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HIGH COURT OF CHHATTISGARH AT BILASPUR

Single Bench: Hon'ble Shri Justice Prashant Kumar Mishra

First Appeal No.67 of 2007

Vikas Kelkar

versus

M. Murthy and another

JUDGMENT

Post for 16 -12-2010

Sd/-P.K.Mishra

7 -12-2010

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HIGH COURT OF CHHATTISGARH AT BILASPUR

Single Bench: Hon'ble Shri Justice Prashant Kumar Mishra

First Appeal No.67 of 2007

<u>Appellant</u>

Vikas Kelkar

versus

Respondents

M. Murthy and another

Present:

Shri Raja Sharma, counsel for the appellant. Shri R.S.Baghel, counsel for respondent No.1. No one appears for respondent No.2 though served.

First Appeal under Section 96 of the Code of Civil Procedure, 1908

JUDGMENT

(Delivered on 16th December, 2010)

This first appeal under Section 96 of the Code of Civil Procedure, 1908 (henceforth 'the Code') has been preferred by defendant Vikas Kelkar against whom a decree for specific performance of agreement dated 10-6-1998 has been passed by the trial Court, together with damages at the rate of Rs.2,500/- per month from the date of decree till the date of delivery of possession.

2. Plaintiff's case, in short, is that the original defendant Digamber Kelkar, being in need of, sought financial assistance from the plaintiff and on denial, he, along with Milind Kelkar, agreed to sell his house bearing No.9/106 situated at Budhapara, Raipur for Rs.3 Lakhs and executed agreement to the said effect on 10-6-1998. The entire amount was received by the original defendant on the date of agreement and he handed over all the original documents to the

plaintiff. It was also agreed by the original defendant that the sale-deed shall be executed by 9th of June, 2000 and shall also pay Rs.7,500/- per month to the plaintiff as damages from the date of agreement for remaining in occupation of the house. According to the plaintiff, the original defendant issued 6 post dated cheques of Rs.7,500/- each to the plaintiff, however, the cheques were dishonoured. The plaintiff published a notice in the newspaper regarding the agreement on 10-5-1999 and legal notices were sent on 7-4-2000 and 31-10-2000, which were not replied. Instead, the original defendant filed a civil suit for declaring the agreement dated 10-6-1998 as cancelled

- 3. Case of the defendants is that the original defendant had never executed the agreement and the cheques were issued regarding business of Sewing Machine. It was also stated that the suit is barred by limitation and is not properly valued. According to the defendants, the plaintiff is in the habit of instituting false cases against several persons by taking support of forged documents.
- 4. On the basis of evidence on record, the trial Court found that the original defendant Digamber Kelkar had executed the said agreement and received Rs.3 Lakhs, however, on issues No.4 and 5, the trial Court recorded the findings that the clause regarding payment of damages at the rate of Rs.7,500/- per month from the date of agreement and issuance of 6 cheques are not proved. The trial Court decreed the suit after finding that the plaintiff was always ready and willing to perform his part of the contract.

- It is not in dispute that the original defendant Digamber Kelkar 5. had instituted a suit for declaring the subject agreement as cancelled, as would be reflected in paragraph 6 of the plaint, which has been admitted in paragraph 11 of the written statement. appears that the said suit bearing Civil Suit No.6-B/2002 abated after death of the original defendant Digamber Kelkar and the present defendants moved an application under Order 22 Rule 9 of the Code for setting aside abatement. The said application was registered as M.J.C. No.10/03, which was withdrawn by the present defendants along with other legal heirs of the original defendant Digamber Kelkar on 12-11-2007. Respondent No.1/plaintiff has moved an application under Order 41 Rule 27 of the Code to place additional evidence on record by producing certified copy of order dated 12-11-2007 withdrawing M.J.C. No.10/03 in the Court of 9th Additional District Judge (F.T.C.), Durg. The defendants have not filed any reply to the said application filed by respondent No.1/plaintiff. Even otherwise, the document is certified copy of the order-sheet of the M.J.C. Court and its authenticity is not in doubt. The said additional evidence is taken on record.
- 6. Shri Raja Sharma, learned counsel appearing for the appellant/defendant has argued that on perusal of the agreement dated 10-6-1998 Ex.P-1, it would clearly appear that the said agreement was, in fact, security for loan of Rs.3 Lakhs, which is also indicated from the framing of the suit, as, on a reading of the plaint averments, it would appear that in essence, it is a suit for recovery of loan rather than specific performance of contract. Learned counsel

would also submit that in view of the provisions contained in Section 23 of the Specific Relief Act, 1963 (henceforth 'the Act'), the present suit for specific performance cannot be granted. It is also put-forth by him that the document was forged and could not be acted upon.

- 7. Per contra, Shri R.S.Baghel, learned counsel appearing for respondent No.1/plaintiff would support the findings recorded by the trial Court and would submit that there is absolutely no plea regarding doctrine of election as contained in Section 23 of the Act and that clause 8 of the agreement Ex.P-1 provides for a penalty in case of failure to perform he contract and is not a case of liquidated damages.
- 8. After appreciating the entire evidence, the trial Court has found the execution of agreement to be proved, however, on the basis of use of whitener and interpolation in clause 7 of the agreement Ex.P-1, the said clause regarding payment of Rs.7,500/-by the original defendant to the plaintiff from the date of agreement in lieu of their continuing to occupy the premises has not been found to be proved. Further, on the basis of newspaper publication and legal notices sent by the plaintiff to the original defendant, it is found that the plaintiff was ready and willing to perform the contract.
- 9. To appreciate and adjudicate the argument of learned counsel for the appellant/defendant by taking shelter of provision contained in Section 23 of the Act, it would be profitable to refer and reproduce clauses 7 and 8 of the agreement Ex.P-1, which read thus:

- "7. यह कि पार्टी नं. 2 उक्त भवन को उपयोग कर रहा है अतः वह पार्टी नं. 1 को क्षतिपूर्ति के तौर पर रिजस्ट्री व वापस कब्जा देने के दिनांक तक 7,500/— रूपये माहवार क्षति देगा ।
- 8. यह कि किन्हीं अपरिहार्य कारणों या वैधानिक अड़चनों के कारण यदि पार्टी नं. 2 पार्टी नं. 1 के पक्ष में रिजस्ट्री कराने में असमर्थ रहा तो पार्टी नं. 2 पार्टी नं. 1 के संपूर्ण रकम मय 7,500/— रूपये मासिक क्षितिपूर्ति के साथ वापस करेगा तथा जब तक संपूर्ण रकम अदा नहीं हो जावेगी तब तक उक्त संपत्ति का किसी भी प्रकार अंतरण, बंधक, विकय, विकय का करार अथवा संपत्ति को किराये पर देने अथवा लाम के कामों में उठाने से पार्टी नं. 2 प्रतिबंधित रहेगा । यदि ऐसा करता है तो यह संविदा का आपराधिक, भंग माना जावेगा तथा पार्टी नं. 1 उक्त संपत्ति एवं पार्टी नं. 2 के समस्त दिगर संपत्तियों से संपूर्ण रकम मय क्षतिपूर्ति प्राप्त करने का अधिकारी होगा ।"
- 10. Section 23 of the Act also needs to be referred, which reads thus:
 - **23.** Liquidation of damages not a bar to specific performance.— (1) A contract, otherwise proper to be specifically enforced, may be to 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."
- 11. Interpreting the intent and scope of the provision contained in Section 23 of the Act, the Hon'ble Supreme Court, in M.L.Devender



Singh and others vs. Syed Khaja, (1973) 2 SCC 515, has held in paragraphs 15, 16 and 17 of the report thus:

"15. We think that Section 23 of the Act of 1963 contains a comprehensive statement of the principles on which, even before the Act of 1963, the presence of a term in a contract specifying a sum of money to be paid for a breach of the contract has to be construed. Where payment is an alternative to carrying out the other terms of the contract, it would exclude, by the terms of the contract itself, specific performance of the contract to convey a property.

16. The position stated above is in conformity with the principles found stated in *Sir Edward Fry's "Treatise on the Specific Performance of Contracts"* (Sixth Edn. At p. 65). It was said there:

"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 as 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 the court to compel the performance of the other alternative of the contract."

17. Sir Edward Fry pointed out that the distinction between a strict penalty and liquidated damages for a breach of contract was important in common law where liquidated damages were considered sufficient compensation for breach of contract, but, sums stipulated by way of penalty stood on a different footing. He then said:

"But as regards the equitable remedy the distinction is, unimportant; for the fact that the sum named is the amount agreed to be paid as liquidated damages is, equally with a penalty strictly so called, ineffectual to prevent the court from enforcing the contract in specie."

- 12. In a later decision, the Hon'ble Supreme Court in P. D'Souza vs. Shondrilo Naidu, (2004) 6 SCC 649, has relied on its earlier judgment in M.L.Devender Singh and others vs. Syed Khaja (supra) and has held in paragraphs 32 and 33 of the report thus:
 - "32. A distinction between liquidated damages and penalty may be important in common law but as regards equitable remedy, the same does not play any significant role.
 - 33. In Manzoor Ahmed Magray v. Ghulam Hassan Aram, (1999) 7 SCC 703 this Court reiterated the ratio laid down in M.L. Devender Singh, (1973) 2 SCC 515. (See also A. Abdul Rashid Khan v. P.A.K.A. Shahul Hamid, (2000) 10 SCC 636.)"
- 13. In view of the law laid down by the Hon'ble Supreme Court in M.L.Devender Singh and others vs. Syed Khaja (supra) and reiterated in P. D'Souza vs. Shondrilo Naidu (supra), this Court is

now required to consider as to whether clause 8 of the present agreement is a case of liquidated damages or adequate compensation in lieu of specific performance or is a case of strict penalty for breach of contract, and whether in the given facts and circumstances of the case, the plaintiff is entitled to the equitable relief of decree for specific performance.

Clause 8 of the agreement says that if for any unavoidable 14. reason or legal impediment, the party No.2 (the original defendant) is not in a position to execute a sale-deed in favour of party No.1 (the plaintiff), he shall repay the entire amount of consideration together with monthly damages at the rate of Rs.7,500/- per month and shall be precluded from creating third party interest with regard to the agreemented property, failing which, it shall be treated to be a case of criminal breach of trust and the plaintiff shall be entitled to recover the amount from other properties of the original defendant. original defendant has raised a plea that he approached the plaintiff for obtaining a loan and the documents were prepared but the amount of loan was not in fact advanced. Plaintiff's initial case is also to the effect that the original defendant approached him for obtaining loan, however, when the plaintiff refused to advance loan, the original defendant agreed to execute the agreement to sell. Thus, prima facie, it appears to be a case of advancement of loan and, therefore, clause 8 of the agreement was couched in such a manner which spells that in the event sale-deed is not registered, the entire amount shall be refunded together with damages at the rate of Rs.7,500/- per month.

- Thus, in view of the above discussion, it appears to this Court 15. that in the given set of facts, the plaintiff was not entitled to the equitable relief of decree for specific performance as the defendants' case of a loan transaction appears highly probable in view of the plaintiff's own case that the original defendant initially approached him for obtaining loan. It is also mentioned by the learned trial Judge in paragraph 6 of the judgment that according to the defendants, the plaintiff has defrauded several persons on the basis of forged documents. From the statement of defendants' witness G.Apanna in paragraph 8 of the cross-examination, it would appear that the plaintiff had entered into loan transaction with several persons. Thus, in the facts and circumstances of the case and more particularly in view of clause 8 of the agreement, by which the plaintiff himself has agreed for refund of the amount instead of execution of the sale-deed, in the event, the same is not possible for any unavoidable reason, this Court would hold that the learned trial Court has committed an error by decreeing the suit. Since the plaintiff has also prayed for an alternative decree for refund of the amount, the instant first appeal is partly allowed and while setting aside the judgment and decree passed by the trial Court, the following decree is granted in favour of the plaintiff:
 - (1) The plaintiff shall be entitled to recover amount of Rs.3 Lakhs from the defendants jointly and severally.
 - (2) The defendants shall jointly and severally be liable to pay interest at the rate of 6% per annum to the plaintiff on the above-said amount of Rs.3 Lakhs

from the date of filing of the suit till the date of its realisation.

Parties to bear their own costs.

16. A decree be drawn up accordingly.

Sd/-P.K.Mishra Judge

Gopal