Karnataka High Court Salarpuria Properties Private ... vs M.S. Ramaiah Developers And ... on 18 July, 2005 Equivalent citations: 2006 (6) KarLJ 23 Bench: S Nayak, C Kumaraswamy JUDGMENT 1. The appellant is the plaintiff and this appeal is directed against the judgment and decree dated 31st March, 2005 passed in O.S. No. 1020 of 2004 on the file of the Court of the XI Additional City Civil Judge, Bangalore City. The Court below, by the decree under appeal, has decreed the suit in part directing the defendant to pay a sum of Rs. 1,05,51,000/- to the plaintiff along with interest at the rate of 9% per annum from the date of the suit till the date of payment. However, the Court below has dismissed the suit with regard to the prayer of the plaintiff for specific performance of the suit agreement dated 9-7-2003 and for liquidated damages to the tune of Rupees forty crores for alleged wrongful breach of the terms of the agreement dated 9-7-2003. Hence, this appeal by the aggrieved plaintiff insofar as the Court below has rejected its prayer for the aforementioned two reliefs. 2. The case of the plaintiff as set out in the plaint is as follows. The plaintiff is one among the companies of M/s. Salarpuria Group, incorporated under the provisions of the Companies Act, 1956 having its registered office at No. 7, Chittaranjan Avenue, Kolkata-72, and its Bangalore Office at Money Terrace, No. 100, Kengal Hanumanthaiah Road (Double Road), Bangalore-560027. The plaintiff-company is incorporated for purposes of development and sale of real estate. The defendant is also a company incorporated under the provisions of the Indian Companies Act, 1956 having its registered office at D4, 1st Floor, Unity Building, J.C. Road, Bangalore-560 002. The defendant-company is also carrying on the business of real estate. The Managing Director of the plaintiff and that of the defendant-company being in the same business are known to each other for past five to six years. M/s. Salarpuria Developers Private Limited, a company having its office at No. 100, KH. Road, Bangalore-560 027 (for short, referred to as 'the said company), is one among the group of companies of Salarpuria Group, incorporated for development of real estate. Mr. Bijay Kumar Agarwal, the Managing Director of the plaintiff is also the Managing Director of the said company. 3. By a Memorandum of Understanding (MOU) dated 18-12-2002 marked as Exhibit P. 17 entered into between Mr. M.R. Seetharam, son of late M.S. Ramaiah, the Managing Director of the defendant (referred to therein as the first party or owner) on the one part and M/s. Salarpuria Developers Private Limited represented by its Managing Director Mr. Bijay Kumar Agarwal (referred to therein as the second party or the developer) on the other part, whereby and whereunder, it was agreed inter alia that the said Mr. M.R. Seetharam shall acquire through a private limited company about 36 to 40 acres of land converted for industrial/commercial use in Sy. Nos. 14, 15/1A, 15/1B, 15/1C, 22/1, 22/2, 23/1, 23/2 and 23/3 of Kadubisanhalli Village and Sy. Nos. 23/1, 23/2, 24/1, 24/2, 25/1, 25/2, 26/11, 26/2, 26/3 and 27 of Kariyammana Agrahara, both in Varthur Hobli, Bangalore East Taluk (formerly known as Bangalore South Taluk) and to execute a comprehensive development agreement in favour of the said company for development of the aforesaid lands on certain terms and conditions morefully set out thereunder. On the execution of Exhibit P. 17 the said company paid sum of

Rs. 5,51,000/- to Mr. M.R. Seetharam as and by way of refundable deposit and M.R. Seetharam has acknowledged the same. Mr. M.R. Seetharam, however, failed and neglected to comply with the terms of Exhibit P. 17 despite several oral requests and reminders made by the said company. 4. In or about the first week of July 2003 Mr. M.R. Seetharam approached the Managing Director of the, said company with a revised offer to purchase about 30 acres out of the total extent of lands proposed for development under Exhibit P. 17 and to develop the remaining lands on joint development basis in terms of Exhibit P. 17. Although the Managing Director of the said company was initially reluctant, but believing the representations and assurances of Mr. M.R. Seetharam, accepted the revised offer made by him to purchase 30 acres of land in the name of one of the Group of Salarpuria companies and to develop the remaining lands as per the terms of Exhibit P. 17. Accordingly, by an agreement and/or understanding dated 9-7-2003 marked as Exhibit P. 1 entered into between the defendant-company represented by its Managing Director Mr. M.R. Seetharam on the one part and M/s. Salarpuria Group of companies on behalf of the plaintiff-company represented by its Managing Director Mr. Bijay Kumar Agarwal on the other part. The agreement and/or understanding dated 9-7-2003 provided inter alia as under: (a) The defendant-company would make available a total extent of approximate 30 acres of conjoint lands having a full frontage of not less than 200 running ft.; (as per Sketch annexed to the said agreement); (b) The plaintiff would pay the sale price at Rs. 2917- sq. ft. for legally available lands; (c) The plaintiff would pay Rs. 1,00,00,000/- (Rupees One Crore only) on signing/exchanging the said agreement as advance/earnest money; (d) The defendant would make available the copies of the title documents in respect of the 'A' Schedule properties within one week from signing of the said agreement; (e) That the plaintiff and defendant would enter into agreement of sale within 30 days from the date of the said agreement; (f) That the plaintiff would pay to the defendant 30% of the balance of total sale price on signing the formal agreement of sale; (g) The plaintiff would pay to the defendant further advance of 30% of the balance of total sale price within 120 days from the date of signing the formal agreement of sale; (h) The plaintiff would pay to the defendant the balance sale amount within 90 days from making the second advance payment (set out in Clause (g) supra); (i) The defendant would make out good and market title to the satisfaction of the plaintiff; (j) The marketable title in respect of the land situated beyond the canal (shown as per the sketch enclosed to the said agreement) is not made out by the defendant the said extent of land would be excluded from the purview of sale; (k) The defendant would organise the outer boundary of the 'A' Schedule property; (l) The defendant would be at liberty to submit plan in respect of the 'A' Schedule property for approval; (m) The defendant would arrange and secure, denotification of the land in Sy. No. 27 of Kariyammana Agrahara from acquisition proceedings initiated by the KIADB/BDA before execution of the formal agreement of the sale and; (n) If the agreement of sale not executed, the amount paid under the said agreement shall be returned forthwith to the plaintiff, provided the plaintiff intimate their intention to terminate the agreement. As detailed in the sketch

annexed to Exhibit P. 1, the defendant company agreed to sell about 30 acres of lands in Sy. Nos. 14, 15/1A, 15/1B, 15/1C, 22/1, 22/2, 23/1, 23/2, 23/3 of Kadubisanahalli and Sy. Nos. 23/1, 23/2, 24/1, 24/2, 25/1, 25/2, 26/1, 26/2, 26/3 and 27 of Kariyammana Agrahara of Varthur Hobli, Bangalore East Taluk, which properties are morefully described in the plaint 'A' Schedule. On the execution of Exhibit P. 1, plaintiff-company paid to the defendant a sum of Rs. 1,00,00,000/- as and by way of earnest money and/or advance by cheque bearing No. 390502, dated 9-7-2003 drawn on Vijaya Bank, Residency Road Branch, Bangalore, the payment and receipt whereof the defendant has acknowledged. The said payment was made to the defendant-company towards securing some of the lands detailed in plaint 'B' schedule. The copies of documents of title could not be made available by the defendant to the said company within the time stipulated under Exhibit P. 1 and for the said reason the formal agreement of sale as contemplated under Exhibit P. 1 could not be executed. 5. In or about second week of August 2003, the Managing Director of the defendant informed the plaintiff that the defendant-company had so far acquired only about 19 acres 7 1/4 guntas of converted lands in various survey numbers of the said villages out of the 'A Schedule property. It was further informed that in respect of the remaining extent of lands the documents were still under scrutiny by the defendant's attorney and on the said ground, the defendant requested the plaintiff to extend over a week's time for production of the copies of the title deeds in respect of the 'A' Schedule property. The plaintiff agreed to the said request made by the defendant. 6. In or about the third week of August, 2003 the Managing Director of the defendant-company informed the Managing Director of the plaintiff that an extent of about 10 acres 33 guntas out of 'A Schedule property could not be purchased for want of marketable title and he requested the plaintiff-company to enter into agreement of sale and complete the sale thereof as per the terms of Exhibit P. 1 in respect of 19 acres 7 1/4 guntas of land acquired by him under the various sale deeds. The plaintiff in the above circumstance agreed to purchase the said 19 acres 7 1/4 guntas of land offered by the defendant. Subsequently, the defendant-company during the last week of August 2003 furnished the copies of the title deeds marked as Exhibits P. 9 to P. 32 and other allied documents for verification of the title pertaining to B' Schedule property. The Counsel of the plaintiff, after verification of Exhibits P. 19 to P. 32, prepared a preliminary list of requisition and the list of said requisition was forwarded by the plaintiff to the defendant on 27-8-2003 with a request to furnish the documents specified in the said requisition. That requisition was handed over to the Managing Director of the defendant-company. Although the defendant made oral premises to furnish documents/particulars sought by the plaintiff, it failed to keep up its premise despite repeated reminders by the plaintiff. 7. When the matter stood thus, the defendant by its letter dated 21-10-2003 marked as Exhibit P. 10 terminated Exhibit P. 1 and returned the sum of Rs. 1,05,51,000/- paid by the plaintiff-company under Exhibit P. 17 and Exhibit P. 1. The plaintiff sent a reply dated 23-10-2003 marked as Exhibit P. 11 to the defendant denying all allegations contained in Exhibit P. 10. While denying the allegations, the plaintiff also stated that at all material times the

plaintiff was ready and willing to fulfill its part of the obligation under Exhibit P. 1 and delay in executing the agreement contemplated under Exhibit P. 1 was by reasons of the breach committed by the defendant and also on account of non-furnishing of the required documents by the defendant. In Exhibit P. 11, it was also stated that the defendant is trying to wriggle out of the contract in order to gain appreciation of the price of the properties. Further, the defendant was informed that the plaintiff would not accept the refund of Rs. 1,05,51,000/- . In Exhibit P. 11, plaintiff also insisted that the defendant-company should comply with the terms of Exhibit P. 1. The defendant acknowledged the receipt of Exhibit P. 11. The defendant sent a rejoinder dated 3-11-2003 to Exhibit P. 11, marked as Exhibit P. 12, which was received by the plaintiff on 18-11-2003. The defendant in Exhibit P. 12 denied the statements made by the plaintiff in Exhibit P. 11 and reiterated its stand taken in Exhibit P. 10. In Exhibit P. 12, the defendant contended that the agreement as contemplated under Exhibit P. 1 was not entered into between the parties on account of certain shortcomings on the part of the plaintiff and that after having discussed such shortcomings with the plaintiff, Exhibit P. 10 was sent to the plaintiff and due to said reasons the defendant refused to perform its obligation in respect of Exhibit P. 17 and Exhibit P. 1. The plaintiff sent reply dated 24-12-2003 marked as Exhibit P. 13 (as reply to Exhibit P. 12) to the defendant denying the allegations contained in Exhibit P. 12 and informed the defendant that the termination of Exhibit P. 1 is illegal inasmuch as such right is not provided to the defendant under Exhibit P. 1; that Exhibit P. 10 was sent by the defendant with dishonest intention to make unlawful gain arising on account of substantial appreciation in price of the properties at the cost of the plaintiff; that before the issue of Exhibit P. 10 the defendant did not issue any notice to the plaintiff for non-payment of sale price; the defendant refused to receive Exhibit P. 13 and the postal cover has been returned to the plaintiff unserved with postal shara 'door lock'. Thereafterwards, the plaintiff sent a copy of Exhibit P. 13 under Certificate of posting on 23-12-2003. 8. The plaintiff thereafter caused a lawyer's notice dated 22-12-2003 marked as Exhibit P. 14 informing the defendant that the reasons assigned by the defendants in Exhibits P. 10 and P. 12 are unconscionable and dishonest; that the plaintiff was always ready and willing to complete its part of obligation in Exhibit P. 1. In Exhibit P. 14 the plaintiff called upon the defendant to execute the formal agreement in respect of 'A' Schedule property as agreed under Exhibit P. 1 and/or in respect of T3' Schedule property subsequently agreed to be sold by the defendant to the plaintiff and further called upon the defendant to execute sale deeds in respect of Exhibit P. 19 to Exhibit P. 32 in seven days from the date of receipt of Exhibit P. 14 and to collect the balance sale consideration on the date of execution of such formal agreements/sale deeds, failing which the plaintiff would seek such reliefs in Court of law against the defendant as the plaintiff may be entitled. The defendant having acknowledged the receipt of Exhibit P. 14, sent a reply on 9-1-2004 marked as Exhibit P. 15 stating inter alia that there is no requirement on its part to perform any obligation either under Exhibit P. 17 or Exhibit P. 1. 9. With the above pleadings and stating that it was always ready and willing to pay the balance consid-

eration amount to the defendant, the plaintiff filed the suit O.S. No. 1020 of 2004 praying for the following reliefs: (a) That the defendant be ordered and decreed to specifically perform the part of the said Agreement dated 9-7-2003 (Document 2) by effecting a sale of the B' Schedule property in favour of the plaintiff and by executing and presenting for registration a deed or deeds of sale conveying the same to the plaintiff and by doing all such other acts, deeds and things whereby the 'B' Schedule property is conveyed to the plaintiff absolutely and forever, free from all encumbrances, at the costs of the plaintiff and also to deliver the vacant possession thereof to the plaintiff; (b) to receive the balance amount of the sale consideration of Rs. 23,31,40,750/- in terms of the said agreement dated 9-7-2003 at the time of the execution and registration of the deed/s of sale coupled with delivery of vacant possession of the "B' Schedule property and completion of all other facets of the conveyances; (c) to admit execution of the sale deed/s and the balance of the sale consideration before the Sub-Registrar of Assurances having jurisdiction over the area in which the"B" Schedule property is situated; (d) that in the alternative and in the event of the specific performance not being granted, the defendant be ordered to pay to the plaintiff as and by way of Liquidated damages and/or compensation to the sum of Rs. 40,00,00,000/- and such damages be determined as this Hon'ble Court may deem just for wrongful breach of the terms of the said agreement dated 9-7-2003 (vide Document 2) together with the repayment of the monies paid as earnest money and advance together with interest that may be awarded by this Hon'ble Court; (e) to declare the termination of the said agreement dated 9-7-2003 made by the defendant-company vide its letter dated 21-10-2003 Document 31 as illegal and void; (f) that pending the hearing and final diaposal of the suit the defendant, their servants and agents be restrained by an order and injunction of this Hon'ble Court from in any way dealing with or disposing of the 'B' Schedule property; (g) that the defendant be ordered to pay to the plaintiff cost of this suit and interest on judgment; (h) for such further and other relief/s as a nature and circumstances of the case. 10. On service of notice in the suit, the defendant put in appearance and contested the suit. The defendant in the written statement filed by it, while denying all material averments in the plaint has averred thus: The defendant has no contractual or other relationship with the plaintiff and has not entered into any agreement/MOU with the plaintiff for sale or development of the lands in question. That apart, the plaintiff is not even a party to Exhibit P. 1. So also in respect of Exhibit P. 17. Neither the plaintiff nor the defendant is a party. Thus, there is no privity of contract between the plaintiff and the defendant and hence the question of defendant being directed to specifically perform any obligation under non-existing agreement, does not arise. Hence, on the above ground alone, the suit is liable to be dismissed in limine. The suit is also liable to be dismissed for non-joinder and mis-joinder of necessary parties. The suit is filed without any cause of action, legal right or interest and therefore the suit is not maintainable in law. 11. The defendant, without prejudice to the above contentions regarding maintainability, contended that there is no concluded contract between the parties requiring the defendant to execute the sale deed in respect of 'B' Schedule

property in favour of the plaintiff. Exhibit P. 1 referred to by the plaintiff' as an agreement, is not an agreement but, admittedly, only a letter regarding the intention of the parties therein to explore the possibility of a future transaction between them after they finalise at a later date all the terms and conditions. Initially, Exhibit P. 17 was entered into between Mr. M.R. Seetharam and M/s. Salarpuria Developers Private Limited, for exploring the possibility of entering into a Joint Development Agreement in respect of the properties which were proposed to be acquired by Mr. M.R. Seetharam in several survey numbers of Kadubisanahalli Village and Kariyammana Agrahara Village, Varthur Hobli, Bangalore East Taluk. Since the parties to Exhibit P. 17 could not make any headway in finalizing all the terms and conditions of development and Mr. Bijay Kumar Agarwal held preliminary discussions, the outcome of which lead to the execution of Exhibit P. 1. The entire matter was still under consideration at that point of time and all the terms and conditions had not yet been finalised. Exhibit P. 1 was executed in order to explore the possibility of finalising the terms and conditions leading to possible future execution of agreement of sale. The parties thought it fit to record their intention to explore the possibility of a sale transaction between them after finalising all the terms and conditions, by executing Exhibit P. 1. Since there is neither an agreement nor a concluded contract between the plaintiff and the defendant, the suit is liable to be dismissed on that ground also. 12. The process of acquiring lands was cumbersome and depended on various factors like identification of lands, discussion with third parties, undertaking land survey, verification of documents of title, applying for and obtaining conversion from the Competent Authorities in the name of the landowners, clearance from KIADB/BDA etc. Hence, the parties thought fit to record their intention to explore the possibility of entering into agreement of sale in future. Thus, Exhibit P. 1 came into existence. At the time of execution of Exhibit P. 1, the entire thing was inchoate. However, for reasons beyond the control of the defendant and for reasons entirely attributable to Mr. Bijay Kumar Agarwal, the terms and conditions could not be finalised and, therefore, no contract or agreement of sale of Schedule 'AVB' properties could be entered into. In view of the above, the defendant withdrew its offer by Exhibit P. 10 to explore the possibility of finalising the terms and conditions for a possible execution of agreement of sale contemplated in Exhibit P. 1. In response to Exhibit P. 10-M/s. Salarpuria Developers Private Limited, gave a reply making false and frivolous allegations against the defendant. Thereafter, the defendant issued Exhibit P. 12-rejoinder reiterating its stand in the matter. Thereafter, the defendant addressed one more letter dated 18-11-2003 stating that all the previous letters addressed by it had been returned by the postal authorities as 'not claimed' and that the defendant had no option but to fax the replies and also deposit the sum of Rs. 1,05,51,000/- in their account in Vijaya Bank, Residency Road Branch, Bangalore. However, the defendant has been given to understand that on account of instructions received from the plaintiff, Vijaya Bank did not send the cheque for collection. Thus, it is clear that Mr. Bijay Kumar Agarwal has deliberately avoided to receive the letters and payment tendered by the defendant towards refund of amount received by it under Exhibit

P. 17 and Exhibit P. 1, with an ulterior motive of making an unlawful gain. 13. It was also stated by the defendant that the defendant and Mr. Bijay Kumar Agarwal had preliminary round of discussion preceding execution of Exhibit P. 1 regarding their intention to explore the possibility of a sale transaction between them after finalising of all the terms and conditions. Accordingly, under Exhibit P. 1 the defendant was required to secure approximately 30 acres of land with a frontage of about 200 feet. Though there is a reference to the sketch in Exhibit P. 1, no such sketch was either prepared or appended to Exhibit P. 1. The defendant was, therefore, required to proceed with the acquisition, secure copies of documents and furnish the same to Mr. Bijay Kumar Agarwal, after which the parties were required to finalise all the terms and conditions so that an agreement contemplated in Exhibit P. 1 for sale could be entered into. Accordingly, the defendant expended huge amount towards purchase of lands by approaching the landlords who were willing to sell the lands, executed agreements of sale, incurred huge expenditure towards survey of lands, obtaining of land documents, applying for and obtaining conversion of lands from agriculture to non-agriculture use etc. During the aforesaid process, the defendant faced lot of difficulties because of the deplorable conduct of Mr. Bijay Kumar Agarwal who was independently making efforts to contact the landowners in the aforesaid villages through consultants/estate agents and making an offer (to them) to purchase and/or develop the very lands by offering exorbitant rates. The defendant came to know that the Plaintiff was offering to purchase the very lands independently from the landowners and was even ready to take lands for joint venture promising the landowners return of a very high percentage of developed area. Thus the defendant faced difficulty in purchase of land in the said villages and was able to secure only about 19 acres of land. The defendant was unable to acquire land to secure proper frontage of about 200 feet. In the meantime, the defendant had been communicating all the difficulties experienced by it to Mr. Bijay Kumar Agarwal and several rounds of discussions were held between the parties wherein defendant requested Mr. Bijay Kumar Agarwal not to indulge in such unethical acts as otherwise it would lead to a situation whereby the defendant would not be in a position to finalise the deal, but of no avail as he continued to indulge in such acts. Due to unethical acts of Mr. Bijay Kumar Agarwal the defendant sustained huge loss in terms of money running to crores of rupees. That also lowered his image and reputation in the eyes of the public. 14. Notwithstanding the above unethical acts of Mr. Bijay Kumar Agarwal, the defendant only in order to explore the possibility of finalising the terms for entering into contract, submitted Exhibits P. 19 to P. 32 title documents in respect of lands purchased by him to Mr. Bijay Kumar Agarwal requiring him to finalise the terms and conditions at the earliest. However, Mr. Bijay Kumar Agarwal did not choose to do so and on the other hand, went on dodging the same on one or the other pretext. The conduct of Mr. Bijay Kumar Agrawal showed that he was not interested in going ahead with the finalisation of terms and conditions for entering into an agreement contemplated in Exhibit P. 1, because, he was more interested in purchasing the lands from the landowners directly. That is the reason why Mr. Bijay Kumar Agarwal consistently

practised delay tactics. In the circumstance, the defendant informed Mr. Bijay Kumar Agarwal that it was unnecessary to furnish any further documents as all the documents had been furnished and that a final decision can be taken to decide whether it was possible for the parties to go ahead with the discussions or not. However, inspite of repeated requests, Mr. Bijay Kumar Agarwal failed to do so and thereby committed breach of the terms of Exhibit, P. 1 In view of the above, there was no other option to the defendant but to withdraw/terminate Exhibit P. 1 vide Exhibit P. 10. In view of the above, it cannot be said that the defendant has committed any breach. In the fats and circumstances of the case, the defendant was legally entitled to withdraw/terminate Exhibit P. 1 and therefore, no exception can be taken to Exhibit P. 10. The plaintiff has no legal right to enforce any of the terms either in Exhibit P. 17 or the terms of Exhibit P. 1. 15. After issuing Exhibit P. 10, the defendant has been in the process of developing 15' Schedule lands for setting up a Software Technology Park under the name and style M/s. M.S. Ramaiah Software Technology Park. In that regard, the defendant has incurred huge expenditure running to several crores of rupees towards identifying the Architects, conducting survey and soil examinations, entering into an MOU for the purpose of construction, making an application to KIADB, seeking exemption of lands in question from the purview of acquisition, applying for and obtaining clearance from Single Window Agency of the Government of Karnataka for development of a Technology park in the lands etc. In that regard the defendant has entered into a MOU with M/s. Chandrakala Enterprises for construction activity and the defendant has paid a sum of Rs. 2.01 crores to M/s. Chandrakala Enterprises. In view of the changed circumstance, the defendant would be put to huge loss and irreparable injury if it is directed to convey the 'B' Schedule lands to the plaintiff. Mr. Bijay Kumar Agarwal is only entitled to refund of Rs. 1,05,51,000/-. The defendant also stated that it is ready and willing to refund the said amount and in fact it was tendered several times which has been refused by the plaintiff without any justifiable reason. The defendant is even now ready and willing to refund the same and it is in fact ready to deposit the same before the Court immediately, if Court permits. 16. The defendant further contended that Mr. Bijay Kumar Agarwal thoroughly misled the defendant to execute Exhibit P. 1 with a mala fide intention of cheating the defendant and with ulterior motive of filing the suit. The defendant bona fide believed that the terms of Exhibit P. 1 did not confer any right upon the parties and it was only a record of the intention of the parties to explore the possibility of future sale transaction between them after they finalise the terms and conditions of the agreement envisaged in Exhibit P. 1. It was with that understanding the defendant signed Exhibit P. 1. Had the defendant known the mala fide intention of Mr. Bijay Kumar Agarwal, the defendant would not have signed Exhibit P. 1. Exhibit P. 1 gives an unfair advantage to the plaintiff over the defendant. The defendant has also averred that decreeing of the suit would result in great hardship to the defendant which they did not foresee. On the contrary, not decreeing the suit would involve no such hardship to Mr. Bijay Kumar Agarwal or to the plaintiff, which, admittedly, is not a party to Exhibit P. 17 or Exhibit P. 1. Defendant has spent all its

fortune running to several crores of rupees for the purpose of obtaining sanction for conversion of land, ensuring that the lands are not notified for acquisition etc., and in that view of the matter, it would be wholly inequitable and unjust to decree the suit. It was also alleged that the plaintiff is guilty of misleading the Court; excerpts of the documents culled out in the plaint do not truly reflect the terms/contents of those documents. The conduct of the plaintiff is wholly unfair and it, is not entitled to any discretionary order or for a decree of specific performance. The plaintiff has not made out any case for grant of any of the reliefs sought by it and therefore, the defendant prayed that the suit be dismissed with costs. 17. In view of the above pleadings the Trial Court, framed the following issues.– 1. Whether the defendant proves that there is no privity of contract between the parties to memorandum of agreement dated 18-12-2002 and an agreement or understanding dated 9-7-2003? 2. Whether the plaintiff proves that it has been always ready and willing' to perform its part of the contract? 3. Whether the defendant proves that there was no concluded contract between him and the plaintiff and the plaintiff has committed the breach of terms of letter dated 9-7-2003 and hence, it has validly terminated the understanding dated 9-7-2003? 4. Whether the suit is bad for misjoinder and non-joinder of parties? 5. Whether the plaintiff is entitled to the relief of specific performance of contract? 6. Whether the plaintiff is entitled to the relief of declaration and permanent injunction as sought for? 7. Whether the plaintiff is entitled to the damages as sought for? 8. To what order or decree? On behalf of he plaintiff company, its Managing Director himself got examined as P.W. 1 and also examined one Mr. Ashwin as P.W. 2 and Mr. H.V. Heggade, Chief Manager of the Vijaya Bank, Residency Road Branch, Bangalore and got marked documents-Exhibits P. 1 to P. 40 and closed the evidence. On behalf of the defendant-company, the Managing Director of the defendant-company got himself examined as D.W. 1 and got marked documents Exhibits D. 1 to D. 10 and closed the evidence. 18. The learned Trial Judge having appreciated the oral and documentary evidence, answered issues 1, 4, 5 and 7 in the negative, issue 2 in the affirmative and issues 3 and 6 partly in the negative and partly in the affirmative. In the light of the findings recorded by him, the learned Trial Judge decreed the suit in part. The operative portion of the judgment reads as follows. The suit is partly decreed with costs. It is declared that the termination letter dated 21-10-2003 issued by the defendant terminating the letter of understanding dated 9-7-2003 is illegal and void. The defendant is directed to pay a sum of Rs. 1,05,51,0007-(Rupees One Crore Five Lakhs Fifty-one Thousand only) to the plaintiff along with interest at the rate of Rs. 9% p.a. from the date of the suit till the date of realisation. The rest of the reliefs such as the relief of specific performance, permanent injunction and damages claimed by the plaintiff are hereby rejected. Hence, this regular first appeal by the plaintiff seeking the reliefs which have not been granted by the Court below. 19. We have heard Sri B.V. Acharya, learned Senior Counsel for the appellant and Sri Udaya Holla, learned Senior Counsel for the respondent. Sri B.V. Acharya while attacking the finding recorded on issue 3 that Exhibit P. 1 is not a concluded contract, would contend that the Trial Court having correctly held that there

is a privity of contract between the plaintiff and the defendant and that the plaintiff has been always ready and willing to perform its part of the contract, seriously erred in law in holding that Exhibit P. 1 is only a letter of intent and does not constitute a concluded contract between the parties. Sri B.V. Acharya would contend that Exhibit P. 1 contains all material terms of the contract and if there is any uncertainty about any material term, it is only with regard to the area of land to be sold by the defendant, but Sri B.V. Acharya would hasten to add that though the exact area to be sold is not specified in Exhibit P. 1, Clause (2) of Exhibit P. 1 would make it clear that the defendant is legally bound to sell legally available land' and in the context of the case that means 'B' Schedule property. According to Sri B.V. Acharya, Exhibit P. 1 contains all material terms of contract such as the identity of the purchaser, the identity of the seller, the identity of the land and the price to be paid as consideration. In that view of the matter, Sri B.V. Acharya would contend that the Trial Court seriously erred in law in recording a finding that there is no concluded contract between the parties. Sri B.V. Acharya would contend that when Exhibit P. 1 was executed there was 'Consensus ad idem' meeting of the mind between the contracting parties on all material terms and conditions of a valid and legally enforceable contract. Sri B.V. Acharya would contend that merely because Exhibit P. 1 contemplates execution of an agreement of sale by which the terms agreed upon in Exhibit P. 1 are to be put in a more formal shape, that does not prevent the existence of a binding contract. Sri B.V. Acharya would submit that Exhibit P. 1 would show that there was 'consensus ad idem' between the parties to the property to be sold as to the payment of sale price, as to the mode of payment of sale price, as to the marketable title of "B" Schedule property to be made out by the defendant and as to the interlocutor; steps that may be taken up in the event of non-availability of approximately 30 acres of land agreed to be sold. The above terms in Exhibit P. 1 are very much material terms of a valid and enforceable contract and therefore, the view of the learned Trial Judge that there is no concluded contract is erroneous and based on technicalities rather than substance of the matter. Sri B.V. Acharya would also contend that the finding of the learned Trial Judge that Exhibit P. 1 is only an arrangement to explore the possibility of sale of the land during the subsistence of Exhibit P. 17 is erroneous and not sustainable. Sri B.V. Acharya would sum up that Exhibit P. 1 if read with Exhibits P. 10, P. 11, P. 12, P. 13, P. 14 and P. 15 would clearly establish that there was a concluded contract between the parties and therefore it was enforceable under the provisions of the Specific Relief Act, 1963 (for short, 'the Act'). 20. Sri Udaya Holla, learned Senior Counsel for the respondent-defendant, per contra, would contend that except the price to be paid, every other material and essential condition of a valid and concluded contract is absent in Exhibit P. 1. Elaborating his contention, Sri Udaya Holla would point out that as on the date of Exhibit P. 1, 30 acres of land sought to be sold by the defendant was not purchased by the defendant and only 19 acres 7 1/2 guntas of land was acquired by the defendant and therefore, there as no certainty of the defendant acquiring approximately 30 acres of land. Sri Udaya Holla would also contend that there was uncertainty about the purchaser

of the land and property to be sold. Sri Udaya Holla would submit that in a valid and concluded contract there is a certainty with regard to the seller of the land, the purchaser of the land, the property to be sold and price to be paid as consideration and if all of them or any one of them is absent, then, such agreement cannot be regarded as a concluded contract. In support of his submission Sri Udaya Holla would draw our attention to Clauses 3(b), 4, 5, 6, 9, 10 and 11 of Exhibit P. 1. Sri Udaya Holla would highlight that even according to P.W. 1, the Managing Director of the plaintiff-company, Exhibit P. 1 as only an arrangement to explore the possibility of sale of land and not a concluded contract. It was highlighted by Sri Udaya Holla that the plaintiff realising that Exhibit P. 1 cannot be regarded as a concluded contract, sought to improve the case by pleading oral agreement in the plaint though the suit is filed for specific performance of Exhibit P. 1 only and not for specific performance of oral agreement pleaded by the plaintiff and, on that count also, the suit is liable to be dismissed in limine. Sri Udaya Holla would further contend that by Clause 3(b) the parties to Exhibit P. 1 did not intend that execution of an agreement of sale contemplated therein is only a formality. On the other hand, it makes it very clear that execution of agreement of sale is made a condition precedent for contract. According to Sri Udaya Holla that is the only inference that can be drawn from Clause 3(b) if read with Clause 5 of Exhibit P. 1. Sri Udaya Holla would also submit that if Exhibit P. 1 itself is a concluded contract, it would not have given power to the plaintiff to terminate the arrangement incorporated in Exhibit P. 1. 21. Sri Udaya Holla while attacking the finding recorded by the learned Trial Judge on issue 1 that there was a privity of contract between the plaintiff and the defendant would point out that according to the plaintiff, the plaintiff consists of 8-10 companies; it has come in the evidence that before execution of Exhibit P. 1 the Board of Directors' of the plaintiff had authorised Mr. Bijay Kumar Agarwal to enter into contract with the defendant on behalf of the plaintiff and, if that is so, Exhibit P. 1 would have shown the plaintiff as a party to Exhibit P. 1, but, it is not so As on the date of Exhibit P. 1, according to Sri Udaya Holla, the identity of the parties was also not certain inasmuch as from Exhibit P. 1 it is not clear as to who among 8-10 companies of Salarpuria Group will be the purchaser of the land. Sri Udaya Holla would contend that what is deposed by P.W. 1 in paragraphs 9, 11 and 12 of his evidence is that the plaintiff-company wanted to purchase the land and if that is so, the plain tiff should have been a party to Exhibit P. 1. 22. Sri Udaya Holla, while attacking the finding of the learned Trial Judge on issue 2 would submit that finding recorded by the learned Trial Judge is perverse, not based on any evidence and is based on misreading of evidence. In that regard, he would draw our attention to para 28 of the judgment and point out that the learned Judge has stated that the plaintiff-company developed real estate in Bangalore alone at the estimated cost of more than rupees two hundred crores and the plaintiff has kept in readiness the balance sale consideration payable to the defendant and that to support this finding, there is neither the required pleadings nor any evidence adduced by the plaintiff. Sri Uday Holla would maintain that there is proper pleading nor evidence to show that the plaintiff has been willing and

ready to pay the balance consideration payable to the defendant. Sri Udaya Holla before concluding would draw our attention to the developments made in the 'B' Schedule property after terminating Exhibit P. 1 arrangement by Exhibit P. 10, dated 21-10-2003. It is pointed out that T3 Schedule property has been developed for setting up a Software Technology Park in the name and style of M/s. MS. Ramaiah Software Technologies Park, spending huge sums of money running to several crores and appointing M/s. Chandrakala Enterprises for construction activity. It was contended that even in the event of this Court coming to the conclusion that there is a concluded contract between the parties, the plaintiff is not entitled to equitable and discretionary remedy of specific performance for the reason that it has utterly failed to show that it has been ready and willing to pay the balance consideration at all material point of time and also on the ground that the subsequent developments which have taken place after Exhibit P. 10 should disentitle the plaintiff from seeking discretionary relief of specific performance. 23. Sri B.V. Acharya, in reply, while supporting the findings recorded by the learned Trial Judge on issues 1 and 2 would contend that the very fact that sum of Rupees One Crore towards earnest money/deposit was paid to the defendant by the plaintiff-company and the fact that after the defendant terminated Exhibit P. 1 by Exhibit P. 10, sought to refund Rs. 1,05,51,0007- to the plaintiff-company at Vijaya Bank, Residency Road Branch, Bangalore, belies the contention of the defendant that there was uncertainty about the purchaser of the land. With regard to finding on issue No. 2, Sri B.V. Acharya would submit that though he is not in a position to support the finding recorded by the learned Trial Judge in para 28 of the judgment on the basis of the evidence on record, the evidence on record to which the learned Trial Judge has not adverted to, would satisfactorily show that the plaintiff has been ready and willing to pay the balance consideration to the defendant at all material point of time and therefore the finding recorded on issue 2 by the learned Trial Judge is well-founded. 24. Sri B.V. Acharya, understandably, and according to us, quite rightly, did not assail the correctness of the finding of the learned Trial Judge on issue 7 obviously because there is no proper pleading on the part of the plaintiff and moreover, there is absolutely no evidence adduced by the plaintiff to decree the suit with regard to Rupees forty crores claimed by the plaintiff as damages. The correctness of the finding recorded by the learned Trial Judge on issue 4 would depend upon the answer to issue 1. Similarly, the plaintiffs entitlement to the relief of specific performance of contract and further relief of declaration and permanent injunction would very much depend upon the finding on the question whether there is a concluded and legally enforceable contract between the plaintiff and the defendant. 25. Having heard the learned Counsels for the parties quite extensively and in the facts and circumstances of the case, the following three points arise for our consideration and decision: (I) Whether the plaintiff proves that there is a privity of contract between the parties to Exhibit P. 17, dated 18-12-2002 and Exhibit P. 1 dated 9-7-2003? (II) Whether the plaintiff proves that it has always been ready and willing to perform the essential terms of the contract which are to be performed by it? (III) Whether the plaintiff proves that there is a concluded contract between

the plaintiff and the defendant? 26. Before we deal with the above points, it is necessary to state that the learned Trial Judge has wrongly placed the burden of proof on the defendant with regard to Issue 1 as well as first part of issue 3. It is the specific case of the defendant that there is no privity of contract between the parties to Exhibit P. 17 and Exhibit P. 1. It was also the specific case of the defendant that there is no concluded contract between the plaintiff and the defendant. Therefore, the learned Trial Judge ought not to have placed the onus on the defendant to prove the negative. Burden of proving a fact lies on a party who asserts such fact affirmatively and not on a party who denies the existence of such fact. In other words, proving a negative would not arise unless a statute otherwise directs. 27. Point No. I.In para 9 of the plaint it is stated that the offer made by the defendant to sell approximately 30 acres of land was accepted and it was decided to purchase the same in the name of one of the group of Salarpuria companies. It has come in the evidence that Salarpuria group consists of 8-10 companies. Therefore, even according to the plaintiff, on the date of execution of Exhibit P. 1, it was not certain as to which of Salarpuria Group company would be the purchaser of approximately 30 acres of land in terms of Exhibit P. 1. In Exhibit P. 17 the party of the MOU is M/s. Salarpuria Developers Private Limited and not the plaintiff-company. The plaintiff is M/s. Salarpuria Properties Private Limited. In para 9 of the deposition of P.W. 1, it is stated that P.W. 1 had orally informed the Chairman and Directors' of the plaintiff-company about the purchase of 30 acres of land and they had given oral consent for the purchase and that he had conveyed this information to the defendant. Further, in para 12 of the deposition of P.W. 1, it is stated that the Board of Directors of the plaintiff-company at its meeting held on 2-7-2003 at Bangalore, authorised P.W. 1 to enter into Exhibit P. 1 on behalf of the plaintiff-company. If what is stated in paragraphs 9 and 12 of the deposition of P.W. 1 is a correct and honest version, there was no difficulty for P.W. 1 to show the name of the plaintiff-company as a party to Exhibit P. 1. P.W. 1 has utterly failed to show any reason as to why notwithstanding his version in paragraphs 9 and 12 of his deposition, he did not show the plaintiff-company as a party to Exhibit P. 1. Furthermore, it needs to be noticed that it is the specific case of the defendant that he was not aware of the resolutions of the Board of Directors' of Salarpuria Group of Companies marked as Exhibits P. 7 and P. 8 before executing Exhibit P. 1. Simply because the defendant received the cheques for Rs. 1,05,51,0007- issued by the Salarpuria Group of Companies which include the plaintiff company also, only on that ground it cannot be said that there was certainty as to which company is the purchaser of the land under Exhibit P, 1. There is no need for us to dilate on this aspect because even according to the plaintiff, as stated in para 9 of the plaint, that it had accepted the offer of the defendant to purchase 30 acres of land in the name of one of the group of Salarpuria companies. That statement makes it is very clear that as on the date of Exhibit P. 1 the parties to Exhibit P. 1 did not arrive at a consensus as to who will be the purchaser of the land. Therefore, we find considerable force in the contention of Sri Udaya Holla that Exhibit P. 1 cannot be regarded as a concluded contract because there was no certainty about the

purchaser. In the result, we answer Point No. 1 in the negative. (emphasis supplied) 28. Point No. II.Section 16 of the Act deals with personal bars to relief of specific performance. Clause (c) of Section 16 of the Act provides that specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant. Clause (c) of Section 16 postulates that a person seeking specific performance of the contract must file a suit wherein he must aver and prove that he has performed or has been ready and willing to perform the essential terms of the contract which are to be performed by him. It is not the case of the plaintiff that it has performed essential terms of the contract which are to be performed by it. In para 24 of the plaint it is stated: ... The plaintiff has kept in readiness the balance sale consideration payable to the defendant in respect of 'B' schedule property. Further in para 33 of the plaint it is stated: That the plaintiff reiterates that it was always ready and willing to pay the balance consideration to the defendant and obtain formal agreement and a conveyance of 'A' Schedule property in its favour in terms of the said agreement dated 9-7-2003 ever since the same was entered into upto this date and even in the future. P.W. 1, in para 32 of his evidence, has stated thus: We have kept in readiness the balance sale consideration payable to the defendant in respect of plaint 13' schedule property. Our Bank balance disclosed our stand and I have produced the letter issued by our banker in the suit. 29. In the old Specific Relief Act, 1877, there was no express provision that the averment of readiness and willingness was necessary for a suit to enforce specific performance. However, on principle, the Indian law requirements in the matter were the same as in the law of England. The Law Commission had recommended the insertion of this provision in the new Act. In Ramesh Chandra Chandiok v. Chuni Lal Sabharwal (dead) by his L.Rs and Ors. , the Supreme Court has observed thus: The precedents mark a shift, towards more liberal interpretation and the better view appears to be that readiness and willingness cannot be treated as a strait-jacket formula and they have to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the party concerned. 30. The requirement of the law is that readiness and willingness to perform the contract should co-exist upto the date of the decree. It is well-settled that in a suit for specific performance the plaintiff must set out the agreement which the defendant has refused to do so. Further, the plaintiff must plead that he has been and is still ready and willing to specifically perform his part of the agreement. In the absence of such averment, the suit is not maintainable. In other words, before a decree for specific performance can be given, plaintiff must prove his readiness and willingness to perform his part of the contract. Absence of an averment on the part of the plaintiff in the plaint that he was and is ready and willing to perform his part of the contract, amounts to failure to disclose a cause of action in regard to the relief of specific performance which would entitle the Court to reject the plaint under Order 7, Rule 11(a) of the Code of Civil Procedure In this regard, we can derive sustenance from the judgment of the

Supreme Court in the case of Ouseph Varghese v. Joseph Aley and Ors. (1962) SCC 539 : (1969) 2 SCWR 347, Section 16(c) is prohibitory in nature and a duty is cast on Courts that specific performance of contracts cannot be granted in favour of a person unless he avers and proves the readiness and willingness to perform his part of the contract. That being the nature of the statute, the Court necessarily should see closely whether the person who seeks to enforce the contract satisfies the mandatory provisions of Clause (c) of Section 16 of the Act. 31. Before dealing with point No. II further as to whether the plaintiff has satisfied the conditions of Clause (c) of Section 16 of the Act, it is profitable to consider the case-law on the point so as to guide ourselves in the decision making. The Supreme Court in the case of N.P. Thirugnanam (dead) by L.Rs v. Dr. R. Jagan Mohan Rao and Ors. , held thus: It is settled law that remedy for specific performance is an equitable remedy and is in the discretion of the Court, which discretion requires to be exercised according to settled principles of law and not arbitrarily as exercised according to settled principles of law and not arbitrarily as adumbrated under Section 20 of the Specific Relief Act, 1963 (for short, "the Act"). Under Section 20, the Court is not bound to grant the relief just because there was a valid agreement of sale. Section 16(c) of the Act envisages the plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the Court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the Court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that, he is ready and has always been willing to perform his part of the contract. 32. The Privy Council speaking through Lord Blanesburgh in the case of Ardeshir H. Mama v. Flora Sasson AIR 1928 PC 208, held: In a suit for specific performance on the other hand, be treated and was required by the Court to treat the contract as still subsisting. He had filed that suit to allege, and if the fact was traversed, he was required to prove continuous readiness and willingness from the date of the contract to the date of the hearing, to perform the contract on his part. Failure to make good the averment brought with it the inevitable dismissal of his suit. 33. The Supreme Court in Pushparani S. Sundaram and Other's v. Pauline Manomani James (deceased) and Ors. , opined that: ... Inference of readiness and willingness could be drawn by the conduct of the plaintiff', the circumstances in a particular case in other words to be gathered from the totality of circumstances. In the same case, the Supreme Court further held: ... So far these being a plea that they were ready and willing to perform their part of the contract is therein the

pleading, we have no hesitation to conclude, that this by itself is not sufficient to hold that the appellants were ready and willing in terms of Section 16(c) of the Specific Relief Act. This requires not only such plea but also proof of the same. Now examining the first of the two circumstances, how could mere filing of this suit, after exemption was granted be a circumstance about willingness or readiness of the plaintiff. This at the most could be the desire of the plaintiff to have this property. It may be for such a desire this suit was filed raising such a plea. But Section 16(c) of the said Act makes it clear that mere plea is not sufficient, it has to be proved. 34. In Manjunath Anandappa Urf Shivappa Hansi v. Tammanasa and Ors. , the Supreme Court held: 27. The decisions of this Court, therefore, leave no manner of doubt that a plaintiff in suit for specific performance of contract not only must raise a plea that he had all along been arid even on the date of filing of suit was ready and willing to perform his part of contract, but also prove the same. Only in certain exceptional situation where although in letter and spirit, the exact words had not been used but readiness and willingness can be culled out from reading all the averments made in the plaintiff as a whole coupled with the materials brought on record at the trial of the suit, to the said effect, the statutory requirement of Section 16(c) of the Specific Relief Act may be held to have been complied with. 35. In Pukhraj D. Jain and Ors. v. G. Gopalakrishna , the Apex Court held: 6. Section 16(c) of the Specific Relief Act lays down that specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant. Explanation II to this sub-section provides that the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction. The requirement of this provision is that the plaintiff must aver that he has always been ready and willing to perform to additional terms of the contract. Therefore, not only there should be such an averment in the plaint but the surrounding circumstances must also indicate that the readiness and willingness continue from the date of the contract till the hearing of the suit. It is well-settled that equitable remedy of specific performance cannot be had on the basis of pleadings which do not contain averments of readiness and willingness of the plaintiff to perform his contract in terms of Forms 47 and 48 of the CPC. 36. The Supreme Court in Umabai and Anr. v. Nilkanth Dhondiba Chavan (dead) by L.Rs and Anr. , rejected the argument that the mere fact that the plaintiff did not have money at the time of issuance of the notice, the day when the plaint was filed or at the time of his evidence was of no consequence and held that if that contention is accepted as correct, it would be in total disregard of statutory mandate contained in Section 16(c) of the Act. 37. In this case, the question to be considered is whether the plaintiff has established that he has been ready and willing to perform his part of the contract, that is to say, whether he has been ready and willing to pay sum of Rupees Twenty-five Crores being the sale consideration for 'B' Schedule property. It is true, as noted above, in the plaint, the plaintiff has pleaded that he has been

ready and willing to perform his part of the contract. The Courts have made distinction between willingness and readiness. The Supreme Court in the case of His Holiness Acharya Swami Ganesh Dassji v. Sita Ram Thapars , held that there is a distinction between readiness to perform the contract and willingness to perform the contract. In that case, the respondent entered into a contract on 27-2-1975 with the petitioner for sale of his land as the respondent was in need of money to celebrate his daughter's marriage on 16-5-1975. The agreement was that the draft sale deed should be finalised within seven days and sale deed registered. Time was, therefore, the essence of the contract in that case. The defendant insisted for payment of consideration in cash. The respondent sent the approved draft sale deed immediately but the petitioner did not give the final draft as contemplated by the agreement since he had to obtain the income-tax clearance certificate which he did not obtain. Two letters written by the respondent indicated that the respondent was always willing to have the sale deed executed but the petitioner delayed the execution of the sale deed on one pretext or the other. The petitioner did not give any reply to any of the two letters. The petitioner filed a suit for specific performance of the contract The learned Single Judge as also the Division Bench of Delhi High Court held that the petitioner was not ready and willing to perform his part of the contract and that he did not have necessary cash for payment of the amount. Petitioner had produced before the Division Bench of Delhi High Court, by way of additional evidence, his account to show that he has got Rupees one lakh and odd. Even that fell short of the required amount. Under that circumstance, the Delhi High Court recorded the above finding. When the correctness of that order was challenged before the Apex Court, the Apex Court while making distinction between readiness to perform the contract and willingness to perform the contract has observed thus: 2. There is a distinction between readiness to perform the contract and willingness to perform the contract. By readiness may be meant the capacity of the plaintiff to perform the contract which includes his financial position to pay the purchase price. For determining his willingness to perform his part of the contract, the conduct has to be properly scrutinised. There is no documentary proof that the plaintiff had ever funds to pay the balance of consideration. Assuming that he had the funds, he has to prove his willingness to perform his part of the contract. According to the terms of the agreement, the plaintiff was to supply the draft sale deed to the defendant within 7 days of the execution of the agreement, i.e., by 27-2-1975. The draft sale deed was not returned after being duly approved by the petitioner. The factum of readiness and willingness to perform plaintiffs part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The Court may inter from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract. The facts of this case would amply demonstrate that the petitioner/plaintiff was not ready nor had the capacity to perform his part of the contract as he had no financial capacity to pay the consideration in cash as contracted and intended to bite for the time which disentitles him as time is of the essence of the contract. Therefore, the question which is required to be considered in

this case is whether the plaintiff has shown willingness as well as readiness to perform his part of the contract from the date of Exhibit P. 1 till upto the date of decree. In support of his readiness, the plaintiff has relied upon a statement of account produced at page 9 of the paper Book II marked as Exhibit P. 9. As per this account, as on 12-7-2003 there as Rs. 2,55,58,933.00 at its credit being overdraft facility extended by Vijaya Bank, Residency Road Branch, Bangalore. The other document relied on by the plaintiff to show his readiness and capacity to pay the consideration is Exhibit P. 40, dated 5-12-2003 issued by the Chief Manager, Vijaya Bank, Residency Road Branch, Bangalore. As per this certificate, the plaintiff company were enjoying a sanctioned overdraft facility of rupees ten crores and there was allowable balance of Rs. 1,043.35 lakhs as on 3-12-2003. Except these two documents, nothing is produced to show that the plaintiff has had the capacity to pay Rupees Twenty-five Crores being the admitted consideration of 'B' Schedule property. Further, the amounts shown in Exhibits P. 9 and P. 40 at the credit of the plaintiffs Bank were on a account of overdraft facilities sanctioned by Vijaya Bank, Residency Road Branch, Bangalore. Where this is the evidence on record, quite curiously, the learned Trial Judge in para 28 of the judgment has observed thus: The plaintiff has also produced the documents at Ex. P. 40 which is a certificate issued by the plaintiff Banker about overdraft facility extended to it. It is also pertinent to note that the plaintiff is a repeated developer developed real estate in Bangalore alone estimated at more than 200 crores and the plaintiff had its disposal kept in readiness, the balance sale consideration, payable to the defendant. The plaintiff has also adduced the evidence of P.W. 3, the Chief Manager of Vijaya Bank Residency Road Branch, Bangalore, which also corroborates the oral evidence given by P.W. 1 regarding the financial capacity of the plaintiff. The oral evidence given by P.Ws. 1 and 3 coupled with the documentary evidence at Ex. P. 40 are sufficient to prove that the plaintiff has always been ready to perform the essential terms of the contract, which are to be performed by it. If we may say so, the above observation of the learned Trial Judge and the findings recorded by him are totally perverse and without any evidence. 38. Sri B.V. Acharya, learned Senior Counsel, therefore, with his usual fairness submitted that there is no legal evidence to show that the plaintiff-company developed real estate in Bangalore alone at the estimated cost of more than Rupees two hundred crores or to show that the plaintiff had at its disposal the balance sale consideration of Rupees Twenty-five Crores. We are at a loss to understand how such a finding is recorded by the learned Trial Judge in the absence of pleading as well as the proof. Further, it needs to be noticed that apart from Exhibits P. 9 and P. 40, the plaintiff has not produced any document to show that it had wherewithal to mobilise/raise sale consideration of Rupees Twenty-five Crores. The judgment of the Supreme Court in the case of Mrs. Sandhya Rani Sarkar v. Smt. Sudha Rani Debt and Ors. , needs to be noticed in this regard. In that case, the appellant had entered into a contract with the respondents for purchase of the premises of the 1st respondent on February 8, 1956 for a consideration of Rs. 46,000/- and earnest money of Rs. 1,0007- was also paid. The transaction was to be completed by the end of April 1956 and the contract provided for the

inspection of all original documents of title by the appellant-purchaser within a week and on the approval by the purchaser of the vendor's title to execute a need of conveyance and have it registered. The vendor was obliged to sell the property because it was mortgaged and the mortgagee had filed a suit for realisation of the mortgage dues. The appellant wrote a letter on February 17, 1956 for inspection of the documents and the respondent on February 25, 1956 stated that the title deeds of the property in question were lying in Court as a result of the suit filed by the mortgagee against the respondent and the same may be inspected in the Court. By April 30, 1956 the appellant approved the title of the respondent and the appellant was put in possession of a substantial portion of the premises. The draft conveyance deed was also accepted by the respondent and yet, the appellant did not take the conveyance. In July-August 1956 the respondent made four different attempts requesting the appellant to complete the transaction but the appellant, instead of doing so, filed a suit for specific performance in 1957. The suit was decreed by the Trial Court in 1962 and the decree provided that the appellant had to pay the balance of purchase price within 30 days from the date of the decree and the vendor had to execute the deed of conveyance failing which the amount was to be deposited in Court within 15 days from the expiry of the first mentioned 30 days and submit the draft of the conveyance to the Court for getting it executed and registered through Court. The decree further directed that if the purchaser failed to deposit the amount within the stipulated time the suit would stand dismissed. The appellant failed to deposit the amount within the stipulated time but applied to the Court for certain directions regarding the inclusion of an extra bit of land. A Commissioner was appointed for determining the area of the extra land and the price to be paid for the same and a further direction was given directing the appellant to deposit the purchase price by September 22, 1965. The appellant challenged the report of the Commissioner and the direction of the Court in the revision to the High Court and the High Court dismissed the revision petition but extended the time for depositing the balance of consideration till February 8, 1968 and imposing the condition that in the event of default the suit would stand dismissed. The appellant-purchaser deposited the balance of consideration on February 6, 1968 and thereupon the respondent made an application to the Court to draw up the final decree so as to enable her to prefer an appeal to the High Court. The application was rejected by the Court and thereafter an appeal was preferred to the High Court in April 1968 against the decree of 1962. In 1972 an application was filed by the respondent to condone the delay in preferring the appeal. The application for condonation of delay and the appeal were heard together and the High Court condoned the delay on the ground that the respondent was prevented by sufficient cause from preferring the appeal to it in time. On merits, the High Court held that the respondent was always ready and willing to perform her part of the contract but the appellant-purchaser, under one pretext or other, deferred performing her part of the contract and, therefore, was not entitled to a decree for specific performance. Accordingly, the High Court allowed the appeal and dismissed the appellant's suit. In appeal to the Supreme Court, among other contentions, the contention that the High Court

was in error in holding that the appellant had no wherewithal to pay balance of consideration and that the relief for specific performance being discretionary and the Trial Court having exercised discretion in favour of the appellant, the High Court should not have interfered with the Trial Court 's discretion, was urged. The Supreme Court rejected that contention for the reasons stated by it in paragraph 16, which reads as follows. Mr. Chatterjee argued that the High Court clearly committed an error in law in holding that the plaintiff had no wherewithal to pay the balance of consideration and it was further argued that the High Court took into consideration extraneous circumstances such as the insolvency of the husband of the plaintiff to come to the conclusion that the plaintiff had not necessary wherewithal with her to pay the balance of consideration. In this connection the plaintiffs case is that the amount of Rs. 2,000 paid as earnest money was advanced by her husband and she was to produce the balance of consideration by selling her ornaments which she had with her. The plaintiff has not stepped into the witness-box. There is no material to show that she had enough ornaments which would have fetched nearly Rs. 45,000. But reliance was placed on the pass books of the plaintiff husband. The pass books show an overdraft account in the name of the husband if the plaintiff. Assuming that the entries in the pass book show that the husband of the plaintiff could have procured the amount, the plaintiffs case is that she was to sell the ornaments to procure the balance of consideration. If that was the case, she wanted to make out, it was incumbent upon her to step into the witness-box. Now, as against this, there are some tell-tale facts on record which permit an irresistible inference that the plaintiff did not have necessary wherewithal to pay the balance of consideration and, therefore, she put forth one or the other execute to avoid the performance of her part of the contract. Two such pretexts can be readily pointed out, one when she insisted for the sale of one foot of land to the north of the property which claim was thoroughly unjust and improper, and second, the demand of Rs. 2,000 spent by her in making the tenant vacate a portion of the premises. The contract was to be completed by April 1956. It was not completed till 1957 even though the defendant after satisfying the queries of the plaintiff fixed different dates on different occasions calling upon the plaintiff to complete the transaction. Thereafter plaintiff filed a suit. The suit was decreed on April 30, 1962. We have already at another place referred to this decree to point out that the plaintiff by that decree was called upon to deposit the balance of consideration within 30 days of the date of the decree. This would mean that she had to deposit the balance of consideration by the end of May 1962. She did not deposit the amount by the stipulated date. She asked for extension of time. Thereafter, she moved an application for ascertaining the area of excess land which was being sold to her. Under this pretext she did not deposit the balance of consideration. Thereafter, when the Commissioner prepared the map and the Court fixed another date to deposit the amount, she questioned the order of the Court in the High Court and after the High Court dismissed her revision application and called upon her to deposit the balance of consideration she again sought extension and ultimately deposited the amount on February 6, 1968. This would show that at the material point of time she

did not have the necessary wherewithal to pay the balance of consideration and to take the conveyance and this would provide tell-tale evidence to explain her conduct in putting forth one or the other impediment in the path of performance of the contract. If in the background of this evidence the High Court reached the conclusion that she did not have the necessary wherewithal with her to pay the balance of consideration and take the deed of conveyance, one cannot take any exception to it. But in this connection Mr. Chatterjee contended that the plaintiff seeking specific performance of the contract is not required to show that she has at all material time necessary cash with her to perform her part of the contract. It is enough if the plaintiff can show that she was in a position to raise the money required at or about the time when the contract was to be performed and she discharges the obligation of proving readiness and willingness so far as the financial aspect is concerned. Reliance was placed on Jitendra Nath Roy v. Smt. Maheshwari Base AIR 1965 Cal. 45. Undoubtedly, the question would be while examining the readiness and willingness of the plaintiff to perform her part of the contract to find out whether she would be in a position to take the conveyance by paying the balance of consideration and that the enquiry may well be made whether she would be in a position to raise the money. Reference was also made to Bank of India Limited v. Jamsetji A.H. Chinoy AIR 1950 PC 90 : 77 Ind. App. 76, where it was held that the plaintiff seeking to prove that he was ready and willing to fulfill his financial obligations has not necessarily to produce the money or to vouch a concluded scheme for financing the transaction. After the High Court dismissed her revision application and fixed the date January 8, 1968 for depositing the amount, she had no further contention to put forth and she should have deposited the amount yet she sought extension of time. And along with this, one must keep in view her contention that she had to sell her ornaments to raise the amount for which she did not step into the witness-box to prove her contention. In this background it does appear that the plaintiff had not the necessary wherewithal to perform her part of the contract. 39. The resultant position in this case is that the plaintiff has utterly failed to establish that at all material points of time the required sum of Rupees Twenty-five Crores was available with it to pay the consideration to the defendant in terms of the judgment in the case of Thirugnanam. It is not enough if the plaintiff proves that he has been willing to perform his part of obligation, but he should also prove satisfactorily that he has necessary funds at his disposal to pay the consideration of sale. It is true, as rightly contended by Sri B.V. Acharya placing reliance on the judgments of the Supreme Court in the case of Pandurang Ganpat Tanawade v. Ganpat Bhairu Kadam and Ors. ; Sukhbir Singh and Ors. v. Brij Pal Singh and Ors. ; Bibi Jaibunisha v. Jagdish Pandit and Ors. and Smt. Swarnam Ramachandran and Anr. v. Aravacode Chakungal Jayapalan , that the plaintiff in order to satisfy Clause (c) of Section 16 of the Act, he need not deposit the consideration before the Court or show actual money with him and it is sufficient to prove that the plaintiff has the capacity to pay the sale consideration. But, the question is whether the plaintiff has proved his capacity to pay the sale consideration of rupees Twenty-five Crores and whether the evidence adduced in the case would

show that the plaintiff had been willing and ready to pay the sale consideration having necessary financial resources from the date of Exhibit P. 1 till upto the date of the decree. The evidence already referred to and considered above would clearly go to show that at no point of time the plaintiff has had the capacity to pay sale consideration of Rupees Twenty-five Crores. Exhibits P. 9 and P. 40 put together would only show that during the interregnum on the dates of those documents the plaintiff has had only Rs. 1,043.35 lakhs in its account, that too, as overdraft facilities sanctioned by the Vijaya Bank, Residency Road Branch, Bangalore. Thus, the plaintiff has utterly failed to prove its continued readiness to pay the sale consideration from the date of Exhibit P. 1 till upto the date of decree. In that view of the matter, we answer point No. II in the negative. 40. Point No. III.It is trite that unless the plaintiff proves that there existed a concluded and legally enforceable contract as on the date of the institution of the suit, it is not entitled to relief of specific performance. The question is whether the plaintiff has proved by evidence the existence of a concluded and enforceable contract as on the date of institution of the suit. In the plaint, as could be seen from paragraph 42 thereof, the plaintiff has sought for specific performance of the agreement Exhibit P. 1, dated 9-7-2003 and not the oral agreement pleaded by him in the plaint. According to the plaintiff, Exhibit P. 1 is a concluded and legally enforceable contract under which the defendant is under a legal obligation to sell 'B' Schedule property. Before we deal with the contents of Exhibit P. 1 agreement, it is appropriate to consider the oral agreement pleaded by the plaintiff. P.W. 1 in his affidavit evidence, in paras 8 and 9 speaks about the revised offer made by the defendant to sell 30 acres of land out of plaint 'A' Schedule property and finalisation of the sale price, stipulation as to payment of sale amount, advance and other terms and conditions of the sale. According to the plaintiff, this took place in the first week of July 2003 but not in the first week of June 2003 as pleaded in the plaint. Further, in paras 17 and 18 of his deposition, P.W. 1 speaks about the oral agreement between him and the defendant to sell/purchase 13' schedule property. The above version of P.W. 1 is quite contrary to what he has stated in Exhibit P. 11 dated 23-10-2003. In that letter, P.W. 1 in unmistakable term has stated that subsequent to execution of Exhibit P. 17, in order to explore the possibility of sale Exhibit P. 1 was made. Oral agreement spoken to by P.W. 1 in para 18 of his evidence is not mentioned either in Exhibit P. 11 or Exhibit P. 13 dated 24-11-2003. Therefore, it is quite clear that oral agreement pleaded by P.W. 1 is an afterthought and an innovation to suit the convenience of the plaintiff. Understandably the plaintiff has resorted to such innovation for the obvious reason that Exhibit P. 1 can never be regarded as a concluded and enforceable contract for the reasons we state presently. 41. It needs to be noticed that the oral agreement for the first time was brought out only in Exhibit P. 14 legal notice dated 22-12-2003. The oral agreement pleaded by plaintiff and spoken to by P.W. 1 is squarely denied in the written statement filed by the defendant and D.W. 1 in his evidence. Except oral assertion, the documents produced by the plaintiff would not support the plea of oral agreement prior or subsequent to Exhibit P. 1. Be that as it may, since the plaintiff has not

sought for specific performance of the oral agreement, there is no need for us to dilate on this aspect further. Suffice it to state that the plaintiff has utterly failed to prove the oral agreement pleaded by it and, therefore, enforcing such non-existing oral agreement would not arise. 42. This takes us to the question whether Exhibit P. 1 can regarded as a concluded and legally enforceable contract. Exhibit P. 1 dated 9-7-2003 reads as follows. It has been agreed and understood between parties as under: 1. MSR to make available a total extent of approx. 30 acres conjoint land having a minimum full frontage of not less than 200 ft. (as per sketch annexed hereto till the restaurant); 2. Price payable of legally available land shall be calculated at rate Rs. 291/- per sq. ft.; 3. The payment to be made as under: a. Rs. 1,00,00,000.00 (Rupees One Crore only) by cheque No. 390502, dated 9-7-2003 drawn on Vijaya Bank, Residency Road Branch, Bangalore, on exchange of this letter; b. 30% of the total price on the date of (execution of agreement of sale) subject to MSR making out good and marketable title; c. 30% within 120 days from the date of agreement for sale; d. Balance of the sale price within 90 days from the payment set out in Point No. 3(c). 4. MSR will make available copies of the documents for title within one week from this date and 30 days to sign the agreement shall commence from that date; 5. MSR to make out good and marketable title to the satisfaction of SGC; 6. If the area of the Canal is not made available with marketable title, the area beyond canal on the Northern side will be excluded from the total extent and accordingly the consideration to be calculated; 7. MSR will organise the outer boundary of the land set out in this intent; 8. On the execution of the agreement SGC will be entitled to submit for plan sanction and developmental activities; 9. In the event of MSR not dropping the acquisition pertaining to Survey No. 27 before the execution of agreement, separate arrangement will be recorded; 10. On the agreement for sale not executed, the amount paid under this letter shall be returned forthwith to SGC, on SGC intimating their intent to terminate this arrangement. 43. There is voluminous case-law to guide us to decide the question when an agreement between parties could be regarded as a concluded and legally enforceable contract. Therefore, it is appropriate at the threshold to briefly refer to some of them. In Alexander Brogden and Ors. v. The Directors and C of the Metropolitan Railway Co. (1877) 2 App. Cases 666, where an alleged contract for the sale, of a leasehold house, contained in letters wherein it was stipulated by the purchaser that her acceptance was subject to, amongst others, a condition that her solicitors should "approve the title to and covenants contained in the lease, the title from the freeholder and the form of contract", Chancery Division was called upon to construe the documents in order to decide whether the contract is susceptible of being enforced by way of specific performance. Chancery Division speaking through Parker J., held: It appears to be well-settled by the authorities that if the documents or letters relied on a constituting a contract contemplate the execution of a further contract between the parties, it a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no en-

forceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document is in words which according to their natural construction import a condition is generally if not invariably conclusive against the reference being treated as the expression of a mere desire. 44. In Gujjar Mal Ram Rattan Puri v. Governor General of India through Postmaster General, Punjab and N.W.F. Circle AIR 1942 Pesh. 33, it was held that where the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case, there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case, there is binding contract and the reference to the mere formal document may be ignored. The contract of the parties in acting upon the contract before the formal agreement was drawn up is the clearest evidence of this fact. 45. In Godhra Electricity Co. Limited v. State of Gujarat and Anr. , the Supreme Court dealing with the interpretation of the terms of contract held thus: In the process of interpretation of the terms of a contract, the Court can frequently get great assistance from the interpreting statements made by the parties themselves or from their conduct in rendering or in receiving performances under it. Parties can, by mutual agreement, make their own contracts; they can also by mutual agreement, remake them. The process of practical interpretation and application, however, is not regarded by the parties as a remaking of the contract, nor do the Courts so regard it. Instead, it is merely a further expression by the parties of the meaning that they give and have given to the terms of their contract previously made. There is no good reason why the Courts should not give great weight to these further expressions by the parties, in view of the fact that they still have the same freedom of contract that they had originally. The American Courts receive subsequent actings as admissible guides in interpretation. It is true that one party cannot build up his case by making an interpretation in his own favour. It is the concurrence therein that such a party can use against the other party. This concurrence may be evidenced by the other party's express assent thereto, by his acting in accordance with it, by his receipt without objection of performances that indicate it, or by saying nothing when he knows that the first party is acting on reliance upon the interpretation. 46. The Supreme Court in the case of United Bank of India v. Ramdas Mahadeo Prasad and Ors. , has emphasised on Consensus ad idem on the terms and conditions stipulated in the agreement. The Supreme Court having found that there was no consensus on the terms and conditions stipulated in MOU and the same also had not been acted upon held that there was no concluded contract. 47. The Supreme Court in Mayawanti v. Kaushalya Devi , in para 18 of the judgment held thus: 18. The Specific performance of a contract is the actual execution of the contract according to its stipulations and terms, and the Courts direct the party in default to do the very thing which he

contracted to do. The stipulations and terms of the contract have, therefore, to be certain and the parties must have been consensus ad idem. The burden of showing the stipulations and terms of the contract and that the minds were ad idem is, of course, on the plaintiff. If the stipulations and terms are uncertain, and the parties are not ad idem, there can be no specific performance, for there was no contract at all. In that case, the Supreme Court quoted the following observations of Fry in his Specific Performance (6th edition, page 19) with approval: There is an observation often made with regard to the jurisdiction in specific performance which remains to be noticed. It is said to be in the discretion of the Court. The meaning of this. proposition is not that the Court may arbitrarily or capriciously perform one contract and refuse to perform another, but that the Court has regard to the conduct of the plaintiff and to circumstances outside the contract itself, and that the mere fact of the existence of a valid contract is not conclusive in the plaintiffs favour. 'If the defendant', said Plumer V.C., 'can show any circumstances de hors, independent of the writing, making it inequitable to interpose for the purpose of a specific performance, a Court of equity, having satisfactory information upon that subject, will not interpose. XXX XXX XXX If a contract be made and one party to it make default in performance, there appears to result to the other party a right at his election either to insist on the actual performance of the contract, or to obtain satisfaction for the non-performance of it. It may be suggested that from this it follows that a perfect system of jurisprudence ought to enforce the actual performance of contracts of every kind and class, except only when there are circumstances which render such enforcement unnecessary or inexpedient, and that it ought to be assumed that every contract is specifically enforceable until the contrary be shown. But, so broad a proposition has never, it is believed, been asserted by any of the Judges of the Court of Chancery, or their successors in the High Court of Justice, though, if prophecy were the function of a law writer, it might be suggested that they will more and more approximate to such a rule. 48. The following passages in Halsbury's Laws of England, Volume XXIX, page 237, are apposite to be noted: An acceptance must be absolute and unqualified. There is no completed contract if the acceptance is 'subject to approval of terms of contract; or 'subject to a formal contract being prepared and signed by both parties as approved by their solicitors; 'or simply subject to contract'; or where it otherwise appears that all the terms of the contract are not definitely settled or that additional terms are to be agreed to and inserted in the formal contract. On the other hand, if it appears that the parties have agreed upon the essential terms of the sale, a mere intimation of a desire that the agreement shall be embodied in another document of a more formal nature, or the expression of what is necessarily a condition, not of the acceptance, but of the contract itself, does not prevent the agreement being enforceable. It is a question of construction whether the parties have come to a final agreement, though they intend to have a more formal document drawn up. I may also refer to Dart, Vendor and Purchaser, 8th Edition, page 227. Before referring to the case I may point out that the law is the same in India as in England. Harichand Mancharam v. Govind Laxman Gokhale, 50 IA 25 : AIR 1923 PC 47 : 71 1C

763 and Currimbhoy and Company Limited v. LA. Greet and Ors. 60 IA 297 : AIR 1933 PC 29 : 1411C 209. The earliest important case on the subject is Winn v. Bull (1877) 7 Ch. D. 29 : 47 L.J. Ch. 139 : 26 WR 230. In that case there was a lease by written agreement of a house for a certain term at a certain rent "subject to the preparation and approval of a formal contract". No other contract was in fact entered into by the parties and it was held that there was no final agreement which could be enforced. Sir George Jessel M.R. said (page 30): I am of opinion that there is no contract. I take it the principle is clear. If in the case of a proposed sale or lease of an estate two persons agree to all the terms and say: We will have the terms put into form, 'then all the terms being put into writing and agreed to, there is a contract. If two persons agree in writing that upto a certain point the terms shall be the terms of the contract, but that the minor terms shall be submitted to a solicitor, and shall be such as are approved of by him, then there is no contract, because all the terms have not been settled. Further on, in his judgment he said (page 32): It comes, therefore, to this, that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared it means what it says; it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail. These latter observations show that the decision did not turn on the fact that the stipulation about a formal contract was express (1877) 7 Ch. D. 29 was approved by Parker, J., afterwards Lord Parker, in Von Hatzfeldt Wildenburg v. Alexander (1912) 1 Ch. 284 : 81 L.J. Ch. 184 : 105 LT 434. In the course of his judgment his Lordship said (p. 288): It appears to be well-settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution or a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into contract. In the latter case there is binding contract and the reference to the mere formal document may be ignored. These observations have become classic and have been cited with approval in Rossdale v. Denny (1921) 1 Ch 57 : 90 LJ Ch. 204 : 124 LT 294 : 65 SJ 59 : 37 TLR 45 and in many other cases. 49. In Courtney and Fairbairn Limited v. Tolaini Brothers (Hotels) Limited and Anr. (1975) 1 All E.R. 716, where a company represented by T wished to develop a site by building a motel, filling station and hotel. T got into touch with C. A property developer who was well-placed to obtain finance for the development. At a meeting between T and C, it was proposed that C should introduce someone to finance the development and that T should employ the company which C represented to construct the buildings. After that meeting C wrote a letter to T, dated 10th April, 1969, stating that he was in a position to introduce to T someone who had access to the necessary

finance for the development; C also pointed out that his commercial interest in the matter was that of a building contractor. The letter continued: 'Accordingly I would very happy to know that, if my discussions and arrangements with interested parties leads to... a financial arrangement acceptable to both parties you will be prepared to instruct your quantity surveyor to negotiate fair and reasonable contract sums in respect of your quantity surveyor to negotiate fair and reasonable contract sums in respect of each of the three projects as they arise. (These would, incidentally be based upon agreed estimates of the net cost of work and general overheads with a margin for profit of 5% which, I am sure you will agree, is, indeed reasonable". On 28th April T wrote to C:"In reply to your letter of the 10th April, I agree to the terms specified therein, and I look forward to meeting the interested party regarding finance". C introduced a person willing to provide finance for the development. T instructed his quantity surveyor to negotiate with C as to the price for the building works, but agreement with C on the price could not be reached and the negotiations broke down. T then instructed contractors other than C's company to carry out the development. C's company brought an action in which they claimed a declaration that there was an enforceable contract to employ them as builders for the development and that T"s company were in breach of contract in employing other building contractors. The Court of Appeal speaking through Lord Denning while holding that the above letters did not give rise to any enforceable contract between Ts company and C's company, has opined that: A contract to negotiate even though supported by consideration was not a contract known to the law since it was too uncertain to have any binding force.... 50. In M/s. Khan and Khan of Delhi v. M/s. Premsukh Das Rup Naraian AIR 1931 Lah. 260', it was held that in order to convert a proposal into a promise the acceptance must be absolute and unqualified and until there is such an acceptance, the stage of negotiations has not passed and no legal obligation is imposed. 51. In the premise of the case-law noted above, let us now proceed to examine the contents of Exhibit P. 1 extracted above. We find considerable force in the contention of Sri Udaya Holla that except for price and the seller, every other essential condition of a concluded contract is absent in Exhibit P. 1. While dealing with point No. I, we have already held that there was no certainty with regard to whom the defendant had to sell 'A' schedule property in terms of Exhibit P. 1. In a contract of sale of landed property, among other terms and conditions, the essential conditions should necessarily include the certainty about seller, the certainty about the purchaser, the certainty of the property to be sold and the price/consideration to be paid. Clause (1) of Exhibit P. 1 speaks about approximately 30 acres of conjoint land having a minimum full frontage of not less than 200 ft. as per sketch appended to Exhibit P. 1. The defendant has asserted that though there is a mention of sketch in Clause (1) of Exhibit P. 1, as a matter of fact, no sketch was appended to Exhibit P. 1. Further, it was contended by Sri Udaya Holla that the so-called sketch now produced before the Court is not a sketch, it is only a guideline survey and that would not in any way come to the aid of the plaintiff. Clause (2) of Exhibit P. 1 speaks about "legally available land". It is trite that on the date of Exhibit P. 1,

parties to Exhibit P. 1 could not have known what would be the legally available land having regard to other stipulation incorporated in Exhibit P. 1. 'legally available land' as on the date of Exhibit P. 1 remained a total uncertainty. However, it was the contention of Sri B.V. Acharya that there was consensus ad idem between the parties with regard to the land to be sold by the defendant to the plaintiff in the sense that the defendant was legally bound to sell all legally available land, whether it is approximately 30 acres of land or less than 30 acres. It was contended by Sri B.V. Acharya that since there was no legal impediment to sell 19 acres 7 1/4 guntas of land to the plaintiff, the defendant was legally bound to sell T3' schedule property to the plaintiff and, therefore, it could not be said that there was no certainty with regard to the extent of land to be sold by the defendant to the plaintiff. We are not inclined to accept the above submission of the learned Senior Counsel as well-founded or correct, if we take into account all clauses of Exhibit P. 1 together and construe the same. In the first place, it needs to be noticed that admittedly as on the date of Exhibit P. 1, the entire extent of "B" schedule property was already purchased by the defendant by investing huge sum of money. If the parties to Exhibit P. 1 had intended that under any circumstance the defendant should sell "B" schedule property, there as absolutely no impediment for them to incorporate a clause to that effect in Exhibit P. 1. That only shows that de hors schedule B property, in terms of Exhibit P. 1, the parties to it wanted to explore the possibility of entering into an agreement for purchase/sale of approximately 30 acres of land in Kadubisanahalli and Kariyammana Agrahara of Varthur Hobli, Bangalore East Taluk. This position is admitted by P.W. 1 himself in Exhibit P. 11 letter dated 23-10-2003. In that letter, in unmistakable term, P.W. 1 has stated that after executing Exhibit P. 17-MOU dated 18-12-2002, in order to explore the possibility of sale, Exhibit P. 1 was entered into between them. Further, Clause (5) of Exhibit P. 1 requires the defendant to make out good and marketable title to the satisfaction of Salarpuria Group of Companies. This clause also would indicate that there/was no certainty about the land to be sold. If the parties under Exhibit P. 1 had agreed on the land to be sold, a clause like Clause (5) would not have found a place in Exhibit P. 1. The satisfaction of the purchaser with regard to good and marketable title of the land to be conveyed, it is trite, is a condition precedent to reach consensus ad idem between the parties. Clause (6) of Exhibit P. 1 would also indicate clearly that there was no certainty about the land to be conveyed because as per that clause, if the area of the canal is not made available with marketable title, the area beyond canal on the Northern side would be excluded from the total extent of the land to be conveyed. Clause (7) speaks about the requirement of the defendant organising the outer boundary of the land to be sold. Thus, it is seen that every clause of Exhibit P. 1 noted above would clearly show that there was no consensus ad idem between the parties with regard to the land to be sold and the whole thing was in an inchoate stage. That is how the parties themselves have rightly understood Exhibit P. 1 as the arrangement to explore the possibility of entering into an agreement for purchase/sale of land. 52. From Clause (10) of Exhibit P. 1 it could be said that Exhibit P. 1 is only an arrangement to explore the possibility

of entering into an agreement to purchase/sale of land in future and not an agreement of sale. Clause (10) having recognised the arrangement of the parties to enter into an agreement of sale in future provides that the Salarpuria Group of Companies can terminate Exhibit P. 1 arrangement in the event of the agreement of sale contemplated in Exhibit P. 1 is not executed. If Exhibit P. 1 itself is an agreement of sale, it would not have contemplated execution of agreement of sale at a future date. 53. Clauses 3(b), 4, 8, 9 and 10 contemplate execution of agreement of sale at a future date. Further, Clause 3(b) which provides payment of 30% of the total price on the date of execution of agreement for sale contemplated in Exhibit P. 1, directs such payment subject to the defendant making out good and marketable title. In other words, only if the defendant makes out good and marketable title with regard to the land to be sold in favour of the plaintiff, 30% of the price is required to be paid to the defendant. 54. In Chitty on Contract, 28th Edition, Volume 1, page 136, in Section 2-108, it is stated thus: 2-108. Agreement "subject to contract".Agreements for the sale of land by private treaty are usually made "subject to contract". Such agreements are normally regarded as incomplete A until the terms of a formal contract have been settled and approved by the parties. Thus in Winn v. Bull the defendant agreed to take a lease of a house for a specified time at a stated rent, "subject to the preparation and approval of a formal contract". It was held that there was no enforceable contract and Jessel M.R. said, "It comes, therefore, to this that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says, it is subject to and is dependent upon a formal contract being prepared". Other examples where it has been held that the parties have made the operation of their contract conditional on the execution of a further document are an agreement to purchase freehold land "subject to a proper contract to be prepared by the Vendor's solicitors", an agreement to take a flat "subject to suitable agreements being arranged between your solicitors and mine", an agreement to grant a lease "subject to the terms of a lease" (because this meant "subject to the terms to be contained in a lease executed by the lessor"); and an agreement to purchase a house "subject to formal contract to be prepared by the vendors' solicitors if the vendors shall so require". In each of these cases the Court held that the agreement gave rise to no legal liability. On the same principle, it has been held that an agreement to pay a fee to an estate agent was not legally binding where it was expressed to be "subject to contract. 55. In Von Hatzfeldt-Wildenburg v. Alexander 81 LJ. Ch. 184 : 105 LT 434 : 1912 Ch. D. 284, where an alleged contract for the sale of a leasehold house, contained in letters wherein it was stipulated by the purchaser that her acceptance was subject to, amongst others, a condition that her solicitors should"approve the title to and covenants contained in the lease, the title from the freeholder and the form of contract" on the construction of the documents, it was held that the agreement is not a complete contract susceptible to being enforced by way of specific performance. 56. In the case of New Mofussil Co. Limited and Anr. v. Shakerlal Narayanadas Mundade AIR 941 Bom. 247, where negotiations opened between the parties for the sale of certain property, some of the terms sale were settled between the parties

and the vendor afterwards sent the vendee to his solicitor, for settling other terms, receiving the earnest money and drawing up a draft agreement and an engrossment on that draft. The further terms were settled, the earnest money was received by the solicitors and a rough draft of agreement was prepared. The agreement was engrossed in due course, but before it could be signed by the vendee, the vendor declined to proceed in the matter. Under the circumstances, it was held that "the agreement arrived at between the parties at the first interview only contemplated execution of the engrossed draft in solicitors' office and was not a concluded agreement between the parties which could be enforced". 57. In Winn v. Bull, wherein, by a written agreement, the defendant agreed with the plaintiff to take on lease a house for a certain term at a certain rent "subject to the preparation and approval of a formal contract". However, subsequently, no formal or other contract was entered into between the parties. In the circumstance, it was held that there was no final agreement against which specific performance could be enforced against the defendant. 58. If we examine Clause 3(b) of Exhibit P. 1 in the light of the principles laid down by the Courts while interpreting agreements subject to terms, it makes it very clear that since Clause 3(b) provides for payment of 30% of the total price of the land to be sold in favour of plaintiff subject to the defendant making out good and marketable title of the land Exhibit P. 1 could not be regarded as a concluded contract and legally enforceable contract. In conclusion, we hold that the plaintiff has utterly failed to prove that there existed any concluded and legally enforceable contract for sale of 'B' schedule property as on the date of institution of the suit. In that view of the matter, we answer Point No. III also in the negative and against the plaintiff. 59. The plaintiff is also not entitled to decree of specific performance in equity. It has come in the evidence that after Exhibit P. 10 the defendant used the 13' schedule property for setting up a Software Technology Park in the name and style of M/s. M.S. Ramaiah Software Technology Park and in that regard it has incurred huge expenditure running to several crores of rupees towards identifying the Architects, conducting soil and survey examination, entering into a MOU for the purpose of construction, making application of KIADB, seeking exemption of lands from the purview of acquisition, applying for and obtaining clearance from Single Window Agency of the Government of Karnataka for development of technology park in B' schedule property. It has also come in the evidence that the defendant has entered into a MOU with M/s. Chandrakala Enterprises for constructions and the defendant paid sum of Rs. 2.01 crores to M/s. Chandrakala Enterprises as on the date of the institution of the suit. Thus, it is quite clear that if the decree of specific performance is granted, it would result in huge loss to the defendant and it will be totally inequitable and ruinous. Looking from that angle also, the plaintiff is not entitled to discretionary and equitable remedy of specific performance under the provisions of the Act. 60. In the result and for the foregoing reasons, we do not find any merit in the appeal and it is accordingly dismissed with costs throughout.