R. Kandasamy(Since Dead) vs T.R.K.Sarawathy on 21 November, 2024

Author: Dipankar Datta

Bench: Sanjay Karol, Dipankar Datta

2024 INSC 884 REPO

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3015 OF 2013

R. KANDASAMY (SINCE DEAD) & ORS. … APPEL

VERSUS

T.R.K. SARAWATHY & ANR. …RESPOND

WITH

CIVIL APPEAL NO. 3016 OF 2013

M/S. ABT LIMITED … APPEL

VERSUS

T.R.K. SARAWATHY & ORS. …RESPOND

JUDGMENT

DIPANKAR DATTA, J.

THE APPEALS

1. The appellants1 in Civil Appeal No.3015 / 2013 were the defendants in a suit2 for specific performance of an agreement for sale3 instituted by sellers, hereafter O.S. 420 of 2006 Agreement, hereafter the first respondent as the plaintiff4, in respect of land together with a tenanted building5. The suit was dismissed by the Trial Court vide judgment and decree dated 17th December, 2007. Upon a first appeal6 being carried under section 96 of the Code of Civil Procedure, 19087 by the

buyer before the High Court of Judicature at Madras8, the same succeeded vide judgment and decree dated 21st October, 20119. The High Court reversed the judgment and decree of dismissal of the suit and granted decree for specific performance. The sellers have taken exception to the first appellate judgment and decree in this appeal by special leave, granted on 5th April, 2013.

2. Civil Appeal No.3016 / 2013 is also an appeal against the impugned judgment, special leave wherefor was also granted on 5 th April, 2013. It is at the instance of a company10 who had purchased the property, forming the subject of the Agreement, from the sellers when the first appeal was pending before the High Court without any order restraining the sellers to alienate the same. Upon such purchase, the subsequent purchaser derived knowledge of pendency of the first appeal; thus, it applied for and was impleaded as the eight respondent therein.

buyer, hereafter property, hereafter A.S.811 of 2008 CPC, hereafter High Court, hereafter impugned judgment, hereafter subsequent purchaser, hereafter RESUME OF FACTS

3. Although the facts leading to institution of the suit by the buyer and the defence raised by the sellers are captured in the decisions of the Trial Court as well as the High Court, for the sake of completeness, we consider it appropriate to briefly refer to the same hereunder:

a. The parties, on mutually agreed terms, executed the Agreement dated 20th January, 2005 for sale of the property. Towards consideration, the buyer agreed to pay Rs. 2.3 crore to the sellers.

Other noticeable features of the Agreement are:

i. A sum of Rs. 10 lakh was paid by the buyer as an advance.

ii. The buyer had to pay the balance sale consideration within four months from the date of the Agreement (the period ending on 19th May, 2005).

iii. On the date of the Agreement, the property was occupied by tenants and the sellers agreed that they will have the tenants vacate the property and deliver vacant possession thereof to the buyer at the time of sale.

iv. Time shall be of the essence.

b. The buyer started effecting payments in instalments. She paid Rs.

5 lakh, Rs. 4 lakh, Rs. 1 lakh and Rs. 5 lakh on 2nd February, 24th February, 5th June, and 24th July, 2005, respectively, totalling to Rs. 15 lakh. Taking into consideration Rs.10 lakh paid in advance, the buyer paid in all Rs. 19 lakh prior to 19th May, 2005 and Rs. 6 lakh beyond that date.

c. The sellers vide letter dated 23rd February, 2006 cancelled the Agreement and returned the sum of Rs. 25 lakh claiming that the said period of 4 (four) months had expired and that the buyer had not shown interest to complete the deal. However, the buyer vide reply letter dated 24th February, 2006 refuted the contents of the letter and emphasized that the sellers were bound to have the property vacated and the sale deed had to be executed only after all the tenants had vacated the property. It is noted that the last of the tenants vacated the property on 2nd February, 2006. d. The sellers vide letter dated 2nd March, 2006 asserted that the buyer has no right to claim purchase of the property as the Agreement had already been cancelled. The sellers reiterated that time is not the essence of the contract; the said period of 4 (four) months had expired; the fact of vacation of property by tenants was duly conveyed to the buyer multiple times; and despite multiple requests, the buyer did not come forward to execute the sale deed. For these reasons, the Agreement was cancelled vide letter dated 23rd February, 2006 and the pay order of Rs. 25 lakh was returned.

e. Despite the letter dated 23rd February, 2006 whereby the sellers cancelled the Agreement (reiterated vide letter dated 2nd March, 2006), the sellers vide a telegram dated 11th March, 2006 again expressed interest to sell the property and conveyed that they were ready to sell it; consequently, the buyer was called upon to complete the sale before 24th March, 2006.

f. The buyer, claiming that she was out of station, sent a letter on 18th March, 2006. She asserted that as per the Agreement, she had four months' time from the date of vacating of the property by all the tenants. A request was made calling upon the sellers to bring the original documents and 'encumbrance certificate for 30 years' to enable her advocate prepare the sale deed. g. The sellers then sent a letter dated 23rd March, 2006 asserting therein that the period of four months is to be counted from the date of the Agreement, and the demand for encumbrance certificate was not tenable as the buyer had already obtained encumbrance certificate from the sellers prior to entering into the Agreement and had also assured that she herself would verify the said certificate from the date of Agreement till date of sale. The sellers further stated that irrespective of the above, they have applied for encumbrance certificate and requested the buyer to execute the sale deed within a week from receipt of encumbrance certificate, failing which, the Agreement would stand cancelled. h. On 25th March, 2006, the sellers called upon the buyer to pay the sale consideration of Rs. 2.3 crore within 7 (seven) days. The buyer responded vide reply notice dated 29th March, 2006 and enclosed with it a draft sale deed and also demanded the sellers to hand over the encumbrance certificate.

i. The sellers responded vide letter dated 6th April, 2006 and reiterated that photostat copies of the title deeds and encumbrance certificate up to the date of Agreement was already furnished to, and verified by the buyer before entering into the Agreement and that although it was not possible for them to deliver the original documents, they were ready to let the buyer verify the original documents. They also made a request to the buyer to pay the sale consideration within 5 (five) days from receipt of the letter.

j. The sellers had not handed over the "original parent documents" for perusal of the buyer; hence, the buyer directly spoke to one of the sellers (the fourth defendant) asking him to bring the "original parent documents" for inspection. The buyer also sent a notice dated 22nd April, 2006 to the counsel of the sellers requesting him to advise the sellers to bring the documents for the buyer's

verification.

k. Vide letter dated 26th April 2006, the sellers deplored the buyer's dilatory tactic of conjuring new demands at the eleventh hour. Despite this, the sellers said, that they attempted their best to satisfy the buyer's demand and offered the buyer the chance to inspect the original parent documents (vide letter dated 6th April,2006), which offer the buyer showed no interest in availing. In view of the buyer's failure to perform her part of the bargain despite multiple opportunities being given, the sellers declared that the Agreement finally stood cancelled,.

l. Thereafter, vide letter dated 10th August, 2006, the buyer called upon the sellers to collect the pay order dated 11th February, 2006 for Rs. 25 lakh from the buyer's office, but the sellers did not collect the same. The buyer then enclosed the pay order with her letter dated 10th August, 2006 and sent it to the sellers who, vide letter dated 14th August, 2006 replied that the Agreement had already been cancelled and that the buyer, who earlier was not ready and willing, is now trying to grab the property as the value of the property has gone up multiple times.

4. It is in this factual background that litigation between the buyer and the seller commenced with institution of the suit by the buyer before the Court of the District Judge of Coimbatore. The suit was later transferred by the District Judge to the Court of the Additional District Judge (Fast Track Court I)11. Based on the averments in the plaint, which refer to more or less what we have narrated above in paragraph 3, relief was claimed in the following terms:

> a. To pass a decree for specific performance of the Agreement dated 20th January, 2005 or in the alternate a decree for refund of Trial Court, hereafter advance amount of Rs. 25 lakh with 18% interest p.a. from the date of Agreement till realization.
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> b. For permanent injunction restraining the sellers from alienating or encumbering the property.
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> c. To direct the sellers to pay the costs of the suit.
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> d. Any other relief that the court deems fit.

5. The sellers in their written statement refuted all the contentions raised in the plaint and pleaded that the buyer was never ready and willing to purchase the property and alleged that the buyer filed the suit with the intention to take benefit of the increase in price of the property by projecting a theory that time is not of the essence. VERDICTS OF THE TRIAL COURT AND THE HIGH COURT

6. The Trial Court framed and answered the issues as follows:

> 6.1 Whether the agreement for sale dated 20th January, 2005, is true, valid and legally enforceable? Answered in the affirmative.

6.2 Whether as per the agreement for sale, the plaintiff was ready and willing to pay the balance sale consideration and get the sale deed executed? Answered in the negative.

6.3 Whether the plaintiff is entitled for a decree directing the defendants to receive the balance sale consideration and execute the sale deed? Answered in the negative.

6.4 Whether the plaintiff is entitled to the alternative relief of refund of Rs.25,00,000 with 18% interest p.a. from the defendants?

Answered in the negative.

7. As has been noticed above, the fortune of the parties changed before the Trial Court and the High Court. High Court, in appeal, decreed the suit of the buyer. High Court observed that time was not of essence as the sellers had received payments, without protest, even after the final date fixed for the performance of the Agreement. After analysing the documents on record, the High Court observed that the buyer was ready and willing and found no reason which disentitled her from the discretionary relief of specific performance. ARGUMENTS

8. Mr. Dwivedi, learned senior counsel for the sellers, argued that the impugned judgment is completely flawed and hence, the appeal deserves interference.

8.1 Firstly, Mr. Dwivedi contended that the terms of the Agreement clearly provided that leaving aside the sum paid as advance, the time period for making payment of the balance sale consideration would be four months commencing from the date of such Agreement, i.e., 20th January, 2005. Admittedly, the buyer did not make the payment as agreed by and between the parties and time being the essence of the contract, the Trial Court was justified in dismissing the suit (although on the point of time being the essence of the contract, it had held otherwise). 8.2 Secondly, Mr. Dwivedi invited our attention to the letter dated 23rd February, 2006 sent by the sellers to the buyer whereby the sellers cancelled the Agreement and refunded the advance amount. The relevant part of the said letter is reproduced below:

> ".....You failed to pay the balance sale consideration within the period of 4 months and get the sale deed executed." In reply to the above, the buyer sent a letter dated 24th February, 2006 to the sellers. Nowhere in this reply letter did the buyer expressly mention that the period of four months is to be counted from the date of vacation of the property by the tenants.
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> Hence, the assertion that the period of four months was to be counted from the date of vacation is merely an afterthought.
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> 8.3 Thirdly, Mr. Dwivedi asserted that vide telegram dated 11th March, 2006, the sellers gave one last opportunity to the buyer to pay the balance amount and register the sale deed before 24th March, 2006. It has come on record that the buyer, despite

> being present in Coimbatore, falsely represented in her reply dated 18th March, 2006 that she was out of station and, hence, was disabled to respond immediately. The conduct of the buyer, therefore, does not inspire confidence and certainly such conduct was sufficient to deny her equitable relief.
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> 8.4 Fourthly, Mr. Dwivedi contended that the buyer was never ready and willing to perform her part of the bargain and hence she was not entitled to the relief of specific performance. To show the reluctance of the buyer to go ahead with the transaction, various communications by and between the parties were referred to.

The reply dated 24th February, 2006 was first referred wherefrom it would be evident that the buyer was aware of the fact of vacation of the property by the last remaining tenant. Vide telegram dated 11th March, 2006, the sellers called upon the buyer to hand over the pay order and gave time till 24 th March, 2006 to pay the balance sale amount and register the sale deed. Despite this, the buyer did not initiate any positive action as evidence of her readiness and willingness. Again, vide letter dated 23rd March, 2006, the sellers informed the buyer that they had applied for the encumbrance certificate, even though provision of such certificate was not a term of the Agreement. The sellers again called upon the buyer to execute the sale deed within 7 (seven) days from the date of receipt of the certificate. Even then, the buyer did not take steps to complete the sale. The sellers sent the encumbrance certificate as requested vide letter dated 06th April, 2006, and asked the buyer to execute the sale deed within 5 (five) days; however, even then, the buyer did not do the needful. Ultimately, having no other option, the sellers finally had to cancel the Agreement vide letter dated 26th April, 2006. Thereafter, the buyer maintained silence for four months. There is no reasonable justification for such silence. 8.5 Fifthly, Mr. Dwivedi submitted that the buyer has nowhere pleaded that she had purchased the stamp papers for execution of the sale deed. This further suggests that the buyer was not ready and willing to perform her part of the obligations under the Agreement.

8.6 Sixthly, Mr. Dwivedi argued that the buyer had taken prevaricating stands and, therefore, is not entitled to the discretionary relief of specific performance. He drew our attention to the letter dated 24th February, 2006 wherein the buyer stated:

> “It appears that only few days ago, the tenant has vacated and the portion is kept under lock and key.” This shows that the buyer was aware of the fact of vacation of the property by the last tenant days prior to 24 th February, 2006. However, in her letter dated 18th March, 2006, she stated that:
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> “You have vacated all the tenants only on 02.02.2006 and it has been officially intimated to me only on 04.03.2006 by your letter dated 02.03.2006”.

To show the alleged wrongful conduct of the buyer, our attention was drawn to another instance. In her reply dated 18th March 2006 to the telegram, the buyer stated:

> “……I am in receipt of your telegram dated 11.03.2006 which has been received by my office and due to my non-availability in the town I could not take

immediate action in this……." However, when the buyer was confronted with Exs. B1 and B2 being news items appearing in Tamil dailies dated 15th March and 16th March, 2006 (wherein the buyer was seen receiving an award at Coimbatore), she admitted that between 11th March and 18th March, 2006 she was coming to and going out of Coimbatore. This fact was neither mentioned in her plaint nor in her sworn affidavit before the High Court. Having come with unclean hands by suppressing such material facts, the buyer disentitled herself to the relief of specific performance.

8.7 Seventhly, Mr. Dwivedi urged that the Agreement having stood cancelled at the instance of the sellers, not once but twice, it was necessary for the buyer to seek declaration that the cancellation was bad and not operative and binding qua her and in the absence of such a prayer, the suit itself was not maintainable in law. However, Mr. Dwivedi fairly pointed out that no such point having been raised by the sellers in their written statement, the Trial Court did not frame an issue on such aspect. Nevertheless, it was argued that this was a substantial point of law concerning the Court's very jurisdiction, which ought to weigh in the mind of the Court while considering whether, at all, the relief of specific performance could be granted in favour of the buyer on the face of her omission/neglect to claim appropriate relief.

8.8 Eighthly, while inviting our attention to several documents on record, more particularly the cross-examination of the buyer wherein she admitted that she did not have enough money in either of her bank accounts to pay the balance sale price and asserted that she had the money in cash, Mr. Dwivedi contended that the buyer did not have the capacity to go ahead with the sale transaction.

8.9 Ninthly, it was the submission of Mr. Dwivedi that the property was sold by the sellers to the subsequent purchaser after stay, prayed in connection with the first appeal of the buyer, was refused by the High Court. A property which was being sold for Rs.2.3 crore had fetched a price of Rs.8 crore and that relief of specific performance being an equitable relief, the facts and circumstances were not such so as to decree the suit of the buyer particularly having regard to her conduct.

8.10 Finally, Mr. Dwivedi appealed that it was a fit and proper case where the impugned judgment of the High Court ought to be reversed and that of the Trial Court restored.

9. Mr. Rana Mukherjee, learned senior counsel for the subsequent purchaser adopted the submissions of Mr. Dwivedi and submitted that that the conduct of the buyer disentitles her from claiming the relief of specific performance; therefore, the Trial Court rightly dismissed the suit. That apart, the subsequent purchaser being a bona fide purchaser of the property for value, this Court may not disturb the status quo.

10. Mr. Guru Krishna Kumar, learned senior counsel for the buyer, argued that the view taken by the High Court is correct, well-reasoned, not perverse and a plausible view; hence, it does not warrant interference.

10.1 First, Mr. Kumar contended that both the Trial Court and High Court have concurrently found that time is not the essence of the contract. While inviting our attention to several documents on record, Mr. Kumar contended that the following conduct of the sellers itself evinced that for them, time was not of the essence:

i. the sellers received payments on 5th June 2004 and 24th July 2005, which is after the final date that they say was fixed for performance of the Agreement, i.e. 19th May 2005;

ii. even though they purportedly cancelled the Agreement vide telegram dated 11th March 2006, in their subsequent letters dated 23rd March 2006, 24th March 2006 and 6th April 2006, they have given extensions to the buyer in a piecemeal manner;

iii. and the sale deed could not have been executed by the sellers unless they evicted all tenants. Since such eviction is an uncertain event, time could not have been of the essence.

10.2 Secondly, Mr. Kumar submitted that the sellers have delineated a conduct full of blemishes, elaborated below, which disentitles them from discretionary relief of specific performance:

i. vide their letter dated 23rd February 2006, sellers purportedly cancelled the Agreement, then taking a volte face, vide letter dated 11th March 2006, the sellers conveyed that they were ready to sell the property;

ii. the sellers never furnished the original title deeds for inspection by the buyer;

iii. though the sellers returned the pay order of Rs. 25 lakh vide letter dated 11th February 2006, it was sent to a wrong address;

iv. and the sellers never obtained and produced any document from their bank, viz. M/s Vijaya Bank, showing the status of the pay order issued by the buyer, even though the same could have been obtained by them and this they did deliberately, so that the court can conclude that either the buyer has encashed the same or that the buyer never returned the same to sellers.

Mr. Kumar cited the decision of this Court in Ferrodous Estates (P) Ltd v P. Gopirathnam12 and relied on the following paragraph:

"54. ...As has been found earlier in this judgment, the Sellers were held to have taken up dishonest pleas and also held to have been in breach of a solemn agreement in which they were to obtain the Urban Land Ceiling permission which, if not obtained, would, under the agreement itself, not stand in the way of the specific performance of the agreement between the parties. He who asks for equity must do equity. Given the conduct of the defendants in this case, as contrasted with the 2020 SCC Online 825 conduct of the appellant who is ready and willing throughout to perform its part of the bargain. We think this is a fit case in which the Division Bench judgment should be set aside. As a result, the decree passed by the Single Judge is restored. Since the appellant itself offered a sum of Rs. 1.25 crores to the Division Bench, it must be made to pay this amount to the respondents within a period of eight weeks from the date of this judgment." (emphasis supplied) 10.3 Thirdly, Mr. Kumar asserted that the buyer was always ready and willing to perform her part of the bargain. In fact, the buyer's obligation to pay the balance consideration was to be fulfilled only after the sellers had performed their part of the bargain, which was to be ready to hand over the vacant possession of the property by evicting the tenants. Hence, without first performing their reciprocal promises, the sellers could not have called upon the buyer to pay the balance sale consideration. On the contrary, it was the sellers who were not ready to perform their part. Vide letter dated 22nd April 2006, the buyer demanded the sellers to produce the original title deeds which was refused by the sellers vide their letter dated 26th April 2006. Even though there was no express condition in the Agreement for production of original title deeds, but such condition is implied in the Agreement. Hence, without the sellers having first complied with their promise, they could not have called upon the buyer to perform her part and later claim that the buyer was not ready and willing.

10.4 Taking the above into consideration, Mr. Kumar submitted, that the High Court has rightly granted the discretionary relief of specific performance in favour of the buyer.

QUESTION

11. The sole question that we are tasked to decide is, whether the impugned judgment of the High Court warrants any interdiction in exercise of our appellate jurisdiction.

JUDICIAL PRECEDENTS

12. Before embarking on the aforesaid task, it would only be just and proper to remind ourselves of certain well-settled principles that have evolved through judicial precedents laid down by this Court on certain points which invariably arise in specific performance suits and which are relevant for the purpose of a decision on these appeals. ON WHETHER TIME IS THE ESSENCE OF THE CONTRACT:

13. A Constitution Bench of this Court in Chand Rani v. Kamal Rani13 surveyed previous decisions on the question as to whether or not time is the essence of the contract in transactions of sale of immovable properties and appears to have made a slight departure from earlier principles by ruling as under:

> (1993) 1 SCC 519 "25. From an analysis of the above case-law it is clear that in the 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 the contract the Court may infer that it is to be performed in a reasonable time if the conditions are:
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> 1. from the express terms of the contract;
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> 2. from the nature of the property; and
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> 3. from the surrounding circumstances, for example: the object of making the contract."

14. An instructive discussion is found in Saradamani Kandappan v. S. Rajalakshmi14 of how the principle of time not being the essence of the contract in transactions relating to sale of immovable properties took shape and how with changing times, the outlook of the courts in pleas claiming specific performance should be. We consider it appropriate to reproduce the same hereunder:

> "36. The principle that time is not of the essence of contracts relating to immovable properties took shape in an era when market values of immovable properties were stable and did not undergo any marked change even over a few years (followed mechanically, even when value ceased to be stable).....This principle made sense during the first half of the twentieth century, when there was comparatively very little inflation, in India. The third quarter of the twentieth century saw a very slow but steady increase in prices. But a drastic change occurred from the beginning of the last quarter of the twentieth century. There has been a galloping inflation and prices of immovable properties have increased steeply, by leaps and bounds. Market values of properties are no longer stable or steady. We can take judicial notice of the comparative purchase power of a rupee in the year 1975 and now, as also the steep increase in the value of the immovable properties between then and now. It is no exaggeration to say that properties in cities, worth a lakh or so in or about 1975 to 1980, may cost a crore or more now.
>
> 37. The reality arising from this economic change cannot continue to be ignored in deciding cases relating to specific performance. The steep increase in prices is a circumstance which makes it inequitable to grant the relief of specific performance where the purchaser does not take steps to (2011) 12 SCC 18 complete the sale within the agreed period, and the vendor has not been responsible for any delay or non-performance. A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to

> cover his delays, laches, breaches and 'non-readiness'..... ***
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> 42. Therefore there is an urgent need to revisit the principle that time is not of the essence in contracts relating to immovable properties and also explain the current position of law with regard to contracts relating to immovable property made after 1975, in view of the changed circumstances arising from inflation and steep increase in prices. We do not propose to undertake that exercise in this case, nor referring the matter to a larger Bench as we have held on facts in this case that time is the essence of the contract, even with reference to the principles in Chand Rani2 and other cases. Be that as it may.
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> 43. Till the issue is considered in an appropriate case, we can only reiterate what has been suggested in K.S. Vidyanadam:
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> (i) The courts, while exercising discretion in suits for specific performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps or for completion of the transaction, that must have some significance and therefore time/period prescribed cannot be ignored.
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> (ii) The courts will apply greater scrutiny and strictness when considering whether the purchaser was 'ready and willing' to perform his part of the contract.
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> (iii) Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. The courts will also 'frown' upon suits which are not filed immediately after the breach/refusal. The fact that limitation is three years does not mean that a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The three-year period is intended to assist the purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in part-

performance, where equity shifts in favour of the purchaser." (emphasis supplied)

CONSIDERATIONS IN GRANT OR REFUSAL:

15. A three-Judge Bench of this Court in Prakash Chandra v. Angadlal15 held, the ordinary rule is that specific performance should be granted. It ought to be denied only when equitable considerations point to its refusal and the circumstances show that damages would constitute an adequate relief.

16. This Court in N.P. Thirugnanam v. R. Jagan Mohan Rao (Dr)16 while reiterating that the remedy of specific performance is equitable in nature and that granting or refusing specific performance is within the discretion of the court, had the occasion to observe:

> "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 Section 20 of the Specific Relief Act, 1963 (for short 'the Act'). Under Section 20, the court is not bound to grant the relief just because there was a 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 along with 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 (1979) 4 SCC 393 (1995) 5 SCC 115 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 the contract." (emphasis supplied)

17. In Nirmala Anand v. Advent Corpn. (P) Ltd.17, a Bench of three Judges of this Court discussed what are the considerations that need to be kept in view while considering grant or refusal of a decree of specific performance in the following words:

> "6. It is true that grant of decree of specific performance lies in the discretion of the court and it is also well settled that it is not always necessary to grant specific performance simply for the reason that it is legal to do so. It is further well settled that the court in its discretion can impose any reasonable condition including payment of an additional amount by one party to the other while granting or refusing decree of specific performance. Whether the purchaser shall be directed to pay an additional amount to the seller or converse would depend upon the facts and circumstances of a case. Ordinarily, the plaintiff is not to be denied the relief of specific performance only on account of the phenomenal increase of price during the pendency of litigation. That may be, in a given case, one of the considerations besides many others to be taken into consideration for refusing the decree of specific performance. As a general rule, it cannot be held that ordinarily the plaintiff cannot be allowed to have, for her alone, the entire benefit of phenomenal increase of the value of the property during the pendency of the litigation. While balancing the equities, one of the considerations to be kept in view is as to who is the defaulting

party. It is also to be borne in mind whether a party is trying to take undue advantage over the other as also the hardship that may be caused to the defendant by directing specific performance. There may be other circumstances on which parties may not have any control. The totality of the circumstances is required to be seen." (2002) 8 SCC 146

18. In Kamal Kumar v. Premlata Joshi18, one finds the following instructive passage:

"7. It is a settled principle of law that the grant of relief of specific performance is a discretionary and equitable relief. The material questions, which are required to be gone into for grant of the relief of specific performance, are:

7.1. First, whether there exists a valid and concluded contract between the parties for sale/purchase of the suit property. 7.2. Second, whether the plaintiff has been ready and willing to perform his part of contract and whether he is still ready and willing to perform his part as mentioned in the contract. 7.3. Third, whether the plaintiff has, in fact, performed his part of the contract and, if so, how and to what extent and in what manner he has performed and whether such performance was in conformity with the terms of the contract; 7.4. Fourth, whether it will be equitable to grant the relief of specific performance to the plaintiff against the defendant in relation to suit property or it will cause any kind of hardship to the defendant and, if so, how and in what manner and the extent if such relief is eventually granted to the plaintiff; 7.5. Lastly, whether the plaintiff is entitled for grant of any other alternative relief, namely, refund of earnest money, etc. and, if so, on what grounds.

8. In our opinion, the aforementioned questions are part of the statutory requirements [See Sections 16(c), 20, 21, 22, 23 of the Specific Relief Act, 1963 and Forms 47/48 of Appendices A to C of the Code of Civil Procedure]. These requirements have to be properly pleaded by the parties in their respective pleadings and proved with the aid of evidence in accordance with law. It is only then the Court is entitled to exercise its discretion and accordingly grant or refuse the relief of specific performance depending upon the case made out by the parties on facts."

19. Quite recently, Kamal Kumar (supra) has been followed in P. Daivasigamani v. S. Sambandan19.

WHO CAN BE SAID TO BE 'READY AND WILLING'?

(2019) 3 SCC 793 (2022) 14 SCC 793

20. In C.S. Venkatesh vs. A.S.C. Murthy20, this Court on consideration of various decisions culled out what is implied by the words "ready and willing". It was held:

"16. The words 'ready and willing' imply that the plaintiff was prepared to carry out those parts of the contract to their logical end so far as they depend upon his

> performance. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of performance. 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 contract, the court must take into consideration the conduct of the plaintiff prior, and subsequent to the filing of the suit along with other attending circumstances. The amount which he has to pay the defendant must be of necessity to be proved to be available. Right from the date of the execution of the contract till the date of decree, he must prove that he is ready and willing to perform his part of the contract. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready to perform his contract.

21. Requisite pleadings and proof that are required of a plaintiff to succeed in a suit for specific performance are succinctly captured in this Court's decision of recent origin in U.N. Krishnamurthy v. A.M. Krishnamurthy21. The relevant passage reads:

> "24. To aver and prove readiness and willingness to perform an obligation to pay money, in terms of a contract, the plaintiff would have to make specific statements in the plaint and adduce evidence to show availability of funds to make payment in terms of the contract in time. In other words, the plaintiff would have to plead that the plaintiff had sufficient funds or was in a position to raise funds in time to discharge his obligation under the contract. If the plaintiff does not have sufficient funds with him to discharge his obligations in terms of a contract, which requires payment of money, the plaintiff would have to specifically plead how the funds would be available to him. To cite an example, the plaintiff may aver and prove, by adducing evidence, an arrangement with a financier for disbursement of (2020) 3 SCC 280 (2023) 11 SCC 775 adequate funds for timely compliance with the terms and conditions of a contract involving payment of money." ABSENT A PRAYER FOR DECLARATORY RELIEF THAT TERMINATION OF THE AGREEMENT IS BAD IN LAW, WHETHER A SUIT FOR SPECIFIC PERFORMANCE IS MAINTAINABLE?

22. This question has been considered by this Court in I.S. Sikandar v.

K. Subramani22 and answered in the following words:

> "37. 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."

23. I.S. Sikandar (supra) was followed by this Court in Mohinder Kaur v. Sant Paul Singh23 where, on facts, it was also held that the relief of specific performance being discretionary in nature, the respondent cannot be held to have established his case for grant of such relief.

24. However, in the interregnum, I.S. Sikandar (supra) was also considered by this Court in A. Kanthamani v. Nasreen Ahmed24 and it was held that the former decision turns on the facts involved therein and is, thus, distinguishable. In the latter decision, this Court also held that it is a well-settled principle of law that the plea regarding the maintainability of suit is required to be raised in the first instance in the pleading (written statement) and then only such plea can be (2013) 15 SCC 27 (2019) 9 SCC 358 (2017) 4 SCC 654 adjudicated by the Trial Court on its merits as a preliminary issue under Order 14 Rule 2 CPC. Once a finding is rendered on the plea, the same can then be examined by the first or/and second appellate court. It is only in appropriate cases, where the court prima facie finds by mere perusal of plaint allegations that the suit is barred by any express provision of law or is not legally maintainable due to any legal provision, a judicial notice can be taken to avoid abuse of judicial process in prosecuting such suit. However, such was not the case therein.

25. What follows from A. Kanthamani (supra) is that unless an issue as to maintainability is framed by the Trial Court, the suit cannot be held to be not maintainable at the appellate stage only because appropriate declaratory relief has not been prayed.

ON INCONSISTENT CLAUSES IN AN AGREEMENT

26. It is not an infrequent happening that two or more clauses in a contract could, in some measure, be inconsistent with each other, - the inconsistency arising because the clauses cannot sensibly be read together. Lord Wrenbury in Forbes v. Git 25 applied the following principle:

> "The principle of law to be applied may be stated in a few words. If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails. In this case the two clauses cannot be reconciled and the earlier provision in the deed prevails over the later. Thus if A covenants to pay ... 100 and the deed [1922] 1 A.C. 256 subsequently provides that he shall not be liable under this covenant, that later provision is to be rejected as repugnant and void, for it altogether destroys the covenant. But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole. Thus if A covenants to pay ... 100 and the deed subsequently provides that he shall be liable to pay only at a future named date or in a future defined event or if at the due date of payment he holds a defined office, then the absolute covenant to pay is controlled by the words qualifying the obligation in manner described."

27. The aforesaid principle of law was approved by this Court in Radha Sundar Dutta v. Mohd. Jahadur Rahim26, where a bench of three Judges held that it is a settled rule of interpretation that if there be admissible two constructions of a document, one of which will give effect to all the clauses therein while the other will render one or more of them nugatory, it is the former that should be adopted on the principle expressed in the maxim "ut res magis valeat quam pereat". Following it up, it was also observed that if, in fact, there is a conflict between the earlier clause and the later clauses

and it is not possible to give effect to all of them, then the rule of construction is well established that it is the earlier clause that must override the later clauses and not vice versa.

28. A decision of recent origin of this Court in Bharat Sher Singh Kalsia v. State of Bihar27 having taken note of the aforesaid decisions, proceeded to hold:

> "32. We are of the considered opinion that all three clauses are capable of being construed in such a manner that they operate AIR 1959 SC 24 (2024) 4 SCC 318 in their own fields and are not rendered nugatory. That apart, we are mindful that even if we had perceived a conflict between Clauses 3 and 11, on the one hand, and Clause 15 on the other, we would have to conclude that Clauses 3 and 11 would prevail over Clause 15 as when the same cannot be reconciled, the earlier clause(s) would prevail over the latter clause(s), when construing a deed or a contract. Reference for such proposition is traceable to Forbes v. Git as approvingly taken note of by a three-Judge Bench of this Court in Radha Sundar Dutta v. Mohd.

Jahadur Rahim. However, we have been able, as noted above, to reconcile the three clauses in the current scenario." ANALYSIS AND REASONS

29. A suit for specific performance of a contract for sale, normally, is premised on a written agreement between the contracting parties, signifying a meeting of minds of two persons or more. Terms of the agreement, which are reasonably ascertainable from the written document, assume extreme relevance. After all, compliance with other requisites takes the shape of a concluded contract and should there be no vitiating factor, the parties are bound thereby.

30. The first point that we need to examine is the effect of the two clauses of the Agreement and to apply the law laid down by this Court in Radha Sundar Dutta (supra) and Bharat Sher Singh Kalsia (supra). The said clauses read as follows:

> "The Second party will have to pay the balance sale price within four months from today and obtain a sale deed either in his name or in the name of persons nominated by him at his own expense." "There are tenants in the property described below at present. The First Parties agree to vacate the tenants and hand over vacant possession to the Second Party at the time of obtaining the sale."

31. On a bare reading of the aforesaid clauses, we do not find that the latter clause destroys the effect of the former clause altogether so much so that it has to be discarded. On the contrary, in this case, both the clauses were such that the same had to be read together and given effect upon ascertaining the intention of the parties as disclosed by the Agreement as a whole. The latter clause could not have been read divorced from the former, having regard to the intent of the parties that is discernible. The latter qualified the former in the sense that although it was obligatory for the buyer to pay the balance price within 19th May, 2005 and "obtain the sale deed", this was on the assumption that the property would be made free of tenants by the sellers by that time. However, the situation therefor did not arise on 19 th May, 2005 since the tenant, who vacated the property

last, did so sometime on 2nd February, 2006. Going by the latter clause, the buyer had time till 1st June, 2006 to complete the deal (four months of vacating of the property by all the tenants to enable the sellers to hand over vacant possession to the buyer). In our understanding, the Trial Court and the High Court were right in concluding that time was not the essence though the Agreement provided that "time mentioned in this agreement shall be of the essence."

32. We now turn our attention to the next point, which should clinch the issue between the parties. It is, whether or not the buyer demonstrated readiness and willingness to perform her part of the contract and even if she did, is she entitled to the discretionary and equitable relief of specific performance on facts and in the circumstances.

33. For tracing an answer, one would necessarily have to bear in mind sections 10, 16 and (unamended) section 20 of the Act. Scanning of the evidence on record unmistakably points to the conclusion that the buyer was not ready and willing to have the terms agreed by and between the parties to be performed.

34. First, the conduct of the buyer does not inspire confidence in view of the fact that despite being aware in February, 2006 of the property having been vacated by all the tenants, she started raising the bogey of failure of the sellers to share with her the 'encumbrance certificate'. Importantly, the Agreement did not record that the sellers were under any obligation to share such certificate. Thus, in the absence of such obligation, one has to presume that the buyer was duly satisfied with the sellers' title to the property and as such did not, consciously, insist on making such obligation a part of the Agreement of sharing of the 'encumbrance certificate' prior to performance of the agreed terms. It is common knowledge that none interested in buying an expensive property would agree to terms leaving himself/herself at a potential risk of facing litigation in future. Even in the absence of an express term and if it were accepted that the obligation is an implied requirement of the Agreement, the buyer would have done well to close the deal if the sellers were taking advantage of the omission in the Agreement, particularly when at the time she raised such objection the entire money received in advance had been returned by the sellers to her. This is one aspect of the matter.

35. The other aspect is this. From the documents on record, it is clear that there was no readiness and willingness on the buyer's part to pay the balance sale consideration and get the sale deed executed. The buyer, despite multiple reminders, did not come forward for execution of the sale deed. Vide letters dated 11th March, 2006, 23rd March, 2006, 06th April, 2006, the buyer was given a deadline of 13 (thirteen), 7 (seven) (counted from the date of receipt of 'encumbrance certificate') and 5 (five) days respectively; however, the buyer did not comply with any of these. It is to be noted that the above communications are subsequent to the reply letter dated 24th February, 2006 by the buyer wherein she admitted her knowledge of the property having been vacated by the last of the tenants. Hence, the conduct of the buyer in not doing the needful, especially even after the property became free of tenants, demonstrates her reluctance and diffidence to perform the contract.

36. Moving further, a perusal of the buyer's cross-examination reveals her admission of not having enough fund in either of her bank accounts to pay the balance sale price. This, in our opinion, is sufficient proof of her financial incapacity to perform her part of the contract. The husband of the

buyer could be a wealthy man having sufficient balance in his bank account but having perused the credit and debit entries, we have significant doubts in respect thereof which we need not dilate here in the absence of him being a party to the proceedings. Suffice is to observe, the transactions evident from the bank accounts of the buyer's husband do little to impress us that the buyer had demonstrated her financial capacity to make payment of the balance sale price and close the deal.

37. Imperative and interesting it is to note, the buyer sought to return the demand draft to the sellers on the last day of its validity. As discussed above, along with letter dated 23rd February 2006 of the sellers cancelling the Agreement, they returned the advance amount received from the buyer vide demand draft dated 11th February 2006. This draft was retained by the buyer and returned as late as 10th August, 2006 vide letter of even date (and not along with any of her previous letters). However, the demand draft dated 11th February, 2006 being valid only for a period of 6 (six) months, i.e., 10th August 2006, it has intrigued us as to why the buyer would hold on to the demand draft and not return it earlier if she was genuinely interested in purchasing the property.

38. Such conduct of the buyer, seen cumulatively, does not inspire confidence in granting her the discretionary relief of specific performance.

39. The question posed for an answer is, thus, decided against the buyer.

40. Having held thus, allowing the appeal is the inevitable result. However, before we part, there seems to be a discordant note struck by the decision in A. Kanthamani (supra) while distinguishing I.S. Sikandar (supra), which could create uncertainty and confusion. It is, therefore, considered worthwhile to attempt and clear the same.

41. A comprehensive reading of the two decisions reveals that in a fact scenario where the vendor unliterally cancels an agreement for sale, the vendee who is seeking specific performance of such agreement ought to seek declaratory relief to the effect that the cancellation is bad and not binding on the vendee. This is because an agreement, which has been cancelled, would be rendered non-existent in the eyes of law and such a non-existent agreement could not possibly be enforced before a court of law. Both the decisions cited above are unanimous in their approval of such legal principle. However, as clarified in Kanthamani (supra), it is imperative that an issue be framed with respect to maintainability of the suit on such ground, before the court of first instance, as it is only when a finding on the issue of maintainability is rendered by trial court that the same can be examined by the first or/and second appellate court. In other words, if maintainability were not an issue before the trial court or the appellate court, a suit cannot be dismissed as not maintainable. This is what Kanthamani (supra) holds.

42. The aforesaid two views of this Court, expressed by coordinate benches, demand deference. However, it is noticed that this Court in Kanthamani (supra) had not been addressed on the effect of non- existence of a jurisdictional fact (the existence whereof would clothe the trial court with jurisdiction to try a suit and consider granting relief), i.e., what would be its effect on the right to relief claimed by the plaintiff in a suit for specific performance of contract.

43. In Shrisht Dhawan (Smt) v. Shaw Bros.28, an interesting discussion on 'jurisdictional fact' is found in the concurring opinion of Hon'ble R. M. Sahai, J. (as His Lordship then was). It reads:

> "19. *** What, then, is an error in respect of jurisdictional fact? A jurisdictional fact is one on existence or non-existence of which depends assumption or refusal to assume jurisdiction by a court, tribunal or an authority. In Black's Legal Dictionary it is explained as a fact which must exist before a court can properly assume jurisdiction of a particular case. Mistake of fact in relation to jurisdiction is an error of jurisdictional fact. No statutory authority or tribunal can assume jurisdiction in respect of subject matter which the statute does not confer on it and if by deciding erroneously the fact on which jurisdiction depends the court or tribunal exercises the jurisdiction then the order is vitiated. Error of jurisdictional fact renders the order ultra vires and bad (Wade, Administrative Law. In Raza Textiles [(1973) 1 SCC 633] it was held that a court or tribunal cannot confer jurisdiction on itself by deciding a jurisdictional fact wrongly. ***" (emphasis supplied)

44. Borrowing wisdom from the aforesaid passage, our deduction is this.

An issue of maintainability of a suit strikes at the root of the proceedings initiated by filing of the plaint as per requirements of Order VII Rule 1, CPC. If a suit is barred by law, the trial court has absolutely no jurisdiction to entertain and try it. However, even though a given case might not attract the bar envisaged by section 9, CPC, it is obligatory for a trial court seized of a suit to inquire and ascertain whether the jurisdictional fact does, in fact, exist to enable it (the trial (1992) 1 SCC 534 court) to proceed to trial and consider granting relief to the plaintiff as claimed. No higher court, much less the Supreme Court, should feel constrained to interfere with a decree granting relief on the specious ground that the parties were not put specifically on notice in respect of a particular line of attack/defence on which success/failure of the suit depends, more particularly an issue touching the authority of the trial court to grant relief if the 'jurisdictional fact' imperative for granting relief had not been satisfied. It is fundamental, as held in Shrisht Dhawan (supra), that assumption of jurisdiction/refusal to assume jurisdiction would depend on existence of the jurisdictional fact. Irrespective of whether the parties have raised the contention, it is for the trial court to satisfy itself that adequate evidence has been led and all facts including the jurisdictional fact stand proved for relief to be granted and the suit to succeed. This is a duty the trial court has to discharge in its pursuit for rendering substantive justice to the parties, irrespective of whether any party to the lis has raised or not. If the jurisdictional fact does not exist, at the time of settling the issues, notice of the parties must be invited to the trial court's prima facie opinion of non-existent jurisdictional fact touching its jurisdiction. However, failure to determine the jurisdictional fact, or erroneously determining it leading to conferment of jurisdiction, would amount to wrongful assumption of jurisdiction and the resultant order liable to be branded as ultra vires and bad.

45. Should the trial court not satisfy itself that the jurisdictional fact for grant of relief does exist, nothing prevents the court higher in the hierarchy from so satisfying itself. It is true that the point of maintainability of a suit has to looked only through the prism of section 9, CPC, and the court can rule on such point either upon framing of an issue or even prior thereto if Order VII Rule 11 (d)

thereof is applicable. In a fit and proper case, notwithstanding omission of the trial court to frame an issue touching jurisdictional fact, the higher court would be justified in pronouncing its verdict upon application of the test laid down in Shrisht Dhawan (supra).

46. In this case, even though no issue as to maintainability of the suit had been framed in course of proceedings before the Trial Court, there was an issue as to whether the Agreement is true, valid and enforceable which was answered against the sellers. Obviously, owing to dismissal of the suit, the sellers did not appeal. Nevertheless, having regard to our findings on the point as to whether the buyer was 'ready and willing', we do not see the necessity of proceeding with any further discussion on the point of jurisdictional fact here.

47. However, we clarify that any failure or omission on the part of the trial court to frame an issue on maintainability of a suit touching jurisdictional fact by itself cannot trim the powers of the higher court to examine whether the jurisdictional fact did exist for grant of relief as claimed, provided no new facts were required to be pleaded and no new evidence led.

CONCLUSION

48. For the foregoing reasons, the appeals merit success and the same are allowed. We set aside the first appellate judgment and decree of the High Court and restore that of the Trial Court with the result that the suit instituted by the buyer shall stand dismissed.

49. It is made clear that the buyer shall be entitled to return of the advance sum of Rs.25 lakh by the sellers. If not already returned, the sellers shall take steps in this behalf within a month from date. If the buyer has made any deposit pursuant to any order of court, the same shall also be returned to her with accrued interest, if any.

.....J. (DIPANKAR DATTA) .....J. (SANJAY KAROL) NEW DELHI;

NOVEMBER 21, 2024.