
(2006) 10 DEL CK 0061

Delhi High Court

Case No: C.S. (OS) No. 1921 of 1996

Simi Katyal

APPELLANT

Vs

Ram Pyari Batra and Others

RESPONDENT

Date of Decision: Oct. 5, 2006

Citation: (2007) 95 DRJ 144

Hon'ble Judges: Pradeep Nandrajog, J

Bench: Single Bench

Advocate: Bhaskar Tiwari, for the Appellant; B.L. Wali, for Defendant Nos. 1-4, Vijay Kishan Jetly and Vikram Jetly for Defendant No. 5, for the Respondent

Judgement

Pradeep Nandrajog, J.

In terms of the order dated 19th July 2006, arguments have been advanced by learned Counsel for the parties on the issue whether the suit for specific performance is maintainable and whether relief which can be claimed by the plaintiff is to be restricted to damages in accordance with Clause "e" of the agreement between the parties.

2. Suit seeks a decree for specific performance of an undated agreement to sell. Clause "e" of the same reads as under:

(e) If the prospective purchaser fail to fulfill the above conditions, the transaction shall stand cancelled and earnest money will be forfeited .In case I fail to complete the transaction as stipulate above, the purchaser will get the DOUBLE amount of the earnest money. In the both condition, DEALER will get 4% commission from the faulty party.

3. Placing reliance upon a decision of the Hon"ble Supreme Court reported as [Dadarao and Another Vs. Ramrao and Others](#), followed by a Division Bench of this Court in the decision reported [Shri Ashok Kumar Ratra Vs. Smt. Simi Katyal and others](#), learned Counsel for the defendants urge that plaintiff cannot claim specific performance. Counsel for the plaintiff states that the decision of the Supreme Court

in Dadarao's case (Supra) has been held to be per incuriam by the Hon'ble Supreme Court in a latter decision [P. D"Souza Vs. Shondrilo Naidu, .](#)

4. Counsel states that as observed by the Supreme Court in P.D. "Souza"s case, decision in Dadarao"s case did not notice an earlier decision of the Supreme Court reported as [M.L. Devender Singh and Others Vs. Syed Khaja, .](#)

5. Relevant clause which was subject matter of consideration in P.D. "Souza"s case was Clause 7 of the subject agreement. The said clause read as under:

(7) That if the vendor fails to discharge the mortgage and also commits any breach of the terms in this agreement and fails to sell the property, then in that even he shall return the advance of Rs. 10,000 paid as aforesaid and shall also be liable to pay a further sum of Rs. 2000 as liquidated damages for the breach of the agreement.

6. Language of the instant clause, subject matter of the present suit being Clause "e" is as noted in para 2 above.

7. The language of the clause is to the effect that if the purchaser i.e., plaintiff fails to fulfill the reciprocal obligations to pay Rs. 23 lacs within 100 days of execution of the agreement, the transaction shall stand cancelled and earnest money will be forfeited. It is further recorded that in case seller i.e., defendant fails to complete the transaction as stipulated, purchaser i.e., plaintiff will get double the amount of the earnest money.

8. There is a material difference in the language of Clause 7 which was subject matter of consideration in P.D. "Souza"s case and instant clause.

9. Where parties provide for a consequence in the agreement, the consequences have to be followed and adhered to.

10. By recording, that in case the prospective purchaser fails to fulfill his reciprocal obligations the transaction shall stand cancelled parties have evidenced that they were at ad idem on the point that failure of the purchaser to comply with his reciprocal obligations would amount to a cancellation of the contract. Remedy of the seller was to forfeit the earnest money.

11. What is price of the property had fallen to Rs. 2 lakhs? Could the seller claim damages from the plaintiff? Had this situation occurred, would it not be a good defence for the plaintiff to urge that the relevant clause of the contract treated the contract as cancelled and, therefore, no claim could be made for damages. Could he not have successfully argued that save and except forfeit the earnest money, no other right is available to the seller?

12. Learned Counsel for the plaintiff submits that effect of transaction being treated as cancelled is limited only to the default of the purchaser. Qua default of the seller, law as explained in P.D "Souza"s case holds good.

13. I am afraid, reciprocity demands equal consequences to flow.

14. As I read Clause V of the agreement, parties are at ad idem that in case of default (of either party) transaction shall stand cancelled. Limited rights have been given to either party. Right of the seller is to forfeit the earnest money. Right of the purchaser is to seek recompense by claiming double the amount of the earnest money.

15. I accordingly hold that the suit is not maintainable insofar it seeks a decree for specific performance. Suit would be maintainable for damages in terms of Clause "e" of the agreement.

16. At this stage, learned Counsel for defendant No. 5 on instructions from defendant No. 5 at a les that without prejudice to the rights of defendant No. 5, said defendant is ready and willing to pay a sum of Rs. 4 lacs to the plaintiff. Counsel states that defendant No. 5 wants to reserve his right to defend the litigation should present order be upset in appeal.

17. I accordingly dispose of the suit passing a decree in favour of the plaintiff and against defendant No. 5 in sum of Rs. 4 lacs together with simple interest @ 6% p.a. from date of suit till date of payment.

18. No costs.