

Shivaram and Another Vs. Hanumanth and Others

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SooperKanoon Citation : sooperkanoon.com/1106814

Court : Karnataka Dharwad

Decided On : Apr-20-2012

Judge : Subhash B. Adi

Appeal No. : R.F.A. No. 3014 of 2009 & RFA CROB 101 of 2010 (SP)

Appellant : Shivaram and Another

Respondent : Hanumanth and Others

Advocate for Pet/Ap. : Sri. G.R. Andanimath, Sri. Andanimath

Judgement :

(Prayers: This RFA is filed u/s 100 of CPC praying to set aside the Judgment and decree dated 16/01/2009 passed in O.S.No.63/2005 on the file of the III addl. Civil Judge (SR.DN). Belgaum, and etc.

This RFA.CROB is filed u/o.41 Rule 22 of CPC., praying to modify the Judgment and decree dated 16-01-2009 passed in O.S.No.63/2005 on the file of the III addl. Civil Judge (SR.DN) Belgaum, in so far as findings on issue No.2 and addl.issue No.1 and dismiss the suit, and etc.)

1. R.F.A.No.3014/2009 and R.F.A.Cr.Ob.No.101/2010 are by the plaintiff and defendant No.1 respectively in O.S.No.63/2005. R.S.A.No.5148/2009 is by the defendant in O.S.No.178/2010.

2. R.F.As. and Cross-Objections are dealt together, R.S.A. is dealt separately.

3. I.A.1 is filed by defendant No.1 under Section 151 of CPC for deletion of names of respondent Nos.2 to 5 in the R.F.A., as defendant No.1 is the sole and absolute owner of the suit schedule property. Opposing the deletion of the names of the respondent Nos.2 to 5, the appellant in R.F.A. has filed I.A.2/2012. Hence, both these I.A.s. will be considered later.

4. Brief facts leading to these cases are as under:

The suit is one for specific performance of the agreement dated 6.1.1995. Plaintiff has sought for a direction, directing the defendants to execute the sale deed and get the same registered, in case the defendants fail to execute the sale deed, then by appointing Commissioner, in the alternative for direction to refund the advance consideration amount to the plaintiff with damage of Rs.13,50,000/- with future interest @ 18% per annum, further, for declaration that, the judgment and decree in O.S.No.133/1999 dated 1.3.2004 on the file of Civil Judge (Sr.Dn.), Belgaum, is not binding on the plaintiff.

5. Plaintiff was in occupation of the suit schedule property as monthly tenant, he is carrying on business in stationery and cosmetic and other items since 1959, on monthly rent of Rs.600/-. On 23rd May 1989, the original owner of the suit schedule property Ananth R.Malithali died leaving behind two sons i.e., defendant No.1 and late Balaram and three daughters defendants-3 to 5. The names of the legal representatives of the deceased Ananth were entered in the survey record. The second son Balaram also died leaving behind Smt.Rohini as his legal representative, who is defendant No.2. All the defendants entered into an agreement of sale with the plaintiff by executing the written agreement dated 6.1.1995 agreeing to sell the suit schedule property for sale consideration of Rs.13,50,000/- plaintiff had Rs.4,00,000/- by way of advance amount and it was acknowledged by the defendant Nos.2, 3 and one Sudhindra, i.e., son of defendant No.1. Defendants were under obligation to compile all the formalities including obtaining clearance certificate from Income Tax Department as required under Section 230(A) of the Income Tax Act (hereinafter referred to as the Act for short). It was also agreed that the sale transaction to be completed on or before

30th June 1995, however, the defendants did not perform their part of contract in terms of the agreement. Defendant Nos.2 and 3 and Sudhindra, demanded additional advance amount in violation of the terms and conditions of the agreement and started harassing the plaintiff. Plaintiff had no option except to pay the said amount and accordingly, defendant Nos.2 and 3 and Sudhindra collected the said amount and acknowledged the receipt. Plaintiff has paid huge advance of consideration hoping that the defendants will perform their part of contract and execute the sale deed in terms of the agreement. Plaintiff was always ready and willing to perform his part of contract right from the date of agreement. He was repeatedly requesting the defendants to obtain income tax clearance certificate. Plaintiff, who was on very cordial terms with the defendants, did not insist to give in writing as to the promise made by the defendants to secure the income tax clearance certificate. Every time the plaintiff used to ask the defendants regarding compliance, the defendants for one or the other reason were postponing the same. Plaintiff believed the explanation given by the defendants that they will secure the income tax clearance certificate after they settle their internal disputes.

6. However, the defendants in order to harass and deprive the plaintiff of his legitimate right and to deny the execution of the sale deed, got a suit filed in O.S.No.133/1999 amongst themselves, and got the said suit compromised. This conduct of the defendants made it clear that, the defendants were avoiding to execute the sale deed, In 4 to 5 years time, the market value of the suit property also increased considerably. Defendants, who were bound to execute the sale deed, they strated avoiding the same to claim enhanced amount, however, they were not entitled to demand enhanced consideration. Indirectly to pressurise the plaintiff, the defendants got their suit compromised. The defendants were aware that, If the plaintiff was made known of the suit, he would get himself impleaded as party. Intentionally the defendants kept the plaintiff in dark of the suit filed by them. The alleged compromise decree will not have any bearing on the suit filed by the plaintiff seeking decree for specific performance of the contract, as the said decree had come into force after the agreement of sale and it is nullity in law.

7. Defendants were trying to use the compromise decree to avoid execution of the sale deed in terms of the agreement. The judgment and decree in

O.S.No.133/1999 is not binding on the plaintiff. Defendants with intention to make unfair gain for themselves had filed the said suit. Defendants instead of performing their part of contract were making an attempt to get their name mutated in the City Survey Record and also making effort to alienate the suit property to third party by suppressing the agreement executed in favour of the plaintiff.

8. There was exchange of notice with regard to the tenancy rights. The plaintiff has given appropriate reply. One S.S. Kousandal had made a sincere effort to convince the defendants, but the defendants for the reasons best known to them did not come forward to execute the sale deed in terms of the agreement.

9. A week before the suit was filed, plaintiff approached the defendants along with said person requesting the defendants was executed by the defendants to execute the sale deed by receiving the sale consideration, however, defendants refused to execute the sale deed.

10. The cause of action accrued to the plaintiff in December 2004, when the defendants refused to execute the sale deed. Accordingly, he filed a suit for specific performance.

11. On service of summons, defendant No.1 filed a written statement inter alia denying the plaint averments, description of the suit schedule property and alleged that the defendant nos.2 to 5 are neither proper nor necessary parties in view of the judgment and decree in O.S.No.133/1999. Defendants-2 to 5 have no right, title and interest in the suit schedule property.

12. Plaintiff was the tenant in possession on monthly rent of Rs.600/- his tenancy has been terminated and has been directed to quit and deliver vacant possession of the suit schedule property. First defendant is the exclusive owner of the suit schedule property. He has exercised his lawful right in terminating tenancy and demanding the possession. Defendant No.1 did not admit that the defendant No.2 was competent to receive the rent. Defendant No.1 had informed the plaintiff as to whom he has to pay the rent. All the payments made by the plaintiff are contrary to his instructions and are illegal.

13. Defendant No.1 admitted the execution of agreement dated 6.1.1995 in favour of the plaintiff by defendant Nos.1 to 5. Since the plaintiff did not comply with the essential terms and conditions of the said agreement, the payments were not made within the time stipulated under the agreement and did not obtain the sale deed within the time stipulated in the agreement.

14. Date of completion of the sale deed was fixed as 30th June 1995. Therefore, plaintiff ought to have instituted a suit for specific performance of the agreement within three years from 30th June 1995. Since the suit is filed beyond three years, same is barred by time. It is false to say that the defendants did not perform their part of contract in terms of the agreement and plaintiff did not get the sale deed executed. Plaintiff has violated the terms and conditions of the agreement. Defendant No.1 also denied that the defendants were harassing the plaintiff, payments made to the defendant Nos.2 and 3 and one Sudhindra are not binding on defendant No.1.

15. Plaintiff had served a notice dated 30th May 1997 through an Advocate demanding specific performance of the agreement of sale within 15 days from date notice, failing which the legal action would be taken. Admittedly, no sale deed was executed by the defendants within stipulated time of 15 days stated in the legal notice. Plaintiff had become aware that the defendants are not willing to execute the sale deed, hence, the limitation for institution of the suit commenced in the month of June 1997. Defendant No.1 served the notice dated 29.4.1999 on the plaintiff, calling upon the plaintiff to surrender vacant possession of the suit schedule property. Plaintiff had replied to the said notice by his reply notice dated 25.5.1999. Plaintiff had the knowledge that the defendants had refused to execute the sale deed, even then the suit was not filed within three years from the said date also. Hence, the suit is barred by limitation.

16. Plaintiff's assertion that he was ready and willing to perform his part of contract is specifically denied. Further, stated that the defendants filed the suit after limitation to file the suit for specific performance expired. The stand taken by the plaintiff that the suit was pending has no relevance on the performance of the contract by the plaintiff. Plaintiff was fully aware that, neither the institution of suit

in O.S.No.133/1995 nor its decree would come in his way to file the suit for specific performance. Decree in the said suit is valid and binding inter se between the defendants. Plaintiff is only a tenant in occupation of part of the suit property in O.S.No.133/1995. He has no right to question the validity of the said decree. There is no obligation on the part of the defendants to obtain consent of the plaintiff to divide their family property.

17. That the income tax clearance certificate was not essential for the plaintiff to perform his part of contract. Even assuming without admitting that it was so, plaintiff was aware at the time of the contract that the last date was fixed for performance of contract i.e., on or before 30th June 1995. Plaintiff has a cause of action, if the income tax clearance certificate was essential, immediately on expiry of 30-06.1995. Plaintiff knew that the income tax clearance certificate was not essential to perform his part of contract. Plaintiff was aware that the suit property is situated in commercial locality and has deliberately avoided to perform his part of contract within the stipulated time by taking the advantage that, he can continue in possession. Hence, his right got extinguished in 1998.

18. First defendant terminated the tenancy of the plaintiff and sought for possession of the suit schedule property. Plaintiff being afraid that he cannot resist the suit for eviction has come out with the manipulative and untenable suit. He is taking advantage of the time barred agreement of sale, preventing the defendants from taking steps to recover possession.

19. There was exchange of notice in 1997 and 1999. Plaintiff had the knowledge of the exchange of notice and had the knowledge that the defendants were not inclined to sell the property under the agreement. The limitation had begun in 1997-1999. In view of the lapse of time, the right to seek suit for specific performance is extinguished under the Limitation Act. The cause of action arose on 30th June 1995 i.e., last date fixed for performance of contract. On these pleadings and others, defendant No.1 contended that the suit for specific performance is liable to be dismissed.

20. The trial court on the basis of these pleadings framed the following issues:

1. Whether plaintiff proves that defendants have executed an agreement of sale on 6.1.95 agreeing to sell the suit property for Rs.13,50,000/- and received Rs.4,00,000/- earnest money towards the sale consideration?

2. Whether plaintiff proves that, he was ready and willing to perform his part of contract?

3. Whether plaintiff proves that defendants with a malafide intention filed a suit O.S.133/99 having knowledge about the execution of the agreement of sale in favour of the plaintiff, fraudulently compromised the said suit to defeat the rights of the plaintiff, hence the Judgment and Decree passed in O.S.133/99 by the Civil Judge (Sr.Dn.), Belgaum is not binding on the rights of the plaintiff?

4. Whether plaintiff is entitled for relief of specific performance of the agreement or in the alternative refund of the earnest money with interest at the rate of 18% p.a.?

5. Whether defendant Nos. 2 and 3 prove that the suit is bad for mis-joinder of the parties?

6. Whether defendant Nos.2 and 3 prove that the suit is not properly valued and Court Fee paid is insufficient?

7. Whether plaintiff is entitled for relief sought?

8. What order or decree?

21. Before the trial court, plaintiff got himself examined as PW-1. None was examined on behalf of the defendants. In the evidence of plaintiff, plaintiff got Exs.P1 to P30 marked in his evidence. No documents were produced or marked by the defendants.

22. Trial court on appreciation of the evidence on record held that the plaintiff has proved that the defendants have executed an agreement of sale dated 6.1.1995, agreeing to sell the suit schedule property for Rs.13,50,000/- and received advance amount of Rs.4,00,000/- towards the sale consideration.

23. That the plaintiff has proved that he was ready and willing to perform his part of contract. However, plaintiff has failed to prove that the defendants with mala fide intention have filed the suit in O.S.No.133/1999, having knowledge that the execution of the agreement of sale in favour of plaintiff, fraudulently compromised the said suit to defeat the rights of the plaintiff. The judgment and decree passed in O.S.No.133/1999 is binding on the plaintiff. Plaintiff is entitled for earnest money with interest @ 6% per annum. The suit is not bad for mis-joinder of defendant Nos.2 and 3. The suit is properly valued and Court fee paid is sufficient. Plaintiff is entitled for earned money with interest. The suit is not barred by time.

24. On these findings, the trial court held that the plaintiff is entitled for Rs. 4,000,000/- with interest @ 6% p.a. from 30th June 1995.

25. Plaintiff has filed this appeal questioning the judgment and decree insofar as it relates to denial of the decree for specific performance of the agreement, whereas, the defendant No.1 has filed the cross-objection as against the findings on issue No.2. that the plaintiff was ready and willing to perform his part of contract and additional issue that the suit is not barred by time.

26. Heard Sri. G.R. Andanimath, learned Counsel for the plaintiff and Sri. Hanumantha Ananth Malihalli defendant No.1 -party-in-person. Though defendant Nos.2 to 5 have represented by the Counsel, but Counsel did not address the arguments. Defendant No.1- party-in-person submitted that he had taken Power of Attorney from defendant Nos.2 and 3 and defendant Nos.4 and 5 have no interest in the suit property. He submitted that, he is making submission for himself and also on behalf of defendant Nos.2 and 3. He also submitted that, in view of the compromise decree in O.S.No.133/1999, the suit schedule property has fallen to his share and as such, he is the sole absolute owner of the suit schedule property and other defendants have no right.

27. Sri. Andanimath, learned Counsel for the plaintiff submitted that, Ex.P10 is an agreement of sale executed by defendant Nos. 1 to 5. Under the terms of the agreement, the sale consideration amount was to be paid at different intervals and the last payment of Rs. 50,000/- was to be made on 30th June 1995. He submitted that, the agreement stipulates that the sale to be executed on the date of payment

of last instalment. Further, stipulates that, in case there is a failure to pay two consecutive instalments, agreement stands cancelled and the vendors, had a right to entire into transaction with others. However, the said conditions were subject to obtaining of certificate under Section 230-A of the Act and for which the vendors were responsible. Admittedly, the income tax certificate was not obtained by the vendors.

28. Though, the date was fixed for payment as 30th June 1995, however, the defendants received the instalment amount even after the expiry of the time fixed under the agreement i.e., 28.8.1995 as per Ex.P21 i.e., beyond the stipulated time under the agreement. As such, the defendants had waived their right and receipt of the payment after the due date, which makes it clear that the time was not the essence of the contract. To support his contention, he relied on the judgment of this Court reported in AIR 1991 KAR 119 and submitted that, when the possession is with the purchaser, time would not be the essence of contract and in this case, the defendants have waived their right by receiving the amount beyond stipulated period.

29. He also relied on the provision of Section 230-A of the Act, and submitted that the said provision was in force till 1.6.2001, the income tax clearance certificate was must, as such, the defendants having failed to produce the income tax clearance certificate under Section 230 A of the Act, within the stipulated time, the time was not treated as the essence of the contract.

30. He also relied on the evidence of the plaintiff - PW-1 and submitted that, PW-1 in his evidence at para-5 has stated that, he was always ready and willing to perform his part of contract and he was repeatedly making requests to the defendants to perform their part of contract, however, the defendants had assured him that they will perform their part of the contract after they received the income tax certificate and after the internal problems are settled. This part of the evidence has not been challenged in the cross-examination and as such, the plaintiffs evidence proves that the defendants has assured that they would secure the income tax certificate and they had directed the plaintiff to wait till the internal problems are settled. The defendants had an internal problem and they had filed

suit in O.S.No. 133/1999 and the said suit was compromised on 1.3.2004 and thereafter, the plaintiff filed the present suit for specific performance.

31. He also submitted that, the defendants have not led any evidence to support their plea, hence, adverse, inference should have been drawn against the defendants. To support his contention, he relied on the judgment reported in AIR 1999 schedule 1341 para 70.

32. Further supporting the finding on ready and willingness, learned Counsel relied on the pleading at paragraph -8 of the plaint and the evidence of PW-1 to show that, the plaintiff has not only pleaded that he is always ready and willing to perform his part of contract, but in the evidence also he has stated that, he is always ready and willing to perform his part of contract. Defendants had not obtained the clearance certificate from the Income-tax authority, thus defendants failed to perform their part of contract. To support his contention, he relied on the judgment of the Apex Court reported in 2011 (1) SCC 429 para 22 and ILR 1984 SC 351 at page.353 to show that the provisions of Section 230-A of the Act require clearance for transfer of any property the value of which exceeds Rs.50,000/- and the said provision was repealed only on 1.6.2001.

33. As regard to the limitation, he relied on Ex.P28 -the notice issued by the plaintiff, and submitted, that, under Ex.P28 though the last date was fixed as 30th June 1995, however, even after the expiry of the said date, the defendants received the payment. As such, the time was not treated as essence of the contract. The defendants were required to obtain income tax clearance certificate, and till then the sale could not have taken place. Since the defendants failed to get the said certificate, time did not become the essence of the contract. Hence, the suit is not barred by limitation. To support his contention, he relied on the judgment in AIR 2001 KAR 442 and Ex.P6 - a reply by the plaintiff informing readiness and willingness to perform his part of contract. This evidence proves that, the contract was kept alive by the parties.

34. He also submitted that, in case of contract for transfer of immovable property, time would never be the essence of contract. He relied on the judgment reported in AIR 2008 SC 1205 para -9 in the matter of Balasaheb Dayandeo Naik (Dead)

through LRs and Ors. - vs. Appasaheb Dattatraya Pawar.

35. On the other hand, defendant No.1 - party-in-person submitted that, the agreement Ex.P10 is not in dispute. The agreement Ex.P10 itself makes it clear that the time was the essence of the contract. He relied on the terms of the agreement and pointed out that, as per the terms of the contract, plaintiff was required to pay the amount in instalment, the last payment was to be made on or before 30th June 1995. The agreement specifically mentions that, in case of failure to make two consecutive instalments, the agreement stands cancelled and the defendants will have a right to enter into a transaction with others. The terms of the contract not only make the time as essence of the contract, but also provides for consequence of failure to perform the contract on the part of the plaintiff. The effect of failure to pay two consecutive instalments automatically results in cancellation of the agreement, as such, the time was treated as essence of the contract.

36. As regard to the requirement of the income tax certificate, he relied on the terms of the contract and pointed out that, the requirement of certificate under Section 230-A of the Act was not mandatory, but it was optional and the condition itself says that, if there is need for certificate, the defendants has agreed and if they failed to get the same, still they were ready to execute separate sale deeds without the income tax clearance certificate.

37. He also relied on Ex.P23 - notice dated 30th June 1997 issued by the plaintiff himself to show that, plaintiff had issued a legal notice and thereby had called upon the defendants to accept the balance of sale consideration and execute the sale deed in his favour as otherwise he would be constrained to take legal action against the defendants. In the said notice, he has not mentioned that the defendants should obtain the income tax clearance certificate under Section 230-A and then execute the sale deed, as such, the contention of the plaintiff that, for want of income tax clearance certificate, he could not enforce the contract does not merit. The fact that he had issued notice as per Ex.P23 in 1997 and had not taken action, show that, even according to the plaintiff, the cause of action accrued to him in 1997 and the suit is admittedly filed in 2005 much after the limitation. He

further submitted that, in view of the above, the suit is barred by law. He also relied on the notice issued by the defendants as per Ex.P22 dated 25.5.1999 wherein the defendants had made it clear that they are not executing the sale deed and had informed the plaintiff that the plaintiffs rights have got extinguished by lapse of time and even after the issue of notice at Ex.P22, the plaintiff did not choose to enforce the contract and much after three years from the date of Ex.P22, the present suit is filed. Hence, this suit is clearly barred by law.

38. As regard to ready and willingness, he relied on the terms of the contract under Ex.P10 and submitted that, Ex.P10 stipulates the schedule of payments and it also stipulates failure to pay two instalments, the agreement stands cancelled. It makes clear that the time was essence of the contract.

39. Insofar as Ex.P21, the receipt of amount in 1995 is concerned, he submitted that, the said amount is not received by him, as such, it does amount to payment under the agreement.

40. He also submitted that, though he has not led the oral evidence, but the plaintiff is required to plead and prove the valid agreement between the plaintiff and defendants that the plaintiff was always ready and willing to perform his part of contract and that he has performed his part of contract, that the suit is filed within the limitation. Even if the agreement is held valid, still the Court can refuse the decree for specific performance, however, plaintiff in this case by his own conduct and by his own showing has not proved that he was ready and willing to perform his part of contract much less the word always ready and willing from the date of agreement till execution of the sale deed. On these submissions, he supported the findings insofar as dismissal of the suit and submitted that, the findings on issue No.3 and additional issue require to be set aside, as they are contrary to the pleadings and the evidence on record.

41. Learned Counsel for the defendant No.1 further contended that, the inaction on the part of the plaintiff proves as to how the plaintiff conducted himself from the date of agreement till filing of the suit. The contention that the income-tax clearance certificate under section 230A of the Act was relevant, also does not merit, as even according the plaintiff himself that the said provision repealed with

effect from 1.6.2001. However, it is not in dispute that the plaintiff did not come forward to get the sale deed executed in his favour, in turn, nearly after more than 4 years of the repeal of the said provision has filed the suit. This clearly proves that the plaintiff was never ready and willing to perform his part of contract. Even on the ground that the plaintiff was not ready and willing to perform become disentitled for discretionary decree for specific performance of contract.

42. In the light of the above submissions, the points that arise for consideration are:

1. Whether the trial court was justified in giving a finding that the plaintiff was always ready and willing to perform his part of contract by interpreting Ex.P.10 - agreement of sale?
2. Whether the trial Court was justified in holding that the suit is not barred by time on the ground that the inter se suit was pending amongst the vendors in O.S.133/1999?
3. Whether the trial court was justified in holding that the plaintiff is not entitled for specific performance of the contract and only for refund of earnest money with interest as there is ten years delay in filing the suit?

43. The facts, which are not in dispute are:

That defendants 1 to 4 and defendant No.5, Sudhindra and deceased Balaram had executed agreement of sale in favour of the plaintiff, agreeing to sell entire house and space comprised in CTS No. 1536/1-B measuring 57.69 sq.mtrs. and house and the space towards Southern side bearing CTS No. 1536/2A, admeasuring measuring South-West: 16 feet towards North, in the middle 14 feet and 10-08 towards South and North-South: 70 feet, bounded on the East by complex of Birje, West by property of Apate, South by property out of CTS.No.1536/2-A and North: by road.

44. That the vendors had agreed to sell the schedule property for sale consideration of Rs.13,50,000/-. Under the agreement vendors acknowledge the receipt of a sum of Rs.1,00,000/- as advance sale consideration on the date of

agreement. It was further agreed that, the remaining sale consideration was to be paid in six installments on or before 30.06.1995 as stipulated under:

Sl.No.	Amount(Rs)	Amount in words	On or before
1.	1,00,000/-	Rupees One lakh only	28.02.1995
2.	1,00,000/-	Rupees one lakh only	07.04.1995
3.	2,00,000/-	Two lakhs	30.04.1995
4.	2,50,000/-	Two lakhs fifty thousand.	31.05.1995
5.	3,00,000/-	Three lakhs	08.06.1995
6.	2,50,000/-	Two lakhs fifty thousand	21.06.1995
7.	50,000/-	Fifty thousand only	30.06.1995

The last payment agreed to be paid was on or before 30.06.1995.

45. The agreement stipulates, that the plaintiff should pay stamp duty, registration charges to be borne by the plaintiff; further, if the plaintiff fails to pay two consecutive installments, the agreement will be treated as cancelled and the vendors will have a right to enter into transaction with others; till completion of the sale, the plaintiff has to go on paying the agreed monthly rent; at the time of sale, the MAHADI (i.e. upper floor) will be delivered. It was further agreed that, if any portion out of the above said property is acquired for the purpose of master plan, the same will be acquired after execution of this agreement and for the same the plaintiff has no right to raise any dispute. Then amount of Rs. 13,50,000/- will be the value for the remaining area.

46. If there is need of certificate under Section 230A of the Income Tax Act, the Vendors will obtain the same or they will execute separate sale deeds in respect of their ownership rights and they are responsible. In the event of the vendors failure to do so, the plaintiff has right to approach the Court and get the sale transaction completed and for the said expenses vendors were responsible. The installment amount to be paid to Sudhindra Hanmant Malihalli and Shindu Anant Malihalli.

47. Since the parties have admitted the agreement, there is no dispute as to the terms of the contract.

48. Plaintiff in his pleadings has relied on two circumstances to submit that, on account of breach of terms of the contract by the defendants as the income tax certificate under Section 230-A of the Income Tax Act was not obtained, and (ii) that there was inter se dispute pending amongst the vendors in O.S.133/1999. In the absence of the income tax clearance and in view of the pendency of the dispute in O.S.133/1999, plaintiff could not seek the enforcement of the contract, though he was always ready and willing to perform his part of contract.

49. Pw.1 in his examination-in-chief has stated that, he was always ready and willing to perform his part of contract right from the date of entering into agreement of sale, he was repeatedly requesting the defendants to perform their part of contract and also requesting the defendants to obtain income tax clearance certificate and to execute the sale deed. Defendants had assured him that they would perform their part of contract and also assured him, the moment they receive income tax clearance they will inform him in writing. It is the contention of the learned Counsel for the plaintiff that, since the plaintiff was in cordial terms with the defendants he did not insist upon the defendants to give in writing regarding obtaining of income tax clearance. Plaintiff was informed that due to internal problems, the defendants had not applied for income tax clearance certificate and the moment the internal disputes are settled they will obtain the income tax clearance certificate. Plaintiff believing their explanation kept quiet. On the basis of above pleading and the evidence of the plaintiff, the learned Counsel for plaintiff submitted that the plaintiff has pleaded and proved that he was always ready and willing to perform his part of contract.

50. To consider as to whether the plaintiff was ready and willing to perform his part of contract, it is better to refer the documentary evidence produced by the plaintiff himself.

51. The plaintiff himself had issued notice produced at Ex.P.23 dated 30.5.1997. This notice is addressed to all the vendors under the agreement. In the said notice, the plaintiff asserts that he is in possession of the property as tenant since many years and demanded the defendants to accept the balance of sale consideration and to execute the sale deed in his favour as per the agreement of

sale dated 6.1.1995. He also has stated that, the defendants are postponing the execution of the sale deed on one pretext or the other, by stating that the plaintiff is already in possession of the property, he need not to worry. The text of the said notice is reproduced hereunder:

2. ..My client is in possession of the property as tenant since many years. My client has kept the balance amount ready. He informed you to take the balance amount and to execute the sale deed in his favour. But you have been postponing the execution of the sale deed on one pretext or the other saying that he is already in possession of the property and as such he should not worry.

3. I am therefore, instructed to inform you should accept the balance amount from my client and execute the sale deed in his favour within 15 days from the date of receipt of this notice or else my client will most reluctantly to constrained to take legal action against you in the matter as he may be advised and in such an event, shall be liable for all the costs as to consequences which pleased note.

52. From the above notice it is clear that, the plaintiff himself had called upon the vendors to execute the sale deed in his favour within 15 days from the date of receipt of notice or else the plaintiff would be constrained to take legal action against the vendors.

53. It is not in dispute that, in the notice issued by the plaintiff he had stated that he is ready and willing to perform his part of contract, and called upon the defendants to execute the sale deed. In the said notice plaintiff did not make any demand of income tax clearance certificate or did not say that the defendants have delayed the execution of the sale deed, on account of their inter se dispute. In turn, he called upon the defendants to execute the sale deed in 15 years by receiving balance of sale consideration. Thus, from this notice it is clear that the plaintiff was not waiting for the income tax clearance, for the execution of the sale deed in his favour. He had not called upon the defendants to perform any part of the contract or had informed the defendants that there was failure on their part to secure the income tax clearance. He was aware that even without the income tax clearance certificate, he could get the sale deed in his favour. Further, as on the date of issue of Ex.P.23 there was no inter se dispute between the vendors.

54. Though the agreement stipulates the plaintiff to get the sale deed executed in his favour on or before 30.6.1995 even assuming that the vendors had received part payment after the due date under the agreement, but as on the date of Ex.P.23 the plaintiff had made clear that he is entitled for the sale deed to be executed in his favour and it was not subject to any condition or requirement of income tax clearance nor subject to performing any obligations on the part of the vendors.

55. It is not in dispute that, the plaintiff had not chosen to take any legal steps thereafter even though defendants did not execute the sale deed. In turn, the defendants issued quit notice dated 21.4.1999 terminating tenancy of the plaintiff as per Ex.P.22. In Ex.P.22 defendant-1 and Balram - husband of defendant-2, had issued notice claiming that under the family arrangement they have become full and absolute owners of the suit property in occupation of the plaintiff and since the existing building thereon is very old and dilapidated, they require immediate restoration of possession for demolition and to put up a new building for their own purpose. The relevant portion of the said notice reads as under;

You had entered into an agreement to purchase the property under a written agreement dated 6.1.1995 and you were proposed to complete the sale transaction on or before 30th June 1995. You have failed to perform your part of contract and your right to claim sale deed in terms of the said agreement is extinguished by the lapse of time. You are liable to pay damages to my clients for breach of contract.

56. The above notice not only terminates the tenancy of the plaintiff but informs the plaintiff that under the agreement dated 6.1.1995, the sale transaction ought to have been completed on or before 30.6.1995 and since the plaintiff has failed to perform his part of contract, he has no right to claim the execution of sale deed in terms of the said agreement, plaintiffs rights got extinguished by lapse of time and further informs that the plaintiff is liable to pay damages to them.

57. From the above two undisputed notices, there remains no doubt that the plaintiff was not insisting on the income tax clearance as he had not even made a demand in his notice Ex.P.23 dated 30.5.1997. Further the vendors, viz.,

defendant-1 and husband of defendant-2 Balram, who claim that they have become the absolute owners in the family arrangement had informed the plaintiff that plaintiff is not entitled for specific performance of the contract. The plaintiff not only was aware that the defendants have refused to execute the sale deed, but the defendants had also made their stand clear in their notice dated 21.4.1999 that the agreement to sell is extinguished by lapse of time. Even after receipt of notice at Ex.22 from the defendants, the plaintiff had not taken any steps to perform his part of contract.

58. His oral assertion in his evidence that the vendors had informed him to wait for the settlement of their internal family dispute, goes contrary to his own documentary evidence produced by him. In turn, the plaintiff has produced single document to shown that either on 30.6.1995 or before expiry of the said date he had made any demand of income tax clearance certificate from the vendors. In turn, till 1997 he had not even issued notice and even after issue of his notice in 197 he did not chose to take any steps to enforce the contract. It is the defendants who issued notice informing that the agreement to sell stood extinguished by lapse of time.

59. Even though, there is no serious challenge to the oral assertion of plaintiff that the defendant asked him to wait till the internal family dispute is settled, however, his own conduct and the documentary evidence goes contrary to his oral evidence. The burden is on the plaintiff to plead and prove that he is always ready and willing to perform his part of contract. Under Section 16(c) of the Specific Relief Act, Plaintiff is not only to plead but has to prove that he has performed or is always ready and willing to perform the essential terms of the contract. Clause 16(c) of the Act reads as under:

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

(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.

60. Under the terms of the agreement Ex.P.10. Plaintiff was required to get the sale deed executed on or before 30.6.1995. However, the learned Counsel for the plaintiff has submitted that as per Ex.P.18, the defendants has received Rs,30,000/- on 28.8.1995, i.e, after the stipulated time.

61. Assuming that the defendants did not treat the time of completion of the sale deed on or before 30.6.1995 is essential, but the plaintiff has relied on the terms of the contract that the income tax certificate was essential to perform his part of contract. The agreement contains the words if there b need of certificate. Form the pleadings and evidence of the plaintiff himself, it is clear that, plaintiff himself did not treat that the income tax clearance certificate is essential to him to perform his part of contract, which is clear from Exhibits P.23 and P.22. Now to say that there was a need of income tax clearance certificate, the plaintiff being purchase is required to show that he has performed or is always ready and willing to perform his part of contract. Further, the terms of the agreement itself stipulate that in the event of the vendors failure to do so, the plaintiff has right to approach the Court to seek enforcement of the contract.

62. As per the terms of the agreement plaintiff should either demand income tax clearance or in case there is failure, he had right to go to the Court to enforce the contract and demand execution of the sale deed. The evidence of the plaintiff shows that, no such certificate was necessary, as in Exhibits-P.23 he did not demand or made the income tax clearance certificate is mandatory or the defendants have failed to obtain the same. The oral assertion of the plaintiff is not supported by any evidence in his documentary evidence goes contrary to his oral assertion. Admittedly, plaintiff is in occupation of suit property as tenant on a monthly rent of Rs.600/- and he might have thought that he can continue as long as he want by keeping the agreement.

63. Yet another circumstance is that, even according to the plaintiff the provision requiring the income tax clearance under Sec.230A. Was admittedly deleted with effect from 1.6.2001 and it is not in dispute that after 1.6.2001 there was no impediment for the plaintiff to get the sale deed registered. However, the plaintiff did not issued any notice to the defendants calling upon them to execute the sale

deed. In turn the present suit is filed after more than 4 years after deletion of the said provision. This conduct of the plaintiff also proves that the never shown any interest in getting the sale deed in this favour.

64. Further except the oral assertion in the pleading and the evidence, in reality plaintiff has not shown his readiness at any time till filling of suit. Ready and willingness has to be judged from conduct of the party, as to how he conducted himself from the date of agreement to the execution of the decree. From the above circumstances, it proves beyond doubt that the plaintiff was never ready and willing to perform his part of the contract. Perhaps, since he was enjoying the suit property on meager rent, might have thought that he can continue in possession under shadow of the agreement. The terms of the agreement expressly stipulates that, the plaintiff was required to get the sale deed executed on or before 30.6.1995. Even if the time is not the essence of the contract, it cannot be said that the plaintiff can seeks specific performance of the contract at any time thereafter he wants.

65. In terms of the contract, the defendants never treated the requirement of income tax clearance as essence of the contract, as the terms of the contract states if any. Under the terms of the contract, even if there is failure on the part of the defendants to secure the said certificate, plaintiff had the right to sue for specific performance of the contract.

66. As far as the pendency of the suit in O.S.133/1999 amongst the defendants is concerned, even assuming that the suit was pending amongst vendors, the defendants in the said suit are Mr. Balram since deceased by Rohini-defendant no.2 Sindhu-defendant-3 and Hanumanth-defendant-1. It is not in dispute that they are the signatories to the agreement and they are all the vendors of the plaintiffs. When the agreement is signed by all the defendants and whose suit was pending, the said pendency would not have affected the plaintiffs filling suit against all of them, as they are all parties to the agreement. The inter se dispute had no relevance as all of them had signed the agreement and none of them had disputed execution of the agreement. There was no need for the plaintiff to wait for the disposal of the said suit, much less, when defendant had not informed the plaintiff

to wait for the disposal of the suit. In turn, in 1999 itself as per Exhibit P.22 the defendant No.1 had informed the plaintiff that his rights under the agreement stood extinguished. Defendants had issued notice treating the agreement stood cancelled. The plaintiff's conduct from the date of the agreement till the execution of the sale deed is relevant and the circumstance as regards is how the plaintiff performed himself in respect of the contract.

67. The apex Court in the judgment reported in AIR 1999 S.C. 3029 in the matter of Syed Dastagir vs. T.R. Gopalakrishna Setty, has held that the language under Sec.16(c) does not require any specific phraseology but only that the plaintiff must aver that he has performed or has always been and is willing to perform his part of contract. So compliance of readiness and willingness has to be in spirit and substance and not in letter and form.

68. Readiness and willingness must be that non-compliance of the contract was not fault of the plaintiff and that he would have been able to complete it had it not been renounced by the defendants. If the plaintiff does not initiate any steps by approaching the vendors to execute the sale deed, mere allegation that he was ready and willing to perform his part of the contract, would not be sufficient to hold that he was ready and willing or was always ready and willing to perform his part of contract. Plaintiff has to prove that he has means from the date of contract till the date suit is filed and his readiness and willingness to perform the contract must be from the date of agreement till the hearing of the suit is necessary. It is not just for completion of the formality of the pleadings, provision of Sec.16(c) he extracted and in the same format oral assertion in the evidence would be sufficient. The readiness and willingness cannot be inferred merely on the ground that the oral assertion of the plaintiff is not seriously challenged by the defendants in the cross-examination, that will not absolve the plaintiff from proving his readiness and willingness. Readiness and willingness to perform his part of contract is the requirement of law which require to be proved by his conduct not only prior to but subsequent to the proceedings also. What is clear from the evidence is that the plaintiff himself has nowhere showed through his conduct that he was ready and willing to perform his part of the contract. Mere averment in the suit that the plaintiff is ready and willing to pay the balance amount, would not prove his

readiness and willingness. No doubt, he need not deposit the amount nor product cash. But his capacity to pay has to be proved.

69. In this case, there is no evidence as to whether he has capacity to pay the balance of sale consideration at any time from the date of the agreement till the decree or execution of sale deed. Willingness is a mental attitude of the plaintiff as to how he performed himself all throughout from the date of the agreement. Events narrated above disclose that even after notice issued by him in 1997, the plaintiff took no action to enforce the agreement. Even after the defendant issued notice in 1999 stating the agreement stood cancelled, the plaintiff did not take action.

70. In 1999 the defendants terminated his tenancy, even then no action was taken by the plaintiff till 2005. There has been absolutely no action on the part of the plaintiff, no correspondence, though the plaintiff knew that the defendants have denied the plaintiffs claim under the agreement. The defendants even cancelled the agreement, still there was no action. As such, only by pleading and oral assertion in the Evidence does not prove the case of the plaintiff of his readiness and willingness. Plaintiff has utterly failed to prove the same.

71. The judgments relied upon by the learned Counsel for the plaintiff that, acceptance of payment after stipulated period amounts to waiver of time as essence of the contract. Even assuming that the time is not the essence of the contract, that will not absolve the plaintiff from proving his readiness and willingness to perform his part of contract.

72. The judgment of this court reported in AIR 2001 KAR. 442 in the matter of H.M. Krishna Reddy Vs. H.C. Narayana Reddy, which was relied upon by the learned Counsel for the plaintiff to show that the time is not essence of the contract. As regards the ban of selling of the property under the provisions of the Karnataka Prevention of Fragmentation and Holdings Act, 1966, it was a case where time was sought to be treated as the time is not essence of contract as there was Act prohibiting the sale. In the said case, this Court has held that repealing of statute which was passed in 1966 cannot be said to be an event which was certain to happen for purpose of fixing the starting date of limitation. As such, time was not treated as the essence of the contract. The said judgment is

not applicable to the facts and circumstances of this case, as the plaintiff himself did not treat that the income tax clearance certificate was an essential term of contract. What is required to be performed is the essential terms of the contract. Even otherwise also after deletion of provision of Section 230A, for four years the plaintiff had kept quiet and only in 2005 he files the suit. As such the judgment relied by the learned counsel for the plaintiff is of no assistance.

73. Learned Counsel for the plaintiff has also relied on the unreported judgment of this Court in RFA.440/99 disposed of on 7.6.2010 to support his contention that, the time is not the essence of contract. However, each case is decided on the facts and circumstances of that case and in the said case there was an endorsement subsequently on the sale agreement extending the time. Under the facts and circumstances of the case it was held that time was not essence of contract.

74. It is no doubt true, in an agreement to sell of immovable property, normally time is not essence of contract unless parties expressly fix the time for performance. Apart from the fact that time is essence of contract or not, this Court has found that the conduct of the plaintiff did not prove that he was ready and willing. Even otherwise also plaintiff was not entitled for the decree.

75. Section 54 of the Limitation Act is always dependant on the terms of contract. If the term of agreement require certain things to happen within a specified time, limitation starts to run from the date of such happening. Though the decision reported in AIR 1994 KAR. 119, K. Venkoji Rao Vs. M. Abdul Khuddur Kureshi, has been relied but it is of no assistance under the facts and circumstances of the case.

76. In the decision relied of apex Court in (2011) 1 SCC 429, in the matter of J.P. Builders and another vs. A. Ramdas Rao and another, do doubt the apex Court has held that readiness and willingness cannot be treated as straitjacket formula and has to be determined from entirety of facts and circumstances relevant to intention and conduct of the party. Unless the plaintiff had shown that there is failure on the part of the defendants to perform essential terms of the contract, it cannot be said that the plaintiff was prevented from enforcing the terms of the

contract.

77. Learned Counsel for the plaintiff relied on ILR 2003 KAR, 3533. To. Mohan vs. Kannammal and another, to submit that, the question of readiness and willingness to pay balance of consideration is not of much importance. Actual possession of the property has been parted with by the vendor in favour of the third party purchaser even before the expiry of the stipulated period in the agreement. Under the said circumstances, this Court has held that the readiness and willingness loses its significance. In the said case, vendor even before the stipulated time under the agreement had sold the property to third party. The question of plaintiff being asked to prove his readiness and willingness did not arise. This case is not similar to the said case. In this case, plaintiff is in possession and enjoyment of the suit schedule property and may be, he being the beneficiary of possession on meager rent is reluctant to get the sale deed in his favour by paying the balance of sale consideration.

78. He had also relied on another decision of the Apex Court reported in AIR 2008 S.C. 1205, in the matter of Balasaheb Dayandeo Naik Vs. Appasaheb Dattatraya Pawar, wherein the apex court has held that clause of forfeiture was stipulated under the agreement and as such time was not treated as essence of the contract. Each case has to be considered on the facts and circumstances of that case to find out, whether the plaintiff in letter and spirit has performed his part of the contract and whether there was failure on the part of the defendants to perform their part of the contract.

79. Learned Counsel also relied on the judgment reported in AIR 1999 SC 1341 in the case of Iswar Bhai C. Patel vs. Harihar Behera, to show that adverse inference should have been drawn against the defendants for not entering into the witness box.

80. The initial burden being on the plaintiff to prove the existence of agreement, to prove that he was always ready and willing to perform his part of contract, the burden does not shift on to the defendants to prove to the contrary, unless the evidence led by the plaintiff proves that he was ready and willing to perform his part of contract, the burden does not shift to the defendants. Plaintiff is required to

prove that there is valid enforceable contract between himself and the defendants and there is breach of contract by the defendants. From his evidence, it is clear that the evidence is insufficient to hold that the plaintiff was ready and willing to perform his part of contract. Even in the absence of defendants entering into the witness box, plaintiff will not be entitled to a decree for specific performance of contract, unless he prove the necessary requirement in law.

81. The trial Court being original court, in a casual manner only on the ground that certificate under Section 230A was not obtained by the defendant holds that, the plaintiff was ready and willing to perform his part of the contract de-hors the provisions of Section 16(c), de-hors the requirements of pleadings and proof. As such, in my opinion, finding of the Trial Court on this issue is not supported by any evidence much less any valid reasons and the same is liable to be set aside.

82. For the above reasons, I hold that the plaintiff is not entitled for decree for specific performance of the contract having failed to prove his readiness and willingness. Accordingly, I hold the first point in favour of the defendants.

83. I hold the second point as to the suit is barred by time, that the suit is barred by law. The cause of action accrued to the plaintiff on the date on which he himself issued legal notice in 1997 as per Ex.P.23 calling upon the defendants to execute the sale deed within 15 days and suit is filed after eight years from the said notice. According to plaintiff himself, the cause of action accrued to him in 1997 and suit is filed after eight years thereafter. Hence, the suit is barred by time.

84. In view of the above answers to points 1 and 2, the plaintiff is not entitled for decree for specific performance of the contract.

85. Defendant no.1 - party-in-person, during the course of argument submitted that he is willing to refund the earnest money with interest. In view of his submission, the Plaintiff is entitled for refund of earnest money with interest as awarded by the trial Court.

In view of the above findings, RFA.3014/2009 filed by the plaintiff stands dismissed.

Cross objection 101/2010 stands allowed.

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