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C.A.No. 5218 OF 1998
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ITEM NO. 101(PH) COURT NO. 6 SECTION XVII

SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

CIVIL APPEAL NO. 5218 OF 1998@@
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Sheikh Farjan Mian (Dead) by Lrs. ... Appellant (s)

Vs.

Teju Sahu ... Respondent (s)

Date: 22-08-2001 This/These matter(s) was/were called
on for hearing today.

CORAM :

HON'BLE MR. JUSTICE V.N. KHARE
HON'BLE MR. JUSTICE B.N. AGRAWAL

For appellant (s) Mr. RS Suri, adv.
Mr. Zafar Sadique, adv.
Mr. Mohd. Ali, adv.
Mr. Irshad Ahmad, adv.

For respondent (s) Mr. SB Upadhyay, adv.
Mr. Sujit K. Singh, adv.
Mr. Santosh Mishra, adv.

UPON hearing counsel, the Court made the following
O R D E R

.....L.....I.....T.....T.....T.....T.....T.....T.....J.
.SP2

The appeal is allowed. There shall be no order
as to costs.

.SP1

(Neelam Kawatra)
Court Master

(S.Krishnan)
Court Master

Signed order is placed on the file.

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5218 OF 1998

Sheikh Farjan Mian (d) by Lrs. .. Appellant (s)

-vs-

Teju Sahu .. Respondent (s)

O R D E R

This is plaintiff s appeal. On 13.4.1972, the plaintiff-appellant executed a sale deed in respect of the property in dispute in favour of the defendant-respondent. On the same day, an agreement for reconveyance of the said property was executed by the defendant-respondent. One of the terms of the agreement of reconveyance was that the plaintiff was required to pay the purchase money by 13.4.1974. It is alleged by the plaintiff that he made several attempts to tender the money to the defendant before 13.4.1974 but he avoided the receipt thereof. It is also alleged that 12.4.1974 to 15.4.1974 were public holidays, therefore, on 16.4.1974 he filed the suit for specific performance of the agreement dated 13.4.1972 and deposited the entire consideration money in the court on the same day. The defendant-respondent contested the suit. However, the trial court decreed the suit after having found that the plaintiff was always willing and ready to perform his part of the contract. Aggrieved, the defendant preferred an appeal before the first appellate court. The first appellate court allowed the appeal and set aside the decree of the trial court. The second appeal preferred by the appellant was dismissed by the High Court. The view taken by the High Court was that since the time was essence of the contract, the plaintiff having failed to pay/deposit the money by 13.4.1974, the plaintiff was not ready and willing to perform his part of the contract. In that view of the matter, the second appeal filed by the plaintiff was dismissed. It is against the said judgment, the plaintiff has preferred this appeal by way of special leave.

Mr. R.S. Suri, learned counsel appearing for the appellant urged that the High Court committed serious mistake of law while entertaining the argument for the first time that the time was essence of the contract and the plaintiff having failed to pay/deposit the money, there was no readiness of willingness on the part of the plaintiff to perform his part of the contract. Learned counsel relied upon a decision of this Court in Smt. Indira Kaur and othes. Vs. Sheo Lal Kapoor reported in 1988 (2) SCC 488. We find substance in the argument.

Learned counsel appearing for the respondent contended that the time is essence of the contract is pure question of law and that can be taken at any stage of the litigation. In the present case, what we find is that neither any plea in this regard was taken by the defendant in the written statement nor any issue was framed by the trial court and further the parties did not lead any evidence to that effect. In the absence of any plea or an issue to that effect, it was not open to the High Court to entertain the argument, for the first time, at the stage of the second appeal. We are, therefore, of the view that the judgment passed by the High Court is not sustainable in law. Now the question is whether the case be remanded to the High Court or to the trial court. Learned counsel appearing for the parties are agreed that the matter be sent to the trial court. We, accordingly, set aside the judgment of the court below and remit the matter to the trial court. The trial court is directed to frame issues in light of observations made hereinbefore and permit the

parties to lead evidence on the said issues. It would open to the plaintiff to lead fresh evidence that he has tendered the consideration money on or before 13.4.1974.

With these observations, the appeal is allowed. There shall be no order as to costs.

& & & & & & & ..J.
(V. N. Khare)

& & & & & & & ..J.
(B. N. Agrawal)

New Delhi;
22 August, 2001

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