

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

+ **RFA No. 800/2016**

% **29th August, 2018**

DEVENDER SINGH Appellant

Through: Mr. Rajiv Yadav, Advocate
(Mobile No. 9811017900).

versus

M/S MALIK BUILDCON PVT LTD Respondent

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

RFA No. 800/2016 and C.M. Appl. No. 37766/2016 (for stay)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff in the suit impugning the Judgment of the Trial Court dated 30.3.2016 by which the trial court has dismissed the suit for specific performance and possession filed by the appellant/plaintiff with respect to shop no. S-17, Buildcon Plaza, Plot No. 6, Pocket 5, Sector 12, Dwarka, Delhi (hereinafter referred to as the 'suit property'). Trial court has dismissed the suit for specific performance essentially on two counts, with the first count

being that the Agreement to Sell being oral was not registered and an unregistered agreement to sell cannot be a basis for a stay for specific performance and second count being that no specific performance can be granted of an oral agreement to sell.

2. The facts of the case are that appellant/plaintiff filed the subject suit pleading that he as the purchaser and the respondent/defendant company as the seller had entered into an Agreement to Sell the suit property with the total price being agreed at Rs.3,80,000/-. This Rs.3,80,000/- was to be paid in instalments as and when demanded by the respondent/defendant. Appellant/plaintiff paid a booking amount of Rs.5,100/- on 9.11.2003 and for which receipt no. 120 dated 9.11.2003 was given to the appellant/plaintiff. As per the demands raised by the respondent/defendant from time to time a further amount of Rs.2,66,000/- was deposited by the appellant/plaintiff with the respondent/defendant upto 21.11.2004. Out of the total amount payable, a sum of Rs.70% was already and the balance 30% was to be paid on receipt of possession and the signing of the necessary documents. Appellant/plaintiff further pleaded that on receiving a call from the respondent/defendant in February, 2006 another sum of

Rs.1,15,000/- was paid by a cheque bearing no. 938812 dated 9.3.2006 of Syndicate Bank, Main Bijwasan Road, New Delhi. Thereafter, the respondent/defendant informed the plaintiff that the area of the shop had increased and along with other dues of transfer fees and documentation charges a sum of Rs.62,075/- was to be paid and for which the appellant/plaintiff issued a cheque bearing no. 938813 dated 24.3.2006 drawn on Syndicate Bank, Bijwasan Road Branch, New Delhi, but neither the receipt was given for this cheque nor the cheque was encashed. Since inspite of repeated requests the respondent/defendant failed to transfer the suit property in the name of the appellant/plaintiff, and in fact claimed that the allotment was cancelled by a letter dated 20.5.2006, the subject suit for specific performance and possession was filed.

3. At the outset it may be noted that though the respondent/defendant filed the written statement and initially contested the suit, however, no evidence has been led by the respondent/defendant. Right of the respondent/defendant to lead evidence was closed as evidence was not led inspite of repeated opportunities. The order closing the right of the respondent/defendant

to lead evidence was challenged in this Court as stated in para 8 of the impugned judgment, but that challenge was also not successful.

4. In the written statement the main defence of the respondent/defendant was that since the appellant/plaintiff failed to pay the amount in time therefore the allotment was cancelled by the respondent/defendant vide its Letter dated 20.5.2006.

5. The following issues were framed in the suit:-

- “1) Whether the suit of the plaintiff is not maintainable in its present form? OPD.
- 2) Whether the suit of the plaintiff is barred by law of limitation? OPD.
- 3) Whether the plaintiff is entitled to the decree of specific performance in respect of title of the suit property as prayed for OPP
- 4) Whether the plaintiff is entitled to the decree of possession as prayed for? OPP
- 5) Relief.”

6. Appellant/plaintiff filed his affidavit by way of evidence and proved various documents and this is recorded in paragraph 6 of the impugned judgment as under:-

“6. Thereafter parties were asked to lead the evidence. The plaintiff had examined him as PW 1. He has relied upon the receipt No. 120 dated 09.11.2003 against payment and same is Ex.PW1/1. He has filed several other receipts of payments which were exhibited Ex.PW1/2 to Ex.PW1/11. Photocopies of cheques which were allegedly given by the plaintiff were placed on record as Mark A and Mark B. Legal notice served on the defendant was exhibited as Ex.PW1/12 and the postal receipts as Ex. PW 1/13 and Ex. PW1/14. The plaintiff has denied a receipt of any letter

written by the defendant to the plaintiff on May, 20, 2006 and this has been placed on record as Ex.PW1/16. He was cross-examined by the Ld. Counsel for defendant.”

7. In my opinion, the trial court has wrongly dismissed the suit on the ground that the Agreement to Sell is not registered and is only an oral agreement. In law an agreement to sell does not have to be registered, and of which agreement to sell, relief of specific performance is sought, and this is clearly stated so in the proviso to Section 49 of the Registration Act, 1908. The finding of the trial court therefore that the Agreement to Sell require registration being completely illegal is therefore set aside.

8. So far as the finding of the trial court that the suit for specific performance had to be dismissed because Agreement to Sell was an oral Agreement to Sell, once again this finding is illegal because there can be an oral Agreement to Sell of an immovable property. In the facts of the present case there did take place an oral Agreement to Sell of the property between the parties because respondent/defendant had admittedly received various amounts totalling to Rs.2,66,000/- under the oral Agreement to Sell with the total price being Rs.3,80,000/-. It may be noted that appellant/plaintiff in the plaint pleaded the total

price of Rs.3,80,000/- in paragraph 4 of the plaint and this is not denied to by the respondent/defendant in paragraph 4 of the written statement. Therefore, even this finding of the trial court that specific performance cannot be granted of an oral Agreement to Sell, this finding is illegal and needs to be and is accordingly set aside.

9. That takes us to the question as to whether appellant/plaintiff is entitled to relief of specific performance. As already stated above total price was Rs.3,80,000/- of which a sum of Rs.2,66,000/- has admittedly been paid because this is not disputed by the respondent/defendant in its written statement. So far as the issue of balance payment and as to whether the respondent/defendant was entitled to cancel the Agreement in terms of its Letter dated 20.5.2006, it will be necessary to refer to the admitted document being the Letter Ex.PW1/DX1 dated 28.3.2006 of the appellant/plaintiff to the respondent/defendant. This document is admitted because this document was put by the counsel for the respondent/defendant in the cross-examination of the appellant/plaintiff and being an admitted document was therefore exhibited as Ex.PW1/DX1.

10. A reference to this letter shows that the total price of the suit property was Rs.3,80,000/-. Appellant/plaintiff had paid Rs.2,66,000/- with balance payment being Rs.1,15,000/-. Since the area of the shop had increased a total amount of Rs.1,77,075/- was payable and which the appellant/plaintiff went to deposit with the respondent/defendant, but the office of the respondent/defendant refused to accept this amount on account of two amounts of Rs.23,000/- towards interest and Rs.10,000/- as advance maintenance for eight months. This letter dated 28.3.2006 Ex.PW1/DX1 also shows that the appellant/plaintiff asked the office of the respondent/defendant to receive Rs.1,77,075/- which was brought by the appellant/plaintiff, but the office of the respondent refused to receive the same by stating that along with this amount of Rs.1,77,075/- and till amount of Rs.23,000/- an advance maintenance charges of eight months of Rs.10,000/- are paid, the office of the respondent/defendant will not receive the amount and in fact will cancel the allotment. Along with this letter Ex.PW1/DX1 the appellant/plaintiff had sent a sum of Rs.1,77,075/- as noted in the last few lines of the letter. Therefore, the dispute really was only with respect to interest claim of Rs.23,000/- and an advance maintenance

for the shop for eight months of Rs.10,000/- i.e. a total sum of Rs.33,000/-. This shows that the total price of the property was Rs.4,42,075/- and this total amount would stand paid as on 28.3.2006 in view of the amount of Rs.2,66,000/- having already been paid and the cheques of Rs.1,77,075/- being attached with this letter Ex.PW1/DX1 dated 28.3.2006. Essentially therefore in and around between 90% to 95% of the total amount stood paid with part of this amount paid by cheques totalling to Rs.1,77,075 being deliberately not encashed by the respondent/defendant i.e an amount of Rs.1,77,075/- was not received by the respondent/defendant by encashing the two cheques of Rs.1,15,000/- and Rs.62,075/- as attached with the letter Ex.PW1/DX1. The only balance payment would be a sum of Rs.33,000/- as stated above with Rs.23,000/- interest towards interest and Rs.10,000/- towards advance maintenance charges of the shop for eight months.

11. With reference to the facts of each case whether or not time of performance is essence of the contract has to be examined. This is so held by the Constitution Bench judgment of the Supreme Court in the case of *Chand Rani (Smt) (Dead) by Lrs Vs. Kamal Rani (Smt)*

(Dead) by Lrs, 1993 (1) SCC 519. In the facts of the present case since admittedly interest has been asked for by the respondent/defendant for late payment, obviously therefore time of performance is not the essence as delayed payment had to be compensated with interest. Once time of performance is not the essence such an Agreement to Sell cannot be cancelled by Letter dated 20.5.2006 issued by the respondent/defendant without first having made time of payment/performance as essence of the contract. It is therefore held that the respondent/defendant could not have cancelled the subject contract to sell the suit property by its Letter dated 20.5.2006.

12. In view of the aforesaid discussion it is held that there was an Agreement to Sell of the suit property between the parties. Appellant/plaintiff was not guilty of breach of contract. Appellant/plaintiff was always ready and willing and continued to be ready and willing and it was the respondent/defendant which did not receive a minor balance amount of Rs.33,000/- out of the total amount of Rs.4,75,075/-. Plaintiff therefore held entitled to specific performance of the suit property by the respondent/defendant

executing the documents conveying title in the suit property to the appellant/plaintiff as per the following directions:-

- (i) Appellant/plaintiff will deposit in this Court a sum of Rs.1,77,075/- plus Rs.33,000/- along with interest at 12% per annum simple from 1.6.2006 within a period of three months from today and which amount will be put by the Registry in a fixed deposit so as to earn maximum rate of interest.
- (ii) On such deposit being made, the respondent/defendant will execute the necessary title documents in favour of the appellant/plaintiff with respect to the suit property being shop no. S-17, Buildcon Plaza, Plot No. 6, Pocket 5, Sector 12, Dwarka.
- (iii) On the title documents being executed and registered in favour of the appellant/plaintiff for the suit property, the respondent/defendant can thereafter withdraw the amount deposited in this Court by the appellant/plaintiff along with interest which will accrue thereon.

(iv) In case the respondent/defendant fails to execute the title documents of the suit property in favour of the appellant/plaintiff, the appellant/plaintiff can initiate execution proceedings of the present judgment and decree including by resorting to Order XXI Rule 32 CPC.

13. This appeal is accordingly allowed and disposed of by decreeing the suit for specific performance filed by the appellant/plaintiff in terms of the directions as given herein above. Parties are left to bear their own costs.

AUGUST 29, 2018

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VALMIKI J. MEHTA, J

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