

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN

WEDNESDAY, THE 8TH DAY OF FEBRUARY 2023 / 19TH MAGHA, 1944

RFA NO. 156 OF 2014

OS 132/2011 ON THE FILE OF THE SUB COURT, PATHANAMTHITTA,
DTD.30.11.2013

APPELLANT/DEFENDANT:

GEORGE M. MATHEWS @ GEORGE,
AGED 67 YEARS,
S/O.MATHEW,
RESIDENT OF MADHAVAMANGALATHU PUTHENVEETIL
HOUSE, KURUMBAKARA MURI, ENADIMANGALAM VILLAGE,
ADOOR TALUK.

BY ADVS.SRI.R.S.KALKURA
SMT.R.BINDU
SRI.HARISH GOPINATH
SRI.JOHNSON JOSE PANJIKKARAN
SRI.M.S.KALESH
SRI.K.KURIAN KOSHY
SMT.M.K.LEELAKUMARI
SRI.MOBIN JACOB
SRI.SANIL KUNJACHAN

SRI.S.ANANTHAKRISHNAN

RESPONDENT/PLAINTIFF:

MUHAMMED HANEEFA RAWTHER,
AGED 75 YEARS,
S/O.MAZOOD RAWTHER,
RESIDING AT AJMAL COTTAGE, PUTHUVAL,
MAROOR THEKKU MURI, ENADIMANGALAM VILLAGE,
ADOOR TALUK-691523.

BY ADVS.SRI.GEORGE MATHEW
SRI.K.S.HARIHARAPUTHRAN

THIS REGULAR FIRST APPEAL HAVING COME UP FOR
ADMISSION ON 19.01.2023, THE COURT ON 08.02.2023
DELIVERED THE FOLLOWING:

K.VINOD CHANDRAN & C.JAYACHANDRAN, JJ.

R.F.A.No.156 of 2014

Dated this the 8th day of February, 2023

JUDGMENT

C.Jayachandran, J.

1. Whether 'readiness' implies 'willingness' in the context of Section 16 of the Specific Relief Act, 1963? If there is overall lack of bonafides in the conduct of the plaintiff/vendee, as discernible from the evidence on record, whether the discretion under Section 20 can be exercised in favour of the plaintiff, even if he was found to have been possessed of the necessary funds for payment of balance consideration? These are the questions which arise for consideration in the instant appeal.

2. The decree impugned in this appeal is the one in O.S.No.132/2011 of the Sub Court, Pathanamthitta, which directed the defendant to specifically perform a contract for sale dated 14.10.2010 in favour of the plaintiff in the suit. The aggrieved defendant is the appellant.

3. The parties are referred to from their original status before the court below. The pleadings are summarized thus:

Ext.A1 contract for sale of the plaint schedule property, having an extent of 43.5 cents (17.61 ares), was entered into by and between the plaintiff as the vendee and the defendant as the vendor on 14.10.2010 for a sale consideration calculated at the rate of Rs.1,50,000/- per cent. A sum of Rs.10,00,000/- was paid as advance sale consideration on the date of agreement. The period fixed for performance was six months. The agreement *inter alia* stipulates that the defendant shall convince the plaintiff the boundaries and extent of the plaint schedule property as per survey records, excluding the road and thodu puramboke and the consideration has to be paid on the extent so found on measurement, at the agreed rate. Though the plaintiff was ready and willing to perform his part of the contract and approached the defendant on several occasions to get the property measured, the defendant did not care to do so. The plaintiff therefore issued Ext.A2 lawyer's notice on 4.4.2011 expressing his readiness and willingness to perform his part of the contract and calling upon the defendant to fix a date and

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time for measurement of the property, as also, for execution of the sale deed. However, the defendant did not take any step before the expiry of the period stipulated in the contract, i.e., 14.4.2011. On 18.4.2011, a reply notice was caused to be issued falsely alleging that the property was already measured on 24.3.2011 through one Chandrangathan, a retired surveyor and that the defendant is in actual possession of 46.891 cents, as against 43½ cents covered by the title deeds. The time stipulated in the contract was unilaterally extended by the defendant till 23.4.2011 and he demanded payment of Rs.55,25,000/- towards balance sale consideration, which amount is calculated reckoning an extent of 43½ cents only. The reply notice also stipulated that, on the event of failure to pay the balance sale consideration as demanded, the contract will stand cancelled. The defendant is not in actual possession of 46.891 cents as claimed. The property was never jointly measured by the plaintiff and defendant. The extent of the property available, after excluding the road and thodu puramboke, is only about 41 cents, which is the reason why the defendant is not prepared to measure the property. The allegation in the reply notice that the plaintiff wants to

undervalue the property in the sale deed is also false. Although the plaintiff again contacted the defendant with revenue plans and persuaded him to execute the sale deed upon receiving the balance sale consideration for the actual extent, the attempt was in vain. On such premise, the plaintiff sought for specific performance of the contract, accepting sale consideration for the actual extent found on measurement, excluding the road and thodu puramboke. The plaintiff also sought for a relief to determine the extent of the property by a measurement enabled through the process of court.

4. The defendant resisted the suit contending that the same is not maintainable, besides being bereft of any bonafides. The agreement for sale, as also, its terms and the receipt of advance sale consideration were admitted. The plaintiff schedule property was measured at the instance of both the plaintiff and defendant on 24.3.2011 by a retired Govt. Surveyor, by name Chandrangathan, on the basis of re.survey plan. Both the plaintiff and the defendant were present at the time of measurement. The Surveyor prepared a rough plan, copies of which were given to the plaintiff and the defendant. The total

extent found was 46.891 cents, of which the registered holding was only 43.50 cents. Allegations to the contrary are false and baseless. It was the defendant who approached the plaintiff for execution of the sale deed upon payment of the balance sale consideration, but the plaintiff was never ready with the balance sale consideration. Later, the defendant learnt that the intention of the plaintiff was to sell the scheduled property to somebody else for a higher consideration and that the plaintiff was only a broker. Having failed to find out a purchaser for a higher price, the plaintiff was trying to prolong the execution of the sale deed on one pretext or other. Ext.A2 lawyer's notice was received by the defendant just before the expiry of the period stipulated in the agreement and he sent an honest and proper reply expressing that he is still ready and willing to execute the sale deed. The same was given to the plaintiff's counsel directly on 18.4.2011. The reply notice stipulated that the purchase price need only be paid for the registered extent of 43.50 cents and that the period of the agreement is extended upto 23.4.2011. The reply notice further stipulated that if the plaintiff do not come forward to purchase the plaintiff schedule property on or before 23.4.2011, the defendant is

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prepared to give back the advance sale consideration. Despite extension of the period till 23.4.2011, the plaintiff did not come forward. The plaintiff co-operated with the measurement with reluctance and after measurement, he brought a draft sale deed written by his brother-in-law one Noorudheen, a document writer. In the draft sale deed, the total sale consideration shown was Rs.5,70,000/- only, which the defendant opposed by insisting that the real value of Rs.65,25,000/- has to be shown in the sale deed. The plaintiff was not ready for the same. Despite earnest efforts on the part of the defendant, the plaintiff was not ready and that he was not ready even when he instituted the plaint, which is only an attempt for extension of time, until the plaintiff finds another buyer. The allegation that the actual extent of the property was 41 cents is false. Though the defendant is not legally bound to sell the property, for the period having expired, he is still ready and willing to sell the same, if the plaintiff is ready to pay the balance sale consideration, with the actual sale price shown in the sale deed. Although the actual extent found on measurement was 46.891 cents, the defendant only insisted payment for 43.50 cents. The defendant is ready to accept the

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extent found on measurement by a commissioner appointed by the court, for which he filed a separate application along with written statement. The defendant averred that he is prepared to execute the sale deed upon receiving the balance sale consideration at any time before 15th July, 2011. He is not prepared to do so after the said date, since the value of the property is increasing day by day. On such premise, the defendant sought for dismissal of the suit.

5. On behalf of the plaintiff, Exts.A1 to A14 were marked through PW1 to PW4, of whom PW1 is the plaintiff himself. The defendant examined himself as DW1 and the Surveyor Chandrangathan as DW2, through whom Exts.B1 to B7 were marked.

6. On an analysis of the facts and evidence, the learned Sub Judge found that the defendant failed to perform his part of the contract and hence decreed the suit directing execution of the sale deed in favour of the plaintiff, conveying the plaint schedule property as identified in Ext.C1(c) plan, within a period of three months from the date of decree.

7. Sri.S.Ananthakrishnan, learned counsel for the appellant and Sri.K.S.Hariharaputhran, learned counsel for the respondent were heard and records perused.

8. Learned counsel for the appellant submitted that the respondent/buyer was never ready and willing to purchase the scheduled property and that his readiness and willingness is only in letter and not in spirit. Neither in Ext.A2 lawyer's notice nor in the plaint, the plaintiff had set forth the relevant factual parameters. Ext.A2 notice is a curt one, without disclosing the measurement claimed by the plaintiff on 11.3.2011. Nor is the same pleaded in the plaint, *de hors* the fact that an exhaustive reply notice (Ext.B7) was issued by the defendant/appellant, specifically averring a joint measurement on 24.3.2011. This suppression itself would tell harsh upon the bonafides of the plaintiff, which is quite relevant in the context of the discretion afforded under Section 20 of the Specific Relief Act. The joint measurement claimed by the defendant on 24.3.2011 is substantially probalised by the fact that the son of the plaintiff reached India on 23.4.2011, coupled with deposition of

PW2 that the plaintiff's son Shoukath came two days before the measurement. The factum of arrival of the son is established vide Ext.A14 passport. Thus, the measurement on 24.3.2011 as claimed by the defendant is probabilsed and the measurement on 11.3.2011 as claimed by the plaintiff is shown to be false. Another aspect highlighted by the learned counsel is Ext.B2 draft sale deed, which according to the defendant is prepared by Noorudeen, the brother-in-law of the plaintiff. As a matter of fact, the handwriting in Ext.A1 agreement and Ext.B2 draft sale deed is one and the same and therefore, the denial of the plaintiff that Ext.B2 was not prepared by the said Noorudheen at the instance of the plaintiff can only be disbelieved. The fact that purchase was sought to be effected in the name of the plaintiff's son as depicted in Ext.B2 draft itself would vouch that Ext.B2 is prepared at the instance of the plaintiff.

9. More importantly, learned counsel contended that the earnestness of the defendant to perform Ext.A1 contract is quite discernible from the offer made by him in Ext.B7 reply notice, as also, in the written statement, on both occasions of

which, the time for performance was extended to enable execution of the sale. The reluctance of the plaintiff is clear from the fact that he had not responded positively to the above offers made by the defendant. The plaintiff cannot for a moment contend that the real point of controversy was the extent of the scheduled property, inasmuch as, the defendant demanded consideration for 43½ cents only covered by the title deed. Another aspect highlighted to disbelieve PW2 is his version regarding the handing over of possession of the scheduled property, simultaneous with the execution of Ext.A1 agreement. No such case is pleaded in Ext.A2 notice, as also, in the plaint. Nor is the same spoken to by any witness, except PW2.

10. Without adverting to the above salutary facts, the learned Sub Judge granted specific performance, after discussing whether time was the essence of the contract, a point where neither of the parties have joined issue. The question whether the plaintiff had approached the court with clean hands; and if not, whether he is entitled to an equitable relief, especially in the context of the vast discretion granted under Section 20 of

the statute has not been addressed at all by the sub court. According to the learned counsel, the judgment impugned cannot be sustained and the plaintiff ought to have been non-suited, at best granting the relief of return of advance sale consideration.

11. Refuting the above submissions, learned counsel for the respondent/plaintiff submitted that the appellant/defendant failed to discharge his obligations under Ext.A1 agreement for sale, which specifically stipulated measurement of the scheduled property to be effected and consideration paid only on the extent found on measurement. The version of DW2/Chandrangathan cannot be believed. It was asserted that no joint measurement was conducted and that, as admitted by DW2, the second measurement was necessitated since there was discrepancy with respect to the extent in the earlier measurement. As between the two versions of measurement of the property through PW3/Roy as claimed by the plaintiff and by DW2/Chandrangathan as claimed by the defendant, the former is more believable and probable. If a measurement as claimed by the defendant was in fact conducted on 24.4.2011,

nothing prevented him from producing such measurement plan/sketch along with written statement. The Commissioner's report was filed only on 20.7.2011, immediately after which, the plaintiff filed an interlocutory application seeking to carry out the sale for the extent found in the measurement of the Commissioner. This amplifies the readiness and willingness on the part of the plaintiff. On the discretion under Section 20, learned counsel submitted that hardship, if any, to the defendant has to be specifically pleaded, which is not done. PW1 denied the measurement through Chandrangathan and he never admitted his son's (PW4) presence at the time of measurement. Therefore, according to the learned counsel, the defendant failed to prove the measurement of the scheduled property, as also, satisfying the defendant of the correct extent of the same. Relying on a judgment of the Hon'ble Supreme Court in **Beemanenimaha Lakshmi v. Gangumalla Appa Rao (since dead) by legal representatives** [(2019) 6 SCC 233], it was pointed out that a demand for measurement would not militate against the readiness and willingness of the plaintiff.

12. As regards Ext.B2 draft sale deed, learned counsel submitted that the same is a photostat copy and that the defendant had not laid the foundation for acceptance of secondary evidence in terms of Section 65 of the Evidence Act. Nor was the author of Ext.B2 examined. Ext.B2 cannot therefore be taken stock of for any purpose. Finally, learned counsel pointed out that Exts.A5 to A11 documents clearly established the factum of the plaintiff being ready with the necessary funds, which, in turn, proves his readiness and willingness to perform the contract, wherefore, the discretion under Section 20 has been correctly exercised in favour of the plaintiff by the learned Sub Judge, warranting no interference to the judgment impugned in this appeal.

13. Having heard the learned counsel appearing on both sides, we will address the issues involved under the following heads:-

13(a). Cause for non-performance:-

It is curious to note that no reason for non-performance of the contract is stated in Ext.A2 lawyer's notice, the first communication between the plaintiff and the defendant after

execution of Ext.A1 agreement. Ext.A2 was issued when there was only 10 days remaining for the expiry of the period fixed in A2. In the plaint, the plaintiff asserts breach in the matter of measurement of the property, simultaneous with shortage of the extent agreed to be conveyed. As against 43.5 cents specified in Ext.A1 agreement, the extent available, according to the plaintiff, is only 41 cents. Significantly, the plaint specifically alleges that a joint measurement of the property in terms of the agreement was never carried out. However, the notice and the plaint is silent about any measurement carried out at the instance of the plaintiff to allege shortage in extent. Nevertheless, evidence was adduced on behalf of the plaintiff claiming that the property was jointly measured on 11.3.2011 and denying a joint measurement on 24.3.2011 as claimed by the defendant. We are rejecting this claim of the plaintiff as untrue by a detailed discussion to follow under the sub-heading 'who conducted the measurement and when?'. The extent found by the commissioner appointed by the court is 42.62 cents, the shortage being a meagre 880 sq.m. only, as against the agreed extent of 43.5 cents. Having regard to the total extent of the subject property and the consideration

involved, the said difference is trivial and we are hence not persuaded to hold that the cause espoused by the plaintiff is not the real reason for non-performance of the contract. We also observe that the extent measured by the Commissioner does not, by itself, probablise either of the rival claims of measurement. Necessarily, the attendant circumstances have to be taken stock off, which we would do a little later. Moreover, PW4 - the son of the plaintiff, who was projected by the plaintiff as the real purchaser - propounds a totally new reason as to the cause for non-performance. According to him, the defendant demanded the consideration to be paid in foreign currency, that too payable at Dubai. No such case was ever pleaded or spoken to by any witness on behalf of the plaintiff, except PW4. This also persuades us to frown upon the cause of non-performance alleged by the plaintiff.

13(b). We notice that the defendant had taken a consistent stand as regards the reason for non-performance, right from the issuance of Ext.A4 reply notice. According to the defendant, the plaintiff was not really ready and willing to take the sale deed after paying the sale consideration and that he

was desperately attempting to find a new purchaser for a higher price. The plaintiff was also not prepared to show the actual sale consideration in the proposed sale deed. We will deal with the issue of readiness and willingness under a separate sub-heading and hence will focus on the second allegation, regarding actual sale consideration being shown in the sale deed, for the time being. Ext.B2 is a draft sale deed prepared at the instance of the plaintiff, by one Noorudeen, their document writer and relative, wherein the sale consideration stated was Rs.5,70,000/- only, as against the real sale consideration of Rs.65,25,000/-. This course was not accepted by the defendant, who insisted to show the real consideration in the sale deed, for, he was not interested to keep black money. It is true that Ext.B2 draft sale deed has not been proved to be in the handwriting of the said Noorudeen, though it was contended so and Pws 1 and 2 gave evasive answers as regards the authorship of the handwriting in Ext.B2. However, PW2, one of the sons of the plaintiff, admits in cross-examination that he met the defendant in the night, after measurement, requesting him that the expenditure for execution of sale deed has to be minimised. We are aware that

this, by itself, would not establish the defense contention. But we notice yet another fact that, *de hors* the plaintiff being put to notice of the allegation of his non-preparedness to show the real consideration, the plaintiff had not chosen to express his willingness in that direction either in the plaint, or in the evidence adduced. Nor did PW2, the son of the plaintiff - who claimed to have been involved in the transaction through out - speak to that effect. It is PW4, another son of the plaintiff, on whose behalf the property was allegedly sought to be purchased, spoke for the first time recalcitrantly - that too in cross-examination - that he is prepared to show the real consideration. This conduct on the part of the plaintiff and his witnesses would go a long way to probabalise the defence contention as regards the cause for non-performance. We leave it at that, since the endeavour is to find out whether the case propounded by the plaintiff, including the cause for non-performance, is established or at least probabalised; the burden of proof being invariably on the plaintiff.

14. Suppression of facts:-

(a). We notice that there is serious suppression of relevant

facts on the part of the plaintiff, which impacts his bonafides. Firstly, Ext.A2 lawyer's notice is a curt one, hardly readable, which merely refers to Ext.A1 agreement and seeks specific performance, asserting readiness and willingness on the part of the plaintiff. It is the specific testimony of the plaintiff/PW1 that a measurement of the scheduled property was carried out at the instance of the plaintiff well before the issuance of Ext.A2 lawyer's notice. However, there is no whisper, whatsoever, in Ext.A2 notice about such measurement done; or for that matter, about the alleged shortage in the extent. The factum of measurement at the instance of the plaintiff is also suppressed in the plaint, though shortage of extent is alleged; which puts paid the claim of a measurement by the plaintiff.

14(b). Suppression of another material fact is with respect to the role of the plaintiff's son, PW4. At the time of adducing evidence, the plaintiff put forward a case that the property in terms of Ext.A1 agreement was meant for purchase by his son, PW4. It was on his behalf that the plaintiff entered into Ext.A1 agreement for sale with the defendant. However, this aspect is

not referred or pleaded at all, either in Ext.A1 agreement, Ext.A2 lawyer's notice or in the plaint. It is only at the stage of adducing evidence, when the plaintiff has to establish that he is ready with necessary funds, that the above case was propounded in the affidavit in lieu of the chief-examination. We are not of the opinion that it is improbable or unbelievable that a father enters into an agreement for sale on behalf of his son, who is employed abroad. We only find fault with the plaintiff in not pleading the said aspect at least in the plaint, if not in Ext.A1 agreement or Ext.A2 lawyer's notice, especially when Ext.A4 reply notice alleges that the plaintiff was not ready with the funds. We are of the considered opinion that the identity of the purchaser is indeed a relevant fact to be pleaded in the plaint, especially when the readiness and willingness of the purchaser is an essential concomitant to be proved in a suit for specific performance, as enjoined by Section 16(c) of the Specific Relief Act.

14(c). Yet another suppression, if at all the assertion is true, is with respect to a claim by PW2 that the possession of the scheduled property was handed over to the plaintiff and that

they have cultivated the same for a period of five months. This aspect, is also seen suppressed in Ext.A2 notice, as also, in the plaint. Moreover, such a claim is not seen espoused by the plaintiff/PW1 or by his son/PW4.

15. Who measured the property and when?

(a). According to the plaintiff, the scheduled property was measured on 11.3.2011 by PW3/Roy, whereas the property was measured on 24.3.2011 by DW2/Chandrangathan, according to the defendant. Thus, there exists dispute, both in respect of the date and the person through whom the property was measured.

15(b). PW2 would admit in cross-examination the presence of his brother Shoukath (PW4) and Chandrangathan (DW2), along with others, at the time of joint measurement. Ext.A14 is the passport of PW4 Shoukath, a perusal of which, would establish that he came to India only on 23.3.2011. This fact is also spoken to by PW2 and PW4. If PW4 Shoukath is to be present at the time of measurement, the same can only be on 24.3.2011, as claimed by the defendant; and not on 11.3.2011

as claimed by the plaintiff.

15(c). As could be seen from the deposition of DW2/Chandrangathan, he retired as the Survey Superintendent in charge, whereas PW3/Roy would claim himself to be a licensed private surveyor. DW2 would state that PW3/Roy is not a Surveyor. He also denied the presence of Roy at the time of measurement and deposed that he had not associated with any survey plan prepared by Roy. Upon perusing the plan prepared by Roy, DW2 opined that the same is not prepared in accord with the survey records.

15(d). Per contra, PW3/Roy would admit in cross the presence of DW2/Chandrangathan at the time of measurement. According to him, DW2 was only supervising, for, he had absolute trust on PW3/Roy. PW3 also would admit that DW2 is a retired Government Surveyor. PW3 deposed that he worked as Village Assistant for six months in Koodal Village and that those who pass the survey test alone can work as Village Assistant. On the top of all, PW3 is completely silent as to the date on which he allegedly measured the property. Finally, it has been elicited that PW3 came to the court twice to tender

evidence, not on receipt of summons, but on the request of the plaintiff.

15(e). In the above state of affairs, we are not persuaded to place any intrinsic reliance upon the version of PW3/Roy. Despite a specific challenge as regards his competence to conduct measurement, the license claimed was not produced. PW3 is propounded as a witness by the plaintiff and so long as PW3 is silent as regards the date of measurement, the plaintiff's version of having measured the property on 11.3.2011 alone can be taken, which we have found to be incorrect and improbable.

15(f). Further, the version put forward by PWs.1 to 4 as regards each others presence at the time of measurement also differs substantially. The plaintiff, when examined as PW1, maintains that a measurement was carried out at the instance of the plaintiff through PW3/Roy. PW1 would state in cross-examination that apart from himself and Roy, the defendant and PW2 were present at the time of measurement. PW1 specifically deposed that PW4 Shoukath and DW2

Chandrangathan (the Surveyor who measured the property according to the defendant) were not present at the time of measurement. However, PW2 would state that besides, apart from himself, the plaintiff/PW1, the defendant, his uncle-cum-document writer Noorudeen, Roy, Shoukath and DW2 Chandrangathan, were present at the time of measurement. PW3 Roy spoke to the effect that besides the plaintiff and defendant, DW2 was also present at the time of measurement. However, he did not refer to the date on which he allegedly measured the property. PW4 Shoukath did not vouch his presence during measurement, but he chose to deny the measurement by Chandrangathan. We are of the opinion that the plaintiff's case about measurement of the scheduled property and the alleged shortage in extent does not inspire confidence in our minds. We find that the case set up by the defendant as regards measurement is much more probable.

16. Whether the plaintiff was ready and willing?

(a). Readiness and willingness broadly refer to the capacity and preparedness of a party to a *lis* to perform his part of the contract. Readiness insofar as a purchaser/plaintiff is

concerned boils down to the question whether he was possessed of the necessary funds to pay the sale consideration. It must be shown that the readiness and willingness on the part of the plaintiff is continuous, right from the date of contract till the decree. (See **Gomathinayagam Pillai v. Pallaniswami Nadar** [(1967) 1 SCR 227]). The conduct of the plaintiff must be judged having regard to the entirety of the pleadings, as also, the evidence brought on record. (**Umabai v. Nilkanth Dhondiba Chavan** [(2005) 6 SCC 243]). Readiness and willingness is a matter to be established from the overall conduct of the plaintiff and not a rhetoric of assertion. The compliance of readiness and willingness has to be in spirit and substance; and not in letter and form. To test whether a party has performed his obligations, one has to see the pith and substance of his plea. The legal position has been succinctly laid down by the Hon'ble Supreme Court in **Aniglase Yohannan v. Ramlatha & others** [(2005) 7 SCC 534]. The Supreme Court relied upon the observations of Lord Campbell in **Cort v. Ambergate, Nottingham & Boston and Eastern Junction Rly. Co.** [(1851) 117 ER 1229] that in common sense, the meaning of an averment of readiness and willingness must be that the

non-completion of the contract was not the fault of the plaintiff, and that they were disposed and able to complete it, had it not been renounced by the defendant. The following observations of the Hon'ble Supreme Court in **Aniglase** (supra) are relevant and extracted here below:-

“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.”

16 (b). Coming to the facts, we notice that the plaintiff had pleaded in so many words that he was and is ready and willing to perform his part of the contract. We will first consider the 'readiness' of the plaintiff, which essentially refers to his financial capacity, as we have referred earlier. Here again, we are constrained to note the controversy as to who is the real purchaser. As discussed while dealing with suppression, neither

Ext.A1 agreement nor Ext.A2 notice portray PW4 Shoukath as the purchaser. More importantly, the plaint also does not disclose that the plaintiff entered into Ext.A1 agreement for sale on behalf of his son, Shoukath. Thus, there is absolutely no pleading, whatsoever, that PW4 Shoukath is the purchaser under Ext.A1 and that the plaintiff, his father, was acting on his behalf. The following observation of the Hon'ble Supreme Court in **Anathula Sudhakar v. P.Buchi Reddy (Dead) By Lrs & Ors [(2008) 4 SCC 594]**, is apposite in this context:

“29.No amount of evidence or arguments can be looked into or considered in the absence of pleadings and issues, is a proposition that is too well settled.”

We can therefore proceed only treating the plaintiff as the purchaser for the purpose of ascertaining the readiness and willingness.

16(c). Exts.A5 to A11 are the documents to show the financial capacity of the purchaser, of which Exts.A5, A6 and A11 pertains to the son Shoukath, whereas Exts.A7, A8 and A10 are

in the joint names of the plaintiff/father and the son, Shoukath. Ext.A9 is in the joint names of the son and his mother, Sainaba Beevi. Ext.A7 reflects a sum of Rs.3,82,175/- as on 21.4.2011. Ext.A8 reflects Rs.12,00,000/- as on 15.11.2008, which is as cash certificate maturing on 15.11.2011, for value of Rs.16,61,741/-. Ext.A10 is again a fixed deposit for Rs.16,21,347/- as on 18.8.2012. Ext.A9 in the joint names of the son and mother (plaintiff's wife), which reflects a sum of Rs.12,00,000/- as on 15.11.2008, which again matures on 15.11.2011, with a value of Rs.16,61,741/-.

16(d). We are not venturing to apportion the proceeds in Exts.A7, A8 and A10 into two equal halves to find out the amounts in the exclusive name of the plaintiff/father. We cannot but observe that in the light of the documents afore referred, the financial capacity of the plaintiff is by and large established and we find that he was ready with the funds to pay the balance sale consideration of Rupees Fifty five lakhs approximately. In finding so, we also reckon the probability of the amounts standing in the names of plaintiff's son and wife being shared for the purpose of performing Ext.A1 agreement,

if in case they really wanted to purchase the property.

17. What requires to be discussed now is the 'willingness' component. In this regard, we notice a distinction between 'readiness' and 'willingness', as expatiated by the Hon'ble Supreme Court in **H.H.Acharya Swami Ganesh Dassji v. Sita Ram Thapar** [(1996) 4 SCC 526]. It was held that 'readiness' means the capacity of the plaintiff to perform the contract, which includes his financial position to pay the purchase price; and to determine his willingness to perform his part of the contract, the conduct has to be properly scrutinized. The Supreme Court held that even if the plaintiff had the funds, he has to prove his willingness to perform his part of the contract, which has to be adjudged with reference to the conduct of the party and attendant circumstances. To the same effect is the judgment in **J.P.Builders v. A.Ramdas Rao** [(2011) 1 SCC 429], where the Hon'ble Supreme Court observed that while readiness refers to the financial capacity of the plaintiff, willingness refers to the conduct of the plaintiff warranting performance and that generally, readiness is backed by willingness. A detailed discussion in this regard is made by a learned Single Judge of

the Allahabad High Court in **Bijai Bahadur v. Shiv Kumar** [AIR 1985 All 223]. After referring to the meaning of the expression 'ready' and 'willing' in Bouvier's, Stroud's and Webster's Dictionary, as also, to Corpus Juris Secundum, it was observed thus:

"17. All the above definitions clearly point out at least one thing that 'readiness and willingness' are sometimes treated as synonymous and have almost the same sense or meaning but there is a clear cut distinction between the two. While 'willingness' is merely mental process, 'readiness' is something to do with translating that will into action and is preceded by necessary preparation for being in a position to be ready. In other words, we can say that while 'willingness' may be something to do mainly with a person's mental process to do an act, his readiness implies close proximity of such willingness and its ultimate physical manifestation. 'Readiness' must in all cases be backed by 'willingness' and its imminent physical action is demonstrated when it is about to be put into action. Time lag between the two may sometimes be very short, may even be negligible, but it must always be preceded by an intention or a will to do. In short, 'readiness' must be said to be the total equipment of a person who is willing to do a thing before he actually does it.

18. There may be cases where though a person may be willing, yet may not be able to do what he wills. He cannot be said to be ready to do it. In other cases, the person may possess all that is necessary to do an act. He may be ready but if the will to do is not there, his willingness will be lacking. One cannot remain unaware of such cases in which the plaintiff may go on demanding performance of the contract for keeping the agreement alive, yet really speaking he does not intend to pursue the matter but only wants to keep it alive for some ulterior motives. Since in granting specific performance the Court acts in equity, it becomes necessary that a high standard of equitable conduct must be displayed by the plaintiff. It is for this reason that a rigor of this kind has been provided in Section 16. It is primarily to eliminate any element of fraud and risk of a party taking undue advantage of the other that the discretion to decree specific performance has still been left with the Court."

18. It could thus be seen that, while readiness refers to the financial capacity of the plaintiff/vendor to pay the sale consideration, willingness is a different component referable to the conduct of the vendor. Therefore, it is not axiomatic that one who is ready is automatically willing to perform the

contract. Per contra, one who is ready with the funds can still be unwilling to perform the contract for different reasons altogether, say for example, the vendor deems the transaction not feasible/profitable for commercial reasons.

19. Coming to the facts pertaining to willingness, we notice that right from the stage of Ext.A4 reply notice, the defendant offered to sell the property, *de hors* the expiry of the period stipulated in Ext.A1, of course subject to receipt of sale consideration for an extent of 43½ cents. The plaintiff did not accept the defendant's offer, on the pretext that the scheduled property has not been measured and that there is shortage in extent, which contention we have already found to be bereft of any bonafides, whatsoever. In as much as we have found that the cause for non-performance, as espoused by the plaintiff, is untrue, it follows that the plaintiff was projecting the failure to measure the property, as also shortage in extent, only as a ruse for not performing his part of the contract, albeit being possessed of necessary funds.

20. When it came to the written statement, the defendant unequivocally expressed his desire to sell the property to the plaintiff, upon receiving consideration for the extent found on actual measurement by the court appointed commissioner. In respect of both these offers, vide Ext.A4 reply notice and the written statement, the defendant had extended the time stipulated for performance, so as to enable the plaintiff to take the sale deed. However, there was no positive reciprocation on the part of the plaintiff to the accept the above offers. The Commissioner filed Ext.C1 report on 20.7.2011 with copies to the counsel for plaintiff and defendant. Although it is recorded in the proceedings sheet that the case was adjourned on 20.7.2011 for objection to commission report, it is not clear as to who sought time for the same. On 24.8.2011, the plaintiff filed I.A. No.1471/2011 expressing his willingness to purchase the scheduled property as per the extent indicated in Ext.C1 report. However, it seems that the said interlocutory application was not prosecuted properly, with the result, the same was dismissed on 19.1.2012. In the meantime, on 4.11.2011, the case was referred for settlement, but not settled, despite an offer on the part of the defendant in the

written statement and the so-called willingness of the plaintiff vide I.A. No.1471/2011, both concurring for sale/purchase of the scheduled property with the extent found on measurement by the Commissioner. Here, we also take into account the defense contention that the plaintiff was not genuinely interested to purchase the scheduled property, that he was a broker and that he was in search for a purchaser to resell the property for a higher price. We also notice the clear stipulation in the written statement of the extended date, 15.7.2011, within which the defendant is prepared to sell the scheduled property to the plaintiff, where he sought for consideration only for the extent found on measurement by the court appointed commissioner; and beyond which the defendant was not so ready on account of the day-to-day increase in the value of the property. The plaintiff's offer vide I.A.No.1471/2011 came only on 24.8.2011, more than a month after the extended date stipulated by the defendant in the written statement. The above referred aspects, coupled with the suppression of facts, prevaricating stand of the plaintiff and other witnesses and the absence of pleading as regards the real purchaser as PW4, all persuades us to find that the plaintiff was not willing to

perform the contract, though he was ready with the funds as established by Exts.A5 to A11.

21. Variance between pleadings and proof adduced:-

We notice substantial variance between the case pleaded and the evidence adduced. The first aspect in this regard is again pertaining to the question as to who is the real purchaser. The case pleaded in the plaint is that the plaintiff had entered into Ext.A1 contract and that he was always ready and willing to perform his part of the contract. There is no whisper, whatsoever, in the plaint that the actual purchaser is the plaintiff's son. However, proof is adduced by the plaintiff as PW1, as also, by other witnesses to the effect that the purchaser is plaintiff's son, PW4. Similarly, the plaint does not refer to any measurement effected in respect of the scheduled property at the instance of the plaintiff. However, evidence is sought to be adduced to the effect that the property was so measured, though we frowned upon such claim. That apart, it has been established by the evidence adduced on behalf of the plaintiff that the measurement was a joint one in the presence of the defendant as well. Another instance of variance between

pleadings and proof is with respect to the cause of non-performance of Ext.A1 agreement. In the plaint, it is asserted that the defendant failed to conduct a joint measurement in terms of Ext.A1 contract, simultaneous with an allegation that there is shortage of extent. However, PW4, the alleged real purchaser, adduced evidence to the effect that the contract failed also for reason of the defendant's demand for payment of the sale consideration in foreign currency payable at Dubai, a case which was not pleaded at all.

22. We perceive that the above variance between pleadings and proof is fatal, especially in a suit for specific performance. In **Ganesh Shet v. Dr.C.S.G.K. Setty and others** [(1998) 5 SCC 381] the Hon'ble Supreme Court held in paragraph no.13 that the evidence and proof must be absolutely clear and certain in a suit for specific performance. The Supreme Court quoted with the approval from *Pomeroy on Specific Performance of Contract* (3rd Edition) that greater amount or degree of certainty is required in the terms of an agreement, which is to be specifically executed in equity, than is necessary in a contract which is to be the basis of an action at law for

damages. It also took stock of the observations of **Sir Asuthosh Mookerjee** in **Gonesh Ram v. Ganpath Rai** [AIR 1924 Cal 461] that the court would not permit the plaintiff to depart from the case made in the plaint, as the court discourages, as a rule, variance between pleading and proof and this rule is applied with special strictness in cases of specific performance of contract. We bow before the above authoritative pronouncement of the Hon'ble Supreme Court to find that the variance between the pleadings and proof afore referred disentitles the plaintiff for an equitable relief of specific performance.

23. How far the conduct of the plaintiff relevant while exercising the discretion under Section 20 of the Specific Relief Act?

Section 20 of the Act stipulates that the jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so. It also stipulates that the discretion, however, should be sound and reasonable guided by judicial principles.

24. In **Zarina Siddiqui v. A.Ramalingam** [(2015) 1 SCC 705] the Hon'ble Supreme Court held thus in paragraph no.33 as regards the discretion under Section 20 of the Specific Relief Act:-

“33. The equitable discretion to grant or not to grant a relief for specific performance also depends upon the conduct of the parties. The necessary ingredient has to be proved and established by the plaintiff so that discretion would be exercised judiciously in favour of the plaintiff. At the same time, if the defendant does not come with clean hands and suppresses material facts and evidence and misleads the court, then such discretion should not be exercised by refusing to grant specific performance.”

It was further held in paragraph no.34 that if a party to a *lis* does not disclose all material facts truly and fairly, but state them in distorted manner and misleads the court, the court has inherent power to exercise its discretionary jurisdiction in order to prevent abuse of process of law.

25. In this regard, we may profitably recall the dictum laid down in **Aniglase** (supra) that the conduct of the plaintiff

should be blemishless throughout, entitling him for a decree for specific performance.

26. Lourdu Mari David & others v. Louis Chinnayya Arogiya Swamy & others [(1996) 5 SCC 589] took note of the settled legal position that a party who seeks to avail of the equitable jurisdiction of a court and specific performance, being an equitable relief, must come to the court with clean hands. A party who makes false allegations does not come with clean hands and is not entitled to equitable relief.

27. Sardar Singh v. Krishna Devi & another [(1994) 4 SCC 18] held that the circumstances specified in Section 20 are only illustrative and not exhaustive and that the court would take into consideration the circumstances of each case, the conduct of the parties and the respective interest under the contract.

28. N.P. Thirugnanam (D) By Lrs v. Dr. R.Jagan Mohan Rao & Ors [(1995) 5 SCC 115] held thus on the topic:

“5.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.”

[underlined by us for emphasis]

29. In **Umabai v. Nilkanth Dhondiba Chavan** [(2005) 6 SCC 243] the Supreme Court held that the conduct of the plaintiff must be judged having regard to the entirety of the pleadings, as also, the evidence brought on record.

30. In the light of the above authoritative pronouncements, we take stock of the following factual aspects regarding the conduct of the plaintiff, to decline the relief of specific performance in exercise of our discretion under Section 20 of the Act:

1. The plaintiff approached the court alleging breach on the part of the defendant in not measuring the scheduled property, as also, alleging shortage of extent, which we have found to be untrue.

2. Non-acceptance of the defendant's offer to sell the property even after the expiry of the period stipulated in the agreement, especially the one specifically pleaded in the written statement.

3. Suppression of several material facts in Ext.A2 notice, as also, in the plaint, the details of which have already been adverted to earlier.

4. The controversy as regards the real purchaser, in respect of which there is no pleading at all in the plaint.

5. The variance between the pleadings and proof.

6. The plaintiff's failure to state in the plaint or at least to depose in evidence of his preparedness to show the actual sale consideration in the sale deed.

31. The cumulative effect of the above referred facts would lead to the inescapable conclusion:

1) that the plaintiff was not willing to perform his part of the contract;

2) that he has not approached the court with clean hands;

3) that the conduct of the plaintiff was not all along blemishless;

4) that he has not stated all material facts truly and fairly, but only in a distorted manner; and

5) that he made false allegations against the defendant in the matter of breach of contract.

32. We cannot but refuse to exercise the discretion in favour of the plaintiff in the above narrated facts and circumstances. We, therefore, allow this appeal and set aside the judgment impugned. Instead, we grant a decree for return of the advance sale consideration of Rupees ten lakhs by the defendant to the plaintiff. In view of the fact that the amount paid towards advance is in the hands of the defendant for the past more than a decade, we direct the same to be returned together with interest at the rate of 6% per annum, within a period of three months from the date of this judgment. The parties shall bear their respective costs.

Sd/-

K.VINOD CHANDRAN, JUDGE

Sd/-

C.JAYACHANDRAN, JUDGE

skj