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

Date of decision: 25th May, 2018

+ **RFA 551/2017**

DEEPAK LAMBA

..... Appellant

Through: Mr. Ashok Sharma & Mr. K.P Rajora,
Advocates.

versus

SMT. SHASHI MALIK

....Respondent

Through: Mr. S.S. Parasher, Advocate (M-
9717854755).

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This is an appeal against the impugned judgment and order dated 4th March, 2017 by which the suit for recovery filed by the Plaintiff in respect of property bearing No.1215, Pocket C2, Sector-28, area measuring 32 sq. mtrs. in Rohini, was dismissed.

2. An Agreement to Sell dated 12th May, 2014 was executed between the Plaintiff and the Defendant by which the Defendant had agreed to sell the suit property for a total consideration of Rs.45,51,000/-. Out of the said amount, a sum of Rs.4 lakhs was paid to the Defendant. The remaining amount was to be paid on or before 12th September, 2014. Along with the Agreement to Sell a Receipt for Rs.4 lakhs was also issued. The Agreement to Sell was not registered. Relevant clauses of the Agreement read as under:

“1. And Whereas the first party for his/her/their bonfire [sic (bonafide)] needs and requirements the first party have agreed to sell, transfer, convey all his/her/their rights, interests, titles in respect

of plot to be allotted against the above said property to the second party for a Total Sale Consideration of Rs. 45,51,000/- (Rupees Forty Five Lac Fifty One Thousand only) and the same purchased by the second party, out of which the First Party has received a sum of Rs. 4,00,000/- (Rupees Four Lac only) as BAYANA, by cash/Cheque, on Dt.12-05-2014, from the second party.

2. And whereas the Balance Payment of Rs. 41,51,000/- (Rupees Forty One Lac Fifty One Thousand only), shall be paid by the second party to the first party on or before Dated. 12-09-2014.

3. And whereas the Deal is through M/s Bhasin Properties (H-18/1 Shop No. 5, Sector-7, Rohini, Delhi-110085)

4. And whereas the Expenses of Freehold will born by Second Party.

*6. That after receiving the full and final sale proceeds in respect of the said property the first party is bound to appear for the execution and registration of all transfer deeds and documents by her/his personal presence before the office of Sub-Registrar Concerned in respect of the said property in favour of the purchaser/second party or any other person as desired by the Second party, **as per circle rate.***

11. That in case the first party fails to complete the transaction within the specified period then there will be the sole discretion of the Second party either to recover the double amount of the bayana or to finalize the transaction through the court of law at the cost and expenses of the First party, and if any court case exercise or initiate by the second party against the First party, the case shall be exercised within the Delhi jurisdiction courts at the cost and expenses of the First party which the first party has also acknowledged and

admitted the same and given their/his consent on this agreement and on the other hand if the second party fails to make the full and final payment within the period as specified above the bayana amount shall be forfeited and the transaction shall be cancelled and the second party shall have no right to take any action against the first party, jurisdiction will be in Delhi Court only.”

3. Written Statement was filed by the Defendant claiming that the Plaintiff failed to make the payment of the full consideration amount. It was also averred that since the plot was a DDA plot, construction was to be carried out on the plot to enable it to be converted from lease hold to free hold. The Defendant also claimed that the Plaintiff deliberately backed out of the transaction in view of the sharp dip in the business of real estate and the prices of the plots. The expenses qua construction and the expenses for the conversion were to be borne by the Plaintiff, neither of which was done. Even the balance sale consideration was not paid, hence the Plaintiff was not entitled to recovery.

4. After completion of pleadings, the following issues were framed by the court:

- 1. Whether for getting plot converted into freehold there was requirement of construction over it and whether there was an agreement between the parties that plaintiff would fund the construction or not? Onus of proof on both the parties.*
- 2. Whether duty was cast upon defendant to get it converted into freehold? OPP*
- 3. Whether plaintiff is entitled to recover Rs. 8 lacs? OPP*
- 4. Whether plaintiff is entitled to any interest, if so, at*

what rate and for what period? OPP

5. Relief”

5. The Plaintiff deposed as PW-1 and also summoned the UDC from the DDA as PW-2. One Mr. Sanjay Bhasin - proprietor Bhasin Properties, who was the broker through whom the transaction was facilitated, as mentioned in the Agreement to Sell, was examined as PW-3. PW-1 interestingly admitted that he runs a real estate business by the name of Bhasin Properties on commission basis. He is in the business of financing real estate transactions. He also admits that in order for conversion of lease hold into free hold rights there must be construction on the plot. He also admits that the expenses for getting conversion done were to be borne by him and that he had not paid any money towards the construction costs. It was his case that the formalities were to be undertaken by the Defendants. He also admitted that though at the time when he had entered into the agreement, the market value was Rs.42-45 lakhs, in 2015, when he gave evidence, the market prices have decreased to Rs.30-35 lakhs. He also categorically averred that he was not ready to pay the construction cost at present.

6. The official from the DDA placed on record two documents EX.PW-1/4 and PW-1/D1 which proved that initially extension was granted to complete the construction on the plot and thereafter the conversion request has been rejected as the plot was found vacant. Admittedly, the Defendant had made the payment for conversion of lease hold to free hold.

7. The testimony of PW-1 is extremely relevant and is extracted herein below:

*“The deal in the present case was through me.
According to the deal all formalities were to be*

completed by defendant while all expenses of free hold were to be borne by the plaintiff. I have seen agreement Ex.PW1/1 which bears my signatures at point A.

XXXXXX by Sh. S.S. Prashar, counsel for defendant.

It is correct that all expenses including expenses of construction were to be borne by the plaintiff.”

8. The Defendant deposed as DW-1. She admitted that she had not raised any construction in the plot and that the Plaintiff had agreed to raise the construction. The Trial Court dismissed the suit after holding that the obligation of raising construction was of the Plaintiff. A perusal of the pleadings and evidence, makes it clear that both the Plaintiff and Bhasin Properties were in the field of real estate. They were well aware of the reality as to how a property is converted from lease hold to free hold. They were also well aware as to which formality was to be completed first. From the sequence of events and the manner in which the agreement to sell is worded, it is clear that the condition of getting the property converted from lease hold to free hold was not a pre-condition for making of the payment of the entire sale consideration. From a perusal of clauses 2 and 6, it is clear that the only pre-condition for registering the documents with the Sub-Registrar which could have been the Agreement to Sell and other documents was the receipt of full and final sale consideration. Moreover, the proprietor of Bhasin Properties, PW-3 categorically admitted that the construction and the expenses for conversion had to be borne by the Plaintiff. There is nothing on record to show that the balance sale consideration was ever tendered to the Defendant or that any such request was made by the Plaintiff

to the Defendant to postpone the payment of sale consideration in order to permit him to complete the construction and get the property converted. The clause in the agreement is clear that if the full and final payment is not made within the period specified, then the Defendant would have the right to forfeit the *Bayana* amount.

9. In this case, though the usual rule is that in an agreement to sell for immovable property, time is not the essence of the contract, the manner in which the agreement provides for the specific date shows that the parties considered time to be of essence. The agreement also provided a consequence for non-payment which shows that the Defendant needed and expected to have the money by the date stipulated in the agreement.

10. The Plaintiff, as per the evidence which has been adduced, appears to have had a change of mind and wanted to resile from the transaction. He has clearly made the non-conversion as an excuse not to pay the remaining sale consideration. The Plaintiff having not complied with his obligations as per the Agreement, the Defendant is entitled to forfeit the amount. The suit has been rightly dismissed. The Trial Court's judgment is upheld.

11. The appeal is accordingly dismissed. No orders as to costs.

PRATHIBA M. SINGH
JUDGE

MAY 25, 2018

Rahul