

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

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Judgment delivered on 16.07.2012

+ CS(OS) No. 65/2012

DAVENDER KUMAR SHARMA Plaintiff
Through: Mr H.C. Mittal and Mr Manoj Mital, Advs.

versus

MOHINDER SINGH & ORS Defendants
Through: Mr Sunil Sabharwal, Adv for Ds-1 to 10

CORAM:
HON'BLE MR. JUSTICE V.K.JAIN

JUDGMENT

V.K.JAIN, J. (ORAL)

IA No. 404/2012 (O. 39 R. 1&2 CPC) and IA No. 8907/2012 (O 39 R. 3A & 4 CPC), by D-1 to 10

1. This is a suit for specific performance of the agreements, alleged to have been executed between the parties. The case of the plaintiff in nutshell is that vide agreement to sell dated 14.03.2011 and a Memorandum of Understanding of even date, defendants No. 1 to 10, who are the owners of Property No. MPL No. WZ-14-C, built on plot Ahata No. 40, measuring 200 sq. yards, out of Khasra No. 217,

218, 219 & 220, Manohar Park, Delhi, agreed that the ground floor of the aforesaid property would be sold by them to the plaintiff for a total sale consideration of Rs 95 lakh. It was further agreed that on receiving possession of the ground floor of the aforesaid property, the plaintiff would demolish the same and construct a four-storey building on it. The ground floor and the third floor of that building were to come to the share of the plaintiff, whereas, the first and second floor were to come to the share of defendants No. 1 and 2. Defendants No. 3 to 10 were to get the amount of Rs 95 lakh. It is an admitted position that a sum of Rs 66,16,666/- was paid by the plaintiff either directly or through defendant No. 11 to defendants No. 1 to 10. However, neither defendants No. 3 to 10 have surrendered their share in the suit property in favour of defendants No. 1 and 2 nor has the possession of the property been given to the plaintiff. The plaintiff has accordingly claimed the following reliefs in this suit:-

- a) pass a decree for specific performance of the Agreement to Sell dated 14.03.2011 in favour of the plaintiff and against defendants 1 to 10 directing defendants 1 to 10 to execute Sale Deed of the Ground floor and hand over its vacant physical possession of the suit property bearing MPL-No. WZ-14-C, built on plot ahata No. 40 measuring 200 yds., situated in Manohar Park, out of Khasra No. 217, 218, 219 & 220 area of village Basai Darapur, Delhi in favour of the plaintiff/or his nominated person on receipt of the balance sale consideration, and on the failure of the defendants-1 to 10, the above acts/functions may be got done by the Hon'ble Court through the Registrar of Hon'ble Court;

b) direct defendants 1 to 10 to perform their parts of the MOU dated 14.03.2011 and by getting the building plan of the four storeyed with stilt parking building from the MCD and to be constructed by the plaintiff, the defendants 1 to 10 (especially defendant Nos. 1 and 2) to execute sale deed of the third floor with roof/terrace rights and hand over its physical possession of the suit property bearing MPL No. WZ-14-C, built on plot ahata No. 40 measuring 200 yds., situated in Manohar Park, out of khasra No. 217, 218, 219 & 220 area of village Basai Darapur, Delhi in favour the plaintiff/or his nominated person-defendant No. 11 Sh. Ishwar Chand Bansal, and on the failure of the defendants 1 to 10, the above acts/functions may be got done by the Hon'ble Court through the Registrar of the Hon'ble Court;

c) pass a decree in favour of the plaintiff and against the defendants 1 to 10 for permanent injunction restraining the defendants 1 to 10 from alienating, selling, creating third party interest or parting with possession of the suit property, bearing MPL No. WZ-14-C, built on plot ahata No. 40 measuring 200 yds., situated in Manohar Park, out of khasra No. 217, 218, 219 & 220 area of village Basai Darapur, Delhi.”

2. The case of the plaintiff is that the balance sale consideration was to be paid at the time of execution of the sale deed and prior to that defendants No. 3 to 10 had to surrender their share in the suit property in favour of defendants No. 1 and 2, in order to enable them to execute the sale deed in his favour. The case of the contesting defendants, on the other hand, is that the whole of the payment of Rs 95 lakh was to be made within 120 days from the date of the agreement.

3. Relying upon the Supreme Court decision in **Vinod Seth v. Devinder Bajaj & Anr.** 2010 (6) SCALE, the learned counsel for the defendants No. 1 to 10 has

submitted that a contract of the nature set up by the plaintiff cannot be enforced and, therefore, no interim order can be passed, restraining them from creating any third party interest in the suit property, during pendency of the suit. In the case before Supreme Court, the plaintiff had an oral agreement between the parties and the oral terms alleged by him were as follows:-

“a) The defendants will apply to the DDA for conversion of the above property from leasehold to freehold and within 2-3 months the defendants will handover vacant physical possession of the above property to the plaintiff.

b) The plaintiff will reconstruct the above property from his own money/funds with three storeys i.e. ground floor, first floor and second floor.

c) Out of the said reconstructed three storeyed building, the plaintiff shall be entitled to own and possess the ground floor; and the first and second floors will be owned and possessed by the defendants.

d) Besides bearing the expenses of construction and furnishing etc. of the proposed three storeyed building, the plaintiff shall also pay a sum of Rs. 3,71,000/- to the defendants at the time of handing over possession of the above house for reconstruction.

e) Out of the agreed consideration of Rs.3,71,000/-, a sum of Rs.51,000/- was paid to the defendants in cash and the remaining consideration of Rs.3,20,000/- was to be paid to the defendants at the time of handing over possession of the above house for reconstruction. In token of the same a Receipt for Rs.51,000/- was duly executed by defendant No.1.

f) On getting conversion of the above property from leasehold to freehold, the above agreement/proposed collaboration of the property bearing No. A-1/365, Paschim Vihar, New Delhi and the above terms and

conditions were to be reduced into writing vide an appropriate Memorandum Of Understanding to be duly executed by the parties i.e. the builder and the owners of the above property.”

It was also alleged by him that he had paid a sum of Rs 51,000/- to respondent No. 1 who had also executed a receipt in his favour. Alleging failure of the respondents to comply with the agreement, he filed a suit for specific performance of the collaboration agreement.

No application for interim relief was filed in that case. The learned Single Judge of this Court directed the plaintiff to file an affidavit/undertaking to the Court to the effect that in the event of his not succeeding in the suit, he will pay a sum of Rs 25 lakh by way of damages to the defendants. The intra-court appeal against that order having been dismissed by the Division Bench of this Court, the matter was taken by the plaintiff to Supreme Court by way of Special Appeal. The Court, while disposing of the appeal, *inter alia*, observed and held as under:-

“8.1) It is doubtful whether the collaboration agreement, as alleged by the appellant, is specifically enforceable, having regard to the prohibition contained in section 14(1) (b) and (d) of the Specific Relief Act, 1963. The agreement propounded by the appellant is not an usual agreement for sale/transfer, where the contract is enforceable and if the defendant fails to comply with the decree for specific performance, the court can have the contract performed by appointing a person to execute the deed of sale/transfer under Order XXI Rule 32(5) of the Code of Civil Procedure (‘Code’ for short). The agreement alleged by the appellant is termed by him as a

commercial collaboration agreement for development of a residential property of the respondents. Under the alleged agreement, the obligations of the respondents are limited, that is, to apply to DDA for conversion of the property from leasehold to freehold, to submit the construction plan to the concerned authority for sanction, and to deliver vacant possession of the suit property to the appellant for development. But the appellant/plaintiff has several obligations to perform when the property is delivered, that is, to demolish the existing building, to construct a three-storeyed building within one year in accordance with the agreed plan, deliver the first and second floors to the respondents and also pay a token cash consideration of Rs.3,71,000/-. The performance of these obligations by appellant is dependant upon his personal qualifications and volition. If the court should decree the suit as prayed by the appellant (the detailed prayer is extracted in para 3 above) and direct specific performance of the “collaboration agreement” by respondents, it will not be practical or possible for the court to ensure that the appellant will perform his part of the obligations, that is demolish the existing structure, construct a three-storeyed building as per the agreed specifications within one year, and deliver free of cost, the two upper floors to the respondents. Certain other questions also will arise for consideration. What will happen if DDA refuses to convert the property from leasehold to freehold? What will happen if the construction plan is not sanctioned in the manner said to have been agreed between the parties and the respondents are not agreeable for any other plans of construction? Who will decide the specifications and who will ensure the quality of the construction by the appellant? The alleged agreement being vague and incomplete, require consensus, decisions or further agreement on several minute details. It would also involve performance of a continuous duty by the appellant which the court will not be able to supervise. The performance of the obligations of a developer/builder under a collaboration agreement cannot be compared to the statutory liability of a landlord

to reconstruct and deliver a shop premises to a tenant under a rent control legislation, which is enforceable under the statutory provisions of the special law. A collaboration agreement of the nature alleged by the appellant is not one that could be specifically enforced. Further, as the appellant has not made an alternative prayer for compensation for breach, there is also a bar in regard to award of any compensation under section 21 of the Specific Relief Act.”

4. Section 14 of Specific Relief Act, to the extent it is relevant, reads as under:-

14. Contracts not specifically enforceable.-(1) The following contracts cannot be specifically enforced, namely:--

(b) a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms;

(d) a contract the performance of which involves the performance of a continuous duty which the court cannot supervise.

5. In the case before this Court, the case of the plaintiff is that under the agreement, he has to construct a four-storey building, after demolishing the existing construction and out of the four floors to be constructed by him, ground and third floor have to come to his share, whereas the first and the second floor have to go to defendants No. 1 and 2. There is no agreement between the parties as regards the specifications of the proposed construction on the suit property. The agreement does not say as to what would happen if the plan, agreed between the parties, is not

sanctioned or in the event a plan for construction of floors on the suit property is not sanctioned by the Municipal Corporation/DDA, as the case may be. The agreement is silent as to what happens if the parties do not agree on the specifications of the proposed construction. No mechanism has been agreed between the parties for joint supervision and quality control during construction. There is no agreement that the specifications of the construction will be unilaterally decided by the plaintiff and/or that the quality of the construction will not be disputed by the defendants. There is no provision in the agreement with respect to supervision of the construction. The agreement does not provide for the eventuality, where the construction raised by the plaintiff is not found acceptable to the defendants. The learned counsel for the parties concede that no time has been fixed in the agreement for completion of the proposed new construction. The agreement is silent as to what happens if the plaintiff does not complete the construction or even does not commence it at all after taking possession from the defendants. It is not possible for the Court or even a Court Commissioner to supervise the construction. In these circumstances, it is difficult to dispute that the agreement between the parties is in agreement of the nature envisaged in Section 14(1) (b) and (d) of Specific Relief Act. If this is so, the contract is not specifically enforceable. Therefore, prima facie, the plaintiff has failed to make out a case with respect to enforceability of the agreements set up by him. Hence, he is not entitled

to grant of any injunction, restraining the defendants from creating third party interest in the suit property or dealing with it in any manner they like.

As regards the amount received by defendants No. 1 to 10 from the plaintiff, the learned counsel for the defendants No. 1 to 10, on instructions, states that the aforesaid amount along with interest on that amount at the rate of 12% per annum from the date of its receipt will be deposited by way of an FDR in the name of Registrar General of this Court, within four weeks from today.

The applications stand disposed of accordingly.

The observations made in this order being tentatively would and prima facie would not affect the suit on merits.

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The parties are directed to appear before Joint Registrar on 29.08.2012 for admission/denial of the documents and the matter be listed before Court for framing of issues on 08.10.2012.

V.K.JAIN, J

JULY 16, 2012
BG