

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.N. RAVINDRAN
&
THE HONOURABLE MR. JUSTICE ANIL K. NARENDRAN

FRIDAY, THE 10TH DAY OF APRIL 2015/20TH CHAITHRA, 1937

RFA.No. 694 of 2011 (D)

AGAINST THE JUDGMENT IN OS 1054/2007 of I ADDL. SUB COURT, THRISSUR DATED
23-12-2010

APPELLANT/FIRST DEFENDANT:

VINODAN, AGED 55 YEARS,
S/O KOTTAYIL VELAYUDHAN,
THANGALLOOR DESOM, VILLAGE,
THRISSUR TALUK, THRISSUR DT.

BY ADVS. SRI. P.B. KRISHNAN
SMT. GEETHA P. MENON
SRI. P.M. NEELAKANDAN
SRI. P.B. SUBRAMANYAN

RESPONDENT(S)/PLAINTIFF AND DEFENDANTS 2, 3 AND 4:

1. SUNIL KUMAR, AGED 41 YEARS,
S/O NEDUVILPURAKALA GOPALAN,
THIROOR, POTTORE DESOM AND VILLAGE, THRISSUR DIST.
PIN - 680 001.
2. SUBHADRA, AGED ABOUT 48 YEARS,
W/O LATE KOTTAYIL RAGHAVAN, THANGALLOOR DESOM & VILLAGE,
THRISSUR TALUK, PIN 680 001.
3. JAYA, AGED ABOUT 28 YEARS,
D/O LATE KOTTAYIL RAGHAVAN,
THANGALLOOR DESOM AND VILLAGE, THRISSUR TALUK
PIN - 680 001.
4. ANITHA, AGED ABOUT 25 YEARS, D/O LATE KOTTAYIL RAGHAVAN,
THANGALLOOR DESOM AND VILLAGE, THRISSUR TALUK,
PIN - 680 001.

R1 BY ADV. SRI. V.V. SURESH
R2 TO 4 BY ADV. SRI. K. PADMANABHAN

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 20.1.2015,
THE COURT ON 10-04-2015, DELIVERED THE FOLLOWING:

"CR"

P.N.RAVINDRAN & ANIL K.NARENDRAN, JJ.

R.F.A.No.694 OF 2011

DATED THIS 10th THE DAY OF APRIL, 2015

JUDGMENT

ANIL K.NARENDRAN, J.

The appellant is the first defendant in O.S.No.1054 of 2007 on the file of the Court of the Subordinate Judge of Thrissur. The first respondent herein filed the said suit seeking specific performance of Ext.A1 agreement dated 17.4.2007 for sale of the plaint schedule property and in the alternative for return of the advance amount of ₹25,000/- together with interest at the rate of 12% from the date of Ext.A1 sale agreement and a further sum of ₹50,000/- towards damages.

2. The court below decreed the suit and the first respondent/plaintiff was directed to pay the balance sale consideration at the rate of ₹24,250/- per cent to the appellant/first defendant within one month from the date of decree and the first defendant in turn was directed to receive the said amount and to execute a sale deed in respect of the entire property described as plaint schedule item No.1 and ½ share in the property described as plaint schedule item No.2. It was also ordered that, if the appellant/first defendant refuses to receive the balance sale consideration and execute the sale deed within the

stipulated period, the first respondent/plaintiff can deposit the balance sale consideration in court, within two weeks from the date of expiry of the aforesaid period of one month and file a petition to have a sale deed executed in his favour. Aggrieved by the judgment and decree of the court below, the appellant/first defendant is before us in this appeal.

3. We heard the arguments of the learned counsel for the appellant/first defendant, the learned counsel for the first respondent/plaintiff and also the learned counsel for respondents 2 to 4/defendants 2 to 4.

4. Going by the averments in the plaint, the property described as plaint schedule item No.1 belongs to the appellant/first defendant. The property described as plaint schedule item No.2 originally belonged to late Madhavi, who was the paternal grandmother of the appellant/first defendant and respondents 2 to 4/defendants 2 to 4, in which the appellant/first defendant have $\frac{1}{2}$ share and respondents 2 to 4/defendants 2 to 4 together have the remaining $\frac{1}{2}$ share. The appellant/first defendant for himself and on behalf of respondents 2 to 4/defendants 2 to 4 had agreed to sell the plaint schedule property to first respondent/plaintiff. Accordingly, appellant/first defendant and the first respondent/plaintiff executed Ext.A1 sale

agreement dated 17.4.2007, on payment of an advance of ₹25,000/-, which the appellant/first defendant received for and on behalf of himself and on behalf of respondents 2 to 4/defendants 2 to 4. As per the terms of Ext.A1 agreement, on the first respondent/plaintiff paying the sum of ₹3,00,000/- within 3 months from the date of execution of Ext.A1 sale agreement, the appellant/first defendant and respondents 2 to 4/defendants 2 to 4 agreed to execute a sale deed in his favour, in respect of 10 cents of property forming part of the plaint schedule property. The sale consideration fixed in Ext.A1 sale agreement was at the rate of ₹24,250/- per cent and the time limit for completion of the contract was fixed as 27.10.2007. Though the first respondent/plaintiff was ready and willing to perform his part of contract, the appellant/first defendant and others failed to produce the title deeds and encumbrance certificates of the property for verification and also to measure out the property in order to ascertain the actual extent. On 10.8.2007, the first respondent/plaintiff sent Ext.A2 lawyer notice, to which the appellant/first defendant sent Ext.A5 reply raising false and untenable contentions. In the meantime, there was an attempt on the part of the appellant/first defendant to cut and remove one jack fruit tree standing in the plaint schedule property. The first respondent/plaintiff again sent Ext.A6 notice dated 29.6.2007, requesting the

appellant/first defendant and others to execute the sale deed, to which the appellant/first defendant sent Ext.A8 reply dated 8.10.2007 raising untenable contentions. Hence the suit for specific performance was filed with an alternative prayer for return of the advance amount of ₹25,000/- together with interest at the rate of 12% and ₹50,000/- towards damages.

5. Along with the plaint, the first respondent/plaintiff filed I.A.No.6292 of 2007, an application under Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908, seeking an order of attachment before judgment. The court below, by order dated 18.10.2007 issued notice to the appellant/first defendant and others directing them to furnish security for the sum of ₹7,09,813/- or to show case within 30 days as to why they shall not be ordered to furnish such security. In the meanwhile, the court below also ordered conditional attachment of the petition schedule property.

6. The appellant/first defendant and respondents 2 to 4/defendants 2 to 4 filed a joint written statement, contending that, the appellant/first defendant had entered into Ext.A1 sale agreement with the first respondent/plaintiff and received ₹25,000/- as advance; but respondents 2 to 4/defendants 2 to 4 have no connection with the said agreement and that, they are unnecessary parties to the suit. The

appellant/first defendant never made the first respondent/plaintiff to believe that respondents 2 to 4/defendants 2 to 4 are also ready and willing to sell their share in the property described as plaint schedule item No.2 to the first respondent/plaintiff. The first respondent/plaintiff was not ready and willing to perform his part of the contract, on the other hand, the appellant/first defendant was ready and willing to perform his part of the contract. The appellant/first defendant never gave any undertaking that, he would get the signature of respondents 2 to 4/defendants 2 to 4 in the deed of conveyance. The first respondent/plaintiff is not entitled to get a decree for specific performance or in the alternative for return of the advance together with interest and damages. The first respondent/plaintiff has not sustained any loss. In fact, the first respondent/plaintiff was not ready to pay ₹3,00,000/- within the time stipulated. Even before the execution of the sale agreement the first respondent/plaintiff was informed about the mortgage created by the appellant/first defendant over the property. He got the property measured and convinced the first respondent/plaintiff about the actual extent to be sold. The appellant, on the last day fixed for execution of the sale deed went to the Sub Registry; but the first respondent/plaintiff did not turn up. It was contended further that, the first respondent/plaintiff is a person

engaged in real estate business and his only intention is to sell the property to third parties and make huge profits; but he could not find out prospective buyers within the time stipulated in the agreement. After the expiry of the period stipulated for execution of the sale deed, the first respondent/plaintiff came to the house of the appellant/first defendant with some others and attacked him. The appellant/first defendant sustained injuries and he lodged a complaint in the Peramangalam Police Station. It was contended in the written statement that, the first respondent/plaintiff is not entitled to get any reliefs and the suit is liable to be dismissed with costs.

7. Before the court below, the first respondent/plaintiff was examined as PW1 and one Raju Kuriakose, who alleged to have agreed to render necessary financial assistance to PW1 for purchasing the plaint schedule property was examined as PW2. Exts.A1 to A13 were also marked on the side of the first respondent/plaintiff. The appellant/first defendant was examined as DW1.

8. The court below found that, there is absolutely no evidence to suggest that respondents 2 to 4/defendants 2 to 4 had agreed to sell the plaint schedule property to the first respondent/plaintiff or that they had authorised the appellant/first defendant to execute the document in their behalf. Therefore, the first respondent/plaintiff is not

entitled to get any relief against respondents 2 to 4/defendants 2 to 4. But, on the issue of specific performance of Ext.A1 sale agreement, the court below held that, though the first respondent/plaintiff had not in the plaint mentioned anything about PW2 who according to him had agreed to render necessary financial assistance to purchase the plaint schedule property, there is no reason to disbelieve the evidence tendered by PW2 to that effect. The court below held further that, prior to the execution of Ext.A1 sale agreement the first respondent/plaintiff had assigned his family property, wherein he was residing with his aged parents and brother and received the sale consideration and he was having the said amount with him. Regarding non-performance of contract, the court below held that, respondents 2 to 4/defendants 2 to 4 were not ready to sell their ½ share in the property described as plaint schedule item No.2 to the first respondent/plaintiff and that the appellant/first defendant was not able to get their sanction, as agreed to by him, and that was the reason for non-performance of the contract. The court below held further that, the first respondent/plaintiff had succeeded in proving that he was always ready and willing to perform his part of the contract and therefore, there is no reason to disallow the prayer for specific performance of the contract in respect of the property described as plaint schedule

item No.1 and ½ share in the property described as plaint schedule item No.2.

9. In the result, the court below decreed the suit and the first respondent/plaintiff was directed to pay the balance sale consideration at the rate of ₹24,250/- per cent to the appellant/first defendant within one month from the date of decree and he in turn was directed to receive the said amount and to execute a sale deed in respect of the entire property described as plaint schedule item No.1 and ½ share in the property described as plaint schedule item No.2. The trial court also directed that, if the appellant/first defendant refuses to receive the balance sale consideration and execute the sale deed within that period, the first respondent/plaintiff can deposit the balance sale consideration in court, within two weeks from the date of expiry of the aforesaid period of one month and file a petition to have the sale deed executed in his favour.

10. The learned counsel for the appellant/first defendant mainly contended that the court below, having found that the first respondent/plaintiff has no sufficient fund at his disposal to pay the balance sale consideration, should not have decreed the suit placing reliance on the testimony of PW2. It was contended that the further finding that, the first respondent/plaintiff had succeeded in proving

that he was always ready and willing to perform his part of the contract is not based on any reliable evidence or materials on record and therefore, the finding of the court below that the first respondent/plaintiff is entitled for a decree for specific performance of Ext.A1 sale agreement is perverse and patently illegal.

11. Per contra, the learned counsel for the first respondent/plaintiff contended that, the various findings in the impugned judgment are perfectly legal and sustainable in law and that, in the facts and circumstances of the case the court below was perfectly justified in decreeing the suit.

12. We have considered the rival submissions made at the Bar and also perused the records of the case.

13. The execution of Ext.A1 sale agreement between the appellant/first defendant and the respondent/plaintiff is not in dispute. It is also not in dispute that at the time of execution of Ext.A1 sale agreement, the appellant/first defendant had received a sum of ₹25,000/- as advance. The appellant/first defendant had contended that, the first respondent/plaintiff was not having sufficient funds to pay the balance sale consideration in terms of Ext.A1 sale agreement. Going by Ext.A1 sale agreement, the total sale consideration for the plaint schedule property is ₹7,09,813/-, out of which ₹25,000/- was

paid as advance at the time of execution of the said agreement. As per the stipulations in the agreement, on payment of a further sum of ₹3,00,000/- within 3 months from the date of execution of the sale agreement, the appellant/first defendant had to execute a sale deed in favour of the first respondent/plaintiff, in respect of 10 cents of property forming part of the plaint schedule property.

14. Though the first respondent/plaintiff made a vague averment in paragraph 4 of the plaint that he was always ready and willing to pay the balance sale consideration and execute the sale deed, nowhere in the plaint has he disclosed his source for the same. None of the documents on record would show that the first respondent/plaintiff was having sufficient funds to pay the balance sale consideration in terms of Ext.A1 sale agreement. In Ext.A2 lawyer notice issued on behalf of the first respondent/plaintiff it has been stated that he was always ready and willing to pay the balance sale consideration and purchase the property within the period stipulated in Ext.A1 sale agreement; but the appellant/first defendant postponed the sale stating one reason or other. To Ext.A2 lawyer notice, the appellant/first defendant caused Ext.A5 reply notice to be issued in which it was contended, inter alia, that the first respondent/plaintiff has no financial capacity to pay the balance sale consideration and the

first respondent/plaintiff was called upon to prove his financial capacity to pay the balance sale consideration in terms of Ext.A1 sale agreement. On receipt of Ext.A5 reply notice, the first respondent/plaintiff caused Ext.A6 reply notice to be issued, reiterating that he has the financial capacity to pay the balance sale consideration and arrange sufficient funds for payment of the balance sale consideration. On receipt of Ext.A6 reply, the appellant/first defendant caused Ext.A8 reply notice to be issued, again calling upon the first respondent/plaintiff to prove his financial capacity to pay the balance sale consideration.

15. The document marked as Ext.A10 is the passbook of a savings bank account maintained by the first respondent/plaintiff in the Viyyoor Branch of the South Indian Bank Ltd. Ext.A10 would show that, as on 30.4.2007, the balance amount in the savings account was only ₹2,039/-. Though a sum of ₹1,00,000/- was credited on 14.6.2007 by cash payment, a sum of ₹30,000/- was withdrawn on 19.6.2007 and a further sum of ₹65,000/- was withdrawn on 21.6.2007. Therefore the balance amount as on 21.6.2007 was only ₹6,931/-. The said balance was reduced to ₹1,781/- by 7.10.2008. Later, on a remittance of ₹24,590/- made on 29.3.2008, the balance became ₹26,352/-. But, on the very same day, a sum of ₹14,000/

was debited and the balance was reduced to ₹12,352/-. Still later, on 11.4.2008, a further sum of ₹9,000/- was debited and the balance became ₹3,352/-. A perusal of Ext.A10 passbook would further show that, till 4.6.2010 the balance amount in the aforesaid savings account was less than ₹1,000/- except on the following dates, namely, 26.3.2009, 28.3.2009 and 6.4.2009.

16. The document marked as Ext.A11 is the passbook of a current account maintained in the name of Neelambari Ladies Hostel, Ambalapuram, Athani, which shows a balance amount of ₹2,30,000/- as on 9.4.2007, which was reduced to ₹30,000/- on 10.4.2007 and to ₹1,744/- by 26.5.2007. Though a cash deposit of ₹25,000/- was made on 14.6.2007, a debit of ₹20,000/- was made on 21.6.2007. Though a sum of ₹1,66,000/- was credited on 16.8.2007, that balance was reduced to ₹34,144/- by 29.8.2007 and the balance amount shown in Ext.A11 as on 20.9.2007 is ₹49,144/-. Ext.A12 certificate issued by the Branch Manager of South Indian Bank, Viyyur Branch, certifies that the first respondent/plaintiff was maintaining a savings bank account in the Viyyur Branch and that, as Proprietor of Neelambari Ladies Hostel, he had operated a current account in that branch during the period from 23.3.2007 to 22.5.2008. But, the first respondent/plaintiff himself had admitted, during cross examination, that there are no

documents to show that he is the owner of the aforesaid ladies hostel.

17. In paragraph 3 of the plaint, the first respondent/plaintiff has admitted that, the sale consideration fixed in Ext.A1 sale agreement is at the rate of ₹24,250/- per cent and that, the time limit for completion of the contract was fixed as 27.10.2007. Though a vague averment was made in paragraph 4 of the plaint that, the first respondent/plaintiff was always ready and willing to pay the balance sale consideration and execute the sale deed, nowhere in the plaint he has disclosed his source for payment of such consideration. The passbooks marked as Exts.A10 and A11 would not show that, the first respondent/plaintiff was having the financial capacity to pay the balance sale consideration in terms of Ext.A1 sale agreement. During cross examination the first respondent/plaintiff, who was examined as PW1, has admitted that Exts.A10 and A11 would not show that he was having sufficient funds, during the relevant period, to pay the balance sale consideration in terms of Ext.A1 sale agreement.

18. In the plaint, the first respondent/plaintiff has no case that his friend Raju Kuriakose, who was examined as PW2 during trial, has agreed to provide him the necessary financial assistance to pay the balance sale consideration in terms of Ext.A1 sale agreement. PW1, has during cross examination, admitted that he has referred to PW2

for the first time in his proof affidavit filed in lieu of chief examination. PW1 has also admitted that, none of the documents on record would show that PW2 had sufficient funds in order to offer him financial assistance to pay the balance sale consideration in terms of Ext.A1 sale agreement. PW2 has admitted, during cross examination, that he came to court as requested by the first respondent/plaintiff. PW2 has also admitted that, there are no documents on record to show that he is the partner of M/s. Thrissur Hire Purchase or to prove his annual income or the fact that he is filing tax returns.

19. In the proof affidavit filed in lieu of chief examination, the first respondent/plaintiff has stated that his mother Kamalakshy was having nearly 15 cents of land in Survey No.283/1 in Kottoor Village and that she had entered into Ext.A9 sale agreement dated 26.1.2007 with M/s. Tomy, Lijo and Jose for sale of the aforesaid property and that she had obtained a sum of ₹8,10,000/- as sale consideration for the aforesaid property and that the first respondent/plaintiff was planning to purchase the plaint schedule property utilising the aforesaid amount. PW1 has also deposed that, the money obtained by sale of the aforesaid property owned by his mother was in his hands and the said amount was never deposited in banks. But, PW1 has admitted that, none of the documents produced in court would show

that the aforesaid property owned by his mother was actually sold in terms of Ext.A9 sale agreement. Though PW1 has deposed that his sister and his sister-in-law together have 40 sovereigns of gold ornaments and they had agreed to sell it in order to raise necessary funds for purchasing the plaint schedule property, there is no reliable evidence in this regard.

20. Going by clause (c) of section 16 of the Specific Relief Act, 1963, specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant. Explanation (i) to section 16 of the Act provides that, for the purpose of clause (c), where the contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court. Explanation (ii) to section 16 provides that, for the purpose of clause (c), the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction. Section 16 of the Act deals with ground of defence based on the conduct of the plaintiff. Clause (c) of section 16 clarifies that such an

averment is necessary, while the explanation states what amounts to an averment of readiness and willingness to perform the contract. Clause (c) of section 16 of the Act therefore provides that in a suit filed for seeking specific performance of the contract, the plaintiff must aver and prove that he has performed or has been ready and willing to perform the essential terms of the contract, which are to be performed by him. The words, 'ready and willing' imply that, the plaintiff was prepared to carry out those parts of the contract to their logical end so far as they depend upon his performance. The distinction between 'readiness' and 'willingness' is that, the former has a reference to financial capacity and the latter on the conduct of the plaintiff wanting specific performance. If the plaintiff did not make any specific averment to that effect in the plaint, it would amount to non-compliance of the mandatory requirement of clause (c) of section 16 of the Act. In the absence of such averments, the suit is not maintainable. Before a decree for specific performance can be given, the plaintiff must prove his readiness and willingness to perform his part. The language of section 16 of the Act being prohibitory, it is not the duty of the court to grant specific performance, unless the plaintiff has averred and proved his readiness and willingness to perform his part of the contract.

21. In **N.P. Thirugnanam v. Dr. R. Jagan Mohan Rao (1995 (5) SCC 115)** the Apex Court held that, the continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. 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 to 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. Paragraph 5 of the judgment reads thus;

"5. It is settled law that remedy for specific performance is an equitable remedy and is in the discretion of the court, which discretion requires to be exercised according to settled principles of law and not arbitrarily as adumbrated under Section 20 of the Specific Relief Act 1963 (for short, 'the Act'). Under Section 20, the court is not bound to grant the relief just because there was valid agreement of sale. Section 16(c) of the Act envisages that plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of

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

22. In **Aniglase Yohannan v. Ramlatha (2005 (7) SCC 534)** the Apex Court held that, the basic principle behind section 16(c) of the Specific Relief Act 1963, read with explanation (ii) is that, any person seeking benefit of the specific performance of contract must manifest that his conduct has been blemishless throughout, entitling him to the specific relief, and that section 16 imposes a personal bar. The Apex Court has also clarified that, section 16(c) of the Act mandates the plaintiff to aver in the plaint and *establish the fact by*

evidence aliunde that he has always been ready and willing to perform his part of the contract. Paragraphs 12 and 13 of the judgment read thus;

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

13. Section 16(c) of the Act mandates the plaintiff to aver in the plaint and *establish the fact by evidence aliunde* that he has always been ready and willing to perform his part of the contract. On considering almost an identical fact situation it was held by this Court in *Surya Narain Upadhyaya v. Ram Roop Pandey* (1995 Supp (4) SCC 542) that the plaintiff had substantiated his plea.”

23. In **Man Kaur (Dead) by Lrs. v. Hartar Singh Sangha (2010 (10) SCC 512)** the Apex Court held that, even assuming that the defendant had committed breach, if the plaintiff fails to aver in the plaint or prove that he was always ready and willing to perform the essential terms of contract which are required to be performed by him, other than the terms the performance of which has been prevented or waived by the defendant, there is a bar to specific performance in his

favour. In the above judgment, the Apex Court in categorical terms held that, the assumption that readiness and willingness on the part of plaintiff is something which need not be proved, if the plaintiff is able to establish that the defendant refused to execute the sale deed and thereby committed breach, is not correct, and that, if the plaintiff did not have the balance sale consideration and the money required for stamp duty and registration or the capacity to arrange and pay such money, when the contract had to be performed, the plaintiff will not be entitled to specific performance, even if he proves breach by defendant, as he was not 'ready and willing' to perform his obligations.

Paragraphs 39 and 40 of the judgment read thus;

"39. The learned counsel for the respondent contended that in terms of the agreement, the defendant had to furnish an NOC from Chandigarh Administration, as also ULC clearance and income tax clearance required for the sale and there was nothing to show that she had obtained them, and therefore the question of plaintiff proving his readiness and willingness to perform his obligations did not arise.

40. This contention has no merit. There are two distinct issues. The first issue is the breach by the defendant-vendor which gives a cause of action to the plaintiff to file a suit for specific performance. The second issue relates to the personal bar to enforcement of a specific performance by persons enumerated in Section 16 of the Act. A person who fails to aver and prove that

he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him (other than the terms the performance of which has been prevented or waived by the defendant) is barred from claiming specific performance. Therefore, even assuming that the defendant had committed breach, if the plaintiff fails to aver in the plaint or prove that he was always ready and willing to perform the essential terms of contract which are required to be performed by him (other than the terms the performance of which has been prevented or waived by the plaintiff), there is a bar to specific performance in his favour. Therefore, the assumption of the respondent that readiness and willingness on the part of plaintiff is something which need not be proved, if the plaintiff is able to establish that defendant refused to execute the sale deed and thereby committed breach, is not correct. Let us give an example. Take a case where there is a contract for sale for a consideration of Rs.10 lakhs and earnest money of Rs.1 lakh was paid and the vendor wrongly refuses to execute the sale deed unless the purchaser is ready to pay Rs.15 lakhs. In such a case there is a clear breach by defendant. But in that case, if plaintiff did not have the balance Rs.9 lakhs (and the money required for stamp duty and registration) or the capacity to arrange and pay such money, when the contract had to be performed, the plaintiff will not be entitled to specific performance, even if he proves breach by defendant, as he was not 'ready and willing' to perform his obligations."

24. In the case on hand, it has come out in evidence that, the first respondent/plaintiff did not have the financial capacity to arrange

the balance sale consideration in terms of Ext.A1 sale agreement. Though PW1 has deposed that, the money obtained by sale of the property owned by his mother was in his hands, he has admitted during cross-examination that, the aforesaid amount was never deposited in any bank and that, none of the documents produced in court would show that the aforesaid property owned by his mother was actually sold in terms of Ext.A9 sale agreement. Though PW2 was brought during trial as a person who had agreed to provide the necessary financial assistance to PW1 to pay the balance sale consideration in terms of Ext.A1 sale agreement, PW1 himself has admitted that none of the documents on record would show that PW2 had sufficient funds in order to offer him such financial assistance. Further, PW2 has also admitted, during cross-examination, that there are no documents to show that he is a partner of M/s. Thrissur Hire Purchase or to prove his annual income or the fact that he is filing tax returns. Though PW1 has deposed that his sister and his sister-in-law together have 40 sovereigns of gold ornaments and they had agreed to sell it in order to raise necessary funds for purchasing the plaint schedule property, there is no reliable evidence in this regard. Further, PW1 himself has admitted that, the passbooks marked as Exts.A10 and A11 would not show that he was having sufficient funds, during the

relevant period, to pay the balance sale consideration in terms of Ext.A1 sale agreement. As we have already noticed in paragraphs 15 and 16 of the judgment, the balance amount available in Exts.A10 and A11 passbooks during the relevant period was very meager. Further, PW1 himself has admitted that, there are no documents to show that he is the proprietor of Neelambari Ladies Hostel, which is shown as the account holder in Ext.A11 pass book. Therefore, the evidence on record makes it explicitly clear that, the first respondent/plaintiff did not have the financial capacity to pay the balance sale consideration in terms of Ext.A1 sale agreement. Since the first respondent/plaintiff did not have the money required for payment of the balance sale consideration and also the capacity to arrange payment of such amount, it has to be concluded that he was not 'ready and willing' to perform his obligations under Ext.A1 sale agreement. In such circumstances, even if the first respondent/plaintiff was able to establish that the appellant/first defendant refused to execute the sale deed and thereby committed breach, he will not be entitled for a decree for specific performance of Ext.A1 sale agreement. Therefore, the reasoning of the court below in the impugned judgment for granting a decree for specific performance of Ext.A1 sale agreement cannot be sustained in law.

25. As we have already noticed, except a vague statement made in paragraph 4 of the plaint that, the first respondent/plaintiff was always ready and willing to pay the balance sale consideration and execute the sale deed, there are no specific averments to the effect that, he has been ready and willing to perform the essential terms of the contract, which are to be performed by him. The absence of specific pleadings to that effect in the plaint would amount to non-compliance of the mandatory requirements of clause (c) of section 16 of the Act. The language of section 16 of the Act being prohibitory, no court can grant a decree for specific performance unless the plaintiff has averred and proved his readiness and willingness to perform his part of the contract. Since the first respondent/plaintiff has failed to aver in the plaint and *establish the fact by evidence aliunde* that he has always been ready and willing to perform his part of the contract, the court below ought to have declined the decree for specific performance of Ext.A1 sale agreement.

26. The first respondent/plaintiff has averred in the plaint that, in case the court finds that a decree for specific performance cannot be granted, he is entitled for return of the advance sale consideration of ₹25,000/- together with 12% interest from the date of Ext.A1 sale agreement and ₹50,000/- towards damages. He has also averred in

the plaint that, due to the default committed in executing sale deed in terms of Ext.A1 sale agreement, he has to stay in a rented house on payment of huge amount towards rent. In the proof affidavit filed in lieu of chief examination, the first respondent/plaintiff has stated that, due to the aforesaid default in executing the sale deed he had to take a house on rent on monthly rent of ₹1500/-, vide Ext.A13 lease deed. He has also stated that, after the execution of Ext.A1 sale deed the land value in the locality has gone up and therefore, he has sustained loss due to the default committed by the appellant/first defendant and others in executing the sale deed.

27. As we have already noticed, none of the documents produced in court would show that the property owned by the mother of the first respondent/plaintiff was actually sold in terms of Ext.A9 sale agreement. During cross-examination, PW1 has admitted that there are no receipts to prove payment of rent in respect of the premises covered by Ext.A9 lease deed. Further, he has also not adduced any evidence regarding the hike of land value in the locality after the execution of Ext.A1 sale agreement. Therefore, there is total lack of materials to conclude that the first respondent/plaintiff had sustained any loss due to non-execution of sale deed pursuant to Ext.A1 sale agreement. We also notice that, during cross-examination

the appellant/first defendant has admitted that he had received a sum of ₹25,000/- from the first respondent/plaintiff towards advance sale consideration. In **State of Kerala v. United Shippers and Dredgers (1982 KLT 738)** a Division Bench of this Court, interpreting sections 73, 74 and 75 of the Indian Contract Act, 1872 held that, a party complaining of breach of contract and claiming compensation is entitled to succeed only on proof of 'legal injury' having been suffered by him in the sense of some loss or damage having been sustained on account of such breach. Paragraph 18 of the judgment reads thus;

“**18.** That the party complaining of breach of contract and claiming compensation is entitled to succeed only on proof of "legal injury" having been suffered by him in the sense of some loss or damage having been sustained on account of such breach, is clear from S.73 and 75 of the Act. S.74 is only supplementary to S.73 of the Act and it does not make any departure from the principle behind S.73 in regard to this matter. Every case of compensation for breach of contract has to be dealt with on the basis of S.73 of the Act. In a particular case where the contract itself stipulates for payment of a sum of money on the breach of contract or contains any other stipulation for penalty, the principle additionally propounded by S.74 also will have to be applied and that is why irrespective of the amount stipulated in the contract, the party suffering from the breach is entitled only to reasonable compensation which, however, shall not exceed the amount so stipulated in the contract. Whether it be a contract

which stipulates a sum of money as being payable on breach of contract or whether it contains any other penal clause, or whether it is a contract which does not contain any such clause, the party complaining of breach of contract cannot successfully claim compensation unless he makes out loss or damage referable to such breach. The best measure of reasonable compensation would of course be the extent of actual loss or damage sustained. If the extent of actual loss or damage sustained is capable of being proved that provides a safe guide for the court to determine the quantum of reasonable compensation. If quantification of loss or damage is not possible, the party who has suffered on account of the breach is not without remedy. He can still request the court to assess reasonable compensation on the materials available and award the same to him. The words in S.74 "whether or not actual damage or loss is proved to have been caused thereby" have been employed to underscore the departure deliberately made by Indian Legislature from the complicated principles of English Common Law and also to emphasise that reasonable compensation can be granted even in a case where extent of actual loss or damage is incapable of proof or not proved. That is why S.74 of the Act deliberately states that what is to be awarded is reasonable compensation. In a case where the party complaining of breach of the contract has not suffered legal injury in the sense of sustaining loss or damage, there is nothing to compensate him for; there is nothing to recompense, satisfy or make amends. Therefore, he will not be entitled to compensation."

28. In the case on hand, there is total lack of materials to

conclude that the first respondent/plaintiff had sustained any loss due to non-execution of sale deed pursuant to Ext.A1 sale agreement. Further, the first respondent/plaintiff, who did not have the money required for payment of the balance sale consideration and also the capacity to arrange payment of such amount, and as such was not 'ready and willing' to perform his obligations under Ext.A1 sale agreement, cannot contend that he had sustained any 'legal injury' due to any 'breach of contract' committed by the appellant/first defendant. Therefore, the claim of the first respondent/plaintiff for ₹50,000/- towards damages is legally unsustainable.

29. Similarly, there is total lack of materials to conclude that the appellant/first defendant had sustained any loss due to non-execution of sale deed pursuant to Ext.A1 sale agreement. In the absence of any proof of 'legal injury' having been suffered by him in the sense of some loss or damage having been sustained on account of the fact that, the first respondent/plaintiff was not 'ready and willing' to perform his obligations under Ext.A1 sale agreement, the appellant/first defendant has no legal right to retain with him the sum of ₹25,000/- received towards advance sale consideration. Therefore, the first respondent/plaintiff will be entailed for return of the aforesaid advance sale consideration together with appropriate rate of interest

from the appellant/first defendant.

30. In the plaint, the first respondent/plaintiff had claimed interest at the rate of 12% for ₹25,000/- received by the appellant/first respondent towards advance sale consideration, from the date of Ext.A1 sale agreement. In view of our finding that the first respondent/plaintiff was not 'ready and willing' to perform his obligations under Ext.A1 sale agreement since he did not have the money required for payment of the balance sale consideration and also the capacity to arrange payment of such amount, the first respondent/plaintiff is not entitled for interest at the rate of 12% for the aforesaid advance sale consideration. We hold that, the first respondent/plaintiff will be entitled for interest only at the rate of 6% per annum for the advance sale consideration of ₹25,000/- from the date of Ext.A1 sale agreement till realisation.

In the result, we allow the appeal in part by setting aside the judgment and decree dated 3.12.2010 of the Court of the Subordinate Judge of Thrissur in O.S.No.1054 of 2007 and decree the suit by directing the appellant/first defendant to return the advance sale consideration of ₹25,000/- to the first respondent/plaintiff together with interest at the rate of 6% per annum, from the date of Ext.A1 sale agreement till realisation. The appellant/first defendant shall

return the the aforesaid advance sale consideration together with interest to the first respondent/plaintiff within two months from the date of the judgment, failing which the first respondent/plaintiff shall be entitled to execute the decree by proceeding against the appellant/first defendant personally and also against the property described as plaint schedule item No.1 and against the ½ share of the appellant/first defendant in the property described as plaint schedule item No.2.

The parties shall suffer their respective costs in this appeal.

Sd/-
P.N.RAVINDRAN,
JUDGE

Sd/-
ANIL K.NARENDRA,
JUDGE

skj/dsn