

(2018) 10 DEL CK 0363

In the Delhi High Court

Case No : Regular Second Appeal No.93 Of 2018 & Cms No.24651, 24652 Of 2018

Sudhir Kumar Nayyar

APPELLANT

Vs

Ansai Housing & Construction Ltd

RESPONDENT

Date of Decision : 11-10-2018

Acts Referred:

Code of Civil Procedure, 1908 — Section 96, 100, Order 43 Rule 1
Specific Relief Act, 1963 — Section 41, 41(h)

Citation : (2018) 10 DEL CK 0363

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree [dated 25th January, 2017 in RCA No.326/2016 of the Court of the Additional Senior Civil Judge (West)] of dismissal of First Appeal under Section 96 of the CPC filed by the appellant against the judgment and decree [dated 12th February, 2014 in Suit No.346/2004 of the Court of Civil Judge-03 (West)] of dismissal of suit filed by the appellant/plaintiff for permanent and mandatory injunction.
2. This appeal along with applications for condonation of 21 days delay in filing the appeal and 330 days delay in re-filing came up first before this Court on 1st June, 2018, when on request of the counsel for the appellant/plaintiff hearing was adjourned to 10th October, 2018.
3. On 10th October, 2018, none appeared for the appellant/plaintiff on first call and the appeal was taken up on second call beyond the court hours and was adjourned to today.

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

5. The question of considering the condonation of long delay after which this appeal has come up before this Court will be considered only if any merit

were to be found in this Regular Second Appeal which can be entertained only on finding the same to be entailing any substantial question of law.

6. The appellant/plaintiff instituted the suit, from which this appeal arises, pleading (i) that the appellant/plaintiff booked a plot bearing No.CC-313,

admeasuring 359 sq. yds. offered by the respondent/defendant in East End, Loni, Ghaziabad, Uttar Pradesh, forming part of Tronica City @ Rs.2300/-

per sq. yds., having basic cost of Rs.8,35,752/- and the respondent/defendant agreed to give a discount of 3% to the appellant/plaintiff; (ii) that the

appellant/plaintiff was lured into making the aforesaid booking by the brochure published by the respondent/defendant; (iii) that the appellant/plaintiff,

as on 11th March, 2008, had paid a sum of Rs.5,12,570/- towards consideration of the plot, out of total sale consideration of Rs.7,93,964.40 paise; (iv)

that when the appellant/plaintiff visited the site for the first time in June, 2000, he found that the plot was surrounded by a fully functional Shamshan

Ghat and Kabristan; (v) that the protests made by the appellant/plaintiff to the respondent/defendant did not yield any result and the appellant/plaintiff

was asked to continue making payments of instalments; (vi) that in the circumstances, the appellant/plaintiff stopped making payment of balance

instalments towards sale consideration to the respondent/defendant and asked the respondent/defendant to remove the Shamshan Ghat and Kabristan;

(vii) that the appellant/plaintiff, on making further enquiries also learnt that the respondent/defendant had also deviated from the terms and conditions

imposed by Uttar Pradesh State Industrial Development Corporation (UPSIDC) and found that there was a high tension electricity wire passing above

the said plot and the green area in front of the main gate towards Delhi Saharanpur Road had also been reduced; (viii) that the respondent/defendant

had also not carried out the development of the colony as had promised in the brochure; (ix) that the appellant/plaintiff wrote letters dated 13th March,

2002 and 17th April, 2002 calling upon the respondent/defendant to remove the Shamshan Ghat and Kabristan and to fulfil all the promises made at the

time the appellant/plaintiff had made the booking; (x) that the respondent/defendant, vide its letter dated 15th June, 2004, made a demand of the

balance sale consideration and also threatened that non-payment would attract interest @ 24% per annum on the balance instalment; (xi) that the

appellant/plaintiff also learnt that the respondent/defendant was in litigation in the Courts at Ghaziabad with one Abdul Rashid with respect to the

Shamshan Ghat and Kabristan surrounding the colony; (xii) that the respondent/defendant continued to make demands on the appellant/plaintiff; (xiii)

that the appellant/plaintiff also observed that name of the appellant/plaintiff, in the letters being sent by the respondent/defendant, was "Tinky

Nayyar" instead of "Sudhir Kumar Nayyar" and that the respondent/defendant had also changed plot number from CC-313 to C/B 313; and,

(xiv) that the respondent/defendant, vide its letter dated 19th July, 2004 asked the appellant/plaintiff to deposit the outstanding dues of Rs.3,55,492/-

latest by 3rd August, 2004 along with interest and on non-payment thereof by the appellant/plaintiff threatened cancellation of the booking and

forfeiture of 20% of the basic cost.

7. On the aforesaid pleas, the reliefs of (a) permanent injunction restraining the respondent/defendant from cancelling the plot and forfeiture of 20% of

the basic costs and from making any further demands on the appellant/plaintiff; and, (b) mandatory injunction directing the respondent/defendant to

issue a "No Objection Certificate" in favour of the appellant/plaintiff with respect to the aforesaid plot and to remove the Shamshan Ghat and

Kabristan from the land surrounding the colony as well as the high tension wire running over the said colony, were claimed.

8. The suit as aforesaid, on the date of institution thereof on 29th July, 2004, was doomed and not maintainable in law. The remedy, if any of the

appellant/plaintiff with respect to the pleas contained in the plaint, was either of seeking specific performance of the booking if amounted to an

agreement of sale of immoveable property and/or to seek recovery of monies paid along with damages, if any from the respondent/defendant.

9. The appellant/plaintiff, in the garb of permanent injunction, could not seek the relief of specific performance of agreement of sale of immoveable

property. Section 41(h) of the Specific Relief Act, 1963 provides that an injunction cannot be granted when equally efficacious relief can certainly be

obtained by any other usual mode of proceeding. For the grievances urged in the plaint, the usual mode of proceeding, as aforesaid was of specific

performance and territorial jurisdiction for invoking which remedy, as per the dicta of the Supreme Court in *Harshad Chiman Lal Modi Vs. DLF*

Universal Ltd. (2005) 7 SCC 791 as followed by the Division Bench of this Court in *Vipul Infrastructure Developers Ltd. Vs. Rohit Kochhar* 2008

(102) DRJ 178 (DB) and *Pantaloon Retail India Ltd. Vs. DLF Limited* 2009 (107) DRJ 228 (DB), was of the Court within whose jurisdiction the plot

aforesaid was situated.

10. The appellant/plaintiff, evidently not wanting to go to the Courts at Ghaziabad, adopted the novel remedy of seeking permanent injunction in the

Courts at Delhi but which mischief played by the appellant/plaintiff ought to have been detected by the Courts at the stage of institution of the suit

itself and the plaint ought to have been rejected.

11. I may in this regard also state that, while the appellant/plaintiff, in a suit for specific performance and/or for recovery of money, would have been

required to pay ad valorem court fees, the appellant/plaintiff attempted to get the relief by paying court fees of Rs.13/- only.

12. However, as aforesaid, the suit was entertained and the respondent/defendant filed a written statement. Though in the light of the aforesaid, there

is no need for detailing the defences of the respondent/defendant, but for the sake of completeness, I proceed to do so.

13. The respondent/defendant contested the suit inter alia pleading (a) that the appellant/plaintiff had no privity of contract with the

respondent/defendant; the subject booking was in the name of one â??Tinky Nayyarâ?? and not the appellant/plaintiff; (b) that the

respondent/defendant had no control and authority to remove the Shamshan Ghat and the relief in that regard was misconceived; (c) that the Courts at

Delhi had no jurisdiction over the subject matter of the suit and only the Civil Courts at Ghaziabad had territorial jurisdiction; (d) that the suit for

permanent injunction and mandatory injunction paying court fees of Rs.13/- only was also misconceived; (e) that all the other averments in the plaint

were denied and it was pleaded that in fact the appellant/plaintiff was in breach of the terms and conditions of booking.

14. On the pleading aforesaid of the parties, the following issues were framed in the suit on 20th April, 2005:

â??1. Whether there is no privity of Contract between the plaintiff and the

defendant? OPD

2. Whether this Court has no jurisdiction to try & entertain the present suit? OPD

3. Whether the suit is a bad for non payment of the proper Court Fee? OPD

4. Whether the plaintiff is entitled for relief of permanent injunction, as prayed for? OPP

5. Whether the plaintiff is entitled for the relief of mandatory injunction, as prayed for in the plaint? OPP

6. Relief, if any.â??

15. The Suit Court dismissed the suit, deciding (i) issue No.(1) against the appellant/plaintiff and in favour of the respondent/defendant; (ii) issue No.

(2) & (3) in favour of the appellant/plaintiff and against the respondent/defendant; and, (iii) issue No.(4) & (5) against the appellant/plaintiff and in favour of the respondent/defendant.

16. The First Appellate Court, in the impugned judgment has agreed with the findings of the Suit Court.

17. The counsel for the appellant/plaintiff, on enquiry as to how the remedy of permanent injunction against cancellation was being sought, has argued

that at that stage, there was no cause of action for the relief of specific performance as the respondent/defendant was not refusing to abide by its part of the agreement to sell.

18. I am unable to agree.

19. As the narration aforesaid of the averments in the plaint would show, disputes had arisen between the appellant/plaintiff and the

respondent/defendant and what the appellant/plaintiff was seeking in the garb of permanent injunction restraining cancellation, was the relief of specific performance only.

20. The counsel for the appellant/plaintiff had drawn attention to a copy of the letter dated 5th September, 2003 claimed to have been written by the

appellant/plaintiff to the respondent/defendant and wherein the appellant/plaintiff has signed of as â??Sudhir Kumar Nayyar (Tinky Nayyar)â? and to

the letter dated 19th July, 2004 of the respondent/defendant addressed to Tinky Nayyar informing that the dues against Unit No.C/B-313 in East End,

Loni had not been cleared and finally requesting for the dues to be cleared by 3rd August, 2004 along with interest and threatening cancellation and

forfeiture.

21. The letter dated 19th July, 2004 *supra*, instead of helping the appellant/plaintiff, clearly demonstrates that the cause of action for the relief of

claiming specific performance of the agreement of sale of immoveable property had accrued to the appellant/plaintiff.

22. I have also enquired from the counsel for the appellant/plaintiff, how the respondent/defendant could have removed the Shamshan Ghat and

Kabristan surrounding the colony in which the plot of land was booked by the appellant/plaintiff.

23. The counsel for the appellant/plaintiff answers "by taking initiative" and on further prodding states "by approaching UPSIDC".

24. The counsel for the appellant/plaintiff has raised only two other arguments. Firstly, it is contended that the Suit Court and the First Appellate Court

have decided the issue of territorial jurisdiction in favour of the appellant/plaintiff and secondly it is contended that the appellant/plaintiff has been

declined relief only for the reason of the difference in name; attention is drawn to evidence to show that the respondent/defendant was fully aware

that Sudhir Kumar Nayyar and Tinky Nayyar are one and the same person.

25. I may in this regard state that even in *Harshad Chiman Lal Modi supra*, the territorial jurisdiction was not disputed but still the Supreme Court held

that if the Court lacks inherent territorial jurisdiction, it cannot grant the relief irrespective of whether territorial jurisdiction had been disputed or not.

Similarly, once the law i.e. Section 41 of the Specific Relief Act bars the grant of injunction, the Court cannot grant injunction contrary thereto.

Reference, if any required in this respect can be made to *Cotton Corporation of India Ltd. Vs. United Industrial Bank Limited (1983) 4 SCC 625*.

26. In this view of the matter, it is irrelevant whether the finding of the two Courts below qua privity of contract is erroneous inasmuch as once this

Court finds that ultimately the suit was misconceived and doomed to fail in the bud, no purpose would be served in entertaining this Regular Second

Appeal, except for letting the appellant/plaintiff remain blindfolded for an even longer time as to the mistake committed in instituting the suit.

27. Thus, though for reasons different from that given by the Suit Court and the First Appellate Court, no error is found in the judgments and decrees,

for this Regular Second Appeal to be entertained.

28. Dismissed.

29. The counsel for the appellant/plaintiff, at this stage, states that in fact there is no agreement of sale of immoveable property between the parties

and there was merely a booking.

30. The counsel has been made aware of further harm which will be caused to the appellant/plaintiff by such a statement but on his insistence, the

said statement is recorded.

31. Once, according to the appellant/plaintiff, there is no agreement of sale of immoveable property, it is inconceivable as to on what basis the reliefs

of injunction were claimed.

No costs.