

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Pronounced on: 10th April, 2023

+ CS(OS) 2248/2008 & I.A. 13053/2008

SHRIDHAR BAJAJ

S/o Late Shri Baij Nath Bajaj,
A-118, Ground Floor,
New Friends Colony,
New Delhi-110065

.....Plaintiff

Through: Mr. Rakesh Kumar, Sr. Advocate
with Mr. Vinod Kumar & Mr.
Shashank Sharma, Advocates.

versus

GYANESH CHAUDHARY

S/o Shri. Desh Raj Chaudhary,
24, Daryaganj,
Delhi

.....Defendant

Through: Mr. Vinayak Mehrotra, Advocate.

CORAM:

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G E M E N T

NEENA BANSAL KRISHNA, J.

1. The plaintiff has sought Specific Performance of Agreement to Sell dated 09.02.2006 in respect of the Property bearing D.S.I.D.C. Shed No. 83-84 situated at Okhla Industrial Area, Phase-II, Scheme-I, New Delhi-110020 (*hereinafter referred to as "the suit property"*) and Permanent Injunction for restraining defendant from creating third party rights in the suit property.
2. The facts in brief are that the plaintiff entered into an Agreement to Sell dated 09.02.2006 in respect of the suit property with the defendant for a total consideration of Rs. 1,24,00,000/-. The plaintiff paid a sum of Rs.

24,00,000/- through cash and cheque with the acknowledgement in the Agreement itself. **Clause 2** of the Agreement provided that the balance amount of Rs. 1,00,00,000/- would be paid by the plaintiff within 15 days of the registration of the Conveyance Deed in respect of suit property in the name of the defendant by Delhi State Industrial Development Corporation (*hereinafter referred to as "D.S.I.D.C."*) and the defendant shall deliver the vacant possession of the suit property to the plaintiff thereof.

3. **Clause 7 of the Agreement** provided that if the Conveyance Deed is not received from D.S.I.D.C by 30.04.2006, the Agreement shall be treated as cancelled and the first party (defendant) shall be entitled to the refund of entire amount. However, it is also stated that the Agreement may be extended at the discretion of the plaintiff herein. Further, **Clause 9 of the Agreement** provided that it is an irrevocable Agreement. The three clauses read as under:

"2. That the balance amount of Rs. 1,00,00,000/- (Rupees One Crore only) will be paid by the Second Party to the First Party after getting the Conveyance Deed in favour of the First Party of the said property and within 15 days of registered conveyance deed of the said property in favour of first party; and the First Party; will deliver the vacant physical possession of the said property to the Second Party at the time getting the final payment and execute the required documents in favour of the Second Party.

...

7. In case the offer from D.S.I.D.C is not received by the first party by 30.04.2006 then this agreement will be treated as cancelled and first party will refund the entire amount received from the second party to the second party within 7 days or the Agreement will be extended at the discretion of the second party.

...

9. That this Agreement is irrevocable and if any of the parties fails to complete the transaction, the aggrieved party shall get it enforced through court of law and the defaulting party shall be liable for all expenses, costs, incurred and damages suffered.”

4. Admittedly, on 30.04.2006, the parties mutually consented to extend the Agreement upto 30.06.2006. The plaintiff has claimed that the defendant on an erroneous interpretation of the Agreement, wrote a letter dated 06.07.2006 stating that since the Conveyance Deed from D.S.I.D.C. has not been received on 30.04.2006 and thereafter till 30.06.2006, the Agreement has come to an end in terms of the Clause 7 of the Agreement and the amount of Rs. 24,00,000/- was returned by way of Bank Pay Order.

5. The plaintiff on receipt of the said letter gave a Legal Notice through his counsel dated 12.07.2006 to the defendant stating that it was the discretion of the plaintiff to extend the time as per Clause 7 of the Agreement and the time stood extended to such time till the Conveyance became available to the defendant and that the plaintiff was ready and willing to complete the transaction as he had sufficient funds for completion of the transaction; time was not the essence of the Contract and that the refund of the amount was on false and frivolous assertions. The plaintiff called upon the defendant to complete the transaction, lest he would initiate legal proceedings for Specific Performance of the Agreement to Sell. The defendant reiterated vide letter dated 28.07.2006 asserting that the Agreement has come to an end as no Conveyance Deed has been received from D.S.I.D.C.

6. The plaintiff has claimed that the defendant has interpreted the Agreement incorrectly since Clause 7 provided for extension of the

Agreement by the plaintiff and Clause 9 specifically provided that the Agreement was irrevocable. The plaintiff till date has not encashed the Pay Orders.

7. It is asserted that the defendant has taken a false plea of D.S.I.D.C. not having given any Conveyance Deed; rather the defendant has become dishonest as he wants more money. The plaintiff has asserted that the damages can neither be computed in terms of money nor is it an adequate compensation for the failure on the part of the defendant to perform the Agreement. The plaintiff has thus sought Specific Performance of the Agreement dated 09.02.2006 and Permanent Injunction for restraining the defendant from selling, alienating, transferring, parting with possession or creating any third-party rights, by way of this suit.

8. **The defendant in his Written Statement** has admitted having entered into an Agreement dated 09.02.2006. It is explained that the sheds were made available by D.S.I.D.C. to various entrepreneurs on Hire-Purchase basis. However, the terms of Hire-Purchase Agreement could not be finalized by D.S.I.D.C., thought it continued to charge the monthly lease rent from the entrepreneurs with the understanding that the same would be adjusted against the cost of Hire-Purchase.

9. Eventually, D.S.I.D.C. made some offer of Hire-Purchase to the defendant, but like many other entrepreneurs, he did not accept the offer. Litigation was commenced under Public Premises (Eviction of Unauthorized Occupants) Act, 1971 which continued for more than a decade at various legal *fora*.

10. D.S.I.D.C. *vide* its Letter dated 27.07.2005 sought acceptance by 10.08.2005 of its offer given *vide* Letter dated 29.01.2004, so that thereafter

the dues statement could be made available to the allottees. The defendant accepted the offer *vide* Intimation Letter dated 10.08.2005 and requested D.S.I.D.C. to send the statement of account at the earliest. However, because of the background of the litigation and the manner it had culminated, there was uncertainty whether D.S.I.D.C. would agree to sell the suit property to the allottees. The defendant thus, entered into the Agreement to Sell with the plaintiff.

11. The defendant did not receive the offer from D.S.I.D.C. till 30.04.2006. Mutually, parties agreed to extend the Agreement till 30.6.2006 with an endorsement to that effect on the Agreement which was signed by both the parties. Even thereafter no offer was received from D.S.I.D.C. till 30.06.2006 and accordingly in terms of the Clause 7 of the Agreement, the defendant refunded the sum of Rs. 24,00,000/- by way of Pay Orders along with the Letter dated 06.07.2006 informing the plaintiff that the Agreement stood cancelled as final purchase offer from D.S.I.D.C. had not been received till 30.06.2006 and the plaintiff had also not exercised his discretion to extend the Agreement. The plaintiff responded through a Legal Notice dated 12.07.2006 incorrectly claiming that it was in the discretion of the plaintiff that time was extended till 30.06.2006, when in fact, it was extended by mutual consent of the parties. The defendant has denied that he ever made any representation to the plaintiff that the Conveyance Deed shall become available to him by 30.06.2006 after which the transaction may be completed. The defendant has further asserted that it was incorrectly claimed by the plaintiff that the time was not the essence of the Contract. Earlier too, on 30.04.2006 which was the date of expiry stipulated under Clause 7 of the Agreement, the plaintiff met the defendant and extended the date further till

30.06.2006, by mutual consent. The subsequent conduct of the parties makes it abundantly clear that time was the essence of Contract. The receipt of the Pay Order in the sum of Rs. 24,00,000/- has also been acknowledged by the plaintiff. Though in the Legal Notice dated 12.07.2006, the plaintiff had asserted that the Conveyance Deed may be executed and physical possession be handed over within 15 days of receipt of the reply failing which a Suit for Specific Performance of the Contract shall be filed against the defendant, but there is no explanation as to why the plaintiff continued to retain the Pay Order or not inform the defendant of his intention to not encash it. The plaintiff's conduct in retaining the Pay Order clearly conveys his acceptance of revocation of Agreement to Sell.

12. The defendant has further asserted that the Contract was a contingent Contract and the amount was liable to be refunded to the plaintiff in the event the terms of the Contract did not materialize within the fixed time. It is further asserted that since the Agreement was extended with the mutual consent of both the parties on the first occasion on 30.04.2006, the clause leaving the discretion to the plaintiff to extend the Agreement automatically stood rescinded and modified to the extent that the mutual consent of both the parties became necessary for further extension of the Agreement. It is claimed that even if it is assumed that the plaintiff had discretion to extend the Agreement, this should have been exercised by 30.06.2006 as was done before the earlier deadline, and on his failure to do so, the Agreement stood cancelled. The defendant became bound to refund money within 7 days according to terms of the Agreement, which was refunded by way of Pay Order to the plaintiff. This also reaffirms that time was the essence of the Agreement.

13. The defendant has also stated that on account of his strenuous and sustained efforts and various letters, D.S.I.D.C. ultimately sent a Letter dated 11.08.2006 in which it made a reference to the defendant's Letter dated 24.07.2006 addressed to the Chief Secretary, Government of N.C.T. of Delhi and the Chairman, D.S.I.D.C., and informed that the request of the allottees had been acceded to, meaning thereby that D.S.I.D.C. agreed to give the suit property to the allottees on their making one time full payment. The defendant *vide* his Letter dated 14.08.2006 informed D.S.I.D.C. about the co-allottees, namely, Shri B.K. Gupta, Smt. Chitra Chaudhry and Shri K.C. Bothra, having retired voluntarily from the partnership business and sought the transfer in his name *vide* Letter dated 14.08.2006. The request was accepted by the D.S.I.D.C. *vide* its Letter dated 22.08.2006. The total cost of suit property and the transfer charges was calculated as Rs. 73,38,096.38/- and after adjustments of various amounts, the total demand of Rs. 18,82,375.62/- was raised on the defendant. The defendant paid the entire amount by arranging the requisite amount through loan of Rs. 16,00,000/- by mortgaging the suit property from Jain Co-operative Bank Limited.

14. The defendant has asserted that it was not within the power of the defendant to get the Conveyance Deed executed within the period as mentioned in the Legal Notice, and infact, no Conveyance Deed till date has been executed in his favour by D.S.I.D.C. Irrespective of this, no further communication was received from the plaintiff after his Legal Notice, and the present Suit was filed by the plaintiff on 15.10.2008 i.e. after about 2½ years.

15. The defendant has further explained that during the period between 1983 and 2005, the defendant was consistently getting bulk orders for manufacturing electronic and electro-mechanical equipment for Indian Air Force. However, the defendant's business suddenly dried up from October, 2005 and did not foresee any improvement in future and on account of sheer frustration, the defendant decided to sell the suit property and entered into the Agreement with the plaintiff. However, the sluggishness of the business was a temporary phase and thereafter, the business again picked up. Since the plaintiff did not extend the Agreement after its expiry on 30.06.2006, it led the defendant to believe that the plaintiff has accepted that the Agreement no longer survived, and the defendant decided to retain the suit property. It is asserted that Specific Performance of the Agreement would now result in extreme hardship. Moreover, since the terms of the Contract were never complied with, the plaintiff is not entitled to any Decree of Specific Performance.

16. **The plaintiff in his Replication** has reaffirmed his assertions as contained in the Plaint.

17. **The issues were framed on 22.09.2009 which read as under:**

- “1. Whether the plaintiff proves that he was ready and willing to perform his part of the contract and continues to be so (to perform his part of the contract) dated 09.02.2006? OPP;*
- 2. Whether by reason of clause-9 of the agreement to sell dated 09.02.2006, the contract is irrevocable? OPP;*
- 3. Whether time was the essence to the contract, as claimed by the defendant? OPD.*

4. *Whether the contract between the parties cannot be enforced, as claimed for the reason that it was a contingent contract? OPD;*

5. *Whether the plaintiff is disentitled to any relief as he did not seek extension of the contract beyond the extended period i.e., 30.06.2006;*

6. *Is the plaintiff entitled to a decree for specific performance of the agreement to sell dated 09.02.2006? OPP;*

7. *Relief."*

18. **PW1/plaintiff** tendered his evidence by way of affidavit Ex. PW1/A. The Advance Receipt-cum-Agreement to Sell dated 09.02.2006 is Ex. PW1/1; endorsement of extension of time upto 30.04.2006 on the Agreement to Sell is Ex. PW1/2; the Letter dated 06.07.2006 of the defendant written to the plaintiff is Ex. PW1/3; Recall Notice dated 12.07.2006 is Ex. PW1/4 and the Reply dated 28.07.2006 is Ex. PW1/5. The testimony and the documents in detail shall be considered subsequently.

19. **DW1/defendant** tendered his evidence by way of affidavit i.e. Ex. DW1/A. The DW1 proved the Letter dated 27.07.2005 received from D.S.I.D.C. and his Letter of Acceptance dated 10.08.2005 are Ex. DW1/1 and Ex. DW1/2 respectively. The copy of the Letter dated 31st January, 2006, *vide* which part payment of Rs. 12,00,000/- by two cheques was made by the defendant is Ex. DW1/3. The endorsement of extension made by the plaintiff and the defendant on the Original Agreement is Ex. DW1/4. The Letter dated 08.05.2006 and 24.07.2006 written by the defendant to the Chairman, D.S.I.D.C. are Ex. DW1/5 and Ex. DW1/6 respectively. The Letter dated 24.07.2006 written by the defendant to the Chief Secretary,

Government of N.C.T. of Delhi is Ex. DW1/7. The testimony and the documents in detail shall be considered subsequently.

20. **Learned Senior Counsel on behalf of the plaintiff** has submitted that essentially the facts are not in dispute; no time was prescribed for concluding the Sale and in terms of Clause 4, all the formalities were to be fulfilled by the defendant. The Agreement could have been cancelled in accordance with Clause 7 only if D.S.I.D.C. refused to execute the ownership documents in favour of the defendant. Admittedly, the defendant has acquired ownership in the suit property and since the Contract never stood rescinded and was irrevocable in terms of Clause 9 of the Agreement where no time limit was prescribed for its execution, the plaintiff is entitled to the execution of the Sale Deed. It is further argued that the plaintiff by not encashing the Pay Order in the sum of Rs. 24,00,000/- clearly manifested his intention of not recalling the Agreement. Clause 7 of the Agreement was explicit in providing that the Agreement could be cancelled if the offer was not received from the D.S.I.D.C. Admittedly, the defendant has received the Conveyance Deed and has also been handed over the possession.

21. According to the terms of the Agreement, if any of the party failed to complete the transaction, the aggrieved party had a right to get it enforced through court of law and the defaulting party was liable for all expenses incurred and damages suffered.

22. It is further argued on behalf of the plaintiff that the time was not the essence of the Agreement to Sell and the same still subsists, giving the right to the plaintiff to seek a Decree for Specific Performance of the Agreement to Sell.

23. Learned Senior Counsel on behalf of the plaintiff has placed reliance on the decisions in Ferrodous Estates (Pvt) Ltd. vs. P. Gopirathnam (Dead) and Ors. 2020 SCC OnLine 825, Chandee Widyawati Vati Madden vs. Dr. C.L. Katial AIR 1964 SC 978, R.C. Chandiok & Anr. vs. Chuni Lal Sabharwal & Ors. (1970) 3 SCC 140, Ajit Parshaad Jain vs. N.K. Widhani&Ors. AIR 1990 Del 42, Vinod Singh vs. Phutori Devi(2006) 87 DRJ 567, Rattan Lal vs. S.N. Bhalla (2012) 8 SCC 659 and A. Kanthamani vs. Narseen Ahmed (2017) 4 SCC 654.

24. **Learned counsel on behalf of the defendant** has contended that the Agreement to Sell was extended till 30.06.2006 mutually by the parties by an endorsement made on the Agreement to Sell/Ex. PW1/1. In terms of the Agreement, since the Conveyance Deed was not forthcoming from D.S.I.D.C., the Contract stood rescinded as is evident from the conduct of the parties. The defendant immediately refunded the sum of Rs. 24,00,000/- on 06.07.2006 in terms of the Agreement to Sell *vide* Pay Order which was admittedly received by the plaintiff. The plaintiff thereafter did not express any readiness and willingness but merely claimed that the Sale Deed may be executed in his favour after the Conveyance Deed is received by the defendant from D.S.I.D.C. There is no equity in favour of the plaintiff in terms of the unamended Specific Relief Act, 1963.

25. It is further submitted that in terms of the Agreement, the payment had been returned to the plaintiff through Pay Order and was not aware of non-encashment of the Pay Order. The plaintiff maintained stoic silence after his Legal Notice and the present suit was filed after 28 months in 2008.

26. It is submitted that the plaintiff had sought re-validation of Pay Order during the trial, but the same was rejected *vide* Order dated 16.01.2019 in terms of Section 22 of the Specific Relief Act, 1963.

27. It is further argued that after the expiry of the Agreement on 30.06.2006 about which a definite Notice was given by the defendant, there was no renewal/extension of the Agreement by the plaintiff and the Agreement stood concluded on 30.06.2006. No Agreement to Sell survived thereafter for the plaintiff to claim its execution. Moreover, the plaintiff never ever made any enquiry about the execution of the Conveyance Deed by D.S.I.D.C in favour of the defendant. The plaintiff has also failed to show that he had the funds available or that he was ready and willing to perform his part of the Agreement. Moreover, the plaintiff has not sought any declaration that determination of Contract was bad in law. In the absence of any such declaration, the Suit for Specific Performance is not maintainable.

28. The fundamental requirements of specific performance of an Agreement to Sell as mentioned in Section 55 of the Specific Relief Act, 1963 have neither been pleaded nor proved; for which reason the Suit is liable to be dismissed.

29. Learned counsel on behalf of the defendant has placed reliance on the decisions in Om Prakash Aggarwal v. Raj Kumar Mittal 2019 SCC OnLine Del 7486, Mohinder Kaur v. Paul Singh (2019) 9 SCC 358, Dharampal Satyapal Ltd. v. Sanmati Trading and Investment Ltd. &Anr. judgement dated 16th January, 2020 in FAO(OS) 219/2016, Shenbagam&Ors. v. K.K.Rathinavel 2022 SCC OnLine SC 71, U.N. Krishnamurthy (since deceased) v. A.M. Krishnamurthy 2022 SCC OnLine SC 840 KattaSujatha Reddy &Anr. v. Siddamsetty Infra Projects Pvt. Ltd. &Ors. 2022 SCC

OnLine SC 1079 and KolliSatyanarayana (Dead) by LRs v. ValuripalliKesavaRaoChowdhary (Dead) through LRs &Ors. 2022 SCC OnLine SC 1306.

30. **Submissions heard. My issue-wise findings are as under:**

ISSUE NO. 1:

1. ***“Whether the plaintiff proves that he was ready and willing to perform his part of the contract and continues to be so (to perform his part of the contract) dated 09.02.2006?”***

31. The plaintiff has sought the relief Specific Performance of the Agreement to Sell dated 09.02.2006 Ex. P1.

32. The principles relating to specific performance contained in Sections 16(c), 20, 21, 22 and 23 of the Specific Relief Act, 1963 read with Forms 47/48 of Appendix A to C of the Code of Civil Procedure, 1908 were summarized by the Supreme Court in Kamal Kumar v. Premlata Joshi 2019 SCC OnLine SC 12 as under:

*“10. It is a settled principle of law that the grant of relief of specific performance is a discretionary and equitable relief. The material questions, which are required to be gone into for grant of the relief of specific performance, are **First**, whether there exists a valid and concluded contract between the parties for sale/purchase of the suit property; **Second**, whether the plaintiff has been ready and willing to perform his part of contract and whether he is still ready and willing to perform his part as mentioned in the contract; **Third**, whether the plaintiff has, in fact, performed his part of the contract and, if so, how and to what extent and in what manner he has performed and whether such performance was in conformity with the terms of the contract; **Fourth**, whether it will be equitable to grant the relief of specific performance to the plaintiff against the defendant in relation to suit property or it will cause any kind of hardship to the defendant and, if so, how and in what manner and the extent if such relief is eventually granted to the plaintiff; and **lastly**,*

whether the plaintiff is entitled for grant of any other alternative relief, namely, refund of earnest money etc. and, if so, on what grounds.

11. In our opinion, the aforementioned questions are part of the statutory requirements (See Sections 16 (c), 20, 21, 22, 23 of the Specific Relief Act, 1963 and the forms 47/48 of Appendix A to C of the Code of Civil Procedure). These requirements have to be properly pleaded by the parties in their respective pleadings and proved with the aid of evidence in accordance with law. It is only then the Court is entitled to exercise its discretion and accordingly grant or refuse the relief of specific performance depending upon the case made out by the parties on facts.”

33. Admittedly, there was a valid and concluded Agreement to Sell dated 09.02.2006 between the parties in respect of the suit property, which satisfies the first condition.

34. Section 16(c) of the Specific Relief Act, 1963, though does not require any specific phraseology, but it mandates that the plaintiff has to necessarily aver that he has performed or has always been willing and ready to perform his part of the Contract.

35. The **second** aspect which is of extreme significance is whether the plaintiff had been, and is still **ready and willing** to perform his part as mentioned in the Agreement. The extent and the manner in which the Agreement has been performed and whether it was in conformity with the terms of the Contract, needs to be further considered.

36. The legislature has chosen to use two phrases, namely *readiness* and *willingness*. The *readiness* indicates the financial capacity of the plaintiff to perform the Agreement, while the *willingness* indicates his state of mind. In so far as readiness is concerned, further question is required to be proved

through evidence that he had the financial capacity, as has been explained in the case of K.V. Balan (Dead) Through Legal Representatives v. Bhavyanath 2015 SCC OnLine Kel 298.

37. In Syed Dastagir v. T.R. Gopalakrishna Setty (1999) 6 SCC 337, the Apex Court while construing the connotation of readiness and willingness, observed that the compliance of “*Readiness and willingness has to be in spirit and substance and not in letter and form. So to insist for mechanical production of the exact words of a statute is to insist for the form rather than essence. So absence of form cannot dissolve an essence if already pleaded.*” It was also observed that the plea of readiness and willingness is not an expression of art and science, but an expression through words to place fact and law of one’s case for a relief. In order to gather true spirit behind a plea it should be read as a whole and to test whether the plaintiff has performed his obligations, one has to see the pith and substance of the plea. Unless statute “*specifically require a plea to be made in any particular form, it can be in any form. No specific phraseology or language is required to take such a plea.*”

38. In H.P. Pyarejan v. Dasappa (Dead) By L.Rs. &Ors. (2006) 2 SCC 496, the Apex Court observed that the plaintiff is required to prove continuous readiness and willingness from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment brings with it and leads to the inevitable dismissal of the Suit. In Motilal Jain v. Ramdasi Devi (2000) 6 SCC 420, the Apex Court had expounded the same principle that averments in the plaint must reflect the readiness and willingness on the part of the plaintiff.

39. The connotation of readiness in the context of Section 16 was explained in Raghunath Rai & Another v. Jageshwar Prashad Sharma (1999) 50 DRJ 751 that the intending purchaser need not produce the money or to vouch a concluded scheme for financing the transaction; it is sufficient for the purchaser to establish that he has the capacity to pay. The financial capacity has to be however, proved strictly and self-serving statements cannot discharge the burden of proving existence of financial capacity as noted by this Court in the case of Baldev. v. Bhule (2012) 132 DRJ 247.

40. Similar view has been expressed in M/s Hotz Industries Pvt. Ltd. v. Dr. Ravi Singh 2018 SCC OnLine Del7618 and Manhor Lal Khetrapal and Ors. v. Hari Chand and Ors. MANU/DE/2934/2018.

41. Mere establishing “readiness” in the plaint itself is not sufficient to meet the rigors of Section 16 of the Specific Relief Act, 1963. It has to be continuous as explained by the Apex Court in the case of N.P. Thirugnanam v. Dr. R. Jagan Mohan Rao (1995) 5 SCC 115, by stating that “***the continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance..... 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 willing to perform his part of the contract.”

42. In Aniglase Yohannan v. Ramlatha and Others (2005) 7 SCC 534, the Apex Court further observed that the court has to grant relief on the basis of the conduct of the persons seeking relief. If the pleadings manifest that the conduct of the plaintiff entitles him to get the relief on perusal of the plaint, he should not be denied the relief. The averments in the plaint as a whole must clearly indicate the readiness and the willingness. Section 16(c) of the Specific Relief Act, 1963 mandates the plaintiff not only to make averments in the plaint but also to establish fact by evidence *aliunde* about his readiness and willingness to perform the Contract.

43. In Man Kaur (Dead) By LRs. v. Hartar Singh Sangha (2010) 10 SCC 512, it was further qualified by the Supreme Court that even assuming that the defendant has committed breach, it is for the plaintiff to aver in the plaint and prove that he has always been ready and willing to perform the essential terms of the contract which required to be performed by him.

44. The Supreme Court in Madhukar Nivrutti Jagtap v. Pramila Bai Chandulal Parandekar 2019 SCC OnLine SC 1026 held that the requirement to prove readiness and willingness is not that the plaintiff should continuously approach the defendant with payment or make incessant requests for performance. The requirement of readiness and willingness of the plaintiff is not theoretical in nature but is essentially a question of fact which needs to be determined in reference to the pleadings and the evidence led by the parties.

45. Similar observations were made by the Apex Court in Bhavyanath v. K.V. Balan (Dead) Through Legal Representatives (2020) 11 SCC 790 where the Apex Court, while considering the financial capacity to pay the consideration, explained that the law is not that the plaintiff must prove that he has cash in his hand from the date of Agreement till the relevant date. But what is important to be proved is that he had the capacity to allow the deal to go through. Therefore, if the plaintiff is able to prove his assets which can be converted into cash either by sale or by loan, it is sufficient to prove the financial capacity of the plaintiff. Even if the plaintiff is able to establish that the defendant has refused to execute the Sale Deed and thereby committed a breach, is not sufficient to entitle him for specific performance unless he is also able to prove his own readiness and willingness.

46. In the recent judgment of U.N. Krishnamurthy (Since Deceased) v. A.M. Krishnamurthy 2022 SCC OnLine SC 840, the Apex Court has reiterated that in order to prove “readiness and willingness” to perform the obligation to pay money in terms of the contract, *the plaintiff would have to not only make the requisite averments in the plaint but also adduce evidence to show the availability of funds to make payment in terms of the contract.* The plaintiff would have to prove that he had sufficient funds or was in a position to raise funds in time to discharge his obligations under the contract. If he does not have sufficient funds with him to make the required payment of money, he would have to specifically show how the funds would be made available by him. Such readiness and willingness have to be proved all along till the decision of the Suit.

47. In view of the above discussed cases, the law of evidence of the parties may be considered.

48. The plaintiff has stated one line in his plaint and his affidavit of evidence Ex. PW1/A that he is ready and willing to perform his part of the Contract, but the same is not supported by any details as to whether he has the financial capacity or has sufficient means/money to pay the balance consideration amount.

49. The plaintiff, except a bald averment, has failed to substantiate his assertions or to prove the same with any evidence whatsoever. The only conclusion that can be drawn out is that there was no “readiness” on the part of the plaintiff to honour the Agreement to Sell.

50. The **other aspect** which needs consideration is whether or not the plaintiff was willing to perform his part of the Contract.

51. As already noted above, the ‘*willingness*’ is in reference to conduct, past and future, of the plaintiff.

52. It would be pertinent to refer to the affidavit of evidence of the plaintiff Ex. PW1/A, where he has deposed that the defendant had deliberately and intentionally delayed in getting the permissions form D.S.I.D.C for execution of Conveyance Deed with a view to avoiding the extension of the Agreement, but he has himself admitted in his cross-examination that after the termination of the Agreement on 30.06.2006, he did not write any letter seeking extension of the Agreement in terms of Clause 7 of the Agreement to Sell. The plaintiff has deposed that he had approached the defendant on 30.06.2006, but he was not found available in the factory. He has also claimed that he had visited the defendant after 30.06.2006 to state that he intended the Agreement to be extended but he has admitted that neither he wrote any letter nor gave any Notice to the defendant expressing his intention to extend the Agreement to Sell.

53. The defendant has categorically deposed that immediately after 30.06.2006 in accordance with the terms of the Agreement to Sell, he not only wrote a letter informing the plaintiff about termination of the Agreement, but also returned a sum of Rs. 24,00,000/- which he had received from the plaintiff.

54. The defendant has further deposed that a sum of Rs. 24,00,000/- had got debited from his account on preparation of the Pay Order. The defendant could not have possibly known about the non-encashment, especially unless he was informed by the plaintiff which he admittedly did not do.

55. Interestingly, the plaintiff himself has admitted in his cross-examination his intention to not continue with the Agreement and the same is also evident from the fact that despite having received Pay Orders along with Letter dated 06.07.2006 Ex. P3 from the defendant, he admittedly did not mention about non-encashment of the Pay Orders in his Legal Notice dated 12.07.2006 Ex PW 1/4. Had there been any intention on the part of the plaintiff to continue with the Agreement, there was nothing which prevented him from mentioning the same in his Legal Notice dated 12.07.2006 Ex PW 1/4. The very fact that there is no mention of extension of the Agreement reflects the conduct of the plaintiff that he had intention to extend the Agreement beyond 30.06.2006. In addition to this, it is the plaintiff's own admission in his cross-examination that he retained the Pay Order of Rs. 24,00,000/- even after sending the Legal Notice dated 12.07.2006/ Ex PW 1/4. This act of retaining the Pay Order lends no credibility to the intention of extending the Agreement that was expressed through Legal Notice dated 12.07.2006 and the testimony of the plaintiff.

56. Another significant admission made by the plaintiff in his cross-examination is that after receiving the Pay Orders in the sum of Rs. 24,00,000/- sent by the defendant, he went to meet the defendant who told him that as per the instructions of his wife, the suit property was not to be sold. According to the plaintiff himself, the defendant had claimed that he did not want to sell the suit property, though it is denied by the defendant in his testimony that the plaintiff ever met him after 30.06.2006. But even if this assertion of the plaintiff is accepted, it only conveys that he did not seek any further extension as the defendant also did not want to continue with the Agreement.

57. In the end, the cross-examination of the defendant to the effect that neither did he try to find out the status of the suit property nor did he make any enquiry from D.S.I.D.C as to whether the Sale Deed has been executed in favour of the defendant reflects his inaction and disinterest to continue with the Agreement to Sell. This fact was also admitted by the plaintiff in his cross-examination. The subsequent conduct of the plaintiff reaffirms that he had no intention to continue with the Agreement to Sell.

58. There is abundant evidence on record and the admissions made by the plaintiff himself to prove that he himself had no intention or willingness to continue with the Agreement.

59. It is thus proved that the plaintiff was neither willing nor ready for the execution of the Agreement to Sell, and for this reason, he did not seek any extension of the Contract beyond 30.06.2006 which disentitles him from seeking specific performance of the Agreement to Sell.

60. **The Issue No. 1 is decided against the plaintiff.**

ISSUE NOS. 3 & 5:

- “3. *Whether time was the essence to the contract, as claimed by the defendant?*”
- “5. *Whether the plaintiff is disentitled to any relief as he did not seek extension of the contract beyond the extended period i.e., 30.06.2006.*”

61. An objection has been taken by the defendant that the time as prescribed under the Agreement was the essence and since the plaintiff did not come forth till 30.06.2006 which was agreed to be the date for execution of the Agreement as was provided in Clause 7, the Agreement stood vitiated.

62. To appreciate this contention, it would be pertinent to reproduce the relevant clause of the Agreement to Sell Ex. P1 which is as under:

“Clause 7–

In case the offer from D.S.I.D.C is not received by the first party by 30.04.2006 then this agreement will be treated as cancelled and first party will refund the entire amount received from the second party to the second party within 7 days or the Agreement will be extended at the discretion of the second party.”

63. Before considering this contention on the facts of this case, it would be pertinent to consider whether the time principally, is the essence of an Agreement to Sell. In earlier days, Time for performance of Agreement to Sell was not considered as essence.

64. The Madras High Court in S.V. Sankaralinga Nadar v. P.T.S. Ratnaswami Nadar AIR 1952 Mad 389 observed that the time difference of six months that was agreed in the Agreement to Sell for execution of the Sale Deed may not amount to essence of Contract, but it must have some meaning. Not for nothing could such time-limit would have been prescribed. Neither can it be posted as a rule of law or rule of prudence where time is

not made the essence of Contract, all stipulations of time provided in the Contract would have no significance or meaning or that they are as good as non-existent. *All it means is that while exercising its discretion, the Court should also bear in mind that when the parties have prescribed certain limits for taking steps by one or the other party, it must have some significance and the time limits cannot be ignored altogether on the ground that the time has not been made the essence of the Contract where there is total inaction on the part of the plaintiff for two and a half years which itself is in clear violation of the terms of the Agreement which required him to do certain things, such delay along with other accompanying circumstances which would make it inequitable to grant the relief of Specific Performance, would become relevant in a case of Specific Performance.*

65. The logic as to why in earlier judgments, time was not being held as of essence in the Agreement to Sell, was given by the Apex Court in K.S. Vidyanadam and Others v. Vairavan (1997) 3 SCC 1, wherein it was observed that the Courts of India following certain early decisions of English Courts have held that in the Agreement to Sell, time is not an essence of the Contract unless specifically provided to that effect. However, the Court cannot be oblivious to the reality of the constant and continuous rise in the values of urban property fueled by the large-scale migration of the people from rural areas to urban centers and by inflation and thus, the rigor of rule evolved by the court that the time is not an essence of the Contract in the case of immoveable properties requires to be relaxed, if not modified, particularly in the case of urban immoveable properties.

66. It was further observed in K.S. Vidyanadam (supra) that there was total inaction on the part of the plaintiff for two and a half of years to

perform his part of the Agreement and such delay between the date of Agreement and the filing of the Suit would make it inequitable to grant the relief of Specific Performance to the plaintiff.

67. Similar explanation prevailed with the Apex Court in Saradamani Kandappan Kandappan v. S. Rajalakshmi and Others (2011) 12 SCC 18 where it was observed that the assumption for holding that time was not an essence for the grant of specific performance would not prejudice the vendor defendant financially as there would not be much difference in the market value of the property even if the Contract was performed after a few months. This principle made sense during the first half of the twentieth century, when there was comparatively very little inflation in India. The third quarter of the twentieth century saw a very slow but steady increase in prices. But a drastic change occurred from the beginning of the last quarter of the twentieth century. There has been a galloping inflation and prices of immovable properties have increased steeply by leaps and bounds. Market values of properties are no longer stable or steady. A judicial notice can be taken and, in such scenario, the readiness and the willingness on the part of the plaintiff. The conduct of delay, laches and prejudice has become relevant to ascertain if the time was the essence in the Agreement.

68. The change in the prevailing market scenario has brought a change in perspective as is reflected in Saradamani (supra) where the Apex Court observed that it may not be correct to say that the time is not the essence for performance of the Contract of an immovable property, but whether the time is an essence would depend upon the nature of delay and the terms of Agreement, especially the readiness and willingness of the plaintiff to execute the Agreement. It was observed that the time can be said to be the

essence where the purchaser does not take steps to complete the sale within the stipulated period and the vendor is not responsible for any delay. *The fact that there has been a steep rise in the price within the stipulated time would be a circumstance which may make it inequitable to grant the relief of specific performance.* Thus, time for performance as stipulated in the Agreement, may be assumed to be not material, or at all events be considered as merely indicating the reasonable period within which the Contract should be performed.

69. In Ferrodous Estates (Pvt.) Ltd. v. P. Gopirathnam (Dead) and Others 2020 SCC OnLine SC 825, the Supreme Court after referring to the aforesaid judgments observed that while exercising discretion in the Suit for Specific Performance, the Court must keep in mind the time/period prescribed by the parties for taking certain steps or for completion of the transaction which must be given significance and the prescribed time limits are not to be ignored.

70. The time frames for performance of Agreement to Sell has to be evaluated in conjunction with the conduct and intention of the parties in the context of surrounding circumstances and the prevailing market scenario. As observed in the case of Ferrodous (supra), the greatest scrutiny and strictness of readiness and willingness on the part of the plaintiff may be applied to ascertain the time-frames.

71. In this case, the Agreement provided the extended date of performance as 30.06.2006. The significant aspect is that after receipt of the letter dated 06.07.2006/Ex. PW1/3 from the defendant specifically indicating that since the Conveyance Deed had not been received from D.S.I.D.C on 30.06.2006 and the plaintiff had not extended the Contract

further, he was returning the money received by him under the Agreement and it has come to an end. In response thereto, the plaintiff sent the Legal Notice dated 12.07.2006/ Ex. PW1/4 claiming that the time stood extended under Clause 7 and called upon the defendant to complete the transaction within a period of 15 days, failing which the plaintiff shall institute a Suit for Specific Performance. The defendant *vide* Reply dated 28.07.2006/Ex. PW1/5 to the said Legal Notice dated 12.07.2006, reiterated that the Agreement had come to an end as the Conveyance Deed had not been finalized by the D.S.I.D.C.

72. The Agreement to Sell/ Ex. PW1/1 had stipulated in Clause 7 that if the offer from D.S.I.D.C was not received till 30.04.2006, then the Agreement were being treated as cancelled and the money shall be refunded by the second party within 7 days or unless the Agreement is extended at the discretion of the second party (plaintiff). Though the plaintiff had served the defendant with the Legal Notice dated 12.07.2006/ Ex PW 1/4 about the extension of the time for execution of the Conveyance Deed, but the conduct of the parties needs to be further considered to ascertain the true intention.

73. In the first instance, the Agreement was to get concluded on 30.04.2006 and admittedly, the Agreement was extended by mutual consent by both the parties on 30.04.2006 by making an endorsement Ex. PW1/2 on the Agreement to Sell/ Ex. PW1/1. No such extension was made either by the plaintiff or mutually after 30.06.2006. Nothing prevented the plaintiff to have sought extension or to make an endorsement to that effect before or upon expiry of the relevant date i.e., 30.06.2006. But no endeavour whatsoever was made by the plaintiff for extension of the date, the second time. There being no extension by the plaintiff or mutually by both the

parties as was done in the first instance, clearly reflects that there was no intention to further extend the Agreement by the plaintiff.

74. The conduct of the plaintiff after termination of the Contract further reinforces that the “time” in this particular case became an essence of the Contract since the plaintiff had no further intention of extension of the time.

75. The defendant on the other hand, on expiry of the date i.e., 30.06.2006 for the execution of the Sale Deed, immediately informed the plaintiff *vide* Letter dated 06.07.2006 Ex. P3 about the termination of the Agreement and also returned Rs. 24,00,000/- by way of Pay Orders in terms of Clause 7 of the Agreement. It is the defendant’s Letter dated 06.07.2006 which promoted the plaintiff to immediately resort to a Legal Notice dated 12.07.2006/ Ex. P4 asserting that the time stood extended and called upon the defendant to complete the transaction within a period of 15 days. The contents of the Legal Notice dated 12.07.2006/ Ex. P4 itself was merely an endeavour to meet the legal requirement of there being some expression of intention to continue in terms of Section 16 of the Specific Relief Act. The pre-requisite for performance of the Agreement was execution of the Sale Deed by D.S.I.D.C which did not happen till the contemplated date i.e., 30.06.2006 and there was no question of execution of Sale Deed by defendant in the circumstances. It is only to meet the legal requirement that perfunctory Legal Notice was sent without any genuine intention to continue with the Agreement.

76. This becomes evident as interestingly, the plaintiff has not referred to the contention of the defendant about non-execution of Conveyance Deed by D.S.I.D.C, but merely has stated that there is an extension of time under Clause 7 of the Agreement. Furthermore, even though Rs. 24,00,000/- that

had been paid by the plaintiff in part performance were returned by way of Pay Orders, the plaintiff has not uttered a word in respect of the Pay Orders in his Legal Notice. The plaintiff has failed to indicate whether he was encashing or refusing to accept the money. The consequence of the same was that the Pay Orders had been retained in his possession by the plaintiff. Though the plaintiff may not have encashed them, but he failed to so inform the defendant. The money has already been debited from the account of the defendant and he had no way to know that the Pay Orders have not been encashed. The only inference that could have been drawn by the defendant was that the return of money has been accepted by the plaintiff, and the Agreement to Sell stands concluded.

77. Further, the defendant in his evidence has explained that there was much litigation/ correspondence exchanged with D.S.I.D.C. for clarity on conferment of ownership rights in respect of suit property and uncertainty shrouded about acquisition of ownership rights. Therefore, the plaintiff, who was aware of uncertainty about the defendant ever being able to get ownership rights, insisted on insertion of Clause 7 fixing the deadline for concluding the Agreement. For this reason, the extension was made only for two months as plaintiff was not inclined to be bound with this transaction for a long time. Also, it was at his insistence that clause giving him unilateral right to extend the Agreement was inserted subsequently in writing instead of being typed in the main body. The circumstances coupled with the conduct of plaintiff and term of Agreement was explained by defendant lead to only one conclusion that once the offer from D.S.I.D.C. was not received till 30.06.2006, the plaintiff decided not to seek further extension and let the

Agreement lapse on account of uncertainty around the D.S.I.D.C. executing the Deed in favour of defendant.

78. The conduct of the plaintiff thereafter is equally significant to gather his intention. The plaintiff, despite being informed about the cancellation of Agreement immediately on expiry of stipulated time, maintained stoic silence for 28 months to institute the Suit on 06.10.2008. Though the Suit may have been filed within the period of limitation, but it is a case of total inaction on the part of the plaintiff for almost 28 months, which itself speaks of the intention of the plaintiff not to extend the Agreement beyond the stipulated time.

79. Similar facts as in hand came up for consideration in Atma Ram v. Charanjit Singh (2020) 3 SCC 311. After issuing a Legal Notice on 12.11.1996, the petitioner filed the Suit after the long delay of three years. The Supreme Court observed that there was no explanation forthcoming for such inordinate delay. The conduct of the plaintiff is very crucial in a Suit for Specific Performance. A person who issues a Legal Notice on 12.11.1996 claiming readiness and willingness, but institutes a Suit only on 13.10.1999 and that too only with a prayer for a mandatory injunction carrying a fixed court fee, would not be entitled to the discretionary relief of Specific Performance.

80. The timelines to be adhered by the parties and their intention to conclude the Agreement in a time bound manner, are circumscribed by their conduct. To grant a Decree for Specific Performance lies in the discretion of the Court which the Court may not exercise due to the conduct of the plaintiff, as observed by the Apex Court in Nirmala Anand v. Advent Corporation (P) Ltd., (2002) 8 SCC 146.

81. Similar observations were made in Zarina Siddiqui v. A. Ramalingam (2015) 1 SCC 705 that the equitable discretion to grant a relief for specific performance depends upon the conduct of the parties. Though efflux of time and escalation of price of the property by itself cannot be a valid ground to deny the relief of Specific Performance, but it is necessary on the part of the plaintiff to establish and prove the circumstances so that the discretion can be judiciously exercised in his favour.

82. In Ferrodous Estates (Pvt.) Ltd. (supra), it was observed that mere delay by itself without more, cannot be the sole factor to deny specific performance. The greater scrutiny and strictness of “*readiness and willingness*” on the part of the plaintiff may be applied to ascertain the time-frames.

83. The facts, as in hand, came up for consideration in Koli Satyanarayana (Dead) by LRs v. Valuripalli Kesava Rao Chowdary (Dead) through LRs & Ors. 2022 SCC OnLine SC 1306, wherein the Supreme Court observed that the defendant had communicated to the plaintiff on 12.04.1982 that since the requisite permission from the concerned authority could not be obtained, as the plaintiff cancelled the Agreement. The plaintiff, however, did not initiate any proceedings against the defendant. It was almost after a period of two years after the defendant gave the intimation about cancellation of their Agreement that the plaintiff chose to file the Suit. The learned Single Judge considered it relevant as the conduct of the plaintiff disentitling him from exercising discretion in favour of the plaintiff in the Suit for Specific Performance even though it had been filed within the period of limitation as prescribed for filing such Suit. This conclusion not only met with approval by the Division Bench of the High

Court, but was also upheld by the Apex Court which observed that despite being intimated about the cancellation of the Agreement, the plaintiff's conduct in not taking any action for more than two years, disentitled him from exercising discretion in his favour.

84. In Gulshan Kumar & Ors vs. Sat Narain Tulsian (Deceased) 206 (2014) DLT 443, reference was made to the observations of the Apex Court in K.S. Vidyanadam (supra) and Sardamani Kandappan vs. Rajalakshmi (2011) 12 SCC 18, that the courts frown upon Suits which are not filed immediately after breach/refusal and the fact that limitation is three years does not mean that a purchaser can wait for one year or two years to file a Suit and obtain specific performance. It was held that the three-year period is provided to assist the purchasers in special cases, where major part of the consideration has already been paid and possession delivered in part performance thereof.

85. Similarly, the defendant in the present case, was duly informed by the plaintiff about the cancellation of the Agreement to Sell on account of Conveyance Deed being not received by D.S.I.D.C by 30.06.2006 *vide* his Letter dated 06.07.2006/Ex. P3 despite which the plaintiff did not take any steps whatsoever, for more than 28 months before filing the Suit on 06.10.2008. Therefore, even though the present Suit has been filed within the limitation, there is an unexplained delay of more than 28 months which disentitles the plaintiff from exercise of discretion to grant the relief of Specific Performance to him.

86. It may, thus, be summed up that though time in given cases may not be an essence of Agreement to Sell, but herein the present case, since it was linked to getting a Conveyance Deed by 30.06.2006 which actually did not

happen, and further considering that the defendant cancelled the Agreement to Sell *vide* his Letter dated 06.07.2006/ Ex. P3 and also returned the amount of ₹24,00,000/- by way of Pay Orders which were not repudiated by the plaintiff, except that he sent a Legal Notice dated 12.07.2006 Ex. P4 claiming specific performance, but he remained silent about cancellation or return of money received by him by way of Pay Orders, clearly reflects that the time was treated as an essence in the Agreement to Sell which was cancelled on expiry of the stipulated time. Accordingly, the plaintiff was not entitled to seek extension of time beyond 30.06.2006.

87. Moreover, the plaintiff's conduct in not taking any concrete steps until about 28 months further corroborates not only that the Agreement to Sell stood cancelled on 30.06.2006 but also delayed action on the part of the plaintiff disentitles him to exercise discretion in his favour.

88. Reliance for coming to this conclusion, may be placed on the observations of Apex Court in Ramathal v. Maruthathal (2018) 18 SCC 303, that the specific performance is an equitable relief and granting relief is the discretion of the Court which has to be exercised judicially within the settled principles of law.

89. **Accordingly, the issue no. 3&5 are decided against the plaintiff.**

ISSUE NO. 2:

“2. Whether by reason of clause-9 of the Agreement to Sell dated 09.02.2006, the contract is irrevocable?”

90. The plaintiff has referred to Clause 9 of the Agreement to claim that this Agreement is irrevocable. Clause 9 of the Agreement to Sell reads as under:

“Clause 9–

That this Agreement is irrevocable and if any of the parties fails to complete the transaction, the aggrieved party shall get it enforced through court of law and the defaulting party shall be liable for all expenses, costs incurred and damages suffered.”

91. It is not doubt true that this Clause 9 of the Agreement to Sell provided that the Agreement would be irrevocable, but it was circumscribed by Clause 7 of the said Agreement which clearly provided that in case offer from D.S.I.D.C was not received by the first party by 30.04.2006, the Agreement shall be treated as cancelled and the first party i.e., the defendant shall refund the entire amount received under the Agreement. Clause 7 contained a condition precedent and unequivocally provided the circumstance when the Agreement shall be treated as cancelled. Since no offer was received from D.S.I.D.C till 30.06.2006, the defendant repudiated the Contract *vide* his Letter dated 06.07.2006/ Ex. P3 which was not seriously contested by the plaintiff who merely sent a Legal Notice dated 12.07.2006 Ex. P4 seeking specific performance of the Agreement. The requisite offer from D.S.I.D.C was a condition precedent and till such time the offer was received, the defendant would not have acquired any ownership right by virtue of which he could have executed the Sale Deed in favour of the plaintiff.

92. Clause 9 of the Agreement would have kicked in only if the permission had been received within the time frame after which neither party would have had any occasion to revoke the Agreement to Sell. Since the condition precedent, which was to get the Conveyance Deed from D.S.I.D.C was not fulfilled within the given time frame, Clause 9 would not

become applicable. Therefore, Clause 9 cannot be read *dehors* the other clauses of the Agreement and it is, therefore, held that Clause 9 did not make the Contract irrevocable under all circumstances.

93. **The Issue No.2 is decided against the plaintiff.**

ISSUE NO. 4:

“4. Whether the contract between the parties cannot be enforced, as claimed for the reason that it was a contingent contract?”

94. A preliminary objection has been taken on behalf of the defendant that the Agreement *inter se* the parties was a contingent contract and its performance was dependent on the receipt of the offer by the defendant from D.S.I.D.C by 30.06.2006 and in the absence thereof, the period for execution of the Sale Deed could not be extended by mutual consent beyond 30.06.2006.

95. The term “contingency” is defined in the **Concise Oxford English Dictionary, Indian Edition Revised Eleventh Edition** at Page 308, *as a future event or circumstance which is possible but cannot be predicted with certainty*. **Black’s Law Dictionary by Bryan A. Garner Eighth Edition** defines *contingent* at Page 338 as (1) an event may or may not occur, a possibility, (2) the condition of being dependent on chance; uncertainty. **Advanced Law Lexicon by P. Ramanatha Aiyar 3rd Edition** defines *contingency* at Page 1012 as (1) a situation in which may an event may or may not happen, (2) something that is liable, but not certain, to happen at some time in the future.

96. **Section 31 of the Indian Contract Act, 1872** defines the Contingent Contract as under:

“31. “Contingent Contract” defined.—A “contingent contract” is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen. —A “contingent contract” is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.” Illustration A contracts to pay to B Rs.10,000 if B’s house is burnt. This is a contingent contract. A contracts to pay to B Rs.10,000 if B’s house is burnt. This is a contingent contract.”

97. The contingency is thus, essentially based upon uncertainty, independent of the Contract of the parties. If the contingency occurs, the Contract may be affected as has been provided under Section 32 of the Indian Contract Act, 1872.

98. In the present case, as per Clause 7 of the Agreement to Sell Ex. PW 1/1, it was to be treated as cancelled in case no offer was received by the defendant from D.S.I.D.C by 30.04.2006 and the defendant was liable to refund the entire amount received from the plaintiff within 7 days unless the Agreement was extended by the second party in its discretion.

99. Admittedly, D.S.I.D.C had sent its offer on 27.07.2005 much prior to the execution of the Agreement, which was accepted by the defendant *vide* his Letter dated 10.08.2005. Since the offer was already received by the defendant at the time of execution of Agreement on 09.02.2006, it cannot be said that it was a contingent Contract dependent on some uncertain event. The execution of the offer to execute the conveyance deed may have been delayed, but this is not a situation where there existed no property or where there were no proprietary rights in the defendant. Mere delay cannot make any agreement as dependent on uncertain terms.

100. The offer of letter had already been received and it was the defendant who had to do the needful. Therefore, the execution of the requisite documents in favour of the defendant was not an uncertain event, but was well-defined with the only variable being the time. It cannot be said that it was a contingent Contract and, therefore, void as claimed by the defendant.

101. **The issue is decided against the defendant.**

ISSUE NO. 6:

“6. Is the plaintiff entitled to a decree for specific performance of the agreement to sell dated 09.02.2006? OPP”

102. Another aspect which has been argued by the defendant and needs consideration is that even though the defendant *vide* his Letter dated 06.07.2006/ Ex. P3 had cancelled the Agreement, but no relief for declaration that the cancellation of the Agreement to Sell by the defendant was void and illegal, has been sought by the plaintiff. Without first challenging the cancellation, no specific performance of the cancelled Agreement can be sought as has been held in I.S. Sikandar (Dead) By Lrs. & Ors. vs. K. Subramani & Ors. (2013) 15 SCC 27.

103. The plaintiff has failed to seek the relief of declaration that the termination of the cancellation of Agreement to Sell by the defendant was illegal and *non-est*. In the absence of any such prayer, the Suit filed by the plaintiff for grant of Decree of Specific Performance is not maintainable in law, for the simple reason, that a Decree for Specific Performance is sought in respect of the Agreement to Sell which has become non-existent pursuant to its cancellation. The plaintiff was, thus, required to seek a specific declaration in respect of the cancellation of the Agreement as void and in the

absence of the same, he cannot seek the specific performance of the Agreement to Sell.

104. Therefore, the Issue No. 6 is decided against the plaintiff.

ISSUE NO. 7:

“7. Relief.”

105. In view of the findings in Issue Nos. 1, 5 and 6, the present Suit of the plaintiff is hereby dismissed.

106. Litigation costs shall be borne by the plaintiff.

APRIL 10, 2023
S.Sharma/A.Sharma

(NEENA BANSAL KRISHNA)
JUDGE

