

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ FAO(OS) No.392/10 & CM Nos.10632-33/10

SANJAY PASSI

.....Appellant through
Mr. Vikas Dhawan &
Mr.Ahimanyu Mahajan,Advs.

versus

IQBAL CHAND KHURANA

.....Respondent through
Mr.Sanjeev Puri, Sr. Adv.
with Mr.Gyaltzen G.
Barfungpa, Adv. for
Respondent Nos.1 & 2
Mr. P.V. Kapur, Sr. Adv. with
Mrs. Neelima Tripathi,
Mr.Vimal Nagrath,
Mr.Sanjay Kumar Jha
& Ms.Ikasha Bhalla, Advs.
for Respondent No.3

WITH

FAO(OS) No.490-92/10 & CM No.13529/10

IQBAL CHAND KHURANA

.....Appellant through
Mr.Sanjeev Puri, Sr. Adv.
with Mr.Gyaltzen G.
Barfungpa, Adv.

versus

SANJAY PASSI

.....Respondent through
Mr. Vikas Dhawan with
Mr.Abhimanyu Mahajan,
Advs. for Respondent No.1
Mr. P.V. Kapur, Sr. Adv. with
Mrs. Neelima Tripathi,
Mr.Vimal Nagrath,
Mr.Sanjay Kumar Jha
& Ms.Ikasha Bhalla, Advs.
for Respondent No.2

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Date of Hearing : August 05, 2010

Date of Decision : August 09, 2010

CORAM:

* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MS. JUSTICE MUKTA GUPTA

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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 this Appeal containing the following Prayers:-

In the facts and circumstances as narrated above, it is most respectfully prayed that this Hon'ble Court may be pleased to –

- (a) pass an order setting aside the impugned order and judgment dated 3.5.2010, except to the extent it directs Respondent Nos.1 and 2 to deposit a sum of Rs.14.5 crores, in view of the prayer of the Appellant for deposit of further amounts; and
- (b) pass any other/further order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

2. Defendant Nos. 1 and 2 [Appellant in FAO(OS) No.490-92/2010], who were the owners of the suit property, have also assailed the said impugned Order dated 3.5.2010. The following Prayers have been made in this Appeal:-

- a) set aside the impugned Order dated May 3, 2010 passed by the Learned Single Judge in IA No.9346 of 2009, IA No.7865 of 2009 and IA No.15611 of 2009 in

CS(OS) No.1001 of 2009 to the extent of direction to the Appellants to deposit of Rs.14.5 crores in this Hon'ble Court;

b) pass such other order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

These Prayers came into focus when Shri P.V. Kapur, learned Senior Counsel commenced arguments on behalf of Respondent No.3 who is the party in whose favour a Sale Deed has been executed after the filing of the subject Suit for Specific Performance. Keeping the extracted Prayers in perspective, we considered it unnecessary to hear arguments on behalf of the transferee *pendent lite* since no adverse orders have been passed against it. Even if any such directions had been passed, the Prayers in the Appeal would supplicate and require to nullify them. The Order to deposit ₹ 14,50,00,000/- has been directed against Defendant No.1.

3. By a detailed discussion, the learned Single Judge has considered threadbare the various Agreements executed between Shri Sanjay Passi on the one hand [Appellant in FAO(OS) No.392/2010] and S/Shri Iqbal Chand Khurana and Ashwani Khurana [Appellants in FAO(OS) No.490—92/2010] on the other. The learned Single Judge has also perused and discussed the correspondence exchanged between the parties.

After doing so, a *prima facie* finding has been articulated to the effect that the Plaintiff was unable to arrange for the requisite funds and had, therefore, requested the Vendors (Khuras) to refund the amount already paid. The readiness and willingness of the Appellant to perform his part of the contract has, in the opinion of the learned Single Judge, not been established. So far as the next question raised before the Trial Court, viz. application of the principle of *lis pendens* is concerned, his *prima facie* conclusion is that “a firm view about the third defendant’s knowledge regarding any pre-existing agreement concerning the suit property” cannot be arrived at. It has been noted in the impugned Order that the Suit had been filed on 25.5.2009 with notice returnable for 29.5.2009; an Agreement to Sell was allegedly entered into between Khuras and the third Respondent/Defendant, namely, Hap Apparel Pvt. Ltd. on 6.5.2009 but the Sale Deed pursuant to this Agreement was executed on 27.5.2009. Thirdly, the learned Single Judge has made mention of the fact that the Agreement between Sanjay Passi and Khuras was for ₹ 60,00,00,000/-, out of which ₹ 20,00,00,000/- had been paid.

4. There is no dispute as to the Clause that ₹ 7,50,00,000/- was to be returned in the event of the cancellation of the Agreement, although there is serious challenge to the inclusion

of the term requiring the Plaintiff to execute a Cancellation Deed. The Plaintiff's assertion is that the words "provided, the purchaser executes a cancellation deed if required by the vendors and does not legally challenge the forfeiture" have been interpolated by the Khuranas in the Agreement. The impugned Order records that there is no defence as to why ₹ 7,50,00,000/- was neither offered nor refunded. Eventually, it has been held that since the Khuranas are treating the Agreement of the Plaintiff as cancelled, there was no justification for their retaining the entire sum of ₹ 20,00,00,000/-. The learned Single Judge has, as per the Agreement between the parties, ordered the deposit of the sum of ₹ 7,50,00,000/-, which was refundable/returnable as per the terms of the Agreement to Sell between the Plaintiff and Defendant Nos.1 and 2. So far as the remaining ₹ 12,50,00,000/- is concerned, the learned Single Judge has *prima facie* found it plausible only to forfeit ₹ 7,00,00,000/- as and by way of a pre-estimate of damages. It is for this reason that Defendants Nos.1 and 2 [Khuranas] have been directed to deposit ₹ 14,50,00,000/- in Court.

5. The Plaintiff prays for the setting aside of the impugned Order but maintaining the direction for the deposit of ₹ 14,50,00,000/-. Defendant Nos.1 and 2 (Appellants in FAO(OS) No.490-92/2010) pray for setting aside of this very

direction; they, however, agree before us to deposit the sum of ₹ 7,50,00,000/- along with interest that has accrued thereon.

6. Since there are two Agreements to Sell which are in the limelight, it will be relevant and topically instructive to reproduce the following extract from *Narandas Karsondas -vs- S.A. Kamtam*, (1977) 3 SCC 247:-

32. A contract of sale does not of itself create any interest in, or charge on, the property. This is expressly declared in Section 54 of the Transfer of Property Act. See *Rambaran Prasad v. Ram Mohit Hazra*, (1967)1 SCR 293. The fiduciary character of the personal obligation created by a contract for sale is recognized in Section 3 of the Specific Relief Act, 1963, and in Section 91 of the Trusts Act. The personal obligation created by a contract of sale is described in Section 40 of the Transfer of Property Act as an obligation arising out of contract and annexed to the ownership of property, but not amounting to an interest or easement therein.

7. We find it relevant that the sale consideration was ₹ 60,00,00,000/- between the Plaintiff and Defendant Nos.1 and 2 and the price at which the suit property was sold to Defendant No.3/Respondent No.3 is ₹ 43,00,00,000/-. We think that at this stage it is not necessary to give any weightage to the fact that earlier the sale consideration was ₹ 1,00,00,00,000/-. As an alleged failure of the Plaintiff to perform his

contract, Defendant Nos.1 and 2 have facially sustained a loss of ₹ 17,00,00,000/-. The claim for damages would, therefore, possibly arise only so far as the sellers, that is, Defendant Nos. 1 and 2/Appellants are concerned, and that too for a sum of ₹ 17,00,00,000/-. As against this amount, the impugned Order directs deposit of ₹ 7,50,00,000/- on the ground that it was specifically stated to be refundable. Since this amount has been ordered to be deposited in this Court, as in view of the statement of learned Senior Counsel for the Khuranas that they do not oppose this deposit, we need not make any observations on this score except to round off the amount at ₹ 10,00,00,000/-, after including interest. There seems to us, however, no justification for calling upon Defendant Nos.1 and 2 to make any further deposit as, on a perusal of the documents between the parties, these Defendants have sustained a loss of ₹ 17,00,00,000/-. It is quite another matter that as the Suit progresses, the Plaintiff may succeed in proving that the price of ₹ 43,00,00,000/- was in fact the market price at all relevant times. We say this, on a *prima facie* appreciation of facts, keeping in perspective that the Agreement between the Plaintiff and Defendant Nos.1 to 3 was initially for ₹ 1,00,00,00,000/- and for no appreciable reason was reduced by 40 per cent to ₹ 60,00,00,000/-. There is obviously more in this transaction

than meets the eye. At the conclusion of the Trial, no doubt, all the complexion and hues of the transaction will become palpably evident.

8. The Original Side of the High Court of Delhi has seen an explosion of dockets pertaining to actions for specific performance of contracts for sale of immovable property. In ***Mohan Overseas (Private) Ltd. -vs- Goyal Tin & General Industries***, 169 (2010) DLT 487 : 2010 I AD (Delhi) 253, a Division Bench has expressed the opinion that keeping in perspective the application of the principle of *lis pendens*, it would be in the interest of justice and equity that the purchaser should be asked to deposit the entire sale consideration. A reading of the impugned Order is indicative of the position that the Plaintiff was actually praying for an injunction against Defendant Nos.1 and 2, which has been declined. No further prayer on these lines has been pressed in the Appeal. The learned Single Judge, therefore, could not have called upon the Plaintiff to deposit the entire sale consideration as a *sine qua non* for considering the discretionary relief for specific performance. Possibly, this course was not chartered since the Suit Property has already been sold to a third party, viz. Defendant No.3, who is in possession thereof.

9. In ***Mohan Overseas***, the Division Bench had also expressed its reservations on the aspect of whether the Court is empowered to obtain an undertaking from the Plaintiff to pay the Defendant a pre-estimated amount of damages fixed by the Court in the event that the Plaintiff loses his suit for Specific Performance of an alleged Agreement to Sell. Such a course was chartered by a learned Single Judge to prevent frivolous suits of specific performance of transfer of immovable properties and had been approved by another Division Bench in FAO(OS) No. 19/2009 titled **Vinod Seth -vs- Devinder Bajaj**. It transpires that the Hon'ble Supreme Court in an appeal from the said Judgment of Division Bench, numbered as Civil Appeal No. 4891 of 2010, did not approve of this method and held that such a direction was not sustainable in law. Their Lordships, however, to balance the equities in the case, arrived at a figure, which according to them, the Plaintiff/Vendee would have earned from the agreement. It was thereafter directed that subject to deposit of this stipulated amount by the Defendant/Owner with the Trial Court, the bar of *lis pendens* would be lifted and he would be free to deal with the property. Their Lordships thus, in effect, converted the suit for specific performance into one for recovery of damages.

10. The only prayer of the Plaintiff/Appellant is that the Order directing the deposit of ₹ 14,50,00,000/- should be upheld. We, therefore, find no useful purpose in discussing *Hindustan Construction Company, Muzaffarpur -vs- The State of Bihar*, AIR 1963 Patna 254, *Tandra Venkata Subrahmanayam -vs- Vegesana Viswanadharaju*, AIR 1968 Andhra Pradesh 190, *Swarnam Ramachandran -vs- Aravacode Chakungal Jayapalan*, (2004) 8 SCC 689 etc. etc.. We are unable to find any reason, at this stage of the proceedings, to uphold this direction in view of the apparent loss incurred by Defendant Nos.1 and 2.

11. The Appeals along with pending applications are disposed of with the issuance of directions to Defendant Nos.1 and 2 to deposit a sum of ₹ 10,00,00,000/- with the Registrar-General of this Court within fifteen days from today. The Registrar-General shall invest the said money in a Fixed Deposit Receipt for an initial period of 366 days, with automatic renewals.

(VIKRAMAJIT SEN)
JUDGE

(MUKTA GUPTA)
JUDGE

August 09, 2010
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