

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 91 OF 2022
WITH
INTERIM APPLICATION NO. 542 OF 2022
IN
SECOND APPEAL NO. 91 OF 2022

Keshav Mansing Salunkhe

Age : 42 Years, Occupation : Agri/Business,

Residing at Ghate Colony, Yashwantnagar, Wai

Tal. Wai, Dist. Satara

.. Appellant

Versus

Nitin Prabhakar Bhagawat

Age : 40 Years, Occupation : Business,

Residing at D-401, Thergaon,

Taluka Mulshi, District - Pune.

.. Respondent

...

Mr. Nikhil Wadikar a/w Ms. Aishwarya Jadhav i/b Mr. Nandu Pawar for the Appellant.

Mr. Prashant L. Rathod, for Respondent.

...

CORAM : SANDEEP V. MARNE J.

RESERVED ON : 31 JANUARY 2024.

PRONOUNCED ON : 12 FEBRUARY 2024.

JUDGMENT :-

1. This Second Appeal is filed challenging Judgment and Decree dated 30 November 2019 passed by the Adhoc District Judge-1, Satara dismissing the Regular Civil Appeal No.111/2016 and confirming the

Judgment and Decree dated 2 March 2016 passed by II Joint Civil Judge Senior Division, Satara in Special Civil Suit No.184 of 2014.

2. Briefly stated, facts of the case, as captured from the plaint, are that Defendant- Nitin Prabhakar Bhagwat is the owner of the Plot bearing No. 18 admeasuring 4658 sq.mtrs out of Survey No.25/1B situated at Village Kasbe Bai, Taluka Wai, District Satara (**the suit property**). Defendant decided to sell the suit property, Plaintiff approached the Defendant and in February 2012, discussion and negotiations took place between them and they agreed to execute Agreement for Sale. Plaintiff claims that it was agreed that the Sale deed was to be executed after carrying out the measurement and fixation of the boundaries by the Defendant, within 3 months from the date of execution of the Agreement for Sale. The Agreement for Sale was executed on 6 March 2012 and total consideration for the sale transaction was fixed at Rs.7,00,000/-. The Agreement for Sale was registered in the office of Sub-Registrar on 7 March 2012 and Plaintiff paid to the Defendant amount of Rs.6,00,000/- towards earnest money. The balance consideration of Rs.1,00,000/- was to be paid at the time of execution of the Sale Deed. It is Plaintiff's contention that he was always ready and willing to pay the balance consideration and to execute the sale deed provided Defendant got the plot measured and boundaries fixed. Plaintiff has stated in the plaint that he inquired through Mr. Jagtap and through telephonic conversations with the Defendant about execution of the Sale Deed. The Defendant sent Notice dated 24 April 2013 through his Advocate conveying that the sale transaction between them stood cancelled. The Plaintiff replied to the Notice on 6 May 2013 stating that Defendant himself has committed breach by not compiling with the conditions agreed and that the said Notice is illegal. The Plaintiff also called upon the Defendant to get the suit property measured and demarcated, to

remain present in the office of Registrar, Wai at 10:30 a.m. on 20 May 2013 and accept the balance consideration for completion of sale transaction. That Defendant paid no heed to the reply and that Plaintiff remained present in the office of Sub-Registrar from 10:30 a.m. to 6:00 p.m. in the office of Sub-Registrar, Wai on 20 May 2013. Plaintiff again sent Notice dated 10 September 2013 to the Defendant to remain present in the office of Sub-Registrar on 25 September 2013 at 10:30 a.m. and to execute the Sale deed by accepting the balance consideration, only if the Defendant has got the plot measured and its boundaries fixed. The said Notice was returned unserved with remark "Address Insufficient." Thereafter the Plaintiff came to know that Defendant was trying to create third party interests in the property. Plaintiff published public notice in the newspaper 'Sakal' on 26 September 2013.

3. Aggrieved by Defendant's refusal to perform his part of contract, the Plaintiff instituted Special Civil Suit No. 184 of 2014 for specific performance of Agreement for Sale dated 06 March 2012 registered on 07 March 2022. The Plaintiff also prayed in his plaint that Defendant be directed to get the plot measured and boundaries fixed and execute Sale deed by accepting balance consideration and not to create third party interest. Despite service of summons Defendant did not appear to defend the suit. The Plaintiff did not pray for refund of earnest money, compensation or damages for breach of contract. The Trial Court by its judgment and decree dated 2 March 2016 dismissed the Suit holding that Plaintiff was not ready and willing to perform his part of the contract and is therefore not entitled to relief of specific performance of the Agreement for Sale.

4. Aggrieved by the decree of the Trail Court, Plaintiff filed Regular Civil Appeal No. 111 of 2016 in the District Court. This time, Defendant

appeared and defended the appeal. This first Appellate Court also held that Plaintiff failed to establish that he was always ready and willing to perform his part of contract and by Judgment and Order dated 30 November 2019, dismissed the Appeal and confirmed the Decree of the Trial Court. Aggrieved by the Judgment and Order of the first Appellate Court, the Plaintiff has filed the present Second Appeal challenging the decisions of the Trial Court and the first Appellate Court.

5. By Order dated 19 June 2023, this Court admitted the Second Appeal on following substantial question of law:

“Whether the finding of the Trial Court as confirmed by the learned First Appellate Court that the Plaintiff has failed to prove his readiness and willingness is contrary to the evidence on record.”

6. I have heard Mr. Wadikar the learned counsel appearing for the Appellant. He would submit that Plaintiff had proved readiness and willingness to perform the contract before the Trial Court. That it was specifically agreed between the parties that Defendant was supposed to get the suit property measured as well as get the boundaries fixed before execution of the sale deed. That such an agreement can also be inferred on the basis of the fact that Plaintiff did not seek possession of the suit property despite paying more than 85% of the agreed amount of consideration. The possession was not obtained despite payment of substantial amount of consideration only because of non-measurement and non-fixation of boundaries of the suit property. That the suit property was thus not capable of being sold without first conducting the measurement and without fixation of boundaries. That mere absence of a covenant about measurement in the agreement does not mean that the parties did not agree on the condition of prior measurement and fixation of boundaries as pre-condition for execution of the sale deed. Mr. Wadikar would rely upon provisions of the Section 54 of the Indian Contract Act,

1872 in support of his contention of reciprocal promise made by Defendant and Plaintiff's promise to get the sale deed executed was dependent on the Defendant first fulfilling his own reciprocal promise. That the ball was thus in the Defendant's Court and since Defendant failed to get the land measured, there was no question of Plaintiff coming forward to get the sale deed executed. That in absence of written statement or defence on the part of Defendant, statements made in the pleadings must be accepted and that therefore agreement between the parties for measurement and fixation of boundaries as a pre-condition for execution of sale deed ought to have been treated as proved.

7. Mr. Wadikar would invite my attention to the finding recorded by the Trial Court that readiness on the part of the Plaintiff was proved. He would therefore submit that it is a settled position of law, that readiness is always backed by willingness. In support of his contention, he would rely on the Judgment of the Apex court in ***J. P. Builders and Ors. Vs. A. Ramadas Rao and Ors.***¹ Mr. Wadikar would further submit that time was not the essence of contract in the present case.

8. *Per contra*, Mr. Rathod the learned counsel appearing for Respondent would oppose the Appeal and support the concurrent findings recorded by the Trial Court and the First Appellate Court. According to Mr. Rathod in the light of concurrent findings recorded by both the Courts below, there is no reason for this Court to interfere in the present Appeal. That after considering the evidence on record it is proved that Plaintiff was never ready or willing to perform his part of the contract. That the agreement for sale does not refer to any oral discussion about measurement and fixation of boundaries and therefore something which is not provided for in the agreement cannot be read into the same.

¹ (2011) 1 SCC 429

Referring to the map attached to the agreement for sale, he would contend that the said map would indicate that the land was already measured and that therefore the condition for measurement of land and fixation of boundaries is nothing but a figment of imagination on the part of the Plaintiff which is rightly not mentioned in the agreement for sale. Inviting my attention the notice dated 25 April 2013, Mr. Rathod would submit that before addressing that notice, Plaintiff never showed willingness to get the sale deed executed in its favour. That Plaintiff wrote to the Defendant for the first time on 6 May 2013, which reply is not marked as exhibit and therefore cannot be read in evidence.

9. Mr. Rathod would submit that time was specifically made essence of contract in the present case. That in the agreement for sale, parties incorporated the condition about execution of sale deed prior to 6 July 2012 in handwriting which indicates deliberate incorporation of the said condition with clear understanding that the agreement for sale was to be cancelled in the event of non-execution of the sale deed by 6 July 2012. In support of his contentions Mr. Rathod would rely of judgment of the Apex Court in *Kolli Satyanarayana (Dead) By Lrs. v. Valuripalli Kesava Rao Chowdary (Dead) Thr. Lrs. and Others.*² and *I.S. Sikandar (D) By Lrs. v. K. Subramani & Ors*³. He would also rely upon judgment of the Andhra Pradesh High Court in *Komatireddy Buchi Reddy v. Pannala Narsimha Reddy @ Bal Reddy.*⁴

10. Rival contentions of the parties now fall for my consideration.

11. The short issue that arises for consideration in the present Appeal is about proof of readiness and willingness on the part of Plaintiff to perform his part of the contract. The question of law formulated by this

² 2022 (14) SCALE 124

³ (2013) 15 SCC 27

⁴ AIR Online 2011 AP 95

Court, in my view, hinges squarely on the issue as to whether time was or was not the essence of contract. Before I proceed to examine the law expounded by the Apex Court on the issue of time not being essence of contract relating to sale of immovable property, it would be first necessary to refer to the relevant clause in the agreement. Plaintiff and Defendant entered into registered agreement for sale dated 6 March 2012 by which Plaintiff agreed to purchase the suit property for consideration of Rs.7,00,000/-, out of which part consideration of Rs.6,00,000/- was paid on the date of execution of the agreement. Execution of the Agreement and payment of consideration has been proved before the Trial Court. The relevant clause of the Agreement reads thus:

"खरेदीपत्रावेळी जमिनीचा प्रत्यक्ष कब्जा देण्याचा आहे. या साठेखताचा व खरेदीपत्राचा खर्च लिहून घेणार यांनी करणेचा आहे. खरेदीपत्र आज पासून ३ महिन्यांचे आत देईन. (६/७/२०१२ पर्यंत)

मुदतीत मी तुम्हास योग्य व कायदेशीर असे खरेदीपत्र लिहून देत असता ते तुम्हीच करून घेतले नाहीतर हे साठेखत रद्द होईल.

मुदतीत मी तुम्हांस योग्य व कायदेशीर असे खरेदी दिली नाही. लिहून देण्याची टाळाटाळ केली तर तुम्ही या साठेखताचे आधारे कोर्ट मार्ग अनुसरून खर्चासह करून घ्यावे. त्याकामी होणारे खर्चास व परिणामास मी जबाबदार राहीन. तुम्हांस तोषीस लागू देणार नाही."

12. Perusal of the Agreement for sale would indicate that the condition of the execution of the sale deed within three months was incorporated in handwriting which is countersigned by both the parties. The said condition contemplated execution of sale deed within three months and upto 6 July 2012. The Agreement has been executed on 6 March 2012 and the same is registered on 7 March 2012. The Agreement provided that the sale deed was to be executed within three months. However, in the bracket it specifies the date of 6 July 2012. Here it appears that there is some inconsistency. In the Agreement is registered on 7 March 2012, the period of three months would come to an end on 6 June 2012. However, in bracket, the date of '6/7/2012' is mentioned. Thus "three months" cannot be treated as the time within which the sale deed was to be executed. The question is whether the date of '6 July

2012' is to be treated as invariable period after expiry of which the Agreement for Sale was to automatically come to an end.

13. The further covenant of the Agreement provided that the same was to be cancelled in the event of Defendant offering to execute sale deed within the time period and Plaintiff failing to get the same executed. On account of inconsistency in the period specified for performance of the contract, the issue is whether time can be said to be the essence of contract in the facts and circumstances of the present case. Second issue is of fact as to whether Defendant approached Plaintiff to get the sale deed executed within the specified time and if not, the exact effect of such conduct of Defendant.

14. It is trite law that in ordinary course, time cannot be treated as essence of contract pertaining to sale of immovable property. It would be apposite to refer to some of the decisions in this regard. The Constitution Bench of the Apex Court in ***Smt. Chand Rani (Dead) By Lrs. v. Smt. Kamal Rani (Dead) By Lrs.***⁵ has held that in case of immovable property, there is no presumption as to time being the essence of contract and that the inference is to be raised only from the express terms of the contract or nature of the property and surrounding circumstances. The Apex Court has held in para 24 and 28 as under:

“24. From an analysis of the above case law it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract the Court may infer that it is to be performed in a reasonable time if the conditions are:

- 1. from the express terms of the contract;*
- 2. from the nature of the property; and*
- 3. from the surrounding circumstances, for example: the object of making the contract.*

28. The analysis of evidence would also point out that the plaintiff was not willing to pay this amount unless vacant delivery of possession of one room

on the ground floor was given. In cross-examination it was deposed that since income-tax clearance certificate had not been obtained the sum of Rs. 98,000 was not paid. Unless the property was redeemed the payment would not be made. If this was the attitude it is clear that the plaintiff was insisting upon delivery of possession as a condition precedent for making this payment. The income-tax certificate was necessary only for completion of sale. We are unable to see how these obligations on the part of the defendant could be insisted upon for payment of Rs. 98,000. Therefore, we conclude that though as a general proposition of law time is not the essence of the contract in the case of a sale of immovable property yet the parties intended to make time as the essence under Clause (1) of the suit agreement. From this point of view, we are unable to see how the case in Nathulal (AIR 1970 SC 546) (Supra) could have any application to the facts of this case.”

15. In **K. S. Vidyanadam v. Vairavan**⁶ the Apex Court has reiterated the position that unless specifically provided to that effect, time is not the essence of contract in case of agreement for sale relating to immovable property. The Court as held in para 10, 11 and 14 as under:

“10. It has been consistently held by the courts in India, following certain early English decisions, that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically provided to that effect. The period of limitation prescribed by the Limitation Act for filing a suit is three years. From these two circumstances, it does not follow that any and every suit for specific performance of the agreement (which does not provide specifically that time is of the essence of the contract) should be decreed provided it is filed within the period of limitation notwithstanding the time limits stipulated in the agreement for doing one or the other thing by one or the other party. That would amount to saying that the time-limits prescribed by the parties in the agreement have no significance or value and that they mean nothing. Would it be reasonable to say that because time is not made the essence of the contract, the time-limit(s) specified in the agreement have no relevance and can be ignored with impunity? It would also mean denying the discretion vested in the court by both Sections 10 and 20. As held by a Constitution Bench of this court in Chand Rani v. Kamal Rani. [1993] 1 S.C.C. 519 : (1993 AIR SCW 1371), "it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract, the court may infer that it is to be performed in a reasonable time if the conditions are (evident)? : (1) From the express terms of the contract; (2) from the nature of the property; and (3) from the surrounding circumstances, for example, the object of making the contract". In other words, the court should look at all the relevant circumstances including the time-limit(s) specified in the agreement and determine whether its discretion to grant specific performance should be exercised. Now in the

case of urban properties in India, it is well-known that their prices have been going up sharply over the last few decades - particularly after 1973.

11. Indeed, we are inclined to think that the rigor of the rule evolved by courts that time is not of the essence of the contract in the case of immovable properties - evolved in times when prices and values were stable and inflation was unknown - requires to be relaxed, if not modified, particularly in the case of urban immovable properties. It is high time, we do so. learned Counsel for the plaintiff says that when the parties entered into the contract, they knew that prices are rising; hence, he says, rise in prices cannot be a ground for denying specific performance. May be, the parties knew of the said circumstance but they have also specified six months as the period within which the transaction should be completed. The said time-limit may no amount to making time the essence of the contract but it must yet have some meaning. Not for nothing could such time-limit would have been prescribed. Can it be stated as a rule of law or rule of prudence that where time is not made the essence of the contract, all stipulations of time provided in the contract have no significance or meaning or that they are as good as non-existent? All this only means that while exercising its discretion, the court should also bear in mind that when the parties prescribes certain time-limit(s) for taking steps by one or the other party, it must have some significance and that the said time-limit(s) cannot be ignored altogether on the ground that time has not been made the essence of the contract (relating to immovable properties).

14. We may reiterate that the true principle is the one stated by the Constitution Bench in Chand Rani, (1993 AIR SCW 1371). Even where time is not of the essence of the contract, the plaintiffs must perform his part of the contract within a reasonable time and reasonable time should be determined by looking at all the surrounding circumstances including the express terms of the contract and the nature of the property.”

16. In ***Shenbagam V/s. K. K. Rathinavel*** the Apex Court held in para 36 as under:

“36. True enough, generally speaking, time is not of the essence in an agreement for the sale of immovable property. In deciding whether to grant the remedy of specific performance, specifically in suits relating to sale of immovable property, the courts must be cognizant of the conduct of the parties, the escalation of the price of the suit property, and whether one party will unfairly benefit from the decree. The remedy provided must not cause injustice to a party, specifically when they are not at fault. In the present case, three decades have passed since the agreement to sell was entered into between the parties. The price of the suit property would undoubtedly have escalated. Given the blemished conduct of the respondent-plaintiff in indicating his willingness to perform the contract, we decline in any event to grant the remedy of specific performance of the contract. However, we order a refund of the consideration together with interest at 6% per annum.”

17. In ***Gaddipati Divija & Anr. v. Pathuri Samrajyam & Ors.*** Civil Appeal No. 4206 and 4207 of 2011 decided on 18 April 2023, the Apex Court as held in para 32, 35 and 36 as under:

“32. Before parting with the judgment, we would like to clarify another aspect, i.e., with regard to whether time is of the essence in the sale agreement in the present case or not. In Siddamsetty Infra Projects (P) Ltd. (supra), this Court was dealing with a similar question with respect to a sale agreement for an immovable property, while referring to an earlier judgment in Chand Rani v. Kamal Rani, it was reiterated that in sale of immovable property there is no presumption that time is the essence of the contract, however, the court may infer performance in a reasonable time if the conditions are evident from the express terms of the contract, from the nature of the property, and from the surrounding circumstances.

*35. Therefore, it can be deduced that unless the vendor got the subject land measured and demarcated within three months, it would be impossible for the purchaser (Respondent No. 1 herein/Plaintiff) to get a sale deed executed, and as such, the question of paying the balance sale consideration does not arise. This was also observed by the High Court while placing reliance on the recitals in the sale agreement coupled with the evidence of PW1 and PW2. Moreover, as has been held above, it is clear that the vendor (deceased G. Venugopala Rao) failed to perform his part of the obligations by getting the subject land measured and demarcated, while the purchaser (Respondent No. 1 herein/Plaintiff) was ever ready and willing to pay the balance consideration. As such, when specific performance of the terms of the contract has not been done, the question of time being the essence does not arise. In this way, the facts of the present case are distinguishable from that of ***Siddamsetty (supra)***, and the Appellants herein cannot claim that time was of the essence of the contract.*

36. In view of the above, we are of the considered opinion that the High Court was justified in allowing the appeal and decreeing the suit for specific performance filed by Respondent No. 1 herein. The findings of the High Court are hereby upheld. The present appeals, in our view, have no merit and are liable to be dismissed.”

18. It would also be relevant to refer to some of decisions of this Court. In ***Smt. Swarnam Ramachandran & Anr. v. Aravacode Chakungal Jayapalan***⁸ Division Bench of this Court held in para 14 as under:

“14. The law on the point is well settled. Ordinarily, time is not the essence of a contract for the sale of immovable property. The parties, in a given case, may make time of the essence either expressly in terms which unmistakably provide unmistakably that they intended to do so. Alternately, making of time as the essence of a contract may be inferred from the nature of the contract, the property or the surrounding circumstances. A mere stipulation in a contract laying down the time for performance is not sufficient to make time the essence of a contract for sale of immovable property. A party to a contract cannot by his unilateral act make time of the essence unless the circumstances are such as would establish that the other party to the contract had delayed or defaulted in the performance of his obligations under the agreement.”

19. In ***Girish Vinodchandra Dhruva v. Neena Paresh Shah***⁹ the Single Judge of this Court (Anuja Prabhudesai, J.) as analyzed various decisions on the subject and as held in para 43 to 49 as under:

“43. It is true that in case of specific performance of contract relating to immovable properties, time is normally not considered as an essence of the contract. But this is not an absolute proposition as the same is subject to several exceptions and would largely depend on the intention of the parties. In the instant case, as noted above, the suit flat was too small to accommodate the large family of the original Defendant. There was pressing need to acquire separate premises for her sons. This being the case, non-payment of the balance sale consideration and non-completion of sale transaction within the stipulated time would frustrate the very purpose of sale.

44. It is also pertinent to note that there was no denial of the statement of the Defendant that time was the essence of the contract. In fact, the Plaintiffs have averred that they were ready and willing to perform the contract within the stipulated time. The pleadings indicate that the Plaintiffs also considered time to be the essence of the contract. These facts and circumstances coupled with express and other implied stipulations in the agreement disclose an intention to make time the essence of the contract, which displaces the general presumption in this regard.

45. As regards the question pertaining to readiness and willingness, it may be mentioned that Section 16(c) of the Specific Relief Act, as it stood prior to 2018 amendment, stipulated that specific performance of a contract cannot be enforced in favour of a person, who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract, which are to be performed by him. In other words, Section 16(c) of the Specific Relief Act mandates readiness and willingness on the part of the Plaintiffs as a condition precedent to seek specific performance.

46. In Katta Sujatha Reddy and another v/s. Siddamsetty Infra Projects Pvt. Ltd. (AIR 2022 SC 5435) and others, a three-Judge Bench judgment of the Apex Court has held that 2018 amendment is prospective in nature and cannot apply to those transactions that took place prior to its enforcement. In the present

case, the matter dates back to the year 2005 and hence, Section 16(c), as it stood prior to the 2018 amendment, would be applicable. As a consequence thereof, the Plaintiffs were required to plead and prove that they had performed or had always been ready and willing to perform the essential terms of the contract which were to be performed by him.

47. In *Shenbagam (supra)*, the Apex Court has observed as under :-

" 14. Section 16 of the Specific Relief Act provides 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, other than terms the performance of which has been prevented and waived by the defendant. In *JP Builders v. A Ramdas Rao*, (2011) 1 SCC 429 : (AIR 2011 SC (Civ) 230), a two-judge Bench of this Court observed that Section 16(c) mandates 'readiness willingness' of the plaintiff and is a condition precedent to obtain the relief of specific performance. The Court held:

"25. Section 16(c) of the Specific Relief Act, 1963 mandates 'readiness and willingness' on the part of the plaintiff and it is a condition precedent for obtaining relief of grant of specific performance. It is also clear that in a suit for specific performance, the plaintiff must allege and prove a continuous 'readiness and willingness' to perform the contract on his part from the date of the contract. The onus is on the plaintiff. [...]"

27. It is settled law that even in the absence of specific plea by the opposite party, it is the mandate of the statute that the 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 to perform must be established throughout the relevant points of time. "Readiness and willingness" to perform the part of the contract has to be determined/ascertained from the conduct of the parties." (emphasis supplied)

The Court further observed that 'readiness' refers to the financial capacity and 'willingness' refers to the conduct of the plaintiff wanting the performance.

15. Similarly, in *His Holiness Acharya Swami Ganesh Dassji v. Sita Ram Thapar*, (1996) 4 SCC 526 : (AIR 1996 SC 2095), a two-Judge Bench of this Court observed that 'readiness' means the capacity of the plaintiff to perform the contract which would include the financial position to pay the purchase price. To ascertain 'willingness', the conduct of the plaintiff has to be properly scrutinised. The Court noted:

"2. There is a distinction between readiness to perform the contract and willingness to perform the contract. By readiness may be meant the capacity of the plaintiff to perform the contract

which includes his financial position to pay the purchase price. For determining his willingness to perform his part of the contract, the conduct has to be properly scrutinised.

[...] the factum of readiness and willingness to perform the plaintiff's part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract. The facts of this case would amply demonstrate that the petitioner/plaintiff was not ready nor had the capacity to perform is part of the contract as he had no financial capacity to pay the consideration in cash as contracted and intended to bide for the time which disentitles him as time is of the essence of the contract." (emphasis supplied).

16. The precedents of this Court indicate that the plaintiff must establish that he was 'ready and willing' to perform the contract. In this regard, the conduct of the plaintiff must be consistent."

48. *In U.N. Krishnamurthy (supra), the Hon'ble Supreme Court has observed that :-*

"25. To aver and prove readiness and willingness to perform an obligation to pay money, in terms of a contract, the plaintiff would have to make specific statements in the plaint and adduce evidence to show availability of funds to make payment in terms of the contract in time. In other words, the plaintiff would have to plead that the plaintiff had sufficient funds or was in a position to raise funds in time to discharge his obligation under the contract. If the plaintiff does not have sufficient funds with him to discharge his obligations in terms of a contract, which requires payment of money, the plaintiff would have to specifically plead how the funds would be available to him. To cite an example, the plaintiff may aver and prove, by adducing evidence, an arrangement with a financier for disbursement of adequate funds for timely compliance with the terms and conditions of a contract involving payment of money. "

49. *In P. Daivasigamani (supra), the Apex Court referred to the decision in Sayed Dastagir v/s. T.R. Gopalakrishna Setty (1999) 6 SCC 337 (AIR 1999 SC 3029) and Sukhbir Singh v/s. Brijpal Singh (1997) 2 SCC 200 : (AIR 1996 SC 2510) and reiterated that readiness and willingness are not one, but two separate elements. Readiness means the capacity of the Plaintiff to perform the contract which would include the financial position to pay the purchase price. It is not a condition that the Plaintiffs should carry cash with them but it is sufficient to establish that they have the capacity to pay. Whereas, willingness refers to the intention of the Plaintiff as a purchaser to perform his part of the contract. Willingness is inferred by scrutinizing the conduct of the Plaintiff/purchaser, including attending circumstances. It is reiterated that compliance of readiness and willingness has to be in spirit and substance and not in letter and form."*

20. I must take into consideration, the Judgment of the Apex Court relied upon by Mr. Rathod in ***Kolli Satyanarayana (Dead) By LRS.*** (supra) in which the Apex Court has held in para 12 as under:

“12. In the case of K. S. Vidyanadam and Others v. Vairavan, this Court has held that the court should look at all the relevant circumstances including the time limit(s) specified in the agreement and determine whether its discretion to grant specific performance should be exercised. It has been held that in case of urban properties, the prices have been rising sharply. It has been held that while exercising its discretion, the court should bear in mind that when the parties prescribe certain time limit(s) for taking steps by one or the other party, it must have some significance and that the said time limit(s) cannot be ignored altogether on the ground that time is not the essence of the contract.”

21. Thus the settled position of law, as is evident from various judgments referred above, is that in case of specific performance of contract relating to immovable properties, time is normally not considered as essence of contract. Of course, when expressly provided for in the agreement, time can be treated as essence of contract. The court can look into the factual position and decide whether the discretionary relief of specific performance can be granted in the facts of the case. Court needs to take into consideration the factor of escalation of price of the property while exercising the discretion.

22. It is sought contended on behalf of the Defendant that time has expressly been made essence of contract by parties by incorporating a specific stipulation to complete the sale transaction within three months. However as observed above, there is inconsistency in that clause as period of 'three months' does not match with the date of '6 July 2012'. It is therefore difficult to hold that parties agreed that on expiry of period of three months or after 6 July 2012, the agreement for sale was to automatically come to an end.

23. There is yet another factor worth consideration. After specifying the time limit of three months or the date of 6 July 2012, parties agreed that if Defendant showed willingness to execute sale deed within time limit and Plaintiff failed to get the same executed, the Agreement for Sale was to be treated as cancelled. In the instant case admittedly, Defendant did not write to the Plaintiff even once either during three months or before 6 July 2012 calling upon Plaintiff to get the sale deed executed. Being conscious of the stipulation in the Agreement, Defendant took a specific stand in the notice dated 25 April 2013 that he contacted Plaintiff from time to time during three months and called him upon to get the sale deed executed. The said statement was denied by Plaintiff's reply dated 13 May 2013. Defendant's assertion in the notice has not been proved either on the basis of any documentary evidence or even from oral depositions. As observed above, Defendant did not file written statement nor led evidence. The Agreement thus mandated Defendant to take some steps for execution of the sale deed and the Defendant failed to prove before the Trial Court that he approached Plaintiff within three months or before 6 July 2012 for execution of sale deed. In absence of any evidence being led by Defendant that he approached Plaintiff to get the sale deed executed within three months or before 6 July 2012, it is difficult to hold that Plaintiff showed disinclination at any point of time to get the sale deed executed.

24. Plaintiff has pleaded in the plaint as well as given evidence about alleged oral agreement for measurement of land and fixation of boundaries as a pre-condition of execution for sale deed. True it is that the said condition is not to be found in the agreement for sale. However Defendant neither filed written statement nor led evidence to deny the said assertion of Plaintiff. However, at the same time, I am not inclined to hold that measurement of land and fixation of boundaries was a

mandatory pre-condition for execution of sale deed in the facts and circumstances of the present case, where the suit plot appears to be forming part of a layout, with the layout plan being appended to the agreement for sale.

25. It is also required to be borne in mind Plaintiff cannot be accused of delaying the execution of sale deed for indefinite period of time. Plaintiff was ready and willing to execute the sale deed and called upon the Defendant to remain present in the Sub Registrar Office on 20 May 2012 for execution of the sale deed. The time gap between 6 July 2012 and 20 May 2013 is not too long. Applying the ratio of various decisions discussed above, it cannot be said that the Defendant was put to any substantial loss because of willingness expressed by Plaintiff to have the sale deed executed on 20 May 2013. Defendant was paid more than 85% of the agreed amount of consideration. Defendant did not return the same to the Plaintiff nor expressed willingness to refund the same in his notice dated 25 April 2013. The conduct of the Defendant shows intention to indulge in unjust enrichment by pocketing 85% of amount of consideration on the pretext of delay by few months in execution of the sale deed. Considering the facts and circumstances of the case, it is difficult to believe that there could have been any exponential rise in the price of suit plot causing any substantial loss to the Defendant who had already pocketed 85% of consideration in March 2012.

26. In the facts and circumstances of the case readiness and willingness on the part of the Plaintiff is proved. The Trial Court and First Appellate Court erroneously concentrated on Plaintiff's stand about measurement and fixation of boundaries as pre-condition for execution of sale, thereby ignoring the fact that there is no substantial delay in execution of the sale deed so as to put Defendant to any loss as such.

Both the Courts did not notice the inconsistency in the timeframe specified in the agreement for execution of the sale deed. Therefore, even if Plaintiff's stand about oral Agreement for measurement and fixation of boundaries is to be ignored, it is difficult to hold that Plaintiff was unwilling or unready to perform his part of contract. Both the Courts have not held that the price of the suit plot increased exponentially during short timegap between 6 July 2012 till 28 May 2013 causing any undue advantage to the Plaintiff or wrongful loss to the Defendant. On the contrary, the Defendant has enjoyed 85% of the consideration and also retained possession of the plot for the last 12 long years. In my view therefore readiness and willingness on the part of the Plaintiff to perform contract was proved. The Trial and First Appellate Court had erred in dismissing Plaintiff's suit.

27. I accordingly proceed to answer the substantial question of law formulated by this Court in the affirmative. The evidence on record clearly proves readiness and willingness on the part of the Plaintiff to get the sale deed executed.

28. No doubt, period of about 12 years has passed since execution of Agreement for Sale. Though Defendant has received consideration of 6,00,000/- out of agreed amount of Rs. 7,00,000/-, Plaintiff must pay the balance amount of consideration to Defendant along with interest. Considering the peculiar facts and circumstances of the case, where specific performance is being directed after about 12 years, in my view, ends of justice would meet if Plaintiff pays compound interest @ 10% on the balance amount of Rs. 1,00,000/- to the Defendant. Accordingly Plaintiff shall pay amount of Rs. 3,25,000/- to the Defendant towards balance amount of consideration along with interest for execution of Sale Deed in his favour.

29. The Second Appeal accordingly succeeds, and I proceed to pass the following Order:

ORDER

- i) Judgment and Order dated 30 November 2019 passed by ad hoc District Judge Satara in Regular Civil Appeal No. 111 of 2016 and Judgment and Decree dated 2 March 2016 passed by Second Joint Civil Judge, Senior Division in Special Civil Suit No.184 of 2014 are set aside.
- ii) Appellant/ Plaintiff's Special Civil Suit No.184 of 2014 is partly decreed by directing Defendant to execute sale deed of the suit property upon acceptance of amount of Rs. 3,25,000/- from the Plaintiff. Plaintiff to deposit the amount of Rs. 3,25,000/- with the Trial Court within four weeks. Simultaneous with execution of the Sale Deed, Defendant shall hand over possession of Suit Property to Plaintiff.
- iii) In the event of Defendant failing to execute the Sale Deed in respect of the suit property in Plaintiff's favour within two months, an Officer nominated by the Trial Court shall execute such Sale Deed on behalf of the Defendant in favour of Plaintiff by handing over possession of the suit property to Plaintiff.

30. With the above directions, the Second Appeal is allowed. Parties shall bear respective costs.

31. In view of the fact that the Second Appeal is allowed, Interim Application No. 542 of 2022 does not survive and the same is also disposed of.

[SANDEEP V. MARNE J.]