

## **Md. Ziaul Haque vs Calcutta Vyaper Pratisthan on 23 March, 1966**

**Equivalent citations: AIR1966CAL605, AIR 1966 CALCUTTA 605**

ORDER

A.N. Ray, J.

1. The plaintiff instituted this suit for a decree for specific performance of the agreement for sale in respect of the property mentioned in the plaint. There are consequential reliefs prayed for, namely a direction on the defendant to execute and register the conveyance in respect of the property, a direction on the Registrar to settle or execute the conveyance if necessary.
2. The alternative prayers are a decree for Rs. 3,00,001 with interest in terms of paragraph 18 of the plaint, and a sum of Rs. 1,00,000 in terms of paragraph 19 of the plaint, and if necessary an enquiry as to the amount due. The plaintiff has also asked for a declaration that the property stands charged for the due payment of the sum of Rs. 3,00,000.
3. The allegations in the plaint are as follows. First, that between 30 April 1963 and 6 May 1963 it was agreed by and between the parties through Ramkisanji Dhanuka that the defendant would sell to the plaintiff and the plaintiff would purchase from the defendant the property mentioned in paragraph 1 of the plaint free from all encumbrances at or for the price or consideration of Rs. 10,75,000. Secondly, that the defendant would make out a good and marketable title to the said property. Thirdly, that the plaintiff would advance a sum of Rs. 25,001 to the defendant towards or on account of earnest money and in part payment of the agreed purchase price or consideration. Fourthly, that the balance sum of Rs. 10,49,999 would be paid by the plaintiff to the defendant at the time of the execution of the conveyance. Fifthly, that every effort would be made by the parties to complete the transaction by 16 June, 1963, but time would not be treated as essence of the contract. Sixthly, that the conveyance would be either in favour of the plaintiff or his nominee or nominees.
4. The plaintiff's case is that the agreement was arrived at orally and in the making of the agreement the plaintiff was represented by his agent, Safar Ali, and the defendant by the agents, Tola Ram Jalan and Bajrang Prosad Jalan. In the plaint the name is given as Bajrang Prosad Jalan, out at the trial it appeared that the real name was Bajrang Prosad Jalan. The plaintiff further alleges that some of the terms of the agreement alleged will appear from the correspondence, namely letters dated 29 April, 1963. 30 April 1963, 6 May, 1963, 6 June 1963, alleged in paragraph 5 of the plaint. The plaintiff paid Rs. 25,001 as earnest money in terms of the said agreement.
5. The further allegations are that in the month of June 1963 the plaintiff through his solicitor delivered requisition on title and on 20 June 1963 the defendant's solicitor sent to, the plaintiff's

solicitor answers to the requisition. It is the plaintiff's case in the plaint that the defendant or his solicitor did not send the original conveyance in favour of the defendant or necessary documents authorising the sale. The defendant's solicitor on or about 28 June 1963 sent to the plaintiff's solicitor copy of the original conveyance in respect of the property forming subject matter of this suit, as also a letter dated 28 November 1962 written on behalf of the defendant to the Corporation of Calcutta for mutation of the name of the defendant as the owner of the property. The plaintiff alleges that on or about 28 June 1968 the defendant through his solicitor promised to furnish the plaintiff's solicitor with resolution passed by the defendant authorising and confirming the sale of the property forming subject-matter of this suit.

6. The plaintiff alleges that by mutual consent and agreement of the parties time for completion of the transaction was extended from time to time and on or about 29 July 1963 there was an extension till 24 August 1963. The plaintiff alleges that the plaintiff's solicitor sent the draft conveyance to the defendant's solicitor some time on 5-8-1963. On or about 17-8-1963 the defendant's solicitor returned to the plaintiff's solicitor the said draft duly approved subject to alterations. The plaintiff also alleges that the defendant did not on or about 13 August 1963 supply or furnish to the plaintiff requisite resolution authorising and confirming the sale of the property. The plaintiff alleges that the defendant requested the plaintiff for some more time. The plaintiff alleges that on or about 21 August 1963 in the presence and through the intervention of Ramkisanji Dhunuka it was agreed between the plaintiff represented by Safar Ali and the defendant first, that the transaction would be completed on or before 15 April 1964. Secondly, that the defendant would furnish or supply resolution to the plaintiff or his solicitor before the extended date. Thirdly, that the plaintiff would pay to the defendant on account of earnest money towards or in part payment of the agreed purchase price and in addition to the aforesaid sum of Rs. 25,001 a further sum of Rs. 2,75,000. Fourthly, that the plaintiff would pay to the defendant at the time of the execution of the conveyance a further sum of Rs. 4,74,999. Fifthly, that the payment of the balance of Rs. 3,00,000 by the plaintiff to the defendant would be made within three months from the date of the execution of the conveyance and that sum would constitute or form a charge on the property in favour of the defendant.

7. In paragraph 15 of the plaint it is alleged that due to and in terms of the said agreement and/or modified agreement and in performance of his part thereunder the plaintiff on or about 14 October 1963 paid to the defendant a further sum of Rs. 2,75,000 and the defendant received and accepted the said cheque and appropriated the proceeds, namely Rs. 2,75,000 to the said agreement and/or further agreement. In paragraph 16 of the plaint it is alleged that the plaintiff has performed, is ready and willing and was always ready and willing to perform his part of the said agreement. In paragraph 17 it is alleged that in spite of demands the defendant failed and neglected to perform its part of the said agreement. The defendant, it is alleged, has not furnished a copy of the resolution and is not executing the conveyance in a manner or within the time finally agreed upon or at all. It is also alleged that the defendant being a limited company cannot make out a good and marketable title to the property without or in the absence of the said resolution.

8. In paragraph 18 it is alleged that if the Court decides that specific performance ought not to be granted in this case or if it is found that the property cannot be sold free from encumbrance or at all

then the plaintiff in lieu of a decree for specific performance would be entitled to a decree for the refund or return of the amount aggregating Rs. 3,00,001 paid as earnest money and towards agreed purchase price. In paragraph 19 of the plaint it is alleged that if specific performance is not granted the plaintiff is also entitled to a decree for Rupee 1,00,000 as loss of bargain being the difference between the present market value of the property and the said agreed consideration.

9. The defendant in the written statement denied that the defendant agreed to make out good title or that the time for completion of the sale would not be treated as essence of the contract. In paragraph 7 of the written statement the defendant alleges that the defendant agreed to sell to the plaintiff and the plaintiff agreed to buy from the defendant 25 cottahs of land with a cottage being portion of 3, Russell Street, and a portion of 36, Chowringhee Road, Calcutta, on terms and condition: first, that the said sale would be as per plan given to Ramkisanji Dhanuka; secondly the price would be Rs. 10,75,000; thirdly, that the earnest money would be Rs. 25,001; fourthly, the defendant would make out marketable title to the property; fifthly the transaction be completed on or before 30, JUNE, 1963; sixthly, that possession on the property would be given as it was without the same being completely vacant. The defendant craves reference to the letters dated 29th April 1963, 30th April 1963, 6th May 1963, 16-5-1963, for ascertainment of the precise terms & conditions and facts. The defendant denies that there was an agreement to send the plaintiff any document authorising the sale or that the defendant was under any obligation to send any document as alleged in the plaint. The defendant alleges that the defendant, however, promised to furnish to the plaintiff or his solicitor with the requisite resolution of the defendant authorising and confirming the sale and that it was understood that the resolution be furnished and the same could be furnished only after the plaintiff would send the approved and engrossed conveyance to be executed and the plaintiff fixed a date for execution thereof.

10. The further defence is that there was no agreement on or about 21 August 1963 as alleged in paragraph 13 of the plaint or in sub-paragraphs thereof. The defendant denies that the sum of Rs. 2,75,000 was paid in terms of the alleged agreement or the alleged modified agreement and the defendant states that the said sum was paid as further earnest money in respect of the agreement alleged in paragraph 7 of the written statement. In paragraph 14 of the written statement the defendant alleges that the plaintiff wrongfully insisted on claiming first, that the defendant was to make out a good and marketable title only; secondly, that the defendant was to supply or arrange for the preparation of the plan of the property; thirdly, that the plaintiff was claiming a copy of the resolution of the defendant without finally approving the draft conveyance and sending the engrossed conveyance.

11. The defendant denies allegations made in paragraph 16 of the plaint. The defendant denies that the plaintiff was ready and willing to execute the conveyance upon performing the terms and conditions of the agreement alleged in paragraph 7 of the written statement.

12. The further defence is that the plain tiff failed and neglected to complete the agreement for sale within the stipulated time and in any event reasonable time for completion of the agreement expired and by letter dated 27-12- 1963 the defendant called upon the plain tiff to complete the sale within 31 December 1963, but the plaintiff failed to comply with the same.

13. The defendant alleges that the defendant determined the agreement for sale and forfeited the earnest money.

14. The following issues were framed at the trial:

1. Was there any agreement as alleged in paragraphs 3, 4 and 13 of the plaint?
2. Were the sums of Rs. 25,001 and Rupees 2,75,000 paid in terms of the agreements alleged in paragraphs 6 and 15 of the plaint?
3. Was there any agreement as alleged in paragraph 7 of the written statement ?
4. Has the plaintiff performed or was or is ready and willing to perform his part of the agreement between the parties?
5. What relief, if any, is the plaintiff entitled to?

15. On behalf of the plaintiff there is oral evidence of Safar Ali and of the plaintiff. On behalf of the defendant there is oral evidence of Bajrang Prasad Jalan and of Tola Ram Jalan.

16. Issues Nos. 1, 2 and 3 can be taken up together. The issues are: whether there was an agreement as alleged in paragraphs 3, 4 and 13 of the plaint; secondly, whether the sums of money were paid in terms of the agreement alleged in paragraphs 6 and 15 of the plaint; and thirdly, whether there was an agreement as alleged in paragraph 7 of the written statement. In paragraphs 3 and 4 of the plaint alleges an agreement entered into between the parties in the months of April and May 1963 on terms alleged in the plaint. In paragraph 13 of the plaint, the plaintiff alleges an agreement entered into between the parties in the month of August 1963. The plaintiff alleges the payment of rupees 25,001 in terms of the agreement in the months of April and May 1963. The plaintiff alleges payment of Rs. 2,75,000 in terms of the agreement entered into in the month of August 1963 as alleged in paragraph 15 of the plaint. The defendant alleges only one agreement in paragraph 7 of the written statement and that is the agreement made in the month of May 1963. As far as the defendant is concerned there is total denial of any agreement in the month of August 1963. On behalf of the plaintiff Safar Ali was examined to prove the agreement entered into in the months of April-May 1963 as also the agreement entered into between the parties in the month of August 1963. The oral evidence on behalf of the defendant is that there was no agreement in the month of August 1963. There is some difference between the oral testimony of the plaintiff and the oral testimony of the defendant as to the terms of the agreement in the months of April-May, 1963.

17. Counsel on behalf of the defendant contended that the oral evidence of Safar Ali should be completely rejected in regard to the plaintiff's case as to whether there was any agreement in the month of August 1963. Various reasons were assigned in support of that contention, First it is said that the document at page 26 of Exhibit A being a letter written by the plaintiff's solicitor to the defendant's solicitor being date 21 August, 1963 refers to an agreement to accept a deferred payment of Rs. 3,00,000, but does not mention a word about the agreement alleged to have been entered into

between the parties on 21 August 1963 as alleged in the plaint. The other letters dated 22 August 1963, 23 August 1963, 24 August 1963 appearing at pages 27, 28, and 29 of Exhibit A being the correspondence between the solicitors of both sides do not state a word about the August agreement. Such silence about August agreement is significant and it raises the right inference to be drawn from the correspondence that if there had been any such agreement in fact it would have found place in contemporaneous correspondence. Secondly, it is said that the documents at pages 36 to 43 of Exhibit A which bear the date in the month of October 1963 and which refer to the draft agreement do not mention that the time for performance of the agreement was extended till the month of April 1964. Again, it is right to hold, as Counsel for the defendant contended, that the correspondence repels any case of August agreement. Thirdly, the document at page 43 of Exhibit A bearing date 14 October 1963 by which the plaintiffs solicitor sent a cheque for rupees 2,75,000 referred to the letters dated 10 June 1963 and offer dated 29 April 1963 and there was no reference to any August agreement. Safar Ali in his oral evidence said that the plaintiff's solicitor made a mistake. The oral evidence is an after-thought and I am unable to accept that it is an omission. In my opinion there was no agreement in the month of August, 1963 and that is why there was no reference in the correspondence to such agreement. Fourthly, a reference was made by Counsel for the defendant to the documents appearing at pages 45, 46 and 48 of Exhibit A, namely, letters dated 27 December 1963, 17 January 1964, and 24 January 1964 being the correspondence exchanged between the solicitors of both sides where the defendant's solicitor gave notice to the plaintiff's solicitor that the transaction was that there was any such agreement or that there to be completed within 31 December 1963 and there was no denial by the plaintiff's solicitor that there was any such agreement or that there was an agreement that the contract would be performed in the month of April 1964. Fifthly, the letter dated 30th January 1964 written by the defendant's solicitor to the plaintiff's solicitor appearing at page 51 of Exhibit A categorically stated that opportunity was given to the plaintiff to complete the transaction by the end of December but that was not done and there was no reply on part of the plaintiff. Sixthly, the plaintiff's solicitor's letter dated 10 April 1964 appearing at page 52 of Exhibit indicated that the defendant's approved conveyance was being engrossed, and the approved conveyance indicated that the price was left blank and there was no reference to payment of the purchase price in accordance with the agreement alleged to have been entered into between the parties in the month of August 1963. On the contrary at page 75 of Exhibit A it will appear that the approved conveyance indicated that the full consideration was being received whereas according to the plaintiff's allegations and evidence the August agreement was that the full consideration would not be paid on the execution of the agreement but subsequent to the agreement. The contentions on behalf of the defendant are sound and correct that the documents completely belie and repel the case of any August agreement as alleged by the plaintiff. The oral evidence of Safar Ali that there was an agreement is unbelievable and unacceptable. I therefore hold that there was no agreement in the month of August 1963 as alleged by the plaintiff.

18. Counsel on behalf of the plaintiff did not advance any argument in support of the contention that there was any agreement in the month of August 1963. On the contrary Counsel for the plaintiff proceeded on the footing that there was no agreement in the month of August 1963 and his contention was that there was an agreement in the month of April-May 1963 and the plaintiff was entitled to succeed on the basis of that agreement. At this stage arguments which were advanced on behalf of the plaintiff on the pleadings in regard to the April-May agreement may be dealt with, It

was contended on behalf of the plaintiff that in paragraph 15 of the plaint the words used were "the said agreement" and "further agreement" and thereby a distinction was made between the May agreement and the August agreement and it was said on behalf of the plaintiff that the words "the said agreement" in the plaint referred to the May agreement and the words "further agreement" referred to the August agreement. That argument should put the plaintiff out of Court at once. The allegations in paragraph 16 of the plaint are that the plaintiff has performed, is ready and willing to perform the part of the said agreement. If the plaintiff came with a case that the plaintiff was ready and willing to perform the said agreement, namely, the May agreement and then the plaintiff alleged the August agreement and there was no averment of willingness and readiness to perform the August agreement the suit should fail at once. It is one of the well settled principles in an action for specific performance that the plaintiff in the plaint must indicate readiness and willingness to perform the agreement. It was next contended on behalf of the plaintiff that there was an admission in the written statement as to the May agreement and there was no denial of allegation in paragraph 16 of the plaint and therefore the plaintiff was entitled to succeed on admission. This argument is devoid of merit and substance and is raised on misreading the pleadings. The defendant in the written statement denied each and every allegation of paragraph 16 of the plaint. It was said on behalf of the plaintiff relying on the provision contained in Order 8, Rules 3 and 5 that there was no specific denial. The entire written statement is to be read in order to appreciate allegations of fact. In my opinion there is proper denial of allegations in the plaint.

19. Counsel on behalf of the plaintiff relied on the decision of the Supreme Court in *Firm Srinivas Ram Kumar v. Mahabir Prasad*, in support of the contention that the plaintiff alleged an agreement in the month of May and the defendant in the written statement in paragraph 7 admitted that there was an agreement and therefore the plaintiff was entitled to succeed on the admission of the defendant. There is no substance in this argument. In the case before the Supreme Court the plaintiff entered into negotiations with Jadu for sale of a house at Gaya. The negotiations failed. Thereupon a contract was entered into for sale of the premises. The vendor put the plaintiff in possession of the premises and promised to execute a conveyance as soon as the title deeds were returned by Jadu with whom the original conveyances were made and the balance of the consideration money was paid by the plaintiff. The conveyance was not executed in favour of the plaintiff even after the plaintiff obtained the title deeds from Jadu. On the contrary the plaintiff sold the house to the defendant. The plaintiff claimed specific performance. The defendants admitted that they were in need of money and they approached the plaintiff for the loan and that the plaintiff advanced a sum of rupees 30,000. The Supreme Court said that the plaintiff might rely upon different rights in the alternative and further that the plaintiff could make two or more inconsistent cases and if no such case was made in the plaint relief could be granted not on the basis of a case for which there was no foundation in the pleadings but upon the case which the defendants themselves made. In the present case if the plaintiff wishes to take recourse to the defence I am unable to see how the plaintiff could succeed in obtaining a decree for specific performance. The defendant, it is true, alleges an agreement but that is not the agreement that the plaintiff alleges and secondly the defence is that the plaintiff was not ready and willing to perform the agreement, and finally that the defendant forfeited the earnest money by reason of failure of the plaintiff to perform the agreement. It is well settled that if the plaintiff wishes to rely on any admission in pleadings the admission is to be taken in its entirety: See 42 Ind App 103: . On that basis the plaintiff is not entitled to succeed.

Further, I am of opinion that as far as the written statement is concerned there is no admission in the defence that the plaintiff can extract to found any case of relief being given to the plaintiff on the basis of an admission.

20. The next question is whether the plaintiff was ready and willing to perform the agreement. Counsel on behalf of the plaintiff contended that the plaintiff was entitled to claim specific performance of the agreement entered into between the parties in the months of April-May 1963. This question resolves into two parts-first, if the plaintiff's case fails as to August agreement, what is the effect with regard to the May agreement; secondly has the plaintiff been ready and willing to perform the plaintiff's part of the agreement. I have already indicated that there was no agreement in the month of August 1963. Counsel on behalf of the plaintiff at the time of the argument accepted that position. The result is that the plaintiff came to the Court with a case which the plaintiff failed to prove. It also appears that the plaintiff came with an incorrect case. Having lost in proving the case which the plaintiff set up, now the plaintiff seeks to take shelter behind the May agreement. Ordinarily, there cannot be two agreements subsisting at the same time in respect of the same subject-matter. A contract is ordinarily discharged by performance or by a new agreement. By such an express agreement the parties may agree that their contract shall be terminated and if the original contract is wholly or partially executory the consideration for discharging the agreement is the mutual release of liability.

21. In the present case it appears that in the correspondence the plaintiff insisted on a warranty of title. It will appear at page 32 of the Exhibit A being the letter dated 28 August 1963 written by the plaintiff's solicitor to the defendant's solicitor that the plaintiff charged the defendant that they had failed to give inspection of the resolution authorising sale of the premises and to approve the draft conveyance by deleting the normal covenant for right to grant. Counsel on behalf of the plaintiff contended that under the provisions of Transfer of Property Act and in particular Section 55, Sub-section 2 thereof, a seller shall be deemed to contract with the buyer that the interest that the seller professed to transfer to the buyer subsists and he has power to transfer the same and that therefore the plaintiff is also entitled to seek for the covenant for right to grant. Counsel for the defendant on the other hand contended that there was no agreement about warranty of title. At this stage reference may be made to Exhibit A and in particular to the documents appearing at pages 1, 2, 3, 4, 5 and 6 which all relate to the agreement entered into between the parties in the month of April-May 1963. In the plaintiff's Solicitors letter dated 30th April, 1963 it was indicated that the plaintiff's Solicitor accepted the defendant's offer with modification and on conditions that the description of the premises would be as given in that letter, secondly that there should be vacant possession, thirdly that the title should be good and marketable and fourthly that the transaction should be completed within six months. The defendant's Solicitor by letter dated 6 May 1963 indicated that the defendant was willing to sell on the conditions that the area of the land would be 25 cottahs as set out in that letter and secondly that the land and cottage would be handed over to the plaintiff as it was and in the same condition in which the defendant purchased from Mackertich John, thirdly, the title would be marketable and fourthly that the transaction would be completed on or before 15-6-1965. The plaintiff's Solicitor by letter dated 10 May 1963 accepted the defendant's Solicitor's letter dated 6 May 1963 on the conditions that the premises would be completely vacant, secondly that the total area would not be less than 25 cottahs and thirdly that the transaction would

be completed within 15 August 1963. By letter dated 15 May 1963 the defendant's Solicitor wrote to the plaintiff's Solicitor that the party agreed that possession would be given as it was without the same being completely vacant and that the transaction will be completed within 30th June 1963.

22. It should be stated that the correspondence supports the defendant's version of the agreement & I am of opinion that the agreement was as alleged by the defendant in the written statement. On mis documentary evidence it was contended that the plaintiff was not entitled to insist on any warranty of title and the plaintiff's insistence indicated that the plaintiff was not ready and willing to perform the agreement as it was but on a new term. Reliance was placed by Counsel for the defendant on the decision in Babu Bindeshri Parshad v. Mahant Jairam Gir, reported in (1887) 14 Ind App 173 (PC). In that case a purchaser delayed payment of the purchase money of immoveable estate insisting upon the insertion in the conveyance of an absolute warranty of title by the vendor to the property sold. It was held that as a right to such covenant was not shown, his delay of payment was not excused, and there was no case for decreeing specific performance. The Judicial Committee said that when the plaintiff claimed to have the contract performed by having warranty of title, he was ready to have it performed in that way. Counsel for the plaintiff in the present case made a distinction between warranty of title and right to grant. It was said that the right to grant was an ordinary incident of conveyancing. Parties through their Solicitor did not accept that position. Solicitor for the defendant did not approve the conveyance in the manner in which Solicitor for the plaintiff drew up the conveyance. The provisions contained in Section 55(2) of the Transfer of Property Act indicate that the seller shall be deemed to contract with the buyer that the seller has interest and has power to transfer the interest. Under Section 25(b) of the Specific Relief Act of 1877 a vendor cannot enforce a contract for sale unless he can give the buyer title free from reasonable doubt. The seller's liability is limited to the title which he has professed to transfer. In the present case counsel for the defendant is in my view right in his contention that insistence of the Clause regarding the right to grant indicated that the plaintiff was insisting on warranty of title which was not one of the express terms in the agreement and which could not be an implied term in view of the provisions of the Transfer of Property Act. It was in the words of the Judicial Committee that the plaintiff was insisting upon having that which he had no right to have. This has a bearing on the question of readiness and willingness. This indicates that the plaintiff was not ready and willing to perform the agreement entered into between the parties in the months of April and May 1963. It will appear at page 32 of Ex. A that the plaintiffs Solicitor insisted on having the draft with the covenant for right to grant. There is no evidence that it was a normal covenant. The provisions in the Transfer of Property Act and in particular Section 55 which deal with the rights and obligations of buyers and sellers do not support the plaintiffs view.

23. It appears in the correspondence that the plaintiff's Solicitor by letter dated 28-8-1963 charged the defendant with having failed to honour obligation as to deferred payment of the sum of Rs. 3,00,000 out of the agreed consideration. The plaintiff all throughout insisted on that deferred payment. In the draft conveyance as approved there does not appear any provision for deferred payment. I have already indicated that there was no agreement in the month of August. The result is that here again the plaintiff was insisting on having performance of the agreement in a manner to which the plaintiff was not entitled under the agreement entered into between the parties in the months of April and May.



24. Another subject of controversy between the parties was as will appear in the plaintiff's Solicitor's letter dated 28th August 1963 at page 32 of Ex. A that the plaintiff charged the defendant with having failed to arrange for preparation of the plan to be annexed to the conveyance. By the letter dated 10th April 1964 appearing at page 52 of Ex. A the plaintiffs Solicitor asked for the plan of the premises. There was some oral evidence that the plaintiff did not obtain the plan along with the letter dated 29th April 1963. In the correspondence there was no such case that the plaintiff did not receive the plan. I have no hesitation in rejecting the evidence of Safar Ali that he did not obtain the plan. This was an after-thought on part of the plaintiff. The letter dated 10-4-1964 asked for the plan of the premises and resolution of the company but the letters at the inception of the agreement indicate as to what property was going to be sold and the parties gave a description of the premises which was proposed to be sold. It was not the evidence of Safer Ali that the plaintiff was unable to prepare the plan. It will appear at page 61 following of Ex. that the draft conveyance was approved with the words "subject to approval of the proposed plan to be annexed with the conveyance". This indicated that a plan was to be annexed to the conveyance. The preparation of plan was a matter which could be solved by the parties. The plaintiffs Solicitor all throughout insisted on the defendant furnishing the plaintiff with the plan whereas there was no such obligation cast on the defendant under the agreement. This is another instance which is indicative of the plaintiff insisting on something to which the plaintiff was not entitled to.

25. The next question is how far did the plaintiff prove the agreement alleged in paragraph 3. In paragraph 3 the plaintiff alleged in sub-paragraph (b) that the defendant would make out a good and marketable title and secondly in sub-paragraph (e) the plaintiff alleged that effort would be made to complete the transaction by June 16th 1963 and time would not be treated as essence of the contract and thirdly in sub-paragraph (f) it is alleged that the conveyance would be in favour of the nominees. The correspondence shows that time fixed was 30th June 1963. In the plaint reference was made to the letters dated 30th April 1963 and 6th May, 1963. There is no reference in the plaint to the letter dated 10th June 1963. In the letter dated June 10th 1963 there is a sentence that every effort will be made to complete the sale within the time fixed. The letter dated 10th June 1963 does not find any place as a term of bargain. I am of opinion that though there is some oral evidence that there was agreement that the defendant would make out a good and marketable title documents repel such a case. Counsel on behalf of the defendant made a distinction between good title and marketable title by contending that good title would be title which would be good against everybody. In *Curtis v. Maloney*, reported in (1950) 2 All ER 982 it was held that marketable title would be free from reasonable doubt. Reliance was placed in support of that proposition on the decisions reported in AIR 1923 Bom 148 and AIR 1935 Bom 16. Counsel for the plaintiff on the other hand relied on the Statement of Law in Halsbury's Laws of England, third Edition Vol. 34 paragraph 443 page 271 in support of the proposition that no title is good that is not marketable. Reliance was placed on the decision in *Pyrke v. Waddingham*, reported in (1853) 68 ER 813. I have referred to the decisions because of the distinction made by counsel for both parties in support of their rival contentions. I am of opinion that the agreement between the parties was that there would be marketable title and not that there would be good and marketable title. The plaintiff by insisting upon good title was again departing from the terms of the agreement.

26. The plaintiffs allegation that the agreement was that effort would be made to complete the transaction by 16th June but time would not be treated as essence is unacceptable. Safar Ali in QQ. 35 and 36 said that the agreement was that all the relevant title deeds would be sent and they would complete the transaction by the month of June or July. Therefore, there is no evidence as to allegations in paragraphs 3(b) and 3 (e) of the plaint. Those allegations are not proved. The agreement alleged by the plaintiff in paragraphs 3(b) and 3 (e) is not proved by oral evidence. The plaintiffs case is that the agreement was partly oral and partly in writing. If it is entirely in writing, the plaintiff's case is insupportable as it was pleaded. If it was partly oral and partly in writing, the plaintiffs case is equally insupportable on the documentary and oral evidence. My conclusions are that the plaintiff has failed to prove the allegations in sub-paragraphs (b) and (e) of paragraph 3. There was some evidence of the plaintiffs witness Safar Ali that the property would be sold to the nominees (Q. 34). But such a conveyance in favour of nominees would be also a matter arising as an incident of sale. The other question is whether time was of the essence of the contract. As far as the documents are concerned to which I have made reference, it appears that the transaction was to be completed within 30th June 1963. Even if the plaintiffs letter dated 10th June 1963 is taken into consideration, that does not detract from the time stipulated for completion of the transaction. In Q. 50 following Safar Ali was asked about the correspondence in the months of April and May and in QQ. 157 and 158 Safar Ali admitted that whatever was agreed was recorded in the letter dated 15th May, 1963. Counsel for the defendant is in my view right in his contention that the oral evidence also proves that whatever was the bargain between the parties is to be found in the correspondence and that there was no scope for oral evidence. Further, oral evidence has not in my opinion proved anything beyond what is contained in the correspondence. The result is that the plaintiff failed to prove sub-paragraphs (b) and (e) of paragraph 3 of the plaint.

27. In this background there are two questions to be gone into. First, is the May agreement enforceable and effective when the plaintiff fails to prove the August agreement? and secondly, has the plaintiff proved readiness and willingness to perform the agreement and if so, what is that agreement? Counsel for the defendant contended relying on the decision of the Judicial Committee in *Kanipta Singh v. Chaturbhuj Singh* that the May agreement is ineffective. Counsel for the plaintiff, on the other hand, relied on the decision of the Federal Court in *Jainarain Ram Lundia v. Surajmull Sagarmull*. in support of the contention that the May agreement was effective. In *Jai Narain's* case, there was a contract for sale of certain shares. Specific performance was asked of that contract. It appeared that after the contract was concluded further negotiations were started with regard to new matters. It was held that such further negotiations would not prevent full effect being given to the contract already existing, unless it was established as a fact that the contract was rescinded or varied with the consent of both the parties or that both parties treated it as incomplete and inconclusive. Counsel for the plaintiff contended that the August agreement being out of the field the plaintiff could yet rely on the May agreement. The distinction to be noticed between negotiations and concluded contract is of great significance. Negotiations do not become a contract unless there is agreement. That is why the Supreme Court said that further negotiations which were started would not have the effect of determining a concluded contract & that a concluded contract could be got rid of only by an agreement. The plaintiff in the present case came to court with the case of an agreement entered into between the parties in the month of August. If the plaintiff succeeded in proving the August agreement as I have already indicated, there could not be two

agreements subsisting at the same time in respect of the same subject-matter. The plaintiff could not claim specific performance of both the May and the August agreements at the same time because the subject-matter would be the same. If the plaintiff succeeded in proving the August agreement the plaintiff would then be entitled to perform the agreement on terms different to the terms in the month of May, 1963. The plaintiff in the present case cannot be heard to say that what happened in August according to plaintiff's allegations were negotiations. The plaintiff came with the case of a concluded agreement in the month of August 1963 and the plaintiff has failed in that case. Therefore, Jainarain's case cannot be brought in aid by the plaintiff in support of the contention that the May agreement is yet alive when the August agreement fails. The terms of the May agreement are different to the terms of the August agreement.

28. Counsel for the defendant, on the other hand, contended that the May agreement was ineffective. It is in support of that contention that reliance was placed on Kampta Singh's case, 61 Ind App 185: (AIR 1934 PC 98). There the appellants having paid off a mortgage on land which they had purchased sued the respondents for contribution in accordance with Section 82 of the Transfer of Property Act, 1882, alleging that land purchased by the respondents from the mortgagors was also subject to the mortgage. The appellants in the plaint set out a registered mortgage deed covering the respondent's land, but stated that its terms had been verbally varied and the respondents by their written statement contended that the effect of the verbal agreement was to exclude their land from the charge. The Judicial Committee said that the allegation of the appellants was that the terms of the security were to be found not in the registered deed, but in the registered deed as modified by a verbal agreement and the respondents in that case admitted a modification by verbal agreement but attributed to the verbal agreement an effect different to that alleged by the appellants. The Judicial Committee said that Section 59 of the Transfer of Property Act enacted provisions which aimed at preventing the mischief of such verbal agreement. Counsel for the plaintiff submitted that in Kampta Singh's Case, 61 Ind App 185: (AIR 1934 PC 98) the ratio was that because of lack of registration the verbal agreement was unenforceable and secondly that there was in fact a verbal agreement and therefore, the first agreement was not fully effective. That distinction appears to be based on a misreading of the decision. The Judicial Committee made the matter quite clear by saying that as the appellants admitted that the transaction was not governed by the registered mortgage deed alone, it would be inadmissible to allow them, when they had failed to prove the transaction alleged, to set up the registered mortgage deed unmodified as being the instrument which alone governed the relations between the parties. The ratio is that when the case of the parties was that there were two agreements and when the party failed to prove the transaction alleged it would be inadmissible to allow such a party to set up the earlier agreement unmodified as the only agreement governing the parties. The reason is that it is intended to prevent false cases being set up and when such false cases are demonstrated to be untrue in a court, to allow a party to take recourse to an agreement in a manner which is completely different to the case alleged, would be to violate the maxim of equity that he who seeks equity must come with clean hands. The attitude of the plaintiff becomes like that of a cringing coward who being unable to prove the case alleged in the pleadings now seeks to make a new case that the only agreement was the May agreement. It was neither the plaintiff's case that the only agreement between the parties was the May agreement, nor was it the defendant's case that the May agreement was in the form in which the plaintiff alleged, but the plaintiff now wants to have specific performance of an agreement alleged to be entered into

in the month of May in a form in which the court should reconstruct it and whatever the plaintiff did by way of readiness and willingness in aid of the alleged August agreement should be now annexed as readiness and willingness of the plaintiff in relation to May agreement. If by such flexibility of evidence and conduct of the party a new case is made and the May agreement which according to the plaint was ineffective on the happening of the August agreement is resuscitated on terms different to the terms alleged in the plaint, actions for specific performance and relief granted in equity will be meaningless. In my opinion counsel for the defendant is right in his contention that in the facts and circumstances of the present case the plaintiff is disentitled to bring in aid the agreement which was alleged to be entered into in the months of April and May 1963 to support the claim for specific performance.

29. The doctrine of readiness and willingness, as I have already indicated, should appear in the plaint. I have earlier referred to the distinction made by counsel for the plaintiff between the words "the said agreement" and the words "further agreement". The plaintiff does not at the trial ask for specific performance of the August agreement though that was the only case pleaded. Counsel for the plaintiff at the stage of argument asked for specific performance in regard to the May agreement. It has to be found out whether the plaintiff performed and was ready and willing to perform the May agreement. It was said that there was no cross-examination of Ziaul Huq on the aspect of readiness and willingness and therefore the plaintiff was entitled to succeed. In my opinion this contention is unmeritorious. Counsel for the defendant is in my view justified in not cross-examining Ziaul Huq. The evidence is worthless in my opinion. Merely stating that the deft, (pltf.?) is a man of wealth and merely enumerating several categories of property do not show that the plaintiff is ready and willing to perform the agreement. The only relevant questions were QQ. 97, 98 and 99. In Q. 97 the plaintiff was asked in examination-in-chief as to whether he was at all material times till the institution of the suit ready and willing to purchase the property. Purchasing the property and performing the terms of the agreement are not synonymous. Secondly, counsel for the defendant is justified in contending that there is no evidence that the plaintiff was ready and willing to perform either the May agreement or the August agreement. There is no foundation in the evidence that the plaintiff was ready and willing to perform either of the agreements. In Q. 98 it was again asked of the plaintiff whether he had the requisite money to purchase the property, This question suffers from the same vice as in Q. 97, Question 99 also suffers from the same defect. There is, therefore, no oral evidence that the plaintiff was ready and willing to perform the agreements alleged in the plaint. On the oral evidence the plaintiff is not entitled to succeed.

30. In law the plaintiff is equally disentitled to succeed. Because counsel for the defendant referred to certain cases; I shall in brief deal with them.

31. These are the decisions in Nil Kanta Rai Chowdhury v. Lalit Mohan Banerjee, reported in 19 Cal WN 933: (AIR 1916 Cal 774), Rustom Ali v. Sheikh Ahidev Rahman Mia, reported in (1941) 45 Cal WN 837 and Narinjan v. Md. Yunus, reported in AIR 1932 Lah 265. In Nil Kanta's case, 19 Cal WN 933: (AIR 1916 Cal 774) it was said that when a plaintiff alleged a contract of which he sought specific performance and failed to establish in the court would not make a decree for specific performance of a different contract. Reliance was placed in support thereof on the decision in Hawkins v. Maltby reported in (1867) 3 Ch A 188. In Nil Kanta's case, 19 Cal WN 933: (AIR 1916 Cal

774) the Courts below found against the plaintiff that there was no contract to grant a lease. The Subordinate Judge however granted the plaintiff damages. On appeal to the High Court it was found that the decree of the Subordinate Judge could not be supported. It was held that to make a decree for damages for the breach of a contract which was not the subject matter of the litigation would be to assume that there was a breach of the contract which had never been attempted to be specifically enforced and the principle upon which the Court refuses specific performance of the contract is equally applicable to claim for damages for breach of that contract. In other words if there is no contract which is capable of specific performance a fortiori there is no contract which is capable of sustaining damages. The decision in Nil Kanta's case, 19 Cal WN 933: (AIR 1916 Cal 774) was invoked by counsel for the defendant in aid of his contention that where the plaintiff failed to establish his case the Court would not make a decree for specific performance of a different contract. Emphasis was rightly placed on the aspect of the plaintiff's case pleaded that there was an agreement in the month of August and that the plaintiff failed to prove that case and the plaintiff having completely abandoned that case of agreement in the month of August any attempt on behalf of the plaintiff to take recourse to May agreement would be to have a decree for specific performance of an agreement which was not the agreement of the parties according to the plaintiff. In the other decision in Rustom Ali's case, (1941) 45 Cal WN 837 the plaintiff asserted that he paid Rs. 60 in advance and that he would pay the balance of Rs. 25 relating to a contract of sale of a piece of land for the sum of Rs. 85. The contention of the defendant was that the agreement to sell the property was not at Rs. 86 but at Rs. 130. A decree for specific performance was given by the Courts below and it was found that the plaintiff had paid Rs. 60 as advance money and that the contract was that the plaintiff would purchase the property at Rs. 130. It was said that in a suit for specific performance it was incumbent on the plaintiff to prove that he was ready and willing to perform the contract as it actually was and not as he alleged it was. The Courts having found that the contract was for Rs. 130, it was found that there was no readiness and willingness to perform that part of the agreement. In the Lahore decision AIR 1932 Lah 265 it was said that readiness and willingness to perform the contract would be readiness and willingness to perform it not in the way the plaintiff insisted but in accordance with the true tenor of the agreement. These three decisions are really in aid of the broad proposition that readiness and willingness to perform the agreement must be readiness and willingness to perform not as the plaintiff wished it nor in the way that the plaintiff evinced it prior to the institution of the suit, nor in the way the plaintiff wanted to fashion it at the trial but whether the plaintiff was really ready and willing to perform the real agreement between the parties. The words "real agreement" would mean either the agreement that the plaintiff and the defendant had between the parties or it would mean the real agreement which the Court finds it to be real agreement. The question of readiness and willingness however would assume different aspects in relation to the real agreement. If at the trial it transpires that the real agreement is not what the plaintiff alleges and the readiness and willingness which the plaintiff displayed was in relation to a different agreement, the plaintiff would be within the mischief of the doctrine of readiness and willingness as the plaintiff is in my opinion in the present case. It is manifest in the correspondence that the plaintiff insisted on performing the agreement not by paying the entire consideration money but by paying it in what the plaintiff described as deferred payment. That was not the May agreement. Secondly the plaintiff insisted on a covenant Clause for right to grant to which the plaintiff was not entitled. The plaintiff equally insisted on the preparation of a plan to which the plaintiff was not entitled. Some controversy arose as to whether the defendant is liable to

have the resolutions. It was argued on behalf of the plaintiff that the plaintiff was not competent to sell the property without resolutions of the Board. Reference was made to Section 293 of the Indian Companies Act in aid of that contention. It was said that the company was selling a part of its undertaking and that property was vested within the undertaking, and on that basis a resolution was required. The case of the defendant however is that the defendant was willing to have resolutions when the execution would be made. In the present case if the plaintiff performed the plaintiff's part of the agreement the defendant was ready and willing to perform the defendant's part of the agreement by having proper resolutions. On behalf of the plaintiff it was contended that in the absence of resolutions and particularly when there was oral evidence on behalf of the defendant that in answer to requisitions the defendant's solicitor said that the necessary documents were being sent in accordance with the answer to requisition No. 5 and that it transpired on the oral evidence of the defendant's witness that the documents were not produced, the defendant was not ready and willing to perform the defendant's part of the agreement. An extreme contention was advanced that the solicitor made a false statement and that steps should be taken against the solicitor. The solicitor did not give any evidence. In my opinion this extreme contention should be brushed aside as utterly irrelevant. The oral evidence of Jalan is that the documents were not sent. In the correspondence at page 33 of Exhibit A there is a letter dated 2-9-1933 in answer to the plaintiff's solicitor's letter dated 28th August 1963 where inspection of resolution for authorising the sale was asked for. The defendant's solicitor wrote that the same would be complied with after time was appointed for execution of the conveyance and prior to the execution thereof. Requisition No. 5 was answered by saying that "all necessary documents authorising the sale by the vendor are sent herewith." The requisition was to produce the necessary documents entitling the defendants who were a limited company to sell the premises. These questions are not free from doubt as to whether there was proper appreciation of the extent of authority on the one hand or the extent of power on part of the Company on the other hand to sell the premises. Be that as it may, as far as the defendant is concerned the defendant was ready and willing to perform the defendant's part of the agreement.

32. Counsel on behalf of the defendant contended that there was no identity of the property which was to be sold. In paragraph 1 of the plaint it is alleged that the defendant is the owner of 25 Cottans of land with a cottage standing on a portion thereof being part of or comprised within premises No. 3 Russell Street and 36 Chowringhee Road, Calcutta. In the plaint thereafter it has been referred to as the said property". At page 38 of Exhibit A it will appear that in the schedule to the agreement there is a description of the property and it is said that unless a plan is prepared there could not be identification of the property. Reliance was placed on the draft conveyance and in particular page 69 of Exhibit A which contains the words "delineated on the plan annexed". It was contended by Counsel for the defendant that in the absence of a plan there was no identity of the property. A reference was made to the oral evidence of Bajrang Prosad Jalan who said in Question 303 following that he had doubts as to the measurements and he said that exact boundaries could be determined by surveyor. Counsel for the plaintiff on the other hand contended that the property was capable of identification and it was sufficiently identified. If, however, I came to the conclusion that the plaintiff had succeeded in proving the agreement the Court could in proper circumstances give directions for ascertaining and identifying the property either by appointment of a commission or by other directions. In the present case if I had accepted the plaintiff's contention that there was an agreement that the plaintiff was ready and willing to perform the agreement I would have given

directions for identifying the property.

33. The result is that the plaintiff fails in proving the agreement. The plaintiff fails in establishing readiness and willingness to perform the agreement. There is however a claim for recovery of Rs. 3,00,000. Counsel on behalf of the defendant submitted that the plaintiff was not entitled to recover any portion of the money.

No argument was advanced by counsel for the plaintiff in aid of this claim. It may be stated that counsel for the defendant made an offer during the trial to refund Rs. 3,00,000 to the plaintiff but the plaintiff did not accept that offer and the case proceeded.

Now that the plaintiff has lost, the question is whether the plaintiff is entitled to any portion of this money. As far as the earnest money is concerned there is no case of forfeiture of the earnest money. There is no oral evidence to that effect nor has the defendant proceeded on the basis of forfeiture. The argument advanced on behalf of the defendant was that if there was no contract, money was not recoverable.

It was said that if the agreement was ineffective the entire money was irrecoverable. Reliance was placed by counsel on behalf of the defendant on the decision in 19 Cal WN 933: (AIR 1916 Cal 774) and on the observations at p. 935 of the report (Cal WN): (at p. 775 of AIR). I have already indicated that damages awarded in that case were wrong because there was no contract which was capable of specific performance. The money in the present case was paid by the plaintiff to the defendant in aid of an agreement.

It is true that the plaintiff has failed to prove the case of agreement. It is also correct that as far as the plaintiff is concerned the plaintiff cannot invoke in aid the mode of agreement in support of a suit for specific performance. In the present case the money that was paid by the plaintiff to the defendant was pursuant to some agreement which the parties entered into.

For some reason or other that agreement is not capable of specific performance. The money that was paid to the defendant, if it is allowed to remain with the defendant would in my opinion be allowing the defendant unjust enrichment. I am therefore unable to allow the defendant to remain in possession of the money.

I make it quite clear that it is not that the money is being awarded to the plaintiff either in lieu of specific performance or as damages for the plaintiff is not entitled either to specific performance or to damages. The money is merely being refunded to the defendant (plaintiff?) as a measure of grace to prevent enrichment of the defendant. The suit is dismissed with costs. The plaintiff is however entitled to refund of Rupees 3,00,000. Certified for two counsel.

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