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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% **Judgment reserved on : 11th March, 2024**
Judgment pronounced on: 14th March, 2024
+ **C.R.P. 183/2023 & CM APPL. 35697/2023, CM APPL. 35698/2023**

KAILASH AGGARWAL Petitioner
Through: **Mr. Sachin Chopra & Mr. Kamal Bansal, Advs.**

versus

ASHWANI SHARMA Respondent
Through: **Mr. Praveen Mishra, Ms. Hardeep Kaur, Mr. Arun Kumar & Ms. Sandhya Pandey, Advs.**

CORAM:
HON'BLE MR. JUSTICE DHARMESH SHARMA

J U D G M E N T

1. This judgment shall decide the present civil revision petition filed by the petitioner under Section 115 of the Civil Procedure Code, 1908¹, who is the defendant in the suit filed by the plaintiff/respondent assailing the impugned order dated 24.03.2023 passed by the learned ADJ-04, South, Saket Courts, New Delhi² in CS DJ No. 6791/2016, whereby the preliminary issue with respect to the suit being premature, was decided in favour of the plaintiff and against the defendant.

¹ CPC

² Trial Court



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**FACTUAL BACKGROUND:**

2. Briefly stated, the facts of the present case are that the plaintiff/Ashwani Sharma (respondent herein) is providing ground liasoning and consultancy services to its customers having its office at 116, Ansal Chamber-II, Bhikaji Cama Place, New Delhi-110066. The defendant/Kailash Aggarwal (petitioner revisionist herein), on the other hand, is running a firm in the name of Aggarwal Sales Corporation at Shop No. 5 and 6, 1865, Gurdwara Road, Kotla Mubarakpur, New Delhi-110003. In November, 2006, the defendant approached the plaintiff for its services for a consideration of Rs. 35,50,000/-, which was satisfactorily discharged by the plaintiff and in discharge of its obligation of Rs. 35,50,000/-, the defendant issued an account payee cheque bearing machine No.227121 dated 08.02.2010 under its signature in favour of the plaintiff.

3. It is pertinent to mention here that the plaintiff provided the liasoning and consultation services with respect to the acquisition of the ground floor of the property bearing No. A-16, Neeti Bagh, New Delhi from the occupants and co-owners of the property i.e. Dr. Shayamala Pappu D/o Sh. P.N. Murthi and Mr. R. Krishnamurthi S/o late Sh. M.K. Ramamurthi. The aforesaid deal with regard to the sale/transfer of the portion of the abovementioned property had been finalized for a total sale consideration of Rs. 8,85,50,000/-. The service charge of Rs. 25 Lacs each had been initially agreed upon to be paid both by the seller and the purchaser and after the finalization of the deal, a cheque No. 188650 dated 20.11.2009 drawn on Allahabad Bank, Anandlok Colony, New Delhi for a sum of Rs. 25



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Lacs had also been issued by Mr. R. Krishnamurthi in favour of the plaintiff.

4. However, it is evident from the record that the defendant deducted the amount from the balance payable sale consideration to Dr. Shayamala Pappu and instead offered to pay the amount of service charge to the plaintiff. That being the case, the defendant negotiated the service charge with the plaintiff and issued a cheque for a lesser amount of Rs. 35.50 Lacs instead of issuing the cheque for the entire amount of Rs. 50 Lacs i.e. service charge (25 lacs each by buyer and seller). The defendant did not pay the entire amount till date. As a result, the plaintiff filed the suit for recovery of Rs.35,50,000/- (Rupees Thirty Five Lacs Fifty Thousand Only) along with *pendent lite* and future interest against the defendant under Order XXXVII CPC.

PROCEEDINGS BEFORE THE LEARNED TRIAL COURT:

5. During the course of proceedings before the learned trial court, it was stated by learned counsel for the plaintiff that the scope of services provided by the plaintiff was only with respect to the 'Ground Floor' of the property bearing No. A-16, Neeti Bagh, New Delhi and as the defendant had already occupied the said area/portion of the ground floor, he cannot deny the due charges payable by him to the plaintiff.

6. Further, it was submitted that the transaction with regard to the purchase/acquisition of the remaining portion of the said property i.e. 'First Floor' and the 'terrace', was directly handled by the defendant through his other consultant/agent and the said deal had been finalized



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for a separate sale consideration of Rs. 17,71,00,000/- with the sellers Mrs. Chandan Ramamurthi and Dr. Alamelu Ramamurthi, who are the wife and daughter of Sh. M.K. Ramamurthi respectively. It was contested that the defendant did not pay the entire amount of sale consideration of Rs. 17,71,00,000/- to the sellers in respect of the First Floor and the terrace and therefore, the sale deed had not been executed in favour of the defendant.

7. *Per Contra*, learned counsel for the defendant stated that the plaintiff, in respect of the cheque bearing No. 227121, had made cogent and clear admissions in his plaint that he never presented the cheque to the banker and intentionally refrained from disclosing this fact. It was further argued that the plaintiff, who is not a privy to the transaction between the defendant and Chandan Group, is claiming the amount contrary to the written documents agreed upon by both the parties including the Agreement to sell dated 14.10.2009, payment receipts, Memorandum of Settlement dated 13.11.2009, Relinquishment deed dated 13.11.2009 etc.

8. Based on the aforementioned submissions by the counsels for the parties, the learned trial court framed the following preliminary issue:

“Whether the instant suit is premature because the endorsement overleaf the cheque in question does not confer any liability against the defendant thereby entitling the plaintiff to institute the present suit?OPD”

9. The learned Trial Court on a bare perusal of the records, *vide* paragraph (17) of the impugned order dated 24.03.2023, observed that the defendant had not denied the issuance of the cheque bearing No.



227121 in favour of the plaintiff. Lastly, the learned Trial Court *vide* para (18) observed that the defendant has also not denied his possession of the ground floor of the said property. Further, the suit was not premature due to the endorsement overleaf of the cheque in question. Accordingly, the preliminary issue was decided in favour of the plaintiff and against the defendant. It would be expedient to reproduce the relevant findings of the court in this regard, which have been reproduced hereunder:

“17. Record shows that defendant has not denied the issuance of cheque bearing no. 227121 dated 08.02.2010 in favour of plaintiff. Defendant in his written statement has taken the stand that since plaintiff failed to provide any services as required to be rendered within stipulated period, defendant was restrained to institute a suit for specific performance of Agreement of Sell against Ms. Chandan Ramamurthi and her daughter Dr. Alamelu Ramamurthi before the Hon'ble High Court of Delhi therein suit no. CS(OS) 1279/2010.

18. On the other hand, plaintiff stated that he has provided services with regard to dealing in respect of ground floor of the property no. A-16, Niti Bagh, New Delhi and defendant has already come to occupy the ground floor of the property therefore he cannot deny the due charges to the plaintiff. Record further shows that defendant has not denied in his written statement regarding the factum of his possession of the ground floor of A-16, Niti Bagh, New Delhi. What kind of services have been provided by the plaintiff to the defendant regarding acquisition of the ground floor of the property no.A-16, Niti Bagh, New Delhi in lieu of which defendant issued cheque bearing no. 227121 dated 08.02.2010 in favour of plaintiff and why defendant issued abovesaid cheque in favour of plaintiff if possession of the ground floor of the property no.A-16, Niti Bagh, New Delhi was handed over by the Chandan Group in the year 2009 to the defendant, can be determined only after leading evidence by the parties. In view of the abovesaid discussion, this Court is of the considered view that present suit is not pre-mature due to endorsement overleaf the cheque in question. **Accordingly, preliminary issue is decided against the defendant.”**



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GROUND FOR APPEAL:

10. The impugned order dated 24.03.2023 has been assailed by the appellant/defendant *inter alia* on the grounds that the respondent/petitioner has not abided by the terms and conditions of the contract and the respondent has failed to bring on record any documentary evidence so as to show that the occurrence/event of sale transaction with respect to the disputed property has been completed. It was further contested that the cheque in question relates to the institution of a premature *lis*, which is a 'jurisdictional fact'. Another objection raised by the appellant was that the respondent admitted that the sale transaction was required to be completed by a third party and the respondent was not a third party with respect to the cheque in question.

ANALYSIS AND DECISION:

11. Having heard the learned counsels for the parties and on perusal of the record, this Court finds that at this stage, *prima facie*, it is difficult to accept the plea canvassed by the learned counsel for the petitioner that the suit filed by the respondent/plaintiff is premature on account of the conditions not fulfilled by the parties to the Agreement to sell dated 14.10.2009.

12. It is pertinent to understand that Section 31 of the Indian Contract Act, 1872³ defines a 'contingent contract' *to mean contract to do or not to do something, if some event, collateral to such contract does or does not happen*. Section 32 of the IC Act further provides

³ IC Act



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that *contingent contracts to do or not to do anything if an uncertain event happens, cannot be enforced by law unless and until that event has happened. However, it also provides that if the event becomes impossible, such contract would become void.* Section 33 of the IC Act further provides that *contingent contracts to do or not to do anything if an uncertain future event does not happen, can be enforced when the happening of that event becomes impossible and not before.*

13. On the construction of the aforesaid provisions in a plain, grammatical and purposeful manner, reverting to the instant case, evidently, the plaintiff/respondent brokered a deal for sale/purchase and transfer of the ground floor portion of the property between the defendant and M/s. Shyamala Group. As a middleman/property dealer or broker, he had apparently provided ground liasoning and consultancy services to the defendant and the other party for which he was to be paid a sum of Rs. 35,50,000/-.

14. Indeed, a bare perusal of the impugned cheque bearing No. 227121 dated 08.02.2010 would show that a condition was put overleaf to the effect 'to be paid after completion of sale documents of A-16, Neeti Bagh in favour of the Kailash and Vijay Kumar'. However, the same is undated and it is also brought to the fore that the petitioner/defendant has already acquired the actual and physical possession of the ground floor of the said property. The dispute, however, remains between the petitioner and the M/s Shyamala Group in respect of the first floor and the terrace. Evidently, the deal with regard to the first floor and terrace was not brokered by the respondent/plaintiff.



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15. *Prima facie*, if subsequent to providing of the services by the plaintiff/respondent, a dispute has arisen between the parties to the agreement, then the said condition that has been placed for encashment of the cheque, or in other words, the contingency has rendered it impossible to be implemented on account of execution of the documents between the contracting parties, then such condition becomes void since *prima facie*, the respondent/plaintiff cannot be blamed for such imbroglio. Anyhow, whether or not there is a real or imminent impossibility, is a matter which has to be addressed during the course of trial. In other words, whether anything was left to be done by the respondent/payee for getting his consultancy fee, is a matter of trial.

16. Therefore, this Court at this stage, finds that the impugned order dated 24.03.2023 does not suffer from any illegality, perversity or incorrect approach in law. However, the impugned order, whereby the preliminary issue too has been decided while taking up an application under Order VII Rule 11 of the CPC, cannot be sustained in law. The dismissal of the application under Order VII Rule 11 of the CPC cannot *ipso facto* result in the decision on the preliminary issue framed by the learned Trial Court, which shall remain alive.

17. Accordingly, the impugned order dated 24.03.2023 is partly sustained to the effect that there is neither any infirmity or perversity nor any incorrect approach adopted by the learned Trial Court in dismissing the application under Order VII Rule 11 of the CPC of the petitioner/defendant. However, with respect to the preliminary issue, which is also decided by the learned Trial Court in the same vein,



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cannot be sustained and set aside.

18. Accordingly, the learned Trial Court shall allow the parties to lead their evidence on the preliminary issue framed as well, which shall be led conjointly with the evidence on other issues already framed by the learned Trial Court. Needless to state, nothing contained herein shall tantamount to an expression of opinion on the merits of the matter.

19. The present revision petition along with the pending applications stand disposed of accordingly.

DHARMESH SHARMA, J.

MARCH 14, 2024
ck