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IN THE HIGH COURT OF DELHI AT NEW DELHI

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RFA No.18/2011

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21st September, 2011

DELHI DEVELOPMENT AUTHORITY

..... Appellant

Through: Ms. Manisha Tripathy Pandey and
Mr. Ashutosh Kaushik, Adv.

VERSUS

H.C.SAREEN

..... Respondent

Through: Mr. Sanjay Kumar Singh

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

1. Whether the 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**

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this Regular First Appeal under Section 96 of the Code of Civil Procedure (CPC), is to the impugned judgment and decree dated 13.8.2010, and by which judgment and decree, the trial court has decreed the suit of the respondent/plaintiff by setting aside the cancellation of the allotment of the subject shop and directed for specific performance by granting allotment of the subject shop by the appellant/defendant to the respondent/plaintiff.

2. The facts of the case are that the respondent/plaintiff bid for a Shop No. 45, CSC-2 DDA Market, Sector-9, Rohini, Delhi (in short 'the subject

shop') for an amount of Rs.12,13,200/- against the reserve price of Rs. 3,68,000/-. The bid of the respondent/plaintiff was accepted and he was allotted the subject shop. After the allotment, the respondent/plaintiff wrote a letter dated 27.1.2000, Ex.PW1/1, that there was allegedly misrepresentation to him with respect to the shop not only with respect to its location but also with respect to its size. In this letter dated 27.1.2000 Ex.PW1/A, the respondent/plaintiff stated that the shop was only 15 sq. mtr. and not of 16.26 sq. mtr. and that the shop was allegedly in the back row instead of the front row. In view of this, the respondent/plaintiff requested for refund of the earnest money of Rs.3,03,300/-, meaning thereby, the respondent/plaintiff himself sought to put an end to the contract on the ground of misrepresentation and asked for return of the earnest money.

3. Even though the contract was put to an end by the respondent/plaintiff himself however thereafter he suddenly woke up after 5 years, i.e. in the year 2005, seeking re-allotment of the shop and the appellant/defendant vide letter dated 23.11.2005 asked the respondent/plaintiff to deposit the balance amount with the DDA. On 6.12.2005, the respondent/plaintiff deposited the balance amount of Rs.9,22,077/- and thereafter asked for the allotment letter with respect to the subject shop, which was refused resulting in filing of the subject suit.

4. The appellant/defendant contested the suit and in the written statement took up a stand that the letter dated 23.11.2005, Ex.PW1/3, sent by the appellant/defendant to the respondent/plaintiff was issued by a

Deputy Director but the concerned Deputy Director had not taken the approval of the competent authority for issuing the letter and consequently a warning had been issued to this Deputy Director by no less a person than the Vice Chairman, DDA and this officer was issued a warning not to issue such letters in future. The case was re-examined by the Director, Commissioner (LD) and the request of the respondent/plaintiff was rejected and a letter of cancellation was sent to the respondent/plaintiff on 28.6.2006, Ex.PW1/8.

5. On the aforesaid pleadings of the parties, the trial court framed the following issues:-

- “(1) Whether the suit is bad for want of notice u/s 53 of the DDA Act?OPD
- (2) Whether the plaintiff is entitled to relief of performance as asked for in the plaint?OPP
- (3) Whether the plaintiff is entitled for declaration, injunction and damages as asked for in the plaint? OPP
- (4) Relief.”

6. The main issues are issues nos.2 and 3 which were argued before the trial court, and which issues have also been argued before me. The trial court has arrived at a finding that in view of the letter dated 23.11.2005, Ex.PW1/3, the appellant/defendant was bound to allot the subject shop to the respondent/plaintiff. The entire reasoning of the trial court is based upon the letter dated 23.11.2005, Ex.PW1/3. On the issue with respect to location and size of the shop, the trial court however held in favour of the appellant that

the shop was sold on "as is where is basis" and therefore, the respondent/plaintiff could not have a grievance with the alleged location or the size of the shop. The relevant observations of the trial court for decreeing the suit are contained in paras 18 to 21 of the impugned judgment and which read as under:-

"18. To ascertain the stand of the defendant, it is inevitable to discuss the note sheets Ex.DW1/PX-1 maintained by the defendant in its day to day affairs. At page no.20/N of the note sheet, the defendant admits that the plaintiff made numerous visits to them and consequently letter dated 23.11.2005 was finally sent to him directing to deposit the balance amount, which he deposited also. Not only that thereafter the file was sent to Senior AO, Rohini for verification of payment and calculation of their dues. At page no.21/N, the defendant admitted that there had been no action on the file for a period of 5 ½ half years i.e. from April 2000 to September 2005. The relevant extract of page no.21N is reproduced herein:-

"In view of the submission made above it is felt that since the shop has not been cancelled/re-allotted so far and the A/P has deposited the balance amount of Rs.9,22,077/- in response to the communication received from the department and also the fact that the file has remained unattended in the office for a considerable time, the department may consider the regularization of this delay to avoid any further litigation. Needless to mention that the earnest money of Rs.3,03,300/- is lying with the department since September 1998 and it is more than a year when the balance amount of Rs.9,22,077/- has also been deposited by the A/P. We may therefore, put up the whole case to CLD/VC being the Competent Authority to regularize such delay as per the provision contained in the Regulation. There have been cases in the past where the delay beyond 180 days has been regularized with approval of VC, DDA"

19. At page no.22 N of the said note sheets, it was also observed "However considering that the payment of balance amount has been made after advice of DD (CE) vide this office letter dated 23.11.2005, we may not be able to defend our stand of cancellation of shop and not accepting payment while it has been made in accordance with the letter dated 23.11.2005 irrespective of the fact that whether the letter was issued after approval of competent authority or not. Prima facie it seems a bonafide mistake on part of the CE Branch in issuing such advice."

20. From the note sheets Ex.DW1/PX-1, it is clear that not only the Dy. Director (CE) issued the letter dated 23.11.2005 and the defendant accepted the amount deposited by the plaintiff in pursuance thereto but also admitted that they had no option but to act upon the same. It is the own case of the defendant that in pursuance to the letter dated 23.11.2005, they processed the file and place it before the concerned authorities. The defendant has failed to explain that if the said letter was issued without authority then instead to revoke the said letter immediately why did they process the file of the plaintiff. In reply to a specific question regarding the note sheets, DW-1 deposed that the said noting had been made by the dealing assistant who had no authority to take the decision. So far as the letter dated 23.11.2005 is concerned, DW1 specifically deposed that Dy. Director (CE) was competent to issue the communication, however, letter dated 23.11.2005 was issued wrongly and warnings had been given to him in that regard. If the statement of DW-1 is accepted it shall imply that the defendant is being run by the dealing assistants only who are making the note sheets and processing the files and the job of the higher officials is only to approve and sign the said notings blindly and proceed with the matter. Hence, the said statement of DW-1 cannot be accepted. As stated above, from the year 2000 till September 2005 there is no written communication between the parties. Hence, it is quite surprising how all of a sudden letter dated 23.11.05 had come into existence. Despite that, the facts remain that neither the defendant took any action against Dy. Director (CE) nor revoked the said letter rather the defendant proceed with the matter. It implies that the defendant had accepted and justified the act of Dy. Director (CE) even if it was wrong. Hence it can be held that Dy. Director (CE) was competent to issue letter dated 23.11.2005. Therefore,

once the said letter was issued from the competent authority, the recipient had nothing to do with the internal procedure of the defendant. Rather, the defendant is bound by the representation made by it through Dy. Director (CE) vide which the plaintiff changed his position. Therefore, at this stage the defendant is estopped from backing out from the said letter and the commitment made therein.

21. Counsel for the defendant strongly pleaded that once the plaintiff had failed to deposit the amount within 180 days then the defendant had the right to forfeit the earnest money deposited by the plaintiff and relied upon the judgment passed by the Hon'ble High Court in CW No. 4171/2007 titled as B.B.Sharma vs. DDA. As discussed above, the demand was raised upon the plaintiff on 04.09.1998, the plaintiff requested for refund of the amount on 27.01.2000 and had sent letter dated 13.09.2005 in reference to his earlier complaints and letter dated 23.11.2005 was issued by the defendant in response thereto. Hence, it can be held that the demand raised vide letter dated 23.11.2005 was in continuation of the earlier demand made on 04.09.1998. The defendant has completely failed to explain once the plaintiff failed to deposit the amount in terms of the demand letter and opted and demanded refund of the amount, then why the defendant had not taken the action and cancelled the allotment and forfeited or refund the amount to the action and cancelled the allotment and forfeited or refund the amount to the plaintiff. The said judgment is not applicable to the present case because as discussed above, the defendant had not forfeited the earnest money deposited by the plaintiff till the date of issuance of letter dated 23.11.2005. Further, it is not the case of the defendant that the defendant had been condoning the delay for a period beyond 180 days. Therefore, there is no substance in the plea of the defendant that 180 days and on expiry of which the allotment stood cancelled automatically."

7. In my opinion, the appeal deserves to be allowed and the impugned judgment and decree is bound to be set aside. This is for the reason that the trial court has given only lip service to the letter dated 27.1.2000, Ex.PW1/1

written by the respondent/plaintiff to the appellant. Since this letter is very material, I would seek to reproduce the same in its entirety. This letter reads as under:-

“From 27 January 2000

Mr. H.C.Sarin
Flat No. 133, Plot No.44
Vasudara Apartments
Sector-9, ROHINI, Delhi-110085

To
The Commissioner
Commercial Estate Branch (LAND)
Delhi Development Authority
Vikas Sadan, NEW DELHI

Dear Sir,

Ref: **File No.F93(61)/98-CE/3718**

Shop No.45, CSC.2, DDA Market, Sector-9, ROHINI, Delhi.

SUB: HARASSMENT METED-OUT TO ME

1. My tender for the subject Shop No.45, CSC.2, DDA Market, Sector-9, ROHINI, Delhi were for the value of Rs.12,13,200/- and it was accepted and I am the successful bidder.
2. That before submission of tender on the due date, I contacted the field staff of DDA to know about the location of the shop as there was no numbering inscribed on the shop. They showed me a shop in the front row corner.
3. Upon receipt of the demand letter, I want to see the shop. Now numbers have been inscribed. This shop has been changed to back row instead of front row as guided by the field staff.
4. Furthermore, the actual size of the shop is 15.00 sqm only and not 16.26 sqm as indicated in the tender document.
5. The facts under para 3 & 4 are contrary to the basis of tender, I put-in.
6. The above grievances were brought to the kind attention of Mr. Amar Authority, Vikas Sadan, New Delhi as back as September 1998 on public hearing day. Mr. Chaterjee asked to me to see Mr. Kuldip

Singh Deputy Director (CE), Commercial Estate Branch, Delhi Development Authority, Vikas Sadan, New Delhi.

The above said officials gave me sympathetic hearings and on each Public Hearing Day, I had been contacting them. They assured me that my earnest money will be refunded with interest accrued.

Sir, I look forward to your goodself for justice by passing orders for release of my hard earned money of Rs.3,03,300 at the earliest along with the accrued interest. (underling added)

Yours very truly,

(H.C.SARIN)

8. The last two paragraphs of the aforesaid letter make it quite clear that the respondent/plaintiff all along only prayed for refund of the earnest money, and which prayer therefore means to cancel the allotment and refund the earnest money. Once, the respondent/plaintiff took up such a stand, the contract of allotment came to an end as per his own choice and there is no question of revival of such a contract to which a quietus had been put. The respondent/plaintiff therefore, having taken the step consciously to terminate the contract, thereafter cannot suddenly turn around and seek allotment of the shop, that too, by means of a one solitary letter of a Deputy Director of the appellant of the year 2005. The trial court in fact, ought to have agreed with the testimony on behalf of the appellant that the letter dated 23.11.2005, Ex.PW1/3 was issued by a Deputy Director who had no authority to issue the same, and which becomes clear from the unrebutted testimony of the appellant's witness that this Deputy Director was issued a

warning not to issue such letters by the Vice Chairman, DDA. One solitary letter obtained favourably by the respondent/plaintiff cannot mean that the period as long as of 5 years from 2000 to 2005, and more importantly, the letter dated 27.1.2000 Ex.PW1/1 can be negated. Once the contract had come to an end there could only be a fresh/new contract and there could not be granted an extension of time for payment under a dead contract.

9. Before admission of this appeal on 12.1.2011, I passed the following order:-

“12.01.2011

By the impugned judgment and decree, the Trial Court relying upon the letter dated 23rd November, 2005 (Ex.PW1/3) has held that by virtue of this letter time was given to the plaintiff/respondent to make balance payment by a person no less than the Deputy Director of the appellant. The witness of the appellant has also deposed that it was very much within the power of the Deputy Director to issue a demand letter extending time for making payment. This court put a specific query to the counsel for the appellant as to whether in no case DDA has ever extended time by 7 years after the tender was opened. Counsel for the appellant states that she cannot make such a statement and it is only an authorized officer of the DDA on instructions who can make such a statement. Accordingly, in order to decide the question of issuing notice in the present appeal, let an affidavit be filed of the Director, Commercial Estates as to whether the appellant has never extended time for making of balance payment of about 7 years after the tender is opened. Meaning thereby, DDA must categorically state that in no case it has ever extended time with respect to any tender for a shop/premises after 7 years of the tender. The applicable policy be also filed. Trial Court record be summoned for the date fixed.
List on 3rd March, 2011.”

10. Pursuant to this order, the necessary affidavit was filed by Mr. A.K.Bisht Director (R.L) of the appellant wherein it was confirmed that in no case ever the DDA has extended the time by 7 years after the tender was opened. It is only after filing of this affidavit that notice was issued in this appeal on 3.3.2011. It is thus quite clear that the respondent/plaintiff had bid for the shop for an amount, which he found not to suit his commercial proposition, inasmuch as, the value of the shop would not have been such to get expected profit therefrom in the year 1998. Therefore, repeatedly, in various public hearings, the respondent/plaintiff only sought cancellation of the allotment and refund of earnest money. It is only after a period of five years in 2005, and during which period, the property prices would have risen, that the respondent/plaintiff again sought to revive the allotment, and which contrived action was though initially approved by a Deputy Director, however, subsequently, when the file was put to higher authority, the allotment was cancelled and warning issued to the Deputy Director. The respondent cannot be allowed to take advantage of a convenient letter got issued by him from a Deputy Director. If this is permitted then this will encourage officers of appellant to act undesirably.

11. In view of the above, the appeal is accepted. The impugned judgment and decree is set aside leaving the parties to bear their own costs.

Decree sheet be prepared. Trial court record be sent back.

SEPTEMBER 21, 2011

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RFA No.18/2011

VALMIKI J. MEHTA, J.

Page 10 of 10