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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.235 OF 2008

Shri M.K.Madhavan (deleted)
i) Nanlini Wd/o M.K.Madhavan and Ors. .. Appellants

Versus

Shri R.Subramaniam (deleted)
1a. Rajesh R. Subramaniam and Ors. .. Respondents

*Mr.Atul G. Damle, Sr.Advocate a/w Mr.Rupesh Lanjekar, Advocates
for the Appellants*

*Mr.Ajaydhar Dwivedi a/w Mr.R.D.Mishra, Advocates for the
Respondents*

CORAM: FIRDOSH P. POONIWALLA, J.
RESERVED ON: NOVEMBER 28, 2025
PRONOUNCED ON: APRIL 1, 2026

JUDGEMENT :-

1. The present First Appeal is filed by the heirs of the original Plaintiff challenging the Judgement dated 19th December 2007 passed by the Bombay City Civil Court, whereby the following order was passed:

“ORDER

“Suit is partly decreed as under:

The defendants shall pay earnest amount of Rs.30,000/- along with interest at the rate of 12% p.a. since the date of suit, till realization of amount to the Plaintiffs.

The relief claimed by the Plaintiffs for specific performance is hereby rejected.

In the circumstances, no order as to costs. ”

FACTS

2. The case of the original Plaintiff is as follows:-

a. The original Plaintiff resided in Flat No.14 of Mangla Goodwill Co-operative Housing Society Ltd situated at Wadala, Mumbai 400 031. The original Defendant was also a member of the said Co-operative Housing Society and owned Flat No.13 adjacent to the original Plaintiff's Flat No.14. The area of the original Plaintiff's flat is 410 sq.feet. The area of the original Defendant's flat No. 13 is 285 sq.feet or thereabouts.

b. The original Plaintiff had a daughter of marriageable age. The original Plaintiff was looking out for a suitable residential flat for his daughter's residence.

c. Being a next door neighbour, the original Plaintiff spoke to the original Defendant about his requirement of a flat for his daughter when the original Defendant expressed his desire to sell his Flat No. 13 since the original defendant did not require the flat as he was having an independent and suitable residential flat at Ghatkopar.

d. The original Plaintiff and the original Defendant negotiated the price for the purchase of Flat No.13 as Rs.50,000/-. When the deal for the purchase of Flat No.13 was concluded on 31st May 1978, the original Plaintiff gave to the original Defendant a sum of Rs.20,000/- by cheque and the original Defendant issued a receipt dated 31st May 1978 for the said payment of Rs.20,000/- against purchase of Flat No.13.

e. Thus, an oral agreement was arrived at between the original Plaintiff and the original Defendant for purchase by the original Plaintiff of Flat No.13 from the original Defendant for a sum of Rs.50,000/-.

f. In further performance of the said oral agreement, the original Plaintiff paid to the original Defendant a further sum of Rs.10,000/- on 30th September 1978. For the said payment of Rs.10,000/- also, a receipt dated 30th September 1978 was issued by the original Defendant.

g. It is the case of the Plaintiffs that the transaction of sale of the said Flat No. 13 was confirmed by the act of the parties in the original Plaintiff making further payment and the original Defendant receiving and accepting such payment unconditionally.

h. The original Plaintiff, thereafter, on several occasions requested the original Defendant to give him possession of Flat No. 13 and the original Defendant went on promising to give possession of the said flat. However, the original Defendant inducted his brother in Flat No. 13. On making inquiries, the original Plaintiff learnt that the brother of the original Defendant had also purchased a flat at Kurla or Ghatkopar and proposed to shift there. However, when the original Defendant started making vague promises to give possession of Flat No. 13, without implementing the agreement by giving vacant possession of the flat against payment of the balance sum of Rs. 20,000/-, the original Plaintiff, by his letter dated 1st September 1981, addressed to the original Defendant, recorded that the original Defendant had sold Flat No. 13 for the sum of Rs. 50,000/- to the original Plaintiff for his daughter and had received from the original Plaintiff a sum of Rs. 30,000/-. The said letter also recorded that, from time to time, the original Defendant had

promised that he would be giving the original Plaintiff possession of the flat, and every time, the original Defendant gave hope that shortly he would manage to give possession of the said flat. By the said letter, the original Plaintiff called upon the original Defendant to treat the matter as urgent and stated that, after hearing from the original Defendant, he wanted to fix his daughter's marriage. In reply to the said letter dated 1st September 1981, the original Defendant addressed a letter dated 5th September 1981 to the original Plaintiff. By the said letter, the original Defendant stated that, as informed to the original Plaintiff on 23rd August 1981, due to changed circumstances, the original Defendant required Flat No.13 for his own personal use, and consequently, he was refunding the sum of Rs.30,000/- paid by the original Plaintiff by two cheques. By the said letter, the original Defendant forwarded the said two cheques for an aggregate sum of Rs.30,000/- to the original Plaintiff.

i. The original Plaintiff was surprised and shocked to receive the original Defendant's letter dated 5th September 1981 and the two cheques. It is the case of the original Plaintiff that the original Defendant had tried to back out from a concluded and binding contract. It is also the case of the original Plaintiff that the reasons given by the

original Defendant in his letter dated 5th September 1981 were evidently false and an afterthought to back out of a binding and concluded contract for the sale and transfer of Flat No. 13 at the price of Rs.50,000/-.

j. It is further the case of the original Plaintiff that, prior to his letter dated 5th September 1981, the original Defendant had, at no time on 23rd August 1981 or on any other date, informed or advised the original Plaintiff of the alleged changed circumstances under which the original Defendant wanted to keep the flat for his own use, and particularly when the original Defendant had another independent residential accommodation. It is further the case of the original Plaintiff that the said conduct of the original Defendant was malafide, illegal and unilateral.

k. It is the case of the original Plaintiff that he is entitled to the relief of specific performance of the contract. The original Plaintiff further stated that he was ready and willing to perform his part of the contract by payment of the balance amount of Rs.20,000/- which he had always been ready and willing to pay to the original Defendant forthwith on the original Defendant giving vacant possession of Flat no.

13 to the original Plaintiff pursuant to the said oral agreement. It is the case of the original Plaintiff that the original Defendant had no right to unilaterally put an end to the contract.

1. It is in these circumstances that the original Plaintiff filed S.C.Suit No.933 of 1982 in the Bombay City Civil Court seeking the following final reliefs:

“(a) that this Hon'ble Court be pleased to order and direct the deceased defendant for the specific performance of the said agreement for sale and put the Plaintiff in vacant and peaceful possession of flat No.13, situated at Mangla Goodwill Co-operative Housing Society Ltd., at Wadala.

(b) For an permanent order and injunction of this Hon'ble Court restraining the deceased defendant his servants and agents or anyone claiming through or under him from dealing with or in any manner disposing of or parting with possession of and/or alienating or encumbering the suit flat No.13, in Mangla Goodwill Co-operative Housing Society Ltd., at Wadala, Bombay 31.”

3. The original Defendant filed Written Statement dated 15th April 1982. The case of the original Defendant in the Written Statement is as follows:

- a. In April 1978, the original Plaintiff approached the original Defendant and asked him whether he would sell Flat No.13 to the original Plaintiff for a sum of Rs.50,000/-. The original Defendant agreed and received Rs.20,000/- on 31st May 1978 and Rs. 10,000/- on 30th September 1978.
- b. In October, 1978, the original Defendant asked the original Plaintiff to pay the balance price of Rs.20,000/- and take possession of the said flat. The original Plaintiff however told the original Defendant that he had no money to pay to the original Defendant.
- c. In December, 1978, the original Defendant's younger brother, R. Anantkrishnan, had no accommodation, and therefore he requested the original Defendant for accommodation. In these circumstances, the original Defendant gave him possession of Flat No.13 in December, 1978.
- d. On 23rd August 1981, the original Defendant met the original Plaintiff in front of the Matunga Railway Station near Matunga Market at 10.00 a.m. The original Plaintiff was sitting in his car whereas his wife had gone for purchasing vegetables etc. It is the case of the original

Defendant that, at that time, he informed the original Plaintiff that, as the original Defendant was retiring from services next year, he would require the suit flat for himself because he had to curtail his expenses and as a smaller flat would suffice him in light of the marriage of his two daughters. It is the case of the original Defendant that the original Plaintiff, at that time, told him to return the amount of Rs.30,000/- by cheque. The original Defendant, on 30th August 1981, drew two cheques in favour of the original Plaintiff, one for Rs.20,000/- and another for Rs.10,000/-

e. It is the case of the original Defendant that, despite the aforesaid conversation between the original Plaintiff and himself which took place on 23rd August 1981, the original Plaintiff addressed the said letter dated 1st September 1981 to him calling upon him to give possession of Flat No.13.

f. It is the case of the original Defendant that, on 5th September 1981, he asked the original Plaintiff on telephone in his factory as to whether he could deliver the cheques in the factory of the original Plaintiff or at his residence. The original Plaintiff told the original Defendant that he could send the cheques to the house of the original

Plaintiff. The original Defendant accordingly, on 5th September 1981, gave his Reply dated 5th September 1981 along with the aforesaid two cheques to the wife of the Plaintiff.

g. On 28th January 1982, the original Defendant sent a registered letter to the original Plaintiff stating that he had refunded the amount of Rs.30,000/- by two cheques and enquiring as to why the original Plaintiff had not encashed the said two cheques. It is the case of the original Defendant that the said letter had been returned to him with postal remarks 'Not Claimed'.

h. It is the case of the original Defendant that he would retire from service on 19th September 1982 and would go on leave prior to retirement on 1st July 1982. The original Defendant relied on a certificate of pension and a letter dated 24th February 1982 from his employer, W.H. Brady & Co. Ltd, which showed the date of retirement and the date of going on leave prior to retirement.

4. At the time of leading evidence in the Suit, both the original Plaintiff and the original Defendant had passed away. The Plaintiffs led the evidence of Pramod Madhavan, who is one of the Plaintiffs and who is the

son of the original Plaintiff. The said Pramod Madhavan was cross-examined by the Advocate for the Defendants. The Defendants led the evidence of a daughter of the original Defendant, one Jayashree S. Iyer, who was cross-examined by the Advocate for the Plaintiff. Both parties also produced certain documents in evidence.

5. The Trial Court framed issues and answered them as follows:

<u>ISSUES</u>	<u>FINDINGS</u>
<i>1. Whether the Plaintiff was and is ready to perform his part of contract?</i>	No.
<i>2. Whether action of defendant to send back two cheques, total amount of Rs.30,000/- to Plaintiff, amounts to termination of contract ?</i>	No.
<i>3. Whether Plaintiffs are entitled to relief of specific performance of contract ?</i>	No.
<i>4. What relief, in any plaintiffs are entitled to ?</i>	<i>Plffs, are entitled to get refund of earnest amount of Rs.30,000/- with interest at the rate of 12% p.a.</i>
<i>5. What order and decree?</i>	<i>Suit decreed. partly</i>

6. The Trial Court, by a Judgement dated 19th December 2007, partly decreed the Suit by directing the Defendants to pay the amount of Rs.30,000/-, along with interest @ 12% p.a., since the date of the Suit till realisation of the amount by the Plaintiff. The Trial Court rejected the Plaintiffs' relief of specific performance.

7. The Plaintiffs, being aggrieved by the Judgement dated 19th December 2007, have filed the present Appeal.

POINTS FOR DETERMINATION

8. The Trial Court has answered Issue No.2 in the negative i.e. against the Defendant. The Defendant has not filed any Cross Appeal or Cross Objections. Therefore, it is concluded against the Defendant that the original agreement for sale was not terminated by the original Defendant. In these circumstances, the following points arise for determination of this Court:

- A. Whether the original Plaintiff was ready and willing to perform his part of the Contract ?
- B. Whether the Plaintiffs are entitled to specific performance of the contract ?
- C. What reliefs are the Plaintiffs entitled to ?

SUBMISSIONS OF THE PLAINTIFFS

9. Mr.Atul Damle, the learned Senior Advocate appearing on behalf of the Appellants/Plaintiffs, submitted that the Trial Court had mainly

framed two issues i.e. (i) readiness and willingness of the original Plaintiff to perform the contract and (ii) whether the termination of the contract by the original Defendant was valid and proper ?

10. Mr.Damle submitted that the issue regarding termination of the contract was answered against the Defendant, and there is no cross appeal filed by the Defendant, and therefore, the only issue which is required to be considered by this Court is about the readiness and willingness of the original Plaintiff to perform the contract. Mr.Damle submitted that, once the issue relating to termination is held against the Defendants, the agreement stands proved and deserved a decree of specific performance.

11. Mr.Damle submitted that the original Defendant in his Written Statement had admitted execution of the oral agreement and also admitted receipt of Rs. 30,000/- out of the total consideration of Rs. 50,000/- towards sale of Flat No. 13.

12. Further, Mr.Damle submitted that the original Plaintiff was requesting the original Defendant to hand over possession of Flat No.13 by accepting the balance amount of Rs. 20,000/-. However, there was no response from the original Defendant, and therefore, the original Plaintiff, by

his letter dated 1st September 1981, requested the original Defendant to hand over possession by accepting the balance amount. The original Defendant, by his letter dated 5th September 1981, refused to perform his part of the contract due to changed circumstances and refunded a sum of Rs. 30,000/- by two cheques, which were not deposited by the original Plaintiff.

13. Mr.Damle submitted that it is important to note that, in the Written Statement, the original Defendant had stated that, in October, 1978 he had asked for the balance amount of Rs.20,000/-, and at that time the original Plaintiff told him that he had no money to pay the said amount. However, the said incident of October, 1978 does not find place in the letter dated 5th September 1981, which shows that the original Defendant has unlawfully and unilaterally cancelled the said transaction.

14. Further, Mr.Damle submitted that the original Plaintiff had, in the Plaint, and Mr.Pramod Madhavan (son of the original Plaintiff and one of the Plaintiffs) had pleaded and proved the case of readiness and willingness to perform the original contract. The evidence of Mr.Pramod Madhavan shows that the Plaintiffs had proved the case of readiness and willingness and there was no cross examination by the Defendants on the said evidence.

15. Mr.Damle further submitted that the Trial Court had answered the issue regarding readiness and willingness against the Plaintiffs and the only finding in respect thereof is recorded at paragraph 8 of the impugned Judgement, wherein it is stated that, since the Plaintiff had not deposited the balance amount during the pendency of the suit, the said conduct shows that the Plaintiff was not ready and willing to pay the balance amount. Mr.Damle submitted that non-deposit of the balance amount cannot be a ground for dismissal of the suit as per the law laid down by the Hon'ble Supreme Court. In support of his submission, Mr.Damle relied upon the Judgement of the Hon'ble Supreme Court in **P. Daivasigamani Versus S. Sambandan (2022) 14 Supreme Court Cases 793**.

16. Mr.Damle further submitted that as per Explanation (i) to Section 16(c) of the Specific Relief Act, the Plaintiff need not tender the amount to the Defendant or deposit the amount in Court, but he must aver performance of, or readiness and willingness to perform the contract, according to its true construction.

17. Further, Mr.Damle submitted that the Defendant had enjoyed the possession of Flat No.13 since 1978, despite receipt of more than 50% of the amount of agreed total consideration of Flat No.13. Due to the same, great

loss and prejudice has been caused to the Plaintiffs. Mr.Damle submitted that the said factors of mental agony, monetary loss and prejudice are required to be considered in favor of the Plaintiffs while granting a decree for specific performance.

18. Mr.Damle submitted that, however, the Plaintiffs are ready to pay some more reasonable amount in addition to the balance amount of Rs.20,000/-.

19. Finally, Mr.Damle submitted that, for all the aforesaid reasons, the present First Appeal ought to be allowed.

SUBMISSIONS OF THE RESPONDENT (DEFENDANT)

20. Mr.Dwivedi, the learned Advocate appearing on behalf of the Respondent / Defendant, submitted that the essential terms of the agreement were not averred in the Plaint and, on that ground alone, specific performance ought not to be granted to the Plaintiffs.

21. Mr.Dwivedi submitted that paragraph 4 of the Plaint very vaguely states that the balance payment of Rs.20,000/- would be made

against possession and the Plaintiffs have not pleaded a specific case in respect thereof.

22. Mr.Dwivedi further submitted that the Plaintiffs did not perform their part of the agreement.

23. Mr.Dwivedi submitted that the Plaintiffs had not produced any evidence to show that the Plaintiffs were ready and willing to perform their part of the contract and only a bare averment to that effect had been made in the Plaint. Mr.Dwivedi submitted that there was no evidence to show that the balance payment was offered or that the Plaintiff had the capacity to pay the balance amount. He submitted that, in these circumstances, the Plaintiff is not entitled to specific performance.

24. Mr.Dwivedi referred to the judgement of the Hon'ble Supreme Court in the case of **U.N.Krishnamurthy (since deceased) thr. Lrs. vs. A.M.Krishnamurthy (Civil Appeal No.4703 of 2022)** and submitted on the basis of the said Judgement that the Plaintiffs have to prove continuous readiness and willingness, which the Plaintiffs have failed to do in the present case.

25. Further, Mr.Dwivedi referred to the Written Statement and submitted that the original Defendant had asked the original Plaintiff to perform his part of the contract by paying the balance amount of Rs.20,000/- but he did not perform the same from 1978 till 1981. Further, Mr.Dwivedi submitted that, on 23rd August 1981, the original Defendant had informed the original Plaintiff that he would require the suit flat for its own use. Mr.Dwivedi submitted that, in these circumstances, the Plaintiffs were not entitled to get specific performance of the agreement.

26. Further, Mr.Dwivedi referred to Notice dated 1st September 1981 addressed by the original Plaintiff to the original Defendant and submitted that, even in the said Notice dated 1st September 1981, the original Plaintiff has not averred his readiness and willingness to perform the suit contract.

27. Finally, Mr.Dwivedi submitted that, for all the aforesaid reasons, the Appeal ought to be dismissed.

ANALYSIS AND FINDINGS

28. The original Defendant had, in the Written Statement, admitted that an oral agreement had been entered between him and the original

Plaintiff to sell Flat No.13 to the original Plaintiff for a sum of Rs.50,000/-. The original Defendant has also admitted that, out of the said sum of Rs.50,000/-, a sum of Rs.30,000/- had been paid by the original Plaintiff towards sale of Flat No.13. Therefore, there is no dispute between the parties that there exists an oral agreement by which the original Defendant agreed to sell the said Flat No.13 to the original Plaintiff for a sum of Rs.50,000/-.

29. In these circumstances, the question that arises is whether the original Plaintiff was ready and willing to perform his part of the said oral agreement. It is the case of the original Plaintiff that, on several occasions, he requested the original Defendant to give possession of Flat No.13 to him, and the original Defendant went on promising to give him possession of the said Flat but did not do so. Instead the original Defendant inducted his brother in Flat No.13. It is further the case of the original Plaintiff that, since despite frequent reminders, the original Defendant failed to complete the performance of the said agreement for sale, the original Plaintiff, by his letter dated 1st September 1981, addressed to the original Defendant, recorded the fact of the sale of Flat No.13 for a sum of Rs.50,000/- and the payment by the original Plaintiff of the sum of Rs.30,000/-. By the said letter, the original Plaintiff also recorded that the original Plaintiff wanted the flat for his daughter. It is the case of the Plaintiffs in the Plaint that the original Plaintiff

has always been ready and willing to perform his part of the contract by payment of the balance sum of Rs.20,000/-, being the remaining amount of the agreed price of Rs.50,000/-.

30. On the other hand, the case of the Defendants on readiness and willingness of the original Plaintiff is that, in October 1978, the original Defendant had asked the original Plaintiff to pay the balance price of Rs.20,000 and take possession of Flat No.13. However, the original Plaintiff told the original Defendant that he had no money to pay to the original Defendant. Further, in December 1978, the original Defendant's younger brother R. Anantkrishnan had no accommodation, and at his request, the original Defendant allowed him to occupy Flat No.13 in December 1978. Further, it is the case of the original Defendant that, when the original Plaintiff met him in front of Matunga Railway Station, near Matunga Market, at 10.00 a.m., on 23rd August 1981, the original Defendant informed the original Plaintiff that, as the original Defendant was retiring from service next year, he would require Flat No.13 for himself because he would have to curtail his expenses and also as he could reside in a smaller flat, as his two daughters had already got married. Further, it is the case of the original Defendant that the original Plaintiff, at that time, told the original Defendant to return to him the amount of Rs.30,000. Further, it is the case of the

original Defendant that, despite the aforesaid conversation, which took place on 23rd August 1981, the original Plaintiff wrote to him a letter dated 1st September 1981 calling upon him to give to the original Plaintiff possession of Flat No.13. In response to the said letter, the original Defendant addressed a letter dated 5th September 1981 to the original Plaintiff whereby he reiterated that he required the flat for his own use and refunded the sum of Rs.30,000/- paid by the original Plaintiff to him. However, the said cheques were not encashed by the original Plaintiff.

31. A Civil Court has to decide a case on preponderance of probability. The Court has to decide as to whether the case of the original Plaintiff or the case of the original Defendant is more probable.

32. In my view, the case of the original Plaintiff is more probable. The oral evidence given in this case is of limited value as the original Plaintiff and the original Defendant had both passed away, and their children who gave evidence, did not have personal knowledge of most of the facts involved. In these circumstances, the Court has to look at the contemporaneous documentary evidence.

33. The case of the original Plaintiff is confirmed by his letter dated 1st September 1981. It is the case of the original Plaintiff that he repeatedly called upon the original Defendant to complete the transaction by giving the original Plaintiff possession on payment of the balance consideration of Rs.20,000/- but the original Defendant failed and neglected to do so. This case of the original Plaintiff is recorded in his letter dated 1st September 1981 addressed to the original Defendant. The relevant part of the said letter reads as under:

“From time to time you promise that you will be giving me the possession. Ever time you gave hope that shortly you will be managing. Kindly treat this matter as very urgent. Hearing from you I want to fix my daughter's marriage.”

34. The aforesaid case of the original Plaintiff is not denied in the original Defendant's letter dated 5th September 1981. In these circumstances, the contemporaneous documentary evidence shows that the case of the original Plaintiff is more probable.

35. On the other hand, the case of the original Defendant is not borne out by the contemporaneous documentary evidence. The case of the original Defendant is that, in October 1978, he asked the original Plaintiff to pay the balance price of Rs.20,000/- and take possession of Flat No.13. The original Plaintiff however told the original Defendant that he had no money

to pay to the original Defendant. It is also the case of the original Defendant that, on 23rd August 1981, the original Plaintiff and the original Defendant had agreed that the original Defendant required the said Flat No.13 for himself, and therefore, the original Defendant would return to the original Plaintiff the sum of Rs.30,000/- paid by the original Plaintiff.

36. The case of the original Defendant that, in October 1978, he told the Plaintiff to pay the balance price of Rs.20,000/- and take possession of the suit flat and the original Plaintiff informing him that he had no money to pay to the original Defendant, is not borne out by the said letter dated 5th September 1981 of the original Defendant. The said letter does not even contain a whisper of the alleged non-payment by the original Plaintiff in October 1978. Further, the said letter also does not state that what was suggested by the original Defendant on 23rd August 1981, namely, that he required the flat for his own use, was accepted by the original Plaintiff. Therefore, once again, the contemporaneous documentary evidence shows that the case of the original Defendant is less probable.

37. In my view, the Trial Court failed to appreciate the above.

38. The Trial Court held that, in the letter dated 1st September 1981, the original Plaintiff had not shown his readiness to pay the remaining consideration amount of Rs.20,000/-. Further, the Trial Court held that, during the pendency of the Suit, the Plaintiffs had not deposited the amount or by their conduct had shown readiness to pay the balance consideration amount.

39. In my view, these findings of the Trial Court are erroneous. First, by his letter dated 1st September 1981, the original Plaintiff has clearly stated that, from time to time, the original Defendant had promised that he would give him possession, but every time he gave him hope that shortly he would be managing the same. The original Plaintiff called upon the original Defendant to treat this matter as urgent as he wanted to fix his daughter's marriage. This clearly shows that, in the letter dated 1st September 1981, the original Plaintiff has shown his readiness and willingness to complete the sale transaction by paying the said amount of Rs.20,000/-.

40. Second, as far as depositing of the amount by the Plaintiffs is concerned, non-deposit of balance amount cannot be a ground for dismissal of the Suit as laid down by the Hon'ble Supreme Court in the case of

P.Daivasigamani (Supra). Paragraphs 21 to 24 of the said Judgement are relevant in that regard and are set out hereunder:

“21. 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. Willingness refers to the intention of the plaintiff as a purchaser to perform his part of the contract. Willingness is inferred by scrutinising the conduct of the plaintiff purchaser, including attending circumstances. Continuous readiness and willingness on the part of the plaintiff purchaser from the date the balance sale consideration was payable in terms of the agreement to sell, till the decision of the suit, is a condition precedent for grant of relief of specific performance.

22. The expression "readiness and willingness" used in Section 16(c) of the said Act, has been interpreted in a catena of decisions by this Court, in the light of facts and circumstances of the cases under consideration for the purpose of granting or refusing to grant the relief of specific performance of a contract. The said expression cannot be interpreted in a straitjacket formula. In a very apt decision of this Court in Syed Dastagir v. T.R. Gopalakrishna Setty, a three-Judge Bench of this Court, construing a plea of "readiness and willingness to perform" in view of the requirement of Section 16(c) and its Explanation, observed as under: (SCC p. 341, para 9)

"9. So the whole gamut of the issue raised is, how to construe a plea specially with reference to Section 16(c) and what are the obligations which the plaintiff has to comply with in reference to his plea and whether the plea of the plaintiff could not be construed to conform to the requirement of the aforesaid section, or does this section require specific words to be pleaded that he has performed or has always been ready and is willing to perform his part of the contract. In construing a plea in any pleading, courts must keep in mind that a plea 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. Such an expression may be pointed, precise, sometimes vague but still it could be gathered what he wants to convey through only by reading the whole pleading,

depending on the person drafting a plea. In India most of the pleas are drafted by counsel hence the aforesaid difference of pleas which inevitably differ from one to the other. Thus, to gather true spirit behind a plea it should be read as a whole. This does not distract one from performing his obligations as required under a statute. But to test whether he has performed his obligations, one has to see the pith and substance of a plea. Where a statute requires any fact to be pleaded then that has to be pleaded may be in any form. The same plea may be stated by different persons through different words; then how could it be constricted to be only in any particular nomenclature or word. Unless a statute specifically requires a plea to be in any particular form, it can be in any form. No specific phraseology or language is required to take such a plea. The language in Section 16(c) does not require any specific phraseology but only that the plaintiff must aver that he has performed or has always been and is willing to perform his part of the contract. So the compliance of "readiness and willingness" has to be in spirit and substance and not in letter and form. So to insist for a mechanical production of the exact words of a statute is to insist for the form rather than the essence. So the absence of form cannot dissolve an essence if already pleaded."

23. It was further observed therein that: (Syed Dastagir case, SCC p. 342, para 11)

"11.... It is significant that this Explanation carves out a contract which involves payment of money as a separate class from Section 16(c). Explanation (1) uses the words "it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court". (emphasis supplied) This speaks in a negative term what is not essential for the plaintiff to do. This is more in support of the plaintiff that he need not tender to the defendant or deposit in court any money but the plaintiff must [as per Explanation (ii)] at least aver his performance or readiness and willingness to perform his part of the contract."

(emphasis in original)

24. In *Sukhbir Singh v. Brij Pal Singh* this Court had laid down that law is not in doubt and it is not a condition that the respondents (plaintiffs) should have ready cash with them. It is

sufficient for the respondents to establish that they had the capacity to pay the sale consideration. It is not necessary that they should always carry the money with them from the date of the suit till the date of the decree. The said principle was followed in A. Kanthamani v. Nasreen Ahmed, in C.S. Venkatesh v. A.S.C. Murthy, etc."

41. In these circumstances, the grounds on which the Trial Court has held that the original Plaintiff was not ready and willing to perform his part of the said oral agreement are erroneous and without any basis.

42. Further, in paragraph 9 of the impugned Judgement, the Trial Court, whilst holding that the Plaintiffs are not entitled to specific performance, has held as under:

"9. Considering the date of contract, now I have to see "whether Plaintiff is entitled to relief of specific performance of contract". For that I have to go through the provisions of Section 20 of Specific Relief Act, which given discretion as to decreeing the specific performance. The Ld. Advocate for the defendants has submitted that the widow of the original defendant is residing in suit flat and she had no shelter, so hardship would be caused to the widow of the defendant. The court is not bound to grant such relief of specific performance because it is lawful to do so. The discretion is not arbitrary but sound and judicial, to be guided by the judicial principles. When the terms of contract or the conduct of the parties at the time of entering into the contract of other circumstances under contract was entered into or such contract gives the Plaintiff unfair advantage over the defendant, the court can exercise its discretion not to grant specific performance even if it is lawful. So, considering the overall conduct of the parties, couples with the fact that original plaintiff and original defendant were the

friends and neighbors and at present the marriage of the plaintiffs daughter must have performed and she must have residing with her husband at other place, I do not think it just and proper to exercise the discretion in favour of Plaintiff awarding specific performance of contract. In the instant case, there was oral agreement and time for performance was not settled. However, from the fact that the original defendant issued letter dtd. 5.9.1981 and repudiated the contract, which is not legal, leads me to told that the suit claim is within limitation, but considering the conduct of plaintiffs, coupled with the fact that they were not diligent in proceeding with the suit, as well as they were and are not ready and willing to perform their part of contract to give reaming consideration amount of Rs.20,000/- to defendants in my opinion, they are not entitled to get relief of specific performance of contract, So I answer Issue No.3 in the negative.”

43. The first reason given by the Trial Court in paragraph 9 is that the Court would not grant specific performance when the terms of the contract or the conduct of the parties, at the time of entering into the contract or other circumstances under which the contract was entered into, gives the Plaintiffs unfair advantage over the Defendants. This finding is totally erroneous as it is not even the case of the Defendant that the original Plaintiff, whilst entering into the said oral agreement for sale of Flat No.13, had obtained some unfair advantage over the original Defendant. Further, the Trial Court has held that, considering the overall conduct of the parties, coupled with the fact that the original Plaintiff and original Defendant were friends and neighbours, and at present, the marriage of the original Plaintiff's daughter must have been performed and she must be residing with her

husband at another place, specific performance should not be granted. This reason given by the Trial Court is erroneous. The evidence on record does not show anything in the conduct of the original Plaintiff that would deprive the Plaintiffs of getting specific performance of the oral agreement. Further, merely because the original Plaintiff and the original Defendant were friends and neighbours does not mean that an oral agreement entered into between them would have no sanctity and should not be specifically enforced. Further, the other reason given by the Trial Court is that the original Plaintiff and the Plaintiffs were not ready and willing to perform their part of the contract by giving the remaining consideration amount of Rs.20,000 to the Defendants. For all the reasons given above, the said finding of the Trial Court is also erroneous.

44. As far as the judgement of the Hon'ble Supreme Court in **U.N.Krishnamurthy (Supra)** is concerned, the same lays down that the Plaintiffs have to prove readiness and willingness to perform the contract. In my view, the said Judgement does not take the case of the Defendants any further as the Plaintiffs have proved readiness and willingness to perform the suit contract.

45. In this connection, it is important to note that, by the letter dated 1st September 1981 addressed to the original Defendant, the original

Plaintiff had informed him that, from time to time, the original Defendant had promised that he would be giving possession, and every time, he was giving hope but had not given possession. Further, the original Plaintiff had stated that the original Defendant should treat this matter as very urgent as the original Plaintiff had to fix his daughter's marriage. In my view, this letter dated 1st September 1981 of the original Plaintiff clearly shows his readiness and willingness to perform the oral agreement.

46. Further, the only case of the original Defendant in this regard is that in October 1978, the original Plaintiff was not ready to pay to him the said amount of Rs.20,000/- and told him that he had no money to pay the said amount of Rs.20,000/-. This case of the original Defendant is not found in the said letter dated 5th September 1981 and, therefore, it clearly shows that the same is not true and is pleaded as an after thought. Further, Mr.Pramod Madhavan, who is one of the Plaintiffs, has given evidence that the Plaintiffs were always ready and willing to perform their part of the said oral agreement. This evidence of Pramod Madhavan has not been challenged in cross-examination. In my view, all these factors put together, clearly show that the Plaintiffs have proved their continuous readiness and willingness to perform the oral agreement.

47. In the Judgement in **P. Daivasigamani (Supra)**, the Hon'ble Supreme Court has referred to its judgement in **Kamal Kumar vs. Premlata Joshi (2019) 3 SCC 704** and has laid down the principles on which specific performance must be granted to a Plaintiff. Paragraph 25 of the said judgement is relevant for this purpose and is set out hereinabove.

“25. Section 20 of the Specific Relief Act (pre-amendment), which confers discretion on the court to exercise jurisdiction to decree of specific performance, states that this exercise should not be arbitrary, but guided by sound and reasonable judicial principles. Interpreting and elucidating on Section 20 of the Specific Relief Act (pre-amendment) and factors to be considered, this Court in Kamal Kumar v. Premlata Joshi has also referred to Sections 16(c), 22, 23 and 24 of the Specific Relief Act and Forms 47/48 of Appendix A to C of the Civil Procedure Code, 1908, to summarise: (SCC pp. 705-706, paras 7-8)

"7. 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:

7.1. First, whether there exists a valid and concluded contract between the parties for sale/purchase of the suit property.

7.2. 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.

7.3. 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.

7.4. 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.

7.5. 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.

8. 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 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."

48. The first ingredient that the Hon'ble Supreme Court has laid down is that there should exist a valid and concluded contract between the parties for sale / purchase of the suit property. As stated hereinabove, in the present case, it is admitted by the parties that there existed an oral agreement between the original Plaintiff and the original Defendant to sell Flat no.13 to the original Plaintiff for a consideration of Rs.50,000/-, and therefore, the first ingredient is satisfied.

49. The second ingredient referred to by the Supreme Court is that the Plaintiff should be ready and willing to perform his part of the contract. As stated hereinabove, in the present case, the Plaintiffs have not only pleaded but have proved that they are ready and willing to perform their part of the contract.

50. The third ingredient laid down by the Hon'ble Supreme Court is that 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. In present case, the original Plaintiff has performed a substantial part of the contract by paying to the original Defendant a sum of Rs.30,000/- against the total consideration of Rs.50,000/-. The original Defendant has admitted that this was in terms of the said oral agreement whereby he had agreed to sell Flat No.13 to the original Plaintiff for a sum of Rs.50,000/-.

51. The fourth ingredient that the Hon'ble Supreme Court has laid down is whether it would be equitable to grant the relief of specific performance to the Plaintiff against the Defendant in relation to the suit property, or will it 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.

52. The fifth ingredient is whether the Plaintiff is entitled for grant of any other alternate relief, namely, refund of earnest money, etc., and, if so, on what grounds.

53. As far as the fourth and fifth ingredients are concerned, in my view, the Plaintiffs are entitled to specific performance of the said oral agreement as grave loss and prejudice would be caused to the Plaintiffs, if specific performance is not granted to them, as the Defendants have enjoyed possession of the said Flat No.13 since 1st September 1978, despite receipt of more than 50% of the amount of the aggregate total consideration for the said flat.

54. The fact that mental agony, monetary loss and prejudice has been caused to the Plaintiffs is one more reason as to why specific performance ought to be granted to the Plaintiffs. However, since the oral agreement was entered into in 1978, prejudice would be caused to the Defendant if specific performance is granted to the Plaintiffs only on paying the balance sum of Rs.20,000/-. This Court cannot be oblivious to the fact

that there has been a steep rise in the price of immovable property since the last few decades. Having regard to the fact that the agreement in question was entered into between the parties in 1978 and considering the steep rise in the price of flats in Mumbai, I am of the opinion that interests of justice would be served if the Plaintiffs are directed to pay some more amount to the Defendant. Hence, in the facts and circumstances of the case and to balance the equities between the parties, the Plaintiffs will have to be directed to pay an additional sum of Rs.25 lacs to the Defendant for getting specific performance. Although this would be must less than the consideration of the suit flat today, it would certainly balance the equities between the parties. On the one hand, the Plaintiffs will get specific performance, and on the other hand, the Defendants will get an extra amount of Rs.25 lacs. In this context, it is also important to note that, in their arguments, the Plaintiffs have agreed to pay an additional reasonable amount to the Defendant.

55. The Points for Determination are answered accordingly.

ORDER

56. In light of the aforesaid discussion, and for all the reasons stated hereinabove, the following order is passed:

a) The present First Appeal is allowed.

- b) The impugned Judgement and Decree dated 19th December 2007 is set aside.
- c) There will be a decree in favour of the Appellants/Plaintiffs in terms of prayer (a) of the Plaint subject to the Appellants/Plaintiffs paying to the Respondent/Defendant a sum of Rs.25,20,000/-.
- d) In the facts and circumstances of the case, there will be no order as to costs.

[FIRDOSH P. POONIWALLA, J.]