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IN THE HIGH COURT OF DELHI

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Date of Order: December 08, 2008

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RFA 69/2001

M/S. SUPRA ENTERPRISES

..... Appellant

Through: Mr.Jayant Nath, Sr.Advocate with
Mr.Upender Thakur and
Mr.K.M.Singh, Advocates

VERSUS

TILAK RAJ SETHI

..... Respondent

Through: Mr.V.K. Makhija, Sr. Advocate
with Ms.Vandana Khurana, Advocate

CORAM:

Hon'ble Mr.Justice Pradeep Nandrajog

Hon'ble Mr.Justice J.R. Midha

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?

: PRADEEP NANDRAJOG, J. (Oral)

1. At the outset, learned counsel for the respondent states that the consent of the respondent may be recorded; if the appeal were to be dismissed the respondent would pay as compensation a further sum of Rs.1,00,000/- (Rupees One Lac only) to the appellant.

2. We bind the respondent to the consent aforementioned.

3. An agreement to sell, Ex.P-1 was executed on

7.4.1981, between the respondent and the appellant. It pertained to an industrial plot bearing No.D-105/106, Okhla Industrial Area, Phase-I, New Delhi admeasuring 504.4 sq. mtr. Agreed sale price was Rs.1,81,000/- (Rupees One Lac Eighty One Thousand only) out of which Rs.18,000/- (Rupees Eighteen Thousand only) was paid as part payment, as recorded in the agreement to sell. Balance sum of Rs.1,63,000/- (One Lac Sixty Three Thousand only) was to be paid when sale deed was to be executed; which event had to be after the seller i.e. respondent obtained perpetual lease deed in its favour and necessary approvals from the lessor.

4. Sale transaction fell through. Suit was filed by the appellant seeking specific performance of the agreement to sell. Alternatively it was prayed that if the Court were to decline specific performance, damages may be awarded in sum of Rs.1,50,000/- (Rupees One Lac Fifty Thousand only).

5. Learned Trial Judge, vide impugned judgment and decree dated 11.12.2000, has declined specific performance but has awarded Rs.50,000/- (Rupees Fifty Thousand only) as damages. Rs.18,000/-, the sum received by the respondent has additionally been directed to be refunded together with interest @ 12% per annum from 7.4.1981 till payment was made.

6. It may be clarified that interest has not been awarded on the damages.

7. Shorn of the verbose reasons given by the learned Trial Judge, in a nut-shell, the basis of the decision is that the

respondent, an ex-serviceman obtained the plot under a scheme of the Government for rehabilitation of ex-servicemen and Ex.DW-1/1 recorded a term of the policy under which the plot was allotted to the respondent as under:-

“(iv) The lessee will not be entitled to transfer the plot before or after the erection of the building without the prior permission of the Director General of Resettlement, Ministry of Defence, Government of India, and the Lt. Governor of Delhi. Such permission will not be given for a period of ten years from the commencement of lease unless in the opinion of the lesser, exceptional circumstances warrant the grant of such permission. If such permission is given it will be only in favour of an ex-serviceman.

However, the lessee may, with the previous consent in writing of the Lt. Governor of Delhi, mortgage or charge the industrial plot to such persons as may be approved by the Lt. Governor in his absolute discretion.

In case the transfer is permitted, the lesser shall be entitled to an amount equivalent to 50% of the unearned increase in the value (i.e., the difference between the premium paid and the market value) of the plot at the time of transfer.”

8. Learned Trial Judge has held that there was a complete embargo for the plot not to be sold for a period of 10 years commencing from the execution of the lease except under exceptional circumstances warranting the grant of such permission. Further, if such permission was to be granted it had to be only in favour of an ex-serviceman. Needless to state the appellant is not an ex-serviceman.

9. Learned counsel for the appellant states that there

are a plethora of authorities which record that if a perpetual lessee is bound by conditions under the perpetual lease deed requiring consent of the lessor before lease hold rights can be transferred, in a suit for specific performance, a conditional decree for specific performance can be passed; conditions being applications to be submitted for approval of the lessor and if granted by the lessor, the sale deed to be executed.

10. We are disinclined to grant relief of specific performance to the appellant and affirm the impugned decision for the reason Ex.DW-1/1 records that even if permission is to be granted it would be only in favour of an ex-serviceman.

11. The appellant can never attain the status of an ex-serviceman.

12. We note that various decisions of this Court as also the Supreme Court, pertaining to cooperative societies, where perpetual leases contained a term that the permission could be granted only in favour of a member of a cooperative society, have taken a view, that the said condition is capable of being complied with by the intending purchaser applying for and obtaining membership of the cooperative society.

13. The appellant which is a partnership firm cannot join the armed forces and cannot ever become an ex-serviceman.

14. That apart, we note that the lease entails forfeiture if a super-structure was not constructed thereon within two years of the lease being executed. To save the property from forfeiture, an industrial building was constructed. In similar

circumstances, in the decision reported as 1989 (SUPP) 2 SCC 409 M/s Eldee Velvet & Silk Mills Pvt. Ltd. Vs. Anand Ram Whigh

Hon'ble Supreme Court observed as under:-

"1. We heard Shri Salve, learned counsel for the appellant at quite some length. The appeal arises out of a suit for specific performance brought by the appellant as the plaintiff on July 21, 1958 in the Court of the First Commercial Sub-Judge, First Class, Delhi of an agreement dated April 5, 1956 entered into between the appellant and the late A.R.Whigh, the predecessor-in-title, whereby he agreed to sell his leasehold rights in plot No.4, block No.10, Golf Links, New Delhi for a sum of Rs.55,000, or in the alternative, for damages for alleged breach of contract. The plaintiff's suit has been dismissed both by the learned Sub-Judge and the High Court on various grounds. The learned counsel has mainly advanced two contentions, namely: (1) There was no hardship which the defendant could not foresee, particularly when he was put to notice by the plaintiff and therefore the High Court was not justified in disallowing the plaintiff's claim for specific performance on the ground that the case fell within Section 22 of the Specific Relief Act, 1877 (2) In any event, the High Court having held that the defendant was in breach, should have decreed the alternative claim for damages. We find no merit in either of these contentions.

2. As to the first, we are in agreement with the High Court that the change in the circumstances brought out in this case were such that if would cause great hardship to the defendant if a decree for specific performance were to be passed inasmuch as the defendant at considerable cost had constructed a massive residential building on the plot under a compelling necessity and this was not a fit case for grant of the discretionary relief for specific performance. The fact is undisputed that the allotment of the plot to the defendant by the Government of India, Ministry of Rehabilitation was subject to the condition that he was to construct the building within a period of two years of the handing over of the possession. It cannot be doubted that that period was fast running out and there was no alternative for the defendant but to start construction of the building to save the property from forfeiture. The mere fact that the plaintiff sent a notice while the work of construction was in progress does not alter the legal position. As

regards the comparative hardship, the plaintiff would be put to no loss if the relief of specific performance was not granted. Apart from payment of a sum of Rs.5,000/- by way of earnest money, it took no further steps for getting the conveyance executed and did nothing beyond sending a lawyer's notice. We are inclined to think that the High Court was not justified in disturbing the finding of the learned Sub-Judge that the plaintiff was disentitled by his conduct from claiming specific performance by reason of his standing by. The suit was not brought till July 21, 1958 by which time the defendant had already put up a substantial portion of the residential building at considerable cost. As to the claim for damages, both the learned Sub-Judge as well as the High Court have rightly held that the plaintiff has failed to substantiate its claim for damages. There is no evidence to show that the plaintiff was put to any loss."

15. Before concluding we would like to note a most disturbing feature. Certified copy of the perpetual lease deed, Ex.PW-2/11, shows that the proforma of the perpetual lease deed applicable when the lease hold rights are purchased at a public auction has been used. The restrictive covenants of the policy have obviously not been incorporated in the perpetual lease deed.

16. We note that on said account learned counsel for the appellant urged that the terms of the policy under which allotment was made have to be eschewed for the reason the perpetual lease deed has been executed under the Government Grants Act, 1895 as recorded in Clause 11 thereof and hence governs the jural relationship between the parties.

17. In respect of said plea we may note that no such case was ever projected before the learned Trial Judge. Assuming that the plea holds good and Ex.DW-1/1 has to be

eschewed, specific performance being a discretionary remedy, we would still decline the relief, on account of money being spent by the respondent on construction of an industrial building and applicability of the decision of the Supreme Court in M/s. Eldee Velvet & Silk Mills Pvt. Ltd. Vs. Anand Ram Whigh (supra).

18. But, in view of the statement made by learned counsel for the respondent we do not dismiss the appeal. We dispose of the same by modifying the impugned judgment and decree dated 11.12.2000. We dispose of the suit filed by the appellant decreeing the same for claim of damages in sum of Rs.1,50,000/- (Rupees One Lac Fifty Thousand only) with proportionate costs. We pass a further decree in sum of Rs.18,000/- (Rupees Eighteen Thousand only) against the respondent and in favour of the appellant together with interest @ 12% per annum thereon from the date of the suit till realization.

PRADEEP NANDRAJOG, J.

J.R. MIDHA, J.

December 08, 2008
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