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

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Reserved on: 21st November, 2019

Decided on : 28th November, 2019

+ **RFA 815/2019 and CM APPL No.40520/2019, 48333/2019**

RAMPAT (DECEASED) THR LRS & ORS Appellants

Through : Mr.A.K.De, Ms.Ananya De,
Mr.Anuj Chauhan, Ms.Deepika
and Mr.Anand, Advs.

versus

M/S VERSATILE COMMOTRADE PVT LTD Respondent

Through : Mr.Ratan Kumar Singh and
Mr.Nikhilesh Krishnan, Advs.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This appeal is preferred by the appellants/defendants against the judgment and decree dated 08.05.2019 passed by the learned Additional District Judge-03/South-West District, Dwarka Courts, Delhi (hereinafter referred as the learned '*Trial Court*') in CS No.17091/2016 whereby the suit of the respondent for recovery of Rs.70.00 lac under Order XXXVII CPC was decreed with pendente lite and future interest @ 9% pa while dismissing the leave to defend application of appellants.

2. The respondent filed this Civil Suit under Order XXXVII CPC for recovery of Rs.70.00 lac with interest etc on following grounds:-

- a)* that the respondent is a company registered under the Companies Act, 1956 and Mr.Man Mohan Arora is duly authorised vide a board resolution to institute this suit;
- b)* the respondent is in a business of real estate and was interested to purchase parcels of land in the revenue estate of Village Jafarpur Kalan, Delhi;
- c)* the appellants offered to sell their respective $1/4$, $1/2$ and $1/8$ share in the land admeasuring 10 bigha and 11 biswas out of Khasra No.555 (4-06), 556/1 (3-11), 557(2-14) situated in the revenue estate of Village Jaffarpur Kalan, Tehsil Najafgarh, Delhi (hereinafter referred as the *subject land*);
- d)* the appellants agreed to sell this land @ Rs.3.58 Crores per acre vide an Agreement To Sell dated 18.04.2013 (hereinafter referred as 'ATS') executed between the parties;
- e)* the following clauses of ATS are relevant:-

"1. That in pursuance of the said agreement and in consideration of Rs.3,58,00,000/- (Rupees Three Crore Fifty Eight Lacs only) per Acre i.e. total sum of Rs.6,88,49,739/- (Rupees Six Crore Eighty Eight lacs Forty Nine thousands Seven hundred and Thirty Five only), out of which Rs.70,00,000/- (Rupees Seventy Lakh only) has / have been received by the first party from the second party in the following manner:-

1. Dharam Singh Yadav	Ch. No.	Amt. 28,00,000/-	18.04.13
	Cash	Amt.12,00,000/-	18.04.13
2. Rampat Yadav	Ch. No.	Amt. 14,00,000/-	18.04.13
	Cash	Amt. 06,00,000/-	18.04.13
3.Brham Prakash o/bc	Ch. No.403852	Amt. 7,00,000/-	18.04.13
	Cash	Amt.3,00,000/-	18.04.13

*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 75 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."

- f)* per clause No.5 of ATS, the appellants were to apply and obtain the NOC in favour of respondent or its nominee at their own cost and responsibility at least 15 days before the date of final payment and in case the first party failed to obtain the NOC, then this ATS was to be extended till the NOC is obtained;
- g)* it is the case of the appellant though ATS was to expire on 02.07.2013, yet the NOC was not obtained in the name of the respondent and in fact it was obtained in the name of one M/s.AD Realbuild Private Limited, to which the respondent had no concern;
- h)* on 01.07.2013 the appellants had sent a unilateral letter to Sub Registrar stating *interalia* in view of non-payment of the balance amount, hence the ATS stood cancelled and terminated;
- i)* as alleged probably it was because the appellants may have entered into a deal with M/s.AD Realbuild Private Limited which may not have gone well and hence later the appellants applied for NOC in the name of the respondent. Yet on 25.09.2013 the appellants again wrote to Sub Registrar stating *interalia* the respondent has not come forward to register the sale deed, hence ATS is cancelled;
- j)* it is alleged the NOC dated 31.07.2013 was in the name of M/s.AD Realbuild Private Limited and though on 19.11.2013, the appellants obtained NOC in the name of respondent and had sent a notice dated 26.11.2013 to the respondent calling upon the respondent to register the

sale deed on 17th or 18th December, 2013 but on 11.12.2013, the respondent wrote a letter to the appellants stating *interalia* though the appellants have cancelled the *ATS* on their own twice, yet the respondent was inclined to perform its part of the contract, hence asked the appellants to furnish a copy of the NOC obtained in its name as their letter dated 26.11.2013 did not contain copy of the such NOC. On 14.12.2013 the appellants sent a copy of the NOC, (received by the respondent only on 16.12.2013), yet the respondent was asked to execute sale deed on 17-18.12.2013 and pay balance sale consideration, which *per se* was in contravention of clause No.5 of the *ATS* requiring 15 days clear time to be given for balance payment and execution of sale deed;

k) the appellants then forfeited the *advance /earnest* money, hence a notice dated 17.12.2013 was issued to the appellants and on their failure to refund the amount, this suit under Order XXXVII CPC was filed; decreed vide impugned judgment; hence this appeal.

3. In this appeal, the learned counsel for the appellant has, primarily, raised two contentions viz *a)* per clause No.5 of the *ATS*, the agreement could not have been terminated by the respondent as in the event of non-issuance of NOC the agreement need to be extended till the NOC was obtained; and *b)* the suit under Order XXXVII CPC is not maintainable as there is no *debt* and the suit is essentially based on the loss suffered by the respondent in this transaction but has been filed without detailing such loss(es).

4. Qua contention *a)* one may note the appellants have themselves cancelled the *ATS* by writing two letters to the Sub-Registrar; firstly on

01.07.2013 and secondly on 25.09.2013. These letters show the respondent was rather trying to wriggle out of the transaction, may be trying to sell the property to M/s.AD Realbuild Private Limited and thus had obtained the NOC in the name of M/s.AD Realbuild Private Limited. Though the appellant argued M/s.AD Realbuild Private Limited was a *nominee* of the respondent and such NOC was rather applied by respondent, but *prima facie* there is nothing on record to prove even a linkage between the respondent and M/s.AD Realbuild Private Limited.

5. The letters dated 01.07.2013 and 25.09.2013 written by the appellants to the Sub Registrar would reveal the appellant were rather eager to terminate the ATS. The letters note:-

“Letter dated 01.07.2013

To,
The Sub-Registrar,
Kapashera, New Delhi

Re: Sale Deed of Agricultural Land measuring 10 Bighas 11 Biswas, bearing Khasra No. 555(4-5) , 556 (3011) and 557(2-14) of Village Jafarpur Kalan, New Delhi.

Dear Sir,

We the applicants, are recorded owners /bhumidhars of the said land as per the revenue records. That we have entered into an Agreement dated 18.4.13 for the sale of our Said Land in favour of M/s.Versatile Commotrade (P) Ltd. That as per our agreement, the last date for full and final payment and registration of sale deed was fixed for today i.e. 1st July, 2013. All of us have come for the registration of Sale Deed at Sub-Registrar Office, Kapashera, New Delhi and have been waiting for the purchased since 10 am and now it is 1.10 p.m. but till now he has not come for payment of balance payment and registration of sale deed. Hence due to fault of the purchaser and agreement stands cancelled and terminated hereafter.

In view of above, you are requested to record our presence for future reference.

Thanking you;

Yours faithfully,

(Rampat) (Dharam Singh)
Sons of Sh. Singh Ram

(Bhram Prakash)

Sons of Shri Surat Singh

R/o PO Jatarpur Kalan, New Delhi.

Letter dated 25.09.2013

*"The Sub-Registrar,
Kapashera, New Delhi*

*RE: SALE DEED OF AGRICULTURAL LAND MEASURING 10
BIGHAS 11 BISWAS. BEARING KHASRA NO. 555(4-5), 556 (3011)
AND 557(2-14) OF VILLAGE JAFARPUR KALAN, NEW DELHI.*

Dear Sir,

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*That as per directions of their representative the second party, we
applied the NOC in the name of nominee of the second party as the
name was given by the representative of second party. M/s A.D.
Realbuild Pvt. Ltd. R/o Kh No. 11, G/F Near Radhu Krishana Mandir,
Samlakha New Delhi.*

*That on dated 31.7.2013 we received the NOC bearing reference
No..... dated 02.07.2013 of _____ the same day we informed the
second party through telephone and as well as letter dated 2 July, 2013
after it we already many time contacted to the representative of the
second party but all in vain. We here by giving our presence before you
and the second party has not come for the payment of balance amount
and registration of the sale deed . Hence, due to the fault of the second
party (Purchaser) our agreement stands cancelled and terminated here
as per terms and conditions of the agreement.*

*In view of the above said submissions we are requested to you to
record our presence for future reference.*

Yours faithfully,

25.09.2013

*1. RAMPAT
2. DHARAN SINGH
3. BRAHAM PRAKASH*

ALL RESIDNET OF VPO JAFFAR KALAN DELHI"

6. It is alleged by the appellants they had obtained NOC in the name of the respondent and vide its letter dated 26.11.2013 had asked the respondent to pay the balance amount and execute the sale deed by 17-

18.12.2013 yet the respondent did not come forward and rather demanded a copy of NOC, though per agreement the appellants were only required to intimate the respondent qua such NOC. Nevertheless, the appellants then send a copy of NOC vide their letter dated 14.12.2013 to the respondent, but yet again the respondent did not come forward to execute the sale deed, hence, per clause No.7 of the ATS the earnest money was forfeited. It is also alleged the respondent had not pleaded any loss in its suit, hence is not entitle to refund. The learned counsel for the appellants relied upon *Oil and Natural Gas Corporation Ltd. vs. Saw Pipes Ltd.* (2003) 5 SCC 705 wherein the Court held:-

“64.xxxxx Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This Section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia [relevant for the present case] provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, whether or not actual loss is proved to have been caused, thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named. xxxxxx”

7. The appellants thus argued it was for the respondent to prove the loss suffered by it and only then it could have filed this suit for recovery of money, but whereas the respondent filed a simple suit for refund of earnest money, which per *Satish Batra vs Sudhir Rawal C.A.* No.7588/2012 decided on 18.10.2012 was rightly forfeited by the appellants *per* clause *viz* 7(supra) of the ATS.

8. I disagree with the contention raised. A breach of the contract should never being a windfall for any of the parties to a contract. The idea of giving compensation is if there is a breach, an endeavour be made

to put the loss suffering party to the same position as it was at the time of entering into an agreement.

9. Section 73 and 74 of the Indian Contract Act, 1872 need to be read together. If a liquidated amount/penalty is mentioned in a contract it is an upper ceiling and does not mean if there is no loss then also one need to be compensated with such liquidated amount. The facts rather show the appellants on their own had estimated their loss to be Rs.70.00 lac and have forfeited such amount, without even pleading it.

10. The word used in clause No.1 of the ATS is *advance / earnest money* and *balance sale consideration* to be paid within 75 days i.e. on or before 01.07.2013. The language used does not clearly say Rs.70.00 lac is to be treated as an earnest money. The amount being *huge* hence it has a character of *advance*. This very clause has been interpreted in *Versatile Commotrade Private Limited vs. Chiranji Lal and Ors.* (2017) 239 DLT 83 in the following manner:-

“6. Clause (1) of the Agreement to Sell speaks about the total sale consideration amount and the advance received by the defendants.

Clause (1) of the Agreement to Sell reads as under:

Clause 1. That in pursuance of the said agreement and in consideration @ Rs.3,60,00,000/- (Rupees three Crore and Sixty Lacs Only) per Acre, out of which Rs.1,03,54,000/- (Rupees One Crore, Three Lacs, and Fifty Four Thousand Only), has been received by the first party from the second party in the following manner-

(a) Rs.11,50,000/-by cash;

(b) Rs.40,27,000 vide Cheque No.403870, dated 23.04.2013 drawn on Oriental Bank of Commerce, Muzaffar Nagar both paid to Shri Chiranji Lal;

(c) Rs.11,50,000/-by cash

(d) Rs.40,27,000 vide Cheque No.403871, dated 23.04.2013, drawn on Oriental Bank of Commerce, Muzaffar Nagar: both paid to Shri Subhash Chand;

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 90 (ninety) days from the date of execution of this agreement to sell.

7. The language of the clause clearly stipulates that the defendants had received Rs.1,03,54,000/- out of the total consideration amount and **thus the money was received towards part payment**. In the latter part of the said clause although the expression used is "advance/earnest money" but the fact that the parties also noted that the "balance sale consideration was to be received", clearly shows that **parties had intended to treat this money solely as a part payment**. Clause (7) of the said agreement further shows the intention of the parties that this advance payment of Rs.1,03,54,000/- was towards part payment of the consideration money. Clause (7) of the agreement reads as under:

Clause 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.

8. The said advance payment was subject to forfeiture by the defendants only when the purchaser failed to pay the balance amount within stipulated period. The said stipulated period was 90 days. Clause (5) of the agreement however put a contingent to the payment of the balance consideration amount. Clause (5) of the agreement reads as under:

Clause 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 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 stand automatically extended till the NOC is obtained.

9. This clause clearly stipulates that the time to pay the balance amount is 90 days from the date of execution of the agreement to sell only if the seller obtains the NOC at least 15 days in advance from the date of final payment and in case the seller fails to obtain the NOC then the agreement would automatically stand extended till the period, NOC is obtained. Time therefore was not the essence of the contract and it was subject to stipulation of obtaining the NOC by the seller. It is apparent that the seller has failed to obtain the NOC and as such cannot take advantage of clause (7) of this agreement."

11. This judgment was challenged in Division Bench in RFA(OS) (COMM) No.12/2017 but such appeal was dismissed. Even SLP(C) No.33758/2017 was also dismissed on 08.01.2018.

12. Further in *Manoj Kumar vs. Smt.Neena Khattar and Another*, CS(OS) 1371/2017 decided on 13.10.2015 it was held if loss is not pleaded there cannot be any forfeiture. Para 6 and 7 of the judgment are relevant and run as under:

*“6. A reading of the ratio of Kailash Nath Associates’s case (supra) makes it more than clear that the law with respect to entitlement of a defendant/proposed seller to forfeit an amount received under the agreement to sell is subject to loss being caused and appropriation is actually pursuant to Section 74 of the Indian Contract Act by taking the advance payment received as liquidated damages, but once there is **no plea of loss** being caused alongwith necessary details, there does not arise issue of appropriation by the defendants, of the advance price received under the contract as liquidated damages.*

*7. In my opinion, an amount of **Rs.1,35,00,000/- cannot be taken as earnest money** inasmuch as, earnest money is only a **nominal** amount. xxxxxxxx”*

13. In *Versatile Commotrade Private Limited vs. Karan Singh* 2017 (245) DLT 398 this Court held:

“13. Thus, the law is settled that who may be at default the advance money cannot be forfeited, unless the loss is pleaded. The plea of the defendants that advance was infact the earnest money then also, per law, it could not have been forfeited in entirety. Even if one may treat the advance amount to be an earnest money, the law as it stands today would only allow the defendants to deduct 5% to 10% of such amount, given the facts of each case. Hence making provision for 10% of the consideration viz Rs.14,22,630/- to plead and prove the loss, if any, suffered by the defendants xxxxxxxx”

14. Further in *Kailash Nath Associates vs. DDA* 216(2015) DLT 433 the Court noted:-

“43. On a conspectus of the above authorities, the law on compensation for breach of contract Under Section 74 can be stated to be as follows:

1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.

2. Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section.

4. The Section applies whether a person is a Plaintiff or a Defendant in a suit.

5. The sum spoken of may already be paid or be payable in future.
 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 dispensed with. 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.
 7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application."

15. Thus, Rs.70 lac ought not have to been forfeited. Per *Chiranji Lal & Others* (supra), the phrase *advance/earnest money* would only relate to *part payment* and not an *earnest money*, hence could not be forfeited.

16. Coming to contention **b)** viz the suit under Order XXXVII CPC being not maintainable, it is argued the learned Trial Court had ignored the provisions embodied in CPC viz:-

"ORDER XXXVII- SUMMARY PROCEDURE

1. Courts and classes of suits to which the Order is to apply—

(1) This Order shall apply to the following Court, namely:—

(a) xxx

(b) xxx

(2) Subject to the provisions of sub-rule (1) the Order applies to the following classes of suits, namely:—

(a) suits upon bills of exchange, hundies and promissory notes;

(b) suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising,—

(i) on a **written contract**, or

(ii) to (iv) xxx."

17. It is argued suit under Order XXXVII CPC is maintainable only where the plaintiff seek to recover the money *payable* on a written contract, but since there is no provision for *refund* of the earnest money in the *ATS*, hence suit under Order XXXVII CPC is not maintainable.

18. However, the Court in *Versatile Commotrade Private Limited vs. Balraj* in CS(COMM) 982/2016 decided on 09.01.2019 held otherwise to

say suit under Order XXXVII CPC is maintainable qua recovery to be made under agreement to sell.

19. Further in *Kiranjit Singh vs. Madan Lal Khanna* 53(1994) DLT 86 the Court has clearly held a suit under Order XXXVII CPC is maintainable for refund of money paid through cash receipts where defendant is not denying execution of the receipts as these receipts are in nature of written contract and could be a basis for filing a suit under Order XXXVII CPC.

20. The last limb of argument was there being no provision in the ATS to pay interest, the interest ought not to have been awarded by the learned Trial Court. However, in *Sanjay Kohli vs. Vikas Srivastava* 2013 (196) DLT 237 the Court held under Order XXXVII CPC the plaintiff would be entitled to interest even if there is no term regarding payment of interest in such agreement to sell.

21. Thus, in the circumstances, since no loss was pleaded by the appellants in their leave to defend and since the appellants admittedly failed to apply for the NOC in the name of the respondent till 01.07.2013 and rather were eager to repudiate the ATS, per their letters dated 01.07.2013 and 25.09.2013 and despite giving one more opportunity to conclude the transaction, yet asked the respondent to execute sale deed on 17-18.12.2013 (while sending NOC only on 14.12.2013), this being in violation of clause No.5(*supra*) of ATS, thus the appellants have no right to forfeit the *advance / earnest money viz part payment per Chiranjil Lal* (*supra*) of an huge amount of Rs.70.00 lac by invoking clause No.7 of ATS.

22. The appeal, thus, has no merit and is accordingly dismissed. The pending applications, if any, also stands dismissed. No order as to costs.

YOGESH KHANNA, J.

NOVEMBER 28, 2019

M/DU

