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

Date of Decision: 13th December, 2018

\+ **CS(OS) 3912/2014 & I.As. 8657/2018, 13311/2018**

M/S VERSATILE COMMOTRDE PVT LTD ..... Plaintiff

Through: Mr. Ratan K. Singh, Mr. Nikhilesh Krishan & Mr. Ashfaq Khan, Advocates (M-6260026908)

versus

SATPAL YADAV ..... Defendant

Through: Mr. Sunil Chauhan, Advocate (M-9810213040)

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (oral)

1. The present suit has been filed by the Plaintiff under Order XXXVII CPC seeking recovery of a sum of Rs. 2 crores along with interest @ 14.25% per annum. The Plaintiff had entered into an agreement to sell dated 14th April, 2013 under which the Plaintiff agreed to purchase the suit property being 53 Bighas and 19 Biswas in the revenue estate of Village Ujwa, Tehsil Najafgarh, New Delhi (*hereinafter 'suit property'*). As per the said agreement to sell, the agreed sale consideration was Rs.4,36,77,081/-. The Plaintiff paid to the Defendant a sum of Rs.80 lakhs as advance/earnest money and thereafter a sum of Rs.1.20 crores /- as part payment of consideration. The further part payment was made in three tranches i.e. vide cheque dated 14th June, 2013 for Rs. 50 lakhs, cheque dated 20th June, 2013

for Rs. 20 lakhs and cheque dated 3rd July, 2013 for Rs. 50 lakhs. According to the Plaintiff, the Defendant was to obtain the No Objection Certificate (*hereinafter 'NOC'*) in favour of the Plaintiff at least 15 days before the date of final payment which was 60 days from 14th April, 2013 i.e. 15 days before 13th June, 2013.

2. The case of the Plaintiff is that the Defendant failed to obtain the NOC and hence it did not make the payment of the balance sale consideration. On this basis, the present suit came to be filed under Order XXXVII CPC.

3. The Defendant filed its leave to defend, and in its application, the case of the Defendant is that the Plaintiff is grossly in breach of the agreement to sell. The Defendant pleads that the NOC was obtained under instructions from the Plaintiff in favour of one Mr. Rishabh Gupta. It is further submitted that in fact the first notice was issued by the Defendant calling upon the Plaintiff to pay the balance consideration. After some correspondence, the present suit came to be filed.

4. On 7th March, 2018, this Court had heard the arguments in part on the leave to defend application and had adjourned the matter in order for the Defendant to seek instructions. The operative portion of the said order is extracted herein below:

> *"...*
> *During course of the arguments, the learned counsel for the defendant says that he would take instructions from the defendant to secure the deposit of ₹50.00 Lac, out of principal amount of ₹2.00 Crores, as claimed by the plaintiff."*

Thereafter, on 15th March, 2018, this Court passed the following order:

> ***"IA No.25652/2015***
>
> *The learned counsel for the defendant submits that presently the defendant do not have the finances to deposit an amount of Rs.50,00,000/- (rupees fifty lakhs) as was proposed vide order dated 7th March, 2018 and alternatively the defendant proposes to get his subject property attached for six months and within such time he shall endeavour to deposit the amount of Rs.50,00,000/- as stated in the order dated 7th March, 2018.*
>
> *In these circumstance, as per the statement of learned counsel for the defendant, the property to the extent of 1/9th share of the defendant in land admeasuring 53 bigha and 11 biswas in Village Ujwa, Najafgarh, Delhi stands attached till further order and that the defendant should deposit an amount of Rs.50,00,000/- within six months from today as stated.*
>
> *On the conditions above and with the consent of both the learned counsels, the leave to defend application under Order 37 Rule 3(6) CPC stands disposed of and liberty is granted to the defendant to file written statement.*
>
> ***CS(OS) 3912/2014***
>
> *In view of above order, written statement be filed within four weeks from today with an advance copy thereof to the learned counsel for the plaintiff. Replication thereto, if any, be filed within two weeks thereafter.*
>
> *List before the learned Joint Registrar on 17th May, 2018."*

5. As per the above order, the leave to defend was granted to the

Defendant subject to two conditions:

i) Attachment of 1/9th share of the land;

ii) Deposit of Rs.50 lakhs within six months.

6. The period of six months has expired in September, 2018. The Defendant has not made the deposit of the amount as directed. Today, counsel for the Plaintiff thus submits that in terms of the provisions of Order XXXVII CPC, a judgment is liable to be pronounced.

7. On the other hand, counsel for the Defendant submits that there has been partial compliance of the condition i.e. to the extent that 1/9th share of the property continues to stand attached and prays that the Defendant be given another six months to deposit the sum of Rs.50 lakhs.

8. It is further submitted that, even if the Defendant does not comply with the condition for grant of leave to defend, the Court is also duty to bound to examine whether the suit under Order XXXVII is maintainable and whether the suit is liable to be decreed and if so, to what extent.

9. Learned counsel relies upon the judgment of a Learned Single Judge of this Court in ***Delhi Power Supply Company. Ltd. v. Hindustan Vidyut Products Limited, C.R.P. No.72/2012, Decided on 13th November, 2014***.

10. This Court has heard the submissions of the parties. A perusal of the agreement to sell shows that it contains the following terms and conditions:

> *1. That in pursuance of the said agreement and in consideration of @ Rs.3,500000/- (Rupees Three Crore Fifty Lacs Only) per Acre i.e. a total sum of Rs.43677081/- (Rupees four Crore Thirty Six Lacs Seventy Seven thousand Eighty One rupees only) out of which Rs.8000000/- (Rupees Eighty Lakh only) has/have been received by the first party from the second party in the following manner:*

CASH Rs. 2000000/- (Twenty lac only)
CHQ. Rs. 6000000/- (Sixty Lac only)
Cheque No.-885612 Dated 15/4/13
Oriental Bank of Commerce
New Mandi, Muzaffarnagar
as advance/earnest money and the receipt of the same is hereby admitted and acknowledged and the balance sale consideration shall be received by the first party from the second party on or before 60 days from the date of execution of this agreement to sell.
...
5. That the first party shall apply and obtain the No Objection Certificate in favour of the second party or the nominee/s at his/her/their own costs and responsibility at least 15 (fifteen) days before the date of final payment. In case the first party fails to obtain the NOC then this agreement shall stands automatically extended till the NOC is obtained.
...
7. That in case if the second party fails to pay the balance amount within the said stipulated period, then the advance/earnest money paid shall be forfeited by the first party. And this agreement to sell will automatically come to an end."

11. A perusal of the above clause shows that the NOC was to be obtained by the Defendant 15 days before 13th June, 2013. However, it is also not in doubt that after the expiry of the said period i.e. further sums of Rs.1.20 crores were paid in various instalments, as set out above, to the Defendant. This is evident from the receipt dated 20th June, 2013 which is placed on record. Thus, the obtaining of the NOC 15 days prior to the expiry of the 60 days period was not treated as an essential condition in the agreement to sell. Further, a perusal of clause 5 also reveals that if the Defendant does not obtain the NOC, the agreement was to be automatically be extended until the

NOC is obtained. This condition also shows that the obtaining of the NOC was not an essential condition. However, it had to be done within a reasonable time.

12. The first notice on record is by the Defendant which is dated 17th July, 2013. In the said notice, the Defendant informed the Plaintiff that the requisite NOC has been obtained from the Revenue Department on 7th June, 2013. The Defendant also made an assertion that this fact was communicated to the Representative of the Plaintiff who did not respond to the Defendant.

13. The said notice was replied by the Plaintiff on 20th July, 2013 wherein the Plaintiff primarily alleged that the Defendant did not obtain the NOC as per the terms and conditions of the contract. On 15th November, 2013, another notice was issued by the Plaintiff to the Defendant, this time calling upon the Defendant to refund the sum of Rs.2 crores along with interest. In response to this notice, the Defendant informed the Plaintiff, vide letter dated 5th December, 2013 that the Plaintiff was in breach as it had not paid the remaining sale consideration. Insofar as the NOC is concerned, para 5 of the reply dated 5th December, 2013 is relevant and is set out herein below:

> *5. Para 5 of your reminder is wrong and denied. In fact, the time was initially extended to 05/07/2013 and the NOC was obtained by my client on 27/06/2013 in the name of Sh Rishabh Gupta, as per instruction of your client. Your client was duly informed about the issuance of the NOC and it was agreed that your client shall pay the balance amount on 05/07/2013 but again your client could not arrange the sufficient funds to make the balance payment. Your client could manage only a sum of Rs. 50 lakhs and time was further extended to 15.7.2013. But again company did not pay*

the balance amount by 15.7.2013. Thereafter, on 17/07/2013 my client sent you a notice as mentioned above."

14. In the above letter, the Defendant claimed that the NOC was obtained in the name of Mr. Rishabh Gupta upon instructions from the Plaintiff. This allegation was denied by the Plaintiff vide its rejoinder dated 1st September, 2014.

15. A perusal of the correspondence exchanged between the parties clearly shows that insofar as the issue of breach is concerned, there is a clear dispute. The Plaintiff alleges that NOC was not obtained and the Defendant alleges that the NOC was in fact obtained in the name of the person who was authorized by the Plaintiff. This issue is obviously is not capable of being adjudicated in a summary manner in an Order XXXVII suit. However, insofar as the amount of Rs.1.2 crores is concerned, this is a part payment of the sale consideration, which cannot be forfeited by the Defendant even as per the terms and conditions in the agreement to sell. The Court after perusing the correspondence on record, comes to the conclusion that the Defendant having given the first notice and having also obtained the NOC, the Plaintiff did not make the payment to the Defendant within the prescribed period or within any extended period. Thus, the Defendant was entitled to forfeit the amount of Rs.80 lakhs as per the agreement.

16. Insofar as the sum of Rs.1.2 crores is concerned, the amount clearly did not constitute any part of the earnest money deposit and constitutes part payment of the sale consideration. As per the settled position in law in ***Satish Batra v Sudhir Rawal (2013) 1 SCC 345***, the part payment, which is in distinct from the earnest money, cannot be forfeited or retained. The

relevant portion of the judgment is set out below:

> *"15. The law is, therefore, clear that to justify the forfeiture of advance money being part of "earnest money" the terms of the contract should be clear and explicit. Earnest money is paid or given at the time when the contract is entered into and, as a pledge for its due performance by the depositor to be forfeited in case of non-performance by the depositor. There can be converse situation also that if the seller fails to perform the contract the purchaser can also get double the amount, if it is so stipulated. It is also the law that part-payment of purchase price cannot be forfeited unless it is a guarantee for the due performance of the contract. In other words, if the payment is made only towards part-payment of consideration and not intended as earnest money then the forfeiture clause will not apply."*

17. A similar view has been taken by this Court in ***Versatile Commotrade Pvt. Ltd. v Angad Developers Pvt. Ltd. CS (OS) 802/2014, Decided on 20th July, 2018.***

18. In this view of the matter, the suit is liable to be decreed for a sum of Rs.1.2 crores along with interest @ 8% from the date of institution of the suit i.e. 12th December, 2014.

19. In respect of any other amounts or claims, the parties are left to their respective remedies.

20. The suit is decreed in the above terms. Decree sheet be drawn accordingly. All pending I.As are disposed of.

PRATHIBA M. SINGH
JUDGE

DECEMBER 13, 2018
Rahul