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

Reserved on : 18th May, 2018

Date of Decision: 4th July, 2018

**+ RFA 369/2016 & CM APPL. 118/2018, 8551/2018, 8552/2018,
8553/2018**

CHAITANYA KOCHAR

..... Appellant

Through: Appellant in person.

versus

HARSH SEHGAL

..... Respondent

Through: Mr. Rahul Bamel, Advocate
(M-9873984074).

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The Respondent/Plaintiff (*hereinafter 'Plaintiff'*)– Sh. Harsh Sehgal filed a suit for recovery of Rs.20 lakhs against the Defendant – Sh. Chaitanya Kochar along with pendente lite and future interest. The Trial Court decreed the suit vide judgment dated 22nd January, 2016. The present first appeal has been preferred impugning the said judgment by the Defendant/Appellant (*hereinafter 'Defendant'*).

2. The background of the case is that a transaction was entered into between the parties in respect of purchase of property bearing no.53, Pocket-B5, Sector-7, Rohini, Delhi-110085 ad measuring 31.69 sq. mtrs. having 2^{1/2} storey built up (*hereinafter 'suit property'*). The Bayana receipt dated 1st May, 2009 recorded the agreement between the parties. The same is exhibited as Ex.PW-1/1. The total sale consideration agreed was Rs.34,75,000/- out of which Rs.10 lakhs bayana amount was paid by the Plaintiff to the Defendant. The Bayana Agreement is signed by the

Defendant and is also signed by the purchaser i.e. the Plaintiff and two witnesses, namely, Sh. Dheeraj and Sh. Pawan Arora.

3. The case of the Plaintiff is that the Bayana amount of Rs.10 lakhs was given on 1st May, 2009. Rs.6,50,000/- was paid vide two cheques and Rs.3,50,000/- was paid by cash. There is no dispute that the two cheques were encashed by the Defendant. The balance sale consideration of Rs.24,75,000/- was to be paid and the transaction was to be completed by 15th June, 2009. At the bottom of the Bayana receipt, a note was added “15 days grace period on Bank’s request will be given which will sanction loan or housing finance”. The translated text of the Bayana receipt is set out herein below:

“Property Dealer

Bayana Receipt

Serial

No.

Dated 01.05.09

I, CHAITANYA KOCHAR S/o LATE SH BALMUKUND KOCHAR R/o B-5/53, Sec.7, Rohini, Delhi-85, I have agreed to sell my Plot No. B-5/53, Sec. 7, Rohini, Delhi-85 Located at Rohini Delhi-110085 admeasuring about 31.69 Sq. M. having built up 2 ½ Floor for a total sum of Rs. 34 Lac 75 Thousand (Thirty-Four Lacs Seventy Five Thousand in words) of whose half value is of Rs. 17,37,500/- (Seventeen Lac Thirty-Seven Thousand Five Hundred in words) today dated 1/5/09 to Sh. Harsh Sehgal S/o Late Sh. Subhash Chandra Sehgal R/o D-14/127 Sec. 7, Rohini, Delhi-110085. I have taken the Bayana of Rs. 10,00,000 (Ten Lacs in words). (Rs. 3,50,000/- is being given in cash plus two cheques (as record) (Centurian Bank Pritampura)) The last date for completion of documentation is 15-06-2009 and the purchaser can have it either in his own name or any other person. In case the purchaser refuses to purchase the same then his earnest money of 10,00,000/- (Ten Lacs) would be forfeited. And if I (the seller) refuses for some reason or the other to execute the documents, then I would be liable to pay the double of the earnest money which is Rs. 20,00,000 (Twenty Lacs only in words).

The aforesaid plot is in my possession. I have complete set of the documents with respect this property. No loan has been taken upon this property. This Bayana Receipt is written/given by me with my free will and without any undue influence/pressure in the presences of the witnesses (All docs will be given on 01.07.09)

Total consideration of the offer is amount 34,75,000/- (Thirty-Four Lacs Seventy Five

Thousand in words)

Bayana is 10,00,000/- (Ten Lac only in words)

Remaining Balance 24,75,000 in words Twenty-Four Lac Seventy Five Thousand

Due date : 15.06.2009

By way of a Cheque bearing No. 000722 for a sum of Rs. 1,50,000/- Dt. 1/5/2009 and Cheque bearing No. 000723 for Rs. 5,00,000/- dt. 1/6/2009

Note: - (1) Both the parties has to give ~~2-2%~~ as commission.

(2) If the present agreement fails then the dealer will give the commission to either the purchaser who is entitled to take double the of the bayana or the seller who will cease the bayana.

(3) Seller will give complete set of the document with respect to the property in question.

(4) After execution of the documents and handing over the possession the purchaser will be liable for any risk.

(5) 15 days grace period on Bank Request will be given which will sanction loan for money finance

**Revenue Stamp
Cross Sd/-
C. Kochar
1/5/09**

**Sd/-
Pawan Arora
Sd/-
Sd/-
Dheeraj
C. Kochar**

**Sd/-
Harsh Sehgal**

**1/5/2009
Witness**

Purchaser

Seller”

4. The Plaintiff claims that one of the terms of the Bayana receipt is that if the Defendant fails to complete the sale transaction, he would be liable to pay double the amount of the earnest money and if the Plaintiff fails to complete the transaction, the amount paid by him would be would be liable to be forfeited. Thus the Plaintiff's case is that the Defendant showed the Plaintiff the original title documents and had agreed to provide him photocopies in order to enable the processing of the bank loan, however, despite repeated requests, the photocopies of the title documents were not

given for one reason or other and finally on 22nd May, 2009, the Plaintiff got issued a notice calling upon the Defendant to give him to supply the photocopies of the title documents. The Plaintiff pleads that despite repeated attempts, the Defendant could not be traced and therefore he lodged a Police complaint on 11th June, 2009 at PS, Rohini, but the Police failed to take any action. The Plaintiff averred that he was always ready and willing to perform his part of the contract and that he repeatedly requested the Defendant to complete the sale transaction and execute the sale deed. However, the Defendant did not come forward to do the needful. The Plaintiff accordingly on 15th June, 2009, went to Sub-Registrar's Office at Rohini and by that time, he had already arranged the balance sale consideration. The Plaintiff claims that he remained at the Sub-Registrar's Office (Rohini) for the entire day on 15th June, 2009 but the Defendant did not turn up. Thus, the Plaintiff, as per the Bayana receipt claimed that he is entitled to recover double the earnest money i.e. Rs.20 lakhs and sought recovery of the same. The prayer sought in the suit is as under:

“It is therefore respectfully prayed that a decree for a sum of Rs.20,00,000/- alongwith Pendente lite and future interest @ 18% per annum from the date of filing of present suit till the date of decree/or till the actual realization of the amount may kindly be passed in favour of the plaintiff and against the defendant. Any other order(s), relief as this Hon'ble Court may deem fit and proper as per the facts and circumstances of the case in hand, may also be passed in favour of plaintiff and against the defendant.”

5. The Appellant/Defendant appeared in person. The case of the Defendant in his written statement was that it was the Plaintiff who had

approached the Defendant who is a permanent resident of Jalandhar that he desired to purchase the suit property in Rohini. He claimed that after the Bayana agreement was entered into, the Defendant sought to invoke the 15 days grace period and he had promised to pay the balance sale consideration on or before 30th June, 2009. However, as per the Defendant, the Plaintiff mischievously sent a legal notice dated 18th June, 2009 in which he falsely blamed the Defendant for his absence before the Sub-Registrar's Office on 15th June, 2009. It was upon receiving the letter dated 18th June, 2009 that the Defendant replied to the said notice on 23rd June, 2009 and thereafter issued a termination notice dated 13th July, 2009. In replication, the Plaintiff made an allegation that the Defendant is an absconder and that he is a chronic litigant against whom various criminal cases were pending. The Plaintiff also pleaded that due to the dishonest conduct of the Defendant, he has been deprived of purchasing the suit property the value of which had almost crossed Rs.1crore.

6. Initially, the Defendant did not appear in the matter and he remained untraceable. Thereafter, an application under Order V Rule 20 was filed and upon being served through publication, on 21st April, 2010, the Defendant was proceeded ex-parte. The suit was thereafter decreed on 19th October, 2010 for a sum of Rs.20 lakhs along with interest @ 9% per annum. On 26th August, 2011, the Defendant moved an application under Order IX Rule 13. The ground in the application was that the Defendant was never served and accordingly the decree is liable to be set aside. The said application was dismissed on 25th November, 2011. Thereafter, the Defendant moved an application seeking review of the said order. The Defendant then made a statement to the following effect:

“I hereby undertake that I shall deposit with this court 100% of the decretal amount of Rs. 22,49,379/- in shape of FDR in favour of the court of Additional District Judge-III, Rohini Courts, Delhi on or before 15th of January, 2012. My application for review dated 07.12.11 filed by me, may be allowed in view of my this undertaking. I have made this statement with my free consent and without any pressure or coercion”

7. Thereafter on 27th January, 2012, a petition seeking transfer was filed by the Defendant on the ground that the Presiding Officer was acting in an inappropriate and high-handed manner. The said petition for transfer moved before the District Judge was dismissed on 27th January, 2012 with the following directions:

“Petitioner seeks transfer of the case pending before Sh. J.K. Mishra, Ld. ADJ, Rohini Courts, alleging that the said Presiding Officer is acting in illegal manner and acting beyond jurisdiction ignoring the facts of the case and is acting in inappropriate and high handed manner besides treating him with shockingly rude and arrogant behavior. The petitioner states that he has also moved a complaint to Hon’ble High Court against the learned Presiding Officer, so case may be transferred.

The transfer application is replied, contested and strongly opposed on behalf of respondent. It is argued that petitioner has usurp a sum of Rs.10 lacs of the respondent/plaintiff and is not paying the decretal amount. He is also involved in criminal cases and was behind the bar for three days and his conduct in itself is not appropriate. The ld. trial court has passed the order in accordance with law, so application should not be allowed.

I have heard the petitioner and counsel for respondent. Trial court record was also summoned which shows that application of the petitioner under

order 9 rule 13 CPC for setting aside the ex-parte decree was allowed by Ld. Trial court subject to deposit of 75% of the decretal amount and cost of Rs.5000/-. On a review petition in the alternative seeking extension of time, filed by the petitioner, the ld. Trial Court modified its order by directing that petitioner is liable to pay 100% of decretal amount in the court to be deposited by the petitioner by 15th of January, 2012 on the statement given himself by the petitioner on oath that he shall give the 100% decretal amount in the form of FDR on or before 15.01.2012. Thereafter, the present petition for transfer is made. It is also argued that a complaint is also moved before Hon'ble High Court by the petitioner.

The above proceedings before Ld. trial court shows that petitioner himself gave a statement in the review cum extension of time application, on the basis of which the ld. Trial Court has passed an order. If the petitioner, has any grievance against any order of ld. trial court, the remedy lies by approaching the Hon'ble High Court. There is nothing inappropriate in the proceedings of ld. trial court and when specifically, the order of ld. trial court is obtained by the petitioner himself by giving statement on oath before ld. trial court so I do not find any justified ground for transfer of petition to any other court. Therefore, the application has not merit and is accordingly dismissed. The trial court record be returned alongwith copy of this order. The parties to appear before learned trial court on 03.02.2012 at 10.00 a.m. The file of transfer petition be consigned to record room."

8. On 3rd February, 2012, the Defendant moved an application to place on record the FDR as per the earlier statement. The same was directed to be placed in safe custody for encashment at the appropriate time. On the said date, three weeks time was granted to the Defendant to file the written

submissions. However, since the Defendant did not file the same, on 21st March, 2012, the defence of the Defendant was struck off. An application was again filed by the Defendant seeking setting aside of the said order dated 21st March, 2012. The ground in the said application was the long hospitalization and demise of the mother of the Defendant. Subject to costs, the written statement then filed by the Defendant was taken on record vide order dated 22nd May, 2012.

9. In admission/denial, the Bayana receipt dated 1st May, 2009 and the legal notice dated 18th June, 2009 were admitted as Ex.PA-1 and Ex.DA-1. Thereafter on 1st February, 2013, the following issues were framed in the matter:

- “i) Whether the suit of the plaintiff is time barred?
OPD*
- ii) Whether the defendant had terminated the agreement to sell dt.1.5.09 on 13.7.09 as alleged. If so its effect?*
- iii) Whether the plaintiff is entitled to money decree. If so to what amount? OPP*
- iv) Whether the plaintiff is entitled to any interest? If so, at what rate and for which period?*
- v) Relief.”*

10. The Defendant continued to absent himself on various dates. On 3rd July, 2013, three witnesses of the Plaintiff were present but none were present for the Defendant. Thus, they were examined by the Trial Court and discharged. The Defendant again moved applications seeking an opportunity to cross-examine the witnesses. The issues were again reframed on the request of the Defendant:

- “1. Whether suit filed by plaintiff is not maintainable as he has not approached the Court*

with clean hands and has suppressed the material facts? OPD?

2. Whether the suit of the plaintiff is time barred? OPD?

3. Whether the defendant had terminated the agreement to sell dated 01.05.09 on 13.07.09 as alleged. If so its effect?

4. Whether the plaintiff is entitled to money decree. If so to what amount? OPP?

5. Whether the plaintiff is entitled to any interest? If so, at what rate and for which period? OPP?

6. Any other relief.”

11. The cross-examination of PW-1 was conducted on several dates. Finally, the trial was completed. The evidence was closed on 31st August, 2015. Thereafter, the impugned order came to be passed.

Analysis of the documentary and oral evidence

12. Most of the documents which were filed by the parties are not in dispute. The Bayana receipt, PW-1/1 is admitted. The payment of earnest money is admitted. The legal notices, Ex.DA-1 issued are admitted. Some of the Police complaints which were given by the parties to the local Police Station are also admitted. The reply given by the Defendant dated 23rd June, 2009 is Ex.D-5 and the letter of termination of Agreement to Sell is Ex.D-7. Various copies of the bills of mobile phones of parties have also been placed on record to show the calls exchanged between the parties. The evidence by way of affidavit and the cross-examination of PW-1 i.e. the Plaintiff does not throw any additional light on the points in issue. PW-2, Sh. Dheeraj was the property dealer who deposed that on 15th June, 2009, he had accompanied the Plaintiff to the Sub-Registrar's Office. In his

cross-examination, various details about the calls made to the Police have been asked and replied to. PW-3, Sh. Pawan Arora was another property dealer who appeared and confirmed his signatures on the Bayana receipt. He stated that there were three to four meetings held between the parties prior to signing of the Bayana receipt. Various meetings appear to have taken place in respect of photocopies of the title documents.

13. The Defendant who appeared as DW-1 made allegations in his affidavit that the Plaintiff was trying to grab the property. He admits that he has since sold the property in September, 2012 for which the sale deed was duly registered at the Sub-Registrar's Office at Rohini. He admitted that he had a litigation against his father. He confirmed that he had sold the property for a sum of Rs.20 lakhs. He stated that he had repeatedly showed the title deeds and had given photocopies to the Plaintiff. He denied that the Plaintiff did not have his Jalandhar address.

14. When the present appeal was filed on 27th May, 2016, the Trial Court was directed to transfer the amount deposited in FDR to the High Court. Accordingly, a sum of Rs.22,49,379/- was received in this court from the Trial Court. The same FDR was endorsed in favour of the Registrar General. An application was moved by the Defendant seeking release of the excess amount of the FDR. Finally, the FDR had matured and upon being encashed Rs.33,14,354/- was deposited in favour of the Registrar General for a period of three months. Since the decretal amount was Rs.19,45,000/- the balance amount was directed to be released in favour of the Appellant. The remaining amount continues to be deposited with the Registrar General of this court. On 3rd January, 2018, an application was moved by the Plaintiff seeking the release of the decretal amount in his favour after which the

matter was heard in part and judgment was reserved on 18th May, 2018.

Analysis and Findings

15. The Plaintiff is not seeking specific performance of the Agreement to Sell dated 1st May, 2009. The Plaintiff is merely invoking the clause in the agreement i.e. to the effect that if the Defendant does not carry out the transaction, the Plaintiff would be entitled for recovery of double the amount. The only question therefore is as to who is responsible for the transaction not fructifying in the present case. The Defendant clearly has not given the address of the Jalandhar residence in the Bayana receipt but has admitted that he is a permanent resident of Jalandhar. From the oral evidence as also the complaint to the Police, it appears that the Plaintiff could not trace the Defendant after the Agreement to Sell was executed. In fact, in the first round, when this suit was filed, the Defendant did not even put in appearance and the suit came to be decreed vide ex-parte decree. It is quite clear that the Defendant has been clearly avoiding appearance before this court till the decree was passed. Even after filing of the review application, the Defendant did not appear regularly.

16. Insofar as the chronology of events that transpired after the execution of the Bayana receipt is concerned, it is the case of the Plaintiff that the Defendant did not provide him the photocopies of the title documents to enable him to get the bank loan sanctioned. The Defendant's case however, is that he was apprehensive that the Plaintiff may usurp the property on the basis of copies of the title deeds, if given. Hence, this was a clear case where there was a deadlock. Moreover, though there was a 15 days grace period, which was contemplated in the agreement, since all the title documents were

shown but were not given, obviously, the Plaintiff could not avail of the bank loan. The two property dealers, who were involved in the transaction, have confirmed the Agreement to Sell. One of them has also confirmed that the Plaintiff had gone to the Sub-Registrar's Office on 15th June, 2009. It also becomes evident from the perusal of evidence of PW-2 and PW-3 and that on the very said date 15th June, 2009/16th June, 2009, the Defendant met the Plaintiff. During that period, it appears that the mother of the Defendant was also with the Plaintiff. Thus, the parties were quite conscious of the deadline of 15th June, 2009. In fact, PW-2 stated in his cross-examination that the Defendant came to the house of the Plaintiff in the evening of 15th June, 2009 and left his mother at the residence of the Plaintiff. She was made to stay in the house of the Plaintiff till very late in the night and it was only by the intervention of the Police that she was taken away. The relevant part of the cross-examination is herein below:

“...I do not remember if I had made contact with defendant on or after 15.06.09 for the purpose of execution of proposed sale deed. It is wrong to suggest that the defendant had come specially from Jalandhar to get the sale deed executed on 15.06.09. Vol. That the defendant came only in the evening of 15.06.09 and he left his mother at the residence of plaintiff and ran away from house of the plaintiff. SHO and police intervened and as the mother of defendant was staying there till late night, one vehicle was called there through defendant and his mother was taken away.”

17. Thus, as on 15th June, 2009, it is clear that the agreement could not reach a closure or conclusion. Events on record show that the Plaintiff did make efforts to contact the Defendant but the Defendant did not respond. In

the cross-examination of the Defendant he claimed that he had given his Jalandhar address at the back of his visiting card, however, there is no evidence to this effect. He claimed that he met the Plaintiff between 1st May, 2009 to 1st June, 2009, seven to eight times. He also claimed that he met the Plaintiff four to five times between 15th to 20th May, 2009. He also claimed that he had gone to ICICI Bank along with the Plaintiff and had shown the documents to the Bank. The Defendant was then confronted with the sale deed which he entered into with the new purchaser dated 12th September, 2012 which is exhibited as Ex.DW-1/PX-1. He further claimed that he tried to contact the Plaintiff between 23rd June, 2009 to 6th June, 2009 and only thereafter issued the termination notice. The telephone bills placed on record were relied upon by the Defendant to show that he had repeatedly made calls to the Plaintiff.

18. From the evidence of the Defendant and the Plaintiff, it is clear that there was a complete lack of trust between the parties. While the Plaintiff complained that he did not receive the title documents, the Defendant claimed that the Plaintiff wanted to usurp the suit property. It is the admitted position on record that the Defendant did not go to the Sub-Registrar's Office on 15th June, 2009, though, it appears that he did get in touch with the Plaintiff during the said period. The suit property stands sold to a third party. The Defendant has sold the property after filing an application for review and after depositing the sum of Rs.20 lakhs before the District Court. The contention of the Defendant before this court is that the Defendant is not in breach and hence he is not liable to return the earnest money. He relies upon various judgments to the effect that since declaratory relief has not been sought by the Plaintiff, specific performance cannot be granted. One such

judgement relied upon is *I.S. Sikandar v. K. Subramani and Ors 2013(15) SCC 27*. He also relies on *D. Vinod Shivappa v. Nanda Belliappa 2006 AIR (SC) 2179* that the notice of termination was served through registered post and hence it is deemed to have been served upon the Plaintiff. He also relies upon *Satish Batra v. Sudhir Rawal 2012 AIR (SCW) 5869* and *Kailash Nath Associate v. Delhi Development Authority and Anr. 2015(4) SCC 136* to argue that if the party does not perform the contract, the earnest money can be forfeited.

19. A perusal of the evidence on record shows that there was a stalemate between the parties. It is admitted on the record that the cheque for Rs.5 lakhs dated 1st June, 2009 was encashed by the Defendant on 16th June, 2009 after he failed to appear for the Sub-Registrar's Office. Moreover, the chain of title deeds was not given by the Defendant to the Plaintiff, thus depriving the Plaintiff from availing a bank loan. The suit for recovery was filed on 31st July, 2009 itself, i.e. within a period of 1^{1/2} month after the last date for concluding the transaction to expire. It thus clear that the Plaintiff was unable to get the Defendant to conclude the transaction and hence non-recovery of the amounts paid by him as per the Bayana receipt. The Defendant has made various allegations against the Plaintiff and several statements in his affidavits and cross-examination which are not proved by the documents on record. It is very much possible that the Defendant was continuously in touch with the Plaintiff, however, it is quite clear that Defendant did not want to conclude the transaction. The encashment of the amount of Rs.5 lakhs on 6th September, 2009 goes to show that there was something amiss. He had maintained the cheques for Rs.5 lakhs since 1st June, 2009 but after the date for conclusion of the transaction had passed, he

encashed the same. This does not show bona fide conduct on behalf of the Defendant.

20. In the present suit, the Plaintiff has not sought specific performance. The Plaintiff has merely sought refund of the amount paid as bayana. The facts do not justify permitting the Defendant to forfeit the bayana amount which is almost 1/3rd of the sale consideration which was agreed. Moreover, from the sale deed executed in 2012 with a third party in respect of the same property, it is clear that while the suit was pending, the Defendant sold the property. The repeated Police complaints also reveal that there was enormous unpleasantness between the parties. The fact that the Defendant was based out of Jalandhar being admitted, the Plaintiff's case, that it was difficult to contact the Defendant appears probable on the balance.

21. The Plaintiff having not sought specific performance, the judgments relied upon by the Defendant do not apply even if the Agreement to Sell is terminated. This however does not mean that the Defendant has the right to forfeit the amount. The Trial Court has rightly decreed the suit. The independent witnesses have supported the Plaintiff's case that the Plaintiff had the sale consideration with him and was ready and willing to perform his part of the agreement. Insofar as the incidents that occurred on the evening on 15th June, 2009, there is contradictory evidence in respect thereof. Since the Plaintiff had reached the Sub-Registrar's Office and had also paid almost Rs.10 lakhs out of the total sale consideration amount of Rs.34,75,000/-, the Plaintiff's readiness and willingness is established on record. However, the Trial Court has rightly not directed the payment of double the amount of earnest money but directed refund of the amount already paid along with interest. The said view is reasonable in the facts. The decree as passed by the

Trial Court is thus upheld. The decretal amount lying deposited in this court along with interest accrued thereon is directed to be released to the Plaintiff within a period of two weeks.

22. The appeal is dismissed, however, with no orders as to costs. All miscellaneous applications stand disposed of.

PRATHIBA M. SINGH
JUDGE

JULY 04, 2018
Rahul

