

IN THE HIGH COURT OF KERALA AT ERNAKULAM



. R.

2023:KER:44037

PRESENT

THE HONOURABLE MR. JUSTICE SATHISH NINAN

MONDAY, THE 31<sup>ST</sup> DAY OF JULY 2023 / 9TH SRAVANA, 1945

RFA NO. 594 OF 2012

AGAINST THE JUDGMENT AND DECREE DT. 04.11.2011 IN OS 43/2007 OF SUB  
COURT, KOCHI

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**APPELLANT/PLAINTIFF:**

P.K.ABDUL SALAM,  
S/O.M.MOHAMMED KOYA, C.C.VI/614, BAZAR ROAD, KOCHI 682002.

BY ADVS.  
SRI.K.V.SOHAN  
SRI.N.N.ARUN BECHU  
SRI.GEORGE JOSEPH PULIMOOTTIL  
SRI.ROVIN RODRIGUES  
SMT.SREEJA SOHAN.K.

**RESPONDENT/DEFENDANT:**

1 ABDUL JABBAR (**DECEASED**)  
S/O.NAINA MOHAMMED, DOOR NO C.C. 14/1579, ANTONY VAIDYAR  
ROAD, CHULLIKKAL KOCHI 5

**\* ADDL. RESPONDENTS 2 TO 6**

2 NASEEMA ABDUL JABBAR,  
AGED 63 YEARS, W/ O LATE ABDUL JABBAR, AAKAN VEEDU, XXV/76,  
GREEN LAND VILLA, PARAPPURAM, PERUMBAVOOR, ERNAKULAM  
DISTRICT - 683 542.

3 AZOORA SUDHEER, AGED 46 YEARS,  
D/O LATE ABDUL JABBAR, PUTHENVEEDU, RAYONPURAM P.O.,  
PERUMBAVOOR -683 543.

4 ANEESH JABIR  
AGED 41 YEARS, D/O LATE ABDUL JABBAR, GREEN LAND GARDENS, H.  
NO. 47, PARAPURAM, PERUMBAVVOOR - 683 542.

5 HARSHANA SHAMNAS,  
AGED 40 YEARS, D/O. LATE ABDUL JABBAR, PADINJAAREATTAM  
HOUSE, TALAYOLAPARAMBU P.O.- 686605.



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6 ASHEERA SUDHEER  
AGED 38, D/O. LATE ABDUL JABBAR, CHENTHARA HOUSE, SOUTH  
VALLAM, RAYONPURAM, PERUMBAVOOR - 683543.

**\* [LEGAL HEIRS OF DECEASED R1 ARE IMPEADED AS SUPPLEMENTAL RESPONDENTS 2 TO  
6 VIDE ORDER DATED 22/03/2023 IN IA 1/2022]**

BY ADVS.  
ZAKEER HUSSAIN  
K.A.SANJEETHA

THIS REGULAR FIRST APPEAL HAVING COME UP FOR HEARING ON 31.07.2023,  
ALONG WITH RFA.600/2012, THE COURT ON THE SAME DAY DELIVERED THE  
FOLLOWING:



. R.

IN THE HIGH COURT OF KERALA AT ERNAKULAM

2023:KER:44037

PRESENT

THE HONOURABLE MR. JUSTICE SATHISH NINAN

MONDAY, THE 31<sup>ST</sup> DAY OF JULY 2023 / 9TH SRAVANA, 1945RFA NO. 600 OF 2012AGAINST THE JUDGMENT AND DECREE DT.04.11.2011 IN OS 58/2008 OF SUB  
COURT, KOCHI

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**APPELLANT/DEFENDANT:**P.K. ABDUL SALAM,  
S/O. M. MOHAMMED KOYA, C.C. VI/614, BAZAR ROAD, KOCHI-682002.BY ADVS.  
SRI.K.V.SOHAN  
SRI.N.N.ARUN BECHU  
SRI.GEORGE JOSEPH PULIMOOTTIL  
SRI.ROVIN RODRIGUES  
SMT.SREEJA SOHAN.K.**RESPONDENT/PLAINTIFF:**

- 1 ABDUL JABBAR, **(DECEASED)**  
S/O. NAINA SYED MOHAMMED, DOOR NO. CC.14/1579, ANTONY VAIDYAR  
ROAD, CHULLICKAL, KOCHI-5.

**\* ADDL. RESPONDENTS 2 TO 6**

- 2 NASEEMA ABDUL JABBAR,  
AGED 63 YEARS, W/O. LATE ABDUL JABBAR, AAKAN VEEDU, XXV/76,  
GREEN LAND VILLA, PARAPPURAM, PERUMBAVOOR, ERNAKULAM DISTRICT  
-683542.
- 3 AZOORA SUDHEER,  
AGED 46 YEARS, D/O. LATE ABDUL JABBAR, PUTHENVEEDU,  
RAYONPURAM P.O., PERUMBAVOOR - 683 542.
- 4 ANEESHA JABIR,  
AGED 41 YEARS, D/O. LATE ABDUL JABBAR, GREENLAND GARDENS,  
H. NO. 47, PARAPURAM, PERUMBAVOOR - 683 542.



- 5 HARSHANA SHAMNAS,  
AGED 40 YEARS, D/O. LATE ABDUL JABBAR, PADINJAREATTAM HOUSE,  
TAHALAYOLAPARAMBU P.O.- 686605.
- 6 ASHEERA SUDHEER,  
AGED 38 YEARS, D/O. LATE ABDUL JABBAR, CHENTHARA HOUSE, SOUTH  
VALLAM, RAYONPURAM, PERUMBAVOOR - 683 543.

**\* (LEGAL HEIRS OF DECEASED R1 ARE IMPLEADED AS SUPPLEMENTAL RESPONDENTS 2 TO 6  
VIDE ORDER DATED 23/03/2023 IN IA 1/2022).**

BY ADVS.  
ZAKEER HUSSAIN  
K.A.SANJEETHA

THIS REGULAR FIRST APPEAL HAVING COME UP FOR HEARING ON 31.07.2023,  
ALONG WITH RFA.594/2012, THE COURT ON THE SAME DAY DELIVERED THE  
FOLLOWING:



**SATHISH NINAN, J.**

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**RFA Nos.594 & 600 of 2012**

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**Dated this the 31<sup>st</sup> day of July, 2023**

**J U D G M E N T**

RFA 594/2012 arises from OS 43/2007. The suit is one for specific performance of an agreement for sale with an alternate prayer for return of advance sale consideration. Specific performance was declined, and the suit was decreed for return of advance. The plaintiff is in appeal.

2. RFA 600/2012 arises from OS 58/2007 which is a cross suit for mandatory injunction to vacate the premises. The defendant, who is the plaintiff in the suit for specific performance, is the appellant.

3. As noticed, the parties to the suit are the same and the suits are filed against each other. For the sake of convenience, the parties are referred to according to their status in the suit for specific performance. The defendant/respondent died pending the appeal. His legal



heirs have been impleaded as additional respondents.

4. Ext.A1 agreement dated 22.03.2006 was entered into between the plaintiff and the defendant. As per Ext.A1, the defendant agreed to convey 10.258 cents of property with the buildings thereon to the plaintiff. The total sale consideration fixed was ₹ 30,50,000/-. The period fixed for performance was four months. On the date of the agreement an amount of ₹ 10 lakhs was paid as advance sale consideration. According to the plaintiff, on 22.07.2006, a further amount of ₹ 5 lakhs was paid towards sale consideration and the agreement was extended for a further period of one month. On the said date the plaintiff was put in possession of a portion of a building. Subsequently on 04.08.2006, the plaintiff paid a further advance amount of ₹ 5 lakhs. On the said date another portion of the building was handed over possession to the plaintiff. Thereafter the plaintiff again paid an amount of ₹ 25,000/- towards advance sale consideration. Thus, a total amount of



₹ 20,25,000/- was paid as advance sale consideration. Alleging that the defendant is evading performance of the agreement, the suit was filed.

5. The defendant admitted Ext.A1 agreement. The receipt of ₹ 10 lakhs as advance sale consideration on the date of execution of Ext.A1 agreement was also admitted. Though he also admitted the receipt of a further amount of ₹ 10 lakhs, he denied the plaintiff's case that ₹ 5 lakhs was paid on 22.07.2006 and another ₹ 5 lakhs on 04.08.2006. According to him, an amount of ₹ 10 lakhs was paid on 04.08.2006. He has also denied the receipt of the alleged further advance of ₹ 25,000/-. It was also contended that, the extent of property agreed to be conveyed under Ext.A1 was only 10.258 cents and that the description of the property in the plaint is not correct. Defendant further contended that, the plaintiff was not ready and willing to perform the contract, that he was not possessed of sufficient funds to proceed with the agreement and that the



defendant was constrained to rescind the contract.

6. OS 58/2007 was filed by the defendant to get back possession of the property handed over to the plaintiff subsequent to the entering into Ext.A1 agreement.

7. The trial court held that there is no sufficient plea of readiness and willingness of the plaintiff to proceed with the agreement, which is a mandatory requirement under Section 16(c) of the Specific Relief Act, 1963. The defendant's plea of rescission of contract was held against. The Court found that the defendant did not perform fully his part of the obligations under Ext.A1. However, it further found that the breach of the contract resulted consequent on the conduct of the plaintiff also. It was also held that, due to governmental restrictions there is impossibility of performance. Accordingly, the court declined the relief for specific performance and directed return of the advance sale consideration. The plaintiff was





directed to surrender possession, on the defendant depositing the advance sale consideration.

8. Heard Sri.K.V.Sohan, learned counsel for the appellant-plaintiff and Smt.Sanjeetha K.A., learned counsel for the respondent. The points that arise for consideration in this appeal are :-

(i) Is the finding of the trial Court regarding lack of plea of 'readiness and willingness' as required under Section 16(c) of the Specific Relief Act correct ?

(ii) Is the contention of, absence of conveyable title, available to the defendant ?

(iii) Is the finding of the trial Court that the plaintiff contributed to the non-performance of the contract, based on materials ?

(iv) How much is the total advance sale consideration paid by the plaintiff ?

(v) Did the trial court err in exercising the discretion under Section 20 of the Specific Relief Act to refuse the prayer for specific performance ?



(vi) Was the trial court right in having declined interest on the advance amount ?

9. The trial court held that, the plaint lacks sufficient pleading of continued 'readiness and willingness' of the plaintiff to go ahead with the agreement. Section 16(c) of the Specific Relief Act, as it stood at the relevant time, reads thus:-

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

(a) xxxxx xxxxx xxxxx

(b) xxxxx xxxxx xxxxx

*(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.”*

A reading of the paragraphs 4, 5, 6, 7 and 9 of the plaint shows that the plaintiff has made sufficient averments with regard to his readiness and willingness to proceed with the transaction. He has pleaded about the further advances allegedly made by him on 22.07.2006



and 04.08.2006. He has also mentioned about Ext.A2 notice dated 25.07.2006 and Ext.A4 notice dated 02.03.2007 demanding performance of the agreement. He has also pleaded, "*Rather plaintiff was always ready and willing to perform his part of the obligations under the agreement*". The suit has been filed on 17.03.2007. Therefore, on a proper understanding of the plaint, I find that the plaintiff has sufficiently complied with the requirement of plea, in terms of Section 16(c) of the Specific Relief Act.

10. The trial court relied on Exts.B9 and B10 information obtained by the defendant under the Right to Information Act from the village Office, Mattancherry and the Sub Registry's Office, Kochi that the properties in Sy. No.42/3, 4, 5 and 1256 and 1257 are 'puramboke' lands and that there cannot be registration of assignments regarding the same. It is not in dispute that the property in respect of which Ext.A1 agreement has been entered into, is enjoyed by the defendant under registered Sale Deeds. Whether the property in question



is a puramboke and whether there is prohibition on transacting the same etc. have not been established. Government is not a party to the suit. Having entered into an agreement to convey the same, it is not open for him to defend the claim for specific performance contending that he does not have a conveyable title. It is for the purchaser to opt whether he is willing to take whatever right the vendor has. A Full Bench of the Madras High Court in *Baluswami Aiyar v. Lakshmana Aiyar & Ors.*, *AIR 1921 Mad 172* held thus: “Where a person sues for specific performance of an agreement to convey and simply impleads the party bound to carry out the agreement there is no necessity to determine the question of the vendor's title, and the fact that the title which the purchaser may acquire might be defeasible by a third party is no ground for refusing specific performance if the purchaser is willing to take such title as the vendor has”. This has been followed in *C.V. Muni Samappa v. Kolala Gurunanjappa and Ors.*, *AIR 1950 Mad 90*. The principle has been accepted and relied on by a Division Bench of this Court in *M.K Marattukulam v. Dhirajal Hemchand & Ors.*, 1988 (2)



**KLJ 96.** The decision of the Full Bench of the Madras High Court was relied on by the High Court of Andhra Pradesh in *Abdul Hakeem Khan v. Abdul Mannan Khadri, AIR 1972 A.P.178* and it was held, “*It is settled law that if a person executes an agreement to sell property, the vendor is not entitled to put forward, in a suit for specific performance by the purchaser the defence that the vendor had no title. It is open to the purchaser to set up a defence that the vendor had no title or has defective title in a suit for specific performance by the vendor. But the vendor cannot set up defective in his own title as a defence in a suit for specific performance by the purchaser.*”. The Rajasthan High Court has also reiterated the same in *Deenanath v. Chunnilal, AIR 1975 Raj.69*. The Court observed, “*In my opinion, the vendor cannot be permitted to set up a defence in a suit for specific performance brought by the purchaser that he had no title or had defective title to the property which he had agreed to sell*”. Therefore, the defendant-vendor cannot challenge the claim for specific performance on the plea of defective title or absence of title. Of course, such fact could be taken note of by the Court while exercising its discretion under Section



20 of the Specific Relief Act whether to grant a decree for specific performance or not.

11. The property agreed to be conveyed under Ext.A1 agreement is, 10.258 cents with buildings thereon bearing Nos. CC 6/614, CC 6/614-1. It is narrated in Ext.A1 that the property belongs to the defendant as per Sale Deed No.3099/1989 and Sale Deed No.578/1991. However, in the plaint the property in respect of which specific performance is sought is described as "11.143" cents. In paragraph 1 of the plaint it is averred that the said 11.143 cents belong to the defendant under Sale Deed Nos.3009/1989, 578/1991 and a portion under Sale Deed No.575/1991. Noticeably, there is difference in the extent of property agreed to be conveyed under Ext.A1 (10.258 cents) and in the plaint (11.143 cents). So also, the plaintiff seeks specific performance in respect of a portion of the property covered under Sale Deed No.575/1991 which is not included in Ext.A1 agreement. Therefore, evidently, there is variance with reference



to the property agreed to be conveyed under Ext.A1 and the property in respect of which specific performance is sought. It is the case of the plaintiff that Ext.A1 agreement provides for widening of the access to the property agreed to be conveyed, by demolishing a shop room situated in the adjacent property. The suit has been filed by including such extent of property which is necessary to widen the way. Therefore, there is no variation with regard to the subject matter of Ext.A1 agreement and the property in respect of which specific performance is sought, it is contended.

12. Here it would be apposite to refer to the recital in Ext.A1 agreement with regard to the providing of way. The same reads thus:-

“.....ടി കാലാവധിക്കുള്ളിൽ 1-ാം പാർട്ടിയുടെ ചിലവിൽ ടി ട്രാക്കെ സ്ഥലവും ടി സ്ഥലത്തിരിപ്പ് 6/614-ം 6/614(1) നമ്പർ പതിഞ്ഞ കെട്ടിടങ്ങളുമടക്കമുള്ള വഹകൾ സംബന്ധിച്ചുള്ള അസ്സലാധാരവും ടി വഹകളിൽ കൂടുതൽ ഗതാഗത സൗകര്യത്തിന് വേണ്ടി ടി വഹകളുടെ പടിഞ്ഞാറുവശമുള്ള 4 കടമുറികളിൽ മേൽപറഞ്ഞ വഹകളിൽ സൗകര്യ



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-: 12 :-

മനുസരിച്ച് പ്രവേശിക്കുന്നതിന് കവാടത്തിന്റെ വീതി കൂട്ടേണ്ടിവന്നാൽ ആയതിന് സൗകര്യപ്രദമായ ഒരു കടമുറി പൊളിച്ചു നൽകാമെന്നുള്ള വ്യവസ്ഥയോടും കൂടി.....”

Therefore, what is provided for is that, if it is found that the width of the access at the entrance portion needs to be widened, it shall be done by demolition of a shop room on the western side. Evidently there is no agreement to convey any extent of the said property. There is lack of specificity regarding the extent of property that is to be used for widening. So also, the agreement is only to the effect that, *“if it is found that the access needs to be widened”* then it shall be done as per the requirement. There is ambiguity as to who is to decide regarding sufficiency, regarding the width to be provided etc. At any rate, the plaintiff could not have sought for assignment of any portion of the said property. Under Ext.A1 agreement, the property that is agreed to be conveyed is only 10.258 cents covered under Sale Deeds Nos.3009/1989 and 578/1991.





13. A suit for specific performance is to specifically enforce the contract entered into. The plaintiff cannot seek enforcement in respect of the property or terms at variance from that agreed to. Here, what the plaintiff has sought for is a decree in respect of a property which is not agreed to be conveyed under Ext.A1. Therefore, the plaintiff is not entitled for a decree for specific performance. In the evidence of the plaintiff as PW1, in his cross-examination, he has categorically admitted that the agreement did not go through consequent on his refusal to proceed since the plaintiff refused to make available the title deed relating to the adjacent property, a portion of which he has included as the additional extent in the plaint schedule and specific performance is sought. In the cross-examination he has maintained that he is entitled for sale of a portion of the property that may be required for widening the way. It is necessary to refer to the said portion of his cross-examination and the



same is extracted hereunder :-

“കരാർ വസ്തുവിന്റെ കുത്തകപാട്ടവും basic tax ഉം അടച്ചതിന്റെ receipt നിങ്ങളെ ബോധ്യപ്പെടുത്താത്തത് കൊണ്ടാണോ തീർ വാങ്ങാതിരുന്നത് (Q). അല്ല. (A). കരാറിൽ പറഞ്ഞ കാലാവധിക്കുള്ളിൽ തീർ വാങ്ങാതിരിക്കാൻ എന്താണ് കാരണം (Q). പ്രതിയുടെയും ഭാര്യയുടെയും പേരിലുള്ള 5 cent വസ്തുവിന്റെ അസൽ ആധാരം എന്റെ വക്കീലിന് കരാർ കാലാവധിക്കുള്ളിൽ കൊടുത്ത് ബോധ്യപ്പെടുത്താതിരുന്നത് കൊണ്ടാണ് (A). മേൽപറഞ്ഞ കാരണം അല്ലാതെ മറ്റ് കാരണങ്ങൾ എന്തെങ്കിലും ഉണ്ടോ (Q). ഇല്ല (A). കരാറിൽ പറയുന്ന വസ്തുവിന്റെ 2 അസൽ ആധാരങ്ങളും നിങ്ങളുടെ വക്കീലിന് കൊടുത്ത് ബോധ്യപ്പെടുത്തിയിരുന്നില്ലേ? (Q). അതെ പ്രതിയുടെയും ഭാര്യയുടെയും പേരിലുള്ള 5 cent ന്റെ അസൽ ആധാരം കാണിച്ചിരുന്നില്ല (A). പ്രതിയുടെയും ഭാര്യയുടെയും പേരിലുള്ള 5 cent വസ്തുവിൽ നിന്നു ഒരു ഇഞ്ച് സ്ഥലം പോലും തീർ തരാം എന്ന് പ്രതി സമ്മതിച്ചിരുന്നില്ല എന്ന് പറയുന്നു (Q). എനിക്ക് ഗതാഗത സൗകര്യത്തിന് വേണ്ടി ഈ സ്ഥലം പൊളിച്ച് തീർ തരാം എന്നാണ് പറഞ്ഞിരുന്നത് (A). ഏതാണ്ട് ഒരു cent താഴെ സ്ഥലമാണ് അങ്ങനെ തരാമെന്ന് സമ്മതിച്ചിരുന്നത് (A). പ്രതിയുടെയും ഭാര്യയുടെയും പേരിലുള്ള shop rooms ഇരി



കുന്ന സ്ഥലം ഉൾപ്പെടാതെ A1 കരാർ പ്രകാരമുള്ള വസ്തു എടുക്കാൻ നിങ്ങൾ തയ്യാറായിരുന്നില്ലേ ? (Q). ഇല്ല. തയ്യാറായിരുന്നില്ല (A). പ്രതിയുടെയും ഭാര്യയുടെയും പേരിലുള്ള 5 cent വസ്തുവിൽപ്പെട്ട വഹകൾ തീർ തരാൻ കരാറിൽ വ്യവസ്ഥയില്ലയെന്ന് പ്രതി പറയുന്നു ? (Q). കരാറിൽവ്യവസ്ഥ ഉണ്ടായിരുന്നു (A).”

14. He has asserted that he was willing to go ahead with Ext.A1 agreement only on the defendant conveying to him the property that is required for widening the way also. As noticed, Ext.A1 agreement did not provide for conveyance of anything in excess of 10.258 cents covered under the Sale Deeds Nos.3009/1989 and 578/1991. Again in his cross-examination he has re-affirmed that he wants conveyance of the extent of the land required for the way and that unless the said extent of land, occupied by the shop room, is also conveyed to him he is not willing to go ahead with Ext.A1 agreement. The said portion of his deposition reads thus:-



“..... Ext.A1 കരാർ തയ്യാറാക്കുന്നതിന് ആധാരമെഴുത്ത് കാരന് നിങ്ങൾ എന്തെങ്കിലും നിർദ്ദേശം തന്നിരുന്നോ ? (Q). വഴിക്കുള്ള കടമുറി ഇരിക്കുന്ന സ്ഥലം കൂടി എനിക്ക് കിട്ടുന്ന രീതിയിൽ വേണമെന്നും അല്ലെങ്കിൽ ഞാൻ തയ്യാറല്ല എന്നും, token നൽകിയ തുക കൂടി ഞാൻ വേണ്ട എന്ന് വെച്ചതാണ്. ഈ നിലപാട് തന്നെയാണ് എനിക്ക് ഇപ്പോഴും ഉള്ളത്. shop room കൂടെ ഇരിക്കുന്ന സ്ഥലവും കിട്ടണമെന്നാണ്...”

Even in the plaint it is stated thus, *“While the plaintiff was demanding the third sale deed vix.,575/1991 it was reported that it still remains with the bank...”*. Therefore, it needs no further elaboration to find that the plaintiff wanted conveyance of a property not included in Ext.A1 agreement without which he was not willing to go ahead with Ext.A1 agreement. Therefore, the non-performance of Ext.A1 agreement was due to the fault of the plaintiff. No further material is necessary to hold that the plaintiff was not ready and willing to go ahead with Ext.A1 agreement. Therefore, the plaintiff is not entitled for a decree for specific performance. The trial court was



right in having declined the relief for specific performance.

15. So also, there is ambiguity with regard to the extent of the property that may be required for widening if necessitated. When there is ambiguity regarding the extent there could not be a relief for specific performance. The property must be certain and definite (See *Nahar Singh v. Harnak Singh and Ors*, 1996 6 SCC 699, *Vimlesh Kumari Kulshretha v. Sambhajirao and Ors.*, (2008) 5 SCC 58, *Sreekumar M.K. v. Ramadasan and Ors.*, 2017 (3) KLJ 798). At any rate, it is a matter to be taken into consideration by the court while exercising its discretion under Section 20 of the Specific Relief Act to grant a decree for specific performance.

16. Yet another aspect is with regard to the balance consideration payable. It is the plaintiff's case that he has paid a total sale consideration of ₹ 20,25,000/- from out of the total consideration of ₹ 30,50,000/-. The defendant denies the receipt of



₹ 25,000/- . Receipt of ₹ 25,000/- is not endorsed on Ext.A1 agreement. According to the plaintiff, the said amount was collected by the defendant from the plaintiff's shop. As noticed by the trial court, there is total lack of material to find payment of such amount of ₹ 25,000/-. While seeking a decree for specific performance the plaintiff has calculated balance sale consideration stating the total advance sale consideration paid at ₹ 20,25,000/- and expressing his willingness to pay the balance sale consideration and get the sale deed executed. The readiness and willingness pleaded by the plaintiff is to go ahead with the transaction on paying the balance consideration after deducting the total advance amount of ₹ 20,25,000/-. There is no plea that he was ready and willing to pay the balance sale consideration without reckoning the disputed amount of ₹ 25,000/-. Though the defendant in the written statement denied the receipt of the said amount of ₹ 25,000/- the plaintiff has not



chosen to incorporate a further plea expressing his willingness to go ahead with the transaction without reckoning the disputed amount of ₹ 25,000/-. Even at the stage of evidence, the plaintiff as PW1 has maintained the stand that an amount of ₹ 20,25,000/- has been paid as advance. The payment of the amount of ₹ 25,000/- having been found against, it tells upon the readiness and willingness of the plaintiff. Therefore, for that reason also the plaintiff is not entitled for a decree for specific performance.

17. I have already held supra that the plaintiff is not entitled for a decree for specific performance consequent on his default in performance of the agreement. That apart, I have noticed herein before various circumstances which impels the Court to exercise its discretion not to grant a decree for specific performance. Thus, viewed in any manner, the plaintiff is not entitled for a decree for specific performance of Ext.A1 agreement.



18. Having found that the plaintiff is not entitled for a decree for specific performance, the plaintiff is bound to vacate the property. He has no right to cling on to the same. The possession being only permissive in nature, the plaintiff is bound to surrender the same to the defendant. The decree of the trial Court directing the same, warrants no interference.

19. A decree has been granted in favour of the plaintiff for return of the advance sale consideration of ₹ 20,00,000/-. The Court directed the defendant to deposit the said amount within one month from the date of decree and on default, the said amount will bear interest at 15% from the date of decree till realisation. It was further provided that the said amount will be a charge on the property covered under Ext.A1. The plaintiff was directed to vacate and surrender the plaint 'B' schedule property in OS 58/2007 within 15 days from the date of deposit by the defendant. It is not in dispute that the defendant has





deposited the amount of ₹ 20 lakhs with 15% interest as provided for under the decree since the deposit was made beyond the period of one month. The direction in the decree with regard to the deposit having been complied with by the defendant, the plaintiff is bound to vacate and surrender the property in compliance with the decree of the trial court.

20. On the question as to whether the plaintiff is entitled for interest on the advance amount from the date of payment till date of decree, admittedly the building portions in respect of which the decree for mandatory injunction is passed was given possession of to the plaintiff and he was enjoying the benefit of such possession. While the plaintiff was examined as PW1 it was pointedly suggested to him that the premises in his occupation will fetch a monthly rent of ₹ 30,000/-. The witness feigned ignorance to the suggestion. Ext.A9 evidences that the plaintiff mortgaged a portion of the building for ₹ 40,000/- on 04.08.2006 and had it



redeemed on 15.02.2007. It is having due consideration to the same that the trial court declined interest on the advance amount during the said period. The plaintiff having taken the benefit of having possession and having enjoyed the fruits therefrom, is not entitled for double benefit by claiming interest for the advance amount.

21. On the findings as above, it could only be concluded that the trial Court rightly declined the relief for specific performance and granted a decree for return of the advance sale consideration. The trial Court was also right in having granted the decree for mandatory injunction. The decree and judgment of the trial Court warrants no interference. The decree of the trial Court having already been complied with by the defendant by making the deposit as ordered thereunder, the plaintiff is bound to vacate and surrender the plaint 'B' schedule property in OS 58/2007 in terms of the decree therein. The plaintiff is granted time till 14.08.2023 to comply with the same.



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The appeals are dismissed.

Sd/-  
**SATHISH NINAN**  
**JUDGE**

kns/-

//True Copy//

P.S. to Judge



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**APPENDIX OF RFA 594/2012**

PETITIONER ANNEXURES

Annexure1

COPY OF JUDGMENT IN O.S 505 OF 2014 ON THE  
FILE OF THE MUNSIFF COURT, KOCHI

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