

**Ashwini Kumar Verma Vs. A.K.Tandon and ors.**

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**Court :** Delhi

**Decided On :** Aug-14-2014

**Judge :** Pradeep Nandrajog

**Appellant :** Ashwini Kumar Verma

**Respondent :** A.K.Tandon and ors.

**Judgement :**

\* IN THE HIGH COURT OF DELHI AT NEW DELHI % Judgment Reserved on: August 04, 2014 Judgment Delivered on: August 14, 2014 + RFA (OS) 87/2014 ASHWINI KUMAR VERMA ..... Appellant Represented by: Mr.Arvind Kumar Nigam, Sr.Advocate instructed by Mr.Harsh Prabhakar and Ms.Anjana Prabhakar, Advocates versus A.K.TANDON & ORS. Represented by: ..... Respondents Mr.Manav Gupta, Advocate with Ms.Esha Dutta, Advocate CORAM: HON'BLE MR. JUSTICE PRADEEP NANDRAJOG HON'BLE MS. JUSTICE MUKTA GUPTA PRADEEP NANDRAJOG, J.

1. Ashwani Kumar Verma is an Executive with M/s. Duncans Industries. He took on rent Flat No.39, Mandakini Enclave, Alakhnanda from A.K.Tandon. He seeks specific performance of an oral agreement to sell pleading that the agreed sale consideration was `35,00,000/- out of which he paid `5,00,000/- as earnest money-cum-part sale consideration. As per him he took a loan from HSBC Bank to finance the purchase of the flat. He claims that he spent `40,000/- to renovate the flat. He claims that after receiving `5,00,000/-, through his son Vijay Tandon,

A.K.Tandon resiled from the agreement and sent a communication to him that he had forfeited the amount of `5,00,000/-. Pleading readiness and willingness to pay the sale consideration and alleging default by A.K.Tandon, the suit was filed.

2. In the written statement A.K.Tandon pleads that Ashwani Kumar Verma was in default. He disputes the sale consideration being `35,00,000/and claims the same to be `61,00,000/-.

3. On the pleadings of the parties issues were settled on February 22, 2011 as under:

(i) Whether there is a valid and binding agreement to sell dated 15th June, 2006 between the parties?. (ii) If issue No.1 is answered in favour of the plaintiff, then whether the plaintiff was ready, willing and able to perform the agreement to sell dated 15th June, 2006?. OPP (iii) Whether the plaintiff is in breach of the agreement dated 15th June, 2006?. OPD (iv) Whether the plaintiff is entitled to specific performance of an agreement to sell dated 15th June, 2006?. OPD (v) 4. Relief.

A.K.Tandon was of the opinion that an issue concerning the very maintainability of the suit was required to be settled and thus he filed IA No.6818/2014 invoking Order 14 Rule 5 of the Code of Civil Procedure. He wanted an additional issue to be settled as under:

Whether the suit for specific performance is maintainable in light of the legal notice dated 05.07.2006 and rejoinder dated 17.08.2006 sent by the plaintiff.

5. Pithily stated, on July 05, 2006 Ashwani Kumar Verma through his counsel had sent a legal notice to A.K.Tandon in which he referred to the oral agreement to sell between the parties and the agreed sale consideration being `35,00,000/- out of which he claimed to have paid `5,00,000/-. He stated in the notice that he had taken a personal loan from HSBC Bank. He raised the grievance that A.K.Tandon had resiled from the contract. He demanded return of `5,00,000/- with interest @ 18% per annum as also damages in sum of `20,000/- for causing harassment to him. A.K.Tandon did not respond to the notice but sent a notice of eviction dated

July 27, 2006 to M/s. Duncans Industries Ltd. claiming that he had let out the flat to the company. Ashwani Kumar Sharma sent a response with reference to the said notice on August 17, 2006 in which he reiterated the demand raised by him in the notice dated July 05, 2006.

6. The exchange of correspondence being an admitted fact, vide impugned order dated April 16, 2014 the learned Single Judge has dismissed the suit seeking specific performance filed by Ashwani Kumar Sharma, holding that in view of the stand taken by him in the two notices dated July 05, 2006 and August 17, 2006 he was not entitled to specific performance because by demanding return of `5,00,000/- paid towards part sale consideration he had conveyed his not being ready and willing to perform his obligations under the contract.

7. The issue which arises for consideration in the appeal is : Whether a party under an agreement to sell on conveying an intention not to proceed ahead with the agreement can seek specific performance of the agreement?. And this question would subsume the issue : Whether it would be a case where the party concerned has conclusively established by its conduct its non-readiness and non-willingness to complete the transaction.

8. It does happen that when parties find themselves in a awkward position after they have entered into a contract, they take positions which are merely leverage and no more or to put it differently to gain a technical advantage. It may also happen that a party wants to expedite itself from the sticky situation provided the other party is willing to cooperate. If the reciprocal cooperation is not extended, the offer made by the party to withdraw the extended hand may be withdrawn. It would then become a matter of fact to be determined after evidence is led as to what was the intention of the party for the reason abandonment of a right has to be proved by cogent evidence.

9. The nearest to the facts of the instant case is the judgment of the Calcutta High Court reported as 44 C.W.N. 541 Calcutta Improvement Trust Vs. Surbarnabala Dehi. The judgment was authored by the legendary Justice Ameer Ali and was delivered in the year 1938 after comprehensively reviewing the law on the subject and taking into consideration the pronouncements of the Privy Council and the

English Authorities.

10. For the purpose of our discussion, it would be relevant to notice the facts of the case in some detail. The said case was a suit for specific performance filed before the Calcutta High Court in its Original Civil Jurisdiction by a vendor against a purchaser.

11. As facts of the case reveal, the parties to the suit had a chequered history, inasmuch as the purchaser had previously entered into a contract for the purchase of land from the vendor and had failed to discharge her share of obligations and had consequently suffered forfeiture of the sum of `8,000/(Rupees Eight Thousand only) deposited as earnest money. However, in September, 1933 the purchaser entered into a fresh agreement by which she agreed to purchase another plot from the vendor corporation, provided the sum forfeited was realised and utilized for her benefit in the new transaction. The arrangement was embodied in a letter to the vendor corporation, which was in the form of an offer and came to be accepted by the corporation on September 13, 1933. The decision to accept the said arrangement was further ratified by the Board of the corporation on October 14, 1933.

12. By virtue of the fact that the purchaser had already defaulted in the previous contract, a stipulation was made that the purchaser would pay 50% of the estimated purchase price in cash within a period of seven days and the previously forfeited sum of `8,000/- (Rupees Eight Thousand only) would be adjusted in this amount. Facts reveal that on January 09, 1934, the husband of the purchaser addressed a letter to the vendor corporation raising a grievance that despite having made payment amounting to `20,000/(Rupees Twenty Thousand only), no benefit had accrued in their favour. This letter was not answered and thereafter on January 23, 1934 another communication was addressed by the husband of the purchaser to the vendor corporation seeking interest at the rate of 7% per annum on the money deposited from the date of payment. On January 26, 1934 the vendor corporation addressed a letter to the purchaser and explained the circumstances leading to the delay. On February 23, 1934 the Estate Manager of the vendor corporation notified the date of call as March 12.

13. It would be relevant to highlight that the area had been measured and duly verified in the presence of the purchasers agent, and a balance sum of `390/- (Rupees Three Hundred and Ninety only) was required to be tendered by the purchaser in terms of the stipulated terms of the agreement in order to make an exact half of the purchase money.

14. No steps were taken by the purchaser to deposit the balance amount and on March 08, 1934 the purchaser in her communication addressed to the vendor corporation merely reiterated the demand for interest at the rate of 7% per annum on the money deposited from the date of payment.

15. The vendor corporation in reply stated that on the contrary interest was due on the balance of the purchase money from the 12 th of March, the date of call. The said fact was not disputed by the husband of the purchaser in his reply dated March 28, 1934 but he persisted in his claim for interest and that the land be delivered forthwith. On April 23, 1934, six weeks after the date of call, Mr.N.K.Mukherji; the Legal Advisor of the purchaser, sent a cheque for `390/- (Rupees Three Hundred and Ninety only) and requested that the cross-claim for interest be considered and sought delivery of possession.

16. The cheque was accepted and on the next day the Estate Manager of the vendor corporation made the necessary arrangements for the possession to be delivered in favour of the purchaser on April 30, 1934. In furtherance thereof, the possession of the land was delivered to the purchaser on April 30, 1934.

17. It would be pertinent to notice that the cheque tendered by the purchaser was not honoured. On May 04, 1934 another cheque was issued by the purchaser which was also not honoured and the vendor corporation ultimately received the payment only on May 10, 1934.

18. Meanwhile, on May 05, 1934 the vendor corporation had forwarded the Draft Conveyance and the Draft Security Deed to the purchaser. In the document of security the date from which interest was to run on the second moiety (the deferred payment) was given as May 01, 1934. Interest was demanded from the date of possession and not from the date of call.

19. The purchaser sent the said documents to her pleader and on July 24, 1934, after a delay of nearly three months, she stated that she was sending the documents for engrossment, but was advised that interest could only be charged from the date of actual execution of the Deed of Security. The vendor corporation forwarded back the said documents to the purchaser for engrossment by her and it was pointed out that there was no endorsement of approval and that the blanks had not been filled. Furthermore, as regards the date the purchaser had crossed out the 1st of May.

20. Facts reveal that this was followed by a long chain of correspondence between the parties, wherein the purchaser essentially claimed interest on her money deposited and asserted that she would not pay interest on the unpaid purchase money until the execution of the Conveyance.

21. On September 26, 1934 the Land Committee of the vendor corporation passed a resolution to the effect that no further time would be granted to the purchaser and unless she discharged her remaining obligations under the agreement before October 11, 1934, the earnest money would stand forfeited. It also emerged in evidence that some time prior to November 09, 1934 the purchaser's agent Mr. N. K. Mukherji interviewed the Estate Manager of the vendor corporation, presumably to put an end to the dead-lock between the parties with regard to the date from which interest would be calculated. The Estate Manager pointed out to him that the date must be 1st May, the date of possession at the latest and thereupon the agent of the purchaser raised no objections.

22. On November 09, 1934 both the draft and the agreements were submitted by the purchaser to the vendor corporation with the date in the draft still struck out and the date in the engrossment left blank. These were filled by the Estate Manager of the vendor corporation in his own handwriting and returned to the purchaser on November 21, 1934 along with a covering letter containing instructions that these documents were required to be stamped by the purchaser and she should come in order to execute the same in a proper manner. Since there was no response from the purchaser a reminder was sent on behalf of the vendor corporation on December 04, 1934.

23. Finally on December 11, 1934 the purchaser broke her silence and her husband addressed a communication to the vendor corporation conveying refusal to execute a document agreeing to pay interest from May 01, 1934 and suggesting an arbitration in this regard. On December 17, 1934 the Chairman of the vendor corporation sent a reply to the purchaser whereby she was given a final opportunity until January 15, 1935 to execute the documents, failing which upon that date effect would be given to the decision of the Land Committee with regard to the forfeiture of earnest money.

24. On January 05, 1935 the husband of the purchaser sent another long letter claiming compensation; interest on the money deposited, refusing to pay interest except from the date of execution and challenging the validity of the resolution. In response thereof, on January 18, 1935, the Chairman of the vendor corporation asserted that the resolution as to forfeiture of the earnest money would be given effect to. On January 29, 1935, the husband of the purchaser wrote that he was arranging to send back the documents stamped and executed. However, vide reply dated January 30, 1935, the Chairman of the vendor corporation informed the purchaser that his last letter closed the matter. Thereafter, two communications on behalf of the purchaser were received by the vendor corporation. The first letter was addressed by the husband of the purchaser challenging the resolution of the vendor corporation and threatening action for specific performance. The second letter dated February 21, 1935 emanating from the purchasers attorney Messrs.G.C.Chunder & Co. was more conciliatory in its tenor and it was asserted that the only possible grievance of the purchaser was merely a claim to some allowance for the period before she obtained possession.

25. The Committee of the vendor corporation considered the action to be taken against the purchaser and decided that the better course was to file a suit for specific performance and they therefore on March 27, 1935 passed a resolution which was confirmed by the Board on April 27, 1935, rescinding the resolution of September 26, 1934 and resolving that a suit should be filed for specific performance.

26. Thus, the position which emerged was that the purchaser having threatened to take proceedings to enforce the contract, did not do so, and rather the vendor corporation which initially conveyed its decision to rescind the contract filed a suit for specific performance against the purchaser on August 12, 1935.

27. The purchaser contested the suit essentially on the premise that the vendor corporation were themselves guilty of repudiating the contract and were not continuously ready and willing to perform the same. Furthermore, the purchaser claimed `5,000/- (Rupees Five Thousand only) as damages for not being given the possession by the vendor corporation.

28. The essential point in this case was the purchasers denial that the vendor corporation was ready and willing in one sense or another and thus not entitled to specific performance.

29. Justice Ameer Ali reduced the matter to the smallest compass and enunciated the following issues for determination, namely:

1. The Purchasers claim for damages for delay in giving possession.
2. The Vendors claim for specific performance and or other reliefs.

30. Apropos, the purchasers claim with regard to damages the Court at the outset rejected the said claim by observing that the said claim was not the real point for determination and was rather being staked by the purchaser as a lever for obtaining greater advantages. The Court observed that there was no time expressed in the contract for delivery of possession and in the facts of the case there was no unreasonable delay, especially in view of the conduct of the purchaser herself who herself procrastinated with the matter.

31. The Court thereafter proceeded to deal with the claim of the vendor corporation for specific performance. The learned counsel for the purchaser urged as a point of demurrer to the effect that the suit was not maintainable in view of the fact that admittedly at a point of time the vendor corporation itself did not intend to sue for specific performance.

32. Significantly, the Court was pleased to repel such a contention and observed that the suit was maintainable but the point argued may disclose a valid defence. The submissions of the learned counsel for the purchaser were concatenated by the Court, in the following words:

i Forfeiture of earnest money and refusal to accept documents equals intention to rescind contract, i.e. not to claim performance. I do not call it repudiation because the purchaser had already repudiated the contract. I would rather call it unwillingness to perform subsequent to repudiation by the defendant purchaser. ii (a) Mr.Roy contends that a vendor wanting specific performance must be continually and uninterruptedly willing to perform from the date of the contract to the date of the decree. He relies upon L.R.55 I.A. 360 Mama Vs. Sassoon. (b) Mr.Roy contends that an expression of intention not to claim specific performance even if not acted upon or accepted by the purchaser is sufficient to break the chain of continual readiness and willingness and, therefore, to disentitle the vendore on specific performance. He relies on 28 L.J.

Ch.555 (1858) Royou Vs. Paul. iii The last branch of Mr.Roys contention is to as to alternate relief : Mr.Roy contends that since the vendor has disentitled himself from specific performance the court cannot grant other reliefs. See again Mama Vs. Sassoon.

(Emphasis supplied) 33. For the purpose of the case at hand, it would be relevant for us to focus our attention on the findings of the Court upon the points of arguments enumerated above as ii (a) and ii (b) since that was the precise contention of the respondent defendant before the learned Single Judge which found acceptance and resulted in the dismissal of the suit.

34. The Court took into account Sec 24(c) of the Specific Relief Act Who has already chosen his remedy and obtained satisfaction and observed that evidently the vendor corporation had not obtained satisfaction of its claims by taking recourse to an alternative remedy.

35. With regard to reliance placed upon the decision of the Privy Council in Mama Vs. Sassoon, the Court was pleased to observe that the said case was actually

decided on the ground that there was no binding contract. It was further observed that in the said case the purchaser had disentitled himself to specific performance by giving formal notice during the suit that he would only claim damages, and the said notice had vitiated or interrupted the continuous readiness and willingness; the necessity for which must be read into Section 24. The Court also noticed that the phrase in question was taken by the Privy Council directly from L.R. 28 Ch. Div 356 (1885) *Hipgrave Vs. Case*. The Court clarified that in *Hipgrave Vs. Case*, the vendor had actually incapacitated himself by resale, pending suit and therefore the case would directly come under Section 24(b). The Court observed that the facts of the case arising for its consideration were that the vendor put the purchaser into possession. The purchaser refused to complete his stipulated obligations and this resulted in a breach. The vendor threatened forfeiture and resale. He rejected the purchaser's belated offer to tender documents. The purchaser threatened to sue for specific performance. Thereupon, the vendor recalled his threat to rescind and sued for specific performance and alternatively for rescission.

36. The Court thereafter endowed its consideration on the views of eminent author Sir Edward Frye comprised in his authoritative treatise on Specific Performance and various pronouncements of Courts in England.

37. It may be highlighted that the learned counsel for the defendant contended that the mere expression of intention or mere choice of remedy was sufficient to disentitle the plaintiff to the relief of specific performance. In this regard reliance was placed upon the words acts tending to rescission, words actually used in Section 957 of Frye and also upon Section 970. It was further contended that the choice of a remedy is election and that this is really the basis of the rule.

38. The Court was also pleased to observe that it had not been able to find any authority in English law which laid down the general proposition that the commencement of an action for damages disentitles the plaintiff to claim specific performance.

39. The Court observed that in *Mama Vs. Sassoon* there was a formal abandonment of the remedy of specific performance during the pendency of the suit and it was held therein that this amounted to Conduct as envisaged under

Section 957 of Fryes Treatise on Specific Performance, which disentitled the plaintiff to seek such relief. The Court in the said case was satisfied that the Notice was given owing to the purchasers decision to employ his money elsewhere, so it became a case hardly differing from a case of incapacity, or continuing refusal.

40. While concluding its discussion on the said aspect of the matter, the Court clearly held that it refused to accept *Mama Vs. Sassoon* as a ruling to the effect that any choice of remedy in any language at any time amounts to Conduct as envisaged under Section 957 of Fryes Treatise on Specific Performance which deprived the vendor of the right to specific performance.

41. Justice Ameer Ali, in his usual eloquence, was pleased to opine that the conduct of the plaintiff in the said case was not, to the extent which the Court of Equity considered a bar, at variance with or amounting to subversion of the relation established by the contract.

42. The Court further reiterated its view that it could find no authority on the subject which laid down the sweeping proposition that the mere commencement of proceedings for damages disentitled a party to ask for equitable relief. It was observed that such a principle was not envisaged under our Code.

43. Perusal of the judgment indicates that after rejecting the various contentions canvassed on behalf of the defendants, the Court was pleased to decree the suit in favour of the plaintiff and grant the relief of specific performance.

44. Under the circumstances it has to be held that issues of abandonment of claims being questions of fact have to be determined after the trial. In the decisions reported as (2006) 5 SCC638 *Ramesh B.Desai & Ors. Vs. Bipin Vadilal Mehta & Ors.*, AIR 1964 SCC497 *Major S.S.Khanna Vs. Brig.F.J.Dillon* AIR1979M.P. 153 *M/s. Ramdayal Umraomal Vs. M/s.Pannalal Jagannathji*, AIR1984 Ker 191 *Thiruvambadi Rubber Col Ltd. Vs. N.K.Damodarana*, AIR2009 Ori. 145 *Saradakanta Panda Vs. Poonam Padhi*, AIR1984 Bom 60 *Usha Sales Ltd. Vs. Malcolm Gomes & Ors.*, Air 2003 Gau 1 *Anom Apang Vs. The State of Arunachal Pradesh & Ors.*, AIR1993 All 2 *The Manager, Bettiah Estate Vs. Sri Bhagwati Saran Singh & Ors.* and AIR1976 All 201 *M/s.Estrela Batteries Ltd. Vs.*

M/s.Modi Industries Ltd. it was held that preliminary issues are only those which are determined as pure questions of law based on undisputed facts. In the decision reported as 2006 (2) SCC496H.P.Pyarejan Vs. Dasappa it was held that readiness and willingness is a mixed question of fact and law. In the decision reported as 2002 (10) SCC82T.Mohan Vs. Kannammal & Anr. it was observed that in a suit for specific performance where the purchaser was already in possession as a tenant the question of readiness and willingness is not of much significance. Thus. the view taken by the learned Single Judge to dismiss the suit seeking specific performance has to be set aside. We do so.

45. Allowing the appeal we set aside the impugned order dated April 16, 2014. We restore CS (OS) No.1743/2008 for adjudication on merits. We also dispose of IA No.6818/2014 filed by the respondents and settle one more issue in the suit, which is the one prayed for by the respondents themselves in the application and as noted by us in paragraph 4 above.

46. Parties shall bear their own costs all throughout.

47. CS (OS) No.1743/2008 shall be listed for directions before the learned Judge on the Original Side as per roster on September 01, 2014.

48. In view of Section 13 of the Court Fees Act, 1870, since the suit is remanded in appeal we direct the Registry of this Court a certificate authorizing appellant to receive back from the Collector the full amount of fee paid on the memorandum of appeal. (PRADEEP NANDRAJOG) JUDGE (MUKTA GUPTA) JUDGE  
AUGUST14 2014 mamta

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