



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

FIRST APPEAL NO. 1252 OF 2013

1. Girish Vinodchandra Dhruva
 2. Jagdish Vinodchandra Dhruva
 3. Rajesh Vindochandra Dhruva
 4. Smt. Malini V. Dholkia
 5. Smt. Mayuri J. Gaglani
- ...Appellants

Versus

1. Smt. Neena Paresh Shah
 2. Paresh Ramesh Shah
- ...Respondents

**WITH
CIVIL APPLICATION NO. 3479 OF 2013
IN
FIRST APPEAL NO. 1252 OF 2013**

Girish Vinodchandra Dhruva and
Ors. ...Applicants

Versus

Smt. Neena Paresh Shah ...Respondent

**WITH
INTERIM APPLICATION NO. 3007 OF 2022
IN
FIRST APPEAL NO. 1252 OF 2013**

Smt. Neena Paresh Shah and Anr. ...Applicants

Versus

Girish Vinodchandra Dhruva and
Ors. ...Respondents

**WITH
INTERIM APPLICATION NO. 18033 OF 2022
IN
FIRST APPEAL NO. 1252 OF 2013**

Girish Vinodchandra Dhruva and
Ors. ...Applicants

Versus

Smt. Neena Paresh Shah and Anr.

...Respondent

Mr. Mayur Khandeparkar a/w. Mr. Sanket Mungale
for the Appellants.

Mr. Kevic Setalvad, senior Advocate with Vatsal Shah,
Mr. Chetan Mehta, Ms Vidhi Shah i/b. M/s. M.M.K. Law
Associates for the Respondents in FA/1252/2013 and for the
Applicants in IA/3007/2022.

CORAM: SMT. ANUJA PRABHUDESSAI, J.

DATED : 12/06/2023.

JUDGMENT :-

1. The challenge in this Appeal is to the judgment and decree dated 07/08/2013 in Regular Civil Suit No.5732 of 2006. By the impugned judgment, the learned Judge, City Civil Court, Greater Bombay decreed the suit for specific performance and directed the Appellants herein to execute the sale deed in respect of the suit property in favour of the Respondent herein within a period of two months.

2. The brief facts necessary to decide this Appeal are as under :-

The Respondents were the Plaintiffs and the Appellants are the legal representatives of the original Defendant Vilasben Vinodchandra

Dhruva, and shall be hereinafter referred to as ‘the Plaintiffs’ and the Defendants, respectively. The Plaintiffs are the residents of the United States of America. They were interested in purchasing a flat in Mumbai, preferably in a building, Jamuna Mahal, Prabhat Colony, Santacruz, wherein Mukesh Shah, the brother of the Plaintiff No.1, was residing. Vilasben Vinodchandra Dhruva, the original Defendant, owned flat No.304 on 3rd floor of Jamuna Mahal, which shall be hereinafter referred to as ‘the suit flat’. The original defendant expressed her desire to sell the suit flat. Accordingly, some time in February, 2005, during her visit to Mumbai, the Plaintiff No.1 visited the suit flat and pursuant to the negotiations, the Plaintiffs decided to purchase the suit flat for total sale consideration of Rs.41,75,000/-.

3. The Plaintiff No.1 had to leave for the United States, hence she requested her brother – Mukesh Shah to complete the remaining formalities. The Plaintiffs executed a power of attorney in favour of Mukesh Shah authorizing him to negotiate, execute documents and to perform all other acts and deeds necessary to complete the sale transaction. Accordingly, the Plaintiffs through their power of attorney and the original Defendant, entered into MoU dated 06/03/2005 for purchase of the suit flat for sale consideration of Rs.41,75,000/-. The

Plaintiffs paid an amount of Rs.2,51,000/- to the original Defendant as an earnest money and the balance sale consideration was to be paid on or before 31/05/2005. The sale was to be completed on receipt of NOC and upon obtaining No Dues Certificate from the Housing Society, the Plaintiffs were required to pay the balance sale consideration and were to be put in possession of the suit flat.

4. The Plaintiffs claim that they had applied for housing loan from City Bank and were ready and willing to pay the balance amount and complete the sale on or before 31/05/2005. The Plaintiffs alleged that the Defendant was unable to obtain certificates from the Society and fulfill her obligation under the Agreement. Hence, by mutual consent, the date of execution of the sale deed was extended till 31/10/2005.

5. The Plaintiffs claim that they had forwarded copies of the documents to the advocate for the Defendant and repeatedly requested the Defendant to complete the sale. It is alleged that the Defendant avoided to complete the sale on one pretext or the other. Hence, the Plaintiffs by letter dated 29/10/2005 informed the Defendant that they were ready and willing to pay the balance amount of Rs.39,24,000/-

and called upon the Defendant to handover vacant and peaceful possession of the suit flat along with all the original documents and the NOC of the Society.

6. The Defendant, vide reply dated 31/10/2005, denied the contents of letter dated 29/10/2005 and claimed that the Plaintiffs had failed to show their readiness and willingness to pay the balance amount, though the sale transaction was to be completed by 31/10/2005, time being essence of the contract. The Defendant therefore terminated the Agreement for sale. In further correspondence between the parties, the Plaintiffs claimed that they were always ready and willing to perform their part of obligation under the Agreement including payment of the balance purchase price.

7. The Plaintiffs claimed that the sale transaction could not be completed since the Defendant failed to perform the reciprocal obligation under the agreement in an attempt to resile from the agreement in view of rise in price of the property subsequent to the execution of the agreement. The Plaintiffs claimed that the agreement is valid and subsisting and is binding on the Defendant. Based on these pleading, the Plaintiffs through their power of attorney – Mukesh Shah

filed a suit for specific performance of Agreement dated 06/03/2005 and further sought payment of Rs.2,000/- per day from the date of the suit till handing over possession of the suit flat.

8. The original Defendant died during the pendency of the suit and the Appellants, who were brought on record as her legal representatives filed the written statement contesting the claim of the Plaintiffs. These Defendants claimed that the original Defendant was residing in the suit flat with 14 members of the family. She was under compulsion to sell the suit flat due to paucity of space and was in urgent need of money to purchase separate flats for her three sons and their family members. The Plaintiffs had assured that the sale consideration would be paid within three months, in addition, they had also agreed to pay an amount of Rs.10,00,000/- over and above the amount mentioned in the subject agreement. The Defendants claimed that the Plaintiffs were unable to obtain RBI permission and to transfer funds. Hence, at the request of Mukesh Shah, time to complete the sale transaction was extended till 31/10/2005.

9. The Defendants averred that they had already obtained no objection certificate from the Society for sale of the flat. The

Defendants alleged that despite extension of time, the Plaintiffs neither forwarded the document nor paid the balance sale consideration. The Plaintiffs with ulterior and dishonest intention, vide letter dated 29/10/2005, received by the original Defendant on 30/10/2005 being a Sunday, offered to pay the balance sale consideration upon handing over vacant possession of the suit flat. The Defendants claim that the Plaintiffs did not take any effective steps between 11/07/2005 to 30/10/2005 to complete the sale transaction and since time was the essence of the contract, the Defendant by letter dated 31/10/2005 rescinded the contract. The Defendants alleged that they were compelled to cancel the agreement since the Plaintiffs were not ready and willing to perform their part of the agreement.

10. Based on the aforesaid pleadings, the Trial Court framed the following issues :-

(i). Whether plaintiffs prove that the Suit agreement dated 6.3.2005 is valid, binding and subsisting and capable of being specifically performed against the defendants?

(ii). Whether plaintiffs prove that the Suit MOU and Power of Attorney are properly stamped & do not require

registration?

(iii). Whether Plaintiffs prove that they are entitled to recover a sum of Rs.2,000/- per day or such other amount from the defendants from the date of the suit till handing over vacant and peaceful possession of the suit flat?

(iv). In the alternative whether plaintiffs prove that they are entitled to order and decree against the defendants to pay to the plaintiffs a sum of Rs.41,75,000/- or such other amount with interest @ 18% per annum from the date of suit till payment and /or realisation?

(v). Whether plaintiffs prove that in case of money decree they are entitled to a declaration that there shall be a charge on the suit flat to the extent of the amount of the decree and for the sale of suit flat to realize the charge?

(vi). Whether defendants prove that consideration mentioned in MoU is incorrect and agreed consideration was Rs.51,75,000/-

(vii). Whether defendants prove that the original

defendant validly cancelled revoked MoU by her letter dated 31.10.2005 addressed to the Plaintiffs?

(viii). Whether Defendants prove that as Plaintiffs failed to pay the balance consideration on or before 31.05.2005 and thereafter before 31.10.2005, original defendant was entitled to forfeit the earnest money?

(ix). Whether Defendants prove that the payment by Plaintiffs to original Defendants was the essence of the contract and Plaintiffs committed deliberate and willful breach thereof?

(x). What Order and Decree?

11. The power of attorney holder– PW1 Mukesh Shah deposed on behalf of the Plaintiffs whereas Rajesh Vinodchandra Dhruva - the Defendant No.1C deposed on behalf of the Defendants. Upon considering the oral as well as documentary evidence produced by the respective parties, the trial court rejected the plea of the Defendants that the power of attorney and MoU were not properly stamped and further that the Plaintiffs were liable to pay to the Defendants an amount of Rs.10,00,000/- over and above the amount mentioned in

the agreement.

12. The trial court held that the passbook produced by the Plaintiffs proved that there was sufficient amount in their account. Furthermore, a housing loan of Rs.15,00,000/- was also sanctioned in favour of the Plaintiffs and they were in a position to arrange the balance amount. The trial court came to the conclusion that the Plaintiffs were ready and willing to perform their part of the Agreement. In terms of the Agreement, the original Defendant was under an obligation to obtain NOC and No Dues Certificate from the Society and handover the original documents and possession of the suit flat to the Plaintiffs and the balance sale consideration was to be paid only upon performance of the reciprocal obligation. The Trial Court also observed that the Defendant failed to prove that she had secured alternative premises to enable her to vacate the suit flat and handover possession of the suit flat to the Plaintiffs. The trial court held that the Defendants having failed to perform reciprocal obligation under the contract, termination of contract was invalid and illegal.

13. The trial court further held that in terms of clause 6(c) of the Agreement, the Plaintiffs are entitled for damages for the delay in

handing over possession of the suit flat. The trial court observed that penalty to the extent of Rs.2,000/- per day as stipulated in the Agreement, would be onerous and allowing the Plaintiffs to retain the interest accrued on the amount of Rs.39,24,000/- deposited by the Plaintiffs pursuant to the order of the Court, would meet the interest of justice. On the basis of these findings, the trial court decreed the suit and directed the Defendants to execute the sale deed in respect of the suit flat within a period of two months. The trial court held that the Defendants would be entitled to receive an amount of Rs.39,24,000/- deposited before the Court and that the Plaintiff would be entitled for interest accrued on the said amount by way of damages. The amount deposited by the Defendants towards security of earnest money, is ordered to be refunded. Being aggrieved by this Judgment, the Defendants have filed this Appeal.

14. The judgment is assailed mainly on the grounds that (i) the Plaintiffs have not stepped into the witness box and the evidence of PW1 – Mukesh Shah, the power of attorney holder, cannot be relied upon. (ii) Time was essence of contract and the Plaintiffs failed to complete the sale transaction within the time stipulated in the agreement (iii) The Plaintiffs have failed to prove that they were ready

and willing to perform the contract.

15. Mr. Mayur Khandeparkar, learned counsel for the Defendants submits that the Plaintiff No.1, who had participated in negotiation and settlement of terms of contract did not step in the witness box as a consequence, the Defendants had no opportunity to cross-examine the Plaintiffs on the issue of readiness and willingness to perform the contract. It is further submitted that willingness to perform the contract is a state of mind, personal to the Plaintiffs alone and hence, the power of attorney was not competent to depose on this issue. Reliance is placed on the decision of *Janki Vashdeo Bhojwani and anr. v/s. IndusInd Bank Ltd. and others (2004) 3 SCC 584* ; *Seethakathi Trust Madras v/s. Krishnaveni (2022) 3 SCC 150* ; *Man Kaur (Dead) by Lrs. v/s. Hartar Singh Sangha (2010) 10 SCC 512* and *Vidhyadhar v/s. Manikrao and anr. (1999) 3 SCC 573*.

16. Learned counsel for the Defendants submits that under Clause 4(b) of the agreement, the balance sale consideration was to be paid on or before 31/05/2005, which date was extended till 31/10/2005. He submits that the agreement contained forfeiture as well as penalty clause. The agreement read as a whole would indicate

that the parties intended to make time the essence of the contract. The Plaintiffs were therefore required to pay the balance amount and conclude the transaction within the stipulated time.

17. Learned counsel for the Defendants submits that readiness and willingness to perform the contract is one of the essential ingredients of the specific performance. The Defendants had raised a specific plea that the Plaintiffs did not have sufficient funds and that they were not ready and willing to perform their part of the contract. Despite categorical pleadings, the trial court did not frame the issue relating to readiness and willingness to perform the contract.

18. He further submits that the power of attorney was not competent to depose about readiness and willingness of the Plaintiffs to perform the contract. Relying upon the decision of the Apex Court in *U.N. Krishnamurthy (since deceased) through Lrs. v/s. A.M. Krishnamurthy 2022 SCC Online SC 840*, he contends that readiness and willingness cannot be inferred on mere statement but there has to be cogent proof that the Plaintiffs had financial capacity to pay the sale consideration and that they were willing to conclude the sale transaction. The Plaintiffs having failed to step in the witness box,

there is no positive evidence in this regard. Though it is contended that the Plaintiff No.1 had applied for loan and that the loan was sanctioned, the sanction letter was not produced along with the plaint and a copy of the letter was produced only in the course of the evidence. Moreover, contents of the said sanction letter have not been proved. He submits that by letter dated 29/10/2005, the Plaintiffs with ulterior and dishonest intention, offered to pay the balance sale consideration, knowing fully well that no sale deed could have been executed on Sunday. In such circumstances, the Defendant was left with no other option but to cancel the agreement. He submits that having failed to prove readiness and willingness, the Plaintiffs were not entitled for decree of specific performance. Reliance is placed on the decisions of the Apex Court in *Shenbagam and ors. v/s. K.K. Rathinavel 2022 SCC Online SC 71* ; *U.N. Krishnamurthy (since deceased) thr. Lrs. v/s. A.M. Krishnamurthy 2022 SCC Online SC 840* and the decision of the Division Bench of this Court in *Niwas Builders v/s. Chanchalaben Gandhi 2003 BCI (0) 48*.

19. Learned counsel for the Defendants further contends that findings of the trial court are not based on evidence. He has relied upon the decision of the Apex Court in *Ahmedabad Municipal*

Corporation v/s. Virendra Kumar Jayantibhai Patel (1997) 6 SCC 650

to contend that finding based on no evidence would suffer from error of law apparent on the face of record. Learned counsel for the Defendants further contends that there is absolutely no deliberation of Section 20 of the Specific Relief Act. He submits that in view of escalation of price, it will not be equitable to grant specific performance after lapse of such a long period. Reliance is placed on the decision of ***Nanjappan v/s. Ramasamy and anr. (2015) 14 SCC 341.***

20. Per contra, Mr. Kevic Setalvad, learned Senior Counsel submits that the Plaintiffs, who are the residents of the United States, had executed a Power of Attorney in favour of Mr. Mukesh Shah, the brother of the Plaintiff No.1. Learned counsel for the Plaintiffs has drawn my attention to the pleadings as well as evidence on record to contend that Mr. Mukesh Shah had personal knowledge of the entire transaction and hence, he was competent to depose on behalf of the Plaintiffs. He has relied upon the decision of the Kerala High Court in ***Asha Joseph represented by Her Power of Attorney Holder Abraham Joseph v/s. Babu C. George and others 2022 SCC Online Ker 1822.***

21. Learned senior counsel submits that the terms and

conditions of the contract do not disclose that the parties intended to make time the essence of the contract. He further submits that in the case of sale of immovable property, there is no presumption as to time being the essence of the contract. Reliance is placed on the decisions of the Apex Court in *Chand Rani (Smt.) dead by Lrs. v/s. Kamal Rani (Smt.) (dead) by Lrs. (1993) 1 SCC 519* ; *Welspun Speciality Solutions Ltd. v/s. Oil and Natural Gas Corporation Limited (2022) 2 SCC 382* ; *Swarnam Ramchandran (smt.) and another v/s. Aravacode Chakungal Jayapalan (2004) 8 SCC 689* ; *R. Lakshmikantham v/s. Devaraji (2019) 8 SCC 62* ; *Sou. Sharada Nanasaheb Patil and others v/s. Appaso Jivappa Chougule and another (Second Appeal No.114/1991) AIR Online 2019 Bom 1146.*

22. Learned senior counsel further submits that the Plaintiffs had already sold their flat at Powai and had sufficient funds in their account. Moreover, the City Bank had also sanctioned home loan of Rs.15,00,000/-. The Plaintiffs were drawing combined salary of USD 120,000 and were in position to arrange funds at all times. He submits that the Plaintiffs had also forwarded documents to the advocate and solicitor of the original defendant. He submits that by letter dated 29/10/2005, the Plaintiffs called upon the Defendant to receive the

balance consideration and execute the sale deed. The Plaintiffs were always ready and willing to perform their part of the contract.

23. Learned senior counsel submits that the agreement clearly stipulates that the liability of the Plaintiffs to pay the balance amount was subject to the Defendant obtaining No Dues Certificate and Transfer Certificate from the Society. Since the Defendant was unable to fulfill her obligation under the agreement time to complete the sale was extended upto 31/10/2005 at her request. Having failed to perform their part of obligation even after extension of time, the Defendants cannot be allowed to contend that time was essence of the contract or that the Plaintiffs were not ready and willing to perform their part of the contract. He has relied upon the decision in ***Aniglase Yohannan v/s. Ramlatha and others (2005) 7 SCC 534 ; Ramathal v/s. Maruthathal and ors. (2018) 18 SCC 303 ; R. Lakshmikantham*** (supra) ; ***Asha Joseph*** (supra) and the decision of the Single Judge of this Court in ***Sou. Sharada Nanasaheb Patil*** (supra).

24. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties.

25. The points for consideration are :-

- (i) Whether PW1 – Mukesh Shah, Power of Attorney holder of the Plaintiffs was not competent to depose on behalf of the Plaintiffs.
- (ii) Whether the time was essence of the contract.
- (iii) Whether the Plaintiffs were ready and willing to perform their part of the contract.
- (iv) Whether the trial court was justified in exercising discretion in favour of the Plaintiffs.

26. Before advertng to the issue relating to the competency of PW1-Mukesh Shah to depose on behalf of the Plaintiffs as their power of attorney holder, it would be relevant to refer to the decision of the Apex Court in **Man Kaur** (supra) wherein the Apex Court has summarized the law as follows:-

“ 17. To succeed in a suit for specific performance, the plaintiff has to prove : (a) that a valid agreement of sale was entered into by the defendant in his favour and the terms thereof ; (b) that the defendant committed breach of the contract ; and (c) that he was always ready and willing to perform his part of the obligations in terms of the contract. If a plaintiff has to prove that he was always ready and willing to perform his part of the contract, that is, to perform his obligations in terms of the contract, necessarily he should step into the witness box and give evidence that he has all along been ready and willing to perform his part of the contract and subject himself to cross-examination on that issue. A plaintiff cannot obviously examine in his place, his attorney-holder who did not have personal knowledge either of the transaction or of

his readiness and willingness. Readiness and willingness refer to the state of mind and conduct of the purchaser, as also his capacity and preparedness on the other. One without the other is not sufficient. Therefore a third party who has no personal knowledge cannot give evidence about such readiness and willingness, even if he is an attorney-holder of the person concerned.

18. We may now summarise for convenience, the position as to who should give evidence in regard to matters involving personal knowledge :

(a) An attorney holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.

(b) If the attorney holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder shall be examined, if those acts and transactions have to be proved.

(c) The attorney holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire

transaction has been handled by an attorney holder; necessarily the attorney holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorized managers/attorney holders or persons residing abroad managing their affairs through their attorney holders.

(e) Where the entire transaction has been conducted through a particular attorney holder, the principal has to examine that attorney holder to prove the transaction, and not a different or subsequent attorney holder.

(f) Where different attorney holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his 'state of mind' or 'conduct', normally the person concerned alone has to give evidence and not an attorney holder. A landlord who seeks eviction of his tenant, on the ground of his 'bona fide' need and a purchaser seeking specific performance who has to show his 'readiness and willingness' fall under this category. There is however a recognized exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or 'readiness and willingness'. Examples of such attorney holders are a

husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad. ”

27. A plain reading of the aforesaid dictum clearly indicates that the power of attorney holder is not competent to depose or give evidence in place of the principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge. However, this bar will not apply to a case where the power of attorney holder has personal knowledge of the facts and of the transaction or where all the affairs of a principal are completely managed, transacted and looked after by an attorney, who may happen to be a close family member.

28. In the instant case, PW1-Mukesh Shah, is the brother of Plaintiff No.1. Both the Plaintiffs are the residents of the United States. They were desirous of purchasing a flat in Mumbai, preferably in the building wherein PW1 had his flat. The pleadings as well as the evidence of PW1 clearly indicate that the original Defendant had informed PW1 that she was desirous of selling the suit flat. The Plaintiff No.1 visited Mumbai and saw the flat and after initial discussion agreed to purchase the said suit flat. The evidence of PW1

reveals that he was present at the time of the said discussion/negotiation. Since the Plaintiffs had to return to the United States, they executed a general power of attorney in favour of PW1-Mukesh Shah authorizing him to negotiate, execute documents and to perform all other acts and deeds necessary to complete the sale transaction in respect of the suit flat. Accordingly, PW1 prepared Memorandum of Understanding incorporating all the terms and conditions agreed between the parties and handed over a copy of the same to the Defendant. The said MoU was signed by PW1 as a power of attorney holder of the Plaintiffs. He claims that he had pursued the loan application with the City Bank. He was also a signatory to the letter under which time for execution of the sale deed was extended.

29. The pleadings as well as the evidence on record clearly indicate that PW1-Mukesh Shah, brother of the Plaintiff No.1 was exclusively dealing with the original Defendant on behalf of the Plaintiffs. He had personal knowledge of the transaction. In this fact situation the decisions in *Seetakathi Trust Madras* and *Vidyadhar* (supra) are not applicable to the facts of the case. In fact, the present case is squarely covered by paragraph 18g of the judgment in

Man Kaur (supra) and consequently PW1 was competent to depose or give evidence on behalf of the Plaintiffs.

30. The next question for consideration is whether time is the essence of the contract. It would be relevant to note that Section 55 of the Contract Act deals with the effect of failure to perform a contract within the agreed time. This section provides that failure to perform the contract within the stipulated time when time is the essence of the contract, renders the contract voidable at the option of the promisee. This section further provides that when parties to contract do not intend to make time essence of the contract, then promisee is entitled to claim compensation for any loss occasioned to him as a result of such default.

31. In ***Chand Rani*** (supra), while considering the question whether time is essence of the contract, the Apex Court referred to previous decisions and observed that :-

“25. 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 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.”

32. In **Swarnam Ramachandran** (supra), the Apex Court has observed that :

“ 12. ... The onus to plead and prove that time was the essence of the contract is on the person alleging it, thus giving an opportunity to the other side to adduce rebuttal evidence that time was not of essence. That when the plaintiff pleads that time was not of essence and the defendant does not deny it by evidence, the Court is bound to accept the plea of the plaintiff. In cases where notice is given making time of the essence, it is duty of the Court to examine the real intention of the party giving such notice by looking at the facts and circumstances of each case. That a vendor has no right to make time of the essence, unless he is ready and willing to proceed to completion and secondly, when the vendor purports to make time of the essence, the purchaser must be guilty of such gross default as to entitle the vendor to rescind the contract.”

33. In **Saradamani Kandappan v/s. S. Rajalakshmi and ors.** 2011 AIR (SC) 3234, the Supreme Court has held as under:-

24. The principle that time is not of the essence of contracts relating to immovable properties took shape in

an era when market value of immovable properties were stable and did not undergo any marked change even over a few years (followed mechanically, even when value ceased to be stable). As a consequence, time for performance, stipulated in the agreement was assumed to be not material, or at all events considered as merely indicating the reasonable period within which contract should be performed. The assumption was that grant of specific performance would not prejudice the vendor-defendant financially as there would not be much difference in the market value of the property even if the contract was performed after a few months. This principle made sense during the first half of the twentieth century, when there was comparatively very little inflation, in India. The third quarter of the twentieth century saw a very slow but steady increase in prices. But a drastic change occurred from the beginning of the last quarter of the twentieth century. There has been a galloping inflation and prices of immovable properties have increased steeply, by leaps and bounds. Market values of properties are no longer stable or steady. We can take judicial notice of the comparative purchase power of a rupee in the year 1975 and now, as also the steep increase in the value of the immovable properties between then and now. It is no exaggeration to say that properties in cities, worth a lakh or so in or about 1975 to 1980, may cost a corer or more now.

25. The reality arising from this economic change cannot continue to be ignored in deciding cases relating to specific performance. The steep increase in prices is a circumstance which makes it inequitable to grant the relief of specific performance where the purchaser does not take steps to complete the sale within the agreed period and the vendor has not been responsible for any delay or non-performance. A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property to cover his delays, lapses, breaches and non-readiness. The precedents from an era, when high inflation was unknown, holding that time is not of

the essence of the contract in regard to immovable properties, may no longer apply, not because the principle laid down therein is unsound or erroneous, but the circumstances that existed when the said principle was evolved, no longer exist. In these days of galloping increases in prices of immovable properties, to hold that a vendor who took an earnest money of say about 10% of the sale price and agreed for three months or four months as the period for performance, did not intend that time should be the essence, will be a cruel joke on him, and will result in injustice. Adding to the misery is the delay in disposal of cases relating to specific performance, as suits and appeals therefrom routinely take two to three decades to attain finality. As a result, an owner agreeing to sell a property for Rs.One Lakh and received Rs.Ten Thousand as advance may be required to execute a sale deed a quarter century later by receiving the remaining Rs.Ninety Thousand,when the property value has risen to a crore of rupees.

26. It is now well settled that laws, which may be reasonable and valid when made, can, with passage of time and consequential change in circumstances, become arbitrary and unreasonable.

26.1) In Rattan Arya v. State of Tamil Nadu- (1986) 3 SC 385, this Court held:

"We must also observe here that whatever justification there may have been in 1973 when Section 30(ii) was amended by imposing a ceiling of Rs. 400 on rent payable by tenants of residential buildings to entitle them to seek the protection of the Act, the passage of time has made the ceiling utterly unreal. We are entitled to take judicial notice of the enormous multifold increase of rents throughout the country, particularly in urban areas. It is common knowledge today that the accommodation which one could have possibly got for Rs. 400 per month in 1973 will today cost at least five times more. In these days of universal day to day

escalation of rentals any ceiling such as that imposed by Section 30(ii) in 1973 can only be considered to be totally artificial and irrelevant today. As held by this court in Motor General Traders v. State of A.P. (1984) 1 SCC 222, a provision which was perfectly valid at the commencement of the Act could be challenged later on the ground of unconstitutionality and struck down on that basis. What was once a perfectly valid legislation, may in course of time, become discriminatory and liable to challenge on the ground of its being violative of Article 14."
(emphasis supplied)

26.2) In *Malpe Vishwanath Acharya v. State of Maharashtra - (1998) 2 SCC 1* a three Judge bench of this court considered the validity of determination of standard rent by freezing or pegging down the rent as on 1.9.1940 or as on the date of first letting, under sections 5(10)(B), 7, 9(2)(b) and 12(3) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. This court held that the said process of determination under the Act, which was reasonable when the law was made, became arbitrary and unreasonable in view of constant escalation of prices due to inflation and corresponding rise in money value with the passage of time. This Court held:

"In so far as social legislation, like the Rent Control Act is concerned, the law must strike a balance between rival interests and it should try to be just to all. The law ought not to be unjust to one and give a disproportionate benefit or protection to another section of the society. When there is shortage of accommodation it is desirable, nay, necessary that some protection should be given to the tenants in order to ensure that they are not exploited. At the same

time such a law to be revised periodically so as to ensure that a disproportionately larger benefit than the one which was intended is not given to the tenants.....

Taking all the facts and circumstances into consideration, we have no doubt that the existing provisions of the Bombay Rent Act relating to the determination and fixation of the standard rent can no longer be considered to be reasonable....."

The principle underlying the said decisions with reference to statutes, would on the same logic, apply to decisions of courts also.

27. A correct perspective relating to the question whether time is not of the essence of the contract in contracts relating to immovable property, is given by this court in K.S. Vidyadnam and Others vs. Vairavan - (1997) 3 SCC 1 (by Jeevan Reddy J. who incidentally was a member of the Constitution Bench in Chand Rani). This Court observed:

"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.

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.We cannot be oblivious to the reality and the reality is constant and continuous rise in the values of urban properties - fueled by large scale migration of people from rural areas to urban centres and by inflation.

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." (emphasis supplied).

Therefore there is an urgent need to revisit the principle that time is not of the essence in contracts relating to immovable properties and also explain the current position of law with regard to contracts relating to immovable property made after 1975, in view of the changed circumstances arising from inflation and steep increase in prices. We do not propose to undertake that exercise in this case, nor referring the matter to larger bench as we have held on facts in this case that time is the essence of the contract, even with reference to the principles in Chand Rani and other cases. Be that as it may.

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

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

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

(iii) Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in

the agreement. Courts will also frown upon suits which are not filed immediately after the breach/refusal. The fact that limitation is three years does not mean a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The three year period is intended to assist purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in part performance, where equity shifts in favour of the purchaser.”

34. In ***P. Daivasigamani vs. S. Sambandan, 2022 SCC Online SC***

1391, Hon’ble Supreme Court has held thus:-

“ 20. Time, it is stated, is not the essence of the contract in the case of immovable properties, unless there are grounds to hold to the contrary. The doctrine is applied, without being unfair and inequitable to the defendant/seller, as the court should not ignore that a person sells the property when he needs money, and, therefore, expects the money in the stipulated or reasonable time, which would meet the purpose of the sale. The purpose of sale can vary from the need for liquid cash to be invested to earn interest, medical, educational, child’s marriage or purchasing another property. To save capital gains, the seller has to purchase another immovable property, unless the proceeds are exempt. There has been a steep rise in the prices of land in the last quarter of the 20th Century in India. With the rise in property value, the value of money has fallen. At times, delay in payment would defeat the defendant/seller’s purpose. Therefore, the offer of the plaintiff/purchaser in writing and the time and occasion when the offer to pay the balance amount to the defendant/seller is an important factor which would matter when the Court examines the question of

discretion; that is, whether or not to grant a decree of specific performance. While examining these aspects, the quantum of money paid by the plaintiff/seller to the defendant/purchaser may become a relevant fact that merits due consideration. There is a distinction between limitation and delay and laches. Limitation is a ground for dismissing a suit even if the plaintiff is otherwise entitled to specific performance, while delay operates to determine the discretion and exercise under Section 20 of the Specific Relief Act, even if the suit is not dismissed on account of limitation. However, not one but several aspects have to be considered when the court, in terms of Section 20 of the Specific Relief Act, exercises discretion, guided by judicial principles, sound and reasonable.”

35. In **Wellspun Speciality Solutions Ltd.** (supra), the Apex Court has observed that *“It is now well settled that ‘Whether time is of the essence in a contract’, has to be curved out from the reading of the entire contract as well as the surrounding circumstances.”*

36. Reverting to the facts of the present case, it is not in dispute that the original Defendant, a widow, was the owner of the suit flat. She was residing in the suit flat with 14 members of her family. The suit flat with an area of 768 sq.ft. was not sufficient to accommodate the large family and hence she was anxious to sell the suit flat and purchase an alternative premises for her three sons. This urgent need necessitated sale of the suit flat. Accordingly she entered

into an agreement for sale with the Plaintiffs to sell the suit flat for total sale consideration of Rs.41,75,000/-.

37. The relevant terms of the agreement read thus:-

“4. The said consideration of Rs.41,75,000/- (rupees Forty One Lacs Seventy Five Thousand Only) shall be paid by the Transferees to the Transferor. In the following manner:

a) Rs.2,51,000/- (Rupees Two Lacs Fifty One Thousand Only) as and by way of Earnest money to be paid by the Transferees to the Transferor on or before the execution of this Agreement (the payment and receipt whereof the Transferor hereby acknowledge and admit at the fact of these presents).

b) The Balance of Rs.39,24,000/- (Rupees Thirty Nine Lacs Twenty Four Thousand Only) to be paid by the Transferees to Transferor on or before 31.5.2005. time for payment as aforesaid shall be essence of the contract.

5. The sale herein is subject to the following conditions

1. against vacant and peaceful possession.
2. Handling over all original documents related to the said flat.
3. No objection and No Due certificate from the said society and
6. a) The said sale herein shall be completed on receipt of No objection certificate by the Transferor from the said society that it has No Objection to admit the Transferees and/or their nominees as members of the society and after obtaining No due certificates provided hereinabove the Transferees shall pay the final balance payment of Rs.39,24,000/- (Rupees Thirty Nine Lacs Twenty Four Thousand Only) as agreed hereinabove the

Transferees shall be placed in possession of the said Flat thereof. The time for completion of the sale and the payment of the said balance price by Transferees to the Transferor on or before 31.5.2005 time being the essence of the contract.

- b) If the Transferees default in fulfilling the terms of this agreement within stipulated time then in that event the earnest money Rs.2,51,000/- shall be forfeited by the Transferor.
 - c) It is also agreed by and between the parties that the Transferees are ready with balance payment and the Transferor is not in a position to handover vacant possession of the said flat then in that event the Transferor shall be liable to penalty to the extent of Rs.2,000/- per day in case of their default till default continues.
 - d) It is agreed and declared by the Transferees that they have taken the inspection of all the relevant documents pertaining to the title of the said building in which it is situated, neighbours water and electric supply, lift and the Transferees have no grievance, about anything at all and they shall not back out and or rescind this agreement on the above grounds and they confirm that the Transferor has disclosed everything pertaining to the said Flat to the best of her knowledge.
7. At the time of completion of sale, the Transferor shall sign/execute Sale Deed and other documents relating thereto and also shall handover peaceful possession of the said flat to the Transferees and also submit to society prescribed transfer form duly signed with a Letter of Authority in favour of Transferees to collect original Share Certificate from the society.”

38. Clause 4 of the Agreement, which relates to payment of sale consideration clearly stipulates that the earnest money of

Rs.2,51,000/- was to be paid on or before execution of the Agreement whereas the balance sale consideration of Rs.39,24,000/- was to be paid on or before 31/05/2005. Clause 4(b) makes the time essence of the contract in regard to the payment of the balance sale consideration.

39. Clauses 5 and 6 relate to execution of sale deed. Clause 5 stipulates that the sale shall be subject to handing over of the vacant and peaceful possession, handing over of the original documents relating to the suit flat and obtaining No Objection and No Due Certificate from the Society. Whereas Clause 6, which is a composite term, provides that the sale shall be completed on receipt of No Objection Certificate and after obtaining No Due Certificate referred to in Clause 5, payment of the balance sale consideration as agreed in Clause 4 and on putting the Plaintiffs in possession of the suit flat. Though Clause 5 does not stipulate any time period for putting the Plaintiffs in possession, handing over of original documents, obtaining No Objection as well as No Due Certificate, Clause 6 expressly stipulates that time for completion of sale and payment of the balance price is the essence of the contract.

40. It is not in dispute that the agreement does not contain a specific clause for extension of time, despite which the parties with mutual consent extended the time till 31/10/2005. It is pertinent to note that writing dated 11/07/2005 pursuant to which time was extended, does not specify the reasons of extension and merely states that time was extended with mutual consent. It is the contention of the Plaintiffs that time was extended at the request of the Defendant since she was unable to get an alternative accommodation whereas the Defendants have claimed that time was extended as per the request of the Plaintiffs since they were unable to arrange for the balance amount. Apart from the bare statements, there is no evidence to substantiate their conflicting claims. Nevertheless, the fact remains that both parties had mutually agreed to extend the original time limit without altering other terms and conditions. It is therefore evident that extension of time with mutual consent was merely a substitution of the original extended time and does not amount to alteration of the basic nature and character of the Contract. As a corollary thereof, time does not cease to be the essence of the contract with mere extension of the original time period. All that it suggests is that the balance payment had to be made within the extended time period.

41. The agreement also reveals that there was consensus between the parties that the amount paid towards earnest money would stand forfeited in the event the purchasers /Plaintiffs defaulted in fulfilling the terms of the agreement within the stipulated time. This clause clearly spells out the urgency in completing the sale transaction within the stipulated time and discloses the intention of the parties to make time the essence of the contract.

42. Furthermore, the agreement specifies that when the transferees are ready with the balance payment and the transferor is not in a position to handover vacant possession, the transferor shall be liable to penalty to the extent of Rs.2,000/- per day in case the default continues. It is true that mere incorporation of penalty clause does not by itself evidence an intention to make time the essence of the contract. Nevertheless, the sum mentioned in the penal clause is an indication that the said clause was incorporated strictly to secure performance of the contract within the stipulated period. Furthermore, the penal clause could have been invoked only on proof of the Plaintiffs being ready with balance sale consideration.

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. 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, 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, 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* and *Sukhbir Singh v/s. Brijjpal Singh (1997) 2 SCC 200* 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.

50. The records reveal that despite specific pleadings, the Trial Court did not frame issue relating to readiness and willingness of the Plaintiffs to perform their part of the contract. As emphasized by the Apex Court in *Nandkishore Lalbhai Mehta v/s. New Era Fabrics Private Limited and others (2015) 9 SCC 755*, the object and purpose of pleadings and issues is to ensure that the litigants come to trial with all the issues clearly defined and to prevent cases being expanded on grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or

considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the Court for its consideration. The Apex Court has reiterated that the pleadings are meant to give to each side intimation of the case of the other so that it may be met, to enable Courts to determine what is really at issue between the parties, and to prevent any deviation from the course which litigation on particular causes must take. The object of issues is to identify from the pleadings the questions or points required to be decided by the Courts to enable the parties to let in evidence thereon.

51. In the instant case, though the trial court had failed to frame the issue regarding readiness and willingness of the Plaintiffs to perform their part of the contract, the records reveal that both parties went to trial fully knowing the rival case and adduced evidence and advanced arguments in support of their respective claims, including the plea of readiness and willingness, without a specific issue thereon. Hence, non-framing of the issue has not led to miscarriage of justice and is not fatal to the case.

52. The Defendants having raised a specific defence that the Plaintiffs were not ready and willing to perform their part of the

contract, the initial burden was on the Plaintiffs to prove that they had sufficient funds or that they had capacity to raise the funds to pay the balance sale consideration within the time stipulated in the agreement. It is pertinent to note that the Plaintiffs have not stepped into the witness box to prove their financial status. PW1-Mukesh Shah, the Power of Attorney holder of the Plaintiffs has deposed that the Plaintiff No.1 was employed as Account Manager with M/s. Young Adult Institute and Workshops INC and Plaintiff No.2 was employed as Recovery Manager with M/s. Daniels and Norelli Pc. and that their aggregate salary during the said period was 1,20,000 USD approx. Apart from this bare assertion there is no other evidence either in the form of appointment letter, income certificate, tax records, bank statements, etc. to prove the nature of the employment and the income of the Plaintiffs. In the absence of such documentary evidence as regards the financial position or capacity of the Plaintiffs, the mere uncontroverted oral statement made by the Power of Attorney, cannot be considered to be a proof of the financial capacity of the Plaintiffs and consequently, findings regarding readiness cannot be recorded in their favour. Reliance is placed on the decision of the Apex Court in ***Vijay Kumar and others v/s. Omprakash (2019) 17 SCC 429, Ritu Saxena v/s. J.S. Grover and another (2019) 9 SCC 132*** and

Bhavyanath represented by power of attorney holder v/s. K.V. Balan (dead) through legal representatives (2020) 11 SCC 790.

53. It is also pertinent to note that in terms of Clause 4(b) of the Agreement, the Plaintiffs were required to pay to the Defendant an amount of Rs.39,24,000/- on or before 31/10/2005. In addition, the Plaintiffs were also required to pay registration charges. The records reveal that the Plaintiffs had sold their flat at Powai and the sale proceeds were deposited in their account in Canara Bank. The passbook of Canara Bank (Exhibit – P3) reveals that as on 14/09/2005, the Plaintiffs had in their account Rs.26,53,384/- as against an amount of Rs.39,24,000/- payable to the Defendant.

54. The Plaintiffs have sought to project that they had applied for and obtained loan of Rs.15,00,000/- from the City Bank. The Plaintiffs have not placed on record copy of the loan application. The Plaintiffs have produced photocopy of the sanction letter dated 26/05/2005 (Exh.P7), allegedly issued by the City Bank sanctioning loan of Rs.15,00,000/- with interest @ 7.75%. It is significant to note that the bank had not disbursed the loan and the Plaintiffs had also not taken any steps for disbursement of the loan.

55. Be that as it may, the said letter at Exhibit – P7 does not give details of the loan application. A perusal of letter dated 26/05/2005 (Exh.-P7) indicates that it is a photocopy of the bank copy. The Plaintiffs have not placed on record the original sanction letter or copy of the letter addressed to the Plaintiffs. No explanation is given for not producing the original document and no case is made out to allow secondary evidence. The Plaintiffs have not examined any bank officers to prove the said document in accordance with the provisions of the Evidence Act.

56. The balance sale consideration was to be paid by 31/10/2005. Though the letter dated 29/10/2005 (Exh. P-9) states that the Plaintiffs were ready with the balance amount of Rs.39,24,000/-, the evidence of PW1 does not indicate that the Plaintiffs had ready cash or that they had made arrangements to raise funds. In fact, to a specific suggestion that the plaintiffs were not ready with funds prior to 31/05/2005, PW1 has stated that they had funds, as can be seen from the passbook of Canara Bank and that he and his relatives would have put additional money and completed the transaction. This statement itself suggests that the Plaintiffs were not

ready with cash of Rs.39,24,000/- as alleged in the said letter dated 29/10/2005.

57. There is no dispute that the Plaintiffs were not required to carry the balance sale consideration. However, it was incumbent upon the Plaintiffs to establish that they had sufficient funds or that they had the capacity to pay the balance sale consideration. In other words, the Plaintiffs were required to prove their financial capacity based on reliable documents. The evidence on record reveals that the Plaintiffs had only an amount of Rs.26,53,384/- in their account with Canara Bank. PW1 has not disclosed the names of his friends and the relatives who would have assisted him in raising the balance amount. Thus, apart from the mere oral statement of PW1, the Plaintiffs have not established through reliable documentary evidence that they had financial capacity to pay the balance sale consideration as well as registration charges.

58. As regards the willingness, it is on record that till 29/10/2005, the Plaintiffs had not addressed a single letter to the defendants, intimating that they were ready and willing to perform their part of the contract and/or calling upon the Defendants to

discharge their obligation under the contract. Though PW1 has deposed that he had sent a set of documents to be executed by and between the parties to Advocates and Solicitors M/s. Haridas and Company, no such reference was made in letter dated 29/10/2005. In fact, the Plaintiffs had made reference to such documents for the first time in letter dated 01/11/2005 addressed to the Defendant wherein it was stated that all the papers were being handed over to the lawyer and that in fact the final documents were sent to their lawyer Mr. Bharatbhai Raghani. It is to be noted that the Plaintiffs have not produced copy of the documents as well as the forwarding letter under which the documents were forwarded to Advocates and Solicitors M/s. Haridas and Company or Advocate and Solicitor Mr. Bharat Raghani.

59. The evidence of DW1 reveals that letter dated 29/10/2005 was received by them on Sunday i.e., 30/10/2005 at 12:30 noon. The Plaintiffs had not purchased the stamp paper, they had not prepared a draft sale or the sale deed and had not got the stamp duty adjudicated. It is therefore evident that the sale deed could not have been executed on or before 31/10/2005. Hence, there can be no dispute that the letter dated 29/10/2005 was not genuinely intended but was apparently a ploy to make it appear that they had acted within the

stipulated time.

60. Apart from a bare assertion of PW1 that the Plaintiffs were ready and willing to perform their part of contract, there is absolutely no evidence to prove that the Plaintiffs had taken any steps for completion of sale transaction. As it has been held by the Apex Court in ***Shenbagam*** (supra), merely averring that they were waiting with the balance sale consideration is not sufficient to prove that the Plaintiffs were willing to perform their obligation under the contract. In these circumstances, the findings of the trial court on the issue of readiness and willingness, cannot be sustained.

61. The Plaintiffs have sought to justify non-payment of balance sale consideration for the reason that the Defendants had failed to perform the reciprocal obligation under the contract viz. obtaining No Objection Certificate and No Due Certificate from the Society. A similar plea was raised in ***Man Kaur*** (supra). It was contended that the Defendants having failed to obtain NOC as also ULC clearance and Income Tax Clearance required for the sale, the question of the Plaintiff proving his readiness and willingness to perform his obligation did not arise. The Hon'ble Supreme Court

rejected the said contention as devoid of merits and held that :-

“ 40. ...There are two distinct issues. The first issue is the breach by the defendant - vendor which gives a cause of action to the plaintiff to file a suit for specific performance. The second issue relates to the personal bar to enforcement of a specific performance by persons enumerated in section 16 of the Act. 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 the terms the performance of which has been prevented or waived by the defendant) is barred from claiming specific performance. Therefore, even assuming that the defendant had committed breach, if the plaintiff fails to aver in the plaint or prove that he was always ready and willing to perform the essential terms of contract which are required to be performed by him (other than the terms the performance of which has been prevented or waived by the plaintiff), there is a bar to specific performance in his favour. Therefore, the assumption of the respondent that readiness and willingness on the part of plaintiff is something which need not be proved, if the plaintiff is able to establish that defendant refused to execute the sale deed and thereby committed breach, is not correct. Let us give an example. Take a case where there is a contract for sale for a consideration of Rs.10 lakhs and earnest money of Rs.1 lakh was paid and the vendor wrongly refuses to execute the sale deed unless the purchaser is ready to pay Rs.15 lakhs. In such a case there is a clear breach by defendant. But in that case, if plaintiff did not have the balance Rs.9 lakhs (and the money required for stamp duty and registration) or the capacity to arrange and pay such money, when the contract had to be performed, the plaintiff will not be entitled to specific

performance, even if he proves breach by defendant, as he was not 'ready and willing' to perform his obligations. ”

62. It is thus evident that the Plaintiffs were required to demonstrate readiness and willingness regardless of any default by the original defendant. As noted above the Plaintiffs have failed to prove that they were ready and willing to perform their part of contract and as such in terms of Section 16(c) of the Specific Relief Act they are barred from claiming specific performance notwithstanding alleged breach by the Defendant vendor. In such facts and circumstances the decisions in ***Swarnam Ramchandran*** and ***R. Laxmikantham*** (supra) are distinguishable and not applicable to the facts of the case.

63. The next question is whether the Plaintiffs are entitled to the discretionary relief of specific performance. Section 20 of the Specific Relief Act, as it stood prior to 2018 amendment, stipulates that the jurisdiction of the Court to grant decree of specific performance is discretionary. In ***Jayakantham and others vs. Abaykumar (2017) 5 SCC 178 in Civil Appeal 3049 of 2017***, the Apex Court while considering the scope of Section 20, has held thus :-

“ 7. While evaluating whether specific performance

ought to have been decreed in the present case, it would be necessary to bear in mind the fundamental principles of law. The court is not bound to grant the relief of specific performance merely because it is lawful to do so. Section 20(1) of the Specific Relief Act, 1963 indicates that the jurisdiction to decree specific performance is discretionary. Yet, the discretion of the court is not arbitrary but is “sound and reasonable”, to be “guided by judicial principles”. The exercise of discretion is capable of being corrected by a court of appeal in the hierarchy of appellate courts. Sub-section 2 of Section 20 contains a stipulation of those cases where the court may exercise its discretion not to grant specific performance. Sub-Section 2 of Section 20 is in the following terms :

“Section 20 (2). The following are cases in which the court may properly exercise discretion not to decree specific performance-

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff;

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.”

8. However, explanation 1 stipulates that the mere

inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, will not constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b). Moreover, explanation 2 requires that the issue as to whether the performance of a contract involves hardship on the defendant has to be determined with reference to the circumstances existing at the time of the contract, except where the hardship has been caused from an act of the plaintiff subsequent to the contract.

9. The precedent on the subject is elucidated below :

9.1. In Parakunnan Veetill Joseph's Son Mathew v. Nedumbara Kuruvila's Son and Ors, AIR 1987 SC 2328, this Court held that :

“...14. Section 20 of the Specific Relief Act, 1963 preserves judicial discretion of Courts as to decreeing specific performance. The Court should meticulously consider all facts and circumstances of the case. The Court is not bound to grant specific performance merely because it is lawful to do so. The motive behind the litigation should also enter into the judicial verdict. The Court should take care to see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff..”

9.2. A similar view was adopted by this Court in Sardar Singh v. Krishna Devi and another, (1994) 4 SCC 18 :

“14.Section 20(1) of the Specific Relief Act, 1963 provides that the jurisdiction to decree specific performance is discretionary, and the court is not

bound to grant such relief, merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal. The grant of relief of specific performance is discretionary. The circumstances specified in Section 20 are only illustrative and not exhaustive. The court would take into consideration the circumstances in each case, the conduct of the parties and the respective interest under the contract.”

9.3. *Reiterating the position in K. Narendra v. Riviera Apartments (P) Ltd, (1999) 5 SCC 77, this Court held thus :*

“29. ...Performance of the contract involving some hardship on the defendant which he did not foresee while non-performance involving no such hardship on the plaintiff, is one of the circumstances in which the court may properly exercise discretion not to decree specific performance. The doctrine of comparative hardship has been thus statutorily recognized in India. However, mere inadequacy of consideration or the mere fact that the contract is onerous to the defendant or improvident in its nature , shall not constitute an unfair advantage to the plaintiff over the defendant or unforeseeable hardship on the defendant. The principle underlying Section 20 has been summed up by this Court in Lourdu Mari David v. Louis Chinnaya Arogiaswamy by stating that the decree for specific performance is in the discretion of the Court but the discretion should not be used arbitrarily; the discretion should be exercised on sound principles of law capable of correction by an appellate court.”

9.4. *These principles were followed by this Court in*

A.C. Arulappan v. Smt. Ahalya Naik, (2001) 6 SCC 600 , with the following observations :

“7. The jurisdiction to decree specific relief is discretionary and the court can consider various circumstances to decide whether such relief is to be granted. Merely because it is lawful to grant specific relief, the court need not grant the order for specific relief; but this discretion shall not be exercised in an arbitrary or unreasonable manner. Certain circumstances have been mentioned in Section 20(2) of the Specific Relief Act, 1963 as to under what circumstances the court shall exercise such discretion. If under the terms of the contract the plaintiff gets an unfair advantage over the defendant, the court may not exercise its discretion in favour of the plaintiff. So also, specific relief may not be granted if the defendant would be put to undue hardship which he did not foresee at the time of agreement. If it is inequitable to grant specific relief, then also the court would desist from granting a decree to the plaintiff.”

.....

“15. Granting of specific performance is an equitable relief, though the same is now governed by the statutory provisions of the Specific Relief Act, 1963. These equitable principles are nicely incorporated in Section 20 of the Act. While granting a decree for specific performance, these salutary guidelines shall be in the forefront of the mind of the court.....”

*9.5. A Bench of three Judges of this Court considered the position in *Nirmala Anand Vs. Advent Corporation (P) Ltd. and Ors. (2002) 8 SCC 1465 , and held thus :**

“6. It is true that grant of decree of specific

performance lies in the discretion of the court and it is also well settled that it is not always necessary to grant specific performance simply for the reason that it is legal to do so. It is further well settled that the court in its discretion can impose any reasonable condition including payment of an additional amount by one party to the other while granting or refusing decree of specific performance. Whether the purchaser shall be directed to pay an additional amount to the seller or converse would depend upon the facts and circumstances of a case. Ordinarily, the plaintiff is not to be denied the relief of specific performance only on account of the phenomenal increase of price during the pendency of litigation. That may be, in a given case, one of the considerations besides many others to be taken into consideration for refusing the decree of specific performance. As a general rule, it cannot be held that ordinarily the plaintiff cannot be allowed to have, for her alone, the entire benefit of phenomenal increase of the value of the property during the pendency of the litigation. While balancing the equities, one of the considerations to be kept in view is as to who is the defaulting party. It is also to be borne in mind whether a party is trying to take undue advantage over the other as also the hardship that may be caused to the defendant by directing specific performance. There may be other circumstances on which parties may not have any control. The totality of the circumstances is required to be seen.”

64. In ***K. Prakash v/s. B.R. Sampath Kumar (2015) 1 SCC 597***, the Apex Court has held that normally when the trial court exercises

his discretion after appreciation of his entire evidence and material on record, the Appellate court should not interfere unless it has been established that the discretion has been exercised perversely, arbitrarily or against judicial principles. The Appellate Court should also not exercise its discretion against the grant of specific performance on extraneous considerations or sympathetic consideration. It is held that once an agreement to sell is legal and validly proved and further requirements for getting such decree are established then the Court has to exercise its discretion in favour of granting relief for specific performance. It is held that subsequent rise in the price will not be treated as a hardship entailing refusal of the decree for specific performance. It is held that rise in price is a normal change of circumstance and therefore, on that ground alone, a decree for specific performance cannot be reversed.

65. In the instant case, the Plaintiffs have failed to prove the requirements of getting the decree of specific performance. Furthermore, the Plaintiffs are also not entitled for discretionary relief for the reason that the original Defendant, who was a widow had agreed to sell the suit flat for Rs.41,75,000/- with an intention of purchasing alternative premises for her sons. The Plaintiffs had paid

nominal sum of Rs.2,51,000/- as earnest money, which was less than 6% of the sale consideration. The Plaintiffs failed to pay the balance amount within the stipulated time. During the interregnum period there is steep escalation of price. Hence, inaction of the Plaintiffs frustrated the very purpose of sale. As held by the Apex Court in *Saradamani Kandappan* (supra), the steep increase in prices is a circumstance, which makes it inequitable to grant the relief of specific performance. Moreover, decree of specific performance would dislocate several members of the Defendant's family and this would cause undue hardship to the Defendants as compared to the hardship caused to the Plaintiffs. Considering the above facts and circumstances, it would not be fair and reasonable to grant specific performance in favour of the Plaintiffs.

66. Under the circumstances and in view of discussion supra, the Appeal is allowed. The impugned judgment and order is hereby set aside. Consequently, the suit is dismissed. The Defendants are directed to refund the earnest money of Rs.2,51,000/- with interest @ 6% per annum from the date of the suit till the final payment and are permitted to withdraw the balance amount with proportionate interest accrued thereon. The Plaintiffs are permitted to withdraw the amount

of Rs.39,24,000/- deposited by them before this Court along with the interest accrued thereon. Pending Applications stand disposed of.

(SMT. ANUJA PRABHUDESSAI, J.)