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

Reserved on : 23rd May, 2018

Date of decision :4th July, 2018

\+ **RFA 191/2007**

RAVI LUTHRA ..... Appellant

Through: Mr. Neeraj Grover, Ms. Mehak Nakra and Mr. Abhishek Butoliya, Advoates (M-9810376869)

versus

M.A.K. LALL & ANR. ..... Respondents

Through: None.

CORAM:
JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. Mr. Ravi Luthra, Appellant in the present case was the allottee of a built-up flat bearing No. 903, Block-16, Category-B-1, 8th Floor, East End Apartments, Mayur Vihar, Phase-1 Extension, Delhi (*hereinafter referred as 'suit property'*). The ownership of the Plaintiff is not disputed in the present case. Plaintiff entered into an Agreement to Sell dated 15th May, 2003 by which the Plaintiff agreed to sell the suit property to Mr. M.A.K. Lall and Mrs. Neelam Lall, Respondents (*hereinafter referred as 'Defendants'*). The total sale consideration agreed was Rs.19,40,000/-. A sum of Rs.2,00,000/- was paid as earnest money and the remaining payment was to be made on or before 30th June, 2003. The parties agreed by way of a supplementary agreement dated 15th March, 2003that the Plaintiff's liability towards arrears

of house tax, society charges, commission and brokerage would be limited to Rs.32,500/-. Thereafter, a fresh agreement to sell dated 5th August, 2003 was executed. The said agreement was registered before the Sub-Registrar's office. Payment of Rs.12,30,000/- was made. In addition, two cheques for Rs.2,40,000/- and Rs.2,70,000/- along with the said registered Agreement to Sell, a General Power of Attorney and Special Power of Attorney were also executed and registered on the same date. The vacant and peaceful possession of the flat was also given to the Defendants.

2. It is the case of the Plaintiff that the Defendants thereafter requested the Plaintiff not to present the cheque for the sum of Rs.2,70,000/- before 20th August, 2003 though the same was dated 5th August, 2003. When the said cheque was presented, it was dishonoured with the remarks 'payment stopped by drawer'. Thus, a sum of Rs.2,70,000/- remained outstanding. The payment of the same was not made by the Defendants. The Plaintiff got a legal notice dated 27th August, 2003 issued. The Defendants replied vide letter dated 16th September, 2003 and sought to justify the non-payment. The Plaintiff then sought to cancel the entire transaction and filed the present suit seeking the following reliefs: -

> "*a) declaration declaring the Agreement to Sell dated 5.8.03 registered at S.No.5181 book no.966, Addl. Book No.01, PagesNo.l54 to 163 before Sub-Registrar, Sub-Division-VIII, Geeta Colony, Delhi as cancelled.*
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> *b) declaration declaring the General Power of Attorney dated 5.8.03 registered at S.No.10789 book no.816, Addl. Book No.04, Pages No.169 to 172 before Sub-Registrar, Sub-Division-VIII, Geeta Colony, Delhi as cancelled,*

> c) *declaration declaring the Special Power of Attorney dated 5.8.03 registered at S.No.10790 book no.816, Addl. Book No.04, Pages No.173 to 174 before Sub-Registrar, Sub-Division-VIII, Geeta Colony, Delhi as cancelled.*
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> d) *possession in favour of the plaintiff directing the defendants to handover the peaceful vacant possession in respect of the suit premises bearing no.16/903,8th Floor, East End Apartments, Mayur Vihar, Delhi to the plaintiff.*"

3. The Defendants filed the written statement and claimed that the filing of the suit is merely an object of harassment to avoid the liability of the house tax, society charges, commission, brokerage and other miscellaneous charges. The main issue raised by the Defendants in the written statement was that the Plaintiff was liable to pay the upto date property tax, society charges, half of the commission and brokerage charges of one percent each. The Defendants disputed that the Plaintiff's liability was only to the tune to Rs.32,500/-. It claimed that the liability to pay the said charges for the Plaintiff existed till 5th August, 2003. The Defendants alleged that the Plaintiff wanted to misuse the initial agreements which were signed on blank papers. The Defendants also alleged that the Plaintiff informed them that all the charges would be cleared by 20th August, 2003 and that he would given the clearance certificate subject to which the cheque was to be encahsed. Since all the charges which were the liability of the Plaintiff were not paid by him, the Defendants had no option but to issue stop payment.

4. The following issues were framed in the suit:

> "*1. Whether plaintiff is entitled to the relief of*

declaration sought for by him in the present suit? OPP.

2. *Whether plaintiff is entitled to grant of relief of possession as claimed for by him in the plaint? OPP.*
3. *Relief.*"

5. All the documents are admitted between the parties. The Plaintiff appeared as PW-1. Mr. Sunil Saini who worked as an Accountant with the Plaintiff appeared as PW-2. Defendant No.1, Mr. M.A.K. Lall appeared as DW-1. The following documents were exhibited:-

i. PW-1/1 and PW-1/2, Agreement to Sell dated 15th May, 2003 along with receipt for Rs.2,00,000/-.

ii. PW-1/3, letter written by Defendant No.1 seeking extension for making payment till 10th August.

iii. PW-1/4, Supplementary Agreement dated 01st August, 2006.

iv. PW-1/5, registered Agreement to Sell dated 5th August, 2003.

v. PW-1/6, registered General Power of Attorney.

vi. PW-1/7, registered Will.

vii. PW-1/8, registered special Power of Attorney.

viii. PW-1/9, cheque dated 20th August, 2003 with the date 5th August, 2003 being cut for sum of Rs.2,70,000/-.

ix. PW-1/10, Cheque Return Memo issued by ICICI Bank dated 22nd August, 2003.

x. PW-1/12, legal notice dated 27th August, 2003.

xi. PW-1/13, reply dated 15th September, 2003.

xii. PW-1/14, PW-1/15 and PW-1/16, notice dated 8th November, 2004 along with speed post receipts.

xiii. PW-1/17 and PW-1/18, AD cards

xiv. PW-1/D-1, original Agreement to Sell and Purchase dated 19th May, 2003.

xv. Exhibit C1 – Copies of cheque dated 04.08.2003 for Rs. 2,40,000/- and cheque dated 20.08.2003 for Rs. 2,70,000/-

6. PW-1 in his evidence stated that the difference between PW-1/D-1 and PW-1/1 was that in the photocopy initially filed, the date did not appear and this was an intentional act by the Defendants. PW-1 denied the copy of the cheque PW-1/9. He also admitted Exhibit-C.1 i.e. the copies of the two cheques. He however denied his signatures acknowledging receipts of these two cheques. He denied having received the cheques on 4th August, 2003. PW-2 admitted his signatures on PW-1/D-1, however, he stated that the said document was signed by him on 15th May, 2003 and not on 19th May, 2003 as a witness.

7. Defendant No.1 who appeared as DW-1 stated that the initial agreements of May, 2003 were only drafts. He stated that the date on PW-1/D-1 was put in front of the Notary. He claimed that the Plaintiff did not make any efforts to obtain the NOC and balance payment of house tax. He admitted his signature on the letter seeking extension (PW-1/3). He stated that he had obtained a loan from Standard Chartered Bank for purchasing the property in question which was sanctioned only in July, 2004. He admitted that he had sought the extension as he did not have funds to make the payment. He admitted his signatures on all the documents. He admitted that he did not have sufficient balance in the bank account. He claimed in his affidavit that the Plaintiff did not pay any amount for house tax which would have been almost Rs.1,00,000/- excluding penalty and surcharge

which the Plaintiff was supposed to pay. Thus, he had issued stop payment for the cheque of Rs.2,70,000/-.

8. The Trial Court dismissed the suit for declaration by holding that the contract was not voidable. The Trial Court held that the Plaintiff is not entitled to the relief and dismissed the suit.

9. The only question is as to whether the Plaintiff had the liability to pay the house tax penalty, surcharge, commission, brokerage etc. As per the Agreement to Sell (PW-1/D-1), the dues pertaining to the suit property were to be borne by Mr. Ravi Luthra and if the same were not paid, the Defendant had the right to deduct the same from the price fixed. This is clear from clause 5 and 6 of PW-1/D-1. The said two clauses are set out below:

> "*5. All dues pertaining to the property in question till the date fixed as per clause no. 2 above shall be paid by the First Party. In case any dues are not paid by the First Party on or before the date of completion of the transaction, the same shall be deducted from the price fixed for transaction as per clause No.1 of this agreement.*
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> *6. The peaceful and vacant possession of the property shall be handed over by the First Party to the Second Party on or before the date fixed as per clause no. 2 above and/or at the time of completion of the transaction free from all loans, attachments and encumbrances and subject to fulfillment of other terms of this agreement alongwith the fixtures and fittings on as is where is basis. There is no electricity connection obtained by the First Party and the same shall be obtained by the Second Party at his own cost. Upto date Property Tax and Society Charges shall be paid by the First Party till the date of finalisation of the transaction.*"

10. In the supplementary agreement dated 1st August, 2006, the clause relating to dues is changed and the following clause is inserted.

> *"Further to the agreement to sell in respect of society built-up flat No. 903 in Block 16, category B1 on 8th floor East End apartments at East End C.G.H.S. Mayur Vihar Phase - I extn. Delhi - 96, the following clause has been incorporated.*
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> *That the total liability of the first party towards arrears of House- Tax, society charges, commission, brokerage payable to the broker or any other expense incidential or otherwise shall be limited, to Rs.32,500/- (Rupees Thirty Two thousand and five hunched only). Any expense above Rs.32,500/- (Rupees Thirty Two thousand and five hundred and five hundred only) shall be borne by the second party.*
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> *That the above clause should be treated as the part of the main agreement."*

11. Thereafter on 5th August, 2003, the final Agreement which was registered does not contain any clause except to the effect that expenses for transfer of the property shall be borne by the second party i.e. the Defendant No.2, Mrs. Neelam Lall. The said clause is relevant and set out below:

> *"6 That all expenses on the transfer of the said property and easements attached thereto i.e. Municipal/Corporation Taxes, Stamp Duty, Court fee, Registration Fee, etc. And proportion of unearned increase in the value of the component of land on conversion charges as may be determined by the Delhi Development Authority shall be borne and paid by the Second Party."*

12. A conjoint reading of the above three documents shows that though initially the Plaintiff was to bear all the charges, the supplementary Agreement changed and limited the liability of the Plaintiff to Rs.32,500/-. The Defendant No.1, Mr. M.A.K. Lall who is duly authorised by his wife, admitted his signature on the document i.e. PW-1/4. His cross examination is relevant and set out below: -

> *"I admit my signatures on Ex. PW-1/4 at point A and B respectively. Both the signatures at point A and B were affixed on 15th May, 2003. Endorsement at point C on Ex. PW-1/4 is in my handwriting and the signatures at point B are mine which were made after I had signed at point A thereon. Since the cheque of Rs.2.00 lacs towards earnest money had been issued from the bank account of my wife, therefore after consultation with the plaintiff and property dealer I made the endorsement at point C. it is correct that despite the aforesaid endorsement at point C on Ex. PW-1/4 agreement to sell Ex.PW-1/D-1 is in my name. it is wrong to suggest that the endorsement at point C on Ex. PW-1/4 agreement to sell Ex. PW-1/D-1 is in my name. It is wrong to suggest that the endorsement at point C on Ex. PW-1/4 was made by me on 3rd August, 2003 after my request for extension for time had been turned down by the plaintiff on 01st August, 2003. It is also wrong to suggest that after the said refusal of the plaintiff regarding extension of time, agreement to sell Ex. PW-1/D-1 stood enacted. It is wrong to suggest that I signed Ex. PW-1/4 at point A on 01st August, 2003 in the office of the plaintiff. It is correct that Ex.PW-1/5 was registered in the office of the Sub-Registar after payment of the appropriate stamp duty."*

13. There is a serious doubt as to the date when the supplementary Agreement and the original Agreement to Sell were entered into. Exhibit

PW-1/D.1 which is produced by the Defendants and confronted to the Plaintiff bears a date of 19th May, 2003. The document produced as PW-1/1 is identical to PW-1/D.1 except for the date being blank. The supplementary Agreement is claimed to have been signed by DW-1 only on 15th May, 2003 but a reading of the same suggests that this was in continuation and further to the Agreement to Sell. So in effect, it appears that these two documents i.e. the Agreement to Sell and the supplementary Agreement were not executed on the same date. The stamp paper on which the Agreement to Sell is executed is of 19th May, 2003. As per the affidavit of PW-1, the date of the Agreement to Sell is 15th May, 2003. In his cross-examination, he denied the suggestion that PW-1/1 was not signed on 15th March, 2003.

14. There is a serious doubt as to the date on which the first Agreement to Sell was signed. Both PW-1/1 and PW-1/D.1 are on stamp paper. They bear the original signatures of both parties on each page. The documents appear to have been executed in duplicate. The so called supplementary Agreement Ex. PW-1/4 was clearly executed subsequent to the Agreement to Sell and definitely not on 15th May, 2003. Ex.PW-1/4 is a document subsequent to the Agreement to Sell and it thus appears that the Plaintiff's liability may have been limited to Rs.32,500/-. The oral testimony in respect of the execution of these documents is contradictory. However, it is quite clear that the signatures on PW-1/3 i.e. the extension letter being admitted, the date of the Agreement is 15th May, 2003 as mentioned therein.

15. The final Agreement to Sell is silent as to the issues of society charges, brokerage and commission. However, the Municipal Corporation Taxes and conversion charges are the responsibility of the Defendant. It is thus clear that the amount of Rs.2,70,000/- ought to have been paid by the

Defendants.

16. The question however urged by the counsel for the Plaintiff is that the stop payment of Rs.2,70,000/- constitutes fraud and hence the declaration sought ought to be granted and the sale ought to be rescinded. Section 17 of the Contract Act defines fraud which is set out below:-

> "*17. 'Fraud' defined.—'Fraud' means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent1, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract: 'Fraud' means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent1, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:*
> *(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;*
> *(2) the active concealment of a fact by one having knowledge or belief of the fact;*
> *(3) a promise made without any intention of performing it;*
> *(4) any other act fitted to deceive;*
> *(5) any such act or omission as the law specially declares to be fraudulent. Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence, is, in itself, equivalent to speech.*"

17. The conduct of the parties reveals that there was a clear dispute as to who ought to pay the various charges i.e. property tax, brokerage, commission etc. This could have been a genuine dispute which could have

been resolved. However, since the Plaintiff sought the cancellation of the entire transaction itself, it appears that no meeting point arose.

18. The dispute raised by the Defendants may not be bonafide. However, the same still does not constitute fraud for cancelling the transaction completely. The Plaintiff can be adequately compensated in money for the said non-payment. The declaration sought for, is thus not liable to be granted. The suit was filed in February, 2005 and thirteen years have passed by, the Plaintiff has been deprived of the amount due to him. The Defendants ought to have cleared the entire amount and the stop payment does not inspire confidence. Though the Plaintiff has sought a declaration and handing over of the possession, in the opinion of this Court, the Plaintiff can adequately be compensated in money. Reliefs prayed for are not granted, however, a lesser relief of payment of sum of Rs.2,70,000/- along with interest @ 8% per annum is granted in favour of the Plaintiff against the Defendants from the date of filing of the suit till the date of payment. The payment shall be made within eight weeks. If the said payment is not made, the Plaintiff shall be entitled to interest @12% on the decretal amount from the filing of the suit till the date of payment. In addition, the Plaintiff is also granted Rs.50,000/- as costs of the litigation.

19. The appeal is disposed of in the above terms.

PRATHIBA M. SINGH, J.
Judge

JULY 04, 2018
Rekha