

(1996) 12 DEL CK 0049
In the Delhi High Court
Case No : Suit No. 1457 of 1979

Gyan Devi Saxena

APPELLANT

Vs

Mohinder Singh

RESPONDENT

Date of Decision : 20-12-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 9, Order 32 Rule 2, Order 8 Rule 1(6), 151
Lunacy Act, 1912 — Section 18, 19
Specific Relief Act, 1963 — Section 16

Citation : (1997) 1 AD 617 : (1997) 65 DLT 764 : (1997) 40 DRJ 538

Hon'ble Judges : K. Ramamoorthy, J

Bench : Single Bench

Advocate : Atul Kumar, for the Appellant;

Judgement

K. Ramamoorthy, J.

(1) The plaintiff No.1 Mrs. Gian Devi wife of K.S. Saxena and plaintiff No.2 Smt. Bimal Saxena wife of Shri Mohan Saxena who is the daughter of plaintiff No.1 have filed the above suit claiming the relief of specific performance against the defendant Sardar Mohinder Singh. The case of the plaintiffs tersely stated is this:

(2) On 26.07.1979, the defendant agreed to sell the plot of land bearing No. B-7/59 situate at Safdarjung residential Scheme measuring 281 sq. yds @ 725.00 per sq. yds. A sum of Rs. 10,000.00 was paid as an advance. The defendant was to execute the necessary documents within 30 days. On 22.08.1979 before the expiry of the 30 days period, the second plaintiff wrote a registered letter to the defendant to complete the documents as the plaintiffs are ready to pay the balance amount.

(3) On 24.08.1979 a telegram was also sent to the defendant. The defendant did not act as per the terms of the agreement, Therefore, the plaintiffs had to file the present suit.

(4) On 04.02.1980 the defendant filed his written statement. His main case is that he had raised super-structure on the plot after termination cancelling the contract with the plaintiffs, thereby he admitted the execution of the agreement. According to the defendant the contract had become impossible of performance because of the subsequent events. In para 3 of the written statement, the defendant projected his case in the following manner: That the contract having become impossible to perform because of the subsequent events and the to the plaintiffs, if any, can be ascertained and, Therefore, the suit of the plaintiff for specific performance is liable to be dismissed.

(5) He further stated that after termination of the contract he raised funds by dissolving a partnership concern M/s Jaiswal Tailors and Drapers, and out of the funds he put up the construction. For the purpose of appreciating what the defendant was going to say, later, what is stated in the written statement about his health is important and, Therefore, I am extracting what is stated in para 5 of the written statement. "The defendant who was operated for brain in 1978 end in the All India Institute of Medical Sciences had to go for medical check up and regular treatment to the hospital continuously. The defendant is still going on every alternative day or after 3/4 days to the hospital for check up. Even on 13.12.1979 when the report of the refusal has been alleged to have been obtained on the registered cover, the defendant was in hospital." It is also his case that after cancelling the contract he forfeited the earnest money of Rs. 10,000.00 for the breach committed by the plaintiffs. According to him, the plan for construction was sanctioned by the concerned authority on 19.07.1979 and the construction was completed on or before 02.12.1979. He has stated that the suit has not been properly valued.

(6) On 17.04.1980, this court framed the following issues for trial: 1) Has the suit not been properly valued for the purpose of court-fee and jurisdiction? 2) Does the plaint disclose no cause of action? 3) Was the plaintiff ready and willing to perform his part of contract at all times? 4) Did the plaintiff commit any breach of the contract of sale? If so what and to what effect? 5) Was the defendant competent to construct a building on the plot of land in dispute after entering into agreement of sale with the plaintiff and what is the effect of his constructing building on the plot in dispute on the rights of the plaintiff? 6) Has the agreement of sale been frustrated or become impossible of performance? 7) Was the defendant competent and justified to cancel the agreement of sale and as such he is entitled to forfeit the amount of Rs. 10,000.00 paid as earnest money?

(7) The matter was being adjourned from time to time since 1980. The defendant had also participated and had also taken time for summoning the witnesses.

(8) The plaintiffs examined PW-1 to PW-4 including the second plaintiff and the defendant also examined witnesses DW-1 to DW-4 and the defendant. Besides setting up a false case about which I shall be adverting to a little later the

defendant had been attempting to protract the proceedings. I did not allow that and the learned counsel for the defendant withdrew from the case and I reserved judgment on 09.08.1996.

(9) At the time of admission/denial of the documents, the defendant had admitted the agreement Exhibit P-1. On 31.08.1987 the eldest son of the defendant Sardar Gurmit Singh filed is No.8271/87 purporting to be under Order 32 Rule 2 CPC praying that he may be appointed as guardian of the defendant as his father had become insane. The eldest son was appointed as guardian without prejudice to the contentions of the plaintiffs.

(10) 15 years after filing of the suit the eldest son purporting to act as guardian of the father, on 30.08.1994 filed is No. 7618/94 for the amendment of the written statement stating that his father was insane at the time of agreement, Therefore, the agreement is not enforceable.

(11) I shall now take up the question whether the plaintiffs have been ready and willing to perform their part of the contract right from the date of the contract up till now. For the purpose of showing that they had sufficient funds, the plaintiffs had examined PW-1 and PW-2 and documents Public Witness 1/1, PW-1/2, PW-1/3, PW-1/4, PW-2/1 and PW-2/2. These things positively show the capacity of the plaintiffs to pay money. PW1 is Mr. Ashish Kumar Mandal an officer Grade-I in Vinay Nagar Branch of Punjab National Bank. He has spoken to the money being available in the bank in the accounts of the plaintiffs. PW-2 Mr. Sanjeev Sachdeva stated to be working as clerk in the Vasant Vihar Branch of the Punjab and Sind Bank at the relevant time. I am satisfied from this evidence that the plaintiffs had necessary funds for purchasing property. It is not necessary to prove the availability of money in the light of Explanation to the Section 16 of the Specific Relief Act, 1963 which provides; for the purpose 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 aver performance of, or readiness and willingness to perform, the contract according to its true construction.

(12) PW-3 is the second plaintiff she has stated that the agreement was executed on 26.07.1979. A sum of Rs. 10,000.00 was paid as an advance and she proved the Exhibit Public Witness 3/2 the registered notice dated 22.08.1979 with the receipt for sending registered notice and also cover showing the refusal. She also proved Exhibit Public Witness 3/3 the telegram dated 25.08.1979. She was examined on 06.03.1991. She was cross-examined on behalf of the defendant by his learned counsel and I am not able to see anything in the cross-examination from which I can say anything against the evidence of Public Witness 3 about the transactions. PW-4 is Mohan Saxena, husband of the second plaintiff. He has deposed to the fact that the defendant had entered into an agreement with the plaintiffs and the transaction was brought about through one Mr. Sharma Property Broker and a sum of Rs. 10,000.00 was paid as an advance to the defendant. The defendant cross- examined the witness through his

counsel I accept the evidence of PW-4. From the evidence of PW-1 to PW-4 there is no other conclusion possible except to say that the plaintiffs have been ready and willing to perform their part of the contract.

(13) I shall now deal with the question whether the defendant can come forward with the case that there has been a frustration of the contract on the premise that he had put up construction in the property after the filing of the suit. The defendant himself filed is No.316/80 seeking permission of this court on 25.01.1980 to complete the construction. Therefore, he cannot now claim any relief on the ground that he had put up construction and Therefore, the suit should be dismissed. The defendant stated in the written statement that the building was completed before December 1979. There is absolutely no evidence to show as to when the construction was commenced. The Local Commissioner was appointed and he has only noted that he found some construction and Therefore, that must have been completed only after the filing of the suit and the commencement must have been after the filing of the suit. Whatever the case may be, the defendant cannot project this as a ground to deny the relief to the plaintiffs. The construction on the property is not at all a factor which could be taken into account in considering the reliefs prayed for by the plaintiffs. I am of the view that the defendant had deliberately taken a risk in putting up the construction.

(14) I shall now take up the question whether the defendant had committed the breach of contract, whether he was justified in forfeiting the advance of Rs. 10,000.00 and whether the amendment filed by the defendant in 1994 should be allowed.

(15) For the purpose of considering the matter a chronological survey of events from 1979 has become imperative because the defendant not only set up a false case in the written statement, not only had protracted the proceedings for more than 17 years but had set up yet another false case through his son as guardian that he was insane even at the time of the agreement. Even while filing the application under Order 32 Rule 2 CPC the defendant and his son had come forward with it. It is totally a false case. On 03.12.1979 the plaint was presented. On 05.12.1979 this court directed summons to be issued and is No.3803/79 was filed by the plaintiffs for the grant of injunction against the defendant from raising any structure or otherwise parting with the property. On 14.12.19 an ad interim order was passed. The plaintiffs filed is No. 3972/79 for appointment of Local Commissioner. On 15.01.1980 the defendant prayed for time to file written statement. On 25.01.1980 the defendant himself filed is No. 316/80 seeking permission of this court to provide with the work mentioned in the petition. On 28.01.1980 none appeared and time was granted to the defendant to file written statement within four weeks. On 04.02.1980, the defendant had signed the written statement and from the records it is not known that when it is filed. On 11.02.1980 the learned counsel for the defendant represented to this court that defendant had already filed the written statement. When the applications

3803/79, 3972/79 and 316/80 were taken up for hearing, the learned counsel for the defendant made a statement regarding construction and in is No. 3803/79 this court passed the following order: This order of mine disposes of all the three above mentioned interim applications. The plaintiff has instituted a suit for specific performance of the contract with regard to a plot of land bearing No.B-7/59, Safdarjung Residential Scheme measuring 281 sq. yards. The defendant contends that the said agreement was duly cancelled by him and the contract of sale was frustrated. Further he raised some construction over the plot in dispute. So is No. 3803/79 was moved by the plaintiff with the prayer to injunct the defendant from transferring, alienating or mortgaging the property in dispute or in any manner letting out or parting with the possession during the pendency of the suit. He also prayed for restraining the defendant from raising construction. is No. 3972/79 was moved by him for appointment of Local Commissioner under Order 26, Rule 9 and Section 151 CPC of the Code of Civil Procedure. Accordingly, Shri Parveen Anand advocate was appointed as Local Commissioner and he submitted his report dated 19th December 1979, after site inspection along with a rough sketch of the construction made by the defendant till then. is No. 316/80 has been moved by the defendant for permission to complete the construction of building as only plastering of the outer boundary wall, plastering of rooms from inside, finishing of roofs which have already laid, fixation and painting of doors, white washing and finishing of the toilets, fixation of window panes etc. remain to be done. The counsel for the defendant has made a statement in court today that the defendant be permitted to complete the building by doing the above mentioned unfinished task without prejudice to the rights of the plaintiff in this case. He has rightly pointed out that leaving the building unfinished at the stage may not be conducive to the interest of any party. having got this assurance, the counsel for the plaintiff has no objection because further construction of the building shall not adversely affect his interest in the suit. As for previous construction, the matter has yet to be considered after trial. It will be premature to say anything about it. Under the circumstances, I allow the defendant to complete the construction as desired without prejudice to the right of the plaintiff. However, he is restrained from selling, transfer, alienating or mortgaging the property in dispute in any manner till disposal of the suit. Further, he shall not let out the property in dispute or part with possession thereof without prior permission of this court till the decision of the suit. No order is made as costs. Both the parties may file additional documents, if any, within a fortnight and then appear before the Deputy Registrar on 9th of April 1980 for admission/denial of documents and further instructions in the matter. I may also notice that on 26.02.1980 the defendant had admitted the agreement dated 26.07.1979 and it was marked as Exhibit P-1. On 02.12.1980 this court noted that the defendant had filed a list of witnesses on 25.09.1980. is No. 4893/84 was filed by the plaintiff to examine Smt. Prakash Wati and Smt. Prem Wati at their residences by a Local Commissioner and that was allowed by this court on 15.09.1980. On 24.07.1985 while dealing with the same this court had noted the conduct of the defendant and that is relevant now

at this stage and Therefore, I have to extract the same: is no. 4893/84 Vide order dated 15th September 1980, an application filed by the plaintiff to examine Smt. Prakash Wati and Smt. prem Wati at their residences by a Local Commissioner was allowed. Ms. Usha Kumar, advocate was appointed as Local Commissioner for examining the said witnesses. Her report shows that she gave notice to counsel for the parties for appearing at the residence of the witnesses on 2nd November 1980 and that the statements would be recorded at 11 a.m. that the said date subsequently did not suit to the counsel for defendant and, Therefore, the same was changed. Ultimately, the date fixed was 30th November 1980 and counsel for the parties had due notice of the same. Following is the report of the Local Commissioner as to what happened: "On 30.11.1980 at 11 A.M. Shri Harnam Das, advocate was present at C-88, Sarojini Nagar, New Delhi. The witnesses were also present. After waiting for about 15 minutes I gave a telephone call to Shri Swantantra Kumar on the telephone No. as given by him and was informed that he had left about half to one hour ago and so I decided to wait for some more time. It was only at 11.35 A.M that the proceedings were started. it took about half an hour but the counsel for the defendant Shri Swantantra Kumar or the defendant in the above matter did not turn up. The statement of both the witnesses were recorded. The same are annexed herewith Along with the proceedings as Annexure 'E' and 'F'." It is stated by the defendant that he went to the place notified by the Local Commissioner for taking adjournment on the ground that his counsel was ill, that he reached about 15 minutes later than the appointed time of 11.a.m., that on enquiry he found that the Local Commissioner had not come and that, Therefore, he came back. he, Therefore, prays that he should be given opportunity to examine the aforesaid two witnesses. The application is contested by the plaintiff and I have heard the counsel for the parties. The statements of witnesses were recorded on 30th November 1980. The present application, as the endorsement and stamp of the registry shows, was filed on 18th August 1984 i.e. after about a period of nearly four years. That fact indicates that the application is mala fide with a view to delay the proceedings as far as possible and whatever has been stated in the application is totally wrong. Counsel for the defendant tried to explain at the bar that the defendant had to undergo an operation a month after execution of the commission, that he remained in the hospital for about a year and that, Therefore, he could not make an application earlier. This Explanation is not mentioned in the application which should have been so done supported by an affidavit. But even if it is assumed for the sake of arguments only that Explanation is factually correct, there is hardly any justification for filing the application so late. this application should have been filed within one month of the execution of the commission when even according to the learned counsel for defendant, the defendant was healthy. In any case, this application should have been filed immediately after the defendant recovered. Yet the application was filed more than two years after the alleged recovery. Further it appears from that portion of the report of the Local Commissioner had gone to the spot on 30th November 1980 at 11.a.m. and not only that she had been waiting but also tried

to contact Shri Swatanter Kumar, counsel for the defendant, so that he may turn up. It also appears that she waited for him up to 11.35 a.m. and that half an hour approximately was taken for recording the statements. Therefore, it is apparent that the local commissioner remained at the spot for about an hour after 11 a.m. and that thus the entire version of the defendant that he went to the place 15 minutes later than the scheduled time of 11 a.m. is totally wrong. Under these circumstances I hold that the application is totally baseless. Same is accordingly dismissed. is 4893/84 stands disposed of. It is only after this the defendant started representing to this court that he had some brain disease. This court noted the statement of learned counsel for the defendant and on that score the suit was adjourned.

(16) The matter was further being adjourned from time to time for trial. On 02.11.1987 this court recorded the statement of the learned counsel for the defendant and adjourned the suit. The order dated 02.11.1987 is as follows: S. No. 1457/79 Mr. Swatanter Kumar, advocate states that the defendant has become insane and that he had filed an application under Order 32 CPC for appointment of his guardian-ad-litem in the registry on 31st October 1987. The same is, however, not on record. It be traced and placed on record. A copy thereof has been supplied to Mr. Arun Kumar. Two witnesses S/Shri Satinder Singh, Clerk, Punjab & Sind Bank, Jungpura Extension, New Delhi, and B.S. Shammi, Officer, Punjab National Bank, Vinay Nagar, New Delhi are present. They have brought the copies of the statements of accounts but they are not certified in accordance with the Banker's Books of Evidence Act. They are directed to bring the same on 4th November 1987.

(17) The statement was made by learned counsel after filing of the application on 31.10.1987 under Order 32 Rule 2 CPC wherein I have noted earlier the eldest son Sardar Surjit Singh sought leave to appoint him as a guardian of the father. In para 3 of the petition it was stated " that in the written statement already filed by defendant it had been specifically stated that Sardar Mohinder Singh was not capable of entering into the contract and also that his brain was not properly functioning because of serious brain ailment. In this regard even the hospital records had been relied upon by the defendant". The statement had been made by the eldest son of the defendant which is contrary to what is stated in the written statement in this behalf which I had already extracted above. On 24.10.1988 this court passed the following order: is No. 8271/87 This is an application for appointing S. Gurmeet Singh as Guardian and next friend of defendant S. Mohinder Singh, the sole defendant in the suit. Mr. Swatanter Kumar states that in terms of the orders passed by this Court, it is not possible to produce said S. Mohinder Singh in court as he is very violent because of the acute attack of insanity. Mr. Atul Kumar, learned counsel for the plaintiff states that without prejudice to the rights & contentions of the plaintiff that S. Mohinder Singh was not insane at the time of entering into the agreement dated 26th July 1979 and when the written statement was filed, he has no objection if S. Gurmeet Singh is appointed as guardian and next friend of S. Mohinder Singh,

defendant. Accordingly, is No.8271/87 is allowed and S. Gurmeet Singh is appointed as guardian and next friend of S. Mohinder singh, defendant. However, it would be without prejudice to the rights & contentions of the plaintiff that S. Mohinder Singh was not insane at the time of execution of the agreement dated 26th July, 1979 and at the time of filing of the written statement. is is disposed of accordingly. S. No. 1457/798 List the suit before the Joint Registrar on 28th November 1988 for fixing fresh dates of trial. If possible, early dates of trial be fixed. The eldest son again participated in the proceedings and was taking time for examining the witnesses. On 06.03.1991 after recording the evidence of PW-3 the matter was adjourned to July 1991. On 26.07.1991 this court passed the following order: Statement of Public Witness 4 recorded and the counsel for the plaintiff has closed his case for evidence of the plaintiff. The witnesses of the defendant are not present except one Shri Amar Nath. The defendant had summoned Dr. P.S. Sachdeva, from the All India Institute of Medical Sciences and the report is that the Doctor had left the department about four years back. The defendant had also summoned the record from the All India Institute of Medical Sciences. The report is that unless the complete particulars are given no record can be produced. This was also the position on the last date of hearing when a clerk from the All India Institute of Medical Sciences appeared and stated that unless complete particulars are given no record could be produced. Mr. Swatanter Kumar states that he will furnish the complete particulars. Last opportunity is given to the defendant to produce his evidence on his own responsibility. However, the defendant can take the assistance of the Registry of this Court for summoning the witnesses. List this suit for recording the evidence of the defendant on 12th and 13th of December 1991. Even in July 1991 the plaintiffs had closed their evidence and an opportunity was given to the defendant to give his evidence. One Mr. Pool Chand a Medical Record Technician of All India Institute of Medical Sciences was examined as DW-1 by the defendant and he frankly stated that he had not produced the records summoned because they were 10 years old and they have been destroyed. Then the matter was adjourned. On 25.07.1994 this court passed the following order: Counsel for the defendant states that the defendant is to examine one doctor, namely, Dr. P.S. Sachdeva and three other witnesses, namely, S/Shri Ramesh Chander, Gurcharan Singh and Amar Nath and no other witness is to be examined and by mistake the witnesses could not be got served by issuance of summons. Dates of trial were fixed on March 23, 1992. plaintiff has completed his evidence earlier and even DW-1 was examined and thereafter the trial has protracted since 1991. However, in the interests of justice, I give one opportunity to the defendants to summon the witnesses subject to payment of Rs. 3000.00 as costs. The case be fixed for recording remaining evidence of the defendant in court on August 24, 1994 and for rebuttal evidence on August 30, 1994. On concluding of evidence, arguments shall be addressed by the counsel immediately. If summons are taken to the witnesses, it shall be defendant's responsibility for effecting service on the witnesses by taking out dusty summons. No other opportunity shall be given for the purpose. List in long cause.

(18) On 30.08.1994, the statements of DW-2 and DW-3 were partly recorded. On 01.09.1994, the defendant sought leave to summon Mr. J.K. Jain from the hospital of All India Institute of Medical Sciences. Giving further opportunity to the defendant this court passed the following order: I permit to examine the formal wit

(19) On 30.08.1994 the eldest son purporting to act as guard of the defendant filed is No. 7618/94 for the amendment of the written statement. The eldest son sought to add paragraph 8A to 8-D to the written statement. Paragraph 8A to 8D reads as follows: 8A. That the defendant was a patient of partial lob tuberculoma for which he was operated in 1977. The defendant was admitted to the All India Institute of Medical Sciences from 19th July 1977 to 4th August 1977. The defendant underwent various investigations including X.ray vide No.6291 or 6297, Biopsy vide No. 77- 5659, of the department of Neuro survey ,Aiims, New Delhi. The defendant was given Opd card No. 1475/77 and Ns No. 710/77. At the time of admission to the hospital, the defendant was in such a bad condition that he was not able to dress himself for the past 6 months amongst other conditions .At the time of discharge, the plaintiff was advised amongst others, lumina and insolence tablets interalia which result in a depression of the Central nervous system amongst other conditions. The defendant was in continuous treatment in the All India Institute of Medical Sciences and the state of his mind and mental condition continuously deteriorated with the passage of time. The defendant was regularly attending the clinic and on 28th June 1979 had been advised to 60 ml. gram luminal. As a result of the disease, surgery and the medication ,the defendant was rendered incapable of understanding even normal matters, dressing himself or physically moving properly. The defendant was incapable of entering into any agreement or giving his consent thereto on 26th July, 1979, as alleged orate any time thereafter had been advised 60 ml. gram lumina. As a result of the disease, surgery and the medication, the defendant was rendered incapable of understanding even normal matters, dressing himself or physically moving properly. The defendant was incapable of entering into any agreement or giving his consent thereto on 26th July 1979, as alleged or at any time hereafter. The defendant was suffering from increasing dressing apraxia, weakness of limbs, constructional apraxia, bilateral papilloedema, hemianopsia amongst other physical disabilities. He was unable to recognise or understand anything or perceive even day today matters, let alone agreements legal matters etc. The defendant did not have the mental capability, capacity or ability to enter into any agreement or give consent. The alleged agreement to sell is void in law and cannot be given effect to for any reason. 8B. These pleas are being raised without prejudice to the other pleas raised in the written statement. As is clear from the above facts and circumstances, the defendant was in capacitated and was not in a fit state of mind to understand the terms and conditions of the alleged agreement, which is not an agreement in law and its consequences. As such there is no agreement to sell and in any case the said agreement is not binding and is ineffective and it has not been signed by the person an executed

by the person in a sound state of mind and by understanding the terms and conditions of the agreement. 8C. Without prejudice to the foregoing, it is further submitted that the defendant has a large family and is the only one residential house. The house had been constructed mainly before the institution of the suit. The prices of the properties have gone up and the plaintiff who otherwise have sufficient properties, are only trying to take advantage of the said agreement which will place the plaintiff completely at a much advantageous position and the plaintiff would gain unfair advantage over the defendants as a large family would be left without any accommodation and homeless and just by paying a sum of Rs. 10,000.00 as alleged which as stated above already stood forfeited as per the understanding between the parties, if at all there was an agreement as stated by the plaintiff. Thus the property which values more than Rs. 25 lakhs today, if given to the plaintiff in the present suit, would be unfair unjust and would give the plaintiff undue advantage and inequitable gain to the plaintiff and as such the plaintiff is disentitled to the relief of specific performance. 8D. The defendant after his surgical was violent, temperamental and at present has to be completely confined because of his aggression.

(20) The plaintiff filed the reply opposing the application. On 21.09.1994 the eldest son filed is No. 8490/94 to summon Dr. A.K. Banerjee who was one of the Surgeons who performed his operation. On 21.08.1995 is No. 8339/95 was filed by the guardian of the defendant to examine Dr. H.M. Chawla, Department of Psychiatry, Aiiims, New Delhi. The guardian also filed is No. 1627/96 and that was rejected by this court. Then I did not permit the defendant to further protract the proceedings and wanted the defendant to examine the guardian so that the suit can be disposed of. It was at that time the wife of the defendant Smt. Tej Kaur has filed is No. 3228/96 praying for her appointment as guardian in place of her son of the defendant on the ground that the eldest son is not acting in the interest of the father. It was only to protract the proceedings. On 22.07.1996 I dismiss the said application by passing the following order: is No. 3228/96 in S. No. 1457/79 This application is filed by Smt. Tej Kaur wife of Sh. Narinder Singh, defendant No. 7 to get herself appointed as guardian in place of her son, who was appointed as guardian by order dated 24.10.1988. The suit is for specific performance. The defendant himself filed the written statement. Subsequently, the stand is that he was not a normal person on the date of the execution of the agreement and that stand is taken by the son who was appointed as guardian. On 24.10.1988 in the application for appointment of guardian, this Court passed the following order:- "IA 8271/87 This is an application for appointing S. Gurmeet Singh as guardian and next friend of defendant S. Mohinder Singh, the sole defendant in the suit. Mr. Swantanter Kumar states that in terms of the orders passed by this Court, it is not possible to produce said S. Mohinder Singh in Court as he is very violent because of the acute attack of insanity. Mr. Atul Kumar, learned counsel for the plaintiff states that without prejudice to the rights and contentions of the plaintiff that S. Mohinder Singh was not insane at the time of entering into the agreement dated 26th July, 1979 and when the written

statement was filed, he has no objection if S. Gurmeet Singh is appointed as guardian and next friend of S. Mohinder Singh, defendant. Accordingly, is No. 8271/87 is allowed and S. Gurmeet Singh is appointed as guardian and next friend of S. Mohinder Singh was not insane at the time of execution of the agreement dated 26th July 1979 and at the time of filing of the written statement. is is disposed of accordingly." From this it is very clear that the question whether the defendant was insane or not was to be decided. On the day when the order was passed in October 1988 the doctors have not been examined to apprise the Court about the condition of the defendant. The son of the defendant for 8 years and more have been participating in the proceedings. He filed is No. 7618/94 for the amendment of the written statement and when doctors were examined he was also present in court after November 1995. Doctors were examined before me and on a prima facie consideration of the matter it appeared that the defendant was a normal person on the date of the execution of the document. I want to have the trial expedited but the son was not cooperating and the matter was being adjourned from time to time. Driven to the position to proceed with the suit, the guardian has set up his mother along with defendant to file the application went through the averments in the application. that makes a very interesting reading. Entire blame is put on the guardian who had done everything on proper legal advice to defend the case. It is quite understandable that who is educated, working in private organisation, who had been conducting the case to the best of his ability now to be replaced by his mother. It is obvious that three persons have colluded to file the application so that the mother may come on record to further protract the proceedings. The application is absolutely mala fide and with ulterior motives it has been filed. Therefore, I do not find any merit in the application filed by the mother of the guardian, the wife of the defendant, to get appointed as guardian for the defendant. Therefore, the application is dismissed. It is stated in the petition that the son has been transferred to Amritsar and, Therefore, he does not take any interest in the proceedings. I was myself watching the son who had appeared. he did not appear to be a person who will act in a very irresponsible manner as is projected by him. Therefore, the son will continue to be the guardian. Post the matter for further directions on 7th of August 1996. As the matter could not be protracted by the defendant and his eldest son and the wife of the defendant did not turn up, the learned counsel for the defendant sought discharge from the case. I further adjourned the matter to 09.08.1996 for further proceedings. On 09.08.1996, no one appeared on behalf of the defendant, Therefore I reserved judgment.

(21) The defendant and his eldest son sought to project a picture as if the defendant was insane on the date of the agreement and Therefore, the plaintiffs, cannot enforce the agreement. DW-2 Mr. J.K. Jain who stated that he had brought the record of the admission register regarding the defendant. DW-2/1 marked as Exhibit shows that the defendant was admitted to the hospital on 19.07.1977 and he was discharged from the hospital on 04.08.1977 and the

record was destroyed on 16.03.1989 as per the instructions given by the superior officers. Through this witness Ex. DW 2/2 photocopy of the admission register was filed. These documents do not show anything about the conditions of the defendant on the date of the agreement.

(22) Prof. A.K. Banerjee was examined as DW-3. Even in the chief examination Dr. Banerjee does not say that at the time of the agreement in July 1979 or at the time of the filing of the written statement the defendant was insane. The Dr. also would state that the defendant was advised to report 4 weeks after a discharge. He would state in the chief examination that as per his records the condition of the patient had improved. He was cured of the disease. The Professor would further state "my record do not say anything about his ability to comprehend. In June 1979 when he came here the note record shows that he is more or less a symptomatic. I cannot make any positive statement that in July 1979 he could comprehend and construct and re-construct. I cannot comment he was sane or insane in July 1979". He would further state " as per marked Exhibit X-3 he was asked to report after six months. His condition as stated in our record, is more or less a symptomatic. A symptomatic, means that he had no complaint of illness. As per my medical experience I can say that an a symptomatic person should be able to comprehend. My record does not show that Mr. Mohinder Singh did not visit neuro surgery Opd for July 1979. Generally a symptomatic person should be able to construct and reconstruct and sign".

(23) DW-4 Dr. H.M. Chawla was examined on 06.03.1996. I need not deal with his evidence in detail because he does not say about the condition of the defendant on the date of the agreement. The defendant marked Exhibits DW-4/1 to DW-4/10. DW- 4/1 is a document marked on 30.01.1996. On that date, the defendant sought to mark some documents on the ground that some documents were filed in court and those documents were being put to DW-4. When the learned counsel for the defendant was informed that no documents had been filed, the learned counsel argued the matter and submitted that the defendant was entitled to file the documents whether those had already been filed or not. I had to pass a detailed order on 30.01.1996. The document were returned to the learned counsel for the defendant. The order is extracted to show the conduct of the defendant and the eldest son. The defendant summoned Dr. H.M. Chawla working in All India Institute of Medical Sciences, New Delhi. The Doctor was examined and he also produced a letter from the concerned department maintaining records that owing to lapse of time no relevant records are available in the hospital. Learned counsel for the defendant started showing documents in his hand and which have not filed, to the witness. That was objected to by learned counsel for the plaintiffs on the ground that the matter is pending long time since 1979 the defendant did not file these documents at any time into court. Nor did the defendant supply the copies of the documents to him. Learned counsel for the defendant submitted on 2/3 occasions when the defendant wants to summons the Doctor documents were filed into the court by the defendant and the copies were also given to the other side. When I checked up with the

records it came to light that the defendant has not filed any documents at any time relating to the ailment of the defendant. Learned counsel for the defendant submitted that he was entitled to put the documents in his hand to the witness in the light of the provisions of Order 8 Rule 1(6) CPC that provision reads as under: "Nothing in sub-rule (5) shall apply to documents produced for the cross-examination of plaintiff's witnesses or in answer to any case set up by the plaintiff subsequent to the filing of the plaint, or handed over to a witness merely to refresh his memory". I put a question to learned counsel for the defendant that how this provision could be called in aid by the defendant when the defendant is examining his own witness. Learned counsel for the defendant asserted that he can produce any document and show it to his own witness whichever he wants just to refresh the memory of the witness. Learned counsel for the defendant also submitted that if the court did not permit him to file the documents appropriate orders may be passed on that the defendant could test the correctness of the order in the appeal. Learned counsel for the plaintiffs submitted that already a Doctor was examined for the purpose for which the defendant wants to examine D.H.M. Chawla to show the condition of the defendant at the time of the execution of the agreement. Now the case of the defendant is that at the time of the execution agreement for sale the defendant was not in a sound mind. One of the documents that the learned counsel for the defendant showed to the witness and the witness also admitted that in two places he is able to identify his hand writing and in other places in the document he has not been able to see who had written. I permitted the learned counsel for the defendant to put the document to the witness and he represented that a photocopy of the document had already been filed and that a photocopy forms part of the record. Again I checked up no photocopy of the document is on record. Thus having regard to the posture of the advocate in trying to mark the document and representing that photocopy already on record. I did not permit the learned counsel for the defendant to mark the document and the document was directed to be returned to the learned counsel for the defendant. The procedure prescribed under law should be followed and all of us are governed by the rule of law. When the matter is more than 16 years old everybody concerned is expected in disposing of such matter, as expeditiously as possible. I am unable to resist the feeling that the defendant is still trying to protract the proceedings. Learned counsel for the defendant seeing the answer from the witness Dr. H.M. Chawla that he would not remember anything and he could say something about the defendant only if hospital records are shown to him. Learned counsel for the defendant was nonplussed and could not proceed further. Learned counsel submitted that the defendant should be permitted to file these documents and if the defendant is not permitted then he cannot proceed further in the matter. It is only thereafter I directed the closing of the evidence of DW-4.

(24) EX. Dw 4/2 to Ex. Dw 4/7 are the Opd tickets issued by the hospital and they did not throw any light on the question. Dw 4/8 is dated 02.11.1987 i.e. after the suit. That is also a out patient card and is not at all relevant. Exhibit Dw

4/9 is dated 05.08.1988. That is issued by Dr. Chawla purporting to be under Sections 18 and 19 of Act Iv of Indian Lunacy Act, 1912. Exhibit Dw 4/10 is dated 05.08.1988 issued by another Doctor who has not been examined. That relates to the period after filing of the suit. Whether the defendant is insane or not is not an issue before me.

(25) The documents marked as Exhibit X-1 to X-10 also do not show about the mental condition of the defendant in 1979. From the record it is clear that the defendant was suffering from some ailment. He was operated upon and was cured from the ailment and that is why he was able to file the written statement giving instructions to his counsel. He applied to the authorities seeking sanction for the Construction of the building in the property. He could engage contractor for putting up a construction and he could file an application seeking permission to complete the construction. Therefore, from the records and the evidence of Professor Dr. Banerjee, it is beyond any doubt that the defendant was a normal person on the date of execution of the agreement and on the date of the filing of the written statement and at any rate till 1987. The defendant is clearly in breach of the agreement. He has not at all proved his case about the cancellation of the agreement and as to how he has justified in forfeiting the advance received by him from the plaintiffs. He had set up a false case that he had issued a notice cancelling the agreement, and that he was not doing well at the relevant time. The so-called guardian while filing the application in 1987 stated as if this case was put forth in the written statement. The application for amendment has been filed setting up a totally new case is an attempt to defeat the rights of the plaintiffs.

(26) Under these circumstances, I have absolutely no hesitation in rejecting the application for amendment. The defendant himself Along with his wife and the eldest son had enacted a drama, as it were, to protract the proceedings and when they did not work they very clearly kept out of the court as if they would not be affected by any order which this court may pass. The Supreme Court has laid down in the case of S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, , that when a party set up a false case the case of that party should be rejected in liming and that can be done at any stage of the proceedings. I am unable to resist the feeling that the defendant and his family, the wife and the eldest son had been attempting to be too smart and they are under the impression that they can make all sorts of representation and get away with them with impunity. I am afraid the law is not helpless in such a situation and the court would be in a position to render justice on the materials available on record. I hold that the defendant is not only guilty of breach of contract but also guilty of putting forth false case. The defendant cannot rely upon the construction put up by him.

(27) It is well settled that the court is to exercise its discretion in a suit for specific performance because the relief of specific performance is a discretionary one and the plaintiffs cannot claim the same ex debito Justicia. From the facts

recounted by me, I think the only conclusion is possible on the facts and circumstances of the case and that is that the plaintiffs have proved their case. I exercise my discretion in favor of the plaintiffs in granting the reliefs of specific performance.

(28) All the issues are answered in favor of the plaintiffs.

(29) The defendant cannot claim compensation for the building put up by him. The defendant can demolish and remove the debris from the plot after the plaintiffs had deposited the balance of consideration.

(30) Therefore, the suit is decreed. There shall be a decree directing ; a) the plaintiffs to deposit the balance sum of Rs. 1,93,725.00 after deducting the amount taken as an advance, in this court on or before 31.03.1997; b) on such deposit directing the defendant to execute a sale deed within three weeks from 31.03.1997 and in case of default by the defendant an officer of this court shall be appointed for the execution of the sale deed in accordance with law. c) directing the defendant to pay to the plaintiffs the costs of the suit. d) directing the defendant to demolish the building and take away the debris within three weeks from the date of deposit of the balance of the consideration by the plaintiff and in case the defendant fails to demolish the building within the time stipulated, directing the plaintiffs to demolish the building through the process of court at their costs.