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AJAIB SINGH AND ORS.

v.

SMT. TULSI DEVI

AUGUST 2, 2000

B

[V.N. KHARE AND S.N. VARIAVA, JJ.]

Specific Relief Act, 1963 : Section 16(c).

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Specific performance—Agreement—Obligation under—Readiness and willingness to perform—Agreement provided (i) for purchase of a part of property by plaintiff for a certain sum; (ii) ownership of this part to be transferred to plaintiff on her paying full price to Government—Plaintiff failed to make the payment as stipulated—Held, Plaintiff has not proved her readiness and willingness to perform her part of the obligation under the agreement—The fact that Government did not cancel the allotment would not have any bearing on the factum of the plaintiff not having performed her obligation under the agreement—Hence, plaintiff not entitled to a decree for specific performance.

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Equity—Equitable relief—Entitlement—Plaintiff made averments as are convenient to her without any regard for the truth—Held, such a conduct would preclude the plaintiff from getting an equitable relief.

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Government allotted two plots of land, Nos. 67-A and 67-B, to one 'S' who was a displaced person. The Government offered to 'S' a chance to purchase the property at a certain price to be paid either in lump sum or in annual instalments. The Government issued a final demand notice to 'S' to make the payment. 'S' did not have the money to make the payment and, therefore, he entered into an agreement with the respondent, which stipulated that (i) the respondent would purchase property No. 67-B for a certain price; (ii) that on the transfer of ownership to 'S' it would be immediately transferred in favour of the respondent upon payment of full price to the Government; (iii) respondent was to pay a certain sum to 'S' to enable him to pay the first instalment; (iv) the said amount was to be treated as a loan and payable in 5 yearly instalments and (v) if 'S' failed to repay the said loan within the stipulated time property No. 67-A would also be transferred to the respondent.

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Subsequently, 'S' entered into an agreement with the Government

which provided that the balance due was to be paid in 7 yearly instalments and quantified the total amount due. After the death of 'S' the appellants survived him.

The respondent filed a suit for specific performance of the agreement and claimed transfer of property No. 67-A in her name on the ground that 'S' did not repay the loan to her. In the suit it was averred that the respondent would be entitled to claim the transfer "on payment of the money due to the Government". In the plaint the respondent-plaintiff stated that she had paid all the sums due to the Government and that the last payment was made on 2.12.1965.

In the written statement the appellants-defendants stated that after the death of 'S' the respondent-plaintiff had not made any payments; and that the wife of 'S' had deposited all the amounts due to the Government.

At the trial it was established that the respondent-plaintiff did not make all the payments. However, the trial court decreed the suit, which was confirmed by the High Court. Hence this appeal.

Allowing the appeal, this Court

HELD : 1. If there is non-payment then it could not be said that the respondent had been always ready and willing and had always performed her part of the Agreement. The fact that the Government did not forfeit would not have any bearing on the factum of the respondent not having performed her obligations under the Agreement. [105-E]

2. The evidence coupled with the admitted position that the last payment was made by the respondent-plaintiff on 2.12.1965 and the evidence of the respondent's husband clearly established that the respondent-plaintiff had not performed her obligation and had not made all the payments as was required to be done under the Agreement. [106-F; G]

3. It is clear that the respondent-plaintiff is making averments as are convenient to her without any regard for the truth. This conduct would preclude the respondent from getting any equitable relief. However, in this case even otherwise it is clear that the respondent had not performed her part of the Agreement. Thus there never was any readiness and willingness. She could thus not get specific performance. [112-D; E]

A **4. The respondent-plaintiff had not performed her part of the Agree-**
ment. There was thus no readiness and willingness on the part of the re-
spondent-plaintiff. Both the trial court and the High Court have clearly
erred in law and on facts by granting specific performance to the respond-
ent-plaintiff and directing transfer of Block 67-A in her favour. It is also
B inequitable to do so. The portion of the judgment granting specific perform-
ance by transfer of Block 67-A to the respondent-plaintiff requires to be and
is hereby set aside. [113-D-E]

C CIVIL APPELLATE JURISDICTION : Civil Appeal No. 11941 of
1995.

From the Judgment and Order dated 27.4.93 of the Delhi High Court in
R.F.A. No. 123 of 1981.

D Jaspal Singh, Dushyant Dave, M.L. Verma, Pramod Dayal, Piyush Sharma,
Hari, Arun K. Sinha, Ms. A. Khatri and Ashok Singh for the appearing
parties.

The Judgment of the Court was delivered by

E **S.N. VARIAVA, J.** This Appeal is against the Judgment dated 27th April,
1993 passed by the Division Bench of the High Court of Delhi. At the beginning
of his submission learned counsel for the Appellants very fairly stated that the
Appellants are not challenging grant of specific performance and transfer of
title to the Respondent in respect of block 67B. This Appeal is therefore
confined to the portion of the impugned Judgment dealing with Block 67A.

F Briefly stated the facts are as follows :

G One Sunder Singh was a displaced person from Pakistan. In 1955 the
Government, under the policy of rehabilitation allotted to him block numbers
67-A and 67-B in Malviya Nagar, New Delhi-110017. In 1957/1958 the
Government offered to Sunder Singh a chance to purchase the properties
allotted to him on payment of the cost of the properties as fixed by the
Government, with arrears of rent, if any, either in lump sum or by annual
instalments. In respect of plot M-67A and M-67B, the Government fixed the
purchase price at Rs. 8080. In 1959 the Government gave to Sunder Singh a
final demand notice to make payment under the Scheme. Sunder Singh did not
H have the money to make payment to the Government. He, therefore, entered

into an Agreement dated 22nd June, 1959 with the Respondent (herein). The Agreement recites the fact that Sunder Singh had been allotted the above two blocks and that he has been given an offer by the Government to purchase these plots and that he is not in a position to pay its purchase price. The Agreement recites that the Respondent was eager and willing to cooperate with Sunder Singh and purchase half of the property, namely, block 67B at a price of Rs. 5,000 and arrears of rent due to the Government. The Agreement recites that the Respondent was to make payment to the Government either in lump sum or by instalments or in any form acceptable to the Government. The Agreement recites that a sum of Rs. 3,000 is being paid to Sunder Singh to enable him to make payment of the first instalment to the Government and that this amount was to be treated as a loan to Sunder Singh. The relevant clauses of the Agreement read as follows :

“1. That the entire cost of the quarter and arrears or rent shall be deposited or caused to be deposited with the Government of India by the second party either in lump sum or by instalments or by offering claims or by one or more of these modes at the discretion of the second party or Shri D.N. Kaul husband of the second party. The said payments shall be made in the name of the first party and all other steps shall be taken by both the parties to have the ownership rights of the quarter in question transferred in favour of the first party and registration effected in his favour. The first party shall refund a sum of Rs.3,000 only to the second party or her husband Shri D.N. Kaul, whosoever, shall demand the same, in five yearly instalments of Rs.600 each year payable on or before the first day of January each year. The balance of the purchase price paid as also the arrears of rent paid shall be deemed and treated as advance payment of purchase price paid by or on behalf of the second party to the first party for the portion 67B agreed to be sold and transferred to her and shall represent the full and final consideration therefor.

Xxx xxx xxx

2. That in case the second party choses to associate some claimant in the matter of purchase of the said property she shall be free to do so at her absolute risk and choice. The first party shall do all that may be necessary or demanded on him in the matter of effective association of the said claimant with him and the ultimate transfer of 67B in favour of the second party jointly with the said claimant or severally.

A 3. That on the transfer of ownership rights in respect of the said
quarter in favour of the first party he shall immediately transfer or
cause to be transferred in respect of the portion 67B as detailed
B hereinbefore in favour of the second party for the above referred to
consideration of Rupees five thousand and the amount of arrears of
rent to be paid to Government or total amount paid on account of cost
of 67A & B and arrears of rent in full and final settlement, whichever
be less, irrespective of the fact whether the amount is paid in cash or
in verified claims or partly in one or partly in the other form. The said
sum shall be the full and final and adequate consideration for the said
portion of the property.

C 4. That the amount paid or caused to be paid or deposited on account
of purchase price and arrears of rent in respect of the above quarter
67 A&B with the Government of India shall be treated as the first
charge of the second party and her husband the said Shri D.N. Kaul
D on the property so long as 67B is not effectively transferred to the
2nd party and Rs.3,000 repaid to them.

E 5. That if the first party fails to refund the said sum of Rupees three
thousand to the second party as stipulated and if anyone instalment
due remains unpaid after 30 days R.A.D., notice in that behalf the
entire sum of Rs.3,000 or balance due shall become due at once and
on the failure on the part of the first party to repay the same within
15 days next, he shall transfer the other portion of the property
namely, 67A also to the second party or the said Shri D.N. Kaul or
her nominee for the said consideration of Rs.3,000 and give her/him
F or their nominee vacant and peaceful possession thereof and have a
deed of transfer executed and registration duly effected before the
proper registering authority.

Xxx xxx xxx

G 8. That in case the first party shall fail to execute his part of the
agreement and fail to transfer quarter No.67B to the second party and
execute sale deed in her favour and have it duly registered he shall be
liable to pay the second party a sum of rupees five thousand, plus the
aforesaid amount paid or caused to be paid by the second party to the
Government in respect of the said quarter on account of purchase price
and arrears of rent and the monies spent on improvement and additions,
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as liquidated damages without prejudice to the second party's right to demand the specific performance of this agreement and to have the specified share i.e. Quarter No. 67B transferred to herself compulsorily through a Court of Law. The same provisions shall apply if and when the right to have the quarter No.67A transferred in favour of second party or Shri D.N. Kaul arises and the first party fails to do so effectively.

9. That in case the allotment in favour of the first party in respect of the said quarter is cancelled for any reason whatsoever and the purpose of this agreement frustrated the first party shall refund to the second party any amount paid or caused to be paid to the Government in respect of the said quarter and cost of improvement and additions made by the second party within three months of the said fact coming to the second party's notice together with interest @ 6% per annum."

Thus under this Agreement the Respondent had taken the obligation of making payment to the Government the cost of the quarters, interest thereon and the arrears of rent. Also the Respondent was put in possession of block 67B. It is clear that the transfer of ownership right could only take place when the said Sunder Singh became the owner. Under his Agreement with the Government Sunder Singh could only become owner if the cost of the flat and arrears of rent were paid in full. Therefore transfer of title could only take place if Respondent performed her obligations under the Agreement and paid the entire cost of flat and all arrears of rent. It is also to be seen that Sunder Singh was only required to repay a sum of Rs. 3,000. This is because the balance amount was to be considered for transfer of block 67B in favour of the Respondent.

On 30th December, 1959, the Sunder Singh entered into an Agreement with the Government. This Agreement provided that the cost of the plot was Rs. 8080, out of which a sum of Rs.1616 had already been received on 22nd June, 1959. The Agreement provided that the balance was to be paid in instalment along with interest. Clause (1) of the Agreement provides that the balance of the purchase price was a sum of Rs. 8108/7 paisa and that there was to be interest on this amount. The Agreement provides that the same was to be paid in 7 yearly instalments, the first instalment being due on 22nd June, 1960. The Agreement also provided that if the default was committed in payment of any instalment then the Government could by notice in writing forthwith determine the Agreement and resume possession of the premises.

A Thus the Respondent was to pay a sum of Rs. 8108/7 paise with interest thereon in 7 yearly instalments to the Government. As the first instalment was to be paid on 22nd June, 1960 the last instalment would have to be paid on or before 22nd June, 1966.

B Sunder Singh died on 20th October, 1964. He was survived by his wife Gurnam Kaur and the present Appellants. After the death of Sunder Singh both the Blocks were allotted to his wife. It appears that there was some dispute between Gurnam Kaur and the Respondent. The Respondent filed Suit No. 328 of 1965 for a permanent injunction against Gurnam Kaur restraining her from disposing of the property. Thereafter on 1st June, 1968, the Respondent filed C a Suit No. 14 of 1968 for specific performance of the Agreement dated 22nd June, 1959. This Suit was filed under Order 33 Civil Procedure Code praying that she be allowed to sue in forma pauperise. In the Suit, after setting out the above mentioned history, it is averred as follows:-

D “Shri Sunder Singh before his death did not pay any instalments on account of the loan advanced to him as mentioned herein before which under the agreement entitles the plaintiff to claim the transfer of House No.M/67-A also in her favour on payment of the money due to the Government (emphasis supplied).

E Thus it is to be seen that even according to the Respondent/Plaintiff she is entitled to transfer of the block No. 67-A, only on payment of all money dues to the Government. Thereafter in para 10 of the plaint, it is stated that under the aforesaid Agreement, the Plaintiff has paid all sums due to the Government. It is obvious that such an averment is made because the Respondent knows that F unless and until all sums are paid by her to the Government there could not be specific performance of the Agreement dated 22nd June, 1959 by transferring block 67A in favor of the Respondent. A reading of further averments in the Plaint make it clear that the Respondent/Plaintiff knows that she has not made payment of all amounts due to the Government. This is clear from the fact that G the Respondent then goes on to aver that the heirs of Sunder Singh are not delivering the challans in respect of the payment due after the last payment made by her and that she is ready and willing to fulfil the terms of contract in respect of any residuary obligations. In para 13(a) it is averred that since the entire sale price of 67-A and 67-B had been paid, the Defendants were bound to convey the property to the Plaintiff. In para 14, it is then averred as H follows :

“14. The cause of action accrued on 2.12.65 when the last payment was made and the plaintiff expressed her willingness to pay any other sum due to the Government on behalf of Shri Sunder Singh or the defendant no.1.”

The Complaint was amended on 28th of October, 1971. The averment that the last payment was made on 2.12.1965 has not been changed. Therefore the Respondent/Plaintiff came to Court and maintained that she had not made any payment after 2nd of December, 1965. It must be mentioned that in the Complaint no details or particulars are given as to when and on what dates and in what amounts payments were made by the Respondent/Plaintiff. To be remembered that specific performance could only be granted provided that the party asking for specific performance has always been ready and willing and has performed their part of the obligation. As seen above under the Agreement the Respondent was to make payment of the costs of the block and arrears of rent to the Government. This included not just the sum of Rs.8108 due towards the costs of the blocks and interest thereon but also the arrears of rent. If the Respondent has committed breaches and did not pay the amounts to the Government then the Government may or may not have revoked the Agreement dated 30th December, 1959 and/or forfeited all amounts and recovered possession. If there is non payment then it could not be said that the Respondent had been always ready and willing and had always performed her part of the Agreement. The fact that the Government did not forfeit would not have any bearing on the factum of Respondent not having performed her obligations under the Agreement.

The wife of Sunder Singh and other heirs filed a written statement raising various contentions with which, we are really not concerned. However, in para 6 of the written statement they made a categorical statement that after the death of Sunder Singh the Respondent had not paid any amounts to the Government but that the wife, Gurnam Kaur, had deposited all the amounts with the Government. Respondent/Plaintiff did not get any Issue raised on this claim of the Appellants. To be remembered that the Respondent/Plaintiff was herself claiming that the last payment had been made by her on 2.12.1965. The trial court, therefore, did not raise any Issue on the question as to whether or not the Respondent/Plaintiff had paid all amounts to the Government. However, an Issue was raised as to whether or not the Agreement could be specifically performed. In answering this Issue it would have been necessary for the Court to see not just readiness and willingness, at all stages, but also whether

A in fact the Respondent/Plaintiff had performed her part of the Agreement. In this context the question of payments made to the Government under the Agreement was a vital aspect. Even though no specific Issue was raised, evidence has been led on this aspect. The husband of the Respondent was examined as PW5. In his evidence he, *inter alia*, stated as follows:

B “The balance amount in respect of property Nos. 67A and 67B was to
 be deposited on behalf of Sunder Singh with the Deptt. Of Rehabilitation,
 Jam Nagar, New Delhi.The entire amount in respect of
 67A has been deposited and there remains any balance we were ready
 to pay the same and still ready to pay.We have receipts of
 C the amounts deposited by us.”

Thus even in evidence the only statement is that the entire amount in respect
 of 67A had been deposited. Payment had to be made for both 67A as well as
 67B. There is no statement that full payment is made. The fact that the husband
 of Respondent deposes that they are ready and willing to pay the balance also
 D shows that to their knowledge all amounts due have not been paid by them.
 Thus even in evidence there is an admission that the entire amount had not been
 deposited by the Respondent with the Government.

On behalf of the Respondent/Plaintiff one S.B. Lal, Upper Division
 Clerk of the Government was examined as PW-4. He had been examined to
 E show that full payments had been made in respect of blocks 67-A and B. This
 witness, amongst other things points out that towards the cost of the flat a sum
 of Rs.2221.10 was deposited on 25th March, 1968. In cross examination he is
 asked whether he can tell the name of the persons who had deposited the
 amounts. He states that the amount was deposited in the name of the same
 F person in whose favour the sale was to take place. This evidence coupled with
 the admitted position that the last payment was made by the Respondent/
 Plaintiff on 2nd December 1965 and the evidence of Respondent’s husband (set
 out above) clearly established that the Respondent/Plaintiff had not performed
 their obligation and had not made all payments as was required to be done
 G under the Agreement. Under the circumstances it could never have been said
 that they were always ready and willing to perform their part of the Agreement.
 This aspect unfortunately was lost sight off by the trial court. In spite of the
 clear evidence on record to show that the Respondent/Plaintiff had not performed
 their part of the Agreement, the trial court decreed the suit on 30th of September,
 1978. The trial Court granted specific performance not only in respect of Block
 H 67B but also for 67A.

The heirs of Sunder Singh then filed Regular First Appeal No.123 of 1981 in the Delhi High Court. This was dismissed by the impugned Judgment on 27th of April, 1993. The portion of the impugned Judgment dealing with this aspect reads as follows:-

“The main ground urged by the learned counsel for the appellant Shri R.L. Tandon before us was that on a proper consideration of the agreement respondent- plaintiff failed to perform her part of the agreement and was not entitled to invoke the provisions of Specific Relief Act in her favour.”

In rejecting this argument the High Court has held as follows :

“It is the admitted case that the respondent-plaintiff made payments on various dates and according to Shri Tandon the respondent made payment of Rs. 8240.04 and Rs. 255.59 till 2nd December, 1965. Though according to the respondent she made payments, yet in the suit the total cost of the property was not mentioned but during the hearing of the appeal counsel for the respondent filed C.M.P. No. 346 of 1993. Notice of the same was issued to the counsel for the appellant who filed reply to the said application. This application was filed by the respondent to clarify the controversy raised in relation to the amount of Rs. 2221.10 paid on 25th March, 1968. According to the counsel for the appellant the said amount was paid by the appellant and according to the respondent the amount was not paid in 1968 but in 1965 that too by the respondent. According to the respondent there is some over writing which shows that the number ‘5’ was written and thereafter ‘8’ was over written on the same which makes 1965 to 1968. We think that at this stage it is not material to go into the controversy as in the written statement filed by the appellants nowhere stated that they had made the payment of the said amount. Moreover, if we carefully examine the agreement to sell which is Ext.P1/1 which was drafted by Shri S. Watel, Advocate who was also examined as P.W.1. Shri Watel in his testimony has stated that the said agreement was drafted at the instance of Sunder Singh and plaintiff. The said agreement specifically states that the said Sunder Singh was not in a position to pay the purchase price of the said quarter or the first instalment thereof and after Sunder Singh received the final demand notice for payment of the first

A instalment to the Government with the warning that in case of non-
payment the quarter would not be transferred to him with the
consequence that it will be auctioned and sold to a third party. Further
on, the agreement says that for the aforesaid reasons Sunder Singh
wanted to associate someone with him for the purchase of the said
B quarter in order to be able to continue to occupy the same and own at
least a part of the said property. It was further stipulated in the
agreement that respondent was eager and willing to cooperate with
Sunder Singh and purchase half of the premises, namely, M/67-B with
its kitchen, bath, lavatory and a common wall between M/67-A and M/
C 67-B at a price of Rs.5000 and arrears of rent due in respect of the
property to be paid to the Government in the account of Sunder Singh
in cash. Sunder Singh further assured that he was entering into the said
agreement for the betterment of his family and out of necessity. In view
of the unequivocal terms of the agreement and in the absence of any
specific plea raised in the written statement by the appellant that they
D had paid the aforesaid amount of Rs. 2221.10 it is too late in the day
for them to take up such a plea.”

At this stage itself it must be noted that the High Court has fallen in error in
observing that in the written statement there is no specific plea regarding
payment made by the heirs of Sunder Singh. As has been pointed out above
E it has been specifically pleaded that after the death of Sunder Singh (i.e. in
1964) the Appellants have been making payment to the Government. Of course
they do not state what amount was paid or that Rs. 2221.10 was paid. But then
Respondent/Plaintiff has also nowhere set out what payments were made by her
and when. To be remembered upto this stage, except for making vague statement
F that amounts had been made paid, Respondent/Plaintiff had given no details or
particulars of payments alleged to have been made by her. Upto this stage the
Respondent/Plaintiff was maintaining that the last payment made by her was
on 2nd December, 1965.

The controversy, referred to by the High Court, arose because in the
G course of their arguments and in the written submission Appellants relied on
the deposition of PW4 to show that a sum of Rs. 2221.10 had been paid on
25th March 1968 for the cost of the flat. It was submitted that as it was an
admitted position that the last payment made by the Respondent was on 2nd
December 1965, this clearly established that all payments had not been made
by the Respondent/Plaintiff. This had a direct bearing on the question of
H performance by the Respondent/Plaintiff and the question of readiness and

willingness. If correct this would establish that the Respondent/Plaintiff had failed to perform her part of the Agreement and was therefore not entitled to specific performance. The Respondent/Plaintiff then filed CMP No. 346 of 1993. In this CMP, it was averred as follows :

“4. That it is submitted that the applicant/respondent varily believing that there might have been some typing error in the paper book as supplied by the appellants, had applied for inspection of the file that was inspected on 11.2.1993. Inspection of the file showed that in the original statement of PW-4 recorded as on 6.9.73, there is evidently an over writing in ink in the figures which has not been initialled by any authorised person and it is evident that the figure “5” in the original copy of the testimony of PW-4 has been changed to “8”.

5. That it is thus evident that there is some possible tampering of the record. The respondent is not to gain by the said change of date. The over writing shows that first the number “5” was written and thereafter “8” over written on the same.

6. That it is submitted that before coming to any conclusion, either way, it would be necessary and also in the interests of justice for this Hon'ble Court to adjudicate upon the said fact. *It is also submitted that probability of the date being 25.3.1965 is in consonance with the stand of the plaintiff in pleadings, and her testimony through PW-5 and also the deposition of the DW-2, all of which lead in the irresistible conclusion that the said date has to be 25.3.65 instead of 25.3.1968.* (emphasis supplied)

7. That accordingly, the present application is being filed before your Lordships, so that this fact could be noted by this Hon'ble Court, while considering the case and the case be decided on the basis of the said date in the testimony of PW-4 being read as 25.3.65 instead of 25.3.68. For this, appropriate directions will have to be issued by this Hon'ble Court.”

Thus it is to be noted that realising that the evidence of PW-4 read with the case in the Plaint would establish that the last payment had been made by Appellants and that this would clearly show that she had not performed her

A part of the Agreement and thus not entitled to specific performance. The Respondent/Plaintiff initially tries to make out a case that there was “typing error in the paper book”; that there was “some over writing in the original testimony of PW-4” and that there is “some possible tampering of the record”.
B Most importantly it is averred that probability of the date being 25.3.1965 is in consonance with the stand of the Plaintiff in pleadings. Thus even at this stage it is being maintained that no payments were made after 2nd of December, 1965. To be noted that at this stage it is not being claimed that any payments were made by the Respondent/Plaintiff after 1965. The High Court has also noted the submissions made before it. They have been set out above but necessitate repetition:

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E “Though according to the respondent she made payments, yet in the suit the total cost of the property was not mentioned but during the hearing of the appeal counsel for the respondent filed C.M.P. No.346 of 1993. Notice of the same was issued to the counsel for the appellant who filed reply to the said application. This application was filed by the respondent to clarify the controversy raised in relation to the amount of Rs. 2221.10 paid on 25th March, 1968. According to the counsel for the appellant the said amount was paid by the appellant and according to the respondent the amount was not paid in 1968 but in 1965 that too by the respondent. According to the respondent there is some over writing which shows that the number “5” was written and thereafter “8” was over written on the same which makes 1965 to 1968. We think that at this stage it is not material to go into the controversy as in the written statement filed by the appellants no where stated that they had made the payment of the said amount.”

F This shows that even during arguments before the High Court it was maintained that this payment of Rs. 2221.10 was made in 1965 by the Respondent. Even during the arguments it had been submitted that the date 1968 was a mistake and that originally number “5” was written and thereafter it was over written with “8”. If Respondent had made payment of this sum she
G would have a receipt for it. The Respondent would know with certainty on what date it was paid. Most importantly at this stage it is not claimed that any payment was made by the Respondent after 2nd December 1965. It appears that the Appellants then produced before the High Court receipts to show that they had made payments towards the cost of the flat on 25th March 1968.
H Unfortunately the High Court has dealt with an important aspect most cursorily

and wrongly refused to look into it.

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Before this Court Respondent has filed a counter affidavit dated 27th July, 1995. In para 15 of this counter affidavit, it is averred as follows :

"In fact the following payments were made by the respondent, the details of which are given below :-

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**PAYMENT MADE TOWARDS HOUSE NO.M-67/A & B
MALVIYA NAGAR, NEW DELHI:**

Payments from 1959 to 1965 :

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1. Rs.1,616.00	On 22.6.1959
2. Rs.1,149.00	On 1960
3. Rs.1,158.00	On 18.2.1963
4. Rs.600.00	On 14.5.1963
5. Rs.,558.00	On 17.6.1963
6. Rs.3,158.39	On 2.12.1965

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Total : Rs.8,239.39

**B) PAYMENT MADE TOWARDS RENT WATER
CHARGES INTEREST, GROUND RENT ETC.**

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1. Rs.101.90	On 30.2.1959
2. Rs.44.00	On 30.12.1959
3. Rs.9.00	On 30.2.1959
4. Rs.20.00	On 2.12.1965
5. Rs.2.00	On 25.3.1968
6. Rs.2,237.10	On 25.3.1968
7. Rs.55.80	On. 25.3.1968
8. Rs.20.00	On 25.3.1968
9.Rs.922.05	On 25.3.1987"

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G

Therefore, now for the first time the Respondent is claiming that some payments had been made by her in 1968 and 1987. She is now claiming that the sum of Rs. 2221.10 was paid by her. To be remembered that in the Plaint there is specific averment that the last payment made by her was on 2nd December, 1965. Even before the High Court her stand was that the last

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A payment was made on 2nd December, 1965 . Before High Court an application was filed to the effect that the evidence of PW4 had been tampered with and that date should not be 25th March, 1968 but should be 25th March, 1965. The counter affidavit now filed shows that on 25th March, 1965, no payment has been made by the Respondent. This was to her knowledge. If she had not
B made any payment on 25th March 1965 and if she had made payment on 25th March 1968 why claim that there was tampering and/or error and that the correct date should be 25th March 1965. On solemn affirmation it is stated before the High Court that the date of payment of Rs. 2221.10, in the deposition of PW-4, should be 25th of March, 1965. Before the High Court it is claimed by the Respondent/Plaintiff that payments were made on 25th
C March, 1965. It is thus clear that the Respondent/Plaintiff has not made this payment on 25th March 1968. This is also clear from the fact that receipts for this payment are with the Appellants. It is not the Respondent's case that any receipt was handed over by them to the Appellants. To be remembered that Sunder Singh had died in 1964. Therefore these could not be part of the three
D receipts alleged to have been handed over to him. It is clear that the Respondent/Plaintiff is making averments as are convenient to her without any regard for truth. This conduct would preclude Respondent from getting any equitable relief. However, in this case even otherwise it is clear that Respondent had not performed her part of the Agreement. Thus there never was any readiness and willingness. She could thus not get specific performance.

E

There is another reason why the discretionary relief of specific performance should not be granted. This Suit is for enforcement of Cl. 5 of the Agreement. For sake of convenience Cl. 5 is again set out herein. It reads as follows:

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“5. That if the first party fails to refund the said sum of Rupees three thousand to the second party as stipulated and if any one instalment due remains unpaid after 30 days R.A.D., notice in that behalf the entire sum of Rs.3,000 or balance due shall become due at once and on the failure on the part of the first party to repay the same within
G 15 days next, he shall transfer the other portion of the property namely, 67A also to the second party or the said Shri D.N. Kaul or her nominee for the said consideration of Rs.3,000 and give her/him or their nominee vacant and peaceful possession thereof and have a deed of transfer executed and registration duly effected before the
H proper registering authority.”

Thus under this clause the Respondent could have given a R.A.D. notice of 30 days for non payment of instalment. A notice dt. 1st May 1962 was given. However, it is fairly admitted that the suit is not based on that notice. Had the suit been based on that notice it would be time barred. The averments in the suit made it clear that specific performance of transfer of Block 67A is sought on basis of non return of Rs. 3000. However, whilst the sum of Rs. 3000 was to be returned the Respondent had to make payment of costs of the Blocks with interest thereon and arrears of rent. It would hardly be equitable to hold the Appellants liable for default to repay Rs. 3000 when they have already had to pay Rs. 2221.10 in order to prevent termination and forfeiture. Neither the trial court nor the High Court has given the Appellants credit/benefit of this payment even though the admissions and the evidence showed that this payment had been made by them. If out of the sum of Rs. 3000 a major amount of Rs. 2221.10 has been paid by the Appellant it would be most inequitable to direct transfer of Block 67A by granting specific performance.

In our view it is clear that Respondent/Plaintiff had not performed their part of the Agreement. There was thus no readiness and willingness on the part of the Respondent/Plaintiff. Both the trial court and the High Court have clearly erred in law and on facts by granting specific performance to the Respondent/Plaintiff and directing transfer of Block 67A in her favour. It is also inequitable to do so. In our view, the judgment of the trial court and the judgment dated 27th April, 1993 of the High Court cannot be sustained to this extent. The portions of the Judgments granting specific performance by transfer of Block 67A to the Respondent/Plaintiff require to be and are hereby set aside. However as it is fairly admitted there has been sale of Block 67B to the Respondent/Plaintiff and to that extent she is entitled to have Block 67B transferred to her name. The decree of the Courts below is affirmed to this extent. As set out above the Respondent/Plaintiff has not been honest with the Court. Whilst no punitive action need be taken against her, in our view this is a fit case where she must be made to bear the cost of the other side not just before this Court but also before the trial court and the High Court. There will be an Order accordingly. The Appeal stands disposed off accordingly.

V.S.S.

Appeal allowed.