

**(1965) 09 AHC CK 0029****Allahabad High Court****Case No:** Second Appeal No"s. 1894 and 2306 of 1953

Umar Noor Mohammad

APPELLANT

Vs

Dayal Saran Darbari

RESPONDENT

**Date of Decision:** Sept. 28, 1965**Acts Referred:**

- Contract Act, 1872 - Section 34, 40, 56, 73
- Specific Relief Act, 1877 - Section 23, 24

**Citation:** AIR 1967 All 253**Hon'ble Judges:** Gangeswar Prasad, J**Bench:** Single Bench**Advocate:** Qazi Masud Hasan, for the Appellant; B.S. Darbari, for the Respondent**Final Decision:** Dismissed

### **Judgement**

Gangeswar Prasad, J.

These two appeals arise out of a suit for the recovery of a sum of money claimed as payable to the plaintiff on account of the defendant's failure to perform a contract for sale of a house in favour of the plaintiff. The house stands on Nazul land forming part of the Government Estates in Allahabad, and the land is held by the defendant as a lessee from the Government. By means of a deed of agreement dated 5-2-1948 the defendant agreed to sell the house to the plaintiff for Rs. 20,500 out of which a sum of Rs. 1,000 was paid to the defendant as earnest money. Under the terms of the agreement the sale deed was to be executed after the sanction of the Collector and within three months of the receipt of the sanction. The case of the plaintiff is that the defendant refused to execute the sale deed in spite of being repeatedly asked to do so, and the plaintiff is consequently entitled to a refund of the earnest money and to a sum of Rs. 1,000 as damages according to the terms of the deed of agreement.

The defence is that the defendant was always prepared to execute the sale deed in favour of the plaintiff but the plaintiff insisted on the sale deed being executed in favour of the Allahabad Cooperative Housing Society Limited and refused to have it executed in his own favour as provided in the deed of agreement, and that the plaintiff thus committed breach of contract and, consequently, the, earnest money stands forfeited under the terms of the deed of agreement and the plaintiff can neither claim recovery of the earnest money nor any damages.

The trial Court upheld the defence and dismissed the suit in its entirety. On appeal, the learned Civil Judge came to the conclusion that the plaintiff has not forfeited his earnest money but his claim for damages is not justified, and he accordingly decreed the suit for the recovery of Rs. 1,000 and dismissed it for the remainder. Both the parties have preferred an appeal to this Court, the appeal of the plaintiff being appeal No. 2306 of 1953 and that of the defendant being appeal No 1894 of 1953.

2. The dispute between the parties which was responsible for the sale deed not having been executed admittedly related only to the question as to who should be described as the vendee in the sale deed and it arose in the following circumstances. It appears that the plaintiff is a member of the Allahabad Cooperative Housing Society Limited which purchases houses for its members and advances two-third of the purchase money on the condition that the member concerned pays the remaining one-third and the sale deed is executed in the name of the Society, which holds the house so long as the money advanced by it along with the interest thereon is not paid up and, thereafter, transfers the house in favour of the member for whom it is purchased

The evidence clearly indicates that a few days after the execution of the deed of agreement the plaintiff thought of purchasing the house under this scheme, and he informed the defendant that he wanted to purchase the house through the Allahabad Cooperative Housing Society Limited as he needed the financial aid of the Society for the purchase. It was alleged by the plaintiff that there was an oral agreement between the parties that the sale deed would be executed in the name of the Society, and that as a result of that agreement the parties made an application to the Collector of Allahabad on 3-3-1948 seeking his sanction for the transfer of the site of the house in question in favour of the plaintiff "through the Allahabad Cooperative Housing Society Limited".

The defendant denied having agreed to execute the sale deed in favour of the Society but he admitted that the words "through the Allahabad Cooperative Housing Society Limited, were added by him in the application to the Collector at the request of the plaintiff who represented to him that he would take some loan from the Society for the purchase of the house and the insertion of these words would facilitate the advance of the loan.

Sanction for the transfer was granted by the Collector but the words "through the Allahabad Cooperative Housing Society Limited" were not mentioned in the sanction. The courts below have not accepted the case of the plaintiff that it was agreed between the parties that the sale deed would be executed in favour of the Society and this finding cannot be disturbed. The learned Judge has, however-clearly held that in consequence of some talk between the parties subsequent to the deed of agreement there was a variation of the terms of the agreement to this extent that the sale deed was to be executed in favour of the plaintiff "through the Allahabad Cooperative Housing Society Limited". This finding too has to be accepted and it is amply borne out by the oral evidence and the application for sanction (Ex B) made to the Collector on 30-3-1948.

3. It appears that the Collector sanctioned the transfer on 26-4-1948 and the parties were informed of the sanction. Then, there was an exchange of correspondence between the parties, the plaintiff insisting that the sale deed be executed in favour of the Society and the defendant insisting on its execution in the name of the plaintiff. Ultimately by a notice (Ex. F) dated 14-6-1948 the defendant informed the plaintiff that if the latter did not get the sale deed executed in his name within three days of the receipt of the notice the earnest money would stand forfeited and the defendant would be at liberty to sell the house to anybody else. A reply (Ex. 6) dated 17-6-1948 was sent by the plaintiff to the above notice, stating among other things that proper sanction in terms of the application for sanction had not been granted by the Collector and asking the defendant either to execute a sale deed in favour of the Society or to make a fresh application for sanctioning transfer in the name of the Society.

In the reply (Ex. 6) the plaintiff also made an offer that in the event of the sale deed being executed in favour of the Society the defendant could take a writing from the plaintiff as well as from the Society absolving him from "future liabilities regarding transfer of lease", and stated that a similar offer had been made by him to the defendant previously also. Upon receiving this reply the defendant again sent to the plaintiff a letter (Ex. J) dated 28-6-1948 reiterating that the earnest money stood forfeited and saying that the defendant was not prepared to make any fresh application for sanction to the Collector.

Thereafter, it appears that the plaintiff made an application (copy of which is Ex. 10) to the Special Manager Court of Wards on 1-7-1948 stating that a difficulty in regard to the transfer had arisen because of the fact that sanction had been granted for a transfer in the name of the plaintiff and praying that sanction may be accorded for a transfer in the name of the Allahabad Cooperative Housing Society Limited. To this application the Special Manager Court of Wards and Government Estates sent a reply (Ex. 5) dated 5-7-1948 saying that the Government Estate was concerned only with the realization of rent and it could not impose any condition on sales or transfers. It was also pointed out in the reply that it was for the defendant to decide

as to who would be the vendee and the matter could be settled between the parties by direct communication. In the end it was said that as the Collector had already sanctioned the transfer and the sanction had been communicated, the application required no action and had, therefore, been rejected. I may here note that the application dated 30th March 1948 for obtaining sanction for transfer had been addressed to the Collector of Allahabad through the Special Manager Court of Wards and Government Estates Allahabad.

On 28-7-1948 the plaintiff sent to the defendant a notice (Ex. 4) informing him of what had been said by the Special Manager Court of Wards and Government Estates in Ex. 5 and calling upon the defendant to execute a sale deed in the name of the Society. The defendant by his reply (Ex. M) dated 2-8-1948 affirmed his stand that the plaintiff had committed breach of contract and stated that the defendant might have considered the question of executing a sale deed in the manner desired by the plaintiff if the plaintiff had secured the permission of the Collector for a sale in favour of the Society. This narrative of the correspondence on record became necessary because it is in the light of the facts emerging from the correspondence that the questions involved in the appeal have to be determined.

4. The finding of the learned Civil Judge that the plaintiff has not forfeited the earnest money paid by him is based on two grounds. Firstly, the defendant was at fault in not taking proper steps to execute the sale deed in favour of the plaintiff "through the Allahabad Cooperative Housing Society Limited" as he was bound to do in accordance with what had been orally agreed between the parties subsequent to the deed of agreement. And secondly, the contract for the sale became incapable of performance by reason of the fact that the defendant did not obtain the sanction of the Collector for sale in favour of the plaintiff "through the Allahabad Cooperative Housing Society Limited" as agreed to by him. For the latter basis of his finding the learned Judge relied on Section 24(b) of the Specific Relief Act and on Section 56 of the Contract Act.

5. I must observe that I fail to see how it can be said that the contract for sale had become incapable of being performed. It is true, as the learned Judge says, that it was for the defendant to obtain the sanction of the Collector for sale because it was he who held the site as a lessee from the Government and was proposing to transfer it. The deed of agreement did not, certainly, mention that the sanction had to be obtained by the defendant, but there can be no doubt that the parties contemplated that the sanction would be obtained by the defendant. In fact, in the letter (Ex F) dated 14-6-1948 sent to the plaintiff by the defendant it was clearly admitted that it was agreed between the parties that the defendant would obtain the necessary sanction.

But the question is whether the defendant ever agreed to obtain sanction for transfer in favour of any particular person. Nowhere in the deed of agreement is there any indication of the fact that the sanction would be in respect of a sale in

favour of a certain individual and the only condition precedent to the execution of the sale deed is that sanction for transfer be obtained. If there had been something in the very nature of the interest held by the defendant which prohibited transfer without a sanction for making the transfer in favour of the particular person in whose favour the transfer was proposed to be made, there might have been reason for holding that the sanction obtained by the defendant should have been for transferring the site of the house to the plaintiff "through the Allahabad Cooperative Housing Society Limited".

But the learned counsel for the plaintiff was not able to point out anything of that kind in the nature of the defendant's interest in the site. Indeed, the counsel for both the parties were unable to lay their hands on anything requiring sanction even for transfer. The position, therefore, is that the defendant has never undertaken that the sanction would be for a transfer in favour of the plaintiff "through the Allahabad Cooperative Housing Society Limited", and the mere fact that he had mentioned in the application for transfer that he had agreed to sell the house to the plaintiff "through the Allahabad Cooperative Housing Society Limited" would not amount to an undertaking to that effect. It cannot, in these circumstances, be said that the defendant had become incapable of performing the contract, and Section 24(b) of the Specific Relief Act cannot on that account stand in his way of claiming enforcement of the term of forfeiture of the earnest money if the claim is otherwise sustainable. Section 56 of the Contract Act could not likewise for that reason absolve the plaintiff from his obligation to carry out the contract.

6. The first ground of the finding of the learned Judge appears, however, to be correct.

On account of the modification effected in the terms of the deed of agreement, the sale deed had to be executed in favour of the plaintiff "through the Allahabad Cooperative Housing Society Limited", but the defendant never showed his preparedness to execute the sale deed in that manner. It is true that the plaintiff was insistent that the Society should be described as the vendee, but the defendant also appears to have insisted that the plaintiff and not the plaintiff "through the Allahabad Cooperative Housing Society Limited" would be described as the vendee. In fact, the defendant clearly stated in his deposition that he did not like to execute the sale deed either in favour of the Society or in favour of the plaintiff "through the Allahabad Cooperative Housing Society Limited" as it was with the plaintiff" that he had entered into a contract for sale. It may here be mentioned that in the letter (Ex. 1) dated 28-6-1948 sent by the defendant to the plaintiff it was also denied that there was any oral agreement that the purchase would be made through the Society. The defendant cannot in these circumstances be said to have been willing to perform his part of the contract, and having regard to the scheme under which the house in question was going to be purchased by the plaintiff the part which the defendant was not willing to perform was a material part of the contract. The learn

ed Civil Judge has, therefore, rightly held that a case for forfeiture of the earnest money has not been established

7. There is, however, another and a broader ground for holding that the plaintiff has not incurred forfeiture of the earnest money paid by him. The nature of the ad which the plaintiff undertook to perform under the deed of agreement was not such as required only a personal performance. The plaintiff had merely to pay the rest of the consideration for the sale and get the sale deed executed. Can it then be said that there was a breach of contract on his part because he insisted that the sale deed be executed not in his own favour but in favour of the Society? It appears to be undeniable that the right of the plaintiff under the contract for sale or in other words the benefit of the contract was assignable. There is nothing in the deed of agreement which may even remotely suggest that an assignment of the rights secured under the contract was prohibited, and there was nothing in the nature of the contract itself to indicate that its enforcement was to be limited only to the plaintiff

8. Except in some special circumstances, a contract to sell a property is not dependent upon any personal qualifications of the individual who agrees to purchase and it is a matter of no consequence to the vendor that the person who is going to be the vendee is not the same person with whom he had entered into a contract for sale. Such a contract is, therefore, enforceable not only by the person to whom the property was agreed to be sold but also by his representatives in interest and assignees, unless of course the contract itself prohibits assignment either expressly or by clear implication. Section 23 of the Specific Relief Act provides as to who may obtain specific performance of a contract and the material part of the section runs as follows:

"Except as otherwise provided by the Chapter, the specific performance of a contract may be obtained by--

(a) any party thereto;

(b) the representative in interest, or the principal, of any party thereto: provided that, where the learning, skill, solvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative in interest or his principal shall not be entitled to specific performance of the contract, unless where his part thereof has already been performed." Clause (b) makes it clear that the contract to sell was enforceable even by the plaintiff's representative and was assignable. In *Munuswami Nayudu v. Sagalaguna Nayudu AIR 1920 Mad 699* where: an assignee of a contract for reconveyance of an immovable property had sued for the specific performance of the contract it was held by a Division Bench of the Madras High Court that a right under an executory contract to exercise an option at a certain future date to obtain a reconveyance of immovable property is assignable. This

decision was affirmed by their Lordships of the Privy Council in AIR 1928 174 (Privy Council) and the view that the benefit of the contract could be assigned was upheld. I may also refer to Bipin Behari Deb v. Masrab Ali. AIR 1961 Gua 173, where Mehrotra, J (as he then was) observed that it cannot be disputed that a transferee of a contract for reconveyance can enforce the contract in the absence of any contract to the contrary

8a. 1 have emphasised the assignability of the benefit of the contract into which the plaintiff had entered not because there was any actual assignment in favour of the Society but to show that the performance of the contract to sell the house in question could in certain situations have been enforced by persons other than the plaintiff, and naturally the act which the plaintiff was required to perform under the contract could in those situations have been performed by such other persons.

9. It has now to be seen whether the plaintiff could have discharged his obligation under the contract by getting it performed by somebody else even without an assignment. The reply to this question is furnished by Section 40 of the Contract Act which is in the following terms:

"If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it:"

Having regard to the principle embodied in the above provision it must be admitted that except in very special circumstances, a person agreeing to purchase a property is not bound to purchase it himself and he may arrange for the purchase of the property by some other person as his nominee on the terms of the agreement entered into by him. In a contract of this nature no considerations of skill, knowledge or other things peculiar to the person stipulating to purchase are involved and the personality of the individual who fulfils the obligation to purchase the property is altogether irrelevant. Generally speaking, therefore, a personal performance of the obligation is not in the contemplation of the parties, and it is open to the person who has agreed to purchase the property to employ a competent person to purchase it. Certainly, before he can be deemed to have discharged his liability under the contract he has to ensure and see that the promise is performed in accordance with the stipulated terms, but if he does so the person who has agreed to sell the property cannot, after declining to accept performance of the contract by the nominee of the person who had agreed to purchase, charge the latter with not having carried out his promise

I may here refer to the case of P.L. Rangiah Chettiar Vs. Parthasarathy Iyengar. In that case the question was whether a contract to sell goods could be assigned by the seller so as to enable the assignee to sue for damages for breach of contract on tender of performance by him. Chan drashekha Aiyar, J. referred to Section 40 of

the Contract Act and held that the suit contract was one which must have been contemplated by the parties as capable of being performed on both sides by assignees or representatives. Further, the possibility of performance or enforcement of the contract was not held to be limited to representatives and assignees in the strict sense as the following observation in the judgment would show:

"If there is no objection to the seller getting some one else on his behalf to deliver the goods to the buyer, there is equally no objection to his being authorised to file a suit as the seller's deputy or nominee or agent to enforce his rights "

For the reasons stated above I am clearly of the view that the plaintiff could have the agreement to purchase the house in question performed by the Society, particularly when the defendant had agreed to sell the property to the plaintiff "through the Allahabad Co-operative Housing Society Limited". And if that is so, it makes no difference that although the plaintiff was insisting that the sale deed be executed in the name of the Society there was no offer by the Society itself to carry out the obligation of the plaintiff. The plaintiff was prepared to do what was required to be done by him under the contract, and all that he desired was that the Society should be described as the vendee in the sale deed. The plaintiff could, as I have said above, employ the Society for the performance of the agreement to purchase the house and the defendant should therefore have accepted performance in the manner in which it was offered to be performed by the plaintiff. The deed of agreement did not require that the sanction for transfer was to be a sanction for transferring the house in favour of the plaintiff and there was nothing to prevent the defendant from executing the sale deed in favour of the Society. It has not been shown that the defendant would have made himself subject to any liability by executing the sale deed in the name of the Society and it would also appear from the correspondence referred to above that the plaintiff had offered to guarantee to the defendant immunity from all liabilities in that connection. It seems clear therefore, that the plaintiff did not incur forfeiture of the earnest money under the terms of the contract.

10. I may incidentally refer to the forfeiture clause in the deed of agreement, which runs thus:

"If from any cause whatsoever the purchase shall not be completed within one month of the receipt of the sanction the purchaser shall forfeit the amount of Rs. 1,000 (one thousand) only paid as earnest money and compel specific performance of the contract by sale and vice versa the same will apply to seller also if he refuses to sell, he will return earnest money with Rs. 1000/- (rupees one thousand) as damages with specific performance."

The words used in the first part of the clause do not make forfeiture the result only of a failure on the part of the plaintiff to purchase the property but forfeiture is to follow as a consequence of the purchase not being completed within one month of

the receipt of the sanction to whatever cause the non-completion of the purchase may be due. The forfeiture clause as it is worded, might, therefore, have been applicable even if the sale could not be executed on account of the defendant's own default, and therefore the clause as it stands in the deed, may be regarded as had and unenforceable in law. Then, it is not intelligible how the plaintiff could forfeit the earnest money and also compel specific performance of the contract of sale, as the clause provides. The case has, however, proceeded throughout on the footing that it was intended by the parties to the contract that the earnest money would be forfeited if the sale deed is not executed on account of a default committed by the plaintiff, and the learned counsel for the parties have argued the case on that footing in this Court as well. However as I have held that there was no default on the part of the plaintiff it is not necessary to deal with this feature of the forfeiture clause in the deed of agreement and its effect.

11. There is yet another matter which has to be considered in connection with the question of forfeiture of the earnest money. Subsequent to the execution of the deed of agreement there was a variation of its terms and the defendant agreed to sell the house to the plaintiff "through the Allahabad Co-operative Housing Society Limited" as the application (Ex. B) clearly shows. Can it be said that the parties meant the same thing by the variation agreed to by them and they were *ad idem*? If the plaintiff believed that in accordance with the subsequent agreement the vendee under the deed would be the Society and the Society would be shown as purchasing the property for him, while the defendant thought that the vendee under the deed would be the plaintiff and he would only be described as purchasing the property, "through the Allahabad Co-operative Housing Society Limited", it would be difficult to attribute to the plaintiff a breach of contract. Attention may be drawn in this connection to the fact that in the draft of the sale deed prepared on behalf of the defendant and sent to D.S. Darbari plaintiff for approval the vendee was described as "D.S. Darbari a member of the Allahabad Co-operative Housing Society Limited a body corporate registered under the Cooperative Societies Act, 1912", whereas the amendment which the plaintiff, according to his statement, suggested and made in the draft described the vendee as the "Allahabad Cooperative Housing Society Limited a body corporate registered under the Co-operative Societies Act 1912 on behalf of D.S. Darbari who is a member of the said society and who has paid a sum of Rs. 1000/- as earnest money on 20-1-1948 and who accepts the conditions of the deed." From the circumstances of the case it must be said to be doubtful if the parties had decided upon the precise words in which the vendee would be described in the sale deed. It is true that the allegation of the plaintiff that it was explicitly agreed that the sale deed would be executed in favour of the Society has not been accepted but the question still remains whether it can be said that both the parties were united in their minds as to the shape which the description of the vendee would take in the deed of sale. As I have said above, this question cannot be answered in the affirmative, with definiteness. And since the whole dispute in

relation to the execution of the contract for sale centred on as to who was to be mentioned as the vendee or rather as to how the vendee was to be described in the sale deed, it cannot likewise be said with definiteness that the plaintiff was guilty of breach of contract.

12. The result of the foregoing discussion is that the stipulation regarding forfeiture of the earnest money never came into operation and the plaintiff is, therefore, entitled to recover the sum of Rs. 1000/- paid by him as such. In view of this finding it is unnecessary for me to enter into the question whether even in the event of the plaintiff's failure to carry out his part of the contract the defendant would have been entitled to retain the earnest money by virtue of the stipulation for forfeiture or only to reasonable compensation not exceeding the earnest money.

13. It now remains to be considered whether the plaintiff is entitled to the damages claimed by him. Admittedly, this amount is claimed by the plaintiff not on account of any actual loss caused to him but in enforcement of that clause in the deed of agreement which has been quoted above. The second part of the clause provides that if the defendant refuses to sell he will return the earnest money with Rs. 1000/- as damages "with specific performance." Again, it is not intelligible how the defendant could be liable for specific performance as also for the return of the earnest money with Rs. 1000/- as damages. However, the question is whether the defendant refused to sell and whether, in the circumstances of the case, he should be made liable for damages on the basis of a pre-estimate of the damages made in the deed of agreement. It has been found that the defendant had never agreed to execute the sale deed in favour of the Society, as alleged by the plaintiff. It is also clear that the plaintiff insisted on the sale being executed in the name of the Society and never showed his willingness to have the sale deed executed in his own favour "through the Allahabad Co-operative Housing Society Limited" as mentioned in the application made by the parties to the Collector for sanction of transfer. The time provided in the deed of agreement for the completion of the sale deed was extended by the defendant and he did not refuse to execute the sale deed merely because the time agreed upon had expired. All that can be said against the defendant is that he should have allowed the plaintiff to purchase the property in the name of the Society and in any event he should have offered to execute the sale deed in favour of the plaintiff "through the Allahabad Co-operative Housing Society Limited" But having regard to the circumstances of the case, it cannot be said on that account that the defendant brought himself within the mischief of the above quoted clause of the agreement. For the situation which prevented the execution of the sale deed both the parties were responsible. Neither of the parties was wholly at fault and neither was faultless. As such no decree for damages should, in my opinion, be passed against the defendant.

14. The result is that the decree of the lower appellate court is upheld and both the appeals are dismissed. The parties will bear their own costs in both the appeals