

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

% **Date of decision: 1<sup>st</sup> February, 2019.**

+ **CS(OS) No.457/2016**

**MOHAN BUILDMART PVT LTD**

**..... Plaintiff**

Through: Mr. Asit Tewari & Mr. Virender  
Rana, Advs.

Versus

**HITESH KUMAR**

**..... Defendant**

Through: Mr. S.N. Gupta, Adv.

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

1. None appeared for the defendant despite passover.
2. The plaintiff has instituted this suit for recovery of Rs.5,41,27,154/- with *pendente lite* and future interest, claiming that (i) the defendant vide Agreement to Sell dated 17<sup>th</sup> April, 2013, as amended on 19<sup>th</sup> April, 2013, had agreed to sell his 1/3<sup>rd</sup> share admeasuring 27 Bighas 19 Biswas in Khatta No.44/46, Killa No.4/22(4-8), 23(4-16), 24(4-16), 25/1(2-8), 20/20/2(2-13), 21/1(2-3), 21/21/24(4-1), 25/2(4-2), 28(0-4), 24/3(4-12), 4(4-16), 7(4-16), 8(4-16), 13(4-16), 18/1(1-10), 24/18/2/1(2-16), 27(0-4), 102(11-1), 172(1-15) total ad-measuring 83 Bighas 18 Biswas in village Khera Dabar, Najafgarh, Delhi; (ii) the plaintiff in pursuance to the aforesaid Agreement to Sell paid advance consideration of Rs.4,15,56,354/- to the defendant out of the total agreed sale consideration informed to be of Rs.21,55,63,540/-; (iii) the defendant however avoided to take steps for getting No Objection Certificate (NOC) from the Competent Authority and / or for complying with the other formalities necessary for execution of the Sale Deed; (iv) the plaintiff had got issued a letter dated 11<sup>th</sup> January, 2014 to the defendant

calling upon the defendant to perform his part of the Agreement to Sell; (v) the defendant in his reply dated 14<sup>th</sup> February, 2014 claimed forfeiture of Rs.4,15,56,354/-; (vi) the plaintiff got issued another notice dated 18<sup>th</sup> February, 2014 to the defendant controverting the claim of the defendant and claiming refund of the advance paid with interest; (vii) a suit was filed in the District Court, Dwarka by a third party against the defendant for specific performance of the agreement to sell, of the same land, claimed to have been executed by the defendant with that third party and the plaintiff was also impleaded in the said suit; vide interim order in the said suit filed by the third party, the defendant no.1 was restrained from alienating the land; (viii) it was also learnt that the wife and child of the defendant were also claiming rights against the defendant in the subject land; and, (ix) the plaintiff is thus entitled to refund of advance sale consideration of Rs.4,15,56,354/- together with interest at 9% per annum thereon amounting to Rs.1,25,70,800/- till the institution of the suit. Hence, the suit claim for Rs.5,41,27,154/-.

3. The suit was entertained and summons thereof ordered to be issued.

4. The defendant has filed a written statement pleading that, (a) this suit instituted on 8<sup>th</sup> September, 2016 with respect to monies admittedly paid under the Agreements to Sell dated 17<sup>th</sup> April, 2013 and 19<sup>th</sup> April, 2013 is barred by time; (b) the plaintiff paid a sum of Rs.2,15,56,354/- to the defendant as earnest money on 17<sup>th</sup> April, 2013 at the time of executing the Agreement to Sell dated 17<sup>th</sup> April, 2013; (c) in terms of the said Agreement to Sell, the plaintiff was to pay the balance amount of Rs.19,40,07,186/- on or before 17<sup>th</sup> July, 2013 and on receipt of which the defendant was to execute the Sale Deed; (d) just two days after the Agreement to Sell dated 17<sup>th</sup> April, 2013, the plaintiff approached the defendant expressing inability

to pay the balance sale consideration of Rs.19,40,07,186/- by 17<sup>th</sup> July, 2013 and requested for extension of time for payment and the said request of the plaintiff was accepted by the defendant and time for payment extended till 30<sup>th</sup> August, 2013 and addendum dated 19<sup>th</sup> April, 2013 executed; (e) the plaintiff, in order to show his *bona fides* and willingness to conclude the contract, paid a further sum of Rs.2,00,00,000/- and it was mutually agreed that the said money would also constitute earnest money; (f) the plaintiff failed to pay the balance sale consideration of Rs.17,40,07,186/- on or before 30<sup>th</sup> August, 2013 and consequently, the amount of Rs.4,15,56,354/- paid by the plaintiff as earnest money stood forfeited and the Agreement to Sell stood cancelled; (g) the defendant, in fulfilment of his part of the Agreement to Sell had signed the documents for obtaining the NOC and handed over the same to the plaintiff for obtaining the NOC; (h) the plaintiff however attempted to obtain the NOC without making full payment to the defendant; and, (i) the plaintiff is in collusion with the third party which has filed the suit for specific performance in the Dwarka Courts, New Delhi.

5. The plaintiff has filed a replication to the written statement aforesaid.

6. The suit came up before this Court on 17<sup>th</sup> January, 2019 for framing of issues when in the aforesaid state of pleadings, it appeared that the parties were not at issue on any material proposition of law or fact and there was no need to frame any issue. However, since none appeared on behalf of the defendant on that date, the hearing was adjourned 24<sup>th</sup> January, 2019. On 24<sup>th</sup> January, 2019, Ms. Nishtha Garg, Advocate appeared for the defendant and stated that Mr. S.N. Gupta, Advocate for the defendant had suffered a bereavement and was unable to appear. Accordingly, the hearing was adjourned to today.

7. Today also none has appeared for the defendant despite passover.
8. It is quite obvious that the defendant, having realized that his written statement does not disclose any defence in law, is avoiding to appear before this Court.
9. The Agreement to Sell dated 17<sup>th</sup> April, 2013 describes the amount of Rs.2,15,56,354/- paid by the plaintiff to the defendant thereunder as earnest money and also contains a clause that in the event of the plaintiff failing to pay the balance sale consideration within the stipulated time, the defendant will be entitled to forfeit the earnest money. However the receipt of the said amount executed by the defendant on 17<sup>th</sup> April, 2013 describes the same as “advance/part payment”.
10. The addendum dated 19<sup>th</sup> April, 2013 however does not give any nomenclature to the amount of Rs.2,00,00,000/- paid thereunder and does not contain any clause about the forfeiture thereof. The receipt dated 24<sup>th</sup> June, 2013 executed by the defendant of the said sum of Rs.2,00,00,000/- describes the same as “part payment”.
11. From the documents aforesaid, which speak for themselves, it is clear that the sum of Rs.2,00,00,000/- was not by way of earnest and not agreed to be forfeited; the sum of Rs.2,15,56,354/- as per Agreement to Sell is earnest and forfeitable and as per receipt, is advance/part payment.
12. The legal position with respect to forfeiture of amounts, even if paid as earnest money is not *res integra* and has been dealt with exhaustively by the Supreme Court in ***Kailash Nath Associates Vs. DDA*** (2015) 4 SCC 136, and thereafter by this Court in a large number of judgments. Reference to ***KlintoZ Pharmaceuticals Pvt. Ltd. Vs. Ravinder Shankar Mathur*** (2015) 4 SCC 136, ***Satish Verma Vs. Garment Gaft (India) Pvt. Ltd.*** 2018 SCC

OnLine Del 6829, *Mera Baba Pvt. Ltd. Vs. Ram Lubhaya Puri* 2018 SCC OnLine Del 9502, *Kamla Rameshchandra Sharma Vs. Maharashtra Rajya Wakhar Mahamandal, Pune* 2008 SCC OnLine Bom 1433 and *Palm Art Apparels Pvt. Ltd. Vs. Enkay Builder Pvt. Ltd.* MANU/DE/3533/2017 would suffice. The legal position is:

*“43.1 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.*

*43.2 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.*

*43.3 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.*

*43.4 The Section applies whether a person is a plaintiff or a defendant in a suit.*

*43.5 The sum spoken of may already be paid or be payable in future.*

*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 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.*

*43.7 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.”*

13. The written statement of the defendant is bereft of any particulars whatsoever of the loss if any suffered by the defendant, even if the breach of the Agreement to Sell were to be proved by the defendant to be of the plaintiff. It is also not the plea that Rs.2,15,56,354/-, which in the Agreement to Sell is described as earnest money and forfeitable, was a genuine pre-estimate of damages fixed by both the parties. It is also not pleaded that it is not possible to prove actual loss or damages and/or that it is impossible to prove that liquidated amount of Rs.2,15,56,354/- named in the contract as forfeitable is difficult or impossible to prove. It has been held in the judgments aforesaid that in the circumstances, there can be no forfeiture without proving the loss.

14. At this stage, Mr. S.N. Gupta, Advocate for the defendant appears and though contends that the plaintiff has not come forward to purchase the land even though the defendant is willing today also, but fairly agrees that there is no plea in the written statement of loss if any suffered by the defendant on account of breach of agreement by the plaintiff.

15. The counsel for the defendant has not made any other argument.

16. As far as the plea of defendant of suit claim being barred by time is concerned, it has already been held in order dated 17<sup>th</sup> January, 2019 that this suit filed within three years of date agreed of performance of Agreement to

Sell, is within time.

17. The plaintiff is however not found entitled to pre-suit interest, being evidently in breach of Agreement to Sell.

18. A decree is passed, in favour of the plaintiff and against the defendant, of recovery of Rs.4,15,56,354/- with interest, with effect from the date of institution of the suit and for a period of one year hereof, at the rate of 6% per annum and thereafter at the rate of 9% per annum. However, in the facts, no costs.

Decree sheet be drawn up.

**FEBRUARY 01, 2019**

‘gsr’..

**RAJIV SAHAI ENDLAW, J**