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

+IA Nos. 4895/2010 (under Order 7 Rule 11 CPC filed by defendant no. 1) and 4894/2010 (under Order 7 Rule 11 CPC filed by defendant nos. 2-9) in CS(OS) 142/2010

Decided on 20th March, 2012

TILAK RAJ BHAGAT

..... Plaintiff

Through :Mr. Rajeev Saxena and
Mr. Rohan Ahuja, Advs.

Versus

RANJIT KAUR & ORS

..... Defendants

Through :Mr. Dinesh Garg and
Ms. Rachna Agarwal, Advs.

Coram:

HON'BLE MR. JUSTICE A.K. PATHAK

A.K. PATHAK, J. (ORAL)

1. Plaintiff has filed this suit for Specific Performance, declaration and permanent injunction against the defendant. It has been prayed as under:-

“a) pass a decree thereby directing the defendants for Specific Performance of the M.O.U./Agreement to Sell dated 26.06.2007 upon receipt of the balance amount as to be negotiated as a first option to be given to the plaintiff for the sale of the suit property with due and proper

adjustment of the advance amount of ₹8,00,000/- (Rupees Eight Lacs Only) and for the purpose to execute all necessary documents, Conveyance Deeds including amongst other due and proper Sale Deed for the transfer of the complete house property No. C-352, Defence Colony, New Delhi with handing over of the complete vacant, peaceful possession of the premises in question too to be vested unto the plaintiff;

b) pass a decree by way of a declaration thereby declaring the Sale Deed, allegedly dated 12.03.2009 as illegal, unlawful and non-est being executed in gross breach of the terms and conditions of the Memorandum of Understanding without giving the plaintiff the first option, reserved on the basis of the advance payments made by him in this regard;

c) pass a decree by way of permanent injunction thereby permanently restraining the defendants, their attornies, assigns, agents, employees, representatives etc. from in any way forcibly evicting or dispossessing the plaintiff from the suit property or in any way parting with, transferring, assigning or creating any third party interest in the suit property in any manner whatsoever;

d) grant costs of the suit in favour of the plaintiff and against the defendant; and

e) pass such other order/s which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case, in favour of the plaintiff and against the defendant, in the interest of justice, equity and fair trial."

2. A perusal of the plaint makes it clear that the plaintiff primarily seeks Specific Performance of the Memorandum of Understanding dated 26th June, 2007 (hereinafter referred to as “MOU”) entered into between him and Late Mr. Prabjot Singh , with regard to property bearing No. C-352, Defence Colony, New Delhi (for short hereinafter referred to as “suit property”), who was having share in the suit property being legal heir of Late Sardar Gurbachan Singh. Suit property was owned by Late Sardar Gurbachan Singh. All other reliefs are consequential to the main relief of specific performance.

3. Defendant no. 1 is widow of Late Mr. Prabjot Singh. Defendant nos. 2 to 9 have been impleaded as joint owners of the suit property as also being successors-in-interest to the estate of Late Sardar Gurbachan Singh. Case of the plaintiff is that he was occupying the ground floor of the suit property as a tenant. He was paying monthly rent of ₹3000/-. During his life time, Late Mr. Prabjot Singh negotiated with him for sale of the complete suit property and even accepted ₹8,00,000/- (Rupees Eight Lacs Only) towards advance. Sale deed could not have been executed as there were serious family problems between Late Mr. Prabjot Singh, his brothers and their children, inasmuch as, he was also not keeping well, thus, he assured that the plaintiff would be given first option

to purchase the suit property, after the things are settled amongst the family members. After the death of Mr. Prabjot Singh on 23rd September, 2007, plaintiff informed the family members of Late Mr. Prabjot Singh, vide letter dated 24th October, 2007, about his right to buy the suit property against a token advance of ₹8,00,000/- (Rupees Eight Lacs Only) received by Late Mr. Prabjot Singh. Vide notice dated 21st March, 2009, defendant nos. 1 to 8 intimated the plaintiff that they had sold the suit property to defendant nos. 9 to 12 vide Sale Deed dated 6th March, 2009, hence the suit.

4. A perusal of plaint further makes it clear that no formal Agreement to Sell was executed between the plaintiff and Late Mr. Prabjot Singh, inasmuch as, even sale consideration or the time period for completing the sale transaction etc. has been mentioned in the MOU. At that stage, even the suit property was embroiled in the family disputes, thus, share of Late Mr. Prabjot Singh was uncertain, inasmuch as it has not been pleaded that other family members had authorized Late Mr. Prabjot Singh to sell the property. Late Mr. Prabjot Singh was not the exclusive owner of the suit property but was only having some share therein, which has not been even specified in the MOU.

5. MOU reads as under:-

“MEMORANDUM OF UNDERSTANDING

THIS MEMORANDUM OF UNDERSTANDING is executed on this 26th June, 2007 BETWEEN Mr.PROBJOT SINGH son of late Sardar Gurbachan Singh, resident of 65, Prtapaditya Road, Kolkata 700 026, hereinafter called the “LESSOR” (which expression shall include his heirs, successors, legal representatives) of the ONE PART AND SHRI TILAK RAJ BHAGAT on M/s. Lennarts India, 14, C.S.C. Building, Sheikh Sarai, Phase-II, New Delhi 110 017, hereinafter called the ‘LESSEE’ of the OTHER PART.

That the Lessee is in occupation of the entire ground floor flat of House No.C-352, Defence Colony, New Delhi-110 024, since 1978.

That the lease with regard to the above premises had been extended from time to time. However, in the mean while the Lessee has paid an amount of Rs.8,00,000/- (Rupees eight lakh) only to the daughter of Lessor which amount has been agreed between the parties to be considered as an advance against the said property No.C-352, Defence Colony, New Delhi 110 024, in which regard the Lessor has already dicussed the matter through his brother Mr.G.S.Sondhi in Delhi.

That the Lessor has accepted the said amount of Rs.8,00,000/- (Rupees two lakh) only as advance against the sale of the property adjustable at the time of the execution of the sale deed as there had been serious family problems in the family of the Lessor pertaining to properties in Delhi, Kolkata and Noida and to keep the Lessee safe and secured the Lessor has already issued a letter of confirmation to the Lessee.

That however, till such time as the issues within the members of the family of the lessor are settled and the sale of the

property is finalized with the Lessee, who shall have first preference in this regard. It is agreed between the parties that the Lessee shall continue his use, occupation and possession of the entire ground floor consisting of two bed rooms, two bath rooms, drawing cum dining room, kitchen, garage and one servant quarters along with front lawn and back court yards for a fixed period of 3 (three) years commencing from 01st July, 2007 to 30th June, 2010 at a rent of Rs.3,000/- (Rupees three thousand) only per month which shall be paid by him till the time of execution of the necessary sale for the maintenance and upkeep of the premises and the interest on the said amount of Rs.8,00,000/- (Rupees eight lakh) only shall be worked out and adjusted at the time of execution of the sale deed. It is agreed between the parties that:

1. The Lessee shall pay to the Lessor for the premises the agreed rent of Rs.3,000/- (Rupees three thousand) only per month in advance before the 05th of each calendar month. The Lessee shall also pay Rs.500/- (Rupees five hundred) only as miscellaneous charges as is being paid earlier since 1999.
2. That the lease has been granted for a fixed period of 3 (three) years commencing from 01st July, 2007 to 30th June, 2010 at a rent of Rs.3,000/- (Rupees three thousand) only per month plus Misc. charges of Rs.500/- as usual.
3. That the Lessee shall pay the electricity charges according to the meter reading direct to the authority concerned.
4. That the Lessee shall use the demised premises for residential purpose only and not to use the demised premises as Godown or for any commercial purpose or any other purposes, which goes against the Rules and Regulations of Municipal Corporation, Delhi, Defence Colony Welfare Association and

L&DO. In case the Lessee uses the demised premises for any other purpose than residential, legal action would be taken and the Lease Agreement will be terminated.

5. That the Lessee shall maintain the lawn at his own cost.

6. That the Lessee shall use the demised premises for residential purpose only.

7. That the lessee shall not sublet the demised premises without the prior written consent of the Lessor.

8. That the lessee shall be responsible to pay any breakages, damages done to the sanitary, electricals and other fittings during the tenancy period.

9. That the Lessee shall not carry out any additions, alterations in relation to the demised premises, building layout, fittings & fixtures without the written consent of the Lessor.

10. That the Lessee shall permit the Agents of Lessor to enter the demised premises for inspection and carry out the repairs etc. at reasonable time as and when necessary.

11. That the Lessor shall pay all the taxes whatsoever in relation to the demised premises.

12. That day to day repairs such as fuses, leakages and water taps have to be done by the Lessee at his own cost but in case of any major repairs of the demised premises which shall be attended by the Lessor at his own cost.

13. That the Lessor shall do the painting polishing, distempering of the demised premises during the period of tenancy commencing from 01st July, 2007 to 30th June, 2010 as and when necessary.

14. That before the expiry of the lease period, the parties shall, if the family disputes of the lessor gets sorted out, execute

necessary Sale Deed, however, in case the negotiations shall fail, the Lessee shall be entitled to specific performance of the agreement of sale or seek refund of the amount paid as advance along with interest as prevailing at the relevant time and shall then deliver the vacant possession of the demise premises with all the fittings and fixtures intact.

15. The Lessee shall not make major repairs at his own cost to the demised premises without the prior written permission of the Lessor.

16. That the Lessor and the Lessee represent and warrant that they are fully empowered and authorizes and able to make this lease.

IN WITNESS WHEREOF the Lessor and the Lessee have hereunder subscribed their respective signatures on this the day, month and year first above written in presence of witness.”

6. It may be worthwhile to mention here that while considering an application under Order 7 Rule 11 CPC, the Court has to look at the averments made in the plaint by taking the same as correct on its face value as also the documents filed in support thereof. Neither defence of the defendant nor averments made in the application have to be given any weightage. Plaint has to be read as a whole together with the documents filed by the plaintiff. In Sri Kishan Vs. Shri Ram Kishan and Ors.¹⁵⁹ (2009) DLT 470, a Single Judge of this Court observed thus, “Order 7 Rule 11 of the Civil Procedure Code contemplates that where the suit appears from the averments

made in the plaint to be barred by any law, then the plaint can be rejected. The legal position is that to decide whether a plaint is liable to be rejected under Order 7 Rule 11, averments in the plaint have to be read without looking at the defence and thereupon it has to be seen whether on the averments made in the plaint under Order 7 Rule 11 of the Code of Civil Procedure gets attracted. For rejection of the plaint under Order 7 Rule 11 the averments in the plaint should be unequivocal, categorical and specific leading to only conclusion that the plaint is barred”.

7. A perusal of the averments made in the plaint coupled with the terms and conditions of the MOU clearly indicate that the necessary ingredients to constitute a valid agreement for sale of an immovable property are totally missing in this case. Four ingredients, that is, (1) particulars of consideration, (2) certainty as to party i.e. the vendor and the vendee, (3) certainty as to the property to be sold and (4) certainty as to other terms relating to probable cost of conveyance to be borne by the parties time etc; are necessary to constitute a valid agreement. In absence of these ingredients specific performance of the agreement to sell cannot be granted. In *M/s. Aggarwal Hotels (P) Ltd. vs. M/s. Focus Properties (P) Ltd.*, 1996 II AD (Delhi) 625, a Single Judge of this court has held that 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 as contemplated under Section 16 of Specific Relief Act, which provides specific performance of immoveable property, would not arise.

8. In *Smt Mayawanti vs. Smt. Kaushalya Devi*, 1990 (2), SCR 350, Supreme Court has held that 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. Where a valid and enforceable contract has not been made, the court will not make a contract for them. Specific performance will not be ordered if the contract itself suffers from some defect, which makes the contract invalid or unenforceable. In the said case there were two co-sharers of the property and agreement was only with one person. On the material available on record Court came to the conclusion that the share of the vendor

was uncertain. In this context it was held that 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. The burden of showing the stipulations and terms of the contract and that the minds were ad idem is, of course, on the plaintiff. If the stipulations and terms are uncertain, and the parties are not ad idem, there can be no specific performance, for there was no contract at all.

9. In Mahesh Chand Sharma Vs. Jaswant Rai Hora 2002 IV AD (Delhi) 334 sale consideration was not mentioned and the court held that “it cannot be termed that there was an agreement of sale and the sale consideration is not decided. This makes the very document i.e. agreement of sale purported to have been executed suspicious and not tenable.” In Hem Chandra Choudhary vs. Ajadhya Bala Choudhury and Ors. MANU/GH/0054/1968, in the similar facts; it was held as under:-

“10. In the stipulation which is under my consideration, it is, said that the lessee will buy the land if he agrees to do so. Obviously he is not bound by this stipulation to buy the land even if it is offered to him.

So, in brief, in the stipulation in the case before me (1) no, time limit is fixed; (2) no price is specified; and (3) it is clearly said that the lessee will buy it if he agrees to do so.

11. In these circumstances, this stipulation cannot be a completed contract. There being no completed contract the question of specific performance or violation of a contract cannot arise”.

10. In this case, first of all MOU is basically a Lease Agreement, as the terms and conditions stipulated therein suggest, Plaintiff was only given an opportunity to purchase without mentioning the sale consideration and share of Mr.Prabjot Singh. Secondly, this agreement lacks in material particulars to constitute an agreement to sell. In the agreement (1) sale consideration has not been specified, (2) no time limit has been fixed for completion of the sale transaction and (3) no shares of the successors-in-interest of the original owner Late Sardar Gurbachan Singh have been specified. Accordingly, it can safely be concluded that no concluded contract for sale of the suit property came in existence. MOU does not fulfill the ingredients of an Agreement to Sell. It is for the parties to fix the sale consideration and specify the same in the Agreement to Sell. It is not for the court to bring the parties to the negotiation table and mediate between them to arrive at the agreed sale consideration. Facts of this case show that there was no consensus

between the parties with regard to the sale consideration as also the share of Late Mr. Prabjot Singh, inasmuch as, other co-sharers are not even party to the MOU. In my view, vide this MOU in question no concluded contract came in existence with regard to the sale of property.

11. Counsel for the plaintiff has placed reliance on Naresh Gaur & Ors. vs. Uma Gupta, 163(2009) DLT 25, Nisha Raj & Anr. vs. Pratap K. Kaula & Ors., 151 (2008) DLT 402, Rakesh Kumar Jain & Ors. vs. Devender Singh Mehta (deceased) through his LRs. 83 (2000) DLT 615, Mohan Lal Ahuja & Ors. vs. Tarun Chandra, 157(2009) DLT 216 and Shivaji vs. Raghunath (dead) by LRs and Ors. AIR 1997 SC 1917. The judgments, relied upon by the counsel for the plaintiff, are in the context of different facts and are not relevant to the point in issue involved in this case.

12. It is well settled that the court can exercise its power under the Code of Civil Procedure, 1908 (“CPC” for short) at every appropriate stage in order to nip frivolous cases or those which are clearly barred in law and reject the plaint by exercising its power under Order 7 Rule 11 CPC. In J.D. Jain & Ors. vs. Sharma Associates & Ors., 167 (2010) DLT 766, a Single Judge of this Court held as under:-

“20. It has been held more than 30

years ago by the Supreme Court in T. Arivanandam v. T. Satyapal, AIR 1977 SC 2421 that if on a meaningful – not formal reading of the plaint it is manifestly found to be vexatious and meritless, in the sense of not disclosing a right to sue, the Judge should exercise his power under Order 7 Rule 11 CPC taking care to see that the ground mentioned therein is fulfilled. The same principles were being reiterated in I.T.C. Ltd. vs. Debts Recovery Appellate Tribunal, AIR 1988 SC 634, in the following terms:

‘Question is whether a real cause of action has been set out in the plaint or something purely illusory has been stated with the view to get out of Order 7 Rule 11 CPC. Clever drafting creating illusions are not permitted in law and a clear right to sue should be shown in the plaint.’

Thus, the Court should always be vigilant for scrutinizing the pleadings and materials placed before it to ascertain whether the litigation is frivolous or maintainable at all. The Supreme Court also observed that the Court must exercise its powers under CPC at every appropriate stage in order to nip frivolous cases or those which are clearly barred in law.”

13. For the foregoing discussion, suit is dismissed. All other pending applications are also disposed of as infructuous.

A.K. PATHAK, J.

MARCH 20, 2012

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