

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

+ **RFA No.91/2018**

% **5th February, 2018**

RAJESH Appellant
Through: Mr. Gourav Puri, Advocate
with Mr. Aditeya Bali,
Advocate.

versus

RAM BABU SHARMA Respondent
Through:

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. No.3330/2018 (exemption)

1. Exemption allowed subject to just exceptions.

C.M. stands disposed of.

RFA No.91/2018

2. 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 27.10.2017 by which trial court has decreed the suit for a sum of Rs.4 lacs alongwith

interest @ 9% per annum being the advance price paid by the respondent/plaintiff to the appellant/defendant under the agreement to sell dated 4.5.2012 and which agreement to sell could not go through.

3. The facts of the case are that the respondent/plaintiff filed the subject suit pleading that he and the appellant/defendant entered into the agreement to sell on 4.5.2012 whereby the appellant/defendant had agreed to sell to the respondent/plaintiff property bearing no.303, admeasuring 99 sq yds out of khasra no.303, situated at Village Kondli in the aabadi of Lal Dora Delhi-110096 for a sum of Rs.53.50 lacs and the respondent/plaintiff had paid to the appellant/defendant a sum of Rs.4 lacs as advance. The respondent/plaintiff pleaded that the balance due was to be paid to the appellant/defendant by end of 30.6.2012 at the time of execution of the sale deed and that it subsequently transpired that the appellant/defendant was not the owner by a sale deed but only had with him the copy of General Power of Attorney with the fact that certain disputes were pending between the appellant/defendant and the relatives of previous seller as regards the suit property. After serving

the legal notice dated 12.12.2012, the subject suit for recovery of Rs.4 lacs with interest came to be filed.

4. The appellant/defendant contested the suit. It was pleaded by the appellant/defendant that the agreement to sell was signed in good faith because the agreement to sell was prepared in english by the respondent/plaintiff and neither the appellant/defendant nor her husband were well versant with the english language. The appellant/defendant pleaded that she was the owner of the suit property having purchased it from the earlier owner Sh. Ved Prakash for a sum at Rs.11,80,000/- vide registered power of attorney dated 3.9.2008 registered before the concerned sub-registrar. It was pleaded that nothing was concealed by the appellant/defendant from the respondent/plaintiff and that it was the respondent/plaintiff who was responsible for not going ahead with the transaction.

5. After pleading were complete the following issues were framed:-

- “1. Whether the plaintiff is entitled to recover an amount of Rs.4,00,000/- from the defendant? OPP
2. Whether the plaintiff is also entitled to recover any interest from the defendant? OPP

3. Whether the defendant has legally forfeited the amount? OPD
4. Relief.”
6. Parties led evidence and which aspect are recorded in paras 5 and 6 of the impugned judgment and which paras read as under:-

“5. The plaintiff examined himself as PW1 and deposed the entire set of facts as contained in the plaint by way of his affidavit Ex.PW1/A and also relied upon two documents Ex.PW1/1 and PW1/2.

6. The defendant examined herself as DW1 and tendered her evidence by way of affidavit Ex.DW1/A and also registered upon registered power of attorney coupled with consideration and proved it as Ex.DW1/1. She also examined her husband as DW2 and the erstwhile owner Shri Ved Prakash Gaur as DW3. All the above witnesses were duly cross-examined by the opposite Counsels.”

7. All the issues have been discussed by the trial court together and it has been held that there is no dispute that the appellant/defendant had received a sum of Rs.4 lacs from the respondent/plaintiff under the agreement to sell. Trial court has relied upon the ratios of the judgment of the Supreme Court in the case of ***Kailash Nath Associates Vs. Delhi Development Authority (2015) 4 SCC 136*** and that of a Single Bench judgment of this Court in C.M(M) No.961/2017 titled as ***Dr. VB Roy & Anr. Vs. Ravindra***

Kishore Sinha decided on 5.9.2017, and which ratios are to the effect that there cannot be forfeiture of an earnest money or an advance price paid unless pursuant to the breach of contract loss is caused by the guilty party to the aggrieved person. This relevant discussion is found in paras 15 and 16 of the impugned judgment and these paras read as under:-

“15. The Hon'ble Supreme Court in **Kailash Nath Associates Vs. Delhi Development Authority (2015) 4 SCC 136** held in para No. 21 as under :

"21. Based on the facts of this case, the Single Judge was correct in observing that the letter of cancellation dated 06.10.1993 and consequent forfeiture of earnest money was made without putting the appellant on notice that it has to deposit the balance 75% premium of the plot within a certain stated time. In the absence of such notice, there is no breach of contract on the part of the appellant and consequently, earnest money cannot be forfeited".

It was further held in para 29 as under :

"29. Based on the facts of this case, it would be arbitrary for the DDA to forfeit the earnest money on two fundamental grounds. First, there is no breach of contract on the part of the appellant as has been held above. And second, DDA not having been put to any loss, even if DDA could insist on a contractual stipulation in its favour, it would be arbitrary to allow DDA as a public authority to appropriate Rs. 78,00,000/- (Rupees Seventy Eight Lakhs) without any loss being caused. It is clear, therefore, that Article 14 would apply in the field of contract in this case and the finding of the Division Bench on this aspect is hereby reversed".

16. The observations of Hon'ble Justice Rajiv Sahai Endlaw of the Hon'ble High Court of Delhi in **CM (M) No. 961/2017 titled Dr. VB Roy & anr. Vs. Ravindra Kishore Sinha dt. 05.9.2017** are also relevant to the facts of this case which are as under :

“12. I have inquired from the Counsel for the petitioners/defendants, whether in the absence of any forfeiture clause in writing, any forfeiture can be effected. Attention of the Counsels is invited to the dicta of the Supreme Court in *Kailash Nath Associates Vs. Delhi Development Authority* (2015) 4 SCC 136 and thereafter to the judgment of this Court dt. 31st July 2017 in CRP No. 3/2017 titled *Palm Art Apparels Pvt. Ltd. Vs. Enkay Builders Pvt. Ltd.* holding that forfeiture can only be of earnest money and not of part sale consideration and only when there is a specific agreement therefor and in the absence thereof, without proof of damage having been suffered, no forfeiture can be effected”.

8. I may note that the judgment of the Supreme Court in the case of *Kailash Nath Associates (supra)* essentially follows the Constitution Bench judgment of the Supreme Court in the case of *Fateh Chand Vs. Balkishan Dass AIR 1963 SC 1405* and which judgment holds that the existence of a loss being caused pursuant to the breach of contract is a *sine qua non* for a claim of damages. Forfeiture of advance money paid under an agreement to sell is actually forfeiture on account of the loss which is presumably caused to the seller of the property and once there is no pleading and proof of loss by the appellant/defendant the appellant/defendant could not have forfeited the advance price paid under the agreement to sell dated 4.5.2012.

9. In view of the above discussion, I do not find any merit in the challenge to the impugned judgment which rightly holds that the appellant/defendant is liable to refund a sum of Rs.4 lacs paid by the respondent/plaintiff to the appellant/defendant as advance price paid under the subject agreement to sell dated 4.5.2012. Dismissed.

FEBRUARY 05, 2018
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VALMIKI J. MEHTA, J