

Shilpi Modes Pvt. Ltd. Vs. Shilpi Unitech

Shilpi Modes Pvt. Ltd. Vs. Shilpi Unitech

SooperKanoon Citation : sooperkanoon.com/695867

Court : Delhi

Decided On : Mar-11-1997

Reported in : 70(1997)DLT636

Judge : M.K. Sharma, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 39, Rule 1

Appeal No. : Interim Application Nos. 8710 and 9309 of 1995 and Suit No. 2084 of 1995

Appellant : Shilpi Modes Pvt. Ltd.

Respondent : Shilpi Unitech

Advocate for Def. : Mr. Jaitley

Advocate for Pet/Ap. : P.C. Khanna,; Ruchi Sindhwani,; Arun Jaitley,;

Judgement :

M.K. Sharma, J.

(1) This order shall dispose of the application filed by the plaintiff under Order 39, Rules 1 and 2 read with Order 39, Rule 5 of the Code of Civil Procedure and also the application namely, I.A. 9309/1995 filed on behalf of defendants 2 to 4 under Order 39, Rule 4 of the Code of Civil Procedure.

(2) The plaintiff instituted the present suit against the defendants seeking for a decree for declaration for dissolution of defendant No. 1 and also for rendition of accounts by defendant No. 2 and after such rendition of account to pass a decree in favor of the plaintiff and against defendants 2 to 4 in respect of the amount found to be due to it.

(3) The case pleaded in the plaint is that the defendant No. 1 is a single venture partnership of the plaintiff and the defendant No. 2. It is alleged that a partnership agreement between the plaintiff and the defendant No. 2 had come into existence and acted upon and that although in respect of the said single venture partnership entered into between the plaintiff and the defendant No. 2 no name was given but the said name as the defendant No. 1 could be used as the description of the fact that a partnership agreement between the two had come into existence. It is alleged that the plaintiff purchased 67 acres of land in Village Gawal Pahari and another 40 acres of land was acquired by it in Hyderpur. Besides the plaintiff company also had agreement with land owners for purchase of approximately 180 acres of land in Village Hyderpur. In respect of the aforesaid land the plaintiff entered into a partnership business with defendant No. 2 to develop the said land by both the parties for the purpose of colonisation project. It is stated that the defendants in the course of negotiations made detailed enquiries and all negotiations in respect of the aforesaid land. On 7.10.1991 the terms were reduced into writing in an alleged partnership agreement described as Memorandum of Understanding. A copy of the said Memorandum of Understanding is on record. The parties agreed that the expenses for development of the land which was in the ownership of plaintiff company through sale deed was to be shared between the plaintiff and defendant No. 2 company in the ratio of 55% for the plaintiff and 45% for the defendant No. 2, and the expenses for development of the land which was in the agreement for the purchase was to be shared in the ratio of 65:35 between the plaintiff and defendant No. 2 respectively. The defendant company under re-structured agreement assured the payment of Rs. 10 lacs per week from middle of November, 1991 till January, 1992 to fulfill the minimum requirement and in terms thereof the defendant company No. 2 gave two cheques of Rs. 15 lacs each Along with covering letters that the payment of the same was assured. However, when the aforesaid 2 cheques were presented to

the Bank the same were dishonoured on the ground that the 'drawer had stopped the payment'. In view of the failure on the part of the defendant No. 2 to honour its commitment under the Mou the present suit has been instituted by the plaintiff for the aforesaid reliefs.

(4) Along with the plaint the plaintiff also filed an application under Order 39, Rules 1 & 2 read with Order 39, Rule 5 of the Code of Civil Procedure which was registered as I.A. 8710/1995. On 14.9.1995 this Court by an ad interim ex parte injunction passed in the aforesaid suit restrained the defendant No. 2 from transferring, alienating or parting with possession of the properties set out in Schedule 'A' except for the purpose of running the business of defendant No. 2 till the next date.

(5) The aforesaid order apparently was passed by this Court on the basis of the statement made by the Counsel for the plaintiff that on taking of accounts the plaintiff would be entitled to atleast Rs. 815 crores from the defendants and that the partnership between the plaintiff and defendant No. 2 is admitted by the defendants and that in reply to notice for dissolution of partnership firm the defendant No. 2 replied that they did not agree to dissolution of the firm. Considering the aforesaid statements made by the Counsel for the plaintiff, this Court in order to protect the plaintiff's interest granted the ex parte ad interim injunction sought for in the suit.

(6) It is pertinent to mention here that prior to that date i.e. on 11.2.1995 this Court noticed that the defendant No. 2 filed a suit bearing No. 2497/94 for recovery of Rs. 59,39,092.00 against the present plaintiff and that the amount which was sought to be recovered in that suit is also the subject matter in the present suit inasmuch as the said amount was stated to have been given by defendant No. 2 to the plaintiff in terms of the agreement which had been arrived at whereby an understanding had been created between the parties.

(7) After passing of the aforesaid ex parte injunction against the defendants and on service of notice the defendants appeared in the suit and filed an application under Order 39, Rule 4 of the Code of Civil Procedure praying for varying, modifying and/or vacating the ex parte order dated 14.9.1995 passed by this Court.

(8) Both the aforesaid applications were taken up for consideration and I have heard the learned Counsel appearing for the parties.

(9) Mr. Khanna, appearing for the plaintiff submitted that the suit has been instituted by the plaintiff not only for dissolution of the partnership between the plaintiff and the defendant No. 2 which is admitted by the defendants but also for rendition of accounts and on such rendition of accounts for payment of the amount found to be due to the plaintiff. The properties described in Schedule 'A' as against ex parte ad interim injunction was issued are as follows:

(I) Amount lying in the Bank account of defendant No. 2 in Canara Bank, Nehru Place, New Delhi.

(II) Recoveries be made from persons to whom plots/flats have been sold.

(III) Attachment of all flats/plots belonging to defendant No. 2 in any of his colonisation project.

(IV) Shares held by Unitech Limited, defendant No. 2 in its own name or in the name of its nominees and officers in wholly owned or partly owned subsidiaries of the Joint Stock Companies.

(10) therefore, as of date the respondent Nos. 2 to 4 are restrained from transferring, alienating or parting with possession of the entire aforesaid properties except for the purpose of running the business of defendant No. 2. Mr. Jaitley, appearing for defendant Nos. 2 to 4 submitted that in view of the aforesaid order passed by this Court the entire business of the said defendants has been brought to a stand still. He further submitted that there was no concluded contract between the plaintiff and the defendant No. 2 and that the Memorandum of Understanding is void for uncertainty. He also submitted that there was no partnership business between the plaintiff and defendant Nos. 2 to 4 and there did not exist a partnership firm known as Shilpi Unitech as has been shown in the plaint as defendant No. 1. He also submitted that the suit in its present form is not maintainable. According to him no land is available for giving effect to the terms and conditions of the Memorandum of Understanding entered into between the

plaintiff and defendant No. 2. It was his further submission that in a suit for dissolution the plaintiff can at best claim sharing of assets and profits of the firm. The plaintiff cannot claim any amount outside the assets of the alleged firm. On these grounds the learned Counsel submitted that the order of not only the ad interim temporary injunction passed by this Court on 14.9.1995 should be vacated and that the application filed by the plaintiff should be rejected and the application filed by defendant Nos. 2 to 4 should be allowed.

(11) It is the admitted position between the parties that the defendant No. 1 has in fact no existence at all. No documentary evidence has been produced by the plaintiff in support of its action in making defendant No. 1 a party to the suit. It is an admitted position between the parties that the Mou was signed by the plaintiff and the defendant No. 2 somewhere in the month of October, 1991 which appears to be an agreement between the plaintiffs and defendant No. 2. The said Mou stipulates that the second party namely, the plaintiff agreed to provide the copies of the sale deed /agreement to sell to defendant No. 2 within 10 days of signing of the Mou for the purpose of determining the ownership and title etc. and also gave an assurance that the said project land was free from all sorts of encumbrances and that no notice of acquisition or requisition had been received.

(12) It was also stipulated that the development of the land which was under the ownership of the plaintiff through sale deeds would be shared between the first party and the second party in the ratio of 45:55 and the development of the lands which were presently under agreements to sell/procured beyond 107 acres, shall be shared in the ratio of 35:65. The aforesaid Mou is signed by the plaintiff and the defendant No. 2. 'The said agreement apparently is not witnessed nor any name as witness appears in the said MOU. The said document does not specify any particulars of the land, its Khasra Nos. etc. which the plaintiff claimed to have acquired. The said document also does not mention the investment to be made by either party. In view of the aforesaid factual position the question that arises for my consideration is whether the plaintiff is entitled to have the ad interim order of injunction confirmed in his favor on the basis of the aforesaid document and is also entitled to an order under Order 39, Rule 5, CPC.

(13) It is pertinent to mention here that the plaintiff, as required under Sub-rule (3) of Rule (5) of Order 38 of the Code, did not give the estimated value of the property for which the order of attachment was sought. In the application filed under Order 39, Rule 5 the plaintiff did not assign any reason for not being able to state the estimated value of the immovable properties of defendant Nos. 2 to 4 or the worth of movable properties. An order for attachment before judgment can be passed only where the Court on an application of the plaintiff is satisfied that the defendant with intent to obstruct or delay the execution of the decree that may be passed against him is about to dispose of the whole or any part of the property or is about to move the whole or any part of the property from the local limits of the jurisdiction of the Court.- Sub-rule (4) inserted in Rule (5) of Order 38 provides that any order of attachment is made without compliance with the provisions of Order 38(5)(4) is void. On a bare perusal of the application filed by the plaintiff it is apparent that only a vague statement has been made therein by the plaintiff to the effect that the defendant would dispose of its assets so that the decree which might be passed cannot be executed. That apart the suit is entirely based on the Memorandum of Understanding which, prima facie, appears to me to be not a binding contract between the parties as the ownership of the plaintiff over the subject matter of the land was to be established by producing the sale deeds/agreements to sell within ten days of signing the Mou, which were not produced and accordingly the fact of ownership of the said land was not determined on the date of entering into the aforesaid understanding but was left to be determined in future. The defendant No. 2 has stated that the agreement is based on misrepresentation and fraud. According to it the plaintiff does not legitimately own a single acre of land. This statement appears to be corroborated by the subsequent events as noticed herein. It is settled law that a contract, terms of which are not certain cannot be said to be a concluded contract and the same cannot be enforced. In order to be a binding contract an agreement must be definite and certain. Reference may be made to the decision of *Mary and Butcher Ltd. v. Kigem*, reported in (1929) All E.R. 679, wherein the House of Lords have held that an agreement between two parties to enter into an agreement by which some critical part of the contract matter was left to be determined is no contract at all. It was further held that it is not open to people to agree that they

would in future agree on a matter which, vital to the arrangement between them, had not yet been determined. In the present Memorandum of Understanding, on careful scrutiny of terms and conditions mentioned in the agreement I find that ownership of the plaintiff over the subject matter of the agreement was not established on the date of agreement and the same was left to be verified on a future date and that neither the particulars of the land are mentioned nor the amount to be invested is so stated nor the deed is signed by any witness and therefore, I am of the prima fade opinion that the aforesaid agreement is not a concluded contract.

(14) Moreover, it has further been brought to my notice that the ownership right of the plaintiff even to an acre of land out of the entire land shown in the aforesaid agreement appears to be disputed and doubtful. The plaintiff, it is stated did not furnish copies of the sale deeds to the defendant No. 2 as stipulated in the aforesaid MOU. In respect of the lands in question suits were filed by the plaintiff for declaration of its right and title through its Director but the said suits have been dismissed and no appeals had been filed thereto. It has also been brought to my notice that the police has also filed charge sheet against the Directors of the plaintiff company charging them for breach of trust in respect of the cheating and forgery. However, in respect of the aforesaid charge-sheet a revision has been filed in this Court in which trial has been stayed by this Court. In respect of the agreement to sell for purchase of 180 acres of land, the Counsel for defendant No. 2 pointed out from paragraph 2 of the agreement to sell which is on record that the land is disputed whereas in the Memorandum of Understanding it was represented that the said land is free from all encumbrances. The plaintiff has also failed to prove that there was any partnership between the plaintiff and that any partnership agreement had been entered into between the plaintiff and defendant No. 2, and, therefore, the declaration sought for in the suit for dissolution of the partnership apparently cannot be granted to the plaintiff.

(15) Considering all the aforesaid factors, I am of the considered opinion that the plaintiff has failed to make out any prima fade case for the grant and/or confirmation of the order of injunction passed in its favor and against defendant Nos. 2 to 4. It is also disclosed from the records that the defendant No. 2 has filed

a suit bearing No. 2497/1994 for recovery of Rs. 59,39,092.00 against the plaintiff which amount was stated to have been given by defendant No. 1 to the plaintiff. The contention of the learned Counsel for the plaintiff that the plaintiff would be entitled to at least Rs. 850 crores from the defendants appears to be a claim for damages which has not been claimed in the present suit. On the aforesaid grounds I do not find any merit in the application filed by the plaintiff against defendants under Order Xxxix, Rules 1 and 2 read with Order xxxviii, Rule 5 of the Code of Civil Procedure and the same stands dismissed and the application filed by defendant Nos. 2 to 4 under Order Xxxix, Rule 4, Civil Procedure Code stands allowed. The ad interim ex parte injunction passed by this Court on 14.9.1995 stands vacated. List this matter for arguments on the remaining pending applications on 22.4.1997.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com