

**IN THE HIGH COURT AT CALCUTTA**  
**Civil Appellate Jurisdiction**  
**APPELLATE SIDE**

Present:

**The Hon'ble Justice Tapabrata Chakraborty**  
**&**  
**The Hon'ble Justice Partha Sarathi Chatterjee**

**FAT 403 of 2018**  
with  
IA No: CAN 1 of 2018 (Old No.CAN 6334 of 2018)  
with  
IA No: CAN 2 of 2020 (Old No.CAN 2049 of 2020)

**Usha Chowdhury & Anr.**  
**versus**  
**Uma Sankar Bhagat @ Usha Shankar Bhagat**

*For the Appellants* : *Mr. Partha Sarathi Bhattacharya, Sr. Adv.,*  
*Mr. Sounak Bhattacharya,*  
*Mr. Raju Bhattacharya.*

*For the Respondent* : *Mr. Probal Mukherjee, Sr. Adv.,*  
*Mr. Dipayan Kundu.*

*Hearing is concluded on* : *7<sup>th</sup> November, 2022.*

**Judgment On** : **23<sup>rd</sup> November, 2022.**

**Partha Sarathi Chatterjee, J.**

1. Legality and propriety of the judgment and decree dated 17.5.2018 passed by the learned Civil Judge, Senior Division, Malda in O.C. 205 of 2008, whereby the suit for specific performance of contract filed by the

plaintiff/respondent herein was decreed, has been called in question in this instant appeal.

2. Facts projected in the plaint, in brief, are as follows :

- i) That the suit property originally belonged to defendant no.1 who had purchased the same by virtue of registered deeds being nos. 8158, 8159, 8160, 8161, 14729, 14730 and 14732 registered on 24.5.1984 and 15.10.1984;
- ii) That the defendant no.1 proposed to sale out the suit property and the plaintiff agreed to purchase the same on a highest market value of Rs.23,40,001/-;
- iii) That defendant no.1 accepted Rs.1,51,001/- by cheque from the plaintiff and executed an agreement for sale on 4.3.2008 and the same agreement for sale being no. 1728 was duly registered in the office of Malda Sadar Sub Registrar on 5.3.2008;
- iv) That since there was a mistake in recording the name of the plaintiff in the agreement for sale, one deed of declaration being no. 18 of 2008 was also made incorporating correct name of the plaintiff;
- v) That on the same day, the plaintiff by issuing one cheque being no. 195775 drawn on SBI, Malda Branch in name of defendant no.2, son of defendant no.1, gave Rs.7,60,000/- and Rs.40,000/- in cash to defendant no.2 towards consideration money of the suit property;
- vi) That in the agreement, it was stipulated that on or before 30.5.2008 rest amount of consideration money being

Rs.13,89,000/- shall be paid by the plaintiff and defendant no.1 would execute and register the deed of sale;

- vii) That on 23.5.2008, plaintiff made a contact with the defendant no.1 and then defendant no.1 asked him to come at the office of Registrar concerned with rest amount of consideration money on 28.5.2008 and accordingly as per such instruction, plaintiff went to the office of Registrar concerned with rest amount of consideration money and remained present therein till 3 p.m. but defendant no.1 did not come to perform her part of contract;
- viii) That on the next day i.e. on 29.5.2008, plaintiff sent one legal notice through his learned advocate, Mr. Partho Roy requesting the defendant no.1 to execute and register the deed on 16.6.2008 and on that date also, defendant did not come to the office of Registrar concerned to execute and register the deed;
- ix) The plaintiff has averred that he was ready and willing to perform his part of the contract but defendant no.1 was reluctant to perform her part of the contract.

Hence, the suit.

3. Records postulate that both the defendants contested the suit by filing written statement wherein both of them admitted that defendant no.1 entered into an agreement for sale with the plaintiff to sale out the suit property at a highest market value of Rs.23,40,001/- and as an advance, defendant no.1 accepted Rs.1,51,001/- but plaintiff never paid Rs.7,60,000/- by cheque and Rs.40,000/- in cash to defendant no.2. It was specifically pleaded therein that since one good relationship was developed

in between the plaintiff and the defendants, the plaintiff by issuing that cheque of Rs.7,60,000/- asked defendant no.2 to withdraw the money from the bank since there was huge crowd in the queue and accordingly, defendant no.2 withdrew the money and handed over to the plaintiff and that the plaintiff had never given liquid cash of Rs.40,000/- to defendant no.2. It was claimed by the defendants that plaintiff never came to defendant no.1 to get the deed of sale executed and registered by her within 30.5.2008 and lastly, prayer was made for dismissal of the suit.

4. Records further speak that to substantiate his claim, plaintiff adduced oral accounts of himself, of one Gopal Bhagat, Ranjan Poddar, Deb Ranjan Prasad and Jagabandhu Mandal, who were examined as PW-1 to PW-5 respectively.

5. Plaintiff tendered the original registered agreement for sale being no. 1728 of 2008, deed of declaration being no. 18 of 2008, legal notice dated 29.5.2008, his Original Pass book of account no. 11001320632, original cheque being No. 195774 dated 4.3.2008 which were marked as Ext. 1, 2, 3 and 3/1, 4, 5 & 6 respectively.

6. On the other hand, to resist the suit, the defendant nos. 1 and 2 adduced their respective oral testimonies and were examined as DW-1 and DW-2 respectively and they only produced original copy of legal notice dated 29.5.2008 which was marked as Ext.-A.

7. As has been stated earlier, by the judgment and decree impugned, the learned Trial Court decreed the suit and gave a direction to the defendant no. 1 which is as follows :

*“..the defendant no.1 is directed to register the covenant in favour of the plaintiff in terms of the Exhibit.-1 within a period of three months from this day upon receipt of rest amount of consideration money being Rs.14,29,000/- as deposited by the plaintiff through challan, failing which the plaintiff may approach the Court for proper redressal in accordance with law.”*

8. Hence, aforesaid judgment and decree have been assailed in this appeal, *inter alia*, on the grounds that the learned Court below erred in decreeing the suit and in not holding that except Rs.1,51,001/-, the plaintiff did not pay any single farthing to the defendant no.1 towards consideration money of the suit property and that the learned Court below ought to have held that the plaintiff had never paid Rs.7,60,000/- to the defendant no.1 and that the plaintiff also did not pay the rest amount of consideration money within 30.5.2008 and that the plaintiff was not ready and willing to perform his part of contract and that the amount mentioned in the legal notice dated 29.5.2008 was material and judgment and decree were liable to be set aside.

9. Now, while pressing this appeal, Mr. Partha Sarathi Bhattacharya, learned senior advocate being assisted by Mr. Sounak Bhattacharya, submitted that that the plaintiff had failed to prove that he paid Rs.7,60,000/- to defendant no. 1 towards consideration money and he stated that the plaintiff by issuing one cheque in name of defendant no. 2, who is not owner of the property, asked the defendant no.2 to get the cheque encashed and to hand over the money to him and accordingly, the defendant no. 2 did the same and such amount had never been paid to the defendant no.1 and he added that the plaintiff had failed to pay rest

amount of consideration money within 30.5.2008 and he submitted that in case this Court affirms the decree, the defendant no.1 would be entitled to get higher price due to escalation of price of land in the locality by passage of time.

10. *Per Contra*, Mr. Probal Mukherjee, learned senior advocate, while representing plaintiff/respondent submitted that officials of the bank concerned deposed in the suit and they had proved that it was the defendant no.2, who happens to be the son of defendant no.1, encashed the cheque and took the money and hence, the learned Court below had rightly held that the cheque amount being Rs.7,60,000/- was paid towards consideration money and he asserted that the defendants cooked up the story that since there was a crowd in the queue leading to the counter of the bank, the plaintiff asked the defendant no.2 to encash the cheque and to bring the money for him and he added that the plaintiff filed the suit on 30.6.2008, i.e., immediately after the defendant no.1 refused to perform her part of contract and hence the delay in disposal of the suit cannot be attributed to the plaintiff and he further submitted that if in like case, plaintiff is forced to pay higher price, then there shall not be any sanctity of the agreement for sale and every vendor of like nature shall take advantage of delay of disposal of *lis* in such fashion.

11. He submits that since the learned advocate while giving legal notice mentioned that rest amount of consideration amount was Rs. 21,89,000/- and if the Court directs to pay such amount, he has to pay the same but in the given facts and circumstances, the plaintiff cannot be forced to pay higher price. To buttress his argument, Mr. Bhattacharya has

placed reliance upon judgments delivered in the case of *P.G. Sinha –vs- Commodore K.C. Chatterjee*, reported in *AIR 1991 Cal 327* and in the case of *Satya Jain (dead) Through Lrs. and Others –vs- Anis Ahmed Rushdie (dead) Through Lrs. and Others*, reported in *(2013) 8 SCC 131*.

12. Now, shorn of unnecessary details, capsulated form of the facts in the case at hand is that it is an admitted position that the defendant no.1 being owner of the suit proper entered into agreement for sale with the plaintiff to sale out the suit property at a higher market rate of Rs.23,40,001/- and she took Rs.1,51,001/- as an advance and the said agreement for sale was registered on 4.3.2008 and thereafter, in the agreement for sale there was error in recording the name of the plaintiff and by virtue of one registered deed of declaration, rectification was made and it was also an admitted position that the defendant no.1 agreed to execute and register the deed of sale upon receipt of rest amount of money within 30.5.2008.

13. In the given case, two officials of the bank concerned deposed and stated that defendant no.2 encashed the amount being Rs.7,60,000/- and the learned Court below has held that it has been proved that defendant no.2 encashed that cheque and took the money and hence, the learned Court below has asked the plaintiff to pay the rest amount of consideration money.

14. Here, admittedly, the defendant no.2 is not the owner of the property and the plaintiff has failed to prove that such payment was made towards payment of consideration money of the suit property and there was no endorsement of such payment in the agreement for sale. Now if, for the

sake of argument it is assumed that it has been proved on the degree of preponderance of probability that defendant no.2 has taken that amount being Rs.7,60,000/-, then also unless it is proved that such acceptance was made on behalf of the defendant no.1 towards payment of consideration money of the suit property, this court cannot recognize such payment as a payment of consideration money of the suit property. That apart, the learned advocate of the plaintiff by giving one legal notice on 29.5.2008 stated that plaintiff was ready and willing to pay the rest amount of consideration money being, Rs.21,89,000/- and such notice is binding upon the plaintiff.

15. Here, the learned advocates for the defendants/appellants raised one plea that plaintiff was not ready and willing to perform his part of contract within 30.5.2008. Section 16 (c) of the Specific Relief Act, 1963 (hereinafter, the Act of 1963) provides that specific performance of 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, other than the terms, the performance of which has been prevented or waived by the defendant.

16. Explanation for the purpose of clause (c) says that i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court and ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.

17. So, the provision of clause (c) of Section 16 of Act of 1963 and the explanation lays down the conditions precedent to enforce specific performance of contract and says that the plaintiff must aver and prove that i) he has performed or ii) he has always been ready and willing to perform essential terms of the contract which are to be performed by him and such requirement is mandatory.

18. The word '*aver*' signifies that it should be asserted and/or mentioned in the plaint and the word '*prove*' indicates that it should be proved by giving evidence in course of trial and needless to mention question of proof comes only if an averment is made in the plaint and incorporation of the words '*ready and willing*' in the provision requires that the plaintiff must be ready with necessary financial resources and must have mental attitude to perform his part of contract and such requirement is a mandatory requirement and even one subsequent transferee can also take defence that plaintiff was not ready and willing to perform his part of contract.

19. It is worth mentioning that compliance of '*readiness and willingness*' has to be in spirit and substance and not in letter and form and plaintiff's readiness and willingness can be inferred from the conduct of the parties and attending circumstances.

20. In the case at hand, the plaintiff has averred that he was ready and willing to perform his part of contract and in the plaint, he pleaded that on 23.5.2008 he had approached the defendant no.1 and defendant no.1 asked him to remain ready and to come in the office of the Registrar on 28.5.2008 and plaintiff stated that he was present in the office of the Registrar concerned on 28.5.2008 and such statement got support from oral

accounts of other witness deposed on his behalf and on 29.5.2008. By giving one legal notice, the plaintiff asked the defendant no.1 to execute and register the deed of sale on 16.6.2008 and such legal notice was duly received by the defendant no.1.

21. When one purchaser by giving one legal notice states that he was and is always ready with rest amount of consideration money and asks the vendor to come and to execute and register the deed of sale and he makes this averment in the plaint and in course of trial he proves such legal notice and its receipt by the vendor, then readiness and willingness of such purchaser can be said to have been proved.

22. Here, no evidence has come that the defendant was ever ready to execute and register the deed and she was present in the office of Register concerned either on 28.5.2008 or 16.6.2008 rather in her evidence, she herself disclosed that she has transferred the suit property in favour of her two daughters during pendency of the suit with an intent to frustrate the enforcement of specific performance of the contract. This court has no qualm to hold that defendant no. 1 was not ready and willing to perform her part of contract.

23. Here, the defendant no. 1 did not disclose the particulars of the deeds of gift executed by her in favour of her daughter and she even did not disclose the particulars of her daughter and fact remains that her daughters being subsequent transferees have not been brought on record.

24. Section 52 of Transfer of Property Act, 1882 has prohibited transfer of the suit property during pendency of the suit and there are

repetitive judgments to the effect that if any transfer is made in contravention of S. 52 of Act of 1882, then doctrine of *lis pendens* shall apply to such transfer and acceptability of such transfer shall be subject to the result of such suit.

25. On numerous occasions, the Hon'ble Apex Court has been pleased to hold that the agreement for sale, if *bona fide*, can be given effect to in a suit for specific performance of contract notwithstanding the transfer of the self-same property to stranger during pendency of the suit and such subsequent transfer cannot stand in way of enforcement of specific performance of contract.

26. So, such transfers say, transfer of the suit property by way of gift in favour of the two daughters of the defendant no.1 by her during pendency of the suit cannot be accepted to be valid and those deeds of gift have got no value in the eye of law.

27. Now, here, the learned advocates for the appellants submitted that since by passage of time, price of the property has soared, appellants are entitled to get higher price.

28. In this regard, first and foremost thing which can be stated that escalation of price during pendency of the *lis* cannot stand in the way in giving decree for enforcement of specific performance of contract.

29. There is no absolute proposition of law that in all cases where there had been an escalation of price, the Court should either refuse to pass a decree of specific performance of contract or direct the plaintiff to pay a higher sum.

30. Here, PWs have conjointly voiced that plaintiff went to office of Registrar on 28.5.2008 and the plaintiff gave a legal notice on 29.5.2008, which was duly received by the defendant and plaintiff also averred that he was and is ready and willing to perform his part of contract and he took prompt action by filing the suit within one month and he has diligently pursued the suit and no delay is attributable to the plaintiff. Here, conduct of the defendant does not inspire the Court to order that such defendant should be compensated by higher price since by passage of time, price of the suit property has increased.

31. So, considering the totality of the facts and circumstances of this case, this court is of the view that the learned Court has rightly held that plaintiff is entitled to enforce the specific performance of contract but this court is of the considered view that here, even if it is assumed that Rs.7,60,000/- was paid to defendant no. 2 by the plaintiff on the degree of preponderance of probability but such payment to defendant no. 2, who is not owner of the suit property, cannot be accepted to be payment to the owner towards payment of consideration money and hence, we are of the view that to enforce the specific performance of contract, the plaintiff has to pay Rs.21,89,000/- as he undertook in his legal notice dated 29.5.2008.

32. We have carefully gone through the judgments relied upon by the learned advocate for the appellants but the same are distinguishable on facts and are not applicable to the case at hand.

33. Consequently, it is ordered that the appeal be and the same is dismissed, however, without any order as to the costs and the judgment and decree impugned are affirmed but subject to the modification to the effect

that defendant no.1 shall register the covenant in favour of the plaintiff in terms of the agreement for sale upon receipt of Rs.21,89,000/- and the other part of the judgment and decree impugned are left unaltered. It is clarified that if any amount has been deposited by the plaintiff either in the original proceeding or in execution proceeding, such amount shall be adjusted with the amount being Rs.21,89,000/-.

34. The applications being IA No: CAN 1 of 2018 (Old No.CAN 6334 of 2018) and IA No: CAN 2 of 2020 (Old No.CAN 2049 of 2020) have already been disposed of earlier by an order dated 12<sup>th</sup> January, 2021.

35. Urgent Xerox certified copy, if applied for, shall be given expeditiously upon completion of all formalities.

**(Partha Sarathi Chatterjee, J.)**

**(Tapabrata Chakraborty, J.)**