

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

SECOND APPEAL NO. 507 OF 2013

1. Shri Gangadhar s/o Shamrao Khekare,
Aged about years, Occ. Agriculturist,
R/o Pandari, Tah. Saoner, Dist. Nagpur.
2. Smt. Saraswati w/o Nanaji Jogi
(Since Deceased through his legal heirs)
- 2(i) Shri Babarao s/o Nanaji Jogi
Aged about 38 years, Occ. Agriculturist,
R/o Pandari, Tah. Saoner, Dist. Nagpur.

... APPELLANTS

...VERSUS...

Shri Bhagwan s/o Narayan Kalamkar,
Aged about 37 years, Occ. Agriculturist,
R/o Silewara, Tah. Saoner, Dist. Nagpur.

...RESPONDENT

 Shri C.B. Dharmadhikari, Advocate for the appellants
 Shri R.L. Khapre, Senior Advocate Assisted by Shri S.K. Tambde, Advocate for
 the respondent

CORAM : SMT. M.S. JAWALKAR, J.
DATE OF RESERVING THE JUDGMENT : 28/07/2022
DATE OF PRONOUNCING THE JUDGMENT : 10/10/2022

Heard learned Counsel for the appellants and learned
 Counsel for the respondent.

2. Present appeal is filed by the appellants challenging the judgment and decree dated 26/02/2009 passed by the District Judge-4, Nagpur in Regular Civil Appeal No.329/1999 by that allowed the said appeal preferred by the plaintiff/respondent. The respondent challenged the judgment and decree dated 07/04/1999 passed by the learned Joint Civil Judge, Junior Division, Ramtek in Regular Civil Suit No.99/1989. This Court vide order dated 28/09/2016 framed following substantial question of law.

“Whether by virtue of acquisition of the suit property by the Central Government under the provisions of the Coal Bearing Areas (Acquisition and Development) Act, 1957, the decree passed for specific performance of contract becomes unexecutable?”

3. After hearing both the parties and at their request, additional substantial questions of law framed by me as follows:

- i) Whether time was the essence of contract?*
- ii) Whether plaintiff was ready and willing to perform his part of contract?*
- iii) Whether respondent is entitled for amount of compensation in lieu of specific performance of contract?*

4. The brief facts as per plaint can be summarized as under:

For the sake of convenience, parties are referred as per

their original status. The suit property is a field bearing survey No.33 admeasuring 2.83 hecteres of village Singori, Tah. Parsheoni, District Nagpur. It belongs to defendants. On 21/03/1986, the defendants entered into an agreement of sale, the suit property to the plaintiff for consideration of Rs.17,000/-. The plaintiff paid Rs.6,500/- to the defendants towards earnest money. Accordingly, the defendants executed written agreement on 21/03/1986. The defendants agreed to execute the sale-deed of the suit property upon receiving the balance of consideration of Rs.10,500/- before the Sub Registrar. He also agreed to sale the suit field free from all the encumbrances. It was contention of the plaintiff that though plaintiff was ready and willing to perform his part of contract but defendants avoided to execute the sale-deed. Ultimately, on 25/02/1989, the plaintiff issued notice to the defendants to execute the sale-deed. As defendants failed to execute the sale-deed, plaintiff filed suit for specific performance of contract and for the possession of the suit property. In alternative, the plaintiff claimed refund of earnest money with interest at the rate of 18% per annum.

5. Defendants filed their written statements. It is contention

of the defendants that the plaintiff used to advance loan and they were needed Rs.3,000/- for which plaintiff insisted for execution of agreement of sale by way of security. Therefore, the defendant nos.1 to 4 executed an agreement of sale of the suit field. The said agreement was not to be acted upon. It is further contention that defendants have repaid amount of Rs.1000/- with interest only amount of Rs.2000/- was left to be paid.

6. The learned Joint Civil Judge, Junior Division after considering the evidence on record and after hearing the parties, decreed the suit with costs and directed the refund of amount of Rs.6,500/- along with 8% interest per annum. Claim of specific performance came to be dismissed.

7. Being aggrieved by the judgment dismissing the suit for specific performance, plaintiff challenged the same by filing in Regular Civil Appeal No.329/1999. The said appeal came to be allowed and relief of specific performance was granted. The plaintiff was directed to pay Rs.10,500/- within one month. From the date of deposit of the amount by plaintiff, in case, failure of defendant to execute and register the sale-deed, plaintiff was

granted liberty to get it executed and registered by the appointment of Commissioner. This order is under challenge in this second appeal.

8. The learned Counsel for appellants submits that the learned Appellate Court has not framed any issues of readiness and willingness or whether time is essence of contract. It is his contention that even if, it is presumed that there was an agreement to sale, sale-deed has to be executed before 13 months from the date of agreement. As no sale-deed was executed, the learned Appellate Court ought to have held that the time was essence of contract and contract was cancelled. Moreover, even if, it is presumed that time was not of essence of contract, the plaintiff failed to prove that he was continuously ready and willing to perform his part of contract.

9. Learned Counsel for the appellants relied on following citations:

1) *Shenbagam and others Vs. K.K. Rathinavel reported in 2022 SCC OnLine SC 71*

2) *Saradamani Kandappan Vs. S. Rajalakshmi and others*

reported in (2011) 12 SCC 18

3) *Man Kaur (D) Thr. LRs. Vs. Hartar Singh Sangha reported in (2010) 10 SCC 512*

4) *V. Raveendran and others Vs. Capt. S.K. Joshua and others reported in 2014 SCC OnLine Mad 13069*

5) *Saurav Jain and Anr. Vs. M/s. A.B.P. Design and Anr. reported in 2021 SC 3673*

6) *M/s. Citadel Fine Pharmaceuticals Vs. M/s. Ramaniyam Real Estate P. Ltd. and another M/s. Ramaniyam Real Estate P. Ltd and Anr. Vs. M/s Citadel Fine Pharmaceuticals and Anr. reported in AIR 2011 SC 3351,*

10. The learned Senior Counsel Shri Khapre for the respondent vehemently opposed the contention of the appellants and submitted that even if the contract is frustrated, the plaintiff ought to have duly compensated by granting amount of compensation awarded in land acquisition matter. He further submitted that there is no challenge to the finding recorded by the learned Trial Court in respect of whether time is the essence of contract or whether plaintiff was ready and willing to perform his part of contract. As such he claimed for amount of compensation in

lieu of specific performance.

11. Learned Senior Counsel Shri Khapre for the respondent relied on following citations:

- 1) *Jagdish Singh Vs. Nattju Singh reported in AIR 1992 SC 1604*
- 2) *Urmila Devi and Ors. Vs. Deity, Mandir Shree Chamunda Devi Through Temple Commissioner and Ors. Reported in AIR 2018 SC 640*
- 3) *Banarsi and others Vs. Ram Phal reported in AIR 2003 SC 1989*
- 4) *Gomathinayagam Pillai and others Vs. Palaniswami Nagar reported in AIR 1967 SC 868*
- 5) *R. Lakshmikantham Vs. Devaraji reported in (2019) 8 SCC 62*
- 6) *Haren Krishnakumar Mehta Vs. Kamla Pribhdas Nebhanani reported in 2001 (2) Mh.L.J.*

12. The learned Trial Court held that appellants will become landless persons if suit is decreed and hence, the discretionary relief of specific performance was refused. During the pendency of

the first appeal before the learned District Court, the Notification came to be issued dated 25/01/2005 by the Ministry of Coal GOI under Section 4(1) of the Coal Bearing Areas (Acquisition and Development) Act, 1957 declaring the intention to prospect for Coal in the areas mentioned therein, wherein the suit property is included. This fact was not brought by either of the parties before the learned Appellate Court. Further, Notification under Section 7(1) of the aforesaid Act was issued on 30/09/2005 declaring the intention to acquire the land including suit property. Thereafter, Notification under Section 9(1) of the aforesaid Act was issued on 20/07/2006 declaring that the land has been acquired and is now vested with the Government. However as the learned Appellate Court was not aware of the fact of acquisition, the learned Appellate Court passed decree of specific performance. In view of this fact, it appears that this Court directed to appellants to place on record relevant Notifications. The Notification under Section 9(1) issued on 20/07/2006 reflects names of the appellants and respondent and plot number of appellants' land is 105/1 and that of respondent is 106 and 107 shown as acquired.

13. It also appears from record that this Court passed an

order on 18/12/2018 whereby the stay granted earlier in favour of appellants has been confirmed in Civil Application (CAS) No.1185/2013. The appellants herein deposited total amount of Rs.20,800/-i.e. Rs.6,500/- along with 8% interest per annum from 29/03/1989 to 29/09/2016 i.e Rs.14,300/-. In view of the subsequent development after filing of first appeal, this Court has framed the substantial question of law as mentioned earlier. In addition to that I have also framed three substantial questions of law as per request of parties.

14. I have heard both the sides at length. Admittedly, the subject matter of the suit is no longer in existence and the contract, if any, has been frustrated because of subsequent development and because of acquisition of the suit property. Thus, contract has been rendered unexecutable. **Thus, substantial question of law No.(i) is answered in the affirmative.**

15. Learned Counsel for appellants also submitted that though there is no counter claim in writing filed, the said points can be raised even orally. As such, learned Appellate Court ought to have discussed the points raised by the defendants in argument.

Learned Counsel in support of his contention submitted that he can raise counter claim for all the findings which are against him in appeal, at any point of time, even if decree is in his favour.

16. Learned Counsel for the appellants further relied on **V.**

Raveendran and others (supra) held as under:

“38. As held by the Hon’ble Supreme Court in the judgment reported in (1999) 7 SCC 435 in the case of *Ravinder Kumar Sharma V. State of Assam*, filing of cross objection, after the 1976 Amendment is purely optional and not mandatory and the pre-amendment law has been merely clarified by the 1976 Amendment and there is no change in the law after the amendment. Having regard to the facts of this case, the suit filed by the appellant was dismissed, though a finding was rendered holding that the appellant was ready and willing to perform his part of contract. Nevertheless, the trial court dismissed the suit holding that the 3rd defendant/ 3rd respondent was a bonafide purchaser for value and therefore, the appellant cannot claim the relief of specific performance as against the 3rd respondent and dismissed the suit. In the result, the suit filed by the appellant for specific performance was dismissed, though a finding was given in favour of the appellant holding that the appellant was ready and willing to perform his part of contract. In such circumstances, when the appellant challenged the decree denying the relief of specific performance, is it open to the respondents to contend that the finding in respect of readiness and willingness on the part of the appellant, decided against the defendant was erroneous, even though filing cross appeal and the answer is in the affirmative or the appellant as the

defendant/respondent is only supporting the decree and at the same time, attacking the finding and he is not attacking the decree.”

The learned Counsel for appellants also relied on **Saurav**

Jain and another (supra) held as under:

“Although, Trial Court passed decree in favour of defendant but it had decided against defendant on question of jurisdiction. Though defendant did not assail finding of Trial Court on issue of jurisdiction before High Court under O.41, R. 22 either by filing memorandum of cross-objection or otherwise-Defendant not precluded from raising said argument before Court- Court in view of its plenary jurisdiction under Articles 136 and 142 of Constitution of India - can entertain new grounds raised for first time if it involves question of law which does not require adducing additional evidence, specifically one concerning jurisdiction of the court.”

17. The learned Senior Counsel Shri Khapre submitted that there was no challenge to the finding recorded by the learned Trial Court. As such, they need not be gone into.

Learned Senior Counsel Shri Khapre, relied on **Banarsi and others** (supra), held as under:

“..... in an appeal filed by the defendant laying challenge to the relief of compensation or refund of money or any other relief while decree for specific performance was denied to the plaintiff, the plaintiff as a respondent cannot seek the relief of specific performance of contract or modification of the impugned decree except by filing an appeal of his

own or by taking cross-objection. Therefore in the absence of cross-appeal preferred or cross-objection taken by the plaintiff-respondent the First Appellate Court while dismissing defendants appeal did not have jurisdiction to modify the decree by decreeing plaintiff suit for specific relief.”

18. After going through the citations relied on, I have no hesitation to hold that the findings which are against the party in whose favour decree is passed, can be challenged at any stage. So far as reliance placed by learned Counsel for respondent on ***Banarsi and others*** (*supra*) is concerned wherein it is held that without filing appeal or cross objection decree of refund cannot be modified at instance of plaintiff, this is not a case of the respondent seeking specific performance without an appeal or cross-objection, but of the appellant challenging the grant of specific performance and therefore all facts are not attracted.

19. It is matter of record that the suit was partly allowed and the relief of refund was granted by the learned Trial Court. During the pendency of appeal, land came to be acquired by WCL. As such, practically it was not possible to execute the decree but this fact was not brought to the notice of learned Appellate Court and the learned Appellate Court passed the order of specific performance.

The said order passed after land is acquired by the WCL. As such on the date of acquisition, the position was that the relief of refund only could have been granted in favour of plaintiff and not the decree of specific performance. In view of this anomaly, this Court required to go in to the merits of the appeal, as well as in to question that if plaintiff would have succeeded in appeal what would be the effect.

20. Though the substantial question of law No.(i) is answered in the affirmative and it is held that decree is not executable, the appeal has to be decided on merits. The contention of the appellants is that the time was the essence of contract as there was date fixed in the agreement. It was agreed between the parties that the sale deed was to be executed by registered sale deed in respect of the suit property in favour of plaintiff within a period of 13 months from the date of agreement. The defendants also agreed to deliver the vacant possession of the suit property to the plaintiff on the date of execution and registration of the sale deed. As such, the time was expired in April 1987, in view thereof, the agreement stands cancelled.

21. I have gone through the judgment of both the Courts, depositions, rival contentions and agreement to sale. As per the agreement, the sale deed was to be registered by 13 months from the date of agreement to sale. However, there is no clause expressly giving consequences on failure to execute the sale deed within 13 months nor it is written specifically that time is essence of contract.

22. Learned Counsel for the appellants relied on ***Saradamani Kandappan*** (*supra*), in support of his contention, that time was essence of contract. The Hon'ble Apex Court reiterated the principles laid down in ***Chand Rani Vs. Kamal Rani*** in para 19 of the said judgment.

"The legal position is clear from the decision of a Constitution Bench of this court in Chand Rani v. Kamal Rani [1993 (1) SCC 519], wherein this court outlined the principle thus:

"19. It is a well-accepted principle that in the case of sale of immovable property, time is never regarded as the essence of the contract. In fact, there is a presumption against time being the essence of the contract. This principle is not in any way different from that obtainable in England. Under the law of equity which governs the rights of the parties in the case of specific performance of contract to sell real estate, law looks not at the letter but at the substance of the agreement. It has to be ascertained whether under the terms of the contract the parties named a specific time within which

completion was to take place, really and in substance it was intended that it should be completed within a reasonable time. An intention to make time the essence of the contract must be expressed in unequivocal language."

23. Learned Counsel for appellant also relied on ***M/s. Citadel Fine Pharmaceuticals*** (*supra*), however, the facts in the said matter are distinguishable from the facts in the present matter. In the said matter there was express stipulation in contract that time is of essence, there are also consequences of non performance within time also stipulated. As there was obligation to get permission for sale of part of suit land declared surplus was on the purchaser and as purchaser unable to get permission within time, it was held that vendor had very right to cancel the contract and raise defence that time was of essence. The recital in the agreement in present matter appears to be that sale deed has to be executed within 13 months. There are no consequences mentioned in the sale deed nor it is specifically mentioned that time is of essence.

24. As against this, learned Senior Advocate for respondent Shri R.L. Khapre submitted that it is a well accepted principle that in the case of sale of immovable property, time is never regarded as the essence of the contract, in fact, there is a presumption against

time being the essence of contract. Learned Counsel relied on ***Gomathinayagam Pillai*** (*supra*), in support of his contention wherein Hon'ble Apex Court laid down that time when essence of contract, it is held that fixation of period within which contract is to be performed does not make stipulation as to time essence of contract nor default clause in contract by itself evidences intention to make time of essence. Time is of essence if parties intend it to be so. Intention may be evidenced either by express stipulation or by circumstances which are sufficiently strong to displace ordinary presumption that in contract for sale of land stipulation as to time is not of essence.

25. Learned Counsel also relied on ***Haren Krishnakumar Mehta*** (*supra*), judgment by this Court wherein in the similar set of fact this Court held that:

“11. It is pertinent to note in this regard that nowhere in the written statement, the defendant alleged that the time was an essence of contract, nor does the agreement show that time was the essence of contract. Merely putting a date for execution of the agreement does not make the time as an essence of contract. The parties must specifically aver and plead and such stipulation must be there in the agreement itself, and since it is not in the agreement, nor there is any pleading about that, the contention of the defendant cannot

be accepted that the time is the essence of contract.”

26. The property involved is immovable property. As such in the case of sale of immovable property, time is never regarded as the essence of contract. Unless there is specific clause to that effect, consequences are given and it is specifically mentioned that time will be the essence of contract and parties are also intent to make time as essence of contract by express provision, it cannot be held as time is essence of contract. **As such the substantial question of law No.(ii) is answered in the negative.**

27. So far as readiness and willingness of plaintiff to perform his part of contract, the learned Counsel for appellants submitted that the agreement came to be executed on 21/03/1986. As per agreement, the sale deed to be executed within 13 months. Period of 13 months expired on April, 1987. The notice thereafter issued on 25/02/1989. Thereafter, suit came to be filed. There was alternative prayer for refund of earnest amount with interest which is quantified as Rs.10,000/-. The plaintiff totally failed to prove that he was continuously ready and willing to perform his part of contract.

28. Learned Counsel for appellants also relied on ***Saradamani Kandappan*** (supra), wherein principles laid down in K.S. Vaidyanathan are reiterated. Para 43 of the said judgment reads as under:

“43. Till the issue is considered in an appropriate case, we can only reiterate what has been suggested in K.S. Vidyanadam (supra) :

(i) The Courts, while exercising discretion in suits for specific performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps or for completion of the transaction, that must have some significance and therefore time/period prescribed cannot be ignored.

(ii) The Courts will apply greater scrutiny and strictness when considering whether the purchaser was 'ready and willing' to perform his part of the contract.

(iii) Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. The Courts will also 'frown' upon suits which are not filed immediately after the breach/refusal. The fact that limitation is three years does not mean a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The three year period is intended to assist purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in part performance, where equity shifts in favour of the purchaser.”

29. The learned Counsel for appellant also relied on ***Man Kaur*** (*supra*), wherein the Hon'ble Apex Court held that the assumption that readiness and willingness on the part of the plaintiff is something which need not be proved, if the plaintiff is able to establish that the defendant refused to execute the sale deed and thereby committed breach, is not correct. The Hon'ble Apex Court gave an example that when there is a contract for sale for a consideration of Rs.10,00,000/- and earnest money of Rs.1,00,000/- was paid and the vendor wrongly refuses to execute the sale deed unless the purchaser is ready to pay Rs.15,00,000/-. In such a case there is a clear breach by the defendant, but in that case if the plaintiff did not have any balance of Rs.9,00,000/- or the capacity to pay and arrange that money, when the contract had to be performed, the plaintiff will not be entitled to specific performance, even if he proves breach by the defendant, as he was not ready and willing to perform his obligation.

30. It is the case of defendants that it was a case of money lending and there was no such agreement to sale executed. Even if, it is presumed that the agreement of sale was executed, however, it is not pleaded or averred by the plaintiff that since, agreement to

sale executed, he was continuously ready and willing to perform his part of contract. Learned Counsel for appellants relied on ***Shenbagam and others*** (*supra*), in support of his contention that in a suit for specific performance, the plaintiff must allege and prove his readiness and willingness to perform the contract on his part from the date of the contract. The onus is on the plaintiff. It is pointed out that Section 16 (c) of the Specific Relief Act provide certain bars to the relief of specific performance. These include, *inter-alia*, 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. It is held in the above citation that it is the mandate of the statute that 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 and willingness to perform must be established throughout the relevant points of time. It is further held that the factum of readiness and willingness to perform the plaintiff's part of contract is to be adjudged with reference to the conduct of the party and the attending circumstances, whether the plaintiff was

ready and was always ready and willing to perform his part of the contract.

31. Learned counsel for respondent vehemently argued that the plaintiff was always ready and willing to perform his part of contract, however, the defendant was avoiding to perform his part of contract. Therefore, he was constrained to issue legal notice on 25/02/1989 and thereafter, he filed the suit. Merely, from delay in filing of suit, after accrual of cause of action cannot be inferred against plaintiff that he was not ready and willing to perform his part, if suit was filed within period of limitation. Relief of specific performance which is governed entirely by principles of equity in England, must be considered in India in light of the statutory framework to which it has been cast.

32. Heard both the learned Counsel on point of readiness and willingness admittedly, the agreement was executed on 21/03/1986. As per agreement, sale-deed was to be executed within 13 months, as such, 13 months period expired in April, 1987. Learned Counsel for appellant drawn my attention to the cross of plaintiff wherein he deposed that he sent notice through

Advocate Mandani. He further deposed that he had a visit to the defendant in 1986, 1987 and 1988, however, that was not mentioned in the notice. Therefore, copy of notice was referred to the plaintiff and it was exhibited as Exhibit 61.

33. Learned Counsel also pointed out the cross of defendants. The defendants specifically denied that he has sold 4 acres of land after the agreement is executed. It is also pointed out that in the whole cross, there is no suggestion that from the date of agreement within 13 months or thereafter, till issuance of notice on 25/02/1989, plaintiff met with the defendants and requested for execution of sale-deed. Specifically when in cross, the defendants suggested to the plaintiff that he never met with the defendants nor made any request till issuance of notice for execution of sale-deed. In absence of any proof that plaintiff met with the defendant during the period from the date of execution till issuance of notice, his continuous readiness and willingness is not established.

34. So far as judgment relied on by the learned Counsel for respondent i.e. ***R. Lakshmikantham*** (surpa) is concerned, the said judgment is distinguishable on the facts. In the said matter,

according to Clause 3 of the agreement, balance consideration would be paid within 3 months from the date of agreement, then respondent/defendant would execute sale-deed on payment of balance consideration. However, Clauses 5 and 8 of the agreement clearly shows that original title deeds which are with mortgagee had yet to be handed over and mortgage had yet to be redeemed. Thus after fulfilment of these Clauses, Clause 3 would be applicable. Thus in these facts and circumstances, it was held that merely from delay in filing of suit, after accrual of cause of action held, it cannot be inferred against plaintiff that he was not ready and willing to perform his part.

35. Learned Trial Court failed to appreciate this fact that there is nothing on record to show that the plaintiff was continuously ready and willing from 1986 till 25/02/1989 to perform his part of contract. The learned Appellate Court did not discussed this issue at all. Learned Appellate Court failed to appreciate this fact that defendants specifically denied that the plaintiff approached to the defendants for execution of sale-deed. The plaintiff was not brought anything on record to show that before expiry of period of 13 months as agreed in the agreement of sale, or thereafter till issuance of notice he has taken all the steps in

time. The learned Appellate Court failed to appreciate that learned Trial Court has wrongly observed that notice is issued at the end of expiry of 13 months. The learned Trial Court erred in holding that the defendants raised ground that plaintiff issued notice Exhibit 61 at the end of expiry of period of 13 months. In fact, in view of the agreement, it can be seen that sale-deed was to be executed from the date of agreement i.e. 21/03/1986 in 13 months period which expired in the month of April, 1987. Since 1987, 1988 and 1989, there is nothing on record to show that any attempts on the part of plaintiff is made to execute the sale-deed, the notice was issued on 25/02/1989 and not on the expiry of 13 months as observed by learned Trial Court. Moreover, if cross of plaintiff is perused, it has come on record that reply to his notice was given vide Exhibit 58 and as in the said reply, defendants refused to execute the sale-deed, they filed a suit. In view thereof, finding of Trial Court that defendants kept silent on receiving notice is erroneous finding by learned Trial Court. The learned Appellate Court has not at all considered the other issues about time is essence of contract or readiness and willingness as if the learned Trial Court recorded correct finding on those issues. It is the duty on the part of learned Appellate Court while sitting in appeal to see finding against all the

issues are rightly recorded by the learned Trial Court, specifically before granting relief of specific performance. The requirement of establishing readiness and willingness is a burden cast upon the plaintiff in light of the requirement of Section 16(c) of the Specific Reliefs Act, which mandates that the plaintiff must not only but also prove by leading cogent evidence acceptable to the Court his readiness and willingness. This can be done by establishing on record the availability of funds with the plaintiff, which could be demonstrated by production of his bank account or the Income Tax returns for the relevant period or a scheme available for financing the transaction. However nothing of this kind has been established on record. As such plaintiff failed to establish that he was continuously ready and willing to perform his part of contract. **Hence I answer substantial question of law No.(iii) in the negative.**

36. Learned Senior Counsel Shri Khapre, vehemently submitted that even though decree is not executable, he be awarded with compensation. He relied on citation in case of ***Jagdish Singh*** (*supra*) wherein the Hon'ble Apex Court held in paragraph no. 9 which reads as under:

“9. The second contention is, however, not without its interesting aspects. During the pendency of the second appeal, the properties were acquired by the

*State for a public purpose. This is not disputed. It would appear that a compensation of Rs. 4 lakhs or thereabouts has been determined. That sum, along with the generous solatium and the rates of interest provided by the statute would now be a much larger amount. Before the High Court, Appellant sought to rely upon the decision of this Court in **Piarey Lal v. Hori Lal**, [1977] 2 S.C.R. 915 (AIR 1977 SC 1226). That was a case where in proceedings of consolidation the subject-matter of an agreement to sell was allotted to a person other than the vendor, the relief of specific performance was held not to survive. The High Court rightly held that pronouncement was distinguishable and inapplicable to the present controversy. As to the relief available to a plaintiff where the subject matter was acquired during the pendency of a suit for specific-performance the High Court said:*

"...The learned counsel for the respondent has vehemently urged that after the land has been acquired its corpus has ceased to exist and no decree for specific performance can now be granted. In my opinion with the acquisition of the land plaintiffs rights do not get extinguished in totality. The appellate court always suitably mould the relief which the circumstances of the case may require or permit. The power in this regard is ample and wide enough..."

However, in the present case the property has not been totally lost. What happens in the case of the acquisition is that for the property compensation payable in lieu there of substituted..."

37. In case of **Urmila Devi and Ors.** (*supra*), the Hon'ble Apex Court in this matter directed to return the compensation to the extent of Rs.10,00,000/- to the appellants and rest of the amount

to the defendant nos.1 to 5 and decree was modified accordingly.

38. From the documents placed on record, it appears that the property of plaintiff and son of plaintiff is also acquired. They were paid with compensation and also received benefits of the resettlement and rehabilitation policy of Western Coalfield Limited. The appellants as well as respondent entered into an agreement with Western Coalfield Limited under Section 14 of the said Act. However, the fact is not brought to the notice of the learned Appellate Court about the acquisition.

39. There is one Civil Application bearing No.515/2020 for permission to amend second appeal and to add Western Coalfields Limited, Nagpur as necessary party respondent. An another Application No.520/2020 to amend Original Regular Civil Suit. In my considered opinion, the present application of addition of respondent in second appeal is not maintainable as it is filed by the respondent and not by the appellants. Moreover, the Western Coalfields Limited is not necessary party to this proceedings. As such, application by the respondent to add Western Coalfields Limited as a party is rejected.

40. So far as the permission to amend the suit is concerned, in view of Order 6 Rule 17 of the Code of Civil Procedure, application for amendment cannot be allowed after the trial has commenced, unless the Court comes to the conclusion that inspite of due diligence, the party could not have raised the matter before commencement of trial. Even if it is considered that amendment to Civil Procedure Code is prospective by this amendment, the respondent-plaintiff seeking amendment to add paragraph 5-A, i.e. the facts of acquisition of 2005. He wanted to insert paragraph 5-A by way of amendment. The judgment in Regular Civil Suit No.99/1989 passed on 07/04/1999 itself. Therefore, there can not be any question of inserting paragraph 5-A about the subsequent development which occurred in the year 2005. Those facts can be considered in pending appeal. As such the application is rejected.

41. In view of the judgment passed in *Jagdish Singh (supra)* and relied on *Urmila Devi (supra)*, it is held that when decree for specific performance of contract in question is found incapable of being executed due to acquisition of subject land, the decree shall stand suitably substituted by a decree for realization of compensation payable in lieu thereof as may be or have been determined under the relevant Act and the plaintiff shall have a

right to recover such compensation together with solatium and interest due thereon. The plaintiff shall have a right to recover it from the defendants, if the defendants have already realized this amount and in that event, the defendants shall be further liable to pay interest at the rate of 12% from the date of realization by him to the date of payment on the entire amount realized in respect of the disputed land. The Hon'ble Apex Court in the said matter in substitution of the decree for specific performance make a decree for compensation equivalent to the amount of land acquisition, compensation awarded for the suit land together with solatium and accrued interest less the sum of Rs.1,50,000/- which by a rough and ready estimate quantified by the Hon'ble Apex Court as the amount to be paid to the appellants in respect of his services, time and money expended in pursuing the legal claims for compensation. However, in view of the fact that I have answered substantial question No.(iii) in the negative. The decree granted for specific performance will not survive. Though, the judgment and decree is not executable in view of the acquisition, however, on merits also, the judgment and decree is not sustainable. As such, the judgment and decree passed by the learned Trial Court has to be confirmed. Accordingly I proceed to pass the following order:

ORDER

- i) The appeal is allowed.
- ii) The impugned judgment dated 26/02/2009 passed by the District Judge-4, Nagpur in Regular Civil Appeal No.329/1999 is hereby quashed and set aside.
- iii) The judgment and decree dated 07/04/1999 passed by the learned Joint Civil Judge, Junior Division, Ramtek in Regular Civil Suit No.99/1989 is hereby confirmed.
- iv) The decree be drawn accordingly.

42. At this stage, it is requested by the learned Counsel for the respondent that the amount of acquisition may not be permitted to withdraw. As such, the direction be issued to Western Coalfield Limited.

43. The learned Counsel for the appellant on instructions submits that the appellant will not withdraw the said amount of acquisition for four weeks, as such there is no necessity to issue any directions to the Western Coalfield Limited.

(Smt. M.S. Jawalkar, J.)

R.S. Sahare