

**(2011) 04 DEL CK 0104**

**In the Delhi High Court**

**Case No :** Regular First Appeal No. 197 of 2011

Shamsher Singh

APPELLANT

Vs

Anshu Mangla

RESPONDENT

**Date of Decision :** 04-04-2011

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 6, Order 21 Rule 32, Order 7 Rule 11, 2(2), 96

**Citation :** (2011) 182 DLT 137

**Hon'ble Judges :** Valmiki J Mehta, J

**Bench :** Single Bench

**Advocate :** S.P. Mehta, for the Appellant; None, for the Respondent

## **Judgement**

Valmiki J Mehta, J.—The challenge by means of this Regular First Appeal u/s 96 of the Code of Civil Procedure, 1908 (CPC) is to the impugned judgment and decree dated 3.1.2011 which has rejected the plaint of the Appellant/Plaintiff as it does not disclose cause of action. In fact, in my opinion, the impugned judgment and decree is really one under Order 12 Rule 6 CPC inasmuch as it decides the suit on merits on the admitted factual position. As per Order 12 Rule 6 CPC a decree is passed and decree includes dismissal of a suit vide Section 2(2) CPC.

2. The facts of the case are that the Appellant was allotted the property bearing No. 34 (measuring 100 Sq. mtrs.), Sector-3, Pocket-M at Bawana, Delhi by the Delhi State Industrial Development Corporation Ltd. (DSIDC). Rights in this property were transferred on 23.7.2004 by the Appellant by means of the usual documents of Agreement to sell, Will and a General Power of Attorney-the General Power of Attorney & Will being registered with the sub-Registrar. The Appellant received the entire consideration with respect to transfer of the rights in the property and it is not the case of the Appellant in the plaint that these documents were illegally got executed from him either by force or coercion or misrepresentation etc. The only case of the Appellant/Plaintiff in the plaint was

that subsequently when the perpetual lease deed of the property was executed in favour of the Appellant/Plaintiff by the DSIDC, it transpired that the Appellant was not entitled to transfer the property and therefore the suit was filed seeking cancellation of documents. By the impugned judgment and decree, the suit has been dismissed holding that there is no cause of action.

3. Learned Counsel for the Appellant relied upon the following Clause 5(a) found in the perpetual lease deed to canvass that the suit could be filed and that the documentation dated 23.7.2004 were illegal:

5(a) The Lessee shall not sell, transfer, assign or otherwise part with the possession of the whole or any part of the industrial plot except with the previous consent in writing of the Lesson which he shall be entitled to refuse in his absolute discretion.

PROVIDED that such consent shall not be given for a period of ten years from the commencement of this lease unless, in the opinion of the Lesson exceptional circumstances exist for the grant of such consent.

PROVIDED FURTHER, that in the event of the consent being given, the Lesson may impose such terms and conditions as he thinks fit and the Lesson shall be entitled to claim and recover a portion of the unearned increase in the value (i.e. the difference between the PREMIUM Paid and the market value) of the industrial plot at the time of sale, transfer, assignment, or parting with the possession, the amount to be recovered being fifty per cent of the unearned increase and the decision of the Lesson in respect of the market value shall be final and binding.

PROVIDED FURTHER that the Lesson shall have the pre-emptive right to purchase the property after deducting fifty percent of the unearned increase as aforesaid.

It is argued that the Appellant therefore could not have entered into the documentation dated 23.4.2004 by which the rights in the property were transferred to the Respondent.

4. There are two reasons to reject the argument as raised by the learned Counsel for the Appellant and which are:

(i). Quite clearly, the suit was male fide and an abuse of process of law because the Appellant after receiving the complete monies for transfer of the property from the Respondent has turned dishonest and seeks cancellation of documents although complete consideration was received and the possession of the property was transferred. As already stated, it is not the case of the Petitioner that the documents are to be faulted on any count pertaining to fraud, coercion, misrepresentation or so on. Thus the Appellant had turned greedy, because of increase in the value of the property, and which led him to file the suit.

(ii). Clause 5(a) of the perpetual lease does not make the transaction in question by which the property was transferred as void. All that the clause provides is that

before transfer of the property permission is required for transfer and the permission which may given may be a conditional permission subject to certain payment. In agreements to Sell where the seller has to take prior permission from an appropriate authority, then, the agreement does not become invalid for that reason, but the seller must take the appropriate permission and failing which, in a suit for specific performance being decreed, the seller is directed to obtain the necessary permission or failing which the Local Commissioner is appointed by the Court under Order 21 Rule 32 CPC to take the appropriate permission. Such a contract cannot be declared as bad or void merely because the prior permission ought to have been taken and which is not taken by the lesson. This issue is no longer resintegra and so held by the Supreme Court in the case of Mrs. Chandnee Widya Vati Madden Vs. Dr. C.L. Katial and Others, in which it is held that such contracts are only contingent contracts and the said contracts have to be performed by obtaining the necessary permission. I may note that the Supreme Court in the case of B.O.I. Finance Ltd. Vs. Custodian and Others, , a decision by a Bench of three Judges, has gone to the extent of saying that if a contract which is illegal is performed then rights would be created thereunder as long as it is not sought to be enforced through a Court of law. Same is the view of the Supreme Court in Canbank Financial Services Ltd. Vs. The Custodian and Others, In the present case, it is not that the Respondent/Defendant/buyer is seeking enforcement of the contract and the documents dated 23.4.2004 and it is in fact the Appellant/Plaintiff who is seeking cancellation of the documents.

5. In view of the above, there are no disputed questions of facts which require summoning of the trial Court record. Impugned judgment and decree is therefore liable to be sustained by dismissing the suit of the Appellant/Plaintiff, though of course, not on the ground that it does not disclose cause of action for the purpose of Order 7 Rule 11 CPC, but because the admitted facts show that no cause of action is made out. I, therefore, hold that the suit of the Appellant/Plaintiff will stand dismissed. Appeal is accordingly disposed of. Parties are left to bear their own costs.

C.M. No. 6898/2011 (stay) in RFA No. 197/2011

Since the main appeal is dismissed, no orders are required to be passed in this application which is disposed of as such.