**(1997) 09 P&H CK 0032**

**High Court Of Punjab And Haryana At Chandigarh**

**Case No:** Regular Second Appeal No. 1925 of 1996

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| S.K. Nayyar | | APPELLANT |
| | Vs | |
| C.K. Anand and Another | | RESPONDENT |

**Date of Decision:** Sept. 29, 1997

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 100
- Punjab Courts Act, 1918 - Section 41(1)

**Citation:** (1998) 2 CivCC 51 : (1998) 118 PLR 694 : (1998) 2 RCR(Civil) 331

**Hon'ble Judges:** Sarojnei Saksena, J

**Bench:** Single Bench

**Advocate:** A.M. Punchhi, for the Appellant; M.L. Sarin Sanjay Vij, for the Respondent No. 1 and Kamal Sehgal, for the Respondent No. 2, for the Respondent

**Final Decision:** Dismissed

**Judgement**

Sarojnei Saksena, J.
Appellant-defendant No. 1 has assailed the judgment of the lower appellate Court dated April 22, 1.996, whereby lower Court''s judgment and decree dated October 29, 1993, is affirmed.

2. Factual matrix of the case is that defendant No. l is the owner-in-possession of an industrial plot bearing No. 442 measuring 487.50 sq. metres situated in Phase-III, Udyog Vihar, Dundahera, Tehsil and District Gurgaon. This plot was allotted to him by defendant No. 2, i.e. Haryana State Industrial Development Corporation, Chandigarh (hereinafter called the ''HSIDC'') vide its letter dated October 28, 1982. Its possession was delivered to defendant No. 1 on February 14, 1982. Subsequently, defendant No. 1 agreed to sell this plot to the plaintiff-respondent No. 1 for a sale consideration of Rs. 1,37,500/- vide agreement dated March 28, 1988. Defendant No. 1 received Rs. 10,000/- as advance part-payment from the plaintiff-respondent No. 1. He was to transfer the plot in plaintiffs favour within

three weeks from March 28, 1988, i.e, on or before April 18, 1988. Defendant No. 1 undertook to apply for transfer of the plot in favour of the plaintiff or his nominee to defendant No. 2 before April 18, 1988. He also assured the plaintiff that the plot in suit was free from all encumbrances and that he had got clean and marketable title. He further undertook to execute all the necessary documents in plaintiffs favour to complete transaction and to perform all the formalities of transfer of this plot. He gave photostat copies of the allotment letter and letter of delivery of possession regarding the suit plot to the plaintiff. On April 16, 1988, the plaintiff came to know that defendant No. 1 had not paid the entire amount payable to defendant No. 2 with regard to this plot. He requested defendant No. 1 to give him original allotment letter, letter of delivery of possession, approved building site plan, if any, and ''No Dues Certificate'' from defendant No. 2, but defendant No. 1 evaded to comply. Defendant No. 1 told the plaintiff that he would let him know as to when he collects all these documents and till then, it was not possible to transfer the plot. However, on April 16, 1988, defendant No. 1 sent a telegram to the plaintiff to contact him on April 18, 1988, as per the agreement, failing which the agreement shall stand cancelled. Plaintiff immediately replied telegraphically and disclosed that he was ready and willing to perform his part of the contract and defendant No. 1 should hand over the necessary documents on payment of the balance sale consideration. Plaintiff further stated that he had got the requisite money ready with him on April 18, 1988. He had purchased necessary stamp papers for getting executed the agreement of sale, general power of attorney etc. On April 18, 1988 in the hope that defendant No. 1 would be executing the requisite documents. Plaintiff also sent a registered letter to defendant No. 1 asking him to transfer the plot in his favour as agreed upon. But, the plaintiff received a letter from defendant No. 1 dated April 22, 1988, to the effect that the agreement stood cancelled.

3. Plaintiff averred that he was always ready and willing to perform his part of the contract and defendant No. 1 had committed breach thereof as an amount of Rs. 13,000/- in still payable by defendant No. 1 in respect of the suit plot to defendant No. 2; till then, the plot could not be transferred. He also approached defendant No. 110 days before filing the suit for the transfer of the suit plot on payment of the balance sale consideration, but to no effect. Plaintiff sought a decree for specific performance of the contract of sale and prayed that defendant No. 1 be directed to transfer the suit plot in his name on receiving the balance sale consideration and he be also directed to execute the necessary documents and defendant No. 2 be directed to hand over the relevant papers to the plaintiff and to make necessary entries in its record. As usual, in the alternative, plaintiff claimed Rs. 1,37,500/- as damages.

4. In his written statement, defendant No. 1 admitted to have agreed to sell the plot in question in favour of the plaintiff on March 28, 1988. He also admitted the receipt of Rs. 10,000/-, but according to him, it was not an advance payment but was earnest money. According to defendant No. 1, the act of transfer of plot was to be

preceded by full payment of balance sale consideration of Rs. 1,27,500/- by the plaintiff. It was denied that he had undertaken to apply for transfer of the suit plot before the stipulated date. The plaintiff had already made enquiries and satisfied himself that all the instalments had been paid and the plot was free from all liabilities. Defendant No. 1 also pleaded that the original allotment letter had been mislaid and the said fact was told to the plaintiff. He denied to have agreed to give original letter of allotment and other alleged documents to the plaintiff. He asserted that the plaintiff could not arrange the funds for payment of balance sale consideration and he had fabricated a baseless story in order to justify the breach of agreement. He denied that the plaintiff had the requisite funds with him for the said purpose and he was ready and willing to perform his part of the contract. According to defendant No. 1, the plaintiff had failed to perform his part of the agreement within the stipulated time, which was of the essence of the contract. Defendant No. 1 has further averred that he had sent letter dated April 22, 1988, informing the plaintiff that the agreement stood cancelled and earnest money stood forfeited.

5. Defendant No. 2 in its separate written statement denied the plaint allegations and averred that no agreement to sell/transfer the suit plot can be entered into without its prior permission. Plaints has no locus standi to file the suit which is bad for misjoinder of defendant No. 2 The alleged agreement is not enforceable.

6. On these pleadings, issues were framed, parties led their evidence and the trial Court decided the suit in plaintiffs favour holding that he was always ready and willing to perform his part of the contract. Defendant No. 1 has committed breach of contract, therefore, decree for specific performance was granted.

7. Defendant No. 1-appellant filed appeal before the lower appellate Court which affirmed the lower Court''s judgment and decree. Hence, this appeal.

8. The appellant''s learned counsel vehemently argued that the Courts below have fallen into an error in holding that the plaintiff-respondent No. 1 was always ready and willing to perform his part of the contract. From the plaint allegations as well as from the plaintiffs evidence, it is evident that plaintiff was not ready to pay the balance amount of sale consideration and, therefore, he was putting various conditions and was demanding original letter of allotment, original letter of delivery of possession, no dues certificate, etc. These conditions were not agreed upon earlier. It was agreed that the agreement of sale was to be executed by or on April 18, 1988. Time was of the essence of contract. Since the plaintiff did not pay the balance sale consideration by or on April 18, 1988, it was obvious that he committed breach of the contract. To support hi contention, he has placed reliance on apex Court''s judgment in Smt. Chand Rani (dead) by LRs. Vs. Smt. Kamal Rani (dead) by LRs., .

9. The appellant''s learned counsel also submitted with vehemence at his command that the contract was not executable as plaintiff himself has admitted that Rs.

13,000/- were yet to be paid by defendant No. 1 to defendant No. 2 and before any sale could be effected of the suit plot, prior approval of defendant No. 2 was essential. Thus, according to the learned counsel, the said agreement was not at all enforceable. Finally, he submitted that during this span prices have gone very high. Plaintiff also claimed an alternative relief of damages in the amount of Rs. 1,27,500/-. Defendant-appellant is willing to pay even Rs. six/seven lakhs to the plaintiff as damages. For advancing this argument, he placed reliance on two judgments of the apex Court reported in Sardar Singh v. Smt. Krishna Devi and Anr. J.T. 1994(3) 465 and Kanshi Ram Vs. Om Prakash Jawal and others, .

10. Plaintiff-respondent''s learned counsel, refuting all the above contentions vehemently argued that all these points were raised before the lower appellate Court. Both the Courts below have given concurrent findings. The first point raised by the appellant''s counsel that the plaintiff-respondent was not ready and willing to perform his part of the contract and he started putting certain conditions, is a question of fact which cannot be raised in second appeal. He has based his argument on the judgment of the Apex Court in Deity Pattabhiramaswamy v. S. Hanyamyya and Ors. AIR 1959 S.C. 57. He also submitted that the defendant-appellant received Rs. 10,000/- from the plaintiff-respondent, who agreed that he will apply for transfer of the suit plot in plaintiffs favour on receiving full, sale consideration. In this case, time was not of the essence of contract. From the agreement to sell, Ex.PX, it is evident that time was not of the essence of the contract. There is no attending circumstances as well to indicate that the parties had agreed that time was of the essence of the contract. He also submitted that even though it is to be believed that prices have gone high yet that is not a valid consideration for not decreeing the suit. The plaintiff was not only ready and willing to perform his part of the contract on April 18, 1988, but he had filed the suit on April 30, 1988. Even if the defendant-appellant thought that time was of the essence of the contract and he was ready and willing to perform his part of the contract, then instead of contesting the suit he would have immediately agreed to execute the sale agreement and other documents in favour of the plaintiff after accepting the balance amount of sale consideration. By adducing his evidence, the plaintiff has proved that on April 18, 1988, he was ready and willing to perform his part of the contract as he had got prepared three bank drafts, Ex.PW3/M, PW3/N and PW3/O, in the amount of Rs. 50,000/- on that date, purchased necessary stamp papers, Ex.P.1 to P.6, for executing the relevant documents and had sufficient funds in his bank account. This he had proved by adducing oral as well as documentary evidence. Lastly, to show his willingness and readiness to perform his part of the contract, he deposited the whole amount of balance sale consideration of the suit plot in the lower Court.

11. Plaintiff-respondent''s learned counsel contended that the defendant-appellant cannot raise the plea of defect in title. He is estopped from raising such a plea. At the time of agreement, he stated that his title was clear and without any

charge/encumbrances. He undertook to take permission from defendant No. 2 for the transfer of the suit plot. In the plaint, plaintiff has averred that he received information that defendant No. 1 had not paid Rs. 13,000/- to defendant No. 2, therefore, the plaintiff wanted defendant No. 1 to satisfy him on this point. This was not based on his own information. In his written statement, defendant No. 1 has not accepted this plea and has averred that he had deposited all the instalments of the suit plot with defendant No. 2. The only objection taken by defendant No. 2 in his written statement is that the transfer of the suit plot cannot take place without its prior permission. On this pleading, issue No. 3 was raised: -

"Whether the agreement dated 28.3.1988 is not enforceable as alleged by defendant No. 2 ?" OPD2

The burden of proof on this issue was on defendant No. 2 which stands decided against defendant No. 2 and in plaintiffs favour. Defendant No. 2 has not filed any appeal or cross objection against the said finding.

12. Relying on Abdul Hakeem Khan Vs. Abdul Mannan Khadri, , and Deenanath Vs. Chunnilal, the plaintiff-respondent''s learned counsel vehemently argued that suit cannot be dismissed merely because vendor''s title is defective.

13. Lastly, the plaintiff-respondant''s learned counsel submitted that there is no rule of defendant No. 2-Corporation debarring transfer of plot unless Rs. 13,000/- are paid. He also clarified that the plaintiff is now willing to purchase the suit plot subject to payment of Rs. 13,000/-. Section 13 of the Specific Relief Act 1963, gives him that right.

14. After hearing the rival contentions, in my considered view, this second appeal deserves dismissal at the motion stage. The apex Court''s judgment in Smt. Chand Rani''s case (supra), which is relied upon by the appellant''s learned counsel, is clearly distinguishable. In that case, the plaintiff was insisting upon delivery of possession as well as to obtain the Income Tax clearance certificate as a condition precedent for making payment of Rs. 98,000/- within a period of ten days from the date of execution of the contract. Income Tax clearance certificate was necessary only for completion of sale. The apex Court observed that they were unable to see how these obligations on the part of the defendant could be insisted upon for payment of Rs. 98,000/-, which were to be paid as part payment as Rs. 30,000/- were paid by way of earnest money on the date of execution of agreement to sell and the remaining amount of Rs. 50,000/- was to be paid at the time of registration of sale deed.

15. In this case, the plaintiff-respondent was ready and willing to perform his part of the contract. Defendant No. 1 gave him photostat copies of the letter of allotment and letter of delivery of possession of the suit plot. The plaintiff was asking defendant No. 1 to give him the originals of these two letters. In the written statement, defendant No. 1 has pleaded that these documents are mislaid, but on

oath he stated they were eaten away by ants. If really defendant No. 1 had an intention to perform his part of the contract, it was his bounden duty to give both these relevant documents to the plaintiff and also to obtain prior permission from defendant No. 2 for entering into the agreement to sell with the plaintiff.

16. Admittedly, the agreed date for performance of the contract was April 18, 1988. On April 14, 1988, plaintiff came to know that defendant No. 1 has not paid Rs. 13,000/- to defendant No. 2. Therefore, he wanted defendant No. 1 to obtain ''No Due Certificate'' from defendant No. 2 so that there may not be any objection subsequently. If the plaintiff was insisting defendant No. 1 to supply him the originals of these documents, it cannot be said that he was putting up new conditions or on this false pretext he was trying to evade performance of the contract. When defendant No. 1 received Rs. 10,000/- as part payment of the sale price, he executed receipt, Ex.D.l, in plaintiffs favour, whereby he undertook to obtain prior permission of defendant No. 2 for the transfer of the suit plot in plaintiffs favour immediately on receipt of full payment. He also confirmed that the suit plot was free from all encumbrances, loans and liabilities and he had absolute title over it. He also agreed to execute the agreement to sell, General Power of Attorney and will etc. in plaintiffs favour and lastly he clearly mentioned in this receipt, Ex.D.l, that "till the payment, formalities are completed in your favour." Therefore also, the plaintiff was insisting that defendant No. 1 should comply with these terms.

17. From the agreement, Ex.PX, and from the attending circumstances which are proved on record, there is no inkling that time was of the essence of the contract.

18. In Amba Lal Umrao Singh Ji Vs. L. Harish Chander and Others, , a Division Bench of this Court while considering such a plea observed that ordinarily in all contracts for sale of immovable property time is not of the essence of the contract unless circumstances show otherwise. The circumstance that the price of the land was rising cannot be a ground for holding that time was of the essence of the contract.

19. In Ruldu Singh (Dead) v. Inder Singh and Anr. 1974 R.L.R. 542, also, the same principle is re-iterated and it is further observed that mere delay in filing the suit per se is not sufficient to throw the claim of the plaintiff in a suit for specific performance of contract. Though in this case, there is no delay, the agreed date for the performance of the contract was April 18, 1988, after receiving telegram, Ex.D.4, from defendant No. 1 on April 16, 1988, the plaintiff immediately sent telegram, Ex.P.7, on April 17, 1988, informing defendant No. 1 that he was ready and willing to perform his part of the contract and on April 30, 1988, he filed this suit. Thus, it cannot be said that the plaintiffs filing of the suit was delayed.

20. In Gomathinayagam Pillai and Others Vs. Pallaniswami Nadar, , the apex Court held that fixation of period within which contract is to be performed does not make stipulation as to time the essence of the contract nor default clause in the contract

by itself evidences intention to make time of essence. Time is of essence if the parties intend it to be so. Intention may be evidenced either by express stipulations or by circumstances which are sufficiently strong to displace ordinary presumption that in contract for sale of land stipulation as to time is not of essence. If time is not of essence originally, it can be made of essence subsequently by serving notice on other party. In this case, no such circumstance was proved, nor such notice was exchanged by the parties.

21. In Smt. Chand Rani''s case (supra), the apex Court has held:-

"It is well-accepted principle that in the case of sale of immovable property, time is never regarded as the essence of the contract. In fact, there is a presumption against time being the essence of the contract. This principle is not in any way different from that obtainable in England. Under the law of equity which governs the rights of the parties in the case of specific performance of contract to sell real estate, law looks not at the letter but at the substance of the agreement. It has to be ascertained whether under the terms of the contract the parties named a specific time within which completion was to take place, really and in substance it was intended that it should be completed within a reasonable time. An intention to make time the essence of the contract must be expressed in unequivocal language."

22. Further, in S.V.R. Mudaliar (Dead) by Lrs. and Others Vs. Rajabu F. Buhari (Mrs) (Dead) by Lrs. and Others, , the apex Court considered whether hike in price of the disputed property can be a ground to refuse the relief of the specific performance. The apex Court held that such a relief cannot be refused merely on the ground that the price of the property in question has risen during the pendency of litigation. In this case also, as the appellant''s learned counsel has strongly expressed that the prices have gone high. The fault that the prices have gone high during the pendency of the litigation cannot be attributed to the plaintiff-respondent No. 1 because within twelve days of the date which was agreed between the parties to perform the contract, the plaintiff knocked the door of the Court by filing suit for specific performance and thereby asked defendant No. 1 to perform his part of the contract.

23. So far as the plaintiffs willingness and readiness to perform his part of the contract is concerned, plaintiff has proved the following facts, which are not disputed before me :-

(a) Plaintiff purchased bank drafts in the amount of Rs. 50,000/- on April 18, 1988, (the agreed date) which are Exhibits PW3/M, PW3/N and PW3/O).

(b) Stamp papers, Ex.P-1 to P-6, were purchased by the plaintiff on April 18, 1988, for the execution of the relevant documents;

(c) Plaintiff had sufficient funds in his account as he himself has proved it and his statement is duly corroborated by Mr. B.S. Bhatt, Manager of the Canara Bank Branch East of Kailash, New Delhi (P.W.3). Plaintiff has stated that he had cash

amount of Rs. one lakh with him. He is the proprietor of M/s Deepa Exports having an account with Canara Bank. His wife is running business in the name of M/s Hot Line and his mother is running a concern in the name of M/s Indo Overseas and they have also accounts with the Canara Bank. Statements of account of these three concerns are produced at Ex.PW3/A to PW3/K. He was to pay only Rs. 1,27,500/- a the balance amount of sale consideration. He has stated that on April 18, 1988, he had sufficient amount in the Bank also.

24. Whether it is essential for a purchaser to have ready money with him or he is required to prove that he has sufficient funds to perform his part of the contract was the precise question which was considered by the apex Court in Sukhbir Singh and others Vs. Brij Pal Singh and others, The apex Court held that where respondent/buyer pleads that he was willing and ready to pay the sale consideration and the seller had notice of the same, it is not a condition that the respondent/buyer should have ready cash with him. It is sufficient for the respondent/buyer to establish that he had the capacity to pay the sale consideration. Thus, on this point also, it cannot be said that the plaintiff-respondent No. 1 was not possessed of sufficient funds to pay the balance amount of sale consideration and, therefore, he was trying to evade the contract by putting up one pretext or the other. During arguments, the plaintiff-respondent''s counsel submitted that the plaintiff had already deposited the remaining sale consideration in the lower Court, which also supports his contention that the plaintiff was always ready and willing to perform his part of the contract.

25. The plaintiff-respondent''s counsel rightly submitted that defendant-respondent No. 1 is estopped from raising the plea of defect in title. While entering into agreement, defendant-respondent No. 1 had stated that his title over the suit plot was clear without any charge or encumbrances. He also undertook to take permission from defendant No. 2. On receiving some information that defendant No. 1 had not paid Rs. 13,000/- to defendant No. 2, the plaintiff has pleaded so in his plaint. This was not based on his personal information. Plaintiff examined P.W.2 K.C. Sachdeva, Assistant of H.S.I.D.C, Gurgaon, who proved Ex.D.2 a copy of letter of allotment of the suit plot to defendant No. 1, and Ex.D.3 - copy of letter of delivery of possession in respect of the suit plot. This witness deposed that defendant No. 1 had not made full payment towards cost of the plot. Thus, the information received by the plaintiff was not baseless. If on this account he was apprehending that defendant No. 1 may not be in a position to transfer clear title in the suit plot to him and was insisting that defendant No. 1 should pay Rs. 13,000/- to defendant No. 2 and should also obtain ''NOC'' and its prior permission to transfer the suit plot in plaintiffs favour, it cannot be said that the plaintiff was putting up new and baseless conditions in the performance of contract and was, thus, trying to evade it.

26. Secondly, this plea was raised by defendant No. 2 in its written statement. Issue No. 3 was raised thereupon and burden of proof was on defendant No. 2. The

finding is recorded against defendant No. 2 Defendant No. 2 has not filed any appeal or cross objection against this finding of the Courts below.

27. Further, suit for specific performance of a contract cannot be dismissed merely because vendor''s title is defective. For holding this view, I take support from the judgments rendered in Mir Abdul Hakeem Khan''s (supra) and Deenanath''s cases (supra).

28. In this connection, it is also noteworthy that no rule of the respondent-Corporation was placed on record debarring transfer of plot unless whole of amount on account of sale price of the plot due to it is paid by the purchaser or prior permission is obtained from H.S.I.D.C. for transferring the plot to another person. So far as the payment of Rs. 13,000/- is concerned, the plaintiff is willing to purchase the suit plot subject to payment of Rs. 13,000/- to defendant No. 2, which he is entitled to do u/s 13 of the Specific Relief Act.

29. In Deity Pattabhiramaswamy''s case (supra), the apex Court has held that "the provisions of Section 100, Civil Procedure Code, are clear and unambiguous. There is no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact, however gross the error may seem to be. Nor does the fact that the finding of the first appellate Court is based upon some documentary evidence make it any the less a finding of fact. A Judge of the High Court has, therefore, no jurisdiction to interfere in second appeal with the findings of fact given by the first appellate Court based upon an appreciation of the relevant evidence."

30. No doubt, the present second appeal is not filed u/s 100 of the Code of Civil Procedure, 1908 but u/s 41 of the Punjab Courts Act, 1918. Section 41(1) provides that an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court on any of the following grounds :-

(a) the decision being contrary to law or to some custom or usage having the force of law;

(b) the decision having failed to determine some material issue of law or custom or usage having the force of the law;

(c) a substantial error or defect in the Civil Procedure Code, 1908 (V of 1908) or by any other law for the time being in force which may possibly have produced error or defect in the decision of the case upon the merits.

Explanation. - A question relating to the existence or validity of a custom or usage shall be deemed to be a question of law within the meaning of this section. Sub-section (2) of Section 41 provides that an appeal may lie under this section from an appellate decree passed ex-parte. Thus, it is evident that if concurrent findings of fact are recorded by the Courts below, second appeal can lie to the High Court only on the above grounds and on no others. In this second appeal, no such ground is raised in the grounds of appeal.

31. Learned counsel for defendant-appellant argued that since prices have gone high, the defendant-appellant is ready and willing to pay Rs. six/seven lakhs as damages to the plaintiff-respondent. To support his argument, he placed reliance on the two decisions of the apex Court in Sardar Singh Vs. Smt. Krishna Devi and another, and Kanshi Ram Vs. Om Prakash Jawal and others,

32. The facts of both these cases are distinguishable. In Sardar Singh''s case (supra), provisions of Sections 12 and 20 of the Specific Relief Act were considered by the Apex Court. It was held that "the grant of relief of specific performance is discretionary. The circumstances specified in Section 20 are only illustrative and not exhaustive." In that case, appellant-Sardar Singh had half share in the house in dispute which was contracted to be sold by his brother. The appellant was not a consenting party to the sale agreement. On these facts, it was held by the Apex Court that the courts below had committed manifest error of law in exercising their discretion directing specific performance of the contract for the entire property. It was further held that the house being divisible and the appellant being not a consenting party to the contract, equity and justice demand partial enforcement of the contract, instead of refusing specific performance in its entirety, which would meet the ends of justice.

33. No doubt, in Kanshi Ram''s case (supra), it is observed by their Lordships of the apex Court that the respondent also claimed alternative relief of damages. Courts below granted decree for specific performance. The apex Court held that grant of decree for specific performance of a contract of immovable property is discretionary and to be exercised on sound principles. Rise in prices of the property during the pendency of the suit is not the sole consideration for refusing the grant of decree for specific performance of a contract, but in view of the fact that the respondent himself had claimed alternative relief for damages, the courts would have been well justified in granting alternative decree for damages, instead of ordering specific performance which would be unrealistic and unfair. It was further held that the decree for specific performance was inequitable and unjust to the appellant. The facts on which the apex Court came to the conclusion that ordering specific performance of the contract would be unrealistic and unfair and alternative decree for damages would be well justified are not reproduced in the reported judgment. In this case, there is no fact or circumstances placed on record or proved on the basis of which it can be said that the decree for specific performance of contract would be unrealistic or inequitable to the parties.

34. Before parting with this judgment, I am constrained to mention that the plea that the plaintiff was not ready and willing to perform his part of the contract is a question of fact, which cannot be raised in second appeal as has been held by the apex court in Deity Pattabhiramaswamy''s case (supra).

35. Resultantly, the appeal being merit less is hereby dismissed with costs quantified at Rs. 2,000/- (Rupees two thousand).