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***IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ RFA 152/2013

Decided on 21st March, 2013

ASHOK KUMAR ARORA Appellant
Through: Mr. Satya Narayan, Adv.
versus

DS SODHI AND ANR. Respondents
Through: None.

CORAM:
HON'BLE MR. JUSTICE A.K. PATHAK

A.K. PATHAK, J.(ORAL)

1. Respondent no.1-plaintiff filed a suit for specific performance of agreement to sell dated 5th April, 2000 (Ex.PW1/7) against the appellant-defendant no.1 before the trial court. Vide judgment and decree dated 1st December, 2012 trial court has declined the relief of specific performance to respondent no.1, however, has passed a money decree in the sum of ₹3 lacs together with interest @ 6% per annum from the date of filing of the suit till realisation of decretal amount in favour of respondent no.1 and against the appellant.

2. That is how appellant is before this Court by way of present appeal under Section 96 of the Code of Civil Procedure, 1908 (the

‘Code’, for short).

3. Agreement to Sell reads as under :-

AGREEMENT TO SELL & PURCHASE

This Agreement is made on this 5th day of April, 2000 between Ashok Kumar Arora S/o Radhey Sham Arora R/o T-25/5 (ground floor) Village Khirki, Malviya Nagar, New Delhi hereinafter referred to as party of the 1st part and D.S. Sodhi S/o Shri K.S. Sodhi R/o B-4/6, Vasant Vihar, New Delhi hereinafter referred to party of the 2nd Part.

Whereas party of the 1st Part is duly constituted GPA of Prem Singh Chauhan S/o R.S. Chauhan in respect of property bearing Khasra No.1 min., (T-25/5) Village Khirki Malviya Nagar, New Delhi hereinafter referred to as the Property.

Whereas the party of 1st part has agreed to sell the ground floor of the property to the party of the 2nd part for a sale consideration of Rs.5,00,000/- (Five Lacs).

Whereas party of the 2nd part has paid a sum of Rs.3 lacs to the party of the 1st part in cash who acknowledges the receipt of the same.

Whereas party of the 1st part agrees & binds himself to convey/transfer the property in the name of the party of the 2nd part vide sale deed on the receipt of balance consideration of Rs.2 lacs which shall be paid within a period of 2 years from today & in the event of default either party shall be entitled to get this Agreement enforced through competent court of law.

Whereas party of 1st part declares that the property is free from all encumbrances & that he shall not create an interest in the property in favour of another person during the subsistence of this Agreement & in order to protect the interest of

party of 2nd part, part of 1st part has handed over his original GPA executed by Prem Singh Chauhan to the party of 2nd part that the legal heirs and assigns of parties of both the part are bound by this Agreement.

Witnesses:-

1.Sd/- Shaheed Ahmad	Party of the First Part
S/o Sh. Sirajuhaq C-3	Sd/-
Main Market, Vasant	Ashok Kumar Arora
Vihar, N. Delhi	T-25/5 (GF) Village
	Khirki, Malviya Nagar,
	New Delhi

2.Sd- Jasminder Singh
S/o Aara Singh
90/90 Malviya Nagar
ND – 17

3.Sd/- Ashok Kumar Mishra	Party of the S/o
Shivdhan Mishra	Second Part
C-3 Main Market, V.V.	Sd/-
New, Delhi – 110057	D.S. Sodhi
	B-4/6, Vasant
	Vihar
	New Delhi

4. Respondent no. 1 had paid ₹3 lacs towards earnest money. It is this amount for which money decree has been passed and earnest money has been ordered to be refunded to respondent no.1 together with interest @ 6% per annum. Money decree has been passed even though no alternative prayer for refund of earnest money was made in the plaint.

5. Learned counsel for the appellant has vehemently contended

that decree of compensation could not have been passed by the trial court in absence of any alternate prayer made in the plaint. Such a relief has thus barred in view of Section 21 of the Specific Relief Act, 1963 (the Act, for short) which provision trial court has not taken note of. It is contended that the alternate relief of recovery of compensation could not have been granted in absence of their being any pleading or prayer in the plaint. Reliance has been placed on Shamsu Suhara Beevi versus G. Alex and Another (2004) 8 SCC 569. This is the only point which has been urged and pressed during the course of hearing.

6. Relevant it would be to refer to Section 21 of the Act at this stage which reads as under:-

21. Power to award compensation in certain cases.-

(1) In a suit for specific performance of a contract, the plaintiff may also claim compensation for its breach, either in addition to, or in substitution of, such performance.

(2) If, in any such suit, the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award him such compensation accordingly.

(3) If, in any such suit, the court decides that specific performance ought to be granted, but that

is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

(4) In determining the amount of any compensation awarded under this section, the court shall be guided by the principles specified in section 73 of the Indian Contract Act, 1872 (9 of 1872).

(5) No compensation shall be awarded under this section unless the plaintiff has claimed such compensation in his plaint: Provided that where the plaintiff has not claimed any such compensation 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 compensation.

7. A bare perusal of the aforesaid provision makes it clear that it envisages grant of compensation or damages to the plaintiff for the breach of contract in a suit for specific performance of a contract in addition to or in substitution of relief of specific performance. Sub Section 5 of Section 21 further provides that no compensation shall be awarded under this Section unless the plaintiff has claimed the same in his plaint. Section 21 of the Act deals with award of compensation or damages to a plaintiff which he may be entitled to as a consequence of breach of contract either in addition to the relief of specific performance or in substitution

thereof. It does not cover the refund of earnest money paid by a vendee to the vendor. Damages and compensation as envisaged under Section 21 of the Act cannot be equated with the earnest money while determining the rights of a purchaser seeks for its return. In cases where specific performance is refused, in order to render complete justice the court may direct a refund even though plaintiff has not specifically asked for it in the plaint. A Single Judge of Karnataka High Court in Smt. Khamarunnisa versus Mudalappa ILR 2003 Karnataka 4535 has held as under :-

“Thus, in the ultimate analysis, I have to hold that the appellant though is not entitled for the relief of specific performance or for damages in substitution of specific performance, is certainly entitled to get back the earnest money paid by him under the agreement even in the absence of a plea in the plaint in that regard. It is trite law that no man should be allowed to gain out of his own default.”

8. In B.R. Mulani versus A.B. Asawathanarayana AIR 1993 SC 1318, Apex Court, on coming to the conclusion that the specific performance of an agreement cannot be ordered as it was not agreement of sale purely, however decreed suit for repayment of monies paid. In Mack and Krishnaswami Nayudu AIR 1955

Madras 591, it has been held thus “in a suit for specific performance the wide discretion a Court has in granting relief to the two parties to the contract is incapable of strict definition and must depend on facts of each case”. In the said case, suit for specific performance brought by the vendee was dismissed but Court ordered the vendor to return the amount deposited with him by the vendee, even though refund of earnest money was not claimed in the suit.

9. Judgment relied upon by the learned counsel is in the context of different facts and is not applicable to the present case. In this case, no compensation, as envisaged under Section 21 of the Act, has been awarded by the trial court. It is the earnest money which has been ordered to be refunded by way of money decree.

10. For the foregoing reasons, appeal is dismissed in limine.

A.K. PATHAK, J.

MARCH 21, 2013

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