

RSA-895-1988 (O&M)

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**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**RSA-895-1988 (O&M) AND
XOBJC-2-C-1989 (O&M)
Date of decision : 06.02.2019**

Mamu (deceased) through LR's and another

... Appellants

Versus

Rameshwar Dass (deceased) through LR's and another

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Arun Jain, Senior Advocate with
Mr. Rajinder Goyal, Advocate
for the appellants.

None for the respondents.

AMIT RAWAL, J. (ORAL)

The present regular second appeal is directed against the concurrent findings of fact, whereby the suit of the appellants-plaintiffs, instead of granting discretionary relief, has been confined to alternative relief of refund of ₹ 15,000/- by the trial Court and affirmed in appeal.

The appellants-plaintiffs sought the specific performance of agreement to sell dated 02.02.1977, in respect of suit land with alternative prayer of recovery of ₹15,000/-. It was alleged that there was a some litigation in Civil Suit No.74 of 1970, filed by the defendants against the plaintiffs for declaration and joint possession, including the land measuring 152 kanals 13 marals. In the aforesaid suit, the parties arrived at a compromise and the suit was decreed and the second suit titled as "Jai Devi

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V/s Mam Chand etc." filed by the plaintiffs, was dismissed as withdrawn.

The defendants, as per the aforementioned compromise, were to be give, 16 kanals of land and in this process, entered into agreement to sell, in question. Since there was a dispute with regard to mutation and time was also not the essence of the agreement and it was stated that as and when mutation would be effected, the sale deed would be executed within a period of one year. The mutation was effected on 13.01.1977. However, the defendants, according to the averments in the plaint, did not come forward, resultantly, the suit was filed on 16.07.1977.

Since the parties were at variance, the trial Court framed the following issues:-

- 1. Whether a compromise was arrived at whereby the defendants were to give 16 kanals of the land to the plaintiff out of the land involved in suit No.70/74 "Jai Devi V/s Mam Chand etc." according to their choice? OPP*
- 2. If issue No.1 is proved whether it was further agreed that in case of default by the defendant, they would be liable to pay ₹15,000/- to the plaintiffs ? OPP*
- 3. Whether the plaintiffs have no locus standi to file the present suit? OPD*
- 4. Whether the suit is not maintainable against the answering defendants? OPD*
- 5. Whether the suit is barred by limitation? ODP*
- 6. Whether the suit does not lie in the present form? OPD*
- 7. Whether the suit is bad for non-joinder and mis-joinder of necessary parties? OPD*
- 8. Whether any notice of the suit was given by the plaintiff to the answering defendant, if so to what effect? OPD*
- 9. Whether the suit is pre-mature? OPD*
- 10. Whether the agreement dated 2.2.1972 is void, vague,*

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illegal and unlawful, if so to what effect ? OPD

11. Relief.

In order to prove the case, the plaintiff examined himself as PW4, R.K. Bindlish, Gian Parkash Sharma, Handwriting and Finger Print Expert as PW1, Deed Writer as PW2, Y.K. Mangal, Advocate as PW3 and tendered in evidence many documents. On the other hand, the defendants examined Naranjan Lal as DW1. Though the defendants denied the agreement to sell, but did not lead any evidence to belie its contents, correctness or intention.

On the preponderance of evidence, the trial Court found that the agreement to sell was proved and it was not vague, but confined the decree to alternative relief of ₹15,000/-, so did the lower Appellate Court.

Mr. Arun Jain, learned Senior Counsel assisted by Mr. Rajinder Goyal, learned counsel appearing on behalf of the appellants-plaintiffs submitted that both the Courts below have committed illegality and perversity in not interpreting the provisions of Section 23 of the Specific Relief Act, 1963 (in short 'the 1963 Act') in correct perspective. Every agreement to sell contains the clause of liquidated damages. It is not necessary that once the agreement to sell has been proved, the Court could confine to the liquid damages. The judgment on this point i.e. "Dadarao V/s Ramrao" (1999) 8 SCC 416, remained no longer good law owing to the decision rendered in "P.D'Souza V/s Shondrilo Naidu" 2004 (3) RCR (Civil) 668, 2004 (6) SCC 649, wherein, *ratio decidendi* culled out in "Dadarao's case" (supra) has to be *per incuriam*. There is inherent relief of specific performance, even if, it contains the clause of liquid damages. The attention of this Court was also drawn to the categoric findings of the lower

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Appellate Court, whereby the argument of the defendants regarding non-proving of agreement, was repelled, thus, urges this Court for setting aside the concurrent findings, under challenge by decreeing the suit *in toto*.

The respondents-defendants before the trial Court were Rameshwar Dass and Ram Parshad, but during the pendency of the appeal, both have died and an application for impleading his LRs was filed, which was allowed. The LRs were also represented by the lawyer. As per office report dated 23.04.2018, 18.05.2018 and 06.02.2019, the LRs of respondent Nos.1 and 2, almost have been served. It is a settled law that once the estate of deceased is being represented by one of the LRs, there is no need to serve all the LRs in view of law laid down by the Division Bench of this Court in ***Sardara Singh and another v/s Harbhajan Singh and others, AIR 1974 345 (Punjab)***. There is no representation on behalf of the LRs of the respondent Nos.1 & 2, despite service. The appeal is of the year 1988, accordingly, I proceed to decide the appeal on merits.

As per the averments in the cross-objections, it has been alleged that the compromise was without consideration, vague and void. The agreement (Ex.P1) cannot be called an agreement for sale of immovable property as it was alleged to have arrived at, during the pendency of the suit.

I have heard learned counsel for the appellants-plaintiffs, appraised the paper book as well as the records of the Courts below and of the view that the following 'Substantial Questions of Law' arise for determination:-

- 1. Whether the appellants-plaintiffs can be denied discretionary relief under Section 23 of the 1963 Act, if the agreement to sell contains the clause of liquidated damages?.*

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2. Whether mere provision of damage or a compensation in agreement to sell would be a ground to refuse the specific performance?

Both the Courts below have vehemently held that the agreement to sell bore the signatures of the defendants, which has been proved through the testimony of Handwriting Expert and the attesting witnesses.

It is also a matter of record that the mutation was effected on 13.01.1977 and the plaintiffs, in order to reflect the readiness and willingness, instituted the suit dated 16.07.1977. It is not comprehensible under what circumstances, the Courts below confined the decree to the refund of ₹15,000/-, instead of granting discretionary relief.

It would be apt to extract the relevant para Nos.27 to 31 of the judgment rendered in **P. D'Souza's case** (supra), which read as under:-

"27. In Dadarao (supra) whereupon Mr. Bhat placed strong reliance, the binding decision of M.L. Devender Singh (supra) 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.

28. Furthermore, the relevant term stipulated in Dadarao (supra) was as under:

"Tukaram Devsarkar, aged about 65, agriculturist, r/o Devsar, purchaser (CHENAR) - Balwantrao Ganpatrao Pande, aged 76 years, r/o Duadi 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:

"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.

Apart from the fact that agreement of sale did not contain a similar clause, Dadarao (supra) 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 and Others](#), [2004] 1 SCC 347 para 26).

The second contention of Mr. Bhat therefore, cannot also be accepted.

29. The third contention of the learned counsel to the effect that this Court should not exercise its discretionary jurisdiction in view of hardship which would be faced by the defendant is stated to be rejected. Such a plea was not raised before the High Court.

30. It is not a case where the defendant did not foresee the hardship. It is furthermore not a case that non-performance of the agreement would not cause any hardship to the plaintiff. The defendant was a landlord of the plaintiff. He had accepted part payments from the plaintiff from time to time without any demur whatsoever. He redeemed the mortgage only upon receipt of requisite payment from the plaintiff. Even in August, 1981, i.e. just two months prior to the institution of suit, he had accepted ₹20,000 from the Plaintiff. It is, therefore, too late for the Appellant now to suggest that having regard to the escalation in price, the Respondent should be denied the benefit of the decree passed in his favour. Explanation 1 appended to [Section 20](#) clearly stipulates that merely inadequacy of

consideration or the mere fact that the contract is onerous to the defendant or improvident in its nature would not constitute an unfair advantage within the meaning of sub-section (2) of [Section 20](#).

The decision of this Court in Nirmala Anand (supra) may be considered in the aforementioned context.

31. Raju, J. in the fact and circumstance of the matter obtaining therein held that it would not only be unreasonable but too inequitable for courts to make the appellant the sole beneficiary of the escalation of real estate prices and the enhanced value of the flat in question preserved all along by the respondents No. 1 and 2 by keeping alive the issues pending with the authorities of the Government and the municipal body.

It was in the facts and circumstances of the case held :

"23... Specific performance being an equitable relief, balance of equities have also to be struck taking into account all these relevant aspects of the matter, including the lapses which occurred and parties respectively responsible therefor. Before decreeing specific performance, it is obligatory for courts to consider whether by doing so any unfair advantage would result for the plaintiff over the defendant, the extent of hardship that may be caused to the defendant and if it would render such enforcement inequitable, besides taking into (sic consideration) the totality of circumstances of each case...."

The Court for arriving at the said finding gave opportunities to the parties to settle the matter and the respondents No. 1 and 2 were prepared to pay upto ₹60 lakhs as against the demand of the appellant to the tune of rupees one and a half crores which was subsequently reduced upto ₹120 lakhs. In view of the respective stand taken by the parties, the Court inter alia directed the respondents No. 1 and 2 to pay a sum of ₹40 lakhs in addition to the sum already paid by them.

Bhan, J. however, while expressing his dissention in part observed:

"38. It is well-settled that in case of contract for sale of immovable property the grant of relief of specific performance is a rule and its refusal an exception based on valid and cogent grounds. Further, the defendant cannot take advantage of his own wrong and then plead that decree for specific performance would be an unfair advantage to the plaintiff.

40. Escalation of price during the period may be a relevant consideration under certain circumstances for either refusing to grant the decree of specific performance or for decreeing the specific performance with a direction to the plaintiff to pay an additional amount to the defendant and compensate him. It would depend on the facts and circumstances of each case."

The learned Judge further observed that delay in performance of the contract due to pendency of proceedings in court cannot by itself be a ground to refuse relief of specific performance in absence of any compelling circumstances to take a contrary view. However, the learned judge noticed the events which occurred subsequent to the passing of the decree and held:

"45. The appellant has always been ready and willing to perform her part of the contract at all stages. She has not taken any advantage. of other own wrong. The appellant is in no way responsible for the delay at any stage of the proceeding. It is the respondents who have always been and are trying to wriggle out of the contract. The respondents cannot take advantage of their own wrong and then plead that the grant of decree of specific performance would amount to an unfair advantage to the appellant.

46. Requiring the appellant to pay further sum of ₹40 lakhs would/may amount to frustrating the agreement

itself as the appellant may not be in a position to pay the sum of ₹40 lakhs. Respective counsel for the parties had quoted the figure of a particular sum which could be paid to the appellant in lieu of avoiding the decree of specific performance. The appellant had not made an offer to pay any additional sum over and above the quoted price to sell by way of compensation. It does not indicate the financial position of the appellant to pay the additional sum of ₹40 lakhs. With due respect, in my view, it would be unfair to grant the decree of specific performance by one hand and take it back by the other.

47. For the reasons stated above, I am of the view that the appellant is entitled to the specific performance of agreement to sell the flat No. 71 on the 7th floor of Divya Prabha Building on the price mentioned in the agreement to sell which would be subject to the terms (iii), (iv), (v) and (vi) of the last paragraph of the judgment of my learned Brother. There would be no order as to costs.

The said decision cannot be said to constitute a binding precedent to the effect that in all cases where there had been an escalation of prices the court should either refuse to pass a decree on specific performance of contract or direct the plaintiff to pay a higher sum. No law in absolute terms to that effect has been laid down by this Court nor is discernible from the aforementioned decision.

For the reasons aforementioned, we do not find any merit in this appeal which is accordingly dismissed" However, in the facts and circumstances of the case, there shall be no order as to the costs."

There is no substance in the cross-objections as the defendants miserably failed to place on record any material to belie the agreement to sell or contents of the compromise.

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As an upshot of my findings, judgment and decree of the Courts below are modified and confined to the specific performance of agreement. The suit is decreed in toto. The decree sheet is ordered to be prepared. The respondents-defendants are directed to execute the sale deed within a period of two months, failing which, the plaintiffs shall be at liberty to seek the execution of the judgment, in accordance with law. The substantial questions of law, as framed above, are answered in favour of the appellants-plaintiffs and against the respondents-defendants.

Resultantly, the present second appeal is allowed and the cross-objections are dismissed.

06.02.2019
Yogesh Sharma

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned **Yes/ No**

Whether Reportable **Yes/ No**