Shri Rajiv K. Khanna vs Shri Ravinder K. Nayar & Others on 15 December, 2008

Author: Sanjiv Khanna

Bench: Sanjiv Khanna

CS(OS) No.701/2008 Page No.1

REPORTABLE

* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ I.A. Nos. 8269/2008 & 11741/2008, 10602/2008, 4721/2008 & 13295/2008 in CS(OS) No. 701/2008

% Date of Decision : December 15th , 2008.

SHRI RAJIV K. KHANNA .... Plaintiff.

Through Mr. Krishan Venugopal, Sr.Advocate with Mr.Vikram Bajaj, Mr.Udai Rathore, Mr.Sidharth Singh, advocates.

VERSUS

SHRI RAVINDER K. NAYAR & OTHERS .... Defendants.

Through Mr. T.K.Ganju, advocate for defendant no.1.

Mr.Arun Jaitley, Sr. Advocate with Mr.S.C.Nanda, Mr.Vikas Dhawan, Mr.S.P.Das, Mr.P.N. Jha, advocates for defendant nos. 2 and 3.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

1.

Whether Reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not ? YES

3. Whether the judgment should be reported in the Digest ? YES SANJIV KHANNA, J:

> 1. This Order will dispose of application for interim injunction-I.A. No.4721/2008, applications- I.A. Nos. 8269/2008 and 11741/2008, under Order XXXIX, Rule 2A of the Code of Civil Procedure, 1908 (hereinafter referred to as the Code, for short), application for amendment of the plaint- I.A. No. 11602/2008 and application IA No. 13295/2008 filed by the defendant Nos. 2 and 3 for bringing on record additional facts and documents.

MAIN FACTS

2. On 21st April, 2008, the plaintiff, Mr. Rajiv K. Khanna had filed the present Suit for specific performance of Memorandum of Understanding dated 28th July, 2006 and in the alternative for recovery of money and injunction against Mr.Ravinder K. Nayar, defendant no.1. The plaintiff seeks specific performance of the Memorandum of Understanding dated 28 th July, 2006 by execution of a sale deed in respect of 1000 sq.yds. of land in property no. 34, Friends Colony (East), Mathura Road, New Delhi-110065 (hereinafter referred to as „the Property , for short).

3. Mr.Shakti Nath and his wife Ms. Meera Nath had on 17th July, 2008 filed an application for being impleaded as parties claiming themselves to be purchasers for value without notice. Defendant nos. 2 and 3 have placed on record registered Sale Deed dated 11th February, 2008 executed by defendant no.1 in their favour. The Sale Deed was executed before the plaintiff had filed a present Suit and is in respect of 1320 sq. yds. of land with constructed area of 2500 sq.ft. or 232.3 sq.mts. The area includes 1000 sq.yds. of land which the plaintiff claims is the subject matter of the Memorandum of Understanding dated 28th July, 2006. Without prejudice to the rights and contentions of the plaintiff, they were impleaded as defendant nos. 2 and 3 vide Order dated 22nd July, 2008.

MEMORANDUM OF UNDERSTANDING

4. Defendants had argued that application for interim injunction should be dismissed as Memorandum of Understanding between the plaintiff and defendant No.1 is a forged document. Defendant No.1 admits having received Rupees 85 lacs on different dates by cheques from the plaintiff but as a loan and states that he had signed a blank piece of paper for preparing composite receipt for Income Tax purpose. Considerable emphasis was laid by counsel for the defendants on the contents of Memorandum of Understanding dated 28th July, 2006, wherein the total area of the plot has been described as 2100 square yards approximately. It was submitted that this is factually incorrect and, therefore, the Agreement/Memorandum of Understanding dated 28th July, 2006, was prepared by the plaintiff on a blank paper which was signed by defendant No.1. Prima facie, contention of defendants should not be accepted. Memorandum of Understanding records that Mr.

Arun Nayar (defendant no.1) was residing in 34, Friends Colony East in a plot measuring approximately 2100 square yards. The said area has not been described as the area owned by the defendant No.1. Reference to 2100 square yards is made with reference to the area in which defendant No.1 was residing at the time when Memorandum of Understanding dated 28th July, 2006 was executed. Moreover, it is difficult, prima facie to conceive and accept that defendant No.1 would have signed a blank piece of paper and given it to the plaintiff, as a receipt had to be executed. Executing a receipt does not require extraordinary skill or legal acumen. Defendant No. 1 is educated and a person who has been involved in litigation. He knows consequences of signing a blank paper. Moreover, defendant No.1 did not reply to the legal notices dated 23rd August, 2007 and 6th December, 2007. The said notices were sent by registered post and the acknowledgement cards were received back after service of defendant No.1. The address mentioned in the acknowledgement cards is of the defendant No.1 and correct. It is a case of defendant No.1 that these notices were not received by him personally and he had no knowledge of the two notices. Prima facie it is difficult to accept the said alibi. It is not a case of one but two notices. Silence inspite of allegations and reference to Memorandum, is a circumstance against the defendant No.1.

5. Terms of the Memorandum do not indicate and support that the defendant no.1 had signed a blank paper. In case the plaintiff wanted to fabricate a document on a blank signed paper, he would have incorporated favourable terms as per payments made and would not incorporate a schedule which he had not adhered to. Per sq. yard sale consideration mentioned is about the same as paid by defendant Nos.2 and 3. Prima facie story that the defendant No.1 had signed a blank paper cannot be accepted.

RIGHTS OF SUBSEQUENT PURCHASERS, STAY AND I.A. No. 13295/2008.

6. Mere execution of Agreement to Sell does not create interest or a charge on the property under the Transfer of Property Act,1882. An agreement for purchase creates interest in personam but no privity in the estate. Agreement to sell gives right to ask for execution of a registered sale deed or to file a suit for specific performance for the said purpose against the seller or parties to the agreement. Under Section 19(b) of the Specific Relief Act,1963 specific performance can be also enforced against a subsequent purchaser, except when the purchaser has paid value in good faith and without notice of the earlier agreement to sell. Good faith implies honesty and exercise of due care and attention. Notice as defined in section 3 of the Transfer of Property Act, 1882, may be actual knowledge of the agreement to sell or constructive notice, when a purchaser willfully abstains or due to gross negligence fails to make inquiry which ought to have been made (see, Ram Baran Prasad versus Ram Mohit Hazra reported in AIR 1967 SC 744, P.K.Mohammed Ubaidullah and Ors. versus Hajee C. Abdul Wahab (D) by Lrs. And Ors. reported in (2000) 6 SCC 402 and Jiwan Dass Rawal versus Narain Dass and Others reported in AIR 1981 Delhi 291).

7. Memorandum of Understanding dated 28th July, 2006 did not create any interest in the property in favour of the plaintiff. Before the Suit was filed, defendant no.1 had transferred the property in favour of defendant nos. 2 and 3 by way of a registered sale deed. Whether plaintiff will be entitled to specific performance of the Agreement to Sell in respect of the suit Property, inspite of the Sale Deed dated 11th February, 2008 in favour of defendant Nos. 2 and 3, depends on whether the said

defendants were bonafide purchasers for value without notice.

8. Learned counsel for the defendants relied on Sections 3 and 55(1) (a) of the Transfer of Property Act and Section 19(b) of the Specific Relief Act, to urge that it is for the defendant Nos. 2 and 3 to establish and prove that they were purchasers in good faith for value and without notice of the earlier agreement to sell between the plaintiff and defendant No.1. Reliance was placed on Bhoop Narain Singh versus Gokul Chand Mahton and others reported in AIR 1934 Privy Council 68 wherein it has been observed that it is for the transferee purchaser to establish the circumstances which will allow him to retain the property. Good faith and lack of notice are elements within the knowledge of the purchaser. The said decision does not relate to interim orders but deals with the question of onus and that the initial burden is on the purchaser. The said case was of no evidence or insufficient evidence on record at the time of final decision, on good faith and lack of notice of the earlier agreement to sell. Question of discharge of onus, shifting of onus etc. are a matter of trial and final judgment. At this stage, to decide the interim application, three principles of prima facie case, balance of convenience and irreparable harm and injury have to be applied.

9. Defendant Nos.2 and 3 have placed on record copy of due diligence report dated 10th December, 2007. The due diligence report was obtained by the defendant Nos. 2 and 3 before making the purchase to satisfy whether the property was subject matter of any limitation, restriction, condition etc. They rely on the said document for discharge of the initial onus. Prima facie the said document cannot, at this stage, be ignored.

10. It was submitted the Agreement between the plaintiff and the defendant No.1 was known to all persons in the locality. There cannot be any such presumption. The plaintiff did not implead defendants Nos. 2 and 3 as parties even though a registered sale deed had been executed by defendant No.1 in favour of defendant Nos. 2 and 3 on 11th February, 2008 i.e. before the filing of the suit. Similarly, reply to legal notices by other co-owners does not attribute knowledge to defendant Nos. 2 and 3.

11. The plaintiff had delayed filing of the present suit. On 23rd August, 2007, the plaintiff had issued notice to defendant No.1 by registered post but defendant No.1 did not respond. Thereafter another notice dated 6th December, 2007 was issued by the plaintiff to defendant No.1. Again, the defendant No.1 did not reply. Both notices were issued through advocates. The plaintiff did not immediately file the suit and waited till 21st April, 2008 to file the suit. The plaintiff was fully aware that he relies upon an un-registered Memorandum but did not take steps to obtain injunction against defendant No.1 from entering into a transaction with another person. The plaintiff had access to legal advice but took his chance by delaying filing of the present suit.

12. Defendant nos. 2 and 3 had filed I.A. No. 13295/2008 on 24th October, 2008 after other applications were heard on 22nd October, 2008 and orders were reserved. It is submitted that defendant nos. 2 and 3 had mortgaged the suit property with India Bulls Housing Finance Pvt. Ltd. in February, 2008 before the suit was filed but inadvertently this fact was not pleaded. Documents executed in favour of India Bulls Housing Finance Pvt. Ltd. have been filed. Plaintiff in reply has alleged suppressio veri, suggestio falsi by not disclosing true facts and attempt to prejudice the

Court. It was alleged that defendant nos. 2 and 3 were asked to file copy of the mortgage deed but no such deed has been filed on the plea that no deed of mortgage has been executed. Reference was made to the letter dated 2nd February, 2008 written by India Bulls Housing Finance Pvt. Ltd. which required execution of a registered mortgage deed. It is also alleged that the loan documents bear stamp date of 31st October, 2007 and therefore the documents have been manipulated. Further the loan obtained from India Bulls Housing Finance Pvt. Ltd. also relates to finance facilities extended to Logix Softel Pvt. Ltd and Mr.Vikram Nath.

13. Defendant nos. 2 and 3 have however clarified that no loan has been extended or procured by Logix Softel Pvt. Ltd or Mr. Vikram Nath. They have executed documents to stand as surety/guarantors for the loan of Rs. 19 crores obtained by defendant nos. 2 and 3 from India Bulls Housing Finance Pvt. Ltd.. The entire loan amount has been utilized for payment of the sale consideration to the defendant no.1.

14. Disclosure of pre suit mortgage was in the interest of defendant nos. 2 and 3. It is a relevant factor which is required to be taken into consideration for deciding balance of convenience. The date of the loan mentioned in the documents filed by the defendant is 1st February, 2008. Letter dated 16th February, 2008 written by India Bulls Housing Finance Pvt. Ltd. states that the loan amount of Rs.18,78,67/660/- was paid by cheque dated 31st January, 2008 and credited to the bank account of defendant no.2, after deducting processing fee of Rs.21,34,840/- being 1% of the loan amount. The date of disbursement therefore is before the Suit was filed and the ex parte injunction order was granted. The date 31st October, 2007 is mentioned on the adhesive stamps fixed on the agreement. The said date has no relevance to the date on which the agreement was executed. Defendant Nos. 2 and 3 have pleaded equitable mortgage by deposit of title deeds without executing an instrument in writing. Prima facie statement made by defendant Nos. 2 and 3 on oath should be accepted.

15. The factum that the defendant nos. 2 and 3 had taken loan of Rs.19 crores from India Bulls Housing Finance Pvt. Ltd. before filing of the present Suit and had mortgaged the property is a relevant factor to be taken into consideration for deciding balance of convenience. Defendant nos. 2 and 3 have an obligation to pay back the said amount along with interest. Failure to pay will cause complications with rights being exercised by the finance company on the property. This may not be in the interest of both parties. It also appears that the defendants were not aware of the Memorandum of Understanding or any claim of the plaintiff. Defendant nos. 2 and 3 have taken loan of huge amount of Rs.19 crores and are liable to repay the same back along with interest in installments. Normally, a party would not take a loan of Rs.19 crores to purchase a property, which is subject matter of an earlier agreement to sell or disputed.

16. In these circumstances, I do not think that it will be appropriate to pass an absolute stay order restraining defendant Nos. 2 and 3 from carrying out any construction in the said property. Appropriate directions have to be issued to balance convenience and avoid irreparable harm and loss. If no party is allowed and permitted to use the property during the litigation, loss will be occasioned to both parties. Even if, ultimately the suit is dismissed, the defendant Nos. 2 and 3 will suffer a reparable harm. There is evidence and material in form of the registered Sale Deed that the defendants were in possession of the property and demolition was undertaken before the suit was

filed (see para 15 of the plaint). Balance of convenience requires that defendant Nos. 2 and 3 should be permitted to use the property in the interregnum till the suit is decided but subject to certain conditions so as to protect the rights of the plaintiff and to ensure that the plaintiff if he succeeds is entitled to execute the decree of specific performance. FALSE STATEMENTS

17. Both parties are prima facie equally guilty of making wrong statements. Defendant Nos. 2 and 3 have claimed that they had put up sign board with their names in March, 2008 that they were owners. Why and what made them put up a sign board, is not stated. This statement made in paragraph 6 of the written statement is belied by the photographs of the main entrance filed by the plaintiff. No such sign board is visible in the photograph taken by the plaintiff as on 5th May, 2008. Sign board is visible in the photographs of the main entrance taken by the Local Commissioner on 22nd July, 2008. Similarly, the plaintiff has prima facie wrongly stated that he had made payment of Rupees 25 lacs in cash to the defendant on 10th August, 2007. There is no receipt for the said payment. It is stated that no receipt was executed when payment was made to defendant No.1 on 10th August, 2007. Moreover, plaintiff in paragraph 7 of the plaint has stated that in July, 2007, the plaintiff had expressed his willingness to pay the entire balance sale consideration but the defendant No.1 did not accept payment because of interse family litigation. Payment of Rupees 25 lacs is not specifically mentioned in the legal notice dated 23rd August, 2007. In the notice dated 6th December, 2007, total amount paid is mentioned as Rs.1,05,00,000/-, whereas in the plaint, total amount paid, as stated, is Rs.1,10,00,000/-.

Deposit of Rs. 15 Lacs

18. It is not the case of defendant No.1 that he has forfeited Rupees 85 lacs paid by the plaintiff or he has suffered any loss because the plaintiff has not performed his obligation under the memorandum of understanding. Defendant No.1 states that Rs. 85 Lacs was received as loan from the plaintiff. On the other hand, counsel for defendant No.1 has submitted that he is ready and willing to deposit the entire amount of Rupees 85 lacs, admittedly received by defendant No.1 from the plaintiff. Accordingly directions are being issued to defendant No.1 to deposit Rs.85 lacs in the Court along with interest @ 15%. INTERIM DIRECTIONS

19. In these circumstances, the following interim order in modification of Orders dated 23rd April, 2008 and 22nd July, 2008 is passed:-

(i) Defendant Nos. 2 and 3 are permitted to raise construction on the property.

(ii) Defendant Nos. 2 and 3 will not create any further third party interest in the property or sell, transfer possession or dispose of the same to any third person. Defendant Nos. 2 and 3 can use the property for their own use/residence or rent out the same on a monthly rent for more than Rs. 3501/- per month with prior approval of the Court but subject to the condition that in case the plaintiff succeeds in the present suit, the lease shall stand terminated. To ensure proper compliance defendant Nos. 2 and 3 will file an application in Court along with proposed lease deed and rent out the property only with permission of the Court.

(iii) Construction by defendant Nos. 2 and 3 will not create any special equities in their favour and will not be a relevant and determining factor to be taken into account at the time of final disposal and grant of relief.

(iv) In case a decree of specific performance is passed in favour of the plaintiff, the same will be executed and will be equally applicable to the constructed portion of the property and on the land-subject matter of the suit. The plaintiff will not be liable to pay any extra amount to defendant Nos. 2 and 3 for the said purpose. Further, defendant Nos.2 and 3 will carry out modifications, additions and alterations by constructing walls etc. as per the directions issued by the Court. The plaintiff will be also at liberty to demolish the constructed portion and make appropriate recovery from the sale of building material.

(v) Defendant No.1 is directed to deposit in Court Rupees 85 lacs along with interest @ 15% per annum from the date payment was received till deposit is made. Deposit will be made within a period of three weeks from the date of this order. The deposit will be kept in an FDR initially for a period of one year to earn maximum interest. The FDR will abide by further order or the final decision.

ORDER XXX, RULE 2A of the Code

20. This Court while issuing summons in the suit and notice in the application for interim injunction by Order dated 23rd April, 2008 had restrained the defendant No.1 and/or his representatives from creating any third party interest with further direction to maintain status quo with regard to title, possession and construction in respect of the property. It appears that defendant No.1 deliberately avoided service of summons and as is clear from the Order dated 22nd July, 2008. In the meanwhile, defendant Nos. 2 and 3 filed an application, I.A. No.8420/08, for impleadment. The said application was allowed by Order dated 22nd July, 2008 with a direction that the order passed on 23rd April, 2008, would equally apply to the newly added defendant Nos. 2 and 3. A Local Commissioner was also appointed to visit the suit property, take photographs and report on the nature and extent of construction. The plaintiff has placed on record photographs taken on 5th May, 2008, which show that some demolition had taken place but no digging or construction work had started. Photographs taken by the Local Commissioner on 22nd July, 2008, reveal that digging had been done and construction work was going on. The plaintiff in application I.A.No.11741/08, has enclosed subsequent photographs after 22nd July, 2008 to establish that construction has continued inspite of the stay order.

21. Defendant Nos. 2 and 3 have admitted that construction has continued even after Order dated 22nd July, 2008 was passed. It is their contention that status quo order passed by this Court on 23rd April, 2008/22nd July, 2008, does not injunct or prohibit them from carrying on construction as construction was continuing and in was progress when Order dated 22nd July, 2008 was passed.

22. By order dated 23rd April, 2008, defendant No.1 was directed to maintain status quo with regard to the title, possession and construction in respect of the property. It is apparent that by

Order dated 23rd April, 2008, defendant No.1and/or representatives were asked to maintain status quo in respect of construction. Thus, defendant No.1 or his representatives should not have carried out further construction. By Order dated 22nd July, 2008, this interim order passed on 23rd April, 2008 was made equally applicable to the defendant Nos. 2 and 3. Thus they were restrained from carrying on construction. Conduct of defendant Nos. 2 and 3 to continue construction and stand taken in their reply that status quo in respect of construction meant that construction that had started could continue, cannot be accepted. Status quo with regard to construction clearly meant that no further construction was to be done. It is also difficult to conceive that defendant Nos. 2 and 3 who had access to legal opinion could have misunderstood a simple and clear status quo/restrain order. Interim order of the Court cannot be trifled with and subverted. Defendant Nos. 2 and 3 have violated the interim order. This aspect has been kept in mind, while giving directions on the interim application.

23. Order XXXIX, Rule 2A of the Code, stipulates that in case of disobedience or breach of a term of an interim order, property of the violator can be attached and the violator can be also detained in a civil prison. Attachment can continue for a term of one year and if the breach/disobedience continues, the property can be sold and compensation paid to the injured party. Attachment is to compel compliance and comes to an end when compliance is made. Civil imprisonment is a mode of punishment for being guilty of such disobedience (see, Samee Khan versus Bindu Khan reported in (1998) 7 SCC 59). The rule is to ensure enforcement of the interim order and seeks to remedy the effect of disobedience and restore status quo ante. In the present case it will mean demolition of the construction made by defendant Nos. 2 and 3 after the Order dated 22nd July, 2008 and thereafter the said defendants will be at liberty to carry out fresh construction. This may not be proper. In Prestige Lights Ltd. versus SBI reported in (2007) 8 SCC 449 on the question of "purge first, then hearing" it was observed:

> "An order passed by a competent court--
>
> interim or final--has to be obeyed without any reservation. If such order is disobeyed or not complied with, the court may refuse the party violating such order to hear him on merits. We are not unmindful of the situation that refusal to hear a party to the proceeding on merits is a "drastic step" and such a serious penalty should not be imposed on him except in grave and extraordinary situations, but sometimes such an action is needed in the larger interest of justice when a party obtaining interim relief intentionally and deliberately flouts such order by not abiding by the terms and conditions on which a relief is granted by the court in his favour."

24. Yet defendant Nos. 2 and 3 cannot be let off by a mere warning. High Court as a Court of record has power to suitably modulate relief or penal action (see, All Bengal Excise Licensees Association versus Raghabendra Singh, reported in (2007) 11 SCC 374 and High Court of Judicature at Allahabad versus Raj Kishore Yadav, reported in (1997) 3 SCC 11). Mere vacation/modification of the interim order or rejection of relief in the main proceedings, cannot be a ground to justify disobedience of the interim order (see, Prithawi Nath Ram versus State of Jharkhand, reported in (2004) 7 SCC

261). The parties must abide by interim orders of the Court for Rule of Law to prevail. Deliberate disobedience has to be viewed seriously and punishment should be awarded to commensurate with the nature of breach and also to ensure that parties do not ignore Court Orders under the misapprehension that only a nominal penalty will be imposed or apology will suffice. In these circumstances, I feel that defendant Nos. 2 and 3 should be directed to pay fine of Rupees 5 lacs out of which Rupees One lac will be paid to the plaintiff and the balance amount will be deposited in the Prime Minister s Relief Fund within four weeks. Payment made to Prime Minister s relief Fund will not qualify for income tax deduction. The above amount has been fixed keeping in mind the monetary value of transaction and the fact that a smaller amount may not pinch and serve the purpose.

Amendment Application-IA No. 10602/2008

25. The plaintiff has filed this application for amendment of the plaint in view of the impleadment of defendant Nos. 2 and 3 by order dated 22nd July, 2008. Counsel for defendant No.1 has not opposed the application. However, counsel for defendant Nos. 2 and 3 has objected to the proposed amended paragraph 15 of the plaint. It was stated that the plaintiff wants to withdraw his admission to the extent that in paragraph 15 of the original plaint it is stated that plaintiff apprehends that third party rights might be created, but in paragraph 15 of the proposed amended plaint it is stated that plaintiff "genuinely apprehended" that defendant No.1 after making fresh construction would transfer the property to a third party for a higher price. The contention raised by defendant Nos. 2 and 3 has no merit. The plaintiff does not want to withdrawn any admission. Use of past tense in the proposed paragraph 15 is in view of the fact that the defendant Nos. 2 and 3 have been already impleaded as parties. The objection is technical. Counsel for the plaintiff has submitted that use of past tense is grammatically correct. In these circumstances, the amendment application is allowed but subject to the condition that the word "apprehended" used in paragraph 15 of the amended plaint will also be read as "apprehends" and the amendment made to this extent will not cause any prejudice to the defendant Nos. 2 and

3.

26. The amendment application being I.A.No.10602/08 is allowed subject to the conditions mentioned above.

All observations in this Order are prima facie and tentative and will not influence the final judgment and decision.

(SANJIV KHANNA)

JUDGE

DECEMBER 15, 2008.

NA/P