

**HARDSHIP AS A GROUND FOR REFUSING TO GRANT SPECIFIC
PERFORMANCE OF CONTRACT: IN LIGHT OF ADMINISTRATOR OF WAQFS
AND ANOTHER VS. MST. SAHERA BEGUM CHOWDHURANI AND OTHERS**

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GENERAL OBSERVATION

Specific performance, granted with a view to enforcing reasonable and well-grounded right of a person, is a discretionary remedy in nature. Being an equitable relief, the Court may refuse to grant it, where it will be unconscionable to allow it. Securing ends of justice, being the governing principle, facts and circumstances determining the parameter of justice in each case, deserve to be considered as pivotal issue, before granting this relief. Existing pattern of S.22 of the Specific Relief Act, 1877[Act no. I of 1877], absence of specific definition of hardship and unfair advantage, Clauses and Illustrations to this section being illustrative and not exhaustive, no hard and fast rule can be laid down in respect of refusing to grant this relief.

THE CASE, AT A GLANCE

To sell two residential houses constituting the only tangible assets of the Wakf with a view to replenishing the fund of a cloth business under the Wakf, the Mutwallis entered into an agreement of sale with the plaintiff, under a sanction granted by the Wakf Commissioner. Subsequently, on account of withdrawal of sanction by the Wakf Commissioner, the Mutwallis refused to execute the agreement of sale and the learned lower Court held that, on account of such withdrawal, specific performance of the contract should not be refused and the appeal was filed before the High Court Division from original Decree No.201 of 1962 which was heard on 10th, 13th,14th,29th,30th,31st January,1975 and D.C. Bhattacharya, J. and A.S. Faizul Islam Chowdhury, J. delivered this judgment on April 29, 1975.

STATUTORY PROVISIONS ANALYSED IN THIS CASE

S. 22 Of the Specific Relief Act, 1877[Act No. I of 1877] which lays down that, the jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal.

The following are cases in which the Court may properly exercise a discretion not to decree specific performance:

Clause I- Where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part.

Clause II- Where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas it's non performance would involve no such hardship on the plaintiff.

S. 53 (1) of the Bengal Wakf Act, 1934 which provides for incompetence of a Mutwalli to make an absolute transfer except with the previous sanction of the Wakf Commissioner.

S.54 of the Bengal Wakf Act, 1934 which provides for grant of sanction by the Wakf Commissioner on such terms and conditions as he may in his discretion impose.

ARGUMENTS SUBMITTED BY BOTH PARTIES AND ISSUES FRAMED THEREUPON

The appellant and the respondent submitted arguments in favour of and against the following issues respectively. Such as-

1. On account of withdrawal of sanction by the Wakf Commissioner, whether the Mutwallis can transfer the Wakf property validly or not?
2. Whether the Wakf Commissioner can withdraw the sanction previously granted by him?
3. Whether the question of hardship can be judged with reference to the change of circumstances or not?
4. Whether the Court can exercise discretion to refuse to grant specific performance beyond set-criteria or not?
5. Whether a Court can pass an infructuous decree or not?

PRINCIPLES IN RESPECT OF REFUSING SPECIFIC PERFORMANCE AS REITERATED IN THE JUDGMENT

In respect of refusing to grant specific performance on account of hardship, following principles and guidelines have been laid down in this judgment.

Specific performance and right of third parties: The fact of this case asserts that, the Wakf business having ceased to exist, the consideration money cannot now be invested in the said business. Therefore, the effect of the enforcement of the contract will be the extinction of the only tangible property of the Wakf resulting hardship to a number of beneficiaries. Considering this reality, specific performance can't be granted affecting the right of third parties. (Para-32).

Specific performance and frustration of the purpose of according sanction: Sanction by the Wakf Commissioner was accorded for replenishing the fund of cloth business, but, by

the efflux of time, this purpose was frustrated and this reality supports the refusal to grant specific performance. (Para 5 and 11).

Specific performance and the question of multiplicity of proceeding: Referring to the judgment of the case, Nowab Meah Chowdhury Vs. Syed Ezazuddin Ahmed and others¹ the Court observed, on account of withdrawal of the sanction by the Wakf Commissioner, a decree granting specific performance will involve the Mutwallis in further litigation and this reality allows the Court to refuse to grant specific performance. (Para- 21 and 34).

Specific performance and the question of legality of the act to be done by the defendant: The withdrawal of the sanction by the Wakf Commissioner has removed the protective cover from the Mutwallis act of transfer of the disputed properties. Therefore, a decree of specific performance allowing the execution of the impugned kabala by the Mutwallis would be doing an act which is not lawful for them to do².

Future eventuality envisaged as a ground for repudiation of contract: From the last para of the deed of agreement, it is clear that, both the parties visualized that there might be a bar imposed by the appropriate authority in future against the transaction and that such a bar would be a valid ground for repudiation of the contract. Hence, sanction revoked by the Wakf Commissioner may very well be construed as a ground for repudiation of the contract³.

Specific performance and the question of breach of duty: The promissors whose agreement for sale is the basis of the present suit were not the owners of the property in their personal capacity. They were mere Mutwallis, whose primary duty was to preserve the Wakf and to effect its improvement. On account of this reality, an order to execute the impugned kabala, would compel the Mutwallis to commit breach of duty. Therefore, specific performance is to be refused⁴.

Specific performance and the question of breach of Trust: In para 23 of the judgment, as regards the position of the Muwallis, the Court expressly observed that, their position was analogous to that of trustees although they might not be trustees in the strict sense of law. The very natures of the position of Mutwallis, rights of the beneficiaries of the Wakf require them to be vigilant to protect the Wakf property and to preserve the interest of the beneficiaries. A decree granting specific performance would compel the Mutwallis to commit an act in breach of this fiduciary relationship. On account of this reality, specific performance is to be refused.

Nature of the suit property and the question of specific performance: The property in dispute being Wakf property, can be transferred only subject to the conditions imposed in the sanction by the Wakf Commissioner. The conditions imposed, being directory and not

¹ 13 DLR 554

² Para- 27, 32, 34.

³ Para-36.

⁴ Para-23.

having been complied with, sanction was revoked. Hence, specific performance allowing transfer of such property can not be granted. (Para-38).

Question of infructuous decree: On account of withdrawal of sanction by the Wakf Commissioner, the Mutwalli was not able to transfer the property validly and by means of such transfer no valid title will be conferred upon the purchaser. Therefore, specific performance cannot be enforced since it will be regarded as passing of infructuous decree. (Para-9)

Authority of the Court to exercise discretion in respect of refusing specific performance beyond set-criteria: S. 22 of the Specific Relief Act, 1877 [Act No. I of 1877], its Clauses and Illustrations being illustrative and not exhaustive, the Court is authorized to exercise the discretion conferred by this section beyond set-criteria. Besides, the absence of specific definition of hardship requires the Court to consider the demands of facts and circumstances of each case. Every case is to be judged by the lights of its own facts, and a Court of law is not to be hamstrung by some rigid formulation in the exercise of its discretion under a positive provision of the law which does not prescribe any such restrictive condition. (Para 16).

Time at which hardship must arise: Referring to paragraphs 429, 430 at pages 301 and 302 of Vol- 36 of Halsbury's Laws of England⁵ the Court's observation was as follows-

General Rule: As a general rule, hardship to operate as a ground of defence, must be such as existed at the time of the contract and not such as has arisen from subsequent events. (Para-14 and 15).

Referring to chapter VI of Edward Fry's Treatise on the specific performance of contracts⁶ the Court observed that, the question of hardship of a contract is generally to be judged of at the time at which it is entered into. (Para-15).

In the cases *Immadi Mahalakshamma vs. Immadi Venkatachalamaya and another*⁷; *Ram Sundar Saha and others Vs. Kali Narain Sen Choudhury and others*⁸ it has been laid down that, hardship should be co-lateral to the contract and be arising out of the terms of the contract.

Hardship arising out of subsequent events as defence: The Court referred to the Commentary of Pollock and D.F. Mulla on the Contract and Specific Relief Acts⁹ where these two learned authors commented that, our S.22 with its subdivisions and illustrations is really more like an elementary lecture than legislation. It must not be supposed to be exhaustive. (Para-18).

⁵ 3rd edition

⁶ 1861, p. 181-191

⁷ A.I.R. 1954 Madras 870

⁸ A.I.R.1927 Cal. 889

⁹ 8th edition, 1975

In respect of time at which hardship must arise, the learned Court observed that, there may be situations where specific performance can be refused on the ground of hardship arising out of subsequent events. Every case is to be judged by the light of its own facts, and a Court of law is not to be hamstrung by some rigid formulation in the exercise of its discretion under a positive provision of the law which does not prescribe any such restrictive condition. (Para 16).

Manner of wording Clause II Of S.22: The manner in which Clause II of S.22 has been worded does not in any way confine the exercise of discretion to the consideration of events existing at the date of the contract.

Hardship arising out of the performance of the contract: The hardship contemplated in this Clause is the one which would arise out of the performance of the contract- a future event, and which was not foreseen by the defendant- also indicative of a future eventuality and in describing the nature of hardship in this Clause no limiting words of the kind 'not arising out of the events subsequent to the contract' have been used.

Difference as regards time between unfair advantage contemplated in Clause I and hardship contemplated in Clause II of S. 22: The unfair advantage contemplated in Clause I is such as given rise to by the circumstances under which the contract is made but the frame of Clause II does not lead to such conclusion as to hardship.

Maintenance of balance between Clause II and Clause III of S.22: To maintain a balance between Clause II and Clause III Of S.22 the Court held that, since the plaintiff had parted with the sum of TK 10,000 as back as in 1959 and having regard to the principles of S.38 of the S.R. Act, 1877 the plaintiff is entitled to compensation in this regard.

DEMAND OF FACTS AND THE DECISION OF THIS CASE: AN EVALUATION

Granting specific performance, being an equitable relief, depends upon the discretion of the Court. Discretion is to be exercised, having due regard to the demands of facts and circumstances of each case. The rule that, hardship is to be judged with reference to the facts existing at the time of contract is required to be subject to exception. Practical reality asserts that, the question of hardship deserves, in certain cases, to be judged with reference to subsequent events. The very nature of disputed property, peculiarity of facts and circumstances of this case set an exception to the general rule of granting specific performance. Besides, granting specific performance in this suit would compel the Mutwallis to commit a breach of duty. In view of Clause III of S.22 of the S.R. Act, 1877 specific performance is to be granted, when the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance. Since, the plaintiff had parted with the sum of TK 10,000 as back as in 1959, the Court awarded compensation to him having due regard to Clause III Of S.22 and to S. 38 of the S.R. Act, 1877. The judgment delivered, in this case, by the learned Court, deserves support

on account of considering the above mentioned realities, upon which the learned Court refused to grant specific performance.

LATEST DEVELOPMENT OF RULES AS REGARDS HARDSHIP: SCOPE OF DISSENSION

In order to judge the question of hardship, mere consideration of the right of the defendant is not sufficient, rather the rights of both parties deserve to be considered equally. In this regard, maintenance of balance among the rights of both parties should be the guiding principle. Hardship, arising out of subsequent events, may be set up by way of defence, if the change of conditions leading to hardship to the defendant, has resulted from the act of the plaintiff or if the plaintiff's act operated as something in the nature of trap. But, the facts of this case establish that, nothing was done by the plaintiff to be construed as leading to hardship to the defendant. Infact, it was the defendant's negligence, or default on account of which, the cloth business under the Wakf, ceased to exist. Hence, in view of the rights of the plaintiff, the fact of refusing to grant specific performance on account of hardship arising from subsequent events representing default or negligence solely on the part of the defendant lacks of cogent rationality.

Concluding remarks: Granting specific performance, being a discretionary remedy, depends upon the facts and circumstances of each case. Demands of facts and circumstances of each case determine the parameter of justice in each case in an independent and distinct way. Rationality, upheld by the learned Court, in this judgment, obviously, deserves support. On the other hand, in view of the right of the plaintiff, the scope of dissension cannot be negated. In truth, refusal to grant specific performance on account of hardship arising from subsequent events, being dependent on facts, facts and circumstances of each case deserve to be scrutinized minutely.