

IN THE HIGH COURT OF DELHI AT NEW DELHI

CS (OS) No. 299 of 2005

Reserved on: September 10, 2013

Decision on: October 8, 2013

ULTIMATE BUILDERS & DEVELOPERS

P. LTD.

..... Plaintiff

Through: Mr. R. L. Kohli, Advocate.

versus

SAPAN CHOPRA & ANR.

..... Defendants

Through: Mr. Anil Mittal, Advocate.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

8.10.2013

CS (OS) No. 299 of 2005 & IA No.13988 of 2013

1. Ultimate Builders & Developers (P) Ltd. has filed this suit against Mr. Sapan Chopra and his mother Mrs. Madhu Chopra, Defendants 1 and 2 seeking specific performance of an agreement to sell dated 11th August 2004 in respect of the immovable property i.e. first and second floor with roof rights of the property at 72, Kohat Enclave, Pitampura, Delhi (hereafter the 'suit property').

2. The Plaintiff states that the aforementioned agreement to sell was executed by the Defendants in its favour in respect of the entire first and second floor with roof rights of the suit property for a total sale consideration of Rs.43,50,000 on 11th August 2004. Rs. 8 lakhs was

paid by the Plaintiff to the Defendants as part consideration. The receipt dated 11th August 2004 has been marked as Exhibit P-2 and the agreement to sell as Exhibit P-1. Both documents have been admitted by the Defendants.

3. In terms of Clause 1 of the agreement to sell, the payment of the balance amount of Rs.35,50,000 and the execution of the registration of the sale deed was to be completed within three months from 11th August 2004 or from handing over of the copy of the mutation letter by the Defendants to the Plaintiff whichever is later. In terms of Clause 10 of the agreement to sell, if any of the parties do not perform their part of the agreement “then the other party shall have right to get the said transaction completed through the court of law under the suit for specific performance”. In terms of the agreement, the entire ground floor was to be retained by the Defendants. As per Clause 18 the Plaintiff was to complete the construction work at the ground floor portion within ten months from the date of fresh sanction of the building plan and after completion of the ground floor, the Plaintiff was to hand over the ground floor portion to the Defendants. The agreement to sell provided that the Defendants would obtain ‘No Objection Certificate’ (‘NOC’) from the Municipal Corporation of Delhi for the house tax and NOC/no dues certificate from the Kohat Co-operative House Building Society (‘Society’) at their own costs and expenses. The construction of the ground floor was to be carried out in accordance with the working plan annexed to the agreement and signed by both parties in token of their approval. The agreement

recorded in Clause 7 that the Defendants have delivered the actual and physical vacant possession of the suit property to the Plaintiff “to resume the construction work at the site”. The expenses incurred in the sanction of the building plan was to be paid by the Plaintiff exclusively. The Defendants were to have right to the terrace of the property only for the maintenance of the water tanks and TV antenna. Clause 22 stated that the Defendants would demolish the existing construction in the front courtyard/lawn before the final payment and the expenses of such demolition would be borne by the Plaintiff. Clause 22 provided that the Defendants “shall complete the formalities with regard to mutation of the property in their favour in the records of the MCD at their own costs and expenses before the final transaction of the property under sale.” It was further agreed in Clause 25 that three small mezzanine rooms would be constructed in the stairs of the building of which the one on the lower side shall belong to the Defendants whereas the middle and top mezzanine rooms would belong to the Plaintiff.

4. Clause 26 of the agreement provided that upon final payment, execution and registration of the sale deed by the Defendants in favour of the Plaintiff, and on handing over of the vacant possession of the entire building by the Defendants to the Plaintiff, the Plaintiff shall pay a sum of Rs.5,000 per month to the Defendants till the date of completion of the ground floor portion and handing over of its possession to the Defendants.

5. On 11th December 2004, the Plaintiff is stated to have paid the Defendants another sum of Rs.50,000 by cheque as the Defendants stated that they wanted the sum for paying the security deposit to the landlord of the premises which they were taking on rent.

6. The Plaintiff stated that the Defendants applied to the MCD for sanction of the plan on 30th December 2004 and the document in that regard has been marked as Exhibit PW-1/4.

7. The Plaintiff's case is that although the Defendants were requested to execute and have the sale deed registered by receiving the balance sale consideration at the time of execution of sale deed before the Sub Registrar, the Defendants kept delaying on one pretext or the other. Exhibit P-3 is a letter dated 25th January 2005 from Defendant No.2 to the Plaintiff requesting for extension of the date for the execution of the sale deed up to 7th February 2005. This was admitted by the Defendants. Another letter was sent on 5th February 2005 by Defendant No.1 asking that the date for execution of the sale deed be extended till his mother returned from Dehradun. This has been marked as Exhibit P-4 and admitted by the Defendants. There is a third letter dated 7th February 2005 written by Defendant No. 2 to the Plaintiff marked as Exhibit P-5 praying for extension of the time for execution of the sale deed up to 16th February 2005. This too has been admitted by the Defendants.

8. According to the Plaintiff, 16th February 2005 was the date finally

fixed for getting the sale deed executed and registered. The parties were to meet at the office of Mr. G.P. Goyal, Advocate at Pitampura Delhi. The affidavit of PW-1 Mr. Subhash Gupta, Director of the Plaintiff, dated 20th December 2005 states that he reached the office of Mr. Goyal on 16th February 2005 and waited for more than two to three hours. However, none of the Defendants reached there. Having no other alternative, the Plaintiff got his declaration registered with the Sub Registrar that he appeared before the Sub Registrar for getting the sale deed of the suit property executed. The declaration has been marked as Exhibit PW-1/2.

9. The Plaintiff further states that on 16th February 2005, he had with him two banker's cheque for Rs.17,25,000 and Rs.17,75,000 towards the balance sale consideration. The certificate dated 3rd March 2005 issued by the Nainital Bank Ltd. certifying that they had issued two pay orders favouring Mr. Sapan Chopra and Mrs. Madhu Chopra dated 16th February 2005 for the aforementioned sums have been placed on record by the Plaintiff on 24th October 2005.

10. The Plaintiff then states that he had arranged for the labour for renovation and construction. The material had also been arranged. There was already a customer for the first floor and the second floor after construction. The Director of the Plaintiff in his affidavit states that "the deponent even offered Rs.3 lakhs more on the condition that the property is given vacant possession within one week i.e. by 23rd January 2005 and the sale deed is executed and registered up to 27th

January 2005. The said offer was not accepted and the letter dated 16th January 2005 on which the Defendants were required to agree and deliver back the original of the same, the Defendants kept it with themselves and did not agree or commit in that regard and as such no agreement for escalation of sale consideration came into being”. The photocopy of the aforementioned document has been marked as Exhibit P-1.

11. The Plaintiff states that the Defendants did not perform their part of the contract. They had started negotiating for transfer of the property through property brokers. The Plaintiff then sent a telegraphic notice dated 17th February 2005. A copy of the telegram and postal receipts are exhibited as Exhibit PW1/3. It is stated that the original letter of sanction issued by the MCD on 30th January 2004 as well as the sanction plan are with the Plaintiff. A copy of the letter of sanction issued by the MCD is Exhibit PW1/4. In the circumstances, the Plaintiff has prayed for relief of specific performance of the aforementioned agreement to sell and for a direction to the Defendants to execute the sale deed of the entire first floor, second floor and roof rights and two mezzanine on stairs on receipt of the balance sale consideration and for a permanent injunction restraining the Defendants from transferring or creating any third party interest in respect of the suit property during the pendency of the suit.

12. In the written statement filed by the Defendants, it is not disputed

that originally an agreement to sell was entered into whereby the sale consideration was agreed as Rs.43,50,000. It is contended that the sale consideration was agreed to be enhanced to Rs.46,50,000 by a writing executed between the parties on 16th January 2005. It is contended that this fact has been concealed in the original plaint filed by the Plaintiff. It is stated that the Defendants had obtained NOC and NDC from the MCD and the Society respectively and photocopies thereof were given to the Plaintiff. It is stated that the Plaintiff was in default in not getting the sanction of the renovation approved from the municipal authorities and the same was not in accordance with the building bye-laws. According to the Defendants, the balance sale consideration was not Rs.35,50,000 but Rs.38,50,000. It is stated that the premises arranged by the Plaintiff for the Defendants had to be vacated by them since the landlord refused to refund Rs.50,000 given to him as security deposit. The Defendants state that they had shifted to their own house as a result thereof. Since the Plaintiff had breached the agreement by not paying the balance consideration of Rs.38,50,000 there was no question of the parties proceeding with the execution of the sale deed.

13. On 7th March 2005, while directing summons in the suit and notice in the application, the Court directed Defendants to maintain *status quo* in respect of the suit property. It appears that the said *status quo* has been maintained till date and as of now, the suit property is unoccupied.

14. On 16th November 2005, the following issues were framed:

1. Whether the Plaintiff is entitled for specific performance of contract dated 11th August 2004, if so, on what terms and conditions? OPP
2. Whether the Plaintiff entitled for perpetual injunction as prayed for? OPP
3. Whether the Plaintiff has been ready and willing to perform his part of contract dated 11th August 2004? OPP
4. Whether the parties were not ad idem in respect of sale consideration, if so, to what effect? OPD
5. Whether the Plaintiff has not submitted the plan for renovation of the ground floor in accordance with the bye-laws of the Municipal Corporation of Delhi, if so, to what effect? OPD
6. Whether the Plaintiff was liable to arrange for accommodation for the Defendants' living during the period of renovation and construction, if so, to what effect? OPD
7. Relief.

15. Mr. Subhash Gupta, the Director of the Plaintiff, was examined as PW-1. He filed an affidavit of evidence dated 20th December 2005. The Plaintiff further filed the affidavits of the following witnesses: (i) Affidavit dated 20th December 2005 of Mr. Ashish Gupta (PW-2), (ii) Affidavit dated 20th December 2005 of Mr. G.P. Goyal (PW-3), (iii) Affidavit dated 20th December 2005 of Mr. Vikas Aggarwal (PW-4), (iv) Affidavit dated 20th December 2005 of Mr. B.N. Arora (PW-5) and (vi) Affidavit dated 2nd January 2006 of Mr. Prashant Jhamb (PW-

6). It may be mentioned here that the agreement to sell which has been admitted by the Defendants was witnessed by Mr. Prashant Jhamb and Mr. Vikas Aggarwal. The declaration of the Plaintiff before the Sub Registrar, Exhibit PW1/2, was witnessed by Mr. G.P. Goyal and Mr. Ashish Gupta.

16. On behalf of the Defendants, Defendant No.2 filed her affidavit of evidence dated 20th July 2009. The affidavit dated 9th March 2011 of Mr. Raj Kumar and the affidavit dated 9th March 2011 of Mr. Sanjay Bhatija, DWs-2 and 3 were filed. An affidavit of Mr. Ashok Kumar (PW-6) dated 29th March 2011 was filed by the Plaintiffs.

17. In the cross-examination of Mr. Subhash Gupta conducted on 19th April 2006, he stated that he had got the plan sanctioned and that he had brought the sanctioned construction plan in Court. He denied the suggestion that the said plan was not agreed to by the Plaintiff as it was not in accordance with the MCD bye-laws. As regards the enhanced sale consideration he stated that “it is correct that on 16th January 2005, I had given a proposal to the Defendant to enhance the sale consideration by Rs.3 lakhs and make it Rs.46.50 lakhs if premises were vacated by the Defendant within a week. It is correct that I had written a note to the effect on 16th January 2005. Ex.PW1/D-1 is the photocopy of the writing made by me on 16th January 2005 in that regard. However, the said writing was not signed by me as Defendant had not agreed to vacate the premises. It is correct that I have filed a suit for specific performance and I want

Defendant to perform her part of the agreement for a sale consideration of Rs.43.50 lakhs only.”

18. The Plaintiff’s cross-examination continued on 14th July 2006. He denied the suggestion that he had given a draft sale deed in the last week of January 2005 or first week of February 2005 suggesting that it should be in the sum of Rs.12.5 lakhs and that the balance amount should be paid in black and that since the Defendants were not agreeable to execute the sale deed, the Defendants had told him that they would not be coming to the office of Mr. G.P. Goyal on 16th February 2005. As regards the purchase of stamp papers, he gave the following answers in response to the questions put to him.

“I had told Mr. Goyal, Advocate to prepare sale deed for Rs.43.50 lakhs and not for Rs.46.50 lakhs. The stamp duty was to be paid at 8% of the value in the sale deed which could be Rs.3.48 lakhs. It is correct that sum of Rs.3.48 lakhs was not paid by me to Mr. Goyal, Advocate for purchase of stamp papers. Volunteer, the moment the draft was approved, the money would have been given to Mr. Goyal for the purchase of the stamp papers. It is correct that one or two days would have been taken for getting the stamp papers, as money had to be deposited first with the State Bank of India”.

19. As regards the proposal for the enhancement of the sale consideration, the Plaintiff answered as under:

“It is also incorrect to suggest that Defendants refused to execute the sale deed when sum of Rs.46.50 lakhs was not agreed to be paid by me. Volunteer, the Defendants did not respond to the proposal of Rs.46.50 lakhs and hence that proposal was abandoned”.

20. Significantly, the Plaintiff also stated that he could produce documents from the bank relating to the preparation of the drafts towards the sale amount. He volunteered as under:

“I was always ready with the amount and was willing to pay the amount to the Defendants always. It is correct that in the written statement filed, the Defendants had offered to complete the transactions within a week if a sum of Rs.46.50 lakhs was paid to them. Volunteer(ed), the sale consideration was not Rs.46.50 lakhs. I am prepared to pay a sum of Rs.46.50 lakhs to the Defendants, if they are prepared to complete the transactions now and also do the renovation work on the ground floor as per the agreement subject to the condition that premises in suit are vacated by the Defendants”.

21. Mr. Ashish Chopra in his cross-examination stated that Defendant No. 2 told him that she would reach the office of Mr. G.P. Goyal on 15th January 2005 between 10 and 10.30 am. He accompanied Mr. Subhash Gupta on 16th January 2005 to the office of Mr. G.P. Goyal and thereafter to the office of Sub Registrar. He further stated as under:

“Payment for purchasing of the stamp papers had been made to Mr. G.P. Goyal, Advocate. I do not know the exact amount paid to Mr. G.P. Goyal. I do not know whether the required stamp papers had been purchased and were available with Mr. G.P. Goyal, Advocate on 16th February 2005”.

22. Mr. G.P. Goyal has in his cross-examination confirmed that he had drafted the agreement to sell and that draft is available in his computer. He denied that he was told by the Plaintiff that the sale

consideration had been enhanced to Rs.46.50 lakhs. Mr. Vikas Aggarwal in his cross-examination confirmed that he and Mr. Prakash Jhamb were witnesses to the agreement to sell. He confirmed that he had gone to the Sub-Registrar's office on 16th February 2005 but Defendant No.2 had not reached there. Mr. B. N. Arora confirmed that he was present on 16th January 2005 and that Exhibit PW1/D-1 was written in his presence. He stated that exhibit PW1/D-1 was kept by Defendant No.1 who had assured to respond by the next day.

23. Mr. Prashant Jhamb confirmed that there was a talk between the parties for enhancing the sale consideration to Rs.46,50,000 but he had no information that this was finalised between the parties. In his cross-examination on 23rd October 2008 he confirmed that the present market value of one floor in the suit property would be around Rs. 80 to Rs.85 lakhs.

24. From the evidence of the Plaintiff it is clear that the Defendants have not been able to bring out any contradiction in any of the statements. It emerges from the above evidence that:

- (a) the agreed sale consideration was Rs.43,50,000 and not Rs.46,50,000.
- (b) The document Exhibit PW1/D-1 was not signed by Mr. Subhash Gupta. The original of the said document was retained by the Defendants.

(c) There was no signed agreement between the parties substituting the agreement to sell dated 11th August 2004. Therefore, the sale consideration remained unchanged at Rs. 43,50,000.

(d) The Plaintiff was ready with the demand drafts favouring both Defendants with the balance sale consideration on 15th February 2005.

(e) It was the Defendants who kept asking for postponement of the time for execution of the sale deed. Defendant No.2 did write on 7th February 2005 to the Plaintiff seeking extension of time for execution of the sale deed till 16th February 2005.

(f) The Director of the Plaintiff was present at the Sub-Registrar's office on 16th February 2005; he executed a declaration before the Sub Registrar to that effect.

(g) The Plaintiff had paid the money for purchase of stamp papers for the registration of the sale deed.

(h) The Plaintiff was prepared to pay the Defendants the enhanced sale consideration of Rs.3 lakhs if they were willing to surrender possession even on the date of the cross-examination of PW-1.

25. It transpires from the cross-examination of Defendant No.2, who examined herself as DW-1, that she admits that Ex.PW1/D-1 was signed by her and in terms thereof she was to vacate the premises within seven days. She also agreed that the Plaintiff "refused to pay the additional Rs.3 lakhs as settled between us". She stated that she had no information whether Plaintiff was ready with the two banker's cheques for the balance consideration on 16th February 2005. While she admitted to have written on 7th February 2005 seeking extension

of time till 16th February 2005, she denied that the parties had to reach Sub-Registrar's office on 16th February 2005 to execute the sale deed. Significantly, she stated as under:

“I am not willing to perform on my part today as rate of properties have gone higher in Dehradun even if I am paid additional three lakhs along with agreed balance sale consideration. I do not know whether the plan submitted to the corporation by Plaintiff before my signature or not”.

Defendant No.2 also admitted that she was given a site plan by the Plaintiff Ex. DW1/1 for renovation of the ground floor of the property.

26. Mr. Raj Kumar, who was examined as DW-2, agreed that the signatures on Ex.PW1/D-1 were that of the Defendants. He also offered no reason why the Plaintiff did not sign Ex. PW1/D-1. In his cross-examination, Mr. Sanjay Bhatija denied the suggestion that Ex.DW-1/2 was a forged and fabricated document. He, however, could not say who had written the words in hand on the last page of the said document.

27. In his evidence, Mr. Ashok Kumar Chhabra confirmed that Defendant No.2 deposited with him an interest-free security deposit of Rs.50,000; she stayed in the premises for three months and then vacated; and he had on vacation of premises refunded her Rs.50,000. In his cross-examination he stated that he did not have any receipt for having refunded the aforementioned amount to Defendant No.2.

28. From the evidence of Defendant No.2 it emerges that she could not deny the fact that Mr. Subhash Gupta had himself not signed the so-called agreement dated 16th January 2005 as regards the enhanced sale consideration. Therefore, the entire defence of the Defendants that it was the Plaintiff who failed to perform its part of the contract by not agreeing to pay the enhanced sale consideration of Rs.46,50,000 remains disproved. Defendant No.2 has also been unable to prove that Ex.DW-1/2, the so-called draft sale deed for Rs.12,50,000, was in fact prepared by the Plaintiff and sent to her and that since she refused to agree to that proposal, the entire transaction failed. On the other hand, the Plaintiff has been able to prove the deposit of sums with the MCD for obtaining sanction of the plan.

29. From the above analysis of the evidence it is clear that while the Plaintiff was ready and willing to perform its part of the contract, the Defendants were not.

30. In the considered view of the Court, the issues have to be answered as under:

Issue No.1: Whether the Plaintiff is entitled for specific performance of contract dated 11th August 2004, if so, on what terms and conditions? OPP

Issue No.2: Whether the Plaintiff entitled for perpetual injunction as prayed for? OPP

The above two issues are answered in the affirmative. It is held that the Plaintiff is entitled for specific performance of the contract dated

11th August 2004 and is also entitled for perpetual injunction as prayed for.

Issue No.3: Whether the Plaintiff has been ready and willing to perform his part of contract dated 11th August 2004? OPP

The above issue is answered in the affirmative by holding that the Plaintiff was ready and willing to perform its part of the contract dated 11th August 2004.

Issue No.4: Whether the parties were not ad idem in respect of sale consideration, if so, to what effect? OPD

The above issue is answered in favour of the Plaintiff and against the Defendants. There was no agreement as regards the enhanced sale consideration. The Defendants could not have resiled from the earlier agreement to sell dated 11th August 2004. In fact, it was Defendant No.2 who asked on 7th February 2005 for extension of time for completion of the sale deed in terms of the said agreement up to 16th February 2005. In the said letter she made no reference to the enhanced sale consideration or to the so-called agreement dated 16th January 2005.

Issue No.5: Whether the Plaintiff has not submitted the plan for renovation of the ground floor in accordance with the bye-laws of the Municipal Corporation of Delhi, if so, to what effect? OPD

The above issue is answered against the Defendants and in favour of the Plaintiff. The Plaintiff indeed submitted a plan for renovation of

the ground floor. It has not been proved that this was not in accordance with bye-laws of MCD.

Issue No.6: Whether the Plaintiff was liable to arrange for accommodation for the Defendants' living during the period of renovation and construction, if so, to what effect? OPD

The above issue is answered in favour of the Plaintiff and against the Defendants. The Plaintiff had arranged for an accommodation for the Defendants and paid the advance sum to the landlord and had, therefore, performed his part of the contract.

31. The mere fact that the suit property today may have an enhanced market value will not and cannot be used to defeat the rights of the Plaintiff. The Defendants have by their own unreasonable conduct frustrated the Plaintiff's right to have the specific performance of the agreement to sell. The Plaintiff has parted with Rs.8,50,000 admittedly towards the performance of its part of the contract. The Defendants do not deny having received the aforementioned sum. The Plaintiff has been able to show that he was ready with the balance sale consideration way back on 16th February 2005.

32. Consequently, the Court is not prepared to accept the submissions made on behalf of the Defendants that on account of the enhanced market value the Plaintiff should be subject to further terms and made to pay the present market value. The Court cannot rewrite the terms of contract agreed to between the parties.

33. Accordingly, the following directions are issued:

- (i) The Defendants will within a period of four weeks from today hand over to the Plaintiff the possession of the entire suit property.
- (ii) The Plaintiff will within a period of four weeks complete all formalities to have the sanction of the building plan renewed in accordance with law and the Defendants will cooperate and execute all the necessary documents for that purpose.
- (iii) The Plaintiff will within four weeks deposit in this Court the balance sale consideration of Rs.38,50,000 by way of demand draft favouring the Registrar General of this Court. The said amount will be kept in a fixed deposit initially for a period of six months and kept renewed from time to time.
- (iv) As and when the sanction of the building plan is renewed/freshly sanctioned, the parties will appear before the Sub-Registrar to have the sale deed executed and registered in terms of the agreement to sell dated 11th August 2004.
- (v) The Registrar (Original) will make arrangements to have demand drafts in the names of both the Defendants prepared from the sum deposited in the FDR together with interest accrued thereon in two equal halves.
- (vi) The said demand drafts will be arranged by the Registrar (Original) to be taken to the Office of the Sub-Registrar by a Special Messenger on the date of execution of the sale deed and handed over to the Defendants 1 and 2 at the time of execution of the sale deed.

(vii) The parties will be bound by the remaining terms of the agreement dated 11th August 2004 and comply with their respective obligations thereunder.

34. The suit is decreed in the above terms with costs of Rs.30,000 which will be paid to the Plaintiff by the Defendants within four weeks. Decree sheet be drawn up accordingly. The pending application is disposed of.

OCTOBER 8, 2013
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S. MURALIDHAR, J.

