

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

+ **RFA No. 20/2019**

% **11th January, 2019**

ALI SHER Appellant

Through: Mr. Alok Kumar, Advocate
with Mr. Abhishek Pruthi,
Advocate (M. No.9810127735).

Versus

NASEEM AHMAD 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. No. 882/2019(exemption)

1. Exemption allowed subject to just exceptions.

C.M.s stand disposed of.

C.M. No. 883/2019(for condonation of delay)

2. For the reasons stated in the application, delay of 47 days

in re-filing the appeal is condoned.

C.M. stands disposed of.

RFA No. 20/2019 and C.M. No. 881/2019(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 21.07.2018 by which the trial court has decreed the suit filed by the respondent/plaintiff for the recovery of Rs. 15,00,000/- paid by the respondent/plaintiff to the appellant/defendant under the Agreement to Sell dated 12.01.2013 with respect to the property bearing no. F-453/16, Gali No. 16, ad measuring 175 sq. yds. situated at Khajoori Khas, Delhi-110094 (*hereinafter* 'suit property').

4. The respondent/plaintiff has admitted to entering into the agreement to sell and also the receipt of Rs. 15,00,000/- with the appellant/defendant. The only issue is as to whether the trial court has rightly held that it was the appellant/plaintiff who was guilty of breach of contract because though the Agreement to Sell was with respect to 175 sq. yds., however, an area of 50 sq. yds. was also sold by the appellant to his wife on 29.04.2000, and that a part of the property of approximately 35 sq. yds. was not in possession of the appellant/defendant but was in possession of St. Thomas Indian

National Church. There is also an additional issue which this Court is examining in exercise of powers under Order XLI Rule 24 CPC that even if the respondent/plaintiff is guilty of breach of contract in not going ahead with the Agreement to Sell, whether at all the appellant/defendant/seller could have forfeited the amount of Rs. 15,00,000/- in the absence of any pleading and proof that the appellant had suffered any loss on account of the respondent/plaintiff having not gone ahead with the agreement to sell.

5. On the aspect as to whether 50 sq. yds. of the suit property was sold to the wife of the appellant/defendant on 29.04.2000, it is a fact that the appellant/defendant in his cross-examination did admit that he had sold 50 sq. yds. of the suit property to his wife. This aspect is recorded by the trial court in para 15 of the impugned judgment. Admittedly, there is no agreement to sell in favour of the wife of the appellant/defendant *qua* the 50 sq. yds. owned by her. Merely because the wife in the legal proceedings may choose to file an affidavit contending that she is ready to sell her 50 sq. yds. of the suit property to the appellant/defendant, the same cannot mean that the appellant/defendant was the owner of 175 sq.

yds. of the property which was agreed to be sold to the respondent/plaintiff under the agreement to sell dated 12.01.2013. Also, the trial court has rightly held that 35 sq. yds. of the suit property was in possession of the Church and this was proved by statement of PW-2, Section Officer of the local electricity company, BSES Yamuna Power Limited, which showed that the electricity connection bearing CA No. 101478193 (domestic) was installed in the suit property in the name of Ms. Pansy Samuel Robeat, National Church, Khajoori Khas Extension, Karawal Nagar, Delhi-110094. Therefore, the trial court has committed no error in holding that the appellant/defendant was not the owner of 175 sq. yds. of the suit property and he could not go ahead with the Agreement to Sell with respect to 175 sq. yds. and in any case the appellant/defendant was not in a position to hand over the area of approximately 35 sq. yds. which was in possession of the church.

6. The second aspect is that the law is now well-settled right from the Constitution Bench judgment of the Hon'ble Supreme Court in the case of *Fateh Chand v. Bal Kishan Das*, AIR 1963 SC 1405 that even if there is a breach of an agreement to sell by a buyer, then,

in such a case the seller cannot forfeit any amount paid as price of the property unless the seller pleads and proves that he has been caused loss on account of the breach of contract in not going ahead with the agreement to sell. The ratio laid down by the Constitution Bench judgment of the Hon'ble Supreme Court in the case of ***Fateh Chand (supra)*** was recently followed by the Supreme Court in the case of ***Kailash Nath Associates v. Delhi Development Authority & Another, (2015) 4 SCC 136*** and I have considered all these judgments including the contrary judgment of the Supreme Court in the case of ***Satish Batra v. Sudhir Rawal, (2013) 1 SCC 345***, 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***, wherein I have by reference to the judgments of the Hon'ble Supreme Court held that it is the ratio of the Constitution Bench judgment of the Supreme Court in the case of ***Fateh Chand (supra)*** which will prevail and as interpreted by the Supreme Court in its recent judgment in the case of ***Kailash Nath Associates (supra)***. An SLP filed against the judgment in the case of ***M.C. Luthra (supra)*** being ***SLP(C) No. 11702/2018*** was dismissed by the Supreme Court on 15.05.2018. Therefore, once no loss has been

caused to the appellant/defendant/seller on account of alleged breach by the respondent/plaintiff/buyer, the appellant/defendant was completely unjustified in forfeiting the amount of Rs. 15,00,000/- received under the Agreement to Sell dated 12.01.2013.

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

JANUARY 11, 2019
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VALMIKI J. MEHTA, J



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