

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

+ **RFA No. 749/2018**

% **7th September, 2018**

RUKHSANA BEGUM Appellant

Through: Mr. Shekhar Kumar, Advocate
(Mobile No. 9871008884).

versus

ABDUL AZIZ Respondent

Through: Mr. Rahul Pandey, Advocate
(Mobile No. 7838517151).

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

CAVEAT No. 810/2018

1. Since counsel for the caveator has entered appearance,
the caveat stands discharged.

C.M. Appl. No. 36280/2018 (for exemption)

2. Exemption allowed, subject to all just exceptions.

C.M. stands disposed of.

RFA No. 749/2018 and C.M. Appl. No. 36279/2018 (for stay)

3. 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 10.5.2018 by which the trial court has decreed the suit for recovery for Rs.5,00,000/- and which amount was the amount paid by the respondent/plaintiff/buyer to the appellant/defendant/seller under the Agreement to Sell dated 12.9.2012, and on which Agreement to Sell the respondent/plaintiff/buyer had in an earlier suit failed to seek specific performance.

4. I need not narrate the facts in detail because it is an admitted position that the parties entered into an Agreement to Sell on 12.9.2012 for selling by the appellant/defendant/seller of her property to the respondent/plaintiff/buyer bearing no. 15/329, Trilok Puri, Delhi-110091. Total sale price fixed was Rs.17,88,000/-, of which a sum of Rs.5,00,000/- was admittedly received by the appellant/defendant/seller. Respondent/plaintiff/buyer did not succeed in his earlier suit for specific performance and claiming of double the amount of price paid inasmuch as this suit was dismissed by a

Judgment dated 16.2.2016 by the Court of Ms. Nisha Saxena, ADJ, East, Karkardooma Courts, Delhi, in Suit No. 1792/2016 titled as **Abdul Aziz Vs. Rukhsana Begum** holding that respondent/plaintiff/buyer was not ready and willing as required under Section 16(c) of the Specific Relief Act, 1963. The subject suit was thereafter filed seeking double the amount of price paid of Rs.5,00,000/-, and this suit however has been decreed by the trial court by the impugned judgment only by allowing refund of the sum of Rs.5,00,000/- which was paid by the respondent/plaintiff/buyer to the appellant/defendant/seller under the Agreement to Sell dated 12.9.2012.

5. It is now settled law right from the Constitution Bench judgment of the Supreme Court in the case of **Fateh Chand Vs. Balkishan Dass, AIR 1963 SC 1405** that a seller under an agreement to sell cannot forfeit an amount received from a buyer, even if the buyer is guilty of breach under the agreement to sell, if it is found that the seller has not suffered any loss. A seller must necessarily plead and prove loss caused to him on account of breach of agreement to sell

by the buyer and only thereafter can the amount paid under the agreement to sell be forfeited by the seller.

6. I have recently examined this issue in depth in the case of ***M.C. Luthra Vs. Ashok Kumar Khanna, 2018 (248) DLT 161***, wherein I have distinguished an earlier judgment of the Supreme Court in the case of ***Satish Batra Vs. Sudhir Rawal (2013) 1 SCC 345*** and held that the ratio of the Constitution Bench in the case of ***Fateh Chand (supra)*** will apply, and especially because of the subsequent judgment of the Supreme Court in the case of ***Kailash Nath Associates Vs. Delhi Development Authority and Another (2015) 4 SCC 136***. An SLP against this judgment in the case of ***M.C. Luthra (surpa)*** has been dismissed by the Supreme Court on 15.5.2018 in SLP(C) No. 11702/2018.

7. Learned counsel for the appellant/defendant/seller could not dispute that the appellant/defendant/seller has not pleaded or proved any loss caused to her because of the stated breach by the respondent/plaintiff/buyer under the subject Agreement to Sell dated 12.9.2012. Once that is so, the appellant/defendant/seller cannot forfeit

the amount of Rs.5,00,000/- received under the subject Agreement to Sell dated 12.9.2012, except for a nominal amount.

8. Learned counsel for the appellant/defendant/seller argued that once the earlier suit for specific performance filed by the respondent/plaintiff/buyer was dismissed, in which the relief of double the amount of price paid of Rs.5,00,000/- was claimed by the respondent/plaintiff/buyer, then the present suit is barred under Order II Rule 2 CPC. Trial court has in my opinion however rightly rejected this argument by holding that the present suit is on an independent cause of action and hence Order II Rule 2 CPC does not apply. I agree with this finding of the trial court because the subject matter and cause of action in a suit for specific performance and for damages of double the advance price paid is predicated on the breach by the appellant/defendant/seller under the Agreement to Sell, however, it is only when specific performance is declined and damages are not granted in a suit for specific performance and damages, would then the cause of action accrue for refund of the price paid under the Agreement to Sell because if specific performance would have gone through, then the price paid would have become part of the price for

the transaction of sale going through as per the Agreement to Sell. An entitlement to claim refund of the price paid by a seller only arises because the seller does not suffer any loss on account of breach of contract by the buyer, and which aspect is an independent cause of action which arises after the entitlement of the specific performance claimed by the buyer is dismissed. Therefore, in my opinion, it has to be held that the cause of action accrued in favour of the respondent/plaintiff/buyer only when the earlier suit for specific performance and damages was dismissed in terms of the Judgment dated 16.2.2016, and the present suit has been filed within three years period of limitation, inasmuch as the present suit which has been decreed in terms of the impugned respondent/plaintiff/buyer Judgment dated 10.5.2018 was filed on 18.5.2016.

9. In view of the aforesaid discussion, the appeal is essentially dismissed, except that the impugned judgment of the trial court is modified that the appellant/defendant/seller would be entitled to only forfeit a nominal amount of Rs. 25,000/-, and it is held that the decree in favour of the respondent/plaintiff/buyer will be for a sum of Rs.4,75,000/- and not Rs.5,00,000/- as held by the trial court.

Respondent/plaintiff/buyer of course will be entitled to interest as decreed in his favour in terms of the impugned judgment of the trial court.

10. Appeal is accordingly dismissed, but by simultaneously modifying the impugned judgment and decree, and as stated above. Parties are left to bear their own costs.

SEPTEMBER 07, 2018

VALMIKI J. MEHTA, J

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