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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA-596-2012 (O&M) AND
XOBJC-10C-2012 (O&M)
Date of decision : 27.07.2016

Ranbir Choudhary

... Appellant

Versus

T.D.Vivek Kumar and another

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. A.K. Jain, Advocate
for the appellant.

Mr. T. Devadasan, respondent No.2 in person.

Mr. Bhupinder Singh, Advocate for
Mr. Pankaj Sharma, Advocate
for the respondents.

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporters or not?
3. Whether the judgment should be reported in the digest?

AMIT RAWAL, J. (ORAL)

This order of mine shall dispose of the appeal bearing **RSA No.596 of 2012** tiled as **“Ranbir Choudhary V/s T.D.Vivek Kumar and another”** and **XOBJC No.10/C of 2012.**

The appellant-plaintiff is aggrieved of the findings rendered by the trial Court and affirmed by the lower Appellate Court qua the relief of specific performance on the ground that the agreement to sell dated

18.07.2004 did not contain the clause of seeking specific performance of agreement to sell in case of refusal by the vendor.

Mr. A.K. Jain, learned counsel appearing on behalf of the appellant-plaintiff submits that issue qua readiness and willingness has been rendered in favour of the plaintiff and there is no appeal qua that. The target date for execution and registration of the sale deed was dated 18.09.2004. 18th September being Saturday and 19th September being Sunday, a telegram dated 16.09.2004 was sent for calling upon the defendant(s) to execute the sale deed on 20.09.2004. Noticing the aforementioned evidence, the finding aforementioned qua readiness and willingness has been rendered, but the Court below rejected the plea on the ground that the agreement to sell did not contain the clause of seeking specific performance of the agreement to sell through intervention of the Court. In support of his contentions, he relies upon the judgment of Hon'ble Supreme Court in **"P.D. Souza V/s Shondriilo Naidu" (2004) 6 Supreme Court Cases 649**, holding the view of in **"Dadarao V/s Ramrao" (1999) 8 SCC 416** has been held *per incuriam*, thus, urges this Court for formulation of the following substantial question of law arises for determination:-

Where the agreement to sell does not contain the clause of seeking specific performance of the agreement to sell through the intervention of the Court, can the party be denied the discretion relief under Section 20 of the Specific Relief Act or not?

Mr. Bhupinder Singh, Advocate for Mr. Pankaj Sharma, learned counsel appearing on behalf of respondent Nos.1 and 2 prays for

short accommodation as Mr. Pankaj Sharma, arguing counsel is out of

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station. The appeal is of 2012 and therefore, this Court cannot grant the adjournment and accordingly, I proceed to decide the appeal on merits.

Mr. T. Devadasan, respondent No.2, who is present in Court and argued that the appellant-plaintiff was required to go to the office of the M/s Urban Improvement Company Ltd. Connaught Place, New Delhi for obtaining the NOC as the plot bearing No.1233 Sector B, measuring 223 square yards situated at Green Field Colony, Faridabad was allotted to the aforementioned Company. Having failed to do so, the agreement stood cancelled and notice dated 20.09.2004 (Ex.D-2) in this regard was also despatched. The appellant-plaintiff was not ready and willing to perform his part of the agreement. The findings qua readiness and willingness rendered by both the Courts below are erroneous and perverse, for, the appellant-plaintiff was not having sufficient money. The telegram has also been procured as the address in the telegrams was incomplete.

He submits that respondent(s)-defendant(s) was present in the office of the M/s Urban Improvement Company Ltd. Connaught Place, New Delhi, on 19.09.2004 as it was opened on Saturday, but did not approach the Company for obtaining no objection and therefore, the discretion has rightly been declined by both the Courts below, thus, urges this Court for dismissal of the appeal and prays for allowing of the cross-objections.

I have heard the learned counsel for the parties and appraised the paper book and of the view that there is a merit and substance in the submissions of Mr. A.K. Jain, for, the agreement to sell does not envisage about obtaining the NOC/prior permission from the office of M/s Urban

Improvement Company Ltd. Connaught Place, New Delhi, in essence, the agreement is silent, thus, there is no force and merit in the submissions of Mr. T. Devadasan, that the plaintiff(s) and the defendant(s) were required to approach the competent authority for obtaining the NOC. In this regard, the appellant-plaintiff had also sent a telegram dated 16.09.2004 (Ex.P-5 & P-6). Cancellation of the agreement to sell on 20.09.2004 would be meaningless, once, the appellant-plaintiff had shown the readiness and willingness. The finding rendered by the trial Court viz-a-viz the agreement having not contained the clause of seeking specific performance of agreement to sell through the competent Court of law, is not only fallacious, but perverse in view of the ratio decidendi culled out by the Hon'ble Supreme Court in "P.D. Souza's case (supra), where the Hon'ble Supreme Court had an occasion to examine the provisions of Sections 23 & 21 of the Specific Relief Act, 1963 viz-a-viz liquidated damages in the shape of compensation in the absence of the clause of seeking specific performance and held the judgment rendered in "Dadaraao's case (supra).

For the sake of brevity, the findings rendered by the Hon'ble Supreme Court of India in "P.D. Souza's case (supra) reads thus:-

"30. Section 23 of the Specific Relief Act, 1963 read as under:

"23. (1) A contract, otherwise, proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach and the party in default is willing to pay the same, if the court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for the purpose of securing performance of the contract and not for the purpose

of giving to the party in default an option of paying money in lieu of specific performance.

(2) When enforcing specific performance under this section, the court shall not also decree payment of the sum so named in the contract."

31. *In M.L. Devender Singh & Ors. v. Syed Khaja, the following statement of law appears: (SCC p. 522 para 16)*

"The question always is: What is the contract? is it that one certain act shall be done, with a sum annexed, whether by way of penalty or damages, to secure the performance of this very act? Or, is it that one of the two things shall be done at the election of the party who has to perform the contract, namely, the performance of the act or the payment of the sum of money? If the former, the fact of the penal or other like sum being annexed will not prevent the Court's enforcing performance of the very act, and thus carrying into execution the intention of the parties; if the latter, the contract is satisfied by the payment of a sum of money, and there is no ground for proceeding against the party having the election to compel the performance of the other alternative.

From what has been said it will be gathered that contracts of the kind now under discussion are divisible into three classes:

(i) Where the sum mentioned is strictly a penalty-a sum named by way of securing the performance of the contract, as the penalty is a bond;

(ii) Where the sum named is to be paid liquidated damages for a breach of the contract;

(iii) Where the sum named is an amount the payment of which may be substituted for the performance of the act at the election of the person by whom the money is to be paid or the act done.

Where the stipulated payment comes under either of the two first - mentioned heads, the Court will enforce the contract, if in other respects it can and ought to be enforced just in the same way as a contract not to do a particular act, with a penalty added to secure its performance or a sum named as liquidated damages, may be specifically enforced by means of an injunction against breaking it. On the other hand, where the contract comes under the third head, it is satisfied by the payment of the money, and there is no ground for the Court to compel the specific performance of the other alternative of the contract."

This Court further stated: (SCC p.523, paras 20-21)

"20. The fact that the parties themselves have provided a sum to be paid by the party breaking the contract does not, by itself, remove the strong presumption contemplated by the use of the words "unless and until the contrary is proved". The sufficiency or insufficiency of any evidence to remove such a presumption is a matter of evidence. The fact that the parties themselves specified a sum of money to be paid in the event of its breach is, no doubt, a piece of evidence to be considered in deciding whether the presumption has been repelled or not. But, in our opinion, it is nothing more than a piece of evidence. It is not conclusive or decisive.

21. The second assumption underlying the contentions on behalf the Defendants-Appellants is that, once the presumption, contained in explanation to Section 12 of the old Act, is removed, the bar contained in Section 21 of the old Act, against the specific enforcement of a contract for which compensation in money is an adequate relief, automatically operates, overlooks that the condition for the imposition of the bar is actual proof that compensation in money is adequate on the facts and circumstances of a particular case before the

Court. The effect of the presumption is that the party coming to Court for the specific performance of a contract for sale of immovable property need not prove anything until the other side has removed the presumption. After evidence is led to remove the presumption, the plaintiff may still be in a position to prove by other evidence in the case, that payment of money does not compensate him adequately."

32. *A distinction between liquidated damages and penalty may be important in common law put as regards equitable remedy the same does not play any significant role.*

33. *In Manzoor Ahmed Magrav v. Gulam Hassan Aram, this Court reiterated the ratio laid down in M.L. Devender Singh (See also A. Abdul Rashid Khan v. P.A.K.A. Shahul Hamid.)*

34. *In Dadarao whereupon Mr. Bhat placed strong reliance, the binding decision of M.L. Devender Singh was not noticed. This Court furthermore failed to notice and consider the provisions of Section 23 of the Specific Relief Act, 1963. The said decision, thus, was rendered per incurium.*

35. *Furthermore, the relevant term stipulated in Dadarao was as under: (SCC p. 417, para 2)*

"Tukaram Devsarkar, aged about 65, agriculturist, r/o Devsar, purchaser (GHENAR) - Balwantrao Ganpatrao Pande, aged 76 years, r/o Digadi Post Devsar, vendor (DENAR), who hereby give in writing that a paddy field situated at Dighadi Mouja, Survey No. 7/2 admeasuring 3 acres belonging to me hereby agree to sell to you for ₹ 2000 and agree to receive ₹ 1000 from you in presence of V. D. N. Sane. A sale deed shall be made by me at my cost by 15.4.1972. In case the sale deed is not made to you or if you refuse to accept, in addition of earnest money an amount of ₹ 500 shall be given or taken and no sale deed will be executed. The possession of the property has been agreed to be delivered at the time of

purchase. This agreement is binding on the legal heirs and successors and assigns.

(Emphasis supplied) Interpreting the said term, it was held: (SCC p. 418 paras 6-7)

"6. The relationship between the parties has to be regulated by the terms of the agreement between them. Whereas the defendants in the suit had taken up the stand that the agreement dated 24.4.1969 was really in the nature of a loan transaction, it is the plaintiff who contended that it was an agreement to sell. As we read the agreement, it contemplates that on or before 15.4.1972 the sale deed would be executed. But what is important is that the agreement itself provides as to what is to happen if either the seller refuses to sell or the purchaser refuses to buy. In that event the agreement provides that in addition to the earnest money of ₹ 1000 a sum of ₹ 500 was to be given back to Tukaram Devsarkar and that "no sale deed will be executed". The agreement is very categorical in envisaging that a sale deed is to be executed only if both the parties agree to do so and in the event of any one of them resiling from the same there was to be no question of the other party being compelled to go ahead with the execution of the sale deed. In the event of the sale deed not being executed ₹ 500 in addition to the return of ₹ 1000, was the only sum payable. This sum of ₹ 500 perhaps represented the amount of quantified damages or, as the defendants would have it, interest payable on ₹ 1000.

7. If the agreement had not stipulated as to what is to happen in the event of the sale not going through, then perhaps the plaintiff could have asked the Court for a decree of specific performance but here the parties to the agreement had agreed that even if the seller did not want to execute the sale deed he would only be required to refund the amount of ₹ 1000 plus

pay ₹ 500 in addition thereto. There was thus no obligation on Balwantrao to complete the sale transaction.”

36. Apart from the fact that agreement of sale did not contain a similar clause, Dadarao does not create a binding precedent having not noticed the statutory provisions as also an earlier binding precedent. (See Government of W.B. v. Tarun K. Roy (SCC para 26))”

It is also matter of record that the plaintiff had prepared a draft of the balance amount. During the pendency of the suit, no person shall keep alive the draft with himself as he would be losing interest. In my view the respondent(s)-defendant(s) was not ready and willing to perform his part of the agreement to sell and therefore, he did not appear before the Sub-Registrar. On the contrary, the plaintiff discharged the onus qua his presence before the Office of the Sub-Registrar, thus, finding of the trial Court and as well as the lower Appellate Court qua the readiness and willingness is hereby affirmed and the cross-objections filed at the instance of the defendant(s) are liable to be rejected.

Accordingly, the findings rendered by the lower Appellate Court qua granting of the relief of doubling the amount is hereby set aside and the judgements are modified. The appellant(s)-plaintiff(s) shall be entitled to seek the specific performance to the agreement to sell on deposit of the balance sale consideration within a period of two months from the date of receipt of certified copy of the judgment. On deposit of the balance sale consideration, the defendant(s) is directed to execute and register the sale deed, in case of failure, the appellant-plaintiff shall be entitled to seek the execution and registration through the intervention of the Court. The

For the foregoing reasons, the cross-objections are hereby dismissed and the appeal is allowed in the aforementioned terms. Decree sheet be prepared.

(AMIT RAWAL)
JUDGE

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