



WEB COPY



AS.Nos.355 & 356/2014

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 22.12.2022

Delivered on 02.02.2023

CORAM

THE HONOURABLE MR. JUSTICE S.S.SUNDAR

AND

THE HONOURABLE MR. JUSTICE SATHI KUMAR SUKUMARA
KURUP

AS.Nos.355 & 356/2014& MP.Nos.1&1/2014

AS.NO.355/2014:-

1.V.Dhanasekaran
2.V.Dhanasingh
3.Smt.D.Prema
4.Smt.D.Rebekka
5.Smt.A.Dhanaseelia

.. Appellants /
Defendants 8
to 12

Versus

A.Krishnamurthy [Died]
1.Smt.A.Krishnaveni
2.Smt.C.Gayathri
3.K.Manoj Kumar

.. Plaintiffs /
Respondents



AS.Nos.355 & 356/2014

WEB COPY

- 4.Smt.Rathina Mohan
- 5.Smt.Vasantha Kulasekar
- Smt.Revathi Natarajan [Died]
- 6.K.Ramachandran
- 7.K.Dharanipathy
- 8.M/s.Corporation Bank
rep.by Branch Manager
Oppanakarar Street
Coimbatore.
- 9.A.Parthiban
- 10.A.Bhaskaran
- 11.A.Senthilkumar
- 12.Smt.Rahini
- 13.Mr.Natarajan
- 14.Smt.Radha
- 15.Smt.Dhara
- 16.Smt.Saradha
- 17.Smt.Kalpana

.. Respondents /
Defendants 1,
3, 5 to 7, 13 to 21

Prayer:- Appeal Suit filed under Section 96 of CPC against the judgment and decree dated 26.03.2014 made in OS.No.497/2006 on the file of the learned IV Additional District and Sessions Judge, Coimbatore.



AS.Nos.355 & 356/2014

AS.NO.356/2014:-

1.V.Dhanasekaran
2.V.Dhanasingh
3.Smt.D.Prema
4.Smt.D.Rebekka
5.Smt.A.Dhanaseelia

.. Appellants /
Defendants 8
to 12

Versus

A.Krishnamurthy [Died]
1.Smt.A.Krishnaveni
2.Smt.C.Gayathri
3.K.Manoj Kumar

.. Plaintiffs /
Respondents

4.Smt.Rathina Mohan
5.Smt.Vasanth Kulasekar
Smt.Revathi Natarajan [Died]
6.K.Ramachandran
7.K.Dharanipathy

.. Respondents /
Defendants 1,
3, 5 & 7

Prayer:- Appeal Suit filed under Section 96 of CPC against the judgment and decree dated 26.03.2014 made in OS.No.673/2011 on the file of the learned IV Additional District and Sessions Judge, Coimbatore.



AS.Nos.355 & 356/2014

For Appellants in
both the appeals : Mr.M.S.Krishnan
Senior Counsel for
Mr.A.E.Ravichandran

For RR 1 to 3 in
both the appeals : Mr.C.Ravichandran

For RR4 to 17 in
AS.No.355/2014
& RR 4 to 7 in
AS.No.356/2014 : Given up

COMMON JUDGMENT

S.S.SUNDAR, J.,

- (1) These two appeals are filed against the common judgment and decree in the suits in OS.No.497/2006 and OS.No.673/2011 dated 26.03.2014 on the file of the IV Additional District and Sessions Court, Coimbatore, by the defendants 8 to 12 in the suit in OS.No.497/2006 who are also defendants 7 to 11 in the suit in OS.No.673/2011.



AS.Nos.355 & 356/2014

- (2) Since the contesting parties are one and the same and the suits are connected and disposed of by a common judgment and decree, these two appeals are also heard together and disposed of by this common judgment.
- (3) Respondents 1 to 3 in both the appeals are the wife and children of late Sri.A.Krishnamurthy who is the plaintiff in both the suits, namely, OS.Nos.497/2006 and 673/2011. The suit in OS.No.497/2006 was filed for specific performance of an Agreement of Sale dated 18.05.2006 and consequential reliefs and in the alternative for directing the defendants to pay a sum of Rs.16,55,200/- with interest. The suit in OS.No.673/2011 was filed by the very same plaintiff for permanent injunction restraining the defendants therein from in any manner altering the physical features of the suit property either by putting up construction or otherwise.
- (4) The suit property is an extent of 8.05 acres [3.66 acres comprised in SF.No.729/1 and an extent of 4.39 acres in SF.No.729/2] in Kudalur Village, Coimbatore Taluk.



AS.Nos.355 & 356/2014

WEB COPY

- (5) In the suit for specific performance, the case of the plaintiff is as follows:
- (6) The suit property originally belonged to one Kannaiya Naidu who purchased the same by virtue of a Sale Deed dated 28.06.1954. After the death of late Sri.Kannaiya Naidu, defendants 1 to 6 in the suit who are the daughters and sons of late Sri.Kannaiya Naidu, succeeded to the properties as the wife of Sri.Kannaiya Naidu also predeceased him.
- (7) Defendants 1 to 4 namely, the daughters of late Sri.Kannaiya Naidu executed a registered Power of Attorney Deed in favour of their brothers namely defendants 5 and 6 on 28.04.1999 and on the basis of the said Power of Attorney Deed, defendants 5 and 6 entered into an Agreement of Sale dated 18.05.2006 with the plaintiff. Defendants 5 and 6 signed the Agreement for themselves and on behalf of defendants 1 to 4. As per the Agreement of Sale, the total consideration is Rs.34 lakhs and the time agreed under the Sale



AS.Nos.355 & 356/2014

Agreement is three months from the date of Agreement [on or before 17.08.2006]. However, time is not the essence of the contract.

- (8) The plaintiff paid a sum of Rs.5 lakhs as acknowledged by defendants 5 and 6 in the Agreement under Ex.A3 and the plaintiff was directed to pay a further sum of Rs.10 lakhs to the previous Agreement holders who had also entered into an agreement with defendants for the same property. The plaintiff, therefore, paid a sum of Rs.10 lakhs as per the instructions of defendants on 11.07.2006. The previous agreement holders cancelled the previous agreement. Therefore, a sum of Rs.15 lakhs was acknowledged by the 6th defendant for himself and on behalf of the other defendants on the back side of the first page of the Sale Agreement. The plaintiff was ready and willing continuously with the balance of sale consideration to get the Sale Deed in his favour and regularly contacted defendants 5 and 6 in that regard. However, defendants 5 and 6 delayed and did not show any inclination to settle their bank debt in spite of the amount being made ready by the plaintiff. The



WEB COPY



AS.Nos.355 & 356/2014

defendants did not make any attempt to come to the Bank to release the documents by signing the necessary papers with the Bank.

- (9) The plaintiff went a step further and opened an account with the Bank to whom the defendants have to pay a sum of Rs.19 lakhs to show his bona fide in settling the account for releasing the original documents, When the plaintiff reminded the defendants regarding the expiry of time specified in the Agreement [Ex.A3] by 17.08.2006, the 6th defendant came down to extend the Agreement time till 30.09.2006. While extending the time, the 6th defendant also received a further sum at Rs.1 lakh from the plaintiff towards part of sale consideration and made an endorsement on the back side of the 2nd page of the Agreement. The plaintiff reliably learnt that the Bank had filed a suit against defendants 1 to 6 for recovery of money based on the equitable mortgage in favour of the Bank in respect of the suit property. Therefore, the Bank has also been added as a party to the proceedings since the plaintiff was ready to settle the issue with the Bank. However, the plaintiff came to know that the



AS.Nos.355 & 356/2014

defendants are making attempts to alienate the property to third parties by suppressing the existing Agreement with the plaintiff to defeat his claim. The plaintiff is always ready and willing to perform his part of the contract.

- (10) During the pendency of the suit, it is admitted that defendants 5 and 6 executed two Sale Deeds in favour the appellants herein in respect of the suit property. Hence, the plaintiff filed an application to implead the appellants herein in the suit and the same was also allowed on 20.03.2008. Thereafter, the plaint was amended and the plaintiff also sought for an amendment to introduce the alternate relief of refund of advance amount with interest. It is to be noted that the relief prayed for by the plaintiff in the plaint was to grant a decree directing defendants to execute the Sale Deed by receiving the balance sale consideration as per the Agreement dated 18.05.2006 and to deliver vacant possession of the suit property or in the alternative, directing the defendants to pay the plaintiff a sum of Rs.16,55,200/- together with interest @ 18% per annum from the



AS.Nos.355 & 356/2014

date of suit by creating a charge over the suit property. The suit is also for injunction restraining the defendants from alienating or encumbering suit property in any manner. The plaintiff thereafter on the identical pleading filed the suit in OS.No.673/2011 for permanent injunction restraining the defendants, their men and agents from in any manner altering the physical features of the suit property either by putting up construction or otherwise.

- (11) Even though the typed set of documents filed by appellants and the judgment of Trial Court do not indicate any written statement filed by defendants 1 to 6, learned counsel for respondents 1 to 3 has produced before this Court the written statement filed by the 6th defendant in the suit in OS.No.497/2006. The contents of the written statement also indicates that defendants 1, 2, 4 and 5 have also adopted the written statement of the 6th defendant.
- (12) In the written statement filed by 6th defendant, it is seen that the defendants denied every averments in the plaint and the plaintiff was put to strict proof of all the averments made in the plaint. It is to be



WEB COPY



AS.Nos.355 & 356/2014

noted that defendants 1 to 6 specifically denied the genuineness of the Sale Agreement dated 18.05.2006 and contended further that the unfilled signed papers obtained by the plaintiff towards the money lent for development of the property had been used to file the suit for specific performance. It is further stated in the written statement that the suit property had already been mortgaged with the 7th defendant/Bank and that no prudent man would go for an Agreement of Sale without the consent of the 7th defendant/Bank. The averments relating to payment of a sum of Rs.5 lakhs paid to defendants 5 and 6 and a further payment of Rs.10 lakhs to the previous Agreement holders as stated in the plaint were specifically denied by defendants 1 to 6. It is the specific case of defendants 5 and 6 that the earlier blank signed papers had been filled up by the plaintiff to create the agreement. It is also suggested by defendants 1 to 6 that if the agreement is genuine, the plaintiff as a bonafide purchaser would have cleared debts due to the Bank at the first instance and then demanded the execution of Sale Deed in favour of



AS.Nos.355 & 356/2014

plaintiff. Therefore, the readiness and willingness of plaintiff and bona fides of the Sale Agreement is specifically disputed by defendants 5 and 6. The subsequent receipt of money from plaintiff or the endorsement made by the plaintiff were seriously disputed by defendants 1, 2 and 4 to 6. Describing the entire Agreement as a fabricated one, defendants 1, 2 and 4 to 6 further stated in the written statement that the plaintiff is not entitled to any relief for want of bona fides. Their defence in the written statement is therefore that the Sale Agreement dated 18.05.2006 [Ex.A3] is a self serving document, that there was no *consensus-ad-idem* for the sale transaction and that the Agreement is by playing fraud and hence, the Sale Agreement is not enforceable and the suit is liable to be dismissed.

- (13) However, defendants 1 to 6 though filed a detailed written statement disputing the genuineness of the Sale Agreement, remained ex-parte throughout.



AS.Nos.355 & 356/2014

(14) Defendants 8 to 12 in OS.No.497/2006 who purchased the suit property under two Sale Deeds dated 09.08.2007 when the suit for specific performance was pending, were impleaded on the application filed by the plaintiff. They filed a detailed written statement stating that Defendants 8 to 12 are bona fide purchasers for value without notice of prior Agreement or the suit filed for specific performance. It is there case that defendants 5 and 6 never disclosed the Agreement they have entered into with plaintiff. It is further contended that the 6th defendant represented that he was carrying on business in the name and style of "M/s.Dharani and Co", that defendants 1 to 6 had deposited original Title Deeds relating to the suit property with the Bank to create a mortgage, to secure the loan, that the suit in OS.No.576/2001 on the file of the Sub Court, Coimbatore, was filed by the 7th defendant/Bank for recovery of a sum of Rs.25 lakhs together with interest and that the 6th defendant offered to sell the property to discharge the entire amount due to the Bank namely, a sum of Rs.45 lakhs. The appellants further



WEB COPY



AS.Nos.355 & 356/2014

contended that after perusal of the Title Deeds and inspecting the suit property, the appellants enquired regarding the market value of the property and realised that the suit property could be purchased for a sum of Rs.50 lakhs and therefore, they agreed to purchase the property only for a sum of Rs.50 lakhs.

- (15) It was further contended by the appellants that defendants 8 and 9 went to the Bank during the 3rd week of March 2007 and negotiated for settlement of loan account pleading waiver of compound interest and penal interest. It is the specific case of the appellants that neither the Bank Manager nor defendants 5 and 6 ever informed about the pendency of the suit. Since the Bank Manager insisted the appellants to make some deposits to show their bona fides in settling their claims, it is stated that the appellants initially made a fixed deposit of Rs.3 lakhs in the name of 8th defendant and thereafter, further amounts to make a total sum of Rs.35 lakhs before the end of April 2007. It is also stated by the appellants that the Bank was claiming a sum of Rs.60 lakhs towards settlement of entire dues to



AS.Nos.355 & 356/2014

release the property by contending that the market value of suit property would be more than Rs.75 lakhs. In sum and substance, it was contended by the appellants that the appellants could convince the Bank to agree for a settlement by paying a sum Rs.49 lakhs to the Bank towards settlement of the entire dues of defendants 1 to 6 to release the property. It is contended that on 08.08.2007, 19 Pay Orders were purchased by the appellants in favour of M/s.Dharani & Co and paid to the mortgagor Bank towards discharge of the entire liability. It was thereafter upon discharging the entire loan, it is stated that the Bank delivered all the original Title Deeds to the appellants. It is admitted that two Sale Deeds dated 09.08.2007 were executed by defendants 5 and 6 in the presence of defendants 1 to 4 as attestors of the documents.

- (16) It is the specific case of the appellants that they came to know about the pendency of the suit only when they received notice in the application in IA.No.775/2007 filed by the plaintiff to implead the appellants herein in the suit for specific performance. The appellants



AS.Nos.355 & 356/2014

also came forward with a plea that their vendors, namely, defendants 5 and 6, on enquiry, claimed that they had borrowed money from the plaintiff who insisted defendants 5 and 6 to give signed blank papers and stamp papers and that the suit Agreement, according to defendants 5 and 6, is fabricated document and that the suit had been filed for wrongful gain. The existence of a prior Agreement and payment of a substantial amount to settle the claim of previous agreement holders is also specifically denied by the appellants herein in the written statement. Strangely, the appellants also came up with the plea that the suit Agreement is a fraudulent fabrication with the active collusion of plaintiff with defendants 5 and 6 and with an ulterior motive to deceive the Bank in an attempt to settle the bank loan for a sum of Rs.19 lakhs as One Time Settlement [OTS].

- (17) To be precise, it was contended by the appellants that the intention of the plaintiff and defendants 5 and 6 was to enter into an Agreement to pressurise the Bank to settle the dues by accepting a sum of Rs.19 lakhs with an intention to sell the property for a higher



AS.Nos.355 & 356/2014

price and to share profits. Therefore, the appellants described the Suit Agreement as one brought into existence as a result of collusion between the plaintiff and defendants 1 to 6 to defeat Bank's claim with ill-motive. The appellants further contended that the appellants being the bona fide purchasers without notice of the prior Agreement or the suit, has discharged the entire loan due to the Bank and therefore, the suit for specific performance cannot be enforced against the appellants herein.

- (18) Pointing out the case of the plaintiff that the liability towards discharge of mortgage was only Rs.19 lakhs is a false plea and that the suit Agreement is a contingent contract depending upon happening of a future event which could never happen and hence, it is not specifically enforceable. Since the Agreement was created to arrive at a settlement with the Bank for a lesser amount than the actual amount due, it is also contended by the appellants that the object of the Agreement was illegal and hence, it cannot be enforced. Stating that the Suit Agreement was executed knowing fully well that



AS.Nos.355 & 356/2014

the Title Deeds are in the custody of the Bank and the suit for recovery of dues was pending for more than five years at the time of Agreement, the appellants contended that the suit for specific performance of an agreement which was executed during the pendency of a suit on mortgage cannot be enforced. Pointing out that the amount payable to the Bank as per the suit Agreement was just Rs.19 lakhs, it is contended by the appellants that the case of plaintiff in the plaint that he is ready to settle the issue with the Bank is not a bona fide offer and that, the plaintiff is not ready and willing to perform his obligation under the Suit Agreement. Since the plaintiff had not come forward to pay any money to the Bank till the suit for specific performance was filed and the plaintiff did not take any steps to settle the issues with the Bank who has already obtained a decree for recovery of a huge money, the appellants further contended that the conduct of plaintiff to insist specific performance without settling dues of the Bank disentitles the plaintiff from pursuing the suit for specific performance. Since the actual amount



AS.Nos.355 & 356/2014

due to the Bank is contrary to the terms of sale of Agreement, it is contended by the appellants that readiness and willingness is not made out even as per the plaint averments coupled with the terms of the Agreement.

- (19) The appellants also questioned the authority of the 6th defendant to receive further amount and to make the endorsement to extend the time for performance unilaterally pointing out that the 6th defendant has no authority to act as Power of Attorney Agent of the 5th defendant. It is also contended that the Power of Attorney being executed jointly in favour of defendants 5 and 6, the 6th defendant cannot act independently to bind the other defendants, namely, defendants 1 to 5. The appellants also contended that the plaintiff was never willing to pay any money to the Bank even before filing the suit and therefore, the suit for specific performance agreeing to pay balance of Rs.19 lakhs which is not sufficient to discharge the mortgage, cannot be entertained. The appellants also pleaded that defendants 1 to 6 particularly, defendants 5 and 6, have fraudulently



AS.Nos.355 & 356/2014

suppressed the prior Agreement and made the appellants to pay a huge amount to discharge the mortgage.

- (20) The second suit in OS.No.673/2011 was also filed by the plaintiff late Sri.Kannaiaya Naidu, with similar averments and stated that the appellants have hurriedly made attempts to alter the physical features of the suit property by putting up construction. Therefore, the pleadings in the subsequent suit is not required to be elaborated for the purpose of disposing of these appeals.
- (21) Before the Trial Court, defendants 1 to 6 remained exparte. Though the 7th defendant filed a written statement, it is only formal. Except stating that they are not necessary parties and no relief has been claimed against them, they have not come forward to disclose at least the events relating to the discharge of mortgage. The fact that they have not claimed any right over the suit property would lead to the conclusion that the Bank had no subsisting right on the basis of mortgage. The Bank has not disputed the discharge of mortgage loan and the handing over of the documents to the appellants.



AS.Nos.355 & 356/2014

(22) The Trial Court has framed the following issues:-

22[i] Issues in OS.No.497/2006:-

- (a) Whether the suit sale agreement dated 18.05.2006 is true, valid and bindings?
- (b) Whether the plaintiff is entitled for the relief of specific performance as prayed for in the plaint?
- (c) Whether the plaintiff is entitled for the decree of permanent injunction as prayed for in the plaint?
- (d) To what other relief?

Additional Issues framed:-

- i. Whether the defendants 8 to 12 are the bona fide purchasers for value without notice?
- ii. Whether the plaintiff is entitled for the alternative relief of refund of advance amount as prayed for in the plaint?

22[ii] The Trial Court framed the following issues in OS.No.673/2011:-

- (a) Whether the plaintiff is entitled for permanent injunction against the defendants from altering the physical features of the suit property?
- (b) To what other relief?

(23) The Trial Court recorded evidence in OS.No.497/2006. Since the



AS.Nos.355 & 356/2014

sole plaintiff died pending suit, respondents 1 to 3 herein were impleaded as plaintiffs 2 to 4 even during the pendency of suit. Defendants 2 and 4 died pending suit and therefore, defendants 13 to 21 were impleaded as their legal representatives. However, except the appellants herein, all other defendants remained exparte. On behalf of plaintiff, PWs.1 to 4 were examined. PW1 is the plaintiff and other witnesses were examined to prove the execution of the Agreement which is marked as Ex.A3. On behalf of defendants, the 8th defendant who is the first appellant herein alone was examined as DW1. Exs.B1 to B29 were marked on the side of defendants.

- (24) The Trial Court, on the basis of evidence, observed that the case is a classic example where the owners of the property have played with third parties to discharge their liabilities. Referring to the conduct of defendants 1 to 6 who remained exparte throughout the proceedings, the Trial Court expressed its concern as no attempt was made by the plaintiff or appellants to summon the owners to give evidence to establish the truth of the transactions. However, the Trial Court,



AS.Nos.355 & 356/2014

after taking note of the fact that the appellants are purchasers *pendente lite*, observed that the appellants have no locus standi to question the bona fides of the transaction after taking note of a few judgments of the Hon'ble Supreme Court and this Court. The Trial Court accepted the contentions of the appellants that subsequent purchasers have a right to establish whether they are bona fide purchasers for value without notice and that they can also be permitted to raise the point of readiness and willingness on the part of plaintiff. The Trial court after finding that the documents-Exs.A2 and A3 are validly executed, gave a finding that the plaintiffs have satisfactorily proved the genuineness of the Agreement under Ex.A3 by accepting the evidence of PW4 who attested the Sale Agreement. The Trial Court did not agree with the case of the appellants that the Sale Agreement is not binding on the subsequent purchasers. The Trial Court, then found that the endorsement made by the 6th defendant on the back side of the Sale Agreement [Ex.A3] is proved and therefore, the suit Agreement and the endorsement [Ex.A4] for



WEB COPY



AS.Nos.355 & 356/2014

receipt of Rs.10 lakhs and extension of time by the 6th defendant are valid and binding on defendants 1 to 6. Even though the Trial Court observed many discrepancies in the evidence of plaintiffs' witnesses regarding endorsement relating to extension and receipt of Rs.1 lakh, the Trial Court observed that the discrepancies and omission on the part of plaintiff cannot be taken so seriously and further held that the endorsement signed by the 6th defendant on behalf of other defendants is valid by holding that one of the agents can act individually as there was no restriction for one of the agents to act on behalf of all the principals.

- (25) On the question whether appellants are bona fide purchasers for value without notice, the Trial Court held that the appellants have not proved that they made any enquiry before entering into the sale transaction with the original owners and therefore, they are not bona fide purchasers for value without notice of the suit Agreement. Repeatedly pointing out that the appellants have not let in any evidence that they had taken care to verify whether any litigation or



WEB COPY



AS.Nos.355 & 356/2014

encumbrance over the property and that there was no enquiry by them regarding pendency of the suit or encumbrance, the Trial Court came to the conclusion that the appellants are bona fide purchasers for value. Even though the Trial Court noticed that the suit filed by the Bank was decreed on 10.05.2007 and a sum of Rs.49 lakhs had been paid by the appellants to the Bank to discharge the entire loan and to release the suit property from mortgage, the Trial Court held that the plaintiff who was ready to discharge the loan by paying a sum of Rs.19 lakhs to the Bank cannot be denied relief of specific performance as the plaintiff was required to pay only a sum of Rs.19 lakhs at the time of entering into the suit Agreement and that the decree that was passed in the suit instituted by the Bank would not affect the suit filed by the plaintiff for specific performance. The Trial Court then observed that the investment of appellants to discharge the loan would not alter the terms of contract and that the discharge of liability by appellants by ignoring the Agreement in favour of plaintiff will not given them any right as they have failed to



AS.Nos.355 & 356/2014

convince the Court that they are bona fide purchasers of property for value without notice.

- (26) Since the plaintiff produced documents to show that they are capable of mobilising funds to complete the sale transaction, the Trial Court observed that the plaintiffs have proved their readiness and willingness. Even though the defendants have settled their dues by paying substantial amount of Rs.49 lakhs to the Bank, the Trial Court further observed that the plaintiff cannot be fastened with the liability to pay more than what they had agreed to pay under the suit Agreement. Therefore, the Trial Court held that the plaintiffs are entitled to the equitable relief of specific performance upon payment of balance amount without specifying the balance as per the suit Agreement. All the defendants including the appellants were directed to execute the Sale Deed after receiving the balance amount within two months. Since the suit for specific performance is decreed, consequently the suit filed by the plaintiff in OS.No.673/2011 for permanent injunction was also decreed in



AS.Nos.355 & 356/2014

favour of plaintiffs with costs. Aggrieved by the same, the above Appeal Suits are preferred by the subsequent purchasers who are defendants 8 to 12 in OS.No.497/2006 / defendants 7 to 11 in OS.No.673/2011.

(27) This Court has considered the submissions made on either side and also perused the materials placed.

(28) Mr.M.S.Krishnan, learned Senior counsel appearing for the learned counsel on record for the appellants refers to almost all the documents and the relevant portion of oral evidence of witnesses and made the following submissions:-

- ➔ The suit Agreement under Ex.A3 dated 18.05.2006 is not an agreement enforceable in law as the plaintiff has miserably failed to prove that the parties had consensus-ad-idem on all the terms. The plaintiff though has pleaded readiness and willingness, has by his conduct, proved beyond doubt the unwillingness of the plaintiff to pay the balance as he was always unable to commit the actual amount payable to the



AS.Nos.355 & 356/2014

Bank to discharge the mortgage. The plaintiff did not pay the balance even as per the Agreement.

- The plaintiff has come forward with a specific case during evidence that the amount due to the Bank was only Rs.19 lakhs as confirmed by him by talking to the Bank officials directly and that the plea and the oral evidence shows that the plaintiff has come forward with a false case regarding actual amount due to the Bank to discharge the mortgage and that the plaintiff cannot be granted any relief as he was never ready or willing to pay the entire mortgage amount due to the Bank.
- The amount due to the Bank was more than Rs.50 lakhs as on the date of Agreement and that the amount due as per the proceedings initiated by the Bank in the year 1991 was more than Rs.21 lakhs plus interest and that the case of plaintiff that Bank had agreed for One Time Settlement by receiving a sum of Rs.19 lakhs to settle the dues of Bank cannot be accepted and that the suit Agreement on that understanding should fail.



AS.Nos.355 & 356/2014

- ➔ The suit for specific performance on the basis of the endorsement made by the 6th defendant acknowledging receipt of a further sum of Rs.1 lakh and extension of time to the plaintiff to complete the transaction is not sustainable especially when the 6th defendant has no power or authority to extend the time on behalf of the 5th defendant.
- ➔ The Agreement showing money transaction by cash cannot be enforced especially when the transaction involved under the Sale Agreement are unaccounted.
- ➔ The appellants are bona fide purchasers for value without notice of the Agreement or the suit and therefore, they are entitled to the protection under Section 19[b] of the Specific Relief Act. When the amount payable to the Bank to discharge the mortgage loan is more than Rs.50 lakhs, the Trial Court ought to have held that the sale Agreement, which is based on a wrong understanding between parties, is not enforceable.
- ➔ The appellants who are bona fide purchasers for value are



WEB COPY



AS.Nos.355 & 356/2014

entitled to contest the suit on all grounds available to defendants 1 to 6 and that the Court below had erred in holding that the appellants are not bona fide purchasers for value without notice of the Agreement or the suit.

- ➔ The learned Senior counsel then submitted several authorities to emphasize that the plaintiff is not entitled to the discretionary relief of specific performance and the Trial Court has granted the relief unmindful of the decided cases on the power of Court to exercise discretion particularly with reference to Section 20 of the Specific Relief Act.
- ➔ The conduct of the plaintiff requires consideration as he has not only colluded with defendants 1 to 6 by making an Agreement with the sole object of giving pressure to the Bank but also while projecting a case of readiness without actually being ready and willing to pay money to the Bank towards discharge of the mortgage loan.
- ➔ When the original documents were with the Bank and the



AS.Nos.355 & 356/2014

subject matter of the Agreement was mortgaged with the Bank/7th defendant, the fact that the plaintiff was not willing to pay more than Rs.19 lakhs irrespective of the actual amount due to the Bank, is a material circumstance which would disentitle the plaintiff to seek specific performance.

- ➔ Learned Senior counsel brought to the notice of this Court by a Memo dated 13.12.2022 pointing out that respondents after the Appeal withdrew the entire amount of Rs.18 lakhs deposited by them pursuant to decree for specific performance and hence, the plaintiff is not ready and willing to purchase the suit property in terms of Section 16[c] of the Specific Relief Act.
- ➔ The learned Senior counsel also reiterated the points the appellants have raised in the Memorandum of Grounds

(29) ***Per contra***, Mr.C.Ravichandran, learned counsel appearing for respondents 1 to 3, namely the legal representatives of the deceased plaintiff submitted mainly that the appellants who are purchasers *pendente lite* have no right and the plea relying upon Section 19[b]



AS.Nos.355 & 356/2014

of the Specific Relief Act is not available to a purchaser *pendente lite*. Learned counsel then submitted that the suit Agreement is held to be valid by the Trial Court based on documents and oral evidence and the appellants though are the victims of fraud committed by defendants 1 to 6, are not entitled to any relief in the light of the fact that the alienation was only after the filing of suit and that the plaintiffs' right cannot be subject to any right that may flow to anyone after the institution of the suit for specific performance. The learned counsel further submitted that respondents 1 to 3 have produced before this Court, several documents to show that the deceased plaintiff had the capacity to mobilise funds to complete the sale transaction as per sale Agreement under Ex.A3 and it is not open to the appellants who are purchasers *pendente lite* to raise any ground questioning the readiness and willingness particularly when defendants 1 to 6 remained *exparte* throughout the proceedings. The learned counsel also came forward with an argument that the subsequent purchasers are entitled to step into the shoes of original



AS.Nos.355 & 356/2014

owners only if they contest the suit and that the *pendente lite* purchasers cannot have a defence in a suit which was not contested by their vendors. He also relied upon several precedents to support his argument that the deceased plaintiff has proved the due execution of Agreement under Ex.A3 by defendants 1 to 6 and hence, respondents 1 to 3 cannot be denied the relief of specific performance, especially when the plaintiff has proved his readiness and willingness at all material times right from the date of Agreement and that the suit is contested only by the purchasers *pendente lite*, who have only a limited right under Section 52 of the Transfer of Property Act. He also relied upon a few judgments on the interpretation of Section 52 of the Transfer of Property Act to contend that Section 52 of the Act disentitle the subsequent purchaser who acquired right pending litigation to have an independent defence in a suit for specific performance. The learned counsel then submitted that the plaintiff who has proved the agreement to be genuine and supported by consideration, is entitled



AS.Nos.355 & 356/2014

to the relief of specific performance upon proof of his readiness and willingness to perform his part of the contract.

- (30) This Court, considering the pleadings, evidence and arguments advanced by the learned Senior counsel appearing for the appellants and learned counsel for respondents 1 to 3 focussing the legal and factual issues raised by them is inclined to frame the following issues for consideration in the above appeals:-

A) Whether the Suit Agreement is a bona fide Sale transaction?

B) Whether the Suit Agreement under Ex.A3 dated 18.05.2006 is an Agreement to which the parties to the contract have perfect understanding of all the terms or whether there was mutuality while agreeing to the terms of Ex.A3, the Suit Agreement?

C) Whether the appellants, as pendente lite purchasers are entitled to defend the suit on all issues as owners of the suit property?



AS.Nos.355 & 356/2014

- D) Whether the suit Agreement can be enforced against the appellants even though they are the transferees for value who had paid substantial amount in good faith and without notice of the suit Agreement under Ex.A3 dated 18.05.2006?*
- E) Whether the appellants who are the transferees pendente lite are entitled to the benefit of Section 19[b] of the Specific Relief Act?*
- F) Whether the plaintiff has averred and proved his readiness and willingness in terms of Section 16 [c] of the Specific Relief Act?*
- G) Whether the plaintiff is entitled to the equitable relief of specific performance in the light of the peculiar facts and circumstances of the case?*
- H) Whether the appellants have any right under Sections 92 and 93 of the Transfer of Property Act having discharged the mortgage by making substantial payment to the*



AS.Nos.355 & 356/2014

Bank?

I) To what other relief, the plaintiff is entitled to?

- (31) One of the issues that was framed by this Court by referring to Sections 92 and 93 of the Transfer of Property Act, was not raised by the learned Senior counsel for the appellants. This Court is unable to find a plea or a counter claim by referring to Sections 92 and 93 of the Transfer of Property Act. However, this Court has framed the issue only because it became necessary on the admitted facts. Though a relief cannot be granted in favour of a party to the lis, without a specific pleading and cause of action, this Court is inclined to consider this issue as an additional issue as it may have a bearing while exercising its discretion in favour of plaintiffs in the light of Section 20 of the Specific Relief Act.

POINT No.[A] & [B]:

- (32) The following facts are not in dispute. The suit property measuring an extent of 8.05 acres comprised in two survey numbers in Kudalur Village in Coimbatore Taluk, belonged to late Sri.Kannaiaya Naidu



AS.Nos.355 & 356/2014

who died intestate in the year 1981 leaving behind four daughters and two sons namely, defendants 1 to 6. Defendants 1 to 6 admitted that their mother died even prior to the demise of Sri.Kannaiaya Naidu. Defendants 1 to 6 created a mortgage in respect of the suit property in favour of the 7th defendant/Bank by depositing title deeds on 12.08.1985 for the loan advanced to a Partnership Firm in which the 6th defendant was the Managing partner. The 7th defendant/Bank already filed a suit in OS.No.576/1991 against the Firm M/s.Dharani & Co., as well as defendants 1 to 6 and others for recovery of a sum of Rs.21,84,167.99 p., as on 25.02.1991 as evident from Ex.B12-plaint. Defendants 1 to 4 executed a general Power of Attorney Deed in favour of defendants 5 and 6, appointing them as their Power of Attorney agents to execute the Sale Agreement or Sale Deed. The general Power of Attorney which is marked as Ex.A2 discloses that all the sisters of defendants 5 and 6 have appointed their brothers jointly as Power of Attorney agents to do every act including the sale of property on behalf of defendants 1 to 4. The



Power of Attorney Deed is neither registered nor authenticated. The Xerox copy of Power of Attorney Deed alone is marked as Ex.A2. The truth or validity of this document is not disputed by defendants 1 to 6. But the power does not specifically authorise either one of the Power Agent to act on behalf of all or to represent the other Agent. On the basis of the Power of Attorney Deed dated 28.04.1999, defendants 5 and 6 entered into a Sale Agreement with one Jayachandran and two others to sell the suit property on 11.07.2005 without disclosing the existing mortgage. The document which is marked as Ex.A5 discloses that a sum of Rs.3 lakhs was paid as advance. A receipt of a sum of Rs.5.75 lakhs in all is acknowledged by the 6th defendant as per the endorsement dated 30.12.2005. The said Agreement was duly cancelled upon receipt of a sum of Rs.10 lakhs from the 6th defendant as per the endorsement found in Ex.A5.

- (33) On the strength of the Power of Attorney Deed under Ex.A2 dated 28.04.1999, defendants 5 and 6 once again entered into the suit Sale Agreement marked as Ex.A3 dated 18.05.2006. As per the suit



AS.Nos.355 & 356/2014

Agreement, the total consideration for the entire suit schedule is Rs.34 lakhs. The time for performance of Agreement is three months which expired on 17.08.2006. A sum of Rs.5 lakhs was paid as advance. It is stated that a sum of Rs.19 lakhs is due to the Bank on account of mortgage created by deposit of title deeds in favour of 7th defendant/Bank and that the said sum of Rs.19 lakhs should be paid by the plaintiff on behalf of the vendors towards discharge of the mortgage and to get the documents of title for themselves. The remaining amount of Rs.10 lakhs was agreed to be paid within the stipulated time to one or more persons specified by vendors.

- (34) This Court has to consider a few arguments on the factual issues based on the recitals of the Agreement under Ex.A3. It is relevant to extract the following portion of the Agreement which contains the essential terms of the Agreement:-

இன்று கீழ்க்காணும் சாட்சிகள் முன்னிலையில்
நாங்கள் தங்களிடம் ரொக்கமாகப் பெற்றுக்
கொண்ட வகையில் ஊ மொத்தக் கிரையத்



AS.Nos.355 & 356/2014

தொகையில் உங்களால் இன்று எங்களுக்கு
செல்லான அட்வான்சுத் தொகை...ரூ.5,00,000/-
(ரூபாய் ஐந்து லட்சம்) மட்டும்.

நாங்கள் கோவை டவுன் ஒப்பனக்கார
வீதியில் இயங்கிவரும் கார்ப்பரேஷன் வங்கியில்
இந்த ஒப்பந்த பூமியையும், அதன்
பத்திரங்களையும் ஈடு வைத்து கடன்
தொகைகள் பெற்றுள்ளோம். உ் கடன்
தொகைகளுக்கு இன்றுவரை வட்டியும் அசலும்
சேர்த்து சுமார் ..ரூ.19,00,000/- (ரூபாய்
பத்தொன்பது லட்சம்) வரை கூடியுள்ளது. உ்
தொகையை எங்களுக்காக நீங்களே எங்கள்
முன்னிலையில் உ் வங்கிக்குச் செலுத்தி உ் ஈடு
வைத்துள்ள பத்திரங்களை வாபஸ் வாங்கி இந்த
ஒப்பந்தத்திற்கு ஆதரவாக நீங்களே வைத்துக்
கொள்வதாக நீங்கள் ஒப்புக் கொண்ட வகையில்
உ் மொத்தக் கிரையத் தொகையில் உங்களால்
எங்களுக்குச் செல்லாக இருக்கும்
கிரையத் தொகை.. ..ரூ.19,00,000/- (ரூபாய்
பத்தொன்பது லட்சம்) மட்டும்.

உ் வங்கிக்குச் செலுத்த வேண்டிய
தொகைகளை உ் வங்கியின் கணக்கீட்டின்படி
நீங்கள் உ் வங்கிக்குச் செலுத்தியது போக உ்
ரூ.19,00,000/- த்தில் மீதமுள்ள தொகை ஏதாவது



AS.Nos.355 & 356/2014

இருப்பின் அவைகளை கணக்குப்படி நீங்கள் எங்களிடம் செலுத்திவிட வேண்டியது. ஒருக்கால் ஂ ரூ.19,00,000/-த்திற்கும் அதிகமாக கடன் தொகை இருப்பின் அந்த மீதமுள்ள கடன் தொகையை நாங்கள் ஂ வங்கிக்கு அன்றைய தினமே செலுத்தி விடுவதாக உறுதி கூறுகிறோம்.

இந்த ஒப்பந்த பூமியை நீங்கள் எங்களிடம் கிரையம் பெறும் போது ஂ 1,2,3,4- லக்கமிட்ட எங்களது சகோதரிகளிடமிருந்து முறையான பத்திரம் எழுதி பத்திர அலுவலகத்தில் பதிவு செய்து அதன்படி ஂ பவர் பத்திரப்படி உங்களுக்கு கிரையம் பதிவு செய்து கொடுப்பதாகவும் உறுதி கூறுகிறோம்.

மீதிநிற்கும் கிரையத் தொகை ரூ.10,00,000/- ஂ நாங்கள் கோரும் நபர் நபர்களுக்கு கீழ்க்கண்ட கெடுவிற்குள் நீங்கள் செலுத்தி இருக்கும் வகையில் உங்களால் எங்களுக்குச் செல்லாக இருக்கும் தொகை.. ..ரூ.10,00,000/- (ரூபாய் பத்து இலட்சம்)மட்டும்.

ஆக ஂ 3-வகையிலும் ஂ மொத்தக் கிரையத் தொகை ரூபாய் முப்பத்து நான்கு இலட்சமும் உங்களால் எங்களுக்குச் செல்லாகியும் செல்லாகவும் உள்ளது.



WEB COPY



AS.Nos.355 & 356/2014

உதவிபரப்படி மீதமுள்ள கிரையத்
தொகைகளை இன்று முதல் 3(முன்று) மாதக்
கெடுவிற்குள் நீங்கள் உதவி வங்கியிலும்.
எங்களிடமும் செலுத்தி கிரையம் உங்கள்
பெயருக்கோ நீங்கள் கோரும் நபர் & நபர்கள்
பெயருக்கோ ஒரு கிரையமாகவோ அல்லது பல
கிரையங்களாகவோ கிரையம் பெற்றுக்
கொள்பவர்கள் செலவில் கிரையம் பதிவு செய்து
கொடுக்கும்படி கேட்டால் நாங்கள் யாதொரு
ஆட்சேபனையும் சொல்லாமல் சகல வில்லங்க
சத்தியாக சொத்து சுவாதீனம் செய்து
கொடுத்தும் தேவையான மூலப் பத்திரங்கள்
மற்றும் 1-1-1920 முதல் வில்லங்க சான்றுகள்
பெற்றுக் கொடுத்தும் சிட்டா நகல், புல
வரைபடம், தொகுப்பு வரைபடம், விவசாய பூமி
சான்று, நடப்பாண்டு நிலவரி இரசீது, இறப்புச்
சான்று, வாரிசு சான்று ஆகிய இவைகளை
ஒப்படைப்பது, நான்கு பக்க எல்லைகளை
மணியகாரரைக் கொண்டு அளந்து அரிதியிட்டு
கல்நட்டு இணங்காட்டி காண்பிக்க வேண்டியது
எல்லாம் பவர் ஏஜெண்டுகளான எங்களது
கடமையாகுமென உறுதி கூறி இந்த ஒப்பந்தம்
எழுதிக் கொடுத்துள்ளோம்.....



AS.Nos.355 & 356/2014

(35) After the Agreement, there is a subsequent endorsement by the 6th defendant on 11.07.2006 acknowledging the receipt of a sum of Rs.10 lakhs towards payment to three individuals. The plaintiff sent a letter to defendants 5 and 6 on 14.08.2006 to move the Bank for release of title deeds. There was a subsequent endorsement by the 6th defendant on 18.08.2006 extending the time till 30.09.2006 for performance. It is pertinent to mention that the endorsement specifically refers to the readiness of the plaintiff to pay a sum of Rs.19 lakhs to the Bank. It is mentioned as if the 6th defendant could not resolve the issues with the Bank to redeem the property and therefore, the sale was postponed. On 18.08.2006, the 6th defendant further acknowledged the receipt of a sum of Rs.50,000/- by cash and a further sum of Rs.50,000/- by way of cheque dated 18.08.2006. Thereafter, a legal notice dated 25.10.2006 was issued by plaintiff to defendants 1 to 6 calling upon them to execute the Sale Deed. Even without awaiting for any response the suit for specific performance came to be filed on 27.10.2006. A reply notice



AS.Nos.355 & 356/2014

dated 21.11.2006 was sent by defendants 3 and 4 disputing the Agreement of Sale. The Debts Recovery Tribunal, Coimbatore, to which the suit filed by the Bank in OS.No.576/1991 was transferred and renumbered as TA.No.1/2005 passed final orders on 10.05.2007 allowing the application. Pending recovery proceedings, defendants 5 and 6 started negotiating for the sale of suit property with the appellants. In July 2007, the Bank has approved the proposal for receiving a sum of Rs.49 lakhs to satisfy the entire decree and to discharge the mortgage. The appellants have paid a sum of Rs.49 lakhs to the Bank by way of Pay Orders and the application filed by Bank in IA.No.2466/2007 to record full satisfaction of TA.No.1/2005 and termination of TA.No.1/2005 as settled out of Court was allowed by order dated 04.12.2007. The Bank has acknowledged the receipt of a sum of Rs.49 lakhs towards full satisfaction of their claim in TA.No.1/2005. While recording the satisfaction of the claim in TA.No.1/2005, DRT, Coimbatore, directed the Registry to return all the documents marked as Exs.A22



AS.Nos.355 & 356/2014

to A26 to the applicant/Bank on proper undertaking and acknowledgment.

- (36) It is not in dispute before this Court that Sale Deeds were executed by defendants 5 and 6 in respect of suit property by two different documents of Sale dated 09.08.2007 in favour of defendants 8 to 12. The evidence of plaintiff regarding the suit Agreement under Ex.A3 is not controverted. Execution of Ex.A3 is not disputed. Having regard to the sequence of events, as borne out from records and the evidence, this Court has no hesitation to uphold the genuineness of the suit Agreement especially when defendants 1 to 6 who are parties to sale Agreement and subsequent correspondence have remained exparte and the evidence of plaintiff relying upon documents and the signatures of defendants 1 to 6 in several documents evidencing transactions are admitted. Hence, **Point [A] is answered in favour of plaintiffs/respondents 1 to 3.**

- (37) The next issue is whether there was mutuality or whether the parties had perfect understanding as regards the terms of Agreement so that



AS.Nos.355 & 356/2014

specific relief can be granted?

- (38) The plaintiff who was examined as PW1, has categorically admitted during evidence as follows:-

"மேலும் கோவை ஒப்பணக்கார வீதியில் உள்ள கார்ப்பரேசன் வங்கிக்கு பிரதிவாதிகள் செலுத்த வேண்டிய கடன் பாக்கித் தொகைக்காக ரூபாய் 19,00,000/=ஐ என்னை நேரடியாக மேற்படி வங்கியில் செலுத்தும்படி மற்றும் மீதமுள்ள கிரையத் தொகையில் ரூ.10,00,000/= ஐ பிரதிவாதிகள் கோரும் நபர்களுக்கு செலுத்தும் படியும் ஒப்பந்தம் எழுதிக் கொள்ளப்பட்டது...."

- (39) During cross examination, the plaintiff has categorically admitted that he enquired with the Bank and confirmed that the amount due as on the date of Agreement was only Rs.19 lakhs. It is relevant to extract the same:-

".....கண்ணையா நாயுடுவின் கிரைய பத்திரத்தின் நகலை பார்த்தேன். அசலை கேட்டப்போது கார்ப்பரேசன் வங்கியில் இருப்பதாகவும் வாங்கிகொடுப்பதாகவும் சொன்னார். கடன் இருப்பதாகவும் 19 இலட்சம்



AS.Nos.355 & 356/2014

பாக்கி செலுத்த வேண்டியிருப்பதாகவும் சொன்னார். கடன் எவ்வளவு வாங்கப்பட்டது என்பதை நான் கேட்டுக்கொள்ளவில்லை. இது குறித்து நான் வங்கியில் சென்று கேட்டேன். நான் ஏப்ரல் 2006ம் ஆண்டு கேட்டபோது 19 இலட்சம் இருப்பதாக சொன்னார்கள். அதை காட்டுவதற்கு நான் எழுத்த மூலமாக எழுதி வாங்கவில்லை. நானும் கேட்கவில்லை. நான் கேட்டபோது 19 இலட்சம் ரூபாய் திருப்பி செலுத்தினால் ஆவணங்களை கொடுத்து விடுவதாக சொன்னார்....."

- (40) Therefore, the essential or important understanding between the parties was that the total consideration of Rs.34 lakhs is to settle the Bank's dues in full apart from the balance amount of Rs.15 lakhs as acknowledged by the 6th defendant by the subsequent endorsement. The time agreed was only three months. Out of the total sale consideration, a sum of Rs.5 lakhs was paid as advance and a further sum of Rs.10 lakhs was agreed to be paid to previous agreement holders. Since the payments were acknowledged by the 6th defendant in the Agreement by way of subsequent endorsement in



AS.Nos.355 & 356/2014

the suit Agreement, the appellants cannot dispute the payments. However, three months time was specified for discharging the entire Bank's dues which was quantified as Rs.19 lakhs. When the plaintiff admits that the Bank's claim was just Rs.19 lakhs and he ascertained this from the Bank, he could have paid the amount to the Bank if really his intention was to complete the sale in terms of the Agreement and understanding the parties had at the time of entering into the suit Agreement. When a specific question was put to plaintiff during cross examination, the plaintiff gave the following explanation:-

"....நான் செலுத்த விரும்பியபோது 5,6 பிரதிவாதிகள் வட்டியில் சலுகை வாங்கிக் கொடுப்பதால் செலுத்தவேண்டாம் என்று சொன்னார்கள். நான் வட்டியை பிறகு பார்த்துக்கொள்ளலாம் என்றும் நான் கட்டி விடுவதாகவும் சொன்னார்கள். அப்படி கட்டிவிட்டால் வட்டியை வாங்க முடியாது என்றும் எனவே கட்டவேண்டாம் என்று சொன்னார்கள். வங்கியின் சம்மதத்தின் அடிப்படையில் 5.6 பிரதிவாதிகள் சேர்ந்து ஒப்புக்கொண்டு நான்



AS.Nos.355 & 356/2014

பாக்கியை திருப்பிக் கொடுப்பதாக விருப்பம்
தெரிவித்து அறிவிப்பு கொடுத்தேனா என்று
கேட்டால் சொல்லிக்கொண்டுதான் இருந்தேன்..."

- (41) In the plaint, the plaintiff has stated at least in a few places that the plaintiff is ready to settle the issue with the Bank and hence, the Bank has been added as a party to the proceeding. It is also stated in para IX of the plaint that the plaintiff has to settle the debt with the Bank as per the Agreement. The pleadings and evidence is not consistent as regards the extent of liability he has undertaken to discharge the mortgage loan. From the pleadings and evidence, this Court has no hesitation to hold that the parties had in mind that the amount required to release the mortgage was only a sum of Rs.19 lakhs at the time of Agreement and that the plaintiff had agreed to settle the mortgage debt and discharge the liability of defendants 1 to 6. The plaintiff who has promised to pay balance as per the Agreement within three months, did not make payment only on the basis of the endorsement made by the 6th defendant in the Agreement. The further payment of a sum of Rs.1 lakh was without



WEB COPY



AS.Nos.355 & 356/2014

the knowledge of the 5th defendant. It is not pleaded nor proved as to how the 5th defendant is also bound by the endorsement made by the 6th defendant. In view of the admission that the plaintiff has confirmed the amount due to the Bank as Rs.19 lakhs even before suit Agreement, the parties could never imagine a situation where defendants 1 to 6 would discharge the entire mortgage loan of Rs.49 lakhs as it is now established that the actual dues cannot be less than Rs.60 lakhs. The plaintiff has admitted that he approached the Bank to verify and confirm the balance and he entered into the Agreement with defendants 1 to 6 only with the clear understanding that the actual amount payable by defendants 1 to 6 to the 7th defendant/Bank is Rs.19 lakhs. The fact now admitted before this Court is that the Bank had never agreed or could agree to discharge the loan by receipt a sum of Rs.19 lakhs. When the Bank has already filed a suit in the year 1991 and the amount due as per the plaint in the previous suit instituted by the Bank against defendants 1 to 6 was Rs.21,84,167.99 p., with interest from the date of plaint,



WEB COPY



AS.Nos.355 & 356/2014

this Court cannot believe that the total outstanding would be less than Rs.60 lakhs. In the course of evidence, it is also stated that the Bank was claiming compound interest at quarterly rest. Therefore, from the facts revealed from the documents and the admission of PW1, this Court is of the view that there was no consensus-ad-idem with regard to the terms of Ex.A3. In other words, the parties entered into an Agreement on the specific understanding that the amount due to the Bank was just Rs.19 lakhs. Had it been revealed that the total outstanding towards mortgage in respect of the suit property is more than Rs.49 lakhs, the plaintiff would not have entered into an Agreement especially it would be unrealistic to expect the defendants to mobilise more than Rs.30 lakhs for completing the sale. It is true that Ex.A3-Agreement specifically refers to a condition that in case any amount payable in excess of Rs.19 lakhs, defendants 1 to 6 should meet the balance of loan amount. The clause only indicate that a marginal difference is likely. There is no indication that parties had imagined of a liability more



AS.Nos.355 & 356/2014

than the total sale consideration for the suit property as per Ex.A3. In other words, the terms of Agreement would be entirely different if the plaintiff and defendants 1 to 6 are aware that the amount payable to the Bank towards discharge of mortgage was much more than the amount agreed as total consideration for the sale of suit schedule property.

(42) This issue regarding mutuality is very relevant while exercising discretion. The Hon'ble Supreme Court in the case of ***M.P.Mathur and Others V. D.T.C. and Others*** reported in ***AIR 2007 SC 414*** =

2006 [13] SCC 706, has held as follows:-

"14. The court has to ascertain whether there exists an element of mutuality in the contract. If there is absence of mutuality the court will not exercise discretion in favour of the plaintiffs. Even if, want of mutuality is regarded as discretionary and not as an absolute bar to specific performance, the court has to consider the entire conduct of the parties in relation to the subject-matter and in case of any disqualifying circumstances the court will not grant the relief



AS.Nos.355 & 356/2014

prayed for....."

- (43) Mutuality is about the terms of Agreement and it is essential that the terms of Agreement should be mutual to be a complete contract. Law has developed and the subject mutuality in specific performance though recognized as an unsolved problem, the doctrine of mutuality can be applied in many situations while exercising discretion particularly in a suit for specific performance. As pointed out earlier, this Court is of the view that there is no consensus ad idem or mutuality in the suit Agreement inasmuch as the parties had never in mind that the defendants would be required to settle the entire dues of Bank by making a substantial payment of a sum not less than Rs.30 lakhs in addition to a sum of Rs.19 lakhs payable under the Agreement and then to execute the Sale Deed in favour of plaintiff.

POINTS [C], [D] and [E]:-

- (44) Section 52 of the Transfer of Property Act reads as follows:-

"52. Transfer of property pending suit relating thereto.—During the pendency in any Court having



AS.Nos.355 & 356/2014

authority [within the limits of India excluding the State of Jammu and Kashmir] or established beyond such limits by the Central Government of any suit or proceeding 7 which is not collusive and] in. which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

Explanation.—*For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force."*



AS.Nos.355 & 356/2014

WEB COPY

- (45) Section 52 of the Transfer of Property Act is based on the principle that no new right should be introduced pending litigation. This principle was applied by Courts even before the commencement of Transfer of Property Act. The object of Section 52 has been dealt with in several precedents. The section is based on equity and good conscience and intended to protect that parties to a litigation against alienations by anyone of the parties to the lis. However, the Court has always held that the transaction will not become void as a whole.
- (46) In the case of ***Khemchand Shankar Choudhari and another Vs. Vishnu Hari Patil and Others*** reported in ***1983 [1] SCC 18***, the Hon'ble Supreme Court had an occasion to deal with the scope of Section 52 of the Transfer of Property Act read with Order 22 Rule 10 of CPC which recognizes the right of transferee to be impleaded as a party to the proceedings who are entitled to be heard before any order is made. It is useful to extract the relevant portion of the judgment which reads thus:-



WEB COPY



AS.Nos.355 & 356/2014

"6. Section 52 of the Transfer of Property Act no doubt lays down that a transferee pendente lite of an interest in an immovable property which is the subject-matter of a suit from any of the parties to the suit will be bound insofar as that interest is concerned by the proceedings in the suit. Such a transferee is a representative in interest of the party from whom he has acquired that interest. Rule 10 of Order 22 of the Code of Civil Procedure clearly recognises the right of a transferee to be impleaded as a party to the proceedings and to be heard before any order is made. It may be that if he does not apply to be impleaded, he may suffer by default on account of any order passed in the proceedings. But if he applies to be impleaded as a party and to be heard, he has got to be so impleaded and heard. He can also prefer an appeal against an order made in the said proceedings but with the leave of the appellate court where he is not already brought on record. The position of a person on whom any interest has devolved on account of a transfer during the pendency of any suit or a proceeding is somewhat similar to the position of an.



WEB COPY



AS.Nos.355 & 356/2014

heir or a legatee of a party who dies during the pendency of a suit or a proceeding, or an Official Receiver who takes over the assets of such a party on his insolvency. An heir or a legatee or an Official Receiver or a transferee can participate in the execution proceedings even though their names may not have been shown in the decree, preliminary or final. If they apply to the court to be impleaded as parties they cannot be turned out. The Collector who has to effect partition of an estate under Section 54 of the Code of Civil Procedure has no doubt to divide it in accordance with the decree sent to him. But if a party to such a decree dies leaving some heirs about whose interest there is no dispute should he fold up his hands and return the papers to the civil court? He need not do so. He may proceed to allot the share of the deceased party to his heirs. Similarly he may, when there is no dispute, allot the share of a deceased party in favour of his legatees. In the case of insolvency of a party, the Official Receiver may be allotted the share of the insolvent. In the case of transferees pendente lite also, if there is no dispute,



the Collector may proceed to make allotment of properties in an equitable manner instead of rejecting their claim for such equitable partition on the ground that they have no locus standi. A transferee from a party of a property which is the subject-matter of partition can exercise all the rights of the transferor. There is no dispute that a party can ask for an equitable partition. A transferee from him, therefore, can also do so. Such a construction of Section 54 of the Code of Civil Procedure advances the cause of justice. Otherwise in every case where a party dies, or where a party is adjudicated as an insolvent or where he transfers some interest in the suit property pendente lite the matter has got to be referred back to the civil court even though there may be no dispute about the succession, devolution or transfer of interest. In any such case where there is no dispute if the Collector makes an equitable partition taking into consideration the interests of all concerned including those on whom any interest in the subject-matter has devolved, he would neither be violating the decree nor transgressing any law. His action would not be ultra



vires. On the other hand, it would be in conformity with the intention of the legislature which has placed the work of partition of lands subject to payment of assessment to the Government in his hands to be carried out “in accordance with the law (if any) for the time being in force relating to the partition or the separate possession of shares”.

- (47) The question whether purchaser *pendente lite* is entitled to get himself impleaded as a party to the proceeding is also answered by the Hon'ble Supreme Court in the case of ***Amit Kumar Shaw and Another Vs. Farida Khatoon and Another*** reported in **2005 [11] SCC 403**. The Hon'ble Supreme Court has held as follows:-

"16 [Ed.: Para 16 corrected vide Official letter dated 25-8-2005.] . The doctrine of lis pendens applies only where the lis is pending before a court. Further pending the suit, the transferee is not entitled as of right to be made a party to the suit, though the court has a discretion to make him a party. But the transferee pendente lite can be added as a proper party if his interest in the subject-matter of the suit is substantial and not just peripheral. A



AS.Nos.355 & 356/2014

transferee pendente lite to the extent he has acquired interest from the defendant is vitally interested in the litigation, where the transfer is of the entire interest of the defendant; the latter having no more interest in the property may not properly defend the suit. He may collude with the plaintiff. Hence, though the plaintiff is under no obligation to make a lis pendens transferee a party, under Order 22 Rule 10 an alienee pendente lite may be joined as party. As already noticed, the court has discretion in the matter which must be judicially exercised and an alienee would ordinarily be joined as a party to enable him to protect his interests. The court has held that a transferee pendente lite of an interest in immovable property is a representative-in-interest of the party from whom he has acquired that interest. He is entitled to be impleaded in the suit or other proceedings where his predecessor-in-interest is made a party to the litigation; he is entitled to be heard in the matter on the merits of the case."

- (48) Again in ***Thomson Press [India] Limited V. Nanak Builders and Investors Private Limited and Others*** reported in **2013 [5] SCC**



397, the Hon'ble Supreme Court reiterated the position that a purchaser *pendente lite* is entitled to be added as a party to the suit and that he is entitled to raise and pursue such defences as are available to his vendors. Therefore, the purchaser *pendente lite* is entitled to be heard and as observed in several precedents, this Court has no hesitation to hold that purchaser *pendente lite* is entitled to defend or prosecute the case by stepping into the shoes of their vendors. The further question whether a purchaser *pendente lite* is entitled to the protection under Section 19[b] of the Specific Relief Act, also has to be examined.

(49) Section 19 of the Specific Relief Act reads as follows:-

Section 19. :- Relief against parties and persons claiming under them by subsequent title.

Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against--

(a) either party thereto;

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;



(c) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant;

[(ca) when a limited liability partnership has entered into a contract and subsequently becomes amalgamated with another limited liability partnership, the new limited liability partnership which arises out of the amalgamation.]

(d) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;

(e) when the promoters of a company have, before its incorporation, entered into a contract for the purpose of the company and such contract is warranted by the terms of the incorporation, the company:

Provided *that the company has accepted the contract and communicated such acceptance to the other party to the contract.*

- (50) From the bare reading of section 19 of the Act, it is seen that section 19[b] bars enforcement of specific performance of a contract as against transferee for value who has paid his money in good faith and without notice of the original contract. Section 19 of the Specific Relief Act cannot override the provisions under Section 52



AS.Nos.355 & 356/2014

of the Transfer of Property Act, particularly, when section 19 of confined to Chapter II of the Specific Relief Act. In this regard, it is useful to refer to the judgment of the Hon'ble Supreme Court in the case of ***Guruswamy Nadar Vs. Lakshmi Ammal [Dead] through LRs and Others*** reported in ***2008 [5] SCC 796***. The Hon'ble Supreme Court dealt with a similar case where the Trial Court dismissed the suit for specific performance only on the ground that the defendant therein who is the appellant before the Hon'ble Supreme Court purchased the suit property for bona fide consideration. A Learned Single Judge of this Court reversed the judgment of the Trial Court and decreed the suit for specific performance. A Division Bench of this Court also confirmed the judgment of the learned Single Judge granting specific performance. Referring to the Full Bench decision of Allahabad High Court in ***Ram Peary Vs. Gauri*** reported in ***AIR 1978 All 318*** and the judgment of the Privy Council in the case of ***Faiyaz Husain Khan Vs. Munshi Prag Narain*** reported in ***1906-07 34 IA 102***, the



AS.Nos.355 & 356/2014

Hon'ble Supreme Court has observed that the subsequent purchaser cannot be said to be bona fide purchaser of the suit property for value without notice of suit Agreement and the plaintiff would be entitled to the relief of specific performance. The view taken by several precedents that the litigating parties are exempted from taking any notice of title so acquired and that alienations made during pending litigation would defeat the whole purpose to end litigation and therefore, it is held that the right of a purchaser *pendente lite* is subservient to the rights of parties to the litigation. The Hon'ble Supreme Court has observed in paragraph No.15 as follows:-

"15. So far as the present case is concerned, it is apparent that the appellant who is a subsequent purchaser of the same property, has purchased in good faith but the principle of lis pendens will certainly be applicable to the present case notwithstanding the fact that under Section 19[b] of the Specific Relief Act his rights could be protected."

(51) In a similar case, the Hon'ble Supreme Court had an occasion to deal



AS.Nos.355 & 356/2014

with the right of transferee *pendente lite* in the case of ***Thomson Press [India] Limited Vs. Nanak Builders and Investors Private Limited and Others*** reported in ***2013 [5] SCC 397***. The Hon'ble Supreme Court, has held that the appellant before the Hon'ble Supreme Court, a transferee *pendente lite* is not protected under Section 19 of the Specific Relief Act against specific performance of prior contract. However, a transfer *pendente lite* is held neither illegal nor void ab initio but remains subservient to rights eventually determined by Court in pending litigation. In other words, a transfer in favour of purchaser *pendente lite* is effective in transferring title subject to decision of Court in a suit which is binding not only on litigating parties but also on those who derive title *pendente lite*.

- (52) The Hon'ble Supreme Court then considered the enabling provision under Order 22 Rule 10 of CPC to hold that a transferee *pendente lite* is entitled to come on record under Order 22 Rule 10 of CPC to protect his interest as a person who had derived title under the party to the *lis*. However, it is to be noted that the Hon'ble Supreme Court



AS.Nos.355 & 356/2014

has also held that such person who has purchased the property *pendente lite* can be permitted to take only such defences that are available to original owner/vendor. It is to be noted that the facts of the case dealt with by the Hon'ble Supreme Court would show that the purchaser *pendente lite* has obtained a Sale Deed during pendency of a suit for specific performance when an order of injunction restraining alienation was in force. Even in that situation, the person who purchased the property pending litigation was held to be a necessary party and that he is entitled to canvas the defences that are available to his vendor even though Section 19 of the Specific Relief Act cannot be invoked by the purchaser *pendente lite*.

(53) In the judgment above referred to, Hon'ble Mr. Justice T.S.THAKUR, while concurring with the view of Hon'ble Mr. Justice M.Y.IQBAL, has summed up the law in the following lines:-

57.1. The appellant is not a bona fide purchaser and is, therefore, not protected against specific performance of the contract between the plaintiffs and



the defendant owners in the suit.

57.2. The transfer in favour of the appellant pendente lite is effective in transferring title to the appellant but such title shall remain subservient to the rights of the plaintiff in the suit and subject to any direction which the Court may eventually pass therein.

57.3. Since the appellant has purchased the entire estate that forms the subject-matter of the suit, the appellant is entitled to be added as a party-defendant to the suit.

57.4. The appellant shall as a result of his addition raise and pursue only such defences as were available and taken by the original defendants and none other.

- (54) In view of the above discussions and the judgments cited [supra], this Court is of the view that the appellants are not entitled to invoke Section 19 of the Specific Relief Act and cannot contend that the Agreement cannot be enforced as against them on the ground that they had purchased the property for value without notice of the original contract. However, the appellants are entitled to canvas all the points in defence that are available to defendants 1 to 6.



POINT [F]-Readiness and Willingness:-

(55) As pointed out earlier, the learned Senior counsel appearing for the appellants pointed out the evidence of PW1/plaintiff regarding his unwillingness to pay the amount to the Bank as agreed. From the pleadings, it is to be pointed out that the plaintiff has stated that defendants 5 and 6 have postponed the completion of sale under one or other false pretext without taking any recourse to settle their debts in spite of the amount being ready with the plaintiff. In the plaint, the plaintiff has averred as follows:-

"VI....The plaintiff has been ready and willing and continuous to be ready and willing with the balance sale consideration to get the sale deed in his favour and regularly contacted the defendants 5 and 6 in this regard. But the defendants 5 and 6 dilly dallied the same under one or other pretext without taking any recourse to settle their bank debt inspite of the amount ready with the plaintiff. The defendants did not make any attempts to come to the Bank to release the documents by signing the necessary papers with the bankers.



VII...Even the plaintiff went a step further and opened an account with the Bank to whom the defendants has to pay a sum of Rs.19 lakhs, to show his bonafide in setting the account for releasing the original document.....

VIII.Now the plaintiff reliably learnt that the corporation Bank also proceeded against all the defendants by filling the suit. Hence, the bank has been added as a party to this proceedings, since the plaintiff is ready to settle the issue with the Bank.....

IX....The plaintiff added the bankers also as a party to this proceedings since original documents of the suit property are with the bank. As per the agreement he has to settle the debt with the bank....."

- (56) From the pleadings, it is evident that the plaintiff had agreed to pay the balance to the Bank within the time stipulated. However, the fact remains that the plaintiff has not made any payment to the Bank to discharge the liability towards mortgage loan. Though the plaintiff states that he has gone to the extent of opening an account and was ready with the balance sale consideration to perform his part of the contract, no amount was paid by the plaintiff to the Bank. A close



AS.Nos.355 & 356/2014

scrutiny of the pleadings would lead to a legitimate inference that the plaintiff was not willing to make any payment towards discharge of mortgage loan or to the Bank as agreed to settle the dues. This Court has already seen that the extension of time by the 6th defendant is not binding on the 5th defendant as 5th defendant has never authorised 6th defendant to act on his behalf and therefore, the plaintiff cannot rely upon the extension of time. When the property is the subject matter of mortgage, the liability of the mortgagor towards discharge of mortgage increases every day and therefore, the stipulation of three months cannot be ignored. Whether it is Rs.19 lakhs or something more, the liability of the plaintiff as on the date of Agreement is freezed at least to make the balance of Rs.19 lakhs within three months from the date of Agreement. This was not done. In the absence of any evidence to show that the 6th defendant can independently or unilaterally extend the time for performance, this Court cannot accept the readiness and willingness as pleaded by the plaintiff. Though the plaintiff has repeatedly stated in the plaint that



AS.Nos.355 & 356/2014

he was always ready and willing to pay the balance, the fact that the amount has not been paid to discharge the liability, would show that the plaintiff was not willing to perform his part of contract in terms of the Agreement. From the first endorsement under Ex.A4 and the second endorsement under Ex.A12, the 6th defendant alone has admitted the readiness of plaintiff to pay the balance. Coupled with the fact that the plaintiff was ready only upto Rs,19 lakhs and that the parties could never stop interest running, this Court is unable to accept the plea of readiness and willingness by plaintiff.

- (57) As recorded earlier, the plaintiff has admitted in an unequivocal terms that he had agreed to pay a sum of Rs.19 lakhs to the 7th defendant/Bank directly. During chief examination itself, the plaintiff had admitted as follows:-

"மேலும் கோவை ஒப்பணக்கார வீதியில்
உள்ள கார்ப்பரேசன் வங்கிக்கு பிரதிவாதிகள்
செலுத்த வேண்டிய கடன் பாக்கித்
தொகைக்காக ரூபாய் 19,00,000/=ஐ என்னை
நேரடியாக மேற்படி வங்கியில் செலுத்தும்படி
மற்றும் மீதமுள்ள கிரையத் தொகையில்



AS.Nos.355 & 356/2014

ரூ.10,00,000/= ஐ பிரதிவாதிகள் கோரும்
நபர்களுக்கு செலுத்தும் படியும் ஒப்பந்தம்
எழுதிக் கொள்ளப்பட்டது...."

(58) As indicated earlier by extracting the evidence of PW1 during cross examination, this Court is of the view that the plaintiff was ready to perform his part of the contract only if defendants 1 to 6 are willing to discharge the entire mortgage by paying whatever amount that is due to the Bank. This Court has to consider whether the plaintiff has pleaded and proved readiness and willingness in terms of the contract in accordance with Explanation [ii] of Section 16[c] of the Specific Relief Act.

(59) The Delhi High Court in the case of **Raj Rani Bhasin and Others V. S.Kartar Singh Mehta** reported in **AIR 1975 Del 137**, has made distinction between readiness and willingness and it has been held as follows:-

"10. A distinction may be drawn between readiness to perform the contract and willingness to perform the contract. By readiness may be meant the



capacity of the plaintiff to perform the contract. This includes his financial ability to pay the purchase price. We will assume for the sake of argument that the plaintiff respondent could have raised the money to pay the purchase price if he wanted to do so. But the more important question is whether he was willing to perform his part of the contract even if he had the financial capacity to do so. It is here that the plaintiff's conduct has to be properly scrutinised....."

- (60) The 6th defendant alone signed the endorsement under Exs.A4 and A12. Even though defendants 5 and 6 were appointed as the Power of Attorney Agents jointly by defendants 1 to 4, the 5th defendant had not authorised the 6th defendant to act on his behalf. During cross-examination, the plaintiff also admitted that the 5th defendant was not there when the endorsement under Ex.A4 was made and the plaintiff has specifically stated that the 6th defendant had promised to get the signature from the 5th defendant, but did not get the signature of the 5th defendant. The plaintiff though proved the Agreement-Ex.A3, the endorsements extending the time for performance signed



AS.Nos.355 & 356/2014

by the 6th defendant is not binding on the 5th defendant. Therefore, the endorsement under Exs.A4 and A12 cannot be taken as an admission of 5th defendant. Similarly, receipt of a sum of Rs.1 lakh under Ex.A12 – endorsement and the extension of time by the 6th defendant is not binding on the 5th defendant. Therefore, the question whether the plaintiff is ready to perform his part of the contract cannot be decided on the basis of Exs.A4 and A12-endorsements.

- (61) It is well settled that the obligation imposed by Section 16 of Specific Relief Act is upon Court not to grant specific performance to a plaintiff who has not met the requirements of clauses a, b and c of Section 16. Even if the defendants are set exparte, the plaintiff is not absolved from proving readiness and willingness. Hence, the fact that defendants 1 to 6 remained exparte throughout does not dispense with proof of readiness and willingness. Though the learned counsel appearing for respondents 1 to 3 relied upon a few judgments to support his argument that the question of readiness and



AS.Nos.355 & 356/2014

willingness cannot be raised by *pendente lite* purchasers, this Court has already rejected the said contention.

- (62) As pointed out by the learned Senior Counsel appearing for the appellants, the amount due to the 7th defendant/Bank towards discharge of mortgage loan was not less than Rs.50 lakhs. Defendants 1 to 6 who were not in a position to discharge entire loan by making payment have entered into an Agreement with plaintiff for a total consideration of Rs.34 lakhs which is just 60% of the outstanding as on the date of Agreement. Out of the total consideration of Rs.34 lakhs, defendants 1 to 6 have acknowledged receipt of Rs.15 lakhs and therefore, the balance payable is only Rs.19 lakhs. No doubt, the plaintiff has produced the income tax returns for the relevant Assessment Years to show that his total income was around Rs.4 lakhs for the relevant year. This Court may still has to examine the readiness of plaintiff. Though Explanation [i] to Section 16[c] of the Specific Relief Act absolve the plaintiff to



AS.Nos.355 & 356/2014

make any deposit to show his bona fides, the question of readiness requires serious attention in a case like this. The mental state of mind as on date of the Agreement is to complete the transaction for total a consideration of Rs.34 lakhs with a corresponding obligation of defendants 1 to 6 to pay balance if any to the Bank beyond a sum of Rs.19 lakhs. This could never happen and defendants 1 to 6 though agreed to discharge the balance if any, as agreed under the Agreement was never in possession of funds or means to mobilise funds to pay the dues of Bank. The plaintiff is aware of the position. The terms of Agreement was cleverly drafted so that the plaintiff could legitimately expect defendants 1 to 6 to discharge the entire mortgage and release the property from the mortgage. Though the plaintiff had agreed to settle the Bank, this Court is unable to believe his case that the Bank had agreed to discharge the mortgage upon receipt of the sum of Rs.19 lakhs. Now, the stand of plaintiff is very clear that the plaintiff would pay upto Rs.18 lakhs only to Bank upon defendants 1 to 6 discharge the entire debt. Knowing that



WEB COPY



AS.Nos.355 & 356/2014

defendants 1 to 6 are not going to pay balance, the plaintiff has come forward with a case of readiness and willingness. Whether the plaintiff was willing to pay the money can be assessed from the conduct of the plaintiff at the relevant point of time. When the plaintiff who is aware of the consequences of delay in discharging the mortgage debt, has not come forward to make payment as promised to defendants 1 to 6 under the Agreement. Going by terms of Agreement, the parties expected only a small difference if at all beyond Rs.19 lakhs payable to the Bank. Strangely or surprisingly, the actual amount due to Bank was three times more and hence, the plaintiff blamed defendants 1 to 6 for not coming to Bank to clear the debts or to discharge the mortgage. The sequence of performance as per suit Agreement does not justify plaintiff not paying balance of sale consideration to the Bank. This Court has to hold that the plaintiff was never willing to perform his part of contract and his contention that defendants 1 to 6 did not come to the Bank to discharge the loan by getting the funds from the plaintiff and paying the balance if necessary was not as per the terms



AS.Nos.355 & 356/2014

agreed under Ex.A3. In these circumstances, the plaintiff though was ready with the balance amount in the sense that he was in a position to mobilise funds to pay the balance of consideration as agreed under Ex.A3, he has failed to aver and prove his willingness to perform his part of contract in terms of the Agreement.

- (63) Learned Senior counsel appearing for the appellants relied on the decision of the Division Bench of this Court of *Arunachala Mudhaliar Vs. Jayalakshmi Ammal and Another* reported in 2003 [1] CTC 355, where this Court has observed that the subsequent purchaser of property can raise defence regarding readiness and willingness on part of plaintiff in a suit for specific performance. It was further observed by the Division Bench that a Court cannot grant decree of specific performance to one who is not ready and willing to perform the essential terms of the Agreement. After referring to the case of *Ram Awadh [Dead] By LRs. and Others V. Achhaibar Dubey and Another* reported in 2000 [2] SCC 428, and the judgment of a Division Bench of this Court in the case of



AS.Nos.355 & 356/2014

Bhagwandas Fatechand Daswani Vs. H.P.A.International, reported in **2001 [3] CTC 86**, the Division Bench has held that the subsequent purchasers are entitled to plead by way of defence any ground available to them under the law relating to contract and that, in every other case, the plaintiff is entitled to get relief of specific performance only upon showing that the plaintiff has averred and proved that he was always ready and willing to perform his part of the Agreement.

(64) In ***Azhar Sultana V. B.Rajamani and Others*** reported in **2009 [17] SCC 27**, the Hon'ble Supreme Court has held that the plaintiff should prove continuous readiness and willingness to perform his part of the contract as a condition precedent for obtaining the relief of specific performance. In ***Ram Awadh's case [cited supra]*** reported in **2000 [2] SCC 428**, the Hon'ble Supreme Court on the question of readiness and willingness, referring to Section 16 of the Specific Relief Act, has held as follows:-

"6. 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 he 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 case [(1995) 2 SCC 31] is erroneous."

- (65) It is to be noted that the judgment in **Ram Awadh's case** was rendered by a Three Member Bench of the Hon'ble Supreme Court. The previous judgment of the Hon'ble Supreme Court in the case of **Jugraj Singh V. Labh Singh** reported in **1995 [2] SCC 31**, has been overruled and was held to be not good law. It is to be noted



AS.Nos.355 & 356/2014

that in **Jugraj Singh's case**, a Two Member Bench of the Hon'ble Supreme Court has held that the plea on readiness and willingness is available only to the vendor or his legal representatives and not to the subsequent purchasers. The view of larger Bench in **Ram Awadh's case** was quoted in several judgments of the Hon'ble Supreme Court later and it is not necessary to refer to all other judgments on this point and therefore, is convinced that the appellants in this case is also entitled to canvass that the plaintiff has not averred as to his readiness and willingness nor proved readiness and willingness by his conduct and evidence to the satisfaction of this Court.

POINT [G]- Whether the plaintiff is entitled to the discretionary / equitable relief:-

(66) In the case of **Kamal Kumar Vs. Premlata Joshi and Others** reported in **2019 [3] SCC 704**, the Hon'ble Supreme Court has considered the scope of Section 20 of the Specific Relief Act and the material questions which are required to be looked into by Court. It is useful to refer to paragraph No.7 of the said judgment:-



"7. It is a settled principle of law that the grant of relief of specific performance is a discretionary and equitable relief. The material questions, which are required to be gone into for grant of the relief of specific performance, are:

7.1. First, whether there exists a valid and concluded contract between the parties for sale/purchase of the suit property.

7.2. Second, whether the plaintiff has been ready and willing to perform his part of contract and whether he is still ready and willing to perform his part as mentioned in the contract.

7.3. Third, whether the plaintiff has, in fact, performed his part of the contract and, if so, how and to what extent and in what manner he has performed and whether such performance was in conformity with the terms of the contract;

7.4. Fourth, whether it will be equitable to grant the relief of specific performance to the plaintiff against the defendant in relation to suit property or it will cause any kind of hardship to the defendant and, if so, how and in what manner and the extent if such



AS.Nos.355 & 356/2014

relief is eventually granted to the plaintiff;

7.5. Lastly, whether the plaintiff is entitled for grant of any other alternative relief, namely, refund of earnest money, etc. and, if so, on what grounds.

- (67) On the question of exercising discretion to grant equitable relief of specific performance, Section 20 of the Specific Relief Act prescribes statutory guidance. A discretion which is required to be exercised by Courts before granting specific performance should be governed by the Rule of law and equity. The law and equity are subservient to the other. The relief of specific performance need not be granted merely because it is lawful. The discretion should be exercised on the basis of sound judicial principles. Courts have repeatedly held that the plaintiff, in a suit for specific performance, is not entitled to the relief as a matter of right. While exercising discretion, the Courts are expected to keep in mind the material and peculiar facts and circumstances of the case, the conduct of the parties and consequences or the fallouts by granting specific relief to a party to the contract. In no case the relief can be used as an instrument of



AS.Nos.355 & 356/2014

oppression to have an unfair advantage to the plaintiff or to the defendant. If we apply the settled principles of how a discretion of Court should be exercised with the guidance of Section 20 of the Specific Relief Act, this Court has to necessarily keep in mind the following circumstances.

- (68) Since the suit property was mortgaged, what was agreed to be sold is only the equity of redemption or the right to redeem the mortgage. The parties at the time of entering into suit Agreement have specifically recorded a fact that the total amount due to the 7th defendant/Bank towards discharge of mortgage loan was just Rs.19 lakhs or a little more. The parties never contemplated a situation that the amount that is payable to the Bank to redeem the mortgage is more than the actual consideration agreed under Ex.A3-suit Agreement. Therefore, the Agreement suffered from serious infirmities and uncertainty or lack of mutuality as to the material term of the Agreement. The plaintiff has specifically admitted during evidence that he had confirmed with the Bank that the total



AS.Nos.355 & 356/2014

liability towards discharge of mortgage loan is not more than Rs.19 lakhs. However, this particular aspect of the case has not been considered by the Trial Court while granting decree for specific performance in favour of plaintiff. The specific pleading of plaintiff and the terms of the Agreement about the total outstanding as on the date of Agreement to the Bank is admittedly false. Therefore, the contract which is based on an erroneous understanding, if allowed to be acted upon, would result in absurdity or likely to affect third parties to the contract. In the present case, the Agreement of Sale under Ex.A3 is illusory in the sense that the parties are not aware of their rights and obligations or actual commitments and they proceeded to enter into the contract with an erroneous understanding that the total amount due and payable to the Bank towards discharge of mortgage loan is just Rs.19 lakhs or something which is negligibly less or more.

- (69) This Court has already held that the Suit Agreement is not enforceable due to lack of mutuality as the parties never



AS.Nos.355 & 356/2014

contemplated a situation by which the defendants 1 to 6 have to pay not less than Rs.25 lakhs [After paying the entire balance payable by plaintiff namely Rs.19 lakhs and then to execute the Sale Deed. The plaintiff has come forward with the false case that the bank has informed him about the liability of defendants 1 to 6 to discharge their loan is Rs.19 lakhs. In ***Venkatasami Naidu Vs. Annamalai Goundar***, reported in ***AIR 1964 Mad 474*** , a learned Single Judge of this Court, considered the ruling of Privy Council in ***Mir Sarwarjan Vs. Fakhruddin Mahomed Chowdhuri and Others***, reported in ***ILR [1912] 39 Cal 232(PC)*** and Halsbury's Laws of England dealing with contracts lacking mutuality. The principle approved is: 'If a contract cannot be enforced against one party by reason of circumstances existing at the date of the contract, such as personal incapacity or the nature of the contract, that party will not be enabled to enforce the contract against the other party'. For example, it is not within the competence of guardian of the minor to bind the minor or his estate by a contract to purchase property on behalf of minor, as



AS.Nos.355 & 356/2014

the minor was not bound by the contract. Since there was no mutuality, the contract cannot be enforced at the instance or on behalf of minor. It is well accepted in a bilateral contract the parties should not only agree on promises/consideration for one another, but also towards exchange of performance. If simultaneous performance is impracticable, the Court can refuse to enforce the contract by applying the doctrine of mutuality. When the plaintiff filed the suit, he never asked for discharge of mortgage by defendants 1 to 6. The plaintiff took a specific stand that he was willing to pay only a sum of Rs.19 lakhs. When defendants 1 to 6 cannot seek specific performance of agreement by directing plaintiff to take the sale with the liability, the plaintiff cannot be given relief merely because the appellants have discharged the entire liability of Bank by paying Rs.49 lakhs.

- (70) Defendants 1 to 6 never agreed to discharge the mortgage loan and execute the Sale Deed as per Ex.A3-Agreement. Either due to misunderstanding or with a determined effort to mislead or to cheat



WEB COPY



AS.Nos.355 & 356/2014

the other, the terms of Agreement are drafted. Even though defendants 1 to 6 are bound by the terms of Agreement, this Court is able to see that they never showed any interest to discharge the loan as they are quite aware that the amount payable to the Bank to discharge the loan is not within their reach at that time. Therefore, they ventured to negotiate with the appellants to get the mortgage discharged.

- (71) From the sequence of events, this Court is unable to approve the finding of the Trial Court that the appellants are not bona fide purchasers for value without notice of prior Agreement or the suit filed by the plaintiff for specific performance. Absolutely, there is no evidence in this case to suggest that the appellants had notice of the prior sale Agreement or suit for specific performance. It is the specific case of the appellants that neither the Bank nor defendants 5 and 6 informed the appellants about the prior Agreement or pendency of the suit. The appellants have paid a sum of Rs.49 lakhs to the Bank as it has been proved by documents of which there is no



AS.Nos.355 & 356/2014

dispute. The plaintiff entered into the Agreement only when the suit was laid by the 7th defendant/Bank for realising of the amount due under the mortgage in respect of the suit property.

- (72) The learned Senior counsel appearing for the appellants has relied upon the judgment of the Full Bench of Kerala High Court in the case of *V.T.Vijayan Vs. U.Kuttappan Nair and Others* reported in *AIR 2019 Kerala 102*. Before the Full Bench of Kerala High Court, the question referred to was whether the Agreement for sale executed by a party to a *lis* during the pendency of the suit is hit by the doctrine of *lis pendens* or not? Even though mere Agreement does not involve a transfer in respect of immovable property, the Hon'ble Full Bench has held as follows:-

16. Therefore, we find that execution of an agreement for sale of the subject-matter of the suit, during the pendency of the suit, is a dealing with the subject-matter of the suit, which would adversely affect the rights of other party under the decree, that may be passed in the suit. Hence, an agreement for sale executed by the parties to the lis, during the



pendency of the suit is hit by the doctrine of lis pendens. But, we noticed that in Wellington B. case (supra), the Division Bench of this court has lost sight of the 2nd limb of section 52, "otherwise dealt with by any party to the suit or proceedings so as to affect the right of any other party thereto under any decree or order, which may be made therein". The said provision was not brought to the notice of the court, while rendering the judgment. So, we find that the ratio laid down in Wellington B. case (supra) in respect of section 52 of the Act, is not a good law. Further, we also endorse the view expressed in Kubra Bibi's case, (AIR 1997 Oudh 193) (supra) that creation of a contract capable of specific performance, though not an alienation by itself, is a mode of dealing with the property, pregnant with very mischief, which section 52 of the Act seeks to obviate."

- (73) In the present case, the suit Agreement is therefore, hit by *lis pendens* and the Bank's right to proceed against the property is protected and the appellants who had redeemed the mortgage by making a substantial payment to the tune of Rs.49 lakhs to the Bank



AS.Nos.355 & 356/2014

directly are now facing the litigation and they are put to serious prejudice because they are just purchasers *pendente lite*. In this case prior mortgage is known to plaintiff. Hence, he cannot invoke Section 13[1][c] of Specific Relief Act. The plaintiff now takes an undue advantage at the cost of appellants who have parted with Rs.49 lakhs about 18 years back. If they are just given liberty to proceed against defendants 1 to 6, it may lead to injustice. Having regard to the facts admitted and established before the Court below, this Court is of the view that the appellants who had discharged the entire mortgage by making payment on behalf of defendants, are entitled to protect their interest derived from defendants 1 to 6 on equity. This Court is unable to ignore the substantial payment made by the appellants to the Bank while exercising discretion. This Court finds that Clauses [a], [b] and [c] of Sub-section 2 of Section 20 of Specific Relief Act can be applied in the present case to refuse to exercise discretion.

(74) Taking note of the admitted position that substantial injustice will be



done to the appellants in case specific relief is granted to the plaintiff, this Court is of the view that granting alternative relief pleaded by the plaintiff would be appropriate in this case.

POINT No.[H]:-

(75) Sections 91 and 92 of the Transfer of Property Act read as follows:-

91. Persons who may sue for redemption.—*Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property, namely:—*

(a) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same;

(b) any surety for the payment of the mortgage-debt or any part thereof; or

(c) any creditor of the mortgagor who has in a suit for the administration of his estate obtained a decree for sale of the mortgaged property.

92. Subrogation.—*Any of the persons referred to in section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to*



AS.Nos.355 & 356/2014

the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee. The right conferred by this section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems. A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated. Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full.

- (76) Section 92 of the Transfer of Property Act enables any person who is referred to in Section 91 on the redemption of property to claim right as the mortgagee whose mortgage he redeemed against mortgagor or any other mortgagee. The subject matter of sale Agreement in the



WEB COPY



AS.Nos.355 & 356/2014

present case is just the right to redeem. When the Agreement Holder knows the existence of mortgage and files a suit before redemption, he is not entitled to the relief of specific performance ignoring the rights of a third party redeeming the entire mortgage by paying the mortgage amount. In this case, the appellants have not claimed the right of subrogation. Even though the appellants have not claimed any relief by way of a counter claim particularly in terms of Section 92 of the Transfer of Property Act, this Court is unable to grant the relief against the appellants whose rights under Section 92 of the Act cannot be ignored. Though a remedy is barred, this Court can still consider the substantial rights of parties to the lis while granting the discretionary relief of specific performance. In the absence of plea or grounds raised by the appellants, this Court is not inclined to rest our decision solely by relying upon Sections 91 and 92 of the Transfer of Property Act.

POINT No.[I]:-

(77) In the result,



AS.Nos.355 & 356/2014

(a) The Appeal Suits are **allowed with costs.**

(b) The Judgment and Decree dated 26.03.2014 made in OS.Nos.497/2006 and 673/2011 by the learned IV Additional District and Sessions Judge, Coimbatore, **is set aside.**

(c) The suit in OS.No.497/2006 for specific performance as well as the suit is OS.No.673/2011 for permanent injunction stand **dismissed.** The plaintiffs in OS.No.497/2006 are entitled to the alternative relief of recovery of a sum of Rs.16,55,200/- [Rupees Sixteen Lakhs Fifty Five Thousand Two Hundred only] together with interest @ 12% per annum on Rs.16,00,000/- from the defendants 1 to 6 from the date of suit.

(d) A charge is created in respect of the suit property for the decretal amount. However, the appellants are entitled to file a suit against defendants 1 to 6 for the suit claim in case the appellants are forced to pay the decree amount to save the suit property.

(e) The appellants are also entitled to the cost of suit and this appeal from defendants 5 and 6. Consequently, connected miscellaneous petitions



AS.Nos.355 & 356/2014

WEB COPY

are closed.

[S.S.S.R., J.] [S.S.K., J.]
02.02.2023

AP

Internet : Yes

Index : Yes

Neutral Citation : Yes/No.

To

- 1.The IV Additional District and Sessions Judge,
Coimbatore.
- 2.The Section Officer
VR Section, High Court
Madras.

S.S.SUNDAR, J.,
and
SATHI KUMAR SUKUMARA KURUP, J.,

AP

Common Judgment in
AS.Nos.355 & 356/2014



WEB COPY



AS.Nos.355 & 356/2014

02.02.2023