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

+ RFA(OS) 6/2020, CM 3010/2020 & CM 3012/2020

AJIT KUMAR

..... Appellant

Through Mr. Deepak Anand and Hemlata
Rawat, Advocates with the appellant in person.

versus

ANIL KUMAR GUPTA

..... Respondent

Through Ms. A.K. Sharma, Advocate.

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MS. JUSTICE ASHA MENON

ORDER

29.01.2020

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1. This appeal assails an order dated 26.11.2019, passed by the learned Single Judge on two applications, both moved under Order XII Rule 6 of the Code of Civil Procedure, one by the appellant/defendant (I.A. No. 5010/2019) and the other by the respondent/plaintiff (I.A. No. 516/2018) whereunder, it has been held that the appellant/defendant is not entitled to retain a sum of Rs.1.10 crores paid to him by the respondent/plaintiff as part sale consideration, over and above a sum of Rs.85 lakhs paid by him towards earnest money in respect of an immovable property bearing No.C1/7, Rana Pratap Bagh, Delhi, pursuant to his entering into an Agreement to Sell with the respondent/plaintiff on 4.6.2014, not only on the ground that it was a case of unjust enrichment where the appellant/defendant has retained the property, but had also retained the excess amount. As a

result, a preliminary decree was passed in favour of the respondent/plaintiff whereunder the appellant/defendant has been directed to refund the sum of Rs.1.10 crores to the respondent/plaintiff alongwith interest @ 12% per annum, with effect from 3.4.2015, within four weeks. However, the learned Single Judge has refrained from returning any finding as to which of the parties had committed breach of the contract and left the said dispute pending for adjudication.

2. The period of four weeks for refunding the amount payable to the respondent/plaintiff reckoned from 26.11.2019, expired on 25.12.2019. However, the appellant/defendant did not take any steps to assail the impugned order till the middle of January, 2020. When this appeal was listed for a preliminary hearing yesterday, Mr. Anand, learned counsel for the appellant/defendant had submitted that his client has no quarrel with the direction issued to pay back a sum of Rs.1.10 crores to the respondent/plaintiff. However, he argued that the learned Single Judge has erred in awarding interest @ 12% per annum on the sum of Rs.1.10 crores, directed to be refunded to the respondent/plaintiff and that the pre-suit interest ought to be waived and the post suit interest ought to be scaled down.

3. To test the aforesaid submission made by learned counsel for the appellant/defendant that his client is ready and willing to refund the undisputed sum of Rs.1.10 crores to the respondent/plaintiff, we had called upon him to pay back the said amount. In response, learned counsel for the appellant/defendant had started to dither and requested that instalments be fixed spreading over 5 months for refunding the said amount to the respondent/plaintiff. Declining the said request, we had stated that the

appellant/defendant having already exhausted the period of four weeks granted under the impugned order and a further period of four weeks thereafter and having accepted his liability to refund the sum of Rs.1.10 crores to the respondent/plaintiff, there was no question of granting him any further time, particularly when not a penny was refunded till date. At that stage, learned counsel for the appellant had stated that if granted some time, his client would bring a draft of Rs.25 lakhs drawn in favour of the Registrar General, to show his bona fides. Accordingly, the matter was adjourned for today.

4. The case has been called out thrice. On the first call, Mr. Anand, learned counsel for the appellant had requested that his client may be granted one week to arrange the funds, which was turned down. Then, learned counsel for the appellant/defendant stated that the matter may be passed over for the appellant/defendant to get a draft prepared for a sum of Rs.25 lakhs, in favour of the Registrar General. Learned counsel for the appellant was duly accommodated. It is now 03:02 p.m. Yet, the appellant is nowhere to be seen. Counsel for the appellant states that his client has forwarded him a photo of the demand draft prepared in favour of the Registrar General, on his mobile phone and he is on his way. Not inclined to wait any longer, learned counsel for the parties have been directed to address arguments on merits.

5. As noted above, the scope of this appeal is limited to the challenge laid to the interest component on Rs.1.10 crores, payable by the appellant/defendant. Learned counsel for the appellant/defendant argues that in view of the fact that the respondent/plaintiff has failed to demonstrate any prejudice caused to him or any loss incurred by him on the

appellant/defendant retaining a sum of Rs.1.10 crores received under the *Bayana* Agreement dated 07.06.2014, towards part sale consideration, the learned Single Judge ought not to have awarded any interest in his favour. He refers to the legal notices dated 18.02.2015, 10.03.2015 and 02.06.2015, served by the appellant/defendant on the respondent/plaintiff to urge that once the appellant/defendant had put the respondent/plaintiff to notice about cancellation of the transaction and forfeiture of the earnest money in the year 2015 itself, there was no occasion for the respondent/plaintiff to have waited till May, 2017 to institute the suit for recovery against the appellant/defendant. He submits that in such circumstances, the learned Single Judge ought to have refrained from imposing pre-suit interest on the sum of Rs.1.10 crores directed to be refunded to the respondent/plaintiff. As for the post-suit period, he states that in the absence of any averment made by the respondent/plaintiff to demonstrate any loss that may have been suffered by him on account of the appellant/defendant failing to disclose the fact that the subject premises was encumbered much before the date of executing an Agreement to Sell in view of a loan taken from Dewan Housing Finance Corporation Limited (for short, ‘**DHFCL**’) against the same and in view of para 8 of the *Bayana* Agreement, no interest ought to have been awarded in his favour.

6. *Per contra*, Mr. A.K. Sharma learned counsel for the respondent/plaintiff opposes the present appeal and states that the appellant/defendant had deliberately misled the respondent/plaintiff at the time of executing the *Bayana* Agreement, on 07.06.2014. He states that though the appellant/defendant had assured the respondent/plaintiff that the suit property was free from all encumbrances, like mortgage, burden,

transfer, gift, charge, lien, court case, etc. and a recital to the said effect forms a part of para 3 of the Agreement, it transpired later on that the subject premises had been mortgaged by the appellant/defendant with DHFCL on 30.09.2013, against a loan of Rs.2,35,69,690/-, which was to be discharged in instalments spanning over a period of 15 years. He submits that the fact that the subject premises was encumbered, came to the knowledge of the respondent/plaintiff only when the appellant/defendant served on him a legal notice dated 18.02.2015 and falsely stated therein that he had duly intimated the respondent/plaintiff about the property being mortgaged with DHFCL. He further submits that in the reply dated 19.03.2015, served by the counsel for the respondent/plaintiff on the other side, the appellant/defendant was called upon to obtain an NOC from DHFCL and produce the original title documents to demonstrate that the premises was free from any encumbrance whereafter, the respondent/plaintiff was willing to go ahead with the execution of the sale deed. Learned counsel further states that the respondent/plaintiff is under no obligation to demonstrate any prejudice caused to him on the false representation made by the appellant/defendant in the *Bayana* Agreement, as interest is nothing but a manner of compensating a party, who has been wrongly deprived the use of his money. It is his contention that the rate of interest awarded in the impugned order is reasonable and below the market rate and therefore, does not deserve to be reduced or waived.

7. We have heard the arguments advanced by learned counsel for the parties, gone through the record and perused the impugned order. It is noteworthy that during the course of arguments, the appellant/defendant has turned up and handed over a draft of Rs.25 lakhs drawn in favour of the

Registrar General, towards part payment of Rs. 1.10 crores to the respondent/plaintiff.

8. As recorded above, the appellant/defendant has not assailed the impugned order insofar as it has directed refund of Rs.1.10 crores in favour of the respondent/plaintiff. The only dispute raised is with regard to the pre-suit interest and the quantum of interest awarded @12 % *per annum* from 03.04.2015, the date on which the appellant/defendant had received the last payment from the respondent/plaintiff, which was after he had served a legal notice dated 10.03.2015, for cancellation of the transaction and forfeiture of the earnest money.

9. It is pertinent to note that the sum of Rs.1.95 crores received by the appellant/defendant includes Rs.85 lakhs that was paid by the respondent/plaintiff to the appellant/defendant as earnest money alongwith the remaining amount paid by him towards part sale consideration in the following manner: -

S. No.	Date of Payment	Amount
1.	04.06.2014	Rs.20 lakhs
2.	05.06.2014	Rs.20 lakhs
3.	07.06.2014	Rs.45 lakhs
4.	07.10.2014	Rs.60 lakhs
5.	03.04.2015	Rs.50 lakhs
Total		Rs.1.95 crores

10. The learned Single Judge could have very well directed the appellant/defendant to pay interest on the amounts received by him from the date each of the instalments were paid by the respondent/plaintiff, commencing from 07.06.2014 to 03.5.2015. But that has not been done. Instead, the learned Single Judge has pegged the date as 03.04.2015, on

which date the last instalment of Rs.50 lakhs was received by the appellant/defendant from the respondent/plaintiff. The Court has directed that a sum of Rs. 85 lakhs paid by the respondent/plaintiff as earnest money under the Agreement to Sell be kept aside and the balance sum of Rs.1.10 crores be refunded by the appellant/defendant with interest @12% *per annum* with effect from 03.04.2015. We do not find any flaw in the said approach adopted by the learned Single Judge.

11. The plea taken by learned counsel for the appellant/defendant that the fact that the respondent/plaintiff took his own sweet time to approach the court and institute the suit for recovery against the appellant/defendant in May, 2017, should have weighed with the learned Single Judge for disallowing pre-suit interest, is not persuasive. It is not in dispute that the appellant/defendant has retained not only the subject premises, he has also kept with him, a sum of Rs. 1.95 crores received from the respondent/plaintiff after executing the *Bayana* Agreement. Noting that the court was only passing a preliminary decree and refraining from returning any finding as to which party was in breach of the contract, the learned Single Judge has permitted the appellant/defendant to retain a sum of Rs. 85 lakhs from out of a total sum of Rs.1.95 crores paid by the respondent/plaintiff as earnest money and directed refund of Rs. 1.10 crores. We are in complete agreement with the view expressed by the learned Single Judge that this was a case of “unjust enrichment”.

12. The respondent/plaintiff has in fact been visited with double jeopardy. On the one hand, the appellant/defendant made a false declaration in the *Bayana* Agreement dated 07.06.2014, that the subject premises is free from any encumbrance, thereby luring the respondent/plaintiff to part with

valuable consideration as earnest money and on the other hand, the appellant/defendant has retained the premises and failed to come clean by stating the correct position regarding the status of the said premises. It was only at the time of issuing the notice of cancellation of the *Bayana* Agreement dated 04.6.2014 and termination of the contract on 18.02.2015, that the appellant/defendant admitted for the first time that the premises had been mortgaged by him with DHFCL on 30.09.2013, which was one year previous to the year in which the *Bayana* Agreement had been executed. Clearly, the appellant/defendant has taken the respondent/plaintiff for a ride and in those circumstances, the money paid to him by the respondent/plaintiff can only be described as 'unjust enrichment'. Thus directions issued to him to refund the sum of Rs.1.10 crores allegedly forfeited by him, do not deserve interference. Nor is there any reason to interfere with the period or the quantum of interest imposed under the impugned order.

13. Grant of interest is founded on the rule of equity and is payable in certain circumstances being established that justify exercise of equitable jurisdiction by the court. In South Eastern Coalfields Ltd. vs State Of M.P. And Ors. reported as **AIR 2003 SC 4482**, the Supreme Court had referred to its earlier decision in Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa and Ors. v. N.C. Budharaj (Deceased) by Lrs. and Ors., reported as **(2001) 2 SCC 721**, wherein the Constitution Bench had opined that the basic proposition of law is that a person deprived of the use of money to which he is legitimately entitled, has a right to be compensated for the deprivation by whatever name it may be called, viz., interest, compensation or damages and this proposition has been held to be

unmistakable and valid. A coordinate Bench of this Court has held in Indo Soviet Medical Education Care & Research Foundation vs. Anju Jain and Ors. reported as **2014 SCC OnLine Del 7342**, that a claim for restitution encompasses return of the principal amount and the related money value that the decree holder was deprived of the use of that principal amount. Such a claim is recognized as ‘time value of money’, i.e., compensation for the falling value of money due to inflation. In the instant case, denial of interest to the respondent/plaintiff on the money directed to be refunded by the appellant/defendant would amount to what has been described by the Supreme Court as “*unjust impoverishment*” in South Eastern Coalfields (supra).

14. We are also not persuaded by the submission made by learned counsel for the appellant/defendant that the respondent/plaintiff having instituted the suit for recovery of Rs.3,55,65,000/- in May, 2017, is not entitled to receive any pre-suit interest on a sum of Rs.1.10 crore or that till the respondent/plaintiff demonstrates that he has suffered a loss, he is not entitled to receive any interest even for the post-suit period. It is ironical that such a plea is being taken by the appellant/plaintiff, who failed to come clean at the time of executing the Agreement to Sell in respect of the subject premises by informing the respondent/plaintiff about the premises having been mortgaged by him with DHFCL on 30.09.2013. Even after cancelling the transaction and forfeiting the earnest money, the appellant/defendant accepted a sum of Rs.50 lakhs from the respondent/plaintiff on 03.4.2015. Moreover, on examining the loan documents executed by the appellant/defendant with DHFCL, produced by learned counsel for the appellant/defendant for our perusal today, it is revealed that he had taken a

loan of Rs.2,35,69,690/- by mortgaging the subject premises and had agreed to pay interest @ 14.25% per annum (variable) to be returned in equated monthly instalments spanning over 15 years. In this background, it does not lie in the mouth of the appellant/defendant to question the rate of interest awarded by the learned Single Judge, which is 12% per annum and that too from 03.04.2015, the date on which the respondent/plaintiff had lastly paid a sum of Rs.50 lakhs to the appellant/defendant. We are of the firm view that the respondent/plaintiff is legitimately entitled to be restituted for being unlawfully deprived of the sum of Rs.1.10 crore paid to the appellant/defendant towards part sale consideration.

15. None of the decisions cited by learned counsel for the appellant/defendant, i.e., Rajesh Arora vs. UOI and Ors. reported as **MANU/DE/9021/2006**, Motor Industries Co. Ltd. vs. Capital Fuel Injection Engineers Pvt. Ltd. and Ors. reported as **MANU/DE/5026/2012** and Satish Batra vs. Sudhir Rawal reported as **(2013) 1 SCC 345** would be of any assistance to claim that the rate of interest ought to be scaled down, when admittedly, the appellant/defendant himself is paying a higher rate of interest on the loan taken from DHFCL on mortgaging the subject premises; nor is it a case where there was any undue delay on the part of the respondent/plaintiff in approaching the court for relief. The suit has been instituted by him well within the prescribed period of limitation.

16. In view of the aforesaid facts and circumstances, the present appeal fails and is dismissed as meritless. The demand draft of Rs.25 lakhs drawn in favour of the Registrar General and handed over by learned counsel for the appellant/defendant, shall be sent by the Court Master to the Registry and the amount shall be released in favour of the respondent/plaintiff

through his counsel, as part payment of the principal sum of Rs.1.10 crores directed to be refunded to him under the impugned order, which part of the order has not been contested by the appellant/defendant.

17. Before parting with the case, it is made clear that the view expressed hereinabove is only in the context of the challenge laid by the appellant/defendant to the interest awarded under the preliminary decree dated 26.11.2019 and shall not be treated as an expression on the merits of the suit, which is pending adjudication. The suit shall be decided uninfluenced by the observations made above.

18. The appeal is dismissed alongwith the pending applications.

HIMA KOHLI, J

ASHA MENON, J

JANUARY 29, 2020

NA/s/rkb/ap