



## IN THE SUPREME COURT OF INDIA

## EXTRAORDINARY APPELLATE JURISDICTION

Petition for Special Leave to Appeal (C) No.25246/2023

VIJAY PRABHU

Petitioner(s)

VERSUS

S.T. LAJAPATHIE &amp; ORS.

Respondent(s)

O R D E R

1. We have heard Mr. S. Nagamuthu, the learned Senior counsel appearing for the petitioner (original plaintiff) and Mr. Balaji Srinivasan, the learned counsel appearing for the respondents (original defendants) .

2. This petition arises from the judgment and order passed by the High Court of Judicature at Madras dated 24.03.2023 in Appeal Suit No. 211 of 2013 by which the High Court dismissed the appeal and thereby affirmed the judgment and decree passed by the District Judge of Nilgiris at Udhagamandalam dated 18.02.2010 in Original Suit No. 45 of 2008. It appears from the materials on record that the petitioner herein (original plaintiff) instituted Original Suit No. 45 of 2008 seeking specific performance of the agreement dated 07.11.2005 and for delivery of possession of the suit property. In the alternative, he prayed for Rs. 60,00,000/- with interest at 12 per cent per annum towards the damages from the date of filing of the suit.

3. The Trial Court rejected the prayer for specific performance and directed that the amount of Rs. 20,00,000/- paid by the plaintiff to the defendants towards the earnest money be refunded with

interest at 12 per cent per annum.

4. The Trial Court framed the following issues:

"1. Whether the plaintiff is entitled to the relief of specific performance of sale agreement dated 07.11.2005 with modifications as prayed by him?

2. Whether the plaintiff is entitled to possession of the suit property described in the plaint schedule excluding the portion in the possession of the tenants?

3. In the alternative, whether the plaintiff is entitled to refund of the advance amount of Rs.20,00,000/- and for damages to a tune of Rs.40,00,000/- from the defendants?

4. Whether the plaintiff is entitled to claim interest at the rate of 12% p.a. on the above amounts? (end of the 6th page in original)

5. Whether the plaintiff is entitled to charge over the suit property for the above amounts as claimed by him?

6. To what other reliefs the plaintiff is entitled?"

5. The Trial Court recorded a finding that the plaintiff was not ready and willing to perform his part of the contract. Besides, the plaintiff had failed to plead and prove that he has suffered damages.

6. The High Court while deciding the appeals framed the following points for its determination:

"(1) Whether the plaintiff was ready and willing to perform his part of the agreement of sale dated 07.11.2005?

(2) Whether the plaintiff can seek to invoke Sec.12 of the Specific Relief Act, 1963?

(3) Whether the plaintiff is entitled to the

discretionary and equitable relief of specific performance?

(4) Whether the plaintiff, in the event of not being entitled to the relief of specific performance, would be alternatively entitled to the relief of damages and refund of advance to the tune Rs.40,00,000/- and Rs.20,00,000/- respectively?"

7. The High Court in Para 35 while discussing Section 12 of the Specific Relief Act (for short, "the Act") has observed as under:-

"35. Thus, when the plaintiff has chosen to waive only one of the obligations that remained unfulfilled at the end of the defendants, it is not open to the plaintiff to seek shelter U/s.12 and claim specific performance of the part of the agreement of sale in his favour. Interestingly, it is also seen that apart from seeking relief of specific performance, the plaintiff has also made a claim for damages besides refund of advance. Thus, the plaintiff does not qualify to invoke clause (ii) of Sub-Section (3) to Sec.12, when admittedly, he has not relinquished "all claims" and when he approaches the Court seeking damages. This Court also holds that Sec.12(3) is only a discretionary relief, which can be granted to the plaintiff, depending on peculiar facts and circumstances of the case. In the opinion of this Court, Sec.12(3) cannot be invoked where the terms of the contract are not capable of being segregated. In the instant case, we do not find that the agreement of sale can be compartmentalised in order to grant specific performance of only a part of the agreement of sale. It is also seen that A.S.Nos.211 and 355 of 2013 mandate of Sec.12 is very clear in so far as payment of the whole of the consideration. Admittedly, in the instant case, the plaintiff has paid only a sum of Rs.20,00,000/- and a sum of Rs.64,00,000/- was still outstanding. Unless the plaintiff's pay or has paid the sum of Rs.64,00,000/- he was not even justified in invoking the part performance of the agreement of sale by resorting to Sec.12 of the Act."

8. The learned Senior counsel appearing for the petitioner (plaintiff) reiterated that his client is entitled to the benefit of the provisions of Section 12(3) of the Specific Relief Act (for short, "the Act") and the High Court has not appreciated this aspect of the matter in its true perspective.

9. Section 12 of the Act:

"12. Specific performance of part of contract.—(1) Except as otherwise hereinafter provided in this section, the court shall not direct the specific performance of a part of a contract.

(2) Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed by only a small proportion to the whole in value and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

(3) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either—

- (a) forms a considerable part of the whole, though admitting of compensation in money; or
- (b) does not admit of compensation in money;

he is not entitled to obtain a decree for specific performance; but the court may, at the suit of other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the other party—

(i) in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and in a case falling under clause (b), pays or has paid the consideration for the whole of the contract without any abatement; and

(ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

(4) When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part.

*Explanation.—For the purposes of this section, a party to a contract shall be deemed to be unable to perform*

*the whole of his part of it if a portion of its subject-matter existing at the date of the contract has ceased to exist at the time of its performance."*

10. A bare perusal of the aforesaid provision contained in Section 12 of the Act makes it clear that it is not open to the High Court to direct specific performance of a part of contract except otherwise provided in the section in absence of any of the exigencies available under the provisions of sub-sections (2), (3) and (4) of Section 12 so as to decree the suit.

11. The words 'unable to perform' suggest that the sub-section is applicable only when the party cannot for any reason perform the whole of what he has promised. The inability may arise by any cause whatsoever including any statutory limitations. The inability to perform may arise by—

- (i) deficiency in quantity of the subject-matter, or
- (ii) variance in quality, or
- (iii) defect in title; or
- (iv) some legal prohibition; or
- (v) other causes.

12. The expression 'considerable part' implies that the part which will be left unperformed is either large as regards quantity or as regards quality. In other words, it is material and not insignificant, so that a reasonable objection can be taken by the promisee to accept performance. The phrase 'does not admit of compensation' implies that there is no data for ascertaining a fair and reasonable amount as the money value of the difference between what can be performed and the express subject-matter of the contract. The amount need not be mathematically accurate. If a reasonable estimate of the amount as the money value can be made, it will not be a case where the compensation is unascertainable.

13. The power to grant partial relief, from the very language of

Section 12(3) of the Act is discretionary with the court to be exercised keeping in view the facts and circumstances of each case and the rights and interests of the parties involved. Section 12(3) of the Act can be invoked only where the terms of contract permit segregation of rights and interests of parties in the property.

14. In view of the specific finding recorded by the courts below that the plaintiff was not ready and willing to perform his part of the contract and the plaintiff being in default he could not be said to be entitled to invoke Section 12(3) of the Act also.

15. In the aforesaid context, we may refer to a decision of this Court in *Jaswinder Kaur (Now Deceased) through her Legal Representatives and Others v. Gurmeet Singh and Others* reported in (2017) 12 SCC 810, wherein this Court observed in paras 19, 20 and 21 respectively as under:

*"19. In Abdul Haq v. Mohd. Yehia Khan reported in AIR 1924 Pat 81, the Court observed that the Court will not as a general rule compel specific performance of a contract unless it can execute the whole contract. It is not a case where the entire contract is not capable of performance. Section 12 encompasses provisions in respect of a claim for specific performance of part of a contract. Sections 14 and 17 of the old Act have been amalgamated with modifications and the explanation based on Section 13 of the repealed Act together, the law is stated with clarity under Section 12 of the Act.*

20. Section 12(1) of the Act provides that specific performance can be granted on part of a contract only in the circumstances mentioned in the section. Section 12(2) of the Act deals with breach the contract if a party is unable to perform the whole of its part and such part bears a small proportion to the whole in value and admits compensation in money. The expression "unable to perform" in Section 12(2) of the Act for instance would mean that a part of the property destroyed after contract or act of God or an act by which it would cease to exist. In such a case party to a contract shall be deemed to be unable to

perform the whole or its part of the contract. Such a person would come within the words "party in default". The inability to perform may arise by deficiency in quantity of subject-matter or deficiencies or some legal prohibition or such other causes. None of such causes is present in the instant case.

21. Section 12 of the Act does not apply where the inability to perform specific performance on part of contract arises because of the plaintiff's own conduct as held in *Abdul Rahim v. Maidhar Gazi* reported in AIR 1928 Cal 584. In *Graham v. Krishna Chunder Dey* reported in AIR 1925 PC 45, it has been laid down that the Explanation in the section exhaust all the circumstances in which part-performance can be granted. Section 12(2) of the Act deals with the situation where a party is unable to perform and such part is only a small proportion in value and capable of compensation in form of money. It was not a case covered in Section 12(2) of the Act at all. Under Section 12(3) of the Act party in default is entitled to specific performance on payment of whole consideration or for the part left unperformed but here in the instant case the plaintiff being in default could not be said to be entitled to invoke Section 12(3) of the Act also."

16. There is one another issue, we must look into and clarify. In para 29, the High Court has observed as under:

"29. Learned Senior counsel for the plaintiff relied on Sec.12 of the Act and vehemently contended that the plaintiff would be entitled to a decree when the plaintiff was willing to relinquish his claims to the performance by the defendants, of the remaining part of the agreement of sale. This Court at the very outset notices that such a plea was never raised before the Trial Court and no grounds have also been raised in the memorandum of First Appeal in this regard. However, this Court is inclined to deal with the elaborate submissions made by the learned Senior counsel for the plaintiff touching Sec.12 of the Act."

(Emphasis supplied)

17. Thus, the High Court expressed doubt whether the plea as regards Section 12 of the Act if not raised before the Trial Court

could have been raised for the first time before the High Court in first appeal.

18. In the aforesaid context, we may only say that the relinquishment of claim to further performance of the remaining part of the contract and all rights to compensation can be made at any stage of litigation. This was held in *Kalyanpur Lime Works v. State of Bihar* reported in AIR 1954 SC 165. This Court referred with approval to a Division Bench decision of the Lahore High Court in *Waryam Singh v. Gopi Chand*, (AIR 1930 Lah 34).

19. In the case of *Kalyanpur Lime Works* (supra) the plaintiff had sued the State of Bihar for specific performance of a contract for lease. It was found that an earlier lease in favour of another company was in force and could not be forfeited and, therefore, the Government was not in a position to grant lease of the property to the Lime company. The Lime Company made an application at the appellate stage claiming benefit of the provisions of old Section 15 and prayed for grant of lease for a period of five years which remained after the expiry of the period of lease of the other company. This Court observed:

*"Relinquishment of the claim to further performance can be made at any stage of the litigation."*

Thus, *Waryam Singh's* case was referred to with approval. However, the benefit of old Section 15 was not allowed on other considerations.

20. In *Waryam Singh's* case the defendant Nos. 1 and 2 respectively had agreed to sell 200 Kanals of specified land, but later on it was found that they were owners of only two-third of that land. In the Trial Court the plaintiff insisted on specific performance of the whole contract and prayed that the defendants be asked to make good the deficiency from the other land belonging to them. At the

time of the arguments the plaintiff had moved an application claiming benefit of the old Section 15 in case it was held that the defendants were incompetent to sell the whole of the land. The Division Bench held:

*"It is open to the plaintiff to relinquish his claim to any part of the property in suit on the conditions specified in Section 15 at any time before the suit is finally decided by the Court of appeal."*

21. Thus, the position of law is that relinquishment could be made at any stage of the litigation including the appellate stage. The claim of the plaintiff appellant for grant of benefit under Section 12(3) of the Act was, therefore, rightly not rejected by the High Court on the simple ground that it was not made at the trial stage and had been made for the first time at the appellate stage. In our view the claim can also not be rejected on the short ground that it was not incorporated in the plaint or was not get forth in writing before the Trial Court. [See: *Ram Niwas v. Smt. Omkari and another* : AIR 1983 All 310]

22. We are of the view that no error not to speak of any error of law could be said to have been committed by the High Court in passing the impugned order.

23. In such circumstances, referred to above, the Special Leave Petition fails and is hereby dismissed.

24. The amount of Rs.20,00,000/- which came to be deposited by the defendants in the Trial Court in the form of refund of the earnest money to the original plaintiff must have been invested by the Court concerned with any bank by way of fixed deposit receipt, the said amount shall be refunded to the petitioner - herein (original plaintiff) within a period of four weeks from today with the accumulated interest as awarded by the Court below.

25. Pending applications, if any, also stand disposed of.

.....J.  
(J.B. PARDIWALA)

.....J.  
(R. MAHADEVAN)

New Delhi.  
8th January, 2025.

