

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

% **Date of decision: 12th October, 2018.**

+ **RSA 44/2017 & CM No.42663/2018 (for recalling of order dated 10th September, 2018)**

RAJESHWAR KUMAR **..... Appellant**

Through: Mr. Sanjay Agnihotri and Vikram Singh Yadav, Advs.

Versus

JAINA PROPERTIES (P) LTD **..... Respondent**

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree [dated 26th September, 2016 in RCA DJ/60759/2016 of the Court of Additional District Judge-09 (West)] of dismissal of First Appeal under Section 96 of the CPC preferred by the appellant against the judgment and decree [dated 5th February, 2015 in Suit No.153/2013 of the Court of Civil Judge-04 (Central)] of dismissal of suit filed by the appellant/plaintiff for specific performance of the contract dated 22nd February, 1986 and to hand over shop bearing No.G-29, Ground Floor, measuring 60 sq. ft. situated at Rajendra Mahaveera Tower-II, 32-33, Community Center, A-Block, Pashchim Vihar, Delhi to the appellant/plaintiff and in the alternative for refund of Rs.54,200/- paid by the appellant/plaintiff to the respondent/defendant along with interest @ 18% per annum.

2. This appeal came up first before this Court on 6th February, 2017, when on request of the counsel for the appellant/plaintiff, it was renotified for 17th April, 2017. On 17th April, 2017, an adjournment was sought by the counsel for the appellant/plaintiff, and the appeal was listed on 17th July, 2017. Vide order dated 17th July, 2017, notice of the appeal was ordered to be issued, without recording any satisfaction that the appeal entailed any substantial question of law and without framing any substantial question of law and CM No.24801/2017 filed by the appellant/plaintiff for amendment of the memorandum of appeal was allowed. On 5th April, 2018, adjournment was sought by the counsel for the appellant/plaintiff, though the counsel for the respondent/defendant stated that he was ready for arguments. In these circumstances, on 10th September, 2018, when counsel for the appellant/plaintiff did not appear and some other counsel appeared and who refused to argue, that the appeal was dismissed for non-prosecution.

3. CM No.42663/2018 has been filed by the appellant/plaintiff for recall of the order dated 10th September, 2018 and for restoration of the appeal to its original position and the counsel for the appellant/plaintiff has been heard thereon.

4. Though the reasons given by the counsel for the appellant/plaintiff for non-appearance on 10th September, 2018 do not disclose any sufficient cause for restoration of the appeal and are not in consonance with what had happened on 10th September, 2018, as has been recorded in the order of the said date, but so as not to deprive the appellant/plaintiff, if has a genuine case, of an opportunity of being heard, the counsel for the appellant/plaintiff

has been asked to satisfy this Court that the appeal does entail a substantial question of law and restoration thereof will serve any purpose.

5. The counsel for the appellant/plaintiff has been heard and the copies of the Trial Court record annexed to the memorandum of appeal perused.

6. Both the Courts i.e. the Suit Court and the First Appellate Court have held the suit, for the reliefs claimed, to be barred by time. The counsel for the appellant/plaintiff has also addressed on the said aspect only, though the Suit Court and the First Appellate Court have also decided other issues framed in the suit against the appellant/plaintiff.

7. As far as the aspect of limitation is concerned, the admitted position is that the appellant/plaintiff, on 22nd February, 1986 made an application to the respondent/defendant for “Registration of Licence of Shops/Offices and Basement Space in “Jaina’s” Commercial Complex, Paschim Vihar, New Delhi” and was allotted shop No.G-29 having super area of 60 sq. ft. on the ground floor of the said commercial complex. It was a term of the said application that super area includes the covered area, proportionate share of area under common spaces i.e. staircase, lifts, common toilets, corridors, louvers, balconies, varandaha, walls etc. and the recessed space below window sill etc. Though the said application form did not mention the time frame for completion of the transaction but a perusal of the “Schedule of Payment-Instalments” in the said application form shows the payment of purchase consideration to be construction linked with the last 5% of the purchase consideration and the remaining allied charges being payable at the time of offer of possession. Therefrom it transpires that the date fixed of

performance was the date when the respondent/defendant offers possession of the shop agreed to be sold.

8. The appellant/plaintiff, in the plaint in the suit from which this appeal arises, pleaded that the appellant/plaintiff paid a total amount of Rs.54,270/- against the total consideration of Rs.54,000/-, as per Schedule of Payment-Instalments agreed. Paras 5, 6, 7, 9 to 12 and 16 of the plaint are as under:

- “5. That on 10.08.91 the plaintiff was informed by the defendant vide its letter no.- jp/101/461/71/91G-29/32-33/pg that the Plaintiff was only allotted 51 Sqr. Ft. area which cost was 45,900/-. But despite this breach of commitment as mentioned, when the Plaintiff came forwarded to take the possession of the shop he found that the area of the shop was only 29. S.q. feet and when the Defendant raised objection in this respect the defendant made a false pretext that at present 51 Sqr. Feet shop is not available with it and advise the plaintiff to wait some more time.*
- 6. That instead of refunding the extra amount charged by the defendant and handing over the possession of the shop the defendant started harassing the Plaintiff by various means. That the defendant wrote various letters to the defendant thereby demanding his access amount which was charged by the defendant and also requesting it to handover the possession of the shop but despite various request and reminders the defendant had failed to refund the excess amount as well as handing over the possession of the suit property.*
- 7. That the Plaintiff had already made the whole payment of the suit premises to the defendant and as such the plaintiff become legally entitled for the possession of the suit*

premises. But despite these fact the defendant could not handed over the possession of the property in question to the Plaintiff. As an when Plaintiff asked defendant to handover the possession the defendant made the false pretext every time in view to grab the hard earn money of the Plaintiff.

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- 9. That in view to cheat the Plaintiff the defendant had also filed a false and fabricated suit bearing no.208 of 05 for permanent injunction against the Plaintiff before the Hon'ble Court of Shri R.K. Goel Civil Judge, Delhi, making therein totally false and frivolous averments. The said suit is one of the attempts to harass the Plaintiff.*
- 10. That in the said suit the defendant had alleged that it had already cancelled the allotment of the Plaintiff on non-payment of the alleged balance towards the Plaintiff and the defendant has sent the information of cancellation of allotment to the Plaintiff. The said alleged contention of the defendant is totally untenable as the Plaintiff had already made the excess payment to the defendant and nor any point of time his allotment was cancelled. The said suit of the defendant was also based upon false and fabricated documents. That the Plaintiff had appeared in the said suit and filed his written statement stating all the facts and circumstances for which the Plaintiff is suffering and raise various objections. However in view to show his bonafide the plaintiff made the statement without prejudice to his rights and contentions made by him in his written statement before the Hon'ble Court that he may be allowed to adopt the legal way to receive the physical possession of the suit property. That being satisfied from the statement of the Plaintiff the Hon'ble*

Court of Shri R.K. Goel Civil Judge Delhi disposed off the suit on 09.08.05.

- 11. That in the said suit the Plaintiff herein came to the knowledge of the purported cancellation letter allegedly written by the Defendant herein, wherein the allotment of the said shop had been illegally and malafidely cancelled by them.*
- 12. That it is submitted that the Plaintiff has never been served with the alleged cancellation letter and came to know about the same from the averments of the Defendant made by it in the said suit.*

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- 16. That the cause of action of filing the present suit accrues in favour of the plaintiff when the Plaintiff had booked the property in question vide agreement dated 22.02.86 it further arose time to time when the plaintiff had made the payment in respect of the suit property as per the Schedule agreed between both the parties. The cause of action again arose on various dates when the Plaintiff wrote to the Defendant for the possession of the shop. The cause of action again arose when the summons of the suit no. 208 of 05 filed by the Defendant were served upon the Plaintiff and the Plaintiff for the first time came to know about the alleged cancellation letter dated 29.04.1991. The cause of action again arose on 02.04.2005 when the notice was served upon the defendant and despite the service the defendant failed to perform its part of contract. The cause of action is still continuing.”*

9. The counsel for the appellant/plaintiff does not controvert that the limitation for a suit for specific performance is provided for in Article 54 of the Schedule to the Limitation Act, 1963 which provides period of limitation of three years commencing from the date fixed for performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused. The Suit Court as well as the First Appellate Court have held the suit, instituted on 10th November, 2005, to be palpably barred by time.

10. I have enquired from the counsel for the appellant/plaintiff, whether not from an admission of the appellant/plaintiff in the plaint, of the appellant/plaintiff having been offered possession on 10th August, 1991, it is evident that the date for performance agreed upon and fixed by the parties was 10th August, 1991.

11. The counsel for the appellant/plaintiff though does not controvert but has drawn attention to the last few lines of para 5 of the plaint reproduced above, where the appellant/plaintiff has pleaded that the respondent/defendant “made a false pretext that at present 51 sq. ft shop is not available with it and advise the plaintiff to wait some more time”.

12. Though initially the counsel for the appellant/plaintiff contended that this fact is not disputed by the respondent/defendant but a perusal of the written statement of the respondent/defendant shows the respondent/defendant to have denied that any such advise was given. Rather, the respondent/defendant is found to have pleaded (i) that the appellant/plaintiff was irregular in making the payments and numerous letters were issued to the appellant/plaintiff in this regard and eventually vide notice dated 29th April, 1991, the allotment was cancelled; (ii) that the

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appellant/plaintiff, after a lapse of 13 years, approached the respondent/defendant on 1st July, 2004 and asked the respondent/defendant for possession; (iii) that the appellant/plaintiff was informed that the allotment made in favour of the appellant/plaintiff had already been cancelled; (iv) that the appellant/plaintiff threatened to take forcible possession; (v) that the appellant/plaintiff came to the suit property on 16th April, 2005 and tried to forcibly enter and owing where to, the suit for permanent injunction was filed by the respondent/defendant against the appellant/plaintiff; and, (vi) that it had offered possession to the appellant/plaintiff on 10th August, 1991, without prejudice to the earlier cancellation affected and that the said offer was in terms of the letter of allotment of the booking of the area being of super area and not carpet area as was being insisted by the appellant/plaintiff.

13. The counsel for the appellant/plaintiff also, on enquiry admits that there is not a single letter or communication from the respondent/defendant to the appellant/plaintiff asking the appellant/plaintiff to wait. The counsel for the appellant/plaintiff also states that that between 10th August, 1991 and 10th November, 2005, only two letters were sent by the appellant/plaintiff to the respondent/defendant, one on 1st July, 2004 and the other on 2nd April, 2005.

14. It is thus clear, that from 10th August, 1991 till 1st July, 2004, the appellant/plaintiff was quiet and did not take any step to recover possession.

15. As per the aforesaid admissions of the appellant/plaintiff, the suit should have been filed within three years of 10th August, 1991 and was filed after more than eleven years therefrom. I fail to see, as to what substantial

question of law qua the aspect of limitation, being one of the grounds on which the suit, from which this Regular Second Appeal arises, has been dismissed, can arise.

16. The appeal does not raise any substantial question of law.

17. The judicial conscience is thus satisfied, that by not recalling the order of dismissal for non-prosecution, no injustice is being caused to the appellant/plaintiff.

18. Dismissed.

OCTOBER 12, 2018

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RAJIV SAHAI ENDLAW, J.



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