Shenbagam vs Kk Rathinavel on 20 January, 2022

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Bench: As Bopanna, Dhananjaya Y Chandrachud

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No 150 of 2022

Shenbagam & Ors. … Appellants

Versus

KK Rathinavel …Respondent

The appeal arises from a judgment and order dated 7 January 2019 of a Single Judge of the High Court of Judicature at Madras. The High Court dismissed the second appeal of the appellants, who are defendants to the suit for specific performance. The High Court confirmed the decree for specific performance, and affirmed the decision of the first appellate court against the decree for specific performance.

2 The appellants are owners of a property located at Patta Nos. 147, 240, 217, Madukkarai Village, Coimbatore Taluk, Coimbatore measuring about 12.60 acres1. The first appellant and her spouse entered into an agreement on 7 February 1990 with the respondent by which they agreed to sell the suit property for a consideration of Rs. 1,25,000. The respondent paid a sum of Rs. 25,000 as an advance and agreed to pay the balance within six months, with the stamp duty. On the payment of the balance, the appellants were required to execute a sale deed conveying the property, free from all encumbrances. The terms of the agreement also stipulated that the advance amount would be forfeited in case the appellants failed to complete the sale. Further, in the event the respondent was ready and willing to complete the sale but the appellants delayed or refused, the respondent could proceed before the court to get the sale completed and seek possession of the suit property under the

Specific Relief Act 1963 2. The suit property was also subject to a mortgage of Rs. 6,000 in favour of one Janaki Amma. The respondent-plaintiff alleged that the appellants had received the "suit property" "Specific Relief Act" PART A advance sum to discharge the mortgage over the suit property. On the contrary, the appellants alleged that the respondent was aware of the mortgage over the suit property and had agreed to discharge the mortgage from the sale consideration. On 8 March 1990, the appellants received a further sum of Rs. 10,000 from the respondent as an advance under the sale agreement. 3 On 19 December 1990, the appellants sent a legal notice to the respondent calling upon him to pay the balance consideration and perform his obligations under the agreement to sell. The appellants rescinded the contract on the ground that the respondent was not ready and willing to perform his obligations. In response, the respondent sent a reply dated 26 December 1990 calling upon the appellants to execute the sale free from encumbrance. 4 In 1991, the respondent instituted a suit3 before the Principal District Munsif, Coimbatore seeking a permanent injunction restraining the appellants from alienating or creating any encumbrance on the suit property. The respondent obtained an ad interim injunction. In the meantime, the appellants discharged the mortgage debt.

5 On 17 June 1993, the respondent instituted a suit4 for specific performance before the Sub-Judge, Coimbatore seeking in the alternative, a refund of the advance of Rs. 35,000 with interest at 24% per annum from the date of the suit till realization.

6 By its judgment dated 11 October 1996, the trial court decreed the suit in favour of the respondent and directed the respondent to deposit the balance PART A consideration of Rs. 90,000 within a month. The appellants were directed to receive this amount and execute the sale deed in favour of the respondent within a period of three months. The trial court held that:

> (i) The appellants had discharged the mortgage debt only on 17 June 1992, after which the respondent-plaintiff could get the sale deed executed; and
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> (ii) The suit was filed within three years from the date of discharge of the mortgage and was not barred by limitation.

7 The appellant preferred an appeal5 against the order of the trial court before the Principal District Judge, Coimbatore, which was dismissed by a judgment dated 24 February 1998. Following this, the appellant filed a second appeal6 before the Madras High Court. While the appeal was pending, the respondent moved an application to withdraw the balance consideration of Rs. 90,000 which was deposited before the trial court. The application was allowed by the High Court on 24 July 2001. In the meantime, the spouse of the appellant passed away and his legal heirs were substituted on record. 8 The Single Judge of the High Court dismissed the second appeal and upheld the judgment of the trial court and the first appellate court. The High Court held that:

> (i) The agreement to sell provides that the discharge of the mortgage by the appellants was a condition precedent for the completion of the sale transaction. Since the appellants took no steps to discharge the mortgage, PART A it cannot be accepted that the respondent-plaintiff was not ready and willing to perform his part of the

contract;

(ii) There is no clause in the agreement to sell that indicates that time was of the essence to the contract. If time was of the essence, then the appellants would have discharged the mortgage before the expiry of the term mentioned in the agreement;

(iii) The trial court did consider the bank passbook and income tax returns of the respondent-plaintiff and rightly concluded that he was ready and willing to perform the agreement and had sufficient resources to purchase the property;

(iv) The plea that the suit was barred by Order II Rule 2 of the Code of Civil Procedure 19087 had not been raised in the written statement and could not be taken for the first time in the second appeal; and

(v) The withdrawal of the balance of the sale consideration by the respondent cannot disentitle him to the reliefs sought as it was pursuant to an order of the High Court, after taking into account that the amount in deposit was not earning any interest.

9 Against the judgment and order of the High Court, the appellants filed a Special Leave Petition before this Court under Article 136 of the Constitution.

"CPC"

PART B

B Submissions

10 Ms V Mohana, Senior counsel appearing on behalf of the appellants urged the following submissions:

(i) The trial court failed to frame an issue on whether the respondent-plaintiff was ready and willing to perform his part of the agreement to sell;

(ii) The trial court failed to consider any evidence or reach any finding as to whether the respondent was ready to perform the contract and merely noted that he had sufficient means to purchase the

suit property;

(iii) After the legal notice was served on the respondent by the appellant, the respondent filed a suit for permanent injunction and not a suit for specific performance. This indicates that he was not ready to perform the contract;

(iv) The finding that the respondent was ready to perform the contract as he had sufficient means to purchase the property is erroneous as the passbooks produced by the respondent were for the accounts opened on 11 March 1992 and 22 July 1994. Thus, the accounts were not contemporary to the period of the contract;

(v) Merely because the respondent was paying income tax since 1988 does not indicate his willingness to perform the contract;

(vi) The respondent filed the suit for specific performance on 17 June 1993 and the remaining consideration of Rs. 90,000 was deposited on 15 November 1996. This amount was then withdrawn in 2001. Thus, the conduct of the respondent does not indicate that he was ready and willing to perform the contract;

PART B

(vii) Until the appellants issued a notice to the respondent informing him about the rescission of the contract, there was no communication from the respondent to seek performance of the agreement by the appellants. Thus, merely filing a suit three years after the agreement does not prove the readiness and willingness of the respondent;

(viii) The jurisdiction of courts under Section 20 of the Specific Relief Act is discretionary and should not be exercised in the present case as the appellants would be dispossessed of the suit property for a meagre sum that was arrived at thirty years ago;

(ix) Clearing the mortgage over the property was not a condition precedent of the agreement. In fact, the clause in the agreement stipulates that it was only on receipt of the balance consideration that the appellants would be required to execute the sale deed free from all encumbrances;

(x) The agreement clearly notes that the balance consideration is to be paid within a period of six months. Thus, time was of essence of the agreement; and

(xi) The respondent s suit for specific performance is barred by Order II Rule 2 of the CPC as he had filed a suit for permanent injunction in 1991 and relinquished his right to seek the relief of specific performance. 11 Opposing these submissions, Mr Siddharth Naidu, counsel appearing on behalf of the respondents, submitted that:

> (i) The respondent-plaintiff in his reply dated 26 December 1990 specifically stated that he was ready and willing to pay the balance consideration and get the sale deed

executed, provided the mortgage is discharged;

PART C

(ii) The terms of the contract and the conduct of the parties made it clear that time was not of the essence of the contract;

(iii) Under the agreement, it was the obligation of the appellants to discharge the mortgage, after which the respondent was to pay the balance consideration. The appellants discharged the mortgage on 17 June 1992, and thereafter, the respondent filed a suit for specific performance of contract;

(iv) The respondent deposited the balance consideration before the trial court which was withdrawn in 2001 pursuant to order of the High Court dated 24 July 2001; and

(v) The respondent had sufficient means to purchase the suit property and was ready and willing to perform his part of the contract. 12 We shall now consider the rival submissions.

C Analysis

13 The present appeal involves a suit for specific performance of an

agreement to sell the suit property between the appellants and respondent. The core of the dispute arising from the suit seeking the relief of specific performance under the Specific Relief Act is whether the respondent-plaintiff has performed or has always been „ready and willing to perform his obligations under the contract. 14 Section 168 of the Specific Relief Act provides certain bars to the relief of specific performance. These include, inter alia, a person who fails to aver and "16. Personal bars to relief.- Specific performance of a contract cannot be enforced in favour of a person— [(a) who has obtained substituted performance of contract under section 20; or] PART C prove that he has performed or has always been „ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented and waived by the defendant. In JP Builders v. A Ramadas Rao9, a two-judge Bench of this Court observed that Section 16(c) mandates „readiness and willingness of the plaintiff and is a condition precedent to obtain the relief of specific performance. The Court held:

> "25. Section 16(c) of the Specific Relief Act, 1963 mandates "readiness and willingness" on the part of the plaintiff and it is a condition precedent for obtaining relief of grant of specific performance. It is also clear that in a suit for specific performance, the plaintiff must allege and prove a continuous "readiness and willingness" to perform the contract on his part from the date of the contract. The onus is on the plaintiff.
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> [...]

> 27. It is settled law that even in the absence of specific plea by the opposite party, it is the mandate of the statute that the plaintiff has to comply with Section 16(c) of the Specific Relief Act and when there is non-compliance with this statutory mandate, the court is not bound to grant specific performance and is left with no other alternative but to dismiss the suit. It is also clear that readiness to perform must be established throughout the relevant points of time. "Readiness and willingness" to perform the part of the contract has to be determined/ascertained from the conduct of the parties." (emphasis supplied)
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> (b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or
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> (c) [who fails to prove] that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms of the performance of which has been prevented or waived by the defendant.

Explanation.—For the purposes of clause (c),—

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;

(ii) the plaintiff [must prove] performance of, or readiness and willingness to perform, the contract according to its true construction." (2011) 1 SCC 429 PART C The Court further observed that „readiness refers to the financial capacity and „willingness refers to the conduct of the plaintiff wanting the performance. 15 Similarly, in His Holiness Acharya Swami Ganesh Dassji v. Sita Ram Thapar10, a two-judge Bench of this Court observed that „readiness means the capacity of the plaintiff to perform the contract which would include the financial position to pay the purchase price. To ascertain „willingness , the conduct of the plaintiff has to be properly scrutinised. The Court noted:

> "2. There is a distinction between readiness to perform the contract and willingness to perform the contract. By readiness may be meant the capacity of the plaintiff to perform the contract which includes his financial position to pay the purchase price. For determining his willingness to perform his part of the contract, the conduct has to be properly scrutinised. [...] The factum of readiness and willingness to perform the plaintiff's 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. The facts of this case would amply demonstrate that the petitioner/plaintiff was not ready nor had the capacity to perform his part of the contract as he had no financial capacity to pay the consideration in cash as contracted

> and intended to bide for the time which disentitles him as time is of the essence of the contract." (emphasis supplied)

16 The precedents of this Court indicate that the plaintiff must establish that he was „ready and willing to perform the contract. In this regard, the conduct of the plaintiff must be consistent.

17 In another decision in Atma Ram v. Charanjit Singh11, a two-judge Bench of this Court dealt with a case where an agreement for sale of immovable property was entered into between the petitioner and respondent. The date for (1996) 4 SCC 526 (2020) 3 SCC 311 PART C performance of the contract was fixed as 7 October 1996. A legal notice was issued by the petitioner on 12 November 1996 seeking performance of the contract by the respondent, and thereafter a suit was filed. The plaintiff sought a mandatory injunction to direct the respondent to execute documents for transfer of the property. However, the trial court chose to treat it as a suit for specific performance of the contract. In declining the relief of specific performance, the Court observed:

> "9. Coming to the second aspect revolving around Section 16(c), a look at the judgment of the trial court would show that no issue was framed on the question of readiness and willingness on the part of the petitioner-plaintiff in terms of Section 16(c) of the Specific Relief Act, 1963. The fact that the petitioner chose to issue a legal notice dated 12-11-1996 and the fact that the petitioner created an alibi in the form of an affidavit executed before the Sub-Registrar on 7-10-1996 (marked as Ext. P-2) to show that he was present before the Sub-Registrar for the purpose of completion of the transaction, within the time stipulated for its performance, was not sufficient to conclude that the petitioner continued to be ready and willing even after three years, on 13-10-1999 when the plaint was presented. No explanation was forthcoming from the petitioner for the long delay of three years, in filing the suit (on 13-10-1999) after issuing a legal notice on 12-11-1996. The conduct of a plaintiff is very crucial in a suit for specific performance. A person who issues a legal notice on 12-11-1996 claiming readiness and willingness, but who institutes a suit only on 13-10-1999 and that too only with a prayer for a mandatory injunction carrying a fixed court fee relatable only to the said relief, will not be entitled to the discretionary relief of specific performance." (emphasis supplied) In assessing the conduct of the plaintiff, the Court in Atma Ram (supra) observed that the delay in filing a suit, specifically one for mandatory injunction, indicates the inconsistent behaviour of the plaintiff. The failure of the trial court to frame an issue relating to the readiness and willingness of the plaintiff to perform the contract is also critical in declining the remedy of specific performance.
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> PART C

18 This Court in P Meenakshisundaram v. P Vijayakumar12, dealt with a suit for specific performance of a contract for sale of an immovable property, which had a mortgage over it. In evaluating whether the respondent-plaintiff had established that he was „ready and willing to perform the contract, the two-judge Bench, held:

> "8. As regards suit for specific performance, the law is very clear that the plaintiff must plead and prove his readiness and willingness to perform his part of the contract all through i.e. right from the date of the contract till the date of hearing of the suit. If Respondent 1 was well aware about the encumbrance and the parties had chosen that the balance consideration be paid to the appellant before 20-3-2001 so that the sale deed could be registered without any encumbrance, it was for Respondent 1 to have taken appropriate steps in that behalf for completion of transaction. The facts on record disclose that the first step taken by Respondent 1 after the suit agreement was well after four months, when further amount of Rs 2 lakhs was paid on 21-1-2001. Thereafter nothing was done till 20-3-2001 by which the transaction had to be completed. The record is completely silent about any communication sent around 20-3-2001 towards completion of transaction. As a matter of fact the first step thereafter was six months after the deadline, namely, on 22- 9-2001 when the communication (Ext. A-6) was sent along with amount of Rs 10 lakhs. The written submissions filed on behalf of Respondent 1 also do not indicate any steps till this time so as to say that he was all the while ready and willing to complete the transaction.
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> 9. The assertion made by Respondent 1 in Para 7 of the plaint is a mere assertion without any relevant details as to what exactly he had done towards fulfilment of his obligations and completion of the transaction." (emphasis supplied) In P. Meenakshisundaram (supra), the Court dealt with a similar case in which the suit property was encumbered and the sale deed, free from encumbrances, had to be executed after payment of the consideration. The Court noted that (2018) 15 SCC 80 PART C there was no communication of the plaintiff with the defendant till the date on which the transaction was to be completed, showing his lack of willingness to perform the contract.

19 In the present case, the respondent and the appellants entered into an agreement to sell the suit property on 7 February 1990. The relevant terms of the agreement are reproduced below:

> "Whereas the SELLERS agreed to sell the property to the PURCHASER for a sale consideration of Rs. 1,25,000/- (Rupees One lakh and twenty five thousand only) and the PURCHASER also agreed to purchase the same.
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> Now this agreement witnesseth as follows:
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> The PURCHASER has paid a sum of Rs. 25,000/- as advance, the receipt of which sum the SELLERS acknowledge The PURCHASER agreed to pay the remaining sale consideration within a period of six months from this day of agreement to the SELLERS and to bear the cost of stamp duty. On receipt of the balance sale consideration, the SELLERS agreed to execute sale deed pertaining to the property free from all encumbrances to the PURCHASER or to his nominee.

> If the SELLERS fail to complete the Sale, the advance amount shall be forfeited.
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> If the PURCHASER is ready and willing to complete the Sale and the SELLERS refuse or delay to execute Sale, the PURCHASER is at liberty to proceed before the Court of law and to get the sale completed and to get possession of the property through Court under the Specific Relief Act., holding the SELLERS liable for the loss." Further, on 8 March 1990, the appellants issued a receipt for an additional sum of Rs. 10,000 as advance from the respondent:
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> "On this day of 8th March 1990 we received a sum of Rs. 10,000/- (Rupees Ten thousand only) from you in the PART C presence of the witnesses for our urgent family expenses in addition to the advance amount received under the sale agreement dated 07.02.1990."

20 The terms of the agreement indicate that the suit property was to be sold for a total consideration of Rs. 1,25,000, out of which the appellants had received Rs. 25,000 as advance. On 8 March 1990, a further sum of Rs. 10,000 was given as advance to the appellants "for [their] urgent family expenses". The agreement stipulated that the respondent shall pay the balance consideration within a period of six months, that is, by 7 August 1990 and shall bear the cost of stamp duty. On receipt of the balance sale consideration, the appellants were required to execute the sale deed free from all encumbrances.

21 By 19 December 1990, the respondent did not pay the balance consideration to the appellant and thus, the appellant rescinded the contract and forfeited the advance money. The respondent sent a reply dated 26 December 1990 demanding that the appellants execute the sale deed free from encumbrances. The appellants alleged that there was a mortgage of Rs. 6,000 on the suit property that the respondent agreed to discharge from the sale consideration. However, the respondent did not show any interest in getting the sale deed executed. In 1991, the respondent filed a suit for mandatory injunction. On 17 June 1992, the appellant discharged the mortgage debt, and a year after that the respondent instituted a suit for specific performance. 22 In the plaint, the respondent claimed that it was agreed between the parties that the appellants should clear the title to the suit property and execute the sale deed. The respondent further alleged that for this reason he had paid an PART C additional amount of Rs. 10,000 on 8 March 1990. In order to demonstrate his readiness and willingness to perform the contract, the respondent alleged that:

> (i) He was waiting with the balance consideration and believed that the appellants would clear the encumbrance and produce all necessary documents;
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> (ii) He replied to their legal notice demanding the discharge of the mortgage over the suit property;
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> (iii) After filing a suit for mandatory injunction, the respondent approached the appellants and requested them to perform their obligations under the contract; and

(iv) He instituted a suit for specific performance when he became aware of the discharge of mortgage by the appellants.

23 The trial court decreed the suit for specific performance in favour of the respondent. The trial court only framed the following two issues:

"1. Whether the plaintiff [is entitled] for the relief of specific performance?

2. To what other reliefs?"

24 No issue on readiness and willingness was framed by the trial court. The trial court analysed the notice issued by the appellants and held that the appellants made no demand from the respondent to discharge the mortgage liability. Thus, the appellants plea that the respondent-plaintiff had to pay the loan and only thereafter, could the appellants execute the sale deed was rejected. The court also accepted the respondent s argument that the advance PART C amount of Rs. 10,000 was paid to discharge the mortgage. Further, the trial court observed that the documents submitted by the respondent indicate that he had sufficient means to purchase the suit property. The judgment of the trial court was upheld by the first appellate court and, in a second appeal, by the High Court. 25 All the three courts, including the High Court, grossly erred in the manner in which they have adjudicated upon this dispute in a suit for specific performance. In the first instance, the trial court failed to frame an issue on whether the respondent-plaintiff was ready and willing to perform his obligations under the contract and instead assessed whether he is entitled to the relief of specific performance. In doing so, the trial court viewed the legal issue from an incorrect lens. The foundation of a suit for specific performance lies in ascertaining whether the plaintiff has come to the court with clean hands and has, through his conduct, demonstrated that he has always been willing to perform the contract. There is a conspicuous absence in judgment of the trial court of any reference to evidence led by the respondent to indicate his willingness to perform the contract. The trial court merely adverted to "document produced on behalf of the plaintiff" and concluded that he had sufficient means to purchase the suit property. Apart from this observation, the judgment fails to analyse the terms of the agreement, the obligations of the parties and the conduct of the respondent or the appellant.

26 In evaluating whether the respondent was ready and willing to perform his obligations under the contract, it is not only necessary to view whether he had the financial capacity to pay the balance consideration, but also assess his conduct throughout the transaction.

PART C 27 The respondent has alleged that he did not pay the balance consideration as the appellants failed to remove the encumbrance on the suit property. First of all, we note that the agreement to sell the suit property did not specifically record the mortgage over the suit property. However, neither has the appellant denied the existence of the mortgage nor has the respondent claimed that he was unaware of the encumbrance over the suit property at the time of entering into the agreement. The agreement did not expressly detail whose liability it is to discharge the mortgage.

28 Having said that, the terms of the agreement stipulated that the respondent was to pay the balance consideration within a period of six months and "on receipt of the balance consideration", the appellants were to execute the sale deed "pertaining to the property free from all encumbrances". It is evident from the agreement that the liability to deliver the property free from any encumbrance was on the appellants. However, this obligation is prefaced by the condition that the appellants would be required to execute the sale deed free from encumbrance on the receipt of the balance consideration. Thus, the agreement did not specify when the appellants should discharge their mortgage- before the expiry of six months, after receipt of the advance amount, or after receipt of the balance consideration. It only obligated them to ensure that after the balance consideration is received, the sale deed executed should be free from encumbrances. Based on a plain reading of the agreement, we are unable to accept the respondent s plea that he was willing to perform his obligations under the contract. It is evident that he was required to pay the remaining consideration (or indicate his willingness to pay) and only then could have sought specific PART C performance of the contract. The respondent has also urged that the additional amount of Rs. 10,000 was paid to the appellants to discharge the mortgage. The acknowledgment signed by the appellants indicates that the money was to meet urgent family expenses. Since no further details have been provided and no evidence has been adduced by the respondent-plaintiff, we cannot conclude that the money was for discharge of the mortgage. Even assuming that the respondent is correct, the agreement still required the respondent to pay the balance consideration. In this regard, the High Court, while holding in favour of the respondent, has noted that the appellants were free to demand a further amount for discharging the mortgage. This finding ignores the plain terms of the contract. The agreement clearly provided that the balance consideration would be paid and then the sale deed would be executed. How the appellants chose to discharge the mortgage was for them to decide. The respondent had to prove his readiness and willingness to perform the contract.

29 We shall now advert to the respondent s conduct throughout the sale transaction. The respondent has failed to provide any documents or communication which would indicate that he called upon the appellants to perform their obligations or discharge the mortgage within the time period stipulated in the contract. Even after the expiry of the six months, the respondent did not reach out to the appellants. It is only in response to the appellants legal notice that the respondent demanded performance of their obligations. Merely averring that he was waiting with the balance consideration and believed that the appellants would clear the encumbrance is insufficient to prove that the respondent-plaintiff was willing to perform his obligations under the contract. PART C 30 Further, in 1991 the respondent instituted a suit for mandatory injunction for restraining the appellants from alienating the suit property. He did not however, institute a suit for specific performance of the contract until 17 June 1993. The respondent has taken the plea that he was waiting for the appellants to discharge the mortgage to file a suit for specific performance. We are unable to accept this submission. By extending the respondent s argument, if the appellants had failed to discharge the mortgage, the respondent would not have filed a suit for specific performance of the contract at all. We also note that the respondent has withdrawn the balance consideration deposited by him before the trial court in 2001. The inconsistency in the respondent s conduct, the lack of communication with the appellants urging them to discharge the mortgage and showing his willingness to pay the balance consideration, and the delay of about three years from the date fixed for performance of the contract in filing a suit, are all indicative of the respondent s lack of will to

perform the contract. 31 The „readiness of the respondent to perform his obligations refers to whether he was financially capable of paying the balance consideration. Both the trial court and the first appellate court have observed that the respondent was ready to pay the balance consideration as (i) he was paying income tax since 1988 and (ii) his bank passbooks indicate that he had sufficient funds. The payment of income tax by itself does not show that the respondent had sufficient resources to pay for the suit property. Moreover, the bank passbooks submitted in evidence by the respondent were for accounts opened on 11 March 1992 and 22 July 1994, that is, after the expiry of the period written in the contract. The first appellate court despite noting this, has chosen to hold that the respondent was PART C ready and willing to perform the agreement. The respondent however did not lead any evidence to indicate that in the year 1990 he had the money to pay the balance consideration. The first appellate court shifted the burden on the appellants to prove that the respondent-plaintiff was incapable of paying the balance consideration. It is an established principle of law that the plaintiff must prove that he is ready and willing to perform the contract. The burden lies on the plaintiff. The respondent has not led any evidence that he was ready or willing to perform his obligations under the agreement.

32 Even assuming that the respondent was willing to perform his obligations under the contract, we must decide whether it would be appropriate to direct the specific performance of the contract in this case. In Zarina Siddiqui v. A. Ramalingam13, a two-judge Bench of this Court while dealing with a suit for specific performance of a contract regarding the sale of immovable property observed that the remedy for specific performance is an equitable remedy and Section 20 of the Specific Relief Act confers a discretion on the Court. The Court held:

> “24. It is well settled that remedy for specific performance is an equitable remedy. The court while granting decree of specific performance exercises its discretionary jurisdiction. Section 20 of the Specific Relief Act specifically provides that the Court's discretion to grant decree of specific performance is discretionary but not arbitrary. Discretion must be exercised in accordance with sound and reasonable judicial principles.”

33 In the context of the discretion under Section 20 of the Specific Relief Act, several decisions of this Court have considered whether it is appropriate to direct specific performance of a contract relating to the transfer of immovable property, (2015) 1 SCC 705 PART C especially given the efflux of time and the escalation of prices of property. In Satya Jain v. Anis Ahmed Rushdie14, this Court held:

> “39. The long efflux of time (over 40 years) that has occurred and the galloping value of real estate in the meantime are the twin inhibiting factors in this regard. The same, however, have to be balanced with the fact that the plaintiffs are in no way responsible for the delay that has occurred and their keen participation in the proceedings till date show the live interest on the part of the plaintiffs to have the agreement enforced in law.

> 40. The discretion to direct specific performance of an agreement and that too after elapse of a long period of time, undoubtedly, has to be exercised on sound, reasonable, rational and acceptable principles. The parameters for the exercise of discretion vested by Section 20 of the Specific Relief Act, 1963 cannot be entrapped within any precise expression of language and the contours thereof will always depend on the facts and circumstances of each case. The ultimate guiding test would be the principles of fairness and reasonableness as may be dictated by the peculiar facts of any given case, which features the experienced judicial mind can perceive without any real difficulty. It must however be emphasised that efflux of time and escalation of price of property, by itself, cannot be a valid ground to deny the relief of specific performance. [...]
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> 41. The twin inhibiting factors identified above if are to be read as a bar to the grant of a decree of specific performance would amount to penalising the plaintiffs for no fault on their part; to deny them the real fruits of a protracted litigation wherein the issues arising are being answered in their favour." (emphasis supplied) In directing specific performance of the agreement, this Court in Satya Jain (supra) held that sale deed must be executed for the current market price of the suit property.

34 In Nirmala Anand v. Advent Corporation (P.) Ltd. and Others15, a three- judge Bench of this Court observed that in case of a phenomenal increase in the (2013) 8 SCC 131 PART C price of the land, the Court may impose a reasonable condition in the decree such as payment of an additional amount by the purchaser. In decreeing the suit for specific performance, the Court observed:

> "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." (emphasis supplied)

35 In KS Vidyanadam and others v. Vairavan16, an agreement to sell immovable property was entered into between the plaintiff-buyer and the defendant-seller for a consideration of Rs. 60,000, where earnest money of Rs. 5,000 had been paid in advance. The agreement stipulated that the plaintiff had to purchase stamp papers and pay the balance amount within six months and call (2002) 8 SCC 146 (1997) 3 SCC 1 PART C upon the defendants to execute the sale deed. The plaintiff filed a suit for specific performance after a lapse of two and a half years seeking performance of the contract. The Court held:

> "10. It has been consistently held by the courts in India, following certain early English decisions, that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically provided to that effect. The period of limitation prescribed by the Limitation Act for filing a suit is three years. From these two circumstances, it does not follow that any and every suit for specific performance of the agreement (which does not provide specifically that time is of the essence of the contract) should be decreed provided it is filed within the period of limitation notwithstanding the time-limits stipulated in the agreement for doing one or the other thing by one or the other party. That would amount to saying that the time-limits prescribed by the parties in the agreement have no significance or value and that they mean nothing.
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> [...] In this case, the suit property is the house property situated in Madurai, which is one of the major cities of Tamil Nadu. The suit agreement was in December 1978 and the six months' period specified therein for completing the sale expired with 15-6-1979. The suit notice was issued by the plaintiff only on 11-7-1981, i.e., more than two years after the expiry of six months' period. The question is what was the plaintiff doing in this interval of more than two years? [...] There is not a single letter or notice from the plaintiff to the defendants calling upon them to get the tenant vacated and get the sale deed executed until he issued the suit notice on 11- 7-1981. It is not the plaintiff's case that within six months', he purchased the stamp papers and offered to pay the balance consideration.
>
> [...] PART C
>
> 13. In the case before us, it is not mere delay. It is a case of total inaction on the part of the plaintiff for 2 1/2 years in clear violation of the terms of agreement which required him to pay the balance, purchase the stamp papers and then ask for execution of sale deed within six months. Further, the delay is coupled with substantial rise in prices — according to the defendants, three times — between the date of agreement and the date of suit notice. The delay has brought about a situation where it would be inequitable to give the relief of specific performance to the plaintiff." (emphasis supplied)

36 True enough, generally speaking, time is not of the essence in an agreement for the sale of immoveable property. In deciding whether to grant the remedy of specific performance, specifically

in suits relating to sale of immovable property, the courts must be cognizant of the conduct of the parties, the escalation of the price of the suit property, and whether one party will unfairly benefit from the decree. The remedy provided must not cause injustice to a party, specifically when they are not at fault. In the present case, three decades have passed since the agreement to sell was entered into between the parties. The price of the suit property would undoubtedly have escalated. Given the blemished conduct of the respondent-plaintiff in indicating his willingness to perform the contract, we decline in any event to grant the remedy of specific performance of the contract. However, we order a refund of the consideration together with interest at 6% per annum.

D Conclusion

37 For the above reasons, we allow the appeal and set aside the judgment

dated 7 January 2019 of the High Court of Judicature at Madras. The appellants are directed to refund the advance amount of Rs. 35,000/- received from the respondent with interest at the rate of 6% per annum from the date of the filing of the suit for specific performance by the respondent, till the payment of the refund. 38 Pending applications, if any, shall stand disposed of.

……..…..……J. [Dr Dhananjaya Y Chandrachud]
……J. [AS Bopanna] New Delhi;

January 20, 2022