Smt. Sandhya Rani Sarkar

Vs

Smt. Sudha Rani Debi and Others

Civil Appeal No. 1389 of 1976

(CJI M. H. Beg, D. A. Desai JJ)

14.02.1978

JUDGMENT

DESAI, J. -

1. This appeal by special leave by the original plaintiff questions the correctness of the decree dismissing her suit for specific performance of contract for sale of premises No. 88-A, Rash Behari Avenue, Calcutta, entered into between her and deceased Smt. Paribala Das on February 8, 1956 for a consideration of Rs. 46,000. The agreement of sale, Ext. I, recites that Rs. 1001 were paid as earnest money and subsequently the defendant vendor received a further sum of Rs. 2000 from the plaintiff intending purchaser. Various terms of agreement would be referred to in the course of this judgment. The plaintiff filed the suit for a decree for specific performance of the contract alleging that even though she is ready and willing to perform her part of the contract the defendant No. 1 has not completed the transaction and, therefore, a decree for specific performance should be made in favour of the plaintiff. In this suit she impleaded vendor defendant No. 1 and her son Hrishikesh Das as defendant No. 2. The suit was resisted by the defendants, inter alia, contending that the plaintiff was not ready and willing to perform her part of the contract more particularly saying that the vendor was in urgent need of money to pay off the mortgage debt and, therefore, she had entered into contract for sale of property and that time was of the essence of the contract and yet the plaintiff under one or the other false pretext put off performing her part of the contract so that the vendor was compelled to sell another valuable property bearing No. 86-A, Rash Behari Avenue, Calcutta. The trial Court after an elaborate examination of the evidence decreed the suit on April 30, 1962 directing "defendant No. 1 to execute and register a deed of sale in favour of the plaintiff in respect of the premises No. 88-A, Rash Behari Avenue, Calcutta, on receipt of the balance of consideration of Rs. 42,999 and a further sum of Rs. 500 if there be an excess land of 1 cottah 88 sq. ft. beyond 2 cottahs 2 chittaks 38 sq. ft. or any money proportionate to the extent of the excess land, amicably within 30 days, of date, failing which the plaintiff do deposit in Court the consideration thus due, together with the cost of execution and registration and the draft of the conveyance with stamp for the conveyance within 15 days of the expiry of that 30 days for having the conveyance executed and registered through Court .... In case of default on the part of the plaintiff in complying with the above order the suit shall stand dismissed with costs and that the sum of Rs .... be paid by the ... to the ... on account of the costs of this suit, with interest thereon at the rate of ... per cent per annum from his date to date of realisation". The decree in terms of the operative portion herein above mentioned was drawn up on May 16, 1962. Since the date of the decree certain events occurred which would be noticed while examining the first contention on behalf of the appellant herein. Suffice it to say that the vendor preferred first appeal to the High Court of Calcutta on April 11, 1968. When the appeal appeared on the cause list and was taken up for hearing, an application under Section 5 of the Limitation Act supported by an affidavit was filed on August 8, 1972

requesting the Court that in case the appeal is found to be barred by limitation the appellant before the High Court was prevented by a sufficient cause from preferring the appeal in time and, therefore, the delay should be condoned. The application for condonation of delay and the appeal were heard together and the High Court while holding that the appeal was barred by limitation, was further of the opinion that the vendor appellant before it was prevented by a sufficient cause from preferring the appeal in time, and accordingly condoned the delay. On merits, the High Court held that the vendor was always ready and willing to perform her part of the contract but the plaintiff purchaser under one pretext or the other deferred performing her part of the contract beyond reasonable time and was, therefore, not entitled to a decree for specific performance. Accordingly, the High Court allowed the appeal and dismissed the plaintiff purchaser's suit. Hence this appeal by the plaintiff purchaser.

2. The first contention raised on behalf of the appellant is that the appeal before the High Court preferred by the respondent vendor was barred by limitation and the vendor had failed to make out any cause, much less a sufficient cause, preventing her from preferring the appeal in time and the High Court was in error in exercising the discretion condoning the delay and admitting the appeal to file. On behalf of the vendor respondent it was submitted that the appeal before the High Court was in time and at any rate the discretion exercised by the High Court could not be styled as perverse or unreasonable and this Court should not interfere with the same. Simultaneously it was submitted that the material on record would unquestionably establish that the appellant before the High Court was prevented by a sufficient cause from preferring the appeal in time.

3. Some relevant and material dates may now be noticed. Agreement of sale, Ex. I on which suit was founded was executed on February 8, 1956. Suit for specific performance of this agreement was instituted on January 28, 1957. It was decreed on April 30, 1962. The decree was drawn up on May 25, 1962, the first appeal was preferred on April 11, 1968. An application under Section 5 of the Limitation Act supported by an affidavit was presented on August 8, 1972. There are certain events that occurred after the decree was drawn up on May 25, 1962 and before April 11, 1968 when appeal was preferred by the vendor of which by the vendor of which brief note would be necessary. The material portion of the decree has been set out in extenso above and at first glance it would appear that the purchaser had to pay the amount therein mentioned to the vendor within 30 days from the date of the decree and the vendor had to execute the deed of conveyance failing which the amount was to be deposited in the Court within 15 days from the expiry of the first mentioned 30 days and submit the draft of conveyance to the Court for getting it executed and registered through the Court. The decree further directed that if the purchaser failed to deposit the amount within the stipulated time the suit would stand dismissed. The vendor interpreted the decree to be a preliminary decree and awaited the purchaser to perform her part of the decree by depositing the amount in the Court. The purchaser failed to deposit the amount within the stipulated time but on June 14, 1962 she sought some directions from the Court for making the deposit. There was some dispute between the parties about the extra land which was to be sold and its price. An order was made by the trial Court on May 14, 1964 directing the plaintiff purchaser to take steps for appointment of a Commissioner to determine the area of extra land and the price to be paid for such land and she was required to take steps by May 22, 1965. A further direction was given on August 26, 1965 directing the plaintiff to deposit Rs. 42,999 plus Rs. 500 by September 22, 1965 pursuant to the maps and report submitted by the Commissioner. Plaintiff purchaser preferred Civil Revision Application No. 3195 of 1965 challenging the report of the Commissioner and the direction of the Court. The Civil Revision Application was dismissed by the High Court on January 8, 1968 and the High Court simultaneously extended the time for depositing the balance of consideration by three weeks from the date of the order making it conditional that in the event of default the suit would stand

dismissed. This order was modified by the High Court on February 2, 1968 extending the time to make the deposit till February 8, 1968 retaining the original condition. The purchaser deposited the balance of consideration on February 6, 1968 whereupon the vendor defendant No. 1 made an application on March 25, 1968 requesting the Court to draw the final decree so as to enable her to prefer first appeal. This application was rejected by the Court on March 27, 1968 and thereafter the appeal was preferred to the High Court on April 11, 1968. As stated earlier, an application requesting the Court to condone the delay in preferring the appeal was filed on August 8, 1972.

4. The appeal against the decree dated April 30, 1962 preferred on April 11, 1968 was obviously barred by limitation. To assert that the decree made in a suit for specific performance of contract for sale of immovable property calling upon the purchaser to deposit the balance of consideration within the time stipulated in the decree with super added condition that in the event of default the suit would stand dismissed, is a preliminary decree, is to ignore the relevant provisions of the Code of Civil Procedure which require in certain types of suits to pass preliminary decree. Such a suit when contested, each party would be accusing the opposite party of committing breach of contract. The right to ask for specific performance of contract would be adjudicated upon and in fact in this case it was adjudicated upon. The trial Court did call upon the defendant to execute the conveyance on receipt of consideration. Such a decree could never be said to be preliminary decree. If defendant vendor was contesting the right of the plaintiff to ask for specific performance and that was concluded adverse to her and if the vendor wanted to challenge the finding, it was incumbent upon her to prefer an appeal within the prescribed period of limitation. Similarly, it is also not possible to entertain the contention that the orders extending the time to deposit the balance of consideration would result in amending the decree and as the appeal is preferred after such last amendment the appeal would be in time. Reliance was placed on Smt. Soudamini Das v. Nabalak Mia Bhuiya (AIR 1931 Cal 578), but that decision would not assist the respondent and in fact the High Court treated that fact as sufficient for extension of time under Section 5. The decision in Jagat Dhish Bhargava v. Jawahar Lal Bhargava (AIR 1961 SC 832), proceeds on the basis that litigant deserves to be protected against the default committed or negligence shown by the Court or its officers in the discharge of their duties. In that case litigant had applied for certified copy of the decree soon after judgment was pronounced but as the certified copy was not given, appeal was filed without producing certified copy of the decree and it was contended that under the relevant rules appeal was not competent. Such is not the case. Present respondent, if she wanted to question the decree directing her to execute conveyance, ought to have preferred appeal against the decree dated April 30, 1962. That has not been done and obviously the appeal preferred on April 11, 1968 was barred by limitation.

5. The High Court rightly held that the appeal was barred by limitation, and then proceeded to examine the submission of the appellant before it that the appellant was prevented by a sufficient cause from preferring the appeal in time and the delay should be condoned. The High Court having examined all the relevant materials placed before it, has exercised its discretion in favour of the appellant by condoning the delay and admitting the appeal to file. In the facts and circumstances of this case, could it be said that the High Court committed an error in exercising its discretion in favour of the appellant before it ?

6. At the outset it was urged that the cause shown by the respondent which prevented her from preferring the appeal in time is not the one accepted by the High Court, but the High Court has made out entirely a different ground not pleaded for condoning delay. We have gone through the application filed by the appellant before the High Court praying for condoning delay. It was asserted that the appeal is within time and alternatively it was prayed that delay, if any, be condoned. The

High Court examined both limbs of the contention. We see no contradiction in what is stated in the application and what the High Court found as a fact. The contention is that decree was a preliminary decree and on deposit it became a final decree. Alternatively it was contended that various events that occurred since the decree did create an impression in the mind of the vendor appellant that till the balance of purchase price was deposited the right to file an appeal did not arise and that a final decree would be made. That was pleaded and that has been accepted. Therefore, there is no merit in this contention.

7. Very serious exception is taken one observation of the High Court that an application for condoning the delay was submitted simultaneously with filing the appeal though in fact it was done nearly four years after filing of the appeal, and that the office of the High Court was misled by certain averments made in the Memo of Appeal which the Registry prima facie accepted and numbered the appeal without insisting upon an application for condonation of delay or bringing that fact to the notice of the Court on whose cause list the appeal was listed for admission. Now, it is undoubtedly true that the application for condoning the delay was made on August 8, 1972 and there is some factual error in stating in the judgment that the application was simultaneously filed with the appeal. But this aspect is not very material as the delay had to be explained till the date of filing of the appeal and not at any rate after filing of the appeal or till the application for condoning the delay was made. It is true that in the Memo of Appeal it has been stated that the appeal is directed against the judgment and decree dated April 30, 1962 as amended and/or modified by orders dated January 8, 1968 and February 2, 1968. The averments are factually correct and, therefore, it could not be said that they were made with a view to misleading the Registry of the High Court. By the decree dated April 30, 1962 purchaser was directed to deposit the balance of consideration within the stipulated time and at the request of the purchaser the time was first extended by the trial Court and then by the High Court in Civil Revision Application No. 3195 of 1965 on two different occasions, viz on January 8, 1968 and February 2, 1968. Therefore, no exception can be taken to these averments which are factually correct though the appeal would lie obviously against the decree dated April 30, 1962. It, however, appears that as the appeal was numbered and was even admitted, though the application for condoning delay was not made till the appeal was placed on the cause list and was actually taken up for hearing when an objection was raised that the appeal was barred by limitation. It is obviously at that stage that the application for condoning delay was made.

8. The appellant before the High Court did honestly believe that the decree was a preliminary decree and only after the deposit as directed therein was made by the plaintiff purchaser that a final decree would be made. The learned trial Judge has also styled it as a preliminary decree. Subsequent steps which have been listed in detail above clearly show that the plaintiff purchaser did not deposit the amount and in fact got a Commissioner appointed for determining the area of excess land and when the report of the Commissioner was accepted by the trial Court, that decision was questioned by the plaintiff in Civil Revision No. 3195 of 1965. If since the decree the plaintiff sought extension of time for depositing the amount which was the obligation imposed by the decree the performance of which will make the decree executable against judgment-debtor, the judgment-debtor may honestly, though erroneously, believe that there was no decree against which she could appeal unless the deposit was made. The decree also provided that failure to deposit would entail dismissal of the suit. The defendant may honestly believe that if the consideration is not deposited the suit would stand dismissed and it would not be necessary to prefer an appeal at all. Such a contention may not stand the scrutiny of a law Court but the question to which we must address ourselves is whether the defendant vendor on account of this peculiar situation could be said to be prevented by a sufficient cause from preferring an appeal in time ? Soon after the deposit was made she first requested the

Court to draw up a final decree which request was turned down and she immediately preferred the appeal. These are relevant considerations while examining a request for condoning the delay in preferring an appeal and on these relevant considerations if the High Court is satisfied simultaneously keeping in view the conduct of the plaintiff since the date of the decree, a case for condoning the delay is made out, and no exception can be taken to it. It is undoubtedly true that in dealing with the question of condoning the delay under Section 5 of the Limitation Act the party seeking relief has to satisfy the Court that he had sufficient cause for not preferring the appeal or making the application within the prescribed time and this has always been understood to mean that the explanation has to cover the whole period of delay, vide Sitaram Ramcharan v. M. N. Nagarshana ((1960) 1 SCR 875 at 889 : AIR 1960 SC 260 : 1960 SCJ 183). However, it is not possible to lay down precisely as to what facts of matters would constitute 'sufficient cause' under Section 5 of the Limitation Act. But those words should be liberally construed so as to advance substantial justice when no negligence or any inaction or want of bona fides is imputable to a party, i.e., the delay in filing an appeal should not have been for reasons which indicate the party's negligence in not taking necessary steps which he would have or should have taken. What would be such necessary steps will again depend upon the circumstances of a particular case (vide State of W. B. v. Administrator, Howrah Municipality ((1972) 2 SCR 874 : (1972) 1 SCC 366)). Discretion is conferred on the Court before which an application for condoning delay is made and if the Court after keeping in view relevant principles exercises its discretion granting relief unless it is shown to be manifestly unjust or perverse, this court would be loathe to interfere with it.

9. The High Court took into consideration the fact that no affidavit in opposition to the application for condoning delay was filed even though copy of the application was served on the present appellant who was respondent before the High Court and accordingly it was concluded that averments in the application remained unrebutted. The High Court also took into consideration the relevant fact that plaintiff sought extension of time to deposit balance of consideration from time to time and this is important because if the deposit was not made the suit was likely to be dismissed as per the decree of the trial Court as well as the order of the High Court in Civil Revision Application No. 3195 of 1965. The High Court recapitulated the events since the judgment of the trial Court and concluded that it was satisfied that the appellant before it had sufficient cause for not preferring the appeal within the period as prescribed in law and accordingly condoned the delay in preferring the appeal. In our opinion these are vital and relevant considerations while considering the prayer for condoning the delay in preferring the appeal and no case is made out for interfering with the same.

10. And now to the merits of the contentions raised in the appeal. Plaintiff's suit for specific performance had been decreed by the trial Court and on appeal by the vendor defendant, the suit has been dismissed. Plaintiff is here before us praying for a decree for specific performance of the contract. Let it be recalled that the contract of which plaintiff seeks performance is dated February 8, 1956 and the parties had agreed to complete the translation by the end of April 1956. The contract provided that within a week from the date of the agreement the vendor shall give to the purchaser for proper inspection all original documents of title and other papers connected therewith and necessary information and the purchaser shall within a period of one and half months from such inspection of the documents and other papers and receipt of other particulars and information complete her searches in respect of the property and the vendor's title being proved good and marketable to the satisfaction of the purchaser the deed of conveyance will be executed and registered within fifteen days thereof in favour of the purchaser or her nominee or nominees at the cost of the purchaser or such nominee or nominees. The vendor also agreed and undertook to deliver to the purchaser vacant and peaceful possession of the property to be sold with the execution of the deed of conveyance. Keeping in view these important terms, Mr. Purshottam Chatterjee contended

that the High Court was in error in holding that the vendor complied with all the request of the purchaser and it was submitted that the vendor had committed a default in complying with the requests. It was submitted that the plaintiff purchaser wanted to inspect title deeds as evidenced by Ext. 2 dated February 17, 1956 to which a reply was sent on behalf of the defendant vendor that these documents were filed in title suit No. 10 of 1956 and were lying in the Third Court of the Sub-Judge at Alipore and that it was as late a August 9, 1956 that the defendant vendor asked the purchaser to inspect the documents in the Court and also failed either to produce the original documents or certified copies as undertaken in the contract for sale of property. It was, therefore, contended that the vendor committed a breach of the terms of the agreement when she failed to produce the title deeds for inspection of the purchaser within the prescribed time schedule. It appears that the contention in the form it was canvassed before us was not raised before the High Court. Nor does it appear to have been contended before the trial Court. However, it must be stated that in a slightly different form this contention was pressed before the trial Court in support of the submission that the plaintiff was entitled as per terms of the contract to one foot of land to the north of the property to be purchased and the trial Court which had in fact decreed the plaintiff's suit, had on this point held against the plaintiff. Mr. Mukherjee for the respondent submitted that title was approved by the plaintiff by April 30, 1956 and then she was put in possession of a substantial portion of the premises. At any rate, during the extended period the title of the vendor was accepted by the plaintiff and the draft of conveyance deed prepared by her attorney was accepted by the vendor and yet the plaintiff failed to take conveyance by the date next fixed for the same and raised an untenable controversy about 1 foot of land to the north of the property to be sold to her. Therefore, even if vendor failed to submit title deeds in time it loses all significance. Save this, the finding of the High Court that the defendant had complied with all the requests made by the plaintiff to complete the transaction in time could not be assailed.

11. The High Court reversed the decree of the trial Court holding that the plaintiff purchaser had under one pretext or other put off the taking of the deed of conveyance and delayed performing her part of the contract. The correctness of this finding was seriously assailed on behalf of the appellant. It was urged that the High Court itself has found in this case that time was not the essence of the contract nor was it made essence of the contract because the date for performance was extended on number of occasions. It was urged that this discloses a self-contradictory approach on the part of the High Court when on the one hand it holds that time was neither the essence of the contract nor was it made essence of the contract but on the other refuses decree for specific performance on the only ground that the plaintiff delayed performing her part of the contract. It is undoubtedly true that the High Court has recorded a finding (p. 32) that time was not the essence of the contract nor was it made essence of the contract by a specific notice, but it is equally true that the plaintiff seeks relief for specific performance of contract and it is incumbent upon the plaintiff seek relief for specific performance of contract and it is incumbent upon the plaintiff to affirmatively establish that all throughout he or she, as the case may be, was willing to perform his or her part of the contract, and that the failure on the p[art of the plaintiff to perform the contract or willingness to perform her part of the contract may in an appropriate case disentitle her to relief, one such situation being where there is inordinate delay on the part of the plaintiff to perform his or her part of the contract and that is how the High Court has approached the matter in this case. One aspect of the case which deserves notice is that by the terms of the contract the vendor had to put the purchase in possession of the property when conveyance is executed and balance of consideration is paid and that was to be done by the end of April 1956. Even though the plaintiff purchaser had failed to perform any portion of her part of the contract by the end of April 1956, the vendor put the plaintiff in actual possession of the first and second floors of the premises to be sold on April 28, 1956 and the plaintiff is in

possession of the same till today that is after a lapse of more than 20 years. On the other hand, she deposited after struggle and procrastination the balance of consideration on February 6, 1968 that is nearly 12 years after the date of agreement. The plaintiff thus enjoyed actual possession of the property from April 1956 to February 1968 when she parted with consideration without paying a farthing for the use and occupation of the premises which, on a reasonable construction of the contract, she was not entitled at all, till she parted with the full consideration and took the conclusion. This has undoubtedly weighted with the High Court in coming to the conclusion that the plaintiff is disentitled to a relief of specific performance of contract.

12. Mr. Chatterjee contended that delay on the part of the plaintiff would not disentitle her to a decree for specific performance unless it can be shown that time was of the essence of the contract or was made essence of the contract or delay on the part of the plaintiff amounted to abandonment of the contract. Our attention was drawn to Article 466, Halsbury's Laws of England, III Edition, Vol. 36, p. 322 where it is observed that delay by a plaintiff in performing his part of the contract is a bar to his enforcing specific performance, provided that : (1) time was in equity originally of the essence of the contract; or (2) was made so by subsequent notice; or (3) the delay has been so great as to be evidence of an abandonment of the contract. It was then said that in view of the finding or the High Court that time was not of the essence of the contract or was not so made, the decree could not be refused on the ground of delay. The question whether relief of specific performance of the contract for the purchase of immovable property should be granted or not always depends on the facts and circumstances of each case and the Court would not grant such a relief if it gives the plaintiff an unfair advantage over the defendant. A few relevant facts of the case would unmistakably show that if a decree for specific performance in this case is granted it would give the plaintiff an unfair advantage over the defendant. The defendant was obliged to sell the property because it was mortgaged with Hindustan Co-operative Insurance Society Ltd., and the mortgage Company had filed Title Suit No. 10/656 for realization of mortgage dues. The vendor then had thus a compelling necessity to sell the property to save the property from being sold at a Court auction. It is in this background that we have to appreciate the conduct of the plaintiff. The stages within which the contract was to be completed were clearly demarcated and set out in the contract itself and by the end of April 1956 the transaction was to be completed. In her anxiety to see that the transaction was completed the defendant vendor put the plaintiff in possession of a substantial portion of the property even when the plaintiff had not paid a major part of the consideration. This would clearly evidence the anxiety of the defendant to successfully complete the contract within the stipulated time. To repel this submission on the flimsy ground that mortgage was not referred to in the contract for sale is to ignore the letter on behalf of the defendant dated February 25, 1956 in which it is specifically stated that the title deeds of the property in question were lying in the Court of Sub-Judge at Alipore in which Hindustan Co-operative Insurance Society Ltd., had filed a suit for realisation of mortgage dues. And the procrastination on the part of the plaintiff put the defendant then in such a disadvantageous position that she was forced to sell the adjacent property 86-A, Rash Behari Avenue to Hindu Maha Sabha to raise enough money to pay of the dues in respect of the property which she plaintiff desired to purchase. If in this background the High Court took into consideration the fact that while the defendant did everything within her power to meet the requests made by the plaintiff, the latter avoided performing her part of the contract under one or the other pretext and, therefore, is disentitled to a decree for specific performance, no serious exception can be taken to this finding.

13. Mr. Chatterjee, however, contended that assuming there was delay on the part of the plaintiff in performing her part of the contract, once she was put in possession of a substantial portion of the property which was intended to be purchased, a decree for specific performance could not be

refused. In this connection he invited our attention to para 471, Halsbury's Laws of England, III Edition, Vol. 36, p. 325, where it is observed that delay does not, however, bar a claim to specific performance if the plaintiff has been in substantial possession of the benefits under the contract and is merely claiming completion of the legal estate. Reference was also made to Williams v. Greatrex (1956 All ER 705). In that case the delay was of 10 years before bringing an action for specific performance. During the entire period of 10 years neither side gave notice requiring the other to complete the transaction. In this background the fact that the intending purchaser was put in possession of the plots acquired considerable importance and after considering the question of laches, a decree for specific performance was granted. But the conclusion was reached on the facts of that case. In the case before us the defendant had on as many as three different occasions invited the plaintiff to complete the transaction. By Ext. 2H, July 17, 1956 was fixed as the date for execution and registration and by Ext. 2J dated August 9, 1956, August 12, 1956 was fixed as the date for execution and registration of the conveyance. Again, by letter dated August 27, 1956, Ext. 2P, the plaintiff was informed that if the transaction was not completed within a week from August 26, 1956, the defendant would treat the agreement of sale as cancelled, forfeit the earnest money and claim damages for wrongful use and occupation of the premises. In this background it is not possible to accept the submission that even if the plaintiff was guilty of delay in performing her part of the contract, in view of fact that she is in possession of a substantial portion of the property which is the subject-matter of this appeal, the delay should be overlooked and a decree for specific performance should be granted.

14. The correspondence that passed between the parties prominently brought out three points of dispute between the parties. The plaintiff claimed sale of one foot of land to the north of the property involved in dispute. Reliance was placed in support of the submission on the map annexed to the agreement. The map prepared by the Commissioner was also referred to. It is not necessary to examine evidence on this point because both the trial Court which decreed the plaintiff's suit and the High Court which held against the plaintiff have recorded a concurrent finding that the plaintiff was not entitled as a part of the agreement to purchase one foot of land to the north of the property. In fact, it has been held that this claim was purposely invented by the plaintiff fully knowing that to the north of the premises 88A, Rash Behari Avenue there was no land appurtenant to the said premises. Even if both the maps are compared it is not possible to come to the conclusion that there was any such land which was included in the agreement of sale. If there was no such land which could be sold to the plaintiff and yet if the plaintiff persisted in making this demand, the High Court and the trial Court were both amply justified in coming to the conclusion that this claim was invented with a view to putting off the date for performing her part of the contract. But in this connection Mr. Chatterjee contended that the plaintiff purchaser wanted demarcation of boundary as per Ext. 2E and instead of agreeing to make arrangement for demarcation, the defendant contended that demarcation was already effected. By letter Ext. 2K, the plaintiff denied any such demarcation. It was also urged that there is no document on record which would show that any joint demarcation of the boundary was undertaken and demarcation was made. In this connection, the letter Ext. 2P on behalf of the defendant clearly shows that demarcation of the boundary was already done. The dispute about demarcation has hardly any relevance. In fact, the dispute is raised by the plaintiff when she claims one foot of land to the north of property. Even if one relies upon the map annexed to the agreement, the claim is not substantiated. Both the trial Court and the High Court have concurrently found that no such land was agreed to be sold. If the plaintiff still persists in making such a demand she is asking the defendant to perform an agreement which was not entered into between the parties. However, this matter can be looked at from a slightly different angle also in that when the Commissioner prepared the map the plaintiff questioned it in the High Court and the

High Court accepted the Commissioner's map showing which was the property to be sold by the defendant to the plaintiff and this map did not contain one foot of land to the north of the property. The contention about one foot of land of the north was already negatived and could not be reagitated before the High Court. Even apart from this technical aspect substantially on evidence also the plaintiff fails on this point. Yet she delayed performing her part by insisting upon buying one foot of land.

15. Another dispute between the parties was with regard to the claim of Rs. 2000 which the plaintiff appears to have paid to the tenant to get him vacate a portion of the premises so that she could take over possession. Both the trial Court and the High Court have rejected this claim observing that if the plaintiff voluntarily paid something for her own benefit she could not claim the same from the defendant. There is nothing to show that this amount was paid by the plaintiff on behalf of the defendant or with the consent or concurrence of the defendant. The plaintiff, till 1968 when she deposited the balance of consideration in the Court, was not entitled to be put in actual possession and yet if she was put in possession of a substantial portion of the premises and she for her own benefit paid something to the tenant in a portion of the premises to vacate the same so that she can enjoy it, it was a voluntary payment made by her for her own benefit and not for the benefit of the vendor. That amount was used by her for her own benefit and could not be recovered from the defendant. On the contrary, this claim would show that the plaintiff was putting hurdles in the way of performing the contract.

16. Mr. Chatterjee argued that the High Court clearly committed an error in law in holding that the plaintiff had no wherewithal to pay the balance of consideration and it was further argued that the High Court took into consideration extraneous circumstances such as the insolvency of the husband of the plaintiff to come to the conclusion that the plaintiff had not necessary wherewithal with her to pay the balance of consideration. In this connection the plaintiff's case is that the amount of Rs. 2000 paid earnest money was advanced by her husband and she was to procure the balance of consideration by selling her ornaments which she had with her. The plaintiff has not stepped into the witness box. There is no material to show that she had enough ornaments which would have fetched nearly Rs. 45,000. But reliance was placed on the pass books of the plaintiff's husband. The pass books show an overdraft account in the name of the husband of the plaintiff. Assuming that the entries in the pass book show that the husband of the plaintiff could have procured the amount, the plaintiff's case is that she was to sell the ornaments to procure the balance of consideration. If that was the case, she wanted to make out, it was incumbent upon her to step into the witness box. Now, as against this, there are some tell-tale facts on record which permit an irresistible inference that the plaintiff did not have necessary wherewithal to pay the balance of consideration and, therefore, she put forth one or the other excuse to avoid the performance of her part of the contract. Two such pretexts can be readily pointed out, one when she insisted for the sale of one foot of land to the north of the property which claim was thoroughly unjust and improper, and second, the demand of Rs. 2000 spent by her in making the tenant vacate a portion of the premises. The contract was to be completed by April 1956. It was not completed till 1957 even though the defendant after satisfying the queries of the plaintiff fixed different dates on different occasions calling upon the plaintiff to complete the transaction. Thereafter plaintiff filed a suit. The suit was decreed on April 30, 1962. We have already at another place referred to this decree to point out that the plaintiff by that decree was called upon to deposit the balance of consideration within 30 days of the date of the decree. This would mean that she had to deposit the balance of consideration by the end of May 1962. She did not deposit the amount by the stipulated date. She asked for extension of time. Thereafter she moved an application for ascertaining the area of excess land which was being sold to her. Under this pretext she did not deposit the balance of consideration. Thereafter when the Commissioner

prepared the map and the Court fixed another date to deposit the amount, she questioned the order of the Court in the High Court and after the High Court dismissed her revision application and called upon her to deposit the balance of consideration she again sought extension and ultimately deposited the amount of February 6, 1968. This would show that at the material point of time she did not have the necessary wherewithal to pay the balance of consideration and to take the conveyance and this would provide tell-tale evidence to explain her conduct in putting forth one or the other impediment in the path of performance of the contract. If in the background of this evidence the High Court reached the conclusion that she did not have the necessary wherewithal her to pay the balance of consideration and take the deed of conveyance, one cannot take any exception to it. But in this connection Mr. Chatterjee contended that the plaintiff seeking specific performance of the contract is not required to show that she has at all material time necessary cash with her to perform her part of the contract. It is enough if the plaintiff can show that she was in a position to raise the money required at or about the time when the contract was to be performed and she discharges the obligation of proving readiness and willingness so far as the financial aspect is concerned. Reliance was placed on Jitendra Nath Roy v. Smt. Maheswari Bose (AIR 1965 Cal 45). Undoubtedly, the question would be while examining the readiness and willingness of the plaintiff to perform her part of the contract to find out whether she would be in a position to take the conveyance by paying the balance of consideration and that the enquiry may well be made whether she would be in a position to raise the money. Reference was also made to Bank of India Ltd. v. Jamsetji A. H. Chinoy (77 IA 76), where it was held that the plaintiff seeking to prove that he was ready and willing to fulfil his financial obligations has not necessarily to produce the money or to vouch a concluded scheme for financing the transaction. After the High Court dismissed her revision application and fixed the date January 8, 1968 for depositing the amount, she had no further contention to put forth and she should have deposited the amount yet she sought extension of time. And along with this, one must keep in view her contention that she had to sell her ornaments to raise the amount for which she did not step into the witness box to prove her contention. In this back-ground it does appear that the plaintiff had not the necessary wherewithal to perform her part of the contract.

17. It was next contended that the relief for specific performance being discretionary and the trial Court having exercised its discretion one way in favour of the plaintiff, the High Court should not have interfered with the same. It may be recalled that on major points of dispute between the parties the trial Court and the High Court recorded concurrent findings to wit the claim of the plaintiff for sale of one foot of land to north of property and the demand of Rs. 2000 spent by the plaintiff for removing the tenant. The third dispute was about removal of fixtures from the northern wall by the defendant. The trial Court held that the defendant committed default in removing the fixtures. Our attention was drawn to the relevant correspondence on the subject. It was urged that the defendant was required to remove the fixtures on the northern wall. On this point the trial Court held that the defendant committed default in removing the fixtures. In fact, correspondence would show that the fixtures could be removed in a short time and the defendant was always willing to remove the fixture. But the trial Court held that the defendant committed a default in this behalf and recorded a finding that as both the plaintiff and the defendant committed default law must take its own course, viz., the plaintiff should get a decree for specific performance of the contract. The High Court examined this contention meticulously. So have we done here. In fact, it prominently appears that the plaintiff put off performing her part of the contract presumably because she had not the necessary wherewithal to take the conveyance when she would be obliged to pay the balance of consideration and having obtained possession stuck on to it without meeting her obligation. If in this background the High Court interfered with the decree of the trial Court, we see nothing

objectionable in it. The decree for specific performance in this case has been rightly refused and this appeal is liable to be dismissed.

18. At one stage Mr. Chatterjee wanted us to work out the equities of the situation but as we are of the opinion that the plaintiff is not entitled to a decree for specific performance of the contract, we need examine the same. Accordingly, this appeal fails and is dismissed with costs.

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