

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

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Date of decision: 20th September, 2013

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RFA 16/2013

ELLA GHOSH

..... Appellant

Through: Mr. G.S. Narula & Mr. Ravi Pal,
Adv.

Versus

PRATEEK AGGARWAL

..... Respondent

Through: None.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. The appeal impugns the judgment and decree dated 30.08.2012 of the Court of Additional District Judge-04, South District, Saket Court Complex, New Delhi of dismissal of CS No.625/2010 filed by the appellant / plaintiff for recovery of Rs.11,00,000/- with interest.

2. Notice of the appeal was issued. It was reported that the respondent / defendant was not residing at the address given; liberty was given to the appellant / plaintiff to serve the respondent / defendant at a fresh address. The counsel for the appellant / plaintiff states that a fresh address of the respondent / defendant was so furnished. The order dated 08.08.2013 of the Registrar (Appellate) records that the notice had been

served on the respondent / defendant. None appeared for the respondent / defendant before the Registrar (Appellate) on 08.08.2013. None appears for the respondent / defendant today also.

3. Admit.

4. The counsel for the appellant / plaintiff states that the copies of all the relevant record of the Trial Court have been filed along with the memorandum of appeal. Hence need is not felt to requisition the Trial Court record and the counsel for the appellant / plaintiff has been heard.

5. It was the case of the appellant / plaintiff that the said sum of Rs.11,00,000/- for recovery of which the suit was filed was paid to the respondent / defendant as 'token money' under an Agreement of Sale by the respondent / defendant to the appellant / plaintiff of his flat No.G-31, Tara Apartments, New Delhi-110 019, as evidenced from a document dated 22.10.2008 signed by the appellant / plaintiff and the respondent / defendant and which is as under:

"Dated: 22nd October, 2008

Received from Ms. Ella Ghosh, a sum of Rs.11 Lakhs (Rs.11,00,000/-) through Cheque No.612105 drawn on HDFC Bank, GK-I, New Delhi; as the token money against the sale of

our property: Flat No.G-31, Tara Apartments, New Delhi-110 019.

The total consideration for the said property has been agreed upon at Rs.1.13 Crs. (Rs.1,13,00,000/-). All the outstanding dues till date on the said property will be paid by the Seller. The Seller will arrange for an early expedition of converting the property in to Freehold Property. The Registration Charges regarding the transfer of property will be paid by the Purchaser.

The deal has been matured through Mr. Hemant Kaushik who will be taking 1% of the consideration amount from the Seller.

The Sale Agreement shall be executed before or by 31st of Dec. 2008.

Seller: Mr. Prateek Agarwal

S/o : Mr. Rajendra Agarwal

R/o : B-15 Kailash Colony, New Delhi 110 048

Purchaser : Ms. Ella Ghosh

Manger : Primary health Workshop, PMV''

6. It was further the case of the appellant / plaintiff that the respondent / defendant failed to show the title documents of the property in his favour or obtain conversion of the property into freehold and for which reason, the sale could not materialize. The appellant / plaintiff thus chose to sue for recovery of the amount of Rs.11,00,000/- paid.

7. The respondent / defendant contested the suit by filing a written statement, on the grounds:

- (i) that the appellant / plaintiff was settled in Norway and the Court did not have the jurisdiction over the parties to the Agreement;
- (ii) that the amount of Rs.11,00,000/- was earnest amount forfeitable by the respondent / defendant in case of default on the part of the appellant / plaintiff;
- (iii) that the respondent / defendant had exercised such right of forfeiture as communicated to the appellant / plaintiff vide communication dated 22.01.2009;
- (iv) that in the aforesaid communication, even though the time for transfer had lapsed, the appellant / plaintiff was called upon to come forward to complete the Agreement and which option also was not exercised by the appellant / plaintiff;
- (v) that the appellant / plaintiff having herself chosen not to comply with the terms of the Agreement contained in the

document aforesaid, is not entitled to refund of the earnest amount;

- (vi) that the respondent / defendant was in dire need of money and was looking for a buyer for his flat aforesaid and owing to such urgency had agreed to sell the same to the appellant / plaintiff for Rs.1,13,00,000/- though otherwise the flat was valued at much more;
- (vii) that the appellant / plaintiff had caused huge loss to the respondent / defendant;
- (viii) denying that the amount of Rs.11,00,000/- was paid as token amount;
- (ix) it was pleaded that the amount of Rs.11,00,000/- represented 10% of the total agreed amount and was earnest amount;
- (x) that the appellant / plaintiff had entered into agreement after getting satisfied of the title, possession etc. of the respondent / defendant;

- (xi) that there was no condition precedent on the part of the respondent / defendant like getting it converted into freehold etc.;
- (xii) that the respondent / defendant was always ready to clear all the dues and there were no substantial dues at any relevant time;
- (xiii) that neither the appellant / plaintiff nor her attorney had ever contacted or visited the respondent / defendant to see the original documents;
- (xiv) that the respondent / defendant was always ready and willing to complete the transaction;
- (xv) that the appellant / plaintiff was not ready and willing to perform her part of the agreement; and,
- (xvi) that the filing of the suit by the appellant / plaintiff for recovery of Rs.11,00,000/- also shows that the appellant / plaintiff was not interested in specific performance.

8. On the pleadings of the parties, the following issues were framed in the suit:

1. *Whether the plaintiff is entitled to the decree of recovery as prayed for? OPP*
2. *Whether the present suit is not maintainable? OPD*
3. *Whether the plaintiff has no cause of action to file the present suit? OPD*
4. *Whether the present suit is bad for not paying the requisite court fee? OPD*

9. The appellant / plaintiff, besides examining herself, examined the official from the HDFC bank as witness to prove the statement of her bank account for the period of 01.10.2008 till 31.05.2009 to demonstrate the availability of funds. The respondent / defendant though cross examined the appellant / plaintiff extensively, did not cross examine the witness from HDFC bank despite opportunity. The respondent / defendant also did not lead any evidence of his own.

10. The learned Additional District Judge, vide the impugned judgment has dismissed the suit of the appellant / plaintiff finding / observing / holding:

- (i) that the document aforesaid could not be termed a Agreement to Sell since no terms and conditions were specified as regards the consequences of one or the other party failing to perform his / her part of the agreement and was in the form of a receipt and a statement of what the parties had decided;
- (ii) that as per the aforesaid document all outstanding dues of the property were to be paid by the respondent / defendant / seller who was to also arrange for early conversion of the property into freehold and registration charges were to be paid by the appellant / plaintiff / purchaser;
- (iii) that there was no term or condition of forfeiture of money paid by the appellant / plaintiff on her failure to perform her part of the Agreement;
- (iv) that there was also no term or condition of payment of double the amount in case of failure of the respondent / defendant;

- (v) that the appellant / plaintiff in her e-mail dated 23.12.2008 exhibited as Ex.PW1/2 had called upon the respondent / defendant to show the original documents and inform the status of conversion of the suit property into freehold --- however there appear to be no such obligation on the part of the respondent / defendant;
- (vi) that there was nothing on record to show that at any point of time, the appellant / plaintiff or anyone else on her behalf had taken up the matter for completing the transaction with the respondent / defendant;
- (vii) that the e-mail dated 23.12.2008 also had not been proved as per the requirement of Section 65-B of the Evidence Act;
- (viii) that there was nothing to show that it was the respondent / defendant who had failed to perform his part of the Agreement;
- (ix) that it could not be lost sight of that at the contemporaneous time there was a financial turmoil in the world markets and there was serious correction in the property prices and it

appeared that the appellant / plaintiff lost interest to purchase the suit property and that is why made the freehold conversion and inspection of the title documents a pre-condition for completing the transaction, just to wriggle out of the same; and,

- (x) the Issues No.2 to 4 were decided against the respondent / defendant.

accordingly, the appellant / plaintiff was held not entitled to the refund of Rs.11,00,000/-.

11. The finding of the learned Additional District Judge, of there being no Agreement between the parties for freehold conversion, as would be apparent from a bare reading of the document aforesaid which was not in dispute and which was the sole repository of the agreement between the parties, is contrary to the said document. The same unequivocally provides that the respondent / defendant i.e. “the seller will arrange for an early expedition of converting the property into freehold property’.

12. It was not the plea of the respondent / defendant that he had got the property converted to freehold. Once that is so, the appellant / plaintiff

cannot be held to be in default / breach of the agreement for her monies, even if by way of earnest, to be forfeited.

13. The judgment impugned in this appeal clearly suffers from the malaise of the reasoning therein being contrary to material on record.

14. Strangely, the learned Additional District Judge after noticing that there was no provision in the document aforesaid of forfeiture, has upheld the claim of the respondent / defendant for forfeiture thereof. I have recently in judgment dated 10.07.2013 in CS(OS) No.1100/2005 titled as ***M/s Entrepreneurs Co-operative Group Housing Society Ltd. Vs. M/s Schindler India Pvt. Ltd.*** have had the occasion to deal with the aspect of forfeiture in detail and need is thus not felt to discuss the said aspect in detail. In fact, in a subsequent judgment dated 09.09.2013 in RFA No.149/2009 titled as ***Lalit Kumar Bagla Vs. Karam Chand Thapar & Bros. (CS) Ltd.*** the principles laid down in ***M/s Entrepreneurs Co-operative Group Housing Society Ltd.*** supra were culled out as under:

- i) that even in the absence of a clause for forfeiture there could be forfeiture depending on the nature and character of the payment and the intention of the parties and in determining

which, the designation used by the parties to indicate the nature of the sum that was paid though is relevant but not determinative;

- ii) that there is no distinction in this regard between contracts for sale of goods and contracts for sale of immovable property;
- iii) that it has to be determined, whether the money paid was intended to serve as earnest or security for performance, necessarily implying a liability to forfeit or as a part payment;
- iv) that if it is intended to serve as earnest or security for performance, even in the absence of a clause for forfeiture, it is liable to be forfeited upon breach of the contract by the giver;
- v) however the rule of forfeiture has no application to money received as part payment;

- vi) that the monies given as earnest or security for performance, once paid are and continue to remain the property of the recipient, having been paid as a contract of security which is distinct and separate from real or pure contract and the right to forfeiture arises under a contract of security which can be provided expressly or impliedly;
- vii) however to justify forfeiture, the terms of contract should be clear and explicit;
- viii) where the language used in the contract is neutral, then a payment will generally be interpreted as part payment so that it is, in principle, recoverable;
- ix) where the contract is of a sale and no property in goods has passed to the buyer, the money will generally be recoverable by the purchaser because the right of the vendor to retain the principal payment is conditional upon completion of the contract because when completion does not take place, the condition upon which the vendor retains the money fails

with the result that the money is recoverable by the purchaser; and,

- x) however where the contract is one for work and materials, the pre-payment is less likely to be recoverable because the recipient of money incurs expenditure in the performance of the contract and because the failure of consideration in such case is not total.

15. Applying the aforesaid principles to the facts of the present case:

- (a) that neither in the written document between the parties was there a case for forfeiture nor has the respondent / defendant pleaded or proved anything to show that the nature and character of the payment or the intention of the parties was for the said amount of Rs.11,00,000/- to be forfeitable;
- (b) that the designation used by the parties for the said sum of Rs.11,00,000/- is also not of 'earnest' but of 'token';
- (c) that the respondent / defendant has not pleaded or proved any consideration to show intention that the said sum of

Rs.11,00,000/- was to serve as earnest or security for performance; and,

- (d) that the terms of the contract are not clear and explicit so as to justify forfeiture and in the absence thereof, the payment of Rs.11,00,000/- is to be interpreted as part payment which is refundable as the contract remained uncompleted.

16. Once the nature and character of the payment is not found to be such which could have been forfeited, the appeal has to succeed and the suit decreed.

17. I also do not find any basis in pleadings or evidence for the Ld. ADJ to conjecture / surmise that the appellant / plaintiff lost interest to purchase the flat for the reason of any correction in prices. Rather the plea of respondent / defendant was of having agreed to sell below market price for the reason of urgency and which also he failed to prove. In fact, for this reason the possibility of respondent / defendant suffering any loss does not arise.

18. The appellant / plaintiff had also claimed interest at 12% per annum and a sum of Rs.55,000/- was claimed towards interest for the period prior to the institution of the suit on 13.04.2009. I find the appellant / plaintiff to

have made the first demand for refund only in notice dated 04.02.2009. In the circumstances, it is deemed expedient to award interest to the appellant / plaintiff only from the date of institution of the suit and not for any period prior to the institution of the suit, as has been claimed. I also feel that considering the average rate of interest paid by nationalized banks on the fixed deposits during the relevant time, the claim of the appellant / plaintiff for interest at 12% per annum is not justified; grant of interest from the date of institution of the suit and till realization at the rate of 10% is deemed appropriate.

19. The appeal is therefore allowed. The judgment and decree of the Trial Court is set aside. The suit filed by the appellant / plaintiff against the respondent / defendant is decreed for recovery of Rs.11,00,000/- together with interest at 10% per annum from the date of institution of the suit i.e. 13.04.2009 till the date of payment.

20. The respondent / defendant having not contested the appeal, no costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

SEPTEMBER 20, 2013

‘gsr’..