* IN THE HIGH COURT OF DELHI AT NEW DELHI

% **Date of decision: 1st November, 2019**

\+ **CS(OS) 400/2016 & IAs No.9770/2016 (u/O XXXIX R-1&2 CPC) & 10614/2019 (u/O XII R-6 CPC)**

MERA BABA INFRASTRUCTURE PVT LTD ..... Plaintiff

Through: Mr. Asit Tiwari and Mr. Virender Singh Rana, Advs.

Versus

CHAILU (DECEASED) THROUGH LRS ..... Defendant

Through: Mr. R.C. Gupta and Mr. O.P. Upadhyay, Advs.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff has instituted this suit for recovery of Rs.4,48,31,000/- pleading (i) that the defendant, vide agreement to sell dated 19th April, 2013 agreed to sell his agricultural land to the plaintiff for a total sale consideration of Rs.35,28,80,000/- and the plaintiff paid a sum of Rs.3,53,00,000/- to the defendant as advance payment i.e. 10% of the total amount and the receipt whereof the defendant acknowledged; (ii) that though the plaintiff approached the defendant to complete the sale and to deliver possession of the land as well as original title deeds, but subsequently came to know that the land which was shown by the defendant to the plaintiff was not owned by the defendant and the defendant also failed and avoided to take 'No Objection Certificate' from the Competent Authority for taking *Tatima* / demarcation of the land and/or for partition of the land; (iii) that the defendant, despite extension of time for taking steps, failed to comply with his part of the agreement; and, (iv) that the defendant was thus

liable to refund the advance payment of Rs.3,53,00,000/- received, but failed to do so inspite of demand. Hence, the suit for recovery of Rs.3,53,00,000/- along with interest @ 9% per annum from 31st July, 2013 to 30th July, 2016 amounting to Rs.95,31,000/- i.e. for total amount of Rs.4,48,31,000/-.

2. The suit came up first before this Court on 12th August, 2016, when summons thereof were ordered to be issued. The order dated 20th December, 2016 records that written statement had been filed by the defendant. However, the defendant died soon thereafter and vide order dated 28th August, 2017 his legal representatives (LRs) were substituted. The order dated 28th August, 2017 also records that written statement had already been filed by the deceased defendant and the plaintiff was directed to file replication thereto. However, the subsequent order dated 14th November, 2017 records that the LRs of the deceased defendant had filed a fresh written statement and the plaintiff was directed to file replication thereto. There was however no adjudication, whether the LRs of the deceased defendant were entitled to file a fresh written statement.

3. On the pleadings of the parties, the following issues were framed in the suit on 7th September, 2018:

> *"1. Whether the suit is barred by limitation? OPD*
> *2. Whether the plaint does not disclose any cause of action in favour of the plaintiff? OPD*
> *3. Whether the suit is barred under the provisions of the Section 41(h) of the Specific Relief Act, 1963? OPD*

> 4. *Whether the plaintiff is entitled to a money decree for the recovery of Rs.4,48,31,000/- against the defendant? OPP*
> 5. *Whether the plaintiff is entitled to recovery of interest @ 9% pa on the suit amount pendentelite and future interest from the date of filing of suit? OPP*
> 6. *Relief."*

and the parties relegated to trial.

4. The counsel for the plaintiff, on enquiry states that though the affidavits by way of examination-in-chief of the witnesses of the plaintiff have been tendered in evidence but cross-examination has not commenced as yet.

5. The plaintiff has filed IA No.10614/2019 under Order XII Rule 6 of the Code of Civil Procedure, 1908 (CPC) and to which reply has been filed by the defendant.

6. The counsel for the plaintiff has contended, (i) that there was no clause in the agreement to sell entitling the defendant to forfeit the monies received as advance from the plaintiff; (ii) that the defendant has not made any counter-claim for any loss or compensation suffered on account of breach of the agreement to sell, even if any by the plaintiff; (iii) that the plaintiff in accordance with the dicta of the Supreme Court in ***Kailash Nath Associates Vs. Delhi Development Authority & Anr.*** (2015) 4 SCC 136 is entitled to a decree for refund forthwith with interest at such rate as may be awarded by the Court.

7. The counsel for the plaintiff has however also pointed out that though in the written statement filed by the deceased defendant no loss

even was pleaded, but in the fresh written statement filed by the LRs of the deceased defendant, in paragraphs 7 to 9 of the preliminary objections, it has been pleaded (a) that the deceased defendant had distributed the earnest money received from the plaintiff and forfeited for breach of the agreement by the plaintiff, equally between his three sons impleaded as LRs No.2, 3 & 4, with the consent of the LRs No.1, 5 & 6 and had also transferred the subject land in favour of LRs No.2 to 4; (b) that LRs No.2 to 4 invested the monies so received from their father, by purchasing land property in their names; and, (c) that the price of the property has fallen down in the area to the extent of 20% and the plaintiff was not willing to purchase the land for this reason.

8. In the face of the aforesaid, I have enquired from the counsel for all the LRs of the deceased defendant, why the suit should not be decreed forthwith.

9. The counsel for the LRs of the deceased defendant states that issues have already been framed in the suit and the defendant, in evidence will show that it was the plaintiff who was in breach of various obligations under the agreement to sell.

10. I have however further enquired from the counsel for the LRs of the deceased defendant, that even if the LRs of the deceased defendant succeed in establishing the plaintiff to be in breach of the agreement to sell, whether not in accordance with the dicta in ***Kailash Nath*** supra followed by this Court in ***Palm Art Apparels Pvt. Ltd. Vs. Enkay Builders*** 2017 SCC OnLine Del 12766, ***Mera Baba Pvt. Ltd. Vs. Ram Lubhaya Puri*** 2018 SCC OnLine 9502, ***Klintoz Parmaceuticals Pvt. Ltd. Vs. Ravinder Shankar Mathur*** 2018 SCC OnLine Del 11954,

Satish Verma Vs. Garment Craft (India) Pvt. Ltd. 2018 SCC OnLine Del 6829 and ***Mahendera Verma Vs. Suresh T. Kilachand*** 2019 SCC OnLine Del 9333, the defendant would still remain liable for refund of the monies received from the plaintiff under the agreement to sell, having not made any claim for compensation on account of loss, if any suffered on account of breach of the agreement to sell, by the plaintiff.

11. The counsel for the LRs of deceased defendant then seeks adjournment of 15-20 days to argue.

12. The suit is listed today for arguments on the application under Order XII Rule 6 of the CPC and the counsel for the LRs of deceased defendant, before filing a reply to the said application, is expected to study the law and in fact today initially opposed the application and only on finding himself in a sticky wicket is requesting adjournment. Such adjournments cannot be granted and have to be refused. Such adjournments sought, when faced with adversity, only lead to pendency of cases, with none of the cases coming to be decided owing to the counsels wanting to ward off the evil day. The adjournment is thus refused.

13. No other argument has been made by the counsel for the defendant.

14. A perusal of the agreement to sell dated 19th April, 2013 which is not in dispute and has been admitted into evidence as Ex.P-1 shows, (i) the amount of Rs.3,53,00,000/- described as 'earnest money' i.e. 10% of the total amount; (ii) providing in Clause 9 thereof that if the deceased defendant did not perform his part of the agreement within the stipulated period, the plaintiff will be free to get the sale deed done

in its favour at the same price without any extra compensation but not providing for consequences of forfeiture of earnest money in the event of the plaintiff being in breach.

15. Though the written statement subsequently filed by the LRs of the deceased defendant ought not to have been taken on record without specific permission of the Court for filing of a fresh written statement by the LRs of the deceased defendant as the LRs ordinarily are bound by the pleadings of their predecessor, but a perusal of even the written statement filed by the LRs of the defendant does not show any plea of any loss suffered by the LRs. All that is pleaded is forfeiture of earnest money on breach by the plaintiff and distribution of the monies amongst the three sons of the deceased defendant and who are pleaded to have invested the same in purchase of other properties. It is not the plea that in the matter of said purchase of other properties also, any loss was suffered. The plea of fall in prices is only in relation to the reason for the plaintiff to not go ahead with transaction and it is not the plea that the deceased defendant sold the property at any value lesser than that at which the plaintiff had agreed to purchase. Rather, it is merely pleaded that the deceased defendant, with the consent of his widow and daughters, gifted the land earlier agreed to be sold to the plaintiff to LRs No.2 to 4.

16. It has been held in ***Poorna Radiology Services Pvt. Ltd. Vs. Philips Electronics India Ltd.*** MANU/DE/8456/2007; ***Lalit Kumar Bagla Vs. Karam Chand Thapar & Bros. (CS) Ltd.*** 204 (2013) DLT 392 and ***Mahendra Verma Vs. Suresh T. Kilachand*** MANU/DE/2352/2019 that without a Counterclaim for recovery of

compensation for loss alleged to be suffered, mere plea in the written statement of the defendant for breach of agreement to sell by the plaintiff having suffered a loss is of no avail.

17. Thus, the plaintiff is found to be entitled to a decree.

18. However in the issues framed in the suit, an issue of limitation has been framed and which needs adjudication. The LRs of the deceased defendant, in their written statement, have pleaded breach of agreement to sell by the plaintiff. The agreement to sell dated 19th April, 2013 provides for completion of sale by 15th July, 2013. However, the deceased defendant vide legal notice dated 31st July, 2013 admitted into evidence as Ex.P-3, though claimed the earnest money received to be liable to be forfeited as on 15th July, 2013 and again after expiry of extended period on 26th July, 2013, but extended the time for completion of sale to 14th August, 2013. Thus, the date fixed for performance of the agreement to sell was 14th August, 2013. This suit is found to have been instituted on 30th July, 2016 and came up first before this Court on 12th August, 2016 i.e. within three years from the date of forfeiture and is within time.

19. The plaintiff is thus found entitled to a decree for refund of monies.

20. A perusal of the pleadings and the documents however does indicate that it was the plaintiff who was reneging from the agreement to sell. The said factor though not relevant for entitlement of the plaintiff to refund of earnest money, but is relevant for the purpose of fixing the rate of interest. The plaintiff, along with its documents has not filed copy of any communication which may have been sent to the

defendant, demanding refund of the monies for recovery of which the present suit has been filed. On the contrary, the defendant is found to be writing to the Additional District Magistrate within whose jurisdiction the land subject matter of the agreement to sell is situated, to not register any sale deed of the land owing to the monies of the plaintiff lying with the defendant. In this view of the matter, the plaintiff is not found entitled to any pre-suit interest. The plaintiff is however found entitled to interest *pendente lite* @ 6% per annum and future interest @ 9% per annum.

21. A decree is accordingly passed, in favour of the plaintiff and jointly and severally against all the legal heirs of the deceased defendant and of whom the LR No.1 being the wife of the deceased defendant is stated to have died, of recovery of Rs.3,53,00,000/- with interest *pendente lite* @ 6% per annum and future interest @ 9% per annum, leaving the parties to bear their own costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

NOVEMBER 01, 2019

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