

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

% Date of decision: 31st July, 2017.

+ **C.R.P. 3/2017**

PALM ART APPARELS PVT. LTD. **Petitioner**
Through: Mr. Rajat Aneja and Ms. Chandrika
Gupta, Advs.

Versus

ENKAY BUILDERS PVT. LTD. **Respondent**
Through: None.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Revision Petition under Section 115 of the Code of Civil Procedure, 1908 (CPC) impugns the order (dated 14th December, 2016 in CS No.57809/2016 of the Court of Additional District Judge (ADJ)-02, New Delhi District, Patiala House Courts, New Delhi) granting un-conditional leave to defend to the respondent/defendant to contest the suit filed by the petitioner/plaintiff under Order XXXVII of CPC for recovery of Rs.70,30,601/- with interest.

2. The petition was entertained and notice thereof issued. Though the notice remained unserved but on 28th April, 2017 Mr. Vishesh Wadhwa, Advocate appeared for the respondent/defendant and accepted notice and was furnished a complete set of paper book and the matter adjourned to 28th July, 2017. On 28th July, 2017, Mr. Shrey Chathly, Advocate appeared and the counsel for the petitioner/plaintiff and Mr. Shrey Chathly, Advocate for the respondent/defendant were heard. However, when I was about to

commence dictating the order, Mr. Shrey Chathly, Advocate requested for opportunity to examine whether there were any judgments in support of what he had contended and finding that he is young, the matter was adjourned to today.

3. Today, none has appeared for the respondent/defendant inspite of passover. Though no *Vakalatnama*, either of Mr. Vishesh Wadhwa, Advocate or of Mr. Shrey Chathly, Advocate is found to have been filed in this Court but from a copy on record, of the application for leave to defend filed by the respondent/defendant before the Trial Court, it is found that the same was filed on behalf of the respondent/defendant by the same Mr. Shrey Chathly and Mr. Vishesh Wadhwa, Advocates. The respondent/defendant/its Advocates cannot by such practices defeat the process of the Courts. The need to await the respondent/defendant any further is not felt. Though Mr. Shrey Chathly, Advocate for the respondent/defendant was fully heard on 28th July, 2017 but since this petition was not disposed of on 28th July, 2017, today the respondent/defendant is proceeded against *ex-parte*.

4. The petitioner/plaintiff instituted the suit from which this petition arises, pleading (i) that the respondent/defendant vide Agreement to Sell and Purchase dated 16th September, 2011 agreed to sell the first floor of Plot No.42, situated at Community Centre, Naraina Industrial Area, Phase-I, New Delhi as described therein to the petitioner/plaintiff for a total consideration of Rs.1,25,00,000/- and the petitioner/plaintiff agreed to purchase the same; (ii) that the respondent/defendant in the said Agreement to Sell and Purchase itself acknowledged receipt of Rs.15 lakhs from the petitioner/plaintiff as earnest money; (iii) that in accordance with the Agreement to Sell and

Purchase aforesaid, a further sum of Rs.20 lakhs was paid by the petitioner/plaintiff to the respondent/defendant on 8th October, 2011; (iv) that on request, assurances and representations of the respondent/defendant, a further sum of Rs.10 lakhs towards sale consideration was paid by the petitioner/plaintiff to the respondent/defendant on 20th June, 2013; (v) that thus the petitioner/plaintiff has paid a sum of Rs.45 lakhs out of the total sale consideration of Rs.1,25,00,000/-, leaving the balance sale consideration of Rs.80 lakhs only to be paid; (vi) that the respondent/defendant did not fulfil its part of the Agreement and the petitioner/plaintiff discovered that the respondent/defendant had misrepresented about pursuing the application for conversion of leasehold rights in the land underneath the property into freehold; (vii) that the petitioner/plaintiff vide notice dated 23rd August, 2014 terminated the Agreement to Sell and Purchase aforesaid; (viii) accordingly, the suit for recovery of Rs.45 lakhs together with interest thereon till the date of institution of the suit i.e. for total sum of Rs.70,30,601/- on the basis of the Agreement to Sell and Purchase dated 16th September, 2011 supra was filed under Order XXXVII of CPC.

5. The respondent/defendant sought leave to defend pleading (a) that the suit was not maintainable under Order XXXVII of CPC inasmuch as in the entire Agreement to Sell and Purchase dated 16th September, 2011, there was no stipulation for refund by the respondent/defendant to the petitioner/plaintiff of the amounts paid by the petitioner/plaintiff to the respondent/defendant thereunder; (b) that the respondent/defendant had been performing its part of the Agreement and the Delhi Development Authority had already converted the leasehold right in the land underneath the property agreed to be sold to freehold in February, 2015; (c) that there is no

stipulation in the Agreement to Sell and Purchase dated 16th September, 2011 for payment of interest; (d) that it is in fact the petitioner/plaintiff who is in breach of the Agreement to Sell and Purchase dated 16th September, 2011; (e) that the respondent/defendant had suffered loss of profit owing to breaches on the part of the petitioner/plaintiff; (f) that the respondent/defendant has already incurred a sum of Rs.35,33,184/- in getting the leasehold rights converted to freehold; (g) that the real reason for the petitioner/plaintiff to terminate the Agreement to Sell and Purchase was the slump in the real estate market; (h) that time was not the essence of the Agreement to Sell and Purchase.

6. The learned ADJ has vide the impugned order granted un-conditional leave to defendant, merely observing that the leave to defend application of the respondent/defendant raised several triable issues which raise doubt and need a trial for adjudication and which appeared to be a substantial defence and that the petitioner/plaintiff has to prove, the validity and authenticity of the receipts relied by it, payment by the petitioner/plaintiff to the respondent/defendant “in cash and acknowledgement by the defendant in respect of payment”, arrangement of money with source of income etc. and that these matters would have to be adjudicated in trial.

7. Before proceeding further, I may take notice of a disturbing trend. It is found that most of the judgments/orders, against which petitions under Article 227 of Constitution of India, Revision Petitions etc. have been coming up before this Bench in the last about one and a half month, barely contain any analysis of facts of the case and in a large part of the judgment/order reproduce either statutory provisions or passages from cited

judgments. Need is felt to remind that the reasons form the skeleton of judicial decision making and the judgments referred to also have to be applied to the facts of the case.

8. In the present case, the learned ADJ has reasoned that the petitioner/plaintiff has to prove the validity and authenticity of the receipts relied upon by it but receipt of payments whereunder has not been controverted in the leave to defend application. Similarly, the learned ADJ has reasoned that the petitioner/plaintiff has to prove payment to the respondent/defendant in cash and acknowledgement by the respondent/defendant in respect of payment but again, receipt of amount of Rs.45 lakhs is not controverted in the application for leave to defend. The learned ADJ has yet further reasoned that the petitioner/plaintiff has to prove arrangement of money with source of income etc. but forgetting that the suit filed by the petitioner/plaintiff was not for specific performance but to recover monies paid under an Agreement to Sell and Purchase which had been terminated by the petitioner/plaintiff. The only question for adjudication was, whether on interpretation of the terms and conditions of the Agreement to Sell and Purchase dated 16th September, 2011, which was admitted by the respondent/defendant also in the leave to defend application, the respondent/defendant in the leave to defend application had disclosed any facts which could be deemed sufficient to entitle it to leave to defend or which could be said to be a substantial defence raised within the meaning of Order XXXVII Rule 3(5) of CPC and which unfortunately has not been addressed in the impugned order.

9. The Agreement to Sell and Purchase dated 16th September, 2011 on which the suit was based and in which the petitioner/plaintiff is described as 'Second Party' and the respondent/defendant as the 'First Party' and which was not disputed by the counsel for the respondent/defendant before this Court also on 28th July, 2017, in Clauses 1,2,13&14 thereof provides as under:

"1. That the total consideration amount for the sale and purchase of the said property has been between the parties at Rs.1,25,00,000/- (Rs. One Crore Twenty Five Lacs Only.) out of which First Party have received from the Second Party sum of Rs.15,00,000/- (Rs. Fifteen Lacs Only) in the following manner:

(a) A sum of Rs.2,50,000/- (Rs. Two Lacs Fifty Thousands Only) by Cheque No.452940 dated 17-09-2011 Drawn on State Bank of Patiala, Naraina Branch.

(b) A sum of Rs.12,50,000/- (Rs. Twelve Lacs Fifty Thousands Only) by Cash Making a total amount of Rs.15,00,000/- (Rs. One Fifteen Lacs Only) As earnest money paid at the time of execution of this agreement to sell and the First Party have issued by First party. The remaining balance of Rs.25,00,000/- (Rs. Twenty Five Lacs Only) shall be payable by the Second Party to the First Party after the Apply for leasehold to Free hold rights of the said property in their own name(s) from DDA and cost and expenses for conversion to be incurred by the First Party.

2. Once the said property is got freehold, then the Second Party will pay the remaining balance payment within 15 days from the date of execution of conveyance deed from DDA.

13. That the First Party infringes or breach the terms and condition of this agreement then the Second Party shall be entitled to get the execution of this agreement to sell of the said property through the court of law at the costs of First Party.

14. That is the second Party infringes the terms and condition of the agreement the first party shall be entitled to forfeit the earnest money.”

10. I had on 28th July, 2017 enquired from the counsel for the respondent/defendant that the respondent/defendant in the Agreement to Sell and Purchase having agreed that in the event of the petitioner/plaintiff being in breach of the terms and conditions of the agreement, the respondent/defendant shall only be entitled to forfeit the earnest money, what could be the ground on which the respondent/defendant could be permitted to retain the monies received from the petitioner/plaintiff under the Agreement to Sell and Purchase aforesaid in excess of the earnest money.

11. The counsel for the respondent/defendant, on 28th July, 2017 argued, that the respondent/defendant, besides filing its written statement to the suit has also filed a counter-claim for specific performance of the Agreement to Sell and Purchase dated 16th September, 2011 and in the alternative for recovery of damages; that the respondent/defendant owing to the Agreement to Sell and Purchase has also incurred monies in getting the leasehold rights in the land underneath the property converted into freehold; that the respondent/defendant has suffered loss on account of the petitioner/plaintiff having not proceeded with the transaction and the respondent/defendant has been unable to utilise the sale consideration expected to be received, for the purposes planned.

12. Per contra, the counsel for the petitioner/plaintiff argued that the respondent/defendant cannot even forfeit the earnest money amount without proving the loss and of which no particulars have been given. Reliance was placed on ***Fateh Chand Vs. Balkishan Dass*** AIR 1963 SC 1405 and ***Bhuley Singh Vs. Khazan Singh*** MANU/DE/4391/2011.

13. It was in the aforesaid state of affairs that the counsel for the respondent/defendant on 28th July, 2017, after the hearing was concluded, had taken time to look up the case law.

14. A Coordinate Bench of this Court in ***Bhuley Singh*** supra relying upon ***Fateh Chand*** supra has held that a breach of contract by a buyer does not entitle the seller to forfeit amounts received from the buyer unless loss is proved to have been caused and that nomenclature of payment is not important and what is important is really the quantum of the amount paid; nominal amount could be an earnest money because object of such a clause is to allow forfeiture of that amount to a nominal extent; forfeiture of a reasonable amount is not penalty; but if forfeiture is of a large amount, then the same is to be in the nature of penalty, attracting applicability of Section 74 of the Indian Contract Act, 1872.

15. The counsel for the petitioner/plaintiff further argued that once the petitioner/plaintiff is found entitled to refund of the amount of Rs.45 lakhs, the additional claim of the petitioner/plaintiff for interest would not require any trial and this Court can in its discretion award interest at the appropriate rate. It was however reminded that monies of the petitioner/plaintiff were retained by the respondent/defendant.

16. Supreme Court in the recent past in ***Kailash Nath Associates Vs. Delhi Development Authority*** (2015) 4 SCC 136 set aside a judgment of the Division Bench of this Court allowing appeal (by relying on Section 74 of the Contract Act) against the judgment of the Single Judge of this Court ordering refund of earnest money on the ground that the seller had not suffered any loss. It was held that compensation can only be given for damages or loss suffered and if damage or loss is not suffered, law does not provide for a wind fall. It was laid down (i) that terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is not entitled to the same; (ii) that if the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract, unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation in terms of Section 73 of the Contract Act; (iii) that Section 74 of the Contract Act is to be read with Section 73 thereof and in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree; the Court is competent to award reasonable compensation in case of breach, even if no actual damage is proved to have been suffered; (iv) that in some contracts, it would be impossible for the Court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the Court can award the same, if it is genuine pre-estimate by the parties as the measure of reasonable compensation. I may however add that the Supreme Court also did not find the plaintiff therein to be guilty of breach and the defendant therein to be entitled to forfeit.

17. Prior thereto, I have in *Entrepreneurs Co-Op Group Housing Society Ltd. Vs. Schindler India Pvt. Ltd.* (2013) 137 DRJ 374 held (a) that even in the absence of a clause for forfeiture, there could be forfeiture dependant on the nature and character of the payment and intention of the parties and in determining which, the designation used by the party to indicate the nature of the sum that was paid, though is relevant but not determinative; (b) there is no distinction between contracts for sale of goods and contracts for sale of immovable property; (c) that it has to be determined, whether the money was intended to serve as earnest or security for performance, necessarily implying a liability to forfeit, or as a part payment; (d) that if it is intended to serve as an earnest or security for performance, even in the absence of a clause for forfeiture, it is liable to be forfeited upon breach of contract by the giver; (e) however the rule of forfeiture has no application to money received as part payment; (f) that monies given as earnest or security for performance, once paid are to 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 forfeit arises under a contract of security which can be provided expressly or impliedly.

18. The same view was followed in *Lalit Kumar Bagla Vs. Karam Chand Thapar & Bros. (CS) Ltd.* (2013) 204 DLT 392.

19. Mention may also be made of order dated 18th March, 2015 in SLP(C) No.15689/2011 titled *National Highways Authority of India Vs. MEILEDB LLC (JV)* reproduced by me in *Speed Track Cargo Vs. State Bank of Patiala* (2016) 228 DLT 325, holding that where a contract restricts forfeiture of 5% of the value of the bid security, a Writ Court cannot quash

such forfeiture and it should be left to the Civil Courts to determine, whether any damage has been suffered and if so, whether the forfeiture of 5% was a fair pre-estimate or was punitive in nature.

20. Applying the aforesaid principles, I am unable to accept the contention of the counsel for the petitioner/plaintiff that the application of the respondent/defendant for leave to defend did not disclose any substantial defence for forfeiture of Rs.15 lakhs described in the Agreement to Sell and Purchase as earnest money. The dispute with respect to Rs.15 lakhs will be decided in the suit and in the counter-claim stated to have been preferred. At this stage, it cannot also be determined, whether it is by way of penalty. As noted above, the nomenclature given by the parties is not determinative.

21. However, as far as Rs.30 lakhs admittedly paid by the petitioner/plaintiff to the respondent/defendant over and above the sum of Rs.15 lakhs described as earnest money is concerned, the same is only towards part sale consideration and to which the principle of forfeiture does not apply. Thus, even if the breach of Agreement to Sell and Purchase is by the petitioner/plaintiff and the respondent/defendant has suffered loss in excess of Rs.15 lakhs described as earnest money therefrom and for which the respondent/defendant has already initiated proceedings, the respondent/defendant, unless establishes the said loss, cannot retain the said amount of Rs.30 lakhs and the leave to defend application having not disclosed any substantial defence qua the same, the petitioner/plaintiff is immediately entitled thereto.

22. I am also of the view that the respondent/defendant, in the Agreement to Sell and Purchase dated 16th September, 2011, having agreed to forfeit a

sum of Rs.15 lakhs only, described therein as earnest money, in the event of breach by the petitioner/plaintiff, is in law not entitled to claim compensation for the loss, even if any, suffered by the respondent/defendant on account of breach by the petitioner/plaintiff. Reference in this regard can be made to Section 74 of the Contract Act, 1872 and ***Fateh Chand*** supra, ***Tarsem Singh Vs. Sukhminder Singh*** (1998) 3 SCC 471 and ***Food Corporation of India Vs. Prem Chand Jain*** (2013) 136 DRJ 369. For this reason also, there is no defence to the suit claim insofar as for Rs.30 lakhs.

23. As far as the claim of the petitioner/plaintiff for interest is concerned, I am of the view that once the petitioner/plaintiff is found entitled to a decree forthwith for Rs.30 lakhs, the Court is entitled to also award interest thereon at such rate as may be deemed appropriate. This Court, in ***Sanjay Kohli Vs. Vikas Srivastava*** (2013) 196 DLT 237 followed by High Court of Bombay in ***Daryanani (Indo Saigon) Construction Pvt. Ltd. Vs. Mantri Reality Ltd.*** 2017 SCC OnLine Bom 7963 held that even if there is no agreement between parties to claim any specified interest, the plaintiff is entitled to include interest amount in a summary suit in accordance with Section 80 of the Negotiable Instruments Act, 1881 read with Order XXXVII of the CPC.

24. Considering all the facts and circumstances of the case, I am of the view that the petitioner/plaintiff should be held entitled to interest @ 10% per annum on the said sum of Rs.30 lakhs from the dates of payment thereof as mentioned above till realisation.

25. Accordingly, the order impugned is set aside and is substituted with an order refusing leave to defend to the respondent/defendant insofar as the claim of the petitioner/plaintiff for Rs.30 lakhs is concerned and

axiomatically a decree is passed in favour of the petitioner/plaintiff and against the respondent/defendant for recovery from the respondent/defendant of Rs.30 lakhs with interest @ 10% per annum from the dates of payment till the date of realisation and granting leave to defend to the respondent/defendant for the balance claim only of the petitioner/plaintiff. The petitioner/plaintiff shall also be entitled to proportionate costs of the suit.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

JULY 31, 2017

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(corrected & released on 27th September, 2017)



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