

PETITIONER:
SMT. MAYAWANTI

Vs.

RESPONDENT:
SMT. KAUSHALYA DEVI

DATE OF JUDGMENT 06/04/1990

BENCH:
SAIKIA, K.N. (J)
BENCH:
SAIKIA, K.N. (J)
RANGNATHAN, S.

CITATION:
1990 SCR (2) 350 1990 SCC (3) 1
JT 1990 (3) 205 1990 SCALE (1) 724

ACT:

Specific Relief Act: Section 9---Suit .for specific performance of contract--Considerations to be taken note of by the Court in directing specific performance.

Contract Act: Whether there was a valid and enforceable contract-Nature and obligation arising therefrom.

Indian Evidence Act: Whether the document Exhibit PW 11/A was admissible in evidence?

HEADNOTE:

A civil suit was filed by the appellant herein against the respondent herein in the year 1973 praying for a decree for specific performance of the contract, in the alternative for a decree for a total sum of Rs. 16,000 including the earnest money of Rs.5,000 on averments inter alia that she had entered into an agreement dated 16.9.71 with the Respondent for the purchase of a property with 2 Kohlus of 20 H.P. electric Motor etc., installed therein and jointly owned by the Respondent with her step mother-in-law Smt. Lajwanti, for a consideration of Rs.50,000; that in case Smt. Lajwanti did not join in the execution of the sale deed, the Respondent would sell her half share of the property for half the sale price; that pursuant to this agreement the Respondent handed over to the Plaintiff-appellant possession of her share of the property but later as arbitration proceedings were going on between the Respondent and her co-sharer Smt. Lajwanti, the Respondent took back the said agreement (styled as receipt) and thereafter illegally took possession of the property from the appellant and declined to execute the sale deed in terms of the agreement.

The Respondent contested the suit on the pleas that she never intended to sell the suit property to the Plaintiff; that the agreement was a mere paper transaction brought into being for putting pressure on her co-sharer; that the agreement being not scribed on a proper stamped paper was inadmissible in evidence; that the agreement related only to the moveable property; that no advance money was paid as alleged and lastly that pursuant to the compromise between the parties dated 9.1.72

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the agreement dated 16.9.71 stood destroyed.

The trial Court disallowed the agreement Exhibit PW-I

I/A which constituted the foundation of the claim as inadmissible in evidence and dismissed the suit.

The High Court on revision, allowed the revision petition of the appellant with the direction to the trial court to impound the document in accordance with law and then proceed with the case. Respondent's Petition for special leave against that order was dismissed by this Court.

Consequent to these orders of the Supreme Court and the High Court the Trial Court tried the suit afresh and passed a decree for specific performance which was affirmed by the Additional District Judge on appeal. However on second appeal the High Court held that there was no valid and enforceable contract as evidenced by Exhibit PW. II/A and thus instead of the decree for specific performance granted a decree for Rs.5,000 only by way of refund of the earnest money.

Hence this appeal by special leave by the Plaintiff.

Dismissing the appeal and upholding the finding of the High Court, this Court,

HELD: The specific performance of a contract is the actual execution of the contract according to its stipulations and terms, and the courts direct the party in default to do the very thing which he contracted to do. The stipulations and terms of the contract have, therefore, to be certain and the parties must have been consensus ad idem. The burden of showing the stipulations and terms of the contract and that the minds were ad idem is, of course, on the plaintiff. If the stipulations and terms are uncertain and the parties are not ad idem there can be no specific performance, for there was no contract at all. [362D-E]

Where there are negotiations, the Court has to determine at what point, if at all, the parties have reached agreement. Negotiations thereafter would also be material if the agreement is rescinded. In the instant case the defence of there having not been a contract for lack of consensus ad idem was available to the defendant. [363F; 364B]

The jurisdiction of the Court in specific performance is discretionary. When a promise is made in an alternative form and one

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alternative is impossible to perform, the question whether the promiser' is bound to perform the other or is altogether excused depends on the intention of the parties to be ascertained from the nature and terms of the contract and the circumstances of the particular case. [362F]

The expression 'otherwise pay back the advance and compensation in the same amount' is capable of being interpreted as payment of the amount as alternative to performance. Of course the amount advanced and the compensation was stipulated to be the same amount. That, however, would not effect the real character of the promise. [361G]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 4145 of 1984.

From the Judgment and Order dated 14.2.1984 of the Punjab and Haryana High Court in Regular Second Appeal No. 1498 of 1982.

Ravi Parkash Gupta, Arvind Varma, Bahar Burqui and Gopal Subramaniam for the Appellant.

R.F. Nariman, Ms. Madhvi Gupta and Ashok K. Gupta for the Respondent.

The Judgment of the Court was delivered by

K.N. SAIKIA, J. This plaintiff's appeal by special leave

is from the judgment and order dated 14.2.1984 of the High Court of Punjab and Haryana in Regular Second Appeal No. 1498 of 1982, modifying those of the courts below and passing a decree for Rs.5,000 only by way of refund of earnest money instead of decree for specific performance.

The appellant herein as plaintiff filed Civil Suit Nos. 195/196 of 1973, averring, inter alia, that she had entered into an agreement dated 16.9.1971 with the respondent (defendant) for purchase of property No. B-VII-7 (old) and B-VIII-9 (new) containing 2 Kohlus of 20 H.P. electric motor etc. for a consideration of Rs.50,000 and also had paid to the defendant an earnest money of Rs.5,000; that the property was jointly owned by the defendant with her step mother-in-law Smt. Lajwanti who would also join the execution of the sale deed; that if Smt. Lajwanti failed to do so the respondent (defendant) would sell her half share of the property for half of the sale price; that the

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defendant-respondent pursuant to the agreement delivered possession of her share of the property to the plaintiff-appellant, whereafter the plaintiff repaired the property spending Rs.4,200; that thereafter the partition was also effected between the defendant-respondent and Smt. Lajwanti; that the defendant thereafter illegally took possession of the property from the plaintiff-appellant and refused to execute the sale deed in terms of the agreement dated 16.9.1971 on or before September 26, 1971 as stipulated; that as arbitration proceedings between defendant and her co-sharer Smt. Lajwanti was going on the defendant took back the said agreement (styled as receipt) and thereafter refused to execute the stipulated sale deed and in response to the plaintiff's lawyer's notice dated 23.7.1971 the defendant took the false plea that the agreement did not pertain to the building but only to the machinery fitted therein. The relief prayed was a decree for specific performance of the contract, in the alternative a decree for a total sum of Rs. 16,000 including the earnest money of Rs. 5,000.

The defendant-respondent contested the suit on the inter alia pleas that the agreement being not scribed on a proper stamped paper was not permissible in evidence; that it was only a paper transaction executed to pressurise her co-sharer Smt. Lajwanti; that no earnest money was paid; that in any case the document related only to the moveable property; and that pursuant to the compromise between the parties dated 9.1.1972, the agreement was destroyed.

In the trial court the plaintiff relied mainly on Ext. PW-11/A being the entry of the transaction in the Petition Writer's Register. When this Exhibit was disallowed by the trial court vide its order dated 27.10.1976 as the entry was a duplicate of its original document which had not been produced in the court and therefore inadmissible, the plaintiff's revision petition therefrom to the High Court was allowed with a direction to impound the document in accordance with law and then proceed with the case. The High Court in its order dated 18.7.1977 characterised Ext. PW-11/A as the entry in the Petition Writer's Register and observed that it contained all the details of a transaction but appeared to be neither a copy nor an extract though a prima facie duplicate of the original document. The defendant-respondent's special leave petition therefrom was dismissed by this Court with the following observation:

"The entry in the writer's register which has been allowed to be admitted by the High Court subject to impounding and consequential processes will in our view be eligible for

admission as evidence. This means that we will not interfere with the order of the High Court. However we make it clear that the trial court which considers this entry will evaluate it properly and not read more than what it says or treat it as equivalent to something which it does not. Full effect will be given to the entry, no more, no less."

In light of the aforesaid orders of the High Court as well as of this Court, the trial court having decreed the suit and the defendant respondent having been unsuccessful in appeal to the Additional District Judge, she filed a Regular Second Appeal which was allowed by the High Court by the impugned judgment and order to the extent already indicated.

Before the High Court the defendant-respondent contended that if the entry PW-11/A was to be treated as original document or its counterpart the same did not bear the signatures of one of the parties, that is, the respondent. The signatures of the husband of the respondent would be of no avail as there was no evidence on record to show that he had the authority to execute a document on her behalf and the document signed unilaterally by one party could not be treated as an agreement between two persons. Secondly as was admitted by the witness, the entry was more or less an extract of the original document and such an extract drawn and maintained by a deed writer according to his own light could not form basis of an agreement between the parties which could be given effect to by way of specific performance. Both the contentions were sustained by the High Court holding that no contract could be inferred from the document PW-1 I/A. Accordingly the High Court set aside the decree for specific performance, allowed the appeal and passed a decree to the extent of Rs.5,000 being the earnest money to be returned by the defendant to the plaintiff.

Mr. Gopal Subramaniam, the learned counsel for the appellant assails the impugned judgment on the grounds, inter alia, that the High Court overlooked the relevant provisions of the Evidence Act as also this Court's order relating to Ext. PW-11/A inasmuch as all the findings of the courts below were in favour of the appellant holding on issue No. 14 that there was an oral agreement which was also admitted with its contents and the theory of destruction was found to be false; that the High Court should not have gone behind the Supreme Court's order and should not have gone into the admissibility of Ext. PW- 11/A in face of this Court's order; that the High Court has not given even a single reason as to why the decree of the lower courts should have been

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set aside; and that Ext. PW-II/A was rightly admitted by the courts below in accordance with the Supreme Court's order but the High Court going behind that order rejected it. Counsel puts the appellant's case on PW- 11/A and also dehors that document.

Mr. R.F. Nariman, the learned counsel for the respondent submits that the High Court rightly set aside the decree because the trial court as well as the lower appellate court were concerned only with the question as to whether there was an agreement or not, but not with the question as to whether specific performance ought to be decreed or not. Counsel submits that the High Court's holding Ext. PW-11/A to be inadmissible meant only its evaluation as the agreement; and that the grounds given by the High Court on the merit of the case are correct. Accordingly to counsel, even assuming that Ext. PW-11/A was a copy of the agreement, it would by no means justify specific performance due to various patent and latent defects in it, and it did not create

any fight in favour of the plaintiff. In view of this submission we proceed to examine first the contract itself.

In a case of specific performance it is settled law, and indeed it cannot be doubted, that the jurisdiction to order specific performance of a contract is based on the existence of a valid and enforceable contract. The Law of Contract is based on the ideal of freedom of contract and it provides the limiting principles within which the parties are free to make their own contracts. Where a valid and enforceable contract has not been made, the court will not make a contract for them. Specific performance will not be ordered if the contract itself suffers from some defect which makes the contract invalid or unenforceable. The discretion of the court will be there even though the contract is otherwise valid and enforceable and it can pass a decree of specific performance even before there has been any breach of the contract. It is, therefore, necessary first to see whether there has been a valid and enforceable contract and then to see the nature and obligation arising out of it. The contract being the foundation of the obligation the order of specific performance is to enforce that obligation.

Mr. Subramaniam argues that there was an oral agreement. The issue No. 1 was "whether there was a valid agreement of sale dated 16.9.1971 between the parties, if so what were its terms". Issue No. 14 was "whether there was an agreement of sale on 12.9.1971 between the parties, if so what were its terms"? The trial court adjudicated issue No. 1 in favour of the plaintiff. Before the First Appellate Court it was contended by the defendant that the alleged agreement to sell

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dated 16.9.1971 was not admissible in evidence for the reason of it having not been scribed on the stamp paper of the requisite value nor could any secondary evidence be adduced by the plaintiff-respondent to prove and establish the contents of the said agreement. The defendant averred that she never intended to sell the suit property to the plaintiff nor was it intended to be purchased by the plaintiff, and that the agreement dated 16.9.1971 was a paper transaction which was brought into being for exerting pressure on Lajwanti, the other co-sharer of the property as suggested by plaintiff's husband Master Kasturi Lal. The plaintiff before the First Appellate Court relied on Ext. PW- 11/A, and the Court observed:

"The learned counsel for the defendant-appellant very fairly/frankly submitted and conceded at the bar that the fate of this case hinges in its entirety on the all-important document Ext. PW-11/A which is claimed by the plaintiff respondent to be an agreement to sell dated 16.9.71, the specific performance of which was sought and enforced in the suit by her."

While Mr. Subramaniam asserts that the correspondence between the parties amply showed admission of the contract on the part of the defendant-respondent, Mr. Nariman's demurrer is that there was no such admission, but on the other hand statements on the part of the defendant showed that she put an end to what was claimed to be a contract. Though predominantly a question of fact, in view of the assertions of counsel, we have ourselves looked into the correspondence on record. The earliest letter on record is from S.K. Singhal, Advocate for the plaintiff Mayawanti to defendant Kaushalya Devi and Lajwanti stating inter alia that on 16.9. 1971 the latter agree to sell one karkhana building with two wheat grinding machines, two kohlus for expelling oil, one electric motor of 20 H.P., electric

connection and other necessary goods and accessories owned by them and Kaushalya Devi executed an agreement to sell the building and machinery for Rs.50,000 and received a sum of Rs.5,000 in advance at the time of execution of the said agreement; that in case of default his client was entitled to get the sale deed executed through the intervention of the court and further that in case Lajwanti did not sign the sale deed Kaushalya Devi would execute it with regard to one half share belonging to her; that the sale deed was to be executed upto 26.9.1971.; and that his client was ready and willing to perform her part of the contract. Kaushalya Devi was therefore called upon to execute and register the sale deed in favour of Mayawanti to the extent of one half each

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of the karkhana as his client had always been and still was ready and willing to perform her part of the contract. The defendant replied to the said letter through her Advocate Hat Kishan Lal Soni by letter dated December 29, 1971 stating that Mayawanti agreed to buy a factory consisting of a flour mill, two kohlus, a 20 H.P. electric connection installed in property Unit No. B-VII-7 (old), B-VIII-9 (new) and she called upon the plaintiff to arrange to pay the sum of Rs.50,000 and get the sale transaction registered within 10 days failing which the sender should be at liberty to sell it to any other party at the risk of the plaintiff for compensation by way of damages suffered from the resale. It is to be noted that there is no mention of any building in this letter. In their letter dated 4.1.1972 from Mr. Soni to Mr. Singhal, Advocate for the plaintiff, it was stated that the agreement was to transfer two kohlus and 20 H.P. electric connection installed in the property Unit No. B-VII-7 (old)/B-VIII-9 (new) situated on Gokal Road, Ludhiana lying on the road side nearby excluding the buildings and the 20 H.P. electric motor on receipt of full price of Rs.50,000 and that the latter's client seemed to be labouring unnecessarily to include the building and 20 H.P. electric motor in the bargain. In his letter dated 18.1.1972 to the plaintiff, Sham Lal Katyal, Advocate of Lajwanti intimated that Kaushalya Devi had no fight to sell the share of Lajwanti. In his letter dated 13.7.1973 Sukhpat Rai Wadehra, Advocate for Mayawanti stated that the defendant entered into an agreement to sell the property Unit No. B-VII-7 (old) and B-VIII-9 (new) with a flour mill, two kohlus, 20 H.P. factory connection and a wooden cabin standing on the roadside and that due to the partition with her "sister Lajwanti" a sale deed was to be executed on or before 26.9.1972 and she having failed to do so Mayawanti was entitled to specific performance of the agreement to sell and therefore she was called upon to execute the sale deed of property No. B-VII-7 (old) and B-VIII-9 (new.). In his letter dated 23.7.1973 Mr. Soni wrote to Mr. Wadehra, that the agreement was without the building and the motor and that the original agreement was suspected to have been interpolated and so not produced by the plaintiff as required by the defendant. In the letter dated August 3, 1973 from Mr. Wadehra to Mr. Soni, it was asserted that the agreement was for the building and the machinery therein and that the agreement was never cancelled orally. In the next letter dated 6.9.1973 from Mr. Ahluwalia, the defendant's lawyer reiterated that the agreement dated 16.9.1971 was for karkhana only and not for the building and that the plaintiff could not arrange money for payment. In this letter it was stated that the time was of essence of the contract and had Mayawanti paid any earnest money after the expiry date 26.9.1971, the defendant was

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entitled to forfeit the same. Thus, even though the sale deed was to be executed on 26.9.1971 the instant suit was filed long thereafter on 31.7.1973.

If the above correspondence were true, it would appear that the contract was in the alternative of either whole or half of the property and that the offer and acceptance did not correspond. It is settled law that if a contract is to be made, the intention of the offeree to accept the offer must be expressed without leaving room for doubt as to the fact of acceptance or to the coincidence of the terms of acceptance with those of the offer. The rule is that the acceptance must be absolute, and must correspond with the terms of the offer. If the two minds were not ad idem in respect of the property to be sold, there cannot be said to have been a contract for specific performance. If the parties themselves were not ad idem as to the subject matter of the contract the court cannot order specific performance. If the plaintiff understood the terms to have included the building but the defendant understood it to have excluded the building and the so called memorandum Ext. PW-11/A did not mention the building, there is no contract before the court for specific performance. While Mr. Subramaniam would argue that the land was also included, Mr. Nariman rightly points out that land was nowhere mentioned in PW-11/A. It is true that Issue Nos. 2 and 3 were whether the defendant delivered possession of the property to the plaintiff pursuant to the agreement and whether the possession was illegally taken by the defendant, and the Trial Court found no independent evidence and Kasturilal admitted that there was no document to prove the delivery of possession. However, on basis of a suggestion to Kasturilal that it was "incorrect to suggest that any goods, i.e. gunny bags, oil, khal, was in possession having been taken out from the factory building at the time of repairs", the trial court concluded that delivery of possession was there. The first appellate court also took it to be a "vital and material suggestion" and upheld the finding. Admittedly the possession was with the defendant at the time of the suit and there was no proceeding to recover the possession by the plaintiff. This inferential finding, therefore, can not have any bearing on the subject matter of the contract contrary to what was stated in Ext. PW-11/A which was heavily relied on by the plaintiff.

Mr. Subramaniam then submits that the plaintiff was entitled to specific performance by virtue of Ext. PW-11/A which was rightly admitted and that even if it was excluded from consideration then also on the notices, pleadings and evidence the plaintiff was entitled to a

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decree and the High Court ought not to have gone behind the order of the Supreme Court to hold that Exhibit to be inadmissible and it never adverted to the admission of the agreement of 16.9. 1971. Before us Mr. Subramaniam argued that Ext. PW-11/A was either a primary evidence or a secondary evidence of the original and its impounding implies its intrinsic value for the purpose of the case. The signatures were not denied. The trial court rightly treated it as the agreement and in the written statement, the defendant objected to its admissibility and not to its contents. Mr. Nariman would like us to proceed on the basis that Ext. PW-11/A was not disputed by the defendant.

Ext. PW-11/A is Sl. No. 871 dated 16.9.1971 in the columns of the register of Atma Ram Gupta, petition writer, Ludhiana for the year 1971 and contains the following particulars:

It is styled as "receipt" for Rs.5,000 in column 4, and in column 3 the name and address of the writer is given as Smt. Koshalya Devi W/o Dharam Dev, Ludhiana, Gokal Road, Mohalla Kothi Megh Singh. It bore 10 n.p. stamp. In writer's signatures column No. 8 it contains writer's signature in English and the R.T.I. of Kaushalya Devi and the signature in English of Kasturi Lal. It contains the signatures of its writer Atma Ram Gupta, petition writer, Ludhiana dated 21.11.1971. Under the column particulars of writing and address for the witnesses, it contains the following:

"Smt. Mayawanti W/o Master Kasturi Lal, Ludhiana owns and has a factory, flour mill, Two 'kohlus' for expelling oil. I and Smt. Lajwanti widow of Baru Ram, Ludhiana have an electric motor of 20 H.P. connection in working condition at Gokal Road. To the East Amar Singh, to the West Mansa Ram, Ramji Das, to the north there is a road, to the South there is a Gali. All these are settled to be sold for Rs.50,000 and Rs.5,000 is taken as advance. The balance will be taken at the time of registration. The registration will be done at the expense of the buyer. It will be in the name of the buyer or in any other name he indicates by 26.9. 1971. If any other person has a right or encumbrance on it, the advance and compensation will be paid back. If Lajwanti does not sign these sale deeds, then I will execute the sale deed of my one of the two shares, otherwise pay back the advance and compensation in the same amount. The buyer may take the advance.

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WITNESSES: Dharam Dev, husband of one who gives the receipt, R/o Ludhiana, Kothi Megh Singh, Gokal Road. Tarsem Kumar Gupta, Stamp Vendor, Khanna Zila, Distt. Ludhiana, Mohalla Hakim Rehamatullah, Kucha Kaka Ram House No. 27 13 (9)."
Admittedly witnesses were examined and cross-examined on this Exhibit and the appellant argued before us on its basis.

The defects pointed out by Mr. Nariman are that it refers to Smt. Mayawanti W/o Master Kasturi Lal as the owner of the factory, flour mill and two kohlus for expelling oil. Mayawanti, the plaintiff appellant, was the intending purchaser and not owner of the property. The owner and vendor was the defendant/respondent Kaushalya Devi. It nowhere mentions the land and the building; and it gives the property number only. Of course the boundaries of the factory, flour mill are given. Mr. Subramaniam submits that land was implied in the description. Mr. Nariman would not agree. It says: "if Lajwanti does not sign this sale deed, then I will execute the sale deed of my one of the two shares, otherwise pay back the advance and compensation in the same amounts. The buyer may take the advance." What is the legal effect of this statement on the agreement? Even assuming that recitation of Mayawanti as the owner was a mistake and the factory also implied the land whereupon it stood, the question is whether it amounts to an alternative promise. In Halsbury's Laws of England 4th Edn. Vol. 9, Para 446 on alternative promises we read:

"When a promise is made in an alternative form and one alternative is impossible to perform, the question whether the promisor is bound to perform the other or is altogether excused depends on the intention of the parties to be ascertained from the nature and terms of the contract and the circumstances of the particular case. The usual result in such a case will be that the promisor must perform the alternative which remains possible; but it may be that on the proper construction of the contract there is not one obligation to be performed in alternative ways but one

obligation to be performed in one way unless the promisor chooses to substitute another way, in which case, the primary obligation being impeded, the promisor is not bound to exercise the option for the benefit of the other party."

Applying the principle to the instant case, on proper construction-

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tion of Ext. PW-11/A can it be construed that there was not one obligation to be performed in alternative ways but one obligation to be performed in one way unless the promisor choose to substitute another way? In other words, the primary obligation being impossible was the promisor bound to exercise the option for the benefit of the other party? It would be reasonable to construe that if Lajwanti failed to sign the sale deed then the promisor would either execute the sale deed in respect of her share, or in the alternative, pay back the advance and compensation in the same amount, and the buyer would have to take the advance. Lajwanti having refused to sell her share, the first alternative became impossible. The question then was whether the second alternative would automatically follow or option was reserved by the vendor either to sell her own share or to pay back the advance and the compensation in the same amount. The first alternative failing, if the promisor decided in favour of the other alternative, it could not be said that there was any breach of any obligation under the agreement, and if that was so, there could arise no question of specific performance of the contract.

Looking at PW-1 i/A from another angle the payment was an alternative to performance. In paragraph 4 17 of volume 44 of Halsbury's Laws of England dealing with payment as an alternative to performance we find:

"There are cases where the court holds, on the construction of the contract, that the intention of the parties is that the act may be done by the contracting party or that payment may be made by him of the stipulated amount, so that the contracting party has in effect the option either of doing the act which he has contracted to do or paying the specified sum, the contract being alternative, either to do or abstain from doing on payment of the sum in money. The court may treat covenants to perform or to pay as alternative where specific performance would work unreasonable results."

The expression 'otherwise pay back the advance and compensation in the same amount' is capable of being interpreted as payment of the amount as alternative to performance. Of course the amount advanced and the compensation was stipulated to be the same amount. That however, would not affect the real character of the promise.

We may also refer to another element of uncertainty or ambiguity

in the contract in the event that has happened viz. Lajwanti's refusal to part with her share in the property. Ex. PW-1 1/A says that, in that event, Kaushalya Devi should execute the sale deed of "my one of the two shares". The share is undefined and the consideration for the sale price for the half share is also unspecified. This is of importance because portions of the property are not equally valuable due to the situation of the kohlus, flour mill etc. on a part thereof. It is true that, eventually there was a partition between Kaushalya Devi and Lajwanti and the vendee may have had no difficulty in working out the portion that should come to her towards the half share agreed to be sold by Kaushalya Devi. But the question is whether words could be read into Ext. PW- 11/A to spell out an agreement, on the

date of that exhibit, that, in case Lajwanti backed out, Kaushalya Devi would sell her half share to the appellant for one half of the total consideration. It seems difficult to say that the answer should necessarily be in the affirmative. There are too many is to be dotted and it's to be crossed before a clear and unambiguous contract, on the terms sought to be enforced, could be spelt out of the language of Ext. PW- 1 1/A.

The specific performance of a contract is the actual execution of the contract according to its stipulations and terms, and the courts direct the party in default to do the very thing which he contracted to do. The stipulations and terms of the contract have, therefore, to be certain and the parties must have been consensus ad idem. The burden of showing the stipulations and terms of the contract and that the minds were ad idem is, of course, on the plaintiff. If the stipulations and terms are uncertain, and the parties are not ad idem, there can be no specific performance, for there was no contract at all. Where there are negotiations, the court has to determine at what point, if at all, the parties have reached agreement. Negotiations thereafter would also be material if the agreement is rescinded.

The jurisdiction of the court in specific performance is discretionary. Fry in his Specific Performance, 6th Edn. P. 19, said:

"There is an observation often made with regard to the jurisdiction in specific performance which remains to be noticed. It is said to be in the discretion of the Court. The meaning of this proposition is not that the Court may arbitrarily or capriciously perform one contract and refuse to perform another, but that the Court has regard to the conduct of the plaintiff and to circumstances outside the contract itself, and that the mere fact of the existence of a

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valid contract is not conclusive in the plaintiff's favour. 'If the defendant', said Plumer V.C., can show any circumstances dehors, independent of the writing, making it inequitable to interpose for the purpose of a specific performance, a Court of Equity, having satisfactory information upon that subject, will not interpose."

The author goes on to say that of 'the circumstances calling for the exercise of this discretion, "the Court judges by settled and fixed rules; hence the discretion is said to be not arbitrary or capricious but judicial; hence, also, if the contract has been entered into by a competent party, and is unobjectionable in its nature and circumstances, specific performance is as much a matter of course, and therefore of right, as are damages. The mere hardship of the results will not affect the discretion of the court."

Regarding the extent of the jurisdiction Fry wrote:

"If a contract be made and one party to it make default in performance, there appears to result to the other party a right at his election either to insist on the actual performance of the contract, or to obtain satisfaction for the non-performance of it. It may be suggested that from this it follows that a perfect system of jurisprudence ought to enforce the actual performance of contracts of every kind and class, except only when there are circumstances which render such enforcement unnecessary or inexpedient, and that it ought to be assumed that every contract is specifically enforceable until the contrary be shown. But so broad a proposition has never, it is believed, been asserted by any of the Judges of the Court of Chancery, or their successors in the High Court of Justice, though, if prophecy were the

function of a law writer, it might be suggested that they will more and more approximate to such a rule."

As Chitty observes, the "prophecy has not been wholly fulfilled, for the scope of the remedy remains subject to many limitations." But the author observes a welcome move towards the more liberal view as to the extent of jurisdiction which was favoured by Lord Justice Fry. But where no contract has been entered into at all, there is no room for any liberal view.

Section 9 of the Specific Relief Act says that except as otherwise

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provided in that Act where any relief is claimed under Chapter II of the Act in respect of a contract, the person against whom the relief is claimed may plead by way of defence any ground which is available to him under any law relating to contracts. In the instant case the defence of there having not been a contract for lack of consensus ad idem was available to the defendant.

In view of the above conclusion, the appeal has to be dismissed. We should, however, like before concluding, to refer to certain other aspects debated before us:

(1) At a late stage of the arguments, it was contended on behalf of the appellant that the translation of Ext. PW- 1 1/A acted upon by the High Court, is not accurate and that it does not refer to Mayawanti as the owner of the Kohlus etc. We directed the original records to be called for and also gave leave to the appellant to file a translation. This has been done but the respondent does not accept this. It was also mentioned on behalf of the appellant that the translator in the Supreme Court had found the original too illegible to be translated and it was requested that a translation may be allowed to be got done by an Advocate of this Court knowing the language. We cannot permit this at this stage. The unofficial translation filed tries to improve upon the recorded translation of Ext. PW- 1 1/A in two respects. First, the reference to Mayawanti as the owner is sought to be substituted by a reference to her as the vendee. So far as this is concerned, as already pointed out, even if we take the reference to Mayawanti in the exhibit as due to oversight, there are various other aspects of uncertainty which render the terms of Ext. PW-11/A specifically unenforceable. The second improvement is the addition of a sentence at the end: "The purchaser either may take earnest money along with penalty or get the registry done forcibly. I will have no objection." This is a totally new version which we cannot permit at this stage when it is objected to by the other side. After all, the entry PW- 11/A in the Deed Writer's Register could not be treated as preappointed evidence. It was not a piece of evidence prescribed in advance by statute as requisite for proof of the transaction of sale, as distinguished from casual evidence. But it could not be allowed at the same time to grow out of the surrounding circumstances.

(2) A reference was made in the argument before us to an oral agreement preceding Ext. PW-11/A. But the terms of such oral

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agreement are nowhere in evidence and the same uncertainties surround it as hover around Ext. PW-11/A. The High Court cannot, therefore, be faulted for not confirming the decree of specific performance on the basis of an oral agreement.

(3) A good deal of argument was also addressed before us as to whether PW-11/A was admissible as secondary evidence. We have not touched upon this and have proceeded on the assump-

tion that the entries in the document--writer's register, signed by the parties, can itself be treated as an agreement between them the specific performance of which can be sought.

(4) Shri Gopal Subramaniam contended that the High Court has erred in holding, contrary to the earlier observations of this Court, that Ext. PW-11/A was inadmissible. There is no doubt a certain degree of ambiguity in the observations of the High Court in this regard. But, reading the High Court's judgment as a whole, we are inclined to accept the submission of Mr. Nariman that the High Court has only evaluated the exhibit in the light of the direction of this Court that "full effect will be given to the entry; no more, no less" and not rejected it as inadmissible, as contended for by the appellant. We have referred to these aspects only because counsel had placed considerable emphasis on them in the course of arguments but in the view we have taken of the scope and effect of Ext. PW-11/A, it is unnecessary to elaborate on them or to deal with certain other contentions urged before us.

For the foregoing reasons we uphold the finding of the High Court that there was no valid and enforceable contract between the parties as evidenced by Ext. PW-11/A. The result is that this appeal fails and is dismissed, but under the peculiar facts and circumstances of the case without any order as to costs. Interim orders, if any, stand vacated.

R.N.J. Appeal dismissed.
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