

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

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Date of decision: 27th July, 2018.

+ **RSA 381/2016 & CM No.46434/2016 (u/O XXXIX R-1&2 CPC)**

SURENDER KUMAR

..... Appellant

Through: Mr. Rajat Aneja, Ms. Chandrika
Gupta & Ms. Nisha Sharma, Advs.

Versus

GIRISH KAPOOR & ORS

..... Respondents

Through: Respondent no.2 in person.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Second Appeal under Section 100 of the Code of Civil Procedure Code, 1908 (CPC) impugns the judgment and decree, [dated 2nd July, 2016 in RCA No.23/2015 of the Court of Additional District Judge-2, District North] not only dismissing the First Appeal preferred by the appellant / plaintiff against the judgment and decree [dated 19th March, 2015 in CS No.202/14/09 of the Court of Civil Judge, District North-West] of dismissal of the suit of the appellant / plaintiff for specific performance of an Agreement of Sale of immovable property, but also setting aside the decree of the Suit Court in favour of the appellant / plaintiff and against the respondents / defendants of recovery of Rs.2,46,100/- with interest.

2. The appeal came up first before this Court on 16th December, 2016, when on the contention of the counsel for the appellant / plaintiff that the First Appellate Court has set aside the money decree in favour of the

appellant / plaintiff without the respondents / defendants challenging the same, notice of the appeal was ordered to be issued.

3. The respondent no.1 / defendant appeared on 8th February, 2017 and though the respondent no.2 / defendant was unserved but the appellant / plaintiff and the respondent no.1/ defendant were referred to mediation. Mediation remained unsuccessful. The respondent no.2 / defendant also appeared on 16th August, 2017 and the advocate for the respondent no.2 / defendant also appeared on 11th December, 2017. None appeared for the respondent no.1 / defendant on 16th August, 2017 and on 11th December, 2017. Thereafter, on 21st March, 2018, none appeared for either of the respondents / defendants.

4. The respondents / defendants are proceeded against *ex parte*.

5. Trial Court record has been requisitioned.

6. The counsel for the appellant / plaintiff has been heard and the trial court record perused.

7. The counsel for the appellant / plaintiff states that the appellant / plaintiff is not pressing the claim for specific performance of Agreement to Sell and is only pressing the claim for recovery of money in lieu of specific performance.

8. The counsel for the appellant / plaintiff further informs that the Agreement to Sell was only by the respondent no.1 / defendant and the respondent no.2 / defendant was merely a broker in the transaction. It is also informed that in the suit as originally filed, one Dhawan & Malhotra

Property Dealers was also impleaded as defendant no.3 but was directed to be deleted by the trial court.

9. A perusal of the judgment of the First Appellate Court shows the First Appellate Court to have set aside the money decree in favour of the appellant / plaintiff only for the reason that mere putting of an exhibit mark on a document was no proof of document and thus the receipts of payment made by the appellant / plaintiff to the respondent no.1 / defendant did not prove payment.

10. The following substantial question of law arises and is framed:

“Whether the appreciation of evidence qua receipts of payment by the First Appellate Court is perverse and contrary to law?”

11. At this stage, one person who claims himself to be respondent no.2 / defendant appears and has again gone out to call his advocate.

12. Considering that the respondent no.1 / defendant is *ex parte* and the respondent no.2 / defendant also is playing hide and seek, it is not deemed proper to after framing the substantial question of law aforesaid, post this appeal for hearing to another date.

13. A perusal of the Suit Court record shows, that (i) only defendant no.3 who has since been deleted on 9th July, 2013, filed written statement; (ii) the respondent no.1 / defendant was proceeded against *ex parte* on 6th May, 2011 and the respondent no.2 / defendant was proceeded against *ex parte* on 8th May, 2009; (iii) the appellant / plaintiff, on 7th August, 2014 led *ex parte* evidence and in which *ex parte* evidence, along with the affidavit by way of examination-in-chief, tendered into evidence the receipts of payment of a total sum of Rs.70,000/- and identified the signature of the respondent no.1 /

defendant and the respondent no.2 / defendant as guarantor; (iv) there was no cross-examination of the appellant / plaintiff, lest with respect to the aforesaid receipts; (v) the original receipts of Rs.20,000/- bearing Ex.PW1/1, of Rs.10,000/- bearing Ex.PW1/2, of Rs.35,000/- bearing Ex.PW1/3 and of Rs.5,000/- bearing Ex.PW1/4 are on record; (vi) of the aforesaid receipts, only the Ex.PW1/1, in addition to the signatures of respondent no.1 / defendant, also bears the signature of respondent no.2 / defendant; (vii) there is nothing on Ex.PW1/1 to show that respondent no.2 / defendant had stood as guarantor.

14. In the aforesaid state of evidence, the learned Additional District Judge indeed is found to have committed perversity in appreciation of evidence in holding the receipts to be not proved in accordance with law.

15. I have however enquired from the counsel for the appellant / plaintiff, whether not the same would entitle the appellant / plaintiff to a decree against respondent / defendant no.1 only and that too of Rs.70,000/- with interest and not of recovery of Rs.2,46,100/- as decreed by the Suit Court.

16. I may in this context record that it is the finding of both the Courts that the appellant / plaintiff is not entitled to specific performance because the Agreement was for sale of a flat which was yet to be allotted by the Delhi Development Authority to the respondent / defendant no.1 and even the flat was not identified.

17. Even if that be so, in law it having been proved that the appellant / plaintiff under the Agreement had paid Rs.70,000/- to the respondent / defendant no.1, the aforesaid fact did not disentitle the appellant / plaintiff from recovering Rs.70,000/- paid with interest. The Suit Court appears to

have granted decree for Rs.2,40,100/-, without there being any proof of damages.

18. The appeal is thus allowed to the aforesaid extent. The judgments and decrees of the Suit Court and the First Appellate Court are set aside and a decree is passed in favour of the appellant / plaintiff and against the respondent no.1/ defendant Girish Kapoor, of recovery of Rs.70,000/- with interest at 10% per annum with effect from date of institution of the suit till realization.

19. The appellant / plaintiff shall also be entitled to costs of legal proceedings of Rs.50,000/- from the respondent no.1 / defendant, to be recovered as part of the decree.

20. The person who had earlier claimed to be respondent no.2 / defendant has again come but still without his advocate. However, since no order has been passed against him, it is not deemed necessary to await his advocate.

Decree sheet be prepared.

JULY 27, 2018

‘gsr’

RAJIV SAHAI ENDLAW, J.