P. D'Souza vs Shondrilo Naidu on 28 July, 2004

Equivalent citations: AIR 2004 SUPREME COURT 4472, 2004 AIR SCW 4653, (2004) 6 JT 126 (SC), 2004 (4) SLT 893, (2005) 1 ALLMR 15 (SC), 2005 (1) ALL MR 15, 2004 (7) SRJ 189, (2004) 2 CLR 340 (SC), (2004) 4 CTC 150 (SC), (2004) 2 CGLJ 245, 2004 (2) ALL CJ 1983, 2004 (6) JT 126, 2004 (2) CTLJ 124, 2004 (2) CLR 340, 2004 (4) CTC 150, 2004 (3) LRI 747, 2004 (6) ACE 401, 2004 (3) CURCC 166, 2004 (6) SCALE 364, 2004 (6) SCC 649, (2004) 4 MAH LJ 802, (2005) 1 CIVILCOURTC 131, (2004) 4 MPLJ 411, (2004) 6 SUPREME 28, (2004) 3 RECCIVR 668, (2004) 4 ICC 224, (2004) 6 SCALE 364, (2004) 4 ALL WC 3629, (2005) 1 CAL HN 15, (2004) 3 LANDLR 514, (2004) 2 WLC(SC)CVL 463, (2004) 21 INDLD 218

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Bench: S.B. Sinha, S.H. Kapadia

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           CASE NO.:
Appeal (civil)  5333 of 1999

PETITIONER:
P. D'SOUZA

RESPONDENT:
SHONDRILO NAIDU

DATE OF JUDGMENT: 28/07/2004

BENCH:
S.B. SINHA & S.H. KAPADIA

JUDGMENT:
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JUDGMENT 2004 Supp(3) SCR 186 The Judgment of the Court was delivered by S.B. SINHA, J. : A suit for specific performance of contract for enforcing an agreement for sale dated 6.6.1977 was filed by the respondent herein against Shri P. D'souza, the predecessor-in-interest of the appellant. In terms of the said agreement, the parties hereto were required to perform their respective parts of contract within a period of 18 months expiring on 5.12.1978. The total consideration for the said transfer was fixed at Rs. 1,55,000.

It is not in dispute that the father or the plaintiff-respondent Shri S.J. Naidu was in occupation of the first floor of the premises in question as a tenant whereas plaintiff was a tenant on the ground floor thereof. A suit for their eviction was filed but the same was dismissed.

It is also not in dispute that the suit property was mortgaged by the defendant-appellant in favour of the Life Insurance Corporation of India. It is averred that despite assurances given to the plaintiff by the defendant that all original documents, title deeds and encumbrance certificate would be produced by May, 1981, the same had not been done within the said period.

It also stands admitted that pursuant to or in furtherance of the said agreement, the folio wing payments have been made in part payment of the consideration.

(a) A sum of Rs. 2,500 on 11.11.1976.

(b) A sum of Rs. 10,000 was paid by four cheques of Rs. 2500 each before the agreement was executed.

(c) A further sum of Rs. 2,500 was paid subsequently and an amount of Rs.

20,000 was paid on 29.12.1977.

The defendant allegedly demanded some amount on 29.11.1980 from the plaintiff and further wanted extension of time for registering the sale deed till 31.12.1981. A letter was also addressed to the plaintiff s father to enhance the rent pursuant whereto and in furtherance whereof the rent was enhanced from Rs. 440 to Rs. 500 per month. The plaintiff by a letter dated 21.5.1981 called upon the defendant to execute the deed of sale wherein she conveyed her readiness and willingness to perform her part of contract and in response thereto the defendant by a letter dated 25.5.1981 purported to have cancelled the agreement and sought to forfeit a sum of P.s. 35,000 paid by the plaintiff.

A notice to execute the deed of sale was issued to which a reply was sent by the defendant on 4.6.1981. A further notice was issued by the Plaintiff on 29.6.1981 calling upon the defendant to execute the deed of sale. On or about 6.8.1981 the plaintiff sent a draft sale deed in order to enable the defendant to claim the requisite clearance under Section 230A of the Income Tax Act. A notice dated 7.9.1981 was also issued by the plaintiff to which the defendant did not reply. The plaintiff advanced in all Rs. 55,000 including Rs. 6,000 towards consideration on 9.9.1981 to enable the defendant to defray the expenses for obtaining the Income Tax clearance certificate.

In the aforementioned situation, a suit for specific performance of the agreement of sale was filed.

Once of the issue which was raised by the defendant in his written statement was that the plaintif had never been ready and willing to perform her part of contract.

The learned Trial Court having regard to the pleadings of the parties inter alia framed the following issues:

"(4) Does the plaintiff prove that she was and has always been ready and willing to perform her part of the contract?

(7) Whether the suit is within time?"

The Trial Court answered the issue No. 4 in the negative and dismissed the suit. An appeal thereagainst was filed by plaintiff-respondent before the High Court.

The High Court accepted the contentions advanced on behalf of the plaintiff and held that on the basis of materials on record it was proved that the Plaintiff has all along been ready and willing to perform her part of contract holding:

> "The question is whether on a particular day i.e., before the expiry of the period, for which extension has been granted, the plaintiff was ready to perform her part of he contract. The fact that subsequently the money was withdrawn does not indicate that readiness and willingness has gone. The very fact that the money was available in D.D. is abundantly clear that the plaintiff was ready and willing."

The High Court furthermore rejected the contention of the defendant to the effect that the Court should not exercise its discretionary jurisdiction under Section 20 of the specific Relief Act on the ground of hardship of the defendant.

Further submission of the defendant to the effect that he was prepared to pay back money with the interest at higher rate was also not acceded to.

Mr. S.N. Bhat, learned counsel appearing on behalf of the appellant raised three contentions in support of this appeal. It was firstly submitted that the onus to prove that she was al l along ready and willing to perform her part of contract was on the plaintiff and the very fact that she admittedly did not perform her part of the contract by 5.12.1978 is itself a pointer to show that she had not been able to do so. Reliance in this behalf has been placed on Ardeshir H. Mama v. Flora Sassoon, AIR (1928) PC 208.

Further contention of Mr. Bhat is that as the agreement provided for a damage clause in terms whereof, the Appellant had a option to pay the liquidated damages and in that view of the matter decree for specific performance of contract could not have been passed. Reliance in this behalf has been placed on Dadarao and Another v. Ramrao and Others, [1999] 8 SCC

416. Mr. Bhat would further submit that in a case of this nature where the decree for specific performance of contract has not taken effect for a long time, this Court having regard to the escalation in price, refuse to exercise its discretionary jurisdiction in granting a decree for specific performance of contract. Reliance in this behalf has been placed on Nirmala Anand v. Advent Corporation (P) Ltd. and Others, [2002] 5 SCC 481.

Mr. M.N. Krishnamani, learned senior counsel appearing on behalf of the respondent, on the other hand, would submit that a finding of fact has been arrived at by the High Court to the effect that the respondent had all along been ready and willing to perform her part of the contract. It was urged that the defendant-appellant did not hand over the original documents and furthermore, did not

discharge the mortgage. The learned counsel would contend that the mortgage was redeemed by the defendant upon receipt of the requisite amount from the plaintiff, the High Court must be held to have correctly exercised its discretionary jurisdiction.

The learned counsel furthermore would draw our attention to the fact that the defendant-appellant accepted a sum of Rs. 20,000 in August, 1981 and within the period of two months thereafter the suit had been filed.

It is indisputable that in a suit for specific performance of contract the plaintiff must establish his readiness and willingness to perform his part of contract. The question as to whether the onus was discharged by the plaintiff or not will depend upon the fact and circumstance of each case. No strait-jacket formula can be laid down in this behalf.

The High Court upon consideration of the materials on records had arrived at a finding of fact that the plaintiffs had all along been ready and willing to perform their part of contract. The said findings are binding upon this Court as it had not been shown that while arriving at the said finding the High Court had taken into consideration any irrelevant fact or failed to take into consideration any relevant fact.

It is not a case where the plaintiff had not made the requisite averments in the plaint. The readiness and willingness on the part of the plaintiff to perform his part of contract would also depend upon the question as to whether the defendant did everything which was required of him to be done in terms of the agreement for sale. The plaintiff was a tenant of the defendant.

It is not disputed that the defendant by a letter dated 29th November, 1980 requested the plaintiff to enhance the rent from Rs. 440 to Rs. 500. Therein she further assumed that the sale deed would be executed and registered by 31st December, 1981 which could not be done for unavoidable reasons. The fact that the plaintiff had paid different amounts to the defendant from time to time which were accepted by him stands admitted.

It appears from the records that the defendant herself did not produce the original documents nor redeemed the mortgage. If the mortgage was not redeemed and the original documents were not produced, the sale deed could not have been executed and in that view of the matter, the question of plaintiffs readiness and willingness to perform his part of contract would not arise. In August, 1981 the defendant accepted a sum of Rs. 20,000 from the plaintiff. The contention raised on behalf of the appellant to the effect that the plaintiff has failed to show his readiness and willingness to perform his part of contract by 5.12.1978 is stated to be rejected inasmuch as the defendant himself had revived the contract at a later stage. He as would appear from the findings recorded by the High Court even sought for extension of time for registering the sale deed till 31.12.1981. It is therefore, too late in the day for the defendant now to contend that it was obligatory on the part of plaintiff to show readiness and willingness as far back on 5.12.1978.

Time, having regard to the fact situation obtaining herein, cannot thus, be said to be of the essence of the contract. In any event, the defendant consciously waived his right. He, therefore, now cannot

turn round and contend that the time was of the essence of the contract and the plaintiff was not ready and willing to perform her part of contract in December, 1978.

In Ardeshir H Mama (supra) in the fact of the matter it was held that there was no completed contract. The said decision has no application in the fact of the present case.

The clause as regard 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 even he shall return the advance of Rs. 10,000 paid as aforesaid and shall also be liable to pay a further sum of Rs. 20,000 as liquidated damages for the breach of the agreement."

The mortgage was, thus, required to be redeemed. From Exhibit P40 dated 15th June, 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 on 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 15th June, 1979. 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.

Section 23 of the Specific Relief Act, 1968 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 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.
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> (2) When enforcing specific performance under this section, the court shall not also decree payment of the sum so named in the contract."

In M.L. Devender Singh & Ors. v. Syed Khaja, [1974] l SCR 312, the following statement of law appears:

> "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 that 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 proceeding 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;

(ii) Where the sum named is to be paid 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.

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 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."

This Court further stated:

"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."

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

In Manzoor Ahmed Magrav v. Gulam Hassan Aram and Others, 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 Others v. P.A.K.A. Shahul Hamid and Others, [2000] 10 SCC 636).

In Dadarao (supra) whereupon Mr. Bhat placed strong reliance, the binding decision of M.L. Devender Singh (supra) 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 incurium.

Furthermore, the relevant term stipulated in Dadarao (supra) was as under:

> "Tukaram Devsarkar, aged about 65, agriculturist, r/o Devsar, purchaser (CHENAR) - Balwantrao Ganpatrao Pande, aged 76 years, r/o Duadi Post Devsar, vendor (DENAR), who hereby give in writing that a paddy field situated at Dighadi Mouja, 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 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.
>
> (Emphasis supplied) Interpreting the said term, it was held:
>
> "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 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.

Apart from the fact that agreement of sale did not contain a similar clause, Dadarao (supra) does not create a binding precedent having not noticed the statutory provisions as also an earlier binding precedent. (See Government of W.B. v. Tarun K. Roy and Others, [2004] l SCC 347 para 26).

The second contention of Mr. Bhat therefore, cannot also be accepted.

The third contention of the learned counsel to the effect that this Court should not exercise its discretionary jurisdiction in view of hardship which would be faced by the defendant is stated to be rejected. Such a plea was not raised before the High Court.

It is not a case where the defendant did not foresee the hardship. It is furthermore not a case that non-performance of the agreement would not cause any hardship to the plaintiff. The defendant was a landlord of the plaintiff. He had accepted part payments from the plaintiff from time to time without any demur whatsoever. He redeemed the mortgage only upon receipt of requisite payment from the plaintiff. Even in August, 1981, i.e. just two months prior to the institution of suit, he had accepted Rs. 20,000 from the Plaintiff. It is, therefore, too late for the Appellant now to suggest that having regard to the escalation in price, the Respondent should be denied the benefit of the decree passed in his favour. Explanation l appended to Section 20 clearly stipulates that merely inadequacy of consideration or the mere fact that the contract is onerous to the defendant or improvident in its nature would not constitute an unfair advantage within the meaning of sub-section (2) of Section 20.

The decision of this Court in Nirmala Anand (supra) may be considered in the aforementioned context.

Raju, J. in the fact and circumstance of the matter obtaining therein held that it would not only be unreasonable but too inequitable for courts to make the appellant

the sole beneficiary of the escalation of real estate prices and the enhanced value of the flat in question preserved all along by the respondents No. l and 2 by keeping alive the issues pending with the authorities of the Government and the municipal body. It was in the facts and circumstances of the case held :

"23... Specific performance being an equitable relief, balance of equities have also to be struck taking into account all these relevant aspects of the matter, including the lapses which occurred and parties respectively responsible therefor. Before decreeing specific performance, it is obligatory for courts to consider whether by doing so any unfair advantage would result for the plaintiff over the defendant, the extent of hardship that may be caused to the defendant and if it would render such enforcement inequitable, besides taking into (sic consideration) the totality of circumstances of each case...."

The Court for arriving at the said finding gave opportunities to the parties to settle the matter and the respondents No. l and 2 were prepared to pay upto Rs. 60 lakhs as against the demand of the appellant to the fine of rupees one and a half crores which was subsequently reduced upto Rs. 120 lakhs. In view of the respective stand taken by the parties, the Court inter alia directed the respondents No. l and 2 to pay a sum of Rs. 40 lakhs in addition to the sum already paid by them.

Bhan, J. however, while expressing his dissention in part observed:

"38. It is well-settled that in case of contract for sale of immovable property the grant of relief of specific performance is a rule and its refusal an exception based on valid and cogent grounds. Further, the defendant cannot take advantage of his own wrong and then plead that decree for specific performance would be an unfair advantage to the plaintiff.

40. Escalation of price during the period may be a relevant consideration under certain circumstances for either refusing to grant the decree of specific performance or for decreeing the specific performance with a direction to the plaintiff to pay an additional amount to the defendant and compensate him. It would depend on the facts and circumstances of each case."

The learned Judge further observed that delay in performance of the contract due to pendency of proceedings in court cannot by itself be a ground to refuse relief of specific performance in absence of any compelling circumstances to take a contrary view. However, the learned judge noticed the events which occurred subsequent to the passing of the decree and held:

"45. The appellant has always been ready and willing to perform her part of the contract at all stages. She has not taken any advantage. of other own wrong. The appellant is in no way responsible for the delay at any stage of the proceeding. It is the respondents who have always been and are trying to wriggle out of the contract. The respondents cannot take advantage of their own wrong and then plead that the

grant of decree of specific performance would amount to an unfair advantage to the appellant.

46. Requiring the appellant to pay further sum of Rs. 40 lakhs would/may amount to frustrating the agreement itself as the appellant may not be in a position to pay the sum of Rs. 40 lakhs. Respective counsel for the parties had quoted the figure of a particular sum which could be paid to the appellant in lieu of avoiding the decree of specific performance. The appellant had not made an offer to pay any additional sum over and above the quoted price to sell by way of compensation. It does not indicate the financial position of the appellant to pay the additional sum of Rs. 40 lakhs. With due respect, in my view, it would be unfair to grant the decree of specific performance by one hand and take it back by the other.

47. For the reasons stated above, I am of the view that the appellant is entitled to the specific performance of agreement to sell the flat No. 71 on the 7th floor of Divya Prabha Building on the price mentioned in the agreement to sell which would be subject to the terms (iii), (iv), (v) and

(vi) of the last paragraph of the judgment of my learned Brother. There would be no order as to costs.

The said decision cannot be said to constitute a binding precedent to the effect that in all cases where there had been an escalation of prices the court should either refuse to pass a decree on specific performance of contract of direct the plaintiff to pay a higher sum. No law in absolute terms to that effect has been laid down by this Court not is discernible from the aforementioned decision.

For the reasons aforementioned, we do not find any merit in this appeal which is accordingly dismissed" However, in the facts and circumstances of the case, there shall be no order as to the costs.