

PETITIONER:
SURJIT KAUR

Vs.

RESPONDENT:
NAURATA SINGH & ANR.

DATE OF JUDGMENT: 13/09/2000

BENCH:
V. N. Khare J. & S. N. Variava j.

JUDGMENT:

S. N. VARIAVA, J.
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This Appeal is against a Judgment dated 15th December, 1992 by which the Second Appeal filed by the Appellant (herein) has been dismissed. Briefly stated the facts are as follows: On 10th September, 1980 the Appellant entered into an Agreement to Sell, to Respondent No., 1 her 1/2 share in 212K 13M of land at the rate of Rs. 30,250/- per killa. The Agreement to Sell provided that the Sale Deed was to be executed by 30th June, 1981. It also provided that by that date the Appellant was to get her name muted into the record of rights and she was also to give possession of land to the 1st Respondent. A sum of Rs.20,000/- was paid to the Appellant at time of execution of the Agreement. Respondent No. 2 filed a suit against the Appellant and the 1st Respondent claiming@@

ownership and possession of land. Respondent No. 2 claimed@@
ownership to the suit land under an alleged will made in his favour by the mother of the Appellant. In that suit an interim order was passed preventing alienation of the land by the Appellant. However, that suit was ultimately dismissed on 7th October, 1982. In the meantime the 1st Respondent sent a notice dated 22nd June, 1981 to the Appellant calling upon her to execute the Sale Deed as per the terms of the Agreement and informing her to remain present in the Office of the Sub-Registrar on 30th June, 1981. On 30th June, 1981 the 1st Respondent remained present before the Registrar. He gave an Application to the Registrar which, interalia, reads as follows:

"2. That agreement deed aforesaid was for the sale of aforesaid land. In favour of Naurata Singh son of S. Sham Singh resident of village Nasrali, Sub Tehsil Amloh District Patiala. That a sum of Rs. 20,000/- in cash was paid to Surjit Kaur with the condition that before the execution and registration of sale deed before 30.6.1981 the possession of the land mentioned in the agreement deed will be delivered to the applicant (Naurata Singh). Today is 29th June, 1981, but uptill now Smt. Surjit Kaur has not taken action for giving possession of the land in question.

It is therefore, requested that my presence may kindly be marked in your office, to enable the undersigned to go to the civil court to get the conditions of the agreement deed

implemented therein."

The Appellant also remained present before the Sub-Registrar. She also gave an Application stating that she was not in a position to deliver possession as a suit has been filed by the 2nd Respondent. She stated that she was willing to execute the Sale Deed and have the same registered but that the 1st Respondent was not willing to get the same executed.

On the Application of the 1st Respondent the Registrar passed the following Order:

" The applicant has presented this application. Surjit Kaur d/o Kalu was called. Surjit Kaur stated that she was ready to execute the sale deed but Norata Singh stated that as per written agreement there is a condition precedent and therefore he was ready to get sale deed executed after deliver of possession of land.

In these circumstances no action can be taken on this application. Applicant is directed to seek his remedy in Civil Court. Application is filed 30.6.81."

On the Application of the Appellant the Registrar passed the following Order:

"Today application was presented by Surjit Kaur. Norata Singh is also present. Norata Singh stated that he was ready to get the execution of sale deed but possession of the land has to be delivered before execution as per terms of agreement. Surjit Kaur stated that she could not deliver possession but was ready to execute the sale deed. In these circumstances no action is necessary. Application is filed parties are directed to go to the Civil Court."

Thus, it is to be seen that both the parties understood that 30th June, 1981 was of the essence of the Contract. The Appellant was ready and willing to execute the Sale Deed but the 1st Respondent was not willing to have the Sale Deed executed unless and until all conditions of the Agreement to Sell, viz. transfer of mutation in favour of the Appellant and delivery of possession also took place. In other words, the 1st Respondent elected not to accept part performance of the Agreement to Sell. It is obvious that the 1st Respondent elected not to execute Sale Deed as he would have to pay the consideration for the whole of the Contract without any abatement and he was not willing to do so. The 1st Respondent filed the present suit for specific performance of the Agreement to Sell. In the alternative, he also claimed refund of the money paid with compensation. In this suit the 2nd Respondent was also made a party Defendant. The trial Court framed various Issues, including an Issue as to readiness and willingness on the part of the 1st Respondent. The trial Court also framed an Issue as to whether the Agreement to Sell dated 10th September, 1980 could be specifically performed. The trial Court held that the 1st Respondent was ready and willing to perform the Agreement as per its terms, but that as delivery of possession could not take place there could be no specific performance of the Agreement. Thus the trial Court decreed the suit by directing refund of Rs.20,000/- and payment of Rs.8800/- as compensation. At this stage to be noted that the refund of money and compensation was directed as even at this stage 1st Respondent was insisting on full compliance with the terms of the Agreement, including being put in possession. This in spite of the fact that the 1st

Respondent knew that all the terms of the Agreement were not capable of being implemented as Appellant was not in a position to deliver possession. The 1st Respondent then filed Civil Appeal No. 242/79 of 1985. At the time of hearing of this Appeal counsel for the 1st Respondent made a statement that the 1st Respondent was now ready and willing to accept the offer of the Appellant and would not object to Sale Deed being executed and registered, even if possession was not given by the Appellant. The first Appellate Court held that before the Registrar the Appellant had stated that she was willing to get the Sale Deed executed and registered without delivery of possession. It was held that as the 1st Respondent was ready and willing to accept this offer and the clause regarding delivery of possession was for the benefit of the 1st Respondent he could always waive it. On this basis, the first Appellate Court allowed the Appeal and set aside the Judgment of the trial Court and decreed the suit for specific performance. The first Appellate Court made it clear that the Sale Deed would be executed without delivery of possession. The Appellant then filed Second Appeal No. 2500 of 1992. By the impugned Judgment dated 15th December, 1992, the Second Appeal has been dismissed in limine. We have seen the impugned Judgment. No reasons are given. The impugned Judgment merely sets out the Order of the first Appellate Court. However, there appears to be some mistake in the final copy. The final copy provides that the remaining sum was to be paid only after getting possession. Parties are agreed that this is a mistake and that it has been agreed even before the High Court that the Sale Deed would be executed without delivery of possession. The question which arises, in this case, is whether the 1st Respondent is entitled to the benefit of Section 12(3) of the Specific Relief Act. Section 12 of the Specific Relief Act reads as follows:

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

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

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

(a) forms a considerable part of the whole, though admitting of compensation in money; or

(b) does not admit of compensation in money; he is not entitled to obtain a decree for specific performance; but the court may, at the suit of other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the other party-

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

to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

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

Thus if a party to the Contract is not able to perform the whole of it and the part which must be left unperformed does not admit of compensation in money (in this case Appellant is not in a position to deliver possession and such non-performance is not capable of compensation in money) then the other party (1st Respondent) could get Court to direct, in a Suit filed by him, that party to perform provided he:- a) pays or has paid the consideration of the whole of the Contract without any abatement and b) relinquishes all claims to performance of the remaining part of the Contract and all rights to compensation, either for deficiency or loss or damage. Relying on Section 12(3) of the Specific Relief Act, Mr. Gupta submitted that a party can elect to accept part performance at any stage of the litigation. He submitted that

mere filing of a Suit for specific performance of the Agreement and not averring that the party was willing to accept performance in part does not preclude a party from subsequently electing to accept performance in part. He submitted that such election can be made even at the stage of Appeal. In support of his contention he had relied upon the cases of Kalyanpur Lime Works Ltd. vs. State of Bihar & Anr. reported in (1954) S.C.R. 958, Dr. Jiwan Lal & Ors. vs. Brij Mohan Mehra & Anr. reported in (1972) 2 S.C.C. 757, Ram Niwas vs. Smt. Omkari & Anr. reported in AIR 1983 Allahabad 310, Smt. T.K. Santha & Ors. vs. Smt. A.G. Rathnam and Ors. reported in AIR 1990 Kerala 69, Ramani Ammal vs. Susilammal reported in AIR 1991 Madras 163, and Smt. Purnima Rani Dutta vs. Smt. Lakshmi Bala Dasi reported in AIR 1988 Calcutta 148. There can be no dispute with the broad proposition of law. All these cases support the broad

proposition. Thus the facts of each case need not be set out.

It must be mentioned that in many of these cases the option had been exercised at the Appellate stage. An exercise of option at the Appellate stage has been upheld on the ground that a party could elect to accept part performance at any stage of the litigation. However, it is to be noted that in all these cases the party exercising the option had not earlier elected not to accept part performance. Mr. Rao could not show to Court even a single case where a party had elected not to accept part performance; had insisted on full performance and finding that the Courts were against him, then elected to accept part performance. Normally time is not of the essence of the Contract unless parties make it so. From the facts set out hereinabove, it is to be seen that both the parties understood that the date for performance was 30th June, 1981. The 1st Respondent sent a notice dated 22nd June, 1981 calling upon the Appellant to remain present before the Sub-Registrar on 30th June, 1981. Both the parties remained present before the Sub-Registrar on 30th June, 1981. The Appellant clarified that she could not deliver possession but

that she was willing to execute Sale Deed and get it registered. The Appellant could not deliver possession because the 2nd Respondent had filed a suit and obtained an injunction in that suit. To be remembered that the 1st Respondent was also a party to that suit. This was the time when the 1st Respondent had to elect either to accept part performance and/or to complete the sale by executing Sale Deed and making payment of money. By refusing to accept part performance the 1st Respondent has elected not to accept part performance. To be seen that delivery of possession formed a considerable part of the whole and did not admit of compensation in money. The 1st Respondent had to pay the consideration of the whole without any abatement. He had to pay this consideration on 30th June, 1981. He appeared before the Sub-Registrar. He refused to execute the Sale Deed and pay the consideration. He refused to relinquish all claims to the performance of the remaining part of the contract. By refusing to have Sale Deed executed he was in effect refusing to pay the balance consideration. Once he did that he no longer became entitled to claim part performance. This fact was lost sight off by the first Appellate Court as well as the High Court. The first Appellate Court failed to notice that in this case provisions of sub-clause (3) of Section 12 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 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. If this was to be permitted then all vendees would not pay the consideration amount on the dates fixed for performance. Whilst such dates may not be of the essence of the Contract, they still have some meaning. If this was to be permitted then vendees would withhold payments by first refusing to accept part performance and then after years of litigation agree to accept part performance at the Appellate stage. If this was to be permitted then the sellers would be kept out of their money for long periods of time by vendees. In our view, 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 inasmuch as 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 resile from his earlier election. It must be clarified that this Court is not saying 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 a 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. It is also settled law that specific performance cannot be granted to a party who has not been ready and willing at all stages to perform the contract. Of course, the 1st Respondent was ready and willing to perform the contract in its entirety. To that extent there would be readiness and willingness on the part of the 1st Respondent. But 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. None of the authorities cited by Mr. Rao lay down anything contrary. In all those cases the party had been insisting on part performance and/or the time for election had not arrived. In none of those cases an election not to accept part performance had been made. It is under those circumstances that the Courts held that the party could elect to accept part performance at any stage of the litigation. In those cases it could not be said that there was no readiness and willingness to accept part performance. For the above reasons, we are of the view that the Order dated 19th October,@@

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1992 passed by the first Appellate Court and the Order of the@@
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High Court dated 15th December, 1992 cannot be sustained and requires to be and are hereby set aside. The decree passed by the Trial Court on 27th February, 1985 is correct on this aspect and the same is restored qua refusal to grant specific performance. The trial Court has also directed refund of Rs. 20000/- (being the amount admittedly received by the Appellant) with interest thereon at 12% p.a. from 30th June 1981 till decree. The trial Court has also awarded a sum of Rs. 8800 as damages. The trial Court has directed payment of interest at 6% p.a. on Rs. 28800/- from date of decree till payment. It is to be seen that the suit was for specific performance or in the alternative for a sum of Rs. 40000/- as compensation. The sum of Rs. 40000/- was claimed as the suit Agreement inter-alia provided as follows: Due to any reason, if I dont get sale deed executed then purchaser can get it done through court of law or he can claim double the advance amount paid to me.

No reasons have been given by the trial Court as to why this term of the suit Agreement should not be given effect to. No reasons have been given as to why compensation of only Rs. 8800/- was awarded when what was to be returned, if Appellant could not get Sale Deed executed, was double the amount. Trial Court has held that the 1st Respondent was ready and willing to perform the whole of the Agreement. Trial Court has noted that the Appellant could not perform the Agreement in its entirety in as much as she could not deliver possession. As 1st Respondent had elected not to accept performance in part the trial Court held that the Agreement could not be specifically enforced. However in such an event trial Court should have directed payment of Rs. 40000/- as provided in the Agreement. We accordingly vary the decree granted by the trial Court to the extent that the Appellant shall repay Rs. 20000/- with interest thereon at 12% p.a. from 30th June 1981 till payment and also pay another sum of Rs. 20000/- with interest thereon at 12% p.a. from date of decree till payment. The Appeal stands disposed off accordingly. In the circumstances of this case, there will be

no order as to costs.

JUDIS