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Siddhartha Kumar Biswas Vs. Ruby Mukherjee and anr.

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Court : Kolkata

Decided On : May-04-2007

Reported in : 2007(3)CHN18

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

Acts : [Income Tax Act, 1961](#) - Section 230(1); ;Urban Land (Ceiling and Regulation) Act, 1976; ;Transfer of Property Act; ;Calcutta Municipal Corporation Building Rules; ;Municipal Law

Appeal No. : F.A. No. 14 of 2001

Appellant : Siddhartha Kumar Biswas

Respondent : Ruby Mukherjee and anr.

Advocate for Def. : Ashoke Chatterjee and ;Saptaugshu Basu, Advs. for the Owner and ;Anupam Chatterjee, Adv. for the Promoter

Advocate for Pet/Ap. : S.P. Roychowdkury, ;Anwari Quarishi and ;Anit Kumar Rakshit, Advs.

Disposition : Appeal allowed

Judgement :

Bhaskar Bhattacharya, J.

1. This first appeal is at the instance of the plaintiff in a suit for specific performance of contract and other consequential relief and is directed against the judgment and decree dated January 29, 2000 passed by the learned Civil Judge, Senior Division, 9th Court, Alipur, District South 24-Parganas in Title Suit No. 70 of 1997 thereby passing a part decree in favour of the plaintiff.

2. In the said suit, the basic prayer of the appellant before the Court was to pass a decree for specific performance of contract and in the said suit, several other relief were claimed. The entire prayer portion of the plaint is quoted below:

a) A decree for specific performance of contract directing the first defendant and the second defendant to execute and register the conveyance for sale in favour of the plaintiff for transferring of the undivided 1/8 of the land as described in schedule 'A' hereto and the flat being number 3 as described in schedule 'B' hereto together with proportionate 1/8 right and enjoyment of the said the building known and described as 'Rajani Apartment' situated in premises No. 196A, Sarat Bose Road, Calcutta - 700029 within P.S. Lake.

b) A decree of declaration that the provision and/or clause as mentioned in schedule 'B' to the said agreement dated 6th April, 1992 restricting the plaintiff's proportionate right to the roof and terrace of the said building is invalid, illegal and inoperative and is liable to be struck down and/or rectified by deletion.

c) In the event, the defendants and/or order any of them fail and/or neglect and/or refuse to execute and register the conveyance, to get the same executed and registered in favour of the plaintiff through the process of Court.

d) A decree for - permanent injunction restraining the defendants and each of them and/or their servants and/or agent and agents/or representative from transferring and alienating and/or dealing with the undivided 1/8th share of the roof of the said the building to any other person than the plaintiff.

e) A decree for perpetual injunction restraining the defendants and each of them and/or servants and/or agents and/or representatives and/or assigns from transferring and/or conveying undivided 1/8th share of the land comprising of the

said premises No. 196A, Sarat Bose Road, Calcutta - 700029 in favour of any personnel other than the plaintiff.

f) A decree for Perpetual injunction restraining the defendants and each of them and/or their servants and/or agents and/or assigns and/or representatives from disturbing in, interfering with and obstructing to the plaintiff's peaceful enjoyment, possession and occupation of the said flat as described in schedule 'B' of the agreement or any portion as well as right of access to the roof and terrace of the said building.

g) A decree for Mandatory Injunction directing the defendant Nos. 1 and 2 to remove the collapsible gate installed and/or fixed on the landing of the stair case on the fourth floor of the said premises No. 196A, Sarat Bose Road, Calcutta-700029.

h) Receiver.

i) Attachment.

j) Cost of the suit.

k) Such further or other relief or reliefs as the plaintiff is entitled in law and equity.

3. The case made out by the plaintiff/appellant may be summarised thus:

a) On April 6, 1992, one Smt. Jyotirmoyee Devi, since deceased, the mother of the defendant No. 1 being the sole and absolute owner in respect of premises No. 196A, Sarat Bose Road, Calcutta - 29 together with structure agreed to sell and the plaintiff agreed to purchase all that undivided 1/8th share of the land comprising in the said premises with all the right and enjoyment attached thereto at the consideration mentioned in the said agreement. The detailed description of the said land is given in the schedule given in 'A'. By the said agreement, the second defendant duly agreed in writing to construct a flat for the plaintiff on the basis of the said 1/8th share of land and measuring 1148 square feet on the second floor of the proposed new four-storied building bearing No. 3 comprising of three bed rooms, one kitchen, two bathrooms and privy, one dining and one living, one

drawing, one verandah fully described in schedule 'B' at a consideration mentioned in the said agreement to be paid by the plaintiff. The said agreement dated April 6, 1992 was signed and executed by the second defendant by describing himself as developer/contractor and the first defendant was described as confirming party and the constituted attorney of her mother, Smt. Jyotirmoyee Devi.

b) By the said agreement, the undivided 1/8th share in the land was agreed to be sold at the price of Rs. 1,46,000/- and the second defendant agreed to construct the aforesaid flat at the price of Rs. 6,29,000/- payable by instalments as provided in the said agreement. In the said agreement, the plaintiff was described as the purchaser, the second defendant was described as the developer and the mother of the first defendant was mentioned as the vendor.

c) By the said agreement, the parties decided to abide by the following terms and conditions:

I) The developer and the purchasers agreed that the developer would sell the undivided 1/8th share of the land in favour of the purchaser at the price of Rs. 1,46,000/- and the purchaser agreed to purchase the same at the said price. For the above purpose, the purchaser paid the said sum of Rs. 1,46,000/- at the time of execution of the agreement and the vendor had no objection in the said arrangement.

II) The vendor should take necessary permission and clearance under Section 230(1) of the Income-tax Act, 1961 or any other clearance, which would be required for the said purpose.

III) The vendor should also take necessary permission from the competent authority under the Urban Land (Ceiling and Regulation) Act, 1976, if necessary.

IV) The vendor should execute the deed of conveyance directed in favour of the purchaser or his nominee.

V) The developer had agreed to construct the flat at the instance of the purchaser subject to the condition that he agreed with the said contractor to have the

absolute right to make variation or modification in the plan, design and specifications of the proposed building as may be deemed necessary without, however, deducting the area/structure as may be required by the Calcutta Municipal Corporation or any other competent authority.

VI) The developer undertook to complete the construction within February, 1993 in general and definitely, within May, 1993.

VII) The developer undertook to hand over possession of the said flat with the sanctioned car parking space within two days after the receipt of the entire payment from the purchaser or after the completion of the said project whichever was later.

d) Subsequently, on July 31, 1992, another agreement was entered into between the plaintiff and the second defendant by which the consideration amount which was written in the parent agreement was reduced to Rs. 4,84,000/- instead of Rs. 6,29,000/- which was initially agreed by the parties.

e) According to the plaintiff, in the agreement dated April 6, 1992, in the schedule 'B', it was wrongly and illegally mentioned that the plaintiff would get access only to the enclosed part reserved for the lift room and the water tank and that no access to the other part of the terrace as mentioned in schedule 'B' would be available to the plaintiff. The plaintiff claimed that such embargo mentioned in schedule 'B' did not create any right or obligation in favour of any person and the defendants had no right to take away from the plaintiff his right to the access to the terrace although the undivided share in the land of the premises had been sought to be conveyed by the proposed agreement.

f) The plaintiff paid the entire amount agreed between the parties to the predecessor-in-interest of the first defendant and the second defendant in compliance of the terms mentioned in the modified agreement dated July 31, 1992.

g) After the completion of the construction, the possession of the flat was delivered to the plaintiff on September 7, 1992 and since then the plaintiff had

been in peaceful and exclusive possession of the flat together with a motor garage in the ground floor.

h) The plaintiff at all material times since the date of obtaining possession had been paying the proportionate rates and taxes payable to the Calcutta Municipal Corporation by handing over the same to the second defendant. Therefore, in part performance of the said agreement, the plaintiff had paid the entire amount and further was put into possession of the portion agreed to be sold.

i) Thereafter, the plaintiff called upon the defendants to execute and register the necessary deed after obtaining clearance under the provision of the Income-tax Act. Ultimately, the predecessor-in-inter est of the first defendant and the second defendant duly executed a deed of conveyance more or less in terms of the said agreement on October 10, 1992 but in spite of execution of the said deed of conveyance, the defendants did not take any step for presentation of the said deed before the registering authority for registration of the same.

j) After the death of the mother of the first defendant, the plaintiff repeatedly asked the defendants to execute a fresh deed of sale in favour of the plaintiff and to register the same but they refused to execute such deed. Over and above, by the last sentence of schedule 'B' of the agreement, the defendant sought to take away, the plaintiffs right of having proportionate right of the roof and such agreement was in conflict with and repugnant to the provisions of the Transfer of Property Act as, well as the Calcutta Municipal Corporation Building Rules. The defendants by taking advantage of the said clause are restraining the plaintiff from exercising the right of the roof as per law and have fixed and installed a collapsible gate on the landing of the staircase for the purpose of preventing the plaintiff from entering into the roof.

4. The first defendant contested the said suit by filing written statement thereby denying the material allegations made in the plaint and her defence was inter alia as follows:

a) By the agreement dated August 6, 1989, between the two defendants it was specifically provided that the second defendant would act as the developer and in

terms thereof, the second defendant demolished the old structure and raised a new four-storied building according to the sanctioned plan. It was stipulated in the agreement that the owner would be allotted 45% of the total super-built area and the balance 55% would vest in the developer. The first defendant was also a confirming party to the said agreement.

b) The mother of the first defendant on January 1, 1993, got flat No. 5 on the third floor and flat Nos. 7 and 8 on the fourth floor in the new building constructed on the said premises. The total super-built area of the three flats came to 3744 square feet. In exercise of her right, the mother of the first defendant sold the flat No. 5 keeping the other two flats in her possession. Taking into account the total constructed area of the said building, the mother of the first defendant was entitled to get an area of 4492.8 square feet in her 45% share of allocation in terms of the said agreement and after adjusting the constructed area given to her possession, she was further entitled to 748.8 square feet of constructed area and 497 square feet of garage space on the ground floor of the said building.

c) According to the agreement, in case the area of 45% was not given to the owner, she should be entitled to be compensated in terms of money at the rate of Rs. 1200/- per square feet for the residential area and at the rate of Rs. 685/- per square feet for garage space. According to the first defendant, a sum of Rs. 9,29,562/- was still due and payable from the second defendant.

d) In spite of repeated demands, the second defendant failed and neglected to pay the said amount to the first defendant together with interest at the rate of 15% per annum. It was further provided in the agreement between the owner and the developer that until the share of the owner was completely given and the account was fully settled, the second defendant would not be able to part with the possession of the premises or any part thereof, which had fallen in his share.

e) The second defendant, in clear violation of such agreement, had transferred possession of different portion to different parties without settling the accounts with the first defendant. The plaintiff with full knowledge of the agreement between the owner and the developer had taken possession of the flat and the car parking space. The plaintiff, in violation of the municipal laws, had converted the car

parking space into his chamber and the said portion is used for commercial purpose. The first defendant was entitled to postpone the execution of the sale-deed so long her share of allotment was not settled by the second defendant.

5. The suit was also contested by the second defendant by filing separate written statement thereby denying the material allegations made in the plaint and his defence may be summed up thus:

a) The first defendant had failed to execute and register the deed of conveyance in favour of the plaintiff and there was no negligence or inaction on his part. For the purpose of protecting the overhead tank and the lift room of the premises, the second defendant fixed collapsible gate on the landing space of the fourth floor and the plaintiff was not entitled to get any order of injunction.

b) In violation of the terms of the agreement, the plaintiff after taking possession from the first defendant converted the car parking space to a doctor's chamber in violation of the Building Rules. The plaintiff was not entitled to the registration of the deed of conveyance for his own fault and due to the breach of the terms of the agreement. The second defendant had complied with the terms and conditions of the agreement by constructing the premises and delivering the portion to the owner but the deed had not been registered for the fault on the part of the first defendant. The second defendant was always ready and willing to attend the registration office for the purpose of registration of the deed. The plaintiff was not entitled to the other prayers made in the plaint in accordance with the terms of the agreement.

6. The learned Trial Judge on consideration of the materials on record came to the conclusion that the plaintiff was entitled to get a decree for specific performance of contract for sale of the property on condition that he would demolish the portion of the parking space that has been converted into a doctor's chamber. It was further directed that so long the second defendant did not pay the legitimate dues of the first defendant towards her 45% share, the deed would not be executed. The learned Trial Judge further came to the conclusion that the plaintiff was not entitled to get a declaration that he had right over the roof of the building as he had already signed the agreement for sale containing the clause restricting the right to

the plaintiff over the roof except for the purpose mentioned. The other prayers made in the plaint were refused.

7. Being dissatisfied, the plaintiff has come up with the present first appeal.

8. Mr. Roychowdhury, the learned senior Advocate appearing on behalf of the appellant has strenuously contended before us that the learned Trial Judge erred in law in imposing two additional conditions as condition precedent for grant of the decree for specific performance of contract. According to Mr. Roychowdhury, once it is established by documentary evidence that his client had performed his part of the contract by making full payment of money to the second defendant, the Court was left with no other alternative but to pass an unconditional decree for specific performance of contract. Mr. Roychowdhury submits that in the agreement for sale, there is no stipulation that so long the money payable by the second defendant to the first defendant would be paid, the deed could not be executed. Mr. Roychowdhury, on the other hand, points out that both the defendants jointly delivered possession of the property in favour of his client and at that point of time, no such plea was taken. Mr. Roychowdhury further contends that even in the deed signed by the parties is no clause prohibiting registration of the deed unless dues of the first defendant was cleared by the second defendant.

9. As regards the allegation that the plaintiff has violated the Building Rules of the Kolkata Municipal Corporation, Mr. Roychowdhury submits that those portions of the building are outside the scope of the present agreement and the Kolkata Municipal Corporation has already regularised the deviation. Moreover, Mr. Roychowdhury points out that the first defendant herself has sold as car parking space in favour of his client and the other one has been sold by the second defendant. Mr. Roychowdhury, therefore, contends that the demolition of the chamber of the appellant cannot be a condition precedent for execution of the present transaction.

10. Regarding the right of the roof, Mr. Roychowdhury contends that according to the Municipal Laws, in this type of a multi-storeyed building, all the flat owners will have the common right over the roof and therefore, the clause restricting such right should be declared to be illegal. Mr. Roychowdhury, therefore, prays for

modification of the decree passed by the learned Trial Judge by passing unconditional decree for specific performance of contract with further declaration that his client will have the common right of roof and the consequent permanent injunction restraining the defendants from creating any obstruction in the matter of user of the roof.

11. Mr. Chatterjee, the learned senior Advocate appearing on behalf of the second defendant has virtually supported the appellant and has contended that his client was all along ready and willing to register the deed but due to inaction on the part of the first defendant, the deed could not be registered.

12. Mr. Basu, the learned Advocate appearing on behalf of the first defendant has on the other hand vehemently opposed the contentions advanced by Mr. Roychowdhury and has submitted that the learned Trial Judge rightly imposed those conditions. According to Mr. Basu, the appellant was well aware of the conditions of the agreement between the two defendants and knowing fully well those terms, he decided to purchase the flat. Mr. Basu, therefore, contends that so long the dues payable by the second defendant to his client are not paid, his client was under no obligation to register the deed.

13. As regards the question on right of user of the roof, Mr. Basu contends that the plaintiff having accepted the terms of the agreement thereby abandoning his right over the roof, cannot pray for deletion of that clause from the agreement. Mr. Basu, therefore, prays for dismissal of the appeal.

14. After hearing the learned Counsel for the parties and after going through the materials on record we find that in the agreement for purchase of the property there is no indication that the execution of the deed will be subject to the full payment of the dues of the first defendant. The agreement was signed by both the defendants and it was specifically stated therein that the plaintiff was required to make the full payment to the second defendant alone. It is apparent that the plaintiff has made full payment to the second defendant pursuant to such agreement. It further appears from record that both the defendants recognised such payment and consequently, possession of the flat and the car parking were handed over to the plaintiff by taking receipt from his and both the defendants

handed over such possession by recording such fact in writing. It further appears that even a formal deed was executed by both the defendants in favour of the plaintiff. We are unable to accept the reason assigned by the learned Trial Judge that the agreement between the parties is subject to the agreement between the two defendants. In terms of the agreement between the defendants there may be restriction for transfer of the share of the second defendant so long the dues of the first defendant are not paid but both the defendants having subsequently entered into a separate agreement asking the plaintiff to pay the entire amount to the second defendant without imposing any further condition regarding postponing of the execution of the deed till the payment of the share of the first defendant, the right accrued in favour of the first defendant by virtue of the earlier agreements between the defendants was waived so far as the agreement with the plaintiff is concerned. We, therefore, find no reason to impose any condition for execution of the sale-deed in favour of the plaintiff when he has paid the full amount in terms of the agreement and there is no further restriction mentioned in the said agreement for execution and the registration of the deed.

15. As regards the other condition imposed, namely, asking the plaintiff to demolish the chamber, we are of the view that the said chamber is outside the scope of the present agreement. It appears that both the defendants, by subsequent separate deeds, have sold separate car parking space to the plaintiff and the alleged deviation of the sanctioned plan had been regularized by the Kolkata Municipal Corporation. The first defendant raised objection before the Corporation but ultimately lost. The first defendant has not moved the higher forum against the decision of the appellate authority and as such, the order of the appellate authority has attained finality. We have already pointed out that those disputes are beyond the purview of the present suit and as such, in the present proceeding, there is no scope of passing a direction upon the plaintiff regarding the demolition of those structures.

16. We, however, find substance in the contention of Mr. Basu, the learned Advocate appearing on behalf of the first defendant that there was no scope of deletion of the clause regarding restricted use of the roof, which was agreed to by the plaintiff. Even if the Municipal Laws recognised the right of roof of a flat owner,

such owner can surrender his right in favour of the vendor by specific agreement. The learned Trial Judge, therefore, rightly refused to declared the said clause as invalid.

17. On consideration of the entire materials on record, we, therefore, modify the decree for specific performance of contract passed by the learned Trial Judge by directing both the defendants to execute and register the sale-deed in terms of Exhibit-5 within a month from today without imposing any further condition. In default, the deed will be executed and registered through Court.

18. The appeal is, thus, allowed to the extent indicated above with costs, which we assess at Rs. 10,000/- to be paid by the first defendant to the plaintiff for causing unnecessary harassment.

Pravendu Narayan Sinha, J.

19. I agree.

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