

A

C. HARIDASAN

v.

ANAPPATH PARAKKATTU VASUDEVA KURUP & OTHERS

(Civil appeal no. 4072 of 2022)

B

JANUARY 13, 2023

[M. R. SHAH AND B. V. NAGARATHNA, JJ.]

- Specific Relief Act, 1963 : ss. 10, 16(c), 20 – Discretion as to decreeing specific performance – On facts execution of the agreement to sell land between the parties and receipt of consideration by the appellant-buyer – Balance amount to be paid within six months provided the respondent-seller made available the document of title and purchase certificate after measuring the property – Thereafter notice served by the appellant to the respondent to execute the sale deed – Refusal of the respondent to execute the sale deed and cancelled the agreement – Suit for specific performance of the agreement to sell by the appellant – Trial court allowed the suit and also directed the appellant to pay 25% more amount, over and above the agreed consideration – High Court while considering s. 20, set aside the decree for specific performance and directed the respondent to pay the consideration amount to the appellant – On appeal held: In view of difference of opinion, matter referred to the larger bench – Reference to larger Bench.*

Referring *the matter to larger Bench, the Court

HELD :

F

PER M. R. SHAH, J.

G

1.1. It was never the case on behalf of the defendants in the written statement and/or even before the trial court that the agreement to sell was inequitable and/or was a forced agreement to sell. Even the trial court also did not frame the issue, “whether agreement to sell was a forced agreement to sell/contract or not”.

Ed. Note : Hon'ble Mr. Justice M.R. Shah and Hon'ble Mrs. Justice B.V. Nagarathna pronounced separate reportable judgments of the Bench comprising Their Lordships. In view of difference of opinion in the matter it was directed to place the papers before Hon'ble the Chief Justice of India for appropriate orders for constituting a larger Bench

H

to decide the controversy.

On appreciation of entire evidence on record, the trial court after recording the findings on the execution of the agreement to sell by the defendants and receipt of part sale consideration and that the plaintiff was always ready and willing to perform his part of the contract, decreed the suit for specific performance. The High Court, as such, has not commented upon and/or set aside any of the findings recorded by the trial court, recorded while passing a decree for specific performance. Straightway, the High Court considered Section 20 of the Specific Relief Act and observed and held that by enhancing the amount of sale consideration, the trial court has wrongly exercised the discretion in favour of the plaintiff. The High Court commented upon the order passed by the trial court enhancing the amount of sale consideration and directing the plaintiff to pay more amount than the sale consideration mentioned in the agreement to sell. [Para 6][257-A-E]

1.2 The trial court directed the plaintiff to pay some more amount than the amount mentioned in the agreement to sell, at the most, the plaintiff can be said to be aggrieved. Still, the High Court considered such an order passed by the trial court against the defendants. As such, the trial court was absolutely justified in compensating the defendants by paying some more amount while passing a decree for specific performance. Therefore, in the facts and circumstances of the case and more particularly when the trial court exercised the discretion in favour of the plaintiff after having observed and recorded the findings on the execution of the agreement to sell by the defendants and that the part sale consideration was paid by the plaintiff which was accepted by the defendants and thereafter the finding that the plaintiff was always ready and willing to perform his part of the contract, the trial court was absolutely justified in passing the decree for specific performance. The High Court has erred in interfering with the judgment and decree passed by the trial court, without setting aside the findings recorded by the trial court recorded while passing the decree for specific performance. The impugned judgment and order passed by the High Court is unsustainable, both, on law as well as on facts, and is quashed and set aside and the judgment and decree passed by the trial court for specific performance of agreement to sell is restored. However, to do

A

B

C

D

E

F

G

H

- A complete justice and in exercise of powers under Article 142 of the Constitution of India, it is directed that over and above the sale consideration mentioned in the agreement to sell and the amount already deposited by the plaintiff, the plaintiff to pay a further sum of Rs. 10,00,000/- (Rupees Ten Lakhs only) to the original defendants, to be paid within the stipulated period. The amount which might have been deposited by the original defendants, deposited pursuant to the impugned judgment and order passed by the High Court, i.e., Rs. 3,10,000/- be also returned/paid to the original defendants. [Para 7, 8][257-F-H; 258-A-E]
- B
- C *Pratap Lakshman Muchandi v. Shamlal Uddavadas Wadhwa, (2008) 12 SCC 67 : [2008] 1 SCR 854 – relied on.*

PER B. V. NAGARATHNA, J. (Dissenting) :

- D 1.1 The High Court relied on Section 20 of the Specific Relief Act, prior to the same being substituted by way of Act No. 18 of 2018, to deny the relief of specific performance to the plaintiff. Section 20 of the Act as it stood prior to the Amendment Act of 2018 provided that the jurisdiction to decree specific performance is discretionary. It said that the Court is not bound to grant such relief merely because it is lawful to do so. Such a discretion, however, was not to be exercised arbitrarily, but ought to have been based on sound and reasonable judicial principles. Even in the absence of discretionary power under Section 20 to deny the relief of specific performance, the plaintiff was not entitled to claim such relief as a matter of right. The position of law, even following the amendment of 2018 remains that the provisions of Section 16 of the Act have to be mandatorily complied with by the party seeking the relief of specific performance. The relief of specific performance cannot be granted in favour of a party who has not performed his obligations under the contract. It is therefore necessary to ascertain whether, the plaintiff had complied with the statutory prerequisites under Section 16 (c), before claiming the relief of specific performance. [Para 12,18][268-B-C; 270-H; 271-A-B]
- E
- F
- G
- H 1.2 Clause (c) of Section 16 of the Act, which is relevant in the instant case, though amended w.e.f. 01st October, 2018 clearly states that unless the plaintiff establishes his readiness and

willingness to perform his part of the contract, he would not be entitled to a decree of specific performance. Prior to the amendment, the expression “who fails to aver and prove” was on the statute book and its substitution by the words “who fails to prove” does not bring about any drastic change to the object and intent of the clause. This is because failing to prove readiness and willingness to perform the essential terms of the contract would first require averments to that effect to be made in the plaint by the plaintiff. The absence of such averments regarding readiness and willingness to perform the essential terms of the contract by the plaintiff would not permit him to let in any evidence on that aspect. It is a settled principle of law that no evidence can be permitted to be let in in the absence of averments in the plaint / pleadings. [Para 19][271-G-H; 272-A-C]

1.3 Notwithstanding the amendment to Section 16 of the Act whereby the expression “who fails to aver and prove” has been substituted with the phrase “who fails to prove,” the law remains that no evidence can be let in on a plea that was never put forward in the plaint/pleadings. But, it is necessary to sound a caveat. Even the absence of the words “ready and willing to perform the contract” in the plaint would now not have an adverse impact on the plaintiff’s case, so long as plaintiff’s readiness and willingness to perform the essential terms of the contract could be gathered on a holistic reading of the plaint. In fact, even in relation to the earlier scheme of Section 16 of the Act which required a plaintiff seeking the remedy of specific performance to ‘aver and prove’ that he was ready and willing to perform his obligations under an agreement, it was sufficient if the averments in substance indicate continuous readiness and willingness on the part of the person suing, to perform his part of the contract language in Section 16 (c), as it stood prior to the Amendment Act of 2018, did not require any specific phraseology to be followed in relation to the averments as to readiness and willingness. That the compliance of requirements of readiness and willingness have to be in spirit and substance and not in letter and form. That is why the deletion of the words “who fails to aver” in Section 16 (c) of the Act does bring about any real change in the position of law as it stood prior to the amendment. [Para 20, 21][272-E-H; 273-A-B]

A

B

C

D

E

F

G

H

- A **1.4 Readiness and willingness cannot be considered in a straitjacket formula; it has to be inferred on a consideration of the entire facts and circumstances of each case and the intention and conduct of the parties concerned. Even if a party to the contract is ready and has the requisite funds he may not be willing to perform his part of the contract and vice versa. Thus, both readiness as well as willingness have to be established by the plaintiff on whom the burden is cast in a suit for specific performance of an agreement. [Para 22, 23][273-C-D; 274-B]**
- B **1.5 Nothing was brought on record by the plaintiff to demonstrate that positive steps were taken by him in pursuance of the agreement of sale of Kanam and Kuzhikoor rights. It is trite that the relief of specific performance cannot be granted in favour of a party who has not performed his obligations under the contract. The only exception to such rule is that a party is not required to perform those obligations, as are prevented or waived by the other party to the contract. [Para 26][275-G-H]**
- C **1.6 It is an admitted fact that the plaintiff had paid an amount, which constituted merely 4% of the consideration. The trial court itself recorded findings to the effect that neither party had initiated timely steps to perform their respective obligations under the contract. Although the defendants did not make available the title deeds of the schedule property to the plaintiff, it could not be said that the conduct of the defendants had prevented the plaintiff from tendering the balance sale consideration, within the stipulated date, or at any time before filing the suit for specific performance as the whole object of the intended sale was to garner funds for discharging a debt which was ultimately done by the defendants by selling family jewellery. Further, there was no delay on the part of the defendant in acting in pursuance of the agreement. The fact that the purchase certificate was granted by the concerned authority only on 31st May, 2007, was beyond the control of the defendants and such delay could not be attributed to the defendants. The defendants had duly initiated the process of obtaining a purchase certificate soon after entering into the agreement. [Para 27, 28][276-A-E]**
- H **1.7 While the counsel for the appellant-plaintiff has contended that since the transaction in question involved the**

transfer of rights in immovable property, a prudent purchaser would have to satisfy himself as to the genuineness and validity of the documents of title, and therefore, owing to the nonavailability of documents of title, the plaintiff was unable to proceed with his obligations, no explanation has been provided as to why ancillary steps such as measurement of the property was not proceeded with. Delay in securing relevant documents from the concerned authorities could not absolve the plaintiff of his obligations under the agreement of sale of *Kanam* and *Kuzhikoor* rights. Further, this aspect of the matter is to be appreciated in light of the fact that there is nothing on record which would demonstrate any step taken by the plaintiff to pursue the agreement, until, 2nd November, 2006, on which date, the legal notice was served on the defendants calling upon them to execute the sale deed in respect of the *Kanam* and *Kuzhikoor* rights over the suit property. No explanation has been provided as to why the legal notice was not served earlier, particularly when the six-month period stipulated under the agreement had expired on 7th February, 2006. Such conduct of the plaintiff is certainly not reflective of willingness, in terms of Section 16(c) of the Act. Further, the Court has to be mindful of circumstances which compelled the defendants to enter into the agreement of sale of *Kanam* and *Kuzhikoor* rights dated 7th February, 2006. The time limit stipulated in the agreement is of significance in the instant case when this aspect is viewed in light of the fact that the defendants were debt-ridden and sought to sell their *Kanam* and *Kuzhikoor* rights over suit property with the sole intention of clearing off such debts which were incurred to support the cardiac treatment of defendant no. 1. It was therefore necessary that the plaintiff paid a significant portion of the consideration, if not the entire sale consideration, within the period of six months as stipulated in the agreement. But the plaintiff refused to do so even on being repeatedly requested by the defendants. [Para 29, 30][276-E-H; 277-A-C]

1.8 The period of six months which was stipulated in the agreement of sale of *Kanam* and *Kuzhikoor* rights, in the present case, has to be accorded its due significance while deciding the suit for specific performance. Having regard to the urgency of the financial need of the defendants, which need had prompted

A

B

C

D

E

F

G

H

- A them to sell their *Kanam* and *Kuzhikoor* rights over the suit property, it must be held that time stipulated in the agreement was the essence of the contract. The plaintiff in the present case served a legal notice only on 02nd November, 2006 while the six month period stipulated in the agreement had elapsed on 07th February, 2006. There is no explanation as to what occasioned the delay in serving the legal notice on the defendants and why such steps were not adopted soon after the expiry of the six month period stipulated in the agreement of sale of *Kanam* and *Kuzhikoor* rights. Therefore, it is held that the plaintiff, having paid no more than 4% of the sale consideration, and having not done even as much as getting the property measured within the period of six months stipulated under the agreement, cannot, at a belated date, claim specific performance of the agreement dated 7th August, 2005 to the disadvantage and hardship of the defendants. [Para 32-34][279-B-F]
- D 1.9 The Courts may grant additional amount of consideration, a relief to balance equities, such a decree would be warranted only in cases where the plaintiff satisfactorily establishes compliance with Section 16 of the Act. That the measure of enhancement of compensation may be awarded at the discretion of the Court only if insufficiency of compensation is the only impediment to ensuring equity and preventing undue gain to one party. In the absence of compliance with the elementary requirements of Section 16 of the Act, enhancement of compensation cannot be employed as a device to allow specific performance in cases where the plaintiff has not performed his obligations under the contract as in the instant case. [Para 35][280-A-C]
- G 1.10 The appeal fails on the sole ground that the conduct of the plaintiff was not reflective of his readiness as well as willingness on his part to pursue the agreement of sale of *Kanam* and *Kuzhikoor* rights, in terms of Section 16(c) of the Act. [Para 36][280-C-D]
- H 1.11 The impugned judgment of the High Court whereby the High Court set-aside the judgment and decree passed by the trial court, (by which the suit for specific performance of an agreement of sale of *Kanam* and *Kuzhikoor* rights, filed by the plaintiff was decreed), is affirmed. [Para 38][280-H; 281-A]

Pratap Lakshman Muchandi and Ors. vs. Shamlal Uddavadas Wadhwa and Ors., (2008) 1 SCC 67; Shenbagam vs. K.K. Rathinavel, 2022 SCC OnLine SC 71; Mehboob-Ur-Rehman (Dead) through LRs vs. Ahsanul Ghani (2019) 19 SCC 415; Sughar Singh vs. Hari Singh (Dead) through LRs and Ors., A.I.R. 2021 SC 5581; B. Santoshamma vs. D. Sarala and Anr., (2020) 19 SCC 80; Bachhaj Nahar vs. Nilima Mandal and Ors., (2008) 17 SCC 491; Motilal Jain vs. Ramdasi Devi, A.I.R. 2000 SC 2408 : [2000] 1 Suppl. SCR 615; Syed Dastagir vs. T.R. Gopalakrishna Shetty, (1999) 6 SCC 337 : [1999] 1 Suppl. SCR 351; His Holiness Acharya Swami Ganesh Dassji vs. Sita Ram Thapar, (1996) 4 SCC 526 : [1996] 2 Suppl. SCR 111; J.P. Builders vs. A. Ramdas Rao, (2011) 1 SCC 429 : [2010] 15 SCR 538; Saradamani Kandappan vs. S. Rajalakshmi, (2011) 12 SCC 18 : [2011] 8 SCR 874; K.S. Vidyanadam vs. Vairavan (1997) 3 SCC 1 : [1997] 1 SCR 993 – referred to.

Case Law Reference

In the Judgment of M. R. SHAH, J.

[2008] 1 SCR 854	relied on	Para 7	E
------------------	-----------	--------	---

In the Judgment of B. V. NAGARATHNA, J.

(2008) 1 SCC 67	referred to	Para 9.4, 35
-----------------	-------------	--------------

(2019) 19 SCC 415	referred to	Para 15
-------------------	-------------	---------

A.I.R. 2021 SC 5581	referred to	Para 16
---------------------	-------------	---------

(2020) 19 SCC 80	referred to	Para 17
------------------	-------------	---------

(2008) 17 SCC 491	referred to	Para 19
-------------------	-------------	---------

[2000] 1 Suppl. SCR 615	referred to	Para 21
-------------------------	-------------	---------

[1999] 1 Suppl. SCR 351	referred to	Para 21
-------------------------	-------------	---------

[1996] 2 Suppl. SCR 111	referred to	Para 23
-------------------------	-------------	---------

[2010] 15 SCR 538	referred to	Para 24
-------------------	-------------	---------

[2011] 8 SCR 874	referred to	Para 31
------------------	-------------	---------

[1997] 1 SCR 993	referred to	Para 32
------------------	-------------	---------

G

H

- A CIVIL APPELLATE JURISDICTION : Civil Appeal No.4072
of 2022.

From the Judgment and Order dated 03.11.2021 of the High Court of Kerala at Ernakulam in RFA No.63 of 2009.

- B M. K. S. Menon, Ms. Usha Nandini V., Biju P. Raman, M. S. Vishnu Sankar, Ravi, Advs. for the Appellant.

Raghenth Basant, Ms. Rashmi Nandakumar, Ms. Roopali Lakhotia, Shankar Narayanan, Advs. for the Respondents.

The Judgments of the Court were delivered by

- C **M. R. SHAH, J.**

1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 03.11.2021 passed by the High Court of Kerala at Ernakulam in Regular First Appeal No. 63 of 2009, by which the High Court has allowed the said appeal preferred by the original defendants

- D and has set aside the judgment and decree dated 18.08.2008 passed by the learned trial Court in Original Suit No. 205/2006, decreeing the suit for specific performance, the original plaintiff has preferred the present appeal.

2. That the plaintiff and the defendants entered into an agreement

- E to sell dated 07.08.2005 under which the defendants agreed to sell the land in question for a consideration of Rs. 8,750/- per cent. The plaintiff paid an amount of Rs. 10,000/- as advance towards the part sale consideration amount. The balance consideration was agreed to be paid by the plaintiff within six months from the date after measuring the

- F property provided the defendants make available the documents of title including the purchase certificate under the Kerala Land Reforms Act.

2.1 That thereafter, the plaintiff served a legal notice dated 02.11.2006 upon the defendants to execute the sale deed to which the defendants sent reply and refused to execute the sale deed and cancelled

- G the agreement to sell. Therefore, the appellant herein – original plaintiff instituted a Suit being Original Suit No. 205/2006 before the learned trial Court for specific performance of agreement to sell and in the alternative return of the plaintiff's amount with interest.

2.2 The said suit was resisted by the defendants by filing written statement. It was denied that the plaintiff was ever ready and willing to

- H

perform his part of the contract. It was also submitted that the suit was filed after one year from the date of expiry of the agreement. It was the case on behalf of the defendants that defendant No.1 was a heart patient and he had undergone the surgery on which huge amount was spent which was borrowed from others and therefore to clear off the said liability, the defendants agreed to sell the property in question. It was also the case of the defendants that even though the defendants had approached the plaintiff to pay some more money, he was not prepared for the same, thereby defendants had been compelled to sell the gold ornaments and clear the liabilities. It was submitted that the defendants were always ready and willing to perform their part of the agreement.

A

B

C

2.3 The learned trial Court framed the following issues:

- “1. Whether plaintiff had performed his part of the contract, thereby entitling him for specific performance of the agreement?
2. Whether plaintiff has got any cause of action against defendants?
3. Whether the plaintiff is entitled to the reliefs sought?
4. Relief and costs?”

D

2.4 On appreciation of the entire evidence on record, the learned trial Court decreed the suit for specific performance of agreement to sell dated 07.08.2005. However, at the same time and to do complete justice between the parties, the learned trial Court directed the plaintiff to pay 25% more amount, over and above the agreed consideration i.e., sale consideration at the rate of Rs. 11,000/- per cent (Rs. 8750/- per cent + 25% = 10,037/-, rounded off to Rs. 11,000/-). The learned trial Court also directed the plaintiff to deposit the balance sale consideration, i.e., Rs. 3,97,000/-, within a period of two months.

E

F

2.5 Feeling aggrieved and dissatisfied with the judgment and decree passed by the learned trial Court decreeing the suit for specific performance of agreement to sell dated 7.8.2005, the defendants preferred an appeal before the High Court. Without upsetting the findings recorded by the learned trial Court on execution of agreement to sell dated 7.8.2005; payment of part sale consideration and the other issues held in favour of the plaintiff, straightway the High Court considered Section 20 of the Specific Relief Act and opined that the trial Court was not justified in enhancing the sale consideration and ought not to have exercised the discretion in favour of the plaintiff. By the impugned

G

H

- A judgment and order, the High Court, while relying upon and/or considering Section 20 of the Specific Relief Act, has partly allowed the appeal and has set aside the judgment and decree for specific performance and has directed the defendants to pay Rs. 3,10,000/- to the plaintiff.
 - 2.6 Feeling aggrieved and dissatisfied with the impugned judgment
- B and order passed by the High Court, setting aside the judgment and decree passed by the learned trial Court for specific performance of agreement to sell, the original plaintiff has preferred the present appeal.
 - 3. It is vehemently submitted by the learned counsel appearing on behalf of the appellant that in the facts and circumstances of the case,
 - C the High Court has committed an error in reversing the decree of specific performance.
 - 3.1 It is submitted that the execution of the agreement to sell and receipt of part sale consideration have not been disputed by the defendants.
 - D 3.2 It is submitted that as per the conditions mentioned in the agreement to sell, the balance sale consideration was required to be paid within a period of six months from the date after measuring the property provided the defendants make available the documents of title including the purchase certificate under Kerala Land Reforms Act, which was yet to be obtained.
 - E 3.3 It is submitted that even the purchase certificate was issued by the Government during the pendency of the suit. It is submitted that therefore once the execution of agreement to sell is admitted and the part sale consideration is received and it was found that the plaintiff was always ready and willing to perform his part of the contract, the learned trial Court was justified in decreeing the suit for specific performance.
 - F 3.4 It is then submitted that even, though not required, the learned trial Court enhanced the sale consideration to do complete justice, which the plaintiff agreed. It is submitted that enhancement of the sale consideration by the learned trial Court could not have been gone against the plaintiff.
 - G 3.5 It is further submitted that even otherwise when while exercising the discretion in favour of the plaintiff to pass a decree for specific performance, the learned trial Court enhanced the amount of sale consideration and directed the plaintiff to pay some more amount
- H

than the sale consideration mentioned in the agreement to sell, the same A was not required to be interfered with by the High Court.

3.6 It is submitted that as such the High Court has straightway gone and considered Section 20 of the Specific Relief Act, without adverting to the findings recorded by the learned trial Court on execution of the agreement to sell; payment of part sale consideration and that the plaintiff was always ready and willing to perform his part of the contract. B

3.7 Making the above submissions, it is prayed to allow the present appeal.

4. The present appeal is opposed by Shri Raghenth Basant, learned counsel appearing on behalf of the original defendants. C

4.1 It is vehemently submitted by the learned counsel appearing on behalf of the original defendants that as such the agreement to sell was a forced agreement to sell as at the relevant time, defendant no.1 suffered a heart attack and he was in need of money and therefore he was compelled to sell the property in question. It is therefore submitted and as rightly observed by the High Court, the learned trial Court ought not to have exercised the discretion in favour of the plaintiff, rather ought to have exercised the discretion in favour of the defendants on the ground of equity. D

4.2 Learned counsel appearing on behalf of the original defendants has submitted that at the time of execution of agreement to sell, the plaintiff paid a meagre amount of Rs. 10,000/- only as advance towards the consideration amount. It is submitted that as the defendants were hard pressed and were in need of immediate money as defendant no.1 suffered a heart attack, it was agreed that the balance consideration to be paid within six months from the date of agreement to sell. It is submitted that thereafter as the plaintiff did not pay the balance sale consideration within six months, the defendants cleared their liabilities by selling gold ornaments of their family members and therefore thereafter the defendants were not in need of money and therefore there was no cause and/or reason to sell the property in question and thereafter the agreement to sell was cancelled. It is submitted that considering the aforesaid circumstances, the High Court has rightly set aside the decree for specific performance, considering Section 20 of the Specific Relief Act and has rightly exercised the discretion in favour of the defendants, rather than in favour of the plaintiff. E F G H

A 4.3 It is further submitted by the learned counsel appearing on behalf of the defendants that as on today the price of the property in question has gone very high and therefore it is prayed not to interfere with the impugned judgment and order passed by the High Court.

B 5. I have heard the learned counsel for the respective parties at length.

At the outset, it is required to be noted that the execution of agreement to sell and receipt of part sale consideration paid under the agreement to sell has not been disputed by the defendants. It is not in dispute that the defendants as such agreed to sell the property in question.

C The relevant terms of agreement to sell, as agreed between the parties, are as follows:

“(a) the balance consideration was to be paid by the Petitioner to the Respondents within six months from the date of sale agreement.

D (b) The Petitioner was obligated to measure the property at his own expense, arrange the balance consideration amount and prepare the deeds with respect to the plaint schedule property in favour of himself or in favour of its nominees.

E (c) Respondents were to handover the abovementioned deeds as also the anterior documents, possession certification, tax receipt and encumbrance certificate for the last 13 years, purchase certificate, either in their originals or certified copies within the stipulated six months to the Petitioner.

F (d) After the fulfilment of the above terms and conditions, the Respondent No.1 and his wife were obligated to execute the sale deed prepared by the Petitioner and register the same after obtaining the balance consideration amount and then accordingly, the Respondents were to hand over actual possession of the plaint schedule property to the Petitioner.”

G 6. It is contended on behalf of the defendants that the agreement to sell was a forced agreement to sell. On the contrary, the defendants stated in the written statement in para 4 that the defendants were always ready and willing to perform their part of the contract. It may be true that at the relevant time the defendants may be in need of money. However, the fact remains that they agreed to sell the property in question

H

for sale consideration mentioned in the agreement to sell and as observed hereinabove, it was the case on behalf of the defendants that they were always ready and willing to perform their part of the contract. Therefore, as observed hereinabove, it was never the case on behalf of the defendants in the written statement and/or even before the learned trial Court that the agreement to sell was inequitable and/or was a forced agreement to sell. Even the learned trial Court also did not frame the issue, "whether agreement to sell was a forced agreement to sell/contract or not". On appreciation of entire evidence on record, the learned trial Court after recording the findings on the execution of the agreement to sell by the defendants and receipt of part sale consideration and that the plaintiff was always ready and willing to perform his part of the contract, decreed the suit for specific performance. By the impugned judgment and order, the High Court, as such, has not commented upon and/or set aside any of the findings recorded by the learned trial Court, recorded while passing a decree for specific performance. Straightway, the High Court has considered Section 20 of the Specific Relief Act and has observed and held that by enhancing the amount of sale consideration, the learned trial Court has wrongly exercised the discretion in favour of the plaintiff. The High Court has commented upon the order passed by the learned trial Court enhancing the amount of sale consideration and directing the plaintiff to pay more amount than the sale consideration mentioned in the agreement to sell.

7. When to do the complete justice and relying upon and/or considering the decision of this Court in the case of *Pratap Lakshman Muchandi v. Shamlal Uddavadas Wadhwa, (2008) 12 SCC 67*, the learned trial Court directed the plaintiff to pay some more amount than the amount mentioned in the agreement to sell, at the most, the plaintiff can be said to be aggrieved. Still, the High Court has considered such an order passed by the learned trial Court against the defendants. As such, the learned trial Court was absolutely justified in compensating the defendants by paying some more amount while passing a decree for specific performance. Therefore, in the facts and circumstances of the case and more particularly when the learned trial Court exercised the discretion in favour of the plaintiff after having observed and recorded the findings on the execution of the agreement to sell by the defendants and that the part sale consideration was paid by the plaintiff which was accepted by the defendants and thereafter the finding that the plaintiff was always ready and willing to perform his part of the contract, the

A

B

C

D

E

F

G

H

- A learned trial Court was absolutely justified in passing the decree for specific performance. The High Court has erred in interfering with the judgment and decree passed by the learned trial Court, without setting aside the findings recorded by the learned trial Court recorded while passing the decree for specific performance. The impugned judgment and order passed by the High Court is unsustainable, both, on law as well as on facts.

- 8. In view of the above and for the reasons stated above, the present appeal succeeds. The impugned judgment and order passed by the High Court is hereby quashed and set aside and the judgment and decree passed by the learned trial Court for specific performance of agreement to sell is hereby restored.

- However, to do complete justice and in exercise of powers under Article 142 of the Constitution of India, I direct that over and above the sale consideration mentioned in the agreement to sell and the amount already deposited by the plaintiff, the plaintiff to pay a further sum of Rs. 10,00,000/- (Rupees Ten Lakhs only) to the original defendants, to be paid within a period of six weeks from today. The amount which might have been deposited by the original defendants, deposited pursuant to the impugned judgment and order passed by the High Court, i.e., Rs. 3,10,000/- be also returned/paid to the original defendants.

- E 9. The present appeal is accordingly allowed in the aforesaid terms. However, in the facts and circumstances of the case, there shall be no order as to costs.

NAGARATHNA, J.

- F 1. I have had the advantage of reading the judgment proposed by His Lordship M.R. Shah, J. However, I regret to agree with the reasoning as well as the conclusion arrived at by His Lordship. Hence, my separate judgment.

- G 2. The plaintiff in Original Suit No. 205/2006 has assailed the judgment dated 03rd November, 2021, passed by the High Court of Kerala at Ernakulam in Regular First Appeal No. 63 of 2009. By the impugned judgment, the High Court has set-aside the judgment and decree passed by the Trial Court, i.e., the Court of the Subordinate Judge, Tirur in O.S. No. 205/2006, by which the suit for specific performance of an agreement of sale of *Kanam* and *Kuzhikoor* rights, filed by the plaintiff, was allowed.

- H Hence, the appeal by the plaintiff in the suit.

3. For the sake of convenience, the parties herein shall be referred to in terms of their rank and status before the Trial Court. A

4. The case of the plaintiff in a nutshell is stated as under:

4.1 That the defendants who have *Kanam* and *Kuzhikoor* rights over the suit property, measuring 37 cents since 1989, assigned such rights over the same in favour of the plaintiff for a consideration of Rs. 8750/- per cent. That an agreement of sale in respect of the *Kanam* and *Kuzhikoor* rights over the suit property was entered into between the defendants-sellers and the plaintiff-buyer on 7th August, 2005 in the presence of witnesses. An advance sale consideration of Rs. 10,000/- was paid by the plaintiff. The remaining sale consideration was required as per the agreement to be paid within six months from the date on which agreement of sale was entered into, following which the sale deed was to be executed in favour of the plaintiff or his nominees, in respect of the *Kanam* and *Kuzhikoor* rights, which are valuable usufructuary rights and possession of the suit property was to be handed over to the plaintiff. B

4.2 That before the expiry of six months, the defendants were to make available to the plaintiff documents pertaining to the suit property, such as tax receipts, non-encumbrance certificate, purchase certificate etc. That the plaintiff contacted the defendants repeatedly and expressed his willingness to comply with the terms of the agreement of sale dated 7th August, 2005. However, defendants sought to evade and delay compliance with the said agreement on the ground that anterior documents and certificates relating to the suit property could not be obtained. C

4.3 That though the plaintiff had sent a legal notice dated 02nd November, 2006 calling upon the defendants to execute the deed assigning *Kanam* and *Kuzhikoor* rights after accepting the balance sale consideration from the plaintiff, the defendants took no positive steps in this regard. D

4.4 That the plaintiff was ready and willing to tender the balance sale consideration and have the deed of assignment registered in his name within the period stipulated in the agreement. That the defendants were attempting to evade the agreement of sale in an attempt to obtain a better price for the *Kanam* and *Kuzhikoor* rights over the suit property as the market value thereof had increased manifold. Therefore, the plaintiff was constrained to file a suit for specific performance of the G

H

- A agreement of sale of *Kanam* and *Kuzhikoor* rights, dated 7th August, 2005.
- 4.5 With the aforesaid averments, it was prayed that the defendants be directed to receive the balance sale consideration from the plaintiff and execute the sale deed in respect of the *Kanam* and *Kuzhikoor* rights over the suit property in his favour. In the alternative, it was prayed that the defendants may be directed to return the advance amount of Rs. 10,000/- paid by the plaintiff, together with interest thereon.
5. In response to the plaint, the defendants filed a written statement, the contents of which are encapsulated as under:-
- C 5.1 That the plaintiff was never ready and willing to perform his obligations under the agreement dated 7th August, 2005. That the suit for specific performance was filed on 13th December, 2006, which was nearly one year after the expiry of the deadline fixed in the agreement, for compliance of the terms thereof.
- D 5.2 That as per the agreement of sale of *Kanam* and *Kuzhikoor* rights, the plaintiff-purchaser was to measure the suit property and accordingly ascertain the sale consideration payable at the rate of Rs. 8750/- per cent. That no attempt was made by the plaintiff in this regard. Therefore, it could not be said that the plaintiff was ready and willing to perform his part of the agreement, more so, when no attempt was made by the plaintiff to determine even as much as the exact purchase price for the *Kanam* and *Kuzhikoor* rights over the suit property. That the plaintiff had paid only Rs. 10,000/- which is a very negligible portion of the purchase price. That the defendants were in dire need for finances in order to bear the expenses for cardiac treatment of defendant no. 1.
- E Therefore, the defendants had approached the plaintiff repeatedly, with requests to tender the balance sale consideration. However, the plaintiff did not pay heed to the requests of the defendants and therefore, the defendants were constrained to raise the requisite funds by selling their jewellery and ornaments.
- G 5.3 That the defendants agreed to sell their *Kanam* and *Kuzhikoor* rights over the suit property only with a view to urgently raise requisite finances to enable them to bear the medical expenses for the treatment of defendant no. 1. Therefore, it was additionally important for the plaintiff to have duly paid the balance consideration within six months from the date on which agreement of sale of *Kanam* and *Kuzhikoor* rights was
- H

entered into. Since the plaintiff failed to do so, it could not be concluded that he was ready and willing to perform his obligations under the agreement dated 7th August, 2005.

A

5.4 That the plaintiff was by occupation, a real estate agent and frequently engaged in the practice of entering into agreements of sale in respect of properties and thereafter attempting to find buyers for smaller extents or portions of such properties. That since the plaintiff could not find prospective buyers, he did not pursue the agreement dated 7th August, 2005 for over one year and had been attempting to evade the same. However, since the value of the suit property considerably increased over time, the plaintiff sought to claim the same at a price significantly below the prevailing market rate by placing reliance on a stale agreement of sale of *Kanam* and *Kuzhikoor* rights.

B

C

5.5 With the aforesaid averments, it was prayed before the Trial Court that the suit filed by the plaintiff for specific performance of the agreement of sale dated 7th August, 2005, be dismissed.

D

6. The Court of the Subordinate Judge, Tirur by its judgment and decree dated 18th August, 2008 allowed the suit filed by the plaintiff and passed a decree of specific performance of the agreement of sale of *Kanam* and *Kuzhikoor* rights dated 7th August, 2005. Sale consideration was enhanced by 25% and it was directed that a sale consideration of Rs. 11,000/- per cent, instead of Rs.8750/- per cent, be paid by the plaintiff. It was directed that on payment of the sale consideration, sale deed in respect of the *Kanam* and *Kuzhikoor* rights over the suit property be executed in favour of the plaintiff within a period of three months from the date on which the decree was passed.

E

The salient findings of the Trial Court are as under:

F

- i) That specifying the time for performance of an agreement is not sufficient to prove that time was indeed the essence of the contract. That if time was the essence of the agreement, either of the parties ought to have initiated due performance of the same within the specified period. However, since neither of the parties to the agreement of sale had initiated timely steps in pursuance of the said agreement, it was held that time was not the essence of the contract.

G

H

- A ii) That the purchase certificate and title deed of the property were not readily available with the defendants at the time of entering into the agreement of sale of *Kanam* and *Kuzhikoor* rights over the suit property. That this fact raised the probability that non-performance of the agreement within the stipulated time, was not attributable to the plaintiff.
 - B iii) That since the transaction in question involved sale of rights over immovable property, a prudent purchaser would have to satisfy himself as to the genuineness and validity of the documents of title. Therefore, the first step ought to have been taken by the defendants, by handing over the relevant documents to the plaintiff, which would have in turn enabled the plaintiff to measure the property and tender the balance sale consideration. That the delay in performance of the agreement of sale could be attributed to the non-availability and non-furnishing of the title deeds of the plaintiff schedule property.
 - D iv) That the mere fact that the defendants had handed over the photostat copy of the title deed to the plaintiff, could not lead to the inference that the plaintiff could have proceeded to measure the property.
 - E v) That although a direction of specific performance would cause some hardship to the defendants, because they could no longer pursue their intention of constructing a house on the suit property, that alone would not be a ground to deny specific performance of a valid agreement.
 - F vi) That since the value of the suit property had increased manifold and had doubled within a short span of time, specific performance, if allowed by payment of the consideration agreed upon in the agreement, would confer an undue benefit on the plaintiff. Therefore, the sale consideration was enhanced by 25% *vis-à-vis* the consideration agreed upon in the agreement dated 7th August, 2005.
 - H
7. Being aggrieved, the defendants preferred Regular First Appeal No. 63 of 2009 before the High Court of Kerala at Ernakulam. By the impugned judgment dated 3rd November, 2021, the first appeal was allowed and the judgment of the Trial Court dated 18th August, 2008 was

set aside. The following findings were recorded by the High Court in the A
impugned judgment:

- i) That the Trial Court could not have re-fixed the sale consideration at Rs. 11,000/- per cent as against Rs. 8,750/- per cent, which was the price agreed upon by the parties. That the Court could not have dictated or deviated from B the terms and conditions enumerated in the contract for sale between the parties.
- ii) That under Section 20 of the Specific Relief Act, 1963 (prior to the same being substituted by way of Act No. 18 of 2018) Courts were vested with the discretion to deny the relief of specific performance. The Court could balance competing interests by compensating the plaintiff in terms of money so as to bring him back to his original position, to the extent possible. The compensation so granted was to be understood to be compensation for not granting specific performance in favour of the plaintiff. The said provision did not contemplate exercise of discretion to award an amount to the defendant in excess of the amount agreed upon contract of sale, while still allowing specific performance. C
- iii) That in the present suit, the agreement of sale of *Kanam* and *Kuzhikoor* rights was executed on 07th August, 2005 when the defendants were faced with a financial crisis. What was received by way of advance was merely 4% of the sale consideration of Rs. 3,23,750/-. Therefore, it was not a fit case for grant of the discretionary relief of specific performance. D
- iv) Having regard to the fact that the plaintiff had, in compliance with the judgment of the Trial Court dated 18th August, 2008, deposited the enhanced consideration of Rs. 3,97,000/-, it was directed that an amount of Rs. 3,00,000/- be paid by the defendants to the plaintiff in addition to the advance sum of Rs. 10,000/- which was paid by the plaintiff at the time of entering into the agreement of sale dated 07th August, 2005. Such a direction was issued based on a proposal made to that effect by the counsel appearing on behalf of the defendants. E F G H

A Aggrieved by the judgment of the High Court allowing the regular first appeal preferred by the defendants, the plaintiff has approached this Court.

B 8. We have heard Sri M.K.S Menon, learned advocate appearing on behalf of the appellant and Sri Raghenth Basant, learned advocate appearing on behalf of the respondents, and perused the material on record.

C 9. Learned counsel for the appellant-plaintiff made the following submissions. At the outset it was contended that the High Court was not right in allowing the first appeal preferred by the defendants by applying Section 20 of the Specific Relief Act, 1963 (hereinafter “the Act”). That the present case was not a fit case for exercising discretion to deny the relief of specific performance.

D 9.1 It was next contended that the Trial Court rightly noted that the first step ought to have been taken by the defendants, by handing over the relevant documents to the plaintiff. That since the purchase certificate and title deed of the property were not readily available with the defendants at the time of entering into the agreement, it was rightly presumed by the Trial Court that the delay in performance of the agreement of sale was attributable to the defendant.

E 9.2 It was urged that the High Court committed a serious error in law by applying Section 20 of the Act to deny the relief of specific performance in favour of the appellant-plaintiff. That the relief could not be denied on the ground of insufficiency of sale consideration in light of the fact that the market value of the suit property had increased manifold over a period of time. That denial of the relief of specific performance F on such ground was barred by Explanation 1 to Clause (c) of Section 20 (2) of the Act. That although Section 20 permits denial of the remedy of specific performance where a decree of specific performance would involve some hardship to the defendant(s), the Explanation to Clause (c) of Section 20 (2) clarifies that mere insufficiency of consideration would G not be deemed to constitute ‘hardship.’ Therefore, the consideration guiding the decision of the High Court to deny the relief of specific performance, was extraneous.

H 9.3 It was next contended that the Court ought to have moulded the relief by having due regard to the conduct of the plaintiff. That the plaintiff’s conduct was reflective of the fact that he duly pursued the

execution of the agreement of sale of *Kanam* and *Kuzhikoor* and therefore, was entitled to be awarded a decree of specific performance in his favour. That in the absence of any proof demonstrative of delay, unwillingness, unreadiness on the part of the plaintiff, the relief of specific performance could not have been denied. A

9.4 Learned counsel for the appellant contended that this Court has authoritatively laid down that in cases where specific performance of a contract is sought in relation to property, the market value of which has increased since the date on which contract of sale was entered into, it would be justified to award an additional amount of consideration to the seller, at the discretion of the Court, *vide Pratap Lakshman Muchandi and Ors. vs. Shamlal Uddavadas Wadhwa and Ors.*, (2008) 1 SCC 67. Therefore, the Trial Court had not erred in decreeing the suit for specific performance in favour of the plaintiff, by directing the plaintiff to pay additional sale consideration to the defendants. That the direction of the Trial Court to enhance the consideration did not amount to rewriting the terms of the agreement, but was done with a view to balance the equities. That the direction of the Trial Court ought to be appreciated in light of the fact that the relief of specific performance is an equitable remedy. In that context it was further submitted that the plaintiff duly paid the enhanced sale consideration, which fact also would demonstrate the conduct of the plaintiff and his willingness to execute the agreement of sale. B C D E

9.5 It was submitted that the reason the plaintiff did not tender the sale consideration in excess of 4% of the total consideration agreed upon was because the defendants had not made available any documents which would enable the plaintiff to satisfy himself as to the title of the defendants. Therefore, the High Court had erred in holding that since only 4% of the sale consideration had been paid, it would not be a fit case to grant the discretionary remedy of specific performance, without appreciating the facts of the case in its true perspective. F

With the aforesaid averments, it was prayed that the impugned judgment of the High Court be set-aside and the judgment of the Trial Court, be restored. G

10. Respondent – defendants’ counsel *per contra* advanced the following arguments:

H

- A 10.1 He supported the impugned judgment of the High Court and contended that the High Court rightly applied Section 20 of the Act and denied the relief of specific performance of the agreement dated 7th August, 2005. That the defendants' daughter and son-in-law were desirous of building a house on the suit property and therefore, they would be put through great hardship if the suit for specific performance was decreed in favour of the plaintiff; more so, given that market price of the suit property had increased manifold over a period of time and it would not be possible for the defendants to purchase rights over land similar to the suit property with the enhanced consideration awarded by the Trial Court.
- C 10.2 It was further submitted that the High Court rightly appreciated that the defendants had entered into the agreement when they were faced with a financial crisis and therefore, it was imperative that the plaintiff paid a significant portion of the consideration, if not the entire sale consideration, within the period of six months as stipulated in the agreement of sale of *Kanam* and *Kuzhikoor* rights. That it was in the said context that the fact as to payment of merely 4% of the sale consideration would be relevant to determine the plaintiff's readiness and willingness to perform his obligations under the agreement of sale. That the object of agreement to sell the *Kanam* and *Kuzhikoor* rights over the suit property in the year 2005 was to receive the entire sale consideration within a period of six months, which would enable the defendants to pay off certain debts which had been taken to enable the defendants to bear the medical expenses towards cardiac treatment of defendant no. 1. Since the plaintiff refused to pay the balance consideration within the time stipulated in the agreement, notwithstanding several requests by the defendants, the defendants were compelled to sell their jewellery and ornaments to clear the debts.
- G 10.3 That by refusing to pay sale consideration exceeding 4% of the total sale consideration within six months from the date of the contract, the plaintiff defeated the purpose of the agreement to sell the *Kanam* and *Kuzhikoor* rights. That the plaintiff was well aware of the fact that the only reason compelling the defendants to sell the *Kanam* and *Kuzhikoor* rights over suit property at a nominal price agreed upon by the parties was the critical financial condition that the defendants were faced with at the time of entering into the agreement of sale. That freedom from financial pressure within a short span of time (six months) was the sole motive guiding the decision of the defendants to part with the suit

H

property. In that regard, it was contended that time was the essence of the agreement and having failed to deposit the balance sale consideration within the stipulated period, the plaintiff could not subsequently seek the remedy of specific performance, having defeated the purpose of the agreement *vis-à-vis* the defendants. A

10.4 It was submitted that admittedly, the defendants had, immediately after executing the agreement of sale of *Kanam* and *Kuzhikoor* rights , moved the Land Tribunal, Tirur for obtaining the purchase certificate. However, the issuance of purchase certificate and time taken for the same was not under the control of the defendants. That the plaintiff was well aware of the status of the matter at every juncture. It was averred that delay on the part of the Land Tribunal in granting purchase certificate could neither be attributed to the defendants, nor could it absolve the plaintiff of his obligations under the agreement of sale of *Kanam* and *Kuzhikoor* rights. That had the plaintiff duly got measured the schedule property and tendered the balance sale consideration, it could be concluded that he was ready and willing to comply with the terms of the agreement. B C D

10.5 With the aforesaid averments it was lastly submitted that the High Court, appreciated the matter in its true perspective and passed the impugned judgment which appropriately balances equities between the parties and the same does not call for interference by this Court. E Therefore, it was prayed that the instant appeal be dismissed.

11. Having heard the learned counsel for the respective parties, the following points would arise for consideration which shall be considered together:

- i) Whether the plaintiff's conduct demonstrates readiness and willingness on his part to carry out his obligations under the agreement of sale of *Kanam* and *Kuzhikoor* rights dated 7th August, 2005? F
- ii) Whether the plaintiff, by not paying consideration above 4% of total sale consideration within the period stipulated in the agreement, had defeated the purpose of the agreement to sell *Kanam* and *Kuzhikoor* rights executed by the defendants? G
- iii) What order? H

- A The detailed narration of facts and contentions would not call for reiteration.

12. The High Court has relied on Section 20 of the Act, prior to the same being substituted by way of Act No. 18 of 2018, to deny the relief of specific performance to the plaintiff. Section 20 of the Act as it stood prior to the Amendment Act of 2018 provided that the jurisdiction to decree specific performance is discretionary. It said that the Court is not bound to grant such relief merely because it is lawful to do so. Such a discretion, however, was not to be exercised arbitrarily, but ought to have been based on sound and reasonable judicial principles. The Section also specified the circumstances in which the Court may properly exercise the discretion not to decree specific performance and it also specified when, in an appropriate case, a decree could be given by proper exercise of discretion. Section 20, as it then stood was not an exhaustive provision, but merely illustrative as it was not possible to define the circumstances in which equitable relief could or could not be granted. If, therefore, on a consideration of all the circumstances of the case, the Court thought that it would be inequitable to grant the relief prayed for, it should not do so.

13. However, in *Shenbagam vs. K.K. Rathinavel*, 2022 SCC OnLine SC 71, this Court reiterated that in deciding whether or not to grant the relief of specific performance, the Courts must be cognizant of the conduct of the parties, the escalation in the price of the suit property and consider whether one party will unfairly benefit from the decree.

14. By way of the Specific Relief (Amendment) Act, 2018 (hereinafter “the Amendment Act”), Section 20 of the Act has been substituted, thereby rendering the relief of specific performance to be a statutory remedy, instead of a discretionary remedy. Previously, the unamended provision granted the courts the discretion to deny the relief of specific performance, on the basis of judicially developed exceptions, even where it would otherwise be lawful to direct specific performance. Now, such statutorily created exceptions have been excluded. The Amendment Act has eliminated the discretion of the courts in cases involving specific performance of contracts and grants a right to an aggrieved party to seek specific performance of a contract in certain cases, subject to the provisions contained in Sections 11(2), 14 and 16 of the Act. These Sections deal with ‘Cases in which specific performance

H

of contracts connected with trusts being enforceable', 'contracts which cannot be specifically enforced' and 'personal bars to relief,' respectively.

15. It is however to be noted that notwithstanding substitution of Section 20 of the Act, the position of law on all material aspects, such as the essential elements of readiness and willingness and other aspects under the unamended Section 16 remains the same. In this regard, the decision of this Court in *Mehboob-Ur-Rehman (Dead) through LRs vs. Ahsanul Ghani – [(2019) 19 SCC 415]* may be referred to. In the said case, this Court held that even following the amendment of the Specific Relief Act, 1963, by way of Act No. 18 of 2018, the position of law on all material aspects remains the same. It was observed that, even following the amendment, the law was to the effect that specific performance of a contract could not be granted or enforced in favour to the person who fails to prove that he has already 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 of which, the performance has been prevented or waived by the other party.

16. Reference may also be had to the decision of this Court in *Sughar Singh vs. Hari Singh (Dead) through LRs and Ors., A.I.R. 2021 SC 5581*. In the said case, the question as to applicability of the unsubstituted provision of Section 20 of the Act on transactions entered into prior to the date on which the Amendment Act of 2018, was kept open. However, the Court held that the provisions subsequently substituted, may act as a guide to Courts in exercising discretion in matters dating prior to the substitution, even though such provisions may not apply retrospectively. The relevant observations of this Court have been extracted as under:

"10. Now, so far as the finding recorded by the High Court and the observations made by the High court on Section 20 of the Act and the observation that even if the agreement is found to be duly executed and the plaintiff is found to be ready and willing to perform his part of the Agreement, grant of decree of specific performance is not automatic and it is a discretionary relief is concerned, the same cannot be accepted and/or approved. In such a case, many a times it would be giving a premium to the dishonest conduct on the part of the defendant/executant of the agreement to sell. Even the discretion under Section 20 of the Act is required

A

B

C

D

E

F

G

H

- A to be exercised judiciously, soundly and reasonably. The plaintiff cannot be punished by refusing the relief of specific performance despite the fact that the execution of the agreement to sell in his favour has been established and proved and that he is found to be always ready and willing to perform his part of the contract. Not to grant the decree of specific performance despite the execution of the agreement to sell is proved; part sale consideration is proved and the plaintiff is always ready and willing to perform his part of the contract would encourage the dishonesty. In such a situation, the balance should tilt in favour of the plaintiff rather than in favour of the defendant – executant of the agreement to sell, while exercising the discretion judiciously.

For the aforesaid, even amendment to the Specific Relief Act, 1963 by which section 10(a) has been inserted, though may not be applicable retrospectively but can be a guide on the discretionary relief. Now the legislature has also thought it to insert

- D Section 10(a) and now the specific performance is no longer a discretionary relief. As such the question whether the said provision would be applicable retrospectively or not and/or should be made applicable to all pending proceedings including appeals is kept open. However, at the same time, as observed hereinabove, the same can be a guide.”

- E (emphasis by me)

17. In ***B. Santoshamma vs. D. Sarala and Anr., (2020) 19 SCC 80*** this Court, while examining the amendment made to Section 10 of the Act observed that after the amendment to Section 10, the words “*specific performance of any contract may, in the discretion of the Court, be enforced*” have been substituted with the words “*specific performance of a contract shall be enforced subject to the provisions contained in sub-section (2) of Section 11, Section 14 and Section 16*”. It was concluded that although the relief of specific performance of a contract is no longer discretionary, after the amendment, the same would still be subject to Section 11, Section 14 and Section 16 of the Act.

18. Applying the law discussed above to the facts of the present dispute, I am of the view that even in the absence of discretionary power under Section 20 to deny the relief of specific performance, the plaintiff was not entitled to claim such relief as a matter of right. The position of law, even following the amendment of 2018 remains that the provisions

of Section 16 of the Act have to be mandatorily complied with by the party seeking the relief of specific performance. The relief of specific performance cannot be granted in favour of a party who has not performed his obligations under the contract. It is therefore necessary to ascertain whether, the plaintiff had complied with the statutory prerequisites under Section 16 (c) of the Act, before claiming the relief of specific performance. Section 16 of the Act on being amended w.e.f. 01st October, 2018, reads as under:

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

- (a) who has obtained substituted performance of contract under section 20; or C
- (b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or D
- (c) who fails to 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. E

Explanation.—For the purposes of clause (c),—

- (i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court; F
- (ii) the plaintiff must prove performance of, or readiness and willingness to perform, the contract according to its true construction.”

19. Clause (c) of Section 16 of the Act, which is relevant in the instant case, though amended w.e.f. 01st October, 2018 clearly states that unless the plaintiff establishes his readiness and willingness to perform his part of the contract, he would not be entitled to a decree of specific performance. Prior to the amendment, the expression “who fails to aver and prove” was on the statute book and its substitution by the words G H

- A “who fails to prove” does not bring about any drastic change to the object and intent of the clause. This is because failing to prove readiness and willingness to perform the essential terms of the contract would first require averments to that effect to be made in the plaint by the plaintiff. The absence of such averments regarding readiness and willingness to perform the essential terms of the contract by the plaintiff would not permit him to let in any evidence on that aspect. It is a settled principle of law that no evidence can be permitted to be let in in the absence of averments in the plaint / pleadings *vide Bachhaj Nahar vs. Nilima Mandal and Ors., (2008) 17 SCC 491*. In the said case, a Bench of this Court speaking through Raveendran J. laid down as follows:
- C
 - (i) No amount of evidence can be looked into, upon a plea which was never put forward in the pleadings. A question which did not arise from the pleadings and which was not the subject matter of an issue, cannot be decided by the Court.
 - (ii) A Court cannot make out a case not pleaded. The Court should confine its decision to the question raised in pleadings. Nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint.
- E 20. Therefore, notwithstanding the amendment to Section 16 of the Act whereby the expression “who fails to aver and prove” has been substituted with the phrase “who fails to prove,” the law remains that no evidence can be let in on a plea that was never put forward in the plaint/ pleadings. But, it is necessary to sound a caveat. Even the absence of the words “ready and willing to perform the contract” in the plaint would now not have an adverse impact on the plaintiff’s case, so long as plaintiff’s readiness and willingness to perform the essential terms of the contract could be gathered on a holistic reading of the plaint.
- G 21. In fact, even in relation to the earlier scheme of Section 16 of the Act which required a plaintiff seeking the remedy of specific performance to ‘aver and prove’ that he was ready and willing to perform his obligations under an agreement, this Court had observed that it was sufficient if the averments in substance indicate continuous readiness and willingness on the part of the person suing, to perform his part of the contract *vide Motilal Jain vs. Ramdasi Devi, A.I.R. 2000 SC 2408*.
- H

Further, it had been declared that language in Section 16 (c), as it stood prior to the Amendment Act of 2018, did not require any specific phraseology to be followed in relation to the averments as to readiness and willingness. That the compliance of requirements of readiness and willingness have to be in spirit and substance and not in letter and form *vide Syed Dastagir vs. T.R. Gopalakrishna Shetty, (1999) 6 SCC 337.*

A

B

That is why the deletion of the words “who fails to aver” in Section 16 (c) of the Act does bring about any real change in the position of law as it stood prior to the amendment.

22. Further, readiness and willingness cannot be considered in a straitjacket formula; it has to be inferred on a consideration of the entire facts and circumstances of each case and the intention and conduct of the parties concerned. Even if a party to the contract is ready and has the requisite funds he may not be willing to perform his part of the contract and vice versa.

C

D

23. In this regard, reference may be made to the decision of this Court in *His Holiness Acharya Swami Ganesh Dassji vs. Sita Ram Thapar, (1996) 4 SCC 526* wherein this Court made a distinction between ‘readiness’ and ‘willingness’ and the manner in which the said parameters are to be scrutinised in deciding a suit for specific performance. The relevant findings of this Court are extracted as under:

E

“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.

F

[xxx]

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 infer 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 capacity to perform his part of the contract as he had no financial capacity to pay the

G

H

- A consideration in cash as contracted and intended to bite for the time which disentitles him as time is the essence of the contract.”

Thus, both readiness as well as willingness have to be established by the plaintiff on whom the burden is cast in a suit for specific performance of an agreement. Therefore, the question would arise as to B whether the plaintiff discharged such burden in the instant case.

24. Further, in **J.P. Builders vs. A. Ramdas Rao, (2011) 1 SCC 429**, this Court held as under, as regards the onus on a plaintiff claiming the relief of specific performance, to prove that he had complied with Section 16 (c) of the Act and had demonstrated ‘readiness’ and C ‘willingness’ to carry out his obligations under the agreement of sale:

“25. Section 16(c) of the Specific Relief Act, 1963 mandates “readiness and willingness” on the part of the plaintiff and it is a condition precedent for obtaining relief of grant of specific performance. It is also clear that in a suit for specific performance, D the plaintiff must allege and prove a continuous “readiness and willingness” to perform the contract on his part from the date of the contract. The onus is on the plaintiff.

[xxx]

27. It is settled law that even in the absence of specific plea by E the opposite party, it is the mandate of the statute that plaintiff has to comply with Section 16(c) of the Specific Relief Act and when there is non-compliance with this statutory mandate, the Court is not bound to grant specific performance and is left with no other alternative but to dismiss the suit. It is also clear that readiness to F perform must be established throughout the relevant points of time. “Readiness and willingness” to perform the part of the contract has to be determined/ascertained from the conduct of the parties.”

25. As per the agreement of sale of *Kanam* and *Kuzhikoor* rights, dated 07th August, 2005, the plaintiff was obligated to carry out the G following terms:

- (a) The plaintiff was obligated to measure the property at his own expense;
- (b) Prepare the deeds with respect to the plaint schedule property in favour of himself or in favour of his nominees;

H

(c) The balance consideration was to be paid by the plaintiff to A the defendants within six months from the date of agreement.

The agreement also stipulated that the defendants were to:

(a) Handover the abovementioned deeds as also the anterior documents, possession certification, tax receipt and encumbrance certificate for the last thirteen years, purchase certificate, either in their originals or certified copies to the plaintiff; B

(b) On receipt of the balance sale consideration execute the sale deed in favour of the plaintiff within six months.

The relevant terms of the agreement are reproduced hereinunder: C

“The 1st Parties have decided to assign the above property belonged and possessed by them to 2nd Party by fixing an amount of Rs.8750/- (Eight Thousand Seven Hundred and Fifty Only) for their rights of Kanam and Kuzhikkoor rights over the property and the 2nd Party has agreed for the same and accordingly the 1st Parties have received an amount of Rs. 10,000/- (Ten Thousand Only) from the 2nd Party towards advance for the consideration amount. It has been decided that the 2nd Party shall measure the property on his expense, arrange the balance consideration amount and prepare the deeds pertaining to the above property in favour of 2nd party or in favour of the nominees of 2nd Party within 6 (six) months from today and the 1st Parties shall sign the deed prepared by the 2nd Party and register the same after obtaining the balance consideration amount from 2nd Party and hand over actual possession of the property to 2nd party. It is further decided that the 1st party shall hand over the above mentioned deeds and anterior documents, possession certificate, tax receipt, encumbrance certificate for the last 13 years, purchase certificate, either in original or certified copies, within the above said period to 2nd Party.” D E F

26. Nothing was brought on record by the plaintiff to demonstrate that positive steps were taken by him in pursuance of the agreement of sale of *Kanam* and *Kuzhikkoor* rights. It is trite that the relief of specific performance cannot be granted in favour of a party who has not performed his obligations under the contract. The only exception to such rule is that a party is not required to perform those obligations, as are prevented or waived by the other party to the contract. G H

- A 27. In the present case, it is an admitted fact that the plaintiff had paid an amount, which constituted merely 4% of the consideration. The Trial Court itself recorded findings to the effect that neither party had initiated timely steps to perform their respective obligations under the contract. Although the defendants did not make available the title deeds of the schedule property to the plaintiff, it could not be said that the conduct of the defendants had prevented the plaintiff from tendering the balance sale consideration, within the stipulated date, or at any time before filing the suit for specific performance as the whole object of the intended sale was to garner funds for discharging a debt which was ultimately done by the defendants by selling family jewellery.
- B 28. That paragraph 11 of the Trial Court's judgment records a finding to the effect that the defendants had applied for the purchase certificate in the year 2005 itself, i.e., soon after entering into the agreement of sale of *Kanam* and *Kuzhikoor* rights. The same was obtained on 31st May, 2007. This fact would suggest that there was no delay on the part of the defendant in acting in pursuance of the agreement. The fact that the purchase certificate was granted by the concerned authority only on 31st May, 2007, was beyond the control of the defendants and such delay could not be attributed to the defendants. The defendants had duly initiated the process of obtaining a purchase certificate soon after entering into the agreement.
- C 29. While learned counsel for the appellant-plaintiff has contended that since the transaction in question involved the transfer of rights in immovable property, a prudent purchaser would have to satisfy himself as to the genuineness and validity of the documents of title, and therefore, owing to the non- availability of documents of title, the plaintiff was unable to proceed with his obligations, no explanation has been provided as to why ancillary steps such as measurement of the property was not proceeded with. Delay in securing relevant documents from the concerned authorities could not absolve the plaintiff of his obligations under the agreement of sale of *Kanam* and *Kuzhikoor* rights. Further,
- D this aspect of the matter is to be appreciated in light of the fact that there is nothing on record which would demonstrate any step taken by the plaintiff to pursue the agreement, until, 02nd November, 2006, on which date, the legal notice was served on the defendants calling upon them to execute the sale deed in respect of the *Kanam* and *Kuzhikoor* rights over the suit property. No explanation has been provided as to why the
- E
- F
- G
- H

legal notice was not served earlier, particularly when the six-month period stipulated under the agreement had expired on 7th February, 2006. Such conduct of the plaintiff is certainly not reflective of willingness, in terms of Section 16(c) of the Act.

30. Further, the Court has to be mindful of circumstances which compelled the defendants to enter into the agreement of sale of *Kanam* and *Kuzhikoor* rights dated 7th February, 2006. The time limit stipulated in the agreement is of significance in the instant case when this aspect is viewed in light of the fact that the defendants were debt-ridden and sought to sell their *Kanam* and *Kuzhikoor* rights over suit property with the sole intention of clearing off such debts which were incurred to support the cardiac treatment of defendant no. 1. It was therefore necessary that the plaintiff paid a significant portion of the consideration, if not the entire sale consideration, within the period of six months as stipulated in the agreement. But the plaintiff refused to do so even on being repeatedly requested by the defendants.

31. At this juncture, it may also be apposite to refer to the decision of this Court in *Saradamani Kandappan vs. S. Rajalakshmi, (2011) 12 SCC 18* wherein this Court had an occasion to consider the aspect of payment of a nominal advance by the plaintiff and effect of the amount of advance paid on the decision of the Court to grant the discretionary relief of specific performance. This Court has authoritatively laid down that it would amount to injustice to hold that a vendor who took a very meagre sum as earnest money, and agreed that the rest of the consideration would be paid within a stipulated period of time, did not intend that time was of essence to the contract. The relevant portion of the said judgment is usefully extracted as under:

“37. The reality arising from this economic change cannot continue to be ignored in deciding cases relating to specific performance. The steep increase in prices is a circumstance which makes it inequitable to grant the relief of specific performance where the purchaser does not take steps to complete the sale within the agreed period, and the vendor has not been responsible for any delay or non-performance. A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to cover his delays, laches, breaches and “non-readiness”. The precedents from an era, when high inflation was unknown, holding that time is not of

- A the essence of the contract in regard to immovable properties, may no longer apply, not because the principle laid down therein is unsound or erroneous, but the circumstances that existed when the said principle was evolved, no longer exist. In these days of galloping increases in prices of immovable properties, to hold that a vendor who took an earnest money of say about 10% of the sale price and agreed for three months or four months as the period for performance, did not intend that time should be the essence, will be a cruel joke on him, and will result in injustice.
- B Adding to the misery is the delay in disposal of cases relating to specific performance, as suits and appeals therefrom routinely take two to three decades to attain finality. As a result, an owner agreeing to sell a property for rupees one lakh and received rupees ten thousand as advance may be required to execute a sale deed a quarter century later by receiving the remaining rupees ninety thousand, when the property value has risen to a crore of rupees.”
- C
- D (emphasis by me)
- E 32. Further, regarding the factors that ought to guide the Court’s decision in decreeing a suit for specific performance, particularly when the agreement of sale has not been given effect to within the time stipulated therein, the following directions issued in an earlier decision in *K.S. Vidyadanam vs. Vairavan (1997) 3 SCC 1*, were reiterated:
- F
- (i) The courts, while exercising discretion in suits for specific performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps or for completion of the transaction, that must have some significance and therefore time/period prescribed cannot be ignored.
 - (ii) The courts will apply greater scrutiny and strictness when considering whether the purchaser was “ready and willing” to perform his part of the contract.
- G
- (iii) Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. The courts will also “frown” upon suits which are not filed immediately after the breach/refusal. The fact that limitation is three years does not mean that a purchaser can wait for

H

1 or 2 years to file a suit and obtain specific performance. A
The three-year period is intended to assist the purchasers
in special cases, as for example, where the major part of
the consideration has been paid to the vendor and possession
has been delivered in part-performance, where equity shifts
in favour of the purchaser.

B
(emphasis by me)

In light of the said directions, the period of six months which was stipulated in the agreement of sale of *Kanam* and *Kuzhikoor* rights, in the present case, has to be accorded its due significance while deciding the suit for specific performance. Having regard to the urgency of the financial need of the defendants, which need had prompted them to sell their *Kanam* and *Kuzhikoor* rights over the suit property, it must be held that time stipulated in the agreement was the essence of the contract.

33. Further, the direction of this Court in the aforecited case regarding the onus on the party claiming specific performance to initiate action immediately after the breach or refusal by the other party to the contract, is also relevant to the facts of the present case. The plaintiff in the present case served a legal notice only on 02nd November, 2006 while the six month period stipulated in the agreement had elapsed on 07th February, 2006. There is no explanation as to what occasioned the delay in serving the legal notice on the defendants and why such steps were not adopted soon after the expiry of the six month period stipulated in the agreement of sale of *Kanam* and *Kuzhikoor* rights.

34. Therefore, it is held that the plaintiff, having paid no more than 4% of the sale consideration, and having not done even as much as getting the property measured within the period of six months stipulated under the agreement, cannot, at a belated date, claim specific performance of the agreement dated 7th August, 2005 to the disadvantage and hardship of the defendants.

35. Learned counsel for the plaintiff has sought to rely on the decision of this Court in *Pratap Lakshman Muchandi and Ors. vs. Shamal Uddavadas Wadhwa and Ors.*, (2008) 1 SCC 67 wherein it was held that in cases where specific performance of a contract is sought in relation to property, the market value of which has increased since the date on which contract of sale of *Kanam* and *Kuzhikoor* rights was entered into, it would be justified to award an additional amount of

A

B

C

D

E

F

G

H

- A consideration to the seller, at the discretion of the Court. While I am mindful of the fact that Courts may grant such a relief to balance equities, such a decree would be warranted only in cases where the plaintiff satisfactorily establishes compliance with Section 16 of the Act. That the measure of enhancement of compensation may be awarded at the discretion of the Court only if insufficiency of compensation is the only impediment to ensuring equity and preventing undue gain to one party. In the absence of compliance with the elementary requirements of Section 16 of the Act, enhancement of compensation cannot be employed as a device to allow specific performance in cases where the plaintiff has not performed his obligations under the contract as in the instant case.
- B 36. In my view, this appeal must fail on the sole ground that the conduct of the plaintiff was not reflective of his readiness as well as willingness on his part to pursue the agreement of sale of *Kanam* and *Kuzhikoor* rights, in terms of Section 16(c) of the Act. Accordingly, the present appeal is dismissed.
- C 37. At this juncture, it is clarified that the result of this appeal has been arrived at having regard to the conduct of the plaintiff, which does not reflect his willingness to comply with the terms of the agreement of sale dated 7th August, 2005. The suit for specific performance of the agreement of sale of *Kanam* and *Kuzhikoor* rights would fail on the sole ground that the plaintiff has failed to comply with the essential requirements of Section 16(c) of the Act. Although it is acknowledged that the defendants would be put through hardship if the suit for specific performance was decreed in favour of the plaintiff, the appeal has been decided *dehors* considerations of hardship to the defendants, or of other circumstances under which the contract was entered into which could give the plaintiff an unfair advantage over the defendants, which are considerations in equity as the relief of specific performance is essentially an equitable remedy though crystallised in the form of a legislation as per the Act. Thus, the appeal has not been decided in light of Section 20 of the Act, as it stood prior to the Amendment Act of 2018. The question as to applicability of the provision of Section 20 of the Act as it stood prior to its amendment in 2018, on transactions entered into prior to the date on which the Amendment Act of 2018, is thus kept open.
- D 38. The impugned judgment of the High Court of Kerala dated 03rd November, 2021 whereby the High Court set-aside the judgment and decree passed by the Trial Court, i.e., the Court of the Subordinate

Judge, Tirur in O.S. No. 205/2006 (by which the suit for specific A performance of an agreement of sale of *Kanam* and *Kuzhikoor* rights, filed by the plaintiff was decreed), is affirmed. This appeal is dismissed.

Parties are directed to bear their respective costs.

Nidhi Jain Matter referred to larger Bench.
(Assisted by : Abhishek Agnihotri and Tamana, LCRAs)