* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 09.02.2017

% **Decided on: 17.03.2017**

\+ CS(COMM) 304/2016

VERSATILE COMMOTRADE PRIVATE LIMITED ..... Plaintiff

Through: Mr. Ratan Kumar Singh, Mr. Nikhilesh Krishnan, Mr Nishank Tyagi and Mr Abhishek Iyer, Advocates

versus

CHIRANJI LAL & ANR ..... Defendants

Through: Mr Sunil Dalal and Mr Ashish Sharma, Advocates

CORAM:
HON'BLE MS. JUSTICE DEEPA SHARMA

JUDGMENT

IA No.23676/2015 (moved by defendants under Order XXXVII Rule 3 (7) CPC r/w S.151 CPC)

1. The present application of the defendants under Order XXXVII Rule 3 (7) of Civil Procedure Code (CPC) relates to grant of leave to defend the present suit, which has been filed by the plaintiff under Order XXXVII CPC for recovery of a sum of ₹1,03,54,000/- along with interest at the rate of 18% per annum with effect from 02.11.2013 till actual payment. It is submitted by the plaintiff that they are dealing in the business of real estate and were interested in purchasing land in revenue estate of Village Surhera,

Tehsil Najafgarh, New Delhi. Defendants approached them in first weeks of April, 2013 and offered to sell their agricultural land, the detail of which is as under:

> *(a) 1/3th share in total agricultural land measuring area 35 Bigha 9 Biswa, in Khata No. 101/100, in Khasra Nos/ 18//14 (4-16),17 (6-12), 24/2 (2-03), 25/2 (4-10), 45//6/2, (3-04), 15(4-16),16(4-16), 25(4-12), situated in the revenue estate of Village Surhera, Tehsil Najafgarh, New Delhi;*
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> *(b) 1/12 share in total agricultural land measuring area 6 Biswa, in Khata No. 102/101, in Khasra Nos. 18//25/1 (0-06), situated in the revenue estate of Village Surhera, Tehsil Najafgarh, New Delhi.*
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> *(c) 1/6 share in total agricultural land measuring area 6 Bigha 18 Biswa, in Khata No. 103/102, in Khasra Nos. 159 (3-18), 203 (3-0), situated in the revenue estate of Village Surhera, Tehsil Najafgarh, New Delhi.*

(These properties shall be hereinafter referred to as "suit property")

It is further contended by the plaintiff that since they wanted to purchase land in that area, they agreed to purchase the suit property and paid a token amount of ₹80,54,000/- (vide Cheque no. 403870 dated 23rd April 2013 for a sum of ₹40,27,000/- in favour of defendant no. 1 and another cheque no. 403871 dated 23rd April 2013 for ₹40,27,000/- in favour of defendant no.2). The defendants accepted the said token amount and promised to execute agreement to sell the suit property. However, they started delaying the execution of the agreement to sell. After much persuasion, the agreement to sell was executed on 18.07.2013 for total sale consideration of ₹3,60,00,000/- per acre and also paid a sum of ₹11,50,000/- to both the defendants and thus paid a total sum of ₹1,03,54,000/- to the defendants towards the part sale consideration price and that the defendants had also executed a receipt to this effect. In the agreement to sell, the defendants had represented that there was no legal impediment in selling the land. It is submitted that as per clause (1) of the agreement to sell it was agreed that the plaintiff would pay the balance sale consideration to the defendants within 90 days from the date of execution of the agreement to sell i.e. by 18.10.2013 subject to the defendants obtaining No Objection Certificate (NOC) from the concerned authority 15 days before 18.10.2013. It is submitted that the defendants, instead of obtaining NOC sent a notice dated 20.07.2013 alleging that the sale deed was to be executed on 18.07.2013 and that defendants had come to the office of Sub Registrar on 18.07.2013 for execution of the sale deed after obtaining NOC from the competent authority and that the sale would stand cancelled and the advance money would stand forfeited if the plaintiff failed to pay the balance sale consideration within 15 days from the date of receipt of the said notice. This notice was duly replied by the plaintiff on 14.08.2013 whereby the plaintiff had denied the contents of the notice and insisted that the balance consideration amount was payable by plaintiff only on furnishing the NOC to the defendants 15 days prior to the date of execution of the sale deed with defendants had failed to furnish. The plaintiff also disputed the contentions of the defendants in notice dated 20.07.2013 that agreement to sale was executed on 18.04.2013. The plaintiff further contends that the conduct of the defendants shows that they were not interested in complying with their obligations and had committed breach of the terms of the contract and did not obtain the NOC within the stipulated period and so the defendants were liable to refund the advance money which they had taken from the plaintiff and for that purpose a legal notice dated 15.11.2013 was served upon them, asking them to refund the advance/part sale consideration money along with interest at the rate of 18% per annum.

3. The defendants/applicants in the application for leave to defend have not denied that there was an agreement to sell of the suit property between the parties. The contention of the defendants, however, is that the agreement to sell was in fact executed in the month of April, 2013 and that is why the token money amount was paid by the plaintiff to them in April, 2013 through cheques which were encashed by the defendants in the month of

April, 2013 itself. The defendants have submitted that on the due date fixed in the agreement i.e. on 18.07.2013 the defendants visited the office of Sub-Registrar, Kapashera, New Delhi for the execution of the sale deed and has also applied for NOC on 18.07.2013 itself but the plaintiff did not attend the office of the Sub-Registrar for the said purpose and therefore the defendants sent legal notice dated 20.07.2013. It is further contended that it was the plaintiff who had violated the terms of the contract and he was never ready and willing to purchase the property and to pay full and final sale consideration. It is further submitted that clause (7) of the agreement to sell permits the defendants to forfeit the advance/earnest money paid by the plaintiff on failure on the part of the plaintiff to pay balance amount within the stipulated period. It is submitted that it is because the existence of clause (7) in the agreement to sell and because the plaintiff was not ready to make the payment, the plaintiff has written down the date on the agreement to sell as 18.07.2013 rather than 18.04.2013. It is further contended that the agreement to sell is not signed by the plaintiff and is neither registered nor notorized and therefore it is not a valid contract and cannot be relied upon. It is further contended that the suit is not maintainable under Order XXXVII of CPC because in the agreement to sell it is not mentioned that the earnest money was refundable in case the sale deed is not executed. It is submitted that the defendants were always willing and ready to perform their part of contract. It is further contended that the remedy available to the plaintiff was to file a suit under Section 22 of the Specific Relief Act when a party fails to perform their part of the contract. It is submitted that there is a triable issue to the effect, whether the defendants in the facts and circumstances of this case are liable to forfeit the earnest money/part payment.

4. In the reply to the present application, the plaintiff reiterated the averments made in the plaint and has also submitted that this application is barred by limitation as has been filed after a delay of 10 days. It is further submitted that there is no triable issue in view of the fact that the defendants in the application has admitted all the facts i.e. execution of the agreement to sell and the essential conditions to the execution. It is further submitted that the defendants has wrongly stated that the agreement to sell was executed in April, 2013. The document itself shows that it was executed on 18.07.2013. It is further submitted that the defendants have not contended at any stage in the application that they had obtained NOC and sent it to the plaintiff 15 days in advance then the date on which the plaintiff had to make the balance

payment of the consideration money. It is submitted that it only states that it had applied for obtaining NOC on 18.07.2013. It is submitted that as per clause (5) of the agreement to sell the defendants had to obtain NOC at least 15 days before the date of final payment. It is further submitted that there is no requirement under the law for the agreement to sell to be notorized and registered. It is further submitted that there is no requirement of law that the agreement to sell should be signed by the purchaser and it is sufficient if the same is signed by the seller. Reliance is placed on the judgments in ***Jyotsna K. Valia vs. T.S.Parekh & Co.*** 2007 (4) MH.L.J., ***Nandan Prashad Gupta vs. Sunil Gupta*** 2003 (104) DLT 132, ***Mrs.Sushila Mehta vs. Shri Bansi Lal Arora*** ILR (1982) 320 Delhi and ***Sarala Devi and Ors. Vs. Daya Ram and Ors.*** 60 (1995) DLT 3. It is further contended that the purchaser is not required to seek specific performance before seeking refund of advance/part sale consideration and the purchaser can straightway file suit for refund under Order XXXVII of CPC without seeking specific performance of the agreement to sell and the reliance is placed on ***Harbans Lal vs. Daulat Ram*** 2007 (1) ILR (Delhi) 706 (DB). It is submitted that as per clause (7) of the agreement the defendants have violated the terms and conditions of the agreement to sell and are at fault and therefore cannot forfeit advance/earnest money paid by the plaintiff. It is submitted that the application is liable to be rejected and the plaintiff is entitled for a decree.

5. I have heard the arguments of the parties and have given thoughtful consideration to the rival contentions.

6. The admitted facts of the case are that the parties had entered into the agreement to sell whereby the defendants had agreed to sell the suit property to the plaintiff for ₹3,60,00,000/- per acre and had received token amount of ₹1,03,54,000/- from the plaintiff on various dates. It is also the admitted fact that the parties had entered into a written contract i.e. agreement to sell. Although defendants say that the agreement to sell was executed in April, 2013, plaintiff's contention is that it was executed on 18.07.2013. The plea of the defendants is based on the fact that the plaintiff had paid a sum of ₹80,54,000/- by way of cheques which were dated 23.04.2013. While it is a fact that this money was paid by the plaintiff by cheques which were dated 23.04.2013, it is also a fact that cash amount of ₹11,50,000/- was also paid to the defendants and the plaintiff alleges that it was paid on 18.07.2013 at the time of execution of the agreement to sell and the defendants are silent as of the date of payment of this cash amount. It is also a fact that the date of issuance of e-stamp paper is 23.04.2013 at 06.06 p.m. but is signed by the

defendants on 24.04.2013 after attaching their photographs on it. This makes it clear that the plaintiff though made the payment by cheques dated 23.04.2013, but no agreement to sell was executed on that date. Also this contention of the defendants does not find support from their own legal notice dated 20.07.2013 wherein they had taken the plea that the agreement to sell was executed on 18.04.2013 while the e-stamp papers were purchased only on 23.04.2013 for execution of agreement to sell. In the notice dated 20.07.2013 the defendants had stated that the plaintiff was to pay the balance consideration amount within 90 days from 18.04.2013 i.e. by 18.07.2013 and that they were also to obtain the NOC for transfer of the said land from the competent Revenue Authorities, 15 days prior to the date of execution of the sale deed, yet the revenue record, which the defendants have furnished during the course of arguments, shows that they had applied for NOC only on 18.07.2013 i.e. on the alleged date of execution of the sale deed as defendants. Not only that, the revenue record shows that their request for issuance of NOC was rejected by Additional District Magistrate, (South West) Old Terminal Tax Building, Kapashera, New, Delhi – 110037 vide its order dated 23.08.2013 therefore on 18.07.2013 the defendants did not have a NOC in their possession and their averments to this effect in their notice dated 20.07.2013 were false. The defendants in para 8 of the said notice have clearly stated "*That I would also like to intimate you that my clients have also obtained 'NOC' for transfer the above said land from competent revenue authorities, this, requesting you to take an immediate step to execute the Sale Deed.*" In the application for leave to defend the defendants have taken a contrary plea to the effect that on the date when they had visited the Office of Sub-Registrar for registration of the Sale Deed i.e. on 18.07.2013 they had applied for NOC. Thus, the defendants are taking contrary stand and they are not stating the true facts. Even though the application for leave to defend was filed in the year 2015, the defendants have concealed this fact from the court that their application for issuance of NOC was rejected by the concerned ADM on 23.08.2013 itself. All these facts clearly show that the contention of the defendants that the agreement to sell was executed on 18.04.2013 is not correct. Even if, we accept this contention that the agreement to sell was executed on 18.04.2013, still as per clause (7) of the agreement the defendants were to obtain NOC 15 days in advance than the date of final payment which was 90 days from the execution of the agreement to sell. Since the defendants applied for NOC only on 18.07.2013 which as per contention of the defendants was also the date of payment of the balance consideration, shows that it had violated the terms of the contract. Clause (1) of the Agreement to Sell speaks about the total sale consideration amount and the advance received by the defendants. Clause (1) of the Agreement to Sell reads as under:

> *Clause 1. That in pursuance of the said agreement and in consideration @ Rs.3,60,00,000/- (Rupees three Crore and Sixty Lacs Only) per Acre, out of which Rs.1,03,54,000/- (Rupees One Crore, Three Lacs, and Fifty Four Thousand Only), has been received by the first party from the second party in the following manner-*
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> *(a) Rs.11,50,000/-by cash;*
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> *(b) Rs.40,27,000 vide Cheque No.403870, dated 23.04.2013 drawn on Oriental Bank of Commerce, Muzaffar Nagar both paid to Shri Chiranji Lal;*
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> *(c) Rs.11,50,000/-by cash*
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> *(d) Rs.40,27,000 vide Cheque No.403871, dated 23.04.2013, drawn on Oriental Bank of Commerce, Muzaffar Nagar: both paid to Shri Subhash Chand;*
> *as advance/earnest money and the receipt of the same is hereby admitted and acknowledged and the balance sale consideration shall be received by the first party from the second party on or before 90 (ninety) days from the date of execution of this agreement to sell.*

7. The language of the clause clearly stipulates that the defendants had received ₹1,03,54,000/- out of the total consideration amount and thus the money was received towards part payment. In the latter part of the said clause although the expression used is "*advance/earnest money*" but the fact

that the parties also noted that the "*balance sale consideration was to be received*", clearly shows that parties had intended to treat this money solely as a part payment. Clause (7) of the said agreement further shows the intention of the parties that this advance payment of ₹1,03,54,000/- was towards part payment of the consideration money. Clause (7) of the agreement reads as under:

> *Clause 7. That in case if the second party fails to pay the balance amount within the said stipulated period, then the advance/earnest money paid shall be forfeited by the first party. And this agreement to sell will automatically come to an end.*

8. The said advance payment was subject to forfeiture by the defendants only when the purchaser failed to pay the balance amount within stipulated period. The said stipulated period was 90 days. Clause (5) of the agreement however put a contingent to the payment of the balance consideration amount. Clause (5) of the agreement reads as under:

> *Clause 5. That the first party shall apply and obtain the No Objection Certificate in favour of the second party or the nominee/s at his own costs and responsibility at least 15 (fifteen) days before the date of final payment. In case the first party fails to obtain the NOC then this agreement shall stand automatically extended till the NOC is obtained.*

9. This clause clearly stipulates that the time to pay the balance amount is 90 days from the date of execution of the agreement to sell only if the seller obtains the NOC at least 15 days in advance from the date of final payment and in case the seller fails to obtain the NOC then the agreement would automatically stand extended till the period, NOC is obtained. Time therefore was not the essence of the contract and it was subject to stipulation of obtaining the NOC by the seller. It is apparent that the seller has failed to obtain the NOC and as such cannot take advantage of clause (7) of this agreement.

10. As regards the contention of the defendants that suit is liable to be dismissed because the agreement to sell was not registered and notorized and is not signed by the plaintiff is concerned, this argument has no merit. Section 17 (2) (v) of the Registration Act clearly exempts from the requirement of compulsory registration of those documents which do not create, declare, assign, limit or extinguish any right or interest in any immovable property or a property of a value of one hundred rupees and upwards to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest in the property. Only exception

to this provision is the documents specified in Sub-section (1A) of Section 17 of the Registration Act. This provision deals with compulsory registration of the documents relating to the contracts to transfer for consideration, any immovable property for the purpose of Section 53A of the Transfer of Property Act. Section 53A of the Transfer of Property Act deals with the contract to transfer for consideration any immovable property which includes the transfer of possession of the property as part performance of the contract. It is apparent that the agreement to sell in the present case does not fall within the definition of sub-section (1A) of Section 17 of the Registration Act and therefore registration is not compulsory. In ***Jyotsna K. Valia's*** case (*surpa*), three judges bench has clearly held that a written contract as contemplated under Order XXXVII of CPC need not necessarily be signed by both the parties where writings are such that a conclusion as to the existence of the agreement can be drawn. In the present case although the agreement to sell is signed by the defendants only yet the plaintiff has not disputed this agreement and the defendants since have signed it, cannot dispute it and therefore a suit under Order XXXVII of CPC is maintainable based on this agreement to sell. The contention of the defendants that before filing the suit under Order XXXVII of CPC the plaintiff ought to have asked for specific performance of the contract under Section 22 of the Specific Relief Act is also unfounded in terms of the settled proposition of law as held in ***Harbans Lal's*** case (*supra*) wherein it is clearly held that after the repudiation of the contract suit under Order XXXVII of CPC is maintainable. Also in ***Nandan Prashad Gupta's*** case (*supra*) the court has clearly held that the suit for refund of earnest money is maintainable under agreement to sell. In ***Kiranjit Singh vs. Madan Lal Khanna*** 53 (1994) DLT 86 the court has clearly held that a suit under Order XXXVII of CPC is maintainable for refund of money paid through cash receipts where defendants is not denying execution of the receipts because these receipts are in nature of written contract and could be basis for filing a suit under Order XXXVII of CPC. The same view is also taken by the court in the cases of ***Mrs.Sushila Mehta*** (*supra*) and ***Sarala Devi*** (*supra*). Therefore the contention of the defendants that the suit is not maintainable is unfounded.

11. In view of the above discussion, it is apparent that the defendants have failed to raise any triable issue. It were the defendants who have failed to comply with the terms and conditions of agreement to sell as they have failed to obtain NOC not only within the stipulated time but they were denied the permission to sell by the competent authority on their application

dated 19.07.2013 by the competent authority i.e. the Additional District Magistrate (South West) Old Terminal Tax Building, Kapashera, New, Delhi – 110037 vide its order dated 23.08.2013. The defendants during the course of arguments have relied on a certificate issued by ADM (South/West), South West District, Delhi and submitted that permission to sell the property i.e. NOC has been given to the defendants, However, this documents clearly shows that the defendants had applied again vide their application which was recorded as reference no. of SR office 4545 dated 15.10.2013, were given permission to sell only on 07.11.2013 i.e. much after the stipulated period under the agreement for obtaining NOC. All the above facts clearly show that it were the defendants who have failed to comply with the terms and conditions of the agreement to sell and therefore were at fault. Under clause (7) of the agreement to sell, the defendants could forfeit advance/earnest money paid to them by the plaintiff if they failed to pay the balance within the stipulated period.

12. As discussed the above, the plaintiff was to pay the balance consideration only after the defendants obtained the NOC within the prescribed period under the agreement or within the automatically extended period. The defendants' conduct show they repudiated the agreement to sell

even without complying and fulfilling the obligation imposed upon them under the agreement to sell. Therefore the defendants cannot invoke clause 7 of the agreement to sell and forfeit the money paid to them by the plaintiff. The application stands dismissed. In the facts and circumstances of the case, the plaintiff is entitled for the refund of sum of ₹1,03,54,000/- . The plaintiff has also claimed *pendente lite* and future interest till the payment of the money at the rate of 18% per annum with effect from 02.11.2013. The plaintiff, however, has failed to prove that it is entitled for the interest at the rate of 18% per annum as there exists no agreement between the parties to show such an entitlement. The plaintiff is therefore not entitled to the interest at the rate of 18 per cent per annum and for the period from the date 02.11.2013 till the filing of the suit. However, by virtue of Section 34 of the CPC, I award interest at the rate of 9% per annum to the plaintiff on sum of ₹1,03,54,000/- from the date of filing of the suit till its realisation. The suit stands decreed in these terms with no orders as to cost. Decree sheet be prepared accordingly.

DEEPA SHARMA
(JUDGE)

MARCH 17, 2017
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