

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO.2201 OF 2011**

M/s. Dreams Construction Private Limited	]	
Through Shri Ramesh Ghisulal Mehta	]	
Age – 45 years, Occupation – Business,	]	
Resident of 1, Prestige Point,	]	
283, Shukrawar Peth, Pune.	]	Appellant
		(Original Plaintiff)

Versus

1. Shri Ravindra Manohar Kulkarni	]	
Age – 68 years, Occupation – Business,	]	
Resident of Flat No.1, Gidoji Apt.	]	
Gruhkalp Society, Bibwewadi,	]	
Pune – 411 030.	]	
 2. Shri Balasaheb Baburao Tupe	]	
Age: 60 years, Occupation – Agriculture,	]	
Resident of Deffo-Dills, Magarpatta,	]	
City E-40, Hadapsar, Pune.	]	
 3. Shri Yogesh Balasaheb Tupe	]	
Age – 34 years,	]	
Occupation – Agriculture and Business,	]	
Resident of Deffo-Dills, Magarpatta,	]	
City E-40, Hadapsar, Pune.	]	Respondents
		(Original Defendants)

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Dr. Uday P. Warunjikar a/w Ms. Vaishnavi M. Gujarathi a/w Ms. Sonali Chavan a/w Mr. K. Gadade a/w Mr. Sumit Kate a/w Mr. Siddhesh Pilankar, for Appellant.

Mr. Atul Damle, Senior Advocate a/w Ms. Niranjana P. Shimpi, for Respondents No.2 and 3.

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CORAM : PRITHVIRAJ K. CHAVAN, J.
RESERVED ON : 19th MARCH, 2021.
PRONOUNCED ON : 29th APRIL, 2021.

JUDGMENT:

1. This is an appeal challenging the judgment and order dated 24th August, 2011 passed by the learned Joint Civil Judge, Senior Division, Pune in Special Civil Suit No.1780 of 2009 by which the learned Judge has dismissed the suit for specific performance and directed respondents No.1 and 2 (“original defendants No.1 and 2”) to refund the earnest amount to the appellant (original plaintiff) within two months.

2. Facts germane for decision of the appeal can be summarized as under;

The plaintiff is a construction company of which Ramesh Ghisulal Mehta is the Director. The plaintiff Company has developed construction projects in the vicinity of Pune and has a reputation in the construction business.

3. Subject matter of the suit is a land admeasuring 1 Hectare and 62.63 R out of total area of 2 Hectare and 26 R situate at

Mou'je Koregaon, Taluka Haveli, District Pune. This property shall be hereinafter referred to as "suit property" for the sake of brevity. Defendant No.1- Ravindra Manohar Kulkarni is the owner of the suit property. Defendant No.2- Balasaheb Baburao Tupe is the Power of Attorney holder of Ravindra Manohar Kulkarni. Defendant No.3 – Yogesh Balasaheb Tupe is the son of defendant No.2. Defendant No.1 executed a power of attorney in favour of Balasaheb Tupe on 28th August, 2007.

4. Defendant No.1 had mortgaged the suit property with Central Bank of India against which he obtained a loan. Since defendant No.1 failed to repay the amount, Central Bank of India had instituted a recovery proceeding before the Debt Recovery Tribunal, Pune bearing No.52 of 2003. In order to clear the loan, defendant No.1 was in need of money. There was no option for him than to sell the suit property. Meanwhile, the Debt Recovery Tribunal, Pune (for short 'D.R.T') allowed the recovery proceeding in favour of Bank on 22nd March, 2003 for an outstanding loan amount of Rs.1,23,72,683/-. Recovery officer of the Bank, accordingly, filed execution proceeding bearing No.12 of 2004 against defendant No.1.

5. When the plaintiff came to know about the willingness of defendant No.1 to sell the suit property, he approached defendant No.1 for purchase of it. The plaintiff wanted to purchase the suit property for the reason that he had already purchased abutting land for his other projects. If he purchases the suit property then it will be convenient for him to make constructions simultaneously in

a big project. Pursuant to the said decision, there was a talk between plaintiff on one hand and defendants No.1 and 2 on the other hand. In the talk, it was finalized that the suit property would be purchased by the plaintiff for a consideration of Rs.1,30,20,000/-. An agreement of sale came to be executed by defendant No.2 on behalf of defendant No.1 on 1st September, 2007. The said agreement also came to be notarized. In view of the said agreement, the plaintiff had issued a cheque bearing No.528990 dated 20th August, 2007 in the sum of Rs.10,00,000/- drawn on UTI Bank, Pune. At the same time, the plaintiff had paid Rs.5,00,000/- in cash. As such, an earnest amount of Rs.15,00,000/- was paid pursuant to the agreement of sale dated 1st September, 2007.

6. According to the plaintiff, he was always ready and willing to perform his part of contract. However, in order to defraud and thwart his legitimate right to get the sale deed executed, defendants No.1 and 2 have concealed the fact of agreement to sell from D.R.T and moved an application before the said Authority on 15th October, 2007 by which a permission was sought to sell the suit property in favour of defendant No.3. Accordingly, defendant No.2, in his capacity as a power of attorney holder of defendant No.1 executed sale deed in favour of his son defendant No.3 on 17th December, 2007 for a consideration of Rs.89,00,000/-. It is contended that by virtue of the said sale deed, rights of the plaintiff are not at all affected. It is further contended that despite asking the defendants to accept balance consideration of the transaction *qua* the suit property as per the

agreement of sale, defendants had said that they would accept the balance consideration as soon as there would be requirement for clearing the outstanding debts of the Bank. Thereafter, they would execute the sale deed. According to the plaintiff, this was a false promise given by the defendants as they were not ready and willing to perform their part of agreement. The defendants by a notice dated 3rd January, 2008, cancelled the agreement to sell dated 1st September, 2007 and forfeited the earnest amount.

7. On 14th September, 2009, a notice was issued by the plaintiff to the defendants asking for specific performance of the agreement, *inter alia*, issued a public notice in “*Daily Prabhat*”. Thus, the plaintiff has sought a decree of specific performance to execute the sale deed in respect of the suit property, *inter alia*, declaration that the sale deed between defendants No.1 and 3 is not binding upon him.

8. Suit proceeded ex-parte against defendant No.1.

9. Defendants No.2 and defendant No.3 have filed their respective written statements.

10. Defendants No.2 and 3 in their respective written statements, which are identical, have taken a stand that as the plaintiff was not ready and willing to perform his part of contract within a period of two months as agreed in the agreement to sell dated 1st September, 2007 and since the suit property was about to be auctioned, defendant No.1 had to execute a sale deed in favour

of defendant No.3. According to defendant No.3, he was a *bona fide* purchaser of the suit property. It is also the stand of defendant No.2 that despite repeatedly making demands by him to pay balance consideration of Rs.1,15,20,000/-, plaintiff did not pay any heed and, therefore, he had cancelled the agreement to sell dated 1st September, 2007.

11. As the recovery proceedings were initiated against defendant No.1, pursuant to which, the Bank Recovery Officer issued a notice dated 15th October, 2007 for auction of the suit property, defendant No.1 was left with no option than to sell the suit property to some one else. In view of the said averments, defendants No.2 and 3 have prayed for dismissal of the suit.

12. From the respective contentions, following are the facts which are no more in dispute;

- [a] Suit property was owned and possessed by defendant No.1 and defendant No.2 was his power of attorney, whereas, defendant No.3 is son of defendant No.2;
- [b] There was an outstanding loan of Central Bank of India against defendant No.1 as the suit property was mortgaged with the said Bank;
- [c] For recovery of loan amount, Central Bank of India initiated Recovery Proceeding bearing No.52 of 2003 in D.R.T, Pune;
- [d] Out of legal necessity, defendant No.1 was required to repay the outstanding loan amount,

else, suit property was to be sold in auction and, therefore, he wanted to sell the suit property;

- [e] D.R.T allowed recovery proceedings in favour of Central Bank of India on 22nd March, 2003 against outstanding loan amount of Rs.1,23,72,683/-.
- [f] Recovery officer initiated proceedings bearing No.12 of 2004 against defendant No.1 in D.R.T;
- [g] Defendant No.2 on behalf of defendant No.1 entered into an agreement of sale with the plaintiff on 1st September, 2007 for a consideration of Rs.1,30,20,000/-;
- [h] An amount of Rs.10,00,000/- through cheque and Rs.5,00,000/- in cash was paid by the plaintiff to defendant No.1. Balance amount was agreed to be paid within two months of the said agreement so that defendant No.2 would clear outstanding loan amount and will obtain no objection certificate of the Bank. Thereafter, defendant No.2 would execute a sale deed in respect of the suit property on behalf of defendant No.1 in favour of the plaintiff.
- [g] Defendant No.2 in his capacity as a power of attorney of defendant No.1 executed a registered sale deed of the suit property in favour of his son defendant No.3 on 17th December, 2007 as defendant No.3 has paid Rs.89,00,000/- against outstanding loan

amount pursuant to which D.R.T had granted permission to sell the property.

13. The learned Civil Judge, Senior Division, Pune framed necessary issues. The learned Civil Judge returned affirmative findings to the issue that there was an agreement of sale in respect of the suit property dated 1st September, 2007 between the plaintiff and defendant No.1, and that defendant No.2 was a power of attorney of defendant No.1. However, he answered the issue of ready and willingness on the part of the plaintiff in negative by recording reasons for the findings. The learned trial Judge dismissed the suit, *inter alia*, directing the defendants to refund the earnest amount to the plaintiff within two months.

14. I heard Dr. Warunjikar, learned Counsel for the plaintiff at a considerable length. Dr. Warunjikar took me through the document dated 1st September, 2007 at **(Exhibit 55)**, registered sale deed in favour of defendant No.3 by defendant No.1 dated 17th December, 2007 **(Exhibit 78)** and notice dated 3rd January, 2008 by defendant No.1 to the plaintiff **(Exhibit 56)**. My attention has also been drawn to the notice reply **(Exhibit 57)** dated 23rd May, 2008 and the notice of the plaintiff seeking specific performance dated 14th September, 2009 **(Exhibit 58)**. According to Dr. Warunjikar, transaction between defendants No.2 and 3 is not binding upon the plaintiff as the plaintiff was always ready and willing to perform his part of contract. Dr. Warunjikar would argue that defendant No.1 has shrewdly remained absent as neither he appeared nor filed his written statement. He submits that the

written statement of defendant No.2 *vis-a-vis* examination-in-chief is totally at variance. Dr. Warunjikar took me through the detailed cross-examination of defendant No.2 and emphasized that the defendants have made demand of balance consideration to the agents namely Santosh Bhandale and Sandip Javalekar and not to the plaintiff. The plaintiff was not at all concerned with the agents Bhandale and Javalekar but was only with defendants No.1 and 2. My attention has also been drawn to the agreement to sell dated 1st September, 2007, especially, clauses 4 and 5 to buttress his contention that the defendants agreed to refund the outstanding loan of the Bank and would bring no objection certificate. The loan amount would be cleared after receipt of the balance consideration.

15. Dr. Warunjikar emphasized that though the plaintiff was always ready and willing to perform his part of contract, however, no demand at any point of time was made by the defendants and, therefore, there was no occasion to show his willingness and readiness. In order to substantiate his contention that the plaintiff was willing, it is submitted that adjacent property has already been purchased by the plaintiff and the suit property being in the same vicinity, the plaintiff intended to purchase the same so that he could develop the entire property as he was financially capable of developing a big complex. He has been in the said business for many years and, therefore, it would not lie in the mouth of the defendants to say that the plaintiff was not ready and willing. Dr. Warunjikar would stress on the conduct of the defendants which, according to him, has to be compared to that of the conduct of the

plaintiff. Conduct of the plaintiff, according to the learned Counsel is unblemished and he had shown his *bona fides* for depositing the balance amount.

16. Learned Counsel has, therefore, prayed for setting aside the impugned judgment, *inter alia*, seeking a relief of specific performance.

17. Per contra, Mr. Damle, learned Senior Counsel while supporting the impugned judgment and order submitted that as per the agreement (**Exhibit 55**), it was agreed between the parties and has been specifically admitted by the plaintiff himself that the balance consideration was required to be paid within two months so that defendant No.1 could refund the loan amount to the Bank and thereby avoid auction of the suit property. The plaintiff was very much aware about the D.R.T proceedings which is evident from the averments in the plaint as well as from the evidence of P.W.1-Dhairyashil Khot. He would argue that after issuance of notice by defendant No.1 on 3rd January, 2008, (**Exhibit 56**) by which the agreement was cancelled, the same was replied by the plaintiff vide reply dated 23.05.2008 (**Exhibit 57**) i.e almost after five months which itself is evident of the fact that the plaintiff was neither ready nor willing to perform his part of contract even after termination of the agreement. It is also brought to my notice by the learned Senior Counsel that the suit notice also came to be issued by the plaintiff on 14th September, 2009 i.e two years thereafter. Despite having knowledge of dire urgency and need of defendant No.1 to clear the outstanding loan of the Bank, plaintiff's negligence and unwillingness can be seen from its

overall conduct. Mr. Damle would argue that burden of readiness and willingness never shifted upon defendant No.1 since the plaintiff himself has failed to discharge initial burden of readiness and willingness. Defendant's evidence is not material and relevant and as such, he prayed for dismissal of the appeal.

18. Specific performance is an equitable relief given by the Court to enforce against a defendant, duty of doing what he agreed by the contract to do. It is incumbent upon the plaintiff who wants to enforce specific performance of contract to aver and prove that he has performed or has always been ready and willing to perform essential terms of the agreement. Section 16 (c) mandates for "readiness and willingness" on the part of the plaintiff and it is a condition precedent for obtaining relief of grant of specific performance. The plaintiff herein has, though averred in the plaint that he was always ready and willing to perform his part of agreement dated 1st September, 2007, nevertheless, he failed to prove the same by way of evidence. The reasons are hereinbelow.

19. The most crucial document is the agreement for sale (**Exhibit 55**) dated 1st September, 2007. Admittedly, this document came to be executed between the parties who have unequivocally admitted the truthfulness of its contents, especially, clauses 4 and 5 which are relevant. Clauses 4 and 5 stipulate that there was an outstanding loan *qua* the suit property which was obtained by defendant No.1 by mortgaging the same. The vendor-defendant No.1 undertook to obtain a no objection certificate from the Bank after clearing the entire loan amount which would be received

from the vendee-plaintiff towards the balance consideration of Rs.1,15,20,000/- within two months and thereafter vendor-defendant No.1 would execute the sale deed. The said clause also stipulates that on 20th August, 2007, the plaintiff had paid Rs.10,00,000/- by a cheque dated 20th February, 2007 and cash of Rs.5,00,000/- towards earnest amount. This essentially confirms the fact that time was the essence of the contract. It is quite clear from the recitals of the agreement (**Exhibit 55**) that time would be the essence of the contract in regard to the terms relevant to the payment of balance price. It specifies that the balance consideration was to be paid within two months as defendant No.1 was in dire need of money to repay the outstanding loan obtained from Central Bank of India pursuant to mortgage of the suit property.

20. PW.1-Khot has specifically deposed in his affidavit in lieu of examination-in-chief that D.R.T, Pune has issued a recovery certificate for recovery of the arrears from defendant No.1 directing him to complete the transaction within 30 days and to submit a copy of the sale deed in the Tribunal. He even testified that the recovery proceeding No.12 of 2004 was pending in D.R.T, Pune. Thus, time was the essence of contract. Had there been no recovery of the outstanding loan pursuant to D.R.T proceedings, suit property would have been sold in auction, thereby resulting into substantial loss to defendant No.1. Argument of Dr. Warunjikar, learned Counsel for the plaintiff that time was not the essence of the contract is to be accepted with a pinch of salt for the simple reason that the plaintiff himself has averred and proved

that the time was essence of the contract.

21. The decision pressed into service by Dr. Warunjikar in case of **Swarnam Ramachandran (Smt.) Vs. Aravacode Chakungal Jayapalan, (2004) 8 Supreme Court Cases, 689** can be distinguished on the aspect of time as the essence of contract. It has been held by the Hon'ble Supreme Court that burden of proving whether time was of the essence is upon the person alleging it, thus giving an opportunity to the other side to rebut such a presumption. Therefore, if such evidence is led and not rebutted then the Court is bound to accept the plaintiff's plea. It is further observed that in cases where notice of making time of essence is given, it is the duty of the Court to examine the real intention looking to the surrounding facts and circumstances of each case. Paragraphs 11 and 12 of the said judgment are relevant ;

“11. According to Pollock & Mulla: Indian Contract & Specific Reliefs Act [(2001) 12th Edition page 1086], the intention can be ascertained from:

- (i) the express words used in the contract;*
- (ii) the nature of the property which forms the subject-matter of the contract;*
- (iii) the nature of the contract itself; and*
- (iv) the surrounding circumstances.*

12. That time is presumed not to be of essence of the contract relating to immovable property, but it is of essence in contracts of reconveyance or renewal of lease. The onus to plead and prove that time was the essence of the contract was on the person alleging it,

thus giving an opportunity to the other side to adduce rebuttal evidence that time was not of essence. That when the plaintiff pleads that time was not of essence and the defendant does not deny it by evidence, the Court is bound to accept the plea of the plaintiff. In cases where notice is given making time of the essence, it is duty of the Court to examine the real intention of the party giving such notice by looking at the facts and circumstances of each case. That a vendor has no right to make time of the essence, unless he is ready and willing to proceed to completion and secondly, when the vendor purports to make time of the essence, the purchaser must be guilty of such gross default as to entitle the vendor to rescind the contract”.

22. In case at hand, defendant No.1 has established that time was the essence of the contract as already discussed hereinabove. The plaintiff has not rebutted the same, rather supported the contention of defendant No.1 that time was the essence. In short, the plaintiff himself averred and proved that time was the essence of the contract.

23. Now, turning to the aspect of readiness and willingness in view of section 16 (c) of the Specific Relief Act. It is a *sine qua non* for a suit for specific performance. The aspect of readiness and willingness is to be ascertained from the conduct of the parties and the attending circumstances.

24. PW.1-Khot is the Power of Attorney holder of the Director of the plaintiff namely Ramesh Mehta. He admits execution of the agreement (**Exhibit 55**), dire need of defendant No.1 to clear the outstanding loan and impending auction of the suit property by virtue of D.R.T proceeding bearing No.2 of 2004 and also time is the essence of the contract. However, his evidence further indicates that he was waiting for the defendants to approach him for demanding the balance consideration to be deposited in the Bank so as to clear outstanding loan and getting a no objection certificate. This is quite surprising. In fact, it was incumbent upon the plaintiff to fulfill his obligations within two months. PW.1-Khot clearly and unequivocally admits it in his cross-examination. He further admits that no initiative has been taken either by him or any one on behalf of the plaintiff to deposit outstanding loan amount in the Bank as agreed, nor any written communication has been made.

25. Ultimately, there was no option left with defendant No.1 than to cancel the agreement which he did by a notice dated 3rd January, 2008 (**Exhibit 56**). In the said notice which was duly served upon the plaintiff, defendant No.1 had clarified that despite repeated demands to pay the outstanding balance, there was no response from the plaintiff nor the middlemen viz Santosh Bhandale and Javalekar and, therefore, defendant No.1 was constrained to repudiate the agreement for sale.

26. Unwillingness and unreadiness of the plaintiff has further been fortified from the fact that the notice dated 3rd January, 2008 was replied by the plaintiff after five months i.e on 23rd May, 2008 (**Exhibit 57**). A perusal of the reply also does not, in clear terms

indicate that the plaintiff was ready and willing; instead, it reads that the plaintiff was and is curious (उत्सुक) to complete the transaction. Inquisitiveness or curiosity cannot be equated with readiness and willingness to perform the contractual obligation, for, a person may be curious to do something but it cannot be necessarily mean that, he was in fact ready and willing. Be it noted that the reply was drafted and sent by an Advocate and not by a lay person.

27. In his further cross-examination, P.W.1-Khot admits that till 23rd May, 2008, neither he inquired about the status of the suit property nor on his own offered to pay the balance consideration. There is no explanation as to why the notice dated 3rd January, 2008 issued by defendant No.2 was not promptly replied by the plaintiff. Thus, conduct of the Director of the plaintiff is evident from the tenor of his own language and overall circumstances. The Director of the plaintiff being a reputed and well known developer in the city cannot be said to be a naive person. He feigned that defendant No.1 was to approach him to get the terms of the agreement fulfilled *sans* any stipulation therein.

28. D.W.1- Balasaheb Tupe is the power of attorney holder of defendant No.1. The sum and substance of his evidence is that the suit property had been mortgaged with Central Bank of India. An amount of loan was outstanding. Since defendant No.1 could not repay the same, the Bank initiated recovery proceedings in D.R.T. Defendant No.1 was in dire need of money and, therefore, he intended to sell the suit property in order to clear the outstanding loan. Agents Bhadale and Jawalekar approached D.W.1- Balasaheb Tupe. Interestingly, D.W.1- Balasaheb Tupe has a different story to

tell. According to him, he had never seen or met P.W.1-Khot. It were Bhadale and Jawalekar from whom earnest money of Rs.15,00,000/- was accepted. Agreement was signed by him and defendant No.1. It was not signed either by P.W.1-Khot or any one on behalf of the plaintiff. Agents promised him that the balance would be paid within two months. Be that as it may. Evidence of this witness though not totally irrelevant yet the transaction between the parties in terms of an agreement (**Exhibit 55**) entered into on 1st September, 2007 is an undisputed fact. However, it would indeed cast a shadow of doubt as to whether Director of the plaintiff namely Ramesh Mehta who appears to have signed (**Exhibit 55**) was himself ready and willing to perform his part of contract?

29. After cancellation of the agreement, defendant No.1 agreed to sell the suit property to defendant No.3. Accordingly, it was agreed between the recovery officer and defendant No.3 that the latter would deposit an amount of Rs.89,00,000/- in the Bank and accordingly it was deposited. Consequently, defendant No.1 executed a sale deed of the suit property in favour of defendant No.3 on 17th December, 2007 (**Exhibit 78**).

30. This witness was extensively cross-examined, however, the answers given in the cross-examination would not be of much assistance to the plaintiff, rather, it would not absolve the plaintiff from it's obligation to fulfill his part of agreement.

31. Defendant No.3- Balasaheb Tupe deposed in tune with his father. He is a formal witness and a *bona fide* purchaser of the suit property. It is needless to scan his evidence.

32. Dr. Warunjikar, learned Counsel for the plaintiff has placed reliance on a decision in the case of **Mehboob-Ur-Rehman (dead) through Legal Representatives Vs. Ahsanul-Ghani, (2019) 19 Supreme Court Cases 415**. Ratio laid down by the Hon'ble Supreme Court in this case is that in a suit for specific performance of contract, the plaintiff must aver in the plaint and prove continuous readiness and willingness to perform his part of contract. It is held that averments are not required to be mere mechanical reproduction of statutory words. Requirement of such averment is not a matter of form but is of substance. One has to take into consideration the averments as well as conduct of the plaintiff and evidence as a whole. The Court must be satisfied that the plaintiff established his readiness and willingness to perform his part of contract.

33. Paragraphs 14,15,16 and 19 of this judgment need to be referred as Dr. Warunjikar has laid emphasis upon these paragraphs which read as under;

"14. It remains trite that the relief of specific performance is not that of common law remedy but is essentially an exercise in equity. Therefore, in the Specific Relief Act, 1963, even while providing for various factors and parameters for specific performance of contract, the provisions are made regarding the contracts which are not specifically enforceable as also the persons for or against whom the contract may be specifically enforced. In this scheme of the Act, Section 16 thereof provides for personal bars to the relief of specific performance. Clause (c) of Section 16 with the Explanation thereto, as applicable to the suit in question, had been as follows:-

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

(a)-(b)

(c) [who fails to aver and prove]³ 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: - For the purpose of clause (c),---

(i) 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;

(ii) the plaintiff [must aver]⁴ performance of, or readiness and willingness to perform, the contract according to its true construction.”

15. Though, with the amendment of the Specific Relief Act 1963 by Act No. 18 of 2018, the expression “who fails to aver and prove” is substituted by the expression “who fails to prove” and the expression “must aver” stands substituted by the expression “must prove” but then, the position on all the material aspects remains the same that, specific performance of a contract cannot be enforced in favour to the person who fails to prove that he has already 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 of which, the performance has been prevented or waived by the other party. As per the law applicable at the relevant time, it was incumbent for the plaintiff to take the specific averment to that effect in the plaint. Of course, it was made clear by this Court in several decisions, that such requirement of taking the necessary averment was not a matter of form and no specific phraseology or language was required to take such a plea. However, and even when mechanical reproduction of the words of statute was not insisted upon, the requirement of such pleading being available in the plaint was neither waived nor even whittled down. In *A. Kanthamani v. Nasreen Ahmed* (2017) 4 SCC 654 even while approving the decree for specific performance of the agreement on facts, this Court pointed out that the

requirement analogous to that contained in Section 16 (c) of the Specific Relief Act, 1963 was read in its forerunner i.e., the Specific Relief Act, 1877 even without specific provision to that effect. Having examined the scheme of the Act and the requirements of CPC, this Court said,- Vide Syed Dastagir v. T.R.Gopalakrishna Setty: (1999) 6 SCC 337; and Aniglase Yohanan v. Ramlatha, (2005) 7 SCC 534;

“22. Therefore, the plaint which seeks the relief of specific performance of the agreement/contract must contain all requirements of Section 16 (c) read with requirements contained in Forms 47 and 48 of Appendix ‘A’ CPC”

16. Such a requirement, of necessary averment in the plaint, that he has already performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him being on the plaintiff, mere want of objection by the defendant in the written statement is hardly of any effect or consequence. The essential question to be addressed to by the Court in such a matter has always been as to whether, by taking the pleading and the evidence on record as a whole, the plaintiff has established that he has performed his part of the contract or has always been ready and willing to do so. In this regard, suffice it would be to refer to the principles enunciated by this Court in the case of Umabai v Nilkanth Dhondiba Chavan, (2005) 6 SCC 243 as under:- (SCC pp.256 & 260, paras 30 & 45)

"30. It is now well settled that the conduct of the parties, with a view to arrive at a finding as to whether the plaintiff-respondents were all along and still are ready and willing to perform their part of contract as is mandatorily required under Section 16 (c) of the Specific Relief Act must be determined having regard to the entire attending circumstances. A bare averment in the plaint or a statement made in the examination-in-chief would not suffice. The conduct of the plaintiff- respondents must be judged having

regard to the entirety of the pleadings as also the evidences brought on records.

45. It was for the plaintiff to prove his readiness and willingness to pay the stipulated amount and it was not for the appellants to raise such question..."

17. When the pleadings in the present case are examined with reference to the principle aforesaid, it is but apparent that in the plaint, the plaintiff referred to the agreement in question whereby, the defendant had allegedly agreed to sell the house in question to him for a sale consideration of Rs. 30,000/- and averred that the defendant received a sum of Rs. 15,000/- from him. The plaintiff stated that the agreement was executed on 16-4-1975/17-04-1975. Thereafter, the plaintiff straight away referred to the fact that subsequent to the execution of agreement, the Urban Land (Ceiling and Regulation) Act, 1976 was promulgated; and Section 27 thereof prohibited transfer of property without prior permission of the Competent Authority. The plaintiff further averred that he served notice dated 6-5-1979 on the defendant asking him to seek permission and to execute the sale deed; that the notice was personally served on the defendant on 17-5-1979; and that the defendant in his reply dated 6-7-1979, feigned ignorance about the agreement. The plaintiff further averred that the defendant was bound to execute the sale deed of the house after seeking necessary permission and for the defendant having failed to do so, the suit was being filed. There is not even a remote suggestion in the plaint averments that the plaintiff had performed or has always been ready and willing to perform his part of the contract. Even in the plaintiff's testimony as PW-1, it is difficult to find a categorical assertion that he had performed or has always been ready and willing to perform his part of the contract. The testimony of the plaintiff as PW-1 is essentially directed towards the existence and validity of the alleged agreement and the surrounding dealings of the parties; but is lacking in those material assertions on readiness and willingness on his part, which remain essential for grant of the relief of the specific performance.

18. In the above set of circumstances, we are unable to find any fault in the findings of the High Court that the plaintiff had failed to aver and prove his continuous readiness and willingness to perform his part of the contract. The suit was bound to fail on this ground above.

19. So far as the proposition for amendment of the plaint is concerned, we are unable to find any illegality on the part of first appellate Court and the High Court in rejecting the prayer belatedly made by the plaintiff. As noticed, the averment and proof on readiness and willingness to perform his part of the contract has been the threshold requirement for a plaintiff who seeks the relief of specific performance. The principle that the requirement of such averment had not been a matter of form, applied equally to the proposition for amendment at the late stage whereby, the plaintiff only attempted to somehow improve upon the form of the plaint and insert only the phraseology of his readiness and willingness. In such a suit for specific performance, the Court would be, and had always been, looking at the substance of the matter if the plaintiff, by his conduct, has established that he is unquestionably standing with the contract and is not wanting in preparedness as also willingness to perform everything required of him before he could be granted a relief whereby, the performance of other part of the contract could be enjoined upon the defendant. In the present case, the plaintiff-appellant had failed to aver and prove his readiness and willingness to perform his part of the contract. The Trial Court made a rather assumptive observation that he had proved such readiness and willingness. Thereafter, the plaintiff sought leave to amend the plaint only when the ground to that effect was taken in the first appeal by the defendant. In the facts and circumstances of the present case, in our view, it was too late in the day for the plaintiff to fill up such a lacuna in his case only at the appellate stage. In other words, the late attempt to improve upon the pleadings of the plaint at the appellate stage was only an exercise in futility in the present case.

34. I am afraid, this ratio would not be of any assistance to the plaintiff for the reasons already stated hereinabove as to how the plaintiff has failed to establish that he was continuously ready and willing to perform his part of contract on all the material aspects. There is nothing in the agreement (**Exhibit 55**) from which it can be inferred that defendant No.1 had prevented the plaintiff from doing his part of contract.

35. In case of **J.P Builders and another Vs. A. Ramdas Rao and another, (2011) 1 Supreme Court Cases 429**, a similar approach was found to have been taken by the Hon'ble Supreme Court. The facts in the said case are more or less similar to the case at hand. Paragraphs 20 to 27 can be quoted for advantage which read thus;

“Readiness and Willingness

20. Section 16 of the Specific Relief Act, 1963 provides for personal bars to relief. This provision states that:

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

- a) who would not be entitled to recover compensation for its breach; or
- b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or
- 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.

Explanation.- For the purposes of clause (c),-

- (i) 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;
- (ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction."

21. Among the three clauses, we are more concerned about sub clause (c). "Readiness and willingness" is enshrined in clause (c) which was not present in the old Act of 1877. However, it was later inserted with the recommendations of the 9th Law Commission's report. This clause provides that the person seeking specific performance must 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.

22. The words "ready" and "willing" imply that the person was prepared to carry out the terms of the contract. The distinction between "readiness" and "willingness" is that the former refers to financial capacity and the latter to the conduct of the plaintiff wanting performance. Generally, readiness is backed by willingness.

23. In *N.P. Thirugnanam v. Dr. R. Jagan Mohan Rao* (1995) 5 SCC 115 at para 5, this Court held: (SCC pp. 117-18)

"5..... Section 16 (c) of the Act envisages that the 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 always ready and willing to perform his part of the contract."

24. In *P. D'Souza v. Shondrilo Naidu* (2004) 6 SCC 649 (paras 19 and 21), this Court observed:

"19. It is indisputable that in a suit for specific performance of contract the plaintiff must establish his readiness and willingness to perform his part of contract. The question as to whether the onus was discharged by the plaintiff or not will depend upon the facts and circumstance of each case. No strait-jacket formula can be laid down in this behalf....

21.....The readiness and willingness on the part of the plaintiff to perform his part of contract would also 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."

25. Section 16 (c) of the Specific Relief Act, 1963 mandates "readiness and willingness" on the part of the plaintiff and it is a condition precedent for obtaining relief of grant of specific performance. It is also clear that in a suit for specific performance, the plaintiff must allege and prove a continuous "readiness and willingness" to

perform the contract on his part from the date of the contract. The onus is on the plaintiff.

26. It has been rightly considered by this Court in *R.C. Chandiok v. Chuni Lal Sabharwal*, (1970) 3 SCC 140 that "readiness and willingness" cannot be treated as a straight jacket formula. This has to be determined from the entirety of the facts and circumstances relevant to the intention and conduct of the party concerned.

27. It is settled law that even in the absence of specific plea by the opposite party, it is the mandate of the statute that plaintiff has to comply with Section 16 (c) of the Specific Relief Act and when there is non-compliance with this statutory mandate, the Court is not bound to grant specific performance and is left with no other alternative but to dismiss the suit. It is also clear that readiness to perform must be established throughout the relevant points of time. "Readiness and willingness" to perform the part of the contract has to be determined/ascertained from the conduct of the parties".

36. It is needless to reiterate the settled legal position in respect of readiness and willingness of the plaintiff who seeks specific performance of the contract. In the case at hand, intention and conduct of the plaintiff is writ large.

37. Dr. Warunjikar has then led emphasis upon one more judgment of the Hon'ble Supreme Court in case of **Man Kaur (dead) By LRS Vs. Hartar Singh Sangha**, (2010) 10 Supreme Court Cases 512. Paragraphs 17 of the judgment reads thus;

"37. To succeed in a suit for specific performance, the plaintiff has to prove: (a) that a valid agreement of sale was entered 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”.

38. As can be seen from the ratio laid down in this judgment that if the plaintiff has to prove that he was ready and willing to perform his part of contract i.e to perform his obligation 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 contract subject to cross-examine himself on this issue. **(Exhibit 55)** has been signed by Ramesh Mehta, who is a Director of the plaintiff-Company. He did not step into the witness box, instead, his power of attorney P.W.1- Khot testified as a power of attorney holder. Going back to the evidence of D.W.1- Balasaheb Tupe wherein he had

specifically testified that he had never seen P.W.1-Khot or even Mr. Mehta but the entire transaction was entered into by the agents Bhandale and Jawalekar. If his contention is accepted to be true then entire edifice of the plaintiff's case collapses.

39. In view of mandate of the Hon'ble Supreme Court in case of **Man Kaur (Dead) by LRS.** (supra), the plaintiff cannot examine in his place, his attorney holder who did not have personal knowledge either of the transaction or his readiness and willingness. Obviously, readiness and willingness referred 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. Thus, P.W.1-Knot who perhaps had no personal knowledge could not have given evidence about such readiness and willingness of Mr. Mehta even if he was a attorney holder of Mr. Mehta. The ratio in case of **Man Kaur (Dead) by LRs** (supra) can be distinguished accordingly.

40. A corollary of the aforesaid discussion is that the appeal is devoid of merits. Learned Civil Judge has rightly appreciated the facts, circumstances and evidence on record and reached a proper conclusion which does not warrant interference in appeal. Consequently, the appeal is dismissed. In the circumstances, the parties to bear their respective costs.

[PRITHVIRAJ K. CHAVAN, J.]

At this stage, Dr. Warunjikar, learned Counsel appearing for the appellant (plaintiff) prays for continuation of the interim relief granted by this Court on 14th March, 2017 in Civil Application No.703 of 2017 for a period of 12 weeks to enable the appellant to approach the Hon'ble Supreme Court.

Learned Counsel appearing for respondents No.2 and 3 Mr. Niranjana Shimpi objects on the ground that respondent No. 3 has been prevented from using the suit property for agricultural purpose and, therefore, 12 weeks time may not be granted.

Taking into consideration the fact that possession of the suit property is already with respondent No.3, no prejudice would be caused if prayer of Dr. Warunjikar is accepted.

As such, interim relief granted by this Court on 14th March, 2017 shall continue to operate for a period of 12 weeks from today. There shall be no further extension of time. Liberty to the appellant/plaintiff to withdraw the amount of earnest money deposited by the respondents with accrued interest.

[PRITHVIRAJ K. CHAVAN, J.]