HIGH COURT OF MADHYA PRADESH

BENCH GWALIOR

SINGLE BENCH:

HON'BLE SHRI JUSTICE G.S. AHLUWALIA

First Appeal No.87/2002

.....Appellant: **Smt. Ramwati**

Versus

.....Respondents : **Premnarayan & Anr.**

Shri D.D. Bansal, Counsel for the appellants.

Shri V.K. Bhardwaj, Senior Adocate with Shri M.L. Sharma, Counsel for the respondents.

Date of hearing : 29/08/2019

Date of Judgment : 29/08/2019

Whether approved for reporting: Yes

Law Laid down :

Significant paragraph numbers:

J U D G M E N T

(29/08/2019)

This First Appeal under Section 96 of CPC has been filed against the judgment and decree dated 26.3.2002 passed by 8th Additional District Judge, Gwalior in Civil Suit No.61-A/1995 by which a decree of specific performance of contract has been passed in favour of the

respondents.

2. In view of the controversy involved in the present case, it is not necessary to consider the facts of the case in detail. Suffice it to say that the respondents had filed a suit for specific performance of contract pleading *inter alia* that the defendant/appellant had executed an agreement to sell in favour of the respondents/plaintiffs in respect of a house for a consideration amount of Rs.2,25,000/-. At the time of agreement, an amount of Rs.1,00,000/- was given by way of advance and it was decided that the sale deed would be executed after the payment of the remaining amount. The respondents/plaintiffs were ready and willing to perform their part of contract, but the appellant/defendant has failed to do so and, accordingly, the suit was filed.

3. From the proceedings of the Trial Court, it appears that on 19.9.1996, the following order was passed:-

> ''19.9.96
>
> वादी द्वारा श्री एम0एल0 शर्मा एड.।
>
> प्रतिवादी द्वारा श्री बी.बी.शुक्ला एड.।
>
> प्रतिवादी की ओर से अस्थाई निषेधाज्ञा के आवेदनका जबाब एवं जबाबदावा पेश किया गया।
>
> अस्थाई निषेधाज्ञा के आवेदन पर दोनो पक्ष अभि. को सुना गया।
>
> वादी के केस के मुताबिक विवादित मकान उसने प्रतिवादी से क्रय करने का अनुबन्ध किया है और कब्जा प्राप्त किया है, किन्तु प्रतिवादी अनुबन्ध के पालन में इस भवन को विक्रय नही कर रहा है और वह इस भवन कों अन्यत्र विक्रय करना चाहता है, अतः अनुबन्ध के विशिष्ट पालन व निषेधाज्ञा बावत यह दावा पेश किया गया है।
>
> प्रतिवादी द्वारा विक्रय अनुबन्ध पत्र संपादित किया जाना स्वीकार किया गया है किन्तु उसका कहना है कि विवादित भवन के किसी भी कमरे पर वादी का कब्जा नही है और वह इस भवन को किसी अन्य को विक्रय करने नही जा रहा है, यदि वादी चाहे तो अनुबन्ध के मुताबिक

उस भवन को वह आज ही विक्रय करने को तैयार है, इस स्टेज पर वादी अभि. ने भी व्यक्त किया कि वे भी अनुबन्ध के मुताबिक भवन क्रय करने को तैयार है।

वादी की ओर से जो प्रतिवादी के आवेदन आदेश 26 नियम 9 जा.दी. का दिनांक 22.4.96 को जबाब पेश किया गया है, उसके अवलोकन से स्पष्ट होता है कि विवादित भवन के किसी भी कमरे पर वादी का वर्तमान में कोई आधिपत्य नही है और चूँकि स्वयं प्रतिवादी के मुताबिक कि वह किसी अन्य को विक्रय करने नही जा रहा है, ऐसी स्थिति में निषेधाज्ञा के आवेदन के सम्बन्ध में आदेश दिया जाता है कि अन्य आदेश तक प्रतिवादी विवादित भवन को किसी अन्य व्यक्ति को किसी भी प्रकार से अन्तरित न करे।

प्रकरण वादप्रश्न निर्धारित किए जाने हेतु नियत किया जाता है। प्रकरण दिनांक 24.9.96 को पेश हो।

(के.सी. गर्ग)
अष्टम अति. जिला जज
ग्वालियर।

4. Thereafter, on 11.2.1997, 11.4.1997, 21.4.1997, 5.7.1997, 13.11.1997 and 16.10.1998 following orders were passed:

''11.2.1997

उभयपक्ष पूर्ववत।

वादी अभि0 द्वारा व्यक्त किया गया कि आदेश दिनांक 19.9.96 के पालन मे वह अनुबंध अनुसार संपत्ति के विक्रय मूल्य को जमा करने को तैयार है और तदनुसार प्रतिवादी यह वादी क्र. एक में विक्रय–पत्र संपादित कर दे।

दोनो पक्षों को सुनने के उपरांत आदेश दिया जाता है कि 2 माह के अंदर वादी अनुबंध अनुसार समस्त रकम न्यायालय में जमा करे और तत्पश्चात प्रतिवादी यह विवादित संपत्ति का विक्रय पत्र वादी के हक मे संपादित करे। यह कार्यवाही नियत दिनांक के पूर्व संपादित कर ली जावे।

प्रकरण वास्ते अग्रिम आदेश हेतु दिनांक 11.4.97 को पेश हो।

ह0 अपठित
(के0सी0 गर्ग)

11.4.97

उभयपक्ष उपस्थित

वादी ने आदेश 11.2.97 के आदेश का पालन नही किया है। आगामी तारीख पर आदेश का पालन करें।

आदेश के पालन हेतु दिनांक 21.4.97।

जिला न्यायाधीश ग्वालियर के
षष्टम अतिरिक्त जिला न्यायाधीश ग्वालियर

21.4.97

पक्षकार पूर्ववत उपस्थित।

आदेश दिनांक 11.2.97 के आदेश का पालन कराया जाये।

अगली तारीख पर आवश्यक ..... आदेश का पालन करें। ..... दि0 5.7.97।

जिला न्यायाधीश ग्वालियर के
षष्टम अतिरिक्त जिला न्यायाधीश ग्वालियर

5.7.97

वादी द्वारा श्री एम0एल0शर्मा एड0।

प्रतिवादी द्वारा श्री शिवनाथ तोमर एड0।

प्रकरण आज पूर्व आदेश दिनांक 11.2.97 के आदेश के पालन हेतु नियत है। किन्तु प्रतिवादी ने व्यक्त किया कि वादी ने उक्त आदेश का पालन आज तक नही किया है।

वादी ने व्यक्त किया कि उसकी लड़की कु0 संतोष की शादी होने के कारण अत्यंत व्यस्त रहने के कारण वो आदेश का पालन नही कर सका है। उक्त आदेश के पालन हेतु वादी ने समय चाहा जो न्यायहित में दिया गया।

प्रकरण वास्ते विचार हेतु नियत 5.8.97 को पेश हो।

8 ए डी जे

13.11.97

वादी द्वारा श्री एम0एल0 शर्मा एडवोकेट।

प्रतिवादी द्वारा श्री बी0बी0 शुक्ला अधिवक्ता।

उभय पक्ष द्वारा आदेश पत्रिका दिनांक 11.1297 के अनुसार आदेश का पालन नही किया गया। उक्त आदेश का पालन पूर्ण करने हेतु अंतिम अवसर दियाजाता है।

प्रकरण दिनांक 23.12.97 को अग्रिम कार्यवाही हेतु पेश हो।

(राजीव शर्मा)
8 ए डी जे

16.10.98

वादी द्वारा श्री शर्मा एड0

प्रति0 द्वारा श्री शुक्ला एड0

वादी ने कार्यवाही नही की है काफी समय दिया जा चुका है।

प्रकरण वाद प्रश्न हेतु दिनांक 25.11.98 को पेश हो।

8 ए डी जे

5. From the plain reading of the above mentioned order sheets, it is clear that the defendant/appellant had admitted that an agreement to sell was executed and the defendant/appellant is ready to execute the sale deed in favour of the plaintiffs and the plaintiffs had also agreed that they are ready and willing to execute the sale deed after making payment of the consideration amount. It is clear from the order sheet dated 19.9.1996 no dispute was raised by the appellant/defendant with regard to the averment that an amount of Rs.1,00,000/- was paid at the time of agreement to sell. Thus it is clear that on 19.9.1996 the defendant/appellant had admitted the claim of the plaintiffs/respondents and similarly the plaintiffs/respondents had also agreed to perform their part of contract but later on it appears that the plaintiffs/respondents failed to perform their part of contract and the sale deed could not be executed and ultimately by order dated 16.10.1998, the Trial Court proceeded further with the suit and issues were framed. Although in view of the statement made by the parties on 19.9.1996, the Trial Court could have directed the parties to file an application for drawing a compromise decree but it appears that the Trial Court in its wisdom had

decided not to pass a compromise decree and granted at least two years time to the plaintiffs/respondents to perform their part of contract, however, the plaintiffs could not perform their part of contract. Under these circumstances, this Court is of the considered opinion that in view of the admission made by the defendant/appellant on 19.9.1996 it is held that an agreement to sell was executed by the defendant/appellant in favour of the respondents/plaintiffs. It was agreed by the appellant/defendant to sell the house for a consideration amount of Rs.2,25,000/- and an amount of Rs.1,00,000/- was given by the respondents/plaintiffs by way of advance money. However, it is also clear that in spite of grant of opportunity of two years, the plaintiffs/respondents also could not perform their part of contract and failed to deposit the remaining agreed amount and thus the sale deed could not be executed. Under these circumstances, not only the execution of agreement to sell has been admitted by the defendant/appellant but at the same time, the plaintiffs had also failed to get the sale deed executed which is indicative of the fact that the plaintiffs were not ready and willing to perform their part of contract.

6. The Supreme Court in the case of **Jawahar Lal Wadhwa & Anr. vs. Haripada Chakroberty** reported in **(1989) 1 SCC 76** has held as under:-

> **"4.** …….....The decision, however, nowhere lays down that where one party to a contract repudiates the contract, the other party to the contract who claims specific performance of the contract is absolved from his obligation to show that he was

> ready and willing to perform the contract. Mr Bhandare's argument really is to the effect that the respondent wrongly repudiated the contract by his said letter dated 16-1-1976, before all the mutual obligations under the contract had been carried out, that is to say, he committed an anticipatory breach of the contract and in view of this, Appellant 1 was absolved from carrying out his remaining obligations under the contract and could claim specific performance of the same even though he failed to carry out his remaining obligations under the contract and might have failed to show his readiness and willingness to perform the contract. In our view, this argument cannot be accepted. It is settled in law that where a party to a contract commits an anticipatory breach of the contract, the other party to the contract may treat the breach as putting an end to the contract and sue for damages, but in that event he cannot ask for specific performance. The other option open to the other party, namely, the aggrieved party, is that he may choose to keep the contract alive till the time for performance and claim specific performance but, in that event, he cannot claim specific performance of the contract unless he shows his readiness and willingness to perform the contract. The decision of this Court in *International Contractors Ltd.* v. *Prasanta Kumar Sur*, properly analysed, only lays down that in certain circumstances it is not necessary for the party complaining of an anticipatory breach of contract by the other party to offer to perform his remaining obligations under the contract in order to show his readiness and willingness to perform the contract and claim specified performance of the said contract. Mr Bhandare also referred to the decision of the Andhra Pradesh High Court in *Makineni Nagayya* v. *Makineni Bapamma*. We do not consider it necessary to refer to this decision as it does not carry the case of the appellants any further. The ratio of the said decision in no way runs counter to the said position in law set out above.

The Supreme Court in the case of **Kamal Kumar vs. Premlata Joshi & Ors.** reported in **(2019) 3 SCC 704** has held as under:-

> 7. It is a settled principle of law that the grant of relief of specific performance is a discretionary and equitable relief. The material questions, which are required to be gone into for grant of the relief of specific performance, are:
> 7.1 First, whether there exists a valid and concluded contract between the parties for sale/purchase of the suit property.
> 7.2 Second, whether the plaintiff has been ready and willing to perform his part of contract and whether he is still ready and willing to perform his part as mentioned in the contract.
> 7.3 Third, whether the plaintiff has, in fact, performed his part of the contract and, if so, how and to what extent and in what manner he has performed and whether such performance was in conformity with the terms of the contract.
> 7.4 Fourth, whether it will be equitable to grant the relief of specific performance to the plaintiff against the defendant in relation to suit property or it will cause any kind of hardship to the defendant and, if so, how and in what manner and the extent if such relief is eventually granted to the plaintiff;
> 7.5 Lastly, whether the plaintiff is entitled for grant of any other alternative relief, namely, refund of earnest money, etc. and, if so, on what grounds.

7. The Supreme Court in the case of **Bal Krishna & Anr. vs. Bhagwan Das (dead) by Lrs. & Ors.** reported in **(2008) 12 SCC 145** has held as under:-

> **13.** Section 16 of the Specific Relief Act, 1963 (hereinafter referred to as "the Act") corresponds with Section 24 of the old Act of 1877 which lays down that the person seeking specific performance of the contract, must file a suit wherein he must allege and prove that he has performed or has been ready and willing to perform the essential terms of the contract, which are to be performed by him. The specific performance of the contract cannot be enforced in favour of the person who fails to aver and prove his readiness and willingness to perform essential terms of the contract. Explanation (*ii*) to clause (*c*) of Section 16 further makes it clear that

> the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction. The compliance with the requirement of Section 16(*c*) is mandatory and in the absence of proof of the same that the plaintiff has been ready and willing to perform his part of the contract suit cannot succeed. The first requirement is that he must aver in plaint and thereafter prove those averments made in the plaint. The plaintiff's readiness and willingness must be in accordance with the terms of the agreement. The readiness and willingness of the plaintiff to perform the essential part of the contract would be required to be demonstrated by him from the institution of the suit till it is culminated into decree of the court.
>
> **14.** It is also settled by various decisions of this Court that by virtue of Section 20 of the Act, the relief for specific performance lies in the discretion of the court and the court is not bound to grant such relief merely because it is lawful to do so. The exercise of the discretion to order specific performance would require the court to satisfy itself that the circumstances are such that it is equitable to grant decree for specific performance of the contract. While exercising the discretion, the court would take into consideration the circumstances of the case, the conduct of parties, and their respective interests under the contract. No specific performance of a contract, though it is not vitiated by fraud or misrepresentation, can be granted if it would give an unfair advantage to the plaintiff and where the performance of the contract would involve some hardship on the defendant, which he did not foresee. In other words, the court's discretion to grant specific performance is not exercised if the contract is not equal and fair, although the contract is not void.

8. Thus it is clear that the plaintiff has failed to prove his readiness and willingness, therefore he is not entitled for discretionary decree of specific performance of contract. However, in the present case, in view of the admission made by the defendant before the Trial Court on

19.9.1996 it is clear that an amount of Rs.1,00,000/- was paid by the plaintiffs/respondents.

9. Now the next question for consideration is that whether the respondents are entitled for refund of Rs.1,00,000/- paid by them or not?

10. It is submitted by the counsel for the appellant that as per the plaint averments an amount of Rs.1,00,000/- was given by the plaintiffs jointly to the defendant, however, later on the plaintiff No.1 took a somersault.

11. Premnarayan (PW-1) has stated that an amount of Rs.1,00,000/- was given by him. It is submitted that after the evidence of the parties was over, the plaintiffs filed an application under Order 1 Rule 10 of CPC and by order dated 5.3.2002 it was held by the Trial Court that the said application shall be decided at the time of final hearing.

12. It is submitted that by the impugned judgment and decree, the Trial Court has allowed the application filed under Order 1 Rule 10 of CPC and has held that since the plaintiff No.2 has given up his claim, therefore, the defendant shall execute the sale deed in favour of plaintiff No.1 only. It is submitted by the counsel for the appellant that an application under Order 1 Rule 10 of CPC was not filed by the appellant because the said application was neither signed by the plaintiff No.2 nor the said application was supported by an affidavit of the plaintiff No.2. It is further submitted that the Trial Court has wrongly held that the submissions made by the counsel for the plaintiffs is sufficient to hold that the plaintiff No.2 has entered into a compromise with the plaintiff

No.1 and, therefore, now the plaintiff No.2 has no connection with the present suit.

13. The counsel for the respondents submitted that an application under Order 1 Rule 10 of CPC was filed by the plaintiffs and once the plaintiff No.2 had given up his claim in favour of the plaintiff No.1, then it cannot be said that the judgment and decree passed by the Trial Court in favour of the plaintiff No.1 is bad.

14. Heard the learned counsel for the parties.

15. The relevant observation made by the Trial Court with regard to the application filed by the plaintiffs under Order 1 Rule 10 reads as under:-

> 16.....इस प्रकरण में वादी प्रेमनारायण की तरफ से एक अनुबन्धपत्र इस बावत प्रस्तुत किया गया है कि उसका वादी क्रमांक 2 भगवतीशरण से इस बावत अनुबन्ध हुआ है कि अनुबन्ध के तहत प्रतिवादी को अग्रिम धनराशि एक लाख रूपये वादी क्रमांक 1 प्रेमनारायण द्वारा दी गयी और वादी भगवतीशरण ने कोई पैसा नहीं दिया था और वह मात्र दिखावटी अनुबन्धकर्ता है। इसलिये अनुबन्ध के तहत उसके पालन करने के लिये संपूर्ण जिम्मेदारी वादी क्रमांक 1 प्रेमनारायण की होगी और इसी आधार पर एक आवेदन इस बावत पेश किया गया था कि वादी भगवती शरण का नाम वादपत्र से कम कर दिया जाये। यद्धपि इस संबंध में दिये गये आवेदन का विरोध प्रतिवादी द्वारा इस आधार पर किया गया है कि वादी भगवतीशरण की सहमति के बिना उसका नाम वादपत्र से कम नहीं किया जा सकता। ***लेकिन जब दोनों वादीगण की तरफ से एक ही अभिभाषक द्वारा पैरवी की जा रही है और उनके अभिभाषक ने अनुबन्धपत्र की इस बावत पुष्टि की है कि वादीगण के मध्य जो अनुबन्ध हुआ है, उसके अनुसार वादी भगवतीशरण का अब प्रकरण से कोई संबंध नहीं रह गया है।*** ऐसी स्थिति में यह पाया जाता है कि वादी भगवतीशरण की तरफ से इस बावत सहमति दी गयी है कि अनुबन्ध प्र0पी0–1 के तहत अग्रिम धनराशि वादी प्रेमनारायण द्वारा ही दी गयी थी और वही उस

अनुबन्ध का पालन कराने का अधिकारी है। अतः यह निर्णीत किया जाता है कि वादी क्रमांक 1 प्रेमनारायण अनुबन्ध प्र0पी0–1 के तहत शेष बकाया धनराशि प्रतिवादी को अदा करके वादग्रस्त मकान का विक्रयपत्र पंजीयत कराकर भवन का रिक्त आधिपत्य प्राप्त करने का अधिकारी है।

16. Application under Order 1 Rule 10 of CPC filed by the plaintiffs reads as under:-

न्यायालय जिला जज के अष्ठम अपर जिला जज, ग्वालियर
प्रकरण क्रमांक 61–ए/95 ई0दी0

प्रेमनारायण–––––वादी
बनाम
रामवती–––प्रतिवादी

प्रार्थना पत्र अन्तर्गत आदेश। नियम 10 सहपठित धारा 151 सी0पी0सी0

श्रीमान् जी,

वादी प्रेमनारायाण की ओर से आवेदन पत्र निम्न प्रकार प्रस्तुत हैः–

1– यह कि, वादी प्रेमनारायण व भगवती द्वारा मिलकर प्रतिवादिनी के विरूद्ध वाद वास्ते संविदा के विशिष्ट पालन हेतु दावा पेश किया गया है।

2– यह कि, वादी प्रेमनारायण द्वारा अनुबन्ध तारीखी 2–10–92 के माध्यम से, प्रतिवादिनी को ऐकमेव रूप से 1,00,000/– रूपये की अदायगी अनुबन्ध के वक्त समक्ष गवाहान की गई थी जिसमें भगवती द्वारा कोई पैसा रामवती को नही दिया गया, ऐसा वादी प्रेमनारायण द्वारा अपने कथन में भी कहा गया है। मात्र भगवती का नाम वादी प्रेमनारायण द्वारा दूरस्थ रिश्तेदार होने के कारण से डलवा दिया गया था वादीगण की ओर से एक ही अभिभाषक है, वादी प्रेमनारायण एवं भगवती के मध्य उक्त आशय की लिखापढ़ी 28–3–2001 को समक्ष गवाहान हुई है जिसमे भगवती द्वारा स्वीकार किया गया कि रामवतीबाई को प्रेमनारायण द्वारा ही 1,00,000/– रूपये दिया गया था भगवती प्रसाद वादी क0–2 द्वारा कोई पैसा नहीं दिया गया ऐसी सूरत में भगवती का नाम वाद के शीर्षक में उपरोक्त कारणों से कम किया जाना या काटे जाने का आदेश दिया जाना न्याय संगत होगा। और भगवती प्रकरण में शुरू से ही इन्ट्रेस्टेड नहीं रहा हूॅ। इस कारण से ही भगवती प्रकरण में कतई उचित व आवश्यक पक्षकार नहीं रहा है। ऐसी सूरत में भी भगवती का नाम दावे में से कम किये जाने का आदेश दिया जाना न्याय संगत होगा।

अतः प्रार्थना पत्र प्रस्तुत कर निवेदन है कि, प्रार्थना पत्र स्वीकार किया जाकर वादी क्रमांक 2 भगवती का नाम दावे में से कम किये जाने का आदेश दिया जावे। तदहेतु वादी प्रेमनारायण निवेदन करता है।

इति दिनांक 5–3–2002

प्रार्थी
प्रेमनारायण–––––– वादी
द्वारा अभिभाषक
(एम0एल0 शर्मा)

17. This application was also supported by an agreement purportedly executed by the plaintiff No.2 in favour of plaintiff No.1. It appears that neither the application filed under Order 1 Rule 10 of CPC was supported by an affidavit of any of the plaintiff specifically the plaintiff No.2 nor any evidence was recorded by the Trial Court to find out that any such agreement was executed by the plaintiff No.2 in favour of the plaintiff No.1 or not. The only reason given by the Trial Court for accepting the application under Order 1 Rule 10 of CPC was that since both the plaintiffs are being represented by a common lawyer and as the counsel for the plaintiffs has submitted that an agreement has been executed by the plaintiff No.2 in favour of the plaintiff No.1, therefore, it is proved that now the plaintiff No.2 has no concern with the present suit, although no direction was given to delete the plaintiff No.2.

18. The only question which requires consideration is that whether the Trial Court was right in holding that since the counsel has approved that an agreement has been executed between the plaintiff No.1 and plaintiff No.2, therefore, it is proved that the plaintiff No.2 has given up his rights in favour of the plaintiff No.1.

19. Considered the findings/observations made by the Trial Court.

20. The advocates appearing on behalf of the litigants have to act on the instructions of litigants and if they want to become a witness on

behalf of any litigating party in the civil suit or any other proceedings, then they are not entitled to appear as a counsel and they have to withdraw their Vakalatnama. A counsel cannot be treated as a witness on behalf of his client. The Trial Court by holding that since the counsel for the plaintiffs has stated that the plaintiffs have entered into an agreement, therefore, it is proved that the plaintiff No.2 has given up his case in favour of the plaintiff No.1 is contrary to law. The application under Order 1 Rule 10 of CPC was not signed by any of the plaintiffs nor any affidavit was filed along with the said application. The application was signed by the counsel for the plaintiffs only. If the Trial Court was of the view that the statement/submission made by the counsel for the plaintiffs is to be accepted as a statement by a witness, then first of all, it should have directed the counsel for the plaintiffs to withdraw his Vakalatnama and thereafter to get his evidence recorded as a witness by giving an opportunity of cross-examination to the defendant/appellant. The Advocate is an agent of the party. His acts and statements should always be within the limits of the authority given to him and the same can be treated as acts and statements of the principal i.e. the party who has engaged. If an Advocate insist that whatever statement he is making on behalf of his client should be accepted as a gospel truth, then it amounts to commercialization of legal profession and same has to be deprecated.

21. The Supreme Court in the case of **Himalayan Coop. Group Housing Society vs. Balwan Singh & Ors.** reported in **(2015) 7 SCC**

373 has held as under:-

> **22.** Apart from the above, in our view lawyers are perceived to be their client's agents. The law of agency may not strictly apply to the client-lawyer's relationship as lawyers or agents, lawyers have certain authority and certain duties. Because lawyers are also fiduciaries, their duties will sometimes be more demanding than those imposed on other agents. The authority-agency status affords the lawyers to act for the client on the subject-matter of the retainer. One of the most basic principles of the lawyer-client relationship is that lawyers owe fiduciary duties to their clients. As part of those duties, lawyers assume all the traditional duties that agents owe to their principals and, thus, have to respect the client's autonomy to make decisions at a minimum, as to the objectives of the representation. Thus, according to generally accepted notions of professional responsibility, lawyers should follow the client's instructions rather than substitute their judgment for that of the client. The law is now well settled that a lawyer must be specifically authorised to settle and compromise a claim, that merely on the basis of his employment he has no implied or ostensible authority to bind his client to a compromise/settlement. To put it alternatively that a lawyer by virtue of retention, has the authority to choose the means for achieving the client's legal goal, while the client has the right to decide on what the goal will be. If the decision in question falls within those that clearly belong to the client, the lawyer's conduct in failing to consult the client or in making the decision for the client, is more likely to constitute ineffective assistance of counsel.
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> **24.** The Preamble makes it imperative that an advocate has to conduct himself and his duties in an extremely responsible manner. They must bear in mind that what may be appropriate and lawful for a person who is not a member of the Bar, or for a member of the Bar in his non-professional capacity, may be improper for an advocate in his professional capacity.

25. Section II of the said Chapter II provides for duties of an advocate towards his client. Rules 15 and 19 of the BCI Rules, have relevance to the subject-matter and therefore, they are extracted below:

> "**15.** It shall be the duty of an advocate fearlessly to uphold the interests of his client by all fair and honourable means without regard to any unpleasant consequences to himself or any other. He shall defend a person accused of a crime regardless of his personal opinion as to the guilt of the accused, bearing in mind that his loyalty is to the law which requires that no man should be convicted without adequate evidence.
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> **19.** An advocate shall not act on the instructions of any person other than his client or his authorised agent."

26. While Rule 15 mandates that the advocate must uphold the interest of his clients by fair and honourable means without regard to any unpleasant consequences to himself or any other. Rule 19 prescribes that an advocate shall only act on the instructions of his client or his authorised agent. Further, the BCI Rules in Chapter I of the said Section II provide that the Senior Advocates in the matter of their practice of the profession of law mentioned in Section 30 of the 1961 Act would be subject to certain restrictions. One of such restrictions contained in clause (*cc*) reads as under:

> "(*cc*) A Senior Advocate shall, however, be free to make concessions or give undertaking in the course of arguments on behalf of his clients on instructions from the junior advocate."

27. Further, the "*Code of Ethics*" prescribed by the Bar Council of India, in recognition of the evolution in professional and ethical standards within the legal community, provides for certain rules which contain canons of conduct and etiquette which ought to serve as general guide to the practice and profession. Chapter III of the said Code provides for an "Advocate's duty to the

client". Rule 26 thereunder mandates that an "*advocate shall not make any compromise or concession without the proper and specific instructions of his/her client*". It is pertinent to notice that an advocate under the Code expressly includes a group of advocates and a law firm whose partner or associate acts for the client.

28. Therefore, the BCI Rules make it necessary that despite the specific legal stream of practice, seniority at the Bar or designation of an advocate as a Senior Advocate, the ethical duty and the professional standards insofar as making concessions before the Court remain the same. It is expected of the lawyers to obtain necessary instructions from the clients or the authorised agent before making any concession/statement before the court for and on behalf of the client.

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30. The Privy Council in *Sourendra Nath Mitra* v. *Tarubala Dasi*, has made the following two observations which hold relevance to the present discussion: (IA pp. 140-41)

> "Two observations may be added. First, the implied authority of counsel is not an appendage of office, a dignity added by the courts to the status of barrister or advocate at law. It is implied in the interests of the client, to give the fullest beneficial effect to his employment of the advocate. Secondly, the implied authority can always be countermanded by the express directions of the client. No advocate has actual authority to settle a case against the express instructions of his client. If he considers such express instructions contrary to the interests of his client, his remedy is to return his brief."

(See: *Jamilabai Abdul Kadar* v. *Shankarlal Gulabchand* and *Svenska Handelsbanken* v. *Indian Charge Chrome Ltd.*)

31. Therefore, it is the solemn duty of an advocate not to transgress the authority conferred on him by the client. It is always better to seek appropriate instructions from the client or his authorised agent before making any concession which may, directly or remotely, affect the rightful

> legal right of the client. The advocate represents the client before the court and conducts proceedings on behalf of the client. He is the only link between the court and the client. Therefore his responsibility is onerous. He is expected to follow the instructions of his client rather than substitute his judgment.
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> **32.** Generally, admissions of fact made by a counsel are binding upon their principals as long as they are unequivocal; where, however, doubt exists as to a purported admission, the court should be wary to accept such admissions until and unless the counsel or the advocate is authorised by his principal to make such admissions. Furthermore, a client is not bound by a statement or admission which he or his lawyer was not authorised to make. A lawyer generally has no implied or apparent authority to make an admission or statement which would directly surrender or conclude the substantial legal rights of the client unless such an admission or statement is clearly a proper step in accomplishing the purpose for which the lawyer was employed. We hasten to add neither the client nor the court is bound by the lawyer's statements or admissions as to matters of law or legal conclusions. Thus, according to generally accepted notions of professional responsibility, lawyers should follow the client's instructions rather than substitute their judgment for that of the client. We may add that in some cases, lawyers can make decisions without consulting the client. While in others, the decision is reserved for the client. It is often said that the lawyer can make decisions as to tactics without consulting the client, while the client has a right to make decisions that can affect his rights.

22. In the present case, the agreement executed in favour of the plaintiff No.1 by the plaintiff No.2 thereby giving up his rights, was a private document of which no judicial notice can be taken by any Court. The document was required to be proved in accordance with law. It was not the case of the counsel appearing for the plaintiffs that he was the

attesting witness of the said agreement. Even otherwise, before making such a statement, the counsel for the plaintiffs should have withdrawn his Vakalatnama before appearing as the witness of his client. The counsel should not try to pressurize the Court by saying that since the submission is made by him, therefore, it is correct and should be accepted. Whenever a counsel wants to appear as a witness for his client, then he must withdraw his Vakalatnama and must appear as a witness and not as an Advocate registered under the Advocates Act. Under these circumstances, it was not correct on the part of the counsel for the plaintiffs to insist that since he is appearing for both the plaintiffs and, therefore, it should be presumed that the agreement purportedly executed by the plaintiff No.2 in favour of the plaintiff No.1 should be treated as duly proved under the law. Such an act of the Advocate is nothing but traveling beyond the authority given by Vakalatnama under Advocates Act and Bar Council of India Rules. The counsel for the plaintiffs had not filed any authority letter in his favour to make a statement as a witness on behalf of the plaintiffs. The statement made by the counsel for the plaintiffs cannot be treated as an undertaking on their behalf. Thus this Court is of the considered opinion that the Trial Court has wrongly held that since the counsel for the plaintiffs had stated that an agreement has been executed by the plaintiff No.2 in favour of the plaintiff No.1, therefore, it has to be held that the plaintiff No.2 has given up his rights in favour of the plaintiff No.1. Under these circumstances, the Trial Court should have rejected the application filed

by the plaintiffs under Order 1 Rule 10 of CPC and, accordingly, it is rejected.

23. It is next contended by the counsel for the appellant that since the plaintiff Premnarayan (PW-1) has stated that he had paid the entire advance amount, therefore, it is clear that it was a Benami Transaction, therefore, no relief can be given.

24. Considered the submissions.

25. The agreement to sell, Ex.P/1, was executed between plaintiffs and defendant. Since Premnarayan (PW-1) is also one of the party to the agreement, therefore, it cannot be held that the agreement, Ex.P/1 was a benami transaction in toto. At the most, the agreement Ex.P/1 can be said to have been executed jointly by two persons and thereafter one of them had decided to leave his claim in favour of another person. Therefore, the submission made by counsel for appellant is rejected.

26. Since the defendant had admitted the execution of the agreement to sell and, therefore, it is held that since the plaintiffs by their conduct have failed to prove their readiness and willingness to perform their part of contract, therefore, the discretionary decree of specific performance of contract in favour of the plaintiffs is denied. However, since the payment of Rs.1,00,000/- by the plaintiffs to the defendant is not disputed as per the admission mentioned in order dated 19.9.1996, therefore, it is held that in stead of decree for specific performance of contract, the plaintiffs are entitled for refund of the advance amount paid by them.

27. The counsel for the respondents/plaintiffs has relied upon the

judgment passed by the Supreme Court in the case of **Urvashi Aggarwal (since deceased) through Lrs. & Anr. vs. Kushagr Ansal (successor in interest of erstwhile Defendant No.1 Mrs. Suraj Kumari) & Ors.** reported in **AIR 2019 SC 1280** in which it has been held as under:

> 14. The High Court directed a refund of Rs.70,000/- which was paid by the Plaintiffs to the Defendants in 1975 with interest at the rate of 24% p.a.. In view of the peculiar facts of this case in which the Plaintiffs have paid Rs.70,000/- way back in 1975 and the steep increase in the price of the property over time, we are of the considered opinion that the Plaintiffs are entitled to a higher amount than what was granted by the High Court. Instead of the refund of Rs.70,000/- with interest at the rate of 24% p.a., we direct the Defendants to pay Rs.2,00,00,000/- (Rupees Two Crores) to the Plaintiffs within a period of eight weeks from today.

28. Thus while directing for refund of the advance amount paid by the plaintiffs, this Court can consider the hike in price of the property. According to the plaint, the agreement to sell was executed on 2.10.1992. Thus 27 long years have passed. Since the plaintiffs have failed to perform their part of contract in the light of order dated 19.9.1996, therefore, the entire period of 27 long years cannot be taken into consideration and this Court has to exclude the period starting from 19.9.1996 to 26.3.2002, i.e., the date on which the decree for specific performance was passed. The defendant has filed this appeal along with an application M (C) P. No.990/2002 which was an application for stay and, accordingly, by order dated 15.5.2002, this Court had directed the parties to maintain the status quo as existed on the said date. Thus it is

clear that it is the appellant, who had obtained stay order from this Court.

29. The Supreme Court in the case of **Style (Dress Land) vs. Union Territory, Chandigarh & Anr.** reported in **(1999) 7 SCC 89** has held as under:-

> **15.** Regarding awarding of the interest by the High Court for the period of stay it is argued that as in *Sahib Singh case* no such direction was issued, the appellants could not be burdened with the liability of paying the interest and that at the rate of 18% per annum it was excessive and exorbitant. It is a settled principle of law that as and when a party applies and obtains a stay from the court of law, it is always at the risk and responsibility of the party applying. Mere passing of an order of stay cannot be presumed to be the conferment of any additional right upon the litigating party. This Court in *Shree Chamundi Mopeds Ltd.* v. *Church of South India Trust Assn.* held that the said portion of order by the Court means only that such order would not be operative from the date of its passing. The order would not mean that the order stayed had been wiped out from existence. The order of stay granted pending disposal of a case comes to an end with the dismissal of a substantive proceeding and it is the duty of the court in such cases to put the parties in the same position they would have been but for the interim orders of the court. Again in *Kanoria Chemicals and Industries Ltd.* v. *U.P. SEB* the Court held that the grant of stay had not the effect of relieving the litigants of their obligation to pay late payment with interest on the amount withheld by them when the writ petition was dismissed ultimately. Holding otherwise would be against public policy and the interests of justice. In *Kashyap Zip Industries* v. *Union of India* interest was awarded to the Revenue for the duration of stay under the Court's order, since the petitioners therein were found to have the benefit of keeping back the payment of duty under orders of the Court.

> **16.** The High Court was, therefore, not wrong in directing the payment of interest on the amount of arrears of rent for the period when the stay order was obtained till the period the writ petitions were dismissed. We, however, feel that awarding of interest @ 18% per annum from the aforesaid period was on the excessive side. The respondent authority could not be equated with private commercial institutions and conferred with an amount of compensation in the form of interest which, in the judicial parlance, may amount to penalty, despite the fact that the persons found to have jeopardised the process of law were rightly held liable to compensate the respondent authority by way of interest. In our opinion 15% per annum interest for the aforesaid period would have been just and proper. We, however, agree with the findings of the High Court that the respondents are free to charge appropriate interest on the amount of arrears of rent between 1-3-1992 to the date when the stay orders were passed by the High Court. We are sure that in determining such rate of interest the respondent authority would act fairly and justly.

30. Thus it is held that since the stay was granted on the application filed by the appellant and no vested right was created in favour of the appellant by virtue of the interim order, therefore, for the purposes of ascertaining the reasonable amount, the period of 17 long years i.e. period of pendency of this appeal, has to be taken into consideration. Thus since the agreement to sell was executed in the year 1992 and after taking four years into consideration i.e. up to 1996 and 17 years after the judgment and decree was passed by the Trial Court, it is held that while assessing the reasonable amount, this Court has to consider the hike in price of the property during these 21 long years.

31. Under these circumstances, this Court is of the considered opinion

that since the property in dispute is a three storey residential house, therefore, an amount of Rs.50,000/- for every year can be taken as hike in price. Since 21 years have passed therefore, the defendant is directed to refund Rs.10,50,000/- + 1,00,000/- (which was paid by way of advance) within a period of three months from today. The delayed payment shall carry the further interest @ Rs.6% per annum.

32. With aforesaid modifications, the judgment and decree dated 26.3.2002 passed by 8th Additional District Judge, Gwalior in Civil Suit No.61-A/1995 is hereby confirmed. Accordingly, the decree in the following terms is passed:

> "(i) The prayer for specific performance of contract filed by the plaintiffs stands dismissed.
> (ii) The defendant shall pay Rs.11,50,000/- to the plaintiffs within a period of three months failing which the delayed payment shall carry the interest @ 6% per annum from the date of expiry of three months from today.
> (iii) The defendant shall also bear the expenses of this appeal. Advocates fee shall be payable if certified."

33. With aforesaid modification, the appeal filed by the appellant is hereby **disposed of**.

34. The decree be drawn accordingly.

(G.S. AHLUWALIA)
Judge

(alok)