

JAGDISH SINGH

v.

NATTHU SINGH

NOVEMBER 25, 1991

[M.N.VENKATACHALIAH AND S.C.AGRawal, JJ.]

Specific Relief Act, 1963: Section 21 (2), (4) & (5)—Proviso.

Suit for specific performance—Acquisition of suit properties during the pendency of second appeal—Effect of—Nature of relief available to plaintiff—Power of Court to grant compensation—Held where the contract becomes impossible of performance for no fault of plaintiff—Court can award compensation in lieu and substitution of specific performance—Measure of compensation is by the standards of Section 73 of the Contract Act—Scope of the Proviso explained—Distinction between Indian Law and English law discussed.

Code of Civil Procedure, 1908: Section 100

Second Appeal—High Court—Power to reappreciate evidence and disturb concurrent findings of fact—Held findings of fact vitiated by non-consideration of relevant evidence can be reversed.

General Clauses Act, 1897: Section 27.

Suit for specific performance—Notice issued by plaintiff—Refusal to accept by defendant—Notice returned unserved—Held notice must be presumed to have been served—Averments in the Notices could be treated as part to the plaint.

By an agreement dated 3.7.1973 the respondent sold two plots to the appellant for a consideration of Rs.15,000. By another agreement, entered into between the parties on the same day, the appellant agreed to reconvey the said properties to the respondent against payment of Rs.15,000 within two years. Within the stipulated period the respondent (Plaintiff) instituted a suit for specific performance alleging that despite offer of performance and tendering the price, the Appellant (Defendant) refused reconveyance of the properties.

The Trial Court dismissed the suit by holding that the Respondent was not ready and willing to perform the contract, and

- A that the time was essence of the reconveyance agreement. The first Appellate Court dismissed the respondent's appeal.

B The respondent preferred second appeal before the High Court. Relying upon the two notices issued by the Respondent to the appellant before filing of the suit which contained the averments that he was willing and ready to perform the contract, the High Court reversed the findings of the two courts below and allowed the appeal and held that Respondent-Plaintiff was willing to perform the contract and that the Appellant was the party in breach. Accordingly it passed a decree of specific performance of an agreement for sale of land.

C During the pendency of the Second Appeal, suit properties were acquired by the State for public purposes and the High Court rejected the plea that after the land has been acquired by the State corpus of the Land had ceased to exist and no decree for specific performance can be granted.

D In defendant's appeal to this Court it was contended on his behalf (1) that the High Court erred in reappreciating the evidence in second appeal and in disturbing the concurrent findings of fact that Respondent was not willing and ready to perform the contract; (2) that in view of the acquisition of the suit-properties the contract itself became incapable of specific performance and to such a case the power to give compensation as an alternative to specific performance did not extend.

Modifying the decree of the High Court, this Court,

F HELD:1. Where the findings by the Court of facts are vitiated by non-consideration of relevant evidence or by an essentially erroneous approach to the matter, the High Court is not precluded from recording proper findings. [572-H]

G 1.1 The notices issued by the respondent to the appellant containing the averments that he was ready and willing to perform the contract which were not actually served on the appellant because of his refusal to accept them must be presumed to have been served as contemplated by Section 27 of the General Clauses Act. Therefore the High Court was right in relying upon the averments in the notices which could be treated as part to the plaint. Accordingly the finding of the High Court that Respondent was willing and ready to

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perform the contract and that it was the Appellant who was in breach is accordingly confirmed. [572 F-G, 578 H, 579-A] A

2. Section 21 of the Specific Relief Act, 1963 enables the Plaintiff in a suit for specific performance also to claim compensation for its breach either in addition to or in substitution of, such performance. However, when the plaintiff by his option has made specific performance impossible, Section 21 does not entitle him to seek damages. That position is common under the English and Indian Law namely under Section 2 of Lord Cairn's Act, 1858 and Section 21 of the Specific Relief Act, 1963. But under the Indian Law the explanation to sub-section (5) of Section 21 makes a specific departure and the jurisdiction to award damages remains unaffected by the fact that without any fault of the plaintiff, the contract becomes incapable of specific performance. [574-D, 577, H-C] B C

Piarey Lal v. Hori Lal, [1977]-2 S.C.R. 915, distinguished and held inapplicable. D

Mohamad Abdul Jabbar & Ors. v. Lalmia & Ors., A.I.R. (34) 1947 Nagpur 254, disapproved.

Ardeshir H. Mama v. Flora Sessoon, A.I.R. 1928 Privy Council 208, explained. E

3. However, so far as the proviso to sub-section (5) of Section 21 is concerned, two positions must be kept clearly distinguished. If the amendment relates to the relief of compensation in lieu of or in addition to specific performance where the plaintiff has not abandoned his relief of specific performance the Court will allow the amendment at any stage of the proceeding. That is a claim for compensation falling under section 21 of the Specific Relief Act, 1963 and the amendment is one under the proviso to sub-section (5). But different and less liberal standards apply if what is sought by the amendment is the conversion of a suit for specific performance into one for damages for breach of contract in which case Section 73 of the Contract is invoked. This amendment is under the discipline of Rule 17, Order 6, C.P.C. The fact that sub-section (4), in turn, invokes Section 73 of the Indian Contract Act for the principles of quantification and assessment of compensation does not obliterate this distinction. [575 B-C] F G

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A 3.1 In the instant case, assuming that the Respondent had not specifically sought for compensation in lieu of specific performance the amendment is permitted in order that complete justice is done. [578-B]

B 3.2 The measure of the compensation is by the standards of Section 73 of the Indian Contract Act. Here the English Rule in *Bain v. Fothergill* that the purchaser, on breach of the contract, cannot recover for the loss of his bargain is not applicable. [578-C]

Bain v. Fothergill, 1874 L.R. 7 House of Lords 158, held inapplicable.

C Pollock & Mulla on *Contract* (10th edn.) p.663; *Nagardas v. Ahmedkhan*, (1895) 21 Bom. 175, referred to.

D 3.3 In the instant case, the quantum of the compensation is ascertainable with reference to the determination of the market value in the land acquisition proceedings. The compensation awarded may safely be taken to be the measure of damages subject, of course, to the deduction therefrom of money value of the services, time and energy expended by the appellant in pursuing the claims of compensation and the expenditure incurred by him in the litigation culminating in the award. [578-G]

E 4. Accordingly there will be a decree awarding to the Respondent compensation in lieu and substitution of one for specific performance which but for the acquisition Respondent would have been entitled to; the quantum and the measure of the compensation being the entire amount of compensation determined for the acquisition of the suit-properties together with all the solatium, accrued interest and all other payments under the law authorising the acquisition less a sum of rupees one lakh fifty thousand only which shall go to the Appellant towards his services, time and amounts spent in pursuing the claims for compensation as well as the consideration stipulated for reconveyance. [579 E-F]

G CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4916 of 1991

From the Judgment and Order dated 5.4.1991 of the Allahabad High Court in Second Appeal No. 3395 of 1978.

H Manoj Swarup and Ms. Lalita Kohli for the Appellants.

B.S. Nagar for Goodwill Indeevar for the Respondent.

The Judgment of the Court was delivered by

VENKATACHALIAH, J. Special leave is granted and the appeal taken-up for final hearing and disposed of by this judgment. We have heard Sri Manoj Swarup, learned counsel for the Appellant and Shri Goodwill Indeevar for the Respondent.

2. Appellant was Defendant in a suit for specific performance. He seeks special leave to appeal to this Court from the judgment and order dated 5.4.1991 of the High Court of Allahabad in Second Appeal No.3395 of 1978 decreeing, in reversal of the decrees of dismissal entered by the two courts below, specific performance of an agreement for sale of land.

3. On 3.7.1973 Respondent-Natthu Singh sold Plot No.195 measuring 5 bighas and 18 biswas and Plot No.196 measuring 9 bighas and 8 biswas of Gulistapur Village, Pargana Dadri to the appellant for a consideration of Rs.15,000. On the very day, i.e., 3.7.1973, another agreement was entered into between the parties whereunder Appellant agreed to reconvey the said properties to the Respondent against payment of Rs.15,000- within two years.

On 2.6.1975, well within the period of two years stipulated for the performance of the agreement to re-sell, Respondent instituted the suit for specific performance alleging that despite offer of performance and tendering the price, Appellant, with the dishonest intention of appropriating the properties to himself refused reconveyance. The Appellant contested the suit principally on the ground that Respondent was never ready and willing to perform the contract and that Respondent himself was in breach.

4. The trial court framed the necessary and relevant issues stemming from the pleadings and on its own appreciation of the evidence on record came to find against the Respondent that he was ready and willing to perform the contract; and that the agreement, being one of reconveyance, time was of its essence. The suit was accordingly dismissed. Respondent's first appeal before the learned IInd Additional District Judge, Bulandshahar was also unsuccessful.

5. However, in Respondent's second appeal, the High Court reversed the findings of the two courts below and allowing the appeal held that Respondent-Plaintiff was ready and willing to perform the contract; that the Appellant was the party in breach; and that, therefore, Respondent was entitled to a decree. This decree is assailed in this appeal.

A 6. Sri Manoj Swarup appearing in support of the appeal urged two contentions; the first is that the High Court was in error in embarking upon a re-appraisal of the evidence in a second-appeal to disturb concurrent findings of fact that Respondent was not willing and ready to perform the contract. The second contention is that contract itself became incapable of specific performance in view of the fact that during the pendency
B of second appeal the State had initiated proceedings for compulsory acquisition of the suit-properties and the subject-matter of the suit itself ceased to be available. Counsel says the power to give compensation as an alternative to specific performance did not extend to a case in which the relief of specific performance had itself become impossible.

C 7. On the first question, as to the readiness of the Respondent to perform his obligations, the High Court noticed that on 30th January, 1974 even before institution of the suit Respondent and his brother had sold another property belonging to them for a price of Rs. 30,000 and that Respondent had the necessary wherewithal to perform his part of the bargain. The High Court held :

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E "...Thus, the plaintiff admittedly had received Rs.15,000/- on 30.1.1974 and soon thereafter the first notice was issued to the defendant asking him to indicate a date for executing the sale-deed and also expressing his readiness and willingness. There is no evidence on the record that between 30.1.1974 and the date of suit or thereafter the plaintiff had parted with this money."

F The High Court also noticed that the two notices dated 23.3.1974 and 6.5.1975 respectively issued by the Respondent to the Appellant before the suit contained the averments that he was ready and willing to perform the contract. The notices were, no doubt, not actually served on the appellant as they had come back unserved upon the alleged refusal by the appellant to accept them. The High Court relied upon the averments in the notices which could be treated as a part to the plaint having been referred to and relied upon therein.

G 8. In our opinion, the High Court was right in its view. The notices must be presumed to have been served as contemplated by Section 27 of the General Clauses Act. As to the jurisdiction of the High Court to re-appreciate evidence in a second appeal it is to be observed that where the findings by the Court of facts is vitiated by non-consideration of relevant evidence or by an essentially erroneous approach to the matter, the High
H Court is not precluded from recording proper findings. We find no substance in the first contention.

9. The second contention is, however, not without its interesting aspects. During the pendency of the second appeal, the properties were acquired by the State for a public purpose. This is not disputed. It would appear that a compensation of Rs.4 lakhs or thereabouts has been determined. That sum, along with the generous solatium and the rates of interest provided by the statute would now be a much larger amount. Before the High Court, Appellant sought to rely upon the decision of this Court in *Piarey Lal v. Hori Lal*, [1977] 2 S.C.R. 915. That was a case where in proceedings of consolidation the subject-matter of an agreement to sell was allotted to a person other than the vendor, the relief of specific performance was held not to survive. The High Court rightly held that pronouncement was distinguishable and inapplicable to the present controversy.

As to the relief available to a plaintiff where the subject matter was acquired during the pendency of a suit for specific-performance the High Court said :

“...The learned counsel for the respondent has vehemently urged that after the land has been acquired its corpus has ceased to exist and no decree for specific performance can now be granted. In my opinion with the acquisition of the land plaintiff's rights do not get extinguished in totality. The appellate court always suitably mould the relief which the circumstances of the case may require or permit. The power in this regard is ample and wide enough...”

...However, in the present case the property has not been totally lost. What happens in the case of the acquisition is that for the property compensation payable in lieu thereof is substituted...”

The High Court issued these consequential directions :

“If the decree for specific performance of contract in question is found incapable of being executed due to acquisition of subject land, the decree shall stand suitably substituted by a decree for realisation of compensation payable in lieu thereof as may be or have been determined under the relevant Act and the plaintiff shall have a right to recover such compensation together with solatium and interest due thereon. The plaintiff shall have a right to recover it from the defendant if the defendant has already realised these amounts and in that event the defendant shall be further liable to pay interest at the rate

- A. of twelve per cent from the date of realisation by him to the date of payment on the entire amount realised in respect of the disputed land."

- B. We are afraid the approach of the High Court is perhaps somewhat an over-simplification of an otherwise difficult area of law as to the nature of relief available to a plaintiff where the contract becomes impossible of specific performance and where there is no alternative prayer for compensation in lieu or substitution of specific performance. While the solution that has commended itself to the High Court might appear essentially just or equitable, there are certain problems both of procedure and of substance in the administration of the law of specific relief particularly in the area of award of an alternative relief in lieu or substitute of specific performance that require and compel consideration, especially in view of some pronouncements of the High Courts which have not perceived with precision, the nice distinctions between this branch of the law as administered in England and in India.

- D. 10. Section 21 of the Specific Relief Act, 1963 corresponding to Section 19 of 1877 Act enables the plaintiff in a suit for specific performance also to claim compensation for its breach either in addition to or in substitution of, such performance. Sub-sections (2), (4) and (5) of Section 21 are material and they provide :

- E. "(2). If, in any such suit, the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award his such compensation accordingly.

- F. (3) [Omitted as unnecessary.]

- (4) In determining the amount of any compensation awarded under this section, the Court shall be guided by the principles specified in Section 73 of the Indian Contract Act, 1872, 9 of 1872.

- G. (5) No compensation shall be awarded under this section unless the plaintiff has claimed such compensation in his plaint :

Provided that where the plaintiff has not claimed any such compensation in the plaint, *the Court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just, for including a claim for such compensation.*

- H. Explanation-The circumstance that the contract has become

incapable of specific performance does not preclude the Court from exercising the jurisdiction conferred by this section."

(emphasis added)

So far as the proviso to sub-section (5) is concerned, two positions must be kept clearly distinguished. If the amendment relates to the relief of compensation in lieu of or in addition to specific performance where the plaintiff has not abandoned his relief of specific-performance the court will allow the amendment at any stage of the proceeding. That is a claim for compensation falling under Section 21 of the Specific Relief Act, 1963 and the amendment is one under the proviso to sub-section (5). But different and less liberal standards apply if what is sought by the amendment is the conversion of a suit for specific performance into one for damages for breach of contract in which case Section 73 of the Contract Act is invoked. This amendment is under the discipline of Rule 17 Order 6, C.P.C. The fact that sub-section (4), in turn, invokes Section 73 of the Indian Contract Act for the principles of quantification and assessment of compensation does not obliterate this distinction.

The provisions of Section 21 seem to resolve certain divergencies of judicial opinion in the High Courts on some aspects of the jurisdiction to award of compensation. Sub-section (5) seeks to set at rest the divergence of judicial opinion between High Courts whether a specific claim in the plaint is necessary to grant the compensation. In England Lord Cairn's (Chancery Amendment) Act, 1858 sought to confer jurisdiction upon the Equity Courts to award damages in substitution or in addition to specific performance. This became necessary in view of the earlier dichotomy in the jurisdiction between common law and Equity Courts in the matter of choice of the nature of remedies for breach. In common law the remedy for breach of a contract was damages. The Equity Court innovated the remedy of specific performance because the remedy of damages was found to be an inadequate remedy. Lord Cairn's Act, 1858 conferred jurisdiction upon the Equity Courts to award damages also so that both the reliefs could be administered by one court. Section 2 of the Act provided :

"In all cases in which the Court of Chancery has jurisdiction to entertain an application for specific performance of any covenant, contract or agreement it shall be lawful for the same Court if it shall think fit to award damages to the party injured either in addition to or in substitution for such specific performance and such damages may be assessed as the Court shall direct."

A This is the historical background to the provisions of Section 21 of the Specific Relief Act, 1963 and its predecessor in Section 19 of the 1877 Act.

B 11. In *Mohamad Abdul Jabbar & Others v. Lalmia & Others*, A.I.R. (34) 1947 Nagpur 254 specific performance of an agreement of sale dated 16th January, 1934, was sought by the institution of a suit on 15th January, 1937. During the pendency of the suit, on 20th April, 1937, the provincial Government started land acquisition proceedings respecting the subject-matter of the suit and the same was acquired. The High Court upheld the dismissal of the suit for specific performance and referred an amendment for award of damages. On the obvious impermissibility of specific performance the Nagpur High Court said :

D "We accordingly conclude that specific performance is now impossible and we cannot decree it for "equity like nature does nothing in vain." We cannot hold the plaintiffs-appellants entitled to the compensation money into which the property was converted because they had no right or interest in that property...."

Refusing the amendment for the relief for payment of money the High Court held :

E "We would not allow amendment also because on the facts found by the trial Court (with which we see no reason, whatever, to differ) we would have refused specific performance, and the claim for damages on this account would also have been negatived because damages could have been awarded only if specific performance could rightly have been claimed. The appeal, therefore, fails and is dismissed with costs."

F Support for these conclusions was sought from the oft quoted, but perhaps a little misunderstood, case of *Ardeshir H. Mama v. Flora Sassoon* A.I.R. 1928 Privy Council 208. The passage in *Sassoon's* case relied upon by the Nagpur High Court is this :

G "In a series of decisions it was consistently held that just as its power to give damages additional was to be exercised in a suit in which the Court had granted specific performance, so the power to give damages as an alternative to specific performance did not extend to a case in which the plaintiff had debarred himself from claiming that form of relief, nor to a case in which that relief had become impossible."

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The case of 52 Bombay 597 fell within the first category of cases described above under the alternative relief of damages. *This case falls within the second part where the relief of specific performance has become impossible.* A

(emphasis supplied)

The second part of the observation of the Nagpur High Court, with great respect to the learned Judges proceeds on a fallacy resulting from the non-perception of the specific departure in the Indian law. In Lord Cairn's Act, 1858 damages could not be awarded when the contract had, for whatever reason, become incapable of specific performance. But under the Indian law the explanation makes a specific departure and the jurisdiction to award damages remains unaffected by the fact that without any fault of the plaintiff, the contract becomes incapable of specific performance. Indeed, *Sassoon's* case is not susceptible of the import attributed to it by the Nagpur High Court. *Sassoon's* case itself indicated the departure made in Indian Law by the Explanation in Section 19 of the 1877 Act, which is the same as the Explanation to Section 21 of the 1963 Act. The Judicial Committee, no doubt, said that Section 19 of the 1877 Act "embodies the same principle as Lord Cairn's Act and does not, any more than did the English Statute enable the court in a specific performance suit to award 'compensation for its breach' where at the hearing the plaintiff debarred himself by his own action from asking for a specific decree". But what was overlooked was this observation of Lord Blanesburgh : B C D

"except as the case provided for in the explanation—as to which there is introduced an express divergence from Lord Cairn's Act, as expanded in England" E

(emphasis supplied)

Indeed the following illustration of the Explanation appended to Section 19 of Specific Relief Act, 1877 makes the position clear : F

"Of the Explanation-A, a purchaser, sues B, his vendor, for specific performance of a contract for the sale of a patent. Before the hearing of the suit the patent expires. The Court may award A compensation for the non-performance of the contract, and may, if necessary, amend the plaint for that purpose." G

When the plaintiff by his option has made specific performance impossible, Section 21 does not entitle him to seek damages. That position is common to both Section 2 of Lord Cairn's Act, 1858 and Section 21 of the Specific Relief Act, 1963. But in Indian Law where the contract, H

A for no fault of the plaintiff, becomes impossible of performance section 21 enables award of compensation in lieu and substitution of specific performance.

We, therefore, hold that the second contention of Sri Manoj Swarup is not substantial either.

B 12. Learned counsel were not specific on the point whether the Respondent had actually asked for compensation in lieu of specific performance. We may assume that it was not so specifically sought. In order that formality in this behalf be completed, we permit the amendment here and now so that complete justice is done.

C 13. The measure of the compensation is by the standards of Section 73 of the Indian Contract. Here again the English Rule in *Bain v. Fothergill*, (1874) L.R. 7 House of Lords 158 that the purchaser, on breach of the contract, cannot recover, for the loss of his bargain is not applicable. In *Pollock & Mulla on Contract* (10th Edn.) the law on the matter is set out thus :

E “Where, therefore, a purchaser of land claims damages for the loss of his bargain, the question to be decided is whether the damages alleged to have been caused to him ‘naturally arose in the usual course of things from such breach’; and in an ordinary case it would be difficult to hold otherwise.” [p. 663]

Learned Authors adopt the following observation of Farran C.J. in *Nagardas v. Ahmedkhan*, (1895) 21 Bom. 175 :

F “The Legislature has not prescribed a different measure of damages in the case of contracts dealing with land from that laid down in the case of contracts relating to commodities”.

G In the present case there is no difficulty in assessing the quantum of the compensation. That is ascertainable with reference to the determination of the market value in the land acquisition proceedings. The compensation awarded may safely be taken to be the measure of damages subject, of course, to the deduction therefrom of money value of the services, time and energy expended by the appellant in pursuing the claims of compensation and the expenditure incurred by him in the litigation culminating in the award.

H 14. We accordingly confirm the finding of the High Court that Respondent was willing and ready to perform the contract and that it was the

Appellant who was in breach. However, in substitution of the decree for specific performance, we make a decree for compensation, equivalent to the amount of the land acquisition compensation awarded for the suit lands together with solatium and accrued interest, less a sum of Rs.1,50,000 (one lakh fifty thousand only) which, by a rough and ready estimate, we quantify as the amount to be paid to the appellant in respect of his services, time and money expended in pursuing the legal-claims for compensation.

15. We may here notice one other submission of Sri Manoj Swarup. He found fault with the operative part of the judgment of the High Court, Which, according to Sri Manoj Swarup, had not even provided for the payment to the appellant of Rs.15,000 the stipulated consideration for reconveyance. There is this apparent omission in the operative part of the High Court's judgment. But this is only a technicality. The operative part granting relief should be read with the relevant prayers in the plaint itself. But that is not of any practical significance here in as much as we have also taken this amount of Rs.15,000 into account in somewhat generously quantifying the litigation-expenses at Rs.1,50,000 as payable to the appellant out of the sums awarded for the acquisition. Therefore, there is no need for Respondent to pay the sum of Rs.15,000 additionally.

16. In the result there will be a decree awarding to the Respondent compensation in lieu and substitution of one for specific performance which but for the acquisition Respondent would have been entitled to the quantum and the measure of the compensation being take entire amount of compensation determined for take acquisition of the suit-properties together with all the solatium, accrued interest and all other payments under the law authorising the acquisition, less a sum of Rs.1,50,000 (Rupees one lakh fifty thousand only) which shall go to the Appellant towards his services, time and amounts spent in pursuing the claims for compensation as well as the consideration stipulated for reconveyance.

The sum of Rs.1,50,000 is allowed to be paid to the Appellant on his assurance that he has not received any part of the compensation earlier. If any amount has been received by the Appellant out of compensation awarded for the acquisition, such sums shall go in reduction of the sum of Rs.1,50,000, the difference being for the benefit of and be paid to the Respondent additionally.

This order shall be sufficient authority for the land acquisition authorities or the Courts wherever the matter may be pending for the apportionment and payment of the compensation for the acquisition of the suit

- A property between the Appellant and the Respondent in the manner indicated above. These directions shall, of course, not affect or prejudice the claim of other claimants, if any, whose claims are to be determined in the said land acquisition proceedings, the assumption implicit in this apportionment being that there are no other claimants in the land acquisition proceedings. If such apportionment and withdrawal is not possible, the
- B decree in terms of this judgment shall be worked out in execution proceedings.

The decree under appeal is modified accordingly. No costs.

T.N.A.

Decree modified.