Hungerford Investment Trust Limited (In Voluntary Liquidation)

Vs

Haridas Mundhra and Others

Civil Appeal No. 488 (N) of 1971

(K. S. Hegde, K. K. Mathew, JJ)

09.03.1972

JUDGMENT

MATHEW, J. -

1. This is an appeal with certificate from a judgment of Division Bench of the Calcutta High Court, setting aside the order of a single judge of the Court allowing an application filed by the appellant for rescission of an agreement for sale, dated October 30, 1956, as also the decree, dated February 25, 1964, for specific performance of the agreement and for other alternative reliefs specified in the application.

2. Hungerford Investment Trust Limited (in voluntary liquidation) hereinafter called 'Hungerford' was the owner of 100 per cent. shares in Turner Morrison & Co., hereinafter called 'Turner Morrison.' John Geoffrey Turner and Nigel Frederic Turner, both since deceased, were the owners of the 100 per cent. share of Hungerford. The entire share capital of Turner Morrison consisted of the 4,500 fully paid up ordinary shares of Rs. 1,000/- each.

3. By exchange of letters it was agreed that Haridas Mundhra, hereinafter called 'Mundhra' would purchase from Hungerford, 49 per cent. shares of Turner Morrison. The agreement also provided for an option to Mundhra to purchase from Hungerford, the balance of 51 per cent. shares of Turner Morrison within five years. A formal agreement, dated October 30, 1956, was executed between Hungerford, John Geoffrey Turner and Nigel Frederic Turner on the one hand, and British India Corporation and Haridas Mundhra on the other, embodying the terms of the agreement. Pursuant to this agreement, 46 per cent. of the shares in Turner Morrison was sold and transferred to Mundhra and his nominee British India Corporation. Thereafter, Mundhra exercised his option to purchase the 51 per cent. shares. But the shares were not sold or transferred to him. So, on April 19, 1961, Mundhra filed a suit against Hungerford, Turner Morrison and others for specific performance of the agreement to sell the 51 per cent. shares (Suit No. 600 of 1961). As Mundhra did not want to proceed against Turner Morrison, the suit was dismissed as against that company and a decree was passed on February 25, 1964. The decree provided that the agreement relating to the sale of 51 per cent. ordinary shares of Turner Morrison ought to be specifically performed and directed Hungerford to deliver to Mundhra, the 51 per cent. shares against payment of the consideration of Rs. 86,60,000/-. An injunction was also granted restraining Hungerford and the other defendants in the suit from voting except in accordance with the instruction of Mundhra and restraining Hungerford from selling the shares to any person other than Mundhra. The decree, except as regards the injunction was stayed by the trial judge, on the application of the appellant, for three weeks.

4. Hungerford, along with some other defendants, filed an appeal from the decree on March 18,

1964 (Appeal No. 69 of 1964) and obtained a stay or execution of the decree except insofar as it related to the injunction, until the disposal of the appeal. The Appeal was dismissed on August 26, 1964, for the reason that it was withdrawn by the appellant, leaving Mundhra free to perform his part of the obligation under the decree.

5. By a Master's summons, dated August 30, 1965, Hungerford made an application praying that Mundhra may be directed to implement the decree by paying Rs. 86,60,000/-, the unpaid purchase money, within such time as the Court may direct; that Hungerford be directed to execute proper transfer deeds in respect of the 51 per cent. shares within such time as the Court may direct; and that in default of payment of Rs. 86,60,000/- by Mundhra within the period to be fixed, the Court may order the rescission of the agreement and the decree. The application was dismissed on September 28, 1965, by Justice Ray, holding that the application was one for execution of the decree in Suit No. 600 of 1961 and must be in a tubular form and "that any imposition of time-limit would be to engraft something on the decree which does exist in the decree". Hungerford preferred an appeal against the said order (appeal No. 286 of 1965). The appeal was dismissed on August 8, 1966. The application of Hungerford for leave to appeal to this Court was also dismissed on November 25, 1968.

6. Before the dismissal of appeal No. 69 of 1964 filed against the decree for specific performance in suit No. 600 of 1961, the Certificate Officer, 24 Parganas had attached that decree, as Mundhra failed to satisfy six certificates then pending against him. In pursuance to a Memorandum issued by the Certificate Officer, Ray, J., made an order, dated March 2, 1964, staying the execution of the decree until cancellation of the notice by the Certificate Officer or until the Certificate Officer or the debtor appealed for execution of the decree. The decree in suit No. 600 of 1961 was also attached in execution of three other decrees, namely the decree obtained by Champaran Sugar Co. Ltd. and British India Corporation Ltd. in suit No. 179 of 1960 of the Court of Civil Judge, Kanpur and those obtained by Kanpur Sugar Works Ltd. and British India Corporation Ltd. in suit No. 178 of 1960 in the Court of Second Civil Judge, Kanpur and the Life Insurance Corporation of India in special appeal No. 299 of 1961 of the High Court of Allahabad. The effect of these orders of attachment was that the decree-holder Mundhra was prohibited and restrained from alienating, transferring or charging his right, title and interest in the decree in suit No. 600 of 1961 or from obtaining satisfaction thereof.

7. In February, 1965, Bank Hoffman A.G. obtained a decree from Queen's Bench Division, London, for pound 657, 345-17-9d. with interest of 4.5 per cent. per annum from the date of decree against Romanigo Holdings S.A.H., a holding company of Hungerford and also against Hungerford. Bank Hoffman executed the decree in the Court of District Judge, Delhi, and got the 51 per cent. shares of Hungerford attached. The District Judge ordered the attachment and directed that the 51 per cent. share be produced in the High Court of Calcutta for delivery to Mundhra against payment of consideration mentioned in the specific performance decree.

8. Hungerford was in control of Turner Morrison up to February 25, 1964, when the injunction in regard to voting rights are (sic) granted. It had kept scrips of 707 shares out of 2,295 shares in the office of Turner Morrison. When Mundhra got control of Turner Morrison, these scrips went under his control and power. The liquidators of Hungerford wrote on December 12, 1964, to Turner Morrison to deliver the scrips of 707 shares to M/s. Sanderson and Margon, solicitors of Hungerford. The request for delivery of 707 shares was repeated by Sanderson and Margon on December 22, 1964. Turner Morrison wrote a letter on January 12, 1965 to K. N. Srivastava, Income Tax Officer, if the 707 shares' scrips could be delivered to Hungerford and if the Income

Tax Officer had any objection to such delivery. On January 13, 1965, Turner Morrison's solicitors wrote to M/s. Sanderson and Morgan that 707 shares had become the property of Mundhra and, for the first time, also claimed that there was a lien on the shares. On January 18, 1965, K.N. Srivastava, the Income Tax Officer, wrote a letter raising objection to the delivery of 707 shares to Hungerford although the Income Tax Department had no claim on these shares.

9. Turner Morrison instituted a suit against Hungerford (Suit No. 2005 of 1965) in the Calcutta High Court claiming Rs. 79,70,802 as principal and Rs. 47,96,250.16 as interest, in respect of payment made by Turner Morrison to Income Tax authorities on behalf of Hungerford under Section 23(a) of the Indian Income Tax Act, 1922. A claim was also made in the suit for possession and sale of the 2,295 shares in the exercise of their lien on those shares under Article 22 of the Articles of Association of the Company. Mundhra was not a party to the suit. Turner Morrison made an ex parte application in the suit on July 8, 1966, for appointment of a receiver in respect of the 2,295 shares. Mr. K.B. Bose was appointed receiver and he took possession of 1,588 shares from the First National City Bank and 707 shares from the Police. On July 13, 1966, Sen, J., passed an order confirming the order of appointment of the recover and directing that the receiver will be at liberty to deliver the 51 per cent. of shares to Mundhra on payment of Rs. 86,60,000/- in performance of his part of the obligation under the decree, if so required by the Court hearing appeal No. 286 of 1965. The order also provided that if Mundhra takes the shares on payment of the price directed to be paid by the decree, or in direction of the Court of appeal the lien if any, as claimed by Turner Morrison will shift on to the money which the receiver would get from Mundhra.

10. Turner Morrison preferred and appeal against the order and applied for stay of the order. The stay was refused but the appeal was partly allowed on September 2, 1968, by setting aside the direction given to the receiver to tender the shares to Mundhra as also the direction that the lien of Turner Morrison would shift to the purchase money to be paid by Mundhra.

11. On March 21, 1967, the application from which the present appeal arises, was made by Hungerford (the appellant here), before the High Court. The prayers in the application were inartistically worked. It was prayed that the agreement, dated October 30, 1956, and the decree, dated February 25, 1964, passed in suit No. 600 of 1961 be rescinded, that the injunction granted by the decree in the suit be vacated unless Mundhra (the Ist respondent here) deposits Rs. 86,60,000/- in the Court or with the receiver in suit No. 2005 of 1965, that the receiver appointed in suit No. 2005 of 1965 be appointed as receiver in the suit for specific performance in respect of the said 2,295 shares, that the receiver be directed to tender, on a day certain, the said shares to Mundhra, and Mundhra be directed to pay the sum of Rs. 86,60,000/- to the receiver on that day and to declare that if Mundhra failed to pay the amount to the receiver on or before the day, the agreement, dated October 30, 1956 and the decree, dated February 25, 1964, would stand rescinded. This application was allowed by Masood, J.

12. The learned judge overruled the objection of Mundhra that the application was not maintainable and held that it was maintainable under Section 35 of the Specific Relief Act, 1877, notwithstanding the repeal of that Act by the Specific Relief Act, 1963, as the appellant had an accrued right under the section to make the application even before the repeal.

13. The learned judge then found that Mundhra was not keen in paying the purchase money and getting transfer of the 51 per cent. shares for the reason that the injunction granted by the Court in the decree in suit No. 600 of 1961 restraining the appellant from voting except in accordance with the instruction of Mundhra made him virtually the owner of 100 per cent. shares in Turner

Morrison, and if without paying any amount for the 51 per cent. shares of Turner Morrison, he got control of Turner Morrison, it was to his interest not to pay anything to the appellant.

14. As regards the objection by Mundhra that since Turner Morrison claimed a lien on the 51 per cent. shares and, therefore, the appellant was not in a position to deliver the shares free from encumbrance, he held that there was no bona fides in claim of Turner Morrison : firstly because the lien was not set up by Turner Morrison in its written statement in the suit filed by Mundhra for specific performance, secondly because in the suit filed by Turner Morrison claiming the lien, Mundhra, who has interest in the shares upon which the lien was claimed, was not made a party and thirdly for the reason that by his letter, dated November 29, 1955, Mundhra had agreed that Turner Morrison would pay the income tax liabilities of Hungerford to the extent of Rs. 46 lakhs. The learned Judge found it impossible to believe that Mundhra had no knowledge about the suit filed by Turner Morrison claiming the lien as he was in complete control of Turner Morrison at the time the suit was filed and said that Turner Morrison and Mundhra were colluding with each other to defeat the appellant in its attempt to get the purchase money from Mundhra and that suit No. 2005 of 1965 was instituted with the connivance of Mundhra. The learned judge also found that even if Turner Morrison had a lien on those shares, since there was no covenant for title, Mundhra was not justified in declining to take delivery of the shares on the score that Turner Morrison had a lien upon the shares.

15. The learned Judge, after evaluating all the circumstances ultimately came to the conclusion that Mundhra committed breach of the contract which he was directed specifically to perform, that he created a situation which made it practically impossible for him to perform his part of the obligation under the decree and that the agreement, dated October 30, 1956 and the decree, dated February 25, 1964, for specific performance must be rescinded. The learned Judge, therefore, appointed the receiver in suit No. 2005 of 1965 as received of the 51 per cent. shares and directed Mundhra to pay Rs. 86,60,000/- to the receiver within a fortnight from the date of the order and the receiver to hand over the 51 per cent. of the shares to Mundhra's solicitors if the amount was paid as directed. The receiver was also directed to pay the amount to the solicitors of Hungerford. The stay order passed by Ray, J., on March 2, 1964, was vacated and liberty was given to the Certificate Officer or the Tax Recovery Officer, 24 Parganas to take such steps against Mundhra as he thought fit. In default of payment of Rs. 86,60,000/- by Mundhra to the receiver within the time specified, the Court directed that the contract and the decree would stand rescinded and Hungerford absolved from all obligations under the said contract and the decree.

16. Against the decision, the appellant filed appeal No. 148 of 1969 before a Division Bench of the Court and Mundhra filed a cross-objection.

17. The appellate Court found that if Mundhra was really interested in getting transfer of the shares by paying the money, he would not have allowed the opportunity to acquire the shares under the order, dated July 13, 1966 and also of the opportunity given to him by the order to get delivery of the shares on payment of the purchase money, but that he did not avail of the opportunity for the reason that, if without paying money, he could virtually enjoy the same advantage, it would be foolish from a businessman's point of view to invest any amount in purchasing the shares.

The court observed :

> "A businessman who files a suit for specific performance of a contract to buy shares and prosecutes that suit to a successful termination in his favour, will not fritter away

> the benefit under the decree except for a higher or superior advantage and that advantage Mundhra got under the decree in suit No. 600 of 1961."

18. The Court then held that the application filed by the appellant for rescission of the contract and the decree was not maintainable. The reasoning of the Court was two-fold. The Court said that the appellant had no accrued right to apply for rescission under Section 35 of the Specific Relief Act, 1877, which would survive the repeal of that Act by the Specific Relief Act, 1963, and so, no application for rescission would lie under Section 35 of the old Act, read with Section 6 of the General Clauses Act, 1897. It then held that since Section 28 of the Specific Relief Act, 1963, only provided for rescission of a decree for specific performance of a contract for the sale or lease of immovable property, the application was incompetent under the section and allowed the appeal and cross-objection in part.

19. We do not think that the appellant had an accrued right for rescission of the contract or the decree for specific performance under Section 35 of the Specific Relief Act, 1877, when the Act was repealed by the Specific Relief Act, 1963, on March 1, 1964. It may be recalled that the decree in suit No. 600 of 1961 was passed on February 25, 1964 and that the application for rescission of the decree was filed on March 21, 1967. Section 35 of the Specific Relief Act, 1877, so far as it is material for the purpose of this case, provided that where a decree for specific performance of a contract of sale or of a contract to take a lease has been made and the purchaser or lessee makes default in payment of the purchase money, which the Court has ordered him to pay, the decree may be rescinded as regards the party in default either by a suit or by an application. The right to rescind the decree under the section can arise only if the purchase makes default in paying the purchase money ordered to be paid under the decree. Before the lapse of a reasonable time from the date of the decree, the appellant could have no right to have the decree rescinded on the ground of default of the purchaser. To put it in other words, the right of the appellant to have the decree rescinded was dependent upon the default of the purchaser in paying the purchase money. Such a default had not occurred when the Specific Relief Act, 1877, was repealed, as a reasonable time for the performance of the obligation under the decree has not elapsed from the date of the decree. The more important reason why there was no default in this case was that the execution of the decree in suit No. 600 of 1961 was stayed by orders of the trial and appellate Court till August 26, 1964. We, therefore, agree with the finding of the Division Bench that the appellant had no accrued right no the date of the repeal to file an application under Section 35 of the Specific Relief Act, 1877, which was saved under Section 6 of the General Clauses Act, 1897. The mere right to take advantage of the provisions of an Act is not an accrued right (see Abbott v. The Minister for Plans). (1893 AC 425).

20. We also agree with the finding of the Division Bench that since Section 28 of the Specific Relief Act, 1963, provides only for an application for rescission of a decree for specific performance for the sale or lease of immovable property, no application to rescind a decree for specific performance of an agreement to sell movables, would lie under that section.

21. The question then is whether the application was maintainable under any other provision of the law. The Specific Relief Act, 1963, is not an exhaustive enactment. It does not consolidate the whole law on the subject. As the preamble would indicate, it is an Act "to define and amend the law relating to certain kinds of specific relief". It does not purport to lay down the law relating to specific relief in all its ramifications. In Ramdas Khatau & Co. v. Atlas Mills Co. Ltd., (AIR 1931 Bom 151) it was held that the Specific Relief Act, 1877, was not exhaustive. In Rohmath Unnissa Begum v. Shimoga Co-operative Bank Ltd. and Another, (AIR 1951 Mys 59) the Court said that the

Specific Relief Act, 1877 is founded on English equity jurisprudence and that it is permissible to refer to English Law on the subject wherever the Act did not deal specifically with any topic (see also Firm Kishore Chand Shiva Charan Lal and Another v. Budaun Electric Supply Co. Ltd.) (AIR 1944 All 66 at p. 77) Although a matter on which the Act defines the law it might generally be exhaustive, the Act as a whole cannot be considered as exhaustive of the whole branch of the law of specific performance.

22. It is settled by a long course of decisions of the Indian High Courts that the Court which passes a decree for specific performance retains control over the decree even after the decree has been passed. In Mahommadalli Sahib v. Abdul Khadir Saheb, (1930 MLJ Vol. 59, p. 351) it was held that the Court which passes a decree for specific performance has the power to extend to time fixed in the decree between the parties is not extinguished by the passing of a decree for specific performance and that the contract subsists notwithstanding the passing of the decree. In Pearisundari Dassee v. Hari Charan Mozumdar Chowdhry, the Calcutta High Court said that the Court retains control over the proceedings even after a decree for specific performance has been passed, that the decree passed in a suit for specific performance is not a final decree and that the suit must be deemed to be pending even after the decree. The same view was taken in Someshwar Dayal and Others v. Widow of Lalman Shah and Others (AIR 1958 All 488). In Anandilal Poddar v. Gunendra Kr. Roy and Another, (AIR 1966 Cal 107) Ray, J., speaking for the Court, said that the court retains control over the matter even after passing a decree for specific performance and that virtually, the decree is in the nature of a preliminary one. In Tribeni Tewary and Others v. Ramratan Nonia and Others, (AIR 1959 Pat 460) it was held that Court retains rescission of the case notwithstanding the fact that a decree for specific performance has been passed and that the decree is really in the nature of a preliminary decree. Fry in this book (Fry on Specific Performance, 6th Ed. p. 546) on specific performance stated the law in England as follows :

> "It may and not unfrequently does happen that after judgment has been given for the specific performance of a contract, some further relief becomes necessary, in consequence of one or other of the parties making default in the performance of something which ought under the judgment to be performed by him or on his part; as for instance, where a vendor refuses or is unable to execute a proper conveyance of the property or a purchaser to pay the purchase money.....
>
> There are two kinds of relief after judgment for specific performance of which either party to the contract may, in a proper case, avail himself -
>
> (i) He may obtain (on motion in the action) an order appointing a definite time and place for the completion of the contract by payment of the un-paid purchase-money and delivery over of the executed conveyance and title deeds, or a period within which the judgment is to be obeyed, and if the other party fails to obey the order, may thereupon at once issue a writ of sequestration against the defaulting party's estate and effects.....
>
> (ii) He may apply to the Court (by motion in the action) for an order rescinding the contract. On an application of this kind, if it appears that the party moved against has positively refused to complete the contract, its immediate rescission may be ordered; otherwise, the order will be for rescission in default of completion within a limited time....."

23. In Halsbury's Laws of England (Halsbury's Laws of England, 3rd Ed.,Vol. 36, 351-52) the law is stated as under :

> "Ancillary relief may be obtained after judgment in an action for specific performance where such further relief becomes necessary.....
>
> Either party may also obtain an order rescinding the contract in default of completion within a fixed time."

24. As the Court retained control over the matter despite the decree, it was open to the Court, when it was alleged that the party moved against has positively refused to complete the contract to entertain the application and order rescission of the decree if the allegation was proved. We, therefore, think that application of the appellant was competent.

25. It was contended on behalf of Mundhra that he was always ready and willing to pay the purchase money, but since the decree did not specify any time for payment of the money, there was no default on his part. In other words, the contention was that since the decree did not specify a time within which the purchase money should be paid and, since an application for fixing the time was made by the appellant and dismissed by the Court, Mundhra cannot be said to have been in default in not paying the purchase money so that the appellant might apply for rescission of the decree. If a contract does not specify the time for performance, the Law will imply that the parties intended that the obligation under the contract should be performed within a reasonable time. Section 46 of the Contract Act provides that where, by a contract, a promiser is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time and the question "what is reasonable time" is, in each particular case, a question of fact. We have already indicated that the contract between the parties was not extinguished by the passing of the decree, that it subsisted notwithstanding the decree. It was on implied term of the contract and, therefore, of the decree passed thereon that the parties would perform the contract within a reasonable time. To put it in other words, as the contract subsisted despite the decree and as the decree did not abrogate or modify any of the express or implied terms of the contract, it must be presumed that the parties to the decree had the obligation to complete the contract within a reasonable time.

26. The matter can be looked at from another angle. Mundhra, by exercising the option to purchase the 51 per cent. shares became entitled to obtain a conveyance of the shares from the appellant on payment of the purchase money. There was no provision in the agreement at what time or within what period after the exercise of the option the appellant should convey the shares against the payment of the purchase money. But it was open to either party to make time essential by intimating the other party after a reasonable period about it after expressing its or his readiness and willingness to perform its or his obligation under the contract. That liberty was not taken away because a decree has been passed for specific performance of the contract without fixing the time for the performance. The appellant could, therefore, have called upon Mundhra to pay the purchase money and take delivery of the shares within a reasonable time. The fact that the decree did not fix a time for completing the contract did not prevent either party from demanding performance from other party within a reasonable time and thus make time essential, as the parties had that liberty before the decree was passed and the decree did not a abrogate that liberty in any way, and if the party from whom performance was demanded evinced by his conduct that he was unwilling to perform his part, then it was open to the party claiming performance to rescind the contract and obtain an order from the Court adjudging rescission of the contract and the decree thereon. We do not think, in case the

Court comes to the conclusion that the party moved against has by conduct evinced an intention not perform his party of the contract, the fact that no time has been fixed in the decree would preclude it from adjudging the contract as rescinded. The observation of Fry already quoted does not mean that unless a time is specified in the decree there can be no default. It only means that if the conduct of the party moved against is equivocal, an order for rescission will be made only in default of completion within a specified time. Nor can the observation quoted above from Halsbury's Laws of England bear any other construction. We have already indicated that Section 28 of the Specific Relief Act, 1963, deals only with rescission of a decree for specific performance of an agreement to sell or lease immovable property and so the terms of the section are hardly relevant in deciding the question whether there can be default without fixing the time for performance in a decree for specific performance of an agreement to sell movables. We think it unnecessary to decide the question whether, under any circumstances, there can be default of performance where a decree for specific performance of an agreement to sell or lease immovable property does not specify the time of performance for the purpose of an application for rescission of the decree.

27. It is no doubt true that after the decree in suit No. 600 of 1961, a stay was obtained by the appellant preventing the execution of the decree; an appeal was also preferred against that decree and a stay obtained for the same purpose from the appellate court and that the order continued in force till the disposal of the appeal, on August 26, 1965. Till then, there can be no question of Mundhra being in default because he was not required by the orders of Court to perform his part of the obligation under the decree but the question is, was he in default after August 26, 1965 in performing his part of the obligation under the decree. Counsel for Mundhra relied upon the observations in the order of Ray, J., passed on the application on the Master's summons as well as in the order passed in the appeal (No. 287 of 1965) therefrom on August 18, 1966, to show that there was no offer by the appellant to deliver the shares and, therefor, Mundhra was not in default in paying the purchase money. It will be recalled that, on July 13, 1966, Sen, J., passed the order in suit No. 2005 of 1965 directing Mundhra to pay the purchase price and the delivery of the shares from the receiver. The learned Judge further directed that the lien, if any, of Turner Morrison would shift to the purchase money to be paid to the receiver. This order, though passed in suit No. 2005 of 1965 in which Mundhra was not a party, was communicated to him by the letter of the appellant, dated January 11, 1967. Even before that two letters had been sent on July 28 and July 29, 1966, by the appellant's solicitors to Mundhra asking him to be ready with sum to take delivery of the shares before the Court hearing appeal No. 286 of 1965. This was refused by Mundhra by his letter, dated August 2, 1966. In the reply of Mundhra, dated January 25, 1967, to the letter, dated January 11, 1967, from the appellant, he raised the objection that the appellant was not in a position to give delivery of the shares and that the order, dated July 13, 1966, was not binding on him, as he was not a party to the suit in which the order was passed. As the receiver had the shares in his possession, there was no point in the objection raised by Mundhra that the appellant was not in a position to deliver the shares. In order words, the receiver had the shares in his possession, and as there was an order by the Court directing the receiver to deliver possession of the shares on payment of the purchase money subject to the order of the Court hearing appeal No. 286 of 1965, there was no substance in the objection that the appellant was not in a position to deliver the shares. Mundhra did not raise any objection on the score that the appellate court has not made any direction asking him to pay the purchase money as against the delivery of the shares by the receiver or that the receiver was not directed by that Court to deliver the shares. The only legitimate inference from his conduct is that Mundhra was deliberately putting forward the plea that the appellant was not in a position to deliver the shares and that it was not ready and willing to perform its part of the contract only to avoid payment of the purchase money. Nor is there any substance in the contention of counsel for

Mundhra that because the appellant obtained a stay of the order passed by Masud, J., giving Mundhra a fortnight's time to pay the purchase money for asking delivery of the shares, the appellant was precluded from contending that Mundhra committed default in the payment of the amount. In other words, there is no point in the contention of counsel that since the appellant itself obtained a stay of the order passed by Masud, J., giving liberty to Mundhra to pay the purchase money within a fortnight from the date of the order, the appellant prevented Mundhra from performing his part of the obligation under the decree in suit No. 600 of 1961. When the appellant came to the Court with its application for rescission there was already rescission of the contract and the decree by its letter, dated February 11, 1967, stating that Mundhra had forfeited his right to purchase the 51 per cent. shares in pursuance of the decree in suit No. 600 of 1961, as he failed to fulfil his obligation in pursuance to the notice of the appellant of January 11, 1967. It only wanted a declaration by adjudgment by the Court that it was justified in doing so. A court generally adjudicates upon the antecedent rights of the parties. When a Court adjudges rescission of a contract or a decree, it is only concerned with the question whether the person rescinding it was justified in doing so. The Court does not create any right which parties did not possess when it makes a declaration that a contract has been validly rescinded. Merely because it is necessary for the Court to pass an order of rescission, when a controversy arises, it does not follow that it is the Court that rescinds the contract. The Court is only passing upon the validity of the rescission already made by the party. In Abram Steamship Company Ltd. and Another v. Westville Shipping Company Ltd., (Law Reports, Appeal Cases, 1923, p. 773 at p. 781. Ed note : (1972) 1 SCC 857) their Lordship of the House of Lords said :

> "Where one party to a contract expresses by word or act in an unequivocal manner that by reason of fraud or essential error of a material kind inducing him to enter into the contract he has resolved to rescind it, and refuses to be bound by it, the expression of his election, if justified by the facts, terminates the contract, puts the parties in statues quo ante and restores things, as between them, to the position in which they stood before the contract was entered into. It may be that the facts impose upon the party desiring to rescind the duty of making restitution in interregnum. If so, he must discharge that duty, before the rescission is, in effect, accomplished; but if the other party to the contract questions the right of the first to rescind, thus obliging the latter to bring an action at law to enforce the right he has secured for himself by his election, and he later gets a verdict, it is an entire mistake to suppose that is it this verdict which by itself terminates the contract and restores the antecedent status. The verdict is merely the judicial determination of the fact that the expression by the plaintiff of his election to rescind was justified was effective, and put an end to the contract....."

28. The rights of the parties became crystallized when the appellant, by its letter, dated February 11, 1967, rescinded the contract and the decree based thereon and when Masud, J., adjudged that the contract and the decree be rescinded. Mundhra cannot, therefore, complain that he was prevented by the appellant from paying the purchase money in pursuance of the order of Masud, J., and resist the prayer for rescission.

29. There is no substance in the contention of counsel for Mundhra that the appellant was not in a position to give title to the shares because Turner Morrison has a lien upon the shares. The question whether Turner Morrison has a lien upon the shares has been finally decided by this Court in appeal No. 1223 (N) of 1970, (Ed. note : (1972) 1 SCC 857) filed by Turner Morrison, holding that they have no lien in respect of there shares.

30. It was contended that if Mundhra committed default in payment of the purchase money, the remedy of the appellant was to execute the decree for specific performance as the decree was a decree in favour of both the appellant and Mundhra and that the decree in favour of the appellant was a decree for money.

31. A decree for specific performance is a decree in favour of both the plaintiff and the defendant in the suit. In Heramba Chandra Maitra v. Jyotish Chandra Sinha and Others, (AIR 1932 Cal 579) Rankin, C.J., speaking for the Court, said that a decree for specific performance operates in favour of both plaintiff and defendant and that the decree is capable of being executed by either. (See also Bai Karimabibi v. Abderahman Sayad Banu). (AIR 1923 Bom 26). Counsel for Mundhra, therefore, argued that it was open to the appellant to have executed the decree and realised the purchase money from Mundhra instead of resorting to the remedy of rescission. Order 21, Rule 30 provides for execution of a decree for money. That rule can possibly have no application to the execution of a decree for specific performance, firstly for the reason that a specific mode for execution of a decree for specific performance is provided by Order 21, Rule 32 and secondly, because no decree for money is passed in a suit for specific performance. Order 21, Rule 32 provides as follows :

> "(1) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract or for an injunction by detention in the civil prison, or by the attachment of his property or by both.
>
> (2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation, the decree may be enforced, by the attachment of the property of the corporation or, with the leave of the Court by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.
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> (3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for one year, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any), to the judgment-debtor on his application.
>
> (4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of one year from the date of the attachment, no application to have the property sold has been made, or if made, has been refused, the attachment shall cease.
>
> (5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the costs of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree."

32. The execution of a decree for specific performance can only be in the manner prescribed by this rule; sub-rule (1) of the rule says that if a decree for specific performance is not obeyed, the decree is to be enforced by the detention of the party in default in the civil prison or by attachment of his property or by both. The detention in the civil prison of the party who failed to obey the decree and the attachment of his property are simply the means to compel him to obey the decree. That is made clear by sub-rule (3) which says that if the judgment-debtor has failed to obey the decree when the attachment has remained in force for one year, the property attached may be sold and out of the proceeds the decree-holder may be awarded such compensation as the Court thinks fit. Sub-rule (5) which provides that the Court may direct the act required to be done may be done by the decree-holder or some other person appointed by the Court can only refer to an act other than an act of payment of money. We do not think that the appellant could have executed the decree against Mundhra as a money decree and realised the purchase money from him. Therefore, if Mundhra refused to pay the purchase money, there was nothing which prevented the appellant from applying for rescission of the decree.

33. It was then contended that the attachments of the decree in suit No. 600 of 1961 by the creditors of Mundhra prevented him from tendering the purchase money to the appellant and take delivery of the shares as the attachments prevented him from obtaining satisfaction of the decree by paying the purchase money and obtaining delivery of the shares. In other words, the contention was that because of the attachments Mundhra could not have paid the purchase money to the appellant as that would have been in contravention of the orders of the Court attaching the decree. We do not think that there is any substance in this contention. If the creditors of Mundhra attached the decree and he was prevented from tendering the money because of the attachment, he has only to blame himself. The only question with which the Court is concerned is whether Mundhra has disabled himself from performing his part of the obligation under the decree. The inability to pay off the creditors was the proximate cause of the attachments and the responsibility for the same was that of Mundhra. The fact that the attachments prevented him from performing his part of the obligation under the decree or obtaining satisfaction thereof would not make him anytheless a defaulter, so far as the performance of his part of the obligation under the decree is concerned. Nor is there any substance in the contention of counsel for Mundhra that the attachment by Bank Hoffman of the 51 per cent. shares under the order of the District Judge of Delhi made it impossible for the appellant to deliver the shares to Mundhra, as the attachment order directed that the 51 per cent. shares should be produced before the Calcutta High Court for delivery to Mundhra against payment of the consideration mentioned in the decree in suit No. 600 of 1961.

34. We, therefore, allow the appeal and set aside the judgment under appeal and order the rescission of the decree for specific performance passed in suit No. 600 of 1961. We direct Shri K. B. Bose, Barrister, Member, Bar Library Club, Calcutta High Court, the receiver appointed in suit No. 2005 of 1965, and who was appointed as receiver of the shares by the proceedings, dated July 14, 1969, of Masud, J., in suit No. 600 of 1961, to produce the 2,295 shares before this Court and give custody of the same to the Registrar of this Court. The Registrar will hand them over to the appellant.

35. The Registrar will issue notice to Shri K. B. Bose to produce the shares in this Court in pursuance of this judgment.

36. We allow the appeal with costs.

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