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

***Reserved on : 1st October, 2018***

***Date of decision :26th October, 2018***

\+ **CS (OS) 381/2014, I.As. 7320/2015 & 13279/2018**

\+ **CS (OS) 402/2014, I.As. 7318/2015 & 13278/2018**

VERSATILE COMMOTRADE PVT LTD. ..... Plaintiff

Through: Mr. Nikhlesh Krishnan & Mr. Aman Prasad, Advocates. (M:9810683803 & 9718684930)

versus

ADHARSHILA COUNTRY HOMES PVT LTD. ..... Defendant

Through: Mr. Sanjay Poddar, Senior Advocate with Mr. Jagdeep Dharma, Mr. Gyanendra Kumar and Mr. Sharaf Habibullah, Advs. (M:88000099887)

**CORAM:**

**JUSTICE PRATHIBA M. SINGH**

**JUDGMENT**

**<u>Prathiba M. Singh, J.</u>**

1. The present judgment disposes of two suits for recovery filed by the Plaintiff.

**<u>Suit no.1 - CS (OS) 402/2014</u>**

2. The Plaintiff has filed the present suit under Order XXXVII CPC seeking recovery of a sum of Rs.1,50,00,000/- along with interest @ 16.25%. The brief facts are that the Plaintiff entered into an agreement to sell dated 7th April, 2013 ("ATS-1") with the Defendant, for the sale of 9 bighas 6 biswas out of Khasra No. 31//9/2 (2-3), 12 (3-19), & 13/1 (3-4) situated in the revenue estate of Village Jhuljhuli, Tehsil-Najafgarh, NewDelhi-110043. The total sale consideration was Rs.6,20,00,000/- out of which Rs.1,50,00,000/- was paid by means of cheque no.403785 dated 7th

April, 2013, drawn on Oriental Bank of Commerce, New Mandi, Muzaffarnagar.

3. The Defendant had executed a receipt for the said amount, which was witnessed by two witnesses.

4. The Defendant claimed to be the absolute owner/Bhumidaar of the said land on the basis of an agreement to sell entered into between the Defendant and one Mr. Kapoor Singh Dagar – the Bhumidaar, dated 29th March, 2013.

5. The Plaintiff's case is that as per clause 5 of the agreement, the Defendant was to obtain NOC from the concerned ADM for execution of the sale deed, 15 days prior to the date of final payment. The date of final payment was to be 22nd June, 2013. Since the Defendant did not obtain the NOC in time, the Plaintiff is entitled to a refund of the sum paid. The Plaintiff also got issued a legal notice dated 30th December, 2013, since the Defendant failed to obtain the NOC. The Plaintiff has placed on record the bank statement to prove that the sum of Rs.1,50,00,000/- was credited to the Defendant's account.

6. The Defendant filed its leave to defend on the ground that the Plaintiff did not make the payment of the balance sale consideration. It was further stated by the Defendant that it had entered into an agreement to sell dated 29th March, 2013 with one Mr. Kapoor Singh Dagar. The Defendant took the plea that it had never assured the Plaintiff that the Defendant would get the sale deed executed in its favour on or before 18th June, 2013. Since the Plaintiff did not approach the Defendant with the payment of the remaining sale consideration, the Plaintiff failed to prove readiness and willingness. The Defendant relied upon clause 5 of the agreement and contended that the

time period for obtaining the NOC is open ended, and thus the agreement is still alive. The Defendant has taken the plea that since the Plaintiff did not make the remaining payment, its transaction with Mr. Kapoor Singh Dagar also stood cancelled, and hence the transaction with the Plaintiff could not be fructified. In view of this, the Defendant submits that the Plaintiff itself being in breach, is not entitled to a decree.

**Suit No.2 - CS (OS) 381/2014**

7. The facts of this case are similar to the facts in the abovementioned case. The Plaintiff entered into an agreement to sell dated 11th April, 2013 ("ATS-2") with the Defendant for the sale of 1/2 share In 11 bigha 15 biswa out of Khasra Nos. 74/21/2 (1-2), 85/1 (4-09), 10(3-10), 88/14(2-12), 15(0-2) and ½ share in 4 bigha out of Khasra No.28/23/2(4-0) & 1/6 share in land measuring 4 biswas out of Khasra No.31/26 (0-4) and ½ share in land measuring 13 bigha 16 biswa out of Khasra No.62/15 (4-16), 6(4-16), 15(4-04) situated in the revenue estate of Village Ujjwa, Tehsil Najafgarh, New Delhi. The total sale consideration was Rs.3,20,00,000/- per acre, out of which Rs.1,33,00,000/- was paid by the Plaintiff to the Defendant. The receipt dated 11th April, 2013 is also on record.

8. The counsel for the Plaintiff has submitted that the Defendant, having failed to obtain the NOC, was in breach of the agreement to sell. The Plaintiff had therefore no obligation to pay the remaining consideration amount. The advance amount is liable to be refunded as the power of forfeiture could not have been exercised by the Defendant. It is further submitted by Ld. Counsel for the Plaintiff that the Defendant was guilty of breach on more than one count. The NOC from the concerned ADM was to be obtained 15 days prior to the final payment. The back-to-back agreements

entered into by the Defendant with Mr. Rambir Singh and Mr. Ranbir Singh were themselves cancelled and hence the Defendant had no surviving rights in the property to even obtain a NOC.

9. On the other hand, it is submitted by Mr. Sanjay Poddar, Ld. Senior Counsel appearing on behalf of the Defendant that the above two cases relate to two agreements for three parcels of land. One parcel of land belonged to Mr. Ranbir Singh, the second parcel of land belonged to Mr. Rambir Singh and the third belonged to Mr. Kapoor Singh Dagar. These are back-to -back agreements, and time was not of the essence of the contract. In fact, the Plaintiff did not have requisite funds to make the payment as required under the agreement to sell and it told the Defendant not to get the NOC. The NOC was in fact obtained and given to the Plaintiff on 13th September, 2013, which is Annexure C to the leave to defend. After this NOC was submitted, the Plaintiff, in fact, issued a cheque dated 27th September 2013, of Rs.20,00,000/- in favour of Mr. Ranbir Singh. The original cheque, which has been placed on record, was returned due to insufficient funds. He submits that due to the fault of the Plaintiff, the Defendant incurred a huge loss and had to forfeit Rs.12,87,500/- paid to Mr. Ranbir Singh, Rs.40,18,750/- paid to Mr. Rambir Singh and Rs.75,00,000/- paid to Mr. Kapoor Singh Dagar. In fact, all the three agreements between the Defendant and the respective parties were cancelled because the Plaintiff did not make the payment. He further submits that the payment made by the Plaintiff constituted the earnest money deposit, which was liable to be forfeited.

10. In rejoinder submissions, Ld. counsel for the Plaintiff submits that the amount paid is not the earnest money, but is in fact advance payment which

cannot be forfeited. Mr. Ranbir Singh himself terminated the agreement with the Defendant on 26th September, 2013, and any payment made by the Plaintiff to Mr. Ranbir Singh after the said date is not related to the transaction with the Defendant. The NOC obtained on 13th September, 2013 was only in respect to one portion of the land. For the major portion of the land, no NOC was obtained. Since, the Defendant did not adhere to the terms of the agreement, the suit is liable to be decreed.

***Analysis and findings***

11. The agreements to sell dated 7th April, 2013 and 11th April, 2013 have identical clauses except in respect of the description of the property and the consideration amount. The relevant clauses of the said two agreements to sell, which are necessary for the purpose of deciding the application for leave to defend are set out herein below:

> *"2. That the first party shall hand over the physical vacant possession of the said land to the second party at the time of registration of the Sale Deed.*
> *3. That the first party assure/s the second party that he/she/they is/are the absolute owner(s)/vide agreements to sell dated 25.03.13 of the said land and that he/she/they has/have not encumbered in any manner i.e. such as sale, gift, mortgage, court-litigation, dispute, charge, lien, notices, agreement, etc. etc.*
> *4. That the first party further assures the second party that he/she/they is/are exclusive owner(s)/bhumidar(s) of the said land and as such he/she/they is/are fully competent to enter into an agreement and if someone-else claims any right, title and interest as owner or otherwise or raises any objection for the sale then the first party shall be liable and responsible for the losses if any suffered by the second party.*

*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/her/their 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 stands automatically extended till the NOC is obtained.*
*6. That the first party shall execute and register the sale deed and give the physical vacant possession within the said stipulated period to the second party or his/her/their nominee/s failing which the second party shall have a right to get this transaction executed through the court of law under specific performance of the contract at the cost of the first party.*
*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."*

12. A perusal of the above clauses in the context of the agreement to sell shows that there was no doubt that these two agreements were back-to-back agreements. The clauses which show that the agreements were back to back agreements are set out herein below:

<u>Agreement to Sell dated 7th April, 2013</u>

*"Whereas the first party is/are the absolute owner/s and bhumidar/s of 9 Bighas 6 Biswas out of Khasrna No.31/19/2 (2-3), 12(3-19) & 13/1 (3-4) <u>through agreement to sell dated 29-03-13</u> , situated in the revenue estate of Village Jhuljhuli, Tehsil Najafgarh, New Delhi.*

<u>Agreement to Sell dated 11th April, 2013</u>

> *Whereas the first party is/are the owner/s <u>vide agreements to sell with bhumidars dated 25.3.2013</u> of 1/2 share In 11 Bigha 15 Biswa out of K No's 74/21/2 (1-2), 85/1 (4-09), 10(3-10), 88/14(2-12), 15(0-2) and ½ share in 4 Bigha out of K.No.28/23/2(4-0) & 1/6 share in 4 Biswas out of K No.31/26 (0-4) and ½ share in 13 Bigha 16 Biswa out of Khasra No.62/15 (4-16), 6(4-16), 15(4-04). Total land, situated in the revenue estate of Village Ujjwa, Tehsil Najafgarh, New Delhi"*

13. While in CS(OS) 402/2014, the back to back agreement was with Mr. Kapoor Singh Dagar, dated 29th March, 2013, in CS(OS) 381/2014, the back-to-back-agreements were with Mr. Rambir Singh and Mr. Ranbir Singh, both dated 25th March, 2013.

14. The Court is however not dealing with disputes under the said two agreements. What is relevant to decide the present dispute are the two agreements to sell dated 7th April, 2013 and 11th April, 2013. The consideration stipulated in the said agreements is not in dispute. The amounts paid by the Plaintiff i.e. to the tune of Rs.1,33,00,000/- and Rs1,50,00,000/- at the time of execution of the agreements to sell, are also not in dispute. The only question is whether the Defendant can forfeit the said amounts.

15. A perusal of the clauses in the agreements to sell shows that no physical possession was handed over at the time of execution of the agreements. Execution of the sale deeds had been contemplated. The Defendant was required, under clause 5, to obtain a NOC from the concerned ADM, 15 days prior to the date of final payment. The date of final payment in ATS-1 is 22nd June, 2013 and in ATS-2 is 90 days from 11th April, 2013 i.e., 11th July, 2013.

16. The NOC was to be obtained 15 days prior to the final payment, which admittedly was not obtained. The Defendant argues that for a portion of the land, he obtained a NOC from the concerned ADM on 13th September, 2013. Such a NOC for only part of the land would still not come to the Defendant's aid.

17. The Defendant argues that clause 5 is open ended, and the NOC could have been obtained at any point of time. This is a self-defeating argument of the Defendant. On the one hand, the Defendant has pleaded that the Plaintiff failed to make payment within the prescribed period. Thus, the Defendant, while arguing that time was of the essence of the contract for making of payment, in the same breath, argues that time was not the essence of the contract for obtaining the NOC. The NOC was a pre-condition for making of the payment. No payment could have been made till the NOC was obtained. No sale deed could have been executed without first, the NOC and secondly the payment. The NOC and payment were interlinked and the NOC preceded the payment.

18. The plea of the Defendant that the Plaintiff told the Defendant not to obtain the NOC is not borne out from the record. In fact, the Plaintiff has claimed that after realizing that the Defendant may not be able to get the sale deed executed, it entered into an independent transaction with the owners.

19. The fact that the agreement, which the Defendant had with Mr. Ranbir was itself terminated as per Annexure F to the leave to defend application goes to show that after 26th September, 2013, the Defendant could not have, in any event, obtained a NOC. Thus, for the Defendant to obtain the NOC, was an impossibility.

20. The Defendant's reliance on a cheque of Rs.20 lakhs in favour of Mr. Ranbir Singh, does not improve its case in any manner as there appears to be some relationship between the Defendant and Mr. Ranbir Singh, and must have come in possession of the said cheque. The Defendant has attempted to weave a story around the said cheque, which is not borne out from the record. This fact is extraneous to the case between the Plaintiff and the Defendant. Thus, the Plaintiff had rightly issued the notice seeking refund of the amount.

21. In a leave to defend application, the Court has to only see whether the Defendant has a triable defence. The argument of the Defendant, that time was not the essence of the contract for obtaining NOC is liable to be rejected on two counts:

- The Defendant itself pleaded that the Plaintiff failed to make payment of the balance consideration with the stipulated time, hence for payment being made, time was the essence of the contract;
- Even if there is an open-ended clause, as per Section 46 of the Indian Contract Act, 1872, in case no specific time period is prescribed for the performance of an obligation, the obligation must be performed within a reasonable time.

22. In the present case, reasonable time would include that amount of time during which the Defendant could have obtained NOC. After termination of the contract by Mr. Ranbir Singh on 26th September, 2013, the Defendant could not have even obtained the NOC since the very basis of the agreement to sell had collapsed.

23. Thus, clause 5 cannot be interpreted in the manner in which the Defendant seeks to interpret the same.

24. The agreement does not permit forfeiture in any situation except if the Plaintiff fails to pay the balance amount. Clause 7 is clear to this effect. The clear position on record is that prior to the final date for making payment i.e. 22nd June, 2013 in case of ATS-1 and 11th July, 2013 in case of ATS-2, it did not obtain the NOC. The NOC had to be obtained 15 days prior to the final date of payment.

25. Thus, no occasion arose for the Plaintiff to pay the balance sale consideration. Thus, the Plaintiff is not in breach, and the advance/earnest money cannot be forfeited by the Defendant.

26. The Defendant has raised a further issue as to the nature of the amount received by it. The agreement to sell itself describes the amount as advance/earnest money.

27. The Defendant's counsel has submitted that it has already filed a suit against the Plaintiff in respect of Rs.40 lakhs, which it had to forego in view of the transaction with Mr. Rambir Singh. The said suit is pending before the District Courts in Dwarka, Delhi and the Defendant can pursue the same against the Plaintiff.

28. No other claims have been raised in respect of any losses suffered by the Defendant. The losses, if any, are not the subject matter of the present suit as the Defendant has not raised any claims in this regard. The advance/earnest money having been admittedly received by the Defendant, the NOC having not been obtained as per the stipulation in the agreement to sell, the obligation to pay the balance sale consideration did not arise. Thus, there is no triable defence raised by the Defendant. The law on this subject is

well settled in ***IDBI Trusteeship Services Ltd. v Hubtown Ltd*. *Civil Appeal No. 10860/2016, Decided on November 15th, 2016.*** The Supreme Court held as under:

> *"18. Accordingly, the principles stated in paragraph 8 of Mechelec's case will now stand superseded, given the amendment of O.XXXVII R.3, and the binding decision of four judges in Milkhiram's case, as follows:*
> *a. If the defendant satisfies the Court that he has a substantial defence, that is, a defence that is likely to succeed, the plaintiff is not entitled to leave to sign judgment, and the defendant is entitled to unconditional leave to defend the suit;*
> *b. if the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the plaintiff is not entitled to sign judgment, and the defendant is ordinarily entitled to unconditional leave to defend;*
> *c. even if the defendant raises triable issues, if a doubt is left with the trial judge about the defendant's good faith, or the genuineness of the triable issues, the trial judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security;*
> *d. if the Defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.*

*e. if the Defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the plaintiff is entitled to judgment forthwith;*

*f. if any part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit, (even if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the defendant in court."*

29. If the Defendant has no triable defence, the leave to defend is not liable to be granted.

30. The Plaintiff has relied upon ***Subhash Chand v. M/s Versatile Commotrade Pvt. Ltd., RFA (OS) (COMM) 12/2017, Decided on 18th August, 2017,*** which is a suit involving a similar agreement to sell entered into by the Plaintiff with a third party. In the said suit, a Division Bench of this court upheld the decree granted by the Ld. Single Judge and held that, the Plaintiff was entitled to seek refund of money.

31. The Defendant has relied upon a judgment of this Court in M/s ***Versatile Commotrade Pvt. Ltd. v M/s Angad Developers Pvt. Ltd CS (OS) 802/2014, Decided on 20th July, 2018 .*** In the said case, there were two amounts of which recovery was sought. One amount was the earnest money and the second amount was part of the balance sale consideration. In respect of the second amount, the suit was decreed. In respect of the first amount, the matter was sent to trial, as there was a forfeiture clause, which was relied upon by the Defendant and the matter required evidence to be led to justify the forfeiture and to establish as to who was in breach. This judgement is of no application in the present case as the amount has been paid at one go and

has been described as Earnest money/advance payment. In the said judgment, the amounts were paid in two different tranches and were differently described and in the present case, the aspect as to who is in breach does not require oral evidence as the facts are not in dispute.

32. The leave to defend applications are accordingly liable to be dismissed and the suits are liable to be decreed. CS (OS) 381/2014 is decreed for a sum of Rs.1,33,00,000/- along with simple interest @ 10% per annum from the date of issuance of notice dated 13th December, 2013, till the date of decree.

33. CS (OS) 402/2014 is decreed for a sum of Rs.1,50,00,000/- along with simple interest @ 10% per annum from the date of issuance of notice dated 30th December 2013, till date of decree.

34. Decree sheet be drawn. All pending I.As are disposed of.

**PRATHIBA M. SINGH**
**JUDGE**

**OCTOBER 26, 2018**
*Rahul*