

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

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Date of decision: 5th January, 2016

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RFA No.279/2001

JAGTAR SINGH & ORS.

..... Appellants

Through: Mr. Manish Kohli and Mr. Pradeep Shukla, Advs.

Versus

CHANDE LAL & ORS.

..... Respondents

Through: None.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This first appeal under Section 96 of the Code of Civil Procedure (CPC), 1908 impugns the *ex parte* judgment and decree dated 12th April, 2001 of the Court of Shri Prithvi Raj, Additional District Judge (ADJ), Delhi of dismissal of Suit No.170/2000 filed by the appellant on 21st December, 2000 for specific performance of an Agreement of Sale of immovable property.
2. The appeal was admitted for hearing and while issuing notice, vide *ex parte ad interim* order dated 24th July, 2001 the respondent was restrained from alienating or transferring in any manner or creating any third party interest in the suit property. The respondent failed to appear despite service of notice of the appeal also and was vide order dated 6th March, 2002 proceeded against *ex parte* and the interim order was confirmed. Both, the appellant as

well as the respondent died during the pendency of appeal and upon notice of the application for substitution being issued to the legal representatives of the respondent, Advocate for some of the legal representatives of the respondent appeared and the legal representatives of the appellant as well as respondent were ordered to be substituted. However, the Advocate who had appeared for some of the legal representatives of the respondent also did not appear regularly and though on the last three dates either one of the legal representatives of the respondent appeared in person or an Advocate appeared for some of the legal representatives but today again none has appeared for the legal representatives of the respondent. The appeal being old, it is not deemed appropriate to defer the hearing any further awaiting the legal representatives of the respondent. The counsel for the appellant has been heard and the Trial Court Record requisitioned in this Court has been perused.

3. The appellant instituted the suit from which this appeal arises pleading:-

- (i) that the respondent/defendant representing himself to be the exclusive owner of Shop No.B-189, area measuring 70.60 sq. yds. situated at New Subzi Mandi, Azadpur, Delhi – 110 033 with leasehold rights in the land underneath the same approached

the appellant/plaintiff for sale of first floor and above portion (whatever can be legally constructed) of the said shop for a total sale consideration of Rs.2 lacs;

- (ii) an Agreement to Sell dated 17th June, 1998 was executed;
- (iii) that the entire sale consideration of Rs.2 lacs was paid by the appellant/plaintiff to the respondent/defendant in cash and receipt whereof was confirmed in the Agreement to Sell;
- (iv) that the respondent/defendant in part performance of the Agreement handed over actual physical peaceful and vacant possession of the first floor and above portion of the shop to the appellant/plaintiff and also agreed that the appellant/plaintiff would be entitled to raise construction over and above the first floor which was unbuilt and the respondent/defendant would not raise any hindrance therein;
- (v) that the respondent/defendant also agreed to get all requisite permissions/clearances to execute the Sale Deed;
- (vi) though the appellant/plaintiff called upon the respondent/defendant to allow the appellant/plaintiff to raise

construction over and above the first floor and to complete the transaction but the respondent/defendant avoided;

- (vii) that in September, 1999 the respondent/defendant sold/alienated the basement floor of the said property to the appellant/plaintiff for a total sale consideration of Rs.6 lacs and also handed over actual physical peaceful and vacant possession of the same to the appellant/plaintiff and executed various documents in that regard in favour of the appellant/plaintiff on 21st September, 1999 and got them registered on 22nd September, 1999;
- (viii) on 25th September, 1999 the son of the respondent/defendant Shri Raj Kumar instituted a suit against the appellant/plaintiff and the respondent/defendant for injunction to restrain them taking forcible possession of the said basement from Shri Raj Kumar;
- (ix) a Court Commissioner was appointed in the said proceedings who submitted a Report, of the appellant/plaintiff being in possession of the basement;
- (x) Shri Raj Kumar son of the respondent/defendant thereafter withdrew the suit which was dismissed as withdrawn on 7th August, 2000;

- (xi) that the aforesaid Shri Raj Kumar on 16th December, 2000 filed another suit against the appellant/plaintiff for possession of the said basement; and,
- (xii) that on 18th December, 2000 the appellant/plaintiff finally called upon the respondent/defendant to comply with his obligations under the Agreement to Sell dated 17th June, 1998 and upon refusal of the respondent/defendant the present suit was filed on 21st December, 2000 for specific performance of the Agreement to Sell dated 17th June, 1998 directing the respondent/defendant to execute the Sale Deed in favour of the appellant/plaintiff after obtaining all the requisite permissions and for permanent injunction restraining respondent/defendant from creating third party rights in the property agreed to be sold to the appellant/plaintiff.

4. The respondent/defendant though initially appeared in the suit but did not file any written statement and was proceeded against *ex parte*; he moved an application for setting aside of the order proceeding *ex parte* against him but thereafter again stopped appearing and the *ex parte* evidence of the appellant/plaintiff was recorded.

5. The learned ADJ has vide impugned judgment and decree dismissed the suit observing/finding/holding:-

- (a) that though under the Agreement to Sell the respondent/defendant was required to apply for and obtain all sale permissions/clearances for transfer of the property agreed to be sold in favour of the appellant/plaintiff but the appellant/plaintiff did not call upon the respondent/defendant to comply therewith;
- (b) that the perpetual lease of the land underneath the shop was granted by Delhi Development Authority (DDA) in favour of the respondent/defendant for use of the respondent/defendant for fruits and vegetables business;
- (c) that the appellant/plaintiff had failed to prove that the respondent/defendant had on the land so leased to him raised structure;
- (d) that the perpetual Lease Deed of the land underneath the property also required a notice of any transfer/sale/sub-lease to be given to the DDA within three months of transfer; no such notice also had been given;

- (e) that in the Agreement to Sell of which specific performance was sought the parties had not made the time of the essence and the appellant/plaintiff had failed to prove that he had at any time called upon the respondent/defendant to complete the transaction;
- (f) no cause of action had arisen in favour of the appellant/plaintiff; and,
- (g) that the execution of the Sale Deed in pursuance to the Agreement to Sell was dependent upon various permissions/clearances being received and which had admittedly not been received.

6. The counsel for the appellant/plaintiff has argued that the learned ADJ has erred in presuming that before the Court can order specific performance permissions if any required for execution of the Sale Deed should be in existence. Reliance is placed on, (i) ***Vishwa Nath Sharma Vs. Shyam Shanker Goela*** (2007) 10 SCC 595; (ii) ***Raghunath Rai Vs. Jageshwar Prashad Sharma*** 1999 V AD (Delhi) 254; (iii) ***Ajit Prashad Jain Vs. N.K. Widhani*** AIR 1990 Delhi 42; (iv) ***Rojasara Ramjibhai Dahyabhai Vs. Jani Narottamdas Lallubhai*** AIR 1986 SC 1912; (v) ***Mrs. Chandnee Widya Vati***

Madden Vs. Dr. C.L. Katial AIR 1964 SC 978; and, (vi) *Prakash Chandra Vs. Angadlal* AIR 1979 SC 1241 to contend that the proper course is to decree specific performance by directing the respondent/defendant to apply for and obtain for permission and by making the execution of the Sale Deed subject to such permissions being granted.

7. The counsel for the appellant/plaintiff is correct to the aforesaid extent and the impugned judgment is indeed faulty on this ground.

8. However on the basis of pleadings and the evidence I am unable to exercise the discretion implicit in the grant of relief of specific performance of a Agreement of Sale of immovable property in favour of the appellant/plaintiff for the following reasons:-

A. It being the case of the appellant/plaintiff that the appellant/plaintiff at the time of execution of the Agreement to Sell on 17th June, 1998 was put into possession of the first floor and above of Shop No.B-189, New Subzi Mandi, Azadpur, Delhi agreed to be sold, I have enquired from the counsel for the appellant/plaintiff as to who is in occupation of the first floor and what other construction exists above the first floor.

- B. The counsel for the appellant/plaintiff states that the first floor is not constructed and the property comprises of basement and ground floor only with open terrace above the ground floor.
- C. However the Agreement to Sell is of the first floor and above, though mentions that the same is unbuilt and that the appellant/plaintiff shall within three months of the Agreement make construction of the first floor. Clause 7 of the Agreement to Sell in this regard is as under:

“7. That the second party shall have right to make the construction on the first floor and above within three months and shall not put any malba in front and backside of the said property after the said period.”

and which suggests that it was imperative for appellant/plaintiff to construct within three months and that after that he was not entitled to construct the first floor inasmuch as after three months he were not entitled to put ‘malba’ in front and backside of the property and without which no construction was possible.

- D. The appellant/plaintiff in the plaint, as aforesaid, has not pleaded a single word in this context i.e. whether he took any steps to raise construction of the first floor within three month. I have perused the *ex parte* examination-in-chief recorded of the appellant/plaintiff and find the appellant/plaintiff therein to have merely deposed that the respondent/defendant did not allow him to raise construction over and above the first floor.
- E. As per the Agreement the appellant/plaintiff should have raised construction by September, 1998; though there is no pleading to that effect but as aforesaid the appellant/plaintiff in his *ex parte* evidence has deposed that he was not allowed to do so. A dispute had thus arisen between the appellant/plaintiff and the respondent/defendant by September, 1998.
- F. However the appellant/plaintiff claims that respondent/defendant on 21st September, 1999 i.e. after one year from September, 1998 agreed to sell the basement of the same property to the appellant/plaintiff for a sum of Rs.6 lacs.

- G. It does not inspire confidence that if on the one hand there were disputes between the appellant/plaintiff and the respondent/defendant with respect to the Agreement dated 17th June, 1998 of first floor and above, why would respondent/defendant during the pendency of the said disputes agree to sell another portion of the property to the appellant/plaintiff.
- H. On the other hand if it is to be believed that there were no disputes, it is inexplicable why the appellant/plaintiff in September, 1999 when agreed to purchase the basement, did not have the transactions subject matter of the Agreement dated 17th June, 1998 completed.
- I. This is more so as the transaction of September, 1999 is not only by execution of Agreement to Sell but also by execution and registration by the respondent/defendant of General Power of Attorney, Special Power of Attorney, Will etc. It is inexplicable why the appellant/plaintiff did not get General Power of Attorney, Special Power of Attorney, Will executed from the respondent/defendant with respect to the property subject matter

of Agreement to Sell dated 17th June, 1998 also. No explanation whatsoever is forthcoming.

- J. The sale consideration for the basement aforesaid was Rs.6 lacs and which as per the documents executed with respect to the basement is found to have been paid by payment of Rs.2 lacs in cash (and date whereof is not given) and Rs.4 lacs by cheque.
- K. The sale documents of the basement do not make any reference whatsoever to the Agreement to Sell dated 17th June, 1998 with respect to first floor and above or record that the appellant/plaintiff had thus become the owner of the basement as well as first floor and above of the property.
- L. The appellant/plaintiff, when obtaining registration from the respondent/defendant of Power of Attorney and Will for the basement floor, would not have in the normal course, if had paid the entire sale consideration of the first floor and above and was in possession thereof, confined the said power to basement only but would have included the first floor and above also.

- M. The possibility of the parties having novated the Agreement to Sell dated 17th June, 1998 of which specific performance is claimed with the sale of basement with Rs.2 lacs paid for the first floor and above being adjusted against the sale consideration of basement cannot be ruled out. The appellant/plaintiff has not proved payment of Rs.2 lacs in cash for first floor and above and separate payment of Rs.2 lacs in cash for the basement. Interestingly the purported witnesses to the Agreement to Sell of which specific performance is sought and to the Will executed with respect to the basement are the same.
- N. The only inference, from the appellant/plaintiff, not constructing first floor and above till September, 1998 and in September, 1999 transacting with the respondent/defendant with respect to the basement and which transaction stretched on till March, 2000, is that the appellant/plaintiff was not ready and willing to go ahead with the transaction subject matter of Agreement to Sell dated 17th June, 1988 and which also disentitles the appellant/plaintiff from the relief of specific performance.

- O. The delay as aforesaid from September, 1998 till December, 2000 when the suit from which this appeal arises was instituted is fatal to the claim of the appellant/plaintiff for specific performance especially when the appellant/plaintiff in September, 1999 had the occasion to better his rights under the Agreement to Sell dated 17th June, 1998.
- P. Merely because the respondents/defendants have failed to appear and have been proceeded *ex parte* does not require this Court, especially in a case of present nature, to believe whatever the appellant/plaintiff states as gospel truth especially when the relief claimed is of specific performance of an Agreement of Sale of immovable property and which is a discretionary relief and to be entitled whereto the plaintiff has to satisfy the Court of him being all time ready and willing to perform his part of the Agreement and having acted diligently and with promptitude.
- Q. The appellant herein is not found to have acted diligently and with promptitude. As aforesaid, though he had an opportunity to obtain Power of Attorney and Will with respect to the first floor

and above also but he chose not to and has not given any explanation with respect thereto.

- R. The subject property does not appear to be freely transferable. It is situated in a Subzi Mandi, properties wherein can be used for specific purpose of the business of fruits and vegetables only and from wherein no other business/activity can be carried out. The said properties are also covered by the Delhi Agricultural Produce Marketing (Regulation) Act, 1998 and Delhi Agricultural Produce Marketing (Regulation) General Rules, 2000. There are a large number of seekers of the limited shops/space available in Subzi Mandi and only those who fulfill the eligibility conditions are entitled to shops therein. The counsel for the appellant/plaintiff though on enquiry states that the appellant/plaintiff is in the same trade but fairly admits that there is no inkling to the said effect in the documents. Rather Clause 17 of the Agreement of which specific performance is claimed provides that the appellant/plaintiff will get 2 APMC licences in his name from the APMC Authority. The appellant/plaintiff has neither pleaded nor proved having

obtained such licenses. The same also negate the readiness and willingness of the appellant/plaintiff.

9. Thus, though for reasons different from that given in the impugned judgment, I do not find the appellant/plaintiff entitled to the relief of specific performance.

Dismissed.

No costs.

Decree sheet be prepared.

RAJIV SAHAI ENDLAW, J

JANUARY 05, 2016

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(corrected & released on 16th January, 2016)