

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

%

Date of decision: 5th September, 2013

+

RFA 542/2007

**MUNNA LAL SAINI (DECEASED)
THROUGH LR'S**

..... Appellant

Through: Mr. Ram Kishan Saini, Adv.

versus

SANJAY GULATI

..... Respondent

Through: None.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. The appeal impugns the judgment and decree dated 30th July, 2007 of the Court of the Addl. District Judge, Delhi in Suit No.206/03/02 filed by the appellant/plaintiff for recovery of possession of shop No.9150 in Gali No.3, Multani Dhanda, Paharganj, New Delhi and in the Counter Claim filed by the respondent/defendant for recovery of Rs.4,76,000/- from the appellant/plaintiff, to the extent the same makes the decree for possession passed in favour of the appellant/plaintiff conditional to the appellant/plaintiff paying a sum of Rs.1,90,000/- to the respondent/defendant.

2. Notice of the appeal was issued and on the application of the

appellant/plaintiff for interim relief the operation of the impugned judgment was stayed. The respondent/defendant failed to appear inspite of service and in the circumstances vide order dated 6th February, 2008 the earlier *ad interim* order was made absolute till the disposal of the appeal. The appellant/plaintiff died during the pendency of the appeal and upon application for substitution of his legal heirs being filed, even though the respondent/defendant had failed to appear, notice of the application was again ordered to be issued to the respondent/defendant. The respondent/defendant inspite of service of the notice of the said application also did not appear; accordingly vide order dated 24th July, 2008 the legal heirs of the deceased appellant/plaintiff were substituted/brought on record and the appeal admitted for hearing. Vide order dated 14th August, 2013 on the application of the appellant/plaintiff for early hearing, the appeal was directed to be listed in the category of 'Regular Matters Senior Citizens'. None has appeared for the respondent/defendant today also. Finding that there is no earlier order, inspite of failure of the respondent/defendant to appear, proceeding *ex parte* against the respondent/defendant, the respondent/defendant is now formally proceeded against *ex parte* in this appeal and the counsel for the appellant/plaintiff has been heard and the

Trial Court record perused.

3. The appellant/plaintiff filed the suit from which this appeal arises pleading:-

- (a). that he had vide Agreement to Sell dated 22nd October, 2001 agreed to sell the aforesaid property to the respondent/defendant for a total sale consideration of Rs.3,90,000/- out of which the respondent/defendant paid Rs.1,25,000/- as earnest money and the balance sale consideration of Rs.2,65,000/- was payable in four instalments ending on 15th March, 2003;
- (b) that in pursuance to the Agreement to Sell, possession of the property was delivered to the respondent/defendant at the time of agreement to sell;
- (c). that the respondent/defendant out of the balance sale consideration of Rs.2,65,000/- paid only Rs.65,000/- and failed to pay the balance sale consideration;
- (d). that the respondent/defendant vide legal notice dated 8th / 11th July, 2002 resiled from the Agreement to Sell alleging that the

appellant/plaintiff had no saleable title to the property and demanded double of the earnest money of Rs.1,25,000/- together with refund of Rs.65,000/- along with interest and amounts allegedly spent on renovation of the property; and,

- (e). the appellant/plaintiff responded denying that he had misrepresented to the respondent/defendant and claimed forfeiture of the amounts paid till then by the respondent/defendant.

Since in pursuance to the Agreement to Sell possession of the property had been delivered by the appellant/plaintiff to the respondent/defendant, the appellant/plaintiff sued for the reliefs of possession and *mesne* profits/damages for use and occupation.

4. The respondent/defendant contested the suit averring:-

- (i). that the appellant/plaintiff had at the time of Agreement to Sell represented himself to be the owner of the property and the property being free from all kinds of defects, disputes etc.;
- (ii). that the respondent/defendant had subsequently learnt that the electricity connection in the property was in the name of one Shri Pyara Singh and on making further enquiries learnt that the

suit property had been allotted in the name of Shri Pyara Singh and there were arrears of lease charges due to the DDA (Slum Wing) of Rs.85,000/-;

(iii). that the property was not even mutated in the name of the appellant/plaintiff; and,

(iv) that the respondent/defendant was thus not interested in acquiring the property and claimed double the amount of earnest money of Rs.1,25,000/-, refund of Rs.65,000/-, Rs.1,25,000/- spent of repairs and renovation of the property together with interest on all the amounts, totalling Rs.4,76,000/-

5. In the aforesaid state of pleadings, the following issues were framed in the suit and the Counter Claim on 9th May, 2003:-

- “1. Whether the suit is bad for non joinder of the parties? OPD*
- 2. Whether the suit has not properly valued? OPD*
- 3. Whether the suit is bad for want of cause of action? OPD*
- 4. Whether the plaintiff had any title/locus standi to enter into Agreement to Sell dated 22.10.2001 and its effect? OPP*
- 5. Whether plaintiff is liable to pay to defendant the amount claimed in the counter claim? OPD*
- 6. Whether the plaintiff is liable to pay interest on*

amount claimed in counter claim, if so at what rate and for what period? OPD

7. *Whether plaintiff is entitled to relief of possession? OPP*
8. *Whether plaintiff is entitled for mesne profit/damages and if so at what rate? OPP*
9. *Relief.”*

6. The learned Addl. District Judge in the impugned judgment has found/observed/held:-

- (A). that the suit was not bad for non-joinder of the parties;
- (B). that the suit had been properly valued for the purposes of Court Fees and jurisdiction;
- (C). that the suit was not without cause of action;
- (D). that though the plaintiff/appellant had a *locus standi* to enter into the Agreement to Sell but no title to the property for the reasons:-

- (i). that the property was originally allotted by the Ministry of Rehabilitation on lease/license basis to Shri Pyara Singh;
- (ii). nothing had been brought on record that Shri Pyara

Singh was not entitled to sell his interest in the property;

(iii). that upon the demise of Shri Pyara Singh the property had changed several hands through the medium of Agreement to Sell, Power of Attorney, Will etc.;

(iii). that the appellant/plaintiff thus was the holder of whatever interest Shri Pyara Singh had in the property and was entitled to further transfer the said interest;

(iv). however since Shri Pyara Singh himself was not the owner, the appellant/plaintiff could not be said to be the owner of the property;

(v). that non-entry of the name of the appellant/plaintiff in the records of the Slum & JJ Deptt. of the DDA did not erase such rights and interest of the appellant/plaintiff in the property;

(vi). that the respondent/defendant though resiling from the agreement, did not want to deliver back possession of the property which had been taken in pursuance to the Agreement to Sell.

(E). that the appellant/plaintiff was not liable to pay to the respondent/defendant the amount claimed in the counter claim because:-

(a). the respondent/defendant was at fault for resiling from the Agreement to Sell;

(b). the respondent/defendant while resiling from the Agreement had not surrendered possession of the premises;

(F). that the appellant/plaintiff was not entitled to any *mesne* profits since he was enjoying interest on the amount of Rs.1,25,000/- and Rs.65,000/- received from the respondent/defendant.

Having given the aforesaid findings, the learned Addl. District Judge though passed a decree for possession in favour of the appellant/plaintiff but made the same conditional to the refund of Rs.1,25,000/- + Rs.65,000/- i.e. Rs.1,90,000/- to the respondent/defendant.

7. The respondent/defendant is informed to have not preferred any application against the dismissal of his Counter Claim.

8. I have at the outset also enquired from the counsel for the

appellant/plaintiff whether the appellant/plaintiff, without prejudice to his rights and contentions has deposited the sum of Rs.1,90,000/- and executed the decree for possession. The answer is in the negative. Though I find it strange but in the absence of respondent/defendant, the same is found to be of no relevance in disposal of the appeal.

9. As per the Agreement to Sell between the parties what was forfeitable was the earnest money of Rs.1,25,000/- only and not the balance sale consideration payable by the respondent/defendant to the appellant/plaintiff in instalments and in payment of first instalment of which the sum of Rs.65,000/- was paid. The appellant/plaintiff did not make claim for any loss suffered on account of breach of Agreement by the respondent/defendant. It has therefore been enquired from the counsel for the appellant/plaintiff as to how the appellant/plaintiff can have grievance with respect to the direction in so far as for refund of Rs.65,000/-.

10. The counsel for the appellant/plaintiff has fairly stated that he is not pressing the appeal as far as the direction for refund of Rs.65,000/- is concerned and the grievance against the judgment is limited to in so far as not permitting forfeiture of the earnest money of Rs.1,25,000/-.

11. As aforesaid analysis of the impugned judgment would show, though

the learned Addl. District Judge has decided issues no.5&6 (supra) in favour of the appellant/plaintiff and against the respondent/defendant and held the respondent/defendant not entitled to recovery of Rs.4,76,000/- and which also included the earnest money of Rs.1,25,000/- and part payment of Rs.65,000/- but has nevertheless in the operative part of the judgment made the decree for recovery of possession dependent upon refund of the said amount. The said error appears to have crept into the judgment for the reason of the learned Addl. District Judge in the discussion under issues no.5&6 having also observed that the contract had been frustrated and upon which frustration the position as prevailing immediately prior to the signing of the Agreement to Sell was to be restored. However I do not find any discussion in the judgment on the aspect of frustration. Rather the judgment holds the respondent/defendant to be at fault in resiling from the Agreement. There is thus no basis in the judgment and decree in so far as directing the appellant/plaintiff to refund the sum of Rs.1,25,000/- to the respondent/defendant.

12. Though the sum of Rs.1,25,000/- in the Agreement to Sell has been described as part consideration/earnest money but the Agreement to Sell contains a clause for forfeiture thereof in the event of the

respondent/defendant purchaser not fulfilling his part of the Agreement. The Supreme Court recently in *Satish Batra Vs. Sudhir Rawal* (2013) 1 SCC 345 has held that such forfeiture of earnest money paid under an Agreement of Sale of immovable property, without proof of loss, is permissible.

13. The appeal therefore partly succeeds. The impugned judgment and decree in so far as makes the decree for possession in favour of the appellant/plaintiff conditional upon refund by the appellant/plaintiff to the respondent/defendant of Rs.1,25,000/- as well as Rs.65,000/- is modified to the extent the same directs refund/payment of Rs.1,25,000/- and it is directed that decree for recovery of possession will be executable by the appellant/plaintiff upon deposit in the Trial Court of the sum of Rs.65,000/- only.

14. The respondent/defendant having not contested the appeal, no order as to costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

SEPTEMBER 05, 2013

pp