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

+ RFA 109/2017 & CM APPL. Nos. 3654-56/2017

RAVI GUPTA

..... Appellants

Through: Mr. Rakesh Kumar with
Mr. Vijay Kumar, Advocates.

versus

DEEPAK KUMAR & ANR.

..... Respondents

Through: None.

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

ORDER

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30.01.2017

1. The appellant/plaintiff is aggrieved by the impugned judgment dated 30.8.2016 passed by the learned trial court dismissing a suit for specific performance of Agreement to Sell and permanent injunction instituted against the respondents/defendants in respect of shop No.6, Ground Floor, Masjid Moth Extension, Phase-I, CSCLSC, DDA Market, Uday Park, New Delhi.

2. It may be noted at the outset that the impugned judgment is a common judgment whereunder, the learned trial court has decided two suits, one instituted by the appellant herein against Deepak Kumar & DDA and the other instituted by one Mr. Brij Pal Bhati against the appellant herein for a decree of possession and permanent injunction in respect of the very same shop (CS No. 588/2015). Both the suits have been dismissed under the impugned judgment.

3. The facts germane for a decision in the present appeal arising out of C.S. No. 149/2015, are that the appellant/plaintiff claims to have purchased the subject shop from the respondent No.1, who was originally allotted the same by the respondent No.2/DDA, on 30.10.2004. The agreed sale consideration in respect of the shop was Rs.13,00,000/-. The appellant claims to have paid a total sum of Rs.10,50,000/- to the respondent No.1 against acknowledgment and states that respondent No.1 had handed over peaceful possession thereof to him alongwith an allotment letter issued in his favour by the respondent No.2/DDA. It was orally agreed between the appellant and the respondent No.1 that the latter will get the shop converted from leasehold to freehold and complete all other formalities required by the respondent No.2/DDA for a formal sale deed to be executed in his favour and at that time, he would pay the balance sale consideration of Rs.2,50,000/- to the respondent No.1. After taking possession of the subject shop from the respondent No.1, the appellant had got the electricity and telephone connection etc. in his name and he continues to occupy the shop till date. It has been pleaded that the appellant kept on contacting the respondent No.1 from time to time to complete the formalities of conversion of the shop to freehold and for execution and registration of the sale deed, but he kept on stalling, thus leaving no option available with him but to institute a suit for specific performance and permanent injunction etc.

4. Per contra, the plea of the respondent No.1/defendant No.1 as taken in the written statement was that the appellant is a land grabber and in conspiracy with his business partners, who are influential persons in the area, he had forced him to sign some written and blank letters so as to grab

the subject shop and ever since then, he has been extending him threats.

5. On merits, the respondent No.1 has pleaded that he is the original allottee of the subject shop that was allotted to him by the respondent No. 2/DDA and at no point of time did he execute any Agreement to Sell in respect thereof in favour of the appellant; that the alleged *bayana* receipt dated 30.4.2004 relied on by the appellant is a result of fraud, force and coercion; that he had not handed over possession of the subject shop to the appellant; that there was no correspondence exchanged between him and the appellant for executing any sale deed in respect of the subject shop.

6. The respondent No.2/DDA had also filed a written statement pleading inter alia that the subject shop was allotted on lease hold basis to the respondent No.1 and Clause -2 of the terms and conditions of the allotment had clearly stated that “*the allottee shall not be entitled to sell, transfer, assign or otherwise part with possession of the shop/stall without prior permission of the lessor in writing*”.

7. The respondent No.2/DDA had further pleaded that the lease deed could have been executed in favour of the respondent No.1 only on receipt of the full consideration. However, respondent No.1 had deposited only 25% of the total amount payable in respect of the subject shop and had failed to deposit the balance 75% in terms of Clause 3 of the terms and conditions of allotment. Clause 3 contemplates that the remaining 75% of the amount was payable by the allottee in 10 half yearly instalments spread over a maximum period of five years together with interest charged @ 18% p.a. alongwith penalties, if any and in case of delay/default in payment of the instalments, the allotment shall stand cancelled.

8. Stating that the respondent No.1 had failed to pay the instalments and the ground rent and consequently, he had no right to occupy the subject shop and nor did he have any assignable interest therein, respondent No.2/DDA contended that there was no question of conversion of the shop and nor did the respondent No.1, or the appellant/plaintiff have any right, title or interest in the shop, premised on a *bayana* receipt.

9. In the instant case, the suit was instituted by the appellant/plaintiff on 16.12.2006. The respondent No.2/DDA had filed its written statement on 05.2.2007. During the pendency of the suit, having woken up to the fact that the subject shop was allotted in favour of the respondent No.1 way back in the year 1983 and he had failed to deposit the balance 75% of the amount payable, DDA served on him a letter dated 11.12.2009, stating *inter alia* that he had failed to deposit a sum of Rs.13,71,391/- that was outstanding against the shop towards rent, interest on ground rent, maintenance charges, interest on maintenance charges, balance monthly instalments (10 Nos.) and penalty for the belated period.

10. Issues were framed in the suit on 28.10.2009. To prove his case, the appellant examined himself as PW-1 and his business partner, Mr. Nirlep Kumar as PW-2. Respondent No.1 examined himself as DW-1. On behalf of the respondent No.2/DDA Mr. C.S. Negi, Assistant Director (CE) was examined as D2W1 and Mr. Khush Dalbir, Dy. Director (CE) as D2W2.

11. After perusing the pleadings, examining the evidence and the documents filed by the parties, the trial court concluded that the respondent No.1 having failed to pay the balance amount in respect of the subject shop to the respondent No.2/DDA within the stipulated timeline, there is a

deemed forfeiture /automatic cancellation in terms of Clause 3 of the terms and conditions of the allotment and therefore, he had no right either to occupy the subject shop or to transfer the same in favour of any other person including the appellant herein without obtaining a written permission of the principal lessor i.e., DDA. As a result, the suit instituted by the appellant/plaintiff was dismissed. Based on the same reasoning, the other suit instituted by Mr.Brij Lal Bhati against the appellant was also dismissed.

12. Learned counsel for the appellant argues that the trial court has failed to appreciate that there was a concluded contract between the appellant and the respondent No.1 and there was no impediment in enforcing the said agreement by directing the respondent No.2/DDA to co-operate in completion of formalities for execution of a sale deed in favour of the appellant. He contends that the trial court has completely overlooked the fact that the original documents executed between the respondent No.1 and respondent No.2 were all along in the possession of the appellant which clearly demonstrates the fact that an Agreement to Sell was executed between the appellant and the respondent No.1 pursuant to which he was placed in possession of the shop.

13. It is next argued that to show his *bonafides*, the appellant/plaintiff had deposited a sum of Rs.1,50,000/- with the respondent No.2/DDA during the pendency of the suit, on 15.12.2009 and that Clauses 2 and 3 of the lease agreement were not mandatory in nature, particularly, when the respondent No.2/DDA had vide letter dated 11.12.2009, informed the respondent No.1 that a sum of Rs.13,71,391/- was outstanding in respect of the subject shop. Once the respondent No.2/DDA had demanded the aforesaid amount from

the respondent No.1, the learned trial court ought to have assumed that DDA did not propose to enforce Clauses 2 and 3 of the lease agreement, in respect of the subject shop.

14. This court has heard the arguments advanced by learned counsel for the appellant, perused the impugned judgment and carefully examined the pleadings in the suit, the documents filed on record and the evidence led by the parties, certified copies whereof have been placed on the file.

15. The undisputed facts of the case are that the respondent No.1 was allotted the subject shop on 12.9.1983 and the respondent No.2/DDA had handed him over the possession thereof on his depositing 25% of the tender amount i.e. a sum of Rs.53,237.75; that the remaining 75% amount which came to a sum of Rs.1,47,833.25, was to be deposited by the respondent No.1, in 10 instalments within a period of five years, i.e., by the end of the year 1988, in accordance with the terms and conditions of the allotment, but he had failed to do so. In all this duration, the respondent No.2/DDA did not initiate any action against the respondent No.1 who remained in possession till the present suit came to be instituted by the appellant in the year 2006 and another suit was instituted by Mr. Brij Pal Bhati. Only upon institution of the present suit was the respondent No.2/DDA shaken out of its stupor and it discovered that the initial allotment file of the present case was missing from its record. The said file was apparently reconstructed on 11.12.2009 and the respondent No.2/DDA served a letter on the respondent No.1 intimating him that a sum of Rs.13,71,391/- was outstanding in respect of the subject shop. Thereafter, a show cause notice was also issued by the respondent No.2/DDA to the respondent No.1 stating *inter alia* that the

outstanding dues of Rs.13,71,391/- had not been deposited and the allotment was finally cancelled vide letter dated 29.6.2012. Pertinently, the aforesaid cancellation order has not been challenged either by the respondent No.1, the original allottee or by the appellant/plaintiff in the present suit. Nor has the same been assailed by anybody else including the parties in CS No. 588/2015.

16. The trial court has recorded in the impugned judgment that when the respondent No.2/DDA had issued a notice to show cause to the respondent No.1, the latter had denied having sold the subject shop to anyone else. Holding that there was no privity of contract between the appellant/plaintiff and the respondent No.2/DDA or between Mr. Brij Pal Bhati, the plaintiff in CS No.588/2015 and the DDA, the learned trial court opined that the question of granting any relief of specific performance in their favour did not arise. Having regard to the terms and conditions of the original lease agreement between the respondent No.2/DDA and the original allottee, which contains a clause that prescribes that the allottee cannot sell, transfer, assign or otherwise part with the possession of the subject shop/stall without obtaining the prior permission of the lessor in writing, the trial court cannot be faulted in observing that the documents allegedly relied upon by the appellant/plaintiff namely an Agreement to Sell, Will, SPA and receipts allegedly executed by the respondent No. 1 in his favour on 30.10.2004, could not create any right, title or interest in the subject shop in his favour.

17. Furthermore, Clause 3 of the original lease agreement had clearly stipulated a deemed forfeiture /automatic cancellation in favour of the original allottee, in the event of violation of the terms and conditions of

allotment, after depositing 25% of the tender amount. Given the aforesaid position, the inevitable conclusion is that the respondent No. 1 was not left with any right, title or interest in the subject shop and consequently, there was no question of his transferring it on a later date to any third person, including the appellant herein.

18. The learned trial court has minutely examined the entire evidence produced by the respondent No.2/DDA, and observing that the deposition of D2W1 had remained unrebutted, it had concluded that the respondent No.1 had no legal right to sell, transfer or part with the possession of the subject shop without obtaining the prior written permission of the lessor in terms of the original lease agreement executed in his favour and the said agreement having been cancelled by the DDA vide order dated 29.6.2012, to which no challenge has been laid, the appellant was not entitled to any relief in the suit.

19. There does not appear any mis-appreciation of evidence, perversity or infirmity in the impugned judgment for interference. This court is not persuaded by the argument sought to be advanced by learned counsel for the appellant/plaintiff that there was a concluded contract between his client and respondent No.1 or that merely because the original allotment letter is in the power and possession of the appellant/plaintiff who is also in possession of the subject shop and he had got an electricity and telephone connection installed therein in his name, he is entitled to a decree of specific performance against the respondents. None of the above factors would make any difference when neither the appellant nor the respondent No.1 have been able to lead cogent evidence to demonstrate that the respondent No.2/DDA

had permitted the respondent No.1, the original allottee, to transfer the subject shop in favour of the appellant. Nor has the appellant been able to prove that the respondent No.1 had paid the entire consideration in respect of the subject shop to the respondent No.2/DDA.

20. On the contrary, the appellant has admitted in his cross examination that as per the terms and conditions stipulated in the lease agreement, he could not have purchased the subject shop from the respondent No.1 without obtaining prior written permission of the respondent No.2/DDA and that he had not seen any written permission obtained by the respondent No.1 from the respondent No.2/DDA in respect of the subject shop. The appellant had also admitted to the fact that the respondent No.1 had not paid the entire amount due to the respondent No.2/DDA in respect of the subject shop except for the amount mentioned in five receipts collectively exhibited as Ex.PW1/7.

21. It is not out of place to mention here that it was for the first time that the appellant had stated in his deposition that he had on his own deposited a sum of Rs.1,50,000/- with the respondent No.2/DDA during the pendency of the suit, but he admitted that he did not mention the said fact either in the legal notice issued by him to the respondent No.2/DDA or in the averments made in the plaint or for that matter, in his affidavit by way of evidence. It has been brought out in his cross examination that the appellant had deposited the aforesaid amount after the institution of the suit and before filing the affidavit by way of evidence. He also admitted that the respondent No.2/DDA had not raised any demand on him in respect of the subject shop and he had on his own proceeded to deposit a sum of Rs.1,50,000/- with the

DDA to save payment of interest on the principal amount due in respect of the subject shop. Therefore, any amount deposited by the appellant unilaterally with the respondent No.2/DDA, would not foreclose the right of the respondent No.2/DDA to pass a cancellation order in respect of the allotment. Nor can it be assumed that the respondent No.2/DDA did not have the intention of enforcing Clauses 2 and 3 of the lease agreement.

22. It is ironical to note that only after the appellant/plaintiff instituted the present suit in the year 2006, where DDA was impleaded as respondent No.2, did the DDA wake up to the fact that the respondent No.1 had miserably failed to deposit the entire amount due and payable towards the perpetual leasehold right in respect of the shop allotted in his favour as long back as in the year 1983. It transpires from the record that the respondent No.1 continued to enjoy the subject shop situated in a prime locality in South Delhi for over 30 years on payment of a meagre 25% of the total amount which comes to paltry sum of Rs.53,237.75 and in all this duration, the respondent No.2/DDA failed to initiate any action against him for determining the lease and re-entering the shop. Instead, on enquiring, the trial court was informed that the original file was not traceable in the Department and had got lost. It was after much prodding and pushing by the learned trial court that the file was reconstructed by the respondent No.2/DDA and the matter was referred to the Vigilance Department for fixing responsibility for the loss of the file.

23. Driven by court orders, the respondent No.2/DDA finally issued a notice to show cause to the respondent No.1 calling upon him to explain why the allotment of the subject shop should not be cancelled due to failure

to pay the outstanding dues, which as on 30.9.2009, had mounted to a sum of Rs.13,71,391/-. The said show cause notice was followed by the cancellation order dated 29.6.2012 (Ex. D2W1/16) issued by the respondent No.2/DDA cancelling the allotment of the subject shop in favour of the respondent No.1.

24. In view of the aforesaid discussion, this court is of the opinion that there is no illegality, arbitrariness or mis-appreciation of facts or the evidence by the learned trial court. The present appeal is accordingly dismissed in *limini*, as meritless.

25. Before parting with the matter, this court has enquired from learned counsel for the appellant/plaintiff as to whether the cancellation order issued by the DDA has been challenged by his client or by the respondent No.1, to which the reply is in the negative. Interestingly, the appellant continues to remain in occupation of the subject shop, leaving this court wondering as to whether the respondent No.2/DDA has gone back into a deep slumber instead of taking immediate and urgent steps in law, to re-enter the subject shop, on determination of the lease in favour of the respondent No.1 on 29.6.2012.

A copy of this order shall be forwarded by the Registry forthwith to the Vice Chairman, DDA for perusal.

HIMA KOHLI, J

JANUARY 30, 2017

ap/mk