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Devender Kumar vs.brijesh & Anr

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Court : Delhi

Decided On : Jan-16-2019

Appellant : Devender Kumar

Respondent : Brijesh & Anr

Advocate for Def. : Mr. Sanjay Verma, Mr. Nitesh Kumar Singh, Ms. Savita, Ms. Neha

Advocate for Pet/Ap. : Mr. Ravinder Narwal

Judgement :

* % + 1. IN THE HIGH COURT OF DELHI AT NEW DELHI Date of decision:

16. h January, 2019 CS(OS) 330/2016& IA No.7982/2016 (u/O XXXVIII R-5 CPC) & OA No.29/2018 & IAs No.3826/2018 & 3828/2018 (for condonation of 374 days in filing and 28 days in re-filing the Chamber Appeal). DEVENDER KUMAR ..... Plaintiff Through: Mr. Ravinder Narwal, Adv. versus BRIJESH & ANR ..... Defendants Through: Mr. Sanjay Verma, Mr. Nitesh Kumar Singh, Ms. Savita, Ms. Neha, Advs. CORAM: HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW The plaintiff has instituted this suit for recovery of Rs.4,80,40,000/- pleading, (i) that the defendant no.1 represented himself to be the owner of land comprised in Khasra no.
(2-15),
(1-2), 77/1

(2-8), 17 (4-16), 18 (4-16), 19 (4-16) and 20 (4-16) situated in the Revenue Estate of Village Bakhtawapur, Delhi - 110 036 and vide two Agreements to Sell both dated 10th March, 2011, one with respect to 3 bigha 17 biswas of land comprised in Khasra No.
(2-15) and
(1-2) and the second with respect to 21 bigha 12 biswas of land comprised in Khasra No.77/1
(2-8), 17 (4-16), 18 (4-16), 19 (4-16), 20 (4-16) of Village Bakhtawarpur, Delhi, aforesaid agreed to sell the said land to the plaintiff for a consideration of Rs.20,00,000/- and Rs.30,00,000/- respectively and the plaintiff, at the time of execution of the Agreements to Sell, paid advance sale consideration of Rs.2,00,000/- and Rs.3,00,000/- respectively to the defendant no.1; (ii) that while the two Agreements dated 11th March, 2011 were alive and enforceable, the defendant no.1 offered to the plaintiff that in case the CS(OS) 330/2016 Page 1 of 10 plaintiff does not enforce the Agreements and gives up his rights under the Agreements, the defendant no.1 shall pay a sum of Rs.3,00,00,000/- towards compensation besides refunding double the amount of advance received i.e. Rs.10,00,000/- to the plaintiff, in the second week of June, 2013; (iii) that the plaintiff accepted the offer and a formal Memorandum of Understanding (MoU) was executed between the parties on 15th June, 2013; (iv) that with a view to secure the amount payable under the MoU, the defendant no.2 Yashpal Khatri also became a party to the MoU and undertook to pay the amounts mentioned in the MoU in case the defendant no.1 failed to pay the same; thus the liability of the two defendants is joint and several; (v) that pursuant to the MoU, the defendant no.1 has paid only a sum of Rs.30,00,000/- to the plaintiff, leaving a balance of Rs.2,80,00,000/- which has not been paid inspite of repeated reminders; and, (vi) that the defendants had also undertaken to pay interest at 24% per annum and thus, besides the principal amount of Rs.2,80,00,000/-, a sum of Rs.1,90,40,000/- is due towards pre-suit interest. Hence the suit for recovery of Rs.4,80,40,000/-.

2. The suit was entertained and summons thereof ordered to be issued. The defendant no.1 failed to file any written statement and in the order dated 20th December, 2016 was held liable to be proceeded against ex parte but has not been proceeded against ex parte as yet and the counsel for the defendant no.1

continues to appear. The defendant no.2 has filed written statement.

3. The suit came up before this court on 18th May, 2018 when doubt was expressed as to the maintainability of the suit; it was observed, that the plaintiff, if has suffered loss for breach of contract, has to prove such loss/damages, to be entitled to recover the same; but there are no averments in the plaint qua loss and the monies are sought to be recovered by enforcement of MoU. It was further observed that the Agreements to Sell provided for the consequences of breach of contract and the plaintiff, even if there was any breach by the defendant no.1, could not recover double the amount of advance/earnest money paid as well as damages. However since on that date also the main counsel for the plaintiff did not appear and a non-main counsel was sent, instead of dismissing the suit, an opportunity was given to the counsel for the plaintiff to explain. Thereafter, on several dates the matter continued to languish. Finally yesterday Mr. Vijay Dahiya, Advocate appeared and was heard on the maintainability of the suit. However after he failed to convince this Court, he stated that he is a junior to. Mr. Ravinder Narwal, Advocate and requested that Mr. Narwal, Advocate be allowed to appear. Accordingly, the hearing was adjourned to today.

4. Today, Mr. Narwal, Advocate has appeared and has stated (i) that while the defendant no.1 had agreed to sell to the plaintiff for total sale consideration of Rs.20,00,000/-and Rs.30,00,000/- respectively but the prevalent value of the land is at a rate of Rs.3,00,00,000/- per acre and photocopies of Sale Deeds dated 23rd November, 2012 are flashed in the Court in support thereof. Further, reading from photocopies of pages from some textbook, author whereof is not even in the knowledge of the counsel for the plaintiff, it is contended that the word shall in the MOU dated 15th June, 2013 would give a binding effect to the MOU and the defendants, under the MoU aforesaid were bound to pay the monies sought to be recovered. Reference is made to Kailash Nath Associates Vs. Delhi Development Authority (2015) 4 SCC136to contend that the named amount to be paid in the event of breach of an agreement can be recovered. Reference is also made to Motilal Padampat Sugar Mills Co. Ltd. Vs. The State of Uttar Pradesh (1979) 2 SCC409on the aspect of estoppel.

5. As far as the reference to Kailash Nath Associates supra is concerned, reliance thereon is misconceived. The same does not lay down what the counsel for the plaintiff has canvassed. On the contrary, therein, on a conspectus of earlier judgments, the law on compensation for breach of contract under Section 74 of the Indian Contract Act, 1872 was held to be: 43.1 Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation. 43.2 Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act. 43.3 Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section. 43.4 The Section applies whether a person is a plaintiff or a defendant in a suit. 43.5 The sum spoken of may already be paid or be payable in future. 43.6 The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded. 43.7 Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application. 6. Merely because in the MoU it was provided that the defendants shall pay the amount mentioned therein to the plaintiff, would not make the MoU binding or actionable if otherwise were to not constitute an enforceable contract.

7. 8. The question of estoppel does not arise in the facts of the case. The arguments are even otherwise de hors the averments in the plaint and the counsel for the plaintiff admits that there are no averments in the plaint, of the plaintiff having suffered any loss. No particulars on the loss if any have also been pleaded.

9. The two Agreements to Sell dated 10th March, 2011, which are otherwise identical, record (i) that it was in the notice of both the parties i.e. the plaintiff and the defendant no.1, that some litigation was pending before the Revenue Authorities with respect to the land subject matter thereof and the defendant no.1 had undertaken to, at his own risk and cost have the said litigation cleared before executing the Sale Deed in pursuance to the Agreement to Sell; and, (ii) that in case the defendant no.1 failed to complete the sale bargain, the plaintiff would be entitled to specific performance thereof and in case the plaintiff failed to complete his part of the Agreement to Sell, the amounts paid by the plaintiff by way of earnest money shall be forfeited. CS(OS) 330/2016 Page 5 of 10 10. The MoU dated 15th June, 2013 records, (i) that the litigation referred to in the Agreements to Sell by the defendant no.1 to the plaintiff had not ended; (ii) in view of the ongoing litigation and for other reasons, the plaintiff and the defendant no.1 had decided not to enforce and not to comply with the Agreements to Sell; (iii) that in lieu of the earnest money of Rs.5,00,000/- paid by the plaintiff under both the Agreements, the defendant shall pay a sum of Rs.10,00,000/- to the plaintiff; (iv) that since the plaintiff had invested Rs.5,00,000/- two years prior to the MoU and had also helped the defendant in the pending litigation, in lieu of the efforts, hopes, expectations and investments and past, present and future losses the defendants had agreed to and were binding themselves to pay a sum of Rs.3,00,00,000/- to the plaintiff and out of which a sum of Rs.30,00,000/- had been paid in cash at the time of execution of the MOU.

11. The MoU does not record breach of the Agreement to Sell, either by the plaintiff or by the defendant. The amounts agreed to be paid thereunder, were / are not by way of compensation for any breach. Rather, the plaintiff and the defendant had agreed to, with mutual consent, terminate the Agreements to sell.

12. In the aforesaid scenario, the question which arises is, whether the MoU qualifies as a contract.

13. The counsel for the plaintiff draws attention to Section 10 of the Contract Act which prescribes that all agreements are contracts, if made by free consent of parties competent to contract, for a lawful consideration and with a lawful object and are not expressly declared to be void.

14. However, Section 25 of the Contract Act declares as void, an agreement made without consideration. Thus, if the MOU is without CS(OS) 330/2016 Page 6 of 10 consideration and is expressly declared to be void by Section 25, the same, under Section 10 will not qualify as a contract.

15. Upon it being enquired from Mr. Vijay Dahiya, Advocate appearing for the plaintiff yesterday, as to how the MoU in enforcement whereof monies are sought to be recovered is not void under Section 25, he had drawn attention to Exception 2 thereto which provides that if the agreement is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do, then an agreement without consideration is not void.

16. Though Mr. Narwal, Advocate today appearing has not pressed the said point, but it is deemed appropriate to deal with the same.

17. The question of the amounts agreed by the defendant under the MOU qualifying as a promise to compensate the plaintiff for something done by the plaintiff for the defendant or which the defendant was legally compellable to do for the plaintiff would arise only if the plaintiff had pleaded particulars of expenses incurred by the plaintiff on behalf of the defendant, either with respect to the land agreed to be sold or the litigation with respect to the said land or if the amounts agreed to be paid under the MOU been by way of compensation for breach by the defendant of Agreements to Sell which the defendant was compellable to perform. However, neither does the MOU contain any particulars of the expenses voluntarily incurred by the plaintiff with respect to land or in the litigation with respect to land nor has the plaintiff in the plaint pleaded the said particulars.

Similarly, the MOU does not mention any breach of Agreements to Sell by the defendant, for the amounts agreed to be paid thereunder being CS(OS) 330/2016 Page 7 of 10 by way of compensation therefor. On the contrary the MOU records mutual termination of Agreements to Sell by the parties. Thus, in my view exception (2) to Section 25 is not attracted.

18. The words already voluntarily done something for the promisor in exception (2) to Section 25 of the Contract Act cover cases where a person, without the knowledge of the promisor, or otherwise than at his request, does the latter some service and the promisor undertakes to recompensate him for it. The plaintiff, as aforesaid, has not pleaded what did he voluntarily do for the defendants, for the defendants to promise to pay the amounts under the MOU to the plaintiff. It may be highlighted that under the Agreements to Sell, it was the defendant no.1 who was bound to remove / clear at his own cost and risk the litigation / case which was pending in the Court in respect of land agreed to be sold thereunder. The plaintiff in the plaint also has not pleaded the expenditure which he voluntarily incurred on behalf of the defendants and which the defendants under the MOU promised to recompense to the plaintiff. The language of the Agreements to Sell also does not support the view that the defendant no.1 could compel the plaintiff to incur any expenditure on the litigation with respect to land. On the contrary, the Agreements to Sell clearly mention that the defendant no.1 was to have the said litigation cleared at his own cost and risk.

19. I may mention that exception (2) to Section 25 of the Contract Act is a deviation from the English Common Law whereunder past consideration is no consideration and the promises have to be simultaneous. Under the English Common Law, an act done before the promise can be consideration for the promise only if the same has been done at the request of the promisor and it must have been understood that payment would be made and the CS(OS) 330/2016 Page 8 of 10 payment if had been promised in advance, must have been legally recoverable. The Contract Act on the contrary, in exception (2) requires the promise to be for compensation for a voluntary act or for something which the promisor was compellable to do. The purport of exception (2) can be gauged from illustrations (c) and (d) thereto which are as under: (c) A finds Bs purse and gives

it to him. B promises to give A Rs.50. This is a contract. (d) A supports Bs infant son. B promises to pay As expenses in so doing. This is a contract. 20. The promise by the defendants in the MOU to pay the amounts mentioned therein to the plaintiff is thus found to be without consideration and falls foul of Section 25 of the Contract Act and is void and does not constitute a contract.

21. If the MOU is not a contract, the question of the plaintiff, in enforcement thereof, being entitled to recover monies mentioned therein from the defendant does not arise and no purpose will be served in proceeding with the present suit.

22. Once it is found that the promise by the defendants to pay the amounts under the MOU to the plaintiff is without consideration, the inference is that the said promise is for consideration which is forbidden by law and / or is immoral or opposed to public policy and the object of the MOU is not lawful, again constituting the MOU void under Section 24 of the Contract Act.

23. The plaintiff, against the sum of Rs.5,00,000/- paid under the Agreements to Sell, has already admittedly received Rs.30,00,000/- and which compensates the plaintiff more than sufficiently for the two years for CS(OS) 330/2016 Page 9 of 10 which the said sum of Rs.5,00,000/- remained with the defendant no.1. However, in the absence of a contract for payment of the balance amount, the plaintiff is not entitled to recover the same from the defendants.

24. I may mention that the defendant no.2 died during the pendency of the suit and the legal heirs of defendant no.2 in the written statement have denied the MOU or any privity with the plaintiff.

25. The counsel for the plaintiff at this stage states that the defendant no.1, after the MoU has sold the property.

26. The said fact would be irrelevant for the present purposes.

27. The MOU dated 15th June, 2013, in enforcement of which the suit amounts are sought to be recovered having been found to be void and unenforceable, the suit is dismissed.

28. OA No.29/2018 preferred by the defendant no.1 against the orders dated 17th October, 2016 and 20th October, 2016 is thus infructuous and is disposed of. In the facts no costs. Decree sheet be drawn up. JANUARY16 2019 pp/gsr RAJIV SAHAI ENDLAW, J CS(OS) 330/2016 Page 10 of 10

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