the judgment-debtors, the decree-holders have not been able to execute the decree during this long period. The saying that real difficulty of a decree-holder starts after passing of the decree stands fully established. The objection is absolutely frivolous and has been raised to delay the execution of the decree.

(14) The third argument of the learned counsel is that the amended decree is not in consonance with the judgment and pleadings. No such objection was raised before the first appellate Court at the time of arguments. The learned counsel cannot be allowed to raise the objection in revision for the first time. Therefore, the argument is liable to be rejected.

(15) For the aforesaid reasons, I accept the review application and dismiss the revision petition with costs. Costs Rs. 500.

N.K.S.

Before R. N. Mittal, J.

DHANNA SINGH and another,—*Appellants.*

versus

MALKIAT SINGH and others,—*Respondents.*

Regular First Appeal No. 169 *of* 1971.

November 2, 1982.

Stamp Act (II of 1899)—Section 18—Diplomatic and Consular Officers (Oaths & Fees) Act (XLI of 1948)—Section 3(1)—Specific Relief Act (XLVII of 1963)—Section 16—Code of Civil Procedure (V of 1908)—First Schedule Forms 47 and 48—Power of attorney duly executed and stamped outside India and attested by the Vice Consul of the Indian High Commission—The document, however, not stamped in India as required by section 18 of the Stamp Act—Such power of attorney—Whether valid—Agreement to sell executed in favour of the plaintiff—Property later sold by a joint sale in favour of two co-purchasers—Suit by the plaintiff for specific performance—One of the purchasers having no knowledge of the earlier agreement to sell—Knowledge of one of the purchasers—Whether to be presumed to be the knowledge of all the purchasers—Plea of being ready and willing to perform the contract not taken in the plaint nor the requirements prescribed in forms 47 and 48 complied with—Suit—Whether liable to be

dismissed—Subsequent purchaser—Whether entitled to contend that the plaintiff was not ready and willing to perform the contract.

Held, that it is evident from sub-section (1) of Section 3 of the Diplomatic and Consular Officers (Oaths & Fees) Act, 1948 that the notarial act done by a consular officer outside India is to be treated on the same footing as if it had been done by a notary in a State in India. Therefore, the attestation of the power of attorney bearing Indian stamps by the Vice Consul will be deemed to have been attested by a notary public in India. It is true that section 18 of the Stamp Act, 1899 *inter alia* provides that an instrument chargeable with duty executed out of India is liable to be stamped within a period of three months after it had been received in India. However, in view of section 3 of the Diplomatic Act, section 18 will not apply to a document which is attested by a consul in accordance with the Diplomatic Act outside India and, therefore, the power of attorney duly executed and stamped outside India and attested by the Vice Consul of the Indian High Commission is valid even though it is not stamped in India as required by section 18 of the Stamp Act. (Para 6).

Held, that if one of the purchasers has come to know about the earlier agreement, the other purchaser cannot be allowed to say that he had no knowledge about it. In such transactions, it will be presumed that the knowledge of one of the purchasers about the earlier agreement is knowledge of all the purchasers. (Para 11).

Durga Prasad and another *vs.* Smt. Lilawati and another, A.I.R. 1972 Allahabad 396. *DISSENTED FROM:*

Held, that a suit for specific performance has to conform to the requirements prescribed in Forms 47 and 48 of the First Schedule to the Code of Civil Procedure, 1908. In a suit for specific performance it is incumbent on the plaintiff not only to set out the agreement on the basis of which he sues in all its details, he must go further and plead that he has applied to the defendant specifically to perform the agreement pleaded by him but the defendant has not done so. He must also plead that he has been and is still ready and willing to specifically perform his part of the agreement. It is prescribed in Form 48 that the plaintiff is to plead that he tendered the money to the defendant on a particular date and demanded transfer of the property by a sufficient instrument Where the plaintiff fails to make any such averment in the plaint and also does not make any statement in conformity with the said plea, it cannot be said that he was ready and willing to perform his part of the agreement and his suit must, therefore, fail. (Para 17).

Held, that section 16 of the Specific Relief Act, 1963 provides that in case the plaintiff fails to aver and prove that he had been always ready and willing to perform the essential terms of the contract to be performed by him, he is not entitled to specific performance of the contract. The plaintiff is required to plead that he tendered the money to the defendant on a particular date and demanded transfer of the property by an instrument. If the plaintiff fails to aver and prove these ingredients his suit is liable to be dismissed and in such a situation it cannot be said that the subsequent purchaser cannot raise these pleas. (Para 19).

Regular First Appeal from the decree of the Court of the Sub-Judge 1st Class, Jullundur, dated the 7th day of April, 1971, decreeing the suit of the plaintiff with a direction to the vendee defendants Nos. 1 and 2 to execute a sale deed in favour of the plaintiff in respect of the land in dispute in terms of the sale agreement Ex. P-1 on or before 30th April, 1971 and leaving the parties to bear their own costs.

R. S. Bindra, Advocate with Rajiv Bhalla, Advocate, *for the Appellant.*

J. M. Sethi, Advocate, *for respondent No.* 1.

JUDGMENT

Rajendra Nath Mittal, J.

(1) This first appeal has been filed by Dhanna Singh and Pal Singh defendants Nos. 1 and 2 against the judgment and decree of the Subordinate Judge Ist Class, Jullundur, dated 7th April, 1971.

(2) Briefly, the case of Malkiat Singh plaintiff is that he entered into an agreement with Harbans Singh, defendant No. 3, to purchase the land in dispute situated in village Chitti, Tehsil and District Jullundur, for a consideration of Rs. 26,000/- on 9th April, 1968, out of which he paid a sum of Rs. 9,000/- as earnest money and agreed to pay the balance before the Sub Registrar at the time of execution of the sale deed, to be executed on or before 30th June, 1968. It is alleged that defendant No. 3 sold the land to defendants Nos. 1 and 2 for Rs. 30,000/- by a registered sale-deed dated 22nd April, 1968. The plaintiff consequently filed a suit for the specific performance of the agreement of sale on the ground that he was always ready and willing to perform his part of the agreement and that defendant No. 3 fails to perform his part. In the alternative, he prayed for a decree for the refund of Rs. 9,000/- paid as earnest money and

recovery of an equal amount by way of liquidated damages in terms of the agreement, in his favour.

(3) The suit was contested by defendants Nos. 1 to 3. Defendants Nos. 1 to 2 in their written statement averred that they did not know about the agreement of sale between the plaintiff and defendant No. 3 and that they were *bona fide* purchasers of the land for consideration without notice of the agreement. Defendant No. 3 pleaded that he was minor at the time when the agreement of sale was executed by him and, therefore, was not bound by the same. He further said that he did not receive Rs. 9,000/- as earnest money.

(4) The learned trial Court held that the plaintiff had paid Rs. 9,000/- to defendant No. 3 and that he was not minor at the time of execution of the agreement to sell. It further held that the plaintiff was ready and willing to purchase the land and defendants Nos. 1 and 2 were not *bona fide* purchasers without notice of the agreement of sale. Consequently, a decree for specific performance was passed in favour of the plaintiff with a direction to defendants Nos. 1 and 2 to execute a sale-deed in his favour in terms of the sale agreement on or before 30th April, 1971. Defendants Nos. 1 and 2 have come up in appeal to this Court.

(5) Mr. Sethi has raised a preliminary objection that the appeal is not presented by a properly authorised person on behalf of Dhanna Singh as the power of attorney executed by him in favour of Kehar Singh out of India was not stamped in accordance with section 18 of the Stamp Act when it was first received in India. According to him, it is liable to be dismissed on this short ground.

(6) I have given due consideration to the argument but regret my inability to accept it. Mr. Bindra has produced the original power of attorney dated 16th February, 1970, executed by Dhanna Singh. It bears Indian stamps of the denomination of Rs. 23/- and was attested by the Passport Officer, High Commission of India in the United Kingdom, Consular Department, and *Ex-Officio* Vice Consul under the Diplomatic and Consular Officers (Oaths & Fees) Act, 1948 (hereinafter referred to as the Diplomatic Act). Section 3(1) of the Diplomatic Act empowers a consular officer to do all notarial acts outside India. The said sub-section read as follows:—

> "3. *Powers as to oaths and notarial acts abroad.*—(1) Every diplomatic or consular officer may, in any foreign country or place where he is exercising his function.....do any

notarial act which any notary public may do within a State; and every.....notarial act.....done by or before any such persons shall be as effectual as if duly..... done by or before any lawful authority in a State."

It is evident from the sub-section that the notarial act done by a consular officer outside India is to be treated on the same footing as if it has been done by a notary in a State in India. Therefore, the attestation of the power of attorney bearing Indian stamps, by the Vice Consul will be deemed to have been attested by a notary public in India. It is true that section 18 of the Stamp Act *inter alia* provides that an instrument chargeable with duty executed out of India is liable to be stamped within a period of three months after it has been received in India. However, in view of section 3 of the Diplomatic Act, that section will not apply to a document which is attested by a consul in accordance with the Diplomatic Act outside India. I, therefore, reject the contention of the learned counsel.

(7) It is contended by Mr. Bindra that the appellants had no notice regarding the agreement of sale dated 9th April, 1968, Exhibit P. 1, between the plaintiff and defendant No. 3. He urges that in any case Dhanna Singh appellant was residing in U.K. and was not present at the time of execution of the agreement and the sale-deed. According to him, if Dhanna Singh had no knowledge regarding the agreement, he would be considered to be a *bona fide* purchaser for consideration and the sale in favour of the defendants cannot be upset.

(8) I have given due consideration to the argument but regret my inability to accept it. There is sufficient evidence on the record to hold that Pal Singh and his father Kehar Singh had knowledge of the agreement, Exhibit P.1. Jagjit Singh, Advocate, and *Lambardar*, who was an attesting witness of the agreement, Exhibit P. 1, and the sale-deed, Exhibit D. 1, stated that he had informed defendant No. 2 at the time of registration of the sale-deed, Exhibit D. 1, that the vendor had entered into an agreement to sell with the plaintiff. Some criticism has been made regarding his statement by Mr. Bindra but a few discrepancies do arise after passage of long time and his statement cannot be discarded. In addition, there are statements of Gurbachan Singh P.W. 3, Ishar Singh P.W. 4, Prem Singh P.W. 5, Nand Singh P.W.6 and the plaintiff, which go to show that the agreement, Exhibit P. 1, was brought to the notice of Pal Singh defendant and his father Kehar Singh. Gurbachan Singh P.W. 3 stated that the bargain between

the plaintiff and defendant No. 3 had been struck in village Chitti which was reduced into writing at Jullundur. He further adds that at the time of the agreement, Harbans Singh vendor, his father Udham Singh, Pal Singh and his father Kehar Singh were there, besides Malkiat Singh plaintiff, Ishar Singh and himself (the witness). His statement is supported by Ishar Singh P.W. 4, Prem Singh P.W. 5, Nand Singh P.W. 6 and the plaintiff. After taking into consideration the aforesaid statements, I am of the opinion that Pal Singh and Kehar Singh had knowledge of the agreement, Exhibit P. 1.

(9) It is admitted by Pal Singh defendant that the land had been purchased on his behalf and on behalf of his brother by their father Kehar Singh. Admittedly, Dhanna Singh was not present in India at the time of agreement of sale, Exhibit P. 1, or at the time of execution of the sale-deed in his favour, Exhibit D.1. Pal Singh was present at the time of registration and paid the consideration on his behalf and on behalf of his brother. Thus, it was Pal Singh and Kehar Singh who were acting on behalf of Dhanna Singh. In case a purchaser enters into an agreement to purchase property through another person and subsequently purchases the same through him, the purchaser cannot be allowed to say that he did not come to know about the earlier agreement between the vendor and the other person if the person through whom he purchased the property was informed about that. Therefore, it cannot be held that Dhanna Singh did not come to know about the earlier agreement in spite of the fact that he was not present in the country.

(10) This matter may be examined from another angle. The burden to prove that defendants Nos. 1 and 2 were *bona fide* purchasers for valuable consideration without notice of the agreement was on defendants Nos. 1 and 2. Only Pal Singh appeared in the witness box and not Dhanna Singh to prove that he was *bona fide* purchaser without notice of the agreement. It was necessary that Dhanna Singh should have appeared as a witness and stated so. It is well-settled that if a party does not appear in the witness-box then it will be presumed that it was unable to support its case In view of the aforesaid reasoning also, it cannot be said that Dhanna Singh was a *bona fide* purchaser without notice of the prior agreement.

(11) Even if it may be assumed that Dhanna Singh did not know about the earlier agreement and his brother Pal Singh knew about

it, still it cannot be held that Dhanna Singh was a *bona fide* purchaser. The reason is that Pal Singh is a co-purchaser and if one of the purchasers has come to know about the earlier agreement, the other purchaser cannot be allowed to say that he had no knowledge about it. In such transactions, it will be presumed that the knowledge of one of the purchasers about the earlier agreement is knowledge of all the purchasers.

(12) The learned counsel for the appellants referred to *Durga Prasad and another* vs. *Smt. Lilawati and another,* (1). In that case, the learned Judge took the view that even if one of the co-purchasers came to know about the earlier transaction, it could not be held that the other purchaser was not a purchaser for value in good faith if he did not come to know about the earlier transactions. In view of the above observations, the suit of the plaintiff for specific performance was dismissed. With great respect to the learned Judge, I am unable to persuade myself to take that view.

(13) Regardnig the consideration, the sale was effected for Rs. 30,000/- out of which Rs. 25,750/- was paid by defendants Nos. 1 and 2 to defendant No. 3 before the Sub-Registrar. Out of the balance of Rs. 4,250/-, Rs. 4,000/- were left with the said defendants to be paid at the time of attestation of the mutation and Rs. 250/- as trust money for payment to Gurdit Singh and his brother. Normally, the sale consideratoin is not withheld for payment at the time of mutation. It shows that they had a doubt as to whether the property would remain with them or not.

(14) After taking into consideration all the above said circumstances, I am of the opinion that defendants Nos. 1 and 2 are not *bona fide* purchasers without notice of the agreement in favour of the plaintiff.

(15) It is next contended by Mr. Bindra that the plaintiff did not state in the plaint that he had money at his disposal to pay the sale consideration to defendant No. 3 and that he asked the latter to transfer the property to him as provided in Forms Nos. 47 and 48 to Schedule I of the Code of Civil Procedure, relating to pleadings. According to him, in that situation, the plaintiff was not entitled to specific performance.

(16) I have considered the argument of the learned counsel. Section 16 of the Specific Relief Act provides that specific performance of a contract cannot be enforced in favour of a person who

(1) A.I.R. 1972, All 396.

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. The words 'ready' and 'willing' have not been defined in the Act. However, according to the Shorter Oxford English Dictionary, Third Edition, the word 'ready' has been defined as "prepared, or having all preparations made, to do something", and the word 'willing' as "having a ready will;...". Therefore, the word 'ready' implies that the plaintiff had money at his disposal to pay the sale consideration and the word 'willing' implies that he was inclined to do what was required. The word 'ready' has been interpreted by the Delhi High Court in *Smt. Raj Rani Bhasin and others* vs. *S. Kartar Singh Mehta,* (2). The relevant observations of the learned Division Bench are as follows:—

> "A distinction may be drawn 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. This includes his financial ability to pay the purchase price."

Therefore, it was incumbent upon the plaintiff to show that he had money at his disposal to pay the sale consideration to defendant No. 3. I am fortified in the above observations by the dictum of the Supreme Court in *Garikapati Veerayya* vs. *Nannapaneni Subbayya Chowdhary and others,* (3). The following passage from judgment may be read with advantage:—

> "...In a suit for specific performance, the plaintiff must aver in his plaint that he was ready and willing to perform his part of the contract and if the said averment is traversed, he must prove the said averment. Law does not require that in order to prove his readiness and willingness, the plaintiff must show that he had ready in his hands the requisite amount which had to be paid by him to his vendor. If he proves that he had in his hands such ready amount at all material times and was willing to pay it and get the conveyance executed in his favour, that, of course, is a very clear case of the plaintiff's readiness and willingness. But the same fact can be proved if the plaintiff can show that at all material times, he could

(2) A.I.R. 1975 Delhi 137.
(3) (1966) II S.C.J. 789.

have raised the said amount and was willing to do so and was prepared to perform his part of the contract and carry out the stipulations binding on him. If the plaintiff fails to allege and prove his readiness and willingness in this matter, he had no right to claim specific perfarmance."

The plaintiff, in the instant case, however, failed to prove that the money was at his disposal to be paid to defendant No. 3 at the time when the sale deed was to be executed. Even he himself did not make a statement in this regard when he appeared as his own witness. Thus it cannot be said that he was ready to perform his part of the agreement. It is also relevant to point out that the sale consideration was to be paid and the said deed executed on or before 30th June, 1968. When the plaintiff appeared as a witness, he stated that he came to know about the sale in favour of defenddants Nos. 1 and 2 about five or seven days before the filing of the suit. The suit was filed on 4th October, 1968. Thus, he came to know about the sale somewhere in the end of September, 1968. In case he was ready aid willing to perform his part of the agreement and wanted the sale-deed to be executed within the agreed period, he would have come to know about the sale of the land by defendant No. 3 in favour of defendants Nos. 1 and 2 latest by 30th June, 1968, the last date when the sale-deed was to be executed in terms of the agreement, Exhibit P. 1. Consequently, I am of the opinion that the plaintiff was also not willing to perform his part of the agreement.

(17) It has been held by the Supreme Court in *Ouseph Varghese* vs. *Joseph Aley and others,* (4) that a suit for specific performance has to conform to the requirements prescribed in Forms 47 and 48 of the First Schedule in Civil Procedure Code. In a suit for specific performance it is incumbent on the plaintiff not only to set up the agreement on the basis of which he sues in all its details, he must go further and plead that he has applied to the defendant specifically to perform the agreement pleaded by him but the defendant has not done so. It has further been held that he must also plead that he has been and is still ready and willing to specifically perform his part of the agreement. It is prescribed in Form 48 that the plaintiff is to plead that he tendered the money to the defendant on a particular date and demanded transfer of the property by a sufficient instrument. In the present case, the plaintiff failed to make any such averment in the plaint. He also did not make any statement in conformity with the said plea. Therefore, it cannot be said that the plaintiff was

(4) 1969(2) S.C.C. 539.

ready and willing to perform his part of the agreement. Same view was taken by the Karnataka High Court in *Gurupadayya Shivayya Hiremath* vs. *Shivappa Basappa Gurammanavar*, (5) while interpreting section 16(c) of the Specific Relief Act. It was held therein as under:—

> "This sub-section makes it obligatory for the plaintiff to aver in his plaint and also to prove that he has performed or has always been ready to perform the essential terms of the contract which are to be performed by him. The plaint, however, need not be followed by the actual deposit when a contract involves such payment, but there must be proper averments in the plaint regarding the plaintiff's willingness to perform his part of the contract followed by the evidence to prove it. In other words, his conduct should not be anything other than his readiness to perform his part of the contract. If there is no such proper plea in that regard, the suit for specific performance is not maintainable."

(18) After taking into consideration all the circumstances, I am of the opinion that the plaintiff was not entitled to the decree for specific performance.

(19) Faced with that situation, Mr. Sethi sought to urge that the plea that the plaintiff was not ready and willing to perform his part of the agreement was available to defendant No. 3 and not the appellants who are subsequent purchasers from him. He relies on *Abdul Kayum Ahmad etc.* v. *Damodhar Paikaji Kinhekar, etc.*, (6). I do not find any substance in the argument. As stated above, section 16 of the new Act provides that in case the plaintiff fails to aver and prove that he had been always ready and willing to perform the essential terms of the contract to be performed by him, he is not entitled to specific performance of the contract. It has also been held above that the plaintiff is required to plead that he tendered the money to the defendant on a particular date and demanded transfer of the property by an instrument. Therefore, if the plaintiff fails to aver and prove the aforesaid ingredients his suit is liable to be dismissed.

(5) A.I.R. 1978 Karnataka 98.
(6) A.I.R. 1964 Bombay 46.

In this situation, it cannot be said that the subsequent purchasers cannot raise the above said plea.

(20) Adverting to the facts of the present case, it may be mentioned that not only the appellants but even defendant No. 3 contested the suit and took the aforesaid plea. Therefore, in view of the fact that even defendant No. 3 had taken the plea to have effect, the argument is without any merit. *Abdul Kayum Ahmad's case* (*supra*), to which reference has been made by Mr. Sethi, is distinguishable. In that case, the argument was raised by subsequent purchasers that instead of granting specific performance, damages should be granted to the plaintiff who sought specific performance of an agreement of sale. The learned Judge, after referring to sub-section (c) of section 12 and sub-section (a) of section 21 of the Specific Relief Act, 1877, observed that the plea that specific performance should not be given as the promisee could be adequately compensated in money, could be taken by the promisor. Section 12(c) and 21(a) of the old Act are equivalent to sections 10(b) and 14(1)(a) of the new Act. No such argument was raised in the present case. In my view, Mr. Sethi, cannot derive any benefit from the observations in that case. Consequently, I reject the contention of Mr. Sethi.

(21) Mr. Sethi lastly urges that in case the Court accepts the appeal and dismisses the suit of the plaintiff for specific performance, the plaintiff is entitled to the refund of the earnest money paid by him. I find substance in the submission of Mr. Sethi. It is not disputed that defendant No. 3 had sold the property to defendants Nos. 1 and 2 before 30th June, 1968, the last date on which the sale-deed was to be executed in favour of the plaintiff. Thus, defendant No. 3 was unable to perform his part of the agreement on that date. After taking into consideration this circumstance, I am of the view that the plaintiff-respondent is entitled to the refund of the earnest money.

(22) For the aforesaid reasons, I partly accept the appeal, modify the judgment and decree of the trial Court and dismiss the suit of the plaintiff for specific performance but pass a decree for recovery of Rs. 9,000/- in his favour and against the defendant No. 3. In view of the complicated questions of law and fact involved in the case, I leave the parties to bear their own costs throughout.

N.K.S.