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ITEM NO.12 COURT NO.12 SECTION IVB
S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS
Petition(s) for Special Leave to Appeal (C) No(s). 8112/2016
(Arising out of impugned final judgment and order dated 17/02/2016
in RSA No. 3038/2010 passed by the High Court Of Punjab & Haryana
At Chandigarh)
JASWINDER KAUR (NOW DECEASED) THROUGH HER
LRS AND ORS. Petitioner(s)
VERSUS
GURMEET SINGH AND ORS Respondent(s)
(with interim relief and office report)
Date : 18/04/2017 This petition was called on for hearing today.
CORAM :
HON'BLE MR. JUSTICE ARUN MISHRA
HON'BLE MR. JUSTICE AMITAVA ROY
For Petitioner(s) Mr. C.A. Sundaram, Sr. Adv.
Mr. Vaibhav Sehgal, Adv.
Mr. Jaspreet Singh Rai, Adv.
Mr. Shyamal Kumar,Adv.

For Respondent(s) Mr. Sumeet Mahajan, Adv.
Mr. Amit Kochar, Adv.
Mr. Ashok K. Mahajan,Adv.

UPON hearing the counsel the Court made the following
O R D E R

Leave granted.
The appeal is allowed with the observations made in the signed order. The impugned judgment and the decree passed by the High Court is set aside.
(NEELAM GULATI)
COURT MASTER (TAPAN KR. CHAKRABORTY)
COURT MASTER
(Signed Reportable Order is placed on the file)

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REPORTABLE
IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL No(s). 5636 OF 2017
(Arising out of SLP (C) No.8112 of 2016)
JASWINDER KAUR (NOW DECEASED) THROUGH
HER LRS AND ORS .. APPELLANT(S)
VERSUS
GURMEET SINGH AND ORS ..RESPONDENT(S)
O R D E R
Leave granted.
Heard learned senior counsel for the parties.
The defendants (the appellants-herein) are before us having succeeded before the trial court and in the first appellate court. The High Court has unfortunately invented a new method of decreeing the suit for specific performance in part only in respect to the payment of the earnest money of Rs.50,000/- (Rupees Fifty Thousand Only) and advance money of Rs.14,50,000/- (Rupees Fourteen Lakhs and Fifty Thousand Only) without reversing the findings of the trial court as well as that of the first appellate court on the vital aspects that the plaintiffs

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(respondents-herein) were not ready and willing to perform their part of the contract apart from that they did not had the balance consideration to purchase the disputed land within the time stipulated in the agreement.

The facts unfold that initially an agreement dated 13.01.1990 was entered into, in which it was agreed that for the sum of Rs.55,00,000/- (Rupees Fifty Five Lakhs only), defendants would sell the property in area 10.75 acres situated at village Mehmoodpura, Tehsil and District Ludhiana, State of Punjab, and on that day a sum of Rs.50,000/- (Rupees Fifty Thousand only) was paid as earnest money. Later on, at the time of payment of Rs.14,50,000/- (Rupees Fourteen Lakhs and Fifty Thousand only) on 31.1.1990 further agreement was entered into which was also reduced in writing in which it was stipulated that sale deed would be executed by 30.10.1990. It would be open to the plaintiffs to construct boundary wall between 24.4.1990 to 15.5.1990 at their own cost and the possession of the land would be delivered to the purchaser at the time of registration of the sale deed. This agreement has referred the prior agreement

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dated 13.1.1990 on which date a sum of Rs.50,000/- (Rupees Fifty Thousand Only) had been paid as earnest money. It was also stipulated that sale deeds would be registered in the name of anyone suggested by the plaintiffs and the land had been mortgaged with Punjab National Bank (for short, â¬ Sthe Bankâ¬ \235). It would be necessary for the defendants to clear the amount and to obtain No Objection Certificate from the Bank and only thereafter sale deed to be executed.

The plaintiffs filed suit for specific performance of the agreement to sale dated 31.1.1990 or in alternative, refund of earnest money with interest and damages were claimed. It was averred by the plaintiffs that they were ready and willing to purchase property and were present before the Sub Registrar on the date fixed i.e. 30.10.1990 with the balance amount whereas the defendants did not turn up to execute the sale deed. Plaintiffs served telegraphic notice but in futile.

The defendants in the written statement contended that plaintiffs had failed to perform their part of the agreement and as such the agreement stood

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cancelled and earnest money forfeited. Defendants were ready and willing to execute the sale deed and were present before the Sub-Registrar on 30.10.1990. Telegram was also sent to the plaintiffs but they were not ready and willing to perform their part of the contract. Plaintiffs did not raise the boundary wall as agreed and possession was with the defendants. The defendants got the property redeemed from the Banks in order to execute sale deed on 2.7.1990 and intimated the same to the plaintiffs vide legal notice (Ex. P-9) which was duly replied. The trial court held that the plaintiffs were not ready and willing to perform their part of the agreements dated 13.01.1990 and 31.1.1990. Defendants have cancelled the agreement and forfeited the earnest money. Thus, the plaintiffs could not be said to be entitled to specific performance of the aforesaid agreement. It was also found that the plaintiffs were not having the required money in order to purchase the property. The submissions urged as to demarcation and permission under Urban Land Ceiling Act were found to be untenable. Plaintiffs were not ready and willing to perform their part of the contract, hence agreements

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stood cancelled after service of another notice (Ex.P-14) by defendants and the suit was dismissed.

Aggrieved thereby the plaintiffs preferred First Appeal. The first appellate court also examined the evidence of the plaintiffs in extenso and the legality of the findings recorded by the trial court and came to the conclusion that plaintiffs were not ready and willing to perform their part of the agreement neither they were having the required balance amount for the purchase of the property in question as per the aforesaid agreements. It was also one of the circumstance which was taken into consideration that only one plaintiff Kanwaljit Singh PW-1 had entered in the witness box not other two appellants. Plaintiff Kanwaljit Singh had stated that he was maintaining account books from 1989 but he had failed to file Income Tax Assessment Orders, the Income Tax Returns or account books. It was admitted by the plaintiffs that the time limit was fixed for constructing the boundary wall under the agreement and the parties were bound by the same and the time was the essence of the contract. There was no explanation offered for not

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constructing the boundary wall within the stipulated period in the month of April-May, 1990. Plaintiffs also admitted that there was already demarcation when the plaintiffs entered into the agreement thus the guise of demarcation taken for not constructing the boundary wall was also found to be flimsy. It was also found by the first appellate court that notice (P9) dated 23.10.1990 had been served upon the plaintiffs intimating the factum of the redemption made from Bank by the defendants. They had also obtained income tax clearance certificate from the Income Tax Department which fact was mentioned in the said notice, notice was admittedly received by the plaintiffs. Again a notice (P14) was served upon the plaintiffs in which it was informed that permission under the Urban Land Ceiling Act was not required as it was agricultural land. This notice was also received on 6.12.1990. But even thereafter the plaintiffs failed to get the sale deed executed. The part of deposition of the plaintiff PW1- Kanwaljit Singh had been reproduced by the first appellate court in which he had stated that the defendants did not show the jamabandi indicating that they were the owner

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of the property, and for that reason sale deed could not be registered and there was no other reason. He also admitted the fact in extracted portion that provisions of Urban Land Ceiling Act were not applicable as the land was agricultural land and he also admitted that plaintiffs were informed that the land had been redeemed from the Bank. Considering the deposition of PW1, the findings of the trial court had been affirmed by the first appellate court. The stand of the plaintiffs that they were present on 30.10.1990 before Sub-Registrar was not substantiated by as PW 1- Kanwaljit Singh, he had not uttered even a word about his presence in the office of Sub Registrar on the said date. For non production of the documents i.e. bank accounts and Income Tax Statements etc., adverse inference had been drawn and findings had been recorded by the first appellate court, after discussing the entire evidence in detail to the effect that plaintiffs had miserably failed to prove that they had financial capacity to pay the balance sale

consideration required for the execution of the sale deed. They did not produce necessary documents, bank account, ledger book and income tax statements etc. to

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prove their financial capacity so as to indicate that they had in fact raised the loan amount allegedly from various persons as stated by PW1 in his cross examination.
The High Court without discussing evidence and the correctness of the aforesaid findings as recorded by the trial court and affirmed by the first appellate court had referred to Section 12 of the Specific Relief Act, 1963 (hereinafter referred to as 'the Act') and on the ground that a sum of Rs.15,00,000/- (Rupees Fifteen Lakhs Only) had been accepted by the defendants decreed the suit partly. It observed at one go that the readiness and willingness has to be seen from the conduct of the parties. The High Court has only made following relevant discussion to reverse the findings of two courts below:-
â¬ SIn my view, the provisions of sub-section (3) of Section 12 of 1963 Act, vehemently relied upon by Mr. Sarin, would not come in the aid of the respondent-defendants to show that for specific performance of the agreement to sell, viz-a-viz payment of Rs. 14,50,000/-, the appellant-plaintiffs are required to deposit the entire amount of sale consideration, i.e. Rs.55,00,000/-. The readiness and willingness has to be seen from the act, conduct and intention of the

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parties. Once the respondent-defendants had received the sale consideration of Rs.14,50,000/-, nothing prevented them for offering sale of a part of the land. Both the Courts below have completely been swayed away from the fact that the appellant-plaintiffs failed to prove the bank account or payment of the receipt of the balance sale consideration, which is not essential requirement of law as per the judgment of the Hon'ble Supreme Court (supra) and as well as Explanation-1 of Section 20 of 1963 Act.
Keeping in view the aforementioned facts and circumstances, the judgments and decrees of both the courts below are partly modified. The suit of the appellant-plaintiffs is partly decreed by granting specific performance of the agreement to sell viz-a-viz the area for which sale consideration of Rs.14,50,000/- had been paid and relief of specific performance qua other area is declined, much less findings of the courts below are affirmed. The substantial questions of law are answered in favour of the appellant-plaintiffs and against the respondent-defendants to the aforementioned extent.
The appeal is accordingly partly allowed.â¬ \235
In the earlier part of the judgment, the High Court had noted the facts, submissions, quoted Agreement, Section 12 of the Act, the decisions which were cited and thereafter discussion had followed in the extracted portion.

Sh. C.A. Sundaram, learned senior counsel appearing with Mr. Vaibhav Sehgal, learned counsel, on

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behalf of the appellants submitted that the High Court had not reversed the findings of the trial court as well as that of the appellate court with respect to non availability of the balance consideration and readiness and willingness of the plaintiffs to perform their part of the contract while decreeing the suit in part going beyond the purview of Section 12 of the Act. He has placed reliance on the decision of the Privy Council in â¬ S William Graham vs. Krishna Chandra Deyâ¬ \235 AIR 1925 PC 45 so as to contend that it is not open to the court to decree the suit for specific performance in part except in the exigency provided in Section 12 of the Act when the contract has been rendered incapable of performance, specific performance of part can be ordered not otherwise. Merely on the ground that a sum of Rs.15,00,000/- (Rupees Fifteen Lakhs Only) had been paid which too was forfeited due to non performance of the remaining part, as per the terms of the agreement. It was not open to the High Court without adverting to the forfeiture clause to allow the appeal in part. The High court had decreed a specific performance of totally different contract which was not set up by the

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plaintiffs themselves, in flagrant violation of law. Ultimate cause of justice had been made to suffer by the High Court and approach of the High Court is not only palpably illegal to indicate that the principles of law had been thrown to the winds in undue hastle.

Mr. Sumeet Mahajan, learned senior counsel has made a serious attempt to salvage situation for the plaintiffs by urging that equitable jurisdiction had been exercised by the High Court while decreeing the suit in part with respect to the consideration which was substantial and had been paid in the month of January, 1990. The readiness and willingness had to be seen with respect to the part of the contract which had been performed by the plaintiffs by making payments of a sum of Rs.15,00,000/- (Rupees Fifteen Lakhs only) in two installments; firstly Rs.50,000/- (Rupees Fifty Thousand only) on 13.1.1990, and secondly Rs.14,50,000/- (Rupees Fourteen Lakhs Fifty Thousand only) on 31.1.1990. It was further submitted that once discretion had been exercised by the High Court for decreeing the suit in part, substantial justice has been made, hence no case for interference

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by this Court is made out in the appeal. It was also submitted by him that documents with respect to the redemption from the Bank were not shown to the plaintiffs which was necessary nor any such document has been exhibited indicating that property had been redeemed from the Bank. Thus the advance money could not have been forfeited, as held by the trial court, and it would be unfair in the facts of the case to permit the plaintiffs to forfeit the advance money as per forfeiture clause in the Agreement dated 31.1.1990.
After hearing learned counsel for the parties and having perused the judgment and the documents on record, we are of the considered opinion that the judgment and decree passed by the High Court is not

sustainable for a moment on a bare perusal of the judgment passed by it.

It is shocking to judicial conscience that how the High court could have decreed the suit without reversing the finding recorded by the trial court and affirmed by the first appellate court on elaborate discussion of the evidence and the deposition of the

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plaintiffs himself to the effect that plaintiffs were not ready and willing to purchase the property as projected from their conduct. The defendants had got the property redeemed from the Bank and the factum of redemption had been intimated to the plaintiffs by serving notices i.e. P-9 and another P-14. PW 1-Kanwaljit Singh himself had stated in his cross examination that he was aware of the notice in which it was mentioned that the property had been redeemed from the Bank in the month of July, 1990. Plaintiff never asked the defendants to show document of redemption. The plaintiff Kanwaljit Singh PW-1 stated to the effect that since the defendants did not show jamabandi regarding their ownership to them, was the only reason for not purchasing the property has been ignored in impugned judgment. High Court had not adverted to any of the findings and had not found any illegality or perversity in the finding that the plaintiffs were not having arrangement of the balance consideration so as to purchase the property within the time which was stipulated. The High Court had also not gone into the question of the forfeiture of earnest money. The method and manner in which the

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High Court had decreed the suit for specific performance in part was wholly impermissible, unwarranted and it was not expected of the High Court to do so ignoring the basic principles of law of Code of Civil Procedure while dealing with the matter in a second appeal. The trite legal position is this that reasons of trial court and first appellate court have to be considered including evidence actively without that judgment of reversal cannot be passed in second appeal. It was incumbent upon the High Court to consider legality of the finding of non-readiness and willingness of plaintiffs which is of sine qua non for passing decree in a suit for specific performance in part or as a whole. However, High Court could not have simplicitor inferred readiness and willingness by making passing observation that it has to be seen in the facts and circumstances of the case. No positive finding had been recorded by the High Court with respect to readiness and willingness of the plaintiffs merely by making payment of part consideration it could not have inferred. In our opinion, no readiness and willingness could have been inferred even if it is assumed that High Court by aforesaid passing

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observation intended to hold that the plaintiffs were ready to perform their part by making payment of part consideration on 31.1.1990, readiness and willingness has to be seen in the context of the entire agreement not with respect to portion of contract. Plaintiffs had stated that they had borrowed the amount but had failed to produce the accounts indicating that in fact money was borrowed as stated by the plaintiff for effecting the purchase.

In the instant case, it is apparent that the

plaintiffs had no arrangement of balance consideration. PW1- Kanwaljit Singh himself stated in his cross examination that they had borrowed the amount from someone to purchase the property but failed to produce the ledger account books which used to be maintained and also did not produce the Income Tax Returns Assessment Orders to support their averments. Thus, the finding which had been recorded by the trial court and affirmed by the first appellate court were based on sound reasoning and on proper appreciation of the evidence. The finding had also not to be adverted to by the High Court. Thus, when the

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balance consideration was not available with the plaintiffs obviously they were not entitled even in part for the decree of specific performance of agreement to sale as ordered by the High Court. High Court had acted in flagrant violation of the law while decreeing the suit in part for specific performance without reversing the aforesaid finding recorded by the trial court and the first appellate court. It was not within the jurisdiction of the High Court to decree the suit for specific performance on the basis of the elementary principles relating to specific performance as envisaged under the Act.

It is necessary under Section 16 (c) of the Act not only to aver the readiness and willingness but also to prove it. The plaintiffs only pleaded it, but they have utterly failed to prove it as rightly held by the trial court as well as by the first appellate court. The defendants had done everything which was possible for them to require the plaintiffs to get the sale deed executed. They got the property redeemed from the Bank on 2.7.90 and issued a notice P-9 to the plaintiffs intimating them of the factum of

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redemption. They also informed that the permission under the Urban Land Ceiling Act was not required as the land was agricultural land.

On the other hand plaintiff Kanwaljit Singh PW-1 had deposed that the only reason for not purchasing the property was that the defendants had failed to show jamabandi to them regarding their names as owners if that be so the same indicates unwillingness of the plaintiffs to purchase the property for defect in title of the defendants. When they had entered into an agreement, the defendants had clearly disclosed to the plaintiffs that as a matter of fact the property had been mortgaged with the Bank. It was for the plaintiffs to ascertain whether the defendants were owner or not before entering into agreement. The stand of the plaintiff is unsound and unworthy of credence and they had tried to take guise of defects of the title of the property in untenable manner.
The trial court as well as the first appellate court had also found that in spite of the notice given by the defendants to the plaintiffs to be present for

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the execution of the sale deed in office of Sub-Registrar on 30.10.1990 none of the plaintiffs was present in the office of the Sub Registrar on the date on which the sale deed had to be executed. It shows that they were not ready and willing to purchase the property in spite of the notice having been given by the defendants to them to keep them present for the

execution of the sale deed on the stipulated date of the agreement failing which the earnest money had to be forfeited.
Section 12 of the Specific Relief Act, 1963 (in short 'the Act'):
â¬ S(1) Except as otherwise hereinafter provided in this section the court shall not direct the specific performance of a part of a contract.
(2) Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed by only a small proportion to the whole in value and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.
(3) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed eitherâ¬
(a) forms a considerable part of the

whole, though admitting of compensation in money; or
(b) does not admit of compensation in money,
he is not entitled to obtain a decree for specific performance; but the court may, at the suit of other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the other partyâ¬
(i) in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and a case falling under clause (b), [pays or had paid] the consideration for the whole of the contract without any abatement; and
(ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.
4. When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part.
Explanation.â¬ For the purposes of this section, a party to a contract shall be deemed to be unable to perform the whole of his part of it if a portion of its subject matter existing at the date of the contract has ceased to exist at the time of its performance.â¬ \235
A bare perusal of the aforesaid provision

contained in Section 12 of the Act makes it clear that it is not open to the High Court to direct specific performance of a part of contract except otherwise

provided in the Section in absence any of the exigencies available under the provisions of sub Sections 2, 3, and 4 of Section 12 so as to decree the suit. The High Court could not have decreed the suit with an purview of Section 12.

In Abdul Haq v. Mohammad Yehia Khan & Ors. AIR 1924 Pat. 81 the Court observed that the Court will not as a general rule compel specific performance of a contract unless it can execute the whole contract. It is not a case where the entire contract is not capable of performance. Section 12 encompasses provisions in respect of a claim for specific performance of part of a contract. Section 14 and 17 of the old Act have been amalgamated with modifications and the explanation based on Section 13 of the repealed Act together, the law is stated with clarity under Section 12 of the Specific Relief Act, 1963.

Section 12(1) provides that specific performance can be granted on part of a contract only in the

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circumstances mentioned in the Section. Section 12(2) deals with breach the contract if a party is unable to perform the whole of its part and such part bears a small proportion to the whole in value and admits compensation in money. The expression â¬ Sunable to performâ¬ \235 in Section 12(2) for instance would mean that a part of the property destroyed after contract or act of god or an act by which it would cease to exist. In such a case party to a contract shall be deemed to be unable to perform the whole or its part of the contract. Such a person would come within the words â¬ Sparty in defaultâ¬ \235. The inability to perform may arise by deficiency in quantity of subject matter or deficiencies or some legal prohibition or such other causes. None of such causes is present in the instant case.

The section 12 of the Act does not apply where the inability to perform specific performance on part of contract arises because of the plaintiff own conduct as held in Abdul Rahim & Ors. v. Tufan Gazi and Ors. AIR 1928 Cal. 584. In William Graham v. Krishna Chandra Dey , AIR 1925 PC 45 it has been laid down that the

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explanation in the section exhaust all the circumstances in which part performance can be granted. Section 12(2) deals with the situation where a party is unable to perform and such part is only a small proportion in value and capable of compensation in form of money. It was not a case covered in Section 12(2) at all. Under Section 12 (3) party in default is entitled to specific performance on payment of whole consideration or for the part left unperformed but here in the instant case plaintiff being in default could not be said to be entitled to invoke Section 12(3) also.

In Surjit Kaur v. Naurata Singh & Anr. 2000 (7) SCC 379 this court has observed that specific performance cannot be granted to a party who has not been ready and willing to perform a contract. In case a party is ready and willing to perform the contract in entirety, in cases where contract is not capable of being performed, in entirety the readiness and willingness would be taken to perform part of contract also. This Court has laid down thus:

15. It is also settled law that specific performance cannot be granted to a

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party who has not been ready and willing at all stages to perform the contract. Of course, the 1st respondent was ready and willing to perform the contract in its entirety. To that extent there would be readiness and willingness on the part of the 1st respondent. But in cases where a contract is not capable of being performed in whole then the readiness and willingness, at all stages, is the readiness and willingness to accept part performance. If a contract is not capable of being performed in whole and a party clearly indicates that he is not willing to accept part performance, then there is no readiness and willingness, at all stages, to accept part performance. In that case there can be no specific performance of a part of the contract at a later stage. None of the authorities cited by Mr. Rao lay down anything contrary. In all those cases the party had been insisting on part performance and/or the time for election had not arrived. In none of those cases an election not to accept part performance had been made. It is under those circumstances that the Courts held that the party could elect to accept part performance at any stage of the litigation. In those cases it could not be said that there was no readiness and willingness to accept part performance.
Applying the aforesaid principle, if a party is not ready and willing to perform whole of the contract, specific performance with respect to the part of the contract could not have been ordered in view of the aforesaid decision and Section 16 (c) of the Act. In the instant case, the High Court has ignored aforesaid

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basic principles that the party cannot claim specific performance.
Reliance had rightly been placed by appellants on the decision of Privy Council in William Graham's case (supra) in which it had been laid down that it is not for the High Court to make out a new contract, when specific performance is possible with respect to the entire contract. It has to be ordered for the entire contract not for part as has been ordered in this case by the High Court. However, in the instant case as earnest money has been paid i.e. initially Rs.50,000/- (Rupees Fifty Thousand only) and subsequently advance of Rs.14,50,000/- (Rupees Fourteen Lakhs and Fifty thousand only). In our opinion, forfeiture of the amount paid as earnest money of Rs.50,000/- had rightly been made as plaintiffs were delaying to perform their essential part of contract which was enjoined upon them. Remaining money paid in advance on 31.1.1990 is ordered to be refunded with simple interest at the rate of 6% per annum to the plaintiffs within three months from today. However, the plaintiffs shall bear the cost of the appellants of courts below and the cost of the appeal in this Court

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which is quantified at Rs.5,00,000/- (Rupees Five Lakhs only). The amount of cost payable to the defendants shall be adjusted out of the amount which

has to be paid alongwith interest to the plaintiffs.
The appeal is allowed to the aforesaid extent.
The impugned judgment and the decree passed by the High Court is set aside.

.....J.
(ARUN MISHRA)

.....J.
(AMITAVA ROY)

NEW DELHI;
APRIL 18, 2017