

Gopal Devi Vs. Kanta Bhatia

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Court : Delhi

Decided On : May-03-1994

Reported in : 1994IIAD(Delhi)657; AIR1994Delhi349; 54(1994)DLT541; 1994(30)DRJ1; 1994RLR347

Judge : D.P. Wadhwa and; D.K. Jain, JJ.

Acts : [Specific Relief Act, 1963](#) - Sections 16

Appeal No. : Regular First Appeal No. 65 of 1983

Appellant : Gopal Devi

Respondent : Kanta Bhatia

Advocate for Def. : Mrs. Shyamla P

Advocate for Pet/Ap. : I.S. Mathur,; Tarun John,; S. Pappu and;

Judgement :

D.P. Wadhwa, J.

(1) This is defendant's appeal. Suit of the plaintiff-respondent was decreed by judgment dated 24 December 1982 of the Additional District Judge, Delhi, for specific performance of an agreement to sell in respect of property being plot of land bearing No. H-45, Kalkaji, New Delhi. Defendant is the mother of Dina Nath

who as owner entered into an agreement, to sell the aforesaid suit plot, with the plaintiff. The suit plot measures 200 sq. yds. and the sale consideration agreed to was Rs.60,000.00 . A sum of Rs.5,000.00 was paid as advance by the plaintiff to Dina Nath and the balance amount was to be paid at the time of registration of the sale deed. This agreement (Ext. Public Witness 2 /1) was registered with the Sub Registrar, New Delhi. Dina Nath was having perpetual leasehold rights in this suit plot under a lease deed granted by the President of India on 8 February 1977. Under the agreement to sell, Dina Nath was required to file an application with the Land & Development Office/Competent Authority, Delhi, for obtaining permission to sell the suit plot and was also required to obtain income-tax clearance certificate from the income-tax department. Dina Nath was to inform the plaintiff within one week of having received the sale permission, etc., and within 90 days of the receipt of submission he was to complete the sale of the suit plot.

(2) The plaintiff on 20 May 1978 filed this suit for specific performance of the agreement to sell against Dina Nath. However, before any written statement could be filed Dina Nath died on 6 January 1979 and his mother, the appellant was substituted as his legal heir. The plaintiff said that defendant committed breach of the agreement to sell and that she was always ready and willing to perform her part of the contract. She said she had even purchased a bank draft for the balance amount of sale consideration, and had served a notice on the defendant to execute the sale deed. The defendant, who was now the mother of the deceased Dina Nath who had entered into the agreement to sell, denied execution of any such agreement. She said the suit plot was in fact purchased by her in the name of her son Dina Nath who at the time of purchase of the suit plot was hardly about 19 years of age and had no money of his own to purchase any property. Dina Nath, she said, had no right to sell the plot and there was no question of his entering into any agreement to sell the same to the plaintiff. She said Dina Nath even could not think of selling the suit plot which he knew was benami in his name and the real owner was his mother. Defendant also said that the value of the suit plot in the year 1977 was at least Rs.1,40,000.00 and the sale consideration could not, therefore, have been agreed to Rs.60,000.00 . Defendant said that in fact a fraud had been committed on Dina Nath and that Dina Nath had become prey to a conspiracy of the husband of the plaintiff, who was himself a property broker, and

few others who had taken advantage of the habits of Dina Nath. We may at this stage note that during the course of arguments before us it was submitted that Dina Nath had died in his room in Claridges Hotel, New Delhi, on 6 January 1979. The defendant denied the allegations made by the plaintiff in the plaint and also denied that the plaintiff was ever ready and willing to perform her part of the agreement. In fact the defendant said such a plea in the plaint was frivolous, wrong and denied. It was also denied that any bank draft was ever sent to Dina Nath. The plaintiff also filed his replication reiterating what she had said in the plaint.

(3) From the pleadings of the parties the following issues were framed :- 1. Whether Dina Nath deceased executed an agreement to sell in favor of the plaintiff, as alleged? If so, what are the terms 2. Whether the plaintiff has been ready and willing to perform her part of the contract 3. Whether agreement came into existence due to some conspiracy and fraud as alleged by the defendant OPD. 4. On what terms, if any, is the plaintiff entitled to specific performance of the contract 5. Relief. Additional Issue: I. Whether property in fact belongs to Smt. Gopal Devi and Dina Nath had no right to enter into any agreement as alleged? If so, to what effect

(4) Additional issue would not survive for consideration in view of the provisions of the Benami Transactions (Prohibition) Act, 1988. The property was admittedly in the name of Dina Nath. Sub-section (2) of section 4 of the Benami Act bars any defense based on any right in respect of any property held benami whether against the person in whose name the property is held or against any other person. The plaintiff, therefore, could not be non-suited on the plea of the defendant that she was the real owner and that the suit plot was held benami in the name of her deceased son Dina Nath.

(5) Evidence on record is both oral and documentary. The trial court held issues 1,2 and 3 in favor of the plaintiff and against the defendant. On issue No. 4 it was held that the plaintiff was entitled to the specific performance of the agreement on payment of balance consideration of Rs.50,000.00 and she was also to bear the execution and registration expenses. The suit of the plaintiff was, accordingly,

decreed with certain directions as to how the sale deed was to be executed.

(6) We do not think much could be said by the defendant on issues 1 and 3. The learned Additional District Judge after minutely examining the evidence on record came to the finding that Dina Nath did execute the agreement to sell and that it was not executed due to conspiracy or fraud as alleged by the defendant. We find no fault in the reasoning of the learned Additional District Judge. It is not that after execution of the agreement the parties maintained some sort of silence, but record shows that steps were being taken by Dina Nath to have the sale permission for sale of the suit plot from various authorities, like the Land & Development Office. Income-tax Department, etc. When the plaintiff sent a notice dated 27 August 1978 (Ext.PW6/1) through her Advocate to Dina Nath requiring him to perform his part of the agreement, there was no response to that from Dina Nath. In this notice it is clearly mentioned that Dina Nath entered into an agreement to sell the leasehold rights of the suit plot for a consideration of Rs.60,000.00 and that the agreement was registered on 21 May 1977 and further a sum of Rs.5,000.00 had been paid at the time of registration of the said agreement as advance and the balance consideration was to be paid at the time of execution of the sale deed. Mother of Dina Nath, the present defendant, could not be aware of these things and could not advance any plea of conspiracy or of any fraud as alleged by her. Mr. Ishwar Sahai, Senior Advocate, appearing for the appellant- defendant said , that Dina Nath had not attained much maturity and did not understand the consequences of the agreement to sell and perhaps he had been duped. We do not think this argument to be of any serious consideration for us in view of the statements of the plaintiff and the witnesses to the agreement and the proof on record that the agreement to sell was duly executed and registered. Issues 1 and 3 have been rightly decided in favor of the plaintiff and against the defendant.

(7) It was issue No. 2 on which principal arguments had been addressed by the counsel for the parties. The arguments turned round on a notice dated 6 March 1978 (Ext. DW3/1) issued by Mr. Inder Kandhari, Advocate, on behalf of the plaintiff to Dina Nath. This notice was issued on the instructions of the plaintiff by Mr. Kandhari. He referred to the agreement to sell in question and said that the plaintiff was made to enter into this agreement under the false pretence and

connivance with M/s. C.L. Property Dealers, and thereby a sum of Rs.17,000.00 was extorted from her out of which Rs.5,000.00 were given by cheque and the balance through cash. The plaintiff complained in this notice that in spite of many months having been elapsed no steps had been taken by Dina Nath to get the sale deed registered in the name of the plaintiff in terms of the agreement to sell and that it was on various assurances given by Dina Nath that the plaintiff had entered into the agreement to sell and advance Rs.17,000.00 as earnest money. The concluding paras of this notice are as under :-

'5.That it has now come to the knowledge of my client that you are neither the owner of the property nor a lessee and had under false pretext and misrepresentation in connivance with M/s. C.L. Property Dealer, Kalkaji Market, New Delhi, had preplanned to defraud (deprive) my client of her money by giving a rosy and colour picture to her. Please note that my client proposes to initiate a criminal complaint against you and your co-associates M/s. C.L. Property Dealers for criminal breach of trust for extorting monies from her under false pretexts and misrepresentation and for defrauding her of Rs.17,000.00 , but before taking any such steps, and filing any such complaint, I on her behalf give you one more chance to return back a sum of Rs.17,000/- to her, within one month of receipt of this notice failing which I have instructions to file the criminal complaint against you and your associates at your risk, cost and responsibility. A copy of the notice is kept in my office for further reference.'

This notice (Ext. DW3/1) was proved by the defendant by producing Mr. Inder Kandhari, Advocate, as witness. Mr. Kandhari not only proved the notice but also proved the envelope (Ext. DW3/2) in which this notice was sent under registered post. His statement is brief and may be reproduced in full :-

'STATEMENT of Shri Inder Kandhari, Advocate, on S.A. Notice was given to Dina Nath on the instruction of the plaintiff. The original is Ext.DW3/1 (objected to as the document of custody and not produced earlier. Document allowed to be produced subject to proof of authenticity). This notice was sent in envelope Ext. DW3/2. Whatever is written in this notice was on the instructions of the plaintiff. I have got the office in the same street in which the plaintiff is living and personally know the

plaintiff. I do not know that the copy of the notice is with me or not and for that I will have to look for my records. The cutting in the notice does not bear my initials. RO&AC.; ADj, Delhi.'

Basing his argument on the evidence of Mr. Kandhari and the notice (Ext. DW3/1) Mr. Ishwar Sahai said that the plaintiff was not ready and willing to perform her part of the agreement as the notice would have amply showed. He said readiness and willingness of the plaintiff to perform her part of the agreement had to be up to the time of the decree and in any case up to the time of the filing of the suit. In support of his submissions he referred to opinion of the Privy Council in *Ardeshir M. Mama v. flora Sassoon* Air 1928 PC 208, and certain decisions of the Supreme Court and the High Courts. The case before the Privy Council was under the old Specific Relief Act, 1877. In this case a suit for specific performance of a certain property was filed in the Bombay High Court on 10 January 1920 with claims for damages in addition or in the alternative. On 19 March 1924 before the trial could begin the plaintiff's solicitors formally notified the defendant to the effect that the plaintiff had decided to abandon his claim for specific performance, and that he would, instead, at the trial claim damages against the defendant for the breach of contract which damages were assessed at Rs.7 lacs. The trial judge held that there did exist a concluded contract for sale which was repudiated by the defendant and he decreed the suit of the plaintiff by order dated 22 January 1925 by which he ordered the defendant to return the deposit paid by the plaintiff and further awarded the plaintiff, according to a measure which he explained in his judgment, the sum of Rs.7 lacs as damages for the defendant's breach of contract. The defendant appealed to the High Court in its appellate side and succeeded on the ground that the defendant's agent who had entered into the contract had no authority to do so. Against this judgment the matter came to the Supreme Court on appeal by the plaintiff. The Board (Privy Council) considered the question whether, even if the Court had agreed with the learned trial Judge that there was in existence a binding contract for sale, his award of damages would not still have had to be set aside for the reason that as the plaintiff had by his solicitor's letter of 19 March 1924, in effect intimated that he was no longer either willing or ready to perform the contract on his part the plaintiff had not only thereby renounced, but as from that moment had disentitled himself to a decree for specific performance,

and had thus brought upon him the untoward consequence that there was under the statute, in the circumstances of the case, no power left in the trial Judge to award him in the suit any damages at all. The Board said that the right of the plaintiff would be dependent upon his having been himself up to the date of the decree ready and willing to perform the contract on his part. The Board observed that although so far as the Act (the old Specific Relief Act) was concerned, there was no express provision that the averment of readiness and willingness was in a suit for specific performance necessary as it always was in England, it seemed invariably to have been recognised, and, on principle it was held that the Indian and English requirements in this matter were the same. The Privy Council further observed that the plaintiff did not enable the Court in a specific performance suit to award 'compensation for its breach' where at the hearing the plaintiff had debarred himself by his own action from asking for a specific decree. It is not necessary for us to discuss other submissions recorded in the judgment except to note that the appeal of the plaintiff was dismissed.

(8) In *K.S. Sundaramayyar v. K. Jagdeesan and another*, : AIR1965 Mad85 also, the plaintiff was in appeal. There was an agreement to sell dated 31 January 1958 respecting certain property in Coimbatore. There was some correspondence between the parties which is not quite relevant for our purpose. On 22 May 1958, however, the plaintiff sent a notice through his advocate to the defendant and the concluding portion of the notice was as under:- 'As there was no offer even in the telegram to deliver possession to my client of the property as per the terms of agreement, my client was not bound to finish the sale deed as stated in the telegram. You have thus committed default and broken the terms of the agreement. My client has been every ready and willing to act up to the terms to the property by giving the title deeds for my client's inspection and by handing over possession to my client of the portion in your occupation, you are bound to return the sum of Rs.4000 received by you as advance and also pay my client Rs.4000 by way of damages. You are therefore hereby called upon to pay my client the sum of Rs.4000 received as advance and also Rs.4000 by way of damages, within 3 days of receipt of this notice. Take notice that on default of compliance with this demand, steps will be taken through Court for recovery of the said sums.' One of the two counts on which the plaintiff was non-suited by the trial court was that he

was not continuously ready and willing to perform the contract and he, therefore, could not obtain relief by way of specific performance. This view was upheld by the Madras High Court and with reference to the concluding portion of the notice reproduced above the court said that such a demand of return of advance paid was quite inconsistent with the subsistence of the contract, and it could not, therefore, be said that the plaintiff was ready and willing to perform his part of the contract. The court also noticed subsequent correspondence between the parties and in one of the letters to the defendant the counsel for the plaintiff had said :- 'My client hereby withdraws the notice he gave you for the refund of the advance and the compensation money as he is advised that he can obtain specific performance itself. ' The court Said that the subsequent correspondence between the parties only confirmed the view that the plaintiff was not ready and willing to perform his part of the contract, and that the aforesaid statement itself amounted to admission that by previous notice the plaintiff had put an end to the contract by claiming return of the advance amount paid by him, and it would not be open to a party to a contract, who had once elected to accept the breach assuming there was a breach on the part of the other side to cancel that election and treat the contract as if it were subsisting. The court held that notice dated 22 May 1958 as amounting to a definite abandonment by the plaintiff of his right to obtain specific performance of the contract. In coming to this conclusion the Madras High Court relied on the decision of the Privy Council in *Ardeshir Mamee's case* AIR 1928 PC 208.

(9) In *Ayissabiv. Gopala Konar*, : AIR1989 Ker134 , the question of law for consideration was whether the plaintiff who repudiated the contract and claimed damages could turn back and seek specific performance. The court again relied on the decision of the Privy Council in *Ardeshir Mamee* (supra), and observed as under :- '..... Specific performance is an equitable and discretionary relief. It is necessary for the plaintiff not only to allege but also to prove if traversed that he has performed all the conditions which under the contract he was bound to perform and that he has been ready and willing at all times from the time of the contract down to the date of suit to perform his part of the contract. This principle is set out successfully in S.24(b) [15(b)] of the Specific Relief Act and expanded by judicial decisions. In a suit for specific performance, the plaintiff is also bound to

treat the contract as subsisting at all times. Continuous readiness and willingness from the date of contract to the time of hearing without any interruption is the requisite for the grant of the equitable remedy. Plaintiff must treat the contract as subsisting always. After repudiating the contract as was done in Ext.A-2 and electing to sue for damages he cannot turn round and claim specific performance at his sweet will and pleasure.'

(10) In *Prem Raj v. The D.L.F. Housing and Construction (Private) Ltd.*, : [1968]3SCR648 , the question involved in the appeal was whether a plaintiff suing for a declaration that a certain contract against him was void and inoperative having been obtained by undue influence, could not in the same suit in the alternative ask for the relief of specific performance of the same contract. The court held that the plaintiff could not in the same suit in the alternative ask for the relief of specific performance of the same contract. The decision of the Privy Council in *Ardeshir Mamma* (supra) was again referred to. The Supreme Court observed that the appellant had made out no cause of action with regard to relief of specific performance of the contract, and that it was well settled that in a suit for specific performance the plaintiff should allege that he was ready and willing to perform his part of the contract. This case was under the old Specific Relief Act. The court said that in the absence of an averment on the part of the plaintiff in the plaint that he was ready to perform his part of the contract, the plaintiff had no cause of action as far as the relief for specific performance was concerned. This judgment is, however, not quite relevant to the facts of the present case before us.

(11) Thus, the argument of Mr. Ishwar Sahai was short and simple but of considerable substance. He said since the plaintiff was not always ready and willing to perform her part of the agreement and infact she by her notice (Ext.DW3/ 1) sought to put an end to the agreement to sell and in fact made an allegation of fraud having been committed on her by Dina Nath in entering into this agreement to sell, she could not seek relief of specific performance.

(12) Mrs. Shyamla Pappu appearing for the respondent-plaintiff submitted that the court had to see the whole set of circumstances to arrive at the finding if the plaintiff was ready and willing to perform her part of the contract. She questioned

the very genuineness of the notice(Ext.DW3/1)andalsosaid it had been wrongly admitted into evidence. She said that this notice had not been produced by the defendant at or before the settlement of issues when defendant was in possession of the same, nor was it mentioned in any list showing that this notice was one of the documents on which the defendant intended to rely. Mrs. Pappu said that no leave was obtained from the court to produce on record this document and it had been produced in violation of the provisions of rule 2 of Order 13 of the Code . of Civil Procedure. This rule is as under :- Effect of non-production of documents. 2. (1)No documentary evidence in the possession or power of any party which should have been, but has not been, produced in accordance with the requirements of rule 1 shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof; and the Court receiving any such evidence shall record the reasons for so doing. (2) Nothing in sub-rule (1) shall apply to documents, - (a) produced for the cross-examination of the witnesses of the other party, or (b) handed over to a witness merely to refresh his memory. ' According to her there had to be a specific order of the court allowing the defendant to bring on record the documents which had not been produced at or before the settlement of issues as provided in rule 1 of Order 13 of the Code. We do not think Ms. Pappu is right on this submission. Here the court did allow the document to be produced subject to proof of authenticity. As the statement of Mr.Inder Kandhari (DW3) reproduced above would show that objection about the production of notice (Ext.DW3/1) and envelope (Ext.DW3/2)wassotaken, but that was overruled. Then Ms. Pappu said since the document was allowed to be produced subject to proof of authenticity, no evidence was produced to prove the authenticity of the document. This submission is again wrong. As a matter of fact, we do not find there was any further necessity for the defendant to bring on record any evidence to prove the authenticity of the notice and the envelope. Both these documents had been proved by the person who was auth or of the same, an Advocate. There is no misgiving about the statement of Mr. Inder Kandhari, Advocate, that he did issue this notice on the instructions of the plaintiff. He knew the plaintiff as well as he had got his office in the same street in which the plaintiff was living and he said he personally knew the plaintiff. There is hardly any cross examination by the plaintiff and the statement of Inder

Kandhari remained unchallenged. It was also the contention of Ms. Pappu that notice (Ext.DW3/ 1) was not put to the plaintiff when she appeared as her own witness. But this fact would not deviate our mind to cloud the authenticity of the notice. Even then the matter did not stop at that. After the close of the evidence of the defendant by which time notice (Ext. DW3/1) had been brought on record and proved, the plaintiff led evidence in rebuttal. She had full opportunity to challenge the genuineness of the notice, as now contended before us, but she did not and accepted the correctness of the notice. We are conscious of the fact that so much of the case of the party as concerns the witness should be put to him for him to explain, contradict himself or otherwise. This is certainly a sound principle, but this cannot be in itself a rule in all cases whatever the circumstances. True the fact that the plaintiff got sent the notice (Ext. DW3/1) terminating the agreement to sell was not put to the plaintiff but then the notice was allowed to be produced and proved at a later stage after the plaintiff had already been examined. The plaintiff did not question the statement of DW3 Inder Kandhari, Advocate, nor did she lead any evidence in rebuttal on this aspect and, thus, accepted the correctness of the notice and the statement of the witness (DW3). When the requirement of law in a suit for specific performance is that the plaintiff must aver and prove willingness to perform his part of the agreement to sell, it does not mean that the court merely looks at the statement of the plaintiff and does not examine other evidence which disproves the case of the plaintiff. We may at this stage note that when Mr. Ishwar Sahai concluded his arguments before us, Mr. Y.P. Chandna, Advocate, for the plaintiff, made submissions and at that time, he admitted the genuineness of the notice as having been sent by Mr. Inder Kandhari, Advocate, on the instructions of the plaintiff. The arguments could not be concluded on that day and the matter remained part heard where after with our permission Mrs. Pappu took over as she said she was now arguing on being instructed by Mr. Chandna, Advocate. We reject the argument of the plaintiff that notice(Ext. DW3/ 1) was not genuine or it was not sent by Mr. Inder Kandhari, Advocate, on the instructions of the plaintiff. Ms. Pappu had also argued that how could Mr. Inder Kandhari, Advocate, appear as a witness for the defendant when he sent notice on the instructions of the plaintiff. We do not think this argument is even worth considering.

(13) So the position is that before the institution of the suit at one stage the plaintiff herself resolved from the contract. Could she in these circumstances get a decree for specific performance of the contract. After the plaintiff had sent notice (Ext. DW3/1) dated 6 March 1978 permission was obtained from the appropriate authorities granting permission to sell the suit plot. Then by subsequent notice dated 27 August 1978 (Ext. PW6/1) the plaintiff changed her stand and called upon Dina Nath to execute the sale deed under the agreement. In this notice she made no reference of the earlier notice (Ext. DW3/1).

(14) The plaintiff-respondent also filed in this appeal an application (C.M. 743/83) under Order 41 Rule 27 and section 151 of the Code praying to bring on record certain documentary evidence in support of her case. These documents were sought to be produced to demolish the plea of the defendant based on the notice (Ext. DW3/1). In this application also it was mentioned that the notice was not genuine and had been manufactured in connivance and in conspiracy with Mr. Inder Kandhari, Advocate, because the plaintiff never instructed him to give such a notice. This application was ordered to be heard along with the appeal. Under rule 27 of Order 41, the appellate court can allow additional evidence in certain set of circumstances. The documents which the plaintiff wanted to prove were certain letters written by M/s. C. Lal Property Dealer, who was instrumental in getting the agreement to sell entered into between the parties. These letters are after the date of the notice dated 6 March 1978 (Ext. DW3/1). First letter is dated 10 May 1978 addressed to the plaintiff where the property dealer said he had met the concerned officer in the Land & Development Office for the purpose of grant of sale permission. Next letter is dated 12 September 1978, again addressed to the plaintiff, telling her that Dina Nath had applied to the Land & Development Office for extending the date of sale permission since he had not so far received the income-tax clearance certificate. Third letter is a copy of the letter addressed to Dina Nath requesting him to get the income-tax clearance certificate otherwise he was told that if he failed to get the income-tax clearance certificate the Land & Development Officer might reject the request for sale permission. Fourth undated letter is again addressed to the plaintiff telling her that Vijay Kumar Wadhwa had applied again to revalidate the sale permission of the suit plot, and endorsement on this letter, perhaps by the plaintiff, would show that this letter was received by

her on 29 October 1978. The last letter is dated 15 November 1978 addressed to Mr. Vijay Wadhwa requesting him to get the sale deed executed soon if he had received the income-tax clearance certificate. It is difficult to see how these letters, even if these are brought on record, would advance the case of the plaintiff. These at best show that the property dealer was deeply involved in getting the sale deed executed as he would have been certainly entitled to his commission. The letter addressed to Mr. Vijay Wadhwa or making reference to him, would be of no relevance at all. We would, therefore, reject the application (C.M- 743/83).

(15) The permission to sell the suit plot was granted by the Land & Development Officer by his letter dated 17 June 1978 addressed to the plaintiff herself. It was then that on 27 August 1978 that the plaintiff gave notice (Ext. Public Witness 6/1) through her advocate to Dina Nath to get the sale deed executed. At this stage it will appear that the plaintiff became wiser and wanted to reassert the agreement to sell. In support of her case Mrs. Pappu referred to a decision of the Supreme Court in Ramesh Chandra Choudhary and another v. Chuni Lal Sabharwal (dead) by his legal representatives and others, : [1971]2SCR573 . She relied on the observation in the judgment that readiness and willingness could not be treated as a strait-jacket formula and these have to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the party concerned. The court had held in that case that on the facts and circumstances of the case plaintiff must be held to be ready and willing to perform his part of the contract till date of the suit and was, therefore, entitled to a decree for specific performance. In this case the plaintiff had entered into an agreement to purchase certain property from the defendant. A notice was served upon him by the counsel for the defendant that since the balance consideration according to the terms of the agreement was to be paid by the plaintiff and the sale deed got registered within a certain period and since could not be done, the defendant sought to cancel the agreement, and one of the issues in the suit was whether the plaintiff was ready and willing to perform his part of the contract. Thus, it was a case where the defendant sought to cancel the agreement, but in the case before us it is the plaintiff who had sought to cancel the agreement to sell.

(16) After considering the whole aspect of the matter we are of the opinion that the defendant must succeed on issue No.2.

(17) We may refer to section 16 of the [Specific Relief Act, 1963](#), which, in relevant part, is as under :- '16. Personal bars to relief.- Specific performance of a contract cannot be enforced in favor of a person - (a) 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 or waived by the defendant. Explanationn. - For the purposes of clause (c), - (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; (ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction. ' Clause (c), reproduced above, was not there in the old Specific Relief Act. However, this clause incorporates the view of the Privy Council in the case of *Ardeshir Mamma* AIR 1928 PC 208. The plaintiff is not only to aver but is also to prove that he has performed or has always been ready and willing to perform the essential terms of his part of the contract. It is nobody's case that the plaintiff before us was prevented from performing any particular terms of the agreement to sell, or she could perform those terms having been prevented or waived by the defendant. Here is a case where she completely renounced the agreement to sell. Provisions contained in clause (c) are very stringent. If the plaintiff does not aver in the plaint that he was ready and willing to perform his part of the contract, his suit is likely to fail. Then, as stated above, the plaintiff is not only to aver but also to prove that all through he was ready and willing to perform his part of the agreement. Though the plaintiff in the case before us did aver that she was ready and willing to perform her part of the agreement to sell, but she has failed to prove that she was ready and willing to perform the same. We would, therefore, hold issue No. 3 in favor of the appellant-defendant, and the suit for specific performance filed by the plaintiff-respondent must fail.

(18) This, however, would not finally conclude the matter for the plaintiff as we find that in the agreement to sell it is mentioned that she had paid a sum of Rs.5,000/-

as advance to DinaNath. It was not an earnest money and could not have been forfeited, nor such claim made by the defendant. In the notice dated 6 March 1978 sent by the plaintiff through her advocate Mr. Inder Kandhari she claimed refund of Rs.17,000.00 which according to her she paid at the time of-execution of the agreement to sell. There is no such evidence that the plaintiff did pay Rs.17,000/-, but the fact that she paid Rs.5,000.00 stands proved. When we are declining her prayer for specific performance of the agreement to sell she would certainly be entitled to the refund of Rs.5,000.00 . We are of the opinion that we should balance the equities between the parties and though the plaintiff has not specifically claimed any damages in the alternative or refund of the advance paid by her, we cannot throw her to another bout of litigation when the facts are admitted before us in her suit. We would, therefore, dismiss the suit of the plaintiff for a decree for specific performance of the agreement to sell and would set aside the impugned judgment and decree. We will, however, decree the suit of the plaintiff for Rs.5,000.00 with interest at the rate of 12% per annum from 30 May 1977, the date of the agreement to sell, till the filing of the suit. The decree will be drawn up after requisite court fee has been paid by the plaintiff. She would be entitled to cost limited to court fee paid on the decree as granted by us. Plaintiff would also be entitled to interest pendente lite and future interest at the same rate of 12% per annum on the amount of Rs.5,000.00 from the date of decree till payment. On the failure of the plaintiff to pay the court fee within four weeks from today her suit shall stand dismissed.