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

\+ **RFA No. 912/2018 and C.M. No. 46241/2018 (stay)**

% ***18th February, 2019***

RAJESH KUMAR DABAS & ANR ..... Appellants
Through: Mr. N.S. Dalal, Advocate

versus

RAJPATI ..... Respondent

Through

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. No one appears for the respondent, although the respondent is served. The matter was passed over for the presence of the respondent but even after a pass-over no one appears for the respondent. It is noted that in fact respondent did not appear in the suit in the trial court, and was proceeded *ex parte*.

2. When notice was issued in this appeal on 02.11.2018, a limited notice was issued, and this order dated 02.11.2018 reads as under:-

“C.M. No.46240/2018(exemption)

1. Exemption allowed subject to just exceptions.

C.M. stands disposed of.

C.M. Nos.46242/2018(for condonation of delay in filing) & 46243/2018(for condonation of delay in re-filing)

2. For the reasons stated in the applications, delay of 82 days in filing and 3 days in re-filing the appeal is condoned subject to just exceptions.

C.M.s stand disposed of.

+RFA No.912/2018 and C.M. No.46241/2018(stay)

3. Learned counsel for the appellants sought a pass over for taking instructions, and after taking instructions it is stated that appeal is not pressed for seeking the decree for specific performance but is only pressed for return of the amount paid of Rs. 4,50,000/- by the appellants/plaintiffs to the respondent/defendant under the subject Agreement to Sell dated 19.5.2011 alongwith reasonable rate of interest.

4. On the limited aspect as stated above, let notice in this appeal be issued to the respondent, on filing of process fee, both in the ordinary method as well as by registered post AD, returnable on 18th February, 2019.

Additional set dasti.”

3. It is seen that the appellants/plaintiffs had proved the Agreement to Sell dated 19.05.2011 as Ex.PW1/1 and Receipt as Ex.PW1/2, and these documents showed that the respondent/defendant had received a sum of Rs. 3,00,000/-. The appellants/plaintiffs have thereafter paid a sum of Rs. 1,00,000/- on 24.06.2011, and which has been proved in terms of the Receipt/Ex.PW1/3. The appellants/plaintiffs thereafter paid an amount of Rs. 25,000/- by cheque, and Rs. 25,000/- by cash, thus totalling to an amount of Rs. 4,50,000/- paid by the appellants/plaintiffs/buyer to the respondent/defendant/seller.

4. In law, any amount received by a seller under an agreement to sell cannot be forfeited unless the defendant/seller pleads and proves that any loss has been caused to him on account of the breach of contract of the plaintiff/buyer vide ***M.C. Luthra v. Ashok Kumar Khanna*** in ***RFA No. 780/2017*** decided on 27.02.2018, ***248 (2018) DLT 161: 2018 (169) DRJ 4***. In the present case, since the respondent/defendant was *ex parte* in the trial court, there does not arise any issue of any loss being pleaded and proved by the respondent/defendant. An SLP filed against the

judgment in ***M.C. Luthra's case (supra)*** has been dismissed by the Hon'ble Supreme Court vide Order dated 15.05.2018 in ***SLP(C) No. 11702/2018***.

5. In view of the aforesaid discussion, this appeal is allowed to the extent that a money decree is passed in favour of the appellants/plaintiffs and against the respondent/defendant for a sum of Rs. 4,50,000/- along with interest at 12% per annum simple from 01.07.2011 till the date of filing of the suit, and thereafter *pendente lite* and future till payment at the same rate. The appellants/plaintiffs will also be entitled to costs of this appeal. Decree sheet be prepared.

6. The appeal is allowed to the extent as stated above, and disposed of. All pending applications are also disposed of.

FEBRUARY 18, 2019 **VALMIKI J. MEHTA, J**

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