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

**+ RFA(OS) 148/2014, CM Nos.18218-19/2014, 18223/2014
& 5159/2015**

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Date of decision: 19th March, 2015

RAKESH CHHABRA

..... Appellant

Through : Mr. Sanjeev Sindhvani, Sr.
Adv. with Mr. Manoj Kumar
Sahu, Adv.

versus

ANSUL ARYA & ORS

..... Respondents

Through : Mr. Virendra Choudhary and
Mr. Anand Verdhan
Maitraya, Advs. for R-1.
Mr. Rajiv Vig, Adv. for R-2.

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MR. JUSTICE P.S.TEJI

GITA MITTAL, J. (Oral)

1. Learned counsel for the parties submit that the record of CS(OS)No.411/2013 as is necessary for the effective adjudication of the present appeal has been filed by the appellant. We have been carefully taken through the record and perused the impugned judgment dated 21st July, 2014 passed by the learned Single Judge. Learned senior counsel for the appellant and learned counsels for the respondents have been heard at length.

2. Respondent no.1 Anshul Arya (as plaintiff) had originally

filed suit bearing CS(OS)No.411/2013 against defendant no.1 Rakesh Chhabra (appellant herein) and defendant no.2 Mohinder Kumar (respondent no.2 herein), who was the owner of Flat No.42, 3rd Floor, Antariksha Apartment, Vikas Puri, New Delhi-110018. It appears that Rakesh Chhabra (the appellant herein), who was a tenant in the property and had been earlier claiming under agreement to sell with Mohinder Kumar, unsuccessfully filed a suit for specific performance. The suit by Rakesh Chhabra as on date stands dismissed on the finding that the appellant was unable to establish readiness and willingness to perform his part of the contract. The appeal against the dismissal of the suit happens to be pending in this court. We are informed by learned counsel appearing for respondent no.1 herein that interim stay in the appeal has been declined to the appellant herein for the reason that he is claiming under an unregistered agreement to sell. Be that as it may, for the purposes of adjudication of the present appeal, it is not necessary for us to deliberate on this litigation between Rakesh Chhabra and Mohinder Kumar, the recorded owner of Flat No.42, 3rd Floor, Antariksha Apartment, Vikas Puri, New Delhi-110018 any further.

3. So far as the suit out of which the present appeal arises is concerned, Anshul Arya claiming under a registered agreement to sell as well as general power of attorney both dated 1st April, 2008 executed by Mohinder Kumar in his favour, filed the suit for declaration, recovery of possession, damages for illegal occupation, mesne profits and permanent injunction initially against Rakesh

Chhabra (appellant herein) and Mohinder Kumar, the recorded owner of the said property. Subsequently, the plaintiff was permitted to amend the plaint to implead the Antariksha Co-operative Group Housing Society as defendant no.3. The plaintiff sought the following prayers in the amended plaint:

- “(a) Pass a decree of declaration in favour of the Plaintiff and against Defendant No.1 thereby declaring that the Plaintiff is the absolute purchaser of the suit property i.e. Flat No.42, 3rd floor, Antariksha Apartment, Vikas Puri, New Delhi-110018 by virtue of duly Registered ‘Agreement to sell and registered General Power of Attorney’ dated 01.04.2008;
- (b) Pass a decree of recovery of possession in favour of the plaintiff and against the defendant no. 1 thereby directing the defendant no. 1 to handover the peaceful and vacant possession of the suit property i.e. Flat No. 42, 3rd Floor, Antariksha Apartment, Vikas Puri, New Delhi-110018 to the plaintiff (specifically shown in the site plan annexed herewith);
- (c) pass a decree of Rs.5,40,000/- (Rupees five lacs forty thousand only) alongwith interest 2 18% per annum w.e.f. 15.02.2010 till date of payment for damages for illegal occupancy/mesne profits in favour of the plaintiff and against the defendant no.1
- (d) pass a decree of penalty @ Rs.2000/- per day w.e.f. 15.02.2013 till the actual vacation/handing over possession of the suit property in favour of the plaintiff and against the defendant no.1.
- (e) allow the costs of the suit in favour of the plaintiff and against the defendant no.1.
- (f) pass a decree of permanent injunction in favour of the plaintiff and against the defendant thereby restraining the defendant no. 1, his associates, agents, servants and any person acting and representing on behalf of the defendant no. 1 from selling, alienating or crating third party interest in the suit property i.e. Flat

No. 42, 3rd floor, Antariksha Apartment, Vikas Puri,
New Dlehi-110018;

(ff) pass a decree of mandatory injunction in favour of the plaintiff and against the defendant no. 3 thereby directing the defendant no. 3 to issue necessary NOC in respect of suit property in favour of the plaintiff.”

4. It appears that despite service, Rakesh Chhabra (appellant herein) failed to file written statement in accordance with law and his right to do so was closed on 30th May, 2014. For the reason that no further steps were taken by Rakesh Chhabra as well as the fact that Mohinder Kumar admitted the plaintiff's case, the court proceeded to judgment on the 21st of July 2014 and decreed the suit in favour of the plaintiff (respondent no.1 herein) against the present appellant in terms of the prayers.

5. It is noteworthy that so far as prayer for mesne profits was concerned, it is recorded that the appellant herein was in occupation of the suit property at a monthly rent of ₹6,500/- on 13th September, 2006 when the agreement to sell was executed between Mohinder Kumar and Rakesh Chhabra. We find that the learned Single Judge has also noted that the legal notice was issued to the appellant herein on the 1st of April 2008 wherein entitlement to mesne profits at the rate of last paid rent i.e. ₹6,500/- per month with increase of 15% on the increased amount every year had been sought. The court consequently decreed the mesne profits at this rate. Before us, the appellant has challenged and prayed for setting aside of the judgment dated 21st July, 2014 and prayed for grant of an opportunity to file written statement in the suit. It is urged that

given the nature of the prayers in the suit and the claim of the respondent no.1 herein which was premised on agreement to sell, albeit registered, the learned Single Judge was first required to consider the prayer of the respondent no.1 herein for the declaration that he was the absolute owner of the suit property. It is contended by Mr. Sanjeev Sindhvani, learned senior counsel for the appellant that so far as the decree for possession as well as mesne profits in favour of Anshul Arya (respondent no.1 herein) is concerned, it was consequential upon the learned Single Judge first returning a finding that the respondent no.1 was the owner of the suit property and hence entitled to these consequential reliefs. Learned senior counsel would challenge the decree dated 21st July, 2014 for the reason that there is no such finding therein.

6. It is also submitted that reliance by respondent no.1/plaintiff was on an agreement to sell and consequently on the face of the claim made by the plaintiff, the relief of possession and mesne profits could not have been decreed in favour of the respondent no.1, even if the appellant had failed to file written statement or to contest the suit.

7. It is also contended that without making a prayer for specific performance against Mohinder Kumar (impleaded as defendant no.1), the relief of declaration was barred by virtue of the proviso to Section 34 of the Specific Relief Act, 1963. Mr. Sindhvani, learned senior counsel has also contested the maintainability of the suit on several grounds including the ground that mere purchaser under agreement to sell cannot seek possession of the property

from even a lawful tenant.

8. Learned senior counsel for the appellant has also drawn our attention to the explanation given by the appellant for not having filed the written statement and the circumstances in which he was prevented from taking steps with regard to his defence which resulted in the passing of the judgment on 21st July, 2014.

9. Mr. Virendra Chaudhary, counsel appearing for respondent no.1 has vehemently contested the present appeal. It is urged that given the admission by Mohinder Kumar of the case of respondent no.1, no prayer for specific performance was necessary in the facts and circumstances of this case. It is also urged that the appellant herein is wrongfully occupying the suit property without paying a single penny since August, 2006 and that there are no equities in his favour. Learned counsel has also submitted that the failure to file a written statement was sheer negligence and that the appellant has, with malafide, deliberately awaited for passing the judgment in favour of respondent no.1, before seeking leave to file a written statement. The submission is that in the facts and circumstances of this case, the judgment and decree dated 21st July, 2014 cannot be faulted and the appeal against the same must be dismissed.

10. We have given our thoughtful consideration to the records placed before us as well as the rival contentions. We find that in para 7 of the impugned judgment dated 21st July, 2014, while narrating the facts giving rise to the suit, the learned Single Judge has noted that the respondent no.1 Anshul Arya had purchased the suit property from the “erstwhile” owner Mohinder Kumar on 1st

April, 2008 vide “registered sale deed” which stood registered in accordance with law. The same factual narration is repeated at the end of the consideration of the case. It therefore, appears that the learned Single Judge has been pleased to decree the suit as prayed for on the erroneous impression that the title of the property had passed in accordance with law from Mohinder Kumar, who was an admitted owner of the property, to Anshul Arya by execution of the documents registered in accordance with law. It is not disputed before us that the plaintiff Anshul Arya was relying on the registered agreement to sell dated 1st April, 2008. It is an admitted position that no sale deed has been registered so far. Therefore, the learned Single Judge appears to have proceeded on the erroneous assumption of title having passed in favour of the respondent no.1.

11. The agreement to sell dated 1st April, 2008 which has been placed on record would show that the sale consideration of ₹9,00,000/- stated therein stands paid. However, for the reason that the flat is a leasehold property and certain formalities including no objection certificate from the superior owner as well as the conversion of the property to freehold from the Delhi Development Authority has to be obtained before the property can be finally conveyed in favour of the purchaser. It is therefore, recorded in Clause 11 of the agreement to sell that the second party Anshul Arya would obtain all permissions and approvals to “complete the sale transactions”. This position has been noted for the reason that learned Senior Counsel for the appellant has staunchly contested the entitlement of the respondent no.1 to the decree for possession

and mesne profits and also emphasized that without first declaring the respondent no.1 as the owner of the property, no such reliefs could have been decreed in his favour. We find merit in this submission of the learned senior counsel for the appellant. The learned Single Judge has not returned any findings with regard to the title of the suit premises and the right of the respondent no.1 to the decree of possession and mesne profits. No decree of declaration in terms of prayer(a) as prayed in the suit has been granted in the impugned judgment and without such declaration, certainly the relief of possession and mesne profits could not have been considered.

12. We are now required to consider the prayer of the appellant for leave to file the written statement. It cannot be disputed that the appellant has contested the present case negligently. So far as the explanation for not filing the written statement or taking steps for setting aside the order of 30th May, 2014 is concerned, the appellant has sought to put the blame squarely on the counsel who was conducting the case. Detailed submissions in this regard have been made from paras (AA) to (EE) of the appeal. There is also the fact that the suit has been decreed on the first date after closure of defence. The legal entitlement of the plaintiff has not been adjudicated in the judgment and decree which has followed. The above discussion would show that the judgment dated 21st July, 2014 cannot be sustained in law. We are therefore, inclined to accept the explanation given by the appellant for his default in filing the written statement and failing to take steps in accordance

with law.

13. However, in the facts and circumstances noted by us, including the fact that the appellant has not paid any charges towards use and occupation of the suit property since August, 2006, the appellant is disentitled to any unconditional relief in the present appeal.

14. We may also note so far as the agreement to sell dated 1st April, 2006 relied upon by the appellant is concerned, the appellant seems to have paid a paltry sum of ₹1,00,000/- as sale consideration to Mohinder Kumar herein.

15. Before us, learned counsel for respondent no.1 has contended that the market rate of rent for similar flats as on date is not less than ₹30,000/- per month. Be that as it may, these are the aspects which are required to be gone through by the learned Single Judge. In order to balance equities, we are of the view that the appellant should deposit in court, use and occupation charges with effect from 1st September, 2006 till 1st April, 2015 @ ₹10,000/- per month. With effect from 1st April, 2015, the appellant shall deposit an amount of ₹15,000/- on this count on or before seventh day of each English calendar month in this court towards use and occupation charges.

16. We make it clear that the order we have passed today and the deposit which shall be made by the appellant is without prejudice to the respective rights and contentions of the parties. In case, the respondents are able to establish mesne profits at a rate higher than the rate which has been ordered by us, the appellant shall be liable

to pay the same.

17. We also find that pursuant to the order dated 13th January, 2005, the appellant has deposited an amount of ₹5,00,000/- in this court which has been kept in a fixed deposit receipt. It is directed that the amount in the fixed deposit receipt shall be transferred to the record of CS(OS)No.411/2013 for administrative convenience. The fixed deposit receipt shall be kept renewed till further orders of any court.

18. So far as the amount to be deposited in terms of this order is concerned, the appellant shall be entitled to deduct the amount of ₹5,00,000/- from the arrears of the amount in terms of the orders that we have passed today. All deposits which are made in terms of the orders passed today, shall be kept on the record of CS(OS)No.411/2013. The amount as and when deposited shall be kept in fixed deposit receipt till final adjudication of the suit.

19. At this stage, the appellant who is present in person makes a prayer that he may be permitted to deposit the amount of arrears ordered by us today in four equated instalments. The prayer appears to be reasonable. The appellant is permitted to deposit the amount of arrears in four monthly equated instalments. The first instalment shall be payable on or before 7th April, 2015.

20. The appellant shall also be liable for payment of costs of ₹50,000/- to the respondent no.1 on or before the next date of hearing.

21. Subject to the above, we hereby set aside the judgment and decree dated 21st July, 2014 and the order closing the right of the

appellant to file the written statement. The written statement with documents relied upon in support shall be positively filed by the appellant within four weeks from today. The respondent no.1 plaintiff may file the replication thereto within four weeks thereafter. The plaintiff is also permitted to file any documents in support.

22. The parties shall file their admission/denial of documents of the other side on affidavit which shall be filed within 10 weeks from today.

23. The parties shall appear before the Joint Registrar (Original) for marking of documents on 6th July, 2015.

24. The matter shall be listed before the learned Single Judge for framing of issues on 19th August, 2015.

The appeal is allowed in the above terms.

CM Nos.18218-19/2014 & 18223/2014

In view of the orders passed in the appeal, these applications are disposed of.

GITA MITTAL, J

P.S.TEJI, J

MARCH 19, 2015

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