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

Reserved on : 02nd February, 2018
Date of decision : 13th February 2018

+ **RFA 532/2017 & CM APPL.19965/2017 (Stay)**

PRAKASH MALHOTRA Appellant

Through: Mr. S.C. Singhal, Advocate.

versus

JITENDER MALHOTRA & ANR Respondents

Through: Mr. C.M. Sharma, Advocate.

CORAM:
JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The Appellant/Plaintiff (*hereinafter 'Plaintiff'*) filed a suit for specific performance, possession and permanent injunction in respect of property bearing Shop No. 35, Edward Lines, Kingsway Camp, Delhi-110009 measuring 23.8 sq. yds. The property consisted of a built up portion of ground, first and second floor. Agreement to sell dated 23rd September, 2006 (*Ex.P-1*) was entered into between the Plaintiff and the Respondents/Defendants (*hereinafter 'Defendants'*) for a consideration of Rs.60,00,000/- (Rupees Sixty Lakhs Only). At the time of signing of the agreement, a sum of Rs.8,00,000/- (Rupees Eight Lakhs Only) was paid. The relevant clauses in the agreement are:

"NOW THIS DEED WITNESSETH AS UNDER: -

(1) That the total sale price agreed for the above said entire shop is Rs.60,00,000/- (Rupees Sixty Lacs

Only) with all fittings and fixtures.

(2) That the First Party has received a sum of Rs. 8,00,000/- (Rupees Eight Lacs Only) from the Second Party as earnest money out of the agreed sale price. The First Party has executed a separate receipt for the said amount in favour of the Second Party, the receipt of which is hereby acknowledged.

(3) That the First Party has assured and undertaken to get the mutation sanctioned in their names and thereafter shall obtain Sale Permission from the Lessor. However all the expenses for getting mutation sanctioned and obtaining sale permission shall be borne by the Second Party.

(4) That the remaining sale price shall be paid within 90 days from today subject to the condition that 1st Party obtains sale permission before that date. However if the sale permission is not granted before that time then the Second Party shall pay Rs.49,00,000/- (Rupees Forty Nine Lacs Only) on expiry of 90 days to the 1st Party who upon receipt of the said amount shall deliver vacant possession of the shop to the Second Party with all fittings and fixtures ceiling fans, electricity tubes, sanitary and water fittings etc. etc. and shall execute Agreement to Sell, General Power of Attorney, Special Power of Attorney, Affidavits, Indemnity Bond, Receipt, Will, Arbitration Agreement in favour of the Second party or his nominee(s) and shall get them registered in the office of the Sub-Registrar. The balance sale price of Rs. 3,00,000/- (Rupees Three Lacs Only) shall be kept by the Second Party and shall pay the same at the time of execution and registration of Sale Deed.

5) That the First Party has assured the Second Party that the property under sale is free from all kinds of encumbrances, such as previous sale, gift, mortgage, lien, charges, legal flaws, notices or any kind of disputes etc. and if proved otherwise then the First Party shall be liable to pay damages/losses to the

Second Party which may be incurred/sustained by the Second Party.

6) That all dues towards house-tax, electricity charges and water charges shall be paid by the First Party till the date of delivery of possession and thereafter the same shall be payable by the Second Party.

7) The original documents of property under sale has been placed with M/s. Hitkari Property Dealers for due performance of this agreement and shall remain with them till the finalization of sale transaction.

8) That if the First Party fails to perform their part of the contract they shall pay Rs.16,00,000/- (Rupees Sixteen Lacs only) to the Second Party as damages and refund of the earnest money. The Second Party shall also be entitled to get the sale completed through Court of Law at the costs and expenses of the First Party. If the Second Party fails to perform his part of the contract then the earnest money shall stand forfeited”.

2. The documents executed along with the agreement to sell including a receipt for Rs.8,00,000/- (Rupees Eight Lakhs Only) dated 23rd September, 2006 (**Ex.P-2**). Thereafter another sum of Rs.2,00,000/- (Rupees Two Lakhs Only) was paid by the Plaintiff to the Defendants which is duly acknowledged in receipt dated 3rd November, 2006 (**Ex.PW-3**). The last date for completion of the transaction was 1st June, 2008. Thereafter on 10th April, 2007 when the document was executed between the parties which acknowledged receipt of a sum of Rs.22,00,000/- (Rupees Twenty Two Lakhs) (**part of Ex.PW-4**). A further sum of Rs.2,00,000/- (Rupees Two Lakhs Only) was paid on 14th October, 2007 by the Plaintiff. The receipt dated 10th April 2007 reads as under:

“RECEIPT”

Received Rs. 22,00,000/- (Rupees Twenty Two Lacs Only) as detailed below from Shri Parkash Malhotra son of Shri Krishan Lal Malhotra R/o 348, Bhai Parma Nand Colony, Delhi-110009 as advance/part payment out of sale price of Shop No. 35, Edward Lines, Kingsway Camp, Delhi: -

(i) Rs. 1,00,000/- (Rupees One Lac only) vide Cheque No. 963094 dated 10-04-2007 drawn on UCO Bank, Dr. Mukherjee Nagar, Commercial Complex, Delhi-110009 in the name of Shri Kamal Malhotra (subject to encashment);

(ii) Rs. 1,00,000/- (Rupees One Lac only) vide Cheque No. 963093 dated 10-04-2007 drawn on UCO Bank, Dr. Mukherjee Nagar, Commercial Complex, Delhi-110009 (subject to encashment);

(iii) Rs. 20,00,000/- (Rupees Twenty Lacs Only) in cash.

With the receipt of this amount a sum of Rs. 32,00,000/- (Rupees Thirty Two Lacs only) stands received by us till today out of agreed sale price which is Rs. 60,00,000/- (Rupees Sixty Lacs only). However, another sum of Rs. 2,00,000/- (Rupees Two Lacs only) has been increased added in sale price which now comes to Rs. 62,00,000/- (Rupees Sixty Two Lacs only). The parties have mutually without any fraud, threat, coercion or misrepresentation have agreed to extend the time for finalization of transaction upto 01-06-2008 on which date the Purchaser shall pay Rs. 27,00,000/- (Rupees Twenty Seven Lacs only) to the Sellers out of balance sale price and shall execute Agreement to Sell, General Power of Attorney, Special Power of Attorney, etc. etc. in favour of the Purchaser or his nominee(s) and shall get them registered in the office of the Sub-Registrar, Delhi. The balance sale price of Rs. 3,00,000/- (Rupees Three Lacs Only) shall be paid

at the time of execution and registration of Sale Deed. All other terms and conditions shall apply as stated in the Agreement dated 23-09-2006 which are hereby again confirmed. The Sellers have delivered today vacant possession of First Floor and Second Floor with stair-case and roof to the Purchaser as part performance of the Agreement and the possession of Ground Floor shall be delivered to the Purchaser at the time of execution and registration of Agreement to Sell, General Power of Attorney etc. etc. and at the time of payment of remaining sale price as detailed above. However, the sellers shall have limited right to go to roof for use of toilets till the finalization of transaction. No further extension shall be given under any circumstances to any of the parties to the Deed.

IN WITNESSES WHEREOF, we have signed this Receipt at Delhi on this 10th Day of April, 2007

WITNESSES :-

(1)

(Shri Ramesh Chander Batra)

S/o Shri. Siri Ram Batra

Shop No. 27, Hudson Lines, Kingsway Camp
Delhi-9

(2)

(Shri. Parvesh Kr. Sachdeva)

S/o Late Shri Raja Ram

R/o 442, Indra Vihar,
Delhi-1 10 009

1. Shri Kamal Malhotra
 2. Shri Jatinder Malhotra
- Sons of Shri Balkishan Malhotra

SELLERS

Confirmed

(Shri Parkash Malhotra)
S/o Shri Krishan Lal Malhotra”

3. The last date to finalize the transaction was 1st June, 2008. Since the transaction was not finalized, the Plaintiff gave notice dated 7th July, 2008 (***Ex.P-5***) to the Defendants by which the Plaintiff called upon the Defendants to fulfill the contractual formalities in respect of the suit property. In reply to the said notice, the Defendants took the stand that they no longer intended to sell the suit property. Relevant portion of the reply of the Defendants dated 16th July, 2008 (***Ex.P-6***) is set out below:

“As per the information transpired, the alleged agreement to sell dated 23/9/2006 towards the sale of shop no.35, Edward lines, Kingsway Camp, Delhi-110009 has since been rescinded by our client. The same stands revoked and is of no Consequence. Your client was well intimated in advance that the circumstances have changed and that our clients were not intended to sell the above property to your client any more. Despite the same, your client persuaded our clients to be available at Sub Registrar’s office on 2/6/2008. There also, it was made clear to your client that our clients are no more interested in the sale of the said property. It was very well intimated to your client that he is at liberty to collect the part payment made to our clients, towards the same, on any convenient date and time, with prior information to that aspect.”

4. The present suit came to be filed in 12th May, 2017 Defendants set up a defense that it was the Plaintiff who was guilty of non performance of the

agreement. The Defendants contended that the Plaintiff ought to have obtained the sale permission as per the agreement to sell. They also tried to implicate the broker M/s. Hitkari Property Dealers. In effect, the Defendants contended that the Plaintiff is not entitled to specific performance. The Trial Court framed the following issues:

- “1. Whether the plaintiff is entitled to a decree for specific performance of Agreement to sell of 23rd September, 2006 (as amended on 10th April, 2007) in respect of the suit property? (OPP)*
- 2. Whether the plaintiff is entitled to possession of the suit premises upon succeeding in proving issue no.1? (OPP)*
- 3. Whether the aforesaid Agreement to Sell of 23rd September, 2006 stands rescinded? (OPD)*
- 4. Relief”*

5. The Plaintiff led the evidence of 3 witnesses and the summary of evidence has been fully captured by the Trial Court in paragraph 7 of the impugned order. The Defendants led the evidence of two witnesses.

Judgment of the Trial Court

6. The Trial Court firstly held that all the documents were unregistered and hence were not capable of being enforced. The Trial Court relied upon the provisions of Indian Registration Act and the Transfer of Property Act and held that the documents are inadmissible in evidence. The Trial Court thereafter found that as per the agreement to sell the expenses for getting the mutation were to be paid by the Plaintiff and the remaining sale price was to be paid within 90 days and thereafter if the permission was not granted in 90 days, the Plaintiff ought to have paid Rs.49,00,000/- (Rupees Forty Nine Lakhs Only) for getting the various documents registered with the Sub-

Registrar. The Trial Court thus held that since the mutation was not done and the same was a condition precedent for the transfer of the property in favour of the Plaintiff, specific performance was not liable to be granted. The Trial Court further held that the Plaintiff did not have the necessary resources to pay the balance amount of Rs.49,00,000/- (Rupees Forty Nine Lakhs Only) and hence it was unable to establish its readiness and willingness. Since, in the reply to the legal notice, the Defendants had agreed to return the part payment, compensation would be sufficient. Accordingly, the court granted Rs.34,00,000/- (Rupees Thirty Four Lakhs Only) with interest @ 6% p.a. from the date of filing of the suit till the date of decree and further interest @ 12% p.a. from the date of decree till the date of realization with costs of suit.

7. Mr. S.C. Singhal, counsel for the Appellant submits that the Trial Court has erred in holding that the documents required registration and that the Appellant is not entitled to specific performance. The counsel for the Defendants submits that the Appellant did not perform his part of the contract as he did not pay the expenses for mutation and permission to sell. He further submits that specific performance cannot be granted, as per the agreement to sell, Clause 8 contemplates monetary damages. Mr. S.C. Singhal, Advocate, however, submits that in the reply to notice dated 7th July, 2008, the Respondent merely took a plea that he is no longer interested in selling the property.

Discussion and analysis

8. A perusal of the agreement dated 23rd September, 2006 reveals that there were various terms and conditions imposed upon both the parties. The

initial obligation was on the Defendants to obtain the mutation in their names and also to obtain sale permission. The expenses, however, for the same were to be borne by the Plaintiff. Subject to the sale permission being obtained by the Defendants, the balance sale consideration was to be paid within 90 days from the date of agreement.

9. For any reason if the sale permission was not granted before the 90 days period, then the Plaintiff was to pay the remaining Rs.49,00,000/- (Rupees Forty Nine Lakhs Only) on the expiry of 90 days. On the receipt of Rs.49,00,000/- (Rupees Forty Nine Lakhs Only), vacant possession was to be given to the Plaintiff and registered agreement to sell, General Power of Attorney, Special Power of Attorney and indemnity bond, Receipt, Will, Arbitration agreement were to be executed before the Sub- Registrar.

10. Only a sum of Rs.3,00,000/- (Rupees Three Lakhs Only) was to be kept in abeyance for payment at the time of execution and registration of the sale deed. Clauses 3 and 4 of the agreement read *in toto* clearly place the first obligation upon the Defendants to obtain mutation and sale permission. There is nothing on record to show if the Defendants even tried to get the mutation and sale permission. There is no communication written by the Defendants to the Plaintiff calling upon it to pay the balance consideration and take vacant possession of the shop. The obligations in Clauses 3 and 4 were slightly modified in the receipt dated 10th April, 2007, wherein, instead of the 90 days' period, the date for finalization was extended to 1st June, 2008. The remaining obligations remained intact.

11. The Trial Court was therefore incorrect in holding that the Plaintiff was not ready to perform his part of the contract. The Trial Court has completely erred in holding that the expenses for mutation and sale

permission were not paid by the Plaintiff. There is nothing on the record to show that the Defendants ever demanded the said amounts from the Plaintiff. In so far as registration of documents is concerned, the agreement to sell did not require any registration as DW-2 Shri Kamal Malhotra has categorically averred that no possession was given to the Plaintiff. It is admitted by DW-2 that Clause 3 does not contain an obligation for payment of mutation charges and charges for sale permission in advance. DW-2 in fact relies upon an oral understanding to this effect which is contrary to the Clause. Thus, the Trial Court has erred in holding that the Plaintiff was in breach of the agreement. In fact, from a perusal of the reply to the legal notice record the Defendants had a change of mind and did not want to honour the sales transaction.

12. Counsel the Defendants relies upon the cross examination of Ex.PW-1 which admits that the Plaintiff did not give the expense for getting mutation sanction and obtaining sale permission. The relevant portion of PW-1 cross is set out below:-

“...I did not give any money to the Defendants towards the expenses for getting mutation sanctioned and obtaining sale permission from L & DO...”

The cross examination of PW-1 categorically records that the Plaintiff has paid a sum of Rs.32,00,000/- (Rupees Thirty Two Lakhs only) out of Rs.62,00,000/- (Rupees Sixty Two Lakhs Only). The above cross examination does not help the case of the Defendants inasmuch as in order for the Plaintiff to get mutation sanctioned, there had to be a communication from the Defendants to the Plaintiff that it had failed to obtain the mutation

and sale permission. The Defendants has not set up the case that it had at any point of time told the Plaintiff that it was unable to get the mutation and sale permission and hence the Plaintiff opt to apply for the same.

13. In any event, both the agreement to sell and the receipt executed thereafter had provided for this contingency i.e. non-grant of mutation and sale permission. The Plaintiff was to then pay the remaining amount and get the registration to sell and other documents executed. It is at this stage, after expiry of late date of 1st July, 2008 that the notice was issued by the Plaintiff on 7th July, 2008. In this notice, however, apart from making the statement that the Plaintiff is ready and willing to pay the balance amount, the Plaintiff does not call upon the Defendants to execute the agreement to sell, Will, etc. and seek registration of the same. After the issuance of this notice, in reply the Defendants clearly communicates that he no longer wishes to go ahead with the sale transaction and that the Plaintiff can collect the part payment.

14. The notice dated 7th July, 2008 and the reply thereto appear to convey an impression to the court that the Defendants had completely reneged on their commitments to the Plaintiff. The reply in fact states that the agreement to sell “*has since been rescinded by our client. The same stands revoked and is of no consequence.*” This goes to show that the Defendants never intended to perform their part of the agreement. There is not even a suggestion in the said reply to the effect that the Defendants attempted to obtain mutation and sale permission or that the Plaintiff failed to pay the charges for mutation and sales permission in advance. These submissions of the Defendants appear to be an afterthought.

15. Thus the Trial Court has erred in holding that the Plaintiff is in breach and the Plaintiff was not ready and willing to perform its part of the contract.

16. In so far as registration of documents is concerned, the same did not require registration as the Agreement to Sell was not a document transferring title. This is clear even from a reading of ***Suraj Lamp and Industries Pvt Ltd v State of Haryana and Anr (2012) 1 SCC 656*** where the Supreme Court holds:

“We therefore reiterate that immovable property can be legally and lawfully transferred/conveyed only by a registered deed of conveyance. Transactions of the nature of “GPA sales” or “SA/GPA/will transfers” do not convey title and do not amount to transfer, nor can they be recognised or vaild mode of transfer of immovable property...”

The Trial Court is therefore incorrect in holding that the agreement to sell required registration.

17. The Plaintiff has therefore made out a case for relief to be granted in its favour. The question that now arises is as to whether the Plaintiff is entitled to specific performance or to compensation. In the plaint, the Plaintiff has sought the following reliefs:-

“1. That a decree of specific performance of the Agreement dated 23.09.2006, which was subsequently amended on 10.04.2007, be passed in favour of the Plaintiff and against the defendants in respect of the Shop in the property bearing No. 35, Edward Lines, Kingsway Camp, Delhi-110 009.

2. That a decree of Possession in respect of the ground first and second floors or the property in suit, out of which the possession of first and second floor was delivered to the plaintiff in part

performance of the agreement on receipt of the amount of Rs. 8 lakhs, be passed in favour of the plaintiff and against the defendants, and they be directed to execute and register the necessary transfer documents in favour of the plaintiff. The defendants be given reasonable time for this purpose, failing which an official of this Hon'ble Court be appointed to execute the necessary sale deed and to deliver the vacant and physical possession of the suit property to the plaintiff

1. That a decree for permanent prohibitory injunction be passed in favour of the plaintiff and against the defendants thereby restraining the defendants, their family members, servants, associates etc. to forcibly dispossess the plaintiff from the suit property otherwise than following the due process of law, in respect of the first and second floors of the property bearing No.35, Edward Lines, Kingsway Camp, Delhi-1 10 009.

2. The costs of the present suit be also directed to be awarded in favour of the plaintiff and against the Defendants.

3. Any other or further order which this Hon'ble Court may deem fit and proper in view of the facts and circumstances of the case may also be passed in favour of the plaintiff and against the Defendants.”

The Plaintiff has sought for specific performance as well as permanent prohibitory injunction and has not prayed for refund of the sum paid or for the compensation. However, specific performance is a higher relief & the agreement being of 2006, it would be inequitable to award a decree of

specific performance. The agreement dated 23rd September, 2006 itself contains a Clause to the following effect.

“8) That if the First Party fails to perform their part of the contract they shall pay Rs.16,00,000/- (Rupees Sixteen Lacs only) to the Second Party as damages and refund of the earnest money. The Second Party shall also be entitled to get the sale completed through Court of Law at the costs and expenses of the First Party. If the Second Party fails to perform his part of the contract then the earnest money shall stand forfeited”.

From this clause, it is clear that in lieu of specific performance, parties agreed that damages and refund would adequately compensate the Plaintiff. The above clause shows that at the time when Rs.8,00,000/- (Rupee Eight Lakhs Only) had been paid by the Plaintiff, the Defendants agreed to pay Rs.16,00,000/- (Rupees Sixteen Lakhs Only) as damages and refund i.e. double the amount of earnest money. Thus, parties themselves have determined the benchmark for the compensation that can be awarded in lieu of the specific performance in this case.

18. In the overall fact and circumstances of the present case and keeping in mind that considerable time has elapsed since the execution of the agreement to sell, the Appellant/Plaintiff is granted Rs.25,00,000/- (Rupees Twenty Five Lakhs Only) as compensation /damages in lieu of relief of the specific performance. The amount of Rs.34,00,000/- (Rupees Thirty Four Lakhs Only) which was deposited in this court vide order dated 25th August 2010 along with all interest that has accrued thereon shall be released to the Plaintiff within a week. The payment of the further sum of Rs.25,00,000/-

the (Rupees Twenty Five Lakhs Only) shall be made by the Defendants to the Plaintiff within a period of two weeks.

19. Upon the said payments being made to the Plaintiff, the agreement to sell and all other documents shall stand discharged. Till the payment of Rs. 25,00,000/- is made, there shall be an injunction restraining the Defendants from transferring, alienating or parting with possession of the suit property. Upon payment being made, the injunction shall be automatically discharged. No further amounts would be payable to the Plaintiff by the Defendants. The impugned judgement and decree is modified accordingly.

20. Accordingly, the appeal and all pending applications are disposed of in the above terms.

PRATHIBA M. SINGH, J.
Judge

FEBRUARY 13, 2018/R