* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: October 23, 2009
Date of Order: November 09, 2009

+CS(OS) 549 of 2008 and IA 3658 of 2008

% **09.11.2009**

Ravinder Kishore Sinha **...Plaintiff**
Through: Mr. A.K. Singh, Advocate

Versus

Smt. Manjula Bhushan **...Defendant**
Through: Ms. Rachna Agarwal, Advocates

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment?

2. To be referred to the reporter or not?

3. Whether judgment should be reported in Digest?

ORDER

1. By this Order, I shall dispose of the issue of maintainability of this suit as raised by defendant.

2. Brief facts relevant for the purpose of deciding this are that the plaintiff entered into an agreement with the defendant on 31st March, 2005 for sale of property bearing number E-1, East of Kailash ad measuring 500 sq. yards with all the construction thereon including basement, ground floor, first floor, second floor and the third floor (including terrace) as well as servant quarters. The parties agreed for total sale consideration of the entire property at Rs.6.15 crore. The property was lying mortgaged with Standard Chartered Bank as defendant had taken loan from the aforesaid bank on mortgaging the property and the loan amount showed balance payable by defendant of Rs.88.78 lac. The

defendant had other needs and had agreed to sell the property. The relevant clauses contained in the agreement and having bearing on this issue read as under:

> *"xxxx*
>
> *(iii) The total consideration for the sale of the entire aforesaid property with all the rights belonging and appurtenant thereto shale be Rs.6.15 crore (Rupees six crores fifteen lakhs) out of which an amount of Rs.11 lakhs (Rupees eleven lakhas) has been paid as an earnest money vide cheque no.355128 dated 25.03.2005 drawn on HDFC Bank Limited, Opp. Deer Park, Safdarjung Enclave, New Delhi, (the receipt of which the VENDOR hereby acknowledges) and, the balance shall be paid in the manner provided hereinbelow:*
>
> *a. Rs.1 crore (Rupees one crore) within 30(thirty) days from date of the execution of the Agreement of sale, which amount will be utilized by the VENDOR towards liquidating the dues of the Standard Chartered Bank, Connaught Place Branch, New Delhi and obtain all documents of title submitted with the Standard Chartered Bank or otherwise.*
>
> *b. Rs.3.08 crores (Rupees three crores and eight lakhs) within a period of 60 days (sixty) days from the date of liquidation of the loan dues of Standard Chartered Bank by the VENDOR and release of the document of titles.*
>
> *c. Rs.1.96 crores (Rupees one crore and ninety six lakhs) within a period of three years from the date of execution of this agreement of sale.*
>
> *iv) That the VENDEE shall bear the expenses for the purchasing of registration stamp paper and registration fee regarding registration of sale deed/ deeds which shall be in*

phases as hereunder:

a. *The VENDOR shall get the sale deed in respect of basement, ground floor and first floor duly executed and registered in favour of the VENDEE and/or his nominee(s) at the time of the payment of the installment of Rs.3.08 crores as aforesaid such that there is a total payment of Rs.4.15 crores (i.e. Rs.1 crore of first installment, Rs.3.08 crores of second installment and adjustment of Rs.7 lakhas out of the advance, part payment of Rs.11 lakhs made at the time of execution of the agreement of sale) at the time of execution and registration of the sale deed in respect of the basement, ground floor and first floor which is just and proper.*

b. *The VENDOR shall get the sale deed in respect of the second and third floor duly executed and registered in favour of the VENDEE and/or his nominee(s) within three years of the date of execution of this agreement of sale at the time when balance consideration money of Rs.1.96 crores is paid and the amount of Rs.4 lakhs out of the advance part of total sale consideration is adjusted, such that there is a total payment of Rs.2 crores at the time of execution and registration of the sale deed in respect of the second and third floors which is just and proper.*

v) *The VENDOR shall handover self certified photocopies of all the original documents of title to the VENDEE at the time of registration of sale deed in respect of basement, ground floor and first floor of the aforesaid property. The VENDOR shall handover peaceful possession of the basement, ground floor and first floor of the aforesaid property to the VENDEE and or his nominee(s) at the time of payment of Rs.1 crore as stated hereinabove in* *paragraph (iii) a.*

vi) *That the VENDOR shall be entitled to retain possession of the second floor and third floor (including terrace) for a maximum period of three years from the date of execution of this agreement of sale. The VENDOR may get the sale deed/ deeds in respect of the second and third floor (including terrace) executed and registered in favour of the VENDEE/ his nominee(s) either collectively for a sale consideration of Rs.2 crore for both second and third floor as aforesaid, or individually and separately for any fot he balance floors, i.e. second and third floor on payment of pro rata sale consideration of Rs.1 crore for each floor including the proportionate adjustment of the advance part of the total sale consideration paid at the time of the execution of this agreement of sale. Possession of the second and third floor of the aforesaid property would be delivered by the VENDOR to the VENDEE at the time of registration of the sale deed/ or the respective sale deeds as the case may be.*

vii) *That the VENDOR shall be entitled to receive interest on the balance sale consideration of Rs.1.96 crore which remains to be paid after execution and registration of the first sale deed and such interest shall be paid by the VENDEE at the rate of 6% per annum for the period commencing the date of the execution of the agreement of sale till the dates of registration of the sale deed/ deeds in respect of the second and third floor only. Such interest shall be paid at the interval of every six months from the date of execution of the agreement of sale.*

3. After this agreement was entered into, a sale deed was executed between the parties in respect of basement, ground floor and first floor on 11th May, 2005 along with one servant quarter with undivided, indivisible, proportionate shares in the land rights of the plot against a sale consideration of Rs.4.15 crore in terms of the agreement. However, copy of the sale deed shows that the entire amount of Rs.11 lac given in advance was adjusted towards the sale consideration of basement, ground floor and first floor. It also shows that the amount of Rs.1 crore which was to be paid by plaintiff to defendant in terms of the agreement was in fact not paid and only a cheque of Rs.92 lac was handed over on 11th May, 2005. The balance consideration of Rs.3.12 crore was paid vide pay order of State Bank of Patiala. After execution of the sale deed, plaintiff took over the possession of the property sold to him and started residing in it and the defendants continued to live in second floor and third floor as owner. Vide letter dated 28th March, 2007 plaintiff told defendant that the balance sale consideration of Rs.1.96 crore was ready with him and asked defendant to execute the sale deed in respect of second and third floor(terrace) and remaining servant quarter in favour of the plaintiff. The defendant replied to this letter and stating that the letter dated 28th March 2007 was a pre-dated letter as it was dispatched to her on 26th April, 2007. Defendant brought it to the notice of plaintiff that the amount of Rs.4 lac which was to serve as earnest money for second and third floor was adjusted by plaintiff at the time of getting sale deed executed in respect of basement, ground floor and first floor. It was also told by defendant that the entire amount paid by plaintiff was adjusted against the sale consideration of basement, ground floor and the first floor and thus the balance consideration for second and third floor even at the time of execution of the earlier sale deed was Rs.2 crore. Defendant also took the stand that the plaintiff not only got the earnest money for second and third floor adjusted but had also failed to pay the interest @ 6% per annum at six monthly rests as provided in the

agreement and this only showed that the sale deed executed on 11th May, 2005 brought the agreement to sale to an end and the plaintiff himself rescinded rest of the agreement to sell by adjusting the earnest money and by not acting on the clauses of payment of interest at the interval of six months. Thus, the agreement to sell stood terminated with the sale of ground floor, first floor and basement. It was also informed that the cheque of Rs.92 lac drawn by plaintiff on HDFC Bank towards consideration was also taken back by him and instead a sum of Rs.90,40,000/- was paid to Standard Chartered Bank by the defendant and the balance amount of Rs.1.60 lac was not given to the defendant.

4. A reply was given to above response of the defendant wherein plaintiff reiterated its right to get the sale deed in respect of second floor and third floor and terrace executed in his favour. Regarding adjustment of entire amount of Rs.11 lac towards sale consideration of basement, first floor and ground floor it was stated that it was done with the consent of defendant and the plaintiff by this had not given up his right in sale of second floor, third floor with terrace in his favour. Regarding non-payment of interest @ 6% per annum it was stated that the interest was not paid on the suggestion of defendant herself who had told plaintiff to pay interest at one go along with sale consideration. It was also stated that defendant had not put plaintiff on notice to above interest amount and, therefore, it would be deemed that non-payment of interest was compounded by the conduct of the defendant. It was denied that a sum of Rs.1.6 lac, as alleged by the defendant was payable by the plaintiff to the defendant against sale consideration of even first transaction.

5. It is submitted by the counsel for the defendant that the agreement entered into between the parties shows that the parties had bifurcated the agreement in two parts and

had fixed appropriate sale consideration in respect of the two parts of the property. The sale consideration of Rs.4.15 crore was fixed for basement, ground floor and first floor and sale consideration of second floor and partly built third floor (as per FAR) with terrace rights was separately fixed in the agreement to sell and the agreement to sell specifically recorded that the sale consideration being fixed for two parts was just and proper and it also provided that the plaintiff may either get the second and third floor transferred in his own name or in the name of his nominee. It is submitted by counsel for defendant that plaintiff was short of money even at the time of execution of the sale deed of the basement, ground floor and first floor and for this reason plaintiff abandoned the agreement of purchasing whole of the property and could arrange money only for the basement, ground floor and first floor. He submitted that in terms of the agreement only rupees seven lac was to be adjusted against the purchase price of basement, first floor, and second floor out of rupees eleven lac of earnest money, but since plaintiff had abandoned the idea of purchasing rest of the property, the plaintiff asked defendant to adjust the entire earnest money of Rs.11 lac towards the sale consideration of basement, ground floor and first floor. He further argued that plaintiff failed to pay Rs.1 crore as agreed under the agreement and could hardly arrange the amount required for discharging the liability of the bank towards mortgage of the property. Even the cheque of Rs.92 lac was taken back and only the due amount was paid directly to the bank. This shows the money crunch with the plaintiff and his inability to arrange sufficient funds even at the time of purchasing the basement, ground floor and first floor. He submitted that the plaintiff after purchasing the property, returned the original agreement to defendant since the agreement had come to an end and told the defendant of abandoning the rest of the agreement with the result that defendant took back the original agreement. If the agreement between plaintiff and defendant for sale of the rest of the property had survived, the plaintiff would have abide by the terms of the agreement and would have paid 6% interest to the defendant every six months and would have also re-deposited the balance earnest money of Rs.4 lac immediately. The very fact that plaintiff did not deposit the amount of rs.4 lac which was got adjusted towards the sale consideration of part of the property and the fact that plaintiff did not pay interest on the balance sale consideration as agreed between the parties and the fact that the original sale agreement was returned to defendant all show that the plaintiff had abandoned the contract and it is only later on when the prices of properties in the subsequent years increased phenomenally that the plaintiff became greedy and issued letter to defendant reviving his interest in the property. However, prices of the properties by that time had gone considerably up. Had the agreement between the parties been surviving the defendant would have asked plaintiff to pay consideration along with interest within a reasonable time so that defendant could arrange some alternative accommodation for herself. It is only because the agreement was abandoned that the defendant did not communicate to plaintiff and when she received letter from plaintiff then only she replied to the plaintiff. It is submitted that the contract between the parties had come to an end and this was reflected from the undisputed and admitted conduct of parties.

6. Per contra, counsel for plaintiff argued that the period as stated in the agreement to sell, for execution of the sale deed for entire property was three years. It was so agreed only because the plaintiff was not in a position to arrange funds immediately and this fact was very well known to defendant. Had plaintiff been in a position to arrange funds immediately for the entire building, the parties would not have agreed for a period of three years for execution of the sale deed in respect of the second and third floor. He further submitted that the adjustment of Rs.4 lac towards the sale consideration of

basement, ground floor, first floor could not be said to be an adjustment of the earnest money. The bifurcation of Rs.11 lac into Rs.7 lac and then Rs.4 lac was only for the sake of convenience and Rs.4 lac could not be treated as earnest money. Regarding non-payment of interest, it is submitted that plaintiff had been ready and willing to pay interest but interest was not paid only because defendant expressed her desire to receive interest together with the sale consideration.

7. Plaintiff relied on *M.P. Housing Board* v *Progressive Writers & Publishers JT 2009 (4) SC 219* wherein the Supreme Court has observed that the time was not normally an essence of any agreement qua immovable property and even if there was an express covenant of the time being an essence, the overall agreement had to be looked into to see whether the time was the essence or not. Mere expression of the stipulated time would not make the time an essence of the contract. It is ruled that in case of contract relating to an immovable property, the Court has to look on the essence of the contract and whether the time was the essence of contract is a question of facts and law. The real test is intention of parties and it depends upon the facts and circumstances of each case [*Swarnam Ramachandran and Anr. v Aravacode Chakungal Jayapalan 2004(8) SCC 68]*. The intention of the parties can be ascertained from the express terms used in the contract; the nature of property; the nature of contract; surrounding circumstances; and conduct of the parties.

8. It is an undisputed fact that in this case at the time of entering into the agreement in respect of entire property, the parties had assessed the market value of the two portions of the property, one part consisting of basement, ground floor and first floor and the second part consisting of second floor and particularly built third floor with terrace. The

agreement itself provides that the amount of Rs.4.15 crore was a reasonable market value of basement, ground and first floor and Rs.2 crore was proper value of second and third floor. Even in case of second floor and third floor, the value was put at Rs.1 crore for each floor since plaintiff had agreed, for convenience sake that in respect of these two floors he could get the sale deed executed either in his or in favour of his nominee for this value. Defendant who was the owner of the property had to remain in occupation of the second floor and third floor all along since she had agreed to receive the consideration of second and third floor within a period of three years. It is apparent that it was in the minds of the parties that the prices of the property keep on increasing. To compensate this, the parties had agreed that defendant will continue to receive 6% interest over the unpaid consideration on interval of every six months. Rs.4 lac was to remain as earnest money with her for second floor and third floor.

9. It is an undisputed fact that the plaintiff did not keep even that Rs.4 lac with the defendant as a token of his surviving interest for second floor and third floor. If the interest of the plaintiff had still been there after 11th October 2005 when he got the sale deed executed in respect of one portion, he would have at least kept that token amount of Rs.4 lac with defendant against the total sale consideration of Rs.2 crore. It cannot be presumed that a person who could spend Rs.4.15 crore on purchasing basement, ground floor and first floor would not spare Rs.4 lac to keep his interest surviving in rest of the property. It only shows that looking at the market situation at that time, plaintiff thought that the deal in respect of part of the property was good enough and he scrapped rest of the agreement and did not keep even Rs.4 lac with defendant. The agreement provided that the plaintiff had to pay every six months interest on balance consideration @ 6% per annum, which to my mind was a very moderate interest and six monthly interest on Rs.2

crore amounted to Rs. six lac. If the plaintiff had not abandoned the agreement he would have paid Rs.6 lac every six months to the defendant to show that his interest was surviving. The first payment of interest of the agreement had become due on 1st October, 2005 and the second payment of Rs.6 lac had become due on 1st April, 2006, third payment on 1st October 2006 and the 4th payment on 1st April, 2007. Plaintiff had not offered any of these dues on account of interest to defendant. No cheque or draft was sent and even in the letter written by plaintiff dated 28th March 2007, there is no talk of interest payable by the plaintiff to the defendant after every six months. Plaintiff only talked of Rs.1.96 crore being ready with him although even Rs.4 lac was not lying with defendant and had already been adjusted. It is not mentioned in the letter that the defendant at any point of time refused to receive the interest or had asked for the adjustment of the interest. A subsequent reply given to the response of the defendant is not reflective of the true intention of plaintiff. If it had been agreed by defendant as is alleged in the subsequent reply of plaintiff that the accumulated interest was to be paid along with the consideration, then plaintiff in its letter dated 28th March 2007 would have made this offer to defendant. It only shows that the plaintiff, looking at the rise in real estate price wanted to revive an abandoned contract and wanted to drag defendant in unnecessary ligation thinking that under the coercion of litigation, defendant may come to some compromise.

10. I consider that conduct of the parties at the time of execution of the sale deed of adjusting the entire earnest money lying with defendant towards the sale consideration of basement, ground floor and first floor and not leaving even Rs. four lac as earnest money for rest of the property and thereafter non-payment of six monthly interest as agreed, not writing any letter or communication by plaintiff to defendant and there being no

correspondence between the parties for two years shows that the contract between the parties in respect of second floor and third floor was abandoned and no part of the contract survived which could be specifically enforced.

11. In view of the foregoing discussion, I find that the present suit is not maintainable and is hereby dismissed. All interim applications also stand dismissed.

November 09, 2009 **SHIV NARAYAN DHINGRA J.**
rd