

**IN THE HIGH COURT AT CALCUTTA  
CIVIL APPELLATE JURISDICTION  
ORIGINAL SIDE**

**Present:**

**THE HON'BLE JUSTICE BISWANATH SOMADDER**

**AND**

**THE HON'BLE JUSTICE MOUSHUMI BHATTACHARYA**

**APD No.442 of 2017**

**G.A.No.2768 of 2017**

**G.A.No.1602 of 2018**

**WITH**

**C.S.No.262 of 2001**

**Shivshankar Resources Ltd. & Ors.**

**VS.**

**Shyama Enclave Pvt. Ltd. & Ors.**

**AND**

**APD No. 443 of 2017**

**G.A.No.2774 of 2017**

**G.A.No.1603 of 2018**

**WITH**

**C.S.No.262 of 2001**

**Uma Devi Agarwal & Ors.**

**-Vs.-**

**Shyama Enclave Pvt. Ltd. & Ors.**

For the Applicants : Mr. Aniruddha Chatterjee, Advocate,  
Ms. Mickey Chowdhury, Advocate,  
Ms. Rimpa Rajpal, Advocate,

Ms. Rituparna De, Advocate.

For the respondents : Mr. Joy Saha, Sr. Advocate,  
Mr. Brotin Dey, Advocate,  
Mr. Amalaksha Jana, Advocate.

Heard on : 08.11.2017, 13.11.2017, 22.11.2017,  
27.11.2017, 18.12.2017, 03.01.2018,  
16.01.2018, 25.01.2018, 08.02.2018,  
13.02.2018, 15.02.2018, 04.05.2018,  
08.06.2018, 15.06.2018, 29.06.2018,  
13.07.2018, 03.08.2018, 17.08.2018,  
24.08.2018, 16.11.2018, 30.11.2018,  
07.12.2018, 14.12.2018, 11.01.2019,  
18.01.2019, 25.01.2019, 15.02.2019,  
22.02.2019, 01.03.2019, 29.03.2019,  
05.04.2019, 09.04.2019, 14.06.2019,  
21.06.2019, 05.07.2019, 12.07.2019,  
19.07.2019, 2.08.2019, 16.08.2019,  
30.08.2019, 20.09.2019.

Judgment on : 01.10.2019.

**Moushumi Bhattacharya, J. :**

1. Both these appeals arise out of a Judgment and decree dated 29<sup>th</sup> June, 2017, which has been challenged by two sets of appellants. The appellants in APD 443/2017 were before the learned First Court as added defendants. The two appeals are being disposed of by this judgment.

2. The impugned Judgment was delivered in a suit for specific performance of two agreements filed by the plaintiff/respondent: Shyama Enclave Private Limited. The suit was originally filed against Sanjib Kumar Roy and Jamuna Bala Roy and the plaint was later amended on 30<sup>th</sup> November, 2004 by which the subsequent purchasers were added as defendant nos. 2(b) to 2(zx). The original defendant nos. 1 and 2 (Sanjib Kumar Roy and Jamuna Bala Roy) were the owners of the suit property and entered into an agreement for sale of the suit property to the extent of their respective shares in the said property. The agreement to sell the suit property was in the form of a writing dated 22<sup>nd</sup> January, 2000 (marked as Exhibit A) by which the plaintiff agreed to purchase the property for a total consideration of Rs.1,70,00,000/- (Rupees One Crore Seventy Lakhs). The case made out by the plaintiff was that the original defendants in this agreement agreed to the following terms;

- (a) That the vendor would apply and get permission from the Income Tax authorities under Section 269 UC of the Income Tax Act, 1961;
- (b) That after getting permission from Income Tax authorities under the aforesaid provision, the purchaser would pay to the vendor the total amount of Rs.1,70,00,000/- (Rupees One Crore Seventy Lakh) only. A sum of Rs.70,00,000/- (Rupees Seventy Lakh) only, was to be paid immediately, Rs.50,00,000/- (Rupees Fifty Lakh) only, was to be paid within three months and the balance of Rs.50,00,000/- (Rupees Fifty Lakh) only, within six months of the permission from the Income Tax authorities;

- (c) Upon receiving such payment of Rs.70,00,000/- (Rupees Seventy Lakh) only, from the purchaser, the vendor would hand over vacant and peaceful possession of the entire premises no.7, Grant Lane, Kolkata -12 except the ground floor and 50% of the first floor and on receiving the second payment of Rs.50,00,000/- (Rupees Fifty Lakh) only, from the purchaser, the vendor would hand over vacant and peaceful possession of the 50% of the first floor and on receiving the balance amount of Rs.50,00,000/- (Rupees Fifty Lakh) only, from the purchaser, the vendor would hand over vacant and peaceful possession of the entire ground floor of the entire premises for the exclusive use, sale or otherwise transfer of the purchaser.
- (d) The entire suit property (premises no.7, Grant Lane, Kolkata – 700012) was free from encumbrances and the vendor had a clear and undisputed marketable title to the said property.
- (e) All the original documents, title deeds regarding the suit property would be handed over by the vendor to the purchaser at the time of making first payment of Rs.70 lakhs.
- (f) The purchaser would have every right to sell, transfer and otherwise dispose of the entire and/or part area of the portion under the possession of the purchaser in the suit premises.
- (g) Until permission is obtained from Income Tax Authority as mentioned, the purchaser would be allowed to make internal works such as brick portions, electrical jobs, minor repairs, replacing asbestos roofs at top floor on behalf of the vendor.

3. A supplementary agreement (Exhibit B) for sale of the same property was executed between the plaintiff and the original defendants on 22<sup>nd</sup> February, 2000 by varying and amending the original agreement dated 22<sup>nd</sup> January, 2000. By the supplementary agreement, the parties agreed that

the purchaser would pay a total sum of Rs.5,00,000/- (Rupees Five Lakh) only, on execution of the supplementary agreement, which the vendor accepted and acknowledged and would pay another sum of Rs.25,00,000/- (Rupees Twenty Five Lakh) only, by 22<sup>nd</sup> March, 2000 to the vendor.

4. According to Mr. Joy Saha, learned Senior Counsel appearing for the plaintiff, pursuant to the agreement for sale (taking both the agreements together), the plaintiff paid a total sum of Rs.8,00,000/- (Rs.8 lakh) to the defendants. The plaintiff paid a further sum of Rs.43,849/-, on the instruction of the defendants and as a part of their liabilities towards Kolkata Municipal Corporation and a further sum of Rs.5,873/- to Calcutta Telephones on behalf of the vendors. The plaintiff complained that although the agreement dated 22<sup>nd</sup> January, 2000 contained a declaration that the defendants had absolute right, title and interest in the suit property, it was subsequently discovered that the suit property had been hypothecated in favour of West Bengal Industrial Development Corporation Limited and West Bengal Financial Corporation Limited. Since the business of the defendants became unviable, the defendants sought for a direction to dispose of the suit property in order to liquidate their liabilities with the financial institutions.

5. According to the plaintiff, by a letter dated 24<sup>th</sup> January, 2001, an offer was made for payment in order to enable the defendants to get confirmation from the financial institutions in the matter of sale of the suit property. By a letter dated 22<sup>nd</sup> February, 2000, the defendants proposed to hand over the absolute physical vacant possession of the second floor of the

suit property for which the agreement for sale was implemented in part. The plaintiff states despite receiving a sum of Rs.8,49,722/- (Rupees Eight Lakh Forty Nine Thousand Seven Hundred Twenty Two) by way of part consideration, the defendants failed to complete the sale of the suit property in terms of the agreements and also did not take steps to obtain the confirmation from the financial institutions for completing the sale of the said property. The plaintiff's case was that it had always been ready and willing to complete the transaction in accordance with the terms of both the agreements dated 22<sup>nd</sup> January, 2000 and 22<sup>nd</sup> February, 2000 but the defendants refused to complete the sale under the said agreements. The plaintiff was hence constrained to file the suit for the following reliefs;

- (a) A decree for specific performance of the agreement for sale dated 22<sup>nd</sup> January, 2000 and supplementary agreement dated 22<sup>nd</sup> February, 2000, entered into by and between the plaintiff and the defendant nos.1 and 2.
- (b) Alternatively Rs.3.20 Crores towards damages.
- (c) Refund of the deposit of a sum of Rs.8,49,722/- (Rupees Eight Lakh Forty Nine Thousand Seven Hundred Twenty Two) only, together with interest thereon at the rate of 24% per annum.
- (d) Interest pendente lite.

6. The primary submission of Mr Aniruddha Chatterjee, learned counsel appearing for the appellants, assisted by Ms. Rituparna De and Ms. M. Chowdhury, is that the plaintiff/respondent was not ready or willing to perform its obligations under the agreements entered into with the original defendants. It is the case of the appellants that the plaintiff has neither

proved nor averred its continuous readiness and willingness in respect of the performance of the agreements. Counsel has placed the Supplementary Agreement dated 22nd February 2000 under which the plaintiff was to pay different amounts of money in sequence, which the plaintiff failed to do save and except an amount of Rs 8 lakhs as part consideration and another 50 thousand approximately towards Calcutta Municipal Corporation dues. Counsel stresses that by a covering letter dated 26th February, 2000, the plaintiff made over 31 post-dated cheques all dated 22nd March, 2000 of a total sum of Rs.23,25,000/- as part consideration for the suit property. However, the said cheques were dishonoured for insufficiency of funds which was admitted by the witness of the plaintiff, Tarachand Gupta. Counsel further relies on a letter dated 24th January, 2001 by which the plaintiff made a fresh offer for purchasing the property on new terms proposed in the letter on a floor to floor basis, which was wholly contrary to Clause 7 of the Supplementary Agreement. Counsel also submits that an ex parte ad- interim order of injunction granted in favour of the plaintiff on 3rd July, 2001 was vacated on 28th September, 2001 upon the Court finding that the cheques issued by the plaintiff were dishonoured and that the plaintiff did not come forward to deposit the defaulted amount to demonstrate its readiness and willingness. Counsel takes the additional point that the impugned decree is liable to be set aside as some of the added defendants were not served with the summons in the suit. According to counsel, the appellants are bona fide purchasers for valuable consideration of rooms/cubicles on the second and third floor of the suit property which was purchased by the appellants on various dates by way of registered

deeds of conveyance in 2002-2004 without notice or knowledge of the agreements for sale of the pending suit. Counsel submits that despite orders of court, the plaint was amended and the added defendants were added as parties only in 2013 and that the appellants in APD 442/2017 were not served with the summons at all.

7. Counsel raises an additional point of the agreements for sale not being sufficiently stamped or registered and hence not admissible in evidence. Counsel relies on *SMS Tea Estates Private Limited vs Chandmari Tea Company Private Limited* reported in (2011) 14 SCC 66 where it was held that a court will not admit a document unless it is sufficiently stamped and registered if the law requires the document to be compulsorily stamped.

A few of the issues which were framed in the suit are;

- (1) Is the plaintiff entitled to a decree for specific performance of the agreements dated 22<sup>nd</sup> January, 2000 and 22<sup>nd</sup> February, 2000?
- (2) Is the plaintiff entitled to refund of the sum of Rs.8,49,722/- ((Rupees Eight Lakh Forty Nine Thousand Seven Hundred Twenty Two) only, with interest at the rate of 24% per annum; in the alternative to specific performance?
- (3) Is the plaintiff entitled to a decree for a sum of Rs.3.20 Crores as damages; in the alternative to specific performance?



- (4) Whether the defendant no.1 had initially neglected and/or refused to obtain the necessary approval from the defendant nos. 3 and 4?
- (5) Did the plaintiff pay a sum of Rs.8 Lakhs to the first defendant and a sum of Rs.43,849/- (Rupees Forty Three Thousand Eight Hundred Forty Nine) only, to the Kolkata Municipal Corporation and a sum of Rs.5,873 (Rupees Five Thousand Eight Hundred Seventy Three) only, to the Calcutta Telephones?

8. Of the added defendants before the First Court, Shyam Sundar Dalal, Renu Dalal and S.S. Dalal contested the suit. The case of these defendants was that the agreements in question were unregistered agreements and since the properties were mortgaged with the financial institutions, the agreement of January, 2000 could not have been executed. Further, the plaintiff did not take any steps to complete the purchase of the premises in terms of the agreements dated 22<sup>nd</sup> January, 2000 and 22<sup>nd</sup> February, 2000 and that the plaintiff had specifically instructed its banker not to honour the cheques issued by the plaintiff to the defendants. The original defendants entered into an agreement for sale of the said property to the defendant no. 2(a) on 16<sup>th</sup> January, 2002 since the plaintiff was not ready and willing to purchase the said property. The defendants further stated in their written statements that the defendant no.2 paid a sum of Rs.95 lakhs to the defendant nos. 3 and 4 under the agreements dated 16<sup>th</sup> January, 2002 and 13<sup>th</sup> April, 2002 towards redemption of mortgage of the said property. Defendant nos.1 and 2 also executed a deed of conveyance in favour of the

defendant nos.2(c), 2(e), 2(i), 2(j), 2(n), 2(r), 2(u), 2(v), 2(w), 2(x), 2(z), 2(zii), 2(ziii), 2(ziv), 2(zvi) and 2(zvii), who were nominees of the defendant no.2(a). The primary contention urged by the defendant nos. 2(a), 2(zvii), 2(zviii) and 2(xix), before the First Court was that the plaintiff has failed to make out any case for specific performance of the agreements.

9. Upon hearing the rival submissions made on behalf of the parties, the learned Single Judge held that the defendants have failed to make out a case for refusing specific performance of the agreement in favour of the plaintiff. In coming to the aforesaid conclusion, the learned Judge came to the finding that the plaintiff was unable to make the payments as agreed under the agreement dated 22<sup>nd</sup> January, 2000 since the defendant could not produce any permission from the income tax authorities. The learned Judge relied on specific clauses of the two agreements in bolstering his view. The learned Judge also held in favour of the plaintiff on the issue of the agreements being insufficiently stamped. According to the Learned Judge, the plaintiff is entitled to get the benefit of Section 36 of the Stamp Act to the effect that when an instrument has been admitted in evidence, the ground that the instrument has not been duly stamped cannot be called in question at any stage of the suit thereafter. Therefore, the objection taken by the defendant in reliance of the bar under Section 35 of the Stamp Act cannot stand in the way of the plaintiff getting a decree for specific performance of the contract. The learned Judge was also of the view that since the contract contained reciprocal promises, the contract became voidable at the option of the party on being prevented by the other party

from performing his promise. The learned Single Judge also declined to accept the argument advanced on behalf of some of the added defendants that the transaction is hit by the principle of *lis pendens* and held that since the transfer commenced during the pendency of the suit, the transfer must be held to be subject to the result of the suit filed by the plaintiff. The learned Judge held that regardless of whether an injunction was passed, the purchasers would be governed by the result of the suit and since the plaintiff was found to be entitled to a decree for specific performance, the purchasers did not acquire any title of property. It was also held that the plaintiff would be entitled to the cancellation of the deeds of transfer *pendente lite* as a relief consequent to the main reliefs prayed for in the suit.

10. On the question of readiness and willingness, the learned Single Judge was of the view that there were no laches on the part of the plaintiff to show its *bone fides* for completing the purchase of the suit property. The learned Judge relied on *Nirmala Anand Vs. Advent Corporation (P) Ltd.* reported in (2002)8 SCC 146 in holding that a court can grant a decree for specific performance of a contract by exercising discretion in imposing reasonable conditions including payment of additional amount by the purchaser to the seller. On the basis of the aforesaid, the learned First Court decreed the suit on contest against the defendant nos. 2(zxvii), 2(zxviii) and 2(zxix) and *ex parte* against the rest of the defendants. The defendant nos.2(zxvii), 2(zxviii) and 2(zxix) were directed to make re-conveyance of the suit property in favour of the plaintiff subject to the plaintiff paying the total consideration money paid by these defendants to the original defendants

together with a sum equivalent to a total amount of simple interest @ 9% per annum to be calculated on and from the date when the property was purchased by the defendants nos. 2(zxvii), 2(zxviii) and 2(zxix) till such time the re-conveyance was made.

11. We have heard learned counsel for the parties and considered the materials on record. The point which falls for adjudication is whether the plaintiff satisfied the requirements of Section 16 of The Specific Relief Act, 1963 and whether the appellants in APD 442 of 2017, not being before the First Court, can take recourse to the 'Readiness and Willingness' argument. On the second point, we have considered the case-law relied on behalf of the appellants. In *Ram Awadh vs. Achhaibar Dubey* reported in AIR 2000 SC 860, the Supreme Court held that the plea of readiness and willingness was available to all defendants. In *Azhar Sultana vs. B. Rajamani* reported in (2009) 17 SCC 27, the Supreme Court reiterated this position and held that the issue of the plaintiff not willing to perform his part of the contract can be taken even by a subsequent purchaser. In *Bhanu Kumar Jain vs. Archana Kumar* reported in AIR 2005 SC 626, the Supreme Court held that in an ex parte decree, a defendant has the option to argue the merits of the suit in the first appeal and contest the decree passed in favour of the plaintiff. None of these decisions have been disputed by or distinguished on behalf of the plaintiff/respondent. On a careful reading of the decisions, we are of the view that the point of readiness and willingness is available to the appellants in APD 442 of 2017 (Shivshankar Resources) even though they were not before the First Court.

12. For deciding whether the contention of the appellants with regard to the plaintiff not being ready or willing to perform the Agreement dated 22<sup>nd</sup> January, 2000 and the Supplementary Agreement dated 22<sup>nd</sup> February 2000 is correct, the averments and evidence on record with regard to the plaintiff's performance of the said agreements are required to be considered.

13. To assess the willingness of the plaintiff to perform its part of the bargain, the modified terms as agreed by the parties by the Supplementary Agreement dated 22<sup>nd</sup> February 2000 are set out:

- (i) The suit property is free from all encumbrances and the vendor has a clear marketable title subject to placement for personal guarantee to the vendor as collateral security to the West Bengal Industrial Development Corporation Limited and the West Bengal Financial Corporation Limited. However, the said financial Institutions, i.e., the West Bengal Industrial Development Corporation and West Bengal Financial Corporation have already expressed their willingness to release the said property vide their letter no. F.1-83(277/13)I..718 dated 27<sup>th</sup> December, 1999, provided a sum of Rs.1,00,00,000/- (Rupees One Crore) only, is repaid to them.
- (ii) To implement the original agreement dated 22<sup>nd</sup> January, 2000 for sale of the suit premises the purchaser would pay a total sum of Rs.5,00,000/- (Rupees Five Lakh) only, on execution of the supplementary agreement, which the vendor accepted and acknowledged.
- (iii) The purchaser would pay another sum of Rs.25,00,000/- (Rupees Twenty Five Lakh) only, by 22<sup>nd</sup> March, 2000 to

the vendor. However, the consent to sell of the said property was obtained from the West Bengal Industrial Development Corporation and West Bengal Financial Corporation and would produce to the purchaser before making the payment of Rs.1,00,00,000/- (Rupees One Crore) only, to the West Bengal Industrial Development Corporation and West Bengal Financial Corporation.

- (iv) That the purchaser was also authorised the vendor to repay Rs.1,00,00,000/- (Rupees One Crore) only, to the West Bengal Industrial Development Corporation Limited and the West Bengal Financial Corporation directly on behalf of the vendor as part payment out of the total consideration money of Rs.1,70,00,000/- (Rupees One Crore Seventy Lakh) only, of the said property.
- (v) On execution of the supplementary sale agreement the vendor would hand over absolute and peaceful vacant possession of the entire second floor comprising of a carpet area of 4195.50 square feet and one room attached with bathroom at the first floor of the suit premises. The purchaser would have all rights to divide the entire second floor into small offices and realize rent with the proportionate right and title in landing and all the common facilities, easement, passages, etc.
- (vi) The lift, generator, AC and DC light connections, water motor etc. would remain as part and parcel of the suit property.
- (vii) That the purchaser would forego the claim over ground floor without deducting any consideration money, i.e., Rs.1.70 crore for the entire suit property for providing more time to pay the consideration money in terms of the earlier agreement dated 22<sup>nd</sup> January, 2000. All other

terms and conditions, save and except mentioned in the supplementary agreement, the original agreement dated 22<sup>nd</sup> January, 2000 for sale of suit property, would remain unchanged and would be binding upon both the parties.

14. The plaintiff has stated in paragraph 5 of the Plaint that it paid a total sum of Rs 8 lakhs to the defendants as part consideration and Rs. 43,849 towards Calcutta Municipal Corporation dues and Rs. 5,873 towards Calcutta Telephone. Under a covering letter dated 26<sup>th</sup> February 2000, the plaintiff made over 31 post-dated cheques all dated 22<sup>nd</sup> March 2000 for a total amount of Rs.23,25,000/- towards part consideration for purchasing the suit property. These cheques were however returned 'dishonoured' by the plaintiff's banker for insufficiency of funds. The reason for the cheques being dishonoured would appear from the evidence of the plaintiff's witness Tarachand Gupta, whose answers to questions 77-79 are reproduced below;

*"Q 77. "Were the cheques ever deposited for presentation?"*

*A. The cheques were deposited for payment.*

*Q78. Were they honored?"*

*A. No.*

*Q 79. What was the ground for dishonor of cheques?"*

*A. The ground was insufficient fund. One cheque was encashed because there was a balance of Rs.75,000/-.*

*The same was also marked as part of exhibit M."*

15. The plaintiff therefore, admittedly did not make payment of a sum of Rs. 25 Lakhs under the Supplementary Agreement within 22<sup>nd</sup> March, 2000. Further the plaintiff also did not come forward for making payment to the financial institution of a sum of Rs. 1 Crore for the conveyance being executed in its favour. The supplementary agreement for sale specifically records the fact that the Financial Institutions namely WBIDC and WBFC

have expressed their willingness to release the property by a letter subject to payment of a sum of Rs. 1 Crore. Further the plaintiff in paragraph 6 of the plaint has relied on the minutes of the meeting of the financial institution dated 23.12.99 wherein it is recorded that *“immediate permission is to be granted by the FLS to the Company for sale of immovable properties of the promoter at 7 Grant Lane, Calcutta 12 offered as co-lateral security to FLS. The entire sale proceeds of Rs.100 Lacs as expected while negotiating with a very potential buyer would be paid to FLS. This process will be completed maximum within March, 2000.”*

16. After one year, the plaintiff by a letter dated 24.1.2001 made a fresh offer to the vendor offering to purchase the said property on new terms proposed in the said letter. The plaintiff offered to make payment as following:-

- 1) Rs. 15,00,000/- for entire 3<sup>rd</sup> floor.
- 2) Rs.45,00,000/- for 2<sup>nd</sup> floor.
- 3) Balance of sales price for 1<sup>st</sup> floor, ground floor including mezzanine floor.

17. Notably, there was no clause in the agreements for payment of consideration on floor basis. Under clause 7 of the supplementary agreement for sale dated 22<sup>nd</sup> February, 2000 the plaintiff had forgone the claim over the ground floor of the said premises. In paragraph 9 of the



plaint, the plaintiff has admitted that a new set of terms were offered by the plaintiff to the defendant for purchase of the said property by letter dated 24<sup>th</sup> January, 2001.

18. Further the plaintiff had also filed an application for interim injunction in connection with the said suit where an ex-parte ad- interim order of injunction was passed on 3rd July 2001. On 28<sup>th</sup> September, 2001, the court found that the cheques issued by the plaintiff towards part consideration had been dishonored by reason of which the interim order was vacated. The plaintiff did not come forward to deposit the defaulted amount in court. The conduct of the plaintiff shows that there was no continuous readiness and willingness on its part to perform its obligation under the said agreements. An appeal was preferred by the plaintiff from the refusal to extend the interim order before the Division bench which was dismissed by an order dated 28th March, 2007. The Division Bench held that since the amount agreed to be paid by way of cheques had been dishonored, the obligation on the part of the purchaser had not been fulfilled.

19. From the records it appears that the plaintiff has admittedly paid the following amounts:

Rs. 5 lakhs on 22.02.2000

Rs. 2.25 lakhs between 6th April 2000 and 16th April 2000

Rs. 75,000/- on 23rd March 2000.

The Plaintiff thereafter made over post dated cheques for a total sum of Rs. 23.25 lakhs under cover of a letter dated 26th February 2000 (Exhibit –M) which provides that the cheques were "*to be deposited on our further written instruction only.*"

20. Admittedly therefore, the plaintiff only paid a sum of Rs. 8 lakhs under the agreements. The PDCs for Rs 23.25 lakhs made over under the letter of 26<sup>th</sup> February 2000 were dishonoured by reason of insufficient funds. The letter of the plaintiff dated 24<sup>th</sup> January, 2001 (Exhibit F) calling upon Sanjiv Kumar Roy/ vendor to obtain the consent of the two Financial Institutions for making further payments cannot be given any weightage since the plaintiff offered to make such payments on a floor basis without there being any such term in the agreements. Further the plaintiff had given up the claim over the ground floor of the suit property under Clause 7 of the Supplementary Agreement proving thereby that the plaintiff had offered fresh terms for purchase of individual floors of the suit property under cover of the letter dated 24<sup>th</sup> January 2001.

21. Since it has strenuously been urged on behalf of the plaintiff that the plaintiff has always been ready and willing to perform its part of the bargain under the agreements for purchase of the suit property, the decision in *Rangammal Vs. Kuppaswami* reported in (2011) 12 SCC 220 cited on behalf of the appellants is relevant. In this decision, the Supreme Court held that under Section 101 of the Indian Evidence Act, 1872 ("Burden of Proof") whosoever wants a court to give judgment as to any legal right or law

dependent on the existence of facts asserted, must prove that those facts exist. In other words, the burden of proof lies on that person who is bound to prove the existence of any fact and that until such burden is discharged, the other party is not required to be called upon to prove his case. Considering the ratio of the aforesaid decision as well as Section 101 of the Indian Evidence Act, this court is of the view that the burden of proving that the plaintiff was always ready and willing to perform the terms of the agreements for purchase of the property, lies squarely on the plaintiff. According to the plaintiff itself, the total amount of money paid under the agreements was restricted to 8 lakhs. Hence, there was an admitted failure on the part of the plaintiff to make payment of Rs.25 lakhs as per the supplementary agreement. The fact that the post-dated cheques amounting to a total of 23.25 lakhs were dishonoured by reason of insufficiency of funds points to the lack of readiness on the part of the plaintiff and its inability to make good the defaulted sum. The distinction between “readiness” and “willingness” has been explained in *Kalawati Vs. Rakesh Kumar* reported in (2018) 3 SCC 658 where the Supreme Court relying on *Acharya Swami Ganesh Dassji Vs. Sita Ram Thapar* reported in (1996)4 SCC 526, held that readiness meant the capacity of the plaintiff to perform the contract which would include the plaintiff’s financial capability to pay the purchase price as opposed to the plaintiff’s willingness to perform the contract which has to be seen from its conduct along with attending circumstances. Both these decisions were cited on behalf of the appellants. The evidence of the plaintiff’s witness that the reason for the cheques being dishonoured was for insufficiency of funds (one cheque was encashed

because there was a balance of Rs.75,000/-), is significant since that would have a bearing on the plaintiff's readiness under Section 16(b) of the Specific Relief Act, 1963. The decisions cited on the issue of the remedy for specific performance being of a equitable nature and subject to the discretion of the court cannot be called into question. The principles enunciated in *N.P. Thirugnanam Vs. Dr. R. Jagan Mohan Rao* reported in (1995) 5 SCC 115 and *Bal Krishna Vs. Bhagwan Das* reported in (2008) 12 SCC 145 affirms the discretionary role of a court for passing a decree of specific performance as provided under Section 20 of The Specific Relief Act. The decisions also lay down that there must be continuous readiness and willingness on the part of the plaintiff as a condition precedent for grant of the relief of specific performance and that a court must also take into consideration the conduct of the plaintiff both prior to and subsequent to the filing of the suit and whether the plaintiff has averred and proved that he has either performed or has always been ready and willing to perform the essential terms of the contract which were to be performed by him (Section 16(c) read with Explanation (ii) of the Specific Relief Act). *Bal Krishna* held the compliance of Section 16(c) to be mandatory in the absence of which a suit for specific performance cannot succeed. This court finds that no document has been produced by the plaintiff to show its financial capacity to perform the terms of the agreements. The readiness of the plaintiff to put in the money would have ensured extension of the interim order granted in favour of the plaintiff had the plaintiff put in the money equivalent to the amount of the dishonoured cheques. Notably, the plaintiff's case is also that its letter dated 26th February 2000 specifically provided that the post-dated cheques were

to be deposited on the plaintiff's '*...further, written instructions only*'. Not only is this at variance with the evidence of the plaintiff's witness (questions and answers have been set out above) but that there is also no document on record showing that the plaintiff ever issued such written instruction. The only defence taken by the plaintiff is that the payments were to be made by the plaintiff to the original defendants upon the latter obtaining the clearance of the Income Tax authorities as well as the consent of the financial institutions. The credibility of this defence pales into insignificance since the plaintiff has not produced any document to show that it took any steps from 24<sup>th</sup> January, 2001 or ever after filing of the suit in May 2001 to prove that it was ready and willing to put in the money for honouring the terms of the agreements for purchase of the property. The other defence taken by the plaintiff that not a single demand of payment of money was even made by the original defendant nos.1 and 2 and that the agreements dated 22<sup>nd</sup> January, 2000 and the supplementary agreement dated 22<sup>nd</sup> February, 2000 had not been terminated, cannot assist the plaintiff in the matter of averring or proving its readiness and willingness to perform the terms of the agreements.

22. The issue urged by learned counsel for the plaintiff/respondent on transfer *pendente lite* cannot circumvent the issue of the fundamental requirement of Section 16 of the Specific Relief Act for grant of a decree of specific performance in favour of the plaintiff. The suit was filed on 18<sup>th</sup> May, 2001 and the *ex-parte* order of injunction granted on 3<sup>rd</sup> July, 2001 was vacated on 28<sup>th</sup> September, 2001 on the court finding that the cheques

issued by the plaintiff towards part consideration had been dishonoured. Although counsel has cited several cases for the proposition that the transferee *pendente lite* in a suit for specific performance is bound to re-convey the property, the plaint does not contain any such prayer. The plaint does not also contain any pleading towards this relief. It is also significant that the plaint contains a prayer for refund of the deposit of Rs.8,49,722/- together with interest at the rate of 24 per cent per annum. This prayer is also to be taken into consideration for grant of specific performance of the agreements as prayed for by the plaintiff in the suit as it significantly dilutes the plaintiff's plea for specific performance of the agreements.

23. We now come to the other issue raised by the appellants in APD 442/2017 (*Shivshankar Resources Ltd. Vs. Shyama Enclave Pvt. Ltd.*) that the impugned judgment and decree is also liable to be set aside as some of the defendants were not served with the summons in the suit.

24. The issue of some of the defendants not having been served is connected with the appellants being *bona fide* purchasers for valuable consideration of cubicles in the second and third floors of the suit property which were purchased by them by registered deeds of conveyance between 2002 and 2004 without any notice of the pending agreements for sale. The appellants claim that they had no knowledge of the suit. It is also their case that there was no order of injunction subsisting in favour of the plaintiff at the time the property was purchased. A chart prepared by counsel for the plaintiff/respondent on the status of service upon the defendants, makes it

evident that not all the defendants were served and five of such defendants are the appellants before us.

25. By an order dated 30<sup>th</sup> November, 2004, the application of the plaintiff being G.A. No. 257 of 2004 for addition of the subsequent purchasers as party defendants was allowed. However, the plaintiff took no steps for addition of the appellants or to ensure service of the writ of summons upon the appellants till 2013. Therefore, the appellants in APD 442/2017 (Shivshankar Resources Ltd. & Ors. -Vs.- Shyama Enclave Pvt. Ltd. & Ors.) have an additional point of non-service of summons. The fact of non-service has also been reflected from the process server's report and from the report of the sheriff. An application under Order 9 Rule 13 has also been filed by the said appellant for setting aside the decree on the ground of non-service of summons. Although the plaintiff has relied on the paper publication to contend that service was made on all the defendants, the said paper publication was meant for defendant no.2(i) only as per the order dated 18<sup>th</sup> February, 2014. From the dates/orders relied on by counsel for the plaintiff, it does not appear that all the added defendants were successfully served with the summons in the suit. The plaintiff's contention that the appellants having purchased parts of the same floor of the suit property where the other appellants were located and had entered appearance in the suit is a presumption which does not find corroboration from the records. Moreover, the bailiff's report, the process server and the paper publications in the matter of recording service are inconsistent with each other and do not show that all the added defendants were served. Therefore, if the plaintiff has not

been able to show service on all the added defendants including the appellants in APD 442/2017, the contention of the appellants that they were *bona fide* purchasers for valuable consideration without notice or knowledge of the suit has to be accepted.

26. Although, we are in agreement with the view taken by the Learned Single Judge on the admissibility of the Exhibits (the two agreements for sale) since they were already admitted in evidence, marked as exhibits, this issue cannot decide the matter of compliance of Section 16 of the Specific Relief Act. We are of the view that since the two agreements were admitted in evidence and were the subject matter of examination and cross-examination, their admissibility can no longer be called in question. We rely on Section 36 of The Stamp Act, 1899 for this issue.

27. It is also settled by various decisions of this Court that by virtue of Section 20 of the Act, the relief for specific performance is a matter of discretion of the court and the court is not bound to grant such relief merely because it is lawful to do so. The exercise of the discretion to order specific performance would require the court to satisfy itself that the circumstances are such that it is equitable to grant a decree for specific performance of the contract. While exercising the discretion, the court would take into consideration the circumstances of the case, the conduct of parties, and their respective interests under the contract. Specific performance of a contract may be refused on a balance of unfair advantage to one party and



significant hardship to another. The fact-situations where the court may exercise discretion not to grant specific performance have been enumerated under Sub-section (2) of Section 20 of the Specific Relief Act. In this context, a relevant portion of *Kamal Kumar Vs. Premlata Joshi* reported in (2019)3 SCC 704 is set out;

*“It is a settled principle of law that the grant of relief of specific performance is a discretionary and equitable relief. The material questions, which are required to be gone into for grant of the relief of specific performance, are:*

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

*Second, whether the plaintiff has been ready and willing to perform his part of contract and whether he is still ready and willing to perform his part as mentioned in the contract;*

*Third, whether the plaintiff has, in fact, performed his part of the contract and, if so, how and to what extent and in what manner he has performed and whether such performance was in conformity with the terms of the contract;*

*Fourth, whether it will be equitable to grant the relief of specific performance to the plaintiff against the defendant in relation to suit property or it will cause any kind of hardship to the defendant and, if so, how and in what manner and the extent if such relief is eventually granted to the plaintiff;*

*Lastly, whether the plaintiff is entitled for grant of any other alternative relief, namely, refund of earnest money etc. and, if so, on what grounds.”*

28. The plaintiff has not been able to show readiness and willingness to perform the essential terms of the contract or its financial capacity to honour its obligations. The cheques of the plaintiff had been dishonoured and the plaintiff did not demonstrate its readiness to put in the money equivalent to the defaulted cheques. The appellants are *bona fide* purchasers of small cubicles in the said premises who are also in possession of the said premises since 2002 to 2004.

29. The arguments of learned counsel for plaintiff in relation to *lis pendens* and the explanation to Section 52 of The Transfer of Property Act, 1882 to the effect that the pendency of a suit of proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a court of competent jurisdiction for persuading this court to hold that the sale by original defendants in favour of the appellants is barred by the said principle, cannot be accepted in light of the above discussion. The stand of the plaintiff/respondent would have been legally tenable if the appellants, being the purchasers of the property, had notice of the pendency of the suit or had purchased the property during the subsistence of any interim order protecting the plaintiff. We have already expressed our view with regard to the plaintiff not being able to show service of summons on of the added defendants and further that the appellants in one of the appeals were not served with the summons at all. Further, the issue of *lis pendens* would arise only upon the plaintiff being able to prove its readiness and willingness to perform its obligations under the agreements. The decisions cited by the plaintiff in support of the submission that the plaintiff is entitled to specific performance despite a rise in price of the said property (*SVR Mudaliar Vs. Rajabu F. Buhari; Nirmala Anand Vs. Advent Corporation*) cannot assist the plaintiff unless the plaintiff is able to prove readiness and willingness in terms of its obligations under the agreements. This court cannot shut its eyes to the factual realities of the matter in view of the fact that the appellants/added defendants purchased the property as *bona fide* purchasers for value without notice and have been

using the said property from the time of purchase as compared to the plaintiff who sought to develop the property being engaged in the business of real estate and significantly has also prayed for refund of the deposit made to the original defendants.

30. To conclude, in our considered view, the decision would centre around the plaintiff successfully proving its readiness and willingness to perform its obligations under the agreements for sale of the property. In other words, the requirements of Section 16(c) and the Explanation (ii) to the section will have to be satisfied. All other issues urged by learned counsel for the parties are ancillary and incidental to the issue of readiness and willingness. Since we have come to the finding on facts as well as the materials-on-record that the plaintiff was unable to prove his readiness and willingness to honour its obligations for purchase of the property, the conclusion of the learned First Court as expressed in the following passage;

*“On the question of readiness and willingness, the discussion I have made earlier will make it clear that there was no laches on the part of the plaintiff to show his bona fide to complete the transaction so also his readiness and willingness to complete the purchase. According to the terms of the agreement, he made initial payment for a sum of Rs. 8 Lakh and the balance was to be paid after clearance from the Income Tax Authorities. Apart from such payment of Rs. 8 Lakh, 31 post-dated cheques for a total of Rs. 23.25 Lakh under cover of a letter dated 26th February, 2000 (Exhibit M) was handed over to the vendor which provided that “to be deposited on our further written instruction only”. By a letter dated 24th January, 2001(Exhibit F) the plaintiff called upon Sanjib Kumar Roy to provide consent of the Financial Institutions but nothing proceeded further. Therefore, it cannot be said that the plaintiff was in default with regard to the readiness and willingness.”*

does not appear to be corroborated by the evidence on record.

31. Since we have found that the plaintiff has not been able to satisfy the conditions for grant of a decree for specific performance of the agreements, the impugned judgment and decree dated 29<sup>th</sup> June, 2017 is liable to be set aside.

32. APD 442 of 2017 and APD 443 of 2017 are disposed of in terms of the above.

33. In view of disposal of the APD 442 of 2017 and APD 443 of 2017, no further order is required to be passed in respect of the connected applications which stand disposed of accordingly.

Urgent photostat certified copy of this judgment and order, if applied for, be supplied to the parties on a priority basis.

***(MOUSHUMI BHATTACHARYA, J.)***

***(BISWANATH SOMADDER, J.)***