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KAMAL KANT JAIN

v.

SURINDER SINGH (D) THR. LRS.

(Civil Appeal No. 17321 of 2017)

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OCTOBER 27, 2017

[R. F. NARIMAN AND SANJAY KISHAN KAUL, JJ.]

Specific Relief Act, 1963 – s.23 – Liquidation of damages not a bar to specific performance – Respondent authorised one 'H' to sell the property in question by way of an authorisation letter – Accordingly, agreement to sell entered into between the appellant-buyer and respondent-seller, in terms whereof earnest money was paid by appellant – Refusal by respondent to perform his part of the agreement – Suit for specific performance filed by appellant, dismissed by Trial court – Appeal filed by appellant was dismissed

C – *Second appeal filed by appellant, dismissed by before High Court holding that s.23 barred the specific performance in the facts of the case – On appeal, held: Mere naming of a certain amount which may sound in damages is not good by itself to non-suit a person seeking specific performance unless it is clear that the said sum was named in lieu of specific performance – In the instant case, refund of earnest money with an equal amount as penalty was only to secure the performance of the contract and cannot be stated to be a sum in lieu of specific performance of the contract – Mere omission of a statement in the agreement to sell that specific performance ought to be allowed would be of no consequence –*

D – *Impugned judgment is set aside – Specific performance of the agreement to sell is ordered – Vacant possession of the property in question to be handed over to the appellant as soon as Rs.10 crores is paid by the appellant to the respondent – Specific Relief Act, 1877 – s.20.*

G **Allowing the appeal, the Court**

HELD: 1.1 The legislature, in the new Section 23, Specific Relief Act, 1963 explicitly provided that the mere naming of a certain amount which may sound in damages is not good enough by itself to non-suit a person seeking specific performance unless

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it is clear on the facts that the said sum was named in lieu of A
specific performance. This is normally explicitly spelled out in
the agreement itself. [Para 9] [1133-B]

1.2 Further, paragraph 6 of the agreement to sell referred B
to paragraph 6 of the authorisation letter and made it clear that
the refund of the amount of earnest money with an equal amount
as penalty was only to secure the performance of the contract
and cannot be stated to be a sum in lieu of specific performance.
The mere omission of a statement in the agreement to sell that C
specific performance ought to be allowed would, therefore, be of
no consequence. It is clear that in both para 6 of the authorisation
letter (which explicitly referred to specific performance) and para
6 of the agreement to sell (which omitted reference to specific
performance) earnest money with equal amount as penalty/
damages remained the same, making it clear that there was no
change in the position that this amount was only to secure D
performance of the contract, and is not in lieu of specific
performance. [Para 15] [1140-B-D]

Dadarao and Anr. v. Ramrao & Ors. (1999) 8 SCC 416
: [1999] 4 Suppl. SCR 356 – distinguished.

Man Kaur (Dead) by Lrs. v. Hartar Singh Sangha E
(2010) 10 SCC 512; [2010] 12 SCR 515; *M.L. Devender Singh and Others v. Syed Khaja* (1973) 2
SCC 515 : [1974] 1 SCR 312 – relied on.

P. D'Souza v. Shondrilo Naidu (2004) 6 SCC 649;
[2004] 3 Suppl. SCR 186; *P. S. Ranakrishna Reddy v. M. K. Bhagyalakshmi and Anr.* (2007) 10 SCC 231; F
[2007] 2 SCR 876 – referred to.

Case Law Reference

[1999] 4 Suppl. SCR 356	distinguished	Para 4
[1974] 1 SCR 312	relied on	Para 10
[2004] 3 Suppl. SCR 186	referred to	Para 12
[2007] 2 SCR 876	referred to	Para 12
[2010] 12 SCR 515	relied on	Para 14

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A CIVIL APPELLATE JURISDICTION : Civil Appeal No.17321 of 2017.

From the final Judgment and Order dated 29.04.2008 passed by the High Court of Punjab and Haryana at Chandigarh in RSA No.1178 of 1996.

B V.K. Jhanjhi, Sr. Adv., Ms. Jyoti Mendiratta, Aastik, Advs. for the Appellant.

Jayant Kumar Mehta, Shaurya Kuthiala, Sunil Fernandes, Nisheeth Bhatt, Ms. Astha Sharma, Advs. for the Respondents.

C The Judgment of the Court was delivered by

R. F. NARIMAN, J. 1. Leave granted.

2. The facts of the present case show that there was an authorisation letter dated 08.03.1978 of the respondent to a certain power of attorney holder namely, Harnam Singh, to sell the property in question.

D Paragraph 6 of this authorisation letter reads as follows:

E “Purchaser should be warned that his earnest money will stand as forfeited in my favour if he does not come forth to pay the balance amount to have the sale deed registered, inspite of my part being complete. Of course if I do not come forth before (sub) registrar to have balance amount and to have sale deed registered, the purchaser will have the right to have his earnest money back with equal amount as damages or to have sale deed registered under specific performance and relief act in his own, or his nominee’s name.”

F 3. On 05.06.1978, in pursuance of this authorisation letter, an agreement to sell the said property was arrived at in a sum of Rs. 3,25,000/- out of which earnest money of Rs. 32,500/- was deposited along with the agreement. The agreement to sell also contained para 6, in which it was stated as under:

G “Should the bargain fail to materialize action will be taken in accordance with 6 or the seller’s sale order dated 08.03.1978, i.e. :-

H (a) should the purchaser fail to come forth for payment of balance amount and registration of the sale deed, inspite of the seller’s part being complete, the earnest money will stand as

forfeited in favour of the seller who would be at liberty to retain the house or to sell it to any body else he likes; A

(b) should the seller back out from the deal, he will have to refund the earnest money with an equal amount as penalty for non fulfilment of the contract in accordance with para 6 of the sale order." B

4. Some correspondence ensued between the parties, after which it was clear to the appellant that the respondent was going to resile from the agreement. Therefore, by a notice dated 11.01.1979, the appellant called upon the respondent to specifically perform the aforesaid agreement to sell. In February 1979, the respondent refused to do so, as a result of which the appellant filed a suit for specific performance dated 13.06.1979. The Trial Court framed three issues and found that the agreement to sell stood proved and that the appellant was ready and willing to perform his part of the agreement. However, on a construction of Section 23 of Specific Relief Act, 1963 in the facts of the case namely, that since paragraph 6 of the authorisation letter specifically contained the words "or to have sale deed registered under specific performance" and the said words being absent in paragraph 6 of the agreement to sell dated 05.06.1978, it would be clear that this omission would indicate that specific performance could not, therefore, be granted. The First Appellate Court arrived at the same result on all counts and, therefore, dismissed the appeal. The High Court in second appeal also arrived at the same conclusion, and relied upon a judgment in Dadarao and Anr. Vs. Ramrao & Ors. 1999 (8) SCC 416; and following the aforesaid judgment, therefore, held that Section 23 of Specific Relief Act would bar specific performance in the facts of the present case. C D E F

5. The appellant has argued before us that Dadarao's case (supra) is itself not to be considered as a precedent in the light of subsequent judgments of this Court. He further went on to state that except for misconstruing Section 23 of the Specific relief Act, all findings were otherwise in his favour, namely that the agreement had been proved and that he was ready and willing to perform his part of the agreement. He, therefore, asked us to apply the later judgments of this Court, which on a proper construction of Section 23 state that if there is any omission to mention that specific performance of contract can be obtained, such omission would not be taken to mean that a suit for specific performance cannot be filed, provided a sum was not named in the contract as damages G H

A in lieu of specific performance. He, therefore, asked us to reverse the findings of the courts below inasmuch as all findings of fact which are in his favour ought to be affirmed and the finding of law reversed.

6. Mr. Sunil Fernandese, learned counsel appearing for the respondent, on the other hand, stated that the concurrent findings in this case ought not to be disturbed at this length of time. He also stated that only 10% of the sum had been paid and, therefore, on balance, specific performance should not be decreed in favour of the appellant. According to him, the justice of the case demands that, at this point of time, we should not exercise our jurisdiction under Article 136 of the Constitution of India in favour of the appellant. He has referred in detail to the reasoning of the Trial Court and the first Appellate Court and asked us to adopt the same.

7. Having heard learned counsel for the parties, we are of the view that there has been a travesty of justice in the facts of this case as has been pointed out by learned senior counsel appearing for the appellant. D All factual findings are in favour of the appellant. We might only add that this being the case, it is clear that the respondent in refusing to perform his part of the contract did so wrongfully.

8. We may now examine whether the courts below were correct in their reading of paragraph 6 of the agreement to sell and Section 23 of the Specific Relief Act, which reads as under:

“23. Liquidation of damages not a bar to specific performance.-

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

This section was the subject matter of some debate, as Section 20 of the earlier Specific Relief Act, 1877 was in somewhat different terms, H and read as follows: