



* IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment reserved on : 13th September, 2022*
Judgment delivered on : 27th September, 2022

+ CS(COMM) 1168/2016 & I.A. 5508/2017 (u/S 151 CPC)

JMD BUILDCON

..... Plaintiff

Through: Ms.Stuti Gupta and
Mr.Vasantha Kumar, Advocates.

versus

SUDHA DEWAN

..... Defendant

Through: Mr.Samrat Nigam and
Mr.Rishabh Gupta, Advocates.

CORAM:

HON'BLE MR. JUSTICE AMIT BANSAL

JUDGMENT

AMIT BANSAL, J.

1. The present suit has been filed on behalf of JMD Buildcon seeking recovery Rs.6,00,00,000/- along with *pendente lite* and future interest @18% per annum.
2. In the plaint, it has been pleaded that:
 - (i) The plaintiff is a partnership firm duly registered with the Registrar of firms.
 - (ii) The plaintiff is in the real estate business. It raises construction of apartments and also deals in sale and purchase of properties.
 - (iii) Defendant is the owner of the property bearing no. D-972, New Friends Colony, New Delhi admeasuring 492 square yards, consisting of ground floor and first floor (suit property).
 - (iv) Defendant approached the plaintiff for sale of the suit property in late 2012 and brought to the plaintiff's notice that the suit property has



been mortgaged with Cholamandalam Finance and Investment Company Limited (hereinafter referred to as 'Cholamandalam') and due to the heavy interest being paid, the defendant is facing financial hardships. The Defendant stated that the money received from the plaintiff as sale consideration will be used for redeeming the mortgage.

- (v) An Agreement to Sell dated 21st November, 2012 was entered into by the plaintiff and the defendant for a total sale consideration of Rs.19,30,00,000/-. Earnest money of Rs.1,93,00,000/- was deposited by the plaintiff with the defendant in the following manner:
 - a) Rs.80,00,000/- vide cheque bearing no.613876 dated 21st November, 2012.
 - b) Rs.5,50,000/- vide cheque bearing no.613877 dated 21st November, 2012.
 - c) Rs.1,07,50,000/- in cash on 21st November, 2012.
- (vi) In addition, Rs.7,00,000/- was paid by the plaintiff to the defendant vide cheque bearing no.613878 on 5th December, 2012.
- (vii) The plaintiff, on request of the defendant, made a payment of Rs.32,00,000/- on 21st/22nd March, 2013 directly to Cholamandalam as a part payment towards redeeming the mortgaged suit property.
- (viii) Time was never the essence of the contract.
- (ix) The plaintiff requested the defendant to supply the true copies of the title documents along with the chain of documents in respect of the suit property, which request was not acceded to despite repeated efforts.



- (x) Vide notification dated 4th December, 2012 the circle rate of the property was changed from Rs.2,15,000/- per square meter to Rs.6,45,000/- per square meter.
- (xi) The payments made to the defendant were not used to redeem the mortgaged suit property. The plaintiff discovered that the loan by Cholamandalam to the defendant was recalled prior to entering into the aforesaid Agreement to Sell and Cholamandalam had already initiated recovery proceedings against the defendant.
- (xii) The arbitration proceedings pending before the Arbitrator in Chennai were concealed by the defendant from the plaintiff and hence, on account of acts of omission by the defendant, the plaintiff did not adhere to the schedule of payment, although it was ready and willing to perform its obligations.
- (xiii) The plaintiff received a legal notice dated 9th May, 2013 by the defendant, terminating the Agreement to Sell dated 21st November, 2012 and forfeiting the earnest money deposited of Rs.1,93,00,000/-, while asking the plaintiff to collect the further amount of Rs.39,00,000/- paid by the plaintiff.
- (xiv) The plaintiff, in its reply dated 21st May, 2013 to the aforesaid legal notice by the defendant, raised a claim of total Rs.6 crores.
- (xv) A legal notice dated 6th April, 2015 was sent by the plaintiff to the defendant, reminding her to pay the amount claimed in terms of the notice dated 21st May, 2013, to which the defendant replied by a letter dated 21st April, 2015.
- (xvi) Rs.3,86,00,000/-, being double of the amount of earnest money paid by the plaintiff plus Rs.39,00,000/- paid in addition has been claimed



in the suit along with pre suit interest @18% per annum amounting to Rs. 1,75,00,000/-. Thus, a total amount of Rs.6,00,00,000/- has been claimed along with *pendente lite* and future interest.

3. Summons in the suit were issued on 26th May, 2015.
4. The defendant contested the present suit by filing a written statement, in which it has been pleaded that:
 - (i) The plaintiff is not registered with the Registrar of Firms. Hence, the suit is barred under Section 69 of the Indian Partnership Act, 1932.
 - (ii) The defendant executed an Agreement to Sell dated 21st November, 2012 with the plaintiff in respect of the suit property to clear her and her family's outstanding debts, on account of which she was subjected to heavy interest.
 - (iii) The defendant had made the plaintiff aware that the suit property has been mortgaged with Cholamandalam and the original title documents of the suit property were deposited with Cholamandalam.
 - (iv) In terms of Clause 7 of the aforesaid Agreement to Sell, time was the essence of the contract.
 - (v) The plaintiff violated the terms of the Agreement and defaulted in making payments to the defendant, thereby causing financial implications and burden on the defendant.
 - (vi) Even after making the payment of Rs.32,00,000/- to Cholamandalam on 21st/22nd March, 2013, the plaintiff was already in default having violated the terms of the Agreement and the schedule of payment appended thereto.
 - (vii) Around 13th September, 2013, the plaintiff filed a complaint with the P.S. New Friends Colony against the defendant, to which the



defendant filed a representation dated 14th September, 2013. Subsequently, the complaint was dropped.

(viii) The forfeiture of the earnest money is on account of non-fulfilment of the obligations under the Agreement to Sell.

5. In its replication, the plaintiff has re-affirmed its assertions made in the plaint.

6. On 23rd August, 2016, the present suit was re-numbered as a commercial suit and the following issues were framed:

“(i) Whether the suit is not maintainable by the Plaintiff in the present form? **OPD**

(ii) Whether the Plaintiff is entitled to a decree for recovery of Rs. 6 crores against the Defendant? **OPP**

(iii) Whether the amount of Rs. 1.93 crore paid as earnest money stood forfeited by Defendant in terms of the cancelled Agreement to Sell dated 21st November 2012? **OPD**

(iv) Whether the time was essence of Agreement to Sell dated 21st November 2012 as alleged by the Defendant? **OPD**

(v) Whether the Plaintiff is entitled to interest as prayed for? **OPP**

(vi) Whether the Defendant has concealed material facts in respect of Agreement to Sell as alleged by the Plaintiff in plaint? **OPP**

(vii) Whether the Defendant failed to perform her obligations as alleged in the plaint? **OPP**

(viii) Relief.”



7. Evidence was recorded before the Joint Registrar between 22nd May, 2017 and 5th May, 2022. Mr. Sunil Kumar Suri (PW-1) and Mr. Subhash Chand Rana (PW-2) being partner of the plaintiff firm deposed on behalf of the plaintiff firm and Mr. Ram Naresh (PW-3) being the official witness from the office of Divisional Commissioner, Revenue Department appeared as a witness on behalf of the plaintiff and on behalf of the defendant, the defendant herself was the only witness to depose. Evidence of the plaintiff's witnesses concluded on 16th November, 2017 and that of the defendant's witness concluded on 5th May, 2022.

8. Witnesses of both the sides have supported their respective versions which shall be discussed in detail while dealing with the issues.

9. Final arguments in the suit were heard on 28th July, 2022, 6th September, 2022 and 13th September, 2022.

10. I have heard the submissions on behalf of the parties and also gone through the record of the suit.

11. Before I deal with the individual issues it may be relevant to refer to the relevant Clauses of the Agreement to Sell, which have been set out below:

"1. That the amount of Rs. 17,37,00,000/- (Rupees Seventeen Crores Thirty Seven Lacs Only) which is payable to the First Party by the Second Party must be made by 20.04.2013 and the copy of the payment schedule of this payment to the First Party by the Second Party is enclosed with the Agreement which is a part and parcel of this agreement.

2. That it is agreed that as the First Party will receive the payments from the Second Party, the First Party will accordingly pay the loan amount to M/s. Chola Mangalam Finance and



Investment Company Limited so that the said property can become free from Mortgage.

3. *That the Second Party will make the payments to the First Party as per the payment schedule. The Second Party will abide the payment terms of the schedule and in case the Second Party fails to make the payment –*

4. *In such situation the Second Party will pay a penalty of Rs. 6,000/- (Rupees Six Thousand Only) on daily basis. This amount will be paid within 30 days and in case this penalty amount along with the payment as per payment schedule is not paid within 30 days then this agreement will be treated as void.*

....

7. *That time limit for the registration of the said property is till 20.04.2013 from today, i.e., the day of signing the agreement.*

....

9. *That in case the First Party fails to make the registration of the said property in favour of the Second Party then in that situation the Second Party will have full right to move the application in the Court for registration of the said property in his name or take twice the Earnest money.*

10. *That in case the second party does not register the property in his name or any person nominated by him then the Earnest money paid by the Second Party to the First Party will be forfeited.”*

12. My issue wise findings are as under:

Issue No.1: Whether the suit is not maintainable by the Plaintiff in the present form? OPD

13. Counsel for the defendant submits that the plaintiff is a partnership firm and is not registered under the provisions of Indian Partnership Act, 1932 and therefore, the present suit is not maintainable in terms of Section 69 of the Partnership Act. He submits that the plaintiff has only filed the



application form for registration of the partnership firm and no proof of registration has been filed.

14. On the other hand, counsel for the plaintiff has placed reliance on the documents filed along with the plaint (Ex. PW-1/B colly) to submit that the partnership firm has been duly registered. Originals of the documents that are part of Ex. PW-1/B (colly) were produced at the time of recording of evidence. Plaintiff has filed Form no.1 for grant of registration under Section 58(1) of the Partnership Act. As per the [Uttar Pradesh] Indian Partnership Rules, 1933, Form-1 is the requisite form in terms of which the application for registration of a partnership firm is required to be filed under Section 58(1) of the Partnership Act. Plaintiff has also filed a document dated 6th February, 2014 issued by the Registrar of Firms, Meerut, Uttar Pradesh to submit that registration has been granted to the partnership firm by the Registrar of Firms, Meerut, Uttar Pradesh. The aforesaid documents are a part of Ex PW-1/B (colly).

15. The document dated 6th February, 2014 issued by the Registrar of Firms, Meerut, Uttar Pradesh is in Hindi. Since there was a doubt about the exact translation of the said document, the Senior Judicial Translator, High Court of Delhi was asked to translate the said document in English. As per the said translation, **the aforesaid document records that the document submitted by the plaintiff has been duly entered and registered by the Registrar of firms Meerut, Uttar Pradesh.** Though reference in the said document has been made to Section 9 of the Partnership Act, in my view, this seems to be a typographical error and the reference should have been made to Section 59 of the Partnership Act which deals with registration. Section 9 of the Partnership Act deals with general duties of the partners.



16. Therefore, I am of the view that the plaintiff firm is duly registered under the provisions of the Partnership Act and accordingly, issue no.1 is decided in favour of the plaintiff.

Issue No.4: Whether the time was essence of Agreement to Sell dated 21st November 2012 has alleged by the Defendant? OPD

17. Counsel for the plaintiff submits that time was not the essence of the Agreement to Sell. No demands were raised on behalf of the defendant with respect to payments due on 3rd January, 2013, 16th February, 2013, 25th March, 2013, 10th April, 2013 and 20th April, 2013 in terms of the payment scheduled appended to the Agreement to Sell (Ex. PW-1/3). In fact, on 14th March, 2013, a request was made on behalf of the defendant to the plaintiff to pay a sum of Rs.32 lacs directly to Cholamandalam (Ex. PW-1/5).

18. On behalf of the defendant, it has been submitted that the plaintiff failed to adhere to the schedule of payment in terms of the Agreement to Sell and therefore, the defendant could not meet the repayment obligations towards Cholamandalam and other financial institutions. A reading of the Agreement shows that time was the essence of the contract.

19. Despite the fact that the plaintiff did not make payments in terms of the schedule appended to the Agreement to Sell (Ex. PW-1/3), no communication or notice was sent on behalf of the defendant to the plaintiff in respect of such defaults. Nor did the defendant demand any penalty from the plaintiff in terms of Clause 4 of the Agreement to Sell. This position has been admitted by the defendant in her cross-examination.

20. The defendant in her cross-examination conducted on 5th May, 2022 has also admitted that because the plaintiff paid Rs.32,00,000/- to



Cholamandalam, the defendant did not insist on payment of the installments as per time schedule.

21. Clearly, the defendant also believed that time was not the essence of contract otherwise, the defendant would have raised the issue of non-payment as and when default was made on behalf of the plaintiff. Despite the fact that the plaintiff was in default of making payments in terms of the Agreement to Sell (Ex. PW-1/3), on 14th March, 2013, a request was made on behalf of the defendant to deposit only a sum of Rs.32,00,000/- to Cholamandalam. Plaintiff in his evidence has admitted that a sum of Rs.32,00,000/- was duly deposited by the plaintiff with Cholamandalam on 21st/ 22nd March, 2013, at the request of the defendant.

22. In view of the above, I am of the view that time was not the essence to the Agreement to Sell.

23. Issue no.4 is decided in favour of the plaintiff and against the defendant.

Issue No.6: Whether the Defendant has concealed material facts in respect of Agreement to Sell as alleged by the Plaintiff in plaint? OPP

24. Counsel for the plaintiff submits that there was concealment on part of the defendant as she did not disclose to the plaintiff that (i) Cholamandalam had recalled the loan given to the defendant and had initiated legal proceedings against the defendant; (ii) the defendant has also taken a loan from Bank of Baroda by mortgaging the suit property.

25. Counsel for the defendant submits that:

- i) The plaintiff was made aware that the suit property had been mortgaged with Cholamandalam and the original title deeds were deposited with Cholamandalam. It was also made known to the



plaintiff that the monies paid by the plaintiff were required to redeem the suit property mortgaged with Choramandalam.

- ii) The notice was received by the defendant in respect of arbitration proceedings initiated by Choramandalam only on 22nd December, 2012 and therefore, it could not have been disclosed in the Agreement to Sell that was executed on 21st November, 2012.
- iii) No averments have been made in the plaint with regard to loan from Bank of Baroda. The suit property was never mortgaged with Bank of Baroda.

26. During the course of the cross-examination, the defendant was confronted by the counsel for the plaintiffs with notices dated 18th July, 2012, 27th July, 2012, 31st July, 2012, 27th August, 2012, 3rd September, 2012, 5th September, 2012 and 21st September, 2012 (Ex. DW-1/D-2 colly) sent on behalf of Choramandalam recalling the loan and invoking arbitration clause on account of the defaults committed by the defendant in repayment of the loan as well as notices under Section 138 of the Negotiable Instruments Act on account of dishonor of cheques issued by the defendant in favour of Choramandalam.

27. The defendant in her cross-examination conducted on 8th November, 2019, revealed for the first time that a loan had been taken by mortgaging the suit property with Bank of Baroda and the said loan was pending. The defendant in her cross-examination conducted on 5th May, 2022 also revealed that the suit property was under lien with Bank of Baroda and that the loan of Bank of Baroda was not repaid before the execution of the Agreement to Sell.



28. As mentioned above, the only fact noted in the Agreement to Sell was that the aforesaid suit property was mortgaged with Cholamandalam. However, the defendant failed to disclose that on account of default in making payments towards the loan from Cholamandalam, loan amount was recalled and arbitration proceedings have been initiated by Cholamandalam against the defendant. Further, the defendant did not disclose that a loan was taken from Bank of Baroda by mortgaging the suit property or that a lien has been created in respect of the suit property in favour of Bank of Baroda. These are material concealments as no prospective purchaser would be interested in buying a property which is subject matter of a dispute and is mortgaged with multiple lenders.

29. Issue no.6 is decided in favour of the plaintiff and against the defendant.

Issue No.7: Whether the Defendant failed to perform her obligations as alleged in the plaint? OPP

30. Under Clause 2 of the Agreement to Sell, the defendant was required to repay the loan amount received from Cholamandalam, from the amounts received from the plaintiff. In the cross-examination of the defendant conducted on 20th April, 2019, the defendant has admitted that out of a sum of Rs.2 crores received from the plaintiff, only a sum of Rs.40 lacs was paid to Cholamandalam and the rest was used for her business.

31. As per the various legal notices dated 18th July, 2012, 27th July, 2012, 31st July, 2012, 27th August, 2012, 3rd September, 2012, 5th September, 2012 and 21st September, 2012 (Ex. DW-1/D-2 colly) sent by Cholamandalam to the defendant large amounts were due to Cholamandalam from the defendant. Yet, the defendant did not utilize the monies received from the



plaintiff towards repayment of the loan to Cholamandalam. Admittedly, the suit property was mortgaged with Cholamandalam and the sale deed in respect of the said property could only be executed after the mortgage was redeemed. No details have been given by the defendant as to when the mortgage in respect of the suit property was redeemed, if at all. Therefore, I am of the view that the defendant failed to perform her obligations in respect of the Agreement to Sell (Ex. PW1/3).

32. Issue no.7 is decided in favour of the plaintiff and against the defendant.

Issue No.3: Whether the amount of Rs. 1.93 crore paid as earnest money stood forfeited by Defendant in terms of the cancelled Agreement to Sell dated 21st November 2012? OPD

33. Counsel for the plaintiff submits that earnest money of Rs. Rs.1,93,00,000/- was given by the plaintiff to the defendant in terms of the Agreement to Sell dated 21st November, 2012. Subsequently, a further payment of Rs.7,00,000/- was made on 5th December, 2012.

34. The aforesaid payments were required to be made by the defendant to Cholamandalam however, the same was not done. In fact, at the request of the defendant, on 21st /22nd March, 2013 the plaintiff paid a further sum of Rs.32,00,000/- to Cholamandalam on her behalf.

35. Counsel for the plaintiff further submits that a huge amount of Rs.1,93,00,000/- cannot be considered to be earnest money and therefore, the same cannot be forfeited. Further, in the present case, it is the defendant who has breached the obligations under the Agreement to Sell and therefore, the defendant cannot be allowed to take advantage of her own wrong by



forfeiting Rs.1,93,00,000/-. In any event, the defendant has not suffered any loss and therefore, cannot forfeit the amount of Rs.1,93,00,000/-.

36. Counsel for the defendant submits that the defendant was fully entitled to forfeit the earnest money on account of breaches made by the plaintiff. The forfeiture is not by way of penalty but on account of non-fulfillment of the obligations of the plaintiff under the Agreement to Sell.

37. In the legal notice dated 9th May, 2013 (Ex P-2), the defendant has admitted that the amount of Rs.1,93,00,000/- lacs was forfeited in terms of Clauses 4 and 10 of the Agreement to Sell. It is not the case of the defendant that she has suffered any loss on account of the transaction not going through. Defendant has also admitted in her cross-examination that she has not filed any document on record to show that she suffered any loss or damage due to non-conclusion of the transaction under the Agreement to Sell (Ex. PW-1/3), nor has she demanded any damages from the plaintiff.

38. Counsel for the defendant has relied upon the judgment in **Satish Batra v. Sudhir Rawal**, (2013) 1 SCC 345 to contend that when the contract provides for forfeiture of earnest money, the same can be forfeited when the transaction falls through by reason of default or failure of the purchaser. This judgment would have no application in the facts of the present case in view of my finding above that it was the defendant who defaulted in her obligations under the Agreement to Sell. The Plaintiff was only asked to pay Rs.32,00,000/- to Cholamandalam on her behalf on 14th March, 2013, which the Plaintiff duly did. No demand was made thereafter and vide notice dated 9th May, 2013, the Agreement was abruptly terminated by the Defendant. There was nothing to suggest that there was any default or failure on the part



of the plaintiff. Therefore, the defendant was not entitled to forfeit the earnest money.

39. In any event, the legal position with regard to forfeiture of earnest money is no longer *res integra* in view of the judgment of the Supreme Court in ***Kailash Nath Associates v. Delhi Development Authority***, (2015) 4 SCC 136. After analyzing the various judgments of the Supreme Court, the legal principles with respect to compensation upon breach of contract under Section 74 of the Contract Act have been enunciated in ***Kailash Nath Associates*** (supra) as under :

“42. In the present case, forfeiture of earnest money took place long after an agreement had been reached. It is obvious that the amount sought to be forfeited on the facts of the present case is sought to be forfeited without any loss being shown. In fact it has been shown that far from suffering any loss, DDA has received a much higher amount on re-auction of the same plot of land.

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:

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.

44. The Division Bench has gone wrong in principle. As has been pointed out above, there has been no breach of contract by the appellant. Further, we cannot accept the view of the Division Bench that the fact that DDA made a profit from re-auction is irrelevant, as that would fly in the face of the most basic principle on the award of damages—namely, that compensation can only be given for damage or loss suffered. If damage or loss is not suffered, the law does not provide for a windfall.”

40. Counsel for the defendant has sought to distinguish the aforesaid judgment on the ground that this judgment was in the context of earnest money being forfeited under an auction conducted by DDA. I do not agree



with the aforesaid submission. The principles laid down in ***Kailash Nath Associates*** (supra) are in respect of Section 74 of the Contract Act and would be applicable to all categories of contracts.

41. ***Kailash Nath Associates*** (supra) was followed by a Coordinate Bench of this Court in ***Rajbir Singh v. Jaswant Singh***, MANU/DE/1866/2018. In ***Rajbir Singh*** (supra), the subject matter of the suit was specific performance of an Agreement to Sell in respect of an immovable property. Upon the transaction not going through, the seller therein sought to forfeit the earnest money. This Court upheld the judgment of the Trial Court which directed refund of the earnest money on account of the fact that the seller did not plead or prove any loss caused to him on account of the alleged breach of the Agreement to Sell by the purchaser. The judgment in ***Satish Batra*** (supra) was considered by the Court in ***Rajbir Singh*** (supra).

42. ***Kailash Nath Associates*** (supra) was also followed by a Coordinate Bench of this Court in ***Virendra Kumar Awasthi v. Mahender Kumar***, MANU/DE/3343/2021. In ***Virendra Kumar Awasthi*** (supra), the Court was seized of an issue whether a seller can forfeit the earnest money as provided under the Agreement to Sell on account of breach of the Agreement by the purchaser. Once again, relying upon the judgment in ***Kailash Nath Associates*** (supra), this Court came to the conclusion that the seller had not pleaded the case of having suffered a loss in view of the non-execution of the Sale Deed by the purchaser and therefore, the seller could not forfeit the earnest money.

43. The ratio of the aforesaid judgments is fully applicable in the facts of the present case. In the present case also, the defendant has neither pleaded



nor proved any loss suffered on account of the non-conclusion of the obligations under the Agreement to Sell.

44. In view of the discussion above, the defendant was not entitled to forfeit the amount of Rs.1,93,00,000/- paid as earnest money by the plaintiff to the defendant under the Agreement to Sell (Ex. PW-1/3).

45. Issue no.3 is decided in favour of the plaintiff and against the defendant.

Issue No.2: Whether the Plaintiff is entitled to a decree for recovery of Rs. 6 crores against the Defendant? OPP

and

Issue No.5: Whether the Plaintiff is entitled to interest as prayed for? OPP

46. Counsel for the plaintiff submits that the plaintiff has paid a sum of Rs.2,32,00,000/- crores to the defendant, which includes Rs.1,93,00,000/- as earnest money. This fact has been admitted by the defendant. Since the defendant has breached the said Agreement, the defendant is liable to pay double the amount of earnest money deposited along with interest in terms of Clause 9 of the Agreement to Sell.

47. On behalf of the defendant, it has been submitted that the plaintiff firm was constituted on 5th November, 2012, barely 15 days before the execution of the Agreement to Sell. There were no prior projects that had been executed by the plaintiff firm. Therefore, the plaintiff has not suffered any loss and is not entitled to the double the amount of earnest money as claimed in the suit. Reference may be made to cross-examination of PW-2 dated 22nd May, 2017, relevant portion of which is set out below:



“The partnership firm M/s JMD Buildcon was formed on 05.11.2012. This partnership firm had not undertaken any other work till agreement to sell dated 21.11.2012. Except entering into an agreement with regard to the suit property the partnership firm has not undertaken any other work till date.”

48. It is not the case of the plaintiff that it has suffered any loss on account of the defendant not fulfilling her obligations under the Agreement to Sell. Neither has the plaintiff proved any loss which the plaintiff has suffered on account of the said breach. Therefore, applying the dicta of **Kailash Nath** (supra), the plaintiff cannot claim double the amount of earnest money paid by the plaintiff to the defendant only on account of the fact that the Clause in the Agreement to Sell provided for the same.

49. Accordingly, the plaintiff shall only be entitled to refund of the amounts paid to the defendants under the Agreement to Sell. The plaintiff shall also be entitled to interest on the aforesaid amounts from the date of the termination of the Agreement to Sell till its payment.

50. In view of the discussion above, the plaintiff is entitled to recovery of a sum of Rs.2,32,00,000/- from the defendant. Though the plaintiff has claimed interest @18% per annum for the pre-suit period, it is deemed appropriate to award pre-suit interest @7% per annum on the aforesaid amount of Rs.2,32,00,000/- from 9th May, 2013, the date on which the defendant terminated the agreement till the date of filing of the suit. The plaintiff is also entitled to *pendente lite* and future interest @7% per annum from the date of filing of the suit till its payment.

51. Both the issues stand answered accordingly.

**RELIEF**

52. A decree is accordingly passed in favour of the plaintiff and against the defendant, in the following terms:

- (i) Recovery of Rs.2,32,00,000/- along with pre-suit interest @7% per annum from 9th May, 2013 till the date of filing of the suit.
- (ii) *Pendente lite* and future interest @7% per annum from the date of filing of the suit till its payment.
- (iii) The plaintiff shall also be entitled to cost of the suit.

53. Decree sheet be drawn.

54. All pending applications, if any, stand disposed of.

AMIT BANSAL, J.

SEPTEMBER 27, 2022

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