

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 28TH DAY OF JANUARY 2015/8TH MAGHA, 1936

OP(C).No. 1560 of 2013 (O)

(O.S.1/1989 OF ADDITIONAL DISTRICT COURT-I, MAVELIKKARA)

PETITIONERS:

1. K. BIJU
PUNARTHAM HOUSE, KAYAMKULAM KURI, KAYAMKULAM VILLAGE.

2. K. BINU
BEENA SADANAM, ERUVA MURI, PATHIYOOR VILLAGE,
PATHIYOOR P.O.

BY ADVS. SRI.R.D. SHENIOY (SR.)
SRI.S.VINOD BHAT
SRI.LEGITH T.KOTTAKKAL

RESPONDENTS:

1. NABEESA BEEVI (DIED. Lrs IMPEADED)
MUTTANISSERIL HOUSE, ERUVA MURI, PATHIYOOR VILLAGE
PATHIYOOR P.O, PIN - 690 564.

ADDL.R2 NAZEEMA BEEVI, AGED 64 YEARS, D/O. LATE NABEESA BEEVI,
HOUSE No.A-12, SANTHI NAGAR, KALAMASSERY - 683 104.

ADDL.R3 AMEENA BEEVI, AGED 63 YEARS, D/O. NABEESA BEEVI,
VETTUKARANTHETHU HOUSE, KOLLURVILA P.O.
KOLLAM - 691 001.

ADDL.R4 SHADIYA, AGED 51 YEARS, D/O. NABEESA BEEVI,
KUTTIYIL KIZHAKKATHIL, PALLIKKAL P.O.,
PIN - 691 506.

ADDL.R5 TAHA HUSSAIN, AGED 60 YEARS, S/O. KOYAKUTTY,
MUTTANYSSERIL VEEDU, ERUVA P.O.,
PIN 690 564.

ADDL.R6 MAKBOOL HUSSAIN, AGED 47 YEARS, S/O. KOYAKUTTY,
MUTTANYSSERIL VEEDU, ERUVA -690 564.

OP(C).No. 1560/2013

ADDL.R7 SHAHIDA, W/O. LATE ASHARAF,
 MUTTANYSSERIL VEEDU, ERUVA - 690 564.

ADDL.R8 FATHIMA, D/O. SHAHIDA,
 MUTTANYSSERIL VEEDU, ERUVA - 690 564.

ADDL.R9 FABINA, D/O. SHAHIDA,
 MUTTANYSSERIL VEEDU, ERUVA - 690 564.

ADDL.R10 FAZILA, D/O. SHAHIDA,
 MUTTANYSSERIL VEEDU, ERUVA - 690 564.

ADDL.R11 FAYAZ, S/O. LATE ASHARAF,
 MUTTANYSSERIL VEEDU, ERUVA - 690 564.

ADDL.R12 AYISHA, D/O.TAZMI, KOLLAMPARAMBIL,
 ERUVA - 690 564.

ADDL. R13 ANEEZ, D/O. TAZMI, KOLLAMPARAMBIL, ERUVA - 690 564.

(The legal heirs of deceased respondent are impleaded as additional respondents 2 to 13 as per order dtd.22/9/14 in I.A.14280/13 in OPC).

R1 & ADDL.R2 to R4, R 6 -R11 BY ADV. SRI.ASOK M.CHERIAN
BY ADV. SRI.S.KANNAN
BY ADV. SRI.R.ROHITH

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 28-01-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER(S)' EXHIBITS :

EXHIBIT-P1-TRUE COPY OF THE JUDGMENT DATED 20/02/2008 ON THE FILE
OF SUPREME COURT OF INDIA IN C.A 1397/2002.

EXHIBIT-P2-TRUE COPY OF THE PLAINT IN O.S 236/2008 OF SUB COURT,
MAVELIKKARA.

EXHIBIT-P3-TRUE COPY OF THE PETITION IN I.A 898/2009 IN O.S 1/1989
OF DISTRICT COURT, MAVELIKKARA.

EXHIBIT-P4-TRUE COPY OF THE MEMO DATED 30/09/2009.

EXHIBIT-P5-TRUE COPY OF THE OBJECTION IN I.A 898/2009 IN O.S 1/1989
OF DISTRICT COURT, MAVELIKKARA.

EXHIBIT-P6-TRUE COPY OF THE ORDER DATED 05/10/2000 IN I.A 898/2009
IN O.S 1/1989 OF DISTRICT COURT, MAVELIKKARA.

EXHIBIT-P7-TRUE COPY OF THE PETITION IN I.A 491/2012 IN O.S 1/1989
OF DISTRICT COURT, MAVELIKKARA.

EXHIBIT-P8-TRUE COPY OF THE OBJECTION IN I.A 491/2012 IN OS 1/1989
OF DISTRICT COURT, MAVELIKKARA.

EXHIBIT-P9-TRUE COPY OF THE JUDGMENT DATED 01/10/2012 IN
O.P(C) 41/2011.

EXHIBIT-P10-TRUE COPY OF THE PETITION I.A 1029/2012 IN O.S 1/1989 OF
THE DISTRICT COURT, MAVELIKKARA.

EXHIBIT-P11-TRUE COPY OF THE PETITION IN I.A 1030/2012 IN OS.1/1989
OF DISTRICT COURT, MAVELIKKARA.

EXHIBIT-P12-TRUE COPY OF THE B DIARY IN O.S 1/1989 OF DISTRICT
COURT, MAVELIKKARA.

EXHIBIT-P13-TRUE COPY OF THE PETITION I.A 1058/2012 IN O.S 1/1989 OF
DISTRICT COURT, MAVELIKKARA.

EXHIBIT-P14-TRUE COPY OF THE OBJECTION IN I.A 1058/2012 IN
O.S 1/1989 OF ADDITIONAL DISTRICT COURT, MAVELIKKARA.

EXHIBIT-P15-TRUE COPY OF THE ORDER DATED 05/02/2013 IN
I.A 1058/2012 IN O.S 1/1989 OF DISTRICT COURT,
MAVELIKKARA.

OP(C).No. 1560 of 2013 (O)

EXHIBIT-P16-TRUE COPY OF THE ORDER DATED 05/02/2013 IN
I.A 491/2012 IN O.S 1/1989 OF DISTRICT COURT,
MAVELIKKARA.

RESPONDENT(S)' EXHIBITS: NIL.

// True copy //

P.A. To Judge.

smp

P.BHAVADASAN, J.

Original Petition (Civil) No.1560 OF 2013

Dated this the 28th day of January, 2015.

J U D G M E N T

O.S.No.1/1989 before the Additional District Court-I, Mavelikkara was a suit for specific performance filed by the respondent herein as plaintiff. The suit was dismissed. However, in appeal, this Court reversed the decree and granted a money decree for the amount paid as advance by the plaintiff. The matter was carried in appeal to the Apex Court and the Apex Court granted specific performance by a decree dated 20.02.2008 directing the plaintiff to deposit balance sale consideration within a period of three months. An amount of Rs.16,500/- is seen to have been deposited on 05.10.2009 though memo shows that it was deposited on 30.09.2009. On 15.06.2012, I.A.No.491/2012 was filed and there was an order to produce draft sale deed. While that was pending, respondent herein filed three applications namely, I.A.Nos.1028/2012, 1029/2012 and 1030/2012 seeking to accept order dated 03.12.2012 of Apex

Court, for issuance of a commission and also to adjudicate the contentions of the respondent regarding certain matters. An application was also filed seeking to ascertain the extent of plaint schedule property available for assignment. That was filed on 19.12.2012. On 20.12.2012, judgment debtor filed I.A.No.1058/2012 under Section 28 of the Specific Relief Act seeking to rescind the contract. The reason given in I.A.No.1058/2012 was that the decree holder had not deposited the amount specified by the Apex Court within the time granted by the Apex Court and even if there was any subsequent deposit, there was no prayer or application for extension of time. Therefore, it was contended that there is nothing to show that decree holder was ready and willing to perform his part of contract.

2. The court below persuaded by the above contentions, allowed I.A.No.1058/2012 and dismissed I.A.No.491/2012 and other three applications filed by the judgment debtor. The said orders are assailed by the decree holder.

3. Sri.R.D.Shenoy, learned Senior Counsel appearing for the petitioners contended that the court below has erred both on

facts and in law in allowing I.A.No.1058/2012. True, even though the Apex Court while decreeing the suit for specific performance had granted three months time to deposit the amount, the amount was deposited only on 30.09.2009. But learned counsel contended that the deposit was accepted. Subsequently, I.A.No.491/2012 was filed and there was an order to produce the draft sale deed. It was contended that not only the above facts speak for themselves, but the fact that the judgment debtor had filed three applications mentioned above indicates that they had no objection for the execution of sale deed. Their only grievance was that the extent of property had to be ascertained as there was acquisition proceedings after the agreement. Learned Senior Counsel contended that it is not essential that an application for extension of time must be filed but acceptance of deposit out of time would be deemed to be an extension of time as contemplated under Section 28 of the Specific Relief Act.

4. For the above proposition, learned Senior Counsel for the petitioners relied on the decisions in **Chitambaran** vs. **Viswambaran** (2000 (2) KLT 128), **Joseph George** vs. **Chacko**

Thomas (1992 (1) KLT 6), **Ouseph** vs. **Devassy** (2001 (1) KLJ 59) and in **Chanda (dead) through Lrs** vs. **Rattni and anr.** (AIR 2007 Supreme Court 1514).

5. Learned Senior Counsel appearing for the petitioners went on to point out that no objection was taken by the judgment debtor at the time of deposit and the deposit was accepted without any demur. Apart from the above fact, the conduct of the judgment debtor in filing three applications would further fortify that the deposit was accepted and he was willing to execute sale deed. But, the only contention then was regarding the extent of property available for assignment. It was later that petition for rescission was filed. Learned Senior Counsel points out that it is not the law that a formal application will have to be necessarily filed for extension of time and the facts and circumstances of the case may be sufficient to show that there has been an extension of time granted by the court by accepting the deposit. If that be the position, according to the learned Senior Counsel, the impugned orders cannot stand.

6. Sri.Asok M Cherian, learned counsel appearing for the respondent, on the other hand, contended that extension of time

is not something which is automatic. The readiness and willingness contemplated under Section 16(c)(i) of Specific Relief Act must not only exist at the time of filing of the suit and at the time of decree but continues to exist till the entire transaction is completed. It does not mean that after the passing of the decree the decree holder can deposit the amount at his will and pleasure and seek execution of document. At best what could be said is that it should be deposited within reasonable time but it is mandatory on the part of the decree holder to seek extension of time.

7. In the case on hand, learned counsel appearing for the respondent, went on to point out that there is no such petition filed for extension of time and if that be so, the court below was justified in allowing I.A.No.1058/2012. In support of his contention, learned counsel relied on the decisions in **V.S. Palanichamy Chettiar Firm** vs. **C. Alagappan and another** ((1999) 4 Supreme Court Cases 702), **Ramesh** vs. **John K. Joseph** (1995 (1) KLT 801), **Anandavally** vs. **Natesan** (1992 (2) KLT 833), **Kumaresan** vs. **Seshadri** (2002 (1) KLT 565) and in **N.P. Thirugnanam (dead) by Lrs.** vs. **Dr.R.Jagan Mohan**

Rao and others ((1995) 5 Supreme Court Cases 115).

8. Learned counsel appearing for the respondent went on to point out that there is no dispute regarding the fact that no formal application for extension of time was filed by the decree holder and therefore the court below was justified in its conclusion that the decree holder is not entitled to get the sale deed executed and the contract was rightly rescinded.

9. As would be clear from the above narration of facts, the scope and ambit of Section 28 of the Specific Relief Act arises for consideration in this case which reads as follows.

"28. Rescission in certain circumstances of contracts for the sale or lease of immovable property, the specific performance of which has been decreed-(1)

Where in any suit a decree for specific performance of a contract for the sale or lease of immovable property has been made and the purchaser or lessee does not, within the period allowed by the decree or such further period as the Court may allow, pay the purchase money or other sum which the Court has ordered him to pay, the vendor or lessor may apply in the same suit in which the decree is made, to have the contract rescinded and on such application the Court may, by order, rescind the contract either so far as regards the

party in default or altogether, as the justice of the case may require.

(2) Where a contract is rescinded under sub-section (1), the Court -

(a) shall direct the purchaser or the lessee, if he has obtained possession of the property under the contract, to restore such possession to the vendor or lessor, and

(b) may direct payment to the vendor or lessor of all the rents and profits which have accrued in respect of the property from the date on which possession was so obtained by the purchaser or lessee until restoration of possession to the vendor or lessor, and, if the justice of the case so requires, the refund of any sum paid by the vendee or lessee as earnest money or deposit in connection with the contract.

(3) If the purchaser or lessee pays the purchase money or other sum which he is ordered to pay under the decree within the period referred to in sub-section (1) the Court may, on application made in the same suit, award the purchaser or lessee such further relief as he may be entitled to including in appropriate cases all or any of the following reliefs, namely:-

(a) the execution of a proper conveyance or lease by the vendor or lessor;

(b) the delivery of possession, or partition

and separate possession, of the property on the execution of such conveyance or lease.

(4) No separate suit in respect of any relief which may be claimed under this section shall lie at the instance of a vendor, purchaser, lessor or lessee, as the case may be.

(5) The costs of any proceedings under this section shall be in the discretion of the Court”.

10. There was no dispute before this Court that even after passing of a decree in a suit for specific performance, the court retains control over the proceedings and it is not as if the court became functus officio and subsequent proceedings can be taken before that court and the court is competent to pass orders in cases where judgment debtor moves to have the original contract rescinded.

11. The first part of Section 28 of the Specific Relief Act referred to above deals with the act on the part of the purchaser. It says that when the purchaser within the period allowed by the decree or such further period as the court may allow does not deposit the amount, then a right accrues to the judgment debtor to file an application for rescission of contract. It is significant to notice that the former part which deals with the duty on the part

of the decree holder does not specify or make mention of an application as such whereas the latter part which deals with rescission of contract mandates that application for rescission will have to be made. Probably, that is the reason why the courts have held that it is not necessary that in all cases where extension becomes necessary, an application should be filed and the fact that deposit made was accepted by itself be sufficient to warrant a conclusion that there is extension of time granted by the court.

12. Referring to the decisions relied on by the learned counsel appearing for the respondent, it is true that in the decision in **V.S. Palanichamy Chettiar Firm vs. C. Alagappan and another** ((1999) 4 Supreme Court Cases 702), it was held as follows:

“10. In the present case no such application has been filed by the respondent decree-holders before the trial Court seeking extension of time to deposit the balance amount under the decrees. The applications which have been filed in the High Court have been transmitted to the executing Court with a direction to the executing Court to dispose them of by restoring the execution applications which had

been dismissed.

17. The agreement of sale was entered into as far back on February 16, 1980, about 19 years ago. No explanation is forthcoming as to why the balance amount of consideration could not be deposited within time granted by the Court and why no application was made under Section 28 of the Act seeking extension of time of this period. Under Article 54 of the Limitation Act, 3 years period is prescribed for filing the suit for specific performance of contract of sale from the date of the agreement or when the cause of action arises. Merely because a suit is filed within the prescribed period of limitation does not absolve the vendee-plaintiff from showing as to whether he was ready and willing to perform his part of agreement and if there was non-performance was that on account of any obstacle put by the vendor or otherwise. Provisions to grant specific performance of an agreement are quite stringent. Equitable considerations come into play. Court has to see all the attendant circumstances including if the vendee has conducted himself in a reasonable manner under the contract of sale. That being the position of law for filing the suit for specific performance, can the Court as a matter of course allow extension of time for making payment of balance amount of consideration in terms of a decree after 5 years of passing of the decree by the trial

Court and 3 years of its confirmation by the appellate Court ? It is not the case of the respondent-decree holder that on account of any fault on the part of the vendor-judgment-debtor, the amount could not be deposited as per the decree. That being the position, if now time is granted, that would be going beyond the period of limitation prescribed for filing of the suit for specific performance of the agreement though this provision may not be strictly applicable. It is nevertheless an important circumstance to be considered by the Court. That apart, no explanation whatsoever is coming from the decree-holder-respondents as to why they did not pay the balance amount of consideration as per the decree except what the High Court itself thought fit to comment which is certainly not borne out from the record. Equity demands that discretion be not exercised in favour of the decree holder-respondents and no extension of time be granted to them to comply with the decree".

13. In **N.P. Thirugnanam (dead) by Lrs. vs. Dr.R.Jagan Mohan Rao and others** ((1995) 5 Supreme Court Cases 115), it was held as follows:

"5. It is settled law that remedy for specific performance is an equitable remedy and is in the discretion of the Court, which discretion requires to

be exercised according to settled principles of law and not arbitrarily as adumbrated under S. 20 of the Specific Relief Act 1963 (for short, 'the Act'). Under S. 20, the court is not bound to grant the relief just because there was valid agreement of sale. Section 16(c) of the Act envisages that plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his

readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of contract”.

14. In **Anandavally** vs. **Natesan** (1992 (2) KLT 833), it was held as follows:

“7. It is well settled by a series of decisions of the Privy Council as also of the Supreme Court that a plaintiff who files a suit for performance of a contract has always to be ready and willing to perform his part of the contract. The performance of the contract by the purchaser including tender or deposit of full purchase money is part of his obligation before the seller is liable to execute a sale deed. This has been given legislative recognition in S.16(c) of the Specific Relief Act which provides as follows:-

16. Personal bars to relief-specific performance of a contract cannot be enforced in favour of a person,-

(a) xx xx xx

(b) xx xx xx

(c) Who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which

are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation.- For the purposes of clause ©,-

(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 aver performance of, or readiness and willingness to perform, the contract according to its true construction”.

As far as this case is concerned, the Explanation to S.16(c) is very relevant. The Explanation provides that where a contract involves 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. Though normally a plaintiff is not bound to tender to the defendant or deposit the purchase money in court, when there is an order of court, he is bound to do the same under Explanation to S.16(c). In other words, even if after an order or a decree is passed by court, the decree-holder fails to tender or deposit the money within the time fixed in the decree, it has to be presumed that he was not ready and willing to perform his part of the contract. The fact that a decree was passed does not absolve him from the liability to be always ready and willing to perform his

part of the contract. Though counsel for the revision petitioner-decree holder relied on the decisions of the Privy Council and the Supreme Court in *Ardeshir H. Mama v. Flora Sassoon* (AIR 1928 PC 208), *Gomathinayagam Pillai v. Palaniswamy Nadar* (AIR 1967 SC 868) and *Ramesh Chandra v. Chuni Lal* (AIR 1971 SC 123) to contend for the position that her readiness need continue only till the decree, on going through the said decisions, I do not think that such a proposition is laid down therein. All those cases were appeals against the decrees and in that context only their Lordship said that he must be ready and willing to perform his part of the contract till the trial is over. A decree-holder in a suit for specific performance cannot choose his own time for depositing the money. No doubt, in given cases the court has the power to extend the time and the purchaser is bound to deposit the purchase money as ordered by court. Though the purchase money is not deposited within the time, it is not as if the decree becomes inexecutable; on the application of the defendant if other circumstances exist, court can rescind the contract under S.28 or if the decree-holder satisfies the court that there were sufficient reasons for not depositing the money in time, the court can grant extension of time.

9. So the next question to be considered is as to whether the lower court was justified in

rescinding the contract by exercising its power under S.28 of the Specific Relief Act. Counsel for the revision petitioner-decree-holder contended that on the wording of the decree, no time for payment of the purchase money is stipulated in the decree and as such the provisions of S.28 cannot apply at all. I am not inclined to agree with this contention. On the wording of the decree which I have already stated in the first paragraph, it provides that the defendant shall execute a sale deed in respect of the suit property in favour of the plaintiff within one month and that too after receiving the balance sale consideration. It is well-known that the vendor is bound to execute the sale deed only on receipt of the sale consideration. In other words, payment of the sale consideration is a condition precedent for his executing a sale deed and that is what is provided for in the decree. On a reading of the decree I have no doubt in my mind that what the court intended was to fix a time-limit for the decree-holder to pay the balance purchase price as contemplated under Order 20 Rule 12A of the Code of Civil Procedure. Thus, the contention of counsel for the revision petitioner that no time is fixed in the decree cannot be accepted".

15. In **K.Saraswathi (alias) K. Kalpana** vs. **P.S.S Somasundaram Chettiar** (1977 MLJ 68), it was held in

paragraph 18 as follows:

"18.....After the original judgment for specific performance it is the definite practice in England that all consequential relief by reason of any party failing to comply with the terms of the judgment must be sought by application to the Court by which the judgment was passed. Such applications are made by motion in the action showing that in England, after the original judgment the action is by no means ended but remains under the control of the same Court. If the default is made by the purchaser in paying the purchase-money there are several remedies open to the vendor. (1) He may on motion in the action obtain an order fixing a definite time and place for payment and delivery over of the conveyance and title-deed and can, after the expiration of that time, levy execution for the amount, if not paid. (2) He may apply by motion in the action for an order rescinding, not the judgment but the contract, and in order to succeed in such a motion he had to satisfy the Court that there has been a positive refusal to complete, which it may be observed in the present case the respondent has certainly not proved. A similar right is given by section 35 of the Specific Relief Act of 1877. (3) He can enforce his unpaid vendor's lien for the purchase-money and costs: (4) He can by motion in the action obtain an order for sale by the Court of

the property when he will be at liberty to bid. The proceeds of the sale are paid into Court and the vendor gets his contract price, interest and costs and the purchaser the balance if any. Where the vendor is in default, the remedies are even more varied”.

16. In **Kumaresan** vs. **Seshadri** (2002 (1) KLT 565), it was held in paragraph 26 as follows:

“26. The counsel for the respondent has submitted that the respondent has already filed I.A.No.771/99 on 27.2.1999 before the lower court to extend the time to deposit the balance purchase price as directed in the decree and he has deposited the amount before the lower court on 27.2.1999 itself. It is further submitted that due to the interim stay of the decree granted by this Court in CMP No.1678/99 in the above appeal, the lower court could not pass order extending the time to deposit the amount in that I.A. Therefore, the contention raised by the appellant that since the respondent has failed to deposit the balance sale price as per Ext.A1 within three months from the date of the decree as directed by the lower court, the respondent is not entitled to specific performance of Ext.A1 agreement by compelling him to execute and register the assignment deed and if at all, the respondent can claim only the amount already advanced with interest

and compensation or damages, if any, is not sustainable”.

17. In **Ramesh** vs. **John K. Joseph** (1995 (1) KLT 801), it was held as follows:

“6. Lastly it was urged that the decree-holder had not made out ‘sufficient cause’ for enlargement of time for making deposit of the amount. As noticed, the decree-holder has filed the petition for extension of time under S. 148 of the C.P.C. The power under S. 148 C.P.C. can be invoked by the court ‘in its discretion’ whereas under S.28 of the Specific Relief Act the purchaser shall pay the purchase money within “such further period as the court may allow”. In both the cases the grant of extension of time by the court is not automatic or perfunctory. The discretion conferred on court under the above provisions is no doubt capacious but it can be wielded only when the decree-holder has made out a ‘sufficient cause’. “The power given to court under S.148 is discretionary and is given for the purpose of securing the ends of justice in case of necessity”. (See *Jogdhayan v. Babu Ram and others* (AIR 1983 SC 57). In order to meet the ends of justice in a given case the court can work out its power under S. 148 of the C.P.C. or S.28 of the Specific Relief Act and extend the period fixed for the payment of balance consideration. But if such

extension is not substantiated by 'sufficient cause' the exercise of discretion may be wrongous or improper. Here I am reminded of the decision in *K. CM. Ltd. v. R. Padmanabha Pillai* (1957 KLT 1175 FB) where the Full Bench of this court, while dealing with extension of time for the deposit of deficit court fee, observed: "We would like to draw the attention of the courts that in the matter of granting time, courts will have to apply their mind and exercise a judicial discretion after satisfying themselves about the reasons for the non-payment of court fees at the proper time and not grant time as a matter of routine or automatically. No doubt, the discretion must be exercised judicially and not capriciously or arbitrarily." The case of the decree-holder is that even though he was conscient of the decree passed on 19-12-1992 the terms thereof were unavailable. It is revealed that the decree was signed only on 25-2-1993. The decree holder had applied for a copy of the decree on 1-1-1993 and it was received by him on 29-5-1993. By the time the period fixed for payment of the balance consideration had expired. However, the decree-holder could not deposit the amount *eo instanti* after the receipt of the copy of the decree due to paucity of funds. His case is that even though he made strenuous attempts for arranging the funds he could deposit the entire balance consideration only on 7-7-1993. It was after

making the deposit the decree-holder has filed the execution petition as well as the petition for enlargement of time. The above factual background is sufficiently authenticated by the affidavit filed by the decree-holder in support of the petition for extension of time".

18. A reading of the above decisions leave one in no doubt that normally an extension of time will have to be sought for. Extension of time is not something which is automatic or which is readily available to the decree holder. The decisions also go on to specify that readiness and willingness which is a sine qua non continues to govern even after the decree till it is completed or finality is attained by execution of sale deed.

19. Delay in depositing the amount viewed by the courts as lack of readiness and willingness on the part of the decree holder is fatal in some of the cases. A close reading of the decisions relied on by the learned counsel for the respondent would show that those were cases where extension of time was sought for depositing the amount and thereafter deposit was made and in that context it was held that readiness and willingness cannot be gathered readily from such conducts. It is also significant to

notice that extension of time was sought for after a long time.

20. It is in this context the decisions relied on by the learned Senior Counsel for the petitioners need mention. In the decision in **Chitambaran** vs. **Viswambaran** (2000 (2) KLT 128), it was held as follows:

“6. What remains to be considered is whether a written application is necessary for extension of time. Here is a case where, even in the decree the court below allowed the decree holder time to make the deposit. Mere failure on the part of the decree holder to deposit the amount does not render the decree ineffective or release the judgment debtor from his liability to satisfy the decree. It is only when there is willful default on the part of the decree holder to make the deposit, that the court would be justified in refusing extension of time. There is no such willful default evident in the present case and as such the court below has the authority and power, under S.148 of the CPC to extend the time and to proceed with the execution albeit the deposit was belated. That there exists power on the part of the execution court to extend the time even without application is clear from the decision in *K. Kalpana Saraswathi v. P.S.S.S Chettiar* (AIR 1980 SC 512) also”.

21. It is significant to notice that in the said decision it was held that merely because the decree holder does not seek extension of time that does not mean that he is not ready and willing to deposit the amount. Only in cases where there is willful default on the part of the decree holder to deposit the amount, a conclusion can be drawn that he is not ready and willing to perform his part of contract as contemplated under the provision. In the decision in **Joseph George** vs. **Chacko Thomas** (1992 (1) KLT 6), it was observed as follows:

"11. Consistent with the nature of the decree for specific performance, in the matter of deposit within the stipulated time, courts used to make a liberal approach to enable performances. In the decision in *Manika Gounder v. Samikanu* (AIR 1967 Madras 397) a suit for specific performance was compromised and the decree stipulated that the plaintiff should deposit a sum of Rs.800/-on or before 15-11-1962. Plaintiff therein filed an Execution Petition on 26-11-1962 for execution of the decree after depositing the balance consideration. - The plaintiff also moved a petition for extension of time for payment of the said sum. It was held that the extension of time granted by the lower court was in order. In the decision in *Amar Nath Jain v. Ram*

Parkash Dhir (1987 (1) Punjab Law Reporter - Vol.91) in a decree for specific performance one month's time was granted for deposit of the consideration, an appeal was filed and the same was dismissed. No deposit was made within one month of the dismissal of even the Second Appeal. It was contended that, the agreement stood rescinded and thus the decree has become incapable of execution. The court held that since the court had power to extend the time and since the decree holder was allowed to make deposit, it could be presumed that the time was extended even though no application in that behalf was made. In the decision in *K. Kalpana Saraswathi v. P.S.S.S. Chettiar* (AIR 1980 SC 512) it is held even at the stage of appeal before the Supreme Court the time to make deposit should be extended enabling the plaintiff to get advantage of the agreement to sell. These decisions also show that the mere failure to deposit within the time mentioned in the decree cannot over throw the decree and free the judgment debtor from satisfying the decree. In the absence of wilful default the court will not rescind the decree. We are unable to agree with the contrary view in *Nawal Kishore's* case (AIR 1986 Patna 301)".

22. In the decision in **Amar Nath Jain vs. Ram Parkash Dhir** (1987-1 Punjab Law Reporter Vol.XCI Page 490), the Punjab and Haryana High Court has considered the issue.

Therein the facts reveal that neither there was an application for extension of time nor there was deposit within the specified time. However, the court accepted the deposit at a later point of time and felt that that was sufficient to show that there was extension of time. In the decision in **Ouseph vs. Devassy** (2001 (1) KLJ 59), it was held as follows:

“8. The learned counsel for the revision petitioners relied on a decision in **Kanhaiyalal v. Abdul Hussain** (AIR 1985 M.P.24) where even nine months' delay was found unjustified. However, whether it is 9 months or longer period what is crucial on the point is the circumstances in which the delay occurred. **K.Kalpana Saraswathi v. P.S.S.S Chettiar** (AIR 1980 SC 512) took the view that even at the stage of appeal before the Supreme Court, the time to make deposit could be extended to enable the plaintiff to get the advantage of the agreement to sell. In **Joseph George v. Chacko Thomas** (1992 (1) K.L.T 6) a Bench of this court also has occasion to consider the question of delay and its impact on an application under Sec.28 of the Specific Relief Act. It was found that the fact that Sec.28 enable the court to extend time itself would imply that mere failure to deposit need not result in the rescission of the contract. The Specific Relief Act, it was held, is not an exhaustive enactment and it does

not consolidate the whole law on the subject and deposit the passing of the decree in a suit for specific performance, the court retains the control and it is open to the court to entertain an application for rescission of the decree if it is shown that the plaintiff 'positively refused' to complete the contract. It was further held that the willful refusal by the plaintiff to make the deposit would be a relevant circumstance to rescind the contract under Sec.28 of the Act. In the context of Sec.28 of the Act and also Order XXI Rule 32 C.P.C, it would not be possible to hold that a decree passed for specific performance can be effaced for the mere failure to deposit amount in time. This is particularly so since under Sec.28 of the Act and under Sec.148 of the C.P.C., the court can extend the time for deposit".

23. In the unreported decision of this Court in CRP No.412/2010, it was held as follows:

"9. A remand cannot be ordered for the mere asking. Binding authorities on the point say that a remand must be avoided as far as possible if on the materials on record the issue can be determined. The decree was executable at the instance of petitioner also. If petitioner was ready and willing to perform his part of the contract he could have sought execution of the decree rather than waiting for two years after filing of the execution petition to file an

application for cancellation of contract. This court indicated in Joseph George vs. Chacko Thomas (1992 (1) KLT 6, paragraph 10), that in the absence of positive refusal to complete the contract, rescission of contract is not permissible. In the absence of evidence of positive refusal or willful negligence of respondent in the matter executing court was correct in permitting respondent to enjoy the fruits of the decree. I do not find reason to interfere with the impugned order”.

24. A reading of the above decisions lead to the conclusion that as already noticed the former part of Section 28 of Specific Relief Act does not contemplate an application as such for extension of time. The courts have held that even if there is no application for extension of time and even if deposit is not made within time and if deposit is made belatedly and is accepted by the court, there is deemed extension of time.

25. Bearing the above principles in mind, one may have a fresh look at the facts of the present case.

26. The decree of the Apex Court was on 20.02.2008 and the Apex Court granted three months' time to deposit the amount. It is true that amount was not deposited within the

specified time and it was deposited only on 30.09.2009. But what is significant is that when notice of deposit was given, judgment debtor has no objection from his side that the amount was deposited out of time. Consequently, the court accepted the deposit. Later on I.A.No.491/2012 was filed on 15.06.2012 and the decree holder was directed to produce draft sale deed. At that point of time also, there was no objection from the side of the judgment debtor regarding the delayed deposit nor any complaint that there was willful default on the part of the decree holder amounting to lack of readiness and willingness to perform his part of contract. Further, judgment debtor filed three applications namely, I.A.Nos.1028/2012, 1029/2012 and 1030/2012, details of which have already been referred to, thereby indicating that even at that point of time he has no objection regarding the delayed deposit. Then on 20.12.2012, I.A.No.1058/2012 was filed seeking rescission of contract. Therein also the complaint was only that there was no application for extension of time and there was no deposit within time. As has been noticed in one of the decisions referred to above, mere absence of deposit or mere failure to apply for extension by itself

will not be sufficient. There must be materials to show that there was willful default on the part of the decree holder to comply with the terms of the decree. If that be the test to be applied, then, in the case on hand, it is difficult to say that there was willful default on the part of the decree holder in not depositing the amount within the time specified. It is also significant to notice that deposit was made on 30.09.2009 and till 20.12.2012 judgment debtor did not feel it necessary to move for rescission of the contract. It was only after draft sale deed was directed to be produced and after commission was issued to ascertain the actual extent of property available for assignment that judgment debtor moved for rescission of contract. If, as a matter of fact, judgment debtor was of the view that there was willful default on the part of the decree holder to deposit the amount as contemplated and as specified under Section 28 of the Specific Relief Act, he would have at least soon after deposit was made moved the court and appraise the court that deposit was not made within time and there was willful default on the part of the decree holder. There was no such act on the side of the judgment debtor till 20.12.2012 i.e. after three years.

27. It is also significant to notice that a major portion of sale consideration has already been paid as advance amount and balance to be paid was only Rs.16,500/-. That, as already stated, has been deposited on 30.09.2009.

28. Bearing the principles laid down above in mind, it is difficult to hold that there was willful default on the part of the decree holder in making the balance payment within the time granted by the court. As already noticed, courts have gone on to hold that formal application for extension is not necessary and the factum of acceptance of deposit by the court itself is an indication of the fact that there has been an extension of time.

For the above reasons, this Court is unable to sustain the orders impugned. The impugned orders are set aside and the matter is remanded to the trial court for fresh consideration regarding the extent of property that is available for assignment and such other matters. However, it is made clear that deposit will be deemed to have made within the time stipulated and the decree holder is entitled to get the sale deed executed for the extent available subject to such conditions as is specified by the court below. Parties shall appear before the court below on

24.02.2015. The court below may make every endeavour to dispose of the matter as expeditiously as possible, at any rate, within a period of four months from the date of appearance of the parties.

Sd/-

**P.BHAVADASAN
JUDGE**

smp