

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 2<sup>nd</sup> March, 2020**

+ **CS(OS) 2353/2013**

**VIKAS AGGARWAL** **..... Plaintiff**

Through: Mr. Akshay Ringe and Mr. Nitish  
Ojha, Advs.

Versus

**BAL KRISHNA GUPTA & ORS** **..... Defendants**

Through: Mr. P.D. Gupta, Sr. Adv. with Mr.  
Atul Gupta, Adv. for D-1&2 with D-2  
in person.

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

**IA No.2919/2020 (for exemption)**

1. Allowed, subject to just exceptions.
2. The application is disposed of.

**IA No.2918/2020 (of plaintiff u/S 27 of Specific Relief Act, 1963)**

3. The applicant/plaintiff, after failing to perform its part of the decree dated 20<sup>th</sup> July, 2016 for specific performance of Agreement to Sell dated 1<sup>st</sup> February, 2013 passed in his favour i.e. deposit of balance sale consideration in this Court and to thereafter call upon the two defendants to deliver possession and execute sale deed and after dismissal vide judgment dated 27<sup>th</sup> October, 2016 of RFA(OS) No.75/2016 preferred by the applicant/plaintiff against the said decree, and after the dismissal on 3<sup>rd</sup> April, 2017, *in limine* of the Special Leave Petition (SLP) (C) No.6539/2017 preferred thereagainst has applied under Section 27 of the Specific Relief Act, 1963 for rescission of the contract of which specific performance has been decreed in favour of the applicant/plaintiff.

4. It is the plea of the applicant/plaintiff that the applicant/plaintiff under the Agreement to Sell dated 1<sup>st</sup> February, 2013, had paid a sum of Rs.3 crores to the defendants and of which Rs.1 crore was forfeitable but the balance Rs.2 crores not forfeitable and the applicant/plaintiff is entitled to refund of the balance Rs.2 crores.

5. Sections 27 & 28 of the Specific Relief Act are as under:

*“27. Where rescission may be adjudged or refused.—(1) Any person interested in a contract may sue to have it rescinded, and such rescission may be adjudged by the court in any of the following cases, namely:—*

*(a) where the contract is voidable or terminable by the plaintiff;*

*(b) where the contract is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff.*

*(2) Notwithstanding anything contained in sub-section (1), the court may refuse to rescind the contract—*

*(a) where the plaintiff has expressly or impliedly ratified the contract; or*

*(b) where, owing to the change of circumstances which has taken place since the making of the contract (not being due to any act of the defendant himself), the parties cannot be substantially restored to the position in which they stood when the contract was made; or*

*(c) where third parties have, during the subsistence of the contract, acquired rights in good faith without notice and for value; or*

- (d) *where only a part of the contract is sought to be rescinded and such part is not severable from the rest of the contract.*

*Explanation.—In this section “contract”, in relation to the territories to which the Transfer of Property Act, 1882 (4 of 1882), does not extend, means a contract in writing.*

**28. Rescission in certain circumstances of contracts for the sale or lease of immovable property, the specific performance of which has been decreed.**—(1) *Where in any suit a decree for specific performance of a contract for the sale or lease of immovable property has been made and the purchaser or lessee does not, within the period allowed by the decree or such further period as the court may allow, pay the purchase money or other sum which the court has ordered him to pay, the vendor or lessor may apply in the same suit in which the decree is made, to have the contract rescinded and on such application the court may, by order, rescind the contract either so far as regards the party in default or altogether, as the justice of the case may require.*

(2) *Where a contract is rescinded under sub-section (1), the court—*

- (a) *shall direct the purchaser or the lessee, if he has obtained possession of the property under the contract, to restore such possession to the vendor or lessor; and*
- (b) *may direct payment to the vendor or lessor of all the rents and profits which have accrued in respect of the property from the date on which possession was so obtained by the purchaser or lessee until restoration of possession to the vendor or lessor, and if the justice of the case so requires, the refund*

*of any sum paid by the vendee or lessee as earnest money or deposit in connection with the contract.*

*(3) If the purchaser or lessee pays the purchase money or other sum which he is ordered to pay under the decree within the period referred to in sub-section (1), the court may, on application made in the same suit, award the purchaser or lessee such further relief as he may be entitled to, including in appropriate cases all or any of the following reliefs, namely:—*

*(a) the execution of a proper conveyance or lease by the vendor or lessor;*

*(b) the delivery of possession, or partition and separate possession, of the property on the execution of such conveyance or lease.*

*(4) No separate suit in respect of any relief which may be claimed under this section shall lie at the instance of a vendor, purchaser, lessor or lessee, as the case may be.*

*(5) The costs of any proceedings under this section shall be in the discretion of the court.”*

6. The applicant/plaintiff has applied under Section 27 of the Act and the counsel for the applicant/plaintiff admits that Section 28 of the Act would not apply.

7. I have enquired from the counsel for the applicant/plaintiff, whether not Section 27 of the Act, by using the word “sue”, envisages an original proceeding to have the contract rescinded and not an application in a suit already decreed for specific performance. I have also enquired from the counsel for the applicant/plaintiff, whether not the judgment and decree of this Court, having merged in the judgment and decree dated 27<sup>th</sup> October,

2016 of the Division Bench of this Court in RFA(OS) No.75/2016, the application, even if any, can be made only before the Division Bench.

8. The counsel for the applicant/plaintiff has referred to ***Hungerford Investment Trust Limited Vs. Haridas Mundhra*** (1972) 3 SCC 684, particularly to paragraph 22 thereof, to contend that it holds that the Court which passes a decree for specific performance post decree, can grant the relief under Section 27 of the Act.

9. A perusal of the facts in ***Hungerford Investment Trust Limited*** supra shows the same to be concerned with an agreement for sale of shares in a company i.e. movable property and not concerned with an agreement for sale of immovable property as the subject agreement in this suit was/is. It is also found that in ***Hungerford Investment Trust Limited*** supra, the agreement of sale was dated 30<sup>th</sup> October, 1956 i.e. of prior to coming into force of the Specific Relief Act, 1963 and decree for specific performance whereof was passed on 25<sup>th</sup> February, 1964. I have thus enquired from the counsel for the applicant/plaintiff, whether the aforesaid are sufficient to distinguish the applicability of the judgment in this present case. It is felt that the Legislature, in Section 28 of the 1963 Act having specifically provided for rescission post decree for specific performance relating to sale or lease of immovable properties, and having conferred the power of applying for rescission of the contract only on the vendor or lessor against whom the decree has been passed and not on the purchaser/lessee in favour of whom the decree was passed, what has been held in ***Hungerford Investment Trust Limited*** supra would not apply to the present case.

10. The counsel for the applicant/plaintiff contends that Section 27 of the Act does not make any distinction between movable and immovable properties and though the agreement to sell, subject matter of *Hungerford Investment Trust Limited* supra, was of prior to 1963 but the decision is in the light of Section 27 of the 1963 Act.

11. I have considered the aforesaid contentions and am of the view that the proceeding referred to under Section 27 of the Act is an original proceeding only and not by way of an application in a suit for specific performance which has already been decreed in favour of the plaintiff. I say so because the same uses the expression “adjudged by the Court” and also requires determination of, whether the contract is voidable or terminable and “defendant is more to blame than the plaintiff” and which cannot be adjudicated in a disposed of suit which has been decreed in favour of the plaintiff, specifically at the asking of the plaintiff.

12. In this context I may also notice that it was the case of the applicant/plaintiff in the appeal preferred by the applicant/plaintiff himself against the decree in his favour, that the counsel for the applicant/plaintiff on the date when the suit was decreed had made a statement that the applicant/plaintiff had filed an application for amendment of the plaint to give up the relief of specific performance and to confine the relief in the suit to other prayers but disregarding which the Court, on the application of the defendants conceding to the decree for specific performance sought by the applicant/plaintiff, had passed the decree for specific performance. The said contention of the applicant/plaintiff was disbelieved and the appeal dismissed and as aforesaid SLP preferred thereagainst also dismissed. Once

the plaintiff has already had an opportunity to contend that it was not desirous of continuing to seek the relief of specific performance and wanted refund of his monies, the applicant/plaintiff in the same suit cannot have a second round.

13. To clarify the air at this stage, it is deemed necessary to refer to Section 35 of the Specific Relief Act, 1877 in force prior to the Specific Relief Act, 1963 and which Act of 1877 was repealed by Section 44 of the 1963 Act. The said Section 35 was as under:

*“35. When rescission may be adjudged.*

*Any person interested in a contract in writing may sue to have it rescinded, and such rescission may be adjudged by the Court in any of the following cases, namely:-*

*(a) where the contract is voidable or terminable by the plaintiff;*

*(b) where the contract is unlawful for causes not apparent on its face, and the defendant is more to blame than the plaintiff;*

*(c) where a decree for specific performance of a contract of sale, or of a contract to take a lease, has been made, and the purchaser or lessee makes default in payment of the purchase-money or other sums which the Court has ordered him to pay.*

*When the purchaser or lessee is in possession of the subject-matter, and the Court finds that such possession is wrongful, the Court may also order him to pay to the vendor or lessor the rents and profits, if any, received by him as such possessor.*

*In the same case, the Court may, by order in the suit in which the decree has been made and not complied with, rescind*

*the contract, either so far as regards the party in default, or altogether, as the justice of the case may require.”*

14. The Law Commission of India, in its 9<sup>th</sup> Report (submitted on 19<sup>th</sup> July, 1958), relating to Specific Relief Act, 1877 observed as under:

*“80. In England, where the defendant in an action for specific performance fails to comply with a judgment against him, the plaintiff may, at his election, move in the action to have the contract rescinded. This right extends to the vendor and the vendee. The Indian Courts have taken the same view.*

*In all probability, the English rule was sought to be adopted, without modification, in the third paragraph of section 35(c) of our Specific Relief Act. But, as has been pointed out by Collett, as well as in the cases mentioned below, the words, ‘in the same case’ are not happily chosen and “it is not at all clear to what these words in the same case refer whether to the second paragraph or the first paragraph of clause (c)”.*

*The question is, whether the vendor or lessor should have the option of bringing a separate suit for rescission, in a case coming under cl.(c). As the section stands, he has the option of bringing a separate suit under the first paragraph of section 35 or to apply for rescission in the same suit under the third paragraph of the section.*

*But, as Banerji observes, there is no reason why the vendor or lessor should be allowed to harass the other party in a separate proceeding when the remedy of rescission can be made available in the same suit.*

*We therefore propose a new section which will enable the vendor or lessor to apply for rescission in the suit for specific performance, if the purchaser or lessee fails to comply with the*



*terms of the decree. In view of this new provision, clause (c) of section 35 and the two succeeding paragraphs become unnecessary and should be omitted.*

*81. While section 35(c) deals with the consequences which will follow them from the default of the purchaser or lessee to comply with the terms of a decree for specific performance, there is no provision in the Act as to what would happen if the purchaser or lessee makes the payments due from him but the vendor or lessor does not comply with the decree by executing a conveyance or how the purchaser or lessee should obtain possession of the property. At present, the latter contingency is dealt with in proceedings for the execution of the decree. But, if in the former case, the vendor or lessor may obtain relief by way of rescission in the same suit, there is no reason why the other party may not have his reliefs against the vendor or lessor in the suit itself. inasmuch as the principle of avoidance of multiplicity of proceedings is equally applicable to both cases.*

*We have already provided that consequential reliefs like possession or partition can be claimed in the suit for specific performance itself and included in the decree. We are now speaking of the enforcement of such reliefs included in the decree which are at present available only by executing the decree, in separate execution proceedings.*

*We recommend that complete relief in terms of the decree in a suit for specific performance shall be available by application in the suit itself, without having to resort to separate execution proceedings and that appropriate provisions should be made in the Code of Civil Procedure enabling such applications to be made and orders thereon and also for appeals.*

*82. There are certain well-known limitations to the equitable right to rescind which are not incorporated into the existing section 35, but which have been applied by our Courts, on*

*general considerations. For the sake of clarity and comprehensiveness, we may codify and include these principles in section 35, taking care not to make the propositions rigid so as to restrict the powers of the Courts to do justice. The Court may refuse to rescind a contract in any of the following cases:*

- (a) Where the plaintiff has elected, whether expressly or impliedly, to abide by the contract;*
- (b) Where owing to the change of circumstances which has taken place since the making of the contract (not due to any act of the defendant himself) the parties cannot be substantially restored to the position in which they stood when the contract was made;*
- (c) Where the contract is of such a nature that it is not severable and a part thereof is sought to be rescinded;*
- (d) Where third parties have, during the subsistence of the contract, bona fide acquired rights under it, without notice of the facts which make the contract liable to be rescinded.*

*It is now proposed that the above propositions be included in a new sub-section to section 35.”*

15. As would immediately be obvious from a perusal of Section 35 of the 1877 Act, the same, while providing for rescission of contracts, permitted such rescission even after decree for specific performance. However in the 1963 Act, Section 27, while providing for rescission of contracts, does not permit rescission post decree for specific performance. Rescission post decree for specific performance is permitted by the 1963 Act, only under Section 28, but at the instance only of the vendor / seller or the lessor and not at the instance of the vendee / purchaser or the lessee. The applicant

herein is a vendee / purchaser and the counsel for the applicant / plaintiff fairly admits that this application is not made under Section 28 as the same would not apply.

16. The question of application of Section 27 even otherwise would arise only where the contract is voidable or terminable by the plaintiff or where the contract is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff. A contract, decree for specific performance has already been passed, cannot be said to be voidable or terminable or unlawful. Thus, the question of applicability of Section 27 on the face of it also, does not arise. However even if it were to be applicable, Sub-Section (2) thereof bars rescission of the contract *inter alia* where the plaintiff has expressly or impliedly ratified the contract. Again, the plaintiff, after seeking specific performance of the Contract and which decree for specific performance has been upheld till the Supreme Court, has expressly or impliedly ratified the contract and on which ground alone rescission cannot be ordered.

17. It is for the aforesaid reason that I have hereinabove held ***Hungerford Investment Trust Limited*** supra to be not applicable; I may however add that ***Hungerford Investment Trust Limited*** supra has been referred to in several subsequent dicta but only to negate the contention, that an agreement pursuant to a decree for specific performance being passed, merges into the decree – it was held that notwithstanding the decree, the agreement remains and the decree for specific performance is in the nature of a preliminary decree.

18. The Legislature, by re-enactment of the Specific Relief Act having not permitted rescission after the decree for specific performance, as was permitted under the earlier Act of the year 1987 and having permitted such rescission post decree for specific performance only in relation to contracts of sale or lease of immovable property but at the instance of the seller or the lessor, no application for rescission outside the ambit of Section 28 lies or can be entertained.

19. I may in this context also notice the clauses in the Agreement to Sell of which specific performance has been decreed. The same *inter alia* provides as under:

*“AND whereas the first party has agreed to sell the above said property to the second party and second party has also agreed to purchase the same, at the rate of Rs.2,31,00,000/- (Rupees Two Crore Thirty One Lac Only), per Acre/kill, Total Area of land comes out to 384 Biswas i.e. 4 Acre and the second party shall pay Rs.9,24,00,000/- as total amount to the first party, as per terms and conditions of this agreement to sell, as under:—*

*1. That the first party has received a sum of Rs.1,00,00,000/- (Rupees One Crore Only), as an advance Money, vide a valid separate receipt and the second party shall pay minimum Rs.1,50,00,000/- or more to the first party upto 25<sup>th</sup> April, 2013, Rs.50,00,000/- shall be paid by the second party to the first party in May 2013 and the balance amount shall be paid by the second party to the first party, on or before the completion of the said bargain.*

*2. That the first party shall hand over the vacant possession of the above said property, to the second party, at the time of execution of Sale Document.*

3. *That the completion of the said bargain is fixed up to Six Months, from the date of execution of this agreement to sell.*

4. *That the first party will be bound to execute the sale documents in respect of the sale property, in favour of the second party or his nominees/any other person, on or before the specified period.*

5. *That the first party will be bound to complete all the dues, such as electric, water dues, MCD Tax, House Tax, if any, regarding the said property and also to complete all the documents, regarding the said property, within the specified period.*

6. *That if the first party backsout to sale the said property to the second party or his nominees/company within the specified period, then the second party will be empowered to get the Regd. Sale Deed through Court or Law, under specification act.*

7. *That in case if the second party backsout to purchase the said property from the first party within the specified period, then the advance money shall be forfeited and the said bargain shall be cancelled.*

*(emphasis added)*

20. The counsel for the applicant/plaintiff contends that since Clause 7 supra provides for forfeiture only of the advance money and in Clause 1 only the sum of Rs.1 crore paid at the time of Agreement to Sell is referred to as advance money, the forfeiture can be only of Rs.1 crore and not of the balance Rs.2 crores paid by the applicant/plaintiff to the defendants.

21. I am unable to agree. Clause 1 of the agreement to sell, after payment of Rs.1 crore, also provided for payment of Rs.1.50 crores on or before 25<sup>th</sup> April, 2013 and Rs.50 lacs on or before May, 2013 and the balance amount to be paid at the time of completion of the bargain within six months

thereof. The entire amount paid by the applicant/plaintiff to the defendants before completion of the transaction would qualify as an 'advance' and the agreement of the parties being with reference to the 'advance' and not with respect to Rs.1 crore only, as per the Agreement, the entire amount of Rs.3 crores paid before completion of bargain would be 'advance'.

22. There is thus no merit in the application.

23. Dismissed.

24. The counsel for the applicant/plaintiff seeks liberty to institute a suit.

25. If the applicant/plaintiff institutes a suit, the same shall be considered in accordance with law and all defences shall remain open to the defendants.

**MARCH 02, 2020**  
'bs/gsr'..

**RAJIV SAHAI ENDLAW, J.**

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