IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

FRIDAY, THE 8TH DAY OF APRIL 2022 / 18TH CHAITHRA, 1944

RFA NO. 543 OF 2012

AGAINST THE JUDGMENT & DECREE DATED 7.02.2012 IN OS 468/2006 OF ADDITIONAL SUB COURT, KOTTAYAM

APPELLANT/PLAINTIFF:

**ASHA JOSEPH,AGED 47 YEARS,
D/O.JOSEPH, PERINGATTU HOUSE, THELLAKAM KARA,
PEROOR VILLAGE, KOTTAYAM TALUK, REPRESENTED BY
HER POWER OF ATTORNEY HOLDER ABRAHAM JOSEPH,
AGED 54 YEARS, S/O.JOSEPH, PERINGATTU HOUSE,
UDAYAMPEROOR, MANAKUNNAM VILLAGE, KANAYANNUR TALUK.**

**BY ADVS.SRI.ABRAHAM P.GEORGE
SMT.M.SANTHY
SRI.K.VINODKUMAR 70789**

RESPONDENTS/DEFENDANTS:

1 **BABU C. GEORGE,AGED 60 YEARS,
S/O.GEORGE, CHANDRATHIL HOUSE,
PALARIVATTOM KARA, EDAPPALLY SOUTH VILLAGE,
KANAYANNUR TALUK, PALARIVATTOM P.O., ERNAKULAM DISTRICT.**

2 **RAYMOL C GEORGE,AGED 35 YEARS,
D/O.BABU C. GEORGE, CHANDRATHIL HOUSE,
PALARIVATTOM KARA, EDAPPALLY SOUTH VILLAGE,
KANAYANNUR TALUK, PALARIVATTOM P.O.,
ERNAKULAM DISTRICT.**

3 **REKHA C. GEORGE,AGED 43 YEARS,
D/O.BABU C. GEORGE, CHANDRATHIL HOUSE,
PALARIVATTOM KARA, EDAPPALLY SOUTH VILLAGE,
KANAYANNUR TALUK, PALARIVATTOM P.O.,
ERNAKULAM DISTRICT.**

BY ADV SRI.P.K.BABU

THIS REGULAR FIRST APPEAL HAVING COME UP FOR HEARING ON 08.04.2022, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

"C.R."

P.B. SURESH KUMAR & C.S. SUDHA, JJ.

R.F.A. No.543 of 2012

Dated this the 8th day of April, 2022

JUDGMENT

C.S. Sudha, J.

This appeal is against the judgment and decree dated 07/02/2012 in O.S.No.468/2006 on the file of the Subordinate Judge's Court, Kottayam. The suit for specific performance or in the alternative return of advance money has been decreed partly by allowing the prayer for return of advance money. Aggrieved, the sole plaintiff has come up in appeal. The respondents herein are the defendants in the suit. The parties in this appeal will be referred to as described in the suit.

2. According to the plaintiff, she had entered into Ex. A2 sale agreement dated 07/08/2006 by which defendants 1 to 3 agreed to sell their plaint schedule property having an extent of 12.32 acres for a total sale consideration of ₹ 55,44,000/-. On the date of the agreement, an amount of

₹10,00,000/- was paid as advance. The agreement was to execute the sale deed within a period of three months from the date of agreement. The plaintiff was always ready and willing to perform her part of the contract. However, the defendants were never ready to perform their part of the contract. So, the plaintiff issued Ext.A3 lawyer notice dated 31/10/2006 calling upon the defendants to execute the deed, to which they sent Ext.A5 reply notice dated 16/11/2006, raising false and untenable contentions. Hence the suit.

3. Defendants on the other hand, filed written statement contending that there was never any sale agreement as alleged in the plaint. According to the defendants, Ext.A2 was executed as security when the first defendant borrowed an amount of ₹ 10,00,000/- from the plaintiff. Though styled as a sale agreement, parties never intended to act upon the same. When the defendants received Ext.A3 lawyer notice, along with Ext.A5 reply notice, they had also sent a cheque for ₹ 10,00,000/- returning the amount borrowed by the first defendant from the plaintiff. Ext.A2 is not a sale agreement as alleged in the plaint. The agreement was prepared and

brought by the plaintiff incorporating the conditions therein and the signature of the first defendant obtained. The 1st defendant was forced to sign in the agreement in order to obtain the loan amount, failing which the amount was refused to be advanced. None of the terms in the agreement had been agreed to by the defendants. The plaintiff got the agreement executed by playing fraud, exercising undue influence and coercion. Thus Ext.A2 agreement is void *ab initio* and is not binding on the defendants.

4. On completion of the pleadings, necessary issues were raised by the court below. Pws.1 and 2 were examined and Exts.A1 to A11 were marked on the side of the plaintiff. DW1 was examined on the side of the defendants. No documentary evidence was adduced by the defendants. The court below disbelieved the case of the plaintiff and so disallowed the prayer for specific performance. Aggrieved, the plaintiff has come up in appeal.

5. Heard Sri.Abraham P.George, the learned counsel for the appellant and Sri.P.K.Babu, the learned counsel for respondents 1 to 3.

6. The points that arise for consideration are:

i) Has the plaintiff succeeded in establishing that Ext.A2 document is an agreement for sale as alleged in the plaint?

ii) Has the plaintiff satisfied the requirements under Section 16(c) of the Specific Relief Act, 1963(the Act)?

iii) Is there any infirmity in the findings of the court below calling for an interference by this Court?

iv) Reliefs and costs?

7. **Point No. (i) to (iii):** The first and foremost reason given by the court below for rejecting the relief of specific performance is the failure of the plaintiff to enter the witness box and depose regarding her readiness and willingness. The court below relied on the dictum of the Hon'ble Supreme Court in **Man Kaur v. Hartar Singh Sangha – (2010) 10 SCC 512: 2010 KHC 4741** to disbelieve and find that the evidence let in by PW1, the power of attorney holder of the plaintiff, is insufficient to prove the case pleaded in the plaint. Before we go into the said aspect, we need to look into the pleadings of both parties.

8. Ext.A3 lawyer notice dated 31/10/2006 sent by the plaintiff to the defendants produced along with the plaint says - *".... That my client is ready and willing for the purchase of the above property for the sale consideration as agreed between the parties in the sale agreement and she has arranged necessary funds also for the above purpose. My client informs me that though she had intimated her readiness and willingness for the purchase of the property before the expiry of time stipulated as per the agreement, on several occasions you failed to comply the stipulations in the agreement and failed to convince your title and possession over the said properties to my client by producing the title deed and other documents and also to the extent of the property by way of measurement. …… That my client is ready and willing to give the balance sale consideration and get the execution of sale deed at the earliest even prior to the expiry of time fixed between the parties as per the agreement……."*

9. In Paragraph 5 of the plaint, it is averred - *"5. It is submitted that the plaintiff was ready and willing to purchase the schedule property by giving the balance sale consideration prior to the stipulated*

period and he informed the same to the defendants on several occasions. The plaintiff also demanded the defendants to measure the schedule property at the earliest. .....". In paragraph 6 of the plaint, it is stated thus - *"6. It is submitted that the plaintiff is ready and willing to purchase the schedule properties from the defendants for the agreed sale consideration and he is ready with the balance sale consideration also……".*

10. The question is, are the aforesaid pleadings sufficient in a case of this nature? According to the learned counsel for the defendants, the aforesaid pleadings are insufficient and that they are not in compliance with Section 16(c) of the Act. He relies on the dictums in **Susheela v. Mohammed Kunhi – 2012(1) ILR (Ker.) 812** and **Jogendra Singh v. Mukul Joshi – 2020 KHC 5590** in support of this argument. **Susheela** (*supra*) is a case in which the only averment in the plaint was to the effect that the plaintiff was ready and willing to perform his part of the contract. A Division Bench of this Court held that the said averment at best would only indicate that the plaintiff was ready and willing to perform his part of the contract when he instituted the suit and that it did not show that he has

been ready and willing to perform his part of the contract during the currency of the contract. This court held that courts have been very strict regarding the requirement under Section 16(c) of the Act, which provision is couched in negative terms. Section 16 is not an empty formality and readiness and willingness have to be proved right from the date of the contract till the date of the decree. In other words, strict requirement of law is continuous readiness and willingness. In the absence of a plea in the plaint regarding readiness and willingness, no decree for specific performance can be granted to the plaintiff. In a suit for specific performance of a contract it is necessary for the purchaser to show that he was ready and willing to fulfill the terms of the agreement, that he had not abandoned the contract and that he had kept the contract subsisting. This burden is upon the purchaser. Thus, it was held that there was total lack of pleading to the effect that the plaintiff was ready and willing to perform his part of the contract from the date of the contract till at least the date of filing the suit. Holding so the relief of specific performance was declined.

17. **Jogendra Singh** (*supra*), a decision of a Single Bench

of the Uttarakhand High Court, was a case in which the plaintiff had not averred anywhere in the plaint that he was always ready and willing to perform his part of the contract as per the mandate contained in Section 16(c) of the Act. The word 'readiness' was missing in the plaint. What was averred in the plaint was that the plaintiff was always ready to get the sale deed executed in his favour by paying the remaining amount within time.

18. Referring to the aforesaid two decisions, it was argued on behalf of the defendants that the pleadings in the plaint are totally insufficient and that it does not satisfy the requirements under Section 16(c) of the Act. The plaint does not give the details of the funds in the possession of the plaintiff or how she intended to raise the necessary funds to pay the balance sale consideration. These facts are revealed only in the proof affidavit of PW1, the power of attorney of the plaintiff. As there is noncompliance of Section 16(c), the plaintiff is not entitled to the relief of specific performance, goes the argument of the defendants.

19. Are the aforesaid pleadings, sufficient compliance of Section 16(c) of the Act? Order VI Rule 2 CPC says that every pleading

shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved. As per Section 16(c) of the Act, specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than the terms the performance of which has been prevented or waived by the defendant. This was the pre-amendment position. After the amendment of the Section in the year 2018, now it is not necessary for the plaintiff to 'aver and prove', it is sufficient that he proves his readiness and willingness.

20. There can be no doubt on the point that for the plaintiff to succeed in a suit of this nature, compliance of Section 16 (c) of the Act is mandatory. However, procedural law is intended to facilitate and not to obstruct the course of substantive justice. Provisions relating to pleading in civil cases are meant to give to each side intimation of the case of the other so that it may be met to enable Courts to determine what is really at issue

between the parties (**Ganesh Trading Co. v. Moji Ram, 1978 KHC 500: AIR 1978 SC 484)**.

21. Pleadings and particulars are necessary to enable the Court to decide the rights of the parties in the trial. The purpose of pleadings and issues is to ascertain the real dispute between the parties and to narrow the area of conflict between them. In order to have a fair trial it is imperative that the party should state the essential material facts so that the other party may not be taken by surprise. The parties are expected to raise specific pleadings before the first forum for adjudication of the dispute. Those pleadings are the basis of the case of the respective parties even before the appellate / higher Courts. The parties would be bound by such pleadings, of course, subject to the right of amendment allowed in accordance with law. It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. It is equally well settled that pleadings shall receive a

liberal construction. No pedantic approach should be adopted to defeat justice on hair splitting technicalities. Pleadings must be construed reasonably. The contention of the parties must be culled out from the pleadings by reading the same as a whole. Sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with the strict interpretation of the law. In such a case it is the duty of the Court to ascertain the substance of the pleadings. Whenever the question about lack of pleading is raised, the enquiry should not be so much about the form of the pleadings. Then the Court must find out whether in substance, the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings, parties knew the case and they proceeded to trial on the issues by producing evidence, it would not be open to a party to raise the question of lack of pleadings (**Ram Sarup Gupta v. Bishun Narain Inter College, 1987 KHC 965: AIR 1987 SC 1242**).

22. In **Bhagwati Prasad v. Shri Chandramaul, 1966 KHC 493: AIR 1966 SC 735,** the Apex Court dealt with the principles to be followed whenever a contention of lack of pleadings is raised. It has been held

that a party cannot be permitted to justify its claim on a ground which is entirely new and which is inconsistent with the ground made by it in its pleadings. But in considering the application of this doctrine to the facts of a case, it is necessary to bear in mind the principle that considerations of form cannot override the legitimate considerations of substance. If a plea is not specifically made and yet it is covered by an issue by implication and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule, no doubt, is that the relief should be founded on pleadings made by the parties. But where substantial matters relating to both parties to the suit are touched, though indirectly or even obscurely, in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings, would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is: did the parties know that the matter in question was involved in the trial and did they lead evidence

about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another. Therefore, the enquiry should not be so much about the form of the pleadings as their substance.

23. In the case on hand, Ext.A3 lawyer notice produced along with the plaint and the plaint, with sufficient clarity has stated that the plaintiff was and is ready and willing to perform her part of the contract and that though she had approached and requested the defendants to execute the deed in her favour, they have failed to perform their part of the agreement. It is true that the plaintiff has not given the details of the funds in her possession or the manner in which she intended to raise them in the plaint. Those aspects are matters of evidence, which as per O.VI Rule 1 need not be pleaded. There is yet another important aspect that needs to be taken

note of and which has been lost sight of by the court below. As referred to earlier, Ext. A3 notice issued by the plaintiff refers to her readiness and willingness. In Ext.A5 reply sent by the defendants, there is absolutely no reference or denial of the claim made by the plaintiff in her notice that she was always ready and willing to perform her part of the contract. On the other hand, in the reply notice, the only case put forward by the defendants is that Ext.A2 is not a sale agreement and that it is an agreement that was executed as security when the first defendant borrowed an amount of ₹10 lakhs from the plaintiff. In the plaint the plaintiff has reiterated her case of readiness and willingness. However, there is no denial whatsoever of this allegation/pleading in the written statement filed by the defendants. Order VIII Rule 3 says that denial has to be specific. It says that it shall not be sufficient for the defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth. Order VIII Rule 4 says that where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus, if it is

alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances. Order VIII Rule 5 says that every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability. The proviso says that the court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

24. In terms of O.8 R.3 CPC, a defendant is required to deny or dispute the statements made in the plaint categorically, as evasive denial would amount to an admission of the allegation made in the plaint in terms of O.8 R.5 CPC. In other words, the written statement must specifically deal with each of the allegations of fact made in the plaint. The failure to make specific denial amounts to an admission. (**Jaspal Kaur Cheema v. M/s.Industrial Trade Links, AIR 2017 SC 3995; Badat and Co. v. East**

India Trading Co., AIR 1964 SC 538; Sushil Kumar v. Rakesh Kumar, (2003)8 SCC 673 and M. Venkataramana Hebbar v. M. Rajagopal Hebbar, (2007) 6 SCC 401).

25. If a plea which is relevant for the purpose of maintaining a suit has not been specifically traversed, the Court is entitled to draw an inference that the same had been admitted. A fact admitted in terms of S.58 of the Evidence Act need not be proved (**M. Venkataramana Hebbar v. M. Rajagopal Hebbar, (2007) 6 SCC 401**).

26. In the case on hand, in the written statement, apart from a vague and evasive denial of the entire pleadings in the plaint, there is no specific denial or for that matter, any denial of the case of the plaintiff in the plaint that she was/is always ready and willing to perform her part of the contract. It is true that the plaintiff is the *dominus litis* or the master of the suit and hence as per Section 101 of the Evidence Act, the burden is on the plaintiff to establish her case and she cannot win her case on the weakness or inconsistencies in the case of the defendants. However, in this case, there is no denial of the claim by the plaintiff that she was/is always ready

and willing to perform her part of the contract. That being the position, it can only be taken that there has been no specific denial and in the absence of a specific denial as contemplated under Order VIII Rule 5, it would amount to an admission. As long as there is no denial, there is no duty on the part of the plaintiff to prove her case because admitted facts need not be proved.

27. It is true that the proviso to Sub-rule (1) of R.5 to O.8 of CPC says that the court can in its discretion require any fact, even if admitted, to be proved otherwise than by such admission. Here the argument advanced on behalf of the defendants is that even if the defendant has no consistent case or sets up a weak case, that would not entitle him to a decree because the plaintiff being the master of the suit will necessarily have to establish his case even in cases where the defendant sets up an evasive denial. There can be no quarrel to this proposition advanced. All the three Rules referred to, that is, R.3 to 5 of O.8 form an integrated Code dealing with the manner in which allegations of fact in the plaint should be traversed and the legal consequences flowing from its non-compliance. The written statement

must deal specifically with each allegation of fact in the plaint. When a defendant denies any such fact alleged in the plaint, he must not do so evasively but must answer the point of substance. If denial of fact is not specific but evasive, the said fact shall be taken to be admitted. In such an event, the admission itself being proof, no other proof is necessary. To do justice between the parties, for which courts are intended, the rigor of R.5 has been modified by the proviso. Under the proviso the court may in its discretion require any fact so admitted to be proved otherwise than by such admission. True, in construing such pleadings, the proviso can be invoked only in exceptional circumstances to prevent obvious injustice to a party or to relieve him from the results of an accidental slip or omission. It cannot be to help a party who designedly made vague denials. The discretion under the proviso has to be exercised by a court having regard to the justice of a cause with particular reference to the nature of the parties, the standard of drafting in a locality, and the traditions and conventions of a court wherein the pleadings are filed. Sub-rule (1) of R.5 of O.8 of CPC only mandates that every allegation of fact in the plaint shall be denied either specifically or by necessary

implication, or stated to be not admitted in the pleading and if not the allegations in the plaint shall be taken as admitted except the acts against a person under disability. To decide whether there is a specific denial or a denial by necessary implication, the written statement has to be read as a whole (**Josita Antony v. New India Assurance Company Ltd., 2005 KHC 2096**).

28. A reading of the entire written statement of the defendants in the instant case would show that there is no denial at all relating to the specific case of the plaintiffs that she was and is always ready and willing to perform her part. It is in this background the testimony of PWs.1 and 2 is to be analysed. Here we refer to the decision of the Hon'ble Supreme Court in **Man Kaur v. Hartar Singh Sangha, (2010) 10 SCC 512: 2010 KHC4741**, relied on by the court below to reject the testimony of PW1, which we also quote:

> *"12. We may now summarise for convenience, the position as to who should give evidence in regard to matters involving personal knowledge:*
>
> (*a) An attorney holder who has signed the plaint and instituted the suit,*

but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.

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

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

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

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

(f) Where different attorney holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what

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

A reading of the above dictum itself would make it clear that there is no complete bar in the power of attorney deposing on behalf of the plaintiff. The power of attorney holder who has personal knowledge of the facts and of the transaction, is competent to depose on these aspects on behalf of the principal. Here the case of PW1 in the box, which has not been discredited

in any way, is that he was the person who had negotiated with the first defendant on behalf of the plaintiff. It is true that this case has not been pleaded in the plaint. But that is not a major drawback in the light of Order VI Rule 2. PW1 in the box has deposed that the plaintiff was always ready and willing to perform her part of the contract and that the default was committed by the defendants. He also refers to the means by which the plaintiff intended to pay the sale consideration. PW2 - the wife of PW1 was examined to prove that she had promised to help the plaintiff in raising the necessary resources. As stated earlier, when readiness and willingness of the plaintiff is not disputed, it was not necessary for the plaintiff to prove the same. However, she has let in evidence of PWs.1 and 2, who supports her case of readiness and willingness.

29. The court below found that though money came into the bank account of the plaintiff at the relevant time, it was immediately thereafter seen withdrawn. Hence the court arrived at the conclusion that evidence is lacking to establish that the plaintiff had the necessary resources at the relevant point of time to pay the balance sale consideration. The

Hon'ble Supreme Court in **Nathulal vs Phoolchand, AIR 1970 SC 546** has held that, to prove himself ready and willing, a purchaser has not necessarily to produce the money or to vouch a concluded scheme for financing the transaction.

30. As held in **Ganesh Prasad v. Saraswati Devi, AIR 1982 All 47, i**t is not necessary for the plaintiff to work out actual figures and satisfy the Court what specific amount a bank would have advanced to him. Referring to the Websters III New International Dictionary, the court held, being ready means "prepared for something about to be done or experienced..... equipped or supplied with what is needed for some action or event..... prepared in mind or disposition so as to be willing and not reluctant not hesitant: inclined, disposed." Willing means according to the same dictionary; inclined or favourably disposed in mind." The words "ready and willing" are simple words and all that they mean is that a plaintiff, in order to succeed in a suit for specific performance must aver and prove that he has performed or has throughout been prepared to do his part under the contract, that preparedness may not, however be mere verbal

show of readiness to do his part. It should be backed by the means to perform his part of the contract when called upon to do so. The plaintiff does not have in such a case to go about jingling money to demonstrate his capacity to pay the purchase price, all that the plaintiff has to do in such a situation is to be really willing to purchase the property when the time for doing so comes and to have the means to arrange for payment of the consideration payable by him. There could, therefore, be no objection if the owner raises the money for payment when the time for doing so comes as Clause (1) of the Explanation to Section 16(c) clearly enacts that money need be produced only when directed by the court.

31. Therefore, the plaintiff need only establish that she had the capacity to raise the necessary funds, which she has done in this case through the testimony of PWs.1 and 2.

32. There is yet another finding in paragraph 16 of the impugned judgment that the plaintiff being a house wife, cannot have any source of income. This is one another reason for the court below to disbelieve the case of readiness and willingness of the plaintiff. Even the

defendants have no such case either in their reply notice or in their written statement and therefore the court below was apparently wrong in arriving at such a conclusion. Further, Ext.A2 sale agreement is in a typed format. However, the figure of ₹ 4,500/- per cent and the advance amount of ₹10 lakhs is seen written by hand. This is another reason for the court below to doubt the genuineness of Ext.A2. Here also, the defendants have no case that the amounts written by hand, had been subsequently filled up after the 1st defendant had affixed his signature in the document. The first defendant when examined as DW1, also has no such case. That being the position the finding of the court below on the said aspect is also unwarranted.

33. Another ground for the court below to disbelieve Ext.A2 is the absence of detailed description of the boundaries of the property in the document. However, the details of the title deeds of the defendants, which is not disputed have been clearly referred to and it is stated that the boundaries are as described in the said documents. It is true that in the body of Ext.A2 in page 3, it is stated that the document has been executed in the

presence of witnesses. However, there are no witnesses to the document and the portion where the details of the witnesses are to be entered, has been left blank in Ext.A2. Law does not mandate that a sale agreement should necessarily be attested by witnesses. In the aforesaid circumstances, we find that the plaintiff has *prima facie* established her case as pleaded in the plaint

34. According to the defendants, the transaction evidenced by Ext.A2 is actually not a sale agreement, on the other hand, it is a loan transaction between the parties. It is contended that the first defendant borrowed an amount of ₹ 10 lakhs from the plaintiff and then the plaintiff by exercising undue influence and by playing fraud on the first defendant, had got Ext.A2 sale agreement executed in her favour. It is a unilateral agreement in which only the first defendant is the signatory. This contention of fraud etc. seems to be quite improbable and unbelievable. From the evidence on record, it appears that the first defendant is a business magnet. The court below has rightly found that in such circumstances, his case of fraud, undue influence etc. cannot be believed. Apart from a vague and

sweeping contention of fraud and undue influence, there are no adequate pleadings in the written statement relating to the said contention. No attempt(s) was also made by the defendants to establish the said contention.

35. Furthermore, the case of loan transaction appears all the more improbable for one another reason. The total extent of the property is 12.32 acres. It is highly unlikely that such a large extent of property would be given as security for a transaction amounting to ₹ 10 lakhs. If it was actually a mere money transaction of the 1st defendant, then his property alone having an extent of 1.98 acres appears to have been sufficient to be given as security. It was quite unnecessary for the first defendant to have included the property of his daughter's also, especially when he has no case that the properties are worthless. On the other hand, the argument advanced, though there is no such case in the written statement, is that the property is a very valuable one.

36. It appears that after the execution of Ext.A2 agreement, the first defendant had a change of mind, probably because the price of land must have gone up. Hence the defendants seem to have retracted from their

promise. After the amendment to Section 20, the relief of specific performance is no longer discretionary. Section 20 of the Act which confers discretion on the court to refuse a decree for specific performance even in cases where it is lawful for the court to do so, has now been substituted and the courts have no longer any discretion to refuse a decree for specific performance. The Apex Court in **Sughar Singh v. Hari Singh, 2021 SCC ONLINE SC 975**, held that though the amended provisions do not have retrospective effect, the same shall be a guide for the court in the matter of exercising the discretion under Section 20.

37. S.20, as it stood before amendment, makes it clear that the jurisdiction to decree specific performance is discretionary; but S.20(1) says that this discretion is not arbitrary but has to be exercised soundly and reasonably, guided by judicial principles, and capable of correction by a court of appeal. S.20(2) speaks of cases in which the court may properly exercise discretion not to decree specific performance. Significantly, under clause (a) of sub-section (2), what is to be seen is the terms of the contract or the conduct of the parties at the time of entering into the contract. Even

"other circumstances under which the contract was entered into" refers only to circumstances that prevailed at the time of entering into the contract. It is only then that this exception comes in - and this is when the plaintiff gets an unfair advantage over the defendant. Equally, under clause (b) of sub-section (2), the hardship involved is again at the time of entering into the contract which is clear from the expression "which he did not foresee". This is made clear beyond doubt by Explanation 2 of S.20 which states that the only exception to the hardship principle contained in clause (b) of sub-section (2) is where hardship results from an act of the plaintiff subsequent to the contract. The act cannot be an act of a third party or of the court - the act must only be the act of the plaintiff. Clause (c) of sub-section (2) again refers to the defendant entering into the contract under circumstances which makes it inequitable to enforce specific performance. Here again, the point of time at which this is to be judged is the time of entering into the contract (**Ferrodous Estates (Pvt.) Ltd. v. P.Gopirathnam (2020 KHC 6584)**.

38. This is not a case where the defendant did not foresee the hardship. It is furthermore, not a case that non-performance of the

agreement would not cause any hardship to the plaintiff. Explanation 1 appended to S.20 (prior to the amendment in 2018) clearly stipulates that mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature would not constitute an unfair advantage within the meaning of sub-section (2) of S.20 [**P.D'Souza v. Shondrilo Naidu, [(2004) 6 SCC 649**].

39. Given the facts and circumstances of this case, we think that this is a case in which the discretion can be exercised. No case of hardship has been also pleaded in the written statement. It is true, that since the filing of the suit in the year 2006, 16 years have elapsed. In the light of S.20, the courts have uniformly held that the mere escalation of land prices after the date of the filing of the suit cannot be the sole ground to deny specific performance. (**Nirmala Anand v. Advent Corpn. (P) Ltd., (2002) 8 SCC 146; P.S. Ranakrishna Reddy v. M.K. Bhagyalakshmi, (2007) 10 SCC 231; P. D'Souza v.Shondrilo Naidu, (2004) 6 SCC 649 and Jai Narain Parasrampuria v. Pushpa Devi Saraf, (2006) 7 SCC 756).**

40. The Hon’ble Supreme Court in **Madana Gopal A. R. v.**

M/s.Ramnath Publications Pvt. Ltd., 2021 KHC 6226 relying on Ferrodous Estates (Pvt) Ltd. v. P. Gopirathnam, 2020 SCC OnLine SC 825, held that a suit for specific performance cannot be dismissed on the sole ground of delay or laches. However, an exception to this rule is where an immovable property is to be sold within a certain period, time being of the essence, and it is found that owing to some default on the part of the plaintiff, the sale could not take place within the stipulated time. Once a suit for specific performance has been filed, any delay as a result of the Court process cannot be put against the plaintiff as a matter of law in decreeing specific performance. However, it is within the discretion of the Court, regard being had to the facts of each case, as to whether some additional amount ought or ought not to be paid by the plaintiff once a decree of specific performance is passed in its favour even at the appellate stage.

41. Specific performance being an equitable relief, balance of equities has also, to be struck taking into account all the relevant aspects of the matter, including the lapses which occurred and parties respectively responsible therefor. Before decreeing specific performance, it is obligatory

for courts to consider whether by doing so any unfair advantage would result for the plaintiff over the defendant, the extent of hardship that may be caused to the defendant and if it would render such enforcement inequitable, besides taking into consideration the totality of circumstances of each case. It is not necessary that in all cases where there has been an escalation of prices, the court should either refuse to pass a decree on specific performance of contract or direct the plaintiff to pay a higher sum.

42. In **K. Narendra v. Riviera Apartments (P) Ltd., (1999) 5 SCC 77** the Apex court while interpreting S.20 of the Act laid down that, where performance of the contract involves some hardship on the defendant which he did not foresee, while non -performance involve no such hardship on the plaintiff, is one of the circumstances in which the court may properly exercise discretion not to decree specific performance. The doctrine of comparative hardship has been thus statutorily recognised in India. However, mere inadequacy of consideration or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not constitute an unfair advantage to the plaintiff over the defendant or

unforeseeable hardship on the defendant.

43. In the present case, the defendant has neither pleaded any hardship nor produced any evidence to show that it would be inequitable to order specific performance of the agreement. Be that as it may, it is by now settled that a court dealing with a suit for specific performance of an agreement for sale can impose, having regard to the delay in the judicial process and the consequential escalation of price of the property, any reasonable condition including payment of an additional amount by one party to the other while granting or refusing a decree for specific performance. [**Nirmala Anand v. Advent Corporation (P) Ltd., (2002) 5 SCC 481 and Zarina Siddiqui v. A.Ramalingam, (2015) 1 SCC 705**].

44. Ext.A2 agreement is dated 07/08/2006. 16 years have elapsed since the execution of the agreement. The price of the property must necessarily have gone up many fold. Hence directing the defendants to execute a sale deed for the entire extent of the property comprising 12 and odd acres for a sale consideration fixed years back would be quite

unjust, especially when the plaintiff has given only less than 20% of the sale consideration by way of advance at the time of entering into the agreement. However, a total rejection of the relief of specific performance would also be unjust to the plaintiff. Therefore, keeping in mind, the principles laid down in the aforesaid decisions, we find that it would be just and proper to grant a decree of specific performance relating to that much extent of property that could have been purchased for an amount of ₹ 10 lakhs at the time of Ext.A2 agreement. As per Ext.A2, the sale consideration for one cent of property has been fixed at ₹ 4,500/- per cent. Therefore for ₹ 10 lakhs, the plaintiff would have got about **2.22 acres, that is, two acres and twenty-two cents** of property. To that extent alone, she can be granted a decree for specific performance. Points answered accordingly.

45. **Point No. (iv)**: In the result, the appeal is allowed. The judgment and decree of the court below are set aside. The suit is partly decreed and the plaintiff is granted a decree of specific performance relating to 2.22 acres out of the total extent of 12.32 acres of the plaint

schedule property. If the defendants fail to execute the sale deed in favour of the plaintiff within a period of three months from the date of receipt of a copy of this judgment, the plaintiff is entitled to get the decree executed through court. The plaintiff will also be entitled to realise the costs of the suit and the appeal.

All interlocutory applications, if any, pending shall stand disposed of.

Sd/-

P.B. SURESH KUMAR
JUDGE

Sd/-
C.S. SUDHA
JUDGE

ami/

R.F.A. No.543 of 2012

APPENDIX

APPELLANT'S ANNEXURE :

ANNEXURE A1 : TRUE PHOTO COPY OF THE POWER OF ATTORNEY.