

M. Krishna Murthy Vs. M. Anantharam and anr.

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Court : Andhra Pradesh

Decided On : Feb-21-2003

Reported in : 2003(4)ALD123

Judge : G. Bikshapathy and ;S.R.K. Prasad, JJ.

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

Appeal No. : CCCA Nos. 159 and 232 of 1999

Appellant : M. Krishna Murthy

Respondent : M. Anantharam and anr.

Advocate for Def. : T. Veerabhadrayya, Adv. for respondent No. 1 in CCCA No. 232 of 1999, ;K. Venugopalachary for Respondent No. 1 in CCCA No. 159 of 1999, ;P.R. Prasad, Adv. for Respondent No. 2 in CCCA No. 159 of 1999

Advocate for Pet/Ap. : T. Veerabhadrayya, Adv. in CCCA No. 159 of 1999 and ;P.R. Prasad, Adv. in CCA No. 232 of 1999

Disposition : CCCA allowed

Judgement :

G. Bikshapathy, J.

1. Both the appeals can be decided by a common judgment as they arise out of a common judgment and decree of the lower Court in OS No. 417 of 1991.
2. The facts and the events leading to the filing of the appeals is narrated hereinafter.
3. The parties as arrayed in the suit are referred to in this judgment for the sake of convenience.
4. The plaintiff laid a suit OS No. 417 of 1991 seeking specific performance of Agreement of Sale dated 12-3-1990 and Memorandum of Understanding dated 12-4-1990 and for direction to the defendants No. 1 and 2 to execute the registered sale deed in favour of the plaintiff. He also sought for the relief of possession and for consequential injunction restraining the defendant No. 1 from interfering with the suit schedule property.
5. As per the averments made in the plaint one Smt. Mathuri Hymavathi, wife of Ranga Rao was the absolute owner of the premises of the House bearing No. 3-6-539/ 1, Himayathnagar, Hyderabad admeasuring 313 sq.yds. The building was a terrace building. While so, the said Mathur Hymavathi executed a registered sale deed dated 21-1-1984 conveying the terrace rights in favour of the plaintiff consisting of Terrance portion 1,461 sq.fts. (157.30 sq.yds.) Subsequently, on 30-4-1985, Mathuri Hymavathi executed a rectification deed by adding the proportionate undivided share in the land to the extent of 120 sq.yds.
6. While the matter stood thus, Hymavathi died on 11-5-1985. Consequently the property devolved on her husband Ranga Rao and her adopted son M. Anantha Ram-defendant No. 1. Since the Plaintiff wanted to purchase the ground floor as well as the remaining land from the defendant No. 1 and Ranga Rao an agreement was entered between the plaintiff and the defendant No. 1 on 12-3-1990 for the purchase of the ground floor along with the land for consideration of Rs. 3 lakhs. This agreement was signed by M. Ranga Rao, defendant No. 1 also signed the said agreement accepting the sale agreement. Subsequently, a Memorandum of Understanding was executed by Ranga Rao and defendant No. 1 on 12-4-1990. As per the understanding, the consideration of Rs. 3 lakhs has to be

paid as follows :

Rs. 50,000/- was paid on 12-4-1990 and on the date of the registration namely 30-10-1990, a sum of Rs. 1 lakh has to be paid,

The balance sum of Rs. 1,50,000/- bears interest @ 7.50% per month from 30-10-1990 and Rs. 1,100/- per month from 1-4-1991 till 31-7-1991, the date fixed for payment of the balance amount.

7. While so, Ranga Rao died in July, 1990. According to the Memorandum of Understanding Plaintiff and the defendant No. 1 were to meet on 14-10-1990 to discuss about the payment. Since, the defendant No. 1 did not go for the meeting, Plaintiff issued notice dated 11-11-1990 to which no reply was issued by the defendant No. 1. However, defendant No. 1 issued notice on 6-5-1990 with a false claim on the basis of a false agreement dated 12-4-1990. Therefore, the plaintiff laid a suit for specific performance of the agreement of sale dated 12-3-1990 read with Memorandum of Understanding dated 12-4-1990.

8. Defendant No. 1 filed a written statement stating that the plaintiff with a mala fide intention and taking advantage of the close relationship of the plaintiff created documents. Defendant No. 1 also stated that the Agreement of Sale dated 12-3-1990 and the Memorandum of Understanding dated 1-2-4-1990 are not binding. On the other hand, defendant No. 1 issued a legal notice on 6-5-1991 calling upon the plaintiff to pay the balance sale consideration of Rs. 3,99,000/- and as the plaintiff failed to perform the part of the obligation, defendant No. 1 was forced to sell the property to defendant No. 2 to meet his pressing financial needs. It is also the case of the defendant No. 1 that the Agreement of Sale dated 12-4-1990 is tampered and it is false and baseless. The original agreement was not produced and that there was no cause of action to file the suit and pleaded for dismissal of the suit.

9. Consequent on the averments made by the defendant No. 1 that the property was sold to defendant No. 2, an application was filed to implead the purchaser with a prayer to cancel the sale deed. Defendant No. 2 filed written statement stating that as on the date of the amendment, defendant No. 2 was already put in

possession in pursuance of the registered sale deed executed in her favour on 15-6-1991 that she was not aware of any of the sale transaction between plaintiff and defendant No. 1 and that on the date of the death of Mathur Hymavathi, Ranga Rao and defendant No. 1 succeeded to the suit properties.

10. Basing on the respective contentions, the Trial Court framed the following issues:

1. Which of the two agreements of sale set up by the plaintiff and the defendant No. 1 is true, valid and binding the other?
2. Whether the Sale Deed dated 15-6-1991 in favour of the defendant No. 2 is not hit by the bar of the lis-pendence?
3. Whether the plaintiff is entitled to the relief of specific performance as prayed for?
4. Whether the defendants are entitled to exemplary costs?
5. To what relief?

11. Seven witnesses were examined for the Plaintiff and Ex.A1 to A21 were marked. Two witnesses were examined for the defendant and Ex.B-1 to B3 were marked. Ex.X-1 to X6 were marked by the Court.

12. The lower Court after considering the evidence on record recorded a finding that Agreement of Sale and Memorandum of Understanding are true and valid and binding on the defendant No. 1 and the Agreement of Sale put up by the defendant No. 1 vide Ex.B1 was not true and was not binding. The Trial Court held that the Sale Deed dated 15-6-1991 executed in favour of the defendant No. 2 was hit by the provisions of lis pendence and consequently held that the plaintiff is entitled for specific performance of the Agreement of Sale subject to payment of the balance sale consideration of Rs. 2,50,000/- together with interest @ 18% per annum from the date of Ex.A1 i.e., 12.3.1990 till the date of payment. Accordingly, the suit was decreed by a judgment and decree dated 10-6-1999.

13. Aggrieved by the said judgment and decree insofar as it relates to the direction to deposit the balance sale consideration with interest @ 18% per annum, the plaintiff filed CCCA No. 232 of 1999. Challenging the judgment and decree, defendant No. 2 filed CCCA No. 159 of 1999. It is also on record that defendant No. 1 also filed an appeal challenging the judgment and decree and since there was delay in filing the appeal, application to condone the delay in filing the appeal was filed and the said application was dismissed vide CMP No. 20358 of 2000 on 29-11-2000.

14. It is also to be noted in this regard, when the matter was heard by the Division Bench and it was reserved for judgment on 14-11-2000 defendant No. 2 sold the entire property in favour of the one Dr. Lalitha and Dr. K. K Prasad, under a registered sale deeds on 29-3-2001 and 30-3-2001. Therefore, the plaintiff filed CMP No. 7298 of 2001 seeking permission to implead them as respondents and the said petition was allowed making the purchasers as respondents No. 3 and 4 and temporary injunction was also granted restraining the respondents from alienating or meddling with the suit property. Status quo orders were passed on 24-4-2001.

15. Now it is stated before this Court by the learned Counsel for the parties that the entire structures on the suit schedule property were removed and thus suit schedule property became vacant land.

16. Before dealing with the appeal filed by the plaintiff, it would be appropriate to deal with the appeal filed by the defendant No. 2.

17. It is the contention of the learned Counsel for the appellant that there was total failure on the part of the plaintiff in fulfilling the terms of contract and that the plaintiff committed total breach of the terms of the agreement of contract. The plaintiff having failed to perform his obligations is not entitled to seek discretionary relief from this Court for specific performance of the Agreement of Sale and consequently execution of the sale in his favour. It is also contended that the plaintiff was never ready and willing and thus he failed to perform his part of contract. It is also contended that the plaintiff was not entitled for specific performance of the entire plaint schedule property as defendant No. 1 is not a

party and his share is not covered by the agreement. On the other hand, the learned Counsel for the Plaintiff submits that the defendant No. 2 has no locus standi to file the appeal and that evidence adduced before the lower Court clearly establishes that the plaintiff has performed his part of obligation and the defendant has failed to execute the Sale Deed and the Sale Deed executed by the defendant No. 1 in favour of the defendant No. 2 was hit by Section 52 of Transfer of Property Act. The learned Counsel would submit that the nature of the property has been changed altogether and the structures were already demolished by respondents No. 3 and 4 after purchase from the defendant No. 2 and that it is a fit case for executing a registered sale deed in favour of the Plaintiff leaving open to the plaintiff to seek recovery of the damages for demolition of the ground floor.

18. Both the learned Counsel have argued the matter at length and relied on various decisions.

19. It is not in dispute that the suit was filed for specific performance of the Agreement of Sale and Memorandum of Understanding namely Exs.A1 and A2. It is also not in dispute that originally, the entire premises with an area of 313 sq.yards was purchased by Smt. Mathur Hymavathi under a registered sale deed. Subsequently, she executed a registered sale deed on 22-11-1984 Ex.A3 conveying the terrace rights in favour of the plaintiff covering an area of 1114.96 sq.ft. Thereafter under Ex.A5 further rights were conveyed with the proportionate undivided share in the land to an extent of 120 sq.yards. It is also admitted that after the death of Smt. Mathur Hymavathi, the property excluding the property covered by Ex.A4 and A5 devolved on her husband Ranga Rao and defendant No. 1 adopted son. The remaining land was sought to be purchased by the plaintiff and an agreement was entered on 12-3-1990 for purchase of ground floor along with the land for a consideration of Rs. 3 lakhs under Ex.A1 dated 12-3-1990 which was executed by Ranga Rao in favour of the plaintiff. It is stated that the plaintiff had purchased terrace site for the 1st floor i.e., above the ground floor from Smt. Mathur Hymavathi. However, both the parties keeping in view the difficulty that may arise in future, Ranga Rao has given up his right in the ground floor of the premises along with the proportionate land and to execute a registered deed in favour of the plaintiff for a total consideration of Rs. 3 lakhs, which shall be

paid as follows:

Rs. 50,000/- shall be paid on or before 12-4-1990, Rs. 1,00,000/- shall be paid on or before 12-10-1990.

20. On receipt of the aforesaid amounts, Ranga Rao has to execute a registered deed in favour of Krishna Murthy.

21. For the balance amount of Rs. 1,50,000/- Plaintiff has to execute promissory note with interest @ 6% per month and the amount under promissory note has to be discharged on or before 1-7-1991. The said agreement was scribed by one M. Narsimha Rao, who is PW3. Below the signature of the scribe, an endorsement was made by defendant No. 1 to the following effect:

'I am accepting this agreement.'

22. But, however, under Ex.A2 Memorandum of Understanding dated 12-4-1990, the terms of the original agreement were altered and it was agreed that Rs. 50,000/- was paid on 12-4-1990 and rupees one lakh has to be paid on the date of the registration namely on 30-10-1990, the balance of Rs. 1,50,000/-together with interest of Rs. 750/- per month from 1-11-1990 with the following conditions:

Plaintiff shall renovate the house within a period of four months from the date of the registration.

From 1-4-1991, the interest would be Rs. 1,100/- per month instead of Rs. 1,700/- per month.

Final payment i.e., Rs. 1,50,000/- shall be paid on or before 31-7-1991.

23. Plaintiff should pledge registered Sale Deeds in favour of wife of Ranga Rao on or before 30-10-1990 with condition that the plaintiff should register the said plots in case they failed to pay Rs. 1,50,000/- on or before 31-7-1991 and this Memorandum of Understanding Ex.A2 was signed by Ranga Rao and defendant No. 1 and the plaintiff. It was scribed by M. Narsimha Rao. Ex.A6 is a letter written by the plaintiff to defendant No. 1, wherein it has been stated that he could not meet on 14-10-1990 as Chandrasekhar had a fracture. He stated in the said letter

that as per the understanding, he intended to pay the amount on or before 31-10-1990 and since the plaintiff had stated that he would go to M. Narsimha Rao and received the amount in the presence of M Narsimha Rao at Hanamkonda and finally he stated that defendant No. 1 should inform as to that he is going to M. Narsimha Rao, so that he will also go over there and pay the money, which is to be paid. But, thereafter, the defendant issued a notice on 6-5-1991 referring to another agreement dated 12-4-1990 demanding balance sale price of Rs. 3,99,000/-and at this point of time, the suit was filed seeking specific performance of the Agreement of Sale. The Trial Court has held that the agreement under Ex.X-1 on the basis of which a notice was issued by the defendant was fabricated and tampered. But, however, the concentration was made on Ex.A1 and A2. It is also to be noted in this regard that as on the date of the filing of the suit, the property was already sold to defendant No. 2 and the possession was given according to the Sale Deed. The Trial Court also found that the said Sale Deed was not valid and hit by lis pendence as defendant No. 2 has purchased the same with full notice that the matter is pending in the Civil Court in respect of the same property,

24. The learned Counsel for the appellant Mr. P.R. Prasad vehemently submits that the plaintiff had not fulfilled his part of obligation under Ex.A1 or Ex.A2. He submits that under Ex.A2, Memorandum of Understanding is in between the plaintiff and the defendant No. 2 and Ranga Rao. The plaintiff was required to furnish security of his wife's property by depositing the registered sale deed on or before 30-10-1990 with Ranga Rao and no such security was furnished even the letter written by the plaintiff. It does not reveal that he was ready and willing with money and it was only evasive letter which could not be relied on. He further submits that the plaintiff did not issue any notice calling upon the defendant to perform the obligations under Ex.A2 nor did he exhibit and establish that he was ready and willing with the money. He further submits that de hors the repudiation of the contract by the defendant, the plaintiff ought to establish that he is ready and willing to perform his obligations irrespective of the sales alleged to have been effected by defendant No. 1 in favour of the defendant No. 2 and subsequently, by defendant No. 2 in favour of the Respondent Nos. 3 and 4 in the appeals. Unless and until, the plaintiff establishes that he is readying and willing, he cannot seek the decree for specific performance. He further submits that the relief of specific

performance is a discretionary relief and the person, who approaches the Court seeking specific performance of the Agreement of Sale should approach the Court with clean hands. In the instant case, the plaintiff having failed to perform his part of obligations under either Ex.A1 or Ex.A2 cannot seek relief of specific performance and thus the Trial Court has gravely erred in ordering the specific performance, without properly appreciating these facts. He relies on the following decisions:

Potluri Babu Rao v. Sistla Neelagriva Sastry, : 1994(3)ALT669 .

N.P. Thirugnanam v. Dr. R. Jagan Mohan Rao, : AIR 1996 SC116 .

Pudi Lazarus v. Rev, Johnson Edward, AIR 1976 A.P. 243.

G. Rosaiah v. C. Balarami Reddy, : AIR 1989 AP179 .

Bishambhar Nath Agarwal v. Kishan Chand, : AIR1990 All65 .

He also submits that the Trial Court failed to consider what was transferred in Ex.A1 and Ex.A2 is the only property that fell to the share of Ranga Rao and it cannot be said that the property which fell to the share of defendant No. 1 was also covered by Ex.A1 and A2. Even though this point was not specifically pleaded he is entitled for pressing the same at the time of the appeal. He relies on the following decisions.

Sir Chunilal V. Mehta v. Century Spinning and Manufacturing Company Limited, : AIR 1962 SC1314 .

V. Bapu Kalingarayar v. Rajam, : AIR1978 Mad192 .

SM. Surasaibalini Debi v. Phanindra Mohan Majumdar, : [1965]1SCR861 .

Appana Radha Sri Krishna Rao v. KM. Kodandarama Chetti, AIR 1990 AP 190,
and

Sri Pottem Subbarayudu v. Kothapalli Gangulu Naidu, : 2000(5)ALD764 .

Thus he submits that even assuming that the agreement Ex.A1 and A2 are valid, yet, it cannot cover the properties belonging to defendant No. 1 and since it is an undivided property and no relief for partition and separation of the defendant No. 1's share was sought in the suit, in such a situation, the plaintiff is not entitled for specific performance of the property as against the property of defendant No. 1.

25. As against these contentions, the learned Senior Counsel Mr. T. Veerabhadrayya appearing for the Appellant in CCCA No. 159 of 1999 and respondents in CCCA No. 232 of 1999 submits that defendant No. 2 has no locus standi to question the decree for specific performance when the same has become final insofar as the defendant No. 1 is concerned. He submits that the sale in favour of the defendant No. 2 was hit by Section 52 of the Transfer of Property Act and Section 52 of Transfer of Property Act is not subject to Section 19(b) of Specific Relief Act. he relies on the decision of the Division Bench reported in Smt. Ram Peary v. Gauri, AIR 1978 All. 318 and thus he submits that the defendant No. 2 cannot even plead that she is bona fide purchaser without valid notice. Even on merits also, the learned Counsel would submit that defendant No. 2 has to prove that she is transferee for value without earlier sale agreement and the amount was paid in good faith as held in Shankarlal Narayandas Mundade v. The New Mofussil Company Limited, AIR (33) 1946 PC 97. He submits that after defendant No. 2 was added in the plaint by amendment, it was clearly stated by the Plaintiff that defendant No. 2 was not bona fide purchaser for value and defendant did not file any rejoinder. Therefore, no issue could be framed touching this aspect. The learned Counsel would further submits that the sale in favour of the defendant No. 2 by defendant No. 1 was correctly set aside by the Trial Court. He again submits that originally the Sale Deed was not filed and the entire amount was paid in the presence of the Sub-Registrar and that when defendant No. 2 was Income Tax Assessee, he has not produced the income tax certificate. Therefore, an adverse inference ought to have been drawn as best evidence was withheld as held by the Supreme Court in Gopal Krishnaji Ketkar v. Mohamed Haji Latif, : [1968]3SCR862 . Further, defendant No. 1 when he filed an application for condonation of the delay, in the affidavit filed in support of the petition, he has clearly stated that defendant No. 2 paid only part of the sale consideration towards the sale. Thus, it shows that defendant No. 2 expressed his inability to pay the sale consideration

and the said averment was not rebutted. Therefore, non-examination of defendant No. 2 was fatal to his case. He relies on the decision of the Supreme Court reported in Iswar Bhai C. Patel Alias Bachu Bhai Patel v. Harihar Behera, : [1999]1SCR1097 .

26. The learned Counsel would also submit that with regard to the contention that sale of defendant No. 1 was never agreed and it was only share of Ranga Rao, which was agreed to be sold, the learned Counsel would submit that this contention was never pressed before the lower Court. On the other hand, it has clearly admitted by defendant No. 1 in Ex.A1 and A2 that Ex.A1 is relates to suit property and therefore, the principle of estoppels under Section 115 of Evidence Act operates against the defendant No. 1 and defendant No. 2 to contend that Ranga Rao sold only his 1/2 share and not other shares. He refers to the decisions reported in Nagubai Ammal v. B. Shama Rao, : [1956]1SCR451 , and Jegannatham Pillai v. Kunjithapatham Pillai, : AIR1972 Mad390 .

27. With regard to the readiness and willingness, the learned Counsel would submit that there was ample evidence to come to a conclusion that the plaintiff was ready and willing and submits that the purchaser under the defendant cannot plead violation of Section 16(c) of Specific Relief Act. He tries to distinguish the judgment reported in Ram Awadh v. Achhaibar Dubey, 2000 (1) Supreme Today 319, on the ground that the party in that case was not a purchaser pending the suit and in fact he raised the plea in the written statement before the Trial Court. The Supreme Court in the above case has categorically held thus:

'The obligation imposed by Section 16 is upon the Court not to grant specific performance to a plaintiff who has not met the requirements of Clauses (a), (b) and (c) thereof. A Court may not, therefore, grant to a plaintiff who has failed to aver and to prove that he has performed or has always been ready and willing to perform his part of the agreement the specific performance whereof he seeks. There is, therefore, no question of the plea being available to one defendant and not to another. It is open to any defendant to contend and establish that the mandatory requirement of Section 16(c) has not been complied with and it is for the Court to determine whether it has or has not been complied with and,

depending upon its conclusion, decree or decline to decree the suit. We are of the view that the decision in Jugraj Singh 's case is erroneous.'

28. The principle laid down by the Supreme Court in Jugraj Singh v. Labh Singh : AIR 1995 SC945a , was overruled in the aforesaid decision. Thus, it is clear that plea of the defendant under Section 16(c) of Specific Relief Act is not only available to Vendor Defendant, but also subsequent purchasers. Therefore, defendant No. 2 is quite justified in raising such plea. Thus, we have to reject the contention of the learned Senior Counsel on this issue.

29. From the foregoing facts and events and also the contentions raised, the basic issue that arises for consideration is whether the plaintiff was ready and willing to perform his part of contract?

30. The issue relating to compliance of Section 16(c) of the Act by the plaintiff has been considered by the Supreme Court in catena of decisions. However, some of the basic requirements under Section 16(c) are contained in the decisions referred to herein.

31. In N.P. Thirugnanam v. Dr. R. Jagan Mohan Rao, : AIR 1996 SC116 , the Supreme Court held thus:

'It is settled law that remedy for specific performance is an equitable remedy and is in the discretion of the Court, which discretion requires to be exercised according to settled principles of law and not arbitrarily as adumbrated under Section 20 of the [Specific Relief Act, 1963](#).....Under Section 20, the Court is not bound to grant the relief just because there was a valid agreement of sale. Section 16(c) of the Act envisages that plaintiff must plead and prove that he had 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 those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the Court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the

plaintiff is ready and willing to perform his part of the contract, the Court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The Court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract.'

32. The Supreme Court in *Lourdu Mari David v. Louis Chinnaya Arogiaswamy*, : AIR 1996 SC2814 , observed thus:

'Under Section 20 of the Specific Relief Act, the decree for specific performance is in the discretion of the Court but the discretion should not be refused arbitrarily. The discretion should be exercised on sound principles of law capable of correction by an appellate Court.

It is settled law that the party who seeks to avail of the equitable jurisdiction of a Court and specific performance being equitable relief must come to the Court with clean hands. In other words the party who makes false allegations does not come with clean hands and is not entitled to the equitable relief.'

33. In *K.S. Vidyanadam v. Vairavan*, : AIR 1997 SC1751 , the Supreme Court observed thus:

'It can be said that any and every suit for specific performance of the agreement (which does not provide specifically that time is of the essence of the contract) should be decreed provided it is filed within the period of limitation notwithstanding the time-limits stipulated in the agreement for doing one or the other thing by one or the other party. That would amount to saying that the time-limits prescribed by the parties in the agreement have no significance or value and that they mean nothing.

The rigor of the rule evolved by Courts that time is not of the essence of the contract in the case of immovable properties - evolved in times when prices and values were stable and inflation was unknown - requires to be relaxed, if not modified, particularly in the case of urban immovable properties. It is high time, the Court do so. In the instant case, may be, the parties knew of the said circumstance but they have also specified six months as the period within which the transaction should be completed. The said time-limit may not amount to making time the essence of the contract but it must yet have some meaning. Not for nothing could such time-limit would have been prescribed. Can it be stated as a rule of law or rule of prudence that where time is not made the essence of the contract, all stipulations of time provided in the contract have no significance or meaning or that they are as good as non-existence? All this only means that while exercising its discretion, the Court should also bear in mind that when the parties prescribe certain time-limit (s) for taking steps by one or the other party, it must have some significance and that the said time-limit(s) cannot be ignored altogether on the ground that time has not been made the essence of the contract (relating to immovable properties.).

In the instant case from the date of agreement to sale till the date of suit notice the purchaser was sitting quiet without taking any steps to perform his part of the contract under the agreement though the agreement specified a period of six months within which he was expected to purchase stamp papers, tender the balance amount and call upon the vendors to execute the Sale Deed and deliver possession of the property. Further, the delay was coupled with substantial rise in prices - according to the vendors three times - between the date of agreement and the date of suit notice. The delay has brought about a situation where it would be inequitable to give the relief of specific performance to the purchaser.'

34. The Division Bench of this Court in *Sardar Amarjeet Singh v. Nandu Bai*, : 1998(5)ALD697 (DB), while dealing with Section 16 of Specific Relief Act observed thus:

'It is true that in Ex.A1, there is no specific provision which calls upon the vendee to tender the balance amount and call upon the defendant Nos. 1 and 2 to execute

the sale deed within the stipulated time (in that case, the prescribed time was six months). But, such obligation on the part of the vendee is necessarily implied from Clauses 2 and 3. The rights and obligations flowing from the agreement are necessarily bilateral and it is not possible to countenance the argument that the obligation is cast on the vendors to take steps for the completion of the transaction within nine months, but not on the vendee. It may be that the vendors, for their own reasons, remained reticent and allowed the passage of time without calling upon the vendee to finalise the deal. It is also true that they set up an ante-dated agreement of sale in favour of defendant Nos. 3 to 7, But, here the Court is more concerned with the conduct of the vendee who approaches the Court to grant the equitable relief of specific performance. The readiness and willingness on the part of the plaintiff cannot be inferred merely because at the fag end of the period of limitation a notice was issued calling upon the vendors to execute the Sale Deed.

As already noticed, there is no iota of explanation coming from the side of the Appellant-Plaintiff as to why he kept quiet without taking any steps or without making known his readiness and willingness to the other party. Mere averment in the plaint or pre-suit notice that he was at all material times ready and willing to perform his part of the contract is not sufficient. But, such averment should be supported by satisfactory evidence. That is utterly lacking in this case. Though time may not be the essence in a contract of sale of immovable property, the performance of obligations cannot be postponed for an unreasonably long length of time unless there is a satisfactory explanation for such delay.'

35. In *Pushparani S. Sundaram v. Pauline Manomani James*, : (2002)9SCC582 , again while referring to Section 16(c) of Specific Relief Act, the Supreme Court held thus:

'Section 16(c) of the Specific Relief Act, requires that not only there be a plea of readiness and willingness but has to be proved so. It is not in dispute except for a plea there is no other evidence on record to prove the same except the two circumstances. It is true that mere absence of plaintiff coming in the witness box that by itself may not be a factor to conclude that he was not ready and willing in a given case as erroneously concluded by the High Court. But in the present case,

not only the plaintiff has not come in the witness box, but not even sent any communication or notice to the defendant about his willingness to perform his part of the contract. In fact no evidence is led to prove the same.'

36. Basing on the aforesaid decisions, let us consider the facts in the case on hand.

37. The recitals in Ex.A1 and A2 are very clear which have already been referred to in extenso in the preceding paragraphs.

38. Plaintiff and defendant No. 1 are close relations and there is no dispute about that. But, however, whether the plaintiff has established that he has performed his obligations is the moot question.

39. As per Exs.A1 and A2 number of conditions were stipulated with regard to the deposit of title deeds, payment of interest and other conditions and there is no reference to the compliance of these conditions by the plaintiff at any point of time. Even in Ex.A6, the plaintiff did not refer to the aspect of complying the conditions under contract and requiring defendant No. 1 to discharge the obligations under the contract. He only tried to focus that he could not come to the house of M. Narsimha Rao, where the amount was sought to be paid in his presence and that asked defendant No. 1 to intimate the date of his coming over to M. Narsimha Rao, so that he will make arrangements for the payment of money.

40. Under these circumstances, it has to be considered whether the plaintiff was ready and willing to perform his obligations. Admittedly, as on the date of Ex.A2, he did not deposit the title deeds nor was there any reference for payment of interest. On the other hand, defendant No. 1 issued a notice on the basis of Ex.A1 at which point, the suit was filed. But, he never intimated that he was ready and willing to discharge the obligations under the contract. There is no other document forthcoming to establish that he was ready and willing to perform his part of the terms of agreement. He only examined another relation who is residing in USA to the effect that he has agreed to advance the money. But, this evidence is of no assistance to him. Apart from expressing the readiness to effect that he has kept the money, there is no evidence to the effect that he has deposited the title deeds

of his wife with Ranga Rao. It is to be noted in this regard that the relief of specific performance of a contract is a discretionary relief and the person approaching the Court for such relief is required to maintain clean conscious and conduct. It is not open for him to seek such a relief without first discharging his obligations. The reference to the validity of the Sale Deed executed by defendant No. 1 in favour of the defendant No. 2 or defendant No. 2 in favour of the respondents No. 3 and 4 are immaterial. The conduct of the defendant is not sine qua non for granting relief to the Plaintiff. Plaintiff has to independently establish his readiness and willingness and also he should prove that he had complied with the conditions under Ex.A1 and A2. Without establishing these elements and the cashing in of deficiencies or illegalities committed by the defendants would not be any assistance to the plaintiff. It is true that readiness and willingness need not be established by deposit of money or by bank account. But, there must be some prima facie evidence or circumstances to draw inference that the plaintiff was ready and willing and that he had discharged his obligations arising under the contract.

41. The suit was filed on the basis of Ex.A1 and A2. PW2 denies about Ex.X1. PW1 who is said to be knowing the affairs categorically states that the plaintiff is not a party to Ex.X1 which has been kept in his custody and produced. He is the best person to speak about the execution of Ex.X1. The person who produced Ex.X1 from his custody has been examined on commission. He categorically states that PW2 did not sign and the plaintiff did not agree for Ex.X1 and all the averments were made at the instance of 1st defendant. More over, he is said to have attested the document. It is referred in Ex.X1 that he is the well wisher of both of them since he attested Ex.A2 and Ex.X1. When such is the situation, his evidence has to be given more weight. It is significant to note that in the registered notice issued, there was no reference about the prior dealings namely the suit contracts. There is no explanation given by DW 1 for non-mentioning of earlier contracts in Ex.X1 who signed on Ex.A2. More over it is in the evidence of DW1 that during morning time, Ex.A2 was executed and during the evening time, Ex.X1 was executed changing the stipulation of consideration etc. It appears that the lower Court found some corrections in the agreement at some places. The plaintiff has denied about the execution of Ex.X1 and its acceptance and he has not

signed on it. It is only PW1 who speak about Ex.X1 stating that the plaintiff is not a party to the agreement and some corrections are found in the agreement. Even according to him, the consideration stipulated is only Rs. 3 lakhs, but not Rs. 4 lakhs. If the contents of Ex.A1 and A2 are taken into consideration, it can safely be taken that the consideration amount stipulated is only Rs. 3 lakhs. Rs. 50,000/- was paid to have been paid under Ex.A2 as per the evidence of PW1 in his presence. He has knowledge about Ex.A2 as well as Ex.X1. He is an advocate and freedom fighter. He was sick and during the examination also he was found to be sick. Hence, there was no necessity for him to speak falsehood. He is said to be a well wisher. PW1 states that Ex.A1 is unilateral, having been brought to him and kept with him. It is not bilateral as plaintiff has never a party to it or its terms. PW1 also states in his evidence when he found tampering he chided the 1st defendant for doing such a foul thing. More over, Ex.A2 is said to have been executed at the instance of PW1. When certain condition was stipulated and in the morning Rs. 50,000/- was paid and when the terms were settled, there was no need to have a change by evening time and enter into some other agreement. The purchase of stamps etc., in the name of plaintiff cannot in any way show that Ex.X1 is genuine agreement, which is not accepted by PW2 being plaintiff. PW1 was also equally responsible for bringing about Ex.A2 understanding during morning time. The suit for specific performance is based only on the strength of Ex.A1 and A2. Therefore, we also find that the 1st defendant has not filed any suit on the strength of Ex.X1. He has only issued the notice calling upon to perform his part of the contract. Under the notice what is recited is that the plaintiff was called upon to perform his part of the contract by paying the consideration and also obtaining the sale deed within 7 days and he was informed that he would sell away the property. Assuming that time is made essence of the contract, there is no other notice issued subsequent to Ex.X1 cancelling the contract and forfeiting the amount paid. Moreover, Rs. 50,000/- is said to have been paid in the morning and it is unlikely an amount of Rs. 1,000/- will be paid in the evening to enter into a contract ignoring the payment of Rs. 50,000/- and without mentioning of the same.

42. We are of considered view that the question of performing the plaintiff's part of the contract stipulated by Ex.X1 does not arise, as he is not a party as per the reliable evidence of PW1. Insofar as the contracts under Ex.A1 and A2 are

concerned, they are not cancelled. It is the version of DW1 that PW2 the plaintiff in the suit has promised to return the agreement executed in the morning as well as earlier agreements and this has not been done so. No reference is made under Ex.X1 no steps are taken for return of documents and no document is returned. The signature of first defendant is found accepting the terms of agreement under Ex.A2. He also admitted the same in his evidence. No doubt the Supreme Court has categorically stated that the parties to the suit can always dispute the ready and willingness of the party to perform part of the contract under the agreement even by a subsequent purchaser. During the course of arguments, the plaintiff who is the appellant herein has presented an application to receive a document by presenting a petition to show that the first defendant preferred an appeal with delay condonation and it ended in dismissal.

43. The contention of the learned Counsel Sri T. Veerabhadraiah, is that it has reached the finality in so far as the first defendant is concerned, and other who are claiming through the 1st defendant as subsequent purchasers cannot challenge the same, and (that fact has to be taken into consideration since it operates as res judicata.) The learned Counsel appearing for the subsequent purchaser during the pendency of the suit has categorically stated that they are not parties to the appeal and the delay condonation petition, and it is not binding on them, and the document cannot be received. We are of considered view that the document is absolutely not necessary for giving a just decision in this case, since the rights of DW 1 has to be worked out by this Court as the ready and willingness alleged on the part of the plaintiff is being challenged by, the subsequent purchasers and it can be decided only after taking into consideration of conduct of first defendant and his alleged rights. Hence it is dismissed. In view of the settled proposition of law overruling the earlier principles laid down by the Supreme Court in a decision referred supra, the subsequent purchaser can challenge the ready and willingness of the plaintiff. It is clear and Court can take judicial notice that the decision relating to first defendant has reached the finality in view of dismissal of delay condonation petition by this Court. It is only the persons who purchased during pendency of suit have to work out their remedies. If the terms of Ex.A2 are strictly considered, there is no sufficient compliance. The 1st defendant never asked for return of earlier agreement and did not mention about their existence even under

Ex.X1. He never cancelled the earlier agreements or Ex.X1. He also never forfeited the amounts paid earlier or under alleged Ex.X1. This conduct has to be judged along with other circumstances. This Court is doubting the correctness of Ex.X1 as no acceptance has been given by the plaintiff for Ex.X1. The capacity to pay the amount is admitted by DW1 who states that the plaintiff has got 20 acres of land. He has examined another relation who is residing in USA to the effect that he has agreed to advance the money. The relief of specific performance is a discretionary relief and the person approaching for such a relief, is required to have clean conscious and conduct. Hence, it is not open for him to seek such a relief without first discharging his obligation. He has not issued any registered notice stating that he was ready and willing to perform his part of contract except writing a letter under Ex.A6. The contents of the letter do not make a mention about the performing the terms of the agreement under Ex.A2. Moreover, the amounts were not immediately deposited at the time of filing of the suit. If the said conduct is taken into consideration, namely about non-issue of reply non-performance of stipulated terms as per Ex.A2, it cannot be said that he was ready and willing to perform his part of contract under Ex.A1 and A2. We are not convinced about the same. His failure to show that he is ready and willing to perform his part of the contract makes it clear that the plaintiff certainly has to be non-suited. This is a case where both the parties are at fault. The plaintiff is unable to perform the stipulated terms as per Ex.A1 and A2. The first defendant is only responsible for bringing into existence of Ex.X1 and the corrections are found therein changing the stipulation of consideration etc. The other defendants who are appellants herein are equally guilty of purchasing the property during lis pendence. The suit property said to be a building which has been demolished to the ground by subsequent purchasers. If the totality of the conduct of all the parties are taken, they are blameworthy. More over when defendant No. 2 sold the property to subsequent purchasers during the pendency of the suit, they were brought on record. They did not care to file their statements. They did not raise their pleas. It is well settled law that no amount of evidence can be looked into without a pleading as per the principles laid down by the Privy Council in AIR 1930 PC 57. In that view of the matter, the contentions of subsequent purchaser, cannot be taken into consideration. More over, it is clearly stated in the amended CPC

that filing of a statement is mandatory as per Order 8 Rule 1 which reads as follows:

'Order 8 Rule 1 :- Written statement:--The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence: Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons.'

44. Not only he has not raised his pleas, but also he did not file his documentary evidence and did not depose. In spite of giving an opportunity, he never asked for the same even at the stage of dealing the matter by this Court. In such cases, the question of hearing him does not arise and it is impossible to decide the bona fide nature of purchasing the property and also in demolishing the building without pleas and documentary evidence or oral evidence.

45. Coming to the plea of 2nd defendant who is the 1st appellant herein and her husband is examined on the ground of power of attorney has been conferred on her husband. He is competent to speak. Be that as it may. Non-examination of the party to the suit is always fatal since the notice contemplated under statute is a notice about the prior agreement of sale. Her husband cannot speak about hers knowledge. The knowledge contemplated under the statute is the knowledge of subsequent purchaser and it is for the 2nd defendant to prove that she is a bona fide purchaser for the value without due notice of agreement in favour of plaintiff. The evidence placed is not sufficient to arrive at such a conclusion and mainly the original Sale Deed is not produced and not proved. The question that falls for consideration is whether the plaintiff is entitled for any equities in this case. We are of considered view that the facts in this case are very peculiar. Firstly the right of the 1st defendant has reached the finality and the judgment of the lower Court has reached finality in so far as defendant No. 1 is concerned subject to the rights of subsequent purchaser namely during lis pendence. The first defendant never cancelled the contract namely Ex.A1 and A2. Ex.X1 is not found to be unilateral one and plaintiff has never accepted it. Even assuming that 1st defendant issued a

notice demanding enforcement of terms under Ex.X1 the contract was never cancelled and the amounts paid under it were never forfeited. It is now well settled that when time is made essence of the contract, a second notice has to be issued cancelling the contract and exercise his right forfeiting the amounts paid under it. This has not been done so. In view of the subsequent change in law by the Supreme Court, the subsequent purchaser had got right to challenge about rediness and willigness to perform the contract. They are successful in proving the same. The subsequent purchaser is not a party to the proceedings presented by defendant No. 1 against judgment and decree before this Court. If all these peculiar circumstances are taken into consideration, the 1st defendant cannot take unfair advantage by keeping the amounts with him, but it may amount to unjust enrichment. In a suit for specific performance, the Court has to consider grant of equity. This Court has to change the findings given by lower Court against the subsequent purchaser, since it cannot be held on one hand that the contract is valid and he is entitled to specific performance against D-1 and on the other than, it cannot uphold the rights of the subsequent purchaser. As per Order 41, Rule 33 of CPC the appellate Court is entitled to pass any suitable decree as can be seen from the following provision.

'Order 41 Rule 33: Power of Court of appeal :--The Appellant Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although and appeal may not have been filed against such decrees. Provided that the Appellate Court shall not make any order under Section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.

Illustration

A claims a sum of money as due to him from X or Y, and in a suit against both obtains a decree against X. X, appeals and A and Y are respondents. The Appellate Court decides in favour of X. It has power to pass a decree against Y.'

46. We are of considered view that the entire decree has to be set aside. If the settled rights of 1st defendant are being modified, it is but natural that he has to return the amounts received which are not forfeited even till today. More over no suit has been instituted on the basis of Ex.X1 for specific performance. If the above peculiar circumstances are taken into consideration equities have to be worked out since the Court cannot give unfair advantage to the 1st defendant who took the amount under Ex.A2 in the morning after its execution, we are of considered view that the refund of consideration has to be ordered namely Rs. 50,000/-. The question that falls for consideration is can the subsequent purchaser ask for cancellation of the agreement. It cannot be done. No decree can be passed against subsequent purchaser when plaintiff is not entitled for specific performance. The only remedy is against the 1st defendant who received Rs. 50,000/-under Ex.A2 and it has to be ordered to be refunded. In that view of the matter, we hold that the plaintiff is not entitled for any relief of specific performance of the agreement and the arrangement under Ex.A1 and A2. He is entitled to refund of the amounts paid as the agreements are not cancelled and the amount has not been forfeited by the 1st defendant. More over the building was demolished. Therefore, a modified decree is liable to be passed insofar as against defendant No. 1 is concerned for the amount of Rs. 50,000/- instead of relief of specific performance. The plaintiff purchased undivided extent of terraced rights. He is at liberty to work out his remedies for demolishing the building by defendant Nos.2 to 4 effecting the rights.

47. In the result, CCCA No. 159 of 1999 is allowed. The judgment and decree in OS No. 417/91 is set aside. A modified decree is passed for sum of Rs. 50,000/- with interest @ 12% per annum against defendant No. 1 from the date of suit till realization. A charge is created on the plaint schedule property. The decree against defendant Nos. 2 to 4 is set aside in respect of specific performance.

48. CCCA No. 232 of 1999 is allowed accordingly. Defendant/respondent Nos. 2 to 4 shall pay costs to the plaintiff through out. Plaintiff is at liberty to work out remedies for demolishing the building whereunder he has purchased undivided extent of terraced rights.

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