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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CS(OS) 487/2012

VAIBHAV GUPTA AND ANOTHER Plaintiff

Through Mr. Harpreet Singh &
Mr. Rajesh Gupta, Advs.

versus

SURJEET KAUR Defendant

Through Mr. Sanjiv Kr. Jha, Adv

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

ORDER

% 27.09.2012

1. The plaintiffs have prayed for the grant of decree of Specific Performance of the Contract based on the admissions made by the defendant in her written statement under Order 12 Rule 6 CPC, 1908.

2. In the present suit, the plaintiffs seek Specific Performance of the Agreement to Sell dated 29.4.2011, whereby the defendant had agreed to sell her DDA Flat allotted to her in the LIG category under the Rohini Residential Scheme, 1981, for a total sale consideration amount of Rs. 38,70,000/-. Against the said sale consideration amount, the plaintiffs had paid an amount of Rs.4 lacs as an earnest money, against which the defendant had executed a receipt dated

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29.4.2011, thereby acknowledging the said payment by the plaintiffs. It is also the case of the plaintiffs that the defendant was to take necessary steps to get the lease deed of the said flat executed in her favour from the office of the DDA and also obtain sale permission for the transfer of the said flat in favour of the plaintiffs on or before the agreed date of 26.8.2011 and thereafter the plaintiffs were to pay the balance sale consideration amount of Rs. 34,70,000/- to the defendant and at the same time the defendant was to execute the sale deed of the said flat in favour of the plaintiffs. It is also the case of the plaintiffs that the defendant had failed to take any steps to get the lease deed executed from DDA in her favour till 26.8.2011 and at the request of the defendant, the time for execution of the final sale deed and payment of balance sale consideration amount was extended for another period of six weeks. It is also the case of the plaintiffs that they were always ready and willing to fulfill their part of obligation of making the payment of the balance sale consideration amount of Rs.34,70,000/- but the defendant kept on avoiding the completion of the said sale transaction on the pretext that she was taking steps for completing the formalities for getting the sale deed executed from the DDA in her favour. It is also the case of the plaintiffs that despite repeated requests made by the plaintiffs and despite service of legal notice dated 16.11.2011, the defendant did not come forward to complete the said transaction in terms of the Agreement to Sell dated

29.4.2011.

3. In the written statement filed by the defendant, two main objections have been raised which inter-alia are that due to the technical problems the execution of the lease deed by the DDA was delayed and therefore, the defendant was not in a position to complete the said sale transaction in favour of the plaintiffs. According to the defendant, the performance of the contract by the defendant was contingent on the execution of the lease deed by the DDA in her favour and since the said act became impossible due to certain technical reasons, therefore, the plaintiffs cannot enforce such a contingent contract. The second objection raised by the defendant is that pending execution of the lease deed in favour of the defendant, the price of the flat in locality has increased and considering such a rise in the price, the plaintiff should be denied the relief of Specific Performance of the said Contract.

4. Opposing the above contentions, counsel for the plaintiffs submit that the argument taken by the counsel for the defendant that the defendant could not take steps to get the lease deed executed in her favour because she could not state in the affidavit that no sale of the property has taken place in favour of the plaintiff which was an essential condition laid down by the DDA is not only misleading but wholly untenable. The contention of the counsel is that by the execution of the Agreement To Sell by the defendant in favour of the plaintiff,

no sale can be said to have taken place and therefore the defendant could easily file an affidavit in fulfillment of the laid down condition of DDA in getting the lease deed executed in her favour. Counsel also submits that in the entire written statement the defendant has not raised any such plea specifically, rather the plea raised by the defendant is that the DDA could not execute the lease deed in favour of the defendant because of certain technicalities.

5. Refuting the above contentions, Mr. Sanjeev K. Jha, counsel appearing for the defendant submits that no decree in favour of the plaintiff can be passed under Order 12 Rule 6 CPC, 1908 in the light of the various legal hurdles standing in the way of the plaintiff. Counsel submits that the contract entered into between the parties is contingent on the execution of the lease deed by the DDA in favour of the defendant and since execution of the lease deed has yet not happened, therefore, the plaintiff is not entitled to walk away with the decree in the present suit. Counsel also submits that rather it became impossible for the defendant to have performed her part of obligation of getting the lease deed executed because the DDA required the defendant to give a declaration that he had not entered into any sale of the said property and such a declaration could not have been given by the defendant and therefore there was no default on the part of the defendant in not taking steps to get the lease deed executed in her favour. In support of his arguments, counsel for the defendant places reliance on Section 31 and 32 of the

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Indian Contract Act, 1872. Counsel also places reliance on Section 17 of the Specific Relief Act, 1963 to support his arguments that in the absence of the execution of the lease deed by the DDA in favour of the defendant, the defendant was not vested with any title which could be transferred by her in favour of the plaintiff. Counsel for the defendant also submits that at best the plaintiff is entitled to the alternative relief of claiming damages in the light of the hardship coming in the way of the defendant in getting the lease deed executed in her favour under Section 20 of the Specific Relief Act, 1963. In support of his arguments, Counsel places reliance on *Dalsukh M. Pancholi v. The Guarantee Life and Employment Insurance Co. Ltd. and others, AIR 1947 PC 182*, laying special emphasis on Para 19 of the same. Counsel for the defendant also places reliance on the judgment of this court in *Shri Baij Nath v. Ansal and Saigal Properties Pvt. Ltd. , AIR 1993 Delhi 285*.

6. I have heard learned counsel for the parties at considerable length and given my thoughtful consideration to the arguments advanced by them.

7. From the pleadings of the parties, it is quite manifest that both the parties have admitted the said transaction for the sale of the DDA flat in LIG category under Rohini Residential Scheme, 1981. The parties have also not disputed the Agreement to Sell dated 29.4.2011 and payment of the earnest amount of Rs.4 lacs by the plaintiffs to the defendant. The parties have also not disputed the

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receipt dated 29.4.2011 and also the endorsement dated 27.8.2011 on the reverse side of the last page of the Agreement to Sell. So far the objection raised by the defendant in the written statement that Specific Performance of the Contract should be denied to the plaintiffs since the price in the locality has increased in between, this is an utter dishonest plea raised by the defendant. After having agreed to sell the said DDA flat for a sale consideration amount of Rs. 38,70,000/- vide Agreement to Sell dated 29.4.2011 and after having received the earnest amount of Rs.4 lacs, the defendant cannot be allowed to take refuge under such a vexatious plea and evade from fulfilling her part of obligation under the contract. As regards other plea taken by the defendant that the contract is a Contingent Contract in terms of Section 31 of the Contract Act, 1872, this plea raised by the counsel for the defendant is equally preposterous. The Contingent Contract as envisaged under Section 31 of the Contract Act, 1872 cannot be confused with the reciprocal promises made by the parties in a contract. The parties to the contract cannot frustrate the contract entered into between them by not resorting to the obligations to the contract deliberately and then taking shelter under such a misconceived plea. According to the terms of the Agreement to Sell dated 29.4.2011, it was obligatory on the part of the defendant to have taken all requisite steps to obtain the lease deed from the DDA in her favour and also complete all the other formalities which were

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required to be completed before the deadline stipulated in the said Agreement to Sell. Dealing with such kind of conditional agreement, the Apex Court in the matter of *Mrs. Chandnee Widyawati Maddon v. Dr. C. L. Katial*, AIR 1964 SC 973, while rejecting the contention that the contract was not enforceable being of a contingent nature, observed that

"In our opinion, there is no substance in this contention. So far as the parties to the contract are concerned, they had agreed to bind themselves by the terms of the document executed between them. Under that document it was for the defendant-vendor to make the necessary application for the permission to the Chief Commissioner. She had as a matter of fact made such an application but for reasons of her own decided to withdraw the same. On the findings that the plaintiffs have always been ready and willing to perform their part of the contract, and that it was the defendant who wilfully refused to perform her part of the contract, and that the time was not of the essence of the contract, the Court has got to enforce the terms of the contract and to enjoin upon the defendant-appellant to make the necessary application to the Chief Commissioner. It will be for the Chief Commissioner to decide whether or not to grant the necessary sanction."

8. The Apex Court in *Nathulal v. Phoolchand*, AIR 1970 SC 546(1), after

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relying on the above judgment, *Chandnee Widyawati (Supra)*, also took a view that

"where by a statute, property is not transferable without the permission of the authority, an agreement to transfer the property must be deemed subject to the implied condition that the transferor will obtain the sanction of the authority concerned."

9. The same principle was applied by the Apex court in a recent judgment *J.P. Builders & Anr. v. A. Ramdas Rao & Anr., (2011) 1 SCC 429*. In the said case, the main contention raised by the appellant was that as the contract was depending upon uncertain events of the Indian Bank, agreeing for OTS, the contract entered into was contingent depending on the move of the Indian Bank. According to the appellant, in as much as various clauses insist certain impossible conditions at the hands of the Indian Bank, the contract entered into between the plaintiff and the defendant becomes impossible and void. Rejecting such contention, the Court held that

"...merely because the contract insist settlement of a loan of the bank and hand over the title deeds to the plaintiff from the bank, these are not impossible events in the light of the performance made by the plaintiff. The contract in question did not come to an end on this ground and such contract in not a

contingent contract and undoubtedly the court has jurisdiction to grant relief in terms of the contract. Obtaining NOC from the authority concerned, clearance of NOC from Income Tax Department or any other State/Central authority, securing title deeds after clearing certain loans are incidental and implied covenants on the part of the vendors to do the needful to give effect to the agreement."

10. In the facts of the present case, the defendant had put herself under an obligation to get the lease deed executed in her favour and it is not the case of the defendant that there was any statutory bar to sell the flat in question in favour of the buyer as was the case before the Hon'ble Supreme Court in *Nathulal (supra)*. To say that the defendant could not have fulfilled the condition of filing an affidavit of 'No Sale' of the said flat, as filing of such an affidavit on the part of the defendant would have been an illegal act, is again a plea worth rejection as with the execution of the Agreement to Sell by the defendant in favour of the plaintiffs, the sale of the said flat could not have been said to have taken place between the parties. In my view, such an affidavit could have been easily filed by the defendant. Section 54 of the Transfer of the Property Act, 1882 defines the sale and the contract for sale. It would be appropriate to reproduce Section 54 of the Transfer of the Property Act, 1882 as under:

"Sale defined. Sale how made.-" Sale" is a transfer of ownership in exchange for a price paid or promised or part- paid and part- promised.

Sale how made.- Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument. In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property. Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property. Contract for sale.- A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property."

11. Contract of sale of immovable property is a contract of sale of such property which shall take place on the terms settled between the parties and the same by itself does not create any interest or charge on such property. An Agreement to Sell is thus merely a document granting a right to obtain another document of sale on the fulfillment of certain terms and conditions laid down in such document. Under the Agreement to Sell, the ownership of the property

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always vests with the seller and the same is not transferred to the buyer and the buyer also cannot claim any right, title, interest or ownership of the property merely on the basis of the Agreement to Sell. The Apex Court in ***Suraj Lamp and Industries Pvt. Ltd. Vs. State of Haryana & Anr., AIR 2012 CS 206***, has categorically held that immovable properties can be legally and lawfully transferred only by registered deed of conveyance and not in the nature of GPA or SPA etc. Thus, the defendant cannot be allowed to raise a plea that it became impossible for the defendant to fulfill the condition laid down by the DDA for the execution of the lease deed in her favour by not being able to file an affidavit of 'No Sale' as such an affidavit could have been easily filed by the defendant when no sale of the said flat had in fact taken place.

12. In light of the above, the present case is a clear case of breach on the part of the defendant in not fulfilling her part of the obligation as was agreed upon by her under the Agreement to Sell dated 29.4.2011.

13. Considering the fact that there is an unequivocal and unambiguous admission of the relevant facts by the defendant in her written statement and also that both the objections raised by the defendant do not require any trial, the plaintiffs in the present case are entitled to grant of a decree under Order 12 Rule 6 of CPC, 1908.

14. The defendant no.1 is accordingly directed to obtain lease deed of the

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said flat in her favour within a period of one month from the date of this order and the DDA shall ensure execution of the lease deed in favour of the defendant on the defendant fulfilling all the laid down conditions and formalities. After the execution of the lease deed, the defendant shall take steps for the transfer of the said flat in favour of the plaintiff within a period of two months.

15. Decree sheet be drawn up accordingly.



KAILASH GAMBHIR, J

SEPTEMBER 27, 2012

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