Neutral Citation No. - 2023:AHC:220473

Court No. - 33 **Reserved**

A.F.R.

Case :- SECOND APPEAL No. - 2053 of 1980

Appellant :- Smt. Jeet Kuar
Respondent :- Sri Mishri Lal
Counsel for Appellant :- Sri G.N.Verma,A.N.Verma,Omuir Babu, Vishnu Sahai
Counsel for Respondent :- Sri S.N.Singh,Ashok Kumar Srivastava, R.N.Singh

Hon'ble J.J. Munir,J.

1. This is a plaintiff's second appeal arising out of a suit for specific performance of contract. The suit was decreed by the Trial Court, but the decree has been modified in appeal by the Lower Appellate Court, substituting the direction for specific performance with an order for refund of the admitted earnest.

2. By a registered agreement to sell dated 13.06.1974 executed by Mishri Lal in favour of Smt. Jeet Kaur, Jeet Kaur, the plaintiff, alleged that Mishri Lal had covenanted to transfer for a sale consideration of Rs.9000/- his one-fourth share in the property, subject matter of contract. The property, agreed to be sold in terms of the registered agreement dated 13.06.1974, shall be called hereinafter as 'the suit property'. The details of the suit property are:

Sl. No.	Plot No.	Area	Location
1.	854	3 Bigha 15 Biswa 1 Biswansi	Village Bain Kalan, Pargana Gangeri, Tehsil Atrauli, District Aligarh
2.	856	14 Biswa 15 Biswansi	Do
3.	858-Ba	3 Bigha 13 Biswa 11 Biswansi	Do
4.	858-Aa	4 Biswansi	Do

3. According to Smt. Jeet Kaur, the sole plaintiff-appellant, now represented by her heirs and LRs, plaintiff-appellant Nos.1/1 and 1/2, who shall hereinafter be referred to as 'the plaintiff', executed an agreement to sell dated 13.06.1974, for short, 'the suit agreement' covenanting that the defendant, Mishri Lal had received in earnest a sum of Rs.7900/- until time of execution of the last mentioned agreement; the balance of Rs.1100/- was covenanted to be paid by the plaintiff to the defendant at the time of execution of the sale deed. The plaintiff's further case is that the defendant, Mishri Lal agreed that he would secure for the suit property a *bhumidhari sanad* and within the time period of a month of its receipt, would execute a registered sale deed, as covenanted, upon receipt of the balance sale consideration of Rs.1100/-. The defendant, Mishri Lal, who is now represented on record by his sole heir and LR, Natthi Singh, his son, as respondent No.1/1, shall hereinafter be referred to as 'the defendant'.

4. According to the plaintiff, the defendant had agreed that upon receipt of the *bhumidhari sanad*, he would inform the plaintiff by notice about the fact, calling upon the latter to execute the conveyance. The plaintiff averred in his plaint that the defendant, in terms of the suit agreement, did not give him any information about receipt of the *bhumidhari sanad*, despite the plaintiff verbally inquiring of the defendant time over again regarding the fact aforesaid. As such, the plaintiff caused a notice dated 31.01.1977 to be served upon the defendant to the effect that the defendant may, in terms of the suit agreement, receive the balance sale consideration from the plaintiff and

execute the covenanted sale deed at the earliest, and get the same registered.

5. The plaintiff pleads that despite service of the said notice, the defendant is not ready to execute the covenanted sale deed, in breach of the suit agreement. There is then the plaintiff's case that she has, in terms of the suit agreement, been always ready and willing, and is still ready and willing to secure execution of the covenanted sale deed. It may be remarked here that the precise words in the pleading employed in Paragraph No.7 of the plaint are: सदैव बैनामा कराने को तैयार थी और अब भी है।

6. This Court noticed that the pleading on the point does not mention the Hindi equivalents of ready and willing, which are concomitants of the cause of action under Section 16 of the Specific Relief Act, 1963. The Hindi equivalents of ready and willing are 'तत्पर' and 'इच्छुक'. Here, the word employed is a single word 'तैयार', an Urdu vernacular, which may not precisely represent the two distinct ideas of readiness and willingness postulated by the statute. However, since there was no issue raised about this matter before the Courts below, this Court does not propose to examine the matter any further and leaves it to rest here.

7. The plaintiff's further case is that the defendant's estate has been enlarged into a *bhumidhari* in view of the 1977 Amendment to the U.P. Zamindari Abolition and Land Reforms Act, and that now without securing a *bhumidhari sanad*, the defendant is competent to execute the covenanted sale deed. Alleging a breach of the suit agreement by the defendant, the present suit for specific performance was instituted by the plaintiff on 02.07.1977.

8. A written statement was filed on behalf of the defendant, where the pleas raised in the plaint were generally denied. In the additional pleas, it was averred that no cause of action arose to the plaintiff to bring the present action. The defendant never entered into the suit agreement covenanting to convey the suit property for a sum of Rs.9000/- or any other sum of money in the plaintiff's favour. According to the defendant, the value of the suit property was at least Rs.25,000/-, and, therefore, the defendant would never execute an agreement to sell covenanting to convey the suit property in favour of the plaintiff for a sum of Rs.9000/-. The defendant alleged that the plaintiff was his cousin, his father's brother's daughter. The defendant would trust her much. He was in need of a sum of Rs.4000/-. He received a sum of Rs.2500/- in loan from the plaintiff to be repaid with interest @ 2% per month. The sum of Rs.2500/- lent to the defendant at the time of execution of the registered instrument was done on the understanding that the balance sum of loan would be paid to the defendant by and by, against receipts to be executed by the defendant. Since, the defendant was not in need of any further sum of money, he did not receive the balance of the agreed loan from the plaintiff.

9. There is an averment to the effect in the written statement that the plaintiff's case that a sum of Rs.5400/- had already been paid to the defendant is absolutely incorrect, without basis and a falsehood. The defendant says that he is an illiterate and rustic villager. The entire transaction and execution of the suit agreement has been undertaken by the plaintiff's husband, Pratap Singh, an experienced litigant and a clever man. It is he, who has got the suit agreement executed employing a scribe and witnesses, who enjoy his confidence. The defendant has admitted that he would have no objection to repay the plaintiff

the sum of Rs.2500/- and the accrued interest thereon. The defendant next avers that he is a member of a scheduled caste and by the law not competent to transfer the suit property in the plaintiff's favour. Therefore, according to the defendant, the suit agreement cannot be acted upon. It is again pleaded that the suit property is not worth less than Rs.25,000/-. The defendant is entitled to the benefits of Section 20 and 22 of the Specific Relief Act. The defendant says that the suit deserves to be dismissed with costs.

10. On the pleadings of parties, the following issues were framed:

> "1. Whether the defendant agreed to sell the land in dispute for Rs.9000/- to the plaintiff as alleged and executed the agreement dated 13/6/74?
>
> 2. Weather the defendant is a member of scheduled caste and as such he is not competent to sell his land?
>
> 3. Whether the defendant is entitled to get benefit of Sections 20 and 22 of Specific Relief Act?
>
> 4. Whether the defendant was given only Rs.2500/- and not Rs.7900/- as alleged in paras 10 and 11 of WS?
>
> 5. To what relief, if any, is the plaintiff entitled?"

11. Issues Nos.1 and 4 were decided together by the Trial Court, answering Issue No.1 in the plaintiff's favour and No.4 against the defendant. The execution of the suit agreement contracting a sale of the suit property was held established and it was further held that the defendant received from the plaintiff a sum of Rs.5400/- and Rs.2500/-, the former, prior to execution of the suit agreement, and the latter, at the time of its registration, leaving a balance of Rs.1100/- to be paid at the time of execution of the registered sale deed. Issue No.2 was

decided against the defendant and likewise Issue No.3. The suit was, in consequence, decreed with costs directing the defendant to specifically perform his obligations by executing a sale deed in the plaintiff's favour upon receiving the balance sale consideration of Rs.1100/-, all to be done in the time period of 30 days from the date of the decree; in default the plaintiff was given liberty to secure execution of the sale deed in his favour at the defendant's expense through process of Court.

12. The defendant appealed the decree to the District Judge, Aligarh in *forma pauperis*. The appeal was, therefore, registered as Misc. Case No.135 of 1978. The application to appeal as an indigent was rejected by the learned District Judge *vide* order dated 15.12.1979. The defendant paid the requisite court-fee on 06.04.1980 leading to registration of the appeal on the file of the learned District Judge, numbered as Civil Appeal No.156 of 1980.

13. The appeal was heard and determined by the learned District Judge *vide* judgment and decree dated 14.07.1980. The learned Judge allowed the appeal, set aside the decree granting specific performance and substituted it by one directing refund of Rs.2500/- paid in earnest with interest @ 17% per *annum* from 13.06.1974 upto 02.07.1977. The plaintiff was also held entitled to *pendente lite* and future interest on the sum of Rs.2500/- @ 6% per *annum* until realization upon payment of court-fee in the execution department. The parties were held entitled to costs proportionate to their failure and success throughout. The learned District Judge in deciding the appeal formulated three points for determination, upon which he pronounced. These are: *(1) Whether plaintiff paid a sum of Rs.5400/- to defendant as advance on 13.6.1974 prior to the*

execution of the agreement for sale (Ex.1)?, (2) Whether defendant is entitled to the benefit of Sec.20 and 22 of Specific Relief Act? And, (3) To what relief, if any, is the plaintiff entitled? The learned District Judge decided Point No.(1) in the negative holding that the advance of Rs.5400/- was not paid by the defendant to the plaintiff on 13.06.1974 at her home while her husband was away. Point No.(2) was decided in the affirmative holding that in the totality of circumstances and having regard to the conduct of parties, their relationship, the manner in which the defendant fell prey to the sharp practice of his brother-in-law, Pratap Singh, it is just and proper to refuse specific performance. Point No.3 was decided in the manner that the plaintiff was held entitled to the relief of refund of the earnest in the sum of Rs.2500/-. In addition to it, he was held obliged to pay interest at the rate of Rs.17/- per *annum* from 13.06.1974 to 02.07.1977. She was further held entitled to *pendente lite* and future interest on the principal at the rate of 6% per *annum* until payment, upon payment of necessary court-fee in the execution department.

14. On these findings, the learned District Judge set aside the decree for specific performance and substituted it with one for refund of the earnest. So much of the findings of the Lower Appellate Court on these points, would be alluded to during the course of this judgment as are necessary to answer the substantial questions, on which this appeal has been heard before us.

15. Aggrieved by the appellate decree, the plaintiff has preferred this second appeal.

16. This second appeal was admitted to hearing *vide* order dated 19.08.1980 saying in that order that Grounds Nos.1, 2

and 3 raise substantial questions of law. No substantial question of law, however, was formulated by the Court in accordance with the requirements of the statute. The appeal came up before this Court on 13.05.2022 for hearing, when it was noticed that substantial questions, though mentioned in the order of admission with reference to grounds taken in the appeal, had not been formulated by the Court. Accordingly, on 13.05.2022, the following substantial questions of law were framed:

> *(i) Whether in a case where substantial part of the sale consideration is paid at the time of the suit agreement or thereafter before the suit is instituted, discretion can be exercised by the Court against granting specific performance under Section 20 of the Specific Relief Act, 1963?*
>
> *(ii) Whether Court can go behind the terms of the agreement executed between the parties in view of the provisions of Sections 91 and 92 of Indian Evidence Act, 1972?*

17. Heard Mr. Raghav Arora, learned Counsel for the plaintiff and Mr. Ashok Kumar Srivastava, learned Counsel appearing on behalf of the defendant.

18. It would be more convenient to take up for consideration Substantial Question of Law No. (ii), first.

19. It is submitted by Mr. Raghav Arora, learned Counsel for the plaintiff that in order to understand the legislative scheme underlying Sections 91 and 92 of the Indian Evidence Act, one has to look to the principle behind the need for reducing transactions between parties into writing. The purpose of reducing a transaction into writing is to perpetuate the memory of the transaction so as to avoid confusion about what that transaction is. Also, if the transaction has to be proved, the mandate of Sections 91 and 92 of the Evidence Act is that it

can be proved by the document alone; not by parole evidence. This, Mr. Arora says, is also called the principle of exclusivity of documentary evidence. He has invited the attention of the Court to Section 91 of the Evidence Act to say that it provides: '*when the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself,…...*', to borrow the precise phraseology of the statute. He submits that Section 91 embodies the rules of exclusivity of documentary evidence.

20. Mr. Arora next submits that Section 92 of the Evidence Act provides that when the terms of any such contract have been reduced to the form of a document and proved according to Section 91 of the Evidence Act, no evidence of any oral agreement or statement shall be admissible *inter partes* or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, the terms of the document. It is argued that Section 91 of the Evidence Act is a prohibitive provision. It places a bar upon parties proving the terms of a contract reduced to writing by extrinsic evidence. It permits proof of the transaction reduced to writing by documentary evidence and prohibits it by any oral evidence.

21. Section 92 of the Evidence Act also carries a prohibition. It prohibits proof of a document proved under Section 91 by any other evidence, particularly, oral, that a party may seek to lead in order to modify, add to or subtract from anything what the document says. Mr. Arora has placed reliance upon the

decision of the Uttarakhand High Court in **Smt. Raghuberi 'deceased' and others v. Ved Pal and others, AIR 2011 Utt 38**, where it is observed:

> "**8.** Since the substantial question of law on which the second appeal has been admitted encompasses a narrow area, this Court will only take up this legal issue. The fact of the matter is that plain reading of Sections 91 and 92 clearly stipulates that once the contents of written document have been proved, as it has been proved in the present case in the form of registered agreement for sale dated 10.5.1978, nothing which is contrary to or varying to or adding or subtracting to this contract shall be taken into consideration by the court. The existence of any condition which is there in an unregistered document (Ex. A-1) stipulates that if the defendant returns the agreed amount i.e. ` 7,700/- within a period of 2 years, the plaintiff shall not press upon the execution of the sale deed, is a document which cannot be relied upon in view of the clear cut separate provision contained in the written agreement for sale which was registered. Any reliance on it will be in violation of Sections 91 and 92 of the Indian Evidence Act. Therefore, it is the clear opinion of this Court that registered document for agreement for sale was misinterpreted and the reliance on the unregistered document (Ex. A-1) was clearly wrong."

22. He has further relied upon the decision of the Supreme Court in **Bishwanath Prasad Singh v. Rajendra Prasad and another, (2006) 4 SCC 432**, which in turn refers to **Ishwar Dass Jain (dead) through LRs v. Sohan Lal (dead) by LRs, (2000) 1 SCC 434** and **Roop Kumar v. Mohan Thedani, (2003) 6 SCC 595**. It is urged on the foot of all these authorities that this is a case where the suit agreement carries a recital to the effect that the defendant had received from the plaintiff Rs.5400/-. The suit agreement also covenants that the defendant will receive a sum of Rs.2500/- before the Sub-Registrar. The execution and registration of the document is admitted to the defendant. The suit agreement had been duly

proved by the plaintiff during trial, a fact clearly found by the Trial Court in the plaintiff's favour. The parole evidence of the defendant to the effect that he never received a sum of Rs.5400/- from the plaintiff as per the recitals in the suit agreement, cannot be looked into or considered. The reason is that the terms of the contract cannot be contradicted or proved incorrect by oral evidence on the point, which is inadmissible under Sections 91 and 92 of the Evidence Act.

23. It is urged next that if for the sake of argument oral evidence regarding the terms of the suit agreement be held admissible, the defendant has averred in his written statement that he has not received the sum of Rs.5400/- from the plaintiff as recorded in the said agreement. This is a fact which had to be proved by the defendant. The defendant failed to prove this fact before the Trial Judge that he actually did not receive the sum of Rs.5400/- from the plaintiff, a fact that is part of recitals in the suit agreement. It is next argued by Mr. Arora that Sections 103 and 106 of the Evidence Act would cast burden of proof upon the defendant to establish that he did not receive the sum of Rs.5400/- from the plaintiff, a fact otherwise established by the recitals in the suit agreement. It is further urged that the Lower Appellate Court, by going behind the terms of the suit agreement, shifted the burden away from the defendant that he bears under Sections 103 and 106 of the Evidence Act, placing it in manifest error upon the plaintiff's shoulders to prove that the plaintiff had paid Rs.5400/- to the defendant in terms of the suit agreement. According to learned Counsel, the plaintiff has duly discharged his burden by proving the execution of the suit agreement, a fact found for him by the Lower Appellate Court.

24. The learned Counsel for the defendant has submitted that the provisions of Sections 91 and 92 of the Evidence Act do not come into play at all in this case, forbidding the defendant from leading oral evidence, inasmuch as the defendant disputes the character of the suit agreement and says that it was never the intention of parties to enter into a bargain for the sale of the suit property. Since the case of the defendant is that the document that he executed was understood by him to be one securing repayment of the agreed loan of Rs.4000/-, out of which he received Rs.2500/- alone, the bar under Section 92 would never be attracted. If a party to a contract pleads that the document embodies a transaction different from that recorded, the principle is well settled that parole evidence about what was truly intended by parties can be given, unhindered by the provisions of Section 92 of the Evidence Act.

25. We have given our thoughtful consideration to the submissions advanced by learned Counsel and perused the record.

26. It is true for a salutary principle that the terms of a solemn document, which embodies the terms of a contract entered into between parties, must generally and always be considered according to its apparent tenor and read as a complete embodiment of the terms of contract that the parties entered into, to the exclusion of all other evidence about it. This is the substance of the Rules embodied in Sections 91 and 92 of the Evidence Act. While Section 91 of the Evidence Act postulates a rule of exclusion of oral evidence, where the terms of a contract etc., have been reduced to writing, the rule in Section 92 makes what is exclusively provable in accordance with Section 91, conclusive between parties. Thus, while Section 91

makes documentary evidence of a transaction reduced to writing exclusive about its proof, Section 92 makes it conclusive. There is little quarrel about these well established principles and we do not think that there is any cavil about these arising from whatever the learned Counsel for the parties have mooted before this Court. What seems to have been missed by the learned Counsel for the plaintiff in relying upon the complementary rules in Sections 91 and 92, is the fact that Section 92 does not prohibit a party from showing the true character of a transaction embodied in a document, if he says that it is different from what was really entered into between parties. A party, therefore, urging a plea of *non est* factum or saying that what he signed was understood by him to be something essentially different from what the writing is, is not at all hindered by Section 92 of the Evidence Act from leading parole evidence about what he intends to prove.

27. I had occasion to consider this question in **Kashi Ram v. Ramji Lal, 2023 (9) ADJ 370**, where after reference to relevant and high authority bearing on the point, in particular, the decisions of the Supreme Court in **Gangabai v. Chhabubai, (1982) 1 SCC 4**, **Vimal Chand Ghevarchand Jain and others v. Ramakant Eknath Jadoo, (2009) 5 SCC 713**, **Roop Kumar** (*supra*), **Ishwar Dass Jain** (*supra*), **Placido Francisco Pinto v. Jose Francisco Pinto, 2021 SCC OnLine SC 842**, **V. Anantha Raju and another v. T.M. Narasimhan, AIR 2021 SC 5342** and **Mangala Waman Karandikar v. Prakash Damodar Ranade, (2021) 6 SCC 139**, the principle was summarized thus:

> "**41.** On principle, the prohibition on admitting parole evidence, where parties have entered into a solemn and written deed or contract, is the rule. About the exceptions, a close look at authority demonstrates that the conservative view is to permit oral evidence to be admitted

> contrary to the terms of a written deed, agreement or document, in case one or the other exceptions, mentioned in the six provisos to Section 92 of the Evidence Act is attracted, or one of the exceptions in Sections 93, 95, 96, 97, 98, 99 and 100 of the Act last mentioned. In a case, where the statutory exceptions to the rule in Section 92 do not apply, there is this judicially evolved principle operating in a very narrow field and subject to very exacting standards of burden on the party, seeking to introduce oral evidence, which applies in those cases alone, where a party does not seek to plead anything contradicting, varying, adding to or subtracting from the terms of the written document, but show that the parties in fact intended to enter into a transaction, very different from what is ostensible. Therefore, this exception, judicially recognized, applies to cases, where the party, intending to lead oral evidence, does not rely on the document, but says that it is sham, and that the intention of parties was entirely different than the recitals.
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> **42.** A reading of the principle in Mangala Waman Karandikar, and, also somewhat in Placido Francisco Pinto shows that the Court has leaned in favour of a strict approach to admit oral evidence, where parties have a written deed or contract governing their rights with exceptions only being those enumerated in the provisos to Section 92 of the Evidence or Sections 93, 95, 96, 97, 98, 99 and 100. But, it is equally true that the holding in Placido Francisco Pinto also acknowledges the principle that oral evidence, contrary to a written agreement, may be led in those cases, where the document is claimed by one party to be sham and what the parties contracted really being entirely different. At this stage, it is necessary to notice the standards by which a person, who refuses to rely on a written record of the transaction or contract between him and the other party and says that what was contracted was entirely different, must prove that fact. In this connection, reference must be made to Gurdial Singh, where it is said that the inference of a different intention than the written contract ''from the circumstances should be an irresistible one and not merely a matter of conjectures and surmises'', to borrow the words of their Lordships."

28. In our opinion, the principles deduced by this Court in **Kashi Ram** (*supra*) does not require an elaborate reference to

all the authorities, on which it is based. We proceed, therefore, to hold that this is the principle, by which the substantial question here is to be answered.

29. In this case, therefore, what this Court is required to see is if the suit agreement here is one, where from the circumstances, there is an apparent and irresistible inference about the said agreement not being the embodiment of the contract that was really entered into between parties. If the inference on the circumstances is irresistible that the suit agreement does not embody what the parties bargained, but something entirely different, the rule in **Mangala Waman Karandikar** (*supra*) and **Placido Francisco Pinto** (*supra*) laid down by the Supreme Court and by this Court in **Kashi Ram** may be invoked to permit consideration of parole evidence about the terms of the contract; else, Section 92 of the Evidence Act would forbid any such consideration. The Trial Court has found for the plaintiff, going by the terms of the suit agreement, and, also, evidence of breach thereof followed by that about readiness and willingness. The Lower Appellate Court, however, has chosen to look beyond the suit agreement and considered parole evidence and other circumstances to judge what the transaction really was.

30. The Lower Appellate Court seems to have been impressed by the fact that out of the recorded earnest in the suit agreement, the sum of Rs.5400/- was paid to the defendant at home, regarding which a receipt was issued to the plaintiff, but not produced in evidence. The Lower Appellate Court has opined that the evidence of this receipt being returned to the defendant about time or just before the execution of the suit agreement, is not believable. The Lower Appellate Court has

then gone about the exercise of considering the oral testimony of the three witnesses called by the plaintiff to prove the suit agreement, one of whom was the scribe and the other two, witnesses of the document, properly so called. The Lower Appellate Court has also taken into account the fact that the Sub-Registrar's endorsement mentions payment of the sum of Rs.2500/- out of the earnest of Rs.7900/-, that was made before him, but not the sum of Rs.5400/- paid at home. Though, the Lower Appellate Court, as the last Court of fact, certainly had jurisdiction to review evidence wholesomely, coextensive with that of the Trial Court, but it certainly had the same embargo to face, in looking into parole evidence which the Trial Court would have, in considering the suit agreement, in view of the Rules in Sections 91 and 92 of the Evidence Act.

31. In the clear opinion of this Court, the Lower Appellate Court did not point to any circumstances, from which an irresistible inference could be drawn that the suit agreement was not an embodiment of the real transaction that the parties entered into. The remarks of the Lower Appellate Court that the receipt was not mentioned by the plaintiff to her Counsel and was, therefore, not part of her pleadings, or to the scribe, who drafted the suit agreement, making the payment of a sum of Rs.5400/- back at home unbelievable, is besides the point.

32. The other remarks, disbelieving the case for return of a the receipt, evidencing payment of Rs.5400/- out of the earnest, immediately before execution of the suit agreement, is also a matter that does not make the suit agreement shrouded by circumstances that may lead to the irresistible conclusion of it being the embodiment of a transaction different from what the parties entered into. Rather, if the evidence of parties for the

limited purpose of judging if the rule in Section 92 bars a consideration of oral evidence, is looked into, the irresistible conclusion is that the receipt of whatever kind for the sum of Rs.5400/-, that was earlier executed in the defendant's favour, could very logically be returned to the plaintiff, once the parties formally reduced their bargain to a written and registered contract, where receipt of the sum of Rs.5400/- also found mention in the recitals. The mere fact that the Sub-Registrar in his endorsement, at the time of registration, mentioned the sum of Rs.2500/-, part of the total earnest of Rs.7900/- alone, is also not that kind of a circumstance, on which an irresistible inference about the document being a sham or the embodiment of a different transaction, could be drawn. Normally and invariably, as a rule, parties ought be bound by the terms of their written deed or contract, and it is only in the most extraordinary circumstances, suggesting a sham transaction or an entirely different one from what has been scripted in the contract or deed, that parole evidence may be considered contrary to the rule in Section 92 of the Evidence Act.

33. Of course, if a party does not rely on the terms of a contract on one or the other grounds postulated in the six provisos of Section 92 or one of the exceptions in Sections 93, 95, 96, 97, 98, 99 and 100 of the Evidence Act, oral evidence in support of those pleas must be permitted to be led. Here, that is not the case. The defendant has not specifically pleaded or sought to establish fraud, intimidation, illegality, want of due execution, want of capacity in him; but simply said that the agreement embodies a transaction different from what the parties entered into. Though, this is permissible in view of the judicially evolved principles, but only if by the most exacting standards an irresistible inference from circumstances could be

drawn that the solemn contract is not the embodiment of the real transaction.

34. This Court is afraid that the Lower Appellate Court has not judged the case of parties by this standard before venturing to consider all kind of parole evidence and circumstances to hold against the solemn terms of the suit agreement. In the opinion of this Court, the Trial Court was right in going by the terms of the registered agreement, executed *inter partes*, without looking into parole evidence and other circumstances to judge if the suit agreement indeed embodied the transaction that is apparent.

35. In view of what we have held, there is no necessity to consider the decision of the Uttarakhand High Court in **Smt. Raghuberi** (*supra*) and the Supreme Court in **Bishwanath Prasad Singh** (*supra*) relied upon by the learned Counsel for the plaintiff on the substantial question under consideration.

36. In view of what has been held, **Substantial Question No. (ii) is answered in the negative**, subject to the remarks hereinabove.

37. So far as the first substantial question of law goes, this Court has to go by the finding of the Trial Court about the suit agreement and its terms. This is so because whatever the Lower Appellate Court has held to the contrary has not met with our approval on principle that the Appellate Judge ought not to have looked into parole evidence, for reasons already given. The terms of the suit agreement, which is a registered instrument, clearly indicate that the bargain embodied therein is one for sale of the suit property for a total consideration of Rs.9000/-. Out of the agreed consideration, a sum of Rs.7900/- was paid in earnest, sparing a residue of Rs.1100/- to be paid at the time of execution of the sale deed. Now, one of the

principles governing the exercise of discretion to grant specific performance is substantial compliance with his part of the contract by the price contractee, that is to say, the plaintiff. If out of the entire sale consideration, the price contractee or the vendee has paid almost the whole of the agreed sale consideration, with a negligible residue to be paid at the time of execution of the sale deed, discretion normally ought to be exercised in favour of the vendee. Of course, there could be cases disentitling the plaintiff to relief since specific performance on the terms of the statute, as it stands for the purpose of the present suit, is after all an equitable relief, and, therefore, discretionary. But, there is no denying the fact that in guiding that discretion substantial payment by the vendee is one of the robust factors that ought to weigh with the Court in opting for the grant of specific performance.

38. This question came up for consideration before this Court in **Rajendra Singh v. Chandra Pal, 2016 (7) ADJ 564**, where it was observed:

> "**11.** In present case the readiness and willingness to perform his part of the contract, as required for the grant of relief of specific performance, is proved fact. Not only the lower Courts had given such finding in favour of plaintiff-appellant, but also this fact is explicitly clear and evident from the fact that out of total agreed sale consideration of Rs. 80,000/- the plaintiff-appellant had already paid Rs. 77,000/- which is 96.25 % of the sale consideration. This amount of sale consideration was used and usurped by defendant-respondent who had also been enjoying the possession of disputed property.
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> **12.** Thus almost slightly less than total consideration was utilized and enjoyed by the defendant-respondent, who had not only been enjoying the property in question, but had already been acting in bad faith and mala fide manner when he had been taking false defences of alleged loan and refund of amount etc., which

were found incorrect and false by the two lower Courts. He had been repeatedly telling lie, and misusing process of Court by giving false evidences.

13. Section 20 (2) of the Specific Relief Act had provided certain conditions, as quoted above, in which Court may properly exercise discretion not to decree specific performance. Considering those conditions in light of present case it is found that (a) the terms of the contract or the conduct of the parties at the time of entering into the contract was not such could give the plaintiff an unfair advantage over the defendant, because the plaintiff had already received more than 96% of sale consideration, and it would be the defendant whould get unfair advantage over plaintiff-appellant if no relief of specific performance is granted; (b) in present matter there appeared nothing which the defendant-respondent could not foresee, and instead of defendant it would be the plaintiff-appellant who would suffer hardship by non-performance who had paid almost nearly whole the price of property, and when in present age of boom of property prices would get meager amount of actual price of said land, even if the money is refunded with interest; and (c) the defendant-respondent, after receiving of almost more than 96% of sale consideration, had not entered into the contract under any circumstances which makes it inequitable to enforce specific performance."

39. This issue came up before me in **Mahendra Singh v. Ramesh Singh, 2020 (10) ADJ 93**. That was a case where out of the settled consideration of Rs.50,000/-, the defendant had received a sum of Rs.45,000/- at the time of execution of the contract. In **Mahendra Singh** (*supra*), I held:

"**70.** Once this Court is assured that the Lower Appellate Court has rightly concluded that the defendant has received a sum of Rs. 45,000/-, out of the total sale consideration of Rs. 50,000/- agreed, the scales for the exercise of discretion in favour of specific performance are decisively tipped. The fact that the defendant has received a sum of Rs. 45,000/- for one part, excludes any doubt about the defendant being inequitably dealt with by the plaintiff on account of his illiteracy etc. At the same time, the fact that the defendant has received a sum, that accounts for ninety percent of the sale consideration, places the plaintiff in a position where he has

> done substantial acts in performance of his part of the contract. Nothing remains to be done on the plaintiff's part, except payment of the balance of Rs. 5000/- and meeting the expenses of execution and registration of the conveyance. The doing of all substantial acts in performance of the plaintiff's part of the contract is a relevant consideration, under sub-Section (3) of Section 20 of the Specific Relief Act."

40. In view of what has been said hereinabove, Substantial Question of Law No. (I) is also decided in the **negative** holding that where a substantial part of the sale consideration is paid when the suit agreement is executed or at any time before action is brought, discretion generally ought not be exercised against granting specific performance under Section 20 of the Specific Relief Act, 1963.

41. In view of what this Court has held on the two substantial questions of law, the logical conclusion is that the decree of the Trial Court ought to be restored and that of the Lower Appellate Court set aside.

42. In the result, this appeal succeeds and is allowed with costs throughout. The decree passed by the Lower Appellate Court is **set aside** and that of the Trial Court **restored**.

43. Let a decree be drawn up, accordingly.

Order Date :- 21.11.2023
Anoop

(**J.J. Munir, J.**)