

BANSHILAL SONI (DEAD) THROUGH LRS.

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v.

KASTOOR CHAND BEGANI (DEAD) BY L.RS. & ORS.

JULY 12, 2007

[DR. ARIJIT PASAYAT AND LOKESHWAR SINGH PANTA, JJ.]

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*Specific performance—Specific performance of contract—Entitlement for—Plaintiff's case that defendant agreed to sell house by execution of sale agreement—Plaintiff paying advance amount of Rs 50,000/—Non-execution of sale deed—Suit for specific performance of contract—Defendant's case that plaintiff gave loan of Rs 50,000/ on condition that defendants would execute sale agreement of house as collateral security for such loan and plaintiff voluntarily accepting return of Rs 25,000/ towards part of loan advanced by him—Return of amount was 7 days before the date fixed for execution of sale deed—High Court held that plaintiff not entitled to specific performance of contract since he abandoned the right by accepting Rs. 25,000—On appeal, held: Transaction was of loan and security and not of refund of earnest money as made out by High Court—However, order of High Court not set aside—In the interest of justice, defendant directed to pay Rs 7.5 lakhs to the plaintiff.*

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According to the plaintiff, the defendants agreed to sell a house to the plaintiff for Rs 5 lakhs by execution of sale agreement. Defendant took advance amount of Rs. 50,000/-. Sale deed was to be executed on 10.04.1991. Defendants did not execute the sale deed. Plaintiff issued notice to the defendants. Plaintiff then filed suit for specific performance of contract for sale of house. Defendants contended that the plaintiffs gave a loan of Rs 50,000/- to them on the condition that the defendants would execute an agreement to sell the house as a collateral security for such loan; that they never agreed to hand over the possession of the house after execution of sale deed; that the plaintiff was not ready and willing to perform his part of the contract; that the plaintiff voluntarily accepted return of Rs 25,000/- towards part of loan advanced by him on 03.04.1991 and receipt was issued and as such abandoned his claim of specific enforcement of the contract; and that the time was essence of contract and the same was not complied with. Trial Court held that the plaintiff was ready and willing to perform the contract,

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A the time was not essence of contract and that it was an agreement for sale and not for loan amount. High Court held that the plaintiff abandoned his rights under the contract thus, was not entitled to specific performance of the contract. However, it directed the defendants to pay Rs 1 lakh to the plaintiff for wrong retention of Rs 25,000/- of the plaintiff. Hence the present appeal.

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Appellants-plaintiffs contended that the High Court made out a new case which is contrary to the evidence led in the matter and the evidence adduced.

Disposing of the appeal, the Court

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HELD: 1.1. When the evidence of the defendants is scanned with the specific stand there was no agreement to sale and the agreement of security of loan. In the evidence it was stated that Rs.25,000/- was paid by way of repayment. It was indicated to suggest that plaintiff had paid earnest money. The trial court recorded that stipulation for damages are unusual. The last date for execution of sale deed was 10.4.1991. For a period of nearly 20 months nothing was done and about 7 days before the expiry of the 20 months period the receipt of Rs.25,000/- was issued. There was no notice or demand indicating readiness and willingness. The notice was given three months after the date i.e. 10.4.1991, on 15.7.1991. There was no mention about the payment of Rs.25,000/- in the suit. Since the relief claimed is discretionary one, it would not be proper to interfere with the conclusions of the High Court.

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[Para 8] [327-H; 328-A-B]

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1.2. A bare reading of the evidence of the defendants clearly shows that the specific case was one of loan and security and not a case regarding refund of earnest money. That being so the High Court has made out a new case that the sum of Rs.25,000/- was by way of refund of earnest money. That was not the case of the defendants in the pleadings or in the evidence. Interestingly, the stands in the reply to the notice were at variance with the written statement. Therefore, normally the order of the High Court would have been set aside. But some factors which were relevant for the defendant need to be noted. It is stated that the house is only one which is possessed by the legal heirs of the original defendant though the counsel for the plaintiffs stated that the statement is not fully correct. Both the plaintiff and the defendant No.1 have died. [Para 9] [328-C-E]

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1.3. In the interest of justice, the defendants are directed to pay a sum of Rs.7.5 lakhs to the plaintiffs. The plaintiffs are permitted to withdraw Rs.

one lakh which was deposited pursuant to the order of High Court. Balance amount is to be paid within six months by the defendants to the plaintiffs. If the payment is made, it would be treated as if order of High Court is not interfered with though the same is not sustainable. On the contrary, if the amount is not paid, the appeal would be treated as allowed and the impugned order has to be treated to have been set aside. [Para 9] [328-E-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5453 of 2000.

From the Final Judgment & Order dated 4.3.1999 of the High Court of Madhya Pradesh at Jabalpur in First Appeal No. 394 of 1995.

Ginny A. Rautray, Manoj Sharma and Kanchan Kaur Dhodi for the Appellant.

V.A. Mohta, Sr. Adv., Manish Pitale and Chander Shekhar Ashri for the Respondents.

The Judgment of the Court was delivered by

**DR. ARIJIT PASAYAT, J.** 1. Challenge in this appeal is to the judgment rendered by a Division Bench of the Madhya Pradesh High Court at Jabalpur. By the impugned judgment, the High Court held that the Trial Court had erroneously accepted the explanation given by the appellant. It accepted the plea of the defendant-respondent that there was abandonment of rights under the contract by the plaintiff. The plaintiff was, therefore, held to be not entitled to claim for specific performance of the contract. However, directions were given for payment of rupees one lakh in view of the wrong retention of a sum of Rs.25,000/- of the plaintiff by the defendant. The original plaintiff Banshilal Soni is dead and his legal heirs are the appellants.

Background facts in a nutshell are as follows:

2. The appellant-plaintiff instituted the Civil Suit No.8-A/92 for specific performance of contract for sale of house no.11/198 situated at Halwai Line, Raipur as per the agreement dated 10.10.1989. According to the plaintiff, the defendants had agreed to sell the suit house to the plaintiff, for a consideration of Rs.5 lakhs by execution of an agreement for sale of the same on 10.10.1989. In pursuance of the agreement dated 10.10.1989, the defendant no.1 had taken Rs.50,000/- as an advance/earnest money by cheque no.062037 dated 11.10.1989 drawn on Central Bank of India, Raipur. The defendants had undertaken to

A satisfy the plaintiff about their clear title to obtain 'No Objection Certificate' from Income Tax Department and to complete all requisite formalities before the registration of the sale deed. The sale deed was to be executed on 10.4.1991 and physical possession of the house was to be given by that date. The defendants had conveyed that the suit house was free from all encumbrances. It was pleaded in the plaint that the plaintiff was and is still

B ready to perform his part of the contract to pay the balance consideration and get the sale deed executed and registered in his favour. The plaintiff had given a registered notice on 15.7.1991 through his Advocate requiring the defendants to execute the sale deed and get the same registered and to hand over physical possession of the suit house. However, the defendants, through

C their counsel, falsely alleged that the plaintiff had no sufficient fund and thus was responsible for breach of contract. It was put-forth that the defendants did not take any step to obtain a clearance certificate from the Income Tax Department and were taking steps to sell the suit house to some one else at a higher price. With the aforesaid averments, the plaintiff sought relief for issue of a direction to the defendants to execute the sale deed and get the

D same registered in favour of the plaintiff and to put the plaintiff in actual physical possession and on his failure to comply with the direction of the Court, for execution of the sale deed through court. There was also a prayer for grant of any other relief in the circumstances of the case.

E 3. The defendants resisted the relief sought in the suit. According to them, the defendant No.2 had not signed the above agreement. In the year 1989, the defendant No.1 had suffered loss in his business and was in financial difficulty and, therefore, he approached the plaintiff for financial assistance. The plaintiff had advanced Rs.50,000/- as a loan on the condition, that the defendants shall execute an agreement to sell the suit house as a

F collateral security for such loan. It is the case of the defendants that the market value of the suit house was Rs.10 lakhs but the defendants were compelled to execute the agreement being in a precarious financial condition. It was also stated that they were not required to obtain any clearance certificate from the Income Tax Department and had never agreed to hand over the possession of the suit house after execution of sale deed. They disputed the

G plaintiff's readiness and willingness. It was also the case of the defendants before the Court below that the plaintiff had accepted Rs.25,000/- on 3.4.1991 towards a part of the loan advanced by him and granted a receipt thereof. It was also pleaded that the contract is not specifically enforceable as the agreement itself stipulates that the parties had agreed that the defendants shall pay Rs.2 lakhs to the plaintiff in case the contract was not completed.

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It was further set forth that in case the court thinks it fit, it may grant compensation to the plaintiff, instead of issuing a direction for execution of the sale deed. It was also put-forth by the defendants that the time was the essence of the contract and the same having not been given due compliance, the plaintiff was not entitled to any relief under the law. Lastly, it was contended by the defendants that the plaintiff having voluntarily accepted the return of Rs.25,000/- he had abandoned his claim of specific enforcement of the contract.

4. The High Court accepted that the Trial Court's finding regarding readiness and willingness of the plaintiff was in order, and that time was not the essence of the contract. Exhibit P1 was an agreement for sale, and not for a loan amount. After having accepted the plaintiff's case to the aforesaid extent the High Court ultimately came to the conclusion that there was abandonment of the rights under the contract by the plaintiff.

5. During the pendency of the appeal both the plaintiff and the defendant no.1 have died and their legal heirs have been brought on record.

6. Learned counsel for the appellants submitted that the High Court has made out a new case which is contrary to the evidence led in the matter and the evidence adduced.

7. With reference to the reply to the legal notice it is pointed out that the execution of the agreement and receipt of the money was not disputed. Further, there was no question of oral agreement as the agreement itself provided for the contingency when either of the parties failed to perform his part of the contract. There was no evidence led regarding the oral agreement. In the reply it was not mentioned that the amount was taken as loan or as mortgage. It was stated to be refund of the earnest money. In the written statement a different stand has been taken from what was stated in the reply to the notice. It was stated in the written statement that the amount represented a loan. It was further stated that the document was one of security and there was part payment of the loan. In the additional plea it was stated that the hardship was not realized at the time of the agreement. Additionally, this plea is also contrary with the plea about the loan. When the evidence of the defendants is scanned with the specific stand there was no agreement to sale and the agreement of security of loan.

8. In para 6 of the evidence it was stated that Rs.25,000/- was paid by way of repayment. At para 7 it was indicated to suggest that plaintiff had paid

A earnest money. It is, therefore, submitted that terms of the agreement were usual and could not be treated to be one for agreement of sale. The Trial Court recorded that stipulation for damages are unusual. The last date for execution of sale deed was 10.4.1991. For a period of nearly 20 months nothing was done and about 7 days before the expiry of the 20 months period the receipt of Rs.25,000/- was issued. There was no notice or demand indicating readiness and willingness. The notice was given three months after the date i.e. 10.4.1991, on 15.7.1991. There was no mention about the payment of Rs.25,000/- in the suit. Since the relief claimed is discretionary one, it would not be proper to interfere with the conclusions of the High Court.

C 9. A bare reading of the evidence of the defendants clearly shows that the specific case was one of loan and security and not a case regarding refund of earnest money. That being so the High Court has made out a new case that the sum of Rs.25,000/- was by way of refund of earnest money. That was not the case of the defendants in the pleadings or in the evidence. Interestingly, the stands in the reply to the notice were at variance with the written statement. Therefore, normally we would have set aside the order of the High Court. But some factors which were relevant for the respondent need to be noted. It is stated that the house is only one which is possessed by the legal heirs of the original defendant though the learned counsel for the appellants stated that the statement is not fully correct. Both the plaintiff and the defendant No.1 have died. We feel in the peculiar circumstances of the case interest of justice would be best served if the respondents are directed to pay a sum of Rs.7.5 lakhs to the appellants. It is stated that a sum of rupees one lakh has been deposited pursuant to the order of the High Court. The same shall be permitted to be withdrawn by the appellants. Balance amount shall be paid within six months by the respondents to the appellants. If the payment is made, it shall be treated as if we have not interfered with the order of the High Court though the same is not sustainable. On the contrary, if the amount is not paid, the appeal shall be treated as allowed and the impugned order has to be treated to have been set aside.

G 10. The appeal is accordingly disposed of. There will be no order as to costs.