

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Reserved on: February 23, 2022***

Pronounced on: March 23, 2022

+ **CS(OS) 301/2020**

KULMOHAN SINGH & ANR. Plaintiffs

Through: **Mr.Kuldeep Mansukhani & Mr.Jay
Kishan Dev, Advocates**

Versus

SATINDER SINGH BHASIN & ANR. Defendants

Through: **Mr.Anil K. Airi, Senior Advocate
with Mr.Ravi Krishan Chandna &
Mr.Mudit Ruhella, Advocates**

**CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT**

ORDER

IA No. 9202/2020 (under Order XXXVIII Rule 5 CPC) & IA No. 4438/2021 (u/S 151 CPC)

1. According to plaintiffs, an Agreement to Sell dated 07.01.2019 was entered into between the plaintiff/ buyer and defendants/seller in respect of property being D-24, Rajouri Garden, New Delhi-110027, in terms whereof, plaintiffs paid amount of Rs. 3.85 Crores on 07.01.2019 and Rs. 2.00 Crores on 03.02.2019 to the defendants as earnest money. Since, the Agreement to Sell in question could not be executed the plaintiff has filed the present suit for recovery praying for recovery of Rs.5,85,00,000/- along

CS(OS) 301/2020

Page 1 of 12

with interest of Rs.1,43,75,000/-.

2. By the above captioned first application, applicants/plaintiffs are seeking attachment of the property or direct the defendants to provide security to the extent of liability and to restrain them to not create any third party interest against the suit property. Vide *ex parte* interim order dated 12.10.2020, this Court has restrained the defendants from creating third-party rights in the suit property.

3. By the above captioned second application, applicants/defendants are seeking vacation of *ex parte ad-interim* stay granted by this Court vide order dated 12.10.2020.

4. During the course of hearing, it was submitted on behalf of plaintiffs that defendants had assured the plaintiffs that they are owners of the suit property and have right to sell the property, but the same is under charge/ mortgaged with HDFC Bank. However, defendants had also assured the plaintiffs that they would obtain 'No Objection Certificate' (NOC) from HDFC Bank and the suit property shall be made free from all encumbrances, liens, decree, court cases, attachments, outstanding dues, charges, tax penalties etc., before the registration of the sale deed in favour of the plaintiffs.

5. According to plaintiffs, they agreed to purchase the property and settled the terms of payment, mode of transfer, date of transfer and other formalities and the price of the suit property was settled for Rs.38,50,00,000. The plaintiffs gave amount of Rs.3,85,00,000/- to the defendants on 07.01.2019 towards earnest money, against receipt and in the presence of the witnesses. On the said date i.e. 07.01.2019, an Agreement to Sell was also executed between the parties. Thereafter, plaintiffs also claim to have given a sum of Rs.2,00,00,000/- on 03.02.2019 to the defendants towards part payment in respect of the suit property.

6. Learned counsel for plaintiffs submitted that it came to the knowledge of plaintiffs that defendant No.2- Satinder Singh had duped various persons/buyers who wanted to buy property in "Project Grande Venice" at Noida, run by defendant No.2 and he was arrested on 08.02.2019. However, in June, 2019 plaintiffs informed the defendants that they were willing and ready to pay the balance purchase money if defendants are ready to transfer the property to the plaintiffs, however, defendants were not able to obtain NOC from the bank where the subject property was mortgaged. Learned counsel for plaintiffs vehemently opposed the application filed by the defendants seeking vacation of interim stay on the ground that defendants

have failed to fulfill the terms of Agreement to Sell in respect of suit property and on their failure to comply with the said Agreement, the defendants are liable to pay the double of the earnest money received by them. It was submitted that the defendants have enjoyed the benefit of amount given by the plaintiffs and so, plaintiff are entitled to refund of the amount with interest @15% p.a.

7. Learned counsel for plaintiffs also submitted that defendants have tried to dispose of the suit property and plaintiffs apprehend that if the suit property is not attached or interim order is vacated, the defendants shall flee the country without fulfilling their liability towards the plaintiff.

8. To the contrary, learned senior counsel appearing on behalf of defendants submitted that the allegations levelled against the defendants are without any cause of action or basis. Learned counsel submitted that defendants are the owners and are in possession of the suit property and they had agreed to sell the same to the plaintiffs and for this purpose, defendants had executed an Agreement for Sale and Purchase dated 07.01.2019 for a total sale consideration of Rs.38,50,00,000/-. However, defendants had duly informed the plaintiffs that the said property was under charge of HDFC Bank and the defendants shall pay back the loan taken from the Bank with

amount of consideration received from the plaintiffs and after obtaining a No Objection Certificate (NOC), the defendants shall execute the title deeds in favour of the plaintiffs. It was next submitted that in terms of the Agreement, plaintiffs were to pay amount of Rs.3,85,00,000/- to the defendants by way of bank transfer towards earnest money, however, at the time of signing of the Agreement, plaintiffs informed the defendants that a sum of Rs.5,85,00,000/- shall be transferred in the bank account of defendants instead of Rs.3,85,00,000/- and, therefore, requested the defendants to issue receipts in respect thereof. To convince the defendants, plaintiffs transferred an amount of Rs.40,00,000/- to the defendants by bank transfer and assured to transfer the rest of the amount at the earliest. Consequently, receipt for the amount of Rs.2,00,00,000/- in addition to the receipt for the amount of Rs.3,85,00,000/- was issued by the defendants. It was further agreed between the parties that the receipts shall be kept with the Mediator till the time entire payment is received from the plaintiffs and after receiving the full payment, these receipts shall be destroyed and a fresh receipt for the amount of Rs.5,85,00,000/- shall be issued by the defendants. Additionally, a sum of Rs.3,85,00,000 was to be paid by the plaintiffs on 07.03.2019 and further amount of Rs.3,85,00,000/- on or before 07.05.2019.

Learned senior counsel submitted that subsequently, the defendants approached the plaintiffs several times to pay the balance consideration and take possession of the suit property, but plaintiffs avoided to make payment on one or other pretext. Therefore, defendants vide Termination Notice dated 13.02.2020 terminated the Agreement to Sell in question. Plaintiffs had also sent a legal notice dated 12.02.2020 calling upon the defendants to pay the amount of Rs.11,70,00,000/- i.e. double the amount of Rs.5,85,00,000/-, allegedly paid as earnest money by the plaintiffs.

9. Learned senior counsel emphatically submitted that plaintiffs were never ready and willing to take the suit property and they failed to adhere to the time line mentioned in the said Agreement and, therefore, defendants have rightly terminated the Agreement to Sell in question. Further submitted that Clause-6 of Agreement to Sell specifically stated that in the event of failure to make the payment of the balance consideration amount, defendants were entitled to forfeit the amount and thereby, they have rightly forfeited the earnest money of Rs.40,00,000/- and rather, defendants have right to claim damages from the plaintiffs for not abiding by the Agreement to Sell.

10. Learned senior counsel for defendants brought to the notice of this Court that plaintiffs have already invested in an alternate property in the

vicinity of the suit property after breach of the said Agreement; they have no money to pay the balance consideration amount for the suit property and hence, plaintiffs are not interested in the said property and so, stay levied on the said property deserves to be vacated.

11. In rebuttal, learned counsel for plaintiffs submitted that defendants did not want to sell the suit property but had allured the plaintiffs to pay the amount towards earnest money, as they were facing financial crunch. It was submitted that defendants are facing various criminal proceedings and they will not be able to pay the amount and, therefore, the suit property be attached for recovery of the earnest money along with interest and their application seeking vacation of stay be dismissed.

12. Pertinently, vide order dated 12.10.2020, this Court summoned the defendants in the present suit and on the application Order XXXVIII Rule 5 CPC filed by the plaintiff, restrained the defendants from creating third party rights in the suit property. The provisions of Order XXXVIII Rule 5 CPC read as under:-

“Where defendant may be called upon to furnish security for production of property.-

(1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intend to

obstruct or delay the execution of any decree that may be passed against him,-

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court, the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof. 71

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

(4) If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule, such attachment shall be void.”

13. On scrupulous application of provisions of Order XXXVIII Rule 5

CPC, the Hon'ble Supreme Court in **Raman Tech. & Process Engg. Co. Vs.**

Solanki Traders (2008) 2 SCC 302 has observed as under:-

“5. The power under Order 38 Rule 5 CPC is a drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the

Rule. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilise the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realised by unscrupulous plaintiffs by obtaining orders of attachment before judgment and forcing the defendants for out-of-court settlements under threat of attachment.”

14. The aforesaid observations of the Hon'ble Supreme Court has also been followed by me in ***V.K. Bajaj and Company Versus Nayati Healthcare and Research NCR Pvt. Ltd. and Another*** 2021 SCC OnLine Del 5364.

15. In the present case, it is not disputed that plaintiffs and defendants had entered into Agreement to Sell dated 07.01.2019 in respect of suit property being D-24, Rajouri Garden, New Delhi, admeasuring 1151 sq. yards for a total consideration of amount of Rs.38,50,00,000/- (Rupees Thirty Eight Crore Fifty Lacs only, which stood mortgaged with HDFC Bank. However, certain disputes arose between the parties and the Agreement to Sell could not fructify.

16. During the course of hearing, it was not disputed by learned counsel for plaintiffs that plaintiffs have already bought another property and

CS(OS) 301/2020

therefore, this Court had put a query as to whether plaintiffs are still willing and ready to buy the suit property? The answer was in the negative. In fact the prayer in the present suit is, for recovery of amount purportedly paid towards the earnest money with interest and restrain the defendants from creating third party interest. The question for adjudication before this Court is refund of amount which was purportedly paid as earnest/ advance money and since there is difference of amounts by both the sides, both sides are required to establish as to what is due and payable.

17. Upon hearing both sides at length and on perusal of material placed on record, this Court finds that plaintiffs are not willing and ready to buy the suit property but to secure refund/return of earnest money paid to the defendants, they have prayed for restrain order/ attachment of suit property by invoking provisions of Order XXXVIII Rule 5 CPC. The order dated 12.10.2020 was passed by this Court when defendants were not served, however, after defendants entered appearance, they have disputed the quantum of amount paid by plaintiffs as earnest money. Needless to say, the above is subject matter of suit and this Court will not delve into it at this stage. However, since plaintiffs have clearly denied that they are not willing to buy the suit property, defendants cannot be indefinitely restrained to not

sell or dispose of the said property while ensuring that amount payable by defendants to the plaintiff is secured.

18. Admittedly, total consideration of the suit property is Rs.38,50,00,000/- as per Agreement to Sell dated 07.01.2019 entered between the plaintiffs and defendants. As per plaintiffs, they paid Rs.5,85,00,000/- as earnest money on different dates to the defendants, which is disputed by the defendants. However, an amount of Rs.40,00,000/- which was transmitted through bank, cannot be disputed.

19. In the case of ***Raman Tech (Supra)***, the Hon'ble Supreme Court observed that the powers under Order XXXVIII Rule 5 of the Civil Procedure Code are drastic and extraordinary powers. Such powers should not be exercised mechanically or merely for the asking. The purpose of above said provision is not to controvert an unsecured loan into a secured debt.

20. In view of the above, testing the applicability of provisions of Order XXXVIII Rule 5 of the Civil Procedure Code to the case in hand, this Court finds that by seeking attachment of the suit property, plaintiffs are in fact trying to secure the amount over and above the amount of which decree is sought against the defendants in the main suit, whereas only an amount of

Rs.40,00,000/- has been paid through bank transaction, which is still to be proved whether the plaintiffs are liable to recover double of the earnest money or defendants are entitled to forfeit the same.

21. In view of the aforesaid and in the interest of justice, the stay order dated 12.10.2020, restraining the defendants from creating any third party right in the suit property is vacated while making it clear that in the event defendants sell the suit property, out of the sale proceeds a sum of Rs.50,00,000/- shall be deposited with the Registrar General of this Court within one week of sale thereof, which shall be subject to outcome of the suit.

22. With aforesaid observations, these applications are disposed of. Any observation made herein shall not be treated as an observation on the merits of the case.

(SURESH KUMAR KAIT)
JUDGE

MARCH 23, 2022

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