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

+ CS(OS) 1244/2013

M/S KUSHAL INFRAPROJECT
INDUSTRIES (INDIA) LTD.

..... Plaintiff

Through: Mr.Tanmay Mehta with
Mr.Aditya, Advocates.

versus

UMED SINGH & ORS.

..... Defendants

Through Mr.Parvinder Chauhan with
Mr.Vishal Chauhan, Advocates.

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Date of Decision: 14th December, 2018

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J: (Oral)

1. Present suit has been filed for specific performance, possession and permanent injunction.
2. It is averred in the plaint that the parties had entered into an Agreement to Sell dated 23rd January, 2013 for sale of agricultural land admeasuring 26 bighas 14 biswas, bearing khata/khatoni No.69/53 Mustatil/Killa No.751(4-10), 752/2(2-05), 753(4-16), 754(7-00), 756(3-13), 757(4-10) situated in village Katewada, Delhi for a total sale consideration of Rs.6,67,50,000/- (Rupees Six Crores Sixty Seven Lakhs Fifty Thousand Only).

3. It is the plaintiff's case that though it had paid earnest money of Rs.66,75,000/- (Rupees Sixty Six Lakhs Seventy Five Thousand Only) to the defendants, yet the defendants deliberately did not obtain the 'No Objection Certificates' from the concerned authorities under the Delhi Land Reforms Act, 1954.

4. It is averred in the plaint that the plaintiff sent a legal notice dated 13th May, 2013 to the defendants. In reply to the said notice, the defendants stated that they had never agreed to sell the land bearing Khasra No.757(4-10) to the plaintiff company as on the date of execution of the said Agreement to Sell the defendants were not its owners and the said Khasra number had been inserted by the plaintiff company by committing a forgery. The defendants also contended that the impugned Agreement to Sell was void under the Delhi Land Reforms Act.

5. The plaintiff alleged that the defendants' reply was false and frivolous as the defendants were trying to sell the suit property to a third party.

6. After completion of pleadings and admission/denial of the documents, this Court on 04th March, 2015 framed the following issues:-

"1. Whether the plaintiff company is incorporated under the Company Act and Shri Kushal K. Rana was competent to file the present suit? OPP

2. Whether the defendants had not agreed to sell the land bearing Khasra No. 757 (4-10) to the plaintiff? OPD

3. Whether the Agreement to Sell dated 23rd January, 2013 is void and hit by the provision of Sections 33 and 45 of the Delhi Land Reforms Act? If so, what effect? OPD / OPP

4. *Whether the plaintiff is entitled to specific performance of the Agreement to Sell dated 23rd January, 2013? OPP*

5. *Whether the plaintiff is entitled to decree of permanent injunction as prayed? OPP*

6. *Whether in alternative the plaintiff is entitled for a decree of damages to the tune of Rs. 6,67,50,000/-? OPP*

7. *Whether grant of NOC by the Revenue Department is mandatory pre-condition of the Agreement to Sell dated 23rd January, 2013 and what is the effect of absence/denial of such NOC?OPD*

8. *Relief.*

Both the parties are directed to file their list of witnesses within a period of four weeks.

Plaintiff is permitted to file its evidence by way of affidavit within a further period of four weeks.

List before the Joint Registrar on 7th May, 2015 for recording of evidence.”

7. Since despite grant of number of opportunities the plaintiff did not file its evidence by way of affidavits, the learned Joint Registrar vide order dated 23rd July, 2018 closed the right of the plaintiff to lead evidence. On the said date, the counsel for the defendants made a statement that they did not wish to lead any evidence.

8. As despite lapse of nearly three and a half years, neither the list of witnesses nor evidence by way of affidavits was filed by the plaintiff, this Court vide order dated 08th August, 2018 declined the plaintiff's prayer for extension of time to file the list of witnesses as well as the

evidence by way of affidavits. The order dated 08th August, 2018 is reproduced hereinbelow:-

“Today learned counsel for the plaintiff prays that she may be given last and final opportunity to lead evidence in the present case.

However, a perusal of the order sheets reveals that issues in the present case were framed on 04th March, 2015. Despite a lapse of nearly three and a half years, neither the list of witnesses nor the evidence by way of affidavits has been filed by the plaintiff.

Learned counsel for the plaintiff states that in the present case, considerable time was lost in bringing the legal heirs of defendant no.1 on record.

However, this Court is of the view that pendency of an application under Order XXII Rule 4 CPC is not a good enough ground to seek extension of time to file the list of witnesses as well as the evidence by way of affidavits. Moreover, though the application under Order XXII Rule 4 CPC was allowed vide order dated 24th November, 2017, yet till date even the amended memo of parties has not been filed.

Consequently, the prayer for extension of time to file the list of witnesses as well as the evidence by way of affidavits is declined.

Learned counsel for the plaintiff prays for some time to argue the matter on merits.

In the interest of justice, re-notify on 14th August, 2018.

9. An appeal being FAO(OS) No.132/2018 challenging the order dated 08th August, 2018 was dismissed by the Division Bench of this Court vide judgment and order dated 22nd October, 2018.

10. A Special Leave Petition being SLP(Civil) No.45198/2018 challenging the aforesaid Division Bench order as well as this Court's order dated 08th August, 2018 was dismissed by the Apex Court on 10th December, 2018. The order dated 10th August, 2018 is reproduced hereinbelow:-

*“Delay condoned.
The special leave petitions are dismissed.
Pending application is disposed of.”*

FINDING ON ISSUES NO.1 to 7

11. Issues No.1, 4, 5 & 6 are decided against the plaintiff as it had failed to discharge the onus of proof cast on it as it had failed to lead its evidence. On similar reasoning, Issues No.2, 3 & 7 are decided against the defendants.

RELIEF

12. At this stage, Mr.Tanmay Mehta, learned counsel for the plaintiff makes an oral prayer for amendment of the plaint to incorporate the relief for refund of advance sale consideration paid by the plaintiff to the defendants. He contends that the plaintiff, in the alternative, had prayed for compensation of Rs.6,67,50,000/- (Rupees Six Crores Sixty Seven Lakhs Fifty Thousand Only) and since the purchase price to be refunded by the defendants is lesser than the said compensation amount, the amendment should be allowed forthwith.

13. However, learned counsel for the defendants submits that this Court cannot order refund of the advance sale consideration received by the defendants as, firstly, no such prayer has been made in the plaint and, secondly, such a relief would be barred by limitation.

14. In the opinion of this Court, Section 22(2) of the Specific Relief Act, 1963 empowers the Court to allow amendment of the plaint in a suit for specific performance at any stage on such terms as may be just and fair. Consequently, the submissions advanced by learned counsel for defendants are untenable in law.

15. Since in the present case, the defendants have not been able to prove that they have suffered any loss on account of breach of the agreement to sell by the plaintiff, this Court allows the oral prayer of learned counsel for plaintiff to amend the plaint to incorporate the relief for refund of the advance sale consideration of Rs.66,75,000/- (Rupees Sixty Six Lakhs Seventy Five Thousand Only). Let the amended plaint incorporating the relief for refund be filed within one week.

16. The Supreme Court with regard to earnest money in ***Kailash Nath Associates Vs. Delhi Development Authority & Anr. (2015) 4 SCC 136*** has held as under: -

“42. In the present case, forfeiture of earnest money took place long after an agreement had been reached. It is obvious that the amount sought to be forfeited on the facts of the present case is sought to be forfeited without any loss being shown. In fact it has been shown that far from suffering any loss, DDA has received a much higher amount on re-auction of the same plot of land.

43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:- Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such

by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.

Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section.

The Section applies whether a person is a plaintiff or a defendant in a suit.

The sum spoken of may already be paid or be payable in future.

The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application.

44. The Division Bench has gone wrong in principle. As has been pointed out above, there has been no breach of contract by the appellant. Further, we cannot accept the view of the Division Bench that the fact that the DDA made a profit from re-auction is irrelevant, as that would fly in the face of the most

basic principle on the award of damages - namely, that compensation can only be given for damage or loss suffered. If damage or loss is not suffered, the law does not provide for a windfall.”

(emphasis supplied)

17. Keeping in view the aforesaid mandate of law as well as the fact that the defendants have admittedly received the earnest money of Rs.66,75,000/- (Rupees Sixty Six Lakhs Seventy Five Thousand Only) from the plaintiff and as there is no clause for forfeiture of earnest money and the defendants have not been able to prove that they have suffered any loss on account of non-performance of the agreement, this Court while rejecting the prayers for specific performance of Agreement to Sell dated 23rd January, 2013 as well as possession and damages directs the defendants to refund the aforesaid earnest money to the plaintiff within four weeks.

18. With the aforesaid directions, present suit stands disposed of. Registry is directed to prepare a decree sheet accordingly.

MANMOHAN, J

DECEMBER 14, 2018
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