

(2015) 06 MAD CK 0165

In the Madras High Court

Case No : S.A. No. 1224 of 2004 and C.M.P. No. 324 of 2015

G. Sekar

APPELLANT

Vs

K. Masilamani

RESPONDENT

Date of Decision : 09-06-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Specific Relief Act, 1963 — Section 16(c), 20

Citation : (2015) 06 MAD CK 0165

Hon'ble Judges : R. Mala, J

Bench : Single Bench

Advocate : S.V. Jayaraman, Senior Counsel for V. Mani, for the Appellant; V. Bhiman for Sampathkumar Associates, Advocates for the Respondent

Final Decision : Dismissed

Judgement

R. Mala, J.—This second appeal arises out of the Judgment and Decree dated 03.11.2003 in A.S. No. 6 of 2000 on the file of the Additional District Judge Fast Track Court III, Chengalpattu at Poonamalee confirming the Judgment and Decree dated 05.11.1999 in O.S. No. 212 of 1992 on the file of the learned Subordinate Judge, Poonamalee.

2. The averments made in the plaint are as follows:-

The plaintiff entered into an agreement with the defendant on 17.01.1992 for purchase of house site bearing Plot No. 15, Abirami Nagar, Karayanchavadi, Sennirkuppam, Poonamallee, Madras-56. The house site measures an extent of 3175-1/2 sq.ft. and the plaintiff agreed to pay Rs. 84,000/- per ground of 2400 sq.ft. and the total sale consideration amounts to Rs. 1,11,142/- and also paid Rs. 25,000/- as advance. As per the sale agreement, time for completion of the sale deed was 45 days from 17.01.1992. Accordingly, the plaintiff informed the defendant to execute and register the sale deed on 02.03.1992 and also engrossed the sale deed on Non Judicial Stamp Papers of the value of Rs. 11,450/-. Before execution and registration of the sale deed to take possession

of the property, at the request of the plaintiff, the defendant measure the suit property and it was found that an extent of 8-1/2 x 45 on the Southern side of the suit property was less and the total extent of the suit property was only 2793 sq.ft. Therefore, the plaintiff informed the defendant that as per the sale agreement, he has to pay the price only for 2793 sq.ft. at Rs. 84,000/- per ground of 2400 sq.ft. and the total sale consideration would be Rs. 97,755/-. The plaintiff has also offered a sum of Rs. 72,755/- to the defendant after deducting the sum of Rs. 25,001/- which was paid as advance and requested the defendant to execute and register the sale deed. But the defendant has not agreed to reduce the price for the difference area and refused to receive the price for the actual area found after measurement. The defendant has also sent a notice dated 16.03.1992 to the plaintiff which was received by the plaintiff on 19.03.1992 and the plaintiff has also sent a reply on 25.03.1992. But the defendant has taken up an unreasonable stand and also contemplating to sell the property to third parties. Hence, the plaintiff was constrained to file a suit in O.S. No. 212 of 1992 to direct the defendant to execute and register the sale deed in respect of the Schedule mentioned property in favour of the plaintiff, if the defendant failed to execute the sale deed.

3. The gist and essence of written statement filed by the defendant are as follows:

The allegations made in the plaint were denied as highly mischieved and false by the defendant. The defendant submitted that the suit itself is not maintainable in law and on facts. It is further submitted that only after measuring the extent of land, the plaintiff entered into an agreement and the allegation that only after the agreement, the land was measured is absolutely false. The defendant further stated that the plaintiff was not ready to complete the contract. It is also submitted that the allegation that there is a difference in the measurement is a ruse to knock the property for a low price. The defendant also submitted that exchange of notices would clearly reveal the intention of the plaintiff who was never ready to complete the transaction and hence the suit is devoid of merits.

4. The Learned Trial Judge after considering the averments both in the plaint and written statement and arguments on either side counsel has framed necessary issues and on perusing the oral and documentary evidence viz., P.W. 1, D.W. 1, D.W. 2 and Exs. A1 to A6 and Exs. C1 and C2, decreed the suit. Aggrieved against the judgment and decree of the trial court, the defendant preferred an appeal in A.S. No. 6 of 2000 on the file of the learned Additional District Judge, Fast Track Court III, Chengalpattu.

5. The learned First Appellate Court has considered the argument advanced on either side and framed necessary point for consideration and confirmed the Judgment and Decree passed by the Trial Court and dismissed the appeal. Against the Decree and Judgment of the first Appellate Court, the present second appeal has been preferred by the defendant.

6. At the time of admission of the above second appeal, the following substantial questions of law were framed for consideration.

"Whether the judgments of the Courts below are sustainable in law, as the trial court has not framed any issue with respect to the readiness and willingness on the part of the plaintiff to perform the contract, though such a plea was raised by the defendant?"

7. Challenging the concurrent finding of both the Courts below, the learned counsel appearing for the appellant, who is the defendant in the Trial Court has put forth two limbs of arguments:

1. The suit is not maintainable since the suit is not filed for declaration that the termination of sale agreement is void.

2. The Trial Court has not framed proper issues in respect of readiness and willingness. But the First Appellate Court has without setting aside the judgment of the Trial Court has issued point for consideration and decreed the suit which is against law. Hence, he pray for setting aside the judgment and decree passed by both the Courts below.

3. To substantiate his argument, the learned counsel appearing for the appellant relied upon the decision reported in I.S. Sikandar (D) by L.Rs. Vs. K. Subramani and Others, (2014) 118 CLT 89 : (2014) 1 RCR(Civil) 236 : (2014) 1 SCALE 1 .

8. Refuting the same, the learned counsel appearing for the respondent would submit that the suit is maintainable. The respondent herein has entered into an agreement with the appellant under Ex. A1 on 17.01.1992 wherein 45 days time has been fixed to complete the registration. The total extent of the property was 3175-1/2 sq.ft. and the respondent agreed to pay Rs. 84,000/- per ground of 2400 sq.ft., which amounts to the total sale consideration of Rs. 1,11,142/-. The respondent also paid Rs. 25,001/- as advance and the balance sale consideration has to be paid within 45 days and document to be got registered. But before execution and registration of the sale deed, the suit property was measured and it was found that it was only 2793 sq.ft. Hence, the respondent informed the appellant that he has to pay the price only for 2793 sq.ft. and the actual price payable would be Rs. 97,755/-. But the appellant refused to receive the same and issued a notice dated 16.03.1992 wherein it was stated that he revoked the sale agreement. A reply has been sent by the respondent on 25.03.1992 wherein it was stated that the property has been measured on 02.03.1992 and the total property available is only 2793 sq.ft. and he is ready to pay the balance sale consideration for the extent of property available and hence requested the appellant to execute the sale deed by receiving the balance sale consideration. The intention of the defendant is to avoid the sale and till now he has not alienated the property and hence, there is no necessity to set aside the revocation of the sale agreement and so, the suit is maintainable. He further submitted that it is true that the Trial Court has not framed proper issue in respect of Section 16(c) of the Specific Relief Act that whether the plaintiff is

ready and willing to perform his part of contract. But it was discussed by the First Appellate Court which is the last fact finding Court after framing necessary point for consideration and has come to the correct conclusion and there is no necessity to interfere with the finding. Hence, he pray for dismissal of the appeal. To substantiate his arguments, he relied upon the following decisions:

1. K. Prakash Vs. B.R. Sampath Kumar, AIR 2015 SC 9 : (2014) AIRSCW 5795
2. N.P. Thirugnanam (D) by L.Rs., Vs. Dr. R. Jagan Mohan Rao and others, AIR 1996 SC 116 : AIR 1995 SC 116 : (1995) 5 JT 553 : (1995) 4 SCALE 465 : (1995) 5 SCC 115 : (1995) 2 SCR 53 Supp
3. Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and Others, AIR 1999 SC 2213 : (1999) 2 CTC 468 : (1999) 3 JT 163 : (1999) 2 SCALE 633 : (1999) 3 SCC 722 : (1999) 2 SCR 728 : (1999) 2 UJ 820 : (1999) AIRSCW 2240 : (1999) 4 Supreme 108
4. Maniar Ismail Sab and Others Vs. Maniar Fakruddin and Others, AIR 1989 SC 1509 : (1989) 1 SCALE 1124 : (1989) 1 SCALE 1122 : (1989) 2 SCC 685
5. Veerayee Ammal Vs. Seenii Ammal, AIR 2001 SC 2920 : (2001) 9 JT 145 : (2001) 7 SCALE 403 : (2002) 1 SCC 134 : (2001) AIRSCW 4377 : (2001) 7 Supreme 812
6. Ramani Ammal Vs. Susilammal, AIR 1991 Mad 163 : (1991) 2 LW 43 : (1991) 1 MLJ 1
7. S.P. Narayaaswami Pillai Vs. Dhanakoti Ammal, AIR 1967 Mad 220 : (1966) ILR (Mad) 668 : (1966) 79 LW 486

9. Considered the rival submissions made on both sides and also perused the typed set of papers.

Maintainability of the Suit:

10. It is admitted fact that the appellant is the owner of the property and he entered into a sale agreement as per Ex. A1 on 17.01.1992 wherein the extent of property was mentioned as 3175 sq.ft., total sale consideration was fixed as Rs. 1,11,142/-, Rs. 25,001/- was received as advance by the appellant and the time for completion of the sale was fixed as 45 days. But as per Ex. A2, notice issued by the appellant dated 16.03.1992, he has revoked the sale agreement since he is not ready and willing to perform his part of contract. The plaintiff/respondent has sent a reply dated 25.03.1992 stating that he is always ready and willing to perform his part of contract but on 02.03.1992, the property was measured and at that time, it was came to know that only 2793 sq.ft. was available and so, he is ready to pay the balance amount for the available extent. Immediately, the plaintiff/respondent filed a suit.

11. At this juncture, it is appropriate to consider the decision relied upon the learned counsel appearing for the appellant reported in I.S. Sikandar (D) by

L.Rs. Vs. K. Subramani and Others, (2014) 118 CLT 89 : (2014) 1 RCR(Civil) 236 : (2014) 1 SCALE 1 , wherein it was held that without prayer for setting aside the revocation, the suit is not maintainable. It is appropriate to incorporate paragraph Nos. 17 and 26 of the judgment, which reads as follows:

"17. Answer to Point No. 1

The first point is answered in favour of the defendant No. 5 by assigning the following reasons:

It is an undisputed fact that there is an Agreement of Sale executed by defendant Nos. 1-4 dated 25.12.1983 in favour of the plaintiff agreeing to sell the schedule property in his favour for a sum of Rs. 45,000/- by receiving an advance sale consideration of Rs. 5,000/- and the plaintiff had further agreed that the remaining sale consideration will be paid to them at the time of execution of the sale deed. As per Clause 6 of the Agreement of Sale, the time to get the sale deed executed was specified as 5 months in favour of the plaintiff by the defendant Nos. 1-4, after obtaining necessary permission from the competent authorities such as the Urban Land Ceiling Authority and Income Tax Department for execution and registration of the sale deed at the cost and expenses of the plaintiff. If there is any delay in obtaining necessary permission from the above authorities and the payment of layout charges, the time for due performance of agreement shall further be extended for a period of two months from the date of grant of such permission. In the instant case, permission from the above authorities was not obtained from defendant Nos. 1-4. The period of five months stipulated under clause 6 of the Agreement of Sale for execution and registration of the sale deed in favour of the plaintiff had expired. Despite the same, the defendant Nos. 1-4 got issued legal notice dated 06.03.1985 to the plaintiff pointing out that he has failed to perform his part of the contract in terms of the Agreement of Sale by not paying balance sale consideration to them and getting the sale deed executed in his favour and called upon him to pay the balance sale consideration and get the sale deed executed on or before 18.3.1985. The plaintiff had issued reply letter dated 16.3.1985 to the advocates of defendant Nos. 1-4, in which he had admitted his default in performing his part of contract and prayed time till 23.05.1985 to get the sale deed executed in his favour. Another legal notice dated 28.03.1985 was sent by the first defendant to the plaintiff extending time to the plaintiff asking him to pay the sale consideration amount and get the sale deed executed on or before 10.04.1985, and on failure to comply with the same, the Agreement of Sale dated 25.12.1983 would be terminated since the plaintiff did not avail the time extended to him by defendant Nos. 1-4. Since the plaintiff did not perform his part of contract within the extended period in the legal notice referred to supra, the Agreement of Sale was terminated as per notice dated 28.03.1985 and thus, there is termination of the Agreement of Sale between the plaintiff and defendant Nos. 1-4 w.e.f. 10.04.1985. As could be seen from the prayer sought for in the original suit, the plaintiff has not sought for declaratory relief to declare the termination of

Agreement of Sale as bad in law. In the absence of such prayer by the plaintiff the original suit filed by him before the trial court for grant of decree for specific performance in respect of the suit schedule property on the basis of Agreement of Sale and consequential relief of decree for permanent injunction is not maintainable in law. Therefore, we have to hold that the relief sought for by the plaintiff for grant of decree for specific performance of execution of sale deed in respect of the suit schedule property in his favour on the basis of non existing Agreement of Sale is wholly unsustainable in law. Accordingly, the point No. 1 is answered in favour of the defendant No. 5.

26. Answer to the Point No. 4

The point No. 4 is also required to be answered in favour of the 5th defendant for the reason that sale consideration of Rs. 48,000/- in respect of the suit schedule property has been paid to the defendant Nos. 1-4 after the termination of the earlier agreement with the plaintiff on 10.04.1985 vide notice dated 28.03.1985. Therefore, the contention urged on behalf of the plaintiff, that 5th defendant is not the bona fide purchaser, does not arise at all for the reason that the earlier agreement executed in favour of the plaintiff by the defendant Nos. 1-4 was not subsisting, is the finding recorded by us in answer to the point No. 1 and we have held that there is termination of Agreement of Sale dated 25.12.1983 by letter dated 28.03.1985 sent to him by them. Therefore, the findings recorded by the appellate court on this aspect stating that the defendant No. 5 is not a bona fide purchaser cannot be allowed to sustain. Accordingly, we set aside the same in the above aspect."

It is true that the above citation is not applicable because the sale agreed dated 25.12.1983, sale consideration was fixed as Rs. 45,000/-, Rs. 5,000/- was paid as advance and delivered the original deed and put the plaintiff in physical possession, five months time has been given for securing necessary permission from the Urban Land Ceiling Authority and it was agreed to extend by two months because of delay in securing permission from the competent authorities. Then the defendant issued a notice on 06.03.1985 calling upon the plaintiff to complete his part of the Contract by paying the balance amount of sale consideration. Reply has been received on 16.03.1985 and then only sale agreement has been terminated on 28.03.1985. Then the property has been sold and the fifth defendant has purchased the property and in that it was held that without setting aside the termination of the sale agreement, the suit for specific performance is not maintainable. In the case in hand, in the sale agreement/Ex. A1, 45 days time has been given to execute the sale deed but on perusal of the sale agreement there is no averment that time is the essence of contract and no forfeiture clause has been mentioned, notice has been issued on 16.03.1992 by the appellant, for which the respondent sent a reply on 25.03.1992 and filed a suit on 27.03.1992. In such circumstances, I am of the view that the above citation is not applicable to the facts of the present case.

12. The learned counsel appearing for the respondent also relied upon the

decision reported in K. Prakash Vs. B.R. Sampath Kumar, AIR 2015 SC 9 : (2014) AIRSCW 5795 and submits that decree for specific performance is discretionary and not arbitrary. The Appellate Court in exercise of discretion against grant of specific performance on extraneous consideration or sympathetic consideration and subsequent rise in price would not be treated as hardship entailing refusal of decree for specific performance.

13. The learned counsel appearing for the respondent also relied upon the decision reported in N.P. Thirugnanam (D) by L.Rs., Vs. Dr. R. Jagan Mohan Rao and others, AIR 1996 SC 116 : AIR 1995 SC 116 : (1995) 5 JT 553 : (1995) 4 SCALE 465 : (1995) 5 SCC 115 : (1995) 2 SCR 53 Supp , wherein in paragraph No. 5 it was held as follows:

"5. It is settled law that remedy for specific performance is an equitable remedy and is in the discretion of the court, which discretion requires to be exercised according to settled principles of law and not arbitrarily as adumbrated under s. 20 of the Specific Relief Act 1963 (for short, "the Act"). Under s. 20, the court is not bound to grant the relief just because there was valid agreement of sale. Section 16(c) of the Act envisages that plaintiff must plead and prove that he had 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 those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit alongwith other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of contract."

14. He has also relied upon the decision reported in Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and Others, AIR 1999 SC 2213 : (1999) 2 CTC 468 : (1999) 3 JT 163 : (1999) 2 SCALE 633 : (1999) 3 SCC 722 : (1999) 2 SCR 728 : (1999) 2 UJ 820 : (1999) AIRSCW 2240 : (1999) 4 Supreme 108 , wherein it was held that the High Court cannot substitute its opinion for the opinion of the First Appellate Court unless it is found that the conclusions drawn by the Lower Appellate Court were erroneous. It is appropriate to incorporate paragraph No. 5,

which reads as follows:

"5. It is not within the domain of the High Court to investigate the grounds on which findings were arrived at, by the last court of fact, being the first appellate court. It is true that the lower appellate court should not ordinarily reject witnesses accepted by the trial court in respect of credibility but even where it has rejected the witnesses accepted by the trial court, the same is no ground for interference in second appeal when it is found that the appellate court had given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences are possible, one drawn by the lower appellate court is binding on the High Court in second appeal. Adopting any other approach is not permissible. The High Court cannot substitute its opinion for the opinion of the first appellate court unless it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable of its settled position on the basis of pronouncements made by the apex Court, or was based upon inadmissible evidence or arrived at without evidence."

15. He has also relied upon the decision reported in Maniar Ismail Sab and Others Vs. Maniar Fakruddin and Others, AIR 1989 SC 1509 : (1989) 1 SCALE 1124 : (1989) 1 SCALE 1122 : (1989) 2 SCC 685 , wherein it was held that the High Court has not interfere with the finding of the facts in the view that the two Courts below had made out a new case by concluding on the basis of new case. It is appropriate to incorporate paragraph No. 2, which reads as follows:

"2. The High Court had before it a second appeal under Section 100 of the CPC and the appeal could have been entertained only if a question of law arose in the case. A perusal of the impugned judgment of the High Court shows that the High Court appraised the evidence on the record and interfered with the findings of fact reached by the two courts below on the basis of evidence before them that the property in dispute was part of the land assigned under Exhibit P-3 and that the plaintiffs' case that Abdul Sab had constructed the two shops in question had not been established. The High Court has interfered with these findings of fact in the view that the two courts below had made out a new case by concluding that there was no partition between Abdul Sab and Mohammad Sab and they were tenants in common in respect of the suit property. What the High Court has done is to reverse the findings of fact upon considerations which proceed entirely upon facts. This the High Court was not competent to do in a second appeal under Section 100 of the CPC. Accordingly, the appeal is allowed, the impugned judgment and decree of the High Court are set aside and the judgment and decree of the first Appellate Court are restored. In the circumstances there is no order as to costs."

16. He has also relied upon the decision reported in Veerayee Ammal Vs. Seenii Ammal, AIR 2001 SC 2920 : (2001) 9 JT 145 : (2001) 7 SCALE 403 : (2002) 1 SCC 134 : (2001) AIRSCW 4377 : (2001) 7 Supreme 812 , wherein it was held that in the suit for specific performance, time is not essence of contract. It is

appropriate to incorporate paragraph No. 11, which reads as follows:

"11. When, concededly, the time was not the essence of the contract, the appellant-plaintiff was required to approach the court of law within a reasonable time. A Constitution Bench of this Hon'ble Court in Smt. Chand Rani (dead) by LRs. Vs. Smt. Kamal Rani (dead) by LRs., AIR 1993 SC 1742 : (1993) 1 JT 74 : (1992) 3 SCALE 544 : (1993) 1 SCC 519 : (1992) 3 SCR 798 Supp held that in case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of contract, the court may infer that it is to be performed in a reasonable time if the conditions are (i) from the express terms of the contract; (ii) from the nature of the property; and (iii) from the surrounding circumstances, for example, the object of making the contract. For the purposes of granting relief, the reasonable time has to be ascertained from all the facts and circumstances of the case."

17. For the same proposition, he has also relied upon the decision reported in Ramani Ammal Vs. Susilammal, AIR 1991 Mad 163 : (1991) 2 LW 43 : (1991) 1 MLJ 1 , wherein in paragraph No. 11, it was held as follows:

"11. As regards the contention whether the plaintiff has been ready and willing to perform her part of the agreement, it is seen that the suit agreement came into existence on 23-10-1978. As per the terms of the agreement, the plaintiff agreed to pay Rs. 89,000/- towards the sale consideration, and out of the sale consideration a sum of Rs. 5,001/- was paid on the date of the agreement as advance and the period of performance of the contract was fixed as 4 months. As per the terms of the agreement, the plaintiff also discharged the existing encumbrance over the suit property by payment of Rs. 31,500/- out of the sale consideration, on 6-12-1978. The plaintiff also paid a sum of Rs. 3,500/- out of the sale consideration as desired by the defendant, and by consent of the parties, the time was extended for a further period of 3 months from 11-2-1979 and it was so endorsed on the agreement. On 4-5-1979 under Ex. A-2 the plaintiff sent a registered notice through her lawyer to the defendant calling upon her to execute the sale deed and deliver possession as per the suit agreement. In Ex. A-2 it has been categorically stated that the plaintiff has always been ready and willing to have the sale deed executed at her expenses and that it is only the defendant who has been postponing the same. It has also been mentioned that the period fixed therein expired by 11-5-1979 and she has been directed to act as per the sale agreement and execute the sale deed. The notice was sent by registered post, acknowledgment due and the defendant was served with the notice on 5-5-1979. Under Ex. A-4 the plaintiff sent a telegram to the effect that she is ready and willing to complete the sale and that a notice had already been issued. By that telegram the defendant was called upon to express her willingness to complete the sale. She has also mentioned that the balance of sale price is ready. The defendant sent Ex. A-10 telegram by way of reply stating that the notice and telegram sent by plaintiff were received. She has also stated therein that a reply will follow in due course. The defendant never showed

readiness and willingness to execute a sale deed. The defendant sent Ex. A-3 reply on 15-5-1979, to which the plaintiff sent a reply through her lawyer on 16-6-1979 wherein also the plaintiff categorically expressed that she was always ready and willing to perform her part of the contract as per agreement. Even after the notice sent by the plaintiff, the defendant was not agreeable for execution of the sale deed, but only insisted on cancellation of the agreement. The suit was filed on 7-8-1979 within three months from 11-5-1979 when the period of performance was extended by three months."

18. He has also relied upon the decision reported in S.P. Narayaaswami Pillai Vs. Dhanakoti Ammal, AIR 1967 Mad 220 : (1966) ILR (Mad) 668 : (1966) 79 LW 486 , wherein it was held that once readiness and willingness has been proved by the appellant, it does not required to show that he had command of necessary finance throughout the life of the contract. It is appropriate to incorporate paragraph Nos. 5, 9 and 10, wherein it was held as follows:

"5. Mr. A. Sundaram Iyer, learned counsel for the respondent, contended that a mere statement of readiness and willingness to perform the contract will not do and that the plaintiff must establish the truth of the same when challenger. It is contended that on the finding that the money was available only on 02.03.1959, it was clear that the plaintiff could not have performed the contract earlier and that there could be no decree for specific performance in his favour. I am not able to accede to this argument. Once it is held that with reference to a particular contract, time is not the essence, then the readiness and willingness which the plaintiff must establish is the readiness and willingness to perform his part of the contract at the proper time, that is, within a reasonable time. If time could be reasonably extended and if he establishes his capacity to perform the contract within the extended time, that will be sufficient. All that the Privy Council has observed in Adeshir v. Flora Samsom, AIR 1928 PC 208 at p. 216 is:

"In suit for specific performance on the other hand, he treated and was required by the Court to treat the contract as still subsisting. He had in that suit to allege, and if the facts was traversed, he was required to prove a continuous readiness and willingness, from the date of the contract to the time of the hearing to perform the contract on his part. Failure to make good that averment brought with it the inevitable dismissal of his suit."

In my view when time is provided for performance, readiness and willingness on the part of the person seeking performance can only mean that on his part he has through the period kept the contract as a subsisting one with a preparedness to fulfill his obligations and accept performance when the time came. This does not mean that the purchase should besides show that he had command of the necessary finance throughout the life of the contract. Such an insistence will make the fixing of a time for performance meaningless.

9. Failure to find money or prove possession of money before the time for performance has arrived can never be taken as a breach entitling the vendors to

resile from the contract, and when the contract is for the sale of immovable property the vendor must give reasonable notice requiring performance within a definite time.

10. Illustrative of the position, reference may be made to the decision in *Jenning's Trustee v. King*, 1952-1 Ch. 899. There a vendor of land under a contract where time was not of the essence of the contract who received notice between the date of the contract and the day fixed for completion that the purchaser had committed an act of bankruptcy, claimed to treat that notice as a repudiation of the contract entitling him forthwith to rescind and treat the contract as at an end. Questioning the right of the vendor to thus rescind the contract, *Harmon J.* observes at p. 912:

"I am unable to agree that a vendor ought to be allowed to treat an act of bankruptcy before the date of completion as an anticipatory breach entitling him immediately to repudiate or to wait for the day fixed for completion and then treat the contract as though time were of its essence, failure to complete on that day entitled the vendor immediately to rescind".

This being the true position and time not being the essence of the contract, I am unable to see how the plaintiff could be refused specific performance for not having deposited the amount into court earlier which is the requirement which the learned District Judge appears to demand in this case."

19. Considering the above citations, the respondent herein has filed the document Ex. A4, Sale deed engrossed in Stamp Paper which was purchased in March 2002, Exs. A5 and A6, Bank pass book would show that he had sufficient funds to fulfill the contract. It is pertinent to note that the Advocate Commissioner has been appointed to prove the case of the plaintiff/respondent, the Commissioner measured the property and submitted a report Exs. C1 and C2 which shows that the suit property is not as if he has mentioned as 3175 sq.ft. and it is only 2793 sq.ft. In the report submitted, the Advocate Commissioner has stated that the property measures East to West 39.6 Ft. on Southern side and 39 Ft. on Northern side and North to South 70 Ft. on both sides, so, The Trial Court and the First Appellate Court has considered all the aspects in proper perspective and came to the correct conclusion that the respondent/plaintiff is ready and willing to perform his part of contract.

20. As already stated even though in the Trial Court, no proper issue has been framed in respect of readiness and willingness but whereas in the First Appellate Court, proper point for consideration has been framed for readiness and willingness. It is well settled dictum of the Hon'ble Apex Court that the First Appellate Court is the last fact finding Court and the Second Appellate Court only deals with the substantial question of law. Readiness and willingness is only the question of fact. The Trial Court and the First Appellate Court has considered both the oral and documentary evidence and came to the correct conclusion that the respondent is always ready and willing to perform his part of contract and

granted the decree of specific performance which is a discretionary relief and as per the dictum of the Hon"ble Apex Court, the exercise of discretion is not on extraneous consideration or sympathetic consideration and subsequent rise in price would not be treated as hardship entailing refusal of the decree of specific performance. So, both the Courts below have considered all the aspects in proper perspective and came to the correct conclusion. Hence, I do not find any reason for interfering with the judgment and decree passed by both the Courts below and the same are hereby confirmed. The second appeal is liable to be dismissed and it is hereby dismissed.

21. In fine,

? Second appeal is dismissed with cost.

? The decree and judgment passed by both the Courts below are hereby confirmed.

? Consequently, connected civil miscellaneous petition is closed.