

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

RESERVED ON : 27th NOVEMBER, 2014

DECIDED ON : 11th DECEMBER, 2014

+ CS (OS) 1980/2011 & CC No.21/2012

SHIV SHAKTI MADAN

..... Plaintiff

Through : Mr.P.V.Kapur, Sr.Advocate with
Mr.V.K.Nagrath, Mr.Abhay Varma
& Mr.Sidhant Kapur, Advocates.

VERSUS

M/S NEW WAYS PROJECTS PVT. LTD.

..... Defendant

Through : None.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. The plaintiff – Shiv Shakti Madan has instituted the instant suit for recovery of ₹ 31,31,085/- along with pendente-lite and future interest @ 15% per annum.

2. Plaintiff's case as reflected in the plaint is that on 29.01.2008, she entered into an 'Agreement to Sell' with defendant regarding purchase of the entire first floor of the property bearing No.51/40, Old Rajinder Nagar, New Delhi-60 for a total consideration of ₹ 75 lacs. ₹ 45,50,000/- were paid to the defendant as part payment in terms of the 'Agreement to

Sell' as detailed in para No.4 of the plaint. Further payment of ₹1,50,000/- was made to the defendant on 02.06.2008. As such, the defendant received a total sum of ₹ 47 lacs from her as advanced payment till 02.06.2008.

3. Further case of the plaintiff is that the defendant violated the terms and conditions of the 'Agreement to Sell' and failed to deliver possession within the stipulated period of six months. After some discussions and negotiations in July, 2009, Mr.Dandona, representing the defendant company, approached her and offered to mutually cancel / terminate the Agreement to Sell dated 29.01.2008. She agreed for the cancellation and the defendant promised to return the advance payment of ₹ 47 lacs along with interest @ 15% per annum effective from 29.01.2008 within two months. A formal Cancellation Agreement dated 20.07.2009 was executed between the parties.

4. Further case of the plaintiff is that pursuant to the Cancellation Agreement dated 20.07.2009, the defendant in all made payment of ₹ 34.5 lacs to her on various dates as per details given in para Nos. 8 & 9 of the plaint. The defendant, however, failed to make the

balance amount of ₹ 12.5 lacs as principal and a sum of ₹ 18,81,085/- as interest. Hence the present suit.

5. The suit was contested by the defendant. In the written statement, the defendant controverted the allegations of the plaintiff. It was contended that there was no stipulation to pay interest pursuant to the execution of Cancellation Agreement to Sell. The plaintiff herself was at fault in complying with the terms and conditions of the Agreement to Sell. She was not having sufficient money to pay. She wanted to purchase a property for a lesser amount and finally another property for a total consideration of ₹ 55 lacs was purchased by her through him. No commission was charged by him from the plaintiff. It was further stated that the entire payment has since made to the plaintiff and nothing was due.

6. In the replication, the plaintiff reiterated her stand in the plaint.

7. The defendant also filed CC No.21/2012 to recover a sum of ₹ 4.7 lacs from the plaintiff. It was pleaded therein that at the request of the plaintiff, the rented accommodation was made available on a monthly rent of ₹ 12,000/- to her by him. The defendant has given details of the

various expenses in para No.10 of the Counter Claim incurred by him from his pocket which were never paid back by the plaintiff.

8. In the written statement to the Counter Claim, the plaintiff denied if any such rented accommodation was made available to her by the defendant or that she was liable to pay any such amount.

9. On the basis of the pleadings of the parties and the documents on record, following issues were framed by an order dated 19.09.2013 :

- “(i) *Whether the Hon’ble High Court has pecuniary jurisdiction to entertain the counter claim in the sum of ₹ 4,70,800/-? OPD*
- (ii) *Whether the counter claim to the extent of ₹ 1,97,500/- is within limitation? OPD*
- (iii) *Whether the defendant is entitled to a decree for a sum of ₹ 4,70,800/- against the plaintiff? OPD*
- (iv) *Whether the defendant is entitled to pendente lite interest @ 12% per annum on the aforesaid amount? OPD*
- (v) *Relief.”*

10. The defendant was directed to lead evidence first in the matter. Record reveals that the defendant failed to adduce any evidence despite various opportunities granted. This Court by an order dated 02.07.2013 observed that due to failure of Mr.Rajiv Kumar Dandona,

Managing Director of the defendant company, to remain present despite specific directions on number of dates, adverse inference would be drawn against him at the appropriate stage. Record further reveals that the defendant did not appear before the Joint Registrar on subsequent dates. Accordingly, by an order dated 01.08.2014, the evidence of the defendant was closed.

11. The plaintiff has filed evidence by way of affidavit which is on record.

12. I have heard the learned counsel for the plaintiff and have examined the record. During the course of arguments, learned counsel for the plaintiff fairly admitted that the plaintiff was entitled to interest @ 15% from the date of Cancellation of the Agreement to Sell and restricted its claim from the said date.

13. The defendant failed to produce any evidence to prove the issues, the burden of which was upon him to prove its claim in the Counter Claim. Adverse inference is to be drawn against the defendant for remaining ex-parte and avoiding to produce any witness in support of his claim. There is no evidence to show if any rented accommodation was made available by the defendant to the plaintiff at her request or any amount as alleged in the Counter Claim was spent by him for or on behalf

of the plaintiff or that she was liable to pay the same to the defendant. Mere pleadings without proof has no meaning. In the absence of any evidence on record, apparently the defendant has failed to prove the issues framed on 19.09.2013.

14. Since there is no evidence on record, Counter Claim filed by the defendant stands dismissed and all the issues are decided in favour of the plaintiff and against the defendant.

15. Admitted position is that Agreement to Sell (Ex.P1) dated 29.01.2008 was executed between the parties. Payment of ₹ 45.5 lacs was made as earnest money and part payment as recorded therein. The plaintiff has stated on oath that subsequently ₹ 1.5 lacs were paid on 02.06.2008 to the defendant; the receipt of which was duly acknowledged by him. There is no denial of this fact. In the written statement, the defendant has admitted receipt of ₹ 47 lacs from the plaintiff.

16. It is also not in dispute that subsequently the terms and conditions of the Agreement to Sell were not complied with and it led to cancellation of the said document. Accordingly, Cancellation of Agreement to Sell (Ex.D1) was executed between the parties on 10.07.2009. There is specific admission of payment of ₹ 47 lacs in all by

the plaintiff to the defendant pursuant to the execution of Agreement to Sell dated 29.01.2008. The defendant agreed to return the entire consideration of ₹ 47 lacs to the plaintiff. ₹ 5 lacs were paid by cheque No.018834 dated 10.07.2009. The defendant further promised to pay the balance amount of ₹ 42 lacs to the plaintiff within next two months.

17. The plaintiff in the plaint has fairly admitted that subsequently ₹ 29.5 lacs were paid on various dates as reflected in para No.9 of the plaint by the defendant. The defendant, however, failed to pay the balance amount of ₹ 12.5 lacs as principal. The defendant did not produce any evidence to show if entire payment on any specific date was made by him to the plaintiff after the execution of the document Ex.D1 and if so, in what form i.e. cash or cheque. The plaintiff in her affidavit dated 15.11.2014 has categorically stated on oath that ₹ 12.5 lacs still remained due to be paid by the defendant. The contents of the affidavit have remained unchallenged and unrebutted. Adverse inference is to be drawn against the defendant for not appearing and contesting the claim. No plausible reasons have been given by the defendant to withheld the amount of ₹ 12.5 lacs which he had received from the plaintiff.

Apparently, the defendant is liable to return the said amount of ₹ 12.5 lacs.

18. The plaintiff has claimed interest @ 15% per annum. In the Agreement to Sell dated 29.01.2008, there is expressly mentioned that on the payment of ₹ 50 lacs made by the plaintiff, interest @ 15% per annum would be adjusted out of the balance money at the time of final payment. However, at the time of execution of the Cancellation Agreement (Ex.D1), there was no reference / stipulation to pay any interest on the amount of ₹ 47 lacs which the defendant had agreed to return within two months.

19. Learned counsel for the plaintiff has already confined / restricted claim of interest from the date of Cancellation of the Agreement to Sell. Considering the unchallenged testimony of PW-1 coupled with the stipulation of payment of interest @ 15% per annum in 'Agreement to Sell', I am of the view that the plaintiff shall be entitled for interest @ 15% per annum from 10.09.2009 when the defendant failed to fulfil his promise to return the balance amount of ₹ 42 lacs within two months. Subsequently, certain payments were given by the defendant to the plaintiff belatedly [₹ 5 lacs vide cheque No.018870 dated 20.02.2010, ₹ 5

lacs (in cash) on 10.05.2010 and ₹ 19.5 lacs vide cheque No.146849 dated 22.10.2010]. The defendant, thus, shall be liable to pay interest @ 15% per annum w.e.f. 10.09.2009 on the payment due.

20. In the light of above discussion, CC No.21/2012 filed by the defendant is dismissed.

21. Suit of the plaintiff - CS (OS) 1980/2011 is decreed in the sum of ₹ 12.5 lacs with proportionate costs. The plaintiff shall be entitled to interest @ 15% per annum on the principal amount of ₹ 12.5 lacs w.e.f. 10.09.2009 till the date of filing of the suit on the reduced outstanding amount. The plaintiff shall also be entitled to interest @ 15% per annum from the date of filing of the suit till the recovery of the decretal amount.

22. Decree-sheet be prepared accordingly.

23. The suit and pending IAs (if any) stand disposed of.

(S.P.GARG)
JUDGE

DECEMBER 11, 2014 / *tr*