

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

+ **RFA No. 1036/2018**

% **21st December, 2018**

NAFE SINGH

..... Appellant

Through: Mr. Rakesh Kumar, Advocate
with Mr. Anil Kumar Sahu,
Advocate (M. No.9810134793).

versus

SANJAY GUPTA

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

**C.M. Nos. 54260/2018 (for condonation of delay in filing) &
54261/2018 (for condonation of delay in re-filing)**

1. For the reasons stated in the applications, delay of 1 day in filing and 18 days in re-filing the appeal is condoned subject to just exceptions.

C.M.s stand disposed of.

RFA No. 1036/2018 and C.M. No. 54259/2018(stay)

2. 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 26.07.2018 by which the trial court has decreed the suit for recovery of earnest money of Rs. 90,00,000/- paid by the respondent/plaintiff to the appellant/defendant under the Agreement to Sell dated 14.10.2013, and this agreement to sell did not go through.

3. Before the trial court, the issue which arose was to decide as to who was guilty of breach of contract, and to consider whether even if the respondent/plaintiff was guilty of breach of contract, was he legally entitled to forfeit the amount of Rs. 90,00,000/- received by him under the agreement to sell. The issues framed in the suit and the evidence led by the parties are referred to in paras 5 to 9 of the impugned judgment and these paras read as under:

“5. Following issues were settled on 05.04.2016 upon completion of pleadings :-

1). Whether plaintiff is entitled to a decree of recovery of earnest money received by the defendant under the agreement to sell dated 14.10.2013 ? OPP

2). Whether the plaintiff is entitled to damages, if yes, at what amount? OPP

3). Relief.

6. Plaintiff Sh. Sanjay Gupta has examined himself as PW-1 by tendering his affidavit Ex. PW-1/A in evidence and relied upon following documents in support of his case :-

(i) Original agreement to sell dated 14.10.2013 referred as Ex. P-1;

(ii) Original receipt of advance payment dated 14.10.2013 referred as Ex. P-2;

(iii) Copy of cheque dated 21.01.2013 referred as Ex. P-3;

(iv) Notice dated 03.03.2014 along-with postal receipts referred as Ex. P-4;

(v) Notice dated 27.02.2014 issued by defendant referred as Ex. P-5;

(vi) Reply notice dated 12.03.2014 issued by plaintiff referred as Ex. P-6 and

(vii) Notice dated 10.03.2014 issued by defendant referred as Ex. P-7.

7. He was cross-examined by defendant's counsel and plaintiff's evidence was closed in the affirmative on 24.11.2016.

8. Defendant Sh. Nafe Singh, on the other hand, has tendered his affidavit Ex. DW1/A in evidence and relied upon following documents :-

(i) Original application dated 13.02.2014 addressed to Sub-Registrar-IX, Kapashera for recording his presence referred as Ex. DW1/1;

(ii) Copy of cash receipt dated 21.01.2014 for NOC referred as Mark D-1;

(iii) Original NOC dated 21.02.2014 referred as Ex. DW1/3 and

(iv) Original legal notice dated 27.02.2014 along-with original postal receipt and courier receipt referred as Ex. DW1/4 (colly).

9. Defendant's son Sh. Rajender Kumar has deposed as DW-2 whereas Sh. Devender Kumar (attesting witness) has deposed as DW-3. Defendant and his witnesses were cross-examined by plaintiff's counsel and DE was closed on 02.01.2018.”

4. The trial court has considered the facts of the present case and has thereafter applied the settled legal position as laid down way back in the Constitution Bench judgment of the Hon'ble Supreme Court in the case of *Fateh Chand v. Bal Kishan Das*, AIR 1963 SC 1405 and as followed in the recent judgment of the Hon'ble Supreme Court in the case of *Kailash Nath Associates v. Delhi Development Authority & Another*, (2015) 4 SCC 136, as also in the judgment delivered by this Court in the case of *M.C. Luthra v. Ashok Kumar Khanna* in RFA No.780/2017 decided on 27.02.2018, 248 (2018) DLT 161: 2018 (169) DRJ 418, is that a seller under an agreement to sell cannot forfeit the amount received under the agreement to sell unless loss is pleaded and proved to have been caused to the seller on account of the breach of contract by the buyer. The relevant paras of the impugned judgment are paras 12.10 to 12.12 and these paras read as under:

“12.10 Hon'ble Supreme Court of India in its judgment titled "***Fateh Chand vs. Bal Kishan Das***" AIR 1963 Supreme Court 1405 has held that seller cannot forfeit the earnest money received under the agreement to sell even if the buyer is guilty of breach of performance of agreement to sell as forfeiture being in the nature of penalty is hit by Section 74 of The Indian Contract Act, 1872 which cannot take place unless loss is pleaded and proved by the seller.

12.11 Ratio of the earlier judgment titled ***Fateh Chand*** (supra) has been reiterated by Hon'ble Apex Court in "***Kailash Nath Associates vs. Delhi Development Authority***" (2015) 4 SCC 136 by holding :-

"43.6 The Expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensable. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded".

12.12 Aforesaid judgments of Hon'ble Supreme Court of India have been referred by Hon'ble High Court of Delhi in cases titled (i) "***Anand Singh vs. Anurag Bareja & Ors.***" RFA No. 480/2011 ; (ii) "***Sunil Sehgal vs. Chander Batra & Ors.***" CS (OS) No. 1250/2006 ; (iii) "***Adhunik Data Matics Pvt. Ltd. vs. Chandan Singh & Ors.***" CS (OS) No. 4052/2014 and I.A. No. 14/2016 and (iv) "***M. C. Luthra vs. Ashok Kumar Khanna***" RFA No. 780/2017.

Finding :- Defendant Sh. Nafe Singh having defaulted in obtaining NOC within time is not entitled to forfeit the earnest money as sale deed could not be executed in the absence of NOC. Similarly, he is not entitled to receive reasonable compensation under Section 74 of The Indian Contract Act, 1872 in the absence of pleading verifying any loss caused to him on account of termination of agreement to sell by the plaintiff.

Issue No. 1 is therefore decided in plaintiff's favour and plaintiff Sh. Sanjay Gupta is held entitled to recover Rs. 90,00,000/- which was paid to defendant as earnest money towards part payment of sale consideration.”

5. I may note that one judgment of the Hon'ble Supreme Court reported as *Satish Batra v. Sudhir Rawal*, (2013) 1 SCC 345 took a view contrary to the one in the Constitution Bench judgment of the Hon'ble Supreme Court in the case of *Fateh Chand (supra)* and the Hon'ble Supreme Court in its subsequent judgment of *Kailash Nath Associates (supra)* cleared the legal position and these aspects have been extensively dealt with by this Court in the judgment in the case of *M.C. Luthra (supra)*. The judgment in the case of *M.C. Luthra (supra)* was taken up in challenge before the Hon'ble Supreme Court, and the Hon'ble Supreme Court vide Order dated 15.05.2018 has dismissed the SLP(C) No. 11702/2018 challenging the judgment passed by this Court in the case of *M.C. Luthra (supra)*.

6. Accordingly, I do not find any fault with the impugned judgment by which the appellant/defendant has been directed to refund the amount of earnest money received by the appellant/defendant under the subject agreement to sell. This is because in law, a mere breach of contract does not entitle a person to damages and the entitlement to damages is only if loss is pleaded and proved to have been caused on account of the breach of contract to the aggrieved party/seller.

7. In view of the aforesaid discussion, there is no merit in the appeal. Dismissed.

DECEMBER 21, 2018

VALMIKI J. MEHTA, J

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