

**IN THE COURT OF SHRI SANJAY SHARMA-I :
ADDL. DISTRICT JUDGE – 02 (EAST DISTRICT)
KARKARDOOMA COURTS : DELHI**

Civil Suit No. 2880/2016

Shri Amit Mukherjee

S/o Late Shri Surajit Mukherjee
R/o E-3, Bina Complex, Khailsani,
Garerdhar, Chandannagar,
Hooghly, West Bengal

.....Plaintiff

Versus

Shri Bhupesh Bhan

S/o Shri RN Bhan
R/o Flat No. C-2/306, III Floor,
Plot No. 3, Capital Apartments,
Vasundhra Enclave,
New Delhi – 110 096

.....Defendant

<i>Date of institution</i>	<i>: 25.5.2016</i>
<i>Date of reserving judgment</i>	<i>: 07.11.2017</i>
<i>Date of judgment</i>	<i>: 15.11.2017</i>

ORDER :

This order shall dispose of an application of the defendant under Order 37 Rule 3 CPC read with Section 151 CPC seeking leave to defend the present suit. The plaintiff has filed an appropriate reply to the application .

2. The plaintiff herein filed a suit under Order 37 CPC seeking a decree of Rs. Eight Lacs alongwith interest @ 18% per annum, based on an agreement to sell/written contract, vide which earnest money of Rs. 4 lacs was paid by the plaintiff to the defendant, but the defendant allegedly failed to perform his part of contract and thus, as per the terms

of the agreement, the plaintiff has claimed double the amount of earnest money.

3. In brief, the facts as averred in the plaint are that the defendant was introduced to the plaintiff by his co-brother Mr. Partha Chatterjee and the defendant had shown his intention to sell his Flat No. S-1204, Saffron Tower, Ajnara Gen X, at Crossing Republic, Ghaziabad (hereinafter referred to as the suit flat) to the plaintiff. It is further averred that after negotiations, defendant agreed to sell the suit flat to the plaintiff for a consideration of Rs.44,35,000/- and the plaintiff paid Rs. 4 lacs as earnest money vide three cheques amounting to Rs.One Lac, Two Lacs and One Lac respectively, which were received by the defendant and an Agreement to Sell dt. 12.2.2015 was executed between the two. The defendant encashed the said cheques on 09.2.2015 and 10.3.2015 respectively. The sale documents were to be executed within 45 days of the date of agreement.

4. It has further been averred that after 45 days of sale agreement, the plaintiff was ready to pay the balance amount as his loan of Rs.39 Lacs was approved from India Bulls, however, on inquiry in respect of the sale deed of the suit flat, the plaintiff came to know that the defendant had done nothing to get the suit flat transferred in his name by the builder, meaning thereby that he had no title or authority to sale the flat to the plaintiff. It has further been submitted that when the plaintiff approached the defendant for refund of the earnest money, he promised to pay Rs. 8 Lacs to the plaintiff, i.e. double of the earnest money within one month , as per the clause 8 of the agreement and in May 2015, when the plaintiff again approached the defendant for payment, he showed his

incapability to pay the said amount on the pretext of his financial hardships and his mother's critical health condition who was suffering from cancer and the defendant agreed to pay interest @ 1.5% per month to the plaintiff, till the realization of the principal amount. However, the defendant failed to make any payment within the agreed period and therefore, the plaintiff served a legal notice upon him on 06.4.2016 demanding double the earnest money with interest but the defendant failed to pay and hence, the present suit.

5. It has been averred in the plaint that the present suit is based on a written contract and for a liquidated amount of money and that no relief which is out of the purview of Order 37 CPC, has been claimed.

6. Summons of the suit were issued to the defendant under provisions of Order 37 CPC who filed his appearance on 01.10.2016 and thereafter, on the request of the plaintiff, summons for judgment were issued to the defendant vide order dt. 24.8.2016. The defendant was duly served with the said summons and thereafter, he filed the present application seeking leave to defend, within the limitation period.

7. I have heard Shri Vivek Virmani – Ld. Counsel for the plaintiff and Shri Manish Arora – Ld. Counsel for the defendant and have gone through the records.

8. It was submitted by Ld. Counsel for the defendant in support of the application that it was the plaintiff who had offered to purchase the suit flat from the defendant for a sum of Rs. 44,35,000/- and had further agreed to pay 10% of the agreed amount as earnest money. It was admitted that the plaintiff paid a sum of Rs. 4 Lacs as earnest money instead of Rs. 4.5 lacs, i.e. 10% of the consideration amount. It was

further stated that on 12.3.2015, the defendant signed the agreement and handed over the original to the plaintiff after the encashment of the cheques. In the application , the defendant has not disputed the contents of the agreement to sell but took the plea that when he signed it, it was not bearing the signatures of the plaintiff or of the witnesses nor it was notarized in his presence. It has been alleged that the said agreement was notarized in a back date. It was also submitted that the agreement to sell was to be effective from 10.3.2015 and the sale deed was to be executed by 25.4.2015.

9. It has further been stated in the application that on 27.4.2015, the mediator Shri Partha Chatterjee sent a message to the defendant that because of certain problems relating to the job , the plaintiff was not able to take the flat and move further. However, by that time the defendant had already started the process of getting the flat transferred into his name from the builders. Thus, it has been alleged that it was the plaintiff who was unwilling to perform his part of the contract. According to the defendant, the suit flat was transferred in his name on 29.4.2015 and thereafter, he started searching for new customers. It has further been averred in the application that thereafter, the plaintiff again approached the defendant for return of the earnest money but the defendant again offered to sell the flat to him. However, the defendant cautioned the plaintiff that in case he fails to execute the agreement, his earnest money would be forfeited. It has been submitted that thereafter, the plaintiff never contacted him. It was also submitted that because of the inaction on part of the plaintiff, the defendant had to pay interest on the loan which he had taken on the suit flat and suffered losses on account

of interest and lesser sale consideration and therefore, was justified in forfeiting the earnest money.

10. Thus, the defendant in his application has disputed the manner of execution in the agreement to sell, the factum of its notarization on the date on which it is alleged to have been notarized and has also taken the plea that the time was never an essence for performance of the contract. It had also been pleaded that the defendant was always ready and willing to perform his part of contract but it was the plaintiff who failed to perform his part. It was, therefore, submitted that various triable issues have arisen and therefore, leave be granted to the defendant to defend the present suit.

11. In reply, the counter allegations were denied and it was submitted that the date of execution of the agreement was never extended which was to be executed by 29.3.2015. It was also denied that the plaintiff ever approached the defendant for directly transferring the suit flat in his name from the builder and no such clause was mentioned in the agreement. It has also been denied that the mediator Shri Partha Chatterjee had sent any message to the defendant on 27.4.2015.

12. In brief, the plaintiff denied any fault on his part in executing the agreement but blamed the defendant that he failed to execute the sale deed within the time frame, as per the agreement.

13. On consideration of the rival contentions in the application and the reply and also on hearing the oral submissions, it is clear that both the parties have admitted that :

1). They entered into an agreement for the sale and purchase of the suit flat for a sum of Rs.44,35,000/-;

- 2). *An agreement to sell dt. 12.2.2015 was executed between them which was also signed by the defendant;*
- 3). *The plaintiff had paid earnest money of Rs. Four Lacs to the defendant by way of cheques which were duly encashed by him;*
- 4). *the agreement could not be performed, that is to say, the sale deed of the suit flat could not be executed by the defendant within the stipulated period; and*
- 5). *the agreement contained forfeiture clause as well as provision of payment of double the earnest money in case of failure to perform the part of the contract/agreement by the parties, as the case maybe.*

14. The plaintiff has alleged that it was the defendant who failed to perform his part of the agreement by not executing the sale deed within 45 days of the execution of the sale agreement as he made no effort for transferring the suit flat in his name by the builder during this period and avoided to stick to the time clause on one pretext or the other, whereas he was always willing and ready to perform his part of the contract and had even arranged the finances through loan to purchase the suit flat. On the other hand, the defendant has alleged that time was not an essence to the agreement and he had got the suit flat transferred in his name but it was the plaintiff who had failed to perform his part of the agreement. Thus, the question arises as to who failed to perform his part of the contract/agreement and whether time was an essence for execution of the same. In my opinion , it raises a valid triable issue for which evidence is required to be led by both the parties and therefore, the defendant is entitled to an unconditional leave to defend the present suit.

15. For the foregoing reasons, the present application is allowed and the defendant is granted unconditional leave to defend the present suit.

ANNOUNCED IN OPEN COURT
ON the 15th day of November 2017

(SANJAY SHARMA-I)
Addl. District Judge-02 (East)
Karkardooma Courts, Delhi