IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

O R D E R

SURENDRA SINGH VS LRs OF BHANWAR LAL & ORS
D.B. CIVIL SPECIAL APPEAL NO. 31/1993

Date of order : 30th May, 2005

PRESENT

HON'BLE MR. JUSTICE B. PRASAD
HON'BLE MR. JUSTICE S.P. PATHAK

Mr. B.L. Purohit for the appellant.
Mr. R.K. Thanvi for the respondent.

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REPORTABLE

BY THE COURT :- (PER HON'BLE B. PRASAD,J.)

This Special appeal has been filed against the decision of the learned Single Judge in Civil First Appeal No60/73 decided on 5th March, 1992. The proceedings were initiated on filing of Civil Original Suit No. 57/1965 in the court of Additional District Judge, Udaipur. The suit was for specific performance of contract entered in between the parties. After trial, the trial court was of the opinion that plaintiff has not been able to make out a case for ordering specific performance of contract. The trial court found that the document Ex.2 dated 07.12.62 was a false and forged document. It was concluded that Rs. 15,000/- received by the defendant was an

independent loan transaction. It was repaid with interest to the plaintiff on 21.05.65 by holding the receipt Ex.A/2 to be genuine. The trial court also concluded that there was no transferable right vested with the defendant on the day when agreement was entered in between the parties. Since, there was no transferable right vested in the defendant, the suit for specific performance of the contract would not lie and in view of the aforesaid finding of the trial court, the trial court dismissed the suit for specific performance. The trial court also found that Rs. 15000/- were repaid therefore, suit for recovery of money on the basis of promissory note was also dismissed. However, the suit was decreed for Rs.1000/-, the amount which was paid by the plaintiff to the defendant at the time of execution of the agreement Ex.1. Apart from the relief of re-payment of Rs.1000/-, rest of the suit was dismissed.

Aggrieved by the decision of the trial court, a first appeal was filed in this Court. The learned Single Judge while deciding the appeal noticed that most important document which was important to adjudicate the controversy was Ex.2, the agreement dated 07.12.62 and receipt Ex.A/2 dated 21.05.65 but they were not available on record. The learned Single Judge also noticed that opinion of the handwriting expert Shri C.S. Servate alongwith relevant photographs on which he has based his opinion was not available on record. The learned Single Judge observed that on the basis of the pleadings of the parties, it is apparent that there was no dispute on the

fact that on 30.11.62, an agreement was executed in between the parties. By this agreement, the defendant agreed to sell Plot No. 8 situated at Surajpole, Delhi Gate Scheme, Udaipur. The sale consideration was fixed as Rs. 34000/- out of which Rs. 1000/- was paid by the plaintiff to the defendant on that day. It has been noticed that on 07.12.62, a sum of Rs. 15,000/- was paid by the plaintiff to the defendant and a promisory note Ex.3 was executed by the defendant. In this connection, notices were sent and their receipts Ex. 5 & Ex.6 are also not disputed by the defendant. The defendant in reply to the notice Ex.6, admitted the document dated 08.05.63. The defendant has also not disputed that Ex.A/7 the allotment letter for Plot No.8 was issued in favour of the defendant. This document was shown to the plaintiff when document E.1 was executed in between the parties. Above facts have been noticed by the learned Single Judge in his judgment, as admitted facts.

Apart from the above mentioned facts, it has been noticed by the learned Single Judge that there is a serious dispute between the parties qua certain points. They relate to the execution of Ex.D/2. It is also disputed whether advance of Rs. 15000/- was an independent transaction of loan or an advanced as consideration of agreement to sale of the plot in question and the said agreement was kept alive. As claimed by the defendant, Rs.15,000/- was re-paid on 21.05.65 for which document Ex.A/2 was executed. In this connection, it has been disputed that if Rs. 15000/-

was not returned with interest on 21.05.65, then whether the plaintiff would be entitled to recover this amount. Learned Single Judge proceeded on the bass of the admitted and disputed facts and observed that main challenge of the appellant is on the findings of Issue No.7(a) and 7(b). Learned Single Judge was of the opinion that on the basis of the record, it was not proved that sum of Rs. 15000/- was re-paid. Learned Single also found that the opinion of the handwriting expert of the defendant is not conclusive. Finally, the learned Single Judge came to the conclusion that two facets of evidence suggested by the defendant are highly contrary to the normal course of human conduct and held that it is difficult to believe that the payment of money was made by the defendant to the plaintiff without asking for the promisory note which is alleged to have been executed in consideration there of. The promisory note having remained with the plaintiff, the payment as alleged by the defendant was not found proved by the learned trial court. The learned Single Judge was also of the opinion that the agreement subsisted in between the parties is a valid agreement and reversed the finding on Issues No. 7(a) and 7(b).

Learned Single Judge therefore was persuaded to reverse the finding of the record on Issue No.7(a) and 7(b). These findings on Issue No. 7(a) and 7(b) became final. There were no steps taken by the respondents to challenge them. In the final conclusion, the learned Single Judge was of the opinion that since the plaintiff in its prayer clause has

made a prayer to the effect that if specific performance is not granted, then in the alternative, the amount advanced may be returned with interest. Learned Single Judge found that the plaintiff was not ready and willing to get the performance of contract made and therefore, coupled with the fact that he had made an alternative prayer for payment of money, order of specific performance of contract is not granted. Learned Single Judge granted return of the amount paid by the plaintiff to the defendant with interest @ 6% per annum.

Feeling aggrieved by the findings of the learned Single Judge, this appeal has been filed by the plaintiff.

Learned counsel for the appellant supporting his appeal urged that the learned Single Judge has held that a valid agreement was there. He has also held that the case of the defendant respondent wherein, he claimed that a sum of Rs.15,000/- were repaid was false. The defendant is guilty of fabrication. In a case where equitable jurisdiction is exercised, a party which is held to be guilty of fabrication looses his right to be addressed in the realm of equity. Grant of specific performance is an equitable jurisdiction. Finding against the defendant respondent that he is guilty of fabricating a document to defraud the plaintiff goes a long way in knocking down the case of the defence. In the agreement of the parties, the defendant respondent had agreed to do all that was required to be done for conveying

the title. Having defeated him by taking shelter behind the terms of the allotment letter, the defendant is trying to further put premium on a fraud committed by him.

The plaintiff further asserted that the dispossession of the defendant had already been set aside by the Division Bench of this Court. Possession has been restored to the defendant. This was ordered by this Court in 1984. In the order under reference, this Court left it to the U.I.T to take proceedings for dispossessing the appellant in accordance with law. We are informed that till date no such proceedings have been initiated. The U.I.T is perhaps not interested in dispossessing the petitioner. That being the position the petitioner is in possession in the light of original allotment letter.

According to the learned counsel for the appellant, all the issues which are material have been held against the defendant respondent. Only on one count, that it would not be equitable to grant specific performance in favour of the plaintiff, the learned Single Judge has held against the appellant. According to the learned Single Judge, the appellant was ready to receive payment of money with interest as per his prayer in the suit. To support his argument, the learned counsel for the appellant relies on a case decided by the Hon'ble Supreme Court in the case of Mademsetty Satyanarayana Vs G. Yelloji Rao and others reported in AIR 1965 SC 1405,

wherein, Hon'ble Supreme Court has held as under :-

> “This passage indicates that either waiver or conduct equivalent to waiver alongwith delay may be a ground for refusing to give a decree for specific performance.”

Learned counsel emphasizes that the doctrine of waiver as is prevalent in England has no relevant and in this case, law has been laid down in the following terms :-

> “9. It is clear from these decisions that the conduct of a party which puts the other party in a disadvantageous position, though it does not amount to waiver, may in certain circumstances preclude him from obtaining a decree for specific performance.”

Hon'ble Supreme Court has further held :

> “As Article 113 of the Limitation Act prescribes a period of three years from the date fixed thereunder for specific performance of a contract, it follows that mere delay without more extending upto the said period cannot possibly be a reason for a Court to exercise its discretion against being a relief of specific performance. Nor can the scope of the discretion, after excluding the case mentioned in Section 22 of the Specific Relief Act, we confine to waiver, abandonment or estoppel.”

Learned counsel further relies on the law which has been laid down in the following terms :-

> ".....(2) Under the Indian law, relief of specific performance could be refused only if the plaintiff abandons or waives his right under the contract; and in the present case, the appellant had not established either abandonment or waiver by the first respondent of his right under the contract, for indeed as soon as he saw that the appellant had laid foundations for putting up structures on the plots, he rushed without any delay to the Court and filed the suit."

Hon'ble Supreme Court has further held as under :-

> "While in England mere delay and laches may be a ground for refusing to give a relief of specific performance, in India mere delay without such conduct on the part of the plaintiff as would cause prejudice to the defendant does not empower a Court to refuse such a relief. But as in England so in India, proof of abandonment or waiver of a right is not a pre-condition necessary to dis-entitle the plaintiff to the said relief, for if abandonment or waiver is established, no question of discretion on the part of the Court would arise."

It has been canvassed that in this case, all through the plaintiff did whatever, he was required to do and therefore, the delay would not be of any consequence which would induce a Court to refuse in its discretion a relief for grant of specific relief.

Learned counsel further relied on a case decided by the

Hon'ble Supreme Court in the matter of Ramesh Chandra Chandiok and Anr Vs Chunni lal Sabharwal reported in AIR 1971 SC 1238. Hon'ble Supreme Court has held as under :-

> "We are unable to concur with the reasoning or the conclusions of the High Court on the above main points. It is significant that the lase deed was not execute in favour of the respondents by the Government until May 21, 1956. So long as their own title was incomplete there was no question of the sale being completed. It is also undisputed that according to the conditions of the lease the respondents were bound to obtain the sanction of the Rehabilitation Ministry before transferring the plot to any one else. The respondents were fully aware and conscious of this situation much earlier and that is the reason why on 11-8-1955, it was agreed while extending the period for execution of the sale deed that the same shall be got executed after receipt of the sanction. The statement contained in Exhibit P-7 that the execution of the sale deed "by us cannot be complete without the said sanction" was unqualified and unequivocal. The respondents further undertook to inform the appellants as soon as sanction was received and thereafter the sale deed had to be executed within a week and got registered on payment of the balance amount of consideration. We are wholly unable to understand how in the presence of Exhibit P7 it was possible to hold that the appellants were bound to get the sale completed even before any information was received from the respondents about the sanction having been obtained. It is quite obvious from the letter Exhibit P-8 dated June 15, 1956 that he respondents were having second thoughts and wanted to

wriggle out of the agreement because presumably they wanted to transfer it for better consideration to some one else or to transfer it in favour of their own relation as is stated to have been done later. The respondents never applied for any sanction after August 11, 1955 and took up the position that they were not prepared to wait indefinitely in the matter and were therefore cancelling the agreement "for want of certainty". We are completely at a loss to understand this attitude nor has any light been thrown on the uncertainty contemplated in the aforesaid letter. *It does not appear that there would have been any difficulty in obtaining the sanction if the respondents had made any attempt to obtain it.* This is obvious from the fact that when they actually applied for sanction on November 11, 1956, it was granted after almost a week. The statement contained in Exhibit P-10 dated July 4, 1956 that the sanction was not forthcoming has not been substantiated by any cogent evidence as no document was placed on record to show that any attempt was made to obtain sanction prior to November 11, 1956. *Be that as it may the respondents could not call upon the appellants to complete the sale and pay the balance money until the undertaking given in Exhibit P-7 dated August, 11, 1955 had been fulfilled by them.* The sanction was given in November, 1956 and even then the respondents did not inform the appellants about it so as to enable them to perform their part of the agreement of sale. *There was no question of time having ever been made the essence of the contract by the letters sent by the respondents nor could it be said that the appellants had failed to perform their part of the agreement within a reasonable time*." (emphasis applied)

Learned counsel for the appellant has further relied on a decision of this Court in the matter of Deenanath Vs Chunni lal reported in AIR 1975 Rajasthan page 69 wherein this Court relying on the provisions of law as contained in Section 20 of the Specific Relief Act held that it is discretion of the Court to grant or not to grant specific relief but mere delay extending upto the period of limitation cannot be a possible reason for a Court to exercise its discretion of giving a relief of specific performance.

It has been held as under :-

> "The learned counsel for the respondent argued that specific performance should not be granted in the present case as there were laches and delay on the part of the plaintiff. It was submitted that the agreement ex.A/1 was entered into on 22-2-1964 and the suit was instituted on 5-12-1967 although the defendant declined to execute the sale deed by his notice dated 14-1-1966. It was argued that since the plaintiff did not take any steps to enforce his right for about two years, he was not entitled to the discretionary relief of specific performance. In my opinion, there is no substance in the above contention. *Article 54 of the Limitation Act, 1963 prescribes a periof of three years from the date fixed for the specific performance of the contract and if no such date is fixed when the plaintiff has notice that the performance is refused by the defendant.* In the present case, no date was fixed for the performance of the contract. The plaintiff came to about refusal on the part of the defendant to perform the contract on January 14, 1966. The suit was therefore brought within the prescribed period of

limitation on 5-12-1967. The learned counsel was not able to point out any circumstance which may attract any of the three clauses mentioned in sub-section (2) of Section 20 of the Specific Relief Act of 1963. *Mere delay extending upto the period of limitation cannot possibly be a reason for the Court to exercise its discretion against giving a relief of specific performance.* I am fortified in my view by the decision of their Lordships of the Supreme Court in Mademsetty Satyanarayana Vs G. Yelloji Rao, AIR 1965 SC 1405." (emphasis applied)

Learned counsel for the appellant has further relied on a case decided in the matter of Moti lal Jain Vs Ramdasi devi & Ors reported in JT 2000 (8) SC 59 wherein Hon'ble Supreme Court has held as under :-

"9. That decision was relied upon by a three Judges Bench of this Court in Syed Dastagir's case (supra), wherein it was held that in construing a plea in any pleading, Courts must keep in mind that a plea is not an expression of art and science but an expression through words to place fact and law of one's case for a relief. It is pointed out that in India most of the pleas are drafted by counsel and hence they inevitably differ from one to the other; thus, to gather true spirit behind a plea it should be read as a whole and to test whether the plaintiff has performed his obligations, one has to see the pith and substance of the plea. It was observed, "Unless a statute specifically requires a plea to be in any particular form, it can be in any form. No specific phraseology or language is required to take such a plea. The language in Section 16(c) of the Specific Relief Act, 1963 does not require any specific phraseology but only that the plaintiff must aver that he has performed or has always been and is willing to perform his part of the contract." *So the*

> *compliance of "readiness and willingness" has to be in spirit and substance and not in letter and form.*" It is thus clear that an averment of readiness and willingness in the plaint is not a mathematical formula which should only be in specific words. If the averments in the plaint as a whole do clearly indicate the readiness and willingness of the plaintiff to fulfill his part of the obligations under the contract which is subject-matter of the suit, the fact that they are differently worded will not militate against the readiness and willingness of the plaintiff in a suit of specific performance of contract for sale. “

Learned counsel for the appellant urged that the entire case has been held against the defendant respondent except two points that the petitioner was not ready and willing to perform his contract. He had preferred all the litigation within the limitation but on the last days and the other aspect which has weighed heavily with the learned Single Judge is that there were certain clauses in the sanction letter in favour of the respondent defendant that if he violates them, then he will not be able to transfer the plot in question. These two points are too mundane to be considered to be refuse the specific performance of contract to the appellant.

Learned counsel for the respondent on the other hand, urged that the judgment of the learned Single Judge has proceeded on sound principles of law,wherein the learned Single Judge observed that the performance of contract dated 30.11.62 was not possible on the admitted facts because no absolute right of transferring right had vested in the

defendant respondent regarding the land in question until 30.11.62. The learned counsel urged that the finding of the learned Single Judge was correct wherein, he has observed that only right the defendant had on 30.11.62 was to get his highest bid accepted from the U.I.T. The title of the defendant is still not perfect. According to the learned Single Judge, in terms of the allotment letter, he was required to fulfill obligations which have been narrated in Ex.A/7 and have been quoted by the learned Single Judge in the judgment. Since, on the ground of various considerations and the various obligations having not been complied with, the allotment was liable to be cancelled and in fact cancelled, though cancellation and dispossession of the defendant is still pendente lite before this Court. Though orders of the U.I.T dispossessing the defendant has been set aside by the Division Bench of this Court but the question of injunction is still pending before the learned Single Judge of this Court in second appeal.

Learned counsel further emphasized that there was a condition in the allotment letter which prescribes that until the building work on the plot in question is completed, the sale should not be made. The right of the defendant respondent was not absolute and was eclipsed by the conditions narrated in the allotment letter Ex.A/7. These restrictions were sufficient to put a bar on the defendant on the sale of plot in question. Since in law, the defendant was not in a position to make a sale prior to fulfillment of the obligations narrated, therefore, it was not lawful to execute the sale deed.

The conditions enumerated in Ex.A/7 according to the learned Single Judge was dependent on the discretion of the U.I.T and if the performance is granted in favour of the plaintiff, then that would amount to pre-empt the discretion which is lawfully vested in the U.I.T. That being the position, learned counsel for the defendant urged that performance was not voluntarily denied by him but was on account of legal lacunaes. Further, the plaintiff has not fulfilled its obligations of showing that he was ready and willing to perform the contract. No effective action on the part of the plaintiff was taken to secure specific performance. The suit for specific performance was filed on the last date of limitation. The appeal before the learned Single Judge was filed on the last date of limitation. The appeal before the learned Division Bench was filed after two days delay which was of course condoned by the Court. Thus, althrough acting on the last minute shows that plaintiff was not ready and willing to perform his part of the contract and therefore, the learned counsel for the respondent urged that the specific performance has not been rightly granted in favour of the plaintiff.

Learned counsel for the defendant further urged that in terms of Section 20 of the Specific Relief Act, grant of specific performance is the discretion of the Court. The discretion has been exercised against the appellant by the two courts below. In a Special appeal, this is the third chance and therefore, grant of discretionary relief should not be made in

favour of the plaintiff. The learned counsel for the respondent has further urged that it is a discretionary relief which in the circumstances deserves to be denied to the plaintiff. Learned counsel has also emphasized that having made an alternative prayer in the relief clause, the petitioner has shown the way that in case the specific performance of contract is not granted, alternative relief is available to the plaintiff. The relief having been granted to the plaintiff, other relief should not be resorted to by this Court because this is the third chance that the case is being considered. Two courts having gone against the plaintiff and alternative relief having been granted, interference should not be made in the judgment.

Learned counsel has relied on a case decided by the Hon'ble Supreme Court in the case of K.S. Vidyanandam & Ors. Vs. Vairavan reported in AIR 1997 SC 1751 wherein, Hon'ble Supreme Court has held as under :-

> "It cannot be said that any and every suit for specific performance of the agreement (which does not provide specifically that time is of the essence of the contract) should be decreed provided it is filed within the period of limitation notwithstanding the time limits stipulated in the agreement for doing one or the other thing by one or the other party. That would amount to saying that the time-limits prescribed by the parties in the agreement have no significance or value and that they mean nothing."

Hon'ble Supreme Court has further held :

"The rigor of the rule evolved by courts that time is not of the essence of the contract in the case of immovable properties - evolved in times when prices and values were stable and inflation was unknown - requires to be relaxed, if the modified, particularly in the case of urban immovable properties. It is high time, the Court do so. In the instant case, may be, parties knew of the circumstance regarding rising prices but they have also specified six months as the period within which the transaction should be completed. The said time-limit may not amount to making time the essence of the contract, but it must yet have some meaning. *Not for nothing could such time-limit would have been prescribed. Can it be stated as a rule of law or rule of prudence that where time is not made the essence of the contract, all stipulations of time provided in the contract have no significance or meaning or that they are as good as non-existent*? All this only means that while exercising its discretion, the court should also bear in mind that when the parties prescribe certain time-limit(s) for taking steps by one or the other party, it must have some significance and that the said *time-limit(s) cannot be ignored altogether on the ground that time has not been made the essence of the contract (relating to immovable properties*)."

It has further been held by the Hon'ble Supreme Court that

"In the instant case, from the date of agreement to sale till the date of suit notice the purchaser was sitting quiet without taking any steps to perform his part of the contract under the agreement though the agreement specified a period of six months within which he was expected to purchase stamp papers, tender the balance amount and call upon the vendors to execute the sale deed and deliver possession of the property. Further, the delay was coupled with substantial rise in prices- according to the vendors three times- between the date of agreement and the date of suit notice. *The delay*

has brought about a situation where it would be inequitable to give the relief of specific performance to the purchaser."

The facts of this case will not govern the case. In the case in hand, the delay is not on any count of the plaintiff.

Learned counsel for the respondent has further relied on the case decided by the Hon'ble Supreme Court in the matter of Kanshi Ram Vs Om Prakash Jawal & Ors reported in AIR 1996 SC 2150 wherein, Hon'ble Supreme Court has held as under :-

"Having regards to the facts of this case and the arguments addressed by the learned counsel, the question that arises for consideration is : whether it would be just, fair and equitable to grant the decree for specific performance ? *It is true that the rise in prices of the property during the pendency of the suit may not be the sole consideration for refusing to decree the suit for specific performance.* But it is equally settled law that granting decree for specific performance of a contract of immovable property is not automatic. It is one of discretion to be exercised on sound principles. When the court gets into equity jurisdiction, it would be guided by justice, equity, good conscience and fairness to both the parties. considered from this perspective, *in view of the fact that the respondent himself had claimed alternative relief for damages, we think that the courts would have been well justified in granting alternative decree for damages, instead of ordering specific performance which would be unrealistic and unfair.* Under these circumstances, we hold that the decree for specific performance is inequitable and unjust to the appellant."

The defendant in the case in hand has tried to defraud the plaintiff.

Therefore, this case will not govern the facts of the present case.

Learned counsel for the respondent further relied on the case of Veerayee Ammal Vs Seeni Ammal reported in (2002) 1 SCC 134 wherein, Hon'ble Supreme Court has held as under :-

> “10. The question of law formulated as substantial question of law in the instant case cannot, in any way, be termed to be a question of law much less as substantial question of law. The question formulated in fact is a question of fact. Merely because of appreciation of evidence another view is also possible would not clothe the High Court to assume the jurisdiction by terming the question as substantial question of law. In this case Issue No. 1, as framed by the Trial Court, was, admittedly, an issue of fact which was concurrently held in favour of the appellant-plaintiff and did not justify the High Court to disturb the same by substituting its own finding for the findings of the courts below, arrived at on appreciation of evidence.”

> Further Hon'ble Supreme Court has held as under :

> “13. The word "reasonable" has in law *prima facie* meaning of reasonable in regard to those circumstances of which the persons concerned is called upon to act reasonably knows or ought to know as to what was reasonable. It may be unreasonable to give an exact definition of the word "reasonable". The reason varies in its conclusion according to ideosyncrasy of the individual and the time and circumstances in which he thinks. The dictionary meaning of the "reasonable time" is to be so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case. In other words it means as soon as circumstances permit. In Law Lexicon it is defined to

> mean "A reasonable time, looking at all the circumstances of the case; a reasonable time under ordinary circumstances; as soon as circumstances will permit; so much time as is necessary under the circumstances, conveniently to do what the contract requires should be done; some more protracted space than `directly'; such length of time as may fairly, and properly, and reasonably be allowed or required, having regard to the nature of the act or duty and to the attending circumstances; all these convey more or less the same idea."

Mere filing of suit on the last day of limitation cannot be regarded as delay in isolation.

Learned counsel further relied on the matter of Surjit Kaur Vs Naurata Singh & Anr. Reported in (2000) 7 SCC page 379, wherein Hon'ble Supreme Court has held as under :-

> "In this case provisions of sub-section (3) of Section 12 of the Specific Relief Act had not been met inasmuch as the 1st Respondent had not paid the consideration for the whole of the contract without abatement and he had elected not to relinquish all claims to the performance of the remaining part of the contract. *It is settled law that in cases of part performance of contracts once an election is made then that party cannot at a later date resile or get out of the election. Once the 1st Respondent elected not to accept part performance it was no longer open to him, on finding that he could not get the specific performance of the whole, to claim part performance at a later date*."
>
> .....

"Both the first appellate court as well as the High Court have committed a serious error in law by ignoring the fact that the conditions of Section 12(3) were not met in this case in as much as the *1st respondent had already elected not to accept part-performance. Both these courts ignored the fact that the 1st respondent had elected not to relinquish all claims to performance of the remaining part of the contract and had not paid the consideration.* Both the courts erred in law and on facts in allowing the 1st respondent to reside from his earlier election."

.....

"It is clarified that it is not being laid down that merely because in correspondence or orally a party has insisted on performance of the whole contract he cannot thereafter elect to accept performance in part. A mere assertion that contract must be performed in full or even filing of a suit for specific performance of the whole contract without averring that the Plaintiff is willing to accept performance in part may not amount to electing not to accept performance in part. *It is only in cases where a party has categorically refused to accept performance in part i.e. he has unambiguously elected not to accept part performance that he will be precluded from subsequently turning around and electing to accept performance in part.* Whether a party has categorically elected or not will depend on facts of each case. "

.....

"In cases where a contract is not capable of being performed in whole then the readiness and willingness, *at all stages, is the readiness and willingness to accept part performance.* If a contract is not capable of being performed in whole and a party clearly indicates that he is not willing to accept part performance, then

> there is no readiness and willingness, at all stages, to accept part performance. In that case there can be no specific performance of a part of the contract at a later stage."

There was nothing like part performance involved the case in issue, therefore, this case has no relevance.

Another case relied upon by the learned counsel for the respondent is that of Jamila Khatoon & Ors. Vs Ram Niwas Gupta reported in AIR 1998 Allahabad 138, wherein, the Court has held as under :-

> "6. I have also considered the legal proposition. In the instant case, the plaintiff prayed for alternative remedy also i.e for refund of earnest money together with damages, so it was not a case where the court should provide with an opportunity to the plaintiff for making an alternative claim. However, the fact remained that plaintiff did not file the suit with right promptitude though it was filed within the period of limitation. Since, there was inordinate delay in presentation of the suit without giving proper explanation for filing the suit after a long lapse of time. I think that the learned court below was not justified in decreeing the suit for specific performance of contract. Learned court below should have granted alternative relief as prayed for by the plaintiff. However, the plaintiff made statements on oath that he was although ready and willing to purchase the disputed property on payment of balance money that implied that he was willing to purchase the land. However, in view of the materials on record, I am inclined to grant alternative relief and as such this appeal stands allowed partly by modification of the decree as given hereunder : the decree is hereby set aside and is modified by allowing a decree for refund of earnest money along with simple interest at the rate of 9% per annum from the date of presentation of suit together

with damages of Rs. 5000/- by the defendant to the plaintiff. The suit

> thus stands partly allowed in the nature of modification of decree as stated above, ad the plaintiff is to get the costs of the suit accordingly, but as the appeal stands partly allowed as indicated above, I do not order as to costs in this appeal."

To defeat the claim of the appellant, the respondent defendant has used a forged document. Use of forgery can be pronounced as a fraud by the concerned litigant. As and when a litigant proceeds on the basis of such documents which are relevant to the litigation and has the tenor of forgery, it tentamounts to playing fraud with the Court. A litigant who approaches the Court is bound to produce genuine documents only to establish his claim. If he uses a forged document and wants to take advantage, then he would be guilty of playing fraud on the Court as well as on the opposite party. Such party has to be non-suited. In this background also, if the defendant respondent has used a forged document, has made himself liable for being summarily thrown out of the Court. A reference in this connection may be made to a decision of Hon'ble Supreme Court in the matter of S.P. Chengalvaraya Naidu Vs Jagannath reported in AIR 1994 SC 853 wherein, Hon'ble Supreme Court has held as under :-

> "We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to Court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice

> between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out any stage of the litigation."

In view of the fact that the defendant has attempted to use forged documents, the present analogy of law will not be sufficient to defeat the claim of the plaintiff.

We have given our thoughtful consideration. Learned Single Judge has come to the conclusion that there was an agreement and a valid one which has been sought to be defeated by the defendant by production of such documents which are not genuine. Learned Single Judge has held that re-payment receipt for Rs. 15,000/- was not a genuine document and the defendant has taken such steps which tantamount to showing a false payment. What becomes more pronounced is that his conduct was not one which would weigh on the scale of equity in his favour. Here is a party who does not deserve to be given any equitable consideration and who has used all foul means to defeat the claim of the plaintiff. If the defendant has gone to the extent of using a document which was not genuine, then it cannot be

said that the defendant has altered his position to any dis-advantageous position wherein, he could not respond with promptitude.

If a man is faced with an adversary who has no reservations about using foul means, of using a document which is not genuine, then levelling him with a person who is alleged to have not respond equitably, amount to loosing sight of the fact that he was facing an adversary who was not a normal man and had the audacity of using all un-fair means. Except that the suit was filed on last day. No other circumstance is available against the plaintiff. In law, he was entitled to wait up to last day of limitation.

The law relied upon by the defendant is distinguishable as indicated by us hereinabove and the case relied upon by the appellant in Mademsetty Satyanarayana (Supra) shows that mere delay is not sufficient to deny the plaintiff the right of specific performance. Here the dis-advantageous position cannot be claimed in favour of the defendant but the same cannot be seen in favour of the plaintiff wherein the defendant has tried to use forged documents to defeat his claim. Thus, the delay in this case cannot be a ground to refuse specific performance.

As regards the imperfect title, defendant was required to take certain steps. If he has not taken such steps then, it goes to his dis-

advantage and show that he had a guilty mind at the inception. The defendant cannot be permitted to take shelter of certain niceties which has nothing to do with the plaintiff. If he on his own has not performed, then he had the guilty intent and one who nurses such intent, cannot claim any advantage in a court of equity while exercising jurisdiction of grant of specific performance. The courts are required to look into quantum of equitable circumstances which heavily weigh against the defendant. We are of the opinion that the plaintiff is entitled to grant of decree of specific performance. We are remitting it back to the trial court to detail out the niceties of execution of the sale deed in favour of the appellant in terms of the agreement on which we are ordering the specific performance. The exercise should be completed within three months.

(S.P. PATHAK), J. **(B.PRASAD), J.**

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