Hansa V.Gandhi vs Deep Shankar Roy & Ors on 18 April, 2013

Equivalent citations: AIR 2013 SUPREME COURT 2873, 2013 AIR SCW 2560, 2013 (3) ABR 1413, (2013) 116 CUT LT 457, (2013) 2 RENTLR 275, (2013) 1 CLR 1193 (SC), (2013) 3 CIVLJ 734, AIR 2013 SC (CIV) 1471, (2013) 2 LANDLR 221, (2013) 3 ALLMR 947 (SC), (2013) 4 ICC 232, 2013 (12) SCC 776, (2013) 6 SCALE 163, (2013) 4 BOM CR 123

Bench: R.M. Lodha, Anil R. Dave, Ranjan Gogoi

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4509 OF 2007

HANSA V. GANDHI …APPELLANT

VERSUS

DEEP SHANKAR ROY & ORS. ....RESPONDENTS

WITH

CIVIL APPEAL NO. 4510 OF 2007
AND
CIVIL APPEAL NO. 4511 OF 2007

1 J U D G M E N T

1 ANIL R. DAVE, J.

1. Being aggrieved by a common judgment delivered in First Appeal Nos.492, 493 and 499 of 2002, dated 24th August, 2005 by the High Court of Judicature at Bombay, these appeals have been filed by the original plaintiffs, who had filed the suits for specific performance.

2. As the facts involved in all these three appeals are similar in nature, all these appeals are being decided by this common judgment. For the purpose of clarity, we are referring to all the parties by

their description as it was before the trial court. The Developer of the property, original Defendant No.1 is now respondent No. 2 in all the appeals whereas respondent no.1 is a subsequent buyer of the property in question. M/s. O.P. Co-operative Housing Society (hereinafter referred to as 'the Society') was the owner of the land which was being developed by the Developer.

3. The Developer had entered into an agreement to develop the property i.e. land owned by the Society and thereafter to sell the flats constructed on the land in question to the intending purchasers in accordance with the terms and conditions of the agreement dated 17th April, 1992.

4. Each plaintiff wanted to purchase one flat to be constructed by the Developer on the land belonging to the Society, so they had negotiated deals with the Developer. As per the understanding arrived at between each plaintiff and the Developer, the plaintiffs had to pay a total consideration of Rs.4,40,000/- in respect of each flat in certain installments. Accordingly, each plaintiff had started making payment to the Developer as per the amount of installments determined by the Developer. The Developer had executed a letter of intent dated 29th September, 1992, whereby the Developer had agreed to reserve a flat for each plaintiff . Reservation of the flat was subject to bye-laws of the Society. Moreover, the reservation made by the Developer for the flats was also subject to the terms and conditions which had been incorporated in the letter of intent. Initially each plaintiff had given a sum of Rs. 88,000/- to the Developer and a receipt had been executed by the Developer in respect of the said amount. Clause No. 3 of the said letter of intent dated 29.9.1992, written by the Developer and addressed to the plaintiffs is as under :

> "Clause 3 : We acknowledge and admit the receipt of Rs.88,000/- (Rupees Eighty Eight Thousand only) from you, which amount you have paid to us in view of our reserving the above mentioned flat in our proposed building on the basis of the plans shown to you, with a view to securing that on compliance of all the terms and conditions of Agreement to Lease executed between the Society and the Corporation, you shall purchase the said flat and enter into 'Agreement to Sale' with us." Thus, upon compliance of certain terms and conditions referred to in the aforestated clause and in the letter of intent, the Developer had agreed to sell the flats to the plaintiffs.

5. It was also provided in the letter of intent that the plaintiffs had to bear expenses in relation to registration of the document, stamp duty and certain other expenditure to be incurred for getting motor and electric connection etc. and it was also provided in the letter of intent that delayed payment of the installment would attract interest at the rate of 21% p.a. and if two or more installments remained unpaid, the reservation made in respect of the flat would stand cancelled.

6. In pursuance of the execution of the aforestated letter of intent, the plaintiffs had started paying installments to the Developer. It may also be noted here that due to some litigation which had taken place between some persons and the Society before the High Court, the High Court had ordered an enquiry. The said litigation went on till the end of 1996, due to which the Developer could not continue his construction activity and that resulted into delay in the construction work. According to the Developer, the said delay had resulted into increase in the cost of construction and therefore, it was constrained to increase the price of the flats and as a result thereof, the amount of installment

was also increased from Rs.22,000/- to Rs. 38,500/-. The increase in the price of the flats and the amount of installments had been opposed by the plaintiffs and they had refused to pay the installments on the ground that the increase in the price as well as installments was not justified. The plaintiffs had paid about ten installments till 10th January, 1997. In view of the fact that the entire amount payable as per the letter of intent and the understanding arrived at among the plaintiffs and the Developer had not been paid, the Developer did not allot or sell any flat to the plaintiffs and therefore, a Civil Suit No. 149 of 1998 had been filed by Mrs. Hansa V. Gandhi (who has filed Civil Appeal No. 4509 of 2007 herein) with a prayer for specific performance of the agreement for sale of the flat or in the alternative, to refund the price already paid to the Developer along with damages, which according to the plaintiff was Rs.10,00,000/-. Similarly, other plaintiffs had also filed suits for specific performance/damages.

7. It is important to note that when the plaintiffs had stopped paying installments to the Developer, the Developer had entered into another agreement with the present respondent No.1 in each appeal for sale of the flats with increased price, which were to be constructed and allotted to the plaintiffs. All these buyers are described hereinafter as 'Subsequent Buyers', who were defendant No.3 in the suits.

8. The Developer had filed written statements before the trial court denying its liability on the ground that by virtue of letter dated 19th December, 1997, it had cancelled the reservation of flats in question made for the plaintiffs. Thus, the understanding arrived at among the Developer and the plaintiffs in pursuance of the letter of intent had come to an end and as there was no subsisting agreement with regard to sale of the flats in question with any of the plaintiffs, there was no question of either specific performance of the contract or about breach of the contract resulting into payment of damages by the Developer.

9. It was contended on behalf of the Subsequent Buyers, who had purchased the flats from the Developer that they were bonafide purchasers for consideration without notice. It was specifically stated by them that they had no notice with regard to the earlier transactions which the plaintiffs had entered into with the Developer. It was also submitted that the agreement between each plaintiff and the Developer, if any, had never been registered as required under the provisions of the Maharashtra Ownership of Flats (Regulation of Promotion of Construction, Sale, Management and Transfer) Act, 1963 (hereinafter referred to as 'the Act') and therefore, it cannot be presumed that the Subsequent Buyers had any notice with regard to the earlier transactions, especially when they were never informed about the earlier transactions either by the Developer or by the original plaintiffs. It was further submitted on behalf of the Subsequent Buyers that they had paid the entire amount of consideration of Rs. 6,37,000/- and they were also put in possession of their respective flats and therefore, they were bonafide purchasers for consideration. Thus, the agreement with regard to sale of the flats, by the Developer to the Subsequent Buyers could not have been questioned and they had legal and legitimate right to have occupation of their respective flats.

10. After framing necessary issues and upon considering the evidence led before the trial court, the trial court decreed the suits whereby the Developer was directed to specifically perform the contract with regard to sale of the flats in favour of the plaintiffs upon payment of unpaid amount of

consideration by them.

11. Being aggrieved by the judgment and decree of the trial court, the Subsequent Buyers filed the First Appeals, referred to hereinabove, before the High Court. As the facts in respect of each First appeal were quite similar, the High Court thought it proper to decide all the three First Appeals by a common judgment, which was delivered on 24th August, 2005 and validity of the said judgment is challenged in these civil appeals filed before this Court.

12. After hearing the concerned parties and looking at the facts of the case and after considering the judgment delivered by the trial court, the High Court allowed the appeals. The judgments and decrees which had been passed in favour of the plaintiffs by the trial court had been set aside and it was directed by the High Court that the plaintiffs would be entitled to get refund of the amount paid by them to the Developer with interest at the rate of 9% per annum from the date on which the letter of termination of the agreement was sent by the Developer to the plaintiffs till the date of payment of the said amount.

13. The learned counsel appearing for the appellants i.e. the original plaintiffs mainly submitted that the Subsequent Buyers were not bonafide purchasers without notice because they did not make sufficient enquiry with regard to the earlier transactions which had been entered into by the Developer with the plaintiffs. According to the learned counsel, had the Subsequent Buyers made detailed enquiry with regard to the records of the Developer, they would have surely ascertained the facts with regard to the letters of intent sent to the plaintiffs by the Developer but by not doing so, the Subsequent Buyers had shown gross negligence and therefore, it cannot be said that the Subsequent Buyers were bonafide purchasers without any notice with regard to earlier transactions entered into between the Developer and the plaintiffs. The counsel further submitted that the burden of establishing the bonafides of the Subsequent Buyers was on them and the said burden had not been discharged by them and therefore, the High Court was in error while observing that the Subsequent Buyers were bonafide purchasers without any notice.

14. It was also submitted by the learned counsel that the Subsequent Buyers had not adduced any evidence with regard to payment of purchase price to the Developer and therefore, it could not have been said that the Subsequent Buyers were buyers in good faith for valuable consideration.

15. On the other hand, it had been submitted on behalf of the Subsequent Buyers i.e. respondent no. 1 in each appeal that the plaintiffs never averred in their respective plaints that the Subsequent Buyers were not bonafide purchasers having no notice with regard to the earlier transactions. In absence of such pleadings before the trial court, the plaintiffs could not have advanced any argument with regard to bonafides of the Subsequent Buyers. To substantiate the aforestated submission, the learned counsel had relied upon a judgment delivered in the case of Ram Swarup Gupta (dead) through LRs. Vs. Bishun Narain Inter College and Ors. [(1987) 2 SCC 555] to the effect that in absence of pleadings, the court would not deal with the matter not pleaded or the concerned party would not be permitted to make out a case beyond its pleadings. Some other judgments were also cited to substantiate the aforestated submissions.

16. It was mainly submitted by the learned counsel appearing for the Subsequent Buyers that in absence of any registration of the agreement, entered into between the plaintiffs and the Developer, the Subsequent Buyers could not have got any opportunity to find out existence of the letter of intent or an agreement, if any, entered into between the plaintiffs and the Developer. According to the learned counsel, registration of a document is a notice to all concerned persons and in absence of registration of the so called agreement, it cannot be presumed that the Subsequent Buyers had any knowledge with regard to the earlier transactions. The burden of proof would be on the plaintiffs to establish that the Subsequent Buyers had knowledge about the earlier transactions entered into by the Developer with the plaintiffs.

17. The counsel appearing for the Subsequent Buyers further submitted that Section 4(1) of the Act makes it mandatory to get the agreement, between the purchaser of the flat and the Developer, registered but in the instant case there was no registration as required under Section 4(1) of the Act, the plaintiffs could not have acquired any right in the flats.

18. Thus, the sum and substance of the submissions made on behalf of the Subsequent Buyers was that being bonafide purchasers for consideration, they had a better right in respect of the flats in question, especially when the plaintiffs had stopped paying installments which were due and payable by them to the Developer and in view of the letter of cancellation written by the Developer to the plaintiffs. If there was any agreement or if the plaintiffs had any right to purchase the flats in question, by virtue of the letter dated 19th December, 1997, cancelling the allotment, the so called right had come to an end and thereafter the plaintiffs did not have any enforceable right in respect of the flats in question.

19. We have heard the learned counsel for the parties at length and have perused the judgments of the courts below and the judgments referred to by the learned counsel.

20. Upon thoughtful consideration, we are of the view that the High Court was not in error while allowing the First Appeals filed by the Subsequent Buyers for the reasons stated by it in the impugned judgment.

21. It is not in dispute that the letter of intent was issued by the Developer to the plaintiffs wherein certain conditions had been incorporated and upon fulfillment of those conditions, agreements for sale of the flats were to be executed. Upon perusal of the letter of intent closely, one would find that certain conditions had been incorporated in the letter of intent. The said conditions clearly imposed a duty on the part of the intended purchasers to make payment of all the installments payable in respect of the purchase price of the flat. It is also not in dispute that it was open to the Developer to vary the price or the area to be covered by a flat in certain cases. It is not in dispute that the Developer had raised the price because of the delay caused on account of the litigation faced by the Society. On account of the delay caused in construction of the flats, the cost had gone up and therefore, the Developer had asked for a rise in the price which was approved by the majority of the intended purchasers of the flats. Accordingly, all the other purchasers had started paying the increased price of installments but the plaintiffs had refused to the same and in fact they had stopped paying the installments which were becoming due and payable after the price had been

increased. It is also worth noticing that the plaintiffs did not make payment even as per the rate prescribed under the letter of intent and the terms and conditions agreed upon by them with the Developer.

22. It is a fact that the plaintiffs had not entered into any formal agreement with regard to the purchase of the flats with the Developer. The mere letter of intent, which was subject to several conditions, would not give any right to the plaintiffs for purchase of the flats in question till all the conditions incorporated in the letter of intent were fulfilled by the plaintiffs i.e. the proposed purchasers. It is also a fact that all the conditions, which were to be fulfilled, had not been fulfilled by the plaintiffs.

23. According to the provisions of Section 4 (1) of the Act, the agreement, if any, executed between the plaintiffs on one hand and the developer on the another, ought to have been registered with the sub- Registrar.

24. In absence of such a registered document, the plaintiffs would not get any right in respect of the flats, which they intended to purchase. Moreover, in absence of the registration, the Subsequent Buyers could not have got an opportunity to inspect the agreement and there could not be any presumption that the Subsequent Buyers knew about the agreement.

25. The letter of intent cannot be said to be an agreement to sell for the simple reason that according to the contents of the letter of intent, only upon payment of the entire purchase price, the Developer and the plaintiffs were to enter into an agreement with regard to sale of the flats. This fact clearly denotes that no agreement to sell had been entered into between the plaintiffs and the Developer and in absence of such agreements, in our opinion, there cannot be any right in favour of the plaintiffs with regard to specific performance of any contract. Thus, in our opinion, the High Court did not commit any error while coming to the conclusion that there was no binding contract or agreement in existence between the plaintiffs and the Developer and therefore, the trial court could not have decreed the suit for specific performance.

26. As no averment was made by the plaintiffs in their plaints that the Subsequent Buyers were not bonafide purchasers for consideration, the Subsequent Buyers could not have adduced any evidence to show that they were bonafide purchasers for consideration. Had such a plea been raised by the plaintiffs in their pleadings, the Subsequent Buyers could have adduced necessary evidence to prove their cases. In such cases, normally the burden of proof would lie on the plaintiffs unless there is a registered document so as to raise a presumption that the Subsequent Buyers had knowledge with regard to the earlier transaction. Such a burden of proof was not discharged by the plaintiffs and therefore, we are also of the view that the Subsequent Buyers were bonafide buyers for consideration.

27. The learned counsel for the Subsequent Buyers relied upon several judgments and the propositions laid down in the said judgments are clear to the effect that if the contention of the plaintiffs is that the Subsequent Buyers are not bonafide purchasers, the plaintiffs must have pleading to that effect.

28. In view of the above circumstances, in our opinion, the High Court was right in allowing the appeals and directing the Developer to return the amount of the purchase price received by it from the plaintiffs with interest at the rate of 9% p.a. from the date when the letter of cancellation was written by the Developer to the plaintiffs. In our opinion, the said direction is just and proper however, looking to the rising price and inflationary trend in the country, we partly modify the judgment by increasing the rate of interest from 9% p.a. to 12% p.a. The said amount shall be paid to the plaintiffs by the Developer within two months from today.

29. Looking into the aforestated facts, we are of the view that the High Court did not commit any error while allowing the appeals. Subject to aforestated modification with regard to the rate of interest, the appeals are dismissed with no order as to costs.

.....J. (R.M. LODHA) .....

...J. (ANIL R. DAVE) .....J. (RANJAN GOGOI) New Delhi April 18, 2013
