

271 **22.04.
2024**

**FAT 268 of 2023
IA No. CAN 2 of 2023**

Ct. No. 04

Ab

**Sri Debendra Narayan Mondal alias Manik Mondal
Vs.
Kalpana Mondal and others.**

**Mrs. Shohini Chakraborty,
Mr. Arijit Sarkar.**

... for the appellant.

Mr. Sagnik Chatterjee.

... for the respondent no.2.

Though the application is listed today, but by consent of the appearing parties, the main appeal is taken up together.

We are conscious that the substituted respondent no. 1(a) has not appeared nor a notice of appeal has been directed to be served upon her, yet we decided to dispose of the appeal in presence of the respondent no. 2 at whose behest an application under Order XIV Rule 2 of the Code of Civil Procedure was filed before the Trial Court, which was eventually allowed. The parties are not in variance that neither the respondent no. 1(a) nor the heirs appeared before the Trial Court to contest the said proceeding.

A suit for specific performance of an agreement for sale was filed by the plaintiff/appellant together with a further relief of refund of earnest money in the event the Court declined to pass a decree for specific performance. The respondent no. 2 took a plea that the suit of such nature is not maintainable in view express embargo created in the parent document in respect of a transfer, alienation, letting out or parting with possession of the said suit premises and, therefore, an agreement to alienate, transfer and sale the said property is in direct conflict with the aforesaid embargo. On the basis of the

stand, the Court framed a preliminary issue and decided the same against the plaintiff/appellant.

As indicated above, the plaint would reveal twin relief claimed therein; one in respect of a specific performance of an agreement for sale and the other for refund of the earnest money together with interest. The Court cannot segregate the relief claimed in the plaint of its own and proceed to decide the preliminary issue as if the only issue involved in the suit relates to specific performance of an agreement for sale. Even if the Court declines to pass a decree for specific performance yet it is not denuded of any power to refund the earnest money provided there is no specific clause in the agreement in this regard.

We do not find any fetter in law in claiming the relief in alternative form as an abandon caution. The refund of the earnest money depends upon the nature of the contract and the terms and conditions agreed upon by the parties thereto, which are essentially to be decided after full-fledged trial. The embargo of alienation, transfer and sale of the property cannot be a sole criteria for denying the refund of the earnest money as the wrongdoer shall not be permitted to receive the blessings of the Court and get away with the onerous responsibility under the contract to refund the earnest money so received.

We, thus, cannot countenance to the view expressed by the Trial Court that the suit is otherwise barred because of an express embargo created in the parent deed executed in favour of the vendor, but should have proceeded to decide the suit on the alternative relief so claimed in the said plaint. Thus, the order impugned cannot be sustained and the same is hereby set aside.

The Trial Court is directed to proceed with the suit and we expect that the suit would be brought to its logical conclusion at an earliest preferably within six months from the date of communication of this order.

With these observations, the appeal and the connected applications being CAN 1 of 2023 and CAN 2 of 2023 are disposed of.

There shall, however, be no order as to costs.

(Harish Tandon, J.)

(Madhuresh Prasad, J.)