

Kalidas Sadhu Vs. Sushil Kumar Agarwal

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Court : Kolkata

Decided On : Feb-21-2005

Reported in : AIR2005Cal274,2005(2)CHN511

Judge : Bhaskar Bhattacharya and ;Rajendra Nath Sinha, JJ.

Acts : [Specific Relief Act, 1963](#) - Sections 14 and 41; ;[Code of Civil Procedure \(CPC\) , 1908](#) - Order 39 Rules 1 and 2

Appeal No. : F.M.A. No. 836 of 2004 with CAN 5637 of 2004

Appellant : Kalidas Sadhu

Respondent : Sushil Kumar Agarwal

Advocate for Def. : Amitabha Das, Adv.

Advocate for Pet/Ap. : Harish Tandon and ;Sandeep Kumar Tewari, Adv.

Judgement :

Bhaskar Bhattacharya, J.

1. This first miscellaneous appeal is at the instance of a defendant in a suit for declaration and permanent injunction and is directed against Order No. 17 dated June 1, 2004 passed by the learned Judge, Second Bench, City Civil Court at Calcutta, in Title Suit No. 1150 of 2003 thereby disposing of an application under

Order 39 Rules 1 and 2 of Code of Civil Procedure filed by the plaintiff by directing the parties to maintain status quo as on that day in respect of the suit property till the disposal of the suit.

2. The respondent filed the aforesaid suit being Title Suit No. 1150 of 2003 thereby praying for declaration that the letter dated 19th May, 2003 issued by the appellant had no force in the eye of law and not binding on the parties and for permanent injunction restraining the appellant, his men and agents and servants from encumbering the premises No. 243N, Acharya Prafulla Chandra Road, P.S. Burtolla and from parting with possession or inducting any person and also from entering into any agreement with any third party in respect of construction and development of the said premises.

3. In connection with the aforesaid suit, the respondent filed an application for temporary injunction in terms of the prayer of permanent injunction mentioned above.

4. The case made out by the respondent may be summed up thus:

(a) By an agreement dated 14th April, 1992 the appellant promised to hand over the premises free from all encumbrances to the respondent. But after the execution of the said agreement, it was found that the said premises were not free from all encumbrances and there was huge Municipal Tax-liability and dues towards electricity charges and at the same time, there were labour and industrial disputes and factory-closure problems relating to the industry previously run from the suit premises.

(b) The appellant as per the said agreement agreed to obtain clearance from K.M.D.A., C.I.T. and also Kolkata Municipal Corporation but subsequently he expressed his inability to bear the costs, expenses and responsibility of the same and requested the respondent to undertake those jobs with the assurance that he would pay the costs and expenses thereof to the respondent before sanction of the building plan.

(c) Pursuant to such agreement, the respondent spent a sum of Rs. 7,03,000/- in addition to the initial advance of Rs. 4,00,000/-.

(d) The respondent further spent a sum of Rs. 18.41 lakh towards incidental and miscellaneous expenses for the development of the said site, the particulars of which were described in the application for injunction.

(e) On the persuasion of the respondent, the plan in respect of premises No. 243N, Acharya Prafulla Chandra Road, P.S. Burtolla was duly sanctioned by Kolkata Municipal Corporation and the respondent made a bank pay-order for Rs. 3,36,387/- ready on 13th February, 2002 for the purpose of depositing the same to the Kolkata Municipal Corporation towards sanction fees.

(f) A lot of work was required to be done on behalf of the appellant in terms of agreement dated 14th April, 1992 and the parties decided that the appellant would execute a power-of-attorney in favour of the respondent to enable him to do such jobs on behalf of the appellant. Accordingly, the respondent on 12th March, 2002 got a power-of-attorney prepared and after getting the same ready for being executed by the appellant sent the same to him for completion.

(g) The appellant on receiving the said letter dated 12th March, 2002 from the respondent answered through a letter dated 18th March, 2002 thereby totally denying that he had executed any agreement on 14th April, 1992. The appellant also denied all his liabilities under the said agreement.

(h) In view of the letter written by the appellant dated 18th March, 2002 denying the agreement, the respondent again wrote a letter on 4th April, 2002 to the appellant and complained therein that he was ready and willing to do the said job as per agreement but the appellant was reluctant to do his part of the job.

(i) Ultimately, the parties assembled in a meeting at the chamber of an Advocate on 9th April, 2002 in the presence of their respective lawyers as well as some of their well-wishers. At the said meeting, the earlier agreement dated 14th April, 1992 was modified to some extent and the said modified terms were recorded in the minutes of the said meeting and those were signed by the persons present at

the meeting. On the basis of such modification, the appellant further undertook to execute his part of the duty by payment of money for the purpose of sanction by Municipal Authority.

(j) Notwithstanding such modified agreement, the appellant failed and neglected to comply with his part of the obligations and as such, the respondent gave a notice dated 26th May, 2003 calling upon the appellant to perform his part of duty.

(k) The appellant thereafter through his Advocate gave a reply dated 3rd June, 2003 wherein the appellant admitted execution of agreement with the respondent and conceded to have received a sum of Rs. 4,00,000/-. With the said letter, the learned Advocate for the appellant annexed another letter dated 19th May, 2003 whereby he allegedly cancelled the agreement entered into between the parties but no particular of the agreement was specified.

(1) In view of the aforesaid conduct on the part of the appellant the respondent filed the aforesaid suit for declaration and injunction and also prayed for temporary injunction.

5. The aforesaid application was opposed by the appellant by filing written objection thereby denying the material allegations made in the application for injunction and the defence taken by the appellant may be summarised thus:

(a) The appellant admitted to have entered into the agreement with the respondent on 14th April, 1992 and also admitted acceptance of Rs. 4,00,000/- but denied that appellant spent any further amount as alleged in the plaint and application for injunction.

(b) There had been no development at the said premises of any nature since the execution of agreement dated 14th April, 1992 and the alleged amount was never spent. As per procedure followed by the Kolkata Municipal Corporation, no plan is sanctioned unless the required sanctioned money is paid to the Kolkata Municipal Corporation. As per agreement, the respondent was supposed to pay the money for obtaining sanctioned plan but he did not deposit the said amount.

(c) The respondent did not send the alleged power-of-attorney with letter dated 12th March, 2002. When the respondent realised that due to his own laches a period of 10 years had elapsed and the agreement lost its force or became invalid, he started to pursue the appellant by offering 5% more share over and above the specified share mentioned in the agreement.

(d) The appellant merely took a sum of Rs. 4,00,000/- from the respondent and was ready to refund the same and the question of making illegal gain or benefit did not arise. The suit was barred under Section 41(h) of the Specific Relief Act and the same was under valued and as such, the respondent was not entitled to get any order of injunction.

6. By filing affidavit-in-reply respondent annexed several documents showing details of the expenditures made by him pursuant to the agreement.

7. As pointed out earlier, the learned Trial Judge on consideration of the materials on record held that the respondent had made out a prima facie case to go for trial and as such, directed the parties to maintain status quo.

8. Being dissatisfied, the defendant has come up with the present appeal.

9. Mr. Tandon, learned Counsel appearing on behalf of the appellant has strenuously contended that the agreement entered into in the year 1992 having already been cancelled, the respondent is not entitled to get any relief of injunction. Mr. Tandon further contends that the said agreement even did not create any interest in the property and as such, the learned Trial Judge erred in law in directing the parties to maintain status quo. Mr. Tandon contends that even if there is any breach of agreement on the part of the appellant, the respondent has adequate alternative remedy of getting compensation and as such, by following the principles mentioned in Section 41(h) of the Specific Relief Act, the Court should have rejected the application for injunction. In support of the aforesaid contention, Mr. Tandon relies upon a decision of this Court in the case of *Satguru Nirman (P) Ltd. v. Narayan Chandra Paul*, reported in 2002(2) WBLR 519.

10. The learned Advocate appearing on behalf of the respondent has opposed the aforesaid contentions of the learned counsel for the appellant and has contended that the learned Trial Judge on consideration of the materials on record having found prima facie case in favour of the respondent, this Court should not interfere with such discretion exercised in favour of the respondent. According to him, it is a fit case where the parties should be directed to maintain status quo as regards suit property and the Court below rightly passed the impugned order.

11. After hearing the learned counsel for the parties and after going through the aforesaid materials on record, we find that agreement dated 14th April, 1992 is admitted. Receipt of a sum of Rs. 4,00,000/- at the time of execution of the agreement is also admitted by the appellant and he has also conceded that he has not yet refunded the aforesaid amount. Although, the appellant disputed further expenditures alleged to have been made by the respondent, from the documents filed by the respondent, we are satisfied that the respondent has made out strong prima facie case indicating that he has spent about Rs. 25 lakh in furtherance of that agreement in addition to the security deposit of Rs. 4 lakh. Although, Mr. Tandon tried to convince us that respondent did not perform his part of his job as per agreement dated 14th April, 1992 and his client was justified in cancelling such agreement, we are not impressed by such submission; on the other hand, we are of the view that the respondent after the execution of agreement is all along honestly trying to perform his part of the contract but in view of various defaults committed by appellant, the agreement could not be given effect to. It appears from the record that there were huge arrears of Municipal Tax, dues towards electricity charges and there were also labour disputes as the factory situated on the property was closed and the respondent was taking steps for curing those problems. It further appears from the minutes of the meeting dated 9th April, 2002 that the appellant even accepted the proposal of the respondent for getting 5 per cent more share than the one mentioned in the agreement.

12. Under the aforesaid circumstances, we are of the opinion that the respondent has made out a strong prima facie case showing a subsisting agreement and it is apparent that the appellant is now unfairly trying to back out from the said agreement without offering compensation for the huge financial loss caused to the

respondent for no fault on his part.

13. We are also not impressed by the submission of Mr. Tandon that merely because the respondent has an alternative remedy of getting damages for breach of contract, the Court cannot pass any interim order to protect the interest of the plaintiff. The respondent having sincerely spent long thirteen years towards performing his duties under the agreement and at the same time having spent a huge amount of money, we are of the view that it will be unfair not to restrain the appellant from committing breach of the same.

14. After going through the materials on record, we find that the suit filed by the plaintiff is not one for specific performance of contract but is in substance, a suit restraining the defendant from committing breach of contract and in such a suit, the Court is empowered by Order 39 Rule 2 of the Code of Civil Procedure to restrain the defendant from committing breach of contract or injury complained of on such terms as to the duration of injunction, keeping an account, giving security or otherwise as the Court thinks fit even if the plaintiff has not claimed any damages.

15. We are quite conscious of the position of law that this type of agreement for development may not be specifically enforceable in view of Section 14 of the Specific Relief Act as pointed out by a Division Bench of this Court in the case of *Satguru Nirman (P) Ltd. v. Narayan Chandra Paul* (supra), relied upon by Mr. Tandon. But in a case, where the plaintiff has in good faith spent about Rs. 30 lakh in course of last thirteen years in terms of the agreement on the assurance of the defendant, a Court is entitled to restrain the defendant from committing breach of such contract or causing the injury complained of, unless the defendant gives appropriate security to the amount spent by the plaintiff in furtherance of the agreement which he is entitled to recover from the defendant in addition to compensation for its breach.

16. Therefore, we find that it is a fit case where the Court should compel the defendant to secure a sum of Rs. 30 lakh towards the claim of the plaintiff since a very strong prima facie case of the breach of the agreement has been made out and the balance of convenience and inconvenience is also in favour of granting

such direction. If no injunction is granted and at the same time, the defendant is permitted to transfer the property to a third party without securing the claim of the plaintiff, it may cause irreparable loss and injury to the plaintiff inasmuch as he may not be in a position to recover the amount even if he succeeds in the long run.

17. We, accordingly, modify the order impugned to this extent that unless the defendant gives security by way of Bank guarantee or mortgage of immovable property to the satisfaction of the Trial Court to the extent of Rs. 30 lakh, there should be an injunction restraining the defendant from entering into any agreement with any other party for construction of the building on the suit property. The defendant is also restrained from transferring, alienating or encumbering the property in any way so long the aforesaid security is not given.

18. The appeal is, thus, allowed to the extent indicated above. The order impugned is modified accordingly. The observations made herein as regards prima facie case of the plaintiff are all tentative for the purpose of disposal of the injunction application and will not be binding upon the Court below at the time of trial when evidence will be led by the parties in support of their respective cases. In the facts and circumstances, there will be, however, no order as to costs.

Rajendra Nath Sinha, J.

19. I agree.