IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE SMT. JUSTICE P.V.ASHA

THURSDAY, THE 26TH DAY OF NOVEMBER 2015/5TH AGRAHAYANA, 1937

RFA.No. 550 of 2012 ()

AGAINST THE ORDER/JUDGMENT IN OS 353/1995 of SUB COURT, MAVELIKKARA
DATED 30-11-2011

APPELLANT(S)/DEFENDANT:

VIJAYAMANI,
D/O.BHARATHI CHANNATHI
ANAKUZHI THARAYIL (KALA BHAVAN)PERINGALA MURI
KAYAMKULAM VILLAGE

BY ADVS.SRI.JACOB P.ALEX
SRI.JOSEPH P.ALEX

RESPONDENT(S)/PLAINTIFFS:
----

1. P.V.AJAYAKUMAR
S/O.VASU, PLANKKOTTU HOUSE, MUDIYOORKKONAM MURI
PANDALAM VILLAGE

2. M.K.DEVARAJAN,
KUNNATHETHU HOUSE, MUDIYOORKKONAM MURI
PANDALAM VILLAGE

R1,2 BY ADV. SRI.K.S.MADHUSOODANAN
R1,R2 BY ADV. SRI.THOMAS CHAZHUKKARAN
R1,R2 BY ADV. SRI.P.K.RAKESH KUMAR

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 26-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ANTONY DOMINIC & P.V.ASHA, JJ.

R.F.A.No.550 of 2012

Dated this the 26th day of November, 2015

JUDGMENT

Antony Dominic, J.

1. Aggrieved by the judgment and decree dated 30.11.2011, the defendant in O.S.353/95 on the file of the Sub Court, Mavelikkara filed this appeal.

2. The first respondent plaintiff filed the suit seeking specific performance of an agreement dated 6.5.1995, whereby, according to him, 12.5 cents of land along with a building thereon was agreed to be sold to him for ₹5 lakhs. Subsequently, by order in I.A.1229/96, the power of attorney holder of the plaintiff was impleaded as additional plaintiff. Case of the plaintiffs was that, though, by agreement dated 6.5.1995, the plaint schedule property was agreed to be sold, despite the readiness and willingness of the first plaintiff to perform his part of the contract and the payment of ₹3.5 lakhs already made as advance, the appellant defendant failed to execute the sale deed within the one month period agreed between the parties. It is in such circumstances,

the plaintiffs filed the suit seeking specific performance.

3. On the other hand, appellant defendant contended that there was a money transaction between her son and the first plaintiff and that the first plaintiff and certain persons trespassed into her house on 6.5.1995 and coerced her to sign on blank papers and misusing those papers, the agreement in question was fabricated. In the suit, on behalf of the first plaintiff, the additional plaintiff was examined as PW1 and Exts.A1 to A8 were marked. The appellant was examined as DW1. After hearing the parties, by judgment and decree dated 30.11.2011, the suit was decreed directing the appellant to execute sale deed in favour of the first plaintiff on his depositing the balance sale consideration of ₹1.5 lakhs in court. It was also decreed that on failure of the defendant to do so, the first plaintiff will be entitled to get the sale deed executed through court. It is this judgment which is under challenge before us.

4.We heard the learned counsel for the appellant and the learned counsel appearing for the respondents.

5. The contentions urged by the learned counsel for the appellant are that in view of the provisions of section 16(c) of the Specific Relief Act, 1963 requiring that on the failure of the first plaintiff to aver and prove that he has performed and has always been ready and willing to perform the essential terms of the contract which are to be performed by him, specific performance of a contract cannot be enforced, the court below ought not to have passed a decree for specific performance. This contention was elaborated by the learned counsel by pointing out that the first plaintiff who sought the performance of the agreement did not prove his readiness and willingness as contemplated in section 16(c) of the Specific Relief Act by examining himself and instead, contended himself by adducing the oral evidence of his power of attorney holder, who was examined as PW1, the second plaintiff. In this context, counsel also placed reliance on the judgment of the Apex Court in Man Kaur v. Hartar Singh Sangha

[(2010) 10 SCC 512] and this Court in Rekharani v. Prabhu [2007 (3) KLT 917].

6. The second contention raised was that the original title deeds pertaining to the plaint schedule property were produced in court by the first plaintiff and that in view of the principles laid down by this Court in the judgment in Sarada v. Divakara Kurup [2012 (4) KLT SN 152], that itself should be taken as indicating that the transaction was not one for sale of the property but was only a financial transaction as contended by the defendant. Learned counsel further contended that in view of the provisions contained in section 20 of the Specific Relief Act providing that specific performance is a discretionary remedy, the court below ought to have exercised the discretion and considered whether, in the facts of the case, the plaintiff was entitled to a decree for specific performance. It was contended that the judgment does not disclose such an exercise of the discretionary power and for that reason, the judgment is vitiated.

7. On the other hand, learned counsel for the plaintiffs referred us to the averments in the plaint and also Exts.A4, A6 and A7. According to the learned counsel, in the plaint, it was clearly averred that the first plaintiff was always ready and willing to perform his part of the agreement. He also showed the acknowledgement card for the issuance of Ext.A4 notice to the defendant, followed by his presence in the Sub Registrar office, which is reflected in Exs.A6 and A7, to which, he is a witness. In so far as the incompetence of PW1 contended by the appellant is concerned, learned counsel argued that PW1 was not cross examined on that aspect and therefore, the appellant having accepted the competence of PW1 cannot now be allowed to turn round and contend otherwise. He also argued that it was evident from the fact that specific performance was granted by the trial court, the court has exercised discretion conferred on it under section 20 of the Specific Relief Act in favour of the plaintiffs. Therefore, on this basis, counsel submitted that the judgment does not merit interference.

8.We have considered the submissions made. Section 16 of the Specific Relief Act, 1963 provides the personal bars to relief. As per clause (c) thereof, specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove that he has performed or always been ready and willing to perform the essential terms of the contract which are to be preformed by him. In so far as this case is concerned, Ext.A1 agreement dated 6.5.1995 provides for a sale consideration of ₹5 lakhs and admittedly, balance sale consideration of ₹1.5 lakhs remained unpaid. The plaint also contains an averment that the first plaintiff was always ready and willing to perform his part of the obligations. It is also true that on behalf of the 1st plaintiff, legal notice was issued to the defendant evidenced by Ext.A4 acknowledgement card and Exts.A6 and A7 shows his presence in the Sub Registrar's office on the date mentioned in the notice. However, apart from all these, section 16(1)(c) of the Act provides for proof of readiness and willingness, which, as explained by the Apex Court, is a 'state of mind'.

9. It was in the aforesaid context that the learned counsel for the appellant took serious objection to the evidence of PW1, the second plaintiff, who is the power of attorney holder of the first plaintiff. His contention was that in a case where specific performance is sought for, except in a case where the power of attorney holder is a person who is managing the affairs of the principal and is conversant with all his affairs, the power of attorney holder is incompetent to depose about the readiness and willingness of the principal. In this context, learned counsel for the appellant relied on the judgment of the Apex Court in Man Kaur (supra), where, in paragraphs 2 to 18, it has been held thus:

> "**2.** The appellant Man Kaur was the owner of the suit property, a plot admeasuring 1000 sq yd with the building thereon, identified as "Annexe No. 508" situated in Sector 18-B, Chandigarh. The respondent-plaintiff was, at all the relevant points of time, a non-resident Indian living in the United Kingdom. An agreement of sale dated 20-10-1978 was entered into between the defendant represented by her husband and attorney-holder Kartar Singh, as the vendor, and the plaintiff represented by his attorney-holder Paramjit

Singh, as the purchaser.

3. The material terms of the said agreement were:

(i) The defendant shall sell the suit property to the plaintiff for a consideration of Rs. 1,50,000;

(ii) As the premises was tenanted the defendant was liable to deliver vacant possession of only a small portion which was in her occupation. If the vendor was able to get the tenant vacated and deliver vacant possession of the entire premises, then the sale price shall be Rs. 1,60,000;

(iii) A sum of Rs. 10,000 was paid in cash as earnest money by the attorney-holder of the purchaser to the attorney-holder of the vendor;

(iv) The sale had to be completed by 20-12-1978 and the balance sale price shall be paid at the time of registration of the sale deed;

(v) The vendor had to deliver at the time of registration of the sale deed, her title deed, as also NOC from the Estate Office, Chandigarh, permission for sale under the Urban Land (Ceiling and Regulation) Act, 1976, and clearance certificate under Section 230-A of the Income Tax Act, 1961 and other relevant documents, if any;

(vi) If the vendor committed default, he had to pay double the amount of earnest money to the purchaser and if the purchaser committed any default, the sum of Rs. 10,000 paid as earnest money would stand forfeited; and

(vii) The bargain was entered through the property dealer M/s R.P. Sethi & Co. to whom both the parties should pay 2% commission on the total price; and in the event of default, the defaulting party shall pay 4% commission.

The agreement of sale was signed by the attorney-holder of the vendor and the attorney-holder of the purchaser and witnessed by Hari Singh (property dealer) and Balraj Singh (property dealer carrying on business under the name and style of M/s R.P. Sethi & Co.) The agreement also contained an endorsement by Kartar Singh acknowledging the receipt of Rs. 10,000 as earnest money in addition to another sum of Rs. 1500.

4. On 25-4-1980 the respondent (represented by his attorney-holder Jagtar Singh Sangha under power of attorney dated 1-3-1980) filed a suit for specific performance of the said agreement of sale against the appellant. The plaint after referring to the terms of the agreement of sale, averred that the bargain was struck through property dealer Balraj Singh of M/s R.P. Sethi & Co; that the time for performance was extended from time to time till 7-6-1979; that the defendant's attorney-holder and the plaintiff reached Chandigarh on 7-6-1979; that though the defendant's attorney-holder stated that he had come to Chandigarh to execute the sale deed, he did not go over to the Sub-Registrar's Office nor executed the sale deed; that the plaintiff remained present in the Sub-Registrar's Office at Chandigarh, and recorded his presence on 7-6-

1979 by presenting an application and getting an acknowledgment from the Sub-Registrar; that after 7-6-1979, neither the defendant nor her attorney-holder Kartar Singh came to Chandigarh; that they did not also contact the plaintiff or the property dealer Balraj Singh; and that the repeated attempts of the property dealer Balraj Singh to contact the defendant were futile.

5. The plaint also averred that the plaintiff was always ready and willing to perform his part of the contract and get the sale deed registered by paying the balance consideration; and that in spite of a notice dated 5-3-1980 calling upon the defendant to complete the sale, the defendant had failed to execute the sale deed. The plaintiff therefore prayed for specific performance of the agreement of sale dated 20-10-1978 or in the alternative, if he was found not entitled to specific performance, then for a decree of recovery of Rs. 21,500 (that is Rs. 11,500 paid to the defendant's attorney-holder and Rs. 10,000 as liquidated damages) with costs.

6. The defendant resisted the suit. The defendant alleged that as she and her husband were residents of Rourkela, it was agreed that the property dealer Balraj Singh, who was acting on behalf of the plaintiff purchaser would be responsible for securing the required clearances for the sale; that a sum of Rs. 1500 was paid by the plaintiff's attorney-holder to Balraj Singh (shown as advance payment to the vendor in the receipt portion of the agreement of sale) to secure the said NOC/permission/clearance; that the defendant signed and delivered to Balraj Singh the necessary papers for getting the clearances/certificates; that time stipulated for sale (20-12-1978) was the essence of the contract; that Balraj Singh sent a telegram dated 2-6-1979 requiring the defendant's husband Kartar Singh to reach Chandigarh on 7-6-1979 for registration, assuring that registration of sale deed would definitely take place on that day and no further extension would be sought; that in response to it, the defendant's husband, who was intent to maintain cordial relationship, in spite of the expiry of the last date fixed for sale, went to Chandigarh and met the plaintiff and Balraj Singh, in the office of Balraj Singh; that the plaintiff informed him that he (the plaintiff) could not arrange the entire funds for making full payment and therefore could not proceed with the sale; that the defendant's husband informed the plaintiff and Balraj Singh that he had come all the way from Rourkela to get the sale deed registered, and it was evident that the plaintiff did not have the money and was not interested in purchasing the property and that therefore the agreement stood cancelled, and he would not execute the sale deed; and that the defendant's husband thereafter left for Rourkela and also wrote a letter to Balraj Singh confirming the termination of the agreement in view of the plaintiff's conduct on 7-6-1979.

7. The defendant contended that as the plaintiff was not ready and willing to perform the contract by paying the balance of the sale price and get the sale completed, he was not entitled to specific performance; and that in view of the breach committed by the plaintiff, the earnest money amount paid by him stood forfeited. The defendant also contended that the suit was not maintainable as it was not filed by a duly authorised person. Subsequently the defendant amended her written statement to contend that the plaintiff was a non-resident Indian and he had not obtained the permission of Reserve Bank of India under the Foreign Exchange Regulation Act, 1973, and therefore he was not entitled to purchase any immovable property in India.

8. On the said pleadings, the trial court framed the following issues:

(1) Whether the suit has been filed by a duly authorised person?

(2) Whether the suit is not maintainable in the present form?

(3) Whether the suit for specific performance is not maintainable?

(4) Whether the suit is hit by laches and delay? If so, its effect?

(5) Whether the agreement dated 20-10-1978 has been rescinded and the suit is thus not maintainable?

(6) Whether the plaintiff is estopped by his own

act and conduct from filing the present suit?

(7) Whether the time was the essence of the contract?

(8) Whether the plaintiff was and is ready and willing to perform his part of the agreement? If not, its effect?

(9) Whether the plaintiff is entitled to the specific performance and in the alternative damages as claimed?

(9-A)Whether the suit is barred in view of Preliminary Objection 7 in the written statement?

(10) Relief.

The parties went to trial on the said issues. On behalf of the plaintiff, his attorney-holder Jagtar Singh Sangha was examined as PW 1, and the property dealer Balraj Singh was examined as PW 2. On behalf of the defendant, her husband and attorney-holder Lt. Col. Kartar Singh was examined as DW 1.

9. After appreciating the evidence, the trial court by judgment dated 15-3-1983, decreed the suit. It held that as the plaintiff had executed a power of attorney dated 1-3-1980 in favour of his brother Jagtar Singh Sangha and as Jagtar Singh Sangha has asserted in his evidence that he was the attorney-holder of the plaintiff, and as Balraj Singh had given evidence that the plaintiff executed the power of attorney in favour of Jagtar Singh Sangha in his presence, the suit was filed by a duly authorised person and was maintainable. The trial court held that the time was not of essence of the contract; that defendant had failed to prove that the agreement dated 20-10-1978 was rescinded; that the plaintiff had proved that he was ready and willing to perform his part of the contract; that the suit was not barred by time; that Reserve Bank's permission was not necessary for obtaining a decree for specific performance, but was required only for execution of the sale deed in pursuance of a decree for specific performance; and therefore the plaintiff was entitled to specific performance.

10. The appeal filed by the defendant was dismissed by the District Judge, Chandigarh, by judgment dated 3-6-1997 affirming the findings of fact recorded by the trial court. The second appeal filed by the appellant was dismissed by the Punjab and Haryana High Court, by the impugned judgment dated 26-10-1999. The appellant has challenged the said judgment in this appeal by special leave.

11. The contentions of the appellant in brief are:

(i) The plaintiff did not sign the agreement of sale nor signed the plaint, nor gave evidence. His attorney-holder (Paramjit Singh) who entered into the agreement of sale on behalf of the plaintiff and who represented the plaintiff initially, was not examined. The second attorney-holder (Jagtar Singh Sangha) examined as PW 1 was not personally aware of the transaction and admitted that he was not aware of what transpired prior to the execution of the power of attorney in his favour on 1-3-1980. There was therefore no acceptable or valid evidence about the readiness and willingness of the plaintiff to perform the contract. The courts below ought to have dismissed the suit by drawing a presumption that the plaintiff's case was false and for non-compliance with Section 16(c) of the Specific Relief Act, 1963 as the plaintiff did not enter the witness box.

(ii) The agreement of sale only provided for damages in the event of breach by either party. The agreement (Clause 11) provided that if the vendor failed to perform his part of the contract by executing the sale deed and getting it registered on receiving the balance consideration, he shall be liable to pay double the amount of earnest money received by her from the purchaser. The agreement did not provide for specific performance in the event of breach by the vendor. The clear intention of the parties was that in the event of breach by the vendor, the purchaser will be entitled to double the earnest money (that is refund of earnest money plus liquidated damages of Rs. 10,000) and nothing more. Therefore, even if breach by the appellant vendor was made out, the remedy of the respondent purchaser was only to get Rs. 20,000 and not for specific performance.

(iii) The evidence clearly established that the plaintiff was not ready and willing to perform the contract and committed breach and as a consequence, the defendant rescinded the contract. The courts below ignored the relevant evidence in this behalf and drew invalid inferences from the evidence. The courts below therefore ought to have dismissed the suit.

Re: Contention (i)

12. Section 16(c) of the Specific Relief Act, 1963 ("the Act", for short) bars the specific performance of a contract in favour of a plaintiff

"who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms of the performance of which has been prevented or waived by the defendant".

Explanation (ii) to Section 16 provides that for purposes of clause (c) of Section 16,

"the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction."

Thus, in a suit for specific performance, the plaintiff should not only plead and prove the terms of the agreement, but should also plead and prove his readiness and willingness to perform his obligations under the contract in terms of the contract. (See N.P. Thirugnanam v. Dr. R. Jagan Mohan Rao[(1995) 5 SCC 115]; Pushparani S. Sundaram v. Pauline Manomani James [(2002) 9 SCC 582] and Manjunath Anandappa v. Tammanasa. [(2003) 10 SCC 390])

13. In the first case, this Court held: (N.P. Thirugnanam case, [(1995) 5 SCC 115] SCC p. 118, para 5)

"5. … The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract."

14. In Vidhyadhar v. Manikrao [(1999) 3 SCC 573] this Court reiterated the following well-recognised legal position: (SCC pp. 583-84, para 17)

"17. Where a party to the suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct…."

15. We may next refer to two decisions of this Court which considered the evidentiary value of the depositions of the attorney-holders. This Court in Janki Vashdeo Bhojwani v. Indusind Bank Ltd. [(2005) 2 *SCC* 217]held as follows: (*SCC* pp. 222-24, paras 13, 17-18 & 21)

"13. Order 3 Rules 1 and 2 CPC empower the holder of power of attorney to 'act' on behalf of the principal. In our view the word 'acts' employed in Order 3 Rules 1 and 2 CPC confines only to in respect of 'acts' done by the power-of-attorney holder in exercise of power granted by the instrument. The term 'acts' would not include deposing in place and instead of the principal. In other words, if the power-of-attorney holder has rendered some 'acts' in pursuance of power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter of which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.

*   *   *

17. … In Shambhu Dutt Shastri v. State of Rajasthan [(1986) 2 WLN 713 (Raj)] it was held

that a general power-of-attorney holder can appear, plead and act on behalf of the party but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in the witness box on behalf of himself. To appear in a witness box is altogether a different act. A general power-of-attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff.

18. The aforesaid judgment was quoted with approval in Ram Prasad v. Hari Narain [AIR 1998 Raj 185]. It was held that the word 'acts' used in Rule 2 of Order 3 CPC does not include the act of power-of-attorney holder to appear as a witness on behalf of a party. Power-of-attorney holder of a party can appear only as a witness in his personal capacity and whatever knowledge he has about the case he can state on oath but be cannot appear as a witness on behalf of the party in the capacity of that party. If the plaintiff is unable to appear in the court, a commission for recording his evidence may be issued under the relevant provisions of CPC.

*   *   *

21. We hold that the view taken by the Rajasthan High Court in Shambhu Dutt Shastri [(1986) 2 WLN 713 (Raj)] followed and reiterated in Ram Prasad [AIR 1998 Raj 185] is the correct view."

(emphasis supplied)

16. In Shankar Finance & Investments v. State of

A.P.[(2008) 8 *SCC* 536] this Court explained in what circumstances, the evidence of an attorney-holder would be relevant, while dealing with a complaint under Section 138 of the Negotiable Instruments Act, 1881 signed by the attorney-holder of the payee. This Court held: (SCC pp. 542-43, paras 15-16)

"15. … A power-of-attorney holder of the complainant who does not have personal knowledge, cannot be examined. But where the attorney-holder of the complainant is in charge of the business of the complainant payee and the attorney-holder alone is personally aware of the transactions, and the complaint is signed by the attorney-holder on behalf of the complainant payee, there is no reason why the attorney-holder cannot be examined as the complainant. …

16. In regard to business transactions of companies, partnerships or proprietary concerns, many a time the authorised agent or attorney-holder may be the only person having personal knowledge of the particular transaction; and if the authorised agent or attorney-holder has signed the complaint, it will be absurd to say that he should not be examined under Section 200 of the Code, and only the Secretary of the company or the partner of the firm or the proprietor of a concern, who did not have personal knowledge of the transaction, should be examined."

17. To succeed in a suit for specific performance, the plaintiff has to prove: (a) that a valid agreement of sale was entered into by the defendant in his favour and the terms thereof; (b) that the defendant committed breach of the contract; and (c) that he was always ready and willing to perform his part of the obligations in terms of the contract. If a plaintiff has to prove that he was always ready and willing to perform his part of the contract, that is, to perform his obligations in terms of the contract, necessarily he should step into the witness box and give evidence that he has all along been ready and willing to perform his part of the contract and subject himself to cross-examination on that issue. A plaintiff cannot obviously examine in his place, his attorney-holder who did not have personal knowledge either of the transaction or of his readiness and willingness. Readiness and willingness refer to the state of mind and conduct of the purchaser, as also his capacity and preparedness on the other. One without the other is not sufficient. Therefore a third party who has no personal knowledge cannot give evidence about such readiness and willingness, even if he is an attorney-holder of the person concerned.

18. We may now summarise for convenience, the position as to who should give evidence in regard to matters involving personal knowledge:

(a) An attorney-holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.

(b) If the attorney-holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney-holder alone has personal knowledge of such acts and transactions and not the principal, the attorney-holder shall be examined, if those acts and transactions have to be proved.

(c) The attorney-holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney-holder, necessarily the attorney-holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorised managers/ attorney-holders or persons residing abroad managing their affairs through their attorney-holders.

(e) Where the entire transaction has been conducted through a particular attorney-holder, the principal has to examine that attorney-holder to prove the transaction, and not a different or subsequent attorney-holder.

(f) Where different attorney-holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney-holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his "state of mind" or "conduct", normally the person concerned alone has to give evidence and not an attorney-holder. A landlord who seeks eviction of his tenant, on the ground of his "bona fide" need and a purchaser seeking specific performance who has to show his "readiness and willingness" fall under this category. There is however a recognised exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or "readiness and willingness". Examples of such attorney-holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad."

10. In the context of the provisions of section 13B of the Hindu Marriage Act, in the judgment of this Court in Rekharani (supra), the Division Bench of this Court has also spoken on this aspect thus:

> 5. The Supreme Court in Janki Vashdeo v. Indusind Bank (2005 (2) KLT 265 (SC)) also has reiterated that a power of attorney can give evidence only in respect of acts done by him in the exercise of powers granted by the instrument, but he cannot depose for the principal in respect of the matter on which the principal alone can have personal knowledge. It was also held therein that the power of attorney ... "cannot depose for the principal in respect of the matter, which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined." A Division Bench of this Court in Ummer Farooque v. Naseema (2005 (4) KLT 565) on a question as to which sect a party to a marriage belongs to, held that "Power of Attorney can give evidence only in respect of acts done by him in the exercise of powers granted by the instrument, but he cannot depose for the principal in respect of the matter on which the principal alone can have personal knowledge." In Ratheesh Kumar v. Jithendra Kumar (2005 (2) KLT 669) in the matter arising under the Buildings (Lease and

> Rent Control) Act, 1965, another Division Bench of this Court held that "A general power of attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff. The power of attorney holder of a party can appear only in his personal capacity and cannot appear on behalf of the party in the capacity of that party." Thus the law is well settled that in matters requiring personal knowledge, evidence cannot be adduced through a power of attorney.

However, we do not find from the judgment under appeal that this aspect of the matter has engaged the attention of the lower court.

11. The second argument raised by the learned counsel for the appellant is by placing reliance on section 20 of the Specific Relief Act. Section 20 provides that the jurisdiction to decree specific performance is discretionary and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal. Counsel also placed reliance on section 20(2)(b)

which provides that the performance of a contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff, the court may properly exercise discretion not to decree specific performance. According to the learned counsel, the appellant is a widow and the property involved is the place of her residence. It is also stated that the first plaintiff is a person employed abroad and is well placed in life and therefore, non performance of the agreement would not involve any hardship to him.

12. Though this contention was refuted by the learned counsel for the respondents by pointing out that this is a case where, in 1995, substantial part of the sale consideration was paid by the respondent and that at this distance of time, there is no equity for the defendant to claim the benefit of section 20 (2) (b), what we find is that this vital aspect was also not dealt with by the court below and the court has decreed in favour of the plaintiffs stating that the defendant has not pleaded that the discretion should

be exercised in her favour. In our view, in the light of the provisions contained in section 20, irrespective of whether the party has claimed the benefit of section 20 or not, the court is bound to act according to the provisions of that section and therefore, the reason stated by the court in this behalf cannot be approved.

13.We also do prima facie find force in the contention raised by the learned counsel for the appellant relying on the judgment of this Court in Sarada (supra) that the availability of the original document in the possession of the first plaintiff indicate that the transaction in question was a financial transaction as contended by the plaintiffs.

14.From the above, we are satisfied that the court below has decreed the suit for specific performance in favour of the plaintiffs without adverting to relevant aspects. We cannot therefore sustain the judgment and according to us, the matter requires to be considered afresh. Hence we set aside the judgment and decree of the Sub Court, Mavelikkara in

O.S.353/95 and remit the matter to that court which will dispose of the same afresh, after hearing the parties and adverting to all relevant aspects, including the provisions of the Specific relief Act and the binding precedents. The trial court will be at liberty to permit both sides to adduce evidence if request is made to that effect.

Appeal is disposed of as above. Parties will mark their appearance before the Sub Court, Mavelikkara on 21.12.2015.

Sd/-
ANTONY DOMINIC, Judge.

Sd/-
P.V.ASHA, Judge.

kkb.

/True copy/

PS to Judge