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

%   **Date of decision: 11th December, 2017.**

+   **<u>CS(OS) 401/2010</u>**

SATISH VERMA ..... **Plaintiff**

Through: Ms. Sonia Malhotra & Mr. Shubendu Kaushik, Advs.

Versus

GARMENT CRAFT (INDIA) PVT. LTD. ..... **Defendant**

Through: Mr. Sudesh Ranjan Singh, Adv.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff instituted this suit, for a) specific performance of the Agreement of Sale of July, 2008 of property No. 259, Okhla Industrial Estate, Phase-III, New Delhi; b) in the alternative, i) for recovery of damages in the sum of Rs.3 crores for breach of contract; ii) for refund of Rs.2 crores paid by the plaintiff to the defendant as advance/part sale consideration out of the total agreed price of Rs.11,31,00,000/- together with interest; and, c) for permanent injunction restraining the defendant from alienating, encumbering or parting with possession of the said property.

2. The suit was entertained and vide *ex-parte* ad-interim order dated 8th March, 2010, the defendant restrained from dealing with the property. The said order was made absolute on 19th November, 2010.

3. The defendant contested the suit by filing a written statement and on 13th August, 2014, the following issues were framed in the suit:

> *"1. Whether the plaintiff is entitled for a decree of specific performance of the Agreement to Sell dated July, 2008? OPP*
>
> *2. Whether the plaintiff was ready and willing to perform his part of the obligations in terms of the Agreement to Sell dated July, 2008? OPP*
>
> *3. Whether the plaintiff has committed any default in performing his part of the obligation in terms of the Agreement to Sell dated July, 2008? OPD*
>
> *4. Whether the plaintiff is entitled for a decree of permanent injunction restraining the defendant from in any way transferring, selling, mortgaging, alienating or creating third party interest or parting with possession of the suit property No.259, Okhla Industrial Estate, Phase-III, New Delhi-110020, built on 606 Sq. Yards? OPP*
>
> *5. Relief."*

and the suit set down for trial.

4. The suit, on 22nd April, 2016 was dismissed under Order XVII Rule 3 of the Code of Civil Procedure, 1908 (CPC), for the failure of the plaintiff to file any affidavit by way of evidence or to lead any evidence.

5. The plaintiff filed IA No.11234/2016 for recall of the order dated 22nd April, 2016 along with IA No.11235/2016 for condonation of 102 days delay in applying therefor. The said applications came up first before this Court on 14th September, 2016 and were thereafter adjourned from time to time.

6. Hearing of the aforesaid applications was commenced on 23rd November, 2017, and

(A) the following order was passed on 23rd November, 2017:

"1. This Suit, inter alia, for specific performance of an agreement of sale of immovable property, was on 22nd April, 2016 dismissed for non-prosecution owing to the plaintiff, till then, inspite of issues having been framed on 13th August, 2014 and inspite of repeated opportunities, having not taken any steps to lead evidence.

2. These applications for recall of order dated 22nd April, 2016 and for condonation of delay in applying thereof also came up first before the Court thereafter only on 14th September, 2016, i.e. after five months, again showing that the plaintiff inspite of the Suit having been dismissed for non-prosecution, did not show any urgency. Since then, these applications are pending adjudication.

3. The counsel for the plaintiff, during the hearing, has contended that the plaintiff has paid a sum of Rs.2 Crores to the defendant for purchase of the property and has cited primarily the said reason for restoration of the Suit and also explaining the delay on the part of the plaintiff.

4. I have enquired from the counsel for the plaintiff, whether the plaintiff is willing to give up the relief of specific performance of agreement to sell and confine the relief in the Suit to recovery of amounts paid. Similar query has been made from the counsel for the defendant.

5. The plaintiff as well as the Managing Director of the defendant to remain personally present in the Court on the next date of hearing.

6. List on 29th November, 2017.";

(B) the following order was passed on 29th November, 2017:

"1. This order is in continuation of the earlier order dated 23rd November, 2017.

2. Mr.Sudesh Ranjan Singh, Advocate who had on 23rd November, 2017 appeared as the main counsel, today states that he is not the main counsel and Mr. Ashish D.Verma is the main counsel and seeks adjournment.

3. The Managing Director of the defendant is also not present.

4. Last opportunity is granted to the defendant to appear tomorrow failing which appropriate order shall follow.

5. The plaintiff stated to be present today to remain present tomorrow also.

6. List on 30th November, 2017.";

(C) the following order was passed on 30th November, 2017:

"1. This order is in continuation of the orders dated 23rd November, 2017 as well as 29th November, 2017. Today, Mr. Ashish Deep Verma, Advocate for the defendant appears but the position remains the same as before.

2. Though Mr. Ashish Deep Verma, Advocate on enquiry states that no part of the amount of Rs.2 crores admittedly received is shown as earnest money but is unable to show as to in exercise of what right the defendant has forfeited the said amount of Rs.2 crores. Mr. Ashish Deep Verma, Advocate contends that it is the plaintiff who is in breach of the agreement and the defendant has suffered loss owing to the said breach. However on enquiry, whether the defendant has sued for damages or compensation for such breach, the answer is in the negative.

3. Though Mr. Ashish Deep Verma contends that the defendant can still sue for such damages but on asking as to when the cause of action arose, states that the cause of action arose in the year 2008 and is

> *unable to tell as to how the claim for damages today, would be within limitation.*
>
> *4. Today, again adjournment is sought.*
>
> *5. So as to ensure that Mr. Ashish Deep Verma, Advocate on the next date of hearing does not seek adjournment to study anything else, his attention is drawn to the dicta of the Supreme Court in* ***Kailash Nath Associates Vs. Delhi Development Authority*** *(2015) 4 SCC 136 as well as of this Court in* ***Palm Art Apparels Pvt. Ltd. Vs. Enkay Builders Pvt. Ltd.*** *MANU/DE/3533/2017 as per which even qua earnest money, in the absence of proof of actual loss or damage, a decree of recovery thereof has to be passed.*
>
> *6. Subject to the defendant paying costs of Rs.20,000/-, list on 6th December, 2017.";*

and, (D) the following order was passed on 6th December, 2017:

> *"1. The defendant has not paid the costs till now.*
>
> *2. Without the same, the defendant cannot be heard. Another opportunity is given to the defendant to pay the costs, failing which appropriate orders shall follow.*
>
> *3. List on 11th December, 2017."*

7. The counsel for the defendant has today paid the costs to the counsel for the plaintiff and the counsel for the defendant has been heard further.

8. The counsel for the defendant has at the outset drawn attention to para 44 of ***Kailash Nath Associates*** supra and has contended that the Supreme Court therein had found the plaintiff therein to be not in breach and for this reason had directed refund of the earnest money paid by the plaintiff.

9. Undoubtedly so, but at the same time, it was held that compensation can only be given for damage or loss suffered and if damage or loss is not suffered, the law does not provide for a windfall. The said paragraph thus, rather than helping the defendant, is against the defendant.

10. The defendant in the present case, though has admittedly received advance sale consideration of Rs.2 crores but has not made any claim for the loss or damage suffered and the counsel for the defendant has already agreed that the limitation for claiming damages/compensation has expired. The present is thus a case of no loss/damage having been suffered by the defendant.

11. The counsel for the defendant has then referred to the judgment of a Single Judge of this Court in ***Airports Authority of India Vs. R.K. Singhal*** (2011) 185 DLT 648 and has read out para 6 thereof.

12. On a reading of the same, I do not find the same to be holding any different from what has been held by the Supreme Court in ***Kailash Nath Associates*** supra.

13. The counsel for the defendant has then referred to the order dated 22nd April, 2016 whereby this suit was dismissed and for restoration of which IAs No.11234-11235/2016 have been filed and to ***Mohan Madan Vs. Sheel Gulati*** (2015) 223 DLT 57, in para 18 whereof certain observations have been made as to speculative litigation.

14. I have already enquired from the counsel for the plaintiff, whether the plaintiff is willing to give up the relief of specific performance.

15. Upon the same query being made from the counsel for the plaintiff today, she, under instructions from the plaintiff, stated to be present in Court, states that the plaintiff confines the relief in this suit to recovery of Rs.2 crores paid and for recovery of damages and gives up the relief of specific performance.

16. Finding it to be highly inequitable that the suit of the plaintiff for the relief, even of recovery of Rs.2 crores paid as advance sale consideration for a transaction which has not fructified, be also dismissed for non-prosecution, though ought to have been allowed in the absence of any claim for damages, binding the plaintiff to the statement made today that the plaintiff gives up the relief of specific performance, for the reasons pleaded, the delay in applying for restoration of the suit is condoned and the suit is restored to its original position.

17. IAs No.11234-11235/2016 are disposed of.

18. The suit thus survives for the relief of recovery of Rs.2 crores admittedly paid by the plaintiff to the defendant under the Agreement and for recovery of damages for breach of contract.

19. As far as the relief claimed of refund of Rs.2 crores paid is concerned, the relevant clauses of the Agreement to Sell-cum-Receipt of July, 2008 and in which the defendant is described as 'First Party/Seller' and the plaintiff as 'Second Party/Purchaser', are as under:

> *"The First Party/seller has agreed to sell its entire Property No.259, Okhla Industrial Estate, Ph-III, New Delhi-110020, with physical vacant possession, free from all encumbrances, after clearing all the dues, demands, taxes (if any) and the second party/purchaser has agreed to purchase*

as referred above the Property No.259, Okhla Industrial Estate, Ph-III, New Delhi-110020, for a total sale consideration Rs.11,31,00,000/- (Rupees Eleven Crore and Thirty One Lacs Only).

…….

The seller and the purchaser are aware of it that at present that the Property No.259, Okhla Industrial Estate, Ph-III, New Delhi-110020, is being occupied by the tenants and to get the Property vacated from the existing tenants, its maximum expenses upto the extend upto Rs.50,00,000/- (Rupees Fifty Lacs only) shall be paid extra by the purchaser.

And if the said amount exceed/increased Rs.50,00,000/- (Rupees Fifty Lacs only) then the entire difference shall be paid by the Owner/Seller.

<u>NOW THIS AGREEMENT WITNESSES AS FOLLOWS:-</u>

1. *The seller has already received from the Purchaser a sum of Rs.50,00,000/- (Rupees Fifty Lacs only) out of which Rs.10,00,000/- (Rupees Ten Lacs only) receive in cash & Rs.40,00,000/- (Rupees Forty Lacs only) by Ch. No.490794 dated 20.07.2008, drawn on State Bank of India, Okhla Industrial Estate, New Delhi-110020.*
2. *At the time of executing of this agreement to sell the seller hereby admit to have received from the purchaser another sum of Rs.1,50,00,000/- (Rupees One Crore and Fifty Lacs only) out of which Rs.90,00,000/- (Rupees Ninety Lacs only) receive in cash & Rs.60,00,000/- (Rupees Sixty Lacs only) by Ch. Nos.490798 & 490800, dated 25.07.08, drawn on State Bank of India, Okhla Industrial Estate, New Delhi-110020.*

3. The Balance payment Consideration schedule has been agreed & settled between the Seller and the Purchaser as follows:-

i. If the owner shall be able to handover the 50% of the vacant possession of entire Property No.259, Okhla Industrial Estate, New Delhi-20, on or before 31st January, 2009, then the purchaser shall pay 50% of the total sale consideration.

ii. If the seller shall be able to handover the entire property (except One tenant in possession) on or before 31st March, 2009, then the purchaser shall pay the entire balance consideration of the said Property.

As and when the seller shall receive the entire balance consideration the seller shall sign execute/registered the required documents in the office of Sub-Registrar, Agreement to sell, GPA and other required documents as required by the purchaser."

20. The defendant also executed Receipt-cum-MOU dated 20th July, 2008 as under:

"RECEIPT-CUM-MOU

M/s Garment Craft (India) Pvt. Ltd. owner of Property No.259, Okhla Industrial Estate, New Delhi-20, built on about 606 sq.yds., as per registered conveyance deed dated 27th May, 2008, hereby admit to have receive from the purchaser Mr. Satish Verma son of Shri K.L. Verma, resident Farm No.11, South Drive, DLF Chhattarpur, New Delhi, a sum of Rs.1,50,00,000/- (Rupees One fifty Lacs only) out of which Rs.90,00,000/- (Rupees Ninety Lacs only) received in cash & Rs.40,00,000/- (Rupees Sixty Lacs only) by Ch. No.490798 and 490800 dated

25/07/08 drawn on State Bank of India, Okhla Ph. III, New Delhi-110020 on account of Part sale consideration, regarding sale of entire Property No.259, Okhla Industrial Estate, New Delhi-110020, with actual physical vacant possession and free from all encumbrances.

Uptill now the seller (M/s Garment Craft (India) Pvt. Ltd.) hereby admit to have receive from the purchaser (Mr. Satish Verma) total sum of Rs.2,00,00,000/- (Rupees two crores only), at the time of receiving the above said consideration the seller has handed over the actual physical vacant possession of ground floor portion of Property No.259, Okhla Industrial Estate, New Delhi-110020 to the purchaser.

Dated: July, 2008."

21. The aforesaid documents are not in dispute.

22. It is the plea of the plaintiff in the plaint (i) that the plaintiff, vide his letter dated 18th February, 2009, called upon the defendant to complete its part of the agreement; (ii) that the defendant vide its letter dated 6th March, 2009 called for a meeting on 8th March, 2009; (iii) letters dated 23rd March, 2009, 24th March, 2009 and 27th March, 2009 were sent by the plaintiff to the defendant and a reply dated 28th March, 2009 was received from the defendant; (iv) that the balance sale consideration of Rs.9.31 crores was payable by the plaintiff to the defendant at the time of registration of Sale Deed and handing over actual, vacant, physical possession of the remaining suit property by the defendant to the plaintiff; (v) that the defendant refused to perform the sale transaction after receiving Rs.2 crores from the plaintiff, inspite of plaintiff being ready and willing to pay the balance sale consideration and to fulfil his part of the Agreement to Sell.

23. The defendant contested the suit by filing a written statement pleading (a) that the defendant was desirous of selling the property to meet the expenses of the medical treatment of one of the Directors of the defendant; (b) that the plaintiff initially paid Rs.50 lacs on 20th July, 2008 and thereafter on 25th July, 2008, paid Rs.1.5 crores; (c) that though in the Agreement, it was mentioned that the possession of the ground floor was handed over but it was in fact not so handed over; (d) that the time frame for payment of the balance sale consideration was mandatory; (e) that the Director of the defendant who was ailing, expired on 4th October, 2008 and the defendant managed to get the premises vacated from all tenants except M/s OSR Shipping and being in urgent need of money, vide letter dated 17th February, 2009, called upon the plaintiff to take possession of the property except the portion in possession of said M/s OSR Shipping and after making payment of the entire balance sale consideration; and, (f) that the plaintiff being in breach cannot take advantage of his own defaults.

24. The counsels for both parties are *ad-idem* that the plaintiff was never in possession of any part of the property and the defendant remains in possession thereof.

25. Neither the sum of Rs.50 lakhs nor the sum of Rs.1,50,00,000/- admittedly paid by the plaintiff to the defendant were agreed by the parties, neither in the Agreement to Sell-cum-Receipt nor in the Receipt-cum-MOU, to be treated as earnest and in the Receipt-cum-MOU are expressly described as ‘part sale consideration’.

26. Though I have in the hearings aforesaid, heard the counsels at length on the aspect of right of the plaintiff to damages and the right of the defendant to forfeit the amount of Rs.2 crores but since the hearing till now was under the head of the applications for restoration, I have today again expressly asked the counsels, whether they want to address any further arguments on the aforesaid aspects today or on any other day.

27. Both counsels fairly state that whatever they had to argue on the said aspect has already been argued.

28. Supreme Court, in ***Kailash Nath Associates*** supra set aside the judgment of the Division Bench of this Court allowing the 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 damage or loss suffered and if damage or loss is not suffered, law does not provide for a windfall. It was laid down that (i) terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same; (ii) 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, the party who has committed the breach is required to pay such compensation in terms of Section 73 of the Contract Act; (iii) 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 in case of consequence of breach of a contract; (iv) 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.

29. Neither the Agreement to Sell-cum-Receipt nor the Receipt-cum-MoU in the present case stipulate liquidated damages to be paid by the plaintiff or the amount paid to be forfeited in case of breach by the plaintiff. It is also not the term that the parties had arrived at any genuine pre-estimate in this regard nor is it pleaded so.

30. Thus, what has been held in ***Kailash Nath Associates*** and ***Palm Art Apparels Pvt. Ltd.*** supra, squarely applies to the said amount of Rs.2 crores and the written statement of the defendant does not disclose any defence entitling the defendant no.1 to retain/forfeit the said amount and a decree for recovery thereof is liable to be passed forthwith.

31. As far as the claim of the plaintiff for damages is concerned, the tenor of the proceedings with effect from 23rd November, 2017 alone does not entitle the plaintiff to any damages from the defendant for breach of contract. The conduct of the plaintiff is found to be highly negligent.

32. The order dated 13th August, 2014, after framing the issues, directed the parties to file list of witnesses within four weeks and directed the plaintiff to adduce evidence by way of affidavits within eight weeks therefrom and posted the suit before the Joint Registrar for recording of evidence on 15th December, 2014. The plaintiff, till 15th December, 2014 neither filed list of witnesses nor any affidavit by way of evidence and the counsel for the plaintiff also failed to appear before the Joint Registrar on 15th December, 2014. Notwithstanding the same, the Joint Registrar gave further time to the plaintiff to file list of witnesses and affidavits by way of examination-in-chief of the witnesses of the plaintiff within further eight weeks therefrom and adjourned the suit to 26th May, 2015 for evidence of the plaintiff. By 26th May, 2015 also, the plaintiff neither filed list of witnesses nor affidavits by way of evidence and again did not appear. Though the suit should have been placed before the Court for dismissal for defaults of the plaintiff including of appearance but the Joint Registrar nevertheless gave further time of twelve weeks to the plaintiff for filing list of witnesses and affidavits by way of evidence and posted the suit for evidence of the plaintiff on 15th December, 2015. The default of the plaintiff continued and the position was unchanged by 15th December, 2015 as well. However, since the Joint Registrar was on leave on 15th December, 2015, the suit was adjourned for evidence of the plaintiff to 5th February, 2016. The position still remained unchanged. However, the Joint Registrar was not available on 5th February, 2016 as well, resulting in adverse orders being not passed against the plaintiff and the suit being posted to 30th March, 2016 for evidence of the plaintiff. On 30th March, 2016 also, the default of the plaintiff continued and the

counsel for the plaintiff even failed to appear before the Joint Registrar. The Joint Registrar in the order dated 30th March, 2016 noted that the plaintiff had neither filed list of witnesses nor affidavit by way of evidence despite more than one and a half years since framing of issues having elapsed and despite being given sufficient opportunities, and posted the suit before the Bench on 22nd April, 2016. On 22nd April, 2016, reasoning that the plaintiff, inspite of repeated opportunities, had failed to lead any evidence and there was gross negligence on the part of the plaintiff and the affidavits by way of evidence were not ready by that date also, as aforesaid, the suit was dismissed as the plaintiff had failed to discharge the onus of the issues framed.

33. The aforesaid would show that the plaintiff inspite of availing six opportunities, did not lead any evidence. The plaintiff, without proving breach of contract on the part of the defendant and which the plaintiff has failed to do, cannot be entitled to any damages from the defendant. The claim of the plaintiff for damages is thus dismissed.

34. As far as the claim of the plaintiff for interest is concerned, the plaintiff in the plaint has claimed pre-suit interest at the rate of 18% per annum on the amount of Rs.2 crores and the amount of interest due till the date of institution of the suit is stated to be Rs.2.54 crores. The plaintiff has of course also claimed *pendente lite* and future interest.

35. In the entirety of the facts aforesaid, I am of the view that the plaintiff is not entitled to any pre-suit interest on the amount of Rs.2 crores and is entitled only to interest *pendente lite* on the said sum of Rs.2 crores at the rate of 7% per annum and till 31st March, 2018; however post

31st March, 2018, the plaintiff shall be entitled to interest at the rate of 11% per annum on the said sum of Rs.2 crores.

35. A decree is accordingly passed, in favour of the plaintiff and against the defendant, for recovery of Rs.2 crores with interest at the rate of 7% per annum from the date of institution of the suit till 31st March, 2018 and if the amount of Rs.2 crores is not paid by 31st March, 2018, then with effect from 1st April, 2018, the defendant shall be liable to interest at the rate of 11% per annum till the date of payment / realization.

36. In the circumstances, no costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

DECEMBER 11, 2017
'bs/gsr'
(corrected & released on 25th January, 2018)