



2024:DHC:3454-DB



IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 01.05.2024

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RFA(OS)(COMM) 7/2022 and CM Nos. 51820/2022 & 51821/2022

SMT. SUDHA DEWAN

.... Appellant

versus

M/S. JMD BUILDCON

.... Respondent

Advocates who appeared in this case:

For the Appellant : Mr. Abhimanyu Walia &
Mr. Samrat Nigam, Advocate.

For the Respondent : Ms. Stuti Gupta, Advocate.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

AMIT MAHAJAN, J.

1. The appellant has filed the present appeal before this Court under Section 96 and Order XLI of the Code of Civil Procedure, 1908 ('CPC') read with Section 13(1A) of the Commercial Courts Act, 2015 read with Section 151 of the CPC, challenging the judgment dated 27.09.2022 (hereafter '**impugned judgment**'), passed by the learned Single Judge of this Court in CS (COMM) No. 1168 of 2016, whereby the commercial suit instituted by the respondent has been decreed in favour of the said Respondent and against the appellant.

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2. The learned Single Judge, by the impugned judgment, has directed the appellant to return to the respondent, the amount of earnest money and further deposits made by the respondents pursuant to the Agreement to Sell dated 21.11.2012, quantified at ₹2,32,00,000/- along with interest @ 7% per annum, pendente-lite and for future.

BRIEF FACTS

3. The appellant, Smt. Sudha Dewan, is the owner and is in possession of the property bearing no. D-972, New Friends Colony, New Delhi (hereafter '**the subject property**'). The subject property consists of a built-up ground and first floor admeasuring approximately 492 square yards. It is stated that the subject property had been mortgaged with Cholamandalam Finance and Investment Company Limited (hereafter referred to as '**Cholamandalam**') and due to the reason of heavy interests on the mortgage, the appellant entered into an Agreement to sell the subject property with the respondent, so that she could redeem the mortgage.

4. The respondent is a partnership firm in the real estate sector. It works in the business activities of raising construction of apartments and also deals in sale and purchase of properties.

5. The respondent and the appellant executed an Agreement to Sell dated 21.11.2012 (hereafter '**the Sale Agreement**') for the sale and purchase of the subject property for a total sale consideration of ₹19,30,00,000/-. A sum of ₹1,93,00,000/- was paid as earnest money, which is equivalent to 10% of the agreed total sale consideration, by the



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respondent to the appellant at the time of execution of the Sale Agreement and the balance of ₹17,37,00,000/- was agreed to be paid on or before 20.04.2013 as per the “payment schedule” attached to the said Sale Agreement. The payment schedule stipulated payments of the balance consideration as under:

- a. Amount of ₹7,00,000/- to be paid on or before 06.12.2012 by cheque or cash;
 - b. Amount of ₹3,00,00,000/- to be paid on or before 03.01.2013 by cheque or cash;
 - c. Amount of ₹2,00,00,000/- to be paid on or before 16.02.2013 by cheque or cash;
 - d. Amount of ₹1,00,00,000/- to be paid on or before 25.03.2013 by cheque or cash;
 - e. Amount of ₹4,30,00,000/- to be paid on or before 10.04.2013 by cheque or cash;
 - f. Amount of ₹7,00,00,000/- to be paid on or before 20.04.2013 by cheque or cash.
6. The payments were admittedly not made as per the schedule.
7. The respondent, on the request of the appellant, made a further payment of ₹32,00,000/- on 21.03.2013, directly to Cholanmandalam as a part payment towards redeeming the mortgage of the subject property.

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8. It the appellant's case that the respondent did not adhere to the schedule of payments, and defaulted in paying the balance consideration. Therefore, the appellant sent a legal notice dated 09.05.2013, terminating the Sale Agreement, and stating that the earnest money of ₹1,93,00,000/- stood forfeited, in terms of Clause 4, 7 and 10 of the Sale Agreement on account of non-fulfilment of the obligations under the same. The appellant further stated that the respondent was at liberty to collect the amount of ₹39,00,000/-, which was paid by the respondent after the deposit of the earnest money.

9. The respondent replied to the said legal notice on 21.05.2013, and raised a claim of ₹6,18,00,000/- with interest at the rate of 18% per annum with effect from the date of the Sale Agreement, that is, 21.11.2012.

10. On 13.09.2013, the respondent filed a complaint with the Police Station New Friends Colony against the appellant, with respect to the transaction emanating from the Sale Agreement. The appellant filed a representation against the same on 14.09.2013. The said complaint was subsequently dropped.

11. The respondent further sent a legal notice dated 06.04.2015 to the appellant reminding her to pay the claim mentioned in its reply dated 21.05.2013. The appellant replied to the same on 21.04.2015.

12. The respondent filed Civil Suit being CS (OS) No. 1601 of 2015, which is the subject matter of the present appeal, praying for a decree of recovery of ₹6,00,00,000 with interest and costs. The said suit was



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re-numbered as Commercial Suit being CS(Comm.) No. 1168 of 2016 (hereafter '**commercial suit**').

13. The respondent filed a list of witnesses in the said commercial suit by way of an affidavit, whereafter, Mr. Sunil Kumar Suri and Mr. Subhash Chand Rana, partners of the respondent firm, were cross examined by the advocate of the appellant. The appellant, Smt. Sudha Dewan, was also cross examined by the advocate of the respondent.

14. By the impugned judgment, the learned Single Judge, decreed the commercial suit instituted by the respondent in its favour and against the appellant, and directed the appellant to return the amount of ₹2,32,00,000/- along with pre-suit interest @7% per annum from 09.05.2013 till the date of filing of the suit and *pendente lite* and future interest @7% per annum from the date of filing of the suit till its payment. Costs were also awarded in favour of the respondent. This has led to the filing of the present appeal.

SUBMISSIONS ON BEHALF OF THE APPELLANT

15. The learned counsel for the appellant submitted that the commercial suit filed by the respondent was not maintainable as the respondent was not a registered partnership firm and had failed to produce the relevant documents regarding its registration. The suit was thus barred as per Section 69(2) of the Partnership Act, 1932

16. He vehemently submitted that the time was of the essence in the Sale Agreement. He referred to the Clauses 1, 7, 10 of the Sale

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Agreement and stated that it clearly stipulated that the payment and registration of the subject property had to be done by 20.04.2023.

17. He further stated that as per the said agreement, the respondent was under the obligation to make the payments on time and the failure of the respondent to register the subject property within the stipulated time was breach of the contract making the earnest money liable for forfeiture.

18. He submitted that the earnest money represents a guarantee that the contract will be fulfilled and it is a part of the purchase price when the transaction is carried out. He referred to ***Shri Hanuman Cotton Mills and others v. Tata Aircraft Limited: (1969 3 SCC 522)***.

19. He stated that the timely performance of the Sale Agreement, was essential. He further stated that as per Clause 4 of the Sale Agreement, the failure to make the payment to the appellant as per the schedule would make the agreement void.

20. He submitted that the forfeiture was not by way of a penalty but on the non fulfilment of the obligations stated in the Sale Agreement. It is the respondent who had breached the contract and the appellant is entitled to forfeit the earnest money. He referred to the judgment in the case of ***Versatile Commotrade Private Limited v. Kesari Devi: AIR 2019 Del 155*** in this regard.

21. He submitted that the learned Single Judge erroneously proceeded to premise his findings with respect to suppression of



material facts by the appellant solely on an answer given by the Appellant to a question during her cross examination on 05.05.2022, that the subject property was mortgaged to Bank of Baroda.

22. He stated that as a matter of fact the subject property was never mortgaged with Bank of Baroda. The appellant, for reasons attributable to her old age and anxiety, had answered incorrectly. The appellant had also filed relevant document to confirm the same.

23. He submitted that the appellant did not conceal any material fact from the respondent, the respondent was specifically made aware about the loan from Cholamandalam, and it was because of this reason that the appellant had to sell the subject property.

24. He submitted that the loan had finally been redeemed on 30.09.2021 and a no objection certificate had been issued on 18.10.2021. He further submitted that it was because of the default of the respondent that the appellant defaulted and had to pay in excess to Cholamandalam.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

25. Ms. Stuti Gupta, learned counsel appearing for the respondent submitted that the appeal was without any merit and the issue was correctly decided by the learned Single Judge by directing the appellant to refund the amount of earnest money and further deposits, which was wrongfully forfeited by the appellant.



26. She submitted that it is a fallacious argument of the appellant that the respondent could not file a suit against the appellants as they were not a Registered Firm.

27. She submitted that the respondent was duly registered as a partnership firm on 06.04.2014. She further submitted that the requisite documents to prove that it was a registered firm are placed on record with the plaint and a reply to RTI, which states that the respondent firm was registered, is also attached.

28. She submitted that the appellant had neither pleaded nor proved that she had suffered any loss and therefore the appellant cannot be permitted to forfeit an amount of ₹1,93,00,000/-. The forfeiture of the earnest money will wrongfully enrich the appellant.

29. She contended that unless a loss is pleaded and proved, where it is capable of being proved, it cannot be recovered. She referred to ***Sudarshan Kumar Bhayana (Deceased) Through LRs. v. Vinod Seth: 2023 (SCC OnLine Del) 6097.***

30. She further stated that after the execution of Sale Agreement on 21.11.2012, the circle rate of the subject property suddenly tripled, from ₹2,15,000/- per square meter to ₹6,45,000/- per square meter *vide* notification dated 04.12.2012, which is the reason of non-cooperation of the appellant.



31. She further submitted that the respondent had shown its readiness and willingness to perform the contract by making the payment of ₹32,00,000, on the instructions of the appellant to the Bank.

32. She stated that the appellant had concealed various material facts from the respondent and the respondent came to know from the bank that the proceedings in relation to the outstanding loan were pending against the appellant.

33. She vehemently submitted that time was not the essence of the contract. When the respondent allegedly defaulted at the first instance or breached the terms of the contract, the appellant rather than raising any objections, directed the respondent to deposit certain amount with Bank on her behalf, without any condition, on 21.03.2013.

34. She stated that if there is no loss which is suffered by a seller then there cannot be a forfeiture of a large amount, which is not a nominal amount simply because a clause in a contract provides so. She further stated that in this case the forfeiture sought for is not of any nominal amount but of an exceptionally high amount.

35. She finally submitted that appellant had not raised any demand with respect to payments due on 03.11.2013, 16.02.2013, 25.03.2013 and 10.04.2013 in terms of the payment schedule, which shows that time was not of the essence in the contract.

36. Whether the time is of the essence in the contract, has to be ascertained from the reading of the entire contract as well as the



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surrounding circumstances and merely having an explicit clause may not be sufficient to make time the essence of the contract. She referred to *Welspun Specialty Solutions Limited v. Oil & Natural Gas Corporation Limited* : (2022) 2 SCC 382.

ANALYSIS

37. At the outset, the appellant has challenged that the maintainability of the commercial suit in terms of the bar under Section 69(2) of the Indian Partnership Act, 1932, as the respondent was allegedly not a registered partnership firm. It has been contended on behalf of the appellant that the evidence adduced by the respondent was insufficient to prove that the respondent was a registered partnership concern at the time of filing of the commercial suit. It is pertinent to note that having raised the said contention, the onus to prove that the respondent was not a registered partnership concern was on the appellant.

38. The learned Single Judge, in relation to the maintainability of the commercial suit, in our opinion, rightly decided against the appellant. The respondent has sought to establish its registration by way of its Registration Application and the Document dated 06.02.2014, issued by the Registrar of Firms, Meerut, Uttar Pradesh, which records that the documents submitted by the respondent are duly filed and registered pursuant to the provisions of the Partnership Act, 1932.

39. The appellant has contested that the learned Single Judge has erroneously read Section 9 of the Partnership Act, 1932, as mentioned

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in the Document dated 06.02.2014, to be a typographical error, and instead taken it as Section 59 of the Partnership Act, 1932, which deals with registration.

40. We are unable to agree with the said argument. In the present case, it is apparent that the Document dated 06.02.2014 records that the documents, which were furnished pursuant to the respondent's application for registration, were duly filed and registered by the Registrar of Firms, Meerut, Uttar Pradesh.

41. On merits, the appellant is contesting the impugned judgment on primarily two grounds. First, the learned Single Judge erroneously adjudged time to be not of essence in the Sale Agreement; and second, the respondent had illegally forfeited the earnest money on breach of the payment schedule appended in the Sale Agreement.

42. The learned Single Judge had come to the conclusion that time was not of essence in the Sale Agreement and observed that the same was apparent from the appellant's tacit consent and conduct. The appellant had not raised the issue of non-payment of balance amount as per the payment schedule prescribed in the Sale Agreement on earlier occasions when the payments became due, that is, on 03.01.2013, 16.02.2013, 25.03.2013, and 10.04.2013. The appellant had called upon the respondent to pay a definite sum (₹32,00,000/-) to Cholamandalam directly and the respondent had complied.

43. The appellant has contended that Clauses 1, 7 and 10 of the Sale Agreement clearly stipulate the payment schedule and deadline for the



payment of balance amount of consideration as 20.04.2013, and the time limit for registration of the subject property. It is contended that a bare perusal of the aforesaid clauses leaves no doubt that time was of the essence in the present contract. Further, it is submitted that due to the non-payment of the consideration amount by the respondent, the appellant could not meet her repayment obligations towards Cholamandalam.

44. In the present case, even though, the respondent did not make the payments as per the payment schedule in the Sale Agreement, no notice was sent by the respondent regarding the default and the appellant also did not insist on payments as per the schedule. The appellant in her cross-examination on 05.05.2022 admitted that she did not insist on timely payments of installments as the respondent had paid ₹32,00,000/- to Cholamandalam on her request. The relevant portion of the cross-examination of the appellant is reproduced hereunder: -

*“At the time of execution of agreement to sell, I had received sum of Rs. 1.93 crores. So far as I remember, later the plaintiffs paid around Rs.30 or 35 lacs only. **Volunteered:** The plaintiff did not pay as per schedule. I had not given any notice of non-payment of due installments on 03.01.2013 and 16.02.2013. **Volunteered:**03.04.2013 was the last date of payment after which I gave notice. **I did not demand any penalty from the plaintiff when the installment was not paid on 03.01.2013, 16.02.2013, 25.03.2013 and 10.04.2013. It is wrong to suggest that I did not raise demand of installments or penalty because time was not of essence of the contract. It is correct that plaintiff has paid a sum of Rs.32 Lacs to Cholamandalam at my request. It is correct that because the plaintiff paid Rs.32 Lacs, I did not insist on payment of the above installments.**”*

(emphasis supplied)



45. Furthermore, admittedly the appellant did not demand any penalty from the respondent for delayed payments in terms of Clause 4 of the Sale Agreement which provides that the respondent shall pay an amount of ₹6,000/- per day if it fails to make timely payments in accordance with the payment schedule. The learned Single Judge considered the aforesaid factors and concluded that even the appellant did not believe that time was of the essence of contract. It has been argued by the learned counsel of the appellant that the fact that the appellant asked the respondent to make the payment of ₹32,00,000/- shows her alacrity rather than laxity towards the payment of installments.

46. It is pertinent to note that apart from a holistic reading of the contract in question and surrounding circumstances, the conduct of the parties has also to be taken into consideration while determining whether time is of the essence [Ref. *Welspun Specialty Solutions Ltd. v. ONGC (supra)*; *Gomathinayagam Pillai v. Palaniswami Nadar : (1967) 1 SCR 227*]. It is trite law that the onus to prove that time is of the essence lies on the party claiming it.

47. Whilst a timeline was stipulated for payment of installments in the Sale Agreement between the parties, the appellant by her conduct accepted belated performance by the respondent. Had the time been of the essence, the appellant would have made an endeavour to press for timely payments at the outset itself, however, the appellant did not demand timely payments and instead merely asked the respondent on one occasion to pay ₹32,00,000/- to Cholamandalam. In such a case, in



the opinion of this Court, the conduct of the appellant does not indicate that it was her understanding that time was of the essence.

48. In so far as the question regarding whether the earnest money paid by the respondent stood forfeited due to its failure to adhere to the payment schedule in the Sale Agreement, the learned Single Judge opined that the appellant was not entitled to forfeit the earnest money as she had neither pleaded nor proved as to how she had suffered any loss on account of non-conclusion of the obligations under the Sale Agreement. The learned Single Judge relied on the dictum in the case of ***Kailash Nath Associates v. Delhi Development Authority : (2015) 4 SCC 136.***

49. The relevant portion of the judgment is reproduced hereunder:

“40... In the circumstances, it would therefore be correct to say that as earnest money is an amount to be paid in case of breach of contract and named in the contract as such, it would necessarily be covered by Section 74.

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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.”

(emphasis supplied)

50. The Hon’ble Apex Court observed as under in the case of **Fateh Chand v. Balkishan Dass : 1963 SCC OnLine SC 49:**

“11. Before turning to the question about the compensation which may be awarded to the plaintiff, it is necessary to consider whether Section 74 applies to stipulations for forfeiture of amounts deposited or paid under the contract. It was urged that the section deals in terms with the right to receive from the party who has broken the contract reasonable compensation and not the right to forfeit what has



*already been received by the party aggrieved.... In our judgment the expression “the contract contains any other stipulation by way of penalty” comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money or delivery of property in future, or for forfeiture of right to money or other property already delivered. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon courts by Section 74. **In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture...***

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*15. Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of the parties pre-determined, or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. **The section does not confer a special benefit upon any party; it merely declares the law that notwithstanding any term in the contract predetermining damages or providing for forfeiture of any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated. The jurisdiction of the court is not determined by the accidental circumstance of the party in default being a plaintiff or a defendant in a suit. Use of the expression “to receive from the party who has broken the contract” does not predicate that the jurisdiction of the court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract. The court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach.***

16. There is no evidence that any loss was suffered by the plaintiff in consequence of the default by the defendant, save as to the loss suffered by him by being kept out of possession of



the property. There is no evidence that the property had depreciated in value since the date of the contract provided; nor was there evidence that any other special damage had resulted.”

51. The Hon’ble Apex Court observed as under in the case of ***Maula Bux v. Union of India : (1969) 2 SCC 554:***

“5. Forfeiture of earnest money under a contract for sale of property — Movable or immovable — If the amount is reasonable, does not fall within Section 74. That has been decided in several cases: *Kunwar Chiranjit Singh v. Har Swarup*; *Roshan Lal v. Delhi Cloth and General Mills Company Ltd.* [ILR 33 All 166] ; *Muhammad Habibullah v. Muhammad Shafi* [ILR 41 All 324] ; *Bishan Chand v. Radhakishan Das.* [ILR 19 All 490] These cases are easily explained, for forfeiture of reasonable amount paid as earnest money does not amount to imposing a penalty. ***But if forfeiture is of the nature of penalty. Section 74 applies.*** Where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty.

6. ... It is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree, and the Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. But the expression “whether or not actual damage or loss is proved to have been caused thereby” is intended to cover different classes of contracts which come before the Courts. In case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules. Where the Court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him.”



(emphasis supplied)

52. It is argued by the appellant that the forfeiture is not as a penalty but on account of breach of the Sale Agreement by the respondent. In the present case, it is pertinent to note that the quantum of earnest money in question is not a token or nominal amount but a substantial sum of ₹1,93,00,000/-. Forfeiture of such a substantial amount is in the nature of a penalty.

53. In view of the aforesaid judgments, it is clear that Section 74 of the Contract Act, 1860 would apply in cases relating to forfeiture of earnest money under the contract when the amount is not reasonable. It has also been observed in the said cases that actual loss has to be proved where it is possible to prove the same. To claim compensation, a party is required to establish that there was a breach of the contract by the other side and that it had suffered an injury due to the same. Compensation can only be given under Section 74 of the Contract Act, 1860 for loss or damage suffered. When no loss is suffered, forfeiture of large amounts would be arbitrary. A mere contractual clause that a party will be entitled to forfeit the earnest money in event of breach of contract does not curtail the Court from adjudging the quantum of compensation. It is incumbent on the Court to award only such compensation, not exceeding the amount specified in the contract as liable for forfeiture, that it deems reasonable in the facts of the case.

54. While the proof of loss suffered can be dispensed with in certain cases, it is relevant to note that the appellant has admittedly not pleaded or placed any material on record to show that she suffered any loss due



to non-execution of the Sale Agreement either. Without the appellant having established as to how she had suffered any loss on account of the respondent not making the payments as per the payment schedule in the Sale Agreement, no ground is made out to entitle the appellant to forfeit the entire earnest money of ₹1,93,00,000/.

55. The learned Single Judge observed that the appellant had concealed material facts from the respondent and failed to disclose that due to default in payment of installments to Chola mandalam, the loan amount had been recalled and arbitration proceedings had been initiated. It was also observed that loan was taken from Bank of Baroda by mortgaging the subject property. During the course of arguments, it was pointed out that the subject property was never mortgaged with Bank of Baroda. The appellant has also adduced the documents pertaining to the loan availed from the Bank of Baroda which indicates that the subject property was perhaps not mortgaged with Bank of Baroda.

56. The observation of the learned Single Judge in regard to the appellant not having disclosed that a loan was taken from the Bank of Baroda by mortgaging the subject property is thus not correct.

57. However, it is relevant to note that no specific averment is made that the appellant had informed the respondent about the pending arbitration proceedings. It is incumbent on the owner to disclose to a prospective purchaser if any encumbrances or proceedings have been initiated in relation to the property in question. Any prospective



purchaser would have reservations in buying a property that is the subject matter of a dispute. Thus, considering that the appellant had concealed from the respondent that Cholamandalam had recalled the loan given to the appellant and started legal proceedings against the appellant, this Court is of the opinion that the finding that the appellant had concealed material facts in respect of the Sale Agreement does not merit interference.

58. The learned Single Judge also observed that the appellant had failed to perform her obligations by admittedly only paying a sum of ₹40,00,000/- to Cholamandalam out of the total amount received by her from the respondent. The said fact is not disputed by the appellant. As noted by the learned Single Judge, the Sale Deed could only be executed after the mortgage was redeemed. Despite large amounts being due, evidently, the appellant did not utilize the monies received by her towards repayment of the loan. The appellant has not put forth any cogent explanation as to why the amounts received by her were not paid to Cholamandalam. By her conduct, the appellant has failed to show her intent to redeem the mortgage. In view of the same, we find no infirmity with the observations of the learned Single Judge in this regard.

59. The interest awarded by the learned Single Judge from the date of termination of the Sale Agreement till its payment, in the opinion of this Court, is reasonable.

60. In view of the above, this Court finds no reason to interfere with the impugned judgment.



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61. This Court by order dated 30.11.2022 had directed the appellant to pay the admitted amount of ₹39,00,000/- along with *pendent-lite* and future interest at the rate of 7% to the respondent, and also to deposit the sum of ₹90,00,000/-, out of the balance amount of ₹1,93,00,000/-, with the Registrar General of this Court. In compliance of the said directions, ₹39,00,000/- along with *pendent-lite* and future interest at the rate of 7% per annum, that is, ₹65,14,816/-, already stands paid by the appellant to the respondent, and ₹90,00,000/- was also deposited by the appellant with the Registrar General of this Court in a fixed deposit.

62. The aforesaid amount deposited by the appellant with the Registrar General of this Court in a fixed deposit along with the accrued interest is directed to be released in favour of the respondent.

63. The said amounts shall be adjusted towards the decreed amount as payable by the appellant to the respondent in terms of the impugned judgment.

64. The appeal, along with the applications, is dismissed in the aforesaid terms.

AMIT MAHAJAN, J

VIBHU BAKHRU, J

May 01, 2024
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