

Sanjeev Arora Vs. Ajay Kumar Babbar

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Court : Delhi

Decided On : Feb-23-2015

Judge : Jayant Nath

Appellant : Sanjeev Arora

Respondent : Ajay Kumar Babbar

Judgement :

\$~A-12 * IN THE HIGH COURT OF DELHI AT NEW DELHI + IA No.24703/2014
in CS(OS) 1704/2013 Date of Decision :

23. d February, 2015. SANJEEV ARORA Through Plaintiff Mr.Y.S.Chauhan, Advocate with the plaintiff-in-person. versus AJAY KUMAR BABBAR Through Defendant Mr.A.K.Sharma, Advocate with the defendant-in-person. CORAM: HON'BLE MR. JUSTICE JAYANT NATH JAYANT NATH, J.

(Oral) IA No.24704/2014 (for condonation of delay) For the reasons stated in the application, the delay of 120 days in re-filing the application for leave to defend is condoned. The application is disposed of. IA No.24703/2014 [u/O37R3(5) CPC].

1. This is an application under Order 37 Rule 3(5) CPC for grant of leave to defend.

2. The plaintiff has filed the accompanying suit for recovery of Rs.47lacs under Order 37 CPC. The plaint states that the parties entered into an agreement to sell

dated 06.04.2013 whereby the plaintiff agreed to purchase the suit property bearing No.1 in Block D/2 Rana Pratap Bagh, Delhi. On 06.04.2013 an advance of Rs.10 lacs was paid. On 05.05.2013 an advance of Rs.13,50,000/- was paid making a total of Rs.23,50,000/-. The transaction was to be completed within two months from the date of signing of the agreement to sell and on making payment of the balance amount of Rs.60 lacs. As per the plaint on 03.07.2013 the plaintiff visited the office of Sub-Registrar and put his appearance vide a slip and waited for some time but the defendant did not come and finding no alternative, the plaintiff returned back. A legal notice was sent on 03.07.2013. Reliance is placed on Clause 7 of the Agreement to Sell which states that in case the defendant does a default the defendant will return double of the advance amount which comes to Rs.47 lacs. Hence the present suit has been filed seeking recovery of Rs.47lacs.

3. Learned counsel appearing for the defendant has submitted that the agreement to sell provides to make balance payment within two months. Thereafter the sale deed was to be executed by the defendant. Reliance is also placed on clause 6 of the agreement itself which states that in case the plaintiff fails to pay the balance amount within the time specified, the earnest money shall stand forfeited. It is urged that as the plaintiff has failed to tender the balance sum of Rs.60 lacs on time, hence, the defendant has forfeited the entire advance amount of Rs.23,50,000/- as earnest. It is urged that the steps have been taken in terms of the agreement to sell and the defendant is entitled to unconditional leave to defend.

4. Needless to add learned counsel for the plaintiff has refuted the contentions of the learned counsel for the defendant. It is urged that the plaintiff was ready and willing to perform the terms of the contract. The plaintiff with the requisite consideration of balance of Rs.60 lacs was present before the office of Sub-Registrar on 03.07.2013 but the defendant did not turn up and hence the legal notice dated 03.07.2013 was served on the defendant. Reliance is reiterated on Clause 7 of the agreement to contend that in case of refusal by the defendant to take necessary steps on time, the defendant would be liable to pay the sum equal to double of the earnest money/bayana.

5. A perusal of the documents placed on record shows that the plaintiff has not placed on record any document to show that he was in possession of a sum of Rs.60 lacs on the date when the agreement had to be fulfilled. He will have to prove in evidence that he was ready and willing to perform the agreement. It is only after crossing this factual hurdle, the plaintiff would be entitled to claim refund of the advance money paid.

6. Further, though the plaintiff has paid Rs.23,52,000/- to the defendant, the present suit is filed for recovery of Rs.47 lacs relying upon clause 7 which stipulates that in case the defendant does not take necessary steps on time, he will pay double of the earnest money/bayana.

7. The first question is as to what is earnest money. Relevant portion of the Agreement to Sell reads as under:

And whereas the first party/seller for his/her bonafide needs and requirements has agreed to sell the above said property UNTO the SECOND PARTY/PURCHASER, and the SECOND PARTY/PURCHASER has agreed to purchase the same for a sum of Rs.83,50,000/- (Rupees Eighty Three Lacs Fifty Thousand Only), out of which the FIRST PARTY/SELLER has received a sum of Rs.10,00,000/- (Rupees Ten Lacs Only), in cash in advance on dt.06.04.2013 as an earnest/byana money and part of the sale/proceeds and the receipt of which the FIRST PARTY/SELLER acknowledges subject to the all terms and conditions of this agreement.

AND WHEREAS a part payment of Rs.13,50,000/(Rupees Thirteen Lacs Fifty Thousand Only), will be paid by the SECOND PARTY to the FIRST PARTY within or upto 30 days from the date of signing of this agreement and the balance & final payment of Rs.60,00,000/- (Rupees Sixty Lacs Only), will be paid by the SECOND PARTY to the FIRST PARTY within or upto two months from the date of signing of this agreement, and on final payment the FIRST PARTY will execute all the necessary transfer papers/documents in respect of the above said property in favour of the SECOND PARTY/PURCHASER or his/her nominee(s)/any person (s), and the FIRST PARTY also shall deliver the vacant possession of the said property to the SECOND PARTY/PURCHASER without any hitch.

8. The Agreement to Sell dated 6.4.2013 prima facie stipulates that the sum of Rs.10 lacs is the earnest/bayana money. The second payment of Rs.13,50,000/- is described as part payment.

9. The Supreme Court in Shri Hanuman Cotton Mills And Ors. vs. Tata Air Crafts Limited, AIR 1970 SC1986 noted earnest to mean as follows:

25. From a review of the decisions cited above, the following principles emerge regarding "earnest": (1) It must be given at the moment at which the contract is concluded. (2) It represents a guarantee that the contract will be fulfilled or, in other words, 'earnest' is given to bind the contract. (3) It is part of the purchase price when the transaction is carried out. (4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser. (5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest.

10. Even assuming that the entire advance payment made by the plaintiff i.e. Rs.23,50,000/- constitutes earnest money, the issue would be whether in terms of Clause 7 in case of default by the defendant the plaintiff is entitled to recover the sum of Rs.47 lacs as claimed. Section 74 of the Indian Contract Act provides that when a contract is broken and a sum is named in the Contract as the amount to be paid, in case of such breach, or if the contract contains a stipulation by way of penalty, the party complaining of the breach is entitled to reasonable compensation not exceeding the amount so named. Hence, whether the stipulated sum of Rs.47 lacs can be stipulated to be a penalty or a reasonable compensation would have to be decided after parties have led their evidence.

11. Hence, prima facie on a reading of the Agreement it is clear that earnest deposit is only Rs.10 lacs and not Rs.23,50,000/- as is being claimed by the plaintiff.

12. Hence, it cannot be said that the present claim of the plaintiff arises out of a contract. Plaintiff will have to prove that the amount being claimed is as per the Agreement. He will also have to prove that the amount is not by way of penalty as described in Section 74 of the Indian Contract Act. However, there can be no

dispute that the sum of Rs.10 lacs would at least be treated as earnest deposit.

13. In the light of the above facts and circumstances, I grant leave to defend to the defendant subject to the defendant depositing in Court the sum of Rs.13,50,000/-. The said amount may be deposited within six weeks from today. On deposit of the said amount, the Registrar General shall keep the same in FDR subject to automatic renewal till deposit of the suit.

14. Application stands disposed of. CS(OS) 1704/2013 On deposit of the aforesaid amount, the defendant may file his written statement within four weeks thereafter. List before the Joint Registrar on 21.04.2015. JAYANT NATH, J FEBRUARY23 2015 rb

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