

(2016) 03 KAR CK 0393
In the Karnataka High Court
Case No : R.F.A. No. 96 of 2013

Punny Akat Philip Raju, Since dead by his LRs.

APPELLANT

Vs

Dinesh Reddy

RESPONDENT

Date of Decision : 31-03-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27
Evidence Act, 1872 — Section 3
Specific Relief Act, 1963 — Section 16(c)

Citation : (2016) AIRCC 3225 : (2016) 3 AirKarR 836 : (2017) 1 CivilLJ 177 :
(2016) 4 ICC 863 : (2016) ILRKarnataka 2252 : (2016) 5 KantLJ 91 : (2016) 3
KCCR 2372

Hon'ble Judges : N. Kumar and B. Veerappa, JJ.

Bench : Division Bench

Advocate : Sri. Udaya Holla, Senior Counsel for Sri. T.S. Amar Kumar for M/s. Lawyers Inc, Advocates, for the Appellant; Sri. C.V. Nagesh and ashok Haranahalli, Senior Counsel for Sir. K. Raghavendra, Advocate, for the Respondent

Final Decision : Allowed

Judgement

N. Kumar, J.—This is the defendant's regular first appeal challenging the judgment and decree passed by the Trial Court on 4.10.2012 in O.S.No. 693/2005 decreeing the suit of the plaintiff for specific performance of agreement of sale dated 12.08.2004.

2. For the purpose of convenience, the parties are referred to as they are referred to in the original suit.

Facts of the Case

3. The subject matter of the suit is dry land with the house constructed thereon in Sy. No. 30/IA 13 measuring 3 acres, being a portion of Sy. No. 30 of Seegehalli Village, Krishnarajapura Hobli, Bengaluru South Taluk, Bengaluru, which is more particularly described in the Schedule to the plaint and hereinafter referred to as "schedule property"

4. The case of the plaintiff is that, the defendant is the owner of the schedule property. On 12.08.2004, he entered into a contract of sale with the plaintiff for the sale of suit property for a consideration of Rs. 75 lakhs. On the date of agreement, the defendant received a sum of Rs. 10 lakhs from the plaintiff by way of demand draft dated 21.07.2004 drawn on City Bank, Bengaluru towards the advance of sale price. The defendant was required to perform all the obligations cast upon him under the agreement of sale dated 12.08.2004 within a period of 45 days. Immediately on the expiry of the period of 45 days, he shall execute and register, either in favour of the plaintiff or in favour of his nominee or assignee, a proper deed of conveyance in respect of suit schedule property. Although the plaintiff has always being ready and willing to perform his pan of the contract under the agreement of sale dated 12.08.2004. the defendant for the reasons best known to him and which is inexplicable did not chose to perform the left over obligations under the contract of sale dated 12.08.2004. The plaintiff has since the middle of September. 2004 been ready and is even now ready and willing to perform his part of the contract. The defendant has become greedy. He has been evading to fulfil the performance left over obligations and to execute and register a proper deed of conveyance in respect of schedule property. Therefore, plaintiff on 29.9.2004 called upon the defendant through a letter and also through an e-mail to bring all the original documents and to receive the balance amount payable and to execute and register the sale deed in his favour. The defendant did not bother to respond to the Communication. Therefore, on 1.10.2004, the plaintiff got issued a legal notice to the defendant seeking specific performance of the Agreement of sale dated 12.8.2004 and to transfer the schedule property by executing and registering the sale deed in his favour. Though the defendant was duly served with the legal notice, did not bother to respond to the same, let alone, comply with the demands made therein. The plaintiff came to know that the defendant was making all efforts to alienate the schedule property in favour of certain third party for a higher price. On learning of the intention of the defendant, the plaintiff then got a public notice issued through his Advocate cautioning the public about the Agreement that the defendant has entered into with the plaintiff. The said public notice was published in the Indian Express Daily dated 8.10.2004. Thereafter, he initiated the suit for specific performance of the agreement of sale.

5. After service of summons, the defendant entered appearance and filed a written statement contesting the claim. The defendant specifically denied all the allegations in the plaint. He also denied the allegation in the plaint that plaintiff is always being ready and willing to perform his part of the contract under the agreement of sale dated 12.8.2004 and that he is ready to pay the defendant the balance of consideration due. Further, the allegation of the plaintiff that since middle of September 2004, he is ready and even now he is ready and willing to perform his part of the contract was specifically denied. The allegation that the defendant was greedy and was trying to alienate the property in favour of third party was also denied. He also denied the issue of a letter, e-mail and receipt of

the same by the defendant.

6. After traversing all the allegations of the plaint, the defendant has set out his case. He contends that he only tentatively agreed with the plaintiff to negotiate and to enter into an agreement of sale in respect of schedule property. The said contract was never completed and the alleged agreement was never entered into. The defendant realised that the plaintiff was attempting to get the schedule property at a throw away price taking advantage of the defendant residing in Muscat. The alleged price mentioned by the plaintiff is not the market value of the suit schedule property. There was no consensus-ad-idem between the parties and both the parties have not affixed their signature on any agreement together. The plaintiff after illegally accessing the account number of the defendant has deposited a sum of Rs. 10 lakhs in the account of defendant without his knowledge. The defendant has never received the alleged amount. However, he is ready to re-deposit the same before this Court, pending disposal of the above suit. There was no concluded contract between the defendant and the plaintiff in respect of suit schedule property. The plaintiff has misrepresented the facts before this Court, in order to make illegal gain out of the schedule property for a meager amount which is no way near to the actual market value of the schedule property. Therefore, the suit for specific performance is not maintainable and is liable to be dismissed with punitive cost.

7. On the aforesaid pleadings, the Trial Court has framed the following issues:

1. Whether plaintiff proves that defendant agreeing to sell the suit property for Rs. 75,00,000/- and executed an agreement of sale on 12.08.2004 and received Rs. 10,00,000/- towards part of the sale consideration?

2. Whether plaintiff proves that he was/is always ready and willing to perform his part of the contract?

3. Whether plaintiff proves that he is entitled for specific performance of the agreement dated 12.08.2004 or in the alternative refund of the earnest money with interest and damages?

4. Whether plaintiff proves that defendant is trying to alienate the property?

5. Whether plaintiff is entitled for relief sought?

6. What order or decree?

8. The plaintiff in order to substantiate his claim, examined himself as PW. 1 and produced 17 documents which were marked as Exs. P1 to P17. He also examined an independent witness and witness to the agreement of sale as PW.2. Defendant did not step into the witness box. However, he examined his Power of Attorney holder as DW.I and has produced the said power of attorney, which is marked as Ex.D1.

9. The Trial Court on appreciation of the oral and documentary evidence on record held that the plaintiff has proved that the defendant agreed to sell the

schedule property for a sum of Rs. 75 lakhs and executed the agreement of sale dated 12.8.2004 and received a sum of Rs. 10 lakhs towards part of the sale consideration. It also recorded a finding that the plaintiff was always ready and willing to perform his part of the contract and therefore, it held, the plaintiff is entitled to a decree for specific performance. Accordingly, it decreed the suit of the plaintiff.

10. The defendant being aggrieved by the said judgment and decree has preferred this regular first appeal.

Rival Contentions

11. Learned Senior Counsel Sri. Udaya Holla appearing for the appellant assailing the impugned judgment and decree contended that taking advantage of the fact that defendant was residing at Muscat, even before the parties really agreed to the terms of the sale, the sale agreement at Ex.P1 is obtained. It is not a concluded contract. The amount of Rs. 10 lakhs said to have been paid under the agreement was credited to the account of defendant without his knowledge. He further contended that though the plaintiff has averred in the plaint that he is ready and willing to perform his part of the contract, he has not Produced any evidence to show that he was ready with the balance sale consideration and he was willing to pay the balance sale consideration. Therefore, he submits, the Trial Court committed a serious error in ignoring the mandatory provisions of law as contained in Section 16 (c) of the Specific Relief Act, 1963 and accordingly, the judgment is vitiated. Hence, he submits that the appeal is to be allowed and the suit is to be dismissed.

12. Per contra, Learned Senior Counsel Sri. C.V. Nagesh appearing for the plaintiff submitted that the evidence on record clearly establishes the execution of the agreement. The evidence of the plaintiff and his witness prove the execution of the agreement. On the contrary, the defendant has not stepped into the witness box and his power of attorney has no personal knowledge of the execution of the agreement and therefore, the plea that is taken by the defendant in the written statement is not proved. Therefore, the Trial Court was justified in holding the agreement of sale dated 12.08.2004 is duly executed and a sum of Rs. 10 lakhs has paid towards sale consideration under the agreement. Secondly he contended that the defendant in his written statement has denied specifically the plea of readiness and willingness put forth by the plaintiff. When PW. 1 has adduced his evidence in support of the said plea, there is no cross-examination at all. DW. 1 has not spoken about on these aspects. Under those circumstances, the Trial Court was justified in accepting and acting upon the evidence of PW.1 which has remained un-controverted on the question of readiness and willingness and in holding that the plaintiff has proved his case of readiness and willingness and accordingly, he is entitled to a decree for specific performance.

13. When the Court pointed out to the Learned Senior Counsel appearing for the

plaintiff, the requirement of Section 16(c) of the Specific Relief Act that the plaintiff should satisfy the Court by acceptable evidence on record that he is ready with the balance sale consideration and was willing to pay the balance sale consideration to the defendant, time was taken, to place the judgments in support of their contentions that when the evidence of PW.1 has remained unchallenged, the requirement of Section 16(c) of the Act is complied with. Therefore, the case was adjourned. On the adjournment date, another Learned Senior Counsel Sri. Ashok Haranahalli argued on behalf of the plaintiff contending that, as the plaintiff was under the impression that when there was no serious cross-examination of plaintiff" on the aspects of readiness and willingness and when the defendant has not stepped into the witness box nor his witness spoke anything in this regard, it was not necessary to produce the documents to show his financial capacity either on the date of the agreement or on the due date mentioned in the agreement. Now that is disputed, an application under Order 41, Rule 27 of Code of Civil Procedure is filed producing Bank statements, copy of registered sale deed and copy of demand drafts in support of their contention that the plaintiff had requisite funds to pay the balance sale consideration to the defendant in terms of the agreement of sale. The documents produced show his preparedness and financial capacity. Therefore it was contended in order to do justice to the parties, the Court has to permit the plaintiff to produce additional evidence in appeal, and on the basis of the said evidence uphold the order passed by the Trial Court. The said application is opposed by the defendant.

14. The Learned Senior Counsel for the defendant/respondent opposed the said application contending that all these documents were very much available to the plaintiff on the date he was adducing evidence and for the reasons best known to him, he did not choose to produce the same and therefore, it cannot be permitted to be brought on record by way of additional evidence as the requirements stipulated under Order 41, Rule 27 of CPC is not fulfilled. Therefore, he submits that the application requires to be dismissed. Even otherwise, he contended that careful examination of the Bank statements, demand drafts and the sale deed would go to show that on the 45th day, he had taken pay order for only sum of Rs. 18 lakhs, whereas balance amount payable was Rs. 65 lakhs which shows he was not ready to complete the transaction. Even if we look into the bank account, sufficient amount was not available in the bank account of the plaintiff, which again disproves the case of the plaintiff, that he was ready and willing to pay the balance consideration. Reliance is placed on bank account of his brother. Those statements show that they are business amounts which were credited to their account, withdrawn immediately and at different point of time, the balance amount was hardly ranging from Rs. 6 to 5 lakhs which clearly shows that required amount to pay the balance sale consideration was not available from the date of agreement till the date of filing of the suit. Even all these amounts are taken into consideration, the amount mentioned therein would not be sufficient to pay the balance sale consideration of Rs. 65 lakhs and therefore, he submits even on merits, the plaintiff cannot

succeed relying on all those documents.

15. The defendants have also filed an application under Order 41, Rule 27 CPC for production of two documents claiming to be the bank accounts of Vijaya Bank, Indiranagar Branch, to demonstrate that Rs. 10 Lakhs which was paid as advance sale consideration was credited to their bank account without their knowledge.

16. In the light of the aforesaid facts and rival contentions, the points that arise for our consideration in this appeal are:

1. Whether the plaintiff is under an obligation under the law to prove his readiness and willingness to perform his part of the contract as stipulated under Section 16 (c) of the Specific Relief Act even if the defendant has not at all contested the matter, or defendant has not denied the readiness and willingness of the plaintiff nor there is no cross-examination on these aspects by the defendants in respect of the plaintiff witness?

2. Whether a case is made out for allowing the applications filed under Order 41, Rule 27 of CPC both by the plaintiff and defendant?

Point No. 1

17. The plaintiff in para-2 of the plaint has pleaded that he was always ready and willing to perform his part of the contract, under the agreement of sale dated 12.8.2004 executed by the defendants in his favour, in as much as, to pay to the defendants, the balance of sale consideration due and payable by him. Traversing these allegations, the defendants in para-3 of their written statement have specifically denied the said allegations. Therefore, the Court below was justified in framing an issue to the effect that whether the plaintiff proves that he was/is always ready and willing to perform his part of the contract?

18. The plaintiff was examined as P.W. 1. In the examination-in-chief filed by way of affidavit of evidence, he has categorically stated that since in the middle of September, 2004 he has been ready and is even now ready and willing to perform his part of the contract under the agreement of sale dated 12.8.2004. In the cross-examination, all that is stated is that there was no sale agreement in respect of the suit schedule property and that the plaintiff has created the said document only for the purpose of the suit. The statement of the plaintiff that he was and is ready and willing to perform his part of the contract is not challenged. Though the plaintiff examined a witness by name Kiran Noel as P.W.2, he has not spoken about the readiness and willingness on the part of the plaintiff to pay the balance sale consideration and obtain the registered Deed of Conveyance. This is the oral evidence on record. The documentary evidence produced by the plaintiff in support of his case are Ex.P1 - agreement of sale, Ex.P.2- legal notice, Ex.P.3 - postal receipt, Ex.P. 15 - paper notification, Ex.P.16 - Encumbrance Certificate, Ex.P. 17 Notarised copy of the passport. No documents are produced to show that the plaintiff had the balance sale consideration of Rs. 65 Lakhs with him at

any point of time to complete the sale transaction. The Trial Court on appreciation of this evidence has held that the plaintiff has proved the said document and also his readiness and willingness on his part to perform the contract. Further it held that the plaintiff has paid the considerable amount as advance and has proved his readiness and willingness to perform his part of the contract. Therefore, the plaintiff is eligible and entitled to the relief of specific performance of contract as against the defendants.

19. Now the question is whether the finding regarding the readiness and willingness recorded by the Trial Court is based on legal evidence or not?

Ready And Willing

20. Section 16 of the Specific Relief Act, 1963 which imposes a personal bar to the relief of specific performance reads as under:

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

(a) who would not be entitled to recover compensation for its breach; or

(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 will fully acts at variance with, or in subversion of the relation intended to be established by the contract; or

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

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:

(ii) The plaintiff must aver performance of or readiness and willingness to perform, the contract according to its true construction."

21. Now in this case, we are concerned with Clause (c) of Section 16 of the Act which provides - specific performance of the contract cannot be enforced in favour of a person, who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him other than terms of the performance of which has been prevented or waived by the defendant.

22. The essential terms of the contract which are to be performed by the parties are as under:

(1) That the total sale consideration for the entire schedule property including

the house is fixed at Rs. 75.00,000/- (Rupees Seventy Five Lakhs Only).

(2) The Purchaser has paid a sum of Rs. 10,00,000 (Rupees Ten Lakhs Only) to me towards the advance sale consideration;

(3) The balance sale consideration of Rs. 6.5,00.000/- shall be paid by the purchaser within 45 days from the date of the agreement.

(4) On payment of the entire sale consideration as aforementioned, the defendant shall execute the deed of sale conveying the schedule property in favour of the purchaser or in favour of his nominee or nominees and shall deliver to the purchaser the vacant possession of the schedule property.

23. As is clear from Section 16(c) of the Act, unless the plaintiff avers and proves that he has performed or has always been ready and willing to perform the aforesaid terms of the contract, he cannot succeed in getting the decree for specific performance. Explanation (ii) to Clause (c) of Section 16 of the Act provides 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 regard to any money, except when so directed by the Court. Therefore, the plaintiff in order to succeed in proving that he has performed or is always being ready and willing to perform, is not expected to actually tender to the defendants or to deposit in Court any money except when so directed by the Court. But he has to prove that he is ready with the balance sale consideration payable under the terms of the agreement and is willing to pay the said amount to the defendants.

24. It is contended that the plaintiff has deposed on oath that he is ready with the balance sale consideration and on that aspect, there is no cross-examination and therefore, it amounts to his proving his readiness and willingness to pay the balance sale consideration. In other words, as the said statement on oath is not disputed in the cross-examination, there is no obligation cast upon the plaintiff to produce any documentary evidence to prove his readiness and willingness to pay the balance sale consideration.

Statutory Requirement of Proof

25. Section 3 of the Indian Evidence Act, 1872 defines "Evidence".-

"Evidence" means and includes -

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;

such statements are called oral evidence;

(2) all documents including electronic records produced for the inspection of the Court;

such documents are called documentary evidence.

Thus the evidence may be oral or documentary.

26. The words "proved", "not proved" and "disproved" are also defined under Section 3 of the Indian Evidence Act. It states that,

(a) A fact is said to be proved when, after considering the matter before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

(b) A fact is said to be not proved when it is neither proved nor disproved.

(c) A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its nonexistence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

27. The Evidence Act gives the Court power to adjudge the existence of facts on matters before it as well as they are deposed to in evidence. The test of whether a fact in issue is proved or dis-proved is whether a prudent man after considering the matters before him, deemed it proved or not. Ultimately on appreciation of the evidence, if the Court believes it to exist or considers its existence so probable, then the said fact is said to be proved. The test prescribed is satisfaction of a prudent man having regard to the circumstances of that particular case.

28. Section 59 of the Evidence Act deals with the proof of facts by oral evidence which reads as under:

59. Proof of facts by oral evidence.-All facts, except the contents of documents or electronic records, may be proved by oral evidence.

29. Section 60 of the Evidence Act speaks that the oral evidence must be direct, which reads as under:-

60. Oral evidence must be direct.- Oral evidence must, in all cases whatever, be direct; that is to say-

If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the

production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable:

Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

It provides that the oral evidence must, in all cases whatever, be direct. The proviso to Section 60 categorically states that if oral evidence refers to a fact in existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

30. Section 61 of the Evidence Act speaks about the proof of contents of document, which reads as under:-

61. Proof of contents of documents.—The contents of documents may be proved either by primary or by secondary evidence.

31. It is in this background of the statutory provisions, we have to find out, when the plaintiff avers in the plaint that he has performed or is always being ready and willing to perform the essential terms of the contract, which deals with payment of money, what is the proof that is required to prove the said averments. The explanation to Section 16 clarifies that when a contract involves 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. But none the less, if the plaintiff wants to prove that he is possessed With the requisite funds to perform his part of the contract i.e., payment of balance sale consideration, he should produce such evidence to substantiate his case. What he has to place before the Court is his financial ability either to raise the requisite funds or the possession of the requisite funds in proof of his readiness and willingness to perform the stipulations regarding the payment of balance sale consideration. The rule that in each case best evidence of which the case in its nature is susceptible should always be given naturally leads to the division of evidence into primary and secondary. Primary evidence is the best or highest evidence, or, in other words, it is that kind of proof which, in the eye of the law affords the greatest certainty of the fact in question. Until it is shown that the production of this evidence is out of the party's power no other proof of the fact is in general admitted. It is based on the principle that "best evidence" in the possession or power of the party must be produced. What the best evidence is it depends upon the facts and circumstances of each case.

Proof of Readiness

32. The proof of readiness necessarily means demonstration of financial ability or capacity to pay the balance sale consideration and take the sale deed. When a person on oath states in the witness box that he is ready with the requisite funds,

he must produce some evidence to prove his possession of the required funds. The explanation makes clear that the proof of requisite funds does not mean he should Produce the currency before the Court or he should deposit the money in Court. But at the same time, mere statement on oath in the witness box that he is possessed of the requisite funds would also do not prove possession of funds. The said proof has to be necessarily by way of documentary evidence. The reason being, if, the payment is to be made in cash i.e., by handing over currency, currency is a documentary evidence. The explanation makes it clear that to prove readiness, the plaintiff need not produce the currency before the Court. If the balance consideration is to be deposited in the Court such a deposit is also evidenced by documentary evidence, which is also not necessary by virtue of the explanation.

33. Money docs not exist in vacuum. Money has to be necessarily in the form of physical object. It is in the nature of document. Money is deposited in banks. Money is in the nature of securities. Money is capable of being raised from borrowing. Money could be raised by sale of properties movable or immovable. When a person claims that he is possessed of sufficient funds, he has to produce some documentary evidence, which proves his capacity to raise the funds or he possess the funds. What are the documents which, the plaintiff can produce to prove his capacity? It may be a passbook issued by a Bank where he has kept the balance sale consideration ready for payment. If he has invested his money by way of securities, he has to produce those securities before Court to show that any time he can encash the same and pay the balance consideration. Similarly, if he has kept the money in Fixed Deposit, in a Bank, that deposit receipt is the proof of his ability to raise the balance sale consideration. If he intends to borrow" money from a Nationalized Bank or from his employer or from any other financial institution, it has to be Remonstrated by producing a request for such financial assistance in writing, sanctioning of the said loan which has to be necessarily in writing. These instances are only illustrative. There may be several other modes by which the requisite funds are raised. But all of these instances are evidenced by documentary evidence.

34. Therefore, mere stepping into the witness box and saying on oath that he is ready with the balance sale consideration or that he is going to borrow money from any financial institution or that he has got sufficient funds in his Bank accounts or that he has kept money in Fixed Deposit, without that oral evidence being supported by documentary evidence will not prove the plaintiff's readiness to pay the balance sale consideration. It is immaterial whether such oral evidence is challenged in cross-examination or not. The plaintiff has to prove to the satisfaction of the Court that he possessed the requisite funds. He has to produce such documentary evidence, which would enable the Court to come to the conclusion that plaintiff is ready with the requisite balance sale consideration to complete the sale transaction. If no evidence is adduced in this regard by way of documentary evidence, no prudent man would come to the conclusion that the person has proved the possession of funds. In the absence of any such

documentary evidence being produced, it is a case of plaintiff's case being not proved. Plaintiff cannot expect the Court to pass a decree for specific performance of a contract of sale when the plaintiff has not proved his readiness to perform his part of the contract.

35. Therefore, in a case arising under Section 16(c) of the Specific Relief Act, the obligation is cast on the plaintiff to prove that he was ready with the balance sale consideration. When the statute requires the plaintiff must plead and prove his readiness and willingness to perform his part of the contract and that readiness refers to the possession of the requisite funds, there is an obligation cast on that person, who has to prove the possession of funds to produce documents to show possession of funds by him. Though he is not expected to tender or deposit the cash before the Court, he has to produce such evidence to prove his financial capability. Only on production of such documentary evidence, on verification and appreciation of those documents. Court could come to the conclusion that the plea of readiness is proved. Mere assertion on oath that he is ready with the balance sale consideration even if it is not challenged in the cross-examination; is not the proof of the plaintiff's readiness with the balance sale consideration. He should produce such evidence to show either he possess the requisite funds or he is capable of raising such funds within the time stipulated. If such evidence is not forthcoming it is a case of, the plaintiff's case being not proved.

36. The Apex Court Had an Occasion to consider the contention that when there is no denial of readiness and willingness by the defendant either in the written statement or in the evidence, there is no obligation on the part of the plaintiff to produce any documentary evidence to prove his readiness. The Supreme Court in the case of J.P. Builders & Another v. A. Ramadas Rao, (2011)1 SCC 429. after referring to Section 16 of the Specific Relief Act has held at para-21 as under;

21. Among the three clauses, we are more concerned about clause (c). Readiness and Willingness" is enshrined in clause (c) which was not present in the old Act of 1877. However, it was later inserted with the recommendations of the 9th Law Commission's Report. This clause provides that the person seeking specific performance must prove that he has performed or has been ready and willing to perform the essential terms of the contract which are to be performed by him.

At para 22 it is held as under:

The words ready" and "willing" imply that the person was prepared to carry out the terms of the contract. The distinction between readiness" and willingness" is that the former refers to financial capacity and the latter to the conduct of the plaintiff wanting performance. Generally, readiness is backed by willingness.

At Paras-25, 26 and 27 it is held as under:

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, 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.

26. It has been rightly considered by this Court in R.C. Chandiok v. Chuni Lai Sabharwal that "readiness and willingness" cannot be treated as a strait jacket formula. This has to be determined from the entirety of the facts and circumstances relevant to the intention and conduct of the party concerned.

27. It is settled law that even in the absence of specific plea by the opposite party, it is the mandate of the statute that the 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 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.

Underlining by us

37. Order 14 of the Code of Civil Procedure deals with the settlement of issues and determination of suit on issues of law or on issues agreed upon. Order 14, Rule 1 (3) states how the settlement of issue is framed in a suit. It provides each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue. Issues may be of fact or of law.

38. Section 16(c) of the Specific Relief Act is an exception to this general rule. Unless a person avers and proves that he has performed or has always being ready and willing to perform the essential terms of the contract which are to be performed by him, he is not entitled to enforce the specific performance of the contract. In other words, before a Court can grant a decree for specific performance, this mandatory requirement of the statute has to be complied with by the plaintiff irrespective of the defence taken by the defendant. Only if this mandatory requirement is complied with, the Civil Court gets jurisdiction to grant a decree for specific performance. If this requirement is not met, the Civil Court has no jurisdiction to grant a decree for specific performance. Therefore, it is obligatory on the part of the Court, that, in every suit for specific performance to frame an issue regarding readiness and willingness to perform the essential terms of the contract by the plaintiff irrespective of the fact whether the defendant has specifically denied the allegations in the plaint regarding readiness and willingness to perform or not. Therefore, what follows is that a plaintiff, who comes to the Court seeking a decree for specific performance must aver and prove that he has performed or is always ready and willing to perform the essential terms of the contract which are to be performed by him. Whether the defendant denied those allegations are not in the written statement, the Court is under an obligation to frame an issue regarding readiness and willingness on the

part of the plaintiff to perform the terms of the contract. Once that issue is framed, the burden of proving readiness and willingness is on the plaintiff. It is not dependent upon the admission of the defendant either in the written statement or in the evidence. Unless the plaintiff proves to the satisfaction of the Court that he was ready and willing to perform his part of the contract, the Court gets no jurisdiction to pass a decree for specific performance. Therefore, the argument of the Learned Counsel for the plaintiff", that, as there was no serious cross-examination of P.W. 1 regarding readiness and willingness, the oral evidence of P.W. 1 that he was ready and willing to perform his part of the contract was sufficient for the Trial Court to decree the suit for specific performance is unfounded. The plaintiff has not produced a scrap of paper to show how he propose to raise the balance sale consideration of Rs. 65 lakhs, where he has kept that money, is it in any bank or has he formulated a scheme for raising the funds and whether he actually possessed of the said funds. In the absence of such material, which has to be necessarily in the form of documentary evidence, not placed before the Court, the Trial Court committed a serious error in holding that the plaintiff was ready and willing to perform his part of the contract. There is absolutely no discussion in the entire judgment on this aspect and the said finding is not supported or based on any legal evidence on record. In that view of the matter, we are of the view that the finding recorded by the Trial Court that the plaintiff was ready and willing to perform his part of the contract is vitiated and is hereby set-aside.

Point No. 2

Additional Evidence in Appeal

39. Realizing the futility of the aforesaid argument, the Learned Senior Counsel took time to substantiate his contentions with judgments and accordingly, the case was adjourned. Thereafter, the plaintiff has come up with an application under Order 41, Rule 27 r/w Section 151 of the Code of Civil Procedure, 1908 for production of additional evidence. The additional evidence sought to be produced in respect of the plaintiff's case are: the statement of account of the plaintiff in IndusInd Bank, City Bank and the statement of his brothers in the City Bank and copies of the registered sale deeds under which the plaintiff and his brothers have purchased the immoveable property prior to the execution of the agreement of sale and also the demand drafts for sum of Rs. 18 lakhs taken in the name of the defendants. In the affidavit filed in support of the application for production of additional evidence, the plaintiff has reiterated all the allegations which he has made in the plaint. Thereafter, at para-6, 16 & 17 of the affidavit he states as under:

"6. Although my evidence with regard to my readiness and willingness and the availability of funds at my command was never in dispute, this Hon"ble Court during the hearing of the above Appeal, thought that the respondent/plaintiff ought to have brought on record in the case some evidence in compliance with the provisions of Sections 16-C of the Specific Relief Act.

16. However, in order to ward-off the cloud, if any, despite there being neither a pleading nor proof that I was not having sufficient funds to pay to the appellant/defendant the balance of sale consideration due and payable by me, I am advised to bring on record in the case the documents mentioned in the annexed list, which in my opinion, are unquestionable as additional evidence.

17. I respectfully submit that I would be put to irreparable loss, damage and injury if the additional evidence which are referred to above are not permitted to be brought on record in the case. The additional evidence referred to by me has got a material bearing on the facts in issue in the case. Non-production of the additional evidence referred to in the application till this day was" certainly not intentional and I did not bring the same on record till this day as there was no challenge at all to my say that I have kept the funds needed for being paid to the appellant/defendant. I am now required to bring the above evidence on record since the appellant/defendant during the hearing has raised the issue half-heartedly only by placing some reliance on some judgments."

40. Now" the question for consideration is whether the reason given by the plaintiff in his affidavit constitutes a substantial cause for allowing the application for additional evidence?

41. Order 41, Rule 27 of the Code of Civil Procedure deals with the production of additional evidence in Appellate Court which reads as under:

"27. Production of additional evidence in Appellate Court-

(1) The Parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if-

(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the court shall record the reason for its admission.

42. Sub-Rule (1) of Rule 27 of Order XL1 is clothed in a negative form i.e.. the parties to an appeal shall not be entitled to produce additional evidence. Therefore, negative words, when used in a statute, implies that it is prohibiting

and ordinarily used as a legislative device to make a statute imperative. In view of the said negative words, the parties are not entitled, as a matter of right to the admission of additional evidence in appeal. Additional evidence is admissible in appeal only if, the case falls under Clause (a), (aa) and (b) of the said provision. In this context, it is to be noticed that the provisions of the Civil Procedure Code regarding production of documentary evidence in the Trial Court has undergone substantial amendments. By virtue of the amendments brought about in 1999 and 2002, both the parties to a suit have to produce documents along with the pleadings. Production of documents at the subsequent stage is only an exception. Though Order 41, Rule 27 is not amended, the intention of the Legislature in bringing about substantial amendments at the stage of trial cannot be ignored while interpreting Order 41, Rule 27 also. Therefore, allowing of an application for production of additional evidence is only an exception. Until and unless the requirements stipulated in the aforesaid provision are made out, the Court cannot allow the application for additional evidence.

43. As could be seen from the aforesaid provision, the case does not fall under Clause (a) of the said provision because the Trial Court has not refused to admit the said documents in the evidence, but on contrary it was never produced.

44. It also does not fall under Clause (aa) because it is not the case of the plaintiff that notwithstanding the exercise of due diligence, the said additional evidence which is now sought to be produced was not within his knowledge or could not after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed. The documents which are now sought to be produced are pay orders which the plaintiff is said to have obtained and the pass sheets in the name of himself and his brothers, copies of the registered sale deed for the year 2003-04, copies of the passport of himself and his brothers, copies of the demand drafts obtained in the year 2004 and copy of the affidavits which are obtained on 17.3.2006 when the arguments commenced. Barring those two affidavits, all the documents Were available and were in possession of the plaintiff during trial which he did not produce at the time of the trial.

45. The case also would not fall under Clause (b) as this Court does not require those documents to enable it to pronounce the judgment.

46. The last ground on which the production of additional evidence in the Appellate Court is permissible is for any other substantial cause which the Appellate Court feels that those documents are required for pronouncing the judgment. The cause, set out in the affidavit would not constitute substantial cause.

47. The Apex Court had an occasion to consider these provisions of law in a recent judgment in the case of Union of India v. Ibrahim Uddin, (2012) 8 SCC 148. and laid down the law as under:

"36. The general principle is that the Appellate Court should not travel outside

the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order 41, Rule 27 CPC enables the appellate court to take additional evidence in exceptional circumstances. The appellate court may permit additional evidence only and only if the conditions laid down in this Rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, the provision does not apply, when on the basis of the evidence on record, the appellate court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the Court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the Rule itself.

37. The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide: Haji Mohammed Ishaq Wd. S.K. Mohammed & Ors. v. Mohamed Iqbal and Mohamed Ali and Co., AIR 1978 SC 798).

38. Under Order 41, Rule 27 CPC, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary" to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. [Vide: Lala Pancham & Ors. (supra)].

39. It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the absence of satisfactory reasons for the non-production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide: State of U.P. v. Manbodhan Lal Srivastava, AIR 1957 SC 912; and S. Rajagopal v. C.M. Armugam & Ors., AIR 1969 SC 101).

40. The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a "substantial cause" within the meaning of this rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that

evidence in appeal.

41. The words "for any other substantial cause" must be read with the word "requires" in the beginning of sentence, so that it is only where, for any other substantial cause, the Appellate Court requires additional evidence, that this rule will apply, e.g., when evidence has been taken by the lower Court so imperfectly that the Appellate Court cannot pass a satisfactory judgment.

42. Whenever the appellate Court admits additional evidence it should record its reasons for doing so. (Sub-rule 2). It is a salutary provision which operates as a check against a too easy reception of evidence at a late stage of litigation and the statement of reasons may inspire confidence and disarm objection. Another reason of this requirement is that, where a further appeal lies from the decision, the record of reasons will be useful and necessary for the Court of further appeal to see, if the discretion under this rule has been properly exercised by the Court below. The omission to record the reasons must, therefore, be treated as a serious defect. But this provision is only directory and not mandatory, if the reception of such evidence can be justified under the rule.

44. It is a settled legal proposition that not only administrative order, hut also judicial order must he supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of order and exercise of judicial power by a judicial forum is for the forum to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of the justice delivery system, to make it known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of the principles of natural justice. The reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, the order becomes lifeless. Reasons substitute subjectivity with objectivity. The absence of reasons renders an order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. Recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected must know why his application has been rejected."

48. In view" of the aforesaid authoritative pronouncements of the Apex Court, the application filed under Order 41, Rule 27 r/w Section 151 of the Code of Civil Procedure, cannot be allowed as a matter of course as allowing an application is an exception. Until and unless the requirements of the said provisions are met the Court has no jurisdiction to allow the application for additional evidence. Therefore, unless the conditions stipulated in the aforesaid provision exists, the additional evidence should not be admitted in appeal, as a party guilty of remissness in the Lower Court is not entitled to the indulgence of being allowed to give further evidence under this Rule. A party, who had ample opportunity to

produce certain evidence in the Lower Court had failed to do so or elected not to do so cannot be permitted to adduce additional evidence in appeal. The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that of the party or that the party did not place reliance on the importance of a document, does not constitute a substantial cause within the meaning of the Rule to enable the Court to allow" additional evidence. As held by the Apex Court, the words "for any other substantial cause" has to be read with the word "requires" in the beginning of the sentence, so that it is only where, for any other substantial cause, the Appellate Court requires additional evidence, then the Appellate Court can allow Such application.

49. In the instant case as the facts disclose that the arguments canvassed was, in the absence of a challenge to the plaintiff s evidence regarding readiness and willingness, the oral evidence of the plaintiff on oath is sufficient to prove his readiness and willingness. It is only when the Court brought to the notice of the Learned Counsel the mandatory requirement of Section 16(c) of the Specific Relief Act, an adjournment was taken and this application is filed. Even when an application is filed, the plaintiff asserts even in the absence of these documents that he has proved his case. In order to find out whether the findings recorded by the trial Court is proper or not, the Appellate Court has to look into the evidence adduced before the Trial Court. If the evidence on record is not sufficient to record a finding that the Trial Court has recorded, it is liable to be set-aside. Any amount of evidence by way of additional evidence in the Appellate Court cannot be taken into consideration to support the findings recorded by the Trial Court as the same was not produced before the Trial Court. As already pointed out the case of the plaintiff did not fall under any of the categories. Even if it is to be held "for any other substantial cause" then it is only if the Court requires evidence to pronounce the judgment, then it has to be allowed. As set out above, we have looked into oral and documentary evidence on record. We have recorded a finding of fact, finding fault with the Trial Court findings and for this purpose, we do not require the additional evidence which is now sought to be produced. Therefore, this application for additional evidence is dismissed.

50. Even otherwise, in order to make sure that no injustice is caused, we have carefully examined the documents produced. The balance sale consideration payable by the plaintiff within 45 days front the date of the agreement was Rs. 65 lakhs. It is settled law that if the plaintiff wants specific performance, then he has to demonstrate his readiness and willingness from the date of the suit till the date of judgment and decree.

51. In that background, when we look at the documents produced, as rightly pointed out by the Learned Counsel for the defendants, he had only taken demand drafts for a sum of Rs. 18 lakhs as against Rs. 65 lakhs which is the balance sale consideration payable. The copies of the registered sale deeds which are produced would only show that prior to entering into agreement of sale, the

plaintiff and his brothers had purchased immoveable properties. Though that shows financial capability of the plaintiff and his brothers, it also shows that they had already made investment in purchase of those properties and therefore, it was obligatory on the part of the plaintiff to demonstrate before the Court even after such investment, still lie was possessed of the balance sale consideration which is required to complete the sale transaction.

52. In this context, he has produced the bank statements. A perusal of the bank statement shows that periodical amounts are credited and amounts are withdrawn. If at the relevant point of time, the plaintiff had a balance of Rs. 15,16,211.47 ps. as on 25th September, 2004, by 25th October, 2004, the balance had reduced to Rs. 165.36 ps., which only shows that they are in the habit of continuously depositing and withdrawing money and probably that money was not meant for any investment to purchase the immoveable property. Similarly, the Second bank statement on which reliance is placed also shows that at the relevant point of time, they had about Rs. 4,11,882.03 ps. If both the amounts are taken into consideration, it will show that the plaintiff was in possession of Rs. 20 lakhs. He had purchased a demand draft of Rs. 18 lakhs. Total comes to Rs. 38 lakhs whereas the balance sale consideration was Rs. 65 lakhs. Then if we look into the statement of his brothers, similarly the amounts are fluctuating because of deposits" and withdrawals. If all those amounts are taken into consideration, at any given point of time and at the relevant point of time, the plaintiff did not possess Rs. 65 lakhs plus the stamp duty and registration charges which are required for completing the sale transaction. As rightly pointed out by the Learned Counsel for the defendants, the very same documents show that he was not possessed of the requisite funds and even those bank statements were to be accepted, it only shows that he is in the business and he was constantly in need of money so that he was withdrawing and depositing the money. But it cannot be construed that the said amounts were earmarked for the purchase of the property. Hence, seen from any angle we do not find any justification to allow the said application.

53. In fact, the defendants also have filed an application under Order 41, Rule 27 r/w Section 151 of CPC., for production of two documents claiming to be the bank statement of Vijaya Bank Indiranagar branch for the purpose of showing that the amount Rs. Ten lakhs was paid as advance sale consideration which was actually not handed over to them but the said amount was credited to their bank account without their knowledge. Having taken the said plea, the plaintiff ought to have produced these documents in the Trial Court but on the contrary, they have not stepped into the witness box. They have examined the power of attorney holder, who is not aware of the transaction. It is not that the said document was not available at the time of the trial. For the same reasons which we have dismissed the application filed by the plaintiff under Order 41, Rule 27 of the CPC., this application also requires to be dismissed. Accordingly, both the applications filed for production of additional evidence are dismissed as meritless. For the foregoing reasons, we pass the following:

ORDER

(i) Appeal is allowed;

(ii) The impugned judgment and decree passed by the Trial Court is hereby set-aside and the plaintiff's suit is dismissed.

(iii) It is submitted that when the impugned judgment and decree was passed by the Trial Court, the plaintiff in obedience to the decree has deposited the balance sale consideration before the Court below which is now kept in Court Deposit. Now that we have set-aside the impugned judgment and decree passed by the Trial Court, the plaintiff would be entitled to withdraw the said amount and if any, request is made for such refund, the Trial Court shall expeditiously refund the said amount without any delay.

(iv) It is submitted that the plaintiff had the benefit of the order of status quo during the trial and now that we have allowed this appeal and the plaintiff intends to challenge the said order before the Apex Court, the order of status quo shall be in force for a period of 3 months.