N. L. Devender Singh & Ors vs Syed Khaja on 3 August, 1973

Equivalent citations: 1973 AIR 2457, 1974 SCR (1) 312, AIR 1973 SUPREME COURT 2457, 1973 2 SCC 515 1974 (1) SCR 312, 1974 (1) SCR 312, 1974 (1) SCR 312 1973 2 SCC 515, 1973 2 SCC 515

Author: M. Hameedullah Beg

Bench: M. Hameedullah Beg, Kuttyil Kurien Mathew

PETITIONER:
N. L. DEVENDER SINGH & ORS.

Vs.

RESPONDENT:
SYED KHAJA

DATE OF JUDGMENT03/08/1973

BENCH:
BEG, M. HAMEEDULLAH
BENCH:
BEG, M. HAMEEDULLAH
MATHEW, KUTTYIL KURIEN

CITATION:
1973 AIR 2457 1974 SCR (1) 312
1973 SCC (2) 515

ACT:
Specific Relief Act 1877, s. 12-Presumption under-When rebutted-Bar in S. 21-When operates.

HEADNOTE:
The plaintiff (respondent herein) executed an agreement on 9-10-1962 with defendant no. 1 whereby the latter agreed to sell to the former his house in Hyderabad for a sum of Rs. 60,000. The plaintiff paid a sum of Rs. 2,000 as earnest money. However, dependent no. 1 sold the property in question on 19-10-1962 to defendants 2 to 7 for a sum of Rs. 70 , 000. The plaintiff consequently filed a suit for specific performance of the agreement. The suit was resisted by defendant no. 1 on the ground that the plaintiff had obtained the agreement dated 9-10-1962 as a result of misrepresentation and fraud. The trial court held that misrepresentation and fraud had not been proved but the

plaintiff had obtained an "unfair advantage'. On this view the trial Court dismissed the suit for specific performance. It ordered the repayment to the plaintiff of the earnest money paid by him. Inter alia the trial court also ordered the payment of Rs. 20,000 to the plaintiff as liquidated damages or penalty as stipulated in the agreement of 9-10-1962. In appeal the High Court decreed the plaintiff's suit disagreeing with the view of the trial Court that the plaintiff had obtained an unfair advantage. The High Court granted the defendants a certificate of fitness to appeal to this Court. It was contended on behalf of the defendants-appellants that the parties themselves having stipulated for Rs. 20,000 as liquidated damages in the event of a breach by the first defendant, the presumption contained in the explanation to a. 12 of the Specific Relief Act 1877 stood rebutted. It was also contended that once the aforesaid presumption was rebutted the bar contained in section 21 of the Act would ipso facto become operative.

Dismissing the appeal,

HELD : (1) A reference to s. 22 of the Act of 1877 (corresponding to a. 20 of the Specific Relief Act 1965) would show that the jurisdiction of the Court to decree specific relief is discretionary and must be exercised on sound and reasonable grounds "guided by judicial principles and capable of correction by the Court of appeal". This jurisdiction cannot be curtailed or taken away by merely fixing a sum even as liquidated damages. This is made perfectly clear by the provisions of s. 20 of the old Act (corresponding to a. 23 of the Act of 1963) so that the Court has to determine, on the facts and circumstances of each case before it, whether specific performance of a contract to convey a property ought to be granted. [319G-H]

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, it is nothing more than a Piece of evidence. It is not conclusive or decisive. [32OA-B]

(ii) The contention that once the presumption contained in explanation to s. 12 of the old Act is removed, the bar contained S. 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 the 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 the 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. [320G-

E]
In the present case, although, evidence was led by parties, yet there was no evidence to show the extent of loss of prospective gains to the plaintiff-respondent or to the appellants. [320E-F]
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(iii) Since the presumption under s. 12 of the old Act had not been rebutted the High Court rightly decreed the suit for specific performance of the contract. It could not be said that the High Court had lightly interfered with the exercise of its discretion by the trial court to grant or not to grant specific performance on the facts and circumstances of the case. [321C-D]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2517 of 1969.

From the Judgment and Order dated 31st March, 1969 of the Andhra Pradesh High Court at Hyderabad, in City Civil Court Appeal No. 71 of 1964.

P. Keshva Pillai, for appeallants Nos. 1 & 3. M. C. Chagla, Aziz Ahmad and P. C. Bharatri, for appellants Nos. 2, 4-7.

C. K. Daphtary, Y. S. Sahni, S. M. Aqil and U. P. Singh, for the respondent.

The Judgment of the Court was delivered by BEG, J. This appeal has come before us on a Certificate of fitness granted by the High Court of Andhra Pradesh under Articles 132 and 133 of the Constitution of India. The Plaintiff-Respondent had sued Defendant-Appellant Devender Singh (hereinafter referred to as the "First Defendant") for specific performance of a contract to sell a house facing the Secunderabad Junction Railway Station in Hyderabad for a sum of Rs. 60,000/- concluded on 9-10-1962 at New Delhi where the first Defendant resides. It appears that there was a previous agreement on 27-9-1962 (hereinafter referred to as the " first agreement) between the Plaintiff, who resides at Hyderabad, and the first Defendant, through an agent, Laxmanaswamy, D.W. 2, with the help of Sambamurthy, D.W. 3, a nephew of Laxmanaswamy and an Income-tax 'practitioner residing at Secunderabad, for the sale of this very property for Rs. 55,0001- the terms of which were embodied in a document Ex. B. 15. The First Defendant denies the binding character of the first agreement of 27-9-1962 under which a cheque for Rs. 10,000/- was drawn up by the Plaintiff in favour of the first Defen- dant and handed over to his agent by the Plaintiff. The exact reason for a cancellation of this cheque for Rs. 10,000/- in favour of the 1st Defendant is not clear, but, according to Sambamurthy, D.W. 3, the reason was that, actually, Rs. 20,000/- was being demanded on behalf of the first Defendant as earnest money to which the plaintiff had consented so that a new cheque was, for some unknown reas on, to be issued and not another cheque for Rs. 10,000/. The evidence of Sainbamurthy also show that the Plaintiff had become aware of want of written authority on the part of either Laxmanaswamy or Sambamurthy to conclude the contract on

behalf of the 1st Defendant so that be must have felt uncertain about the effect of the first agreement. Evidently, attempts to show the Plaintiff that his position was shaky under the first agreement and higgling were going on despite the agreement of 27-9-1962 Evidence in the case and findings recorded thereon by the Trial Court as well as the High Court show that, although the first Dedendant, who was keen to dis-

post of his property at Secunderabad, may have had other offers, yet, upto 27-9-1962, when the first agreement was concluded, he had no better offer than the plaintiff's. Evidence is conflicting on the question whether the first Defendant had autborised Sambaniurthy by telephone to conclude the contract on his behalf for the sale of property of Rs. 55,000/-, but this was unimportant in view of the subsequent agreement of 9-10-1962. The Plaintiff, who was evidently very anxious to obtain the property, had flown to Delhi with his lawyer and had managed, by offering Rs. 60,000,/- as the price of the property, out of which Rs. 20,000/- was paid is earnest money (Rs. 10,000,/- in cash and Rs. 10,0100/- by a cheque dated 9-10-1962) and the balance at the time of registration, to induce the first Defendant himself to conclude and execute the fresh agreement of 9-10-1962.

The deed of agreement of 9-10-1962 Ex. Al was not executed in a hurry by the first Defendant. He had ample time to consider any other offers the-re, might be till then for' sale of his property and to take legal advice, if he had wanted to have it, before executing the deed of 9-10-1962. The Trial Court as well as the High Court had found that the first Defendant was fully aware of all the facts and had entered into the agreement of 9th October, 1962, with open eyes because it was the most advantageous transaction open to the first Defendant at that time and not as a result of any pressure or misrepresentation or fraud practised upon the first Defendant, a middle aged hard headed and astute businessman who deposed that he was a Director of Blackwood Hodge (Pvt.) Ltd., and was connected with a number of other business concerns. He had himself stated in his evidence in Court that he entered into the agreement of 9-10-1962 because he considered that "a bird in hand was worth two in the bush" and had thus given out the real reason for the agreement of 9-10-1962.

The first Defendant bad, however, ignoring the contract of 9-10-1962, actually sold the property under a deed dated 19- 10-1962 Ex. B. 22 for a sum of Rs. 70,000-/- received from Gulam Hussain Jowkar (2nd Defendant), Rajab (3rd Defendant), Safar Jowkar (4th Defendant), Hussain Jowkar' (5th Defendant), Wali Husstin Nasab (6th Defendant), all partners in the firm carrying on the business of running Alpha Hotel (7th Defendant), situated in front of the Railway Station at Secunderabad Apparently, the offer of Rs. 70,000/- had come too late and proved too tempting for the first Defendant to resist it.

The first Defendant had, in answer to the suit of the PlaintiffResponsent, pleased that the' contract of 9-10- 1.962 was the result of mis-representation and fraud. All he could urge in support of such a plea was that the first Defendant had been so completely overawed by the Plaintiff and his lawyer mis-representing to him that the first agreement was still binding and that the Plaintiff could sue upon it. that he executed the agreement of 9-10-1962. Both the Trial Court and the High Court had found the plea of fraud and mis-representation taken by the first Defendant to be baseless. Nevertheless, the Trial Court had relied upon the facts leading up to the agreement of 9-10-1962 and the allegation that the first Defendant was overawed as sufficient to justify the finding that the

plaintiff had obtained an " unfair advantage" over the 1st Defendant while concluding the agreement of 9-10- 1962. Therefore, the Trial Court thought that the plaintiff was not entitled to specific performance of the agreement of 9-10-1962, but awarded a decree for the return of Rs. 20,000/- to the plaintiff, which he had paid to the first Defendant as earliest money, and for damages of Rs. 20,000/- , which had been stipulated for by way of liquidated damages or penalty in the agreement of 9-10-1962 and for additional damages to the extent of Rs. 2,300/. Interest at 6% per annum and the costs of the suit were also. awarded to the Plaintiff by the Trial Court.

The High Court had rightly found, after a thorough re- exammation of. evidence in the case, that it was impossible to hold that the plaintiff had obtained any unfair advantage over the first Defendant in concluding the agreement of 9-10-1962. It found the stand of the 1st Defendant to be disingenuous and his plea as to why or how he found himself compelled to execute the agreement of 9-10-1962 to be utterly incredible. The High Court had rightly held that the first Defendant concluded the agreement of 9-10-1962 because he obtained not only an enhancement of Rs. 5,000/- in the sale consideration but Rs. 20,000/- immediately as earnest money and a stipulation of a further sum of Rs. 20,000 /- as liquidated damages or as penalty in the event of the plaintiff resiling from the contract.' Actually, the first Defendant-Appellant was, owing to the fact that be could put forward want of the alleged agent's authority to sell, for whatever such an excuse may be worth, and the fact that he had still to execute a sale deed and give possession of the property, placed in a more favorable and advantageous bargaining position. And, bargaining had evidently not stopped despite the first agreement.

The only point which could be and which was seriously urged before us by Mr. Chagla, appearing for the Defendants-Appel- lants, was that, the parties themselves having stipulated for Rs. 20,000/- as liquidated damages in the event of a breach by first Defendant, the presumption contained in the Explanation to Section 12 of the Specific Relief Act 1877 (hereinafter called 'the old Act") was rebutted. Here, Section 12 of the old Act may be reproduced in toto :-

> " 12. Except as otherwise. provide in this Chapter, the specific performance of any contract of any contract may in the discretion of the Court be enforced-
>
> (a) when the act agreed to be done is in the performance, wholly or partly, of a trust;
>
> (b) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done;
>
> (c) when the act agreed to be done is such that pecuniary compensation for its non-

performance would not afford adequate relief; or

(d) when it is probable that pecuniary compensation cannot be got for the non-

performance of the act agreed to be done.

Explanation.-Unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer movable property can be thus relieved".

The principles embodied in Section 12 of the old Act have been incorporated in Section 10 of the Specific Relief Act of 1963 (hereinafter referred to as the Act of 1963") which runs as follows :

> "10. Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the court, be enforced-
>
> (a) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done; or
>
> (b) when the act agreed to be done is such that compensation in money for its non-

performance would not afford adequate relief. Explanation.-Unless and until the contrary is proved, the court shall presume-

(i) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money; and

(ii) that the breach of a contract to transfer movable property can be so relieved except in the following cases :-

> (a) Where the Property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market;
>
> (b) where the property is held by the defendant as the agent or trustee of the plaintiff".

The term of the contract of 9-10-62 which, according to Mr. Chagla, attracts the explanation of Section 12 of the old Act reads as follows :

> "It is agreed that should I fail to comply with the terms of this agreement, I shall be liable not only for the refund of the advance, of Rs. 20,000/- (Rupees twenty thousand only) received by me but I shall also be liable to pay a similar amount of Rs. 20,000/- (Rupees twenty thousand only) as damages to the said Syed Khaja".

There is no mention anywhere in the contract that a party to it will have the option to either fulfil the contract to buy or sell or to pay the liquidated damages or penalty of Rs. 20,000/- stipulated for a breach, as an alternative to the performance of the contract to buy or to sell. Section 21 of the old Act, to which Section 14 of the Act of 1963 corresponds, enacts, inter alia, that "a contract for the nonperformance- of which a compensation of money is adequate relief' cannot be specifically

enforced. Hence, it is contended that, once the presumption contained in Explanation to Section 12 is rebutted, by proof that the, parties themselves contemplated a certain amount as liquidated damages for a breach of contract, the bar under Section 21 of the old Act must be, given effect to because it must be deemed to be proved that the non-performance complained of can be adequately compensated by money. The assumptions underlying the superficially attractive arguments an behalf of the Defendants-appellants are two :

> firstly, that the mere existence of a clause in a contract providing for liquidated damages or a penalty for a breach is sufficient to rebut the presumption raised by the explanation to Section 12; and, secondly, that, if the presumption is rebutted, the bar contained in Section 21 of the old-Act will ipso facto become operative. We now proceed to deal with each of the two assumptions mentioned above.
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> The answer to the 1st assumption is provided by Section 20 of the old Act. It reads :
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> "20. A contract, otherwise proper to be specifically forced, 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".

If the Legislative intent was that the mere proof that a sum is specified as liquidated damages or penalty for a breach should be enough to prove that a contract for the transfer of immovable property could be adequately compensated by the specified damages or penalty Section 20 of the old Act will certainly become meaningless. It is true that Section 20 of the old Act does not mention the case of an express contract giving an option to a promiser to either carry out the contract to convey, or, in the alternative, to pay the sum specified, in which case the enforcement of the undertaking far g to make the payment would. be an enforcement of the contract itself and no occasion for rebutting the presumption in the explanation to Section 21 would arise. In such cases the contract itself is specifically enforced when payment is directed in lieu of the conveyance to be made.

It may be mentioned here that the Principles contained in Section 20 of the old Act are reenacted in Section 23 of the Act of 1963 in language which makes it dear that a case where an option is given by a contract to a party either to pay or to carry out the other terms of the contract falls outside the purview of Section 20 of the old Act, but, mere specification of a sum of money to be paid for a breach in order to compel the formance of the contract to transfer property will not do. Section 23 of the Act of 1963 may be advantageously cited here. It runs as follows :

> "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 adoption of paying money in lieu of specific performance. (2) When enforcing specific performance under thissection, the court shall not also decree payment of the sum so named in the, contract".

We think that Section 23 of the Act of 1963 contains a comprehensive statement of the principles on which, even before the Act of 1963, the presence of a term in a contract specifying a sum of money to be paid for a breach of the, contract has to be construed Where payment is an alternative to carrying out the other terms of the contract, it would exclude, by the terms of the contract itself, specific performance of the contract to convey a property. 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 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.
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> 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.

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".

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 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 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".

The equitable principles which regulated- the grant of specific performance by the separate Court of Equity which existed in England at one time have been given statutory form in India. It is, therefore, immaterial that the stipulated payment under the, terms of the contract under consideration before us could be viewed as one for payment of liquidated damages. The question would still remain whether the Courts are relieved by the agreement between the parties of the duty to determine, on the facts of a particular else, whether damages, specified or left unspecified, would really afford adequate compensation to the party which wants a conveyance of immovable property as agreed upon.

A reference to Section 22 of the _old Act, (the corresponding provision is Section 20 of the Act of (1963), would show that the jurisdiction of the Court to decree specific relief is discretionary and must be exercised on sound and reasonable grounds "guided by judicial principles and capable of correction by a Court of appeal". This jurisdiction cannot be curtailed or taken away by merely fixing a sum even as liquidated damages. We think that this is made perfectly clear by the provisions of Section 20 of the old Act (corresponding to Section 23 of the Act of (1963) so that the Court has to determine, on the facts, and circumstances of each case before it, whether specific performance of a contract to convey a property ought to be granted.

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.

The second assumption underlying the contentions on behalf of 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, over-looks 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 unmovable 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.

In the instant case, both sides have led evidence. But, there is no evidence as to the extent of loss of prospective gains to the plaintiff-Respondent, who carries on a Bakery business, from the depreciation of a site so valuable as one in front of the Secundrabad Junction Railway Station. In

fact, there is no standard for judging the loss from such a depreciation either to the Plaintiff-Respondent or to the partners of the Alpha Hotel who are the real contending parties. No attempt was even made to gauge the value of future prospects of such a site to businessmen in the position of Plaintiff Respondent and those Defendants- Appellants who are partners of the Alpha Hotel. It is clear that the property has got no such value for the first De- fendant. who is a businessman fully occupied with a number of businesses at Delhi where he had been residing for 19 years in 1963. it is evident that he could not conveniently look after the property situated in Secunderabad. The Defendants-Appellants had miserably failed to prove their cases. The attempt to prove either fraud or misrepresentation or " an unfair advantage" over the first Defendant, so as to bring his case within Section 22(1) of the old Act, was totally unsuccessful. The courts commented adversely on incorrect assertions made by the first Defendant who could not show anything beyond the penalty or damages clause in the contract for sale dated 9-10-1962. It is strange that the first Defendant, while willing to pay Rs. 20,000/ as damages to the Plaintiff-Respondent, will only get Rs. 10,000/more in price over Rs. 60,000/- if his contract of sale to the partners of the Alpha Hotel were to stand. It is, therefore, clear that the first Defendant must have some ulterior motive in being prepared to suffer an ostensible loss of Rs. 10,000/- even if his sale of 16-10-1962 for Rs. 70,000/- to the partners of the Alpha Hotel could be upheld. The plaintiff himself had stated that financial considerations do not really determine his stand. We are unable to accept this profession of unconcern for financial gain on the part of an astute businessman like the first Defendant. It is more likely that there, is some undisclosed understanding between him and the partners of Alpha Hotel who are also co- appellants with him before us.

The result in that we think that the presumption contained in the explanation to Section 12 of the old Act was not rebutted here. In such cases Equity helps honest plaintiffs against defendants who break solemnly given undertakings. The High Court had rightly decreed the suit for specific performance of the contract.

Lastly it was urged before us that the High Court should not have lightly interfered with the exercise of its discretion by the Trial Court to grant or not to grant specific performance on the facts and circumstance of this case. It is clear that the discretion, as laid down in Section 22 of the old Act (corresponding to Section 20 of the Act of 1963), is not to be exercised arbitrarily but on sound and reasonable grounds "guided by judicial principles- so that it is capable of correction by a court of appeal". It appeared, quite rightly, to the High Court That the Trial Court had gone completely astray in the exercise of its discretion on the footing that the Plaintiff Respondent enjoyed an "unfair advantage" over the first Defendants, whereas, on the facts and circumstances of the case, it was the first Defendant who was placed in a position to exploit the need of the plaintiff and the plaintiffs allegedly insecure position under the first agreement. It is clear that the Plaintiff-Respondent had dealt very fairly and squarely with the first Defendant-Appellant. The Trial Court's error in the exercise of its discretion on an utterly untenable, fanciful and unsound ground was rightly corrected by the High Court.

We, therefore, dismiss this appeal with costs.

K.B.M. Appeal dismissed.