

IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH

RSA No.1156 of 2013 (O&M)

Date of Decision.19.10.2016

Harnek Singh

.....Appellant

Vs

Jarnail Singh

.....Respondent

Present: Mr. Paramjit Singh Jammu, Advocate
for the appellant.

Mr. A.S. Ahluwalia, Advocate
for the respondent.

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

-. -

AMIT RAWAL J. (ORAL)

The appellant-defendant is aggrieved of the concurrent finding of fact whereby the suit seeking specific performance of agreement to sell dated 26.05.2005 for piece of land measuring 8 kanals for total sale consideration of ₹2,13,000/- against the earnest money of ₹1,50,000/-, has been decreed by both the Courts below.

Mr. P.S. Jammu, learned counsel appearing for the appellant has drawn attention of this Court to the notice of motion order to contend that the agreement to sell did not contain the recital of seeking specific performance of agreement to sell through the intervention of the Court. At the best when the vendor fails to perform his part of the agreement, the vendee would be entitled to double the amount.

I am afraid that the aforementioned argument is not only fallacious but perverse in view of the law laid down by the Hon'ble Supreme Court in P.D'souza Vs. Shondrilo Naidu (2004)6 SCC 649 whereby the judgment rendered in Dadarao Vs. Ramrao (1999) 8 SCC 416 has been held to be not a good law. For the sake of brevity, findings rendered by the

Hon'ble Supreme Court in **P.D.Souza's case** (supra) are reproduced as under:-

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) ”

Since the argument as per the notice of motion order reproduced here-in-below, was confined to this aspect only, I am of the view that this plea is not sustainable in the eyes of law.

“Counsel for the appellant states that the appellant is ready and willing to settle the matter with the plaintiff-respondent by paying him substantial amount.

Notice of motion for 16.09.2013.

In the meantime, the execution of the impugned order shall remain stayed.”

For the foregoing reasons, I do not intend to differ with the findings rendered by the Courts below which are based upon correct appreciation of fact and law, much less, no substantial question of law arises for consideration in the second appeal. No ground for interference is made out. The second appeal is dismissed.

(AMIT RAWAL)
JUDGE

October 19, 2016
Pankaj*

Whether reasoned/speaking Yes

Whether reportable Yes