

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

% *Judgment Reserved on: August 19, 2014*
Judgment Delivered on: August 29, 2014

+ **FAO(OS) 363/2013**

SMT. UMA KAPOOR & ANR. Appellants
Represented by: Mr.Prem Kumar, Advocate with
Mr.Bhasker, Advocate

versus

KAPIL AGGARWAL Respondent
Represented by: Mr.P.K.Verma, Advocate with
Ms.S.Sood, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J.

1. On October 04, 2005 a development agreement was executed in writing. Uma Kapoor and her son Vivek Kapoor were referred to therein as the first party and Kapil Aggarwal was referred to therein as the second party. As per the agreement, the first party was the owner of property bearing No.18, Road No.78, Punjabi Bagh, ad-measuring 550 sq.yds. As per the agreement, the second party had to demolish the existing building and reconstruct the same using his own funds. He had to pay ₹2,10,00,000/- (Rupees Two Crores Ten Lacs only) to the first party. After reconstruction, the ground floor was to belong to the first party. The first and the second floor with roof rights above were to belong to the second party. To facilitate

the redevelopment the first party was to vacate the property within three months. The property had to be reconstructed by February 2007 or within sixteen months from the date when second party took over possession from the first party. A penalty of ₹25,000/- (Rupees Twenty Five Thousand only) per month for delayed construction was stipulated in the agreement.

2. The agreement records that the second party has paid ₹25,00,000/- (Rupees Twenty Five Lacs only) to the first party. It records that the balance sum of ₹1,85,00,000/- (Rupees One Crore Eighty Five Lacs only) shall be paid by the second party to the first party within three months from the date of execution of the agreement or when the sale-deed was executed by the first party in favour of the second party with respect to the first and the second floor, whichever was earlier. Parties are not at variance that the second party paid a further sum of ₹75,00,000/- (Rupees Seventy Five Lacs only) to the first party in different instalments, the last of which was in sum of ₹20,00,000/- (Rupees Twenty Lacs only) on February 22, 2006.

3. The redevelopment was a non-starter. The reason was that the plot of land was a part of a larger plot ad-measuring 2609 sq.yds and in a partition as per a compromise decree passed by this Court in a suit the 550 sq.yds land came to the share of the first party. Before reconstructing sanctions had to be obtained from the municipal authorities which require an existing unauthorized construction to be regularized before plans were sanctioned for reconstruction of the property and thereafter the existing structure was to be demolished. The unauthorized constructions in the building could be regularized only by May 17, 2007, by which date, the stipulated date of completion had become history. It was only thereafter the second party requested the first party to hand over possession of the existing building so that after demolishing the same he could reconstruct on the plot. The first

party refused.

4. The agreement between the parties had an arbitration clause. The dispute was referred to the sole arbitration of Justice R.C.Chopra (Retd.). The second party : Kapil Aggarwal was the claimant. He sought specific performance of the agreement to sell. The first party opposed the grant of specific performance of the agreement and raised a counter claim in sum of ₹20,00,000/- (Rupees Twenty Lacs only).

5. Interpreting the agreement Ex.C-1 the learned Arbitrator took the view that under the agreement the first party was not obliged to regularize the existing unauthorized construction and obtain a completion certificate before the property had to be redeveloped. The learned Arbitrator noted that the second party was a builder and therefrom attributed knowledge to the second party of being aware of what documents were required before municipal sanction could be obtained to reconstruct the property. The learned Arbitrator noted that the second party had been silent with respect to steps taken to obtain a municipal sanction to reconstruct the property. In that view of the matter the learned Arbitrator has held that the second party would not be entitled to specific performance of the agreement Ex.C-1.

6. Holding so, the learned Arbitrator posed the question : whether the first party would be entitled to forfeit ₹1,00,00,000/- (Rupees One Crore only). The learned Arbitrator held that though in the agreement ₹25,00,000/- (Rupees Twenty Five Lacs only) received by the first party from the second party was not referred to as earnest money, it could be treated as earnest money and thus could be forfeited, notwithstanding there being no clause in the agreement of forfeiture, the learned Arbitrator, on said reasoning held that the second party would be entitled to a refund of ₹75,00,000/- (Rupees Seventy Five Lacs only) from the first party.

7. As regards ₹20,00,000/- (Rupees Twenty Lacs only) claimed by the first party as damages, there is no specific discussion, but one can gather the underlying reason of ₹25,00,000/- (Rupees Twenty Five Lacs only) being forfeited towards penalty as not entitling the first party to any further damages.
8. The award terminates with a direction that Uma Kapoor and her son Vivek Kapoor shall pay ₹75,00,000/- (Rupees Seventy Five Lacs only) to Kapil Aggarwal within 30 days of the award and in case they fail to do so the amount shall bear interest @ 12% per annum from the date of the award till realization.
9. Uma Kapoor and her son Vivek Kapoor challenge the award by filing objections under Section 34 of the Arbitration and Conciliation Act, which was registered as OMP No.3/2011. The objections have been dismissed vide impugned order May 02, 2013.
10. The basis for the objections is Section 22 of the Specific Relief Act, 1963 which reads as under:-

“22. Power to grant relief for possession, partition, refund of earnest money, etc.—

(1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908 any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for—

(a) possession, or partition and separate possession, of the property, in addition to such performance; or

(b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or made by him, in case his claim for specific performance is refused.

(2) No relief under clause (a) or clause (b) of sub-section (1) shall be granted by the court unless it has been specifically claimed:

Provided that where the plaintiff has not claimed any such relief in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.

(3) The power of the court to grant relief under clause (b) of sub-section (1) shall be without prejudice to its powers to award compensation under section 21.”

11. The contention before the learned Single Judge was that in his claim petition, Kapil Aggarwal never claim an alternative relief of being entitled to refund of the earnest money or deposit made in case the claim for specific performance is refused. It was urged that sub-Section (2) of Section 22 of the Specific Relief Act, 1963 prohibited any refund to be made in the absence of a specific relief.

12. The learned Single Judge has noted various decisions as to the power of the Arbitrator to interpret an agreement and apply the law. The learned Single Judge has noted the law declared by the Supreme Court in the decision reported as AIR 1993 SC 1318 B.R.Mulani vs. A.B.Asawathanarayana to hold that law declared therein was that upon a Court reaching the conclusion that specific performance of an agreement could not be granted, suit could be decreed for repayment of the money paid. The learned Single Judge has noted two decisions, one of the Karnataka High Court and the other of the Madras High Court reported as ILR 2003 Karnataka 4535 Smt.Khamarunnisa vs.Mudalappa and AIR 1955 Madras 591 Mack vs.Krishnaswami Nayudu to hold that notwithstanding it not being prayed in the relief in a suit seeking specific performance that in

case main relief is not granted money paid under the agreement be refunded, it was permissible to decree refund of the amount paid.

13. Contention urged in appeal is that the Andhra Pradesh High Court in the decision reported as 2002 (4) ALD 178 Koneru Syam Sundara Rao & Anr. vs. Pendurti Kanaka Durga, the Madhya Pradesh High Court in the decision reported as AIR 1990 Madhya Pradesh 323 Suraj Singh vs. Smt.Nathi Bai & Ors., and the Patna High Court in the decision reported as 1997 (1) BLJR 592 Bhagwati Prasad Jalan vs.Smt.Prem Lata Devi Kedia have held that in view of the bar imposed by sub-Section(2) of Section 22 of the Specific Relief Act, 1963, in the absence of a specific prayer for refund of the earnest money/security deposit a Court could not pass a money decree in a suit seeking specific performance of an agreement to sell.

14. Thus, we have three High Courts taking a view which supports the case of the appellant and three High Courts, including a Single Judge of this Court, taking a view to the contrary.

15. As regards the decision of the Supreme Court in B.R.Mulani's case (supra), the decision would be a pronouncement of the law that if a Court finds from the evidence that the plaintiff who seeks specific performance of an agreement has established a right, relief of specific performance may be denied and in view compensation could be paid. This is evident from paragraph 8 of the decision.

16. The learned Single Judge has overlooked the said distinctive feature on facts in B.R.Mulani's case (supra), which is not an authority on the legal issue which was debated before the learned Single Judge.

17. The view of the Karnataka High Court and Madras High Court is rooted in equity and holds that where specific performance is denied but

equities demand adjusting or moulding the relief, it is permissible to do so.

18. In our view the legal position would be that sub Section (2) of Section 22 of the Specific Relief Act recognizes a rule of procedure that Courts should not grant a relief unless it has been specifically prayed for. It is trite that a rule of procedure cannot defeat a right which may flow from a statute or even in equity. Law draws a distinction between a relief which requires additional pleadings and some more facts to be proved vis-a-vis a relief which is subsumed or can be granted without proof of any other fact. Law recognizes that though not specifically asked for, a lesser relief would be included in a main relief prayed for. Thus, in a suit seeking specific performance, it would be open for a Court to order refund of earnest money if equity demands so even in the absence of a specific prayer made. In this context we would only refer to a decision of the Supreme Court reported as 1982 (1) SCC 525 Babu Lal vs.M/s Hazari Lal Kishore Lal & Ors. wherein the Supreme Court referred to sub Section (2) of Section 22 of the Specific Relief Act and interpreted the same concerning a suit for specific performance where there was no prayer made for the defendant to put the plaintiff in possession of the suit property. The Supreme Court held that notwithstanding a prayer made for possession to be granted, it was permissible to direct possession to be handed over.

19. In the facts of the instant case, the issue can be looked at very differently. The words used in clause (b) of sub Section (1) of Section 22 are '*earnest money or deposit paid*'. The prohibition under sub Section (2) to the reliefs under clauses (a) or (b) of sub Section (1) of Section 22 would obviously relate to earnest money or deposit paid.

20. As we have noted above, the agreement in question has not made a reference to any sum as earnest money or deposit paid. The learned

Arbitrator has treated ₹25,00,000/- (Rupees Twenty Five Lacs only) paid at the time of execution as earnest money and has directed forfeiture thereof. ₹75,00,000/- (Rupees Seventy Five Lacs only) paid in instalments thereafter which has been directed to be refunded is ex-facie neither earnest money or deposit paid. We draw a distinction between a deposit paid and money tendered in part payment of an amount payable under an agreement to sell. The later would not be deposit paid. Thus, the bar of sub-Section (2) of Section 22 of the Specific Relief Act, 1963 in the facts of the instant case would not come into play.

21. The appeal is dismissed.

22. Parties shall bear their own costs.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

AUGUST 29, 2014

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