

Swapna Bhattacharya Vs. M/S M-tech Developers Ltd.

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Court : Delhi

Decided On : Jan-22-2014

Judge : Vibhu Bakhru

Appellant : Swapna Bhattacharya

Respondent : M/S M-tech Developers Ltd.

Judgement :

THE HIGH COURT OF DELHI AT NEW DELHI % + Judgment delivered on:

22. 01.2014 CO.PET.54/2013 & CA No.141-142/2013 SWAPNA BHATTACHARYA Petitioner versus M/S M-TECH DEVELOPERS LTD. Respondent
Advocates who appeared in this case: For the Petitioner : Mr B.K. Dash & Mr Pawan Kumar. For the Respondent : Mr Raman Duggal.
CORAM:HONBLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J1 The present petition has been filed by the petitioner under Sections 433(e), (f), 434 and 439 of the Companies Act, 1956, inter alia, praying for winding up of the respondent company. It is alleged that the respondent company has failed and neglected to pay the amounts due and payable to the petitioner and is, thus, unable to pay its debts. Consequently, it is contended that the respondent company is liable to be wound up.

2. The respondent company is a company engaged in the business of developing real estate and housing projects. The respondent company is presently engaged in developing and construction of multistoried residential flats in a project under the name of Camellia Garden situated at Bhiwadi, Rajasthan. The said project was advertised and bookings were invited from general public by circulation of brochures.

3. On the basis of the said advertisements, one Navdeep Uppal had booked a flat in the said housing project. An initial amount of `1,50,000/- was paid to the respondent company as booking amount. The respondent company acknowledged the same and issued a receipt bearing no.043 dated 25.04.2006 for the said amount. The balance payment was to be made in installments which were linked to the progress in construction of the multistoried buildings. The respondent company raised a further demand of `2,25,000/- towards first installment vide demand letter no.CG/INST.I/618 dated 21.12.2006. This installment representing 12% of consideration was due and payable on the commencement of construction. Mr Navdeep Uppal did not make the said payment and agreed to sell/transfer the booking in favour of the petitioner.

4. Thereafter, Mr Navdeep Uppal and the petitioner executed an agreement dated 26.12.2006 whereby the petitioner paid a sum of `1,50,000/- to Mr Navdeep Uppal vide Demand Draft No.811208 dated 11.10.2006 drawn on State Bank of Patiala, Kanpur and Mr Navdeep Uppal surrendered his booking and all attendant rights vide a surrender memo along with original memo receipt No.043 dated 25.04.2006. Pursuant to the said agreement, respondent company recorded the said booking in the name of the petitioner instead of the Navdeep Uppal. Accordingly, all rights, title and interest with respect to the said booking of a flat stood transferred in favour of the petitioner. The respondent company also issued a fresh receipt, bearing No.9910 dated 07.02.2007, in favour of the petitioner confirming the payment of `1,50,000/- as the booking amount.

5. The petitioner further paid a sum of `2,25,000/- to the respondent company, by a cheque No.715972 dated 06.02.2007 drawn on State Bank of Patiala, as the first installment and the respondent company also issued a receipt, bearing no.AS/CG-

05/18/118 dated 14.02.2007, confirming the receipt of payment of `2,25,000/- as the first installment. In view of the first installment being made by the petitioner, the respondent company provisionally allotted a flat bearing no.302 on 3rd Floor, in Tower BEETA6 at Camellia Garden, Bhiwadi, Rajasthan vide allotment letter dated 22.11.2007.

6. On 09.01.2012, the respondent company issued another letter demanding the balance payment from the petitioner stating that petitioner could take possession of the flat in question and get the title deed registered. However, on visiting the site, the petitioner found that construction of Tower BEETA-6 had not commenced and, therefore, there was no possibility of the petitioner being given the possession of a flat in the said Tower.

7. In the given circumstances, the petitioner issued a statutory legal notice dated 01.10.2012 to the respondent, under Section 433 & 434 of the Companies Act, 1956, calling upon the respondent company to pay the sum of `3,75,000/- along with interest at the rate of 18% P.A. within three weeks from the date of the receipt of the said legal notice. Although, the said notice is stated to have been served on the respondent company, the respondent did not respond to the said notice. The Petitioner filed the present petition as the respondent company neither responded to the said demand notice nor paid the amount as demanded by the petitioner within the specified period. During the course of proceedings before this court, the respondent company deposited a sum of `3,75,000/- without prejudice to the its rights and contentions. By an order dated 20.05.2013, this court directed that the said amount be deposited in a fixed deposit.

8. The counsel for the petitioner has contended that the respondent company has played a fraud on the petitioner by repeatedly representing that the construction of Tower BEETA-6, in which the petitioner had booked a flat, was in full swing while, in fact, the construction of the said tower had not even commenced. It is contended that the respondent has misrepresented and mislead the petitioner as the petitioner was induced to make the payment of the first installment on the false representation that the construction had commenced. It is contended that the petitioner demanded a refund of `3,75,000/- alongwith interest, by a demand

notice dated 01.10.2012, as the respondent had failed to carry out the construction of the flat booked by the petitioner. However, the respondent neither responded to the said demand notice nor paid the demanded amount. It is contended that the respondent has used the funds of the petitioner without performing its obligations and, therefore, the respondent company is liable to pay the sum of `3,75,000/- alongwith interest to the petitioner.

9. The counsel for the respondent has submitted that the flat allotted to the petitioner was only tentative and provisional. It was further contended that the respondent has already completed the construction of two towers and had made substantial progress in constructing three other towers. Accordingly, certain residential flats were available in the said project, the possession of which could be handed over to the petitioner. The learned counsel submitted that although the project was approved by Urban Improvement Trust (UIT), Bhiwadi, Rajasthan, yet the project suffered certain set backs on account of an attempt by the UIT to carve a 60 meter road through the plot of land on which the said project was being developed.

10. It was further contended by the learned counsel for the respondent that the claim of the petitioner was barred by limitation as the amount in question had been deposited with the respondent in 2007 and more than three years had elapsed since.

11. I have heard the learned counsel for the parties.

12. At the outset, the contention that the claim of the petitioner, which is subject matter of the present petition, is barred by limitation is erroneous and is liable to be rejected. Admittedly, the respondent had received the sum of `3,75,000/- towards booking of a residential flat. The said payment was made to the respondent in terms of a construction linked plan as advertised and agreed by the respondent. In terms of the construction linked payment plan, the payments for the flat were to be made in the following manner:

Construction Link Payment Plan - II At the time of Booking CO.PET. 54/2013 - At the time of launching On start of Foundation On casting of G.F. Roof Slab On

casting of 1st Floor Roof Slab On casting of 2nd Floor Roof Slab On casting of 3rd Floor Roof Slab On casting of 4th Floor Roof Slab On casting of 5th Floor Roof Slab On casting of 6th Floor Roof Slab On casting of 7th Floor Roof Slab On casting of 8th Floor Roof Slab On casting of 9th Floor Roof Slab On casting top Floor Roof Slab On completion of Brick Work in Apptt. On completion of flooring work in Apptt. On completion of internal plaster Within Apartment At the time of Possession 13.-. 12% 5% 5%+50% car parking 5%+50% of EDC5+50% Of PLC5 5% 5% 5% 5% 5% 5% 5% 5% + 50% of PLC5 + 50% car parking - 5%+50% of EDC5 + Stamp duty + any other charges as applicable.

The respondent demanded a sum of `2,25,000/- (12% of the consideration) by its letter dated 21.12.2006. The said letter further put the petitioner to notice that if the payment as demanded was not made within a period of 30 days, the petitioner would be liable to pay penal interest at the rate of 20% P.A.

14. Admittedly, the respondent received the payment of the booking amount and the first installment (aggregating 20% of the consideration) and thereafter, issued the letter for allotment of Provisional Flat No.302 on the 3rd floor measuring 1500 Sq. Ft. in Tower Beeta 6 at Camelia Garden, Bhiwadi. The respondent was obliged to carry out the construction and demand further payments according to the schedule as agreed. However, admittedly, the respondent did not carry out any construction in respect of Tower Beeta-6 and no further demands were made on the petitioner till 09.01.2012. The respondent invited the petitioner to make the balance payment immediately by its letter dated 09.01.2012. It is apparent that the said demand was completely unjustified as the respondent had not even commenced construction of Tower Beeta-6. The respondent had also not issued any other communication with regard to altering the previous provisional allotment. In the circumstances, the contention that cause of action arose in 2007 and is barred by limitation is wholly erroneous. The petitioner has made the claim for refund of the amount paid as it was, subsequently, discovered that the respondent has not commenced the construction as represented. The petitioner could only make a claim as a reasonable period for construction had elapsed. The demand for the balance consideration in January 2012 and the discovery that the respondent had not commenced construction of tower Beeta 6 provided the

petitioner the cause to seek refund of the amount paid. In any event, the amount of `3,75,000/- is also duly acknowledged by the respondent as part consideration for a flat and the respondent still contends the booking for the same to be valid. In view of the forgoing, any claim in respect of the amount paid by the petitioner cannot be stated to be barred by limitation.

15. The only question to be addressed is whether the amount calculated by the respondent is admittedly due and payable to the petitioner. The said question has to be considered in the context of the following facts: (a) It is not disputed that a sum of `3,75,000/- was calculated and demanded by the respondent towards booking of a flat in measuring 1500 sq. ft. (b) It is also admitted that a provisional allotment of flat on the 3rd Floor of Tower BEETA6 was made in favour of the petitioner and the said allotment has not been modified or amended till date. (c) It is also admitted by the learned counsel for the respondent that construction in respect of Tower BEETA6 has not commenced. (d) It is further admitted by the learned counsel for the respondent that a flat measuring 1500 sq. ft. was not presently available in the project currently as the towers that have been constructed comprise of flats which measure approximately 1200 sq. ft. each.

16. Considering the above facts, it can hardly be disputed that the respondent has failed to fulfill its obligation and is not in a position to handover the possession of the flat in respect of which the amount of `3,75,000/- had been accepted. Admittedly, the petitioner was only obliged to pay 20% of the consideration till the commencement of construction as per the construction linked plan. The amount of booking and the first installment was also demanded and accepted by the respondent as being 20% of the consideration (computed for a flat of 1500 Sq. ft. at the rate of `1250 per Sq ft.) for a flat measuring 1500 sq ft. It is thus, not open for the respondent to contend that it was not obliged to hand over a flat measuring 1500 Sq ft. A allotment letter for such flat was issued to the petitioner on 22.11.2007 and there has been no further communication by the respondent whereby the said allotment has been sought to be altered in any manner. On the contrary, respondent called upon the petitioner to pay the balance sum due immediately, by its letter dated 09.01.2012 17. In the given circumstances, the defence raised by the respondent that he is not liable to repay the amount of

`3,75,000/- to the petitioner is not credible. In my view, there is no justifiable reason or ground on which the respondent can resist the claim of the petitioner and withhold the payment of `3,75,000/-. The said amount had been paid by the petitioner for purchase of the flat, which the respondent is, admittedly, not in a position to deliver and consequently cannot withhold the amount paid by the petitioner. The contention that the allotment was only a provisional one and the respondent could amend the same also cannot be accepted as, admittedly, there is no flat measuring 1500 Sq. ft. that has been built and is available with the respondent in the residential development - Camelia Garden. The respondent cannot now compel the petitioner to accept a residential flat measuring 1200 Sq. ft. in another Tower. The contention canvassed on behalf of the respondent is clearly without any merit and is ex-facie a sham defence raised only to avoid the obligation to refund the amount collected by the respondent.

18. The petitioner would also be entitled to a reasonable interest as the sums paid by the petitioner have been utilised by the respondent. The respondent had itself demanded interest at the rate of 20% in the event the first installment of `2,25,000/- was not paid within a period of 30 days from the date of the demand. In my considered view, interest at the rate of 12% P.A would be reasonable and the respondent is liable to pay the same.

19. The Supreme Court in the case of Aditya Mass Communications (P) Ltd. v. A.P.SRTC: (2003) 11 SCC17 has held that:

If a court comes to the conclusion on a given set of facts that a party has been wrongly denied the use of its own money, it is the duty of the court to see that the said party is appropriately compensated.

20. Following the decision of the Supreme Court in the case of Aditya Mass Communications (supra), the Punjab & Haryana High Court in the case of Munshi Ram Om Prakash, Bankers and Commission Agents v. Arti Food and Fats Pvt. Ltd. and Ors.: [2008]. 142 Comp Cas 678 (P&H) has also directed payment of interest at the rate of 12% P.A. in proceedings for winding up of a company.

21. A Single Judge of this Court in the case of Devendra Kumar Jain v. Polar Forgings & Tools Ltd.:

49. (1993) DLT552 has held as under:

the creditor need not be forced to initiate separate litigation for recovery of the interest amount and the interest amount can be determined by the Company Judge in the winding up proceedings and on failure of the company to pay that amount the Company can be ordered to be wound up on the ground that it is unable to pay its debts.

22. A Division Bench of this Court in the case of Bhajan Singh Samra v. Wimpy International Ltd.: Co. App. No.42/2012, decided on 18.05.2012, has affirmed the observation and the decision passed by a Single Judge of this court in the case of Devendra Kumar Jain (supra).

23. I am not inclined to admit the petition at the present stage as the respondent has already deposited the principal amount (a sum of `3,75,000/-) with the registry of this court. The Registry is directed to pay the said amount along with accrued interest to the petitioner. In addition, the respondent would pay simple interest at the rate of 12% P.A. from the date of receipt of the amount till the date of deposit of the amount with the registry of this court. The said interest be paid within a period of four weeks from today.

24. In the event, the payment of interest as directed is not made within a period of four weeks, the petition would stand admitted and necessary orders would follow.

25. List for compliance on 10.03.2014. VIBHU BAKHRU, J JANUARY 22 2014 RK

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