

THE HIGH COURT OF TRIPURA
AGARTALA

RSA No.57 of 2008

Sri Bishnupada Saha,
son of late Sanatan Saha,
resident of Village & P.O. Kumarghat,
P.S. Kumarghat,
District - North Tripura

.....**Appellant**

- **Vs** -

Sri Bidhu Bhusan Deb,
son of late Binode Behari Deb,
resident of Village-Padmapur,
P.S. Dharmanagar, District-North Tripura

.....**Respondent**

B E F O R E
THE HON'BLE MR. JUSTICE S. TALAPATRA

For the appellant	: Mr. S. Deb, Sr. Advocate Mr. S. M. Chakraborty, Sr. Advocate Mr. S. Bhattacharjee, Advocate Ms. D. Das, Advocate
For the respondent	: Mr. D. K. Biswas, Advocate Mr. G. K. Nama, Advocate Mr. S. S. Debnath, Advocate
Date of hearing	: 08.07.2015
Date of delivery of judgment & order.	: 31.08.2015
Whether fit for reporting	: YES

JUDGMENT & ORDER

For the substantial questions of law, as reproduced hereunder, this appeal under Section 100 of the CPC has questioned the reversal finding as returned by the Judgment and decree dated 11.08.2008 in Title Appeal No.18 of 2008 by the Addl. District Judge (Fast Track Court), North Tripura, Kailashahar:

1. Whether the learned appellate Court committed substantial error of law in holding that even though the plaintiff respondent did not tender the consideration money within the period of limitation, the suit having been filed within the period of three years from the date of execution of the deed of reconveyance was maintainable in law while in fact the suit was filed on July 17, 2003 beyond three years from the date of execution of the deed of agreement for reconveyance (ekrarnama) which was executed on April 22, 2000?

2. Whether the learned first appellate Court was right in holding that even in the absence of expression of readiness and willingness within the period of limitation as prescribed in the deed of agreement for reconveyance the period of limitation continued till three years from the date of execution of the deed of agreement for reconveyance irrespective of any pleading or proof of performing his (plaintiff's) part of performance?

The appellant is given liberty to raise any other substantial question of law at the time of hearing of the appeal by the order dated 26.09.2008.

02. The basic facts which are required to be noted to appreciate the substantial questions of law be laid at the outset.

The respondent instituted the suit for specific performance of contract being Title Suit No.14 of 2003 in the Court of the Civil Judge, Sr. Divn., North Tripura, Kailashahar, pleading *inter alia* that he was the owner and possessor of the land measuring 7.07 acres under Khatian No.359 of Mouja-Kumarghat, more fully described in the schedule of the plaint. According to the plaint that land 'bore market value' much more than Rs.2,50,000/- during the year 2000 but the suit has been valued at Rs.2,50,000/- for purpose of jurisdiction and accordingly the court fees has been paid. However, there is no dispute regarding the payment of the court fees.

In the latter part of the month of April, 2000, the plaintiff required a sum of Rs.2,50,000/- urgently and as the appellant, the

defendant in the suit, was an acquaintance, he approached him for loan. The defendant agreed to extend loan on condition that the plaintiff would execute a registered deed in favour of the defendant as to the suit land 'on conditional sale' stipulating the condition that if the plaintiff would return the money within a period of three years then the defendant would reconvey the land in favour of the plaintiff and that was in the spirit of mortgage.

Accordingly, on 22.04.2000 the plaintiff executed a registered sale deed in favour of the defendant in respect of the suit land measuring 7.07 acres against the purported loan of Rs.2,50,000/-. The plaintiff has acknowledged that he had received the entire amount from the defendant. On the same day the defendant executed a registered deed of agreement (Ekrarnama) in favour of the plaintiff with the condition that if the plaintiff repaid the loan money, the defendant should be legally bound to reconvey the suit land. The plaintiff has stated further that the defendant was entrusted for having the collateral agreement prepared, executed and registered. The defendant executed it, however according to the plaintiff, the said deed of agreement for reconveyance was kept by the defendant.

In the month of March 2003, the year when the suit was filed, the plaintiff requested the defendant to execute the deed of reconveyance in his favour on receiving the loan money. The plaintiff requested the defendant time and again immediately on expiry of 2 or 3 months from the said transaction to execute the reconveyance deed on receiving the loan money amounting to Rs.2,50,000/-. But the defendant deferred the matter and the plaintiff waited on good faith.

Finally, the plaintiff served a notice on 05.04.2003 to the defendant requesting him to reconvey the suit land on receiving the loan amount. The plaintiff has admitted that in the said notice the loan amount was written as Rs.2,75,000/- in place of Rs.2,50,000/- by mistake. The plaintiff, since had no copy of the Ekrarnama, applied for certified copy and obtained the same on 25.04.2003. When he found to his utter surprise that the period of repayment of the loan for purpose of getting the reconveyance has been mentioned in the Ekrarnama as three months in place of three years, the plaintiff has pleaded in that context that it was beyond his imagination that the defendant would indulge in such activity by changing the period of repayment from three years to three months. Apart that, he executed the sale deed on good faith in favour of the defendant.

On 06.05.2003 again a notice through the lawyer of the plaintiff was served on the defendant but the defendant in response to the said notice has simply stated that the allegations are ill motivated. The plaintiff was/is ready and willing to have the reconveyance on making payment of Rs.2,50,000/- but that could not be materialised due to ill intention and non-cooperation of the defendant. The plaintiff prayed for a decree of specific performance in terms of the said Ekrarnama dated 22.04.2000 for reconveyance of the suit land. The defendant, the appellant herein, filed a written statement and has denied that the original Ekrarnama dated 22.04.2000 was taken and kept by the defendant. On the contrary, he has asserted that the Ekrarnama was delivered to the plaintiff and the defendant obtained a certified copy later on. He has categorically asserted that when the agreement was reduced in writing, it was reduced correctly in terms of

what has been agreed between the plaintiff and the defendant. The defendant has denied that at any point of time before 05.04.2003 the plaintiff had approached the defendant for reconveyance.

After expiry of the three months, the defendant developed the said land by spending huge amount and the plaintiff's sole design is to grab the said developed land. He has categorically stated since the notice dated 05.04.2003 was after the stipulated time of repayment of the loan, he had been under no obligation to act on the Ekrarnama. According to him, the suit is hopelessly barred by limitation.

After framing the necessary issues, such as whether the plaintiff was ready and willing to perform his part of contract or still ready to perform his part after institution of suit, the trial court allowed both the plaintiff and the defendant to lay their evidence. The plaintiff filed 7 documentary evidence and examined 3 witnesses including himself, whereas the defendant filed one documentary evidence i.e. the order of mutation dated 09.05.2000 passed in terms of Section 46(3) of the TLR&LR Act, 1960.

On appreciation of the evidence, as would transpire from the judgment dated 25.05.2006, passed by the trial Judge, all the issues have been decided against the plaintiff holding that *"I do not find any evidence that plaintiff ever approached the defendant within the stipulated period of agreement. According to the provision of Section 16(c) of Specific Relief Act the plaintiff ought to have approached the defendant and expressed his readiness and willingness to perform his performance. From the plaint as well as*

evidence of the plaintiff side I do not find such a thing that plaintiff was ready and willing to perform his performance. What I find that plaintiff served a notice dated 5.4.2003 to the defendant requesting him to execute reconveyance (return sale deed) in favour of the plaintiff on receiving the price money. This service of notice does not support the plaintiff's case. Moreover, I find that the notice was a defective notice. In the said notice the amount of consideration was written as Rs.2,75,000/- instead of Rs.2,50,000/-. At the time of cross-examination the plaintiff stated that he cannot say what was the term or period for repayment of loan in the agreement. Further he stated that he did not deposit the loan amount in the Court for getting the decree for specific performance. Today he is not ready for making the payment of the loan amount. Pointing out the above evidence learned senior counsel Mr. S. M. Chakraborty submitted that now the plaintiff is not ready for making payment of loan.

I have meticulously gone through the plaint as well as evidence of the plaintiff. The evidence of the plaintiff is very much clear that he is not ready for making the payment of the loan amount. So this evidence is hit the provision of Section 16(c) of Specific Relief Act. I also hold that the plaint is very much lacking of the ingredients of readiness and willingness on the part of the plaintiff. Accordingly this issue is decided against the plaintiff."

As consequence of such observation, the suit was dismissed.

03. Being aggrieved by that judgment and decree, the plaintiff, the respondent herein, filed an appeal under Section 96 of

the CPC being Title Appeal No.35 of 2006 in the Court of the Addl. District Judge, North Tripura, Kailashahar. But the said appeal was finally taken up for hearing by the Addl. District Judge, Fast Track Court, North Tripura, Kailashahar. The first appellate court formulated two points as noted below for determination of the appeal.

(i) Whether the Learned Trial Court has rightly decided the above issues with proper appreciation of evidence of the parties in lawful manner by the impugned judgment?

(ii) Whether there is any cogent, reasonable and lawful ground to interfere with the findings and decision of the Learned Trial Court recorded in the impugned judgment?

04. In the appeal, the defendant has raised one additional point questioning the validity of the Ekrarnama as the Ekrarnama was unilaterally signed by the defendant. As per Section 25 of the Indian Contract Act, 1872 the deed of agreement is void in the eye of law inasmuch as for constituting a contract at least two persons must arrive at a consensus which is enforceable by law. So a unilateral statement recorded in the agreement being not a contract cannot be enforced under Section 16(c) of the Specific Relief Act, 1963.

05. The first appellate court on purported appreciation of the evidence of record as well as the respective pleadings has observed as under:

"Findings of the Learned Trial Court cannot be considered as correct since the plaintiff clearly stated in para 10 of the plaint regarding his readiness and willingness to have the reconveyance making payment of the amount but could not be materialized due to ill intention and non cooperation of the defendant and the plaintiff still remain ready and willing with the amount of money for getting the desired and contracted reconveyance deed as to the suit land. Moreover, readiness and willingness cannot be considered as a straight jacket formula and these have to be determined from the entirety of the facts and surrounding circumstance relevant to the intention and conduct of the

party concerned. If the averments in the plaint as a whole do clearly indicate the readiness and willingness of the plaintiff to fulfil his part of the obligations under the contract which is the 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 for Specific Performance of the Contract for sale. The basic principle behind Section 16(c) read with explanation (ii) is that any person seeking benefit of the specific performance of contract must manifest that his conduct has been blemishless throughout entitling him to the specific relief. The Court is to grant relief on the basis of the contract of the person seeking relief. If the pleadings manifest that the conduct of the plaintiff entitles him to get the relief on perusal of the plaint he should not be denied the relief. The institution of the suit for specific performance of contract and prosecution of the case with due diligence shows the readiness and willingness of the plaintiff to perform his part of the contract. So the crux question is the intention of the parties and that can be gathered from the pleadings, conduct of the parties and surrounding circumstances."

06. It has been further observed that the main controversy has not been examined by the trial court. According to the first appellate court, the main issues in the suit are as under:

(i) Whether the transaction of the suit land by registered sale deed executed by the plaintiff on 22.04.2000 is outright sale or conditional sale since the defendant on the same day had executed the registered agreement (Ekrarnama) to reconvey the suit property to the plaintiff? and that

(ii) Whether the registered agreement (Ekrarnama) dated 22.04.2000 executed by the defendant himself alone in favour of the plaintiff is legally valid and enforceable in the eye of law? He has further observed that

(iii) Whether it was the defendant who had intentionally inserted three months stipulated time instead of agreed period of three years in the registered deed of agreement (Ekrarnama) executed by the defendant and after registration kept the original deed of agreement in his (defendant) custody?

(iv) Whether time is the essence of the agreement (Ekrarnama) in the present suit? If so, with what effect?

(v) Whether the defendant had committed breach of agreement (Ekrarnama) by refusing to reconvey the suit property to the plaintiff?

(vi) Whether the plaintiff was/is ready and willing to perform his part of contract or still ready and willing to perform his part? Along with the usual issues such as

(vii) Whether the plaintiff is entitled to get the decree as prayed for? and

(viii) What other relief/reliefs the parties are entitled to get?

On the finding so reproduced hereinbefore, the appeal was allowed and impugned judgment dated 25.05.2006 was set aside. The suit was remanded for retrial based on the issues formulated by the trial court as noted above.

07. Being aggrieved by the said judgment dated 15.09.2007 delivered in Title Appeal No.35 of 2006 by the first appellate court, the defendant filed a second appeal from the order being SAO No.03 of 2007 in the Gauhati High Court. By the order dated 14.11.2007, the said appeal was dismissed but subject to the observation as under:

It is made clear that the learned trial court is at wisdom to decide the suit on the basis of the evidences available before him without any influence of the judgment passed by the learned appellate court.

08. It appears from the judgment dated 04.02.2008, delivered in Title Suit No.14 of 2003, that the issues as framed by the first appellate court by the judgment dated 15.09.2007 in Title Appeal No.35 of 2006 were all taken up for decision. Both the plaintiff and the defendant filed further deposition and they were cross examined but no further evidence except that part of the oral evidence was introduced in the record of evidence. After examining the sale deed dated 22.04.2000 (Exbt.4) and the Ekrarnama dated 22.04.2000 (Exbt.3), the trial court has observed that to claim mortgage by conditional sale under Section 58(C) of the Transfer of Property Act,

the condition effecting or purporting to effect the same as a mortgaged transaction must be incorporated in one and the same deed. If the condition were not embodied in one deed, in that case Section 58(C) of the Transfer of Property Act is not applicable. A reference was made to a decision of the Gauhati High Court in ***Smti. Hena Sarkar and Ors. vs. Smt. Nilima Basu and Ors.*** reported in **1987(2) GLR 402**. According to the trial court, the sale was outright sale, not conditional one. Thereafter, having referred to Section 2(e) of the Indian Contract Act, the trial court has observed that every promise and every set of promises forming the consideration for each other is an agreement and an agreement, enforceable by law, is a contract. As per Section 2(g) of the said Act, an agreement not enforceable by law is said to be void. Since Ekrarnama (Exbt.3) did not contain the signature of the plaintiff, there is no evidence to show that the plaintiff had accepted that proposal made by the defendant by Exbt.3. As the plaintiff did not evidently accept that proposal, made by the defendant, the Ekrarnama (Exbt.3) cannot form agreement on promise having enforceability in law.

09. Having regard to a decision of the Madras High Court in ***Rajabu Fathima Buhari and Anr. vs. S.V. Ramakrishna Mudaliar and Ors.*** reported in ***AIR 1973 Mad. 70***, it has been observed by the trial court that the purchaser of the property executed a proposal to reconvey the property within three years in favour of seller if the seller pays the consideration money along with 10 per cent additional yield of the sale proceeds but there was no acceptance of this proposal on the part of the said seller. This simple proposal without acceptance was sought to be enforced as an agreement of

reconveyance. But Madras High Court rejecting that attempt observed that one sided proposal made by the purchaser to reconvey having no acceptance from the other side may be a gentleman's understanding but not a formal contract. Accordingly the trial court has held that the Ekrarnama (Exbt.3) is not a contract enforceable under law.

10. On the issue whether the defendant had intentionally inserted three months instead of an agreed period of three years, it is according to the trial court, is preposterous inasmuch as usually the conditions laid down in an agreement are revisited at the time of registration. There was no objection before the Sub-Registrar who had occasion to register the Ekrarnama dated 22.04.2000. As per Section 91 of the Evidence Act, the terms of disposition of the property having been reduced to the form of a document, no evidence shall be given in proof for such terms except the document itself. There is no dispute that the stipulated condition was to repay the loan amount within three months in the Ekrarnama (Exbt.3). According to the trial court, no evidence has been laid by the plaintiff to show that the defendant had taken away the original Ekrarnama (Exbt.3). On such premises, all other issues as referred by the first appellate court were decided against the plaintiff with some additional inputs on the readiness to repay the loan amount etc. by the said judgment dated 04.02.2008 delivered in Title Suit No.14 of 2003.

11. Being aggrieved by that judgment dated 04.02.2008, another appeal being Title Appeal No.18 of 2008 under Section 96 of the CPC was filed in the Court of the District Judge, North Tripura, Kailashahar which was finally taken up for hearing by the same

Additional District Judge, Fast Track Court, North Tripura, Kailashahar who had remanded the suit for retrial on specified issues.

12. By the impugned judgment dated 11.08.2008, the said first appeal being Title Appeal No.18 of 2008 was allowed holding that:

The evidence of the defendant revealed in his cross-examination that question of his intention to execute such sale deed never arose from the date of execution of his purchased deed and he was not bound to execute sale deed in favour of the plaintiff clearly indicated the intention of the defendant which amounts to declination of reconveying the suit property in favour of the plaintiff. From the pleadings and evidence of the defendant I find that the intention of the defendant not to recovery the suit property in favour of the plaintiff though after execution of the Ekrarnama (Exhibit-3) which creates legal obligation upon the defendant and the legal obligation is specifically enforceable.

13. To return such finding, the first appellate court has taken consideration of the various aspects including readiness of payment of the loan money in terms of the Ekrarnama (Exbt.3). Surprisingly, in the course of analysing the fact relevant in the appeal, the first appellate court has also observed that:

Though the period of three months or three years may not have much impact in this suit since the original agreement (Ekrarnama) being in the custody of the defendant and not handed over to the plaintiff. The plaintiff alleged that the defendant managed to execute the agreement (Ekrarnama) mentioning the period as 'three months' instead of 'three years' and he had not even imagined that the defendant would make any such intentional activities. Though the plaintiff on good faith executed the sale deed in favour of the defendant for the suit land assuming that the defendant would execute the agreement (Ekrarnama) as usual. This agreement (Ekrarnama) executed by the defendant on the same ay of execution of sale deed by the plaintiff, is integral part of the transaction. Thereafter on 6.5.2003 the plaintiff again served an Advocate's notice requesting the defendant to execute reconveyance deed in favour of the plaintiff within a period of one month after receipt of the notice on accepting the amount of Rs.2,50,000/- as agreed upon but in response the defendant gave vague

and irrelevant reply dated 29.5.2003. The plaintiff also stated in the plaint that he is ready and willing to have the reconveyance making payment of Rs.2,50,000/- and still remain ready with this amount for getting the desired and contract registered reconveyance deed as to the suit land and ready to bear necessary expense of the reconveyance deed and of its registration etc. So the plaintiff filed the suit before the Court of Learned Civil Judge (Sr. Division), North Tripura, Kailashahar for decree of specific performance of contract for directing the defendant to execute and register reconveyance deed in favour of the plaintiff in respect of the suit land on accepting the amount of Rs.2,50,000/- and also with further direction to the effect that in case the defendant disobeys Court's direction, the reconveyance deed shall be executed and registered at the instance of the Court for and on behalf of the defendant as per rule and also for further direction that plaintiff shall get khash possession of the suit land.

14. The first appellate court in the impugned judgment has also observed that:

Both the sale deed and deed of agreement were executed by the plaintiff and the defendant on the same day i.e. 22.4.2000 separately and got registered. From the recital of the unilateral deed of agreement (Ekrarnama-Exhibit-3) it is revealed that the defendant promised and agreed to reconvey the suit land in favour of the plaintiff if the plaintiff would return the amount of Rs.2,50,000/- within the stipulated period of three months.

15. The first appellate court while delivering the impugned judgment has taken into consideration some circumstances and has drawn presumption which are noted in a nutshell hereafter:

By registered sale deeds (Exbts.9, 10 and 11), the plaintiff has brought in the evidence the land value at the relevant time. Exbt.9 is a sale deed for .28 acres of land on consideration of Rs.2,50,000/- and the said deed was registered on 22.04.2000. Exbt.10 is the another sale deed for a piece of land measuring .04 acres on consideration of Rs.66,000/- and the transaction was made on 19.12.1998. Another sale deed, Exbt.11, is placed on the evidence

which shows that the defendant purchased .04 acres of land on consideration money of Rs.40,000/- and that deed was executed on 15.12.1999 whereas the plaintiff has transferred a land measuring 7.04 acres of Kumarghat Mouja by the said sale deed (Exbt.4) on condition of reconveyance. In short, the first appellate court by the impugned judgment has held that:

So in view of above long discussion, I am of the considered view that though the sale deed (Exhibit-4) cannot be treated to be a mortgage as defined u/S.58(C) of the Transfer of Property Act but considering the entire facts and circumstances said sale deed seems to be a transaction akin to a "mortgage".

16. So far the custody of the registered Ekrarnama (Exbt.3) is concerned, the first appellate court has observed that in all probability, particularly in view of provisions of Section 61(2) of the Registration Act, the registered Ekrarnama was under custody of the plaintiff even though the defendant has categorically stated that the registered Ekrarnama was handed over to the plaintiff. Section 61(2) of the Registration Act provides that the registration of the document shall thereupon be deemed complete and the document shall then be returned to the person who presented the same for registration or to such other person (if any) as he has nominated in writing in that behalf on the receipt mentioned in Section 52. It has been thus observed, *"The defendant failed to prove that after registration of the unilateral deed of agreement (Exhibit 3) he has nominated the plaintiff in writing to receive the said document from the Office of the Sub Registrar, Kailashahar and also failed to prove by giving evidence that the defendant himself had given the document (Exhibit-3) to the plaintiff after its registration. So in view of above legal aspect and*

considering the pleadings and evidence of the parties, I find sufficient force to accept the version of the plaintiff that after execution and registration of the unilateral deed of agreement (Exhibit-3) by the defendant, it was not given to him (plaintiff) and the plaintiff also not nominated by the defendant to receive the same from the Office of the Sub Registrar, Kailashahar. So there are sufficient ground to believe that the defendant had received the document from the Office of the Sub-Registrar, Kailashahar after its registration and kept in his custody."

17. Having referred to a decision of the apex court, in ***Sri Babu Ram Alias Durga Prasad vs. Sri Indra Pal Singh (Dead) by Lrs.*** reported in ***AIR 1998 SC 3021***, it has been observed that under Article 54 of the Limitation Act, 1963, it is stated in the 3rd column that the suit for specific performance had to be filed within three years from the date stipulated in the contract or from the date of refusal of performing the contract. According to the first appellate court, the Ekrarnama (Exbt.3) was executed by the defendant on 22.04.2000 and the stipulated period for re-conveyance of the suit property was three months, which expired on 22.07.2000, even though the plaintiff vehemently denied the same in his plaint. The plaintiff has supported such pleadings while deposing before the trial court. In the matter of enforcement of the agreement or agreement of reconveyance, time is not always the essence of the contract unless the agreement specifically stipulates and there are special fact and circumstances in support thereof. As such, it has been observed by the first appellate court that:

..... in the present suit the time will not effect for enforcement of the unilateral deed of agreement keeping in mind the entire facts and circumstances of the case. From the above discussion I found reasonable ground to believe that the defendant executed the unilateral deed of agreement and contents of the said document (Exhibit 3) was written according to his version since it was kept in his custody after its registration and not handed over to the plaintiff. The plaintiff filed the instant suit within the time before the Learned Trial Court against the defendant seeking relief for specific performance of contract.

18. As regards the readiness, the appellate court has returned the following finding:

14. Readiness and willingness cannot be considered as a strait-jacket formula ad these have to be determined from the entirety of the facts and surrounding circumstance relevant to the intention and conduct of the party concerned. If the averment in the plaint as a whole do clearly indicated the readiness and willingness of the plaintiff to fulfil his part of the obligation under the contract which is the 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 for specific performance of contract for same. The basic principle behind s.16(C) read with explanation(II) of the said Section is that any person seeking benefit of the Specific Performance of Contract, must manifest that his conduct has been blemishless throughout entitling him to the specific relief. The Court is to grant relief on the basis of the contract on the person seeking relief. If the pleadings manifest that the conduct of the plaintiff entitles him to get the relief on perusal of the plaint, he should not be denied the relief. The institution of the suit for specific performance of contract and prosecution of the case with due diligence be considered as readiness and willingness of the plaintiff to perform his part of contract. The intention and conduct of the parties may be gathered from the pleadings, evidence and surrounding facts and circumstances of the case. In Sant Lal, Plaintiff V. Shyam Dhawan, Defendant, AIR 1986 Delhi 275, Hon'ble Delhi High Court held in para 16 that-

".....The requirement of law is simply the continuous readiness and willingness on the part of the plaintiff to perform his part of the contract throughout from the commencement of the agreement to sell till the hearing of the suit but that does not mean that the plaintiff was expected to carry on the cash balance price of Rs.1,45,000/- in his pocket during all the aforesaid period, but what he was to show was simply his continuous readiness and willingness to pay that balance price only as and when the appropriate occasion for the

same was to arise. The expression "readiness and willingness" cannot be treated as a strait-jacket formula and has to be determined from the totality of facts and circumstances relevant to the case and also to the conduct of the party concerned and in order to be real has to be backed by the capacity to do so."

In Prag Datt, Appellant V. Smt. Saraswati Devi and another, Respondents, AIR 1982 Allahabad 37, Hon'ble Allahabad High Court held in Para 12 that –

"..... If from the averment made in the complaints and the surrounding circumstances, it is established in substance that the plaintiff was ready and willing to perform his part of the contract and had remained ready and willing to perform the same throughout, it would not be proper to non-suit him on a verbal omission here or there. It has to be remembered that Section 16(c) or Form 47 of Appendix A of Civil P.C. does not provide for booby trap of which an unscrupulous litigant should be allowed to take advantage."

15. In Ramesh Ch. Chandiok and another, Appellant V. Chuni Lal Saborwal (dead) by his legal representative and others, Respondents, AIR 1971 SC 1238 our Hon'ble Apex Court opined that –

"..... 'Readiness' and 'willingness' cannot be treated as a strait-jacket formula. These have to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the party concerned."

16. In P. D.Souza V. Shondrilo Nidu reported in AIR 2004 S.C. 4472 our Hon'ble Apex Court held in Para 19 –

"..... It is indisputable that in a suit for specific performance of contract the plaintiff must establish his readiness and willingness to perform his part of contract. The question as to whether the onus was discharged by the plaintiff or not will depend upon the fact and circumstances of each case. No strait-jacket formula can be laid down in this behalf."

19. So far the offer to make the repayment for showing the readiness is concerned, in the impugned judgment it has been observed that the plaintiff stated in paragraphs No.4, 5, 9, 10 and 11 of his plaint that in the month of March 2003 he requested the defendant to execute the reconveyance deed in his favour by receiving loan money and also requested the defendant much earlier than that,

even within 2/3 months from the said transaction to execute the reconveyance deed. But the defendant requested the plaintiff to wait for some time, though the plaintiff on good faith waited but the defendant only consumed time as per his design. It has been further observed that the finding no alternative the plaintiff served a notice on 05.04.2003, requesting the defendant to execute reconveyance deed in his favour on receiving the said money but the defendant did not respond to his notice. Then, he collected a certified copy of the deed of agreement (Exbt.3) on 25.04.2003 but surprisingly he found in the said deed of agreement (Exbt.3), the period was mentioned as 'three months' instead of 'three years'. Thereafter, on 06.05.2003, the plaintiff again served a notice requesting for reconveyance and for accepting the amount of Rs.2,50,000/-. The plaintiff has asserted that he was always ready to repay the said amount. But those facts as observed in the impugned judgment were squarely denied by the defendant. Thus, the fate of the suit depended on evidence placed by the plaintiff.

20. From the statement of PW-2, as has been recorded in the judgment, it revealed to the first appellate court that the time stipulated for repayment was 'three years' not 'three months' which was alleged of have been unilaterally inserted by the defendant. It has also been observed that immediately after purchase the defendant got the land mutated and a new khatian was prepared on 09.05.2000, even though there was a condition that on repayment the land was to be reconveyed. Thus, finally the first appellate court has observed that:

.....the defendant by refusing to reconvey the suit property to the plaintiff, has committed breach of agreement (Exhibit-3) and the plaintiff was and still ready and willing to perform his part of contract. So relief should be granted to the plaintiff under the Specific Relief Act.”

The defendant being aggrieved by such decision of the first appellate court has preferred this appeal.

21. Mr. S. Deb, learned senior counsel and Mr. S. M. Chakraborty, learned senior counsel appearing for the appellant has submitted that the Ekrarnama was executed on 22.04.2000 and the period for making the repayment of the amount as stipulated in the Ekrarnama was 'three months' therefrom. It is the admitted position that the respondent did not tender the consideration money to the appellant within such period and hence the enforceability of the contract had lost its force. Mr. Deb, learned senior counsel has further submitted that since the contract is in writing and the registered one, the provisions of Section 91 and Section 92 of the Evidence Act would come into play. Hence, the finding of the first appellate court that the time would not impact enforcement of the unilateral deed of agreement keeping in mind the entire facts and circumstances of the case is unsustainable. The other finding that the defendant executed the unilateral deed of agreement and the contents thereof (Exbt.3) was written according to his version and since it was kept in his custody after its registration and not handed over to the plaintiff, it cannot create any bar for the plaintiff seeking relief for specific performance of their contract. Mr. Deb, learned senior counsel has contended in that context that if the finding is view from the different and substantive angle, it has to be deemed that there was no valid

contract and in absence of the valid contract there would be no relevance of Section 58 of the Transfer of Property Act creating any obligation for the defendant for reconveyance. Mr. Deb, learned senior counsel has further submitted that Section 58(C) of the Transfer of Property Act cannot have any manner of application in the case in hand for the reason that proviso to Section 58(C) of the Transfer of Property Act postulates that no transaction shall be deemed to be a mortgage unless the condition as embodied in the document which effects or purports to effect the same. It is an admitted position that the condition for reconveyance is not embodied in the sale deed (Exbt.4). But such provision has been made by a parallel registered document, Exbt.C. If the specific performance is sought, the basis must be a concluded contract as provided under Section 10 of the Specific Relief Act, 1963 which, however, provides *inter alia* that the specific performance of any contract may in the discretion of the Court be enforced (a) when there exists no standard for ascertaining actual damage caused by the non-performance of the act agreed to be done; and (b) when the act agreed to be done is as such that compensation in money for its non-performance would not afford adequate relief. Unless and until contrary is proved, the court shall presume that the breach of a contract to transfer immovable property cannot be adequately compensated by money. It has been further pointed out by Mr. Deb, learned senior counsel that as per Section 15 of the Specific Relief Act, a specific performance of a contract may be obtained by a person who has performed his part otherwise he fails to acquire the required standing to seek the specific performance of the contract. In this case, in tune with the term as stipulated in the

registered Ekrarnama, the plaintiff could not pay the consideration money in the form of 'repayment'.

22. From the other side, Mr. D. K. Biswas, learned counsel while refuting the submissions made by the learned counsel for the appellant has submitted that the registered Ekrarnama (Exbt.3) was unilaterally drafted and registered at the instance of the appellant. Even though it was agreed that the three years time would be extended for purpose of repayment of the consideration money and reconveyance thereof but in the registered agreement (Exbt.3) the time has been stipulated as 'three months'. It would be apparent that the plaintiff-respondent was under impression that the time for repayment of the said consideration money was 'three years' and he expressed his intention for repayment of the consideration money even before the 'three months', even though he was entitled to make such payment within three years. But to his surprise when he obtained a certified copy of the registered agreement or Ekrarnama (Exbt.3), it was discovered that the time for repayment has been provided as 'three months'. It was a fraud on the condition of reconveyance. If the entire conduct of the plaintiff-respondent is analysed, it would be apparent that he was all along ready for making the payment of the consideration money to ensure the reconveyance but the appellant had foiled this, as he had astutely manipulated the condition of reconveyance.

23. Mr. Biswas, learned counsel has further submitted that when such allegation of exercising fraud is made in the plaint and if the fraud is really manifest on the face of the records, the provisions of Section 91 and 92 of the Evidence Act cannot create a bar for

ensuring the specific performance of the said contract. In this regard he has referred a decision of the apex court in ***Limbaji and Ors. Vs. State of Maharashtra*** reported in **(2001)10 SCC 340**. In ***Limbaji Vs. State of Maharashtra*** the apex court has observed as under:

"As the presumption Under Section 114 of Evidence Act looms large in this case a brief discussion on the basic postulates and evidentiary implications of presumption of fact may not be out of place. A presumption of fact is a type of circumstantial evidence which in the absence of direct evidence becomes a valuable tool in the hands of the Court to reach the truth without unduly diluting the presumption in favour of the innocence of the accused which is the foundation of our Criminal Law. It is an inference of fact drawn from another proved fact taking due note of common experience and common course of events. Holmes J. in Greer v. U.S. 245 USR 559 remarked "a presumption upon a matter of fact, when it is not merely a disguise for some other principle, means that common experience shows the fact to be so generally true that Courts may notice the truth". Section 114 of the Evidence Act shows the way to the Court in its endeavor to discern the truth and to arrive at a finding with reasonable certainty. Under the Indian Evidence Act, the guiding rules for drawing the presumption are set out broadly in the section. Section 114 enjoins: "the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to facts of the particular case." Having due regard to the germane considerations set out in the section certain presumptions which the Court can draw are illustratively set out. It is obvious that they are not exhaustive or comprehensive. The presumption Under Section 114 is, of course, rebuttable. When once the presumption is drawn, the duty of producing evidence to the contra so as to rebut the presumption is cast on the party who is subjected to the rigour of that presumption. Before drawing the presumption as to the existence of a fact on which there is no direct evidence, the facts of the particular case should remain uppermost in the mind of the Judge. These facts should be looked into from the angle of common sense, common experience of men and matters and then a conscious decision has to be arrived at whether to draw the presumption or not.

Among the illustrations appended to Section 114 of the Evidence Act, the very first one is what concerns us in the present case: "The Court may presume -- that a man who is in possession of stolen goods soon after the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession."

Taylor in his treatise on The Law of Evidence has this to say on the nature and scope of the presumption similar to the one contained in Section 114(a):

The possession of stolen property recently after the commission of a theft, is prima facie evidence that the possessor was either the thief, or the receiver, according to the other circumstances of the case, and this presumption, when unexplained, either by direct evidence, or by the character and habits of the possessor, or otherwise, is usually regarded by the Jury as conclusive. The question of what amounts to recent possession varies according to whether the stolen article is or is not calculated to pass readily from hand to hand.

This presumption which in all cases is one of fact rather than of law, is occasionally so strong as to render unnecessary any direct proof of what is called the corpus delicti. Thus, to borrow an apt illustration from Maule, J., if a man were to go into the London Docks quite sober, and shortly afterwards were found very drunk, staggering out of one of the cellars, in which above a million gallons of wine are stored, "I think," says the learned Judge -- and most persons will probably agree with him -- "that this would be reasonable evidence that the man had stolen some of the wine in the cellar, though no proof was given that any particular vat had been broached, and that any wine had actually been missed."

[Emphasis supplied]

24. While scrutinizing the records, it has surfaced from the examination-in-chief of the plaintiff (PW-1) that in the first part of March 2003, he requested the defendant to execute the reconveyance deed in his favour on repayment of the loan money. But the defendant requested him to wait for some time. As a result, on 05.04.2003 he served the notice requesting the defendant-appellant to reconvey the suit property, receiving the loan money. But there was a mistake that the sum to be returned was incorrectly referred as Rs.2,75,000/- in place of Rs.2,50,000/-. He has further stated that after obtaining the certified copy of the Ekrarnama he discovered that the defendant 'managed' to execute the Ekrarnama by mentioning the period of 'three months' instead of 'three years' and he had no idea that the

defendant-appellant would indulge in such activities, as he had the unimpeachable trust on the defendant. He has stated that he was all along willing to make the payment of Rs.2,50,000/- but for the ill design of the defendant-appellant, he could not do it. He has also stated that the defendant-appellant even without waiting for three months got the mutation vide Khatian No.359 on culmination of a proceeding being MR Case No.04 of 2000, which was instituted on 09.05.2000. But in the cross-examination, the plaintiff has categorically asserted that *"I cannot say what was the term of period for repayment of the loan in the agreement."* He has also admitted that he did not give any notice to the defendant for rectification of the period of the repayment of the loan in the Ekrarnama (Exbt.3). After the suit was remanded for fresh adjudication, the additional examination-in-chief was submitted by the plaintiff. In that examination-in-chief he has stated that the stipulated period in the agreement was never 'three months' and the act of the defendant manipulating to get inserted the 'months' instead of 'years' in the agreement dated 22.04.2000 beyond his knowledge was deliberate. He has also admitted that the defendant has already converted the suit property into the brick field. In the cross-examination, he has strangely stated that *"On perusal of the Exbt.4, I am saying that I just signed the deed but I cannot say whether it is sale deed. I do not agree that the Bishnupada Saha is the owner of the suit land by the course of Exbt.4."* He has further stated that he submitted a cheque of Rs.2,50,500/- dated nil in the court by Firisti dated 02.01.2008. The plaintiff has admitted that the Ekrarnama (Exbt.3) is a unilateral promise and that does not bear the signature of the plaintiff. One of

the witnesses, namely Sujit Choudhury (PW-2) has also stated that he was also witness to the Ekrarnama (Exbt.3) and according to him the period of having the loan money returned from the plaintiff was 'three years'. However, he has admitted in the cross-examination that the sale deed and the Ekrarnama were not read over in his presence. Another Subrata Roy (PW-3) has stated that during discussion between the plaintiff and the defendant regarding the conditional sale of the land property, he was present and the period for returning the loan money was 'three years'. In the cross-examination, both PWs.2 and 3 have admitted that they were the employees of the plaintiff.

25. The defendant has raised objection as to the nature of the document (Exbt.3) contending that, that document (Exbt.3) cannot be treated as an agreement as it was a unilateral promise subject to the conditions as made therein. Unless acceptance of the said promise is established, there cannot be any enforceability of the said promise. Section 25 of the Indian Contract Act provides that an agreement made without consideration is void, unless - (1) it is expressed in writing and registered under the law for the time being in force for the registration of documents, and is made on account of natural love and affection between the parties standing in a near relation to each other; or unless (2) it is a promise to compensate, wholly or in part, a person who has voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or (3) unless it is a promise, made in writing and signed by the person to be charged therewith or by his agent generally or specially authorised in that behalf, to pay wholly or in part debt, of which the creditor might have enforced payment, but for the law of

limitation of suits. In any of these cases, such an agreement is a contract.

26. What has appeared that the said contract which is under consideration might have come within the province of Section 25 of the Contract Act even if, that is without any consideration for relation as referred. In this context, the time stipulation as to the period of repayment has to be understood. It is in the general course of action cannot be understood that someone would provide a loan of Rs.2,50,000/- without any benefit or consideration for such a long time of three years and as such what Mr. Biswas, learned counsel has submitted that the Section 114 of the Evidence Act would enable this Court to draw presumption of fraud is entirely misplaced. That apart, no material admittedly have been placed to show the fraud has vitiated the contract. If that is the basis of the challenge, this Court is constrained to hold that in view of Section 17 of the Indian Contract Act, the fraud has been defined as the act committed by a party to a contract, or with his connivance, or by his agents , with intent to deceive another party thereto or his agent, or to induce him to enter into the contract: (1) the suggestion as a fact, of that which is not true, by one who does not believe it to be true; (2) the active concealment of a fact by one having knowledge or belief of the fact; (3) a promise made without any intention of performing it; (4) any other act fitted to deceive; (5) any such act or omission as the law specially declares to be fraudulent. It has also been explained that mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person

keeping silence to speak, or unless his silence is, in itself, equivalent to speech. Had the fraud been really pleaded, that would have made the contract void and the void contract cannot be enforced but the damage for such void contract could be claimed by the party adversely affected. Even the same would be the effect for the misrepresentation of any fact. The suit is not for declaring the contract as void on the ground that the fraud has been exercised. Rather, the suit has been filed for the enforcement of the contract which according to the plaintiff was not properly constructed. This is really a strange situation. The moot question that would cover both the substantial questions of law, whether there can be enforcement unless the plaintiff acceded that the registered Ekrarnama (Exbt.3) is a valid contract and he has cause to seek specific performance of the said contract inasmuch as he had performed his part or he had been all along ready to perform his part here, by way of making the payment.

27. The law is well settled that when an agreement is void, all its terms are void and none of its clauses can be enforced except where the same constitutes a separate and independent agreement severable from the main agreement. The apex court in ***Tarsem Singh Vs. Sukhminder Singh*** reported in ***(1998)3 SCC 471*** has observed as under:

"This section provides that an agreement would be void if both the parties to the agreement were under a mistake as to a matter of fact essential to the agreement. The mistake has to be mutual and in order that the agreement be treated as void, both the parties must be shown to be suffering from mistake of fact. Unilateral mistake is outside the scope of this section."

28. It has been further held by the apex court that the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused to receive from the party who has committed the breach of contract, compensation not exceeding the amount mentioned in the agreement or the penalty stipulated therein. But that Section also contemplates a valid and binding agreement between the parties. Since the stipulation of forfeiture of the earnest money is part of the contract, it is necessary for enforcement of that stipulation that the contract between the parties is valid. If the forfeiture clause is contained in an agreement which is void on account of a fact that the parties did not mutually understand and were suffering from a mistake of fact in respect of a matter which was essential to the contract, it cannot be enforced as the agreement itself and is void under Section 20 of the Contract Act. A void agreement cannot be split up. None of the parties to the agreement can be permitted to seek enforcement of a part only of the contract through a court of law. If the agreement is void, all its terms are void and none of the terms except the certain known exceptions specially where the clause is treated to constitute a separate and independent agreement, severable from the main agreement, can be enforced separately and independently. Therefore, the plaintiff cannot be permitted to seek a specific performance after alleging fraud exercised on him at the time of the execution of the alleged contract.

29. Mr. Deb, learned senior counsel has correctly submitted that for execution of Ekrarnama (Exbt.3) this transaction cannot be brought under Section 58(C) of the Transfer of Property Act. In ***Shyam Singh Vs. Daryao Singh (Dead) by Lrs. and others***

reported in **(2003)2 SCC 160** the apex court has enunciated the law as under:

"The two documents - one of sale and the other of repurchase - were executed on the same day. As the sale and agreement of repurchase are contained in two separate documents, although contemporaneously executed, the transaction cannot be treated to be a 'mortgage' as defined in Section 58(C) read with proviso thereunder of the Transfer of Property Act but it seems to be a transaction akin to a 'mortgage' - if not 'mortgage proper'."

30. If it is not a mortgage proper, the defendant under no obligation to have from the mortgager any permission to indulge in any transaction as to the land. However, the defendant is saddled by the obligation created by the agreement of repurchase. Even the observation by the first appellate court that time is not the essence of the said contract is not sustainable. In ***Babu Ram alias Durga Prasad Vs. Indra Pal Singh (Dead) by Lrs.*** reported in **(1998)6 SCC 358**, the apex court has observed that:

"This Court has recently held in Bismillah Begum v. Rahmatullah Khan, [1998]2 SCC 226 that time is the essence of contract in a contract of reconveyance. If a vendor, who agrees to sell his immovable property under an agreement of sale or who executes a sale deed, is given the option to repurchase the property within a particular period, then such an option must be exercised strictly within the said period. The principle stated under Section 55 of the Contract Act that in regard to contracts of sales of immovable property time is not the essence of contract as stated by the Privy Council in A.H. Mama v. Flora Sassoon: AIR (1928) PC 208: 55 IA 360 (PC) does not apply to contracts of reconveyance.

On the facts of the case, it will be seen that the plaintiff exercised his option on 12.7.1968 within five years from the date of sale deed 15.7.1964 and hence the defendant - vendee was bound to reconvey the property by receiving Rs. 7000 from the plaintiff as stipulated in the contract. This point is held in favour of the plaintiff."

31. The plaintiff has nowhere stated that he had accepted the condition of 'three months' as provided by the purported Ekrarnama

(Exbt.3) but raised objection as to the time of reconveyance. Hence, the said contract cannot be treated as the valid contract for specific performance and if the contract is acceded to, the plaintiff is bound to go by the condition of that contract. It is in the evidence that the plaintiff did not tender the consideration amount within the period of three months and hence the agreement of reconveyance (Ext.3) cannot be enforced.

Having observed thus, the impugned judgment and decree are required to be interfered with and accordingly are interfered and set side. In the result, this appeal is allowed and in consequence thereof, the suit is dismissed.

Draw the decree accordingly.

Send down the LCRs thereafter.

JUDGE

MB