A KAMAL KANT JAIN

v.

SURINDER SINGH (D) THR. LRS.

(Civil Appeal No. 17321 of 2017)

B OCTOBER 27, 2017

[R. F. NARIMAN AND SANJAY KISHAN KAUL, JJ.]

Specific Relief Act, 1963 – s.23 – Liquidation of damages not a bar to specific performance – Respondent authorised one 'H' to C *sell the property in question by way of an authorisation letter – Accordingly, agreement to sell entered into between the appellant-buyer and respondent-seller, in terms whereof earnest money was paid by appellant – Refusal by respondent to perform his part of the agreement – Suit for specific performance filed by appellant, dismissed by Trial court – Appeal filed by appellant was dismissed* D *– Second appeal filed by appellant, dismissed by before High Court holding that s.23 barred the specific performance in the facts of the case – On appeal, held: Mere naming of a certain amount which may sound in damages is not good by itself to non-suit a person seeking specific performance unless it is clear that the said sum* E *was named in lieu of specific performance – In the instant case, refund of earnest money with an equal amount as penalty was only to secure the performance of the contract and cannot be stated to be a sum in lieu of specific performance of the contract – Mere omission of a statement in the agreement to sell that specific performance ought to be allowed would be of no consequence –* F *Impugned judgment is set aside – Specific performance of the agreement to sell is ordered – Vacant possession of the property in question to be handed over to the appellant as soon as Rs.10 crores is paid by the appellant to the respondent – Specific Relief Act, 1877 – s.20.*

G **Allowing the appeal, the Court**

HELD: 1.1 The legislature, in the new Section 23, Specific Relief Act, 1963 explicitly provided that the mere naming of a certain amount which may sound in damages is not good enough by itself to non-suit a person seeking specific performance unless

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it is clear on the facts that the said sum was named in lieu of specific performance. This is normally explicitly spelled out in the agreement itself. [Para 9] [1133-B]

1.2 Further, paragraph 6 of the agreement to sell referred to paragraph 6 of the authorisation letter and made it clear that the refund of the amount of earnest money with an equal amount as penalty was only to secure the performance of the contract and cannot be stated to be a sum in lieu of specific performance. The mere omission of a statement in the agreement to sell that specific performance ought to be allowed would, therefore, be of no consequence. It is clear that in both para 6 of the authorisation letter (which explicitly referred to specific performance) and para 6 of the agreement to sell (which omitted reference to specific performance) earnest money with equal amount as penalty/ damages remained the same, making it clear that there was no change in the position that this amount was only to secure performance of the contract, and is not in lieu of specific performance. [Para 15] [1140-B-D]

Dadarao and Anr. v. Ramrao & Ors. **(1999) 8 SCC 416 : [1999] 4 Suppl. SCR 356 – distinguished.**

Man Kaur (Dead) by Lrs. v. Hartar Singh Sangha **(2010) 10 SCC 512: [2010] 12 SCR 515;** *M.L. Devender Singh and Others v. Syed Khaja* **(1973) 2 SCC 515 : [1974] 1 SCR 312 – relied on.**

P. D'Souza v. Shondrilo Naidu **(2004) 6 SCC 649: [2004] 3 Suppl. SCR 186;** *P. S. Ranakrishna Reddy v. M. K. Bhagyalakshmi and Anr.* **(2007) 10 SCC 231: [2007] 2 SCR 876 – referred to.**

Case Law Reference

[1999] 4 Suppl. SCR 356	distinguished	Para 4
[1974] 1 SCR 312	relied on	Para 10
[2004] 3 Suppl. SCR 186	referred to	Para 12
[2007] 2 SCR 876	referred to	Para 12
[2010] 12 SCR 515	relied on	Para 14

A CIVIL APPELLATE JURISDICTION : Civil Appeal No.17321 of 2017.

From the final Judgment and Order dated 29.04.2008 passed by the High Court of Punjab and Haryana at Chandigarh in RSA No.1178 of 1996.

B V.K. Jhanjhi, Sr. Adv., Ms. Jyoti Mendiratta, Aastik, Advs. for the Appellant.

Jayant Kumar Mehta, Shaurya Kuthiala, Sunil Fernandes, Nisheeth Bhatt, Ms. Astha Sharma, Advs. for the Respondents.

C The Judgment of the Court was delivered by

R. F. NARIMAN, J. 1. Leave granted.

2. The facts of the present case show that there was an authorisation letter dated 08.03.1978 of the respondent to a certain power of attorney holder namely, Harnam Singh, to sell the property in question. D Paragraph 6 of this authorisation letter reads as follows:

> "Purchaser should be warned that his earnest money will stand as forfeited in my favour if he does not come forth to pay the balance amount to have the sale deed registered, inspite of my part being complete. Of course if I do not come forth before E (sub) registrar to have balance amount and to have sale deed registered, the purchaser will have the right to have his earnest money back with equal amount as damages or to have sale deed registered under specific performance and relief act in his own, or his nominee's name."

F 3. On 05.06.1978, in pursuance of this authorisation letter, an agreement to sell the said property was arrived at in a sum of Rs. 3,25,000/- out of which earnest money of Rs. 32,500/- was deposited along with the agreement. The agreement to sell also contained para 6, in which it was stated as under:

G > " Should the bargain fail to materialize action will be taken in accordance with 6 or the seller's sale order dated 08.03.1978, i.e. :-
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> (a) should the purchaser fail to come forth for payment of balance amount and registration of the sale deed, inspite of the H seller's part being complete, the earnest money will stand as

forfeited in favour of the seller who would be at liberty to retain the house or to sell it to any body else he likes;

(b) should the seller back out from the deal, he will have to refund the earnest money with an equal amount as penalty for non fulfilment of the contract in accordance with para 6 of the sale order."

4. Some correspondence ensued between the parties, after which it was clear to the appellant that the respondent was going to resile from the agreement. Therefore, by a notice dated 11.01.1979, the appellant called upon the respondent to specifically perform the aforesaid agreement to sell. In February 1979, the respondent refused to do so, as a result of which the appellant filed a suit for specific performance dated 13.06.1979. The Trial Court framed three issues and found that the agreement to sell stood proved and that the appellant was ready and willing to perform his part of the agreement. However, on a construction of Section 23 of Specific Relief Act, 1963 in the facts of the case namely, that since paragraph 6 of the authorisation letter specifically contained the words "or to have sale deed registered under specific performance" and the said words being absent in paragraph 6 of the agreement to sell dated 05.06.1978, it would be clear that this omission would indicate that specific performance could not, therefore, be granted. The First Appellate Court arrived at the same result on all counts and, therefore, dismissed the appeal. The High Court in second appeal also arrived at the same conclusion, and relied upon a judgment in Dadarao and Anr. Vs. Ramrao & Ors. 1999 (8) SCC 416; and following the aforesaid judgment, therefore, held that Section 23 of Specific Relief Act would bar specific performance in the facts of the present case.

5. The appellant has argued before us that Dadarao's case (supra) is itself not to be considered as a precedent in the light of subsequent judgments of this Court. He further went on to state that except for misconstruing Section 23 of the Specific relief Act, all findings were otherwise in his favour, namely that the agreement had been proved and that he was ready and willing to perform his part of the agreement. He, therefore, asked us to apply the later judgments of this Court, which on a proper construction of Section 23 state that if there is any omission to mention that specific performance of contract can be obtained, such omission would not be taken to mean that a suit for specific performance cannot be filed, provided a sum was not named in the contract as damages

A in lieu of specific performance. He, therefore, asked us to reverse the findings of the courts below inasmuch as all findings of fact which are in his favour ought to be affirmed and the finding of law reversed.

6. Mr. Sunil Fernandese, learned counsel appearing for the respondent, on the other hand, stated that the concurrent findings in this B case ought not to be disturbed at this length of time. He also stated that only 10% of the sum had been paid and, therefore, on balance, specific performance should not be decreed in favour of the appellant. According to him, the justice of the case demands that, at this point of time, we should not exercise our jurisdiction under Article 136 of the Constitution of India in favour of the appellant. He has referred in detail to the C reasoning of the Trial Court and the first Appellate Court and asked us to adopt the same.

7. Having heard learned counsel for the parties, we are of the view that there has been a travesty of justice in the facts of this case as has been pointed out by learned senior counsel appearing for the appellant. D All factual findings are in favour of the appellant. We might only add that this being the case, it is clear that the respondent in refusing to perform his part of the contract did so wrongfully.

8. We may now examine whether the courts below were correct in their reading of paragaph 6 of the agreement to sell and Section 23 of E the Specific Relief Act, which reads as under:

"23. Liquidation of damages not a bar to specific performance.-

(1) A contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount F to be paid in case of its breach and the party in default is willing to pay the same, if the court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for purpose of securing performance of the contract and not for the purpose of giving to the party in default an option of paying money in lieu of specific performance.

G (2) When enforcing specific performance under this section, the court shall not also decree payment of the sum so named in the contract".

This section was the subject matter of some debate, as Section 20 of the earlier Specific Relief Act, 1877 was in somewhat different terms, H and read as follows:

"20. A contract, otherwise proper to be specifically enforced, may be thus enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same."

9. The legislature, in the new Section 23, explicitly provided that the mere naming of a certain amount which may sound in damages is not good enough by itself to non-suit a person seeking specific performance unless it is clear on the facts that the said sum was named in lieu of specific performance. This is normally explicitly spelled out in the agreement itself.

10. In M.L.Devender Singh and Others Vs. Syed Khaja 1973 (2) SCC 515, this Court, after referring to Section 20 of the old Act and 23 of the present Act, stated the genesis (in English law) of this branch of law as follows:

16. The position stated above is in conformity with the principles found stated in Sir Edward Fry's "Treatise on the Specific Performance of Contracts" (Sixth Edn. At p.65) It was said there:

"The question always is: What is the contract? Is it that one certain act shall be done, with a sum annexed, whether by way of penalty or damages, to secure the performance of this very act? Or, is it one of the two things shall be done at the election of the party who has to perform the contract, namely, the performance of the act or the payment of the sum of money? If the former, the fact of the penal or other like sum being annexed will not prevent the court's enforcing performance of the very act, and thus carrying into execution the intention of the parties: if the latter, the contract is satisfied by the payment of a sum of money, and there is no ground for proceedings against the party having the election to compel the performance of the other alternative.

From what has been said it will be gathered that contracts of the kind now under discussion are divisible into three classes—

(i) where the sum mentioned is strictly a penalty –a sum named by way of securing the performance of the contract, as the penalty is a bond;

A (ii) where the sum named is to be paid as liquidated damages for a breach of the contract;

(iii) where the sum named is an amount the payment of which may be substituted for the performance of the act at the election of the person by whom the money is to be paid or the
B act done.

Where the stipulated payment comes under either of the two first-mentioned heads, the court will enforce the contract, if in other respects it can and ought to be enforced, just in the same way as a contract not to do a particular act, with a penalty
C added to secure its performance or a sum named as liquidated damages, may be specifically enforced by means of an injunction against breaking it. On the other hand, where the contract comes under the third head, it is satisfied by the payment of the money, and there is no ground for the court to compel the specific performance of the other alternative of the contract."
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17. Sir Edward Fry pointed out that the distinction between a strict penalty and liquidated damages for a breach of contract was important in common law where liquidated damages were
E considered sufficient compensation for breach of contract, but, sums stipulated by way of penalty stood on a different footing. He then said:

"But as regards the equitable remedy the distinction is unimportant; for the fact that the sum named is the amount agreed
F to be paid as liquidated damages is, equally with a penalty strictly so called, ineffectual to prevent the court from enforcing the contract in specie"

Having thus stated this genesis, the court found:

"20. The fact that the parties themselves have provided a
G sum to be paid by the party breaking the contract does not, by itself, remove the strong presumption contemplated by the use of the words "unless and until the contrary is proved". The sufficiency or insufficiency of any evidence to remove such a presumption is a matter of evidence. The fact that the parties themselves specified a sum of money to be paid in the event of
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its breach is, no doubt, a piece of evidence to be considered in deciding whether the presumption has been repelled or not. But, in our opinion, it is nothing more than a piece of evidence. It is not conclusive or decisive." A

11. Next in chronological sequence comes the judgment in Dadarao's case (supra), in para 6 of which it was stated as follows: B

"6.The relationship between the parties has to be regulated by the terms of the agreement between them. Whereas the defendants in the suit had taken up the stand that the agreement dated 24th April, 1969 was really in the nature of a loan transaction, it is the plaintiff who contended that it was an agreement to sell. As we read the agreement, it contemplates that on or before 15th April, 1972 the sale deed would be executed. But what is important is that the agreement itself provides as to what is to happen if either the seller refuses to sell or the purchaser refuses to buy. In that event the agreement provides that in addition to the earnest money of Rs. 1,000 a sum of Rs. 500 was to be given back to Tukaram Devsarkar and that "no sale deed will be executed". The agreement is very categorical in envisaging that a sale deed is to be executed only if both the parties agree to do so and in the event of any one of them resiling from the same there was to be no question of the other party being compelled to go ahead with the execution of the sale deed. In the event of the sale deed not being executed, Rs. 500, in addition to the return of Rs. 1,000, was the only sum payable. This sum of Rs. 500 perhaps represented the amount of quantified damages or, as the defendants would have it, interest payable on Rs. 1,000/-." C D E F

12. However, in two subsequent judgments namely P.D'Souza Vs. Shondrilo Naidu 2004 (6) SCC 649 and P.S.Ranakrishna Reddy Vs. M.K.Bhagyalakshmi and Anr. 2007 (10) SCC 231, this Court specifically adverted to two earlier judgments and distinguished Dadarao's case by referring to the specific clause stating that "no sale deed will be executed." The Court went on to hold in P.D'Souza (supra) in para 34, as follows: G

"34: In Dadarao-whereupon Mr. Bhat placed strong reliance, the binding decision of M.L.Devender Singh was not noticed. This Court furthermore failed to notice and consider the H

A provisions of Section 23 of the Specific Relief Act, 1963. The said decision, thus, was rendered per incuriam."

This Court then went on to add, in paragraph 36, that Dadarao's case (supra) does not constitute a binding precedent, having not noticed the relevant statutory provisions and at least one earlier binding precedent.

B 13. This was reiterated in P.S.Ranakrishna Reddy (supra) in paragraph 15:

"15. The decision of this Court in Dadarao whereupon reliance has been placed by Mr. Chandrashekhar is wholly misplaced. The term of the agreement therein was absolutely different.
C We need not dilate on the said decision in view of the fact that in a subsequent decision of this Court in P. D'Souza v. Shondrilo Naidu it has been held to have been rendered per incuriam, stating: (SCC pp. 657-58, paras 34-36)

"34. In Dadarao whereupon Mr. Bhat placed strong reliance,
D the binding decision of M.L. Devender Singh was not noticed. This Court furthermore failed to notice and consider the provisions of Section 23 of the Specific Relief Act, 1963. The said decision, thus, was rendered per incuriam.

35. Furthermore, the relevant term stipulated in Dadarao was as
E under: (SCC p. 417, para 2)

'2. ... "Tukaram Devsarkar, aged about 65, agriculturist, r/o Devsar, purchaser (GHENAR) - Balwantrao Ganpatrao Pande, aged 76 years, r/o Dijadi, Post Devsar, vendor (DENAR), who hereby give in writing that a paddy field situated at Dighadi Mouja,
F Survey No. 7/2 admeasuring 3 acres belonging to me hereby agree to sell to you for Rs. 2000 and agree to receive Rs. 1000 from you in presence of V.D.N. Sane. A sale deed shall be made by me at my cost by 15-4-1972. In case the sale deed is not made to you or if you refuse to accept, in addition of earnest money an amount of Rs. 500 shall be given or taken and no sale
G deed will be executed. The possession of the property has been agreed to be delivered at the time of purchase. This agreement is binding on the legal heirs and successors and assigns. "'

Interpreting the said term, it was held: (SCC p. 418, paras 6-7)

'6. The relationship between the parties has to be regulated by
H the terms of the agreement between them. Whereas the

defendants in the suit had taken up the stand that the agreement dated 24-4-1969 was really in the nature of a loan transaction, it is the plaintiff who contended that it was an agreement to sell. As we read the agreement, it contemplates that on or before 15-4-1972 the sale deed would be executed. But what is important is that the agreement itself provides as to what is to happen if either the seller refuses to sell or the purchaser refuses to buy. In that event the agreement provides that in addition to the earnest money of Rs. 1000 a sum of Rs. 500 was to be given back to Tukaram Devsarkar and that "no sale deed will be executed". The agreement is very categorical in envisaging that a sale deed is to be executed only if both the parties agree to do so and in the event of any one of them resiling from the same there was to be no question of the other party being compelled to go ahead with the execution of the sale deed. In the event of the sale deed not being executed, Rs. 500 in addition to the return of Rs. 1000, was the only sum payable. This sum of Rs. 500 perhaps represented the amount of quantified damages or, as the defendants would have it, interest payable on Rs. 1000.

7. If the agreement had not stipulated as to what is to happen in the event of the sale not going through, then perhaps the plaintiff could have asked the Court for a decree of specific performance but here the parties to the agreement had agreed that even if the seller did not want to execute the sale deed he would only be required to refund the amount of Rs. 1000 plus pay Rs. 500 in addition thereto. There was thus no obligation on Balwantrao to complete the sale transaction. '

36. Apart from the fact that the agreement of sale did not contain a similar clause, Dadarao does not create a binding precedent having not noticed the statutory provisions as also an earlier binding precedent." (emphasis in original)"

14. In a fairly recent judgment, in Man Kaur (Dead) by Lrs. Vs. Hartar Singh Sangha, 2010 (10) SCC 512, after referring to some of the earlier precedents , the law is stated thus:

"28. It is thus clear that for a plaintiff to seek specific performance of a contract of sale relating to immovable property, and for a court to grant such specific performance, it is not necessary that the contract should contain a specific provision

A that in the event of breach, the aggrieved party will be entitled to specific performance. The Act makes it clear that if the legal requirements for seeking specific enforcement of a contract are made out, specific performance could be enforced as provided in the Act even in the absence of a specific term for specific performance in the contract. It is evident from section 23 of the Act that even where the agreement of sale contains only a provision for payment of damages or liquidated damages in case of breach and does not contain any provision for specific performance, the party in breach cannot contend that in view of specific provision for payment of damages, and in the absence of a provision for specific performance, the court cannot grant specific performance. But where the provision naming an amount to be paid in case of breach is intended to give to the party in default an option to pay money in lieu of specific performance, then specific performance may not be permissible.

D 29. We may attempt to clarify the position by the following illustrations (not exhaustive):

(A). The agreement of sale provides that in the event of breach by the vendor, the purchaser shall be entitled to an amount equivalent to the earnest money as damages. The agreement is E silent as to specific performance. In such a case, the agreement indicates that the sum was named only for the purpose of securing performance of the contract. Even if there is no provision in the contract for specific performance, the court can direct specific performance by the vendor, if breach is established. But the court has the option, as per Section 21 of the Act, to award damages, F if it comes to the conclusion that it is not a fit case for granting specific performance.

(B). The agreement provides that in the event of the vendor failing to execute a sale deed, the purchaser will not be entitled for specific performance but will only be entitled for return of G the earnest money and/or payment of a sum named as liquidated damages. As the intention of the parties to bar specific performance of the contract and provide only for damages in the event of breach, is clearly expressed, the court may not grant specific performance, but can award liquidated damages and refund of earnest money. H

(C). The agreement of sale provides that in the event of breach by either party the purchaser will be entitled to specific performance, but the party in breach will have the option, instead of performing the contract, to pay a named amount as liquidated damages to the aggrieved party and on such payment, the aggrieved party shall not be entitled to specific performance. In such a case, the purchaser will not be entitled to specific performance, as the terms of the contract give the party in default an option of paying money in lieu of specific performance.

30. In this case, Clauses 11 and 12 of the agreement deal with consequences of breach. They are extracted below :

"11. That in case the seller fails to perform his part of contract of sale according to the terms and conditions agreed upon in this agreement to sell in matter of execution of the sale deed and its registration, on the receipt of the balance sale price, he shall be liable to pay double the amount of the earnest money received by her from the purchaser.

12. That in case the purchaser fails to get the transaction of the sale completed by means of execution and registration of sale deed according to the terms of this agreement for sale, he shall forfeit his earnest money of Rs.10,000/- advanced by the purchaser to the said seller."

31. The agreement does not specifically provide for specific performance. Nor does it bar specific performance. It provides for payment of damages in the event of breach by either party. The provision for damages in the agreement is not intended to provide the vendor an option of paying money in lieu of specific performance. Therefore, we are of the view that plaintiff will be entitled to seek specific performance (even in the absence of a specific provision therefor) subject to his proving breach by the defendant and that he was ready and willing to perform his obligation under the contract, in terms of the contract."

15. At this stage, it is necessary to point out that the impugned judgment referred to and followed only Dadarao's case (supra), which we have seen was stated to be per incuriam atleast in two other judgments of this Court, apart from being distinguishable on facts in that the relevant clause of the agreement in Dadarao's case (supra) contained a specific

A clause to the effect that in the event of breach, only damages would be paid and no specific performance of the contract could be claimed. This is, therefore, the basic infirmity in the impugned judgment under appeal. Apart from that, as is clear from the judgment in Man Kaur's case (supra), paragraph 6 of the agreement to sell refers to paragraph 6 of the authorisation letter and makes it clear that the refund of the amount B of earnest money with an equal amount as penalty is only to secure the performance of the contract and cannot be stated to be a sum in lieu of specific performance. The mere omission of a statement in the said clause that specific performance ought to be allowed would, therefore, be of no consequence, as has been held in Man Kaur's case (supra). It C is clear that in both para 6 of the authorisation letter (which explicitly referred to specific performance) and para 6 of the agreement to sell (which omitted reference to specific performance) earnest money with equal amount as penalty/damages remains the same, making it clear that there is no change in the position that this amount is only to secure performance of the contract, and is not in lieu of specific performance. D

16. We are, therefore, of the view that the impugned judgment deserves to be set aside, as a result of which specific performance of the agreement to sell dated 05.06.1978 is ordered. We record the extremely fair statement made by Mr. V.K.Jhanjhi, learned senior counsel for the appellant, that given the large passage of time, he would be willing E to pay an amount of Rupees ten crores (Rs. 10,00,00,000/- only) to the respondent to be deposited with the registry of this Court within a period of nine months from today. It is made clear that the vacant possession of the property in question must be handed over to the appellant as soon as this amount is paid to the respondent.

F 17. In view of the statement made by learned senior counsel for the appellant, we are not calling upon the appellant to further pay the balance amount of the sale price amounting to Rs. 2,92,500/- (Rs. 3,25,000/- less Rs. 32,500/-).

18. The appeal is allowed in the aforesaid terms.

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Divya Pandey Appeal allowed.