

Man Kaur(Dead)By Lrs vs Hartar Singh Sangha on 5 October, 2010

Bench: Aftab Alam, R. V. Raveendran

Reportab

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 147-148 OF 2001

MAN KAUR (DEAD) BY LRS.

....APPELLANTS

VS.

HARTAR SINGH SANGHA

.....RESPONDENT

JUDGMENT

R. V. RAVEENDRAN J., The appellant (Man Kaur, who died during the pendency of this appeal and is represented by her Legal Representatives) was the defendant in a suit for specific performance of an agreement of sale, filed by the respondent. For convenience the appellant and respondent will also be referred by their ranks in the suit as 'defendant' and 'plaintiff' respectively.

2. The appellant Man Kaur was the owner of the suit property, a plot admeasuring 1000 sq.yards with the building thereon, identified as 'Annexe No 508' situated in Sector-18B, Chandigarh. The respondent-plaintiff was, at all the relevant points of time, a Non-Resident Indian living in United Kingdom. An agreement of sale dated 20.10.1978 was entered between defendant represented by her husband and attorney holder Kartar Singh, as vendor, and plaintiff represented by his attorney holder Paramjit Singh, as purchaser. The material terms of the said agreement were :

(i) The defendant shall sell the suit property to plaintiff for a consideration of Rs.1,50,000/-.

(ii) As the premises was tenanted the defendant was liable to deliver vacant possession of only a small portion which was in her occupation. If the vendor was able to get the tenant vacated and deliver vacant possession of the entire premises, then the sale price shall be Rs.1,60,000/-.

(iii) A sum of Rs.10,000/- was paid in cash as earnest money by the attorney holder

of the purchaser to the attorney holder of the vendor.

(iv) The sale had to be completed by 20.12.1978 and the balance sale price shall be paid at the time of registration of the sale deed.

(v) The vendor had to deliver at the time of registration of the sale deed, her title deed, as also the NOC from the Estate Office, Chandigarh, permission for the sale under Urban Land (Ceiling and Regulation) Act 1976, and Clearance Certificate under section 230A of the Income Tax Act, 1961 and other relevant documents if any.

(vi) If the vendor committed default, he had to pay double the amount of earnest money to the purchaser and if the purchaser committed any default, the sum of Rs.10,000/- paid as earnest money would stand forfeited; and

(vii) The bargain was entered through the property dealer -- M/s R. P. Sethi & Co. to whom both the parties should pay 2% commission on the total price; and in the event of default, the defaulting party shall pay 4% commission.

The agreement of sale was signed by the attorney holder of the vendor and attorney holder of the purchaser and witnessed by Hari Singh (Property Dealer) and Balraj Singh (property dealer carrying on business under the name and style of M/s R. P. Sethi & Co.). The agreement also contained an endorsement by Kartar Singh acknowledging the receipt of Rs.10000/- as earnest money in addition to another sum of Rs.1500/-.

3. On 25.4.1980 the respondent (represented by his attorney holder Jagtar Singh Sangha under power of attorney dated 1.3.1980), filed a suit for specific performance of the said agreement of sale, against the appellant. The plaint after referring to the terms of the agreement of sale, averred that the bargain was struck through property dealer Balraj Singh of M/s. R.P. Sethi & Co; that the time for performance was extended from time to time till 7.6.1979; that the defendant's attorney holder and plaintiff reached Chandigarh on 7.6.1979; that though defendant's attorney holder stated that he had come to Chandigarh to execute the sale deed, he did not go over to the Sub-Registrar's office nor executed the sale deed; that plaintiff remained present in the Sub-Registrar's office at Chandigarh, and recorded his presence on 7.6.1979 by presenting an application and getting an acknowledgement from the Sub-Registrar; that after 7.6.1979, neither the defendant nor her attorney holder Kartar Singh came to Chandigarh; that they did not also contact the plaintiff or the property dealer Balraj Singh; and that the repeated attempts of the property dealer Balraj Singh to contact defendant were futile. The plaint also averred that the plaintiff was always ready and willing to perform his part of the contract and get the sale deed registered by paying the balance consideration; and that in spite of a notice dated 5.3.1980 calling upon the defendant to complete the sale, the defendant had failed to execute the sale deed. The plaintiff therefore prayed for specific performance of the agreement of sale dated 20.10.1978 or in the alternative, if he was found not entitled to specific performance, then for a decree of recovery of Rs.21,500/- (that is Rs.11500/- paid to defendant's attorney holder and Rs.10000/- as liquidated damages) with costs.

4. The defendant resisted the suit. The defendant alleged that as she and her husband were residents of Rourkela, it was agreed that the property dealer Balraj Singh, who was acting on behalf of the purchaser-plaintiff would be responsible for securing the required clearances for the sale; that a sum of Rs.1500/- was paid by plaintiff's attorney holder to Balraj Singh (shown as advance payment to vendor in the receipt portion of the agreement of sale) to secure the said NOC/permission/clearance; that defendant signed and delivered to Balraj Singh the necessary papers for getting the clearances/certificates; that time stipulated for sale (20.12.1978) was the essence of the contract; that Balraj Singh sent a telegram dated 2.6.1979 requiring defendant's husband Kartar Singh to reach Chandigarh on 7.6.1979 for registration, assuring that registration of sale deed would definitely take place on that day and no further extension would be sought; that in response to it, the defendant's husband, who was intent to maintain cordial relationship, in spite of the expiry of the last date fixed for sale, went to Chandigarh and met the plaintiff and Balraj Singh, in the office of Balraj Singh; that the plaintiff informed him that he (plaintiff) could not arrange the entire funds for making full payment and therefore could not proceed with the sale; that defendant's husband informed the plaintiff and Balraj Singh that he had come all the way from Rourkela to get the sale deed registered, and it was evident that the plaintiff did not have the money and not interested in purchasing of the property and that therefore the agreement stood cancelled, and he would not execute the sale deed; and that the defendant's husband thereafter left for Rourkela and also wrote a letter to Balraj Singh confirming the termination of the agreement in view of the plaintiff's conduct on 7.6.1979. The defendant contended that as plaintiff was not ready and willing to perform the contract by paying the balance of the sale price and get the sale completed, he was not entitled to specific performance; and that in view of the breach committed by the plaintiff, the earnest money amount paid by him stood forfeited. The defendant also contended that the suit was not maintainable as it was not filed by a duly authorized person. Subsequently the defendant amended her written statement to contend that plaintiff was a Non-Resident Indian and he had not obtained the permission of the Reserve Bank of India under the Foreign Exchange Regulation Act, 1973, and therefore he was not entitled to purchase any immovable property in India.

5. On the said pleadings, the trial court framed the following issues:

- (1) Whether the suit has been filed by a duly authorized person?
- (2) Whether the suit is not maintainable in the present form?
- (3) Whether the suit for specific performance is not maintainable?
- (4) Whether the suit is hit by laches and delay? If so, its effect?
- (5) Whether the agreement dated 20.10.1978 has been rescinded and the suit is thus not maintainable?
- (6) Whether the plaintiff is estopped by his own act and conduct from filing the present suit?

(7) Whether the time was the essence of the contract?

(8) Whether the plaintiff was and is ready and willing to perform his part of the agreement? If not its effect?

(9) Whether the plaintiff is entitled to the specific performance and in alternative damages as claimed?

(9A) Whether the suit is barred in view of preliminary objection No.7 in the written statement?

(10) Relief.

6. The parties went to trial on the said issues. On behalf of the plaintiff, his attorney holder Jagtar Singh Sangha was examined as PW1, and the property dealer Balraj Singh was examined as PW2. On behalf of the defendant, her husband and attorney holder Lt. Col. Kartar Singh was examined as DW-1. After appreciating the evidence, the trial court by judgment dated 15.3.1983, decreed the suit. It held that as the plaintiff had executed a power of attorney dated 1.3.1980 in favour of his brother Jagtar Singh Sangha and as Jagtar Singh Sangha has asserted in his evidence that he was the attorney holder of the plaintiff, and as Balraj Singh had given evidence that plaintiff executed the power of attorney in favour of Jagtar Singh Sangha in his presence, the suit was filed by a duly authorized person and was maintainable. The trial court held that the time was not of essence of the contract; that defendant had failed to prove that the agreement dated 20.10.1978 was rescinded; that the plaintiff had proved that he was ready and willing to perform his part of the contract; that the suit was not barred by time; that the Reserve Bank's permission was not necessary for obtaining a decree for specific performance, but was required only for execution of the sale deed in pursuance of a decree for specific performance; and therefore plaintiff was entitled to specific performance.

7. The appeal filed by the defendant was dismissed by the District Judge, Chandigarh, by judgment dated 3.6.1997 affirming the findings of fact recorded by the trial court. The second appeal filed by the appellant was dismissed by the Punjab & Haryana High Court, by the impugned judgment dated 26.10.1999. The appellant has challenged the said judgment in this appeal by special leave.

8. The contentions of the appellant in brief are :

(i) The plaintiff did not sign the agreement of sale nor sign the plaint, nor gave evidence. His attorney holder (Paramjit Singh) who entered into the agreement of sale on behalf of the plaintiff and who represented the plaintiff initially, was not examined. The second attorney holder (Jagtar Singh Sangha) examined as PW1 was not personally aware of the transaction and admitted that he was not aware of what transpired prior to the execution of the power of attorney in his favour on 1.3.1980. There was therefore no acceptable or valid evidence about the readiness and willingness of the plaintiff to perform the contract. The courts below ought to have dismissed the suit by drawing a presumption that the plaintiff's case was false and for

non-compliance with Section 16(c) of the Specific Relief Act, 1963 as the plaintiff did not enter the witness box.

(ii) The agreement of sale only provided for damages in the event of breach by either party. The agreement (Clause 11) provided that if the vendor failed to perform his part of the contract by executing the sale deed and getting it registered on receiving the balance consideration, he shall be liable to pay double the amount of earnest money received by her from the purchaser. The agreement did not provide for specific performance in the event of breach by the vendor. The clear intention of the parties was that in the event of breach by the vendor, the purchaser will be entitled to double the earnest money (that is refund of earnest money plus liquidated damages of Rs.10,000/-) and nothing more. Therefore, even if breach by the appellant - vendor was made out, the remedy of respondent - purchaser was only to get Rs.20,000/- and not for specific performance.

(iii) The evidence clearly established that plaintiff was not ready and willing to perform the contract and committed breach and as a consequence, the defendant rescinded the contract. The courts below ignored the relevant evidence in this behalf and drew invalid inferences from the evidence. The courts below therefore ought to have dismissed the suit.

Re : Contention (i)

9. Section 16(c) of the Specific Relief Act 1963 ('Act' for short) bars the specific performance of a contract in favour of a plaintiff 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 of the performance of which has been prevented or waived by the defendant). Explanation (ii) to section 16 provides that for purposes of clause (c) of section 16, the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction. Thus in a suit for specific performance, the plaintiff should not only plead and prove the terms of the agreement, but should also plead and prove his readiness and willingness to perform his obligations under the contract in terms of the contract. (See : N.P. Thirugnanam to R. Jagan Mohan Rao - AIR 1996 SC 116; Pushparani S.Sundaram v. Pauline Manomani James - 2002 (9) SCC 582; and Manjunath Anandappa v. Tammanasa - 2003 (10) SCC 390). In the first case, this Court held :

"The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be

proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of contract."

In *Vidhyadhar v. Manikrao* - 1999 (3) SCC 573, this Court reiterated the following well recognized legal position:

"Where a party to the suit does not appear in the witness-box and state his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct."

10. We may next refer to two decisions of this Court which considered the evidentiary value of the depositions of attorney holders. This Court in *Janki Vashdeo Bhojwani vs. Indusind Bank Ltd.* - 2005 (2) SCC 217, held as follows:

"Order III, Rules 1 and 2 CPC, empowers the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in Order III, Rules 1 and 2 CPC, confines only in respect of "acts" done by the power of attorney holder in exercise of power granted by the instrument. The term "acts" would not include deposing in place and instead of the principal. In other words, if the power of attorney holder has rendered some "acts" in pursuance of power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.

...In the case of *Shambhu Dutt Shastri v. State of Rajasthan*, 1986 2 WLN 713 (Raj) it was held that a general power of attorney holder can appear, plead and act on behalf of the party but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in witness box on behalf of himself. To appear in a witness box is altogether a different act. A general power of attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff.

The aforesaid judgment was quoted with the approval in the case of *Ram Prasad v. Hari Narain* - AIR 1998 Raj 185. It was held that the word "acts" used in Rule 2 of Order III of the CPC does not include the act of power of attorney holder to appear as a witness on behalf of a party. Power of attorney holder of a party can appear only as a witness in his personal capacity and whatever knowledge he has about the case he can state on oath but he cannot appear as a witness on behalf of the party in the

capacity of that party. If the plaintiff is unable to appear in the court, a commission for recording his evidence may be issued under the relevant provisions of the CPC.

We hold that the view taken by the Rajasthan High Court in the case of Shambhu Dutt Shastri followed and reiterated in the case of Ramprasad is the correct view."

In *Shankar Finance & Investments vs. State of AP* - (2008) 8 SCC 536, this Court explained in what circumstances, the evidence of an attorney holder would be relevant, while dealing with a complaint under section 138 of the Negotiable Instruments Act, 1881 signed by the attorney holder of the payee. This Court held :

"A power of attorney holder of the complainant, who does not have personal knowledge, cannot be examined. But where the attorney holder of the complainant is in charge of the business of the complainant and the attorney holder alone is personally aware of the transactions, and the complaint is signed by the attorney holder on behalf of the complainant payee, there is no reason why the attorney holder cannot be examined as the complainant.....In regard to business transactions of companies, partnerships or proprietary concerns, many a time the authorized agent or attorney holder may be the only person having personal knowledge of the particular transaction; and if the authorized agent or attorney-holder has signed the complaint, it will be absurd to say that he should not be examined under section 200 of the Code, and only the Secretary of the company or the partner of the firm or the proprietor of a concern, who did not have personal knowledge of the transaction, should be examined."

11. To succeed in a suit for specific performance, the plaintiff has to prove: (a) that a valid agreement of sale was entered by the defendant in his favour and the terms thereof; (b) that the defendant committed breach of the contract; and (c) that he was always ready and willing to perform his part of the obligations in terms of the contract. If a plaintiff has to prove that he was always ready and willing to perform his part of the contract, that is, to perform his obligations in terms of the contract, necessarily he should step into the witness box and give evidence that he has all along been ready and willing to perform his part of the contract and subject himself to cross examination on that issue. A plaintiff cannot obviously examine in his place, his attorney holder who did not have personal knowledge either of the transaction or of his readiness and willingness. Readiness and willingness refer to the state of mind and conduct of the purchaser, as also his capacity and preparedness on the other. One without the other is not sufficient. Therefore a third party who has no personal knowledge cannot give evidence about such readiness and willingness, even if he is an attorney holder of the person concerned.

12. We may now summarise for convenience, the position as to who should give evidence in regard to matters involving personal knowledge:

(a) An attorney holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the

validity of the power of attorney and the filing of the suit.

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

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

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

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

(f) Where different attorney holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney holders will have to be examined.

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

13. In this case, the matter has been handled by different persons at different points of time on behalf of the plaintiff - (a) the negotiations and execution of agreement on 20.10.1978 were handled

by plaintiff's attorney holder Paramjit Singh; (b) on 7.6.1979, the plaintiff was personally present and dealt with the matter himself; and (c) from 1.3.1980, the matter was dealt with by plaintiff's new attorney holder Jagtar Singh Sangha. The plaintiff neither signed the agreement of sale nor signed the plaint nor gave evidence, in particular, about his readiness and willingness. The agreement of sale was executed by plaintiff's attorney holder Paramjit Singh who was not examined. The plaint was signed by plaintiff's attorney holder Jagtar Singh Sangha (PW1) in whose favour plaintiff had executed the power of attorney on 1.3.1980 and who had no personal knowledge of the transaction. The said attorney holder (PW1) was not aware of the execution of the agreement, nor what happened till the last date fixed for performance had elapsed, nor what transpired on 7.6.1979. The said attorney holder (PW1) clearly stated in his evidence that he was not aware of anything that transpired prior to 1.3.1980 when the power of attorney was executed in his favour. Nothing of relevance transpired after 1.3.1980 except the issue of the suit notice dated 5.3.1980. He did not know whether defendant committed breach nor did he know about the readiness and willingness of the plaintiff. He admitted in his evidence :

"I do not know the detailed terms and conditions of the transaction.... I do not know the facts of this transaction before my appointment in the year 1980..... I do not know whether plaintiff wrote any letter that he is ready to purchase this plot.... I do not know if anybody else also did any bargain in the transaction or not. I do not know who has been in correspondence on behalf of the plaintiff till June 1979".

The evidence of PW 1 is therefore of no assistance in a suit for specific performance except to prove that he was authorized by the plaintiff to file a suit for specific performance.

14. The plaintiff who ought to have given evidence never appeared and gave evidence. As his attorney holder PW1 had no knowledge of the transaction, the plaintiff solely relied on the evidence of the property dealer Balraj Singh (PW2) to prove the execution of the agreement, the terms of the agreement, his readiness and willingness to perform the agreement and the alleged breach by the defendant. But Balraj Singh cannot become a substitute for the plaintiff to give evidence about the finances or intentions or the readiness and willingness of plaintiff which were within the personal knowledge of the plaintiff. Balraj Singh was a property dealer engaged by plaintiff and supporting the plaintiff. He was not an attorney holder acting on behalf of plaintiff. Therefore, neither the evidence of Jagtar Singh (PW 1) nor the evidence of Balraj Singh (PW2) can be relied upon to prove that plaintiff was always ready and willing to perform his obligations under the contract, in terms of the contract. Therefore, it has to be held that though there were necessary averments in the plaint about the readiness and willingness of the plaintiff, and though PW1 and PW2 gave evidence about his readiness and willingness, the suit has to fail for failure to comply with section 16(c) of the Specific Relief Act, as there was no acceptable or valid evidence of such readiness and willingness of plaintiff to perform his part of the obligations in terms of the contract.

15. The respondent relied upon the following observation of this Court in P.D'Souza v. Shondrilo Naidu - 2004 (6) SCC 649 :

"It is indisputable that in a suit for specific performance of contract the plaintiff must establish his readiness and willingness to perform his part of the contract. The readiness and willingness on the part of the plaintiff to perform his part of contract would also depend upon the question as to whether the defendant did everything which was required of him to be done in terms of the agreement for sale. The question as to whether the onus was discharged by the plaintiff or not will depend upon the facts and circumstances of each case. No straitjacket formula can be laid down in this behalf."

The respondent next relied upon the following observations of this Court in *Aniglase Yohannan v. Ramlatha* [2005 (7) SCC 534] :

"12. The basic principle behind Section 16(c) read with Explanation (ii) is that any person seeking benefit of the *grant relief on the basis of the conduct of the person seeking relief. If the pleadings manifest that the conduct of the plaintiff entitles him to get the relief on perusal of the plaint he should not be denied the relief."

This Court further held that the averments relating to readiness and willingness are not a mathematical formula which should be expressed in specific words and if the averments in the plaint as a whole, do clearly indicate the readiness and willingness of the plaintiff to fulfil his part of the obligations under the contract, the fact that the wording was different, will not militate against the readiness and willingness of the plaintiff. The above observations cannot be construed as requiring only a pleading in regard to readiness and willingness and not 'proof' relating to readiness and willingness. In fact, in the very next para, this Court clarified that Section 16(c) of the Act mandates the plaintiff to aver in the plaint and establish the fact by evidence aliunde that he has always been ready and willing to perform his part of the contract. Therefore, the decision merely reiterates the need for both pleadings and proof in regard to readiness and willingness of the plaintiff.

16. The said decisions do no assist the respondent. The respondent also relied upon some decisions which observe that increase in value of the property is not a relevant consideration to deny specific performance. On the facts and circumstances that issue does not arise for consideration in this case.

Re : Contention (ii)

17. Section 10 of the Act deals with cases in which specific performance of contract is enforceable. It provides that except as otherwise provided in that Chapter (dealing with Specific Performance of Contracts) of the Act, specific performance of any contract may, in the discretion of the court, be enforced when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief. Explanation (i) to section 10 provides that unless and until the contrary is proved, the court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money. Sub-sections (2) and (5) of section 21 of the Act provide that in a suit for specific performance, if the court decides that specific performance ought not to be granted, but that there is a contract between the parties which

has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award him such compensation accordingly; and that no compensation shall be awarded under this section unless the plaintiff has claimed such compensation in his plaint. Section 23 of the Act provides that a contract otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach and the party in default is willing to pay the same, if the court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for the purpose of securing performance of the contract and not for the purpose of giving to the party in default an option of paying money in lieu of specific performance.

18. It is thus clear that for a plaintiff to seek specific performance of a contract of sale relating to immovable property, and for a court to grant such specific performance, it is not necessary that the contract should contain a specific provision that in the event of breach, the aggrieved party will be entitled to specific performance. The Act makes it clear that if the legal requirements for seeking specific enforcement of a contract are made out, specific performance could be enforced as provided in the Act even in the absence of a specific term for specific performance in the contract. It is evident from section 23 of the Act that even where the agreement of sale contains only a provision for payment of damages or liquidated damages in case of breach and does not contain any provision for specific performance, the party in breach cannot contend that in view of specific provision for payment of damages, and in the absence of a provision for specific performance, the court cannot grant specific performance. But where the provision naming an amount to be paid in case of breach is intended to give to the party in default an option to pay money in lieu of specific performance, then specific performance may not be permissible. We may attempt to clarify the position by the following illustrations (not exhaustive):

(A). The agreement of sale provides that in the event of breach by the vendor, the purchaser shall be entitled to an amount equivalent to the earnest money as damages. The agreement is silent as to specific performance. In such a case, the agreement indicates that the sum was named only for the purpose of securing performance of the contract. Even if there is no provision in the contract for specific performance, the court can direct specific performance by the vendor, if breach is established. But the court has the option, as per Section 21 of the Act, to award damages, if it comes to the conclusion that it is not a fit case for granting specific performance.

(B). The agreement provides that in the event of the vendor failing to execute a sale deed, the purchaser will not be entitled for specific performance but will only be entitled for return of the earnest money and/or payment of a sum named as liquidated damages. As the intention of the parties to bar specific performance of the contract and provide only for damages in the event of breach, is clearly expressed, the court may not grant specific performance, but can award liquidated damages and refund of earnest money.

(C). The agreement of sale provides that in the event of breach by either party the purchaser will be entitled to specific performance, but the party in breach will have the option, instead of performing the contract, to pay a named amount as liquidated damages to the aggrieved party and on such payment, the aggrieved party shall not be entitled to specific performance.

In such a case, the purchaser will not be entitled to specific performance, as the terms of the contract give the party in default an option of paying money in lieu of specific performance.

19. In this case, clauses 11 and 12 of the agreement deal with consequences of breach. They are extracted below :

"11. That in case the seller fails to perform his part of contract of sale according to the terms and conditions agreed upon in this agreement to sell in matter of execution of the sale deed and its registration, on the receipt of the balance sale price, he shall be liable to pay double the amount of the earnest money received by her from the purchaser.

12. That in case the purchaser fails to get the transaction of the sale completed by means of execution and registration of sale deed according to the terms of this agreement for sale, he shall forfeit his earnest money of Rs.10,000/- advanced by the purchaser to the said seller."

The agreement does not specifically provide for specific performance. Nor does it bar specific performance. It provides for payment of damages in the event of breach by either party. The provision for damages in the agreement is not intended to provide the vendor an option of paying money in lieu of specific performance. Therefore, we are of the view that plaintiff will be entitled to seek specific performance (even in the absence of a specific provision therefor) subject to his proving breach by the defendant and that he was ready and willing to perform his obligation under the contract, in terms of the contract.

Re : Contention (iii)

20. The time fixed for the performance in the agreement was 20.12.1978. But time was obviously not considered by the parties, to be of essence of the contract. The correspondence clearly shows that defendant's attorney holder Lt.Col. Kartar Singh, was willing to perform the contract on 7.6.1979, nearly six months after the last date stipulated in the agreement. The evidence shows that the defendant had entrusted the work of securing the necessary permission/NOC/clearance for the sale to the property dealer to Balraj Singh who was also acting on behalf of the plaintiff. Balraj Singh sent a telegram dated 2.6.1979 to Kartar Singh who was staying at Rourkela to come over to Chandigarh on 7.6.1979 to execute the sale deed. The wording of the telegram is "Reach Chandigarh as Mr. Sangha is here. Sale deed registration is final. Date 7th June. No extension." The evidence of DW1 (Kartar Singh) and the evidence of Balraj Singh (PW2) show that Kartar Singh accordingly visited Chandigarh on 7.6.1979 and met the plaintiff in the office of Balraj Singh on 7.6.1979. Kartar Singh's

evidence shows that he stated that he was ready to receive the balance of the sale price and execute the sale deed and had in fact come all the way from Rourkela to execute the sale deed, and that plaintiff told him that the entire amount was not available. Kartar Singh (DW1) also stated that after the meeting, plaintiff went away stating that he would try to arrange for money; that he (Kartar Singh) went back to the office of Balraj Singh at about 5.30 PM; that at that time, Balraj Singh showed the writing of Sub-Registrar (about plaintiff's presence and Kartar Singh's absence); that he (Kartar Singh) got irritated by the conduct of plaintiff and told Balraj Singh to tell plaintiff that plaintiff was trying to be too clever, and he may treat the transaction as cancelled. Kartar Singh categorically stated :

"He (plaintiff) did not give any proof of money with him. He did not buy the stamp throughout the day and he did not show any inclination to buy. I was fully ready to register the sale deed on 7.6.79."

There is no evidence to rebut the said evidence of Kartar Singh as plaintiff was not examined.

21. Balraj Singh (PW2) who was examined as PW2 attempted to give some evidence about the readiness and willingness of the plaintiff. But the evidence of Balraj Singh can not be a substitute for the evidence of plaintiff regarding plaintiff's readiness and willingness. Further the correspondence between Balraj Singh and Kartar Singh demonstrates that the version and stand of Kartar Singh (DW1) appears to be more probable and correct. After Kartar Singh returned from Chandigarh after the visit on 7.6.1979, by letter dated 29.6.1979 Balraj Singh informed Kartar Singh that the purchaser was now ready to get the sale deed executed in July 1979. Immediately, Kartar Singh sent a reply dated 2.7.1979 referring to his visit to Chandigarh on 7.6.1979 and about plaintiff informing him that full amount of sale price was not available with him for proceeding with the sale, which showed that plaintiff was not ready and willing to complete the sale. Balraj Singh sent a reply dated 7.7.1979 which does not deny the version given by Kartar Singh in his letter dated 2.7.1979, (as to what happened on 7.6.1979) but concentrated on trying to persuade Kartar Singh to come again and execute the sale deed by receiving the higher price of Rs.1,60,000/- even without delivering possession. The said letter dated 7.7.1979 of Balraj Singh also admits that marking the presence of plaintiff in the office of Sub- Registrar on 7.6.1979 was only to save the position of plaintiff. The said letter also states: "Now he is ready to pay you the balance amount, considering Rs.160,000/- as the sale price". The correspondence therefore clearly established that plaintiff was not ready and willing to get the sale deed executed within the time prescribed or even as on 7.6.1979 which was the last day of the extended period. The evidence also demonstrates that plaintiff was not in a position to perform the contract as Balraj Singh admits in his evidence that the purchaser had to purchase the stamp paper and that on 7.6.1979, the stamp paper was not purchased; and that the plaintiff had in his bank account Rs.114000 but that amount was not drawn from the bank. Balraj Singh and PW1 have also referred to the assets owned by plaintiff. Such evidence is of no assistance in the absence of evidence as to availability of money for purchase and about the readiness and willingness of plaintiff to perform the contract.

22. There is also something doubtful about the following version given by Balraj Singh (PW2) in his evidence as to what happened at the Sub- Registrar's office on 7.6.1979 :

"Then we i.e. myself, Hartar Singh plaintiff, Paramjit Singh, all went to the office of the Sub-Registrar. The plaintiff signed the application dated 7.6.1979 in my presence and likewise Paramjit Singh also signed the same and we then submitted the same which is Ex.P21 to the Sub-Registrar, Chandigarh. He then called Kartar Singh, through his Peon. Kartar Singh did not appear before the Sub.Registrar, Chandigarh, who then made an endorsement Ex.22 on the said application in my presence (objected to).

In the plaint, the incident is described thus :

"Ultimately, the general attorney of the Defendant namely Kartar Singh reached Chandigarh on 7.6.1979 and the plaintiff was also there in Chandigarh on the said date. The said Kartar Singh who hold the general attorney for the Defendant had disclosed that he had come on the said date for execution of the sale deed, but neither Kartar Singh nor the Defendant came to the office of Sub-Registrar, Chandigarh to execute the sale deed in favour of the plaintiff in respect of the above said plot, though the plaintiff remained present in the office of Sub-Registrar, Chandigarh on the said day and got himself marked present by moving an application."

But Exs.21 and 22 (the letter dated 7.6.1979 to the Sub-Registrar containing the Sub-Registrar's endorsement) reads thus :

"To, The Sub-Registrar, Chandigarh.

Sir, We, Hartar Singh Sangha, S/o Shri Bikramjit Singh Sangha and Ms. Avtar Kaur D/o S. Charan Singh, 58, Sector-26, Madhya Marg, Chandigarh had entered into agreement with Mrs. Man Kaur, wife of Shri Jartar Singh through her general attorney and husband Major Kartar Singh for purchase of her annexe No.509, Sector-18B, Chandigarh. Today is the last date for the registration of said annexe and we (Purchasers) are ready with the payment to pay the balance full and final amount relating to the above mentioned property before the Sub-Registration, but the seller herself or through her general attorney have not turned up so far. We request you to mark out presence in your court.

Thanking you, Yours faithfully, (Hartar Singh Sangha) (Avtar Kaur) through attorney Paramjit Singh Dated : 7.6.1979 The applicant Hartar Singh Sangha is present. Respondent Col. Kartar Singh name was called out, but was not found present.

(sd/-) Sub-Registrar"

This letter describes plaintiff and Ms. Avtar Kaur, daughter of S. Charan Singh as purchasers and states that plaintiff and Ms. Avtar Singh entered into agreement with defendant for purchase of the property (Annexe No.509, Sector-18B, Chandigarh). The letter is said to have been signed by plaintiff and Avtar Singh through Paramjit Singh (Attorney Holder). There is absolutely no

reference or explanation either in the pleading or evidence as to who is Ms. Avtar Kaur, and how she became a purchaser under the agreement of sale. There is also no explanation as to why Avtar Kaur and Paramjit Singh, if they were present on 7.6.1979, were not examined. The said letter is not marked through either any of the sender or the receiver of the letter and has no evidentiary value.

23. The learned counsel for the respondent contended that in terms of the agreement, the defendant had to furnish an NOC from Chandigarh Administration, as also ULC clearance and income tax clearance required for the sale and there was nothing to show that she had obtained them, and therefore the question of plaintiff proving his readiness and willingness to perform his obligations did not arise. This contention has no merit. There are two distinct issues. The first issue is the breach by the defendant - vendor which gives a cause of action to the plaintiff to file a suit for specific performance. The second issue relates to the personal bar to enforcement of a specific performance by persons enumerated in section 16 of the Act. A person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him (other than the terms the performance of which has been prevented or waived by the defendant) is barred from claiming specific performance. Therefore, even assuming that the defendant had committed breach, if the plaintiff fails to aver in the plaint or prove that he was always ready and willing to perform the essential terms of contract which are required to be performed by him (other than the terms the performance of which has been prevented or waived by the plaintiff), there is a bar to specific performance in his favour. Therefore, the assumption of the respondent that readiness and willingness on the part of plaintiff is something which need not be proved, if the plaintiff is able to establish that defendant refused to execute the sale deed and thereby committed breach, is not correct. Let us give an example. Take a case where there is a contract for sale for a consideration of Rs.10 lakhs and earnest money of Rs.1 lakh was paid and the vendor wrongly refuses to execute the sale deed unless the purchaser is ready to pay Rs.15 lakhs. In such a case there is a clear breach by defendant. But in that case, if plaintiff did not have the balance Rs.9 lakhs (and the money required for stamp duty and registration) or the capacity to arrange and pay such money, when the contract had to be performed, the plaintiff will not be entitled to specific performance, even if he proves breach by defendant, as he was not 'ready and willing' to perform his obligations.

24. In this case, the evidence clearly showed that defendant's attorney holder Kartar Singh had entrusted the work of securing the clearances to the property dealer Balraj Singh, who was acting on behalf of plaintiff. This was within the knowledge of Paramjit Singh, who was the attorney holder of plaintiff at the relevant point of time. Balraj Singh also admitted in his evidence that he was to get the NOC and ULC clearance. Balraj Singh sent a telegram to Kartar Singh at the instance of plaintiff, asking him to come to Chandigarh on 7.6.1979 and execute the sale deed. Therefore, Balraj Singh had either secured the certificates necessary for the sale or had deliberately called Kartar Singh to come over to Chandigarh, even though the plaintiff was not ready and the clearances had not been secured, to create evidence that plaintiff was ready. In neither case, the defendant could be faulted. Be that as it may.

25. None of the courts below have referred to the relevant evidence or the significance of plaintiff not tendering evidence. They have merely gone by the evidence of Balraj Singh to hold that the

plaintiff was ready and willing and defendant committed a breach. The material on record shows that the respondent-plaintiff committed breach. Therefore, the earnest money stood forfeited and respondent is not entitled for refund of the earnest money. Conclusion

26. Having regard to our findings on contentions (i) and (iii), the appellant is bound to succeed in these appeals. We therefore allow these appeals, set aside the judgments of the courts below and dismiss the suit for specific performance.

.....J (R. V. RAVEENDRAN)J (AFTAB ALAM) NEW DELHI;

OCTOBER 5, 2010.