Jaswant Rai vs Abnash Kaur on 3 October, 1973

Equivalent citations: ILR1974DELHI689

JUDGMENT

Avadh Behari, J.

(1) At the conclusion of the hearing of the suit I announced the judgment. I passed a decree for Rs. 50.000.00 in favor of the plaintiff against the defendant with interest at the rate of 6% per annum from the date of suit till payment and proportionate costs. I now give my reasons.

(2) By an agreement in writing dated 2nd October, 1963, Jaswantrai plaintiff (hereinafter called the "purchaser") agreed to purchase and Smt. Abnash Kaur defendant (hereinafter called the "vendor") agreed to sell a dwelling house No. 3, Southend Road, New Delhi, for Rs. 9,35,000.00. In this agreement the vendor stated that she was the "absolute and exclusive owner" of the house which she had purchased from S. B. Basakha Singh by sale deed dated January 18, 1956. Two material terms of this agreement may here be reproduced : "12.On this assurance given by the vendor the vendee has entered into this transaction the vendor further assures the vendee that she will transfer the said (house) as its exclusive to sole owner free from all encumbrances and as regard the title of the vendor being free from all defects the vendor will satisfy the vendee before registration in all respects on the basis of the title deeds held by the vendor." "11. .....If any defect in the title of the vendor to the property hereby agreed to be sold is discovered, the vendee shall be free to repudiate the agreement and the vendor shall in that event in addition to refunding the earnest money of Rs. 90,000.00 (Rupees ninety thousand) also pay to the vendee the sum of Rs. 90,000.00 (Rupees ninety thousand) as consolidated damages etc. without any objection as to the damages actually suffered by the vendee.

The purchaser was to pay Rs. 90,000.00 as earnest money.

(3) In terms of the sale deed the purchaser paid Rs. 50.000.00 on 2nd October. 1963, to the vendor. Another sum of Rs. 40.000.00 to be paid by the purchaser by 15th October, 1963. The sale was to be completed on or before 15th April, 1964.

(4) The agreement dated 2nd October, 1963, was executed at Bombay. The vendor and her brother Ajit Singh were staying in Bombay. The purchaser authorised one Narinder Singh, a broker, to go to Bombay and enter into an agreement with the vendor on his behalf. Narinder Singh arrived at Bombay and at a meeting attended by the vendor, her brother Ajit Singh and Narinder Singh, the agreement dated 2nd October. 1963, was signed by the vendor. On behalf of the purchaser Narinder Singh put his own signatures. This agreement was witnessed by Ajit Singh and Narinder Singh himself. This document is P-12.

(5) The purchaser had scrutinised the agreement and approved of its terms at Delhi. Narinder Singh paid Rs. 50,000.00 by means of cheque obtained from the firm of the purchaser to the vendor at the time of the execution of the agreement. The agreement was thus completed.

(6) Before the date for payment of the further sum of Rs. 40,000.00 arrived the purchaser discovered that one of the vendor's step-sons, Nirmal Kumar, had instituted two suits in 1961 against the vendor. The purport of that litigation was that Nirmal Kumar challenged the ownership of the vendor and alleged that the dwelling house No. 3 Southend Road belonged to the joint Hindu family of Shiv Parshad (who, according to the vendor, had married her) and his sons and that joint family was entitled to the mesne profits of the said property. These two suits though instituted in 1961 are still pending in the court.

(7) The other discovery which was made by the purchaser was that the house No. 3, Southend Road, New Delhi, had been attached some time in 1960 by the Income-tax authorities for a demand of Rs. 23,00,000.00 or thereabout against Shiv Prashad Hindu undivided family and that the attachment subsisted. The vendor filed objections to the attachment on 21st July, 1960 (P8) and also filed her affidavit on 18th March, 1961 (P9) in support of her objections. It appears that these objections were dismissed and the attachment continued.

(8) On October 15, 1963, the counsel for the purchaser sent a notice (P2) that the purchaser was not willing to go forward with the sale as the agreement was vitiated by reason of the fraudulent representations made by the vendor. It was also stated that the agreement was void. The purchaser claimed refund of Rs. 50,000.00 interest, costs and damages from the vendor.

(9) In reply to this notice on November 5, 1963 the counsel for the vendor wrote back to the purchaser that the vendor had agreed to transfer the property free from all encumberances and defects and that if she was unable to do so she would pay Rs. 90,000.00 as damages to the purchaser. The vendor denied that any false representation was made by her and that the litigation with her sons and the attachment of the property by the income-tax authorities constituted defects in her title to the Property. A demand for the balance amount of earnest money of Rs. 40,000.00 was also made and it was said that if the purchaser does not pay Rs. 40,000.00 within 3 days the agreement will be cancelled and the earnest money of Rs. 50.000.00 already received will be forfeited.

(10) On March 23, 1964 the purchaser wrote to the vendor that he was prepared to pay the balance amount of the earnest money provided : (I)the litigation with her step sons is satisfactorily settled ; (II) the order of attachment is raised.

(11) The purchaser finally said he will cancel the agreement and claim damages against the vendor as her title was defective by reason of the two events above referred to and that she had obtained Rs. 50,000.00 by false representation and in spite of opportunity had not been able to clear her title to the property (P4).

(12) On April 3, 1964 the counsel for the vendor wrote to the purchaser that as he, the purchaser, had failed to pay the balance amount of Rs. 40,000.00 the earnest money of Rs. 50,000.00 has been forfeited. A claim of damages for Rs. l,00,000.00 was also made for breach of contract.

(13) On May 12, 1964, the purchaser instituted the present action for recovery of Rs. 1,40,000.00 against the vendor viz. refund of Rs. 50,000.00 paid as earnest money and Rs. 90.000.00 on account of damages. In the plaint the vendor's title was alleged to be defective for the following reasons: (I)That on 6th February 1961 a suit had been filed against the vendor in respect of the property agreed to be sold by Nirmal Kumar a son of Seth Shiv Prasad and others seeking a declaration that the said property together with other properties was the property of a coparcenery joint Hindu family consisting of Shri Nirmal Kumar and others and for possession and for a declaration that the vendor was not the widow of late Shiv Prasad. It was said that the vendor was fully aware of the said litigation and had filed her written statement in the suit. (ii) That the house had been attached under the provisions of the Income-tax before the agreement of sale was entered into and the vendor was fully aware of the attachment. In view of the attachment it was said that the vendor was incompetent to sell the property. (iii) Kanwal Kishore son of the vendor had an interest in the property which the vendor was not competent to dispose of without legal necessity. The existence of the son, it was said, was not disclosed to the purchaser. (iv) That the vendor had given the property on lease and was incapable of delivering vacant possession to the purchaser and had thereby committed a breach of the agreement.

On these grounds the purchaser claimed that he was entitled to repudiate the agreement and claim refund of the earnest money of Rs. 50,000.00 and the stipulated amount of damages of Rs. 90,000.00.

(14) The vendor resisted the suit. She alleged that her step sons had brought false suits against her and that the property had wrongly been attached against the arrears of the Income-tax dues from the Hindu undivided family. These facts, she alleged were told to Narinder Singh, broker, but Narinder Singh did not want these facts to be incorporated in the agreement. As regards lease, the vendor alleged that the property was given to her sister Adarsh Kaur. With regard to her son she said that she was the exclusive owner of the property and that his son had no interest in it. The vendor denied that she had made any false representation or that she was not the sole exclusive owner of the property. The vendor also alleged that Narinder Singh obtained from her two documents one was the agreement in which the consideration was set forth as Rs. 9,35,000.00 and another agreement in which the apparent consideration was shown as Rs. 500,000.00. The vendor alleged that the whole transaction was illegal and that "the consideration for the agreement was forbidden by law and was of such a nature that if permitted, it would defeat the provisions of law. The consideration was also opposed to public policy."

(15) Lastly the vendor said that the purchaser was in league with the step sons and the suit had been instituted at their instance.

ONthe pleadings of the parties following issues were raised : 1. Whether there is no privity of contract between the plaintiff and the defendant ? O.P.D. 2. Whether the agreement in question was

not intended to be acted upon ? O.P.D. 3. Whether the agreement in question is vitiated by misrepresentation alleged in paras 4. 5, 6 of the plaint ? If so, its effect? O.P.D. 4 Whether the defendant has granted a lease of the property in question to Smt. Adrash Kaur and whether the plaintiff has knowledge of the same ? If so, with what effect ? O.P.D. 5. Whether the consideration for the the sale agreed to be paid by the plaintiff was forbidden by law and was of such nature if permitted, it would defeat the provisions of law ? If so with what effect ? O.P.D. 6. Whether the plaintiff has been put to file the suit by the step sons of the defendant ? If so, what is its effect ? O.P.D. 7. What is the effect of the property in question being still subject matter of litigation and continued attachment ? O.P.P. 8. Whether the defendant is in a position to transfer a valid title to the plaintiff in respect of the property in question ? O.P.D. 9. In case issue No. 3 is proved, whether the refusal of the plaintiff to pay Rs. 40,000.00 additional earnest money on 15-10-1963 was not justified? If so, its effect? O.P.D. 10. Whether the plaintiff is entitled to damages? If so, to what amount ? O.P.P. 11. Whether the defendant is entitled to forfeit the amount of Rs. 50.000.00 paid as earnest money? O.P.D. 12. Relief.

ISSUE NOS. 3, 7, 8 and 10 :

> (16) The principal question in the suit is whether the purchaser is entitled to rescind the agreement and claim refund of the earnest money and damages.
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> (17) The facts arc not in dispute and the legal position admits of no doubt. The vendor's counsel did not dispute, (I)that the vendor is involved in a litigation with her step sons in respect of this property and her title has been impugned in that suit; and (ii) that in 1960 the property was attached by the Income-tax authorities and that the vendor filed objections which were dismissed.
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> (18) All that has been contended before me is that the suit is false and that most of the money due from the Hindu undivided family of Seth Shiv Prashad has been paid off to the Income-tax Authorities and only a trifling amount remains due. Next it was contended that the facts relating to litigation and attachment were disclosed to Narinder Singh and that Narinder Singh was a material witness who ought to have been produced by the purchaser and that the non production of Narinder Singh raises an adverse inference against the purchaser. Lastly it was contended that the purchaser's counsel in his statement made in court on December 16, 1971, had given up all objections relating to the title of the vendor and, therefore, it was not open to the purchaser's counsel now to urge that the vendor's title was defective.
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> (19) SECTION 55(1)(a) of the Transfer of Property Act Provides : "In the absence of a contract to the contrary- (1) The seller is bound- (a) to disclose to the buyer any material defect in the property or in the seller's title thereto of which the seller is, and the buyer is not aware, and which the buyer could not with ordinary care discover....."

An omission to make such disclosures as are mentioned in this section, paragraph (1) clause (a), and paragraph (5), clause (a), is fraudulent."

(20) The question is : Do litigation and attachment constitute material defects in the property and in the seller's title there to ? The test of materiality was laid down by Tindall C.J. in Flight v. Booth (1834) 4 L.J. Cp 66(1) and it was held that a defect to be material must be of such a nature that it might be reasonably supposed that if the buyer had been aware of it he might not have entered into the contract at all for he would be getting something different from what he contracted to buy. It is the duty of the vendor to inform the intending purchaser that the property is subject to a claim which might result in a law suit or is the subject of a pending litigation. Any fact calculated to keep the purchaser in ignorance of the real state of the property is a defect for which the vendor is liable. In other words a purchaser is not obliged to take thing essentially different from that which he agreed to take. Applying these principles to the facts of the present case the answer appears to be plain. The vendor was involved in a litigation in respect of the property sought to be sold with her step sons. The step sons challenged her right of exclusive ownership. The litigation continues to be fought till this day though it was started in 1961. A cloud of suspicion and uncertainty hangs over the vendor's title. The purchaser is entitled to a marketable title. A marketable title, it has been said, is a title which a vendor would be in a position to force on an unwilling purchaser : See Shanker Lal & am. v. Jethmel & anr. . If the seller's title is doubtfull and is in dispute in litigation the purchaser will be quite justified in declining to carry through the transaction of sale and to accept the delivery and the court will not in such a case force a doubtful title upon the purchaser : See Sohan Lal v. Bal Kishan , A title which will expose the buyer to litigation a hazard is not such a title as could be forced on an unwilling purchaser. A merketable title is title free from reasonable doubt.

(21) In Tulsi Dass Ram Chand v. Pritbai, Air 1943 Sind 92(4), it was held that where the vendors are not able to give the vendee a title free from reasonable doubt the vendee can properly decline to complete the transaction. The fact that after judicial investigation the title of the vendor is ultimately found to be clear does not disentitle the venlee to claim the return of the earnest money. Weston J. who spoke for the court quoted a passage from Fry on Specific Performance Edition 6 at page 416 where it is said : "THEcourt would, it is conceived, consider the title doubtful in the following cases- (1) Where the probability of litigation ensuing against the purchaser in respect of the matter in doubt is considerable, or as it was put by Alderson B. [Cattle v. Corrall (1840) 4 Y & C 228] where there is 'a reasonable decent probability of litigation'. The court, to use a favorite expression, will not compel the purchaser to buy a law suit....."

(22) In the present case buying the property meant buying a law suit. Litigation was already on. Its end is not in sight even now. The vendor cannot say to the purchaser "You are bound to go forward with the transaction". The purchaser is entitled to say, "The non-disclosure of these facts is a material defect in the property and I am entitled to annul the transaction".

(23) The last paragraph of section 55 of Transfer of Property Act says that an omission to make such disclosure as is mentioned in paragraph 1 clause (a) is fraudulent. Section 17 of the Contract Act defines fraud in these terms: "'Fraud' means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party there to or his agent, or to induce to enter into the contract:__ (5) Any such act or omission as the Law specially declares to be fraudulent".

(24) I need not read the explanation to the section which is not material.

(25) The last paragraph of Section 55 of the Transfer of Property Act read with Section 17 of the Contract Act would clearly show that the failure to disclose the facts relating to litigation and attachment constituted a fraud. This would also amount to misrepresentation under section 18 of the Contract Act.

(26) Under Section 19, the purchaser has the option to rescind the agreement and this is what the purchaser has done in this case. think he was entitled to do so.

(27) As regards the attachment it is enough to say that it is an encumberance on the property. The word 'encumberance' in its ordinary condition means that the estate is burdened with debts, obligations or responsibilities. The word is in law specially used to indicate a burden on the property.

(28) There is a legal duty cast on the seller to disclose to the buyer any facts affecting his interest and his power to transfer the properly to the buyer. It is, therefore, imperative on the seller to inform the buyer that the seller cannot transfer the property to the buyer and that he has no power to transfer the same in view of the injunction order or attachment by the court.

(29) It is generally agreed that section 55(1)(a) of the Transfer of Property Act applies to a contract to sell immovable property. Section 55(2) imports in every sale a covenant of title. There has been a difference of opinion among the High Courts on the question whether section 55(2) applies to an agreement to sell immovable property or whether it applies only to completed conveyance: See the judgment of Aggarwala, J. in Deep Chandra v. Ruknuddanda Shamsher Jang Nawab Mohammad Sajjad Ali Khan and others. and Surendra Maneklal Kathia v. Bai Narmada. .

(30) I am, however, relieved of the duty of deciding the conflict as in this case fortunately there is an express covenant of good title. The vendor agreed with the purchaser that if any defect in her title is discovered the purchaser will be entitled to repudiate the agreement and claim refund of the earnest money.

(31) Under the English law, a covenant for title is an assurance to the buyer that the seller has the very estate in quantity and quality which he purports to convey. The vendor cannot in the present case say with any show of reason that she has power to convey the very quality of estate which she agreed with the purchaser to transfer.

(32) The counsel for the vendor has argued that the purchaser must forfeit his earnest money as the vendor is willing to convey the property and it is only the purchaser who refuses to buy.

(33) Now what is "earnest" money? "Earnest" is the sum of money paid by the buyer of property under a contract for sale in order to bind the seller to the terms of the agreement for sale. In English law it is called deposit.

(34) In Soper v. Arnold and another (1889) 14 Ac 429, 435 Lord Macnaghten said: "THEdeposit serves two purposes, if the purchase is carried out it goes against the purchase money but its primary purpose "is that it is a guarantee that the purchaser means business".

(35) In Howe v. Smith (1884) 27 Ch. D. 89(7) Fry L.J. observed: "THEterms must naturally to be implied appear to me in the case of money paid on the signing of a contract to be that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part payment but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract".

Bowen L.J. said: "IT is quite certain that purchaser cannot insist on abandoning, his contract and yet recover his deposit, because that would enable him to take advantage of his own wrong".

In Charanjit Singh v. Har Swarup, Air 1926 Pc 1(8) Lord Shaw said: "EARNESTmoney is part of the purchaser price when the transaction goes forward: It is forfeited when the transaction falls through, by reasons of the fault or failure of the vendee".

(36) In other words earnest money is security for the completion of the purchase. It is a guarantee for the performance of the contract. The defaulter will not be allowed to recover back what he has paid on an express stipulation that it shall be forfeited in the event of default.

(37) From a review of the decisions cited above, the following principles emerge regarding "earnest": "(1)It must be given at the moment at which the contract is concluded. (2) It represents a guarantee that the contract will be fulfillled or, in other words, "earnest" is given to bind the contract. (3) It is part of the purchase price when the transaction is carried out. (4) It is forfeited when the transaction falls through by reason of the default or failure of the purchase. (5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest".

(See H.C. Mills v. Tata Air Craft, Air 1970 Sc 1897,1994(9).

(38) If the sale as in this case does not go forward by reason of the fault or failure of the vendor, there is no reason why the purchaser connot recover. He is not at fault.

(39) I, therefore, hold that the non-disclosure of the pending litigation and the subsisting attachment are material defects in the property and the title of the vendor and that she was unable to show to the purchaser that she had power to convey what she professed to transfer.

(40) The vendor says that she disclosed these facts to Narinder Singh who was the agent of the purchaser and that it was incumbent on the purchaser to produce Narinder Singh. I do not agree. It is open to the purchaser to contract himself out of the statutory rights conferred on him by section 55(2) of the Transfer of Property Act, but this should be expressed in clear and definite terms in the document and it is not permissible to let in any oral evidence to show that there was an agreement

excluding covenant for title and that the mere knowledge on the part of the purchaser of a defect in the title to the property would not by itself defeat the purchaser's right based on the express covenant in the deed. See: Subayya v. Garikapati Air 1957 A.P. 307(10).

(41) It may be assumed that a covenant of good title is to be implied in every agreement to sell immovable property but here an express covenant is incorporated in the deed of agreement. It is, therefore, not permissible to adduce oral evidence to contradict this as it falls within the mischief of section 92 of .the Evidence Act. If the covenant of good title is to be excluded it must be expressed in clear and unambiguous term in the document itself : See Thanmmineni Paparao and others v. Dhavala Polinaidu and another. Air 1945 Mad. 205(11).

(42) The vendor's counsel cited Mohd. Zafar v. Hamida Khatoon Air 1945 All. 70(12) in support of his proposition that the purchaser was bound to go forward with the purchase and that if he decided to do so he must forfeit the earnest money. On facts I have come to the conclusion that the sale could not go forward by reason of the fault and failure of the vendor. The purchaser never agreed to accept a bad title. He did not have any knowledge of the defects in vendor's title. The document itself is quite clear on this point. The vendor undertook and agreed to satisfy the purchaser that she had a good title to the property and that the property was free from encumberances and defects. In the Allahabad ruling it was found as a fact that the plaintiff had entered into the agreement with full knowledge of the fact that a claim was being made by the two minor brothers of the defendant with regard to the property covered by the agreement. It was, therefore, held that there was no ground upon which the plaintiff could have avoided the performance of his part under the agreement. This ruling, therefore, is clearly distinguishable on facts.

(43) The vendor's counsel next contended that it was not open to the counsel for the purchaser to found his case on the defects in the vendor's title as he had unreservedly given up all objections with regard there to in his statement made in the suit on December 16, 1971. What happened on December 16, 1971, in the suit was this. The vendor was leading evidence, witness after witness, to show that her title to the property was unimpeachable. She had summoned her step sons and wife of one of them to prove that the suit that they had instituted against her was false. The purchaser grew impatient of the protracted trial. The purchaser's counsel made a statement that he will confine his objections to the vendor's title only to the nondisclosure the following facts: (A)the pending suit; (b) the subsisting attachment; and (c) that the vendor had a minor son.

(44) The purchaser's counsel said that non-disclosure of these facts entitled the purchaser to rescind the agreement and that he was claiming relief only on this ground. He also stated that he was not concerned with the merits and demerits of the pending litigation or validity of the attachment, nor was he concerned with the question whether the vendor had a good title to the property in the beginning.

(45) On the statement of the counsel for the purchaser P. N. Khanna, J. made an order on December 16, 1971, restricting thereby the scope of the enquiry in the suit. The learned Judge said that the purchaser's counsel's grievance was about the non-disclosure of certain material facts and that the plaintiff was "confining his objection to the validity of the defendant's title only as it is affected by

the pendency of a litigation in respect of the properly in suit and by the attachment made at the instance of the income-tax department", P. N. Khanna, J. said at the end of the order: "INview of this stand the plaintiff would not be allowed to urge anything to cast any doubt on the validity of the defendant's title except in so tar as the same may be affected or her right to transfer the property in favor of the plaintiff may be affected, on account of the pendency of the aforesaid litigation and the attachment and their non-disclosure".

(46) Now it will be clear that the purchaser's counsel never gave up his attack on the vendor's title, although he stated that he was not concerned with the question whether the vendor had a "good root of title" which means that he did not question the sale of vendor's favor by S. B. Bisakha Singh on January 18, 1956. "Good root of title" in English law means a document by which the land has been disposed of in the past in order to show that the interest which the vendor has agreed to sell has devolved upon him or her. In a word the counsel did not cast doubts on the title of the disposing party in so far as her title to the property rested on the sale deed dated January 18, 1956. Purchaser's counsel made it clear that his case was that he was entitled to rescind the agreement by reason of the subsequent events i.e. pending litigation and the attachment which had not been disclosed to him and which made the vendor's title a defective title or a had title or in any case a cloudy title.

(47) The purchaser's counsel did not press his case as regards the defect in vendor's title on the ground that she had a son and that the property had been leased out by the vendor to her sister. Otherwise too there is no substance in these grounds. The son would have no interest in the property once it is held that the mother is the exclusive owner as is shown by the sale deed dated November 18, 1956 which is in her name. As regards the lease the vendor stated in her evidence that if she had been paid the balance earnest money she would have arranged to get vacant possession from her sister for the purchaser.

(48) I, therefore, hold that the non-disclosure of the pending litigation and the attachment was fraudulent and that the purchaser was entitled to rescind and claim refund of the earnest money. The vendor was not able to deduce a maketable title which she was bound to deduce.

(49) I now turn to the claim for damages. Purchaser claims Rs. 90,000.00 as additional amount stipulated in the agreement. The purchaser says that this is a genuine pre-estimate of damages. I have to decide whether the same is a genuine forecast of the probable loss or it is in the nature of a penalty. When parties agree before hand what sum shall be payable by way of damages in the events of breach the sum fixed in this manner falls into two classes: (I)liquidated damages; and (ii) penalty.

(50) A penalty is not a genuine forecast of the probable loss; it is in the nature of a threat held over the other party in terrorem-a security to the promisethat the contract will be performed.

(51) It is always a question of importance whether a conventional sum is liquidated damage or penalty. This is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of making the contract, not at the time of breach : See Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co. Ltd. (1915) A. C. 79, 86-87(13).

(52) The rule of English law in not permitting the purchaser to recover damages for breach of contract of sale relating to immovable property is not applicable in India in view of the express provisions of Section 73 of the Contract Act which are comprehensive enough to apply to breaches of contract arising from sale of movable as well as immovable properties. The vendor is entitled to recover damages for breach of contract of sale regarding immovable property. In a suit for damages for breach of contract to sell certain land the plaintiff is entitled to a sum as damage which represents the contract price and the market value of the land on the date of breach : See Abdul Latif v. Ladha Ram, Air 1925 Lahore 262(14).

(53) The question is : Did the purchaser sustain loss? Has he in fact lost a good bargain? The purchaser's counsel says that he is entitled to damage because of (A)the express stipulation in the contract; (b) because the vendor herself admit that her property is worth Rs. 14 lakhs; and (c) the advocate for the vendor in his notice admitted that the vendor will be liable to pay Rs. 90,000.00 if she does not convey good title to the purchaser.

(54) I cannot agree with any of these contentions. The purchaser produced in evidence only one broker R. K. Thapar (Public Witness 2) who deposed that the value of the property on the date of the breach had increased by 50 to 60 thousands rupees. He could not cite any instance of sale. No reliable proof has been adduced on the record that the value of the property had increased; nor am I prepared to say that the purchaser has lost a good bargain. The purchaser's own case is that it was a had bargain and he was not prepared to go forward with it. The vendor's advocate in the notice merely recited the term in the agreement. It was for the purchaser to have proved that he actually sustained damage and what was the measure thereof. On this aspect of the case I am of the view that the sum of Rs. 90,000.00 is in the nature of penalty and this sum is subject to the equitable jurisdiction of this court. Equity looks to the intent rather than to the form. Notwithstanding the stipulation in the agreement that the purchaser shall be entitled to Rs. 90,000.00 "without any objection as to the damages actually suffered by the vendee", the purchaser ought to have proved damages if he had suffered any. On evidence I have come to the conclusion that no satisfactory proof has been adduced. I, therefore, hold that the plaintiff is entitled only to the refund of the earnest money of Rs. 50,000.00 and not to the sum of Rs. 90,000.00 as damages claimed by him in the suit. Issue No. 5:

> (55) It was strenuously contended by the vendor's counsel that the entire transaction was illegal, forbidden by law and opposed to public policy.
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> (56) The vendor and her brother Ajit Singh both appeared as witnesses. They deposed that Narinder Singh asked the vendor to execute two agreements. In one agreement the sale consideration was stated to be Rs. 9,35,000.00 and in the other agreement the consideration was stated to be Rs. 5,00,000.00. The vendor produced this other agreement of Rs. 5,00,000.00. It is exhibited D1/A. It is word to word the same as Exhibit P12 the other agreement. The only difference is that in place of the figure of Rs. 9,35,000.00 the figure of Rs. 5,00,000.00 is substituted. Narinder Singh has not been produced by either side. The vendor's counsel says that her evidence ought to be accepted as it was incumbent on the purchaser to have produced

Narinder Singh who was a material witness in the case. If the execution of the two agreements is held to be proved then it is said that the transaction is hit by the provisions of Section 23 of the Contract Act. It is argued that the transaction is had for two reasons. The two agreements were executed with two illegal objects in view: (I)evasion of income-tax: and (ii) evasion of stamp duty.

(57) The counsel states that it was an attempt to defraud the Revenue both Income-tax and Stamp duty. He relies on Section 269 (a) and (c) of the Taxation Law Amendment Act 1972 and Sections 62 and 64(c) of the Stamp Act.

(58) Let me first examine this argument of illegality. The Taxation Law Amendment Act 1972 was passed with the following object, viz., "TOcounter evasion of tax through under statement of the value of immovable properties in transfer deed and also to check the circulation of black money by empowering the Central Government to secure immovable properties at prices which correspond to those recorded in the transfer deed".

(See Circular No. 96 dated November 25. 1972 Reprinted in .

(59) The object of Section 269(A) of the Amendment Act of 1972 is to empower the Central Government to acquire any immovable property having a fair market value exceeding Rs. 25,000.00 in cases where the consideration declared in the instrument of transfer is less than the fair market value of the property on the date of the execution of instrument of transfer. The power is to be exercised only in cases where there is reason to believe that the consideration agreed to between the parties has not been truly stated with a view to facilitate tax evasion by the transferee.

(60) Under the Stamp Act the consideration affecting the chargeability of an instrument with duty shall be fully and truly set-forth therein (Section 27). Section 64(1) provides that any person who with intent to defraud the Government does any act calculated to deprive the Government of any duty or penalty under that Act shall be punishable with fine which may extend to five thousand rupees.

(61) The counsel cited a large number of authorities. It is not necessary to examine them. Relying upon Harry Parker Ltd. v. Mason, 1940 (4) All. E.R. 199-203(15) the counsel urged that the purchaser cannot recover money and this court will not assist him to obtain money paid for an unfulfilled or partly fulfillled illegal purpose and said that it is merely by accident that the vendor gets the advantage but the principle is that the court acts not because it wishes to protect a party to such a claim but because it will not lend its aid to the plaintiff.

(62) In my opinion the argument is untenable. Section 269 (a) of the Amendment Act and Section 64(c) of the Stamp Act do not strike at the transaction. They do not render the transaction illegal. Such transactions are not prohibited by law. If a party under-prices the property in a deed of transfer the Central Government is empowered to pre-empt the sale, so to speak, and to acquire the immovable property at the price so stated in the instrument.

(63) Similarly Section 64(c) does not render the transaction void. Where the document is understamped the parties to the deed cannot take any advantage inter se, e.g.. a purchaser can not refuse to pay the sale price and a seller cannot refuse to deliver possession.

(64) Section 64(c) creates an offence and prescribes a penatly for omission to comply with the provisions of Section 27. Assuming that the purchaser was a party to the two documents though I hold the contrary the purchaser is not disentitled from recovering the amount of the earnest money. The plain reason is that the transaction did not go forward and the sale was never completed. The power of the Central Government comes into play only after the sale deed has been executed. Under section 64 an intention to defraud is an essential ingredient of an offence. The intention to defraud would have been carried into effect if the sale deed had been executed.

(65) Let me now consider the effect of illegality assuming that two agreements were executed as is contended by the vendor. There is a short answer to the argument that the purchaser cannot recover because the contract entered into was illegal, hit as it was by the provisions of the Stamp Act and the Income-tax (Amendment) Act. The principle of the law is that a party who repudiates before anything has been done to perform the illegal purpose can recover back his money, and that a party who repudiates after the illegal purpose has been carried out cannot recover. In this case nothing was done to perform the illegal purpose except to execute two agreements if the vendor's contention were to be accepted. The purpose was never fully carried out. The purchaser repudiated the contract and refused to go forward with the sale. His repudiation was voluntary. The principal justification for the general rule of non-recovery is its tendency to deter person from entering into illegal transaction.

(66) In Taylor v. Bowers (1876) 1 Q.B.D. 291 the plaintiff was being pressed by his creditors. To prevent certain machinery from falling into their hands he assigned it to one Adcock. He then called two meetings of the creditors in an attempt to reach a settlement, but no composition agreement in fact resulted. The plaintiff sucessfully claimed the machinery back from the defendant who had obtained it from Adcock with notice of the fraudulent scheme. The illegal purpose had not been carried out ; No creditor had been defrauded.

(67) Another way of putting the matter can be this. The vendor herself was a party to the illegality. She says that she signed two agreements. Besides she made fraudulent representation and the purchaser was induced to enter into the contract as a result of her fraudulent representations.

(68) The purchaser was deceived. The vendor is entirely to be blamed for her misrepresentations. It is not a case of parties in pan delicto where both parties are equally at fault and law says that one cannot recover from the other under an illegal agreement which has been carried into effect. If in this case the law were to say to the purchaser "you cannot recover" that would enable the vendor to take advantage of her own wrong, as Bowen L.J. said in How v. Smith (supra). This would mean that she can get away with her misrepresentations as well as retain the deposit : The purchaser will lose the deposit as well as the bargain for no fault of his. This would be the most unkindest cut of all.

(69) On the facts I am not prepared to hold that on October 2, 1963, two agreements were executed as contended by the vendor's counsel. The counsel says that the vendor got one copy of the agreement of Rs. 9,35,000.00 and another copy of the agreement of Rs. 5,00,000.00. She has produced in court only one copy, that is, the agreement of Rs. 5,00,000.00. The purchaser's counsel says that the vendor has taken out one page (page No. 2) from the copy of the agreement of Rs. 9,35,000.00 and inserted in its place another page in which she has substituted the figure of Rs. 5,00,000.00 and by colluding with Narinder Singh she asked him to put his signature again on page 2 as well. I have examined the two agreements. I cannot rule out this possibility. It may well have been so. In fact two agreements were executed as is contended the vendor ought to have placed a copy of both the agreements on the record. She has come out only with one copy and has not given any satisfactory explanation for the non-production of the other.

(70) The sequence of events also supports the purchaser's counsel. The suit was filed on May 12. 1964. On September 9, 1964, the vendor filed her written statement in which she pleaded the story of two agreements. She did not file the agreements at the time of filing of the written statement. On September 19, 1964, the purchaser filed the replication and alleged that "the story of the two agreements is totally false." The vendor filed the second copy of the agreement only on September 29, 1964 (D1/A).

(71) The vendor's counsel strenuously argued that his version of two agreements should be accepted as Narinder Singh a material witness had not been produced by the purchaser. He submitted that it was for the purchaser to produce Narinder Singh for he had personal knowledge of all that had happened at Bombay where the purchaser had not gone. He argued that Narinder Singh was as good as the plaintiff herself as he was the plaintiff's agent and had been empowered by the plaintiff to put his signatures on the agreements.

(72) The counsel relied on a number of authorities to show that the procedure of calling the other party who is an essential witness has been condemned by the Privy Council. Commenting on this practice the Privy Council said : "NOTICEhas frequently been taken by this Board of this style of procedure. It sometimes takes the form of a manoeuvre under which counsel does not call his own client, who is an essential witness, but endeavors to force the other party to call him, and so suffer the discomfiture of having him treated as his, the other party's, own witness. This is thought to be clever, but it is a had and degrading practice. Lord Atkinson dealt with the subject in Lal Kanwar v. Chiranjit Lal, 37 Indian Appeals 1. (16) calling it "a vicious practice, unworthy of a hightoned or reputable system of advocacy." (Sardar Gurbaksh Singh v. Gurdial Singh.

(73) He also cited Ishao Abdul Karim and another v. Madan Lal, .

(74) I do not agree with the counsel for the vendor. It was clearly for the vendor to produce Narinder Singh as her own witness if she would have this court believe that: (I)two agreements were executed, one for Rs. 9,35,000.00 and the other for Rs. 5,00,000.00 for the simple reason that Narinder Singh was the best witness to prove that fact ; (ii) to prove her case in the written statement that she had disclosed to Narinder Singh about the pending litigation and the subsisting attachment.

(75) On both the points it was her own case in the written statement. The burden of proof clearly lay upon her. If she did not produce Narinder Singh who the counsel conceded was a material witness in the case, her testimony on both the points must be rejected and I must hold that she has failed in proving the execution of the agreement of Rs. 5,00,000.00 and as well as the fact that she had told Narinder Singh about the litigation and the attachment. On his point I have already held that Narinder Singh's evidence, even if he had been summoned as a witness, would have been inadmissible under Section 92 of the Evidence Act.

(76) In the case of Ishaq Abdul Karim and another (supra) the question was whether the agent had implied authority or that there was any limitation on his authority. It was held that the burden of proving the specific limitation on the authority of the agent was on the principal. Execution of a second agreement will not fall within the implied authority of the agent assuming that Narinder Singh was the purchaser's agent. It was for the vendor to establish that Narinder Singh was duly authorised to enter into two agreements for different prices and that his principal had empowered him (Narinder Singh) to commit what the vendor calls as an illegal act.

(77) I, therefore, decide issue No. 5 against the defendant. Issue No. 1 (78) The defendant-vendor pleaded in her written statement that she had entered into an agreement to sell the property with Narinder Singh and that she did not know the plaintiff. On this ground it was alleged that there is no privity of contract between the plaintiff and the defendant. There is no substance in this plea for Narinder Singh entered into the agreement on behalf of the plaintiff-purchaser. The plaintiff's name appeared in Exhibit P 12 as the vendee who had agreed to purchase the property from the vendor. The earnest money of Rs. 50,000.00 was also paid to the vendor on behalf of the purchaser. There is privity of contract between the parties. Notices sent on behalf of the vendor by her solicitors (P 3 and P 5) belie the vendor's contention. I decide this issue against the defendant. Issue No. 2 (79) Nothing was said in support of this issue by the defendant's counsel. It was not explained why the agreement in question was not intended .to be acted upon. The letters written by the vendor's own attorneys (P 3 and P 5) clearly negative this plea. The vendor's own case in the written statement is that she is entitled to forfeit the amount of Rs. 50,000.00 as the purchaser failed to pay the remaining balance of Rs. 40,000.00 of the earnest money. The execution of agreement Exhibit P 12 was not disputed by the vendor. I, therefore, decide issue No. 2 against the defendant. Issue No. 4 (80) The vendor did not deny that she had given the property in dispute to her sister Smt. Adarsh Kaur Gill but she said that if the purchaser had been willing to go forward with the sale she would have got the house vacated from her sister. The vendor stated that she gave the property to her sister sometime in 1958. In terms of the agreement to sell dated October 2, 1963; the vendor had agreed to give vacant and physical possession of the bungalow at the time of the registration of the sale deed on or before April 15, 1964. Therefore, the question of the delivery of the vacant possession would not have arisen before April 15, 1964. The purchaser has not been able to show that the vendor could not deliver possession at the time of the registration of the sale deed. In any event the counsel for the purchaser confined his case only to two grounds, viz., the existence of the pending litigation and the subsisting attachment. Though the purchaser did take the plea of delivery of possession in the plaint, at a subsequent stage he gave it up. I, therefore, decide issue No. 4 against the purchaser and hold that the mere fact that the vendor had granted a lease of the property in question to Adarsh Kaur did not entitle the purchaser to annul the contract. Whether the purchaser had knowledge of

the tenancy or not is not material, for the only stipulation entered into by the vendor was that at the time of the completion of the sale she would hand over vacant and physical possession of the property. Issue No. 6 (81) There is no evidence on this issue worth consideration. Otherwise too in my opinion this issue is an attempt to draw a red herring across the track. The vendor has not been able to prove that the purchaser had been set up by her step sons to file the present suit against her. Assuming for a moment that what the vendor says is true even then it has no effect on the suit. The suit has to be heard and tried according to strict legal rights of the parties.

(82) The only evidence that the vendor was able to give was that the purchaser was related to her step sons. It is said that one Kanshi Ram, brother of Seth Shiv Pershad has a son Faqir Chand by name. He is married to the daughter of one of the brothers of the purchaser. The purchaser has denied this. There is no cogent evidence to establish this fact. I decide this issue against the defendant. Issue No. 9 (83) I have held issue No. 3 in favor of the plaintiff. Purchaser's refusal to pay the balance amount of the earnest money of Rs. 40,000.00 was fully justified. I decide this issue against the defendant. Issue No. 11 (84) I have already held under issues 3, 7, 8, and 10 that the vendor is not entitled to forfeit the amount of Rs. 50,000.00 paid to her as earnest money. This issue is decided against the defendant Issue No. 12 (85) In the result the plaintiff succeeds and I pass a decree turn Rs. 50,000.00 in favor of the plaintiff and against the defendant with interest at the rate of 6 per cent per annum from the date of the suit till payment and proportionate costs.