
(1999) 01 RAJ CK 0019
In the Rajasthan High Court
Case No : Civil First Appeal No. 19 of 1997

Prithvi Raj Singh	Vs	APPELLANT
Dalip Kulkarni and Others		RESPONDENT

Date of Decision : 08-01-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, 96
Specific Relief Act, 1963 — Section 16, 20

Citation : AIR 1999 Raj 201 : (2000) 1 RLW 170 : (1999) 2 WLC 667

Hon'ble Judges : Arun Madan, J

Bench : Single Bench

Advocate : S. Kasliwal and A. Kama, for the Appellant; Suresh Goyal, R.R.L. Gupta and Paras Sharma, for the Respondent

Final Decision : Allowed

Judgement

Arun Madan, J.—This first appeal arises out of judgment & decree dated 19-11-96 passed by the Additional District Judge No. 1, Jaipur City whereby suit for specific performance of contract filed by plaintiff-appellant was dismissed.

2. Prithvi Raj Singh (plaintiff-appellant) filed civil suit for specific performance of an agreement (Ex. 1), which was duly executed on the basis of a memo of Understanding (for short "MOU") dated 20-7-1987 duly executed between appellant-plaintiff and defendant-respondent No. 1 Dalip Kulkarni while acting on his own behalf and on behalf of his associates namely Skypak Couriers Limited (respondent No. 5), Smt. Sheela M. Kulkarni (respondent No. 6), Smt. Devika D. Kulkarni (respondent No. 7), M.R. Patanakar (respondent No. 8) and V. Chandra Shekaran (respondent No. 9) all Directors of the Kopyrite Limited. According to the Memo of Understanding (Ex. 1), the appellant and his associates constituted a Public Limited Company namely Kopyrite Limited (for short "Kopyrite Company") which was incorporated on 27-2-1984 holding major shares of the Company by the appellant and his associates. The Kopyrite Company established its factory at D-172 Industrial Area, Gehror (District Alwar) after having obtained

financial assistance from RIICO Limited (respondent No. 2), Rajasthan Financial Corporation (respondent No. 3) and Canara Bank Jaipur (respondent No. 4).

3. It is the case of the plaintiff appellant in the plaint that on the date of execution of the Memo of Understanding (Ex. 1), the assets of the Kopyrite Company (for short "the Company") were of rupees two Crores. Hence with an ill motive from the very inception, respondent No. 1 intended to obtain possession of the factory as well as management of the Company on a nominal payment and accordingly he paid only in all Rs. 8,75,000/- towards 1/4th of the paid up value of each share @ Rs. 2.50p. whereupon he took over possession of the factory and management of the said Company from 20-7-87 and started operating the factory. Thereupon according to Clause (4) of the M.O.U. (Ex. 1), he became Director of the Company and he then appointed respondent Nos. 6 to 9 as its associates Directors. As per Clause (2) of M.O.U., the respondent No. 1 had to make the payment of remaining costs of shares after the receipt of the audited balance sheet of financial year 1986-87 but he failed to make the payment of the said amount to the appellant. Therefore, the appellant was constrained to file civil suit No. 40/89 (New No. 190/ 95) for specific performance of the Agreement M.O.U. (Ex. 1) against respondent No. 1 for recovery of the amount due to the appellant for the shares purchased by the sole defendant herein impleaded as respondent No. 1 to the tune of Rs. 9,25,394.99p. (Rs. Nine Lac, twenty five thousand, three hundred ninety four and ninety nine paise) which was decreed by me trial Court (learned Additional District Judge No. 1 Jaipur City) whereby the said trial Court granted the relief to the plaintiff by decreeing the said suit to the extent of Rs. 8,07,500/- only with interest thereon @ 12% per annum from 4-9-87 till its realisation with costs while counter claim preferred by the defendant was held not maintainable and dismissed accordingly vide its judgement & decree dated 18-2-1998.

4. As per Clauses 1 to 6 of the M.O.U. (Ex. 1) it was incumbent upon respondent No. 1 to take all necessary steps with regard to discharge of the liabilities to the financial institutions of the Company, from who the appellant had borrowed heavy amount by way of loans by incurring financial liabilities and for the successful performance by payment thereof, respondent No. 1 had stood as guarantor to the said financial institutions for due compliance of the liabilities imposed under the M.O.U. (Ex. 1). As per the plaint, it was obligatory upon the respondent No. 1 to take necessary steps to discharge liability of the Company whereas he had fraudulently not discharged the same inasmuch as he had purposely not paid the remaining purchase money as against value of shares and also did not show the requisite interest in performance of his corresponding obligations. It has further been alleged that respondent No. 1 after having got approval for change of management of Kopyrite Ltd. to himself from RIICO acting on behalf of all three financial institutions, did not make payment to the financial institutions of the liabilities taken over by him and as such respondent No. 2 -RIICO threatened to acquire the factory of the plaintiff-Company which is borne out from relevant correspondence on record dated 2-2-1988 & 6-2-1988

(Ex. 25 & Ex. 23 respectively).

5. As regards the discharge of the liability by the respondent No. 1 to the financial institutions it has been contended by the appellant that respondent No. 1 had handed over a cheque of Rs. ten lacks towards part payment of an over all liabilities of Kopyrite Company to the RIICO, RFC and Canara Bank but the said cheque upon presentation to the Bank for its encashment was dishonoured. Thereupon the financial institutions again pressed the appellant to make the payment of the amount due to the financial institutions as is evident from telex message dated 11-3-88. Subsequently respondent No. 1 deposited a sum of Rs. Ten lacs towards part payment of the amount due on account of Kopyrite Company with RIICO in acknowledgment of his liability.

6. It has further been contended by the appellant that respondent No. 1 purchased the Company on the basis, "as is where is", by agreeing to take over upon himself all the liabilities of Kopyrite Company in terms of the M.O.U. (Ex. 1) while at the same time, he failed to make payment due to the financial institutions i.e. respondent Nos. 2 to 4 notwithstanding the repeated reminders to discharge the said liability received from the financial institutions and finally on non payment thereof the respondent Rajasthan Financial Corporation (for short "RFC") served with a legal notice on 14-6-1989 upon respondent No. 1.

7. It is also the case of the appellant that while the appellant plaintiff performed his part of obligations referred to in M.O.U. dated 20-7-87, respondent No. 1 failed to perform his corresponding obligations referred to therein in Clauses 2, 3, 4 & 6 which read as under :--

"2. Shri Dalip Kulkarni has agreed to pay the sum of Rs. 2.50 per share on Shri Prithvi Raj Singh handing over to Shri Dalip Kulkarni the original share certificates along with share transfer form on 20th July, 1987. Shri Dalip Kulkarni undertakes to pay due balance amount of Rs. 2.50 per share to Shri Prithvi Raj Singh for himself and on behalf of the remaining share holders immediately on receipt of the audited balance sheet for 1986-87 on which payment the obligation of Shri Dalip Kulkarni in respect of the consideration amount payable on the shares aforesaid would stand fully discharged and fulfilled. It is mutually agreed that on such payment and on submission of the audited balance sheet there will be no claims, rights, interests of titles to be held against Mr. Dalip Kulkarni or his nominees of Shri Prithvi Raj Singh and the shareholders of Kopyrite Limited.

3. Matters related to customs, sales tax, octroi, excise duty and all other statutory liabilities have been disclosed to Mr. Dalip Kulkarni and his nominees. Mr. Prithvi Raj Singh shall also furnish to Mr. Dalip Kulkarni information related to commitments entered into by Kopyrite Limited from time to time which have a bearing on the working of the company. It is now mutually agreed that Shri Dalip Kulkarni will take over on "as is where is" basis the entire undertaking run in the name of "Kopyrite Limited" including all current assets and current liabilities as

disclosed to Shri Dalip Kulkarni and set out respectively in the attached annexures, an additional variation of the sums set out in the annexures to the extent of rupees fifty thousand will be permitted.

4. The transfer of the management of the undertaking as aforesaid shall take place simultaneously with the payment of Rs. 2.50 for the first time to Shri Prithvi Raj Singh and Shri Dalip Kulkarni shall be in possession of the undertaking on that day entitling him to start production. Mr. Dalip Kulkarni will be appointed Director and Chairman of the Board of the same day.

6. Shri Dalip Kulkarni either by himself or through his associates will enter into separate arrangements with Rajasthan Financial Corporation Rajasthan Industrial and Investment Corporation Limited and Canara Bank for discharge of the liabilities taken over as also to furnish such documents, deeds, guarantees as may be required by Rajasthan State Financial Corporation, Rajasthan State Industrial and Investment Corporation Limited and Canara Bank in substitute of the guarantees that may have been given by Shri Prithvi Raj Singh, Shri Santosh Bagaria and their associates."

8. From a perusal of plaint giving rise to this first appeal it is borne out that the appellant has sought specific performance of M.O.U. (Ex.1) duly executed between the plaintiff and defendant-respondent No. 1 on 20/7/87. In para 14 of the plaint it has been averred by the plaintiff that while the appellant fully performed all the relative terms of the M.O.U. (Ex.1) by handing over possession of Kopyrite Company and its management and (hereafter in pursuance of Clause 4 thereof the respondent No. 1 became its Director and later on appointed respondent Nos. 6 to 9 as his associate Directors while the respondent No. 1 did not perform corresponding obligations imposed upon him by M.O.U, (Ex. 1) more particularly by Clauses 1 & 6 which were to be performed by him, hence it had become necessary for the appellant to file suit for specific performance of the M.O.U. (Ex. 1) with a view to enforce due compliance of the said corresponding obligations towards the financial institutions as aforesaid.

9. It is also the case of the appellant that respondent No. 1 in performance of his part of obligations imposed by Clauses 1 & 6 of the M.O.U. (Ex. 1) had only given his personal guarantee to Canara Bank (respondent No. 4) in substitution of personal guarantee furnished by the appellant to the said Bank while no payment had been made by respondent No. 1 to discharge corresponding liability to RIICO, RFC and Canara Bank, which the appellant had earlier undertaken to discharge to the said financial institutions. It has been further averred that after handing over of the management of Kopyrite Company as well as its factory to respondent No. 1 in pursuance of the M.O.U. (Ex. 1), the appellant plaintiff had not only transferred the complete assets of the factory as well as the management of the company as in existence on the date of execution of the Agreement but also corresponding liabilities to respondent No. 1 which he had gladly undertaken to fulfil and discharge by virtue of the said agreement but thereafter he had failed to do so resulting in filing of the present suit for specific

performance of the Agreement. Even after parting with the possession of factory as well as management of the Company for over two years without charging the liabilities which respondent No. 1 had specifically undertaken to discharge, he had on the contrary increased the burden of the plaintiff because the discharge of the corresponding liabilities to the financial institutions could not see light of the day. The basic feature of the plaint is violation of and non-performance of obligations on the part of respondent No. 1 as referred to in Clause 6 of M.O.U. (Ex. 1) which stipulates that it is obligatory upon respondent No. 1, who may either himself or through his associates shall enter into separate arrangements with RFC, RIICO and Canara Bank not only for the discharge of the liability taken over by the latter from the appellant but also to furnish such documents, deeds as may become necessary to be required by the said financial institutions in lieu of the guarantees executed earlier by the appellant and his associates.

10. The plaintiff has sought a decree for specific performance of the terms of agreement more particularly Clause 6 of the M.O.U. (Ex. 1) and for directing respondent Nos. 1, 5 to 9 to discharge the liability of the plaintiff and Kopyrite Company towards the financial institutions i.e. defendant Nos. 2, 3 & 4 and for further direction to defendant Nos. 2 to 4 the financial agencies RIICO, RFC and Canara Bank to get the liabilities due on their account towards M/s. Kopyrite Ltd., duly enforced as against defendant No. 1, 5 to 9.

11. In reply and written statement to the plaint, respondent No. 1 has not disputed that Kopyrite Company was constituted by the appellant and after constitution of the Company, the production commenced. However, respondent No. 1 contended that Kopyrite was not having good financial state and, therefore, the Company had borrowed money from the financial institutions referred to above by raising loan to the tune of Rs. 1.55 crores which was outstanding against the appellant's Company.

12. Respondent No. 1 further did not dispute execution of the M.O.U. (Ex. 1) by which the plaintiff had handed over the entire management and the property appurtenant to the Company M/s. Kopyrite Ltd. by transferring and alienating the same in favour of respondent No. 1. However, with regard to performance of the corresponding obligations imposed upon him and other defendants, the case of defendant No. 1 in short is that though he was ready and willing to perform his part of the performance of the obligations imposed as per the terms and recitals of the Agreement (Ex. 1), the breach if any was on the part of the appellant. There was no mala fide or ulterior motive which could be attributed to him whereas he had in exercise of good faith and due diligence at the time of execution of M.O.U. (Ex. I) itself, advanced Rs. 8.75 lacs through bank draft.

13. It is also the case of the contesting defendant No. 2 that he had conveyed assurance to the appellant that he would obtain necessary sanction from the financial institutions for Kopyrite Company in connection with transfer of its management and ownership. As regards discharge of the corresponding financial obligations imposed upon respondent No. 1 he took a specific plea that the

plaintiff had obtained financial assistance to the tune of Rs. 72.40 lacs from RIICO, Rs. 34.6 lacs from RFC and Rs. 21.33 lacs from Canara Bank for setting up Kopyrite Company and to that effect he had in specific terms informed the plaintiff that as regards transfer of the said amount which was due to the said financial institutions from the plaintiff unless and until a clearance was obtained by way of "no objection certificate", respondent No. 1 was not bound to perform his corresponding obligations by way of discharge towards payment in full satisfaction of the amount due to the said institutions.

14. As per the case set up by the contesting defendant respondent No. 1 Shri Dalip Kulkarni, the appellant-plaintiff after having obtained necessary approval and clearance from the financial institutions was to inform the said defendant within seven days of the receipt of the approval with a view to give finality to the M.O.U. (Ex. 1), After the respondent conveyed his consent vide his letter dated 15-7-87. the appellant had conveyed his acceptance. It is further case of the defendant that he had in unequivocal terms conveyed to the appellant-plaintiff that unless and until financial institutions convey their consent as to the transfer or discharge of liability of the financial institutions which had been undertaken by respondent No. 1 and his associates, the readiness and willingness of respondent No. 1 as to performance of the corresponding obligations imposed upon him by the Agreement in question could not be inferred. Moreover, as per the case of respondent No. 1. he had by the letter dated 15-7-87 conveyed the position to the plaintiff on the basis of understanding arrived at between them prior to the execution of M.O.U. (Ex. 1). Therefore, according to respondent No. 1, since the plaintiff had failed to obtain necessary sanction and clearance of the financial institutions within a period of seven days as referred to above, no liability on the part of respondent No. 1 could be fastened or inferred towards financial institutions. It was further contended by respondent No. 1 that since the plaintiff had obtained loans in the manner indicated as above from the financial institutions and, therefore, RIICO was justified in raising demand for discharge of corresponding liability from the plaintiff appellant with a view to safeguard interest of the management of Kopyrite Company and with a view to avert financial crisis, respondent No. 1 had advanced a sum of Rs. 10 lacs to RIICO on 20-2-88. The defendant had in the manner as aforesaid thus not only refuted the claim of the plaintiff appellant but further, he has not expressly stated as to how and in what manner he was ready and willing to perform his corresponding obligations to the appellant.

15. Respondent Nos. 2, 3 and 4 had filed separate written statement to the plaintiff. In written statement, they have urged that they are not bound by any contract arrived at between the plaintiff and respondent No. 1 since they had not given their acceptance to the same and, therefore, the suit against them should be dismissed with costs.

16. It was further contended by respondent No. 1 that in view of Order 2, Rule 2, CPC, which provides that all the claims based on one document should be

included in a single suit, the plaintiff divided the cause of action which was not divisible and. therefore, the suit was not maintainable. Another plea which was advanced was that since the M.O.U. was executed on 20-7-87 while the suit was filed on 17-2-1992, the same was time barred being filed beyond the period of limitation. The plaintiff had filed suit for specific performance under the Specific Relief Act, 1963 but he has not stated that he was or is ready to fulfil his part of obligation imposed under the M.O.U. (Ex. 1) or willing to perform that as required by Section 16C of the Specific Relief Act. According to defendant-respondent No. 1, Clause 6 of M.O.U. (Ex. 1) is not feasible to be specifically performed and since the parties to the said contract could be compensated by way of damages in the event of its breach, if any, and this being not a suit for damages hence the said suit was not maintainable in its present form.

17. On the basis of the pleadings of the parties, following issues as quoted in memo of appeal were framed by the learned trial Court:--

" 1. Whether a Memorandum of Understanding was executed on 20-7-1987, between the plaintiff and the respondent No. 1?

2. Whether the plaintiff performed those obligations he bound to do, as per terms of the contract dated 20-7-1987?

3. Whether the defendants No. 1 and his associates respondents No. 5, 6, 7, 8 and 9 performed all the obligations they were bound to do as per the terms of the contract dated 20-7-1987?

4. Whether the defendant No. 1 is not bound by Clause 6 of the MOU dated 20-7-1987 to make payment of the money due to RIICO, RFC and Canara Bank?

5. Whether the defendants No. 2, 3 and 4 have right to recover their liabilities of Kopyrite Limited from respondents No. 1, 5, 6, 7, 8 & 9?"

18. The plaintiff in support of his claim examined himself as PW1 and got examined PW2 Kapil Roop Rai while documents Ex. 1 to Ex. 84 were got exhibited, The respondents-defendants did not examine any evidence by way of rebuttal nor did they file any document to controvert the case of the appellant. With regard to defendant Nos. 5 to 9, proceedings against them were drawn up ex-parte since they had not contested the plaintiff's case. After hearing both the parties and considering the evidence on record of both the parties, the learned trial Court dismissed the plaintiff's suit by impugned judgment & decree, referred to above. Hence this first appeal.

19. First contention urged by Shri S. Kasliwal learned counsel for the appellant plaintiff is that it was on the basis of the negotiations held between the appellant and respondent No. 1 that a contract namely M.O.U. (Ex. 1) was executed between them on 20-7-87 which imposed obligations not only on the appellant but also on respondent No. 1 and his associates respondent Nos. 5 to 8, which were to be performed by both of the parties. Since respondent No. 1 in compliance with Clause 4 of the M.O.U. (Ex. 1) had taken over complete

possession of the factory and its management and started operations thereof w.e.f. 20-7-87, and as regards the appellant, he had already fulfilled all the obligations enjoined upon him under M.O.U. (Ex. 1) and since respondent No. 1 had correspondingly failed to perform obligations imposed upon him under Clause 4, as referred to above, respondent No. 1 had not only substituted personal guarantee of the appellant with Canara Bank (respondent No. 4) but had further failed to substitute guarantee of the appellant with other respondent Nos. 2 & 3 (financial institutions) and also failed to make the payment to respondent Nos. 2, 3 & 4 in discharge of the liability of Kopyrite Company which he was bound to do so as per Clause 4 the appellant-plaintiff was entitled to the relief sought for in the plaint by getting the performance of Agreement (Ex. 1) duly enforced. It was alternatively contended that had respondent Nos. 1, 5 to 8 fulfilled their part of obligations as enjoined upon them under Clause 6 of M.O.U. (Ex. 1), the appellant would have in that eventuality been absolved of his liability to respondent Nos. 2 to 4 and for which he would not have filed the suit for specific performance of M.O.U. (Ex. 1).

20. It was then contended by the learned counsel for the appellant that the learned trial Court gravely erred in not taking into consideration that material issues for which burden of proof was heavily on the plaintiff appellant had been successfully discharged which is borne out from the conclusions arrived at by the learned trial Court in its impugned judgment giving rise to this first appeal more particularly issue No. 1, which relates to execution of M.O.U. (Ex. 1), which is an admitted document of both the parties. Issue No. 2 relates to performance of the obligations imposed upon the plaintiff as per M.O.U. (Ex. 1) by virtue of which the appellant had not only handed over all the original share certificates with blank share transfer forms and on 20-7-87 itself but had also handed over possession and management of all the assets of the factory, record with other relevant documents of Kopyrite Company to respondent No. 1 and had directed staff and officers of the Company to take over all future claims from respondent No. 1. All these facts stand duly proved and established by the unimpeachable testimony of plaintiff (PW1). The receipt of original share certificate stands proved from the evidence on record with regard to handing over possession of the property, management and factory to respondent No. 1 which is established and proved by Clause 4 of M.O.U. (Ex. 1) and other documents Ex. 2, 14, 16, 27 to 29, 29/1, 30 to 33, 34, 37, 51, 52/58, 59, 66 to 83 and also from the evidence of PW. 2. Thus, in any view it is fully borne out that the appellant had successfully established on record not only with regard to handing over assets of the factory and management of the Company M/s. Kopyrite to respondent No. 2 as on the date of execution of M.O.U. (Ex. 1) itself besides the possession of factory of Kopyrite Company to the respondent No. 1 and had thus performed obligations imposed upon him by the Agreement Ex. 1.

21. The learned counsel for the plaintiff-appellant further contended that the learned trial Court has failed to appreciate recitals of M.O.U. Ex. 1 more particularly Clauses 3 & 6, referred to above, from which it is apparent that

respondent No. 1 had not only taken over the management of the entire undertaking of Kopyrite Company on "as is where is" basis but had also undertaken to perform corresponding obligations imposed upon the latter by Clause 6 of the M.O.U. (Ex. 1) recital of which establishes that respondent No. 1 should either by himself or through his associates would enter into separate arrangements with financial institutions (RFC, RIICO & Canara Bank) for the discharge of their liabilities taken over by him and also to furnish such documents, deeds and guarantees etc. as may be required by these financial institutions in substitution of the guarantees having been given by the appellant and his associates before handing over the Company and its assets to respondent No. 1 Shri Dalip Kulkarni.

22. It was further contended that while deciding Issue Nos. 4 & 5 against the appellant, the learned trial Court has failed to consider the matter in its entire perspective and that having recorded Findings on issue Nos. 1, 2, 3, 6 to 8 in favour of the appellant, there was absolutely no justification in recording the conclusions contrary to the evidence on record in respect of Issue Nos. 4, 5 & 9 against the plaintiff-appellant.

23. From the entire discussions as aforesaid the sum and substance of the issue is that M.O.U. (Ex. 1) imposes corresponding obligations with regard to the discharge of liability to the financial obligations, as aforesaid, upon respondent No. 1 and his associates like respondent Nos. 6 to 8 and hence it was equally very necessary for them to substitute personal guarantee given by the plaintiff to respondent Nos. 2 to 4 having taken over assets of the Company which they had to successfully discharge and which they failed to do so. It is settled principle of law that once the assets are taken over in its entirety it would also pass over corresponding responsibility and obligations of the party if undertaken earlier on the person who takes over the assets to discharge corresponding liabilities attached thereto. It is not open to the party to wriggle out of the M.O.U. with a view to frustrate the same on one pretext or the other so as to avoid discharge of the obligations which he may be required to perform by recitals of M.O.U. Ex. 1.

24. It will not be out of place to mention here that Ex. 8 is a telex message from respondent No. 2 to respondent No. 1 sent on 18-12-87 by which the acceptance was conveyed by respondent No. 2 for the change in management of Kopyrite Company to Dalip Kulkarni and acceptance was also conveyed for proposal regarding several dues and resettlement of principal amount as discussed on 6-11-87 between the parties. It was contended by Shri Suresh Goyal learned counsel for respondent Nos. 1, 5 to 8 that the suit filed by the plaintiff appellant was misconstrued and camouflage with a view to overcome the lacunae on the part of appellant by not having filed the suit for recovery of amount due to the plaintiff which could have been compensated by way of realisation of damages against the contesting respondents and which is pending adjudication before the concerned Court. Hence there was no occasion for him to have filed this suit for

specific performance of M.O.U. Ex. 1 particularly when he fully knew that the M.O.U. Ex. 1 was exclusively executed between the plaintiff & defendant No. 1 which is a pure and simple agreement between the said persons and earlier suit for recovery was also filed only against the defendant No. 1 with a view to suppress facts and give colour of new cause of action by impleading seven more defendants who are totally strangers being not concerned with the matter. Alternatively, it was further contended that if the plaintiff could be compensated by way of damages in a suit for recovery which has been filed against respondent No. 1 there was no occasion for specific performance of M.O.U. (Ex. 1) duly executed between the parties. Hence the plaintiff has misused process of law resulting in grave miscarriage of justice, thereby this suit was not maintainable for specific performance of the M.O.U. on account of misjoinder of unnecessary parties and liable to be dismissed on this ground as well.

25. I have considered the rival contentions as advanced by the learned counsel for the parties and have given thoughtful consideration to the same as well as relevant evidence led by the parties (both oral and documentary) on record. In my considered view, the contention of the respondents as to the maintainability of the suit itself on account of misjoinder of unnecessary parties is wholly untenable and devoid of any merit for the simple reason that since neither this objection was taken in the pleadings in written statement nor any issue was framed by the trial Court and hence in the absence of such a position, it is not open to the contesting respondents to contend at this stage or to take any objection that the suit filed by the plaintiff deserves to be dismissed on the ground of inherent defect for the reason of misjoinder of parties. Therefore, it cannot be said by any stretch of imagination that the plaintiff has misused or abused the process of law resulting into grave miscarriage of justice as alleged by the respondents.

26. It is further not open for the respondents to contend that the plaintiff has tried to escape his liability by misusing process of law since from the recitals of M.O.U. (Ex. 1) more particularly Clauses 3 and 6 it is fully apparent that once the respondent-defendant No. 1 having agreed to take over the entire undertaking of Kopyrite Company including all its assets and the respondent No. 1, had specifically undertaken either by himself or through his associates to enter into separate arrangements with financial institutions i.e. RFC, RIICO and Canara Bank respectively for the successful discharge of the liability not only of taking over the Company with all its assets but also to furnish such documents, deeds and guarantees as may be required to be executed by financial institutions in substitution of the guarantees with them which might have been furnished earlier by the plaintiff and his associates to them as per Clause 6, the onus for which was heavily on respondent No. 1 to discharge the same which, in my considered view, he had failed to discharge and hence the plaintiff was constrained to file suit for specific performance of M.O.U. Ex. 1 giving rise to the present appeal.

27. From a perusal of Clause 6 of M.O.U. (Ex. 1) it is apparent that it was

mutually agreed between the parties that the respondent No. 1 had agreed to take over the entire undertaking i.e. Kopyrite Company including all its assets including current liabilities which were fully disclosed and known to the respondent No. 1, hence it is not open to the said respondent or his associates to wriggle out of their obligations incurred towards financial institutions referred to above for which the appellant is entitled to seek specific performance. In my view, the trial Court has miserably failed to examine this vital aspect of the matter and has thus gravely erred in not decreeing the plaintiff's suit. Once the respondent No. 1 along with his associates i.e. respondent Nos. 5 to 8 having specifically undertaken to discharge their corresponding obligations and liabilities of Kopyrite Company towards respondent Nos. 2 to 4, till such liabilities are not discharged, it is neither proper nor desirable for respondent No. 1 or his associates (respondent No. 5 to 8) to either resile from the M.O.U. (Ex. 1) or to escape from discharging the corresponding obligations imposed upon them by recitals to M.O.U. (Ex. 1) by furnishing documents i.e. deeds guarantees etc. as well as other relevant documents as may be required by financial institutions (Respondent No. 2 to 4) in substitution of the guarantees already furnished by the plaintiff appellant and his associates so that the appellant may be relieved of responsibilities in respect of the liabilities of Kopyrite Company towards respondent No. 2 to 4 which the contesting respondents had undertaken to discharge after having taken over management of Kopyrite Company with all its assets since taking over the assets also includes due performance of corresponding liabilities which cannot be construed in isolation.

28. Therefore, in my view, the contesting defendant No. 1 was fully bound by recitals of Clause 6 of the M.O.U. (Ex. 1) to discharge his liability for having failed to perform his part of obligations imposed upon him and his associates as per M.O.U. (Ex. 1). The findings arrived at by the trial Court on issue Nos. 4 & 5 are thus obviously perverse and contrary to the evidence on record. Since both the issues are co-related and based on specific performance of Clause 6 of M.O.U. (Ex. 1). referred to above, the trial Court in my view, has failed to appreciate recitals of M.O.U. (Ex. 1) in its true perspective. Therefore, the plaintiff appellant is entitled to specific performance of M.O.U. (Ex. 1.) In This regard I must hasten to add that under Clause 6 of M.O.U. (Ex. 1) is an undertaking executed expressly by respondent No. 1 and 5 to 8 having conveyed positive assurance to the appellant at the time of execution thereof, as Associate Directors of the Company to take over and discharge: liability towards financial institutions (respondent Nos. 2 to 4), the trial Court without recording any findings as regards liability of the respondent, Nos. 1 and 5 to 8 towards financial institutions (respondent No. 2 to 4) as envisaged by Clause 6 of M.O.U (Ex. 1) has obviously misconstrued the recitals thereof and decided the matter out of its context.

29. As regards the contention of the contesting respondents that even in cases where there is breach of contractual obligations by either party to the contract and that there was no necessity for filing suit for specific performance of M.O.U.

(Ex. 1) particularly when the plaintiff could have been compensated by way of suit for damages by an Award of monetary compensation, I am of the considered view that this contention is wholly untenable for the reason that there is a clear distinction between the cases giving rise to the filing of suit for specific performance in the event of breach of recitals of an agreement for due performance of which the parties have covenanted (to agree and perform and for which award of compensation may not be adequate relief. Money suits relating to the award of damages by way of compensation to the aggrieved party to establish its grievance by leading cogent, consistent and reliable evidence usually take very long time to decide whereas in the event of breach of contractual covenants or obligations which are generally based on the basis of sole assurance conveyed to the aggrieved party by the party committing breach of its terms and conditions on the basis of an Agreement reduced in writing, specific performance is the only remedy. There can possibly be no speedy and efficacious remedy other than by way of filing suit for enforcing such contractual obligations, whereas in suit relating to monetary transaction involving breach of terms & conditions alleged by the aggrieved party if establishes breach of such obligations based either under Negotiable Instruments Act viz. bill of exchange or Hundi etc. or in cases where cheque has been dishonoured or bounced, speedy and efficacious remedy is by way of filing complaint before the competent Court or by way of filing a suit for award of compensation. Hence it is not open to the contesting respondents to contend that notwithstanding breach of relevant clauses of the Agreement (Ex. 1), since the appellant could be easily compensated by award of damages and hence he should not have filed the present suit for specific performance more particularly of Clause 6 of M.O.U. in my considered view, is not tenable since it will be wholly unwarranted to relegate the appellant to the remedy by way of award of compensation for damages.

Moreover there is absolutely no bar under the Specific Relief Act for the aggrieved party to enforce specific performance of terms and conditions of an agreement of which breach is alleged by way of filing the suit for specific performance instead of filing the suit for compensation which is certainly more speedy and efficacious remedy than by way of filing suit relating to award of damages.

30. As regards conclusions recorded by the trial Court in respect of Clause 6 of M.O.U. (Ex. 1), I am of the view that notwithstanding the fact highlighted by the trial Court in para 9 of its judgment that as per Clause 6, the defendant also had certain corresponding obligations to fulfil and it was sole responsibility of defendant towards financial institutions by executing documents and also by substituting personal guarantees given by the appellant to those financial institutions, a reference may be made to the evidence of plaintiff Prithviraj Singh wherein he has stated that he was not required to get permission from the financial institutions for transfer of the management of Kopyrite Company because permission depended on the discharge of the liabilities towards financial institutions as per M.O.U. (Ex. 1) which was duly covenanted and undertaken to

be performed by the defendant No. 1 which he had specifically undertaken to do and this fact though having been considered by the trial Court, in my view, it has grossly erred in not appreciating this vital aspect of the matter that once having transferred the management of the Kopyrite Company to the defendant No. 1 and the RIICO having its approval for the transfer of the management, the sole responsibility for discharge of the financial liabilities which were earlier that of the appellant, had subsequent to the transfer of management of the company had become that of defendant No. 1 which admittedly he had failed to perform towards the financial institutions. This fact is borne out from the evidence led on record and from the documents more particularly Ex. 245 to 246, which are admitted documents and from which it is established that the responsibility subsequent to the transfer of the management was that of defendant No. 1 alone.

31. As regards findings arrived at by the learned trial Court that the plaintiff had filed suit giving rise to the present appeal under the Specific Relief Act without making averments in the plaint that he has always been ready and willing to perform his part of the contract as is necessary u/s 16(c) of the Act of 1963 which stipulates that specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove (that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant, I am of the considered view that in view of the onus with regard to the issue Nos. 1, 2, 3 and 6 to 8, notwithstanding absence of averment with regard to the readiness and willingness to perform the contract on his part would not by itself be fatal to the case since the readiness and willingness on the part of the plaintiff is explicitly clear from the material on record as to having performed his part of the contract by handing over complete management of Kopyrite Company at the very outset itself and not only that, assets of Kopyrite Company worth about Rs. 2.00 crores were taken over by defendant No. 1 by making only part payment of the amount @ Rs. 2.50 per share which was only 1/4th of the value paid up cost per share amounting to total Rs. 8.75 lacs. Thereafter nothing remained on the part of plaintiff to perform and the entire responsibility having fallen on the shoulders of defendant No. 1 and his associates who took complete management of Kopyrite Company on "as is where is basis" and started operating the same and as per Clause 6 of the M.O.U. (Ex. 1) defendant No. 1 became Director of the Company and had also thereupon appointed five representatives as Directors (defendant Nos. 6 to 9) and moreover as per Clause 2 of M.O.U. (Ex. 1) the defendant No. 1 was to make remaining payment of shares' price on receipt of audited balance sheets of 1986-87 but he did not do so far which the plaintiff had already filed civil suit No. 40/89 to recover that balance amount. Not only this as per recitals of Clauses 1 and 6 of M.O.U. (Ex. 1) it was incumbent upon defendant No. 1 to take necessary steps for discharge of financial liability of Kopyrite Company to defendant Nos. 2 to 4 which admittedly the defendant No. 1 failed to perform while he kept on operating the factory's management and enjoyed by virtue of

sale of its products and the financial institutions which could not obviously run on bank guarantees, by their letters dated 15-1-88 and 8-2-88. it is evident that they had threatened defendant No. 1 either to discharge its liability or to face legal consequences. It is further evident that defendant No. 1 paid Rs. ten lacs to RIICO on 20-2-88 by a cheque which was bounced and the financial institutions again led pressure. However, the trial Court has thus failed to consider that since as far as recitals of the M.O.U. the defendant No. 1 having successfully undertaken to perform corresponding liabilities towards financial institution, the onus of proof was heavily on the defendants which admittedly they failed to discharge. and for which the plaintiff was constrained to file the suit to enforce terms and conditions of the contract vix, M.O.U. (Ex. 1) which have been violated by them. Hence the conclusions drawn by the learned trial Court as to specific averments to be made by the plaintiff under Section 16(c) of the Specific Relief Act in respect of readiness and willingness on his part would not arise because it is borne out from the evidence itself inasmuch as the findings of the trial Court that specific performance of Clause 6 of M.O.U. (Ex. 1) is not possible and that the suit for damage being alternative to the suit for specific performance is not only wholly perverse but also unwarranted and therefore, not tenable in the eyes of law. Thus, in my view, defendant No. 1 and his associates (defendant Nos. 5 to 9) are wholly responsible to perform their corresponding obligations to make the payment of the amount due to the financial institutions namely RIICO, because it cannot be expected of the financial institutions to run on bank guarantees alone which were earlier executed by the appellant and upon complete take over of management of Kopyrite Company as on the date of execution of M.O.U. (Ex. 1), the corresponding obligations consequently automatically passed and carried over to the party like the defendant No. 1 and his associates having taken over the management as referred to above from the plaintiff appellant. In my considered view, the suit for damages by way of compensation cannot be considered as substitute to the loss otherwise suffered by the appellant.

32. From provisions of Section 16(c) of the Specific Relief Act, 1963 it is apparent that only in certain exceptional circumstances specific performance of the contract may not be enforced in favour of a person where the person concerned fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms, the performance of which has been prevented or waived by the defendant. In the instant case, there is nothing on record to show that the defendants had waived their obligations enjoined upon them by the recitals of M.O.U. (Ex. 1) and rather they had impliedly waived their readiness and willingness to perform their part of the performance of the M.O.U. (Ex. 1). Hence the question of any readiness or willingness cannot be assumed or inferred in their favour. In the text "Law of Specific Relief by S. C. Banerjee (Tagore Law Lecturers), pages 120, 124, 375 and 677, the doctrine of specific performance has been said to "rest on the principle that man is entitled to have

specific thing for which he has contracted and the Courts must enforce literal performance of the contract. Not only is it a sacred principle that man should be compelled to perform the contract, but it is also equitable principle that any person who takes notice of the contract is bound by it. It is also evident from the aforesaid submissions that respondent Nos. 2, 3 and 4 took consideration of Rs. ten lacs from respondent Nos. 1 & 5 for the performance of the contract (Ex. 1) and received benefit from its subject matter. Hence, they are now bound to complete the performance of Ex. 1, which has already been acted upon and partly performed by them. They are now bound by it not only by the Law of Promissory Estoppel, but also by the equitable principle which has been propounded by Rt. Hon. Sir Edward Fry on page 91 of his treatise on specific performance of contracts, a stranger may so mix himself with it by setting up a claim to some benefit resulting from it, so as to render himself liable to be made party to proceedings for the enforcement of the contract. The appellant further relied on "specific performance of contracts" by G.C.V. Subha Rao, Revised by A.N. Saha, pages 636, 637, 717 and 815, reliance is also placed on "A treatise on specific performance of contracts" by Rt. Hon. Sir Edward Fry pages 731 and 732. Both these authorities have held that plaintiff is entitled to enforce specific performance of contract to discharge liabilities sold along with shares or companies or properties. Any permission that may be required from their parties does not make the contract inchoate.

33. As regards the findings arrived at by the learned trial Court on issue Nos. 4 & 5 since plaintiff Prithviraj Singh had deposed in his statement that M.O.U. dt. 20-7-87 was executed with Dalip Kulkarni and financial institutions namely R1ICO, RFC and Canara bank were not since party to it, the statement of plaintiff that by complying with Clause 6 of M.O.U. (Ex" 1) he has got rid of all responsibilities, is totally perverse and contrary to the recitals of Clause 6 of the M.O.U. (Ex. 1) which specifically mandates that Dalip Kulkarni either by himself or through his associates would enter into separate arrangement with financial institutions named above for discharge of liability taken over and shall also furnish such documents, deeds and guarantees as may be required by these institutions to perform in substitution of the guarantees earlier given by the plaintiff and his associates. In my considered view, these significant aspects of the matter have not been taken into consideration by the learned trial Court in its true perspective because earlier on taking over the management of Kopyrite Company and all current assets besides liabilities which were substituted as on the date of its taking over on account of having the respondent No. 1 become sole and exclusive responsible for the financial obligations to be performed by respondent No. 1 and his associates for which there is no evidence on record that they had performed their corresponding obligations and discharged the liabilities on their part, specific performance for which the plaintiff has sought in this suit giving rise to the present first appeal.

34. As regards conclusions drawn on issue No. 9 by the learned trial Court that since defendant No. 1 who was bound to discharge guarantees of plaintiff towards

financial institutions but he had not done so and since defendant Nos. 2, 3 & 4 are not parties to M.O.U. (Ex. 1) since they had not signed on M.O.U. (Ex. 1) and further in the absence of permission of defendant Nos. 2, 3 & 4 the plaintiff cannot be discharged of his liabilities towards these defendants and so the Court is not competent to direct enforcement of such stipulation, in my considered view, such conclusions are wholly unwarranted and untenable for the reason that from the recital of Clause 6 of M.O.U. (Ex. 1) reference to above defendant No. 1 having specifically undertaken to enter into separate arrangements not only with defendant Nos. 4 to 6 but also to execute relevant documents as may be required by financial institutions from time to time in substitution of the documents earlier furnished by the plaintiff, it was the responsibility of defendant No. 1 and his associates to have performed their part of the contract under Clause 6 of M.O.U. (Ex. 1) by execution of fresh guarantees and such deeds in substitution of the plaintiff's in view of the understanding between the parties. Therefore, the findings arrived at by the learned trial Court on issue No. 6 are wholly perverse and not sustain-able in the eyes of law.

35. As regards objection raised by the respondents with regard to the maintainability of the present suit on account of pendency of earlier suit No. 40/89 where relief sought for was confined only (o the question of compensation by award of damages on which issue No. 6 was framed as to whether till the proceedings of another suit No. 40/89 pending between the same parties before the Court of ADJ No. 4, Jaipur have not been completed, the present suit should be stayed. The onus to discharge the burden of proof on this issue was on the respondents. This issue was decided in favour of the plaintiff appellant and against the respondents in view of the findings arrived at by the learned trial Court that since certified copy of the plaint, reply to the plaint and issues framed by the Court in earlier suit No. 40/89 and hence in the absence of which it is not possible to decide that both the cases have same subject matter in issue. In these circumstances rightly it was not possible for the Court to decide both the cases having same subject matter at issue. I am of the view that under Order 2, Rule 2, CPC there is no bar for the plaintiff to include whole of the claim which he is entitled to make in respect of a cause of action and he may at his option relinquish any part of his claim in order to bring a suit within the jurisdiction of any Court. In case the plaintiff omits to sue or intentionally relinquishes any portion of his claim, he may not afterwards sue in respect of portion so omitted or relinquished but if the plaintiff is entitled to grant of one relief in respect of the same cause of action, he may at his option sue for all or any of such relief but if he omits except with the leave of the Court to sue for all such relief, he shall not afterwards sue for such relief so omitted. Obviously the corollary which emerges upon plain reading of the provisions contained in Order 2, Rule 2, CPC is that where cause of action on the basis of which previous suit was brought or filed does not form foundation of subsequent suit and in earlier suit the plaintiff could not have claimed relief which he sought in subsequent suit and in that case, the plaintiff's subsequent suit would not be barred by Order 2, Rule 2, CPC and

therefore, where the foundation of two suits were different as is in the facts and circumstances of the present case, it cannot be observed that subsequent suit i.e. the present suit giving rise to the present appeal is barred by Order 2, Rule 2, CPC. Hence, the plea of bar of suit based on the provisions contained in Order 2, Rule 2, CPC being highly technical in nature and since it tends to defeat justice by depriving the aggrieved party of his or her legitimate right, hence care and caution must be taken to see that complete identity of cause of action is established. For the sake of illustration, if an objection is raised that in case where the previous suit is dismissed on the ground that proper remedy is to file a suit for possession seeking relief for the partition, then possession of the suit property must have been established on the basis of cogent and consistent evidence at the first instance since otherwise it will not be open to a Court to pass a decree for partition and separate possession. If the suit for partition and possession is held not maintainable, the question with regard to passing of a decree for relief of recovery of possession would not arise and in such situation, the bar contained in Order 2, Rule 2, CPC would not be attracted because of the dismissal of the suit on that count not only gives rise to the fresh cause of action but also creates a ground to grant of leave for filing another suit for such relief. Hence cause of action in such situation cannot be held to be identical.

36. Likewise, in the instant case earlier suit referred to above, being only confined to grant of damages and compensation as a consequence of breach of terms and conditions of the agreement in question on the part of the respondents whereas in the suit giving rise to the present first appeal, the appellant plaintiff has sought relief for specific performance of terms and conditions of M.O.U. (Ex.1) contained in its Clause 6, which have been allegedly breached and violated at the instance of the defendants respondents, hence cause of action being wholly separate and not identical because of the foundation of two suits being different, it cannot be inferred by any stretch of imagination that the present suit which is a subsequent suit would be barred under Order 2, Rule 2, CPC.

37. As regards enforceability of M.O.U. (Ex. 1), I am of the view that since its recitals do not fall within exceptions as stipulated by Sec-13 of the Indian Contract Act and the recitals of the M.O.U. (Ex. 1) have not been disputed by the contesting defendants on any of the grounds, it is not open to them to challenge its vires in respect of its enforceability. Therefore, the findings arrived at by the learned trial Court on this aspect of the matter and issue that it is not enforceable because it is dependent upon consent of third parties namely respondent Nos. 2 to 4 (financial institutions) are not sustainable notwithstanding there being no privity of contract between them and financial institutions because the present suit is for the enforcement and specific performance of Clause 6 of MOU (Ex. 1) on the part of the contesting defendants, breach thereof has been alleged against them. I am fortified in my view from the judgments in matters of (1) Mrs. Chandnee Widya Vati Madden Vs. Dr. C.L. Katial and Others, (2) R.C. Chandiok and Another Vs. Chuni Lal

Sabharwal and Others, (3) Rojasara Ramjibhai v. Jani Narottamdas AIR 1986 SC 1912 , and (4) Ajit Prasad Jain Vs. N.K. Widhani and Others,

38. In Mrs. Chandnee Widya Vati Madden Vs. Dr. C.L. Katial and Others, the controversy before the Apex Court was with regard to a contract of sale of a plot granted by the Government and the term of one of the clauses of the contract between the parties was that the vendor was to obtain necessary permission from the competent authority before sale and the vendor moved application for permission while the time was not essence of the contract yet it was held that specific performance was enforceable. It was further observed that the contract was not a contingent contract and the parties had agreed to bind themselves by the terms of the document executed between them and the Court had got to enforce the terms of the contract and to enjoin upon the vendor to make the necessary application for permission. It was also observed that in the event of permission being refused, the vendee shall be entitled to damages. In appeal before the Apex Court arising out of a suit for specific performance of a contract, the plea that it was not a fit case in which specific performance of contract should be enforced by the Court was not allowed to be raised for the first time when it was not specifically raised in the High Court and the necessary facts were not pleaded in the pleadings.

39. In R.C. Chandiok and Another Vs. Chuni Lal Sabharwal and Others, "A" agreed to purchase a plot from "R" on specified date of which latter was not in possession and in respect of which he had not obtained lease deed from the Government and the receipt for earnest money provided that the balance of consideration was to be paid within a month at the time of the execution of the registered sale deed and further it was also enjoined upon the vendor to obtain sanction of the Government before the transfer of lease hold plot to the vendee. Since the vendee was aware of this condition that the execution of the sale deed was dependent upon prior sanction from the competent authority which he has undertaken to inform to the vendee and since he never took any steps till specified date to apply for sanction but on the contrary informed that he was not willing to wait indefinitely for want of sanction it was held on the facts and circumstances of the case that the vendee could not be non-suited for the reason of the vendee being unwilling to perform his part and the vendee was entitled to a decree for specific performance. Hence applying the ratio of the aforesaid decisions to the instant case, I am of the considered view that the readiness and willingness of a party which is bound by the terms of the agreement cannot be treated as strait jacket formula, and the same has to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the party concerned. Since in the instant case, there is no material on record to show that the appellant was not ready and willing to perform his part of the M.O.U. (Ex. 1) and rather there is overwhelming evidence with regard to the appellant having performed all that was required on his part as per recitals of the M.O.U. (Ex. 1), in my considered view, he cannot be non-suited for the reason that there was no privity of contract between the contesting defendants or on any other

sham or illusory grounds since obvious intention of the respondents was to wriggle out of the terms and conditions of the agreement more particularly, Clause 6, which they were bound to perform and hence such technical pleas should not come in the way of the appellant for obtaining decree for specific performance of the M.O.U. (Ex. 1).

40. Likewise in *Ramjibhai v. Narottamdas* AIR 1986 SC 1912, the appellants had entered into an agreement to purchase an agricultural land of which he was having tenancy rights from the vendee. The agreement stipulated that the vendee was to apply for permission from the Collector to convert the agricultural land into village site i.e. for non-agricultural use and with the extinction of the title of "RS" and the confer-raf of the rights of an occupant on the appellant under the Saurashtra Land Reforms Act, 1951, the property became transferable by him and in these circumstances it was held by the Apex Court that it cannot, therefore, be said that the contract between the parties was a contingent one performance of which depended upon fulfilment of the condition under the earlier agreement by which the appellant/vendor had undertaken or imposed obligation of procuring necessary sanction from the Collector. Since the appellant himself had moved to the revenue authority for obtaining necessary permission for conversion of the disputed land into village site, it could not, therefore, be said that there was any legal impediment in the way of the appellant in executing the sale deed.

41. Likewise in the matter *Ajit Prasad Jain Vs. N.K. Widhani and Others*, on the basis of same analogy of the judgment of the Apex Court (*supra*), the learned single Judge of the Delhi High Court observed that since the permission from the Land Development Officer was not a condition precedent for grant of decree for specific performance with regard to the agreement in question because if after grant of the decree of specific performance of the contract the Land and Development Officer refuses to grant permission for sale, the decree-holder may not be in a position to enforce the decree but it cannot be held that such a permission is a condition precedent for passing a decree for specific performance of the contract. Therefore, it is a matter of discretion of the Court to grant specific performance which has to be exercised fairly and not arbitrarily but rather on sound and well settled principles of law. In such cases, specific performance is a rule and refusal is an exception on valid and cogent grounds, if established.

42. While placing reliance upon the judgments of the Apex Court in-- (1) *Maharao Sahib Shri Bhim Singhji Ors. Vs. Union of India (UOI) and Others*, (2) *Nathulal Vs. Phoolchand*, and (3) *Mrs. Chandnee Widya Vati Madden Vs. Dr. C.L. Katial and Others*, the learned single Judge of the Delhi High Court held that the defendants could not take advantage of their own wrongs since the plaintiff was ready and willing to do his part of the contract and was consequently held entitled to the decree for specific performance. Applying the ratio of aforesaid decisions to the instant case. I am of the view that no doubt the decree for

specific performance of a contract though cannot be claimed as a matter of right yet, the Court from which relief for specific performance is sought, should take into consideration not only recitals of the agreement in question of which specific performance is sought or claimed by the aggrieved party who is ready and willing to perform his/her part of the agreement, but should also take into consideration totality of the facts and circumstances of the case and should not go merely by the wishes on desire of the aggrieved party as against the defaulting party who has either violated or deviated from the terms of the contract as well as the readiness and willingness of the party who has either performed its part of the contract or has yet to perform the same, subject to the fulfilment of a particular condition or conditions as the case may be as per recitals of the agreement which should be duly appreciated and considered by the Court after taking an overall view of the matter on due appreciation of the evidence on record and the safeguard which should be observed before the grant of specific performance of the contract should be to see that it should not be mere wishes or intention or fanciful desire of the party who has sought specific performance of the contract apart from readiness and willingness of the party which should be established by substantial evidence on record from which it can be inferred that the said party has already performed its part of the obligations vis-a-vis against the defaulting party to the contract.

43. Thus, applying the ratio of the aforesaid decisions to the instant case. I am of the view that since the agreement is not a contingent contract and the parties had agreed to bind themselves by the specific terms and conditions as stipulated in relevant clauses of the Agreement as referred to above, and the appellant had already performed his part of the agreement by not only passing on substantial consideration to respondent No. 1, and also by transferring the possession of management of the "Kopyrite" Company as well as its factory, defendant No. 1 after receiving the same has made default in not obtaining discharge of financial liabilities qua financial institutions, as aforesaid, the learned trial Court has gravely erred in not granting relief for specific performance as prayed for in the plaint and proved by the evidence on record. Hence there is no reason as to why the decree for specific performance of the M.O.U. (Ex. 1) be declined.

44. As a result of the above discussion, this appeal is allowed with costs throughout. The judgment and decree dated 19-11-1996 passed by the Additional District Judge No. 1, Jaipur City in civil suit No. 341 /95 (old No. 28/92) are quashed and set aside. The suit for specific performance as filed by the plaintiff appellant is decreed with costs. However, it may be observed that it will not be proper for this Court to give any direction relating to the proceedings pending before the Debt Recovery Tribunal Jaipur, in case No. 72/94 as prayed for by the appellant for which he will be at liberty to move before the concerned authority in accordance with law.