

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

Reserved on: 16.05.2013
Pronounced on: 04.07.2013

+ **RFA (OS) 28/2007, C.M. APPL. 5436/2007**

SMT. SIMMI KATYAL Appellant
Through: Mr. S.K. Singla, Sr. Advocate
with Mr. Bhaskar Tiwary, Advocate.

Versus

SMT. RAM PYARI BATRA & ORS. Respondents
Through: Mr. Vijay Kishan and Mr. Vikram
Jetly, Advocates, for Resp. No.5.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI
MR. JUSTICE S.RAVINDRA BHAT

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1. The present appeal questions the decision of the learned Single Judge dated 05.10.2006 whereby the unsuccessful plaintiffs' suit claiming specific performance of a contract for sale of immovable property was dismissed. Briefly the facts are that in the suit, the plaintiff relied upon an agreement said to have been entered on 06.05.1995, whereby the defendants (respondents in this case), and

hereafter called “sellers” agreed to convey a 190 sq. yard residential plot, being A-66, Saraswati Vihar, Delhi (hereafter called “the suit property”), for total consideration of Rs. 25 lakhs. The plaintiff had relied upon a receipt-cum-agreement which contained the terms of the contract. It was also alleged that the contract was to be completed within 100 days; the initial advance of Rs. 25 lakhs was paid. The plaintiff alleged that after entering into the contract, the seller, i.e. Nanak Chand, died, sometime in the second week of August 1995. It was submitted that the plaintiff approached the heirs of the seller, i.e. his children and widow. In the suit, it was alleged further that at that time, the legal heirs of the seller agreed to abide by the contract for sale but subsequently did not do so. As a result, the plaintiff issued a legal notice on 13.06.1996 and subsequently filed a suit. In the written statement, the defendants, i.e. heirs of Nanak Chand denied the plaintiff’s entitlement to specific performance, contending that the seller was not the absolute owner of the property. The defendants also contested the binding nature of the agreement, stating that Nanak Chand did not have the authority to enter into a binding legal arrangement. It was further stated that the lapse of 100-day period within which the plaintiff allegedly did not approach the legal heirs, disentitled him to specific relief.

2. On the basis of the pleadings of the parties and the documents brought on the record, the Court framed the following issues, on 19.11.1998:

1. *Whether late Shri Nanak Chand, father of Defendant No.5 enter into an agreement to sell dated 6th May 1995 in respect of property No.66, Block-A, Saraswati Vihar, Pitampura, Delhi, as alleged para 1 of the plaint? OPP;*
 2. *Whether Defendant No.5 is owner of half undivided share in the suit property, namely, property No. 66, Block-A, Saraswati Vihar, Pitampura, Delhi, if so, to what effect? OPD;*
 3. *Whether the plaintiff fulfilled and complied with the terms and conditions of alleged agreement dated 6th May 1995 as alleged in the plaint? OPP;*
 4. *Whether the plaintiff was and is ready and willing to perform his part of alleged contract dated 6th May 1995? OPP;*
 5. *Whether the plaintiff is entitled to the relief of specific performance? OPP;*
 6. *Relief.*
3. Later on 26.11.2002, additional issues were framed. They are as follows:
1. *Whether receipt-cum-agreement dated 6th May 1995 is inadmissible registered in accordance with law;*
 2. *Whether receipt-cum-agreement dated 6th May 1995 is forged and fabricated as alleged.*

4. The parties had not completed the evidence in the matter when the learned Single Judge was seized of the suit, on 19.07.2006. It was directed that the question of maintainability of the suit seeking specific performance would be first heard. Accordingly, the parties were heard on 05.10.2006. On that day, by the impugned judgment, the suit was dismissed. Learned Single Judge relied upon a decision of the Supreme Court reported as *P. D'Souza v. Shondrilo Naidu* 2004 (6) SCC 649 as well as an earlier decision reported as *M.L. Devender Singh and Others v. Syed Khaja* AIR 1973 SC 2457. On an appreciation of the law declared by the Supreme Court in those decisions, the learned Judge interpreted Clause (e) of the receipt-cum-agreement, and held as follows:

“9. Where parties provide for a consequence in the agreement, the consequences have to be followed and adhered to.

10. By recording, that in case the prospective purchaser fails to fulfill his reciprocal obligations the transaction shall stand cancelled parties have evidenced that they were at ad idem on the point that failure of the purchaser to comply with his reciprocal obligations would amount to a cancellation of the contract. Remedy of the seller was to forfeit the earnest money.

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12. Learned counsel for the plaintiff submits that effect of transaction being treated as cancelled is limited only to the default of the purchaser. Qua default of the seller, law as explained in P.D'Souza's case holds good.

13. I am afraid, reciprocity demands equal consequences to flow.

14. *As I read clause 'e' of the agreement, parties are at ad idem that in case of default (of either party) transaction shall stand cancelled. Limited rights have been given to either party. Right of the seller is to forfeit the earnest money. Right of the purchaser is to seek recompense by claiming double the amount of the earnest money.*

15. *I accordingly hold that the suit is not maintainable in so far it seeks a decree for specific performance. Suit would be maintainable for damages in terms of clause 'e' of the agreement."*

5. The appellant's senior counsel urged that the impugned judgment is in error in as much as it interpreted the decision in *P. D'Souza* and *M.L. Devender Singh* (*supra*) wrongly. It was also urged that by virtue of Section 23 of the Specific Relief Act, 1963, although a sum is named in contract (as the sum to be paid in case of its breach), and despite the party in default's willingness to pay it, the contract, if otherwise appropriate and capable of being specifically performed, can be enforced if the Court, having regard to the terms of the contract and other circumstances, is satisfied that the sum was named only for the purpose of securing the contract. Elaborating on this, it was urged that where the sum mentioned in a contract for sale of property is only for the purpose of securing enforcement or for discharge of mutual or liabilities, its entitling the party to a decree for specific performance, is a question of fact that has to be examined in the light of certain circumstances and evidence. Learned counsel relied upon the observations in *M.L. Devender Singh* (*supra*) and submitted that in the present case the evidence of the parties was never gone into by the learned Single Judge, who merely, on a facial

interpretation of Clause(e) of the receipt-cum-agreement, straightaway proceeded to hold that it spelt-out consequence of non-performance, i.e. the entitlement to only deploy the amount of earnest money. It was emphasized that the learned Single Judge, therefore, fell into error in holding that the relief of specific performance was ruled-out in the present case.

6. Learned counsel for the respondents/defendants justified the impugned judgment and relied upon the observations in *P. D'Souza (supra)*. He sought to urge that contracts, especially those which can be enforced through a decree of specific performance can well be refused for want of mutuality in the contract. For this proposition, he relied upon the following passage from *Fry's Treatise on the Specific Performance of Contracts, Sixth Edition, Page 219*:

“460. A CONTRACT to be specifically enforced by the Court must, as a general rule, be mutual, - that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them. When, therefore, whether from personal incapacity to contract, or the nature of the contract, or any other cause, the contract is incapable of being enforced against one party, that party is, generally, incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former.”

7. It was urged that the conclusions arrived at by the learned Single Judge were in consonance with the principle enunciated in *Fry (supra)*. Learned counsel also relied upon *Halsbury's Law of England, Third Edition, Volume 36, Page 269*, where it is stated that:

“369. Contracts lacking mutuality. *Want of mutuality is in general a ground for refusing a judgment of specific performance(p). If a contract cannot be enforced against one party by reason of circumstances existing at the date of the contract, such as personal incapacity or the nature of the contract, that party will not be enabled to enforce the contract against the other party. Thus, an infant cannot sue for specific performance(q), since he cannot be sued therefor(r); a plaintiff cannot enforce a contract which could not be enforced against himself as involving performance of personal service or continuous acts, even though the consideration to be performed by the defendant is not in itself of a nature to exclude specific performance(s); and a vendor of property in or over which he had no estate or power at the time of the sale may be met by this fact as a defence to a suit by him for specific performance(t). Formerly a tenant in tail could not in general enforce a contract entered into by a tenant for life(u); now, however, a contract made by a tenant for life within the meaning of the Settled Land Act, 1925(a), if properly made, is enforceable against and by every successor in title of the tenant for life(b).*

The want of mutuality must be judged as at the date of the contract. The fact that a defendant by his own neglect or default has since the date of the contract lost the right to enforce it will not prevent its being enforced against him(c). Conversely, if the terms of the contract were such as originally to preclude specific performance, performance of these terms by the plaintiff will not obviate the objection(d).”

8. It is, therefore, stated that when the consequence of either nature and eventuality embracing both possibilities, i.e. the plaintiff defaulting in the performance of his part of the bargain and the seller also refusing to convey the property is envisioned in the contract, such consequence alone has to be respected and the Court would desist

from decreeing specific performance. Learned counsel also submitted that having regard to the conspectus of circumstances, the impugned judgment is justified and in order since the basis of the agreement in the present case was the seller's inability to fund his treatment. As he could not obtain the amount from the plaintiff within the period and he died, the Court's conclusions can also be supported by application of Section 20 of the Specific Relief Act since under the circumstances, it would be inequitable to direct the seller's successors, i.e. his legal representatives to part with the suit property.

9. In the present case, the condition which impelled the learned Single Judge to dispose of the suit, and hold that the remedy of specific relief was barred, reads as follows:

“(e) If the prospective purchaser fail to fulfill the above conditions. The transaction shall stand cancelled and earnest money will be forfeited. In case I fail to complete the transaction as stipulate above the purchaser will get the DOUBLE amount of the earnest money. In the both condition, DEALER will get 4% commission from the faulty party.”

10. There is, as a matter of fact, no doubt that the parties did envision a consequence; i.e. forfeiture of the amount in case the purchaser defaulted, and in case the seller defaulted, his liability to pay double the amount. The question, however, is whether the condition *ipso facto* precluded the plaintiff from claiming specific relief – a reason which persuaded the learned single judge to dismiss the suit, without recording evidence, though issues had been framed.

11. Section 23 of the Specific Relief Act, reads as follows:

“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 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 the 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.

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

12. In *M.L. Devender Singh* (supra) the Supreme Court considered the previous law, and the effect of Section 23. The Court held that:

“16. XXXXXX XXXXXX XXXXXX

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:

(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 act done.

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20. *The fact that the parties themselves have provided a 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 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.*

21. *The second assumption underlying the contentions on behalf the Defendants-Appellants is that, once the presumption contained in explanation to Section 12 of the old Act, is removed, the bar contained in Section 21 of the old Act, against the specific enforcement of a contract for which compensation in money is an adequate relief, automatically operates, overlooks that the condition for the imposition of the bar is actual proof that compensation in money is adequate on the facts and circumstances of a particular case before the Court. The effect of the presumption is that the party coming to Court for the specific performance of a contract for sale of immovable property need not prove anything until the other side has removed the presumption. After evidence is led to remove the presumption, the plaintiff may still be in a position to prove, by other evidence in the case, that payment of money does not compensate him adequately.”*

Again, in *P. D'Souza* the Supreme Court recollected the law on the issue, and observed as follows:

"27. The clause as regards payment of damages as contained in clause (7) of agreement of sale reads as under:

"7. That if the vendor fails to discharge the mortgage and also commits any breach of the terms in this agreement and fails to sell the property, then in that event he shall return the advance of Rs. 10,000/- paid as aforesaid and shall also be liable to pay a further sum of Rs. 2,000/- as liquidated damages for the breach of the agreement."

28. The mortgage was, thus, required to be redeemed. From Exhibit P-40 dated 15-6-1979, it appears that the Life Insurance Corporation of India admitted the execution of the discharge and the mortgagor (defendant) was authorized to present the same for registration. The mortgage deed was executed as far back as 3-6-1963. A further charge was created by a deed dated 10-7-1964. The entire mortgage money was paid only on or about 15-6-1979..

29. Clause (7) of the agreement of sale would be attracted only in a case where the vendor is in breach of the term. It was for the plaintiff to file a suit for specific performance of contract despite having any option to invoke the said provision. It would not be correct to contend that only because such a clause exists, a suit for specific performance of contract would not be maintainable.

30. Section [23](#) of the Specific Relief Act, 1963 read as under:

"23. (1) A contract, otherwise proper to be specifically enforced, may be so 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, if the court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for the purpose of securing the 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.

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

31. *In M.L. Devender Singh and Ors. v. Syed Khaja AIR 1973 SC 2457, the following statement of law appears (SCC p. 522, para 16):*

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32. *A distinction between liquidated damages and penalty may be important in common law but as regards equitable remedy, the same does not play any significant role.*

33. *In Manzoor Ahmed Magray v. AIR 2000 SC 191, this Court reiterated the ratio laid down in M.L. Devender Singh (supra) (See also A. Abdul Rashid Khan (Dead) and Ors. v. [P.A.K.A. Shahul Hamid and Ors., MANU/SC/2734/2000](#) 2000 (10) SCC 636."*

13. It is thus apparent, that even in *P. D'Souza*, the Court underlined the correct legal position that *"It would not be correct to contend that only because such a clause exists, a suit for specific performance of contract would not be maintainable."* Earlier, in

Devender Singh, this was underscored, similarly, by saying that the “fact that the parties themselves have provided a 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.”

14. Both in *Devender Singh* and *P.D’Souza*, the Court had the benefit of evidence recorded after a full trial; even the cases and decisions subsequent to *Devender Singh* cited in *P.D’Souza* were after considering the sufficiency of evidence. In the present case, however, the learned Single Judge went merely by the existence of the condition, i.e. Clause (e) and held that mutuality, or want of it, played a part. This Court is of the opinion that such a narrow view, based entirely on the reading of a condition, and in the absence of any opportunity to the plaintiff and the parties to lead evidence, to the effect that it was meant as a condition to secure enforcement, in keeping with the presumption – in Section 23, spoken about by the Supreme Court, in *Devender Singh*, is not tenable. The parties had completed pleadings and the court had framed issues; Issue Nos. 2 to 4 contemplated documentary and oral evidence about the parties’ entitlement to support their respective positions, including on the enforceability of the contract. Such being the case, the learned Single Judge should have refrained from holding – as he did, on an appreciation only of clause (e) that the suit was not maintainable.

15. In view of the above discussion, it is held that the impugned judgment has to be, and is accordingly set aside. The suit shall be listed before the appropriate roster Judge, on 15th July, 2013, for further proceedings. The appeal is allowed in the above terms. There shall, however, be no order on costs.

**S. RAVINDRA BHAT
(JUDGE)**

**NAJMI WAZIRI
(JUDGE)**

JULY 04, 2013