IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 30.09.2010

\+ **CS (OS) 439/2008**

SARABJEET SINGH …………Plaintiff

Through: Sh. J.P. Sengh, Sr. Advocate with Sh. Chopra, Advocate.

versus

ANUP SHARMA & ORS. …….Defendants

Through: Sh. A.J. Bhambhani, Ms. Nisha Bhambhani, Ms. Lakshita Sethi, Sh. Victor and Ms. Sonia Rainia, Advocates, for Defendant Nos. 1 to 3.
Sh. Manish Sharma and Sh. Amit Bhardwaj, Advocates, for Defendant Nos. 4, 7 and 8.
Sh. Vasdev Lalwani, Advocate, for Defendant No.6.
Sh. Raman Kapur, Advocate, for Defendant No.9.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT

1. Whether the Reporters of local papers may be allowed to see the judgment? YES

2. To be referred to Reporter or not? YES

3. Whether the judgment should be reported in the Digest? YES

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

% **I.A. No. 7879/2008**

Learned counsel for the applicant, after addressing the submissions, stated that the application would not be pressed. I.A. No. 7879/2008 is accordingly dismissed as withdrawn.

I.A. Nos. 2950/2008, 7878/2008 and 4045/2009

1. This common order will dispose of three applications, I.A. No. 2950/2008, being the plaintiff's application for *ad interim* injunction; the second application being I.A. No. 7878/2008, moved by the first three defendants, for vacation of existing interim order and the third

application being I.A. No. 4045/2009, moved by the plaintiff for release of the amount – i.e. sum of 1.74 crores deposited in the Court, with the accrued interest.

2. The brief facts necessary for the purposes of this order are that the plaintiff entered into an agreement to purchase the suit property, i.e. D-16-G, Hauz Khas Enclave, New Delhi (hereafter called "the suit property"). For this purpose, he entered into separate agreements. By the first agreement dated 19.06.2006 – signed by the first three defendants (i.e. the vendors), the ground floor, the proportionate first floor share of the property of the plot was sought to be conveyed for a consideration of ₹ 1.71 crores. The second agreement of 19.06.2006 was entered into with the owner, who also had the terrace rights in respect of the same property, being the predecessor-in-interest of Defendant Nos. 4, 7 and 8 (i.e. Sh. B.N. Sharma). Another agreement was entered into with late Sh. B.N. Sharma on the same date, styled as a Memorandum of Understanding (MoU). In terms of the Agreements entered into with the second set of defendants, i.e. Sh. B.N. Sharma, the plaintiff contracted to purchase the second floor rights with the terrace rights of the suit property and also reconstruct the entire property. The late Sh. B.N. Sharma, predecessor-in-interest of Defendant Nos. 4, 7 and 8 was to receive ₹ 33 lakhs, besides entitlement to the right and interest in the first floor of the reconstructed property.

3. The plaintiff approached the Court in March 2008, claiming specific relief and other consequential reliefs, including damages. It is contended that eventhough the defendants had agreed to convey the property by the end of July (according to the written agreements), they refused to do so and instead the plaintiff discovered that there was cloud to the title over the property, in as much as the Defendant Nos. 5, 6 and 9, i.e. the two daughters and wife of the pre-deceased son of late Sh. B.N. Sharma had set-up a rival claim. The plaintiff relies on various documents, including notices exchanged *inter se* between him and the defendants. The plaintiff has placed on the record the legal notice dated 24.07.2006; and the reply to the said notice dated 28.07.2006. The plaintiff also placed reliance on a complaint lodged with the competent Criminal Court under Section 156(3) Cr.PC, whereby it was alleged that the defendants were guilty of the offence of cheating and had induced him to part with valuable consideration of ₹30 lakhs. The plaintiff further relies upon the averment that the daughters' interest was concealed from him and that one of them, i.e. the first defendant, Ms. Manju Sharma had in fact filed a suit. The plaintiff further submits that the vendees, i.e. herself and Sh. Jagdish Chander Sharma (the

first, second and the third defendants), as well as the other vendees (Defendant Nos. 4, 7 and 8) had in fact given no objection to him. It was contended that the cloud to the property arose on account of legal notice issued on behalf of the sisters and the daughter-in-law (Defendant No.6) to the Sub-Registrar, requesting him not to register the property, on 23.06.2006. The plaintiff also relies upon the circumstance that the said defendant had filed a suit, impleading him as Defendant No. 8 before the Civil Court.

4. In these circumstances, the plaintiff submitted that unless *ad interim* injunctive relief is granted, he would suffer irreparable hardship. On the basis of these pleadings, the Court had restrained the defendants, by the order dated 19.03.2008 from creating any third-party interest in respect of the suit property subject to the plaintiff depositing ₹ 1.71 crores (the order had erroneously recorded as ₹ 1.71 lakhs. This order was later modified on 31.03.2008 and 08.04.2008, when it was clarified that the amount was ₹ 1.74 crores) and that the plaintiff was relying on two separate agreements for this purpose.

5. The defendants filed their written statements. They rely upon several documents, including the Court orders in the criminal proceedings initiated by the plaintiff. It is urged that an overall reading of the plaintiff's notice dated 24.07.2006 would reveal that just four days before the transaction had to be completed, the plaintiff elected to call upon the defendants to refund the amount of ₹ 30 lakhs. The relevant part of the said notice is as follows:

> *"XXXXXX XXXXXX XXXXXX*
>
> *Through this legal notice we call upon you to return the payment of the sum of Rs. 30,00,000/- (Rupees Thirty Only) being the advance/earnest money paid to you the above named addresses with an interest @ 18% per annum and also an additional sum of Rs. 30,00,000/- (Rupees Thirty lakh Only) as damages for causing mental trauma and harassment to our client within 7 days of the receipt of this notice.*
>
> *XXXXXX XXXXXX XXXXXX"*

6. The plaintiff had also stated that there was cloud over the title to the first floor of the property, in as much as the defendants had mortgaged it. It is urged that this complaint of cloud over the title was persisted by the plaintiff in the complaint lodged with the Magistrate under Section 156(3) to the following effect:

"XXXXXX XXXXXX XXXXXX

7. That after parting with huge amount of money of Rs. 30,00,000/- (Rupees Thirty Lac Only) to above accused persons complainant later discovered that they have concealed from complainant that they are not the absolute owners of the said property for which they entered into agreement to sell with the complainant and thereby induced him to part with the above money. The complainant came to know about the above fact that accused persons are not the absolute owner of the said property on receipt of legal notice dated 23.06.2006 from Mrs. Anita Sharma, W/O late Sh. Anil Sharma and undated legal notices from Ms. Manju Sharma, D/o Sh. B.N. Sharma addressed to Sub-Registrar, Mehrauli, New Delhi and also from Ms. Anita Sharma. Said Manju Sharma has also filed suit for permanent injunction against accused persons making the complainant as a party.

XXXXXX XXXXXX XXXXXX"

7. On 01.08.2006, in an earlier complaint lodged with the local police, it was averred as follows:

"XXXXXX XXXXXX XXXXXX

However after parting with huge amount of money of Rs. 30,00,000/- (Rupees Thirty Lac Only) to above said persons I have now discovered that you have concealed from me that they are not the absolute owners of the said property for which they entered into the agreement to sell with me and thereby induced me to part with the above money. I came to know about the above fact that they are not the absolute owner of the said property on receipt of legal notice dated 23.06.2006 from Mrs. Anita Sharma, W/O Late Sh. Anil Sharma and undated legal notices from Ms. Manju Sharma, D/O Sh. B.N. Sharma addressed to Sub-Registrar, Mehrauli, New Delhi and also from Ms. Anita Sharma.

XXXXXX XXXXXX XXXXXX"

8. The defendants urge that having elected not to go ahead with the transaction, the plaintiff can now not seek specific performance of the contract almost two years later. It was urged that the plaintiff withheld the material facts from this Hon'ble Court, in as much as the complaint lodged before the police authorities led to a report, whereby the Defendant Nos. 1 to 3 were not sent-up for trial according to the chargesheet filed by the police dated 08.05.2007. The plaintiff had apparently protested and the Protest Petition was pending before the concerned Magistrate. Learned counsel, in this regard, points out to paras 32 and 33, which describe that a criminal complaint had been filed and no chargesheet had been prepared or filed by the police. A plain

reading of the order dated 25.01.2008 by the competent criminal Court, dismissing the Protest Petition reads as follows:

> *"XXXXXX XXXXXX XXXXXX*
>
> *Consequently, the complainant has withheld two important documents, i.e. letter dated 19.7.06 sent by Anoop Sharma, Ajay Sharma and their mother vide Regd. Post duly received by the complainant calling upon him to make the balance amount of Rs. 1.46 crores on or before 29.7.6 as per agreement to sell dated 19.6.06. The letter has nowhere been mentioned in original complaint or placed on record with plaint.*
>
> *Complainant has also withheld another documents, i.e. reply dt. 28.7.06 to legal notice, which was received by complainant and has not filed/placed it along with his complaint before this Court. Withholding and non-filing of these two documents is also not explained when these documents had an important bearing on the entire case of the complainant. A litigant, who approached the Court is bound to produce all documents relevant for litigation. Since no explanation has come forth for non filing of these documents, the Court feels that he has withheld these vital documents in order to gain advantage on the opposite party.*
>
> *Perusal of averments in plaint filed before Hon'ble High Court shows that throughout in the suit, complainant had given the impression that no challan was filed before trial Court, when the matter was already pending consideration over his Protest Petition.*
>
> *On account of the above stated observations, since complainant has deliberately suppressed the important facts by holding vital documents, Protest Petition deserves to be dismissed on this account.*
>
> *XXXXXX XXXXXX XXXXXX"*

9. The above order was concededly made after the filing of the present suit. It is pointed-out that the defendants never accepted the sisters' title or claim in respect of the suit property. Reliance is also placed in this regard upon an order dated 17.03.2007 of the Civil Court in Suit No. 1273/2006 filed by the fifth defendant. The order notes the contentions of Defendant Nos. 4, 7 and 8, denying that the plaintiff, i.e. fifth defendant or any other defendant, i.e. Defendant Nos. 6 and 9 had any other share, right or interest in the property.

10. It is urged that having regard to the entire conspectus of the circumstances, the Court should vacate the interim order. It is submitted that if the plaintiff wishes to press for specific performance, the amount of ₹ 1.74 crores lying in deposit should be continued as a condition precedent to try the suit.

11. In answer to defendants' submission, the plaintiff argues that being a suit for specific performance, there is no question of any delay in approaching the Court as time is never of essence of the contract. It is also argued that the plaintiff had, at every stage, agreed to settle the issues concerned and pay additional amounts and even today, is ready and willing to pay any such further amounts to the other parties if the transaction is completed and property conveyed to him.

12. The Court has considered all the submissions of the parties. It is evident that as is apparent from three agreements, the transactions recorded in the agreement pertaining to ground floor (with the first to third defendant) was to be completed by 29.07.2006. As regards other documents, it entailed and involved performance of mutual obligations; nevertheless, the plaintiff was to pay the entire balance consideration on or before 29.07.2006. It is a matter of record that the plaintiff paid the Defendant Nos. 1 to 3 ₹ 25 lakhs as on that day, which was the amount paid on the day of the agreement. Similarly as far as the other vendees, Defendant Nos. 4, 7 and 8 are concerned, they too were paid ₹ 5 lakhs on 19.06.2006, which continued to be the same position as on the said date, i.e. 29.06.2006. The plaintiff's notice dated 24.07.2006 is common one as against both sets of vendors, i.e. Defendant Nos. 1 to 3, late Sh. B.N. Sharma. It calls upon all of them to return the total sum of ₹ 30 lakhs. At that stage, the defendants denied that they were trying to cheat the plaintiff and called upon him to perform his part of the bargain before the agreed date. The plaintiff further chose to approach the police authorities firstly by complaint to local police; when upon being successful, he approached the Magistrate under Section 156(3) Cr.PC. All along, he took the position that the vendors had cheated him and he had to be refunded the sum of ₹ 30 lakhs. The last notice issued by the plaintiff, calling upon the defendants to perform their part of the bargain was dated 24.07.2006. He chose or elected to pursue with his allegation that the defendants were guilty of cheating and he had to be returned ₹ 30 lakhs.

13. The fifth defendant's injunction application for *ex-parte* hearing in her suit to restrain her brothers from going-ahead with the transaction was rejected on 17.03.2007. The Court notices that the plaintiff did not mention in the suit that the chargesheet had been in fact filed on 08.05.2007 in the criminal proceedings; the chargesheet had been filed as on the date of filing of the suit; no copy of the same has been produced. On the other hand, the impression given in the

suit was that no chargesheet was fled. A list of documents shows that copy of the Protest Petition shows that it had been filed. Although it is settled law (*Chand Rani (dead) by L.Rs v. Smt. Kamal Rani (dead) by L.Rs* 1993 (1) SCC 519 of the Supreme Court, in a larger Bench ruling) that in a contract for sale of immovable property, time is never deemed of essence. Yet the Court indicated that as to what is reasonable time would depend on the facts and circumstances of each case. In the present circumstances, the plaintiff chose to pursue one line of remedies, i.e. criminal proceedings, primarily alleging that he was entitled to refund of the advanced/Earnest Money of ₹ 30 lakhs right from July 2006. It is only when those proceedings were unsuccessful did he turn around and make the claim before this Court for specific performance.

14. The materials on record, in the opinion of the Court, do not suggest that the fifth defendant's suit or notices by the Defendant Nos. 5, 6 and 9 were accepted by the second set of vendees. This is clear from the order of 17.03.2007, made by the Civil Court, rejecting the plaintiff's interim injunction application. No doubt, the defendants have claimed that they are entitled to withhold ₹ 30 lakhs, to forfeit the sum of ₹ 30 lakhs. Defendant Nos. 1 to 3 have indicated about having approached the bank for a loan to purchase some other property. The documents evidencing the *"in-principle"* clearance by the ICICI Bank in respect of such proposal dated 22.06.2006 (i.e. few days after the original Agreement to Sell was executed) for an advance of ₹ 75 lakhs have been placed on the record. It is, therefore, apparent that at the material time, i.e. on or before 29.07.2006, the defendant vendees had intention to convey the property. However, the Court has to consider whether in these circumstances, the conduct of the plaintiff in claiming specific performance – after having claimed for refund of money and after considerable lapse of time from the originally contracted date entitles it to the continuance of injunction on existing terms, or continuance of the *ad-interim* at all.

15. It needs to be hardly emphasized that injunctive relief whether permanent or *ad-interim* is granted on equitable principles. Eventhough the general law is that in contracts for sale of immovable property, time is not deemed to be of essence, the Court cannot be oblivious of the express terms agreed upon by the parties themselves. In such circumstance, the question as to what is the reasonable time, cannot be left to any hard and fast rule. The Court would obviously take into consideration the stipulation expressly agreed upon by the parties coupled with the reality of spiraling property price which our society is witness to almost as a daily phenomenon.

If these are kept in mind, the facts of this case would disclose that when the parties entered into the agreements in question, on 19.06.2006, after agreed to complete entire transaction about six weeks later, i.e. on or by 29.07.2006, they obviously had that time in mind. If one were to extend that principle, at the most, the plaintiff would have been entitled to claim that within reasonable time or on expiry of that date, i.e. 29.07.2006 (such time under the circumstances would have been six-eight weeks), a claim for specific performance could justifiably have been made. However, he not only did not choose to approach the Court but even proceeded in an entirely different direction, with a claim that he had been cheated and wished that the amount paid by him ought to be returned. In these circumstances, and also having regard to the fact that certain important and material facts were withheld from this Court, which were brought to light after written statement was filed and after the defendants produced the documents, this Court is of the opinion that the *ad interim* injunction granted earlier should not be continued.

16. As far as the defendants' plea about forfeiture of the amount is concerned, apart from the documents placed on record to the effect that an advance was sanctioned, no prejudice has been shown. Even otherwise, having regard to the relief – adverted earlier by the Court about spiraling property prices, this is hardly a case where the defendants should be allowed to keep the said amount. *Prima facie* the claim for forfeiture is not sound or tenable.

17. In view of the above discussion, the Court is of the opinion that the order dated 19.03.2006, granting *ex-parte* injunction (clarified by subsequent orders), should be vacated. Consequently, the plaintiff is entitled to withdraw the amount of ₹ 1.74 crores deposited in Court forthwith, with accrued interest. Defendant Nos. 1 to 3, for the above reasons, are directed to refund the sum of ₹ 25 lakhs to the plaintiff within four weeks from today. Defendant Nos. 4, 7 and 8 are likewise directed to refund the sum of ₹ 5 lakhs to the plaintiff within the said period of four weeks. I.A. Nos. 2950/2008, 7878/2008 and 4045/2009 are disposed of in the above terms.

CS (OS) 439/2008

List on 18.11.2010, for directions.

S. RAVINDRA BHAT
(JUDGE)

SEPTEMBER 30, 2010
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