

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

+ **RFA No. 647/2017**

% **9th August, 2017**

VINOD KUMAR SHARMA Appellant

Through: Mr. Amit Jain, Adv.
Appellant in person.

versus

GEETA KHURANA Respondent

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

CM No. 28468/2017 (for restoration)

This application is allowed inasmuch as it is stated that the appeal against the order dismissing the application under Order IX Rule 13 CPC has been dismissed by this Court on 2.8.2017 in FAO No. 328/2017. Accordingly, this application is allowed and appellant is allowed to argue the first appeal on merits.

CM stands disposed of.

RFA No. 647/2017

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant in the suit impugning the judgment of the trial court dated 3.12.2016 whereby the trial court decreed the suit for recovery of Rs.25 lacs along with interest pre-suit at 9% per annum simple and *pendente lite* and future interest at 6% per annum simple.

2. The subject suit was filed by the respondent/plaintiff against the appellant/defendant for recovery of Rs.34,56,250/-by pleading that the appellant/defendant had approached the respondent/plaintiff for selling the property of the appellant/defendant bearing old Municipal No. 55 and new no. 53, on a plot of 200 sq. yds, plot no.5, Village Sandhora Kalan, abadi known as Sri Nagar Colony, Delhi. As per the plaint, the respondent/plaintiff pleaded that she agreed to purchase the entire second floor of the property without roof rights with one fourth share in the parking for a sale consideration of Rs.1,05,00,000/-. An agreement to sell and purchase was entered into on 6.2.2013 and the respondent/plaintiff paid the appellant/defendant a sum of Rs.25,00,000/- of which Rs.17,00,000/- was paid in cash and

Rs.8,00,000/- lacs was paid by cheque bearing no. 367647 dated 10.2.2013 drawn on HDFC Bank, Roop Nagar, Delhi. The balance sale consideration was payable on completion of the entire building from ground floor to third floor with parking. It is pleaded in the plaint that the respondent/plaintiff came to know that the suit property was not built on the plot of 200 sq. yds. but constructed on 150 sq. yds. only and that appellant/defendant had failed to execute the sale deed of the suit property and had in fact not completed the construction. Accordingly, the respondent/plaintiff claimed return of the amount paid of Rs.25,00,000/- along with interest totaling to Rs.34,56,250/-.

3. Appellant/defendant, after service, did not file the written statement and ultimately he was proceeded *ex-parte* vide order dated 18.8.2015. Respondent/plaintiff thereafter led evidence and proved her case by her affidavit by way of evidence as also by proving of various documents. This is noted in para 4 of the impugned judgment and which para reads as under:-

“4. In order to prove her case, the plaintiff has examined herself as PW-1 and tendered her evidence by way of affidavit Ex.PW-1/A signed by her at points A & B. She also proved certain documents on record, in support of her case namely copy of cheque bearing no.367647, dt.

10.02.2013, for an amount of Rs.8 lakhs, marked as mark X-1, copy of the agreement to sell and purchase dt.06.02.2013, exhibited as Ex.PW-1/2, copies of title deeds of the suit property highlighting the area of the suit property as 150 sq. yards, marked as mark X-2, copy of receipt dt.06.02.2013, acknowledging the receipt of the sum of Rs.25 lakhs by the defendant to the plaintiff, exhibited as Ex.PW-1/4, copy of extract of page no.306 of the entry register dt.05.06.2013 of Himachali Co-operative Group Housing Society Ltd., exhibited as Ex.PW-1/5. Original photographs of the plot taken on 16.04.2015, exhibited as Ex.PW-1/6 to Ex.PW-1/14 (colly), copy of legal notice dt.02.07.2013, exhibited as Ex.PW-1/15, copy of reply dt.08.08.2013, sent by the plaintiff to the defendant's legal notice dt. 02.07.2013, exhibited as Ex.PW-1/16, copy of legal notice dt.13.08.2013 sent by the defendant to the plaintiff regarding termination of agreement to sell and purchase dt.06.02.2013, marked as mark X-3, copy of complaint made by defendant to SHO PS Sarai Rohilla dt. 30.09.2011, marked as mark X-4, copy of duly notarized undertaking given by the defendant executed on 10.08.2012, marked as mark X-5, copy of sanction plan dt.04.07.2013 obtained by the defendant in respect of the suit property highlighting it to be admeasuring 150 sq. yds, marked as mark X-6, copy of police complaint dt. 08.08.2013 made by the plaintiff to SHO PS Sarai Rohilla, New Delhi exhibited as Ex.PW-1/21, copy of complaint dt. 12.08.2013 addressed to DCP North District, Civil Lines, New Delhi exhibited as Ex.PW-1/22, copy of letter dt. 29.06.2014 issued under RTI Act by the RTI Cell, North District, Civil Lines, Delhi, exhibited as Ex.PW-1/23, copy of letter dt.12.06.2014 issued under the RTI Act, 2005 by Deputy Commissioner of Police and the Information Officer, Special Cell, Delhi, exhibited as Ex.PW-1/24, copy of letter dt.12.06.2014, issued under the RTI Act, 2005 by the Public Information Officer, Outer District, Delhi, exhibited as Ex.PW-1/25, copy of FIR no.0187/2014 dt. 25.02.2014 made by the plaintiff against the defendant, marked as mark X-7, copy of police complaint dt. 19.08.2015 filed by the defendant against the plaintiff addressed to the Dy. Commissioner (North District), Civil Lines, Delhi, marked as mark X-8 and copy of criminal complaint bearing CC No.196/2013 titled as Smt. Khurana Vs. Sh. Vinod Kumar Sharma & Ors. filed at Tis Hazari Courts, Delhi, marked as markX-9. Thereafter, remaining exparte evidence of plaintiff was closed."

4. Since the case proved by the respondent/plaintiff stood proved and it was unrebutted inasmuch as appellant/defendant filed no written statement and nor led any evidence, and that the

appellant/defendant was *ex-parte*, accordingly, trial court found no reason to disbelieve the case of the respondent/plaintiff and the evidence led by her and accordingly decreed the suit, and to which judgment I cannot thus find any error.

5. Learned counsel for the appellant/defendant sought to argue various aspects on merits, however, aspects of merits in favour of the appellant/defendant can only be examined if these aspects of merits are first pleaded before the trial court in terms of the written statement filed, and thereafter proved, but admittedly the appellant/defendant was *ex-parte*, and therefore, there is no defence of merits of the appellant/defendant. Therefore, this Court cannot consider any issue of merits in the form of defence.

6. There is no merit in the appeal. Dismissed.

AUGUST 09, 2017/ib

VALMIKI J. MEHTA, J