

Chinnaswamy Vs. Profulla

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Court : Karnataka

Decided On : Feb-20-1992

Reported in : ILR1992KAR2294

Judge : K.A. Swami and ;L. Sreenivasa Reddy, JJ.

Acts : [Specific Relief Act, 1963](#) - Sections 16 and 20

Appeal No. : R.F.A. No. 126 of 1991

Appellant : Chinnaswamy

Respondent : Profulla

Advocate for Def. : P. Vishwanatha Shetty, Adv.

Advocate for Pet/Ap. : Chandrasekhar, Adv. for ;G.S. Visweswara, Adv.

Disposition : Appeal allowed

Judgement :

K.A. Swami, J

1. This Appeal by the defendant is preferred against the Judgment and decree dated 22nd December, 1990 passed by the learned Principal Civil Judge, Mysore in O.S.No. 335/1985.

2. The respondent/plaintiff filed the aforesaid suit on 8.10.1985 for the following reliefs:-

'i) That the suit be decreed directing the defendant to execute the sale deed in question in favour of plaintiff in respect of property in the schedule below on accepting the contract purchase money (as per the agreement) less the amounts paid already in addition to earnest money.

ii) That the defendant be directed to execute and register the sale deed within the time specified by the Court, the said deed be executed and registered according to the provisions of Order 21 Rule 10(5) and 6 (a) of C.P.C.

iii) Grant costs of the suit together with such other appropriate reliefs deemed fit to be granted under the circumstances of the case.'

The suit schedule properly is as follows:-

'House property bearing D.No. F.74/2, New Sayyaji Rao Road, Fort Mohalla, Mysore City, bounded on the East-Conservancy, West-Sayyaji Rao Road, South: Kundur Mutt Road, North: House of Muniswamy Naidu.'

House property in the area of 74 feet east to west and 54 1/2 feet south-north of Madras Terrace with compound, tap, light and other fixtures etc.,'

3. The plaintiff sought for the aforesaid reliefs on the ground that the defendant was the owner of the suit schedule property; that he entered into an agreement of sale on 15-2-1982 with the plaintiff agreeing to sell the suit schedule property for a sum of Rs. 4,30,000/-, that pursuant to the said agreement the defendant received an earnest money of Rs. 1,50,000/-, that subsequently the defendant received various sums on the following dates:

Date

Amount

Rs.12-8-1982

5,000-0018-8-1982

15,000-0024-8-1982

15,000-0013-3-1983

3,000-0013-9-1982

2,000-0014-3-1983

1,500-0015-3-1983

4,000-0019-3-1983

1,500-0012-4-1983

1,000-0028-3-1983 25,000-00

That as per the terms of the agreement the sale deed was to be executed within six months from the date of the agreement, that it was agreed that after deducting the advance of Rs. 1,50,000/- in the remaining balance of Rs. 2,80,000/- a sum of Rs. 80,000/- was to be utilised for discharging the earlier debts incurred by the defendant and a sum of Rs. 1,30,000/- was to be paid at the time of registration of the sale deed, that the balance of Rs. 70,000/- was to be paid in six months after the registration of the document, that the plaintiff served the notice dated 12-7-1982 on the defendant, that after receipt of the notice, the defendant extended the period for performance of the agreement thrice upto the end of 9-10-1982, that the last extension was made on 25-9-1982, that the plaintiff was always ready and willing to perform her part of the agreement, that the cause of action for the suit arose on 15-2-1982, 25-8-1982, 12-8-1982, 25-9-1982 and 9-10-1982. Accordingly, she sought for the aforesaid reliefs.

4. The defendant in his written statement though admitted the agreement and also admitted the receipt of Rs. 1,50,000/- as advance but denied that he had received all the sums on various dates as pleaded by the plaintiff. He specifically disputed that a sum of Rs. 25,000/- as pleaded by the plaintiff was paid on 28-3-1983; that the sum of Rs. 25,000/- was not received by him on 28-3-1983; that the cheques

dated 13-9-1982, 15-3-1983 and 12-4-1983 for the sums of Rs. 2,000/-, 4,000/- and 1,000/- were not encashed. He also further pleaded that even though the property was worth of Rs. 5,80,000/- it was agreed to be sold for Rs. 4,80,000/- only with a view to discharge the debts incurred by the defendants; that the plaintiff did not keep up the terms of the agreement and did not discharge the debts of Mambahalli Basavanna Devaru and sons and Vrishubendrappa; that due to failure on the part of the plaintiff to discharge those debts or pay the amount, it resulted in the escalation of the liability of the defendant, that the plaintiff was paying an annual rent of Rs. 20,000/- to the defendant before the agreement was entered into that as the plaintiff failed to keep up the terms of the agreement she was not entitled to specific performance. The specific defence of the defendant was that the conditions of the agreement of sale were not adhered to by the plaintiff as such the plaintiff committed breach of the agreement, therefore, the plaintiff was not entitled to specific performance. It was also contended by the defendant that the time was of the essence of the agreement. Thus, he contended that the plaintiff was not entitled to specific performance and in the event the specific performance is granted he would be put to irreparable injury.

5. On the basis of the pleading of the parties, the Trial Court framed the following issues:-

'1. Whether the plaintiff proves the sale price agreed under the suit agreement was Rs. 4,30,000.00 or alternatively the defendant proves the sale price agreed was Rs. 5,80,000/-?

2. What is the amount paid by the plaintiff after the agreement?

3. Whether the plaintiff was always ready and willing to perform her part of the contract?

4. Whether the suit is bad for nonjoinder of parties?

5. Whether the plaintiff is entitled to the specific performance?

6. To what relief?'

6. In support of her case the plaintiff examined herself as P.W.1 and also examined five more witnesses as P.Ws 2 to 5. P.W.2 is the scribe of the document - Ex.P1. P.W.3- M.K. Shivabasappa was examined to speak about the endorsements made by the defendant on Ex.P1 extending the time for performance as per Exs.P1 (a) and P1 (b). P.W.4 - Sampath Kumar was examined to speak about the documents marked as Exs.P-25 and P-26 - the reports of valuation of the suit property. P.W.5 - B.Shivaswamy was examined to speak about the payment of Rs. 25,000/- to M/s. Vijayalakshmi Finance Corporation. P.W.6 - S.D. Ambikapathy was examined to speak about the documents Exs. P.27 and P-28. He was the partner of M/s. Vijayalakshmi Finance Corporation, plaintiff also produced 54 documents which were marked as Exs.P1 to P.54.

7. In support of his defence the defendant gave evidence as D.W.1 and also produced 28 documents which were marked as Exs. D1 to D-28. We may also point out at this stage that in the appeal the plaintiff has been permitted to produce certain documents as additional evidence which have been marked as Exs.P-55, P-56 and P-57.

8. On appreciating the evidence on record, the Trial Court recorded the findings on Issues 3 and 5 in the affirmative; on Issue No. 1 it held that the plaintiff proved the agreement and also further held that the sale consideration agreed upon was Rs. 4,30,000/-, on Issue No. 2 the Trial Court recorded a finding that the plaintiff had paid to the defendant a sum of Rs. 2,57,000/-. Issue No. 4 was answered in the negative. Consequently the Trial Court decreed the suit with costs directing the defendant to execute the sale deed within three months from the date of the Judgment as per Ex.P1 free from all encumbrances and further directed that in the event of failure of the defendant to execute the sale deed the same be got executed through the agency of the Court. The trial Court did not even direct the plaintiff to pay the balance of the sale consideration.

9. In the light of the contentions urged on both sides, the following points arise for consideration:

1. Whether the plaintiff has adhered to the essential terms of the agreement?

2. What was the amount paid to the defendant by the plaintiff under the agreement before the date of the suit and after the date of the suit?
3. Whether the plaintiff has proved that she was always ready and willing to perform her part of the agreement?
4. Whether the trial Court is justified in law and on facts in granting a decree for specific performance?
5. In the event this Court comes to the conclusion that the plaintiff is not entitled to a decree for specific performance what is the nature of the decree that has to be passed?

10. Before we take up the aforesaid points for consideration we may state that the Trial Court has not appreciated the evidence on record correctly & properly. It has failed to consider the material evidence on record. In the course of this Judgment, we will point out how the Trial Court has ignored the material evidence on record.

POINT NO. 1

11. The defendant has not disputed the Agreement of Sale marked as Ex.P1. In order to adjudicate as to whether the plaintiff has adhered to the essential terms of the Agreement, it is necessary to state the essential terms of the Agreement. The Agreement was executed on 15th of February 1982. The agreed consideration was Rs. 4,30,000/-. A cash of Rs. 50,000/- was paid on the date of the Agreement. Two cheques of Rs. 50,000/- each bearing No. S021747 dated 17.2.1982 and bearing No. SO21748 dated 23-2-1982 drawn on the Mysore City Vysya Bank were also given to the defendant. Thus in all, a sum of Rs. 1,50,000/- was paid. Before we go to the other terms of the Agreement we may also point out here that a cash of Rs. 50,000/- as mentioned in the Agreement was not by way of payment of actual cash on the date of the Agreement, but, it was by way of adjustment of the advance rent paid by the plaintiff to the defendant in respect of the suit premises. The plaintiff herself suggested to the defendant when the defendant gave evidence as D.W.1 to the following effect:

'Prior to the agreement Ext.P-1, the suit building was let out to the plaintiff under a rent bond. It is true that under the said rent bond, it was agreed between us that the rent payable was Rs. 20,000/- per year and that Rs. 60,000/- was paid as advance. Out of the said Rs. 60,000/- a sum of Rs. 10,000/- has been adjusted towards rent and the balance of Rs. 50,000/- was adjusted towards consideration under Ext.P-1. It is not correct to suggest that after Ext.P-1, I took back the rent bond from the plaintiff.'

The cheque bearing No. S021748 dated 23-2-1982 was not encashed because the balance in the account of the plaintiff was not sufficient, that it was not encashed is also clear from Ex.D.3. Ex.D.3 is the intimation by the Vysya Bank Ltd., returning the cheque with the reason that the amount exceeded the arrangement. The further evidence that has come on record is that this amount due under cheque No. SO21748 dates 23-2-1982 was paid subsequently in cash on two date as suggested to D.W.1 - the defendant by the plaintiff during the course of cross examination which are as follows:

'It is true that on 26-2-1982, I received Rs. 20,000/- in cash from the plaintiff in respect of the cheque mentioned in Ext.D-3. It is true that on the next day of Ext.D-3, when I approached the plaintiff, she paid the balance amount of Rs. 30,000/- in respect of the cheque mentioned in Ext.D-3.'

The other conditions of the Agreement are that the Agreement was to be performed within six months from the date of Agreement and the balance of Rs. 2,80,000/- was to be paid in the following manner-The plaintiff was to pay a sum of Rs. 50,000/- to R.B. Vrishubendrappa towards the debt due by the defendant and Rs. 30,000/- to Mambahalli Basavanna Devaru and Sons towards the debt due by the defendant. Thus the plaintiff was to pay a sum of Rs. 80,000/- as stated above. On the date of the Agreement the aforesaid sum was left with the plaintiff to be paid to those persons,

12. The Agreement further stated that on payment of Rs. 80,000/- to Vrishubendrappa and Mambahalli Basavanna Devaru and Sons the remaining sum of Rs. two lakhs was to be paid in the following manner:

Rs. 1,30,000/- was to be paid in cash at the time of registration of the sale deed and the remaining Rs. 70,000/- was to be paid on the expiry of six months from the date of the sale deed with interest at the bank rate. The plaintiff was to bear the registration expenses and cost of stamp papers.

13. The Agreement further stated that the conditions of the Agreement were to be adhered to and if the conditions were not adhered to it would not be open to the plaintiff to seek specific performance and in the event the plaintiff failed to adhere to the conditions of the Agreement, the Agreement shall stand cancelled and the defendant would be entitled to forfeit a sum of Rs. 1,50,000/- paid as advance money. The Agreement further recited that the plaintiff was put in possession of the suit schedule property except the northern portion in occupation of the defendant which was to be handed over at the time of registration of the sale deed.

14. The contention of the defendant is that he agreed to sell the suit schedule property to the plaintiff so that he could discharge his liability as he was due to pay to several persons including Vrishubendrappa and Mambahalli Basavanna Devaru and sons. According to his contention, the plaintiff was to pay the amount of Rs. 50,000/- to Vrishubendrappa and Rs. 30,000/- to Mambahalli Basavanna Devaru and Sons on the date of the Agreement itself, as otherwise the liability of the defendant would go on increasing. Therefore, the contention of the defendant is that as the plaintiff failed to pay the amount to those persons she failed to perform the essential terms of the Agreement. In addition to this it is also contended that the amount due to Vijayalakshmi Finance Corporation was not agreed to be paid by the plaintiff. It is contended that no doubt the defendant had raised a loan of Rs. 20,000/- from Vijayalakshmi Finance Corporation but that amount was not agreed to be paid by the plaintiff because the loan was raised after the Agreement Ex.P.1 came into existence.

15. We shall first consider whether the plaintiff paid the amount of Rs. 50,000/- to Vrishubendrappa and if so, when? The evidence on record is to the effect that Vrishubendrappa filed a Civil Suit O.S.No. 306/1980 in the Court of the Civil Judge, Mysore, for recovery of a sum of Rs. 51,420/-. Ex.P.40 is the Execution

Case No. 85/1987 filed by Vrishubendrappa for execution of the decree obtained in O.S.No. 306/1980. He obtained the decree on 30th March 1982 itself. The decree was for a sum of Rs. 51,420/-. The interest accrued from 18-12-1980 to 25-5-1987 at 12% p.a. was to the tune of Rs. 44,480/-. The cost awarded in the original suit was to the tune of Rs. 3,571/-. The execution costs and costs awarded in the decree were claimed in the Execution Case. Execution Fee was Rs. 1,850/-. Thus in all under Ex.Case No. 85/1987 - Ex.P.40, Vrishubendrappa claimed Rs. 1,01,328/- as on the date of filing of the execution which was filed on 25-5-1987. It may be relevant to notice that on the date of the Agreement i.e., 15-2-82 Vrishubendrappa had filed O.S.No. 306/1980. Therefore, the plaintiff as per the terms of the Agreement was required to pay the amount on the date of the Agreement or at any rate within a reasonable period of one or two weeks from the date of the Agreement. But, she did not pay the amount at any time before she filed the present suit for specific performance. The evidence on record further discloses and it is also the case of the plaintiff herself that she paid the amount during the course of execution of the decree obtained by Vrishubendrappa in O.S.No. 306/1980. The evidence regarding the payment is produced as additional evidence in this Appeal. Ex.P-39 is a certified copy of the order sheet in Ex.Case No. 85/1987 filed by Vrishubendrappa since deceased by his L.Rs in the Court of the Principal Civil Judge, Mysore for execution of the decree obtained by him in O.S.No. 306/1980 against the defendant. As per Ex.P.39 on 6.9.1988 the Court has passed the following order.

'Sri S.V.Advocate files an advancement application under Section 151 CPC. prays to advance the case to to-day 6.9.88 to consider his application which was already filed.

Sri M.N.G. reports receipt of draft of Rs. 25,000/- from K. Prafulla. Other side to say on I.A.No. 4. Sri M.N.G. says that the sale is on 9.9.88. Originally case is posted for 9.9.88.

Call on 9.9.88.'

Thus, on 6.9.1988 a sum of Rs. 25,000/- was paid by the plaintiff to the decree holder R.S.Vrishubendrappa. Again on 27.1.1989 certain payments were made by

the plaintiff as recorded by the Court in Ex.P.39. The order sheet of 27-1-89 reads thus:

'Sri M.N.G. for Dhr. files two memos reporting receipt of in all Rs. 25,000/- from Sri S.V.Advocate for applicant. Sri O.S.B. for Jdr. No. 3 protest this payment. Kum. B.N.L for. Sri M.N.G. reports receipt of Rs. 10,000/- from Jdr. No. 3. E.P.S. for Rs. 35,000/- Balance and to hear on application by 24-2-1989.'

S.V. Advocate referred to therein was appearing for the plaintiff herein who was the applicant in Ex.Case No. 85/1987. Thus on 27.1.1989 another sum of Rs. 25,000/- was paid. It is not in dispute that receipt of Rs. 25,000/- noted on 27.1.1989 was in addition to the amount of Rs. 25,000/- paid by the plaintiff as per the order passed on 6-9-1988 to which we have already made a reference. On 15-7-1990 the decree holder filed a Memo of satisfaction of the decree. The said Memo is produced as Ex.P.56 which reads thus:-

' The decree amount is settled out of court by Smt. K.Prafulla with the consent of the decree holders. Hence, full satisfaction of the claim be entered. Execution petition be closed accordingly.'

It is not in dispute that on 15.7.1990 a sum of Rs. 52,378/- being the balance due under Ex.Case No. 85/1987 was paid by the plaintiff out of Court therefore, the decree holder filed a Memo as per Ex.P-56. Thus in all, a sum of Rs. 1,02,378/- was paid by the plaintiff to Vrishubendrappa towards the satisfaction of the decree obtained by him in O.S.No. 306/1980. This is also admitted by Sri G.C.Shiva Prasad, the son of the defendant. The application and the affidavit filed by him in Ex.Case No. 85/1987 are produced as Ex.P.57. In the affidavit filed in support of the application Sri Shiva Prasad has stated thus:

'I.G.C.Shivaprasad, the 3rd Judgment debtor in this case do hereby solemnly affirm and state on oath as follows:-

I am the 3rd Judgment debtor in the above case. The total claim made in the above case by the decree holder is Rs. 1,00,902-50ps. I have paid in total a sum of Rs. 39,000/- on different dates as mentioned below in the above proceedings.

a) on 11-11-1988

Rs.20,000-00

b) on 27-1-1989

Rs.10,000-00

c) on 10-3-1989

Rs. 5,000-00

d) on 18-8-1989

Rs. 4,000-00

Total

Rs.39,000-00

In the above case one Smt. Profulla who came as an applicant in the above proceedings has paid a sum of Rs. 25,000/- on 6-9-1988, on 27-1-1989 Rs. 25,000/- and subsequently Rs. 52,378/-. In all the said applicant has paid Rs. 1,02,378/-. While issuing the sale warrant the payment made by me in Court has not been taken into account. The decree holder has collected the sum of Rs. 39,000/- in addition to the amount which he is entitled to under the execution petition. This was only due to the mistake of the office while issuing the sale warrant, necessary deductions for the payments made by me. As such the decree holder has collected the said amount in excess which he is bound to refund to me. Hence I have made the accompanying application.

Wherefore I pray the Hon'ble Court to pass an order directing the decree holder to refund a sum of Rs. 39,000/- as prayed in the accompanying application.

I do swear in the name of God that this is my name and signature and the contents of this my affidavit are true.'

Thus, it is clear that the plaintiff paid the amount towards the debt due Vrishubendrappa long after filing the suit. If the amount of Rs. 50,000/- left with the plaintiff to be paid to Vrishubendrappa as per the Agreement had been paid on 15.2.1982 or within a reasonable time of one or two weeks thereafter, the liability of the defendant would not have increased to Rs. 1,41,378/-. The decree was passed in O.S.No. 306/1980 on 30.3.1984 as stated in Ex.P-40, for a sum of Rs. 51,420/-. Thus on the date of the Agreement the amount due to Vrishubendrappa as per the terms of the decree as mentioned in Ex.P.40 was to the tune of Rs. 51,420/- plus interest at 12% from 18.12.1980 which was to the tune of Rs. 12,340/-, whereas due to failure on the part of the plaintiff to pay the sum of Rs. 50,000/- as agreed the debt escalated to Rs. 1,41,378/-. Therefore, it is clear that the plaintiff's failure to adhere to the term regarding payment of Rs. 50,000/- to Vrishubendrappa resulted in a considerable loss to the defendant.

16. Similarly the plaintiff did not pay a sum of Rs. 30,000/- to Mambahalli Basavanna Devaru and sons. Regarding the failure on the part of the plaintiff to pay a sum of Rs. 50,000/- to Vrishubendrappa and Rs. 30,000/- to Mambahalli Basavanna Devaru and Sons she has stated in the course of her cross examination thus:

'Within the period stipulated under the agreement I had cash of Rs. 1,30,000/- with me. But there is no document to evidence this fact. A sum of Rs. 80,000/- was left with me as per the terms of the agreement Ex.P.1. for discharging debts of defendant. One of the creditors of the defendant is Mamballi Basavanna Devaru and sons and the other creditor is Vrishubendrappa. I approached these creditors for the purpose of discharging of debts due to them. They said that the defendant owed more money than what I was required to discharge under the Agreement. As such, I could not discharge the debts due to them. The creditors refused to receive the amounts saying that the entire amount due by the defendant should be paid. There is no document to evidence this fact. I did not send the amounts to the creditors by cheque or D.D. within the period stipulated in Ex.P.1. It is not correct to say that as I had no money with me, I did not discharge the debts as per the terms of Ex.P.1. It is not correct to say that I did not approach the creditors and I did not make any efforts to discharge the debts due to them. I did not write any

letter to the defendant to know as to how much he owed to the aforesaid creditors. It is not correct to say that because I failed to discharge the debts, the creditors filed suits and obtained decrees and brought the suit property for sale. It is not correct to say that because of my lapses and negligence the defendant suffered loss in as much as he suffered decree for the amounts due to his creditors.'

It is not possible to accept this evidence of the plaintiff. The terms of the Agreement were clear. She was required to pay the aforesaid two sums to Vrishubendrappa and Mambahalli Basavanna Devaru and Sons. Whether the amount left with her was sufficient to discharge the debt due to the aforesaid persons or not was not the matter for the plaintiff to take into account. She was only to pay a sum of Rs. 50,000/- to Vrishubendrappa and Rs. 30,000/- to Marnbahalli Basavanna Devaru and Sons or at any rate the plaintiff ought to have informed the defendant and paid that sum into the hands of the defendant to pay it to Vrishubendrappa and Marnbahalli Basavanna Devaru and Sons and thereafter if any balance was left it was for the defendant to pay. This would have established the bona fides on the part of the plaintiff and her readiness and willingness to perform her part of the Agreement. A person seeking specific performance must be always ready and willing to perform her part of the Agreement. In the instant case the plaintiff having failed to pay the aforesaid two sums if not on the date of Agreement, atleast within a reasonable period from the date of Agreement, we are of the view that the plaintiff committed breach of the terms of the Agreement and this would also go to demonstrate that the plaintiff was not ready and willing to perform her part of the agreement,

17. The plaintiff not only failed to adhere to the terms of the Agreement regarding payment of the sum of Rs. 50,000/- to Vrishubendrappa and Rs. 30,000/- to Mambahalli Basavanna Devaru and sons; she also tried to put-forth a case which was not agreed upon between the parties and also a case which cannot at all be accepted as true. This is in relation to the case of the plaintiff that she paid a sum of Rs. 25,000/- to Vijayalakshmi Finance Corporation. In this regard it may be noted that the Agreement of Sale - Ex.P1 does not mention anything about the amount due to Vijayalakshmi Finance Corporation. It could not have been mentioned in the Agreement because the defendant raised loan of Rs. 20,000/-

from Vijayalakshmi Finance Corporation subsequent to the Agreement, According to the evidence of the plaintiff she paid a sum of Rs. 25,000 on 28-3-1983 to Vijayalakshmi Finance Corporation and in proof of it she has produced Ex.P.-13 and has also claimed this amount in para-2 of the plaint as having paid to the defendant. In para-15 of her deposition she has stated thus:

'Vijayalakshmi Finance Corporation mentioned in Ex.P.13 is at Mamballi, in Yelandur taluk. As per the terms of Agreement Ex.P.1, I am not required to pay the debts due by the defendant to Vijayalakshmi Finance Corporation. I cannot say when and how much the defendant borrowed from that Finance Corporation. I discharged the debts as per Ex.P.13 as requested by the defendant. He did not ask me in writing to discharge the debt due to that Corporation, In respect of Ex.P.13, no Court summons or order was received by me. I paid Rs. 25,000/- in cash mentioned in Ex.P.13. I made that payment at Mamballi in the office of the Corporation. I did not make any enquiries about the amounts due by the defendant before making payment as per Ex.P.13. No notice or letter was written by that Corporation before I made the payment as per Ex.P.13. Ex.P.13 is issued by one B. Shivaswamy on behalf of Vijayalakshmi Finance Corporation.'

She has further stated thus:

'I did not know Shivaswamy before Ex.P.13. The defendant took me to Vijayalakshmi Finance Corporation and asked me to pay the amount to Shivaswamy. This Corporation is about 8-10 miles from Mysore. We went by bus on that day. My husband accompanied me along with the defendant. On that day the defendant had come to Mysore and we went together.'

Ex.P.13 is a receipt executed by Shivaswamy - P.W.5 which reads thus:

17.1. When we go to the evidence of P.W.5 it is relevant to notice that the evidence of the plaintiff referred to above and the contents of Ex.13 are not corroborated. In para-3 of his evidence P.W.5 has stated thus:

'The receipt of Ex.P.13 was written in my house at Mamballi. At that time, besides the plaintiff and the defendant, the plaintiff's husband Udupa was present.

Vijayalakshmi Finance Corporation is at Kollegal about 5-6 kms away from my house. That corporation is about 58 kms away from Mysore City. I was aware of the facts of this suit when I passed the receipt as per Ex.P.13. The defendant did not authorise me in writing to receive the amount mentioned in Ex.P.13. I did not obtain a receipt from Finance Corporation in respect of the amount collected by me under Ex.P.13. Ex.P.13 was written at the instance of the plaintiff. There was no impediment for obtaining signature of the defendant in Ex.P.13. It is not correct to suggest that the plaintiff did not pay me Rs. 25,000/- and that Ex.P.13 has been falsely got up by me. The amount of Rs. 25,000/- mentioned in Ex.P.13 was paid by the plaintiff by way of cheques on 5 times, for Rs. 5,000/- each. I cannot say on what dates, the plaintiff gave the cheques. There was no difficulty for me to mention the dates of the cheques in Ex.P.13.'

Whereas the evidence of P.W.1 extracted above is to the effect that a sum of Rs. 25,000/- was paid by her in cash to the Corporation itself. If really the amount of Rs. 25,000/- was paid in cash to the Corporation itself there was no necessity for Shivaswamy to issue receipt as per Ex.P.-13. Vijayalakshmi Finance Corporation would have issued the receipt and closed the account of the defendant. As per the evidence of P.W.5 the amount was not paid in cash but the amount was paid to him by way of five cheques on different dates. Sri Ambikapathy -P.W.6 - the Partner of Vijayalakshmi Finance Corporation has been examined as P.W.6 and has produced the account extracts relating to the khatha of the plaintiff and the defendant as per Exs.P.27 and P.28. Ex.P.27 is the loan ledger relating to the loan borrowed by the defendant. Ex.P.27(A) is the photostat copy of page 36 of Ex.P.27. It relates to the khatha of Lakshminarayana Udupa - the husband of the plaintiff and also of the plaintiff. Ex.P.27(b) is the photostat copy of Ex.P.27 the khatha relating to defendant. Ex.P.28 is the current account ledger extract of the Vijayalakshmi Finance Corporation. The photostat copy of page 170 of Ex.P.28 has been marked as Ex.P.-28(b). It relates to the khatha of the defendant. In relation to Exs.P.27(a) and P.28(b) P.W.6 has deposed thus:-

'P.W.5 - Shivaswamy is my maternal uncle. P.W.5 collected a sum of Rs. 22,800/- on behalf of the plaintiff. P.W.5 remitted this amount to our Finance Corporation on two dates - 1st on 30.6.83 Rs. 10,000/- and 2nd on 31.12.83 Rs. 12,300/-. On

6.8.1987 our corporation gave credit for Rs. 500/- by way of interest on the above amount. A sum of Rs. 22,800/- was transferred to the account of defendant on 10.10.87. This amount was transferred to the account of the defendant on 12-10-87. These transactions are entered in Current Account Ledger of our finance corporation Ex.P.28. The relevant entries are found at page No. 170 at Ex.P.28(a). Photo copy of Ex.P.28(a) is marked as Ex.P.28(b). A sum of Rs. 22,800/- transferred to the account of the defendant in Ex.P.28 at Ex.P.28(a) has been adjusted towards the loan due by him as shown in Ex.P.27(a).'

17.2. Thus it is clear that as per Ex.P.27(a) the defendant raised a loan of Rs. 20,000/- from the Vijayalakshmi Finance Corporation on 9.6.1982. P.W.5 had opened a khatha in the name of his son S.Maheshswamy as per Ex.P.28. As per page 170 of Ex.P.28 he deposited a sum of Rs. 10,000/- in that katha on 30.6.1983. He again deposited on 31.12.1983 by cash a sum of Rs. 10,300-00 and Rs. 2000/- in all, Rs. 12,300/-. Thus, by 31.12.1983 he deposited a sum of Rs. 22,300/- in the account of his son. Ex.P.13 is dated 28.3.1983. Further there is an entry made on 6.8.1987 crediting the interest of Rs. 500/-. Then there is another entry made on 10.10.1987 debiting the amount of Rs. 22,800/-. This amount of Rs. 22,800/- on 10.10.1987 has been credited to the account of the plaintiff as per Ex.P.28(a). On 12.10.1987 this amount has been credited to the account of the defendant as per Ex.P-28(b). Thus it is clear that on the date of Ex.P.13 i.e., 28.3.1983 there was no payment of money by the plaintiff either to Shivaswamy or to Vijayalakshmi Finance Corporation. The story does not stop at this itself. Vijayalakshmi Finance had filed a suit O.S.No. 202/1982 against the defendant on 12.7.1982 which was decreed on 31.7.1985 as deposed to by P.W.6 himself in para-4 of his deposition which is as follows:

'The plaintiff did not make any payment directly to our Finance Corporation on behalf of the defendant. The suit filed by our Finance Corporation against the defendant might have been decreed on 31.7.1985. I do not remember the correct date. As per oral instructions of P.W.5 the amount credited by his son as stated above were transferred to the account of the plaintiff on 10.10.87.'

P.W.6 has further stated in para-1 of his deposition that O.S.No. 202/1982 filed by Vijayalakshmi Finance Corporation against the defendant in the Court of the 11 Additional Civil Judge, Mysore was decreed by consent of parties. If really the amount had been paid as per Ex.P.13 the same should have been reported to the Court by the Vijayalakshmi Finance Corporation and the payment should have been recorded in the suit. The suit was decreed by consent of parties. It only shows that the amount had not been paid on the date the decree was passed. P.W.6 has further admitted that the Finance Corporation did not inform the defendant in writing about the adjustment of Rs. 22,800/-. The case of the plaintiff that she paid a sum of Rs. 25,000/- to Vijayalakshmi Finance Corporation appears to be a make believe case. As already pointed out on the date when Ex.P.13 came into existence no amount was paid. There was no question of paying Rs. 25,000/- because what was due by the defendant to Vijayalakshmi Finance Corporation was only a sum of Rs. 22,800/- and not Rs. 25,000/-. We do not find any evidence to show as to why a sum more than Rs. 22,800/- was paid to Shivaswamy and not to Vijayalakshmi Finance Corporation directly. It is also relevant to notice that the alleged payment of Rs. 25,000/- to Vijayalakshmi Finance Corporation by the plaintiff towards the loan amount due by the defendant in respect of which Vijayalakshmi Finance Corporation had filed O.S.No. 202/1982 and obtained a decree was not even got certified by the Court. The payment made in respect of a decree, satisfaction has to be recorded and unless such satisfaction is recorded as per Order 21 Rule 2 of C.P.C. such payment will not be valid and in the event the decree holder files an execution the Court cannot take the payment into account. Therefore, as per the evidence on record the decree obtained by Vijayalakshmi Finance Corporation against the defendant still remains to be satisfied. D.W.1 has also made it clear in his evidence at para-13. He has stated thus:

'In respect of the loan I have borrowed from Vijayalakshmi Finance Corporation, Kollegal, I suffered decree and the decretal amount is still outstanding'

Neither Shivaswamy - P.W.5 nor P.W.6 has stated that the decree has been satisfied and the satisfaction has been entered by the Court.

No evidence is produced in this regard. Therefore, it can be safely concluded that the decree obtained by Vijayalakshmi Finance Corporation against the defendant still remains unsatisfied. The alleged payment of Rs. 25,000/- by the plaintiff to Vijayalakshmi Finance Corporation under Ex.P.13 as pleaded by the plaintiff cannot at all be accepted in the light of the evidence discussed hitherto. Therefore, we are of the view that in addition to not adhering to the terms of the agreement regarding payment of amounts to Vrishubendrappa and Mambahalli Basavanna Devaru and Sons, the plaintiff, has tried to put-forth a false case of payment of a sum of Rs. 25,000/- to Vijayalakshmi Finance Corporation on 28.3.1983. Even though the amount due to Vijayalakshmi Finance Corporation was not agreed to be paid by the plaintiff, we can go a step further and view the matter that in view of the fact that Vijayalakshmi Finance Corporation had filed a suit within two months from the date of the Agreement and got the suit property attached, the plaintiff was well within her right if she were to pay the amount. But, nevertheless instead of paying the amount directly to the Vijayalakshmi Finance Corporation or deposit it in the Court in O.S.No. 202/1982 the plaintiff tried to take recourse to payment of the amount to Shivaswamy by cash under Ex.P-13 which, in the light of the evidence discussed above is nothing but a concocted document. Therefore, the conduct of the plaintiff in this regard cannot be held to be just and proper. This conduct is relevant to be taken into account while considering the Point as to whether the plaintiff is entitled to a decree for specific performance. She lacks bona fides. This also shows that the plaintiff is unreliable and has no regard for truth.

18. The evidence of P.W.5 also cannot be accepted because it is opposed to the evidence of P.W.6 and Exs.P.27(a), P.28(b) and Ex.P. 13 itself, in addition to this, he has also admitted that the relationship between the defendant and himself was strained. We may also point out that this payment of Rs. 25,000/- to Vijayalakshmi Finance Corporation which is now tried to be made out during the course of evidence has not been specifically pleaded in the plaint except pleading that a sum of Rs. 25,000/- was paid to the defendant on 28.3.1983. Accordingly Point No. 1 is answered in the negative and it is held that the plaintiff has failed to adhere to the essential terms of the Agreement.

POINT NO. 2:

19. This point need not detain us any longer. The learned Counsel appearing for the appellant and the respondent have filed a Memo stating the details as to the payment of amount by the respondent-plaintiff before and after the filing of the suit, In view of the Memo, it is not necessary to discuss the evidence on record. In fact the Memo is filed at the end of the arguments after both the sides were satisfied regarding the amount paid by the respondent-plaintiff under the Agreement. The said Memo reads thus:

'The appellant had received the amounts from the respondent, the details of which are as follows:

Rs.

Under Exhibit P2

50,000/- (The amount adjusted by the appellant due to the respondent under rent bond)

50,000/- (Ch.No.021747, Dtd. 17.2.82)

Another cheque No.021748 was dishonoured as per Ex.

D3 dated 1.3.82.

20,000/- In cash

On 27.2.82

30,000/- In cash

On 12.8.82 under Ex.P-4

5,000/-

On 18.8.82 under Ex. P.5

15,000/-

On 24.8.82 under EX.P.-6

15,000/-

On 13.3.82 under Ex.P-7

2,000/-

On 13-9-83 under Ex.P-8

3,000/-

On 14.3.83 under Ex.P-9

1,500/-

On 15.3.83 under Ex.P-10

4,000/-

On 19.3.83 under EX.P.-11

1,500/-

On 12.4.83 under Ex.P-12

1,000/-

Amount deposited by the respondent in Ex. Case No. 85/87 filed by Sri R.B. Vrishubendrappa against the appellant. (This amount has been deposited in Court subsequent to the filing of the suit)

25,000/-dt. 6.9.88

25,000/-dt. 27.1.89

52,378/-

Memo filed by the decree holder dated 15.7.90 to the effect decree amount is settled out of Court.

Total

Rs.3,00,378/-

Disputed amount Rs.25,000/- under Ex.P-13 dated 28.3.83'

The aforesaid Memo is signed by the learned Counsel for the appellant as well as the learned Counsel for the respondent. We may also point out that the evidence on record also reflects the statement as to payments made in the aforesaid Memo. As far as the disputed amount of Rs. 25,000/- claimed to have been paid under Ex.P-13 by the plaintiff for discharging the debt of the appellant-defendant due to Vijayalakshmi Finance Corporation is concerned, while recording a finding on Point No. 1 we have held that the payment of such amount to Vijayalakshmi Finance Corporation has not been established and we have also rejected Ex.P-13 as not representing the true and correct facts. Therefore, it is not in dispute between the parties that in all a sum of Rs. 3,00,378/- has been paid by the respondent under Agreement Exhibit P-1 in question. From the various dates given in the Memo, it is clear that a sum of Rs. 25,000/- was paid on 6.9.1988 and another sum of Rs. 25,000/- was paid on 27.1.1989 and a further sum of Rs. 52,378/- was paid on 15.7.1990. Thus, it is clear that the aforesaid three payments have been made during the pendency of the suit. Point No. 2 is answered accordingly.

POINT NO. 3:

20. Under the terms of the Agreement the plaintiff was to perform her part of the Agreement within a period of six months from the date of the Agreement. However, extension of time was granted by the defendant only. Exhibit P-1 (a) is the endorsement made by the defendant and also signed by the plaintiff on 12-8-1982 extending the time for performance of the Agreement till 25-8-1982. Exhibit P-1 (b) is a similar endorsement made by the defendant and also signed by the plaintiff on 24-8-1982 extending time for performance of the Agreement till 25-9-

1982. Still there is another endorsement made on the reverse of Ex.P-1 which is marked as Exhibit P-1 (c). It is signed by the plaintiff and the defendant. It was made on 25-9-1982 extending the time for performance of the Agreement till 9-10-1982. After 9-10-1982 there was no further endorsement made or any communication sent by the defendant to the plaintiff extending time. The suit was filed on 8-10-1985. It is the case of the plaintiff that she was always ready and willing to pay to the defendant and offered to pay under a registered notice dated 12-7-1982. This notice has been marked as Exhibit P.2. In addition to this we may also point out here that the plaintiff has gone on paying the amount to the defendant even after 9-10-1982 as is clear from the payments made on 14-3-1983, 15-3-1983, 19-3-1983 and 12-4-1983. However, we may point out that it is not possible for us to appreciate her conduct in not making the payment of the balance amount immediately and obtain the sale executed. Even there is no evidence that pursuance to the notice issued as per Exhibit P.2, the defendant refused to perform his part of the Agreement. Exhibit P.2 was replied as per Exhibit P.3 dated 30-7-1982. In Exhibit P.3 the defendant specifically stated that he was ready and willing to perform his part of the Agreement and vacate the portion of the premises on the registration of the sale deed and he will also furnish necessary documents. However, he denied the allegation made in para'3 of Ex.P-2 and further asserted that the plaintiff should get ready for the registration of the document and pay the balance of consideration as agreed to. Even then, the plaintiff did not pay the balance of the amount and get the sale deed executed. The plaintiff however issued another notice dated 23-9-1982 as per Exhibit P-14 stating that the defendant had not got the attachment raised. Therefore, he should take steps to see that the transaction takes place as early as possible and she was ready to fulfil her part of the Agreement. In the said notice it was also further stated that if the defendant were to fail to do so, she will be going to take suitable action to get the registration of the sale deed. Exhibits P-15 to P-18 are also the notices sent by the plaintiff to the defendant. We may refer to Exhibit P-18 which was issued on 13-6-1983. In this notice it was stated by the plaintiff regarding the payments made and the defendant was called upon to forward the papers to the plaintiff as per the Agreement within a week. Exhibit P-19 is dated 21 9-1982. It is a reply by the defendant to the plaintiff. In this reply the defendant has stated that

the Agreement fixed six months for finalising the sale and thereafter at the instance of the plaintiff time was extended till 25-9-1982 and further stated that the sale was agreed to be finalised in accordance with law but extension of time was granted till 25-9-1982. In this reply the defendant further stated that inspite of several reminders the plaintiff did not purchase the stamp paper required for the sale deed and went on dodging the finalisation of the sale deed with an ulterior motive. Therefore, by Ex.P-19 the defendant informed the plaintiff that if she failed to have the sale deed registered within 25-9-1982 as agreed to by her in accordance with the terms of the Agreement dated 15-2-1982 he would be constrained not only to refuse to grant any time for finalisation of the same beyond 25-9-1982 and he would also be at liberty to take such action as may be necessary to recoup the damages and loss on account of non-performance of the terms of the Agreement. Ultimately he called upon the plaintiff to immediately take all such necessary action as may be necessary on her part to perform her part of the Agreement. No importance can be attached to Exhibit P-19 because subsequent to 25-9-1982 the defendant himself had received further payments from the plaintiff. Similarly no importance can be attached to the replies sent by the defendant on 20-8-1982 and 30-9-1982 marked as Exhibits P.24 and P.20 respectively because subsequent to these replies, the defendant had received further payments from the plaintiff. But one thing is certain that subsequent to 12-4-1983 the payment made under Ex.P.12, there were no further payments until 6-9-1988 voluntarily made by the plaintiff in Execution No. 85 of 1987. Thus it is clear that from 12-4-1983 to the date of filing of the suit on 8-10-1985 for two and half years, there was no attempt made by the plaintiff to show that she was ready and willing to perform her part of the Agreement. Payment made subsequent to filing of the suit on 6-9-88, 27-1-89 and 15-7-90 cannot be of much consequence. No doubt in the matter of agreement of sale of immovable property time is not of the essence of the agreement unless it is specifically agreed to by the parties and followed by their conduct but the intended purchaser cannot drag on for an unreasonable length of time. In this case, there was no such obstacle which came in the way of obtaining the sale deed.

21. However, it is contended by Sri P.Viswanaths Shetty, learned Counsel for the respondent, that the plaintiff could not have paid the balance of the amount and

obtained the sale deed immediately after 12-4-1983 because Vijayalakshmi Finance Corporation had got attached the suit schedule properties in O.S. No. 202 of 1982 and Mysore Navarathna Jewellery Mart had filed O.S.No. 182 of 1982 against the defendant and got the suit properties attached before judgment. P.W.5 B, Shivaswamy had also filed a suit against the defendant for recovery of a sum of Rs. 48,000/- under a pronote and got the suit schedule properties attached. It was not brought to our notice that the amounts payable to Mysore Navarathna Jewellery Mart, Vijayalakshmi Finance Corporation and P.W.5 exceeded the balance of the amount payable by the plaintiff to the defendant. Therefore, nothing prevented the plaintiff to have the sale deed executed on paying the amount that was due to be paid to Vijayalakshmi Finance Corporation, Mysore, Navarathna Jewelry Mart and also P.W.5. As far as Vijayalakshmi Finance Corporation is concerned, we have already discussed about it at a considerable length under Point No. 1 and we have not accepted the case of the plaintiff and rejected Ex.P.13. The contention that the defendant was due to pay to several other persons cannot also be countenanced because there was no attachment order obtained by anyone of those other creditors. It may be pointed out that the amount for which the three suits were filed did not exceed the balance of the amount payable by the plaintiff to the defendant under Ex.P.1. Further the suit filed by P.W.5 for recovery of a sum of Rs. 48,000/- due under two pronotes, the amount was left with the plaintiff for paying it to Mamballi Basavanna Devaru and Sons as mentioned in the Agreement Ex.P.1. The plaintiff was required to pay a sum of Rs. 30,000/- immediately after the Agreement which she failed to pay. Therefore, the suit came to be filed. Even otherwise, the amount claimed in these three suits did not exceed the balance of the consideration amount payable by the defendant to the plaintiff. The fact of attachment of the suit schedule properties by the plaintiffs in the aforesaid three suits as long as those three suits related to recovery of money only and not related to the suit properties, could not have prevented the plaintiff from paying the amount and obtaining the sale deed. This excuse is only put-forth by the plaintiff to overcome the delay on her part in not getting the sale deed executed within a reasonable period.

22. It is next contended that Sri. G.C.Shivaprasad, the son of the defendant, filed a suit for partition and separate possession of his share in the suit schedule

properties in the year 1983. The son-in-law of the defendant also filed a suit claiming that he has been in possession of a portion of the suit schedule properties as a tenant. Therefore, the pendency of these two suits also prevented the plaintiff to perform her part of the Agreement and have the sale deed executed.

23. O.S.No. 268/1983 was filed by one of the sons of the defendant for partition and separate possession of his share in the suit schedule properties. It is true that there was no order of temporary injunction passed against the defendant herein in that suit restraining him from alienating the suit schedule property.

The fact that the defendant went on receiving the amount viz., a sum of Rs. 1500/- on 14-3-1983; Rs. 4000/- on 15-3-1983; Rs. 1500/- on 19-3-1983; Rs. 1000/- on 12-4-1983; Rs. 3000/- on 13-9-1983 as per the joint Memo after the expiry of the period stipulated in the Agreement and also extended from time to time as per Exts.P.1 (a), P.1 (b) and P.1 (c) and also the fact that there was a suit filed by one of the sons of the defendant against the plaintiff and the defendant for partition and separate possession of his share in the suit schedule properties and another suit filed by the son-in-law of the defendant claiming to be the tenant of the portion which was in occupation of the defendant, would no doubt enure to the benefit of the plaintiff in deciding the question as to whether the plaintiff was ready and willing to perform her part of the Agreement. The suit O.S.No. 467/83 filed by the son-in-law came to be decided on 28-9-1987. During the course of the argument a certified copy of the judgment passed in O.S.No. 467/83 was shown to us. On perusing the same we noticed that the suit was dismissed on 28-9-1987. The pendency of O.S.No. 467/83 filed by the son-in-law of the defendant could not have come in the way of the plaintiff to obtain the sale deed because the son-in-law of the defendant only claimed the tenancy right. The plaintiff was also made a party to O.S.No. 268/83. There is no evidence adduced by the parties as to what happened to O.S.No. 268/83. This apart there is failure on the part of the plaintiff to perform two essential conditions of the Agreement which has been discussed under Point No. 1 and also her conduct in trying to plead and prove that she had paid a sum of Rs. 25,000/- to Vijayalakshmi Finance Corporation on 28-3-1983 under Ex.P. 13 would go against the plaintiff. In addition to this, before the

aforesaid two suits O.S.No. 467/83 and O.S.No. 288/83 were filed, the plaintiff had sufficient time to have the sale deed executed. Under Ex.P.1(c) time was extended till 9-10-1982. Even then the plaintiff could not get the sale deed executed. The evidence on record shows that the plaintiff was not in a position to afford to pay the balance of the sale consideration in Sump sum, therefore, she adopted the tactics of paying in small amount to gain time. Therefore, taking into consideration all the facts and circumstances of the case, the plaintiff cannot be held to have been ready and willing to perform her part of the agreement. It is also submitted that a sum of Rs. 25,000/- alleged to have been paid under Ex. P.13, if held against the plaintiff, the plaintiff is even now ready to pay that amount. The conduct of the plaintiff in putting-forth the case of payment of Rs. 25,000/- under Ex.P.13 is highly deprecable. The evidence adduced in this regard is far from truth. Ex.P.13 has been rejected by us as a got up document. A person seeking specific performance of an Agreement must approach the court with clean hands. He or she should not suffer from or give rise to unrighteous conduct. Accordingly Point No. 3 is answered in the negative,

POINT NO. 4

24. The trial Court has not considered the material evidence on record. In a suit for specific performance, the plaintiff who seeks specific performance of the agreement of sale must not only adhere to essential terms of the agreement, must not also suffer from lack of probity and lack of bona fides. Apart from the fact that the plaintiff must be always ready and willing to perform his/her part of agreement, his/her conduct must be above board. The trial Court has proceeded to decree the suit on the basis that the Agreement is proved. It has not considered the material evidence on record and the defence of the defendant and the injury caused to the defendant due to failure of the plaintiff to adhere to the essential terms of the Agreement, and the conduct of the plaintiff. While considering Point No. 1, we have pointed out that the plaintiff did not adhere to essential terms of the Agreement and did not comply with the same. We do not consider it necessary to repeat all those circumstances while considering Point No. 4. Section 16 of the Specific Relief Act (for short the 'Act') specifically provides.

'16. 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 wilfully acts at variance with; or in subversion of, the relation intended to be established by the contract; or

c) who failed 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 involved 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 willing to perform the contract according to its true construction.'

As far as Clause (c) of Section 16 of the Act is concerned, we have already recorded a finding on Point No. 3 and have held that the plaintiff was not ready and willing to perform her part of the Agreement as per the true purport of the Agreement. In addition to this, the plaintiff has violated the essential terms of the Agreement in not paying the amount to Vrishubendrappa and Sri Mamballi Basavanna Devaru and Sons, as a result thereof, the liability of the defendant escalated into a large sum which is evident from Exhibits P.55, P.56 and P,57. The terms relating to payment of a sum of Rs. 50,000/- to Vrishubendrappa and sum of Rs. 30,000/- to Mamballi Basavanna Devaru & Sons, were essential terms of the Agreement. In fact the necessity for entering into an Agreement to sell the suit schedule property by the defendant to the plaintiff arose because the defendant was heavily indebted and was required to discharge the liability of loans incurred by him, with several persons including the aforesaid two persons,

Vrishubendrappa had already filed a suit O.S.No. 306/80 against the defendant for recovery of the money due to him. Therefore, the plaintiff was required to pay the aforesaid sums to the aforesaid persons on the date of the Agreement or within a reasonable period or at any rate before the expiry of the period of six months stipulated in the Agreement for obtaining the sale deed. The plaintiff failed to perform the essential terms of the Agreement. The fact that after several years of filing of the instant suit, the plaintiff paid the money to Vrishubendrappa in the course of execution of the decree obtained by Vrishubendrappa as by then the liability of the defendant had escalated considerably cannot be considered or construed as amounting to performing the essential terms of the Agreement, as per the true purport of the Agreement. As far as the amount payable to Mamballi Basavanna Devaru & Sons, is concerned, it has already been held that the plaintiff did not make any payment. Thus the plaintiff failed to perform this essential term of the Agreement.

25. in addition to this, the plaintiff not only acted wilfully at variance with the terms of the Agreement but also acted in fraud of it. in as much as she tried to show that she had discharged the debt of Vijayalakshmi Finance Corporation which as per the terms of the Agreement she was not authorised to discharge. She produced Exs.P.13, P.27(b) and P.28(b) to prove that she had discharged the debt due to M/s. Vijayalakshmi Finance Corporation. In fact the defendant raised the loan from the Vijayalakshmi Finance Corporation after the suit Agreement. Hence we are of the view that the plaintiff acted at variance with the terms of the Agreement. She also acted in fraud of the Agreement by attempting to prove payment of money to M/s.Vijayalakshmi Finance Corporation to discharge the debt of the defendant by producing concocted evidence. We have rejected Ex.P.13 as a concocted document. Similarly we have rejected Ex.P.27(b) and Ex.P.28(b) and the oral evidence of P.W.1 and P.W.5.

26. It is also contended on behalf of the defendant that if the specific performance is granted, it would cause great hardship and irreparable injury to the defendant inasmuch as the debts of Mamballi Basavanna Devaru and Sons, and Vrushubendrappa, by reason of non-payment of the money left with the plaintiff, had escalated into a large sum; that further from the date of Agreement till the date

of the suit, there has been considerable appreciation in the value of the suit property. On the contrary, it is contended on behalf of the plaintiff that the stand as to the hardship has not been taken in the Written Statement. Therefore, it is not now open to the defendant to contend it in the Appeal. In the Written Statement, the defendant has specifically contended that he was compelled to enter into an Agreement of sale in question due to the fact that the property was in possession of the plaintiff as a tenant; therefore it was difficult to sell the suit property to others as physical possession could not be handed over to other purchaser. It is true that there is no specific plea raised in the Written Statement as to hardship in the manner in which it is now argued. Hardship is not the only deciding factor in considering the question as to whether a decree for specific performance should or should not be granted. Several other circumstances enumerated in Section 16 and also Section 20 of the Act are to be taken into consideration.

26.1 In the instant case, we have pointed out four aspects; 1) failure of the plaintiff to perform essential terms of the Agreement; (2) wilfully acting at variance with the terms of the Agreement; (3) acting in fraud of the Agreement; and (4) has not been always ready and willing to perform essential terms of the Agreement. Section 16 of the Act specifically provides that specific performance of a contract cannot be granted in favour of a person who falls in any one of the terms enumerated in Clauses (a), (b) and (c) thereof. Therefore, we are of the view that the trial Court is not justified in law and on facts in granting a decree for specific performance. Accordingly Point No. 4 is answered in the negative.

POINT NO. 5

27. We consider this Point in the light of the finding recorded by us on Points 1 to 4. The plaintiff is not entitled to a decree for specific performance. However, it is not in dispute that the plaintiff in all, as per the joint Memo dated 24-2-1992, has paid a sum of Rs. 3,00,378/- under the Agreement. Out of this amount, a sum of Rs. 1,02,378/- was paid towards the satisfaction of the decree obtained by Vrishubendrappa in O.S.No. 306/1980 in Execution Case No. 85/87 on the following dates viz., on 6-9-1988 - Rs. 25,000/-; 27-1-1989 - Rs. 25,000/-, and on 15-7-1990 - Rs. 52,378/-. In other words a sum of Rs. 1,02,378/- was paid during

the pendency of the suit. As far as the sum of Rs. 25,000/-alleged to have been paid on 28-3-1983 under Ex.P.13 which was disputed by the defendant has been considered by us under Point No. 3. We have held that the payment of this amount is not proved. In fact the decree obtained by Vijayalakshmi Finance Corporation has not been so far satisfied. No evidence is adduced in the case to show that decree has been satisfied. No doubt the plaintiff has paid a sum of Rs. 1,02,378/- during the pendency of the suit but this has been paid towards the satisfaction of the decree obtained against the defendant. It is also true that if only the sum of Rs. 50,000/- would have been paid to Vrishubendrappa immediately after the Agreement, the liability of the defendant would not have escalated to the tune of Rs. 1,02,378/-, it would have been within Rs. 57,750/-. However, it is submitted on behalf of the defendant that even then the defendant is ready and willing to refund the amount of Rs. 1,02,378/- paid towards the discharge of the decree obtained by Vrishubendrappa during the pendency of the suit. As such we do not find any difficulty in passing a decree for a sum of Rs. 3,00,378/- in favour of the plaintiff.

28. The next question that would arise for consideration is, as to what would be the nature of possession of the plaintiff of the suit schedule property. In this case, as per the evidence on record, the plaintiff was a tenant of the suit property except a portion which was and is in occupation of the defendant. P.W.1 the plaintiff in her evidence has stated at para 10 thus:

'I came into possession of the suit schedule property about 6 months prior to Ex.P.1 as a mortgagee, by paying Rs. 60,000/-. At the time of Ex.P.1, I returned the mortgage deed to the defendant. I have no record to show that I paid Rs. 60,000/- to the defendant at the time of the mortgage. The mortgage amount of Rs. 60,000/- was agreed to be adjusted towards rent at the rate of Rs. 20,000/- per year for three years. That was for the period of 3 years prior to the Agreement.'

It is not disputed before us that there was no deed of mortgage. No evidence is adduced by the plaintiff to show that there was a mortgage created in respect of the suit schedule property. In the cross-examination of D.W.1, the plaintiff has also suggested as follows:-

'Prior to the Agreement Ex.P., the suit building was let out to the plaintiff under a rent bond. It is true that under the said rent bond, it was agreed between us that the rent payable was Rs. 20,000/- per year and that Rs. 60,000/- was paid as advance. Out of the said Rs. 60,000/- a sum of Rs. 10,000/- has been adjusted towards rent and the balance of Rs. 50,000/- was adjusted towards consideration under Ex.P.1. It is not correct to suggest that after Ex.P.1, I took back the rent bond from the plaintiff.'

This very portion of the evidence of D.W.1 we have already extracted in para 11 above to point out that the payment of a sum of Rs. 50,000/- in cash as mentioned in the Agreement Ex.P.1 was by way of adjustment in the advance of Rs. 60,000/- paid by the plaintiff to the defendant towards the rent. The suggestions put to the defendant and the evidence given by the plaintiff make it clear that she was in occupation of the premises except the portion which is now in occupation of the defendant as a tenant on a rent of Rs. 20,000/- per year even before the Agreement Ex.P.1 was entered into between the plaintiff and the defendant. She had also paid a sum of Rs. 60,000/- as advance and out of that sum, a sum of Rs. 10,000/- was adjusted towards the rent. The balance of the amount of Rs. 50,000/- was adjusted towards. payment of part of the sale consideration described as paid in cash in Ex.P.1. The evidence on record discloses that the payment of Rs. 50,000/- was treated as paid in cash by adjusting the advance of Rs. 50,000/- paid to the defendant by the plaintiff towards the rent as per Ex.D.6. Ex.D.6 is the receipt executed subsequent to the Agreement Ex.P.1. by the plaintiff. It is also signed by her husband and one Mahadeva, represented by one M.R.Laxmanagowda. Ex.D.6 reads thus:

From the document Ex.D.6 it is clear that a sum of Rs. 50,000/- out of the advance paid towards the rent by the plaintiff to the defendant was adjusted towards the sale consideration and the rent deed was cancelled. This is also deposed to by the plaintiff in para 19 of her evidence which reads thus:

'It is true that I gave a receipt dt.14-2-1982 as per Ex.D.6 to the defendant for having taken possession of the suit building. Ex.D.6 also bears the signature of my husband.'

Therefore, it is clear that the juridical relationship between the plaintiff and the defendant as on the date of Agreement was that of tenant and landlord. No doubt under the Agreement advance rent paid to the defendant was also adjusted towards the part payment of the sale consideration and in Ex.D.6 it is also stated that they have cancelled the rent bond; but the relationship of the plaintiff and the defendant as that of tenant and landlord would come to an end only when the title of the defendant in the suit property is transferred in accordance with law or if there is a specific act of the parties expressed by their conduct or by the document putting an end to the relationship of landlord and tenant. It is not possible to hold that a mere process of adjusting the advance amount towards the sale consideration would have the effect of ending or the parties had agreed to put an end to, the juridical relationship of tenant and landlord. Therefore, as the plaintiff is not entitled to specific performance, the relationship of the plaintiff and the defendant as tenant and landlord continues to exist. At this stage itself we may also refer to the contention of the plaintiff that as no issue was raised in the trial Court as to whether the possession of the plaintiff of the suit schedule property continued to be that of the tenant or the one under the Agreement of Sale, the same need not be gone into in this Appeal. In view of the finding recorded by us that the plaintiff is not entitled to specific performance and on that basis we have to pass a decree for refund of the amount including the amount paid even during the pendency of the suit, it becomes necessary for us to adjudicate upon the nature of possession of the plaintiff of the suit schedule property. If there was no relationship of landlord and tenant prior to the Agreement of Sale, this Court was not required to go into the question as to the nature of possession of the plaintiff of the suit schedule property and in such a case, the parties would have been free to seek such remedy as is open to them in law. But in the instant case, there is a specific evidence on record and it is also the case of the plaintiff that she was in possession of the suit schedule property except a small portion in the occupation of the defendant even now, as tenant. While passing a decree for refund of the amount paid by her under the Agreement, this Court is required to record a finding as to the nature of the possession of the plaintiff of the suit schedule property as otherwise there would be a failure of justice inasmuch as when the defendant is required to refund the amount, he must also be told as to the nature of the

possession of the plaintiff. Once a decree in favour of the plaintiff is passed for refund of the amount paid under the Agreement, she will be liable to restore possession to the defendant. Of course, if there is such a prayer made by the defendant by way of counter-claim or by way of separate suit. But in the instant case, that situation does not arise because the plaintiff was in possession of the suit schedule property earlier to and on the date of Agreement of Sale, as a tenant as per her own case to which we have already adverted to. Therefore, in the facts and circumstances of the case, there is no prejudice caused to the plaintiff in recording a finding as to the nature of possession of the plaintiff because in doing so, we will only be accepting the case of the plaintiff as to the possession of the suit schedule premises on the date of the suit Agreement of Sale. Therefore, the contention of the plaintiff that the question as to nature of possession of the plaintiff of the suit property need not be gone into in the Appeal cannot be accepted. This will unnecessarily lead to multiplicity of litigation. Further, the plaintiff on receiving the amount paid by her pursuant to the Agreement as a result of rejection of her prayer for specific performance, cannot also continue to claim her possession pursuant to the Agreement. Therefore, we are of the view that the relationship of the plaintiff and the defendant as tenant and landlord continues on the refusal of the decree for specific performance as prayed for by the plaintiff. Mere agreement of sale does not have the effect of creating or vesting, title in the plaintiff of the suit property. As per Section 55(4)(a) of the Transfer of Property Act, the seller is entitled to the rent and profits of the property till the ownership thereof passes to the buyer.

29. The next question that arises for consideration is as to what is the rate of interest to which the plaintiff is entitled to? The transaction is not a commercial transaction. The transaction is one of sale and purchase of the immoveable property. The plaintiff has been in possession of the property, the rent of which is admittedly Rs. 20,000/-per year. From the date of Agreement till now she has not paid the rent. However, she has paid large sum towards the Agreement on several dates as stated in the joint Memo extracted above under Point No,2. The rent payable by the plaintiff from the date of Agreement till today can be and it is set off against the interest payable till today by the defendant on the amount paid by the plaintiff under the Agreement. This will meet the ends of justice between the

parties, and it would be sufficient to adjust equities between them. But, hereafter she will be liable to pay the rent of Rs. 20,000/- per year as agreed to by the parties. Taking into consideration these aspects, we are of the view that the plaintiff will be entitled to interest at the rate of 12% per annum from today. Accordingly Point No. 5 is answered as follows:

The plaintiff is entitled to a decree for a sum of Rs. 3,00,378/- with interest at 12% per annum from today. The plaintiff will continue to be in possession as a tenant of the suit schedule property except the portion in the occupation of the defendant on a rent of Rs. 20,000/- per year commencing and payable from today.

30. For the reasons stated above, this Appeal is allowed. The Judgment and decree of the trial Court are set aside. The suit of the plaintiff for specific performance of an Agreement of Sale Ex.P.1, is dismissed. However, there shall be a decree in favour of the plaintiff for recovery of a sum of Rs. 3,00,378/- with interest at 12% per annum from today. The plaintiff's possession of the suit schedule property except the portion in occupation of the defendant will be that of a tenant on a rent of Rs. 20,000/- per year commencing and payable from today.

31. In view of the fact that the plaintiff and defendant have succeeded in part, we order that each party shall bear his or her costs.

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