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HIGH COURT OF DELHI AT NEW DELHI

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R.S.A. No.362/2014 & C.M. No.2349/2016

Decided on : 3rd June, 2016

M/S. HOUSING & URBAN DEVELOPMENT
CORPORATION LTD.

..... Appellant

Through: Ms. Meenakshi Arora, Sr. Advocate with
Mr. Rajiv Chauhan & Mr. Arush
Pathaina, Advocates.

Versus

M/S. MS SHOES (EAST) LTD. & ORS.

..... Respondents

Through: Mr. G.P. Thareja, Mr. Pawan Sachdeva,
Advocates for R-1.
Mr. Jaswinder Singh & Mr. Reshesh
Mani Tripathi, Advocates for R-2.

CORAM:

HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J.

1. This is a regular second appeal filed by the appellant under Section 100 read with Order XLI Rule 1 & 2 CPC against the order dated 18.7.2014 passed by the learned Additional District Judge, Saket Courts, New Delhi in RCA No.10/2013 upholding the judgment and decree dated 3.7.2010 passed by the learned Senior Civil Judge-cum-Rent Controller, Central, Delhi, in Suit No.1026/06/97.
2. The second appeal according to Section 100 CPC is permissible only if substantial question of law arises in the matter. Vide order

dated 03.12.2015 the following substantial questions of law were formulated before the appeal was heard:-

- “(i) Whether the plaintiff was entitled to only declaration sought by him in the second suit without claiming consequential relief in the light of proviso to Section 34 of the Specific Relief Act?*
- (ii) Whether the respondent/plaintiff was at all entitled to file a second suit without seeking the liberty of the court in which the first suit No.275/1996 was pending?*
- (iii) Whether the second suit could be continued after the withdrawal of the first suit at all, without reserving any liberty to do so?*
- (iv) Whether provisions of Order II Rule 2 CPC are applicable to the second suit?”*

3. Essentially the aforesaid four questions of law had arisen in the matter which were summed up in an earlier order dated 15.10.2015 as under :-

“As to whether the judgment and the decree dated 03.07.2010 passed by the learned Civil Judge and affirmed by the learned ADJ vide judgment and decree dated 18.07.2014 suffers from any perversity, if so, to what effect.”

4. The answer to the question as to whether the impugned judgment suffers from any perversity would encompass all the aforesaid issues which would be appreciated only after the brief background of the case is given. But before doing so I must observe that both the judgments of the learned trial Judge as well as the judgment of

the first appellate Court which is impugned herein are unduly verbose with the result and it becomes all the more difficult for the Court to decipher the real reasons for allowing the suit. Further the trial court has not been correct in framing so many issues. The issues which are the preliminary in nature on which the failure or the success of the suit is dependent ought to have been decided first and with clarity, while as the judgment is completely lacking in this regard. The appellate Judge has cited the head notes while referring to the judgment.

5. Briefly stated the facts of the case are that the appellant/defendant invited bids for the hotel projects which included a guest house, shops, and restaurants at Andrews Ganj, New Delhi near Ansal Plaza. As the respondent No.1/plaintiff was the highest bidder, accordingly, its bid was accepted and the site in question was allotted to it for five star hotel and car parking for a total consideration of Rs.78,10,00,000/- including a sum of Rs.14 crores for car parking site. The respondent No.1/plaintiff accepted the terms and conditions and allotment letter dated 31.10.1994 was issued in its favour, who paid first installment of Rs.25,04,00,000/- to the appellant/defendant No.1 (Rs.2 lacs being earnest money deposited earlier). The respondent No.1/plaintiff also paid a sum of Rs.2,50,000/- to the appellant/defendant No.1's maintenance agency. It was the case of the respondent No.1/plaintiff that after the payment of Ist installment the appellant/defendant No.1 was to execute agreement to sub-lease in favour of the respondent No.1/plaintiff and hand over the site along with the car parking

space to it to raise construction; however, the appellant/defendant No.1 was alleged to be avoiding the same though the possession was to be handed over prior to the payment of the second installment.

6. Vide letter dated 31.1.1996, the appellant/defendant No.1 demanded the further installment failing which the allotment stood cancelled and first installment forfeited. The respondent No.1/plaintiff made representation against the said act of the appellant/defendant No.1 stating that it was not liable to pay the second installment as the appellant did not comply with its part of the agreement.
7. The respondent No.1/plaintiff filed a suit in Delhi High Court on 30.1.1996 bearing No.275/1996 claiming a decree of declaration that the dates of payment of second and third installments, as per the allotment letter dated 31.10.1994, be extended till the appellant/defendant No.1 perform its reciprocal obligation under clause 5 (vi) and 5 (ix) of the said allotment letter. It also prayed for permanent injunction in its favour restraining appellant/defendant No.1 from cancelling allotment in relation to the hotel site and car parking space.
8. In the said suit, the court had initially granted the *status quo* order but later on vacated the same because the respondent No.1/plaintiff failed to pay/deposit a sum of Rs. 15 crores as directed by this court vide order dated 16.04.1996. It was alleged that the appellant/defendant No.1 was to give possession of the aforesaid site to the respondent No.1/plaintiff by February, 1995 and the next

installment was payable in October, 1995, in fact, payable in January, 1996 (after three months grace period) along with interest but the appellant/defendant No.1 invited fresh tenders to re-allot the said site. The appellant/defendant No.1 issued cancellation letter dated 2.5.1996 as the respondent No.1/plaintiff failed to make payment of the second installment. It was further alleged by the respondent No.1/plaintiff that the lease deed was not executed even in favour of the appellant/defendant No.1 by the UOI/respondent No.2 (defendant No.2 in the suit). Moreover, it was alleged by the respondent No.1/plaintiff that the cancellation would cause irreparable loss and injury to the respondent No.1/plaintiff. It was also alleged that respondent No.1/plaintiff was not liable to pay the second installment to the appellant/defendant No.1 till the possession of the suit property was handed over to the respondent No.1/plaintiff.

9. Meanwhile, The respondent No.1/plaintiff filed another suit bearing No.1/1997 (Suit No. 1026/06/97) on 24.1.1997 seeking decree of declaration that the cancellation letter dated 2.5.1996 be declared null and void and further mandatory injunction to the appellant/defendant to deliver the possession of the aforesaid site and restraining from re-alloting the same. It was also prayed that the MCD be restrained from raising/charging House-Tax demands in respect of the suit property from the plaintiff/respondent. An *ex parte* interim injunction was issued vide order dated 25.1.1997. Subsequently, MCD was given up as a party as well as the relief against it.

10. The written statement was filed by the appellant/defendant No.1 along with an application under Order 39 Rule 4 CPC for vacation of the interim injunction wherein the learned ADJ on 17.3.1997 vacated the *ex-parte status quo* granted vide order dated 25.1.1997. The respondent No.1/plaintiff filed an appeal against the order dated 17.3.1997 bearing F.A.O. No.78/1997 and the appellant/defendant also filed an appeal bearing F.A.O. No.111/97 against the same order dated 17.3.1997. Both the appeals were clubbed together as per order dated 28.4.1997 and were disposed of by this court vide separate orders.
11. On 22.04.1997 the respondent No.1/ plaintiff filed an application before this court seeking permission to withdraw the suit bearing CS (OS) No. 275/1996 with liberty to file afresh, however this court did not grant any liberty and the suit was dismissed as withdrawn.
12. Thereafter, the respondent No.2/UOI moved an application under Order 7 Rule 11 before the trial court for rejection of the plaint which was dismissed vide order dated 03.03.2001. Consequently, a Revision petition was filed by the respondent No.2 /UOI against the order dated 03.03.2001 before this court. The same was allowed and since the respondent No.1/plaintiff had claimed the possession of the suit premises also he was directed to pay ad-valorem court fees. The respondent No.1/plaintiff then filed an application before the trial court under Order 23 Rule 1 to give up his relief to claim the possession and confined his prayer only to injunction.

13. On the pleadings of the parties fifteen issues were framed and it will be worthwhile to reproduce here all the issues which were framed. These issues were as under:-

- “1) Whether defendant No.1 performed its reciprocal obligations on receipt of 1st installment from plaintiff as per the terms of allotment letter dated 31.10.1994 and whether in the absence of not doing so defendant No.1 could demand the 2nd installment? OPP.*
- 2) Whether defendant No.1 has committed breach? OPP.*
- 3) Whether defendant No.1 mis-represented that entire complex of community centre is approved when the building plans of 5 star hotel could not be sanctioned without approval of revised lay out plans and unless the unauthorized constructions carried out car park and other buildings constructed by defendant No.1 at HUDCO Place were regularized and whether defendant could demand the second installment in the absence of such approvals? OPP.*
- 4) Whether the act and conduct of the defendant No.1 and 2 was arbitrary, illegal and discriminatory while dealing with the plaintiff in respect of the suit property and whether defendants have permitted various time interest free extensions under Relief similar conditions of allotment to Ansals Properties & Industries Ltd. as of plaintiff because car park was built unauthorized by defendant No.1? OPP.*
- 5) Whether timely payment is essence of allotment letter dated 31.10.1994 in terms of clause No.5 (iii) issued by defendant No.1 in favour of plaintiff*

and whether 2nd installment and 3rd installment were deferred payments payable in one year and two years for the date of possession on license basis to facilitate the allottee for construction of building there upon? OPP.

- 6) Whether defendant No.1 had any valid allotment and lease of the subject land and in their favour at the time of allotment to plaintiff? OPP.*
- 7) Whether legally construction of 5 star hotel was permitted in the said Community Centre as per old Master Plan MPD-1962 under which said Community Centre was allotted to defendant No.1 by defendant No.2 and whether the lease and allotment in favour of defendant No.1 specified the use of land for construction of Hotel? OPP.*
- 8) Whether defendant No.1 is an agent of defendant No.2 and whether defendant No.1 was given the said land under Govt. Grants Act and whether defendant No.1 was to take permission of defendant No.2 before allotments, permission to mortgage, any extension of payments and cancellation of allotments and whether defendant No.1 took the permission/approval of defendant No.2 regarding allotment/cancellation of allotment of plaintiff? OPP.*
- 9) If the above issues are proved whether in view of the above issue the plaintiff is entitled to the decree of declaration as claimed in the suit in respect of letter dated 02.05.1996, issued by defendant No.1 as null and void? OPP.*
- 10) Whether the suit has not been properly valued for the purpose of court fees and jurisdiction? OPD.*

- 11) *Whether suit as framed is not maintainable? OPD.*
- 12) *Whether the suit of plaintiff is barred by the provisions contained u/O 2 rule 2 CPC? OPD.*
- 13) *Whether the suit of plaintiff is barred by provisions contained under the Specific Relief Act? OPD.*
- 14) *Whether the suit of the plaintiff is also barred under the provisions contained under order 23 Rule 1 CPC? OPD.*
- 15) *Relief.”*

14. The respondent No.1/plaintiff examined 24 witnesses on the other hand the appellant/defendant examined DW-1, Arti Tyagi, Deputy Chief (Project), HUDCO, India Habitat Centre and closed its evidence. Respondent No. 2 did not examine any witness. Vide a detailed judgment dated 3.7.2010, the learned trial judge decreed the suit in favour of the respondent No.1/plaintiff that the cancellation letter dated 2.5.1996 is null and void and inoperative and the appellant/defendant No.1 was directed to follow the terms of allotment letter by doing the needful.
15. The learned trial Court decided issues No.11 to 14 pertaining to the aforesaid subject in favour of the respondent No.1/plaintiff and so far as the merits of the case are concerned, they were dealt with and a decree of declaration without possession was passed in favour of the respondent No.1/plaintiff.
16. The appellant/defendant feeling aggrieved preferred RCA No.10/2013 before the learned ADJ against the judgment and the

decree which was also dismissed by the impugned order dated 18.07.2014.

17. Still not feeling satisfied, the appellant/defendant has preferred the present regular second appeal raising the aforesaid substantial question of law.
18. In order to further consider the question of law as enumerated in para 2 it will be worthwhile in the first instance to reproduce the exact language of the allotment letter by the appellant/defendant No.1 in favour of respondent No.1, which reads as under:-

“No.HUDCO /AG/H/94

Dated the 31, October, 1994

To

*Ms. Sadhna Sachdeva
Director
M/s. MS Shoes (East) Ltd.
5, NWA, Punjabi Bagh Extn.
New Delhi-110 026*

*Sub: ALLOTMENT OF FIVE STAR HOTEL SITE
measuring about 3 (three) Acres at HUDCO Place,
Andrews Ganj, New Delhi.*

Dear Madam,

1. Please refer to your financial bid for Five Star Hotel Site opened on 15th July, 1994.

2. Housing & Urban Development Corporation Ltd. (HUDCO) is pleased to accept your offer and allot the aforesaid Five Star Hotel Site to you. The site has permissible buildable space of 25,000 sq. mts. On a building envelope of 41750 sq. mts plus permissible basement of 3000 sq. mts.

3. We are also pleased to allot to you the underground car parking space with the capacity to park about 415 cars on a separate area adjacent to the Hotel site.

4. The Hotel site as well as the car parking space as mentioned in paras 2 & 3 above shall be on perpetual sub leasehold basis.

5. The broad terms and conditions for the allotment are as under:-

(i) The 5-Star Hotel building shall be constructed within the parameters of the approved overall Urban Design Form after obtaining required approvals from the concerned local authority and the Delhi Urban Arts Commission. The height coverage in basement and such related development controls shall be as per the operative norms of the statutory authorities.

(ii) You shall make the payment of premium i.e. consideration of Rs.64.10 crores (Rs. Sixty-four crores and ten lacs only) for the allotment of the Hotel site and Rs. 14.00 crores for the allotment of car parking space. The payment shall be made in the following manner/stages.

(A) Hotel Site (Rs.64.10. crores

(i) Within 4 weeks of the date of this allotment letter
(i.e. before 28.11.94) – 40%

(Rs.25,64,00,000)

(ii) Before the end of one year of the date of this allotment letter (i.e. before 31.10.95) - 30%

(Rs. 19,23,00,000)

(iii) Before the end of two years of the date of this allotment letter (i.e. before 31.10.96) – 30%

(Rs.19,23,00,000)

Rs.64,10,00,000

(B) Car Parking Space (Rs. 14.00 crores)

(i) Within four weeks of the date of issue of allotment letter (i.e. before 28.11.94) – 10%

(Rs.1,40,00,000)

(ii) Before the end of one year of the date issue of allotment letter (i.e. before 31.10.95) - 40%

(Rs. 5,60,00,000)

(iii) Within four weeks of issue of letter by HUDCO intimating that the service were ready for being handing over – 50%

(Rs.7,00,00,000)

Rs.14,00,00,000

The above payments shall be made through demand drafts drawn in favour of HUDCO payable at New Delhi.

(iii) No interest will be charged on payments made before the due dates stated above. In case of default, interest shall be charged @ 16% p.a. for three months if the payment is made after the due date. Additional penal interest @ 3% p.a. shall also be charged on the interest for three months. **Any delay beyond three months would entail cancellation of allotment and/or forfeiture of the total amount deposited till date.**

(iv) You will be required to complete the construction of the Hotel site within **three years** of the date of handing **over possession of the Hotel site on license basis for construction of the Hotel building as per terms and conditions** contained in the proforma of Agreement to sub-lease, two copies of which are enclosed with this allotment letter. In the event of non completion of construction

*within the stipulated time, HUDCO may consider **granting extension if exceptional and unavoidable circumstances have prevented you to complete construction within the stipulated time.** The decision of HUDCO regarding the existence of the exceptional and unavoidable circumstances will be final and binding upon you. In case the construction is not completed within the prescribed period or the extended period as decided by HUDCO, HUDCO will have the **right to take over the land along with the unfinished building with materials, fixtures, if any, on the site without payment of any compensation to you.** Since the underground car parking space will be made available to you in the adjacent building, you may provide underground linkage from the Hotel with the parking space. However, cost of such linkages shall be borne by you.*

(v) You shall not have any right to sell, transfer, assign or otherwise parting with the possession without the prior permission of the lessor/HUDCO. You may also at the discretion of HUDCO, be permitted to raise loan only for construction of the building and equipment, to mortgage the premises subject to such terms and conditions including recovery of 50% unearned increase in the value of this land as will be laid down in the lease documents and subject to the first charge of HUDCO for the unpaid cost of land for the Hotel as well as other dues payable hereunder.

(vi) HUDCO will execute all required documents for obtaining approval of the competent authority under the Urban Land (Ceiling and Regulation) Act, 1976 and also of the Appropriate Authority in terms of Chapter XX C of the Income Tax Act. If these approvals are not accorded HUDCO will refund the amount paid without any interest and you shall not be entitled to claim any compensation or damages.

(vii) You shall pay annual ground rent at the rate of 2½% of the premium for land for the Hotel site and the proportionate cost of land underneath the car parking space from the date of handing over of possession of the Hotel site and the car parking space to

you. The ground rent shall be revised periodically in accordance with the terms and conditions of the sub lease deed.

(viii) Initially, the Hotel site will be on a license under an Agreement to Sub-lease and upon fulfillment of the terms of the said Agreement including payment of all dues, perpetual sub-lease will be executed. The terms and conditions of the perpetual sub-lease shall be as per the proforma duly approved by the Govt. of India, a copy of which will be sent to you in due course.

(ix) Upon the receipt of the first installment of the premium both for the Hotel site as well as the car parking space as indicated in para 5(ii) and also after receipt of approvals as indicated in para 5 (vi), the Agreement to Sub-lease will be made available to you for execution for the Hotel site and upon its execution, the possession of Hotel site will be handed over to you for raising construction.

(x) All costs for the preparation of the required documents, stamp duty, registration charges and other levies of any kind whatsoever will have to be borne by you. Property taxes and other municipal levies shall be borne by you from the date of possession of the site(s).

(xi) You shall also have to pay to HUDCO/Maintenance Agency appointed by HUDCO, the maintenance charges and other levies, taxes, etc. for the car parking space and other common services like roads, street lights, etc. in addition, an initial interest free deposit equivalent to maintenance charges for two quarters, to be used as corpus fund for maintenance by HUDCO or the maintenance agency, appointed by HUDCO shall have to be paid by you.

(xii) The Hotel site and the building constructed thereon shall not be used for a purpose other than that of a Hotel. Similarly, car parking space shall be used only as car parking and for no other purpose.

(xiii) You shall be permitted to use the permissible percentage of the total covered area for activities/trades, ancillary to the Hotel as decided by the competent authority.

(xiv) You shall not deviate in any manner from the layout plan nor alter the size of the Hotel site for said purpose either by subdivision, amalgamation or otherwise failing which HUDCO in its discretion will be entitled to cancel the lease and forfeit the amount paid by you.

(xv) You shall obtain clearance for five star rating for the Hotel from the Deptt. of Tourism/Govt. of India/Competent Authority and shall be responsible for making all arrangements as are necessary for maintenance of the Hotel building including the fire fighting system and the common services.

(xvi) You shall have to arrange electric and water connections from the concerned authorities directly at your cost.

(xvii) If it is discovered that the allotment of the Hotel site has been obtained by suppression of any fact or misstatement or misrepresentation or fraud or if there is any breach of the conditions of the Agreement to lease, the Agreement to lease will be determined and possession of the site and the building thereon taken over by HUDCO and you will not be entitled to any compensation whatsoever nor to the return of any premium paid by you.

(xiii) You may licence out the spaces meant for activities/trade upto permissible limits, ancillary to the Hotel only and for such purposes for which they are meant.

(xiv) You shall ensure that the licencees of the space carved out of the area meant for activities/trade ancillary to the Hotel, observe the general conditions, to the sub lease entered into between you and HUDCO and the lease deed entered into between the HUDCO and the Govt. of India. The licencees of the space meant for activities/trade, ancillary shall not be used or permit to be used the

space referred to above or any portion thereof for any purpose whatsoever other than the prescribed use.

6. *You are now requested to deposit an amount of Rs.23.64 crores (Rs. Twenty-three crores and sixty-four lacs only) after adjusting the amount of Rs.2.00 crores (Rs. Two crores only) already deposited by you as earnest money with offer towards the payment of first instalment of hotel site. A sum of Rs.1,40 crores (Rs., One crore and forty lacs only) should also be deposited by you towards the proportional cost of car parking space. You are therefore, requested to deposit the total amount of Rs.25.04 crores (Rupees twenty five crores and four lakhs only) by bank draft on a scheduled bank on or before 28.11.94. You are requested to make the above payments and initiate action for obtaining approvals under para 5(vi) above. You are also requested to return a copy of the proforma of Agreement to sub lease duly signed at the foot of each page in token of your having accepted the terms and conditions contained therein.*

7. *Please note that in the event of non-payment of the above said amounts by the dates specified hereinabove and return of the proforma of Agreement to sub lease duly signed the acceptance of offer made by you shall stand rescinded without further reference to you and the earnest money of Rs.2.00 crores (Rupees two crores only) paid by you shall stand forfeited.*

Thanking you,

*Yours faithfully,
Sd/-
31/10/94
(H.K. Dubey)
Asstt. Chief."*

19. The concurrent finding returned by the two Courts below granting a declaration in favour of the respondent No.1/plaintiff which is to the effect that the cancellation letter dated 02.05.1996 has been held to be null and void and further it has been directed that the

appellant/defendant must act in accordance with the allotment letter dated 31.10.1994.

20. The main contention of Ms. Arora, the learned senior counsel for the appellant hinges on three things; firstly, that the suit as framed was not maintainable because the respondent No.1/plaintiff had not claimed the consequential relief of possession. The relief which according to Ms. Arora, respondent No.1/plaintiff ought to have claimed was either to seek possession of the plot of land in question or to seek refund of the monies paid by him. Ancillary to this, there were two more objections, one pertained to the Order 2 Rule 2 CPC and the other to Order 23 Rule 1 CPC and second suit being barred by it.
21. For the present, I feel that it would be better to deal with one issue only that is with regard to the non-maintainability of the suit because the respondent No.1/plaintiff did not claim the consequential relief.
22. The respondent No.1/plaintiff who was appearing in person had contended that the suit was very much maintainable and the declaration which was sought by the respondent No.1/plaintiff was not under Section 34 of the Specific Relief Act but under Section 9 of the CPC which permitted a party to file a suit pertaining to a civil dispute and there was no occasion for the respondent No.1/plaintiff to claim any further relief as envisaged in proviso to Section 34 of the Specific Relief Act. He had also given a compilation of judgments consisting as many as 28-30 judgments dealing with this proposition that the suit *per se* for declaration

alone was maintainable but since these were not cited, the Court could not be expected to read all these 28-30 judgments and then see for itself what judgment applies to the facts of the case.

23. As against this Ms. Arora, the learned senior counsel has cited the case title *Venkataraja & Ors. vs. Vidyane Doureradjaperumal (Dead) Through LRs & Ors.*, (2014) 14 SCC 502 and taken the Court through relevant paragraph to support her submission regarding non maintainability of the suit, which reads as under:-

“23. *The very purpose of the proviso to Section 34 of the 1963 Act, is to avoid the multiplicity of the proceedings, and also the loss of revenue of court fees. When the Specific Relief Act, 1877 was in force, the 9th Report of the Law Commission of India, 1958, had suggested certain amendments in the proviso, according to which, the Plaintiff could seek declaratory relief without seeking any consequential relief, if he sought permission of the court to make his subsequent claim in another suit/proceedings. However, such an amendment was not accepted. There is no provision analogous to such suggestion in the Act 1963.*

24. *A mere declaratory decree remains non-executable in most cases generally. However, there is no prohibition upon a party from seeking an amendment in the plaint to include the unsought relief, provided that it is saved by limitation. However, it is obligatory on the part of the defendants to raise the issue at the earliest. (Vide: Parkash Chand Khurana etc. v. Harnam Singh and Ors.: AIR 1973 SC 2065; and State of M.P. v. Mangilal Sharma: AIR 1998 SC 743).*

25. *In Muni Lal v. The Oriental Fire and General Insurance Co. Ltd. and Anr.: AIR 1996 SC 642, this Court dealt with declaratory decree, and observed that*

“4....mere declaration without consequential relief does not provide the needed relief in the suit; it would be for the Plaintiff to seek both the reliefs. The omission thereof mandates the court to refuse the grant of declaratory relief.”

26. *In Shakuntla Devi v. Kamla and Ors.: (2005) 5 SCC 390, this Court while dealing with the issue held:*

“21.....a declaratory decree simpliciter does not attain finality if it has to be used for obtaining any future decree like possession. In such cases, if suit for possession based on an earlier declaratory decree is filed, it is open to the Defendant to establish that the declaratory decree on which the suit is based is not a lawful decree.”

27. *In view of the above, it is evident that the suit filed by the Appellants/Plaintiffs was not maintainable, as they did not claim consequential relief.....”*

24. I have considered the respective submission and gone through the record.

25. The two issues which have been framed with regard to the maintainability of the suit are issue No.(11) and (13) which reads as under:-

“11) Whether suit as framed is not maintainable? OPD.

13) Whether the suit of plaintiff is barred by provisions contained under the Specific Relief Act? OPD.”

26. Both these issues in sum and substance are the same and in my view the issue which ought to have been framed by the Court has to be in positive and not in negative as the issue No.11 has been framed. However, without going into that controversy it would be pertinent here to mention that it was held by the learned trial Court that the declaration which has been claimed by the respondent No.1/plaintiff is the one under Section 9 of the CPC which deals with the jurisdiction of the civil courts to entertain matter pertaining to civil disputes. In holding so, the learned trial Court has placed reliance on a judgment of the Apex Court in case title, *“Ramaraghava Reddy vs. Sheshu Reddy, AIR 1967 SC 436* to hold that the grant of declaration under Section 34 of the Specific Relief Act is not exhaustive provision there can be declaration granted under Section 9 of the CPC as well. It has also been observed by the learned trial Court in the judgment dated 03.07.2010 and upheld by the first Appellate Court vide order dated 18.07.2014 that the proviso to Section 34 uses the word ***“further relief”***. It has been stated that further relief would mean a relief which is emanating from the cause of action on the basis of which suit for declaration is based and if the said cause of action gives rise to grant of any further relief then only such a relief ought to be claimed by a party.

27. Both these findings have been upheld by the learned first Appellate Court vide judgment dated 18.07.2014 which is impugned in the present regular second appeal. Notwithstanding the fact that there is a concurrent finding returned by the two Courts below in this regard, I feel that the judgment of both of the trial Court as well as of the first Appellate Court suffers from perversity because the respondent No.1/plaintiff ought to have claimed further relief also and that further relief in the instant case was the possession of the parcel of land in question. To test this proposition, it would be pertinent here to recall that the case of the respondent No.1/plaintiff is that he had paid the first installment of approximately Rs.25 crores. The second installment was payable on or before 31.10.1995 subject to the payment of interest on that amount of Rs.19 crores was to be extended by another three months and since the payment of the first installment was made by the respondent No.1/plaintiff, the latter was under an obligation to hand over the possession of the parcel of land for the purpose of construction of a hotel and execute agreement to sub-lease in its favour and till the same was not done, the appellant/defendant was not entitled to the second installment.
28. If we test this proposition then obviously the respondent No.1/plaintiff was entitled to possession of the said parcel of land for the purpose of construction of hotel.
29. Now seeing the fact that the respondent No.1/plaintiff has already succeeded in the trial Court as well as in the first appellate court in getting the letter of cancellation of the allotment letter issued by the

appellant/defendant to the respondent No.1/plaintiff to be declared as null and void and his case being that the second installment as is being claimed by the respondent No.1/plaintiff is not payable because the appellant/defendant has to perform its reciprocal obligation of handing over the possession of the suit land to the respondent No.1/plaintiff after executing the agreement to sub-lease in respect of the same. Obviously, in the light of this stand, the respondent No.1/plaintiff ought to have claimed the possession of the suit land. This is the ‘further relief’ emanating from the same cause of action which ought to have been claimed by the respondent No.1/plaintiff.

30. Further the learned trial court has held that the time for payment was not the essence because there was no condition contained in the letter of allotment to that effect.
31. Curiously, the learned trial Judge as well as the first appellate Court having not been able to appreciate this aspect of the matter and it is in this regard that their finding suffers from perversity. Both the Courts have concurrently given the faulty reasoning that the declaration which has been sought by the respondent No.1/plaintiff was a declaration under Section 9 CPC and not under Section 34 of the Specific Relief Act. It is really very unfortunate and sad that the trial Court has written judgment running into almost 250 pages with a reasoning which is not sustainable in the eyes of law. The trial Court has dealt with same such issue in almost 8 to 9 running pages which does not make any head and tail and the first appellate Court also committing the same mistake by

even not citing the judgments and reproducing there only head notes. It does not disclose as to how the judgments which are sought to be relied upon by it are related to the facts of the case in hand and what is the law which is laid down in such judgments which is applicable to the facts of the present case. Therefore, I feel that both these issues which are in fact repetitive in nature ought to have been decided in favour of the appellant/defendant and if done so the suit itself of the respondent No.1/plaintiff becomes not maintainable for want of not claiming the possession. The claim of the possession of the suit land was integral to the declaration by not doing so it becomes a fatal defect to the suit of the respondent No.1/plaintiff. As a matter of fact, the respondent No.1/plaintiff had originally and rightly claimed possession of the suit land but he gave up the said relief because he did not have sufficient funds to pay the court fees of Rs.27 crores which was held to be the market value.

32. There is another angle to this non-maintainability of the suit. It is not in dispute that while the first suit bearing No.275/1996 was pending in the High Court the respondent No.1/plaintiff was directed by the learned Single Judge to deposit a sum of Rs.15 crores to the in the Court in order to show his *bona fides* and to prove that he has sufficient funds available with him for the payment of the second installment as a restrain order was operating against cancellation. Despite sufficient time having been given to the respondent No.1/plaintiff, it failed to deposit the said amount. As a matter of fact it had taken out an appeal against the said order

and before the Division Bench it had admitted that it is not able to muster resources to make the payment of that nature in pursuance to the directions of the learned Single Judge. This clearly shows that the respondent No.1/plaintiff did not have sufficient funds available with him to make the payment.

33. In addition to this, the respondent No.1/plaintiff in the first instance during the pendency of the suit in the High Court had filed another suit before the learned ADJ, Tis Hazari Court, Delhi impleading MCD as well as the appellant/defendant as a party. In this particular suit apart from the challenge to the levy of the property tax/vacant land tax the respondent No.1/plaintiff had also stated that the cancellation letter dated 02.05.1996 be declared null and void. A mandatory injunction in this suit was also prayed for which was to the effect that the appellant/defendant be directed to hand over the possession of the suit land for the construction of hotel. The learned Judge had opined that by seeking a mandatory injunction with regard to the grant of possession of the suit land in effect the respondent No.1/plaintiff was claiming possession of the suit land and therefore he was liable to pay court fees on the valuation of the suit land on ad-valorem basis. The valuation of the suit land was shown to be Rs. 1,05,000/- or so while as the Court observed since the suit land was able to garner a bid of Rs.217 crores from M/s. Leela Hotels, therefore, respondent No.1/plaintiff would the market value of the plot of land in question and the ad-valorem court fees on the said amount is payable. The ad-valorem court fees on Rs.217 crores calculated roughly @ one per cent

according to the Court Fees Act would be come around Rs.2 crores or so. For want of payment of ad-valorem court fees, the respondent No.1/plaintiff gave up the relief of possession and the suit was amended and MCD was deleted as a party, the Union of India was impleaded as a party and the relief by the respondent No.1/plaintiff was confined only to declaration. As a matter of fact the un-amended suit wherein possession was claimed was the correct relief which was sought by the respondent No.1/plaintiff which could be granted to him under Section 34 of the Specific Relief Act keeping in view his stand. But as relief of possession was given up voluntarily or rather abandoned voluntarily and the declaration which is obtained by the respondent No.1/plaintiff which is not executable independently, therefore, the learned trial Court as well as the first appellate Court ought to have held that the suit itself was not maintainable. Since this was not done, not only the appreciation of facts but the application of law thereof was also totally incorrect rather illegal which has resulted in this perversity of passing a declaration simplicitor in favour of the respondent No.1/plaintiff which is of no consequence.

34. I am tempted here to refer to the judgment of the Apex Court in case title *Venkataraja & Ors. vs. Vidyane Doureradjaperumal (Dead) Through LRs & Ors., (2014) 14 SCC 502*, cited by Ms. Arora in support of her contention urged by her that if a party is entitled to a further relief and that relief is not claimed then mere declaration simplicitor cannot be granted and the suit in such a contingencies itself is not maintainable.

35. In view of the aforesaid discussion, I feel that the judgment dated 3.7.2010 confirmed by order dated 18.7.2014 is suffering from perversity because the respondent No.1/plaintiff ought to have claimed possession of the plot of land in question which he actually did but gave up for want of payment of court fees on *ad valorem* basis. The mere declaration which has been moved in favour of the respondent No.1/plaintiff declaring the cancellation letter dated 02.05.1996 as null and void of its own is of no consequence. To that extant the trial court order dated 03.07.2010 is liable to be set aside.
36. Last but not the least the grant of declaration itself under Section 34 of the Specific Relief Act is a matter of discretion with the Court. This discretion has to be exercised judiciously. It is well settled by now that a party who indulges in sharp practices, unfair, unethical stand tries to steal a march over the other, mislead the courts as well as conceal the facts does not deserve to be granted discretionary relief.
37. In the present case the respondent No.1/plaintiff in the first instance filed a suit in the High Court bearing No.275/1996 wherein it was stated by the respondent No.1/plaintiff that the appellant/defendant cannot claim the payment of second and the third installment without performing their reciprocal obligations and these reciprocal obligations which were to be performed by them was that they must first hand over the possession of the plot of land to the respondent No.1/plaintiff as first installment stood paid to them. But if one reads the schedule of payment the definite

dates are given spread over a period of two and three years then there is an inbuilt extension clause of payment by another three months from the date so fixed and subject to the payment of interest. All these conditions are stand alone conditions and are not to be linked with the other reciprocal obligations to be discharged by the parties, that is, by obtaining clearance from Urban Land Ceiling Department, Income Tax Department, etc. But, on the one hand, the respondent No.1/plaintiff has taken a plea that the possession was not to be claimed by him. At the same time he also takes a stand before the Court that the appellant/defendant did not have the title to the property in as much as Lease Deed by the Union of India in respect of the said parcel of land in favour of HUDCO was yet to be executed. It is also contended by the respondent No.1/plaintiff that the permission of the Urban Land Ceiling Act had not been obtained and that clearance from Income Tax Department was also to be obtained by the appellant/defendant before which it could have been sold. These pleas which have been taken by the respondent No.1/plaintiff are essentially factually incorrect. These pleas which are being taken by the respondent No.1/plaintiff, in my view are on account of the fact that respondent No.1/plaintiff wanted to delay the payment of the monies to the appellant/defendant as admittedly he did not have sufficient funds with him and therefore, he wanted to prolong and entangle the appellant/defendant into litigation by taking up these pleas.

38. Moreover, he filed a suit in High Court, giving up a part of the relief then withdrew the suit itself and before the withdrawal of the suit he had filed another suit seeking the same declaration as well as possession through mandatory injunction. The relief of mandatory injunction was given up once he was asked to make the payment of ad-valorem court fees on the market value of the land and he gave up that relief. The reason which he gave for filing a second suit in the District Court is that in the first suit he had asked for deferment of payment of second and third installment and at that point of time the cancellation letter dated 02.05.1996 was not issued. The appellant/defendant had subsequent thereto filed an application stating that the suit has become infructuous because the allotment itself had been cancelled which necessitated him to withdraw the suit and before withdrawal filed a fresh suit allowing a challenge to the cancellation letter. But the fact of the matter remains that the respondent No.1/plaintiff could have amended the first suit itself even if the appellant/defendant had cancelled the allotment. Even if this was not done, it could have informed the High court that it has already filed a suit challenging the cancellation letter and therefore is seeking withdrawal of the first suit. On the contrary, he simply states he is withdrawing the suit unconditionally without giving any reason nor does he told the court where the second suit is filed that he had earlier filed a suit in High Court claiming almost the same relief. All these facts make the bona fide of the respondent No.1/plaintiff as suspect and if a party comes under the cloud of suspicion because of its conduct

going to different forum then discretion should never be exercised in favour of such a party.

39. The other part of the contention raised by the appellant/defendant in that suit is barred under Order 2 Rule 2 CPC or suit being barred under Order 23 Rule 1 CPC on account of abandoning or unconditional withdrawal which I feel need not be dealt with for the simple reason that I have already held that the suit of the respondent No.1/plaintiff plaintiff suffer from a fatal defect of not claiming the possession as a further relief in terms of proviso to Section 34 of the Specific Relief Act and therefore, the suit as framed by the respondent No.1/plaintiff seeking only declaration to the effect that the cancellation letter dated 02.05.1996 was bad in law could not have been passed by the two courts below.
40. There is one issue No.5 decided by the concurrent finding of the trial court that the time is not the essence. This is also a perverse finding because a plain reading of the allotment letter will show that there are specified dates on which the payment is to be made and in case these are not adhered to then, upto three months, the payment can be made subject to payment of interest and after that there is a sanction of cancellation. If the plot is cancelled then nothing is left. But both the courts have taken into consideration other documents like allotment letter dated 31.03.1997 of the suit property issued in favour of Leela Hotels & Convention Centre Ltd. or past practice or future documents to support their contention that in all these documents, it is written that time is the essence and since this was not written in the present agreement,

therefore, time was not an essence. This is not a correct method of interpreting a document. Moreover, as per Section 91 of the Indian Evidence Act. 1872, no oral evidence can be produced to add, contradict or subtract any terms and conditions from a written document. Therefore, reference to these documents was not required. There was no reciprocal obligation to be performed by the appellant which could be connected with the payment. To that effect, this finding is also perverse that time was not the essence.

41. For the aforesaid reasons, I answer the question framed by this court in affirmative that the judgment of the trial Court dated 03.07.2010 which was affirmed by the first appellate court vide order dated 18.07.2014 suffers from perversity so far as the issue No.1 is concerned and the same deserves to be set aside. Ordered accordingly.

V.K. SHALI, J.

JUNE 03, 2016
‘AA/vk’