
(2003) 04 CAL CK 0001

Calcutta High Court

Case No: C.O. No. 3196 of 2002

Mira Rani Dutta

APPELLANT

Vs

Snehalata Saraf and Others

RESPONDENT

Date of Decision: April 17, 2003

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 12 Rule 6, Order 23 Rule 3, Order 6 Rule 17
- Specific Relief Act, 1963 - Section 10, 16, 16(c), 20

Citation: 107 CWN 1101

Hon'ble Judges: D.K. Seth, J

Bench: Single Bench

Advocate: S.P. Roy Chowdhury and Jiban Ratan Chatterjee, for the Appellant; Sudhis Dasgupta, Pritibhusan Chakraborty and Biswajit Basu, for the Respondent

Judgement

D.K. Seth, J.

The first appeal is directed against a judgment and decree dated 12th March, 1998 passed by the learned Civil Judge (Senior Division), 2nd Court, Barasat in Title Suit No. 252 of 1993, granting the relief of specific performance of contract.

Plaint Case:

The plaint case, inter alia, was that the suit property described in the schedule to the plaint belonged to the defendant No. 1 who agreed to sell the property to the plaintiff at a consideration of Rs. 20,000/- per cottah. The plaintiff accepted her offer and advanced an earnest money of Rs. 10,000/- on 7th January, 1992 to the defendant No. 1. It was settled that the sale was to be completed by January, 1992. In January, 1992, the plaintiff paid a further sum of Rs. 30,000/- to the defendant No. 1. The time for completing the sale was extended till December, 1993. The plaintiff tendered the balance consideration and requested to execute and register the deed in respect of the property. But the defendant failed and neglected to perform her part of the contract, therefore, the suit.

Defence Case:

2. It appears that the defendants No. 2 and 3 had got themselves added as "party to the suit on the plea that they had entered into an agreement for sale with the defendant No. 1 after the expiry of the time for completing the agreement for sale between the plaintiff and the defendant No. 1. The defendant No. 1 appeared through her lawyer, but did not file any written statement. The defendants No. 2 and 3, however, filed their written statement denying the right of the plaintiff to obtain specific performance of the contract for sale.

The Hearing:

3. Though the defendant No. 1 did not file written statement but had cross-examined the plaintiffs witnesses. It appears that the plaintiffs witnesses were not cross-examined on behalf of defendant No. 2 and 3. The plaintiff had examined only one witness, viz. P. W. 1, her husband. It further appears that after, the examination of P. W. 1 was over on 20th February, 1998, he was recalled on 9th March, 1998 and was examined and cross-examined.

The Amendments:

4. There were two applications for amendment under Order 6 Rule 17 CPC (CPC). One was filed on 22nd July. 1936 and the other was filed on 20th February. 1998. Having been recalled, the P.W. 1 had referred to a letter addressed by the defendant No. 1 to the plaintiff on 25th March, 1996 signifying her readiness and willingness to perform her part by executing the deed of conveyance on receipt of the balance consideration. This recalling was allowed after the plaint was amended on the basis of an application under Order 6 Rule 17 filed on 20th February, 1998. which was allowed on the same date by which the fact of addressing the letter dated 25th March, 1996 by the defendant No. 1 to the plaintiff was sought to be brought on record.

Submission on behalf of the defendant No. 1 /appellant:

5. Mr. Roy Chowdhury, learned Counsel appearing with Mr. Jiban Ratan Chatterjee for the defendant No. 1 /appellant contended that the defendant No. 1 has filed a suit for declaration that the decree was obtained by fraud and the same is pending hearing. Therefore, he prayed that he may be permitted to address the court and pursue this appeal without prejudice to the rights and contention of defendant No. 1 as the plaintiff in the pending suit and seeks for an observation from the Court that the judgment on this appeal will not prejudice the appellant's right in the pending suit filed subsequently. He had also contended that he will not address the court on the question which will have an effect of pre-empting the issue involved in the subsequent suit, now pending between the parties.

5.1. On merit Mr. Roy Chowdhury had contended that there are materials to show that the plaintiff was not ready and willing to perform his part of the contract

though It was so pleaded in the plaint in terms of Explanation (ii) of Section 16(c) of the Specific Relief Act (SR Act). Unless the plaintiff is ready and willing and by reason of such readiness and willingness keeps the agreement valid and subsisting till the date of decree the plaintiff cannot succeed. From the conduct of the plaintiff, it appears that he was not ready and willing to perform his part of the contract He then contends that the circumstances under which the said letter dated 25th March, 1996 (Ext. 3) was brought on record is not free from suspicion. On the basis of the said letter, the plaintiff could have asked for a decree on admission or he could have gone straight for filing a compromise petition. It is also pointed out by him that having regard to the situation of the property it could not have been valued at the price of Rupees three lacs which was at least five times more than that even at the time of the agreement. Pointing out to the alternative prayer made in the plaint of damages, he contended that the plaintiff at best, if presumed to have proved his case, could get the alternative relief. Relying on Section 20 of the SR Act, he pointed out that it is at the discretion of the Court to grant appropriate relief having regard to the facts and circumstances of the case. Mr. Roy Chowdhury had also pointed out that in such a case even if the court feels like granting a decree for specific performance, it should have considered all facts and circumstances of the case and the motive behind the litigation. The specific performance is not automatic and it depends on the discretion of the court, which has to consider whether it would be fair, just and equitable guided by the principle of justice, equity and good conscience. It may also take note of the escalation of the price. Relying on the decision in [Gobind Ram Vs. Gian Chand](#), , he supported his above contention and contended that this is a case where if the court grants a decree for specific performance, in that event, in view of the escalation in price, the consideration should be enhanced.

Submission on behalf of the plaintiff/respondent:

6. Mr. Sudhis Dasgupta, learned Counsel appearing with Mr. Pritibhusan Chakraborty and Mr. Biswajit Basu on behalf of the respondent, contends that the defendant No. 1 did not file any written statement and had never made out any case that the plaintiff was not ready and willing. The suggestion on which Mr. Roy Chowdhury had banked upon was on the basis that if a decree is passed, he can pay the consideration, which was answered that she can do it within two months. According to Mr. Dasgupta that has to be construed having regard to the subsequent cross-examination where P.W. 1 has pointed out that the plaintiff is ready and willing to perform his part of the contract This cannot be read in isolation. Even then a proper text of the said submission made earlier would mean that he was ready and willing to pay immediately and outer limit was indicated as two months. Relying on a passage from Indian Contract and Specific Relief Acts by Pollock & Mulla, 11th Edition (1994) by R. K. Abichandani Vol. II page 1287, he contended that the readiness and willingness is to be inferred from the facts and circumstances of the case having due care with regard to the conduct of the parties.

It does not mean that the plaintiff should have handed over the amount of necessary money during the existence "of the contract, but it is a question of preparedness in order to fulfill the obligation and accept the performance in order to keep the contract subsisting. It is not necessary either to tender the money or to deposit the same in court. It is not the money, but the conduct or act of being prepared to perform the part of the contract, which is material. In support, he relied on a decision of this court in *Sk. Roushan Ali alias Anwar vs. Jaji Abdul Jalil* 2001(3) CHN 216(DB), particularly on paras 18 and 19 where comments of Pollock and Mulla, referred to above, was quoted. He has also relied on a decision in [Shafiq Ahmad Vs. Smt. Sayeedan,](#) to support his contention. He also relied on a decision of the Privy Council in AIR 1950 90 (Privy Council) and contended that the readiness and willingness did not mean that one should be ready with the money. But. it is the willingness to purchase that has to be proved as was done in the present case.

6.1. On the question of alternative relief, he contends relying on Section 10 of the SR Act that in the circumstances specified therein the court has to presume readiness and willingness and grant the relief of specific performance in respect of the sale of the movable property. The court cannot be guided by any other principle where it is otherwise proved that there was an agreement and the plaintiff is ready and willing to perform his part of the contract. Relying on the explanation, he contends that inadequacy of price or other materials is not a consideration for denying the relief. He has also contended that the question is to be looked into from the fact that the defendant No. 1 has never contested the suit On the question of the judgment on admission he points out that the defendants No. 2 and 3 having been there as parties complete relief could not be had by passing a decree of Judgment on admission against the defendant No. 1. According to him, the jurisdiction of the court in passing a judgment on admission is discretionary and as such, it cannot be a ground for denying the relief. So far as the question of compromise is concerned, he said that it is the dependant on the agreement by and between the parties; if one of the parties did not agree then there could not be any question of compromise and as such, it will also not affect the present appeal as contended by Mr. Roy Chowdhury. He lastly contends that the court cannot make any observation with regard to the subsequent suit, filed by the appellant now pending in the court, since it is wholly outside the scope of the present appeal. Therefore, the court should refrain from making any observation with regard thereto.

The Question :

7. After having heard the respective counsel for the parties for days together, we find that the principal question that is to be determined is as to whether in the facts and circumstances of the case the decree for specific performance of contract is to be granted or the court should have exercised its discretion for granting alternative relief having regard to the facts and circumstances of the case.

Readiness and Willingness:

8. In order to appreciate the situation, we may first deal with the facts of the case to the extent as would be necessary for our purpose. We have already narrated the facts hereinbefore. It appears from the cross-examination of P.W. 1 at page 30 of the Paper Book that he had stated-"If the suit is decreed I shall be able to pay the balance consideration of Rs. 2,60,000/- within two months." At page 36 of the Paper Book in cross-examination upon being recalled P.W. 1 had stated - The fact that we are ready to pay the balance consideration of Rs. 2,60,000/-". Thus it appears that at one point of time P.W. 1 says that he would be able to pay the balance consideration within two months after the decree is passed. It is not a question that he is not ready and willing, but it is a question of his ability to pay, which might be related to the state of his preparedness to perform the contract. This appears to have been repaired at a subsequent stage by recalling P.W. 1. Therefore, we may consider this aspect for the purpose of exercising our discretion. But, it is a question as to whether these two statements can be reconciled. If the earlier statement can be interpreted in a manner which would ensure to the benefit of the person deposing, then it is to be interpreted having regard to the subsequent statement to the benefit of such party on whose behalf such statement is made. Therefore, we may conclude that the plaintiff may be prepared or ready and willing as has been rightly pointed out by Mr. Dasgupta that readiness and willingness is not dependant on the fact being ready with the money for all time to come during which specific performance of contract is being asked for. It is only a state of preparedness, as was held by Privy Council in the case of AIR 1950 90 (Privy Council) . In the said decision, it was observed that: "But in order to prove himself ready and willing a purchaser has not necessarily to produce the money or to vouch a concluded scheme for financing the transaction. The question is one of fact and in the present case the appellate court had ample material on which to found the view it reached."

8.1. In Pollock & Mulla's Indian Contract & Specific Relief Acts, the observation made at page 1287 also supports the same proposition which records: "But to prove readiness and willingness a purchaser has not necessarily to produce the money or vouch a concluded scheme for financing the transaction. Failure to find money or prove possession of money before time for performance cannot entitle the vendor to refuse performance."

8.2. The above observation was also quoted by this court in the decision in Sk. Roushan Ali alias Anwar vs. Kaji Abdul Jalil, 2001 (3) CHN 216. Similar view was also taken to the case of [Shafiq Ahmad Vs. Smt. Sayeedan](#), . The legal proposition with regard to the said finding is already settled.

Readiness and Willingness can be questioned without filing written statement:

9. Mr. Dasgupta pointed out that the defendant No. 1 is not entitled to raise the question of absence of readiness and willingness of the plaintiff, since the defendant No. 1 has not filed any written statement raising any such question. This contention cannot be sustained on three grounds. First, the fact remains that the

suit was decreed on contest and not ex parte. Even in an appeal against a decree passed ex parte question of facts and law can be challenged on the basis of the materials on record. Secondly, there was cross-examination on behalf of the defendant No. 1 on these points. Thirdly, in a suit for specific performance, in view of Section 16(c) SR Act. the plaintiff has not only to aver in the pleading but also to prove that he was always ready and willing. Therefore, the plaintiff can succeed, if he has averred to his continuous readiness and willingness, and is then able to prove the same.

How far the plaintiff was able to establish his case:.

10. This question has to be looked into from the stand point of the facts and materials available on record. Admittedly, in the present case, Ext. 3 was never produced earlier than 20th February, 1998. On the said date, an application for amendment was filed. The alleged letter was addressed on 25th March, 1996. On 22nd July, 1996, an application for amendment was made by the plaintiff. In the said application despite the existence of Ext. 3, the same was not sought to be brought on record nor was it pleaded therein. Whereas, this application was made only after the examination and cross-examination of P.W. 1 was over and after the amendment was made on the same date on which it was filed. P.W. 1 was recalled and further examined on the same document. This fact discloses that there might be something suspicious. This court while deciding the appeal can look into the same for the purpose of deciding the question of readiness and willingness. This may also be a sufficient ground that may weigh with the court in order to exercise its discretion to grant specific relief within the meaning of Section 20 of the SR Act.

10.1. We may also note that in the examination- in -chief about Ext. 1 P.W. 1 had stated, as it appears from page 26, that the husband of " defendant No. 1 was also present at the time when Ext. 1 was typed and that the defendant No. 1 had put her signature in presence of her husband. Similar statement was made with regard to Ext. 2 that the husband of defendant No. 1 was present which, however, was alleged to have contained the signature of the husband of the defendant No. 1. Whereas at page 32 in cross-examination of PW.1. the company of the husband of defendant No. 1 at the time of typing out Ext. 1 was given a go-bye and one Khokan Dutta was introduced to accompany PW. 1. The husband of defendant No. 1 was, however, retained with regard to Ext 2. Thus it raises a doubt in the mind of the Court as to the veracity of the statement of P.W. 1 with regard to Ext. 1, in respect of which he makes two different statements. Be that as it may, this cannot be sufficient to reverse the decision. But still this may be one of the factors to be taken into consideration for the purpose of granting the alternative relief.

10.2. The question that the plaintiff could have asked for a decree on admission is also a factor to be weighed with for the purpose of finding out readiness and willingness as also for exercising such jurisdiction in terms of Section 20 of the SR Act. However, as rightly contended by Mr. Dasgupta the passing of judgment on

admission is a discretion of the court. True, Order 12 Rule 6 CPC makes it discretionary. It appears from the record that defendants No. 2 and 3 had filed written statement. But had never cross-examined the plaintiff. In effect, they did not contest the suit. Therefore, there could not have been any bar in obtaining decree on admission or on compromise. Whether decree could have been passed or not could be decided only if such step was taken. The fact remains no such step was taken though it was available on the basis of the material that at a subsequent stage it was open to the plaintiff to take advantage of such a situation under Order 12 Rule 6 or Order 23 Rule 3 CPC. But no such step was taken after 25th March, 1996. The date of receipt of Ext. 3 was never mentioned by P. W. 1. Therefore, it is to be presumed that it was received around 25th March, 1996 or in its close proximity. The expression used in Ext. 3 clearly shows that it was possible to enter into a compromise. But then it was upto the parties to enter into a compromise or not. Even a judgment on admission could have been asked for. It was the plaintiffs option to apply.

How far the plaintiff was ready and willing:

11. Ext. 3 provided that the defendant No. 1 was ready and willing to perform her part of the contract. It was open to the plaintiff to accept the same immediately, since Ext. 3 pointed out that it should have been done earlier. There is no averment made by P.W. 1 that after having written Ext 3, defendant No. 1 had refused to perform her part of the contract at any point of time. It was said that the plaintiff was ready and willing to perform her part of the contract, but nothing has been said as to why it was not performed after Ext. 3 till the amendment was brought on 20th February, 1998 and the decree was obtained. No explanation has been given as to why, despite receipt of Ext. 3, the plaintiff did not perform her part of the contract and waited for the decree for about 2 years. Even on 21st January. 1998, the P.W. 1 deposed in the cross-examination that he will be able to pay the balance consideration within 2 months. This clearly shows, assuming the genuineness of Ext 3, that the plaintiff was not ready and willing after receipt of Ext, 3 till 9th March, 1998 when the P.W. 1 was recalled and examined.

11.1. On facts, it appears that despite Exhibit 3 having been dated 25th March, 1996, the same was not incorporated in the pleading, though an application under Order 6 Rule 17 CPC was filed on 22nd July. 1996. Be that as it may. In spite of receipt of the said letter contained in Exhibit 3, there is nothing on record to show that plaintiff had ever expressed his readiness and willingness to agree with the said Exhibit 3 from 25th March, 1996 till 20th February, 1998, which is almost two years during which it does not appear that the plaintiff had ever expressed any readiness and willingness to perform his part of the contract.

11.2 The preparedness must be a continuous one even though it may not be showing of the colour of the money but still it must be a state of preparedness by reasonable conduct of the party by gesture or by action. There having been no

materials to show that after having addressed the letter dated 25th March, 1999, defendant No. 1 had ever expressed her unwillingness to perform her part of the contract. From Ext. 3, it appears that she was always ready and willing. On the other hand, it appears that the plaintiff was guilty of delay or laches in performing her part of the contract in terms of Exhibit 3. In view of such materials, this can be inferred to mean that despite having the opportunity of complying with the same, the plaintiff did not do so till 20th February, 1998 almost for two years. Thus it appears, during this period, plaintiff has not been able to establish her preparedness to perform her part of the contract.

11.3. True, as rightly contended by Mr. Dasgupta, the readiness and willingness is to be inferred from the conduct of the parties relying on the materials available on record. It is a state of preparedness. The state of preparedness can be judged from the conduct of the parties and it must continue throughout the period. Plaintiff had been pursuing her remedy through the suit. During the pendency of the suit, she must remain prepared as soon as the opportunity, is available. In fact, this opportunity the plaintiff did not avail of. This goes against the plaintiff in the matter of her preparedness. The decision cited by Mr. Dasgupta does not help us in view of the distinguishing features as is apparent from the facts disclosed above.

Section 20 SR Act : Discretion:

12. Be that as it may, even if we may not consider this aspect of the matter as sufficient to reverse the decision, yet, this can at best be a consideration for exercising discretion u/s 20 of the SR Act.

12.1. Section 10 of the SR Act provides the cases where specific performance is permissible. In the explanation, it has been provided that until contrary is proved, the court shall presume that the breach of contract to transfer immovable property cannot be adequately relieved by compensation and money. But, at the same time, Section 16 of the said Act provides that in such a case, it is to be averred in terms of clause(c) thereof that the plaintiff is ready and willing to perform the essential part of the contract. Explanation to clause (c) makes it clear and provides that it is not essential that money is to be tendered to the defendant or deposited in court until directed by the court But it is to be proved that the plaintiff was ready and willing to perform, according to the true consideration of the term. In the plaint it is to be averred and in the proceedings it is to be proved that such readiness and willingness continued throughout till the date when the decree is passed. Therefore, It has to be proved on evidence that the plaintiff was ready and willing on the date when the decree is being passed and that he had remained so ready and willing all through. In case despite having opportunity plaintiff fails to avail of the same and does not show that he was ready and willing, then it may be presumed that he was not ready and willing at that point of time.

12.2. Section 20 of the SR Act makes the relief a discretion of the court. It provides that it is not necessary that the court is bound to grant such relief merely because it is lawful to do so. At its discretion, which is not arbitrary but is based on sound reasonable ground and guided by judicial principles, the court may grant specific performance or grant alternative relief. Sub-Section(2) provides the cases where such discretion is exercised Mere inadequacy of consideration or unfair advantage or hardship in cases explained in explanations I and II would not be a ground for exercising Such discretion. However, in this case, neither inadequacy nor unfair advantage nor hardship has been pleaded by the defendant No. 1. The conducts of the parties show that there are sufficient ground where grant of specific performance would not be justifiable, particularly, in view of the fact that the plaintiff had been unable to prove that he was ready and willing in between the period 25th March, 1996 and 20th February, 1998.

12.3. Where, in a suit for specific performance, it appears that the plaintiff has not been able to make out a ground for grant of the relief of specific performance on any one of the grounds, which disentitles the plaintiff to obtain specific performance of the contract. It is not necessary that the suit is to be dismissed. In such a case, the court, instead of dismissing the suit, should grant relief in the form of damages provided the payment of money is proved. On the principle that no one can take advantage of his own wrong nor one is permitted to take unfair advantage of a contract, the defendant cannot retain the consideration when the specific performance is refused, except in cases containing forfeiture clause, depending on the facts of each case. He is bound to refund the same. Since he has enjoyed the benefit of the money received and retained by him, he is liable to pay interest. If it appears that it is justified that the plaintiff should get additional damages, provided on record it is proved and found that the plaintiff had suffered losses or damages in connection with the contract on account of any conduct on the part of the defendant. Similar is also true in a case where the defendant suffers loss or damages and in such cases such losses or damages are required to be adjusted and balanced between the parties. The question is dependent on the proved facts in each case in given circumstances. The court has to weigh to materials and come to a conclusion for exercising the discretion of the court, not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

12.4. The court in a suit for specific performance must not confine itself to the consideration of the terms of the contract. It must look to the conduct of the plaintiff and try to administer justice between man and man. There may be cases, where, although there was no intrinsic defect in the contract itself, yet, by reason of some defect in the conduct of the plaintiff in relation to the contract, a personal bar is created in equity to enforcing it; such as: (1) if the plaintiff has disregarded his obligation, the court will not interfere on his behalf; (2) if the plaintiff has forfeited his rights under the contract by his conduct in respect of his obligation towards the

defendant, namely, had violated an essential term of the contract that on his part remains to be performed; or (3) if he may have done acts in contravention of or at variance with the contract, tending to subvert the relation established by it [Srish Chandra vs. Banomali Rai 8 CWN 594: ILR 31 Cal 584 (PCM: or (4) if he has refused to fulfill some stipulation on his part which relates to the contract and which was a part of the inducement to it [Australian Hardwoods Ptg. Limited vs. Commissioner of Railways, (1961) 1 All. ER 737). The facts with which the plaintiff is charged might either be omission or commission. While exercising its discretion, the court must keep in mind the conduct of the plaintiff and the circumstances outside the contract itself, since circumstances of a valid contract is not a circumstance that is conclusive in favour of the plaintiff. Though discretionary, the jurisdiction of the court must be exercised on sound and reasonable ground guided by judicial principles, keeping in mind the circumstances in each case. The conduct of the plaintiff is also an important element for consideration [[Bishwanath Prasad Verma Vs. Bhagwat Pandey and Another](#),). In this case, by his conduct the plaintiff had shown that he was ever ready and willing at least in between 25th March, 1996 till 20th February, 1998.

12.5. The decision in [Gobind Ram Vs. Gian Chand](#), rendered say the Apex Court has drawn a new line. There it is held that it is a settled position of law that grant of a decree for specific performance of contract is not automatic. It is one of the discretions of the court. The court has to consider whether it will be fair, just and equitable. The court is guided by principle of Justice, equity and good conscience. In P.V. Joseph's Son Mathew. it was held that the court should meticulously consider all facts and circumstances of the case. The motive behind the litigation should also be considered. In Govind Ram (supra), the Apex Court on facts found that the appellant was trying to wriggle out of the contract on account of escalation of prices, when the plaintiff/respondent was found to be ready and willing. It was further found that plaintiff/respondent had not taken any unfair advantage. While coming to the above conclusion, the court had noted that the respondent deposited the balance of the consideration in the trial court and also the amount in the High Court, as directed, in order to mitigate the hardship, the Apex Court directed the respondent to pay a further sum of Rs. 3,00,000/- to the appellant/vendor.

12.6. Thus, it appears that the court has a discretion even to enhance the price when there has been escalation. Admittedly, there must be escalation in the price. That has not been brought on record but yet of its own the court can take notice of escalation. But then, in the present case, the conduct of the plaintiff, as we have seen, does not permit us to grant relief of specific performance, but to convert it into one of alternative relief of damages. The decision cited by Mr. Dasgupta in AIR 1950 90 (Privy Council) , does not help us in view of the fact that in the said decision the court found on fact that the plaintiff in the said suit was ready and willing which was concurred by the Privy Council.

Conclusion:

13. In the facts and circumstances of this case as discussed above, we find that the conduct of the plaintiff shows that she was not ready and willing to perform her part of the contract, namely, with regard to the making of the payment. There is no evidence to show that the plaintiff had even tendered or offered to pay the consideration. It is not only that she has to state in the pleading that she was always ready and willing, but she has to prove that she had always been ready and willing till the decree is passed. We have found that in between 25th March, 1996 and 20th February, 1998 the plaintiff was not ready and willing to perform her part of the contract. On 20th February even it is stated on behalf of the plaintiff that If a decree is passed then she would be able to pay the consideration within two months. It was not said that the plaintiff was ready and willing to pay even now. It is not a case of readiness and willingness if a decree is passed then she would require some time, namely, two months. Therefore, the plaintiff is not entitled to a decree for specific performance. But the relief cannot be altogether denied to her since she had parted with a part of the money. Therefore, she is entitled to the alternative relief of damages. Having regard to the facts and circumstances of the case, we assess the same at an amount equivalent to the advance made together with interest as directed hereafter.

Order:

14. In the circumstances, the Judgment and decree dated 12th March, 1998 passed by the learned Civil Judge (Senior Division), 2nd Court, Barasat in Title Suit No. 252 of 1993, is modified by granting the alternative relief of damages. Let the decree be modified to a decree of damages and the suit be and the same is decreed for a sum of Rs. 40,000/- as damages together with interest at the rate of 12% (simple) per annum payable from the date of payment thereof till the date of this decree on the said sum to be decided in a separate proceeding in the suit by the learned Trial Court upon payment of proper court fees. The plaintiff shall also be entitled to interest @ 12% (simple) per annum on the decretal amount from the date of this decree till payment or deposit in court, as the case may be. The decree for specific performance is set aside and substituted by a decree for damages as specified above. The decree appealed against stands modified to the extent as above. The appeal is thus disposed of. There will be no order as to costs.