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IN THE HIGH COURT OF DELHI AT NEW DELHI

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**Reserved on: 24th May, 2017
Pronounced on: 29th May, 2017**

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CS(OS) 4052/2014 & IA No.14/2016

M/S ADHUNIK DATAMATICS PVT LTD Plaintiff

Through : Mr.Ratan K Singh, Mr.Nikhlesh
Krishnan, Mr.Aishwary Kumar
Tiwari and Ms.Somya Priadarshani,
Advocates.

versus

CHANDAN SINGH & ORS Defendants

Through : Mr.L.B.Rai, Mr.Vijay Kumar, &
Mr.Gaurav Kumar Rai, Advocates.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

IA No.14/2016

1. The plaintiff company had entered into an agreement to sell dated 11.04.2013 for purchase of 1/5th share each, of the defendants in the agricultural land falling in Khasra Nos.11(3-18), 12(4-16), 13(4-16), 19(4-16) of Rectangle No.20, Khasra Nos.13/2(0-5), 14(4-0), 15(3-5), 17(1-15), 24(2-12), 25(4-16) of Rectangle No.25 & Khasra No.4(6-4), 5(4-9) of Rectangle No.33 total measuring 45 bighas 12 biswas, situated in revenue estate of village Neelwal, Tehsil

Punjabi Bagh, District West, Delhi for a total sale consideration of ₹28.50 Crore. An amount of ₹2.85 Crore was paid as an *advance sale consideration* as stated in para No.2.1.1 of the sale agreement. The balance sale consideration to the tune of ₹25.65 Crore was payable to the defendants within 90 days from the execution of the agreement to sell i.e. on or before 09.07.2013. Since, the said land was an agricultural land, a No Objection Certificate under Section 5 (1) of the Delhi Land (Restrictions on Transfer) Act 1972 from the competent authority was required, per clause 4.2(a) of the agreement to sell dated 11.04.2013. It was agreed between the parties that the defendants would sign all necessary documents/forms for obtaining the transfer/permission/NOC from the concerned government offices necessary for execution of the sale deed in favour of the plaintiff. The processing of the application for obtaining NOC was the duty of the plaintiff. The plaintiff got all the necessary applications / forms signed from the defendants and got issued the NOC on 29.06.2013 from the authorities and duly informed the defendants.

2. It is the case of the plaintiff that the defendants requested the original NOC be handed over to them as they would bring it at the time of the registration of sale deed on 09.07.2013. It was thus handed over to the defendants but in the first week of July 2013 the defendant informed the original NOC is misplaced by them. The plaintiff insisted that the defendants should make efforts to trace the original NOC failing which it would not be possible to get the sale

deed registered on 09.07.2013. The original NOC could not be traced and hence the sale deed could not be executed by 09.07.2013.

3. Now, in their application under Order 37 Rule 3 CPC for leave to defend, the defendants have alleged that per clause 10.2 of the agreement to sell, if the purchaser fail/default/ avoid or refuse to pay the balance sale consideration in the manner as stipulated in the agreement in that event the seller shall have the right to forfeit the *advance sale consideration* paid by the purchaser under clause 2.1.1. and the sale agreement shall stand cancelled.

4. The defendants got issued a legal notice dated 12.07.2013 stating *inter alia* that as the plaintiff had failed to appear in the office of the Sub Registrar on 09.07.2013 to make payment of the balance amount and as have failed to purchase the non-judicial stamp papers required for sale deed so *advance amount* is forfeited and the agreement stood cancelled. It is also alleged by the defendants that they had applied for the NOC and with great efforts had obtained it on 01.08.2013 and yet again wrote a letter on 03.08.2013 to the plaintiff to come forward and get the sale deed executed by 14.08.2013 but the plaintiff failed. Hence, the defendant argues that as there was a failure on the part of the plaintiff to get the sale deed executed in time – so the forfeiture of its *advance* of ₹2.85 Crore and consequently cancellation of the agreement to sell raises a tri-able issue and hence they be granted unconditional leave to defend. Heard.

5. The facts are not so simple as pleaded by the defendant.

6. If we look at the reply dated 22.07.2013 sent by the plaintiff to the legal notice dated 12.07.2013 of the defendants, the plaintiff company mentions about the NOC dated 29.06.2013 and its handing it over to the defendants, per their request. It is alleged that the original of NOC dated 29.06.2013 was lost by the defendants and it only delayed the execution of sale deed by 09.07.2013. The plaintiff rather called upon the defendants to withdraw their notice dated 12.07.2013 and to hand over the original NOC dated 29.06.2013 or lest apply it afresh.

7. The defendants then gave a rejoinder dated 28.07.2013 to the reply dated 22.07.2013 of the plaintiff wherein they raised a dispute qua the alleged receipt of original NOC or it was lost by them. The defendants wrote a letter dated 03.08.2013 wherein they informed the plaintiff that they have obtained an NOC dated 01.08.2013 from the *Tehsildaar*, effective for one month, so the sale deed be got executed by 14.08.2013.

8. Now, the plaintiff by its letter dated 05.08.2013 reiterated that as the NOC dated 29.06.2013 had expired so fresh NOC is to be obtained and then by its letter dated 10.08.2013 requested the defendants to furnish the copy of the NOC dated 01.08.2013, allegedly obtained by the defendants so as to verify it and prepare the draft sale deed for its approval by the defendants. The plaintiff yet again wrote a letter dated 02.09.2013 to the defendants seeking copy of the NOC dated 01.08.2013 and reiterated the delay in execution of

sale deed was only on the part of the defendants and that the defendants never supplied them the copy of NOC dated 01.08.2013.

9. Admittedly, per agreement to sell dated 11.04.2013 the balance sale consideration was payable by 09.07.2013 on which date the sale deed was to be executed. However, it did not happen. According to the plaintiff the reason of delay was the mischievous loss of original NOC dated 29.06.2013 by the defendants; though the defendants allege that as the plaintiff did not come forward so they had to obtain the NOC dated 01.08.2013 and afforded yet another opportunity to the plaintiff to pay the balance sale consideration and to get the sale deed executed by 14.08.2013 and that as the plaintiff even failed to comply with their later offer, they forfeited the advance.

10. Thus, in nutshell, the time limit stipulated and agreed by the parties per agreement to sell was not adhered to hence the defendant forfeited the advance payment. Both the parties alleged that it was on account of failure of the opposite side. Nonetheless, as the date of completion of the agreement was extended beyond 09.07.2013 by the defendants themselves, it is an evidence of the fact that time was never an essence of the agreement, thus the question is if the defendants were within their right to cancel the agreement unilaterally and forfeit the advance of ₹2.85 Crore without even pleading the loss or damage suffered by them on account of delay in execution of sale deed and/or by cancellation of the agreement. It is settled law that even the earnest money cannot be forfeited in entirety unless the loss is pleaded – as settled by the catena of judgments including *Kailash*

Nath Associates vs. Delhi Development Authority and Another (2015) 4 SCC 136. In *Manoj Tomar vs. Smt. Neena Khatter & Anr.* 2015 SCC Online Del 12831 a Co-ordinate Bench of this Court has observed as under:-

*“5. The issue is that even if the plaintiff is guilty of breach of contract, whether the defendants are entitled to forfeit the advance money received by the defendants under the agreement to sell. Para 14 of the written statement shows that defendants have made an averment that the defendants have forfeited the amount because the plaintiff did not call upon the defendants to complete the sale transaction, however there is no averment in the written statement that defendants have forfeited the amount on account of loss being caused to them by the plaintiff on account of the breach of contract, much less details of loss and how caused as required by Order VI Rule 4 CPC is pleaded. In law, once no loss is caused to the aggrieved party as per Section 73 and 74 of the Indian Contract Act, 1872, no cause of action arises for claiming damages or forfeiture of advance money received under the agreement to sell as damages. This is the law as laid down in the Constitution Bench judgment of the Supreme Court in the case of *Fateh Chand Vs. Balkishan Dass*, AIR 1963 SC 1405 and which judgment has been recently followed by the Supreme Court in the judgment in the case of *Kailash Nath Associates Vs. Delhi Development Authority and Another*, (2015) 4 SCC 136.*

6. A reading of the ratio of Kailash Nath Associates's case (supra) makes it more than clear that the law with respect to entitlement of a defendant/proposed seller to forfeit an amount

received under the agreement to sell is subject to loss being caused and appropriation is actually pursuant to Section 74 of the Indian Contract Act by taking the advance payment received as liquidated damages, but once there is no plea of loss being caused along with necessary details, there does not arise issue of appropriation by the defendants, of the advance price received under the contract as liquidated damages.

7. In my opinion, an amount of Rs. 1,35,00,000/- cannot be taken as earnest money inasmuch as, earnest money is only a nominal amount . In similar circumstances I have recently in the case of Sh. Sunil Sehgal Vs. Shri Chander Batra & Ors. CS(OS) No. 1250/2006 decided on 23.9.2015 held that what is to be seen is the substance and not the label and merely because a huge amount is called as earnest money, the same will not become an earnest money but would be an advance price paid under the agreement to sell. The relevant paras of this judgment are paras 8 and 9, and which read as under:-

"8. In the present case, the nature of contract is such that losses could have been proved by the defendants by proving the falling of prices of the subject property, and only if the prices of the property had fallen and breach was committed by the plaintiff/buyer, the defendants could have only then been entitled to forfeit the amount paid by the plaintiff as damages on account of loss caused. Para 43.4 of the judgment of the Supreme Court in the case of Kailash Nath Associates (supra) reproduced above shows that the provisions of Sections 73 and 74 of the Indian Contract Act applies whether a person is plaintiff or a defendant

in the suit i.e. a defendant who is a seller cannot forfeit any moneys unless loss is proved to be caused by fall in the price of the property.

9. In the present case, defendants have led no evidence of any loss caused to them, and therefore, assuming that plaintiff is guilty of breach of contract, yet, the defendants cannot forfeit the amount of Rs.15 lacs lying with them. A huge amount of Rs.15 lacs out of the total sale consideration of Rs.79,50,000/- cannot in law be called earnest money. By giving a stamp of 'earnest money' to advance price, the latter cannot become the former. What is to be seen is the substance and not the label. Only a nominal amount can be said to be earnest money and not an amount of Rs.15 lacs out of Rs.79.50 lacs, by noting that if suppose an amount of Rs. 30 lacs or 40 lacs would be called as earnest money by the parties, that would not take away the fact that such amount cannot be earnest money but would in fact be part of the price to be paid for sale." (underlining added)"

11. Further the Supreme Court in *Satish Batra vs. Sudhir Rawal* Civil Appeal No.7588/2012 decided on 18.10.2012 has observed as under:-

"17. Law is, therefore, clear that to justify the forfeiture of advance money being part of 'earnest money' the terms of the contract should be clear and explicit. Earnest money is paid or given at the time when the contract is entered into and, as a pledge for its due performance by the depositor to be forfeited in case of non-performance, by the

depositor. There can be converse situation also that if the seller fails to perform the contract the purchaser can also get the double the amount, if it is so stipulated. It is also the law that part payment of purchase price cannot be forfeited unless it is a guarantee for the due performance of the contract. In other words, if the payment is made only towards part payment of consideration and not intended as earnest money then the forfeiture clause will not apply.”

12. Thus, the law is well settled that who may be at default the advance money cannot be forfeited, unless the loss is pleaded. The plea of the defendants that the advance was infact the earnest money then also, per law, it could not have been forfeited in entirety and even if one may treat the advance amount to be an earnest money, the law as it stands today would only allow the defendants to deduct 5% to 10% of such amount, given the facts of each case. Hence making provision for 10% of the consideration viz ₹28.50 Lac to plead and prove the loss, if any, suffered by the defendants, the leave to defend is hereby granted to the defendants on their depositing an amount of ₹2,56,50,000/- (Rupees Two Crore Fifty Six Lacs & Fifty Thousands) in the Court or in the alternative on giving Bank Guarantee for the said amount, with the Registrar General of this Court within four weeks from today. In case the amount is deposited it shall be converted into a fixed deposit with a nationalised bank for a term of one year initially, extendable per order of the Court.

13. The application stands disposed of in above terms.

CS(OS) 4052/2014

14. Upon complying with above directions, written statement be filed by the defendants within four weeks thereafter. Replication thereto, if any, be also filed by the plaintiff within two weeks of filing the written statement.

15. List for compliance and completion of pleadings before the Joint Registrar (Judicial) on 10th August, 2017.

16. Be listed in the Court upon completion of pleadings.

MAY 29, 2017

M/VLD

YOGESH KHANNA, J

