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District Court, Sindhudurg-Oros.

SUBJECT OF THE THIRD WORKSHOP.

:- Civil Group :-

“Specific Performance of contract with reference to the provisions of Chapter II of the Specific Relief Act, 1963.”

(a) Section 10- Cases in which Specific Performance of contract enforceable.”

A contract is an agreement enforceable by law. Specific Performance of a Contract is equitable relief given by the Court in a cases of breach of contract in the form of a Judgment that the defendant do actually perform the contract according to its terms and conditions. The jurisdiction to enforce specific performance of a contract is said to be in the discretion of a Court. In order to enable the Court to decree Specific Performance, the terms of contract must be clear definite, certain, and complete. The contract must be free from doubt, vagueness and ambiguity so as to leave nothing to conjecture or to be supplied by the Court. The stipulation and terms of the contract have therefore, to be certain and the parties must have been *consensus idem*. The burden of showing the stipulations and terms of the contract and that the minds were *ad-idem* is of course on the plaintiff. If the stipulations and terms are uncertain and the parties are not *ad-idem* there can be no specific performance. The relief of Specific Performance is an equitable relief and the contract of which Specific Performance is sought must appear to be correct and precise and no oral evidence is admissible to add to the terms or contents.

Section 10 of the Specific Relief Act specifies the cases where

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the specific performance of a contract is enforceable, while section 14 of the said Act enumerates the contract which cannot be specifically enforced.

It may be noted that it is only void contract that are excluded from the operation of specific performance and voidable contracts are not excluded. A Court of equity will not decree a specific performance in favour of a party who is not competent to perform his part of the agreement. To entitle a party to a specific performance, he must show that he has been in no default and that he has taken all proper steps toward the performance of the agreement on his own part. In order to get relief of specific performance, it is bounden duty cast upon the plaintiff that (i) he has performed or be on ready and willing to perform the terms of contract on his part to be then performed and (ii) that he is ready and willing to do all matters and things on his part thereafter to be done.

As per Sec.10 of the Act, the specific performance of any contract may in the discretion of the Court, be enforced when there exists no standard for ascertaining the actual damage caused by the non performance of the act agreed to be done or when the act agreed to be done is such that compensation in money for its non performance would not afford adequate relief. The relief given is confined to contract i.e. agreement enforceable by law.

Explanation u/s. 10(1) provides that ordinarily a contract relating to transfer of immovable property is to be specifically enforced. The legislature do not intend that persons who are parties to such contract should be allowed to escape from them to suit their own convenience by simply alleging that the person in whose favour the contract was made could be compensated in money and with that object has added the explanation requiring the Court to presume that such compensation cannot be adequate

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relief unless and until the contrary is proved. The presumption envisaged in the explanation is, however, rebuttable.

When contracts may be specifically enforced (S.10).

There are seven cases in which specific performance of a contract may be allowed by the Court in its discretion, namely,-

- (1) Where there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done.
- (2) Where the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.

However, until the contrary is proved, it is to be presumed-

- (i) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money; and
- (ii) that the breach of a contract to transfer movable property can be so relieved, except in the following cases
 - (a) where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market;
 - (b) where the property is held by the defendant as the agent or trustee of the plaintiff.

Ordinarily the Courts are entitled to presume that, in case of breach of contract to transfer immovable property, mere compensation is not adequate relief and specific performance is so; while in the case of movables, compensation is the ordinary relief and specific performance is exceptional.

- (3) Where the suit is for the enforcement of a contract to execute a mortgage or furnish any other security for the repayment of any loan which the borrower is not willing to repay at once. However, in such a suit, if only part of

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the loan has been advanced, the lender should be willing to advance the remaining part of the loan.

Although a contract to lend money cannot be specifically enforced, if the loan has been already advanced (in whole or in part) and the mortgage has not been executed, this clause becomes applicable.

- (4) Where the suit is for the enforcement of a contract to take and pay for, any debentures of a company.
- (5) Where the suit is for the execution of a formal deed or partnership, in cases where the parties have already started the business of the partnership.
- (6) Where the suit is for the purchase of a share of a partner of a firm.
- (7) Where the suit is for the enforcement of a contract for the construction of any building, or the execution of any other work on land, provided the following three conditions are fulfilled :-
 - (i) the building or other work is described in the contract in terms sufficiently precise to enable the Court to determine the exact nature of the building work;
 - (ii) the plaintiff has a substantial interest in the performance of the contract, and the interest is of such a nature that compensation of the contract is not an adequate relief; and
 - (iii) the defendant has, in pursuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed.

The general principles regarding specific performance of a contract may be noted:

- (i) Specific performance will not be granted where damages are an adequate remedy.
- (ii) To grant specific performance of a contract is at the discretion of the Court.
- (iii) The plaintiff must prove the following:-

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- (a) that there was a concluded and valid contract between himself and the defendant;
- (b) that he had performed, or was ready and willing to perform, the terms of the contract on his part;
- (c) that he was ready and willing to do all matters and things on his part thereafter to be done.

The purpose of Explanation attached to S.10 of Specific Relief Act.-

Persons entering into contracts for the sale or lease of immovable property cannot be allowed to escape from them to suit their own convenience by alleging that the person in whose favour the contract was made can be compensated in money. Hence the Explanation to Section 10 which enacts a presumption that compensation in such cases cannot be an adequate remedy.

Contingent Contract.-

In the case of, "Harbaksh Singh Vs. Ram Rataan, AIR 1988 P & H 60," the Hon'ble High Court observed that, the vendor had agreed to sell his half share in the property in dispute, but the sale-deed was agreed to be executed after a month of the partition of the property and separation of his share. To get the property partitioned and his share separated was an obligation undertaken by the vendor for the benefit of the vendee. It was not a condition precedent without the happening of which no obligation to transfer the share could arise. If the vendor failed to get his share separated, the vendee could get the same done after the completion of the sale through Court, which right had been given to him under the contract. If the sale was of a specified portion, then the situation might have been different. The sale here being of the unspecified share, it could not be said that the contract was

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a contingent one and the plaintiff was not entitled to enforce it without the share of the vendor having been separated.

Period of limitation in respect of Suit for specific performance.-

It is settled law that unless the deed of agreement of sale stipulated a date for performance, time is not always essence of the contract.

Doctrine of “potential existence”.-

The doctrine of 'potential existence' came in for interpretation in the United States of America in the case of O'Hare Vs. Peacock Dairies, and it was laid down:-

“Things which are the natural product or the expected increase of something already belonging to a seller have a potential existence and may be the subject of a sale.”

The distinction seems to be based on the ground that the goods having a potential existence are more or less specific goods; there is no difficulty as to their identification, as the things out of which they grown are clearly identified.

The coal ash in the present case was in the nature of potential goods and that it would be fully covered under Clause (ii) (b) of the Explanation to Section 10 of the Act. Consequently, a suit for compensation would not be an adequate relief in respect thereof.

Payment of monetary compensation.-

In the case of Sandeep Cement Pvt. Ltd. Vs. Union of Indian, 1990 (1) Civil L.J. Guj. 263, it is held by Hon'ble High Court that, mineral coal is not freely available in the market and as such in suit for its recovery it will not be proper to direct the payment of monetary compensation.

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Doctrine of promissory estoppel -

The true principle of promissory estoppel seems to be that where one party has by his words or conduct made to other a clear and unequivocal promise which is intended to create legal relations or affects a legal relationship to arise in the future knowing or intending that, it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective of whether there is any preexisting relationship between the parties or not. The Hon'ble Apex Court in the case of, "Motilal Padmapat Sugar Mills Ltd. Vs. State of Uttar Pradesh, reported in A.I.R. 1981, S.C. page No.621," has laid down this principle.

B) S. 14 - Contracts not specifically enforceable. –

Section 14 of the Specific Relief Act deals with contracts which cannot be specifically enforced. The main grounds on which contracts may be refused to be enforced are adequacy of compensation, futility of enforcement or impossibility of enforcement. It may be noted that specific relief under English Law developed to make good the deficiencies of common law reliefs. Where the common law remedy, compensation, was adequate, the Courts of Equity would not intervene. The same principle is contained in S.14. It must be noted that specific performance is a discretionary relief, & the Court may refuse to grant the specific performance of a contract even though such contract does not fall under S. 14.

(1) The following contracts cannot be specifically enforced, namely:

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- (a) a contract for the non-performance at which compensation in money is an adequate relief;
- (b) a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms;
- (c) a contract which is in its nature determinable;
- (d) a contract the performance of which involves the performance of a continuous duty which the court cannot supervise.

(2) Save as provided by the Arbitration Act, 1940, no contract to refer present or future differences to arbitration shall be specifically enforced; but if any person who has made such a contract (other than an arbitration agreement to which the provisions of the said Act apply) and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

(3) Notwithstanding anything contained in clause (a) or clause (c) or clause (d) of sub-section (1), the court may enforce specific performance in the following cases:—

- (a) where the suit is for the enforcement of a contract,—
 - (i) to execute a mortgage or furnish any other security for securing the repayment of any loan which the borrower is not willing to repay at once:

Provided that where only a part of the loan has been advanced, the lender is willing to advance the remaining part of the loan in terms of the contract; or

- (ii) to take up and pay for any debentures of a company;
- (b) where the suit is for,—

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- (i) the execution of a formal deed of partnership, the parties having commenced to carry on the business of the partnership; or
- (ii) the purchase of a share of a partner in a firm;

(c) where the suit is for the enforcement of a contract for the construction of any building or the execution of any other work on land :

Provided that the following conditions are fulfilled, namely :—(i) the building or other work is described in the contract in terms sufficiently precise to enable the court to determine the exact nature of the building or work;

- (ii) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief; and
- (iii) the defendant has, in pursuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed.

(1) Contracts where compensation is adequate relief.

Compensation must be adequate in the mind of the Court for some reasons found as a fact and stated by the Court for holding it to be adequate in spite of the opinion of the plaintiffs that it is inadequate. [**Brij Ballav v. Mahabir, 78 I. C. 167(A)**].

(2) Contracts which run into minute or numerous details.

Contracts running into minute details will not be enforced, because the Court cannot be required to watch and supervise the performance in detail of such acts. Contracts like contracts of personal

service cannot be specifically enforced, as such contracts depend on the personal volition on the parties. [*Mustfa v. District Board, 56 Alla. 73*].

The bar under this clause is applicable to both affirmative and negative covenants and whether the employer is a private person or a company. : [*Ramchandra v. Chinubhai, AIR 1944 Bom. 76.*]

A contract to marry would fall under the category of such contracts for which the Court cannot enforce specific performance of material terms : [*Purshottam v. Purshottam, ILR 21 Bom. 33.*]

(3) A contract which is, in its nature, determinable.

If the agreement to sale is itself is invalid no decree for specific performance could be passed by the Trial Court. A contract for sale of immovable property does not create any interest in or charge on such property. Where property is agreed to be sold is compulsorily acquired the *vendee* suing for specific performance is not even entitled to the compensation money lying with the Collector.

(4) A contract which involves performance of a continuous duty.

The sole test under this clause is whether the contract is such that the Court cannot supervise its performance, in as much as it involves the performance of a continuous duty. [*Central Bank v. Vyankaiesh, A.I.R. 1949 Nag. 286.*]

The duty referred to here is a positive duty to do something and not a negative duty not to do something, because in the latter case there is no question of the Court being called upon to supervise. [*Lallubhai v. Chittaranjan, A. I. R. 1966 Guj. 189*]. However, the House of Lords allowed specific performance enforcing the defendant to pay a weekly sum

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of £ 5 on the ground that otherwise it would lead to multiplicity of actions. [**Beswick v. Beswick 1968 A. C. 58**].

(5) Arbitration agreements.

Arbitration agreements cannot be specifically enforced. However in such cases, i.e., where there is an arbitration clause in a contract, if a person files a suit instead of filing arbitration proceedings, the existence of the arbitration clause would bar such a suit.

(6) Contracts of personal service.

Several authors on the law of specific relief are of the opinion that contracts of personal service are not specifically enforced. Several reasons are given for not granting specific performance of contracts of personal service. *Firstly*, it is said that contracts of personal service are based on personal faith and confidence. *Further*, it is said that enforcement of such contracts of personal service would be opposed to public policy.

The Supreme Court has held in **U. P. Warehouse Corporation Case (1970, I. S. C. J. 793)** that no declaration to enforce a contract of personal service will be normally permitted; but the Supreme Court has laid down three exceptions to the above rule:

- (1) Contracts of personal service of Civil Servants under Article 311 of the Constitution.
- (2) Services of workmen under Labour or industrial Laws.
- (3) Services under a statutory body which is governed by statutory instructions in connection with the services.

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C) Personal bars to relief, ready and willingness, requirement u/s. 16 (c) of the Specific Relief Act, 1963, averments and proofs. Sec. 16(c) of the Specific Relief Act, 1963. -

A plain reading of Section 16 of Specific Relief Act makes it clear that, in order to obtain specific performance of a contract. The plaintiff has to show that, he has to show that he has not violated any essential terms of the contract that on his part remains to be performed or that he has not acted willfully and variance with or in subversion of the relation intended to be established by the contract and that he has averred and proved that, he has performed and was always ready and willing to perform the essential terms of the contract to be performed by him unless prevented or waved by the defendant. The ingredients may be specified thus -

- (1) The plaintiff has become incapable of performing any part of the contract that remains to be performed by him, or
- (2) he has violated any essential terms of the contract that remains to be performed by him, or
- (3) he acts in fraud of the contract, or
- (4) he willfully acts at variance with the relation intended to be established by the contract, or
- (5) he willfully acts in subversion of the relation intended to be established by the contract, or
- (6) he fails to aver that he has performed the essential terms of the contract to be performed by him, or
- (7) he was always ready and willing to perform the essential terms of the contract to be performed by him, or
- (8) he was prevented by the defendant from performing any part of the contract, or
- (9) the defendant has waved performance of any part of the contract, and

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(10) he has to prove the conditions contained in (6) to (8).

According to the explanation such readiness and willingness to perform the contract must be according to the true construction of the contract.

Specific performance of a contract can not be enforced in favour of a person -

- (a) who would not be entitled to recover compensation for its breach, or
- (b) who has become incapable of performing or violates any essential terms of the contract that on his part remains to be performed, or
- (c) acts in fraud of the contract, or
- (d) willfully acts at variance with or in subversion of the relations intended to be established by the contract, or
- (e) who 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.

Explanation: For the purposes this 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.
- (f) Contract to sell or let property by one who has no title, not specifically enforceable.

In common sense the meaning of such an averments of readiness and willingness must be that the non compliance of the contract was not the fault of plaintiff. The basic principle behind Sec. 16(c) r.w.

explanation (ii) is that any person seeking benefit of the specific performance of contract must manifest that his conduct has been blemishless through out entitling him to the specific relief. The provision imposes a personal bar. The court is to grant relief on the basis of to conduct of person seeking relief. If the pleadings manifest that the conduct of the plaintiff entitles him to get the relief on perusal of plaint should not be denied the relief. The continuous readiness and willingness at all stages from date of agreement till the date of hearing of suit must be proved. Provision imposes personal bar in event of plaintiff failing to do so. Specific statement must in plaint that plaintiff- vendee has always been ready and willing and is still ready and willing to perform essential terms of contract. Complete inaction or silence on part of plaintiff to perform his part of contract so as to get sale-deed executed, he cannot be regarded as a person who is continuously ready and willing to perform his part of obligation.

Readiness and willingness on part of vendee to perform his part of contract must exist ever since payment of balance became due, and must subsist till the suit is filed. Certain payments by plaintiff after execution of agreement from time to time satisfies requirement of Sec. 16(c) of the Specific Relief Act.

Sec. 16 is a mandatory and imperative provision, because it reads that specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove as laid down by it. The word 'aver' and the word 'prove' are entirely two different things. The word 'aver' means that it should be asserted or mentioned in the plaint. The word 'prove' indicates that the said averment which is pleaded in plaint must be proved by leading evidence, in the course of trial. The question of proof would arise only if an averment is made in the plaint. In the plaint there is no question of proof at

all. Therefore a reading of S. 16 makes it absolutely clear that it is quite imperative for the plaintiff to aver in the plaint that he has performed or has always been ready and willing to perform the essential terms of the contract. It is not simply sufficient to mention in the plaint the various circumstances showing the readiness and willingness of the plaintiff to perform his part of the contract. But he must go further and allege in the plaint that he was and is ever willing and ready to perform his part of the contract.

Sec.16(c) of the Specific Relief Act 1963 is prohibitory and a specific performance of a contract cannot be granted in favour of a person unless he avers & proves his readiness & willingness to perform his part of contract. That being the nature of the statute, it would be the duty of the court to see whether the person who seeks to enforce the contract satisfies the mandatory provisions of S.16 of the said Act. If the conditions are not satisfied, the court is bound to dismiss the suit. It is certainly the duty of the plaintiff to have gone into the witness-box and given formal evidence that he was ready & willing to perform his part of the contract and subjected himself to cross-examination. Where in a suit for specific performance of a contract.

Where the averment to the effect that the plaintiff has all along been ready and willing to perform his part of the contract, is lacking in the plaint, the plaintiff is not entitled to any decree for specific performance notwithstanding the fact that no breach of contract was committed by the plaintiff and that it was the defendant who tried to evade execution of the contract by hook or by crook.

In a suit for specific performance, the requirement as to averment and proof of plaintiff's readiness and willingness to perform his part of the contract is a mandatory one. The language in which S. 16 of the Act is couched makes it abundantly clear that unless the plaintiff establishes

to the satisfaction of the Court that he has fulfilled the requirement of Cl. (c) of S. 16, the Court will not be able to grant a decree for specific performance of contract in his favour.

The absence of any plea on the part of the party resisting the plaintiff's claim for specific performance will not matter at all and the plaintiff is bound in law to establish compliance with the requirement of Cl. (c) of S. 16.

The fact that the parties did not press for framing of an issue on the question of compliance or otherwise of S.16 (c) will not relieve the trial Court from the necessity of framing an issue and going into the question whether the plaintiff satisfied the said mandatory condition of law of proving his readiness and willingness to perform his part of contract. The fact that plaintiff had complied with mandatory requirement of S. 16 (c) can only appear from a clear finding in that regard by the Court in its judgment.

In view of the requirement of para 3 of the Form No. 47 of Appendix "A" of the First Schedule of the Civil Procedure Code 1908 and in view of the mandate of S. 16(c) of the Specific Relief Act, it has become obligatory for the plaintiff not only to aver in the plaint, but also to prove by evidence that the plaintiff has always been ready and willing to perform his part of the contract. The first requirement is that he must aver in the plaint. Indeed, the question of evidence of proving a particular fact would come only when there is an allegation in the plaint to that effect. The compliance of requirement of S. 16(c) of the Specific Relief Act is mandatory and in absence of the necessary averment in the plaint and in the absence of proof of the same- that the plaintiff had been ready and willing to perform his part of the contract- the suit cannot succeed. Though the defendants had not raised any plea to that effect in the written statement nor was there any

issue, the mandate of the statute required that the plaintiff must aver in the plaint and must give proof of the fact that he was and has been ready and willing to perform his part of the contract. Merely giving proof of the fact will not be a substitute for the necessary averment in the plaint. The amendment in the plaint in such a case cannot be allowed for two reasons; firstly, because a valuable right has accrued to the defendant and, secondly, because the amendment seeks to bring out a cause of action in the plaint, which was conspicuous by its absence in the plaint as originally filed.

Failure to examine the plaintiff would amount to non-compliance of the requirement of the Section 16(c) of the Act. But, such observations are not to be understood as if the failure of the plaintiff himself or herself to get into the witness-box would be fatal to the suit of specific performance. It was opened to the parties to adduce proper reasons for the non-examination of the plaintiff, but, on the facts and circumstances of the particular case, no reason have been adduced and hence adverse inference was drawn against the plaintiff. It is needless to point out in our society husband and wife share a fiduciary relationship and even now all transactions on behalf of womenfolk in a family are carried on only by menfolk, especially the husband in the case of wife. But, it is also equally true that, the relationship of husband and wife is not to be treated as an exception to the mandatory requirement under section 16(c) of the Act. It would be opened to and also the duty of plaintiff to plead and prove the reasons for the non-examination of the plaintiff.

Ready and willingness conduct of the plaintiff -

If the conduct of the plaintiff shows that he was really unwilling to buy the property, then the plaintiff is disqualified from specific

performance. If, on the other hand the plaintiff was alleged to willing to buy the property, but in doing so made a mistake in insisting of something which he was not entitled to get from the defendant then such a mistake would not disqualify him from specific performance if the mistake was corrected in time and the plaintiff had made it clear that, he had withdrawn the mistaken demand and the mistake did not detract his essential willingness to purchase property. In the case of, "Gomathinayagam Pillai Vs. Pallaniswami Nadar, reported in A.I.R. 1967, S.C. 668," the Hon'ble Apex Court has held that, mere assertion in the plaint that he was ready and willing to perform the contract was not sufficient and his readiness and willingness had to be judged from what he had done or from his conduct subsequent to the agreement.

The plea that the plaintiff must always be ready and willing to perform his part on the contract is specifically available to the vendor/defendant. It is personal to him. The subsequent purchaser have got only the right to defend their purchase on the premises that they have no prior knowledge of the agreement of sale which the plaintiff their plead is of bonafide purchase for value without notice. Though they are necessary parties to the suit, since any decreed obtained by the plaintiff would be binding on the subsequent purchaser, the plea that the plaintiff must always be ready and willing to perform his part of the contract must be available only to the vendor or his legal representatives, but not to the subsequent purchaser as held by Hon'ble Apex Court, in the case of, "S.N.Upadhaya Vs. R.N.Pande, reported in A.I.R. 1994, S.C. 105."

Rejection of plaint under Order 7, Rule 11 C.P.C. -

In absence of an averment on the part of plaintiff in the plaint

that, he was and is ready and willing to perform his part of the contract amounts to failure to disclose a cause of action in regard to the relief of specific performance which would entitle the Court to reject the plaint under O. 7, R. 11(a) of the Civil Procedure Code, as held in the case of, "Raja Tulsibai Vs. Berar Enterprises, reported in A.I.R. 1988, Gujrat 42 at page 45."

The law does not enjoin the plaintiffs seeking specific performance of a contract to deposit the amount in Court unless he is so directed by the Court. It is always not necessary to deposit the money unless the Court so direct as held in the case of, "R.C.Chandiok Vs. C.L.Sabharwal, reported in 1970(3) Supreme Court Cases 140."

To sum up it must be said that in a suit for specific performance of contract plaintiff must lead and prove his readiness and willingness. If he fails to do so then suit must be dismissed. The court is duty bound to consider the pleading and evidence of plaintiff in respect of his readiness and willingness to perform his part of contract. However, readiness and willingness can not be treated as strait jacket formula. This have to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the party concerned as held by Hon'ble Apex Court in the case of, "Sayyad Dastagir Vs. T.R. Gopalkrishna Shetty, reported in A.I.R. 1999, S.C. 3029."

D) Section 20 - Discretion and powers of Court, discretion as to decree of specific performance, refusal or specific performance. -

Section 20 of the Specific Relief Act provides a discretion to the Court for decreeing specific performance sought by the plaintiff. Sub-Section 1 provided that, the jurisdiction to decree specific performance is discretionary and the Court is not bound to grant such relief merely because

it is lawful to do so, but the discretion of the Court is not arbitrary, but sound and reasonable guided by judicial principles and capable of correction by a Court of appeal. Sub-Section 2 provides the cases in which the Court may properly exercised the discretion in not decreeing the specific performance. It is pertinent to note that, it is studded with two explanation also. But, even then that is not the limit to the discretion which Court can exercise while deciding the suit which is revolving around the prayer for specific performance. For coming to a conclusion whether the specific performance granted or rejected court has always to be circumspect and has to avert its judicial attention towards the facts and circumstances of each case. The Supreme Court in the case of, “Parakunnan Veetill Josephs s/o. Matheu Vs. Nedumbara Kuruvilla & Sons, reported in A.I.R. 1987, S.C. 2328,” have held that, Section 20 of the Act preserves judicial discretion of the Court whether to grant decree of specific performance or not when it is the power of the Court to consider the facts and circumstances of the case meticulously and they should examine while discharging their statutory duty as to whether the plaintiff disentitle for discretionary relief or not. In the case of, “Lourdu Mari David Vs. Louis Chinnaya Aroglaswamy, reported in A.I.R. 1996, S.C. 2814,” the Hon'ble Apex Court has held that, granting or refusing a decree of specific performance is in the discretion of the Court, but the discretion should not be refused arbitrarily. Discretion should be exercised on sound principles of law and can be of correction by Appellate Court. It is settled law that, the party who seeks to avail the equitable jurisdiction of a Court and specific performance being equitable relief must come to the Court with clean hands. In other words the party who makes false allegations does not come with clean hands and is not entitle to the equitable relief. The Court would take into consideration the circumstances

in each case the conduct of the parties and the respective interest under the contract.

The ordinary rule is that, specific performance should be granted, it ought to be denied only when equitable considerations point to its refusal and the circumstances show that the damages would constitute an adequate remedy as held by Hon'ble Apex Court in the case of. "Prakashchandra Vs. Angadlal, reported in A.I.R. 1979, S.C. 1241."

As mentioned above, decree of specific performance is a discretionary relief. There should be a valid contract. If damages are an adequate remedy, no specific performance would be ordered. For the act, which requires continued supervision of the Court, no specific performance would be ordered (See Sec.14(1)(b) of the Act). No Specific Performance would be ordered for contracts for personal works or service. "Equity" will insist on the principle of mutuality. The person against whom the relief is claimed may take plea by way of defence under law relating to contract. Section 9 of the Specific Relief Act, 1963 speaks that, except as otherwise provided in the Act, where any relief is claimed under this chapter in respect of contract the person against whom the relief is claimed may plead by way of defence, any ground which is available to him under any law relating to contracts. The Hon'ble Bombay High Court, in the case between, "Maharu. Gaindhal Bhoi versus Hemraj Waman Patil reported in A.I.R. 2014 Bombay. 124 : 2014(5) All.M.R. 664," held that, when the suit is for specific performance of contract, in view of Section 09 of the Specific Relief Act, the defences available under Specific Relief Act and under the provisions of the Contract Act only are available to defend the suit. If no defence available the Court is not expected to refuse the relief of specific performance of contract, when it is in respect of immovable property.

In India the defences that are available under the law of contract, such as, incapacity of parties, absence of concluded contract, the uncertainty of the contract, coercion, fraud, misrepresentation, mistake, illegality or want of authority to inter into contract are all dealt with under the contract Act. Defendant may also set up any one of the following defences in a suit for specific performance of contract.

- (1) Compensation in money would be adequate relief,
- (2) Plaintiff's unperformed part is large,
- (3) Contract depends on personal qualifications or volition of parties,
- (4) Want of title,
- (5) Want of mutuality,
- (6) Contract is devoid of consideration,
- (7) Essential part of contract has ceased to exist,
- (8) Performance of contract would involve hardship to defendant than the plaintiff,
- (9) Performance of contract involve continuous duty over three years
- (10) Uncertainty in the terms of contract.

The Hon'ble Apex Court in, "Deorao Vs. Ganpat reported in 2014(4) Mh. L.J. 820," held that, Section 20 of the Specific Relief Act, 1963 provides that the jurisdiction to decree specific performance is discretionary and the Court is not bound to grant such relief merely because it is lawful to do so; the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal. Performance of the contract involving some hardship on the defendant which he did not foresee while non-performance involving no such hardship on the plaintiff is one of the circumstances in which the Court may properly exercise discretion not to decree specific performance. The doctrine of comparative hardship has been thus statutorily recognized in India.

However, mere inadequacy of consideration or the mere fact that the contract is onerous to the defendant or improvident in its nature shall not constitute an unfair advantage to the plaintiff over the defendant or unforeseeable hardship on the defendant.'

The Hon'ble Apex Court in, "Union of India Vs. M/s. Millenium Mumbai Broadcast Pvt.Ltd reported in A.I.R. 2006 SC 2751," held that, the provisions of Specific Relief Act would not apply to the Contracts, which are governed by the statutory provisions. The Specific Relief can be granted only for the purpose of individual civil right and not for the mere purpose of enforcing a penal law.

In, 'Shamsu Suhara Bevi Vs. G. Alex and Another reported in (2004) 8 SCC 569,' the Honble Apex Court held that, while dealing with a matter relating to grant of compensation by the High Court under Section 21 of the Specific Relief Act in addition to the relief of specific performance in the absence of prayer made to that effect either in the plaint or amending the same at any legal stage of the proceedings to include the relief of compensation in addition to the relief of specific performance, observed: "Grant of such a relief in the teeth of express provisions of the statute to the contrary is not permissible. On equitable consideration court cannot ignore or overlook the provisions of the statute. Equity must yield to law.

Determination of hardship :-

It is well established doctrine that the Court will not enforce specific performance of a contract, the result of which would be to impose great hardship on either of the parties to it. Section 20 of the Specific Relief Act, 1963 provides that the jurisdiction to decree specific performance is discretionary and the Court is not bound to grant such relief merely because

it is lawful to do so. The discretion of the Court however, should be exercised on reasonable principles capable of correction by a Court of appeal. When the Section states that “the jurisdiction to decree specific performance is discretionary” to it only means that the mere existence of a legal right is not sufficient to attract the remedy. An agreement may be valid in law and there may not be sufficient grounds for its cancellation; yet, upon a fair and just consideration of the attendant circumstances, the Court may abstain from its enforcement. Sub-section (02) of Section 20 sets forth the cases in which the Court may properly exercise such discretion to refuse specific performance.

The hardship contemplated under Clause (b) of sub-section (02) of Section 20 may be hardship or oppression arising from the terms of the agreement itself or from circumstances existing at the time of entering into it. This has been so clarified by Explanation (02) thereunder. The mere loss or inconvenience resulting from the enforcement of a lawful bargain however onerous should not be regarded as hardship in this context. Inadequacy of price is not also a ground to be considered, unless the purchaser stands in a fiduciary position to the vendor or fraud entered into the agreement. Lack of knowledge of the real value of the property to be sold on the part of the vendor is not also a ground for refusal.

The hardship contemplated under Clause B of Sub-Sec. 2 of Section 20 may be hardship or oppression arising from the terms of the agreement itself or from circumstances existing at the time of entering into it. This has been so clarified by explanation 2 thereunder. The mere loss or inconvenience resulting from the enforcement of a lawful bargain, however, onerous should not be regarded hardship in this context. Inadequacy of price is not also a ground to be considered unless the purchaser stands in a

fiduciary position to the vendor or fraud entered into the agreement. Lack of knowledge of the real value of the property to be sold on the part of vendor is not also a ground for refusal. Perhaps, a combination of these coupled with some other circumstances flowing from the enforcement of the agreement or collateral to it may persuade the Court towards refusal provided those hardships were not foreseen by the vendor. It is not possible to enumerate the different circumstances which constitutes a hardship it will suffice if it is noted that, the question of hardship will have to be adjudged in the facts and circumstances of the case. It is necessary to remember that, mere rise in price subsequent to the date of the contract or inadequacy of price is not to be treated as a hardship entailing refusal of specific performance of the contract. Further the hardship involved should be one not foreseen by the party and should be collateral to the contract.

The illustration given under Sec. 2 & 3 of Sec. 20 in which a court could refuse specific performance are not exhaustive and there may be a broad brand of different cases in which also the Court may deny relief to the plaintiff. The relief may vary with the circumstances of individual cases judged by the familiar legal standard of the reasonable man. The legislature in the first place has given the discretion to Courts and secondly, it was emphasized that the discretion is required to be exercised on sound and reasonable basis guided by judicial principles thirdly, it was provided that the decision should be capable of correction by a court of appeal.

Unfair advantage :-

If under the terms of contract the plaintiff gets an unfair advantage over the defendant, the Court may not exercise its discretion in favour of the plaintiff. So also specific relief may not be granted if the

defendant would be put to undue hardship which he did not foresee at the time of agreement. If it is inequitable to grant specific relief, then also the Court would desist from granting a decree to the plaintiff, as held in the case of, "A.C.Arulappan Vs. Ahalya Naik, reported in A.I.R. 2001, S.C. 2783."

When the term of contract or the conduct of the parties at the time of entering into the contract or the other circumstances, under which the contract was entered into are such that the contract gives the plaintiff an unfair advantage over the defendant the Court can exercise the discretion not to grant specific performance even if it is lawful.

In the case of, "Nirmala Anand Vs. Advent Corporation Pvt. Ltd., reported in A.I.R. 2002, S.C. 2290, at page 2307," the appellant was always ready and willing to perform her part of contract at all stages. She has not taken any advantage of her own ground. The appellant is no way responsible for the delay at any stage of the proceeding. It is the respondent who have always been and trying to wriggle out the contract. On this background the Hon'ble Apex Court held that, the respondents can not taken advantage of their own ground and then plead that the grant of decree of specific performance would amount to an unfair advantage to the appellant. It can be inferred on the basis of observations of Hon'ble Apex Court that, while considering the ground of unfair advantage, entire facts, circumstances of the case, & conduct of the parties is necessary to consider.

E) Power to grant relief of possession partition, refund of earnest money.

Section 22 which enacts a rule of pleading provides that a person in a suit for specific performance of a contract for transfer of immovable property, may ask for appropriate reliefs, namely, he may ask for

possession, for partition or for separate possession including relief for specific performance. These reliefs can be claimed, notwithstanding anything contained in Code of Civil Procedure, to contrary, sub section 02 of this section, however, specifically provides that these reliefs cannot be granted by Court, unless they have been expressly claimed by plaintiff in suit.

The proviso to this sub section 02, however, say that where plaintiff has not specifically claimed these reliefs in plaint, in initial stages of suit, the Court shall permit plaintiff at any stage of proceedings, to include one or more of reliefs, by means of an amendment of plaint on such terms as it may deem proper. The only purpose of this newly enacted provision is to avoid multiplicity of suits and that plaintiff may get appropriate relief without being hampered by procedural complications.

In, "Balasaheb Dayandeo Naik Vs. Appasaheb Dattatraya Pawar reported in 2008 A.I.R. SCW 1183 : 2008 LawSuit(SC) 118," the Hon'ble Apex Court held that, the plaintiff is entitled to seek alternative relief of refund of earnest money in event of decree for specific performance cannot be granted for any reason.

In, "P.C. Varghese Vs. Devaki Amma Balambika Devi reported in 2006 A.I.R. (SC) 145 : 2005 LawSuit(SC) 1392," the Hon'ble Apex Court held that, Decree for partition and separate possession of property can be granted in addition to decree for specific performance of contract. Section 22 enacts a rule of pleading that in order to avoid multiplicity of proceedings, the plaintiff may claim a decree for possession and or partition in a suit for specific performance, ordinarily, a proceeding for grant of a final decree for partition should be initiated after the sale deed in terms of the decree for specific performance of contract is executed registered and not vice-versa.

In, "Babu Lal Vs. Hazari Lal Kishori Lal reported in 1982 A.I.R.

(SC) 818 : 1982 LawSuit(SC) 43,” the Hon'ble Apex Court held that, in view of Order 02, Rule 02 of Code of Civil Procedure some doubt was entertained whether the relief for specific performance and partition and possession could be combined in one suit; one view being that the cause of action for claiming relief for partition and possession could accrue to the plaintiff only after he acquired title to the property on the execution of a sale deed in his favour and since the relief for specific performance of the contract for sale was not based on the same cause of action as the relief for partition and possession, the two reliefs could not be combined in one suit. Similarly, a case may be visualized where after the contract between the plaintiff and the defendant the property passed in possession of a third person. A mere relief for specific performance of the contract of sale or may not entitle the plaintiff to obtain possession as against the party in actual possession of the property. As against him, a decree for possession must be specifically claimed for such a person is not bound by the contract ought to be enforced. In a case where exclusive possession is with the contracting party, a decree for specific performance of the contract of sale simplicitor, without specifically providing for delivery of possession, may give complete relief to the decree-holder. In order to satisfy the decree against him completely he is bound not only to execute the sale-deed but also to put the property in possession of the decree-holder. This is consonance with the provisions of Section 55(1) of the Transfer of Property Act which provides that the seller is bound to give, on being so required, the buyer or such person as he directs, such possession of the property as its nature admits.

To sum up the topic it can said in short. The relief of specific performance of contract is discretionary relief. However the discretionary must be used in lawful manner the court has to consider the general

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principles of Indian Contracts Act equitable principles while exercising the discretion. It is necessary to consider the circumstances in case in each case the conduct of parties and the respective interest under the contract.

With this, I conclude the summary/gist of subject for workshop.

Sindhudurg-Oros.

Date :- 10/03/2016

(R. V. Huddar),
Chief Judicial Magistrate &
Civil Judge (Senior Division),
Sindhudurg-Oros.
Head of the Core Group of Judges,
(CIVIL GROUP).