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

+ **RFA 998/2016 & CMs 46917-18/2016**

**JYOTI KESARWANI** ..... Appellant

Through : Mr. Jasmine Detwani with  
Ms. Priyanka Sharma, Advocates

versus

**VALUE INFRACON INDIA PRIVATE LIMITED & ORS**

..... Respondents

Through : None.

**CORAM:**

**HON'BLE MS. JUSTICE HIMA KOHLI**

**ORDER**

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**20.12.2016**

1. The appellant/plaintiff has assailed the judgment dated 9.5.2016, passed by the learned trial court dismissing a summary suit instituted by her against the respondents/defendants for recovery of a sum of Rs.3.50 lacs. The summary suit was premised on a cheque dated 25.11.2014 for a sum of Rs.3,50,000/- issued by the respondent No.1/defendant No.1 company under the signatures of the respondents No.2 and 3/defendants No.2 and 3, allegedly in discharge of their admitted liability to pay her an amount of Rs.1,14,00,000/- terms of their letter dated 25.6.2016.

2. The circumstances as narrated in the plaint, in which the aforesaid post dated cheque was issued by the respondents/defendants in favour of the appellant/plaintiff is that the appellant/plaintiff had agreed to purchase nine flats for a total side consideration of Rs.1,00,08,450/- in a project floated by the respondents/defendants under the name of "Meadows Vista", located at

NH 58, Raj Nagar Extension, Ghaziabad, UP. Out of the aforesaid amount, the appellant/plaintiff had paid a sum of Rs.1,00,00,000/- to the respondent No.1/defendant No.1 and they had in turn issued an allotment letter dated 23.6.2014 in her favour. Vide letter dated 25.6.2014, the respondents/defendants had offered to repurchase the said flats from the appellant/plaintiff for a total sale consideration of Rs.1,14,00,000/-. The said offer of repurchase made by the respondent No.1/defendant No.1 was duly accepted by the appellant/plaintiff. In terms of the aforesaid letter, the respondents/defendants had issued five post dated cheques for a total sum of Rs.1,14,00,000/- in favour of the appellant/plaintiff, out of which the first cheque for a sum of Rs.3,50,000/-, when presented for encashment on the due date, was dishonoured on the ground, “refer to drawer.”

3. Claiming that the aforesaid cheque was issued by the respondents/defendants towards their admitted and acknowledged liability, and on being presented, was dishonoured, the appellant/plaintiff had issued a legal notice dated 2.3.2015 to the respondents/defendants, which was duly served on them through speed post and courier. However, the respondent/defendants failed to make any payment. Apart from instituting the summary suit against the respondents/defendants, the appellant/plaintiff has also filed a complaint against them under Section 138 of the NI Act, which is pending before the learned MM, Patiala House Courts, New Delhi.

4. The suit was instituted by the appellant/plaintiff on 22.7.2015. Summons were issued in the suit in the prescribed proforma on 23.7.2015, returnable on 28.9.2015. Though summons in the suit were duly served on the respondents/defendants on 17.8.2015, they failed to enter appearance within the stipulated period of ten days from the date of service or even

thereafter.

5. By the impugned judgment dated 9.5.2016, the said suit was dismissed by the trial court on the ground that it was clearly stated in the letter dated 25.6.2014 addressed by the respondent/defendant No.1 to the appellant/plaintiff that on encashment of the five post dated cheques mentioned therein, totalling to a sum of Rs.1,14,00,000/-, the allotment letter dated 23.3.2014 issued in favour of the appellant/plaintiff for the sale of the said flats shall stand rescinded and she would not be left with any right, title and interest in the said flats. However, it was clarified that in the event the said cheques got dishonoured, the appellant/plaintiff shall be the absolute owner of the said flats and the allotment letter would remain binding for all purposes and intents.

6. The trial court held that in view of the terms and conditions stipulated in the letter dated 25.6.2014, issued by the respondents/defendants, on the dishonour of the cheque dated 25.11.2014 for the sum of Rs.3,50,000/-, the consequences spelt out in the said letter would automatically follow and it would have to be assumed that the repurchase agreement stood rescinded. But that itself would not be a ground for the appellant/plaintiff to institute a summary suit on the ground that the aforesaid cheque had been issued towards any liability. As a result, the suit was dismissed. Aggrieved by the aforesaid finding, the present appeal has been filed.

7. Mr. Detwani, learned counsel for the appellant/plaintiff has argued that once the respondents/defendants had acted in terms of the letter dated 25.6.2014 and issued five post dated cheques in favour of the appellant/plaintiff, they were under an obligation to honour the said cheques and on the first cheque of Rs.3,50,000/- being dishonoured, the

appellant/plaintiff had no other option but to seek recovery of moneys by instituting a summary suit which was maintainable as filed. It is further contended that before issuing summons in the suit, the trial court had satisfied itself about its maintainability and once the summons were duly served on the respondents/defendants, who had elected not to enter appearance within the prescribed timeline, the said suit ought to have been decreed in favour of the appellant/plaintiff.

8. The submission made by learned counsel for the appellant/plaintiff, as recorded above, is found to be devoid of merits. Merely because Rule 2(3) of Order XXXVII CPC prescribes that on the defendant failing to enter appearance in a summary suit, the allegation in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree, does not mean that the court is barred from examining as to whether the said suit falls within the ambit of the Rule. Provisions of Order XXXVII Rule 3(1) CPC prescribe that if the defendant fails to enter appearance within the prescribed period in law, then the Court is expected to examine the averments made in the plaint and the documents filed along with the plaint and only if it is satisfied that the plaintiff has been able to make out a case for grant of a judgment in his favour, shall an order be passed accordingly.

9. Simply because the appellant/plaintiff herein had filed a summary suit, wherein summons were issued to the respondents/defendants and they had not entered appearance within the prescribed period, would not necessarily mean that the said suit ought to have been decreed against them. Even if a defendant commits a default in entering appearance, within the period prescribed in Order XXXVII Rule 3(1) CPC, the court remain under an obligation to apply its mind, examine the averments made in the plaint

and scrutinize the documents filed along with the plaint so as to satisfy itself that a decree can be passed in favour of the plaintiff.

10. A perusal of the impugned judgment reveals that the trial court had duly examined the plaint and all the documents relied upon by the appellant/plaintiff in support of her case and had opined that the most relevant document was the letter dated 25.6.2014 addressed by the respondents/defendants to the appellant/plaintiff, which is reproduced herein below for ready reference:-

*“To,  
Ms JYOTI KESARWANI,  
W/o Mr. Vikram Kesarwani,  
QD-15, PITAMPURA,  
Delhi-110038*

*Date: 25<sup>th</sup> June 2014*

*Sub.: Offer of repurchase of flats.*

*Sir/Madam,*

*As you are aware, you have purchased Nine Flats (A-001, A-066, A-086, C-146, D-011) of total area 6937.64 Sq. Ft. from our company, as per the details given hereunder vide Allotment Letter dated 23.06.2014 in our project “located at NH-58, Raj Nagar Extension, Ghaziabad measuring 29570 SQ. MTR. and developing a residential project namely “MEADOWS VISTA”.*

*We have sold you the aforesaid flats for a total sale consideration of Rs.100,08,450.00 (Rupees One Crore Eight Thousand Four Hundred Fifty Only), which has been paid by you as per the details given in Allotment Letter dated 23.06.2014.*

*We understand that you may sell these flats. The company is pleased to make offer for the repurchase of the said flat at the consideration of Rs.114,00,000.00 (Rupees One Crore Fourteen Lacs only) to be paid in Twelve and a half months from the date of this letter.*

*The payment schedule shall be as mentioned in Table 1 below:-*

| <i>Sl. No.</i> | <i>Principal<br/>Cheque No.</i> | <i>Profit Ch.<br/>No.</i> | <i>Date</i> | <i>Bank</i>   | <i>Amount</i> |
|----------------|---------------------------------|---------------------------|-------------|---------------|---------------|
| 1.             |                                 | 671780                    | 25-08-14    | ICICI<br>BANK | 3,50,000.00   |
| 2.             |                                 | 671783                    | 25-11-14    | ICICI<br>BANK | 3,50,000.00   |
| 3.             |                                 | 671786                    | 25-02-15    | ICICI<br>BANK | 3,50,000.00   |
| 4.             |                                 | 671789                    | 25-05-15    | ICICI<br>BANK | 3,50,000.00   |
| 5.             | 671790                          |                           | 25-06-15    | ICICI<br>BANK | 100,00,000.00 |
|                |                                 | <i>Total</i>              |             |               | 114,00,000.00 |

*As you have accepted our offer we have issued the post dated cheques for the said amount as in Table-1.*

***We confirm that the above said post date cheque (s) would be duly honoured on presentation. On encashment of the above said cheque the Allotment Letter dated 23.06.2014 for the sale of the said flats shall stand rescinded and you would be left with no title, interest or right in the said flats. In case, the cheque gets dishonoured, you shall remain the absolute owner of the aforesaid flats under the Allotment Letter dated 23.06.2014 which shall be valid and binding for all purposes and intents. We hope that our offer for higher consideration gives you good return and would find favour with you.***

*Awaiting your reply.*

*Thanking you,*

*Yours faithfully,  
For Value Infracon India Pvt. Ltd.  
sd/-  
(Authorized Signatory) ”*

11. The contents of the aforesaid letter itself indicates that the respondents/defendants had agreed to repurchase nine flats from the appellant/plaintiff for a total consideration of Rs.1,14,00,000/- for which five post dated cheques were issued. The dishonour of the said cheques would result in forfeiture of the right of the respondents/defendants to repurchase the flats in question and in that eventuality, it was understood that the earlier allotment letter dated 23.6.2014, issued in favour of the appellant/plaintiff would remain valid and binding on the parties. In other words, the appellant/plaintiff would remain the allottee of the nine flats.

12. Given the terms of the offer made by the respondent No.1/defendant No.1 as mentioned in the letter dated 25.6.2014 and the fact that the appellant/plaintiff had accepted the same, this Court is of the opinion that no liability has been admitted on the part of the respondents/defendants which would entitle the appellant/plaintiff to institute a suit under Order XXXVII of the CPC. In fact, the learned trial court rightly observed that the said suit does not fall within the ambit of the aforesaid provisions. At best, the cheque for Rs.3,50,000/- issued by the respondents/defendants could be treated as part payment towards repurchase of the nine flats from the appellant/plaintiff. The consequences of the said cheques being dishonoured have been clearly spelt out in the letter itself, which is that the allotment letter dated 23.6.2014 issued in favour of the appellant/plaintiff would continue to bind the parties. In these circumstances, it is evident that the remedy of the appellant/plaintiff does not lie under Order XXXVII CPC.

13. Learned counsel for the appellant/plaintiff states in the course of arguments that the appellant did not present the remaining four post dated cheques knowing that they too would not be honoured. He submits that the

respondents/defendants have failed to complete the project and deliver possession of the flats in question to the appellant/plaintiff. If there has been a breach of contract by the respondents/defendants, then the appellant shall have to seek recourse to the Specific Relief Act, 1963, in accordance with law. But dishonour of the subject cheque would not be a ground to institute a summary suit for recovery of money, predicated on admitted liabilities, when the fallout of non-encashment of the cheques was clearly stated in the letter dated 25.6.2014 and understood by the appellant/plaintiff.

14. In view of the aforesaid facts and circumstances, this Court is of the opinion that the present appeal lacks merits. The impugned judgment is sustained and the appeal is dismissed *in limine*, along with the pending applications.

**HIMA KOHLI, J**

**DECEMBER 20, 2016**

sk/ap