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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgement reserved on **11.09.2020**
Judgement pronounced on **11.12.2020**

\+ **CS (OS) 1995/2008**

SHRI VIJAY ISRANI .....Plaintiff

Through Mr. Kirti Uppal, Senior Advocate with Mr. Pragyan Sharma, Advocate.

versus

SHRI SALIM LALVANI .....Defendant

Through Ms. Rashi Bansal and Mr. Sameer Singh, Advs. along with Mr. Salim Lalvani i.e. defendant-in-person.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.:

Preface: -

1. The plaintiff is one, Mr. Vijay Israni [hereafter referred to as "Mr. Israni"] who has filed a suit for specific performance of an agreement to sell dated 19.04.2008 which was countersigned by the defendant on 29.04.2008 [in short "ATS"]. The defendant is one, Mr. Salim Lalvani, a resident of United Kingdom [hereafter referred to as "Mr. Lalvani"].

1.1. Mr. Israni and Mr. Lalvani will, collectively, be referred to as parties unless the context requires otherwise.

Background facts: -

2. The ATS concerns sale of 50% undivided share in a built-up property located at A-1/149, Safdarjung Enclave, New Delhi 110029 [hereafter referred to as "suit property"] by Mr. Lalvani in favour of Mr. Israni.

2.1. The total consideration which Mr. Israni was required to pay Mr. Lalvani under the ATS was Rs. 4 crores. The ATS records that out of the total consideration of Rs. 4 crores, Rs. 5,00,000 was paid by Mr. Israni to Mr. Lalvani at the time of its execution.

2.2. Furthermore, in terms of Clause 2.1 of the ATS, within 60 days of its execution, two simultaneous steps had to be taken by the parties. Thus, while Mr. Lalvani was required to execute a General Power of Attorney [GPA] and special power of attorney [SPA] in favour of Mr. Israni, the latter i.e. Mr. Israni was required to remit Rs. 3,18,91,000/- as “clear funds” to the specified bank account of Mr. Lalvani.

2.3. As per Clause 2.2 of the ATS, Mr. Lalvani was required to have the GPA and the SPA attested from the Indian High Commission at London.

2.4. The last tranche or the balance amount i.e. Rs. 76,09,000/- was required to be paid by Mr. Israni to Mr. Lalvani within 90 days of execution of the ATS. Simultaneously, upon Mr. Lalvani receiving the amount, he was obliged to execute all relevant deeds and documents which would then result in the consummation of the sale transaction in consonance with the provision made in Clause 2.3 of the ATS.

2.5. The record shows that Mr. Lalvani served a notice of default dated 02.07.2008 on Mr. Israni alleging that he had defaulted in paying the second tranche i.e. Rs. 3,18,91,000/-. In this communication, Mr. Lalvani referred to the fact that he had executed the GPA and the SPA. Consequently, Mr. Lalvani

called upon Mr. Israni to make good the payment of Rs. 3,18,91,000/- by 17.07.2008.

2.6. Five days before the expiry of the 15-day window provided by Mr. Lalvani, Mr. Israni, *vide* communication dated 12.07.2008, sent his response wherein he *inter alia* averred that he had not committed a breach of any of the terms of the ATS and that Mr. Lalvani had failed to furnish proof of execution and attestation of the GPA and SPA.

2.7. Mr. Lalvani responded by issuing a rejoinder dated 21.07.2008 *via* his advocates. The rejoinder, in effect, terminated the ATS. Mr. Israni, in turn, replied to this termination notice *vide* communication dated 24.07.2008. *Via* this communication, Mr. Israni called upon Mr. Lalvani to perform his obligation under the ATS.

3. It is in this background that Mr. Israni approached this Court with the instant action for specific performance.

4. Summons in the suit were issued on 22.09.2008, whereupon, an opportunity was given to Mr. Lalvani to file his written statement.

5. Upon completion of pleadings and admission and denial of documents, the following issues in the suit were framed at the hearing held on 13.08.2010.

> "*On the pleadings of the parties following issues are framed for consideration:-*
>
> *1. Whether the suit is barred under Section 14 (C) of the Specific Relief Act? OPD.*
>
> *2. Whether the Plaintiff was ready and willing to perform his part of the contract? If so, its effect. OPP.*
>
> *3. Whether the Plaintiff is entitled to the relief of specific performance as prayed? OPP.*
>
> *4. Relief.*"

6. Thereafter, evidence in the matter was recorded; an exercise which was concluded on 08.02.2017. The matter was put in the category of 'finals' on 02.03.2017. The matter was heard by a coordinate bench and released from part-heard on 23.01.2020.

7. It is in this backdrop that the matter was called out for hearing on 09.07.2020. On that date, Mr. Israni's son one, Mr. Sunny Israni joined the proceedings. After hearing him and Ms. Rashi Bansal, counsel for Mr. Lalvani, the following order was passed.

> "*1. The captioned suit has been called out today.*
>
> *2. Mr. Sunny Israni, the son of the plaintiff, has joined the proceedings.*
>
> *2.1 Mr. Israni says that he has instructions to convey to the Court that the plaintiff is interested in purchasing the subject property, albeit, at the current market value.*
>
> *2.2 Mr. Israni further submits that, according to the plaintiff, the current market value of the subject property is Rs. 14.50 crores.*
>
> *3. To demonstrate his bona fides, Mr. Israni says the plaintiff will deposit the said amount i.e. Rs. 14.50 crores with the Registry of this Court by way of a pay order/demand draft drawn in favour of the Registrar General of this Court.*
>
> *3.1 Mr. Israni further states that while the money lies with the Registry of this Court, the Court could appoint a valuer to ascertain the current market value of the subject property. CS (OS)1995/2008 1/2*
>
> *4. Ms. Rashi Bansal, on instructions of Mr. Salim Lalvani i.e. the defendant, says that the market value of the subject property is Rs.20 crores.*
>
> *4.1 Ms. Bansal further says that to test the bona fides of the plaintiff, the plaintiff be asked to deposit the aforementioned amount even while the current market value of the subject property is evaluated by a Court appointed valuer.*
>
> *5. I may also indicate that Mr. Israni has conveyed to me that in case the plaintiff is unable to deposit the aforementioned amount within the timeframe indicated by the Court, he will not press the suit any further.*

6. Accordingly, the plaintiff will deposit Rs. 14.5 crores by way of a pay order/demand draft drawn in favour of the Registrar General of this Court within three weeks from today.

6.1 Once the pay order/demand draft is deposited, the same will be encashed and the money will be invested in an interest-bearing security maintained with a nationalized bank.

6.2 A valuer will be appointed by the Court to ascertain the current value of the subject property, once, the plaintiff deposits the said amount, albeit, in the manner indicated hereinabove.

6.3 The plaintiff will file an affidavit, in terms of what has been indicated hereinabove by me, within one week from today.

7. Renotify the matter on 04.08.2020."

7.1. The matter was taken up for hearing on 30.07.2020 on account of an application [i.e. I.A. No. 6053/2020] moved on behalf of Mr. Israni by Mr. Pragyan Sharma, Advocate. Although there was an affidavit of Mr. Israni dated 20.07.2020 on record, on that date, Mr. Pragyan Sharma sought time to file an affidavit in terms of order dated 09.07.2020 by 31.07.2020. The matter was directed to be listed on 04.08.2020. In the interregnum, Mr. Israni filed an affidavit dated 31.07.2020.

7.2. On 04.08.2020, initially, there was no appearance on behalf of Mr. Israni.

7.3. Ms. Rashi Bansal, who appeared on behalf of Mr. Lalvani submitted that the affidavit was not in terms of the order dated 09.07.2020 inasmuch as Mr. Israni had indicated in the affidavit that if he was unable to deposit Rs. 14.50 crores for the entire property, then, he would restrict his claim to the refund of Rs. 5,00,000/- along with interest or compensation as may be ordered by the Court.

7.4. Ms. Bansal said that on the other hand, on 09.07.2020, Mr. Israni had indicated that if he was unable to deposit Rs. 14.50 crores for securing interest in the entire property, he would not press the instant suit any further. In other words, according to Ms. Bansal, the assertion made by Mr. Israni in his affidavit

dated 31.07.2020 that he would restrict his claim to refund of Rs. 5,00,000 along with interest or compensation as may be ordered by this Court was contrary to the position adopted by him on 09.07.2020. After the matter had concluded for the day, Mr. Sunny Israni i.e. the plaintiff's son joined the hearing and, accordingly, he was apprised of what had transpired in the hearing and that the next date in the matter was fixed as 10.08.2020.

7.5. It is in these circumstances that on 10.08.2020, the Court recorded the following.

> *"1. Concededly, Rs. 14.50 crores which the plaintiff had offered to deposit in terms of his affidavit dated 31.07.2020, has not been deposited with this Court.*
> *2. Therefore, if nothing else, the suit vis-a-vis relief for specific performance, even according to the plaintiff, cannot be pressed further as per the stand taken by him in the aforementioned affidavit.*
> *3. Mr. Kirti Uppal, learned senior counsel, along with Mr. Pragyan Sharma, who appear on behalf of the plaintiff, say that the money could not be deposited as the plaintiff was bereaved.*
> *4. Ms. Bansal, on the other hand, says that the timeline fixed for the purpose of deposit of Rs. 14.50 crores expired on 07.08.2020 and that even according to the plaintiff he was bereaved on 08.08.2020.*
> *5. The record shows that on 09.07.2020, the plaintiff via his son, had offered to deposit Rs. 14.50 crores with the Registry of this Court in order to demonstrate his readiness and willingness to purchase the subject property at the current market value.*
> *5.1 The matter was fixed for further proceedings on 04.08.2020.*
> *5.2 In the interregnum, the plaintiff approached the Court on 24.07.2020 when Mr. Sharma sought time to obtain instructions directly from the plaintiff as to whether the plaintiff would be willing to deposit Rs. 14.50 crores, as indicated to this Court by his son on 09.07.2020. At request of Mr. Sharma, the matter was posted for further proceedings on 30.07.2020.*
> *5.3 On 30.07.2020, Mr. Sharma sought a day's accommodation to file an affidavit in terms of the order dated 09.07.2020. It is in this backdrop that plaintiff filed an affidavit dated 31.07.2020.*
> *5.4 In the affidavit dated 31.07.2020, the plaintiff made a deviation from the position that was taken on 09.07.2020 inasmuch as it was indicated in the aforementioned affidavit that if there was a failure to*

deposit Rs. 14.50 crores, the plaintiff would restrict his relief to seek refund from the defendant.

5.5 The precise assertion made in the affidavit dated 31.07.2020, in this behalf, reads as follows:

> *"7 The Plaintiff further undertakes that in case the Plaintiff is not able to deposit the sum of Rs. 14,50,00,000/- (Rupees Fourteen Crore and Fifty Lakh Only), as stated in this affidavit or as may be directed by this Hon'ble Court the Plaintiff shall not proceed with the specific performance of the agreement dated 19.4.2008 (concluded on 29.4.2008) and restrict his claim only to refund of the amount of Rs. 5,00,000/- (Five Lakh Only) paid by him with such interest as this Hon'ble Court may deem just and proper."*

5.6 Consequently, the matter was taken up by me on 04.08.2020 which was the date fixed in the ordinary course. Since there was, initially, no appearance on behalf of the plaintiff on the said date when the matter was called out, it was posted for today i.e. 10.08.2020.

5.7 However, just after the matter was concluded, plaintiffs son joined the proceedings which is when he was apprised of the order passed on the said date i.e. 04.08.2020.

6. Given these circumstances, I am not inclined to grant further time to the plaintiff. I am persuaded to proceed in this line manner not only given the history of the proceedings, as noticed hereinabove, but also given the fact that nothing has been brought on record, except for submissions made across bar, to show the fact that the plaintiff, although ready and willing, was, in any way, impeded in depositing the money qua which he otherwise had ample time.

7. Insofar as the relief sought in the instant suit is concerned; it is confined to specific performance.

7.1 Therefore, in terms of the affidavit dated 31.07.2020 filed by the plaintiff, the relief of specific performance is now not available to him.

8. Accordingly, the reliefs sought in the prayer clause 19 (i) to (iii) of the plaint are rejected. Resultantly, LA. 6053/2020 shall stand closed.

9. Mr. Uppal and Mr. Sharma say that they would want to address arguments on as to whether the plaintiff should be accorded the relief of refund.

10. List the matter only for this purpose on 14.08.2020."

7.6. To be noted, in paragraph 5.5 of the order dated 10.08.2020, there is a reference to paragraph 7 of the affidavit dated 31.07.2020 filed by Mr. Israni. As a matter of fact, paragraph 7 appears in the affidavit dated 20.07.2020 filed by Mr. Israni, which is, substantially, same as paragraph 5 of the affidavit dated

31.07.2020, save and except, that Mr. Israni has slipped in the word 'compensation' apart from the expression refund. Paragraph 5.5 of the order dated 10.08.2020 was meant to advert to paragraph 5 of the order dated 31.07.2020.

Submissions of counsels for the parties: -

8. Given the aforesaid circumstances, counsels were heard, thereafter, not only on the aspect of refund but also on compensation. Counsel for Mr. Israni argued that since Mr. Israni had given up his claim for specific performance, he was entitled to not only refund of Rs. 5 lakhs but also compensation in lieu of specific performance.

9. An attempt was also made by the counsel for Mr. Israni to reopen the claim for specific performance by seeking to demonstrate that it was Mr. Lalvani who had breached his obligation to execute the GPA and SPA and have the same apostilled from the Indian High Commission at London before he could lay claim to the second tranche i.e. Rs. 3,18,91,000/-.

10. In support of the plea that Mr. Israni was always ready and willing to perform his part of the obligation, his advocates sought to rely upon the fact that a demand draft [bearing number 132049] and a bankers' cheque dated 15.07.2008 and 16.07.2008 [bearing number 160428] respectively, cumulatively amounting to Rs. 3,18,91,000/- drawn on ICICI Bank Limited favouring Mr. Lalvani was prepared by Mr. Israni.

11. On the other hand, Ms. Bansal, on behalf of Mr. Lalvani, had claimed that not only were the GPA and SPA executed and apostilled but also lay emphasis on the fact that as per Clause 2.1 of the ATS, Mr. Israni was required to remit the second tranche to the specified bank account of Mr. Lalvani. As noticed above, these arguments and counter-arguments and the evidence led by each party lost significance since Mr. Israni himself had indicated that he was

interested in purchasing the entire property and not just Mr. Lalvani's 50% share in the said property [i.e. the suit property] and that to demonstrate his ability he would deposit Rs. 14.50 crores with the Registry of this Court. Since Mr. Israni himself took the position that if he failed to deposit Rs. 14.50 crores, he would not press the suit, on 10.08.2020, the reliefs claimed in prayer clause 19 (i) to (iii) of the plaint were rejected.

Analysis and Reasons: -

12. Consequently, at this stage, all that I am required to consider is whether or not Mr. Israni is entitled to refund of Rs. 5 lakhs paid as advance [along with interest] or compensation.

13. Let me first take the submission advanced on behalf of Mr. Israni concerning the refund of Rs. 5,00,000/-. The claim for refund is pivoted, in my view, on two clauses of ATS i.e. Clause 1.2 and Clause 5.3[1].

13.1. While Clause 1.2 is suggestive of the fact that Rs. 5,00,000/- was paid by Mr. Israni to Mr. Lalvani, as an advance to be adjusted against full consideration payable *qua* the suit property, Clause 5.3 states, in no uncertain terms, that in case Mr. Israni failed to rectify the default pointed out to him within 15 days of a written notice being issued, in that behalf, the ATS will stand terminated and Mr. Lalvani would not be liable to refund or return the amounts received up until the date of the notice of termination.

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[1] "*1.2 The Second Party has paid an amount of Rs. 5,00,000/- (Rupees Five Lakhs) as advance payment, out of the total Consideration Amount, vide demand draft number 079546 dated 11.04.2008 drawn in favour of the First Party and the First Party acknowledges the receipt of the same.*

xxx xxx xxx

5.3 On occurring of the event of default the First Party shall give a written notice of 15 days to the Second Party and if the Second Party fails to rectify the default within the said period this Agreement shall stand terminated on the day following the 15th day and the First Party shall not be liable to refund/return the amounts hereby received till the date of notice of termination."

13.2. There is no dispute that the only amount received by Mr. Lalvani up until the date of issuance of the termination notice i.e. communication dated 21.07.2008 was Rs. 5,00,000/-. The evidence on record shows that the amount was received in pound sterling by Mr. Lalvani in two instalments i.e. GBP 4,500 and GBP 500.

13.3. A plain reading of Clause 1.2 of the ATS would show that Rs. 5,00,000/- was paid as an advance, to be adjusted against the full consideration of Rs. 4 crores agreed to be paid *qua* the suit property. The following portion of Clause 1.2 of the ATS makes this amply evident.

> "*1.2 The Second Party has paid an amount of* ***Rs. 5,00,000/- (Rupees Five Lakhs) as advance payment, out of the total Consideration Amount****, vide demand draft number, 079546 dated 11.04.2008 drawn in favour of the First Party and the First Party acknowledges the receipt of the same.*"
>
> [Emphasis is mine]

13.4. What is, however, peculiar about this particular ATS is the provision made in Clause 5.3, which empowers the vendor [i.e. Mr. Lalvani] to retain amounts received by him up until the date of the notice of termination if the default pointed out therein was not cured by the 16th day of issuance of such notice.

13.5. Ordinarily, such stipulation is found juxtaposed in such like agreements with amounts paid as 'earnest money'. Earnest money is construed as part of the purchase price when the transaction is consummated and is forfeited by the vendor when the transaction falls through on account of the fault of the vendee.[2]

13.6. It is, thus, in the nature of a contract of security, whose primary purpose is to guarantee performance and, in that sense, is, strictly speaking, different

[2] See: ***Charanjeet Singh vs. Har Swarup***, AIR 1926 PC 1

from the real agreement to sell. Therefore, if the real agreement to sell is rescinded, the contract of security still survives which is evidenced, either by an express covenant of forfeiture or is implied by law. [See: ***State Bank of India vs. Union of India and Ors.***, 2013 SCC OnLine Del 1456; and ***Piramal Healthcare Limited vs. Union of India***, 2013 SCC OnLine Del 2357]

13.7. However, as indicated above, Rs. 5,00,000/- was paid as advance to be adjusted against total consideration. Therefore, *sans* the forfeiture clause i.e. Clause 5.3 of the ATS, the said amount would have to be repaid by Mr. Lalvani to Mr. Israni notwithstanding the fact, Mr. Israni had committed the breach of the obligation placed upon him under the ATS. In this case, apart from anything else, Mr. Israni has failed to demonstrate that he was ready and willing to pay the second tranche to Mr. Lalvani in terms of Clause 2.1 of the ATS. This clause required Mr. Israni to remit within 60 days of the execution of the ATS, Rs. 3,18,91,000/- as "clear funds" to the bank account specified by Mr. Lalvani.

13.8. Mr. Israni's attempt to show that he was ready with the demand drafts amounting to Rs. 3,18,91,000/- on 15.07.2008 and 16.07.2008 before the 15-day notice period expired [i.e. before 17.07.2008] would be of no avail given the obligation placed on Mr. Israni to remit "clear funds" to the bank account provided by Mr. Lalvani. The evidence on record points in the direction that Mr. Israni was aware as to the account where monies had to be remitted since he had done so while remitting amounts in pound sterling equivalent to Rs. 5,00,000/-, as noticed above, when advance payment was made.

13.9. Mr. Israni's attempt to muddy the waters by taking recourse to a ruse that Mr. Lalvani had not furnished him proof of execution and attestation of GPA and SPA must fail as Mr. Lalvani, in his notice of default dated 02.07.2008, had, in no uncertain terms, indicated that he had executed the GPA and the

SPA. This is evident from the following portion of the notice of default dated 02.07.2008.

> "*You are fully aware that Our Client has fulfilled all obligations set out in Clause 2 of the Agreement including but not limited to the execution of a general power of attorney and a special power of attorney in terms of Clause 2 of the Agreement and has been awaiting payment from you.*"

14. Execution, in the legal sense, to my mind, would include attestation. Thus, Mr. Israni, only to buy time, it appears, shot off the reply dated 12.07.2008 seeking proof of attestation and execution of GPA and SPA.

14.1. It was only after Mr. Lalvani had issued the notice of termination dated 24.07.2008, that Mr. Israni, *via* a return communication dated 24.07.2008, informed Mr. Lalvani that he had prepared two demand drafts dated 15.07.2008 and 16.07.2008 amounting to Rs. 3,18,91,000/-. Thus, clearly, to my mind, Mr. Israni was in breach.

14.2. The possibility that Mr. Israni could establish to the contrary [i.e. his readiness and willingness to consummate the transaction] was completely foreclosed by virtue of the stand taken by him in his affidavit dated 31.07.2020 wherein he stated that if he was not able to deposit Rs. 14,50,00,000/- on or before 07.08.2020, he would not proceed with the specific performance of the ATS.

14.3. That being said, the logical sequitur in law is that even if the transaction falls through on account of the fault of the vendee [in this case, Mr. Israni] monies paid as an advance towards sale consideration would have to be refunded to him. In the instant case, as noticed above, the vendor has a right to retain the money received as an advance.

14.4. Therefore, what requires to be seen is whether the amount sought to be retained would be construed in law as reasonable compensation for the breach

committed by the vendee i.e. Mr. Israni or would it, in the facts and circumstances of the case, be penal?

14.5. It is not as if the vendor can retain the entire amount unless he is in a position to show that he suffered an injury on account of the breach which, in turn, resulted in vendor i.e. Mr. Lalvani suffering damages. A somewhat similar situation arose in ***Fateh Chand vs. Balkishan Dass***, (1964) 1 SCR 515 where, apart from the earnest money of Rs. 1,000/-, a further sum of Rs. 24,000/- paid towards the total consideration, agreed to between the parties, was sought to be retained on account of the subsistence of the forfeiture clause[3]. In this behalf, the following observations, being apposite, are extracted hereafter.

> "*7. The Attorney-General appearing on behalf of the defendant has not challenged the plaintiff's right to forfeit Rs 1,000 which were expressly named and paid as earnest money. He has, however, contended that the covenant which gave to the plaintiff the right to forfeit Rs 24,000 out of the amount paid by the defendant was a stipulation in the nature of penalty, and the plaintiff can retain that amount or part thereof only if he establishes that in consequence of the breach by the defendant, he suffered loss, and in the view of the Court the amount or part thereof is reasonable compensation for that loss. We agree with the Attorney-General that the amount of Rs 24,000 was not of the nature of earnest money. The agreement expressly provided for payment of Rs 1,000 as earnest money, and that amount was paid by the defendant. The amount of Rs 24,000 was to be paid when vacant possession of the land and*

[3] "*...The conditions of the agreement were:*

"(1) I, the executant, shall deliver the actual possession i.e. complete vacant possession of kothi (bungalow) to the vendee on the 30th March, 1949, and the vendee shall have to give another cheque for Rs 25,000 to me: out of the sale price.

(2) Then the vendee shall have to get the sale (deed) registered by the 1st of June, 1949. If, on account of any reason, the vendee fails to get the said sale-deed registered by the 1st June, 1949, then this sum of Rs 25,000 (twenty five thousand) mentioned above shall be deemed to be forfeited and the agreement cancelled. Moreover, the vendee shall have to deliver back the complete vacant possession of the kothi (bungalow) to me, the executant. If due to certain reason, any delay takes place on my part in the registration of the sale-deed, by the 1st June, 1949, then I, the executant, shall be liable to pay a further sum of Rs 25,000 as damages, apart from the aforesaid sum of Rs 25,000 to the vendee, and the bargain shall be deemed to be cancelled.""

building was delivered, and it was expressly referred to as "out of the sale price". If this amount was also to be regarded as earnest money, there was no reason why the parties would not have so named it in the agreement of sale. We are unable to agree with the High Court that this amount was paid as security for due performance of the contract. No such case appears to have been made out in the plaint and the finding of the High Court on that point is based on no evidence. It cannot be assumed that because there is a stipulation for forfeiture the amount paid must bear the character of a deposit for due performance of the contract.

8. The claim made by the plaintiff to forfeit the amount of Rs 24,000 may be adjusted in the light of Section 74 of the Indian Contract Act, which in its material part provides:

"When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or as the case may be, the penalty stipulated for."

The section is clearly an attempt to eliminate the sometime elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty."

14.6. Therefore, ordinarily, Mr. Lalvani would be required in law to repay Rs. 5,00,000/- to Mr. Israni till such time he was able to demonstrate that he had suffered an injury on account of Mr. Lalvani's breach and in turn suffered damages. Damages that Mr. Lalvani can seek in law can only be compensatory in law i.e. reasonable damages even though Clause 5.3 of the ATS allowed him

to retain all that he had received towards sale consideration up until the date of issuance of the notice of termination.

14.7. The difficulty, which one is presented with, in this case, is that the plaintiff sought only one relief, which was the relief of specific performance of the ATS. Mr. Lalvani did not seek, at any stage, an amendment to the plaint (a right which he could have, perhaps, exercised) and, therefore, the issue concerning the refund of Rs. 5,00,000/- was not brought to fore.

14.8. Therefore, Mr. Lalvani, at no point, would have had the opportunity to lead evidence to show that he had suffered injury and damages to the extent of Rs. 5,00,000/- or more. One may have, perhaps, ignored all this and still ordered refund but for the fact, Mr. Israni had taken the position on 09.07.2020 that he would simply not press the suit if he failed to deposit Rs. 14,50,00,000 with the Registry of this Court. As noticed hereinabove, the assertion for seeking refund or compensation was slipped in by Mr. Israni *via* affidavit dated 31.07.2020.

14.9. Therefore, looking at the entirety of the facts, which includes the period over which Mr. Lalvani had to hold on to the suit property, the amount he would have spent over this period towards litigation expenses and the attempt of Mr. Israni to slip in a last-minute plea of refund without giving him an opportunity of demonstrating that he had suffered injury and damages, I am not inclined to grant this relief to Mr. Israni. Therefore, the plea made, in this behalf, is rejected.

15. This brings me to the last submission which is that whether or not Mr. Israni should be allowed to press his plea for award of compensation/damages. Section 21 of the Specific Relief Act, 1963 [unamended][4] allows the plaintiff to

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[4] "***21. Power to award compensation in certain cases***
(1) In a suit for a specific performance of a contract, the plaintiff may also claim compensation for its breach, either in addition to, or in substitution of, such performance.

claim compensation both in addition to or in substitution of specific performance of a contract.

15.1. However, subsection (5) of Section 21 makes it clear that no compensation will be awarded under this Section unless the plaintiff has claimed such compensation in his plaint. The proviso to subsection (5) vests a right in the plaintiff to seek an amendment of the plaint if the relief for compensation is not claimed in the first instance with a corresponding power vested in the Court to allow such amendment at any stage of the proceeding on such terms as those it may consider just.

15.2. Furthermore, the explanation states that because the contract has become incapable of specific performance, it does not preclude the Court from exercising the jurisdiction conferred by this Section. In the facts of the instant case, as noticed above, Mr. Israni, at no stage, sought amendment of the plaint; he had only claimed the relief of specific performance. That right was available to Mr. Israni, which, for whatever reason, he chose not to exercise. Mr. Israni

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(2) 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 such compensation accordingly.
(3) 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.
(4) In determining the amount of any compensation awarded under this section, the court shall be guided by the principles specified in section 73 of the Indian Contract Act, 1872.
(5) No compensation shall be awarded under this section unless the plaintiff has claimed such compensation in his plaint:
***PROVIDED** that where the plaintiff has not claimed any such compensation in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just, for including a claim for such compensation.*
***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.*"

abandoned his relief for specific performance once he was unable to deposit Rs. 14,50,00,000/- with the Registry of this Court.

15.3. Clearly, if the amendment for compensation/damages was sought, the parameters would have to be stricter. However, at this stage, it is only in the realm of speculation as to how one would have approached the matter, if such a plea was raised. [See: ***Jagdish Singh vs. Natthu Singh***[5], (1992) 1 SCC 647]

15.4. Therefore, in my opinion, the submission advanced on behalf of Mr. Israni that he should be paid compensation/damages in the facts of the instant case is misconceived and is, consequently, rejected. In any event, any relief for compensation/damages would require evidence for quantification, if nothing else. There is, concededly, no such evidence on the record as Mr. Israni prosecuted the case on one single plank which was to claim the relief for specific performance.

Conclusion: -

16. Given the foregoing, I find no merit in the case.

17. The suit is, accordingly, dismissed. Costs will follow the result in the suit.

RAJIV SHAKDHER, J

DECEMBER 11, 2020 *Click here to check corrigendum, if any*

[5] "**16.** So far as the proviso to sub-section (5) is concerned, two positions must be kept clearly distinguished. If the amendment relates to the relief of compensation in lieu of or in addition to specific performance where the plaintiff has not abandoned his relief of specific performance the Court will allow the amendment at any stage of the proceeding. That is a claim for compensation falling under Section 21 of the Specific Relief Act, 1963 and the amendment is one under the proviso to sub-section (5). But different and less liberal standards apply if what is sought by the amendment is the conversion of a suit for specific performance into one for damages for breach of contract in which case Section 73 of the Contract Act is invoked. This amendment is under the discipline of Rule 17 Order 6, CPC. The fact that sub-section (4), in turn, invokes Section 73 of the Indian Contract Act for the principles of quantification and assessment of compensation does not obliterate this distinction."