

**IN THE CIRCUIT BENCH OF CALCUTTA HIGH COURT
AT JALPAIGURI
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE
(Via Video Conference)**

PRESENT:

**THE HON'BLE JUSTICE RAVI KRISHAN KAPUR
AND
THE HON'BLE JUSTICE UDAY KUMAR**

**FAT 4 of 2024
With
IA No. CAN 2 of 2024**

**Ankit Kumar Kedia and Anr.
-Vs-
Sharda Devi Agarwal and Ors.**

For the appellants : Mr. Deborshi Dhar

For the respondents : Mr. Rajat Das

Judgment on : 16.04.2025

Uday Kumar, J. : –

IA No. CAN 2 of 2024

1. By consent of the parties both the application and the appeal were taken up for hearing analogously.
2. CAN 2 of 2024 is an application for restoration. The appellants seek recalling of an order dated 26th November, 2024 dismissing the appeal for default. The proceeding has been repeatedly adjourned.
3. Upon consideration of the grounds, we are satisfied that there is sufficient cause and adequate reason for recalling of the order dated 26th November 2024. The respondents also do not seriously oppose the prayer for restoration of the appeal. In such circumstances, CAN 2 of 2024 stands allowed.

FAT 4 of 2024

1. This appeal arises out of a judgment dated 13th October, 2023 and decree dated 22th November, 2023 passed by the Learned Civil Judge (Senior Division), at Jalpaiguri in Title Suit No. 240 of 2022. By the impugned judgment and decree, this suit for specific performance of an agreement for sale of land has been dismissed, inter alia, on the ground that the original agreement executed between the parties had not been produced as evidence by the appellants.
2. In brief, the parties had entered into an agreement for sale dated 11th May, 2022 for a plot of land measuring 10 kathas of land situated at R.S plot no. 478 (corresponding to LR Plot nos. 25 and 26) appertaining to R.S. Khatian no. 623 (corresponding to L.R. No. 217 to 223) at Mouza Dabgram under PS. Bhaktinagar (the suit premises) for a consideration of Rs. 3,10,00,000/-.
3. Pursuant to the agreement for sale, the appellants paid a sum of Rs. 25,00,000/- (Rupees Twenty five lakhs only) by fourteen separate undated cheques to the respondents. Under the terms of the agreement, the appellants had also agreed to pay additional instalments on 15.05.2022, 15.07.2022, 15.09.2022 and 15.10.2022 respectively. However, the appellants failed to honour their obligations and were unable to pay the additional amounts as stipulated under the agreement. In such circumstances, the appellants issued a notice on 10th September 2022, requesting them to perform their obligations within the stipulated time. By a reply dated 10th October 2022, the respondents responded that the agreement for sale stood cancelled in view of the non-payment of

the balance consideration by the appellants as stipulated under the agreement.

4. Being aggrieved by the above termination, the appellants filed this suit praying for specific performance of the agreement dated 11th May 2022, execution and registration of the deed of sale and consequential reliefs. By the impugned decree, the suit was dismissed on the ground that the appellants had failed to prove the agreement nor were the appellants ready or willing to perform their obligations under the agreement.
5. On behalf of the appellants it is contended that, despite the appellants readiness and willingness to pay the balance consideration, the respondents deliberately cancelled the agreement only to obtain a higher price for the suit premises. It is further alleged that in terms of the agreement, the appellants had handed over a cheque for Rs. 25 lakhs and the respondents had also issued money receipts in respect of the same on 11th May 2022. However, the respondents chose not to encash the same. During cross-examination, the witness on behalf of the respondents had admitted that they had failed to inform the appellants about the cancellation of the agreement. Nor did they issue any show cause notice on the refusal and failure of the appellants to make the balance payments. In addition, the respondents had failed to execute the sale deed by 15th October 2022 as agreed upon between the parties. It is further contended that the appellants had proved their readiness and willingness by performing their part of the contract. In support of such contention the appellants rely on *P. Ramasubbamma v. V. Vijayalakshmi* (2022) 7 SCC 384 and *Sughar Singh v. Hari Singh* (2021) 17 SCC 705. The appellants also contend that in order to prove default, the only question

which must be enquired into is whether there was lawful tender of consideration or not [*Damadilal v. Parashram*, (1976) 4 SCC 855 and *Bir Singh v. Mukesh Kumar*, (2019) 4 SCC 197]. Order XII Rule 6 of the Civil Procedure Code (CPC) 1908 allows the Court to pass a judgment based on admissions of fact made by a party. It is also contended that the respondents had failed to prove that the appellants were neither ready nor willing to perform their obligations under the agreement.

6. On behalf of the respondents it is submitted that, the impugned judgment and decree does not warrant any interference whatsoever. The appellants had failed to pay the subsequent amounts of Rs. 25,00,000/- (Rupees Twenty Five Lakhs) by 15th May 2022 and Rs.50,00,000 (Rupees Fifty Lakhs) by 15th July 2022 respectively as provided for in the agreement. As such, there was default by the appellants and the agreement stood terminated. Additionally, since no date was mentioned on the fourteen cheques which had been submitted by the appellants, the respondents were unable to encash the same. In the above circumstances, the conduct of the appellants conclusively proved that they were neither ready nor willing to perform the essential conditions of the contract and the prayer of specific performance was liable to be dismissed. The agreement dated 11 May, 2022 has neither been adduced as evidence nor produced before the Trial Court. In such circumstances, the Court was justified in drawing an adverse inference under section 114 (g) of the Evidence Act 1872. In support of such contentions, the respondents rely on *Sukhwinder Singh v. Jagroop Singh* (2021) 20 SCC 245, *Mohinder Kaur v. Sant Paul Singh* 2019) 9 SCC 358, *Mohd. Mukhtar*

v. Mahesh Kumar 2022 SCC OnLine Cal 3052, CITI Bank N.A. v. Standard Chartered Bank (2004) 1 SCC 12.

7. In its amended form, upon an agreement being duly executed, the appellant if otherwise found under the Act to be ready and willing to perform his obligations under the agreement, grant of specific performance is a matter of course. There remains no discretion in the matter [*Sughar Singh v. Hari Singh (2021) 17 SCC 705*]. However, it is still incumbent on the appellant to prove readiness and willingness to perform the essential conditions of the contract.
8. For convenience, the relevant sections of the Specific Relief Act, 1963 are as follows:-

10. Specific performance in respect of contracts.—*The specific performance of a contract shall be enforced by the Court subject to the provisions contained in sub-section (2) of section 11, section 14 and section 16.*

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16. Personal bars to relief.—*Specific performance of a contract cannot be enforced in favour of a person—*

a) who has obtained substituted performance of contract under section 20; or

(b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or

(c) who fails to prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation.—*For the purposes of clause (c),—*

- (i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;
- (ii) the plaintiff must prove performance of, or readiness and willingness to perform, the contract according to its true construction.

9. In order to obtain specific performance of a written contract, the appellant must necessarily prove the agreement and its terms and conditions. Sections 61, 63, 65, 101, 102 and 103 of the Indian Evidence Act, 1872 reads as follows:

"61. Proof of contents of documents. — The contents of documents may be proved either by primary or by secondary evidence.

63. Secondary evidence. — Secondary evidence means and includes —

- (1) certified copies given under the provisions hereinafter contained;
- (2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;
- (3) copies made from or compared with the original;
- (4) counterparts of documents as against the parties who did not execute them;
- (5) oral accounts of the contents of a document given by some person who has himself seen it.

65. Cases in which secondary evidence relating to documents may be given.—Secondary evidence may be given of the existence, condition, or contents of a document in the following cases: —

- (a) when the original is shown or appears to be in the possession or power — of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;
- (b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in 1 [India] to be given in evidence;

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible. In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

101 Burden of Proof-- Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

102 On whom the burden of proof lies-- The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

103 Burden of proof as to particular fact--The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person."

10. In *Vijay vs. Union of India* 2023 SCC OnLine SC 1585, it has been held as follows:

34. After perusing various judgments of this Court, we can deduce the following principles relevant for examining the admissibility of secondary evidence:

34.1. Law requires the best evidence to be given first, that is, primary evidence.

34.2. Section 63 of the Evidence Act provides a list of the kinds of documents that can be produced as secondary evidence, which is admissible only in the absence of primary evidence.

34.3. If the original document is available, it has to be produced and proved in the manner prescribed for primary evidence. So long as the best evidence is within the possession or can be produced or can be reached, no inferior proof could be given. [*J. Yashoda v. K. Shobha Rani*, (2007) 5 SCC 730 : (2007) 3 SCC (Cri) 9]

34.4. A party must endeavour to adduce primary evidence of the contents, and only in exceptional cases will secondary evidence be admissible. The exceptions are designed to provide relief when a party is genuinely unable to produce the original through no fault of that party. [*M. Chandra v. M. Thangamuthu* (two-Judge Bench), (2010) 9 SCC 712 : (2010) 3 SCC (Civ) 907]

34.5. When the non-availability of a document is sufficiently and properly explained, then the secondary evidence can be allowed. [*Neeraj Dutta v. State (NCT of Delhi)*, (2023) 4 SCC 731 : (2023) 2 SCC (Cri) 352]

34.6. Secondary evidence could be given when the party cannot produce the original document for any reason not arising from his default or neglect. [*Surendra Krishna Roy v. Mohd. Syed Ali Matwali Mirza*, 1935 SCC OnLine PC 56 : (1935-36) 63 IA 85]

34.7. When the copies are produced in the absence of the original document, they become good secondary evidence. Still, there must be foundational evidence that the alleged copy is a true copy of the original. [*H. Siddiqui v. A. Ramalingam* (two-Judge Bench), (2011) 4 SCC 240 : (2011) 2 SCC (Civ) 209]

34.8. Before producing secondary evidence of the contents of a document, the non-production of the original must be accounted for in a manner that can bring it within one or other of the cases provided for in the section. [*H. Siddiqui v. A. Ramalingam* (two-Judge Bench), (2011) 4 SCC 240 : (2011) 2 SCC (Civ) 209]

34.9. Mere production and marking of a document as an exhibit by the Court cannot be held to be due proof of its contents. [*Neeraj Dutta v. State (NCT of Delhi)*, (2023) 4 SCC 731 : (2023) 2 SCC (Cri) 352] It has to be proved in accordance with the law. [*H. Siddiqui v. A. Ramalingam* (two-Judge Bench), (2011) 4 SCC 240 : (2011) 2 SCC (Civ) 209]

11. In view of the above, the appellants were bound to prove to the satisfaction of the Court, the agreement of which specific performance is claimed. The initial burden of proving the agreement was squarely on the appellants. [*Kumbhan Lakshmanan v. Tangirala Venkateswarlu*, 1949 SCC OnLine PC 26.]

12. Section 114(g) of the Indian Evidence Act, 1872, empowers a Court to draw an adverse inference of certain facts which, if produced, would be unfavourable to the person who has withheld it. Ordinarily, it is the duty of a party to lead the best evidence in his possession which would throw light on the issue in controversy and in case such material evidence is withheld, the Court may draw an adverse inference under Section 114(g).
13. In *Ajay Kumar D. Amin v. Air France*, (2016) 12 SCC 566, it has been held as follows:-

“6. While examining the correctness of the judgment in the reference by the City Civil Court and the correctness of the finding recorded with regard to non-production of documents, the High Court ought not to have taken a different view in view of the said direction issued by the Commissioner for Taking Accounts in the preliminary decree which has been modified by the High Court in Ajaykumar D. Amin v. AIR France [Ajaykumar D. Amin v. AIR France, First Appeal No. 640 of 1981, decided on 19-2-1985 (Guj)] . Therefore, the fact remains that on the important aspect of the matter i.e. non-production of the documents, the adverse inference has rightly been drawn by the Commissioner as well as by the trial court after adverting to the Privy Council judgment in Moti Lal v. Kundan Lal [Moti Lal v. Kundan Lal, 1917 SCC OnLine PC 2 : AIR 1917 PC 1] , wherein it has been held that failure by a party in spite of the order for discovery to produce account books which ought to have been produced or should have explained the non-production raises a presumption that the contents were unfavourable to the party. Thus, adverse inference should be drawn against the respondent.

7. Again, in support of the said proposition, the Commissioner for Taking Accounts rightly placed reliance upon the judgment of this Court in Gopal Krishnaji Ketkar v. Mohd. Haji Latif [Gopal Krishnaji Ketkar v. Mohd. Haji Latif, AIR 1968 SC 1413] , wherein this Court held that under Sections 114(g) and 103 of the Evidence Act, 1872, a party in possession of best evidence which throws light on the issue in controversy withholding it, the Court ought to draw an adverse inference against it notwithstanding that onus of proof does not lie on him and the party cannot rely on abstract doctrine of onus of proof or on the fact that he was not called upon to produce it.”

14. The contents of a document may be proved either by primary or secondary evidence. As a general rule, the contents of a document can best be proved by the document itself. In the facts of this case, the appellants consciously chose not to produce the agreement dated 11th May 2022. There was simply no evidence in this regard. In such circumstances, the appellants have failed to prove the agreement or the contents of the same.
15. The Trial Court has taken into consideration that the appellants did not present the agreement for sale as evidence and had submitted Exhibit 4, a General Diary Entry (G.D.E) dated 19.04.2023, recorded at Siliguri Police Station (G.D.E no. 1089) stating that the original agreement dated 11.05.2022 was lying with their Advocate and was lost from the Advocate's custody on 18.04.2023. This was the only evidence on record and was found to be an unconvincing explanation by the Trial Court. In such circumstances, an adverse inference drawn by the Trial Court that the agreement was unregistered and insufficiently stamped since the same involved immovable property and that is the reason for non-production does not warrant any interference.
16. The payment of the first instalment does not in itself prove that the appellants had all along complied with the remaining terms of the agreement and were ready and willing to pay the balance amount within the stipulated time. On the contrary, the evidence suggests otherwise. The respondents' failure to encash the earlier cheques does not discharge the appellant from making additional payments as stipulated under the agreement. There was also no evidence furnished of any payments attempted to be made by the appellants under the agreement.

On this aspect, PW-1 had deposed that he could always provide evidence of sufficient bank balance but chose not to provide the same. In view of the above, the finding that the appellants' case was weak due to their failure to substantiate their claims is also not liable to be interfered with.

17. Section 49 of the Registration Act, 1908 provides that an unregistered document cannot be received as evidence of any transaction affecting such property or conferring such power unless it has been registered. Section 35 of the Indian Stamp Act prohibits admissibility of an unstamped or insufficiently stamped instrument. As such, an insufficiently stamped document is inadmissible in evidence. However, since no primary nor secondary evidence of the agreement of sale was attempted to be proved by the appellants the question of applicability of the proviso to section 49 of the Act does not arise for consideration in the facts of this case [*S. Kaladevi v. V.R. Somasundaram* (2010) 5 SCC 401 and *R. Hemalatha v. Kashthuri* (2023) 10 SCC 725].
18. For the above reasons, there is no reason to interfere with the finding of the Trial Court that failure to adduce the agreement was vital and non-production of the same was only to circumvent the rigours of the Registration Act, 1949 and the Indian Stamp Act 1899. [*Jupudi Kesava Rao v. Pulavarthi Venkata Subbarao*, (1971) 1 SCC 545 at paragraphs 13 and 14 and *Interplay Between Arbitration Agreements under A&C Act, 1996 & Stamp Act, 1899*, (2024) 6 SCC 1].
19. There are also no grounds which justify interference with the finding that the appellants were neither ready nor willing to perform the agreement in view of violation of Clause 2 of the agreement i.e. payment

of the instalments dated 15.05.2022, 15.07.2022 and 15.09.2022 respectively. This was also fatal to the case of the appellants. This also demonstrates that the appellants were neither ready nor willing to perform the agreement. With regard to readiness and willingness of a party to fulfil the conditions of the contract, the Apex Court has repeatedly held that if the appellant fails to prove that the plaintiff has always and continuously been ready and willing to perform his part of contract then he is not entitled to specific performance of the contract.

20. In *Katta Sujatha Reddy v. Siddamsetty Infra Projects (P) Ltd.*, (2023) 1 SCC 355 it was held that if a purchaser breaches the essential condition of the contract, it disentitles him to his claim of specific performance. The same was also held in *Surinder Kaur v. Bahadur Singh*, (2019) 8 SCC 575 where it was found that a vendee who does not perform one of the essential promises in a contract is not entitled to the discretionary relief of specific performance of that contract. In *Mehboob-Ur-Rehman v. Ahsanul Ghani*, (2019) 19 SCC 415, the Hon'ble Supreme Court held that a party cannot be granted the relief of specific performance if he fails to prove that he has already performed or has always been ready and willing to perform the essential terms of the contract which are required to be performed by him.
21. It was also admitted by both parties that subsequent payments were to be made on 15.05.2022, 15.07.2022 and 15.09.2022 respectively. Despite the above, the appellants admittedly did not pay the agreed amount. Section 51 of the Contract Act, 1872 stipulates a contract involving reciprocal promises is to be performed simultaneously. Neither party is obliged to fulfil their promise unless the other party is ready and

willing to perform their corresponding promise. Under such circumstances, the appellants' failure to pay the consideration amount is also a crucial fact which has weighed with the Trial Court and does not justify interference.

22. For the above reasons, the impugned judgment and decree does not warrant any interference whatsoever. There are no grounds to interfere with the discretion exercised by the Trial Court in dismissing the suit. In view of the above, FAT 4 of 2024 stands dismissed. CAN 2 of 2024 stands disposed of. Interim orders, if any, stands vacated.
23. Urgent Photostat certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.

I Agree

(Ravi Krishan Kapur, J.)

(Uday Kumar, J.)