

(1962) 12 PAT CK 0008
In the Patna High Court
Case No : AFOD No. 309 of 1960

Dalmia Jain and Company Ltd.

APPELLANT

Vs

Kalyanpur Lime Works Ltd. and Another

RESPONDENT

Date of Decision : 10-12-1962

Acts Referred:

Contract Act, 1872 — Section 73
Specific Relief Act, 1877 — Section 19, 27
Trusts Act, 1882 — Section 91

Citation : AIR 1963 Patna 298

Hon'ble Judges : Ramratna Singh, J;Kanhaiya Singh, J

Bench : Division Bench

Advocate : C.T. Daphtary, R.P. Katriar, Kailash Pandey, Kedarnath Thakur and K.K. Sinha, for the Appellant; Mahabir Prasad, General, A.C. Sinha and Devendra Prasad, L.N. Sinha, Government Advocate, L.M. Sharma and M.M. Gajadhar, for the Respondent

Final Decision : Dismissed

Judgement

Ramratna Singh, J.—This appeal by one of the defendants [hereinafter referred to as the Dalmias) is directed against a decree of the Additional Subordinate Judge, Sasaram, in Title suit No. 87 of 1949, determining the amount pf compensation payable to the plaintiff in substitution for the specific performance of a contract to grant a lease for the purpose of quarrying limestone. The plaintiff, Kalyanpur Lime Works Ltd. (hereinafter referred to as the Kalyanpur Lime Company) has preferred a cross-objection claiming a higher amount as compensation. The only other party to the appeal is the other defendant, namely, the State of Bihar, and it has supported the plaintiff-respondent.

2. In order to appreciate the order of the lower Court, it is necessary to recapitulate tha past history of the litigation. The State of Bihar is the owner of the Murli Hills, situate in the Sasaram subdivision of the district of Shahabad. The upper portion of the hill is called the Upper Murli Hill and the lower portion is called the tower Murli Hill. On the 1st April, 1928, the then Local Government

gave to Kuchwar Lime and Stone Company Ltd. (hereinafter referred to as the Kuchwar Company) a lease of the entire Murli Hills under two deeds for a period of twenty years for the purpose of quarrying limestone. On the 25th January, 1933, Kuchwar Company went into voluntary liquidation, and on the 30th September, 1933 this Company, through their Managing Agents and Liquidators, purported to assign the leasehold interest to one Mr. Bose.

On the 9th October, 1933, Mr. Bose entered into possession of the leasehold property, but was subsequently stopped by Government from working the quarries for breach of a term of the contract. The Government forfeited the lease on the 27th March, 1934 and re-entered into possession. In March-April, 1934, the Government agreed to grant a lease for twenty years of the Murli Hills to the present plaintiff-respondent, that is, the Kalyanpur Lime Company, for the purpose of quarrying limestone and they obtained possession on the 15th April, 1934, though the lease was to take effect from the 1st April, 1934. Hence, on the 24th September, 1934, Kuchwar Company filed Title Suit No. 39 of 1934 against the Government for declaration that the leases in their favour had not been validly forfeited. They also prayed for damages and injunction restraining the Government from granting any lease to Kalyanpur Lime Company. On the 7th March 1935, this title suit was dismissed by the Subordinate Judge; but, on appeal by the Kuchwar company, the suit was decreed by the High Court on the 7th February, 1936. In the meantime, the High Court had passed an order of injunction on the 7th August, 1935 prohibiting the Government from executing any lease in favour of the Kalyanpur Lime Company, who had to vacate the quarries in April, 1936.

3. On the 31st March, 1948, the leases in favour of Kuchwar Company expired, and the Government entered into possession. In spite of repeated requests of the Kalyanpur Lime Company to execute the document of lease in their favour, in pursuance of the agreement that took place in March-April, 1934, the Government granted lease for one year in favour of the Dalmias, who are the appellants in the present appeal; and, thereafter, this lease was renewed from year to year. On the 11th August, 1949, Kuchwar Company filed another title suit, which was numbered as Title Suit No. 51 of 1949, against the Government of Bihar and the Dalmias for declaration of their surface right to the lower Murli Hill. On the 21st September, 1949, an application for injunction by Kuchwar Company was dismissed by the Subordinate Judge, but, on appeal, the High Court passed an order of injunction on the 5th December, 1949 in respect of the lower Murli Hill in favour of the Kuchwar Company. On the 17th November, 1950, Mr. P. N. Gour, Advocate, was appointed Receiver in Title Suit No. 51 of 1949 instituted by Kuchwar Company; and the Receiver started working the quarries on the 21st November, 1950. But the suit was dismissed on the 22nd April, 1951.

4. In the meantime, on the 21st November, 1949, the Kalyanpur Lime Company instituted Title Suit No. 87 of 1949 (out of which the present appeal arises) against the Government and the Dalmias for specific performance of the contract

(that had taken place in March-April, 1934) to execute the lease in their favour. On the 7th February, 1951, the title suit was decreed by the Subordinate Judge for specific performance of the unexpired period and for damages for the past period. On the 5th March, 1951, the Dalmias preferred an appeal against this decree to the High Court, and on the 27th March, the State of Bihar also filed another appeal. During the pendency of these two first appeals, this Court ordered the continuance of the Receiver, Mr. P. N. Gour. The High Court allowed the appeals and dismissed the title suit, No. 87 Of 1949, in March, 1951. See *Dalmia Jain and Co. Ltd. Vs. Kalyanpore Lime Works Ltd. and Others*, On appeal by the Kalyanpur Lime Company, the Supreme Court decreed the suit on the 14th December, 1953, See *Kalyanpur Lime Workers Ltd. Vs. State of Bihar and Another*, with a direction that the plaintiff, that is, the Kalyanpur Lime Company, shall be allowed a decree for compensation from the 1st April, 1948 to the 31st March, 1954, the amount of compensation to be ascertained by the trial Court. In the meantime, the Receiver was discharged on the 19th May, 1952, and he gave up possession on the 3rd July, 1952.

5. On the 4th February, 1954 the Kalyanpur Lime Company filed an application before the Subordinate Judge for determining the amount of compensation and claimed Rs. 1,16,06,160/- only as compensation, Inclusive of the amount deposited by the Receiver. On the 19th June, 1954, the State of Bihar filed a rejoinder to this application; and on the 20th August, 1954, the Dalmias also filed a rejoinder. After hearing the parties, the then Subordinate Judge, Mr. S. N. Basu, passed orders on the 17th August, 1955, giving; certain directions for determination of the amount of compensation by a pleader commissioner. Being dissatisfied with the directions, both the Kalyanpur Lime Company and the Dalmias came up to the High Court. On the 10th July, 1958, the High Court declined to interfere with the order of the Subordinate Judge on the ground that no appeal lay against it and the Subordinate Judge had not erred materially in the exercise of his jurisdiction. On the 8th May, 1958, the Kalyanpur Lime Company and the State filed, a compromise petition before the High Court and the Court directed that the compensation had to be worked out between them on the basis of the terms of the compromise, but these terms would not affect the rights of the Dalmias. Thereafter, a pleader-commissioner was appointed and, after taking evidence, he submitted a report on the 7th March, 1959. The next Subordinate Judge, Mr. Jha, finally heard the matter and on the 15th July, 1960 he passed a decree for Rs. 10,73,558.2SN.P. besides costs, against the Dalmias. Hence, the present appeal and the cross-objection.

6. It was contended on behalf of the Dalmias that they were not liable for compensation at all, as the contract was between the Kalyanpur Lime Company and the State of Bihar and the State would alone be liable to pay damages for breach of the contract. It is admitted that the Dalmias were transferees with notice of the contract with Kalyanpur Lime Company and, except during the period when the Receiver was in charge, the Dalmias appropriated the usufruct of the quarries.

It was conceded that, if the suit were for compensation for breach of the contract, strictly so called, u/s 73 of the Contract Act, the State alone would be Liable. But, in fact, the suit was for specific performance of contract; and relief was sought for against both the State and the Dalmias u/s 27 of the Specific Relief Act. It is obvious that the State was impleaded under Clause (a) of Section 27 and the Dalmias were impleaded under Clause (b) thereof. The trial Court granted a decree for specific performance and further directed that the plaintiff would get compensation from the two defendants for the period commencing from the 1st April, 1948 till they got possession of the leasehold property, and that the respective liabilities of the two defendants and the amount of compensation would be ascertained in a subsequent proceeding. But this direction has to be read along with the finding of the learned Subordinate Judge on issue No. 10, namely, that the plaintiffs were entitled to compensation from the State for the period the State was in possession, that is, from the 1st April, 1948 to the 30th September, 1949, and from the Dalmias for the subsequent period, that is, from the 1st October, 1949 to the 31st March, 1954, during which they were in possession.

While dealing with point No. 8, the High Court, in their judgment, referred to the direction of the Subordinate Judge regarding compensation from each of the two defendants and approved his finding on Issue No. 10 that only the Dalmias would be liable for compensation for the period during which they were in possession. On behalf of the Dalmias, learned Solicitor-General said that the finding of the High Court on point No. 8 was superfluous; but it was one of the points urged before the Court and, as the first appellate Court, it was desirable for the Court to record its findings on all the points. It is then remarkable that the Supreme Court held that Section 15 of the Specific Relief Act applied to this case, by which their Lordships meant that the plaintiffs were entitled to a decree for specific performance in part as also a decree for compensation; but their lordships did not think it to be a fit case in which they should grant a decree for specific performance, inasmuch as only a few months were left out of the period of twenty years, and, therefore, granted the plaintiff a decree for compensation from the 1st April, 1948 to the 31st March, 1954, the amount of compensation to be ascertained by the trial Court.

Hence, the learned Government Advocate, appearing for the State, rightly submitted that the judgment of the Supreme Court amounted to restoration of the judgment of the trial Court, subject to the modification that, in lieu of the decree for specific performance in respect of the remaining period, the plaintiff were allowed compensation. Learned Solicitor-General, however, challenged this interpretation of the judgment of the Supreme Court and submitted that the Court varied the judgment of the Subordinate Judge by granting a decree for merely compensation instead of specific performance plus compensation. But I am unable to agree. It will be recalled that the Supreme Court had to pass such a decree, as only a few months were left for the term of the lease to expire -- there being an interval of about three years between the two judgments. A

perusal of the judgment of the Supreme Court shows that the finding of the High Court on point No. 8 or that of the Subordinate Judge on Issue No. 10 was not at all challenged by learned Counsel before the Supreme Court. While summarising the decision of the trial Court, the Supreme Court clearly said that the suit was decreed for specific performance and for compensation against defendants 1 and 2 for the period commencing from the 1st April, 1948 till the Kalyanpur Lime Company would get possession of the leasehold property.

It is true that in the plaint the plaintiff sought for a decree for specific performance against defendant No. 1 only, but a decree for compensation was also prayed for. Of course, the Dalmias asserted in the written statement that the plaintiff were not entitled to claim any equity against the joint tort-feasor, the State of Bihar or against the Dalmias, who were bona fide transferees for value; but this fact does not matter. Issue No. 10 was framed in respect of compensation and the trial Court found that both the defendants were liable for compensation; and the Supreme Court affirmed, by implication, the finding that the State would be liable for compensation from the 1st April, 1948 until the date when the Dalmias got possession of the leasehold property, and thereafter the Dalmias would be liable for compensation. Hence, the liability of the Dalmias for compensation is concluded by the judgment of the Supreme Court.

7. Learned Solicitor-General also contended that, inasmuch as the Supreme Court granted the decree substantially in terms of the second paragraph of Section 19 of the Specific Relief Act, the decree for compensation could be passed against that party only who was responsible for breach of the contract, and, therefore, the Supreme Court, in effect, passed the decree for compensation against the State only. Section 19 of the Specific Relief Act, which provides only for the reliefs to be granted, reads thus.--

"Any person suing for the specific performance of a contract, may also ask for compensation for its breach, either in addition to, or "in substitution for", such performance.

"If in any such suit the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly,

If in any such suit the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

Compensation awarded under this Section may be assessed in such manner as the Court may direct.

Explanation-- The circumstance that the contract has become incapable "of specific performance does not preclude the Court from exercising the jurisdiction

conferred by this section." (The underlining (here in single quotation marks -- Ed.) has been done by me.)

It is obvious that the Supreme Court passed the decree for compensation under the second paragraph in substitution for the specific performance of contract. Such a decree for compensation can be passed against those parties against whom the decree for specific performance of contract could be passed. Section 27 of this Act speaks of the parties against whom a decree for specific performance can be passed; and Clauses (a) and (b) thereof lay down that specific performance may be enforced against either party to the contract as also against any other person claiming under a party by a title arising subsequent to the contract, except a bona fide transferee for value without notice of the original contract. This exception does not apply to the present case, as the Dalmias, who were the subsequent transferees from the State, had admittedly notice of the contract between the State and the Kalyanpur Lime Company.

Then it is well settled that a decree for specific performance of contract may be passed against the contracting party as well as his transferee who is in possession of the property forming the subject-matter of the contract, because a decree against the contracting party alone would be infructuous in absence of a decree against the subsequent transferee who is in possession; and this proposition of law was not disputed at the bar. Hence, the decree, if any, for specific performance of the contract would be against both the State and the Dalmias in the present case. But, inasmuch as the decree for compensation was "in substitution for" the decree for specific performance of the contract, both these defendants were liable for the decree for compensation,

8. Learned Solicitor-General submitted that the contract by itself does not create a right in rem, but only creates a right in personam against the vendor and that obligation is made enforceable against the subsequent transferee as an obligation in personam to a limited extent, namely, to the extent of compelling him to give effect to the previous contract by way of specific performance (see Section 91 of the Indian Trusts Act, 1882), though he is not liable in damages as the original transferor would be; see *Narshingappa Parasappa Chavan Vs. Tippanna Bhimjeppa Santanavar*, and *Thiruvengkata Chariar v. Seshadri Iyengar* AIR 1917 Mad 190. But it follows from this proposition of law that the transferee, who is liable to give effect to the previous contract by way of specific performance, is also liable to pay compensation in substitution for the specific performance. Hence, the Dalmias could not escape the liability for compensation for the period during which they were in possession of the leasehold property. The Dalmias were the trustees of the leasehold property for the benefit of the Kalyanpur Lime Company and they worked the leasehold property and appropriated the limestone of the same as trustees. If they had not worked the quarries, the Kalyanpur Lime Company would have by getting a decree for specific performance of the contract, got the usufruct of the leasehold property which was taken away by the Dalmias. That is why the Supreme Court granted a

decree for compensation in substitution for the specific performance. In the circumstances, it must be held that the Dalmias are liable for the compensation in respect of the period during which they were in possession of the leasehold property.

9. The next contention of the learned Solicitor-General was that Subordinate Judge Mr. Jha, who ascertained the amount of compensation finally, adopted a wrong measure for the ascertainment thereof. He submitted that the compensation which could be allowed to the Kalyanpur Lime Company would be equivalent to the loss to them on account of their being kept out of possession of the leasehold property, and not the gains made by the Dalmias by working the quarries. He further submitted that the claim for damages against the Dalmias could not be the claim against a person who had illegally dispossessed the Kalyanpur Lime Company and was in wrongful possession of the leasehold property, because the possession of the Dalmias was legal subject to the right of the Kalyanpur Lime Company for specific performance of the contract. It was conceded at the bar that the possession of the Dalmias was lawful until the decree by the Court against them, because they were in possession of the leasehold property under a lease from the State from year to year. On the other hand, learned Advocate General, appearing for the Kalyanpur Lime Company, submitted that the Kalyanpur Lime Company are entitled to compensation equivalent to the maximum quantity of limestone that could have been extracted by a prudent and diligent lessee.

10. In this connection, there was a good deal of argument regarding the question whether the compensation would be payable u/s 73 of the Contract Act or Section 19 of the Specific Relief Act. On behalf of the respondent, reliance was placed on a bench decision of the Bombay High Court in *Mrs. Flora Sassoon Vs. Ardeshir H. Mama*, in which it was held that the measure of compensation in such cases is entirely in the discretion of the Court and the Court, in awarding compensation, is not bound to follow the ordinary rules with regard to damages for breach of contract. The action was, however, dismissed, as the plaintiff had failed to prove that there was a concluded contract. The Privy Council dismissed an appeal from this decision AIR 1928 208 (Privy Council), without expressing any opinion on the above observation of the High Court. Learned Solicitor-General, however, disputed the correctness of this observation and relied on the history of the law in England on which the Indian law is substantially based. This history is contained in the aforesaid Privy Council case.

According to the Common Law of England, the only legal right which arose upon the non-performance of a contract in favour of the party injured by its breach was a claim for damages. There was no remedy for specific performance of the contract, in course of time, the Chancellor's Court began to entertain a suit in equity for specific performance. Thus, there were two remedies, one in equity for specific performance and the other for damages at law for the breach of the contract; and the plaintiffs' attitude towards the contract and towards the

defendant differed fundamentally according to his choice". If the plaintiff sued at law for damages, he thereby elected to treat the contract at an end, and, no further performance by him was either contemplated or had to be tendered. In a suit for specific performance, on the other hand, the plaintiff treated and was required by the Court to treat the contract as still subsisting.

But experience showed that cases from time to time occurred in which, although the contract was one of which specific performance might be decreed, damages were the more adequate remedy, and, therefore the plaintiff had to go to the Common Law Courts for the purpose of obtaining damages. In order to overcome this difficulty, Lord Cairn's Act was passed in 1858, and Section 2 thereof provided as follows:

"In all cases in which the Court of chancery has jurisdiction to entertain an application for the specific performance of any covenant, contract or agreement, it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such. . . .specific performance, and such damages may be assessed as the Court shall direct."

After this Act, the equity Courts had the power to grant specific performance in whole or specific performance In part and damages in part of only damages in lieu of specific performance. Section 19 of the Indian Specific Relief Act follows S: 2 of Lord Cairn's Act. After some time, the Judicature Act of England enabled every Division of the High Court to give both the legal and equitable remedies. Accordingly, an order dismissing an action for specific performance deprived the plaintiff's right to sue again for damages for the breach; and this is provided in Section 29 of the Specific Relief Act. Thus, though the procedure changed, the old distinction in case of breach of contract between the equitable and legal form of remedy was still maintained. In paragraph 1306 of Fry's book on Specific Performance (5th edition), the effect in England of Lord Cairn's Act and Judicature Act is summarised thus:

"1306. The Court therefore can now give damages in any of the following cases, viz:--

(i) In substitution for specific performance where there is a case for specific performance, under Lord Cairn's Act

(ii) Where there is no case for specific performance, under the Judicature Acts.

(iiij In addition to specific performance in whole or In part, -- under Lord Cairn's Act, and probably also under the Judicature Acts.

Accordingly, a plaintiff may now come to the Court and say "Give me specific performance, and with it give me damages, or in substitution for it give me damages, or if I am not entitled to specific performance give me damages as at Common Law by reason of the breach of the agreement."

Learned Solicitor-General contended that, as the remedy for damages was derived from the Common Law of England and Section 73 of the Contract Act provides for compensation for breach of a contract, the measure of damages embodied in that Section should be followed even in a suit based on Section 19 read with Section 27 of the Specific Relief Act. He referred in this connection to paragraph 1302 of Fry's book, which reads as follows :

"1302. It is apprehended that where damages are awarded under this Act (that is, Lord Cairn's Act) in substitution for specific performance, the measure of damages would be the same as in an action at Common Law for breach of the contract. So, where the damages at Common Law would be nominal, they would also, It is submitted, be nominal under the statute".

But in paragraph 1307 of the same book, the learned author has said :

"1307. The Court's jurisdiction in damages is an apt and flexible instrument for doing exact justice under the diverse- and complicated circumstances of many of the cases upon which the Court has from time to time to adjudicate"

Learned Advocate-General relied on an English decision in *Nelson v. Bridges* (1839) 48 ER 1172. In that case, defendant Bridges entered into a verbal contract by which he agreed to grant to the plaintiff Nelson the right of raising the stone under a plot of 1026 square yards of his land at a fixed rent per yard; the plaintiff entered and part performed his agreement, but Bridges disregarding this arrangement, in the following year agreed to let the same land to the defendant Woodward for similar purposes, and he brought an action of ejectment against the plaintiff to turn him out of possession. It was declared that the plaintiff was entitled to specific performance of the agreement; but pending the proceedings, the very subject of the agreement, to which the plaintiff had by the decree been declared entitled, had been abstracted and the plaintiff was thereby for ever deprived of the full benefit of his contract. In a supplemental bill brought before the Court, the Master of the Rolls directed ascertainment of compensation to be paid to the plaintiff in substitution for the specific performance of the contract. His Lordship observed:

"In this, and perhaps in all other cases, the profit made by the defendant is not the measure of the damages done to the plaintiff, for we find that the quarry was not worked in a way to make the most of it; Mr. Bridges, thinking the validity of the licence which he had given to Wordsworth (Woodward) to be doubtful, discouraged his working it pending the proceedings, so that Wordsworth took only that stone which it was convenient for him to take, and he did not therefore work it in the profitable way in which the plaintiff would have worked it."

This observation supports the view in paragraph 1307 of Fry's book that the amount of compensation depends on the facts and circumstances of each case.

11. Further, it will be noticed that Section 19 of the Indian Specific Relief Act does not refer to Section 73 of the Contract Act, and it lays down that

"Compensation awarded under this Section may be assessed In such manner as the Court may direct". This shows that the amount of compensation to be allowed u/s 19 depends on the discretion of the Court. In other words, the Court may grant such compensation as it may think fit and proper in order to do justice between the parties after taking into consideration the facts and circumstances of the case. In view of this specific provision In Section 19, It cannot be said that Section 73 of the Contract Act, which is based on the Common Law of England, would necessarily apply to a claim for compensation in substitution for the specific performance of the contract. This question is, however, academic and, in fact, the Court has ordinarily no alternative but to act on the principles contained in Section 73 of the Contract Act in determining the amount of compensation.

That is why it has been held by a bench of the Nagpur High Court in AIR 1955 38 (Nagpur) , that the word "compensation" used in Section 19 of the Specific Relief Act should be understood In the sense of damages contemplated in Section 73 of the Contract Act. In coming to this conclusion, their Lordships relied on a Full Bench decision of the Madras High Court in Adikesavan Naidu v. Gurunatha Chetti AIR 1918 Mad 1315 and they referred to a Bench decision of the Bombay High Court in Ramchandra Lalbhai Vs. Chinubhai Lalbhai, . A single Judge of the Saurashtra High Court also took the same view in Ayub v. Devji Bhanji AIR 1953 Sau 91, and relied on the observation of Chagla, J. (as he then was) In the aforesaid Bench decision of the Bombay High Court, which reads thus:

"In deciding whether the plaintiff is entitled to compensation, the principle that the Court must adopt is the same that underlies Section 73, Contract Act, that is to say, the plaintiff is bound to prove some loss or damage."

12. Let us now consider what would be the just amount of compensation in the present case. According to Section 73 of the Contract Act, a plaintiff is entitled to compensation for any loss or damage caused to him which naturally arose in the usual course of things from the breach of the contract, or which the parties knew, at the time they made the contract, to be likely to result from the breach. But at the same time it is provided that compensation is not to be given for any remote or indirect loss or damage sustained by reason of the breach, and that in estimating the loss or damage, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

The last condition cannot, however, apply to the present case, as the plaintiff had sued for specific performance of contract and there could be no question of their adopting any means of remedying the inconvenience caused by the non-performance of the contract. In short, the plaintiff would be entitled, u/s 73 of the Contract Act, to the amount of compensation for any loss or damage which arose in the natural and probable course of things, or which the parties, in fact, contemplated at the time of making the contract. Hence, the measure of damages in the present case would be the loss to the plaintiff on account of the defendants preventing them from getting possession of the leasehold property.

This loss may be either equal to the gain of the Dalmias or more than that gain, or even less than that gain, because the loss would depend on the facts and circumstances of the case. Keeping this principle in view, we have to ascertain the amount of compensation to which the plaintiff company were entitled. (His Lordship then discussed the evidence for ascertaining the amount of compensation. As it contains no law point, this portion of the judgment (paras 13-24) is omitted here -- Ed.)

Kanhaiya Singh, J.

25. I agree.