

**IN THE HIGH COURT AT CALCUTTA**  
**Civil Appellate Jurisdiction**  
**APPELLATE SIDE**

Present:

**The Hon'ble Justice Tapabrata Chakraborty**  
**&**  
**The Hon'ble Justice Partha Sarathi Chatterjee**

**FA 2 of 2022**  
with  
**CAN 3 of 2022**

**Smt. Gouri Chakraborty *alias* Malakar**  
**versus**  
**Smt. Jyotsna Mazumdar & anr.**

*For the Appellant* : *Mr. Pinaki Ranjan Mitra,*  
*Mr. Jaydip Basu,*  
*Mr. S. Mukhopadhyay.*

*For the Respondent No.1* : *Mr. Haradhan Banerjee, Sr. Adv.*  
*Mr. A. Pain,*  
*Mr. Subhrangshu Dutt,*  
*Mr. Nilmoni Das,*  
*Ms. Monidipa Pal Roy.*

*For the Respondent No.2* : *Mr. Tanmoy Bhattacharyya.*

*Hearing is concluded on* : *15<sup>th</sup> November, 2022.*

**Judgment On** : **12<sup>th</sup> December, 2022.**

**Partha Sarathi Chatterjee, J.**

1. This appeal is directed against the judgment and decree dated 30.3.2019 passed by the learned Civil Judge, Senior Division, 3<sup>rd</sup> Court,

Howrah in Title Suit No. 159 of 2009 whereby the learned Court below decreed the suit being a suit for specific performance of contract.

2. Facts projected in the plaint, in brief, are that the defendant no.1/ appellant herein, namely, Smt. Gouri Chakraborty (hereinafter referred to as Gouri) happened to be the owner and occupier of the suit property. She acquired the property by way of gift from the Government of West Bengal on 1.7.1994 under the Refugee Rehabilitation Scheme and on 23.2.2008 she entered into an agreement for sale with the plaintiff/respondent no.1, namely, Smt. Jyotsna Mazumdar (hereinafter referred to as Jyotsna) to sell out the property at a consideration money of Rs. 12 lakhs and at the time of execution of such agreement for sale, Jyotsna paid Rs. 3 lakhs.

3. In the plaint, it was further pleaded that in the agreement, it was stipulated that Gouri would hand over photo copies of the documents relating to title of the suit property to Jyotsna within a week from the date of execution of the agreement but Gouri did not supply any document to Jyotsna and as such she could not verify the title of Gouri in respect of the suit property.

4. It was also claimed that ultimately at the end of 2008, Gouri supplied the documents and then Jyotsna conducted one search and being satisfied with the title of Gouri in respect of the suit property, she asked Gouri to fix up a date for execution and registration of deed of sale but Gouri did not respond to such request and on 25.2.2009, Jyotsna met with Gouri with a request to perform her part of contract but in vain.

5. It was further pleaded that on 20.10.2009, the defendant no.2/ respondent no.2, namely, Sri. Ajit Das (hereinafter referred to as Ajit) being an agent of Gouri took some masons and labourers on the suit property and started to make construction of boundary wall and on that date Jyotsna somehow resisted Ajit from making such construction and Jyotsna was forced to file an application under Section 144(2) of the Code of Criminal Procedure, which was registered as M.P. Case no. 1946 of 2009, before the Court of the learned Sub Divisional Magistrate (Executive) at Howrah.

6. It was also specifically averred that Jyotsna was ready and willing to perform her part of contract but Gouri was not willing to perform her part of contract. Hence, the suit.

7. Gouri resisted the suit by filing written statement wherein it was, *inter alia*, contended that suit is bad for mis-joinder of party and Ajit being unknown to Jyotsna and having no right, title and interest in the suit property was not a necessary party to the suit and suit was barred by limitation and the agreement dated 23.2.2008 was a void document and such agreement was not enforceable in law.

8. Ajit neither did enter his appearance nor did contest the suit by filing written statement or adducing evidence.

9. Record reveals that to substantiate her claim, Jyotsna deposed as PW-1 and one Bibhas Chandra Majumder deposed as PW-2 respectively and Jyotsna tendered some documents being the agreement for sale dated 23.2.2008, her income tax return for the financial years, 2008-09, 2009-

2010, 2015-16 & 2016-17, balance sheet of her physiotherapy centre and four bank passbooks which were marked as Ext.1 to 5.

10. On the other hand, to negate the claim, Gouri adduced her oral accounts and was examined as DW-1 and she submitted some documents being her letter dated 13.5.2008 along with its postal receipt, A/D card, envelop and bank pass book which were marked as Ext. A to E.

11. As has been stated earlier, the learned Court below upon scrutiny of pleadings and upon appreciation of evidence of either of the parties, decreed the suit and hence, Gouri has impugned the judgment and decree, *inter alia*, on the grounds that the learned Court erred in holding that the Gouri had withheld the documents although Jyotsna herself deposed that she had got information that Gouri acquired the title of the suit property and there was no material to show that Gouri had supplied the documents at the end of 2008 and that the learned Court erred in holding that time was not essence of contract and also failed to consider that Gouri had cancelled the agreement and requested Jyotsna to take back the advance money and Jyotsna had failed to prove her readiness and willingness to perform her part of contract.

12. Mr. Mitra, learned advocate appearing for Gouri submits that it was agreed that entire transaction will be concluded within a month of the agreement dated 23.2.2000 but Jyotsna, in spite of being requested on repeated occasions, did not take any step to perform her part of the contract i.e. to get herself ready with the rest amount of consideration money and to get the deed executed and registered and hence, on 13.5.2008, Gouri by

giving one letter requested Jyotsna to take back the advance money and Gouri determined the agreement for sale by a letter dated 15.09.2009 and also send an account payee cheque dated 14.09.2009 of Rs. 3 lakhs. Jyotsna, however, Jyotsna refused to accept the said letter and the cheque.

13. Drawing our attention to some part of the cross-examination of Jyotsna, he submits that Jyotsna herself deposed that even at the time of entering into such agreement, she was satisfied with the title of Gouri in respect of the suit property and hence, there was no question of supplying any document and Jyotsna herself deposed that she got information about the deed of gift dated 11.7.1994 and Gouri has only this document relating to her title and he asserted that Jyotsna was not ready and willing to perform her part of contract and consequently, she was not entitled to get any decree for specific performance of contract. Jyotsna ought to have been vigilant to enforce her right and could not have been lackadaisical in her approach. To buttress his argument, he placed his placed reliance upon two judgments delivered in the cases of *Shenbagam versus KK Rathinavel*, reported in 2022 (2) CHN (SC) and *Katta Sujatha Reddy versus Siddamsetty Infra Projects Private Limited and Others*, reported in 2022 SCC Online SC 1079.

14. *Per contra*, Mr Banerjee learned advocate appearing for Jyotsna referring to a relevant portion of the agreement for sale and to a relevant portion of affidavit-in-chief of DW-1, submitted that time was not essence of the contract and that Gouri herself deposed that even after issuing the letter dated 13.5.2008, she met Jyotsna with a request to execute and register the

deed. Gouri herself did not treat that the time was essence of the contract. He submitted that in affidavit-in-chief, Gouri had stated that relevant papers and deeds were handed over to Jyotsna prior to preparation and execution of agreement. He submitted that such statement itself speaks that documents had not been handed over to Jyotsna as per terms of the agreement and he asserted that those documents were handed over only in the end of 2008 and there was no cross-examination on this issue. He asserted that Gouri had no power to cancel the contract unilaterally. Gouri herself stated that at the relevant point of time, she was in need of money and now, she is not ready and willing to perform her part of contract.

15. Ajit appeared before this Court through his learned advocate and submitted that the agreement for sale was unregistered and hence, such agreement cannot be acted upon and in support of such contention, he placed reliance upon an unreported judgment of the Hon'ble Supreme Court passed in *Civil Appeal no. 6733 of 2022* and he asserted that Jyotsna was not ready and willing to get the deed of sale executed and registered within the time stipulated in the agreement and it would be proper to direct refund of advance money to Jyotsna and in support of his such contention, he referred to an unreported judgment of Hon'ble Supreme Court passed in *Civil Appeal no. 4943 of 2002*. Lastly, he submitted that he is in possession of the suit property for the last 25 years.

16. In reply, Mr. Banerjee submitted that Ajit was not a party to the agreement and he had no locus to make any submission regarding agreement and its enforcement.

17. Indisputably, Gouri happens to be owner of the suit property and on 23.02. 2008, she entered into an agreement for sale with Jyotsna to sell out the suit property at a consideration money of Rs. 12 lakhs and Gouri accepted Rs. 3 lakhs as advance. In the agreement it was stipulated that within one week, Gouri was required to hand over all the photostat copies of title deed of the suit property and then within a week from the date of receipt of such document, Jyotsna, the vendor was required to make necessary investigation for her satisfaction regarding title of the vendee.

18. The agreement for sale has not been happily drafted. In clause -3, it was stipulated that *'the Vendor/ 1<sup>st</sup> party after getting information from the purchaser for ready and willingness of her acquisition on payment of the rest consideration money shall be bound to make the Registration of the sale deed either in favour of the 2<sup>nd</sup> party or in favour of her nominated person or persons within 15 days of the date of communication made by the 2<sup>nd</sup> party regarding her readiness and willingness'*.

19. However, in clause 6 of the agreement, it was stipulated as follows:

*'That both the parties hereby declare they must be diligent to each other so that the transaction and/or registration be concluded within the stipulated period, as mention above, but in case if the Registration shall not completed and/or the entire transaction shall not be completed due to some bonafide reasons, in that case the period shall be extended and the time shall not be treated as the essence of contract.'*

20. Admittedly, on 13.5.2008, Gouri gave a letter to Jyotsna making the statement, *'agreement is void due to laptation (most probably, lapse) of time without proper reason intimated to me.'* Jyotsna filed the suit on 29.10.2009 stating that on several occasions, she requested Gouri to hand over the copy of the deed but she did not supply those documents and lastly, in the end of 2008, the same was handed over and she on repeated occasions requested Gouri to execute and register the deed but she did not do so and on 21.10.2009, Ajit with his men tried to erect boundary wall entrenching the suit property.

21. It needs to be first ascertained as to whether time was the essence of contract. In the agreement itself, it was stipulated that the time was not essence of the contract. General presumption is that in case of an agreement for sale, time is not the essence of contract. It is axiomatic that mere stipulation in a contract laying down the time for performance is not sufficient to make time the essence of a contract for sale of immovable property and a party cannot by his unilateral act make time the essence unless it is proved that other party had defaulted and/or delayed in the performance of his part of the contract and such delay is to be gross. Whether parties to a contract has made the time as essence of a contract shall be inferred from the nature of the contract and surrounding circumstances.

22. Section 55 of the Indian Contract Act enacts that when a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at

or before the specified time, the contract or so much of it, as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract and if it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such things at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

23. In the present case, although there was a prescription of some time to do certain things but the parties never intended that the time would be the essence of the contract and hence, in clause 6 of the agreement, it was stipulated that *'in case if the Registration shall not completed and/or the entire transaction shall not be completed due to some bonafide reasons, in that case the period shall be extended and the time shall not be treated as the essence of contract'*.

24. Gouri herself while giving deposition as DW-1 stated that even after 13.5.2008, she requested Jyotsna to get the deed executed and registered. So, Gouri extended the time for Jyotsna to perform her part of the contract. Such extension is permissible.

25. Section 63 of the Indian Contract Act provides that every promisee may extend time for the performance of the contract and it is well settled proposition that such agreement to extend the time need not necessarily be reduced to writing and may be proved by oral evidence and even by evidence of conduct including forbearance on the part of the other party.

26. Gouri raised one plea that Jyotsna was not ready and willing to perform her part of the contract. Section 16 (c) of Specific Relief Act, 1963 (hereinafter referred to as the Act of 1963) provides that specific performance of contract cannot be enforced in favour of a person 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.

27. So, plaintiff is to aver and prove that he was ready and willing to perform her part of the contract. Needless to note that such provision is mandatory and rigid and Court has no power to relax the rule and statutory requirement of pleading. Proof of readiness and willingness is not mere an empty formality and failure to prove that readiness and willingness disentitles the plaintiff to get the specific performance enforced. Readiness and willingness signify that plaintiff must be ready with necessary financial resources and must have mental attitude to perform his/her part of contract and plaintiff has to prove his continuous readiness to perform his part of contract. To infer whether plaintiff was ready and willing to perform his/her part of contract, conduct of the plaintiff, availability of consideration money and other attending circumstances have to be considered by the Court.

28. Here, in the given case, Jyotsna in her plaint averred that she was ready and willing and in course of trial she tendered her Income Tax Returns (hereinafter referred to as ITRs) to discharge her burden to prove that she was continuously ready and willing to perform her part of contract.

29. Now, let us to examine the ITRs of Jyotsna. In the ITR submitted for the assessment year of 2008-09, gross income of Jyotsna was shown as Rs. 1,86,950/-. In balance sheet of assets and liability as on 31.3.2008, cash at bank was shown as Rs. 25,585/- and cash in hand was shown as Rs. 4,221/- and net annual income for that year was shown to have been at Rs. 1,88,950/-. In the ITR of 2009-10, her gross income was shown to have been at Rs. 2,39,805/- and her assets were shown to have been of Rs. 5,87,393/-. Cash at bank was shown as Rs. 2,943/- and cash in hand was shown as Rs. 1568/-. In 2015-2016 and in 2016-2017, her gross income was shown to have been Rs. 3,96,305/- and Rs. 4,06,180/- respectively. So, Jyotsna, in our opinion, failed to prove that she had financial resources to pay the rest amount of consideration money being Rs. 9,00,000/-. The finding as regards Jyotsna's capacity to purchase the property, as arrived at by the learned Court below, does not stand supported with reasons. A mere statement that the exhibits have been considered can under no circumstances, be held to be a substitute for a legal proof and reason. From the said documents, we are unable to accept the contention of Mr. Banerjee that Jyostna had the financial resource and was ready with the entire money to purchase the property.

30. It has been strenuously argued by Mr. Banerjee that Gouri did not hand over the relevant papers and deeds to Jyotsna as per terms of the agreement and he asserted that those documents were handed over only at the end 2008 and that there was no cross-examination on this issue. We are unable to accept such argument, as advanced, since during cross

examination itself Jyotsna stated that she was residing just adjacent to the suit property and that she knew that the land was settled to Gouri by a patta dated 11.07.1994 and that the parties had discussed and deliberated about 2/3 months prior to execution of the agreement. Jyotsna also categorically stated that at that time she was satisfied with the title of Gouri in respect of the suit property. The entire deposition needs to be considered together and not in isolation. A particular clause cannot be taken up and highlighted. There is a conspicuous absence in the judgment impugned of any reference to such categoric statements made by Jyotsna in course of her cross-examination.

31. Proof of readiness is mandatory to get an order for enforcement of specific performance of contract. Since Jyotsna had failed to substantiate her claim that she was ready to perform her part of contract, we are unable to hold that Jyotsna is entitled to get the decree to enforce the specific performance of contract against Gouri.

32. Consequently, the appeal succeeds. Judgment and decree impugned are hereby set aside. Gouri is directed to pay back the advance money being Rs. 3 lakhs along with interest @ 6% p.a. accrued thereon for the period commencing from 23.2.2008 till the date of payment to Jyotsna.

33. It is clarified that any action or actions taken in the meantime based upon the judgment and decree impugned herein is declared to be null and void.

34. Jyotsna would be at liberty to take back the amount, if any, deposited in the learned Court below either in original or in execution proceeding and she shall be at liberty to get back the value of stamp duty if paid in the meantime.

35. Gouri would be at liberty to withdraw the amount, if any, deposited in this Court.

36. The appeal being FA 2 of 2022 and the application being CAN 3 of 2022 are, accordingly, disposed of.

37. Let a decree be drawn up, accordingly.

38. There shall, however, be no order as to costs.

39. Urgent Photostat copy of this judgment, if applied for, shall be granted to the parties as expeditiously as possible, upon compliance of all formalities.

**(Partha Sarathi Chatterjee, J.)**

**(Tapabrata Chakraborty, J.)**