Form No. J. (2)

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction

Present:

The Hon'ble Justice Subhro Kamal Mukherjee
and
The Hon'ble Justice Subrata Talukdar

F.A. No. 233 of 2004

Tollygunge Estate Private Limited
...Defendant/ Appellant.

-Versus-

ITC Limited
...Plaintiff/Respondent.

For the Defendant/ Appellant: Mr. Saktinath Mukherjee,
Mr. L.K. Gupta,
Mr. S.N. Mitra,
Mr. Probal Mukherjee,
Mr. Debjit Mukherjee,
Mr. Chayan Gupta,
Mr. Biswajit Kumar,
Mr. Soumabho Ghosh,
Mr. Raja Baliyal.

For the Plaintiff/Respondent : Mr. Ahin Choudhuri,
Mr. Dhuraba Ghosh,
Mr. Dipendra Nath Chunder.

Judgment on: April 8, 2015.

Subhro Kamal Mukherjee, J.:

This is an appeal against judgment and decree dated April 28, 2004 passed by the learned Civil Judge (Senior Division), Third Court at Alipore, District – 24 Parganas (South) in Title Suit No. 50 of 1989.

The appeal arose out of a suit for specific performance of contract, declaration, injunction and possession. The learned trial judge, by the impugned judgment and decree, decreed the suit with the following order:

"that the suit be and the same is decreed on contest against the defendant, however, without any order of cost. The plaintiff-ITC Limited gets a decree for specific performance of the agreement dated October 27, 1978 and accordingly the defendant is directed to comply with their part of contract by granting tenancy in respect of the schedule 'D' property in accordance with the provisions of the said agreement within a period of three months from the date of decree failing which the plaintiff shall have liberty for taking steps to get the decree executed in accordance with law."

On or about April 15, 1989, this suit for specific performance of the agreement dated October 27, 1978 to grant tenancy of schedule 'D' property in terms of the said agreement and to register a deed of lease upon delivery of possession in favour of the plaintiff was instituted.

As noted hereinabove the agreement was dated October 27, 1978; the agreement has, since, been marked as Exhibit 2. The agreement was in relation to four properties. There has been no dispute in relation to Item nos. I, II and III. Dispute had cropped up in relation to Item No. IV. We are concerned about the said item of the property.

Under Clause 2 of the said agreement, the agreement would take effect and the tenancy would commence from the date on which the landlord would deliver and tenant would accept the vacant and peaceful possession of the premises agreed to be demised.

Under Clause 4 the tenant would be entitled from time to time to erect and from time to time to remove in the demised premises all such internal partition fixtures and fittings and air conditioner and all external nameplates and signboards etc. as the tenants think necessary, but shall not be entitled to make addition or alteration in the demised premises in any manner whatsoever except as provided in the agreement.

Clause 7 recorded an undertaking of the landlord that the landlord would thoroughly repair and renovate whatever necessary to make the said premises habitable and maintain the roofs of the demised premises in a waterproof and watertight condition.

It was recorded that landlord would bear 70 per centum of such cost and the tenant would bear 30 per cent. of such cost. It was, further, recorded that if the landlord could not renovate and repair in terms of the

provisions of the said agreement, the tenant would have the option to complete the renovation and repair at its own cost and would be entitled to deduct such cost from the rental payable at the rate of cent per cent. of such rental payable per month.

Under Clause 9 of the said agreement landlord was to pay municipal rates and taxes and all the outgoings.

Under Clause 10 tenant was authorised to remodel and renovate the existing out-house at its own cost without requiring any approval of the landlord subject, however, to the sanctioned building plan of the Corporation of Calcutta and the tenant would not be liable to pay any additional rent in respect of such construction.

Under Clause 11 tenant was to sublet and assign and part with possession of the demised premises to ITC Sangeet Research Academy, which was created by deed of trust dated September 01, 1977 executed between the ITC Limited and Samir Kumar Ghosh, Amar Nath Singh and Vijoy Kumar Kichlu or to any company where ITC had shareholding of 5 (five) per cent. of equity, without any permission from the landlord.

Under Clause 22 of the said agreement it was provided that upon production of permission and or examination certificate as required under the provisions of Urban Land (Ceiling and Regulation) Act, 1976, tenant was to execute and register a lease in respect of the said demised premises for a period of 14 years with an option to renew the same for a period of

another 7 years. It was provided with the execution and registration of the lease deed between the tenant and the landlord, the agreement dated October 27, 1978 would stand terminated forthwith.

The suit was instituted on the allegation that although the defendant granted tenancy in respect of the properties as mentioned in Item Nos. I, II, III in the agreement in favour of the plaintiff, but the property described in schedule IV could not be delivered to the plaintiff as the same was under occupation of the Military Estate Officer, Calcutta Circle. The plaintiff came to learn in December, 1982, that the Military Estate Officer vacated the suit premises. The plaintiff requested the defendant to let out the said premises to the plaintiff.

It was suggested that the defendant informed the plaintiff that the property was unfit for habitation and in order to put the property in proper condition massive reconstruction was required. The plaintiff engaged Kothari and Associates, architects and engineers, to survey and inspect the suit property and it was suggested by the plaintiff that the plaintiff came to know that in the report submitted by the said surveyor they suggested that such repairing work would cost approximately between Rs.2,00,000/- (Rupees two lakh) and Rs.2,50,000/- (Rupees two lakh fifty thousand) only.

Ultimately, the plaintiff through its learned advocate called upon the defendant to execute the deed, but the defendant in a letter dated

October 11, 1988 alleged that the agreement became frustrated and impossible of performance.

The Defendant filed a written statement contesting the claim of the plaintiff. It was, specifically, asserted that in August, 1986 the agreement was cancelled. It was stated that the agreement provided that the tenancy would commence when the defendant would deliver possession and the plaintiff would accept vacant possession. Therefore, tenancy did not commence from the date of agreement as alleged by the plaintiff. The Military Estate Officer, Calcutta Circle, surrendered the tenancy but, the property was dilapidated and totally unfit for human habitation. Representative of the plaintiff did not meet the defendant or its representative to find out a viable solution for getting the building fit for human habitation.

It was stated that although the plaintiff appointed the said Kothari and Associates and obtained a report in respect to the existing dilapidated building, the plaintiff did not supply copy of such report to the defendant even on requests.

It was suggested that the agreement was unenforceable and the suit was barred by law.

The plaintiff stated that sometime in August 1986, the defendant handed over to the plaintiff only two dwelling rooms on the Western side in part performance of the agreement. The defendant, in reply, stated that two rooms were handed over not to the plaintiff, but to Sangeet Research Academy for temporary use. The Sangeet Research Academy confirmed that the said rooms

would be vacated as and when required by the plaintiff. The defendant, categorically, denied that in part performance of the said agreement possession of the said two rooms were delivered to the plaintiff.

In the suit, the plaintiff cited Vijay Kumar Kichlu as its witness no. 2. He deposed on July 21, 2000 in part. He stated that he signed the said agreement as a witness. Thereafter, his examination-in-chief was deferred on the prayer of the plaintiff. He did not complete his examination-in-chief and was never produced for his cross-examination.

Aniruddha Sen deposed on behalf of the plaintiff as witness no. 1. He categorically asserted that he was not an employee of the plaintiff and at the time of execution of the agreement he was not present. He stated that he was the manager of the Sangeet Research Academy, which is a trust created to preserve and promote Hindustani classical music. He had to admit in his examination that he was not aware as to whether the resolution was taken by the plaintiff/ company authorising him to depose in the suit.

This witness was not acquainted personally with the facts and was even not an employee of the plaintiff. He never claimed that he was authorised by the plaintiff to depose in the suit.

The learned trial judge, however, decreed the suit by holding, inter alia, that the plaintiff did perform its part of the agreement and it was held that as soon as the property fell vacant, the plaintiff requested the defendant for handing over possession.

Being aggrieved by and dissatisfied with the said judgment and decree dated April 28, 2004, the defendant has come up with this appeal.

Mr. Saktinath Mukherjee, learned senior advocate appearing for the defendant-appellant, argued that Exhibit 2, that is, the agreement dated October 27, 1978 has been invalid and unenforceable as there was no date regarding commencement of the tenancy. Mr. Mukherjee submits that under the said agreement the demised premises was to be delivered for repairing with cost sharing basis; landlord was to bear 70% (seventy) per centum of the cost whereas the defendant was to bear 30% (thirty) per centum of the cost. The plaintiff never demanded for delivery of possession of the suit premises on as is where is basis, although it was provided in the said agreement that the plaintiff could, on the failure of the defendant, repair the premises and realise the cost for such repairing against rent. There was lack of promptitude on the part of the plaintiff. There was no proof that the plaintiff was ready and willing.

It was suggested by Mr. Mukherjee that the plaintiff came with unclean hands. It was alleged in the plaint that two rooms were delivered to the plaintiff, but, actually, those rooms were delivered to the Sangeet Research Academy and, certainly, not to the plaintiff, that too on temporary basis. Handing over of two rooms to the Sangeet Research Academy was nothing to do with the specific performance of agreement. There was no consideration for the first agreement to grant tenancy.

Although the receipt of the letter cancelling agreement was disputed, the cancellation was not challenged. The defendant's witness stated about the letter cancelling the agreement and proved the receipt. There has been no cross-examination in this point.

Mr. Ahin Chowdhury, learned senior advocate appearing for the plaintiff-respondent, in support of the decree, submitted that Exhibit 2 was an agreement for creation of a tenancy and was not an agreement to enter into a future agreement. Therefore, it was not open to the defendant to claim the agreement as unenforceable. He asserts that an agreement of tenancy was executed. It was a concluded agreement though not implemented on the date of the agreement. Mr. Chowdhury submitted that the suit was not barred by law as there was no case by the defendant to denude the plaintiff a decree for specific performance. He submitted that even, without considering the evidence adduced on behalf of the plaintiff, the suit would succeed as there has been an admission that there was a concluded agreement. He submitted that the plaintiff asserted in the plaint that the plaintiff was ready and willing, but there was no denial to such submission by the defendant in the written statement.

Mr. Chowdhury submitted that the plaintiff's witness no. 1 was most knowledgeable person to adduce evidence in this case. Mr. Chowdhury, further, submitted that all that was necessary was that the period of commencement of the agreement was capable of being ascertained. Therefore, there was no uncertainty of the commencement of the lease. Mr. Chowdhury submitted that alternative prayer for return of earnest money is no bar to decree the suit for specific performance.

Mr. Chowdhury in support of his contention cited the following decisions:

1. **Shrimati Juthika Mulick and another versus Dr. Mahendra Yashwant Bal and others reported in (1995) 1 SCC 560.**

2. **P.S. Ranakrishna Reddy versus M.K. Bhagyalakshmi and another reported in (2010) 10 SCC 231.**

3. **P.C. Varghese versus Devaki Amma Balambika Devi and others reported in (2005) 8 SCC 486.**

This suit for specific performance of an agreement to grant a tenancy has been decreed without applying the proper legal tests and without real consideration of the materials on record.

The agreement dated October 27, 1978 being marked as Exhibit 2 is the basic document upon which the instant suit is founded. This is an agreement to grant a monthly tenancy by the defendant in favour of the plaintiff for the rent reserved. The agreement covers five different properties in respect of which monthly tenancies were proposed to be granted separately for different rents as mentioned in Clause 3 of the agreement. In respect of each of the properties there is a rent reserved for first seven years and then a provision is made for enhancement of rent after expiry of seven years and fourteen years. The scheme under the agreement was one for grant of monthly tenancy at least for twenty one years. But, the agreement is one for grant of a tenancy or lease and not one granting a tenancy immediately with the execution of the agreement. Thus, the question of registration cannot arise in spite of Clause 22 of the agreement that upon production of permission and/or permission under the Urban Land (Ceiling and Regulation) Act, 1976, the tenant was to execute and register a lease in respect of the said premises. In the present suit the parties are concerned with only one out of several properties mentioned in the agreement. The suit property is No. 3, Netaji Subhas Chandra Bose Road, Tollygunge within Kolkata Municipal

Corporation measuring about 2 ½ bighas as per plan attached with all out-houses, servants' quarters, garages.

Clause 2 of the agreement has a significant operational implication and the said clause reads as follows:

"This agreement shall take effect and the tenancy created hereunder shall commence from the day on which the landlord delivers and the tenant accepts vacant and peaceful possession of the premises agreed to be demised hereunder."

It goes without saying that the agreement in question had five independent parts each of which covered a separate and distinct property and clause 2 of the agreement provides for separate taking effect of each part of the agreement and separate commencement of the particular tenancy with the delivery of possession by the landlord and acceptance of vacant and peaceful possession by the tenant.

This governing clause of the agreement is patently uncertain and, therefore, unenforceable. No date of commencement of the tenancy is mentioned and the same cannot be ascertained otherwise also.

The commencement of a lease must be certain in the first instance or capable of being ascertained with certainty afterwards, so that both the time when it begins and the time when it ends, must be fixed.

It is true that it is enough if the date of commencement is capable of being made certain on a future date. Section 110 of the Transfer of Property Act, 1882, enacts that if the day of commencement is not stated, the lease begins from the

day of execution. However, this does not apply to an executory agreement of lease and such an agreement is void for uncertainty. In the instant case, the very commencement of the agreement and of the lease is wholly uncertain and, thus, unenforceable.

The agreement is, otherwise, uncertain also inasmuch as the taking effect of the agreement and commencement of the tenancy are made wholly dependent upon the delivery of possession by the landlord and the acceptance of vacant and peaceful possession thereof by the tenant.

In the agreement there is no obligation of the landlord to deliver within a particular time, express or implied or upon the happening of any certain event. The obligation of the landlord is wholly vague, indefinite and, therefore, unenforceable.

In order to sustain a suit for specific performance, it is necessary that the agreements relied upon should be both precise and accurate in their terms. This is because Court cannot either by specific performance or the award of damages enforce a contract, which it is unable to interpret.

It is obvious that covenant of certainty is required in proceedings for the specific performance of contract greater than that demanded in an action for damages. For to sustain the latter proceeding, the proposition required is the negative one, that the defendant has not performed the contract – a conclusion which may be often arrived at without any exact consideration of the terms of this contract; whilst in proceedings for specific performance it must appear not only that the contract has not been performed, but what is the contract which is to be performed. It is perhaps impossible to lay down any general rule as to what is

sufficient certainty in a contract, but it may be safely stated that the certainty required must be a reasonable one, having regard to the subject matter in the contract and the circumstances under which it was entered into.

It is the enforceability and not the execution or the existence of the agreement, which is in question in the instant appeal. An agreement duly executed may not be enforceable as indicated in Section 14 of the Specific Relief Act, 1963. The said Section 14 deals with the question and makes such an agreement not enforceable when it depends on volition of the party or which is in its nature determinable.

Clause 7 of the agreement contains the respective rights and obligations of the parties in respect of repairs and renovations of the property in question.

Under the said Clause 7 the obligation is on the landlord to thoroughly repair and renovate the premises at the earliest possible opportunity. It was agreed that 'the landlord will bear 70% (seventy per) centum of such cost while the tenant will bear 30% (thirty per) centum of such cost. However, the tenant shall advance up to 50% (fifty per) centum of such cost at the request of the landlord and shall be entitled to adjust such advance against the monthly rental at the rate of cent per centum of such monthly rent. It was agreed between the parties that 'if the landlord fails to renovate and repair in terms of the provisions herein the tenant will have the option to complete the renovation and repair at its own cost and shall be entitled to deduct such cost from the rental payable at the rate of cent per centum of such rental payable per month'.

It is factually incorrect to suggest that the appellant had no obligation to undertake thorough repairs and renovation of the premises. Clause 7 of the

agreement is the crucial clause governing the mutual rights and obligation of the parties. Such rights and obligations were devised to make the agreement operative. It is evident that "Oasis" was considered to be in such a state, which evidently rendered it unfit to be dealt with commercially.

It could not be disputed that in view of the condition of "Oasis" it was agreed that an expert was to be appointed to make an estimate of the costs to be incurred. It could not be disputed, also, that Kothari and Associates were engaged for that purpose and they had, in fact, submitted a report in respect of the estimated costs of the repairs to be undertaken.

The plaintiff of its own stated that the plaintiff had come to know that in the report submitted by Kothari and Associates it had been stated that repairing work, including painting etc., would cost approximately between Rs. 2,00,000/- (Rupees two lakh) and Rs.2,50,000/- (Rupees two lakh fifty thousand) only. The plaintiff had to come out with these statements because the defendant suggested the need to have such an estimate and Kothari and Associates were appointed for the purpose. The defendant was repeatedly complaining about the inaction and non-supply of the said report.

The plaint refers to the provision that in the event of the failure of the defendant to renovate in terms of the agreement, the tenant would have the option to complete the renovation and repair at its own cost and would be entitled to deduct such cost from the rental payable at the rate of cent per centum of such rent payable per month.

Thus, the plaintiff by withholding the report of Kothari and Associates and by not offering to make an advance and being not willing to exercise the option

under Clause 7 of the agreement on as is where is basis and undertake the repairs itself was demonstrating his lack of readiness and willingness. The plaintiff was avoiding the agreed scheme in all respect. The readiness and willingness require that the plaintiff must be ready and willing from the date of the agreement.

There is no dispute that after the execution of the agreement, the suit premises were vacated by the military authorities in a very dilapidated condition. It will be evident from Exhibit 3 dated January 19, 1983 and Exhibit 3(a) dated May 13, 1983 that the defendant was communicating with the plaintiff and stating "had conducted a preliminary survey of the said building with you and your architect, Kothari associates and we await their report through you, on the basis of which, we could again get together and work out how best we could resolve the situation". Same allegations were made on behalf of the defendant under paragraph 4 of Exhibit 9 dated October 11, 1988.

In the plaint in pargraph 9 the defendant's letter dated January 19, 1983 was referred to and in paragraph 10 thereof an evasive stand was taken by saying that the plaintiff had come to know that in the report given by Kothari associates it had been stated that the repairing work including painting would cost approximately between Rs.2,00,000/- (Rupees two lakh) and Rs.2,50,000/- (Rupees two lakh fifty thousand) only.

This stand is being taken in the plaint filed on April 15, 1989 notwithstanding the letter dated Jaunary 18, 1983, Exhibit 3(a) and the letter July 26, 1983, Exhibit 11 both written by defendant and alleging particularly in Exhibit 11 that " we have not yet received from you the report of Kothari associates. Please be good enough to

let us know as soon as possible what your thinking is over the said premises at present."

In this connection, whatsoever may be the worth of evidence of the plaintiff's witness no. 1 professing to depose on behalf of the plaintiff, his statement on oath may be quoted hereunder:

"I know one architect named and styled as Kothari & Associates. Once they made inspection in the suit premises to assess the cost of repair of the same and after completion of their inspection they sent a report to the plaintiff. This is the original report dated 4. 3.83 (marked 'X' for identification). The defendant sent this letter dated 26. 7. 83 to the plaintiff. It was sent by C.M. Saigal, the Director of the defendant company. I know his signature (the letter dt. 26.7. 83 is marked as Ext. 11 on proof)."

Repair and renovation on the agreed cost sharing basis could be given effect to and implemented only on the basis of an acceptable estimate. Steps were taken to have an estimate, but the report was not supplied to the defendant in spite of specific request. The plaintiffs witness no. 1 was not alleging that the report was supplied to the defendant. None of the exhibits indicates that the report was disclosed and supplied to the defendant. The only suggestion to defendant's witness no. 1 was dinned by saying 'not a fact that the defendant was informed through Kothari Associates'. The defendant witness no. 1 in his chief stated that the plaintiff did not reply to the said letter. The defendant company wrote to the plaintiff for effecting repair of the premises in question, but they did not do so. The only thing put to defendant witness no. 1 during his cross-

examination “I cannot remember whether plaintiff expressed their reluctance in writing to effect repair of the suit premises.”

It may be recalled that the plaintiff’s witness no. 1 during his cross-examination on December 6, 1999 stated that on behalf of the plaintiff/company its witness would depose before the Court stating that the plaintiff/company was ready and willing to take the tenancy of the suit premises.

Significantly, no witness has been examined, who was competent and authorized by plaintiff/company to prove its case and deny the specific allegations of the defendant.

It is, thus, clear that by not disclosing the report, by not replying to Exhibit 3(a) and Exhibit 11 and by never offering to share the costs in spite of specific enquiry by the defendant, the plaintiff failed to prove his readiness and willingness. On the contrary, the plaintiff clearly demonstrated its unwillingness from 1983 to 1989, that is, from January 19, 1983 till the institution of the suit. Even in the plaint there is no case whatsoever that the plaintiff had offered to share the cost of repairs.

It is evident that the plaintiff is seeking a relief, which does not and cannot flow out of the agreement. At present the plaintiff is seeking a tenancy on as is where is basis though never wanted the same. This is contrary to the terms of clause 7 of the agreement. By giving up the construction scheme of the agreement the plaintiff cannot claim to have relief. The defendant was eager to proceed and have the repairs done, but the plaintiff did not respond.

It is well settled that the Specific Relief Act, 1963, seeks to provide the relief in specific, that is, the performance of the specific act or the delivery of the particular property. The agreement in the instant case did not provide that the plaintiff will be entitled to the grant of monthly tenancy of the property without agreeing to and participating in repairs and renovation on cost sharing basis. The second part of clause 7 of the agreement cannot be relevant as the defendant did not disagree or fail to repair under the terms of the agreement.

Clause 2 of the agreement indicates that the delivery of possession by the defendant was volitional as the clause does not fix a time limit for such delivery.

The agreement in question was one for, grant of a monthly tenancy. No monthly tenancy was created by the agreement itself. A monthly tenancy when created can be terminated by a notice to quit subject to the protection provided by the Rent Act. But an agreement for grant of monthly tenancy does not enjoy such protection and there is no law to make it non-terminable. In fact, the agreement has been treated as cancelled by the defendant by the letter dated August 11, 1986 being Exhibit F. Exhibit F refers to the earlier letters dated January 19, 1983, May 13, 1983, July 26, 1983 and November 02, 1983 and, also, to the discussions held between the parties and alleges “unfortunately, there has been no response or reply to our above letters in this connection.” Cancellation was

recorded by the letter dated August 11, 1986 and the suit has been instituted on April 15, 1989.

In the plaint there is a reference to the letter dated August 11, 1986, but it is alleged that the said notice was not served. There is no body of the plaintiff to establish such denial – no witness, who was competent to deny. The defendant proves the notice and its service and there is no cross-examination. There is no one to deny Exhibit F dated August 11, 1986 and the receipt in respect of its service namely Exhibit F (1). It is true that the plaintiff's witness no. 1 had stated that "we never received any letter from the defendant stating that the agreement in question was cancelled" But, the cancellation letter dated August 11, 1986 was addressed to P.K. Sinha of the Legal Department of ITC Limited and the same was received on behalf of ITC Limited. Nobody otherwise competent is disputing these documents and they remain unchallenged.

The letter cancelling the agreement was based on facts. The only plea in the plaint was that the said letter was not served. There is no challenge to this cancellation founded on facts.

Clause 2 of the agreement, Exhibit 2, provides:

"This agreement shall take effect and the tenancy created hereunder shall commence from the day on which the landlord delivers and the tenant accepts vacant and peaceful possession of the premises agreed to be demised hereunder"

The agreement does not take effect and the tenancy does not commence until the landlord gives delivery of possession and the tenant accepts it. Because of lack of response and non-cooperation of the plaintiff the defendant by its letter dated August 11, 1986 has cancelled the coming into effect of the agreement and the consequent creation and commencement of the tenancy. After such cancellation there cannot be a decree for specific performance as decreed by the trial Court in the present case. An agreement, which under its own terms has not yet taken effect cannot be specifically enforced. Such taking effect is being prevented because of the inability of the defendant to deliver on account of circumstances attributable to the plaintiff alone. It is not only case of a terminable agreement, but, also, an agreement, which does not become operative under its own terms on account of the fault of the plaintiff.

It is the case of the defendant that the agreement could not take effect because it was frustrated and becoming impossible to perform. It is the case of the defendant that on account of lack of response and lack of readiness and willingness on the part of the plaintiff the coming into effect of the agreement has become frustrated and had to be cancelled. This was communicated by the defendant's advocate by Exhibit 9 dated October 11, 1988.

This decree is such that it cannot be passed in a suit for specific performance. The decree directs the grant of tenancy "in accordance with the provisions of the agreement." The decree proceeds in total

disregard of the scheme for repairs and the mutual obligations of the parties. The defendant cannot be called upon to grant a tenancy of the premises on as is where is basis. The plaintiff by their own default cannot twist the agreement and get a decree, which is not in accordance with and does not flow out of the inchoate agreement which again has, already, been cancelled.

Under Section 16 (c) of the Specific Relief Act, 1963, specific performance cannot be enforced in favour of a person, who fails to aver and prove that he has performed or has, always, been ready and willing to perform the essential terms of the contract, which are to be performed by him.

In the instant case there is no averment in the plaint about the readiness and willingness of the plaintiff to participate in the repairing and renovation on cost sharing basis and there is no evidence whatsoever on that point. On the contrary, the undisputed documents establish the unwillingness of the plaintiff to do so.

In order to succeed in a suit for specific performance the continuous readiness and willingness at all stages from the date of the agreement till the date of the hearing of the suit need to be proved. The substance of the matter and surrounding circumstances and the conduct of the plaintiff must be taken into consideration in adjudging readiness and willingness to perform the plaintiff's part of the contract.

No suit for specific performance can be decreed in favour of the plaintiff, who remains absent and elusive when his readiness and willingness is disputed.

This agreement apart from being vague and indefinite is wholly one sided and seeks to secure an unfair advantage which a Court of equity would not enforce in view of Section 20 of the Specific Relief Act.

The Supreme Court of India in **N.P. Thirugnanam (Dead) by LRS. Versus Dr R. Jagan Mohan Rao and others reported in (1995) 5 SCC 115** observed as under**:**

"It is settled law that remedy for specific performance is an equitable remedy and is in the discretion of the court, which discretion requires to be exercised according to settled principles of law and not arbitrarily as adumbrated under Section 20 of the Specific Relief Act, 1963 (for short 'the Act'). Under Section 20, the court is not bound to grant the relief just because there was a valid agreement of sale. Section 16 (c) of the Act envisages that plaintiff must plead and prove that he had 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 those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant 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 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 of necessity be proved to be available. Right from the date of execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As state above, the factum of his readiness and willing to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract."

Having regard to the aforesaid discussion and to the provisions of Sections 14, 16, and 20 of the Specific Relief Act, 1963, and, also, the conduct of the plaintiff evident from the evasive and wrong case in the plaint together with utter inability to put up a competent and authorized person of its own to depose the suit deserved to be dismissed.

We, therefore, set aside the judgment and decree dated April28, 2004 passed in Title Suit no. 50 of 1989 and dismiss the said suit.

The appeal is, thus, allowed.

We, however, direct the parties bear their respective costs in this appeal.

(Subhro Kamal Mukherjee, J.)

Subrata Talukdar, J.

I agree.

(Subrata Talukdar, J.)