

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE SMT. JUSTICE P.VASHA

THURSDAY, THE 8TH DAY OF OCTOBER 2015/16TH ASWINA, 1937

RFA.No. 869 of 2013

AGAINST THE DECREE AND JUDGMENT IN OS 468/2008 of I ADDL. SUB COURT, THRISSUR
DATED 10-06-2013

APPELLANT/DEFENDANT:

K.V.BALAN
AGED 84 YEARS, S/O. VELAPPAN, KUTTIKKATT VEEDU
THANIYAM VILLAGE, P.O. PERINGOTTUKARA - 680 565
THRISSUR DISTRICT.

BY ADVS.SRI.SANTHEEP ANKARATH
SRI.Y.JAFAR KHAN

RESPONDENT/PLAINTIFF:

BHAVYANATH
AGED ABOUT 26 YEARS, S/O. GOPINATHAN, VADASSERY HOUSE
TRIPRAYAR DESOM, NATTIKA VILLAGE, CHAVAKKAD TALUK
P.O. VALAPAD - 680 567, THRISSUR DISTRICT.

R.1 BY ADV. SRI.TN..MANOJ

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 08-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ANTONY DOMINIC & P.V.ASHA, JJ.

R.F.A.No.869 of 2013

Dated this the 8th day of October, 2015

JUDGMENT

Antony Dominic, J.

1.The defendant in O.S.468/08 on the file of the 1st Additional Sub Court, Thrissur is the appellant. The suit was filed by the respondent, seeking specific performance of Ext.A1 agreement entered into between himself and the appellant and the decree sought was to direct the appellant to execute and register sale deed in respect of plaint schedule properties in his favour and to deliver the property to him, after getting the boundaries fixed by a Taluk Surveyor and by providing original title deeds and other documents. By the judgment and decree under appeal, the suit was dismissed.

2. we heard the counsel for the appellant and the learned counsel appearing for the respondent.

3.The facts of the case are that on 25.4.2007, Ext.A1 agreement was entered into between the appellant and

the respondent, whereby, the appellant had agreed to sell 75.75 cents of land owned by him for ₹34,000/- per cent. The period specified for completing the sale was 11 months. The agreement shows that the appellant had paid an advance amount of ₹2,00,000/- and had also agreed to make a further payment of a minimum amount of ₹3,00,000/- within four months. As per the agreement, the property was to be measured.

4.As agreed by the respondent, he made a further payment of ₹3,00,000/- within the time specified. It is alleged that on 25.1.2008, he had caused Ext.A2 notice issued to the respondent, expressing his readiness and willingness to perform the agreement. It is stated that in spite of having received the notice, there was no response from the respondent. Subsequently, on 18.3.2008, Ext.A3 notice was issued on behalf of the respondent plaintiff, informing the appellant that he was ready and willing to perform the agreement. He had also raised a contention that the total extent of land available was less than what was mentioned in Ext.A1 agreement. It is the case of

the respondent that even on 24.3.2008, when the period specified in Ext.A1 agreement expired, the appellant was unwilling to perform the agreement and therefore, he filed the suit on 26.3.2008 demanding specific performance of the agreement.

5. In the written statement filed, the appellant denied the allegations in the plaint and contended that the respondent was never ready and willing to perform the agreement and that he never had the necessary amounts for execution of the agreement. All the allegations levelled in the plaint were denied by the appellant and he put the entire responsibility on the respondent/plaintiff.

6. Before the trial court, on behalf of the respondent plaintiff, he himself and Pws. 2 to 9 were examined and Exts.A1 to A42 were marked. On behalf of the appellant, he himself was examined as PW1 and Ext.B1 was also marked. Exts.C1 to C2A and X1 to X6 were also marked.

7. On conclusion of the trial, the court decreed the suit directing the defendant to execute the sale deed conveying the plaint schedule properties, the extent of which was fixed as 71.70 cents, shown as plot 'A' in Ext.C2(a) survey plan, after receiving the balance sale consideration. It is also ordered that in case of failure of the defendant to execute the sale deed, it would be open to the plaintiff to deposit the balance sale consideration in court and get the conveyance executed through court. It was also decreed that on execution of the conveyance deed, respondent would be entitled to get actual delivery of the property. It is this judgment and decree which is under appeal.

8. The main contention raised by the learned counsel for the appellant is that the respondent plaintiff was never ready and willing to perform the agreement and that therefore, in view of Section 16(c) of the Specific Relief Act, 1963, specific performance of Ext.A1 agreement could not have been enforced and a decree could not have been passed. In support of this contention, learned counsel for the appellant

placed reliance on the judgment of this court in Vinodan v. Sunil Kumar [2015 (2) KHC 656] and that of the Apex Court in Man Kaur v. Hartar Singh Sangha [2010 (10) SCC 512].

9. On the other hand, the learned counsel for the respondent plaintiff countered the contentions of the appellant by referring us to the averments in the pleadings, the evidence of PW1 and the documents on record to substantiate his contention that the plaintiff had produced sufficient evidence to prove his readiness and willingness entitling him for the decree. Counsel also placed reliance on the judgments in Sukhbir Singh v. Brij Pal Singh [AIR 1996 SC 2510], P.D'Souza v. Shondriilo Naidu [(2004) 6 SCC 649] and Faizal Eroth v. Venkalath Raveendran [2013 (3) KLT 1041]. It was also his contention that Ext.A1 agreement involved mutual obligations and that as the appellant had failed to perform his part of the agreement, there is no question of insisting on the plaintiff's readiness and willingness to seek a decree of specific performance.

10. We have considered the submissions made. Ext.A1 is the agreement on the basis of which the plaint was instituted. As per this agreement, the appellant had agreed to sell and the respondent had agreed to purchase 75.34 cents of land in Sy.No.353/1 of Thanniyam village. The agreement shows that the appellant had received an advance amount of ₹2,00,000/- from the respondent. The respondent had also agreed that within 4 months, he would pay a further minimum amount of ₹3,00,000/- to the appellant. The agreement also provided that the sale would be completed on or before 24.3.2008. There is also provision that the price agreed to be paid is ₹34,000/- per cent found on actual measurement.

11. Execution of Ext.A1 agreement is not disputed. The plaint also shows that in addition to ₹2,00,000/- paid as advance, within the 4 months' period agreed to in Ext.A1, the respondent plaintiff had paid a further amount of ₹3,00,000/- to the appellant. It is also stated in the plaint that on 16.3.2008, the property was got measured and that on measurement,

extent of the property was found to be 70.950 cents, while the decree shows that the extent is fixed as 71.70 cents and the plot is shown as 'A' in Ext.C2(a) survey plan. While both sides agree that the property was measured on 16.3.2008, which is before the expiry of the period specified for performance of the agreement, even before that, on 25.1.2008, Ext.A2 notice was issued on behalf of the appellant indicating his readiness and willingness for performance of the agreement and calling upon the respondent to perform his part. While the appellant contends that on account of the failure of the respondent plaintiff to reply to the notice and also from his subsequent conduct, he has proved his unwillingness and inability to perform the contract, it is contended by the respondent plaintiff that there was failure on the part of the appellant and that despite Ext.A3 notice issued on his behalf on 18.3.2008, demanding performance of the agreement, there was failure on the part of the appellant and therefore, the suit was filed.

11.As we have already indicated, the main issue that is required to be resolved in this appeal is whether the respondent plaintiff has proved his readiness and willingness, which, undoubtedly is an essential requirement of section 16(c) of the Specific Relief Act, in the absence of which, court could not have granted a decree for specific performance of Ext.A1 agreement.

12.Section 16(c), being relevant reads thus:

“16.Personal bars to relief- Specific performance of a contract cannot be enforced in favour of a person-

(a) xxx

(b) xxx

(c) 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.”

13.In so far as this aspect of the matter is concerned, it is relevant to note that the judgment under appeal itself contains the following findings:

"8) It is true that plaintiff has not produced any document to show that he was having ready cash covering the balance consideration, payable by him under Ext.A1, at the relevant time. Of course, certain documents are produced to show that presently he is having some ready cash in the form of fixed deposits and in the form of share certificates etc. I do not think that any of these documents are much relevant in this case for the reason that in the nature of the dispute the plaintiff has to prove his capacity to pay the balance consideration within the period shown in Ext.A1. Production of these documents which are admittedly after the suit may not have much evidentiary value."

12. PW1, the plaintiff, in his cross examination, was asked about his failure to produce documents along with the plaint showing his capacity to purchase the property in question and his answer shows that he had no explanation at all to offer. He also did not have any explanation for not making any averment in the plaint about the amount, if any, that was kept ready by him for purchasing the property. Further, in answer to the question about the amount that was mobilised by him towards consideration, his answer was that gold worth about ₹24,00,000/- was

available with his family members and that he had mobilised about ₹8,00,000/- with him, for which, he did not have any proof. It was also admitted by him that he had not produced any document evidencing the availability of necessary resources at any time prior to 2.2.2013.

13.Despite the evidence on record being as above, learned counsel for the respondent plaintiff took us through Exts.A22 and A23, marked through PW4. Ext.A22 and 23 are certificates dated 19.1.2013 issued by PW4. By Ext.A22, it is certified that the respondent's mother Daisy had ornaments worth ₹9,46,762/- as on 24.3.2008. Similarly, Ext.A23 shows that his wife had ornaments worth ₹8,74,993/- as on 24.3.2008. Reference was also made to Ext.A24 series, certificates dated 16.1.2013, which were marked through PW8. By Exts.A24(a), (b) and (c), PW8 has certified that the respondent's mother had property worth ₹44,30,000/-, ₹26,12,500/- and ₹48,00,000/- respectively as on March, 2008. Ext.A25 dated 16.1.2013 is a similar certificate issued by

PW8 in respect of the properties owned by the father of the respondent worth ₹26,60,000/- as on March, 2008. Reference was also made to Ext.A11 to A16 which were marked through PW1. These are Fixed Deposit receipts obtained in the year 2012 and according to the respondent plaintiff, a total amount of about ₹20,00,000/- was available in his Fixed Deposit. Counsel also made reference to Exts.A17 and A20 which show that the respondent's father had sold shares on 3.11.2010. Similarly, Ext.A18 shows that the respondent himself had sold shares on 31.8.2010. Reference was also made to Ext.A19 showing that on 26.12.2011 his mother had sold some shares. Also, Exts.A26 and 27 dated 28.1.2013 are certificates issued by Canara Bank and Union Bank to the respondent's father indicating the availability of money.

14. In addition to this evidence available, counsel also referred to us the pleadings contained in paragraphs 3, 7 and 8 of the plaint, in which, the plaintiff had asserted his readiness and willingness to perform the agreement. Before appreciating the evidence adduced,

we shall make reference to the judgments that are cited before us by both sides.

15. In Sukhbir Singh v. Brij Pal Singh [AIR 1996 SC 2510], it has been held by the Apex Court that law is not in doubt and it is not a condition that the respondents should have ready cash with him. It is also held that the fact that a party has attended the Sub Registrar's Office to have a sale deed executed and waited for the petitioners to attend the office is a positive fact to prove that they had necessary funds to pass on consideration and that they had with them the needed money for payment at the time of registration. It is also held that it is sufficient for the party to claim specific performance to establish that they had the capacity to pay the sale consideration and that it is not necessary that they should always carry the money with them from the date of the suit till the date of the decree.

16. In P.D'Souza v. Shondriilo Naidu [(2004) 6 SCC 649], it has been held that it is indisputable that in a suit for specific performance of a contract,

plaintiff must establish his readiness and willingness to perform his part of the contract and that the question as to whether the onus was discharged by the plaintiff or not will depend upon the facts and circumstances of each case and that no straitjacket formula can be laid down in this behalf. It is also held that readiness and willingness on the part of the plaintiff would depend upon the question as to whether the defendant did everything which was required of him to be done in terms of the agreement for sale.

17. In Azhar Sultana v. B.Rajamani [AIR 2009 SC 2157], the Apex Court has agreed that the contention that for specific performance, it is not necessary that the entire amount of consideration should be kept ready and that the plaintiff must file proof in respect thereof.

18. In Muhammed v. Chandrika [2010 (3) KLT 306], it was held thus:

"12.

A suit for specific performance can be filed by the seller or by the buyer. Whoever files the suit, specific performance of a contract cannot be enforced in favour of the plaintiff who fails to aver and prove readiness and willingness as provided in clause (c) of S.16. The readiness and willingness should be proved by the person who claims specific performance of a contract. There may be mutual obligations on the part of the plaintiff or the defendant to perform certain terms as agreed upon between the parties. It may also occur that both the parties might have committed breach of certain terms of the contract. Even if the defendant has failed to perform a term in the contract that does not automatically entitle the plaintiff to get specific performance of a contract. On the failure of the plaintiff to prove his readiness and willingness, the suit for specific performance must fail, notwithstanding the failure to perform a term of the contract by the defendant. In the process of establishing that the plaintiff was ready and willing to perform his part of the contract and that he has always been ready and willing to perform the essential terms of the contract, the plaintiff may rely on the breach committed by the defendant. Depending on the facts and circumstances of each case, the contention raised by the defendant that the plaintiff failed to perform a particular term in the contract could be rejected by the court on a finding that the

defendant committed breach in respect of that particular term in the contract. That does not mean that proof of breach of any of the terms of the contract by the defendant is proof of readiness and willingness on the part of the plaintiff as provided in clause (c) of S.16. Readiness and willingness on the part of the plaintiff has to be independently established to enable him to get a decree for specific performance. Of course, in arriving at the conclusion as to whether the plaintiff has proved his readiness and willingness, the court could take note of a breach committed by the defendant. That is in the realm of appreciation of evidence. It cannot be said that proof of breach committed by the defendant would result in proof of the readiness and willingness on the part of the plaintiff. S.16 is couched in a negative form. It mandates that specific performance a contract cannot be enforced in favour of a person who failed to aver and prove his readiness and willingness to perform his part of the contract. Breach of contract or any term of the contract by the defendant does not find a place in S.16. In my view, the breach committed by the defendant has to be considered by the court only in the process of arriving at a conclusion on facts as to whether the plaintiff has proved his readiness and willingness."

19. In Faizal Eroth v. Venkalath Raveendran [2013 (3) KLT 1041], this Court reiterated the settled legal position that it is not necessary that the entire amount of consideration should be kept ready or that the plaintiff must file proof in respect thereof. It is also held that where the performance of the intending buyer is conditional upon certain acts to be performed by the seller, the buyer need perform his part only after those acts are performed by the seller.

20. All these legal propositions were taken note of and discussed in the Division Bench judgment in Vinodan v. Sunil Kumar [2015 (2) KHC 656] and in paragraphs 20 to 27, it was held thus:

"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 noncompliance 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 Clause (c) 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* [AIR 1996 SC 116], 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 always ready and willing to perform his part of contract."

22. In *Aniglase Yohannan v. Ramlatha* [AIR 2005 SC 3503], 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 was 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 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 ₹10 lakhs and earnest money of ₹1 lakh was paid and the vendor wrongly refuses to execute the sale deed unless the purchaser is ready to pay ₹15 lakhs. In such a case there is a clear breach by defendant. But in that case, if plaintiff did not have the balance ₹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 in 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 noncompliance 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."

21.The principles laid down in the aforesaid judgments cited by both sides reiterate the statutory prescription contained in section 16(c) of the Specific Relief Act 1963, which provide that 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. while taking note of this statutory prescription, we are not oblivious of explanation (1) to this section which provide that where a 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 and that what is required is that he must aver performance thereof or his readiness and willingness to perform the contract according to its true construction. while this statutory prescription is recognised in all these judgments, it is also indicated that while it is not

necessary that the plaintiff should carry the amount required for performance of the agreement from the date of plaint till the date of decree, he should prove his willingness and capacity to perform the agreement. Yet another aspect which is clear is that failure on the part of the defendant would not entitle a plaintiff for a decree for specific performance.

22. Bearing in mind the above principles, from Ext.A1 agreement, specific performance of which was sought for by the respondent, what we find is that though the extent of the property agreed to be purchased is indicated in the agreement as 75.71 cents of land and the price agreed to be paid is ₹34,000/- per cent, the amount is payable on the actual extent of land found on measurement. This, therefore, shows that measurement of the land is one condition which is required to be complied with for specific performance of the agreement. The second condition that is required to be performed is that the defendant should satisfy the plaintiff his title to the property.

23. In so far as the condition requiring measurement of the amount is concerned, averments in the plaint itself show that on 16.3.2008, the land was measured. Although it is case of the respondent that it was he who got the land measured, the appellant contended that it was at his instance, the land was measured. Though evidence is lacking to conclude this dispute either way, for the purpose of this case, we do not think it necessary to resolve this controversy for the reason that irrespective of who got the land measured, fact remains that the land was measured and the parties are in agreement that on measurement, the extent found was only 71.750 cents. In other words, this shows that as a result of the measurement carried out on 16.3.2008, one of the conditions for performance of the agreement was satisfied.

24. In so far as the title of the appellant is concerned, even the respondent plaintiff has no case that the appellant did not have title or that it was defective and the question of handing over the title deeds arise only at the time of execution of the sale deed. This, therefore, means that no fault could

have been attributed on the part of the appellant and therefore, the court could have granted a decree for specific performance of the agreement only if the respondent had satisfied the requirements of section 16(c) of the Specific Relief Act. In so far as this aspect of the matter is concerned, the question is whether the respondent has proved his readiness and willingness to perform the agreement.

25. While readiness indicates the fiscal capacity of the respondent to perform the agreement, willingness indicates his state of mind. In so far as readiness is concerned, the further question that is required to be proved is whether readiness has been proved on the evidence available. We have already referred to paragraph 8 of the judgment and the oral evidence of PW1 which, to our mind, do not help the respondent plaintiff to prove his case of readiness or his capacity to perform the agreement. Turning to the documents that are relied on, those documents include Exts.A22 and A23 valuation certificates of the gold allegedly possessed by the respondent's mother and wife, which were marked through PW4. Ext.A24 series

and A25 marked through PW8 are the certificates issued about the properties allegedly owned by them. These are documents which were obtained after 24.3.2008 and are regarding the assets owned by the father, mother and wife of the respondent plaintiff. The owners of these assets have not tendered any evidence whether they actually possessed these properties at the time when the agreement was to be performed and even if they had possessed these assets, whether they were willing to part with it in order to enable the respondent plaintiff to generate funds out of it towards the sale consideration payable under Ext.A1. There is also no averment in the plaint to that effect.

26. In so far as Exts.A11 to A16 are concerned, these again are Fixed Deposit receipts issued in the year 2012, which also cannot help the respondent plaintiff to prove his capacity as on 24.3.2008 or any time before that. Among the other documents which were relied on by the learned counsel for the respondent to contend that the readiness was proved by him, Exts.A17 and A20 show that his father had sold certain shares on

3.11.2010. Similarly, Ext.A18 shows that the respondent had sold his shares on 31.8.2010. Ext.A19 is yet another document which show that on 26.12.2011 his mother had sold certain shares. Exts.A26 and 27 are certificates issued by the Canara Bank and Union Bank again in 2013 when the trial was pending, which show that his father had certain funds available with him. As in the case of Exts.A11 to A16, A22, A23, A24 and A25, all these documents would not show that funds were available with either of the respondent or his parents on 24.3.2008 or any time prior thereto. Therefore, these documents also will not help the respondent to contend that his readiness and willingness were proved by him to substantiate his prayer for specific performance of Ext.A1 agreement.

27.The sum and substance of the above discussion is that the respondent plaintiff did not succeed in averring and proving his readiness and willingness to perform the agreement, which is an essential condition precedent for maintaining a prayer for specific performance of an agreement.

28. Yet another contention that was raised in the Bar was that the agreement contained mutual obligations and that since the appellant defendant had failed to perform his obligations, the insistence of readiness and willingness of the plaintiff alone could not be necessitated. We are unable to accept this contention for the reason that as we have already stated, even if the requirement of measurement of the property is accepted as the obligation that has to be discharged going by the plaintiff's own case, the property in fact was measured on 16.3.2008. Therefore, the respondent cannot contend that specific performance cannot be denied to him on the ground that he did not perform his part of the obligation. Even otherwise, as is evident from the judgments cited, particularly, in Vinodan v. Sunil Kumar [2015 (2) KHC 656], law is trite that the breach committed by the defendant by itself would not entitle the plaintiff for specific performance of the agreement, unless he has satisfied the requirement of section 16(c) of the Specific Relief Act.

29.The sum and substance of the above discussion is that this is a case where the plaintiff had not established his case for specific performance of Ext.A1 agreement.

For the aforesaid reasons, we are unable to sustain the judgment and decree under appeal. Therefore, the judgment and decree are set aside and the appeal is allowed as prayed for.

Sd/-
ANTONY DOMINIC, Judge.

Sd/-
P.V.ASHA, Judge.

k kb.