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Court : Mumbai

Decided On : Aug-12-2015

Judge : The Honourable Mrs. Justice Roshan Dalvi

Appeal No. : Notice of Motion (L) No. 995 of 2015 in Suit (L) No. 320 of 2015

Appellant : Pius Varghese Pullikottil and Another

Respondent : Neptune Ventures and Developers Pvt. Ltd. and Others

Judgement :

1. The plaintiff has sued upon an agreement of flat purchase. The plaintiff has paid certain installments for the flat. The defendant Nos. 1 to 4 are stated to have unilaterally increased the price of the suit flat, which the plaintiff has not accepted. The plaintiff claims specific performance of the initial agreement between the parties which is acted upon by both the parties. The defendant Nos.1 to 4 have allotted the suit flat to defendant Nos. 5 and 6 upon yet higher amount of the total consideration, but upon payment of a very paltry amount by defendant Nos. 5 and 6. The plaintiff claims the act of the defendant Nos. 1 to 4 to be fraudulent and has sued for specific performance of the contract and applied for the relief of the appointment of Court Receiver and the usual injunctions in the notice of motion.

2. The plaintiff has filled up a booking form on 27th April, 2009, **Exhibit-C** to the plaint, for purchase of the suit flat No.504 in B-wing of the suit building directly with the defendant and showing that he would take a bank loan.

3. The agreement between the plaintiff and defendant Nos. 1 to 4 is admittedly dated 23rd June, 2009, **Exhibit-G** to the plaint.

4. There is a preprinted chart of the defendants setting out the rate, number of the flat, the type of the flat, the total price, various installments at various specified times and the other expenses towards contribution of the society, share money, other charges, charges for registration, stamp duty and parking charges etc., and setting out the terms and conditions which is called the payment chart, **Exhibit-B** to the plaint. The printed chart also sets out other terms and conditions with which we are not concerned.

5. The plaintiff has made the initial payment of Rs.51000/- at the time of booking. Thereafter the plaintiff has made two other payments by 4 cheques. The initial payment is made on 15th June, 2009, by 2 cheques of Rs.5,11,458/- and Rs. 5 lakhs aggregating to Rs.10,11,458/-. The plaintiff has made further payment after the execution of the agreement between the plaintiff and defendant Nos. 1 to 4 on 23rd June, 2009 also. These are by 2 further cheques of Rs.5,31,229/- each aggregating to Rs.10,62,458/- made on 26th June, 2010. These are as set out in the payment chart, **Exhibit-B** to the plaint.

6. These payments would show that the written agreement between the plaintiff and defendant Nos. 1 to 4 showing the flat allotted to the plaintiff on 23rd June, 2009 is in terms of and in consonance with the various written terms stating out the payment schedule. The parties would, therefore, be bound by the written contract dated 23rd June, 2009, **Exhibit-G** to the plaint read with the payment schedule showing the terms and conditions, **Exhibit-B** to the plaint.

7. The issue of the cheques by the plaintiff would show the acceptance of those terms by the plaintiff. The acceptance of the cheques of the plaintiff by defendant Nos. 1 to 4 would show the acceptance of the terms by defendant Nos. 1 to 4 under the agreements / contract between the plaintiff and defendant Nos. 1 to 4

dated 23rd June, 2009.

8. The defendants claim that the initial contract of defendant Nos. 1 to 4 with the plaintiff was dated 23rd June, 2009 had nothing to do with the printed terms and conditions as shown in the payment schedule of the defendant Nos. 1 to 4.

9. It would have to be seen how the parties have acted upon the terms and conditions and it is easy to see so by the issue and acceptance of the aforesaid cheques as also by the defendants' own admission, which shall be considered presently.

10. Under the payment chart of the plaintiff, **Exhibit-B** to the plaint the plaintiff was to make the initial payment of 15% of the total flat cost of Rs.70,83,055/- (70.83L) aside from the initial payment of Rs.51000/-. Hence the cheque of the initial deposit of Rs.51,000/- and the other 2 cheques of 15th June, 2009 of Rs.5,11,458/- and Rs.5 lakhs show the earnest money paid, which constitutes 15% of the total price.

11. The next payment of installment is at the time of the plinth. That is also to be of 15% of the total price. The further 2 cheques dated 14th July, 2010 of Rs.5,31,229/- each constitute precisely further 15% of the total sale price as the 2nd installment.

12. The reverse of the plaintiff's booking form shows the aforesaid payments including the percentage of payments made.

13. These payments are accepted in installments on 27th April, 2009, 15th June, 2009 and 14th July, 2010 by defendant Nos. 1 to 4 precisely as per the payment chart issued by defendant Nos. 1 to 4.

14. The allotment letter dated 23rd June 2009, **Exhibit-G** to the plaint specifically allots flat No.504 in the suit building to the plaintiff. Paragraph 3 of the allotment letter shows that residential flats are to be constructed for the lump-sum consideration of Rs.70.83 lakhs and states that the plaintiff has deposited Rs.10.62 lakhs.

15. Counsel on behalf of defendant Nos. 1 to 4 contended that the agreement between the parties was for lumpsum amount of Rs.70.83 lakhs, which meant that the plaintiff must pay Rs.70.83 lakhs in one installment as a lump-sum.

16. This runs counter to the fact that defendant Nos. 1 to 4 have not only accepted Rs.10.62 lakhs by 3 cheques on 2 different dates, but have even later accepted further payments by 2 other cheques on 14th July, 2010 without insisting upon the balance lump-sum.

17. Defendant Nos. 1 to 4 have written another letter later to the plaintiff dated 17th June, 2010, **Exhibit-H** to the plaint, in respect of the suit flat informing the plaintiff that the construction work was as per schedule that the plinth has been completed and that the installment for the plinth was due. Defendant Nos. 1 to 4 have demanded and accepted precisely the amount of 15% of the total flat cost from the plaintiff as per their printed payment chart. Consequently the defendant Nos. 1 to 4 have expressly adhered to the payment chart and their expression lump-sum? shows only the total consideration. As per the demand of the defendant Nos. 1 to 4 which was as per the payment chart, the plaintiff made payment and defendant Nos. 1 to 4 accepted the payment on 14th July, 2010.

18. All was well between the plaintiff and defendant Nos. 1 to 4 until 14th July, 2010. Both the parties adhered and complied with the terms of their contract not only with regard to the payment schedule, but also with regard to the construction and the demand for the installments.

19. The defendant Nos. 1 to 4 demanded further payment upon the completion of the 7th slab. This was under the 3rd installment. The plaintiff was to pay 1.50% of the total consideration for each slab and there would be 34 slabs showing 51% of the price to be paid for the slabs. Defendant Nos. 1 to 4 demanded 40.5% of the agreement value for the 7 slabs. This would be 15% by way of earnest money, 15% at the time of the plinth and 10.5% for the 7 slabs. This would constitute precisely 40.5% of the agreement value. This is the demand letter dated 26th June, 2013, **Exhibit-O** to the plaint. This is precisely in consonance with the payment schedule under the preprinted payment chart of the defendant Nos. 1 to 4, **Exhibit-B** to the plaint.

20. However at the time of demanding the 3rd installment under the said letter, defendant Nos. 1 to 4 unilaterally increased the flat price from 70.83 lakhs to 98.28 lakhs showing it as Agreement Value?. The plaintiff did not accept the increased value as there were no terms of the contract for any escalation in the payment. Defendant Nos. 1 to 4 sent their first letter on 15th July, 2013 to the plaintiff, 3 years after the second installment became due and was paid by the plaintiff. Defendant Nos. 1 to 4 sent a reminder on 25th July, 2013.

21. The plaintiff rightly challenged the unilateral increase under his Advocates' detailed notice dated 29th July, 2013 setting out the full facts and stating how the parties had complied with the initial agreement under the allotment letter dated 23rd June, 2009 in terms of the payment chart by way of installments.

22. Defendant Nos. 1 to 4 replied to the notice only setting out that the amounts deposited by the plaintiff were adjusted towards the part consideration and that the plaintiff has to pay further installments as demanded by defendant Nos. 1 to 4 under their letter dated 26th June, 2013.

23. There has been no contention in the said reply that the lump-sum amount was due and payable without installments. There has been nothing stated in that letter how and why the price was unilaterally increased. There has been no contention of any oral agreement between the parties of any nature. Indeed no oral terms can be admissible in a written contract under Section 91 of the Indian Evidence Act.

24. The plaintiff complied with the terms of the contract. The defendant Nos. 1 to 4 unilaterally modified the contract. The plaintiff is not bound by the modification. Hence nonpayment of the further amount by the plaintiff would not constitute a breach of the contract by the plaintiff. Since the plaintiff has not breached this contract and has performed his obligations thereunder he would be entitled to specific performance of the oral contract between the parties as per its terms.

25. In the case of **Bal Krishna and Anr. Vs. Bhagwan Das (Dead) by LRs and Ors. (2008) 12 Supreme Court Cases 145** it has been held that the contract must be performed as per its own terms.

26. It is argued by Counsel on behalf of the defendant that an allotment letter would not create any rights in favour of the plaintiff as per the judgment in the case of **Hansa V. Gandhi Vs. Deep Shankar Roy and Ors. AIR 2013 Supreme Court 2873**. He referred to para 22 of the judgment in that behalf. The reliance upon the judgment is wholly misplaced. In that case a letter of intent with several conditions was issued upon the plaintiff. The conditions were not complied. It was held that until the conditions were complied a mere letter of intent would not give any right to the plaintiff in the absence of a formal agreement.

27. In this case the terms and conditions in the payment chart are complied by not only the plaintiff, but also acted upon by defendant Nos. 1 to 4 and the contract between the parties under the allotment letter, which must be read along with the terms and conditions of the payment chart, would bind the parties.

28. It is now contended on behalf of defendant Nos. 1 to 4 that since the initial contract was for lump-sum amount of Rs.70.83 lakhs and the plaintiff could not make payment of the balance amount in one lump-sum, he asked for installments. Defendant Nos. 1 to 4 granted installments upon increasing the price of the flat to 98.28 lakhs, which the plaintiff accepted. Such oral contract alleged by the defendants for the first time in the affidavit-in-reply of this notice of motion and which is absent in the initial reply of the defendant to the plaintiff's Advocates' notice cannot be accepted. It cannot be accepted under the aforesaid statutory provisions and was mandatorily required to be made in writing, if there was such a novatio. On the facts of this case it cannot be accepted also because even in the very letter dated 26th June, 2013, **Exhibit-O** to the plaint showing the higher agreement value defendant Nos. 1 to 4 have acted precisely in terms of the payment chart for demanding the 3rd installment and that is @ 1.5% for 7 slabs making it 10.5% in addition to the earlier payments of 15% and 15% totalling to 40.5%.

29. It may be mentioned that had such a contract been made between the parties, defendant Nos. 1 to 4 in reply to the plaintiff's Advocates' notice would have mentioned this fact. In fact it is stated that it is not only not mentioned in reply to the notice of the plaintiff, but also not mentioned in reply to the petition filed by the

plaintiff in the Consumer Forum where the written statement was filed by defendant Nos. 1 to 4.

30. Defendant Nos. 1 to 4 sought to terminate the contract that never was by their letter dated 19th February, 2014, which the plaintiff has rightly challenged.

31. Soon after the termination notice and without even waiting for the reply of the plaintiff, defendant Nos. 1 to 4 have allotted the suit flat to defendant Nos. 5 and 6. The suit flat has been allotted upon the total price of Rs.2.05 crores. Upon such a large purchase price defendant Nos. 1 to 4 have accepted a deposit of only Rs.5.5 lakhs from defendant Nos. 5 and 6. The entire transaction completely lacks bonafides.

32. Defendant Nos. 1 to 4 are seen to have committed a breach of the contract and backed out of the contract with the plaintiff upon the real estate value rising, which always does. Defendant Nos. 1 to 4 cannot in law be allowed to do so. Defendant Nos. 5 and 6 are stated to have made payment of a paltry amount of 2.5% on the premise that they had taken the flat earlier sold to the plaintiff and would have expected litigation as explained by Counsel on behalf of defendant Nos. 1 to 4.

33. The construction of the building being constructed by defendant Nos. 1 to 4 is yet not complete. The suit flat is not fully constructed. Hence possession has not been handed over to defendant Nos. 5 and 6. The plaintiff has made out a good prima facie case for grant of the relief of injunction against transfer as also against parting with possession or creation of any 3rd party rights by the defendants.

34. Defendant Nos. 5 and 6 have been served a copy of the plaint as also notice of motion on 5th July, 2015 by registered post. Defendant Nos. 5 and 6 have not appeared or filed any affidavit in reply. Affidavit of service in that regard is filed. Defendant Nos. 5 and 6 did not appear at the time of ad-interim application also. They failed to appear on the next date of hearing of this notice of motion, which was on 23rd July, 2015 also.

35. The plaintiff is entitled to the reliefs sought. The notice of motion is made absolute in terms of prayer (b) against all defendants.

36. All the defendants shall not dispose off, alienate, encumber, part with possession or create any 3rd party rights in the suit flat described in Exhibit-A to the plaint. Defendant Nos. 1 to 4 shall not only be entitled but bound to construct the suit flat as also the suit building.

37. Defendant Nos. 1 to 4 shall not put defendant Nos. 5 and 6 or any other party in possession of the suit flat when constructed.

38. Defendant Nos. 1 to 4 shall file their written statement within 30 days as service of the writ of summons must be deemed to be waived by them.

39. The plaintiff shall serve the writ of summons upon defendant Nos. 5 and 6 also within 30 days.

40. Suit to be on board on 21st September, 2015.

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