IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Application for Leave to Appeal against the judgment dated 31.03.2015 delivered by the High Court of the Western Province exercising Civil Appellate Jurisdiction at Avissawella in the Case No. WP/HCCA/AVI/1233/2011 (F) and D.C. Avissawella Case No. 2893/SPL under and in terms of Section 05c of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by Act No. 54 of 2006.

S.C. Appeal No. 49/2017
S.C. (H.C.C.A) L.A. Application No. 171/2015
H.C. Case No.
WP/HCCA/GPH/1233/2011(F)
D.C. Avissawella Case No. 2893/L

Dedigama Group Private Limited,

Head Office,

No. 12, Dehiwala Road,

Maharagama.

PLAINTIFF

Vs.

1. Nagoda Manalage Piyasena,
2. Panawalage Hemawathie,

Both of

No. 522, Minnana,

Getahetthta.

DEFENDANTS

AND BETWEEN

Dedigama Group Private Limited,

Head Office,

No. 12, Dehiwala Road,

Maharagama.

PLAINTIFF – APPELLANT

Vs.

1. Nagoda Manalage Piyasena,
2. Panawalage Hemawathie,

   Both of

   No. 522, Minnana,

   Getahetthta.

DEFENDANTS – RESPONDENTS

AND NOW BETWEEN

Dedigama Group Private Limited,

Head Office,

No. 12, Dehiwala Road,

Maharagama.

PLAINTIFF – APPELLANT –

PETITIONER

Vs.

1. Nagoda Manalage Piyasena,
2. Panawalage Hemawathie,

Both of

No. 522, Minnana,

Getahetthta.

DEFENDANTS – RESPONDENTS –

RESPONDENTS

Before	:	**Hon. S. Thurairaja, P.C., J.** **Hon. Janak De Silva, J.** **Hon. Mahinda Samayawardhena, J.**
Counsel	:	Kuwera de Zoysa, P.C. with Pasindu Bandara for the Plaintiff – Appellant – Appellant Manohara de Silva, P.C. with Hirosha Munasinghe and Senal Kariyawasam for the 1st and 2nd Defendants – Respondent – Respondents
Written Submissions	:	19.06.2017 and 20.02.2023 by the 1st and 2nd Defendants – Respondents – Respondents 19.02.2018 and 21.02.2022 by the Plaintiff – Appellant – Petitioner

Argued on : 04.04.2024

Decided on : 08.10.2025

Janak De Silva, J.

The Plaintiff-Appellant-Appellant (Appellant) instituted this action against the 1st and 2nd Defendant-Respondent-Respondents (Respondents) seeking a judgment for the specific performance of an agreement to sell. In the alternative, the Appellant prayed for damages in a sum of Rs. 50,00,000/=.

The learned District Judge of Avissawella dismissed the action. Aggrieved by the dismissal, the Appellant preferred an appeal to the High Court of the Western Province exercising Civil Appellate jurisdiction at Avissawella (High Court) which was dismissed.

Leave to appeal has been granted on following questions of law:

(1) Did the High Court Judges err in law, by failing to analyze the law applicable in the context of specific performance in the original court action filed by the Appellant in seeking a judgment under the law of contracts against the Respondents?

(2) Did the High Court Judges err in law by not considering the fact that there was no issue raised at the trial in the original court or at the hearing of the appeal in the High Court as to the dismissing of the action of the Appellant for not depositing the balance purchase money of the transaction at the outset of filing the action in the original court?

(3) Did the High Court Judges err in law by not exercising their judicial mind in to the fact that which party has repudiated the contract between the two parties based on the sales agreement marked as P5 at the trial in the Original Court?

(4) Did the High Court Judges err in law by considering that specific performance of the contract between the parties was an inappropriate remedy when there is an

uncertainty regarding the providing a road access to the land sought to be blocked out in terms of clause 5 of the agreement?

Factual Matrix

One Padmini Ranasinghe, being the original owner of the corpus forming the subject matter of the agreement to sell, transferred an undivided 1/3 share thereof to the 1st Respondent, another undivided 1/3 share to the 2nd Respondent and the remaining undivided 1/3 share to one Kudamadurage Sitthi, the mother of the 1st Respondent.

By her last will, Sitthi bequeathed her undivided 1/3 share to the 1st Respondent. Testamentary proceedings were instituted in D.C. Avissawella Case No. 1271/T to prove the last will of Kudumadurage Sitthi.

The agreement to sell between the Appellant and the 1st and 2nd Respondents bearing No. 2378 dated 14.10.2002 (P5) was executed and attested to by Athula Walisundara, Notary Public.

Therein, the Respondents agreed to sell the corpus to Appellant for a sum of Rs. 72,50,000/= subject to the following terms and conditions:

> *"1. ඉහත කී දේපලහි විකුණුම් මිළ රුපියල් හැත්තෑ දෙලක්ෂ පනස් දහස (රු. 72,50,000/=) කි.*
>
> *2. අද දින අත්තිකාරම් ලෙස රුපියල් දස ලක්ෂය (රු. 10,00,000/=) ක් ගැණුම්කාර සමාගම විසින් විකිණුම්කරුවන් හට ගෙවන ලදී. ඒ බව විකුණුම්කරුවන් මෙයින් පිළිගනී.*
>
> *3. මෙම දේපලහි නොබෙදූ තුනෙන් එකක අයිතිවාසිකම තිබූ කුඩා දුරගේ සිත්ති යන අයගේ අන්තිම කැමති පත්‍රය සහිත බුදලය අද්මිනිස්ත්‍රාසි කිරීමෙන් පසු තවත් රුපියල් දස ලක්ෂය (රු. 10,00,000/=) ක් විකිණුම්කරුවන් වෙත ගෙවීමට ගැණුම්කාර සමාගම පොරොන්දු වේ.*

4. ඉතිරි මුදල වන රුපියල් පනස් දෙලක්ෂ පනස් දහස (රු. 52,50,000/=) ක මුදල මෙකී පහත උපලේඛනයේ විස්තර වන දේපළ සංවර්ධනය කර විකිණීම ආරම්භ කළ දින සිට මාස හය (06)ක් ඇතුළත ගෙවා අවසන් කිරීමට ගැණුම්කාර සමාගම මෙයින් පොරොන්දු වේ.

5. විකිණුම්කරුවන් විසින් මෙකී පහත උපලේඛනයේ විස්තර වන දේපළට ප්‍රධාන මාර්ගයේ සිට අඩි 30ක් පළල ප්‍රවේශ මාර්ගයක් ලබා දීමටද, පොරොන්දු වේ.

6. ඉහත කී, ගැණුම්කාර සමාගම අදාළ දේපළ මිළදී ගැනීමට ඉදිරිපත් වන විට විකුණුම්කරුවන් එකී දේපළ විකිණීම ප්‍රතික්ෂේප කරයි නම්, හෝ පැහැර හරි නම්, ඉතිරි මුදල නිසි අධිකරණයේ තැන්පත් කර මෙම ගිවිසුම නිරූපිත ලෙස ඉටුකරවා ගැනීමේ හිමිකම ගැනුම්කරුවන් සමග සතු බව විකුණුම්කරුවන් මෙයින් පිළිගනී.

7. ඉහත කී, ගැණුම්කරුවන් එකී දේපළ මිලදී ගැනීම ප්‍රතික්ෂේප කරයි නම් හෝ පැහැර හරී නම්, අද දින ගෙවනු ලබන, රුපියල් දස ලක්ෂය (රු. 10,00,000/=) ක මුදලින් රුපියල් තුන් ලක්ෂය (රු. 300,000/=) ක් අලාභ ලෙස අය කරගත් පසු ඉතිරි මුදල ගැණුම්කාර සමාගම වෙත ගෙවා මෙම ගිවිසුම අවසන් කිරීමේ හිමිකම, විකිණුම්කරුවන් සතු වේ.

8. ඉහත කී, පරිදි ක්‍රියා කිරීමට විකිණුම්කරුවන් ද, ඔවුන්ගේ උරුමක්කාර, අද්මිනිස්ත්‍රාසිකාර සියල්ලද, ගැණුම්කාර සමාගමද, එකී සමාගමේ අධ්‍යක්ෂවරුන්ද මෙයින් බැඳී ඇති බව දෙපක්ෂයම මෙයින් පිළිගනී.''

In terms of Clause 2 of the agreement to sell, the Appellant paid an advance of Rs. 10,00,000/= to the Respondents on the day the agreement was executed. The Appellant agreed to pay another Rs. 10,00,000/= to the Respondents after due administration of the estate of Kudumadurage Sitthi. One of the contentious issues between the parties was the correct interpretation of Clause 3.

Version of the Appellant

The Respondents failed to take steps to conclude the testamentary proceedings in D.C. Avissawella Case No. 1271/T where the last will of Kudumadurage Sitthi was sought to be

proved. In particular, the Respondents failed to take steps to execute an executors conveyance. The obligation to pay a sum of Rs. 10,00,000/= as set out in Clause 3 of the agreement to sell arose only upon the execution of the executors conveyance.

The Appellant by letter of demand dated 14.10.2006 sent by Athula Walisundara, Attorney-at-Law, made a demand for the transfer of the corpus. This request was willfully disregarded and/or refused by the Respondents.

In the circumstances, the Respondents have deliberately and knowingly breached the terms and conditions of the agreement to sell.

Version of the Respondent

The testamentary proceedings in D.C. Avissawella Case No. 1271/T was over on 04.10.2004 and the probate was issued to 1st Respondent, who was the legatee of the 1/3 undivided share of Sitthi.

The Appellant did not pay Rs.10,00,000/- to the Respondents as stipulated in Clause 3 of the agreement to sell. Thereby, the Appellant has repudiated the agreement to sell.

In the agreement to sell, there was no specific date to transfer the corpus to the Appellant. Therefore, the transfer should take place within a reasonable time. Accordingly, the letter of demand dated 14.10.2006 sent by Athula Walisundara Attorney-at-Law was not sent within reasonable time.

The Appellant did not have financial capacity to fulfill the conditions of the agreement to sell within a reasonable time.

Judgment of the District Court

The learned trial judge held that the obligation on the part of the Appellant to pay a sum of Rs. 10,00,000/= in terms of Clause 3 of the agreement to sell arose only after the executors conveyance was executed. However, he concluded that the Appellant had

failed to establish that the 1st Respondent was duly notified to execute the executors conveyance.

The executors conveyance was signed only on 24.08.2007. The letter demand by the Appellant was sent to the Respondents on 14.10.2006. Hence the learned trial judge held that there was no obligation on the part of the Respondents to transfer the corpus to the Appellant as at that date.

It was further held that the Appellant has not breached the agreement to sell by failing to pay the balance sum within a reasonable period from 14.10.2004.

The learned trial judge emphasized that specific performance is a discretionary remedy. There must be access to the corpus. It must be provided with the consent of a third party. The learned trial judge observed that here is no prayer in the plaint seeking such access. In any event, he concluded that its availability depends on the consent of a third party.

Moreover, the trial judge observed that the Appellant had failed to deposit a sum of Rs. 62,50,000/= in Court as required by Clause 6 of the agreement to sell.

The Appellant has not been able to prove a reasonable basis for assessing the damages claimed. Furthermore, no breach of the agreement to sell has been proved.

On these grounds, the learned trial judge decided that the Appellant's case has not been proved and dismissed the action with costs.

Judgment of the High Court

The High Court held that upon a perusal of the evidence, it was clear that the Appellant intended to purchase the corpus for the purpose of selling after blocking out. The evidence revealed that there was no access from the main road to the land. The Respondents agreed to provide a road way 30 feet in width in terms of clause 5 of the

agreement to sell. The evidence of the 1st Respondent was that a 3rd party had agreed to provide a road way through his land to gain access to the land in dispute.

The testamentary proceedings in D.C. Avissawella Case No. 1271/T were terminated on 04.10.2004. The Appellant failed to prove that it sought to pay a sum of Rs. 10,00,000/= after the conclusion of the testamentary proceedings.

Furthermore, the High Court held that there was an uncertainty in regard to the clause 5 of the sales agreement, and hence specific performance of the sales agreement would be an inappropriate remedy.

The Appellant had failed to deposit a sum of Rs. 62,50,000/= in Court prior to the institution of the case as agreed to in clause 6 of the sales agreement.

Accordingly, High Court of Civil Appellate held that the learned District Judge was correct in dismissing the action of the Appellant.

Specific Performance (ad pecuniam solvendam)

The governing law of the right to claim specific performance of an agreement to sell immovable property is Roman-Dutch law **[*Thaheer v. Abdeen* (57 NLR 1 at 3)].** I will therefore briefly examine the availability of this remedy in Roman-Dutch law.

It is not clear whether specific performance was a remedy available in Roman law. Lee makes contradictory statements in stating that decrees of specific performance were unknown [Lee R.W., *The Elements of Roman Law*, IV Edition, Sweet & Maxwell (1956), 441] while later claiming that specific performance may be decreed [ibid. page 457].

Weeramantry [The Law of Contracts, Vol. 2, (Lawman (India) Pvt., Reprint 1999) pgs. 952-953] explains that during the formulary period, Roman law did not compel specific performance. It was sufficient for the payment of *id quod interest*. He opines that given that the maxim of Roman law being *nemo potest praecise cogi ad factum* (no one can be

compelled to perform a specific act), it was unusual for the grant of the remedy of specific performance.

There is a divergence of opinion among jurists of the availability of specific performance in Roman Dutch law.

According, to Van Der Linden [1.14.7], where the obligation consists in performing a particular act, the oblige may sue the obligor for the performance of that act, or compensation in damages and interest.

Grotius [3.3.41] states that although by natural law a person who has promised to do something is bound to do it if it is in his power, he may nevertheless by municipal law release himself by paying the other contracting party the value of his interest in the same or the penalty, if any, which has been agreed upon in default of payment.

Van Leeuwen was of the view that specific performance may be compelled where a promise is made to perform something or cause it to be done [Com. 4.2.13].

Weeramantry [supra. pages 953-954] concluded that the Roman-Dutch law of Holland would grant specific performance in contracts of sale and in contracts *ad dandum* generally and that it would also grant the relief where possible in contracts *ad faciendum*.

It being an equitable remedy, there are situations where the Court may refuse to order specific performance in circumstances where the defaulting party is unable to comply with an order for specific performance such as where the property to be delivered has been destroyed [Grotius 3.47.1].

The *locus classicus* of the position in the law of South Africa is found in ***Farmers' Co-op Society (Reg) v. Berry*** **[(1912) AD 343 at 350]** where Innes, J. held:

> *"Prima facie every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is*

possible, a performance of his undertaking in terms of the contract. As remarked by KOTZE C.J., in Thompson vs. Pullinger (1 O. R., at p. 301), "the right of a plaintiff to the specific performance of a contract where the defendant is in a position to do so is beyond doub". It is true that Courts will exercise a discretion in determining whether or not decrees of specific performance should be made. They will not, of course, be issued where it is impossible for the defendant to comply with them. And there are many cases in which justice between the parties can be fully and conveniently done by an award of damages. But that is a different thing from saying that a defendant who has broken his undertaking has the option to purge his default by the payment of money. For in the words of Storey (Equity Jurisprudence, Sec. 717 (a)), "it is against conscience that a party should have a right of election whether he would perform his contract or only pay damages for the breach of it." The election is rather with the injured party, subject to the discretion of the Court."

In accordance with the discretionary nature of the remedy of specific performance in the law of South Africa, a Court may refuse to order specific performance where compliance with the order would be impossible **[*Rissik v. Pretoria Municipal Council* 1907 TS 1024, 1037; *Shakinovsky v. Lawson and Smulowitz* 1904 TS 326; *Wheeldon v. Moldenhauer* 1910 EDL 97, 99; *Pretoria East Builders CC v. Basson* 2004 6 SA 15 (SCA) 21]**, cause undue hardship **[*Haynes v. Kingwilliamstown Municipality* 1951 2 SA 371(A) 378H-9A; *Dithaba Platinum (Pvt) Ltd. v. Erronovaal Ltd.* 1985 4 SA 615 (T) 6271-6281; *SAPDC (Trading) Ltd v. Immelman* 1989 3 SA 506 (W) 512C-D]**, contracts for personal service **[*National Union of Textile Workers and Others v. Stag Packings (Pty) Ltd. and Another* 1982 4 SA 151 (T); *Seloadi and Others v. Sun International (Bophuthatswana) Ltd.* 1993 2 SA 174 (BG) 1861-190E; *Santos Professional Football Club (Pty) Ltd v. Igesund* 2003 5 SA 73(C) 78-81]** or where the obligations are imprecise **[*Douglas v. Baynes* 1908 TS 1207 (PC); *Breveton and Upton v. Carnarvon Syndicate* (1889) 10 NLR 166, 169; *Lucerne Asbestos Co. Ltd. v.***

***Becker* 1928 WLD 311, 331; *Barker vs. Beckett & Co. Ltd.* 1911 TPD 151; *Marais v. Cloete* 1945 EDL 238, 242-243]**.

The remedy of specific performance is part of our law. In ***Holmes v. Alia Marikar* (1 NLR 282 at 285)**, Withers, J. explained the concept as follows:

> *"The right specifically to compel a person to give something which he has promised to give, or to do something which he has promised to do, has been frequently recognized and given effect to in our Courts. If the thing cannot be given or done, then its equivalent, id quod creditoris interest praestationem fieri, is exacted. The present is a common case in our Courts. It has been before the Supreme Court since 1837."*

Accordingly, a party ready and willing to perform their contractual obligations has a *prima facie* legal right to specific performance against the other party, subject only to the discretion of the Court in the interests of justice.

I will first address questions of law Nos. 1 and 2 as an answer in the negative must necessarily result in the dismissal of the appeal.

Question of Law Nos. 1 and 2

These two questions are interconnected and will be considered together. Admittedly the Appellant has not deposited the balance part of the purchase price in Court prior to the institution of this action.

Let me begin my analysis by examining whether it was incumbent on the Appellant to do so.

It is trite law that the party seeking to enforce the contract must be ready and willing to perform his part of the bargain [See ***Thaheer v. Abdeen* (57 NLR 1 at 3); *Noorul Asin and Other v. Podinona de Zoysa and Others* (1989) 1 Sri L. R. 63; *T.T.P. Anthony Fernando vs.***

H. D. Felix Nevill Tirimanne and Others **(S.C. Appeal No.244/2014, S.C.M. 16.06.2022 at page 11**].

A plaintiff who has failed to perform his obligation, which is conditional to requiring the defendant to perform his obligation, will not be granted the remedy of specific performance. The civil law recognized this principle through the *exceptio non adimpleti contractus* ("exception of non-performance of contract") which was available against a party claiming performance who had himself not performed [Voet 19.1.23].

In ***BK Tooling (Edms) Bpk v. Scope Precision Engineering (Edms) Bpk*** **[1979 (1) SA 391 (A)]** it was held that, in the case of contract which imposes reciprocal obligations on the parties, the plaintiff is entitled to specific performance only if he has in fact made performance of his own obligations, or if he is able and prepared to do so: otherwise, his claim will be repelled by the exception *non adimpleti contarctus*.

In ***Tirimanne and Others v. Theobald*** **(46 NLR 391)**, the plaintiffs were entitled under a contract, to claim from the defendant, on payment of Rs. 6,325 on or before February 8, 1940, the reconveyance of certain property which had been transferred to the defendant by the 1st plaintiff. The plaintiffs alleged that on February 6, 1940, they tendered to the defendant the sum of Rs. 6,325 in cash which the defendant did not receive. They instituted action on February 7, 1940, for specific performance of the agreement to reconvey, but did not bring the money into Court until January 23, 1941, the day before the date fixed for the hearing of the action. The Privy Council held, that the failure of the plaintiffs to bring the money into Court with the plaint was a very serious omission.

The reasoning of the Privy Council does not show *per se* an examination of the relevant principles of Roman-Dutch law. Nevertheless, it is a fundamental legal principle in Roman-Dutch law that the party seeking to enforce a contract must be ready and willing to perform his part of the bargain. This necessarily leads to the conclusion that a party seeking to obtain specific performance of a contractual stipulation which is conditional

upon the payment of a sum of money, must bring the amount due to Court and deposit it to the credit of the action at the time of filing the plaint.

Imposing such a requirement certainly meets the interest of justice. In addition to the principle that a party seeking to obtain specific performance must be willing and able to perform his part of the bargain, it ensures that a defendant is not dragged through a time consuming and costly litigation only to find at the end of the trial that the plaintiff is not in a position to perform his part of the bargain which is conditional to the obligation of the defendant.

The parties clearly were aware of this principle and took the further step of incorporating it as part of the terms and conditions agreed between them.

Clause 6 of the agreement to sell (P5) reads as follows:

> *"ඉහත කී, ගැණුම්කාර සමාගම අදාළ දේපළ මිළදී ගැනීමට ඉදිරිපත් වන විට විකුණුම්කරුවන් එකී දේපළ විකිණීම ප්‍රතික්ෂේප කරයි නම්, හෝ පැහැර හරි නම්,* ***ඉකිරි මුදල නිසි අධිකරණයේ තැන්පත් කර මෙම ගිවිසුම නිරූපිත ලෙස ඉටුකරවා ගැනීමේ හිමිකම*** *ගැනුම්කරුවන් සමග සතු බව විකුණුම්කරුවන් මෙයින් පිළිගනී."* (emphasis added)

This is a clear expression of the intention of the parties that, the Appellant has the right to seek specific performance of the agreement to sell only upon depositing the balance amount due in Court. The Court must give effect to their express intention.

In ***Ginthota Sarukkale Vitharanage Hemalatha Piyathilake v. Wicrama Pathiranage Mahesh Ruwan Pathirana*** **[S.C. Appeal No: 218/2014, S.C.M. 15.02.2017 pages 9-10]** Sisira J. De Abrew J. held as follows:

> *"When taking a decision whether to grant relief or not in a case of breach of contract* ***it is necessary to examine the intention of the parties at the time that they signed the agreement.*** *In the present case what was the intention of the*

Defendant-Appellant when she signed the agreement? In finding an answer to this question it must be remembered that the Defendant-Appellant, at the time of signing the agreement, accepted a cheque for Rs.1.0 Million from the Plaintiff-Respondent and that she signed the agreement knowing that there is a clause for specific performance. Thus it is clear that the intention of the Defendant-Appellant had been, at the time of signing the agreement, to sell the property to the Plaintiff-Respondent. What was the intention of the Plaintiff-Respondent at the time of signing the agreement? It has to be noted here that he gave a cheque for Rs.1.0 Million to the Defendant-Appellant and signed the agreement knowing that there was a clause relating to specific performance. Thus his intention had been, at the time of signing the agreement, to purchase the property. Thus it is clear that the intention of both parties, at the time of signing of the agreement, was to implement Agreement to Sell marked P1. ***What was the purpose of including a clause for specific performance? The purpose, it appears, had been that both parties would be compelled to fulfill their obligations.****"* (emphasis added)

Similarly, where parties have agreed that specific performance can be sought only upon the balance sum payable being deposited in court, that must be enforced by Court.

In order to overcome this difficulty, the Appellant sought to contend that no issue was raised on the need to make the deposit in Court.

Paragraph 14 of the plaint filed by the Appellant in the District Court of Avissawella identifies the, the first cause of action as follows:

"ඉහත තත්ත්වයන් යටතේ ***පැමිණිලිකාර සමාගම ගරු අධිකරණයෙන් රුපියල් හැට දෙලක්ෂ පනස් දහස (රු.6,250,000/.)*** *ක මුදල ගරු අධිකරණයේ* <u>*තැන්පත් කර*</u> *ඉහත කී අංක* ***: 2378*** *දරණ විකුණුම් ගිවිසුම නිරූපිත ලෙස ඉටු කරවා ගැනීමට* ***(Specific Performance)*** *අයිතිය ඇති බවට ප්‍රකාශයක් ලබා ගැනීමටද, එකී දේපල පැමිණිලිකාර සමාගම වෙත පවරා දෙන මෙන් විත්තිකරුවන්ට විධානය කරන නඩු තීන්දුවක් ලබා*

ගැනීමට ද හා/හෝ විත්තිකරුවන් විසින් එකී දේපල පවරා දීම ප්‍රතික්ෂේප කරන්නේ නම් හා / හෝ අපොහොසත් වන්නේ නම් ගරු අධිකරණයේ රෙජිස්ට්‍රාර් ලවා නිසි විකුණුම් ඔප්පුවක් පැමිණිලිකාර සමාගමේ වාසියට අත්සන් කරවා ගැනීමෙන් නියෝගයක් ගැනීමේ ලබා ගැනීමටද, විත්තිකරුවන්ට එරෙහිව නඩු පැවරීමට පැමිණිලිකාර සමාගමට නඩු නිමිත්තක් උද්ගතව ඇත." (emphasis added)

Issues and admissions were recorded on 13.08.2008. There were 7 admissions and 15 issues. Admission 5 is as follows:

"5. ඉහත කී 2378 දරණ ගිවිසුමේ කොන්දේසි අනුගමනය කිරීමට දෙපාර්ශවය බැඳී සිටින බව පිලිගනියි."

The Respondents raised another issue after commencing the leading of evidences of the Appellant. It was that since the Appellant has failed to deposit the balance consideration to the credit of the case in accordance with the Clause 6 of the sales agreement, can the Appellant have and maintain this action?

Subsequently, there was a correction made to that issue which then read:

"16. පැමිණිලිකාර සමාගම අංක 1378 දරණ ගිවිසුමේ 6 වන කොන්දේසිය පරිදි ඉතිරි මුදල දැනටමත් මෙම නඩුවට තැන්පත් කර නැති හෙයින් මෙම නඩුව පවරා පවත්වා ගෙන යා හැකිද?"

The Appellant called the manager of the Appellant's company and Mr. Athula Walisundera, Attorney-at-Law and Notary in Public to testify on its behalf. The manager has been cross examined regarding depositing the money. It has been recorded at pages 107-108 of the Appeal Brief as follows:

"ප්‍ර. (6 වෙනි කොන්දේසිය බලන්න) තමාට ඒ කොන්දේසිය අනුව විත්තිකරුවන් මෙම ක්‍රියා කිරීම ප්‍රතික්ෂේප කලොතින් තමා ඉතිරි මුදල උසාවියේ තැන්පත් කර උසාවියෙ මාර්ගයෙන් ක්‍රියා කරන්න ඕනේ?

උ. එහෙමයි.

ප්‍ර. තමා එහෙම කලාද?

උ. ඒ සඳහා තමයි මේ නඩුව පවත්වන්නේ.

ප්‍ර. අවුරුදු 4 න් පස්සෙ එහෙම කලේ?

උ. ඔව්.

ප්‍ර. මේ නඩුවෙ මුදල් තැන්පත් කලාද?

උ. නැහැ

ප්‍ර. මේ ගිවිසුම අනුව ඒ විදිහට ක්‍රියා කලෙ නෑ?

උ. තැන්පත් කරන්න තමයි මේ නඩුව ආරම්භ කලේ තැන්පත් කරන්න මට නිකම්ම බෑ.

ප්‍ර. කොන්දේසියේ තිබෙන්නේ මුදල් තැන්පත් කරන්න ඒක කලෙත් නෑ?

උ. ඒක කරන්න තමයි මේ තඩුව දැම්මෙ.

ප්‍ර. කොන්දේසිය අනුව කරන්න ඕනේ?

උ. ඒක මම දන්නෙ නෑ.”

It is in this context the learned trial judge answered issue no.16 in negative and concluded that the Appellant has failed to deposit the balance amount due in Court. This is the correct conclusion on the facts and circumstances of this action.

For the foregoing reasons, I answer question of law No. 1 and 2 in the negative.

In the foregoing circumstances, there is no need to answer the other questions of law and the appeal must be dismissed.

In summary, the following facts are established:

- Clause 6 of the agreement to sell expressly grants the Appellant the right to seek specific performance.
- Before exercising that right, the Appellant is required to deposit the balance amount in Court.
- The Appellant failed to deposit the said balance amount in Court as stipulated in the agreement to sell.
- Therefore, the Appellant cannot seek specific performance.

I affirm the judgment of the District Court of Avissawella dated 03.11.2010 and the judgment of the High Court dated 31.03.2015.

Appeal is dismissed with costs fixed at Rs. 1,00,000/=.

JUDGE OF THE SUPREME COURT

S. Thurairaja, P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

Mahinda Samayawardhena, J.

I agree.

JUDGE OF THE SUPREME COURT