Viswanathan and ors. Vs. R. Lakshmi Ammal (Deed.) and ors.

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Court : Chennai

Decided On : Mar-11-1993

Reported in : (1993)2MLJ560

Appellant : Viswanathan and ors.

Respondent : R. Lakshmi Ammal (Deed.) and ors.

Judgement :

Srinivasan, J.

1. A.S. No. 89 of 1983 arises out of a suit for specific performance of an agreement dated 14.12.1977 marked as Ex.A-1 between plaintiffs 1 to 4 and defendants 1 and 2. The plaintiffs are aggrieved by the dismissal of the suit. A.S. No. 85 of 1983 arises out of a suit for recovery of a sum of Rs. 39,150 representing the arrears of rent from 11.2.1978 to 1.8.1979 at the rate of Rs. 4,350 per mensem and interest thereon. The suit had been decreed and the aggrieved defendant is the appellants. The fifth plaintiff in the suit for specific performance is the defendant in the suit for recovery of money. Defendants 1 and 3 in the suit for specific `performance are plaintiffs 1 and 2 in the suit for recovery of money. The parties are referred in this judgment according to their ranking in the suit for specific performance. First plaintiff is the father of plaintiffs 2 to 5 and defendants 1 and 3 are the wives of the second defendant. Fourth defendant is a lessee of a portion of the suit property.

2. The second defendant had been running a spinning mill by name 'Sri Ramachandra Textiles' in partnership with somebody else. The plant and the machinery in the mill belonged to him. He gave the said machinery on lease on 5.9.1975 under Ex.A-23 to the fifth plaintiff for a period of five years. On the same day, the defendants gave a lease of land and buildings to the 5th plaintiff. Defendants 1 and 2 entered into agreement for selling the machinery to the fifth plaintiff and one Mr. Mani under Ex.B-8 on 27.10.1977 for a total sum of Rs. 2,75,000. A sum of Rs. 50,000 was paid by way of advance. Another agreement on the same day between defendants 1 and 2 on the one hand and plaintiffs 1 to 4 on the other was entered into for the sale of the land and building in S. No. 6/4 of an extent of 10.80 acres which is described fully in the plaint schedule. The total consideration was fixed at Rs. 4,25,000 and sum of Rs. 50,000 was paid in advance. Subsequent thereto, a cheque was issued on 30.11.1977 by the filth plaintiff for a sum of Rs. 50,000 in favour of the first defendant as further advance towards the sale consideration. That cheque was admittedly dishonoured and on 1.12.1977, the second defendant wrote to the first plaintiff and Mani under Ex.B-10 informing them of the dishonouring of the cheque and also calling upon them to complete the transaction by paying the entire balance.

3. The said Mani found it impossible to join the transaction of purchase and dropped out of the same. Then a fresh agreement was brought into existence between plaintiffs 1 to 4 on the one hand and defendants 1 and 2 on the other hand with reference to land and building on 14.12.1979. The total consideration is the same as Rs. 4,25,000. A sum of Rs. 50,000 paid under earlier agreement was treated as advance. The receipt of a sum of Rs. 50,000 by way of further advance was acknowledged. The party agreed that a sum of Rs. 50,000 shall be paid by means of a cheque or draft before registration of the sale deed and that the sale deed shall be executed within two months from the date of the agreement. It was agreed that the remaining part of the consideration shall be paid in three instalments as follows: Rs. 75,000 by 30.11.1978, Rupees One lakh by 30.11.1979 and Rupees one lakh by 30.11.1980. It was provided in the agreement that the purchasers shall pay interest at the rate of 12% per annum on the balance of the amount remaining unpaid for the time being and in case of default of payment by the dates mentioned above, the vendors shall have the right to claim

interest at 18% per annum from the date of default till the date of realisation. Clause 7 of the agreement provided that if the vendor fails to execute the sale deed as agreed, the vendees are at liberty to claim all damages that may be attributed to and arising out of breach of the contract by the vendors. Clause 8 provided for a similar remedy to the vendees if there was any failure on the part of the vendees to perform their part of the contract. Clause 10 refers to the factum of possession being with the fifth plaintiff, son of the first vendee. On the same day, another agreement was entered into between the second defendant and plaintiffs 1 to 4 under which the former agreed to sell the machinery for a total consideration of Rs. 2,75,000. The sum of Rs. 50,000 paid under the earlier agreement as advance was treated as advance under this agreement. The agreement also referred to the receipt of a further sum of Rs. 50,000 in cash on 30.11.1977. Out of the balance, a sum of Rs. 50,000 was to be paid on 5.1.1978 and the reminder was to be paid as follows: Rs. 50,000 by 30.11.1978, Rs. 50,000 by 30.11.1979 and Rs. 25,000 by 30.11.1990. Here again, the factum of possession with the fifth plaintiff was referred to. There was a provision for payment of interest at 12% annum and also default interest at 18% per annum,

4. On 15.12.1977 an application was made for permission to transfer the property under the provisions of Urban Land Ceiling Act. A draft sale deed attached thereto shows that the purchasers shall pay a sum of Rs. 50,000 towards the consideration before 15.1.1978. The claim of the plaintiffs 1 to 4 is that they made payments after that date towards the consideration under both the agreements and at the time of the suit, the balance that remained to be paid was only a small amount.

5. On 1.3.1979, plaintiffs 1 to 4 gave a letter Ex.B-4 to the second defendant requesting him to adjust the sum of Rs. 1,25,000 paid earlier to the first defendant towards the purchase price of the machinery items sold by him to them. On the same day, the second defendant issued a receipt Ex.B-1 for a sum of Rs. 18,750 in favour of plaintiffs 1 to 4 being the interest on account of defaulted payment in respect of the sale price of the machinery items sold to them. A receipt was issued by the third defendant for a sum of Rs. 25,200 on the same day representing the rent payable for the period from 30.11.1977 to 30.11.1978 towards her share in

favour of the fifth plaintiff which is marked as Ex.B-2 Another receipt marked as Ex.B-3 was issued by the first defendant for a sum of Rs. 24,000 representing her share of the rent from 30.11.1977 to 30.11.1978. There is no dispute that all the amounts covered by the four exhibits referred to above relate to the machinery by the four exhibits referred to above relate to the machinery items sold by the second defendant to plaintiffs 1 to 4 and the rent for the land over which the textile mill stands. On the very same day, an agreement of lease was entered by the fifth plaintiff on the one hand and the first defendant on the other. Under that agreement, the fifth plaintiff agreed to pay a monthly rent of Rs. 4,350 from 1.2.1973 out of which a sum of Rs. 2,000 waste be paid to the third defendant and a sum of Rs. 2,350 was to be paid to the first defendant. No period was fixed for the lease.

6. On 17.3.1979 a notice was issued under Ex. A-19 on behalf of the first defendant to plaintiffs 1 to 5 and P.S. Mani by the lawyer for the first defendant. In that notice, it was categorically stated that time was the essence of the contract as per the agreement between the parties and inspite of the concession being shown to the plaintiffs for payment of consideration by allowing them to pay in instalments, the latter had failed to pay the same and was giving lame excuses. It was stated that the agreement was rescinded and it was no longer in force. In reply thereto under Ex. A-20 the plaintiffs sent through their lawyer a notice on 24.3.1979 to the defendants' lawyer. While denying the averments in the notice issued on behalf of the defendants, it was stated that the agreement relating to the land and building and the agreement relating to the machinery are part of the same transaction and could not be split up, especially when the machineries agreed to be sold were fixed to the soil of the property which was the subject matter of the other agreement. It was further stated that time was not the essence of the contract and if it was so, the defendant had no business to keep quiet for more than a year without executing the sale deed. The notice also mentioned that in addition to the sum of Rupees one lakh paid by way of advance, payments were made as follows: Rs. 70,000 on 30.11.1978, Rs. 30,000 on 27.12.1978 and Rs. 25,000 on 25.1.1978 Rs. 15,000 on 24.2.1978, Rs. 13,000 on 2.3.1978 Rs. 5,000 on 8.3. 1978 and 2,000 on 25.3.1978. Besides the said amount they claimed to have paid a sum of Rs. 3,780 on 1.3.1978 for the land tax to the Panchayat for the

year 1978 and another sum of Rs. 3,780 on 13.2.1979 being the tax for the year 1979. The notice also claimed that if the defendants had executed the sale deed as per the agreement, the rent payable by the fifth plaintiff would have been received by plaintiffs 1 to 4 but on the other hand, the defendants had received on 1.3.1979 a sum of Rs. 49,200 for rent upto 30.11.1978. It was stated that in the face of the aforestated facts, payments which were all made towards the two agreements should be treated jointly and there was no default on the part of the plaintiffs. It was further stated that whether the amounts paid already were adjusted towards one agreement or other, in so far as the plaintiffs were concerned, payments were made towards both the agreements without apportioning any portion to any particular agreement pending the execution of the sale deed. It was alleged that the defendants have committed a fraud by suppressing the fact that a portion in the eastern side of the property was occupied by one M/s. G.V.N. Spinners who are impleaded as fourth defendant in the suit, on a rent of Rs. 1,000 per mensem. As it was stated that the defendants have not received the rent for that portion which was a part of the property agreed to be sold to the plaintiffs, they were liable to account for the same.

7. A notice was issued by the defendants' lawyer on 10.4.1978 under Ex.B-12 to the fifth plaintiff calling upon him to pay the arrears of rent and informing him that in default steps would be taken to recover the sum. On the same day, another notice was issued to plaintiffs 1 to 4 by way of rejoinder to the reply notice dated 24.3.1979 under Ex.B-14 and in the notice it is stated that the two agreements were independent of each other and they could not be treated as one transaction. To that notice, a further reply was sent by the plaintiffs' lawyer to the defendants. Again a notice was sent on 21.5.1978 under Ex.B-13 by the defendants lawyer to the plaintiffs. It is not necessary to consider the details of the notices at this stage.

8. On 19.8.1979, defendants 1 and 3 filed the suit O.S. No. 1040 of 1979 against the fifth plaintiff for recovery of Rs. 39,150 representing arrears of rent from 11.2.1978 to 1.8.1979. On 26.9.1979 the plaintiffs instituted the suit in O.S. No. 1253 of 1979 in the same Court for specific performance of the agreement dated 14.12.1977 in respect of the land and building. In the plaint, the case as set out in the earlier notice was repeated. It is not necessary to refer to all the averments in

the plaint, but to some of the allegations therein. In paragraph 8 of the plaint, it was alleged that it was agreed at the time of the agreement that no rent was payable to defendants l and 2 from the date of the agreement of sale and defendants 1 and 2 were to receive the instalments of sale price payable under the agreements with interest if any, due on the unpaid instalments. It was also alleged that as plaintiffs 1 to 4 were beneficially interested in the lease in favour of the fifth plaintiff, the said lesses were terminated by the execution of the two sale agreements. In paragraph 9, it was stated that the plaintiffs were not obliged in any manner to pay any instalments of the balance for the purchase of the lands and buildings unless and until, the first defendant executed the sale deed and got it registered within two months as per the agreement and also put the plaintiffs 1 to 4 in possession of other portions of the land and buildings including the building in possession of the fourth defendant. It was stated that the failure on the part of the defendants 1 and 2 amounted to breach of contract. Further referring to the various payments said to have been made by the plaintiffs, it was alleged that though the payments were made to the first defendant specifically for the sale or land and buildings, the second defendant with ulterior motive suggested that these payments may be taken towards the sale of plant and machinery and the receipt given on 13.1979 for a sum of Rs. 2,75,000 is for the entire sale price for plant and machinery. Even here, it may be noted that no receipt has been produced by the plaintiffs in proof of the same. It is further stated that after the above appropriation by defendants 1 and 2, the first defendant had actually received amounts towards agreement of sale of land and buildings to an extent of Rs. 2,49,200 in all including the sum of Rs. 49,200 appropriated wrongly for rent and that the balance alone was payable. The plaint also claimed that plaintiffs were entitled to recover rent from the fourth defendant at the rate of Rs. 1,000 per month on the completion of the contract for sale of lands and buildings. In paragraph 12 it is stated that the plaintiffs were ready and willing to deposit into Court the balance of the sale-price whenever called upon by the Court. In the written statement filed by the fifth plaintiff in the suit for recovery of rent, while contending that he was not liable to pay any rent after the agreements, he stated that V. Ramaswamy Naidu (Second defendant) with fraudulent intention appropriated from the payments, the entire sale price of the plant and machinery as if the rate of the same was completed,

forgetting that the plant and machinery were all fixed in the land and buildings, forming part of the land and buildings. He also raised a plea that he never agreed to pay Rs. 4,350 by way of rent from 11.2.1978 onwards and denied the fresh agreement dated 1.3.1979. It was contended that if there are any such agreement, it was void and it was the out come of fraud on the part of defendants 1 and 2.

9. The defendants naturally resisted the suit for specific performance raising a plea among others that time was the essence of the contract and it was pointed out to the plaintiffs again and again. It was stated that the plaintiffs had no money to complete the transaction and they did not have money to pay the arrears of rent. It was further stated that the conditions relating to payment of interest could not be taken advantage by the plaintiffs as time was the essence of the contract and that the plaintiffs had lost all their rights in the agreement and they were not entitled to the relief of specific performance! Referring to the transaction on 1.3.1979, it was stated that the same was done with the concurrence and knowledge of all the plaintiffs and there was no ulterior motive as suggested.

10. The plaintiffs examined the fifth plaintiff and an official of the Canara Bank as P. W.2 and also an official of the Indian Bank as P.W.3. Learned trial Judge has wrongly stated in his judgment that apart from the fifth plaintiff, no other witness was examined. Defendants examined the second defendant on their side. The trial Judge after considering the evidence, dismissed the suit for specific performance and decreed the other suit. The trial Judge found that time was the essence of the contract and the plaintiffs had not pleaded or proved their readineas and willingness to perform the contract. It was also found that the plaintiffs could not go behind the documents dated 1.8.1979 as they were brought into existence with their full knowledge and consent. The trial Judge held that the fifth plaintiff was bound to pay rent till the title to the property passes out of the defendants by execution of the sale deed. It was also found that even according to the calculation given by the plaintiffs there was a balance of Rs. 2,25,000 out of the consideration fixed under Ex.A-1 and it had not been paid by the plaintiffs. The trial Judge rejected the connection of the plaintiffs that the lease in favour of the fifth plaintiffs was for the benefit of the joint family.

11. In these appeals, learned Counsel for the appellants contends that time is not the assence of the contract as the parties have provided for payment of interest as well as penal interest on the consideration fixed and it is open to the plaintiffs to insist upon the performance of the contract at any time before the date fixed for payment of the contract at any time before the date fixed for payment of last instalment. It is further contended that the two agreements should be treated as one transaction and all the payments must be taken together for the purpose of decising whether the plaintiffs have failed to perform their part of the contract. It is also argued that the defendants had no right to adjust the payments made towards the purchase price of the lands and buildings, as against the price of the machinery. Learned Counsel for the appellants submite that the capacity of the plaintiffs to pay the entire consideration was not in dispute and the evidence on record would make out that a large portion of the consideration had been paid and only a small amount remains to be paid. It is also the argument of learned Counsel that the agreements put an end to the lease transaction which was subsisting between the fifth plaintiff and defendants 1 and 3. According to him, no rent was payable after the date of the agreement.

12. Per contra, learned Senior Counsel for the defendants argued that the suit for specific performance should be dismissed on the short ground that the plaintiffs have come to court with a false case and are guilty of making several false statements both in the pleadings and also in the evidence. Secondly, it is argued that the plaintiffs are guilty of delay and laches and an inferance should be drawn by the court that they had abandoned the contract. Thirdly, it is contended that time is the essence of the contract and the plaintiffs cannot seek enforcement of the same after the expiry of the said period. Lastly, it is argued that the plaintiffs have not pleaded or proved their readineas and willingness to perform their part of the contract.

13. We will take up for consideration A.S. No. 85 of 1983 in the first instance. We do not accept the contention that the two agreements put an end to the lease transaction. There is nothing in writing to that effect. The agreements do not contain any such clause. In fact, Clause 10 of the agreement indicates that the parties wanted lease transaction to continue. That Clause refers to the fact that the

fifth plaintiff was in possession already. His possession was admittedly under a lease. If the parties, had intended to put an end to the lease transaction, the fifth plaintiff would have also jointed Ex.A-1, as one of the purchasers. Fifth plaintiff has given evidence as P.W. 1. In his deposition, he has admitted that he did not join Ex.A-1 as his status was only that of a lessee. He has also admitted that rent was paid upto 30.11.1978 and that he signed Ex.B-5 with full knowledge of the contents had that he consented to the execution of (he documents Exs.B-1 to B-5. Exs.B-2 and B-3 prove that rent was paid upto 30.11.1978. We have already referred to the contents of Ex.B-5 which are to the effect that the fifth plaintiff should pay the rent of Rs. 4,350 per mensem to the first defendant and the third defendant from 1.12.1978. After executing Ex.B-5 it is not open to the fifth plaintiff to contend that there was no relationship of lessor and lessee between defendants 1 and 3 on the one hand and himself on the other. It is not as if Ex.B-5 was brought about by coercion undue influence or fraud. We have already referred to two different kinds of pleadings in so far as the documents dated 1.3.1979 are concerned. While in the suit for specific performance it was stated that the documents were brought about with ulterior motive by the second defendant, in the other suit it was alleged that it was brought about fraudulently. There is absolutely nothing on record to substantiate the place of fraud. Hence, there is no merit whatever in the contention that the fifth plaintiff is not a tenant under defendants 1 and 3. There is no merit in the appeal and it deserves to be dismissed.

14. In so far as the other appeal is concerned, we have no doubt that the circumstances of the case that the terms in Ex.A-1 clearly prove that time is the essence of the contract. Ex.A-1 is a very peculiar agreement which we do not come across very often. It provides for execution of the sale deed within two months from that date and payment of balance of consideration thereafter. The total consideration is Rs. 4,25,000 out of which a sum of Rupees one lakh is stated to have been received by way of advance. Out of the remaining balance, the purchasers are obliged to pay only a sum of Rs. 50,000 before the registration of the sale deed. On the execution of the document and registration thereof, the title will pass on to the purchasers. In spite of the said fact, the vendors have agreed that the purchasers could pay the balance of consideration in three annual

instalments extending upto 30.11.1980. The circumstances, clearly show that the vendors were willing to sell the property immediately to the purchasers and pass on title to them on condition that they pay the balance in certain specified instalments. When the agreement provides for payment of interest and also penal interest in case of default in payment, that shows that the parties wanted the payments to be made strictly in accordance with the dates fixed. The provision for interest is only to compensate the loss to which the vendors would be put in the event of non payment by the purchasers. The property is already in the possession of a member of the family of the purchasers and the agreement contemplates that besides such enjoyment of the property, the purchasers could pay the consideration in three leisurely instalments of one year each.

15. We have already referred to Clause 7 which has provided that in the event of the vendors failing to execute the sale deed, the vendees are at liberty to claim all damages that may be attributed to and arising out of the breach of contract and proceed to take action against them. It is open to the purchasers to claim damages or enforce specific performance as per the provision of law. If that is the case, the purchasers could well have approached the Court immediately and sought specific performance. But, they kept quiet. The purchasers did not seek to enforce the agreement till the defendants filed the suit for recovery of rent. Learned Senior Counsel for the defendants submits that the transaction itself is a commercial transaction and in such case, there is a presumption that time is the essence of the contract. We do not think it necessary to consider the contention as the evidence on record otherwise shows that time is the essence of the contract. We have also referred to the terms of the sale deed which speaks about the application for permission under the provisions of Urbon Land Ceiling Act for transferring the property. The sale deed expressly refers to 15.1.1978 as the date before which a sum of Rs. 50,000 shall be paid by the purchasers. That indicates clearly that the parties had also agreed upon a date for execution of the sale deed and registration thereof. The agreement provides for payment of a further sum of Rs. 50,000 before the date of registration and on the very next day, i.e., 15.12.1977, the application has been made to the concerned authority under the Urban Land Ceiling Act to which a draft sale deed was annexed. The documents have been produced by the plaintiffs themselves and marked as Ex.A-5. That

shows that draft sale deed was prepared with the consent and knowledge of both parties and they had agreed to a particular date. There is no explanation whatever by the plaintiffs as to why they have not paid the amount of Rs. 50,000 before 15.1.1978 and demand the execution of the sale deed even if the defendants had failed to do so.

16. There is no substance in the contention that the two agreements form part of the same transaction and all the payments made by the plaintiffs should be considered together while deciding the question whether the plaintiffs have performed their part of the contract or not, P.W.1 has admitted specifically that the two agreements are separate.

There is also an admission by P.W.1 that the contracts of first notice issued by the defendants under Ex.A-1 are correct. P. W. 1 has also claimed in his deposition that the entire amount due for the machinery has been paid. If according to the plaintiffs the amounts were paid towards both the agreements without making any discrimination or specific appropriation, there is no question of P.W. 1 claiming that the entire amount due towards the machinery has been paid. He says expressly that a sum of Rs. 2,75,000 due for the machinery had been paid by him and that he had obtained a receipt therefor. Such a receipt has not been produced in Court. It is also his evidence that plaintiffs 1 to 4 are to take possession of the property from him, after the execution of the sale deeds. He has stated.

17. We have already referred to Exs.B-1. to B-4. There is no evidence on record to show that these documents were brought about by fraud or undue influence. Those documents relate only to the machinery as well as the rent payable to defendants 1 and 3. P.W. 1 has stated that it is only with his consent a sum of Rs. 1,25,000 mentioned in Ex.B-4 has been adjusted in the machinery account. In the fact of such evidence, the plea of the plaintiffs that the two agreements should be read as part of one transaction cannot be accepted.

18. There is ample evidence to show that the plaintiffs did not have the required money at any time to pay towards the consideration. Admittedly, they had not paid according to the instalments fixed in the agreements. As per the terms of Exs.A-1 and A-5 read together, they should have paid Rs. 50,000 before 15.1.1978 and a

sum of Rs. 75,000 before 30.11.1978. Admittedly, the said amounts had not been paid. A calculation memo has been filed in the court below a copy of which is produced before us. As per the said memo, a sum of Rs. 50,000 in all is said to have been paid under Exs.A-6 to A.S. But, even the statement given by the Counsel mentions that those payments were made towards the cost of machinery. There is also a doubt as to whether the payments evidenced by Exs.A-6 to A-S were really made after the date of the agreement towards the consideration fixed in the agreement or made as a substitue for the cheque issued on 30.11.1977 which was dishonoured. Evidence on that aspect is not clear. Hence, we do not propose to rest our conclusions on the same. Even assuming that payments as per Exs.A-6 to A-8 were after the date of agreement, they are only towards the cost of the machinery. The plaintiffs cannot claim that they made payment towards the consideration under Ex.A-1. The remaining payment as per the memo of calculation were after 25.1.1978. Thus, as on 5.1.1978, a sum of Rs. 50,000 as required by the agreement has not been paid at all, Similarly, before 30.11.1978 a sum of Rs. 75,000 which should have been paid was not paid. Even as per the memo of calculation a sum of Rs. 25,000 was paid on 25.1.1978 which in fact, was adjusted against machinery account under Ex.B-4. Hence, no reliance can be placed on that payment. The plaintiffs claim that they have paid the tax of Rs. 3,780 on 1.3.1978 under Ex.A-9. That is not an amount which can be adjusted towards sale consideration. There is no provision in the agreement therefor. Under Ex.A-11 a sum of Rs. 10,000 has been paid on 5.7.1978 and it is admittedly towards the machinery account. The only payment as per the calculation memo which is said to be towards the lands and buildings is a sum of Rs. 70,000 by pay order No. 646201 dated 30.11.1978. That amount was also adjusted towards the machinery account under Ex.B-4. Hence. on or before 30.11.1978, the plaintiffs have not paid even a single pie towards the consideration payable as per Ex.A-1. There is no doubt whatever that the plaintiffs have not performed their part of the contract.

19. Learned Counsel for the plaintiffs contends that the default is on the part of the defendants in not having executed the sale deed even after a period of two months as provided in the agreement. It is also his argument that they are bound to get the income tax clearance certificate as well as the permission from the

Urban Land authorities but they have failed to do so and they cannot take advantage of their own default and contend time is the essence of the contract and the plaintiffs have failed to perform their part of the contract. There is no substance in this argument. We have already pointed out that the plaintiffs had a right to enforce the agreement on the expiry of the period of two months.

20. There is no averment in the plaint that the plaintiffs were always ready and willing to perform their part of the contract. The only averment is in paragraph 12 to which we have already made a reference. It is to the effect that the plaintiffs, are ready and willing to deposit in the Court, the balance of the sale price, whenever called upon by the Court. That does not refer to the readiness and willingness of the plaintiffs before the filing of the suit. The plaintiffs have not deposited the amount in the court at the time of filing the suit but they have merely averred that they were always ready to deposit the balance amount whenever called upon. Section 16(c) of the Specific Relief Act provides that the specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract. Order 6, Rule 3 of the Civil Produce Code provides that the Form in Appendix-A when applicable shall be used for all pleadings. Form No. 47 Appendix-A relates to a suit for specific performance. Paragraph 3 reads:

The plaintiff has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice.

21. Thus, it is necessary for the plaintiffs not only to prove the readiness and willingness at the time of the suit, but the readiness and willingness throughout the period from the date of the contract. In fact, the Supreme Court in Sandhya Rani v. Sudha Rani : [1978]2SCR839 , has observed that it is incumbent upon the plaintiff to affirmatively establish that all throughout he or she, as the case may be, was willing to perform his or her part of the contract. Thus, in this case, there is no pleading that the plaintiffs were always ready and willing and there is no proof also to that effect. On the other hand, the evidence clearly points out that the plaintiffs had miserably failed to perform their part of the contract. Obviously they have been keeping quiet, as the fifth plaintiff, a member of their family was already in

enjoyment of the property. It is to be noted that they have come forward with the present suit only after the suit for recovery of rent was filed by the defendants.

22. The inordinate delay on the part of the plaintiffs in not paying the amounts agreed to and filing the suit naturally leads to the inference that the plaintiffs have ebandoned the contract. It is not a case of mere delay. This is a case of wanton delay and deliberate inaction on the part of the plaintiffs, particularly, in view of the fact that the possession was with the fifth plaintiff. A Division Bench of this Court had an occasion to consider this question in Kantilal C. Shah v. Devarajulu Reddiar : (1977)2MLJ484 . The principles have been set out in the judgment as follows:

It is no doubt true that mere delay in seeking for the relief of specific performance by itself cannot be a ground for the Courts to refuse to exercise its judicial discretion to grant the equitable itself. But wanton delay and unexplained silence cannot be equaled to mere delay and in such cases the burden is very heavy on the plaintiff to show that he-had a purpose and not a design when he kept silent and did not demand performance. It is now established that the delay simplicitor without any breach caused to the defendant or which would not amount to abandonment or waiver does not empower the Court to refuse specific performance. But what then is abandonment? Proof of abandonment or waiver of right could be established by a course of conduct demonstrated in a given case or any attitude of want on drift adopted by the plaintiff which by itself is an indicis of his unwillingness to involve himself further in the bargain.'

'No doubt abandonment is a matter which sometimes might be deduced by positive malerial and objective facts. But it is not uncommon for courts to find in given cases that they could presume such abandonment by reason of a court of conduct adopted by a drifting litigant, who is deliberately silent about his rights and wakes up only at convenient limes on which occasions, of course, he has an unfair advantage over the other.

23. A reading of the judgment of the Supreme Court to which we have already made reference in Sandhya Rani v. Sudha Rani : [1978]2SCR839 , will also be relevant in this connection. The facts are similar. The relevant portion of the

judgment is as follows:

One aspect of the case which deserves notice is that by the terms of the contract the vendor had to put the purchaser in possession of the property when conveyance is executed and balance of consideration is paid and that was to be done by the end of April, 1956. Even though the plaintiff purchaser had failed to perform any portion of her part of the contract by the end of April, 1956, the vendor put the plaintiff in actual possession of the first and second floors of the premises to be sold on 28th April, 1956 and the plaintiff is in possession of the same till today that is after a lapse of more than 20 years. On the other hand, she deposited after struggle and procrastination the balance of consideration on 6th February, 1968 that is nearly 12 years after the date of agreement. The plaintiff thus enjoyed actual possession of the property from April, 1956 to February, 1968 when she parted with consideration without paying a farthing for the use and occupation of the premises which, on a reasonable construction of the contract, she was not entitled at all, till she parted with the full consideration and took the conveyance.

24. Learned Counsel for the plaintiffs places reliance on the judgment of a Division Bench in Sankaralinga Nadar v. Ratnaswami Nadar : AIR1952 Mad389 and another judgment of a Division Bench in Eswari Amma v. N.K. Korah A.I.R. 1972 Mad. 239. In both the cases it has been held that mere delay does not by itself preclude the plaintiff from obtaining the specific performance and no inference of claim of abandonment of rights can be made from a delay in institution of the suit we have already referred to the facts and circumstances of the case and we hold that in this case an inference can well be drawn that the plaintiffs have abandoned their rights.

25. There is also another reason as to why we should not exercise our discretion and grant the equitable relief of specific performance in favour of the plaintiffs. They have come forward with a false case not only in the pleadings but also in the evidence. We have referred to the plea in paragraph 8 of the plaint that the lease in favour of the fifth plaintiff had come loan end on the execution of the agreements and no rent was payable after the date of agreement which clearly is a false plea. We have already rejected the contention of the fifth plaintiff that he is

not liable to pay the rent. Another false plea is found in paragraph 10 which purports to set the various payments made by the plaintiffs. According to them, the amount remaining to be paid to the defendants is only a small amount. The plea with regard to the documents which came into existence on 1.3.1979 is already found to be false by us. The plea of the plaintiffs that the documents were brought into existence with ulterior motive or fraudulently is false. A perusal of the evidence of P.W.1 also show that he is not speaking the truth and in fact his admissions would go to show that the pleading of the plaintiffs is falls. Hence, we hold that the plaintiffs are not entitled to the relief of specific performance.

26. Learned Counsel for the plaintiffs relied upon the judgment of the Supreme Court in Nathulal v. Phoolchand : [1970]2SCR854 and contended that there is an implied condition in the contract that the defendants should obtain permission under the provisions of the Urban and Ceiling Act. The Court has held that if the property is not transferable without the permission of the concerned authority, the agreement to transfer the property must be deemed subject to the implied condition that the transferor will obtain the sanction from the authority concerned. In the present case, application was made immediately on the very next day after the agreement for getting clearance from the Urban Land Ceiling Authority. But, obviously, it had not been pursued. But the Supreme Court has struck down the relevant section as unconstitutional. The plaintiffs cannot take advantage of the said application and contend that it is an implied condition in the agreement and unless the defendant get the clearance from the Urban Land Celling Authority, the former should not be required to perform their part of the contract. There is no such express provision in the agreement. The plaintiff never called upon the defendants to Complete the transaction after the expiry of two months, nor the plaintiffs issued any notice to the effect.

27. Learned Counsel for the plaintiffs referred to the rulings of various Courts including this Court and the Supreme Court to contend that with reference to immovable properties, time is not essence of the contract. It is settled law that the question has to be decided only on the facts and circumstances of each case. In Govind Prasad v. Hari Dutt : [1977]2SCR877 . In one of the rulings cited by learned Counsel for the plaintiffs it was pointed out that the question as to whether

time is the essence of the contract should be decided on the facts and circumstances of the case. We have already referred to the relevant facts of this case and held that time was intended to be the essence of the contract between the parties. As the intention of the parties will govern the situation, no useful purpose would be served by referring to the other rulings which depend on the respective facts.

28. In the result, we reject the contention of the plaintiffs and uphold the dismissal of the suit by the trial court. The appeal is dismissed.

29. The appeals are dismissed. The appellants shall pay costs in A.S. No. 89 of 1983 to respondents 2, 3 and 6 (legal representative of the first respondent). There will be no order as to costs in A.S. No. 85 of 1983.