

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**FA No. 244 of 2018**

1. Prakash Chandra Soni S/o Late Shri Mali Ram Soni, Aged About 45 Years R/o R. K. Boot House Lane, Telipara, Tahsil And District- Bilaspur, Chhattisgarh

---- Appellant**Versus**

1. Shiv Balak Ram Sahu S/o S/o Late Pyare Lal Sahu Aged About 69 Years R/o Telipara, Beside Sai Collection, Tahsil And District- Bilaspur, Chhattisgarh

---- Respondent

For Appellant	Shri Somnath Verma, Advocate
For Respondent	Shri Hemant Kesharwani, Advocate

Hon'ble Shri Prashant Kumar Mishra, Ag.CJ
Hon'ble Shri Parth Prateem Sahu, J.

Judgment on Board**By****Prashant Kumar Mishra, Ag. CJ****29/04/2019**

1. Defendant has moved before this Court challenging the judgment and decree passed by the trail Court allowing the plaintiff's prayer for refund of advance amount of Rs.10.00 lacs.
2. Admittedly, parties entered into an agreement on 8-9-2014 wherein the defendant Prakash Chandra Soni agreed to sale his house bearing khasra No.414/22, sheet No.10/06, plot No.32/02, area 384 sq.ft. situated at PH No.22/34, RI Circle Bilaspur,

Thasil & District Bilaspur for a consideration of Rs.20.00 lacs.

The defendant accepted advance amount of Rs.7.00 lacs on the date of agreement (Ex.P/1). The agreement did not recite any forfeiture clause, on the contrary the agreement contains a clause for refund of advance amount in the event the registration of sale deed does not materialise within the stipulated time.

3. For some reason or the other the registered sale deed could not be executed. Both the parties are making allegations against each other as to the reason for which the registered sale deed could not be executed, however, the present suit being only for recovery of the advance amount, we are not entering into the said aspect of the matter particularly in view of the law laid down by the Supreme Court in **Satish Batra v Sudhir Rawal**¹.
4. According to the plaintiff, he paid an amount of Rs.7.00 lacs on the date of agreement and thereafter, a sum of Rs.3.00 lacs on 23-12-2014 through Roop Kumar Soni, brother of the defendant. Thus, the plaintiff claims to have paid the total advance amount of Rs.10.00 lacs to the defendant.
5. Based on the evidence adduced by the parties including the oral testimony of PW-1 Shiv Balak Ram Sahu, PW-2 Roop Kumar Soni, DW-1 Prakash Chandra Soni, the trial Court has reached to the conclusion that the plaintiff paid Rs.10.00 lacs to the

¹ (2013) 1 SCC 345

defendant, which he is entitled to recover along with interest at the rate of 6% per annum.

6. Assailing the impugned decree, the learned counsel appearing for the appellant/defendant, would submit that the suit simplicitor for refund of advance amount is not maintainable in view of the language employed in Section 22 of the Specific Relief Act, 1963 (for short 'the Act, 1963'). Learned counsel would further submit that even if the plaintiff is entitled to recover the amount, the defendant having received only Rs.7.00 lacs, the trial Court could have decreed the suit only to this extent and not for the entire sum of Rs.10.00 lacs. Challenge is also made to the award of interest by the trial Court on submission that in a suit for refund of advance amount ordinarily interest is not awarded.
7. Learned counsel appearing for the respondent/plaintiff, *per contra*, would submit that the suit was maintainable and the plaintiff having paid Rs.10.00 lacs to the defendant the trial Court has rightly passed the decree along with interest at the rate of 6% per annum.
8. Section 22 of the Act, 1963, relied by the learned counsel for the appellant, is reproduced hereunder for ready reference :

**22. Power to grant relief for possession,
partition, refund of earnest money, etc.—(1)**
Notwithstanding anything to the contrary

contained in the Code of Civil Procedure, 1908 (5 of 1908), any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for—

(a) possession, or partition and separate possession, of the property, in addition to such performance; or

(b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or [made by] him, in case his claim for specific performance is refused.

(2) No relief under clause (a) or clause (b) of sub-section (1) shall be granted by the court unless it has been specifically claimed:

Provided that where the plaintiff has not claimed any such relief 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 relief.

(3) The power of the court to grant relief under clause (b) of sub-section (1) shall be without prejudice to its powers to award compensation under section 21.

9. The language contained in Section 22 enables the Court to grant relief for possession, partition and refund of earnest money, in a suit for specific performance of contract for the transfer of immovable property. The provision nowhere indicates that unless the suit itself is for specific performance such relief cannot be granted by the trial Court. The only rider provided in the Section is that relief for possession or partition of the property or any other relief to which the plaintiff is entitled including refund of earnest money shall not be allowed by the

Court unless it has been specifically claimed. Thus, claiming the relief in specific terms is only requisite for the Court to act upon the prayer made by the plaintiff. The converse is not true that unless the suit is for specific performance such relief cannot be allowed.

10. The issue may also be considered with reference to the provision contained in Section 34 of the Act, 1963 which speaks about discretion of Court as to declaration of status or right.

The same is quoted below :

34. Discretion of court as to declaration of status or right.—Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation.—A trustee of property is a “person interested to deny” a title adverse to the title of some one who is not in existence, and whom, if in existence, he would be a trustee.

11. Under the proviso to Section 34 of the Act, 1963 Court shall not grant any relief for declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. The present suit not being a suit for declaration only, but is a

suit claiming entitlement to seek refund, the proviso to Section 34 would not apply. This is the only provision which bars a suit simplicitor for declaration under the provisions of the Act, 1963. Bar of filing of a particular kind of suit or the bar of civil Court for trial of any suit is not to be readily inferred unless the statute specifically provides for, therefore, there being no specific provision creating a bar for trial of the suit for refund of the advance amount, we are not inclined to accept the submission made by the learned counsel for the appellant.

12. In **Satish Batra** (supra) the Supreme Court has held in para 15 that to justify the forfeiture of advance money being part of 'earnest money' the terms of the contract should be clear and explicit and that part payment of purchase price cannot be forfeited unless it is a guarantee for the due performance of the contract. In other words, if the payment is made only towards part payment of consideration and not intended as earnest money then the forfeiture clause will not apply. In the case at hand, the agreement does not contain any forfeiture clause, on the contrary, it contains a clause that in the event sale deed is not executed the advance amount shall be refunded to the purchaser. Thus, the defendant was liable to refund the amount even as per the agreement.

13. We are now left with the last submission of learned counsel for the appellant that the trial Court has wrongly allowed the decree to the entire amount of Rs.10.00 lacs and wrongly awarded the interest at the rate of 6% per annum.
14. Upon reading of the evidence adduced by the parties, it appears while the defendant accepted Rs.07.00 lacs on the date of agreement, nothing prevented the plaintiff to have paid whopping amount of Rs.3.00 lacs personally to the defendant. If the plaintiff was really interested in making payment of amount to Prakash Chandra Soni he could have paid it to the plaintiff himself rather than paying it to his brother Roop Kumar Soni.
15. Bare reading of the statement of PW-2 Roop Kumar Soni to whom the amount of Rs.3.00 lacs was allegedly paid by the plaintiff, would compel us to infer that the said witness who is real brother of the defendant was, in fact, closer to plaintiff than his own brother Prakash Chandra Soni, he having already sold his share of adjoining property to the plaintiff and was, therefore, persuading his brother to sell the remaining part of the house to the plaintiff. He candidly admits that it was he who persuaded his brother to sale the house to the plaintiff. Thus, he was taking keen interest in the transaction, therefore, his appearance as a witness for the plaintiff does not improve the plaintiff's case nor lends credence to his assertion that he has

paid Rs.3.00 lacs to the defendant through his brother Roop Kumar Soni on 23-12-2014.

16. Since the defendant would admit receipt of Rs.7.00 lacs on the date of agreement, we are inclined to hold that it is this amount only, which the defendant has received at the time of agreement and not the additional amount of Rs.3.00 lacs.
17. In the facts and circumstances of the case award of interest does not appear to be just and proper, therefore, this part of the decree also deserves to be set aside.
18. For the foregoing, the first appeal is allowed in part. While setting aside the judgment and decree, it is directed that the appellant/defendant shall refund a sum of Rs.7.00 lacs to the plaintiff within a period of three months from today, failing which the amount shall carry interest at the rate of 6% per annum.

Sd/-
(Prashant Kumar Mishra)
Acting Chief Justice

Sd/-
(Parth Prateem Sahu)
Judge

Gowri