HIGH COURT OF MADHYA PRADESH

BENCH AT GWALIOR

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SB:- Hon'ble Shri Justice G. S. Ahluwalia

FA 211/2002

Kalyan Singh and Others
Vs.
Sanjeev Singh

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Shri Prashant Sharma with Shri Sarvesh Sharma, counsel for the appellants.
Shri Anand V. Bhardwaj, counsel for the respondent.

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JUDGMENT

(Delivered on 19/04/2018)

This First Appeal under Section 96 of CPC has been filed against the judgment and decree dated 28/11/2002, passed by Additional District Judge, Dabra, District Gwalior in Civil Suit No.1/2000, by which the suit for declaration of title and specific performance of contract filed by the respondent/plaintiff has been decreed.

(2) The necessary facts for the disposal of the present appeal in short are that defendant No.1/appellant No.1 Kalyan Singh is the owner of the plot ad-measuring 900 sq. ft. situated in Ward No.16, Shiv Colony, Dabra, District Gwalior (for brevity, this property shall be referred as the ''disputed property''). The ''disputed property'' is a part of survey no.1850/1 and there is a 10 feet wide road on the East, whereas there is a boundary wall of Sugar Mill on the West. On the North side, house of one Baljeet is situated, whereas on the South side, boundary wall of Sugar Mill is situated. It was

pleaded that since this plot was situated near the house of the plaintiff/respondent and the plaintiff/ respondent was using the said plot for the last 15 years for tying his cattle, therefore, he was in possession thereof. On 29/11/1999, the defendant No.1/ appellant No.1 executed an agreement to sell in favour of the plaintiff/ respondent for a consideration amount of Rs.62,000/-. At the time of execution of agreement to sell, an amount of Rs.15,000/- was paid by the plaintiff/ respondent by way of advance and the remaining amount of Rs.40,000/- was agreed to be paid at the time of execution of the sale deed. In the agreement to sell itself, the defendant No.1/ appellant No.1 had admitted that the said plot is in possession of the plaintiff/ respondent. As per the agreement to sell, it was agreed upon by the parties that the sale deed shall be executed by 30/06/2000 and the plaintiff would bear the registry expenses. It was pleaded that the plaintiff and the defendants No.2 to 5 are the neighbourers. The defendants No.2 to 5 are the members of the same family and, therefore, the plaintiff had given then an information about the execution of agreement to sell with the defendant No.1/ appellant No.1 and, thus, the defendants No.2 to 5 were aware of the fact that the plaintiff has entered into an agreement to purchase the disputed property. It was further pleaded that as per the agreement to sell, it was agreed upon between the parties that the sale deed shall be executed by 30/06/2000, but even prior to that, the defendant No.1 dishonestly with an intention to cause loss to the

plaintiff/respondent, executed a registered sale deed in favour of the defendant No.2/appellant No.2 on 25/02/2000, whereas the said document was nothing but a sham document. Thus, it was pleaded that after executing an agreement to sell in favour of the plaintiff/ respondent, the defendant No.1/ appellant No.1 had no right or title to sell the disputed property to the defendant No.2/appellant No.2. Since the sale deed is without any right, therefore, the defendant No.2/ appellant No.2 does not get any title or possession over the disputed property. The plaintiff/ respondent, as per agreement to sell, was always ready and willing to perform his part of contract and even till today, he is ready and willing to do so. It was further pleaded that prior to expiry of the date fixed for execution of sale deed in the agreement to sell, the appellant No.1/ defendant No.1 had no right or title to execute the sale deed in favour of the appellant No.2/defendant No.2. Even otherwise, if he was in urgent need of money, then he could have issued a notice to the plaintiff/ respondent and if the appellant No.1/ defendant No.1 had expressed the need of money and had insisted for immediate execution of sale deed, then the plaintiff/ respondent would have got the sale deed executed even prior in time. It was further pleaded that the defendants No.2 to 5 are aware of the fact that the plaintiff/ respondent is in possession of the plot, but still with an intention to cause irreparable loss to the plaintif/respondent, the defendant No.2/ appellant No.2 has got the sale deed executed in his favour. It was further pleaded that the plaintiff/respondent is still in possession of the plot in dispute

and is using the same for tying his cattle. It was further pleaded that on 29/02/2000, the defendants No.2 to 5 informed the plaintiff/respondent that since the defendant No.2 has purchased the plot, therefore, now the plaintiff should stop tying the cattle on the said plot and now, the appellant No.2/ defendant No.2 would raise a construction over the plot. The plaintiff, thereafter, collected an information from the Office of Sub-Registrar, Dabra, District Gwalior and came to know that the defendant No.1/appellant No.1 has executed a registered sale deed on 25/02/2000 in favour of the appellant No.2/ defendant No.2. It was further pleaded that the defendants No.2 to 5 with an intention to raise construction over the land in dispute, have started collecting building materials on 01/3/2000, whereas they do not have any right or title to interfere with the possession of the plaintiff nor they have any right or title to raise construction over the disputed property. Accordingly, the plaintiff filed a suit for declaration of title and specific performance of contract as well as permanent injunction.

(3) During pendency of the suit, it appears that an application under Order 6 Rule 17 CPC was filed by the plaintiff/respondent seeking amendment in the plaint. The said application was allowed by the trial Court by order dated 23/06/2000. By this amendment, it was once again incorporated by the plaintiff/ respondent that as per the agreement to sell dated 29/11/1999, the plaintiff/ respondent is still ready and willing to perform his part of contract after making payment of outstanding amount and he would remain

ready and willing in future also. It was further pleaded that on 21/01/2000, the defendant No.1/ appellant No.1 had given an assurance to the plaintiff that he would execute the sale deed in his favour, but as the defendant No.1 was getting a higher consideration amount, therefore, he has executed the sale deed in favour of defendant No.2/ appellant No.2 which is void.

(4) The appellant No.1/ defendant No.1 filed his written statement and submitted that the defendant No.1/ appellant No.1 by registered sale deed dated 18/01/1983, had purchased the property from one Somnath Chaubey for a consideration amount of Rs.4,000/- and had constructed a foundation and is in peaceful possession of the same. Since the defendant No.1/appellant No.1 was in need of money, therefore, he executed a registered sale deed in favour of the defendant No.2/ appellant No.2 on 25/02/2000 after receiving the consideration amount. It was further pleaded that thereafter, the possession was handed over to the defendant No.2/ appellant No.2 and the appellant No.2 is using the said plot for tying his cattle and he has unloaded certain materials. It was further pleaded that the appellant No.2/ defendant No.2 is the owner and is in possession of the land in dispute. The appellant No.1/ defendant No.1 also denied the fact that the plaintiff/ respondent is using the said plot for the last 15 years for the purpose of tying his cattle and it was denied that the plaintiff/respondent is in possession of the disputed property for the last 15 years. It was further pleaded that the defendant No.1/

appellant No.1 has never executed an agreement to sell in favour of the plaintiff for a consideration amount of Rs.62,000/- and has not executed the agreement to sell on 29/11/1999. The said agreement to sell is a forged and concocted document. The plaintiff/respondent is not entitled to get any benefit of said agreement to sell. It was further submitted that the defendant No.1/ appellant No.1 had never received an amount of Rs.15,000/- by way of advance and it was never agreed upon between the parties that after making payment of remaining amount of Rs.47,000/-, a registered sale deed shall be executed in favour of the plaintiff/ respondent. However, the defendant No.1/ appellant No.1 fairly conceded that the defendants No. 2 to 5 are the members of the same family and further pleaded that since the plaintiff had never been in possession of the land in dispute, therefore, the question of giving and having information to the defendants No.2 to 5 with regard to possession of the plaintiff over the property in dispute, does not arise. It was further pleaded that since no agreement to sell was executed on 29/11/1999, therefore, no date for execution of sale deed on 30/06/2000 was ever fixed. Since the defendant No.1/ appellant No.1 was in need of money, therefore, he has executed the sale deed on 25/02/2000 in favour of the defendant No.2 and has handed over the possession of the same to the defendant No.2. It was further alleged that there was no need for giving notice to the plaintiff/respondent prior to execution of sale deed in favour of the defendant No.2/ appellant No.2. On the contrary, it was alleged

that on the basis of forged and concocted agreement to sell, the plaintiff/ respondent is trying to forcibly take possession of the land in dispute and is deliberately trying to cause loss to the defendants. It was further pleaded that the defendant No.1 has executed a registered sale deed in favour of the defendant No.2 and it was further admitted that the defendant No.2 has dumped building material on the disputed property. It was further pleaded that the plaintiff/ respondent is not entitled for any relief, as claimed by him. After the plaint was amended by the respondent/ plaintiff, the defendant No.1/appellant No.1 also carried out the consequential amendment in his written statement and once again, pleaded that the defendant No.1/ appellant No.1 has executed the sale deed in favour of the defendant No.2 after receiving the consideration amount and has also handed over the possession. The execution of agreement to sell in favour of the plaintiff was specifically denied. The terms and conditions mentioned in the agreement to sell were also denied. It was further denied that the plaintiff/respondent was ever ready and willing to perform his part of contract. It was further pleaded by the defendant No.1/ appellant No.1 that the pleadings of the plaintiff that he was tying his cattle for the last 15 years over the disputed property is false as the maximum age of a cattle is 12 years.

(5) The defendants No.2 to 5 also filed their separate written statement and pleaded that on 25/02/2000 they had purchased

the land in dispute for a consideration amount of Rs.76,000/- from the defendant No.1/ appellant No.1 by a registered sale deed and at present, the defendant No.2/ appellant No.2 is using the said land for tying his cattle and the building material of the defendant No.2/ appellant No.2 is also lying on the spot. It was further pleaded that the plaintiff had never been in possession of the land in dispute. It was further pleaded that merely because the land in dispute is situated near the house of the plaintiff would not give any legal right to him and the fact that the plaintiff was using his plot for the last 15 years for tying his cattle was also denied. The execution of agreement to sell by the defendant No.1 in favour of the plaintiff on 29/11/1999 was also denied. The defendants No. 2 to 5 also admitted that they are the members of the same family and are the neighbourers of the plaintiff, but they denied that they were ever aware of the fact that the agreement to sell was executed by the defendant No.1 in favour of the plaintiff. It was further pleaded that by creating a forged and fabricated agreement to sell dated 29/11/1999, the plaintiff is also trying to take possession of the land in dispute. It was further denied that any agreement to sell was executed on 29/11/1999 and it was admitted that the foundation was constructed by the defendant No.1/ appellant No.1 and the building material is lying on the disputed land. After the amendment of the plaint, the defendants No.2 to 5 also carried out consequential amendment in the written statement and once again, denied that any agreement to sell dated 29/11/1999 was executed by the defendant No.1 in favour

of the plaintiff and it was further denied that the plaintiff was ever ready and willing to perform his part of contract.

(6) The trial Court, considering the pleadings of the parties, framed the following issues:-

> ''(1) Whether the defendant No.1 had executed an agreement to sell in favour of the plaintiff on 29/11/1999 for the sale of land in dispute for a consideration amount of Rs.62,000/- ?
>
> (2) Whether the defendant No.1 after receiving an amount of Rs.15,000/- by way of advance, had agreed to execute the registered sale deed in favour of the plaintiff/respondent by 30/06/2000 ?
>
> (3) Whether the defendant No.1 had handed over the possession of the land in dispute to the plaintiff on 29/11/1999 ?
>
> (4) Whether the defendant No.1 has executed a registered sale deed in favour of defendant No.2 even prior to the deadline i.e. 30/06/2000 as fixed in the agreement to sell ?
>
> (5) Whether the defendants No. 2 to 5 are trying to interfere with the peaceful possession of the land in dispute, if so, whether the respondent/plaintiff is entitled for permanent injunction against them ?
>
> (6) Whether the registered sale deed dated 25/02/2000 executed in favour of the defendant No.2 is null and void in the light of the agreement to sell dated 29/11/1999 ?
>
> (7) Whether the plaintiff/respondent is entitled for specific performance of contract of agreement to sell dated 29/11/1999 from the defendant No.1?
>
> (8) Whether the plaintiff had never expressed his willingness and readiness to get the sale deed executed ?

(9) Whether the disputed property is being used for tying the cattle of the defendant No.2, its effect ?

(10) Relief and cost ?''

(7) The Trial Court, after recording the evidence of the parties, and hearing them, decreed the suit, and granted the decree of specific performance of contract by judgment and decree dated 28/11/2002, passed by Additional District Judge, Dabra, District Gwalior in Civil Suit No.1/2000.

(8) The appellants, being aggrieved by the judgment and decree passed by the Trial Court, has filed the present appeal.

(9) The Counsel for the appellants submitted that the appellants have filed I.A. No.5579/2003, which is an application under Order 26 Rule 10A read with Order 16 Rule 6 read with Section 151 of C.P.C. for sending the agreement to sell, Ex.P.1 to the handwriting expert for examination of the signature of the appellant No.1 on the agreement to sell, I.A. No. 4120 of 2007 has been filed for calling the register of the Stamp Vendor and I.A. No. 6472 of 2007 has been filed under Order 41 Rule 27 of C.P.C. for taking additional evidence on record.

(10) Challenging the judgment and decree passed by the Court below, it is submitted by the Counsel for the appellants that the appellant no.1, had denied his signatures on the agreement to sell and, therefore, the burden was on the respondent/plaintiff to prove, that the agreement to sell was executed by the appellant no.1. It is further submitted by the Counsel for the appellants that in the agreement to sell, it was mentioned that the respondent is

already in possession of the disputed land, whereas the respondent has failed to prove his possession over the land in dispute, therefore, under this circumstance, the respondent was also under obligation to seek the relief of possession and in absence of such a relief, the suit simplicitor for specific performance of the contract is not maintainable. It is further submitted that the respondent has not pleaded and proved that he was and is ever ready and willing to perform his part of contract. It is submitted that there is nothing on record to suggest, that the respondent/plaintiff had ever given any notice to the appellant no.1 to execute the sale deed. The respondent has not proved that he was in possession of adequate amount for performing his part of contract. It is further submitted that since, the respondent/plaintiff had pleaded his readiness and willingness by making amendment in the plaint, however, the Trial Court committed material illegality by allowing the application filed under Order 6 Rule 17 of C.P.C. as the pleading regarding readiness and willingness cannot be incorporated by way of amendment and has to be pleaded in the plaint itself. It is further submitted that on the reverse side of the agreement to sell, there is an overwriting on the year of purchase of stamp paper, therefore, the agreement to sell appears to be doubtful. It is further submitted that the Trial Court committed material illegality by taking recourse to the provisions of Section 73 of the Evidence Act.

(11) *Per contra,* the submissions made by the Counsel for the appellants are denied by the Counsel for the respondent. It is

submitted that the appellants had paid process fee for summoning the stamp vendor along with the register of sale of stamp papers. Santosh Dubey had appeared before the Trial Court also, but he was given up by the appellants themselves, therefore, now they cannot pray for summoning the original register/record of the stamp vendor. It is submitted that the respondent was and is still ready and willing to perform his part of contract. The Trial Court after appreciation of evidence, has rightly given the findings, that the agreement to sell was executed by the appellant no.1, in favour of the respondent, and the Trial Court didnot commit any mistake in decreeing the suit for specific performance of contract.

(12) Heard the learned Counsel for the parties.

(13) First of all, the pending interlocutory applications shall be considered.

(14) **I.A. No.6472/2007** has been filed for taking additional evidence on record. Along with this application, the appellants have filed the certified copy of the register of the stamp vendor and submitted that although the stamp paper containing serial No.2448 was purchased on 29-11-1999, but it was purchased in the name of some other person, and subsequently, by applying white fluid on the register, the name of Kalyan Singh (Appellant No.1) was inserted. The respondent/plaintiff has filed a reply to this application and has opposed the prayer.

From the record of the Trial Court, it is clear that by order dated 24-9-2002, the appellants were given last opportunity to examine the witnesses in their defence and they were permitted to

pay the process fee for ensuring their appearance. Accordingly, the appellants paid process fee for summoing Santosh Dubey, Stamp Vendor, Premises of Tahsil Court, Dabra, Distt. Gwalior with all original record concerning the stamp paper No.2448 dated 29-11-1999. Santosh Dubey appeared before the Trial Court, but he was not examined by the appellants, although Santosh Dubey had signed on the side of the ordersheet of the Trial Court, to prove his presence. Thus, it is clear that the Stamp Vendor Santosh Dubey, was summoned by the appellants themselves but he was given up. As Santosh Dubey was called with the original documents, and he was given up by the appellants themselves, now they cannot pray that the original record of the Stamp Vendor be requisitioned. Accordingly, I.A. No. **6472/2007** is hereby **rejected.**

(15) I.A. No. 5579/2003 has been filed for sending the agreement to sell Ex.P.1 to a handwriting expert to verify the signatures of the appellant No.1 Kalyan Singh. There is nothing in the application, as to why, such an application was not filed before the Trial Court. It is submitted by the Counsel for the appellants, that the appellants are rustic villagers and they do not know about the technicalities of law, and since, it was not advised by their Counsel, therefore, such an application was not filed before the Trial Court. The respondent has filed his reply to this application, and submitted that the statement of the respondent in his Court evidence, to the effect that the agreement to sell Ex. P.1 was executed by the appellant no.1, was never challenged by the appellants. Even the stamp vendor was summoned as a witness

by the appellants themselves, but subsequently, they themselves had given up the witness. Thus, at this stage, the application cannot be allowed.

Considered the submissions made by the Counsel for the parties. It is submitted that because of a lapse on the part of the Advocate in giving correct advise, the party to a litigiation should not suffer. It is submitted that because of fault of an advocate, the party must not suffer. The submissions, made by the Counsel for the appellants, cannot be accepted and hence, it is rejected. The Advocates claim themselves to be professionals having knowledge of law. They are law graduates. They cannot claim that they were not having knowledge of law. The Advocates cannot say, that the party should not suffer because they were not technically sound. In a litigation, there are always two parties. If a very lenient view is adopted by ignoring the mistake of a lawyer, then it would always adversely affect the rights of the other litigant. If a person had decided to engage a lawyer having less knowledge, then it is litigant, who has to suffer for his choice. A litigant cannot plead that since, his lawyer had not given correct legal advice to him, therefore, he should not suffer. If a litigant feels that he has been cheated by his Counsel by not giving proper legal advice, then the said litigant has remedy, against his lawyer, under the law of the land, but to the detriment of the interest of the other litigant, no leniency can be shown to a litigant on the ground that the Counsel engaged by such litigant was not professionally competent. The professional incompentence of a lawyer cannot be presumed. If

the lawyer had consciously decided not to move an application at the stage of trial, then no fault can be attributed to such a lawyer. Therefore, at the appellate stage, the I.A. No.5579 of 2003 cannot be allowed, specifically when the evidence of the respondent that the agreement to sell, Ex. P.1 was not challenged by the appellants. Furthermore, the appellants themselves had called the Stamp Vendor, Santosh Dubey. Santosh Dubey appeared before the Trial Court, but he was given up by the appellants themselves, thus, it is clear that the present application has been filed just in order to delay the proceedings. Hence, **I.A. No. 5579/2003** is hereby **rejected.**

(16) I.A. No. 4120/2007 has been filed under **Order 41 Rule 27 of C.P.C.** for taking additional evidence on record. Along with this application, a copy of the register of the Stamp Vendor has been placed on record. A reply has been filed by the respondent, opposing the application on the similar grounds.

Considered the submissions made by the Counsel for the parties. It is submitted by the Counsel for the appellants that the Supreme Court in the case of **Wadi Vs. Amilal and others,** reported in **(2015) 1 SCC 677** has held that if the Court is of the opinion, that the additional evidence is necessary for pronouncement of judgment, then the application for taking additional evidence on record may be allowed and the vigilance or negligence of the parties has no meaning. It is further submitted by the Counsel for the appellants that the documents filed along with the I.A. No. 4120/2007 are necessary for the pronouncement

of the judgment as it would clarify that there was an overwriting on the stamp paper as well as in the register of the Stamp Vendor, raising doubts on the genuniness of the agreement to sell. The submissions made by the Counsel for the appellants cannot be accepted and hence rejected. As already pointed out, the appellants themselves had summoned Stamp Vendor namely, Santosh Dubey along with the original register and Santosh Dubey had appeared before the Trial Court also, but the said witness was given up by the appellants themselves. Thus, it can be presumed that Santosh Dubey would have deposed against the appellants. Under these circumstances, **I.A. No.4120 of 2007** cannot be allowed and hence, **rejected.**

(17) Considered the submissions on merits, made by the Counsel for the appellants. It is submitted by the Counsel for the appellants, that on the reverse side of the agreement to sell, Ex.P.1, there is an overwriting on the year of purchase of the stamp paper. Thus, it is clear that a forged agreement to sell was prepared by the respondent and the said document was an ante-dated document. So far the question of overwriting on the reverse side of the agreement to sell is concerned, there is no overwriting on the date and month but there is an overwriting on the year. The appellants could have got this situation clarified by examining the Stamp Vendor. In fact, the appellants had summoned the Stamp Vendor, who had appeared before the Trial Court also, but he was given up. Furthermore, the appellants themselves have filed a copy of the sale register of the Stamp Vendor along with I.A.

No.4120/2007, which clearly shows that the stamp bearing no.2448 was sold on 29-11-1999. Thus, even if there is any overwriting on the year 1999, it would not make any difference.

(18) It is further submitted by the Counsel for the appellants, that since, the appellant no.1 had denied his signatures on the agreement to sell Ex.P.1., therefore, the burden was on the plaintiff/respondent to prove that the agreement to sell Ex.P.1, bears the signatures of the appellant no.1. The submission made by the Counsel for the appellants cannot be accepted and hence, it is rejected. The burden of proof and onus of proof are two different aspects. Although the burden of proof never shifts, but the onus of proof keeps on shifting, subject to the evaluation of evidence. In the present case, the respondent had specifically pleaded that the agreement to sell Ex. P.1, was signed by the appellant no.1, however, the appellant no.1 in his written statement denied his signatures and pleaded that the agreement to sell, Ex. P.1 is a forged document. The plaintiff/respondent, had specifically stated in his evidence, that the agreement to sell Ex.P.1 was executed by the appellant no.1 and it bears his signatures. The appellant no.1 tried to dispute the stamp paper by submitting that there is an overwriting on the year of purchase, but didnot examine the Stamp Vendor, although they had summoned him and the witness was also present in the Court, but he was given up by the appellants themselves. Thus, the onus of proof that the appellant no.1 had signed the agreement to sell, Ex. P.1 was discharged by the respondent/plaintiff, and therefore, the onus of proof had

shifted to the appellants to prove that the said agreement to sell, Ex.P.1 was not signed by the appellant no.1. The appellant no.1 could have filed an application for getting his signatures verified/examined from a handwriting expert, however, that was not done.

(19) The Supreme Court in the case of **A. Raghuvamma Vs. A.Chenchamma,** reported in **AIR 1964 SC 136** has held as under :-

> **''12.**.....There is an essential distinction between burden of proof and onus of proof: burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. The burden of proof in the present case undoubtedly lies upon the plaintiff to establish the factum of adoption and that of partition. The said circumstances do not alter the incidence of the burden of proof. Such considerations, having regard to the circumstances of a particular case, may shift the onus of proof. Such a shifting of onus is a continuous process in the evaluation of evidence.....

The Supreme Court in the case of **R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami & V.P. Temple,** reported in **(2003) 8 SCC 752** has held as under :-

> "***29.*** In a suit for recovery of possession based on title it is for the plaintiff to prove his title and satisfy the court that he, in law, is entitled to dispossess the defendant from his possession over the suit property and for the possession to be restored to him. However, as held in *Addagada Raghavamma* v. *Addagada Chenchamma [AIR 1964 SC 136]* there is an essential distinction between burden of proof and onus of proof: burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. In our opinion, in a suit for possession based on title once

> the plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant it is for the defendant to discharge his onus and in the absence thereof the burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiff's title."

The Supreme Court in the case of **Gian Chand and Bros Vs. Rattan Lal,** reported in **(2013) 2 SCC 606** has held as under :-

> **18.** It is well-settled principle of law that a person who asserts a particular fact is required to affirmatively establish it. In *Anil Rishi* v. *Gurbaksh Singh [(2006) 5 SCC 558]* (SCC p. 561, para 9), it has been held that the burden of proving the facts rests on the party who substantially asserts the affirmative issues and not the party who denies it and the said principle may not be universal in its application and there may be an exception thereto. The purpose of referring to the same is that if the plaintiff asserts that the defendant had acknowledged the signature, it is obligatory on his part to substantiate the same. But the question would be what would be the consequence in a situation where the signatures are proven and there is an evasive reply in the written statement and what should be construed as substantiating the assertion made by the plaintiff.
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> **19.** In *Krishna Mohan Kul* v. *Pratima Maity [(2004) 9 SCC 468]* it has been ruled thus: (SCC p. 474, para 12)
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> "*12.* … When fraud, misrepresentation or undue influence is alleged by a party in a suit, normally, the burden is on him to prove such fraud, undue influence or misrepresentation."
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> **20.** In *Shashi Kumar Banerjee* v. *Subodh Kumar Banerjee [AIR 1964 SC 529]* a Constitution Bench of this Court, while dealing with a mode of proof of a will under the Succession Act, 1925 observed that where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same.
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> **21.** In *A. Raghavamma* v. *A. Chenchamma [AIR 1964 SC 136]*, while making a distinction between burden of proof and onus of proof, a three-Judge Bench opined thus: (AIR p. 143, para 12)
>
> "*12.* … There is an essential distinction between burden of proof and onus of proof:

> burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. The burden of proof in the present case undoubtedly lies upon the plaintiff to establish the factum of adoption and that of partition. The said circumstances do not alter the incidence of the burden of proof. Such considerations, having regard to the circumstances of a particular case, may shift the onus of proof. Such a shifting of onus is a continuous process in the evaluation of evidence."

(20) The appellants are right in submitting that the initial burden to prove that the agreement to sell Ex. P.1, was executed by the appellant no.1, was on the plaintiff/respondent, but in the present case, the respondent has not only examined himself in support of his contentions but has examined Pyarelal (P.W.2) and Dinesh Kumar (P.W.3) who are the attesting witnesses. As already held that the appellants had summoned the Stamp Vendor, but later on, they did not examine him, although he was present in the Court, therefore, an adverse inference can be drawn against the appellant no.1 under Section 114 of the Evidence Act. Thus, this Court is of the considered opinion, that the respondent/plaintiff has discharged his inital burden and has succeeded in establishing beyond reasonable doubt that the appellant no.1 had executed the agreement to sell, Ex.P.1 in favour of the respondent/ plaintiff and the appellants have failed to prove that the agreement to sell, Ex.P.1 is a forged document and does not contain the signatures of the appellant no.1.

(21) It is further submitted that since, the plaintiff/respondent has failed to prove that he was already in possession of the land in dispute, therefore, the plaintiff has failed to prove the execution of

the agreement to sell, Ex.P.1. The Trial Court has specifically given a finding that no possession was handed over to the appellant no.2/defendant no.2 after the execution of the sale deed in his favour. Even otherwise, whether the respondent was already in possession of the disputed property or not would not make any difference, once this Court has already come to a conclusion that the agreement to sell Ex.P.1, was executed by the appellant no.1. It is submitted by the Counsel for the appellants that since, the relief for delivery of possession has not been claimed, therefore, the suit for specific performance of contract was not maintainable. The submission is misconceived because the relief of possession can be treated as implied in the relief for specific performance of contract. After a decree for specific performance of contract is passed, the defendant shall be called upon to execute the sale deed, and in view of Section 55 of Transfer of Property Act, the seller shall be under obligation to hand over the possession of the property in question. Therefore, the submission made by the Counsel for the appellants cannot be accepted that the suit for specific performance of contract will not be maintainable, unless and until the relief of possession is prayed, and hence, it is rejected.

(22) It is next contended by the Counsel for the appellants that since, the plaintiff has not proved his willingness and readiness to peform his part of contract, and secondly, such pleading was incorporated by way of amendment in the plaint, therefore, the Trial Court should not have allowed the application for amendment.

To buttress his contentions, the Counsel for the appellants has relied upon the judgment of the Supreme Court, passed in the case of **J. Samuel and others Vs. Gattu Mahesh and others** reported n **(2012) 2 SCC 300.** The submission made by the Counsel for the appellants cannot be accepted and hence, rejected. It is incorrect to say that the pleadings reagarding readiness and willingess were incorporated by way of amendment. In the original plaint, there was a specific pleading with regard to readiness and willingness to peform the contract. The plaintiff has specifically stated in his evidence, that he was and is still ready to perform his part of contract. The evidence with regard to readiness and willingness was never challenged by the appellants by cross examining Sanjeev (P.W.1). When the evidence of readiness and willingness was never challenged in the cross examination, then it was not necessary for the plaintiff to prove any thing more in this regard. It was not necessary for the plaintiff to file proof that the remaining amount is ready with him. Once, it is claimed that the plaintiff is ready and willing to peform his part of contract, and if it is not challenged by the defendants, then it can be safely held that the plaintiff has proved his readiness and willingness to peform his part of contract.

(23) The Supreme Court in the case of **Ashar Sultana Vs. B. Rajamani,** reported in **(2009) 17 SCC 27** has held as under :-

> **''28.** Section 16(*c*) of the Specific Relief Act, 1963 postulates continuous readiness and willingness on the part of the plaintiff. It is a condition precedent for obtaining a relief of grant of specific performance of contract. The court, keeping in

view the fact that it exercises a discretionary jurisdiction, would be entitled to take into consideration as to whether the suit had been filed within a reasonable time. What would be a reasonable time would, however, depend upon the facts and circumstances of each case. No hard-and-fast law can be laid down therefor. The conduct of the parties in this behalf would also assume significance.

29. In *Veerayee Ammal* v. *Seeni Ammal* it was observed: (SCC p. 140, para 11)

> "*11*. When, concededly, the time was not of the essence of the contract, the appellant-plaintiff was required to approach the court of law within a reasonable time. A Constitution Bench of this Hon'ble Court in *Chand Rani* v. *Kamal Rani*[3] held that in case of sale of immovable property there is no presumption as to time being of the essence of the contract. Even if it is not of the essence of contract, the court may infer that it is to be performed in a reasonable time if the conditions are (*i*) from the express terms of the contract; (*ii*) from the nature of the property; and (*iii*) from the surrounding circumstances, for example, the object of making the contract. For the purposes of granting relief, the reasonable time has to be ascertained from all the facts and circumstances of the case."

It was furthermore observed: (*Veerayee Ammal case*, SCC pp. 140-41, para 13)

> "*13*. The word 'reasonable' has in law prima facie meaning of reasonable in regard to those circumstances of which the person concerned is called upon to act reasonably knows or ought to know as to what was reasonable. It may be unreasonable to give an exact definition of the word 'reasonable'. The reason varies in its conclusion according to idiosyncrasy of the individual and the time and circumstances in which he thinks. The dictionary meaning of 'reasonable time' is to be so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case. In other words it means, as soon as circumstances permit. In *P. Ramanatha Aiyar's Law Lexicon* it is defined to mean:

> ''A reasonable time, looking at all the circumstances of the case; a reasonable time under ordinary circumstances; as soon as circumstances will permit; so much time as is necessary under the circumstances, conveniently to do what the contract requires should be done; some more protracted space than "directly"; such length of time as may fairly, and properly, and reasonably be allowed or required, having regard to the nature of the act or duty and to the attending circumstances; all these convey more or less the same idea."
>
> **30.** It is also a well-settled principle of law that not only the original vendor but also a subsequent purchaser would be entitled to raise a contention that the plaintiff was not ready and willing to perform his part of contract. (See *Ram Awadh* v. *Achhaibar Dubey*, SCC p. 431 para 6.)
>
> **31.** We are, however, in agreement with Mr Lalit that for the aforementioned purpose it was not necessary that the entire amount of consideration should be kept ready and the plaintiff must file proof in respect thereof. It may also be correct to contend that only because the plaintiff who is a Muslim lady, did not examine herself and got examined on her behalf, her husband, the same by itself would not lead to a conclusion that she was not ready and willing to perform her part of contract.''

(24) It is submitted by the Counsel for the appellants, that the respondent had never issued any notice to the appellant expressing his willingness to execute the sale deed, therefore, it cannot be said that the plaintiff was ready and willing to peform his part of contract. The submission made by the Counsel for the appellants cannot be accepted. In the present case, according to the plaintiff, the sale deed was to be executed by 30-6-2000, whereas the appellant no.1 sold the disputed property to the defendant no.2/appellant no.2, by a registered sale deed dated 25-2-2000 i.e., before the time, fixed in the agreement to sell.

Thus, it is clear that where the plaintiff had bona fide belief, that still the last date for execution of the sale deed has not come, therefore, there was no occasion for him to issue any notice to the appellant no.1, calling upon him to execute the sale deed. In the present case, in fact the plaintiff was cheated by the appellant no.1 by executing a registered sale deed in favour of the appellant no.2/defendant no.2 even prior to the expiry of the deadline for execution of the sale deed as fixed in the agreement to sell. Therefore, there was no occasion for the plaintiff to ever any notice to the appellant no.1, calling upon him to execute the sale deed.

(25) It is further submitted that the Trial Court, committed a material illegality by resorting to Section 73 of Evidence Act by comparing the signatures of the appellant no.1/defendant no.1 on the agreement to sell Ex.P.1. This Court has already held that the respondent/plaintiff, had already discharged his burden to prove that the agreement to sell Ex.P.1, was signed by the defenant no.1/appellant no.1, and now the onus was on the appellants/defendants to prove that the agreement to sell Ex. P.1, did not contain the signatures of the appellant no.1/defendant no.1. As the appellants have failed to discharge their onus to prove, therefore, the submission made by the Counsel for the appellants cannot be accepted and is hereby rejected.

(26) Considering the totality of the facts and circumstances of the case, this Court is of the considered opinion that the Trial Court did not commit in holding that the plaintiff/respondent has succeeded

in proving his case.

(27) Accordingly, the judgment and decree dated 28/11/2002, passed by Additional District Judge, Dabra, District Gwalior in Civil Suit No.1/2000 is hereby affirmed.

(28) The appeal fails and is hereby **dismissed.**

A decree may be drawn accordingly.

(G.S. Ahluwalia)
Judge

MKB