

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **RSA No.326/2016**
% **2nd November, 2016**

MR. SURESH KUMAR MAHAJAN Appellant
Through: Mr. K.P. Pathak, Advocate.
versus

DELHI DEVELOPMENT AUTHORITY Respondent
Through:

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. No.40606/2016 (exemption)

1. Exemption allowed subject to just exceptions.
C.M. stands disposed of.

+RSA No.326/2016

2. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908(CPC) is filed by the appellant/plaintiff against the Judgment of the First Appellate Court dated 20.7.2016 by which the first appellate court set aside the Judgment of the Trial Court dated 17.11.2012 by which the trial court had decreed the suit for mandatory injunction filed

by the appellant/plaintiff and directed the respondent/defendant to make allotment of flat no.167 or similar flat in 288 MIG Houses Pocket-2, Sector-23, Rohini, Delhi.

3. The facts of the case are that the appellant/plaintiff was firstly allotted a flat no.55 in Sector 24, Pocket 10, Phase-III, Rohini, Delhi of which the total cost was estimated at Rs.3,37,750/-. The appellant/plaintiff was to pay a sum of Rs.20,000/- on or before 9.6.1994, and which he deposited on 6.6.1994. The appellant/plaintiff thereafter sought conversion of mode of payment from lump sum to hire purchase payment and kept on corresponding with the respondent/defendant on this subject, but appellant/plaintiff did not make the payment of the balance amount. In the meanwhile, as per orders of this Court in a writ petition, a larger flat was to be allotted to persons such as the appellant/plaintiff, and therefore, the respondent/defendant vide a fresh demand-cum-allocation Letter dated 28.8.1996-4.9.1996 allotted another flat being flat no.167, first floor of Pocket II, sector-23, Rohini, Delhi at the cost of Rs.5.50 lacs . Even after giving adjustment to the appellant/plaintiff for deposit of Rs.20,000/-, which was made by the appellant/plaintiff towards the earlier flat, at least a sum of Rs.5,30,500/- still remained to be paid by the appellant/plaintiff and which was never paid to the respondent/defendant. The case of the

appellant/plaintiff is that the amount of Rs.20,000/- deposited by him with respect to the earlier flat could not be traced by the respondent/defendant. The appellant/plaintiff served a Legal Notice dated 1.2.2002 and thereafter filed the subject suit to allot the flat to the appellant/plaintiff.

4. The respondent/defendant contested the suit and stated that due to decision dated 24.3.1995 in Writ Petition No.2298/1994 fresh allotments were made to various persons under the scheme including the appellant/plaintiff and the appellant/plaintiff was allotted a new flat no.167, first floor, Pocket II, Sector-23, Rohini, Delhi on hire purchase basis as per draw of lots held on 7.8.1996. The cost of this allotted flat was Rs.5,50,800/- and demand-cum-allotment Letter was issued to him in block dates on 28.8.1996 - 4.9.1996 , and to which there was no response of the appellant/plaintiff by paying the amount due, and therefore after issuing show cause notices, the allotment of the flat was cancelled.

5. After pleadings were complete, the trial court on 19.11.2003 framed the following issues:-

- “1. Whether the suit is not maintainable in view of the provision of notice under Section 53B DD Act? OPD
2. Whether the plaintiff is entitled for decree of mandatory injunction, a prayed for? OPD
3. Relief.”

6. Both the parties led evidence and the documents which have been proved by both the parties are stated in paras 6 to 8 of the judgment of the trial court and these paras read as under:-

“6. Plaintiff examined only one witness in his support. PW1, plaintiff himself, entered the witness box on 07.04.2004 and tendered his affidavit Ex PW1/A in evidence which states the same facts as are stated in the plaint. He relied on Ex PW1/1 which is the copy of deposit receipt. Ex PW1/2 is the copy of certificate of registration dated 05.06.1980. Ex PW1/3 is the copy of allotment cum demand letter dated 03.05.1994-10.04.1994. Copy of receipt of payment of Rs20,000/- Ex PW1/4 and copy of letter intimating the same is Ex PW1/5. Ex PW1/6 is the copy of letter dated 04.07.1994 sent by plaintiff to DDA requesting conversion from cash down to hire purchase basis. Copy of plaintiff's reminder to defendant is Ex PW1/7. Copy of notice dated 27.10.1994 to the plaintiff from the defendant is Ex PW1/8. Ex PW1/9 is the copy of fresh allotment cum demand letter. Copy of notice dated 01.02.2002 is Ex PW1/10.

In his cross examination, he admitted that he did not make any payment after initial deposit of Rs 20,000/- and explained that this was because the flat was not constructed at that time. He denied receiving show cause notice dated 09.01.1997, 10.12.1998 or 30.03.1999. He stated that he appeared in DDA office in pursuance of letter dated 04.03.1997 which is Ex PW1/D1 but he did not deposit amount as he received it in 1998 and even the letter was dispatched after the extended date.

7. Defendant examined two witnesses in its support. DW1, Sh. Tejinder Kumar, Assistant Director, entered the witness box on 08.02.2010 and tendered his affidavit Ex DW1/X in evidence which states the same facts as are stated in the written statement. He relied on Ex DW1/1 which is the copy of demand cum allotment letter dated 03.05.1994-10.05.1994. Ex DW1/2 is the copy of show cause notice dated 27.10.1994. Copy of demand cum allotment letter dated 28.08.1996-04.09.1996 is Ex DW1/3. Copy of reminders dated 06/09.01.1997, 04.03.1997 and 09.05.1997 are Ex DW1/4. Copy of show case notice dated 10.12.1998/30.03.1999 is Ex DW1/5. Copy of show cause notice dated 09.01.1997 is Ex DW1/6. Copy of letter of request from the plaintiff is Ex DW1/7 and copy of letter of extension of time is Ex DW1/8. Copy of cancellation letter dated 24.06.1999 is Ex DW1/9.

In his cross examination, he stated that the copy of letter dated 06.01.1996 written by plaintiff is Ex DW1/PX1. He further stated that Rs20,000/- had been received when Ex DW1/3 was issued and this deposit was not to be made again. He also stated that after deposit of initial amount, possession is to be handed over and then the remaining installments are to be paid. He admitted that letter Ex PW1/10 was received by DDA on 08.02.2002.

8. DW2, Sh. M.C. Joshi, Assistant Director, entered the witness box on 08.08.2012 and tendered his affidavit Ex DW2/X in evidence which states the same facts as are stated in the written statement. He relied on Ex DW1/1 to Ex DW1/9. He further relied upon Ex DW2/1 which is the copy record of dispatch of Ex DW1/3, Ex DW1/4 and Ex DW1/6.

In his cross examination, he stated that he had not brought the original register and could not say if the copies Ex DW2/1 were from one or more registers. He could not identify the signatures on Ex DW2/1 and could not tell the year to which the first and second page entries pertained to. He stated that the letters were sent by courier but no proof of delivery was received by DDA. He stated that letter extending the time of payment was Ex DW2/P1. He stated that the time was extended till 30.04.2007 but the letter was dispatched on 09.05.1997. He further stated that plaintiff was given letter Ex DW2/P2 on 04.03.1997 in response to letter of plaintiff Ex DW2/P3. He also stated that time for payment was extended further after 30.04.1997. He also stated that letter Ex DW2/P4 was sent to plaintiff at 25/19 Shakti Nagar but letters dated 09.05.1997 and 04.03.1997 were not sent at this address.”

7. The trial court decreed the suit by observing that the respondent/defendant failed to prove the show cause notices and the reminders Ex.DW1/4 to Ex.DW1/6 and since the appellant/plaintiff denied having received these letters and notices, allotment hence could not have been cancelled without serving appropriate show cause notices. Trial court also held that the respondent/defendant had sent a Letter dated 4.3.1997 to the appellant/plaintiff to make the payment till 30.4.1997 and thereafter another Letter dated 9.5.1997/Ex.DW1/4 was sent extending time of payment and therefore earlier letters were rendered nugatory. The suit was accordingly decreed for mandatory injunction with a direction to the respondent/defendant to allot a flat to the appellant/plaintiff.

8. The first appellate court has set aside the findings of the trial court by making the following salient conclusions:-

(i) The appellant/plaintiff even with respect to the earlier flat allotted paid only an amount of Rs.20,000/- and had thereafter only kept on corresponding with the respondent/defendant to change the mode of payment from down payment to hire purchase but had not deposited the balance of the price for the earlier allotted flat being the sum of Rs.3,37,750/-. Even with respect to newly allotted flat, even assuming that the appellant/plaintiff was entitled to an adjustment of Rs.20,000/-, yet, there was nothing which prevented the appellant/plaintiff, and which was in fact his duty, to deposit the balance amount of Rs.5,30,500/- and which the appellant/plaintiff failed to do from August/September, 1996 till the allotment of the appellant/plaintiff was cancelled in terms of the cancellation Letter dated 24.6.1999/Ex.DW1/9.

(ii) In fact, the appellant/plaintiff deliberately concealed the factum of cancellation Letter dated 24.6.1999 in the plaint because the suit was filed by the appellant/plaintiff on 25.9.2002 and which was beyond a period of three years of the cancellation of the allotment of the appellant/plaintiff in June, 1999 and therefore the suit was also barred by limitation.

(iii)(a) The appellant/plaintiff could not question non-grant of hearing or show cause notices inasmuch as the Letter dated 4.3.1997/Ex.DW2/P2 of the respondent/defendant showed that a hearing was given to the appellant/plaintiff in response to his Letter dated 6.1.1997/Ex.DW1/PX1. The appellant/plaintiff was found by the first appellate court to be deliberately avoiding making payment by simply sending letters to the respondent/defendant, and this aspect along with the aspect of grant of hearing to the appellant/plaintiff is stated in para 18 of the judgment of the first appellate court, and which para 18 read as under:-

“18. The version of the plaintiff could have been believed, if he had deposited the balance amount as per the schedule. The dispute was only regarding nominal amount of Rs.20,000/-, which could have been dealt with or sorted out later on. Further, the plaintiff made up a case that no hearing was given or no show case notice was issued. His falsity was again proved when in the affidavit he admitted that he had appeared in the office of DDA in response to call letter dated 04.03.1997, which is Ex.DW-1/D-1, whereas his case was that he was never given a personal hearing. In the letter dated 04.03.1997 Ex.DW-2/P-2, it is apparent that a personal hearing was given to the plaintiff in response to his letter dated 06.01.1997, which is Ex.DW-1/PX-1. In this letter Ex.DW-1/PX-1, the plaintiff has sought extension of time and verification of his already deposited amount. I do not find any bonafide of the plaintiff for again and again sending such letters and gaining time for avoiding the payment. There is no plausible reason for not making the balance payment towards cost of the flat, even if there was any difference in already deposited amount. The welfare scheme of government to give houses on minimum rates gets paralysed because of non receiving the consideration from allottees. In the cross-examination of PW-1, he clearly admitted that it was correct that he had not deposited the balance amount demanded vide allotment letter Ex.PW-1/3, which was earlier allotment. In the plaint, his version was that as he had written a letter for changing mode of payment, hence he did not deposit amount. He gave altogether a new version in volunteered statement that it was a bare plot at site and not constructed at that time, hence he did not deposit the balance amount. These contradictory pleas are not at all acceptable and rather strengthens malafide of the plaintiff with regard to avoiding the payment. Be

that as it may or as the luck had for the plaintiff, he was freshly allotted a plot. But again he picked up an excuse for avoiding balance payment. He himself admitted that he did not deposit the balance amount as demanded. Presuming that he had a dispute with regard to already deposited nominal confirmation amount, which was again asked from him to be paid till 04.10.1996 but there was no reason at all for not making the further payment towards cost of the flat till the last date 03.12.1996 as mentioned in the demand letter.”

(underlining added)

(b) The appellant/plaintiff cannot contend that he did not receive show cause notices in view of the vague denial in the replication to the written statement of the respondent/defendant and the first appellate court therefore rightly rejected the case of the appellant/plaintiff of not having received show cause notices by making the following observations in para 19 of the judgment of the first appellate court:-

“19.The 1d. trial court did not accept the show cause notice sent by the defendant to make the payment, in absence of proof of dispatch. However, I am of the opinion that although the defendant could not prove dispatch of show cause notice dated 10.12.1998-30.03.1999 (block dates) Ex.DW-1/5, in the absence of proof of dispatch but the show cause notice dated 09.01.1997 and 10.12.1998-30.03.1999 (block dates) stood proved because of the admission of the plaintiff himself. In the para no.9 to 10 of WS of the defendant, the defendant had mentioned about issuance of two notice Ex.DW-1/5, DW-1/6 and finally cancellation letter Ex.DW-1/9. In the replication in reply to para no.9 and 10 of the WS, the plaintiff did not deny specifically receiving of show cause notices. Rather, it was replied by the plaintiff that it was denied that show cause notice was rightly issued or that any cancellation order was validly served upon the plaintiff. Meaning thereby the contention of the plaintiff was that show cause notice was not rightly issued. It was not the case of the plaintiff that it was not issued at all. His contention was upon the rightness or wrongness of the show cause notice.” (underlining added)

9. To the aforesaid conclusions of the first appellate court, in exercise of my powers under Order XLI Rule 24 CPC read with the ratio of the judgment of the Supreme Court in the case of *Lisamma Antony and Another Vs. Karthiyayani and Another (2015) 11 SCC 782*, I would like to give additional reason with respect to invalidity of the argument that allotment could not be cancelled on account of non-issuance of show cause notice, inasmuch as, the object of hearing is to decide the issue after hearing a person against whom there is an issue and it is seen that the present suit has been tried to the hilt after completion of the pleadings and leading of evidence i.e effectively now the principles of natural justice stand duly complied with and which show that the appellant/plaintiff is miserably at fault in failing to have paid the balance sale consideration of Rs.5,30,500/- and hence the allotment was rightly cancelled. In fact, with respect to second allotment of the subject flat to the appellant/plaintiff, the appellant/plaintiff could not even have a grievance of the issue of lump sum payment because the second allotted flat being the subject flat was given on hire purchase basis unlike the earlier allotted flat which was allotted on lump sum payment basis. The appellant/plaintiff in order to avoid making payment however instead, kept on corresponding with the respondent/defendant seeking adjustment of Rs.20,000/-, but he failed to pay the balance amount of Rs.5,30,500/- and which the appellant/plaintiff

ought to have done and then raise an issue only of non-requirement of payment of Rs.20,000/- on account of adjustment of this amount with respect to payment made for the first allotted flat.

10. The first appellate court, in my opinion, has given the completely valid reasoning and conclusions. I have already reproduced the relevant findings and some paras of the judgment of the first appellate court above in this regard. No substantial question of law hence arises. Dismissed.

NOVEMBER 02, 2016
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VALMIKI J. MEHTA, J