Sangita Sinha vs Bhawana Bhardwaj on 4 April, 2025

Author: Dipankar Datta

Bench: Dipankar Datta

2025 INSC 450

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4972 OF 2025
(Arising out of Special Leave Petition (C) No.28460 of

SANGITA SINHA .…. APPELLANT

VERSUS

BHAWANA BHARDWAJ AND ORS. ..…RESPONDENTS

JUDGMENT

MANMOHAN, J

1. Leave granted.

2. The primary issue that arises for consideration in the present civil appeal is whether a suit for specific performance of an Agreement to Sell is liable to be decreed if the buyer had accepted the refund of majority of the earnest money deposit/advance consideration, during the pendency of the civil suit?

3. Brief facts leading to the present appeal are as under:-

> 3.1. Late Kushum Kumari (“original defendant” / “seller”) was allotted the subject property by the People's Cooperative House Construction Society Limited (“Society”) vide a registered sub-lease dated 2nd April 1968.

Date: 2025.04.04 17:03:17 IST Reason:

> 3.2. On 25th January 2008, an unregistered Agreement to Sell with respect to the subject property was executed between the “Respondent No.1-buyer”-plaintiff and the seller for a total sale consideration of Rs. 25,00,000/- (Rupees Twenty Five Lakhs). At the time of the execution of the Agreement to Sell, the Respondent No.1-

buyer paid a sum of Rs.2,51,000/- (Rupees Two Lakh Fifty One Thousand) in cash to the seller and issued three post-dated cheques worth Rs.7,50,000/- (Rupees Seven Lakh Fifty Thousand). 3.3. It is the case of Respondent No.1-buyer that when she visited the subject property along with her husband on 11 th February 2008, the tenants of the seller created a scuffle and forced them to return. In the circumstance, the Respondent No.1-buyer issued legal notices dated 23rd February 2008 and 23rd April 2008, expressing her intention to pay the balance sale consideration and to get the property registered in her favour.

3.4. Upon the failure of the seller to execute the sale deed, Respondent No.1-buyer filed a suit before the Trial Court, Sub Judge-IV, Patna under the Specific Performance Act, 1963 ("Act, 1963)" seeking specific performance of the Agreement to Sell dated 25th January 2008 and the same was registered as Title Suit No. TS/176/2008 ("subject suit").

3.5. The subject suit was contested by the seller by filing a written statement, stating therein that she came to know about the Agreement to Sell dated 25th January 2008 on 5th February 2008 and immediately thereafter, made a complaint dated 6th February 2008 with the Inspector of Police-cum-Station House Officer, Kankarbagh Police Station, Patna stating that her signatures had been fraudulently taken on the Agreement to Sell dated 25th January 2008. It was further stated that the seller issued a letter dated 7th January 2008 cancelling the Agreement to Sell dated 25th January 2008 and refunded Rs.2,11,000/- (Rupees Two Lakh Eleven Thousand) through five demand drafts dated 7th February 2008 in lieu of the cash and returned two of the three post-dated cheques of Rs.2,50,000/- (Rupees Two Lakh Fifty Thousand) each, which were issued by the seller. Vide Order dated 16th December 2008, issues were framed by the Trial Court.

3.6. Upon the demise of the seller, the Respondent No.3 herein, who is the step grandson of the seller, was impleaded as substituted defendant no. 1 and the appellant herein was impleaded as defendant no. 3 as the subject property had been bequeathed in her favour by way of a Will dated 23rd September 2002 executed by the original owner/seller.

3.7. After consideration of the depositions of PW-1 (Respondent No.1 herein) and her husband, PW-2, the Trial Court framed three additional issues vide order dated 21st January 2013. The issues were framed once again on 27th April 2018, and a judgment was passed in favour of Respondent No.1-buyer on the same date.

3.8. The judgment dated 27th April 2018 and the decree dated 10th May 2018 were challenged by the appellant herein in First Appeal No. 83 of 2018. The said appeal was dismissed by the Patna High Court vide the impugned Judgment dated 9th May 2024.

3.9. Upon the present Special Leave Petition being filed, this Court, while issuing notice, had directed parties to maintain status quo with respect to the possession on 20th August 2024.

SUBMISSIONS ON BEHALF OF THE APPELLANT

4. Shri S.B. Upadhyay, learned senior counsel for the appellant, stated that the signatures of the seller on the Agreement to Sell dated 25th January 2008 had been fraudulently obtained by Respondent No.3 herein. He stated that the seller-defendant signed some blank papers believing the same to be related to the Will that she had executed in favour of the appellant on 23 rd September 2002.

5. He stated that upon the discovery of the Agreement to Sell dated 25th January 2008 on 5th February 2008, the seller made a criminal complaint dated 6th February 2008 with the Inspector of Police-cum-Station House Officer, Kankarbagh, Patna that her signatures had been fraudulently obtained on the Agreement to Sell dated 25th January 2008.

6. He stated that on 7th February 2008, the seller wrote a letter to Respondent No.1-buyer cancelling the Agreement to Sell dated 25th January 2008 enclosing therewith five demand drafts dated 7 th February 2008 amounting to Rs. 2,11,000/- (Rupees Two Lakh Eleven Thousand) in lieu of the cash and two of the three post-dated cheques of Rs.2,50,000/- (Rupees Two Lakh Fifty Thousand) each, which were issued by the Respondent No.1-buyer.

7. He pointed out that the Respondent No.1-buyer as well as her husband-PW2, in their depositions, have admitted that they had received five demand drafts dated 7th February 2008 amounting to Rs. 2,11,000/-

(Rupees Two Lakh Eleven Thousand) in lieu of the cash and also received two of the three post-dated cheques of Rs.2,50,000/- (Rupees Two Lakh Fifty Thousand) along with the letter cancelling the Agreement to Sell dated 25th January 2008 in March 2008. He explained that five demand drafts dated 7th February 2008 of Rs.2,11,000/- (Rupees Two Lakh Eleven Thousand) were encashed by the Respondent No.1-buyer in July 2008, after institution of the subject suit on 5th May 2008. He submitted that the encashment of the demand drafts amounted to revocation of the Agreement to Sell dated 25th January 2008. He contended that the subject suit was filed by the Respondent No.1-buyer after revocation of the Agreement to Sell dated 25th January 2008, without seeking any relief against the revocation and without disclosing that she was in receipt of the demand drafts and post- dated cheques.

8. He contended that the subject suit was filed on the basis of an Agreement to Sell which stood cancelled and as such, the same was not maintainable. He submitted that existence of a valid agreement is sine qua non for grant of relief of specific performance. He pointed out that, in similar circumstances, this Court in R. Kandasamy (Since Dead) & Ors. vs. T.R.K. Sarawathy & Anr. (Civil Appeal No. 3015 of 2013 decided on 21st November 2024), had set aside the judgment and decree passed in favour of the Respondent No.1-buyer inter alia on the ground that a non- existent Agreement to Sell cannot be enforced by a Court of law.

9. Even otherwise, he contended that the Respondent No.1-buyer was not ready and willing to perform the Agreement to Sell dated 25th January 2008. He stated that a mere averment that the Respondent No.1-buyer is ready and willing to perform the contract will not suffice as readiness and willingness must be inferred in overall circumstances of the case, including the conduct of the

Respondent No.1-buyer prior and subsequent to the filing of the suit.

10. He pointed out that the Respondent No.1-buyer in her cross- examination, had admitted that at the time of execution of the agreement, she was not aware of the balance in her bank account and at the time when the three post-dated cheques for Rs.2,50,000/- (Rupees Two Lakh Fifty Thousand) were issued, there was no sufficient balance in her account. He contended that the conduct of the Respondent No.1-buyer in encashing the demand drafts proved that she was not ready or willing to perform the contract. In support of his contentions, he relied upon the judgments of this Court in Mehboob-Ur-Rehman (Dead) through Legal Representatives vs. Ahsanul Ghani, (2019) 19 SCC 415 and C.S. Venkatesh vs. A.S.C. Murthy (Dead) by Legal Representatives and Ors., (2020) 3 SCC 280.

11. Per contra, Mr. Mungeshwar Sahoo, learned senior counsel for the Respondent No.1-buyer stated that the suit had been decreed in favour of the Respondent No.1-buyer by the Trial Court after rightly appreciating the evidence and a sale deed had been executed subsequently in favour of the Respondent No.1-buyer upon deposit of Rs. 24,61,000/- (Rupees Twenty Four Lakh Sixty One Thousand) before the Trial Court. He contended that the judgment and decree passed by the Trial Court had been rightly upheld by the High Court. He stated that the entire case of the appellant in the present proceedings is based upon reappreciation of evidence and the same cannot be permitted at this stage.

12. He stated that the entire earnest money/advance consideration had not been refunded/returned by the seller. He stated that the Respondent No.1-buyer had paid Rs.2,51,000/- (Rupees Two Lakh Fifty One Thousand) in cash to the seller against which the seller had refunded Rs.2,11,000/- (Rupees Two Lakh Eleven Thousand) through five demand drafts dated 7th February 2008. Therefore, according to him, an amount of Rs. 40,000/- (Rupees Forty Thousand) remained with the seller as earnest money/advance consideration. He contended that as the balance sale consideration had been paid subsequently, the cancellation of the Agreement to Sell dated 25th January 2008 was not valid.

13. Even otherwise, he stated that a bilateral agreement cannot be unilaterally cancelled by a party by returning the earnest money. According to him, a (bilateral) agreement can only be cancelled by a Court of law or by executing a subsequent agreement, cancelling the prior agreement. He stated that in the event parties are permitted to unilaterally cancel the agreement, the purchaser will be left remediless as any third party can intervene by offering a higher earnest money.

14. He contended that the seller passed away before she could prove her defense by leading evidence. He stated that neither the appellant nor the Respondent No.3 herein had deposed in support of the written statement filed by the seller. He therefore stated that the written statement of the seller had not been proved. He also contended that the appellant did not have the locus to file the present appeal. According to him, the appellant had no right, title or interest in the subject property and the findings of the Trial Court or the High Court do not affect the appellant in any manner.

COURT'S REASONING RESPONDENT NO.1 WAS NOT WILLING TO PERFORM THE AGREEMENT TO SELL

15. Having heard learned senior counsel / learned counsel for the parties and having perused the paper book, the admitted position that emerges is that Respondent No.1-buyer had paid Rs. 2,51,000/- (Rupees Two Lakh Fifty One Thousand) in cash and handed over three post-dated cheques of Rs.2,50,000/- (Rupees Two Lakh Fifty Thousand) each at the time of execution of the Agreement to Sell dated 25th January 2008. It is also not disputed that the Respondent No.1-buyer had subsequently received a letter dated 7th February 2008 cancelling the Agreement to Sell dated 25th January 2008 enclosing therewith five demand drafts dated 7th February 2008 totaling to Rs.2,11,000/- (Rupees Two Lakh Eleven Thousand) (in lieu of the cash paid by the Respondent No.1-buyer) along with two of the three post-dated cheques of Rs.2,50,000/- (Rupees Two Lakh Fifty Thousand) each, which had been issued initially by the Respondent No.1-buyer. Further, the third post-dated cheque which was not returned to the Respondent No.1-buyer had not been encashed. The Respondent No.1- buyer has admitted that the letter dated 7th February 2008 had been received prior to filing of the suit for specific performance and five demand drafts dated 7th February 2008 totaling to Rs.2,11,000/- (Rupees Two Lakh Eleven Thousand) had been encashed in July, 2008 after institution of the subject suit on 5th May 2008, without raising any objection with respect to the difference in the cash amount and the demand drafts furnished by the seller.

16. It is settled law that under the Act, 1963, prior to the 2018 Amendment, specific performance was a discretionary and equitable relief.

In Kamal Kumar vs. Premlata Joshi and Ors., (2019) 3 SCC 704, which has been followed in P. Daivasigamani vs. S. Sambandan, (2022) 14 SCC 793, this Court framed material questions which require consideration prior to grant of relief of specific performance. The relevant portion of the judgment in Kamal Kumar (supra) is reproduced hereinbelow:

> "7. 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:
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> 7.1. First, whether there exists a valid and concluded contract between the parties for sale/purchase of the suit property.
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> 7.2. 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.
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> 7.3. 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;

> 7.4. 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;
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> 7.5. 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.
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> 8. In our opinion, the aforementioned questions are part of the statutory requirements [See Sections 16(c), 20, 21, 22, 23 of the Specific Relief Act, 1963 and Forms 47/48 of Appendices A to C of the Code of Civil Procedure]. These requirements have to be properly pleaded by the parties in their respective pleadings and proved with the aid of evidence in accordance with law. It is only then the Court is entitled to exercise its discretion and accordingly grant or refuse the relief of specific performance depending upon the case made out by the parties on facts."

17. It is trite law that 'readiness' and 'willingness' are not one but two separate elements. 'Readiness' means the capacity of the Respondent No.1- buyer to perform the contract, which would include the financial position to pay the sale consideration. 'Willingness' refers to the intention of the Respondent No.1-buyer as a purchaser to perform his part of the contract, which is inferred by scrutinising the conduct of the Respondent No.1-buyer /purchaser, including attending circumstances.

18. Continuous readiness and willingness on the part of the Respondent No.1-buyer /purchaser from the date of execution of Agreement to Sell till the date of the decree, is a condition precedent for grant of relief of specific performance. This Court in various judicial pronouncements has held that it is not enough to show the readiness and willingness up to the date of the plaint as the conduct must be such as to disclose readiness and willingness at all times from the date of the contract and throughout the pendency of the suit up to the decree. A few of the said judgments are reproduced hereinbelow:-

> A. In Gomathinayagam Pillai and Ors. vs. Palaniswami Nadar, (1967) 1 SCR 227, it has been held as under:-
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> "6. But the respondent has claimed a decree for specific performance and it is for him to establish that he was, since the date of the contract, continuously ready and willing to perform his part of the contract. If he fails to do so, his claim for specific performance must fail. As observed by the Judicial Committee of the Privy Council in Ardeshir Mama v. Flora Sassoon 1928 SCC OnLine PC 43:
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> "In a suit for specific performance, on the other hand, he treated and was required by the Court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove a continuous readiness and willingness, from the date of the contract to the time of the hearing, to perform the

contract on his part. Failure to make good that averment brought with it the inevitable dismissal of his suit." The respondent must in a suit for specific performance of an agreement plead and prove that he was ready and willing to perform his part of the contract continuously between the date of the contract and the date of hearing of the suit...." (emphasis supplied) B. In Vijay Kumar and Others vs. Om Parkash, 2018 SCC OnLine SC 1913, it has been held as under:-

"6. In order to obtain a decree for specific performance, the plaintiff has to prove his readiness and willingness to perform his part of the contract and the readiness and willingness has to be shown throughout and has to be established by the plaintiff...." (emphasis supplied) C. In J.P.Builders and Another vs. A. Ramadas Rao and Another, (2011) 1 SCC 429, it has been held as under:-

"27. It is settled law that even in the absence of specific plea by the opposite party, it is the mandate of the statute that the plaintiff has to comply with Section 16(c) of the Specific Relief Act and when there is non-compliance with this statutory mandate, the court is not bound to grant specific performance and is left with no other alternative but to dismiss the suit. It is also clear that readiness to perform must be established throughout the relevant points of time. "Readiness and willingness" to perform the part of the contract has to be determined/ascertained from the conduct of the parties." (emphasis supplied) D. In Umabai and Another vs. Nilkanth Dhondiba Chavan (Dead) By LRs. and Another, (2005) 6 SCC 243, it has been held as under:-

"30. It is now well settled that the conduct of the parties, with a view to arrive at a finding as to whether the plaintiff-respondents were all along and still are ready and willing to perform their part of contract as is mandatorily required under Section 16 (c) of the Specific Relief Act must be determined having regard to the entire attending circumstances. A bare averment in the plaint or a statement made in the examination-in- chief would not suffice. The conduct of the plaintiff- respondents must be judged having regard to the entirety of the pleadings as also the evidence brought on records." (emphasis supplied) E. In Mehboob-Ur-Rehman (Dead) through Legal Representatives v. Ahsanul Ghani (supra), it has been held as under:- "16. Such a requirement, of necessary averment in the plaint, that he has already performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him being on the plaintiff, mere want of objection by the defendant in the written statement is hardly of any effect or consequence. The essential question to be addressed to by the Court in such a matter has always been as to whether, by taking the pleading and the evidence on record as a whole, the plaintiff has established that he has performed his part of the contract or has always been ready and willing to do so..." (emphasis supplied) F. In C.S. Venkatesh v. A.S.C. Murthy (Dead) by Legal Representatives & Ors. (supra), it has been held as under:- "16. The words "ready and willing" imply that the plaintiff was prepared to carry out those parts of the contract to their logical end so far as they

> depend upon his performance. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of performance. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of contract, the court must take into consideration the conduct of the plaintiff prior, and subsequent to the filing of the suit along with other attending circumstances. The amount which he has to pay the defendant must be of necessity to be proved to be available. Right from the date of the execution of the contract till the date of decree, he must prove that he is ready and willing to perform his part of the contract. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready to perform his contract.
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> 17. In N.P. Thirugnanam v. R. Jagan Mohan Rao [N.P. Thirugnanam v. R. Jagan Mohan Rao, (1995) 5 SCC 115], it was held that continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant of the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior to and subsequent to the filing of the suit along with other attending circumstances.

The amount of consideration which he has to pay to the defendant must necessarily be proved to be available.

18. In Pushparani S. Sundaram v. Pauline Manomani James [Pushparani S. Sundaram v. Pauline Manomani James, (2002) 9 SCC 582], this Court has held that inference of readiness and willingness could be drawn from the conduct of the plaintiff and the totality of circumstances in a particular case. It was held thus:

> (SCC p. 584, para 5) "5. ... So far these being a plea that they were ready and willing to perform their part of the contract is there in the pleading, we have no hesitation to conclude, that this by itself is not sufficient to hold that the appellants were ready and willing in terms of Section 16(c) of the Specific Relief Act. This requires not only such plea but also proof of the same. Now examining the first of the two circumstances, how could mere filing of this suit, after exemption was granted be a circumstance about willingness or readiness of the plaintiff. This at the most could be the desire of the plaintiff to have this property. It may be for such a desire this suit was filed raising such a plea. But Section 16(c) of the said Act makes it clear that mere plea is not sufficient, it has to be proved." (emphasis supplied)

19. Consequently, the readiness and willingness of the buyer to go ahead with the sale of the property at the time of the institution of the suit loses its relevance, if the Respondent No.1-buyer is unable to establish that the readiness and willingness has continued throughout the pendency of the

suit.

20. After examination of the pleadings and evidence in the present suit as well as the conduct of the Respondent No.1-buyer, this Court is unable to agree with Respondent No.1-buyer that she was willing to perform the Agreement to Sell dated 25th January, 2008 and go ahead with the purchase of the property. This Court says so because admittedly, as noted above, the five demand drafts dated 7th February 2008 for Rs. 2,11,000/- (Rupees Two Lakh Eleven Thousand) were encashed by the Respondent No.1-buyer in July, 2008. The conduct of the Respondent No.1-buyer in encashing the demand drafts establishes beyond doubt that the Respondent No.1-buyer was not willing to perform her part of the Agreement to Sell and proceed with execution of the sale deed; for the Respondent No.1-buyer would not have encashed the demand drafts if she was indeed willing to perform the contract and have a sale deed executed. Consequently, once it is established that the Respondent No. 1-buyer is not willing to perform the contract, the fact that the entire advance consideration/earnest money had not been returned to Respondent No.1-buyer is irrelevant and immaterial.

THE AGREEMENT TO SELL DATED 25TH JANUARY 2008 STOOD CANCELLED / TERMINATED.

21. This Court is also of the view that the act of the Respondent No.1- buyer in encashing the demand drafts leads to an irresistible conclusion that the agreement in question stood cancelled.

22. The contention of the learned counsel for the Respondent No. 1- buyer that the Agreement to Sell dated 25th January 2008 could not have been cancelled unilaterally is contrary to facts as the letter dated 07th February 2008 along with the refund of the demand drafts and two post- dated cheques was nothing but repudiation of the Agreement to Sell dated 25th January 2008 by the seller and the encashment of the demand drafts was acceptance of such repudiation by the Respondent No.1-buyer, leading to cancellation of the Agreement to Sell dated 25th January 2008.

23. The contention that the demand drafts were encashed under protest is misconceived on facts as there is nothing on record to show that the demand drafts were encashed under protest. In fact, PW-2, who is the husband of the Respondent No.1-buyer, has deposed that upon receipt of the demand drafts and cheques, the Respondent No.1-buyer had not issued any letter to the seller stating that the amounts received by them were less than the earnest money paid by them.

ABSENT A PRAYER FOR DECLARATORY RELIEF THAT CANCELLATION OF THE AGREEMENT IS BAD IN LAW, A SUIT FOR SPECIFIC PERFORMANCE IS NOT MAINTAINABLE

24. This Court further finds that the seller had admittedly issued a letter dated 7th February 2008 cancelling the Agreement to Sell dated 25th January 2008, prior to the filing of the subject suit on 5th May 2008. Even though the demand drafts enclosed with the letter dated 07th February, 2008 were subsequently encashed in July, 2008, yet this Court is of the view that it was incumbent upon the Respondent No.1-buyer to seek a declaratory relief that the said cancellation is bad in law and not binding on parties for the reason that existence of a valid agreement is sine qua non for the grant of relief of specific performance.

25. This Court in I.S. Sikandar (Dead) By LRs. v. K. Subramani and Others, (2013) 15 SCC 27 has held that in absence of a prayer for a declaratory relief that the termination of the agreement is bad in law, the suit for specific performance of that agreement is not maintainable. Though subsequently, this Court in A. Kanthamani Vs. Nasreen Ahmed, (2017) 4 SCC 654 has held that the declaration of law in I.S. Sikander (Dead) By LRs. v. K. Subramani (supra) regarding non-maintainability of the suit in the absence of a challenge to letter of termination is confined to the facts of the said case, yet the aforesaid issue has been recently considered in R. Kandasamy (Since Dead) & Ors. v. T.R.K. Sarawathy & Anr. (supra) authored by brother Justice Dipankar Datta and the conflict between the judgment of I.S. Sikander (Dead) By LRs. v. K. Subramani (supra) and A. Kanthamani Vs. Nasreen Ahmed (supra) has been deliberated upon. In R. Kandasamy (Since Dead) & Ors. v. T.R.K. Sarawathy & Anr. (supra), it has been clarified that the appellate court would not be precluded from examining whether the jurisdictional fact exists for grant of relief of specific performance, notwithstanding the fact that the trial Court omitted or failed to frame an issue on maintainability of the suit. The relevant portion of the judgment in R. Kandasamy (Since Dead) & Ors. v. T.R.K. Sarawathy & Anr. (supra) is reproduced hereinbelow:

> "25. What follows from A. Kanthamani (supra) is that unless an issue as to maintainability is framed by the Trial Court, the suit cannot be held to be not maintainable at the appellate stage only because appropriate declaratory relief has not been prayed.
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> xxx xxx xxx xxx
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> 43. In Shrisht Dhawan (Smt) v. Shaw Bros., (1992) 1 SCC 534, an interesting discussion on 'jurisdictional fact' is found in the concurring opinion of Hon'ble R. M. Sahai, J. (as His Lordship then was). It reads:
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> "19. *** What, then, is an error in respect of jurisdictional fact? A jurisdictional fact is one on existence or non-existence of which depends assumption or refusal to assume jurisdiction by a court, tribunal or an authority. In Black's Legal Dictionary it is explained as a fact which must exist before a court can properly assume jurisdiction of a particular case. Mistake of fact in relation to jurisdiction is an error of jurisdictional fact. No statutory authority or tribunal can assume jurisdiction in respect of subject matter which the statute does not confer on it and if by deciding erroneously the fact on which jurisdiction depends the court or tribunal exercises the jurisdiction then the order is vitiated. Error of jurisdictional fact renders the order ultra vires and bad (Wade, Administrative Law. In Raza Textiles [(1973) 1 SCC 633] it was held that a court or tribunal cannot confer jurisdiction on itself by deciding a jurisdictional fact wrongly. *** (emphasis supplied)
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> 44. Borrowing wisdom from the aforesaid passage, our deduction is this. An issue of maintainability of a suit strikes at the root of the proceedings initiated by filing of the plaint as per requirements of Order VII Rule 1, CPC. If a suit is barred by law, the trial court has absolutely no jurisdiction to entertain and try it. However, even though

> a given case might not attract the bar envisaged by section 9, CPC, it is obligatory for a trial court seized of a suit to inquire and ascertain whether the jurisdictional fact does, in fact, exist to enable it (the trial court) to proceed to trial and consider granting relief to the plaintiff as claimed. No higher court, much less the Supreme Court, should feel constrained to interfere with a decree granting relief on the specious ground that the parties were not put specifically on notice in respect of a particular line of attack/defence on which success/failure of the suit depends, more particularly an issue touching the authority of the trial court to grant relief if the 'jurisdictional fact' imperative for granting relief had not been satisfied. It is fundamental, as held in Shrisht Dhawan (supra), that assumption of jurisdiction/refusal to assume jurisdiction would depend on existence of the jurisdictional fact. Irrespective of whether the parties have raised the contention, it is for the trial court to satisfy itself that adequate evidence has been led and all facts including the jurisdictional fact stand proved for relief to be granted and the suit to succeed. This is a duty the trial court has to discharge in its pursuit for rendering substantive justice to the parties, irrespective of whether any party to the lis has raised or not. If the jurisdictional fact does not exist, at the time of settling the issues, notice of the parties must be invited to the trial court's prima facie opinion of non-

existent jurisdictional fact touching its jurisdiction. However, failure to determine the jurisdictional fact, or erroneously determining it leading to conferment of jurisdiction, would amount to wrongful assumption of jurisdiction and the resultant order liable to be branded as ultra vires and bad.

45. Should the trial court not satisfy itself that the jurisdictional fact for grant of relief does exist, nothing prevents the court higher in the hierarchy from so satisfying itself. It is true that the point of maintainability of a suit has to looked only through the prism of section 9, CPC, and the court can rule on such point either upon framing of an issue or even prior thereto if Order VII Rule 11 (d) thereof is applicable. In a fit and proper case, notwithstanding omission of the trial court to frame an issue touching jurisdictional fact, the higher court would be justified in pronouncing its verdict upon application of the test laid down in Shrisht Dhawan (supra).

46. In this case, even though no issue as to maintainability of the suit had been framed in course of proceedings before the Trial Court, there was an issue as to whether the Agreement is true, valid and enforceable which was answered against the sellers. Obviously, owing to dismissal of the suit, the sellers did not appeal. Nevertheless, having regard to our findings on the point as to whether the buyer was 'ready and willing', we do not see the necessity of proceeding with any further discussion on the point of jurisdictional fact here."

26. Since in the present case, the seller had issued a letter dated 07 th February, 2008 cancelling the agreement to sell prior to the institution of the suit, the same constitutes a jurisdictional fact as till the said cancellation is set aside, the respondent is not entitled to the relief of specific performance.

27. Consequently, this Court is of the opinion that absent a prayer for declaratory relief that termination/cancellation of the agreement is bad in law, a suit for specific performance is not

maintainable.

APPELLANT HAS THE LOCUS STANDI TO FILE THE APPEAL

28. The preliminary objection raised by the Respondent No.1-buyer that the issue of her readiness and willingness should not be examined by this Court as the appellant lacked the locus standi to file the present appeal as she did not have any right, interest or title over the subject property is misconceived on facts. The appellant was impleaded as defendant no. 3 in the subject suit as she is a beneficiary under the Will dated 23rd September 2002 executed by the original owner/seller, whereby the subject property has been bequeathed in her favour. Consequently, the appellant, being a necessary and interested party to the lis, has the locus to file the present appeal. Further, the onus to establish readiness and willingness is on the Respondent No.1-buyer and the failure to establish the same disentitles the Respondent No.1-buyer from the equitable and discretionary relief of specific performance.

SUPPRESSION OF MATERIAL FACTS DISENTITLES THE BUYER FROM THE EQUITABLE AND DISCRETIONARY RELIEF OF SPECIFIC PERFORMANCE

29. A perusal of the record shows that not only did the Respondent No. 1-buyer fail to seek a declaratory relief, but also it failed to disclose in the plaint that the seller had issued the cancellation letter dated 7th February 2008 enclosing therewith the demand drafts dated 7 th February 2008 and two of the three post-dated cheques. The failure of the Respondent No. 1- buyer to disclose the same in her plaint amounts to suppression of material fact, disentitling her from the discretionary relief of specific performance. This Court in Citadel Fine Pharmaceuticals v. Ramaniyam Real Estates Private Limited and Another, (2011) 9 SCC 147 has held as under:

> "57. There is another aspect of the matter also. In the instant case by asking for specific performance of the contract, the plaintiff purchaser is praying for a discretionary remedy. It is axiomatic that when a discretionary remedy is prayed for by a party, such party must come to court on proper disclosure of facts. The plaint which it filed before the court in such cases must state all the facts with sufficient candour and clarity. In the instant case the plaintiff purchaser made an averment in the plaint that the defendant vendor be directed to return the advance amount of Rs 10,00,000 with interest at the rate of 24% from the date of payment of the said amount till the realisation and an alternative prayer to that effect was also made in the prayer clause (c).
>
> 58. However, the fact remains that prior to the filing of the suit the defendant vendor returned the said amount of Rs 10,00,000 by its letter dated 4-9-1996 by an account payee cheque in favour of the plaintiff and the same was sent to the plaintiff under registered post which was refused by the plaintiff on 6-9-1996.

The plaintiff suppressed this fact in the plaint and filed the suit on 9-9-1996 with a totally contrary representation before the court as if the amount had not been returned to it by the vendor. This is

suppression of a material fact, and disentitles the plaintiff purchaser from getting any discretionary relief of specific performance by the court.

59. In this connection we may refer to the Principle of Equitable Remedies by I.C.F. Spry, (4th Edn., Sweet & Maxwell, 1990). Dealing with the question of "clean hands" the learned author opined that where the plaintiff is shown to have materially misled the court or to have abused its process, or to have attempted to do so, the discretionary relief of specific performance can be denied to him. In laying down this principle, the learned author relied on a decision of the English Court in Armstrong v. Sheppard & Short Ltd. [(1959) 2 QB 384 :

(1959) 3 WLR 84 : (1959) 2 All ER 651 (CA)] , QB at p. 397.

(See Spry, Equitable Remedies, p. 243.)

60. This Court has also taken the same view in Arunima Baruah v. Union of India [(2007) 6 SCC 120] . At p. 125, para 12 of the Report, this Court held that it is trite law that to enable the court to refuse to exercise its discretionary jurisdiction suppression must be of a material fact. This Court, of course, held that what is a material fact, suppression whereof would disentitle the suitor to obtain a discretionary relief, would depend upon the facts and circumstances of each case. However, by way of guidance this Court held that a material fact would mean that fact which is material for the purpose of determination of the lis.

61. Following the aforesaid tests, this Court is of the opinion that the suppression of the fact that the plaintiff refused to accept the cheque of Rs 10 lakhs sent to it by the defendant under registered post with acknowledgment due in terms of Clause 9 of the contract is a material fact. So on that ground the plaintiff purchaser is not entitled to any relief in its suit for specific performance." CONCLUSION

30. Keeping in view the aforesaid findings, this Court is of the view that the Agreement to Sell cannot be specifically enforced. Accordingly, the present appeal is allowed and the impugned Judgment dated 27th April, 2018 as well as decrees dated 10th May, 2018 and 09th May, 2024 are set aside. Further, the sale deed executed in favour of Respondent No.1-buyer in pursuance of the impugned judgments is declared as null and void and the Appellant is directed to refund the balance sale consideration amount of Rs.24,61,000/- (Rupees Twenty Four Lakh Sixty One Thousand) deposited by Respondent No.1-buyer in pursuance to the impugned judgment and decrees.

.....J. [DIPANKAR DATTA] .....J. [MANMOHAN] New Delhi;

April 04, 2025.