

\* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CS(OS) 899/2010

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Date of Decision: September 24, 2010

KRISHAN LAL KATHURIA ..... Plaintiff

Through: Mr. Deepak Vohra and  
Mr. Krishan Kumar, Advocates.

versus

AZAD SINGH ..... Defendant

Through: Mr. B.S.Maan, Mr. Jai Prakash,  
Mr. Hardeep Singh and Mr. R.  
Dagar, Advocates.

% **CORAM:**  
**HON'BLE MS. JUSTICE ARUNA SURESH**

- (1) Whether reporters of local paper may be allowed to see the judgment?
- (2) To be referred to the reporter or not?
- (3) Whether the judgment should be reported in the Digest?

### J U D G M E N T

#### ARUNA SURESH, J.

1. Plaintiff has filed the present suit for possession in respect of property No.B-66, Village Rangpuri, Vasant Kunj, New Delhi and for permanent injunction, thereby restraining the defendants, his associates etc. from interfering with the suit property including raising of any construction or parting with possession or creating third party interest therein.

2. In brief, case of the plaintiff is that in 2004, defendant offered to sell his one-third share in the property, admeasuring 660 square yards

comprised in *Khasra* No.1291 situated at Village Nangal Dewat, Delhi, on 'as is where is basis'. Plaintiff agreed to purchase the said property for a sale consideration of Rs.3,00,000/- (Three Lacs). At the time of execution of the Agreement to Sell, plaintiff was informed by the defendant that property was under acquisition and if acquisition proceedings were dropped, plaintiff would retain the possession and ownership of one-third share and if land was acquired and alternate land was allotted to the defendant, plaintiff would become the owner of the said alternate land of which defendant agreed to execute requisite documents. Initially plaintiff paid a sum of Rs.1,00,000/- (One Lac) against receipt and he was put in possession of 40 square yards of land out of 220 square yards in *Khasra* No.1291 situated at Village Nangal Dewat, Delhi by the defendant. On 6<sup>th</sup> October 2005, defendant informed the plaintiff that he was allotted alternate plot No.66, Block-B, Village Rangpuri, Vasant Kunj, New Delhi in lieu of his one-third share. Thereafter, defendant received the balance amount of Rs.2,00,000/- (Two Lacs) in full and final sale price of the property and he executed the following documents in favour of the plaintiff:-

- a. Agreement to sell dated 3.3.2006 (Registered vide Document No.5820, registration No.3024, Book No.1 Volume No.2681 page 101 to 106 dated 3.3.2006)
- b. General Power of Attorney in favor of the plaintiff dated 3.3.2006 ((Registered vide registration No.2390, Document No.5821, Book No.4 Volume No.943 on page 191 to 194 dated 3.3.2006)

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- c. Special Power of Attorney in favor of the plaintiff dated 3.3.2006 (Registered vide registration No.2392, Document No.5823, Book No.4 Volume No.943 on page 197 to 199 dated 3.3.2006)
  - d. Special Power of Attorney in favor of the plaintiff dated 3.3.2006 (Registered vide registration No.2393, Document No.5825, Book No.4 Volume No.944 on page 1 to 2 dated 3.3.2006)
  - e. Special Power of Attorney in favor of the plaintiff dated 3.3.2006 (Registered vide registration No.2391, Document No.5822, Book No.4 Volume No.943 on page 195 to 196 dated 3.3.2006)
  - f. Affidavit of Azad Singh, the defendant.
  - g. Receipt dated 3.3.2006 of Rs.2,00,000/- issued by Azad Singh.
  - h. Possession Letter issued by Azad Singh, the defendant.
  - i. Registered will of Azad Singh, the defendant executed in favor Krishan Lal Kathuria, the plaintiff registered as document No.5824, Registration No.387, Book No.3 Volume No.402 on pages 137 to 138 dated 3.3.2006)."

3. It is averred by the plaintiff that at the time of execution and registration of the said documents, defendant had ensured him that he would be put into actual physical possession of the suit property only when possession of one-third share of the property situated at Village Nangal Dewat, Delhi would be surrendered to the Government. Defendant instead of honouring the commitment turned dishonest and started looking for another buyer for the property at Village Nangal Dewat, Delhi under possession of the plaintiff. Plaintiff visited the property and found that his possession on 40 square yards of land out of 220 square yards of the property was intact.

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However, defendant failed to hand over the possession of the remaining property despite repeated requests and service of legal notice dated 1<sup>st</sup> November, 2008, which was duly replied by the defendant on 1<sup>st</sup> December, 2008, revealing that the Government had acquired the property in the year 2007. Defendant to the dismay of the plaintiff took possession of the suit property, whereas he was under obligation to hand over its possession to the plaintiff. On 27<sup>th</sup> February, 2009 when plaintiff visited the suit property, he found that some construction was going on therein. Hence, the suit.

4. Maintainability of the suit for possession is in question before the Court.

5. Mr. Deepak Vohra, counsel for the plaintiff has submitted that there was no need to file a suit for specific performance of the contract as the defendant entered into a contract with the plaintiff to sell the suit property and subsequently sold the same to the plaintiff vide registered documents. As per law, the execution and registration of aforesaid documents in favour of the plaintiff amounts to outright sale and there was no occasion to seek specific performance in as much as all the obligations in terms of the agreement stood performed. It is further argued that elements of transfer are complete in favour of plaintiff and also that the defendant has forgone his right of possession in the suit property in favour of the plaintiff thus making him exclusively entitled to the possession.

6. It is further submitted by counsel for the plaintiff that it is well

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settled that there is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by statute, one may at ones peril bring a suit on ones choice and it is no answer to a suit however frivolous the claim that the law confers no such right to sue and suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. He has further submitted that cause of action of the present suit is based upon the title against unauthorized occupation of the suit property by the defendant. The cause of action is based on the unperformed obligation of the contract by the defendant for which the plaintiff has sued him.

7. Mr.B.S.Maan, counsel appearing on behalf of the defendant has submitted that in the present suit there is no cause of action which warrants a suit for possession and that the plaintiff should have instead filed a suit for specific performance of the contract. He has alleged that plaint is liable to be rejected under Order 7 Rule 11 CPC as suit for possession without specific performance of the Agreement to Sell is not maintainable.

8. It is pertinent to mention here that plaintiff had earlier filed a suit being CS No.38/2009 for recovery of possession and consequential relief for permanent injunction as prayed in this suit before the Civil Judge. However, he withdrew the said suit with liberty to file this suit in view of the valuation of the suit property, which was found to be more than Rs.20,00,000/-(Twenty Lacs) and exceeded the pecuniary jurisdiction of the Civil Court. Pleadings contained in the said plaint are at variance with the

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pleadings averred by the plaintiff in the present plaint before the Court. Para-

3 of the previous plaint reads:-

“3. That the defendant had represented to the plaintiff that he was the owner of one/third undivided share in the land totally admeasuring 660 sq.yds. in Khasra No.1291, village Nangal Dewat, New Delhi and also that the same had been acquired by the Government, against which the defendant expected to receive possession of an alternative plot of land and thus offered to sell the one/third undivided right in the said land on “as is where is basis” for valuable consideration.”

9. Thus, it is clear that at the time when plaintiff entered into an Agreement to Sell with the defendant, he was in the knowledge that land had been acquired by the Government against which the defendant expected to receive possession of an alternate plot of land. In the plaint before this Court, plaintiff has taken a summer sault and has alleged in para 4 of the plaint:-

“4. The plaintiff was, however, apprised by the defendant at this time that the above described property was under acquisition proceedings. The defendant offered that in case the acquisition proceedings are dropped or are not proceeded further i.e. the above said one third share is not acquired than the plaintiff would retain the possession and ownership of such one third share. Or else i.e. if alternative land is allotted to the defendant than it would be the plaintiff who would be owner of such alternate land and the defendant would execute formal documents in this regard subsequently.”

10. In the earlier plaint, it was not the case of the plaintiff that he was handed over physical possession of 40 square yards of land out of 220 square yards of the property admeasuring 660 square yards comprised in

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*Khasra* No.1291 situated at Village Nangal Dewat, Delhi. However, in this case he has emphasized that on execution of the Agreement to Sell dated 3<sup>rd</sup> March 2006, he was handed over vacant possession of 40 square yards of land comprised in *Khasra* No.1291 situated at Village Nangal Dewat, Delhi.

11. Perusal of the Agreement to Sell indicate that it was executed by the defendant only in respect of plot No.66, Block-B, measuring 40 square yards situated at Village Rangpuri, Vasant Kunj, New Delhi. This Agreement does not find mention of one-third share owned by the defendant in land admeasuring 660 square yards, *Khasra* No.1291 situated at Village Nangal Dewat. As per Clause 2 of the Agreement, defendant was alleged to have handed over actual physical and proprietary vacant possession of the property in suit i.e. plot No.66, Block-B, Village Rangpuri, Vasant Kunj, New Delhi to the plaintiff. Similar are the facts contained in the General Power of Attorney of the even date. Special Power of Attorneys (three in number) dated 3<sup>rd</sup> March 2006, affidavit of the defendant and the Will of the defendant of even date, all pertain to plot No.B-66, Vasant Kunj, New Delhi, i.e. the impugned property. Even the receipt of the balance consideration amount of Rs.2,00,000/- (Two Lacs) is also in respect of the property in suit. Possession letter also pertain to the property in suit. It is significant to note that possession letter is undated. Except the possession letter and the receipt, all other documents are registered. None of the documents executed *inter se* the parties, therefore, in any manner, indicate that plaintiff was put in part

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possession of 40 square yards of land in *Khasra* No.1291 Village Nangal Dewat, Delhi.

12. As discussed above, in the earlier suit filed by the plaintiff for the same relief he never claimed that he was given physical possession of 40 square yards of land out of 220 square yards of property at Village Nangal Dewat, Delhi. Legal notice dated 1<sup>st</sup> November, 2008 served upon the defendant by R.D.Sharma and Associates, Advocates for and on behalf of the plaintiff is in respect of possession of remaining land admeasuring 160 square yards in *Khasra* No.1291, Village Nangal Dewat, Delhi and not in respect of the property in suit, knowing it well that the said land in Village Nangal Dewat, Delhi stood acquired by the Government. Plaintiff has improved over his case in the present suit. Plaintiff has not placed on record any document to show that defendant had actually given him possession of 40 square yards of land in Village Nangal Dewat, Delhi. Present suit, therefore, is for possession of plot No.B-66, Village Rangpuri, Vasant Kunj, New Delhi.

13. Admittedly, as per the pleadings contained in the plaint, plaintiff was not given physical possession of the impugned plot by the defendant though there is a clause to that effect in the Agreement to Sell dated 3<sup>rd</sup> March, 2006.

14. Letter dated 7<sup>th</sup> September 2006, issued by Delhi Development Authority (for short 'DDA') was addressed to Shri Chand, predecessor-in-

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interest of the defendant, informing him about the allotment of plot No.66, Block-B, Village Rangpuri, Vasant Kunj, New Delhi in lieu of plot acquired in Village Nangal Dewat, Delhi. Possession of the said plot was not handed over to Shri Chand for the reasons that the land in Nangal Dewat, Delhi, acquired was yet to be physically taken over by the DDA. There is another letter dated 9<sup>th</sup> June, 2007 addressed to Shri Chand, late father of the defendant regarding allotment of the impugned plot on free hold basis. Vide letter dated 20<sup>th</sup> July 2007, DDA informed Shri Chand its intention to hand over physical possession of the impugned plot to him. Vide letter dated 29<sup>th</sup> January 2008, defendant alongwith his brothers Rajender and Vijay Kumar i.e. legal heirs of deceased Shri Chand were asked to be present at the spot on 12<sup>th</sup> February, 2008 at 11.00 AM to take possession of the plot. Possession was accordingly given to the defendant and his brothers on 12<sup>th</sup> February, 2008 as acknowledged by them under their signatures. Thus, it is clear that defendant Azad Singh was not in actual physical possession of the impugned property at the time when Agreement to Sell, General Power of Attorney, Special Power of Attorneys, Will etc. and other relevant documents were executed by him in favour of the plaintiff.

15. Shri Chand, predecessor-in-interest of the defendant was one of the writ petitioners before this Court in WP(C) No.481/1982, whereby the acquisition proceedings were challenged. In the said writ petition, titled as ***"Daryao Singh & Ors. Vs. Union of India & Ors."***, 2005 (83) DRJ 573,

various applications including one by Shri Chand were filed, which were disposed of by this Court vide detailed order dated 18<sup>th</sup> May, 2005. The said order becomes relevant to appreciate if the suit of the plaintiff is maintainable. Vide said order, the Court considered various objections and claims of various persons including the legal heirs of deceased claimants. It was held that it would be a joint allotment of the alternate plot to the legal heirs of the applicants eligible for allotment of individual alternative plot. It was also observed that no claim for allotment of alternate plot based on sale, mortgage, gift, relinquishment, Power of Attorney, or Will after 28<sup>th</sup> April, 1972, would be accepted and entertained by the Nodal Officer.

16. Admittedly, plaintiff could not claim allotment of the impugned plot based on the Agreement to Sell executed by the defendant, being one of the legal heirs of deceased Shri Chand. As pointed out above, the plot was allotted in the joint name of the defendant and his two brothers. Since physical possession of the plot was not received by the defendant, he could not have handed over the actual physical possession of the impugned plot to the plaintiff. Probably, this is one of the reasons that plaintiff has not claimed that he was put in physical possession of the impugned plot by the defendant. He is claiming part possession of 40 square yards of land forming part of *Khasra* No.1291, Village Nangal Dewat, Delhi by virtue of Agreement to Sell dated 3<sup>rd</sup> March, 2006, which already stood acquired and as discussed above, plaintiff could not have been put in possession of the

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acquired land which vested with the Government.

17. A mere Agreement to Sell of an immovable property does not create an absolute right as owner in favour of the purchaser in the property to enforce the said agreement by claiming possession. Therefore, in law plaintiff has no right to claim possession of the impugned property without claiming specific performance of the Agreement to Sell.

18. As defendant is in continuous possession of the property in suit since its allotment and subsequent physical possession since 12<sup>th</sup> February, 2008, plaintiff should have insisted for performance of the Agreement to Sell. The moment defendant refused to hand over possession of the property to the plaintiff in breach of the Agreement to Sell, cause of action which arose in favour of the plaintiff was to file a suit for specific performance and perpetual injunction. The law requires that all those reliefs based on same cause of action should be pleaded and claimed in the same suit and should not be claimed by separate suits. In view of Section 41(h) of the Specific Relief Act, the Court should not grant perpetual injunction where there is an equally efficacious remedy is available to a party. In the present case, equal efficacious remedy in which the injunction can be claimed is a suit for specific performance with perpetual injunction. Sale Deed was to be executed after possession of the alternative plot was handed over to the defendant by the DDA. These facts clearly point out that the Agreement to Sell could be enforced only after physical possession of the property in suit

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was obtained by the defendant by way of suit for specific performance of the Agreement to Sell.

19. Mr. Deepak Vohra, counsel appearing on behalf of the plaintiff has referred to *"Sparsh Builders Pvt. Ltd. Vs. Maharishi Ayurveda Products Pvt. Ltd."*, 174 (2009) DLT 411, *"J.C. Mehra Vs. Kusum Gupta"*, 117 (2005) DLT 506, *"Shrimant Shamrao Suryavanshi & Anr. Vs. Pralhad Bhairoba Suryavanshi by Lrs & Ors."*, AIR 2002 SC 960, *"Sadashiv Chander Bhamgare Vs. Eknath Pandharinath Nangude"*, AIR 2004 Bom 378, *"Mahadeo Nathuji Patil Vs. Surjabai Khushalchand Lakkad & Ors."*, (1994) 96 BOMLR 846, *"Smt. Ganga Bai Vs. Vijay Kumar & Ors."*, AIR 1974 SC 1126, *"Yenugo Vs. Eranki Venkata Suba Rao"*, 1956 ANDHWR 830 and *"Madan Mohan Vs. Gauri Shankar"*, AIR 1988 (MP) 152 to emphasize that Section 53A of the Transfer of Properties Act (hereinafter to be referred as 'TP Act') protects his possession and therefore, he is entitled to claim possession of the property in suit. None of these judgments are of any help to the plaintiff for the reason that he is out of possession of the plot in suit and its actual physical possession was never handed over to him. Agreement to Sell is contingent and could be enforced only after defendant had received the actual physical possession of the impugned plot. Even the writing claimed by the plaintiff does not provide possession of the plot having been delivered to him in pursuance of the Agreement to Sell.

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20. In all the said cases, possession of the property was also handed over to the purchaser on receipt of full consideration of the sale amount, though the regular Sale Deed was not executed. It was under those circumstances that the Court considered application of provisions of Section 53A TP Act as regards possession and Section 22 of the Contract Act as regards Power of Attorneys executed for consideration. True that there is a practice prevalent in Delhi of properties being transacted by modes of Agreement to Sell, Power of Attorney, Will etc. and the physical possession of the property is also delivered to the purchaser. Section 53A TP Act protects the possession of the prospective purchaser in the property, even if the period of limitation for instituting a suit for specific performance has expired. This principle of law is no longer *res integra* and is being followed in various judgments by the Supreme Court as well as by this Court.

21. In the present case, plaintiff has claimed possession of the suit property without claiming specific performance of the Agreement. Since he is not in possession of the property, he is not entitled to any equity under Section 53A TP Act. At the time when Agreement to Sell was executed on 3<sup>rd</sup> March 2006, the land vested in the Government and physical possession of the impugned property i.e. plot No.B-66, Village Rangpuri, Vasant Kunj, New Delhi had not yet been transferred to the defendant.

22. Plaintiff has very cleverly drafted his plaint while seeking the relief of possession. Mere drafting of a plaint in a clever manner, which

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otherwise is liable for rejection, cannot be made maintainable. The purpose of Order 7 Rule 11 CPC is to nip in the bud those litigations which are otherwise doomed and not to allow them to take up the time of the courts and/or not to allow multiplicity of litigations.

23. Therefore, the suit of the plaintiff for possession without the relief for specific performance of the Agreement to Sell, dated 3<sup>rd</sup> March, 2006 is not maintainable. The relief of injunction as sought against the defendant is based on the possession claimed by the plaintiff. Therefore, unless the plaintiff has full title in the property, he is not entitled to claim any injunction as prayed because, it cannot be said that there is an infringement of his rights in the property. Besides suit is barred U/s 41(h) of the Specific Relief Act as equally efficacious remedy was available to the plaintiff.

24. Hence, plaint is rejected under Order 7 Rule 11 CPC. There are no orders as to costs.

  
ARUNA SURESH  
(JUDGE)

SEPTEMBER 24, 2010  
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