
(2015) 07 GAU CK 0055
In the Gauhati High Court
Case No : RFA No. 11 of 2015

Meghmallar Estates & Services Pvt. Ltd. and Others

APPELLANT

Vs

Ghanashyam Talukdar

RESPONDENT

Date of Decision : 28-07-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12A, Order 6 Rule 1

Contract Act, 1872 — Section 55

Specific Relief Act, 1963 — Section 16, 16(c), 20, 23, 28

Citation : (2015) 4 GLT 700

Hon'ble Judges : Nishitendu Chaudhury, J.

Bench : Single Bench

Advocate : O.P. Bhati and V.K. Chopra, Advocates, for the Appellant; D. Mozumder, Senior Advocate and R. Sarma, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Nishitendu Chaudhury, J.—This is a regular first appeal at the instance of defendants challenging judgment and decree dated 29.08.2014 passed by learned Civil Judge No. 1, Kamrup (M) in Title Suit No. 66/2007 whereby suit of me plaintiff for Specific Performance of Contract was decreed. Ghanashyam Talukdar, as plaintiff instituted T.S. No. 66/2007 in the Court of learned Civil Judge (Sr. Divn.) No. 1 at Guwahati against Meghmallar Estates & Services Pvt. Ltd. which is a company incorporated under Companies Act, 1956 and its Managing Director, Sri Anup Saikia. Plaintiff pleaded that defendants are apartment builders. He entered into a registered agreement with the defendants on 11.05.2005 vide Deed No. 5009/2005 whereby defendants agreed to sell a three bedroom flat to the plaintiff being Flat No. 202 at the second floor of the complex known as Meghmallar "Santoor" situated at Kharguli, Guwahati. Schedule A gives the description of the land on which the complex is situated. Schedule B is the 7th storied complex and Schedule C gives the description of the property proposed to be sold. Plaintiff entered into an agreement to purchase 1409 sq. ft. flat along with proportionate share of the land for a consideration of

Rs. 13,80,820/-. Schedule D to the agreement gives the schedule of payment Plaintiff paid Rs. 9,36,000/- before and at the time of execution of the agreement and was supposed to make payment of the balance sum of Rs. 4,44,820/- afterwards as per the payment schedule. The plaintiff wanted to get this amount by way of housing loan from State Bank of India but as the defendants did not cooperate, the bank returned the loan papers by letter dated 25.01.2007 saying that the loan could not be processed for failure on the part of the defendants to furnish documents. State Bank of India also forwarded a letter dated 03.01.2007 issued by the defendants and addressed to the plaintiff. According to the plaintiff, this letter dated 03.01.2007 was never received by him directly from the defendants at any point of time and; that defendants never issued the same to the plaintiff. The plaintiff was all along eager to settle the remaining outstanding dues by availing financial assistance from the State of Bank of India but the same was foiled owing to non-cooperation by the defendants. In paragraph 8 of the plaint it was stated that plaintiff is ready and willing to make payment of the balance sum through housing finance loan and requested the defendants to extend necessary help for this purpose, however, to no avail. Situated thus, plaintiff became compelled to institute the suit for Specific Performance of Contract so as to get the suit property purchased and also for compensation of Rs. 2,00,000/-. Alternatively, plaintiff also prayed for refund of Rs. 9,36,000/- with interest at the rate of 18% per annum in the event the plaintiff is found to be not entitled to a decree of Specific Performance.

2. The defendants appeared and submitted written statement deciding the case of the plaintiff. The defendants also disputed the quantum of balance sum. According to the defendants, plaintiff was irregular in payment of installments as agreed and defaulted in payment of Rs. 3,55,127/- in addition to a sum of Rs. 3,82,833/- for performance of extra civil work as per the specification given by the plaintiff upto 12.09.2006 and thus plaintiff was due to pay Rs. 7,37,960/- as on 12.09.2006. The defendants denied the allegation of non-cooperation from their side. It is further pleaded that despite various reminders made on 19.11.2005, 14.12.2005, 12.02.2006, 09.02.2006, 23.02.2006, 12.09.2006 and 24.09.2006, the plaintiff did not bother to clear the dues. The defendants, therefore, communicated their intention by letter dated 24.09.2006 to cancel the agreement if the arrear is not cleared within October, 2006. But even thereafter the plaintiff remained silent. Thereafter, by letter dated 03.01.2007, defendants intimated the plaintiff about their decision to cancel the agreement and a copy thereof was forwarded to State Bank of India. The defendants denied the allegation that letter dated 03.01.2007 was never sent to the plaintiff and rather it was sent by registered post from G.P.O., Guwahati on 05.01.2007 vide postal receipt No. G1696 dated 05.01.2007. The defendants also replied to the letter of the plaintiff issued on 03.02.2007 on 16.02.2007 and disclosed intention to reconsider the case. The plaintiff was requested to deposit the dues of Rs. 7,37,960/- as on 12.09.2006 but even thereafter plaintiff did not make the deposit. Referring to clause 7 of the agreement dated 11.05.2005, the

defendants claimed that because of default in payment of outstanding amount along with interest beyond 3 (three) months from the due date, the agreement would stand cancelled and the amount paid by the plaintiff would be forfeited. With these averments, the defendants prayed that the suit of the plaintiff be dismissed.

3. On the aforesaid rival contentions of the parties, the learned trial court framed the following 9 (nine) issues:-

- (1) Whether there is any caution of action for the suit?
- (2) Whether the plaintiff has already paid a sum of Rs. 9,36,000/- to the defendants towards the total price of the three bedrooms flat on the second floor being allotment No. 202?
- (3) Whether the plaintiff had performed his part of the agreement for sale of suit property as described in schedule-C?
- (4) Whether the defendant made additional construction in the suit flat as per advice of the plaintiff?
- (5) Whether the defendant failed to perform his part of the agreement after getting required amount from the plaintiff?
- (6) Whether the letter dated 3.1.2007 given by the defendant threatening to cancel the allotment of the suit property is void and not binding on the plaintiff?
- (7) Whether the defendant not supply or furnish the land documents and other relevant document to the plaintiff for arranging loan from the bank?
- (8) Whether the plaintiff is entitled for a decree directing the defendants to sell the Schedule C flat to the plaintiff?
- (9) To what relief?

4. Plaintiff examined as many as 3 (three) witnesses and exhibited some documents while defendants examined defendant No. 2 as the sole witness and also exhibited certain documents. Upon perusal of these materials, the learned trial court decreed the suit on 29.08.2014 which has been brought under challenge in the present appeal.

5. I have heard Mr. OP Bhatti and Mr. VK Chopra on behalf of the appellants and Mr. D Mozumder, learned senior counsel, assisted by Mr. R. Sarma for the sole respondent. In course of argument, it came to light that initially the same suit was decreed ex-parte against the defendants whereupon a first appeal was preferred before this court which eventually was allowed with a direction to decide the matter afresh after affording opportunity to the defendants to lead evidence. In the mean time, plaintiff had instituted Title Execution No. 6/2011 and made deposit of Rs. 6,04,800/- with the Executing court for getting a registered sale deed with respect to the schedule C flat. The learned trial court thereafter decided the matter afresh after the defendants had led evidence. This

time the suit has been decreed again and the defendants have been permitted to withdraw Rs. 4,44,800A from out of the total amount of Rs. 6,04,800/- deposited by the plaintiff in the aforesaid Execution Case and thereafter to deliver possession of the flat to the plaintiff and also to execute a registered sale deed.

6. The learned trial court decided issue No. 1 in favour of the plaintiff holding that there is cause of action. Issue No. 2 is in regard to payment of Rs. 9,36,000/- to the defendants towards total price of the three bedroom flat on the second floor and the learned trial court held that there is no dispute in regard to payment of Rs. 9,36,000/-. So, no discussion need be made in this regard. Issue No. 3 is in regard to performance by the plaintiff of his part of the contract While deciding this issue the learned trial court considered Ext. 1 deed of agreement dated 11.05.2005 and the fact that plaintiff made payment of Rs. 9,36,000/- to the defendants against the total agreed price. According to the plaintiff, he was ready and willing to pay the balance sum of Rs. 4,44,822/- to the defendants. Schedule D of Ext. 1 shows at what stage how much of money was to be paid by the plaintiff to the defendants. The learned court found that payment made by the plaintiff to the tune of Rs. 9,36,000/- was not as per direction laid down in Schedule D and that the same was accepted by the defendants. Although Ext. 1 was executed on 11.05.2005 but plaintiff had made payment of Rs. 4,36,000/- vide Ext. 2(4) to (3) prior to execution of documents. Defendants could not show any notice to the plaintiff when stage of payment installments under Schedule D was required. The learned trial court also found that P.W. 1 applied for housing loan to State Bank of India on assurance to the defendants that they would provide necessary information to the bank but letter dated 25.01.2007 issued by the bank discloses that loan proposal was returned due to non-furnishing of relevant documents by the defendants. Learned trial court noticed the claim of the plaintiff that it is the bank which provide a copy of letter dated 03.01.2007 to the plaintiff though the same was shown to have been sent to the plaintiff by the defendants. Ext. 1 is this letter which shows that for non-compliance of the term of the agreement dated 11.05.2006 of making payment of amount due w.e.f. 30.12.2006, the booking was cancelled by letter dated 03.01.2007. Considering all these aspects, the learned trial court was satisfied that no notice was sent by the defendants asking for payment of the balance price showing that they had performed their part of the contract. Considering various judgments of the Hon'ble Supreme Court, the learned trial court held that plaintiff was always ready and willing to perform his part of the contract and accordingly, issue No. 3 was decided in favour of the plaintiff.

7. Coming to issue No. 4 as to making of additional construction in the suit land by the defendant, the learned trial court is of the view that while canceling the booking by letter dated 03.01.2007 defendant did not make any mention about incurring of extra cost for making additional construction and so the defendants made no additional construction in the suit flat as per the advice of the plaintiff and accordingly issue No. 4 is decided in favour of the plaintiff. For the same reason, the issue No. 5 was also decided in the affirmative in favour of the

plaintiff.

8. Issue No. 6 is in regard to validity of cancellation letter dated 03.01.2007 issued by the defendants to the plaintiff. By that letter, defendants cancelled the booking on the ground that plaintiff had failed to make payment of Rs. 3,55,127/- within grace period allowed by the defendants by October, 2006. Ext. 1 shows that Rs. 3,55,127/- became due on 08.10.2006 and plaintiff was entitled to 3 (three) months time for making this payment under clause 7(ii) of Ext. I. The Ext. 1 cancellation letter, therefore, was found to have been premature by the learned trial court. It was also noticed that although in Ext. 1 it was mentioned about a reminder letter dated 24.09.2006 but defendant No. 2 admitted in his cross examination that he did not mention as to how he had sent Ext. B to Ext. H to the plaintiff. No postal receipt was exhibited showing despatch of these letters to the plaintiff. On the other hand, plaintiff flatly denied to have received any such letter. Considering all these aspects of the matter, the learned trial court was of the view that since the plaintiff had made payments even before the agreement was executed it was not possible to make payment as per the Schedule D of the agreement. Moreover, defendants accepted the same without demur. On totality of circumstances, it was felt that Ext. 1 was not prepared as per Ext. I and so cancellation letter dated 03.01.2007 vide Ext. I is void and not binding upon the plaintiff.

9. However, while deciding issue No. 7 the learned trial court held that the allegation made by the plaintiff as to non-cooperation of the defendants for arranging housing loan from the bank could not be established, ultimately, the remaining two issues namely, issue No. 8 and 9 are decided in favour of the plaintiff and suit was decreed declaring that registered deed No. 5009/2005 is valid and binding on the parties and that letter dated 03.01.2007 is void, illegal and not binding upon the plaintiff. Accordingly, defendants were directed to withdraw Rs. 4,44,800/- from the amount of Rs. 6,04,800/- deposited already by the plaintiff in Title Execution No. 6/2011 and thereupon to execute sale deed and deliver possession of the suit flat to the plaintiff. It is this judgment which has been brought under challenge in the present appeal.

10. Mr. OP Bhati, learned counsel for the appellants, submits that the plaintiff has miserably failed to comply with the provisions of section 16(c) of the Specific Relief Act to show that he was ready and willing to perform his part of the contract. Calling attention of the court to the statements made in paragraph 8 of the plaint, the learned counsel would argue that plaintiff merely stated that he was ready and willing to make payment by taking housing loan. This shows that he did not have financial capacity to make payment of the balance sum and so there was no compliance of section 16(c) of the Specific Relief Act. Under such circumstances, a decree of specific performance should not have been passed in his favour which is a discretionary relief under section 20 of the same Act. Besides, the conduct of the plaintiff would also show that he is not entitled to a decree of specific performance. Moreover, he made a request vide Ext. 4 to the

defendant No. 2 wherein he undertook to make payment of the balance amount within 10 days. By Ext. A, issued by the defendants to the plaintiff on 16.02.2007, the defendants considered the request of the plaintiff and so the plaintiff was requested to make payment of dues along with interest of Rs. 3,55,127/- and Rs. 3,82,833/- payable towards special work done. This same amount was allowed to be paid within 02.03.2007. But even thereafter plaintiff did not make the payment and rather instituted the suit. Apart from that, although the plaintiff stated that he did not receive letter dated 03.01.2007 (Ext. 1) but he admitted in his cross examination that he had received the same. On totality of circumstances, the findings arrived at by the learned trial court are erroneous and contrary to the provisions of law and consequently, the appeal is liable to be allowed setting aside the impugned judgment and decree. Mr. OP Bhati has placed reliance on the following judgments:-

R.C. Chandiok and Another Vs. Chuni Lal Sabharwal and Others,

P. D'Souza Vs. Shondrilo Naidu,

Satya Jain (D) Thr. L.Rs. and Others Vs. Anis Ahmed Rushdie (D) Thr. L.Rs. and Others,

I.S. Sikandar (D) by L.Rs. Vs. K. Subramani and Others,

Mrs. Saradamani Kandappan Vs. Mrs. S. Rajalakshmi and Others,

Union of India (UOI) and Others Vs. Vasavi Co-op. Housing Society Ltd. and Others,

Rajasthan State TPT Corpn. and Another Vs. Bajrang Lal,

11. Mr. D. Mozumder, learned senior counsel appearing for the sole respondent argued, on the other hand, that there is no straightjacket formula for construing section 16(c) of the Specific Relief Act. Whether a plaintiff is ready and willing has to be understood from the entirety of the facts and circumstances during whole period before, at the time of institution and also after passing of decree in the suit. According to him, the defendants had agreed in Ext. 1 itself with the proposal of the plaintiff for availing financial assistance from bank and it is for this reason, defendants produced some documents with the bank. But later on dispute arose between the parties when defendants raised claim of extra payment on allegedly additional civil construction and thereafter defendants started non-cooperating with the plaintiff in regard to availing financial assistance from the State Bank of India. It is for this reason the defendants did not produce certain document to the bank but for which bank did not process the loan prayer and returned the papers vide letter dated 25.01.2007. It is apparent from this letter itself that the loan proposal could not be processed due to failure on the part of the defendants to produce documents. He further argued that admittedly the defendants did not follow the payment schedule as laid down in Schedule D to the agreement and so there is no question of applicability of Clause 7 of the agreement anymore. According to him, plaintiff all along was ready and willing to

make payment of balance sum of Rs. 4,44,800/-. Even in the cross examination of the plaintiff it came out that plaintiff had offered this balance amount to the defendants but the defendants did not accept the same and demanded more money beyond the scope of the agreement Ext. 1. He further called attention of the court to the cross examination of D.W. 1 to show that the defendants initially cooperated in processing of loan but subsequently backed out from it and specifically admitted that they would not cooperate anymore so as to enable the plaintiff to get financial assistance from the State Bank of India. Thus, from conduct of the defendants it is clear that they did not cooperate with the plaintiff as required under Clause 15 of the Ext. 1 agreement but for which the payment could not be made earlier. On the other hand, from totality of circumstances, it would be clear that the plaintiff was always sincere to make payment of the balance sum. He further argued that immediately upon decreeing the suit on first occasion by the learned trial court, plaintiff deposited Rs. 6,04,800/- in Title Execution No. 6/2011 and so it is too late in the day to argue that plaintiff is not ready and willing to perform his part of the contract, Mr. Mozumder further argued that time was not the essence of contract in this case, he has placed reliance on the following judgments:

R.C. Chandiok and Another Vs. Chuni Lal Sabharwal and Others, ,

P. D'Souza Vs. Shondrilo Naidu,

Satya Jain (D) Thr. L.Rs. and Others Vs. Anis Ahmed Rushdie (D) Thr. L.Rs. and Others,

Syed Dastagir Vs. T.R. Gopalakrishnasetty,

K. Prakash Vs. B.R. Sampath Kumar,

Zarina Siddiqui Vs. A. Ramalingam,

I.S. Sikandar (D) by L.Rs. Vs. K. Subramani and Others,

12. Out of all the judgments relied on by Mr. OP Bhati and Mr. D. Mozumder representing the appellants and the respondent respectively, there are as many as four judgments which are relied on by both sides. These are the case of R.C. Chandiok & Anr. vs. Chuni Lal Sabharwal & Ors. (Supra), P.D'Souza Vs. Shondrilo Naidu (Supra), Satya Jain and Ors. vs. Anis Ahmed Rushdie and Ors. (Supra), and I.S. Sikandar vs. K. Subramani and Ors. (Supra).

12.1. In the case of R.C. Chandiok and another (Supra), appellant entered into an agreement with the respondents for purchase of a plot of land and make payment of Rs. 7,500/- towards earnest money. When appellants offered to make payment of the balance sum for the purchase of getting sale deed executed, the respondents wrote to the appellants on 11.08.1955 that unless and until necessary sanction from the Union Ministry of Rehabilitation is obtained, the sale deed cannot be executed and period of execution would remain extended. But thereafter on 15.06.1956, respondents served a notice on

the appellants through pleader stating that the respondents not having received the balance of consideration in terms of the agreement dated 18.07.1955, they cannot wait for uncertainty and therefore the agreement is cancelled and an offer is made without prejudice to their legal rights to receive back the sum of Rs. 7,500/- failing which the whole of the earnest money would be forfeited. The appellants by reply notice disclosed that they were never informed about getting of sanction from the Union Ministry and called upon the respondents to execute the sale deed against receipt of the balance purchase money. In the mean time, the appellants came to know that the respondents had obtained sanction from the Union Ministry and was communicating with other parties for sale of the land. They accordingly, published their objection in the Times of India on 29.07.1956 by advertisement declaring existence of previous agreement so as to caution the prospective buyers. Thereafter they instituted suit on 04.12.1956 for Specific Performance Contract and in the alternative for refund of Rs. 7,500/- paid as earnest money and also for damage of Rs. 15,000/- along with interest thereon. The learned trial court dismissed the suit for Specific performance but passed a decree under 22 of the S.R. Act for refund of Rs. 7,500/-. The appellants approached the High Court by way of filing appeal. The High Court dismissed the appeal deciding that the appellants had not satisfactorily shown that they had sufficient funds to pay the balance amount of Rs. 15,000/- from which it could be concluded that they were not ready and willing to perform their part of the contract. The Hon"ble Supreme Court in the aforesaid judgment arrived at the finding that time was not the essence of the contract and that the appellants were all along ready and willing to perform their part of the contract. The finding of the High Court as to incapacity of the appellants to make payment of balance sum was not accepted by the Supreme Court. It was held that relief of specific performance is discretionary and not arbitrary. Discretion must be exercised in accordance with sound and reasonable judicial principles. Consequently, the decree of the courts below was set aside and the appeal was allowed with cost.

12.2. In P.D"Souza vs. Shondrilo Naidu (Supra), respondent filed a suit for Specific Performance of Contract for enforcing an agreement for sale dated 06.06.1977. As per the contract the parties were required to perform their respective parts of contract within 18 months i.e. 05.12.1978. The defendants are alleged to have requested for extension of time till 31.12.1981 with demand for some more money. On 21.05.1981, plaintiff called upon the defendant to execute the sale deed by writing a letter wherein it was disclosed that the plaintiff was ready and willing to perform his part, of the contract. The defendant on 25.05.1981 wrote to the plaintiff purporting to have cancelled the agreement and sought to forfeit the earnest money of Rs. 35,000/-. Thereafter issuing notice to the defendant for execution of the sale deed, the plaintiff instituted the suit for Specific Performance of Contract. The defendants raised the question in regard to readiness and willingness of the plaintiff for performing his part of the contract in addition to the point of limitation and learned trial court dismissed the suit holding that the plaintiff was neither ready and willing to perform his part of

the contract nor was the discretion under section 20 of the Act available to the plaintiff. The appellant preferred first appeal before the High Court which allowed the appeal and decreed the suit deciding both the points in favour of the plaintiff. As against that judgment passed in appeal, the defendant approached the Supreme Court. In this reported judgment, Hon''ble Supreme Court considered the implication of the Section 23 of the S.R. Act and thereupon considered implication of default clause in the agreement. In paragraph 31 of the judgment, reliance was placed on earlier judgment of the Supreme Court in the case of M.L. Devender Singh and Others Vs. Syed Khaja, and noted that sum of money specified in the agreement to be paid in case of breach may be divisible into three classes:-

- i) Where the sum mentioned is strictly a penalty - a sum named by way of securing the performance of the contract as the penalty is a bond;
- ii) Where the sum named is to be paid as liquidated damages for a breach of the contract; and
- iii) Where the sum named is an amount the payment of which may be substituted for the performance of the act at the election of the person by whom the money is to be paid or the act done.

12.3. In paragraph 19 and 21 of the this judgment, the Supreme Court held that averment and proof of readiness and willingness would depend upon the facts and circumstances of each case and no straitjacket formula can be laid down in this behalf. Ultimately, the appeal was dismissed and decree passed by the High Court was upheld.

12.4. In the case of Satya Jain (dead) through LRs and others (Supra), appellants, as plaintiff, instituted Title Suit No. 994/1977 seeking a decree of specific performance of an agreement dated 22.12.1970 executed between Bhiku Ram Jain (plaintiff No. 1) and the original defendant Anis Ahmed Rushdie in respect of an immovable property. Trial decreed the suit. But a Division Bench of Delhi High Court allowed the appeal. Thereupon, the plaintiffs approached Supreme Court. Considering various clauses of the agreement in the aforesaid case, the Hon''ble Supreme Court held that Principle of Business Efficacy is normally invoked to read a term in an agreement or a contract to achieve the result intended by the parties as prudent businessmen. Business efficacy has been defined as power to produce intended results. Examining clause (7) of the agreement in the light of the Principle of Business Efficacy, the Hon''ble Supreme Court proceeded to decide the question as to readiness and willingness of the plaintiff in that suit for specific performance. Relying on the earlier judgments of the Hon''ble Supreme Court in R.C. Chandiok (Supra), P.D''Souza (Supra) etc., the Hon''ble Supreme Court held that no straitjacket formula can be laid down to test the readiness and willingness of plaintiff in a suit for specific performance and it has to be tested on overall conduct i.e. prior and subsequent to filing of the suit which has also to be viewed in the light of the conduct of the defendant.

After all the discretion has to be exercised on sound, reasonable, rational and acceptable principles and guiding test would be the principles of fairness and reasonableness as may be dictated by the peculiar facts of any given case. It was emphasized in the judgment that mere efflux of time and escalation of price of property by itself cannot be a valid ground to deny the relief of specific performance. Finally, the appeal was allowed and decree passed by the trial court was restored.

12.5. In the case of I.S. Sikandar (dead) by LRs (Supra), respondent, as plaintiff, instituted O.S. No. 2012/1985 for grant of decree of specific performance in respect of immovable property on the basis of agreement dated 25.12.1983. The agreement was made for sale of the property at a price of Rs. 45,000/- out of which Rs. 5,000/- was paid as part payment to the defendants who put the plaintiff in possession of the property and handed over original title deeds. The defendants were supposed to receive the balance sum of Rs. 40,000/- at the time of registration of the sale deed within 5 months after obtaining necessary permission from the authorities. But on 06.03.1985, defendants issued a legal notice to the plaintiff through their counsel calling upon the plaintiff to comply with his part of the contract by paying the balance sum of money on or before 18.03.1985 failing which legal action was threatened. Plaintiffs sent a reply letter on 16.03.1985 calling upon the defendants to execute sale deed and to receive the balance sum on 23.05.1985 by securing the draft sale deed 5 days prior thereto. By another letter dated 04.05.1985, the defendants were requested to remain present at the Office of the Sub-Registrar on 23.05.1985 for executing and registering the sale deed. The defendants by telegram dated 18.05.1985 declined to comply and hence the suit was instituted by the plaintiff for specific performance. The learned trial court partly decreed the suit on 25.09.2000 and thereupon plaintiff preferred RFA No. 97/2001 in the High Court. Thereupon, the decree was set aside by the High Court and the same was modified granting decree for specific performance as per the agreement for sale. On this appellate judgment being appealed against Hon"ble Supreme Court held in this reported case that the plaintiff in a suit for specific performance is required to prove the fact that right from the date of execution of the agreement of sale till the date of passing the decree he was ready and always been willing to perform his part of the contract as per the agreement. Holding that the plaintiff had failed to produce any document to show that he had the balance sale consideration amount of Rs. 40,000/- to pay to the defendants to get the sale deed executed, the appeal was allowed and trial court decree was restored by setting aside the first appellate judgment of the High Court.

13. In addition to the aforesaid four judgments Mr. OP Bhati relied on three more cases, viz. cases of Saradamani Kandappan vs. S. Rajalakshmi and Ors. (Supra), Union of India and Ors. vs. Vasavi Cooperative Housing Society Limited and Ors. (Supra) and Rajasthan State Road Transport Corporation and Anr. vs. Bajrang Lal (Supra).

13.1. The case of Saradamani Kandappan (Supra) was relied on to argue that terms regarding payment enumerated in the agreement for sale were altered by an oral understanding by the parties subsequently in March, 1981 and that the plaintiff having failed to pay the balance sum of Rs. 75,000/- on 06.04.1981 and the last installment of the equal amount on or before 30.05.1981, there was a breach on the part of the plaintiff as time was the essence of the contract therein and so the defendants were justified in determining the agreement for sale by notice dated 02.08.1981.

13.2. In the case of Union of India and others vs. Vasavi Cooperative Housing Society Limited, a suit for declaration of title was filed by the plaintiff under section 34 of the S.R. Act. It was not a case for specific performance of Contract and it was held in paragraph 15 of this judgment that in a suit for declaration of title burden always lies on the plaintiff to make out and establish a clear case for granting such a declaration and the witness, if any, of the case set up by the defendants would not be a ground to grant relief to the plaintiff. It is not clear as to how this case is relevant for the present appeal.

13.3. Mr. Bhati has placed reliance on paragraph 14 of the judgment in Rajasthan State Road Transport Corporation and another (Supra). The Hon"ble Supreme Court held in this paragraph that a party to a suit has to plead the case and produce/adduce sufficient evidence to substantiate his case made out in the plaint and in case the pleadings are not complete, the court is under no obligation to entertain the pleas.

14. Apart from the four judgments mentioned in paragraph 13 above, Mr. D. Mozumder has cited three more judgments, viz. case of K. Prakash vs. B.R. Sampath Kumar (Supra), Zarina Siddiqui vs. A. Ramalingam (Supra) and Syed Dastagir Vs. T.R. Gopalakrishna Setty (Supra).

14.1. K. Prakash (Supra) is also a case of specific performance of contract. In paragraph 16 of this judgment, the Hon"ble Supreme Court held that the appellate court should not exercise its discretion against the grant of specific performance on extraneous consideration of sympathetic consideration. Under section 20 of the S.R. Act, a party is not entitled to get a decree of specific performance merely because it is lawful to do so. Nevertheless once an agreement to sell is legal and validly proved and further requirement for getting such a decree are established then the court has to exercise its discretion in favour of granting relief for specific performance.

14.2. In Zarina Siddiqui (Supra), the aforesaid judgment of K. Prakash (Supra) has been relied on by the Hon"ble Supreme Court wherein, inter alia, it was also held that subsequent rise in price will not be treated as a hardship entailing refusal of the decree for specific performance. Rise in price in a normal change in circumstance and therefore, on that ground a decree for specific performance cannot be reversed. Finally, in paragraph 33 of the judgment it has been held that equitable discretion to grant or not to grant a relief for specific performance

depends upon the conduct of the parties. The necessary ingredient has to be established by the plaintiffs for getting the discretionary relief but at the same time if it is found that the defendant has not come with clean hands and suppresses material facts and evidence, this discretion should not be exercised by refusing to grant specific relief.

14.3. Mr. Mozumder has placed reliance on paragraph 9 of the case of Syed Dastagir (Supra) wherein it is held that in construing a plea under section 16(c) of the S.R. Act, court must keep in mind that a plea is not an expression of art and science but an expression through words to place fact and law of one's case for a relief. Such an expression may be pointed, precise, some time vague but still it could be gathered what he wants to convey through only by reading the whole pleading, depending on the persons drafting a plea. In India most of the pleas are drafted by counsel hence the aforesaid difference of pleas which inevitably differ from one to the other.

15. On the basis of the arguments put forward by the learned counsel for the parties and on perusal of the entire materials available on record, the sole point for determination in this appeal shall be as follows:

Whether plaintiff is entitled to a decree of specific performance under the facts and circumstances of the case?

16. According to Mr. O.P. Bhati, learned counsel for the appellant, plaintiff is not entitled to get a decree, of specific performance for the reasons that he has not made specific averment as to readiness and willingness as required under Section 16(c) of the Specific Relief Act, 1963 and that the very conduct of the plaintiff in denying acceptance of various letters of the defendants is sufficient to refuse a discretionary relief of like nature. The learned Senior Counsel representing respondent/plaintiff on the other hand vehemently argues that question as to readiness and willingness as required under Section 16(c) of the Specific Relief Act has to be decided after taking into consideration the facts and circumstances in entirety and not as a mere compliance of formalities. It is, therefore, necessary to examine as to whether the requirement of Section 16(c) of the Act has been satisfied in the case in hand.

17. Plaintiff has averred in Paragraph-8 of the plaint that he is ready and willing to perform his part by paying the balance through housing finance loan. In the subsequent sentence in the same paragraph, he has further stated that by letter dated 03.02.2007 he had called upon defendants to co-operate with him and the bank in order to avail housing loan for Rs. 4,44,820/-. It is alleged that defendants have not bothered to reply to the said letter and rather they have been negotiating with others to sell the same flat to somebody else.

18. The deed of agreement dated 11.05.2005 has been exhibited as Exhibit-1 in this suit. In Paragraph-7 of the terms and conditions enumerated in Exhibit-1 it is provided that time of payment of installment is the essence of agreement and that it shall be incumbent on the intending allottees to comply with the terms of

payments and other terms and conditions of the sale. In case the installments are delayed the allottees shall have to pay interest @ 12% per annum for first month of delay from the due date of outstanding amount and thereafter, @ 18% up to three months. If the allottees failed to make payment even thereafter along with the interest, they would forgo the entire amount of registration money deposited by him and the allotment would stand cancelled and he would be left with no lien on the apartment in question. However, the amount would be "unfunded" (refunded?) to the allottee without interest. The total cost of the apartment has been shown as Rs. 13,80,820/- only at Para-graph-26 of this agreement and schedule of payment has been led down in Schedule-D of the agreement which is quoted below:

19. Exhibit-2 series are six money receipts showing payments made by the plaintiff to the defendant on various dates. Plaintiff paid Rs. 10,000/- on 06.12.2004 vide Exhibit-2(1) Rs. 1,76,000/- vide Exhibit-2(2) on 31.1.2005, Rs. 2,50,000/- on 27.04.2005 vide Exhibit-2(3), Rs. 2,00,000/- on 24.06.2005 vide Exhibit-2(4), Rs. 1,50,000/- on 31.11.2005 vide Exhibit-2(5) and Rs. 1,50,000/- on 16.05.2006 vide Exhibit-2(6). All these receipts were issued on the printed receipt form of the defendant No. 1 which have not been denied by the defendants either in their written statement or in evidence. Thus, the averment made in Paragraphs of the plaint that plaintiff has already paid a sum of Rs. 9,36,000/- to the defendants has been proved. Rather it has not been denied by the defendants. In Paragraph-6 of the plaint it is claimed that a sum of Rs. 4,44,820/- is due and payable by the plaintiff as on the date of presentation of the plaint. However, upon perusal of the impugned judgment it appears that plaintiff deposited Rs. 6,04,800/- including aforesaid Rs. 4,44,820/- with the Registry of the learned Trial court in title Execution No. 6/2011. That being the position the plaintiff has already paid whole of the amount payable by him to the defendants towards consideration for price of the apartment in question.

20. Now, it is to be seen as to whether under the aforesaid facts and circumstances, the decree of specific performance granted in favour of the plaintiff can be sustained. The first objection that has been raised on behalf of the defendant is that the suit is liable to be dismissed for non compliance of the provision of Section 16(c) of the Specific Relief Act, 1963 (herein after referred to as "the SR Act"). Section 16 lays down personal bars to relieve of specific performance. It provides that specific performance of a contract cannot be enforced in favour of a person on three circumstances provided under Clause (a), (b) or (c). Under Section 16(c) , when plaintiff 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 the terms the performance of which has been prevented or waved by the defendant in that event specific performance of a contract cannot be enforced in his favour. According to the defendant this requirement has not been fulfilled by the plaintiff in the instant case. Plaintiff has stated in Paragraph-8 of the plaint that he is ready and willing to perform his part by paying the balance through housing

finance loan. According to the learned counsel for the appellant/defendant, because of addition of a rider as to mode of payment "through housing loan", the averment as to readiness and willingness has been negated and so such an averment is not an averment as required by Section 16(c) of the SR Act. On the face of such argument it is necessary to understand as to what should be the nature and character of the averment as to readiness and willingness in the light of the provision of Section 16(c) of the SR Act.

21. Section 16(c) of the SR Act does not only require an averment as to ready and willingness but it also requires proof of such averment. Section itself says "who fails to aver and prove that he has performed or has always been ready and willing to perform". A model specimen of plaint has been furnished at the end of the SR Act itself wherein averments as to readiness and willingness find place in Paragraph-5 which is as follows:

"5. That the plaintiff is ready and willing to do his part of the contract and hereby offers the balance sum of the consideration to be paid to the defendant immediately the Court so orders."

22. Similarly, form No. 47 & 48 in the Appendix to the Code of Civil Procedure contain model pleading of plaint in a suit of specific performance. Form No. 47 contains this averment in Paragraph-3 whereas it occurs at Paragraph-5 in form No. 48. Paragraph-3 in form No. 47 is quoted below:

"3. The plaintiff has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice."

Paragraph-5 in form No. 48 on the other hand contains the same pleadings with slight variation. Paragraph-5 of form No. 48 is quoted below:

"5. The plaintiff is still ready and willing to pay the purchase-money of the said property to the defendant."

23. It is needless to say that the form prescribed either under the SR Act or in the Code of Civil Procedure are mere guidelines for drafting a plaint in a suit for specific performance of contract. After all, plaint has to contain concise statement of material facts only on which the party pleading relies for his claim but not the evidence by which they are to be proved. If plaintiff furnishes materials facts in a different form or style that should be construed as substantial compliance of Rule 1 of Order VI and Order VII. Because it is the substance and not the form on which the merit of a suit is to be decided.

24. The construction of a plaint involving averment under Section 16(c) of the SR Act has to be made keeping in view such basic point. Interpretation of plaint in such suit came up for consideration before the Hon"ble Supreme Court on a number of occasions. In-the case of Syed Dastagir Vs. T.R. Gopalakrishnasetty, the Hon"ble Supreme Court considered as to what are the obligations which the plaintiff has to comply with in reference to his plea and whether the section requires specific words to be pleaded in regard to readiness and willingness: The

Hon"ble Supreme Court has held in Paragraph-9 of this judgment that in construing a plea in any pleading, Courts must keep in mind that a plea is not an expression of art and science but an expression through words to place fact and law of one's case for relief. Such an expression may be pointed, precise, sometimes vague but still it could be gathered what he wants to convey through only by reading the whole pleading depending on the person drafting a plea. In India most of the pleas are drafted by counsel, hence the aforesaid difference of pleas which inevitably differ from one to other. Thus, to gather true spirit behind a plea it should be read as a whole and one has to see the pith and substance of a plea. Where a statute requires any fact to be pleaded then that has to be pleaded may be in any form. The same plea may be expressed in different styles and forms by different persons through different words. Unless a statute requires a statement to be made in a particular form prescribed by it in that event it can be expressed in any form and no specific phraseology or language is required to take such plea. The Hon"ble Supreme Court held in the aforesaid case that Section 16(c) of the SR Act does not require any specific phraseology but only that plaintiff must aver that he has performed or has always been ready and willing to perform his part of the contract. The compliance of Section 16(c) of the SR Act, therefore, has to be in spirit and not in a particular letter and form.

25. In the case of Satya Jain (D) Thr. L.Rs. and Others Vs. Anis Ahmed Rushdie (D) Thr. L.Rs. and Others, , Supreme Court considered a host of earlier judgments on this point and summed up holding that no straitjacket formula can be laid down in regard to pleading of Section 16(c) of the SR Act. It is, therefore, has to be seen as to whether requirement of section 16(c) of the Specific Relief Act has been satisfied in the present case.

26. Requirement of section 16(c) is mandatory. The reason for laying down this provision read with Explanation-(ii) to the section is that any person seeking benefit of specific performance of contract must disclose and establish that his conduct has been blemish less throughout entitling him to the specific relief. As indicated in the heading of the section, it imposes a personal bar. Court is to grant relief on the basis of the conduct of the person seeking relief. If such conduct is manifest in the pleadings and the evidence, the relief should not be denied to the plaintiff. In the case of Mst. Sugani Vs. Rameshwar Das and Another, and Faquir Chand and Another Vs. Sudesh Kumari, the Supreme Court held that specific words in plaint that plaintiff has been ready and willing to perform his part of the contract are not necessary. Not only it should be pleaded in substance in the plaint but it also has to be stated in court during trial as otherwise plaintiff would not be entitled to the relief. The section includes not only the word "aver" but also "prove". The words "aver" and "prove" are entirely two different things. The word "aver" means that it should be stated or mentioned in the body of the plaint. Such averment has to be in substance and so whether or not it has been so averred can be understood only upon reading of the whole plaint in entirety. The word "prove" requires that the averments made in the plaint must be established by leading evidence in course of trial.

27. This requirement as to readiness and willingness does not stop after institution of the suit alone. One may notice the wordings of section 16(c) which includes "he has performed or has always been ready and willing to perform". So, continuous readiness and willingness on the part of the plaintiff vendee is a condition precedent to grant the relief of Specific Performance of Contract. Besides, section 28 of the Act provides for rescission of contract even after decree of specific performance has been passed. It provides that where in a suit for specific performance for sale or lease of an immovable property a decree has been passed and the purchaser or lessee, as the case may be, does not within the period allowed by the decree or such further period as the court may allow, pay the purchase money or other sum which the court has ordered him to pay, the vendor/lesser may apply in the same suit where decree has been passed to have the contract rescinded. Once a rescission is made under section 28(1) of the Act, the court shall direct restoration of possession to the vendor/lesser and payment to the vendor/lesser of such rents or to refund any sum of money earlier paid by the vendee/lessee. Provision of rescission of contract even after decree for specific performance has been passed is indicative of the intention of the legislature that even after decree is passed the plaintiff does not get absolved of its liability to honour the commitment as to readiness and willingness within the meaning of section 16(c) of the Specific Relief Act. The word "has always been" occurring in this section read with effect of default to make payment after passing of the decree as enumerated in section 28 of the Act mean that not only the averment as to readiness and willingness has to be made in the plaint at the time of institution of the suit, the plaintiff of a suit of specific performance is duty bound to establish during course of trial that he has been continuing ready and willing to perform his part of the contract and even after passing of the decree he is duty bound to make payment within the time fixed by the court in the decree in compliance of the provision of Order XX Rule 12A of the Code of Civil Procedure. In nutshell, plaintiff should be ready and willing to perform his part of the contract before, at the time, during and even after passing of the decree in a suit for specific performance of contract. As and when, he discharges his duty of performing his part of the contract in entirety, his obligation under section 16(c) becomes finally discharged. This is the underlying basic principle emanates from section 16(c) as is evident from various judgments of the Hon'ble Supreme Court including the ones relied on by the learned counsel for the parties as aforesaid.

28. Now, let us examined the facts of the present case in the light of the law of section 16(c) of Specific Relief Act. Plaintiff stated in his plaint in regard to execution of Ext. 1 agreement on 11.05.2005 by registered deed for purchase of a flat from the defendants and as to making of payment to the tune of Rs. 9,36,000/- out of the total price of Rs. 13,80,820/-. According to him, he was due to pay Rs. 4,44,820/- more to the defendants as his part of the contract. The defendants initially cooperated with him for getting financial assistance from State Bank of India but subsequently, backed out. The plaintiff pleaded that he is

ready and willing to discharge his part of the contract by securing loan from bank for which he asked for assistance and cooperation from the defendants. He repeated the same story in his examination-in-chief. Execution of the agreement vide Ext. 1 is an admitted fact. The defendants have not denied receipt of Rs. 9,36,000/- from the plaintiff as part payment of the suit apartment in terms of the agreement. But in course of cross examination made by the defendant he went a step further saying that he had offered the balance consideration money to the defendants by cheque but the defendants did not accept the same. Even the defendants refuse to cooperate with him for getting financial assistance from bank. The fact as to offering cheque to the defendants is beyond pleading but it is the defendants who have elicited this statement from the mouth of the plaintiff by cross examining him and so even if it is beyond pleading the defendants are estopped from arguing that this part of the evidence should not be considered.

29. After the suit was decreed ex-parte at the first instance and before setting aside of that decree in course appeal in this court, plaintiff deposited the sum of Rs. 6,04,800/- with the executing court in Title Execution No. 6/2011. That amount was not withdrawn by the plaintiff after the ex-parte judgment was set aside by this court in regular first appeal and a fresh trial was held by the learned trial court giving opportunity to the defendants for adducing evidence. The defendants have not withdrawn the money but it continues to remain in the custody of the court. Once plaintiff deposited money including the balance consideration money, he does not have any other liability to discharge under the contract. This means that his part of the contract has already been performed. As has been pointed out above that section 16(c) of the Specific Relief Act does not only require that the plaintiff must aver and prove that he has performed or has always been ready and willing to perform his part of the contract but he should really perform the same even after passing of the decree in the period stipulated or fixed by the court, and since here is a case where plaintiff performed his part of the contract during trial of the suit, the obligation of the plaintiff under section 16(c) of the Specific Relief Act has already been discharged. This being the position, finding of the learned trial court as to readiness and willingness of the plaintiff under section 16(c) of the Specific Relief Act is not incorrect and the same is, accordingly, upheld.

30. Now, the question arises as to what would be the effect of Ext. 1 which is the letter dated 03.01.2007 issued by the authorized of the defendants to the plaintiff. By that letter, plaintiff was informed that he was to deposit a sum of Rs. 3,55,127/- by 08.10.2006 but he failed to deposit the same even within the grace period. As per Clause 7(ii) of the agreement dated 11.05.2005 which is Ext. 1 in this case, plaintiff was liable to update his dues along with interest for delay but he failed. It is further claimed in the said letter that defendants had issued reminder notice to the plaintiff on 24.09.2006 with intention to cancel the allotment of flat but plaintiff failed to make the payment of the due amount and so company has no alternative but to cancel the booking w.e.f. 30.12.2006. In regard to this letter plaintiff states in paragraph 8 of his plaint this letter was

forwarded to him by the State Bank of India which was issued on 25.01.2007 and this is why both these dates have been mentioned as date for accrual of cause of action of this suit. Even in his cross examination he stated that he had received the letter dated 03.01.2007 from the bank and thereafter he replied to the same vide letter dated 03.02.2007 through registered post. Now, defendants replied to the letter dated 03.02.2007 sent by the plaintiff vide letter dated 16.02.2007 which has been exhibited as Ext. A by the D.W. 1. According to Mr. OP Bhati, the plaintiff did not make mention of these correspondences in the body of the plaint which is indicative of the fact that plaintiff has not come with clean hands. Be that as it may, now that defendant has produced and exhibited the letter dated 16.02.2007, court is duty bound to consider the same for the purpose of adjudication of the suit. In this letter dated 16.02.2007 marketing officer of the defendants informed the plaintiff that since he had shown interest to make payment along with interest within 10 (ten) days he is requested to make payment of the dues to the tune of Rs. 7,37,960/- within 02.03.2007. Plaintiff was further cautioned by this letter that since such an opportunity was given a "special case", defendants reserved the right to re-sell the same flat after expiry of the cut off date i.e. 02.03.2007.

31. Letter dated 16.02.2007 was issued to the plaintiff mentioning "cancellation of flat No. 202/B-Reg" as subject and letter dated 03.02.2007 issued by the plaintiff and the letter dated 03.01.2007 issued by the defendants were mentioned in the reference of the letter. So, it is clear that after issuance of letter dated 03.01.2007 canceling the agreement, plaintiff replied by letter dated 03.02.2007 which according to the learned counsel for the parties is the Ext 4 in this case. By Ext. 4 plaintiff offered to pay the remaining balance amount of Rs. 3,55,127/- within 10 (ten) days. By Ext. A, the letter dated 16.02.2007, defendants replied to the plaintiff in regard to the offer made by Ext. 4. By Ext. A, defendants accepted the offer of receiving balance sum within 02.03.2007 but contradicted in regard to balance consideration. According to the defendants, the plaintiff was due to pay Rs. 7,37,960/- and this amount was demanded by the defendant to the plaintiff vide Ext. A letter. Plaintiff did not make the payment as demanded and instituted the suit on 26.03.2007 i.e. 23 days after the cut off date. Defendants have neither pleaded nor have they stated in course of evidence that after expiry of 02.03.2007 they had cancelled the agreement. This is because even after issuance of letter dated 03.01.2007, defendants gave chance to the plaintiff to make payment within 02.03.2007. This means that default, if there be any, was condoned by the defendants vide letter dated 16.02.2007 by giving a fresh scope to the plaintiff for making payment within 02.03.2007. Under section 55 of the Contract Act, a promise is at liberty to waive the breach by the promisor and accepting the performance on a later date disentitles the promise to take recourse to penal provision under the agreement.

32. It appears that the balance consideration to be Rs. 4,44,820/- is the pleaded case of both the sides. From exhibits of the defendants, on the other hand, the averment does not get support. In Ext. A defendant mentioned balance

installment to be Rs. 3,55,127/- and it was claimed in this letter that this installment ought to have been cleared by 30.09.2006. In this letter defendants claimed that plaintiff was intimated about the dues by letter dated 12.09.2006 and 24.09.2006. The plaintiff in course of his cross examination claimed that he did not receive any letter issued by the defendants on those dates. The learned trial court found that defendants could not prove as to how these letters were, served on the plaintiff as no postal receipt etc. were proved. In course of argument, learned counsel for the appellant could not show any material from the record indicating that these letters were ever served on the plaintiff and so the aforesaid finding of the learned trial court cannot be interfered with. It further appears that by Ext. A, defendants not only demanded balance consideration of Rs. 3,55,127/- but also claimed a sum of Rs. 3,82,833/- towards performance of special work done by the defendants and this is why sum of Rs. 7,37,960/- was demanded by letter dated 16.02.2007 (Ext. A). However, plaintiff himself states that his balance was Rs. 4,44,820/- and so learned trial court held that the defendants were at liberty to withdraw this amount from the total money deposited by plaintiff in Title Execution No. 6/2011. Cost of the special work as demanded vide Ext. A does not appear to arise from the agreement dated 11.05.2005 (Ext. 1). Moreover, no evidence has been led by the defendants to prove that such special work has been done and that such expenditure has been made. The learned trial court, therefore, did not hold that the plaintiff is liable to make payment of such cost to the defendants. Having perused the evidence on record. I do not find any material to hold that defendants had made this expenditure amounting to Rs. 3,55,127/- as claimed in Ext. A.

33. Coming to paragraph 7 of the Ext. 1 agreement it is to be seen that the plaintiff bound himself to make payment as per the terms of the payment mentioned in the agreement. The terms of payment are mentioned in Schedule D to the agreement which has been quoted above. From Ext. 2 (series) it appears that plaintiff Rs. 10,000/- on 06.12.2004, Rs. 1,76,000/- on 31.01.2005, Rs. 2,50,000/- on 27.04.2005, Rs. 2,00,000/- on 24.06.2005, Rs. 1,50,000/- on 31.11.2005 and Rs. 1,50,000/- on 16.05.2006 and the defendants accepted the amount and issued money receipt in acknowledgment thereof. This is how plaintiff had paid Rs. 9,36,000/-, upto 31.11.2005 and the agreement was executed on 11.05.2005. The payments were being made from 06.12.2004 and it continued upto 31.11.2005. The payment schedule mentioned in Schedule D to the agreement, therefore, was clearly repudiated by the parties and so this aspect of the contract stood altered by their conduct. Moreover, defendants were entitled to payment of Rs. 1,38,082/- only on application, Rs. 2,76,164/- on execution of the deed of agreement and Rs. 1,38,082/- upon casting of the first floor and same amount on casting upto sixth floor. The last payment of Rs. 1,38,082/- was to be paid within 30 days prior to handing over of the flat. Now, from Ext. 2 (series) it is clear that defendants realized Rs. 9,36,000/- from the plaintiff before the respective dates mentioned in Schedule D. Till 27.04.2005 i.e.

before execution of the agreement, defendants had realized Rs. 4,36,000/- from the plaintiff whereas defendants were entitled to realize Rs. 1,38,082/- only prior to execution of the agreement. To show that the plaintiff did not make payment as per Schedule D, the defendants were duty bound to plead and prove the respective dates as to when 1st, 2nd, 3rd, 4th, 5th and 6th floor slabs were cast and thereafter to show the respective dates when the payments were received from the plaintiff. Unfortunately, there is no pleading of the defendants in this regard and the defendants have not adduced any evidence to bring on record dates of casting of slabs of the building. Unless and until the respective dates of casting of slabs are established, it is not possible to hold that the plaintiff did not make payment within the time permitted by the agreement. Only after it is established that the plaintiff did not make the payment in time, then and then only question of taking recourse to penal action under Clause 7 of the agreement would arise. It cannot be lost sight that the defendants are entitled to last installment of Rs. 1,38,082/- only within 30 days of handing over possession of flat to the plaintiff. Here in this case, plaintiff made the full payment during trial without getting possession of the flat and so there is no scope in the present case for taking recourse to penal action of cancellation of the agreement. The learned trial court having considered the evidence on record in entirety has arrived at the finding that plaintiff has not committed any default and that he has always been ready and willing to perform his part of the contract. Such findings of the learned trial court being based on materials of record are liable to be upheld and accordingly, the same are upheld.

34. Considering the entirety of circumstances, there is no merit in the appeal and the same is accordingly, dismissed.

35. No order as to costs. Send down the lower courts records immediately after framing of decree.