheer***. His Lordship, S.B. Sinha, J., has perspicuously propounded the law in these words:

The grant of an interlocutory injunction is in exercise of discretionary power and hence, the appellate courts will usually not interfere with it. However, the appellate courts will substitute their discretion if they find that discretion has been exercised arbitrarily, capriciously, perversely, or where the court has ignored the settled principles of law regulating the grant or refusal of interlocutory injunctions. This principle has been stated by this Court time and time again. [See for example *Wander Ltd. v. Antox India P. Ltd.*, 1990 (Supp) Supreme Court Cases 727, *Laxmikant V. Patel v. Chetanbhai Shah*, (2002) 3 SCC 65 and *Seema Arshad Zaheer -vs- Municipal Corpn. of Greater Mumbai*, (2006) 5 SCC 282].

The appellate court may 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.

However, in this case the courts below proceeded on a prima facie misconstruction of documents. They adopted and applied wrong standards. We, therefore, are of the opinion that a case for interference has been made out.

11. No case has been made out disclosing that the exercise of discretion by the learned Single Judge is perverse. On the contrary, we wholly approve and support the stand taken in the interim Orders by the learned Single Judge.

12. The Appeal is without merit and is dismissed with costs of Rupees 10,000/-. Pending application also stands dismissed.

(VIKRAMAJIT SEN)
JUDGE

December 23, 2009
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(SUNIL GAUR)
JUDGE