

02 22.08.23

Ct. No. 04

akd

F.M.A.T. 257 of 2023
CAN 1 of 2023

PS Merlin Developers LLP
Vs.
Ms. Salma Sultana & Ors.

Mr. Abhrajit Mitra,
Mr. Jishnu Chowdhury,
Ms. Saptarshi Datta,
Mr. Satadeep Bhattacharyya,
Ms. Srinjita Ghosh,
Mr. Pourush Kanti Pal
... for the appellant.

Mr. Samrat Choudhury,
Mr. Soumya Kanti Nag.
... for the respondent nos.
1 and 2.

Ms. Soni Ojha,
Ms. Sonia nandy.
... for the respondent no. 3.

Although the scope of the instant appeal was limited to the extent that whether the Court below was justified in refusing to pass an ex parte ad interim order of injunction despite prima facie case having been made out solely on the ground that the issue with regard to the maintainability of the suit or rejection of the plaint has to be adjudicated at first.

For the purpose of record it is however made clear that there was no appearance of the defendants/respondents at the time when the injunction application was moved for ex parte ad interim order of injunction and the Trial Court suo motu intended to decide not only the point of maintainability of the suit but also the rejection of plaint. So far as the rejection of plaint is concerned, the same can be decided on the grounds enumerated under Order VII Rule 11 of the Code of Civil Procedure and, therefore, we do not intend to make any comment

thereupon as to whether the Court can exercise the suo motu power under the aforesaid provisions for rejection of plaint.

Be that as it may, we are conscious that the moment the Court adjourned the hearing of the injunction application, it would be deemed that the prayer for ex parte interim order of injunction is impliedly rejected and, therefore, there is no fetter on the part of the aggrieved person to exhaust the remedy by way of an appeal provided under Order XLIII Rule 1 (r) of the Code of Civil Procedure.

An interpleader suit has been filed by the plaintiff as developer against the intending purchaser as well as the Bank, who financed the borrower i.e. intending purchaser in purchasing a flat in a building constructed by the plaintiff. An agreement was entered into amongst the plaintiff, intending purchaser, respondent no. 1 herein along with the owner of the building on 20th November, 2018 for sale of the residential flats described in the Schedule B appended thereto for a total consideration of Rs.1,19,35,408/-. In addition to the same the said respondent no. 1 was also liable to pay the GST and other statutory charges leviable thereupon.

Clause 15.1 of the said agreement provides that in the event the respondent no. 1 commits default in observing and complying any of the covenants as agreed upon including the payment in terms of the schedule of payment within the time specified therein, the agreement shall be terminated and all the rights and claims of the respondent no. 1 against the plaintiff/appellant shall stand extinguished and cancelled. It is further provided that in the event

termination is effected, the plaintiff shall forfeit as liquidated damages 10% of consideration amount paid under the agreement (excluding taxes) or Rs. 100/- per sq. ft. on built-up area of the said flat, whichever is higher. In the event of payment of the surplus after deducting the liquidated damages in terms of the said clause, the agreement further provides that the plaintiff/appellant shall deal in any manner the said property including selling the same to any third party on any terms and conditions as it may deem fit without any further reference to the respondent no. 1.

Since the respondent no. 1 intend to avail the financial benefits by borrowing from the bank which the bank subsequently agreed, a Tripartite Agreement was entered into on 24th November, 2018 amongst the plaintiff, respondent no. 1 and the respondent no. 3. The relevant clauses of the said Tripartite Agreement are reproduced as under:

“4. It is agreed by and between the parties to this Agreement that in case if the BORROWER fails to honour the commitment, the developer/BUILDER shall iinform the BANK and the BANK shall have the right to pay the Sale consideration and get it registered either in BANK’s name or its nominee. Likewise in the event the Borrower defaults in payment of installments then in such an event also, the Bank shall have the right to inform about such default on the part of the Borrower to the Builder and shall accordingly have the right to write to the Builder for cancellation of the Agreement executed between the Builder and the Borrower, whereafter the Bank shall have the right to pay the Sale consideration and the

get the subject property registered either in the Bank's name or in the name of the Bank's nominee.

5. *The Borrower agrees and confirms that in the event of the Bank enforcing its rights as stated in clause 4 above, the Borrower shall not object/contest the same in any manner whatsoever.*
6. *It is hereby specifically agreed and confirmed by the parties to this agreement that in the event of default on the part of the Borrower as mentioned in clause 4 above, the Bank shall have the remedy available to the Bank, as is stated in clause 4 above, or have legal right to demand from the Builder the entire loan amount disbursed to the Builder on behalf of the Borrower with interest due to the Bank from the Borrower by recovering the interest amount from the Borrower's margin money that was paid by the Borrower in his/her capacity as the customer of the Builder at the time of booking of the subject flat. The Builder agrees and confirms that the Builder shall not object to the Bank's course of action in recovering the Bank's interest by demanding from the Builder the margin money as stated hereinabove. Upon any such demand made by the Bank to the Builder, the Builder shall without any protest or demur pay to the Bank, the demanded amount from the margin amount paid by the Borrower in his/her capacity as the customer to the Builder."*

Admittedly after availing the benefit of financial borrowing from the bank, there was a default in

payment of the installment amount which constrained the bank to invoke their right reserved under the aforesaid Clauses and communicated to the plaintiff/appellant that they have intended to recall the loan and, therefore, the amount is liable to be returned to the bank by the plaintiff/appellant as one of the obligations imposed under the aforesaid Clauses. The plaintiff/appellant filed the interpleader suit seeking various reliefs including the relief in the form of discharging his obligations under the aforesaid Tripartite Agreement and invoking right reserved thereunder as well as the agreement for sale dated 20th November, 2018.

Interestingly the Trial Court without venturing to go into the provisions contained in Order XXXV of the Code of Civil Procedure surreptitiously jumped to the conclusion that the point of maintainability of the suit / rejection of the plaint has to be decided first keeping the hearing of the injunction application in abeyance till such adjudication.

Order XXXV Rule 1 of the Code provides that in every suit of interpleaded the plaint shall, in addition to the other statements necessary for plaint, state that the plaintiff claims no interest in the subject matter in dispute other than for charges or costs; the claims made by the defendants severally; and that there is no collusion between the plaintiff and any of the defendants. Order XXXV Rule 2 provides that if the thing claimed is capable of being paid in the court or placed in the custody of the court, the plaintiff may be required to so pay or place it before he can be entitled to any order in the suit.

Obviously the plaintiff/appellant wanted to discharge its obligations under the aforesaid agreement by depositing the money and for such reason we invited the attention of the plaintiff and the bank whether they are agreeable to liquidate the demands or claims in respect of the subject property. On the earlier occasion the bank gave detailed particulars of the amount paid to the plaintiff/appellant. In fact, the plaintiff/appellant paid the entire amount to the bank and the claim of the bank stands satisfied.

The bank concededly submits that they have no claim in respect of the subject flat and all their rights in respect thereof stand extinguished upon receiving the total amount due on the basis of the said Tripartite Agreement. Now the plaintiff/appellant submits that there is a surplus lying with them, which was paid by the borrower, respondent no. 1, in addition to an amount, which was directly paid by the bank under the borrowing agreement.

We invited attention of the respondent no. 1 in this regard and in course of hearing we are apprised of the fact that the borrower has not taken any steps in respect of the said property even after the termination has taken effect to. However, the learned Advocate appearing for the respondent no. 1 submits, on instruction, that his client is not agreeable to forego her right in respect of the said property and will take appropriate steps as and when advised in this regard.

Be that as it may, considering the nature of the suit, which is obviously an interpleader suit, the plaintiff has come up with a calculation, wherein they have shown an excess amount of Rs.11,47,914/- lying with them in terms of Clause 15.1 of the agreement for

sale dated 20th November, 2018. Let the calculation sheet handed over to this Court be kept with the record.

Without going into the nitty-gritty of the calculation made by the plaintiff/appellant we direct the plaintiff to deposit the said amount with the Trial Court within two weeks from date. Since the amount has been deposited, the parties can proceed on the basis of the agreement entered into by and between them and the rights, which flows therefrom, can be asserted.

Since the Court has decided to keep the matter at the stage of maintainability, we, therefore, direct the Trial Court to decide the same and in the event it is found that the suit is maintainable shall make an endeavour to frame the issues and decide the same as expeditiously as possible.

Since the bank and borrower are before us and have been served with the copy of the plaint and the application for injunction in the instant appeal, we, therefore, grant them liberty to appear before the Trial Court within a week from date and in the event they choose to file any opposition to the application for injunction that should be within fortnight from date; reply thereto, if any, be filed within a week thereafter.

The Trial Court shall decide the application for temporary injunction as well as to the point of maintainability of the suit within fortnight from the date of expiration of the period for exchange of affidavits in accordance with law.

It goes without saying that in the event the contesting defendants intend to take a plea of maintainability of the suit, the same may be permitted

to be taken in the affidavit-in-opposition to the application for injunction so that it can be finally decided along with an application for temporary injunction.

Nothing observed hereinabove shall be construed to have any persuasive effect on the merit of an application for temporary injunction or on the plea of maintainability of the suit.

With the above observations, the appeal and connected application are disposed of.

(Harish Tandon, J.)

(Ajay Kumar Gupta, J.)