

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

+ **RFA No. 424/2018**

% 18th May, 2018

MOHD. CHAMAN GULZAR Appellant

Through: Mr. Arun Baali and Mr.
Jaskaran Singh, Advocates.

versus

RAISUDDIN Respondent

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

CM No. 20574/2018(Exemption)

Exemption allowed subject to just exceptions.

CM stands disposed of.

CM No. 20576/2018 (delay in re-filing)

For the reasons stated in the application, delay in re-filing is
condoned, subject to just exceptions.

CM stands disposed of.

RFA No. 424/2018 and CM No. 20575/2018 (stay)

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 28.11.2017 by which the trial court though has dismissed the suit for specific performance filed by the respondent/plaintiff, however the trial court has passed a money decree in favour of the respondent/plaintiff and against the appellant/defendant on account of appellant/defendant having received a sum of Rs.3 lacs under the subject Agreement to Sell dated 31.12.2010 entered into for a total consideration of Rs.4 ½ lacs pertaining to property bearing no. 70, land measuring 50 sq. yds. part of Khasra No. 274/365, situated at Gali No. 39, Zakir Nagar, Jamia Nagar, Okhla, New Delhi-110025.

2. The facts of the case are that the respondent/plaintiff pleaded that under the subject agreement to sell, out of the total sale consideration of Rs.4 ½ lacs, a sum of Rs.3 lacs was paid to the appellant/defendant, and since the appellant/defendant did not execute the sale documents in favour of the respondent/plaintiff, hence the subject suit for specific performance was filed.

3. Appellant/defendant contested the suit and denied execution of the agreement to sell. Appellant/defendant pleaded that actually the transaction in question was not an agreement to sell but the appellant/defendant needed a loan of Rs.3 lacs for the marriage of his daughter, and therefore, he had given the original documents of his property to the respondent/plaintiff. It was pleaded that the subject agreement to sell is forged and fabricated document. Suit was therefore prayed to be dismissed.

4. In this case no issues were framed because original defendant was proceeded *ex parte*, however, trial court has framed the points of determination and which are really the issues which were called for decision in the subject suit for specific performance.

5. We are not concerned that part of the impugned judgment by which the trial court has dismissed the suit for specific performance by observing that the respondent/plaintiff has failed to prove the readiness and willingness, and we are only concerned as to whether appellant/defendant had received, whether under the agreement to sell or otherwise, a sum of Rs.3 lacs from the respondent/plaintiff.

6. In this regard, it is to be noted that though the appellant/defendant denied having signed any agreement to sell and he pleaded that he had taken a loan of Rs 3 lacs of which an amount of Rs. 1.5 lacs was repaid to respondent/plaintiff, however, the respondent/plaintiff filed and proved on record the Ikrarnama dated 19.2.2011/Ex.PW1/J entered into between the parties in the police station in the presence of as many as three witnesses with one witness being Sh. Azhar the son of the appellant/plaintiff. Ex.PW1/J clearly reflected that appellant/defendant had received a sum of Rs.3 lacs from the respondent/plaintiff for sale of the property and that in case the amount is not returned by 20.4.2011, then the appellant/defendant would sell the property to the respondent/plaintiff. Trial court accordingly by relying on Ex.PW1/J has held that there was entered into an agreement to sell between the parties under which the appellant/defendant had received a sum of Rs.3 lacs as reflected from Ex.PW1/J. It may be noted that the appellant/defendant did not deny that his signatures did in fact appear on the Ikrarnama Ex.PW1/J. The relevant observations of the trial court in this regard are contained in

paras 13 and 14 of the impugned judgment and which paras read as under:-

13. These documents have not been disputed by the defendant either. However, though defendant has denied the execution of the agreement to sell Ex.PW-1/B and receipt Ex.PW-1/A but during his cross examination, DW-1 admitted that Ex.PW-1/J is the same settlement arrived at between him and the plaintiff in the police station and also admitted his signatures thereon. Though DW-1 stated he stated that he did not know what are the contents of Ex.PW-1/J. DW-1 also stated that he did not know what is the contents of the statement and he had never tried to know the contents of the settlement and he even did not try to know the contents of the said settlement even at the time of preparation of his affidavit of evidence. The statement of the defendant even not bothering to inquire about the contents of the settlement Ex.PW-1/J does not inspire any confidence. The Ikrarnama Ex.PW-1/J bears the seal of the PS: Jamia Nagar and plaintiff contended that this Ikrarnama was executed at the police station in the presence of the witnesses including the son of the defendant Sh.Azhar. Ex.PW-1/J reflects that defendant had taken Rs.3 lakhs from the plaintiff for the sale of the suit property and now he did not want to sell the property and he agreed to return the amount to the plaintiff in two months by 20.04.2011 and also undertook not to sell the property to anyone and in case he had to sell the property, he will sell the same to the plaintiff for the earlier agreed amount and on his failure to return the amount, he would handover the possession to the plaintiff. This document Ex.PW-1/J was witnessed by three witnesses one of whom is Azhar who is son of the defendant. Plaintiff has also given a suggestion to the defendant that his son was present in the police station at that time and had signed at point B on Ex.PW-1/J. Defendant admitted that name of his son is Azhar. Further, nowhere in his affidavit Ex.DW-1/A, defendant has disputed the contents of the Ikrarnama Ex.PW-1/J. Even no such suggestion was given to the plaintiff PW-1 during cross examination that contents of the Ikrarnama Ex.PW-1/J were later on filled up or it was a blank document.

14. Once the defendant has admitted the signatures at Ex.PW-1/J, it is clear that the defendant has admitted the contents thereof, in the absence of any contrary suggestion or evidence to that effect. In view of the same, the stand of the defendant that he

had taken a loan of Rs.3 lakh and returned back the sum of Rs.1.5 lakh falls flat. Further, there is no explanation given by the defendant as to how the documents pertaining to suit property fell into the hands of the plaintiff. The story of the loan amount and the documents given as security are also proved to be meritless.”
(underlining added)

7. Learned counsel for the appellant/defendant again sought to argue that the appellant/defendant had not entered into an agreement to sell, however, this argument is baseless in view of the observations made and conclusions drawn by the trial court in paras 13 and 14 of the impugned judgment which have been reproduced above and which have rightly and clearly arrived at a finding of the appellant/defendant signing the Ikrarnama Ex.PW1/J as also the said Ikrarnama being witnessed by three witnesses, one of whom was Sh. Azhar, the son of the appellant/defendant.

8(i) It may be noted that in law even assuming the respondent/plaintiff was guilty of breach of contract, yet, unless loss by the breach of respondent/plaintiff/buyer is pleaded and proved to have been caused to the appellant/defendant, an amount which is received by the appellant/defendant under the agreement to sell cannot be forfeited. I have recently examined this position in the judgment in the case of *M.C.Luthra Vs. Ashok Kumar Khanna* RFA No.780/2017

decided on 27.2.2018 and held without pleading and providing that the breach of contract has caused loss to a seller, the seller(appellant/defendant in this case) cannot forfeit amounts paid by a buyer (respondent/plaintiff in this case) as earnest money/advance price. An SLP which has been filed against this judgment being SLP(C) No. 11702/2018 has been dismissed by the Supreme Court in terms of its order dated 15.5.2018.

(ii) Therefore since in the present case, there is no appellant/defendant's pleading and thereafter proving any loss caused to him, hence the appellant/defendant cannot retain/forfeit the amount of Rs.3 lacs paid to him by the respondent/plaintiff and respect to which amount a money decree has been passed by the trial court against the appellant/defendant along with interest at 12% per annum

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

MAY 18, 2018/ib

VALMIKI J. MEHTA, J