
(2004) 01 RAJ CK 0042
In the Rajasthan High Court
Case No : Civil First Appeal No. 79 of 1994

Anup Krishna Kaul

APPELLANT

Vs

Jagdish Swaroop Agarwal and Others

RESPONDENT

Date of Decision : 15-01-2004

Acts Referred:

Specific Relief Act, 1963 — Section 20

Citation : AIR 2004 Raj 185 : (2004) 2 CivCC 707 : (2004) 1 RLW 534 : (2004) 1 WLC 743

Hon'ble Judges : A.C. Goyal, J

Bench : Single Bench

Advocate : S.M. Mehta and Anil Mehta, for the Appellant; M.M. Ranjan, for the Respondent

Final Decision : Dismissed

Judgement

Goyal, J.—The appellant-defendant No. 2 has preferred this first appeal against the judgment and decree of specific performance dated 2.4.1994 passed by learned Additional District Judge No. 2, Ajmer in civil suit No. 55/1983 (146/1980).

2. The plaintiff-respondent No. 1 filed a civil suit on 16.12.1980 against three defendants for specific performance of an agreement of sale of a house located at Ajmer executed in his favour on 24.7.1979 at Jaipur. The plaintiff's case, in brief is that Smt. Vishnu Maya Kaul-mother of all the three defendants by an agreement dated 24.7.1979 agreed to sell her house bearing AMC No. 41/32 situated at Meyo College Road, Ajmer to the plaintiff for a consideration of Rs. 2,50,000/-. The plaintiff on the same day paid a sum of Rs. 20,000/- vide cheque to Smt. Vishnu Maya Kaul. The balance of the sale price was to be paid before the Sub-Registrar Ajmer at the time of registration of the sale deed on or before the first day of September, 1979. As per the terms of the agreement, Smt. Vishnu Maya Kaul was to obtain "No Objection Certificate" from the competent authority. Smt. Vishnu Maya Kaul expired on 3.8.1979. The

defendants No. 1 & 2 being the sons and the defendant No. 3 being her daughter were requested by the plaintiff to accept the balance of the sale price and to execute the sale deed after obtaining "No Objection Certificate". The plaintiff was at all relevant times and is still prepared to perform his part of the contract. He also served a notice by registered post dated 29.8.1979 and served another notice by registered post on 26.5.1980 along with a draft of the sale deed. In reply to the notice dated 26.5.1980 Dr. S.P. Wanchoo informed the plaintiff that the defendants No. 1 & 3 were prepared to execute the sale deed but the defendant No. 2 was not willing to do so. Hence, the suit for specific performance.

3. The defendants No. 1 & 3 in their joint written statement submitted on 19.5.1981 admitted the plaintiff's claim with a further plea that it was the defendant No. 2 who was not prepared to join them in making application for obtaining the "No Objection Certificate" and to execute the sale deed in accordance with the terms of the agreement executed by their mother.

4. The defendant No. 2 in his amended written statement filed on 25.10.1983 while denying the averments of the plaint admitted receipt of both the notices given by the plaintiff with further pleas that Dr. S.P. Wanchoo (father-in-law of the defendant No. 3) is in collusion with the plaintiff and thereby wants to cause an undue loss to the defendant No. 2 and undue profit to the defendants No. 1 & 3 who are in league with each other. It was also stated that there is no valid contractor or agreement as Smt. Vishnu Maya Kaul was a patient of acute paralysis and was unable to move any part of the body and had lost all her senses before 24.7.1979. The defendant No. 2 also came with a plea that Smt. Vishnu Maya Kaul executed a will in his favour on 5.1.1979 and thus he alone is the owner of the suit house. The defendants No. 1 & 3 have already been given more than their share in the ancestral property during the lifetime of their mother. It was also pleaded that the suit house was owned by their parents.

5. On the basis of the pleadings of the parties, following issues were framed.

1. Whether Smt. Bishnu Maya Kaul executed valid agreement dated 24.7.1979 and thereby contracted to sell Bungalow bearing AMC No. 41/32 to the plaintiff and received a sum of Rs. 20,000/- towards the sale price ?

2. Whether the balance of Rs. 2,30,000/- (Two Lacs Thirty Thousand) was to be paid to Smt. Vishnu Maya Kaul at the time of registration of the sale-deed?

3. Whether the No Objection Certificate from the Competent Authority under the Urban Land Ceiling Act was to be obtained by Smt. Vishnu Maya Kaul and was the sale to be completed before 1.9.1979?

4. Whether the plaintiff was at all times and is still ready and willing to perform his part of the contract ?

5. Whether the defendant No. 2 alone is the owner of the suit bungalow by virtue of the WILL dated 5.1.1979 alleged to have been executed by Smt. Vishnu Maya Kaul ?

6. Whether the agreement sued upon is not a valid and genuine document for reasons alleged in para 11 of the written statement of defendant No. 2 ?

7. Whether the defendant No. 1 and 3 are in collusion with the plaintiff?

8. Whether the suit is false and vexatious and if, so, is the defendant No. 2 entitled to special costs ?

9. What should the relief be ? Additional Issue No. 1

Whether Shri B.K. Kaul had also contributed towards the costs of construction of the suit bungalow and was therefore a co-owner of it ?

6. After recording the evidence of the parties the learned Additional District Judge No. 2, Ajmer vide judgment dated 2.4.1994 decreed the suit for specific performance for execution of the sale deed and for handing over the vacant possession of the suit house to the plaintiff within a period of two months.

7. The defendant No. 2 has preferred this first appeal. During pendency of the suit the defendant No. 1 expired, hence, his legal representatives were brought on record, who had the defendant No. 3 did not appear after service.

8. I have heard learned counsel for the appellant and the respondent No. 1. Learned senior counsel Sh. Mehta firstly submitted that execution of the agreement of sale Ex.1 is not proved and secondly that it was not made by free consent of Smt. Vishnu Maya Kaul as she was physically and mentally unfit to put her thumb impressions on this document and thus she was not competent to contract. Sh. Mehta referred the evidence-oral as well as documentary in detail. He contended that Smt. Vishnu Maya Kaul was suffering from hypertension, acute-paralysis of the right side of her body and she went into diabetic-coma about two weeks prior to her death and due to her illness she was not able to move and to understand any such transaction, she lost her vision and was not able to recognize any person and she was hard of hearing and under the aforesaid circumstances she could not have executed the agreement Ex. 1 on 24.7.1979. It was also contended that she died only after a few days of the alleged agreement and this fact also creates doubt about the genuineness of the agreement Ex.1. It was also contended that Sh. B.K. Kaul father of all the three defendants expired on 21.4.1979 and Smt. Vishnu Maya Kaul was suffering from severe diabetic and hypertension at that time also and she was brought from Jaipur to Ajmer and in accordance with the community rites, she had to take a round of the dead body but being unable to do so she was made to sit on "Muda" and was made to move around the dead body of her husband Sh. B.K. Kaul and after three days she was again brought to Jaipur by the defendant No. 3 for the medical treatment and she again went into severe diabetic coma in the middle of July, 1979 and thus she was not able to understand or execute any such agreement. It was also contended that the relations of the appellant with his elder brother and younger sister (defendant No. 1 & 3) were not cordial and they were already given more than their share of the property by their father and thus

they wanted to sell this house at Ajmer to get their share in the sale proceeds and thus they got executed this agreement Ex.1 in favour of the plaintiff-respondent No. 1. While referring the oral testimony of the plaintiff and his witnesses learned senior counsel Sh. Mehta submitted that the statement of the plaintiff is not only self contradictory but is also contrary to oral testimony of other witnesses and as per the oral testimony of the plaintiff and his witnesses, it is evident that Smt. Vishnu Maya Kaul was not able to speak and thus the findings of the trial court on issues No. 1 & 6 are contrary to the facts and the law. Learned counsel for the plaintiff-respondent No. 1 submitted that the trial court having considered the entire evidence rightly came to this conclusion that Smt. Vishnu Maya Kaul executed this agreement with all her senses on 24.7.1979 and this fact had been admitted by the remaining two defendants and there is no reason to disbelieve the evidence adduced by the plaintiff. According to learned counsel Sh. Ranjan, the plaintiff's evidence cannot and should not be disbelieved only on account of some discrepancies and the appellant-defendant completely failed to prove this fact that Smt. Vishnu Maya Kaul was unconscious or was not in her senses at the relevant time when this document was executed and there is no evidence of any collusion between the plaintiff and the remaining defendants on the one hand or between the defendants No. 1 & 3 and P.W. 4 Dr. Wanchoo-father-in-law of the defendant No. 3 on the other hand. It was also submitted that the appellant-defendant No. 2 himself was in favour of sale of this property at a price of Rs. 2,50,000/-. It was also submitted that the appellant-defendant No. 2 had relied upon two wills Ex.A-6 said to be executed in his favour by Smt. Vishnu Maya Kaul on 5.1.1979 and Ex.A7 said to be executed by Smt. Vishnu Maya Kaul on 27.7.1979 and in view of these two wills, the appellant cannot say that Smt. Vishnu Maya Kaul was not in her senses on 24.7.1979. In reply, Sh. Mehta relying upon Punjab Urban Planning & Development Authority v. Shiv Saraswati Iron & Steel Re- Rolling Mills (1), submitted that the plaintiff must succeed or fail on his own case and cannot take advantage of weakness in the appellant-defendant No. 2's case to get a decree. It was also submitted that the appellant-defendant No. 2 never relied upon Ex.A7 will said to be executed on 27.7.1979, although Sh. Mehta did not press upon the decision of the trial court given against the appellant-defendant No. 2 with regard to execution of Ex.A6 will dated 5.1.1979.

9. I have considered the rival submissions. No doubt, as held by Hon'ble the Supreme Court in the judgment cited hereinabove, the plaintiff must succeed or fail on his own case and cannot take advantage of weakness in the defendant No. 2's case to get a decree. The first point for consideration is as to whether execution of Ex.1 agreement was rightly found to be proved by the trial court? At the very outset, it is observed that learned senior counsel Sh. Mehta did not seriously dispute the thumb impressions of late Smt. Vishnu Maya Kaul on this document and a perusal of the entire evidence available on the record is sufficient enough to hold that execution of this document was rightly found proved by the trial court. It is also significant to say here that the appellant-

defendant No. 2 no where in his written statement made a specific denial of thumb impressions of Smt. Vishnu Maya Kaul on Ex.1 and he did not say so even in his statement recorded by the trial court on 2.9.1986. The next and crucial point for consideration is as to whether Smt. Vishnu Maya Kaul was competent to contract i.e. she executed this agreement Ex.1 with her free consent ? Sections 10 to 14 of the Indian Contract Act, 1872 being relevant on the issue, are reproduced as under :-

10. What agreements are contracts.- All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in [India], and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.

11. Who are competent to contract.- Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject.

12. What is a sound mind for the purposes of contracting.- A person is said to be of sound mind for the purpose of making a contract, if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

Illustrations

(a) A patient in a lunatic asylum, who is, at intervals, of sound mind, may contract during those intervals.

(b) A sane man, who is delirious from fever, or who is so drunk that he cannot understand the terms of a contract, or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.

13. "Consent" defined.- Two or more persons are said to consent when they agree upon the same thing in the same sense.

14. "Free-consent" defined.- Consent is said to be free when it is not caused by -

(1) coercion, as defined in Section 15, or

(2) undue influence, as defined in Section 16, or

- (3) fraud, as defined in Section 17, or
- (4) misrepresentation, as defined in Section 18. or
- (5) mistake, subject to the provisions of Sections 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

10. To decide this controversy it is necessary to consider the entire evidence available on the record. P.W. 1 Jagdish Swaroop is the plaintiff. He stated before the trial court that agreement Ex.1 was executed on 24.7.1979 and Smt. Vishnu Maya Kaul put her thumb impressions on each page and Dr. P. Wanchoo and J.P. Sethi also put their signatures as witnesses. According to him, reason of putting thumb impressions was that she was having paralysis in her finger and otherwise, she was in good health and this agreement was read over to her. P.W. 4 Dr. S.P. Wanchoo a retired medical officer-father-in-law of the defendant No. 3, while corroborating the oral testimony of the plaintiff stated that Smt. Vishnu Maya Kaul agreed to sell the house in favour of the plaintiff and Ex.1 agreement was executed in his presence and at that time she was conscious and as she was suffering from paralysis of the right side of her body, she put her thumb impressions on this document. It was also stated by him that prior to execution of Ex.1, she had executed a power of attorney in his favour. P.W. 6 is Dr. Hukam Chand Sethi and he admitted that he was working as assistant of Dr. Wanchoo. He stated before the trial court that he signed this document Ex. 1 as a witness as instructed by Smt. Vishnu Maya Kaul and she also put her thumb impressions on this document in his presence and she was in full senses at that time, although she was having paralysis of the right side of her body. P.W. 5 Sh. Amrit Kumar is brother of the plaintiff. He stated that this document Ex.1 was executed in his presence. P.W. 2 Sh. Jagdish B. Mathur attested this document as notary public. He stated that he attested this document upon the instruction of Smt. Vishnu Maya Kaul at her residence at Jaipur and she put her thumb impressions on this document in his presence and she was mentally fit to understand this document, although she was having paralysis at that time. P.W. 3 Sh. Manak Chand stated that he sent notice Ex. 19 under his signatures to Dr. S.P. Wanchoo on behalf of the appellant-defendant No. 2. P.W. 7 J.P. Gupta and P.W. 8 Vijay Kumar were examined on behalf of the plaintiff in rebuttal of the evidence of the appellant- defendant No. 2. Sh. J.P. Gupta stated that in the year 1979 he was serving in Rajasthan Patrika and he knew Smt. Vishnu Maya Kaul. He further stated that though she was suffering from paralysis of the right of her body, she was otherwise well and he signed this document Ex.1 as he was asked to do so by Smt. Vishnu Maya Kaul. According to the statement of P.W. 8 Vijay Kumar, he was also interested in purchasing this property and for that he had a talk with Smt. Vishnu Maya Kaul on 24.7.1979 but he was not ready to pay the price of Rs. 2,50,000/-. The defendants No. 1 & 3 did not appear in the court for their evidence. Appellant- defendant No. 2 stated before the trial court that his father expired on 20.4.1979 and his mother being unconscious at that time was unable

to take a round of the dead body of his father and thereafter she was again taken to Jaipur for treatment. He further stated that his mother was being treated by Dr. Mallik, Dr. R.N. Mathur and Dy. Hoam and Dr. Hoam is no more. His mother was admitted in the hospital at Jaipur on 27-28.7.1979 and he was also present at that time. He further stated that he was at the residence of her sister (defendant No. 3) at Jaipur on 24.7.1979 and on that day his mother's condition was quite serious and she was not able to speak and understand and she was lying in coma and she was not in a position even to make any gesture. According to his statement, about 12 noon or 1 p.m. he left Jaipur for Ajmer and no conversation with regard to sale of this house took place in his presence at that time and he is residing in this house. D.W. 2 Smt. Indira and D.W. 3 Sh. Radhey Shyam both stated about the execution of the will Ex.A6 which is said to be executed in favour of the appellant-defendant No. 2 D.W. 4 Vilayat Rai stated about the construction of this house that this house was got constructed by Sh. B.K. Kaul in his supervision. He further stated that he went to see Smt. Vishnu Maya Kaul in July, 1979 and at that time her condition was quite serious and she expired 15 days thereafter. Similar is the statement of D.W. 5 Mishri Lal regarding ill health of Smt. Vishnu Maya Kaul. D.W. 6 Sh. Ram Das Gupta stated that he went to see Smt. Vishnu Maya Kaul about 10 days prior to her death and at that time she was in a serious condition and did not response to him, her eyes were closed and her physical and mental condition was not good. Making his presence on the date of execution of this agreement, he further stated that she was perhaps unconscious. D.W. 7 Ramakant Sharma stated that he went to see Smt. Vishnu Maya Kaul on 24.7.1979 and at that time she was in a serious condition, she was neither able to see nor to hear and speak. D.W. 8 Dr. N.C. Mallik stated that he treated Smt. Vishnu Maya Kaul many a times from 1953 to 1979 and he also examined her in January, 1979 and at that time her condition was quite serious, she was unable to see and read and she could not recognize him and her mental condition was also quite serious but he did not examine her after January, 1979, although he saw her for the last time on the second day of the death of Mr. Kaul and at that time she was unconscious but her blood pressure used to be regular.

11. According to learned senior counsel Sh. Mehta the statement of P.W. 1 Jagdish is not reliable as he stated that Smt. Vishnu Maya Kaul was speaking on that day while he himself admitted in cross-examination that she asked Dr. Wanchoo by gesture to bring the stamps as she was unable to speak and further P.W. 1 stated that she was having paralysis only in one finger while as per evidence of the witnesses examined by him she was having paralysis of entire body of right side. It was also argued that according to P.W. 1 he for the first and final time had negotiations with Smt. Vishnu Maya Kaul on the same day for sale of this house which is not believable at all. About the statement of P.W. 2 a notary public, it was argued that he appears to be an interested witness in the plaintiff's favour as he stated that he handed over the cheque to Smt. Vishnu Maya Kaul as demanded by her but there was no occasion for making a demand

from the notary public. About the statement of P.W. 4 Dr. S.P. Wanchoo it was submitted that he was in collusion with the remaining defendants and being an interested witness his statement is not reliable that Smt. Vishnu Maya Kaul was in her senses at that time. It was next submitted that P.W. 5 Amrit Kumar being brother of the plaintiff is an interested witness and his presence has not been stated at that time by other witnesses and the statement of P.W. 6 Hukam Chand Sethi is also not reliable as he was working under P.W. 4 Dr. S.P. Wanchoo. According to learned senior counsel Sh. Mehta, on the similar grounds, P.W. 7 J.P. Gupta and P.W. 8 Vijay Kumar are also unreliable witnesses, as per the statement of Sh. J.P. Gupta she was speaking on that day while according to the evidence of other witnesses she was not able to speak and she was making gestures and no other witness examined on behalf of the plaintiff stated about the presence of P.W. 8 Vijay Kumar and there is no medical evidence to show that she was mentally fit on that day when Ex.1 agreement was executed. Learned counsel for the plaintiff-respondent No. 1 also while referring the oral as well as documentary evidence submitted that there is no medical evidence produced on behalf of the appellant-defendant No. 2 to prove that Smt. Vishnu Maya Kaul was unconscious on 24.7.1979 and out of three doctors as stated by the appellant-defendant, only one doctor D.W. 8 N.C. Mallik was examined who also admitted this fact that he never examined medically Smt. Vishnu Maya Kaul after January, 1979 and thus his statement on the mental condition of Smt. Vishnu Maya Kaul in July, 1979 is of no consequence. It was also submitted that on the one hand the appellant-defendant came with a plea of execution of will in his favour by Smt. Vishnu Maya Kaul in January, 1979 and another will said to be executed in July, 1979-three days after the execution of Ex. 1 and on the other hand he stated that his mother was not conscious on 24.7.1979 and he also referred Ex.A4 and Ex.19 letters to show that the appellant-defendant himself wanted to sell this house at that time.

12. I have given my thoughtful consideration to the above submissions and the entire evidence available on the record and am of the view that Smt. Vishnu Maya Kaul though suffering from paralysis of the right side of her body and other ailments, was in her senses so as to execute the agreement Ex.1 and she was competent to execute the same at that time. On account of some discrepancies and contradictions in the statements of the witnesses, their entire oral testimony cannot be discarded. The appellant-defendant in para 10 of his amended written statement though pleaded that Dr. S.P. Wanchoo is in collusion with the plaintiff and wanted to cause undue loss to the defendant No. 2 and, undue profit to defendants No. 1 & 3 who are in league with each other but he did not give any details/particulars as to how Dr. S.P. Wanchoo (P.W. 4) was in collusion with the plaintiff so as to cause undue loss to the defendant No. 2 and undue favour to the remaining defendants and further it was also not made clear that as to how the defendants No. 1 & 3 were in league with each other. In para 11, it was pleaded that Smt. Vishnu Maya Kaul had lost all her senses and power to move any part of the body and convey any thought before 24.7.1979. But he did not

specify the time since when she lost all her senses. In para 15, he pleaded that since Smt. Vishnu Maya Kaul had given more than the shares of defendants No. 1 & 3 in the ancestral property, hence, she executed a will of this house in his favour on 5.1.1979, but he did not give any details as to what more property was given by Smt. Vishnu Maya Kaul to the remaining defendants and at the cost of the repetition, it is significant to say here that the execution of the will Ex.A6 dated 5.1.1979 has not been found proved by the trial court and the findings of the trial court on this point have not been challenged at the time of hearing of this appeal. According to oral testimony of the witnesses examined on behalf of the appellant-defendant, Smt. Vishnu Maya Kaul was mentally and physically unfit since January, 1979. If it was so then how she was able to execute the will Ex.A6 in favour of the appellant-defendant No. 2 as pleaded by himself. Ex.A4 is a letter dated 26.6.1979. This letter was written by the appellant-defendant himself to late defendant-respondent No. 2 Sh. S.K. Kaul about one month prior to execution of Ex. 1 agreement. A perusal of the contents of this letter does not show that all the three defendants-brothers and sister had any strained relations. It is specifically mentioned in this letter that advertisement for sale of this house has already been made in the Sunday issue of Ajmer-Jaipur Navjyoti as directed by Smt. Preeti (defendant No. 3) to Sh. A.B. Mathur. It is also mentioned in this letter that until the offer is not of Rs. 2,50,000/-, it is not worthwhile to sell it. Further contents of this letter also show that Smt. Preeti was in need of some money for the maintenance of Smt. Vishnu Maya Kaul. There is nothing regarding any mental or physical condition of Smt. Vishnu Maya Kaul in this letter and thus the appellant-defendant No. 2 himself was desirous of selling this house for a price of rupees about 2.50 lacs. Ex.19 notice dated 13.9.1979 is also very relevant on this issue. P.W. 3 Sh. Manak Chand-advocate has proved this notice and he was not cross-examined by learned counsel for the appellant-defendant. This notice was given to Dr. S.P. Wanchoo (P.W. 4) on behalf of the appellant-defendant No. 2 and copies of this notice were also sent to the plaintiff-respondent No. 1 and Sub- Registrar, Ajmer. As per contents of this notice, the appellant- defendant No. 2 has withdrawn the general power of attorney dated 10.9.1979 given in favour of Dr. S.P. Wanchoo for sale of share of the appellant-defendant No. 2 in this house left by Smt. Vishnu Maya Kaul in favour of Jagdish Prasad Agarwal- the plaintiff in this case. According to this notice Ex.19, it is well proved that the appellant-defendant No. 2 had executed a general power of attorney on 10.9.1979-about one month and 16 days after execution of the agreement Ex.1 authorizing P.W. 4 Dr. S.P. Wanchoo to execute the sale deed of the suit house in favour of the plaintiff as agreed by Smt. Vishnu Maya Kaul. It shows that had Smt. Vishnu Maya Kaul been unconscious and unable to execute the agreement Ex.1 on 24.7.1979, the appellant-defendant No. 2 would not have executed any such general power of attorney in favour Dr. S.P. Wanchoo authorizing him on 10.9.1979 to execute the sale deed in favour of the plaintiff.

13. The contention of learned counsel Sh. Ranjan with regard to Ex.A7 that the appellant-defendant No. 2 had relied upon Ex.A7 cannot be accepted and the

learned trial court wrongly came to this conclusion that the appellant-defendant No. 2 had relied upon Ex.A7. This Ex.A7 was produced before the trial court on 21.2.1984 as it was included in the list of documents submitted by the appellant-defendant No. 2 in the trial court. Thus, admittedly, this Ex.A7 was filed in the court by the appellant-defendant No. 2. Thereafter, the appellant-defendant No. 2 filed an application u/s 65 of the Indian Evidence Act on 9.7.1990 with the averments that one will dated 27.7.1979 was executed by Smt. Vishnu Maya Kaul at Jaipur and this will was sent to him by Dr. Wanchoo and this document bears the signatures of one Sh. B.M. Tanquah and the original will is either with Dr. Wanchoo or with Sh. B.M. Tanquah and both failed to appear after service of summons, hence to prove the plaintiff's case to be false permission should be granted to lead secondary evidence for proving this will.

The plaintiff-respondent No. 1 did not file any reply to this application, rather learned counsel for the plaintiff-respondent No. 1 admitted this will Ex.A7 on 27.7.1993. The learned trial Judge vide order dated 18.8.1990 dismissed this application of the appellant-defendant No. 2. According to learned counsel Sh. Ranjan this document was produced in the court by the appellant-defendant and he vide application dated 9.7.1990 wanted to prove this will by way of secondary evidence and to prove the plaintiff's case to be false and thus it is clear that the appellant-defendant No. 2 relied upon this will. As per learned senior counsel Sh. Mehta Ex.A7 being the copy of the original was sent to the appellant by P.W. 4 Dr. S.P. Wanchoo and the appellant himself produced it in the court but he never relied upon this document and never sought any relief on the basis of this will Ex.A7. Having considered the above submissions, it appears that the appellant-defendant nowhere in any application or in his statement stated to show that he relies upon this document or he wants any relief on this document Ex.A7. However, in view of the entire discussion made hereinabove, it is found well proved that Smt. Vishnu Maya Kaul executed this agreement Ex.1 with free consent and she was competent to execute it. It is also observed that non-appearance of the defendant No. 1 & 3 before the trial court was not fatal at all to the case of the plaintiff-respondent No. 1 as they had already admitted the plaintiff's case in their written statement. It was also submitted by learned senior counsel Sh. Mehta that according to the terms and conditions of the agreement Ex.1, sale deed was to be executed on or before 1.9.1979 after obtaining "No Objection Certificate" and thus there was no ground to file the suit in December, 1980, after a long delay. Having considered this objection, I find no substance as keeping in view the entire facts and circumstances of this case, it is not a case of delay as Smt. Vishnu Maya Kaul expired after execution of this agreement and thereafter, the plaintiff-respondent No. 1 gave first notice in August, 1979 but with no reply and second notice was given in May, 1980 but the appellant-defendant did not give any reply while P.W. 4 Dr. Wanchoo replied on behalf of the remaining defendants that they were ready to execute the sale deed but the appellant-defendant No. 2 is not ready and thereafter the present suit was filed without any material delay.

14. Learned senior counsel Sh. Mehta placing reliance upon Ram Kumar Agarwal and Anr. v. Thawar Das (Dead) Through LRS. (2), contended that a party being failed to prove his willingness to perform his own part of the contract cannot claim decree for specific performance and placing reliance upon Ganesh Shet v. Dr. C.S.G.K. Setty and Ors. (3), contended that the relief for specific performance is discretionary and is not given merely because it is legal but it is governed by sound judicial principles.

15. It is well settled that in a suit for specific performance a plaintiff has to plead and prove that he was and is ready and willing to perform his part of the contract from the date of the agreement to the date of filing the suit. The trial court having considered the entire evidence decided issue No. 4 in favour of the plaintiff-respondent No. 1 and rightly so and findings of the trial court on this issue were not seriously challenged by learned senior counsel appearing for the appellant.

16. It is also correct to say that decree of specific performance is discretionary and the court is not bound to grant such a relief merely because it is lawful to do so. The provisions of Section 20 of the Specific Relief Act, 1963, being relevant are reproduced as under :-

20. Discretion as to decreeing specific performance.

(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

(2) The following are cases in which the court may properly exercise discretion not to decree specific performance :

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation 1 : Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of Clause (a) or hardship within the meaning of Clause (b).

Explanation 2 : The question whether the performance of a contract would

involve hardship on the defendant within the meaning of Clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

(3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the party.

17. Though the court has discretion to grant relief of specific performance but such discretion is not arbitrary but is guided by sound and reasonable principles. In the instance case, none of the circumstances as specified in Section 20 of the Act exists so as to refuse the decree of specific performance. This is not the case of the appellant-defendant that the plaintiff gets unfair advantage over him, nor it is the case of the appellant-defendant No. 2 that he would be put to undue hardship which he did not foresee at the time of the agreement. It is also not the case of the appellant-defendant No. 2 that this house was agreed to be sold at a lower price. Rather as discussed hereinabove, the appellant-defendant himself was of the view that sale price of Rs. 2,50,000/- would be reasonable. It is also significant to say here that the appellant-defendant was and still is in possession of this house and thus there is no reasonable ground to interfere with the decree of specific performance granted by the trial court.

18. Consequently, in view of the entire discussion made hereinabove, this appeal is dismissed.