WHAT IS 'TRUTH' AND HOW TO DISCOVER IT

Ved Parkash Kharbanda v. Vimal Bindal
198 (2013) DLT 555

1. Truth is foundation of Justice. Dispensation of justice, based on truth, is an essential and inevitable feature in the justice delivery system. Justice is truth in action.

2. It is the duty of the Judge to discover truth to do complete justice. The entire judicial system has been created only to discern and find out the real truth.

3. The justice based on truth would establish peace in the society. For the common man truth and justice are synonymous. So when truth fails, justice fails. People would have faith in Courts when truth alone triumphs.

4. Every trial is voyage of discovery in which truth is the quest. Truth should be reigning objective of every trial. Judge has to play an active role to discover the truth and he should explore all avenues open to him in order to discover the truth.

5. The Delhi High Court examined the legal meaning of '*Truth*' and how to discover it. Delhi High Court examined the scope of Sections 3, 114 and 165 of the Indian Evidence Act to discover the truth. Section 3 of the Indian Evidence defines how the facts are proved before the Court. Section 114 of the Evidence Act empowers the Court to draw inferences as to the existence or non-existence of unknown facts on proof/admission of other facts. Section 165 of the Indian Evidence Act, 1872 invests the Judge with plenary powers to put any question to any witness or party; in any form, at any time, about any fact relevant or irrelevant. Section 165 is intended to arm the

Judge with the most extensive power possible for the purpose of getting at the truth. The effect of this section is that in order to get to the bottom of the matter before it, the Court will be able to look at and inquire into every fact and thus possibly acquire valuable indicative evidence which may lead to other evidence strictly relevant and admissible. The Court is not, however, permitted to found its judgment on any but relevant statements. The relevant portion of the judgment is as under:-

"21.2 ***<u>What is Truth' and how to discover it</u>***

- *Law's Truth is synonymous with facts established in accordance with the procedure prescribed by law.*
- *The purpose of judicial inquiry is to establish the existence of facts in accordance with law.*
- *Facts are proved through lawfully prescribed methods and standards.*
- *The belief of Courts about existence of facts must be based on reason, rationality and justification, strictly on the basis of relevant and admissible evidence, judicial notice or legally permitted presumptions. It must be based on a prescribed methodology of proof. It must be objective and verifiable.*

21.3 ***<u>Section 3 of Indian Evidence Act, 1872</u>***

- *"Evidence" of a fact and ―proof‖ of a fact are not synonymous terms. "Proof" in the strict sense means the effect of evidence.*
- *A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.*
- *The term "**after considering the matters before it**" in Section 3 of the Evidence Act means that for judging whether a fact is or not proved, the Court is entitled to take into consideration all matters before it which shall include the statement of the witnesses, admissions of the parties, confession of the accused, documents proved in evidence, judicial notice, demeanour of witnesses, local inspections and presumptions.*

- *The term "**believes it to exist**" in the definition of "proof" is a "judicial belief" of the Judge based on logical/rational thinking and the power of reason, and the Court is required to give reasons for the belief. The reasons are live links between the mind of the decision maker and the belief formed. Reasons convey judicial idea in words and sentences. Reasons are rational explanation of the conclusion. Reason is the very life of law. It is the heart beat of every belief and without it, law becomes lifeless. Reasons also ensure transparency and fairness in the decision making process. The reasons substitute subjectivity by objectivity. Recording of reasons also play as a vital restraint on possible arbitrary use of the judicial power. The recording of reasons serve the following four purposes:-*
  - *To clarify the thought process.*
  - *To explain the decision to the parties.*
  - *To communicate the reasons to the public.*
  - *To provide the reasons for an appellate Court to consider.*
- *Non-recording of reasons would cause prejudice to the litigant who would be unable to know the ground which weighed with the Court and also cause impediment in his taking adequate grounds before the appellate Court in the event of challenge.*
- *Nothing can be said to be "proved", however much material there may be available, until the Court believes the fact to exist or considers its existence so probable that a prudent man will act under the supposition that it exists. For example, ten witnesses may say that they saw the sun rising from the West and all the witnesses may withstand the cross-examination, the Court would not believe it to be true being against the law of nature and, therefore, the fact is 'disproved'. In mathematical terms, the entire evidence is multiplied with zero and, therefore, it is not required to be put on judicial scales. Where the Court believes the case of both the parties, their respective case is to be put on judicial scales to apply the test of preponderance.*
- *The approach of the Trial Court has to be as under:-*
  If on consideration of all the matters before it, the Court believes a fact to exist or considers its existence probable, the fact is said to be 'proved'. On the other hand, if the Court does not believe a fact

either to exist or probable, such fact is said to be 'disproved'. A fact is said to be 'not proved' if it is neither proved nor disproved.

- *The test whether a fact is proved is such degree of probability as would satisfy the mind of a reasonable man as to its existence. The standard of certainty required is of a prudent man. The Judge like a prudent man has to use its own judgment and experience and is not bound by any rule except his own judicial discretion, human experience, and judicial sense.*

21.4 ***Section 114 of the Indian Evidence Act, 1872***

- *Section 114 is a useful device to aid the Court in its quest for truth by using common sense as a judicial tool. Section 114 recognizes the general power of the Court to raise inferences as to the existence or non-existence of unknown facts on proof or admission of other facts.*
- *Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts.*
- *The source of presumptions is the common course of natural events, human conduct and public or private business, and the Section proceeds on the assumption that just as in nature there prevails a fixed order of things, so the volitional acts of men placed in similar circumstances exhibits, on the whole, a distinct uniformity which is traceable to the impulses of human nature, customs and habits of society.*
- *The illustrations though taken from different spheres of human activity, are not exhaustive. They are based upon human experience and have to be applied in the context of the facts of each case. The illustrations are merely examples of circumstances in which certain presumptions may be made. Other presumptions of a similar kind in similar circumstances can be made under the provisions of the section itself.*
- *Presumption in law of evidence is a rule indicating the stage of shifting the burden of proof. From a certain fact or facts the Court can draw an inference and that would remain until such inference is either disproved or dispelled.*
- *Presumptions of fact can be used by the Courts in the course of administration of justice to remove lacunae in the chain of direct evidence before it. The function of a presumption is to fill a gap in evidence.*

- *Section 114 of the Indian Evidence Act applies to both civil and criminal proceedings.*
- *Whether or not a presumption can be drawn under the section in a particular case depends ultimately upon the facts and circumstances of each case. No hard and fast rule can be laid down. Human behaviour is so complex and room must be left for play in the joints. It is not possible to formulate a series of exact propositions and con-flue human behaviour within straitjackets.*
- *No rule of evidence can guide the Judge on the fundamental question whether evidence as to a relevant fact should be believed or not. Secondly, assuming that the Judge believes very few cases, guide him on the question what inference he should draw from it as to assist a Judge in the very smallest degree in determining the master question of the whole subject – whether and how far he ought to believe what the witnesses say? The rules of evidence do not guide what inference the Judge ought to draw from the facts in which, after considering the statements made to him, he believes. In every judicial proceeding whatever these two questions – Is this true, and, if it is true what then? - ought to be constantly present in the mind of the Judge, and the rules of evidence do not throw the smallest portion of light upon them.*

21.5 ***<u>Section 165 of the Indian Evidence Act, 1872</u>***

- *Section 165 of the Indian Evidence Act, 1872 invests the Judge with plenary powers to put any question to any witness or party; in any form, at any time, about any fact relevant or irrelevant. Section 165 is intended to arm the Judge with the most extensive power possible for the purpose of getting at the truth. The effect of this Section is that in order to get to the bottom of the matter before it, the Court will be able to look at and inquire into every fact and thus possibly acquire valuable indicative evidence which may lead to other evidence strictly relevant and admissible. The Court is not, however, permitted to found its judgment on any but relevant statements.*
- *The object of a trial is, first to ascertain truth by the light of reason, and then, do justice upon the basis of the truth and the Judge is not only justified but required to elicit a fact, wherever the interest of truth and justice would suffer, if he did not.*

- *The Judge contemplated by Section 165 is not a mere umpire at a wit-combat between the lawyers for the parties whose only duty is to enforce the rules of the game and declare at the end of the combat who has won and who has lost. He is expected, and indeed it is his duty, to explore all avenues open to him in order to discover the truth and to that end, question witnesses on points which the lawyers for the parties have either overlooked or left obscure or willfully avoided. A Judge, who at the trial merely sits and records evidence without caring so to conduct the examination of the witnesses that every point is brought out, is not fulfilling his duty.*

21.6 ***False claims and defences***

- *In the last 40 years, a new creed of litigants have cropped up who do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the Courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final.*
- *False claims and defences are serious problems with real estate litigation, predominantly because of ever escalating prices of the real estate. Litigation pertaining to valuable real estate properties is dragged on by unscrupulous litigants in the hope that the other party will tire out and ultimately would settle with them by paying a huge amount. This happens because of the enormous delay in adjudication of cases in our Courts. If pragmatic approach is adopted, then this problem can be minimized to a large extent. It is a matter of common experience that Court's otherwise scarce time is consumed or more appropriately, wasted in a large number of uncalled for cases.*
- *Dishonest and unnecessary litigations are a huge strain on the judicial system. The Courts continue to be flooded with litigation with false and incoherent pleas and tainted evidence led by the parties. The judicial system in the country is choked and such litigants are consuming Courts' time for a wrong cause. Efforts are made by the parties to steal a march over their rivals by resorting to false and incoherent statements made before the Court.*

21.7 ***Imposition of Costs***

- *Imposition of actual, realistic or proper costs and or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. The cost should be equal to the benefits derived by the litigants, and the harm and deprivation suffered by the rightful person so as to check the frivolous litigations and prevent the people from reaping a rich harvest of illegal acts through Court. The costs imposed by the Courts must be the real costs equal to the deprivation suffered by the rightful person and also considering how long they have compelled the other side to contest and defend the litigation in various courts. In appropriate cases, the Courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings. The parties raise fanciful claims and contests because the Courts are reluctant to order prosecution.*
- *It is the duty of the Courts to see that such wrongdoers are discouraged at every step and even if they succeed in prolonging the litigation, ultimately they must suffer the costs for prolonging the litigation. Imposition of actual, realistic or proper costs and/or ordering prosecution in appropriate cases would go a long way in controlling the tendency of filing false cases."*

***** **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA No.83/2007**

% Date of decision : 8th March, 2013

VED PARKASH KHARBANDA ..... Appellant
Through: Mr. Rajesh Katyal and Mr. S.S. Katyal, Advs.

versus

VIMAL BINDAL ..... Respondent
Through: Mr. Sanjay Jain, Sr. Adv. with Mr. R.N. Oberoi, Ms. Ruchi Jain and Mr. Sarfaraz Ahmad, Advs.

CORAM :-
HON'BLE MR. JUSTICE J.R. MIDHA

JUDGMENT

1. The appellant has challenged the judgment and decree for specific performance passed by the learned Trial Court. The appellant was the defendant and respondent was the plaintiff before the learned Trial Court. For the sake of convenience, the appellant and the respondent shall be referred to as per their ranks in the plaint as the defendant and plaintiff respectively.

2. **Plaintiff's case –** The plaintiff instituted a suit for specific performance, declaration and permanent injunction against the defendant on 21st August, 1997. The case set-up by the plaintiff in the plaint is as under:-

2.1 On 5th July, 1996, the plaintiff entered into an

agreement with the defendant to purchase the property bearing No.53, New Krishna Nagar, Delhi – 110051 built over land ad-measuring 133.25 Sq. yds., hereinafter referred to as 'the suit property' for a total sale consideration of ₹13,95,000/-. The plaintiff paid a sum of ₹1,50,000/- to the defendant as earnest money which was recorded in the agreement dated 5th July, 1996.

2.2 On 22nd August, 1996, the defendant in continuation of the agreement dated 5th July, 1996, executed another agreement relating to the suit property in favour of the plaintiff on the same terms and conditions except that further payment of ₹50,000/- to be made by the plaintiff to the defendant.

2.3 On 22nd August, 1996, the plaintiff made further payment of ₹1,70,000/- (instead of ₹50,000/- mentioned in the agreement dated 22nd August, 1996) to the defendant who extended the date of the agreement up to 17th October, 1996 which was recorded by the defendant on the back of page '1' of the agreement dated 22nd August, 1996.

2.4 On 16th October, 1996, the defendant extended the date of completion of the agreement up to 30th October, 1996 which was recorded by the defendant in his own hand writing on the back of page '1' of the agreement dated 22nd August, 1996.

2.5 The plaintiff informed the defendant to be present in the office of Sub-Registrar for execution and registration of the sale deed on 30th October, 1996.

2.6 On 30th October, 1996 at 10:00 am, the plaintiff visited the office of the Sub-Registrar along with the balance sale

consideration, partly in the form of bank drafts and partly in cash and waited for the defendant throughout the day. The plaintiff obtained the receipt about her presence from the office of the Sub-Registrar on 30th October, 1996.

2.7 The plaintiff had been requesting the defendant to receive the balance sale consideration, execute and register the sale deed, and hand over the vacant and peaceful possession of the suit property.

2.8 The defendant had been falsely promising to complete the sale in terms of the agreement to sell but later his intention became dishonest and he started giving threats to the plaintiff and her family members.

2.9 On 23rd June, 1997, the husband of the plaintiff lodged a complaint with the SHO, Police Station, Krishna Nagar.

2.10 On 31st July, 1997, the defendant issued a legal notice to the plaintiff wrongly repudiating the agreement to sell and falsely contending that the agreement stood cancelled and the earnest money stood forfeited.

2.11 The plaintiff has always been ready and willing and is still ready and willing to perform her part of the contract.

2.12 The defendant has no right to cancel the agreement or to forfeit the earnest money.

3. **Defendant's case –** The defence set-up by the defendant in the written statement is as under:-

3.1 The defendant agreed to sell the suit property to the plaintiff vide agreement to sell dated 5th July, 1996 as he had to

simultaneously purchase another property for his residence from the sale proceeds of the suit property. The defendant entered into an agreement dated 7th September, 1996 to purchase property No.F-1, Radhey Puri, Khureji Khas, Delhi-51 for a total consideration of ₹10,10,000/- against which he paid ₹1,00,000/- out of the earnest money received by him from the plaintiff. As such, the time was of the essence of the agreement dated 5th July, 1996.

3.2 The plaintiff was not having the entire sale consideration and, therefore, she requested the defendant to accept additional amount of ₹50,000/- on 22nd August, 1996 and to extend the payment of the balance sale consideration. The plaintiff's husband prepared another agreement dated 22nd August, 1996 and requested the defendant to sign the same and agreed to pay ₹50,000/- by the evening. The defendant bonafidely signed the said agreement. Neither the plaintiff nor her husband turned up in the evening with the payment of ₹50,000/-. The plaintiff defaulted in making the payment of ₹50,000/- in terms of the agreement dated 22nd August, 1996 whereupon the defendant informed the plaintiff on telephone that the agreement dated 22nd August, 1996 stood cancelled.

3.3 The plaintiff again approached the defendant on 6th September, 1996 and promised to make the payment of the entire sale consideration by 5th October, 1996 whereupon the defendant entered into an agreement dated 7th September, 1996 to purchase property bearing No.F-1, Radhey Puri, Khureji Khas, Delhi-

110051. The defendant made the payment of ₹1,00,000/- as earnest money to the seller of the suit property and agreed to pay the balance sale consideration by 9th October, 1996. The defendant made further payment of ₹50,000/- to the seller and extended the date of completion of sale up to 20th October, 1996.

3.4 The plaintiff failed to make the payment of the balance sale consideration to the defendant in terms of the agreement dated 5th July, 1996 and, therefore, the agreement dated 5th July, 1996 stood cancelled which was informed by the defendant to the plaintiff.

3.5 On 16th October, 1996, the defendant was called by the police at Police Station, Krishna Nagar where he was threatened that he would be implicated in a false case at the instance of the plaintiff. The defendant being a bank employee, got afraid and under police pressure and threats, made some writing on the back of the agreement as per the dictation of the police and the husband of the plaintiff. The defendant never received any amount from the plaintiff after execution of the agreement dated 5th July, 1996.

3.6 The agreement dated 5th July, 1996 stood cancelled due to the failure of the plaintiff to make the payment of the balance sale consideration within the stipulated period. The endorsement on the back side of the agreement was made under police pressure and no payment was received as endorsed on the back of the agreement dated 22nd August, 1996. However, in order to avoid any controversy, the date of completion of the agreement,

namely 5th July, 1996 was extended up to 30th October, 1996 on telephone on the condition that the entire balance sale consideration shall be paid by means of bank draft/pay order and the same shall be shown to the defendant at his house and then the defendant would accompany the plaintiff for execution/registration of sale deed. The plaintiff did not turn up on 30th October, 1996 and, therefore, the agreement stood cancelled and earnest money stood forfeited which was informed to the plaintiff on telephone.

3.7 The agreement to sell dated 5th July, 1996 stood cancelled and the earnest money stood forfeited due to the failure of the defendant to make the payment of the balance sale consideration within the stipulated period.

3.8 The defendant entered into an agreement dated 7th September, 1996 to purchase property bearing No.F-1, Radhey Puri, Khureji Khas, Delhi-110051 and paid the earnest money of ₹1,50,000/- to the seller. The said agreement was cancelled due to the breach of the plaintiff resulting in forfeiture of earnest money.

3.9 The plaintiff was never ready and willing to perform his part of contract. The plaintiff was not having sufficient funds to make the payment of the balance sale consideration.

4. **Issues**

The following issues were framed by the learned Trial Court on 12th February, 2000:

> "1. Whether the plaintiff was ready and willing to perform her part of the contract? OPP.
> 2. Whether the plaintiff is entitled to decree under Specific Performance and Possession? OPP.

3. Whether agreement dated 5th July, 1996 and 22nd August, 1996 stood cancelled and earnest money stood forfeited? OPD.
4. Whether the defendant did not receive additional amount of Rs.1,70,000/- from the plaintiff as alleged in the written statement? OPD.
5. Whether time was not extended to perform agreement dated 22-8-1996? OPD.
6. Relief."

5. **Plaintiff's evidence**

5.1 The plaintiff appeared in the witness box as PW-1 and reiterated the case set-up in the plaint. She deposed with respect to the agreement to sell dated 5th July, 1996 (Ex.P-1), agreement to sell dated 22nd August, 1996 (Ex.P-2), receipts dated 30th October, 1996 from the office of the Sub-Registrar (Ex.P-3 and Ex.P-3A), complaint dated 23rd June, 1997 to the police (Ex.P-4) and legal notice dated 31st July, 1997 (Ex.P-5). In cross-examination, PW-1 admitted that the defendant had shown the registered sale deed of the suit property to her as well as her husband. She also admitted that the defendant had to simultaneously purchase another property after entering into the agreement to sell with the plaintiff. However, she denied that the defendant actually entered into an agreement to purchase a property in Radhey Puri and made the payment of the earnest money to the vendor of that property.

5.2 The plaintiff's husband appeared in the witness box as PW-10 and also reiterated the case set-up in the plaint. In cross-examination, he admitted that neither he nor his wife was having entire sale consideration in their bank account. He stated that he

had arranged the sale consideration from his father-in-law. He deposed that his brother-in-law brought the demand drafts from Punjab to Delhi on 30th October, 1996. He admitted that the plaintiff had not purchased any stamp paper for execution of the sale deed. He further admitted that the plaintiff had not shown any bank draft or cheque for the balance sale consideration to the defendant. He deposed that the defendant had told the plaintiff that he would give the title documents to the plaintiff in Court on 30th October, 1996. He admitted having not replied to the legal notice dated 30th July, 1997 before filing the case.

5.3 PW-3, father of the plaintiff appeared in the witness box and deposed that he prepared five demand drafts totaling ₹10,25,000/- as per the details given hereinbelow from State Bank of Patiala and State Bank of India, all favouring the defendant and he gave the same to the plaintiff for purchase of the suit property from the defendant:-

D.D.No.	Dated	Amount	Bank
099082	14.10.96	₹40,000/-	State Bank of Patiala, Baghapurana, Distt. Moga, Punjab
099083	14.10.96	₹40,000/-	
099084	14.10.96	₹40,000/-	
099085	14.10.96	₹30,000/-	
TC 118381	29.10.96	₹8,75,000/-	State Bank of India, Baghapurana, Distt. Moga, Punjab

5.4 PW-5, Sub-Inspector from Police Station Krishna Nagar deposed with respect to the receipt of complaint from the plaintiff against the defendant on 23rd June, 1997.

5.5 PW-6 from State Bank of Patiala deposed with respect

to the certificate (Ex.PW-6/1) issued by Manager, State Bank of Patiala regarding four drafts prepared on 14th October, 1996 and cancelled on 5th November, 1996.

5.6 PW-7 from State Bank of India deposed with respect to draft for ₹8,75,000/- prepared on 29th October, 1996 and cancelled by PW-3 on 8th November, 1996. He also deposed with respect to the certificates issued by the Branch Manager (Ex.PW7/1 and Ex.PW7/2).

5.7 PW-8 from the Sub-Registrar's office, Seelampur deposed with respect to the receipts (Ex.PW-8/1 and PW-8/2) issued from the book maintained in their office. He deposed that the receipts were issued from their office.

6. **Defendant's evidence**

6.1 The defendant appeared in the witness box as DW-1 and reiterated the case set-up in the written statement. The defendant deposed with respect to the legal notice dated 31st July, 1997 (Ex.DW-1/1). The photocopy of agreement dated 7th September, 1996 to purchase property no. F-1, Radhey Puri, Khureji Khas, Delhi was marked as Mark 'A'. In cross-examination, he admitted that he did not give any notice in writing to the plaintiff regarding agreement to purchase property no.F-1, Radhey Puri, Khureji Khas, Delhi. He further admitted that he neither lodged any complaint against the police officers nor issued any notice to protest the endorsement on the back of agreement – Ex.P-2. He also admitted that he did not approach any senior police officer. He also admitted that he did not challenge the

endorsement dated 16th October, 1996 in any Court.

6.2 DW-2, brother-in-law of the defendant deposed that he was present at the time of the execution of the agreement - Ex.P-1. DW-2 further deposed that he was aware of the intention of the defendant to purchase another property in Radhey Puri and that the defendant went ahead with this transaction by paying the earnest money received from the plaintiff towards the execution of an agreement to purchase the property in Radhey Puri. He deposed that this agreement to sell was only entered into after receiving assurances from the plaintiff. DW-2 further stated that he personally visited the plaintiff's house before the due date but the plaintiff along with her husband avoided the transaction, as they were not having balance sale consideration. He further stated that the defendant faced harassment from the police at the behest of the husband of the Plaintiff and thereafter the defendant wrote something under duress. DW-2 reiterated that the defendant had received only ₹1,50,000/- as earnest money which was used to execute an agreement to purchase another property, and no further payments were made by the plaintiff who breached the agreement.

7. **Findings of the Trial Court**

The learned Trial Court granted the decree of specific performance of the agreements – Ex.P-1 and Ex.P-2 to the plaintiff against the defendant and directed the defendant to execute the sale deed of property bearing no.53, New Krishna Nagar, Delhi-110051 and get the same registered in the office of concerned Sub-Registrar within a period of one month failing which plaintiff would be entitled to

get it executed and registered through process of the Court. The learned Trial Court directed the plaintiff to deposit the balance sale consideration of ₹10,75,000/- in Court within 30 days. The vacant and peaceful possession of the suit property was also directed to be handed over to the plaintiff at the time of registration of the sale deed. The learned Trial Court declared the agreements – Ex.P-1 and Ex.P-2 to be valid and enforceable and further that the defendant had no right to cancel the same and to forfeit the earnest money. The learned Trial Court restrained the defendant from transferring, selling, creating any interest or disposing of the suit property. The findings of the learned Trial Court are as under:-

7.1 The plaintiff paid a sum of ₹1,50,000/- to the defendant at the time of execution of the agreement – Ex.P-1 dated 5th July, 1996.

7.2 The plaintiff made a further payment of ₹1,70,000/- to the defendant on 22nd August, 1996 in terms of the endorsement made by the defendant on the back of Ex.P-2.

7.3 The endorsements made on the back of the agreement dated 22nd August, 1996 – Ex.P-2 whereby the defendant acknowledged the receipt of ₹1,70,000/- and extended the agreement up to 30th October, 1996, were voluntary. The learned Trial Court rejected the defendant's averment that he signed the same under police pressure.

7.4 The plaintiff was ready and willing to perform her part of the contract. The plaintiff had sufficient means and funds available with her as on 30th October, 1996 to make the payment of

the balance sale consideration of ₹10,75,000/- out of which the plaintiff has proved the five demand drafts totaling ₹10,25,000/-.

7.5 The defendant has not shown any ground due to which he would suffer great hardship by the decree of specific performance.

7.6 The defendant has failed to prove the agreement dated 7th September, 1996 for purchase of another property No.F-1, Radhey Puri, Khureji Khas, Delhi-110051. The original of the said agreement was not produced. The defendant has not issued any notice to the plaintiff informing her about entering into another agreement with the third party. The plaintiff cannot, therefore, be blamed for frustration of the agreement between the defendant and the third party.

7.7 The plaintiff had not purchased the stamp papers for execution of the sale deed as the defendant had not delivered the title deeds of the property to the plaintiff and had assured to bring the same on the date of execution of sale deed. Otherwise, also no proof is shown by the defendant that the stamp papers were required to be purchased beforehand and could not have been available there and then.

7.8 The plea of the defendant that the drafts of balance sale consideration were to be shown at the defendant's house and then he would accompany the plaintiff to the office of the Sub-Registrar was not contained in the agreement and no evidence was brought on record by the defendant regarding the understanding of this condition.

8. **Grounds of appeal**

The learned counsel for the appellant - defendant has urged the following grounds at the time of hearing of this appeal:-

8.1 The plaintiff was not ready with the balance sale consideration on 30th October, 1996. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to the grant of specific performance. The learned counsel referred to *N.P. Thirugnanam* v. *Dr. R. Jagan Mohan Rao,* (1995) 5 SCC 115 in support of this proposition.

8.2 Even assuming that the plaintiff was ready with the balance sale consideration on 30th October, 1996, she was not willing to make the payment of the same to the defendant.

8.3 The plaintiff never informed the defendant that she had made arrangement for the balance sale consideration and would be visiting the office of the Sub-Registrar on 30th October, 1996.

8.4 The plaintiff committed breach of agreement by failing to make the payment of the balance sale consideration to the defendant by 30th October, 1996 and therefore, the agreement stood cancelled and the earnest money stood forfeited. The learned counsel referred to and relied upon *Mohan* v. *Dalel Singh*, 78 (1999) DLT 419 in which this Court declined specific performance to the purchaser who neither brought the typed sale deed nor the sale consideration before the Sub-Registrar on the stipulated date.

8.5 The unwillingness of the plaintiff can be inferred from the following facts:-

(a) The plaintiff neither drafted the sale deed nor sought the approval thereof from the defendant.

(b) The plaintiff did not even purchase the stamp papers for ₹1,12,000/- for the sale deed and had no arrangement for the subject amount.

(c) No notice whatsoever was issued by the plaintiff to the defendant on 30th October, 1996 or at any time thereafter.

(d) The demand drafts for ₹10,25,000/- were cancelled within one week without even informing the defendant.

8.6 The defendant issued a legal notice dated 31st July, 1997 to the plaintiff to notify the cancellation of the agreement and forfeiture of the earnest money to which the plaintiff did not reply.

8.7 Time was the essence of the contract as the defendant had to purchase another property from the sale proceeds of the suit property. The learned counsel referred to and relied upon *Chand Rani* v. *Kamal Rani,* (1993) 1 SCC 519 in which the Supreme Court held time to be the essence of the contract in view of the express term of the contract and the specific performance was declined to the plaintiff.

8.8 The defendant had entered into an agreement to purchase property no. F-1, Radhey Puri, Khureji Khas, Delhi-110051 for ₹10,10,000/- against payment of earnest money of

₹1,00,000/-and further payment of ₹50,000/-. The defendant could not make the payment of the balance sale consideration and therefore, the earnest money paid in that transaction stood forfeited.

8.9 The plaintiff is not entitled to the decree of specific performance on the ground of undue delay of more than nine months in filing the suit for specific performance.

8.10 The specific performance of the agreement would cause great hardship to the defendant as the property prices have gone up and it is impossible for the defendant to purchase any property from the sale consideration of the agreement in question. The learned counsel referred to and relied upon *A.C. Arulappan* v. *Ahalya Naik,* (2001) 6 SCC 600 in which the Supreme Court held that the specific performance may not be granted if the defendant would be put to undue hardship which he did not foresee at the time of the agreement.

8.11 The appellant was a retired person aged about 68 years having responsibility of a mentally disabled son under treatment. The appellant and his family members have no property other than the suit property and they would be rendered homeless in the event of specific performance. The appellant has referred to and relied upon *Ranganayakamma* v. *N. Govinda Narayan,* AIR 1982 Kar 264 in which the specific performance was declined by the Division Bench of the Karnataka High Court on the ground that

the appellant was a widow with no children and could not buy a similar house in Mysore city out of the balance sale consideration payable under the agreement.

8.12 The plaintiff made a police complaint dated 23rd June, 1997 to pressurize the defendant to return the earnest money and thereby gave up the right to specific performance.

8.13 At the time of the final hearing of the appeal, the learned counsel for the defendant offered to return the earnest money to the plaintiff which was rejected by the plaintiff who submitted that he has deposited the balance sale consideration of ₹10,75,000/- with the learned Trial Court as back as 15th December, 2006 in terms of the impugned judgment and decree.

9. **Response of the Plaintiff to the Grounds of Appeal**

9.1 The plaintiff paid the earnest money of ₹1,50,000/- to the defendant recorded in the sale agreement, Ex.P-1 and ₹1,70,000/- recorded on the back of agreement, Ex.P-2. The plaintiff was ready and willing to make the payment of the balance sale consideration of ₹10,75,000/- to the defendant on 30th October, 1996 and she intimated the same to the defendant and requested him to reach the office of the Sub-Registrar for execution of the Sale Deed.

9.2 The defendant committed breach of the agreements Ex.P-1 and Ex.P-2 by failing to reach the office of the Sub-

Registrar on 30th October, 1996 to receive the balance sale consideration of ₹10,75,000/- and to execute the Sale Deed.

9.3 The plaintiff had not purchased the stamp papers and had also not drafted the Sale Deed because the defendant had not given the title documents to the defendant. The plaintiff had promised to give the title documents to the defendant before the Sub-Registrar on 30th October, 1996.

9.4 The defendant issued a legal notice to the plaintiff on 31st July, 1997 i.e. nine months after the stipulated date for completion of sale. The defendant has not explained the said delay.

9.5 The defendant did not mention the frustration of the agreement to purchase another property in Radhey Puri in the legal notice dated 31st July, 1997.

9.6 The defendant also did not mention the execution of the two endorsements on the back of the agreement – Ex.P-2 under police pressure in the legal notice dated 31st July, 1997.

9.7 The defendant also did not dispute the two endorsements on the back of the agreement – Ex.P-2 in the legal notice dated 31st July, 1997.

9.8 The defendant did not challenge the two endorsements on the back of agreement – Ex.P-2 in any Court of law.

9.9 The defendant admitted having extended the date of completion of sale up to 30th October, 1996 on telephone, meaning

thereby that the defendant admitted telephonic communication with the plaintiff.

9.10 If the defendant had to pay the sale consideration for Radhey Puri property by 9th October, 1996, why did the defendant extend the date of completion of sale in the present case up to 30th October, 1996.

9.11 The plaintiff did not waive the right to specific performance by filing the police complaint dated 23rd June, 1997.

9.12 The defendant referred to and relied upon *Faquir Chand* v. *Sudesh Kumari*, (2006) 12 SCC 146; *Motilal Jain* v. *Ramdasi Devi*, (2000) 6 SCC 420; *Razik Ram* v. *J.S. Chouhan*, (1975) 4 SCC 769 and *Bachhaj Nahar* v. *Nilima Mandal*, (2008) 17 SCC 491.

9.13 During the course of final hearing, the learned senior counsel for the plaintiff, on instructions, offered to pay the market price of the suit property according to the circle rates in terms of the judgment of the Supreme Court in *Satya Jain* v. *Anis Ahmed Rushdie*, 2012 (11) SCALE 570 which was rejected by the defendant.

10. It is the fundamental duty of the Court to ascertain the truth and do justice on the basis of truth. The law in this regard is well settled. However, the Trial Court has made no effort to discover the truth. Noting what ***Nobel Laureate and French Thinker, Andre Gide,*** once said, "***Everything has been said***

already, but as no one listens, we must always begin again", this Court considers it necessary to reiterate the principles relating to the discovery of truth for the guidance of the Trial Courts.

11. **Truth should be the Guiding Star in the Entire Judicial Process**

11.1 Truth is the foundation of justice. Dispensation of justice, based on truth, is an essential feature in the justice delivery system. People would have faith in Courts when truth alone triumphs. The justice based on truth would establish peace in the society.

11.2 ***Krishna Iyer*** **J**. in ***Jasraj Inder Singh*** **v.** ***Hemraj Multanchand,*** (1977) 2 SCC 155 described truth and justice as under:

> "8. …**Truth, like song, is whole, and half-truth can be noise! Justice is truth, is beauty and the strategy of healing injustice is discovery of the whole truth and harmonising human relations. Law's finest hour is not in meditating on abstractions but in being the delivery agent of full fairness.** This divagation is justified by the need to remind ourselves that the grammar of justice according to law is not little litigative solution of isolated problems but resolving the conflict in its wider bearings."

11.3 In ***Union Carbide Corporation*** **v.** ***Union of India***, (1989) 3 SCC 38, the Supreme Court described justice and truth to mean the same. The observations of the Supreme Court are as under:

"30. …when one speaks of justice and truth, these words mean the same thing to all men whose judgment is uncommitted. *Of Truth and Justice*, Anatole France said :

> "Truth passes within herself a penetrating force unknown alike to error and falsehood. I say truth and you must understand my meaning. For the beautiful words **Truth and Justice** need not be defined in order to be understood in their true sense. **They bear within them a shining beauty and a heavenly light.** I firmly believe in the triumph of truth and justice. That is what upholds me in times of trial...."

11.4 In ***Mohanlal Shamji Soni* v. *Union of India,*** 1991 Supp (1) SCC 271, the Supreme Court observed that the presiding officer of a Court should not simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost and that there is a legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice.

11.5 In ***Chandra Shashi* v. *Anil Kumar Verma,*** (1995) 1 SCC 421, the Supreme Court observed that to enable the Courts to ward off unjustified interference in their working, those who indulge in immoral acts like perjury, pre-variation and motivated falsehoods have to be appropriately dealt with, without which it would not be possible for any Court to administer justice in the true sense and to the satisfaction of those who approach it in the hope that truth would ultimately prevail. **People would have faith in**

Courts when they would find that truth alone triumphs in Courts.

11.6 In ***A.S. Narayana Deekshitulu* v. *State of A.P.,*** (1996) 9 SCC 548, the Supreme Court observed that from the ancient times, the constitutional system depends on the foundation of truth. The Supreme Court referred to *Upanishads*, *Valmiki Ramayana* and *Rig Veda*.

11.7 In ***Mohan Singh* v. *State of M.P.,*** (1999) 2 SCC 428 the Supreme Court held that **effort should be made to find the truth; this is the very object for which Courts are created.** To search it out, the Court has to remove chaff from the grain. It has to disperse the suspicious, cloud and dust out the smear of dust as all these things clog the very truth. So long chaff, cloud and dust remains, the criminals are clothed with this protective layer to receive the benefit of doubt. **So it is a solemn duty of the Courts, not to merely conclude and leave the case the moment suspicions are created. It is onerous duty of the Court, within permissible limit to find out the truth. It means, on one hand no innocent man should be punished but on the other hand to see no person committing an offence should get scot free. There is no mathematical formula through which the truthfulness of a prosecution or a defence case could be concretised. It would depend on the evidence of each case including the manner of deposition and his demeans, clarity, corroboration of witnesses and overall, the conscience of a judge evoked by the evidence on record. So Courts have to proceed**

further and make genuine efforts within judicial sphere to search out the truth and not stop at the threshold of creation of doubt to confer benefit of doubt.

11.8 In ***Zahira Habibullah Sheikh*** **v.** ***State of Gujarat,*** (2006) 3 SCC 374, the Supreme Court observed that right from the inception of the judicial system it has been accepted that **discovery, vindication and establishment of truth are the main purposes underlying existence of Courts of justice.**

11.9 In ***Himanshu Singh Sabharwal*** **v.** ***State of Madhya Pradesh,*** (2008) 3 SCC 602, the Supreme Court held that the trial should be a search for the truth and not a bout over technicalities. The Supreme Court's observation are as under:

> "5. … 31. In 1846, in a judgment which Lord Chancellor Selborne would later describe as 'one of the ablest judgments of one of the ablest judges who ever sat in this Court', Vice-Chancellor Knight Bruce said [*Pearse* v. *Pearse*, (1846) 1 De G&Sm. 12 : 16 LJ Ch 153 : 63 ER 950 : 18 Digest (Repl.) 91, 748] : (De G&Sm. pp. 28-29):
>
> > "31. The discovery and vindication and establishment of truth are main purposes certainly of the existence of courts of justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination,... **Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much.**
> >
> > xxx xxx xxx

35. Courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice—often referred to as the duty to vindicate and uphold the 'majesty of the law'.

xxx xxx xxx

38. **Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty.**"

(Emphasis Supplied)

11.10 In ***Ritesh Tewari* v. *State of U.P.,*** (2010) 10 SCC 677, the Supreme Court reproduced often quoted quotation: **'Every trial is voyage of discovery in which truth is the quest'**

11.11 In ***Maria Margarida Sequeria Fernandes* v. *Erasmo Jack de Sequeria,*** (2012) 5 SCC 370, the Supreme Court again highlighted the significance of truth and observed that **the truth should be the guiding star in the entire legal process and it is the duty of the Judge to discover truth to do complete justice.** The Supreme Court stressed that **Judge has to play an active role to discover the truth and he should explore all avenues open to him in order to discover the truth**. The Supreme Court observed as under:

"32. In this unfortunate litigation, the Court's serious endeavour has to be to find out where in fact the truth lies.

33. **The truth should be the guiding star in the entire judicial process**.**Truth alone has to be the foundation of justice. The entire judicial system has been created only to discern and find out the real truth. Judges at all levels have to seriously**

engage themselves in the journey of discovering the truth. That is their mandate, obligation and bounden duty. Justice system will acquire credibility only when people will be convinced that justice is based on the foundation of the truth.

xxx xxx xxx

35. What people expect is that the Court should discharge its obligation to find out where in fact the truth lies. Right from inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice.

xxx xxx xxx

52. **Truth is the foundation of justice. It must be the endeavour of all the judicial officers and judges to ascertain truth in every matter and no stone should be left unturned in achieving this object. Courts must give greater emphasis on the veracity of pleadings and documents in order to ascertain the truth.**"

(Emphasis supplied)

11.12 In ***A. Shanmugam* v. *Ariya Kshatriya***, (2012) 6 SCC 430, the Supreme Court held that **the entire journey of a judge is to discern the truth from the pleadings, documents and arguments of the parties. Truth is the basis of justice delivery system**. The Supreme Court laid down the following principles:

"43. On the facts of the present case, following principles emerge:

43.1. **It is the bounden duty of the Court to uphold the truth and do justice.**

43.2. Every litigant is expected to state truth before the law court whether it is pleadings, affidavits or evidence. Dishonest and unscrupulous litigants have no place in law courts.

43.3. The ultimate object of the judicial proceedings is to discern the truth and do justice. It is imperative that pleadings and all other presentations before the court should be truthful.

43.4. Once the court discovers falsehood, concealment, distortion, obstruction or confusion in pleadings and documents, the court should in addition to full restitution impose appropriate costs. The court must ensure that there is no incentive for wrong doer in the temple of justice. **Truth is the foundation of justice and it has to be the common endeavour of all to uphold the truth and no one should be permitted to pollute the stream of justice.**

43.5. It is the bounden obligation of the Court to neutralize any unjust and/or undeserved benefit or advantage obtained by abusing the judicial process."

(Emphasis supplied)

11.13 In ***Ramesh Harijan* v. *State of Uttar Pradesh*,** (2012) 5 SCC 777, the Supreme Court emphasized that it is the duty of the Court to unravel the truth under all circumstances.

11.14 In ***Bhimanna* v. *State of Karnataka*,** (2012) 9 SCC 650, the Supreme Court again stressed that the Court must endeavour to find the truth. The observations of the Supreme Court are as under:

"28. The court must endeavour to find the truth. There would be "failure of justice" not only by unjust conviction but also by acquittal of the guilty, as a result of unjust failure to produce requisite evidence. Of course, the rights of the accused have to be kept in mind and safeguarded but they should not be overemphasised to the extent of forgetting that the victims also have rights."

11.15 In the recent pronouncement in ***Kishore Samrite* v. *State of U.P.*,** MANU/SC/0892/2012, the Supreme Court observed

that truth should become the ideal to inspire the Courts to pursue. This can be achieved by statutorily mandating the Courts to become active seekers of truth. The observations of Supreme Court are as under:

> "31. It has been consistently stated by this Court that the entire journey of a Judge is to discern the truth from the pleadings, documents and arguments of the parties, as truth is the basis of the Justice Delivery System.
>
> 32. With the passage of time, it has been realised that people used to feel proud to tell the truth in the Courts, irrespective of the consequences but that practice no longer proves true, in all cases. The Court does not sit simply as an umpire in a contest between two parties and declare at the end of the combat as to who has won and who has lost but it has a legal duty of its own, independent of parties, to take active role in the proceedings and reach at the truth, which is the foundation of administration of justice. **Therefore, the truth should become the ideal to inspire the courts to pursue.** This can be achieved by statutorily mandating the Courts to become active seekers of truth. To enable the courts to ward off unjustified interference in their working, those who indulge in immoral acts like perjury, prevarication and motivated falsehood, must be appropriately dealt with. The parties must state forthwith sufficient factual details to the extent that it reduces the ability to put forward false and exaggerated claims and a litigant must approach the Court with clean hands. It is the bounden duty of the Court to ensure that dishonesty and any attempt to surpass the legal process must be effectively curbed and the Court must ensure that there is no wrongful, unauthorised or unjust gain to anyone as a result of abuse of the process of the Court. One way to curb this tendency is to impose realistic or punitive costs."
>
> (Emphasis supplied)

11.16 ***Malimath Committee on Judicial Reforms*** discussed the paramount duty of Courts to search for truth. The relevant observations of the Committee are as under:-

> - The Indian ethos accords the highest importance to truth. The motto ***Satyameva Jayate*** (Truth alone succeeds) is inscribed in our National Emblem "Ashoka Sthambha". Our epics extol the virtue of truth.
>
> **-For the common man truth and justice are synonymous. So when truth fails, justice fails**. Those who know that the acquitted accused was in fact the offender, lose faith in the system.
>
> -In practice however we find that the Judge, in his anxiety to demonstrate his neutrality opts to remain passive and truth often becomes a casualty.
>
> -**Truth being the cherished ideal and ethos of India, pursuit of truth should be the guiding star of the Justice System. For justice to be done truth must prevail. It is truth that must protect the innocent and it is truth that must be the basis to punish the guilty**. **Truth is the very soul of justice**. Therefore truth should become the ideal to inspire the courts to pursue.
>
> -Many countries which have Inquisitorial model have inscribed in their Parliamentary Acts a duty to find the truth in the case. In Germany Section 139 of the so called 'Majna Charta', a breach of the Judges' duty to actively discover truth would promulgate a procedural error which may provide grounds for an appeal.
>
> -For Courts of justice there cannot be any better or higher ideal than quest for truth.

12. **What is 'Truth' and how to discover it**

12.1 The next question which arises for consideration is, what is the meaning of Truth and how to discover it. The judgments referred to hereinabove do not contain the answer to these twin questions.

12.2 Eminent scholar Prof. G. Mohan Gopal, former Director, National Judicial Academy, has done remarkable work on the approach of law to truth. He has defined the Law's Truth and has also explained the method of discovering Law's Truth. He has described Law's truth as synonymous with facts established in accordance with the procedure prescribed by law. The existence of facts have to be established strictly on the basis of relevant and admissible evidence, judicial notice and legally permitted presumptions based on reason, rationality and justification. The views of Prof. G. Mohan Gopal in his unpublished article –"Courts and Truth" contain summary of discussions at National Judicial Academy which are reproduced hereunder:-

> "Justice Gajendragadkar, one of India's greatest jurists, says in the 69th Report of the Law Commission of India on the Evidence Act (1977) that ["the judge's] object, above all, is *to find out the truth*…" (para 100.21). The Report adds, "Rules of evidence are intended ultimately to ensure that *truth shall come* before the Court in a manner which secures justice and which is in conformity with the general principles of jurisprudence and the content and spirit of the legal system."(para 100.15). These sentiments are widely echoed in a large number of judgments and also in academic literature on the law.

In the same Report, Justice Gajendragadkar underscores the limitation of the ability of the judicial process in finding the truth. He says, "Rules of evidence, however perfect they may be, *cannot guarantee that truth will be known at the end of the trial*." He says, "The [Evidence] Act recognizes that the *truth need not be pursued at too high a cost*." The caveat that courts cannot guarantee that their decisions will be based on truth is widely shared by judges and academicians.

It should be a matter of concern that, while giving such central importance to the idea of truth, judges have *not* yet articulated clearly their concept of "truth" in their judgments. Nor do statutes give us a definition of truth to be used in the judicial process. In fact, the word "truth" is barely used in statutes. For example, the Evidence Act and the IPC refer to "truth" only in three or four sections, mainly in the context of the obligation of parties/witnesses to say the truth, and as a defence against defamation.

Another source of concern is that judgments erroneously refer to "truth" as if it were an axiomatic, well-understood and commonly accepted concept, whereas "truth" is a highly contested and controversial idea with multiple and diverse definitions that are often mutually opposed.

It is therefore most important to clarify the meaning of "truth" and the method of finding it in the context of judicial proceedings. This is necessary to preserve and strengthen the confidence of people in the judicial system especially because courts are quite explicitly saying (as referred to earlier) that they cannot guarantee that their decisions would be based on the "truth".

What is "truth"? Literally, truth is a quality of trustworthiness/faithfulness and consistency with fact. The contentious part of the concept of truth is the quality of trustworthiness. How is it defined? What is the source of trustworthiness? How is it determined? How is it verified? Clarity on these questions is necessary for any claim based on truth to be accepted.

The issue of "truth" comes up in the judicial process in the following manner. Every law sets out a hypothetical fact pattern, which it may prohibit or permit. It also prescribes consequences should the hypothetical fact pattern occur in real life. For example, the law on murder sets out a prohibited fact pattern: a person (a hypothetical fact) intentionally (a hypothetical fact) kills (a hypothetical fact) another person (a hypothetical fact). It also sets out the consequence of conduct that falls within a prohibited fact pattern –in this case life imprisonment or, in the rarest of rare cases, the death penalty.

The purpose of the judicial process is to determine whether, in truth, the prohibited fact pattern actually occurred in real life, and if so, to assign consequences. In ancient times, evidence could be extracted" in virtually any manner: ritual, religion, ordeal, torture, or confession. Whatever was believed to be true by the judge (or "panchs") was the truth. Law's truth was traditionally "subjective truth", a concept that arbitrarily varied from judge to judge and jury to jury, and was fraught with uncertainty and unpredictability.

A number of factors resulted in the development of a new, more objective approach to the judicial idea of truth. As industrialization, colonialism and a global economy spread in the 19th century, a new goal of the judicial system became predictability, consistency and certainty, irrespective of the judge. This new goal was articulated some 180 years ago by Thomas Macaulay when he told the British House of Commons on 10 July, 1833 that "the objective of codification [of criminal law in India] is to secure "uniformity where you can have it, diversity where you must have it, *but in all cases, certainty*".

There was another important factor that favoured a more objective and less arbitrary approach to the concept of truth – the growth, starting in Europe and the US in the late 18th/19th century, of a jurisprudence of individual rights. Criminal punishment consists of the deprivation of liberty. Therefore *limiting* criminal punishment is one of the most essential pre-requisites for *broadening* individual rights and liberty. A

system that provides for arbitrary criminal punishment based on unguided and subjective belief in undefined concepts of "truth" is a great threat to individual human liberty.

Therefore, a new, more objective concept of "truth" emerged in Indian legislation starting in the 19th century, distinct from the "divine" and "subjective" concepts that had dominated the justice system until then.

The "new" concept was derived from scientific approaches to the discovery of truth. Under this "new" concept, truth was to be discovered by individual judges not from holy books or an inner voice, but from "things" observable and observed by the senses whose existence would be "proved" in an objective and verifiable manner (using approaches borrowed from science). **Under this approach, "fact", proved or established in accordance with the law, became "truth". Through this new approach, "truth" acquired an objective and empirical character that it did not have before. This was a revolutionary and democratic change in the approach of the legal system.**

The "new approach" is set out in the Evidence Act as follows. Section 3 of the Evidence Act says that "fact" means and includes (1) any thing, state of things, or relation of things, capable of being perceived by the senses; and (2) any mental condition of which any person is conscious. In turn, a "thing" may be understood as any occurrence/entity, material or non-material, that exists in human cognition, which is capable of being perceived by human senses (directly or by deduction, for example, when taking cognition of the mental condition of any person).

A fact is said to be *proved* under the Evidence Act (Section 3) "when, *after considering the matters before it*, the *Court* either *believes it to exist*, or considers its existence so probable that a prudent man ought under the circumstances of the particular case, to act upon the supposition that it exists".

The existence of a fact (the "truth") is based on the *belief* of a jury or a judge (now in India, only the judge) in its existence. "Belief" means the "mental acceptance of something as true"(i.e., has the quality of trustworthiness).Belief may be of two kinds: evidence-based or faith-based. Science uses evidence-based belief systems. These systems seek to nullify bias that arises from faith-based and subjective beliefs by following strict procedures of demonstration and verification of evidence. On the other hand, faith-based belief systems do not rely on evidence. They tend to be highly subjective.

The Evidence Act brought in a radical change to the concept of "belief" as the basis of truth applied by Indian courts from *faith-based belief* (as was the case in traditional judicial systems in India) to *evidence-based (scientific) belief.* This change was essential to achieve the then "new" goal of the legal system of consistency, uniformity and certainty, and to reduce arbitrariness. The plain language of the statute clearly supports the view that the nature of belief required by law had been radically changed. The Act requires that the belief of the judge must be based on objective material ("*after considering the matters before it*").

This very important change has, unfortunately however, received very little attention in judgments or academic discourse. As a consequence, many judges and academics appear to still labour under the misunderstanding that the truth to be determined by courts continues to be the subjective belief of each judge based on his/her individual conscience and "trained instinct", inevitably influenced by religious doctrine or traditional belief and varying from one judge to another.

To satisfy the standard of belief required under the Evidence Act, a Court should come to evidence-based belief through *reasoning and rationality*. *Reasoning* is a process of structured thinking. Rationality provides a clear objective for reasoned thought. The belief must be *justified*. Justification is a process of ensuring that the

process and content of reasoning meets an adequate standard, which is objective and not subjective.

Reasoning should be based on *common principles and methods* by which the Court *considers* the matters before it. The use of common methods and principles for determining the existence of facts is required, across all fact-finders. Examples of such common approaches are found for example in model instructions given to juries (see, for example, model instructions to be given to juries by Massachusetts judges).

"Law's Truth" is derived from developments in scientific reasoning. It is a unique and distinct idea of truth, entirely different from "God's Truth" (the "absolute" truth), or "Subjective Truth". It is anchored in the concept of "fact". It is to be derived through well-defined processes of reasoning. Its purpose is to establish the existence, non-existence, nature or extent of right, liability or disability under law, *not* to establish either "God's Truth" (the absolute truth) or "Subjective Truth".

This approach of law of *equating truth with fact established through law* is consistent with some of the most widely accepted philosophical definitions of truth. For example, under the "correspondence theory" of truth a proposition is true if it *corresponds* to facts. The identity theory of truth says that a true proposition is *identical* to a fact. It has been pointed out that under the correspondence theory, "truth is a content-to-world or word-to-world relation: what we say or think is true or false depending on the way the world turns out to be". Another theory of truth that links the idea of truth to facts is the "coherence" theory. Aristotle's *Metaphysics* says, "to say of what is *that it is*, or of what is not *that it is not*, *is true*". 'What is' and 'what is not' is a fact.

The advantage of the reasoned and rational approach to fact finding (as against subjective approaches) is that "judicial error" will be limited to use and application of accepted methodologies and standards (which can be debated and discussed objectively). Reversals of finding of fact by superior

courts can and must be justified on the basis of lack of objectivity in the courts below and their failure to follow required methods of reasoning and rationality, rather than by the substitution of the subjective judgment of judges of lower courts by the subjective judgment of judges of higher courts.

The following conclusions emerge from the above:
(1) The law's approach to truth is to be distinguished form the approach of religion, spirituality and subjective ideas of truth.
(2) For the judicial system, truth is nothing more than fact established in accordance with procedures prescribed by law.
(3) The purpose of judicial inquiry is to establish the existence of facts through reasoning and rationality and in accordance with law, not to establish the truth in the absolute, divine or subjective sense.
(4) Facts are proved through lawfully prescribed methods and standards.
(5) The belief of Courts that facts exist must be based on reason, rationality and justification, strictly on the basis of relevant and admissible evidence, judicial notice or legally permitted presumptions. It must be based on a prescribed methodology of proof. It must be objective and verifiable."

(Emphasis Supplied)

12.3 This Court has gone through various articles to find out further clarity on 'truth'. The views expressed are divergent and do not add to the clarity of the thought as expressed by Prof. Mohan Gopal and therefore, the same are not extracted herein. However, the list of the articles are noted for future reference which is as under:

Allen, Ronald J., *Common Sense, Rationality and the Legal Process*, 22 Cardozo Law Review 1417 (2000-2001); *Ayer*, A.J., *Language, Truth and Logic*, Penguin Books, London, 2001;

Bhushan J., Ashok, *Values of Ethics in Dispensation of Justice*, AIR 2010 Jour 1; *Bingham,* Lisa Blomgren, *When We Hold No Truths to be Self-Evident: Truth, Belief, Trust and the Decline in Trials*, 2006 The University of Missouri Journal of Dispute Resolution 131; *Feigenson*, Neal, *Law's Common Senses*, 30 Quinnipiac Law Review 459 (2011-2012); *Fernandez*, Joseph M, *An Exploration of the Meaning of Truth in Philosophy and Law*, 11 The University of Notre Dame Australia Law Review 53 (2009); *Haack*, Susan, The Whole Truth and Nothing but the Truth, University of Miami School of Law; *Kelsen*, Hans, *What is Justice, What Is Justice: Justice, Law, and Politics in the Mirror of Science Collected Essays*, The Lawbook Exchange, Ltd., New Jersey, 2000; *Lord Brooke* J, Access to Justice and Judicial Review, Judicial Review, 11 (1), 2006 (March): p.1.; *Marshall*, William P., *In Defense of the Search for Truth as a First Amendment Justification*, 30 Georgia Law Review 1 (1995-1996); *Richard* H., *Common Sense and Fact- Finding: Cultural Reason in Judicial Decisions*, 19 Legal Studies Forum 119 (1995); *Riga,* Peter J., *The Nature of Truth and Dissent*, 40 The American Journal Jurisprudence 71 (1995); *Schmeiser* , D.A., *Common Sense and the Law*, 26 The Saskatchewan Bar Review & Law Society's Gazette 101 (1961); *Steffen*, Thomas L., *Truth as Second Fiddle: Reevaluating the Place of Truth in the Adversarial Trial Ensemble*, 1988 Utah Law Review 799 and *Zukeran*, Patrick, '*Truth:Absolute or Relative?*

12.4 Indian Evidence Act does not define 'truth'. It defines what facts are relevant and admissible; and how to prove them. The *proviso* to Section 165 provides that the judgment must be based on duly proved relevant facts. Sections 3, 114 and 165 of the Indian Evidence Act lay down the important principles to aid the Court in its quest for duly proved relevant facts and the same are discussed hereunder.

13. **Section 3 of the Indian Evidence Act, 1872**

13.1 **Proof** : A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. "Evidence" of a fact and "proof" of a fact are not synonymous terms. "Proof", in the strict sense, means the effect of evidence.

13.2 Section 3 defines the expressions 'proved', 'disproved', and 'not proved' as under:-

> **"Proved"** – A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.
>
> **"Disproved"** – A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.
>
> **"Not proved"** – A fact is said not to be proved when it is neither proved nor disproved.

13.3 **Meaning of term "the matters before it"**

The expression "**the matters before it**" in the definition of "proof" are wide enough to cover matters which are not "evidence" as defined in the Act. For instance, a fact may be orally admitted in the Court. The admission would not come within the definition of the word 'evidence' as given in this Act, but still it is a matter

which the Court would have to take into consideration in order to determine whether the particular fact was proved or not. The Court is thus entitled to take into consideration all the matters before it which shall include the statement of the witnesses, admissions of the parties, confession of the accused, documents proved in evidence, judicial notice, demeanour of witnesses, local inspections and presumptions.

13.4 **Meaning of term "believes it to exist"**

The expression "believes" in the definition of "proof" is a "judicial belief" of the Judge based on logical/rational thinking and power of reason, and the Court is required to give reasons for the belief. The reasons are live links between the mind of the decision maker and the belief formed. Reasons convey judicial idea in words and sentences. Reasons are rational explanation of the conclusion. Reasons are the very life of law. It is the heart beat of every belief and without it, law becomes lifeless. Reasons also ensure transparency and fairness in the decision making process. The reasons substitute subjectivity by objectivity. Recording of reasons also acts as a vital restraint on possible arbitrary use of the judicial power. The recording of reasons serve the following four purposes:-

- To clarify the thought process.
- To explain the decision to the parties.
- To communicate the reasons to the public.
- To provide the reasons for an appellate Court to consider.

Non-recording of reasons would cause prejudice to the litigant who would be unable to know the ground which weighed with the Court and also cause impediment in his taking adequate grounds before the appellate Court in the event of challenge.

13.5 **Nothing can be said to be "proved", however much material there may be available, until the Court believes the fact to exist or considers its existence so probable that a prudent man will act under the supposition that it exists.** For example, ten witnesses may say that they saw the sun rising from the West and all the witnesses may withstand the cross-examination, the Court would not believe it to be true being against the law of nature and, therefore, the fact is 'disproved'. In mathematical terms, the entire evidence is multiplied with zero and, therefore, it is not required to be put on judicial scales. Where the Court believes the case of both the parties, their respective case is to be put on judicial scales to apply the test of preponderance.

13.6 Section 3 of the Indian Evidence Act refers to the degree of certainty which is required to treat fact as proved and is so worded to provide for two conditions of mind; first, that in which a man feels absolutely certain of a fact, in other words, "believes it to exist", and second, that in which, though he may not feel absolutely certain of a fact, he thinks it so extremely probable that a prudent man would, under the circumstances, act on assumption of its existence.

13.7 The test of whether a fact is proved is such degree of probability as would satisfy the mind of a reasonable man as to its existence. The standard of certainty required is that of a prudent man. Except where artificial probative value is assigned to certain facts by presumptions, the Act affords no guidance on the question whether one fact is or is not sufficient to prove another fact. On this point, the Judge like a prudent man has to use its own judgment and experience and cannot be bound by any rule except his own judicial discretion. No hard and fast rule can be laid down as to what inference can be drawn from certain circumstances. The cumulative effect of all the circumstances established by evidence and the nature of these circumstances has to be taken into consideration.

13.8 The rules of evidence may provide tests, the value of which has been proved by long experience, by which Judges may be satisfied that the quality of the material upon which their judgments are to proceed is not open to certain obvious objections; but they do not profess to enable the Judges to know whether or not a particular witness tells the truth or what inference is to be drawn from a particular fact. The correctness with which this is done must depend upon the natural sagacity, the logical power, and the practical experience of the Judge and not only upon his acquaintance with the law of evidence.

13.9 Cross-examination supplies a test to a certain extent, but those who have seen most of its application will be disposed to

trust at least as a proof that a man is not shaken by it, ought to be believed. A cool, steady liar who happens not to be open to contradiction will baffle the most skilful cross-examiner in the absence of accidents, which are not so common in practice as persons who take their notions on the subject from anecdotes or fiction would suppose.

13.10 The grounds for believing or disbelieving statements made by people can be brought under following three heads; namely those which affect the power of the witness to speak the truth; those which affect his will to do so ; and those which arise from the nature of the statement itself and from surrounding circumstances:-

13.10.1 Power - A man's power to speak the truth depends upon his knowledge and his power of expression. His knowledge depends partly on his accuracy in observation, partly on his memory, partly on his presence of mind; his power of expression depends upon an infinite number of circumstances, and varies in relation to the subject on which he has to speak.

13.10.2 Will - A man's will to speak the truth depends upon his education, his character, his courage, his sense of duty, his relation to the particular facts as to which he is to testify and a thousand other circumstances, as to the presence or absence of which in any particular case it is often difficult to form a true opinion.

13.10.3 Probability of Statement - The third set of reasons is those which depend upon the probability of the statement.

13.11 All events are connected to each other as cause and effect. The connection may be traced in either direction, from effect to cause or from cause to effect; and if these two words were taken in their widest acceptation it would be correct to say that when any theory has been formed which alleges the existence of any fact, all facts are relevant which, if that theory was true, would stand to the fact alleged to exist either in the relation of cause or in the relation of effect.

13.12 ***M. Monir,* J**. in his commentary ***Principles and Digest of the Law of Evidence, 13th Edition***, opined that no rule of evidence can guide a judge on the fundamental question whether the evidence as to the relevant facts should be believed or not. He observed that the best guide of a judge is to ascertain the truth by his own common sense and experience of human nature. The observations of the author are reproduced hereunder:

> "…There is in almost every trial the question whether evidence as to a fact should be believed or not, and if believed what is its effect on the main question. Does this elaborately framed Code of the Law of Evidence give any assistance to the Judge on this question? The answer, of course, must be in the negative. First, however carefully and with whatever detail the rules of relevancy may be framed, **no rule of evidence can guide the Judge on the fundamental question whether evidence as to a relevant fact should be believed or not. Secondly, assuming that the Judge believes very few cases, guide him on the question what inference he should draw from it as to assist a Judge in the very**

smallest degree in determining the master question of the whole subject – whether and how far he ought to believe what the witnesses say? Again, rules of evidence are not, and do not profess to be, rules of logic. They throw no inference ought the Judge to draw from the facts in which, after considering the statements made to him, he believes. In every judicial proceeding whatever these two questions – Is this true, and, if it is true what then? - ought to be constantly present to the mind of the Judge, and it must be admitted, both that the rules of evidence do not throw the smallest portion of light upon them and that persons who are absolutely ignorant of those rules may give a much better answer to each of these questions than men to whom every rule of evidence is perfectly familiar. The best shoes in the world will not make a man walk, nor will the best glasses make him see; and in just the same way, the best rules of evidence will not supply the place of natural sagacity or of a taste for and training in logic.

The first of these questions, viz., whether a witness should or should not be believed is one peculiar difficulty owing to the perjury that pervades the atmosphere of law Courts in this country. What is the Judge to do where, as it came to the experience of the writer, in answer to true charge of murder the accused is able to support a plea of alibi by proof of an actual conviction of an offence of cattle-lifting alleged to have been committed by him at the time of murder at a place not connected by rail, fifty miles away from the place of murder, and witnesses are prepared to swear to the arrest of the accused and his detention in custody at and since the alleged time of the murder? In another case of murder, the writer again speaks from experience, a conviction of an offence under the Motor Vehicles Act said to have been committed at a place some 200 miles away from the place of murder, where it was physically impossible for the accused to be after committing the murder, was given in evidence, and though the murder resulted in conviction, the difficulty of the Court in coming to a decision to convict can well be judged. Questions of this nature can never be solved by any artificial

rules of evidence, and the best guide of the Judge on such questions is his own common sense and experience of human nature. Again, though the law may declare that a certain fact may be given in evidence to prove another fact, it is impossible for the law to say, except in very rare cases, that the Judge should consider the latter fact to be proved on proof of the former fact. No rules of law can impart to the Judge a knowledge of the ordinary rules of ratiocination, and here again the accuracy of his decision will depend upon his general education, on the development of his intellectual faculties, and his experience of men and the world."

(Emphasis supplied)

13.13 The relevant judgments relating to Section 3 are as under:-

13.13.1 In ***Garib Singh* v. *State of Punjab***, 1972 (3) SCC 418, the Supreme Court approved the following tests laid down by the Himachal Pradesh High Court in *Chet Ram* v. *State*, (1971) 1 Sim LJ 153, 157:

"8. …Courts, in search of the core of truth, have to beware of being misled by half truths or individually defective pieces of evidence. Firstly, undeniable facts and circumstances should be examined. Secondly, the pattern of the case thus revealed, in the context of a whole sequence of proved facts, must be scrutinized to determine whether a natural, or probable and, therefore, a credible course of events is disclosed. Thirdly, the minutes of evidence, including established discrepancies, should be put in the crucible of the whole context of an alleged crime or occurrence and tested, particularly with reference to the proved circumstances which generally provide a more reliable indication of truth than the faulty human testimony, so that the process of separating the grain from the chaff may take place. Fourthly, in arriving at an assessment of credibility of individual

witnesses, regard must be had to the possible motives for either deliberate mendacity or subconscious bias. Lastly, the demeanour and bearing of a witness in Court should be carefully noticed and an appellate Court should remember that a trial Court has had, in this respect, an advantage which it does not possess."

(Emphasis supplied)

13.13.2 In ***M. Narsinga Rao* v. *State of Andhra Pradesh***, (2001) 1 SCC 691, the Supreme Court held as under:

"15. The word "proof" need be understood in the sense in which it is defined in the Evidence Act because proof depends upon the admissibility of evidence. A fact is said to be proved when, after considering the matters before it, the court either believes it to exist, or consider its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. This is the definition given for the word "proved" in the Evidence Act. What is required is production of such materials on which the court can reasonably act to reach the supposition that a fact exists. Proof of the fact depends upon the degree of probability of its having existed. The standard required for reaching the supposition is that of a prudent man acting in any important matter concerning him. Fletcher Moulton L.J. in *Hawkins* v. *Powells Tillery Steam Coal Co.Ltd.,* (1911) 1 K.B. 988 observed like this:

> 'Proof does not mean proof to rigid mathematical demonstration, because that is impossible; it must mean such evidence as would induce a reasonable man to come to a particular conclusion.'

16. **The said observation has stood the test of time and can now be followed as the standard of proof. In reaching the conclusion the court can use the process of inferences to be drawn from facts produced or proved. Such inferences**

are akin to presumptions in law. Law gives absolute discretion to the court to presume the existence of any fact which it thinks likely to have happened. In that process the court may have regard to common course of natural events, human conduct, public or private business vis-a-vis the facts of the particular case. The discretion is clearly envisaged in Section 114 of the Evidence Act."

(Emphasis supplied)

13.13.3 In ***R. Puthunainar Alhithan*** **v.** ***P.H. Pandian,*** (1996) 3 SCC 624, the Supreme Court held that an inference from the proved facts must be so probable that if the Court believes, from the proved facts, that the facts do exist, it must be held that the fact has been proved. The inference of proof of that fact could be drawn from the given objective facts, direct or circumstantial.

13.13.4 In ***Vijayee Singh*** **v.** ***State of U.P***, (1990) 3 SCC 190, the Supreme Court explained the principle of Section 3 as under:

"28. ...Section 3 while explaining the meaning of the words "proved", "disproved" and "not proved" lays down the standard of proof, namely, about the existence or non-existence of the circumstances from the point of view of a prudent man. The Section is so worded as to provide for two conditions of mind, first, that in which a man feels absolutely certain of a fact, in other words, "believe it to exist" and secondly in which though he may not feel absolutely certain of a fact, he thinks it so extremely probable that a prudent man would under the circumstances act on the assumption of its existence. The Act while adopting the requirement of the prudent man as an appropriate concrete standard by which to measure proof at the same time contemplates of giving full effect to be given to circumstances or condition of probability

or improbability. It is this degree of certainty to be arrived where the circumstances before a fact can be said to be proved. A fact is said to be disproved when the Court believes that it does not exist or considers its non-existence so probable in the view of a prudent man and now we come to the third stage where in the view of a prudent man the fact is not proved i.e. neither proved nor disproved. **It is this doubt which occurs to a reasonable man, has legal recognition in the field of criminal disputes. It is something different from moral conviction and it is also different from a suspicion. It is the result of a process of keen examination of the entire material on record by a prudent man.**"

(Emphasis supplied)

13.13.5 In ***State of U.P.*** **v.** ***M.K. Anthony,*** (1985) 1 SCC 505, the Supreme Court held that the approach of the Court should be to find out whether the evidence of a witness has a ring of truth. The Supreme Court held as under:-

"10. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief..."

(Emphasis supplied)

13.13.6 In ***Bundhoo Lall*** **v.** ***Joy Coomar***, MANU/WB/ 0198/1882, the Calcutta High Court explained the intention of the

Legislature in using the words "matters before it" instead of "evidence" in Section 3 as under:

> "12. It would appear, therefore, that the Legislature intentionally refrained from using the word "evidence" in this definition, but used instead the words, "matters before it." For instance, a fact may be orally admitted in Court. The admission would not come within the definition of the word evidence as given in this Act, but still it is a matter which the Court before whom the admission was made would have to take into consideration in order to determine whether the particular fact was proved or not."

13.13.7 In ***Johnson Scaria* v. *State of Kerala***, MANU/KE /0367/2006, the Kerala High Court held that the use of presumptions and the doctrine of burden of proof are certainly of crucial assistance in the adjudication of guilt. Who will fail if a fact is not established? Who will fail if the presumption is not drawn? Who will suffer if the presumption once drawn is not rebutted? These questions will certainly have to be considered in the factual scenario in each case. The Court summarised the law on this aspect as under:

> "27. …The expression 'proved' is defined Under Section 3 of the Indian Evidence Act and that definition applies to civil and criminal cases. Any 'prudent man' whose standards the courts are under Section 3 of the Evidence Act directed to follow, shall and the court must hence, insist on a higher degree of probability, in a criminal case (where the consequence of deprivation of life, liberty and property ensues) before the prosecutor's burden is held to be discharged. This and this alone is directed by law by the

axiomatic insistence on proof beyond doubt - which is at times romanticised and called proof beyond reasonable doubt and proof beyond the shadow of a reasonable doubt. The purpose of such insistence is only to caution courts that they must be able to enter a conclusion of guilt "without hesitation" on the materials available."

13.13.8 In ***Bipin Kumar Mondal* v. *State of West Bengal,*** (2010) 12 SCC 91, the Supreme Court observed as under:

"31. …In fact, it is not the number, the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy, or otherwise."

13.14 The Model Civil Jury instructions in USA and Canada contain important guidelines for appreciation of evidence by the Jury. The same are reproduced as under:-

13.14.1 **Civil Jury Instructions for the District Courts of Philadelphia, United States (2010).**

"1.5 Preliminary Instructions — Evidence

You should use your common sense in weighing the evidence. Consider it in light of your everyday experience with people and events, and give it whatever weight you believe it deserves. If your experience tells you that certain evidence reasonably leads to a conclusion, you are free to reach that conclusion."

xxx xxx xxx

"1.11 Preliminary Instructions — Clear and Convincing Evidence

Clear and convincing evidence is evidence that produces in your mind a firm belief or conviction that the allegations

sought to be proved by the evidence are true. Clear and convincing evidence involves a higher degree of persuasion than is necessary to meet the preponderance of the evidence standard. But it does not require proof beyond a reasonable doubt, the standard applied in criminal cases."

13.14.2 **Federal Civil Jury Instructions, State of Chicago, United States (2013).**

"1.11 Weighing the Evidence

You should use common sense in weighing the evidence and consider the evidence in light of your own observations in life.

In our lives, we often look at one fact and conclude from it that another fact exists. In law we call this "inference." A jury is allowed to make reasonable inferences. Any inference you make must be reasonable and must be based on the evidence in the case."

xxx xxx xxx

"1.13 Testimony of Witnesses (Deciding What to Believe)

You must decide whether the testimony of each of the witnesses is truthful and accurate, in part, in whole, or not at all. You also must decide what weight, if any, you give to the testimony of each witness. In evaluating the testimony of any witness, [including any party to the case,] you may consider, among other things:

- the ability and opportunity the witness had to see, hear, or know the things that the witness testified about;
- the witness's memory;
- any interest, bias, or prejudice the witness may have;
- the witness's intelligence;
- the manner of the witness while testifying;
- [the witness's age];
- the reasonableness of the witness's testimony in light of all the evidence in the case."

13.14.3 **Civil Jury Instructions, State of Connecticut, United States (2008).**

"2.5-1 Credibility of Witnesses

The credibility of witnesses and the weight to be given to their testimony are matters for you as jurors to determine. However, there are some principles that you should keep in mind. No fact is, of course, to be determined merely by the number of witnesses who testify for or against it; it is the quality and not the quantity of testimony that controls. In weighing the testimony of each witness you should consider the witness's appearance on the stand and whether the witness has an interest of whatever sort in the outcome of the trial. You should consider a witness's opportunity and ability to observe facts correctly and to remember them truly and accurately, and you should test the evidence each witness gives you by your own knowledge of human nature and the motives that influence and control human actions. You may consider the reasonableness of what the witness says and the consistency or inconsistency of (his/her) testimony. You may consider (his/her) testimony in relation to facts that you find to have been otherwise proven. You may believe all of what a witness tells you, some of what a witness tells you, or none of what a particular witness tells you. You need not believe any particular number of witnesses and you may reject uncontradicted testimony if you find it reasonable to do so. In short, you are to apply the same considerations and use the same sound judgment and common sense that you use for questions of truth and veracity in your daily life."

13.14.4 **Civil Jury Instructions, Canadian Judicial Council (2012).**

"9.4 Assessment of Evidence

[1] To make your decision, you should consider carefully, and with an open mind, all the evidence presented during the trial. It will be up to you to decide how much or little of the testimony of any witness you will believe or rely on. You may believe some, none or all of the evidence given by a witness.

[2] When you go to the jury room to consider the case, use your collective common sense to decide whether the witnesses know what they are talking about and whether they are telling the truth. There is no magic formula for deciding how much or how little to believe of a witness's testimony or how much to rely on it in deciding this case. But here are a few questions you might keep in mind during your discussions.

[3] Did the witness seem honest? Is there any reason why the witness would not be telling the truth?

[4] Does the witness have any reason to give evidence that is more favourable to one side than to the other?

[5] Was the witness in a position to make accurate and complete observations about the event? Did s/he have a good opportunity to do so? What were the circumstances in which the observation was made? What was the condition of the witness? Was the event itself unusual or routine?

[6] Did the witness seem to have a good memory? Does the witness have any reason to remember the things about which s/he testified? Did any inability or difficulty that the witness had in remembering events seem genuine, or did it seem made up as an excuse to avoid answering questions?

[7] Did the witness seem to be reporting to you what he or she saw or heard, or simply putting together an account based on information obtained from other sources, rather than personal observation?

[8] Did the witness's testimony seem reasonable and consistent? Is it similar to or different from what other witnesses said about the same events? Did the witness say or do something different on an earlier occasion?

[9] Do any inconsistencies in the witness's evidence make the main points of the testimony more or less believable and reliable? Is the inconsistency about something important, or a minor detail? Does it seem like an honest mistake? Is it a deliberate lie? Is the inconsistency because the witness said something different, or because s/he failed to mention

something? Is there any explanation for it? Does the explanation make sense?

[10] What was the witness's manner when he or she testified? Do not jump to conclusions, however, based entirely on how a witness has testified. Looks can be deceiving. Giving evidence in a trial is not a common experience for many witnesses. People react and appear differently. Witnesses come from different backgrounds. They have different abilities, values and life experiences. There are simply too many variables to make the manner in which a witness testifies the only or most important factor in your decision.

[11] These are only some of the factors that you might keep in mind when you go to your jury-room to make your decision. These factors might help you decide how much or little of a witness's evidence you will believe or rely on. You may consider other factors as well.

[12] In making your decision, do not consider only the testimony of the witnesses. Take into account, as well, any exhibits that have been filed and decide how much or little you will rely on them to help you decide this case. I will be telling (or, have already told) you about how you use admissions in making your decision."

14. **Section 114 of the Indian Evidence Act, 1872**

14.1 Section 114 of the Indian Evidence Act deals with the rebuttable presumptions. Section 114 recognizes the general power of the Court to raise inferences as to the existence or non-existence of unknown facts on proof or admission of other facts. The source of such presumptions is the common course of natural events, human conduct and public or private business, and the Section proceeds on the assumption that just as in nature, there prevails a fixed order of things, so the volitional acts of men placed in similar circumstances exhibits, on the whole, a distinct uniformity which is

traceable to the impulses of human nature, customs and habits of society.

14.2 Section 114 of the Indian Evidence Act is reproduced hereunder:

> "**Section 114. Court may presume existence of certain facts.–**
>
> The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

14.3 The Section merely states the principle, and the several illustrations appended to it are taken from the important presumptions relating to innocence, regularity and continuity, which were recognized at common law. The illustrations are by no means exhaustive; nor are the presumptions illustrated therein obligatory in the sense that the Court must raise them or conclusive in the sense that no evidence in rebuttal is admissible. The illustrations to Section 114 provide that the Court "may presume" the following facts:-

> "(a) That a man who is in possession of stolen goods after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;
>
> (b) That an accomplice is unworthy of credit, unless he is corroborated in material particular;
>
> (c) That a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration;
>
> (d) That a thing or state of things which has been shown to be in existence within a period shorter than that within which

such things or state of things usually cease to exist, is still in existence;

(e) That judicial and official acts have been regularly performed;

(f) That the common course of business had been followed in particular cases;

(g) That evidence which could be and is not produced would, if produced be unfavourable to the person who withholds it;

(h) That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him;

(i) That when a document creating an obligation is in the hands of the obligor, the obligation has been discharged."

14.4 The above illustrations are followed by the following caveat:-

"The Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it."

The above caveat is illustrated by following explanatory comments which can be conveniently called "counter illustrations":-

"As to illustration (a)—A shop-keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business;"

"As to illustration (b)—A, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself;"

"As to illustration (b)—A crime is committed by several persons. A, B and C, three of the criminals, are captured on

the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable;"

"As to illustration (c)—A, the drawer of a bill of exchange, was a man of business. B, the acceptor, was young and ignorant person, completely under A's influence;"

"As to illustration (d)—It is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course;"

"As to illustration (e)—A judicial act, the regularity of which is in question, was performed under exceptional circumstances;"

"As to illustration (f)—The question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances;"

"As to illustration (g)—A man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family;"

"As to illustration (h)—A man refuses to answer a question which he is not by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked;"

"As to illustration (i)—A bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it."

14.5 **Sir James Fitzjames Stephen**, while introducing the Bill relating to the Indian Evidence Act, stated, in regard to Section 114 as follows:-

"The effect of this provision is to make it perfectly clear that **Courts of Justice are to use their own common sense and experience in judging the effect of particular facts, and**

that they are to be subject to no particular rules whatever on the subject."

(Emphasis supplied)

14.6 Section 114 uses the words 'may presume'. Thus, it is for the Court to raise the presumption or not. The presumption, even if drawn, is rebuttable. Once a presumption is satisfactorily rebutted, it simply vanishes. It cannot come back once again. In ***Mackowik* v. *Kansas City St. James & CBR Co.,*** 94. S.W. 256, 262 = 196 MO. 550, ***Lamm,* J.** observed that "presumptions are like bats, flitting in the twilight but disappearing in the sunshine of facts"

14.7 The word 'common course' in Section 114 qualifies not only natural events but also the words 'human conduct' and 'public and private businesses'. As to what is 'common course of natural events, human conduct and public and private business' depends upon the common sense of the Judge acquired from experience of worldly and human affairs.

14.8 The subject of presumptions is closely allied to the subject of burden of proof. All rules relating to burden of proof may be stated in terms of presumptions, and all presumptions may be stated in terms of rules of burden of proof. When the burden of proof of a fact is on a party, it may be said that there is a presumption as to the non-existence of that fact and where there is a presumption as to the existence of a fact, the burden of proving the non-existence of that fact is on the party who asserts its non-existence. When a presumption operates in favour of a party, the

burden of proof is on the opponent, and when the burden of proof is on a party, there is a presumption operating in favour of the opponent. In other systems of evidence, several rules which occur in the Act as rules of burden of proof are stated in the form of presumptions, whereas several other rules which are stated in the Act in the form of presumptions occur in other systems as rules of burden of proof.

14.9 The grounds of sources of presumptions of fact are obviously innumerable, they are co-extensive with the facts, both physical and psychological, which may under any circumstances whatever becomes evidentiary in Courts; but, in a general view, such presumptions may be said to relate to things, persons, and the acts and thoughts of intelligent agents. With respect to the first of these it is an established principle that conformity with the ordinary course of nature ought always to be presumed. Thus, the order and changes of the seasons, the rising setting and course of the heavenly bodies, and the known properties of matter, give rise to very important presumptions relative to physical facts or things. The same rule extends to persons. Thus, the absence of those natural qualities, power and faculties which are incident to the human race in general will never be presumed in any individual; such as the impossibility of living long without food, the possession of the reasoning faculties, the common and ordinary understanding of man etc. To this head are reducible the presumptions relating to the duration of human life, the time of gestation, etc. Under the third class – namely, the acts and thought

of intelligent agents – come among others, all psychological facts; and the most important inference are drawn from the ordinary conduct of mankind, and the natural feelings or impulses of human nature. Thus, no man will ever be presumed to throw away his property, as for instance, by paying money not due; and so it is a maxim that everyone must be taken to love his own offspring more than that of another person.

14.10 Presumptions of fact are always rebuttable. In other words, the party against which a presumption may operate can and must lead evidence to show why the presumption should not be given effect to. If, for example, the party which initiates a proceeding or comes with a case to Court offers no evidence to support it, the presumption is that such evidence does not exist. And if some evidence is shown to exist on a question in issue, but the party which has it within its power, does not produce it, despite notice to it to do so, the natural presumption is that it would, if produced, have gone against it. Similarly, a presumption arises from failure to discharge a special or particular onus.

14.11 The Judge has to call in aid not only his training and wisdom but also the experience of life to adjudge which set of evidence is more probable and which evidence is to be believed. The Judge decides who is to be believed and how much and if not, why so. He also visualises what, in ordinary course, should have been the evidence but was not produced, wherefore an adverse inference ought to be drawn.

14.12 The presentation of evidence and the inferences that flow from it are placed by the Judge in his (judicial) scales. The task of a Judge is to first assess the weight of the evidence including presumptions, and then place it into the respective pan (scale) hanging from the two ends of the equal arm of judicial balance.

14.13 The relevant judgments relating to Section 114 of the Indian Evidence Act are as under:

14.13.1 In ***Izhar Ahmad Khan* v. *Union of India***, AIR 1962 SC 1052, the Supreme Court defined presumptions to be an inference, affirmative or disaffirmative of the truth of falsehood of a doubtful fact or proposition drawn by a process of probable reasoning from something proved or taken for granted.

14.13.2 In ***Garib Singh* v. *State of Punjab***, (1972) 3 SCC 418, the Supreme Court held that the standards employed in judging each version are those of a reasonable and prudent man.

14.13.3 In ***Kali Ram* v. *State of Himachal Pradesh***, (1973) 2 SCC 808, the Supreme Court held that **the illustrations to Section 114, though taken from different spheres of human activity, are not exhaustive. They are based upon human experience and have to be applied in the context of the facts of each case. The illustrations are merely examples of circumstances in which certain presumptions may be made. Other presumptions of a similar kind in similar circumstances can be made under the provisions of the section itself.** Whether or not a presumption can

be drawn under the section in a particular case depends ultimately upon the facts and circumstances of each case. No hard and fast rule can be laid down. Human behaviour is so complex that room must be left for play in the joints. It is not possible to formulate a series of exact propositions and con-flue human behaviour within straitjackets. The raw material here is far too complex to be susceptible of precise and exact propositions for exactness here is a fake.

14.13.4 ***Krishna Iyer*, J.** in ***Tukaram Ganpat Pandare* v. *State of Maharashtra***, (1974) 4 SCC 544 held that **Section 114 of the Evidence Act enables the Court to use common sense as judicial tool. Section 114 thus is a useful device to aid the Court in its quest for truth.** While care and caution need to be exercised in drawing any presumption under Section 114, its scope is wide and it has the potential to lend a helping hand in myriad situations.

14.13.5 In ***Narayan Govind Gavate* v. *State of Maharashtra***, (1977) 1 SCC 133, the Supreme Court held that **function of a presumption is to fill a gap in evidence**. Section 114 of the Evidence Act covers a wide range of **presumptions of fact which can be used by Courts in the course of administration of justice to remove lacunae in the chain of direct evidence before it.**

14.13.6 In ***Syad Akbar* v. *State of Karnataka***, (1980) 1 SCC 30, the Supreme Court held that presumptions are inferences of certain fact patterns drawn from the experience and observation of

the common course of nature, the constitution of the human mind, the springs of human action, the usages and habits of society and ordinary course of human affairs.

14.13.7 In ***Sodhi Transport Co.*** **v.** ***State of U.P.***, (1986) 2 SCC 486, the Supreme Court held that the rules of presumption are deduced from enlightened human knowledge and experience and are drawn from the connection, relation and coincidence of facts, and circumstances.

14.13.8 In ***State of W.B.*** **v.** ***Mir Mohammad Omar***, (2000) 8 SCC 382, the Supreme Court held that presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. **Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts.** When inferring the existence of a fact from other set of proved facts, the Court exercises a process of reasoning and reaches a logical conclusion as the most probable position. Section 114 empowers the Court to presume the existence of any fact which it thinks likely to have happened. In that process, the Court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case.

14.13.9 In ***M. Narsinga Rao*** **v.** ***State of Andhra Pradesh***, (2001) 1 SCC 691, the Supreme Court held that presumption is an inference of a certain fact drawn from other proved facts. While inferring the existence of a fact from another, the Court is only

applying a process of intelligent reasoning which the mind of a prudent man would do under similar circumstances. Presumption is not the final conclusion to be drawn from other facts. But it could as well be final if it remains undisturbed later. **Presumption in Law of Evidence is a rule indicating the stage of shifting the burden of proof. From a certain fact or facts the Court can draw an inference and that would remain until such inference is either disproved or dispelled.**

14.13.10 In ***Limbaji* v. *State of Maharashtra***, (2001) 10 SCC 340, the Supreme Court held that **a presumption of fact is a type of circumstantial evidence which in the absence of direct evidence becomes a valuable tool in the hands of the Court to reach the truth without unduly diluting the presumption in favour of the innocence of the accused which is the foundation of our criminal law. It is an inference of fact drawn from another proved fact taking due note of common experience and common course of events. Section 114 of the Evidence Act shows the way to the Court in its endeavour to discern the truth and to arrive at a finding with reasonable certainty.** The Supreme Court further held that having due regard to the germane considerations set out in the section, certain presumptions which the Court can draw are illustratively set out. They are not exhaustive or comprehensive. The presumption under Section 114 is, of course, rebuttable. When once the presumption is drawn, the duty of producing evidence to the *contra* so as to rebut the presumption is cast on the party who is subjected to the rigour of

that presumption. Before drawing the presumption as to the existence of a fact on which there is no direct evidence, the facts of the particular case should remain uppermost in the mind of the Judge. These facts should be looked into from the angle of common sense, common experience of men and matters and then a conscious decision has to be arrived at whether to draw the presumption or not.

14.13.11 In ***Hiten P. Dalal*** **v.** ***Bratindranath Banerjee***, (2001) 6 SCC 16, the Supreme Court held as under:

> "22.…Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. **The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact."**
>
> (Emphasis supplied)

14.13.12 In ***Bhoora Singh*** **v.** ***State of U.P.***, 1992 Cri LJ 2294, the Division Bench of the Allahabad High Court held as under:

> **"42. The term 'presumption' in its largest and most comprehensive signification may be defined, where in the absence of actual certainty of the truth of a fact or proposition, an inference affirmative of that truth is drawn by a process of probable reasoning from something which is taken for granted…"**
>
> (Emphasis supplied)

14.13.13 In ***Ramachandran*** **v.** ***State of Kerala***, 2009 Cri LJ 168, the Kerala High Court held as under:

"10. …A 'presumption' is a probable consequence drawn from facts as to the truth of a fact alleged. 'Presumption of fact' is an inference as to existence of one fact drawn from facts (either certain, or proved by direct testimony) as to the truth of a fact alleged…"

14.14 **Charles C. Moore's** book titled ***A Treatise on Facts or the Weight of the Value of Evidence***, **1908** contains a very exhaustive discussion on the presumptions of fact. Some of the presumptions mentioned in the said book are as under:-

14.14.1 **Testimony contrary to natural laws** – There are well-settled and accepted natural laws, a recognition of which is justified by the long experience of men, the knowledge of everyday life, as well as by the studies and experiments of ages. The natural laws that Courts take cognizance of are the laws of gravitation, cohesion, optics, electricity, etc. Testimony which is directly contrary and in opposition to such laws should be ignored even without contradiction. For example, a fire which was observed in the grass at a specified place adjoining a railroad right of way could not have originated a quarter of a mile distant if the intervening space showed no traces whatever of fire. Courts are not so deaf to the voice of nature, or so blind to the law of physics, that every utterance of a witness in derogation of those laws will be treated as testimony of probative value simply because of its utterance.

14.14.2 **Mathematical impossibilities** – A verdict cannot be sustained if it involves a finding that a part is equal to the whole; for example, where the jury evidently believed testimony that it would cost as much to clear a tract of land after the trees were felled and the logs removed as it would when the trees were standing. Testimony of a so-called expert that while an ordinary man can lift two hundred pounds, it would take sixteen section hands to lift a six-hundred-pound rail was struck out by the Court as manifestly absurd.

14.14.3 **Improbable stories –** The Court is not bound to give credit to a witness who is interested in the result of the action, and whose evidence is improbable and discredited by circumstances, or is against common experience and observation.

14.14.4 **Payment without taking receipt –** The average man would not pay and take no receipt or memorandum to insure himself against loss in case of the death of the other party, or his forgetfulness, or something even worse. No person of ordinary prudence, making payments of principal from time to time on a bond and mortgage, would omit to take receipts, if the papers were not at hand so that the payments could be entered thereon.

14.14.5 **Improbable testimony contradicted by circumstances** – In a case of conviction for murdering a woman by cutting her throat with a razor, the theory that the killing was the result of an accident, occasioned by the defendant supposing that he was drawing the back of the razor across the throat of his victim, was so utterly preposterous that there could be no rational expectation that any Judge would give it the least consideration.

14.14.6 **Numerical equality or preponderance of witness testimony to improbabilities** –Suppose that a small child tells that he saw a large wolf run away with an unusually small lamb. As against this, ten adults testified that this was not the case at all, but that the real fact was that this very small lamb was actually running away with the large wolf. It would not take a Judge very long to determine where the truth lies, notwithstanding ten against one.

14.14.7 **Relative value of direct and circumstantial evidence -** In the Webster case, Chief Justice Shaw, speaking of direct or positive evidence and circumstantial evidence, said: "Each of these modes of proof has its advantages and disadvantages; it is not easy to compare their relative value. The advantage of positive evidence is that it is the direct testimony of a witness to the fact to be proved, who, if he speaks the truth, saw it done; and the only question is whether

> he is entitled to belief. The disadvantage is that the witness may be false and corrupt, and that the case may not afford the means of detecting his falsehood. But, in a case of circumstantial evidence where no witness can testify directly to the fact to be proved, it is arrived at by a series of other facts, which by experience have been found so associated with the fact in question, that in the relation of cause and effect they lead to a satisfactory and certain conclusion; as when footprints are discovered after a recent snow, it is certain that some animated being has passed over the snow since it fell ; and, from the form and number of the footprints, it can be determined with equal certainty, whether they are those of a man, a bird, or a quadruped. Circumstantial evidence, therefore, is founded on experience and observed facts and coincidences, establishing a connection between the known and proved facts and the fact sought to be proved.

15. **Section 165 of the Indian Evidence Act, 1872**

15.1 Section 165 of the Indian Evidence Act, 1872 invests the Judge with plenary powers to put any question to any witness or party; in any form, at any time, about any fact relevant or irrelevant. Section 165 is intended to arm the Judge with the most extensive power possible for the purpose of getting at the truth. The effect of this section is that in order to get to the bottom of the matter before it, the Court will be able to look at and inquire into every fact and thus possibly acquire valuable indicative evidence which may lead to other evidence strictly relevant and admissible. The Court is not, however, permitted to found its judgment on any but relevant statements.

15.2 Section 165 of the Indian Evidence Act, 1872 reads as under:

"Section 165. Judge's power to put questions or order production.-

The Judge may, in order to discover or obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved:

Provided also that this section shall not authorize any Judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under Sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under Section 148 or 149 ; nor shall he dispense with primary evidence of any document, except in the cases herein before excepted."

15.3 The object of a trial is, first to ascertain truth by the light of reason, and then, do justice upon the basis of the truth and the Judge is not only justified but required to elicit a fact, wherever the interest of truth and justice would suffer, if he did not.

15.4 The Judge contemplated by Section 165 is not a mere umpire at a wit-combat between the lawyers for the parties whose only duty is to enforce the rules of the game and declare at the end of the combat who has won and who has lost. He is expected, and indeed it is his duty, to explore all avenues open to him in order to

discover the truth and to that end, question witnesses on points which the lawyers for the parties have either overlooked or left obscure or willfully avoided. A Judge, who at the trial merely sits and records evidence without caring so to conduct the examination of the witnesses that every point is brought out, is not fulfilling his duty.

15.5 The framers of the Act, in the Report of the **Select Committee** published on 31st March, 1871 along with the Bill settled by them, observed:

> "In many cases, the Judge has to get at the truth, or as near to it as he can by the aid of collateral inquiries, which may incidentally tend to something relevant; and it is most unlikely that he should ever wish to push an inquiry needlessly, or to go into matters not really connected with it. We have accordingly thought it right to arm Judges with a general power to ask any questions upon any facts, of any witnesses, at any stage of the proceedings, irrespectively of the rules of evidence binding on the parties and their agents, and we have inserted in the Bill a distinct declaration that it is the duty of the Judge, especially in criminal cases, not merely to listen to the evidence put before him but to inquire to the utmost into the truth of the matter."

15.6 **Cunningham, Secretary to the Council of the Governor – General** for making Laws and Regulations at the time of the passing of the Indian Evidence Act stated:

> "It is highly important that the Judge should be armed with full power enabling him to get at the facts. He may, accordingly, subject to conditions to be immediately noticed, ask any question he pleases, in any form, at any stage of the proceedings, about any matter relevant or irrelevant, and he may order the production of any document or thing. No

objection can be taken to any such question or order, nor are the parties entitled, without Court's permission to cross-examine on the answers given."

15.7 The relevant judgments relating to Section 165 of the Indian Evidence Act, 1872 are as under:-

15.7.1 The Supreme Court in ***Ram Chander* v. *State of Haryana***, (1981) 3 SCC 191 observed that under Section 165, the Court has ample power and discretion to control the trial effectively. **While conducting trial, the Court is not required to sit as a silent spectator or umpire but to take active part within the boundaries of law by putting questions to witnesses in order to elicit the truth** and to protect the weak and the innocent. It is the duty of a Judge to discover the truth and for that purpose he may "ask any question, in any form, at any time, of any witness, or of the parties, about any fact, relevant or irrelevant".

15.7.2 In ***Ritesh Tewari* v. *State of Uttar Pradesh***, (2010) 10 SCC 677, the Supreme Court held that **every trial is a voyage of discovery in which truth is the quest**. The power under Section 165 is to be exercised with the object of subserving the cause of justice and public interest, and for getting the evidence in aid of a just decision and to uphold the truth. **It is an extraordinary power conferred upon the Court to elicit the truth and to act in the interest of justice**. The purpose being to secure justice by full discovery of truth and an accurate knowledge of facts, the Court can put questions to the parties, except those which fall within exceptions contained in the said provision itself.

15.7.3 In ***Zahira Habibulla H. Sheikh* v. *State of Gujarat***, (2004) 4 SCC 158, the Supreme Court held that **Section 165 of the Indian Evidence Act and Section 311 of the Code of Criminal Procedure confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. The Judge can control the proceedings effectively so that ultimate objective i.e. truth is arrived at.** The power of the Court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The Section consists of two parts i.e. (i) giving a discretion to the Court to examine the witness at any stage and (ii) the mandatory portion which compels the Courts to examine a witness if his evidence appears to be essential to the just decision of the Court. The second part of the section does not allow any discretion but obligates and binds the Court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case, essential to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the Section is to enable the Court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. Though justice is depicted to be blind-folded, as popularly said, it is only a veil not to see who the party before it is while pronouncing judgment on the cause brought before it by enforcing law and administering justice and not to ignore or turn the mind/attention of the Court away from the truth of the cause or *lis*

before it, in disregard of its duty to prevent miscarriage of justice. Doing justice is the paramount consideration and that duty cannot be abdicated or diluted and diverted by manipulative red herrings.

15.7.4 In ***State of Rajasthan* v. *Ani***, (1997) 6 SCC162, the Supreme Court held that **Section 165 of the Indian Evidence Act confers vast and unrestricted powers on the Court to elicit truth.** Reticence may be good in many circumstances, but a Judge remaining mute during trial is not an ideal situation. A taciturn Judge may be the model caricatured in public mind. But there is nothing wrong in his becoming active or dynamic during trial so that criminal justice being the end could be achieved. **A Judge is expected to actively participate in the trial to elicit necessary materials from witnesses in the appropriate context which he feels necessary for reaching the correct conclusion**.

15.7.5 In ***Mohanlal Shamji Soni* v. *Union of India***, 1991 Supp. (1) SCC 271, referring to Section 165 of the Indian Evidence Act and Section 311 of the Code of Criminal Procedure, the Supreme Court stated that the said two sections are complementary to each other and between them, they confer jurisdiction on the Judge to act in aid of justice. It is a well-accepted and settled principle that a Court must discharge its statutory functions – whether discretionary or obligatory – according to law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done.

15.7.6 In ***Jamatraj Kewalji Govani* v. *State of Maharashtra***, AIR 1968 SC 178, the Supreme Court held that Section 165 of the Indian Evidence Act and Section 540 of the Code of Criminal Procedure, 1898 confer jurisdiction on the Judge to act in aid of justice. In criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in Court or to recall a witness already examined, and makes this the duty and obligation of the Court provided the just decision of the case demands it.

15.7.7 In ***Sessions Judge Nellore Referring Officer* v. *Intha Ramana Reddy***, 1972 CriLJ 1485, the Andhra Pradesh High Court held that **every trial is a voyage of discovery in which truth is the quest. It is the duty of a presiding Judge to explore every avenue open to him in order to discover the truth and to advance the cause of justice.** For that purpose he is expressly invested by Section 165 of the Evidence Act with the right to put questions to witnesses. Indeed the right given to a Judge is so wide that he may ask any question he pleases, in any form at any time, of any witness, or of the parties about any fact, relevant or irrelevant.

16. **Importance of Trial Courts**

The Law Commission of India headed by ***H.R. Khanna,* J.** in its ***Seventy Seventh Report*** relating to the '***Delays and Arrears in Trial Courts'*** dealt with the importance of Trial Courts in the

justice delivery system. The relevant portion of the said Report is reproduced as under:

-"If an evaluation were made of the importance of the role of the different functionaries who play their part in the administration of justice, the top position would necessarily have to be assigned to the Trial Court Judge. He is **the key-man in our judicial system, the most important and influential participant in the dispensation of justice. It is mostly with the Trial Judge rather than with the appellate Judge that the members of the general public come in contact, whether as parties or as witnesses**. The image of the judiciary for the common man is projected by the Trial Court Judges and this, in turn depends upon their intellectual, moral and personal qualities."

- Personality of Trial Court Judges

"Errors committed by the Trial Judge who is not of the right caliber can sometimes be so crucial that they change the entire course of the trial and thus result in irreparable miscarriage of justice. Apart from that, a rectification of the error by the appellate Court which must necessarily be after lapse of a long time, can hardly compensate for the mischief which resulted from the error committed by the Trial Judge."

-The 'Upper Court' Myth

"The notion about the provisional nature of the Trial Court decisions being subject to correction in appeal, or what has been called the "upper-Court myth" ignores the realities of the situation. **In spite of the right of appeal, there are many cases in which appeals are not filed.** This apart, the appellate Courts having only the written record before them are normally reluctant to interfere with the appraisement of evidence of witnesses by the **Trial Judges who have had the advantage of looking at the demeanour of the witnesses.**

> The appellate Court, it has been said, operates in the partial vacuum of the printed record. A stenographic transcript fails to reproduce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the mere words signify. The best and most accurate record of oral testimony is like a dehydrated peach; it has neither the substance nor the flavor of the peach before it was dried."

17. **False claims and defences**

17.1 In ***Maria Margarida Sequeria Fernandes* v. *Erasmo Jack de Sequeria*** (supra), the Supreme Court held that false claims and defences are serious problems with real estate litigation, predominantly because of ever escalating prices of the real estate. The Supreme Court held as under:-

> **"False claims and false defences**
>
> 81. False claims and defences are really serious problems with real estate litigation, predominantly because of ever escalating prices of the real estate. Litigation pertaining to valuable real estate properties is dragged on by unscrupulous litigants in the hope that the other party will tire out and ultimately would settle with them by paying a huge amount. This happens because of the enormous delay in adjudication of cases in our Courts. If pragmatic approach is adopted, then this problem can be minimized to a large extent."

17.2 In ***Dalip Singh* v. *State of U.P.*, (2010) 2 SCC 114**, the Supreme Court observed that a new creed of litigants have cropped up in the last 40 years who do not have any respect for truth and shamelessly resort to falsehood and unethical means for achieving their goals. The observations of the Supreme Court are as under:-

"1. For many centuries, Indian society cherished two basic values of life i.e., 'Satya' (truth) and 'Ahimsa' (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in the pre-Independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-Independence period has seen drastic changes in our value system. The materialism has over shadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings.

2. **In last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."**

(Emphasis supplied)

17.3 In ***Satyender Singh* v. *Gulab Singh*, 2012 (129) DRJ 128**, the Division Bench of this Court following ***Dalip Singh* v. *State of U.P.*** (supra) observed that the Courts are flooded with litigation with false and incoherent pleas and tainted evidence led by the parties due to which the judicial system in the country is choked and such litigants are consuming Court's time for a wrong cause. The observations of this Court are as under:-

"2. As rightly observed by the Supreme Court, Satya is a basic value of life which was required to be followed by

everybody and is recognized since many centuries. **In spite of caution, courts are continued to be flooded with litigation with false and incoherent pleas and tainted evidence led by the parties. The judicial system in the country is choked and such litigants are consuming courts' time for a wrong cause. Efforts are made by the parties to steal a march over their rivals by resorting to false and incoherent statements made before the Court.** Indeed, it is a nightmare faced by a Trier of Facts; required to stitch a garment, when confronted with a fabric where the weft, shuttling back and forth across the warp in weaving, is nothing but lies. As the threads of the weft fall, the yarn of the warp also collapses; and there is no fabric left."

(Emphasis supplied)

18. **Imposition of costs**

18.1 In ***Ramrameshwari Devi* v. *Nirmala Devi*, (2011) 8 SCC 249**, the Supreme Court has held that the Courts have to take into consideration pragmatic realities and have to be realistic in imposing the costs. The relevant paragraphs of the said judgment are reproduced hereunder:-

"43. ...We are clearly of the view that unless we ensure that wrongdoers are denied profit or undue benefit from the frivolous litigation, it would be difficult to control frivolous and uncalled for litigations. In order to curb uncalled for and frivolous litigation, the courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that court's otherwise scarce and valuable time is consumed or more appropriately wasted in a large number of uncalled for cases.

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52. The main question which arises for our consideration is whether the prevailing delay in civil litigation can be curbed? In our considered opinion the existing system can be

drastically changed or improved if the following steps are taken by the trial courts while dealing with the civil trials.

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C. Imposition of actual, realistic or proper costs and or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases the courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings…

xxx xxx xxx

54. While imposing costs we have to take into consideration pragmatic realities and be realistic what the Defendants or the Respondents had to actually incur in contesting the litigation before different courts. We have to also broadly take into consideration the prevalent fee structure of the lawyers and other miscellaneous expenses which have to be incurred towards drafting and filing of the counter affidavit, miscellaneous charges towards typing, photocopying, court fee etc.

55. The other factor which should not be forgotten while imposing costs is for how long the Defendants or Respondents were compelled to contest and defend the litigation in various courts. The Appellants in the instant case have harassed the Respondents to the hilt for four decades in a totally frivolous and dishonest litigation in various courts. The Appellants have also wasted judicial time of the various courts for the last 40 years.

56. On consideration of totality of the facts and circumstances of this case, we do not find any infirmity in the well reasoned impugned order/judgment. These appeals are consequently dismissed with costs, which we quantify as Rs. 2,00,000/- (Rupees Two Lakhs only). We are imposing the costs not out of anguish but by following the fundamental principle that

wrongdoers should not get benefit out of frivolous litigation…."

(Emphasis supplied)

18.2 In ***Maria Margarida Sequeria Fernandes* v. *Erasmo Jack de Sequeria*** (supra) the Supreme Court held that heavy costs and prosecution should be ordered in cases of false claims and defences. The Supreme Court held as under:-

"82. This Court in a recent judgment in *Ramrameshwari Devi and Ors.* (supra) aptly observed at page 266, para 43 that unless wrongdoers are denied profit from frivolous litigation, it would be difficult to prevent it. In order to curb uncalled for and frivolous litigation, the Courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that Court's otherwise scarce time is consumed or more appropriately, wasted in a large number of uncalled for cases. In this very judgment, the Court provided that this problem can be solved or at least be minimized if exemplary cost is imposed for instituting frivolous litigation. The Court observed at pages 267-268 that imposition of actual, realistic or proper costs and/or ordering prosecution in appropriate cases would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. **In appropriate cases, the Courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.**"

18.3 In ***Padmawati* v. *Harijan Sewak Sangh*, 154 (2008) DLT 411**, this Court imposed cost of ₹15.1 lakhs and noted as under:

"6. The case at hand shows that frivolous defences and frivolous litigation is a calculated venture involving no risks situation. You have only to engage professionals to prolong

the litigation so as to deprive the rights of a person and enjoy the fruits of illegalities. I consider that in such cases where Court finds that using the Courts as a tool, a litigant has perpetuated illegalities or has perpetuated an illegal possession, the Court must impose costs on such litigants which should be equal to the benefits derived by the litigant and harm and deprivation suffered by the rightful person so as to check the frivolous litigation and prevent the people from reaping a rich harvest of illegal acts through the Courts. One of the aim of every judicial system has to be to discourage unjust enrichment using Courts as a tool. The costs imposed by the Courts must in all cases should be the real costs equal to deprivation suffered by the rightful person.

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9. Before parting with this case, I consider it necessary to pen down that one of the reasons for over-flowing of court dockets is the frivolous litigation in which the Courts are engaged by the litigants and which is dragged as long as possible. Even if these litigants ultimately lose the lis, they become the real victors and have the last laugh. This class of people who perpetuate illegal acts by obtaining stays and injunctions from the Courts must be made to pay the sufferer not only the entire illegal gains made by them as costs to the person deprived of his right and also must be burdened with exemplary costs. Faith of people in judiciary can only be sustained if the persons on the right side of the law do not feel that even if they keep fighting for justice in the Court and ultimately win, they would turn out to be a fool since winning a case after 20 or 30 years would make wrong doer as real gainer, who had reaped the benefits for all those years. Thus, it becomes the duty of the Courts to see that such wrong doers are discouraged at every step and even if they succeed in prolonging the litigation due to their money power, ultimately they must suffer the costs of all these years long litigation. Despite settled legal positions, the obvious wrong doers, use one after another tier of judicial review mechanism as a gamble, knowing fully well that dice is

always loaded in their favour, since even if they lose, the time gained is the real gain. This situation must be redeemed by the Courts."

(Emphasis supplied)

19. **Section 16(c) of the Specific Relief Act, 1963**

19.1 In a suit for specific performance, the plaintiff has to prove a valid sale agreement; the breach of the contract by the defendant; and readiness and willingness of the plaintiff to perform his part of the contract.

19.2 Section 16(c) of the Specific Relief Act mandates "readiness" and "willingness" on the part of the plaintiff as a condition precedent to seek specific performance. Section 16 (c) is reproduced hereunder:-

"**Section 16. Personal bars to relief.-**

Specific performance of a contract cannot be enforced in favour of a person-

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(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation.- For the purposes of clause (c),-

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;

(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction."

19.3 The “readiness” and “willingness” are two separate issues. The former depends on the availability of requisite funds whereas the latter depends on the intention of the purchaser.

19.4 The “readiness” has to be proved by the purchaser by leading evidence relating to the availability of the funds whereas the intention has to be inferred from the various circumstances on record.

19.5 If there is no availability of funds with the purchaser, he can be non-suited on the ground of non-readiness alone.

19.6 If the plaintiff is able to prove the availability of the balance sale consideration with him at the time fixed for performance in the agreement, it is an indication of his readiness but his willingness/intention to perform cannot be inferred from readiness alone.

19.7 When the parties enter into an agreement relating to an immovable property, they amicably agree on the sale consideration, earnest money as well as the payment of the balance sale consideration. If both the parties are ready and willing, they usually complete the transaction within the stipulated time in the following manner:-

19.7.1 The purchaser makes arrangement for the balance sale consideration within the stipulated time.

19.7.2 The purchaser informs the seller about the arrangement having been made.

19.7.3 The purchaser drafts the sale deed and sends the draft sale deed to the seller for approval.

19.7.4 The seller approves the draft sale deed and returns it back to the purchaser.

19.7.5 The purchaser purchases the requisite stamp duty for the sale deed.

19.7.6 The purchaser prepares the sale deed on the requisite stamp papers.

19.7.7 Both the parties fix the date, time and place for payment of balance sale consideration, execution of sale deed, registration of the sale deed and handing over of the possession.

19.7.8 The parties complete the sale transaction on the agreed date, time and place.

19.7.9 In normal parlance, both the parties remain in touch either personally or through the property dealer.

19.8 The problem arises when one of the two parties turn dishonest. However, the party in breach purports to be ready and willing and creates evidence to that effect. At times, both the parties visit the office of Sub-Registrar on the last day of performance for obtaining a receipt of having attended the office of the Sub-Registrar to later on contend that they were ready and willing to perform and were waiting for other party. If the seller is in breach, he creates false evidence of readiness to avoid specific performance by the purchaser and to illegally forfeit the earnest money. On the other hand, if the purchaser is in breach, he creates false evidence of readiness and willingness to file a case of specific performance.

19.9 It is the duty of the Court to find out which party has not performed and is trying to wriggle out.

19.10 The Court has to take into consideration the human probabilities, ordinary course of human conduct and common sense to draw necessary inference. Drawing presumptions is the backbone of the judicial process.

19.11 The silence or absence of correspondence by any party may be indicative of his dishonest intention. The dishonest intention of the seller can be inferred where the purchaser repeatedly contacts the seller for providing copies of the title documents or approval of the draft sale deed or fixing time for payment of balance sale consideration or execution/ registration of the sale deed but the seller does not respond or avoids contact. On the other hand, the dishonest intention of the purchaser can be inferred where the purchaser does not contact the seller for approval of the sale deed and fixing date, time and place for payment of balance sale consideration and execution/registration of the sale deed and unilaterally visits the office of the Sub-Registrar to prepare a false ground that he was ready and willing to complete the sale. By the time the suit is finally decreed, the purchaser would get the property at the price fixed in the agreement although the prices would have increased manifold. The Court has to minutely examine the conduct of the parties in order to ascertain the truth. The purchaser would not be entitled to a decree merely because he had the sale consideration with him and had visited the office of the Sub-Registrar before the time fixed in the agreement.

19.12 Upon refusal of the seller to complete the sale in terms of the agreement, the purchaser is expected to issue a notice to place on record the refusal on the part of the seller to furnish copies of the documents or giving a response to the draft sale deed or fixing the schedule for execution and registration of sale deed. The purchaser can also notify the date and time for visiting the office of the Sub-Registrar along with the proof of the balance sale consideration to the seller. The purchaser is also expected to immediately file a suit for specific performance. Any delay in this regard may indicate his intention that he was not ready and willing and the Court may refuse to grant specific performance.

19.13 In a rising market, the purchaser makes a profit by the delay. He may tie down a seller by creating false excuses and use the money for buying some other property. If the purchaser is in a property trade, he may tie down several properties and then decide on which one he can make more profit on. These factors have to be taken into consideration by the Court for deciding the 'readiness' and 'willingness'.

19.14 Once a seller has entered into an agreement to sell an immovable property, he is looking for the sale consideration within the period stipulated in the agreement. If he does not get the money within the stipulated period, his plan to use the money for whatever purpose he has intended would get frustrated. He may have a plan to buy some other property or for some other purpose. Secondly, the delay in completion of sale also causes injustice to the seller as the property prices keep on increasing in normal

parlance. As such more the delay, the seller may suffer loss due to rise in property price and greater is the profit which the purchaser would derive by tying down a property and not paying the sale consideration within the stipulated period.

19.15 The relevant judgments relating to Section 16(c) of the Specific Relief Act, 1963 are as under:-

19.15.1 In ***J.P. Builders* v. *A. Ramadas Rao***, (2011) 1 SCC 429, the Supreme Court explained the distinction between "readiness" and "willingness". The former refers to financial capacity and the latter to the conduct of the plaintiff wanting performance.

19.15.2 In ***N.P. Thirugnanam* v. *Dr. R. Jagan Mohan Rao***, (1995) 5 SCC 115, the Supreme Court held that the Court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances to adjudge the "readiness" and "willingness" of the plaintiff. The amount of balance sale consideration must be proved to be available with the purchaser right from the date of execution till the date of decree. The Court upheld the dismissal of the suit for specific performance on various grounds *inter alia* that the plaintiff was dabbing in real estate business without means to purchase the suit property and the very contract was speculative in nature.

19.15.3 In ***R.C. Chandiok* v. *Chuni Lal Sabharwal***, (1970) 3 SCC 140, the Supreme Court held that "readiness" and "willingness" cannot be treated as a straitjacket formula. It has to

be determined from the entirety of facts and circumstances relevant to the intention and conduct of the party concerned.

20. **Section 20 of the Specific Relief Act, 1963**

20.1 Section 20 of the Specific Relief Act, 1963 provides that the jurisdiction to decree specific performance is discretionary and the Court is not bound to grant such relief merely because it is lawful to do so. Section 20 is reproduced hereunder:-

> **"Section 20. Discretion as to decreeing specific performance.-**
> (1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.
> (2) The following are cases in which the court may property exercise discretion not to decree specific performance:-
>
> (a) Where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the -contract was entered into are such that the contract, though not void able, gives the plaintiff an unfair advantage over the defendant; or
>
> (b) Where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff, or
>
> (c) Where the defendant entered into the contract under circumstances, which though not rendering the contract void able, makes it inequitable to enforce specific performance.
>
> (3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the party.

20.2 The specific performance is an equitable relief. Section 20 of the Specific Relief Act, 1963 preserves judicial discretion. The Court is not bound to grant specific relief merely because it is lawful to do so. The relief sought under Section 20 is not automatic as the Court is required to see the totality of the circumstances which are to be assessed by the Court in the light of facts and circumstances of each case.

20.3 The specific performance is usually granted where substantial sale consideration has been paid and the possession of the property has been delivered to the purchaser.

20.4 In the event of any delay/inaction on the part of the purchaser, it would be inequitable to give the relief of specific performance to the purchaser. The rationale behind refusal of the Court to grant the specific performance where long time has gone by is that the prices of the property may have increased many times with the passage of time and it would be injustice to a person who has not received the sale consideration within the time stipulated in the agreement.

20.5 If under the terms of the contract, the plaintiff gets an unfair advantage over the defendant, the Court may not exercise its discretion in favour of the plaintiff. So also specific relief may not be granted if the defendant would be put to undue hardship which he did not foresee at the time of agreement. If it is inequitable to

grant specific relief, then also the Court would desist from granting a decree to the plaintiff.

20.6 If the sale consideration fixed under the agreement is given to the seller years after the agreement, great prejudice may be caused to a seller who may have intended to purchase another property with the sale consideration.

20.7 While a purchaser cannot be made to suffer because of Court delays, one cannot lose sight of the fact that he retained the sale consideration with him and the seller could not use the money when he wanted. The Court also has to consider that whereas the value of the property may have risen manifold with the passage of time, the value of the sale consideration would have reduced due to inflation. These factors have to be taken into consideration by the Court.

20.8 The party who seeks specific performance being an equitable relief, must come to the Court with clean hands. In other words, the party who makes false allegations does not come with clean hands and is not entitled to the equitable relief.

20.9 While exercising the discretion, the Court would take into consideration the circumstances of the case, the conduct of parties, and the motive behind the litigation.

20.10 The relevant judgments relating to Section 20 of the Specific Relief Act, 1963 are as under:-

20.10.1 In ***K.S. Vidyanadam* v. *Vairavan***, (1997) 3 SCC 1, the Supreme Court held that in case of delay/inaction on the part of the plaintiff for two and a half years, it would be inequitable to give a

relief of specific performance to the plaintiff. The finding of the Supreme Court is reproduced hereunder:

> "13. In the case before us, it is not mere delay. It is a case of total inaction on the part of the plaintiff for 2 ½ years in clear violation of the terms of agreement which required him to pay the balance, purchase the stamp papers and then ask for execution of sale deed within six months. Further, the delay is coupled with substantial rise in prices – according to the defendants, three times – between the date of agreement and the date of suit notice. **The delay has brought about a situation where it would be inequitable to give the relief of specific performance to the plaintiff."**
>
> (Emphasis supplied)

20.10.2 In ***Saradamani Kandappan* v. *S. Rajalakshmi***, (2011) 12 SCC 18, the Supreme Court declined to grant the discretionary relief of specific performance to the purchaser who had made payment of nominal advance to the seller. The finding of the Supreme Court is reproduced hereunder:-

> "36.…The third quarter of the twentieth century saw a very slow but steady increase in prices. But a drastic change occurred from the beginning of the last quarter of the twentieth century. There has been a galloping inflation and prices of immovable properties have increased steeply, by leaps and bounds. Market values of properties are no longer stable or steady. We can take judicial notice of the comparative purchase power of a rupee in the year 1975 and now, as also the steep increase in the value of the immovable properties between then and now. It is no exaggeration to say that properties in cities, worth a lakh or so in or about 1975 to 1980, may cost a crore or more now.
>
> 37. The reality arising from this economic change cannot continue to be ignored in deciding cases relating to specific performance. The steep increase in prices is a circumstance which makes it inequitable to grant the relief of specific

performance where the purchaser does not take steps to complete the sale within the agreed period, and the vendor has not been responsible for any delay or non-performance. A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to cover his delays, laches, breaches and 'non-readiness'. The precedents from an era, when high inflation was unknown, holding that time is not of the essence of the contract in regard to immovable properties, may no longer apply, not because the principle laid down therein is unsound or erroneous, but the circumstances that existed when the said principle was evolved, no longer exist. **In these days of galloping increases in prices of immovable properties, to hold that a vendor who took an earnest money of say about 10% of the sale price and agreed for three months or four months as the period for performance, did not intend that time should be the essence, will be a cruel joke on him, and will result in injustice. Adding to the misery is the delay in disposal of cases relating to specific performance, as suits and appeals therefrom routinely take two to three decades to attain finality. As a result, an owner agreeing to sell a property for rupees one lakh and received rupees ten thousand as advance may be required to execute a sale deed a quarter century later by receiving the remaining rupees ninety thousand, when the property value has risen to a crore of rupees.**

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43. Till the issue is considered in an appropriate case, we can only reiterate what has been suggested in *K.S. Vidyanadam* [(1997) 3 SCC 1]:

(*i*) The courts, while exercising discretion in suits for specific performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps or for completion of the transaction, that must have some significance

and therefore time/period prescribed cannot be ignored.

(*ii*) The courts will apply greater scrutiny and strictness when considering whether the purchaser was "ready and willing" to perform his part of the contract.

(*iii*) Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. **The courts will also "frown" upon suits which are not filed immediately after the breach/refusal. The fact that limitation is three years does not mean that a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance.** The three-year period is intended to assist the purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in part-performance, where equity shifts in favour of the purchaser."

(Emphasis supplied)

20.10.3 In ***Parakunnan Veetill Joseph's Son Mathew* v. *Nedumbara Kuruvila's Son***, 1987 Supp SCC 340, the Supreme Court held that the motive behind the litigation should also enter into the judicial verdict. The Court should take care to see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff.

20.10.4 In ***Lourdu Mari David* v. *Louis Chinnaya Arogiaswamy***, (1996) 5 SCC 589, the Supreme Court held that the party who seeks to avail of the equitable jurisdiction of a Court and

specific performance being equitable relief, must come to the Court with clean hands. In other words the party who makes false allegations does not come with clean hands and is not entitled to the equitable relief.

20.10.5 In ***K. Narendra*** **v.** ***Riviera Apartments (P) Ltd.***, (1999) 5 SCC 77, the Supreme Court held that the performance of the contract involving some hardship on the defendant which he did not foresee while non-performance involving no such hardship on the plaintiff, is one of the circumstances in which the Court may properly exercise discretion not to decree specific performance. However, mere inadequacy of consideration or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not constitute an unfair advantage to the plaintiff over the defendant or unforeseeable hardship on the defendant.

20.10.6 In ***A.C. Arulappan*** **v.** ***Ahalya Naik (smt)***, (2001) 6 SCC 600, the Supreme Court held that if under the terms of the contract the plaintiff gets an unfair advantage over the defendant, the Court may not exercise its discretion in favour of the plaintiff. Also, specific relief may not be granted if the defendant would be put to undue hardship which he did not foresee at the time of agreement. If it is inequitable to grant specific relief, then also the Court would desist from granting a decree to the plaintiff.

20.10.7 In ***Bal Krishna*** **v.** ***Bhagwan Das***, (2008) 12 SCC 145, the Supreme Court held that 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.

20.10.8 In ***G. Jayashree*** **v.** ***Bhagwandas S. Patel***, (2009) 3 SCC 141, the Supreme Court held that the plaintiff is expected to approach the Court with clean hands. His conduct plays an important role in the matter of exercise of discretionary jurisdiction by a Court of law. The Courts ordinarily would not grant any relief in favour of the person who approaches the Court with a pair of dirty hands.

20.10.9 In ***Krishna Sweet House*** **v.** ***Gurbhej Singh***, MANU/DE/2851/2012, this Court held that in certain cases where substantial consideration i.e. at least 50% of the consideration is paid, or possession of the property is delivered under the agreement to sell in addition to paying advance price, the proposed buyer is vigilant for his rights and he files the suit soon after entering into the agreement to sell, then in accordance with totality of facts and circumstances, Courts may decree specific performance.

20.10.10 In ***Laxmi Devi*** **v.** ***Mahavir Singh***, MANU/DE/1930/2012, this Court held that unless substantial consideration is paid out of the total amount of sale consideration, the Courts would lean against granting the specific performance inasmuch as by the loss of time, the balance sale consideration which is granted at a much later date, is not sufficient to enable the

proposed seller to buy an equivalent property which could have been bought from the balance sale consideration if the same was paid on the due date.

20.10.11 In ***Jinesh Kumar Jain*** **v.** ***Iris Paintal***, MANU/DE/3387/2012, this Court held that the plaintiff is entitled to decree of specific performance where the plaintiff has done substantial acts in consequence of a contract/agreement to sell. Substantial acts obviously would mean and include payment of substantial amounts of money. The plaintiff may have paid 50% or more of the consideration or having paid a lesser consideration he could be in possession pursuant to the agreement to sell or otherwise is in the possession of the subject property or other substantial acts have been performed by the plaintiff, and acts which can be said to be substantial acts under Section 20(3). However, where the acts are not substantial i.e. merely 5% or 10% etc of the consideration is paid i.e. less than substantial consideration is paid, (and for which a rough benchmark can be taken as 50% of the consideration), and/or plaintiff is not in possession of the subject land, the plaintiff is not entitled to the discretionary relief of specific performance.

20.10.12 In ***Sushil Jain*** **v.** ***Meharban Singh***, 2012 (131) DRJ 421, this Court held that the plaintiff cannot be held entitled to the discretionary relief of specific performance *inter alia* for the reasons that not only the prices would have gone up about 20 to 30 times during this period but also that the plaintiff has taken benefit of the balance of about 87% of the consideration which he would

have wisely invested in any other assets including in an immovable property.

21. Summary of Principles

21.1 Truth should be the Guiding Star in the Entire Judicial Process

- Truth is foundation of Justice. Dispensation of justice, based on truth, is an essential and inevitable feature in the justice delivery system. Justice is truth in action.
- It is the duty of the Judge to discover truth to do complete justice. The entire judicial system has been created only to discern and find out the real truth.
- The justice based on truth would establish peace in the society. For the common man truth and justice are synonymous. So when truth fails, justice fails. People would have faith in Courts when truth alone triumphs.
- Every trial is voyage of discovery in which truth is the quest. Truth should be reigning objective of every trial. Judge has to play an active role to discover the truth and he should explore all avenues open to him in order to discover the truth.
- The Trial Judge is the key-man in the judicial system and he is in a unique position to strongly impact the quality of a trial to affect system's capacity to produce and assimilate truth. The Trial Judge should explore all avenues open to him in order to discover the truth. Trial Judge has the advantage of looking at the demeanour of the witnesses. In spite of the right of appeal, there are many cases in which appeals are not filed. It is mostly with the Trial Judge rather than with the appellate Judge that the members of the general public come in contact, whether as parties or as witnesses.

21.2 What is 'Truth' and how to discover it

- Law's Truth is synonymous with facts established in accordance with the procedure prescribed by law.

- The purpose of judicial inquiry is to establish the existence of facts in accordance with law.
- Facts are proved through lawfully prescribed methods and standards.
- The belief of Courts about existence of facts must be based on reason, rationality and justification, strictly on the basis of relevant and admissible evidence, judicial notice or legally permitted presumptions. It must be based on a prescribed methodology of proof. It must be objective and verifiable.

21.3 **Section 3 of Indian Evidence Act, 1872**

- "Evidence" of a fact and "proof" of a fact are not synonymous terms. "Proof" in the strict sense means the effect of evidence.
- A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.
- The term "**after considering the matters before it**" in Section 3 of the Evidence Act means that for judging whether a fact is or not proved, the Court is entitled to take into consideration all matters before it which shall include the statement of the witnesses, admissions of the parties, confession of the accused, documents proved in evidence, judicial notice, demeanour of witnesses, local inspections and presumptions.
- The term "**believes it to exist**" in the definition of "proof" is a "judicial belief" of the Judge based on logical/rational thinking and the power of reason, and the Court is required to give reasons for the belief. The reasons are live links between the mind of the decision maker and the belief formed. Reasons convey judicial idea in words and sentences. Reasons are rational explanation of the conclusion. Reason is the very life of law. It is the heart beat of every belief and without it, law becomes lifeless. Reasons also ensure transparency and fairness in the decision making process. The reasons substitute subjectivity by objectivity. Recording of

reasons also play as a vital restraint on possible arbitrary use of the judicial power. The recording of reasons serve the following four purposes:-

- To clarify the thought process.
- To explain the decision to the parties.
- To communicate the reasons to the public.
- To provide the reasons for an appellate Court to consider.

- Non-recording of reasons would cause prejudice to the litigant who would be unable to know the ground which weighed with the Court and also cause impediment in his taking adequate grounds before the appellate Court in the event of challenge.

- Nothing can be said to be "proved", however much material there may be available, until the Court believes the fact to exist or considers its existence so probable that a prudent man will act under the supposition that it exists. For example, ten witnesses may say that they saw the sun rising from the West and all the witnesses may withstand the cross-examination, the Court would not believe it to be true being against the law of nature and, therefore, the fact is 'disproved'. In mathematical terms, the entire evidence is multiplied with zero and, therefore, it is not required to be put on judicial scales. Where the Court believes the case of both the parties, their respective case is to be put on judicial scales to apply the test of preponderance.

- The approach of the Trial Court has to be as under:-

  If on consideration of all the matters before it, the Court believes a fact to exist or considers its existence probable, the fact is said to be 'proved'. On the other hand, if the Court does not believe a fact either to exist or probable, such fact is said to be 'disproved'. A fact is said to be 'not proved' if it is neither proved nor disproved.

- The test whether a fact is proved is such degree of probability as would satisfy the mind of a reasonable man as to its existence. The standard of certainty required is of a prudent man. The Judge like a prudent man has to use its own judgment and experience and is not bound by any rule except his own judicial discretion, human experience, and judicial sense.

21.4 **Section 114 of the Indian Evidence Act, 1872**

- Section 114 is a useful device to aid the Court in its quest for truth by using common sense as a judicial tool. Section 114 recognizes the general power of the Court to raise inferences as to the existence or non-existence of unknown facts on proof or admission of other facts.
- Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts.
- The source of presumptions is the common course of natural events, human conduct and public or private business, and the Section proceeds on the assumption that just as in nature there prevails a fixed order of things, so the volitional acts of men placed in similar circumstances exhibits, on the whole, a distinct uniformity which is traceable to the impulses of human nature, customs and habits of society.
- The illustrations though taken from different spheres of human activity, are not exhaustive. They are based upon human experience and have to be applied in the context of the facts of each case. The illustrations are merely examples of circumstances in which certain presumptions may be made. Other presumptions of a similar kind in similar circumstances can be made under the provisions of the section itself.
- Presumption in law of evidence is a rule indicating the stage of shifting the burden of proof. From a certain fact or facts the Court can draw an inference and that would remain until such inference is either disproved or dispelled.
- Presumptions of fact can be used by the Courts in the course of administration of justice to remove lacunae in the chain of direct evidence before it. The function of a presumption is to fill a gap in evidence.
- Section 114 of the Indian Evidence Act applies to both civil and criminal proceedings.
- Whether or not a presumption can be drawn under the section in a particular case depends ultimately upon the facts and circumstances of each case. No hard and fast rule can be laid

down. Human behaviour is so complex and room must be left for play in the joints. It is not possible to formulate a series of exact propositions and con-flue human behaviour within straitjackets.

- No rule of evidence can guide the Judge on the fundamental question whether evidence as to a relevant fact should be believed or not. Secondly, assuming that the Judge believes very few cases, guide him on the question what inference he should draw from it as to assist a Judge in the very smallest degree in determining the master question of the whole subject – whether and how far he ought to believe what the witnesses say? The rules of evidence do not guide what inference the Judge ought to draw from the facts in which, after considering the statements made to him, he believes. In every judicial proceeding whatever these two questions – Is this true, and, if it is true what then? - ought to be constantly present in the mind of the Judge, and the rules of evidence do not throw the smallest portion of light upon them.

21.5 **Section 165 of the Indian Evidence Act, 1872**

- Section 165 of the Indian Evidence Act, 1872 invests the Judge with plenary powers to put any question to any witness or party; in any form, at any time, about any fact relevant or irrelevant. Section 165 is intended to arm the Judge with the most extensive power possible for the purpose of getting at the truth. The effect of this Section is that in order to get to the bottom of the matter before it, the Court will be able to look at and inquire into every fact and thus possibly acquire valuable indicative evidence which may lead to other evidence strictly relevant and admissible. The Court is not, however, permitted to found its judgment on any but relevant statements.

- The object of a trial is, first to ascertain truth by the light of reason, and then, do justice upon the basis of the truth and the Judge is not only justified but required to elicit a fact, wherever the interest of truth and justice would suffer, if he did not.

- The Judge contemplated by Section 165 is not a mere umpire at a wit-combat between the lawyers for the parties whose only duty is to enforce the rules of the game and declare at the end of the

combat who has won and who has lost. He is expected, and indeed it is his duty, to explore all avenues open to him in order to discover the truth and to that end, question witnesses on points which the lawyers for the parties have either overlooked or left obscure or willfully avoided. A Judge, who at the trial merely sits and records evidence without caring so to conduct the examination of the witnesses that every point is brought out, is not fulfilling his duty.

21.6 **False claims and defences**

- In the last 40 years, a new creed of litigants have cropped up who do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the Courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final.

- False claims and defences are serious problems with real estate litigation, predominantly because of ever escalating prices of the real estate. Litigation pertaining to valuable real estate properties is dragged on by unscrupulous litigants in the hope that the other party will tire out and ultimately would settle with them by paying a huge amount. This happens because of the enormous delay in adjudication of cases in our Courts. If pragmatic approach is adopted, then this problem can be minimized to a large extent. It is a matter of common experience that Court's otherwise scarce time is consumed or more appropriately, wasted in a large number of uncalled for cases.

- Dishonest and unnecessary litigations are a huge strain on the judicial system. The Courts continue to be flooded with litigation with false and incoherent pleas and tainted evidence led by the parties. The judicial system in the country is choked and such litigants are consuming Courts' time for a wrong cause. Efforts are made by the parties to steal a march over their rivals by resorting to false and incoherent statements made before the Court.

21.7 **Imposition of Costs**

- Imposition of actual, realistic or proper costs and or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. The cost should be equal to the benefits derived by the litigants, and the harm and deprivation suffered by the rightful person so as to check the frivolous litigations and prevent the people from reaping a rich harvest of illegal acts through Court. The costs imposed by the Courts must be the real costs equal to the deprivation suffered by the rightful person and also considering how long they have compelled the other side to contest and defend the litigation in various courts. In appropriate cases, the Courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings. The parties raise fanciful claims and contests because the Courts are reluctant to order prosecution.

- It is the duty of the Courts to see that such wrongdoers are discouraged at every step and even if they succeed in prolonging the litigation, ultimately they must suffer the costs for prolonging the litigation. Imposition of actual, realistic or proper costs and/or ordering prosecution in appropriate cases would go a long way in controlling the tendency of filing false cases.

21.8 **Section 16 (c) of the Specific Relief Act, 1963**

- In a suit for specific performance, the plaintiff has to prove a valid agreement of sale; the breach of the contract by the defendant; and readiness and willingness of the plaintiff to perform his part of the contract.
- Section 16(c) of the Specific Relief Act mandates "readiness" and "willingness" on the part of the plaintiff as a condition precedent to seek specific performance.
- The "readiness" and "willingness" are two separate issues. The former refers to financial capacity whereas the latter depends upon the intention of the purchaser.

- "Readiness" and "willingness" cannot be treated as a straitjacket formula. It has to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the party concerned.
- The Court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances to adjudge the "readiness" and "willingness" of the plaintiff.
- When the parties enter into an agreement relating to an immovable property, they amicably agree on the total sale consideration, earnest money as well as the payment of the balance sale consideration. If both the parties are ready and willing, they usually complete the transaction within the stipulated time in the following manner:-
    - The purchaser makes arrangement for the balance sale consideration within the stipulated time.
    - The purchaser informs the seller about the arrangement having been made.
    - The purchaser drafts the sale deed and sends the draft sale deed to the seller for approval.
    - The seller approves the draft sale deed and returns it back to the purchaser.
    - The purchaser prepares the sale deed on the requisite stamp papers.
    - Both the parties fix the date, time and place for payment of balance sale consideration, execution of sale deed, registration of the sale deed and handing over of the possession.
    - The parties complete the sale transaction on the agreed date, time and place.
- In normal parlance, both the parties remain in touch either personally or through the property dealer.
- The problem arises when one of the two parties turn dishonest. However, the party in breach purports to be ready and willing and creates evidence to that effect. At times, both the parties visit the office of Sub-Registrar on the last day of performance for

obtaining a receipt of having attended the office of the Sub-Registrar to later on contend that they were ready and willing to perform and were waiting for other party. If the seller is in breach, he creates false evidence of readiness to avoid specific performance by the purchaser and to illegally forfeit the earnest money. On the other hand, if the purchaser is in breach, he creates false evidence of readiness and willingness to file a case of specific performance.

- It is the duty of the court to find out which party has not performed and is trying to wriggle out.
- The Court has to take into consideration the human probabilities, ordinary course of human conduct and common sense to draw necessary inference. Drawing presumptions is the backbone of the judicial process.
- The silence or absence of correspondence by any party may be indicative of his dishonest intention. The dishonest intention of the seller can be inferred where the purchaser repeatedly contacts the seller for approval of the draft sale deed and for fixing time for payment of balance sale consideration and execution/registration of the sale deed but the seller does not respond or avoids contact. On the other hand, the dishonest intention of the purchaser can be inferred where the purchaser does not contact the seller for approval of the sale deed and fixing date, time and place for payment of balance sale consideration and execution/registration of the sale deed.
- Upon refusal of the seller to complete the agreement, the purchaser is expected to issue a notice and immediately file a suit for specific performance. Any delay in this regard may indicate his intention that he was not ready and willing and the Court may refuse to grant specific performance.

21.9 **Section 20 of the Specific Relief Act, 1963**

- The specific performance is an equitable relief. Section 20 of the Specific Relief Act preserves judicial discretion. The Court is not bound to grant specific relief merely because it is lawful to do so. The relief sought under Section 20 is not automatic as the Court is

required to see the totality of the circumstances which are to be assessed by the Court in the light of facts and circumstances of each case.

- The specific performance is usually granted where substantial sale consideration has been paid and the possession of the property has been delivered to the purchaser.
- In the event of any delay/inaction on the part of the purchaser, it would be inequitable to give the relief of specific performance to the purchaser. The rationale behind refusal of the Court to grant the specific performance where long time has gone by is that the prices of the property may have increased many times with the passage of time and it would be injustice to a person who has not received the sale consideration within the time stipulated in the agreement.
- If under the terms of the contract, the plaintiff gets an unfair advantage over the defendant, the Court may not exercise its discretion in favour of the plaintiff. So also specific relief may not be granted if the defendant would be put to undue hardship which he did not foresee at the time of agreement. If it is inequitable to grant specific relief, then also the Court would desist from granting a decree to the plaintiff.
- The party who seeks specific performance being an equitable relief must come to the Court with clean hands. In other words, the party who makes false allegations does not come with clean hands and is not entitled to the equitable relief.
- The Court has to consider whether it would be fair, just and equitable. The Court is guided by the principles of justice, equity and good conscience.
- While exercising the discretion, the Court would take into consideration the circumstances of the case, the conduct of parties, and the motive behind the litigation.

22. **Admitted facts in the present case**

22.1 Agreement to sell dated 5th July, 1996 (Ex.P-1) for sale of the suit property No.53, New Krishna Nagar, Delhi-110051 by the

defendant to the plaintiff for a total consideration of ₹13,95,000/-. Payment of earnest money of ₹1,50,000/- by the plaintiff to the defendant on 5th July, 1996 at the time of execution of Ex.P-1. Balance sale consideration agreed to be paid by 5th October, 1996.

22.2 Agreement to sell dated 22nd August, 1996 (Ex.P-2) on the same terms and conditions except that further payment of ₹50,000/- to be made by the plaintiff to the defendant.

22.3 Extension of the date of completion of sale from 5th October, 1996 to 30th October, 1996.

22.4 The plaintiff did not make the payment of entire sale consideration to the defendant by 30th October, 1996.

22.5 The Plaintiff made a complaint to the police on 23rd June, 1997 (Ex.P-4) in which she stated that the defendant is not returning the earnest money with penalty and interest.

22.6 The defendant issued a legal notice to the plaintiff on 31st July, 1997 (Ex.P-5) intimating her that she has committed breach and therefore, the agreement stood cancelled and the earnest money was forfeited.

22.7 The plaintiff did not reply to the aforesaid notice.

22.8 The plaintiff neither drafted the sale deed nor sought the approval thereof from the defendant.

22.9 The plaintiff did not purchase the requisite stamp papers for preparation of the sale deed.

22.10 The plaintiff did not issue any notice whatsoever to the defendant to demand the title documents or for fixing date for execution/registration of the sale deed.

22.11 The plaintiff did not issue any notice whatsoever to intimate the defendant that she was ready with the balance sale consideration on 30th October, 1996 and that the defendant was in breach.

22.12 The plaintiff did not issue any notice to the defendant to demand performance of the agreements, Ex.P-1 and Ex.P-2.

22.13 The plaintiff was aware that the defendant had to purchase another property from the sale proceeds of the suit property. (Admitted by PW-1 in cross-examination)

22.14 The defendant had shown the original title deed of the suit property to the plaintiff as well as her husband (Admitted by PW-1 in her cross-examination)

22.15 The plaintiff instituted the suit for specific performance on 21st August, 1997 i.e. after more than nine months of the alleged breach.

23. **Disputed Facts**

23.1 The defendant has denied the two endorsements made on the back of page '1' of the agreement – Ex.P-2. The defendant has also denied the receipt of ₹1,70,000/- mentioned in the first endorsement. The defendant's case is that he signed the endorsements under pressure and threats from the police at the instance of the plaintiff.

23.2 The defendant has disputed that the plaintiff was ready and willing to make the payment of balance sale consideration to the defendant on 30th October, 1996 and that she intimated the plaintiff to visit the office of Sub-Registrar on 30th October, 1996 for execution of the sale deed. According to the defendant, the plaintiff was never ready and willing to perform her part of the contract and she never intimated the defendant about her visit to the office of the sub-Registrar on 30th October, 1996.

23.3 The plaintiff has disputed that the defendant agreed to sell the said property to purchase another property for his residence and he entered into an agreement dated 7th September, 1996 to purchase property no. F-1, Radhey Puri, Delhi for a consideration of ₹10,10,000/-. The defendant claims to have made the payment of ₹1,50,000/- to the vendor of Radhey Puri property and the balance sale consideration had to be paid by 20th October, 1996. The defendant further claims that the said agreement got frustrated due to the breach by the plaintiff to make the balance sale

consideration by 30th October, 1996 and the defendant has lost ₹1,50,000/- in that transaction.

24. Findings of this Court

Applying the aforesaid principles of law to the facts of the present case, the findings of this Court are as under:-

24.1 Findings on the Disputed Facts

24.1.1 Disputed Fact

- The defendant has denied the two endorsements made on the back of page '1' of the agreement – Ex.P-2. The defendant has also denied the receipt of ₹1,70,000/- mentioned in the first endorsement. The defendant's case is that he signed the endorsements under pressure and threats from the police at the instance of the plaintiff.

Finding

- On consideration of all the matters before the Court as defined in Section 3 of the Indian Evidence Act, including the statement of the witnesses, the admission of the parties, the documents proved in evidence and the presumptions, this Court believes to be true that the plaintiff made the payment of ₹1,70,000/- to the defendant on 20th August, 1996 and both the endorsements made on the back of agreement – Ex.P-2 are voluntary. The Court believes that the denial of the payment of ₹1,70,000/- and two endorsements on the back of Ex.P-2 by the defendant to be false.

  The payment of ₹1,70,000/- by the plaintiff to the defendant and the two endorsements on the back of

Ex.P-2 therefore stand "proved" within the meaning of Section 3 of the Indian Evidence Act.

Reasons for the aforesaid finding

- The defendant has admitted the extension of date of the agreement up to 30th October, 1996 in the written statement as well as the evidence.
- The plaintiff has deposed on oath that both the endorsements on the back of Ex.P-2 were made by the defendant in his own handwriting and signed by the defendant in her presence.
- The defendant has admitted his handwriting on the endorsements on the back of Ex.P-2. The defendant's contention that he wrote and signed the endorsements on the back of Ex.P-2 under police pressure is not believable as the defendant has not made any complaint whatsoever against any police officer at any stage.
- It is not the defendant's case that the police pressure continued after making of the endorsement. The defendant could have lodged the complaint after the police pressure was over.
- The defendant has not named any person who exerted pressure on him.
- The defendant has also not disclosed what pressure was exerted on him.

- The defendant has also not challenged the endorsements made on the back of Ex.P-2 in any Court of law.
- The defendant has not mentioned the execution of endorsements on the back of Ex.P-2 under police pressure in his legal notice dated 31st July, 1997.
- This plea was set up by the defendant for the first time in his written statement filed on 5th February, 1998 which is almost 1 year and 5 months after the alleged incident. A prudent seller would not behave in this manner.
- The averments made by the defendant do not satisfy the test of common course of natural events, human conduct and public/private business in relation to the facts of this case and do not appear to have the ring of truth.

24.1.2 **Disputed fact**

The defendant has disputed that the plaintiff was ready and willing to make the payment of balance sale consideration to the defendant on 30th October, 1996 and she intimated the plaintiff to visit the office of Sub-Registrar on 30th October, 1996 for execution of the sale deed.

Finding

- On consideration of all the matters before the Court as defined in Section 3 of the Indian Evidence Act, including the statement of witness, admission of parties, the documents proved in evidence and the presumptions, this Court believes it to be true that the plaintiff was ready with the balance sale consideration. However, this Court does not believe it to be

true that the plaintiff was willing to make the payment thereon to the defendant on 30th October, 1996.

It is therefore "proved" that the plaintiff was ready with the balance sale consideration on 30th October, 1996. However, it is "disproved" that the plaintiff was "willing" to make the payment of the balance sale consideration to the defendant on 30th October, 1996.

Reasons

- The plaintiff has proved availability of ₹10,25,000/- with her on 30th October, 1996 by five demand drafts (Ex.PW-6/1 and PW-7/1 and PW-7/2). The plaintiff's contention that remaining ₹50,000/- was available with her in cash is also believable. As such, the plaintiff was ready to perform on 30th October, 1996.
- The defendant's contention that the balance sale consideration was not available with the plaintiff because she had borrowed the money from her father has no merit. The finding of the Trial Court based on the judgment of this Court in *Raghunath Rai* v. *Jageshwar Prashad Sharma*, AIR 1999 Delhi 383 that if the buyer is in a position to borrow money to make the payment of the balance sale consideration, it would be sufficient to prove her readiness to make the payment, is correct and is upheld.
- The plaintiff has proved to have visited the office of the Sub-Registrar on 30th October, 1996 by receipts Ex.P-3 and P-3A issued by the office of the Sub-Registrar. However, the

plaintiff's claim that she intimated the defendant about the visit to the office of Sub-Registrar does not appear to be true because the plaintiff did not issue any notice to the defendant on 30th October, 1996 or at any point thereafter. If the plaintiff had fixed the visit to the office of Sub-Registrar with the defendant, she would have certainly contacted the defendant to find out why the defendant did not visit and would have also issued a telegram/notice in the evening on 30th October, 1996 itself to notify the breach to the defendant.

- As per the addresses given in the memo of parties, both the parties are residing in close vicinity in the same locality. The plaintiff is the resident of 29, Ram Nagar, Delhi-110051 whereas the defendant is the resident of 53, New Krishna Nagar, Delhi-110051. The plaintiff claims to have visited the office of the Sub-Registrar, Seelampur on 30th October, 1996 at 10:00 am and waited the whole day for the defendant. Since there was no dispute between the parties on 30th October, 1996, the plaintiff ought to have visited the defendant who was staying in the close vicinity of the plaintiff and they could have together visited the office of the Sub-Registrar. It is quite strange and unnatural that after waiting for the whole day on 30th October, 1996 in the office of the Sub-Registrar, the plaintiff still chose not to visit the defendant to inquire as to why he did not visit the office of the Sub-Registrar. It is also unnatural that the plaintiff

cancelled the demand drafts for ₹10,25,000/- within a week without even contacting the defendant. There was no dispute between the parties at that time. Applying the test of common course of natural events and human conduct, it can be presumed that the plaintiff had unilaterally visited the office of the Sub-Registrar on 30th October, 1996 without informing the defendant with the dishonest intention of creating the false evidence of willingness. That is why the plaintiff did not contact the defendant and rushed to get the drafts cancelled within a week.

- The plaintiff, in her cross-examination, admitted that she never contacted the defendant before 30th October, 1996.
- If the defendant had agreed to visit the office of Sub-Registrar on 30th October, 1996, the plaintiff as an ordinary prudent person was unlikely to have not issued a notice to the defendant to notify the default and remained inactive, silent, dumb and mute unless he had any compelling reason. No such reason is revealed. The conduct offers indication about truth. The plaintiff's plea is inherently unconvincing and cannot be accepted. The plaintiff's conduct appears to be improbable, artificial, indifferent, irresponsible and inconsistent.
- The plea of the plaintiff that she had fixed the date and time for visiting the office of the Sub-Registrar with the defendant on telephone does not appear to be true. Had it been true, the plaintiff would have certainly issued a telegram/notice in

the evening of 30th October, 1996 itself to notify the defendant. It appears that the plaintiff deliberately did not issue any notice to the defendant on 30th October, 1996 or at any point thereafter because she was apprehensive that the defendant may still be willing to perform. The natural inference which can be drawn under Section 114 is that the plaintiff wanted to build-up a false plea of readiness and willingness to institute a suit for specific performance.

- In the plaint, the plaintiff has averred that she visited the office of the Sub-Registrar on 30th October, 1996 for execution of the sale deed whereas in cross-examination she deposed that the defendant told her that he would give the title deeds to her in the office of Sub-Registrar on 30th October, 1996 which is not believable and contrary to the common course of natural events. A seller ordinarily never parts with the original title deed till receipt of the balance sale consideration. The plaintiff also would not have parted with the balance sale consideration just against delivery of original title deeds. Secondly, if the defendant was ready to part with the original title deed, there was no need to visit the office of the Sub-Register. The plaintiff had admitted in her cross-examination that she had seen the original title deed of the subject property. The plaintiff had never demanded the title documents from the defendant and this plea was set for the first time in the plaint. The plaintiff's conduct appears to be improbable, artificial, indifferent and inconsistent.

- The willingness of the purchaser has to be inferred from his conduct. If the purchaser would have been willing, he would have drafted the sale deed and sent the draft sale deed to the defendant for approval and thereafter procured the stamp papers to prepare the sale deed. The plea of the plaintiff that she did not purchase the stamp papers or draft the sale deed because the defendant has not handed over the original sale deed is not believable by applying the test of common sense and normal human conduct as no seller would hand over the original sale deed before receiving the complete sale consideration.
- Whereas the plaintiff never issued any notice to demand performance to the defendant, the defendant issued a legal notice dated 31st July, 1997 to the plaintiff to notify the forfeiture of the earnest money to which the plaintiff chose not to send any reply, may be because the plaintiff had nothing to controvert.
- The plaintiff made police complaint dated 23rd June, 1997. The contention of the plaintiff about police complaint that the defendant was giving threats does not appear to be true. If the defendant had refused to sell the property and had forfeited the earnest money, there was no occasion for the defendant to give any threat to the plaintiff. It appears that the plaintiff made the police complaint with an intention of putting pressure on the defendant to refund the earnest money. The plaintiff's unwillingness can be inferred from

her complaint dated 23rd June, 1997 to the police in which she stated that the defendant has not refunded the consideration along with the penalty and interest despite repeated demands. There is no reference either to the non-supply of title documents by the defendant or the willingness of the plaintiff to buy the suit property.

- Even during the course of the hearing, the defendant could not give any justification as to why the plaintiff did not issue any notice to the defendant on 30th October, 1996 to notify that she was waiting for whole day in the office of the Sub-Registrar and to find out why the defendant defaulted; why no notice was issued by the plaintiff to notify that the defendant was in breach and to demand performance; why the plaintiff did not demand performance in the police complaint dated 23rd June, 1997; why the plaintiff did not send reply to the legal notice dated 31st July, 1997 and why the plaintiff waited for more than nine months to file the suit. A prudent purchaser would not behave in this manner and applying the test of common course of natural events and human conduct, it is presumed that the plaintiff was not willing to perform her part of the contract. The silence in the period after agreement and absence of correspondence is a strong indication of the intention of the plaintiff that she was not willing to perform her part of the contract.

- The finding of the Trial Court that the defendant would not suffer any hardship if the decree of specific performance is passed is clearly erroneous inasmuch as the plaintiff was aware that the defendant has to purchase another property after selling the suit property. The property prices have risen manifold since 1996 and the defendant would not be in a position to buy any alternative property with the balance sale consideration. The specific performance would therefore, certainly cause great hardship to the defendant.

- The finding of the Trial Court that no adverse inference can be drawn against the plaintiff for not purchasing the stamp papers is also erroneous. Applying the test of common course of natural events and human conduct provided in Section 114 of the Indian Evidence Act, it can be presumed that the plaintiff had to purchase the stamp papers in advance and prepare the sale deed thereon before visiting the office of the Sub-Registrar. It is the plaintiff's case that she visited the office of the Sub-Registrar on 30th October, 1996 for execution of the sale deed which was not possible unless stamp papers were purchased in advance.

- The plaintiff has referred to and relied upon *Motilal Jain* v. *Ramdasi Devi* (supra) and *Faquir Chand* v. *Sudesh Kumari* (supra) in which the specific performance was granted to the purchaser who was found to be ever ready and willing whereas in the present case, the plaintiff has been found to

be in breach of the contract because she was not willing to make the payment of the balance sale consideration to the defendant. In that view of the matter, the aforesaid judgments do not help the plaintiff.

- The plaintiff has relied upon the *Satya Jain* v. *Anis Ahmed Rushdie* (supra) in support of the contention that specific performance may be allowed by the payment of market price according to circle rates. In *Satya Jain* v. *Anis Ahmed Rushdie* (supra), the Supreme Court granted specific performance because the purchaser was found to be ready and willing whereas the seller was in breach. In the present case, the plaintiff has been found to be unwilling to perform her part of the contract and therefore, the relief for specific performance is not available to the plaintiff.

- The Trial Court has gravely erred in not even applying its mind on the question of "willingness" which was the main bone of contention between the parties. It appears that the learned Trial Court did not differentiate between the "readiness" and "willingness". Whereas the "readiness" relates to the financial capacity of the purchaser, "willingness" relates to the intention of the purchaser. The finding of the learned Trial Court that the plaintiff was willing to make the payment of the balance sale consideration to the defendant on 30th October, 1996 is perverse and is set aside.

24.1.3 **Disputed fact**

The plaintiff has disputed that the defendant agreed to sell the said property to purchase another property for his residence and he entered into an agreement dated 7th September, 1996 to purchase property no. F-1, Radhey Puri, Delhi for a consideration of ₹10,10,000/-.The defendant claims to have made the payment of ₹1,50,000/- to the vendor of Radhey Puri property and the balance sale consideration had to be paid by 20th October, 1996. The defendant further claims that the said agreement got frustrated due to the breach by the plaintiff to make the balance sale consideration by 30th October, 1996 and the defendant has lost ₹1,50,000/- in that transaction.

Finding

- **The agreement dated 7th September, 1996 set up by the defendant is "not proved". The frustration of the alleged agreement dated 7th September, 1996 and the loss of ₹1,50,000/- by the defendant is also "not proved". However, it is "proved" that the defendant had agreed to sell the suit property to the plaintiff to purchase some other property for his residence from the sale consideration since the plaintiff has admitted the same in her cross-examination.**

Reasons

- The defendant has not placed the original agreement dated 7th September, 1996 on record. However, the defendant has placed the photocopy of the same on record which has not been proved and therefore, marked as Mark 'A'. The

defendant has withheld the best evidence in the form of original agreement dated 7th September, 1996.

- The defendant has pleaded the frustration of the agreement dated 7th September, 1996 and the loss of ₹1,50,000/- in that transaction. However, the plaintiff has not placed on record the relevant documents relating to the said transaction. The oral testimony of DW1 and DW2 are not sufficient to prove this plea. The defendant has withheld the evidence relating to the frustration of the alleged agreement dated 7th September, 1996 and the loss of ₹1,50,000/- in that transaction.
- The defendant has deposed on oath that he wanted to sell the suit property to purchase another property for his residence which has been admitted by the plaintiff in her cross-examination.

24.2 **Findings on Issues**

24.2.1 **Findings on Issues no.1, 2 and 3**

"1. Whether the plaintiff was ready and willing to perform her part of the contract?

2. Whether the plaintiff is entitled to decree under Specific Performance and Possession?

3. Whether agreement dated 5th July, 1996 and 22nd August, 1996 stood cancelled and earnest money stood forfeited?"

- The plaintiff was ready with the balance sale consideration of ₹10,75,000/- on 30th October, 1996. However, the plaintiff was not willing to make the payment of the balance

sale consideration to the defendant and she unilaterally visited the office of the Sub-Registrar along with the balance sale consideration with the dishonest intention of creating false evidence of "willingness".

- The plaintiff has committed the breach of the agreements Ex.P-1 and P-2 and therefore is not entitled to the decree of specific performance against the defendant.
- Even assuming for the sake of argument that the plaintiff was willing to perform, still she is not entitled to the discretionary relief under Section 20 of the Specific Relief Act for the following reasons:

  (i) It would be inequitable and would put undue hardship on the defendant who agreed to sell the suit property to the plaintiff to purchase another property for his residence. With the enormous rise in the prices of the property, the defendant would not be in a position to buy any property from the balance sale consideration. The prices of immovable properties in Delhi have risen about 25 to 30 times in the last 15 years and therefore, the balance sale consideration of ₹10,75,000/- is not sufficient to enable the defendant to buy an equivalent property which he could have purchased if the payment would have been made on 30th October, 1996. If money is paid after years, what alternative property can the defendant purchase with that money. Constant rise in prices have been

recognized by the Courts to refuse exercise of discretion under Section 20 of the Specific Relief Act.

(ii) The plaintiff has not approached the Court with clean hands and has made false claim and is therefore disentitled to the equitable relief on this ground also.

(iii) Delay of more than nine months on the part of the plaintiff in filing the suit. Merely because there is limitation for filing a suit for specific performance does not mean that a suit which is filed much after the alleged breach, such a suit for specific performance ought to be decreed.

- The detailed reasons are given in the para 24.1.2 above which are not repeated herein for the sake of brevity. The contrary findings of the learned Trial Court with respect to Issue nos.1, 2 and 3 are erroneous and are set aside.

24.2.2 **Findings on Issues no.4 and 5**

"4. Whether the Defendant did not receive additional amount of ₹1,70,000/- from the plaintiff as alleged in the written statement?

5. Whether time was not extended to perform agreement dated 22.08.1996?"

- The plaintiff made additional payment of ₹1,70,000/- to the defendant on 22nd August, 1996.
- The defendant made two endorsements on the back of Ex.P-2 – agreement dated 22nd August, 1996 and extended the date of the agreement upto 30th October, 1996.

- The detailed reasons are given in the para 24.1.1 above which are not repeated herein for the sake of brevity. The findings of the learned Trial Court with respect to Issue nos.4 and 5 are correct and are upheld.

25. **Conclusion**

25.1 The plaintiff is not entitled to the relief of specific performance against the defendant as the plaintiff has committed the breach of the agreements Ex.P-1 and P-2.

25.2 The plaintiff has paid a sum of ₹3,20,000/- to the defendant out of which the earnest money amount is ₹1,50,000/-. The agreements – Ex.P-1 and Ex.P-2 provide for forfeiture of earnest money of ₹1,50,000/- by the defendant in the event of breach by the plaintiff. As such, the remaining sale consideration of ₹1,70,000/- is refundable to the plaintiff under the terms of agreements – Ex.P-1 and Ex.P-2. However, during the course of final hearing of this appeal, the plaintiff offered to refund the earnest money to the plaintiff .

25.3 This Court is of the view that both the parties have shamelessly resorted to falsehood and unethical means for achieving their goals. It appears that the plaintiff was not willing to purchase the suit property and she approached the defendant for refund of ₹3,20,000/- and even filed a police complaint to pressurize the defendant. The defendant was entitled to forfeit the earnest money of ₹1,50,000/- in terms of the agreement – Ex.P-1 and Ex.P-2 and the matter may have been closed if the defendant

would have shown the grace to refund at least the refundable amount of ₹1,70,000/-. However, the defendant out of greed, declined to refund even the refundable amount of ₹1,70,000/- to the plaintiff whereupon the plaintiff filed a suit for specific performance raising false claim of "willingness". The defendant had a good defense but he backed it up with a dishonest and false evidence by denying the two endorsements on the back of Ex.P-2 and the payment of ₹1,70,000/- which were ultimately proved before the Trial Court. Since the relief of specific performance is being denied to the plaintiff, this Court is of the view that to balance the equities, the defendant should refund the entire amount of ₹3,20,000/- along with interest thereon @ 12% per annum from the date of filing of the suit till realization to the plaintiff. The plaintiff has deposited the balance sale consideration of ₹10,75,000/- with the Trial Court in terms of the impugned judgment and decree for specific performance which is to be refunded back to the plaintiff.

25.4 Consequently, the appeal is allowed, the impugned judgment is set aside and the plaintiff's suit relating to the prayers of specific performance and possession is dismissed. However, a decree for ₹3,20,000/- along with interest thereon at the rate of 12% per annum with effect from the date of filing of the suit upto the date of payment is passed in favour of the plaintiff and against the defendant. The defendant shall maintain *status quo* with respect to the suit property till the aforesaid refund is made to the plaintiff.

25.5 The defendant is not entitled to any costs of this appeal in view of the false defense raised relating to the endorsements made on the back of the agreement (Ex.P-2) and the payment of ₹1,70,000/- mentioned therein.

25.6 The amount deposited by the plaintiff in the Trial Court in terms of the impugned judgment be refunded to the plaintiff along with interest, if any, accrued thereon.

J.R. MIDHA, J

MARCH 08, 2013