

**(2007) 05 AHC CK 0015**

**Allahabad High Court**

**Case No:** Second Appeal No. 3755 of 1982

Abdul Hai

APPELLANT

Vs

Shanti Devi

RESPONDENT

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**Date of Decision:** May 16, 2007

**Acts Referred:**

- Specific Relief Act, 1963 - Section 16(1), 20, 20(2)

**Citation:** (2007) 6 AWC 5525

**Hon'ble Judges:** Dilip Gupta, J

**Bench:** Single Bench

**Advocate:** S.K. Verma, Siddhartha Verma, R.K. Chaurasiya and Anupam Anand, for the Appellant; Vipin Kumar Saxena and Rajeshwari Prasad, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

Dilip Gupta, J.

This second appeal has been filed by the Defendant for setting aside the judgment and decree dated 6.9.1982 passed by the learned Additional District Judge, Budaun whereby the judgment and decree dated 7.11.1981 passed by the learned Civil Judge has been set aside and the Defendant has been directed to execute the sale-deed in favour of the Plaintiff on payment of Rs. 3,480 within a period of three months failing which the Plaintiff would be at liberty to seek the assistance of the Court.

2. The Plaintiff had filed the suit for specific performance of the registered agreement of sale executed on 17.2.1979 on the allegation that the aforesaid agreement had been executed by the Defendant in favour of the Plaintiff for a consideration of Rs. 13,000 out of which Rs. 2,520 was initially paid and thereafter Rs. 7,000 was paid at the time of registration of the agreement to sell while the balance sale consideration of Rs. 3,480 was required to be paid at the time of registration of the sale-deed. It was also stated that the Plaintiff has always been

ready and willing and is still ready and willing to get the sale-deed executed after payment of Rs. 3,480 but the Defendant avoided the same despite repeated demands by the Plaintiff. The Plaintiff had, therefore, asked the Defendant by registered notice to reach the office of the Sub-Registrar on 11.2.1980 and though the Plaintiff remained present in the office of the Sub-Registrar on the said date from morning till evening but the Defendant did not reach there.

3. A written statement was filed by the Defendant denying the execution of the agreement. His case was that he had borrowed a sum of Rs. 7,000 from Raja Ram, the husband of the Plaintiff and Raja Ram took the Defendant to the office of the Sub-Registrar, Budaun under the false pretext that some document had to be executed in respect of the said loan. It was further stated that the property in the suit was purchased by the Defendant in auction sale for a sum of Rs. 20,000 and therefore, the Defendant could not have agreed to sell the said shop for Rs. 13,000.

4. The trial Court framed the following issues:

"1. Whether the Defendant had agreed to sell disputed shop alongwith land in suit to the Plaintiff as alleged ?

2. Whether the Defendant received 9520 towards the earnest money ?

3. Whether the Plaintiff has always been ready and willing and is still ready to perform her part of contract ?

4. Whether the Defendant executed the disputed agreement of sale dated 17.2.1979 ?

5. Whether this Court has no jurisdiction to try the suit ?

6. Whether any fraud was played by the Plaintiff's husband on the Defendant, in the execution of the agreement of sale in suit as alleged ? If so its effect ?

7. Plaintiff's relief ?

5. Issue No. 5 was decided in favour of the Plaintiff and against the Defendant. Issue Nos. 1, 2, 4 and 6 were jointly decided by the trial Court. On the basis of the evidence on record both oral and documentary, the trial Court recorded the following findings in respect of the aforesaid issues:

Therefore, in view of the entire evidence on record, it is proved that the Defendant executed the disputed agreement of sale dated 17.2.1979 in favour of the Plaintiff and he received Rs. 9,520 from the Plaintiff. It is also proved that no fraud was played by the Plaintiff's husband on the Defendant in execution of the agreement of sale. But it is not proved that the Defendant had actually agreed to sell the disputed shop alongwith the land in suit to the Plaintiff. It appears that he had actually executed the agreement of sale in favour of the Plaintiff as security to the alleged money, borrowed by him from the Plaintiff. All the issues are, therefore, decided

accordingly.

6. In respect of issue No. 3 the trial court recorded a finding that it was proved by the documentary as well as oral evidence on record that the Plaintiff had always been ready and willing to perform her part of the contract. While deciding issue No. 7 the trial court found that the Plaintiff was not entitled to get the relief of specific performance but she was entitled to get the alternative relief of recovery of Rs. 9,520 alongwith interest from the date of execution of the agreement to sell. The suit was accordingly decreed for recovery of Rs. 9,520 with interest at the rate of 6% per annum from 17.2.1979 upto the date of recovery.

7. The lower appellate court, however, recorded the following finding:

First of all it may be noted that the judgment contains a contradictory finding saying that the Defendant executed the deed of agreement for sale and again says that it was not proved that the Defendant had actually agreed to sell the shop and it appeared that he had executed the agreement of sale as security for the money borrowed. An agreement for sale cannot be executed by way of security for money borrowed and it was only a conjecture of the trial court that the Defendant had not actually agreed to sell the shop and this conjecture was clear from the expression "it appears that" while there was no evidence in support of this conjectural finding.

8. The lower appellate court also rejected the contention of the learned Counsel for the Defendant that the transaction between the parties was unconscionable and it gave unfair advantage to the Plaintiff and therefore, the Court should refuse to grant the relief of specific performance. The lower appellate court also observed that the finding of the trial court that the Defendant had executed the deed of agreement was not assailed before it. Thus it set aside the finding of the trial court that the registered deed of agreement was merely a security for the loan but the other conclusions of the trial court were upheld. The civil appeal was, accordingly, allowed with a direction to the Defendant to execute the sale-deed.

9. At the time of the admission of the second appeal, the following substantial questions of law were framed:

Whether the Defendant entered into contract under such circumstances as made the agreement inequitable and thus the specific performance of contract could not be effected in view of Section 20(2) of the Specific Relief Act ?

Whether there is no finding of fact recorded by the lower appellate court which would go to establish that the provisions of Section 16(1)(c) of the Specific Relief Act were complied ?

10. An application was moved by the learned Counsel for the Appellant to frame certain other substantial questions of law. This application was allowed by the order dated 18.4.2007 and the following substantial questions were framed:

"A. Whether the agreement was unconscionable and the same could not be specifically enforced in view of the fact that at the time of auction in the partition suit No. 40 of 1976, the Plaintiff's husband had bid for Rs. 18,500 on behalf of the Plaintiff whereas the Defendant Appellant had bid for Rs. 20,000, the sale consideration, which has been shown in the agreement to sell dated 17.2.1979 was only Rs. 13,000 ?

B. Whether the lower appellate court was justified in not giving a finding of fact to the effect that the Plaintiff was always willing and ready to purchase the land in dispute and yet that suit for specific performance of contract was decreed ?

C. Whether in view of Section 20 of the Specific Relief Act the specific performance of the agreement to sell could be enforced ?

D. Whether in the absence of any finding of fact regarding the diminution of the value of the property in dispute the consideration money of Rs. 13,000 fixed in the agreement to sell, be deemed to be unconscionable ?

E. Whether in the absence of any finding of fact given by the trial court as well as lower appellate court that the Plaintiff was always ready and willing to purchase the property in dispute till the passing of the decree, the suit for specific performance of contract could be decreed ?

11. After having framed the aforesaid substantial questions of law, I made it clear to the learned Counsel for the parties that they could seek an adjournment to prepare the appeal on the aforesaid additional substantial questions of law that had been framed but the learned Counsel stated that they were prepared and the matter could be heard.

12. Sri S. K. Verma, learned Counsel appearing for the Appellant contended that the agreement to sell was unconscionable and, therefore, could not be specifically enforced in view of the provisions of Section 20 of the Specific Relief Act, 1963 (hereinafter referred to as the "Act"). He further contended that in the absence of any finding given by the trial court as well as the lower appellate court that the Plaintiff was always ready and willing to perform her part of the contract till the passing of the decree, as was required under the provisions of Section 16(1)(c) of the Act, the lower appellate court could not have decreed the suit for specific performance. He further contended that the agreement was inequitable and the suit for specific performance could not be decreed in view of the provisions of Section 20(2)(c) of the Act.

13. Sri Vipin Kumar Saxena, learned Counsel appearing for the Respondent, however, submitted that though it is correct that the jurisdiction to decree specific performance is discretionary but the discretion of the Court is not arbitrary and has to be exercised in a sound and reasonable manner guided by the judicial principles. He further submitted that the Defendant had failed to establish that the contract

with either unconscionable or inequitable and that the courts below have recorded a categorically finding that the Plaintiff was always ready and willing to perform his part of the contract. He, therefore, submitted that the lower appellate court committed no illegality in decreeing the suit.

14. I have carefully considered the submissions advanced by the learned Counsel for the parties.

15. Sri S. K. Verma, learned senior counsel appearing for the Defendant Appellant did not dispute that the agreement to sell dated 17.2.1979 was registered and executed between the parties. His first contention, however, is that in view of provisions of Section 16(1)(c) of the Act, specific performance of a contract 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 till the date of the execution of the decree and, therefore, the suit for specific performance could not have been decreed and in support of his contention, he has relied upon the decisions of the Supreme Court in [N.P. Thirugnanam \(D\) by L.Rs., Vs. Dr. R. Jagan Mohan Rao and others](#), and Jugraj Singh and Anr. v. Labh Singh and Ors. AIR 1995 SC 945.

16. Learned Counsel for the Plaintiff - Respondent, however, submitted that in view of the specific case taken in the plaint and in view of the documentary and oral evidence on record, there was sufficient material to indicate that the Plaintiff was ready and willing to perform her part of the contract prior to and subsequent to the filing of the suit inasmuch as she had given notice to the Defendant to come to the office of the Sub-Registrar on 11.2.1980 and she remained present in the office on that date with the balance amount but the Defendant did not turn up to execute the sale-deed. He further submitted that the factum of readiness and willingness had to be adjudged with reference to the conduct of the party and the attending circumstances and the Court can infer from the facts and circumstances whether the Plaintiff was ready and was always ready and willing to perform her part of the contract. In support of his contention he has placed reliance upon the decision of this Court in Smt. Katori Devi v. Mata Prasad 1998 ACJ 478: 1996 AWC 1.15 (NOC).

17. In the present case, the trial court, while deciding issue No. 3 clearly recorded a finding that the Plaintiff has always been and was still ready and willing to perform her part of the contract. This finding was not assailed by the Defendant before the lower appellate court as is clear from the judgment. The lower appellate court, therefore, upheld this finding of the trial court.

18. The contention of the learned senior counsel for the Appellant is that the trial court should have recorded a categorical finding that there was a continuous readiness and willingness on the part of the Plaintiff at all stages from the date of the agreement till the date of hearing of the suit.

19. It needs to be mentioned that readiness and willingness cannot be treated as a straitjacket formula. It has to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the party.

20. In [R.C. Chandiok and Another Vs. Chuni Lal Sabharwal and Others](#), the Supreme Court observed:

Readiness and willingness cannot be treated as a straitjacket formula. These have to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the party concerned. In our judgment there was nothing to indicate that the Appellants at any stage were not ready and willing to perform their part of the contract.

21. The Supreme Court in the case of [Syed Dastagir Vs. T.R. Gopalakrishnasetty](#), observed:

So whole gamut of issue raised is, how to construe a plea specially with reference to Section 16(c) and what are the obligations which the Plaintiff has to comply with reference to his plea and whether the plea of the Plaintiff could not be construed to conform to the requirement of the aforesaid section, or does this section require specific words to be pleaded that he has performed or has always been ready and is willing to perform his part of the contract. In construing a plea in any pleading, Courts must keep in mind that a plea is not an expression of art and science but an expression through words to place fact and law of one's case for a relief. Such an expression may be pointed, precise, some times vague but still could be gathered what he wants to convey through only by reading the whole pleading, depends on the person drafting a plea. In India most of the pleas are drafted by counsels hence aforesaid difference of pleas which inevitably differ from one to other. Thus, to gather true spirit behind a plea it should be read as a whole. This does not distract one from performing his obligations as required under a statute. But to test, whether he has performed his obligations one has to see the pith and substance of a plea. Where a statute requires any fact to be pleaded then that has to be pleaded may be in any form. Same plea may be stated by different persons through different words then how could it be constricted to be only in any particular nomenclature or word. Unless statute specifically require for a plea to be in any particular form, it can be in any form. No specific phraseology or language is required to take such a plea. The language in Section 16(c) does not require any specific phraseology but only that the Plaintiff must aver that he has performed or has always been and is willing to perform his part of the contract. So the compliance of "readiness and willingness" has to be in spirit and substance and not in letter and form. So to insist for mechanical production of the exact words of an statute is to insist for the form rather than essence. So absence of form cannot dissolve an essence if already pleaded.

22. In the case of [Motilal Jain Vs. Smt. Ramdasi Devi and Others](#), the Supreme Court observed:

It is thus clear that an averment of readiness and willingness in the plaint is not a mathematical formula which should only be in specific words. If the averments in the plaint as a whole do clearly indicate the readiness and willingness of the Plaintiff to fulfil his part of the obligations under the contract which is the subject-matter of the suit, the fact that they are differently worded will not militate against the readiness and willingness of the Plaintiff in a suit for specific performance of contract for sale.

23. In the case of [Manjunath Anandappa Urf. Shivappa Hanasi Vs. Tammanasa and Others](#), the Supreme Court observed:

The decisions of this Court, therefore, leave no manner of doubt that a Plaintiff in a suit for specific performance of contract not only must raise a plea that he had all along been and even on the date of filing of suit was ready and willing to perform his part of contract, but also prove the same. Only in certain exceptional situation where although in letter and spirit, the exact words had not been used but readiness and willingness can be culled out from reading all the averments made in the plaint as a whole coupled with the materials brought on record at the trial of the suit, to the said effect, the statutory requirement of Section 16(c) of the Specific Relief Act may be held to have been complied with.

24. In Mst. Sugani v. Rameshwar Das and Anr. AIR 2006SCW 2606: 2006 (3) AWC 2392 (SC), the Supreme Court after considering a number of its earlier decisions including Syed Dastagir (supra) ; Motilal Jain (supra) ; and Chandiook (supra), observed as follows:

The basic principle behind Section 16(c) read with Explanation (ii) is that any person seeking benefit of the specific performance of contract must manifest that his conduct has been blemishless throughout entitling him to the specific relief. The provision imposes a personal bar. The Court is to grant relief on the basis of the conduct of the person seeking relief. If the pleadings manifest that the conduct of the Plaintiff entitles him to get the relief on perusal of the plaint he should not be denied the relief.

25. A learned Judge of this Court in Mohammad Yaqub (since deceased by L.Rs. ) and [Jitendra Kumar Sharma and Others Vs. State of U.P., Director General, Medical of Education and Training, Govt. of U.P., Director, Sanjai Gandhi Post Graduate Institute of Medical Sciences and Director, U.P. Rural Institute of Medical Sciences and Research](#), observed as follows:

Coming to the facts of the case I find that it was clearly pleaded by the Appellant that on 12.11.1969 the Defendant got possession of the portion agreed to be sold to the Plaintiff. The Plaintiff made several requests for execution of the sale-deed,

which were avoided by the Defendant on which a registered notice was sent on 9.3.1970 fixing 26.3.1970 for execution but before the date could arrive, the Defendant by her reply dated 11.3.1970 denied the execution agreement giving rise to the suit on 2.4.1970. The Plaintiff then entered the witness box and clearly stated that he was ready and willing to perform his part of the contract and was always prepare to pay the balance sale consideration and execute registered document for sale.

The averment in the plaint and the conduct of the parties clearly proved that the Plaintiff was ready and willing to perform the part of the contract. The strict requirement in law in pleading is no longer necessary. The Court has to read the plaint and other material and to find the intention of the parties. When the Court finds that the Plaintiff has been ready and willing to perform his part of the contract and that the Defendant denies the execution of agreement itself, which is then proved by admissible evidence, the Court could be acting within its discretion to grant the decree for specific performance of contract.

26. In Smt. Katori Devi (supra) a learned Judge of this Court observed:

It was next argued that it is not equitable to grant specific performance because ingredients of Section 16(1)(c) of the Specific Relief Act are not made out. I again do not find force in this contention. The readiness and willingness on the part of the Plaintiffs to perform their part of obligation under the agreement is to be found in para 15 of the plaint and there is specific statement of Mata Prasad PW-3 who is one of the Plaintiffs. He has stated in the end of his cross-examination that he was always ready and willing and was also ready and willing on the date on which his statement was recorded to get the sale-deed executed. The evidence on record and his conduct of moving the Sub Registrar for registration of the sale-deed and on refusal, moving the Registrar for registration of the sale-deed further establishes his readiness and willingness to get the sale-deed registered at all times. There was thus effective compliance of Section 16(1)(c) of the Specific Relief Act.

27. From the aforesaid decisions it is clear that readiness and willingness cannot be treated as a straitjacket formula and it has to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the party. To gather the true spirit behind a plea relevant to readiness and willingness to perform the contract, it should be read as a whole and compliance has to be in spirit and substance and not in letter and form. Any person seeking the benefit of the specific performance of the contract must manifest that his conduct has been blemishless throughout entitling him to the specific relief and if the pleadings manifest that the conduct of the Plaintiff entitles him to get the relief on perusal of the plaint he should not be denied the relief.

28. In the present case there was a specific statement made in the plaint that the Plaintiff has always been ready and willing and is still ready and willing to perform

the essential terms of the contract. She had also given notice to the Defendant to reach the office of the Sub-Registrar on 11.2.1980 for executing the sale-deed and on that date she remained present in the office but the Defendant did not turn up. On behalf of the Plaintiff PW 2, Sri Raja Ram husband of the Plaintiff appeared in the witness box. He clearly stated that the Plaintiff was throughout ready and willing to perform her part of the contract and a notice to the said effect was also sent to the Defendant for getting the sale-deed executed in the office of the Sub-Registrar on 11th February, 1980, and though he went to the office of the Sub-Registrar on 11th February, 1980, along with the Plaintiff and necessary money for execution of the sale-deed but the Defendant did not turn up to execute the sale-deed. The notice dated 5th February, 1980, that had been sent to the Defendant and which was marked as Exhibit-8 clearly mentions about the agreement and the giving of Rs. 9,520 as earnest money and the fact that the Plaintiff had throughout been ready and willing to perform her part of the contract but the Defendant kept avoiding it and, therefore, called upon the Defendant to execute the sale-deed in the Sub-Registrar office on 11th February, 1980, after receiving the balance amount of Rs. 3,480. The aforesaid facts clearly show that the Plaintiff had throughout been ready and willing to perform her part of the contract. This has also what was held by the trial court. This finding was not even challenged by the Defendant in the civil appeal.

29. The contention of the learned Counsel for the Appellant, however, is that the Plaintiff has been ready and willing to perform the essential terms of the contract till the date of the execution of the decree and for this he has placed reliance upon the decision of the Supreme Court in *N. P. Thirugnanam (supra)* and *Jugraj Singh (supra)*.

In *N. P. Thirugnanam (supra)*, the Supreme Court observed:

..... 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 the 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 stated, the factum of his readiness and willingness 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 contract.

30. In Jugraj Singh and Anr. (supra), the Supreme Court observed:

Section 16(c) of the Specific Relief Act, 1963, provides that the Plaintiff must plead and prove that he has always been ready and willing to perform his part of the essential terms of the contract. 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.

31. Both the aforesaid decisions hold that continuance of readiness and willingness on the part of the Plaintiff is a condition precedent for grant of the relief for specific performance and that the substance of the matter and the surrounding circumstances and the conduct of the Plaintiff must be taken into consideration in adjudging the readiness and willingness on the part of the Plaintiff to perform his part of the contract. As seen above, the Plaintiff had not only pleaded that he was throughout ready and willing to perform the essential terms of the contract but had also proved the same by documentary and oral evidence. The said decisions, therefore, do not help the Appellant.

32. It must also be emphasised that the Appellant had even denied that the agreement that had been executed and registered was an agreement to sell as in the written statement he came out with a case that the agreement was in respect of some loan that he had taken from the husband of the Plaintiff.

33. The next contention of the learned Counsel for the Appellant is that the agreement had not been executed out of freewill as the Defendant was required to deposit the second installment of Rs. 6,000 for repayment of the loan and so was compelled to enter into the agreement and that the agreement was unconscionable as it gave unfair advantage to the Plaintiff since the agreement for sale of the property was for Rs. 13,000 whereas the said property had been purchased three months back in the auction for Rs. 20,000. In support of his contention he has relied upon the decisions given in [Shib Kumar Banerjee Vs. Rasul Bux, Madamsetty Satyanarayana Vs. G. Yelloji Rao and Others](#), Vuppalapati Butchiraju and Anr. v. Rajah Sri Ranga Satyanarayana Ram Chandra Venkata Narasimha Bhupala Bhalavayunim Varu and Ors. AIR 1967 AP 69 ; [Parakunnan Veetill Joseph's Vs. Nedumbara Kuruvila's and Ors](#), and [Gobind Ram Vs. Gian Chand](#),

34. Learned Counsel for the Respondents, however, submitted that only a bald statement had been made in paragraph 8 of the written-statement that the transaction was unconscionable but no details had been given and the whole emphasis in the written-statement was on the fact that the agreement for sale of

the property had not been executed at all and that the husband of the Plaintiff Raja Ram had taken the Defendant to the office of the Sub-Registrar on the pretext of executing the documents in respect of the aforesaid loan. He further submitted that no issue was framed whether the Plaintiff was entitled to the discretionary relief of specific performance and therefore, such a plea cannot be raised. In support of his contention he has placed reliance upon the decision of this Court in Ram Dhan v. Kalu Ram, 1996 ACJ 1177; Leela v. Smt. Mukanda and Ors. 1997 ACJ 1104 and the decision of the Supreme Court in Sarita Rani v. Deepak Raj and Ors. JT 2000 (10) SC 270: 2000 (4) AWC 3065 (SC).

35. Section 20 of the Act provides that the jurisdiction to decree the specific performance is discretionary and the same is quoted below:

Discretion as to decreeing specific performance.-(1) The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so ; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal.

(2) The following are cases in which the Court may properly exercise discretion not to decree specific performance-

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the Plaintiff an unfair advantage over the Defendant ; or (b) where the performance of the contract would involve some hardship on the Defendant which he did not foresee, whereas its non-performance would involve no such hardship on the Plaintiff ;

(c) where the Defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation 1. - Mere inadequacy of consideration, or the mere fact that the contract is onerous to the Defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of Clause (a) or hardship within the meaning of Clause (b).

Explanation 2.-The question whether the performance of a contract would involve hardship on the Defendant within the meaning of Clause (b) shall, except in cases where the hardship has resulted from any act of the Plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

(3) The Court may properly exercise discretion to decree specific performance in any case where the Plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The Court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party.

36. Section 20(2) of the Act provides for the conditions under which the Court may properly exercise discretion not to decree for specific performance. The first condition is where the terms of the contract or the conduct of the parties at the time of entering into the contract or other circumstances under which the contract was entered into are such that it gives the Plaintiff an unfair advantage over the Defendant while the second condition is where the performance of the contract would involve some hardship on the Defendant which he did not foresee. Explanation 1, however, provides that mere inadequacy of consideration should not be deemed to constitute an unfair advantage or hardship. Thus, this contention of the learned Counsel for the Appellant cannot be accepted as inadequacy of consideration is not a ground for denying the relief of specific performance.

37. The contention of the learned senior counsel for the Appellant that has now to be examined is whether the Appellant entered into the contract under circumstances which makes it inequitable to enforce specific performance. He contended that if the agreement of sale was in circumstances of great distress and tension and the property was agreed to be sold for an inadequate price, the Court will not make any order for specific performance. According to him as the parties were not on equal terms and the agreement was unconscionable and oppressive, specific performance should be refused.

38. It was for the Defendant to have pleaded and proved the aforesaid facts for persuading the Court not to exercise the discretion in decreeing specific performance. However, in the present case only a bald statement was made in paragraph 8 of the written statement that the transaction was unconscionable and no issue was framed as to whether the Court should not decree specific performance as it was discretionary. Even evidence, either oral or documentary, was not led before the trial court by the Defendant that the agreement was unconscionable. It is only by way of argument before the appellate court that it was submitted that the transaction was unconscionable and it gave unfair advantage to the Plaintiff. This submission was also rejected by the appellate court holding that no undue and unfair advantage had been taken off by the Plaintiff.

39. The cases cited by the learned Counsel for the Appellants have no application in the present case because no such issue was framed before the trial court and no such evidence was led to support this plea.

40. The Supreme Court in *Akbar Ali v. Vinod Khanna and Anr.* AIR 2004 SCW 4387: 2004 (3) AWC 2603 (SC), observed:

The only contention raised by him is that the agreement was unconscionable as the price of land at the time of the alleged agreement to sell was more than 20 lakhs and the Appellant is being deprived of his valuable land for a petty amount. On

perusal of the written statement filed by the Appellant in the trial court we find that no such plea was raised in the written-statement. No issue was framed. No evidence was led by the Appellant to prove that the market price of the land was Rs. 20 lakhs as argued before us. In the absence of plea having been raised or an issue framed or evidence led on the point, we are unable to hold that the agreement to sell was unconscionable.

41. The Supreme Court in the case of AIR 2002 SC 2385 observed as follows:

Further, no issue was framed that Plaintiff-Respondent could be compensated in terms of money in lieu of the decree for specific performance. In the absence of such a plea and issue, we are not inclined to entertain the argument of the learned Counsel for the Appellants raised for the first time.

42. In *Sarita Rani (supra)*, the Supreme Court observed:

On the second question there was neither any plea nor proof that Defendant-vendor suffered hardship as a result of the sale being asked to be specifically performed. When the plea of hardship had not been raised by the party concerned, examination of the provisions of Section 20(2)(b) of the Specific Relief Act would not arise at all. When the party concerned did not raise this plea as to how the Court could imagine it might result in hardship to the party concerned, is beyond our comprehension. We set aside the order of the order of the High Court and restore that of the first appellate court. The appeal is allowed accordingly.

43. In *Leela (supra)*, a learned Judge of this Court observed:

So far as the Clauses (a) and (b) of Sub-section (2) of Section 20 of the Act are concerned, it is well settled that the question of hardship must be judged as on the date of transaction or when the transaction was entered into. The Defendant knew at the time when it entered into the agreement to sell that he was disposing of his land which is his sole source of livelihood. He has, therefore, knowingly executed the said deed after obtaining a substantial amount as consideration from the Plaintiff. Subsequently, when the suit for specific performance was filed by the Plaintiff the Defendant had first denied the execution of the deed and subsequently by means of an amendment had got incorporated the vague plea that he shall be suffering hardship in case he has to execute the sale-deed in respect of the land in question.

44. In *Ram Dhan (supra)*, a learned Judge of this Court observed:

In the case at our hand, as indicated above, the Defendant had not taken any plea of hardship in the written-statement. When a Court had to give a judgment passing on a legal principle, the Court is required to see if the conditions for application of the legal principles are present. For application of Section 20(2)(b) of the Specific Relief Act, specific performance of an agreement could be refused on proof that it would lead to hardship on the Defendant which he did not foresee. This hardship would be inferred from proof of certain facts and no fact could be proved in a civil

proceedings unless the same is pleaded. In fact, the question of hardship was not an issue before the Court itself and the Court could not have come to a finding on that point to give a relief to the Defendant on that ground.

45. Thus, this contention of the learned Counsel for the Appellant cannot also be accepted.

46. There is, therefore, no merit in this second appeal. It is, accordingly, dismissed.