

\$~F-3

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

+

PRONOUNCED ON : 08.12.2010

CS(OS) 1781/1995 & I.A. NO. 7974/1995

SURESH CHAND JAIN Plaintiff
Through : Ms. Sonali Malhotra, Advocate.

versus

M/S. PHALPHOR BUILDERS P. LTD. Defendant
Through : Nemo.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT

- | | | |
|----|---|-----|
| 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 |

MR. JUSTICE S.RAVINDRA BHAT

%

1. In this suit, the plaintiff seeks following reliefs:
 - (a) A decree of cancellation, cancelling the sale deeds executed by defendant No.2 in favor of defendant Nos. 4, 5, 6 & 7 on 24.06.1993, 10.09.1991 and 05.01.1993 for the portions of the property No. 3/104, Parmanand Estate, Opposite Maharani Bagh, New Delhi, and the sale deeds dated 12.09.1994, 06.09.1994, 10.10.1994 and executed by the defendants No. 6 & 10 in favor of defendant No. 8 & 9;
 - (b) A decree for possession in favor of the plaintiff and against the defendants as a consequential relief of cancellation of the sale deeds;
 - (c) A decree for declaration that the defendant No.1 to 10 have acted

illegally, dishonestly without any power or authority of law and the actions of the defendants are null and void;

(d) A decree for injunction restraining the defendants No. 1 to 10 from further executing any agreement to sale or sale deeds in favor of any person of any portion of the property No. 3/104, Permanand Estate, opposite Maharani Bagh, New Delhi.

2. The plaintiff entered into a collaboration agreement, with the first three defendants, whereby the latter were to develop, and construct upon the suit property, and give possession of a certain portion of the built up area. The plaintiff contends that he was paid a sum of ₹10 lakhs as initial advance as Security Deposit and that the first three defendants did not comply with the other terms of the agreement, dated 09.01.1989. In terms of that agreement, the plaintiff was entitled to retain an area of 5000 square feet, after construction; the total constructed area was to be 13,000 square feet. Another admitted fact is that the plaintiff had constituted the said defendant collaborators, as his General Power of Attorney holder, to apply to municipal and other authorities, for clearances, to complete the construction, which was the subject matter of the agreement

3. The plaintiff contends that in terms of Clause-10 of the Collaboration/Building Agreement dated 09.01.1989, the right to sell the newly constructed portions was reserved with him, (i.e. the plaintiff). It is urged that contrary to these terms, the first three defendants started entering into agreements with third parties to create rights in the suit property. The plaintiff submits that therefore, , he was constrained to revoke the Power of Attorney initially issued in favor of the defendants. The notice dated 20.03.1991 purporting to revoke and the Power of Attorney dated 09.01.1989, (an unregistered one, and produced as PW-1/7). was exhibited as Ex. PW-1/8. The plaintiff also relies upon UPC Receipts (Ex. PW-1/9) to evidence that the revocation notice was served on first three defendants. The plaintiff further states that the general public were put to notice about the revocation through publication on 27.03.1991 (produced as Ex. PW-1/10).

4. The plaintiff further submits that in terms of Ex. PW-1/6 agreement, the builder defendants were to construct 13,000 sq. ft. according to the plan, out of which 5000 sq. feet were to be reserved and retained by the plaintiff for his use. The first defendant in

turn had to be paid Rs. 300/- per sq. feet as construction costs/fee. It is stated that acting upon the agreement (Ex. PW-1/6), the first three defendants obtained the plaintiff's signatures on the proposed site plan but filed another site plan for approval with MCD, by forging the plaintiff's signatures. The suit contends that the 5000 sq. ft. of the built portion was handed-over to the plaintiff in the second floor in early March, 1993 but that out of these, the total sanctioned covered area was only 1000 sq. ft. It is stated that the balance area sought to be handed-over was beyond the sanctioned or permissible limits.

5. The plaintiff is aggrieved by what are termed as unauthorized execution of sale deeds in favor of Defendant Nos. 4 to 7 respectively on different dates, by the first three defendants. The sale deed by the first three defendants, in favor of the fourth defendant is produced as Ex. PW-1/11 (dated 24.06.1993); similarly the sale deed dated 24.06.1993 is exhibited as Ex. PW-1/12; the Sale Deed dated 10.09.1991 is exhibited as Ex. PW-1/13 and the Sale Deed dated 05.01.1993 is exhibited as Ex. PW-1/14.

6. It is submitted that the sixth and tenth defendants thereafter sought to sell the property further by entering into agreement to sell with the Defendant Nos. 8 and 9. Those sale deeds were originally impugned in these proceedings. During the course of the proceedings of this suit, on 10.09.1996, the plaintiff entered into settlement with the Defendant Nos. 8 and 9, and received ₹ 5 lakhs. As a consequence, the claim as against the said defendants were abandoned.

7. The plaintiff argues that immediately on issuance of the revocation (of the Power of Attorney) and also the construction agreement dated 09.01.1989, the first defendant ceased to have any right or interest in the property and was duty-bound to hand it over to the plaintiff. By proceeding to hand-over portions of the constructed building to third parties, and creating third-party rights in the property, they acted contrary to law. It is argued that the General Power of Attorney (Ex. PW-1/7), on the basis of which the first three defendants claimed interest in the property, is an unregistered document, and, therefore, could not have in fact effected any conveyance. Furthermore, submits the plaintiff, the terms of the agreement (Ex. PW-1/6) itself constrained the first three defendants and they had not power to make any transfers or alienation, as is evident from reading of Clauses 8 and 10.

8. The first three defendants had filed common written statement. They did not dispute the construction agreement; the execution of the Power of Attorney; the construction of the building on the plot etc. It was submitted by them, that based on the Power of Attorney, a sanction was obtained. The written statement contends that subsequently, the sanction plan was sought to be changed and the amended plans were approved by the municipal authorities consequent to which construction on the ground-floor, first-floor, second-floor and third-floor were carried-out. The defendants submit that on 25.12.1989, the municipal authorities issued C and D forms and also accepted the compounding fee subsequently. Their written statement alleges also that on various dates in 1989-90, the possession was handed-over to third parties.

9. The defendants' contention appears to be having permitted the entire construction and even accepted the handing-over possession in March 1994. The plaintiff cannot now turn-around and contend that the possession given to the third parties – Defendant Nos. 4 to 10 is without authority of law.

10. Defendant Nos. 1 to 5 were unrepresented for a long time; they were consequently set-down *ex-parte* and the plaintiff was permitted to lead oral evidence, by tendering affidavit evidence. The plaintiff has exhibited the evidence originally filed in the Court.

11. Learned counsel for the plaintiff submitted that in the absence of a registered document (Ex. PW-1/7), the General Power of Attorney could not have clothed the defendants with any authority to execute a sale deed, or create interest in the immovable property. It is reiterated besides, that Clauses 8 and 10 constitute a bar upon the said first three defendants' power to deal with the property as the authority to do so was exclusively reserved with the plaintiff owner. It is further stated that the defendants did not honor their part of the bargain and have handed-over portions which are susceptible to demolition, as they are in excess of the sanctioned area.

12. It is evident from the above narrative that the first three defendants were handed-over the suit plot for construction immediately after the plaintiff entered into collaboration/construction agreement on 09.01.1989. The plaintiff had undoubtedly executed a Power of Attorney in favor of the said defendants authorizing them to take necessary steps for obtaining sanction from the concerned municipal authorities and

doing all that was necessary to put-up the agreed construction. There is no dispute that till March 1991, the defendants in fact performed the contract. Though the plaintiff alleges that an excess area was constructed on, it is not denied that what was handed-over in the first floor of the property was an area of about 5000 sq. feet. The plaintiff has, further, not substantiated the excess area, by producing any documentary material in that regard. In these circumstances, the allegation that the first three defendants defaulted or did not perform their part of the bargain and constructed something which was sub-standard or beyond the contract, has to be rejected.

13. That brings the Court to the consideration of the plaintiff's basic grievance, i.e. that the first three defendants could not have handed-over other portions of the suit property, or created interest. The materials on record undoubtedly disclose that the plaintiff was given an earnest money of ₹10 lakhs. The construction agreement (Ex. PW-1/6) stipulates that the plaintiff was under an obligation to pay ₹ 3000/- per sq. feet to the first three defendants in respect of the area they had agreed to construct upon (this part of the agreement not being denied by the plaintiff since he is a beneficiary of the construction). The onus therefore, was on the plaintiff to disclose or prove that such obligation had in fact been fulfilled. The total amount here (i.e. payment of ₹300/- per square feet for construction of 13,000 square feet) would work out to ₹ 39 lakhs. Concededly, the plaintiff did not pay this amount to the defendant; at least there is no material – documentary or otherwise, to infer such conclusion.

14. As far as the argument that the defendants could not have conveyed the title to the subsequent purchasers, i.e. Defendant Nos. 4 to 10 is concerned, it is no doubt true that the General Power of Attorney based on which the said transactions were completed, is unregistered. Yet, the Court cannot but notice that the same General Power of Attorney was used by the first three defendants to obtain sanction and construct on the property. At that stage, the plaintiff did not register any protest. He, on the other hand, allowed the defendants to suffer disadvantage by expending amounts and using energy and labour. Having done so, and even proceeding to accept the first floor portion, working out to above 5,000 sq. feet, this Court is of the view that the plaintiff cannot now question the first three defendants' authority in having transferred the other portions in favor of the

Defendant Nos. 4 to 10. The plaintiff in fact acquiesced in the transactions of the first three defendants with the purchasers/ Defendant Nos. 4 to 10.

15. Learned counsel for the plaintiff had relied upon several judgments, such as *Commissioner of Income Tax (Central) vs. B.N. Bhattacharjee and Anr.* AIR 1979 SC 1725; *Biranchi Narayan Thakur and Anr. vs. Biranchi Narayan Thakur* AIR 1953 Orissa 333 and *Santosh Kumar Meena v. GNCT of Delhi* W.P. 1343/2010, decided on 07.09.2010, and certain other decisions to say that *estoppel* cannot operate against provisions of law and that Sections 17 and 49 of the Registration Act are mandatory in constituting a bar from recognizing the title to immovable property if it is conveyed on the authority of unregistered documents.

16. Here the plaintiff has approached the Court for equitable relief of cancellation of documents executed in favor of third parties. The basis for the action is that such conveyance was effected on the strength of unregistered documents. The plaintiff, further, is not disputing some portions of the agreement, which were finalized by the parties and which are not in question in these proceedings. These are *inter alia* the steps taken by the first three defendants, to construct upon the property; including obtaining sanctions and completion certificate; depositing the compounding fee; spending their money etc. and what is most important, the plaintiff's acceptance of 5000 sq. ft. of the constructed portion in early March 1994. The plaintiff has also not established that the amount of ₹ 39 lakhs, payable as construction fee (Rs.300/- per sq. ft) was ever offered or tendered to the first three defendants at the relevant time. Having accepted an important and substantial part of the obligations arising out of the very same documents, i.e. Ex. PW-1/6, and not having performed their part of the bargain, this Court is of the opinion that the plaintiff cannot approbate and reprobate. In other words, the plaintiff having accepted the performance in respect of the documents cannot question the consequence flowing from the other part, particularly arising out of its non-adherence to the contract. In this regard, the doctrine of approbate and reprobate has been explained as a species of estoppel, where, a party to a contract, elects to appropriate benefits out of it, after which, he would not be allowed to repudiate other parts. In *Kok Hoong v. Leong Cheong Kweng Mines Ltd.*, 1964 AC 993, it was held that:

"a litigant may be shown to have acted positively in the face of the court, making an election and procuring from it an order affecting others apart from himself, in such circumstances the court has no option but to hold him to his conduct and refuse to start again on the basis that he has abandoned.

In *New Bihar Biri Leaves Co. and Ors. v. State of Bihar and Ors.* (1981) 1 SCC 537, the Supreme Court observed that a fundamental principle of general application is that one, voluntarily accepts a contract on certain terms and works it out, he cannot be allowed to adhere to and abide by some of the terms of the contract which prove advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The maxim, *qui approbat non reprobat* (one who approbates cannot reprobate), was applied, in the context. These principles were reiterated and applied, in later judgments, too (See *Union of India v. Krishan Lal Arneja* AIR 2004 SC 3582). Here, the plaintiff clearly elected to take benefits under the contract, and took no steps to effectuate cancellation or revocation of the power of attorney alleged by him. Not only was construction completed, even possession was given, of different portions to various defendants, after which he (the plaintiff) accepted – unreservedly – about 5000 square feet area, in 1994. In the circumstances, the principle of approbate and reprobate bars the reliefs claimed in the present case.

17. In view of the above conclusions, the Court is of the opinion that on an overall consideration of facts of this case, the equities have to be left as they are. The relief of cancellation of any instrument, is a larger one, falling within the discretionary realm of the court, which requires weighing of equities. On an overall conspectus, even though the plaintiff has arguably established a case that title could not have been granted under an unregistered document, yet, his conduct, disentitles such relief, as concededly he is beneficiary under the contract, and has not established how he is prejudiced, otherwise than the grant of possession in favour of the defendant. The suit, therefore, cannot succeed and is accordingly dismissed, but with no order as to costs. All the pending applications are also dismissed.

S. RAVINDRA BHAT,J

DECEMBER 08, 2010