

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

+ **RFA No. 351/2000**

% 21st January, 2011

SHRI H.S.GAMBHIR AND ANR. Appellants
Through: None.
VERSUS

MS. TRIPTA MADAN Respondent
Through: None.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

VALMIKI J. MEHTA, J (ORAL)

1. This case is effective item no. 7 on the 'regular board' and no one appears for the appellant although it is 11.50 am. No one appeared for any of the parties even on 16.11.2009 when in the interest of justice adverse orders were deferred.
2. The challenge of this first appeal under Section 96 of the Code of Civil Procedure, 1908 is the impugned judgment and decree dated 13.5.2000 whereby the suit of the respondent/plaintiff for recovery of the amount paid under an agreement to sell has been decreed.
3. The facts of the case are that an agreement to sell and purchase was entered into between the appellant as seller and the respondent as

buyer with respect to the flat at the first floor of the property bearing no. 323, Rajouri Garden, New Delhi.

4. The receipt cum agreement to sell is dated 10.5.1997 and the appellants received a sum of 3,50,000/- lacs out of total consideration of Rs.34 lacs. The case of the respondent/plaintiff was that the appellants committed a breach of contract in failing to get the necessary permission to sell the property and therefore the suit for recovery was filed. The defence of the appellants/defendant was that they had approached the respondent for further sums of money and that the respondent failed to pay and hence committed breach of contract. It was also contended by the appellant that there was an oral agreement along with the written agreement for the respondent to pay a sum of Rs.7.5 lacs within a period of 15 days of the entering into of the agreement to sell and which amount was not paid.

5. On completion of pleadings the trial court framed the following issues.

“Issues:

1. Is the plaintiff responsible for the breach of contract? OPD.

2. To what relief, if any, is the plaintiff entitled?”

6. While dealing with the issue no.1, the trial court has held that the appellants were guilty of breach of contract because the appellants failed to obtain necessary permissions from the Income Tax authorities for selling of the property. It has also been held that there is no agreement proved of payment of a sum of Rs.7.5 lacs within a period of 15 days of

the date of agreement to sell dated 10.5.1997. I may note at this stage that in fact this plea of an oral agreement would be barred by virtue of Sections 91 and 92 of the Indian Evidence Act, 1872. The trial court has therefore directed the refund of the advance amount paid i.e., Rs.3,50,000/- along with the interest at the rate of 18% per annum pendente lite and 6% per annum from the date of judgment.

7. The relevant discussion of the trial court is contained in paras 4 to 6 of the impugned judgment, and with which I fully agree and the same reads as under:-

“4. Issue No.1

The agreement between the parties is proved as PW1/1. This shows the total consideration as Rs.3,40,000/-. It also shows that a sum of Rs.3,00,000/- was paid at the time of execution of the receipt i.e. on 10.5.97, as earnest money and part payment. Regarding the payment of the balance sale consideration the agreement stipulates the following:-

The balance sale consideration still be paid to me/us by the said purchaser(s) or his/their nominee (s) within a period of 40(Forty) days after the sale permission from the competent authority/Income Tax clearance certificate from the concerned Income Tax Officer, is obtained by me/us. The balance is to paid by the purchaser(s) before Sub-Registrar, concerned Delhi at the time of registration of the deal in the name of the said purchaser(s) or his/their nominee (s). I/We therefore to permission and income tax clearance from the concerned authorities.

5. In the written statement the defendants plead that the plaintiff is responsible for committing a breach of the agreement because the plaintiff did not pay a sum of Rs.7.5 lac within 15 days of 10.5.97 as per oral agreement between the parties and further as she failed despite various requests

and demands to give a draft copy of the proposed sale deed to be but to the Income tax Department for getting the N.O.C. Objection certificate u/s 230A of the Income Tax Act. The onus is on the defendants to prove that the plaintiff committed breach of the agreement. The defendant defendant No.1 appears in the witness box as D.W.1.says that he went to the plaintiff for part payment made no part payment. Further he says that on 19.6.97 the plaintiff informed that she had no arrangement of payment . He further says that he asked the plaintiff to give the proposed sale deed to be submitted with Income Tax Department, but she did not do it. DW2 who is the defendant No.2 in the case does not make any mention of the plaintiff's responsibility to give the draft sale deed. The plaintiff herself appears in the witness box as PW1. No question is put to her regarding the draft sale deed.

6. The agreement between the parties is Ext. PW1/1. All the terms and conditions of the agreement have to be found in Ex.PW1/1. The agreement only says that the balance sale consideration was to be paid within 40 days from the permission to sell and income tax clearance certificate. There is no provision in the agreement requiring the plaintiff to make any further part payment nor is there any requirement for the plaintiff to give the draft sale deed. The evidence does not prove that the plaintiff was required to give the draft sale deed or that the defendant made any such demand. I do not understand why the defendants themselves could not file a sale deed for obtaining clearance. Further, if there was any such requirement on the part of the plaintiff, the defendants could have required the plaintiff to do so by a notice in writing."

8. I do not find any illegality or perversity in the impugned judgment and decree. Not only were the appellants guilty of breach of contract, the appellants are bound to refund the advance monies once the contract falls through. In fact, even if, the contract is terminated on account of the fault of the respondent/plaintiff, still, the appellants are bound to refund the advance monies and which can only be forfeited, if the appellants/plaintiff had proved that they had suffered a loss on account of

the value of the property falling in the meanwhile. There is no discussion in the impugned judgment of the counsel for the appellants having pressed this argument of the value of the property having fallen because apparently no evidence has been led on this aspect. I have also gone through the grounds of appeal and there is no ground urged by the appellant that the appellants suffered loss on account fall in the value of the property. In view of the above, I do not find any error in the impugned judgment and decree. The appeal is therefore dismissed leaving behind the parties to bear their own costs. Trial court record be sent back.

JANUARY 21, 2011
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VALMIKI J. MEHTA, J.