

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

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Judgment reserved on: 20.09.2012
Judgment pronounced on: 24.09.2012

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CS(OS) 1368/2009

M/S NINA GARMENTS(PVT.) LTD.

..... Plaintiff

Through: Mr. Ranjay M., Advocate

versus

M/S UNITECH LTD.

..... Defendant

Through: Mr. Pranav Sapra, Advocate

CORAM:

HON'BLE MR. JUSTICE V.K.JAIN

V.K. JAIN, J.

1. This is a suit for specific performance of the agreement and in the alternative for recovery of the liquidated damages. It is alleged in the plaint that in the year 1989, the plaintiff booked 2 three bed room flats having an area of 1800 sq. ft. each at Curzon Road, New Delhi, by paying Rs.3 lac each to the defendant. It is further alleged that the defendant assured the plaintiff from time to time that the construction work was in progress and the flats would be handed over to it, as soon as the construction was complete. It is further alleged that in January, 1994, when the representative of the plaintiff visited the office of the defendant, he was informed that since there was chronic delay in completion of the project at 7, Curzon Road, some alternative arrangements were being by allotting apartments at

the residential complex being constructed at Janpath Lane. The plaintiff conveyed its acceptance of the alternative allotment vide its letter dated 26.2.1994. However, no allotment to the plaintiff was made even at Janpath Lane and it was informed that the property being situated in Luyten's Delhi, time was being taken for obtaining necessary clearance. It is further alleged that in the year 2005, the plaintiff was informed by the defendant that allotment of the apartments was likely to be expedited. Since no allotment was forthcoming, the plaintiff served a legal notice upon the defendant. Vide its letter dated 17.6.2006, the defendant informed that plaintiff that vide communication dated 5.12.1990, it was informed to the plaintiff to opt for flats at Ferozshah Road which the plaintiff did not accept. The case of the plaintiff is that in fact no offer of allotment of flats at Ferozshah Road was made to it vide letter dated 5.12.1990 and this letter was never received by it. The defendant, with a view to close the matter, forwarded a cheque of Rs.15,45,433/- as full and final settlement of claims. It is further alleged that the plaintiff has always been ready to pay the balance amount of money as and when demanded by the defendant and it is only the defendant which has failed to deliver the flats despite promised to allot the flats. The plaintiff has sought a decree directing the defendant to perform their part of the agreement by allotting two flats to it. As an alternative relief, the plaintiff has sought recovery of damages amounting to Rs.1,50,00,000/- (Rupees one crore and fifty lac) from the defendant.

2. The defendant has contested the suit and has taken a number of preliminary objections. Some of the preliminary objections taken by the defendant are that the alleged agreement between the parties is void being vague and uncertain, the suit is barred by limitation and has not been properly valued for the purposes of court fee and jurisdiction.

On merits, it has been alleged that the registration with the defendant did not confer any legal right upon the plaintiff to seek distribution of the apartments from the defendant since no concluded contract ever came into existence between the parties. It is further alleged that the proposed residential scheme in Connaught Place was only a proposal and not a final scheme, which later on came to be shelved for various reasons. It is also alleged that vide letter dated 5.12.1990, the plaintiff was informed that if it was interested for allotment of apartments at Ferozshah Road, it could contact the defendant company. This offer granted by the defendant to the plaintiff was made out of benevolence, though the plaintiff was not entitled to any such offer. It is further alleged that the plaintiff did not approach the defendant company for allotment of apartments at Ferozshah Road. It is also alleged that the defendant paid a sum of Rs.15,45,433/- to the plaintiff after deducting tax of Rs.2,73,536/- thereby making a total payment of Rs.18,18,969/- which include Rs.12,18,969/- towards interest @ 12% per annum.

3. The following issues were framed on 12.01.2012:

1. Whether there was a concluded contract between the plaintiff and the defendant? OPP
2. Whether the alleged agreement is vague and uncertain and thus a void one, under Section 29 of the Contract Act and if yes, its effect? OPD
3. Whether the suit is time barred? OPD
4. Whether suit has been properly valued for the purpose of court fee and proper court fee has been paid and if not, its effect? OPD
5. Whether the suit has been filed by duly authorized and competent person? OPP
6. Whether the plaintiff is entitled to a decree for specific performance of the agreement? OPP
7. Whether the plaintiff is entitled to any relief i.e. damages other than refund of its money offered by defendant on 17.6.2006? OPP
8. Relief.

Prior to that, on 3.10.2011, the Court had directed that the question with respect to the maintainability of the suit would be considered after framing of issues. Accordingly, arguments were heard on 12.9.2012 and 20.9.2012.

4. The First question which comes up for consideration as to whether there was a concluded contract between the parties for sale of two residential flats to the plaintiff. Admittedly, there is no sale agreement as such between the parties.

Admittedly, there is no allotment letter issued by the defendant to the plaintiff for allotment of one or more residential flats. The admitted factual position in this regard is that vide applications dated 19.5.1989 and 29.7.1989, the plaintiff got registered with the defendant for allotment of the residential apartments at proposed residential scheme in 7, Curzon Road, New Delhi. The application for registration, *inter alia*, reads as under:

“I/we request that/I/We may be registered for a Residential Apartment in your proposed residential scheme in Connaught Place Area, New Delhi. I/we agree that in case the residential apartment registered is allotted to me/us, I/we shall sign and execute the necessary agreement for allotment/ purchase of the same within the period stipulated by the company.

xxxx

I/we agree that if for any reason the company is not in a position to allot the residential apartment applied for, I/we may be considered for the allotment of any alternate property or the refund of the amount deposited with simple interest @ 12% per annum.

xxxx

I/we have noted that the registration amount shall bear a simple interest @ 12% per annum from the date of registration till the allotment amount becomes due to the company. During the period of registration this amount can be withdrawn by

me/us on my/our request by giving at least one month's clear notice to the company."

The receipt dated 19.5.1989 and 29.7.1989 are identical and read as under:

"RECEIPT

No:CR/1

Date: 19.5.89

*"Received a sum of Rs.3,00,000/- (Rupees Three Lacs Only) from M/s Nina Garments (P) Ltd., vide *Cheque No.604737 dated 19.5.89 drawn on State Bank of Saurashtra, Nehru Place Complex, New Delhi towards registration amount for the allotment of residential apartment at the proposed residential scheme in 7, Curzon Road New Delhi.*

For UNITECH

Authorized Signatory

** subject to realization."*

"RECEIPT

No. :CR/8

Date: 29.7.89

*Received a sum of Rs.3,00,000/- (Rupees Three Lacs Only) from M/s Nina Garments (P) Ltd., vide *Cheque No.607049 dated 28.7.89 drawn on State Bank of Saurashtra, Nehru Place Complex, New Delhi towards registration amount for the allotment of residential apartment at the proposed residential scheme in 7, Curzon Road New Delhi.*

For UNITECH

Authorized Signatory

** subject to realization.”*

5. It is undisputable preposition of law that the Court can direct specific performance only of a valid and binding contract between the parties. The following view taken by the Supreme Court in *Mayawanti v Kaushalya Devi*[(1990) 3 SCC 1] in this regard is pertinent:

“8. In a case of specific performance it is settled law, and indeed it cannot be doubted, that the jurisdiction to order specific performance of a contract is based on the existence of a valid and enforceable contract. The Law of Contract is based on the ideal of freedom of contract and it provides the limiting principles within which the parties are free to make their own contracts.....

18. The specific performance of a contract is the actual execution of the contract according to its stipulations and terms, and the courts direct the party in default to do the very thing which he contracted to do. The stipulations and terms of the contract have, therefore, to be certain and the parties must have been consensus ad idem....”

6. The essential ingredients of an agreement for sale of an immovable property were examined by me in *Vijay Kumar Dabas v Chahat Ram and another* [CS(OS) No.506/2010 decided on 30.8.2012), wherein this Court held as under:

“The question whether the agreement of this nature is a valid and concluded contract or not came up for consideration before me in *Braham Singh v Sumitra and Others* [CS(OS) No.1208/2011) and while deciding the IA 8087/2011 (under Order 39 Rule 1 and 2 CPC) filed in the above referred suit on 01.08.2011, I, inter alia, observed and held as under:

“4. Some of the essential ingredients of an Agreement to Sell an immovable property are (i) identity of vendor and purchaser (ii) complete description of the property subject matter of the agreement (iii) amount of consideration to be paid by the purchaser to the seller (iv) time within which the agreement is to be performed and (v) earnest money if any paid to the vendor, if one of these essential ingredients are missing, the agreement between the parties would not amount to concluded contract. A Division Bench of this Court in *Mirahul Enterprises & Ors. Vs. Mrs. Vijaya Srivastava* AIR 2003 Delhi 15 referring to the provisions contained in Section 10 of Specific Relief Act, observed that a true contract requires the agreement of the parties, freely made with full knowledge and without any feeling of restraint and the parties must be ad-idem on the essential terms of the contract and in case it is an Agreement to Sell of immovable property, the law requires that it must

certainly identify the property agreed to be sold and the price fixed as consideration paid or agreed to paid.

5. In Aggarwal Hotels (P) Ltd. vs. Focus Properties (P) Ltd., 63(1996) Delhi Law Times 52, this Court, inter alia, observed as under:

“The four ingredients necessary to make an agreement to sell are: (i) particulars of consideration; (ii) certainty as to party i.e. the vendor and the vendee; (iii) certainty as to the property to be sold; and (iv) certainty as to other terms relating to probable cost of conveyance to be borne by the parties, time, etc. If these ingredients are lacking in the agreement, the obligations contemplated under Section 16 for specific performance for Immovable property would not arise. It is in this background that the receipt dated June 17, 1995 has to be examined.”

This judgment was relied upon by this Court in CS(OS) No.82/1997, Sardar Gurbachan Singh and Ors. vs. Sardar Avtar Singh and Ors. while deciding IA No. 5955/2004.

6. The agreement, alleged to have been executed by defendant No. 1 in favour of the plaintiff on 20th September, 2006, does not identify and in fact could not have identified the property subject matter of the agreement for the simple reason that no plot of land had been allotted to the defendants by that time. At the time this agreement is alleged to have been executed in favour of the plaintiff, it was not known in which colony plot would be allotted to the defendants, when the allotment would take place what would be the size of the plot and which

particular plot would be allotted to the defendants. Therefore, the property, subject matter of the agreement, was incapable of identification at the time the agreement is alleged to have been executed. It is, therefore, difficult to deny that the agreement dated 20th September, 2006, does not constitute a valid and concluded contract for sale of an immovable property to the plaintiff.

7. The learned Counsel for the plaintiff has relied upon the provisions of Section 13 of Specific Relief Act, which deal with right of purchaser or lessee against a person, who at the time of contract has no title or has an imperfect title but subsequently acquires an interest in the property. The reliance on this provision is wholly misplaced since in the case before this Court there was no valid agreement to sell in favour of the plaintiff as at the time, the agreement is alleged to have executed. The learned Counsel has also relied upon *Pundlik Daryaji v. Jainarayan Maliram Shop & Ors* AIR 1949 Nag 83, *Round The Clock Stores Ltd. v. Aggarwal Entertainment Private Limited* MANU/DE/2147/2008 and *Indraraj Singh v. Chaitram & Anr.* AIR 1929 Nag 194. None of these judgments deal with the issue involved in this case and therefore these judgments are of no help.”

7. In the present case, neither the application for registration nor the receipts issued by the defendants company, which are the only documents evidencing the transactions between the parties, discloses the area of the apartment for allotment

of which the plaintiff was registered with the defendant company. Had the proposed residential complex actually come up, the apartments in the complex could have been of different sizes. Unless the area of the apartment is agreed between the parties, there cannot be a concluded contract for sale of the apartment. Had the residential apartments actually come up at 7, Curzon Road, New Delhi, it was quite possible for the plaintiff to refuse to accept the allotment on the ground that the area of the apartments was lesser or larger than its requirements. There was absolutely no certainty with respect to the description or identity of the properties which are alleged to have been booked by the plaintiff with the defendant. This is also not the case of the plaintiff that the area or even the tentative area of the residential apartments registered by it with the defendant was actually agreed between the parties. Therefore, one of the essential ingredients of agreement to sell an immovable property is missing in this case.

8. Neither the applications for registration nor the receipts issued by the defendant to the plaintiff discloses the consideration for sale of the residential apartments to the plaintiff at the proposed residential scheme at 7, Curzon Road, New Delhi. In the absence of an agreed consideration, there could always be disputed between the parties with respect to the price of residential flats, had such flats actually been constructed at 7, Curzon Road, New Delhi. The sale consideration sought by the plaintiff could always have been disputed by the

plaintiff on the ground that the same was excessive and was never agreed by it. Therefore, yet another essential ingredient of an agreement to sell of an immovable property is missing in this case.

One more essential ingredient of a valid agreement to sell of an immovable property missing in this case is the time within which the agreement was to be performed. Neither the application for registration nor the receipts spell out any particular time limit for allotment of the residential apartments at 7, Curzon Road, New Delhi to the plaintiff. In fact, the application for registration clearly indicates that there was no concluded contract between the parties for sale/ allotment of residential apartments at 7, Curzon Road, New Delhi. It is specifically stated by the plaintiff in the application for registration that in case the residential apartments were allotted to it would execute a necessary agreement for allotment/ purchase within the time stipulated by the plaintiff.

9. In the application for registration, the plaintiff specifically agreed that if the defendant is not in a position to allot residential apartments booked by it, the plaintiff would be considered either for allotment of an alternate property or the refund of the amount deposited by the plaintiff with simple interest @ 12% per annum. Since there was no concluded contract between the parties for sale/ allotment of the residential apartments to the plaintiff at 7, Curzon Road, New Delhi, the defendant was well within its right in refunding the amount deposited by

the plaintiff along with simple interest @ 12% per annum, instead of offering an alternate property, though on merits, the case of the defendant is that it had actually offered the flat at Ferozshah Road, New Delhi to the plaintiff but the offer was not availed by the plaintiff company.

10. The learned counsel for the plaintiff contended that since the defendant during the visit of its General Manager to the office of the defendant company in January, 1994 was informed that the defendant company was developing residential apartments at Janpath Lane, New Delhi and the plaintiff had conveyed acceptance of that alternate flats vide its letter dated 26.2.1994, an agreement for allotment/ sale of the residential flats at Janpath Lane came into existence between the parties. I, however, finds no merits in this contention for the simple reason that the plaint does not disclose as to what was the area of the residential apartments which the defendant agreed to allot to the plaintiff at Janpath Lane, what was the sale consideration agreed between the parties for sale/ allotment of the residential apartments at the aforesaid site and what was the time agreed between them with respect to allotment of the residential apartments at Janpath Lane, Even the letter dated 26.2.1994 does not disclose the area of the residential apartments at Janpath Lane, the sale consideration for the aforesaid apartments or the time within which the defendant was to allot those apartments at Janpath Lane. Therefore, it can

hardly be disputed that there was no concluded contract between the parties even for allotment of residential apartments at Janpath Lane.

11. The next question which comes up for consideration in this case as to whether the suit is barred by limitation or not, as far as alternative relief of damages amounting to Rs.1.5 crore is concerned. Article 27 of the Limitation Act provides that in a suit for compensation for breach of a promise to do anything at a specified time, or upon the happening of a specified contingency, the period of limitation is three years from the date when the time specified arrives or the contingency happens.

Before this Court, it is not the case of the plaintiff that the defendant had agreed to allot the residential flats at a specified time or upon happening of specified contingency. Therefore, Article 27 of the Limitation Act would not apply to the present case. That being the position, the suit would be governed by Article 55 of the Limitation Act, which provides that in a suit for compensation for the breach of any contract, express or implied not specifically provided therein the period of limitation would be three years from the date when the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs or (wherein the breach is continuing) when it ceases.

12. Even if I apply Article 55 of the Limitation Act, the period of limitation, commenced from the date when the contract is alleged to have been terminated by

the defendant. This is the plaintiff's own case that vide letter dated 17.6.2006, the defendant company sent to it two cheques, one for Rs.4,70,001/- and the other for Rs.4,75,432/- towards refund of the registration amount along with the interest @ 12% per annum from the date of booking till 31.5.2006, after deducting the income tax deductible at source. It can, therefore, hardly be disputed that the contract between the parties was allegedly broken by the defendant on 17.6.2006 when this letter was sent to the plaintiff along with the cheques mentioned therein. The present suit, having been filed on 29.7.2009, therefore is barred by limitation.

13. It appears from the stamps on the back of the Memo of the Parties that initially the suit was filed on 1.7.2009, but it was returned with objections and was refilled firstly on 9.7.2009, then on 16.7.2009 and lastly on 29.7.2009. The court fees appears to have been filed only on 28/29.7.2009, the same having been obtained only on 28.7.2009. No application was filed by the plaintiff company for extension of time to file deficient court fees or for condonation of delay in refiling the suit. Therefore, the suit cannot be deemed to have been filed prior to 29.7.2009.

14. During the course of arguments, the learned counsel for the plaintiff submitted that initially the plaintiff had filed Petition No.3 of 2007 before the National Consumer Disputes Redressal Forum which came to be dismissed as withdrawn on 19.3.2007, with liberty to file a complaint before the appropriate forum by suitably amending it. Thereafter, the Consumer Complaint No.49/2007

was filed by the plaintiff before the said Commission which was dismissed as withdrawn on 18.9.2007, following by an OP No.116 of 2007 which came to be dismissed by the said Commission on 3.4.2008. The Misc. Application No.143 of 2008 filed by the plaintiff for recall of the order dated 3.4.2008 was dismissed by the Commission on 1.8.2008 and the Special Leave Petition filed by the plaintiff against that order was dismissed by the Supreme Court on 19.12.2008. Referring to the above referred proceedings, the learned counsel for the plaintiff submitted that the plaintiff was entitled to exclusion of time under Section 14 of the Limitation Act.

15. Section 14 of the Limitation, to the extent it is relevant for the purpose of this suit reads as under:

“14.Exclusion of time of proceeding bonafide in court without jurisdiction.

(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.”

Order VII Rule 6 of the Code of Civil Procedure, to the extent it is relevant, provides that where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaintiff shall show the ground upon which exemption from such law is claimed, provided that the court may permit the plaintiff to claim exemption from the law of limitation on any ground not set out in the plaint, if such ground is not inconsistent with the grounds set out in the plaint.

In the case before this Court, the plaintiff has not specifically claimed benefit of Section 14 of the Limitation Act in the plaint. The grounds requisite for claiming exclusion of time under Section 14 of the Limitation Act have not been expressly pleaded in the plaint. No application seeking exclusion of time under Section 14 of the Limitation Act has been filed. A perusal of Section 14 of the Limitation Act, would show that in order to claim benefit of Section 14, the plaintiff must plead and prove the following:

- “(a) The exemption claimed should be for the period the plaintiff has been prosecuting a civil proceeding in a court of first instance or of appeal or revision against the defendant,
- (b) such proceedings prosecuted should have been done with due diligence and in good faith,
- (c) the rejection of the claim by such court before which it is prosecuted should be on account of defect in jurisdiction or other cause of a like nature which disentitles such court to entertain it.”

Unless ingredients of Section 14 are pleaded, the defendant does not get an opportunity to rebut the same and, therefore, it is not possible for the Court to frame an issue and record the evidence with respect to the grounds on which such benefit can be availed by the plaintiff. Had the essential ingredients for applicability of Section 14 of the Limitation Act been pleaded, the defendant would have an opportunity to counter such a claim by pleading that the proceedings before the National Consumer Disputes Redressal Forum were not prosecuted by the plaintiff with due diligence and good faith. Moreover, the orders passed by the said Commission do not indicate that the proceedings initiated before the Commission were rejected on the ground that the Commission did not have the jurisdiction in the matter nor do the order passed by the Commission disclose any cause of a like nature. Hence, the ingredients for applicability of Section 14 of the Limitation Act are even otherwise not made out from the orders passed the Commission.

16. For the reasons stated hereinabove, I am of the view that (i) the present suit is barred by limitation; (ii) there was no concluded contract between the parties for sale/ allotment of the residential apartments by the defendant to the plaintiff; and (iii) the defendant was well within its right in refunding the registration money to the plaintiff along with interest thereon @ 12% per annum, instead of offering an alternate accommodation.

17. Since the registration money along with simple interest @ 12% per annum has already been offered to the plaintiff, along with the letter dated 17.6.2006, the plaintiff is not entitled to any further relief from the Court.

It has come in paragraph 9 of the replication that the cheque of Rs.14,45,430/- sent by the defendant to the plaintiff was not acceptable to the plaintiff and the same has been retained in the office of the Advocate of the plaintiff without prejudice to the rights and interests of the plaintiff. If the cheques, one for Rs.4,70,001/- and the other for Rs.4,75,432/- have not been encashed so far, the defendant would remit the amount of the aforesaid cheques to the plaintiff within four weeks from today along with interest on the said amount @ 12% per annum. The suit stands disposed of in terms of above order. There shall be no orders as to costs. Decree sheet be drawn accordingly.

V.K.JAIN, J

SEPTEMBER 24, 2012/rd