

Sanjay Sethi and anr Vs. Deepak Sethi and anr

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Court : Delhi

Decided On : Dec-14-2012

Judge : V. K. Jain

Appellant : Sanjay Sethi and anr

Respondent : Deepak Sethi and anr

Advocate for Def. : Mr. Naushad Alam

Advocate for Pet/Ap. : Mr. Vibhu Bakhru, Mr. Saurabh Kalia, Mr. Sameer Chaudhary, Mr. Harshit Agarwal

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI % + Date of Decision:

14. 12.2012 CS(OS) 1736/2012 SANJAY SETHI & ANR Through: Plaintiffs Mr. Vibhu Bakhru, Sr. Advocate with Mr. Saurabh Kalia, Mr. Sameer Chaudhary & Mr. Harshit Agarwal, Advs. versus DEEPAK SETHI & ANR Defendants Through: Mr. Naushad Alam, Adv. for D-1. CORAM: HON'BLE MR. JUSTICE V.K.JAIN
JUDGMENT V.K.JAIN, J.

(ORAL) IA Nos. 11010/2010 (under Order 39 Rule 1 & 2 CPC) & 22334/2012 (under Order 39 Rule 4 CPC) 1. The defendant No. 1 Shri Deepak Sethi is the brother of plaintiff No. 1 Shri Sanjay Sethi and the son of plaintiff no.2 Raj Sethi. A Memorandum of Understanding (MOU) is alleged to have been executed between the parties on 6th January, 2010. Under the said MOU, defendant no.1 resigned

from the directorship of two companies, namely, International Corporate Signs Pvt. Ltd. and Laycock Engineers Pvt. Ltd. He also agreed to transfer his shares in these companies to plaintiff no.1 or his nominee on receipt of Rs. 1 crore 25 lakhs and an additional payment of Rs.25,000/- per month for 12 months from January, 2010 to December, 2010 towards monthly expenses. In terms of the aforesaid MOU the plaintiffs paid Rs.50 lakhs to defendant no.1 out of this, Rs.25 lakhs were paid immediately on execution of the MOU and Rs.25 lakhs were paid on 6 th April, 2010. The plaintiffs also made four payments of Rs.25,000/- each to defendant no.1 in terms of the said MOU. Another payment of Rs.6,51,000/- is alleged to have been made to defendant no.1 towards fulfilment of the obligations of the plaintiffs under the said MOU.

2. The case of the plaintiffs is that after accepting the aforesaid payments, defendant no.1 is seeking to back out from the said MOU dated 6th January, 2010 and has been writing letters to various authorities, against them. The plaintiffs are accordingly seeking specific performance of MOU, besides injunction restraining defendant no.1 from acting in any manner prejudicial to the interest of the plaintiff and their companies and mandatory injunction, directing defendant no.2 to handover the shares certificates and transfer deeds to the plaintiff and/or their nominee. Under the MOU the Transfer Deeds in respect of the shares which defendant no.1 held in these companies were deposited by defendant no.1 with defendant no.2 who was to deliver the same to the plaintiffs, on their making the entire payment in terms of the said MOU.

3. Vide order dated 31.05.2012 this Court recorded the statement of learned counsel for the plaintiff that they were prepared to deposit the remaining amount in terms of the MOU dated 6th January, 2010 within two weeks and subject to the deposit of the said amount defendant no.1 was restrained from acting in any manner contrary to the terms and conditions of the MoU dated 06.01.2010. Defendant no.2 was also restrained from parting with the original share certificates, transfer deeds and other documents in his possession.

4. The learned counsel for the defendant no.1 has drawn my attention to the notice dated 7th June, 2010 sent by the plaintiffs to defendant no.1. Clause 12 and 13 of

the said notice read as under:12. That by committing such acts, you have committed the breach of terms and conditions of the Memorandum of Understanding dated 06.01.2010 and my client, therefore, is under no more any contractual obligation to further honour the commitments as made in the said MOU.

13. That a sum of Rs.20 lakhs as per the MOU is payable to you on 06.07.2010 but in view of your above conduct, my client hereby calls upon you that since you have committed the breach of terms of the understanding, my client is not liable to get the said cheque honoured and you are called upon not to present the said cheque and the subsequent cheques, which will fall due in October, 2010 and January, 2011. My client is also not liable to pay a sum of Rs.25,000/- per month committed to be paid to you till December, 2010 for meeting out the monthly expenses. It has also been pointed out by the learned counsel for defendant no.1 that the plaintiffs did not make monthly payment of Rs.25,000/- to defendant no.1 for 12 months as was stipulated in the MOU dated 6th January, 2010.

7. The learned senior counsel appearing for the plaintiff submits that plaintiff has made total payment of Rs.57,51,000/- to defendant no.1 which comprised one payment of Rs.25 lakhs made at the time of signing of the MOU, one payment of Rs.25 lakhs on 6th April, 2012 and then four payments of Rs.25,000/- each and one payment of Rs.6,51,000/-. He states that the plaintiff under the MOU was to pay Rs.1 crore 25 lakhs in addition to Rs.1,51,000/- towards certain adjustments and Rs.3 lakhs by way of 12 monthly payments of Rs.25,000/- each from January, 2010 to December, 2010.

8. It also transpires from the correspondence exchanged between the parties that a cheque of Rs.20 lakhs which the plaintiff had issued to defendant no.1 was not honoured by the bank because the payment of that cheque was stopped by the plaintiffs. This according to the learned counsel for the plaintiffs was done since the defendant no.1 was at one point of time seeking to back out from the MOU dated 6th January, 2010.

9. Section 16(c) of Specific Relief Act, to the extent it is relevant, reads as under:- Specific performance of a contract cannot be enforced in favour of a person who

fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant. Explanation: (ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.

10. By sending the notice dated 7th June, 2010 stating therein that they were no more under any contractual obligation made in the MOU, the plaintiffs clearly indicated, while sending the said notice, that they were not ready and willing to perform their obligations under the MOU dated 6th January, 2010. It was further stated that in the said notice that the plaintiffs were not liable to get the cheque issued by them honoured and defendant no.1 was accordingly called upon not to present the said cheque due as well as the subsequent cheques which were to fall due in October, 2010 and December, 2010. It was further stated that the plaintiffs were not liable to pay Rs.25,000/- which they had committed to pay to make out the monthly expenses. In view of the said notice coupled with the fact that the plaintiffs also stopped payment of a cheque of Rs. 20 lakhs issued by them to defendant no.1, there is no escape from the conclusion that the plaintiffs were not always ready and willing to perform their obligations under the MOU dated 6 th January, 2010. The learned senior counsel for the plaintiffs has pointed out that vide letter dated 7 th August, 2010 the plaintiffs had conveyed to defendant no.1 that the notice dated 7th June, 2010 was written by them on account of continuous breach of the terms and conditions of the MOU on his part and that the plaintiffs had no intention not to pay or to commit any breach of the terms and conditions of the MOU. Sending this notice would indicate that on 7th August, 2010 the plaintiffs were not ready and willing to perform their obligations under the MOU dated 6 th January, 2010. In order to succeed in suit for specific performance of agreement, the plaintiffs are required to aver and prove their continuous readiness and willingness to perform their part of the obligations right from the date of execution of the contract between the parties till the date of decree. If a party to an agreement backs out from its obligations under the said agreement even for a short time, such a party would not be entitled in law to seek specific performance of the agreement to which he/she is a party. Therefore, prima facie, I am of the view that the plaintiffs are not entitled to specific performance of the MOU dated

6th January, 2010 since they themselves sought to back out from their obligations under the said agreement by sending the notice dated 7th June, 2010 and stopping the payment of the cheque of Rs.20 lakhs which they had issued to defendant no.1 towards discharge of their obligations under the said MOU. That apart, the plaintiffs also did not make payment of Rs.25,000/- per month towards the expenses to defendant no.1 for 12 months from January, 2010 to April, 2010 since only four payments were made during this period.

11. For the reasons stated hereinabove, the defendant no.1 cannot be restrained from holding himself out as a shareholder of the two companies namely International Corporate Signs Pvt. Ltd. and Laycock Engineers Pvt. Ltd. However, since he has already resigned from the directorship of these companies, he cannot hold himself out to be the director of these companies. The learned counsel for defendant no.1 submits that defendant no.1 has already filed two petitions before Company Law Board (CLB) seeking restoration of his directorship in the said companies. Till the time the applications filed by defendant no.1 seeking restoration are allowed, he would have no legal right to hold himself out to be the director of these companies. I, therefore, direct that during the pendency of this suit defendant no.1 shall not hold himself out to be director of companies International Corporate Signs Pvt. Ltd. and Laycock Engineers Pvt. Ltd. However, if his directorship in one or both be restored by CLB this order would not come in the way his representing to be a director of the company in which his directorship is restored by CLB.

12. During the course of arguments, the learned counsel for plaintiffs submitted that defendant no.2 should be restrained from parting with possession of the share certificates and the transfer deeds to defendant no.1 who has already accepted a substantial amount from the plaintiffs in terms of the MOU dated 6 th January, 2010. This is not the case of the plaintiff that defendant No.2 is likely to return the share certificate and share transfer deeds to defendant No.1, without his refunding the amount received by him from the plaintiff under the MoU. To my mind he would be justified in returning the share certificates and transfer deeds to defendant no.2 only in the event defendant no.1 refunds the amount received by him from the plaintiffs under the MOU, along with such interest as defendant no.2

may deem appropriate. In this regard, it would be relevant to take note of the provisions of Section 64 of Contract Act, 1872, which inter alia, provides that the party rescinding a voidable contract shall, if he had received any benefit thereunder for another party to such contract, restore such benefit, so far as may be, to the person from whom it was received. He can Part with the possession of the share certificates and the transfer deeds to the plaintiffs only if defendant no.1 is ready and willing to accept the balance amount in terms of the MOU from the plaintiffs. The amount of Rs.76 lakhs which the plaintiff had deposited in terms of the order dated 31st May, 2012 be refunded to them along with accrued interest. Both the applications stand disposed of. The observations made in this order being tentative and prima facie would not affect the final outcome of the suit. It is made clear that it would be open to CLB to pass such order as it may deem appropriate on the applications filed by defendant no.1 and while passing an order the CLB would not be influenced by the view taken and the observations made in this order. IA 22335/2012 Issue notice. Mr. Saurabh Kalia, Adv. accepts notice of this application on behalf of the plaintiff. Reply be filed within four weeks. Rejoinder, if any, be filed within two weeks thereafter. List for disposal of this application on 30th January, 2013, the date already fixed. V.K. JAIN, J
DECEMBER 14 2012 NK////

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