Supreme Court of India
Gomathinayagam Pillai And Ors vs Pallaniswami Nadar on 2 September, 1966
Equivalent citations: 1967 AIR 868, 1967 SCR (1) 227
Author: S C.
Bench: Shah, J.C.

PETITIONER:
GOMATHINAYAGAM PILLAI AND ORS.

Vs.

RESPONDENT:
PALLANISWAMI NADAR

DATE OF JUDGMENT:
02/09/1966

BENCH:
SHAH, J.C.
BENCH:
SHAH, J.C.
WANCHOO, K.N.
BACHAWAT, R.S.

CITATION:
1967 AIR 868 1967 SCR (1) 227
CITATOR INFO :
R 1977 SC1005 (5)

ACT:
Contract, Act, 1872, s., 55-Time to be regarded as essence of contract--Conditions for-Specific performance-Whether decree can be granted unless party claiming can show he was ready and willing at all times to perform his part.

HEADNOTE:
G and his son C, the first and second appellants, were owners of a plot of land which they verbally agreed to sell to the respondent on March 5, 1959, at a time when P, another son of G, was on trial for murder and the latter urgently needed funds for his defence. On that date, as against the total agreed price of Rs. 15,106 the respondent paid them Rs. 1006 as an advance amount for which a receipt was executed by the two appellants. No time was fixed for the completion of the sale. On April 4, 1959, upon receipt of another amount of Rs. 2,000 from the respondent, the two appellants executed a writing stipulating that the sale deed would be executed on or before April 15, 1959. This writing also incorporated a default clause imposing a penalty upon the party failing to complete the sale by the agreed date.

The sale deed was however not executed by that date for which different reasons, were given by each of the parties. On April 15, another agreement was executed whereby it was agreed to complete the sale by 30th April 1959 on the same terms and conditions, but it was not completed by that date either. On July 30, 1959, appellants 1 and 2 wrote to the respondent stating that the agreement was subject to a specific undertaking that time was of the essence of the agreement and since the respondent had failed to carry out the agreement by April 30, 1959, the agreement stood cancelled and the advance amount stood forfeited. Thereafter on July 9, 1959 appellants 1 and 2 agreed to sell the land to the 3rd appellant. On August 3, 1959 the respondent deposited the balance of the amount payable by him in a bank and informed the appellants that he was ready and willing to carry out his part of the contract-, and he called upon appellants 1 and 2 to execute the sale deed within 3 days against payment of the balance of the price. The appellants having failed to execute the sale deed the respondent instituted the present suit against them for a decree for specific performance of the agreement.

The High Court reversed the decision of the Trial Court, and decreed the claim of the respondent for specific performance.

On appeal to this Court,

HELD: (By Wanchoo and Shah, JJ., Bachawat, J. dissertation) Although the High Court had rightly held that time was not of the essence of the contract, the finding of the Trial Court that after entering into the contract the respondent was not ready and willing to perform his part of the contract must be accepted; a decree for specific performance of the contract could not therefore be granted.

The agreements dated April 4 and April 15 did not express in unmistakable language that time was to be of the essence and existence of the default clause would not necessarily evidence such intention. Fixation of the period within which the contract is to be performed does not make the stipulation as to time of the essence of the contract. Intention to make

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time of the essence of the contract may be evidenced by either express stipulations or by circumstances which are sufficiently strong to displace the ordinary presumption that in a contract of sale of land stipulations as to time are not of the essence. In the present case theme was no express stipulation, and the circumstances were not such as to indicate that it was the intention of the parties that time was intended to be of the essence, of the contract. [233E-H; 238 E-F]

Jamshed Khodaram Irani v. Burjorji Dhunjibhai, I.L.R. 40 Bom. 289 and Stickney v. Keeble. L.R. [1915] A.C. 386, referred to.

Before he could be awarded a decree for specific

performance, the respondent had to prove his readiness and willingness continuously from the date of the contract till the date of hearing of the suit to complete his part of the contract, and if he failed in that, his suit was liable to fail. The Trial Court had found on the evidence that the respondent was at no time ready and willing to perform his part of the contract. This finding was never challenged before the High Court and the High Court did not hold that the finding was incorrect. [234 C]
Ardeshir Mamna v. Flora Sassoon, L.R. 55 I.A. 360, referred to.
(Per Bachawat J. dissenting) : There was no specific issue on the question whether the respondent was ready and willing to perform the contract. The Trial Court was clearly wrong in inferring that the respondent was not ready and willing to perform the contract from the fact that from April 30, 1959 upto the middle of July 1959 the respondent had not taken any steps in the matter and from his failure to explain the delay. If the respondent was guilty of aches, it was the duty of the appellants to fix a reasonable time for the completion of the sale. Mere delay, short of waiver or abandonment of the contract, is no ground for refusing relief, nor is it evidence of lack of readiness -and willingness. The materials on the record clearly indicated that the 'respondent was at all material times ready and willing to perform the contract. [239 E; 241 D-F]
Jamshed v. Burjorji, (1916) L.R. 43 I.A. 26 and Bank of India Ltd. v. Jamsetji A. H. Chiney and M/s. Chinoy and Company, (1949) L.R.77 I.A. 76, referred to.

JUDGMENT:

CIVIL, APPELLATE JURISDICTION : Civil Appeal No. 1043 of 1965.

Appeal by special leave from the judgment and order dated December 17, 1964 of the Madras High Court in Appeal Suit No. 375 of 1961.

H. R. Gokhale and R. Ganapathy Iyer, for the appellants. A. K. Sen and R. Gopalakrishnan, for the respondent. The Judgment Of WANCHOO and SHAH, JJ. was delivered by SHAH, J. BACHAWAT, J. delivered a dissenting Opinion. Shah, J. This appeal with special leave is filed against the judgment of the High Court of Judicature at Madras reversing the decree of the Subordinate Judge, Ramnathapuram in original suit No. 30 of 1959. Gomathinayagam Pillai and his son Chinnathambia hillai-hereinafter collectively referred to as appellants 1 & 2 -were owners of a plot of land Survey No. 1155/2-3 in village Periyakulam, District Ramnathapuram. In March 1959, Palaniappa Pillai son of the first appellant was standing trial in a Criminal Court for the offence, of murder and the first appellant was in need of funds to defend him. On March 5, 1959 appellants 1 & 2 agreed verbally to sell S. No. II 5 5/2-3 to Palaniswami Nadar -respondent in this appeal-for Rs. 15,106/- and received Rs. 1006/- in part payment of the price. No time was fixed for completion of the sale. A receipt Ext.

A-1 was executed by appellants 1 & 2 reciting that the land was agreed to be sold by appellants 1 & 2 to the respondent and that Rs. 1006/- were received as "advance amount." On March 31, 1959 Palaniappa Pillai was convicted of the offence of murder and sentenced to imprisonment for life. On April 4, 1959 appellants 1 & 2 received Rs. 2,000/- from the respondent and executed a writing stipulating that the sale deed will be executed on or before April 15, 1959. It was recited in that writing that appellants 1 & 2 had agreed to sell on March 5, 1959 and had received Rs. 1006/- on that date, and Rs. 2,000/- on April 4, 1959 and it was further recited that appellants 1 & 2 "s hall settle the aforesaid sale within 2nd Chittiral, Vikhari (15th April 1959) in favour of" the respondent "that the amount shall be paid as per the particulars of the receipt of sale consideration; that even though" appellants 1 & 2 "are prepared to settle the sale accordingly, if" the respondent "raises any objection whatever to settle the sale, he shall lose the advance amount of Rs. 3006/- (Rupees Three thousand and six only); and that, even though" the respondent "is prepared to settle the sale, if" appellants 1 & 2 "raise any objection whatever to settle the sale, they shall add a sum of Rs. 3000/- to the aforesaid advance amount of Rs. 3006/- and pay in all, a sum of Rs. 6006/- (Rupees six thousand and six only) to" the respondent. The agreement clearly incorporated a default clause imposing penalty upon the party failing to carry out the terms of the contract. But the sale deed was not executed on or before April 15, 1959. Different reasons were given by the parties for not completing the sale by the date stipulated. It was the case of the respondent that appellants 1 & 2 wanted to consult a lawyer and to ascertain whether it was necessary to secure attestation by the first appellant's son Palaniappa and his daughters because the property originally belonged to Ulagammal, wife of the first appellant. It was the case of appellants 1 & 2 that they were full owners of the land agreed to be sold and that the children of the first appellant were not interested in the land and the respondent set up false excuses and neglected to take the sale deed as stipulated. On April 15 1959, another agreement was executed. It was recited in the agreement :

> As certain unforeseen circumstances have arisen to settle the sale on this day as has been fixed as per the Agreement executed on 4th April 1959 by us three Individuals, we have decided to consult the Vakil so as to settle the sale within 30th April 1959 and to settle the sale and to bind ourselves as per the conditions mentioned in the previous Agreement should whomsoever fail to finalise the sale."

The sale was not completed even on April 30,1959. On July 30,1959, appellants 1 &2 addressed a letter to the respondent stating that the agreement of sale was subject to a "specific undertaking" that time was of the essence of the agreement and it was twice extended at the request of the respondent, and since the respondent had failed to carry out the agreement even by April 30, 1959, the agreement stood cancelled and the amount of Rs. 3006/- paid by the respondent stood forfeited. On July 31, 1959 the Appellants agreed to sell the land to P.K. Banarusami Naidu-who will hereinafter be referred to as appellant No. 3. On August 3, 1959 the respondent deposited the balance payable by him under the agreement of sale in a Bank ,and by letter dated August 4, 1959 informed appellants 1 & 2 that time was not of the essence, and that he was ready and willing to carry out his part of the contract, and the respondent called upon appellants 1 & 2 to execute a sale deed within three days of the receipt of the letter against payment of the balance of the price. He also offered to purchase the stamp paper and to have the sale deed prepared for execution. Appellants 1 & 2 having failed to execute the sale-deed the respondent instituted original suit No. 30

of 1959 in the Court of the Subordinate Judge, Ramnathapuram, against appellants, 1, 2 & 3 and one Sethuramalingam Pillai (who was implemented on the ground that he was a mortgagee of the property by deed executed on September 15, 1952 for Rs. 6000/-) for a decree for specific performance of the agreement, alleging that he was at all material times ready and willing to perform his part of the contract and to obtain the sale deed and it was only at the request of appellants 1 & 2 that execution of the sale deed was twice postponed and that appellants 1 & 2 had committed breach of the contract. The suit was resisted by appellants 1, 2 & 3. The learned Trial Judge dismissed the suit holding that under the agreements dated April 4, 1959 and April 15, 1959 time was of the essence, that even if it be held otherwise the respondent "was never ready and willing to perform his part of the contract", that he had committed default in carrying out his part of the bargain, that delay on the part of the respondent to claim his rights under the agreement of sale had caused the interest of the third appellant to intervene and on that account the respondent was estopped from enforcing the agreement, and that delay was evidence of abandonment of the contract or of waiver of the right to ,enforce the contract. The Trial Judge accordingly rejected the ,claim of the respondent for specific performance, but awarded on a concession made by appellants 1 & 2 a decree for recovery of Rs. 3006/- with interest at 6 per cent. from the date of the decree till realisation against appellants 1 & 2. Against the decree, the respondent appealed to the High Court of Judicature at Madras. The High Court opined that time was not of the essence of the contract, that delay on the part of the respondent in claiming completion of sale between April 30, 1959 and July 30, 1959 was not undue delay and there was neither abandonment of the contract, nor waiver, and that "even as a defaulting party", as found by the Trial Court, the respondent was entitled to a decree for specific performance of the agreement of sale. The High Court accordingly reversed the decree passed by the Trial Court, and decreed the claim of the respondent for specific performance.

In this appeal with special leave, two questions fall to be determined: (1) whether under the agreement of sale, time was of the essence; and (2) whether as alleged by appellants, 1, 2 & 3, the respondent was not ready and willing to perform his part of the contract, and was on that account disentitled to a decree for specific performance. The facts which have a material bearing on the first question have already been set out. Section 55 of the Contract Act which deals with the consequences of failure to perform an executory contract at or before the stipulated time provides by the first paragraph:

> "When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promise if the intention of the parties was that time should be of the essence of the contract."

It is not merely because of specification of time at or before which the thing to be done under the contract is promised to be done and default in compliance therewith, that the other party may avoid the contract. Such an option arises only if it is intended by the parties that time is of the essence of the contract. Intention to make time of the essence, if expressed in writing, must be in language which is unmistakable : it may also be inferred from the nature of the property agreed to be sold, conduct of the parties and the surrounding circumstances at or before the contract. Specific

performance of a contract will ordinarily be granted, notwithstanding default in carrying out the contract within the specified period, if having regard to the express stipulations of the parties, nature of the property and the surrounding circumstances, it is not inequitable to grant the relief. If the contract relates to sale of immovable property, it would normally be presumed that time was not of the ,essence of the contract. Mere incorporation in the written agreement of a clause imposing penalty in case of default does not by itself evidence an intention to make time of the essence. In Jamshed Khodaram Irani v. Burjorji Dhunjibhai (1) the Judicial Committee -of the Privy Council observed that the principle underlying s. 55 of the Contract Act did not differ from those which obtained under the law of England as regards contracts for sale of land. The Judicial Committee observed :

> "Under that law equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. . . . Their Lordships are of opinion that this is the doctrine which the section of the Indian Statute adopts and embodies in reference to sales of land. It may be stated concisely in the language used by Lord Cairns in Tilley v. Thomas (1867) L. R. 3 Ch. 61 "The construction is, and must be, in equity the same as in a Court of law. A Court of equity will indeed relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps towards completion, if it can do justice between the parties, and if (as Lord Justice Turner said in Roberts v. Berry (1853) 3 De G. M. & G. 284), there is nothing in the 'express stipulations between the parties, the nature of the property, or the surrounding circumstances,' which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract. of the three grounds mentioned by Lord Justice Turner express stipulations' requires no comment. The 'nature of the property' is illustrated by the case of reversions, mines, or trades. The 'surrounding circumstances' must depend on the facts of each particular case."
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> Their Lordships will add to the statement just quoted these observations. The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really (1) I.L.R. 40 Bom. 289.
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> and in substance intended as regards the time of its performance may be excluded by any plainly expressed stipulation. But to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time limits prescribed in a fashion which is unmistakable. The language will have this effect if it plainly excludes the notion that these time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay as its foundation. "Prima facie, equity

> treats the importance of such time limits as being subordinate to the main purpose of the parties, and it will enjoin specific performance notwithstanding that from the point of view of a Court of Law the contract has not been literally performed by the plaintiff as regards the time limit specified."

The Trial Court relied upon three circumstances in support of its conclusion that time was of the essence of the contract of sale : (i) though no time was prescribed by the oral agreement, in the agreements writing dated April 4, 1959 and April 15, 1959 there were definite stipulations fixing dates for performance of the contract; (ii) that the second and the third agreements contained clauses which imposed penalties upon the party guilty of default; and

(iii) that appellants 1 & 2 were in urgent need of money and it was to meet their pressing need that they desired to effect sale of the property. But the agreements dated April 4 and April 15 do not express in unmistakable language that time was to be of the essence and existence of the default clause will not necessarily evidence such intention. Fixation of the period, within which the contract is to be performed does not make the stipulation as to time of the essence of the contract. It is true that appellants 1 & 2 were badly in need of money, but they had secured Rs. 3006/- from the respondent and had presumably tided over their difficulties at least temporarily. There is no evidence that when the respondent did not advance the full consideration they made other arrangements for securing funds for their immediate needs. Intention to make time of the essence of the contract may be evidenced by either express stipulations or by circumstances which are sufficiently strong to displace the ordinary presumption that in a contract of sale of land stipulations as to time are not of the essence. In the present case there is no express stipulation, and the circumstances are not such as to indicate that it was the intention of the parties that time was intended to be of the essence of the contract. It is true that even if time was not originally of the essence, the appellants could by notice served upon the respondent call upon him to take the conveyance within the time fixed and intimate that in default of compliance with the requisition the contract will be treated as can-

celled. As observed in Stickney v. Keeble (1) where in a contract for the sale of land the time fixed for completion is not made of the essence of the contract, but the vendor has been guilty of unnecessary delay, the purchaser may serve upon the vendor a notice limiting a time at the expiration of which he will treat the contract as at an end. In the present case appellants 1 & 2 have served no such notice; by their letter dated July 30, 1959 they treated the contract as at an end. If the respondent was otherwise qualified to obtain a decree, for specific performance, his right could not be determined by the letter of appellants 1 & 2.

But the respondent has claimed a decree for specific performance and it is for him to establish that he was, since the date of the contract, continuously ready and willing to perform his part of the contract. If he fails to do so, his claim for specific performance must fail. As observed by the Judicial Committee of the Privy Council in Ardeshir Mama v. Flora Sasson(2):

> "In a suit for specific performance, on the other hand, he treated and was required by the Court to treat the contract as still subsisting. He had in that suit to allege, and if

> the fact was traversed, he was required to prove a continuous readings and willingness, from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment brought with it the inevitable dismissal of his suit."

The respondent must in a suit for specific performance of an agreement plead and prove that he was ready and willing to perform his part of the contract continuously between the date of the contract and the date of hearing of the suit. On this part of the case the Trial Court recorded a clear finding against the respondent that he was at no time ready and willing to perform his part of the contract. The High Court did not consider the effect of this finding upon the claim of the respondent and without expressing dissent with that finding granted a decree for specific performance to the. respondent.

It is necessary to consider the pleadings of the parties, the issues raised, the findings recorded by the Trial Court and the basis on which the appeal was pressed before the High Court by counsel for the respondent. In paragraphs of the plaint the respondent averred that he was always ready and willing to perform his part of the contract and to have the sale deed executed, but at the request of appealing 1 & 2 exec ution of the sale deed was postponed. This was denied by appellants 1, 2 & 3. They pleaded that the respondent was not ready and willing to get the sale deed executed and that he was deliberately putting off payment of the balance of the consideration and was delaying performance of the agreement. They (1) L.R. [1915] A.C. 386.

(1) L.R. 55 I.A. 360, 372.

also pleaded that appellants 1 & 2 were "badly in need of money", but the respondent committed default in completing the sale as stipulated. The Trial Judge raised two issues which are material on this part of the case "2. Whether the plaintiff is not entitled to the specific performance of the sale of the suit properties in his favour ?

5. Whether the breach of the contract is due to the fault of the dependents (appellants 1 & 2) or due to the fault of plaintiff (the respondent) ?"

No specific issue was raised about the readiness and willingness of the respondent to perform his part of the contract, but the second issue included trial of the plea raised by appellants, 1, 2 & 3. The parties were, it appears, fully aware of what was required to be proved, and led evidence in support of their respective cases. No objection was raised in the Court of First Instance protesting against the trial of that plea without a specific issue thereon.

At the trial the respondent asserted that on April 15, 1959 be was willing to take the sale deed from appellants 1 & 2, but on April 30, 1959 he was not ready to purchase the stamp paper or take the sale deed. Somewhat inconsistently he stated that on April 30, 1959 he met appellants 1 & 2 and called upon them to execute the sale deed and appellant 1 told him that "he had urgent need to go for the case and that he would get possession only later and the sale deed would be executed after his return". The trial Court con- sidered the plea that the respondent was not ready and willing to

perform his part of the contract on the footing that time was not of the essence. The Court referred to the admission made by the respondent that he was not willing to take the sale deed on April 30, 1959, and then considered the question whether the sale was not completed by April 30, 1959 on account of default on the part of the respondent or of appellants 1 & 2. On a consideration of the evidence, the Trial Court came to the conclusion that the respondent was not ready to complete the sale by April 30, 1959, since he wanted time for consulting his lawyer as to the desirability of obtaining attestation of the children of appellant No. 1 in the proposed sale deed and that appellants 1 & 2 did not ask for postponement. The Trial Court then proceeded to consider whether default was committed by the respondent or by appellants 1 & 2, and observed that mere assertion in the plaint that he was ready and willing to perform the contract was not sufficient and his readiness and willingness had to be judged from what he had done or from his conduct subsequent to the agreement, and on a review of the evidence came to the conclusion that the respondent committed default by not carrying out the contract on April 30, 1959, and that even after April 30, 1959 he was not willing to have the contract completed. The learned Sup.C.1./66n-2 Judge observed that the reasons set up by the respondent for the delay in taking steps in the matter were "obviously untrue.", and that the respondent was trying to put the blame on the appellants and inventing excuses to explain the omission in taking the sale deed. He concluded in paragraph-18 of his judgment : "The consideration of the evidence in the case discloses only one thing, viz., that the plaintiff (the respondent) was never eager, prompt or desirous or willing to take a sale deed in pursuance of Exts. A-2 and A-3. It is the plaintiff (the respondent) who committed default in performance of his part of the agreement." The learned Judge then observed that in his view time was of the essence of the contract and even if it was not, the contract must be performed within a reasonable time after the date fixed in the agreement dated April 4, 1959 and the agreement dated April 15, 1959, and this was not done. The Trial Court thereafter summarised the evidence as to the conduct of the respondent and appellants 1 & 2 and held that the respondent was "never ready and willing to perform his part or the contract at any time." The Trial Judge apparently confused two independent issues one of default in performance of the contract by the respondent and the other of readiness and willingness of the respondent to carry out his part of the contract. As observed earlier, if time is not of the essence of the contract, default occurs when a party serves a notice making time of the essence and requires the other party within a reasonable time fixed by the notice to carry out the terms of the contract, and the party served with the notice fails to comply with the requisition. In this case no such notice was served, and from the mere delay in calling upon appellants 1 & 2 to complete the contract, default on the part of the respondent cannot be inferred. But the Trial Court also came to the conclusion that the conduct of the respondent as evidenced by his statement and his witnesses proved that he was not ready and willing to perform his part of the contract. This the Court inferred from the delay of three months after April 30, 1959 and the evidence given by the respondent to explain that delay and other circumstances.

The Trial Court expressly recorded a finding on issue No. 2 adverse to the claim of the respondent. The respondent had, as already observed, claimed that he was ready and willing to perform his part of the contract and appellants 1, 2 & 3 had denied that claim. Before he could be awarded a decree for specific performance, the respondent had to prove his readiness and willingness continuously from the date of the contract till the date of hearing of the suit and if he failed in that, his suit was liable to fail. And the Trial Court dismissed the respondent's suit on that ground also. The High

Court could grant a decree for specific performance in favour of the respondent against appellants 1 & 2 only if the Court was satisfied that the respondent was continuously ready and willing to perform his part of the contract from the date of the suit tin the date of hearing. But the respondent in the High Court did not apparently challenge the finding of the Trial Court on that question against the respondent. He merely invited the High Court to decide the appeal on the footing that even if the respondent "had defaulted in the sense that on April 30, 1959 or before that date the respondent was not ready with the necessary funds to go through the sale" he was entitled to a decree for specific performance. The statement so recorded is somewhat obscure : a ground for rejecting the respondent's claim for specific performance will not arise merely because the respondent was not ready with the necessary funds on April 30, 1959, if time was not of the essence. But if the respondent was on April 30, 1959 not ready and willing to, perform his part of the contract, his suit must fail.

The Trial Court found that the respondent had committed default in performing his part of the contract. This the Court inferred from his statement made before the Court and the evidence that for three months after the date fixed for performance no steps were taken by the respondent for completion of the contract. That inference however does not necessarily follow from mere delay in calling upon appellants 1 & 2 to perform the contract. But the Trial Court also found that the respondent was at no time ready and willing to perform his part of the contract. This finding was never challenged before the High Court and the High Court did not hold that the finding was incorrect. Counsel for the respondent urged that the finding by the Trial Court on the issue of readiness and willingness was "without evidence, vague and perverse" and that the learned Judges of the High Court were justified in "completely ignoring" it and in granting a decree to the respondent for specific performance, notwithstanding that finding. It is difficult to characterise the finding as perverse or even vague or without evidence. The Trial Judge on his view of the evidence held that the respondent was at no time ready and willing to perform his part of the contract. Whether the evidence justified that conclusion is a matter of which we may for the present defer consideration. But it is one of the grounds on which the suit was dismissed by the Trial Court. Without considering the evidence and without setting aside that finding, a decree for specific performance could not be granted, and there is, in the judgment of the High Court no discussion of the evidence on this part of the case.

Counsel for the respondent then urged that the inference raised by the Trial Judge on the second issue, insofar as it relates to the readiness and willingness for the respondent to perform his part of the contract, could not be raised on the findings recorded by him, The respondent had stated that he was on April 30, 1959 not ready to purchase the stamp- paper or to take the sale deed. After April 30, 1959 also according to the Trial Judge the respondent took no steps to call upon appellants 1 & 2 to perform their part of the contract, and did not purchase the stamp paper. The Trial Judge also found that the story of the respondent that appellant No. 1 requested that completion of the sale be postponed because he had to attend a social function at Madurai and thereafter he had to go about making enquiries for a suitable match for his grand-daughter, and that in the first week of July 1959 appellant No. 1 and the respondent went to V. Pillai P.W. 3 for preparation of the draft sale- deed and that the first appellant requested for time to get the attestation of his son and daughters, was not true, and that the respondent was attempting to throw blame for the delay on appellants 1 & 2

and was trying to invent excuses to explain away his own unwillingness to take the sale-deed. In the view of the Trial Court the respondent was undecided as to whether he should go through with the ,contract, and was apparently willing to allow the matter to drift. The Trial Court has therefore come to the conclusion, having re- gard to the admission made by the respondent, his subsequent conduct and other circumstances, that the respondent was not ready ,and willing to take the sale deed at any time. The finding is based on prima facie good evidence, and the inference raised by the Trial ,Court is reasonable. It would be difficult for this Court to set aside the finding without reappraisal of the evidence. Counsel for the appellant has not asked us-and we think that in the circumstances he was right in so doing-to review the evidence on the record and to arrive at an independent conclusion on the plea of readiness and willingness of the respondent on the evidence, as the learned Judges of the High Court may have done if the question was raised before them. The finding of the Trial Court that after entering into the contract the respondent was not ready and willing to perform his part of the contract must be accepted. The appeal is allowed and the decree passed by the High Court is set aside, and the decree passed by the Trial Court restored. There will be no order as to costs in this Court and the High Court.

Bachawat, J. Having regard to the decision in Jamshed v. Burjorji (1), the High Court rightly held that time was not of the essence of the contract. The contract was entered on March 5, 1959. On that day, the respondent paid a deposit of Rs. 1,006/-. On April 4, 1959, the parties agreed that the sale should be completed before April 15, 1959. On that day, the respondent deposited another sum of Rs. 2,000/-. On April 15, 1959, the time for completion of the sale was extended up to April 30,1959. The transaction was not completed within April 30, 1959. But as the time was not of the essence of the contract, the contract remained alive. On July 30, 1959, the appellants abruptly cancelled the contract (1) (1916) L.R. 43 I.A. 26.

and forfeited the deposit. The respondent did not accept the cancellation. On August 3, 1959, he deposited the balance price of Rs. 13,906/- in a bank. On August 4, 1959, he called upon the appellants to perform the agreement, On March 21, 1960, the respondent instituted the present suit. The High Court repelled the contention that the relief of specific performance was barred by delay. The appellants no longer urge that the respondent was disentitled to relief on the ground of delay. Counsel for the appellants took the new point that the respondent was not ready and willing to perform his part of the contract and his suit should be dismissed on this ground. I find no trace of this argument in the judgment of the High Court. Before the High Court, the present appellants urged two points only, viz., (a) time was of the essence of the contract and therefore the respon- dent was guilty of breach of contract and (b) in any event, the respondent was not entitled to relief on the ground of delay. The High Court rejected both these contentions. The appellants did not rely upon the finding of the trial Court that the respondent was not ready and willing to perform the contract. If the appellants relied on this finding, the High Court would have suitably dealt with it. The High Court could not have decreed the suit for specific per- formance without finding that the respondent was at all material times ready and willing to perform the contract. The trial Court framed six issues. There was no specific issue on the question whether the respondent was ready and willing to perform the contract. I do protest against any Court, be it the mofussil Court or the High Court, recording a finding on such a vital question without raising a specific issue on the point. Issue No. 2 was a general issue. The issue was "whether the plaintiff is not entitled to specific performance of

the sale of the suit properties in his favour." Under this issue, the trial Court in paragraphs 17 to 20 of its judgment, discussed all kinds of questions such as readiness and willingness, default in performance of the contract, delay, waiver and abandonment. The substance of the finding of the trial Court was that the time was of the essence of the contract, and as the respondent had failed to perform his contract by April 30, 1959, he was guilty of breach of contract and could not claim specific performance. It further held that the respondent was disentitled to relief on the ground of delay, waiver, and abandonment. Incidentally, as the respondent had failed to perform the contract by April 30, 1959 and had taken no steps till July 30, 1959, the trial Court found that he was never ready and willing to perform the contract. The finding with regard to readiness and willingness was linked up with the finding that the time was of the essence of the contract and the respondent could not claim any relief on the ground of delay. As we are reversing the finding that the time was of the essence of the contract and also that the respondent was.

disentitled to relief on the ground of delay, we must reverse the finding that the respondent was not ready and willing to perform the contract.

Counsel for the appellants laid stress upon an admission made by the respondent in his cross-examination that on April 30, 1959, he was not ready to purchase the stamp paper or to take the sale deed. Counsel also relied upon the concessions made on behalf of the respondent and recorded in the following passages in the judgment of the High Court "Before us Mr. K. S. Desikan for the appellant made no attempt to canvass the finding that his client had defaulted in the sense that on April 30, 1959, or before that date the appellant was not ready with the necessary funds to go through the sale..... The question then is, whether the appellant being, as found by the trial Court, which, as we said, is not contested before us, a defaulting party, he is entitled to a decree for specific performance. That would depend upon whether there was undue delay on the part of the appellant and whether respondents 1 and 2 have given him reasonable notice that he must complete the agreement within a definite time."

The effect of these admissions is this : If the time was of the essence of the contract, the respondent had defaulted on April 30, 1959. But if the time was not of the essence of the contract, he had committed no breach of contract and the only question then was whether he could be refused relief of specific performance on the ground of delay. It is no longer contended that the respondent is disentitled to relief on the ground of delay. As the time was not of the essence of the contract, it was the duty of the appellants to give to the respondent a notice fixing a reasonable time for the completion of the sale. They did not do so. Instead of fixing a reasonable time for the completion of the sale, they wrongfully 'cancelled the contract by their letter dated July 31, 1959. There was undoubtedly delay ,on the part of the respondent to complete the sale. According to the respondent, the appellants were putting off the sale on various pretexts, but his testimony on this point was not accepted by the trial Court. It follows that there was no explanation for the delay in the completion of the sale. But the High Court rightly found that neither the delay nor the failure to explain the delay was a ground for refusing relief.

After discussing the evidence, the trial Court recorded the following finding :

"The reasons for the delay or the omission on the part of the plaintiff to take any step in the matter, are obviously untrue, and it is clear that he was throwing 2 4 1 blame on defendant and finding out some reason or other to explain the delay or omission to take any sale deed. Thus from 30-4-1959 up to the middle of July 1959, the plaintiff has not taken any step in the matter .... The time expired by 30-4-1959. Nothing was done by the plaintiff till 30-7-1959 for a period of 3 months. The plaintiff did not do anything on his part to implement the agreement for the said period of 3 months."

On the basis of this finding it held that the respondent was not ready and willing to perform the contract. It said :

"The consideration of the evidence in the case discloses only one thing, viz., that the plaintiff was never eager, prompt or desirous or willing to take a sale deed in pursuance of Exs A-2 and A-3. It is the plaintiff who committed default in performance of his part of the agreement .... even if time was not the essence of the contract, the plaintiff was never ready and willing to perform his part of the contract at any time."

I am of the opinion that the trial Court was clearly wrong in inferring that the respondent was not ready and willing to perform the contract from the fact that from April 30, 1959 up to the middle of July 1959 the respondent had not taken any steps in the matter and from his failure to explain the delay. If the respondent was guilty of laches, it was the duty of the appellants to fix a reason- able time for the completion of the sale. Mere delay, short of waiver or abandonment of the contract is no ground for refusing relief, nor is it evidence of lack of readiness and willingness. The materials on the record clearly indicate that the respondent was at all material times ready and willing to perform the contract. The total consideration money was Rs. 15,106/- On March 5, 1959, the respondent made an advance deposit of Rs. 1,006/-. On April 4, 1959, he made another deposit of Rs. 2,000/-. As soon as he received the letter dated July 30, 1959, he deposited the balance sum of Rs. 13,906/- in a bank. Counsel urged that before July 30, 1959 the respondent should have been ready with the money. There is no force in this contention. In Bank of India Limited v. Jamsetji A. H. Chinoy and Messrs. Chinoy and Company (1), the Privy Council decreed specific performance of the contract to sell shares. On the question of readiness and willingness of the buyer to perform the contract, Lord Mcdermott observed at p. 91 of the Report :

"It is true that the first plaintiff stated that he was buying for himself, that he had not sufficient ready money to meet the price and that no definite arrangements had been made for finding it at the time of repudiation. But to (1) (1949) L.R. 77 I.A. 76.

2 4 2 prove himself ready and willing a purchaser has not necessarily to produce the money or to vouch a concluded scheme for financing the transaction."

In my opinion, the respondent is entitled to specific performance of the contract, and the High Court rightly decreed the suit. In the result, the appeal is dismissed with

costs.

ORDER In accordance with the opinion of the majority the appeal is allowed, the decree passed by the High Court is set aside and the decree passed by the trial court restored. There will be no order as to costs in this Court and in the High Court.

R.K.P.S.