Anuja Sharma vs.memo Devi & Ors

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Court : Delhi

Decided On : Feb-22-2019

Appellant : Anuja Sharma

Respondent : Memo Devi & Ors

Judgement :

* + IN THE HIGH COURT OF DELHI AT NEW DELHI RFA No.157/2019 % ANUJA SHARMA22d February, 2019 ..... Appellant Through: Mr. J.K. Srivastava, Advocate (Mobile No.9891210660). versus MEMO DEVI & ORS .....

... RESPONDENTS
CORAM: HONBLE MR. JUSTICE VALMIKI J.

MEHTA To be referred to the Reporter or not?. YES VALMIKI J.

MEHTA, J (ORAL) C.M. Appl. No.8376/2019 (for exemption) 1. Exemption allowed, subject to just exceptions. C.M. stands disposed of. RFA No.157/2019 and C.M. Appl. No.8375/2019 (for stay) 2(i). This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant No.1 in the suit impugning the Judgment of the trial court dated 27.10.2018 by which the trial court while dismissing the suit for specific performance RFA No.157/2019 Page 1 of 15 filed by the respondent/plaintiff, has passed a money decree in favour of the respondent/plaintiff/buyer for a sum of Rs. 15,00,000/-, as the appellant/defendant No.1/seller had received this amount from the

respondent/plaintiff/buyer under the subject Agreement to Sell dated 08.12.2008. The total sale consideration under the Agreement to Sell was Rs. 17,00,000/- out of which the respondent/plaintiff had admittedly paid to the appellant/defendant No.1 a sum of Rs. 15,00,000/-. In terms of the Agreement to Sell, the respondent/plaintiff was to purchase two shops bearing nos. G-4 and G-89 of the property bearing Municipal No.182, Ward No.IV, situated at Katra Mashru, Dariba Kalan, Delhi. It is noted that the defendant No.1/seller did not lead any evidence in the suit and evidence was only led by defendant No.4 as a bonafide purchaser without notice of the subject Agreement to Sell. In terms of the impugned judgment, the trial court while declining the relief of specific performance held that in exercise of powers under Order VII Rule 7 CPC, a money decree has to be passed in favour of the respondent/plaintiff/buyer for a sum of Rs. 15,00,000/- received by the appellant/defendant No.1/seller and the appellant/defendant No.RFA No.157/2019 Page 2 of 15 1/seller cannot be allowed to forfeit the amount of Rs. 15,00,000/-. The relevant observations of the trial court in the impugned judgment read as under:-

"This Court does not deems fit to order Specific Performance of the Contract i.e. Agreement to Sell dated 8.12.2008 for various reasons, as adumbrated above, including the reasons that defendants No.2 to 4 are the bonafide purchasers of the suit property but the conduct of defendant No.1 was also not above the board. The defendant No.1 has not at all issued even the single notice/written notice to the Plaintiff that she is repudiating the contract dated 8.12.2008 as the Plaintiff has failed to adhere to the contract dated for payment of balance amount on the stipulated date i.e. 10.1.2009. The defendant No.1 has accepted substantial consideration amount i.e. about 88% of the consideration amount yet defendant No.1 has not even issued the single Notice before sale of the suit property to defendants No.2 and 3. The defendant No.1 has also not entered into the witness box. In the facts and circumstances of the present case, the defendant No.1 cannot be allowed to forfeit the amount of Rs.15,00,000/- which was paid by Plaintiff to defendant No.1. Although, the Plaintiff has not claimed any relief for refund of money or compensation or damages as alternative relief but looking into the conduct of defendant No.1, the defendant No.1 cannot be allowed to forfeit the amount of Rs.15,00,000/- and this court in exercise of power under Order 7 Rule 7

CPC can always grant a lesser relief or an appropriate relief as arising from the facts and circumstances of the case. Accordingly, the Plaintiff is entitled to refund sum of Rs.15,00,000/- alongwith pendentelite and future interest @9% per annum till its realization. 2(ii). The trial court has held that the respondent/plaintiff has not proved her financial capacity to pay the balance sale consideration of Rs. 2,00,000/- though the FDR Ex. D4W1/P1 was proved, but the RFA No.157/2019 Page 3 of 15 trial court strangely held that the FDR was not proved even though the same was admitted by D4W1. The trial court has not given a specific or categorical finding that the respondent/plaintiff can be held guilty of breach of contract. Specific performance was only declined to the respondent/plaintiff by holding that defendant nos. 2 to 4 in the suit were bonafide purchasers.

3. The Ld. counsel for the appellant/defendant No.1 has argued by placing reliance upon Section 22 of the Specific Relief Act, 1963, which states that the relief with respect to refund of any earnest money or any deposit made under the agreement to sell cannot be decreed in favour of a plaintiff/buyer unless there is a specific pleading (and prayer) to this effect. It is argued that as per the relief clauses in the plaint, there is no relief which has been claimed for seeking refund of the amount of Rs. 15,00,000/- paid by the respondent/plaintiff to the appellant/defendant No.1 and therefore this is a case which is squarely covered by Section 22 of the Specific Relief Act, with the fact that the respondent/plaintiff at no point of time sought amendment of the plaint to seek refund of the advance RFA No.157/2019 Page 4 of 15 price paid of Rs. 15,00,000/- out of the total sale price/consideration of Rs. 17,00,000/-.

4. Since the interpretation of Section 22 of the Specific Relief Act is in question, the said provision is reproduced as under:-

"22. Power to grant relief for possession, partition, refund of earnest money, etc. (1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908 (5 of 1908), any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for (a) possession, or partition and separate possession, of the property, in addition to such performance; or (b) any other relief to which he may be entitled,

including the refund of any earnest money or deposit paid or made by him, in case his claim for specific performance is refused. (2) No relief under clause (a) or clause (b) of sub-section (1) shall be granted by the court unless it has been specifically claimed: Provided that where the plaintiff has not claimed any such relief in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief. (3) The power of the court to grant relief under clause (b) of sub- section (1) shall be without prejudice to its powers to award compensation under section 21. 5. No doubt, the provision of Section 22 of the Specific Relief Act does provide that where a relief is not claimed with respect to refund of earnest money or advance price/deposit, the courts will RFA No.157/2019 Page 5 of 15 not grant such a relief. The provision of Section 22 of the Specific Relief Act however allows amendment of the plaint at any stage of the proceedings to seek refund of the amount paid under an agreement to sell. In the facts of the present case, there was no specific prayer in the plaint with respect to the refund of the price. The issue is that whether non-mention in the plaint by writing and seeking refund of the advance price paid results in a complete prohibition for the courts to refund the price received by a seller under an agreement to sell, once it is found that the agreement to sell does not have to go through and the suit for specific performance is being dismissed.

6. In order to interpret the provision of Section 22, it is necessary to note as to what is the object and requirement of a pleading to be filed by a party. Pleading is defined under Order VI CPC. A pleading will include a plaint and a written statement. What is a plaint is specified under Order VII CPC, and what is a written statement is specified under Order VIII CPC. It is now a settled law by virtue of a catena of decisions of the Hon'ble Supreme Court that object of a pleading is to give notice of a case to the other party. The object of giving notice of a case to the other party is to ensure that the RFA No.157/2019 Page 6 of 15 other party can meet the case. On this principle, the appellate courts have allowed issues which are pure questions of law even at the appellate stage, even in cases till the Hon'ble Supreme Court, if the issue of law goes to the root of the matter, and even if there is no specific pleading, but the issue does arise from the admitted facts and the pleadings on record. Thus, the trial court as also the appellate courts can,

depending on facts of a particular case, allow a pure issue of law to be raised, at any stage of the legal proceedings. This is being stated by this Court because when the object of Section 22 of the Specific Relief Act is seen, and of the requirement of seeking a relief with respect to the advance price paid under an agreement to sell to be included in the plaint, it is found that the object of stating/praying in a pleading for refund of the advance price and/or earnest moneys paid is to allow a defendant/seller to take up a defence as to why the advance price and/or earnest money should not be repaid. Obviously, defence of a defendant/seller would be that the advance price and/or earnest money is not to be re-paid because it is forfeited or liable to be forfeited either because of a specific term of the agreement to sell or because the defendant/seller has suffered a loss and consequently for RFA No.157/2019 Page 7 of 15 the loss suffered by the defendant/seller, the advance price and/or earnest money paid under the agreement to sell has to be forfeited by applying the provision of Section 74 of the Indian Contract Act, 1872.

7. It is settled law that unless a seller proves a loss being caused to him on account of breach by a buyer in purchasing a property under an agreement to sell, the advance price and/or earnest money received under the agreement to sell cannot be forfeited because forfeiture is in the nature of forfeiture being liquated damages under Section 74 of the Indian Contract Act, and that Section 74 of the Indian Contract Act cannot come into play if the nature of the contract is such that the loss which is caused on account of the breach of contract can be proved and assessed in a court of law. This is the law as laid down way back by the Constitution Bench of the Hon'ble Supreme court in the case of Fateh Chand v. Balkishan Dass, AIR 1963 SC1405 and such ratio being elaborated and expounded in the recent judgment of the Hon'ble Supreme Court in the case of Kailash Nath Associates v. Delhi Development Authority and Another, (2015) 4 SCC136 I have had an occasion to consider the ratios of the aforesaid judgments of the Hon'ble Supreme Court in the cases of RFA No.157/2019 Page 8 of 15 Fateh Chand (supra) and Kailash Nath Associates (supra) along with a slightly divergent ratio of the judgment of the Hon'ble Supreme Court in the case of Satish Batra v. Sudhir Rawal (2013) 1 SCC345 and this Court has held that it is the ratio of the judgment of the Constitution Bench in the case of Fateh Chand (supra)

which will prevail, that a seller who has received an advance price and/or earnest moneys under an agreement to sell cannot forfeit an advance price and/or earnest moneys except a very nominal amount in case of a breach by the buyer, unless and until loss is pleaded and proved. It is trite that breach of contract is actionable not because of the breach itself but because the breach causes loss to the aggrieved party. Once there is no loss to the aggrieved party, and the same is a sine qua non under Section 73 of the Indian Contract Act, and the nature of the contract is such that the loss can be proved because the contract is one which falls under Section 73 of the Indian Contract Act and not Section 74 of the Indian Contract Act, in such a scenario, the advance price and/or earnest money received by a seller surely cannot be forfeited in the face of the ratios of the judgment of the Hon'ble Supreme Court in the cases of Fateh Chand (supra) and Kailash RFA No.157/2019 Page 9 of 15 Nath Associates (supra). I may note that the ratios of the aforesaid judgment of the Hon'ble Supreme Court were considered in detail in the case of M.C. Luthra v. Ashok Kumar Khanna, 2018 (248) DLT161 An SLP filed against the judgment passed by this Court in the case of M.C. Luthra (supra), has been dismissed by the Hon'ble Supreme Court on 15.05.2018 in SLP (C) No.11702/2018.

8. In the facts of the present case, it is an undisputed position that as per the pleading/written statement filed by the appellant/defendant No.1, it was pleaded by the appellant/defendant No.1/seller that appellant/defendant No.1/seller had forfeited the amount of Rs. 15,00,000/- received under the subject Agreement to Sell on account of breach by the respondent/plaintiff/buyer to fulfill her part of the bargain in not paying the balance price of Rs. 2,00,000/- under the subject Agreement to Sell, it was also pleaded by the appellant/defendant No.1 that monetary loss was caused to the appellant/defendant No.1. But, as already stated above, the appellant/defendant No.1 has not led any evidence by stepping into the witness-box and thus he has failed to prove the loss. The appellant/defendant No.1 having had no courage to depose and stand RFA No.157/2019 Page 10 of 15 the test of cross-examination to establish the loss that was suffered by him, the appellant/defendant no.1 is thus not entitled to forfeit the advance price received. Therefore, it is held that the appellant/defendant No.1 had already raised his defence with respect to the disentitlement of the respondent/plaintiff to receive

back the advance price and/or earnest money paid under the contract, and hence the present case is not a case where the appellant/defendant No.1 is taken by surprise on the relief being granted of refund of advance price and/or earnest moneys. Once appellant/defendant No.1 is not taken by surprise, the object of Orders VI to VIII CPC are met, that the pleading has to give notice of a persons case to the opposite party.

9. Therefore in my opinion the word 'pleading' in Section 22 cannot be strictly interpreted in the sense that the requirement being only of a written pleading and nothing else, and in law the expression pleading under Section 22 of the Specific Relief Act should be read only and essentially to mean notice of a partys case to the other side. RFA No.157/2019 Page 11 of 15 10. I am fortified in the aforesaid conclusions as regards the interpretation of Section 22 of the Specific Relief Act on account of the observations made by a Ld. Singe Judge of this Court, (Avadh Behari Rohtagi, J.) in the judgment in the case of Ex- Servicemen Enterprises (P) Ltd. v. Samey Singh, AIR1976 Delhi 56, wherein it is held that the expression which is used in Section 22 of the Specific Relief Act that amendment is to be allowed 'at any stage' of a 'proceeding' i.e. the words 'at any stage of the proceedings' will mean thereby not only at any stage of the suit proceedings or appeal proceedings, and therefore, in the case of Samey Singh (supra), the Ld. Single Judge of this Court allowed amendment of the plaint at the stage of execution to seek possession in a suit for specific performance. In fact, in my opinion, para 33 is the most relevant part of the judgment wherein the Ld. Single Judge has very aptly and thoughtfully reproduced the words of Paul of Tarsus that "the letter killeth, but the spirit giveth life". This para 33 of the judgment in the case of Samey Singh (supra) reads as under:-

"It is said that rules of construction do not permit such a wide 33. interpretation. Of rules of construction Lord Reid has said: RFA No.157/2019 Page 12 of 15 They are not rules in the ordinary sense of having some binding force. They are out servants not our masters. They are aids to construction, presumptions or pointers. Not infrequently one rule points in one direction, another in a different direction. In each case we must look at all relevant circumstances and decide as a matter of judgment what weight to attach to any particular rule. [Maunsell v. Olins, (1975)

All. E.R16. On a consideration of all relevant circumstances my conclusion is this. The power of the judge is not gone. It remains in him as an indwelling spirit. So long as anything remains to be done in the case he can exercise that power for the sake of justice. When the judge finds that a verbal interpretation of law might lead to injustice he calls to mind as a comforting thought the words of Paul of Tarsus: the letter Killeth, but the spirit giveth life. For these reasons I grant the application. I allow the amendment of the plaint on payment of Rs.300/- as costs.

11. Therefore, in my opinion the expression 'pleading' which has to be interpreted with respect to Section 22 of the Specific Relief Act, has to be interpreted only to mean that whether the opposite party had notice of the case of the other side, and in the present case, the appellant/defendant No.1 did have notice of the case of the respondent/plaintiff for seeking the refund of the advance price and/or earnest money, inasmuch as, the appellant/defendant No.1 took up a specific defence of being entitled to forfeit the amount received under the subject Agreement to Sell. RFA No.157/2019 Page 13 of 15 12. Therefore, I may note that the trial court, in the facts of the present case, has rightly applied the provision of Order VII Rule 7 CPC, as this provision entitles every court, depending on the facts of each case, to give reliefs which otherwise arise from the position of the facts as found on record in terms of the pleadings and evidence in the case.

13. Before concluding, it is noted that not only there is no clause in the subject Agreement to Sell that the advance price and/or earnest money can be forfeited by the seller for a breach by the buyer, and also that, in fact, the expression 'earnest money' is used in the Agreement to Sell as part of advance price which is paid. Also, no evidence has been led by the appellant/defendant No.1, by himself deposing as to how any monetary loss was suffered by him on account of the breach by the respondent/plaintiff. Therefore, the appellant/defendant No.1 could not forfeit the amount of Rs. 15,00,000/- received under the subject Agreement to Sell and the appellant/defendant No.1 has to refund this amount of Rs. 15,00,000/- to the respondent/plaintiff. RFA No.157/2019 Page 14 of 15 14. In view of the aforesaid discussion, there is no merit in the appeal and the same is hereby dismissed. C.M. Appl. No.8375/2019 also stands disposed of accordingly. FEBRUARY22 2019/ AK VALMIKI J.