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

% *Date of Decision : July 20, 2015*

+ **RFA (OS) 15/2015**

VIKAS GOYAL & ANR. Appellants

Represented by: Mr.Rishi Pal Singh, Advocate

versus

YOGESH AGGARWAL & ANR. Respondents

Represented by: Mr.J.M.Bari, Advocate with
Ms.Meenakshi Bari, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J. (Oral)

CM No.1769/2015

For the reasons stated in the application the delay of 166 days in filing the appeal is condoned.

RFA (OS) No.15/2015

1. Heard learned counsel for the parties. Record of the suit has been perused.
2. The only relevant record is the pleadings of the parties, because vide impugned decree dated January 29, 2013, noting that the plaintiffs gave up relief for specific performance of the written agreement dated January 29, 2013, under which the first defendant was to sell the agreed property comprising second floor, without roof rights, on the building on plot No.G-202, Puskhar Enclave, Paschim Vihar, New Delhi for a sale consideration of

₹2,45,00,000/- (Rupees Two Crores and Forty Five Lacs only), and confined the alternative relief prayed for the refund of ₹45,00,000/- (Rupees Forty Five Lacs only) paid as recorded in the agreement to sell, suit has been decreed, holding that clause 5 of the agreement which provides for the said sum to be forfeited if there is a default by the purchasers is in the nature of a penalty and hence without there being any pleadings that due to the default by the purchasers, due to decrease in the price of the property, a loss has been occasioned would warrant a decree to be passed without any trial.

3. It is apparent that the legal principle, with reference to the pleadings, followed by the learned Single Judge is that in the absence of any plea giving birth to a fact requiring adjudication, no evidence can be led.

4. The learned Single Judge has noted the law concerning Section 74 and Section 75 of the Indian Contract Act as enunciated in the decisions reported as (1964) 1 SCR 515 Fateh Chand Vs. Balkishan Dass, 1969 (2) SCC 554 Maula Bux Vs. UOI, 1974 (2) SCC 231 UOI Vs. Raman Iron Foundry and 2003 (5) SCC 705 ONGC Vs. Saw Pipes Ltd. as also a decision by a learned Single Judge of this Court, which has not been reported but is dated November 16, 2011 in RFA No.576/2002 Airport Authority of India Vs. R.K.Singhal. Pithily put, the learned Single Judge has held that the ratio of the said judgments is that if a loss due to breach of contract is capable of being established, a clause by way of forfeiture by default in a contract has to be treated as a penal clause.

5. A perusal of the decisions of the Supreme Court in Fateh Chand, Maula Bux and Rama Iron Foundry's case (supra) would show that the law declared by the Supreme Court is that clauses of forfeiture by way of liquidated damages by their very nature are hit by Section 74 of the Contract

Act, 1872 if they are in the nature of a penalty and at best only provide for the upper limit for the claim of damages which otherwise are capable of being proved. For breach of a contract for sale of immovable property this would mean that mere breach of the contract by the prospective purchaser does not entitle the prospective seller to forfeit the earnest money-cum-part sale consideration. The prospective seller has to plead, and if pleaded, to prove and thereafter retain the loss suffered.

6. The decision of the Supreme Court in Saw Pipes’ case also holds that a liquidated damage would be a damage which on the face of it ensues if there is a breach of a contract, but its estimation is not possible and thus the parties would be perfectly justified in quantifying the same as a reasonable pre-estimate of the loss. Such an amount would be recoverable as a loss; without proof of the quantum of the loss, because the quantum has been agreed to by the parties; and the loss is inherent.

7. Arguing that the appellant was entitled to forfeit the amount because the contract between the parties so stipulates, with regret we note that when the law was put to learned counsel for the appellant, he had nothing to respond. The only argument was a repeated reiteration : since clause 5 of the contract between the parties permits the forfeiture, the appellant is entitled to forfeit ₹45,00,000/- (Rupees Forty Five Lacs only).

8. We have seen and read the written statement filed by the appellant. Except for pleading that under the clause in question the appellant was to adjust ₹45,00,000/- (Rupees Forty Five Lacs only) when final sale-deed was executed and balance sale consideration paid and in case of breach the amount was liable to be forfeited, there is no pleading that there was a fall in the price of their property agreed to be sold and that due to breach by the

plaintiff the defendant suffered any loss.

9. There is thus no merit in the appeal which is dismissed.

10. Noting that interest has been awarded @ 8% per annum on ₹45,00,000/- (Rupees Forty Five Lacs only) while passing a decree, we note that the date from which interest shall commence has not been stated by the learned Single Judge in the impugned decree. Since no pre-suit interest was claimed, the decree pertaining to interest could be either to award interest from the date of the suit or the date of the decree.

11. The suit has been instituted on November 18, 2013. The date of the decree is July 08, 2014. To cut short this controversy which may arise in execution, with consent of learned counsel for the respondent we clarify on the date as per the decree, by holding that the interest would commence from the date of the decree. This clarification is to the benefit of the appellant and thus the consent of the appellant on said aspect of the decree is not being recorded because the counsel has given none.

12. Parties shall bear their costs in the appeal.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

JULY 20, 2015
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