

Bimal Kumar Khetawat Vs. Dhan Daulat Holding Limited and anr.

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Court : Kolkata

Decided On : Mar-07-2006

Reported in : (2006)2CALLT187(HC)

Judge : Bhaskar Bhattacharya and ;Pravendu Narayan Sinha, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 39, Rules 1, 2 and 4 - Order 41, Rule 11

Appeal No. : F.M.A.T. No. 3637 of 2005 with CAN No. 9323 of 2005

Appellant : Bimal Kumar Khetawat

Respondent : Dhan Daulat Holding Limited and anr.

Advocate for Def. : S.P. Roy Chowdhury, ;Swapan Dutta and ;Hiranmoy Bhatlacharya, Advs. and ;Asoke Banerjee and ;Navojit Mukherjee, Advs. for the proforma Respondent

Advocate for Pet/Ap. : Sudish Dasgupta and ;Harish Tandon, Advs.

Judgement :

B. Bhattacharya, J.

1. This first miscellaneous appeal is at the instance of the defendant No. 1 in a suit for declaration, specific performance of contract and recovery of damages and is

directed against the Order No. 9 dated September 23, 2005 passed by the Civil Judge, Senior Division, 4th Court at Alipore at Title Suit No. 56 of 2005 thereby disposing of an application under Order 39 Rules 1 and 2 of the Code of Civil Procedure filed by directing the parties to maintain status quo in respect of any transfer, sale, alienation, encumbrance, letting out and/ or creating any third party's interest in the developer's allocation of the construction over the suit property in terms of the registered agreement dated 5th October, 1989 between the defendant Nos. 1 and 2 till the disposal of the suit.

2. The respondent No. 1 herein filed a suit being Title Suit No. 56 of 2005 in the 4th Court at Civil Judge, Senior Division, Alipore against the appellant and respondent No. 2 thereby claiming the following relief;

(a) A decree for declaration against the defendants that the plaintiff has the right to construct building on the suit property according to the sanctioned plan being plan No. 141 dated 27/2/1995.

(b) A decree for permanent injunction against the defendants from interfering with the right of the plaintiff in raising the building on the suit property according to the sanctioned plan No, 141 dated 27/2/1995.

(c) A decree for permanent injunction restraining the defendants from assigning the Development Agreement dated 5-10-1989 for the suit property to any person other than the plaintiff.

(d) A decree for permanent injunction restraining the defendants not to alter or change the present position by raising any further construction on the suit property.

(e) A decree for specific performance of contract directing the defendants to assign the actionable claim namely, the development agreement dated 5-10-1989 according to the undated and unsigned Memorandum of Understanding drawn up according to the consent and concurrence and agreement between the plaintiff and defendants, on receipt of balance consideration money amounting to Rs.36,89,746/-.

(f) In case of failure of the defendants to execute the deed of assignment on receipt of the balance consideration money, i.e. Rs.36,89,746/- the plaintiff may be granted liberty to get the deed executed by the learned Court in their favour on deposit of the said balance amount.

(g) Confirmation of possession of the suit property.

(h) Alternatively, a recovery of damages amounting to Rs.3,00,00,000/- for loss caused to the plaintiff including the money paid by the plaintiff in the aid of contract with interest on decree and declaration of charge on the suit property.

(i) Receiver.

(j) Temporary and ad-interim injunction.

(k) Other legal and equitable reliefs.

3. The case made out by the respondent No. 1 may be summed up thus:

(i) The subject matter of the suit is all that piece and parcel of land measuring more or less 9 cottahs 1 chittack and 44 square feet together with three storied brick built old building being municipal premises No. 55, Ramesh Mitra Road, Kolkata-700 025. The said property is owned by defendant No. 2.

(ii) The defendant No. 2 in order to develop his property by demolishing the existing old structure started negotiation with others for raising a multi-storied building and ultimately, the defendant No. 1 agreed with the defendant No. 2 to develop the said property and accordingly, they entered into a formal agreement dated 5th October, 1989 which was registered before the Registrar of Assurance, Kolkata, on the self same date.

(iii) According to the terms of such agreement, the owner's allocation should mean more or less 3000 sq. ft. of saleable space In the first floor of the building comprising of four self-contained apartments each having 750 sq. ft. with an undivided proportionate share in the land and the developer's allocation should be the rest of the properties and/or saleable space in the said building other than the owner's allocation as aforesaid.

(iv) In the said agreement, it was further provided that the owner and the developer would be entitled to transfer and otherwise deal with their respective allocation in such manner as they might at their absolute discretion deem fit and proper provided, however, that in case the owner disposes of the owner's allocation or any part thereof, the same should be done so by the owner upon notice in writing to the developer. The developer would have the full right to transfer and assign its rights under the agreement.

(v) Pursuant to the aforesaid terms of the agreement, the defendant No. 1 submitted a building plan before the Kolkala Municipal Corporation for construction of a ground floor plus three-storied building and the Corporation sanctioned the said plan on 27th February, 1995 and the total sanctioned area of the suit property was approximately 15544 sq, ft,

(vi) After obtaining the sanctioned plan, the defendant No. 1 realised that he was unable to generate sufficient funds for raising construction of the four storied brick built building according to the sanctioned plan and due to such financial stringency, the defendant No. 1 contacted the plaintiff and approached it for giving financial aid for construction of the said building.

(vii) The plaintiff, after going through the documents, being satisfied, placed their proposal to the defendant No. 1 for assigning the rights of the developer under the said agreement and ultimately, the defendant No. 1 agreed to assign his rights in favour of plaintiff or its nominee in terms of the agreement dated 5th October, 1989 on consideration that the plaintiff would have to pay certain sums against the area to be constructed on the first, second, third and fourth floor of the building.

(viii) According to the terms of understanding between the plaintiff and the defendant No, 1, the latter agreed to assign the development agreement in favour of the former on the sanctioned area of 17500 sq. ft. car parking area and the plainliff also agreed to pay the consideration money to the defendanl No. 1 at the rate of Rs. 841/- per sq. ft.

(ix) Pursuant to such agreement, the plaintiff on different dates paid to the defendant No. 1 a total amount of Rs. 36.50.000/-and further paid a sum of

Rs.3,75,695/- towards the sanctioned fees for Kolkata Municipal Corporation. Subsequently, a memorandum of understanding was prepared and the defendant No. 1 was asked to sign it but he refused; on the contrary, the plaintiff got positive information that the project was being done by a third party at the instance of the defendant No 1. Hence the suit.

4. On the basis of such allegation, the plaintiff came up with an application for temporary injunction for restraining the defendant No. 1 from assigning the development agreement dated October 5, 1989 to any third party and also for directing the defendant No. 1 not to alter or change the present position of the building by raising any further construction on the suit property.

5. On such application, the learned Trial Judge issued notice upon the defendants to show cause why the prayer of the plaintiff should not be granted but refused to grant an ad interim order of injunction.

6. Being dissatisfied, the plaintiff in the past, came up before this Court against such refusal of ad interim order of injunction by filing an appeal being F.M.A.T. No. 2816 of 2005 and immediately after the admission of the said appeal under Order XLI Rule 11 of the Code of Civil Procedure, a Division Bench of this Court on the basis of fresh application filed by the plaintiff, granted an order of status quo as regards the nature and character of the property for a limited period.

7. The appellant herein filed an application under Order 39 Rule 4 of the Code of Civil Procedure for variation of the ad interim order of injunction passed by this Court in the said miscellaneous appeal and ultimately, another Division Bench of this Court on contested hearing vacated the interim order granted earlier on the ground that entire external constructions were all complete and only internal works were going on and according to the Division Bench, in such a situation, no useful purpose would be served by restraining the defendant No. 1 from completing the construction already done.

8. The Division Bench, however, directed the learned Trial Judge to dispose of the main application for injunction within a specified period by directing that the application under Order 39 Rule 4 of the Code of Civil Procedure filed by the

defendant No. 1 and the written objection given by the said defendant against the application for injunction should be treated as written objection to the application for injunction and similarly, the written objection given by the plaintiff to the application under Order 39 Rule 4 should be treated as reply to the written objection before the Trial Court. This Court further directed that till the disposal of the application, the defendant No. 1 should be restrained from assigning the development agreement to any other person.

9. Pursuant to the direction given by this Court, the learned Trial Judge by the order impugned herein has disposed of the application for injunction with the modified prayer of the plaintiff by directing the parties to maintain status quo as indicated above.

10. Being dissatisfied, the defendant No. 1 has come up with the present first miscellaneous appeal.

11. After hearing Mr. Dasgupta, the learned senior advocate appearing on behalf of the appellant, Mr. Roy Chowdhury, the learned senior advocate appearing on behalf of the plaintiff-respondent No. 1 and Mr. Banerjee, learned senior advocate appearing on behalf of the heirs of defendant No. 2 and after going through the materials on record we find that the construction is complete by this time. We further find from the submission of the learned Counsel for the parties that after adjustment of Rs. 5,00,000/- admittedly returned by the defendant No. 1 to the plaintiff, a sum of Rs. 35,25,695/- is due and payable by the defendant No. 1 to the plaintiff. In the written objection to the application for temporary injunction as well as in the application under Order 39 Rule 4 of the Code of Civil Procedure, the defendant No. 1 has not expressed his intention to return the said amount. Mr. Roy Chowdhury in this connection vehemently contended that his client is entitled not only to enforce the agreement of assignment but also to claim damages at an excessive rate if it ultimately appears that the defendant No. 1 after accepting the huge amount of about Rs. 40,000,00/- from the plaintiff has illegally dishonoured the agreement.

12. In our view, at this stage as the building is complete, no purpose will be served by restraining the defendants from selling out the property but at the same time,

the Court cannot lose sight of the fact that the defendant No. 1's intention is not bonafide as would appear from the fact, that by this time, he has refunded a paltry amount Rs. 5,00,000/- out of Rs. 40,00,000/- and odd admittedly paid by the plaintiff by account payee cheque.

13. Therefore, at this stage, the plaintiff has at least made out a strong prima facie case to have a decree for recovery of the amount already advanced with damages and the ingredients of Order 39 Rule Kb) of the Code of Civil Procedure are very much established.

14. We have already indicated that according to the terms of the agreement between the defendant Nos. 1 and 2, the defendant No. 2 is entitled to get 3000 sq. ft. of property inclusive of four flats and the rest portion should be allotted to defendant No. 1. The defendant No. 2 cannot be blamed at any rate for the aforesaid non-payment of amount taken from the plaintiff and therefore, no injunction should be passed against the heirs of the defendant No. 2, the owners, from transferring their share of allotment; but for protecting the amount advanced by the plaintiff to the defendant No. 1, we are of the view that there should be an order of conditional injunction restraining the defendant Nos. 1 and 2 from transferring the developer's portion to anybody so long the principal amount of Rs. 35,25,695/- is not paid back to the plaintiff.

15. We, therefore, modify the order impugned to this extent that the heirs of the defendant No. 2 will be free to transfer the four flats allotted in their favour by virtue of the agreement of development with the defendant No. 1 without any restriction but after selling the four flats of their share, if they intend to transfer, encumber, mortgage or alienate any portion from the defendant No. 1's allotment, namely, the developer's share, such transfer will be subject to charge of the principal amount viz., Rs. 35,25,695/- and while transferring or creating any encumbrances as mentioned above, it will be the duty of both the defendant Nos. 1 and 2 to indicate in the deed itself that such transfer is subject to the aforesaid charge and subject to the decision of the pending suit. However, if the aforesaid amount is paid by the defendant No. 1 to the plaintiff by account payee cheque, the charge created by this order will come to an end and the defendants will be

free to transfer the developer's share subject to the decision of the suit.

We, therefore, modify the order impugned to the extent indicated above. The appeal is, therefore, allowed. In the facts and circumstances, there will be, however, no order as to costs.

Later:

Let xerox certified copy of this order be given to the parties within one week from the date of making of such application.

P.M. Sinha, J.

16. I agree.

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